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# The UK-EU Trade Deal: Five Important Implications for the UK Parliament

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ABSTRACT – L'Autore, poco dopo la conclusione del *Trade and Commerce Agreement* (TCA) stipulato fra Unione Europea e Regno Unito il 24 dicembre 2020, che disciplina i rapporti commerciali post-*Brexit*, ne analizza talune rilevanti implicazioni sul ruolo del Parlamento di Westminster. In particolare, viene sottolineato il rischio della marginalizzazione del legislativo britannico, sia nella gestione delle relazioni mercatali fra Regno ed Unione, per via della ritrazione del diritto europeo che assegna ai parlamenti degli Stati Membri rilevanti poteri di scrutinio, sia in quelle con Paesi terzi, per via della mole di accordi commerciali negoziati negli ultimi tempi dal governo di Londra. L'Autore, dunque, individua nelle implicazioni di *Brexit* l'occasione per tornare ad interrogarsi sul ruolo complessivo del Parlamento britannico, in uno scenario in cui il principio di *sovereignty* parlamentare è chiamato a fare i conti, sul versante esterno, con le logiche di cooperazione internazionale e l'assetto globalizzato dei mercati e, su quello interno, con la fitta trama di rapporti inter-parlamentari con i legislativi delle aree devolute.

## The UK-EU Trade Deal: Five Important Implications for the UK Parliament\*

di *Davor Jancic*\*\*

The announcement of the UK-EU Trade and Cooperation Agreement (TCA)<sup>1</sup> on Christmas Eve 2020 may have come as a surprise given endless media reports about the negotiators' intransigence and the imminent threat of a cliff edge. Add to this the Covid-19 pandemic and some ten months and just nine formal rounds of negotiations make it remarkable that any deal has been reached, let alone one that spans 1246 pages. To put this in context, only a fortnight before the deal was reached, Australia concluded its own 9th formal round of negotiations with the EU; however, this was after over two and half years of negotiations, which will continue for the foreseeable future. And while the resounding parliamentary vote in favour<sup>2</sup> of implementing the TCA (521 votes in favour and 73 against) is good for the political legitimacy of the deal, the swiftness of the vote<sup>3</sup> is less good in terms of democratic process and participation. But the speed and comprehensiveness of the UK-EU trade deal is by no means accidental: it is a consequence of two highly interconnected facts. One is the 47 years of correspondence between UK and EU law in many, albeit not all, areas of life; and the other is economic interdependence regardless of the extent to which UK and EU law converge. Not only are the two economies highly connected, at the point of exit they are also substantively the same, if not identical, in numerous areas ranging from market regulation to level playing field legislation, to data protection. This is not only a matter of fact but also one of UK law. The European Union (Withdrawal) Act 2018<sup>4</sup> ensures this by mandating the wide-ranging

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<sup>1</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2531?fbclid=IwAR2X-2QXsF5145U9i8pUG8m9Jw0iMGQjHM-xKHkIKNMBoXwAdUJZCNI9HBw](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2531?fbclid=IwAR2X-2QXsF5145U9i8pUG8m9Jw0iMGQjHM-xKHkIKNMBoXwAdUJZCNI9HBw)

<sup>2</sup> <https://www.legislation.gov.uk/ukpga/2020/29/contents>

<sup>3</sup> <https://www.hansardsociety.org.uk/blog/parliaments-role-in-scrutinising-the-uk-eu-trade-and-cooperation-agreement>

<sup>4</sup> <https://www.legislation.gov.uk/ukpga/2018/16/crossheading/retention-of-existing-eu-law/enacted>

retention of EU law. This entrenches EU law in the UK until Parliament acts to change it. This is where the deal's five important implications for Westminster begin.

First, while the deal guarantees Britain's right to regulate, the exercise of that right hinges on how the EU will view future changes in UK law and regulation. This is because the TCA entitles a party to this agreement to adopt unilateral rebalancing measures<sup>5</sup> – which may take the form of tariff duties – if the competitiveness of their economic actors is adversely affected by the other party. To trigger such measures, one party would have to do two things: (a) significantly diverge from the agreed baseline thresholds in the areas of labour, social, environmental and climate standards and subsidy control; and (b) by doing so cause material impact on trade and investment. The imposition of these measures should be based on reliable evidence. While it is unclear how the notions of significance, materiality and reliability will be interpreted and whether the EU will frequently resort to this mechanism, it is clear that Parliament's freedom to act will be tangibly influenced by the economic considerations that link the UK to the EU. This is why the next implication matters.

Second, it is critical for Parliament to decide how to approach its post-Brexit scrutiny of EU affairs. While a member, the UK Parliament had a Treaty right of direct access to information on EU legislative drafts. It also had a well-functioning system for assessing subsidiarity compliance<sup>6</sup>, which enabled parliamentarians to object to proposed EU legislation where they thought that domestic action was sufficient and EU action did not add value. With the removal of these rights, it is vital for Parliament to revise its scrutiny procedures and adapt them to the new legal regime that underpins UK-EU relations.

Looking internally, any such revisions should ensure the continued upstream access to EU information and the establishment or adjustment of mechanisms to monitor the impact of UK law on the EU and the impact of EU law on the UK. In parallel, it is crucial to create parliamentary structures and instruments to oversee the institutional framework governing bilateral trade. The TCA establishes an intricate system of institutionalised bodies with the Partnership Council at the apex and 19 sector-specific specialised committees and four working groups under its aegis. By way of comparison, the EU-Canada Comprehensive Economic and Trade Agreement – CETA<sup>7</sup> – establishes only nine specialised committees in addition to the overarching Joint Committee. When one adds the Withdrawal Agreement Joint Committee and the six accompanying specialised committees, it becomes evident that swathes of important political dialogue have moved to the transnational level rather than back to London. The problems of opaqueness and secrecy have a demonstrably negative impact on democratic oversight and this is exemplified by scrutiny outcomes in both Houses of Parliament.

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<sup>5</sup> <https://ukandeu.ac.uk/british-sovereignty-run-by-europe/>

<sup>6</sup> [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2649339](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2649339)

<sup>7</sup> <https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>

The House of Commons' criticism of the Government's behaviour regarding several Withdrawal Agreement amendments discussed within the Joint Committee in June 2020 is telling. On that occasion, the European Scrutiny Committee<sup>8</sup> concluded that 'the Government has not lived up to its commitments with respect to transparency of, and accountability for, its actions in the Joint Committee', having failed to provide information and disclose its intentions.

The House of Lords' careful analysis of the infamous Internal Market Bill<sup>9</sup> (Part 5, Sections 40-45 thereof) illustrates these problems further. When the UK Government proposed to enable ministers to disapply parts of the Withdrawal Agreement, the House of Lords<sup>10</sup> EU Select Committee 'repeatedly called for greater transparency' of Joint Committee meetings, but this was 'to little avail'. Although the controversial provisions were subsequently removed from the resulting United Kingdom Internal Market Act 2020<sup>11</sup>, it is clear that the Westminster Parliament needs to devise mechanisms not only to access information exchanged across the new UK-EU decision-making forums, but also to make its views known in advance of action being taken within them. Despite the repatriation of powers from Brussels, close parliamentary involvement in transnational UK-EU decisions is therefore required in order to enable meaningful debate and scrutiny of contentious political issues and potential disputes.

Looking externally, the post-Brexit revision of Parliament's EU-related activities should ensure some form of direct link with EU institutions. In this respect, it is welcome that, against Boris Johnson's wishes<sup>12</sup>, the TCA enables the establishment of a formal Parliamentary Partnership Assembly. This forum would facilitate the exchange of views on the implementation of the deal and enable members to receive information from, and provide recommendations to, the Partnership Council. This could alleviate, although not fully address, the information asymmetry between the Government and Parliament. The Government's explanatory memoranda on EU affairs will in any event remain essential to guide the work of both Houses of Parliament.

Third, to ensure a smooth transition to autonomous trade policy making, the UK embarked on an intensive programme of rolling over EU trade agreements. These continuity agreements<sup>13</sup> are a very positive development and a sign of Britain's post-Brexit dynamism. As of 1 January 2021, a number of important trade agreements began fully or provisionally applying, including those with Japan, Norway, Singapore, South Korea, South Africa, Turkey and Ukraine. Preferential tariff rates also already apply with Canada and Mexico. Mutual

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<sup>8</sup> <https://committees.parliament.uk/publications/1590/documents/15119/default/>

<sup>9</sup> <https://publications.parliament.uk/pa/bills/cbill/58-01/0177/20177.pdf>

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[https://publications.parliament.uk/pa/ld5801/ldselect/ldeucom/147/14705.htm#\\_idTextAnchor016](https://publications.parliament.uk/pa/ld5801/ldselect/ldeucom/147/14705.htm#_idTextAnchor016)

<sup>11</sup> <https://www.legislation.gov.uk/ukpga/2020/27/contents/enacted>

<sup>12</sup> <https://blogs.lse.ac.uk/brexit/2020/05/20/why-britain-should-allow-the-uk-and-eu-parliaments-to-talk-after-brexit/>

<sup>13</sup> <https://www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries>

recognition agreements are in place with the United States, Australia and New Zealand. Further agreements<sup>14</sup> with the EU might also be up for negotiation in the near future, such as on defence and security or deeper trade liberalisation and cooperation.

But the increased conclusion of international agreements raises the question of Parliament's involvement in their ratification. The current treaty-laying system, created by Section 20 of the Constitutional Reform and Governance Act 2010 (CRAGA), seems unsatisfactory to Parliament. So much so that a dedicated House of Commons debate in November 2020 had Emily Thornberry<sup>15</sup>, Shadow Secretary of State for Foreign and Commonwealth Affairs, call the operation of this system a 'sorry mess', an 'absolute mockery', and the result of 'sheer bumbling incompetence'. In less impassioned words, the sentiments of inadequacy<sup>16</sup> are confirmed by the reports of various parliamentary committees.

Ironically, one of the most salient instances that demonstrates the deficiencies of the UK treaty-making system was the treatment of the TCA itself. To wit, Section 36 of the European Union (Future Relationship) Act 2020<sup>17</sup> explicitly set aside the CRAGA process, allowing parliamentarians only the period between the publication of the deal on 26 December 2020 and the vote on 30 December 2020 to read it and consider its many implications. Unsurprisingly, in its 13-page report on the TCA, the House of Commons Committee on the Future Relationship with the European Union (née Exiting the European Union Committee) found this to be 'a matter of deep concern'<sup>18</sup>. However, positive steps can and are being made to address the changing circumstances in which Parliament engages in UK international relations. In the House of Commons, the winding up of the said Future Relationship Committee, which took place on 16 January 2021, represents a chance for reform. Drawing on the practices operating during the transition period pursuant to Section 29 of the European Union (Withdrawal Agreement) Act 2020<sup>19</sup>, the Government should undertake to debate a motion not only when EU legislation raises a matter of vital national interest, but also when a treaty does.

For its part, in April 2019 the House of Lords Constitution Committee published a report on the parliamentary scrutiny of treaties, finding the CRAGA process 'limited and flawed'<sup>20</sup>. Their lordships recommended the setting up of a committee specifically focusing on treaty scrutiny, but advised against giving Parliament the right to approve the Government's mandate before negotiations begin. Less than a year on, in March 2020, the House of Lords established an International Agreements Sub-Committee<sup>21</sup> within the EU Select Committee. The

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<sup>14</sup> <https://www.theguardian.com/commentisfree/2020/dec/30/brexit-far-from-done>

<sup>15</sup> <https://hansard.parliament.uk/commons/2020-11-17/debates/E487C967-E237-4C25-B348-4DDC74C3CE8E/ContinuityTradeAgreementsParliamentaryScrutiny>

<sup>16</sup> <https://researchbriefings.files.parliament.uk/documents/CBP-8509/CBP-8509.pdf>

<sup>17</sup> <https://www.legislation.gov.uk/ukpga/2020/29/section/36/enacted>

<sup>18</sup> <https://committees.parliament.uk/publications/4146/documents/40944/default/>

<sup>19</sup> <https://www.legislation.gov.uk/ukpga/2020/1/section/29/enacted>

<sup>20</sup> <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/345/345.pdf>

<sup>21</sup> <https://ukconstitutionallaw.org/2020/03/18/treaty-scrutiny-a-brave-new-frontier-for-parliament/>

new sub-committee has since not only scrutinised numerous UK international agreements, it has at the same time worked with the Government on refining treaty scrutiny procedures within the confines of the existing legislation. The Chairman of this sub-committee, Lord Goldsmith<sup>22</sup>, correctly observed three days before the TCA was reached, that new UK international agreements ‘can be just as crucial as the laws we make in Parliament’.

Early access to the negotiating objectives and impact assessments is all the more important in case of roll-over agreements that exceed or amend the commitments undertaken in the EU’s agreements as well as in the case of entirely new agreements which the EU does not have. The question is therefore not solely whether Parliament should be given the right à la Section 13 of the European Union (Withdrawal) Act 2018<sup>23</sup>, empowering it to approve ratification once a deal has already been struck; it is in fact invaluable in terms of democracy and public participation to strengthen parliamentary involvement before and during international negotiations.

Fourth, an important dimension in revising Parliament’s international role post-Brexit is to ensure adequate cooperation and involvement of the devolved legislatures: the Scottish Parliament, the Welsh Parliament and the Northern Ireland Assembly.

At the level of the UK, an adapted version of the Interparliamentary Forum on Brexit<sup>24</sup>, which was devoted to scrutinising the Brexit process from October 2017 to September 2019, could be a platform on which such intra-UK quadrilateral legislative cooperation could be built.

At the devolved levels, the legislatures’ institutional capacities and scrutiny arrangements should be reviewed to assess their suitability for analysing the policy impacts of EU and international matters. However, while the work of the Scottish Parliament’s Culture, Tourism, Europe and External Affairs Committee and the Welsh Parliament’s External Affairs and Additional Legislation Committee could be adapted, no committee is dedicated to EU and international matters in the Northern Ireland Assembly. Yet the latter’s tighter involvement is particularly relevant after Brexit. This is because the Withdrawal Agreement’s Northern Ireland Protocol<sup>25</sup> entitles this assembly to terminate the regulatory alignment obligations which keep Northern Ireland within the EU’s customs union and large segments of its internal market. A greater engagement of the Northern Ireland Assembly members in Westminster’s EU and international affairs would be beneficial in informing the assembly’s exercise of this important ‘democratic consent’ right. If Brexit divided the UK, it would help to reunite it if the devolved legislatures were better incorporated in Westminster’s global politics.

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<sup>22</sup> <https://committees.parliament.uk/publications/4135/documents/40830/default/>

<sup>23</sup> <https://www.legislation.gov.uk/ukpga/2018/16/section/13/enacted>

<sup>24</sup> <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/106398.aspx>

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/840230/Revised\\_Protocol\\_to\\_the\\_Withdrawal\\_Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf)

Fifth, and finally, what Brexit shows is that sovereignty does not operate in a vacuum but is exercised in the context of strong worldwide economic and socio-political interconnectedness. Any legally unlimited exercise of legislative power is factually limited by the need for international cooperation on virtually everything we do in our daily lives. Brexit represents an exceptional opportunity to rethink and review Parliament's global outreach. This includes stronger commitments to timely scrutiny and debate, increasing the transparency of international negotiations, enhancing the involvement of devolved legislatures in UK international relations, and ensuring the Government is held to account for the outcomes achieved. Parliament should make the most of this opportunity.