OFFICIAL REPORT
AITHISG OIFIGEIL

Constitution, Europe, External Affairs and Culture Committee

Thursday 26 May 2022

Session 6

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CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE

14th Meeting 2022, Session 6

CONVENER

*Clare Adamson (Motherwell and Wishaw) (SNP)

DEPUTY CONVENER

*Donald Cameron (Highlands and Islands) (Con)

COMMITTEE MEMBERS

*Alasdair Allan (Na h-Eileanan an Iar) (SNP)
*Sarah Boyack (Lothian) (Lab)
*Maurice Golden (North East Scotland) (Con)
*Jenni Minto (Argyll and Bute) (SNP)
*Mark Ruskell (Mid Scotland and Fife) (Green)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Catherine Barnard (UK in a Changing Europe)
Professor Christina Eckes (University of Amsterdam)
Professor Ian Forrester (University of Glasgow)
Dr Fabian Zuleeg (European Policy Centre)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Constitution, Europe, External Affairs and Culture Committee

Thursday 26 May 2022

[The Convener opened the meeting at 09:34]

Decision on Taking Business in Private

The Convener (Clare Adamson): Welcome to the 14th meeting in 2022 of the Constitution, Europe, External Affairs and Culture Committee. Under agenda item 1, does the committee agree to take item 4 in private?

Members *indicated agreement.*

Trade and Co-operation Agreement

09:35

The Convener: Item 2 is an evidence session on implementation of the United Kingdom and European Union trade and co-operation agreement. It is the second in a series of sessions that will focus on post-EU constitutional issues.

We are joined in the room by Professor Ian Forrester, whom I warmly welcome. Joining us online are Professor Catherine Barnard, deputy director at UK in a Changing Europe and professor of European and employment law at the University of Cambridge; Dr Fabian Zuleeg, chief executive and chief economist at the European Policy Centre; and Professor Christina Eckes, professor of European law at the University of Amsterdam and director at the Amsterdam Centre for European Law and Governance. Professor Forrester is an honorary professor of European law at the University of Glasgow and a former judge of the General Court of the European Union. I welcome you all to the meeting. We have apologies from Professor Elaine Fahey, who is Jean Monnet chair in law and transatlantic relations at the City law school.

We will spend time on four main topics, and I hope that we will keep strictly to those subject areas. Our first theme is the policy content and operation of the TCA, which includes commitments in a number of devolved policy areas and commitments to non-regression. I invite Mr Cameron to open the questions.

Donald Cameron (Highlands and Islands) (Con): I will ask about the policy content and operation of the TCA—particularly when it touches on devolved policy areas. Can each witness think of examples of where the TCA might have a practical impact on devolved policy areas? Do they foresee flashpoints in those areas? I will start with Fabian Zuleeg.

Dr Fabian Zuleeg (European Policy Centre): Thank you for inviting me to give evidence. The TCA is a wide-ranging agreement that covers trade in many areas. It has a general impact on how the economy functions in exchange with the European Union.

As has been referred to, there are areas to consider relating to the level playing field conditions. I highlight the implications of the non-regression provisions for the environment and climate change action. That is not the only area to be affected, but I highlight it as a starting point.

Professor Catherine Barnard (UK in a Changing Europe): I broadly agree. The TCA is

very thin—not in numeric terms, as it runs to well over 2,000 pages, but in content. The TCA moves us quite a long way from even the position of Norway or Turkey; it is very much a mid-Atlantic agreement that has rather limited expectations and ambitions.

The committee has a list that highlights the areas that are most likely to impact on devolved matters. I flag up that fisheries had the potential to be a flashpoint last year—the gunboats were sent to the waters around Jersey and Guernsey—but it looks as if careful technocratic work has resolved some of the issues.

Of course, the issue of fisheries comes up again for review in 2026, and it is tied up with the energy policy provisions. However, at the moment, the boot is somewhat on the other foot in respect of energy because, at the moment, the UK is providing a lot of the offshore liquefied petroleum gas and green energy for the EU, because of the energy provision issues in relation to the war in Ukraine. Therefore, the energy policy provisions will not work quite in the way that we expected beforehand.

Professor Christina Eckes (University of Amsterdam): In addition, I will flag the issue of social security, for which we equally have the agreement of non-regression—hence, we cannot lower the standards for social and labour rights. In fact, many of those rights depend very much on national legislation. Therefore, although the TCA is very thin, we require regulation at the national level and here. It must be implemented in a way that meets the requirements of the TCA and is nonetheless determined by the provisions of the TCA. Therefore, a specific Scottish regulation on that could be an issue if there is divergence.

Donald Cameron: Thank you. Finally, I put the same question goes to our witness in the room, Ian Forrester QC.

Professor Ian Forrester (University of Glasgow): I agree with everything that has been said, but I will add two things.

I was a judge for five years, but I was a practising lawyer in Brussels for 40 years, doing technical regulatory work on issues such as competition in a whole slew of industries.

As Catherine Barnard said, the TCA is kind of thin. How are decisions taken today in Brussels and in other specialised agencies? One example is animal feed. It is easy to say that people can give only healthy feed to their animals, but it is very difficult and must necessarily be very prescriptive to agree on which chemical is or is not appropriate for which animal and at which stage in its life.

The process of discussing whether virginiamycin is good for turkeys involves expert committees, such as the Scientific Committee for Animal Nutrition. Those committees are the forum for hashing out technical disagreements. The TCA does not prescribe how technical disagreements will be addressed, and I can see literally hundreds of areas where there will be potential conflicts about matters that seem obscure but which are driven by experts and, ultimately, touch the environment, animal welfare and many other topics.

That example is by way of introduction. How decisions are made is to be contrasted with the general thin provisions of the TCA. One additional element where there might be trouble, and where there should be controversy, is to do with people like me: citizens who live in a country other than that of their birth. Until the referendum and the actual occurrence of Brexit, those people believed that they were European Union citizens and had rights in that respect. There are millions of such people and, thus far, their interests have not adequately been considered by the UK side.

That is not an adequate answer to your question, but it is an answer.

Donald Cameron: It is a very helpful answer, because the point that you made at the start about how decisions are made and where there is disagreement leads me to my second question.

How do you see divergence between the UK and the EU, if it happens, being managed under the TCA or any other arrangement? At UK level, could such divergence ultimately have an impact on devolved competences?

09:45

Professor Forrester: First of all, I will make a frankly political point, which will not astonish you: divergence should not be regarded as a badge of sovereignty or freedom. As I am sure that you will know, every country in the world that is sovereign enters into contractual relations with other member states, and it is false to suggest that sovereignty takes us anywhere in the analysis of these problems. That is the obvious point of departure.

Divergence, especially in medical, social, food-related and many other technical areas, is certainly liable to lead to controversy, which is likely to affect the pockets of, say, the farmer who uses an unapproved additive or pesticide, the manufacturer of that pesticide or, indeed, the opponent of that pesticide. How will those things be managed? They should be managed by intelligent discussion and pursuit of the notion of prosperity, stability and continuity, not by the interests of a particular political party or faction in UK public life.

The notion that it is a proof or badge of independence to have a different rule from the European rule, the development of which the UK has contributed to heavily and remarkably well over the past 40 years, is a political problem. My experience of trade disputes in Brussels is that, frequently, technical issues are easily, if painfully—though not with great difficulty—resolved through discussion between technical experts and then ministers. If a British minister were to decide after all that a pesticide was good when Brussels had decided that it was bad, because of recent information, I can see why that minister might be tempted to make a decision for the entire United Kingdom—and I can readily see that what the minister would wish would be different from what the Scottish Government would regard as being within its competence.

Donald Cameron: Perhaps I can bring in the other witnesses. Professor Eckes, do you have a view on how divergence can be managed between the EU and the UK?

Professor Eckes: Divergences—or what might be called disputes or controversies—would go first to consultation, and the Partnership Council would have a core role in that respect. One must realise that the TCA is an actual fact and that it is all about the externalisation—or, if you like, internationalisation—of political life. As a result, many of the decisions take place outside of the ordinary political structures. A core question that one must ask, therefore, is: what is the representative structure in the Partnership Council? What is its influence or level of information ex ante—that is, before decisions are taken? In my view, the Partnership Council is key to resolving such issues and the first port of call for operative decisions and consultations.

The key thing is that the Parliament at all levels is informed beforehand of the disputes that are coming up, that it can give input and that there is representation in the Partnership Council on what is ultimately, under the TCA, a decision that is internal to the UK. This is all about the access that you have, whether you have timely access to information and the input that you can give.

There are, of course, all the specialised committees in the Partnership Council to consider, too. I agree that technical issues can be resolved at a technical level, but we should not underestimate the fact that technical decisions often have a political dimension and background. Although this should probably not be held up as an issue of sovereignty, there could be differences in interest that trickle down into the specialised committees.

Of course, that is where the problem lies. Scotland, Wales and Northern Ireland were represented at the first meeting of the Partnership Council, which I suppose is a practice that will continue, but what happens if we have to move to arbitration? If the process of consultation is unsuccessful, and if the divergence issue then has to go before an expert panel of three people for consideration, what representation and access to information will be available? I think that that issue deserves attention.

Donald Cameron: Do you have any observations, Dr Zuleeg?

Dr Zuleeg: I will make three general points and then go into a bit more detail on the types of divergence.

First, managing a relationship as complex as the TCA in a way that makes it work most effectively requires trust. Trust is needed for conversations on technical issues and for resolving certain smaller matters. If a big political process is required to deal with any areas of divergence, things will become unmanageable.

My second point—which I will put aside, as I think we will come back to it later—is about the specific impact of divergence on Northern Ireland. That is a separate issue that needs to be looked at in more detail, because it raises the question of the checks that are necessary between Northern Ireland and the rest of the UK.

Thirdly, one thing that has not been discussed very much is the question of EU divergence. Generally, we talk about UK divergence, but the fact is that many things are happening in the EU, too; it is changing very rapidly, and some of those changes are affecting certain areas that are relevant to the TCA.

As for the various types of divergence, it is important to note that, first of all, there is inherent divergence. The moment that this agreement was put in place, the UK and EU markets separated, and divergence in that respect implies the sort of friction that we have already seen at the borders.

I should also point out that divergence does not disregard existing provisions, which means that the current threat not to apply certain parts of the agreements between the EU and UK is not divergence. Instead, it is simply a matter of breaking the agreements.

As for divergences that are covered in the TCA, the agreement contains a mechanism for dealing with them. However, the process can be very lengthy and cumbersome.

Lastly, on divergences that fall outside the scope of the TCA, there are many areas that it does not cover where we have very thin agreements. If such areas are economically relevant, divergence simply leads to non-access to EU markets. If there is significant divergence in areas such as data protection, for example, or in

the way that certain things are applied at UK level that makes them no longer compatible with EU provisions, access to the EU market will simply stop.

Donald Cameron: Thank you for highlighting the possibility of EU divergence. You are right to say that we think primarily of UK divergence, and I found that observation helpful.

Do you have any views on this issue, Professor Barnard?

Professor Barnard: First, divergence is allowed, as is clearly stated in the TCA. Of course, the caveat is that it engages the level playing field provisions in the areas that are covered and, as Fabian Zuleeg has said, it might have the effect of stopping our goods and services getting on to the EU market.

Secondly, it is really difficult to track down exactly what is happening at EU and UK levels. One thing that has been lost in the post-Brexit world is the careful scrutiny of what is going on at EU level to see where divergence is occurring. Are we properly checking the hundreds of statutory instruments that come from the Government? What is the mechanism for checking whether there is divergence? That is a particular issue, because if there is a lack of awareness that a particular regulation may trigger the level playing field mechanism, we might accidentally trigger the mechanism.

To build on what Fabian Zuleeg said, we should remember, when thinking about divergence, that there are active and passive divergences. Active divergence is when the UK, for example, deliberately decides to do something that is different from EU policy choices—gene editing is a good example of that. However, there is also an on-going process of passive divergence, which is when the UK does not keep up with EU rules, because, of course, we are no longer obliged to do so in the UK as a whole—I know that it is different in Scotland in some areas—in the post-Brexit period.

That brings me to my next point, which is about what the institutional mechanisms are for mapping that divergence, at UK level and devolved level, and for ensuring that Scotland has some sort of say on the areas where the UK makes a conscious choice to diverge. I know about the various interparliamentary committees that are being set up, but are they really enough to do the close work that is involved in working out what divergence actually means?

My final point relates to the United Kingdom Internal Market Act 2020. Although we are looking at a complex multidimensional UK-EU jigsaw, if Scotland wants to diverge as well, how does that sit with the act and the common framework provisions?

Donald Cameron: Thank you for those illuminating answers.

Mark Ruskell (Mid Scotland and Fife) (Green): I was just reflecting on the point that Ian Forrester made about the European Union's approach to developing policy, which involves in-depth working with scientific advisers, industry bodies, environmental non-governmental organisations and other stakeholders. Do you and the other witnesses see a mismatch or growing divergence between that well-established EU approach, which the UK was very much part of over many years, and the way in which policy is now being developed in the UK? Professor Barnard's example of gene editing might be an interesting one to use to reflect on the robustness of the conversation that might be happening in the EU compared with what is being proposed here. Another example might relate to fisheries.

Professor Forrester: My first point is that there is, in public discourse at the moment, a disparaging of retained EU law. People think that retained EU law is medieval and like the Magna Carta, and they want to escape from it. That is a dangerous point of departure. It is seductive, because we have left the European Union, which some might say is wonderful. There is a disparaging of the highly technical rules that the UK helped to draft over the past 40 years. UK officials were exceptionally successful in that drafting; the UK and France were the two countries that had the most success in tweaking a text so that it was favourable or friendly to their particular national interests. The first thing to say is that there is nothing wrong with retained EU law—except, apparently, the title.

My next observation is a constitutional one. The way in which texts are drafted in Brussels involves a great deal of consultation with technical committees, national experts and national policy makers. For example, the Portuguese and the Swedes might have different views about animal welfare; that does not make either of them wrong, but their views might be different. The hammering out of a compromise on such questions takes months—maybe years—but, when the process is finished, the compromise is pretty good. If we discard those texts lightly, that might cause technical problems for UK interests.

10:00

Moreover, there is a constitutional problem. If a text that has been drafted carefully and exhaustively, following a lot of expert input, is simply to be discarded by a minister, I worry about whether the supervision of that choice will be

constitutionally adequate. According to the BBC, something like 80,000 or 90,000 texts constituted the corpus of European Union law. How those texts are adapted into UK law and Scots law is, constitutionally, very important, and I do not think that that is being done satisfactorily at the moment.

Catherine Barnard likes to remind us that the last time that a statutory instrument was blocked in the UK Parliament was 30 years ago. There should be careful consideration before a minister decides that a figure will be 3.2 per cent, not 4.1 per cent, for example; it should not be done lightly through a statutory instrument.

Mark Ruskell: We perhaps underestimate how much work goes into hammering out agreements across the EU. There are lessons there for us across the UK.

Professor Barnard: With regard to the institutional mechanisms and how much engagement there is between the UK and the EU on those matters, I am afraid that, actually, there is rather little. There is the institutional structure of the Partnership Council and, more importantly, there are the specialist technical committees that sit underneath. I understand that every committee met once in the course of 2021, but the fact that they met only once suggests that there is not very intense engagement.

There might be more informal engagement, and the UK mission to the European Union in Brussels certainly has an important role in that regard. I note that UKMis is four times the size of the equivalent offices elsewhere, and it is clearly doing important work. However, on the question about engagement in the real detail, the answer is no—from the UK Government’s point of view, it is free to do what it likes and does not need to co-operate with the EU. That is where the tension arises. It arises in particular in the field of goods, because our supply chains are still closely interconnected with those of the EU. Our manufacturers have to comply with provisions of EU law on, for example, the making of widgets for car headlights, because, if they did not, they would not be able to sell car headlights through a supply chain into the EU. Therefore, there is a tension between what UK manufacturers want and what the UK Government actually wants to do.

Mark Ruskell: Would Fabian Zuleeg like to come in?

Dr Zuleeg: I do not want to make a point about internal UK systems, because that is not my area, but I will make two more general points.

First, as long as there is an economic relationship, what is decided in Brussels matters hugely to the UK economy and UK businesses. However, the UK’s ability to influence those decisions has been vastly reduced by Brexit. It is now a question of having a much more informal way of influencing decisions, which means that you have to invest far more, because you are no longer automatically included in the decision-making bodies. In my view, that also applies to Scotland if it wants to have an influence on some of the legislation that comes out of Brussels, which, in many areas, will have to be adopted by the UK. The UK is now a rule taker in many areas, unless it chooses to diverge, which has consequences for market access and integration.

Secondly, there is a major difficulty in translating some of the decisions that are taken at the European level to the UK, at whatever level, because a lot of interpretation is needed. In many areas of EU law, there are directives—they set a general goal, but how they are implemented is down to the member state. The question is how you interpret the legislation and ensure that your interpretation is consistent with the overall laws. Within the European Union, that is checked by the European Court of Justice, but there is no such equivalent for the UK.

Mark Ruskell: Does Christina Eckes wish to come in?

Professor Eckes: I will make a brief point. I see the tensions that arise in all this. There are tensions relating to the intention to maintain EU standards in Scotland, the United Kingdom Internal Market Act 2020 and how such issues are resolved. Personally, I do not see the tensions that might arise going up to the TCA level, but, if they do, that might have repercussions—there might be the intention to diverge from the EU standard, but that might not actually be the case in devolved policies.

Alasdair Allan (Na h-Eileanan an Iar) (SNP): Professor Forrester, could you elaborate on a couple of interesting points that you made? First, you talked about the thinness of the TCA. Can you say a bit more about why you feel that it is so “thin” and what that means?

Professor Forrester: I have been a practitioner for a long time, and I was, for a shorter time, a judge. The European institutions work on the basis of consensus. It is highly political. The court is quite rarely involved in the settling of major controversies, although that is a very big statement, and there are lots of exceptions.

The TCA includes a nice framework for consultation between the two sides—the one and the 27. There is nothing wrong with that, but much depends on the political will of the United Kingdom Government and not very much depends on the political preferences of the devolved Administrations. When I say that the TCA is “thin”, I mean that it is aspirational. It offers a framework

for consultation, but that consultation needs to be effective and on-going.

The standard for animal welfare or for headlights might be the subject of discussion, discussion and more discussion among the 27, and the outcome might be a proposal. The Italian side might then say, “No, that doesn’t work”, and the German side might say, “Okay, how about this?” The Commission might then come in with a compromise. That on-going discussion, which precedes the final stamping of the text, takes months or years and involves a lot of people talking to each other frankly. The TCA is hampered by the absence of that daily communing back and forth. It could be the vehicle for that, but, as we heard from Catherine Barnard, the committees that have been set up do not meet.

Alasdair Allan: I will turn away from the relationship between the UK and the EU and towards how that fits into, if it does at all, relations between the UK and Scottish Governments. Can you offer any observations on that, particularly now that we might be entering a period in which there might be not only policy disagreements between the two Governments but different understandings of what is or should be devolved?

Professor Forrester: Yes. The bad news is that it is the UK that will be defending the compliance of the UK—including Scotland—with the TCA’s provisions or other legal instruments. The devolved Administrations are at a disadvantage because they are devolved Administrations—they are not member states and are not the United Kingdom. As the committee well knows, the European Union has a tradition of dealing very cautiously with devolved Administrations.

On the one hand, Scotland has an exceptionally high level of recognition in Brussels, Strasbourg and Luxembourg. If you say, “Je viens d’Écosse”, people say, “Oh! Hm!”—it is instantly recognisable. The statue that sits in my court is on loan from the National Galleries of Scotland, and the First Minister has said that she wants it to stay there. Scotland has a very high level of political recognition. However, on the other hand, institutionally and constitutionally, the Scottish Government is a devolved Administration; it is not the Government of the United Kingdom. I very cautiously and respectfully hope that Scottish officials and ministers continue to be visible, audible, intelligible, moderate and clear in Brussels, Strasbourg and Luxembourg.

The Convener: We move to our second theme, which is on—[*Interruption*.].

Oh, Professor Barnard wants to come in.

Professor Barnard: Thank you. I thought that it might be helpful to supplement Professor Forrester’s helpful answer on why the TCA is thin. I will give a couple of examples to explain why it is described as thin.

There is no general rule on free movement of goods. The rules are just applied in gaps, but with zero tariffs. However, zero tariffs require rules of origin. There is also very little—almost nothing—in the treaty on trade facilitation, and it would have been very positive if there had been more on that.

The TCA is also very thin on services—even Lord Frost admitted just how thin it is—which means that the mobility of people provisions are very difficult to use. We know that, as we have heard a lot about orchestras and musicians, for example.

There is no mutual recognition agreement, even in relation to testing, so everything must be retested before it can be sold in the EU. There is also no substantive provision on mutual recognition of professional qualifications, so everything has to be renegotiated on a profession-by-profession basis.

That gives a flavour of why the agreement is described as very thin. In places, it is thinner than the EU’s agreement with Canada, albeit that it goes further in relation to law enforcement and co-operation.

Professor Forrester: Permit me to add, with a certain degree of passion, that the gaps in the institutional provisions were identified, predicted, defined and spoken about by a bunch of people, including European judges. We are where we are not because someone must have been surprised.

The Convener: Thank you, Professor Forrester. I should say that if our online witnesses can indicate in the chat that they want to come in, the clerks will pass the information on to me. I often miss it if somebody has their hand up at a particular time.

Our next theme is the accretion of executive powers resulting from the TCA.

10:15

Sarah Boyack (Lothian) (Lab): I want to ask about accountability at the parliamentary level with regard to the UK Parliament and the devolved Parliaments across the UK.

Paul Craig’s paper for the *European Law Review* is strong on the discretionary nature of the Partnership Council, and it also makes the point that it was a very last-minute agreement. Witnesses have been talking about how long the agreement is, but the fact is that it was not effectively scrutinised by UK parliamentarians or legal scrutineers. That is a real issue.

Witnesses have also highlighted the agreement’s thinness. How do we begin to retrofit

accountability and parliamentary scrutiny into the processes so that not only we but our stakeholders can find out what is happening? There is also the question of how the treaty links into the issue of where goods are made, which witnesses have also talked about.

Those are just a couple of questions for our witnesses. I invite Professor Christina Eckes to kick off, given that she talked about how the urgency of agreeing the TCA excluded any alternative scenario with regard to how national Parliaments might be involved in and reported to as part of the process, and the lack of transparency in that regard.

Professor Eckes: The adoption of the TCA was of course so ad hoc that there was no actual scrutiny in most Parliaments. We dived into what happened in the Finnish, Dutch and German Parliaments and found that only the Dutch Parliament discussed the matter, coming to the conclusion that there were no alternatives and that, therefore, they had to move forward. Many provisions were not scrutinised in the traditional way. As it was conducted as an EU-only agreement, national Parliaments were of course not involved in ratification anyway.

The question is: what can we do now under the current system? Here, the core issue is timely access to information. Let us not forget that decisions taken at Partnership Council or TCA level are, in principle, binding on the parties to the agreement—that is, the UK and the EU. They need to be influenced beforehand and are very difficult to change. If Parliaments cannot influence beforehand what is then discussed at the ministerial level and by supporting experts, they can act only after the fact. In that case, even if there is disagreement, there is no way of having a constructive influence. One can then only challenge things afterwards, which is of course much more difficult.

In my view, one must distinguish between active and passive information flows. As many people have emphasised, we get quite some information from the Commission on what is discussed in the Partnership Council and the specialised committees. Of course, that is all about information being passively put up on websites.

It should be the case that positions on specific issues are taken and agreed with parliamentary scrutiny beforehand. That is core to maintaining some accountability in the institutional structure, despite the fact that I fully agree with Catherine Barnard that there is a question around how much will be decided in those committees. Nonetheless, one should not understate the point that it is through that process that one has accountability at TCA level. What is not decided there—in other words, what is decided at the level of the parties to the TCA—is an internal question. In relation to that, I can voice a view only on the representation of EU member states and not so much on that of devolved Administrations.

Sarah Boyack: Catherine Barnard has pointed out the challenge of scrutinising hundreds of pieces of legislation. In our report on the UK internal market, we highlighted the need for more scrutiny of legislation by the Scottish Parliament and the other devolved Parliaments, and the time issue is also critical. How would you suggest we retrofit the system to include parliamentary accountability and transparency in the processes that come through the TCA?

Professor Barnard: Your points are extremely well made. Let me break down the levels of engagement, starting at the top with the Partnership Council. It has met only once, in June 2021, and, as far as I am aware, no date has been set for another meeting. The striking thing about the Partnership Council is that any decision taken by it, or by the joint committee under the withdrawal agreement, does not have to be approved by Parliament. There has been no attempt at scrutiny by Westminster, let alone any talk about how the devolveds might be involved in any decision taken by the Partnership Council.

The next level down is the specialised committees. I think that the devolveds should be making quite a lot of noise about having sight of the agenda for those meetings well in advance and needing to have sight of the minutes, too. Ideally, you need representation on those committees, particularly those likely to touch on your areas of devolved competence such as sanitary and phytosanitary measures and fisheries.

The Parliamentary Partnership Assembly met for the first time recently. Because it involves Westminster and the EU, there is no formal role for the devolveds—although you have been given observer status, albeit at the last minute. A very good piece by Brigid Fowler went up on the UK in a Changing Europe website this morning; I will send you the link to that, so that you can see her informed comments on how the PPA worked. It was the first meeting, and people had to do a lot of getting to know each other, but there seems to be a sense that both sides want it to be a useful forum.

You used the excellent term “retrofit”. The question is how you in the devolveds can have some input into what is discussed by the assembly, even though you are not formally present and have only observer status.

Sarah Boyack: That is very helpful. Do any other witnesses want to come in on the issues of accountability and transparency?

Dr Zuleeg: It is important to recognise that this is a trade deal. From an EU perspective, such deals are generally implemented by the Commission, with the third country. That is the level of interaction. There are many other connections between them, but the heart of the relationship is at that level.

In recent years, there has been a long discussion in the EU about the appropriate input to and scrutiny of such trade deals. That is why we have had a debate about whether the TCA is an EU-only deal or whether it touches on the competencies of member states. The European Parliament has been very vocal and involved in scrutiny, particularly of the TCA, and the Commission has moved towards being much more transparent and open in the negotiation and implementation of those deals. There has been a lot of development on the EU side.

In principle, it is now up to the UK to decide what happens on the UK side. Some new mechanisms, such as the Parliamentary Partnership Assembly, have been put in place, but whether the assembly has any real impact will depend on how seriously the UK Government takes it and whether it is integrated by the UK Government into processes or whether it meets only as a talking shop without much impact.

My other point is that scrutiny of EU legislation is horrendously difficult, even within the European Union, and there has been a long discussion about whether Parliaments within the European Union are playing their full role in that respect. Only some Parliaments have a structured process for such scrutiny, and that has an impact on the decisions made by Governments in negotiations. One of the reasons for that situation is that scrutiny is an enormous task. There is a lot that comes out of the European Union, including a lot of technical detail, that it is very difficult for any Parliament to scrutinise.

Sarah Boyack: That is helpful, but I would point out that in our "UK Internal Market Inquiry" report, we came to the conclusion that, although such scrutiny is difficult, it is actually very important. As a couple of you have illustrated today with regard to business and trade, goods might well start off in one country but the process is completed in another country, and we need clear technical arrangements so that businesses and environmental non-governmental organisations can lobby us as parliamentarians and we can raise issues in which our constituents are interested.

Again, that answer was very useful. Do any of the other witnesses want to comment on the importance of parliamentary scrutiny and how we might deliver the transparency that we need in implementing the TCA?

The Convener: I am not seeing any indications from the witnesses.

Sarah Boyack: I take it, then, that there is agreement that this is really important. The challenge is how we deliver it in practice.

It is interesting for us in Scotland to note Dr Zuleeg's comments about a parallel discussion happening in the EU with the involvement of the European Parliament. That is something for us to take away in respect of our relations with European parliamentarians, devolved Parliaments across the UK and the UK Parliament. The point, perhaps, is: if you do not ask, you do not get.

The Convener: I have a supplementary for Professor Christina Eckes. I am sorry if I have not pronounced your name properly—perhaps you could tell us how to.

From your comments on the Partnership Council in relation to the first theme that we discussed, I got the impression that you felt that Scotland and the other devolved nations were part of that process and involved in the council. I think that the PPA would be the body expected to scrutinise that work, yet the devolved nations have only observer status; for instance, we would not have access to breaking papers from the UK delegation. Is there a mismatch between the operation of the Partnership Council at Government level and the opportunity for the devolved nations to contribute to the PPA?

Professor Eckes: Yes, you could say that. We are talking about access to information and transparency, so it is important to note that the PPA's powers are limited to implementation and recommendation. We must acknowledge as a starting point that the scrutiny that you have mentioned is already limited, but I agree that you could say that there might be a mismatch in executive representation. That is, of course, a matter for internal UK decisions on who is sent to the Partnership Council—the TCA itself does not ensure representation. No devolved Administration is there in its own right; instead, the devolved Administrations are there to represent the UK as a partner to the TCA.

To be honest, I do not know to what extent we can say that the practice of sending governmental representation to the Partnership Council—as happened at the first meeting in June 2021—will continue in the same form, and to what extent that is right for the UK. I cannot speak to that, but you could say—and I would agree—that there is a mismatch between the executive representation and parliamentary representation. The question is to what extent that could be rectified and parliamentarians could stand as part of the PPA.

Professor Forrester: Maybe I could offer a summary. All these discussions require, but

currently appear not to include, a wish on the part of the Westminster Government to pursue consensus, and an attribution by the Westminster Government of importance to the matter.

At present, the fact that headlights and, indeed, the other 35,000 components of a car come from all over the world to be fitted together—which is why we have rules of origin—does not seem to be regarded as very important. However, it should be recognised as important with regard to prosperity, and consensus should be pursued on that—although that is dull and unexciting and possibly involves too much communing with the Europeans, who are nasty to us. It would be appropriate to start by attributing importance to reaching technical consensus on technical matters, which are not sexy but which are important for ordinary people and ordinary businesses.

10:30

The Convener: Thank you. Our next theme is the areas of disagreement between the UK and the EU with regard to the operation of the TCA. Perhaps we can also talk a bit more about the Parliamentary Partnership Assembly. Mr Golden is next.

Maurice Golden (North East Scotland) (Con): I will start with a question for Professor Barnard. We have touched on lots of elements of areas of disagreement between the EU and the UK and how they might be resolved. However, I am keen to hear any further thoughts on that as well as thoughts about the operation of the TCA, what the gaps are and how the operation could be strengthened. I am keen to close off those aspects as well as to hear witnesses' thoughts about how dynamic they envisage that the future governance of the TCA will be.

Professor Barnard: Thank you for that helpful question. I summarise the areas of disagreement as: customs facilitation, which is very thin; fish, which is better than it was; and mobility, where there are still real problems. The other issue is programmes, particularly horizon, and the disagreement about whether the UK can have associate membership. That is now connected to the EU's response to the UK Government's attitude to the Northern Ireland protocol. I hear that it is now increasingly unlikely that the UK will sign up to horizon. From the Treasury's point of view, it is increasingly looking as though the £17 billion that it would cost us could be better spent on setting up our own scheme. Therefore, access to programmes is a real problem. I should say that, of all those specialised committees, the one that nearly did not meet was the committee on programmes. Therefore, the UK Government is saying that the EU is not fully complying with its obligations under the TCA.

The other issue, which is quite striking and which we will see played out quite a lot over the next two or three weeks, is the interconnection between the TCA and the withdrawal agreement. The treaty does recognise that, in respect of remedies—dispute resolution—there is a link between the two treaties. However, the UK Government takes the view that non-co-operation over, for example, horizon is not a legitimate way of using powers under the TCA to extend to issues that arise under the withdrawal agreement.

I would like to put down a marker about the future because we must remember that the TCA is subject to review after five years. Therefore, the planning for that should happen in 2024. Again, the Scottish Parliament might like to have some say in that. Likewise, it might wish to have a say in the review of the fisheries arrangements in 2026, as they interconnect with the energy arrangements.

Professor Eckes: I will throw in an area where conflicts have not yet arisen but where I see potential future conflicts, namely the provisions on surrender and exchange of criminal records. Those cannot be put into practice without national legislation. National legislation is being adopted in different member states, and there is some confusion about references to the TCA and references to EU law in national legislation. That area is highly rights sensitive and differences in protection might arise. I see a lot of potential for individual level conflicts in a non-trade area that, nonetheless, are very rights sensitive.

Dr Zuleeg: First, it is important to highlight that, from an EU perspective, the TCA is not completely separate from the withdrawal agreement. They are connected and there was always a perception—in fact it was a political agreement on the EU side—that the withdrawal agreement was a necessary condition of the trading relationship that is embodied in the TCA. Questioning the withdrawal agreement and the Northern Ireland protocol questions the whole relationship.

That highlights the fact that the TCA is not only thin but is very precarious. There are many areas in which co-operation can break down and there are many review points at which we might see big changes. More generally, international agreements are complex and lengthy, but they cannot specify everything. Getting agreements to work well requires a lot of trust, good faith, on-going co-operation and the will to make them work. There is a real question on the EU side about whether there is a will on the UK side to make the TCA work in the way that was intended, for example by implementing some of the checks that are still not happening on the UK side.

That also plays into the political realities in which such an agreement exists. If there is no agreement to move forward constructively, things can become very difficult in a number of areas. Some of the conversations about technical standards that would otherwise be had are not had. Work is not done quickly to make things move smoothly at the borders. Political discussions about how to find a way forward out of the difficulties that always arise in any agreement of that nature do not happen.

We must see this in the overall context of political reality, and things are very difficult at the moment.

Maurice Golden: Professor Forrester, do you have any thoughts?

Professor Forrester: I have two points.

One programme that should attrister—render sad—members is Erasmus. That was an absolutely excellent programme. Scotland benefited from the arrival of students and Scottish students had the opportunity to study abroad. It was the basis of tremendous good, but it has gone, or UK and Scottish participation has gone, which is a pity.

Secondly, I will add to what has been said about co-operation on crime. Lord Advocate Wolffe spoke repeatedly—I helped to organise one or two of those meetings—about the necessity of establishing adequate and effective measures to ensure cross-frontier co-operation in a world in which cross-frontier crime is routine. He spoke movingly about a case in which, thanks to the European arrest warrant and co-operation between police forces, someone was brought back to this country to stand trial for murder.

Those are really important things that ought to have been properly addressed. They were not.

Maurice Golden: What would be the consequences if the TCA was not in place?

Professor Forrester: The TCA is not required to achieve effective co-operation between police forces or between judicial authorities. An agreement between countries is required and that must be written down, because you cannot do extradition on the basis of something written on the back of an envelope. There has to be an international agreement.

The UK was very cautious 35 years ago but it was gradually convinced and it participated with others in building up the network of co-operation between police and judicial authorities that existed until February two years ago. If people choose to use it, the TCA is a framework on which to build the kind of relationship that used to be there.

Maurice Golden: Do I have time for a final question?

The Convener: Dr Zuleeg wants to come in on that point before we move on.

Dr Zuleeg: Although I fully agree with what has just been said, it is important to note that, if the TCA were to break down, and with all the implications that that would have for the withdrawal agreement and the Northern Ireland protocol, very little co-operation could happen between the European Union and the UK. That would affect all areas of co-operation and would make the relationship impossible to manage.

Maurice Golden: Thank you, Dr Zuleeg. I will stick with you for the final question. How much activity do you envisage happening between the Partnership Council and committees of the devolved legislatures?

Dr Zuleeg: That goes back to my earlier point about who decides what the processes look like. From the EU perspective, it is entirely up to the UK Government to decide how to implement consultation and exchange with the devolved Administrations. The EU would not have any kind of view on or input into that. The Partnership Council is between the UK Government and the Commission: that is the level at which that is dealt with. The way in which input into the Partnership Council is driven from the UK side is entirely up to the UK.

Maurice Golden: Thank you Dr Zuleeg. I am happy to open up either of the last two questions, about the consequences of the TCA breaking down and about how the Partnership Council might operate, to the other witnesses. Do panel members have any thoughts?

I will go to Professor Eckes and then Professor Barnard.

Professor Eckes: I fully second that. The consequences would be dire and far-reaching. I refer to what I said earlier about the consequences that that would have in the Dutch Parliament for areas such as fisheries—in fact for all areas. The TCA gives a framework, albeit a thin one, for co-operation and for further development, specification and exchange.

I agree that there could be exchange of criminal records and that a process for the surrender of evidence could be set up by a separate agreement, but I believe that the damage to the relationship would be so deep as to be difficult to envisage.

On your second point, I have absolutely no doubt about the high regard that Strasbourg and Brussels have for Scotland. However, the TCA is an international and intergovernmental agreement between the UK and the EU and any EU partner

would be very careful about mingling in the internal situation of the other side. One should not forget that. Only the UK and the EU are represented in their own right under the agreement. That is a problem for the member states and for the devolved Administrations. One should not underestimate the formality of the framework in which one co-operates and what that means for how co-operation takes place.

Professor Barnard: The TCA envisaged further co-operation between the UK and the EU. It makes repeated reference to supplementary agreements. At the moment, all of that is for the birds. We could well imagine supplementary agreements on matters such as professional qualifications and mutual recognition agreements, but there is no hint of that at the moment, because of the tension.

10:45

The question then is why might the TCA break down? I do not know if you are going to go on to ask about the Northern Ireland protocol, but I can talk you through the reasons why the protocol might lead to a breakdown under the TCA. There are various reasons why the TCA is described as precarious, to use Dr Zuleeg's word. It is precarious not least because the review that is coming up on 2025-26 could form the basis for the Conservative Party saying in its manifesto that we should leave the TCA, which we could do by giving one year's notice, and the review might point in that direction.

Maurice Golden: Professor Forrester, would you like to comment on that?

Professor Forrester: I cannot add anything to what has just been said, except to confirm that what I said earlier when you asked about criminal co-operation is right; a country can readily enter into a deal on criminal co-operation, but others absolutely correctly said that if the TCA were not there or had broken down, such co-operation would be extremely difficult.

The Convener: I am afraid that we are running up against our time limit. Before we move to our final area, I bring in Ms Boyack for what she assures me is a small supplementary question.

Sarah Boyack: I appreciate that, convener; thank you. I have a quick supplementary question for Dr Zuleeg. You talked about the issue of the PPA and how it actually works. This is clearly about the UK and the EU, but what is the diplomacy for other European countries such as Spain and Germany, which have very strong federal systems? How do they ensure that their Governments and federal systems, which have decisions taken at sub-national level, are properly represented in the PPA, so that there is consistency and transparency of the type that we are looking for?

Dr Zuleeg: The key thing from an EU perspective is that that has to be decided within the individual member state. A federal state has different ways of applying those kinds of provisions and different ways of interacting with the EU level. We have wide-ranging involvement with some federal entities in relation to European decision making—for example, in Belgium, the constituent entities have a big role in a lot of those decisions up to the point where a federal state could veto an international trade treaty.

In other countries, it is arranged differently, because in the end the rule at the European level is essentially that you do not get involved in the internal constitutional issues of the member state—the member state decides—and at the EU level, it acts as the member state.

Jenni Minto (Argyll and Bute) (SNP): I was going to ask about information flow, but you have already talked about accountability, transparency and scrutiny in quite a bit of detail, especially in response to my colleague Sarah Boyack's question about retrofitting.

What have we learned about the TCA? Will its governance structures be considered in other agreements, such as trade agreements? How can the Scottish Parliament get involved? What can we learn from our experience of the TCA? What could be improved on?

Dr Zuleeg: I cannot really comment on what the UK might take forward from that. From an EU perspective, the situation is slightly contradictory. On the one hand, the TCA and all the associated arrangements, including the withdrawal agreement and the Northern Ireland protocol, are very unique. It is a different way of arranging a relationship with a third country, given the history, the size of the UK and the pre-existing integration between the economies. It has been designed in a bespoke way for that particular situation.

However, there are elements on which there has been a much broader debate, as I have mentioned. When it comes to questions of how to implement broader objectives, for example on environmental or labour standards, the TCA, in a way, is pioneering new ways of doing that. When it comes to questions such as how the EU negotiates international trade deals, how it scrutinises them, what the decision-making process is and how there is transparency around that, again, the TCA has been a bit of a pioneer. The fact that it is a unique relationship is reflected in the arrangements, but some elements have much wider implications, which we will find in the future trade agreements of the EU.

Professor Barnard: The starting point is to remember that the TCA is a trade agreement, so it looks rather like the agreement that the EU has with Canada—which is, of course, what the UK Government wanted. The trouble is that Canada did not start from being very close to the EU and moving out; it started from being very far out and moving a bit closer.

Between the withdrawal agreement and the TCA, you can see the schizophrenia that Fabian Zuleeg has just talked about. Essentially, the withdrawal agreement is—to put it bluntly—EU law light, whereas the TCA is, essentially, World Trade Organization heavy. It has very little to do with the EU, yet we look at everything through the prism of EU membership and what we had less than two years ago.

There are two things that the committee might want to consider. First, Switzerland is also having some difficult relationships with the EU at the moment, because of its refusal to approve the institutional arrangements that had been negotiated, so there is some commonality between the EU's approach to Switzerland and its approach to the UK. That brings the UK and Switzerland closer together and may lead to their having a closer and deeper relationship. Given Scotland's interest in financial services, the committee might want to take an interest in that.

Secondly—this is very much for the longer term—you will recall President Macron's speech about how to manage relations with the EU's neighbours. Ukraine is the country that is principally in its sights, but he also alluded to the UK. One of the things that Scotland might think about—indeed, you did some interesting work on this in the immediate post-Brexit period—is what a Europe of concentric circles looks like to an important but recalcitrant neighbour of the EU.

Jenni Minto: That ties in with Dr Zuleeg's comment about the soft power in the relationships that we can continue. Professor Eckes, do you have anything to add?

Professor Eckes: I will add the general point that the TCA is an example of the deep and living trade agreements that are concluded nowadays. If we acknowledge that fully in its extent, there is good reason to say that we need a comparable level of accountability, transparency and access by Parliaments as there is for legislation, because, despite the fact that the institutional structures might not be as proactive as one might have feared when the TCA was concluded—we have spoken about how seldom the committees have met and how little negotiation has happened—they create the potential. There is a framework of an external executive governance structure, which must be taken seriously.

My main advice is to embrace the fact that these are the new generation of trade agreements. They externalise decision making and governance to an executive level that needs to be scrutinised in a timely way and in formalised agreements of access to information. The argument behind that is simply that they have at least the potential to be quasi-legislative in their impact on national law, in all areas on which they touch.

Jenni Minto: Perhaps that ties in with the need for better co-ordination between the committees and Parliaments across the UK, and the committee's meeting our equivalents in Northern Ireland and Wales. Earlier this week, some of us met Westminster's Public Administration and Constitutional Affairs Committee.

Professor Forrester: I do not have much to add, except to suggest that the elephant in the room is the issue of approach—that is, the political difficulty of making a choice between the supposedly irreconcilable policies of sovereignty and prosperity. In other words, a difficulty that we have is that the UK Government's approach to relationships with other countries, as exemplified by the TCA, hinders the resolution of the daily problems that neighbours have to confront, and that is a great pity.

Jenni Minto: Thank you.

The Convener: I thank our witnesses for their evidence, which has been extremely helpful to our deliberations. I suspend the meeting briefly before we move on to the next item.

10:56

Meeting suspended.

11:00

On resuming—

UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021

The Convener: Item 3 is to consider documents that have been laid in connection with the powers in section 1 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.

I refer members to paper 2 in their packs. The committee considered the draft policy statement and draft annual report and reported its recommendations in November 2021. I thank the Scottish Parliament information centre for providing an analysis of the revised documents against our recommendations. I invite any comments from members.

Donald Cameron: I also thank SPICe for the very helpful paper that it provided to the committee. I put on record my gratitude to the Scottish Government for making various changes in the light of our report. However, I note that it has not acted on certain points that we raised in relation to transparency and scrutiny.

For instance, it is not clear from the draft policy statement how the Scottish Government will make decisions about which EU laws to align with. There is no commitment to set out which EU laws the Scottish Government has considered from an alignment perspective but decided not to align with. In my view, we need more transparency on which items of EU legislation the Scottish Government has looked at and considered for alignment, and in what way, because Parliament will want to have a proper overview of the areas in which a choice has been made to align or to not align. If a decision has been made not to align, Scots law will have diverged from EU law, and it is important that we are advised of that and know that.

Convener, I appreciate that time is very short, but it is important that the committee puts those points on record in a letter to the Scottish Government.

Sarah Boyack: I, too, welcome the fact that responses were provided to several of the points that we made in our report, but I was disappointed in the responses in three areas in particular.

The fact that the Scottish Government did not agree with our recommendation that it update its website to give us information about where it intends to align with EU law presents a challenge not just for us as a Parliament, but for stakeholders. They need to understand what changes are likely to be made, particularly in the context of the discussion that we have just had with witnesses about the challenge of tracking the TCA, and how important that is for businesses, the agricultural sector, the fishing industry and environmental lobbyists, given the need to get legislation right.

I was concerned that there was not agreement on flagging what consultations had been carried out, and by the suggestion that that was not proportionate. That cuts across the transparency and accountability element.

I would like us to request further comment from the Government, because it avoided commenting directly on the proposal that we made for a memorandum of understanding between the Scottish Government and the Scottish Parliament on the delivery of effective scrutiny. I am very conscious that a lot of good work has been done by our clerks and Scottish Government officials, but a memorandum of understanding would provide further clarity and would help people to manage timescales—for example, on how keeping pace powers could be effectively monitored for the purposes of transparency.

I note that it was not only our committee that considered the consultation issue to be important; the Rural Affairs, Islands and Natural Environment Committee did so, too. That is important for us to note.

Mark Ruskell: I echo those points. It is one thing to flag up where there has been active alignment in relation to the Government's legal duties, but it is clear that alignment goes much wider than that. An example is the Scottish Government's future catching policy for fisheries, which is currently out for consultation. From reading through that, it appears that there is alignment with the principles of the common fisheries policy but, on looking at the detail of what is proposed, it could be argued that it is divergent on the landing obligation.

It is not clear in such consultations whether the Government seeks active divergence, and we and all committees of the Parliament absolutely need to continue to have a handle on that. That goes way beyond the reporting mechanisms that we currently have. Like other members, I hope that the Government will reflect on that, so that we do not sleepwalk in one direction or another. Such matters need to be given active consideration. Stakeholders need to be clear on where there is alignment and where it is proposed that there be divergence, and I do not think that we have clarity on that at the moment.

The Convener: Do members have any further comments? Is anyone not in agreement with the comments that have been made?

I think that the deputy convener's suggestion that we write to the Government about our concerns is the way forward. If members are so minded, the clerks can draft that and approval of the letter can be left to me and the deputy convener, and we will take that forward on behalf of the committee.

On that note, we move into private session for our final agenda item.

11:06

Meeting continued in private until 11:08.

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