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**Options for the future relationship between the UK and the EU – the legal and constitutional  
framework**

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**Submitted in fulfilment of the requirements of the Degree of LLM by Research.**

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## **ABSTRACT**

In a referendum on 23 June 2016, the electorate of the UK voted for the country to leave the European Union. After an account of the negotiations which thereafter took place between the two sides, this thesis first considers those factors which might motivate both the EU and the UK to seek closer relationships than those which were established at the conclusion of those negotiations. It surveys the ongoing debate within the EU as to its future structure and its relationships with other European countries, including the UK. Thereafter, it sets out a detailed analysis of the legal requirements under the constitutional arrangements of both sides which would govern any changes to the current relationships between them. In particular, it examines in detail the scope of the Trade and Cooperation Agreement as a possible mechanism for enhancing UK-EU relationships. The thesis concludes by considering which of the means for achieving such an enhancement are likely to have a potential for success, given the political positions of the two parties.

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## **AUTHOR'S DECLARATION**

I declare that, except where explicit reference is made to the contribution of others, this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Printed Name: Mark Lazarowicz

Signature:



## ABBREVIATIONS

CETA	Comprehensive Economic and Trade Agreement EU-Canada
Council	Council of the EU
EEA	European Economic Area
EPC	European Political Community
EU	European Union
Protocol	The Protocol to the Withdrawal Agreement (WA) on Ireland/Northern Ireland
SPS	sanitary and phytosanitary
TCA	The Trade and Cooperation Agreement
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
WA	Agreement on the withdrawal of the United Kingdom from the European Union and the European Atomic Energy Community (“The Withdrawal Agreement”)

## **Chapter 1: Introduction**

1.1. On 23 June 2016, the UK voted in a referendum on whether or not the country should leave the European Union. On a turn-out of 72.2%, in answer to the question “Should the United Kingdom remain a member of the European Union or leave the European Union?”<sup>1</sup>, 51.9% of those voted in favour of leaving, and 48.1 % in favour of remaining<sup>2</sup>.

1.2. The vote in the referendum was not one that had any immediate legal effect, as the legislation<sup>3</sup> which set up the referendum did not make any provision for it to do so. In due course, after considerable political debate and argument within the UK, and after an extended negotiation process between the UK and the EU, the UK eventually ceased to be a member of the EU after 31 January 2020. For a further eleven months, however, during a Transition, or Implementation, period<sup>4</sup>, the UK remained, for almost all practical purposes, within the EU’s structure and regulatory regimes, until the end of 2020.

1.3. Since that date there has been considerable continuing debate within the UK as to its future relationship with the EU. After setting out the historical process, and summarising the legal framework established by the negotiations on the UK’s withdrawal from the EU (“Brexit”), this thesis will consider the various factors which are likely to influence both the UK and the EU in the approaches that they are likely to take over the next few years to the possibility of closer relationships between the two sides. It will set out possible options for future relationships which might reasonably be agreed between the UK and the EU, taking into account the policies of the Labour government elected in July 2024, along with the wider political, business, and economic climate likely to influence the policies of both that government and the EU and its member states.

1.4 Thereafter, the various methods available to the two sides under their respective constitutional frameworks, and in the agreements reached between them as part of the Brexit process, will be set out. Consideration will be given to the implication of each of those methods for a possible agreement on an enhanced future relationship between the UK and the EU, and an assessment made as to which of those methods are more likely to be achievable given the political imperatives facing the two sides. Recommendations are then made as to which methods would be most likely to achieve a wide-ranging enhanced relationship between the UK and the EU.

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<sup>1</sup> Set out in section 1(4), European Union Referendum Act 2015

<sup>2</sup> BBC [www.bbc.co.uk/news/politics/eu\\_referendum/results](http://www.bbc.co.uk/news/politics/eu_referendum/results) (last accessed 25.11.2023)

<sup>3</sup> European Union Referendum Act 2015

<sup>4</sup> Article 126 WA

1.5 The benefit to be obtained from this thesis is that although the UK now has a new government committed to a closer relationship between the EU and the UK, the manner in which such a closer relationship might be established is the subject of ongoing public policy debate within both the UK and the EU. This thesis will be a contribution to that debate and will be of value in that it sets out the legal and constitutional parameters within which decisions as the UK's future relationships with the EU must be taken.

## **Chapter 2: From the referendum to Brexit and beyond**

### **The commencement of the withdrawal process**

2.1 After the referendum in 2016, the then UK government announced that it accepted the result of the vote, and would prepare for negotiation with the EU on the UK's withdrawal from the union<sup>5</sup>. However, the government had not made any contingency plans for what would happen if the vote went in favour of "leave"<sup>6</sup>.

2.2 As a result, immediately after the referendum, there was considerable confusion as to how and when the UK would withdraw from the EU, a confusion exacerbated by the announcement of the then UK Prime Minister, David Cameron, on the morning after the referendum, that he would speedily resign, although he indicated he would stay in office until his successor was elected<sup>7</sup>. Theresa May, then Home Secretary, was eventually chosen by the Conservative party to succeed him as leader, taking office as Prime Minister on 13 July 2016.<sup>8</sup>

2.3 Under the terms of Article 50<sup>9</sup> of the Treaty on European Union ("TEU"), a member state that decides to leave the Union must give notice of its intention to withdraw, which by default takes effect two years after that notice is given (although that period can be shortened or lengthened in certain circumstances as set out in Article 50). Prior to the referendum, David Cameron had stated that if the 'leave' side won, he would trigger Article 50 immediately thereafter<sup>10</sup>, but after the vote he expressed the view that the UK should first decide what model of future relationship it wanted to have with the EU before commencing the withdrawal process<sup>11</sup>.

May took a similar position to Cameron<sup>12</sup>. Her own ability to commence that withdrawal process was then constrained by the decision of the UK Supreme Court when it ruled that a notification of intention to withdraw could only be made by the Prime Minister if parliamentary approval had been given for such a

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<sup>5</sup> Statement by the Prime Minister, 24.6.2016 <https://www.gov.uk/government/speeches/eu-referendum-outcome-pm-statement-24-june-2016> (last accessed 9.9.2024)

<sup>6</sup> BBC, 14.9.2016 <https://www.bbc.co.uk/news/uk-politics-37360386> (last accessed 9.9.2024)

<sup>7</sup> Statement by the Prime Minister, 24.6.2016 <https://www.gov.uk/government/speeches/eu-referendum-outcome-pm-statement-24-june-2016> (last accessed 9.9.2024)

<sup>8</sup> See <https://www.gov.uk/government/history/past-prime-ministers/theresa-may> (last accessed 9.9.2024).

<sup>9</sup> Article 50 TEU

<sup>10</sup> Irish Times, 23.2.2016 <https://www.irishtimes.com/news/world/uk/david-cameron-no-second-referendum-if-uk-votes-for-brexit-1.2544465> (last accessed 9.9.2024)

<sup>11</sup> Politico, 27.6.2016 [www.politico.eu/article/david-cameron-we-wont-trigger-article-50-now](http://www.politico.eu/article/david-cameron-we-wont-trigger-article-50-now) (last accessed 9.9.2024)

<sup>12</sup> Guardian, 20.7.2016 [www.theguardian.com/politics/2016/jul/20/angela-merkel-backs-theresa-mays-plan-not-to-trigger-brexit-this-year](http://www.theguardian.com/politics/2016/jul/20/angela-merkel-backs-theresa-mays-plan-not-to-trigger-brexit-this-year) (last accessed, 9.9.2024)

step to be taken<sup>13</sup>. Such approval was finally given by the UK Parliament with the enactment of the European Union (Notification of Withdrawal) Act 2017. On 29 March 2017, May gave the formal notification to the EU of the UK's intention to withdraw, in the terms of Article 50 of the TEU<sup>14</sup>.

2.4 Shortly before that, May had made a speech at Lancaster House, on 17 January 2017, setting out the UK government's negotiating objectives for leaving the EU<sup>15</sup>. At the core of those objectives was a desire to pursue "a bold and ambitious free trade agreement with the European Union...which should allow for the freest possible trade in goods and services between Britain and the EU's member states". However, May also emphasised that her proposal would not mean UK membership of the single market, but instead "the greatest possible access to it through a new, comprehensive, bold and ambitious free trade agreement"<sup>16</sup>.

Those objectives were elaborated further by the UK government in a White Paper published shortly afterwards, in February 2017, setting out its objectives for that future relationship<sup>17</sup>. The scope of May's ambition can be revealed in its stated wishes "for the freest possible trade in services between the UK and EU Member States<sup>18</sup>"; "the freest possible trade in financial services<sup>19</sup>" ... with "strong cooperative oversight arrangements with the EU"; along with possible "coordinated energy trading arrangements help to ensure lower prices and improved security of supply for both the UK and EU Member States" and a close relation with Euratom<sup>20</sup>. The White Paper also left open the possibility<sup>21</sup> of the UK retaining a close relationship with a number of EU agencies.

2.5 However, matters were then complicated by May's decision to hold a general election in order to secure and, in her words, to "make a success of Brexit"<sup>22</sup>. That move backfired spectacularly when that election, on 8 June 2017, resulted in her losing her overall majority in the House of Commons, and her

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<sup>13</sup> R (on the application of Miller and another) v Secretary of State for Exiting the European Union, [2017] UKSC 5, [2016] EWHC 2768 (Admin)

<sup>14</sup> See Politico <https://www.politico.eu/article/theresa-mays-letter-triggering-article-50-in-full> (last accessed 25.11.2023).

<sup>15</sup> <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> (last accessed 7.2.2024)

<sup>16</sup> Ibid., section 8.

<sup>17</sup> Cm 9417, The United Kingdom's exit from and new partnership with the European Union, 2017 <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> (last accessed 27.11.2023)

<sup>18</sup> Ibid., 8.21

<sup>19</sup> Ibid., 8.25

<sup>20</sup> Ibid., 8.28 – 8.31

<sup>21</sup> Ibid., 8.42

<sup>22</sup> Guardian, 18.4.2017 <https://www.theguardian.com/politics/2017/apr/18/theresa-may-uk-general-election-8-june> (last accessed 9.9.2024)

government becoming dependent on a fragile agreement with the traditionally ‘Eurosceptic’ Democratic Unionist Party (DUP) of Northern Ireland<sup>23</sup>.

## The negotiations

2.6 Negotiations in earnest between the UK and the EU commenced in June 2017<sup>24</sup>. Progress was made in some areas<sup>25</sup>, and thereafter, in a major speech on 22 September 2017 in Florence<sup>26</sup>, May set out her government’s position. Saying the UK wanted “to be your strongest friend and partner”, she confirmed that her government’s position was that the UK would no longer be a member of its single market or its customs union, but also made it clear she wanted a close economic partnership with the EU, envisaging a high degree of continuing convergence between the rules and regulations of the UK and the EU after the UK’s withdrawal. She stated that the UK shared a commitment to high regulatory standards, and accepted that the new arrangements would need a strong and appropriate dispute resolution mechanism. In short, the new economic partnership between the UK and EU would be comprehensive and ambitious.

2.7 In that speech, May stated that the “negotiating objectives” set out in her Lancaster House speech earlier in the year still stood, but it can be noted that the specific references to trade in services which were made in that earlier speech were absent from it. Specific mention was made, however, of the need not to impose tariffs where none currently existed, and to avoid “friction at the border” for the trade in goods.

However, by contrast to the relatively limited reference to common security in her Lancaster House speech<sup>27</sup>, in her Florence speech May placed a major emphasis on the importance of establishing “a bold new strategic agreement that provides a comprehensive framework for future security, law enforcement and criminal justice co-operation: a treaty between the UK and the EU, [to] complement the extensive and mature bi-lateral relationships that we already have with European friends to promote our common security”. This would be “underpinned by our shared principles, including high standards of data protection and human rights”. It would be “unprecedented in its depth, in terms of the degree of

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<sup>23</sup> Confidence and Supply Agreement between the Conservative Party and the Democratic Unionist Party <https://www.gov.uk/government/publications/conservative-and-dup-agreement-and-uk-government-financial-support-for-northern-ireland/agreement-between-the-conservative-and-unionist-party-and-the-democratic-unionist-party-on-support-for-the-government-in-parliament> (last accessed 9.9.2024)

<sup>24</sup> BBC, 19.6.2017 <https://www.bbc.co.uk/news/uk-politics-40321271> (last accessed 9.9.2024)

<sup>25</sup> See House of Commons Library, 2017, p 3 (last accessed 9.9.2024).

<sup>26</sup> <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu> (last accessed 27.11.2023)

<sup>27</sup> See para. 2.4.

engagement that we would aim to deliver. It is our ambition to work as closely as possible together with the EU, protecting our people, promoting our values and ensuring the future security of our continent”.

2.8 May’s speech received a generally positive response from the EU<sup>28</sup>. Negotiations intensified during the rest of 2017, and thereafter made sufficient progress for the two lead negotiators on both sides to be able to announce on 19 March 2018 that agreement had been reached in principle on most matters, although some important issues still remained to be dealt with (of which the post-Brexit arrangements for Northern Ireland were the most intractable)<sup>29</sup>.

## **The EU-UK agreements**

2.9 After protracted negotiations, May’s government eventually reached a draft agreement with the EU on the terms of a withdrawal agreement, and also an accompanying “Political Declaration” setting out the “framework for the future relationship” between the two parties (as envisaged in Article 50 of the TEU) at the end of 2018. The terms of those agreements were published on 14 November 2018, and agreed by EU leaders at a European Council meeting on 25 November 2018<sup>30</sup>. However, May failed on three occasions<sup>31</sup> to obtain the support of the House of Commons for the draft withdrawal agreement. Finally, in the face of her continued inability to secure a majority within the House of Commons for any agreement on UK withdrawal from the EU, and the future relationship between the UK and EU, May resigned, and was succeeded as Prime Minister by Boris Johnson<sup>32</sup>.

Following his election, further negotiations were held between the EU and the UK, and limited changes were made to the draft agreement. The only significant change was to the terms of the Protocol on Ireland/Northern Ireland in the withdrawal agreement (“the Protocol”), with the inclusion of a requirement for ‘democratic consent’ to be obtained from the Northern Ireland Assembly every so often to the continued application of articles 5 to 10 of that protocol.<sup>33</sup> However, the government, although now under the leadership of Johnson, was still unable to muster sufficient support from MPs to pass the

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<sup>28</sup> Independent, 22.9.2017 <https://www.independent.co.uk/news/uk/politics/brexit-talks-michel-barnier-theresa-may-florence-speech-constructive-spirit-uk-leave-eu-a7961861.html> (last accessed 9.9.24)

<sup>29</sup> Euractiv, 19.3.2018 <https://www.euractiv.com/section/uk-europe/news/eu-uk-make-major-breakthrough-in-brexit-talksEU> (last accessed 19.3.2018)

<sup>30</sup> Withdrawal Agreement and Political Declaration <https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration> (last accessed 9.9.2024)

<sup>31</sup> On 15.1.2019, 12.3.2019, and 29.3.2019 (on the first two occasions the proposed Political Declaration was also put to the vote in the Commons and defeated. It was not put to the vote on 29.3.2019). See House of Commons Library, 2019, p. 8.

<sup>32</sup> See House of Commons Library, 2019, pp. 8-9.

<sup>33</sup> See House of Commons Library, 2019, for the terms of the revised Withdrawal Agreement, including the changes to the Protocol.

revised agreement. After protracted procedure in the House of Commons, Johnson sought parliamentary approval for an early general election<sup>34</sup>, in order to “Get Brexit Done”<sup>35</sup>.

2.10 In the ensuing election, held on 12 December 2019, the Conservative Party succeeded in securing an overall majority of 80<sup>36</sup>. The government then proceeded to put in place the necessary legislation to implement the agreement on the UK’s departure which it had made with the EU, namely the Withdrawal Agreement<sup>37</sup>(“WA”), and the Political Declaration<sup>38</sup>. The UK finally left the EU on 31 January 2020.

2.11 The WA, and the Political Declaration, did not, however, bring about a comprehensive settlement of all the issues concerning the future relationship between the UK and the EU. The WA only covered those issues which the parties considered necessary to ensure a smooth withdrawal of the UK. The principal matters it dealt with included “citizens’ rights”, that is the rights after the UK’s withdrawal from the EU of EU/EEA/Swiss citizens residing in the UK at that time, and of UK citizens residing in the EU/EEA/Switzerland<sup>39</sup>; some “separation issues”, covering various matters<sup>40</sup> including the rules for goods already on the market, protection of intellectual property rights, data protection and information exchanged before the end of a transition period; winding down ongoing police and judicial protection; and the Protocol.

2.12 Furthermore, in two important respects the WA merely put off for another day a decision to be made by the parties. First, although the Protocol purported to be a “legally-operative solution that avoids a hard border on the island of Ireland, protects the all-island economy and the Good Friday (Belfast) Agreement in all its dimensions, and safeguards the integrity of the EU Single Market<sup>41</sup>”, it also contained within it provisions described above which could result in the termination of certain articles of that protocol<sup>42</sup>. In any event, the arrangements for Northern Ireland were then the subject to further change, as set out below<sup>43</sup>. Secondly, the agreement provided for a Transition Period (from 1 February to 31 December 2020), during which the EU was to treat the United Kingdom as if it were a Member State,

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<sup>34</sup> Early Parliamentary General Election Act 2019

<sup>35</sup> See <https://www.bbc.co.uk/news/uk-50222315> (last accessed 12.9.2024).

<sup>36</sup> See <https://www.bbc.com/news/election-2019-50776671> (last accessed 12.9.2024).

<sup>37</sup> Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community

<sup>38</sup> Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom

<sup>39</sup> Part II, Withdrawal Agreement

<sup>40</sup> Part III, *ibid.*

<sup>41</sup> Introductory notes on Commission website accompanying Withdrawal Agreement, see

[https://commission.europa.eu/strategy-and-policy/relations-non-eu-countries/relations-united-kingdom/eu-uk-withdrawal-agreement\\_en](https://commission.europa.eu/strategy-and-policy/relations-non-eu-countries/relations-united-kingdom/eu-uk-withdrawal-agreement_en) (last accessed 28.11.2023)

<sup>42</sup> See para. 2.9.

<sup>43</sup> See para. 3.6 (ix).



with the exception of participation in the EU institutions and governance structures. Many aspects of the UK's future relationship with the EU therefore remained unresolved on 31 January 2020. During that period, the EU and the United Kingdom therefore negotiated an agreement on future trade arrangements and certain other matters, which resulted in the EU-UK Trade and Cooperation Agreement ("the TCA") being agreed between the UK and the EU on 24 December 2020, which came into effect a week later, on 1 January 2021, after the end of the Transition Period.<sup>44</sup>

2.13 The TCA covered a wide range of matters, and did indeed set out comprehensive and definitive arrangements for many important aspects of the UK's future relationship with the EU. It included a number of key features, providing, amongst others, for<sup>45</sup>:

- No tariffs or quotas on trade in goods between the two parties;
- A "level playing field" between the UK and the EU, both of which had the right to take counter-measures including imposition of tariffs, subject to arbitration, where they believed divergences were distorting trade;
- Both parties were required to have an effective system of subsidy control, with either party being able to impose remedial measures if a dispute is not resolved by consultation;
- The transfer of 25% of the EU fisheries quota (in UK waters) to be transferred to the UK over a period of five years, with annual discussions on "fisheries opportunities" thereafter;
- The establishment of a security partnership between the parties would provide for data sharing, along with policing and judicial co-operation, but with reduced UK access to EU data;
- The UK would be able to continue to participate in some EU programmes (dependent on the UK making a financial contribution to the EU budget for the relevant programme<sup>46</sup>).

2.14 The TCA also made arrangements for the governance of the agreement, including the establishment of a EU-UK Partnership Council<sup>47</sup>. It made provision for the possible establishment of a Parliamentary Partnership Assembly consisting of Members of the European Parliament and of Members of the Parliament of the United Kingdom<sup>48</sup>, as a forum to exchange views on the partnership, along with domestic advisory groups representing civil society, and a "Civil Society Forum"<sup>49</sup>. It also

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<sup>44</sup> Because of the late point at which agreement was reached, the agreement only came into provisional effect on that date, and only came into full effect on 1 May 2021 after it was approved by the European Parliament. For details of the agreement process, see House of Commons Library, 2024, chapter 1.

<sup>45</sup> *Ibid.*, chapter 2.

<sup>46</sup> *Ibid.*, p. 30

<sup>47</sup> Article 2(1), TCA

<sup>48</sup> Article 11 TCA

<sup>49</sup> Articles 12-14 TCA

contained dispute settlement mechanisms (which notably do not give any role to the CJEU). The provisions of the TCA are considered in more detail below<sup>50</sup>.

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<sup>50</sup> Chapter 5

### **Chapter 3. Pressure from within the UK for reform of the post-Brexit arrangements**

#### **The UK experience of the post-Brexit arrangements**

3.1 The TCA put in place a wide ranging package of measures which covered many areas of the pre-Brexit relationship between the EU and the UK. It did not, however, introduce measures which would allow relatively unrestricted trade in all areas between the UK and the EU post-Brexit. That is not surprising, given that as a result of Brexit, the UK ceased to be in an arrangement which provided for the free movement of goods, capital, services, and people between the UK and the 27 member states of the EU. Furthermore, it can be noted that the TCA left many details of the new EU-UK trading relationship, to the extent that they were provided for by the TCA, to be further determined by the Partnership Council, or by numerous and varied joint committees and working groups set under the TCA<sup>51</sup>. Mariani and Sacerdoti<sup>52</sup> suggest that the TCA should be considered as “work in progress”, “the start of a process”.

3.2 The final arrangements between the UK and EU, therefore, whilst wide-ranging, did not consist of a range of measures which comprehensively substituted for those which had existed between the parties prior to the UK’s departure from the EU. It can also be noted that those arrangements were a long way from the ambitions that the UK government had set out in its initial negotiating position, and in the speeches made by May in 2017 at Lancaster House and in Florence<sup>53</sup>. Indeed, the final arrangements for UK-EU relationships set out in the TCA even differed in some important respects from those which had been envisioned in the (non-binding) Political Declaration. For example, the TCA does not contain the provisions on mobility, foreign and security policy, or UK participation in EU programmes on youth, culture and education (such as Erasmus+) in the expansive terms as were envisaged in the Political Declaration<sup>54</sup>.

Still less is there any replication in the TCA of May’s vision, set out in her Florence speech, of the UK and EU agreeing a treaty which would establish “a bold new strategic agreement that provides a comprehensive framework for future security, law enforcement and criminal justice co-operation<sup>55</sup>”. The ‘Political Declaration’, even in the amended form in which it was eventually agreed between the Johnson

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<sup>51</sup> See paras. 5.17-5.18.

<sup>52</sup> Mariani and Sacerdoti, 2021, p. 96

<sup>53</sup> See paras. 2.4-2.7

<sup>54</sup> See Reland and Wachowiak, 2023, p. 23

<sup>55</sup> Para 2.7

UK government and the EU did provide, in the field of “Foreign Policy, Security and Defence”<sup>56</sup> for consultations, possible UK involvement in informal EU ministerial meetings, and close cooperation in third countries, as well as in international organisations and fora, notably the United Nations.

By contrast, the TCA only makes provision for cooperation in a limited number of areas concerning defence and security matters. It encourages the establishment of regular dialogues on countering proliferation of weapons of mass destruction (Article 765), small arms and light weapons and other conventional weapons (Article 766), the most serious crimes of concern to the international community (Article 767), cyber issues (Articles 703), and counter-terrorism (Article 768).<sup>57</sup> Notably also, as Phinnemore observes, the TCA contains no provision for “high-level summit-type meetings between the UK and EU”, in contrast to the 2018 suggestion from the May government that there should be ‘dialogue between the Parties at summit, ministerial and technical level, as well as at parliamentary level’.<sup>58</sup>

3.3 One of the inevitable consequences of the terms of the agreement which was eventually reached on the UK’s future relationship with the EU was that UK businesses trading with the EU would face new compliance burdens, including the need to provide customs declarations, safety and security certificates, evidence of origin of goods and or inputs into the manufacture of goods, and export health certificates for certain food and plant origin products, as well as to comply with import VAT requirements, and requirements under the EU’s REACH system for chemicals.<sup>59</sup> There is now considerable evidence of the difficulties caused by these new burdens.

3.4 In 2023, the British Chambers of Commerce reported that almost 60% of exporters to the EU said trade with the EU was more difficult than it had been a year previously<sup>60</sup>.

Make UK, a leading manufacturers’ organisation reported in December 2023 that 90% of manufacturers were still reporting challenges when trading with their EU partners, with customs paperwork and delays being the biggest barrier for 64% of companies. Demonstrating rules of origin of goods was still difficult

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<sup>56</sup> Paras. 94-96, Political Declaration

[https://assets.publishing.service.gov.uk/media/5daaaba040f0b6598f806460/Political\\_Declaration\\_setting\\_out\\_the\\_framework\\_for\\_the\\_future\\_relationship\\_between\\_the\\_European\\_Union\\_and\\_the\\_United\\_Kingdom.pdf](https://assets.publishing.service.gov.uk/media/5daaaba040f0b6598f806460/Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom.pdf) (last accessed 9.9.2024)

<sup>57</sup> See UK in a Changing Europe, 2024 (1), p 9.

<sup>58</sup> Phinnemore, 2023, p. 1496

<sup>59</sup> See British Chambers of Commerce, 2023, p. 4; Dhingra et al, 2024, p. 60; and

<https://www.salmonscotland.co.uk/news/brexit-costs-scotland-up-to-100-million-a-year-in-lost-salmon-exports> (last accessed 5.4.2024)

<sup>60</sup> British Chambers of Commerce, 2023, p. 32

for 36% of businesses. They also noted that almost half of manufacturers had problems when recruiting from the EU (44%) (at a time when they were experiencing serious skill shortages at home).<sup>61</sup>

Another report found that exports of clothing and footwear sold to EU countries fell from £7.4bn in 2019 to £2.7bn in 2023, contributing to 18% decline in sales of all non-food goods exports to countries covered by the EU single market. Furthermore, some producers who previously made apparel in the UK chose to move manufacturing to an EU country, to avoid additional regulatory requirements. In addition, trade frictions caused by “Brexit-related complexities” were curtailing the substantial international on-line sales opportunities for UK-based brands and retailers in this sector<sup>62</sup>.

Concerns about the impact of Brexit on mobility in other sectors have also been raised, such as its effect on musicians, young people and professionals<sup>63</sup>. The higher education sector has concerns over matters like Erasmus, and new restrictions on immigration which now apply to EU citizens in a way which they did not previously<sup>64</sup>.

3.5 In fact, as a recent study points out, “the UK has become *more* reliant on the EU as a trade partner post-Brexit. In 2023, UK trade with the EU, as a proportion of total trade in volume terms, reached its highest level since 2008. However, this is not a result of a marked increase in UK-EU trade, but rather a drop-off in the UK’s trade with the rest of the world, which has suffered from de-integration from EU supply chains<sup>65</sup>”.

Overall, that study concluded that the UK’s post- Brexit economic performance “can best be categorised as stagnant, when compared to its historical performance, and poor, when compared to its European counterparts.....There is also a consensus that low levels of investment, both private and public, have held back productivity growth. The relatively low level of business investment in the UK pre-dated Brexit, but both aggregate data and survey evidence strongly suggest that Brexit is at least in part responsible for the particularly poor performance since 2016<sup>66</sup>”.

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<sup>61</sup> Make UK, 2023. pp. 7-9

<sup>62</sup> Guardian, 5.6.2024 <https://www.theguardian.com/business/article/2024/jun/05/uk-clothing-sales-eu-crash-brexit-red-tape-deters-exporters> (last accessed 9.9.2024)

<sup>63</sup> Guardian, 29.4.2023 <https://www.theguardian.com/politics/2023/apr/29/lords-committee-urges-end-to-brexit-barriers-for-musicians-and-young-people> (last accessed 10.9.2024)

<sup>64</sup> Guardian, 27.1.2023 <https://www.theguardian.com/education/2023/jan/27/number-eu-students-enrolling-uk-universities-down-half-since-brexit> (last accessed 10.9.2024)

<sup>65</sup> UK in a Changing Europe, 2024 (2), p.17

<sup>66</sup> Ibid., p. 19.

Generally, the weight of expert opinion on the effect of Brexit (or at least the type of post-Brexit arrangements which were put in place between the UK and the EU) is that it has had a not insignificant negative impact on the general trading and economic performance of the UK, and that such an impact is likely to be long-lasting<sup>67</sup>.

3.6 When assessing the consequences of Brexit, it should also be borne in mind that a number of significant post-Brexit compliance requirements did not come into effect immediately after the end of the Transition Period. Some of those have now been commenced (sometimes only partially), but many are still planned to come into effect a future date (which may itself be further delayed). The full effects of many consequences of new post-Brexit trading arrangements have still not therefore been experienced. These pending changes include the following<sup>68</sup>:

(i) Introduction of the UK's Border Target Operating Model (BTOM), which is now due to be implemented in phases during 2024. These checks and controls will involve additional costs for businesses, either for importers in Great Britain or for their suppliers in the EU<sup>69</sup>. The UK government had unilaterally decided to delay earlier implementation of such border checks<sup>70</sup>. In the first phase, commencing at the end of January 2024, the requirement was introduced for export health certificates (EHCs) for medium risk EU plant and animal origin products entering Great Britain. The second phase, originally due to commence at the end of April 2024, was to impose documentary, physical and identity checks on those goods at the GB border. However, shortly before that date, it announced that the most extensive checks would be restricted to goods considered to present a high risk, with others initially having fewer, or no, checks imposed<sup>71</sup>. From 31 October *all* goods moving from the EU into GB were expected to require 'safety and security declarations'. However, following industry pressure, the UK government decided to further delay of import controls on fresh fruit and vegetables until July 2025<sup>72</sup>.

(ii) An 'adjustment period' for fisheries which runs until 30 June 2026<sup>73</sup>. From then, terms of

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<sup>67</sup> See [www.bloomberg.com/opinion/articles/2024-03-19/brexit-s-lasting-economic-and-financial-damage-looks-inescapable](https://www.bloomberg.com/opinion/articles/2024-03-19/brexit-s-lasting-economic-and-financial-damage-looks-inescapable) (last accessed 5.4.2024); UK in a Changing Europe, 2024 (2), p 20; and Novy et al (2024), Executive Summary.

<sup>68</sup> See UK in a Changing Europe, 2024 (2), pp. 52 -55.

<sup>69</sup> Ibid, p.5 See also [Brexit costs up to £100 million-a-year in lost salmon exports \(salmonscotland.co.uk\)](https://salmonscotland.co.uk) (last accessed 5.4.2024)

<sup>70</sup> See [Final Border Target Operating Model.pdf \(publishing.service.gov.uk\)](https://publishing.service.gov.uk), Section 1 (accessed 7.2.2024)

<sup>71</sup> Financial Times, 18.4.2024 <https://on.ft.com/47uhKuQ> (last accessed 18.9.2024)

<sup>72</sup> See <https://www.politico.eu/article/uk-brexit-border-checks-delay-eu-imports-food-prices-food-safety-fruits-vegetables> (last accessed 10.9.2024).

<sup>73</sup> Article 1, Annex 38 TCA

access and quota shares will be decided through annual negotiations between the UK and EU.<sup>74</sup>

(iii) The provisions in the TCA on energy cooperation expire on 30 June 2026<sup>75</sup>. The UK and EU can agree to renew them for a further 9 months, and thereafter on a yearly basis.<sup>76</sup> Many of those provisions can also be amended through agreement through the Partnership Council process in the TCA.

(iv) The TCA's rules of origin for electric vehicles will change from the start of 2027. They were originally due to have come into effect from the start of 2024 but were delayed as a result of concerns from the industry, which may arise again prior to the new 2027 deadline<sup>77</sup>.

(v) The EU's 'adequacy' decision – acknowledging that the UK's personal data protection regime provides an equivalent level of protection to the EU's own 'GDPR' – expires on 30 June 2025. The EU will have the option to decide whether that decision should be renewed<sup>78</sup>.

(vi) The EU 'equivalence' decision for UK clearing houses expires on 30 June 2025. That decision grants UK-based 'clearing houses' – which act as intermediaries in derivatives trades to reduce risk for traders – simplified access to the EU market<sup>79</sup>.

(vii) The UK government's temporary 'equivalence' decision for EEA-based funds expires at the end of 2026, by which point funds must have registered under the UK's 'Overseas Funds Regime' (OFR) in order to maintain simplified access to the UK market<sup>80</sup>.

(It should be noted that both the above 'equivalence' decisions are ones which fall outside the framework of the TCA, and are taken unilaterally by the respective parties.<sup>81</sup> However, such decisions, if they were seen to be damaging to one of other sides' interests, might well have an impact on wider negotiations on the parties' relationships).

(viii) The EU's Carbon Border Adjustment Mechanism (CBAM) was implemented in October 2023, with a transitional phase running until the end of 2025. For its part, the UK is planning to introduce its own CBAM from January 2027. If the two parties establish incompatible CBAM regimes,

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<sup>74</sup> Articles 498-501 TCA

<sup>75</sup> In Title VIII TCA

<sup>76</sup> Article 331 TCA

<sup>77</sup> See UK in a Changing Europe, 2024 (2), p. 55.

<sup>78</sup> See *ibid.*, p. 58.

<sup>79</sup> See *ibid.*, p. 58.

<sup>80</sup> See *ibid.* p. 59.

<sup>81</sup> See *ibid.*, pp. 14 & 59.

difficulties will be caused for both sides, as the UK and EU's energy markets are highly interconnected. The consequence could be significant increases in the price of energy for consumers in both the UK and the EU, and also to make cooperation on other energy projects less financially viable. One solution would be for the UK and the EU to link their emissions trading schemes (a possibility which is foreseen in the TCA). It can also be noted that the Labour party has also expressed ambitions to tie energy and climate issues into a wider, new security pact with the EU which could ultimately supersede or amend Title VIII<sup>82</sup>.

(ix) There are also a number of potential points of difficulty arising from the special arrangements for Northern Ireland<sup>83</sup>, which might result in further divergence between the UK and the EU. First, a product labelling scheme for trade from Great Britain to Northern Ireland is to be implemented between October 2024 and July 2025. There is business pressure for a delay to that scheme<sup>84</sup>. Second, the outcome of a 'democratic consent' vote at the Northern Ireland Assembly which has to be held in the last two months of 2024 may well, given the hostility within the unionist community in Northern Ireland to the Protocol, lead to the termination of key articles thereof. That will require the UK and the EU to consider (through the 'Joint Committee') what 'necessary measures' need to be taken in response<sup>85</sup>. That could lead to a review of the whole Protocol. Ultimately, if the two sides could not agree on what should be done, under the dispute resolution provisions of the WA, one or other could suspend any provision of that or any other agreement between them<sup>86</sup> (although the consequences of such a step might be so dramatic that neither would take such a 'nuclear option').

## **Pressures for divergence**

3.7 The decisions that are eventually taken with regard to such matters – sometimes by both parties jointly, sometimes by each side unilaterally, will be significant factors in deciding whether or not the two sides will diverge further in their trading relationships or remain closely aligned. To maintain alignment will normally require positive actions by the parties. However, the TCA and WA create a range of deadlines where the terms of cooperation will either change or expire, unless the UK and EU decide otherwise. If the parties do not so agree, then significant divergence between the UK and EU regulatory frameworks will arise. Furthermore, the areas of possible divergence described above do not

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<sup>82</sup> See UK in a Changing Europe, 2024 (2), p. 59-60.

<sup>83</sup> See Joel Reland [Labour is on a European honeymoon, but tougher tests await - UK in a changing Europe \(ukandeu.ac.uk\)](https://ukandeu.ac.uk) 18 July 2024, and also para. 3.13 for a summary of the Windsor Framework

<sup>84</sup> BBC, 24.8.2024 <https://www.bbc.co.uk/news/articles/ce9zrzyr2y9o> (last accessed 10.9.2024)

<sup>85</sup> Article 18 Protocol

<sup>86</sup> Article 178 WA



amount to the possible full extent of future divergence between the parties. As the British Chambers of Commerce has pointed out<sup>87</sup>, the UK's post-Brexit trading relationship with the EU is not static, but will continually evolve as new policies and regulations are introduced by both sides.

To date, the extent of the divergence between the UK and the EU's regulatory schemes has been relatively small, because the UK has chosen in many significant areas not to use its freedom to introduce divergent regulations and procedures, or to delay their introduction. These include the decision to delay the mandatory use of the 'UKCA' mark<sup>88</sup>, and the implementation of a new UK REACH regime for chemicals<sup>89</sup>. Another example is the health sector where recent research has shown that, "in practice, the UK has not actively diverged from the EU in its regulation of health-related products and services" although there "has been a degree of passive divergence of the UK from the EU because of the EU's continued efforts to improve the regulatory environment for health-related research" and some "efforts to diverge around standards"<sup>90</sup>. In addition, the EU agreed with the UK to delay the introduction of new "rules of origin" rules for electric vehicles<sup>91</sup>.

However, the forces which will tend to bring about divergence are likely to increase over time. There are areas where the EU is actively regulating but the UK is not (such as in restrictions on the use of chemicals, and bans on products made with forced labour or linked to deforestation)<sup>92</sup>. If the UK does not regulate to match EU regulation, or UK companies do not decide unilaterally to meet new EU regulations to ensure access to EU markets, then UK businesses will lose export opportunities.

3.8 Mention has already been made of the requirement for a 'democratic consent' vote in Northern Ireland which could potentially lead to the renegotiation of the agreements between the two sides, and the consequence of such a negotiation might well lead to further divergence between the UK as a whole and the EU. There are other aspects of the Protocol which could also lead to further divergence between the UK as a whole and the EU. The protocol lists a large number of EU laws which will apply to Northern Ireland (in order to allow it to remain, in effect, within the EU's customs unions and in the single market for goods. However, if the EU passes new legislation which is 'within the scope of the Protocol', but is not an amendment or replacement of one of those listed in the protocol, it will not automatically apply to Northern Ireland, and the UK and EU must, under the terms of Article 13(4) of the Protocol, hold 'an

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<sup>87</sup> British Chambers of Commerce, 2023, p. 5

<sup>88</sup> See para. 3.12.

<sup>89</sup> See <https://www.hse.gov.uk/reach/duin.htm> (last accessed 18.9.2024)

<sup>90</sup> Fahy and Dayan, 2024

<sup>91</sup> See para. 3.6 (iv).

<sup>92</sup> See UK in a Changing Europe, 2024 (2), p. 28.

exchange of views’ on how to deal with the issue. If they cannot agree, then the EU can take ‘appropriate remedial measures’<sup>93</sup>.

Furthermore, although the Protocol in its original form provided that amendments or replacements of the EU legislation listed therein would apply automatically to Northern Ireland, the Windsor Framework introduced the mechanism of the “Stormont Brake”<sup>94</sup>. Under that, a certain number of members of the Northern Ireland Assembly may, in certain circumstances, seek to stop the application of those amendments or replacement. If that happens, the UK government can block the adoption of the relevant new EU legislation. The EU can then seek explanations from the UK. Thereafter, those same provisions of Article 13(4) require ‘an exchange of views’, with the EU having the ultimate right thereafter to ‘take remedial action’. Clearly the outcome of any dispute over the applicability of such new EU legislation has the potential to result in further divergence between the two sides.

3.9 Along with the possible introduction of new regulatory arrangements and policies which will increase the divergence between the two sides, it can also be noted that the European Commission has called for more assertive enforcement of trade and sustainability chapters in its free trade agreements with third countries (which is now the UK’s status vis-à-vis the EU). Other initiatives it has taken include a new international procurement instrument and more regulation of foreign subsidies which it considered distorted the EU’s internal market<sup>95</sup>. In this regard, it may be of potential significance that the European Parliament, in a recent resolution on the working of the TCA, made a call on the European Commission to “to continue to closely monitor regulatory divergences in the UK, which could pose a risk of non-compliance with the TCA, notably in areas relevant to the level playing field such as subsidy control, taxation, labour and social standards, the environment and the climate.” It echoed the European Commission’s “concerns about stated plans to introduce so-called free ports” and called for “increased cooperation between the EU and the UK on subsidies, pursuant to Article 366 of the TCA”<sup>96</sup>.

## **New EU-UK arrangements since the TCA**

3.10 Given the number of areas in which previous, sometimes long-standing, relationships between the UK and the EU were not replicated in the sets of agreements entered into between the UK and EU in 2019 and 2020 (or replaced by substitutes) it is not surprising that the period since the end of the

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<sup>93</sup> Article 13(4) Protocol.

<sup>94</sup> Article 13(3a) Protocol.

<sup>95</sup> See Harbinson, 2022, p. 3.

<sup>96</sup> At paras. 51-52 of that resolution. See [https://www.europarl.europa.eu/doceo/document/A-9-2023-0331\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-9-2023-0331_EN.html) (last accessed 12.9.2024).

Transition period on 31 December 2020 has already seen a number of other measures being adopted which covered areas of the EU-UK relationship which had not been finalised at that date.

3.11 One such measure was the agreement reached on 7 September 2023,<sup>97</sup> following lengthy negotiations, on the terms on which the UK would become an associate of the EU's Horizon programme, which arrangement had been agreed in principle in the TCA. It can be noted that it was originally envisaged that such participation was to have commenced on 1 January 2021. This agreement also allowed the UK to become an associate to the Copernicus component of the EU's Space Programme and use the services of EU Space Surveillance and Tracking. (The UK has chosen, however, not to take up the opportunity provided for by the TCA to become an associate to the Euratom Research and Training Programme.<sup>98</sup> It has also rejected an invitation to join the ITER nuclear fusion programme).<sup>99</sup>

3.12 A number of decisions have been taken unilaterally by the UK to delay implementation of separate UK regulations following Brexit. The UK has decided to permit the indefinite continuation of the use of CE marking by UK businesses.<sup>100</sup> Many business organisations had expressed concern that the planned replacement of the EU conformity assessment system by the UK's own UKCA system (as the UK government had planned to do) would lead to additional cost and complexity. It can be noted that in the British Chambers of Commerce's International Trade Survey in October 2021, almost two thirds of respondents for whom certification marking was applicable, said their preference was to permanently retain the EU's CE certification marking system<sup>101</sup>. The use of the EU's system means, of course, that the UK has accepted, for an indefinite period, that businesses in the UK will be able to make use of a system which is entirely within the EU's control and in which the UK government now has no input as a result of Brexit. The British Chambers of Commerce argue that this decision by the UK government "makes a powerful case for a mutual recognition agreement on conformity assessment to be reached by the UK and EU<sup>102</sup>".

As noted above, the implementation of UK REACH measures has been delayed, and the EU and UK jointly agreed to delay implementation of new rules of origin for electric vehicles<sup>103</sup>.

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<sup>97</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_4374](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4374) (last accessed 5.12.2023)

<sup>98</sup> <https://www.gov.uk/government/news/government-announces-up-to-650-million-for-uk-alternatives-to-euratom-rt> (last accessed 12.3.2024)

<sup>99</sup> <https://www.newscientist.com/article/2419671-uk-spurns-european-invitation-to-join-iter-nuclear-fusion-project> (last accessed 12.3.2024)

<sup>100</sup> <https://www.gov.uk/government/news/uk-government-announces-extension-of-ce-mark-recognition-for-businesses> (last accessed 6.12.2023)

<sup>101</sup> See British Chambers of Commerce (2023), 2023. p. 15.

<sup>102</sup> Ibid., p.16

<sup>103</sup> See para 3.7.

3.13 In addition to those measures which supplemented the measures contained within the TCA, the UK and the EU reached an agreement on certain aspects of the Protocol which the UK, at least, represented as being a substantial change to the agreement reached in the 2019-2020 negotiations. This was the “Windsor framework<sup>104</sup>”, which sought to meet concerns raised by Unionist politicians, along with some MPs within the governing Conservative party, about the terms of that protocol. Its provisions included:

- A new system of checks on goods moving from Great Britain to Northern Ireland
- Disapplication in Northern Ireland of certain EU limits on VAT rates
- Medicines placed on NI market to be regulated by the UK, not the EU
- The “Stormont brake” (described above).<sup>105</sup>

In January 2024, the UK government published a paper<sup>106</sup> announcing further measures designed to “safeguard” the operation of the internal market across the entire UK including Northern Ireland. However, the general view of commentators (and the EU Commission) was that the measures were consistent with the terms of the Windsor Framework.<sup>107</sup>

3.14 From the preceding paragraphs, it can be seen how the arrangements agreed between the UK and the EU in 2019 and 2020 did not mean the completion of the task of defining a new relationship between the UK and the EU. Even in the period of less than three years since the UK’s departure, the UK has in one case (the “Windsor Framework”) sought, and obtained, changes in that relationship; in others it has sought and obtained agreement from the EU for relationships which should have terminated at the end of the Transition period to continue, at the very least for an extended period (rules of origin for electric vehicles); and in yet others it has taken unilateral measures such as those concerning the use of the CE mark, where it has voluntarily aligned itself with EU’s regulations.

Moreover, as well as problems already identified, which are summarised above,<sup>108</sup> there are a number of other areas where final decisions on future UK-EU relationships have not been taken, and where, depending on those eventual decisions, there is considerable potential for further obstructions to be placed

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<sup>104</sup> See House of Commons Library, 2023.

<sup>105</sup> See para. 3.8.

<sup>106</sup> Safeguarding the Union, CP 1021

<sup>107</sup> See Peers, 2023.

<sup>108</sup> See para. 3.6.

in the way of future trade between the UK and EU.<sup>109</sup> A particularly significant one could be issues arising from the definitive decisions that will eventually have to be made on the Carbon Border Adjustment Mechanism, and the related issue of future linkage between the UK and EU Emissions Trading Schemes<sup>110</sup>. Another area is food, where the UK has, since Brexit, introduced rules allowing a much higher level of pesticide residue than the EU regulations permit<sup>111</sup>. The EU's "Farm to Fork" strategy will ban the import of foods grown with pesticides or environmental damaging production practices. Clearly, there is potential for significant divergence here between the UK and EU regulatory schemes.

In some of these areas, the UK is likely to be faced with a choice of trying to enter into new agreements with the EU, or introducing of its own accord what would in effect be "regulatory alignment" with the EU; as if it did not, it would face significant barriers not just to future trade and other business with the EU, but even to existing trade and business.

Some of the existing transitional arrangements entered into since the TCA, such as those for electric vehicles, will also of course require either continuation, or replacement by new UK-EU arrangements, to avoid the UK being excluded from the European market at some future date.

### **Pressures for the reduction of EU-UK trade barriers**

3.15 Furthermore, there is considerable pressure within the UK for further changes to the relationship which the agreements reached in 2019 and 2020 were meant to have put in final form. These calls cover the whole gamut of possibilities, ranging from a major reshaping of the UK's new relationship with the EU, to changes of a more limited nature, affecting particular sectors of the economy or society.

A large number of proposals have been made to reduce the barriers to trade that have arisen as a result of Brexit. There is a considerable degree of consensus from business organisations and commentators on the changes that would be desirable. Amongst the areas of potential change for which appear to have particularly wide support are the following:

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<sup>109</sup> Foster, 2023, pp 145 - 150

<sup>110</sup> See para. 3.6(viii).

<sup>111</sup> See [https://food.ec.europa.eu/plants/pesticides/sustainable-use-pesticides/farm-fork-targets-progress\\_en](https://food.ec.europa.eu/plants/pesticides/sustainable-use-pesticides/farm-fork-targets-progress_en); and Guardian, 19.9.2024 <https://www.theguardian.com/environment/2024/sep/19/revealed-far-higher-pesticide-residues-allowed-on-food-since-brexit> (both last accessed 20.9.2024)

- (a) Minimising divergence of UK's regulatory regime from that of the EU<sup>112</sup>;
- (b) Simplifying paperwork, customs duties, and border checks between the UK and the EU<sup>113</sup> ;
- (c) Increasing mobility between the UK and the EU<sup>114</sup>;
- (d) Mutual recognition of professional qualifications<sup>115</sup>;
- (e) Arrangements for recognition of conformity assessment<sup>116</sup>;
- (f) Links between the Emissions Trading Schemes of the UK and the EU<sup>117</sup>;
- (g) Negotiation of a veterinary and plant product agreement with the EU<sup>118</sup>;
- (h) Liberalising and extending trade in services<sup>119</sup>;
- (i) VAT co-operation<sup>120</sup>.

3.16 Whether the EU would be willing to agree to entertain such a long list of proposals for closer relationships with the UK, or whether a future UK government would wish to see them adopted, and whether both sides would be able to successfully negotiate such new relationships, are of course different matters, which are the subject of further consideration in this thesis.

3.17 Furthermore, there are a number of elements of the existing UK-EU arrangements put in place as a consequence of Brexit which, over the next few years, will likely provide a further impetus to reconsideration of those arrangements. These include matters on which no definitive long-term decisions have been made, which are discussed earlier in this chapter. However, in addition, there is the provision in Article 776 of the TCA requiring its review on the fifth anniversary of it coming into force on 1 May 2021, which will therefore require the EU and UK to at least consider whether any review is required, even though there are differing views as to how comprehensive such a review might be. The implications of Article 776 are considered later<sup>121</sup>.

Of course, the question of whether the review of the TCA, or any other negotiations between the UK and the EU, could lead to changes in the UK-EU relationships is only relevant if there is a political intention

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<sup>112</sup> See British Chambers of Commerce, 2023, p. 40-42; Bhalotia et al, 2023, pp. 38-41; Henig, 2023, p.13; Foster, 2023, p. 150.

<sup>113</sup> See British Chambers of Commerce, 2023, p. 40-42; Make UK, 2023, pp. 17-19; Foster, 2023, p. 166-167.

<sup>114</sup> See British Chambers of Commerce, 2023, p. 40-42; Make UK, 2023, pp. 17-19; Henig, 2023, p. 8; Foster, 2023, p. 159-161.

<sup>115</sup> See British Chambers of Commerce, 2023, p. 40-42; Bhalotia et al, 2023, p. 14; Make UK, 2023, pp. 17-19; Foster, 2023, p. 165.

<sup>116</sup> See British Chambers of Commerce, 2023, p. 40-42; Make UK, 2023, pp 17-19; Foster, 2023, p. 163-164.

<sup>117</sup> See British Chambers of Commerce, 2023, p. 40-42; Make UK, 2023, pp 17-19; Foster, 2023, p. 161.

<sup>118</sup> See British Chambers of Commerce, 2023, p. 40-42; Foster, 2023, p. 157 – 159.

<sup>119</sup> See Bhalotia et al, 2023, pp. 60-63; Henig, 2023 generally.

<sup>120</sup> See British Chambers of Commerce, 2023, p 40-42; Make UK, 2023, pp 17-19; Foster, 2023, p. 161.

<sup>121</sup> See paras. 5.9-5.15.

on both sides to seize those opportunities to make those changes. Consideration is now given to the changes in that relationship which the new UK government will be likely to request. The next chapter considers what would be the likely political response from the EU side to such requests, and its own priorities for changes to those relationships.

3.18 The policy of the Conservative government towards UK-EU relations prior to the 2024 general election was reflected in the agreements the UK eventually reached with the EU, on the UK's withdrawal, and future relationship of the EU, as set out principally in the WA and TCA. During the period when that government was led, first, by Boris Johnson, and then Liz Truss, there were a number of occasions when even those limited agreements came under threat<sup>122</sup>. However, with the appointment of Rishi Sunak as Prime Minister, a degree of stability entered into the ongoing relationship between the two sides, and in some areas practical measures were taken to improve that relationship, within the limits set down by those agreements<sup>123</sup>.

### **The EU policies of the new UK government**

3.19 How such an approach might have further developed is now a hypothetical question, with the election of a Labour government, and it is Labour's policies which are now considered. In his policy programme at the time when the party was choosing its new leader in 2020, the current leader, now Prime Minister, Sir Keir Starmer, stated a policy to "defend free movement [of people] as we leave the EU", while accepting that there would not be a further referendum on EU membership<sup>124</sup>. Since then, however, Labour's policy has changed. In its election manifesto for the 2024 general election, it stated<sup>125</sup>:

"With Labour, Britain will stay outside of the EU. But to seize the opportunities ahead, we must make Brexit work. We will reset the relationship and seek to deepen ties with our European friends, neighbours and allies. That does not mean reopening the divisions of the past. There will be no return to the single market, the customs union, or freedom of movement. Instead, Labour will work to improve the UK's trade and investment relationship with the EU, by tearing down unnecessary barriers to trade. We will seek to negotiate a veterinary agreement to prevent unnecessary border checks and help tackle the cost of food; help our touring artists; and secure a mutual recognition agreement for professional qualifications to help open up markets for UK service exporters. Labour will seek an ambitious new UK-EU

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<sup>122</sup> See UK in a Changing Europe, 2023, pp 9-11

<sup>123</sup> See UK in a Changing Europe, 2024 (2), p.10

<sup>124</sup> Financial Times, 6.9.2023 <https://on.ft.com/47x9IRV> (last accessed 10.9.2024)

<sup>125</sup> Labour Party, 2024, pp 117-118

security pact to strengthen co-operation on the threats we face. We will rebuild relationships with key European allies, including France and Germany, through increased defence and security co-operation. We will seek new bilateral agreements and closer working with Joint Expeditionary Force partners. This will strengthen NATO and keep Britain safe”.

3.20 In the period prior to the 2024 general election, leading Labour spokespersons had set out more detailed policies than those which were set out in the 2024 manifesto. For example, in a January 2023 speech, Shadow Foreign Secretary David Lammy had made other commitments, including “improving links between our students and universities”. He also indicated that while Labour would not adopt a general policy of ‘dynamic alignment’ with EU regulations, it was inclined to ensuring that the UK would not diverge from those regulations in the fields of food, environmental and labour standards<sup>126</sup>.

Furthermore, Lammy also proposed that the “new UK-EU security pact”, would be ‘overseen’ by the European Political Community<sup>127</sup> (“EPC”), and said that Labour would “seek to institutionalise new cooperation across foreign policy through regular EU/UK summits and structured dialogue, both at the political and official level<sup>128</sup>.”

Labour’s shadow defence secretary, John Healey, had also envisaged that defence and security cooperation could be expanded to include logistics projects and cyber security, and suggested that the UK might participate in EU-led peacekeeping missions. He also indicated that a Germany-UK bilateral agreement could lead to cooperation on production, procurement and research along with a joint industrial strategy to aid the defence sector in both countries<sup>129</sup>.

The absence of such more detailed policies from Labour’s manifesto may not be significant. By their nature, party manifestoes are unlikely to spell out in every detail the policies which a party might wish to implement if successful in an election. However, it can be noted that no reference was made in the manifesto specifically to “improving links between students and universities”, which may reflect the party’s hostility to the draft EU-UK “youth mobility” agreement which was proposed by the European Commission in 2024<sup>130</sup>. The reference to a “veterinary agreement” only, rather than to a broader

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<sup>126</sup> See BBC, 22.9.2023 [https:// www.bbc.co.uk/news/uk-politics-66883986](https://www.bbc.co.uk/news/uk-politics-66883986) (last accessed 8.2.2024).

<sup>127</sup> Financial Times, 8.2.2024 <https://on.ft.com/3B8ZTgU> (last accessed 18.9.2024)

<sup>128</sup> <https://www.davidlammy.co.uk/chatham-house-speech> (last accessed 8.2.2024)

<sup>129</sup> [https:// www.politico.eu/article/labour-targets-defense-security-pact-eu-if-wins-general-election-uk-2024-sunak](https://www.politico.eu/article/labour-targets-defense-security-pact-eu-if-wins-general-election-uk-2024-sunak) (last accessed 18.2.2024)

<sup>130</sup> For the European Commission’s proposals, see para. 4.4. For Labour’s policy, see para. 3.2 and also [www.msn.com/en-gb/news/other/keir-starmer-rejects-post-brexit-youth-mobility-scheme-with-spain](http://www.msn.com/en-gb/news/other/keir-starmer-rejects-post-brexit-youth-mobility-scheme-with-spain) (last accessed 10.9.2024).



commitment to the UK not diverging from EU “regulations in the fields of food, environmental and labour standards” may also be significant.

3.21 In any event, the general line of Labour’s future policy towards closer UK-EU relations was made clear by Sir Keir Starmer’s comments the day before the general election, when he said, on being asked whether he could see any circumstances where the UK rejoined the single market or customs union within his lifetime: “No. I don’t think that that is going to happen. I’ve been really clear about not rejoining the EU, the single market or the customs union – or [allowing a] return to freedom of movement.” He indicated, however, that he would hope to improve the UK-EU relationships in some areas of trade, in research and development and on security<sup>131</sup>.

3.22 Labour’s pre-election statements suggested that, in government, it would be cautious about entering into any agreements, or even negotiations, if it could be conceived as leaving them open to criticism as transgressing the boundaries of the limits it has set towards closer UK-EU relations. One indication of that caution was demonstrated by the party’s immediate rejection, a few months prior to the election, of the European Commission’s proposals for a future UK-EU agreement on “youth mobility” on the basis it would contravene its pledge of “no return to the single market, customs union or free movement.”<sup>132</sup>

However, that caution did not prevent the new government from taking immediate steps after the election to make early progress in seeking to establish closer cooperation with the EU. Within a couple of days of his appointment as the UK’s foreign secretary, David Lammy restated<sup>133</sup> Labour’s wish to “reset” the relationship between the UK and the EU. Significantly, he emphasised the importance to be played in this endeavour by the new government’s proposal for “an ambitious and broad-ranging UK-EU Security Pact”. He had earlier said that such a security pact should drive “closer coordination across a wide variety of military, economic, climate, health, cyber, and energy security issues<sup>134</sup>”. He also called for the championing of “the ties between our people and our culture. Holidays, family ties, school and student exchanges, the arts, and sport” which would allow “our citizens [to] benefit from the rich diversity of our continent”.

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<sup>131</sup> Guardian, 3.7.2024 <https://www.theguardian.com/politics/article/2024/jul/03/britain-will-not-rejoin-eu-in-my-lifetime-says-starmer> (last accessed 10.9.2024)

<sup>132</sup> BBC, 18-19.4.2024 <https://www.bbc.co.uk/news/uk-politics-68848046> (last accessed 10.9.2024)

<sup>133</sup> Lammy, 2024 (2)

<sup>134</sup> Lammy, 2024 (1)

3.23 The new government’s programme, as set out in the King’s Speech on 17 July 2024, reiterated<sup>135</sup> its wish “to reset the relationship with European partners and work to improve the United Kingdom’s trade and investment relationship with the European Union” and to “seek a new security pact to strengthen cooperation on the mutual threats faced by the United Kingdom and the European Union”. The proposed legislative programme included a “Product Safety and Metrology Bill” which the government’s briefing paper for the King’s Speech said<sup>136</sup> would “enable [the UK] to make the sovereign choice to mirror or diverge from updated EU rules, so that we can maintain high product safety while supporting businesses and economic growth. This would aim to ensure “that the law can be updated to recognise new or updated EU product regulations, including the CE marking, where appropriate to prevent additional costs for businesses and provide regulatory stability. This legislation will also ensure the UK can end recognition of EU product regulations, where it is in the best interests of UK businesses and consumers”. It can readily be seen that such a bill would allow the UK to ensure that its regulatory regime could remain aligned with EU rules.

3.24 From its manifesto commitments, and the statements of its leaders, it appears that Labour’s policy can be characterised as seeking the closest possible trading relationship between the EU which can be achieved without the UK rejoining the single market or the customs union. However, that policy would not prevent it from seeking the maximum possible coverage for sectoral agreements which would allow trade in goods and services with the minimum impediments to trade. Furthermore, the restatement of its desire for a veterinary agreement, and its stated objectives for a Product Safety and Metrology Bill, suggests that it would not object to dynamic alignment where the UK accepted EU regulations as long as it was able to take the decision as a “sovereign power” whether or not to accept those regulations. It would also seek to maximise the opportunity to participate, probably as a third party associate, in EU programmes so long as it did not perceive a financial imbalance in the costs and benefits of so doing which was detrimental to the UK. Labour would also seek to enter into a security pact, which would not just cover defence and security matters narrowly defined, but also feature agreements and joint action in other areas of international relations which had a bearing on global security, in particular in the field of climate change and energy.

Initially, it seems that Labour had thought it might have been able to use the TCA review process to bring about many of the changes that it sought, but it appears to have now accepted that would be unlikely to be

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<sup>135</sup> <https://www.gov.uk/government/speeches/the-kings-speech-2024> (last accessed 10.9.2024)

<sup>136</sup> See pp. 37-38:

[https://assets.publishing.service.gov.uk/media/6697f5c10808eaf43b50d18e/The\\_King\\_s\\_Speech\\_2024\\_background\\_briefing\\_notes.pdf](https://assets.publishing.service.gov.uk/media/6697f5c10808eaf43b50d18e/The_King_s_Speech_2024_background_briefing_notes.pdf) (last accessed 10.9.2024).

a fruitful way of proceeding<sup>137</sup>. (However, the existing TCA framework already makes it possible for closer relationships to be put into effect in certain areas without requiring supplementary or new agreements, so a Labour government would still be able to take steps to bring about a closer relationship between the UK and EU in those fields if it chose to do so).

3.25 Labour is also likely to seek more informal co-operation with the EU in discussions on foreign policy more generally. Shortly before the General Election, it was reported that Lammy intended to propose that the UK should be allowed to attend regular meetings of the EU Foreign Affairs Council<sup>138</sup>. Another senior figure in the new UK government, Nick Thomas-Symonds, the Minister with responsibility for European Union relation, said, on 19 July 2024, that Britain would want “structured dialogue to happen as soon as possible” to build closer ties on a wide range of issues including security, trade and migration, and would also seek an UK-EU leaders’ summit to “help seal” the new partnership<sup>139</sup>.

Such a dialogue would, of course, be very much in line with the provisions of the 2019 Political Declaration<sup>140</sup>. It may fairly be remarked, as one author has pointed out, “overall, what Labour is suggesting [in the field of security and defence co-operation] is not a million miles away from Theresa May’s desire for a privileged security agreement with the EU, complemented by strong bilateral relationships”<sup>141</sup>.

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<sup>137</sup> Guardian, 30.3.2024 <https://www.theguardian.com/politics/2024/mar/30/the-eu-quandary-labours-efforts-to-build-good-relations-and-keep-red-lines> (accessed 2.4.2024)

<sup>138</sup> Financial Times, 17.4.2024 <https://on.ft.com/4gx95f5> (last accessed 18.9.2024)

<sup>139</sup> Financial Times, 19.7.2024 <https://on.ft.com/47uSRPy> (last accessed 18.9.2024)

<sup>140</sup> See Part III, Political Declaration.

<sup>141</sup> UK in a Changing Europe, 2024 (1), p. 16

## **Chapter 4: EU views on establishing a closer relationship with the UK**

### **Current EU views on the possible enhancement of the Brexit agreements**

4.1 As a starting point, in contrast to the high prominence within the UK of issues relating to Brexit and the EU in political and media discourse, continuing more than three years after the UK finally left the EU (and almost seven years since the referendum), the general consensus from the European side of the Channel has been that Brexit is no longer a “first-order” issue. The extended Brexit negotiations required substantial engagement from EU institutions and personnel, and leading EU officials are clearly reluctant to revisit that period. Comments in 2023 from Stefan Fuehring, lead European Commission official overseeing the TCA illustrate that reality, when he pointed out that although reports regularly emerged from the UK on how the existing Brexit deal could be improved, he was not aware that in the last two years any such report had come out of the EU system. He said: “We have really moved on now with this debate and I think the next decade is one where we’ll deal with future member states, rather than a past member state.”<sup>142</sup> EU Commissioner Maroš Šefčovič expressed the view that the TCA had only been in force for two years and was not yet being used to its full potential. He said: “We have received quite a lot of questions and I’ve seen that there is increased interest in the TCA review. As far as our calendar goes, I think that it’s more for 2026.”<sup>143</sup>

Furthermore, there might be trade realities militating against any substantial changes to the FCA. Foster points out that it could be argued that the present TCA suits the EU, providing tariff-free access to the UK for EU goods exporters (where the EU runs a goods surplus with the UK) while providing very little assistance for UK service industries (where the UK runs a surplus with the EU)<sup>144</sup>. It may be noted that in its 2023 report to the European Parliament on the implementation and the application of the TCA, the European Commission stated that “The TCA is a very good agreement for the EU....: Overall, the TCA functions well”<sup>145</sup>.

An indication of how the EU will protect what it sees as its interests in negotiating any changes to its relationship with the UK was the decision<sup>146</sup> of the European Commission to reject a proposal for mutual

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<sup>142</sup> See Foster, 2023, p. 159

<sup>143</sup> See <https://www.independent.co.uk/news/uk/politics/brexit-talks-trade-renegotiate-b2355895.html> (last accessed 8.2.2024)

<sup>144</sup> See Foster, 2023, pp. 150-151

<sup>145</sup> See Report from the Commission to the European Parliament and Council on the implementation and application of the TCA 15.3.2023 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=COM:2023:118:FIN>, para. 7

<sup>146</sup> See Report from the Commission to the European Parliament and Council on the implementation and application of the TCA, 21.3.2024 [https://www.commission.europa.eu/document/download/def518e5-144b-4e73-a54a-5b078544da48\\_en?filename=COM-2024-127\\_0\\_en.pdf](https://www.commission.europa.eu/document/download/def518e5-144b-4e73-a54a-5b078544da48_en?filename=COM-2024-127_0_en.pdf), p.10 (last accessed 16.9.24)

recognition of professional qualifications for architects, on the ground that it was “unbalanced and prejudicial to EU architects”, even though the proposal had been endorsed by the relevant professional bodies in both the UK and the EU. Another example of an area of disagreement are the concerns from some EU states that UK measures for conservation and management of certain species are eroding fishing and access rights for EU fishers<sup>147</sup>.

4.2. On the other hand, though, there is recognition from within the EU, from both EU institutions and from other influential sources that it too, has suffered negative impacts in many areas from Brexit.

For example, the Foreign Affairs and International Trade Committees of the European Parliament, in a report dated 3 November 2023, identified a number of areas where the position of EU, or EU citizens, has been negatively impacted by Brexit, including the following<sup>148</sup>:

- EU citizens studying in the UK are no longer entitled to ‘home fees’, but must pay higher tuition fees as international students;
- trade flows between the EU and the UK have been negatively impacted by the UK’s withdrawal. Trade between the UK and the EU in goods and services has remained stagnant [compared with] the EU’s trade with other partners;
- opportunities in the EU for the UK’s largely service-based economy have been reduced;
- full implementation of border checks under the UK Border Target Operating Model will bring about additional costs and less flexibility for EU exporters;
- the UK’s proposals for “free-ports” might jeopardise the “level playing field” between the UK and EU;
- EU efforts to reduce carbon emissions through a CBAM could be undermined by production being relocated to countries with less ambitious policies;
- divergence between the UK and EU in environmental protection could jeopardise air and water quality in the EU.

4.3 The report made wide-ranging recommendations<sup>149</sup> for closer co-operation between the EU and the UK in a number of areas, including the following:

- “reasonable solutions” to be found regarding rules of origin for electric vehicles...

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<sup>147</sup> See UK in a Changing Europe 2024 (2), pp. 14 and 53-54.

<sup>148</sup> Report on the implementation of the EU-UK Trade and Cooperation Agreement, European Parliament Report A9-0331/2023. [https://www.europarl.europa.eu/doceo/document/A-9-2023-0331\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-9-2023-0331_EN.html) (last accessed 10.9.2024) See Recital C, Recital AT, and paras. 23, 30, 52, 56, 58

<sup>149</sup> Ibid., paras. 27, 29, 41, 55, 56, 75, 77, 80, 161, 165, 167

- exploring new avenues for cooperation on the supply of raw materials, the development of net-zero technologies and of emerging technologies, and other global trade issues, both bilaterally and within the WTO;
- close EU-UK cooperation on the subject of customs;
- stronger cooperation on health matters;
- the possibility of linking the UK ETS with the EU ETS, and cooperation on carbon border mechanisms;
- a “balanced and coordinated” approach towards achieving the “Green Deal” objectives along with energy independence and resilience for both the EU and UK;
- strengthening technological cooperation, skills development and exchange of data in the energy sector;
- developing trading arrangements for electricity flows between the EU and the UK;
- coordinated EU-UK critical infrastructure development, especially in the energy sector;
- stronger cooperation between the UK and the EU in the energy sector, in particular on reducing energy demand, promoting energy efficiency and renewable generation capacities;
- establishing a structured framework for cooperation on foreign and security affairs between the EU and the UK;
- strengthening of cooperation in cybersecurity;
- stronger involvement of the UK in European security and defence projects.

Such an extensive list of areas for possible closer co-operation must surely be taken as evidence of an interest in rebuilding many of the links between the EU and UK which were broken or weakened by Brexit. Putting such recommendations into concrete effect would no doubt raise substantial questions for negotiations between both parties as to the conditions to make them a reality. Nevertheless, the fact that the European Parliament has identified such a comprehensive package of measures makes it reasonable to conclude that a future UK government which wished to enhance links with the EU could find a willing interlocutor.

4.4 A further indication of an interest from the EU side in rebuilding closer relationships was shown by its proposals for a youth mobility scheme<sup>150</sup>, for which the justification included the fact that as mobility of persons between the EU Union and the United Kingdom was now governed by the respective immigration rules of the EU (and its member states), there was now decreased mobility between the two

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<sup>150</sup> See [https://commission.europa.eu/document/download/2566774b-4e5c-495c-866b-0ede9aa8b084\\_en?filename=COM\\_2024\\_169\\_1\\_EN\\_ACT.pdf](https://commission.europa.eu/document/download/2566774b-4e5c-495c-866b-0ede9aa8b084_en?filename=COM_2024_169_1_EN_ACT.pdf) (last accessed 9.4.2024).

sides. The Commission proposed that young (18-30) EU and UK citizens be allowed to move to the other's territory for up to 4 years, which could be for a wide range of purposes – not just educational or research, but also for volunteering, other activities, or just visiting/travelling. (As we have seen above<sup>151</sup>, these proposals were swiftly rejected out of hand by Labour, but an agreement on such a scheme, of some type, remains an EU priority<sup>152</sup>.)

4.5 Others have also identified areas where there could be mutual benefit for both parties in establishing closer cooperation.

The Centre for European Reform has pointed out<sup>153</sup> that the UK is an important generator of renewable energy, with much more of its energy mix being green than the EU average. Long-term certainty (the TCA's arrangements on energy expire in June 2026) about the terms on which this energy can be exported to Europe would both contribute to the continent's energy security, while at the same time boosting the business case for green energy investment in the UK, supporting the new government's plans to scale up renewable energy production. The previous UK government had already signed<sup>154</sup>, in December 2022, a Memorandum of Understanding with the North Seas Energy Cooperation group (consisting of the European Commission and eight EU states, and Norway) to develop offshore renewable energy, and in April 2024 signed<sup>155</sup> a security pact with four EU member states bordering the North Sea, and Norway, on the sharing of information on marine security issues.

Health policy is another such area. It has been argued that mutual benefit could be secured through establishing better information and preparedness against threats to health, re-establishing the mutual recognition between the UK and the EU in the batch testing of medicine, and in maximising the collective European market in comparison to other global locations of supply<sup>156</sup>.

### **Implications for EU-UK relations of new defence and security issues**

4.6 There are also new global realities which are now concentrating the minds of governments and the policy communities in both the UK and the EU, most immediately prominent being the threats to European security arising from the Russian attack on the Ukraine, and the concern that a future US

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<sup>151</sup> Para. 3.22.

<sup>152</sup> See para. 6.23.

<sup>153</sup> Berg A et al, 2024, p. 6

<sup>154</sup> See [https://energy.ec.europa.eu/news/north-seas-energy-cooperation-and-uk-establish-cooperation-framework-facilitate-development-offshore-2022-12-18\\_en](https://energy.ec.europa.eu/news/north-seas-energy-cooperation-and-uk-establish-cooperation-framework-facilitate-development-offshore-2022-12-18_en) (last accessed 9.4.2024).

<sup>155</sup> <https://www.teamjustitie.be/fr/2024/04/09/08-04-pacte-de-securite-pour-la-mer-du-nord-la-belgique-se-joint-a-cinq-pays-riverains-pour-securiser-les-infrastructures-critiques-sous-marines/> (last accessed 9.4.2024)

<sup>156</sup> See Fahy and Dayan, 2024.

president and government might not provide European countries with the level of security guarantees through NATO that they have relied upon for decades. Beyond that, there are concerns about the consequences of China's growth as a military and economic super-power, and how European countries would be affected by the intensification of tension, and possible conflict, between the US and China. More generally, there are obvious areas of conflict and tension, such as in the Middle East, which have potential serious economic and military implications for the UK as much as for the EU. The consequences of accelerating climate change also present security and environmental challenges.

4.7 There are certainly strong indications that many in the EU would now favour such closer defence and security links with the UK. For example, the European Parliament resolution on the TCA referred to above<sup>157</sup>, included calls for the signing of a structured framework for EU-UK cooperation on foreign and security affairs between the EU and the UK, the strengthening of cooperation in the field of cybersecurity, and greater UK involvement in European security and defence projects. The leader of the Renew group in the European Parliament has called for Theresa May's proposal for an EU-wide defence treaty to be revisited urgently. She said that she believed that a security arrangement with the UK would be possible.<sup>158</sup> In February 2024, a senior German minister suggested that the UK (and French) nuclear weapons capabilities could be brought into wider arrangements for European security – for which he recognised that the rest of Europe would need to make a contribution. In addition, the leader of the European People's Party, the biggest group in the European Parliament, has stated that he does not rule out a “European nuclear umbrella”, including the British, “with whom” (he said) “we should finally start a new chapter of cooperation after Brexit.”<sup>159</sup>

4.8 Detailed proposals for UK – EU security cooperation were also set out in a report from the influential “European & International Analysts Group”, written in 2024 by the former UK-nominated EU Commissioner, Sir Julian King, who can presumably therefore be expected to have a good understanding of thinking within both the EU and UK governmental and policy communities. His report<sup>160</sup> envisages such a pact as facilitating cooperation in a wide range of areas, including:

- civilian and military missions;

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<sup>157</sup> Para. 4.3.

<sup>158</sup> Guardian, 18.2.2024 <https://www.theguardian.com/world/2024/feb/18/call-urgently-revive-theresa-may-plan-eu-wide-defence-treaty> (last accessed 13.3.2024)

<sup>159</sup> <https://www.theguardian.com/world/2024/feb/15/uk-europe-nuclear-shield-donald-trump-germany-nato-deterrent> (last accessed 21.9.24)

<sup>160</sup> King, 2024. Julian King was EU Commissioner for the Security Union, 2016–2019, and had previously served as Chef de Cabinet to Baroness Ashton of Upholland, European Commission; Director General Economic & Consular, Foreign & Commonwealth Office; and British Ambassador to Ireland and France.



- UK participation in the development of EU military capability;
- closer engagement by the UK with EU security and law enforcement agencies;
- enhancement of existing TCA provisions for cooperation in law enforcement and judicial cooperation;
- strengthened cooperation in the fields of crisis management and emergency disaster response;
- greater UK-EU intelligence co-operation;
- promotion of economic security through closer working in building physical, infrastructure and societal resilience;
- a wider dialogue with the EU on energy security issues.

4.9 There also appears to be an openness to the possibility of involvement of the UK in the discussion and development of EU policy in the field of security and foreign affairs more generally. Reference has been made above to the suggestion from David Lammy that the UK could participate in the EU Foreign Affairs Council<sup>161</sup>. At the time, unnamed ‘EU diplomats’ gave a negative response to that suggestion.<sup>162</sup> However, it can be noted that in its election manifesto prior to the European Parliament elections in June 2024, the European Peoples Party (“the EPP”), the biggest political group within the European Parliament (whose nominee for President of the European Council, Ursula van der Leyen, was re-elected) called for the establishment of a new ‘European Security Council’, in which the UK would be a member<sup>163</sup>. That would be a separate body from the EU Foreign Affairs Council, and allowing the UK to attend that latter council regularly (as opposed to doing so on an occasional basis or in relation to specific matters, which has already happened once<sup>164</sup>) might be regarded as a step too far. Nevertheless, that proposal from the EPP would indicate a general willingness for the UK to have a closer involvement in some way in the discussion and formulation of EU security and other foreign policy matters. It can also be noted that the 2019 Political Declaration between the parties did provide<sup>165</sup> that “The High Representative may, where appropriate, invite the United Kingdom to informal Ministerial meetings of the Member States of the Union”, although that too would not amount to regular participation in the EU Foreign Affairs Council. Occasional participation would therefore be in accordance with a position previously agreed between the parties.

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<sup>161</sup> Para. 3.25

<sup>162</sup> Financial Times, 17.4.2024 <https://on.ft.com/4gx95f5> (last accessed 22 July 2024)

<sup>163</sup> Politico, 7.3.2024

[https://assets.publishing.service.gov.uk/media/6697f5c10808eaf43b50d18e/The\\_King\\_s\\_Speech\\_2024\\_background\\_briefing\\_notes.pdf](https://assets.publishing.service.gov.uk/media/6697f5c10808eaf43b50d18e/The_King_s_Speech_2024_background_briefing_notes.pdf) (last accessed, 12.9.2024)

<sup>164</sup> Liz Truss, then UK Foreign Secretary, attended an Extraordinary meeting of the Council in March 2022, held in response to the Russian invasion of Ukraine (along with other representatives from non-EU states).

<https://www.consilium.europa.eu/en/meetings/fac/2022/03/04> (last accessed 10.9.2024)

<sup>165</sup> Paragraph 95, Political Declaration

## Significance of the debate within the EU on future European co-operation

4.10 The establishment of a closer relationship between the UK and the EU which does not, however, entail or lead to UK becoming a member of the EU once more, might also be made more feasible depending on the outcomes of the ongoing debate within the EU about how it should relate to states, and groupings of states, in Europe, by the development of new structures of cooperation, both within and outside the framework of the EU.

Debates on the future structure of the EU are not new, as Fabbrini points out<sup>166</sup>. Events such as the euro-crisis, and the challenge of operating effectively in a body constituted by 27 member states, have provoked such debates. However, Brexit, he argues, “increases the urge – and at the same time creates the possibility – to improve the constitutional architecture of the EU”. That pressure may not, however, necessarily lead to closer integration of states across the board. The difficulty of securing agreement on such closer integration may also, he suggests, spur moves towards a ‘multi-speed Europe’, where closer integration amongst some states may take place outside the EU framework if there it cannot be progressed within it<sup>167</sup>.

4.11 Such moves towards a multi-speed Europe might also be encouraged by proposals to establish co-operation between the EU and other European states, both those which wish to join the EU at some stage, and those without an active intention to join it. Such a proposal has been given form in the establishment of the “European Political Community”.

The key driver behind the establishment of the EPC was French President Emmanuel Macron. At its inception, he envisaged its purpose as being to establish ‘a new space for political cooperation, security and cooperation in the fields of energy, transport, investment, infrastructures the movement of people and in particular our youth’<sup>168</sup>. He saw it as being a loose organisation, which could include (as well as EU/EEA states), states which might join the EU in the future, as well as ones which were not seeking EU membership, with the UK the most obvious example<sup>169</sup>.

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<sup>166</sup> Fabbrini (2017), p.268

<sup>167</sup> Fabbrini (2017) pp. 288-290

<sup>168</sup> See <https://epc-observatory.info/what-is-the-epc> (last accessed 10.9.2024).

<sup>169</sup> See <https://www.politico.eu/article/emmanuel-macron-proposes-european-political-community-as-alternative-to-eu-membership/> (last accessed 20.12.2023).

4.12 Macron’s vision for the EPC (which is now in existence, with its fourth summit held in the UK in the summer of 2024<sup>170</sup>) was reflected and further developed in the work of an expert group, the “Franco-German Working Group on Institutional Reform”, set up by the French and German governments, which on 18 September 2023 published its report “Sailing on High Seas: Reforming and Enlarging the EU for the 21<sup>st</sup> century<sup>171</sup>”.

The report is focussed on two broad themes – (i) institutional challenges for the EU; and (ii) deepening and widening the EU. Those two matters are interlinked, because enlargement presents significant challenges to the structure of existing EU institutions, for example the extent to which unanimity of decision making should still be required, and the form of qualified majority voting. Operational difficulties for the institutions which can arise in a body comprising 27 member states clearly have the potential to increase in an EU of potentially 35 or so.

4.13 For this thesis, the significance of the report is its endorsement (perhaps recognition) of a future for both the EU, and the wider Europe of which it is part, of the concept of differentiation in the decision making process, and the scope of competences and activities, in different policy areas. As part of that process, it envisages a Europe which is “United in diversity”, where the future structures of European organisation will comprise “four distinct tiers, each with a different balance of rights and obligations”<sup>172</sup>. These tiers would be:

- (i) the inner circle, probably including members of the Schengen Zone, and also those participating in “Enhanced Cooperation” and “Permanent Structured Cooperation” (PESCO) in defence. Such “coalitions of the willing” could be further used in a wider range of policy areas;
- (ii) The EU and its member states as a whole;
- (iii) Associate members – the EEA, and Switzerland are mentioned, and it is suggested that “even the UK” could also have such a status<sup>173</sup>;
- (iv) The EPC as a whole, which would not include any form of integration with binding EU law or access to the single market, but would nevertheless “evolve into an arrangement with stronger institutional ties, and perhaps also include Free Trade Agreements and treaties to provide a framework for policy coordination.

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<sup>170</sup> <https://www.consilium.europa.eu/en/meetings/international-summit/2024/07/18/> (last accessed 9.9.2024)

<sup>171</sup> Institut Jacques Delors, 2023

<sup>172</sup> Institut Jacques Delors, 2023, p. 35

<sup>173</sup> The Brussels correspondent of “The Times” described the plans, inter alia, as “designed to tempt Labour”. See The Times, 19.9.2023 <https://www.thetimes.com/uk/politics/article/french-german-plan-for-eu-inner-circle-with-membership-for-uk-pkhn5vsmm> (last accessed 12.4.2024)

4.14 The record of the EPC since its first meeting in October 2022 has shown that although it has provided a useful forum for discussion amongst European political leaders from both within and outside the EU, there is little enthusiasm so far for it to develop into an institution, with its own budget and a secretariat. Commentators have suggested<sup>174</sup>, however, that it provides a useful ‘space’ for leaders from within and outside the EU (both those who are candidate countries for membership and those which do not wish to join) to meet on an equal footing, and can facilitate agreements between countries on practical action. It can also incubate projects which can be taken up by groups of countries, or organisations such as the EU and NATO.

That the EPC would develop such a relatively limited role was confirmed by its first meeting held in the UK, on 18 July 2024. It held discussions focussed on support for Ukraine, defence and security more generally, and illegal migration<sup>175</sup>. The UK government took the opportunity to conclude a number of bilateral and multilateral agreements.

It is hard to see an EPC of that nature being in a position to ‘oversee’ a [defence pact] as Lammy had suggested<sup>176</sup>. However, it could have significant value for the UK, as it seeks to rebuild its links with the EU and the wider Europe, as presenting another way for the UK to reenter the world of European cooperation. Although it may not itself become an organisation through which the UK may be able to enter formally into enhanced co-operation with EU and other European states, it might provide a forum to develop a proposal for the form and content of such an initiative.

4.15 Other organisations have already been established, or have been promoted as possibilities, which involve both the EU and other European countries. The European Energy Community includes the EU along with a number of other states, principally in southern and eastern Europe<sup>177</sup>. The EU is seeking to develop an Energy Union, which envisages cooperation on energy matters with other non-EU states, and possibly inclusion in the provisions of the Energy Union<sup>178</sup>.

The EU has also developed the concept of a European Health Union, which potentially could involve the participation of European Free Trade Association (EFTA) states, and EU candidate countries, in tackling serious cross-border threats to health, and in strengthened arrangements for the joint procurement of

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<sup>174</sup> Scazzieri 2023, p. 3

<sup>175</sup> See <https://www.gov.uk/government/speeches/pms-press-conference-remarks-at-the-european-political-community-summit-18-july-2024> (last accessed 10.9.2024)

<sup>176</sup> See para. 3.20.

<sup>177</sup> See <https://www.energy-community.org/aboutus/whoweare.html> (last accessed 10.9.2024)

<sup>178</sup> See Regulation (EU) 2018/1999, at Recitals 32, 33 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018R1999> (last accessed 10.9.2024).

medicines and equipment.<sup>179</sup> In principle, there would seem no reason why the UK could not also join such a body, or at least have a relationship as an associate, particularly given the trans-national nature of threats to health. It has been suggested that the proposed “security pact” envisaged by Labour could include health cooperation within its scope<sup>180</sup>.

More recently, the editors of a publication from the influential European economic think tank, Bruegel, have called for the creation of a single market for defence production, including the United Kingdom<sup>181</sup>.

It should also be noted that there is already precedent for the EU to establish, within its own structures, mechanisms which allow those member states, who wish to, to co-operate in specific matters. The EU treaties created a framework for such “enhanced cooperation<sup>182</sup>”. Other examples are the arrangements<sup>183</sup> whereby only those EU states whose currency is the euro can vote on certain matters; and the Schengen area, which includes Iceland, Switzerland, Norway and Liechtenstein, but does not include EU member states Cyprus and Ireland. The possibility of “enhanced cooperation” is also now available for matters which fall within the EU’s Common Foreign and Security Policy<sup>184</sup>.

4.16 The debate within the European institutions, EU governments, and the wider policy and political community on questions of future European structures is ongoing. In November 2023, the European Parliament voted in favour of a report calling for a wide range of measures aimed at allowing the EU to act more effectively, and to strengthen the powers of the Parliament. The proposals included more decisions to be taken by qualified majority voting in the Council, giving more legislative power to the Parliament, and giving the EU more powers on a wide range of measures including many which currently fall within the remit of EU member states<sup>185</sup>. However, the vote in favour of that report was close, and the subsequent European Council decision on future reform was non-committal, promising only to “address internal reforms at its upcoming meetings with a view to adopting by summer 2024 conclusions on a roadmap for future work<sup>186</sup>”.

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<sup>179</sup> See para. 4, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0724> (last accessed 10.9.2024).

<sup>180</sup> See also comments in Fahy and Dayan 2024.

<sup>181</sup> See Demertzis, Sapir & Zettelmeyer, 2024, p. 8.

<sup>182</sup> See Lenaerts and Van Nuffel, 2021, Chapter 22.III on “enhanced cooperation.”

<sup>183</sup> Articles 136-138 TFEU

<sup>184</sup> See [https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area\\_en](https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area_en) (last accessed 10.9.2024).

<sup>185</sup> See <https://www.europarl.europa.eu/news/en/press-room/20231117IPR12217/future-of-the-eu-parliament-s-proposals-to-amend-the-treaties> (last accessed 10.9.2024).

<sup>186</sup> See <https://www.consilium.europa.eu/media/68967/europeancouncilconclusions-14-15-12-2023-en.pdf> (last accessed 11.10.2024).

4.17 Given that the European Parliament elections in early June 2024 showed an increase<sup>187</sup> in support for parties and political blocs which are generally opposed to further centralisation of powers by EU institutions (and that even some parties which are normally considered as being in favour of more European integration expressed hostility to the proposals adopted by the Parliament in November 2023<sup>188</sup>), it seems likely that it will be difficult to secure substantial changes to the European treaties to allow for more powers to be exercised by the Parliament, and for any substantial extension of qualified majority voting in the Council.

4.18 However, given that the pressures for more effective decision-making as a result of various external and internal factors are likely to continue, it appears reasonable to conclude that within the not distant future the current European polity, which is essentially a two-tier Europe, with an EU which is firmly delineated from an external Europe which is linked with the EU in a range of looser arrangements, may be transformed into one where there is a multi-level network of different types of relationships both between EU member states and within the EU itself. That may include ‘enhanced cooperation’ in some areas, where some EU member states choose to work together more closely than others.

In such a ‘multi-level relationship’, there are likely to be arrangements where some non-EU member states might well have closer relationships with the EU, and some of its member states, in some areas of policy, than might exist between some member states of the EU themselves. In the current political and security situation, one can envisage that countries like the UK, which have adopted a position of strong support for Ukraine in its resistance to the Russian attack, might well establish closer security cooperation with the EU and some of its member states, than some of those member states themselves choose to do. As has already been noted, Labour, while placing the agreement of a new defence and security pact, covering also political cooperation, at the centre of the new government’s approach to the EU, has also suggested bilateral agreements on military and security matters with EU countries, with France and Germany specifically mentioned<sup>189</sup>.

4.19 There are certainly indications of a growing willingness of EU member states to establish, whether formally within the EU constitutional framework, or alternatively in more informal ways, more extensive structures and channels for cooperation involving only a number of states. Such cooperation has focussed recently on security and military matters: some recent examples have been the decision of the

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<sup>187</sup> Politico, 10.6.2024 <https://www.politico.eu/article/eu-election-results-2024-things-to-know/> (last accessed 11.9.2024)

<sup>188</sup> For example, Poland’s Civic Platform: see Euractiv, 22.11.2023 <https://www.euractiv.com/section/politics/news/polands-tusk-opposes-eu-treaty-changes> (last accessed 10.9.2024)

<sup>189</sup> See para. 3.19.

governments of France, Germany, and Poland to revive the “Weimar triangle” (following the election in Poland of a new, more pro-European government)<sup>190</sup>, and the cooperation between Nordic and Baltic states<sup>191</sup>. Another powerful factor likely to encourage the development of a more ‘multi-speed’ Europe, even if that might be considered to run contrary to the wish to create an ‘ever closer union’<sup>192</sup>, is that the desire for further enlargement of the Union to take place is now underpinned by strong political and security motivations to do so as quickly as possible. As noted above<sup>193</sup>, the new UK government has expressed the wish to develop bilateral security cooperation with a number of EU countries.

4.20 Of course, the establishment of such closer arrangements, and in particular a broad ranging security pact between the UK and the EU, as suggested by influential UK voices<sup>194</sup> as well as the EU voices referred to above, would require agreement by the EU side as well. However, the security issues which have acquired higher salience since the Brexit negotiations between the UK and EU up to 2020, would be a powerful motivating factor for the EU to enter into such an agreement. Furthermore, as has been mentioned<sup>195</sup>, the final version of the Political Declaration agreed between the UK and EU included proposals<sup>196</sup> for extensive cooperation on security matters and foreign affairs. It is true that most did not find their way into the TCA, or into other agreements between the UK and EU<sup>197</sup>, but the fact that the EU was prepared to agree in principle to such proposals indicates that there was a willingness, at that time at least, to consider an agreement of that nature.

4.21 With the political and security realities now facing Europe, there is likely to be an even greater willingness to extend the scope of cooperation with the UK in some way. Therefore, notwithstanding the occasional indication that the EU would be unwilling to make substantial changes to the EU-UK relationship without a UK agreement to participate in the EU’s single market<sup>198</sup>, it is reasonable to conclude that there is a reasonable possibility that the EU would be willing to enter into a package of agreements which would substantially enhance the current relationship between the parties. However, the EU would not do so at the price of putting in place agreements which it considered would jeopardise the

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<sup>190</sup> See Financial Times, 15.3.2024 <https://on.ft.com/47ydJ8t> (last accessed 10.9.2024).

<sup>191</sup> See [www.fpri.org/article/2023/09/the-vilnius-nato-summit-brings-opportunities-for-closer-nordic-baltic-integration](http://www.fpri.org/article/2023/09/the-vilnius-nato-summit-brings-opportunities-for-closer-nordic-baltic-integration) and <https://www.mfa.gov.lv/en/co-operation-among-baltic-and-nordic-countries> (both last accessed 10.9.2024).

<sup>192</sup> Set out, inter alia, in the Preamble and Article 1 of TEU.

<sup>193</sup> See para. 3.19.

<sup>194</sup> See paras. 3.19 and 6.25.

<sup>195</sup> See para. 3.2.

<sup>196</sup> Part III, section III, Political Declaration

<sup>197</sup> See para. 3.2.

<sup>198</sup> E.g. comments by former EU chief Brexit negotiator, and current French prime minister, Michel Barnier, here: <https://www.lbc.co.uk/news/brexit-latest-election-michel-bernier-eu> (last accessed 8.9.2024)

fundamental nature of the single market, nor would it be prepared to enter into a new ‘deal’ with the which it considered provided one-sided benefit to the UK<sup>199</sup>.

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<sup>199</sup> E.g. comments by the Irish deputy prime minister, Micheal Martin here: <https://www.theguardian.com/world/article/2024/sep/07/a-la-carte-new-brex-it-deal-with-eu-not-on-table-micheal-martin-warns> (last accessed 8.9.2024)



## **Chapter 5: The constitutional mechanisms for closer UK-EU links**

### **Constitutional requirements in the UK and EU for the conclusion of international agreements**

5.1 If a political will to bring about closer relationships emerges in both the UK and the EU, both sides will of course require to put any consequential political agreements into legal effect. This will require both the UK and the EU to utilise their respective constitutional mechanisms to do that.

On the UK side, entering into the necessary agreements would, from a formal point of view, be quite straightforward. Parliament has a say in the process of ratification of international agreements, but there is no provision or convention requiring the government to have parliamentary approval to enter into negotiations about, or to sign, such an agreement<sup>200</sup> (subject to some circumstances under which the government may not seek approval of a free trade agreement if it has not laid a report before Parliament concerning certain matters e.g. whether it maintains UK levels of statutory protection in relation to (a) human, animal or plant life or health, (b) animal welfare, and (c) the environment<sup>201</sup>).

However, ultimately the government can still proceed to seek approval of the agreement even if concerns are raised about such matters. In essence, for the UK, Parliamentary control is restricted to a right to withhold approval of the ratification of such an agreement. In that eventuality, the government can go back to Parliament, as often it wishes, to request approval for ratification, although it cannot proceed to ratify the agreement if Parliament continues to vote to withhold approval<sup>202</sup>. The government even has the power, in exceptional cases, to ratify an agreement without Parliament's approval (although the government cannot do that if Parliament has already voted to withhold approval of its ratification)<sup>203</sup>.

Therefore, if the government is able to command a majority in Parliament for the ratification of such an agreement, there should be no legal impediment to it doing so.

5.2 On the EU side, however, any such international agreements must proceed on clear legal bases<sup>204</sup>, which can arise (as the CJEU decided in the important “*ERTA*” case<sup>205</sup>) not only on the basis of an

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<sup>200</sup> See Dougan (2018), p 315.

<sup>201</sup> Section 42(2) Agriculture Act 2020

<sup>202</sup> Sections 20 -21, Constitutional Reform and Governance Act 2010.

<sup>203</sup> Section 22, *ibid.* There are also certain other types of agreement for which the government does not require parliamentary approval (section 23, *ibid.*).

<sup>204</sup> See Article 5 TEU.

<sup>205</sup> 22-70 Commission of the European Communities v Council of the European Communities EU:C:1971:32

“express conferment” of powers by EU treaties, but can also “equally flow from other provisions of the treaty and from measures adopted, within the framework of those provisions, by the community institutions.”

As regards powers “expressly conferred” by EU treaties, Title III of the Treaty on the Functioning of the European Union (“TFEU”) sets out a number of Articles which can provide the legal basis for the EU to enter into agreements with third countries. The EU-UK TCA proceeded under the provisions of Article 217 of the TFEU, which empowers the EU to “conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure”. On the basis of that article, or its predecessors in earlier of its treaties (such as Article 310 of the TEC), the EU has entered into a wide variety of agreements, including trade agreements, free trade agreements, cooperation agreements, and association agreements.<sup>206</sup> The EU-UK TCA is in essence a free trade agreement, but with certain other provisions (mainly in the field of law enforcement and judicial cooperation) incorporated into it<sup>207</sup>.

5.3 There are also other provisions within the TFEU which could potentially provide the legal basis for establishing new relationships between the EU and the UK, in particular Article 207 concerning the EU’s common commercial policy<sup>208</sup>. If necessary, a legal basis could potentially also be found in the overarching provisions of Article 352 of the TFEU, which allows “appropriate measures to be adopted” if they are necessary “to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers”, as long as such action is “within the framework of the policies defined in the Treaties”.

5.4 A further relevant factor in considering how future enhancements of the UK-EU relationship might be implemented is whether or not they would require to be treated as a ‘mixed agreement’. If a proposed EU agreement with a third country includes provisions concerning matters which fall outside the ‘exclusive competence’ of the EU, then the approval of Member States is required as well as that of the EU. The EU Council decided that the TCA would be treated as an ‘EU-only’ agreement which did not therefore require the agreement of Member States also.

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<sup>206</sup> See Lenaerts and P Van Nuffel (2021), para. 10.08.

<sup>207</sup> See [https://commission.europa.eu/strategy-and-policy/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement\\_en](https://commission.europa.eu/strategy-and-policy/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en) (last accessed 4.3.2024).

<sup>208</sup> It can be noted that the CETA agreement proceeded on the basis of Article 207.

There has been some debate as to whether that decision was legally correct, due to the wide scope of the provisions of the TCA. Eckes and Leino-Sandberg point out<sup>209</sup> that although Article 217 TFEU does allow the EU to act alone when concluding an association agreement, in fact association agreements are almost always concluded as mixed agreements, with the Stabilisation and Association Agreement with Kosovo as the only exception. It can also be noted that until very late in the EU-UK negotiation process, the EU felt that the TCA might indeed have to be deemed instead to be a ‘mixed agreement’<sup>210</sup>.

Peers<sup>211</sup> agrees that association agreements are in practice almost always concluded as mixed agreements, but points out there is no explicit requirement for this in the Treaties or CJEU case law, and that the ECJ has since then now ruled that Article 217 gives a wide legal power for the EU<sup>212</sup>. He considers convincing the arguments presented in an opinion by the Council Legal Service that the TCA could be treated as an ‘EU only’ agreement<sup>213</sup>.

Nevertheless, it is suggested that such questions about the legal basis of the TCA might have a bearing on whether any future amendments, or supplementary agreements, to the TCA could be agreed by the EU alone, or would need to be agreed also by Member States, particularly if any such changes were of broad scope and entered upon areas where there might be a good argument that they could only be adopted on the basis of being a “mixed agreement” requiring agreement of member states also.

5.5 As well as any proposed agreement involving the EU and a third party requiring to have a legal base that falls within EU competences, it will have to be approved through the procedures laid down by the relevant European treaties. Under Article 218 TFEU, it is the Council of the EU which has authority to “[open] negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them. The normal rule in the making of such agreements is that the Council operates by a qualified majority<sup>214</sup>. However, the TFEU also provides<sup>215</sup> that the Council “shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements” and on certain other matters. Unanimity may be required, for example, for agreements concerning certain aspects of trade in services, intellectual property, foreign direct investment, cultural and audiovisual services, and in the field of social, education and health services<sup>216</sup>. It

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<sup>209</sup> Eckes and Leino-Sandberg, 2022, p. 173

<sup>210</sup> See Mariani and Sacerdoti, 2021, p.95, and Levrat, 2021, p. 223

<sup>211</sup> Peers, 2022, p. 59

<sup>212</sup> C-479/21 PPU Governor of Cloverhill Prison and Others EU:C:2021:929

<sup>213</sup> That opinion of the Council Legal Service can be found here: <https://eulawanalysis.blogspot.com/2021/01/the-brexite-deal-council-legal-service.html> (last accessed 9.9.2024)

<sup>214</sup> Article 218(8). For definition of “qualified majority”, see Lenaerts & Van Nuffel, 2021, para. 12.047

<sup>215</sup> Article 218(8)

<sup>216</sup> See Article 207(4) TFEU.

may also be required, amongst other things, for certain EU decisions of a general nature, some decisions taken at the request of the CJEU, and decisions taken in connection the Union’s Common Foreign and Security Policy (“CFSP”)<sup>217</sup>. The European Commission considered that, although it had chosen Article 217 of the TFEU as the legal basis for the conclusion of the TCA, it fell within those categories of agreement that would require the unanimous agreement of the Council<sup>218</sup>.

5.6 In addition, the consent of the European Parliament is required for a long list of agreements<sup>219</sup>, including:

(i) association agreements; .....

(iii) agreements establishing a specific institutional framework by organising cooperation procedures

(iv) agreements with important budgetary implications for the Union;

(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

In other cases, the European Parliament is required to be consulted, as it was in the case of the TCA<sup>220</sup>.

5.7 In sum, the EU agreed to enter into the TCA as an ‘EU-only’ agreement; on the legal basis of Article 217 TFEU and unanimity within the Council; and with the consent of the European Parliament. There does not appear to be any legal reason why any future decision by the EU regarding its relationship with the UK would necessarily have to proceed on the same basis. In principle, that would depend on the scope of such an agreement. A broader scope might result in it being treated as a ‘mixed agreement’ (requiring approval by Member States), and a narrower one could be treated not only as an ‘EU-only agreement’, but also one that did not require Council unanimity, or the consent of the European Parliament, with differing consequences as to how smoothly such an agreement might be approved by the EU. It is suggested, however, that the reasoning under which the Council proceeded when agreeing to the TCA would also apply to any future agreements<sup>221</sup>, and the same procedure would therefore require to be employed.

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<sup>217</sup> See Lenaerts & Van Nuffel, 2021, para 12.046, note 181.

<sup>218</sup> See European Commission, 2020.

<sup>219</sup> See Article 218(6) TFEU.

<sup>220</sup> See <https://www.europarl.europa.eu/news/en/press-room/20210423IPR02772/parliament-formally-approves-eu-uk-trade-and-cooperation-agreement> (last accessed 13.9.2024).

<sup>221</sup> See para. 5.4.

5.8 The TCA itself also contains a comprehensive range of provisions envisaging the possibility of implementing further changes in the EU-UK relationship in the future. The presence of such a competence is a significant feature of the TCA, and the institutional framework set up under it. These can be found principally in its review provisions, and in its Partnership Council framework, which are both now considered.

### **The TCA review process**

5.9 As regards review of the TCA, Article 776 is in the following terms:

“The Parties shall jointly review the implementation of this Agreement and supplementing agreements and any matters related thereto five years after the entry into force of this Agreement and every five years thereafter”.

The terms of that Article would appear to leave a wide scope as to the subject matter of such review. However, as Reland and Wachowiak point out, “The review clause is vague: it does not specify a date, nor describe the process, nor specify results which need to be produced. It states only that the parties must ‘review’ the agreement’s implementation. This does not obligate the UK and EU to do anything other than conduct a light-touch stock-take of the agreement. The review could be more wide-reaching, but this would require the UK and EU to jointly agree on the aims and process”<sup>222</sup>.

They comment that “the review has been identified by some, most notably the Labour Party, as an opportunity to expand the terms of the TCA, as a way of reducing barriers to trade” but are sceptical that the EU would be sympathetic to such a wide scope for the review at this stage. They state: “At the moment, the EU has a clear minimalist position: a short, technical “review of the treaty’s implementation in 2026” which arises “from a general satisfaction with the TCA, which it considers to be working well” together with “significant Brexit fatigue”, low trust in the UK, and higher EU priorities.”<sup>223</sup>

They also note that the commitment in Article 776 is to “review”, not “revise”, meaning that while the parties must take stock of the TCA’s implementation, there is no obligation to change anything. However, they point out that the article “adds, somewhat ambiguously, that the parties may review, the TCA’s implementation and “any matters related thereto”. They suggest that “on one reading, this allows the UK and EU to discuss other matters related to the TCA’s implementation (perhaps the functioning of the

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<sup>222</sup> Reland and Wachowiak, 2023, p. 3

<sup>223</sup> Ibid., 2023, p. 3

related WA. A more expansive interpretation might suggest that it allows the parties to address other matters affecting the TCA, beyond the issue of implementation”<sup>224</sup>.

They conclude that the review process will be shaped both by political will, and also by process, the latter being the fact that a more expansive review will entail “multiple, potentially complex negotiations, demanding significant time and administrative effort”. This would require both sides “to consider whether and how the review could be structured”<sup>225</sup>.

5.10 Duff expresses a similar scepticism about the willingness of the EU to allow the Article 776 review process to be the basis for a substantial review of the TCA, and considers that, “as far as the EU is concerned, the purpose of the review will be about improving ways to implement the TCA and not about its revision”. He adds that “additional agreements may be negotiated in areas not covered by the TCA, but this will require the UK to have a very clear idea of what it wants, and for the Commission to seek and be granted a new mandate from the EU Council, before negotiations can begin”.<sup>226</sup>

5.11 Given that the TCA is a ‘sui generis’ agreement, and the scope of the review processes set out in Article 776 process, and elsewhere in its provisions, has not yet been the subject of any definitive legal interpretation, it is impossible to reach a firm conclusion as to how expansive or extensive are the changes that could be made to the UK-EU relationships by utilising its provisions. However, it is suggested that it is highly questionable that Article 776 (in contrast to some other provisions in the TCA) could be interpreted to give a legal basis to either party to make any changes to the TCA, for the following reasons.

5.12 Firstly, it is true that, in the “*ERTA*” case, the CJEU has accepted that a “conferment” of the power to enter into international agreements can arise by implication from provisions of a treaty giving the relevant institution competence in the matter in question, rather than by specific provisions.<sup>227</sup> However, it is suggested that, at a basic level, the natural and normal meaning of the word “review” does not contain within it the implication or authorisation of the taking of “action” following upon the exercise of reconsidering a matter.<sup>228</sup> Therefore, to go further and interpret the requirement to “review” the TCA as implying also a power for the EU to make changes to the TCA, without being based on any specific

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<sup>224</sup> Ibid., p. 9

<sup>225</sup> Ibid., p. 8

<sup>226</sup> Duff, 2024, p. 4.

<sup>227</sup> See paras. 79-91 in *ERTA* case: 22-70 Commission of the European Communities v Council of the European Communities EU:C:1971:32

<sup>228</sup> See *Oxford English Dictionary*, Clarendon Press, 2<sup>nd</sup> ed, 1989, Vol XIII, p.830, which it is submitted would not extend to an interpretation of “review” as including “action” following upon reconsideration.

provision in an EU treaty or other agreement (including the TCA itself) would surely go beyond any reasonable application of the principle laid down in ERTA.

In addition, in Case C-479/21 PPU, although the CJEU accepted that Article 217 gave the EU a broad competence, it also considered that, in a situation where a decision was to be taken, on behalf of the EU, within a body set up by an association agreement, there would also need to be a specific legal basis for such a decision. That also points to Article 776 not providing a legal basis to make changes to the TCA<sup>229</sup>.

5.13 It can also be noted that although a review clause of some sort can be found in other EU trade agreements with third parties, there have been few examples of substantial renegotiations arising from such a review process<sup>230</sup>. Where there have been, the changes have been implemented by means of a new, stand-alone, agreement with the country concerned, superseding the original agreement. Furthermore, the terms of those agreements narrate the new legal basis on which the EU is entering into them, rather than relying on the legal basis of the original agreements<sup>231</sup>.

5.14 For above reasons, it appears reasonable to conclude that the review process by itself would not give a legal basis for the parties to make changes to the TCA. Any attempt to do so would be likely to be struck down by the CJEU. The court has not been slow to do that with other proposed agreements which it considers to be incompatible with the legal foundations of the EU<sup>232</sup>.

Article 776 does, however, require both sides to at least undertake a review, which could perhaps provide the basis for a challenge as a result of a failure to do that. In any event, it would appear that from the EU side, at least at present, there is little interest in seeking to utilise the TCA as a vehicle for substantial change in its relationship with the UK.

5.15 Nevertheless, the very existence of Article 776 and its dates of application, when combined with the continuing pressures on UK trade and business as a result of Brexit, are likely to mean that the review will be invested with a significance, requiring the EU at least to consider proposals from the UK for enhancement of the TCA. Furthermore, there are indications that even with a ‘minimalist’ interpretation

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<sup>229</sup> See para. 61 of that case. See para 5.4 and note 212 for citation, and discussion, about the case.

<sup>230</sup> See Moloney and Usherwood, 2023 : and Reland and Wachowiak, 2023, p.9.

<sup>231</sup> E.g. the agreements with (i) Kazakhstan: Enhanced Partnership and Cooperation Agreement between EU & Kazakhstan, OJ L 29, 4.2.2016, p. 3–150; (ii) Chile: Proposal for a Decision on the Interim Agreement between EU and Chile, COM/2023/434 final; (iii) New Zealand: Free Trade Agreement between EU and New Zealand, OJ 2024 L229.

<sup>232</sup> See Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms. EU:C:2014:2454.

of the potential scope of the TCA, significant steps to improve UK-EU relationships could be taken. At the very least, Article 776 gives the UK government a basis from which it could argue for a comprehensive review of the TCA, even if that was not at the forefront of EU leaders' thinking.

5.16 It can also be noted that TCA also contains, separately from Article 776, a mechanism for the review of certain of its provisions - on services and investment, and on law enforcement and judicial cooperation in criminal matters<sup>233</sup>.

## **The Partnership Council**

5.17 The second method through which changes can be made to UK-EU relationships can be found in its comprehensive network of committees and working groups, headed up by a Partnership Council. Mariani and Sacerdoti consider that “the TCA stands out for the massive use of [such an].. instrument”<sup>234</sup>. Levrat describes the institutional setting of the TCA as being “highly complex and sophisticated”, which, as he points out, establishes, as well as the Partnership Council, eight “specialised committees” and one “trade partnership committee” (itself supervising 10 “trade specialised” committees). The TCA also set up four ‘working groups’, under supervision of the specialised committees. Additional working groups might be established by the specialised committees<sup>235</sup>.

5.18 Article 7 of the TCA established the “Partnership Council”, which “shall comprise representatives of the Union and of the United Kingdom” and “may meet in different configurations depending on the matters under discussion”. It will have senior level participation: meetings will be “chaired by a Member of the European Commission and a representative of the Government of the United Kingdom at ministerial level”. It has a powerful role in the implementation and management of the TCA. Article 7(3) states that:

“The Partnership Council shall oversee the attainment of the objectives of this Agreement and any supplementing agreement. It shall supervise and facilitate the implementation and application of this Agreement and of any supplementing agreement. Each Party may refer to the Partnership Council any issue relating to the implementation, application and interpretation of this Agreement or of any supplementing agreement”.

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<sup>233</sup> Article 691, TCA

<sup>234</sup> Mariani & Sacerdoti, 2021, p. 97

<sup>235</sup> See para. 5.17, and also Levrat, 2021, pp. 229-230.



It can, under Article 7(4), where the TCA or a supplementing agreement so provides, “adopt decisions”, ; and “make amendments to the Agreement and any other supplementing agreement”. It can make recommendations to the EU and the UK “regarding the implementation and application of this Agreement or of any supplementing agreement”.

There are a large number of areas where the TCA provides such a basis for making decisions including amendments to be made to by the Partnership Council or its committees, including: (i) SPS (“sanitary and phytosanitary”) arrangements (Article 87); (ii) Recognition of Professional Qualifications (Article 158); (iii) various measures concerning energy matters (Title VIII); (iv) ownership and control of air carriers (Article 425) and aviation safety (Article 454); (v) various road transport matters (Article 487); and (vi) certain fisheries matters (Article 508); and for UK participation in EU programmes (Part Five).

5.19 Furthermore, for a period of four years after the TCA comes into force, the Partnership Council can (except in relation to Title III of Part One, which establishes the institutional framework for the TCA), “adopt decisions amending this Agreement or any supplementing agreement, provided that such amendments are necessary to correct errors, or to address omissions or other deficiencies....” even without there being specific provisions in the Agreement or supplementing agreement allowing it to do so<sup>236</sup>.

As already mentioned, the TCA also makes provision for the establishment of committees, with similar powers to that of the Partnership Council<sup>237</sup>.

5.20 It should be mentioned here that the TCA also sets up various complex dispute settlement mechanisms. There are special arrangements aimed at ensuring compliance with its ‘level playing field’ provisions<sup>238</sup>, and there are more general provisions within the TCA for dispute settlement in other areas<sup>239</sup>. The arrangements are complex, but the basic scheme is that if either side considers that the other may have breached its provisions, they will engage in consultations. Thereafter, if the matter is not resolved, they can send the matter to arbitration, which can result in a ruling against a party. If the arbitrators decide that a party is in breach of the agreement, but that party fails to comply, the aggrieved party can take retaliatory measures against the party in breach. Ultimately, however, if a party cannot

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<sup>236</sup> Article 7 (4)(d), TCA. However, it is suggested that the scope of that broad provision will be limited by the principle set down in Case C-479/21 PPU (see para. 5.12 above). It could not, therefore, be interpreted as giving a wider competence on the basis that they “flow from other provisions of the treaty” in the manner described by the CJEU in the “ERTA” case (see para 5.2 above).

<sup>237</sup> See para. 5.17.

<sup>238</sup> Articles 408, 409, TCA

<sup>239</sup> See Part Six, TCA: and also Articles 408, 409 TCA for dispute settlement arising from the “level playing field” provisions

obtain compliance from the other party, even after having imposed retaliatory measures (which may of course lead to retaliation from the other party, even though that would not be permissible under the dispute settlement provisions), the only other action that could be taken by the aggrieved party would be to terminate all or part of the TCA. Termination of part of the agreement would normally require 9 months' notice<sup>240</sup>, and termination of the whole TCA would normally require 12 months' notice<sup>241</sup>.

Whether or not termination of part or the whole of the TCA would be a realistic option for the other party is of course another question. It is probably a reasonable supposition that such extreme options would not be desired by either the UK or the EU, but the history of the brinkmanship during the Brexit negotiations suggests it is not inconceivable that such an outcome might transpire.

5.21 In theory, the powers given to the Partnership Council and the committees, as well as the various specific review provisions within the TCA proper (although not Article 776 itself), could provide the opportunity to make substantial changes to the UK-EU relationship, through a relatively simple mechanism. In addition, the TCA contains within it provisions which could allow for its termination.

However, the views of academic and other commentators as to the potential significance of the TCA as a vehicle for changes to the EU-UK relationship differ widely, as can now be seen.

### **The potential role of the TCA in the future EU-UK relationship**

5.22 Peers considers<sup>242</sup> that “although the treaty contains many off ramps leading to a further disintegration of relations...- it could always be amended if the UK ever sought to join the faster lanes of association with the EU”. Pointing to how such a decision would bring together both political and legal choices, he concludes that “Time will tell in which direction the EU/UK dynamic will develop, and how this may affect the evolution of the legal form which this relationship takes”.

5.23 Phinnemore is of the view that the TCA “currently lacks ambition and is limited in scope”, but agrees that the relationship it establishes “is not necessarily a static one” and, similarly to Peers, considers that “If the underpinning political dynamic were to change, then the framework will be important not just for implementation but also for managing the development of the UK–EU relationship and providing the UK with opportunities to influence the EU.”

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<sup>240</sup> Article 692, TCA

<sup>241</sup> Article 779, TCA

<sup>242</sup> Peers, 2022, pp. 79-80

5.24 Levrat, however, argues that there are practical problems in the TCA fulfilling such a role, a vehicle, suggesting<sup>243</sup> that there are substantial features of the “huge institutional architecture” set up by the TCA which may well make it very difficult to achieve much agreement through that structure. Furthermore, he points out that the Council has decided<sup>244</sup> that (i) every member state will be able to send a representative, to accompany the Commission representative, as part of the EU delegation, to meetings of the Partnership Council and other joint bodies set up under the TCA; and (ii) “where the Partnership Council or the Committees...adopt acts having legal effects, the positions to be taken on the EU’s behalf...are to be established in accordance with the procedure set out in Article 218(9) [TFEU].

Levrat considers that this means that the “decisions within any of the bodies set up by the TCA will be under the permanent scrutiny of EU Member States, which intend to consider every Committee or Partnership Council decision as formal legal act according to Article 218(8) TFEU.”<sup>245</sup> He concludes that the institutional framework set out in the TCA is not likely to serve the purpose of concluding “much needed” supplementary agreements to the TCA, nor will it much function for the governing of the relationship already established by the TCA<sup>246</sup>.

5.25 Usherwood<sup>247</sup>, although accepting that “at the level of a legal instrument”, the TCA successfully institutionalized a new phase of the relationship between the EU and the UK”, considered that “at the political level, the impression is much less positive. In particular, there appears to be no clear trajectory for future relations, either in the implementation of the WA and the TCA, or in the use of these or any other means to conduct a stable set of interactions”. He adds: “the conclusion of the TCA potentially draws a line under any active efforts on either side to move things along.”

5.26 Phinnemore was similarly somewhat sceptical about the scope that the TCA offers for change in the UK-EU relationship. He points out<sup>248</sup> that many of the committees set up under the TCA hardly met at all during the first two years of its operation, and some did not even meet. He concedes that “Implementation of the institutional framework for the TCA remains in its early stages and so it would be premature to draw any firm conclusions about its effectiveness in terms of providing the UK with any meaningful influence over the EU”. He considers it clear, however, that “the framework’s focus is more on

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<sup>243</sup> Levrat, 2021, p. 230,

<sup>244</sup> In Council Decision (EU) 2020/2252 of 29 December 2022. See Levrat, 2021, p. 232.

<sup>245</sup> Levrat, 2021, p. 232

<sup>246</sup> Levrat, 2021, p. 233

<sup>247</sup> Usherwood, 2021, p. 121

<sup>248</sup> Phinnemore, 2023, pp. 1498 – 1499

technical implementation and review of arrangements already agreed than on providing opportunities to develop the relationship and influence EU decision-making”.

Certainly, the use of those components of the TCA has so far not accelerated since Phinnemore’s assessment in 2021. A report from UK in a Changing Europe concluded that strains in the UK-EU relationship until early 2023 “effectively froze cooperation”. It points out that when the Windsor Framework was announced, both parties agreed<sup>249</sup> to “exploit fully the potential” of the TCA, but in the authors’ view, progress in doing so has been more halting than many expected<sup>250</sup>. They point out that even in areas where agreement was eventually reached, negotiations have frequently been lengthy and complex, as in the cases of UK participation in the Horizon and Copernicus programmes, and the extension of rule of origin for electric vehicles; and in many areas, negotiations are still ongoing without agreement yet being reached (e.g. on recognition of professional qualifications)<sup>251</sup>.

5.27 That report also highlights other areas of slow progress. It stated that “the possibility, envisaged by the TCA, of coupling the respective UK and EU emissions trading regimes has not been addressed. Some technical cooperation agreements have been signed, though their provisions are generally quite thin. [The parties] are also negotiating a supplementary agreement to the TCA on competition policy, which will cover cooperation and information exchanges. On air transport, although the UK has agreed bilateral arrangements on additional all-cargo services with more than 20 EU member states, the EU has been reluctant to deepen cooperation in other areas that would reduce the bureaucratic burden for the UK.”<sup>252</sup>

According to a recent report<sup>253</sup> by a Scottish Parliament committee, seventeen of the eighteen Specialised Committees set up under the TCA had only met once during 2023 (although the Scottish Government considered that these [TCA] structures were “starting to function properly” given that “the UK-EU relationship has improved.”<sup>254</sup>

5.28 On the other hand, the experience of the implementation of the Windsor Framework shows that when there is political agreement between the two sides, the decision-making process can be completed

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<sup>249</sup> See [https://commission.europa.eu/publications/joint-statement-vice-president-maros-sefcovic-and-foreign-secretary-james-cleverly\\_en](https://commission.europa.eu/publications/joint-statement-vice-president-maros-sefcovic-and-foreign-secretary-james-cleverly_en) (last accessed 10.9.2024).

<sup>250</sup> See UK in a Changing Europe, 2024 (2), p. 10.

<sup>251</sup> Ibid., p. 14

<sup>252</sup> Ibid., pp. 14 -15

<sup>253</sup> 10.9.2024. Scottish Parliament (2024), Para. 233.

<sup>254</sup> Ibid., para. 234.

quickly, even where it concerns matters which are complex and which have considerable political significance. The relevant decisions were made under the Joint Committee set up by the WA rather than the TCA, but the procedures for both are similar. For the Windsor Framework, ‘political agreement’ was reached by the two sides on 27 February 2023<sup>255</sup>; on 17 March 2023 the Council agreed the EU position to be taken at the Joint Committee; and the Joint Committee took the decision on 24 March 2023 which put the arrangements into legal effect<sup>256</sup>.

Similarly, those few decisions that have so far been taken through the Partnership Council and its committees appear to have gone through that process fairly smoothly, although it is fair to say that the bulk of the activity of those bodies appears to have consisted of information exchanges and updates rather than joint decision making<sup>257</sup>.

5.29 The preliminary conclusion that can be reached is that the TCA does provide a means for making significant changes to UK-EU relationships where there is a political will to do so. In agreeing to such changes, the EU, at least, must still have a legal basis within its own constitutional foundations for doing so. However, so far, fears such as Levrat’s that the EU’s participation in the Partnership Council process would be hamstrung by individual states do not appear to have materialised, at least so far<sup>258</sup>. Having said that, the few changes made by the TCA so far are limited in scope. Whether such ease of progress would be achievable if more substantial, or more controversial changes, were being proposed must inevitably be an open question. In addition, although in principle some changes to the TCA might fall within the category where a Council decision would not in principle require to be made on the basis of unanimity, the fact that they were being made through the Partnership Council process, set up under the TCA, might be the basis for an argument that all such changes would require Council unanimity.

5.30 As regards UK participation in the Partnership Council and its committees, the UK has not set up any formal mechanisms in order to decide the position that the UK representative and its committees should take part in such bodies. Whether or not the UK’s constitutional requirements concerning international treaties would restrict the decision-making power of its representatives within the TCA Partnership Council and its committees is unclear, but in practice such representatives will in any event be acting on the basis of instructions from the relevant UK Minister, and it is presumably unlikely (for political reasons if nothing else) that they would issue an instruction which would have the effect of

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<sup>255</sup> See [https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT\\_23\\_1270](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_23_1270) (last accessed 10.9.2024).

<sup>256</sup> See <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22023D0819> (last accessed 10.9.2024).

<sup>257</sup> See [https://commission.europa.eu/strategy-and-policy/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement/meetings-eu-uk-partnership-council-and-specialised-committees-under-trade-and-cooperation-agreement\\_en](https://commission.europa.eu/strategy-and-policy/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement/meetings-eu-uk-partnership-council-and-specialised-committees-under-trade-and-cooperation-agreement_en) (last accessed 10.9.2024.)

<sup>258</sup> See para. 5.24.

blatantly contradicting an earlier Commons vote refusing to approve a treaty.

Subject to those constraints, therefore, the powers of the Partnership Council, and its committees, set up under the TCA do appear to provide an opportunity for relatively speedy changes to be made to EU-UK agreements, which may indeed mean that the use of its mechanisms may be more significant for making legal changes to the EU-UK relationship than the review process set up by Article 776 of the TCA. However, given that the swift use of the Partnership Council process is dependent on there being prior political agreement, it may be that the Article 776 review process could serve securing such political agreement, which is a possibility discussed further in the following Chapter.

5.31 Finally, it should be mentioned that the UK and the EU will sometimes be able to enhance their relationship without formally entering into a specific agreement. For example, the UK recently announced that it had entered into a ‘deal’, to “enable mutually beneficial cooperation between the UK and Frontex (the European Union Border and Coast Guard Agency)”. However, this was described as a “Working Arrangement Establishing Operational Cooperation”, and paragraph 15 of the document agreed by the two sides states that “This working arrangement constitutes solely an administrative arrangement at technical level. It does not constitute a legally binding agreement under national or international law...”<sup>259</sup>

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<sup>259</sup> [https://www.frontex.europa.eu/assets/WA\\_Frontex-UK\\_Home\\_Office.pdf](https://www.frontex.europa.eu/assets/WA_Frontex-UK_Home_Office.pdf) (last accessed 10.9.2024)

## **Chapter 6: Implementing new relationships between UK and Europe: practical options**

### **EU response to the policy of the new UK government**

6.1. The previous chapters have set out the likely objectives that each of the UK and the EU would seek to achieve to enhance their current relationship post-Brexit, and the constitutional framework in which any agreements would need to be set. This chapter will now consider what are the possible parameters of possible agreements between the parties, taking into account the various factors which might impel each party towards an agreement.

6.2 Reference has been made above<sup>260</sup> to the apparent reluctance of senior figures within the EU to countenance any major change in the UK-EU relationship. That approach was reiterated a few days before the UK general election on 4 July 2024, when there were indications from within the EU that negotiations with a new Labour government would be unlikely to lead to quick changes to that relationship. The Guardian quoted<sup>261</sup> a ‘senior source close to the European Commission president’, as saying “It’s not that people are thinking good things about the UK, it’s not that they are thinking bad things. They are not thinking about the UK at all.”

However, immediately after that election, European leaders certainly expressed warm words pointing to a willingness to establish closer EU-UK links. The Irish Prime Minister said<sup>262</sup> “there would be a fair hearing for any proposal about ironing out practical issues in terms of having a relationship that works,” making specific mention to a veterinary agreement, and student mobility. The German foreign ministry said their country was “working with the new UK government to see how the UK can move closer to the EU<sup>263</sup>”. European Commission President Ursula von der Leyen said she was keen to discuss ways to “strengthen cooperation and reset the relationship” between the UK and EU”, and in her candidate’s address to the European Parliament two weeks later, pledged to “work to strengthen relations with the UK on issues of shared interest, such as energy, security, resilience and people-to-people contacts”<sup>264</sup>.

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<sup>260</sup> See para. 4.1.

<sup>261</sup> Guardian, 1.7.2024 <https://www.theguardian.com/politics/article/2024/jul/01/eu-would-not-rush-to-reopen-brexit-talks-with-labour-say-brussel-sources> (last accessed 10.9.2024)

<sup>262</sup> Politico, 7.7.2024 <https://www.politico.eu/article/europe-brexit-ireland-united-kingdom-keir-starmer-simon-harris> (last accessed 10.9.2024)

<sup>263</sup> Telegraph, 6.7.2024 <https://www.telegraph.co.uk/politics/2024/07/06/government-working-with-germany-moving-closer-eu> (last accessed 21.9.2024)

<sup>264</sup> At p. 25 of her address: [https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648\\_en?filename=Political%20Guidelines%202024-2029\\_EN.pdf](https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf) (last accessed 10.9.24)

6.3 On the UK side, as is narrated above<sup>265</sup>, there is clearly a wish on the part of the new Labour government to make significant enhancements to the post-Brexit UK-EU relationship, which it envisages would be founded in treaty relationships between the two parties, alongside the establishment of greater cooperation through mechanisms external to the EU's structure. These latter would be primarily a Defence and Security pact along with participation in bilateral actions and initiatives with individual EU member states. Greater co-operation between the two parties might also take place within other fora outside the framework of the EU, such as the EPC.

On the EU side, there is now a wider recognition of how the post-Brexit arrangements have damaged some of its own trading and commercial interests, and also had negative effects on some of its own citizens (e.g. students)<sup>266</sup>. Generally, there is a wish to rebuild some of the relationships, both economic and societal, with the UK which were disrupted by Brexit, and a willingness, in principle, to enter into new agreements to facilitate trade and other areas of cooperation between the EU and the UK. In particular, there is a keenness to see the UK involved more closely in European security and defence policy.

6.4 However, both the stated position of the UK Labour Party on closer relationships with the EU, and the position that can be deduced as being the initial consensus positions of the EU on closer relationships with the UK, contain conditions, 'red lines', that would make it difficult for the two parties to come to an agreement in many possible areas where both sides, in principle, would desire to establish a closer relationship.

On the UK side, the main 'red lines' would be unwillingness to reenter the EU's single market, including any reintroduction of freedom of movement, or the EU's customs union, along with Labour's position that the UK should not be a "rule-taker" which is obliged to accept EU regulations<sup>267</sup>, and therefore (presumably) rejecting any supervisory jurisdiction for the CJEU over how the relevant EU rules would be interpreted and applied. There has also been an apparent rejection of 'dynamic alignment', if that involves the UK being automatically required to accept new EU legislation and rules<sup>268</sup>.

From the EU side, there would be unwillingness to allow the UK to have the benefit of wider access to the EU market without any provisions to ensure that the relevant EU rules are applied by the UK, which

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<sup>265</sup> See paras. 3.19-3.25

<sup>266</sup> See para. 4.2.

<sup>267</sup> See BBC, 22.9.2023 <http://www.bbc.co.uk/news/uk-politics-66887576> (last accessed 17.9.2024).

<sup>268</sup> See BBC, 22.9.2023 <http://www.bbc.co.uk/news/uk-politics-66883986> (last accessed 17.9.2024).



would include an acceptance of the ultimate supervisory jurisdiction of the CJEU. There would probably also remain a desire to underline how a country which left the EU would not be able to reacquire the advantages of membership by ‘back door’ arrangements. There are also a number of areas of business activity where some actors would identify benefits from the UK’s departure from the EU, and who might consider their interests would be threatened if the UK was to regain greater access to the relevant market<sup>269</sup>.

In addition, although the initial post-election warmth towards the new UK government was undoubtedly genuine, there are now signs that senior figures in the EU are beginning to doubt whether it truly wants a significantly close relationship with the EU<sup>270</sup>. The hostile and speedy response to proposals for a youth mobility scheme, and the UK’s continuing rejection of rejoining Erasmus, have been cited as indication of a lack of enthusiasm for closer links. There are certainly some voices within the EU cautious about reopening the lengthy and often fractious negotiations with the UK over Brexit<sup>271</sup>.

6.5 A strict application of the two sides’ respective positions, as characterised above, would make it difficult to reach enhanced agreements in all but a few areas. However, in political reality, it can reasonably be expected that some of the “red line” conditions sought by either side might be applied in a less rigorous fashion. Signing up to schemes where UK has accepted EU control of the scheme (with the only option for the UK if dissatisfied to terminate its membership) has already been undertaken by the current UK Conservative government<sup>272</sup>, and the ability of the UK government to do so in other fields of activity is already provided for in the TCA<sup>273</sup>, should it wish to do so.

Similarly, even the previous current Conservative government in effect adopted ‘voluntary dynamic alignment,’ where the UK decided to accept the EU regulatory framework on a voluntary and unilateral basis, in a number of areas, even if in theory only on a temporary basis, e.g. in the use of the CE mark<sup>274</sup>.

6.6 As we have seen<sup>275</sup>, one of the new government’s manifesto commitments was to “negotiate a veterinary agreement”, and prior to the 2024 election, Labour had also indicated that its policy was that “the UK would not diverge from EU regulations in the fields of food, environmental and labour

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<sup>269</sup> See para 4.1.

<sup>270</sup> See Politico, 12.9.2024 <https://www.politico.eu/article/keir-starmer-european-union-brexit-relationship-reset> (last accessed 13.9.2024).

<sup>271</sup> See para. 4.1.

<sup>272</sup> For example, in the Horizon and Copernicus programmes – see para. 3.11.

<sup>273</sup> See para. 2.13 above.

<sup>274</sup> See para. 3.12 above.

<sup>275</sup> Para 3.21 above

standards”<sup>276</sup>. That would presumably mean that the UK would have to align itself to future EU rules as well. Business organisations have certainly identified<sup>277</sup> an SPS agreement, under which the U.K. would stay aligned to EU single market rules on food and agricultural products, plant and animal health, as a top priority for UK exporters, and indeed for importers, in the sectors it would cover. Under such an arrangement, those goods would not require health checks and other documentation at the EU-UK border.

Such an arrangement would certainly benefit both UK and, to a lesser extent, EU businesses: expert analysis has indicated that such an agreement could lead to a 22.5% increase in UK agri-food exports and a 5.6% increase in imports from the EU<sup>278</sup>.

6.7 However, there are indications<sup>279</sup> that, for such an agreement, the EU would require some type of oversight by the CJEU to ensure that the UK was complying with the relevant EU single market rules. Furthermore, agreeing to stay aligned to those rules could challenge Labour’s position that it would not want the “UK to be a “rule-taker,” under any future agreements with the EU. The problem with that position is obvious: the EU could hardly be expected to allow the UK greater access to its markets if there was no way of ensuring that the UK was in continued compliance with the relevant EU regulatory schemes.

### **Alternative mechanisms to ensure UK compliance with EU regulatory regimes**

6.8 If the UK’s alignment with EU regulations in this area was restricted to “voluntary” dynamic alignment, it would therefore not achieve the full access to the EU market that business seeks. It would have some benefits. It would reduce the regulatory burden upon UK exporters. It should also reduce the potential for future disputes between the UK and the EU as to whether the UK is still maintaining a ‘level playing field’ in its trade relations with the EU. Concerns that the UK was failing to do that have already been raised by the EU<sup>280</sup>. If the potential for such disputes can be minimised, as well as giving more security to UK exporters, it could also contribute to improving the general atmosphere of the UK-EU relationship, which could presumably then lead to a better climate for wider negotiations on future UK-EU arrangements.

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<sup>276</sup> BBC, 22.9.2023 <https://www.bbc.co.uk/news/uk-politics-66883986> (last accessed 8.2.2024)

<sup>277</sup> See para. 3.15 above.

<sup>278</sup> See <https://ukandeu.ac.uk/would-a-veterinary-agreement-be-a-boost-for-uk-eu-agri-food-exports>

<sup>279</sup> See <https://www.politico.eu/article/eu-labour-party-brexit-trade-ireland-farmers-europe-politics-uk-election> (last accessed 10.9.2024).

<sup>280</sup> See para. 4.12 above.

However, under such “voluntary dynamic alignment” UK exports would still be subject to rules-of-origin requirements, and standards and conformity checks at the EU border would remain<sup>281</sup>.

Fuller benefits of such voluntary alignment would therefore only be achieved if there is an agreement with the EU that it would accept, to a greater or less extent, the UK regulatory scheme as meeting its own requirements. Consideration is therefore now given to whether there are any means under which the EU would do that, without the UK agreeing to accept the oversight of the CJEU to ensure that the UK was complying with the EU’s regulatory framework.

6.9 It is certainly the case that dynamic alignment, overseen by the CJEU, is the EU’s preferred way of ensuring such compliance. In reality, however, it is rare for it to have an agreement with a third party where changes in EU regulation are automatically followed by its partners. Under the EEA Agreement with Norway, Iceland and Liechtenstein, the EEA countries do not apply EU law directly, but instead EU law is transposed into a separate set of EEA laws that mirrors EU law. EEA countries participate in a consultation process during the EU legislative process, the EFTA Surveillance Authority monitors the application of the EEA Agreement in those countries, and the EFTA Court ensures legal compliance with the EEA Agreement<sup>282</sup>. If an EEA country goes as far as to veto the application to it of a new regulation, or if it does not properly implement it, the EEA right to market access to the EU can be suspended, which given the relative strength of the EEA states vis-à-vis the EU, is a powerful incentive to comply with the EU’s requirements. In reality, the EEA Agreement imposes what might be described as “indirect dynamic alignment”, which enforces compliance with EU law, with perhaps minor changes, on the EEA states.

6.10 The system whereby Switzerland aligns its regulations with the EU framework is slightly different. Under the Swiss-EU bilateral agreements, the adoption of each new EU directive by Switzerland has to be negotiated. This arrangement has resulted in friction between the two parties<sup>283</sup>, and the EU has devoted considerable effort to bringing the numerous agreements it has developed with Switzerland into a more ordered arrangement. The agreement has not been popular with the EU. Berg considers that the EU is therefore unlikely to ever offer this type of alignment again. Both parties have now agreed to switch to dynamic alignment in their ongoing negotiations for a new Swiss-EU framework<sup>284</sup>. If the UK wanted to accept alignment in return for a reduction or removal of border checks it would therefore necessarily be a dynamic system reflecting the current state of EU regulation<sup>285</sup>. It is

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<sup>281</sup> See Bhalotia et al. 2023, pp. 10-11.

<sup>282</sup> See <https://www.eftasurv.int/esa-at-a-glance/mission-value> (last accessed 16.9.2024).

<sup>283</sup> Berg, 2024, p. 2

<sup>284</sup> See <https://www.consilium.europa.eu/en/press/press-releases/2024/03/12/eu-switzerland-council-adopts-mandate-for-negotiations-on-future-relationship/> (last accessed 10.9.2024).

<sup>285</sup> Berg, 2024, p. 2

certainly the case that Switzerland, like the EEA countries, has not, in any significant way, been able to refuse to align its own legislation with EU rules.

6.11 Arrangements like those in the EEA Agreement, or in the EU's agreements with Switzerland would certainly appear to breach Labour's 'red line' rejecting a supervisory rule for the CJEU.<sup>286</sup> For the EU to agree Labour's proposals for a veterinary agreement (in some form), some alternative method of ensuring UK compliance with the EU's regulatory standards would have to be employed.

6.12 There are a number of ways in which that could be achieved. One would be for the EU and the UK agree to recognise each other's regulatory framework for the items in question, a type of arrangement that has been described as an agreement based on an "equivalence of standards". Such an arrangement has been established, at least on a temporary basis, for rules of origin for electric vehicles, as we have seen<sup>287</sup>. For an SPS agreement, for example, it has been suggested that the UK and the EU could agree to recognise each other's rules for specific products as equivalent, such as testing procedures to confirm lamb meat is free of certain diseases<sup>288</sup>.

These types of arrangements have their limitations, however. It is unlikely that the EU, or indeed the UK, would accept that any such arrangements to accept 'mutual equivalence' of each other's regulatory framework in a field of trade, at a particular point in time, would then continue unchanged for the indefinite future. It is more likely that one or both parties would want a provision which allowed the agreement to be reviewed or terminated, either at a specific date (as in the rule of origin rules on electric vehicles), or by allowing them to be repudiated (or for retaliatory measures to be taken), if the other side felt that one party was no longer complying with the agreement.

6.13 Another type of arrangement is one where both parties agree in broad terms as to certain standards which each side will maintain, without specifying the regulations by which such standards will be imposed. Such an arrangement will include provisions for dispute settlement in case an issue arises as to whether those standards are being adhered to, and the possibility of termination. These are typical of free trade agreements, and the EU has such agreements with many countries<sup>289</sup>. One such example is the EU-Canada Comprehensive Economic and Trade Agreement ("CETA"). That has dispute settlement procedures which allow either side to take up "any dispute concerning the interpretation or application of

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<sup>286</sup> Berg, 2024, p. 2

<sup>287</sup> See para. 3.6(iv).

<sup>288</sup> Du, Messenger, and Shepotylo, 2024.

<sup>289</sup> See Lenaerts and Van Nuffel, 2021, para. 10.008.

the provisions of this Agreement”. Similar to the TCA, complaints may ultimately proceed to an arbitration panel, and if a party does not comply with the panel’s ruling, the other party can suspend its obligations under the treaty. Ultimately, however, the only sanction for the aggrieved party, if the other does not respond satisfactorily, is to terminate the whole treaty<sup>290</sup>.

6.14 The TCA itself is an agreement of that nature, as it too is founded on provisions which allow either side to utilise a dispute settlement mechanism if they consider the other is failing to maintain the standards to which it committed itself, with the ultimate right to terminate the agreement.

It is also a particularly distinctive form of such an agreement in the wide scope of the requirements placed on both sides to meet certain standards. As Mariani and Sacerdoti point out, it has wide-ranging provisions designed to ensure a “level playing field” for “open and fair competition and sustainable development”, which they consider to be “the most innovative, but also most contentious and problematic trade issue of the TCA<sup>291</sup>”. Under the TCA, the parties are required not to weaken or reduce their levels of social, labour and environmental protection below those in place at the end of 2020. Existing commitments and ambitions on climate change, in particular on climate neutrality by 2050, remain in place for both parties<sup>292</sup>.

Furthermore, in the fields of labour standards, environmental protection, and addressing climate change, the TCA committed both parties to go beyond the intent to ensure a “level playing field”. They are required to take measures to meet various commitments previously entered into under various multilateral environmental agreements, including to a number of specific actions in accordance with the 2015 Paris Agreement on climate change. As Mariani and Sacerdoti point out<sup>293</sup>, through the TCA both parties bind themselves to the implementation of a number of instruments on trade and responsible supply chain management which are in themselves non-binding.

6.15 As well as those provisions, which are particularly wide-ranging for a free trade agreement, the TCA also contains provisions of a more standard nature to ensure mutual maintenance of standards, allowing each party to comply with those ‘level playing field’ requirements as they see fit. Under the TCA, the UK and EU can both “determine the levels of protection it deems appropriate and to adopt or modify its law and policies in a manner consistent with each Party’s international commitments”<sup>294</sup>. There

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<sup>290</sup> See Articles 29, 30 CETA.

<sup>291</sup> Mariani and Sacerdoti, 202, p 93, 102, and Chapter 5 TCA generally

<sup>292</sup> European Parliamentary Research Service, 2021, p. 1.

<sup>293</sup> Mariani & Sacerdoti, 2021, p. 110

<sup>294</sup> Article 356 TCA

is no purpose to “harmonise the standards of the Parties” but the parties declare that they are “determined to maintain and improve their respective high standards in the areas covered by this Title”<sup>295</sup>.

There are also provisions concerning competition and subsidies, with dispute resolution provisions. It can also be noted that the TCA introduces a mechanism whereby a party can take appropriate rebalancing measures to offset any (adverse) 'material impacts on trade or investment' arising from 'significant divergences' between parties. Article 411 also allows either party to request a review with a view to amending the TCA. If the parties cannot agree on such an amendment, either can decide to terminate one or more Headings of the TCA.

6.16 It can be seen, therefore, that there are models for future UK-EU relations which would not require the UK to accept the primacy of EU law, or the jurisdiction of the CJEU. Ultimately these amount to either (i) the UK voluntarily deciding to align itself with EU regulations, either on a static basis, or on a dynamic basis which would require further voluntary realignment to keep up to speed with changes in EU regulations, or (ii) entering into some form of binding agreement to maintain “equivalence of standards”, allowing each party access (or other cooperation e.g. in the field of recognition of professional qualifications) on the condition of agreeing to maintain certain standards, prospectively as well as those standards current at the time an agreement was entered into, on the basis of their being broadly equivalent to the other side’s rules and standards. In the event of a party failing to maintain those agreed standards, the other party would be able to take “appropriate remedies” against the party in breach.

A necessary corollary to agreements of the latter type is that either party is able to terminate it, either at a specific date, or in response to failures to comply with any agreement between the parties.

6.17 As discussed above, voluntary alignment is likely to grant at best limited access to the party operating such a model. If the UK is unwilling to accept ‘dynamic alignment’, where it follows current and future EU rules, subject to the oversight of the CJEU, then the only model which could provide the UK with greater market access is the second type of alternative described above, where the UK agrees to maintain standards and rules, in the fields within the scope of the agreement, which are compatible, in a broad sense, with the EU’s standards regulatory regime. That is underpinned with the right to take retaliatory action, and ultimately to terminate the agreement in the event of irresolvable disputes. A model

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<sup>295</sup> Article 355 (para. 4) TCA

might be that of the EU SPS agreement with New Zealand, which has been described as providing a “more limited” form of alignment than that in the EU agreements with Switzerland<sup>296</sup>.

If that is so, then the question is how far it would be practicable, and politically acceptable, for both the UK and the EU to utilise an “equivalence of standards” model for any agreements on their future relationship. Most likely, any such agreements would be put into effect through the TCA process, as it can be extended to cover more areas of trade and the relationship, through the use of amending or supplementary agreements. It therefore has ‘built in’ a mechanism for dispute settlement, with ultimate sanctions of retaliation and termination, which can automatically apply to different sectors of activity as and when agreements are reached, without the need for negotiating and agreeing terms to cover such eventualities.

6.18 As regards practicability, it is hard to believe that the EU would be willing to accept that agreements on mutual equivalence of broad standards, accompanied by a dispute settlement and an ultimate right for termination, could apply to all aspects of relationships between the UK and the EU, as a substitute for the UK’s recognition and acceptance of EU regulations. Even where the EU might be prepared to accept such arrangements in principle, agreements would likely need to be reached for particular sectors, each of which would be likely to require lengthy negotiation.

From a political point of view, the EU would have concerns about the UK ‘cherry picking’ the benefits of membership without accepting the constraints, in case that became attractive to other member states<sup>297</sup>. There would also be concerns that the more that regulation of trade agreements was governed by mutual dispute settlement mechanisms, the greater would be the threat to the supervisory role of the CJEU, and ultimately the essential pillars of the EU legal order<sup>298</sup>.

Even in sectors and activities for which the potential for closer arrangements is already set out in the TCA (and which might therefore be thought to be easier matters for negotiation), the experience to date with the TCA, and the general experience of trade negotiations, suggests that an approach to rebuilding UK-EU relationships which aimed at too broad a target would not be productive. The more extensive the proposals for change from a Labour government, the more likely that that process would be complex and

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<sup>296</sup> See Scottish Parliament, 2024, paras. 186-191.

<sup>297</sup> E.g. comments from Michel Barnier (former EU chief negotiator on Brexit, currently French Prime Minister, here: <https://www.lbc.co.uk/news/brexit-latest-election-michel-bernier-eu> and Irish deputy Prime Minister, Micheal Martin, here: <https://www.theguardian.com/world/article/2024/sep/07/a-la-carte-new-brexit-deal-with-eu-not-on-table-micheal-martin-warns> (both last accessed 8.9.2024)

<sup>298</sup> See Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms. EU:C:2014:2454.

lengthy. It can be noted that the renegotiation of the agreements with Kazakhstan, Chile, and New Zealand, referred to above, all took many years to achieve<sup>299</sup>.

### **Possibility of a multi-sectoral approach to a new EU-UK relationship**

6.19 All these factors would point to any major enhancement of current EU-UK relationships as being an exercise that would be undertaken on a piecemeal basis, under different timescales, with varying prospects of success depending on the political questions around the specific matters being discussed, and with potentially different forms for whatever individual agreements were reached.

The question must then be asked as to how attractive such an approach, and the eventual finished model, would be to the EU, given the time and energy that it would take to achieve it. The TCA, already a *sui generis* type of agreement, goes against a trend of more than 30 years in which the EU has sought to avoid developing bespoke bilateral relations with neighbouring European countries, as Levrat points out<sup>300</sup>. It might therefore be thought that extending the scope of the TCA would surely further exacerbate that undesirable trend.

The answer to that question is almost certainly to be found in a number of factors, which present powerful countervailing arguments to the concerns set out above.

6.20 First, the UK is still a major force in the world economy, so the ability for EU exporters to have better access to UK market is still attractive. As noted above<sup>301</sup>, many EU businesses have lost out as a result of the barriers imposed by Brexit, as well as UK ones also. There have also been societal disbenefits to the EU from the erecting of those barriers, in fields of education and mobility in particular. Rebuilding those links would be an attractive prospect for EU.

6.21 Second, if the UK was prepared, in recognition of its position as a third party with an enhanced “special relationship” with the EU, to make financial contributions to EU programmes and activities, that too could no doubt be a further persuasive factor<sup>302</sup>. That would not necessarily require payments into the EU budget, which would almost certainly be politically unacceptable to the UK, but could be provided by UK contributions and participation in a wider range of EU programmes (from which the UK itself would

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<sup>299</sup> See note 230 for references to the agreements.

<sup>300</sup> Levrat, 2021. p. 221

<sup>301</sup> See para. 4.2.

<sup>302</sup> See Financial Times, 5.9.2024 <https://on.ft.com/3TtZ5tq> (last accessed 18.9.2024).



gain benefits), and perhaps also by contributions to EU international actions which were in line with UK objectives and policies anyway (such as its Peace Facility programme<sup>303</sup>, and in the fields of international development and measures to tackle climate change).

6.22 Third, and probably most important in the current international climate, are the security and political considerations which would encourage the EU to reestablish a whole portfolio of enhanced relationships, as part of a general rapprochement with the UK. In the current international climate, decisions and implementation of future defence and security arrangements involving the UK with EU may well be taken on a much quicker timescale. As has already been mentioned,<sup>304</sup> there is now significant interest within both the EU and the UK on taking measures to enhance defence and security cooperation between the two, and across Europe more widely.

6.23 The various circumstances set out above are certainly factors motivating towards earlier agreement and establishment of enhanced relationships between the UK and the EU in a number of fields. In so saying, it must be recognised that negotiation and conclusion of any new agreements will still be challenging. The EU can be expected to vigorously defend what it sees as its interests and those of its member states. The “mood music” from EU leaders immediately after the UK general election in July 2024 may have been generally positive, but was soon accompanied by a warning from the European Commission that the UK, if it wants to discuss wider co-operation with the EU, should “demonstrate a real commitment” to honouring the existing Brexit agreements, citing what it considered failures of the UK authorities to properly comply with the Windsor Framework agreement on checks on trade between the UK and Northern Ireland, along with a failure to give EU citizens residing in the UK the rights they were entitled to under the WA. EU officials have also continued to identify as priorities for negotiation the achievement of a youth mobility deal, a UK decision to rejoin Erasmus, and continued EU access to UK fishing waters after 2026<sup>305</sup>.

6.24 In the field of defence and security, although there is EU interest in closer relationships with the UK, the EU is still some way from reaching a political consensus for its own future priorities in these areas, let alone what might be its future relationship with the UK. In addition, although no doubt geopolitical factors motivate both sides to reach an agreement, the defence industry is a highly competitive and major sector in both the EU and the UK, each of which will have its own industrial priorities. Furthermore, the EU is now taking significant steps to strengthen its own “strategic autonomy”

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<sup>303</sup> See Foster, 203, p. 142.

<sup>304</sup> See paras. 4.6-4.9.

<sup>305</sup> Financial Times, 1.8.2024 <https://on.ft.com/3Txse71> (last accessed 18.9.2024)

by increasing its procurement of defence equipment from within its own borders<sup>306</sup>. It can be foreseen that there might be a reluctance on the part of the EU, at least initially, to widen its openness to the UK defence sector if that were to threaten the EU's defence industry and strategic autonomy. As a recent report states<sup>307</sup>, "Since Brexit, and in the aftermath of the Russian invasion of Ukraine, the EU has actively encouraged both collaboration between EU firms on defence related research and development and for increased joint procurement of defence products by member states. As a third country outside the single market, the UK is largely excluded from these schemes. It appears unlikely that the EU will allow it privileged access".

6.25 A number of expert commentators have suggested that some form of defence and security agreement should also be a priority for UK-EU discussion<sup>308</sup>. This might also extend to a wider range of foreign policy matters. Former UK Foreign Secretary, David Miliband has argued<sup>309</sup> that a "such an agreement [could include] foreign policy; defence policy; tackling terrorist threats; cyber security; illegal migration; pandemics and other health security issues; development coordination; decarbonization, climate and critical minerals, and associated industrial policy." He suggested such new relationships could be brought about by a "maximalist option" of a legally binding agreement, coming under the TCA as a new "Foreign and Security Policy pillar", or as a supplementary agreement, or a "minimalist option" of dialogue and high level contact, which could be taken forward initially by a "high level Political Declaration" between the UK Prime Minister and EU Presidents, setting objectives for a future agreement on foreign and security policy.

6.26 His conclusion was that the 'minimalist option' was a more practical objective, which is a reasonable conclusion given the political challenges, both within the EU and UK, that would need to be surmounted to reach agreement on his 'maximalist option', (although it has also been pointed out that a number of the EU's other association agreements provide for cooperation on foreign and security policy, and that therefore "establishing deeper UK-EU foreign policy cooperation entails fewer complications than collaboration on security and defence"<sup>310</sup>.

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<sup>306</sup> See [https://commission.europa.eu/news/first-ever-european-defence-industrial-strategy-enhance-europes-readiness-and-security-2024-03-05\\_en](https://commission.europa.eu/news/first-ever-european-defence-industrial-strategy-enhance-europes-readiness-and-security-2024-03-05_en) (last accessed 18.9.2024).

<sup>307</sup> UK in a Changing Europe 2024 (1), p. 5

<sup>308</sup> Foster, 2023, pp. 140-142

<sup>309</sup> See Miliband, 2024 (last accessed 18.9.2024).

<sup>310</sup> UK in a Changing Europe, 2024 (1), p 28.

In a similar vein, Spisak & Tsoukalis also propose a “new pillar” to the TCA, to “build shared agendas” including dialogue on issues including foreign policy, defence, climate change and decarbonisation, industrial policy and supply chains, and digital trade<sup>311</sup>.

6.27 It appears reasonable to conclude that there is likely to be sufficient political consensus between the UK government and the EU to wish to move ahead quickly with a reasonably wide range of measures to bring about an enhancement of UK-EU links. Given that the TCA already is a pointer to areas of possible agreement, and to the mechanisms for establishing closer links, the first priority for the new government would appear to be ensure that it commits the expertise and resources to utilise the TCA structure as fully as possible with a view to reaching agreements in as many sectors as possible. With a political will on both sides, there is no reason why significant progress could not be made in many areas. Such a focus on utilising the TCA structure and process has been recommended by a wide range of expert opinion.<sup>312</sup> There is also widespread support for the idea of the UK extending the scope of its voluntary alignment with the EU regulatory framework.<sup>313</sup> From the EU standpoint, using the TCA process would have the advantage that as well as reducing the possibility of delay during its own decision making process to make changes in the EU-UK agreements<sup>314</sup>, it would bring any such changes within the TCA’s existing dispute settlement mechanisms, and the commitments to maintain a ‘level playing field’ in many important areas.<sup>315</sup>

6.28 It has to be acknowledged, though, that even if such a wide range of agreements was achievable, they would be likely to constitute a somewhat unwieldy body of measures. They would probably combine a patchwork of agreements: some within the TCA framework, along with others where the UK de facto accepted EU regulations, on the basis of dynamic alignment, while maintaining the fig leaf that such acceptance and alignment was being undertaken on a continuing voluntary basis<sup>316</sup>. As a leading commentator on European affairs, Charles Grant, has accepted, while confirming the general view that the EU is extremely hostile to the ‘Swiss model, there is a case that “in the very long run, the UK relationship [with the EU] will be bespoke, unique, institutional structure rather like the Swiss...serving ‘indirectly’ as a model.”<sup>317</sup>

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<sup>311</sup> Spisak & Tsoukalis, 2023, p. 37

<sup>312</sup> Duff, 2024, pp. 5-6; Henig, 2023, p. 13, Foster, 2023, p. 144; Spisak & Tsoukalis, 2023, pp. 41-42

<sup>313</sup> Henig, 2023, p. 13, Foster, 2023, p. 151; Spisak & Tsoukalis, 2023, p. 26-29

<sup>314</sup> See paras. 5.18-5.21.

<sup>315</sup> See paras. 2.13, 5.20 and 6.14-6.15.

<sup>316</sup> Such an approach could certainly be facilitated by the Product Safety and Metrology Bill that was announced in the 2024 King’s Speech: see para. 3.23.

<sup>317</sup> Politico, 29 July 2024 <https://www.politico.eu/article/brexit-britain-switzerland-model-agreement-trade-treaty-freedom-movement> (last accessed 9.9.2024)

However, it is suggested that such a package might have a better prospect of being as wide-ranging as both sides would like if the negotiating process was seen as part of an integrated process leading to the desired position of enhanced relationship between the UK and EU. Such a strategic approach would minimise the risks of the process descending into a piecemeal and lengthy exercise, including the possibility of negotiations on one subject breaking down and threatening agreement on other topics, the risk of one or both sides being unable to maintain political consensus and support for achievement of closer relationships, or just simple negotiating fatigue and loss of political momentum.

### **A new Political Declaration?**

6.29 To implement such a strategic approach, a new UK government could seek, at an early date, a headline political agreement with the EU setting out the broad parameters of the closer relationship between the two sides. A starting point could be those opportunities for cooperation which were envisaged as future possibilities within the Political Declaration agreed between the UK and the EU in October 2019 along with the WA as a possible basis for the future relationship between the EU and the UK, but were not then reflected in the provisions of the TCA. There could be a political advantage in using the Political Declaration for the basis of such a headline political agreement in that both parties had already at an earlier stage in the negotiations between the parties indicated such terms were acceptable to them.

6.30 In that Political Declaration between the UK and the EU, possibilities for cooperation were set out in a large number of areas, including UK participation in EU programmes, and cooperation with EU agencies; financial equivalence in the financial services sector; research, study, training and youth mobility; linking the EU and UK emissions trading systems; cooperation in various international fora; a broad, comprehensive and balanced security partnership; UK participation in EU missions and operations; and collaboration and participation in defence projects.

6.31 Such a headline political agreement would also give a clear pointer for the direction and scope of the Article 776 TCA review process, which could focus on amendments or supplementary agreements to the TCA insofar as political agreement had been reached, with a Defence and Security agreement either being one of those supplementary agreements, or being agreed as a ‘stand alone’ agreement if that were more appropriate or legally necessary. Perhaps such a “headline political agreement” could itself be agreed between the UK and the EU as constituting an amendment or addendum to the original Political Declaration of 2019: that would not create any new legally binding agreements between the parties, but it could give it a stronger political status, encouraging the parties to take the steps to implement the

amendments or supplementary agreements to the TCA necessary to put such a headline political agreement into effect.

6.32 As indicated above, the outcome of such a process of negotiation would likely be a variegated framework of agreements, many of which might in theory be subject to a dispute settlement mechanism which could end not just in termination of a sectoral agreement, but of other agreements, and indeed the relationship as a whole. However, in reality the two sides would be bound by a network of agreements which it would be practically impossible to disentangle, which gave significant enhancements to the access each side had to the other's market, and which it would be in the interest of both sides to maintain and nurture.

Such an approach, in which the TCA process provides the means for a substantial number of enhancements of existing UK-EU agreements, alongside with additional supplementary agreements and political declaration, could create a new UK-EU relationship which would be substantially deeper and more extensive than the model created by the Brexit negotiations which resulted in the WA and TCA. Somewhat ironically, it could be the TCA, which for the first time in an EU agreement with a third party, “was a trade and cooperation agreement which would create, not dismantle, barriers to economic exchange<sup>318</sup>”, which would become a significant part of the mechanism whereby many of those barriers might be torn down again.

6.33 Sceptics might suggest that such a patchwork of measures would cross too many EU ‘red lines’ and would constitute such a threat to essential features of the single market, and to its system of regulation under the oversight of the CJEU, such that would make it unacceptable to the EU. However, it can be observed that many apparently negative statements of this nature from EU leaders were accompanied by substantial qualification<sup>319</sup>. For example, Ireland’s Martin, while stating “The UK cannot have an “ ‘à la carte’ reset of the Brexit agreement”, also said that Ireland was in favour of an SPS agreement with the UK. Ireland wanted an “ease of trading relationships, but it had to be mutually beneficial”<sup>320</sup>. And Barnier’s emphatic rejection of any opening of the single market to the UK was followed by him saying that there “was room for positive manoeuvre to complete a trade agreement with a specific veterinary agreement”, along with the suggestion that the UK could sign new agreements with

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<sup>318</sup> Laffan, 2021, p. 250

<sup>319</sup> See paras. 4.20 and 6.18.

<sup>320</sup> See <https://www.theguardian.com/world/article/2024/sep/07/a-la-carte-new-brex-it-deal-with-eu-not-on-table-micheal-martin-warns> (last accessed 8.9.2024).

the EU in areas not covered by the TCA, if it was prepared to align with the EU's rules in those areas. Those could be in the field of "defence, foreign policy, cooperation in Africa...financial services."<sup>321</sup>

Such comments, which have been echoed by other senior European voices, suggest that there is indeed a recognition within the EU both that it would be of benefit to Europe to have an enhanced relationship with the UK over a wide range of areas, and also that such a relationship would likely be one constituted by a wide range of agreements and measures to ensure compliance. To achieve that new relationship, the UK too would need to be flexible. Ultimately, whether such a new relationship could be agreed is a matter of politics, but with such agreement, the TCA, along with an imaginative application or interpretation of other constitutional models which have already been employed by the EU, could certainly facilitate the establishment of such a relationship.

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<sup>321</sup> See <https://www.bbc.co.uk/news/brexit-latest-election-michel-bernier-eu> (last accessed 8.9.2024).

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