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LEGISLATION

The EU-UK Trade and Cooperation Agreement – Exceptional Circumstances or a new Paradigm for EU External Relations?

Christina Eckes*  and Päivi Leino-Sandberg 

In the final days of 2020, the European Union and the United Kingdom concluded a Trade and Cooperation Agreement (TCA) covering a broad range of policy areas, including cooperation of law enforcement authorities and social security systems. The EU-UK TCA is unique as concerns the circumstances of its negotiation and adoption, as well as its substance. However, contrary to the argument of the EU institutions, the agreement will have broad implications for the understanding of the EU's external competence and Member States' ability to act in areas that are national competence and rely on national budgets. We are critical of the legitimacy of the TCA's conclusion process, consider that the lack of a deep constitutional analysis of the consequences of EU-only conclusion of the TCA, and of the TCA itself, are problematic, and believe that the choices made are likely to create difficulties for the implementation and enforcement of the agreement.

INTRODUCTION

The EU mandate for negotiating the Trade and Cooperation Agreement (TCA) between the EU and the UK sketched 'an ambitious, broad, deep and flexible partnership across trade and economic cooperation with a comprehensive and balanced Free Trade Agreement at its core, law enforcement and criminal justice, foreign policy, security and defence and wider areas of cooperation.'¹ The negotiators were under greater time pressure than usual. The transition period was to expire at the end of 2020, and the UK was

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1 Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom 2019/C 384 I/02 (2019) at <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1592316528275&uri=CELEX%3A12019W/DCL%2801%29> (last visited 25 May 2021).

reluctant to extend it. The Commission explained that a no-Deal Brexit would lead to a significant disruption of the EU-UK relations, 'to the detriment of individuals, businesses and other stakeholders'.² The negotiations were concluded on Christmas Eve. The decision to sign the agreement was taken by the Council in a hasty written procedure between Christmas and the New Year, enabling provisional application as of 1 January 2021. The European Parliament (EP) gave its consent on 27 April,³ and the Council concluded the agreement on 29 April 2021.⁴ In the UK, Parliament approved the agreement on 30 December, and it became the European Union (Future Relationship) Act 2020 when it received royal assent on 31 December 2020.⁵ The agreement entered into force on 1 May 2021.

Until the end of 2020, the UK was bound by EU law. This could have paved the way for exceptionally easy negotiations. However, this was not the case. The positions of the parties were fundamentally different as regards in particular the role of EU law and the European Court of Justice (ECJ) in the application of the agreement. The UK repeatedly underlined how 'the EU had to accept once again that it was dealing with an independent and sovereign country'.⁶

Yet, the level of ambition was high and many of the UK proposals went 'significantly beyond what has been negotiated by the EU in other [free trade agreements] with third countries in recent years', as the EP observed.⁷ The EU mandate aimed among other things to ensure the 'common standards applicable' in various areas beyond the internal market,⁸ including the 'effective and efficient practical cooperation between law enforcement and judicial

2 European Commission, 'EU-UK Trade and Cooperation Agreement: protecting European interests, ensuring fair competition, and continued cooperation in areas of mutual interest' at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2531 (last visited 25 May 2021).

3 European Parliament, 'Parliament formally approves EU-UK trade and cooperation agreement' Press Release (2021) at www.europarl.europa.eu/news/en/press-room/20210423IPR02772/parliament-formally-approves-eu-uk-trade-and-cooperation-agreement (last visited 25 May 2021).

4 Council of the European Union, '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 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' 5022/3/21 REV 3 (2021) at <https://data.consilium.europa.eu/doc/document/ST-5022-2021-REV-3/en/pdf> (last visited 25 May 2021).

5 European Union (Future Relationship) Act 2020 at www.legislation.gov.uk/ukpga/2020/29/enacted/data.htm (last visited 24 June 2021).

6 UK Prime Minister's Office, 'Statement on further UK-EU negotiations: 21 October 2020' at <https://www.gov.uk/government/news/statement-on-further-uk-eu-negotiations-21-october-2020> (last visited 25 May 2021). See also K. Nicolaïdis, *The Political Mantra. Brexit, Control and the Transformation of the European Order* in F. Fabbrini (ed), *The Law & Politics of Brexit* (Oxford: OUP, 2017) 25, 45.

7 European Parliament, 'Recommendations on the negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland' P9_TA(2020)0152, para 4 at https://www.europarl.europa.eu/doceo/document/TA-9-2020-0152_EN.html (last visited 25 May 2021).

8 Council of the European Union, 'ANNEX to COUNCIL DECISION authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement' 5870/20 ADD 1 REV 3 (2020), para 103 at <https://data.consilium.europa.eu/doc/document/ST-5870-2020-ADD-1-REV-3/en/pdf> (last visited 26 May 2021).

authorities in criminal matters'.⁹ It further recognises that 'the envisaged partnership may encompass areas of cooperation beyond those described therein' and that it 'might evolve over time'.¹⁰

At the stage of opening the negotiations, as is usual, the Council authorised the Commission to conduct negotiations, including in areas of national competences. The question of who should conclude the agreement was to be determined at the end.¹¹ However, due to particular urgency, a proper discussion never took place. The TCA was concluded as an association agreement between the EU and the UK. The EU Member States are thus not parties to the agreement. This has many legal implications, in particular for their role and responsibilities under the agreement. The obligations under the agreement bind them as EU membership obligations. Member States are hence responsible for implementing the TCA *as a matter of EU law*¹² and the UK cannot enforce TCA obligations against them directly as a matter of international law. On the EU side, this solution is based on the argument that the EU had exclusive competence for part of the agreement (in particular Common Commercial Policy (CCP)) and at least 'potential competence' (shared competence that the EU exercises for the first time) for the rest.

The choice against mixity strikes us as an unusual one. Agreements negotiated by the EU that include provisions outside its exclusive competences are generally concluded as mixed agreements. This is the case even if mixity is not strictly necessary because of reserved competences of the Member States but results from a political choice ('facultative mixity').¹³ In the context of the EU-UK TCA, the EU-only solution may be legally problematic from a competence perspective. This is the case because large parts of the agreement fall under shared competences and because it covers several fields that the EU cannot regulate exhaustively, fields that it may not have competence to implement, and measures which are funded from national budgets. While the Member States may join the Union delegation in TCA governance bodies they do not act in a national capacity but as EU *representatives*. We discuss below¹⁴ in what way this makes a difference considering that the Member States are bound by the principle of sincere cooperation with the aim to protect unity in the external representation of the Union.

Instead of a detailed legal analysis, the EU only character of the TCA was justified with the 'exceptional and unique character of the TCA, which is a

⁹ *ibid*, para 124.

¹⁰ *ibid*, para 8.

¹¹ Council Legal Service Opinion, footnote 4. The leaked opinion of the Council Legal Service is available at S. Peers, 'The Brexit Deal – Council legal service opinion' EU Law Analysis (2021) at <http://eulawanalysis.blogspot.com/2021/01/the-brexit-deal-council-legal-service.html?m=1> (last visited 26 May 2021) (CLS opinion). The relevant Annex B of Doc 6239/20 to which the opinion refers is not publicly available.

¹² Both EU-only and mixed agreements are binding on the Member States under Article 216(2) TFEU. They are hence under EU law equally responsible for the implementation of both types of agreements (see also Case C-239/03 *Commission v France (Etang de Berre)* ECLI:EU:C:2004:598).

¹³ 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* (Leiden; Boston: Brill, 2020).

¹⁴ Under the heading 'Institutional consequences'.

comprehensive agreement with a country that has withdrawn from the Union',¹⁵ and presented as a 'political choice'.¹⁶ In order to have the TCA approved on the EU side without any procedural hiccups, the Council made a strategic effort to downplay any permanent effect of the EU-UK TCA on the power division within the EU.¹⁷ It stressed that its

approach does not affect the allocation of competences between the Union and the Member States under the Treaties, and is limited to the United Kingdom due to the unprecedented character of this comprehensive negotiation with a country that has withdrawn from the Union.¹⁸

We find this argument incorrect and believe that under great time pressure, important issues of principle were disregarded and left unresolved. The choice for EU-only conclusion has constitutional implications for the dynamic competence division within the EU and how EU external competence is understood in the future.¹⁹ This also results in many ambiguities in the application and enforcement of the agreement. Therefore, this choice is not only an EU concern, but affects both parties.

Our focus is on the legal and political justification for the decision to conclude the EU-UK TCA as an EU-only agreement, in light of the division of competences between the EU and its Member States. When taking the decision to sign the agreement, the Council relied on a confidential but leaked opinion by the Council Legal Service (CLS), which 'does not provide an in-depth examination of all of its aspects, nor does it provide a comprehensive and detailed competence analysis'.²⁰ The lack of detailed and publicly available analysis is problematic from a democratic legitimacy perspective. It also raises separation of powers issues because of the particular institutional role and position of the CLS, which sees as its task to empower national executives against the national parliaments. The Member States, who were not involved in the negotiations, are unlikely to have had the necessary time to analyse the competence question in any depth. To what extent their parliaments – whose prerogatives are fundamentally affected by the choice for an EU-only agreement – were involved in forming a position on the Council decision depends on national constitutional provisions and their involvement was limited by the short time window. We cannot trace the procedure in all of them, but will briefly consider three

15 Council of the European Union, '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 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' 13905/20 (2020), recital 6 at <https://data.consilium.europa.eu/doc/document/ST-13904-2020-INIT/en/pdf> (last visited 26 May 2021).

16 CLS opinion, n 11 above.

17 Statement by the Council and by the Representatives of the Governments of the Member States meeting within the Council, recorded in Council document 6239/20. CLS opinion, *ibid*.

18 Statement by the Council and by the Representatives of the Governments, *ibid*.

19 In addition to external competence, Brexit is likely to affect EU integration and EU law more broadly. On this, see N. Nic Shuibhne, 'Did Brexit Change EU Law?' (2021) *Current Legal Problems* (forthcoming).

20 CLS opinion, n 11 above.

Member States (Finland, the Netherlands and Germany), whose parliaments have a reputation of being more active in engaging with EU matters, in order to highlight what the best possible engagement looked like under the tight schedule. All three national parliaments have a strong role in EU matters and key documents are publicly available to enable analysis. What happened there is probably a 'best case scenario' of parliamentary involvement. The same concern applies to the British Parliament, which was also rushed in a fashion similar to the Member States' parliaments in the conclusion of the TCA at the end of 2020 and much more than the EP, whose time limit was extended to the end of April 2021.

For our analysis, the engagement of national parliaments is important because they provide the second channel of legitimacy that the EU builds on. Like many others, we believe that the EU is constructed in a way that ensures legitimacy through a two-pronged institutional set-up: via the EU institutions and via national institutions.²¹ This two-pronged approach is also reflected in the principle of democracy under the European Treaties and confirmed by the approach of national constitutional courts.²² National parliaments are the central organ of the parliamentary democracies of the Member States. They must remain in the position to exercise substantial influence within the decision-making process of the Union. In the area of external relations, mixed agreements have been used to enable the participation of national parliaments.²³ If, therefore, the powers of the parliaments of the Member States are reduced to the indirect channel of control via the national representatives in the Council, the national prong of democratic legitimacy is significantly weakened. This hampers the democratic legitimacy of the Union as a whole. In order to protect legitimation via national channels, parliaments must be given appropriate time and information before taking their decisions. The Union does not possess a catch-all external competence. We fear that the EU institutions do not always take seriously enough these constraints on their own functions and the legitimacy boost that national parliaments provide. The EU-UK TCA is a good illustration of this institutional mindset and its consequences. National parliaments will be expected to give effect to subsequent measures that build on the agreement, such as funding social benefits and approving legislation needed to operationalise the agreement.

In this paper, we address the following questions: Could the EU legally conclude the EU-UK TCA as an EU-only agreement? What are the consequences of EU-only conclusion and how do they differ from a (hypothetical) mixed conclusion? How were national parliaments engaged? Was this engagement sufficient to legitimise the EU-only choice? Why was a public justification and

21 Fundamentally, J. Habermas, 'Citizens and State Equality in a Supranational Political Community: Degressive Proportionality and the Pouvoir Constituant Mixte' (2017) 55 *JCML* 171; F. Scharpf, 'Legitimacy in the multilevel European polity' MPIfG Working Paper no 1 (2009) at <https://www.econstor.eu/bitstream/10419/41652/1/610149423.pdf> (last visited 25 June 2021).

22 See Articles 2, 10, 12 and 14 TEU. See above the *ultra vires* test applied by the German Constitutional Court.

23 L. Ankersmit, 'Opinion 2/15 and the future of mixity and ISDS' *European Law Blog* (2017) at <https://europeanlawblog.eu/2017/05/18/opinion-215-and-the-future-of-mixity-and-isds/> (last visited 28 May 2021).

debate of the competence questions particularly needed in the context of the EU-UK TCA?

The analysis is structured as follows. We first discuss the process of negotiating and adopting the EU-UK TCA (in the following section). Next, we explain why the competence questions and the choice for an EU-only agreement required a deeper analysis (the third section). Finally, we examine the consequences of EU-only for the division of powers, including as regards the application and enforcement of the agreement (the fourth section). In the conclusions, we summarise our findings that first, the (public) discussion about EU competences and their implications in the conclusion of the EU-UK TCA was insufficient; and second, that this process does not chime well with the two-pronged legitimacy of the EU, which rests on two levels of decision-making: the European *and the national*. These questions are not only theoretical, but directly affect the legitimacy, application and enforcement of the agreement.

NEGOTIATING AND ADOPTING THE EU-UK TCA

The negotiations

The jointly agreed Terms of Reference on the UK-EU Future Relationship Negotiations laid down the basic principles on the organisation of negotiations. Confidentiality requirements were strict. Material originating from the other part could not be shared ‘outside of negotiating teams without the consent of the other party’ other than for the purposes of fulfilling ‘institutional practice or constitutional obligations in the context of the negotiations, subject to appropriate confidentiality arrangements’.²⁴ Bits and pieces of a draft text of the agreement were distributed in March 2020.²⁵

Throughout the negotiations, public statements were made after the different rounds. The EU tended to point out how it had ‘shown flexibility to work around the UK’s red lines and find solutions that fully respect the UK’s sovereignty. In particular with regard to the role of the ECJ, the future legislative autonomy of the UK, and fisheries’.²⁶ On 18 June 2020, the EP regretted that ‘following four rounds of negotiations, no real progress has been achieved’.²⁷

[It] notes the substantial divergences between the EU and the UK, including on the scope and the legal architecture of the text to be negotiated; expresses deep concern

24 ‘Terms of Reference on the UK-EU Future Relationship Negotiations,’ para 7 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869397/Terms_of_reference_on_the_UK-EU_negotiations.pdf (last visited 25 June 2021).

25 European Commission, ‘Draft text of the Agreement on the New Partnership with the United Kingdom’ UKTF (2020) 14 at <https://ec.europa.eu/info/sites/default/files/200318-draft-agreement-gen.pdf> (last visited 26 May 2021).

26 European Commission, ‘Statement by Michel Barnier following Round of negotiations for a new partnership agreement between the European Union and the United Kingdom’ at https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1612 (last visited 27 May 2021).

27 European Parliament, n 7 above, para 1.

at the limited scope of the future partnership envisaged by the UK Government and its piecemeal approach to negotiations only on areas that are in the interest of the UK; reiterates that such a “cherry-picking” approach is unacceptable for the EU.²⁸

Given the slow progress, EU governments had little to share with their parliaments. As the end of the transitional period approached, negotiations were speeded up. ‘We’ve been clear on multiple occasions that we won’t be extending the transition period. That remains the case,’ stated Downing Street in early December 2020.²⁹ On Christmas Eve, the EU’s Chief Negotiator Michel Barnier announced at a press conference that an agreement had been reached.³⁰ In a video message published on twitter, the British PM Boris Johnson declared that he had ‘glad tidings of great joy because this is a deal’.³¹

The Commission emphasised that the TCA ‘goes well beyond traditional free trade agreements and provides a solid basis for preserving our longstanding friendship and cooperation.’³² It explicitly aims to achieve non-trade objectives, confirmed by its conclusion as an association agreement,³³ and covers for example environmental and climate change issues in a way that does not justify categorising these issues as trade-related, as well as extensive cooperation on law enforcement and criminal matters. Its core legal framework (the TCA) establishes a governing structure, including dispute settlement, which enables the adding of ‘supplementing agreements’ on a broad range of subject matters. This model is also novel and itself raises a host of questions. It seems inspired by the EU’s relationship with Switzerland, where the EU (unsuccessfully) pursued a new governance structure.³⁴ The TCA and its supplementing agreements are all self-standing but connected. All form part of the same overall framework including its institutional structure. This allows concluding these supplementing agreements as mixed agreements, if necessary or desired.³⁵

On Boxing Day, 26 December 2020, the Commission adopted its proposal on the signing of the agreement. It identified Article 217 TFEU as ‘the most appropriate [legal basis] given the broad scope of the envisaged partnership’.³⁶ The preamble revealed the EU-only nature, by stating: ‘[t]he Agreements should

28 *ibid.*

29 A. Sandford, ‘Can the post-Brexit transition period be extended – and if not, why not?’ Euronews (2020) at <https://www.euronews.com/2020/12/09/can-the-post-brexit-transition-period-be-extended-and-if-not-why-not> (last visited 26 May 2021).

30 European Commission, ‘Remarks by Chief Negotiator Michel Barnier at the press conference on the outcome of the EU-UK negotiations’ Press corner (2020) at https://ec.europa.eu/commission/presscorner/detail/en/speech_20_2533 (last visited 26 May 2021).

31 ‘Brexit: EU diplomats briefed on Brexit trade deal’ BBC News, 25 December 2020 at www.bbc.com/news/uk-politics-55443780 (last visited 26 May 2021).

32 European Commission, n 2 above.

33 See Council Decision (EU) 2020/2252 (OJ L444) recital 5.

34 P. van Elsuwege ‘A New Legal Framework for EU-UK Relations: Some Reflections from the Perspective of EU External Relations Law’ (2021) 6 *European Papers*.

35 Article 2(1) TCA.

36 This would be used together with the procedural legal basis in Article 218(5) TFEU, read in conjunction with the second subparagraph of Article 218(8) TFEU which provides for unanimity voting in the Council. European Commission, ‘Proposal for a COUNCIL DECISION 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

be signed on behalf of the Union, subject to the fulfilment of the procedures required for their conclusion at a later date'.³⁷ The Commission stressed that the 'late timing should not jeopardise democratic scrutiny to be exercised by the EP in accordance with the Treaties'.³⁸ Provisional application had been constantly opposed by the UK for reasons of 'uncertainty that it creates for individuals, businesses and indeed the Parties'.³⁹ However, following in particular the EP's protest, it was later extended to the end of April 2020.⁴⁰

The focus of institutional concern was on the EP, whose consent was needed for the conclusion of the agreement. Since the entry into force of the Lisbon Treaty the role of the EP as the focus of lobbying and political struggle has increased also in the context of external agreements.⁴¹ As regards the EU-UK TCA, 'it has certainly managed to enhance its own profile in the process of ratifying the TCA', and with the disappearance of national parliaments from the scene effectively established itself as a new 'mother of all parliaments'.⁴²

The Council approved signature in a written procedure that ended on 29 December 2020 and decided that the TCA was to be applied on a provisional basis from 1 January 2021.⁴³ Signing and concluding the agreement as an EU-only agreement signifies that the EU is competent to act in all areas covered

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/2020/855 final/2 at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0855%2801%29&qid=1622021720904> (last visited 26 May 2021).

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ M. Gove, 'Provisional Application of the EU-UK Trade and Cooperation Agreement' Letter to Vice-President Sefcovic, 23 February 2021 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/963820/CDL_to_Maros_Sefcovic.pdf (last visited 25 June 2021).

⁴⁰ European Commission, 'Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in 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, as regards the date on which provisional application of the Trade and Cooperation Agreement shall cease' COM(2021) 64 final/2 at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021PC0064&from=FR> (last visited 26 May 2021); The Partnership Council, 'Decision No 1/2021 of the Partnership Council established by the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part of 23 February 2021 as regards the date on which provisional application pursuant to the Trade and Cooperation Agreement is to cease' 2021/356 at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22021D0356> (last visited 28 May 2021).

⁴¹ C. Eckes, *EU Powers under Pressure* (Oxford: OUP, 2019) ch 5.

⁴² J. Larik, "'The mother of all parliaments'? How the ratification of the Trade and Cooperation Agreement boosts the European Parliament's Profile' DCU Brexit Institute, 2021 at <http://dcubrexitinstitute.eu/2021/04/the-mother-of-all-parliaments-how-the-ratification-of-the-trade-and-cooperation-agreement-boosts-the-european-parliaments-profile/> (last visited 26 May 2021).

⁴³ Council of the European Union, 'Statement by the Council for the minutes' 14339/20, 2 at <https://data.consilium.europa.eu/doc/document/ST-14339-2020-INIT/en/pdf> (last visited 28 May 2021).

by it. When a Member State, the UK generally insisted on facultative mixity,⁴⁴ which is an option explicitly endorsed by the ECJ.⁴⁵ Yet, by ruling out any further extension of the transition period, the UK, as a non-EU State, in practice pressured the EU to conclude the TCA as an EU-only agreement.

The EU-UK TCA also seems to represent a typical case where it would be advisable to request an opinion from the ECJ pursuant to Article 218(11) TFEU. Like many other requested opinions in the past, it raises unclear and previously unexplored questions concerning the compatibility of an envisaged agreement with the Treaties and the competence to conclude it either as EU-only or a mixed agreement.⁴⁶ Yet, it seems that there was a general agreement that, despite the unbeaten ground and unorthodox solutions involved, the Court should not be engaged with the matter. In any case, this all now seems water under the bridge. Questions can only be asked about *envisaged* agreements ‘at any time before the Community’s consent to be bound by the agreement is finally expressed’.⁴⁷ This is because ‘the preventive intent’ of the procedure ‘can no longer be achieved if the Court rules on an agreement which has already been concluded’.⁴⁸ This means that an Opinion could have been requested by any EU institution or government any time after there was enough information about the proposed agreement, and if not earlier, then after the agreement was signed on 29 December 2020 and while it was being provisionally applied (until 29 April 2021). Most specifically, the opinion procedure cannot be invoked for addressing problems at the implementation stage of the agreement.⁴⁹ Yet, it seems likely that such difficulties may appear on the radar.

Signing a mixed agreement and allowing for provisional application (with or without specifying competences further) is common practice.⁵⁰ While an oft-followed solution is for the EU to confine the scope of the provisional application to matters falling within the Union’s competences, or even *exclusive* competences, the Council has at times decided to provisionally apply provisions generally considered to (also) involve competences of the Member States, such as criminal enforcement of intellectual property rights or the protection of the environment.⁵¹ These options were not used in the case of the TCA. Once the agreement had been signed, a possible mixed nature would have required adding new parties to the agreement and, hence, UK acceptance.

44 For example the UK argued against the EU-only conclusion of the Kosovo SAA.

45 Case C-600/14 *Germany v Council (COTIF I)* ECLI:EU:C:2017:935 at [46]-[52].

46 See Opinion 2/15 *EU-Singapore FTA* ECLI:EU:C:2017:376 at [28]-[29]; Opinion 2/00 ECLI:EU:C:2001:664 at [3]; Opinion 1/75 ECLI:EU:C:1975:145 1360; Opinion 1/78 ECLI:EU:C:1979:224 at [30]; Opinion 2/91 *ILO* ECLI:EU:C:1993:106 at [3]; Opinion 1/94 ECLI:EU:C:1994:384 at [9].

47 Opinion 1/94 *ibid* at [2].

48 Opinion 3/94 ECLI:EU:C:1995:436 at [19].

49 Opinion 2/00 n 46 above at [17].

50 J. Heliskoski, ‘Provisional Application of EU Free Trade Agreements’ in M. Hahn and G. Van der Loo (eds), *Law and Practice of the Common Commercial Policy* (Leiden: Brill, 2020) 587.

51 *ibid*, 607-608; for example the provisions of criminal enforcement of intellectual property rights were explicitly excluded in the provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ (2011) L 127/6.

National parliamentary debate: too little, too late

National parliamentary procedures preceding the adoption of the Council decision were taken in a matter of days after the Commission Boxing Day proposal to sign the agreement. In Finland, on 28 December 2020, the Grand Committee organised an informal online hearing with the Minister for European Affairs concerning the signature of the TCA. It had no time to hear specialist committees or outside experts, and – due to the informal nature of the hearing – did not even formulate a position on the matter.⁵² In the Netherlands, however, the matter was discussed in much detail on 28 December 2020 with Mr Blok, Minister of Foreign Affairs.⁵³ Many critical questions were raised concerning the ‘last minute decision’ for EU-only conclusion, the fact that the EU-only conclusion was presented as a political choice only, rather than based on legal considerations, and the lack of transparency surrounding the CLS advice on this matter.⁵⁴ Some parliamentarians questioned specifically why a mixed agreement with provisional application of the part falling under EU competences was not possible and what the precise consequences of the EU-UK TCA for the Netherlands were.⁵⁵ Foreign minister Blok admitted that the choice for EU-only was last minute and ‘heel ongemakkelijk’ (‘very awkward’) but served Dutch interests including continuation of fishing in British waters.⁵⁶

The Commission proposal for concluding the TCA then followed. In Finland, the Parliament was bluntly informed by the government that it was now too late to even think about formulating a substantive position: the question was about whether Finland should vote against the conclusion of the agreement in the Council and thus cause a no-Deal Brexit.⁵⁷ The government signed up to the CLS analysis and stressed that the provisions in the TCA concern matters that are already broadly covered by EU legislation. For the government, the TCA was ‘a special case’ and an EU-only agreement was the ‘only way’ to avoid a no-Deal Brexit. In any case, the agreement did not affect competence divisions beyond the relations with the UK.⁵⁸ The Constitutional Law Committee pointed out that even if the government assumed the TCA did not have to be a mixed agreement, the competence divisions should have been explained in detail and required that the ‘legal solidity of the solution must be ensured before the decision on the conclusion of the agreement is taken.’⁵⁹ However, the Parliament’s Grand Committee ignored this guidance and accepted the agreement stressing that the ‘exceptional’ solution should not be taken as a change in the

52 Press Release by the Parliament of Finland at <https://www.eduskunta.fi/FI/tiedotteet/Sivut/suuri-valiokunta-kasitteli-eun-ja-ukn-uutta-suhdetta-koskevien-sopimusten-valiakaista-soveltamista.aspx>.

53 *Kamerstukken II* 2020/21, 35393, nr 30.

54 *ibid.* See interventions by Bosman (VVD), Van Ojik (GroenLinks), Omtzigt (CDA), Van der Graaf (ChristenUnie), and Bisschop (SGP).

55 *ibid.*, 12–13.

56 *ibid.*, 26. See the justification of the Dutch foreign minister, emphasising that the Netherlands would be more affected than most EU Member States.

57 Government memorandum UJ 52/2020 vp.

58 Government memorandum UJ 52/2020 vp.

59 Statement in the minutes of the Constitutional Law Committee, 11 February 2021.

way the EU concludes international agreements, and must not affect divisions of competence under the Treaties.⁶⁰

In Germany, only on 25 January 2021, the *Bundestag*'s Committee for European Union Affairs held an expert hearing on the EU-UK TCA that focused, among other things, on the EU-only conclusion.⁶¹ The choice for concluding an EU-only agreement was discussed in the plenary meeting of the *Bundestag* on 13 February 2020.⁶² It was largely supported by members from different factions (CDU; SPD; FDP, BÜNDNIS 90/DIE GRÜNEN) but criticised by *Die Linke*, by pointing at the inconsistency with the position of the *Bundestag* in favour of mixed conclusion of the TTIP and CETA.⁶³

Delivering a mixed agreement would have been difficult, if not impossible, before the end of 2020. But even more fundamentally, the wish to maintain EU unity at the stage of conclusion prevailed. Unity of the EU had served as the key principle all through the EU negotiations, and there were justified fears that the British would exploit any disunity. It is evident that there was no appetite for a new CETA, which has been provisionally applied since 2017 but has not yet entered into force. The difficulties emerging from the negative Dutch referendum on the Ukraine Association Agreement demonstrate how the EU-only conclusion may offer a quicker and more problem-free adoption. This setting provided a further impetus to put pressure on potentially difficult Member States through the expiry of deadlines and the use of hasty written procedures enabling neither the engagement of national actors nor a forum for critical debate during a domestic ratification round.

The choice for mixity was thus *highly political*; it prioritised certain aspects at the expense of others. What received close to no attention in the institutional positions is how the decision to conclude the EU-UK TCA as an EU-only agreement would affect the position of national parliaments. They lose public engagement since they no longer approve those parts of the international agreement that fall under shared competences and that up to the point of conclusion of the agreement were governed by national law. This cannot be compensated by their indirect control of national representatives in the Council. Keeping in mind the constitutional consequences of moving away from the practice of concluding mixed agreements, even if this is based on a political choice (facultative mixity), we believe that this decision to take a different (political) route would have required a detailed and public constitutional analysis of the different competences at play and, above all, the consequences that flow from exercising them at both EU and national level. Parliaments should not be deprived of their functions in a hasty and secret procedure out of a general fear that they might actually exercise their powers and decide something different. When this

60 Position of the Grand Committee, SuVEK 3/2021 vp.

61 Deutscher Bundestag, 'Ausschuss für die Angelegenheiten der Europäischen Union' at https://www.bundestag.de/ausschuesse/pe1_europaeischeunion#url=L2Rva3VtZW50ZS90ZUh0YXJjaGl2LzIwMjEva3cwNC1wYS1ldXJvcGEtYnJleGl0LTgxNzMwNg==&mod=mod540070 (last visited 28 May 2021).

62 Deutscher Bundestag, 'Plenarprotokoll 19/146: 146. Sitzung' 2020 at <https://dipbt.bundestag.de/dip21/btp/19/19146.pdf> (last visited 28 May 2021).

63 Deutscher Bundestag, 'Fraktionen kritisieren Post-Cotonou-Abkommen' Presse, 2021 at <https://www.bundestag.de/presse/hib/816974-816974> (last visited 28 May 2021).

happens, the minimum requirement that we see is that at least the political justification for this choice is brought to a public and openly debated.

National parliaments could not sufficiently exercise their important function as part of the two-pronged approach to democratic legitimacy within the EU. The second prong of legitimacy through the EU institution may have worked better, as the EP had more time for deliberation. However, as explained above, the institutional set-up of the EU relies for its democratic legitimacy on both the national and the European prongs and the TCA, as we will continue to argue, required, because of the range of issues with which it deals, legitimation and approval also via national channels. Within the complex institutional set-up of the EU the national prong cannot simply be substituted by the European one – or the other way around.

IN NEED OF A DEEPER ANALYSIS OF THE EU-ONLY CONCLUSION

The Council Legal Service with a particular mandate

Who should be charged with the comprehensive constitutional analysis prior to the conclusion of a comprehensive and innovative international agreement? In the Council, this task is usually allocated to the CLS.⁶⁴ However, the function of the CLS in the EU structure is to serve decision-making in the Council and promote what it identifies as the ‘Council’s interest’. In this case, the task of the CLS was to save the EU from a no-Deal Brexit and enable the conclusion of the EU-UK TCA without additional procedural hurdles. It is not the task of the CLS to think about Member State sovereignty or even how Member State authorities will deal with the agreement in the future. In the matter at hand, its task was to enable ministers to tell their parliaments in capitals that the agreement was ‘business as usual’, that nothing extraordinary was taking place, and that, in any event, the case was entirely exceptional and had no consequences for Member States’ powers in the future.

From a separation of powers perspective, it appears problematic that the CLS seems to be the only actor who offered a legal analysis – quite concise in its written form and most likely more extensive in its oral delivery. The CLS, because of its institutional position, considers it as its task to empower the national executives represented in the Council, including against their own national parliaments.⁶⁵ This may to a certain extent be justified in light of the CLS’s role in advising the Council, but it is short sighted in light of the indirect source of democratic legitimacy of the Council. Article 10(2) TEU specifically stresses that the Council derives its democratic legitimacy through national governments, who are ‘democratically accountable either to their national Parliaments, or to their citizens’.

64 See P. Leino-Sandberg, *The Politics of Legal Expertise in EU Policy Making* (Cambridge: Cambridge University Press, (forthcoming) 2021).

65 For a discussion of the CLS role in the context of the COVID19 crisis, see P. Leino-Sandberg and M. Ruffert, ‘From apologetics to critical assessment – Next Generation EU and its constitutional ramifications’ (forthcoming, reference to be completed at proofs stage).

The CLS's opinion relating to the EU-UK TCA remains true to this mission of empowering national executives represented in the Council. The CLS explains the decision to conclude the agreement as EU-only as a 'political choice' that 'does not prevent Member States from continuing to exercise their national competences vis-à-vis other third countries'.⁶⁶ As a justification, it refers to procedural complications: 'the conclusion of mixed agreements presents procedural and political complexity as the process relating to the conclusion of recent mixed agreements testifies'.

Mixed agreements are a conscious means of leaving the division of competences undetermined and hence of not deciding who is competent for any given part of the agreement.⁶⁷ This ensures a high level of flexibility. While possible, detailed declarations of competence are not used for bilateral agreements, only for some multilateral agreements. However, national parliaments may in the context of approving mixed agreements require more detailed elaboration of remaining national competence for constitutional purposes.⁶⁸ Hence, usually the exact division of competence remains unclear unless a Court opinion is requested under Article 218(11) TFEU and even then, the division may not be clarified.⁶⁹ At the same time, mixity requires, besides conclusion by the Union, ratification in the 27 Member States, pursuant to their own constitutional rules. This renders the process necessarily more time-consuming and cumbersome.

However, the procedural argument is problematic in light of the fundamental constitutional principle, repeatedly confirmed by the Court,⁷⁰ that the choice of the legal basis is not a matter of simpler procedure, but one of substance. The CLS opinion does not fulfil the requirements of a proper constitutional analysis. It is not comprehensive, as it points out itself, but provides only one side of the argument. It leaves out entirely the consequences of exercising non-exclusive external competences flowing from not yet exercised internally shared competences.⁷¹

The CLS opinion is also noteworthy for its lack of consistency with its own existing doctrine, which is usually carefully nurtured by building individual opinions on earlier practice; something that is considered important for maintaining the credibility of the Legal Service.⁷² The CLS opinion on the EU-UK TCA could not stand in starker contrast with its 2010 position on the 'external competence in the field of environment and climate change following the

66 CLS opinion, n 11 above.

67 Eckes, n 41 above, ch 5.

68 This is the standard requirement of the Finnish Constitutional Law Committee, which has required the government to explain which parts of the agreement fall under national competence at least with reference to individual provisions or subject areas. See for example Constitutional Law Committee statements PeVL 6/2001, PeVL 31/2001.

69 Opinion 2/00 n 46 above at [13]–[19].

70 Case C-137/12 *Commission v Council* ECLI:EU:C:2013:675 at [73]–[74].

71 The CLS is likely to have given oral advice in the Council preparatory bodies, but this advice is not recorded in publicly available documents.

72 This is discussed in detail in P. Leino-Sandberg, *The Politics of Legal Expertise in EU Policy Making* (Cambridge: Cambridge University Press, 2021).

entry into force of the Lisbon Treaty'.⁷³ In this opinion, the CLS explained that 'within areas of shared competence, both the Union and the Member States enjoy the right to be present and to participate, directly or through their representatives, in international negotiations', that it is 'up to the Member States to decide how and by whom their external competence will be exercised'. Moreover, the CLS emphasised that 'as long as it is not established that ... no competence remains with the Member States regarding certain issues relating to emissions reduction, it is correct to assume that Member States continue to share competence with the Union on these issues.' We agree with the CLS' earlier position and find it striking that the CLS now asserts that the EU-UK TCA will not have consequences for the division of competences within the EU. Ruptures of this kind in existing CLS doctrine are rare and when they happen, they are usually carefully justified. In this case, the only justification offered is 'exceptional circumstances', which are more political than legal. In our analysis below, we refer to the CLS analysis in respect of the EU-UK TCA where it exists.

So far, no detailed and public analysis concerning the competence structure of the agreement and the implications of the EU-only agreement has been made available. The opinion of the CLS remains formally confidential despite being publicly available on a popular website.⁷⁴ The Council received a request for public access to it, which it denied in line with its more or less categorical practice of denying public access to legal advice. This stands in stark contrast with the consistent case law of the ECJ advocating a much more transparent line and establishing that questions of competence are a key part of democratic debate.⁷⁵ Despite this case law, there is no tradition of exposing bold legal steps to public scrutiny. If the EU adopts measures that potentially transgress the boundaries of its Treaties, any legal doubts are kept carefully out of the public eye. This time, non-disclosure was justified primarily with reference to how the 'legal advice contained in the requested document relates to a decision-making process of non-legislative nature, which is still ongoing'.⁷⁶ It argued more specifically that 'the requested opinion touches upon horizontal issues (conclusion of EU-only agreements by the exercise by the EU of its potential EU competence, effects for the Member States of the exercise by the EU of its potential competence etc.) that have *broad implications going beyond the decision-making process in question*'.⁷⁷

This reply is drafted in the CLS and evidences a momentary lapse in coordination between its units. Yet, we find this line of argumentation more honest and agree that the solution is likely to have 'broad implications going beyond the decision-making process in question'.

73 Council Legal Service Opinion (6612/1), 17 February 2010 at <https://data.consilium.europa.eu/doc/document/ST-6612-2010-INIT/en/pdf> (last visited 28 May 2021).

74 Peers, n 11 above.

75 P. Leino-Sandberg, 'The invisibility of legal advice given to EU institutions' at <https://constitution-unit.com/tag/paivi-leino-sandberg/>.

76 Reply to Confirmatory Application 07/c/01/21, found in document 6418/21, para 5.

77 *ibid*, para 28 (emphasis added).

Seven Member States disagreed with the non-disclosure of the CLS opinion. The Netherlands, Latvia, Finland, Estonia, Denmark and Belgium stressed that ‘there would be an overriding public interest in full disclosure of the CLS opinion on the nature of the TCA and the exercise of the EU of its competence. Such openness contributes to proving the legitimacy of the decision-making process in the Council with regard to the TCA, while reflecting the unusual circumstances under which it has taken place’.⁷⁸ Sweden stressed that ‘there is an overriding public interest in disclosure considering the subject-matter of the document involved and the criticism which the Council has received on this matter in the past’.⁷⁹ We fully agree with the overriding public interest in a deeper constitutional analysis of the (political) choice for EU-only conclusion and its consequences. Moreover, publicity of legal analysis would also enable its external scrutiny and contribute to its quality. However, opposing this view, the Council argued in the motivation of its denial of access that if the opinion was published ‘the CLS may not fully play its role in advising the Council and be tempted to *release only short and cryptic legal advice* which would *not serve its function* and would run against the legitimate ability of the Council, especially where it has to act in emergency, to seek legal advice and receive frank, objective and comprehensive advice’.⁸⁰

Somewhat paradoxically, this is exactly how we read the leaked CLS opinion: as failing to meet the standard of a frank, objective and comprehensive advice that serves the function of offering a reliable basis for decision-making.

Article 217 TFEU as a comprehensive legal basis

The TCA was concluded on the basis of Article 217 TFEU, the legal basis for association agreements. For the CLS, ‘Article 217 TFEU allows the EU to conclude, by unanimity, a wide-ranging agreement on matters of EU competence without the need to identify in detail the areas where the EU has already exercised or not its competence. It can include areas of EU competence where the sectoral legal basis requires unanimity or qualified majority voting, as well as areas of potential EU competence not yet exercised internally’.⁸¹

Article 217 TFEU allows the Union to act alone when concluding an association agreement. Yet, association agreements are almost always concluded as mixed agreements. The Stabilisation and Association Agreement (SAA) with Kosovo is the only exception.⁸² The reason for this choice is obvious: five Member States had not recognised Kosovo as an independent state at the time

78 Council of the European Union, ‘Communication’ CM 2496/21, 2 at <https://data.consilium.europa.eu/doc/document/CM-2496-2021-INIT/en/pdf> (last visited 28 May 2021).

79 *ibid.*, 3.

80 Reply to Confirmatory Application, n 76 above, para 29 (emphasis added).

81 CLS opinion, n 11 above, para 34.

82 Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part, OJ (2016) L 71/3. See on the Kosovo SAA: P. van Elsuwege, ‘Legal Creativity in EU External Relations: The Stabilisation and Association Agreement Between the EU and Kosovo’ (2017) 22 *European Foreign Affairs Review* 393.

of signing. Therefore, the choice for EU-only conclusion promised a solution for an 'exceptional' case,⁸³ however, it demonstrates that EU-only association agreements are possible if their substance falls under EU competence.

Association is a *specific type of cooperation* between the EU and a third state, not a specific policy field. Article 217 TFEU by its nature covers all fields of EU powers, whether or not previously exercised, and the policy fields and the types of commitments that are included are the result of a negotiation process between the EU (and usually its Member States) on the one side and a third state on the other. Association agreements pursue the *objective* of 'creating special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system'.⁸⁴ In this regard, the UK is an abnormality: it is precisely *not* its intention to create closer links or take part in Union systems.

Article 217 TFEU, like all Union competences, has limits. As the CLS also notes in its opinion, the areas covered by an association agreement need to fall within EU powers, even if they have not been previously used or remain potential and even if the commitments require implementation by the Member States. This is in line with the ECJ's case law, holding that Article 217 TFEU cannot be used as a legal basis if there is no underlying, sectoral competence.⁸⁵ We agree and think that using Article 217 TFEU is not a 'get-out-of-jail' card in the sense that its use would make analysing the extent of EU competences unnecessary. This need for public explanation is exacerbated when Article 217 TFEU is interpreted in an unusually wide-ranging fashion (leading to exceptional EU-only conclusion) and as covering a highly abnormal situation of a loosening of links and a shielding of the UK from the Union system.

Substantively the EU-UK TCA is unique and follows no pre-existing models. It reaches far beyond the Court's very wide interpretation of CCP post-Lisbon.⁸⁶ It excludes areas such as Common Foreign and Security Policy (CFSP), migration and energy, that are routinely covered by association agreements, for example Ukraine, Moldova and Georgia. Other provisions of the TCA, such as those on air travel are routinely concluded as a part of (sectoral) mixed agreements. In line with existing case law, the CLS points out in its opinion that the EU has not yet exercised the shared competence internally with regard to traffic rights granted to third countries, but can now choose to exercise this competence externally.⁸⁷ The CLS does not expand on the motivation

83 See, for transitional agreements, for example Agreement for Trade and Cooperation Between the European Economic Community and Macau, OJ (1992) L 404/27; Euro-Mediterranean Interim Association Agreement on Trade and Cooperation Between the European Community, of the One Part and the Palestine Liberalisation Organisation (PLO) for the Benefit of the Palestine Authority of the West Bank and the Gaza Strip, of the Other Part, OJ (1997) L 187/3; Agreement Between the European Community and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on the Readmission of Persons Residing Without Authorisation, OJ (2004) L 17/25.

84 Case 12/86 *Demirel* ECLI:EU:C:1987:400 at [9].

85 *ibid* at [10] and [33].

86 Case C-414/11 *Daiichi Sankyo* ECLI:EU:C:2013:520; Case C-114/12 *European Commission v Council of the European Union (Broadcasting Rights)* ECLI:EU:C:2014:224; Opinion 2/15 *EU-Singapore FTA* n 46 above.

87 CLS opinion, n 11 above, para 20.

or implications of changing the earlier pattern. Instead, it argues that ‘a rapid examination of the TCA shows that no situation of *obligatory* mixity arises: the EU has competence in all the fields covered by it.’

This ‘rapid examination’ approach differs significantly from the Court’s approach in the ERTA line of case law.⁸⁸ In Opinion 1/13,⁸⁹ the ECJ explicated that

*any competence, especially where it is exclusive, must have its basis in conclusions drawn from a comprehensive and detailed analysis of the relationship between the envisaged international agreement and the EU law in force. That analysis must take into account the areas covered by the EU rules and by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules and those provisions.*⁹⁰

We draw attention to the Court’s explicit statement that the detailed analysis concerns ‘any competence’, not only exclusive competences. The CLS opinion’s position that it is sufficient to state that the EU has – even without detailed examination – some form of competence in all fields covered by the TCA appears to be based on an understanding that using Article 217 TFEU as legal basis permits glossing over the identification of specific competences. Even if no additional legal bases may be required, such a sweeping approach stands in apparent tension with the principle of conferral, which precisely requires that Union competence is demonstrated before acting – in principle by the Commission when proposing a Council decision for signing the agreement. Even if the Union has express competence to conclude association agreements, the choice to exercise this competence, including in areas of implied not yet exercised and non-exclusive competences has *legal consequences* for the position of the Member States (see the section below headed ‘Consequences of an EU-only adoption’). When (national) parliaments are asked to support departing from the established practice of concluding such comprehensive association agreements as mixed agreements they must be offered a careful examination of these consequences in order to be able to make an informed decision for or against EU-only conclusion.

In our analysis, the EU-UK TCA covers four different types of competences, which all have different character and implications. First, and prominently, the *express exclusive* competence of the Union for CCP (Article 3(1)(e) TFEU) covers large parts of the agreement, in particular in its wide post-Lisbon interpretation by the Court. This first type of competence is exercised by the EU alone. It concerns the core trade commitment to zero tariffs and quotas, as well as reservation of non-tariff barriers such as rules of origin and rules on digital trade. In addition, in its broad and objective-oriented interpretation, CCP also includes labour rights and environmental aspects, as long as they are (sufficiently) trade-related. Even when focusing on CCP, EU free trade

88 Case 22-70 *ERTA* ECLI:EU:C:1971:32.

89 Opinion 1/13 *The Hague Convention* ECLI:EU:C:2014:2303.

90 *ibid* at [74] (emphasis added); confirmed by Case C-66/13 *Green Network* ECLI:EU:C:2014:2399 at [33].

agreements may hence regulate a very broad scope of policies in a deep, detailed and invasive fashion.

The rest of the agreement falls under three different categories. The second type is *express shared competences*, such as environmental matters that are not trade related.⁹¹ The third type is *implied external competences that the Union has internally already exercised*. This includes provisions on money laundering and cooperation in criminal matters, such as the European Arrest Warrant (EAW)). These could potentially qualify for exclusivity under Article 3(2) TFEU⁹² or non-exclusive Union competences under Article 216(1) last alternative TFEU.

The fourth and final type is *implied external competences that the Union has not yet internally exercised*.⁹³ These can also be either *exclusive*⁹⁴ or *non-exclusive*.⁹⁵ The EU can for the first-time externally exercise the shared, not earlier internally exercised competences. The Court has for example confirmed the EU's ability to exercise shared not yet exercised competences for the first time externally for exclusive competences, now covered by Article 3(2) TFEU.⁹⁶ In addition, Opinion 2/15 identified that transport services, which are expressly excluded from the CCP,⁹⁷ are an (exclusive) ERTA competence.⁹⁸ For non-exclusive, not earlier internally exercised competences, the case law and the literature are less clear. However, the Union's exercise of this category of competences must logically be subject to some conditions; otherwise this category would be boundaryless. Post-Lisbon, Article 216(1) TFEU outlines these conditions. The first option that Article 216(1) TFEU details is 'where the Treaties so provide', tying it to Union competence in specific policy fields. We find it difficult to believe that any form of sweeping cooperation, such as that under Article 217 TFEU, could satisfy this criterion, especially in the context of an agreement that aims at the exact opposite of association agreements in general: the loosening of ties between the EU and a third country and shielding the UK against any EU influence, or 'taking back control'. The conditions of Article 216(1) TFEU for establishing Union competence would need to be demonstrated for each area covered by the TCA. If, by contrast, Article 217 TFEU is interpreted to make all this analysis and all these conditions redundant, it actually becomes an 'out-of-constraints-of-conferral' card. The EU can do anything, presuming that it acts in the context of an association agreement. Interpreting Article 217 TFEU as allowing the Union to exercise competences irrespective of the internal competence division interferes with Member States' powers, national parliaments' room for manoeuvre, and the third country's ability to enforce the agreement.

91 Article 216(1) first alternative TFEU: 'The Union may conclude agreements 'where the Treaties so provide'; Article 191(4) TFEU. See in the TCA for example Chapter seven: Environment and climate of TITLE XI: LEVEL PLAYING FIELD FOR OPEN AND FAIR COMPETITION AND SUSTAINABLE DEVELOPMENT.

92 Article 3(2) TFEU: 'may affect common rules or alter their scope'; Case 22-70 ERTA n 88 above; Opinion 1/13 *The Hague Convention* n 89 above.

93 Article 216(1) last alternative TFEU: 'likely to affect common rules or alter their scope'.

94 Article 3(2) second alternative TFEU: 'necessary to enable the Union to exercise its internal competences'; Opinion 1/76 *European Laying-up Fund* ECLI:EU:C:1977:63.

95 Article 216(1) first alternative TFEU: 'necessary in order to achieve ... one of its objectives'.

96 Opinion 1/76 *European Laying-up Fund* n 94 above.

97 Article 207(5) TFEU.

98 Opinion 2/15 *EU-Singapore FTA* n 46 above at [217].

Is it beyond any doubt that the EU could conclude the whole agreement on its own?

The previous section demonstrated that it is difficult to identify clearly reserved powers of the Member States that the Union could not – from a legal basis and competence-oriented perspective – exercise in an EU-only agreement based on Article 217 TFEU. Hence, on this account alone, mixity may not have been strictly speaking legally required by the division of competences. However, a more contextual reading of the powers exercised under the TCA may still lead to *legal* doubts about the *political* choice for an EU-only agreement. This approach resembles the ECJ's argument in Opinion 2/15 that removing disputes from the jurisdictions of the national courts was an aspect of the EU-Singapore FTA that could not be concluded without involvement of the Member States.⁹⁹ This position is based on an understanding of the importance of judicial review by independent courts for separation of powers, fundamental rights protection, judicial cooperation, and hence ultimately the legitimacy of decision-making within the EU.

The EU-UK TCA appears to be the first occasion where no attempt has been made to avoid exercising certain competences that are internally exercised by the Member States and for which the EU would not have competence to occupy the field (regulate exhaustively), for example cooperation of law enforcement authorities, coordination of social security rights, recognition of professional qualifications, and transport.¹⁰⁰ The Court has previously accepted that the Union may assume obligations even if the competent authorities referred to in some of the provisions under the agreement are national authorities,¹⁰¹ as is the case for example for the cooperation of law enforcement authorities under the TCA.

However, if it was concluded that the TCA includes specific obligations which the EU itself does not have competence to implement, this would be problematic in light of the ECJ's case law. For the Court, it makes a difference whether provisions in an agreement 'determin[e] the areas for cooperation and specify ... certain of its aspects and various actions to which special importance is attached' on a general level or whether they prescribe 'in concrete terms the manner in which cooperation in each specific area envisaged is to be implemented'.¹⁰² Generally worded provisions do not, according to the Court 'necessarily imply a general power such as to lay down the basis of a competence to undertake any kind of cooperation action in that field. ... the Court must go on to examine in more detail the objective and content of each of the provisions'.¹⁰³ Thus, of essence for a competence evaluation is not only which fields are covered but also how the individual provisions are formulated and what kind of obligations they create for parties. In this kind of evaluation, the

99 Opinion 2/15 *EU-Singapore FTA* n 46 above at [292].

100 For example, in the KOSOVO SAA certain areas were consciously excluded in light of Opinion 2/15. The agreement does not regulate portfolio investment or entry and residence requirements of the citizens of the other party.

101 Opinion 2/91 *ILO* n 46 above at [34].

102 Case C-268/94 *ECLI:EU:C:1996:461* at [45]-[48].

103 *ibid* at [47]-[48].

far-reaching possibilities for further development in the EU-UK TCA are also of relevance.¹⁰⁴

To us, the questions raised by the EU-UK TCA reach beyond questions that have been addressed by the Court earlier. In many areas it creates a parallel universe that does not build on EU legislation but on international conventions. One example is its provisions on cooperation in criminal matters. Surrender of persons and freezing and confiscation of property between the EU and the UK are governed by the provisions of the TCA. The TCA provisions on mutual legal assistance and exchange of criminal record information, however, are not independent but build on Council of Europe Conventions concluded by the Member States,¹⁰⁵ often with reservations, and usually given effect through national legislation. The EU also adopted several framework decisions/directives in the areas covered by these Conventions and Member States approved the necessary national legislation giving effect to EU legislation. This complex landscape of international, EU and national norms is now supplemented by the provisions of the TCA concluded by the EU.

As regards money laundering in particular, the EU has adopted extensive legislation based on its internal market competence and thus binding on the UK until its withdrawal. However, instead of this legislation, the TCA relies on two Council of Europe conventions (1990, 2005), out of which only the first one is comprehensively ratified by all EU Member States. Adding to this complexity, the provisions of the TCA are also to be applied ‘in place of’ certain provisions and replace some of the chapters in these Conventions while the contracting States’ obligations under other Convention provisions remain unchanged.¹⁰⁶ This creates a particularly complex competence structure, where national competence is tightly integrated into, and hence framed and co-determined by, the exercise of Union competences under the TCA.

Another area where clarification would seem particularly necessary is social security coordination – a shared competence. The CLS explains that here also the question is one of political choice, even though agreements containing provisions on the coordination of social security systems (including association agreements) have so far been concluded as mixed agreements.¹⁰⁷ The ECJ has held that Union powers in this area only extend to the coordination of social security systems *within the framework of the free movement of persons* and that it hence may only conclude agreements with third countries if they participate in the free movement of persons.¹⁰⁸ In other cases, specifically concerning association agreements, the ‘progressive development’ towards freedom of movement for workers and the ‘taking part in’ Union systems were taken as a reason for Union competence (and challenged in Court by the UK).¹⁰⁹ The EU-UK TCA does not provide for free movement of persons beyond ‘visa-free

104 See ‘Institutional consequences’ below.

105 The agreement relies on instruments of the Council of Europe including on Mutual Assistance in Criminal Matters (1959), Suppression of Terrorism (1977), and Extradition (1957).

106 Article 656(6) TCA.

107 CLS Opinion, n 11 above, para 35

108 Case C-431/11 *UK v Council* ECLI:EU:C:2013:589.

109 Case C-81/13 *UK v Council* ECLI:EU:C:2014:2449 at [11], [13] and [45]; Case 12/86 *Demirel* n 84 above at [9]. Ignoring this aspect in the interpretation, D. Thym, ‘Kein Brexit „auf Rädern“

travel for short-term visits in respect of their nationals in accordance with their domestic law'.¹¹⁰ Hence, the Court's reasoning that the Union is competent where social benefits are provided as a consequence of free movement and principles of non-discrimination should not be applicable.

The TCA also has budgetary implications for the Member States. It guarantees treatment equal to that of nationals for a range of social benefits, such as sickness, maternity and equivalent paternity, invalidity; old-age, unemployment and pre-retirement benefits.¹¹¹ Access to health services is equally guaranteed. While highly desirable from the perspective of the individual, such an extension of benefits to third country nationals constitutes a direct burden for the national social security system. In addition, the Specialised Committee on Social Security Coordination may amend the Annexes and Appendices to the Protocol on Social Security Coordination, which defines the national benefits to which the Protocol applies.¹¹² The relevant benefits are then however *laid down in national legislation and funded from national budgets*. Such extensions have therefore so far been seen to require authorisation by national parliaments.¹¹³ The Court has previously held that if an international agreement includes obligations that are financed by Member States, Union competence cannot be exclusive.¹¹⁴ In addition, the EU and the UK as parties to the TCA provide for visa-free travel for short-term visits in respect of their nationals in accordance with domestic law, while the possibility to impose visa requirements for short-term visits by nationals of the other Party remains possible. Both social security coordination and short-term visas raise the crucial question: Can the EU alone take international responsibility for something that the Member States need to provide 'in accordance with their domestic law'?¹¹⁵

In other words, first, a deeper examination would have been necessary because the competence division for the conclusion of international agreements is a confusing and controversial issue. Second, the line between EU and national competences is seldom entirely clear or permanent. As a matter of principle, common rules can cease to exist and Member States can again start to exercise shared internal competences once the Union ceases to do so.¹¹⁶ This dependence of implied external competences – both shared and 'exclusive' – on internal common rules is an argument in favour of mixity.¹¹⁷ However, while competence structures are often somewhat unclear, we are not aware of other

- *Wider die Erzählung von einer defizitären Rechtsgrundlage* 'Verfassungsblog', 27 January 2021 at <https://verfassungsblog.de/kein-brexite-auf-radern/> (last visited 25 June 2021).

110 Article VSTV.1: Visas for short-term visits.

111 Article SSC.5(1) Protocol on Social Security Coordination.

112 Article SSC.68: Amendments.

113 See exceptionally and only for workers: Directive 2011/98/EU, Art 12(2)(b) and Preambles 22 and 34.

114 Opinion 1/78 n 46 above at [60]. See also M. Cremona and P. Leino-Sandberg, 'External Relations of the EU and Eurogroup' in F. Amtenbrink and C. Herrmann (eds), *EU Law of Economic & Monetary Union* (Oxford: OUP, 2020).

115 This is not entirely new to the EU-UK TCA: The EU regularly does this, including in fields of exclusive competence such as the CCP (for example non-discrimination in relation to taxation, or enforcement of IPR, or extradition agreements).

116 A prominent example is the devolution of the regulatory power concerning GMOs.

117 M. Chamon, 'Implied exclusive powers in the ECJ's post-Lisbon jurisprudence: the continued development of the ERTA doctrine' (2018) *Common Market Law Review* 1101, 1108-1109.

agreements that would build on such a complex framework as this. This conclusion is unaffected by the conclusion of the TCA on the basis of Article 217 TFEU.

Third, from a practical perspective, if the agreement makes its way before national highest courts, they are likely to analyse the competence question from a very different angle and with a very different result. For the parts that have direct effect, such as at least potentially the provisions on cooperation of law enforcement authorities,¹¹⁸ it is quite possible that constitutional issues, such as alleged fundamental rights violations, may reach the highest national courts.¹¹⁹ In addition, the German Constitutional Court (*Bundesverfassungsgericht – BVerfG*) is at present examining two recent international agreements of the EU, CETA and the EU-Singapore FTA, including with regard to the competence division under these agreements and how that affects their democratic legitimacy.¹²⁰

By detour through national courts, the TCA could then also reach the ECJ after all. When the *ultra vires* nature of an EU act is at stake and the matter has not been previously assessed by the ECJ, national courts would be required to ask a preliminary question under Article 267 TFEU. In other words, while judicial assessment of the EU-UK TCA under Article 218(11) TFEU may have been avoided earlier, it might still occur in a different setting that governments cannot control. The most likely national court is probably the *BVerfG* whose threshold for establishing that an EU act, here the EU-only choice, is *ultra vires*, is very high: the breach must be manifest and structurally significant for the division of competences.¹²¹ Yet, it is evident that the EU-UK TCA includes various aspects that it has assessed critically in its earlier case law and thus the outcome is nothing but certain.

CONSEQUENCES OF AN EU-ONLY ADOPTION

Establishing that powers across the wide range of fields dealt with in the EU-UK TCA can be exercised by the EU alone necessarily has implications for the Member States' role in the future. It lies in the very nature of shared competences that their exercise by the EU has effects on the Member States. Some of these implications arise within the particular context of the relationship with the UK. Some go significantly further. Political choices may have legal consequences.

After discussing the question of whether legal clauses can actually contain effects on the power division within the EU, we identify four different types of consequences of the TCA: First, institutional representation by the Union only;

118 Article 5 TCA.

119 The EAW has been considered by national highest courts several times, see for example *BVerfG*, Order of the Second Senate of 18 July 2005, 2 BvR 2236/04, ECLI:DE:BVerfG:2005:rs20050718.2bvr223604 and E. Guild (ed), *Constitutional challenges to the European Arrest Warrant* (Nijmegen: Wolf Legal Publishers, 2006).

120 *Bundesverfassungsgericht* 13 October 2016, 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1482/16, 2 BvR 1823/16, 2 BvE 3/16 ECLI:DE:BVerfG:2016:rs20161013.2bvr136816.

121 *Bunderverfassungsgericht* 6 July 2010, 2 BvR 2661/06 *Honeywell* ECLI:DE:BVerfG:2010:rs20100706.2bvr266106.

second, pre-emptive effects flowing from the EU-UK TCA; and finally, issues of responsibility, conflict and enforcement under the TCA

Containing the integrative effects?

The decision on signing the TCA states that '[t]he exercise of Union competence through the [TCA] shall be without prejudice to the respective competences of the Union and of the Member States in any ongoing or future negotiations ...' It is correct that the conclusion of the TCA does not establish legally relevant precedent. The ECJ holds that the practices of the institutions do not affect what is legal. Yet, this does not make institutional practice irrelevant. Practices create a presumption of legality as long as the Court does not rebut this presumption by finding the institutional practice illegal. One example concerns the provisional application of the agreement.¹²² David McAllister, Chair of the EP Committee on Foreign Affairs, explained how the EP 'made clear that this was a unique exception, and that, under no circumstances could this be a precedent for future trade agreements'.¹²³ However, the EU-UK TCA is the second agreement that is provisionally applied without the consent of the EP, strengthening the understanding (within the EU and outside its borders) that this is indeed possible.¹²⁴

In different and diverse contexts, the EU has tried to cement the dynamic competence division between the EU and its Member States with clauses aiming at containing integrative effects. Yet, such clauses struggle to have tangible impact. They simply cannot contain the effects flowing from international agreements, which create rights of third parties and effects under EU law.

An example is that Protocol 8 on EU accession to the European Convention on Human Rights (ECHR) stipulates that 'nothing [in the accession agreement] affects the situation of Member States in relation to the European Convention'. However, after accession, the ECHR would form part of EU law and the resulting possibility of the ECJ to interpret and enforce the ECHR and the case law of the ECtHR vis-à-vis the Member States¹²⁵ would necessarily change their relation to the Convention. Another example is Article 207(6) TFEU providing that the exercise of the Union's CCP competences shall not affect the delimitation of competences between the Union and the Member States or lead to harmonisation of national legislative or regulatory provisions in so far as the Treaties exclude such harmonisation. Yet, in Opinion 2/15, 'the objective of sustainable development' came to be seen 'as an integral part of the [CCP]', an exclusive competence of the EU to agree common

122 J.P. Cludius, 'Chaos averted or executive overreach?' *Völkerrechtsblog*, 2021 at <https://voelkerrechtsblog.org/chaos-averted-or-executive-overreach/> (last visited 26 May 2021).

123 'Future trade deals won't be negotiated as fast as Brexit, says German MEP' *Euronews*, 2021 at <https://www.euronews.com/2021/01/14/future-trade-deals-won-t-be-negotiated-as-fast-as-brexit-says-german-mep> (last visited 26 May 2021).

124 The first example is the EU-Ukraine AA.

125 C. Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) *MLR* 254.

rules.¹²⁶ Relevant for the EU-UK TCA is the Lisbon Treaty Declaration on Article 218 TFEU concerning international agreements relating to the area of freedom, security and justice. In this Declaration, the Intergovernmental Conference specifically confirms that Member States may negotiate and conclude agreements with third countries or international organisations in these policy areas in so far as such agreements comply with Union law, including its doctrine of pre-emption.¹²⁷ One wonders if the declaration was of relevance when the EU-UK TCA was being negotiated?

We are not convinced that it is possible to hold the EU's dynamic power division by means of such statements. Instead, the statements of the Council and the Commission are primarily intended as political declarations, suggesting that the TCA is not meant to set a precedent, while consequences flowing from for example Article 3(2) TFEU cannot be excluded. We also see them as a political commitment to be lenient towards Member States if they conclude agreements with third countries on issues that the EU-UK TCA covers. However, any such political commitment is not a permanent constitutional commitment. Moreover, even the political effects of these declarations may *prima facie* seem limited. They are given in a particular moment in time by a particular Commission and by the Council meeting in a particular constellation.

In practice, the EU-UK TCA may well come to set a new paradigm for EU-only agreements. On the EU side, the departure of the UK, as a vocal defender of mixity, may make the choice for EU-only politically more likely. The Post-Cotonou agreement could as a matter of fact be the next non-sectorial EU-only agreement based on Article 217 TFEU, also due to increasing time pressure.¹²⁸ If the EU-UK TCA is anything to go by, the claimed 'exceptional' nature of an agreement seems to be a result of the legal and political emergency caused by the expiry of an arrangement, no matter how long this expiry date has been known. The Commission has already proposed EU-only conclusion for the Post-Cotonou agreement.¹²⁹ This cannot be expected to be smooth riding though. For example, in Germany, all political parties in the Bundestag appear to favour a mixed conclusion of the Post-Cotonou agreement.¹³⁰

126 Opinion 2/15 *EU-Singapore FTA* n 46 above at [141] and [147]. Another example is the lack of effect of Protocol 25 in Case C-114/12, *European Commission v Council of the European Union (Broadcasting Rights)* n 86 above.

127 Declaration 36 on Article 218 of the Treaty on the Functioning of the European Union concerning the negotiation and conclusion of international agreements by Member States relating to the area of freedom, security and justice.

128 The Cotonou Agreement was initially due to expire in February 2020. Its provisions have since been extended until 30 November 2021. This is again a deadline against which the 'post-Cotonou' agreement, which was initialised on 15 April 2021, would need to be either provisionally applied or have entered into force. See: European Council, 'Cotonou Agreement' at <https://www.consilium.europa.eu/en/policies/cotonou-agreement/> (last visited 28 May 2021).

129 Proposal for a COUNCIL DECISION on the signing, on behalf of the European Union, and provisional application of the Partnership Agreement between the European Union, of the one part, and the members of the Organisation of African, Caribbean and Pacific (OACPS) States, of the other part, COM/2021/312 final at https://eur-lex.europa.eu/resource.html?uri=cellar:3d5d7b92-ca90-11eb-84ce-01aa75ed71a1.0002.02/DOC_1&format=PDF (last visited 25 June 2021).

130 Deutscher Bundestag, 'Fraktionen kritisieren Post-Cotonou-Abkommen' Presse, 2021 at <https://www.bundestag.de/presse/hib/816974-816974> (last visited 28 May 2021).

Institutional consequences

The EU-UK TCA can be considered a ‘living agreement’.¹³¹ The precise obligations under the agreement are subject to further development in particular in the Partnership Council. The Partnership Council’s mandate allows it to make suggestions on the implementation and even the amendment of the EU-UK TCA and the broadening of its areas of cooperation.¹³² It determines the tasks of the Trade Partnership Committee or Specialised Committees¹³³ that take decisions and make recommendations on the different substantive chapters of the agreement.¹³⁴ It may initiate dispute settlement, impose sanctions and terminate parts or even the whole agreement.

Member States have no direct role in any of these further developments of the cooperation between the EU and the UK and may only nominate national representatives for the Partnership Council as part of the Union delegation.¹³⁵ EU positions are adopted in the Council pursuant to Article 218(9) TFEU, in principle with qualified majority.¹³⁶ The extent to which national parliaments are involved in the preparation of EU positions depends on national constitutional provisions. Representation of the Union is the task of the Commission.¹³⁷

One striking example of the Partnership Council’s powers to develop the law is its ability to establish arrangements on the conditions for the recognition of professional qualifications.¹³⁸ In the context of free movement of persons,¹³⁹ Member States are competent to regulate professional qualifications of third country nationals. It hence concerns a competence that would be considered in the hands of the Member States in a mixed agreement. This is similar for social security coordination (discussed above). Here however, funding from national budgets raises additional problems. If funded from national budgets, it should follow from *Opinion 1/78* that social security coordination cannot be developed in a treaty body where Member States are not represented in their own right.¹⁴⁰ In both cases, the mere right to contribute to the formulation of EU position does not compensate for this right.

A setting similar to the Partnership Council was considered by the *BVerfG* in the context of an application for a preliminary injunction concerning CETA. The *BVerfG* voiced in this context doubts about the democratic legitimacy of the CETA Joint Committee.¹⁴¹ The Court referred in particular to the lack of representation of the Member States and the fact that it remained unclear whether the decisions of the Joint Committee require consent from the

131 Euronews, n 123 above.

132 Article 7 TCA.

133 Article 7(4)(f) TCA.

134 Article 8 TCA.

135 Art 2(1) of Council Decision (EU) 2020/2252.

136 Case C-81/13 *UK/Council* n 109 above at [60].

137 *Opinion 2/15 EU-Singapore FTA* n 46 above at [276].

138 Article 158 TCA.

139 Articles 46, 53(1), 62 TFEU

140 See section above headed ‘Is it beyond any doubt that the EU could conclude the whole agreement on its own?’.

141 Bundesverfassungsgericht 13 October 2016, 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1482/16, 2 BvR 1823/16, 2 BvE 3/16 n 120 above at [64]-[65].

parties to the agreement (in the case of CETA as a mixed agreement, hence also the consent of the Member States).¹⁴² Under CETA, the Commission represents the EU in all CETA specialised committees as long as these committees intervene in matters falling within EU competence. In matters falling within the competences of Member States, the latter have the right to be present and participate in the adoption of decisions.¹⁴³ No such option exists under the EU-UK TCA.

Pre-emptive consequences

Internally, the EU's exercise of shared competences has immediate implications for the ability of the Member State to exercise that competence. In principle, externally a similar logic applies by means of Article 3(2) TFEU. Most of the case law on pre-emption in external relations is about the ability of Member States to conclude international agreements that may or may not interfere with EU law, usually secondary EU law, sometimes the Treaties. The question here is the opposite: how does *the EU-only conclusion of an international agreement* affect the (future) ability of the Member States to conclude international agreements and adopt internal legislation. *What* are Member States precisely pre-empted from doing in relation to the UK and more generally? And, more importantly, how would this pre-emption have been different if the EU-UK TCA had been agreed as a mixed agreement? Finally, from the UK perspective, if it wished to deepen cooperation with just one or selected Member States, under which conditions would this be possible?¹⁴⁴

We are surprised at the certainty of the CLS that the conclusion of the EU-UK TCA will have 'no consequences'. Some earlier legal basis disputes may give a sense of the Court's understanding of the parallel nature of comprehensive explicit Union competences such as Articles 209 TFEU (development co-operation) and 217 TFEU.¹⁴⁵ Generally, pre-emptive effects are interpreted by the Court very widely. In the past, Member States' arguments that their international action could not result in practical difficulties or amounted to minimum harmonisation have been dismissed by the Court.¹⁴⁶ Both the agreement itself and the subsequent decisions adopted by the Partnership Council are legally capable of creating a pre-emptive effect. In other cases, the ERTA-effect would

142 *ibid* at [60]–[65].

143 European Parliament, 'Answer given by Ms Malmström on behalf of the Commission' (P-009059/2016, 2017) at https://www.europarl.europa.eu/doceo/document/P-8-2016-009059-ASW_EN.html (last visited 30 May 2021).

144 We have discussed this in the context of a no-Deal Brexit in P. Leino-Sandberg and L. Leppävirta, 'Does staying together mean playing together? The influence of EU law on co-operation between EU and non-EU States: the Nordic example' (2018) 43 *European Law Review* 295.

145 The ECJ has held that the Union could conclude an agreement based on Article 209 TFEU while using means from specific policy fields, including where the Union had not yet exercised its internal competence in that field. See C-377/12 *Commission v Council* ECLI:EU:C:2014:1903. See also: Eckes, n 41 above, 119.

146 Opinion 1/13 *The Hague Convention* n 89 above (practical difficulties); Case C-114/12 *European Commission v Council of the European Union (Broadcasting Rights)* n 86 above; Opinion 3/15 *Marrakesh Treaty* ECLI:EU:C:2017:114 (minimum harmonisation).

probably only arise once implementation measures have been taken. For this reason, it is also important how the implementation measures are taken and prepared on the EU side.

For this analysis, we make a difference between *rule*, *obstacle* and *field* pre-emption.¹⁴⁷ In the following subsections, we identify a difference in *how far* Member States are pre-empted from taking unilateral action.

Rule Pre-emption and the Member States' Relationship with the UK

For parts of the EU-UK TCA, the Union exercised a shared competence. Rule pre-emption is certain. As a result, Member States are limited in their capacity to make *bilateral arrangements* with the UK in matters governed by the provisions of the TCA. This is also reflected in the CLS's claim that '[t]he external exercise of the above EU competences with regard to a given third country does not prevent Member States from exercising their competence on that same matter vis-à-vis *other third countries*.'¹⁴⁸ They remain 'free to continue concluding international agreements in these areas of shared competence with third countries other than the UK under the same conditions as before the signature of the TCA.'¹⁴⁹ To our knowledge, the Court has never ruled on the consequences of a facultative EU-only conclusion of an agreement also covering implied external ('non-exclusive') competences flowing from internally shared not yet exercised competences. Therefore, the exercise of shared competences under the EU-UK TCA *may* or *may not* have a pre-emptive effect for the conclusion of international agreements of the Member States with third countries.

Both the Council decisions on signature and conclusion set out an internal notification mechanism that requires Member States to inform the Commission of bilateral agreements or arrangements that they intend to conclude with the UK. The Commission then either gives or withholds authorisation. The TCA specifically allows the Member States to enter into bilateral arrangements or agreements with the UK concerning specific matters (air transport, administrative cooperation in the field of customs and VAT and social security). Logically, this seems to imply that bilateral arrangements and agreements are excluded in all other areas, for which such parallel Member State action is not explicitly allowed.¹⁵⁰

Were the EU-UK TCA concluded as a mixed agreement most of the provisions on law enforcement and judicial cooperation in criminal matters and social security coordination would most likely fall largely under national competence. This would offer Member State authorities more space to make the

147 See for this distinction: R. Schütze, 'Supremacy without Pre-emption: The very slowly emergent doctrine of Community pre-emption' (2006) 43 *Common Market Law Review* 1023; Chamon, n 117 above.

148 CLS opinion, n 11 above, para 37 (emphasis added).

149 *ibid*, para 38.

150 This interpretation can be substantiated by reference to Opinion 3/15, where the Court took the fact that the EU left *discretion to the Member States* on a very specific aspect (derogation from copyright rules for the benefit of persons with disabilities) as a reason to argue *for rather than against pre-emption*.

relevant arrangements with UK authorities. Mixed agreements do not, as a matter of principle, stand in the way of Member States exercising competences on aspects of shared competence. Does the argument hold that Member States are free to exercise the same shared competences when adopting internal national rules or concluding international agreements with third countries?

Loyalty and Obstacle Prevention

The EU-UK TCA is binding on the Member States under Article 216(2) TFEU and has, together with the duty of sincere cooperation in Article 4(3) TEU, far reaching restraining effects on the Member States. Obstacle pre-emption flows directly from the duty of loyalty.¹⁵¹ Member States have a duty to refrain from any action which could jeopardise the attainment of the EU objectives and to exercise their powers, including in areas of reserved national competences. They cannot take any action that would jeopardise the functioning or the realisation of the TCA's objectives. In this context, it is not necessary to link the different parts of the EU-UK TCA to internal legal competences of the Union.¹⁵² What matters instead are the *objectives* of the secondary EU law, which determine whether Member State action is prohibited by obstacle pre-emption. It is further sufficient that such interference appears likely (in the future) on the basis of the currently available information.

These pre-emptive consequences are in principle the same for Member States, irrespective of whether an agreement is concluded as a mixed or EU-only agreement. Mixed agreements equally hinder Member States from engaging in action that could potentially jeopardise the attainment of the objectives that the Union pursues with the conclusion of the agreement.¹⁵³

No Automatic Field Pre-emption but Determination in Favour of Union Competence

As an EU-only agreement, the EU-UK TCA assumes that all areas of the agreement fall either under exclusive competences or shared competences that are now exercised by the Union. Mixity would have, as matter of principle, and with the exception of exclusive EU competences, allowed for each and every specific aspect of the EU-UK TCA an argument that the Union did not exercise that power but that it fell under the competences of the Member States. EU-only conclusion excludes this argument.

However, an association agreement does not result in field pre-emption per se. It is not a policy field. Whether or not the Union has occupied the field depends on the nature and scope of the specific commitments. The conclusion as an EU-only agreement in the concrete case of the TCA affects the possibilities of Member State to *adopt national legislation and conclude international agreements*

151 C. Eckes, 'Disciplining Member States: EU Loyalty in External Relations' (2020) 22 *Cambridge Yearbook of European Legal Studies* 85.

152 See Opinion 1/03 *Lugano Convention* ECLI:EU:C:2006:81 at [131].

153 Case C-246/07 *Commission v Sweden (PFOS)* ECLI:EU:C:2010:203.

with third countries in matters covered by the TCA. We would like to draw attention to two areas in particular.

First, part three on law enforcement and judicial cooperation in criminal matters raises particular questions in this regard, since they concern cooperation of national law enforcement authorities with the authorities of a third state with or without explicit relevance of EU law. At the same time, EU law in this area relies heavily on mutual recognition and the ECJ has identified mutual recognition as a lever to finding that an international agreement of the Member States affects common internal EU rules.¹⁵⁴ Where EU law instruments exist that rely on mutual recognition, Member States could not have agreed bilateral agreements with third countries even before the EU-UK TCA. This makes the identification of the precise areas and aspects governed by EU law even more important.

By blurring all law enforcement and judicial cooperation together and treating international legal instruments (Council of Europe Conventions) and EU law identically, the EU-UK TCA draws areas that are not governed by EU law relying on mutual recognition into the realm where Member States should no longer adopt internal legislation or agree bilateral rules with third countries. In April 2021, the Finnish Government proposed a new bill aiming at complementing the TCA provisions on surrender and exchange of criminal records.¹⁵⁵ There seems to be no particular mandate for national legislation in the TCA, and as noted above, these provisions may have direct effect. However, the Government argued that the TCA provisions in this area cannot actually be applied without national supplementing legislation since they are not detailed enough and require specification. The legislative model proposed was a national act specifying the TCA, but which would also include references to the act implementing the EAW, which would continue to be applied in parallel with the TCA. These provisions build substantively on the EAW and relevant ECJ jurisprudence.¹⁵⁶ In handling the proposal, the Legal Affairs Committee of the Finnish parliament observed that the question of national competence was somewhat unclear, and that the resulting legal framework was particularly complex, which might risk legal certainty.¹⁵⁷ Yet, it agreed that even without an explicit mandate it had no option but to approve the act in order to make the TCA operable in these contexts.

Second, mutual recognition of professional qualifications and labour protection is now a Union competence, at least with regard to the UK and the specific commitments taken in the TCA and subsequent implementation decisions. This area in particular calls for trouble with national highest courts. In an application for a preliminary injunction concerning the provisional application of CETA, the *BVerfG* specifically accepted that the Union *may lack the competence* to conclude international agreements concerning amongst other things *the mutual recognition of professional qualifications and labour protection* and accepted

154 Case C-66/13 *Green Network* n 90 above at [46]–[48].

155 See Government proposal (HE) 58/2021 vp.

156 See for example Case C-388/08 PPU *Leymann ja Pustovarov* ECLI:EU:C:2008:669; Case C-237/15 PPU *Lanigan* ECLI:EU:C:2015:474.

157 Statement of the Legal Affairs Committee, LaVM 6/2021 vp.

giving a decision in the main proceedings.¹⁵⁸ In fact, it explicated that it assumed that the CETA provisions on the mutual recognition of professional qualifications¹⁵⁹ and labour protection¹⁶⁰ were not covered by provisional application because they fell within national competences.¹⁶¹ What would the *BVerfG* say if it has the opportunity to address the competence division in the context of the TCA?

Responsibility, Conflict and Enforcement

The relationship between exercising shared powers and bearing the *responsibility for the agreed international obligations* was addressed by the Court in Opinion 2/00. The Court confirmed that ‘it goes without saying that the extent of the respective powers of the Community and the Member States with regard to the matters governed by the Protocol determines the extent of their respective responsibilities in relation to performance of the obligations under the Protocol.’¹⁶²

Would this not have been an equally valid concern for various provision in the TCA? Again, we would like to draw attention to the part concerning law enforcement, in which references are systematically made to the ‘competent authority of the requested State’.¹⁶³

Furthermore, the EU-UK TCA also directly affects national social security systems and allows the EU to represent the Member States, including on matters that are squarely governed by national legislation. The TCA provisions and the protocol on social security cannot be applied without subsequent national legislation, which Member States’ legislatures are in the process of adopting and regulates the future coordination of social security in the areas of pension, accident, health and unemployment insurance.¹⁶⁴ Member States were bound by a tight timeframe to notify the Commission whether they wish to maintain the existing social security posting regulations in relation to the UK.¹⁶⁵ The EU then notified the UK of their choices.

Both areas raise the issue of implementation and responsibility. Even if the Member States are bound under EU law to perform the obligations under the TCA, is the Union able to take on responsibility for their performance? The obvious assumption is that if a Member State failed to deliver on the commitments, or failed to amend its national legislation to reflect the agreement, the Commission would treat this as a breach of EU membership obligations and

158 Bundesverfassungsgericht 13 October 2016, 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1482/16, 2 BvR 1823/16, 2 BvE 3/16 n 120 above at [52].

159 Chapter 11 CETA-E.

160 Chapter 23 CETA-E.

161 BVerfGE 143, 65 – CETA at [56], [70].

162 Opinion 2/00 n 46 above at [15]–[16].

163 Article 637 TCA.

164 In fact, on 24 March 2021, the German Bundestag held the first reading on the proposed national law on the posting of workers to the UK.

165 Article SSC.11(2) TCA of the protocol on social security. The continuous application of the posting regulations beyond 31 January 2021 is only possible for Member States that notified the Commission by 15 January 2021. 2021. A later notification is not permitted.

launch an infringement action. But the justification of such an action is weaker when the matter falls under the competence of national parliaments who were pushed to approve it based only on a cursory look.

Moreover, conclusion as an EU-only agreement has consequences for the Member States' position in situations of *conflict*, which can be expected because of the open-textured formulations and the lack of stringent control mechanisms. If problems emerge with the UK authorities, individual states cannot react to these problems because they are not parties and not represented in the agreement bodies.¹⁶⁶ Instead, they need to alert the Commission to the issue, and rely on the Council to form a position on actions that involve the application of their own national legislation. Furthermore, the possibilities to renounce part of the agreement can only be taken up the EU. As discussed above, this kind of setting is something that the *BVerfG* criticised in the context of CETA, where Germany *could* unilaterally terminate its provisional application.¹⁶⁷ The same problems of enforcement also apply to the UK, if it wished to enforce TCA obligations against a specific Member State: it cannot do so, but needs to involve the Commission in the process.

The TCA part on law enforcement is particularly significant because it concerns constitutional issues, such as surrendering people, the (automated) transfer of certain data related to law enforcement (DNA profiles, vehicle registrations), and the use of operative powers by authorities of a third state (the UK), which is no longer bound by the relevant EU legal acts or the Charter of Fundamental Rights (CFR). After the expiry of the transition period, the UK is treated as a third country.¹⁶⁸ This means that the Commission adopts an adequacy decision with the ECJ's case law as guidance.¹⁶⁹ However, the exchange of data, for example access to EU data banks, goes further than cooperation with other third states. The Union agreed under the TCA to share the data of EU citizens/EU Member States with the UK, which can now share that data with third countries, 'subject to conditions and safeguards appropriate to the transfer ensuring that the level of protection is not undermined'.¹⁷⁰

What happens if a Member State has data protection or other fundamental rights concerns? In case guarantees under the CFR, as interpreted by the ECJ, are violated, national authorities would be able to give priority to EU primary law and refuse to cooperate under the TCA. However, Member States are under an EU-only agreement not able to refuse cooperation for breaches of national constitutional guarantees. They cannot refer the matter to the Partnership Council, either. Enforcement against the UK is in the hands of the EU institutions and enforcement under the TCA is weak. The EU could impose tariffs and quotas, which may prove more immediate and effective than the TCA's infringement procedures that do not have the bite of strong legal

166 Article 7(3) TCA.

167 Bundesverfassungsgericht 13 October 2016, 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1482/16, 2 BvR 1823/16, 2 BvE 3/16 n 120 above. It equally held that a Council decision could only trigger provisional application of the parts of the agreement that fall under Union competences (paras 67–70).

168 Article 782 TCA.

169 Directive (EU) 2016/680 and Article 45(3) of Regulation (EU) 2016/679, Art 36(3).

170 Article 525(2)(f) TCA.

enforcement. From the UK perspective, enforcement against Member States is equally in the hands of the EU institutions and subject to their discretion.

CONCLUSIONS

The EU-UK TCA has the ambition to continue comprehensive and deep cooperation between the parties. It is exceptional in terms of its context, and unique in terms of its substance. However, it has a vast range of effects on the Member States' ability to exercise powers that have so far been considered national powers. This includes policy areas such as social security, law enforcement and recognition of professional qualifications.

Even if the EU-only conclusion may not constitute a *legal* precedent, it constitutes a *political* precedent by confirming two things: First, it is a lesson in how political will finds a way, irrespective of a large body of legal practice to the contrary. The EU-UK TCA is an example of how national executives and EU institutions have marginalised national parliaments in a rushed procedure and with a range of consequences for the position of Member States internationally, as well as the position of national parliaments when adopting legislation in certain areas. While we agree on the perils of a No-Deal Brexit, we believe that there would have been space for a more democratic, transparent and dignified conclusion of the agreement. As a Member State, the UK actively contributed to these aims. Now its positioning added to the difficulties of the EU institutions in guaranteeing democratic scrutiny at national level and legal scrutiny in the ECJ.

We believe that both EU-only conclusion and the need for a mixed agreement are legally possible to argue. However, the argumentation supporting EU-only conclusion is new and untested in the Court which adds uncertainty. The EU-only conclusion of the TCA suggests that holistic international representation by the EU is possible, including in matters for which the EU does not have (internal) competence to regulate exhaustively. Two striking examples are cooperation of law enforcement authorities and extension of social security benefits to third country nationals. The TCA may be regarded as a *de facto* acceptance of the Union's ability to externally represent all jurisdictions on its territory, including national ones. After all, it implies that the Union is in a position to bind national authorities to certain rules and a certain conduct on matters that are governed by national law only, have so far been considered national competences, and are expressly considered to continue to fall under national competence. The solution also suggests that a foundational agreement can be written around the reserved competences of the Member States; policy areas falling under such reserved competences are then dealt with in follow-up agreements.

Following from this, the TCA confirms that in institutional thinking, EU-only conclusion is a political decision only, including for shared competences that the EU has never exercised. In an EU with ever more heterogeneous national interests and conflicts, many Member States, and certainly national executives, may actually see it as in their own interest not to have to wait for the last ratification for an agreement to enter into force. For us, this thinking is a source

of serious concern. Strong reasons reaching beyond a superficial competence analysis speak in favour of a procedure and outcome that are far more respectful of the position and importance of national parliaments in EU decision-making. We strongly criticise the procedural legitimacy of the adoption of the EU-UK TCA, because of the lack of a public analysis of the competence division and of the consequences of an EU-only conclusion. Additionally, however, we criticise the substantive legitimacy of the EU-only conclusion. The TCA reaches, already at its conclusion, into the legislative prerogatives of national parliaments and national budgets. It also bears, as a result of the powers of its governance structure, the potential of further interference with national prerogatives. Eliminating national channels of legitimacy is short sighted for such a comprehensive non-sectorial agreement, even if it may be legally defensible. It will also create additional hurdles for the implementation of the agreement.

The urgency with which the TCA was concluded as an EU-only agreement may *prima facie* seem to exclude alternative scenarios that involved national parliaments in a more meaningful fashion. The EU could have signed the TCA as a mixed agreement and insisted more on provisional application. The point is that the institutions involved, especially the Commission – which really wishes to get rid of mixed agreements – did not want to, and saw the urgency in this case as a way of introducing a new paradigm – first as exceptional but potentially very soon as the standard procedure. This is in line with Agamben's theory of necessity justifying a gradually permanent 'State of Exception'. First, necessity justifies the release of a particular case from the obligation to observe the law and ordinary procedural guarantees while later the exception becomes the 'new normal'.¹⁷¹

For the EU, the EU-UK TCA is a step in the direction of less law or, if you like, being less governed by the rule of law. Conflicts are dealt with by the governance structure within the agreement, likely to end up in endless loops of political negotiation in which law plays simply less of a role. The agreement was not examined by the Court before it entered into force, nor were parliaments given a thorough legal analysis to consider before considering the agreement. This is one of our most fundamental problems with the arrangement. It is obvious that the EU-UK TCA has broader consequences – it might even become the new paradigm of EU external relations as the Cotonou example already suggests. Legal exercise of power has an influence on the interpretation of the law and legal practices established up to that point and a new practice unavoidably affects interpretation in the future.

Over the years, many arguments for Brexit have been raised. Most of them we do not associate ourselves with. However, one of them has been the difficulty of holding supranational institutions to account, which has persisted as one of the EU's most foundational problems. As formulated by Prime Minister May, 'Britain is not the only member state where there is a strong attachment to accountable and democratic government, such a strong internationalist mindset, or a belief that diversity within Europe should be celebrated. And so I believe

171 G. Agamben, *State of Exception* (Chicago, IL: University of Chicago Press, 2005).

there is a lesson in Brexit not just for Britain but, if it wants to succeed, for the EU itself.¹⁷²

It is sad that the EU institutions seem so reluctant to learn from this experience. When major shifts are made, questions of competence and their implications should be brought to public debate, explaining the alternatives, risks and consequences. Irrespective of how the narrative is framed by the EU institutions, the EU-UK TCA marks a major shift in EU external relations. This shift should not be a turn for EU policies where democratic institutions and the law become an irritant instead of a foundation for sustainable policy making.

172 UK Government, 'The United Kingdom's exit from, and new partnership with, the European Union' Policy Paper, 15 May 2017 at <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-2> (last visited 25 June 2021). See also M. Wind, 'Brexit and Euroskepticism. Will Leaving Europe be Emulated Elsewhere?' in Fabbrini (ed), n 6 above, 231.