ISSN 1826-3534

federalismi.it
RIVISTA DI DIRITTO PUBBLICO ITALIANO, COMPARATO, EUROPEO

LE CONSEGUENZE COSTITUZIONALI DELLA BREXIT
28 MARZO 2022

# EU External Action – Learning from Brexit

by Marise Cremona
Emeritus Professor of European Law
European University Institute

# EU External Action – Learning from Brexit*

**by Marise Cremona**
Emeritus Professor of European Law
European University Institute

**Abstract [En]:** This contribution addresses the ways in which the negotiation of the EU-UK Trade and Cooperation Agreement (TCA) is likely to impact the EU's treaty relations with third countries. It argues that the Brexit process and the negotiation of the TCA has highlighted some fundamental characteristics of, and distinctions between, EU external agreements, and has required the EU to think more explicitly than hitherto about its own 'red lines'.

**Titolo:** L'azione esterna dell'UE - Imparando dalla Brexit
**Abstract [It]:** Il presente contributo si sofferma sulle modalità attraverso cui la negoziazione dell'accordo sugli scambi commerciali e la cooperazione tra l'UE e il Regno Unito potrebbe influenzare le relazioni dell'Unione con i Paesi terzi. Si sostiene che la procedura per la Brexit e la negoziazione di tale accordo hanno evidenziato alcune caratteristiche fondamentali e le differenze tra gli accordi esterni dell'UE e ha indotto l'Unione a riflettere in modo più esplicito rispetto a quanto fatto finora sui proprio "limiti invalicabili".

**Keywords:** Brexit; Trade and Cooperation Agreement; integrational agreements; transactional agreements; Association agreements
**Parole chiave:** Brexit; accordo sulla cooperazione e il commercio; accordi finalizzati all'"integrazione"; accordi finalizzati "agli scambi"; accordi di associazione



## 1. Introduction

In this short contribution I should like to address the ways in which the experience of Brexit – and more especially the negotiation of the EU-UK Trade and Cooperation Agreement (TCA) – is likely to impact the EU's treaty relations with third countries. I will argue that the Brexit process and the negotiation of the TCA has required the EU to think more explicitly than hitherto about what it is prepared to offer third countries in terms of market access, and under what conditions, and has highlighted some fundamental characteristics of, and distinctions between, EU external agreements. These characteristics and distinctions, as well as the EU's formulation of its own "red lines" – something which it was prompted to do in part by the UK's approach to the negotiation, but which has not been standard EU negotiating practice – will influence future external policy.

* Articolo sottoposto a referaggio.

## 2. What type of agreement?

Article 50 TEU establishes that the EU will negotiate an agreement with a Member State that has decided to withdraw, although withdrawal does not depend on the conclusion of an agreement.[1] It does not *require* the negotiation of a separate agreement governing the EU's long-term relations with the withdrawing State, simply saying that the Withdrawal Agreement should "tak[e] account of the framework for its future relationship with the Union." In the case of the UK, it was quickly clear that the EU's objective would be to negotiate an agreement on the future relationship, and that this would be concluded with the UK after withdrawal, as a third State.[2] This was reiterated in April 2017 in the European Council's Guidelines, following the formal notification of the UK's decision to withdraw, with references to the need for "a balance of rights and obligations," "a level playing field," and the desire for "strong and constructive ties."[3]

When the EU negotiates a broad trade and cooperation agreement (as opposed to a sectoral agreement) with a third State, a number of choices have to be made. In terms of legal basis, the choice is between an Association agreement (Article 217 TFEU), an economic, financial and technical cooperation agreement (Article 212 TFEU), a development cooperation agreement (Article 209 TFEU), or a trade agreement (Article 207). Each of these may contain a wide range of provisions including, notably, liberalisation of trade in goods and services in the form of WTO-compatible free trade (FTA), and cooperation across a range of areas, including (for example) enforcement of intellectual property rights, migration, sustainable development, and political and foreign policy cooperation. Towards some groups of countries, especially in its wider neighbourhood, the EU has developed 'models' of broadly similar agreement, such as the 'Europe' agreements with the countries of central and eastern Europe that have now joined the EU, the Stabilisation and Association agreements with the countries of the Western Balkans, the Partnership and Cooperation agreements with some of the countries of the former Soviet Union, and the Euro-Mediterranean agreements. Many, but not all, of these are types of Association agreement. Each group of agreements contains broadly similar provisions and operates (or operated) within a specific geopolitical context. There have also been different 'generations' of free trade agreement, most recently third generation FTAs with developed economies such as South Korea, Singapore, Japan and Canada.

[1] According to Article 50(3) TEU, "The [EU] Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period." See further C. HILLION, *Leaving the European Union, the Union way - A legal analysis of Article 50 TEU*, in *SIEPS European Policy Analysis*, 2016, p. 8.

[2] "Any agreement, which will be concluded with the UK as a third country, will have to be based on a balance of rights and obligations." Statement following the informal meeting at 27, Brussels, 29 June 2016, para 4.

[3] EUROPEAN COUNCIL, Guidelines, 29 April 2017, EUCO XT 20004/17, para 1, paras 18-24.

Clearly the negotiation with the UK was to be to some extent *sui generis*, but the EU's position was naturally influenced by the patterns of its network of treaty relations with third States. In order to better understand this dynamic, we may identify a distinction between two types of agreement: between what can be called *transactional* agreements, and *integrational* agreements. These designations are somewhat simplistic, and they do not capture the whole picture, but they help us to understand a little better the EU's approach to its external relationships. The distinction is not legal, in the sense of different legal categories of instrument, or specific legal bases; it is intended more as an explanatory device to describe the way in which a specific agreement is embedded in, forms part of and is influenced by the overall relationship between the EU and a particular third State.

The distinction I am drawing here between transactional and integrational relationships is not one that the EU explicitly embraces when deciding on its policy towards a third country or group of countries, although when you look at policy documents and the preambles and statements of objectives of its agreements you can find language that is clearly reflective of one or other approach.

### 2.1. Transactional agreements

Transactional agreements are essentially about reciprocity. They have their specific objectives of course, but they do not look (much) beyond the agreement itself, they are not instruments set in the context of a broader policy agenda towards that third country. In the past transactional trade agreements had a rather narrow coverage (trade in goods with some flanking provisions on competition and some regulatory cooperation), such as for example the FTAs of the 1970s with the members of EFTA after the accession of UK, Ireland and Denmark to the EU. But they were also based on establishing a reciprocal and balanced trading relationship, operating within the framework of the GATT/WTO. The new generation FTAs concluded by the EU since 2006 with developed economies such as South Korea, Canada, Japan, Singapore, and currently under negotiation with Australia and New Zealand, are more extensive but still transactional in character. These FTAs contain provisions on goods and services trade, regulatory cooperation and commitments on intellectual property and competition policy (anti-trust), typically also including trade and sustainable development chapters. In some cases, such as the agreement with Canada (CETA) they include provisions on investment, which may include investor-State dispute settlement (ISDS), but more recently (since Opinion 2/15[4]) the tendency has been to place direct and indirect investment into a separate agreement.[5] These agreements tend not to include dynamic clauses allowing for the agreement obligations to develop over time, although of course some of their provisions allow

[4] Court of Justice of the EU, Opinion 2/15, EU:C:2017:376.
[5] See for examples, the investment agreements with Australia, New Zealand and Vietnam.

for the development of relations, such as frameworks for regulatory cooperation. The preambular language of the CETA is indicative of this type of agreement:

"…the Parties resolve to: FURTHER strengthen their close economic relationship and build upon their respective rights and obligations under the Marrakesh Agreement Establishing the World Trade Organization …; CREATE an expanded and secure market for their goods and services through the reduction or elimination of barriers to trade and investment; ESTABLISH clear, transparent, predictable and mutually-advantageous rules to govern their trade and investment; … RECOGNISING that the provisions of this Agreement preserve the right of the Parties to regulate within their territories …"

In Opinion 1/17 the Court of Justice emphasised the arms' length reciprocal nature of the CETA, and the separateness of the CETA relationship from the EU's autonomous constitutional framework. The Court also emphasised the need to protect, in an agreement like CETA, the regulatory autonomy of the EU, the "capacity of the Union to operate autonomously within its unique constitutional framework",[6] since its regulatory choices were the result of its own specific constitutional processes:

"EU legislation is adopted by the EU legislature following the democratic process defined in the EU and FEU Treaties, and that that legislation is deemed, by virtue of the principles of conferral of powers, subsidiarity and proportionality laid down in Article 5 TEU, to be both appropriate and necessary to achieve a legitimate objective of the Union. In accordance with Article 19 TEU, it is the task of the Courts of the European Union to ensure review of the compatibility of the level of protection of public interests established by such legislation with, inter alia, the EU and FEU Treaties, the Charter and the general principles of EU law".[7]

The distinction I am drawing here is not concerned simply with the breadth or depth of the commitments in an agreement. Transactional relationships can encompass agreements on non-trade issues, such as extradition, or passenger name records, but each agreement is justified in its own terms. Transactional agreements are not defined by their level of ambition, but rather by the way in which the parties see the relationship. A transactional agreement will be "balanced" as well as reciprocal and justified for the EU in its own terms, not as part of a broader or longer-term project.

### 2.2. Integrational agreements

Relationships based on integration have been a hallmark of EU external relations, especially with its neighbours, using integration as a starting point in building a structured and long-term relationship. As Article 21 TEU says, the EU is to 'build partnerships' with third countries that share the principles which

[6] Court of Justice of the EU, Opinion 1/17, EU:C:2019:341, para 150.
[7] Court of Justice of the EU, Opinion 1/17, EU:C:2019:341, para 151.

have 'inspired its own creation, development and enlargement, and which it seeks to advance in the wider world'. So there is a sense in which its own integration experience has helped to shape the way the EU sees its external relations (which is not to say that it sees itself as a 'model' to be imitated in its external policy). These relationships of integration are certainly not limited to countries within the 'wider Europe'. But we may say that there is an expectation that relations between the EU and its neighbours will be of this nature, as indeed they have been.

Integrational agreements are embedded in a wider relationship which has a longer-term perspective. Integration, of whatever kind, is a process rather than a transaction. The trade dimension of the relationship is included in a wider agreement, which may be cast as an Association agreement or as a partnership or cooperation agreement; they are reciprocal (with some historic exceptions), as they need to be under GATT / WTO rules, but they are also designed to serve the relationship as a whole, and often to achieve a broader purpose:

### 2.2.1. Different types of integration into or with the EU

Integration with the EU may have a membership perspective. Such agreements would include the Association Agreement with Turkey,[8] the former Europe Agreements with central and eastern Europe concluded during the 1990s, and the current Stabilisation and Association agreements with the countries of the Western Balkans. Other agreements carry no membership perspective but aim to establish a long-term close and dynamic relationship of integration with the EU. These would include the European Economic Area agreement (EEA), the packages of bilateral agreements with Switzerland, and the Association agreements with deep and comprehensive free trade areas (DCFTAs) with Ukraine Moldova and Georgia which have replaced earlier, weaker agreements. The preamble to the 2017 Association Agreement with Ukraine expresses this dimension of the agreement, referring to:

"the close historical relationship and progressively closer links between the Parties as well as their desire to strengthen and widen relations in an ambitious and innovative way; … a close and lasting relationship that is based on common values … which would facilitate the participation of Ukraine in European policies; … the importance Ukraine attaches to its European identity; [and] that the political association and economic integration of Ukraine with the European Union will depend on progress in the implementation of this Agreement as well as Ukraine's track record in ensuring respect for common values, and progress in achieving convergence with the EU in political, economic and legal areas."

The EEA establishes a particularly close form of integration:

[8] I include this agreement here, although Turkey's membership is not currently a live issue, as the agreement itself envisages the prospect of accession: Agreement establishing an Association between the European Economic Community and Turkey, OJ 1977 L 361/29, Article 28.

"… one of the principal aims of the EEA Agreement … is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole EEA, so that the internal market established within the European Union is extended to the EFTA States … the law governing the EU internal market is to be extended as far as possible to the EEA, with the result that *nationals of the EEA States concerned benefit from the free movement of persons under the same social conditions as EU citizens.*"[9]

The integration relationship founded upon the EEA is supplemented by other agreements, including Schengen and an agreement which essentially extends the EAW to Iceland and Norway.[10] In a striking case, reasoning on extradition to a third state which the Court had previously developed for EU citizens[11] was applied to an EEA (Icelandic) national.[12] The question concerned the potential extradition by Croatia to Russia of a Russian / Icelandic dual national who had been given refugee status and eventually citizenship by Iceland. The Court accepted that Articles 18 TEU and 21 TFEU (conferring rights of non-discrimination and citizenship respectively) apply only to EU citizens, and that the European Arrest Warrant Framework decision applies only to EU Member States, not third States. However, it went on to say that Iceland has 'a special relationship' with the EU, which 'goes beyond economic and commercial cooperation.'[13] The Court stressed that this special relationship "is based on proximity, long-standing common values and European identity" and went on:

"It is appropriate to add that not only the fact that the person concerned has the status as a national of an EFTA State, which is a party to the EEA Agreement, but also the fact that that State implements and applies the Schengen *acquis*, renders the situation of that person *objectively comparable with that of an EU citizen* to whom, in accordance with Article 3(2) TEU, the Union offers an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured."[14]

A remarkable judgment, given that the EEA includes neither EU citizenship, nor the equivalent of the area of freedom, security and justice, nor the Charter of Fundamental Rights.

---

[9] Court of Justice of the EU, Case C-431/11 *UK v Council*, EU:C:2013:589, paras 50 & 58 (emphasis added). As a result, the Court decided that measures designed to implement EU social security rules in the EEA should be adopted on the basis of Article 48 TFEU, the legal basis for social security coordination *within* the EU.

[10] Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway OJ 2006 L 292, p. 2.

[11] Court of Justice of the EU, Case C-182/15 *Petruhhin*, EU:C:2016:630. The Court held that Articles 18 and 21 TFEU require that, when a Member State to which a Union citizen, a national of another Member State, has moved receives an extradition request from a third State with which the first Member State has concluded an extradition agreement, it must inform the Member State of which the citizen in question is a national and, should that Member State so request, surrender that citizen to it, in accordance with the provisions of Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), provided that that Member State has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory.

[12] Court of Justice of the EU, Case C-897/19 PPU *IN (Ruska Federacija)*, EU:C:2020:262.

[13] Ibid., para 44.

[14] Ibid., para 58 (emphasis added).

### 2.2.2. Integration into the world economy

Integration does not necessarily imply integration with the EU, or rather, a relationship of integration with the EU may serve a wider integration objective. According to Article 21(2)(e) TFEU) one of the external objectives of the EU is to 'encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade.' Among these we can identify agreements supporting economic and political transition, such as the Partnership and Cooperation agreement with Russia, and the Comprehensive and Enhanced Partnership agreements (CEPA) with Armenia and Kazakhstan. The preamble to the agreement with Armenia, for example, as well as referring to the 'political, socio-economic and institutional development' of Armenia, puts the agreement into the context of the EU's regional policy frameworks, the European Neighbourhood Policy (ENP) and the Eastern Partnership. A second group, including the Stabilisation and Association agreements with the Western Balkans, are concerned with regional stability and regional cooperation.

In this category we can also place development cooperation agreements, such as the Cotonou Convention, the Economic Partnership agreements with groups of African, Caribbean and Pacific countries, and the Partnership and Cooperation agreement with the Philippines. The preamble to the agreement with the Philippines, for example, stresses

"…the comprehensive nature of their mutual relationship … this Agreement forms part of a wider relationship between them … their desire to enhance cooperation on international stability, justice and security in order to promote sustainable social and economic development, the eradication of poverty and the achievement of the Millennium Development Goals."

Despite these variable contexts, integrational agreements share certain characteristics. Indeed, one of their characteristics is precisely that they operate within a specific context: not only the economic, political and social character of the third State partner, but also the place of that relationship within the EU's own external relations policy frameworks.

The relationship established by an integration agreement is certainly not always geared towards membership; it may indeed not be very deep, but it will be multi-faceted and not solely concerned with a reciprocal balance of advantage, although that will be a dimension. These agreements are based on the identification of shared objectives, and their preambles often refer also to shared values. Indeed, the agreement may be embedded in a wider regional policy framework, such as the European Neighbourhood Policy, encompassing other unilateral, bilateral and even regional instruments, such as financial instruments, participation in EU security and defence actions, and agreements relating to readmission and visa facilitation.

Under the Association, development, or cooperation legal bases it is possible to include provisions on a wide range of topics as long as they serve the overall purpose of the agreement and do not establish distinct substantive obligations which would require their own legal basis.[15] Association agreements are perhaps the paradigm basis for integration relationships. According to Article 217 TFEU these agreements involve "reciprocal rights and obligations, common action and special procedures." They are very varied in their objectives but as the Court of Justice said in *Demirel*,[16] an Association agreement creates "special, privileged links" with the third country "which must, at least to a certain extent, take part in the Community system." It might even be said that Association agreements are, by their nature, integrational. As a consequence, the Association agreement may contain provisions covering all aspects of the "Community [Union] system", now of course more far-ranging than at the time of *Demirel*, including sectors where internal rules have not yet been adopted and which may need to be implemented by the Member States.[17]

The trade dimension of integration agreements vary widely; some are basic, some are "deep and comprehensive"; some static, some dynamic. They may include provisions on regulatory approximation or harmonisation, linked to greater degrees of access to the Internal Market. A few provide for a dynamic alignment to EU laws via a system of Annexes listing secondary legislation, which can then be amended.[18] Others make references to EU standards as reference points for reform.[19] These agreements do not generally provide for free movement of persons (the EEA and the bilateral agreement with Switzerland on free movement of persons are exceptions), but they often provide for reciprocal non-discrimination in relation to those legally working in the contracting parties. The integration aims of the agreement will influence its interpretation. For example, the Court of Justice referred to the aims of the Europe Agreements when finding that their provisions were capable of direct effect and also when interpreting the scope of the prohibition of discrimination they contained.[20] Integrational agreements typically establish fields of cooperation that go well beyond trade to include migration, counter-terrorism, regional stability, political cooperation, and sustainable development. The FTA is thus embedded in a long-term

[15] Court of Justice of the EU, Case C-268/94 *Portugal* v *Council* (India), EU:C:1996:461, para 39; case C-377/12 *Commission v Council (Philippines)*, EU:C:2014:1903, para 39; case C-244/17 *Commission v Council (Kazakhstan)*, EU:C:2018:662, paras 45-46.

[16] Court of Justice of the EU, Case 12/86 *Demirel v Stadt Schwäbisch Gmünd,* EU:C:1987:400 para. 9; see also more recently case C-81/13 *UK v Council,* EU:C:2014:2449 para. 61.

[17] Court of Justice of the EU, Case 12/86 *Demirel v Stadt Schwäbisch Gmünd,* EU:C:1987:400, para 10.

[18] For example, the European Economic Area agreement, and the Association agreement with Ukraine.

[19] For example, the Association agreements with Turkey, the Western Balkans, and the Euro-Mediterranean Association agreements.

[20] "… the purpose of the Association Agreement is to establish an association designed to promote the expansion of trade and harmonious economic relations between the Parties, in order to foster dynamic economic development and prosperity in the Republic of Poland, with a view to facilitating its accession to the Community." Court of Justice of the EU, Case C-63/99 *Gloszczuk*, EU:C:2001:488, para 35.

political relationship, which more recently has been given expression through provisions in the agreements themselves on political dialogue, and cooperation on the EU's Common Foreign and Security Policy.

The intention of such agreements is indeed to *build a relationship* as opposed to simply concluding a mutually beneficial deal. They often envisage a development of relations over time, through mechanisms of integration. Such a development is not inevitable: the partner country may decide that it does not want to go further; nor, as we have seen, does integration here necessarily signal the possibility of membership at a future date. Their longer-term and evolutionary perspective implies the need for an institutional framework, providing a basis for legal, economic and political relations which may develop over time, including institutions, such as an Association Council, with decision-making powers.

### 3. The Brexit negotiation: transactional or integrational?

How then can the differences between these two approaches to creating a relationship between the EU and a third State shed light on the negotiation of the EU-UK Trade and Cooperation Agreement?

The EU initially assumed that its future relationship with the UK would be integrational. The situation (withdrawal of a Member State) was of course unprecedented, but the assumption was based on two factors. First, that the UK was moving from the highest-possible level of integration (membership) and as a member for 40 years was already deeply integrated into the EU both legally and economically. And second, an expectation (only partly articulated) that the EU's relations with its neighbours are naturally integrational. Let us explore that second element a little further. According to Article 8 TEU:

"The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation."

The idea of a "special relationship"' of establishing an "area" (however vague that term), and the reference to values all suggest an integration-based relation.[21] As Christophe Hillion has said

"Read in the light of Article 21(1) TEU [which states that the EU is to 'build partnerships' with third countries that share its principles], Article 8 suggests that the post-Lisbon integration goal transcends the legal boundaries of the Union and those of its constituent states."[22]

This has implications for the EU's relations with the UK post-withdrawal. In Hillion's fascinating analysis of Article 50 TEU, that provision (alongside Article 49 TEU) is a key element of the constitutional

[21] On Article 8 TEU see further S. BLOCKMANS, *Friend or Foe? Reviewing EU Relations with its Neighbours Post-Lisbon*, in P. KOUTRAKOS (ed.), *The European Union's External Relations a Year after Lisbon*, CLEER Working Papers, n. 3, 2011; P. VAN ELSUWEGE and R. PETROV, *Towards a New Generation of Agreements with the Neighbouring Countries of the European Union? Scope, Objectives and Potential Application of art. 8 TEU*, in *European Law Review*, 36, n. 5, 2011, p. 697 ff..

[22] C. HILLION, *Leaving the European Union, the Union way A legal analysis of Article 50 TEU*, cit., p. 10.

framework of EU integration; withdrawal is an "integration-friendly process", as he put it. There are several dimensions to this integration orientation of Article 50, including its function in ensuring that participation in the EU is voluntary, and the management of the withdrawal process, but it also impacts the post-withdrawal relationship. If the EU is bound to engage with its neighbours, this (again in Hillion's words) "points towards a strong post-withdrawal engagement by the Union towards the former Member State."[23] The EU's different integration agreements – including the EEA – provide possible models for this engagement, but the post-withdrawal relationship poses a particular challenge: creating a new form of integration while managing a dynamism of dis-integration (mutual engagement in the process of dis-engagement).

The Political Declaration agreed between the EU and the UK in October 2019 represented an attempt to meet this challenge and to sketch out a possible path.[24] Although it was a watered-down version of the Political Declaration negotiated by the May government,[25] reflecting Johnson's greater concern with regulatory autonomy, the final version still envisaged a wide-ranging relationship, "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."[26] There are references to shared values and interests and the "unique context" of the existing high level of integration, and the "interwoven past and future of the Union's and the United Kingdom's people and priorities."[27]

However, in February 2020 the UK government decided on a different approach.[28] Its proposal was transactional in nature: for a "comprehensive FTA" accompanied by stand-alone agreements on fisheries, air transport, social security, energy, criminal justice cooperation, readmission (among others), but excluding any structured basis for foreign policy and defence cooperation. The UK FTA proposal followed the approach of EU-Canada and EU-Japan, and the aviation agreement was modelled on EU

[23] C. HILLION, *Withdrawal Under Article 50 TEU: An Integration-Friendly Process*, in *Common Market Law Review* , 55, 2018, p. 55.

[24] Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom OJ 2019 C 384/I/178.

[25] Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom OJ 2019 C 66/1. On May's approach, see UK GOVERNMENT, *The Future Relationship between the United Kingdom and the European Union* Cm.9593, July 2018, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786626/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf

[26] Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom OJ 2019 C 384/I/178, para 3.

[27] Ibid. para 5.

[28] UK GOVERNMENT, White Paper on *The Future Relationship with the EU: The UK's Approach to Negotiations*, CP211, February 2020, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868874/The_Future_Relationship_with_the_EU.pdf

open skies agreements with third countries such as the USA. Its proposals were based on picking out the most advantageous elements in a range of transactional agreements with a variety of third States. There is no sense of identifying common interests or objectives, nor any sense of the need for an overall institutional framework for the ongoing relationship, or its longer-term perspective. A specific conception of 'sovereignty' acts as a driver for this choice. As expressed by Craig, "for Brexiteers, the connection between sovereignty and control connoted the capacity to devise UK laws unilaterally as a result of leaving the EU, exemplified by the UK's ability to control its own borders."[29] Of course, the UK was perfectly within its rights to decide on a transactional approach, but it must then accept that the EU will decide its own balance of interests, as we have seen in the discussions on governance (enforcement) and the level playing field.

The difficulty we saw played out in the negotiations during 2020 flows – at least in part – from an inevitable tension between the transactional and integration-based perspectives that were in play. The challenge lay in trying to find a path which reconciled the UK's desire for a transactional relation with several factors which suggested – also for the UK – the need for an integration-based agreement and – especially – some form of long-term engagement between the EU and UK:

- The UK is a close neighbour, highly integrated with the EU economically and culturally.
- The UK was interested in preserving some elements of its former integration-based membership, such as the European Arrest Warrant, participation in EU research programmes, free data flows, reciprocal health arrangements, and the kind of free movement of goods and services that depends on harmonized standards and mutual recognition.
- The Withdrawal Agreement itself imposes the need for long-term cooperation, not least in managing citizens' rights and the delicate balance of the Northern Ireland Protocol.

The Trade and Cooperation agreement (TCA) is an uneasy and complex compromise between these two perspectives.[30] On the one hand its name signals limited ambition. But on the other hand, the EU concluded it as an Association agreement, based on the single legal basis of Article 217 TFEU,[31] and as we have seen Association agreements are designed to be integrational. The TCA in fact contains a wider

[29] P. CRAIG, *Brexit a drama, the endgame - Part II: trade, sovereignty and control*, in *European Law Review*, 46, n. 2, 2021, p. 130.
[30] 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, OJ 2021 L 149/10. For comment, see further P. VAN ELSUWEGE, *A New Legal Framework for EU UK Relations: Some Reflections from the Perspective of EU External Relations Law*, in *European Papers*, 6, n. 1, 2021, p. 785; S. PEERS, *So Close, Yet So Far: The EU/UK Trade and Cooperation Agreement*, in *Common Market Law Review*, 59, 2022, p. 49; A. ŁAZOWSKI, *Mind the Fog, Stand Clear of the Cliff! From the Political Declaration to the Post-Brexit EU-UK Legal Framework – Part I*, in *European Papers*, 5, n. 3, 2020, p. 1105; P. CRAIG, *Brexit A Drama, the endgame - Part II: trade, sovereignty and control*, cit., p. 129.
[31] On this choice and its implications, see C. ECKES and P. LEINO-SANDBERG, *The EU-UK Trade and Cooperation Agreement – Exceptional Circumstances or a new Paradigm for EU External Relations*?, in *Modern Law Review* , 85, n. 1, 2022, pp. 164 ff.

range of substantive provisions than might be expected from its name, elements more normally found in integrational relationships, including substantive provisions on social security and justice and home affairs. Van Elsuwege points out the similarity between Article 1 TCA and Article 8 TEU,[32] the significance of the neighbourhood dimension:

Art 8 TEU: "The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation."

Art 1 TCA: "This Agreement establishes the basis for a broad relationship between the Parties, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation, respectful of the Parties' autonomy and sovereignty."

Set against these signs of an integrational approach, throughout the TCA we find references to sovereignty and autonomy, along with an emphasis on public international law: the message being that this is an "ordinary" international agreement, it is not a "new legal order" or creating any new kind of legal – or integrational – space (unlike the EEA).[33] Advocate General Collins, in a case on the citizenship provisions of the Withdrawal Agreement, points to the consciously reciprocal nature of the obligations entered into,[34] and this is also a feature of the TCA.

The TCA is designed to form an institutional umbrella for a group of agreements (current and future) which could develop the relation further. This was a compromise: the UK wanted a group of separate bilateral agreements dealing with trade (FTA), energy, aviation, transport, fishing, etc;[35] the EU was not keen to replicate the Swiss experience,[36] and insisted on a strong institutional and governance framework more typical of integrational agreements.[37] As a result, the overall presentation of the TCA is transactional, as the UK wanted, but the EU's desire for a more integration-oriented agreement is reflected in the level-playing field provisions and the institutional framing, covering future sectoral agreements. As a result, the relationship has the potential to develop in a more integrational direction, but this is by no means inevitable.

[32] Peter VAN ELSUWEGE, *A New Legal Framework for EU UK Relations*, cit., p. 792.
[33] See for example, Articles 4 and 5 TCA.
[34] Court of Justice of the EU, Case 672/20 *Préfet du Gers*, Opinion of AG Collins, EU:C:2022:129, paras 72-73.
[35] https://www.gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu
[36] A LAZOWSKI, *Enhanced Multilateralism and Enhanced Bilateralism: Integration Without Membership in the European Union*, in *Common Market Law Review*, 45, n. 5, 2008, p. 1433.
[37] EUROPEAN COUNCIL, Guidelines, EUCO XT 20001/18, 23 March 2018, para 15. Negotiating directives Council doc. 5870/20 ADD 1 REV 3, 25 Feb 2020, para 147, 151, 155-6.

## 4. Limits to flexibility: the EU's "red lines"

The tension underlying the TCA negotiation was not only a result of these different approaches. One result of the negotiating experience has been to encourage greater reflection on the EU side as to what it is prepared to offer, and how it sees its relationships with its neighbours – especially those who are not, or who do not see themselves as being, in a subordinate position – and where it draws its own red lines. Even if the UK had ultimately embraced a more fully integrational relationship (though surely not using that terminology), the difficulty over the integrational elements of the TCA (such as the level playing field provisions) show us that things would still have been difficult. It was not only the unique (so far) situation of having to manage a process of dis-integration rather than integration. Like transactional agreements, integration agreements are not one-size-fits-all; there are many kinds of integration relationship and considerable room for flexibility; it is about deciding what kind of relationship you want and what its ultimate aims will be. But flexibility has limits: it is bounded by the need to comply with WTO rules on FTAs; by the EU's perception of its interests; and by the need to preserve its own autonomy and the integrity of the Internal Market. That entails maintaining the distinction between membership and non-membership of the EU and the Single Market,[38] the indivisibility of the four freedoms,[39] the role of the Court of Justice, and protecting decision-making and regulatory autonomy.[40] Third countries (even in the framework of the EEA[41]) cannot participate in EU institutions, although there may be provision for consultation prior to and during the EU's legislative process. There are limits to integration without membership.

The EU's own highly-integrated system is based on strong and autonomous enforcement structures, including the principles of primacy and direct effect, the Commission to "oversee the application of Union law,"[42] and the exclusive jurisdiction of the Court of Justice to ensure that "in the interpretation and application of the Treaties the law is observed."[43] The principle of the autonomy of EU law, while regarded by the Court as essential to protect the "essential characteristics" of this "constitutional framework"[44] has created barriers to deep integration of enforcement and dispute settlement procedures

[38] "… a relationship between the Union and a non-Member State cannot offer the same benefits as Union membership," European Council Guidelines, 29 April 2017, EUCO XT 20004/17, para 18. "[A] non-member of the Union, that is not subject to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member," Annex to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement (negotiating directives), Council doc. 5870/20 ADD1, REV3, 25 February 2020, para 10.

[39] EDITORIAL COMMENTS, *Is the "indivisibility" of the four freedoms a principle of EU law?*, in *Common Market Law Review*, 56, 2019, p. 1189.

[40] Opinion 1/17 (CETA) EU:C:2019:341.

[41] Opinion 1/91 (EEA) EU:C:1991:490.

[42] Article 17 TEU.

[43] Article 19 TEU.

[44] Opinion 1/17, EU:C:2019:341, paras 109-111.

in EU international agreements. The dispute settlement clauses of transactional agreements tend to be traditional and arbitration-based; it has become regular practice to exclude direct effect.[45] In contrast, although integrational agreements do not usually include strong enforcement or dispute settlement procedures (the EEA being once more an exception[46]), provisions of the agreement itself and Association Council decisions may both be capable of direct effect.[47] The agreement or decision in such a case will be directly enforceable in EU domestic courts.

The relationship between direct effect and reciprocity is a complex one. In early cases, the Court of Justice took the view that a finding of direct effect by one party did not indicate a lack of reciprocity: "the fact that the courts of one of the parties consider that certain of the stipulations in the agreement are of direct application whereas the courts of the other party do not recognize such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement."[48] Similarly, an integrational agreement was not prevented from being directly effective because its substantive provisions were not fully reciprocal:

"The [Yaounde] Convention was not concluded in order to ensure equality in the obligations which the Community assumes with regard to the associated states, but in order to promote their development in accordance with the aim of the first Convention annexed to the Treaty. This imbalance between the obligations assumed by the Community towards the associated states, which is inherent in the special nature of the Convention, does not prevent recognition by the Community that some of its provisions have a direct effect."[49]

In Opinion 1/17, in contrast, in the context of a transactional agreement (CETA), the Court linked reciprocity to the choice of a separate arbitration-based dispute settlement procedure, an investor-State dispute settlement mechanism (ISDS) and the exclusion of direct effect. The CETA's ISDS "stands outside" the EU judicial system, is based on reciprocity rather than mutual trust, and as such neither party is bound by interpretations of the agreement given by the other's domestic courts. As the Court said:

"It is, moreover, precisely because of the reciprocal nature of international agreements and the need to maintain the powers of the Union in international relations that it is open to the Union … to enter into an agreement that confers on an international court or tribunal the jurisdiction to interpret that agreement

[45] E.g. "nothing in this Agreement shall be construed as . . . permitting this Agreement to be directly invoked in the domestic legal systems of the Parties": CETA, Art 30.6.1. See further A. SEMERTZI, *The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements*, in *Common Market Law Review*, 51, 2014, p. 1125.

[46] The EEA establishes a Court for the EFTA parties as well as an EFTA surveillance authority.

[47] Court of Justice of the EU, Case C-192/89 *S Z Sevince v Staatssecretaris van Justitie*, EU:C:1990:322; case C-18/90 *Office national de l'emploi v Kziber*, EU:C:1991:36.

[48] Court of Justice of the EU, Case 104/81 *Kupferberg*, EU:C:1982:362, para 18.

[49] Court of Justice of the EU, Case 87/75 *Bresciani*, EU:C:1976:18, paras 22-23.

without that court or tribunal being subject to the interpretations of that agreement given by the courts or tribunal of the Parties."[50]

Within the limits of its own constitutional system, the EU must decide on the conditions under which it is prepared to grant third countries a degree of partial participation in its own integrated system. Hitherto this has been an *ad hoc* affair, depending on third state demands as well, increasingly, on the fleshing out by the Court of Justice of the concept of autonomy.[51] It is notable that the Court has in recent years (coinciding with the Brexit negotiation) articulated more clearly what autonomy entails, in terms of regulatory as well as judicial autonomy, and expressed this in terms of the EU's constitutional and democratic system. This concept of autonomy is, if you like, the other side of the coin of the UK's rather empty insistence on "sovereignty".[52] It applies whether the agreement in question is transactional or integrational in character (as already said, this distinction is not a legal one), but by its nature the reciprocal arms-length character of a transactional agreement that does not seek to integrate a third State into EU systems, will pose fewer challenges for the principle of autonomy. A reciprocal but separate system of enforcement, eschewing the interpenetration implied by direct effect, epitomises a transactional approach where there is no attempt to borrow from or extend the EU acquis to the third-country partner.

For the first time (at least in the absence of a Court judgment) in negotiating with the UK, the political negotiators were explicit in having recourse to these legal constraints to justify their negotiating positions. The protection of judicial, institutional, and regulatory autonomy has become a factor in designing EU negotiating positions. But the EU went further. It also formulated, during the EU-UK negotiation, the concept of the indivisibility of the four freedoms; it articulated the distinction between participating in the internal market and having access to it; and the idea that substantial market access requires substantial and enforceable level playing field provisions (the latter being justified on grounds of protecting the EU's internal market from too much regulatory competition and thus preserving its regulatory autonomy). We can see this as a process of defining exactly what it means to be (and to cease to be) a Member State. But it also impacts future agreements, whether transactional or part of a broader integrational relationship, with neighbours and with other strong economic powers. In being required to rationalise and justify its positions the EU has indicated its expectations, and the legal or constitutional language in which these positions are articulated makes them harder to shift.

EU external action post-Brexit will be profoundly affected by the *process* of negotiating Brexit. We can see more clearly the different types of relation on offer, the constitutional and political reasons for desiring an integrational relationship with its neighbours, and the EU's own red lines. Despite the

[50] Court of Justice of the EU, Opinion 1/17, EU:C:2019:341, para 117.
[51] See e.g. Court of Justice of the EU, Opinion 1/17 (CETA) EU:C:2019:341.
[52] Note the appearance of both sovereignty and autonomy in Article 1 TCA, quoted above.

uncertainty and confusion, these are all more transparent than they were, and that reflects too the Lisbon Treaty's attempt to express in words the EU's external mission.