Options for a Stronger Parliamentary Involvement in the Implementation of the Trade and Cooperation Agreement with the UK

Policy Paper

commissioned by the German Bundestag parliamentary group Bündnis 90/Die Grünen (Alliance 90/The Greens) and the Greens/EFA group in the European Parliament

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Executive Summary

On 31 December 2020 the transition period foreseen by the Agreement on the withdrawal of the United Kingdom from the EU expired. At the same moment, the Trade and Cooperation Agreement between the EU and the UK (TCA) was declared provisionally applicable and the Protocol on Ireland/Northern Ireland annex to the Withdrawal Agreement is applicable to Northern Ireland.

The ratification of the TCA requires on the EU side the consent of the European Parliament to a Council decision that has to be adopted unanimously. The TCA is an EU-only agreement as its content falls within the scope of exclusive and shared Union competences and since the Council approved the adoption of the TCA as EU-only. The European Parliament is therefore the core political institution that exercises Parliamentary control over the ratification, implementation and further development of the TCA. National Parliaments are indirectly involved by remaining competent to adopt implementing legislation to the extent that this legislation fall within the scope of shared competences that the Union has not yet exercised and, first and foremost, by controlling its national government's action in the Council.

In the implementation phase of the TCA, the Council is involved in mandating the European Commission prior to the adoption of any act having legal effects in the bodies established by the TCA. The European Parliament is only to be informed immediately and fully (which is even narrowed down by the draft Council decision on the conclusion of the TCA to an obligation to inform Parliament, 'as appropriate').

This discussion paper looks at the legal framework in order to identify options for a stronger Parliamentary involvement in the implementation and further development of the TCA beyond the just mentioned general rules. Stronger Parliamentary involvement refers to the control of the actions of the European Commission in the Partnership Council or in the Committees established by the TCA, to the possibilities for the European Parliament to make indirectly, via the Commission, use of the numerous unilateral rights foreseen by the TCA, and to the supervision of the 'regulatory cooperation' relating to future changes in the EU's and the UK's regulatory framework. Moreover, the paper looks at the delegation of the power to partly open the EU's internal market for financial services to services providers from the UK by means of adopting unilateral equivalence decisions.

Options for Stronger Parliamentary Rights in relation to the Partnership Council and the Use of Trade Remedies and of the Rebalancing Mechanism

The Partnership Council is established by the TCA and consists of representatives of the European Commission and of the UK government. The Partnership Council may adopt legally binding decisions by mutual consent. In doing so, the Partnership Council has, amongst others, the power to amend the TCA or to approve the mutual recognition of professional qualifications. Because of these far-reaching powers that have implications on the autonomy of the European Parliament in EU internal decision-making procedures, the Partnership Council needs a strong democratic control. This control requires more than a duty to inform the Parliamentary Partnership Assembly and to receive non-binding recommendations from it, as it is foreseen by the TCA. Moreover, the TCA contains several unilateral rights such as termination and suspension clauses as well as the adoption of remedial measures in the event of violations of the level-playing field rules and significant divergences between regulatory standards (so-called 'rebalancing'). Possible instruments for a stronger Parliamentary involvement are the following:

- **Mandating of the Commission** prior to decisions in the Partnership Council of the TCA where they concern matters whose regulation within the EU is subject to the ordinary legislative procedure. In such a situation the Commission should be explicitly mandated by the European Parliament prior to casting the Commission's vote in the Partnership Council. Otherwise, the Commission must make

use of its right to veto on behalf of the EU.

- **Establishment of a structured dialogue** between the European Parliament and the Commission in matters concerning the implementation of the TCA. Such structured dialogue is necessary for ensuring the efficient execution of a system of prior mandating of the Commission, so that the European Parliament can quickly decide on the mandate on the basis of information that has already been communicated to it within the structured dialogue. Furthermore, structured dialogue is relevant in areas where prior mandating of the Commission's representative is not required on account of the absence of an internal ordinary legislative procedure and where there is a simple exchange of information taking place in the bodies of the agreement (as in 'regulatory cooperation').
- **Right of the European Parliament to request from the Commission to initiate trade remedial measures:** Under the current rules, the Commission can adopt remedial measures against imports from third countries which the Commission believes are dumped or subsidised. Currently, only companies, business associations and trade unions can request the initiation of a proceedings leading to the adoption of remedial measures by means of a complaint to the European Commission. In relation to the TCA, the European Parliament should receive the right to request from the Commission to initiate proceedings that might lead to the adoption of trade remedies in case of violations of the level-playing field rules and to rebalancing measures. In doing so, the European Parliament receives an instrument to protect labour, social, environmental and climate protection standards that it adopted internally by means of the ordinary legislative procedure.
- **Assignment of a permanent representative of the European Parliament to the bodies of the TCA** if these bodies meet with stakeholders: if, as part of regulatory cooperation, consultations are held with stakeholders, the European Parliament must demand that it be invited as a stakeholder by the Commission's representative so that Parliament can directly attend the consultations.

This extension of Parliamentary rights can be included into the Council Decision on the conclusion of the TCA, into implementing regulations on trade defence instruments in the context of the TCA or into a comprehensive interinstitutional agreement on the implementation of the TCA between the European Parliament and the European Commission.

Market Access for Financial Services: Democratic Control of the Powers of the Commission to Adopt and Withdraw Unilaterally Equivalence Decisions

Since the TCA chapter on services barely goes beyond the EU's and the UK's commitments under WTO law, the power to open the EU's internal market for financial services lies with the European Commission. Several financial market instruments provide for a power for the Commission to adopt equivalence decisions, by which the Commission recognises that the UK has regulatory standards and supervisory practices comparable to the EU ones. The consequence is a passport for the financial service covered by the equivalence decision. Not always is the European Parliament involved in the adoption or the withdrawal of such equivalence decision. The paper therefore proposes the following measures:

- **Equivalence decisions** may only be enacted as **delegated acts**, meaning that the European Parliament is has a **right of scrutiny with veto rights**. The option to revoke the delegation must also be stipulated in the basic act;
- By way of an interinstitutional agreement between the European Parliament and the European Commission, the Parliament must be granted the opportunity to **demand** that the Commission **revoke an equivalence decision**. That demand may be accompanied by an obligation to provide an explanation if the Commission does not wish to fulfil the demand. Alternatively, a compliance obligation may be introduced for the Commission.

Options for a Stronger Parliamentary Involvement in the Implementation of the Trade and Cooperation Agreement with the UK*

1. Background

The following discussion on opportunities for a Parliamentary involvement is based on the Trade and Cooperation Agreement between the EU and the United Kingdom (hereinafter: TCA), which is provisionally applicable between the Parties since 31 December 2020.[1] At the time of writing of this discussion paper (January 2021) the ratification process for the TCA in the European Parliament was not yet concluded. A failure of the ratification would have as a consequence to terminate the provisional application of the TCA and lead to a so-called 'hard Brexit' without any agreement.

The agreement is an association agreement, which the EU can conclude on the basis of Article 217 TFEU. The agreement was classified as 'EU-only' by the EU so that only the EU institutions Council and European Parliament are to be involved in the ratification process of the TCA and not also the Member States. This is legally possible as long as the content of the agreement falls within the scope of exclusive or shared Union competences. In the latter case this is generally recognised once the Union has exercised a shared competence internally. Insofar as the Union has not yet made use of a shared competence within the Union, it can nevertheless conclude international agreement externally as long as the Council has authorised the Union to do so. This case of a so-called 'facultative mixity' is recognised by the CJEU.[2] Only within the scope of exclusive Member States' competences (such as is the case when establishing an 'Investor-State Dispute Settlement' (ISDS)) there is an obligatory mixed agreement, which has also to be ratified by the Member States' Parliaments. None of the content of the TCA does, however, fall within this category of competences. It could therefore validly be concluded as 'EU-only'.

This means that national Parliaments can influence the ratification of the agreement only indirectly by means of their national government's voting behaviour in the Council. The European Parliament must provide its consent regarding the Council's ratification decision (Article 217 TFEU in conjunction with Article 218(6)(2)(a)(i) TFEU) before it can enter into force.

The qualification of the TCA as 'EU-only' does not affect the Parliamentary involvement when it comes to internal legislation implementing the TCA. Especially in those fields that fall within the scope of shared competences which were not yet exercised by the Union, national Parliaments remain competent to autonomously adopt national law. In all other fields the European Parliament is involved in accordance with the legislative procedure that is foreseen by the relevant legal base.

In the following, there are two levels of parliamentary involvement to be distinguished. Firstly, opportunities for involvement may be created for parliaments by means of the agreement itself. Secondly, the legal systems of the contracting parties (in the event of an EU-only agreement, this means the EU

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[1] 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 [2020] OJ L 444, p. 14, available under: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231(01)
[2] CJEU, Case C-600/14 Germany v Council EU:C:2017:935 paras 46 et seqq.

legal system and the United Kingdom's national legal system) may, unilaterally and independently of the agreement's text, stipulate autonomous involvement rights with regard to determining the behaviour of the representatives of the contracting parties, namely the EU and the United Kingdom. These levels shall be dealt with separately below.

2. Parliamentary involvement at the level of the agreement

At the level of the agreement, the TCA provides for the establishment of Parliamentary Partnership Assembly (Art. INST.5). This assembly is an Interparliamentary forum in which the parliaments of the contracting parties (European Parliament and UK Parliament) convene. It is no formal institution of the agreement as it cannot adopt any legally binding text. Yet, the inclusion of the Parliamentary Partnership Assembly is noteworthy as during the negotiations the UK side had originally rejected all forms of parliamentary involvement in the TCA.[3]

Upon its establishment the Parliamentary Partnership Assembly will have the following rights (Article INST.5(2):

- The Parliamentary Partnership Assembly may request relevant information regarding the implementation of this Agreement and any supplementing agreement from the Partnership Council, which shall then supply that Assembly with the requested information;
- The Parliamentary Partnership Assembly must be informed of the decisions and recommendations of the Partnership Council; and
- The Parliamentary Partnership Assembly may adopt recommendations to the Partnership Council.

This overview over the rights of the Parliamentary Partnership Assembly shows that the Partnership Council is the (only) counterpart for the Assembly. It may request information from it and may address recommendations to it. Whether the rights granted to the Parliamentary Partnership Assembly are sufficient with regard to the democratic legitimacy of decisions taken at the level of the agreement or whether a potential lack of democratic legitimacy must be compensated by a stringer involvement of the Parliaments of the Contracting Parties can only be properly assessed after a closer examination of the role and the rights of the Partnership Council.

2.1 The Partnership Council

The Partnership Council is established according to Article INST.1 TCA. It consists of representatives of the European Commission[4] on the EU side and of representatives of UK government on the UK side. The Partnership Council is chaired by a commissioner and a representative of the UK government at ministerial level. The Partnership Council makes decisions by mutual agreement.[5] The Partnership Council monitors the attainment of the agreement's objectives and facilitates and supervises its implementation and application. It is supported in its work by Committees, which consist of representatives of the executive branch of both parties, and are established either by the agreement itself (Art. INST.2) or by the

[3] Remarks by Michel Barnier following Round 3 of negotiations for a new partnership between the European Union and the United Kingdom, 15 May 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_895.
[4] Article 2(1) of Council Decision (EU) 2020/2252 of 29.12.2020 [2020] OJ L 444, p. 2.
[5] Rule 9 of ANEX INST: Rules of Procedure of the Partnership Council and Committees.

Partnership Council. The creation of a Partnership Council and Committees is common in trade agreements. They facilitate the implementation and application of the agreement.

The Partnership Council has far-reaching competences, which are listed in Art. INST.1(4) TCA. The following powers should be highlighted:

- Adopting, by decision, amendments to the agreement or any supplementing agreements in the cases provided for in this agreement or in any supplementing agreement (lit. c);
- Adopting decisions amending the agreement until the end of the fourth year following the entry into force of the agreement, 'provided that such amendments are necessary to correct errors, or to address omissions or other deficiencies' (lit. d);
- Adopting decisions in respect of all matters where this Agreement or any supplementing agreement so provides (lit. a). To clarify the scope of this competence, reference can be made to Article SERVIN.5.13(3), according to which the partnership council can 'develop and adopt an arrangement on the conditions for the recognition of professional qualifications by decision as an annex to this Agreement'.

In particular, the powers to amend the text of the agreement should be viewed critically. It is true that such powers are not uncommon in trade agreements. After all, a trade agreement needs to be made dynamic to a certain extent so that it can be easily adapted to new realities. However, any amendment to the Agreement by the Partnership Council circumvents the ratification requirements and, above all, the associated parliamentary rights.

For this reason, the German Constitutional Court (Bundesverfassungsgericht (BVerfG)), in its ruling on the issuance of an interim order regarding the ratification of CETA, considered the powers to amend the agreement that CETA conferred upon its 'Joint Committee' as very critical.[6] The Court literally states: 'In view of Art. 20(1) and (2) GG, democratic legitimation and oversight of such decisions appears uncertain ...'.[7] The argument of the BVerfG has to be seen against the background that CETA was concluded as a mixed agreement. In an EU-only agreement, however, the democratic considerations can be applied *mutatis mutandis* to the relationship between decisions adopted by the Partnership Council and the European Parliament.

2.2 Control of the Partnership Council exercised by the Parliamentary Partnership Assembly

The Parliamentary Partnership Assembly has the right to request and receive information about the activities of the Partnership Council and can address the Partnership Council with legally non-binding recommendations. These rights allow for an increase in transparency of the Partnership Council. However, the Parliamentary Partnership Assembly does not have any instruments at its disposal to hold the Partnership Council into account on the basis of the information it receives or to overrule decisions of the Partnership Council that the Assembly considers to be wrong. This shows that the Parliamentary Partnership Assembly cannot be viewed as a body that can provide the Partnership Council with sufficient democratic legitimacy it needs against the background of its far-reaching decision-making powers.

[6] BVerfG, Judgment of the Second Senate of 13 October 2016 - 2 BvR 1368/16 - paras. 59 et seqq., available under: http://www.bverfg.de/e/rs20161013_2bvr136816en.html.
[7] BVerfG, Judgment of the Second Senate of 13 October 2016 - 2 BvR 1368/16 - para. 65, available under: http://www.bverfg.de/e/rs20161013_2bvr136816en.html.

Yet, this conclusion is far from surprising either. The Partnership Council is an institution of an agreement concluded between the EU and the United Kingdom. It is therefore accountable to the Contracting Parties. The necessary control of the activities of the Partnership Council by the executive branches of the Contracting Parties (the European Commission and the UK Government) is secured by the consensual decision-making in the Council. The Parliaments of the Contracting Parties only participate in the accountability arrangements of the Partnership Council by holding their respective executive to account. There is no direct link between these Parliaments and the Partnership Council.

This observation shows that the activities of the Partnership Council are neither properly controlled by the Parliamentary Partnership Assembly due to the lack of instruments of accountability nor by the Parliaments of the Contracting Parties due to their exclusion from any mechanism approving decisions made by the Partnership Council. In short, the lack of Parliamentary control of the activities of the Partnership Council cannot be compensated by the Parliamentary Partnership Assembly. The focus shifts therefore to means how the Parliaments of the Contracting Party, and here in particular the European Parliament, can be better involved in the implementation of the TCA by.

3. Parliamentary involvement at the level of the contracting parties

At Contracting Party level, Parliament influences the executive actions of the Contracting Party within the scope granted under the agreement to the executives of the Contracting Parties. In the case of the EU, this refers to the actions of the European Commission. As a college, the Commission is vis-à-vis the European Parliament (Article 17(8) TEU). In matters relating to the external representation of the Union in bodies set up by trade agreements, the Commission is also subject to prior scrutiny by the Council according to Article 218(9) TFEU, as it may only act on the basis of a common position to be adopted by the Council.

Against this background, Parliamentary involvement at the level of the Contracting Part EU takes place in a dual form: directly by the European Parliament in its general capacity to hold the European Commission to account for its actions and indirectly by national Parliaments when controlling their government's actions within the Council mandating the European Commission. Before turning to the options for Parliamentary involvement in the matters relating to the implementation of the TCA, one has to take a closer look at the unilateral options for action for the EU foreseen by the TCA. The potential use or non-use of these options triggers the need for Parliamentary control and allows to reflect further on possibilities for increasing Parliament's involvement.

3.1 Unilateral options for action for the EU foreseen by the TCA

Identifying unilateral options for action for the EU shows where Parliaments in controlling (directly or indirectly) the European Commission can increase their involvement in the implementation of the TCA. As shown above, this is of particular significance because of the creation of the Partnership Council in the TCA with far-reaching powers that escape any meaningful Parliamentary scrutiny.

The first unilateral option for action for the EU is precisely to be found in the functioning of the Partnership Council and of the 10 Trade Specialised Committees and the further 8 Specialised Committees that are supervised by the Partnership Council. Decisions have to be adopted by the Partnership Council or the specialised committees by mutual consent, which means that the EU (just as the UK) has a veto with regard to each decision. The way how this right to veto is to be exercised is a question of the internal law of each Contracting Party and completely separated from the text of the agreement.

Moreover, there is an exchange of information about the regulatory initiatives of the Contracting Parties taking place in such bodies at the level of the agreement (so-called 'regulatory cooperation'). To this end, the TCA establishes a 'Trade Specialised Committee on Regulatory Cooperation' (Article INST.2, Paragraph 1, lit. i) TCA).

Finally, the TCA contains numerous unilateral options for action by which the Contracting Parties can influence their relationship. The European Commission is usually responsible for exercising these rights. In the case of the TCA, a corresponding list can be found in Council Decision (EU) 2020/2252 on the signing and the provisional application of the TCA.[8] The Commission receives in this decision the provisional right to make use of the following unilateral options for action foreseen by the TCA:

- the suspension of the relevant preferential treatment of the product(s) concerned as set out in Article GOODS.19 [Measures in case of breaches or circumvention of customs legislation];
- the application of remedial measures and the suspension of obligations
    - as set out in Article LPFOFCSD.3.12 [Remedial measures] with regard to subsidies;
- the application of compensatory measures and countermeasures
    - as set out in Article LPFOFCSD.9.4 [Rebalancing]
    - as set out in Article FISH.9 [Compensatory measures in case of withdrawal or reduction of access]
- the application of remedial measures
    - as set out in Article ROAD.11 [Remedial measures]
    - set out in Article FISH.14 [Remedial measures and dispute resolution]
- the suspension or termination of the participation of the United Kingdom in Union programmes, as set out in Article UNPRO.3.1 and Article UNPRO.3.20
- an offer or acceptance of temporary compensation or the suspension of obligations in the context of compliance following an arbitration or panel of experts procedure under Article INST.24 [Temporary Remedies];
- the safeguard measures and rebalancing measures as set out in Article INST.36 [Safeguard measures].

The agreement also provides for further unilateral options for action. The most prominent is the possibility of terminating the entire agreement without giving a reason under Article FINPROV.8, which has as an effect that it will be terminated 12 months later. Finally, each Contracting Carty can initiate the dispute settlement procedure because of a breach of contractual obligations (insofar as they are subject to the dispute settlement mechanism under Article INST.10), as well as a panel procedure in case of violations of the level-playing field rules under Article LPFOFCSD.9.2, which may ultimately allow for the adoption of remedial measures.

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

3.2 Specifically: the challenges involved in regulatory cooperation

A special look should be taken at the challenges of 'regulatory cooperation'. It deals with the issue of the further development of regulation of the Contracting Parties after the expiry of the transition period and the beginning of the provisional applicability of the TCA. On the one hand, the TCA has introduced a procedure addressing this issue, by which imbalances resulting from significant divergences between the regulatory standards of the Contracting Parties in the field of labour and social protection as well as environmental and climate protection should be limited and reduced, the so-called 'rebalancing'. This procedure is meant to create a corridor within which divergence is possible. In addition to this form of dealing with excessive divergences, the Contracting Parties can also inform each other about regulatory initiatives and developments without being limited the abovementioned fields. Such exchanges could, ideally speaking, lead to an incorporation of regulatory developments within the one Contracting Party into the regulatory order of the other one.

This second way of addressing regulatory developments of autonomous regulators is addressed by the so-called 'regulatory cooperation'. In an informal exchange forum – in the case of the TCA: the 'Trade Specialised Committee on Regulatory Cooperation' – an exchange of information on regulatory issues should take place without limiting the right to regulate of the Contracting Parties. Besides inspiring the regulatory agenda of the Contracting Parties, the early exchange of regulatory plans can also mean that the contracting parties have an influence on draft regulation at a time before the European legislator has received these drafts. The free trade agreement between the EU and Canada (Comprehensive Economic and Trade Agreement (CETA)) introduced a 'regulatory cooperation' with a view to exchanging information on future changes of regulatory standards.[9] A closer examination of this regulatory cooperation calls for a need to increase Parliamentary control of regulatory cooperation such as the one established by the TCA.

A request for access to documentation submitted, in accordance with the Canadian Access to Information Act, by the NGOs Foodwatch Netherlands and The Council of Canadians recently provided an insight into the mechanisms and practice of regulatory cooperation. The NGOs requested access to an exchange of documentation in connection with the first meeting of the Joint Management Committee for Sanitary and Phytosanitary Measures (SPS Committee, Article 15.14 CETA, hereinafter referred to as the SPS Management Committee),[10] which was held on 27 and 28 March 2018 in Ottawa.[11] An analysis of that documentation[12] shows how influence is exerted over the legislation of the other contracting party at the seemingly technical level of an exchange forum without the legislature being informed.

An example is Animal Health Law.[13] Framework legislation permits the Commission to adopt delegated acts in accordance with Article 290 TFEU and implementing acts in accordance with Article 291 TFEU in order to regulate points of detail. Delegated acts are subject to a time-limited veto right of the European

[9] See also Repasi, Dynamisation of international trade cooperation. Powers and limits of Joint Committees in CETA, QIL 41 (2017), p. 73 et seqq. (available at: http://www.qil-qdi.org/wp-content/uploads/2017/08/05_CETA_REPASI_FIN.pdf).
[10] The CETA text is available at: https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/index_en.htm.
[11] The scans of the documents released by the Canadian Government are available at: https://www.foodwatch.org/fileadmin/-NL/CETA-scans.pdf (327 pages).
[12] For an informative analysis by the NGOs Foodwatch and The Council of Canadians which submitted the request, see: The Potential Dangers of CETA Committees on Europe (26 pages, 2020), available at: https://www.foodwatch.org/fileadmin/-NL/Potential_dangers_of_ceta_committees_on_Europe.pdf.
[13] Regulation (EU) 2016/429 on transmissible animal diseases and amending and repealing certain acts in the area of animal health ('Animal Health Law'), OJ 2016 L 84/1.

Parliament and of the Council. Implementing acts are subject to the procedures of the Comitology Regulation.[14] In the SPS Management Committee, Canada asked to be given the opportunity to comment on the Commission's draft delegated acts and implementing acts.[15] In its response, the European Commission refers to the consultation procedure for delegated acts and implementing acts in which experts, Member States and other interested groups and stakeholders are consulted during the drafting stage.[16]

Another example is provided in the form of the particularly contentious issue between Canada and the EU regarding a hazard-based approach, preferred by the EU, and a risk-based approach, preferred by Canada, to assessments of whether pesticides can be imported from Canada into the EU. The market access of pesticides is regulated by Regulation (EC) No 1107/2009[17] and Regulation (EC) No 396/2005[18]. The European Commission assesses pesticide-related hazards for humans and animals on the basis of the precautionary principle which is enshrined in EU law. Canada broached this issue in the SPS Management Committee and said that it would like the 'hazard-based approach to be addressed through regulatory amendments'.[19] During the committee meeting, the EU referred to the REFIT programme for better regulation, as part of which the market access regulations are being reworked and stakeholders, including third countries, can provide their input.[20] Under 'Goal(s) and Outcomes', the SPS Management Committee's document states: 'The long-term goal is for the EU to move away from a hazard-based cut-off criteria [sic] as a basis for regulatory decisions.'[21] Under the point entitled 'Next steps for the CETA SPS JMC', it is stated that the Management Committee is undertaking advocacy efforts to influence current EU deliberations.[22] The SPS Management Committee held similar discussions regarding glyphosate. Canada criticised the EU's strict position here as well. Under the point entitled 'Next steps for the CETA SPS JMC', the committee repeated its suggestion that advocacy efforts be undertaken to influence EU deliberations on policy options for measures taken by Member States against scientific policy of the EU.[23] The pragmatic significance of these advocacy efforts of the SPS Management Committee should not be underestimated in view of the fact that the EU side is represented in this committee by the European Commission, which, for its part, draws up the draft legislative acts and regulatory acts.

The real-life examples of regulatory cooperation in CETA show that it is an instrument for influencing the political agenda at a technical level which needs democratic scrutiny. This need increases in proportion to the significance of the trade flows into the single market. The trade flows from the United Kingdom are more significant for the EU single market than those from Canada.

[14] Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.
[15] Documents (footnote 11), p. 131.
[16] Ibid., p. 132.
[17] Regulation (EC) No 1107/2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC, OJ 2009 L 309/1.
[18] Regulation (EC) No 396/2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin and amending Council Directive 91/414/EEC, OJ 2005 L 70/1.
[19] Documents (footnote 11), p. 164: 'Systemically, Canada would like the hazard-based approach to be addressed through regulatory amendments.'
[20] Ibid., p. 166.
[21] Ibid., p. 166: 'The long-term goal is for the EU to move away from a hazard-based cut-off criteria as a basis for regulatory decisions.'
[22] Ibid., p. 167: 'Advocacy efforts towards influencing current EU deliberations regarding policy options for addressing import tolerances are immediate priorities for addressing trade concerns in the interim. […] Advocacy efforts to influence current EU deliberations on policy options for substances meeting hazard-based criteria.'
[23] Ibid., p. 182: 'Advocacy efforts to influence EU deliberations on policy options for measures taken by Member States against scientific policy of the EU.'

The TCA establishes 'regulatory cooperation' in Articles GRP.12 and GRP.13. These articles follow the structure and, in parts, the wording known from CETA.

3.3 Types of parliamentary involvement

There is a direct correlation between the possible types of parliamentary involvement in the implementation of the TCA and the quality of the influence exerted on the outcome of the involvement. The types of parliamentary involvement therefore range from complete exclusion, through to exchanges of information, through to veto rights.

3.4 Involvement of the European Parliament

Once the European Parliament has provided its consent for an EU agreement to be ratified, it is usually no longer further involved in the implementation of that agreement. That role falls to the European Commission and, where applicable, the Council. This is illustrated by Article 218(9) TFEU, which no longer assigns any role to the European Parliament in the implementation of agreements. Parliament only needs to be informed immediately and fully (Article 218(10) TFEU). The current draft decision of the Council on the conclusion of the TCA[24] provides in Article 3 even more restrictively that the 'Commission shall also inform the European Parliament, as appropriate', and during the first five years after the entry into force of the TCA is only obliged submit an annual report to the European Parliament.

From this observation, however, the conclusion cannot be drawn that the European Parliament cannot be involved beyond Article 218(9) and (10) TFEU. The obligation to provide information without delay constitutes the absolute minimum of Parliamentary involvement that the Treaties require from the Commission, but it does not preclude to provide for stronger parliamentary oversight rights by means of secondary law or interinstitutional agreements, provided such rights do not restrict the rights of other institutions in terms of institutional balance. Providing for such stronger Parliamentary rights cannot, however, find its legal basis in primary law. The wording of Article 218(9) and (10) TFEU is clear enough. But such rights can be introduced by an interinstitutional agreement between the Commission and the European Parliament. In certain specific cases, the European Parliament can also include special rights for itself in secondary legal acts.

The legal basis for the possibility to create stronger Parliamentary rights in the field of implementing international agreements is to be found in the general control function of the European Parliament vis-à-vis the European Commission, as embodied in Article 17(8)(1) TEU. External representation by the Commission is scrutinised by the European Parliament in accordance with the general rules, whereby, in accordance with Article 230(2) TFEU, MEPs are entitled to put questions to Commissioners and in addition, in the event of misconduct, either to ask the President of the Commission to request that individual Commissioners resign in accordance with Article 17(6)(2) TEU (although this is at the discretion of the President of the Commission), or to table a motion of censure against the entire Commission in accordance with Article 234 TFEU or set up a Committee of Inquiry in accordance with Article 226 TFEU. These instruments appear unsuited for the involvement of the European Parliament in the implementation of trade agreements.

[24] European Commission, Proposal for a Council Decision on the conclusion, on behalf of the Union, of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information, COM(2020) 856 final/2.

This therefore means that the European Parliament must demand new parliamentary involvement rights for itself regarding the implementation of the TCA by means of concluding a dedicated interinstitutional agreement in return for its consent for the ratification of that agreement. The current draft Council decision on the conclusion of the TCA should be adapted accordingly. Not only should the possibility to inform the European Parliament, 'as appropriate', be changed into an obligation to inform Parliament without delay (as foreseen by the Treaties). It should also include concrete Parliamentary participation rights (for example in Article 6 of the draft Council decision) or at least a reference to an interinstitutional agreement. Such parliamentary participation rights could take the following form:

- **Mandating of the Commission** prior to decisions in the Partnership Council of the TCA where they concern matters whose regulation within the EU is subject to the ordinary legislative procedure: where the decisions of the Partnership Council could have an effect on the content of future secondary legislation, the EU legislator must provide consent for such effect at a point in time when a rejection would not result in a breach of the EU's external obligations under international law. As soon as an act under international law has come into force, the other contracting party can insist on compliance ('pacta sunt servanda', Article 26 of the Vienna Convention on the Law of Treaties (VCLT)). If (future) internal legal acts (such as EU secondary legal acts) are in conflict with international treaty obligations (as embodied in decisions made by the Partnership Council), a non-EU country such as the United Kingdom is not affected by diverging EU internal law (which is a so-called 'res inter alios acta'). It can insist on the EU's compliance with the treaty obligations, even if the EU is precluded from doing so by internal secondary law. For this reason, when it comes to matters that fall within the EU into the scope of a competence that provides for a decision-making under the ordinary legislative procedure, the Commission must also be obtained a mandate from the European Parliament prior to the adoption of decisions by the Partnership Council. One may speak in this regard of an 'advance effect' of the EU co-decision procedure.

  Should a decision of the Partnership Council therefore affect the legislative freedom to determine the content of secondary legislation, the adoption of which is subject to the ordinary legislative procedure, the Commission should be explicitly mandated by the European Parliament prior to casting the Commission's vote in the executive body. Otherwise the Commission must make use of its right to veto on behalf of the EU. That finding is not called into question by the fact that Article 218(9) TFEU only provides for such a mandate that is adopted by the Council. This provision is to be understood in such a way that it simplifies the decision-making procedures for the implementation of agreements as compared to the negotiation and ratification procedure – a simplification the Commission can waive if by adopting an interinstitutional agreement. It must, however, be noted that if the position taken by the Council and the one taken by the European Parliament differ from each other, it is the Council's position that would prevail against the European Parliament's one due to the primary law anchoring of Council's role in Article 218(9) TFEU. The Council and the European Parliament should therefore enter into a dialogue prior to any mandating of the European Commission so that such conflict cannot arise.

- **Establishment of structured dialogue** between the European Parliament and the Commission in matters concerning the implementation of the TCA: as part of this structured dialogue, which could be modelled after the 'monetary dialogue' between the European Parliament and the ECB, the Commission would have a duty to inform the European Parliament of all discussions and developments in the bodies of the agreement. In order to ensure fulfilment of a potentially binding confidentiality obligation, parts of this structured dialogue could be held 'in camera'. In that case, the European Parliament would be granted a comprehensive right to access any documents submitted in the bodies of the TCA, and the right to summon the competent Commissioner at any time to appear before

the committee responsible for the dialogue and to put questions by MEPs to the competent Commissioner. Such structured dialogue is necessary for ensuring the efficient execution of a system of prior mandating of the European Commission, so that the European Parliament can quickly decide on the mandate on the basis of information that has already been communicated to it within the structured dialogue. Furthermore, structured dialogue is relevant in areas where prior mandating of the Commission's representative is not required on account of the absence of an internal ordinary legislative procedure and where there is a simple exchange of information taking place in the bodies of the agreement (as it is the case in 'regulatory cooperation').

- **Control of market opening through equivalence decisions**: in the area of services the TCA provides for market access, which replicates the cornerstones of WTO trade law, namely non-discrimination and most-favoured-nation treatment. It also provides for extensive annexes, in which all those measures of the EU and its Member States are enlisted that can be upheld despite being non-conforming (so-called 'negative list' approach). Besides this general, quite narrow opening of the market there is also the possibility that, through the adoption of equivalence decisions, the EU may unilaterally and selectively open up market access for services and service providers from the UK by declaring that the level and intensity of regulation in the legal systems concerned are comparable to each other. Such market openings by means of equivalence decisions may be unilaterally revoked at any time. Equivalence decisions are – legally speaking – very likely in the case of the UK given that at the time of the agreement's provisional application, the legal systems of both Contracting Parties are actually comparable. This comparability results from the fact that UK was part of the EU's legal order prior to the conclusion of the TCA. Yet, there is no entitlement to the adoption of an equivalence decision, which is entirely within the political discretion of the competent authority. Equivalence decisions are adopted by the executive of the Contracting Parties. In the EU, the European Commission is authorised by certain secondary legislation, in particular in the area of financial market regulation, to make equivalence decisions and hence open up the single market to products from third countries. Equivalence decisions can be made in three different ways: as stand-alone administrative acts of the Commission, as implementing decisions of the Commission (Article 291 TFEU), which are scrutinised by the Council under the Comitology Regulation[25], or through delegated acts in accordance with Article 290 TFEU. Delegated acts stipulate that the European Parliament or the Council can use a veto against them, and/or that the European Parliament or the Council can revoke the delegation and hence revoke the Commission's right to adopt equivalence decisions. The basic act determines which of these options is applicable. Existing EU secondary legislation currently comprises both implementing decisions and delegated acts. The following elements for strengthening the rights of the European Parliament to be involved must be taken into consideration in the organisation of a legal framework for future equivalence decisions (and the reform of existing secondary legislation which stipulates equivalence decisions):

    — Equivalence decisions may be enacted only as delegated acts, meaning that the European Parliament is granted a right of scrutiny with veto rights. The option to revoke the delegation must also be stipulated in the basic act;

    — By way of an interinstitutional agreement between the European Parliament and the European Commission, the Parliament must be granted the opportunity to demand that the Commission revoke an equivalence decision. That demand may be accompanied by an obligation to provide an explanation if the Commission does not wish to fulfil the demand.

[25] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L 55, p. 13.

Alternatively, a compliance obligation may be introduced for the Commission. This does not conflict with the Commission's initiative monopoly (Article 17(2) TEU) as delegated acts are not strictly speaking legislation but administrative action which modifies or expands non-essential elements of the basic act.

- **Assignment of a permanent representative of the European Parliament to the bodies of the TCA** if these bodies meet with stakeholders: if, as part of regulatory cooperation, consultations are held with stakeholders, the European Parliament must demand that it be invited as a stakeholder by the Commission's representative so that Parliament can directly attend the consultations. The TCA provides for such a possibility in Article GPR.13. This will ensure that information regarding the outcomes of such consultations is shared with the European Parliament and that such consultations are transparent.

- **Right of the European Parliament to request from the Commission to initiate trade remedial measures:** This right refers to the initiation of procedures that may lead to the adoption of unilateral remedial measures in the field of subsidy control (Article LPFOFCSD.3.12) and in the event of a violation of the non-regression clauses in the field of labour and social protection as well as environmental and climate protection (Article LPFOFCSD.9.2) and to the initiation of the so-called rebalancing procedure (Article LPFOFCSD.9.4) as well as to the initiation of general trade remedies under Article GOODS.17 and the general safeguard measures under Article INST.35.

  Currently, the Commission can adopt remedial measures against imports from third countries which the Commission believes are dumped[26] or subsidised.[27] Since the reform of the trade defence instruments in 2017,[28] the Commission when assessing whether there is dumping has also to take into account the degree of compliance with an adequate level of social and environmental protection. In June 2020, the Commission also published a white paper on levelling the playing field as regards subsidies from third countries, which aims to increase the EU's ability to react to subsidy competition.[29] When it comes to the adoption of the necessary regulations in the area to trade remedies based on Article 207(2) TFEU, the European Parliament is fully involved by means of the ordinary legislative procedure. This also relates to the adoption of a regulation on initiating the newly developed rebalancing mechanism in the TCA. So far, however, the European Parliament has no right to request from the Commission to initiate trade remedial measures. Currently, only companies, business associations and trade unions can request the initiation of a corresponding proceedings by means of a complaint to the European Commission. In relation to the TCA, however, it would be worth considering granting the European Parliament the right to request from the Commission to initiate proceedings that might lead to the adoption of trade remedies. Such a right to request does naturally not replace the Commission's legal evaluation, by which it determines whether there is a dumped or subsidised import or whether the conditions for a rebalancing measures are fulfilled. This special role of the European Parliament in the context of the TCA as compared to other trade agreements of the EU with other third countries is justified by the dangers that the TCA embodies for the EU standards adopted by the European Parliament and the Council in the field of labour, social, environmental and climate protection. With the right to request from

[26] Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union [2016] OJ L 176, p. 21.
[27] Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union [2016] OJ L 176, p. 55.
[28] Regulation (EU) 2017/2321 [2017] OJ L 338, p. 1.
[29] European Commission, White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final.

the Commission to initiate trade remedies, the European Parliament should get a legal instrument counter negative effects of the TCA on EU regulatory standards. As mentioned above, this right to request should cover the existing trade defence instruments under Union law and the more specific trade defence instruments that are foreseen by the TCA.

The proposed measures can be adopted by means of an interinstitutional agreement between the Commission and the European Parliament in the course of the ratification of the TCA and included into the accompanying Council decision as well as in secondary legislation that implements the TCA into EU law.

3.5 Involvement of the national Parliaments

Since the TCA is an EU-only agreement, the opportunities for national Parliaments to exert an influence on the implementation of the TCA outside the adoption of implementing legislation within the scope of shared competences that were not exercised by the Union internally will be limited to the control of the respective national government's actions within the Council. As such, proper participation rights are conceivable only if a national government has a right to veto within the Council, which would presuppose unanimity in the Council's decision making. That is the case with regard to the ratification of the TCA.

The Council will be involved in the implementation of the TCA by adopting its position before the decision are taken in the Partnership Council under Article 218(9) TFEU. This provision is, however, silent as to the majority requirement for the adoption. The majority requirement is therefore to be found in the legal base, the scope of which is affected by an envisaged decision of the Partnership Council. For the most part, this should be a qualified majority. Only if the Council has to decide unanimously, national Parliament will be in a position to expand it influence on the implementation of the TCA due to the possibility of single national governments to raise a veto in the Council. Reference can be made to the German Constitutional Court, which considered in the already mentioned judgment on CETA that any decisions of Treaty bodies that lead to a substantive or institutional extension of the trade agreement must be subject to a unanimous vote in the Council in order to ensure proper participation of national Parliaments in the decision-making procedure.[30] An example for such an extension in the TCA can be found in the Partnership Council's right to approve the mutual recognition of professional qualifications. The participation of national Parliaments can consist of an exchange of information with the national government, a parliamentary debate before a decision is made in the Council or a prior mandating of the national government, as it is foreseen, for example, in analogy to Article 8 of the German Act on the Exercise by the Bundestag and by the Bundesrat of their Responsibility for Integration in Matters concerning the European Union.[31]

4. Conclusions

The Trade and Cooperation Agreement between the EU and the United Kingdom will have the most tangible effects on the regulatory autonomy of the Contracting Parties to date. This is attributable not so much to the legal construction of the agreement as to the existing trade flows which have built up in the single market over the 40 years that the United Kingdom has been a Member State. The fact that

[30] BVerfG, Judgment of the Second Senate of 13 October 2016 - 2 BvR 1368/16 - para. 71, available under: http://www.bverfg.de/e/rs20161013_2bvr136816en.html.
[31] An English translation of the act is available online: https://www.gesetze-im-internet.de/englisch_intvg/englisch_intvg.pdf.

market access under the trade agreement will be more limited than under the single market will lead to disruptions but will allow the continuation of trade flows albeit subject to different legal regimes, thus creating a competitive situation between the EU legal system and the UK legal system.

As a result of these reciprocal influences, parliamentary monitoring of the implementation of this agreement must be more intense than was the case with previous EU trade agreements. Firstly, this concerns the speedy establishment of the Parliamentary Partnership Assembly, which self-confidently makes use of its rights to request information from and to address recommendations to the Partnership Council. Secondly, this concerns in particular the downstream parliamentary scrutiny of the Commission's representatives in the executive bodies of the agreement. As such, the recommendation in this regard is to introduce ex-ante mandating of the Commission by the EU legislator in policy areas which within the EU are subject to the ordinary legislative procedure, to create structured dialogue between the European Parliament and the Commission, and to assign a permanent representative of the European Parliament for possible consultations of the executive bodies of the agreement with stakeholders as part of regulatory cooperation. Finally, given the possibility that market access to the EU single market may be opened up unilaterally by means of equivalence decisions, it is suggested that equivalence decisions must be adopted as delegated acts in accordance with Article 290 TFEU, whereby the European Parliament must be granted both a veto right and a right to revoke the delegation. In addition, by means of an interinstitutional agreement with the Commission, the European Parliament must be granted the opportunity to demand that the Commission revoke an equivalence decision.