



The future partnership between the European Union and the United Kingdom

Negotiating a
framework for
relations after
Brexit

STUDY

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Negotiating a framework for relations after Brexit

Following the European Council's additional guidelines of March 2018, the European Union (EU) and the United Kingdom (UK) have started discussions on their future relationship after Brexit. The aim is to agree on a political framework for their future partnership by autumn 2018, to be adopted alongside the withdrawal agreement. Conclusion of a treaty or treaties establishing future EU-UK relations will only take place after the UK leaves the Union and becomes a third country.

Both parties have expressed the desire to remain in a close partnership, which would cover several areas including trade and economic matters, internal security, foreign and security policy, and cooperation on defence. This study looks at the respective aims for, and principles underpinning, the negotiations, as expressed publicly to date by each party, and analyses some of the legal constraints and existing practices or precedents shaping EU cooperation with third-country partners. This allows assessment of the possibilities and limits of any future EU-UK partnership, in light of the stated objectives and 'red lines' officially announced, leading to the conclusion that, notwithstanding several common aims, significant divergences still persist with respect to the means of achieving the stated objectives.

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Executive summary

Following the European Council's additional guidelines of March 2018, the European Union (EU) and the United Kingdom (UK) have begun discussions on their future relations, after the UK's withdrawal from the EU (Brexit). Negotiations continue, in parallel, to agree the terms of a Withdrawal Agreement, the purpose of which is to sort out the main issues regarding the UK's separation from the EU, in accordance with Article 50 TEU on the procedure for the withdrawal of a Member State from the EU. The negotiating teams currently aim at identifying a political framework for the future partnership, to be annexed to the Withdrawal Agreement and adopted simultaneously. The treaty or treaties governing the future relations between the UK and the EU would only be concluded once the UK leaves the Union and becomes a third country – after the currently scheduled Brexit date of 30 March 2019. At EU level, the treaty or treaties would be subject to the ratification procedure for international agreements under Article 218 TFEU.

Both the EU and the UK have stated their desire for a close partnership in the future. However, a fundamental difference has surfaced in the talks. Whereas the UK has consistently called for a special status, going further and deeper than any existing third-country relationship, the EU has instead based its approach on existing models underpinning its relations with third countries. In particular, the EU assessed the various models used in previous EU agreements against the 'red lines' originally set by the UK government: no membership of the customs union or the internal market, no free movement of persons; no jurisdiction of the Court of Justice of the EU (CJEU); and the regaining of regulatory autonomy. In line with those red lines, the EU has explored what could be offered, in the area of trade, within the framework of a free-trade agreement (FTA) comparable to the EU-South Korea and the EU-Canada agreements. Similarly, the EU is looking at possible arrangements in the fields of justice and home affairs, and foreign policy and defence, based on how the EU cooperates with other third countries. Furthermore, several aspects of the special treatment that were requested by the UK either clash with the above-mentioned UK red lines or with the guiding principles set down in the European Council guidelines for the negotiations. These include: protection of the EU's interests; preserving the integrity of the internal market and customs union; safeguarding the EU's decision-making autonomy, including the role of the CJEU; ensuring a balance of rights and obligations and a level playing field; respecting the principle that a third country cannot have the same rights and benefits as a Member State; and safeguarding the EU's financial stability, as well as its regulatory and supervisory regime and standards. While the objectives of the negotiations might be similar on both sides, the EU and UK perspectives remain divergent, and their positions differ in many areas on the means to achieve those objectives in the context of the future partnership.

In trade and economics, the parties seem to agree on maintaining duty- and quota-free market access in goods, even though for the EU preferential rules of origin would need to be introduced as a result of the UK leaving the customs union. Instead, the UK advocates a facilitated customs arrangement, whereby the UK would apply UK or EU tariff duties at its external border depending on the destination intended for the good (UK or EU internal market) and a common rulebook for goods' standards checked at the borders, which would eliminate the need for an internal border for goods (including the need for preferential rules of origin) between the EU and the UK. However, the Commission has repeatedly indicated it considers these proposals to be unrealistic. Different approaches have also been suggested with regard to access to fishing waters and sustainable fisheries. Other controversial areas for negotiation will include access to the services market and regulatory cooperation. Greater market access is permitted in some sectors only if regulatory alignment is achieved. Whenever alignment to EU law is required, agreements also entail a role for the CJEU. Further market access in an FTA can only be granted within the constraints of other EU FTAs (most favoured nation (MFN) clauses in previously concluded EU agreements, which may require extending the benefits to other EU partners), and within the constraints of EU law (preserving the integrity of the internal market and the EU decision-making system, including CJEU

jurisdiction). Finally, the EU is adamant that strong provisions are introduced to ensure the maintenance of a level playing field (LPF), such as in the areas of competition and state-aid, taxation and environmental and labour standards. Violations of these LPF measures should be subject to a dispute settlement mechanism and sanctions.

In the area of justice and home affairs, the UK has proposed to conclude an internal security treaty with the EU. Such a treaty would be based on the existing EU measures regarding: exchange of information, including access to EU databases; operational cooperation through mutual recognition tools, such as the European arrest warrant; and multilateral cooperation through the EU agencies, Europol and Eurojust. This would avoid any operational gaps post-Brexit and take account of the important contribution the UK has made to date in providing intelligence and analysis under current EU tools. The EU, however, although agreeing to the main areas of future cooperation with the UK – exchange of information; operational police cooperation and judicial cooperation in criminal matters – is offering the UK a relationship based on the model of third countries that do not participate in Schengen, rather than a special status. The UK would thereby lose direct access to the EU's databases and participation rights in the managing bodies of the EU agencies, Europol and Eurojust. Furthermore, the EU mutual recognition instruments recognised as extremely valuable for UK law enforcement – such as the European arrest warrant – would cease to apply. Moreover, data sharing and protection arrangements would need to be agreed to allow the exchange of information to continue in the future.

In addition, in foreign policy and defence, the UK is seeking a special status, including some influence in the EU decision-making process, proportional to its contribution to CFSP and CSDP. However, here again, the EU takes the third-country model of cooperation as a starting point in the talks, although some special arrangements may be possible, *inter alia*, in light of the UK's status as a permanent member of the United Nations Security Council and as a significant European military power. The negotiations on the framework for future dialogue, cooperation and coordination in CFSP/CSDP aim at agreeing arrangements as soon as possible after Brexit.

The European Council meeting of 29 June 2018 evaluated the progress made both with respect to the legal provisions of the Withdrawal Agreement, in particular the contentious issue of the border between Northern Ireland and Ireland, and with regard to the framework for future relations. The conclusions adopted on that occasion stated that further efforts were needed on both issues.

The European Parliament has already provided essential input to the European Council discussions and guidelines, through its March 2018 resolution on the EU-UK future framework for relations. In particular, it suggested the form of an association agreement for the future treaty with the UK that would be based on four pillars: trade and economic relations; foreign policy, security and defence, and development cooperation; internal security; and thematic cooperation (fisheries, aviation, etc.). A single governance structure and dispute resolution mechanism established by the association agreement would cover the entire EU-UK relationship. On many of the issues under discussion, the European Parliament has to give consent (meaning it has the right of veto) for the conclusion of the EU-UK future relationship agreement(s). However, should the parties conclude an agreement relating exclusively to CFSP/CSDP matters, then the Parliament would not have to give consent nor would it have formal consultation rights on that specific agreement.

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1. Introduction

On 29 March 2017, the UK notified its intention to leave the EU (Brexit), following the result of the June 2016 referendum and in accordance with Article 50 of the Treaty on European Union (TEU). Article 50(2) TEU provides that a withdrawal agreement should set out the terms of such a separation, taking the framework of the departing state's future relationship with the Union into account. However, no other guidance is provided on the question of what this framework should look like.

On 29 April 2017, the 27 remaining EU Heads of State or Government adopted political guidelines for the Brexit negotiations, setting out a phased approach. In the first phase, three priorities were set for the negotiation of the withdrawal agreement: the rights of EU-27 citizens in the UK and of UK citizens in the EU-27; the settlement of the financial obligations incurred by the UK; and the issue of the border between Ireland and Northern Ireland. In a second phase – after 'sufficient progress' had been achieved – discussions would continue on possible transitional arrangements and other unsettled issues related to the withdrawal agreement, as well as on the framework for the future EU-UK relationship. After talks led to a EU-UK joint report setting out a common understanding on the withdrawal deal,¹ in December 2017, the European Council decided that sufficient progress was achieved on the first phase issues and talks therefore advanced to the second phase.² On 19 March 2018, the EU and UK negotiators announced that they had agreed a substantial part of the draft withdrawal agreement, paving the way for discussions on the future partnership.

As a result, the European Council adopted specific guidelines regarding the framework for the future EU-UK relationship at its meeting of 22-23 March 2018.³ Discussions began on this basis in April 2018, with the purpose of identifying an 'overall understanding of the framework for the future relationship' between the EU and UK. The negotiating teams agreed the structure of the discussions regarding the future framework jointly: the basis for cooperation (structure, governance, interpretation and application, dispute settlement, non-compliance, participation and cooperation with EU bodies); the economic partnership (objectives, goods, agricultural, food and fisheries products, services and investment, financial services, digital and broadcasting, transport, energy, horizontal measures and mobility framework); the security partnership (aims, law enforcement and criminal justice, foreign, security and defence and wider security issues); and cross-cutting or stand-alone issues (data protection, cooperative accords in science and innovation and culture and education, and fishing opportunities).⁴

The objective is first to jointly agree on a political declaration setting out the framework for future relations, which will be annexed to the withdrawal agreement and thus adopted simultaneously. The two negotiating teams are aiming for an agreement on the text in autumn 2018. This would then constitute the basis for the future negotiations on a treaty or treaties governing the future EU-UK relations. At a press conference on 8 June 2018, the EU's chief negotiator, Michel Barnier, mentioned three remaining issues to discuss with regard to the withdrawal agreement: data protection, geographical indications, and pending and ongoing procedures before the CJEU involving UK violations (such as state aid cases). Certain additional provisions agreed on 19 June do

¹ C. Cîrlig, E. Poptcheva, [The Brexit process: Moving to the second phase of negotiations](#), EPRS, European Parliament, 20 December 2017.

² [Guidelines](#), European Council (Article 50), 15 December 2017. See also C. Cîrlig, S. Mazur, L. Tilindyte, [The EU-UK withdrawal agreement: Progress to date and remaining difficulties](#), EPRS, European Parliament, 12 July 2018.

³ [Guidelines on the framework for the future EU-UK relationship](#), European Council (Article 50), 23 March 2018.

⁴ See [Topics for discussions on the future framework at forthcoming meetings](#), United Kingdom government.

not include the three issues enumerated above.⁵ Discussions on the border between Northern Ireland and Ireland are also ongoing.⁶ The European Council of 29 June 2018 was unable to identify substantial progress with regard to either the Northern Ireland/Ireland issue or the negotiations on the future relationship.⁷

⁵ [Joint statement](#) of the negotiators of the European Union and the United Kingdom Government on progress of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, 19 June 2018.

⁶ M. Barnier, European Commission Chief Negotiator for Article 50 negotiations with the UK, [Press conference following this week's round of negotiations](#), (extracts) 8 June 2018.

⁷ [Conclusions](#), European Council (Article 50), 29 June 2018.

2. Legal basis and procedure

Article 50 TEU does not contain any indications as to what the future relationship between the EU and the UK post-Brexit should look like, or how the agreement(s) governing these future relations should be concluded. In this context, the usual procedures for the negotiation and conclusion of international agreements, as provided for by the EU Treaties, will apply, namely Article 218 TFEU.⁸ This article applies only to agreements with third countries and international organisations, so the agreement(s) governing future EU-UK relations can only be legally concluded after the UK has left the EU. In a statement before a House of Commons committee, the EU's chief negotiator, Michel Barnier, indicated that these agreements would be 'based on a legal basis other than Article 50 and, most probably, mixed agreements.'⁹ Mixed agreements are international agreements which go beyond areas where the EU has exclusive external competence and which therefore need to be concluded jointly by the EU and its Member States. Mixed agreements, once approved by the EU institutions, would then also need to undergo national ratification in the remaining EU Member States, involving the national and even, in one case, regional parliaments.¹⁰ Furthermore, Barnier mentioned that the future relations could be based on one or several treaties. In this latter case, different procedures might apply, depending on the EU competence and the chosen legal basis.

Box 1 – The different types of EU competence and implications for international agreements¹¹

The European Union operates on the principle of conferral, meaning that the Union acts within the limits of the competences conferred upon it by the Treaties. The competence involved governs the procedure for concluding a given agreement. Three types of competences exist in EU law: exclusive competence, shared competence, and concurrent competence.¹² Where there is an express **exclusive competence** (Article 3(1) TFEU), only the EU is competent to conclude trade agreements. Agreements concluded in these areas are ratified solely at EU level, following the procedure under Article 218 TFEU.¹³ This is the case for agreements falling exclusively under the common commercial policy (legal basis Article 207 TFEU).¹⁴ **Shared competences** under Article 4 TFEU (such as the internal market) can fall under both EU and Member State competence. Where the EU has acted, Member States are prevented from acting (except for areas mentioned in Articles 4(3) and 4(4) TFEU). Following the ERTA case (Case 22/70, *Commission v Council*)¹⁵ and subsequent case law, areas where the EU has acted internally may take on **implied exclusive external competence** – the exclusive competence for the conclusion of international agreements – if it is so provided in a legislative act or this is necessary for the exercise of the internal competence, or if it can affect EU measures taken (Article 3(2) TFEU). Where there is implied exclusive competence, the EU can conclude agreements on its own, as in areas of express exclusive competences. A recent example of this kind of exclusive competence is the

⁸ M. van der Wel and R. A. Wessel, [The Brexit Roadmap: mapping the choices and consequences during the EU/UK withdrawal and future relationship negotiations](#), Centre for the Law of EU External Relations, CLEER Papers 2017/5, December 2017.

⁹ [Michel Barnier: Oral evidence: Brexit and Northern Ireland](#), Northern Ireland Affairs Committee, HC 329, United Kingdom House of Commons, 22 January 2018.

¹⁰ K. Grosek and G. Sabbati, [Ratification of international agreements by EU Member States](#), EPRS, European Parliament, November 2016.

¹¹ L. Puccio, [CJEU Opinion on the EU-Singapore Agreement](#), EPRS, European Parliament, May 2017.

¹² [FAQ on the EU competences and the European Commission powers](#), European Commission.

¹³ L. Puccio, [A guide to EU procedures for the conclusion of international trade agreements](#), EPRS, European Parliament, 26 October 2016.

¹⁴ For example, mutual recognition agreements, such as: [Agreement between the European Union and Australia amending the Agreement on mutual recognition](#) in relation to conformity assessment, certificates and markings between the European Community and Australia, OJ L 359, 29 December 2012; [Council Decision of 18 July 2011 on the conclusion of the Agreement](#) between the European Union and Australia amending the Agreement on mutual recognition in relation to conformity assessment, certificates and markings between the European Community and Australia, OJ L 359, 29 December 2012

¹⁵ [Case 22/70, Commission v Council](#), CJEU, Judgment of the Court of 31 March 1971.

agreement concluded between the EU and the US on prudential measures regarding insurance and reinsurance.¹⁶ In shared competences, where the EU has not acted internally, Member States retain their own competences. International agreements touching these competences have to be signed and ratified by both the EU and each Member State, and are referred to as 'mixed' agreements. **Concurrent competences** are competences where external action can take place both at EU or Member State level. EU competence in those areas is mainly to support, coordinate or supplement Member State actions and cannot lead to harmonisation.¹⁷

The European Parliament has put forward a specific proposal for the framework of EU-UK future relations. In its resolution of 14 March 2018, the EP suggests that the future agreement should take the form of an association agreement (based on Articles 217 TFEU and 8 TEU), comprising four pillars: trade and economic relations (a comprehensive EU-UK free trade agreement); foreign policy, security and defence, and development cooperation; internal security; and thematic cooperation (fisheries, aviation, research and innovation, culture and education, energy etc.).¹⁸ One agreement would have, in the EP's opinion, the advantage of a single coherent governance mechanism for the entire relationship. Such an agreement would be mixed and would require both unanimity in the Council and European Parliament consent, as set out in Article 218 TFEU (see box 2). The EP mentioned that obtaining its consent to any agreement on the future relations would depend on compliance with a series of principles set out in its resolution of March 2018. These principles, echoing those established by the European Council, include:

- the fact that a third country may not have the same rights and benefits as EU, or even as an European Free Trade Association (EFTA)/European Economic Area (EEA) Member;
- protecting the integrity of internal market, not allowing 'cherry-picking';
- preserving the autonomy of the EU's decision-making system;
- safeguarding the EU legal order and the role of the CJEU;
- respect of democratic principles, human rights and fundamental freedoms;
- ensuring a level playing field with respect to competition rules, social and workers' rights, environment, etc.;
- safeguarding EU agreements with third countries and international organisations;
- safeguarding EU financial stability, its regulatory and supervisory regime and standards;
- ensuring the right balance between rights and obligations.

¹⁶ [Bilateral Agreement](#) between the European Union and the United States of the America on prudential measures regarding insurance and reinsurance; [Council Decision \(EU\) 2017/1792 of 29 May 2017](#) on the signing, on behalf of the Union, and provisional application of the Bilateral Agreement between the European Union and the United States of America on prudential measures regarding insurance and reinsurance, OJ L 258, 6 October 2017; [Council Decision \(EU\) 2018/539 of 20 March 2018](#) on the conclusion of the Bilateral Agreement between the European Union and the United States of America on prudential measures regarding insurance and reinsurance, OJ L 90, 6 April 2018.

¹⁷ For example, agreements in the area of [research and technical cooperation](#).

¹⁸ Resolution of 14 March 2018 on the [framework of the future EU-UK relationship](#) (2018/2573(RSP)), European Parliament. The EU's chief negotiator Michel Barnier has already [expressed](#) the view that the content of the EU-UK future relations would be organised on the basis of four pillars: 'a trade pillar; a pillar governing specific co-operation in certain areas of shared interest, research, university co-operation, fisheries, aviation; co-operation in internal security and legal matters—home affairs in other words—of initial and particular interest to the citizens and their daily lives; and of course a fourth pillar would involve defence and security.' The UK's then chief negotiator, David Davis, [stated](#) that he had 'no intrinsic objection' to concluding an association agreement with the EU, depending on what would be included in it, in particular as regards the jurisdiction of the EU Court of Justice. Furthermore, the UK government's [White Paper on the future relationship between the United Kingdom and the European Union](#), published in July 2018, mentioned that the arrangements underpinning the future relationship 'could take the form of an Association Agreement'.

See also the European Parliament homepage on [Brexit negotiations](#).

Box 2 – Article 218 TFEU and other possible legal bases

Article 218 TFEU applies to all international agreements concluded by the EU with third countries and international organisations, setting out the procedures at EU level for their negotiation and conclusion. The agreements will also need to be based on one or more additional legal bases in the EU treaties, corresponding to the main field(s) covered by the agreement that will clarify which procedure under Article 218 must be applied, as well as whether the agreement is mixed or not.

Under Article 218 TFEU, negotiations for an international agreement begin after the Council adopts a negotiating mandate on a proposal by the Commission or the High Representative/Vice-President for Foreign Affairs and Security Policy. The Council also nominates the EU negotiator to whom it may address directives throughout the negotiations. Decisions on the signature and conclusion of the final agreement are adopted by the Council, by qualified majority (QMV), with the exception of association agreements and agreements covering fields for which unanimity is required for a Union act.

The Council must wait for the **European Parliament's consent** for the conclusion of those types of agreements set out in Article 218 (6a), inter alia association agreements, agreements falling under a field where the ordinary legislative procedure applies for internal acts of the EU, as well as for those fields where consent of the Parliament is required under a special legislative procedure; agreements with important budgetary implications for the EU etc. For all the other agreements, the European Parliament is only **consulted**. As regards agreements relating exclusively to common foreign and security policy, decisions concerning their conclusion is taken exclusively by the Council. The EP must also be kept **immediately and fully** informed at all stages throughout the procedure, for **all international agreements** (Article 218(10)).¹⁹

In conjunction with Article 218 TFEU, some possible legal bases could be:

- Article 207 TFEU on the common commercial policy (an exclusive EU competence) would be the only possible legal basis if the future agreement would exclusively cover only the trade relations between the EU and the UK. Under Article 207 TFEU, agreements require the consent of the Parliament to be adopted, and the Council normally takes decisions under QMV. Unanimity is necessary in the case of agreements covering cultural and audiovisual services, or those having serious consequences on the national organisation of social, education and health services. Unanimity is also required in those few areas of services, intellectual property rights, and foreign direct investment where the Council adopts internal EU acts by unanimity.²⁰
- Article 212 TFEU covers EU cooperation measures, including the possibility of concluding cooperation agreements with third countries other than developing countries (e.g. macro-economic assistance agreements etc.). In this case, EP consent would be required, while the Council's decision-making rule would be QMV.
- Moreover, some specific agreements have their own legal basis, which could be used either in conjunction with Article 207 TFEU if these issues are tackled in a trade agreement, or they could be used independently if the agreements are concluded as stand-alone agreements. For example, transport agreements should be concluded on the basis of the relevant transport provisions in the TFEU, agreements for scientific and technological cooperation are concluded under Article 186 TFEU, partnership agreements in the fisheries sector are concluded on the basis of Article 43 TFEU, etc.
- Article 217 TFEU governs EU association agreements ('agreements establishing an association involving reciprocal rights and obligations, common action and special procedure').²¹ As mentioned above, Article 217 TFEU could be linked to Article 8 TEU (relations with neighbouring countries) which also envisages the possibility of concluding 'specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.' Article 8 TEU has not been used so far as a legal basis on its own or even jointly with Article 217 TFEU (for example in the recent Association Agreements concluded with Georgia, Ukraine or the Republic of Moldova). The conclusion of association agreements requires, as mentioned, the consent of the EP and unanimity in the Council. They are also mixed agreements

¹⁹ The Court of Justice of the EU may be asked for an opinion on the compatibility of the envisaged international agreement with EU law (Article 218(11) TFEU).

²⁰ L. Puccio, [A guide to EU procedures for the conclusion of international trade agreements](#), EPRS, October 2016.

²¹ For a brief introduction defining association agreements, refer to: [Association Agreement](#), Institute for Government, March 2018.

which entails that ratification at the national level in the EU Member States is also required for their entry into force.

– Article 37 TEU, where the agreement falls exclusively in the CFSP/CSDP area, for example the framework participation agreements (see section 6.2.5). This article can also be linked to Article 217 TFEU, when association agreements contain provisions on cooperation in the field of CFSP/CSDP.

– In the field of justice and home affairs, the legal basis for agreements with third countries will depend on the subject covered by the agreements (e.g. regarding passenger name records (PNR), the legal bases are Article 82 and 87 TFEU).

3. Initial EU and UK positions regarding future relations

For the first time in its history, the EU will negotiate loosening instead of strengthening of ties with a country. Indeed, the EU and UK are departing from a situation of convergence of rules and regulations with both sides recognising the difficult task of mitigating or managing probable future regulatory divergence through their future partnership agreement.²² However, the historical ties, longstanding partnership and interconnectedness between the UK and the EU Member States, their geographical proximity and shared values are arguments in favour of preserving close relations between the EU and the UK, covering areas beyond trade and economic relations, such as: political and strategic cooperation, culture, education, research, global issues such as climate change, international aid for development etc. As acknowledged by the EU-27, 'strong and constructive ties will remain in both sides' interest and should encompass more than just trade.'²³

3.1. The EU's negotiating objectives and principles

The EU-27 already put forward the broad principles for the 'framework on the future relationship' in the European Council Conclusions of April and December 2017, reconfirmed in March 2018.²⁴ While affirming its desire for a close future partnership with the UK, the European Council sets out the core principles guiding the Union's position on any future relationship:

- protecting the EU's interests;
- ensuring a balance of rights and obligations, and a level playing field;
- preserving the integrity and proper functioning of the single market, which excludes a sector-by-sector approach and relies on the indivisibility of the four freedoms;
- a country that is not a Member State of the EU cannot have the same rights and benefits as a member state;
- preserving the EU's decision-making autonomy, including the role of the European Court of Justice (CJEU), in particular in the enforcement and dispute settlement mechanisms of the future partnership;
- safeguarding the EU's financial stability, its regulatory and supervisory regime and standards and their application.

The EU's chief negotiator, Michel Barnier, has also repeatedly stated that any 'vision of the future must take into account the fact that the EU cannot and will not compromise on its founding principles' and that it was the EU's responsibility to preserve the future of the Union, its common values and identity, the single market and common policies, all of which are non-negotiable.²⁵

Internal preparatory discussions within the Council and with the European Commission as the Union negotiator have taken place since December 2017 on various aspects related to the future relations with the UK.²⁶ The Commission has also participated in meetings with the European Parliament on issues such as fisheries, aviation, security, defence and foreign affairs.²⁷ After the European Council adopted the specific guidelines on 23 March 2018, discussions with the UK on the future framework of relations started in April 2018 with a view to agreeing a political declaration.

²² [Trade after Brexit: Options for the UK's relationship with the EU](#), Institute for Government, 18 December 2017.

²³ [Guidelines](#), European Council (Article 50), 15 December 2017.

²⁴ [Guidelines](#) following the United Kingdom's notification under Article 50 TEU, European Council (Article 50), 29 April 2017, and [Guidelines on the framework for the future EU-UK relationship](#), 23 March 2018.

²⁵ M. Barnier, [Speech at BusinessEurope Day 2018](#), 1 March 2018, and [Statement at the plenary session of the European Parliament on the Article 50 negotiations with the United Kingdom](#), 13 March 2018.

²⁶ See [negotiating documents](#) on Article 50 negotiations with the United Kingdom, European Commission.

²⁷ M. Barnier, [Remarques au point presse à l'issue du Conseil affaires générales \(Article 50\)](#), 27 February 2018.

Regarding trade and economic cooperation, the EU-27 took note of the UK's wish to leave the single market and the customs union, and seek a free trade agreement with the EU instead. By its rejection of the two options which enable closer interdependence with the EU markets, the UK will necessarily face trade barriers,²⁸ and make trade for both sides 'more complicated and costly than today', as mentioned by the President of the European Council.²⁹ The EU is particularly concerned about the regulatory challenge posed by the UK (due to its geographic proximity and market size), taking the stance that no ambitious partnership would be possible without 'common ground in fair competition, state aid, tax dumping, food safety, social and environmental standards'.³⁰ Regulatory divergence would also pose a major obstacle to cooperation across the Irish border.³¹ Therefore, an EU-UK free trade agreement should be balanced, ambitious and wide-ranging, but must not undermine the proper functioning and integrity of the single market, by allowing sectoral participation or by failing to ensure appropriate safeguards against unfair competitive advantages (i.e. UK lowering standards on state aid, competition, environment, tax, labour etc.). A future EU-UK FTA would also need to 'avoid upsetting existing relations with other third countries', in the EU's view.³² The European Council guidelines of 23 March 2018 confirmed this initial position.

Box 3 – What do the European Council Guidelines of 23 March 2018 say?

By rejecting the single market and customs union, opposing any role for the CJEU in the future agreement, and upholding regulatory sovereignty, the UK would be left with the option of a Canada-style free trade deal with the EU.³³ The EU-27 propose zero tariffs and quotas for trade in goods with appropriate rules of origin, reciprocal access to fishing waters, agreement on technical barriers to trade and sanitary and phytosanitary standards, as well as a framework for voluntary regulatory cooperation; market access for services under host state rules, but with 'ambitious provisions on movement of people and a framework for recognition of professional qualifications'. The current guidelines take the perspective that 'the Union and the UK will no longer share a common regulatory, supervisory, enforcement and judiciary framework'³⁴ and this has consequences for what the EU can offer in terms of trade in services liberalisation and checks that are necessary at the borders. Indeed stronger integration and liberalisation is permitted only at the cost of 'approximation' or 'alignment', including acceptance of the CJEU's exclusive role in interpreting EU law (see section 4). The guidelines however mention that EU could reconsider its offer should the UK's red lines evolve. Public procurement, investment and intellectual property rights, including geographical indications should also be covered. Importantly, the text makes no mention of financial services, while on data protection it opts for the EU rules on adequacy, and not a specific data-protection agreement as requested by the UK. Moreover, the future partnership should address global challenges, in particular in the areas of climate change and sustainable development, as well as cross-border pollution. Cooperation in the field of transport services is another objective of the EU, with the aim of negotiating an 'air transport agreement, combined with aviation safety and security agreements, as well as agreements on other modes of transport'. The EU is also willing to open its research and innovation programmes or other programmes in the field of education and culture to UK participation after Brexit, subject to conditions available to third countries and with adequate financial participation on the part of the UK. The March European Council guidelines also confirmed the EU-27's already stated 'readiness to establish partnerships in areas unrelated to trade and economic cooperation, in particular the fight against terrorism and international crime, as well as security, defence and foreign policy'.

²⁸ Institute for Government, op. cit.

²⁹ D. Tusk, [Statement by President Donald Tusk on the draft guidelines on the framework for the future relationship with the UK](#), 7 March 2018.

³⁰ [Slides on Level Playing Field](#), European Commission, 31 January 2018.

³¹ K. Hayward, P. McGrade, [Regulatory Alignment: What Will It Take to Make It Work, And How Big Are the Risks of Failure?](#), Scottish Centre on European Relations, 14 December 2017.

³² [Guidelines](#), European Council (Article 50), 15 December 2017.

³³ M. Barnier, [slide presented to the Heads of State and Government at the European Council \(Article 50\) on 15 December 2017](#), TF50(2017) 21, 19 December 2017.

³⁴ [Guidelines on the framework for the future EU-UK relationship](#), European Council (Article 50 TEU), 23 March 2018.

The **governance** of the future relationship agreement would cover 'management and supervision, dispute settlement and enforcement, including sanctions and cross-retaliation mechanisms' and would need to take account, in the EU's view, of the content and depth of the future relationship; the need to ensure effectiveness and legal certainty; as well as the EU's legal autonomy, including the role of the EU Court of Justice.³⁵ No agreement between the EU and the UK may apply to the territory of Gibraltar without agreement between Spain and the UK.

The European Council conclusions of 29 June 2018 did not add elements to the EU's negotiating position, reconfirming the March guidelines. However, the European Council called for further clarity from the UK as well as 'realistic and workable proposals' regarding its position on the future relationship.³⁶

Finally, maintaining EU-27 unity is an EU priority in the Brexit negotiations process. The European Council conclusions of April 2017 state that throughout the withdrawal negotiations 'the Union will maintain its unity and act as one with the aim of reaching a result that is fair and equitable for all Member States and in the interest of its citizens'. At every important stage in the talks, the EU leaders have strived to protect the unity of the 27 Member States, avoiding any action or statement that would undermine consensus.³⁷ While some believe that EU Member States' unity will be tested in the future trade negotiations, due to their different economic interests, experts expect that the EU will stand firm on its position, in light of the wider concern of preserving the integrity of the single market.³⁸

3.2. The United Kingdom's stated objectives

The UK's position on future relations with the EU has been expressed in various places, including the Article 50 notification letter (29 March 2017), the white paper on the United Kingdom's exit from, and new partnership with, the European Union (2 February 2017) and other thematic papers, and in several of the UK Prime Minister's speeches.³⁹ A new government white paper on the British priorities for the future relationship with the EU was published on 12 July 2018 based on the 6 July 2018 Government statement at Chequers.⁴⁰

The UK Prime Minister's speech of 17 January 2017,⁴¹ as well as the government's white paper of February 2017, clearly states the UK's goal of negotiating a bold and ambitious free trade agreement with the EU, allowing for the freest possible trade in goods and services, and including a new customs agreement with the EU. However, the UK 'would not seek to adopt a model already enjoyed by other countries'. Furthermore such an agreement, in the UK's view, could take in elements of current single market arrangements, 'on a fully reciprocal basis and in our mutual interests'. In the Article 50 Notification of 29 March 2017, Prime Minister Theresa May also mentioned the UK's objective of agreeing a deep and special partnership between the UK and the EU, covering both economic and security cooperation. A priority for the negotiations would be to find ways to manage the evolution of the respective regulatory frameworks to maintain a fair and open trading environment, as well as to identify a dispute-settlement mechanism (that would 'respect UK

³⁵ See also [Internal EU-27 preparatory discussions on the framework for the future relationship: Governance](#), TF50 (2018) 22/2, European Commission, 19 January 2018.

³⁶ [Conclusions](#), European Council (Article 50), 29 June 2018.

³⁷ E. Zalan, [EU stresses unity as it launches next phase of Brexit talks](#), EU Observer, 15 December 2017.

³⁸ J. Springford, S. Lowe, B. Oppenheim, [Will the unity of the 27 crack?](#), Centre for European Reform, 15 March 2018.

³⁹ [Prime Minister's letter to Donald Tusk triggering Article 50](#), UK Government, 29 March 2017; [The United Kingdom's exit from and new partnership with the European Union White Paper](#), UK Government, 2 February 2017; [Future partnership papers](#); [Brexit: Prime Minister's speeches](#), UK Government.

⁴⁰ [Statement](#) from HM Government, Chequers, UK Government, 6 July 2018 and [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018..

⁴¹ [The government's negotiating objectives for exiting the EU: PM speech](#), UK Government, 17 January 2017.

sovereignty, protect the role of our courts and maximise legal certainty, including for businesses, consumers, workers and other citizens').

Other speeches by the Prime Minister (from September 2017 and March 2018)⁴² contain more details on the UK's vision regarding the specific aspects of future EU-UK relations, while the general objective of the UK government is reaffirmed: to secure the 'most frictionless possible trade in goods and services' outside the single market and the customs union, through a 'new strategic partnership with the EU, including an ambitious FTA and a new customs arrangement', but to which no existing EU model for relations with third countries could apply.⁴³ Avoiding any physical infrastructure at the Irish border, or any related checks and controls, has been another general objective, entirely shared by the EU. The most recent government white paper from July 2018 advocates a future relationship with the EU structured around an economic partnership and a security partnership, as well as cooperation in some important areas, including the protection of personal data, science and innovation, culture and education, and fisheries, among other things.

With each occasion, the Prime Minister and other UK representatives have, however, reiterated the government's red lines, namely ending the direct jurisdiction of the CJEU; ending the freedom of movement of people and UK contributions to the EU budget; and obtaining the freedom to pursue an independent trade policy (which entails both leaving the customs union and the common commercial policy). Any deal negotiated with the EU would have to comply with five tests: implementing the decision of the British people in the referendum; reaching an enduring solution; protecting the security and prosperity/jobs of people in the UK; delivering an outcome consistent with the UK's values; and strengthening the unity of all UK nations.

Box 4 – What does the UK government want?

In her speech dedicated to the **future economic partnership** (March 2018), Prime Minister Theresa May recognised the necessary trade-offs between sovereignty ('taking back control of our laws, money and border') and market access, as well as the concept of a level playing field, and reaffirmed the commitment to avoid a hard border on the island of Ireland. She wished for the 'broadest and deepest possible partnership - covering more sectors and cooperating more fully than any FTA in the world today', with voluntary alignment by the UK parliament to EU standards, zero tariffs and quotas for goods and a 'comprehensive system of mutual recognition'; a 'customs partnership' or a 'highly streamlined customs arrangement'; regulatory dialogue and associate membership for the UK in some EU regulatory agencies (medicines, chemicals, aviation safety); an independent arbitration mechanism; reciprocal access to waters and open markets for fisheries; and on services: mutual recognition of professional qualifications, arrangements on labour mobility, continuation of mutual recognition of licences for broadcasting services and a collaborative framework for financial services that is 'reciprocal, mutually agreed and permanent'. Furthermore, the UK seeks a new data protection agreement with the EU, as well as cooperation in various fields – transport, energy, culture, digital etc.

The statement agreed by the Cabinet at Chequers on 6 July 2018⁴⁴ and the ensuing white paper of 12 July 2018, clarified that the UK government wants to propose an FTA agreement. While it wants to recover 'regulatory flexibility' in the services field, the UK government suggests the maintenance of a 'common rulebook for all goods including agri-food', in order to diminish regulatory barriers in that framework. The white paper further clarifies that the alignment of UK standards to the EU would only be considered for those goods checked at the border, which means that they would not include certain agri-food standards.⁴⁵ The UK would also seek participation in the EU agencies relevant to the free trade area for goods.

⁴² [PM's Florence speech: a new era of cooperation and partnership between the UK and the EU](#), UK Government, 22 September 2017; [PM speech on our future economic partnership with the European Union](#), 2 March 2018.

⁴³ See for example, J. Carmona, C. Cîrlig, G. Sgueo, [UK withdrawal from the European Union: Legal and procedural issues](#), EPRS, European Parliament, March 2017.

⁴⁴ [Statement from the HM Government](#), UK Government, 6 July 2018.

⁴⁵ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

The UK also proposed a new 'facilitated customs arrangement' (FCA) in order to avoid EU-UK customs barriers, whereby the UK would apply EU duties for goods going to the EU and UK tariffs for goods meant for the UK market. The proper mechanisms and procedures underpinning the functioning of the FCA would have to be agreed with the EU. Furthermore, recognising that 'only the CJEU can bind the EU on the interpretation of EU law', the white paper (as well as the preceding Chequers statement), suggests that the UK would be willing to accommodate, through a 'joint reference procedure', the role of the CJEU with respect to the common rule book on goods, in the event of a dispute. Finally, the statement and the white paper indicate that the UK would agree: to apply a common rulebook on state aid; to establish cooperative arrangements between regulators on competition; and to commit to an obligation to maintain environmental, social and employment and consumer protection standards at least at their current level of protection; in the area of climate change regulation the UK mentioned that it would also maintain high standards and that it would be ready to engage with the EU on a broad agreement on climate change cooperation.

Alongside the economic partnership, a security partnership with the EU would form part of the future relations framework. The UK would like to establish a strong and close **future relationship with the EU in the fight against crime and terrorism**, focusing on operational and practical cross-border cooperation, while continuing to work with the **EU on foreign policy, security and defence**, on sanctions, on stabilising the Balkans, or securing Europe's external border.⁴⁶ In this context, the UK has proposed an EU-UK security partnership 'of unprecedented breadth and depth', based on three pillars – internal security, external security and wider cooperation (e.g. cyber security, civil protection, asylum and illegal immigration, intelligence, countering terrorism and violent extremism) – and underpinned by cross-cutting issues such as data protection and exchange, governance and secondments of officials between the partners' institutions.⁴⁷ Such a partnership would be 'sufficiently flexible, with a mix of political and legal agreements, dynamic, adaptable and responsive to crises'. Regarding the first pillar, a **new security treaty with the EU on law enforcement and criminal justice cooperation** is suggested, that goes beyond the existing precedents for agreements with third countries by enshrining the existing cooperation based on EU measures. It would cover three areas – practical operational cooperation (including measures such as the European Arrest Warrant and the European Investigation Order); multilateral cooperation through EU agencies (Europol and Eurojust) and data-driven law enforcement (information exchange through various law enforcement databases) – and be underpinned by safeguards as regards human rights, dispute settlement and enforcement mechanisms and data protection arrangements. The July 2018 white paper further clarifies that the UK will respect the remit of the CJEU where the UK participates in an EU agency. The treaty should have a dynamic dimension allowing the UK to cooperate on the future versions of the current tools, as well as allowing for the incorporation of new tools and measures, where mutually beneficial. The UK also seeks a strategic dialogue based on expertise and experience exchanges between the UK and the EU on justice and home affairs matters (JHA). As regards the second pillar, the UK proposes a **new partnership on foreign and defence policy** cooperation, based on: consultation by way of an institutionalised and structured dialogue, coordination of diplomatic, defence and development resources, cooperation in the research and development of capabilities, reciprocal exchanges of officials, as well as arrangements for sharing sensitive and classified information. The partnership would possibly be based on a series of formal agreements and should respect both the autonomy of the EU and its Member States, as well as the UK's sovereignty.

Data exchange and protection are mentioned in the July 2018 paper among the vital cross-cutting issues for the UK. Due to the existing alignment of standards on data protection, the UK has repeatedly asked for a separate agreement with the EU, instead of an approach based on the adequacy decision framework which would remain in the discretion of the Commission. The July 2018 white paper however expresses the UK government's readiness to begin preliminary discussions on an adequacy assessment which would constitute a 'right starting point' for a future 'extensive' data protection agreement.

On governance, the white paper of July 2018 proposes that the future relationship should be based on an overarching institutional framework that could take the form of an Association Agreement between the EU and the UK, managed by a Governing Body and a Joint Committee. The white paper also argues for a future partnership which is flexible and adaptable, accommodating additional agreements if needed and the review of existing ones.

⁴⁶ [PM speech at Munich Security Conference](#), UK Government, 17 February 2018.

⁴⁷ [Framework for the UK-EU Security Partnership](#), UK Government, May 2018.

As regards the consistent interpretation of the agreement(s), the UK insists on the independence of the UK and EU courts, but suggests that they could take into account the relevant case-law of the other party. At the same time, Prime Minister May recognised that, where the UK wanted to participate in an EU agency, it would have to respect the CJEU role in that remit; also, in view of maintaining the common rulebook with the EU, the UK would commit by treaty that its courts would pay due regard to CJEU case-law in this respect.

State-to-state dispute resolution in the context of the agreement(s) would be based, in the UK's view, on an independent arbitration mechanism, as is the case in EU free trade agreements. As mentioned above, disputes relating to the common rule book on goods could be solved through the option of a joint referral to the CJEU for interpretation.

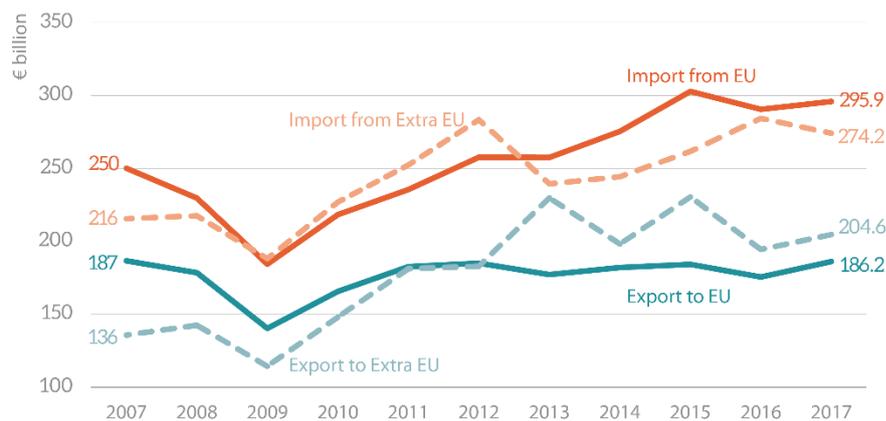
4. The future trade and economic partnership: main issues

4.1. Introduction

4.1.1. EU-UK trade relations

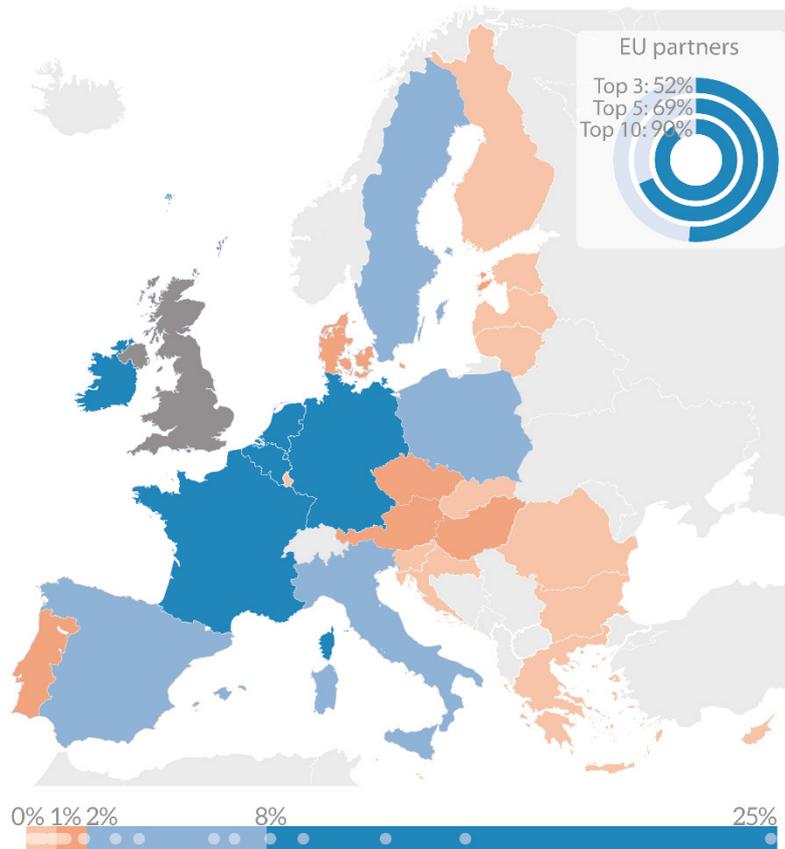
Figure 1 shows the evolution of UK imports and exports with the EU as opposed to extra-EU partners. It is interesting to note that, during the post-2009 crisis, UK exports to non-EU partners exceeded those with EU partners, however this trend has slowly reverted, and imports from the EU remain greater than those from extra-EU trade partners. As such, in 2017, UK trade with the EU amounted to 50 % of UK total trade. Map 1 illustrates the percentage of UK trade with the EU by Member State. The top EU trade partners for the UK are Germany (25 % of total UK trade with the EU), the Netherlands (15 %), France (12 %), Belgium (9 %) and Ireland (8 %). UK trade with the EU is highly concentrated among certain EU trade partners. Indeed, the top three EU partners account for 51 %, while the top five reach 68 % and top ten account for 90 % of UK's trade with the EU. However, such analysis does not account for possible internal EU value chains. For example, the UK might import an input from Germany, but that input can be manufactured using parts from other EU partners. So this descriptive picture might actually underestimate the potential importance of UK-EU trade relations for certain EU countries, with which the UK has less direct trade flows.

Figure 1 – UK trade with EU-28 and with the rest of the world (2016)



Source: Eurostat

Figure 2 – UK trade with other EU Member States (in share of total trade with the EU, 2017)



Source: Eurostat

Moreover, the EU accounted for 42 % of total UK trade in services in 2014. In 2014, services flows from the UK to the EU represented 37 % of total UK services credit (exports). However, that percentage rises to 41 % for financial services (excluding insurance), 43 % for the travel sector, and 45 % for the transport sector. The top UK export sectors to the EU are: financial services (with or without insurance); other business services (which include legal services, accountancy and audit, consultancy, etc.); and the travel and transport sector. EU exports services to the UK of are more important in the transport and travel sector as well as the other business sector. EU exports to the UK represent 49 % of total UK imports of services.

Table 1 – UK service credit with EU-28 and with the rest of the world in million euros (2014)

Balance of payments item	EU-28	Extra-EU28	Total	% EU-28
Services	100 822.5	171 790.8	272 613.3	37.0
Services: Manufacturing services on physical inputs owned by others	n.a.	n.a.	n.a.	n.a.
Services: Maintenance and repair services	n.a.	n.a.	n.a.	n.a.
Services: Transport	14 750.9	18 378.2	33 129.1	44.5
Services: Travel	14 979.2	20 178.1	35 157.3	42.6
Services: Construction	899.4	1 538.2	2 437.6	36.9
Services: Insurance and pension services	3 045.5	21 901.2	24 946.7	12.2
Services: Financial services	25 068.2	35 993.4	61 061.6	41.1

Services: Charges for the use of intellectual property	5 208.9	8 363.5	13 572.4	38.4
Services: Telecommunications, computer, and information services	9 324.9	10 935.1	20 260.0	46.0
Services: Other business services	22 737.3	48 139.2	70 876.5	32.1
Services: Personal, cultural, and recreational services	888.2	1 749.1	2 637.3	33.7
Services: Government goods and services	650.0	2 415.3	3 065.3	21.2

Source: Eurostat, 2014.

Table 2 – UK service debit with EU-28 and with the rest of the world in million euros (2014)

Balance of Payments Item	EU-28	Extra-EU-28	total	% EU-28
Services:	79 583.7	82 450.5	162 034.2	49.1
- Manufacturing services on physical inputs owned by others	n.a	n.a	n.a	n.a
- Maintenance and repair services	n.a	n.a	n.a	n.a
- Transport	12 861.6	11 165.8	24 027.4	53.5
- Travel	27 746.5	19 923.8	47 670.3	58.2
- Construction	2 193.2	517.3	2 710.5	80.9
- Insurance and pension services	664.9	1 039.5	1 704.4	39.0
- Financial services	4 483.2	7 926.9	12 410.1	36.1
- Charges for the use of intellectual property	2 468.6	4 880.2	7 348.8	33.6
- Telecommunications, computer, and information services	6 721.1	4 955.8	11 676.9	57.6
- Other business services	18 919.0	25 129.0	44 048.0	43.0
- Personal, cultural, and recreational services	352.3	3 546.6	3 898.9	9.0
- Government goods and services	2 187.0	3 026.8	5 213.8	41.9

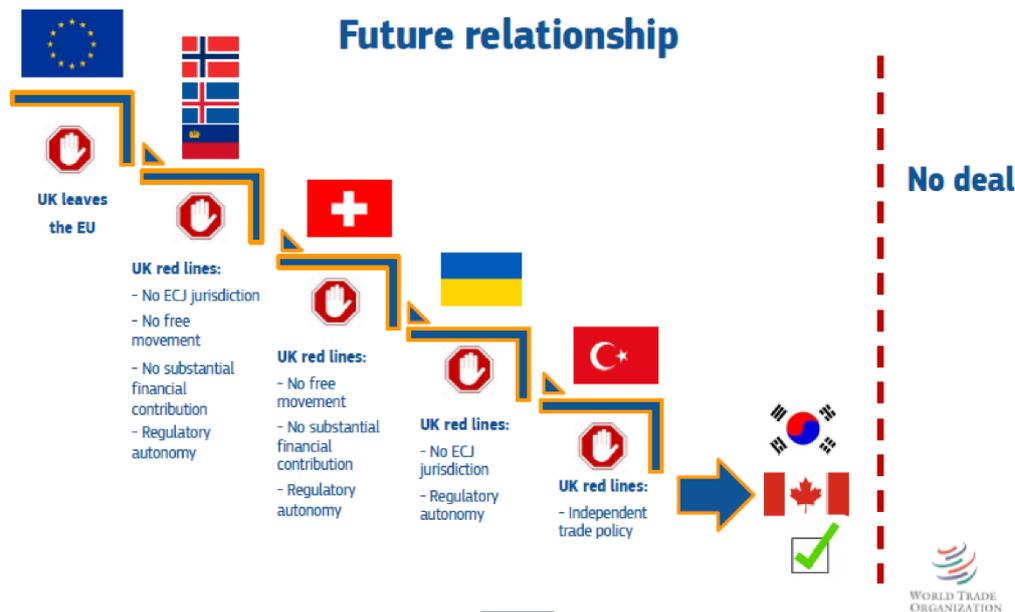
Source: Eurostat, 2014.

4.1.2. What trade agreement model to apply?

After some discussion on the different trade models, the UK government has expressly refused to retain membership of the customs union or form a customs union with the EU (as in the Turkish model), access to the internal market (thus rejecting the EEA model), and free movement rights (thus rejecting both the Swiss model and the EEA). Considering all of these UK government red lines (including those with respect to regulatory autonomy and the CJEU), the European Commission concluded that the only viable trade agreement model for the future relations between the EU and the UK would be of the kind negotiated with Canada or South Korea (see figure 3). Deep and comprehensive free trade agreements (DCFTA) of the kind negotiated with Ukraine in its association agreement – as further explained in section 4.4.2 – would entail areas of approximation or alignment with the EU regulatory system and consequently the need to account for the CJEU role in interpreting EU law. The Commission therefore considered DCFTAs to be incompatible with the red lines expressed by the UK government. The European Council guidelines therefore build mainly upon the FTA model. The FTA model entails exiting the customs union, the common commercial policy and the internal market. However, some of the suggestions made by Prime Minister Theresa May would indeed require to go beyond the FTA model and imply acceptance of both alignment to EU legislation and a CJEU role in some cases. This seems also to be the line adopted in the statement that the UK government issued on 6 July 2018, where the UK suggested some

harmonisation in the field of goods' regulation (common rulebook) in order to ensure frictionless trade and a joint reference procedure to accommodate the role of the CJEU. The European Council Guidelines had mentioned that if the UK revisited its red lines, a new offer could be considered. However the European Council highlighted the need for rights and commitments to be balanced and that the integrity of the internal market and the EU legal and decision-making framework could not be endangered. During the 8 June 2018 press conference, the EU's chief negotiator, Michel Barnier, stressed that maintaining the current status quo in EU-UK relations after Brexit was impossible, and that the UK will have to bear the consequences of its choice, including accepting the constraints that exist in EU law regarding what can be offered to a third country.⁴⁸

Figure 3 – The 'Stairway' to Brexit



Source: M. Barnier, European Commission chief negotiator, [slide](#) presented to the Heads of State or Government at the European Council (Article 50) meeting on 15 December 2017.

4.2. Constraints in EU FTAs on tailored solutions for Britain: Most favoured nation clauses in FTAs

The capacity of the EU to offer a deal that goes beyond the Canadian or other FTA deals that the EU has concluded to date depends on several factors. First of all, certain liberalisation and integration levels can only be granted on the basis of regulatory alignment and CJEU involvement in order to preserve the integrity of the EU internal market and legal framework. Secondly, the EU might also be bound by most favoured nation clauses in its trade agreements. **Most favoured nation** (MFN) status stipulates that an exporter from the partner country is treated no less favourably than an exporter from a third country in like situations. One of the main technical questions during the Brexit debate has been whether the EU introduced MFN clauses in its FTAs and what would be the consequences of such clauses on the current negotiations with the UK.

In other words, do MFN clauses in EU FTAs imply that any more favourable deal granted to the UK has also to be extended to other countries with whom the EU has an FTA?

⁴⁸ M. Barnier, European Commission Chief Negotiator for Article 50 Negotiations with the UK, [press conference following this week's round of negotiations](#), (extracts), 8 June 2018.

First, the existence of **MFN clauses in the framework of trade in goods**, i.e. clauses which prescribe that the EU shall grant any more favourable treatment applicable to a third party in another FTA to the other partners of the FTA containing the MFN clause, could be significant for the Brexit talks, as the EU wants to grant duty free access to UK goods, while in previously agreed EU FTAs, some sensitive products do not receive duty free treatment. However, this is not a problem in practice because MFN clauses for goods are actually extremely rare in EU FTAs. These clauses are mainly found in FTAs with a development perspective, such as the economic partnership agreements (EPAs), aiming at avoiding preference erosion. So, for example, this can be found in the EPA with the East African Community⁴⁹ and with the South African Development Community (SADC).⁵⁰ In the EPA with SADC, this MFN treatment is applicable to all SADC with the exception of South Africa. With South Africa, the EU has only a duty of consultation to decide whether and how to extend to South Africa the more favourable treatment permitted by the EU in an FTA with a third country.⁵¹ Usually, EU FTAs will instead contain a provision that ensures that applied MFN rates⁵² should apply if they become lower than the preferential rate given in the party's schedule to the FTA agreement.⁵³ This kind of provision ensures that the preferential agreement maintains its overall preferential nature even in the context of multilateral liberalisation.

Second, **MFN clauses are present in the services and investment chapters**. However, these types of MFN clauses are also subject to a series of limitations. These clauses will only apply within the scope of the chapters in which they are found, i.e. any sector carved out from the application of the chapter in question is also excluded from the application of the MFN clause found therein. Furthermore, the scope of application of the MFN clause can be limited, both through exceptions or specifications introduced in the provision, as well as through the introduction of reservations.

If we take the example of the EU-Canada Comprehensive Economic and Trade Agreement (CETA), the MFN provision for cross-border services does not apply with respect to 'arrangements or agreements with a third country regarding accreditation of testing and analysis services and service suppliers, the accreditation of repair and maintenance services and service suppliers, as well as the certification of the qualifications of, or the results of, or work done by, those accredited services and service suppliers'.⁵⁴ This provision prevents the MFN clause applying to **mutual recognition agreements**. In other words, if the EU concludes mutual recognition agreements with the UK, it is not obliged to reciprocate these terms with Canada.

As regards the use of reservation to limit application of the MFN principle for services and investment, the EU has used this in particular to avoid extending the treatment granted to countries that are part of the **internal market** or of a stronger integration framework. For example, this main reservation is contained in CETA in Annex 2, and 'reserves the right of the EU to adopt differential treatment to a country pursuant to any existing or future bilateral or multilateral agreement which: a) creates an internal market in services and investment, b) grants the right of establishment; or c) requires the approximation of legislation.' A similar reservation is found in EU FTAs using a positive approach to services commitments, such as the EU-South Korea agreement.⁵⁵

The MFN treatment will also be further limited by other reservations.⁵⁶

⁴⁹ Article 15 of the [Economic Partnership Agreement with EAC](#).

⁵⁰ Article 28 of the [Economic Partnership Agreement with SADC](#).

⁵¹ Article 28.7 of the [Economic Partnership Agreement with SADC](#).

⁵² Applied MFN tariffs are import tariff rates that apply to goods, which do not benefit from preferential treatment.

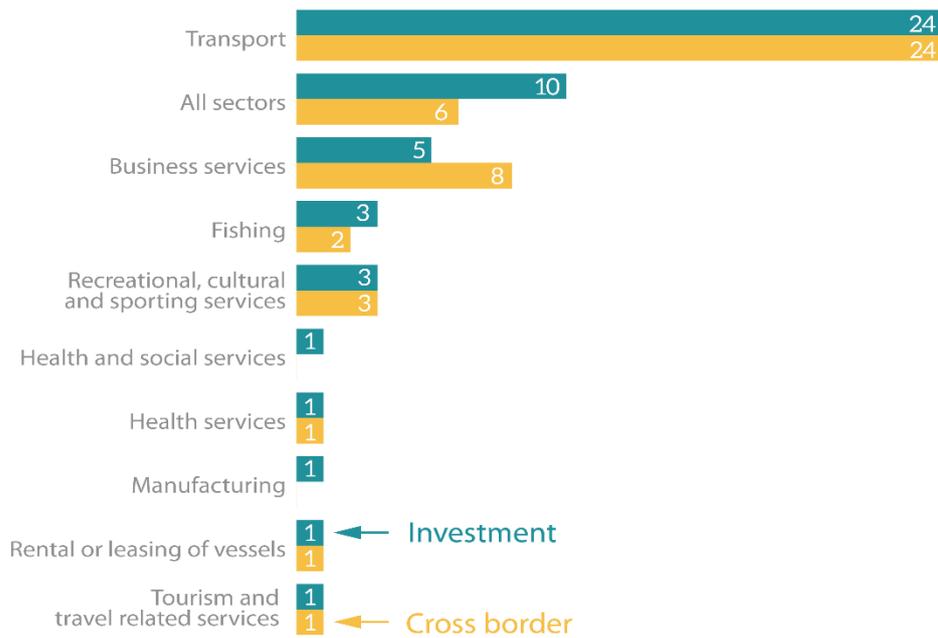
⁵³ See for example Article 29 in the [Association Agreement](#) with Ukraine; Article 25 of the EU-South Korea FTA.

⁵⁴ [CETA](#), Article 9.5.

⁵⁵ Annex 7-B of the [EU-South Korea FTA](#).

⁵⁶ See Annex 7-C of the [EU-South Korea FTA](#) and Annex I and II of [CETA](#).

Figure 4 – EU and EU Member States MFN reservations in CETA by sectors



NOTE: the above figure reports the count by sectors of EU and EU Member States reservations introduced in the agreement with Canada (CETA) and that cover Most Favoured Nation commitments (MFN) for investments and cross border trade. 'All sectors' reservation are reservations covering MFN commitments which are not sector specific (the most important example of this is the reservation to protect the internal market as explained in the study). Other reservations introduced in CETA by the EU and its Member States on other sectors than those mentioned in the figure do not seem to cover MFN commitments. Notable examples of these are: financial services, education services, communication services, environmental services, research and development services, mining and quarrying etc. In these sectors where there is no sector-specific reservation on MFN, any 'more preferential' treatment given to the UK will have to find justification under one of the 'all sectors' reservations to the MFN or otherwise will have to be extend to Canada.

Source: EPRS data on reservations in annex 1 and 2 of CETA.

These reservations can be introduced at the EU level as well as at EU Member State level (in which case the reservation applies only to the Member State introducing it). For example, in CETA, several EU Member States have reservations with respect to legal services and allow a more preferential treatment to be granted to EU or EEA lawyers as opposed to third-country lawyers, including Canadian lawyers and law firms. The EU reserves the right to conclude agreements, which lead to differential treatment in a variety of sectors, especially transport, fisheries, and recreation (cultural and gambling services). Several Member States further restrict MFN application in certain sectors. These often hint at rights for which the Member State wants to obtain reciprocity and will therefore liberalise only for those third countries granting similar concessions. Other Member State reservations will protect certain rights given to some countries only because of closer cooperation or neighbourhood ties (for example, Nordic cooperation, road transport between Bulgaria, the Czech Republic and Slovakia, etc.).

Finally, the MFN clause introduced in CETA for the financial service sector incorporates the clauses found in the chapter on investment and cross-border issues, and therefore includes similar limitations as per these two clauses. Application of MFN has been further limited in the context of chapters on the entry and stay of natural persons for business purposes. For example in CETA, it is granted only to some categories and within the terms of the chapter.⁵⁷

Therefore, in the context of services and establishment, the MFN clauses in previous EU FTAs may impact the Brexit negotiations to some extent. Besides the sectors where the EU or Member States have put reservations on MFN commitments in other FTAs, or commitments to liberalise under

⁵⁷ See, article 10.6 paragraph 2 of [CETA](#).

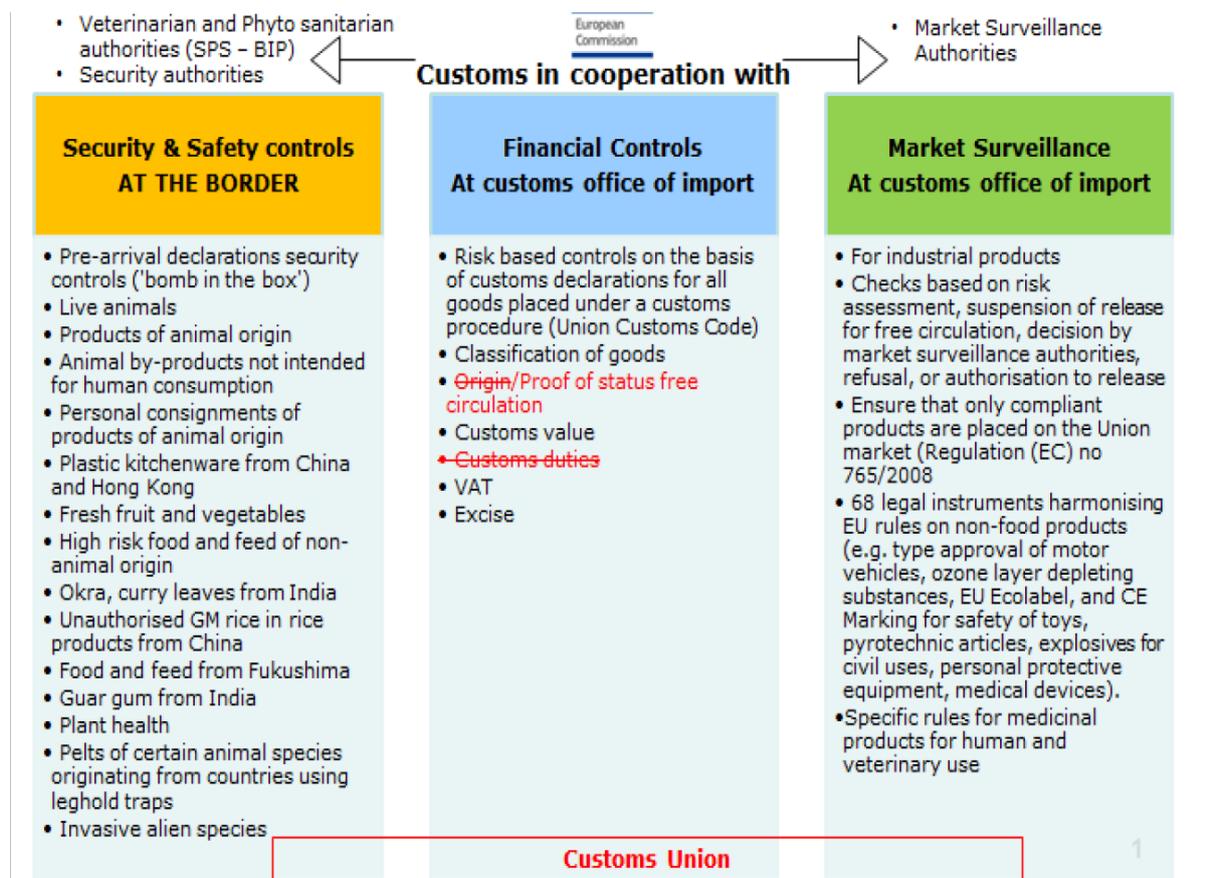
condition of approximation of laws (as in the association agreement with Ukraine), there are some sectors where further commitments to the UK could mean that the EU or the Member State in question would also have to extend such favourable treatment to other FTA partners that enjoy the benefit of an MFN clause.

4.3. Exiting the customs union and common commercial policy

As a member of the EU customs union and of the internal market, goods circulate freely from the UK to the EU and vice versa. Currently, UK firms can source inputs from the rest of the world, pay import duties on these inputs at the UK border, use them in further processing and then export the final processed good to the EU without internal border controls. The customs union implies that the EU has a single external border with respect to the rest of the world, thus the EU and their Member States apply the same tariffs to multilateral trade. To protect the integrity of that external border, competences concerning commercial policy, including both unilateral trade measures (such as trade defence) and international trade agreements (such as preferential trade agreements), are an exclusive competence of the EU.

The choice of an FTA as the future framework of EU-UK trade relations implies that the UK will exit the EU customs union and the EU common commercial policy. In practice, that means that the UK will no longer apply EU external tariffs. Because external tariffs in the EU and the UK will diverge, an FTA will necessitate the introduction of preferential rules of origin. All these changes will require the re-establishment of the customs border between the UK and the EU (see figure 5).

Figure 5 – Reintroduction of customs control when exiting the internal market and the customs union



Source: European Commission.

The UK government would like to minimise such customs borders, and in its statement issued on 6 July 2018,⁵⁸ which was further detailed in the white paper of 12 July 2018, suggested that the UK and the EU should institute a 'facilitated customs arrangement'. Under such an arrangement, where the trader can robustly demonstrate the destination of the good, the UK customs authorities would apply the UK's tariff for goods intended for the UK market and the EU common external tariff for goods intended for the EU market. In cases where traders could not positively demonstrate the destination of the good, UK customs would apply the higher of the UK or EU tariffs. A repayment mechanism would be applicable in cases where the good's destination is later identified as a lower tariff jurisdiction. The framework would be completed by a mechanism for the remittance of relevant tariff revenues, an institutional oversight mechanism, a new trusted trader scheme, and would specify the circumstances where repayment would be applicable.⁵⁹ Notwithstanding this repayment mechanism, a deeper analysis would be needed to verify whether such a system would not be in violation of the Article XXIV GATT requirement not to increase barriers to trade with non-FTA members (external trade requirement).⁶⁰ In any case, such an arrangement would de facto be very similar to a UK proposal suggested as a backstop option for Northern Ireland, which the EU had already refused to consider for the entire UK territory. Such a customs arrangement would necessitate a high level of trust in the management of the border as the EU would relinquish that management to the UK authorities for goods transiting via the UK. By way of illustration, several newspapers quoted the customs fraud case that the European Anti-Fraud Office (OLAF) investigated in 2016 and concluded in 2017, which showed that customs declarations of certain Chinese textile and footwear goods were undervalued by UK customs. These goods were destined for other EU Member State markets, such as France, Spain, Germany and Italy, who suffered the revenue losses from the undervaluation of the goods at the UK border. As a consequence, OLAF had recommended that the Commission seek recovery of the €1.987 billion lost in customs duties from the UK.⁶¹ In general, the European Commission has met UK proposals for a 'facilitated custom arrangement' with scepticism. In a press conference,⁶² Barnier highlighted the following practical questions:

- How can customs authorities verify the final destination of goods, and therefore assure that the correct customs tariff is applied? Is there not a major risk of fraud?
- What would the additional financial and administrative costs be for businesses and customs authorities in order to conform to this new system? In Barnier's view, Brexit cannot, and will not, be a justification for creating additional bureaucracy.
- What would the impact be of a UK tariff that is lower than the EU tariff, with regards to revenues for both the Union budget and Member States? How can the Union delegate the application of its customs rules to a non-member of the EU, who would not be subject to governance structures? Would that be acceptable or, simply, legally possible?

In a recent interview, Barnier clarified the reasons why the proposals were not considered realistic by the European Commission. In particular, he highlighted that it would be illegal for the EU to entrust a third country with the supervision of its borders; also, that it would be extremely difficult to check the final destination of a good and that the proposed system would be prone to fraud.⁶³ Following the informal European Council meeting in Salzburg on 20 September 2018, the President of the European Council, Donald Tusk, confirmed that the framework for economic cooperation

⁵⁸ [Statement from the HM Government](#), UK Government, 6 July 2018.

⁵⁹ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

⁶⁰ For a brief explanation of article XXIV GATT requirements, refer to: G. Fassina, P. Perchoc, L. Puccio, [Customs unions and FTAs: Debate with respect to EU neighbours](#), EPRS, November 2017.

⁶¹ [OLAF report 2016](#), European Commission, 2017.

⁶² [Press statement by Michel Barnier](#) following the July 2018 General Affairs Council (Article 50), 20 July 2018.

⁶³ [Der Termin für den Brexit steht](#), *Frankfurter Allgemeine Sonntagszeitung*, 2 September 2018.

suggested by the UK could not work for the EU, in particular since it would undermine the single market.⁶⁴

Box 5 – The Northern Ireland conundrum

After Brexit, Northern Ireland will be the only part of the UK sharing a land border with the EU. Therefore the border between Northern Ireland and the Republic of Ireland – largely invisible and 'frictionless' at present – will become an external EU border. At the same time, keeping an open border between Northern Ireland and Ireland holds strong political importance for the peace process, which has established consultation and cooperation between the island's North and South on matters of common interest, including the development of joint policies. Both the UK and the EU have recognised the unique circumstances of Northern Ireland and committed to avoiding the introduction of a hard border on the island of Ireland after Brexit; they also committed to fully respecting the 1998 Good Friday/Belfast Peace Agreement, which enshrines extensive North-South cooperation between Northern Ireland and the Republic of Ireland, facilitated by the EU membership of both the UK and Ireland. In this context, EU and UK negotiators have jointly identified more than 140 areas of North-South cooperation.⁶⁵

However, the UK government has rejected the possibility of remaining in the EU's internal market and/or in the EU customs union. This raises the question of how to maintain the open border on the island of Ireland if, in the future, standards and regulations diverge between the UK and the rest of the EU, while at the same time avoiding divergence between Northern Ireland and the rest of the UK. Moreover, the absence of a customs union between the EU and the UK will require the introduction and enforcement of a customs border to manage the future differences in the customs regimes and customs procedures to control the compliance of goods in transit.⁶⁶ A survey conducted in Northern Ireland in May 2018 concluded that there was substantial opposition to physical border checks between Northern Ireland and Ireland and substantial support for an UK exit that would eliminate the need for such checks; that is, for the UK to remain as a whole in the customs union and the single market.⁶⁷

Finding solutions to the Northern Ireland question has been a priority for the Brexit negotiators, and one of the key issues to be tackled by the withdrawal agreement (containing a draft protocol on Ireland/Northern Ireland). Paragraph 49 contains the three scenarios agreed in the joint report of December 2017: 1) first, a solution to avoid a hard border to trade in goods on the island of Ireland and any physical infrastructure or related checks would be achieved in the context of the future EU-UK relationship; 2) should this scenario prove impossible, the UK would propose specific solutions for Northern Ireland; 3) failing agreement on this as well, the UK committed to 'full alignment of those rules of the internal market and the customs union which now or in the future support North-South cooperation, the all-island economy and the protection of the 1998 Agreement.'⁶⁸

The draft protocol agreed in principle in the withdrawal agreement contains the third scenario as a backstop option, should other solutions not be found. Nevertheless, the actual European proposal for this backstop option within the withdrawal agreement would entail the creation of a 'common regulatory area comprising the Union and the United Kingdom in respect of Northern Ireland',⁶⁹ which has not been accepted by the UK.

Negotiations are continuing on Northern Ireland/Ireland, with the European Council meeting at the end of June 2018 concluding with no substantial progress; due to the fact that the parties' positions remain divergent with respect to the backstop option, negotiations on this issue continue. The EU negotiators have

⁶⁴ [Remarks by President Donald Tusk after the Salzburg informal European Council meeting](#), 22 September 2018.

⁶⁵ M. Barnier, [Oral evidence: Brexit and Northern Ireland](#), HC 329, Northern Ireland Affairs Committee, House of Commons, 22 January 2018; [The land border between Northern Ireland and Ireland](#), House of Commons Northern Ireland Affairs Committee, Second Report of Session 2017-19, HC 329, 13 March 2018.

⁶⁶ [Written evidence](#) submitted by K. Howard and D. Phinnemore for the Northern Ireland Affairs Committee' inquiry into the land border between Northern Ireland and Ireland (ILB0020), 28 February 2018.

⁶⁷ J. Garry, K. McNicholl, B. O'Leary, J. Pow, [Northern Ireland and the UK's Exit from the EU: What do people think?](#), Economic and Social Research Council (ESRC)/UK in a Changing Europe, May 2018.

⁶⁸ [Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union](#), 8 December 2017.

⁶⁹ [Infographic on the EU's backstop proposal](#), European Commission, 11 June 2018.

consistently argued that it is the UK government's responsibility to propose 'specific solutions' for the island. Two identified options were initially debated within the UK government without a clear outcome: 1) a customs partnership and 2) a 'maximum facilitation' arrangement.⁷⁰ The first option, supported by the UK Prime Minister, would see the UK adopting the EU's customs rules at its ports and acting as the external frontier of the EU, collecting tariffs and carrying out checks on imports on behalf of the EU. At the same time the UK would establish its own duties and trade policy. The second option would see customs checks reduced to the minimum, through new technological solutions, but would not completely eliminate them. Both options would, however, require years to implement/develop the necessary technology, and they would need to convince the EU and Ireland that the Irish border would remain invisible. One report from the UK House of Commons on the Irish land border has found that there was 'no evidence to suggest that right now an invisible border is possible'.⁷¹ Reports also suggest that the EU has rejected these options.⁷² The EU's chief negotiator, Michel Barnier⁷³ clarified that the backstop option must respect the integrity of the internal market and of the customs union.

Another proposal advanced by the UK government on 7 June 2018 concerns a temporary customs arrangement,⁷⁴ which would apply from the end of the transition period until replaced by a permanent settlement. The text mentions the end of December 2021, as the date at which the government expects that a future end state agreement would be in force, however this is an expectation rather than a precise time limit.

This proposal would see the entire UK (not just Northern Ireland) remain in the EU customs union (or creating a new customs territory combining the customs territories of the UK and the EU), meaning the elimination of tariffs, quotas, rules of origin and customs processes in EU-UK trade, the application of the Union Customs Code by the UK, as well as other relevant parts of the common commercial policy, although the UK would fall outside of the scope of the CCP. During the application of the temporary customs arrangement, as the CCP would not cover the UK, the UK would be able to sign, conclude and ratify FTAs with other countries, and apply those elements that do not impede on the functioning of the temporary customs arrangement. Furthermore, in the UK's view, the EU and the UK would need to find a solution to ensure that the UK continues to apply the Common External Tariff in full and to benefit from existing and future EU FTAs.

Provisions on VAT and excise, on information exchanges and access to the relevant IT systems, on enforcement, as well as on the allocation and distribution of revenue from customs duties, would have to be agreed. The EU and UK would also need to identify mechanisms for ensuring UK participation in the relevant EU committees on trade and customs policy, as well as governance arrangements for dispute settlement. Finally, the UK recognised that an approach to regulatory standards would also need to be addressed, as the UK committed to maintain Northern Ireland's full alignment with the relevant rules of both the customs union and the single market, but the paper does not cover the issue.

This proposal was received with scepticism by observers and EU officials. While the EP's Brexit representative Guy Verhofstadt characterised the plan as unworkable, Michel Barnier welcomed the proposal, but expressed some reservations as to the content, which would have to be assessed against three criteria: providing a workable solution to avoid a hard border; respecting the integrity of the single market/customs union and constituting an 'all-weather' backstop.⁷⁵ Indeed, according to the EU's chief negotiator, Michel Barnier, a time limited backstop option could not secure the absence of a hard border in

⁷⁰ Please see L. Hughes, [Conservative party factions attack Theresa May's Brexit options](#), *Financial Times*, 13 May 2018; D. Roberts, [Customs row punctures 'have-cake-and-eat-it' Brexit fantasy](#), *The Guardian*, 2 May 2018. See also T. Durrant, A. Stojanovic, [The Irish border after Brexit](#), Institute for Government, June 2018.

⁷¹ [The land border between Northern Ireland and Ireland](#), House of Commons Northern Ireland Affairs Committee, Second Report of Session 2017-19, HC 329, 13 March 2018.

⁷² L. O'Carroll, J. Rankin, H. Stewart, [EU rejects Irish border proposals and says Brexit talks could still fail](#), *The Guardian*, 20 April 2018; D. M. Herszenhorn and C. Cooper, [EU rejects UK's post-Brexit customs fixes for Northern Ireland](#), *Politico Europe*, 19 April 2018; [Trade barriers 'unavoidable' outside customs union, says EU's Barnier](#), *BBC*, 5 February 2018.

⁷³ [Speech by Michel Barnier at the All-Island Civic Dialogue](#), 30 April 2018.

⁷⁴ [Technical note: temporary customs arrangement](#), UK Government, 7 June 2018. See also J. Henley, [Brexit: What is the UK's backstop proposal?](#), *The Guardian*, 7 June 2018 and A. Barker, [Brexit's strange harmony](#), *Financial Times*, 8 June 2018.

⁷⁵ P. Smyth, [Lack of 'significant progress' in UK Brexit report](#), *The Irish Times*, 7 June 2018.

all circumstances. He also stressed the importance of and the need for an agreement on regulatory alignment for the Irish border to be seamless, and excluded the possibility to extend this option to the entire United Kingdom. Any backstop solution will have to be limited to the territory of Northern Ireland.⁷⁶ Furthermore, slides published by the Commission on 11 June 2018 mention the need for full EU supervision and enforcement mechanisms, including OLAF.⁷⁷

On the other hand, the UK government considers that its subsequent proposals of 6 and 12 July 2018 would solve the Northern Ireland problem through the future relationship, and any legal text agreed regarding the backstop solution 'would not need to be brought into effect'. As explained above, the proposed facilitated customs arrangement together with the common rulebook as part of the future relationship agreement would ensure, in the UK's view, frictionless trade between the whole of the UK and the EU and in particular no hard borders between Ireland and Northern Ireland. A House of Commons inquiry on the future customs arrangements is ongoing.⁷⁸ On the EU side, officials have on several occasions expressed serious doubts over the feasibility of the proposals.⁷⁹ However, the EU has been working on elements of its proposal for the backstop on Ireland and Northern Ireland (e.g. by clarifying which goods arriving into Northern Ireland from the rest of the UK would need to be checked, where and by whom).⁸⁰

4.3.1. Renegotiation of World Trade Organization schedules

The common external tariff applied by the EU must respect the commitments the EU has undertaken in the World Trade Organization (WTO). Indeed, WTO members committed not to raise their applied tariffs beyond a certain 'bound' tariff rate, known as bindings. In agriculture, those bindings also cover tariff rate quotas, limits on export subsidies and some domestic support measures. Bindings are listed in schedules of commitments, which also exist in non-goods agreements in the WTO, such as the General Agreement on Trade in Services (GATS).

While the UK, as all EU Member States, is a member of the WTO in its own right,⁸¹ its schedule of commitments within the WTO is currently tied to the EU schedule as a result of the EU customs union.⁸² Although for *ad valorem* tariffs, this does not seem to be a problematic issue,⁸³ in the sense that the EU tariff bindings can simply be 'copied and pasted' by the UK into its new separate tariff schedule, this is not so easy for tariff rate quotas limiting market access in agricultural goods.⁸⁴ Quotas are set to satisfy the demand of 28 EU Member States and would thus be disproportionate for a single country. Therefore, as a consequence of Brexit, the UK will have to modify its bindings in the WTO. Considering that the UK is one of the major EU importers of agricultural goods and that UK import demand was taken into account when the EU first negotiated its own bindings, the EU also wishes to adapt its quotas for a reduced post-Brexit EU-27. Figure 6 shows the percentage of UK imports in total EU imports from non EU countries for selected agricultural sectors.

⁷⁶ M. Barnier, European Commission Chief Negotiator for Article 50 Negotiations with the UK, [press conference following this week's round of negotiations](#), (extracts), 8 June 2018.

⁷⁷ [Slides on UK technical note on temporary customs arrangements](#), European Commission, 11 June 2018.

⁷⁸ [Brexit: customs arrangements inquiry](#), EU External Affairs Sub-Committee, House of Commons.

⁷⁹ D. Boffey, P. Crerar, [Angela Merkel admits collapse of Brexit talks cannot be ruled out](#), *The Guardian*, 4 September 2018.

⁸⁰ [Press statement](#) by Michel Barnier following the General Affairs Council (Article 50), 18 September 2018.

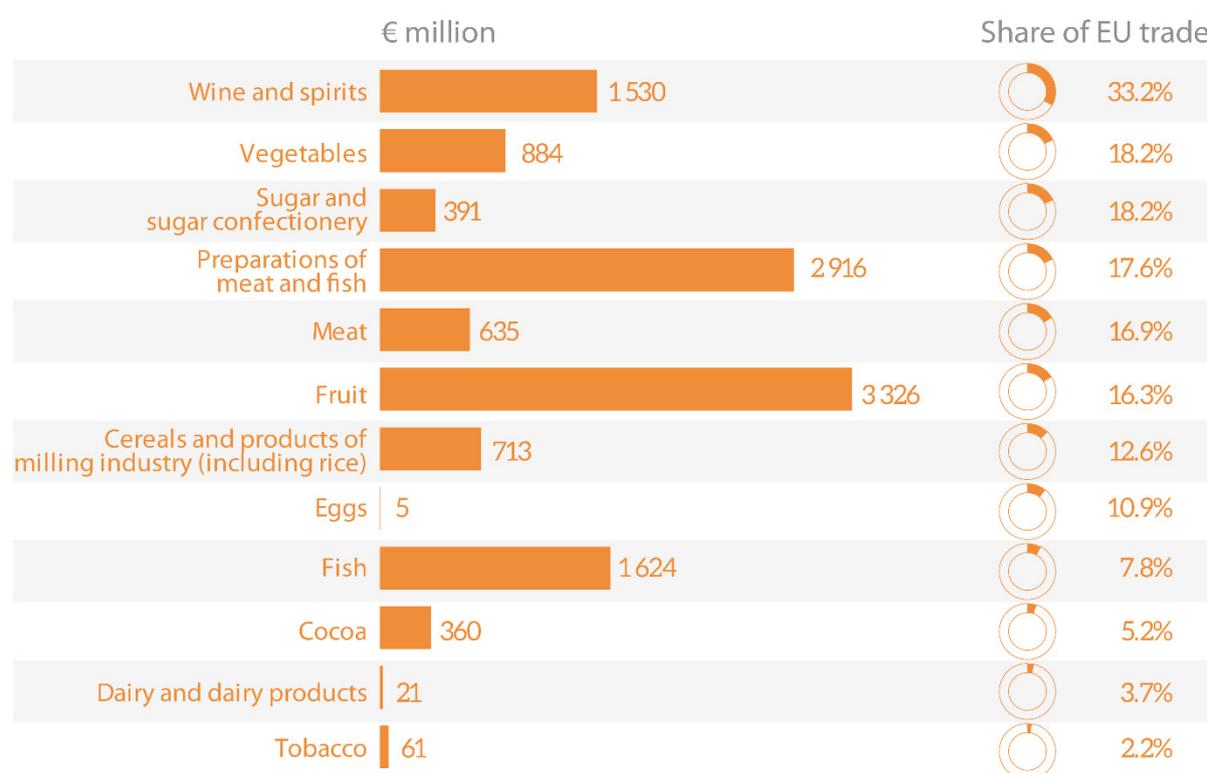
⁸¹ [Member information](#): United Kingdom and the WTO, World Trade Organization.

⁸² [Current Situation of Schedules of WTO Members](#), World Trade Organization; [Schedules of commitments and lists of Article II exemptions](#), World Trade Organization.

⁸³ The Brexit changes also seem unproblematic in the case of services commitments. On this, see: G. Sacerdoti, 'The prospects: the UK trade regime with the EU and the World: options and constraints post-Brexit', in F. Fabbrini (ed.), *The law and politics of Brexit*, Oxford University Press, 2017.

⁸⁴ See: G. Fassina, P. Perchoc, L. Puccio, [Customs unions and FTAs: debate with respect to EU neighbours](#), EPRS, European Parliament, 2017; P. Ungphakorn, [Six things I've learnt since the Brexit referendum: seeing both the wood and trees](#), Trade β blog, 9 January 2017; L. Bartels, [The UK's status in the WTO after Brexit](#), 23 September 2016.

Figure 6 – UK imports from extra-EU partners for selected agricultural sectors and share of UK imports in total EU imports from non-EU countries for those agricultural sectors (2017)



Source: Eurostat.⁸⁵

The schedule of commitments in the WTO will be the background to the fall-back situation in EU-UK relations, as well as the basis for UK trade with third countries as soon as the transition currently planned in the draft withdrawal agreement is over. For that reason, the question of quotas was already raised during the first phase of Brexit negotiations. Considering that adjustments to the schedule were needed because of the special circumstances of Brexit, the EU and the UK viewed these as an adaptation of the schedule to the new post-Brexit situation and not as proper renegotiations of such schedules. In this context, the EU and the UK started initial bilateral discussions in order to adjust their schedules to the post-Brexit situation without triggering renegotiations at the WTO following GATT Article XXVIII. The WTO rules include particular time schedules for requesting renegotiation of bindings, and renegotiations in the WTO are lengthy and entail concessions to be offered to WTO members that originally negotiated the schedules or that have substantial trading interests.⁸⁶ An EU-UK agreement on splitting the quotas was then submitted to the WTO partners in October 2017.⁸⁷ However, some WTO contracting parties –major exporters of agricultural products, have reacted negatively to the announced agreement. Argentina, Brazil, Canada, New Zealand, Thailand, the USA and Uruguay issued a joint letter to the EU and UK Permanent Representatives at the WTO, raising concerns about the reported agreement.⁸⁸ These

⁸⁵ These categories were computed on the basis of the following HS headings: wine and spirits (HS22.04-22.08), Vegetables (HS07), Sugar and sugar confectionery, beet sugar and sugar cane (HS17, HS121291, HS121293), Cocoa (HS 18), Other Food preparations (HS 16, HS 19-21), Meat (HS 03), Fish (HS 02), Dairy and Dairy products (HS 0101-0406), Eggs (HS 0407-0408), Tobacco (HS24).

⁸⁶ See: [Article XXVIII modification of schedules](#), WTO e-book.

⁸⁷ [Letter from the EU and UK Permanent Representatives](#) to the World Trade Organization, 11 October 2017.

⁸⁸ [Joint letter](#) of the Permanent Representatives to the WTO of Argentina, Brazil, Canada, New Zealand, Thailand, United States of America and Uruguay to the Permanent Representatives to the WTO of United Kingdom and of the European Union, 26 September 2017.

countries highlighted that the changes proposed by the EU and the UK were more than a simple rectification and entailed a diminished flexibility and market access for their exporters. Indeed, as Peter Ungphakorn explains,⁸⁹ if a given third country was assigned an EU quota of 200 000 tonnes, that country was free to sell its 200 000 tonnes of agricultural goods in any EU country. If this quota is divided on the basis of historical import levels, the country will no longer have an EU quota of 200 000 tonnes, but only a percentage of that quota. The example given assumes the country in question (New Zealand) exports 48 % of the good to the UK and 52 % of the same good to the rest of the EU; that would signify that the 200 000 tonnes quota would be subdivided into quotas of 96 000 tonnes to the UK and 104 000 tonnes to the EU. For this reason, the WTO contracting parties who wrote the joint letter stressed that if market access were changed as a result of the proposed subdivision, concessions would have to be made to compensate for the loss of market access, and pointed out that modification of the current WTO binding commitments required their agreement.⁹⁰ To obtain an agreement on the split, the EU and the UK began preliminary talks with the countries considered to have a stake in renegotiation of tariff schedules under WTO law (those with initial negotiating rights, principal or substantial supplying interest). On 26 June 2018, the Council formally authorised the start of negotiations with the relevant WTO members pursuant to GATT rules (Article XXVIII GATT).⁹¹

While negotiations in the WTO continue, the European Commission submitted a proposal to modify Council Regulation (EC) No 32/2000, which internally implements the tariff quotas bound in GATT by the EU.⁹² The proposal was submitted to the Council and the European Parliament for adoption because the Commission considers that negotiations in the WTO may not be complete before the UK exit from the EU. The Commission's proposal does not currently reflect an agreement reached, but not yet ratified, with New Zealand with regard to the scheduled tariff rate quota (TRQ) for 'meat of sheep or goats, fresh, chilled or frozen'.⁹³ The proposal gives the Commission delegated powers to change the annexes to the Regulation, as well as to Regulation (EC) No 32/2000, to account for any agreement reached in the WTO. The Commission proposal needs to be adopted by Council and Parliament following the ordinary legislative procedure under Article 207 TFEU.

The Commission's proposal follows the methodology agreed jointly with the UK. The EU share of the apportioned quota was computed by subtracting the UK share of a given quota from the entire scheduled tariff rate quota in question. The UK share of that given quota was computed by determining the UK's usage share (expressed in percentage) and applying it to the scheduled TRQ volume. The UK usage share was obtained by calculating the UK share of imports under a certain

⁸⁹ P. Ungphakorn, [UK, EU, WTO, Brexit primer – 2. Tariff quotas](#), 7 October 2017, updated 25 November 2017.

⁹⁰ [Joint letter](#) of the Permanent Representatives to the WTO of Argentina, Brazil, Canada, New Zealand, Thailand, United States of America and Uruguay to the Permanent Representatives to the WTO of United Kingdom and of the European Union, 26 September 2017.

⁹¹ [Recommendation for a Council Decision](#) authorising the opening of negotiations with a view to apportioning the Union's WTO concessions on Tariff Rate Quotas annexed to the General Agreement on Tariffs and Trade 1994 in view of the withdrawal of the United Kingdom from the Union, COM/2018/311 final; [COUNCIL DECISION](#) authorising the opening of negotiations with a view to apportioning the Union's WTO concessions on Tariff Rate Quotas annexed to the General Agreement on Tariffs and Trade 1994 in view of the withdrawal of the United Kingdom from the Union and Directives for negotiations with a view to apportioning the Union's WTO concessions on Tariff Rate Quotas annexed to the General Agreement on Tariffs and Trade 1994 in view of the withdrawal of the United Kingdom from the Union; see also the press release: Council authorises opening of negotiations with WTO members on Brexit-related adjustments, 26/06/2018

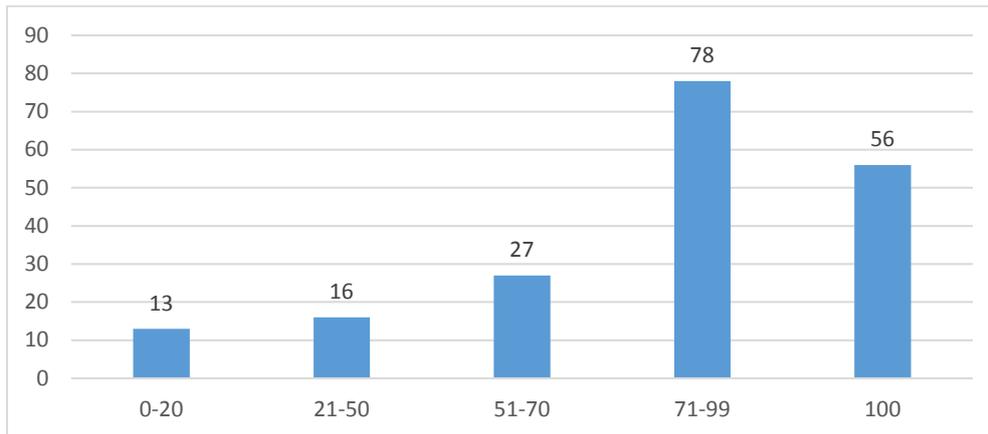
⁹² [Proposal for a regulation of the European Parliament and of the Council on the apportionment of tariff rate quotas included in the WTO schedule of the Union following the withdrawal of the United Kingdom from the Union and amending Council Regulation \(EC\) No 32/2000](#), COM/2018/312 final – 2018/0158 (COD).

⁹³ An agreement has been concluded with New Zealand in the form of an Exchange of Letters between the European Union and New Zealand relating to the modification of concessions in the WTO schedule of the Republic of Croatia in the course of its accession to the European Union. The latter agreement currently awaits European Parliament consent. Once the agreement with New Zealand is adopted, the EU-27 quota allocated to New Zealand for 'meat of sheep or goats, fresh, chilled or frozen' will have to be modified (from 114 116 to 114 184 tonnes).

quota over a recent representative period of three years (in this case 2013-2015). The Commission proposal contains an annex giving the detailed list of TRQs and the respective EU apportionment. Figure 7 shows the TRQ count, depending on the EU-27 share of in quota usage. Only 56 over 194⁹⁴ have an EU-27 share of in quota usage of 100 %; 69.07 % of the TRQ reported in the annex have an EU-27 share of in quota usage over 71 %. In figure 8, the average, minimum and maximum EU-27 share per country are given.

As pointed out by academics, discussions could also take place with respect to the cap imposed under WTO law on trade-distorting agricultural subsidies (known as the amber box),⁹⁵ and whether these should also be subject to apportioning between the EU and the UK.⁹⁶

Figure 7 –Tariff rate quote (TRQ) per EU-27 share of in quota usage



Source: EPRS, from data in European Commission, proposal for a regulation of the European Parliament and of the Council on the apportionment of tariff rate quotas included in the WTO schedule of the Union following the withdrawal of the United Kingdom from the Union and amending Council Regulation (EC) No 32/2000, COM/2018/312 final – 2018/0158 (COD).

Table 3– Average, minimum and maximum EU 27 share of in quota usage of TRQ by country

Row Labels	Average of EU27 share in quota usage[2]	Max of EU27 share in quota usage[2]	Min of EU27 share in quota usage[2]
ACP	0.712	0.712	0.712
ARG	0.955166667	1	0.739
AUS	0.611833333	1	0.2
BIH	0.483	0.483	0.483
BRA	0.8145	0.975	0.553
CAN	0.346	1	0
CHL	0.876	0.876	0.876
CHN	0.7625	1	0.421
CUB	1	1	1
EO	0.851753028	1	0
GRL	0.483	0.483	0.483
IDN	0.292	0.584	0
ISL	0.582	0.582	0.582
MKD	1	1	1
NW	0.923	1	0.846
NZL	0.575833333	0.651	0.417

⁹⁴ Four TRQ lines are left blank with respect to the EU-27 share.

⁹⁵ L. Bartels, [The UK's status in the WTO after Brexit](#), 23 September 2016.

⁹⁶ G. Sacerdoti, The prospects: the UK trade regime with the EU and the World: options and constraints post-Brexit, in F. Fabbrini (ed.), *The law and politics of Brexit*, Oxford University Press, 2017.

OT	0.88	0.88	0.88
OTH	0.7448125	1	0
PAR	0.711	0.711	0.711
THA	0.574615385	1	0
URY	0.859666667	0.879	0.821
US	0.36	0.36	0.36
USA	0.883975	1	0.536
USA / CAN	0.998	0.998	0.998

Source: EPRS, from European Commission, proposal for a regulation of the European Parliament and of the Council on the apportionment of tariff rate quotas included in the WTO schedule of the Union following the withdrawal of the United Kingdom from the Union and amending Council Regulation (EC) No 32/2000, COM/2018/312 final – 2018/0158 (COD).

Box 6 – Procedures in the WTO for the renegotiation of tariff schedules under GATT Article XXVIII

Three different procedures for renegotiation exist under GATT Article XXVIII.⁹⁷

A. The first procedure contained in GATT Article XXVIII(1) can only be triggered at the beginning of each three year period, the first period starting from 1 January 1958. The current three-year period has begun in 2018. The interpretative note to Article XXVIII from Annex I specifies that the desire to modify the schedules must be notified between July and October. The requesting member notifies the Council for Trade in Goods (CTG), which will determine the identity of the parties concerned. Indeed renegotiation only involves negotiation with the parties with whom the concessions were initially negotiated (parties holding initial negotiating rights (INR), and the parties considered to be principal suppliers (principal supplying interests (PSI)). Other WTO members that are neither INR nor PSI but are recognised to have a substantial interest (SI) in the renegotiations must be consulted but do not directly participate in the renegotiation. If the requesting contracting party agrees with the INR and PSI, then it can notify the WTO of its new schedule, which will be applied on a most favoured nation (MFN) basis. If no agreement is reached, the requesting member can still change its schedule unilaterally. However, INR, PSI and SI are then entitled to request the withdrawal of equivalent concessions negotiated with the requesting member. Similarly, under Article XXVIII(3)(b), if agreement is reached between the requesting member and INR and PSI members, but not with SI members, then those members can notify the withdrawal of equivalent concessions. While the wording of the text of Articles XXVIII(3)(a) and XXVIII(3)(b) limits this right to concessions initially negotiated by INR, PSI and SI with the requesting member, in practice, retaliatory measures can be applied to any good, whether or not initially negotiated with the requesting member.⁹⁸

B. The second procedure is envisaged under Article XXVIII(5). Under this provision, a WTO contracting party reserves the right at the end of each three-year period (end of 2017), to modify the schedules following the procedure described above, pursuant to Articles XXVIII(1) to (3) during the next three year period (negotiations would therefore take place from 2018 onwards).

C. The third procedure is found under Article XXVIII(4). Unlike the previous two, this procedure can be triggered at any time. It requires contracting parties' authorisation for the requesting member to be able to launch negotiations on modifications or withdrawal of concessions. The procedures under Article XXVIII(1) and XXVIII(2) are also applicable here, and Article XXVIII(3)(b) is also applicable. However, should the requesting member fail to find agreement with INR and PSI holders, the procedure is different. In that case, the issue is referred to the contracting parties, which should negotiate a solution to the dispute. Nevertheless, while the procedure is different, the end result is the same, indeed if settlement is not reached, the requesting party is still entitled to modify its concession unilaterally. If the contracting parties (i.e. the CTG) consider such a modification offers adequate compensation, then the modification will be allowed to stand. If the CTG considers that an unreasonably introduced modification fails to offer adequate compensation, PSI, INR and SI are entitled to withdraw equivalent concessions.

⁹⁷ A. Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO – procedures and practices*, Cambridge University Press, 2002.

⁹⁸ P. Mavroidis, *Trade in Goods - second edition*, Oxford University Press, 2012.

The current rules of procedure for renegotiation under Article XXVIII were adopted in 1980.⁹⁹ Under these procedures, a Member seeking renegotiation under Article XXVIII GATT must, at the end of the negotiations, submit to the WTO Secretariat: a) a report and a joint letter upon completion of each bilateral negotiation (the report must be initialled and the joint letter must be signed by both parties to the bilateral negotiation); and b) a final report on the completion of all bilateral negotiations. The changes agreed take effect as from the first day of the period referred to in Article XXVIII(1) (and for Article XXVIII(4) and (5), from the date of notification of conclusion of all negotiations). This means that legal effect is given from the negotiations and is not dependent on certification of these schedules (see paragraph 7 of the guidelines reported below). Certification is mentioned instead in paragraph 8 of the guidelines as giving 'formal effect' to the changes in the schedules. Through the certification procedure, the contracting party certifies that the new schedule is accurate (i.e. it properly translate the terms agreed by the parties).

The certification procedure

The WTO Decision of March 1980¹⁰⁰ provides that any changes to the authentic schedules must be certified. The certification procedure entails that the draft schedules is presented by the WTO Director-General to all contracting parties. The modified schedules are then certified if no objections are raised by a contracting party within three months. Objections can be raised on two grounds: 1) for modifications of the schedule, if the new schedule does properly reflect the modification agreed upon, 2) in the case of rectification, objections can be raised whenever the change does not comply with the requirement of not altering the scope of concessions in respect of bound items.

4.3.2. The introduction of preferential rules of origin in EU-UK relations

The aim of the EU negotiating guidelines for EU-UK trade in goods is to maintain zero tariffs, avoid quantitative restrictions, and retain reciprocal access to fishing waters and resources. However, trade in goods will be subject to 'appropriate accompanying rules of origin'.¹⁰¹ An FTA will institute preferential rules of origin (PRoO), which could become one of the most contentious issues in the Brexit negotiations on trade in goods. In an EU-UK FTA, in order to obtain preferential treatment, goods produced in the EU for export to the UK, and goods produced in the UK for export to the EU, will have to comply with the PRoO requirements (see box on the basic functioning of PRoO). Those exports that do not comply with the PRoO requirements will have to pay the applied MFN tariff for the good at the EU-UK border.

Currently, as a member of the internal market and customs union, UK-based producers can source any inputs from third countries, pay the common external tariffs on those imported goods (the EU MFN tariff or preferential rate applicable to that good), use them for further processing, and export the final good produced in the rest of the EU without paying duties and without proving origin. Several foreign investors in the UK export primarily to the EU market, while sourcing inputs from outside the UK. The definition of local content contained in PRoO will determine whether or not such manufacturing investments will lose their privileged access to the EU consumer market. Concerns have been raised in particular in the context of Japanese investments in the UK car industry. A European Parliament Policy Department study correctly pointed out that withdrawing from the EU customs union could put Japanese car manufacturers in the UK that wish to import inputs from Japan for further manufacturing in the UK and export the final product to the EU, at a competitive disadvantage with respect to other producers within the EU. This disadvantage is seen both from the perspective of having to comply with rules of origin in order to export duty-free to the EU, but also from the perspective of importing intermediate goods from Japan if the UK does not conclude an FTA similar to the FTA the EU is about to conclude with Japan, which will allow duty-free import of the required inputs.¹⁰² However, preferential rules of origin could also have an

⁹⁹ WTO, [Procedures for negotiations under Article XXVIII](#), C/113, 5 November 1980.

¹⁰⁰ WTO, [Procedures for modification and rectification of schedules of tariff concession](#), L/4962, 28 March 1980.

¹⁰¹ [Guidelines](#) on the framework for the future EU-UK relationship, European Council (Article 50), 23 March 2018.

¹⁰² [Future trade relations between the EU and the UK: options after Brexit](#), Policy Department for External Policies, European Parliament, 2018.

impact on EU intermediate products used for further production in the UK, depending on the cumulation rule used. This rule will have an important impact on how local content is computed and thus whether intermediates produced in the EU need themselves to comply with rules of origin to be counted as originating in the EU in UK final goods production (and vice-versa; refer to box 7 for a specific example).

Contrary to the European Council guidelines, the UK proposal would institute an FTA **without** preferential rules of origin.¹⁰³ The assumption is that the facilitated customs arrangement would make the FTA work de facto as a customs union, in the sense that there would be no hard border within the preferential area and duties perceived only at the external border of the preferential area. The feasibility of the UK proposal of an FTA without PRoO depends entirely on the feasibility of the facilitated customs arrangement, which has already been questioned by EU leaders and the Commission.¹⁰⁴

Box 7 – Preferential rules of origin

Preferential rules of origin define which exported goods can be deemed as originating in a country in order to obtain preferential duty access.¹⁰⁵ Preferential rules of origin can either define that a good must be wholly obtained, or that it must have achieved substantial transformation, in the country. The former criteria are normally used for agricultural goods, while the latter criteria are applied to manufactured products. Substantial transformation can be drafted in three different ways.

- The first method requires the final good to achieve a specified **change of classification** on the basis of the harmonised commodity description and coding system (HS) with respect to its inputs, i.e. the final product produced must not fall under the same product classification (HS code) as its inputs. The type of change to be performed will be specified in the treaty. For example, if the rule of origin specifies a change of chapter, the final good produced must be classified in a different chapter to the chapter in which the non-FTA originating inputs used for production were classified. Change of classification can also require particular inputs to be sourced locally. The best known example is that of ketchup in the North American Free Trade Agreement (NAFTA), where the rule of origin requires, in addition to the change of chapter, the local sourcing of tomato paste, even though tomato paste falls under a different HS chapter to ketchup.

- The second way of defining substantial transformation is to establish a **value added requirement**, which will either establish a threshold to the value of non-originating material used or establish a required percentage of local value added. EU agreements will usually use the first valuation method mentioned.

- Finally, rules of origin can require that production follows a certain technical process. Known as **technical requirements** rules, these are rare.

The definition of originating goods will depend largely on the applicable '**cumulation**' rule.

Diagonal cumulation is a cumulation between more than two countries, whereby inputs produced in a partner country within the cumulation area can be used by local producers as originating material if they comply with the rules of origin under the agreement. If an input fails to comply with the rule, even if it contains some value added from the partner country, it will account as non-originating input for further local production. **Bilateral cumulation** is similar to diagonal cumulation but applies to two parties only.

¹⁰³ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

¹⁰⁴ [Remarks by President Donald Tusk after the Salzburg informal European Council meeting](#), 22 September 2018. See also '[Der Termin für den Brexit steht](#)', *Frankfurter Allgemeine Sonntagszeitung*, 2 September 2018.

¹⁰⁵ For an overview of preferential rules of origin and how they work, refer to: S. Inama, *Rules of origin in international trade*, Cambridge University Press, 2009; L. Puccio, Building bridges between regionalism and multilateralism: enquiries on the ways and means to internationally regulate preferential rules of origin and their impact on systemic problems of FTA, 2013; L. Puccio, 20 Years After Marrakesh: Reconsidering the Effects of Preferential Rules of Origin and Anti-Circumvention Rules on Trade in Inputs and Global Production Networks, 2013, C. Herrmann, M. Krajewski, J. Terhechte (eds), *European Yearbook of International Economic Law 2014. European Yearbook of International Economic Law, volume 5*, Springer.

Full cumulation instead allows local final goods producers to account for any value added achieved in the production of inputs within the accumulation area, in order to achieve value added requirements applicable to the final good.

The specific example below illustrates the difference between these two cumulation systems and their implication for firms requesting preferential status. For the moment, the more liberal 'full cumulation' has rarely been granted by the EU; it is found for example, for the European Economic Area (EEA) countries, and African, Caribbean, and Pacific Group of States (ACP).

Several other aspects of rules of origin can hamper or facilitate the granting of preferential status, however for reasons of space, these cannot be developed extensively in this analysis.¹⁰⁶

An example of compliance of rules of origin (see also figure 9)¹⁰⁷

Assuming countries A and B are linked by an FTA, while third country C supplies A and B with parts. The producer of hydraulic turbines in A wants to export its good to B under the preferential treatment of their FTA. Following the FTA rule of origin requirement for hydraulic turbines (falling under HS Heading 8410), the hydraulic turbines must undergo:

Rule (a) either a change of classification equivalent to a change of heading, and respect a value added requirement whereby non-originating materials used in the production of the turbine do not exceed 40 %;

Rule (b) or, if the product does not comply with the change of classification required in the first rule (i.e. does not comply with the change of heading), then the product could still obtain origin under the FTA if it complies with a stricter value added requirement whereby non-originating materials used in the production of the turbine do not exceed 30 %.

Assuming that the breakdown of the price for the production of the turbine by the producer of country A is: parts from third-country C correspond to 15 % of the price of the turbine; parts coming from country B correspond to 30 % of the price of the turbine; parts and labour from country A correspond to 55 % of the price of the turbine.

Moreover, assuming the cost of parts from B (under HS 8410) is broken down as follows, to assess whether the parts from B are eligible for FTA origin under the agreement: parts from country C that also fall within HS 8410 and account for 40 % of the price of the intermediate product produced by B and parts and labour from country B correspond to 60 % of the price of the intermediate product produced by B.

Do parts coming from country B qualify for origin under the FTA? Does that affect the possibility for production from country A to qualify for origin under the FTA, depending on the accumulation rule used?

Diagonal cumulation

Parts from B also fall under HS 8410, therefore are subject to the same rule of origin as the turbines from A and must comply either with rule (a) or rule (b) above. Under rule (a), the parts from B do not qualify for origin. Indeed, the producer in B uses non-originating products (parts from C) falling under the same heading as the product produced in B (HS 8410). That means that the producer in B fails to comply with the change of heading which requires that all non-FTA parts used in the FTA production of the good fall under a heading other than HS 8410. The parts in B also do not qualify with rule (b). Indeed, rule (b) allows sourcing of non-originating parts falling under the heading HS 8410, however it also requires compliance with a stricter value added requirement, whereby non-originating parts cannot exceed 30 % of the price. As the producer in B uses parts from third-country C accounting for 40 % of the price of the good produced in B, production in B does not comply with the stricter value added requirement. **Parts from B therefore do not comply with the rules of origin requirement of the FTA. The producer in A will have to pay the MFN duty when importing the parts from B.**

¹⁰⁶ For more on this refer to: S. Inama, [Rules of origin in International trade](#), Cambridge University Press 2009; L. Puccio, [Building bridges between regionalism and multilateralism](#) : enquiries on the ways and means to internationally regulate preferential rules of origin and their impact on systemic problems of FTA, EUI, 2013.

¹⁰⁷ Example taken from B. Driessen, F. Graafsma, The EC Wonderland – An overview of the Pan-European Harmonised Origin Protocols, in E. A. Vermulst, *Customs and Trade Laws as Tools of Protection: Selected Essays*, Cameron May, 2005.

As parts produced in B do not comply with rules of origin under the FTA, they will account as non-originating products in the production of the turbine in country A. This means that non-originating parts used in A are both the parts from country C (accounting for 15 % of the price of the turbine produced in A), but also parts from country B (accounting for 30 % of the price of the turbine produced in A). This means that non-originating parts account for 45 % of the price of the turbine produced in A. **The turbines from A therefore do not qualify, as they do not comply with the value added requirements contained in either rule (a) or (b) of the rule of origin in the FTA. The turbines produced in A will be subject to MFN duty when exported to B.**

Full cumulation

However, the situation is different when the FTA allows 'full cumulation'. Indeed, in 'diagonal cumulation', because the parts in B did not comply with the rules, they automatically counted as 100 % non-originating, even if 60 % of the price of these parts originated in country B. **Full cumulation instead allows to trace back the origin of parts from B used in A.**

Accordingly, the new breakdown of costs for the production in A with 'full cumulation' is the following:

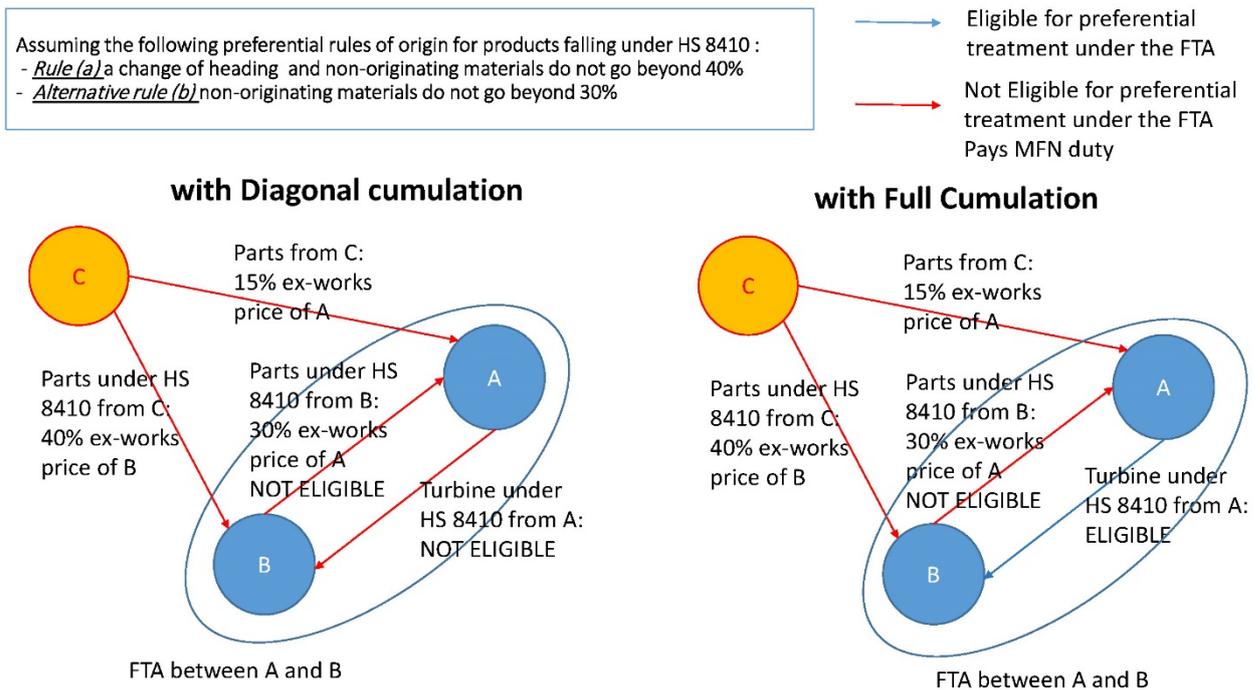
- the parts from country C used by A counted for 15 %. Added to these are the parts from C incorporated in the parts from B used by producer A. These account for 12 % of the price of A.¹⁰⁸ The total value added from C in A's production is equal to 27 % of the price.
- the new value of parts from B used by the turbine producer in A account for 18 % of the price.¹⁰⁹
- value added by A remains 55 %

Production in A still does not comply with rule (a) because it does not fulfil the change of heading requirement, which remains unchanged under 'full cumulation'. However, now production in A complies with the stricter value added requirement in rule (b), as the non-originating parts now account only for 27 % due to 'full cumulation'. **With 'full cumulation', the turbine produced by A qualifies for origin and preferential treatment under the FTA.**

¹⁰⁸ This is obtained by multiplying the value of the parts from C in the production of B times the value of the parts of B in the production of A, i.e. in the example: 40 % times 30 %.

¹⁰⁹ This is obtained by multiplying the value originating in B of B's production of parts times the value of parts from B used in the production of country A, in is the example: 60 % times 30 %.

Figure 8 – Diagonal versus full cumulation



Source: EPRS.

4.3.3. Brexit and existing EU trade agreements

Leaving the EU common commercial policy will also have implications with respect to international agreements concluded with third countries by the EU on its own (EU-only agreements), or concluded jointly with its Member States (known as mixed agreements).

In the case of EU-only agreements, Brexit signifies that these will no longer apply to the UK. For example, mutual recognition agreements (MRA), whereby parties recognise each other's conformity assessments and certifications, will cease to apply to the UK post-Brexit, with related consequences for firms operating under these agreements. An MRA can also include provisions on acquired rights (see box 8).

Box 8 – Doctrine of acquired rights

The doctrine of acquired rights¹¹⁰ considers that certain rights obtained by individuals, because of the execution and application of a certain law (including a treaty provision), remain intact after a change of sovereignty occurs (secession and annexation cases for international public law), or the law is changed. The principle ensures that changes do not have retroactive effect and ensures a certain continuity and stability. Recent commentaries¹¹¹ on the Vienna Convention on the Law of Treaties consider that individual rights acquired **in the execution and application** of a treaty may also be covered as a consequence of the doctrine of acquired rights. However, the protection of acquired rights in international public law is not considered absolute. The doctrine of acquired

¹¹⁰ P. A. Lalive, [The doctrine of acquired rights](#), in: Bender (Ed.), *Rights and duties of private investors abroad - International and Comparative Law Center*, New York, 1965, pp. 145-200; see also: F. J. Nicholson, 'The protection of foreign property under customary international law', *Boston College Law Review*, vol. 6(3), 1965; J. Crawford, *Brownlie's Principles of Public International Law (eighth edition)*, Oxford University Press, 2012; M. Sorajah, *The international law on foreign direct investment*, Cambridge University Press, 2010.

¹¹¹ O. Dörr and K. Schmalenbach, *Vienna Convention on the Law of Treaties - A commentary*, Springer, 2012; O. Corten and P. Klein, *The Vienna Convention on the Law of treaties: a commentary*, Vol. II, Oxford University Press, 2011; see also: C. Binder, 'The Pacta Sunt Servanda Rule in the Vienna Convention on the Law of Treaties: A pillar and its safeguard', in I. Buffard, J. Crawford, A. Pellet, S. Wittich (eds), *International Law and fragmentation between universalism and fragmentation - Festschrift in honour of Gerhard Hafner*, Martinus Nijhoff, 2008.

rights is normally confined to those rights that have been implemented into national law, i.e. a right simply enshrined in a treaty that has not given rise to a specific right in domestic law does not entail a vested right. According to practice, acquired rights appear to be connected with rights that have a contractual form enforceable by individuals in municipal law, such as property, employment rights stipulated in an employment contract, concessions of resource exploitation, licence issued before notification of withdrawal from a treaty, etc.

Some EU MRA agreements may contain explicit provisions with respect to acquired rights. These provisions can be drafted in such a way that they can be triggered only by suspension, termination or non-renewal. In other words, provisions safeguard the recognition of certificates for declarations of conformity submitted prior to the expiry of the agreement, as long as the conformity evaluation request was issued prior to the notice of denunciation or non-renewal of mutual recognition. An example is Article 20 of the Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment.¹¹² As Brexit does not entail a denunciation or suspension of these agreements, as they were concluded by the EU using its exclusive competence and the EU remains a party to these agreements, this casts doubt as to whether or not the acquired rights clause applies in the framework of Brexit.

Brexit also implies that EU FTAs will no longer apply to the UK even if the latter were formally signed and ratified jointly by the EU and the UK (i.e. even if the latter are mixed agreements). Two explanations given for this Brexit consequence. Firstly, this type of mixed agreement is concluded 'between the European Union and its Member States, of the one part, and the [country x], of the other part'. For example, the title of the EU-Korea Agreement refers to an agreement 'between the European Union and its Member States, **of the one part**, and the Republic of Korea, **of the other part**'. This suggests that Member States' participation is strictly associated with their status as EU Member States, and the EU and its Member States comprise a single united party within the agreement. In other words, EU FTAs, though they are mixed agreements, do not behave as multilateral agreements (unless they involve more than one non-EU party), but are considered bilateral agreements with, on the one hand, the EU and its Member States, and, on the other hand, the third party.¹¹³ This interpretation is further confirmed by the territorial application provision found in several EU trade agreements,¹¹⁴ which clarifies that the treaty is binding and applicable **only to** the territories in which the EU treaties apply and the territory of the third country, partner to the FTA.¹¹⁵ Therefore, as soon as the EU treaties are no longer applicable to one of the Member States by virtue of the withdrawal of that Member State from the EU, application of the FTA should also cease for that exiting EU Member State. It has been argued that the UK exit from these EU FTA agreements does not require a denunciation by the UK, because the members to the agreement (the EU and the third party/parties) actually remain part of the agreement, so no real withdrawal would take place for the agreement. The UK would exit automatically because of the territoriality provision, so it is possible that the EU will simply have to notify the UK exit from the agreement to the other party/parties to the FTA.

¹¹² Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment, OJ L 114, 30 April 2002.

¹¹³ See also: [Future trade relations between the EU and the UK: options after Brexit](#), Policy Department for External Policies, European Parliament, 2018.

¹¹⁴ Taking again here the example of the treaty with South Korea, this provision (Article 15.15 of the Agreement) stipulates that:

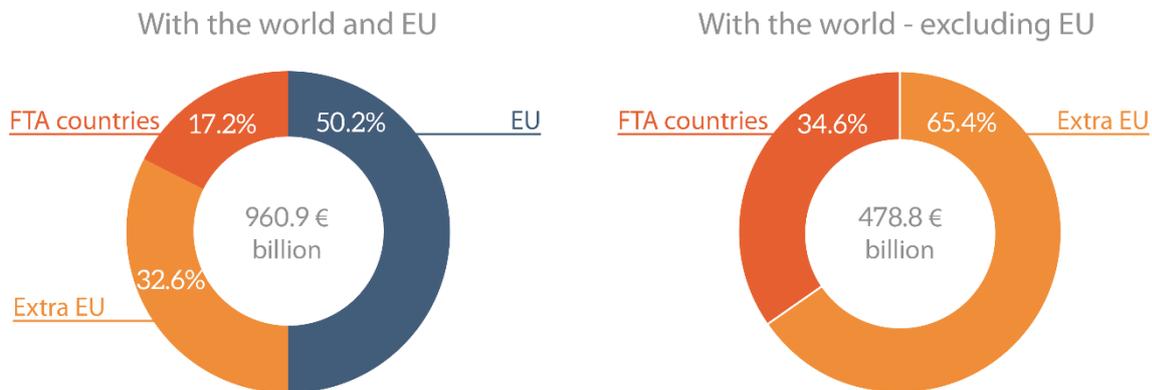
'1. This Agreement shall apply, on the one hand, to the territories in which the Treaty on European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties, and, on the other hand, to the territory of Korea. References to 'territory' in this Agreement shall be understood in this sense, unless explicitly stated otherwise.

2. As regards those provisions concerning the tariff treatment of goods, this Agreement shall also apply to those areas of the EU customs territory not covered by paragraph 1.'

¹¹⁵ G. Fassina, P. Perchoc, L. Puccio, [Customs unions and FTAs: debate with respect to EU neighbours](#), EPRS, European Parliament, 2017; See also: [Future trade relations between the EU and the UK: options after Brexit](#), Policy Department for External Policies, European Parliament, 2018.

The figure below shows the percentage of total UK trade with EU FTA partners.¹¹⁶ Those countries with whom the EU has implemented trade agreements or concluded trade negotiations represented, in 2017, 17 % of total UK trade and 35 % of the UK's trade with extra-EU countries. So Brexit will not only affect the 50 % of UK trade with EU partners but also the additional 17 % of UK trade with EU FTA partners.

Figure 9 – Repartition of UK total trade (2017)



FTA countries: Albania, Algeria, Andorra, Antigua and Barbuda, Bahamas, Barbados, Belize, Bosnia and Herzegovina, Cameroon, Canada, Chile, Colombia, Costa Rica, Dominica, Egypt, El Salvador, Faroe Islands, Fiji, Fyrom, Grenada, Guatemala, Guyana, Holy See, Honduras, Iceland, Iraq, Israel, Jamaica, Japan, Jordan, South Korea, Kosovo*, Lebanon, Madagascar, Mauritius, Mexico, Montenegro, Morocco, Nicaragua, Norway, OPT (Occupied Palestinian Territory), Panama, Papua New Guinea, Peru, San Marino, Serbia, Seychelles, Singapore, South Africa, St Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Switzerland, Syria, Trinidad and Tobago, Tunisia, Turkey, Ukraine, Vietnam and Zimbabwe.

* This designation is without prejudice to positions on status, and is in line with UN Security Council Resolution 1244 and the ICJ opinion on the Kosovo declaration of independence.

Source: Eurostat.

The UK exit from these agreements may have important implications for some EU FTA partners, depending on the importance of the UK as a trade partner. The non-application of EU-FTA agreements to the UK may have also consequences for firms operating under these frameworks. These consequences are not only limited to the UK and partner countries' firms, who will lose preferential market access respectively to the third country and to the UK. Further consequences derive for example from rules of origin (explained above). As a member of the EU, the UK is currently part of the 'cumulation area' applicable under these FTAs; once the UK withdraws from the EU and application of EU FTAs to the UK territory ceases, this will no longer be the case. This means that any UK input used by exporters in other EU Member States, or in the EU trade partner under the FTA, will account as a non-originating material for the EU's FTAs preferential rules of origin.

Another relevant example is EU aviation agreements. In this field, the UK will have to renegotiate and replace around 65 international treaties¹¹⁷ between the EU and third countries. Discussions have already started with the United States on agreeing a replacement to the EU-US Open Skies agreement that regulates air operating rights.¹¹⁸ However, the US proposal for a bilateral treaty has been deemed unsatisfactory by the UK to date, as it removes important elements of the EU-US deal.¹¹⁹ Furthermore, the ownership and control clause included in US bilateral aviation agreements, which in a US-UK deal would require that airlines are majority owned and controlled by US or UK

¹¹⁶ This includes those future FTA partners with which the EU is in the final signing and ratification stages, such as Japan, Singapore and Vietnam. Indeed, if those agreements enter into force, the EU Member States will be able to benefit from preferential market access with these partners, while the UK will have to renegotiate agreements with them.

¹¹⁷ [Brexit and transport](#), United Kingdom House of Commons, April 2018.

¹¹⁸ [Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand](#), signed on 30 April 2007. See also: [International aviation: United States and External Aviation Policy - Horizontal Agreements](#), European Commission.

¹¹⁹ K. Manson, A. Barker, T. Powley, [US offers UK inferior open skies deal after Brexit](#), *Financial Times*, 5 March 2018.

nationals in order to fly to the USA, complicates the situation for UK airlines where significant shares are held by other EU nationals.

Finally, the UK will instead be able to remain party to other agreements, such as the WTO or UN Convention on the Law of the Sea, where the EU and its Member States have individual standing, although the UK might have to make further commitments, originally undertaken by the EU on behalf of the UK.¹²⁰

The UK has already started establishing trade policy dialogues with third countries,¹²¹ although it will be able to formally start negotiations for FTA agreements only after it leaves the European Union. As trade negotiations are lengthy, the UK has considered a 'roll-over' of EU trade agreements as a transitional trade arrangement with third countries.¹²² That would imply that the UK and the third country would conclude, as a transitional trade arrangement, an agreement that would essentially be the same as that concluded between the trade partner and the EU. As highlighted by experts, this 'bilateral roll-over' would most probably not be a perfect 'cut and paste' approach and would still entail some negotiations and possibly technical and political adjustments to adapt to the new bilateral situation.¹²³ Suggestions for trilateralisation, i.e. the UK acceding as a third country to the existing EU trade agreements, also require EU agreement, and would need to be approved following the EU ratification procedures.¹²⁴ In its white paper of 12 July 2018, the UK government mentioned its intention to seek continuity with its existing trade and investment relationships (including those covered by EU FTAs and other preferential arrangements) as well as the desire to pursue ambitious bilateral negotiations with the US, Australia and New Zealand. The UK also mentioned that it would potentially seek accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),¹²⁵ which replaced the Trans-Pacific Partnership (TPP) after the USA withdrew.¹²⁶

4.4. Exit from the internal market

As a member of the internal market, the UK benefits from free movement of goods, services, capital, and workers, and freedom of establishment. This entails a prohibition on introducing restrictions unless justified.¹²⁷ It also provides for mutual recognition of production standards whenever those are not harmonised; i.e. products complying with the rules of a Member State can be sold in other internal market countries without the need to meet the requirements of the country of importation. Derogations to the mutual recognition principle are only permitted if the Member State of importation can prove that stricter regulations are needed to achieve a legitimate objective and the

¹²⁰ Refer to [Future trade relations between the EU and the UK: options after Brexit](#), Policy Department for External Policies, European Parliament, 2018.

¹²¹ See, for example, the [trade policy dialogue established with New Zealand](#), UK Government, 17 October 2016.

¹²² [Continuing application of EU trade agreements after Brexit - First report of session 2017-2019](#), International Trade Committee, House of Commons, 7 March 2018.

¹²³ [Oral evidence](#): continuing application of EU trade agreements, International Trade Committee, House of Commons, HC 520-ii, 15 November 2017; for a deeper analysis of some issues (such as tariff rate quotas and rules of origin) see: [Continuing application of EU trade agreements after Brexit - First report of session 2017-2019](#), International Trade Committee, House of Commons, 7 March 2018.

¹²⁴ *ibid.*

¹²⁵ [The CPTPP](#) includes the following countries: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. Refer also to: K. Binder, [Edging closer to a TPP-11 agreement](#), EPRS at a glance, 2017.

¹²⁶ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

¹²⁷ Restrictions to establishment and cross-border services must be justified within the internal market and therefore a restriction must be found to be necessary to meet some legitimate concern, non-discriminatory, and proportional. The concept of proportionality entails that there must be a clear link between the objective and the measure and that such measure must be the least restrictive possible. Member States must also be able to demonstrate they comply with the requirements of [Directive 2006/123/EC](#).

measure taken is proportionate.¹²⁸ Participation in the internal market comes with rights and obligations, as highlighted by the EU's chief negotiator, Michel Barnier, which means that obtaining internal market rights is dependent on the fulfilment of these obligations; inter alia participation in the EU legal system and the related role of the CJEU.¹²⁹

4.4.1. Services and investment liberalisation under an FTA

The scope of **market access commitment** within the internal market and within an FTA is not equivalent; liberalisation of services and investment under EU FTAs is more limited.

First, the FTA can **exclude some sectors** from the application of the chapters. Often sectors such as audiovisual and air transport are carved-out from EU FTAs. In some cases, air transport agreements are concluded as separate agreements (such as with Canada).¹³⁰ In the case of Brexit, the guidelines adopted by the Council aim at 'continued connectivity between the UK and the EU after the UK' withdrawal, to be achieved via the conclusion of an 'air transport agreement, combined with aviation safety and security agreements, as well as agreements on other modes of transport, while ensuring a strong level playing field in highly competitive sectors'.¹³¹ As pointed out in the UK white paper of 12 July 2018, the UK has the largest aviation industry in Europe and in 2017, 164 million passengers travelled between the UK and other EU Member States.¹³²

Box 9 – EU air transport agreements

Air transport agreements were first concluded by Member States with third countries, the ECJ *Open skies* judgements¹³³ paved the way to the conclusion of an EU external aviation policy and the EU enjoys some exclusive competences in external aviation relations. The EU has negotiated horizontal agreements to amend and bring Member States' pre-existing bilateral agreements into line with EU law. It has also started negotiating comprehensive agreements (also called global agreements) with third countries and is building a common aviation area with its neighbours.

In agreements with countries part of the common aviation area, alignment with the EU *acquis* has been required.¹³⁴ Other type of air transport agreements (global agreements), have regulatory cooperation clauses instead.¹³⁵ Unless an air transport agreement is concluded with the EU, some UK airlines will lose their EU flying rights post-Brexit, as UK shareholders will no longer be considered EU nationals. Indeed, according to the existing rules, for an airline to operate in the EU, it must prove that at least 50 % of its shares are owned and effectively controlled by EU nationals and that its principal place of business is located in one of the EU Member States.¹³⁶ The UK white paper of 12 July 2018 mentions that the UK will explore options for maintaining reciprocal liberalised access through an Air Transport Agreement. The paper specifically mentions the EU-Canada Air Service Agreement as an example.¹³⁷

¹²⁸ S. Weatherill, [What 'mutual recognition' really entails: analysis of the Prime Minister's Mansion House Brexit policy speech](#), EU Law Analysis blog, 4 March 2018.

¹²⁹ For a deeper discussion of what internal market participation entails, refer to [Future trade relations between the EU and the UK: options after Brexit](#), Policy Department for External Policies, European Parliament, 2018.

¹³⁰ [Agreement on air transport](#) between Canada and the European Community and its Member States.

¹³¹ [Guidelines on the framework for the future EU-UK relationship](#), European Council (Article 50), 23 March 2018.

¹³² [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

¹³³ [C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98](#), *Commission v United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, Germany*.

¹³⁴ See, for example, Article 137 of the [EU-Ukraine DCFTA](#) which requires fulfilment of the conditions contained in the EU-Ukraine Common Aviation Area Agreement, which requires the adoption of part of the *acquis* containing the European aviation rules, starting with safety requirements. On the European common aviation area, see the [Commission website](#).

¹³⁵ This kind of agreement has been concluded for example with the [United States](#) and [Canada](#).

¹³⁶ P. McClean, [IAG calls for EU to relax ownership laws as Brexit concerns mount](#), *Financial Times*, 12 July 2017; [Regulation \(EC\) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community](#), OJ L 293, 31 October 2008.

¹³⁷ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

With respect to audiovisual services, the guidelines for future EU-UK relations are silent, whereas for other trade negotiations, audiovisual was explicitly excluded from the mandate for the negotiations (e.g. TTIP).¹³⁸ The UK government has indicated its interest in negotiating specific rights with respect in particular to broadcasting.¹³⁹

Second, commitments in trade agreements are often **subject to reservations**. Reservations are used to limit the application of the commitments undertaken in the agreement to and within specific sectors. Two different approaches exist to reservations in trade in services:

- The first, known as the positive approach, where commitments are made only for those sectors listed in the schedule of commitments, such as in GATS or the EU-South Korea FTA,¹⁴⁰

- The second, or negative approach, entails a broader liberalisation, as commitments apply a priori to all sectors unless explicitly mentioned in reservations. This approach was used in CETA, where reservations were introduced in two different types of annexes.¹⁴¹ Annex 1 of CETA contains those rules that violate the commitments under the agreement that parties want to maintain, subject to a **ratchet clause** (i.e. if those restrictions are lifted in the future they cannot be reintroduced). Annex 2 of CETA instead allows restrictions not subject to a **ratchet clause**, i.e. restrictions that can also be introduced in the future. The European Council guidelines on the framework for future relations do not specify which approach will be used for services; CETA may be taken as a basic model and the more liberal negative approach may be used at least with respect to cross-border services and investment. Even if CETA is used as basic model that does not mean that reservations will be similar. The number and scope of reservations may vary from FTA to FTA. Moreover, within an FTA, the number of reservations may vary greatly from Member State to Member State (see figure 10), as in some Member States, services are more liberalised than in others. Reservations may also vary according to the sectors in terms of number, type (Annex 1 or 2), and scope.

Third, even for sectors covered by the agreement, some measures, that would be construed as restrictive and would therefore require justification under the internal market rules, would not be constrained by the market access commitments under FTA rules. Indeed, the commitment to grant **market access in an FTA** will mainly forbid the introduction of some specific measures as opposed to the internal market formulation which prohibits restrictions to trade in services and establishment in general. The market access rule for cross-border services trade in FTAs only imposes a prohibition on introducing quantitative measures limiting the number of foreign enterprises, imposing other market access bans (such as monopolies, exclusive services suppliers or economic needs test), or limiting the quantity of output.¹⁴² For investments, the market access rule further prohibits measures imposing limitations on an investment's value, on the extent of foreign capital participation, or on the number of employees.¹⁴³ It also forbids prescription of a certain legal form for a foreign enterprise. Reservations can be introduced if a country desires to maintain or introduce a measure which violates the above-mentioned market access commitments.

With respect to investments, an FTA – such as CETA – can consider certain measures as compatible with the market access commitment, such as inter alia, measures limiting the number of authorisations because of technical or physical constraints (for example in the telecommunication

¹³⁸ See, as an example, the mandate for the negotiations issued for the [Transatlantic Trade and Investment Partnership \(TTIP\)](#) negotiation, or the mandate issued for negotiations of [Free Trade Agreement with Japan](#).

¹³⁹ [PM speech on our future economic partnership with the European Union](#), UK Government, 2 March 2018. See also: [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

¹⁴⁰ See, for example, Articles 7.5 and 7.6 of the [EU-South Korea Free Trade Agreement](#) with respect to market access and national treatment commitments.

¹⁴¹ See: [CETA](#) Article 9.7 for cross-border trade, CETA Article 8.15 for investments, CETA Article 13.10 for financial services, CETA Article 14.4 for International Maritime Transport services.

¹⁴² See for example [CETA](#) Article 9.6 for cross-border market access.

¹⁴³ See for example in [CETA](#) Article 8.4.

sector), or measures imposing a certain percentage of directors or shareholders be qualified or practice certain professions such as lawyers or accountants. Some of these measures may also exist in intra-EU relations, but have to be justified. Moreover, in CETA, a chapter was introduced to specifically allow, in the context of both cross-border and establishment, the introduction of authorisation requirements and authorisation fees, licensing requirements and professional qualifications requirements.¹⁴⁴ This chapter imposes some requirements on how such measures should be undertaken, however parties can still derogate from these requirements (for example non-discriminatory requirement of licensing), if they have introduced specific reservations to that effect (for example a reservation on national treatment).

Parties usually also agree not to impose **performance requirements on investments**,¹⁴⁵ such as a mandatory level of exports or domestic content, however reservations can also be introduced in this context.

Regarding **non-discriminatory treatment**, the rules in the internal market are also stricter than rules under an FTA. In the internal market, restrictions to movement must normally be non-discriminatory. The prohibition on instituting discriminatory measures covers measures both directly discriminating on the basis of nationality,¹⁴⁶ and indirectly (for example on the basis of residency requirements).¹⁴⁷ For indirect discrimination, states can successfully justify a measure, for example when it comes to the need to master a certain language in order to provide the service. Justification must include that the measure is necessary to provide the service and that it is proportional.¹⁴⁸ In FTAs, national treatment with respect to cross-border trade in services and investments ensures that foreign enterprises are treated by governments no less favourably than domestic businesses. The concept is however not without limitations. For example, Article 9.4 of CETA specifies a number of measures which can be adopted in the context of cross-border trade in services by the contracting parties, as long as they do not constitute 'arbitrary or unjustified' discrimination. These may include the requirement to speak a language needed to supply the service, or measures requiring a licence, registration, certification or authorisation. Moreover, parties can introduce a series of reservations on national treatment for both cross-border trade in services and investments.

Finally, trade agreements usually prohibit requirements that **senior management or board of director** positions are occupied by people of any particular nationality.¹⁴⁹ Again, parties can waive this requirement by introducing specific reservations.

Box 10 – Selected services sectors relevant to the Brexit debate and example reservations existing under CETA and other agreements

Services commitments and reservations can vary from agreement to agreement, so reservations in a future EU-UK agreement can be very different from those of past agreements, depending on the constraints imposed by MFN clauses introduced in EU agreements for services (see section 4.2).

As CETA was mentioned as a model, and is one of the most ambitious EU FTAs, table 3 shows the number of EU reservations existing per commitment. Unfortunately, the count does not give the idea of the restrictiveness of the measure. Indeed, while cross-border market access (MA) (MA-Mode 1) is not the commitment with most reservations, it is prohibited in many sectors where the EU or the Member States require establishment either in the EU or sometimes even in the Member State introducing the reservation (with a minimum requirement to establish a branch). Nevertheless, the data shows that several restrictive measures are maintained even in the

¹⁴⁴ See Chapter 12 of CETA.

¹⁴⁵ See for example in [CETA](#) Article 8.5.

¹⁴⁶ Cases: C-546/07; C-186/87; C-96/85.

¹⁴⁷ Cases: C-350/96; C-224/97; C-145/99; C-221/89.

¹⁴⁸ Case C-424/97.

¹⁴⁹ For example in [CETA](#) Article 8.8.

more open context of investment/establishment (MA-mode 3). The number and scope of reservations in services will also largely depend on the Member State (see figure 10). When it comes to reservations under Annex 2, these reservations do not necessarily mean that currently the service is restricted but that the EU or the Member State reserves the right to protect it in the future although in some cases restrictions are already in place.

Table 4 – Reservations in CETA Annex 1 and 2 per commitment

Reservations EU and EU MS	MA-mode 1	MA – mode 3	NT – Mode 1	NT – Mode 3	NT – Financial Markets	Perf. Req.	SMBD
Total annex 1+2	313	386	256	314	23	59	130

Market access (MA): MA-mode 1 are reservations on cross-border market access while MA-mode 3 are reservations on investment market access.

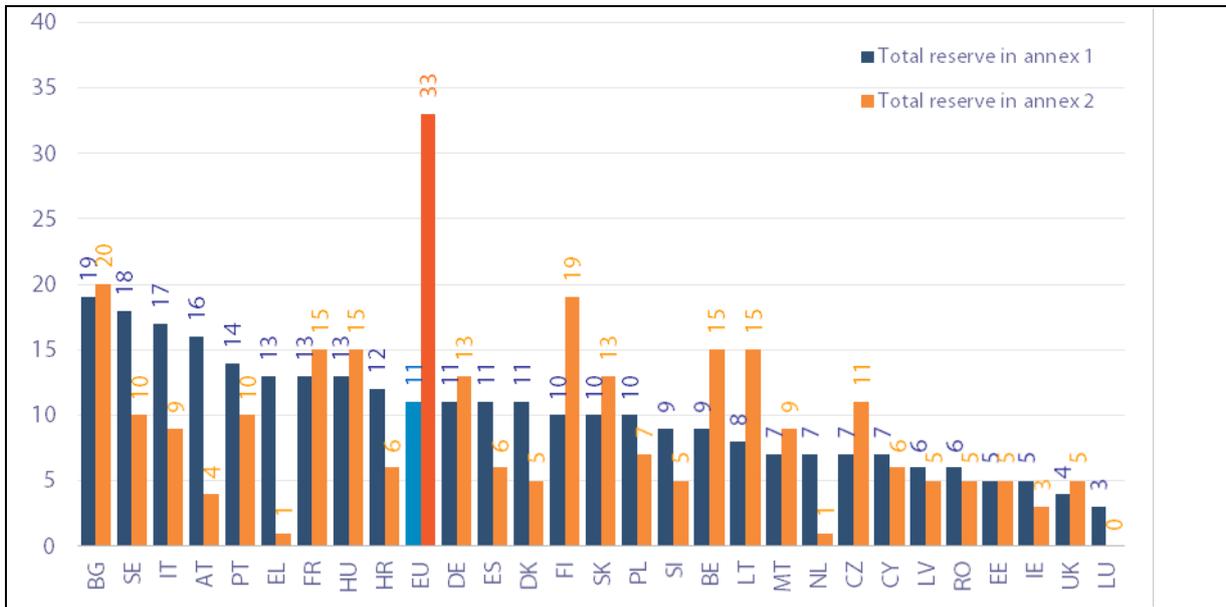
National treatment (NT): NT_ Mode 1 are reservations on national treatment for cross-border trade in services and NT- Mode 3 are reservations for national treatment accorded to investments.

Performance requirement (Perf. Req.) refers to reservation on the performance requirement prohibition.

Senior management and Board of Directors (SMBD) refers to reservation on the commitment with respect to senior management and board of directors.

Source: EPRS

Figure 10 – Reservations in CETA by annexe and country



Source: EPRS; L. Puccio, W. Schöllmann and G. Sabbati, [CETA and public services](#), EPRS in-depth analysis, February 2017.

Financial services and insurance:

Considering the role of the City of London and the importance of financial services in UK services exports, this will be a key area of interest in EU-UK negotiations. Currently, the UK has full access to the internal market thanks to what is known as passporting. The licence to operate, issued by the EU Member State where the financial institution is established, includes a 'European passport', allowing the financial institution to operate in other Member States. The 'European Passport' can only be granted to firms that meet EU legislative requirements and is a benefit limited to the EU and the EEA. Brexit implies that EU legislation will cease to apply to the UK and UK based firms will become third-country firms under EU legislation, thereby losing

passporting rights. This means that UK groups wishing to operate in other EU Member States will have to go through an authorisation process in the host Member State and can be required to establish branches or subsidiaries there. FTAs do not grant passporting rights; this is valid even in the Swiss model, notwithstanding the fact that Switzerland does incorporate part of the EU *acquis*. The authorisation requirement remains for FTA partners' banks and in some cases reservations are introduced. There are limited commitments in FTAs with respect to cross-border trade and several reservations were introduced on both cross border and investments commitments. For example, in CETA an EU reservation in Annex 2 states that only firms with registered offices in the EU can act as depositaries for investment assets. Several Member States also have reservations related to financial services. Those can cover requirements to establish at least a branch, requirements of residency of the executive director or of the board of directors, specific legal forms requirements, etc. Reservations also exist with respect to insurance services. In several EU countries, there are limitations to both cross-border and investment market access for insurance services. Some Member States' reservations require that the insurance company be established in the EU in order to underwrite certain types of insurance risks. Another major issue is that financial services (including insurance) do not seem to be covered in CETA by sector-specific MFN reservations. This means that a more favourable treatment can only be granted to the UK without also extending it to Canada if it falls under one of the broader all-encompassing MFN reservations (such as that for the internal market and approximation of laws). In its white paper of 12 July 2018,¹⁵⁰ the UK government recognises that it cannot obtain passporting rights, but asks for a strong regulatory cooperation framework (see section 4.4.2).

Transport – rail, road and maritime – and fisheries

As shown in tables 1 and 2, transport services are an important sector for EU-UK trade in services.¹⁵¹ Transport services are also subject to several reservations in existing EU FTAs. In CETA for example, the EU has reserved **railway transport** licences only to undertakings established in the EU. Besides the reservation introduced by certain Member States to maintain some exclusive rights, some EU MS further restrict rail transport licences to EU nationals (for example Bulgaria) or require incorporation (such as the Czech Republic). The UK has requested the continuation of cross-border rail services in its white paper of 12 July 2018, and in particular bilateral rail agreements with the relevant EU Member States in order to ensure the continued operation of services through the Channel Tunnel and the Belfast-Dublin Enterprise Line.¹⁵² **Maintenance and repair of rail transport equipment** is also reserved: the EU prohibits cross-border supply, with the exception of some Member States, and can introduce any measure with respect to establishment and physical presence. A similar reservation covers **maintenance and repair of waterway and maritime transport vessels**. The EU also has a reservation allowing it to require establishment and limit cross-border supply of **road transport services**. Establishment is also required for services supporting road transport. Some Member States reservations are introduced for example with respect to taxis, or for the introduction of authorisation systems, or exclusive rights reserved to nationals of the EU, or limiting foreign investments in bus services, etc. On road transport, cross-border agreements between third countries and one or more Member States may be concluded; these agreements are normally protected by reservations on MFN clauses in EU trade agreements such as CETA. The EU also reserved the right to adopt or maintain measures limiting the supply of cabotage within a Member State of the EU by foreign investors established in another Member State of the EU. The UK wants to explore the possibilities for reciprocal access for road hauliers and passenger transport operators and arrangements for private motoring.¹⁵³ **Combined transport** is also subject to reservation in EU FTAs. In Annex 1 to CETA, the EU (with the exception of Finland) reserved access to the market for transport of goods between Member States of the EU, in the context of a combined transport operation, to hauliers established in the EU. On **water transport**, the EU is generally open to maritime transport but restricts inland waterways. In CETA, the EU reserved the right to introduce any measures with respect to national cabotage (including feeder services) as well as with respect to pilotage and berthing services. Pushing and towing services are reserved for vessels carrying an EU Member State flag (with the exception of Lithuania and Latvia where further restrictions apply to pilotage, berthing, pushing and towing). Moreover the EU reserved the right to adopt any measures with respect to the nationality of crew on a seagoing or non-seagoing vessel. Several reservations exist with respect to the requirements in order to fly the flag of an EU Member State. Further reservations exist at the Member State level. The reservation on the conditions in order to fly the flag of an EU Member State can further restrict

¹⁵⁰ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

¹⁵¹ For some numbers see the publication recently published [on transport](#), UK Government, June 2018.

¹⁵² [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

¹⁵³ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

access to restricted inland waterways, cabotage, and fisheries. Indeed, FTAs normally reserve **fisheries**. For example, a reservation in CETA allows the imposition of a requirement to fly the flag of an EU Member State in order to fish in the exclusive economic zone (EEZ). This latter point is of less interest in the context of the EU-UK relationship as both parties have expressed the desire to maintain open access for fisheries. The EU has granted fishing rights for example to some southern partners via the **sustainable fisheries partnership agreements (SFPAs)**.¹⁵⁴ The SFPAs concluded with non-EU countries give the vessels of that third country access rights to the EEZ. Normally these agreements also include clauses with regard to resource conservation, environmental sustainability and cooperation in the fight against illegal, unreported and unregistered (IUU) fishing.¹⁵⁵ The EU also has fisheries **agreements with Norway and the Faeroe Islands** that cover the joint management of shared stocks. In the Brexit context, the Commission proposed an EU-UK fisheries partnership agreement in line with UNCLOS provisions and including mutual access to waters and resources as well as provisions concerning fisheries management based on shared principles.¹⁵⁶ In its statement of 6 July 2018, the UK government simply mentions that the UK would be 'taking back control of UK waters as an independent coastal state'. The 12 July 2018 white paper suggests that the UK would be willing to agree only on annual negotiations on access to waters and fishing opportunities (including multi-annual agreements for appropriate stocks) and proposes provision to promote sustainable fisheries.¹⁵⁷

Transport services are subject to some MFN reservations in trade agreements including CETA, which could allow for further concessions in the context of EU-UK negotiations, as opposed to the approach undertaken in previous EU agreements, however the Commission needs to review the flexibility granted by these MFN reservations.¹⁵⁸

Research and development (R&D) programmes

Another important EU reservation, found in FTAs such as CETA, regards the EU research and innovation funding programme for 2007-2013, or framework programme 7 (FP7), and the **EU, national, regional and local research programmes**. This reservation states that, at EU level, publicly funded R&D exclusive rights or authorisations may only be granted to natural or juridical EU nationals, with a registered office, central administration or principal place of business in the EU. For Member State-level funds, exclusive rights or authorisations may only be granted to EU nationals or juridical persons with headquarters in that Member State. Some limited third country participation in Union research programmes is currently allowed, but will need to be reconfirmed following the next Multiannual Financial Framework.¹⁵⁹ According to the European Council guidelines, this limited participation by third countries,¹⁶⁰ if extended, could cover also the UK.¹⁶¹ Currently, the UK is extremely active in research and development. It ranked first in 2016 for number of participants with signed Horizon 2020 contracts,¹⁶² and second in 2017. The UK also hosted 2 349 Marie Curie Fellows and 773 European Research Council Principal Investigators. The total financial contribution achieved was €4229 38 million and 8 749 participants.¹⁶³ The UK proposed that the future relationship include an accord on science and innovation allowing the UK to participate in EU research funding programmes such as Horizon Europe, the Euratom Research and Training Programme, the Joint European Torus project and ITER. The accord would allow discussion of UK participation in other programmes in the future, and should also

¹⁵⁴ [Bilateral agreements with countries outside the EU](#), European Commission website.

¹⁵⁵ [Illegal, unreported and unregulated fishing](#), Food and Agriculture Organization, 2016.

¹⁵⁶ See slides on [internal EU 27 preparatory discussions on the framework for the future relationship: fisheries](#), European Commission, 17 January 2018.

¹⁵⁷ The future relationship between the United Kingdom and the European Union, UK Government, 12 July 2018.

¹⁵⁸ See slides on [internal EU-27 preparatory discussions on the framework for future relationship: Transport](#), European Commission, 21 February 2018; see also section 4.2.

¹⁵⁹ [Slide on the EU/UK Possible Framework for the Future Partnership Discussions](#), European Commission, 15 May 2018.

¹⁶⁰ In the context of Horizon 2020, a distinction is made between associated countries and non-associated countries. Associated countries can participate under the same conditions applicable to Member States (sometimes even though the association agreement only covers some sectors). A number of non-associated third countries have put co-funding mechanisms in place for their participants in Horizon 2020 projects. See [Guide note - Funding of applicants from non-EU countries and international organisations](#), European Commission, 22 August 2017.

¹⁶¹ [Guidelines on the framework for the future EU-UK relationship](#), European Council (Article 50) 23 March 2018.

¹⁶² [Collaboration on Science and Innovation-a future partnership paper](#), UK Government, 6 September 2017.

¹⁶³ [Horizon 2020 country profile United Kingdom](#), European Commission, 8 February 2018.

enable continued cooperation through joint participation in networks, infrastructure, policies and agencies, and to establish channels for regular dialogue between regulators, researchers and experts.¹⁶⁴

Legal services

Another area of interest for the UK-EU trade in services relations are business services. One example of these are **legal services**. In FTAs, legal services are usually reserved in all the EU Member States to a varying degree.¹⁶⁵ In CETA, some Member States reserve full admission to the bar only for EU nationals or EEA and Swiss lawyers. Others reserve commercial presence for EEA and Swiss lawyers, while allowing other foreign lawyers only minority shares. In other Member States, some aspects of law cannot be practiced by non-EU or non-national lawyers (for example, there are exceptions for national law or EU law). The UK white paper of 12 July 2018 mentions business services where the UK requests supplementary provisions to be inserted in the future agreement, which would permit joint practice between UK and EU lawyers, and continued joint UK-EU ownership of accounting firms.¹⁶⁶

4.4.2. Consequences for regulatory cooperation for goods and services

Even if standards of production are identical in the post-Brexit UK and the EU, compliance with EU standards will have to be verified at the customs border as soon as the UK leaves the internal market. Without the mutual recognition principle enshrined in internal market law, certification issued by the UK authority will not be recognised by EU authorities and vice-versa. The fact that the UK will no longer be bound by the *acquis* can also lead to increasing regulatory divergence in the future. Regulatory barriers exist in the trade of goods, mainly sanitary and phytosanitary measures to ensure food safety, and technical barriers to trade exist to ensure consumer safety and appropriate labelling. Regulatory barriers are also in present trade in services, to ensure consumer protection, as well as in financial markets for prudential reasons.

There are several ways in which regulatory trade barriers can be tackled. The European Council guidelines mention the basic features found in EU FTAs with regard to regulatory matters. These include: disciplines on technical barriers to trade (TBT), sanitary and phytosanitary (SPS) measures, and a framework for voluntary regulatory cooperation. Regulatory cooperation normally envisages WTO+ features, such as provisions on the adoption of international standards, alignment of standards, equivalence, harmonisation, etc.

FTAs may have provisions on the granting of **equivalence**,¹⁶⁷ while both provisions and annexes setting good governance standards for equivalence procedures can be found in association agreements.¹⁶⁸ The possibility for equivalence decisions is included in certain EU regulations.¹⁶⁹ These decisions are adopted unilaterally by the Commission via implementing or delegated acts. Through equivalence decisions, the EU recognises that the regulatory or supervisory regime of a non-EU country is equivalent to the corresponding EU regime. Equivalence normally requires an assessment by the Commission of the comparability of rules applied in the third country and whether they comply with the following characteristics:

- requirements are legally binding;

¹⁶⁴ The future relationship between the United Kingdom and the European Union, UK Government, 12 July 2018.

¹⁶⁵ See CETA as an example.

¹⁶⁶ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

¹⁶⁷ For example [CETA](#) Article 13.5 of the chapter on financial services envisages unilateral recognition of a prudential measure. It further requires that the party according recognition shall provide adequate opportunity to the other party to demonstrate the equivalence of its regulation, oversight and implementation of the regulation. A similar provision is found under Article 7.46 of the section on financial services of [the EU-South Korea FTA](#).

¹⁶⁸ See for example Article 66 (for SPS provisions) and Annex IX to chapter 4 (SPS chapter) included in the [Association Agreement](#) with Ukraine.

¹⁶⁹ See the table of [equivalence decisions](#) provided by the Commission.

- they are subject to effective supervision for compliance and enforcement by domestic authorities;
- their effects are similar to those of the EU legal provisions and supervision.¹⁷⁰

Therefore, trade agreements cannot introduce automatic equivalence, as the Commission needs to comply with the procedure laid down in the EU regulations. Non-compliance with such a procedure can lead to annulment of the equivalence decision by the CJEU. While these EU regulations may give third countries the right to ask, there is no obligation on the Commission to grant equivalence. The power is discretionary under EU law, and can be withdrawn unilaterally, which may lead to the conclusion that a procedure claiming failure to act cannot be initiated against the Commission for not adopting an equivalence decision.¹⁷¹ Nevertheless, provisions in trade agreements might oblige the importing party (therefore also the EU), to provide the exporting party with a detailed and reasoned explanation for the refusal of an equivalence.¹⁷² Equivalence decisions may also be granted partially and sometimes subject to conditions.¹⁷³

Box 11 – Financial markets and equivalence procedures

Equivalence decisions are particularly important for financial markets.¹⁷⁴ According to the Commission's 2017 assessment on equivalence decisions in financial services policy,¹⁷⁵ such equivalence decisions are contemplated in 15 EU acts, although those equivalence decisions might differ in terms of:

- final outcome (some might need follow-up actions),
- processes (involvement or not of Member States),
- criteria for the assessment,
- the extent to which assessment implies an analysis of regulatory and procedural rules, and
- the possibilities to withdraw equivalence.

In financial markets, the Commission usually carries out these assessments on the basis of technical advice from the European supervisory authorities.¹⁷⁶ The Commission has adopted some 212 equivalence decisions with 32 different jurisdictions. Japan has most equivalence (with 17 determinations), the USA and Canada (16), Australia (13), Brazil (12) and Singapore (11). It is interesting to note that these countries do not currently have trade agreements in force with the EU. In other words, the existence of a trade agreement with formalised regulatory dialogues does not necessarily mean adoption of more equivalence decisions.

The UK considers the EU's third-country equivalence regimes in financial regulation insufficient to cope with the interdependence of EU-UK financial markets. The UK proposed a system for what some newspapers have referred to as a 'super-charged' equivalence system.¹⁷⁷ The proposed system, while still relying on the principle of the regulatory autonomy of each party, would provide for:

¹⁷⁰ [EU equivalence decisions in financial services policy: an assessment](#), Commission staff working document, European Commission, SWD(2017) 102 final, 27 February 2017.

¹⁷¹ Article 265 and 266 TFEU on actions for failure to act can only be activated after two months of inaction if the EU institution had an obligation to act.

¹⁷² See for example Article 66 (for SPS) and the Annex IX to chapter 4 (SPS chapter) included in the [Association Agreement with Ukraine](#).

¹⁷³ An example of this kind of arrangement can be the [EU-US organic equivalence arrangement](#).

¹⁷⁴ For a more detailed analysis of equivalence measures in financial services, refer to [Implications of Brexit on EU financial services](#), Policy Department for economic and scientific policy, European Parliament, June 2017.

¹⁷⁵ [EU equivalence decisions in financial services policy: an assessment](#), staff working document, European Commission, SWD(2017) 102 final, 27 February 2017.

¹⁷⁶ The European Banking Authority, the European Securities and Markets Authority, the European Insurance and Occupational Pensions Authority.

¹⁷⁷ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

- the expansion of existing autonomous frameworks for equivalence, covering a larger range of cross-border activities;
- a framework of reciprocal recognition of equivalence under all existing third country regimes, taking effect at the end of the implementation period;
- a transparent assessment methodology for assessing equivalence based on common objectives with industry and other stakeholder consultations, and the possibility of using expert panels;
- a structured withdrawal process, whereby before withdrawal of equivalence, parties must engage in consultations in order to find solutions as to how to maintain equivalence. The process would set clear timeline and notification periods and there would be a clause protecting acquired rights;
- a presumption against unilateral changes that narrow the terms of existing market access other than in exceptional circumstances, including the idea that equivalence decisions can only elapse after a new decision is taken;
- a regulatory dialogue and supervisory cooperation system.

The UK proposal appears at odds with current EU independence and discretion in equivalence decision-making. The scope of equivalence is currently decided unilaterally by the EU in its legislative process, as well as the objectives upon which the Commission's assessment must be made. Withdrawal and decision on whether to issue a new equivalence decision after a decision elapses are mostly left to the Commission's discretion. Similarly, the framework for reciprocal recognition of equivalence could also be interpreted as limiting the Commission's capacity to withdraw these equivalence decisions with third countries. The Commission has apparently already rejected the UK proposal, as it would entail a 'system of generalised equivalence decisions that would in reality be jointly run by the EU and the UK'.¹⁷⁸

In the absence of equivalence provisions in EU regulations, regulatory issues will have to be solved by the **conclusion of agreements** which will have to be based on an external EU competence (that competence can be explicit either in the treaties or in secondary legislation, or implied from secondary legislation). Agreements can also tackle regulatory issues which are not covered by equivalence decisions. A recent example of this is the conclusion in 2017 of the EU-US bilateral agreement on prudential measures regarding insurance and reinsurance.¹⁷⁹ An equivalence provision for reinsurance exists under the solvency regime, and the USA obtained that equivalence for a period of 10 years in 2015.¹⁸⁰ The agreement signed in 2017 with the USA allowed inter alia to reach further regulatory cooperation with respect to group supervision (avoiding duplication of procedures) and exchange of information.

Similarly, in the framework of trade in goods, regulatory requirements will become an additional non-tariff barrier in EU-UK trade, unless agreements are concluded. This is usually done via **mutual recognition agreements** (MRAs) in the framework of conformity assessments. MRAs are bilateral agreements under which the importing party will accept conformity assessment results (e.g. testing or certification) performed by the exporting party's designated conformity assessment bodies (CABs) to show compliance with the importing party's requirements and vice versa. MRAs include relevant lists of designated laboratories, inspection bodies and conformity assessment bodies. Sectors covered by MRAs may vary depending the country.¹⁸¹ MRAs may require equivalence of

¹⁷⁸ M. Sheen, '[EU rejects May's financial services Brexit plan](#)', *Investment Week*, 23 July 2018; J. Brunsdon, '[Brussels rejects UK's financial services Brexit Plan](#)', *Financial Times*, 22 July 2018.

¹⁷⁹ [Bilateral Agreement](#) between the European Union and the United States of America on prudential measures regarding insurance and reinsurance, OJ L 258, 6 October 2017.

¹⁸⁰ Delegated decision (EU) 2015/2290 of 12 June 2015 on the [provisional equivalence of the solvency regimes in force in Australia, Bermuda, Brazil, Canada, Mexico and the United States and applicable to insurance and reinsurance undertakings with head offices in those countries](#), OJ L 323, 9 December 2015.

¹⁸¹ On mutual recognition and for the list of countries with which the EU has concluded agreements, refer to [mutual recognition agreements](#), European Commission website.

regulatory standards ('**enhanced MRAs**'),¹⁸² however, traditionally these did not require alignment of standards or equivalence. **Traditional MRAs**¹⁸³ would require at least compatibility of infrastructures and regulatory objectives, as well as a recognition of technical competence and trust in assessment and certification; thus even traditional MRAs are difficult to conclude where there are major regulatory divergences.¹⁸⁴ Where no equivalence of standards is required, the agreement will require that conformity assessment bodies of the exporting party assess the compatibility of the good with the importing parties' requirements. The MRA contains rules concerning the designation of suitable conformity assessment bodies that should be able to operate according to the criteria and the procedures set out in the other party's regulations. MRAs will not therefore require alignment of regulatory standards, but do entail an assessment of the other party's regulatory praxis.

As mentioned, in its March 2018 resolution, the European Parliament suggested using an association agreement (AA) as a model for the future EU-UK model.¹⁸⁵ On trade aspects, AAs are very different from the FTA model in particular with respect to regulatory cooperation. AAs used by the EU with its neighbours entail **some alignment on technical standards**,¹⁸⁶ and are often accompanied by the negotiation of **agreements on conformity assessment and acceptance of industrial products (ACAA)**.¹⁸⁷ The ACAA is a type of enhanced MRA based on the alignment of the legislative system and infrastructure of the country concerned with those of the European Union. The ACAA would only initially cover some sectors where alignment is specified in the agreement (obviously only if alignment of technical legislation, standards and infrastructure is completed). The ACAA is, in the long term, intended to cover all the sectors for which regulatory alignment was envisaged in the treaty.¹⁸⁸ The ACAA with Israel,¹⁸⁹ for example, covers medicinal and pharmaceutical products (see annex to the agreement), and in its Article 7 sets out the possibility to extend it to other areas if Israel adopts and implements further national law aligning with relevant EU law.¹⁹⁰ The legislative alignment in association agreements entails a role for the CJEU because of the exclusive competence of the CJEU to interpret EU law and the autonomy of the EU legal system. For example, Article 322 of the AA with Ukraine specifies that, when there is a dispute on an AA provision relating to regulatory approximation or which imposes an obligation referring to EU law,

¹⁸² This is the case of the 'enhanced MRA' concluded by the EU. For example, equivalence is required in the MRA with Switzerland: Article 1(2) [Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment](#), OJ L 114, 30 April 2002.

¹⁸³ Examples of these are for the EU: [Agreement on mutual recognition between the European Community and Japan](#), OJ L 284, 29 October 2001; [Agreement on mutual recognition between the European Community and the United States of America](#), OJ L 31, 4 February 1999.

¹⁸⁴ A. Correia de Brito, C. Kauffmann, J. Pelkmans, [The contribution of mutual recognition to international regulatory co-operation](#), OECD Regulatory Working Papers, No 2, 2016.

¹⁸⁵ Resolution of 14 March 2018 on [the framework of the future EU-UK relationship \(2018/2573\(RSP\)\)](#), European Parliament.

¹⁸⁶ See for example Article 52 and Annex III to Chapter 3 of the [Association Agreement](#) with Ukraine. Besides some horizontal measures such as those related to product safety, accreditation and market surveillance to the marketing of products, alignment requirement covers 27 sectors including: machinery, electromagnetic compatibility, simple pressure vessels, pressure equipment, transportable pressure equipment, lifts, toy safety, electrical equipment designed for use within certain voltage limits, medical devices, measuring equipment, radio equipment and telecommunication terminal equipment, construction products, high-speed railways, etc.

¹⁸⁷ For example, the possibility to negotiate an ACAA is included under Article 57 of the [Association Agreement](#) with Ukraine.

¹⁸⁸ See for example Article 57 of the [Association Agreement](#) with Ukraine.

¹⁸⁹ [Protocol to the Euro-Mediterranean Agreement](#) establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, on Conformity Assessment and Acceptance of Industrial Products (CAA), OJ L 1, 4 January 2013.

¹⁹⁰ idem

the arbitration panel must ask the CJEU to give a ruling on the question and that such a ruling is binding on the arbitration panel.¹⁹¹

The UK in its statement of 6 July suggested the creation of a common rulebook for all goods, including agriculture.¹⁹² The statement suggested that harmonisation with EU rules would cover 'only those necessary to provide for frictionless trade at the border', suggesting that harmonisation would not be complete. In the July 2018 white paper, the proposal was further clarified: the common rulebook for goods would only apply to those rules that can be checked at the border (this would include certain agri-food standards checked at the border like SPS measures). The UK confirmed during the negotiations that the common rulebook would not include agri-food standards which are not checked at the border (such as pesticides, GMO, for example).¹⁹³ The UK proposal covers all compliance activities necessary for products to be sold in the UK and EU markets. These include:¹⁹⁴

- testing products, including conformity assessments and type approval for vehicles as well as other declarations, labels and marks to show they meet the requirements.
- accreditation of conformity assessment bodies, whereby the testers would be assessed within a jointly agreed certification framework.
- manufacturing and quality assurance processes, such as Good Laboratory Practice and Good Manufacturing Practice.
- the role of nominated individuals, such as 'responsible persons' for certain high-risk products.
- specific provisions for human and animal medicines and the role for the qualified person in pharmacovigilance, who is responsible for safety monitoring and potential side effects.
- licensing regimes and arrangements for the movement of restricted products.

For certain agri-food standards not checked at the border and therefore not covered by the common rulebook, the UK proposed an equivalence arrangement on wider food policy rules that set marketing and labelling requirements.¹⁹⁵ For the moment, the EU has concluded several reciprocal equivalence arrangements or agreements on organic food.¹⁹⁶ The UK has also asked to establish cooperation arrangements with EU regulators and would like to seek participation in the EU's communication systems, such as the Rapid Alert System for Food and Feed (RASFF), Rapid Alert System for Serious Risk (RAPEX) and the Information and Communication System for market Surveillance (ICSMS).¹⁹⁷

As alignment to EU rules can lead to the need to interpret EU law in disputes, for which the CJEU has exclusive competence, the CJEU's involvement is required. The UK suggested the introduction of a joint institutional framework, carried out by UK and EU courts, which would however have 'due regard' for EU law and would entail a 'joint reference procedure' to account for the CJEU's role as the interpreter of EU law. As opposed to goods, the UK government stresses the maintenance of 'regulatory flexibility' for services and, where appropriate, 'arrangements on financial services' for maintaining integrated markets and protecting financial stability.

Prime Minister May mentioned her desire to also explore the terms on which the UK could remain part of certain **EU agencies**, including the European Medicines Agency (EMA), the European

¹⁹¹ Article 322 of the [Association Agreement](#) with Ukraine.

¹⁹² [Statement from the HM Government](#), UK Government, 6 July 2018.

¹⁹³ European Commission, [Press statement by Michel Barnier following the July 2018 General Affairs Council \(Article 50\)](#), 20 July 2018.

¹⁹⁴ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

¹⁹⁵ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

¹⁹⁶ European Commission, Organic Farming - relations with non EU countries, last accessed 3 September 2018.

¹⁹⁷ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

Chemicals Agency (ECHA) and the European Aviation Safety Agency (EASA).¹⁹⁸ This desire was reconfirmed in the 12. July 2018 white paper.¹⁹⁹ In some cases, it is indeed possible for a third country to be member of an European agency, however full membership implies acceptance of EU law and the role of the CJEU, as these agencies are subjects and actors of EU law.²⁰⁰

For example, the **EASA** is responsible for devising and enforcing EU aviation rules (e.g. aircraft, components or manufacturers cannot operate in the EU internal market without EASA approval). After Brexit, UK aviation operators aiming to perform commercial air transport operations in the EU will have to deal with EASA. The EASA has instituted different types of relationships with third countries. It is open to the participation of **European third countries**, which are not necessarily part of the EEA (for example Switzerland is an Associated Member). The UK's July 2018 white paper suggests that the UK would like to join EASA as an Associated Member, similarly to Switzerland.²⁰¹ However, associated members are required to enter into agreements with the EU, whereby they apply Community law in the field covered by the Regulation establishing EASA and its implementing rules;²⁰² this also entails that interpretation of these laws is the exclusive competence of the CJEU.

The **EMA** is responsible for granting marketing authorisations for pharmaceuticals and supervising the side effects of medicine in circulation. Its membership consists of only the EU Member States; the other EEA members are observers. EEA countries participate fully in the European medicines regulatory network. Bilateral cooperation with non-EEA members²⁰³ is usually carried out via the conclusion of MRAs (as per the agreement with Switzerland mentioned above), and other regulatory cooperation initiatives (see for example the Transatlantic Taskforce on Antimicrobial Resistance). The EMA also cooperates with third countries in multilateral organisations.²⁰⁴ The UK would like to ensure that it can still conduct technical work within the agency, including acting as 'leading authority' for the assessment of medicines and participating in ongoing safety monitoring and the EU clinical trials framework.²⁰⁵

The Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) Regulation which established the **ECHA** – the EU regulatory agency that registers and authorises chemical products for circulation within the internal market – sets out the possibility of third country participation.²⁰⁶ For the moment, EU and EEA countries plus Switzerland are members. Some cooperation is planned with beneficiaries from the European neighbourhood and enlargement countries. The ECHA has reached Memoranda of Understanding with Canada, the USA, Australia and Japan, and also cooperates with other third countries. With respect to ECHA, the UK government would like to ensure that UK businesses can continue to register substances directly with ECHA and not via an EU-

¹⁹⁸ [PM Theresa May's speech on future UK-EU relations](#), UK Government, 2 March 2018.

¹⁹⁹ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

²⁰⁰ For an overview of EU regulatory agencies and possibilities of UK participation after its withdrawal from the EU, please see N. von Ondarza, C. Borrett, [Brexit and EU agencies](#), Staff Working Paper, European Commission, 1 April 2018.

²⁰¹ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

²⁰² Article 66 of Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on [common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation \(EC\) No 1592/2002 and Directive 2004/36/EC](#).

²⁰³ For the complete list of agreements refer to [the EMA website](#).

²⁰⁴ For the complete list see the [EMA website](#).

²⁰⁵ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

²⁰⁶ Article 106 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the [Registration, Evaluation, Authorisation and Restriction of Chemicals \(REACH\), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation \(EEC\) No 793/93 and Commission Regulation \(EC\) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC](#).

based representative.²⁰⁷ However, this eventuality does not seem to have been considered in the current REACH regulation, where only EEA natural or legal persons can register. Substances from non-EEA manufacturers would have to be registered either by the importer established in the EEA or a nominated representative established in the EEA or, in the case international companies, by a legally separate subsidiary that qualifies as a registrant under REACH.²⁰⁸

In trade in services, one of the main issues to discuss will also be recognition of qualifications. Indeed, without such recognition, a service can only be provided on the basis of the host state qualifications. FTAs usually include frameworks for the recognition of qualifications that allow the conclusion of mutual recognition agreements (MRA) at any time after the FTA has come into force.²⁰⁹ The system relies on voluntary decisions to negotiate MRA (no obligation exists to negotiate) and the conclusion of the MRA necessitates the parties' endorsement.²¹⁰ For example, CETA does not provide for mutual recognition of professional qualifications, but establishes a framework for negotiating agreements on the mutual recognition of professional qualifications.²¹¹ In this respect, the UK has requested an alternative arrangement that would include:²¹²

- mutual recognition of qualifications covering the same range of professions as the Mutual Recognition of Qualifications Directive;
- professionals working on a temporary and permanent basis across borders;
- a predictable system, enabling professionals to demonstrate they meet the requirements;
- a proportional system, allowing legitimate compensatory measures where there are significant differences between qualifications or training in a timely way; and
- provisions on transparency and cooperation between regulatory authorities.

4.4.1. Other issues

The EU has expanded its new FTAs to cover WTO+ provisions relating to public procurement, competition law, intellectual property, and trade and sustainable development. These aspects take on a new importance in Brexit negotiations. Indeed, the UK rules on these subjects are currently in line with EU law and Brexit would mean that the UK will be able to deviate from those rules.

Level playing field

As mentioned in the latest European Council guidelines, one of the objectives of the EU in the negotiations with the UK is to prevent any future undercutting of levels of protection 'with respect to, inter alia, competition and state aid, tax, social, environment and regulatory measures and practices.' This is part of the aim to maintain 'a level playing field' (LPF).

In this context, the Commission is also discussing when and how to introduce sanctions for violations of the commitments undertaken in the future partnership. Indeed, some of these LPF areas (such as competition, environment or labour provisions) are not usually covered by traditional state-to-state dispute settlement mechanisms under EU FTAs and are not subject to sanctions. However, in the negotiations with the UK, the Commission suggested that, in principle, dispute settlement must be available for any violation of LPF provisions. These dispute settlement provisions would have a traditional two-stage format including consultation and a dispute settlement mechanism. The Commission further stresses that, whenever the agreement makes reference to EU

²⁰⁷ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

²⁰⁸ See also the [Questions and Answers website](#) on REACH registration on the ECHA website, accessed 3 September 2018.

²⁰⁹ See Chapter 11 [in CETA](#) as an example of a framework for mutual recognition of professional qualifications.

²¹⁰ See, slides prepared on [Internal EU-27 preparatory discussions on the framework for the future relationship 'Services'](#), European Commission 6 February 2018.

²¹¹ See Chapter 11 of CETA.

²¹² [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

law provisions, these can only be interpreted by the CJEU. Sanctions (including interim sanctions for certain areas such as State aid) should also be available, according to the Commission, for all these LPF provisions.²¹³

Competition and State aid

Brexit means that the UK will no longer be bound to the rules enshrined in the EU treaties with respect to competition and State aid. The EU wants to maintain strong commitments in both areas. In her speech of 2 March 2018, Prime Minister Theresa May seemed to also favour reciprocal binding commitments with respect to competition.

Currently concluded or negotiated EU agreements have limited substantive rules on State aid (they mainly reaffirm the rights under WTO law, introduce transparency provisions, consultations and provisions to ensure that trade liberalisation achieved is not replaced by export subsidies).²¹⁴ Moreover, these provisions can exclude some sectors. Therefore, with regard to the UK, the Commission submitted a proposal for internal EU-27 discussions that would instead provide rules equivalent to those enshrined in the EU State aid rules, including with respect to transparency. Ex-ante control would be entrusted to an independent State aid authority having similar powers to those of the Commission.²¹⁵ In its statement of 6 July 2018, the UK government proposes to commit to the application of a common rulebook on State aid and also suggested establishing cooperative arrangements between regulators on competition.²¹⁶ This was confirmed in the July 2018 white paper, where the UK government mentioned the common rulebook on state aid. Enforcement would be entrusted to the Competition and Market Authority (CMA). The UK stressed that its proposal would 'not fetter its sovereign discretion on tax, including to set direct and indirect tax rates, and to set minimum tax rates' and mentioned its intention 'to develop new tailored arrangements in relation to payments to farmers and other land managers for environmental benefits, and the UK's future public procurement policy', suggesting those areas would not be part of/or affected by the UK's commitments under the common rulebook on state aid.²¹⁷

It is not yet clear what the Commission and the UK will introduce in the framework of other provisions relating to competition. In its white paper of 12 July 2018, the UK proposed to establish cooperative arrangements, such as those existing in current FTAs, to manage parallel mergers and antitrust investigations. These provisions would include the sharing of confidential information and joint work on live cases.²¹⁸

Until now, the EU has concluded agreements on competition with like-minded third parties even before signing an FTA with those partners (such as the USA and Canada).²¹⁹ The agreement with Canada only includes provisions concerning notifications requirements, cooperation provisions and a provision to avoid conflicts with other parties' major interests.²²⁰ With the USA, the EU had already established advanced cooperation via stand-alone agreements covering some competition issues. General transatlantic cooperation in the field of competition is based on the 1991 EU/USA

²¹³ [Internal EU-27 preparatory discussions on the framework for the future relationship: 'level playing field'](#), European Commission, 31 January 2018.

²¹⁴ See Chapter 7 of [CETA](#). On the last point see for example Article 7.5 of CETA which prohibits the introduction of an export subsidy on an agricultural good after a tariff rate quota has been eliminated in accordance with the tariff schedules.

²¹⁵ [Internal EU-27 preparatory discussions on the framework for the future relationship: 'level playing field'](#), European Commission, 31 January 2018.

²¹⁶ [Statement from the HM Government](#), UK Government, 6 July 2018.

²¹⁷ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

²¹⁸ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

²¹⁹ The agreement with Canada was later incorporated into CETA, see Article 17.2 of [CETA](#).

²²⁰ [Agreement between the European Communities and the Government of Canada regarding the application of their competition laws](#), signed in Bonn, 1999.

Competition Cooperation Agreement, which provides for the exchange of information on cases and proceedings that are important to the interests of the other party, as well as the general exchange of information and discussion on reforms and implementation of competition rules.²²¹ The Positive Comity Agreement, concluded by the EU and the USA in 1998, instead allows one party to ask the other party to take measures against anti-competitive behaviour occurring in the territory of the other party, and affecting the requesting party's interests.²²² Finally, the EU-US Best Practices on Cooperation in Merger Investigations, first agreed in 2002 and then updated in 2011, contain non-legally-binding rules that provide a framework for interagency cooperation in the field of merger cases.²²³ Moreover, the EU has introduced provisions on competition rules in several agreements with third countries.²²⁴ In the DCFTA concluded with the Ukraine, provisions on competition rules are much stronger. Ukraine shall approximate its legislation to EU law within three years with respect to: the implementation of the rules on competition laid down in Articles 81 and 82 TFEU, control of concentrations between undertakings, the categories of vertical agreements and concerted practices and the categories of technology transfer agreements.²²⁵ This provision of the EU-Ukraine Association Agreement on approximation of competition rules is subject to dispute settlement procedure and the CJEU role of interpretation is safeguarded.

Taxation

As the UK would no longer be bound by the *acquis communautaire*, EU-derived rights and obligations would cease. The Commission stresses in particular the risks with respect to tax avoidance, the potential losses in terms of exchange of information and the risk of fiscal dumping in order to attract competitiveness. The EU has concluded a certain number of agreements with enclave European countries (such as Liechtenstein, Switzerland, Andorra, San Marino, Monaco) and the French Overseas Territory of Saint Barthélemy. In EU FTAs, provisions on taxation are scarce (national treatment with reference to Article III of GATT, provisions to secure the right to regulate and a good governance clause were introduced for example in CETA),²²⁶ while Organisation for Economic Co-operation and Development base erosion and profit sharing (OECD-BEPS)²²⁷ standards are non-binding. Therefore, with a view to future partnership talks with the UK, the Commission submitted a proposal for discussion among the EU-27, which suggested the introduction of: a good governance clause, binding requirements with respect to exchange of information, anti-tax avoidance measures, and public country-by-country reporting (CbCR)²²⁸ for credit institutions and investment firms.²²⁹

²²¹ [Agreement](#) between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws – Exchange of interpretative letters with the Government of the United States of America, OJ L 95, 27 April 1995; on EU-US cooperation in competition laws, see also: I. Van Bael, *Due process in EU Competition Proceedings*, Kluwer Law International, 2011.

²²² [Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws](#), OJ L 173, 18 June 1998.

²²³ [US-EU Merger Working Group Best Practices](#) on cooperation in merger investigations.

²²⁴ See the complete list on the [European Commission website](#).

²²⁵ Article 256 of the EU-Ukraine Association Agreement.

²²⁶ See Article 2.3 and article 28.7 [CETA](#).

²²⁷ Base Erosion and Profit Shifting (BEPS) is an action plan adopted by OECD and G20 countries in 2013 to enhance transparency for tax administrations.

²²⁸ The CbCTR is a report which is part of [Action 13 of the BEPS](#), which multinationals would submit annually for each tax jurisdiction in which they do business.

²²⁹ Internal EU-27 preparatory discussions on the framework for the future relationship: 'level playing field', European Commission, 31 January 2018.

Trade and sustainable development

The EU has developed a rich legislation in the framework of environmental policy, which has had an important impact on UK environmental legislation.²³⁰ Even though the European Union (Withdrawal) Act incorporates EU derived law into UK legislation, the UK will not be obliged to remain aligned to EU law after Brexit. Because of its proximity, there is a high risk of negative externality costs if UK regulatory standards are lowered; this is valid not only for border relations with Ireland but also for preservation of maritime resources and air pollution. This is the main reason for which the EU wants to ensure stronger commitments in the agreement on future relations. While exported products must respect the importing country's product standards (including those derived from environmental policy, such as the REACH regulation concerning chemical substances), this is not the case for other aspects of environmental policy (such as industrial waste, biodiversity preservation etc.), for which the rules of the country of production apply. The EU is bound to ensure coherence of its trade policy with other EU policies, including those concerning the environment.²³¹ This is why the EU has introduced a chapter on trade and sustainable development in all its recent FTA agreements, which includes commitments with respect to labour and environmental policy, while product standards are normally covered by regulatory cooperation chapters, technical barriers to trade chapters and sanitary and phytosanitary measures (see section 4.4.2). Usually trade and sustainable development chapters²³² reaffirm the international commitments taken by parties in the framework of the International Labour Organization, as well as in the main Multilateral Environmental Agreements (MEA). They therefore include provisions for cooperation in various fields of interest to both FTA partners. Finally, the chapters also include two main obligations: the first binds the parties to effectively enforce their respective environmental laws and prohibit the parties from failure to enforce labour law via 'sustained or recurring course of action or inaction' (repeated action or failure to act which can be framed as a pattern).²³³ The second prohibits a party to waive or derogate from its environmental or labour laws in order to encourage trade and investment.²³⁴

The European Commission published some slides for internal discussion on all LPF areas, including the environment and labour.²³⁵ It proposes to maintain the principles of non-lowering of standards of protection and non-regression clauses, as well as the principle of upholding standards across its territory. According to a speech delivered by the EU's chief negotiator, Michel Barnier, these principles could be inspired by the CETA or the EU-Japan FTA, but will need to go further in order to prevent a reduction in pre-Brexit standards.²³⁶ The proposal also includes the maintenance of international commitments, however it also suggests some principles and substantive provisions anchored in EU law without specifying these further.²³⁷ The key areas mentioned for environmental protection include: industrial emissions, air quality, water quality (including issues concerning nitrates), waste management, nature conservation, impact assessments and transparency and good governance principles. With regard to labour, the proposal mentions fundamental rights at work, occupational health and safety, fair working conditions and employment standards, labour

²³⁰ [Brexit: environment and climate change](#), 12th report of session 2016-2017, House of Lords, February 2017.

²³¹ This duty of coherence was reaffirmed by the CJEU in its opinion on the agreement with Singapore. See: [Opinion C-2/15](#) of the Court (Full Court) of 16 May 2017.

²³² Trade and sustainable development chapters may differ in the various agreements, but in general some features are similar.

²³³ See for example Articles 23.5 and 24.6, 23.4(3) and 24.5(3) of [CETA](#).

²³⁴ See for example Article 23.4(2) and article 24.5(2) of [CETA](#).

²³⁵ [Internal EU-27 preparatory discussions on the framework for the future relationship: 'level playing field'](#), European Commission, 31 January 2018.

²³⁶ [Remarks by Michel Barnier at Green 10: 'Is Brexit a threat to the future of the EU's environment?'](#) European Commission/European Parliament, 10 April 2018.

²³⁷ [Internal EU-27 preparatory discussions on the framework for the future relationship: 'level playing field'](#), European Commission, 31 January 2018.

inspection and access to remedy, information and consultation rights at company level, fair wages and rights to social security.²³⁸

In its reply to the House of Lords in April 2017 with respect to environmental policy, the UK government had reaffirmed its intention of respecting the UK's international commitments. The UK is a member of several MEA and of the Paris agreement. The reply specifies a desire to cooperate with the EU on matters such as air pollution and that it would consider the possibility of continued UK participation in the EU Emissions Trading System. The reply also made allusion to a possible simplification after Brexit of the legislation concerning waste management, while trying to maintain a similar level of protection.²³⁹ The UK government statement of 6 July 2018 suggests that the UK would comply with an obligation to at least maintain current levels of protection with respect to environment, climate change, social and employment and consumer protection.²⁴⁰ In its July 2018 white paper, the UK government confirmed its intention to agree with the EU to commit to a non-regression clause on environmental and labour standards. However, such an obligation does not seem to be envisaged for climate change, as the UK government only mentions that 'the UK will maintain [its] high standards after withdrawal'.²⁴¹ The UK also seeks reciprocal commitments to cooperation in environmental matters including in international fora and to uphold obligations derived from their International Labour Organization commitments.

Public procurement

The UK has integrated EU regulations and directives with respect to public procurement²⁴² and according to the single market scoreboard of 2016 is one of the countries with good performance.²⁴³ Brexit means that the UK would no longer have access to the EU market as it does today. The UK is currently part of the Government Procurement Agreement (GPA), a plurilateral agreement in force among 47 WTO members. The UK is, however, part of the GPA only as a Member of the EU and not in its own capacity. The UK will need therefore to accede the GPA.²⁴⁴ GPA market access and rules are however of lower standards than those of the internal market. In order to maintain higher commitments and liberalisation, GPA+ provisions need to be negotiated within the framework of the EU-UK future agreement. The association agreement with Ukraine does envisage 'mutual access to public procurement markets on the basis of national treatment at national, regional and local level for public contracts and concessions in the traditional as well as in the utilities sector' when such contracts are above a certain threshold and within the EU *acquis* definition of public procurement.²⁴⁵ However, the chapter requires approximation of Ukrainian law to the EU rules with the corresponding role of the CJEU.²⁴⁶ Alternatively, the GPA+ model used in EU FTAs does not require approximation, but market access is more limited. In CETA, the public procurement rules are largely inspired by the GPA, with some additions on electronic procurement. Public procurement is not subject to some commitments found in the services chapter, such as performance requirements prohibition under the investment chapter. Moreover public procurement is carved out from the cross-border services chapter.²⁴⁷ Finally, commitments are limited to the sectors listed and are only

²³⁸ [Internal EU-27 preparatory discussions on the framework for the future relationship: 'level playing field'](#), European Commission, 31 January 2018.

²³⁹ [Government response](#) to the House of Lords EU Energy and Environment Sub-Committee report into Brexit, Environment and Climate Change Policy, 16 April 2017.

²⁴⁰ [Statement from the HM Government](#), UK Government, 6 July 2018.

²⁴¹ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

²⁴² [Public procurement rules in the EU](#), European Commission website.

²⁴³ The [EU single market scoreboard](#) website.

²⁴⁴ [The Brexit papers: Public procurement](#), Bar Council Brexit Working Group, paper 19, June 2017.

²⁴⁵ Article 148 and Article 149 of the Association Agreement with Ukraine.

²⁴⁶ Article 148, 153 and 322 of the Association Agreement with Ukraine.

²⁴⁷ In other words, it does not liberalise public procurement contracts to firms not established in the country where the procurement contract is offered.

applicable to those public entities listed by the parties and to those procurements with value above the threshold stipulated in the agreement.²⁴⁸

Intellectual property rights (IPR), in particular geographical indications (GIs)

The UK is also currently bound by EU law with respect to intellectual property and has to protect those geographical indications that are harmonised at EU level (GIs for agricultural food and alcoholic beverages). Nevertheless, Brexit means that the UK will no longer be bound by this EU law. For the moment, the European Union (Withdrawal) Act,²⁴⁹ intended to provide a smooth exit for the UK, incorporates existing EU legislation, converting it into UK law. Thus, the UK would preserve the protection of EU GIs currently protected in EU law but could decide in the future to deviate from that position, and deregister GIs. In the meantime, in its 12 July 2018 white paper, the UK declared that it will establish its own GI scheme with its own set of rules.²⁵⁰ At the same time, the UK itself has some GIs,²⁵¹ and according to a European Commission-commissioned study, the UK is one of the Member States with significant GI sales, even though they have a limited number of GIs.²⁵² Important UK GIs include whisky and cheese. After Brexit, the UK will need to re-register the GIs that it wants to protect in the EU. The EU and the UK will have then to negotiate a chapter on IP rights, including the protection of GIs. In FTAs, GIs protection is given to those GIs that are listed in the agreement. The list of GIs protected in agreements with third countries has until now been smaller than the list of GIs protected internally in the EU.

Apart from GIs, other issues may appear in the context of intellectual property. For example, with respect to patents, the UK wants to remain in the unitary patent system and the Unified Patent Court, which are restricted to Member States.²⁵³ The Unified Patent Court explicitly restrict accession to the Treaty to European Union Member States,²⁵⁴ while the unitary patent system was introduced on the basis of enhanced cooperation between EU Member States under article 329 TFEU.²⁵⁵

Data flows

Another issue in Brexit will be data flows, as the UK will become a third country for EU data protection legislation. Data flows from third countries are allowed if certain conditions are met, as specified in the new General Data Protection Regulation (GDPR).²⁵⁶ Transfers of data to a third country may also take place if the third country is found to have adequate data protection legislation that achieves similar standards of protection and safeguards as in the EU.²⁵⁷ The third country considering that it has similar data protection safeguards must request an adequacy decision from the Commission. The procedure is similar to the equivalence decisions described in section 4.4.2.

²⁴⁸ See Chapter 19 of [CETA](#).

²⁴⁹ [European Union \(Withdrawal\) Bill 2017-2019](#).

²⁵⁰ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

²⁵¹ C. Horseman, [Geographical indications: the Brexit dimension](#), IEG Policy, 7 February 2018; for the complete list of designation see the AGRI [DOOR](#) website.

²⁵² T. Chever, C. Renault, S. Renault, V. Romieu, [Value of production of agricultural products and foodstuffs, wines, aromatised wines and spirits protected by a geographical indication \(GI\)](#), AND-International, October 2012.

²⁵³ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

²⁵⁴ See Article 2 and 84 of the [Agreement on a Unified Patent Court](#), OJ C 175, 20 June 2013.

²⁵⁵ See [Council Decision of 10 March 2011](#) authorising enhanced cooperation in the area of the creation of unitary patent protection, OJ L 76, 22 March 2011; [Regulation \(EU\) No 1257/2012](#) of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ L 361, 31 December 2012.

²⁵⁶ Article 44 to 50 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on [the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC \(General Data Protection Regulation\)](#), OJ L 119, 4 May 2016.

²⁵⁷ Article 45 of Regulation (EU) 2016/679.

Adequacy decision requires first an assessment by the Commission. The GDPR²⁵⁸ specifies some of the elements that need to be taken into account when assessing the adequate level of protection in detail. The list is non-exhaustive and other elements may be taken into account, but those elements contained in the GDPR must be taken into account. Within those elements, we find that attention must be paid to safeguards for data protection in the framework of transfer of data to authorities of third countries for law enforcement. After the assessment is issued, the Commission may decide by means of an implementing act to issue an adequacy decision, which will recognise that the third country or international organisation ensures an adequate level of protection. The implementing act can also specify territorial and sectoral application. The implementing act is adopted following the examination procedure set out in Article 93(2) of the GDPR, which makes reference to Article 5 of Regulation (EU) No 182/2011. The GDPR specifies that a periodic review of the assessment must be carried out at least every four years to verify that safeguards are still in place. As explained in an EPRS in-depth analysis on the Privacy Shield,²⁵⁹ because of triangular flows, a third country that has obtained an adequacy decision for data flows with the EU may feel compelled to conclude a similar data protection agreement with the USA to ensure a similar level of protection of data as in the EU (see the example of Switzerland).²⁶⁰

The UK had instead proposed a 'bespoke arrangement to reflect the UK's exceptionally high standards of data protection', which would apply both to data exchanged for commercial purposes and to data exchanged for law enforcement purposes. The UK considered that a new agreement would give more legal certainty than an adequacy decision, in so far as the Commission has the discretion to withdraw the adequacy decision (as for equivalence decisions).²⁶¹ Nevertheless, in its white paper of 12 July 2018, the UK government mentions that 'it would be ready to begin preliminary discussions on an adequacy assessment so that a data protection agreement is in place by the end of the implementation period at the latest', in order to provide continuity and stability of data flows. The UK further requested a framework that would include 'a transparent framework to facilitate dialogue, minimise risk of disruption to data flows and support stable relationship between the UK and the EU to protect data (...)'. The arrangement should continue to provide for EU data protection authorities cooperation with the Information Commissioners' Office (ICO), the UK data protection authority.²⁶² In May 2018, the EU's chief negotiator, Michel Barnier, explicitly stated that after Brexit the UK data protection authority would no longer be a member of the European Data Protection Board and of the one-stop-shop created by the GDPR, as these are restricted to EU Member States' authorities.²⁶³ The UK underlined²⁶⁴ that its proposal on regulatory cooperation between data protection authorities is still in line with the Commission's intention to 'develop international cooperation mechanisms with key international partners to facilitate effective enforcement', as stated in a Commission communication.²⁶⁵

²⁵⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on [the protection of natural persons with regard to the processing of personal data and on the free movement of such data](#), and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4 May 2016.

²⁵⁹ S. Monteleone and L. Puccio, [From Safe Harbour to Privacy Shield: State of play of the new EU-US data transfer rule](#), EPRS, July 2018.

²⁶⁰ [Swiss-US Privacy Shield: new framework for the transfer of data to the USA](#), press release, Federal Data Protection and Information Commissioner.

²⁶¹ [Technical note: benefits of a new data protection agreement](#), UK Government, 7 June 2018.

²⁶² [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

²⁶³ [Speech by Michel Barnier at the 28th Congress of the International Federation for European Law \(FIDE\)](#), European Commission, 26 May 2018.

²⁶⁴ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

²⁶⁵ European Commission, [Exchanging and Protecting Personal Data in a Globalised World](#), COM(2017) 7 final, 10 January 2017.

4.5. Trade and economic impact of Brexit

Brexit will bring readjustments to the economic relations between the EU and the UK (less economic integration). The table below summarises the readjustment that will take place when moving from EU membership to an FTA.

Table 5 – Overview of some of the trade consequences of Brexit by trade arrangement

	Current situation: EU Membership	CU with Common Commercial Policy (CCP): 'perfect' CU	CU without CCP: 'imperfect' CU	Free Trade Area
Goods internal circulation	Free movement	Duty free (could be subject to exceptions)	Duty free (could be subject to exceptions)	Duty free; sectoral exceptions
Preferential rules of origin	no	No	Could be an option to avoid trade deflection	Yes
Standards	Mutual recognition principle; harmonisation	Could be subject to alignment or sectoral negotiations of MRAs	Could be subject to alignment or sectoral negotiations of MRAs	Sectoral negotiations of MRAs
Customs arrangement internal border	No internal border, free circulation	Border to verify TBT and SPS compliance if standards not aligned	Border to verify TBT and SPS compliance if standards not aligned; border to verify trade deflection (via rules of origin)	Border needed for control of preferential rules of origin; TBT and SPS verification compliance
Services and investments	Free movement of services and investments	Subject to reservations on both market access and national treatment	Subject to reservations on both market access and national treatment	Subject to reservations on both market access and national treatment

Source: G. Fassina, P. Perchoc, L. Puccio, Customs unions and FTAs: debate with respect to EU neighbours, EPRS, European Parliament, November 2017.

Those readjustments will imply economic costs. Most econometric analyses find Brexit results in losses, since some non-tariff barriers are introduced in all of the alternatives considered so far, and therefore even optimum scenarios still represent less integration than the status quo.

A UK HM Treasury analysis²⁶⁶ looks at three alternative scenarios. The first corresponds to membership of the EEA (an FTA plus access to the internal market) and is expected to bring a decrease in trade volumes of -9 % after 15 years. The second refers to a negotiated bilateral agreement (using the models of Switzerland, Turkey and Canada) and is expected to result in changes, according to the study, of between -14 and -19 % in total trade volumes. Finally, the third relates to WTO membership with no preferential treatment, and bringing changes of -17 and -24 % in total trade volumes. The HM Treasury study also quotes a variety of external studies conducted

²⁶⁶ [The long-term economic impact of EU membership and the alternatives](#), HM Treasury, UK Government, April 2016.

mainly by private banks and all with varying negative results ranging from a decrease in GDP of -1 % over 1 year to -8 % over 5 years.

An LSE study, conducted in 2014, considers an optimistic version with internal market access and a pessimistic scenario with only WTO membership. They find results between -1.13 % for the optimistic scenario and -3.09 % for the pessimistic scenario.²⁶⁷

A World Bank study²⁶⁸ assessed the effect of EU Membership on the United Kingdom as well as the impact of different post-Brexit scenarios. The study, using data from 1995-2011, found that EU membership (and participation in the EU common commercial policy) had a particularly strong effect on UK trade, almost doubling UK service trade and increasing both the country's backward and forward participation in global value chains by 30 %. Evaluating the exit scenarios, the study shows that trade between the UK and the EU would decline under all scenarios ranging from -6 % to -28 % for trade in value added; the less deep the agreement on the future relations, the more the trade in value added is expected to decrease. According to the study, exiting EU FTAs with third partners would decrease UK exports to these countries by 17 %. Obviously, renegotiation with these countries and with other important trade partners, such as the USA, Canada and China, could bring some readjustments.

Another study²⁶⁹ analyses the effects of Brexit on the EU and its Member States (with a particular focus on Germany). The study finds that in a 'hard' Brexit scenario (WTO rules only) the UK would lose 1.4 % of GDP per capita, while the EU-27 on average would lose 0.25 %. The Netherlands would experience a loss of about a third of that of the UK, while Germany, France and Spain would lose respectively 0.23 %, 0.17 % and 0.14 %. Losses would be particularly pronounced for Ireland, Luxembourg and Malta, who experience greater losses than the UK. Under a DCFTA, the UK's real GDP per capita is expected to decrease by 0.6 % while the EU-27 average would decrease by 0.11 %. Luxembourg is found to significantly reduce its losses due to smaller frictions in services,²⁷⁰ while Ireland and Malta decrease their losses but maintain higher losses than the UK. The study also analyses the Brexit effect on EU-27 and UK real gross income when accounting for Brexit budgetary losses. The EU-27 would lose €29.6 billion of real gross income per year in the WTO scenario, while the cost for the UK would be €30.2 billion; these results decrease to €13.49 billion for the EU-27 and €12.66 billion for the UK under the FTA scenario. The study also assessed the impact of Brexit on exports from different sectors in the UK and Germany.

Finally, an economic analysis for the EP²⁷¹ looks at the impact of Brexit on the UK and EU Member States. The literature reviewed by the study suggests that there will be losses on both sides, although they could be insignificant when considering the annual impact on the overall EU-27 economy, while the loss would be more substantial for the UK and for certain EU Member States. An EP Policy Department study provides a graph showing the absolute losses observed in different econometric analysis for the UK and the EU27 under optimistic (Opt.) and pessimistic (Pes.) scenarios. When reading the graph, one should be aware that those different econometric studies

²⁶⁷ G. Ottaviano, J. Paulo Pessoa, T. Sampson, [The costs and benefits of leaving the EU](#), May 2014.

²⁶⁸ A. Mulabdic, A. Osnago, M. Ruta, [Deep integration and EU-UK Trade Relations](#), Policy Research Working Paper, World Bank, January 2017.

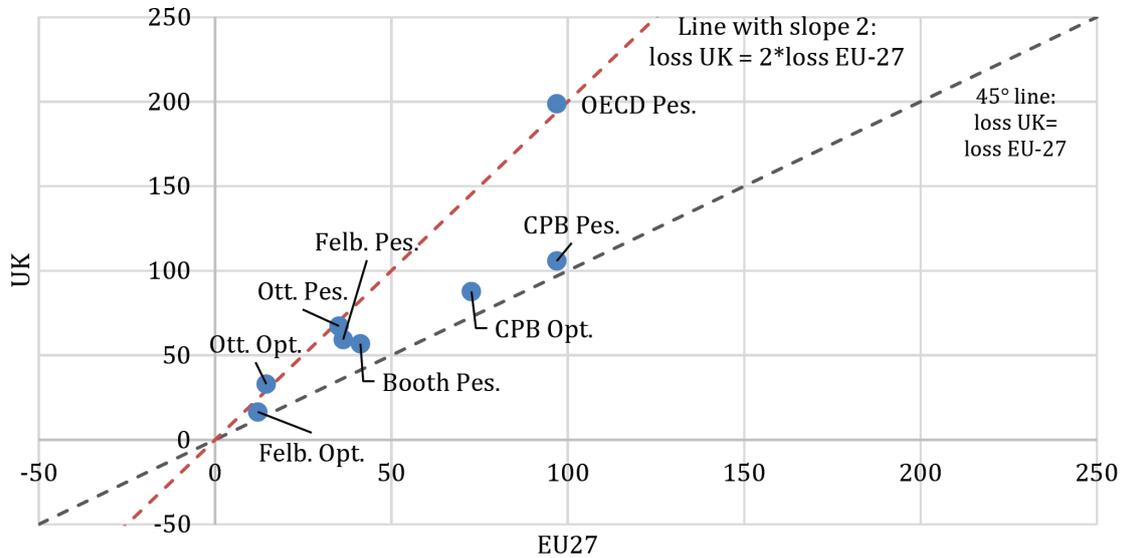
²⁶⁹ G. Felbermayr, C. Fuest, J. Grschla and D. Sthölker, [Economic effects of Brexit on the European Economy](#), EconPol, Policy Report, November 2017.

²⁷⁰ This finding could be linked to the fact that Luxembourg introduces very few and restricted reservations to commitments liberalising trade in services in EU FTAs.

²⁷¹ [An Assessment of the Economic Impact of Brexit on the EU-27](#), Policy Department for Economic and Scientific Policy, European Parliament, 2017.

may have different definitions of what the optimistic/pessimistic scenarios²⁷² are, as well as rely on different models (different assumptions and or econometric models).

Figure 11 – Absolute losses for UK and EU(27) GDP in different scenarios (optimistic and pessimistic) as reported in different economic studies (in billion euros)



Note: GDP figures are sourced from OECD stat. For the UK, the amount is converted from Pound to Euro using the annual average exchange rate for 2015. The blues spots represent the different model-based estimates, with indication of authors.

Legend: Ott. Ottaviano/LSE; CPB: Roja-Romagosa/Central Planning Bureau, NL; Booth: Booth/Open Europe; OECD. Source: [An Assessment of the Economic Impact of Brexit on the EU-27](#), Policy Department for Economic and Scientific Policy, European Parliament, 2017.

²⁷² The study reports the different definitions of scenarios in table 8, p. 30. See: [An Assessment of the Economic Impact of Brexit on the EU-27](#), Policy Department for Economic and Scientific Policy, European Parliament, 2017.

5. Future EU-UK cooperation in justice and home affairs

5.1. UK's special status in the area of freedom, security and justice

Over the past decades, the EU has built up significant cooperation in the area of criminal justice and law enforcement cooperation, going further than any other international body. In particular, following the Treaty of Amsterdam, which introduced the idea of an 'area of freedom, security and justice' (AFSJ), the EU stepped up the adoption of common instruments based on the principle of mutual recognition in criminal matters (e.g. one of the most notable achievements was the 2002 Framework Decision on the European Arrest Warrant, allowing for the mutual recognition between Member States of judicial extradition decisions). Furthermore, with the Lisbon Treaty, the area of police and judicial cooperation in criminal matters relinquished its intergovernmental character and, since 1 December 2014, following a transition period of five years, has become subject to the community method (including the full competence of the CJEU) and underpinned by the EU Charter of Fundamental Rights.²⁷³

Box 12 – The AFSJ and the Treaty of Lisbon reforms

The Treaty of Lisbon divides the themes related to the area of freedom, security and justice into four fields, reunited under **Title V** of the Treaty on the Functioning of the European Union (TFEU): **policies related to border control, asylum and immigration; judicial cooperation in civil matters; judicial cooperation in criminal matters; police cooperation.**²⁷⁴

Matters relating to criminal judicial cooperation and police cooperation were previously covered by the third pillar of the EU, governed by intergovernmental cooperation. Under the framework of the third pillar, EU institutions could not adopt regulations or directives, as opposed to the community method under the first pillar. The Treaty of Lisbon ends this distinction, enabling the EU to intervene in all matters related to the AFSJ. Qualified majority vote (QMV) in the Council and the ordinary legislative procedure apply now to most issues in the criminal law and police cooperation area. However the Treaty of Lisbon preserves the unanimity requirement in the Council – and the special legislative procedure – for: the establishment of the European Public Prosecutor (Article 86(1) TFEU); police cooperation (Article 87(3) TFEU); and cross-border operations of the competent law enforcement and judicial authorities (Article 89 TFEU). Unanimity also applies to possible extensions of competence or changes to decision-making rules.²⁷⁵

The UK has enjoyed special status in the EU AFSJ.²⁷⁶ While the UK has significant expertise in this area, the country, wary of further integration in a field considered a mark of national sovereignty, has negotiated several opt-outs from AFSJ measures. For example, the UK decided not to participate in the Schengen border-free area set up intergovernmentally in 1985; however, since the 1999 Treaty of Amsterdam brought the Schengen *acquis* within the EU legal order, it has negotiated an 'opt-in' system, whereby, subject to unanimous approval of the other Schengen states, it can participate in parts of that *acquis* (e.g. the Schengen rules concerning irregular immigration, policing and criminal law), and in the policing and criminal law part of the Schengen Information System (SIS, and the second generation, SIS II) database.²⁷⁷

The UK has reinforced its special status with the adoption of the Lisbon Treaty, by negotiating two types of opt-outs.

²⁷³ A. Weyembergh, [Consequences of Brexit for European Union criminal law](#), New Journal of European Criminal Law, 2017, Vol. 8(3), pp. 284-299.

²⁷⁴ Summaries of EU legislation: [Area of freedom, security and justice](#), Eur-Lex, September 2015.

²⁷⁵ S. Peers, [EU justice and home affairs law](#), Vol. I and II, Oxford University Press, 2016.

²⁷⁶ [The EU-UK relationship beyond Brexit: options for Police Cooperation and Judicial Cooperation in Criminal Matters](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, July 2018.

²⁷⁷ S. Peers, [UK and Irish opt-outs from EU Justice and Home Affairs \(JHA\) law](#), Statewatch Analysis no 4, 26 June 2009.

Firstly, with regard to EU measures adopted **before the entry into force of the Lisbon Treaty**, the UK secured a block opt-out in Protocol 36. Accordingly, up until six months before 1 December 2014 at the latest, the UK could notify the Council of its decision to opt-out of all instruments adopted in this area under the intergovernmental third pillar; at the same time, the Protocol however allowed the UK to opt back in to the instruments of its choice. The UK used this possibility and decided to opt back into 35 measures (out of more than 130), among which were the European Arrest Warrant (EAW), the law enforcement part of the SIS and SIS II, the measures establishing Europol (the EU's law enforcement cooperation body), Eurojust (the EU's judicial cooperation body), the European Judicial Network (EJN, a network composed of contact points designated by each Member States' central judicial authorities), and the joint investigation teams (JITs).

Secondly, Protocol 21 on the position of the UK and Ireland with regard to the AFSJ²⁷⁸ allows these two countries to exercise an opt-out on any new instruments adopted since 1 December 2009 (**after the entry into force of the Lisbon Treaty**), with the possibility of opting in either before or after the adoption of the specific act. In this context, the UK has opted in to mutual recognition instruments such as the directives on the European Protection Order and the European Investigation Order; certain directives approximating substantive criminal law (on the sexual exploitation of children, on trafficking of human beings, on cybercrime); directives approximating procedural law (victims' rights, suspects' right to interpretation and translation, as well as their right to information), but refused to participate in other procedural law directives (such as the directive on access to a lawyer).²⁷⁹ The UK government also decided to opt in to the new Europol Regulation (in force since 1 May 2017) and to participate in the adoption of the Regulation on the mutual recognition of freezing and confiscation orders. In 2016, its request to re-join measures related to the Prüm system of storage and exchange of personal data (DNA, vehicle registration, fingerprints) was also approved by the EU.²⁸⁰ The box below presents an overview of the role of the EU agencies and databases to which the UK participates in the area of justice and home affairs.

Box 13 – The EU Justice and Home Affairs agencies²⁸¹

Europol is the EU agency that supports law enforcement authorities from the EU Member States in the fight against terrorism, cybercrime, drug trafficking or other forms of serious crimes. It acts as a support centre for law enforcement operations; a hub for information and data exchange on criminal activities; and as centre for law enforcement expertise.

Eurojust is the body that supports the coordination of investigations and prosecutions between the judicial authorities in the EU Member States. With around 2 700 cases referred to Eurojust in 2017, the body provides a platform for cooperation across borders, including through support in the implementation of the EAW, the European Investigation Order, and asset freezing orders, as well as through the creation of Joint Investigation Teams (JITs). The JITs' multinational teams facilitate the coordination of investigations and prosecutions across multiple jurisdictions.²⁸²

EU databases and systems for the exchange of information²⁸³

The **Europol Information System** (containing data on serious international crime and crime organisations, suspected/convicted persons and their offences etc.) can be accessed by Europol members.

²⁷⁸ It also covers judicial cooperation in civil matters.

²⁷⁹ A. Weyembergh, op. cit.

²⁸⁰ House of Lords, European Union Committee, [Brexit: future UK-EU security and police cooperation](#), HL Paper77, 16 December 2016.

²⁸¹ N. von Ordanza, C. Borrett, [Brexit and EU agencies](#), SWP Working Paper, No. 2, April 2018.

²⁸² Please see Eurojust, [Legal framework](#) and [Successful results from intensified judicial cooperation in 2017](#), press release, 26 April 2018.

²⁸³ C. Dumbrava, [European information systems in the area of justice and home affairs: An overview](#), EPRS, European Parliament, May 2017.

SIENA (Secure information exchange network application) is Europol's system for exchanging sensitive and restricted information.

Schengen Information System (SIS) II is a database for sharing real-time alerts between law enforcement authorities related to individuals subject to a EAW, missing persons, witnesses or other persons due to appear before judicial authorities, people or vehicles requiring checks or surveillance, objects that require seizure or are needed as evidence.

European Criminal Records Information System (ECRIS) allows the exchange of data on the criminal records of EU citizens, either on request or every time an EU Member State's court convicts a national of another Member State. Around 288 000 requests per year are sent through ECRIS and the system is currently being expanded to include information on non-EU citizens. New legislative proposals on extending ECRIS to information on third country nationals and stateless persons are in the final stages of adoption, to which the UK decided to opt in in November 2017.²⁸⁴

The Prüm decisions²⁸⁵ allow searches of national databases on vehicle registration, DNA and fingerprints. As mentioned the UK asked to participate in Prüm in 2016, and this became operational in 2017.

The **EU-wide Passenger Name Records (PNR) system** agreed in 2016 allows Passenger Information Units set up by each EU Member State to share airline passenger data with law enforcement authorities across the EU.

Eurodac is an EU asylum fingerprint database, which allows EU Member States to determine which Member State is responsible for examining an asylum application made in the EU. Its primary objective is to help implement the Dublin Regulation.²⁸⁶ Law enforcement officials in the Member States (as well as Europol) may also have access. In the context of the reform of the Common European Asylum System, the Commission proposed to review the Eurodac Regulation. The proposed changes provide for the possibility for Member States to store and search data belonging to third-country nationals or stateless persons who are not applicants for international protection and found irregularly staying in the EU, so that they can be identified for return and readmission purposes. It will also allow Member States to store more personal data in Eurodac, including facial images.²⁸⁷ On 17 November 2016, the UK expressed its desire to take part in the adoption and application of the recast Eurodac Regulation, regarding which the European Parliament and the Council reached a provisional agreement in June 2018.²⁸⁸

5.2. UK and EU views on future JHA cooperation

While both the EU and the UK have expressed their willingness to enter a future partnership to combat organised crime and terrorism,²⁸⁹ the tension between the special status the UK seeks and the limits imposed by EU legislation and existing third-country models frames the current discussions.

²⁸⁴ [Improvement of European Criminal Records Information System \(ECRIS\)](#), Legislative Train, European Parliament.

²⁸⁵ The Convention on the stepping-up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, also called the '[Prüm Convention](#)', was agreed by seven European countries on 27 May 2005. On 23 June 2008, important parts of the Convention were transformed into EU law when Council Decision [2008/615/JHA](#) was adopted. At the same time, the Council adopted Decision [2008/616/JHA](#) on the implementation of Decision 2008/615/JHA6 (together, both Decisions are referred to as 'the two **Prüm Decisions**').

²⁸⁶ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 [establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person](#), OJ L 180, 29 June 2013.

²⁸⁷ [Recast Eurodac regulation](#), Legislative Train, European Parliament, 20 May 2018. See also [2016/0132\(COD\)](#), European Parliament.

²⁸⁸ [Recast Eurodac regulation](#), Legislative Train, European Parliament, as of 20 July 2018.

²⁸⁹ H. Deane, A. Menon, [Post-Brexit law enforcement cooperation: negotiations and future options](#), The UK in a Changing Europe, November 2017.

5.2.1. The UK position

At the Munich Security Conference in February 2018, the UK Prime Minister reiterated the security interests shared between the UK and the other EU Member States and her desire that, 'through a deep and special partnership', the EU and the UK would be able to retain the same level of cooperation and go even further in addressing evolving threats. The Prime Minister recalled the UK's significant contribution in this area and argued that no existing EU partnership with third countries could capture 'the full depth and breadth' of the current cooperation between the UK and EU. Therefore, based on the precedent of the EU's comprehensive agreements with third countries in other areas such as trade, the EU and the UK could consider a comprehensive, strategic agreement in the area of internal security. The proposed UK-EU security treaty would preserve both the EU and UK's operational capabilities, but at the same time be respectful of the sovereignty of the UK and EU legal orders. However, the Prime Minister declared that 'when participating in EU agencies, the UK will respect the remit of the European Court of Justice'. The Prime Minister also mentioned, among the important operational capabilities to be maintained: the EAW, mutual legal assistance including the exchange of evidence in criminal investigations, and the exchange and processing of data through the SIS II and EU PNR. An independent mechanism for dispute resolution would be necessary (which would actually apply to all areas of the UK-EU future partnership). Finally, the UK and the EU would need to agree to comprehensive data protection arrangements (to cover both data exchanged for law enforcement purposes and commercial data flows), which should rely on a 'bespoke arrangement to reflect the UK's exceptionally high standards of data protection' and which would ensure a role for the UK Information Commissioner's Office.²⁹⁰

In September 2017, a UK government position paper on the future partnership on security, law enforcement and criminal justice²⁹¹ set out the UK's objectives for future cooperation in more detail. Another UK government paper published in May 2018 on the framework for the EU-UK security partnership,²⁹² further defines the model and scope of the proposed internal security treaty. Cooperation with the EU would continue on the basis of existing EU measures (over 40 measures in which the UK currently participates) and would cover three areas:

- **practical operational cooperation:** preserving the measures that are essential for effective cross-border investigations, such as the EAW, the European Investigation Order or the Prisoner Transfer Framework Decision – most of which are also important for police cooperation between Ireland and the UK, including Northern Ireland. Another instrument mentioned are the Joint Investigation Teams.
- **multilateral cooperation through EU agencies:** protecting the capabilities and the cooperation underpinning the UK's participation in Europol and Eurojust.
- **data-driven law enforcement:** preserving the tools that allow for secure and timely exchange of information, that is, the existing databases, such as SIS II or ECRIS.

The UK document recognises that EU cooperation under some of the instruments mentioned above is not open to third countries. However, it insists that the future EU-UK partnership should ensure that these capabilities are maintained, in order to prevent a 'patchwork of cooperation' that would result in operational gaps for both the UK and EU. Importantly, the UK makes the case for a dynamic relationship that would allow, 'when mutually beneficial': 1) the UK to continue to cooperate on future versions of the current tools; and 2) for the incorporation in the EU-UK security treaty of new measures and tools. Furthermore, the UK proposes a strategic dialogue with the EU, permitting the exchange of expertise and experience in this field. Finally, institutionalised arrangements are proposed, including regular EU-UK discussions on priorities in JHA; a reciprocal secondment

²⁹⁰ [PM speech at Munich Security Conference](#), UK Government, 17 February 2018. See also, [Framework for the UK-EU partnership on Data Protection](#), UK Government, May 2018.

²⁹¹ [Security, law enforcement and criminal justice: a future partnership paper](#), UK Government, 18 September 2017.

²⁹² [Framework for the UK-EU Security Partnership](#), UK Government, May 2018.

programme to EU and UK institutions and agencies; and a framework for sharing and protecting classified and sensitive information with the EU. The entire internal security partnership would be underpinned by strong governance provisions (based on a dispute resolution mechanism applying to all areas of the future partnership), as well as by a parallel (bespoke) EU-UK agreement on the exchange and protection of personal data.

Another UK government technical note from May 2018,²⁹³ points to various precedents for the participation of third countries to the EU activities in this field that could provide a departure point for discussions, even if the UK considers that most of these cooperation models fall short of what the EU-UK agreement should achieve. In particular, the UK underlined the close and dynamic cooperation arrangements the EU has with two non-EU Schengen countries, Norway and Iceland, which do not involve direct jurisdiction of the CJEU – currently one of the UK's red lines. Nevertheless, it should be noted that these two countries need to follow the interpretation of CJEU case-law.

The white paper published on 12 July 2018 confirms the previous positions of the UK government, while proposing that a number of wider security issues (asylum and illegal migration; cyber security; counter-terrorism and countering violent extremism; civil protection; and health security) be addressed as part of the future security partnership. It reiterates the UK objective of a dynamic relationship with the EU that allows for new areas for cooperation to be added as necessary.²⁹⁴

5.2.2. The EU position

The EU-27 have repeatedly expressed readiness to cooperate with the UK in combating international crime and terrorism. The European Council guidelines of March 2018 mention police and judicial cooperation in criminal matters as an important element of the future relationship, in light of geographical proximity and shared threats. The future partnership should cover 'effective exchanges of information, support for operational cooperation between law enforcement authorities and judicial cooperation in criminal matters', while taking the future status of the UK as a non-Schengen third country into account. Safeguards for effective enforcement and dispute settlement mechanisms and full respect of fundamental rights should be included.

Declarations by the European Commission President and the chief Brexit negotiator also point in this direction: the future EU-UK partnership is essential, and working together is the only way to tackle crime and terrorism. However, the EU is keen to avoid being seen as favouring the UK and discriminating against other third countries.²⁹⁵

For internal preparatory discussions, the European Commission presented an initial vision of the future partnership in this area in January 2018.²⁹⁶ Firstly, the core principles established by the European Council should be respected (the autonomy of the EU's decision-making process; a balance of rights and obligations and non-members cannot have the same rights as a Member State). Moreover, a series of factors determining the degree of cooperation are mentioned, including the existence of a common framework of obligations with third countries (e.g. Schengen), the risk of upsetting relations with other countries, respect for fundamental rights and equivalent data protection standards, and the strength of enforcement and dispute settlement mechanisms. As the UK does not participate in Schengen, the Commission takes the view that the **model for cooperating with non-Schengen third countries** should apply, based on three pillars: exchange of security relevant data; support for operational cooperation and judicial cooperation in criminal

²⁹³ [Technical note on security, law enforcement and criminal justice](#), UK Government, 24 May 2018.

²⁹⁴ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

²⁹⁵ H. F. Carrapico, [The Future UK-EU Internal Security Agreement: political dilemmas, legal challenges and unanswered questions](#), Europe Matters Blog.

²⁹⁶ European Commission, [Slides on Police & judicial cooperation in criminal matters](#), 24 January 2018.

matters. On this basis, the Commission sets out the possibilities and limits of future cooperation with the UK in the framework of Europol, Eurojust, the mutual recognition instruments (such as the EAW), or passenger name records.

In a subsequent document published in June 2018, the Commission completed its initial position with several elements, also in response to the UK's proposals. Firstly, the Commission dampens the UK's expectations for a security treaty, taking the view that the form of the future agreement on internal security will have to be defined at the end of the negotiations, in function of the content agreed. Furthermore, the **dynamic** relationship advocated by the UK is not taken up by the Commission: EU-27 cooperation with the UK on new JHA measures may be possible, but only under the conditions set out for third countries. The Commission thus rejects any incorporation mechanism, as no third country has the possibility to join (or opt-in to) EU JHA measures. Secondly, the Commission sets out the EU approach regarding the safeguards that should be included in the future EU-UK agreement (on fundamental rights, data protection and dispute settlement). Thirdly, as regards the building blocks of the agreement, measures against money laundering and terrorism financing are added to the areas of cooperation to be covered by the agreement. Finally, the Commission clarifies that future operational cooperation along the lines of the UK's proposals – that is, cooperating on the basis of existing EU measures (similarly to an EU Member State), but without the relevant institutional framework relying on CJEU jurisdiction and rules on fundamental rights and data protection – would lead to a situation where the UK would have the same rights as EU Member States, but different constraints. This would pose a risk to the integrity of the EU's AFSJ, including the proper functioning of the Schengen area, and would undermine the mutual trust that underpins law enforcement and judicial cooperation among EU Member States and that cannot exist outside the EU institutional framework.²⁹⁷

5.3. Preserving police and judicial cooperation in criminal matters: Negotiating issues and challenges

Experts consider that the special, 'pick and choose', status of the UK in the area of EU criminal justice cooperation has already become a challenge to the coherence and legal certainty of the EU's single area of freedom, security and justice, as well as for the protection of fundamental rights in the EU.²⁹⁸ In this context, Brexit might offer opportunities for the EU to develop closer cooperation between the remaining Member States and push forward new policy objectives in the AFSJ, once the UK leaves the EU.²⁹⁹ On the other hand, Brexit will come with risks and losses to the EU, as the UK has provided considerable expertise and experience in this field. The British introduced the idea of mutual recognition in criminal matters in the EU; the UK has been one of the biggest contributors to Europol of data, information and expertise; and for almost ten years Europol, led by a British national, has helped shape the current role of the agency.³⁰⁰ Furthermore, Brexit will lead to a reduction in the geographical area covered by EU cooperation in criminal matters and a loss for the EU in terms of benefitting from the UK's privileged partnerships with third countries,³⁰¹ such as the United States or its other partners within the 'Five Eyes' intelligence alliance. The UK has also considerably benefitted from the EU JHA instruments, as one of their largest users, e.g. the ECRIS or the JITs.

²⁹⁷ [Police and judicial cooperation in criminal matters \(slides\)](#), European Commission, 18 June 2018.

²⁹⁸ V. Mitsilegas, [The uneasy relationship between the UK and European criminal law: from opt-outs to Brexit](#), *Criminal Law Review*, 8, 2016, 519-538.

²⁹⁹ [The implications of the UK's withdrawal from the EU for the AFSJ](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, December 2017.

³⁰⁰ A. Weyembergh, op cit.

³⁰¹ A. Weyembergh, op cit.

A European Parliament study has identified the areas within the AFSJ field on which Brexit would have the biggest impact.³⁰² The area of **immigration and asylum** is assessed as not significantly impacted by the UK's departure: the UK participates in a limited number of related measures – e.g. it opted out of the second phase of the Common European Asylum System, with the exception of Eurodac and the Dublin III regulation. When it leaves the EU, the UK will lose access to Eurodac, as the UK will be outside the Dublin system.

In the field of **judicial cooperation**, whereas a minimal impact of Brexit is forecast as regards the common rules of substantive criminal law (the UK intends to transpose into domestic law all measures it has already implemented through the European Union (Withdrawal) Act),³⁰³ the operation of mutual recognition instruments in cases involving the UK would be largely impacted (most importantly, the EAW, but also those instruments allowing for the exchange of evidence or the freezing and confiscation of assets across borders).³⁰⁴ Cooperation under the Joint Investigation Teams will also be impacted once the UK becomes a third country.

In **law enforcement**, the exchange of data would suffer enormously from Brexit. As a third country, the UK would lose full access rights to a series of instruments set up in this area, such as the various Europol databases, the SIS II, the exchange of criminal records for third-country nationals (ECRIS), of passenger name records (PNR) across the EU, and the Prüm decisions (there will be no interconnection of databases).³⁰⁵

5.3.1. EU JHA agencies and the issue of post-Brexit UK participation

Europol

Europol cooperates with third countries and international organisations (e.g. Interpol) or other EU agencies. Europol has concluded two types of cooperation agreements with these external partners: strategic and operational. While strategic agreements are limited to the exchange of general intelligence, as well as strategic and technical information (concluded with China, Russia, Turkey and with a series of agencies), operational agreements allow for closer cooperation through the exchange of information, including personal data (with 17 third countries, including the USA, as well as with Eurojust, Frontex and Interpol). Furthermore, liaison officers from 13 partner countries are hosted at Europol. With the entry into force of the current Europol regulation in May 2017,³⁰⁶ cooperation agreements will no longer be concluded by Europol, but by the EU, following the international agreements procedure set out in Article 218 TFEU, thereby thus involving the Commission, the European Parliament and the CJEU.³⁰⁷

The UK expressed a preference for a bespoke relationship with the agency as part of EU-UK future cooperation, going further than the existing operational agreements, and followed with interest the agreement concluded by Denmark in 2017 with respect to participation in Europol (see box 14). In this context, the EU nevertheless made clear that the agreement with Denmark fell short of the level of cooperation it enjoyed previously as a full Europol member, and was conditional on its continued

³⁰² [The implications of the UK's withdrawal from the EU for the AFSJ](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, December 2017.

³⁰³ The European Union (Withdrawal) Bill became an [Act](#) after receiving Royal Assent on 26 June 2018.

³⁰⁴ Other such instruments are: European Investigation Order, the European Protection Order, the mutual recognition of financial penalties, of custodial sentences, of supervision measures etc.

³⁰⁵ For an overview of existing EU databases in this field please see: C. Dumbrava, [European information systems in the area of justice and home affairs: An overview](#), EPRS, European Parliament, May 2017.

³⁰⁶ [Regulation \(EU\) 2016/794](#) of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.

³⁰⁷ Please see the [Europol website](#), including the list of [Strategic agreements](#) and [Operational agreements](#).

EU and Schengen membership; it cannot therefore be considered a precedent for the future UK relations with Europol.

Box 14 – Denmark's operational and strategic cooperation agreement with Europol

Due to its opt-out from all EU justice and home affairs legislation, without any possibility to opt-in, Denmark could not maintain its cooperation with Europol under the new Europol Regulation. For Denmark to continue cooperation within the Europol framework, the EU designated Denmark as a third country for this purpose, thereby allowing the conclusion of a cooperation agreement. On 29 April 2017, the Agreement between Denmark and Europol was officially signed, and entered into force on 30 April 2017, just before the new Europol Regulation's entry into force on 1 May 2017.³⁰⁸

Under the terms of the agreement, Denmark benefits from closer cooperation with Europol as regards access to the databases than other third countries cooperating with Europol, however this access is conditional on Denmark's continued participation in the Schengen area and its EU membership; moreover Denmark must implement Directive (EU) 2016/680 on the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties,³⁰⁹ in its national law, and agree to the application of the jurisdiction of the Court of Justice of the EU (CJEU) and the competence of the European Data Protection Supervisor (EDPS). Furthermore, while Denmark obtained observer status (with no voting rights) on Europol's Management Board and Management Board working groups, it nevertheless lost direct access to the Europol databases, although Europol is obliged to notify Denmark 'without delay of any information concerning it'. Moreover, Denmark will not be able to take part in the Europol Joint Parliamentary Scrutiny Group (comprised of representatives of the European Parliament and national parliaments of Member States) set up under the new Europol regulation, and loses participation rights to the cooperation council of national data protection authorities and the EDPS.

Finally, the agreement contains a provision whereby the Commission must undertake an evaluation of the agreement by 31 October 2020, based on which, it may recommend to the Council by 30 April 2021, to replace the agreement with an international agreement negotiated under Article 218 TFEU.

According to the Commission, the UK, as a third country,³¹⁰ will have no participation rights (as member or observer) to Europol's Management Board and Management Board working groups, and therefore have no influence on Europol's strategic and policy objectives. However, its representative could be invited to Heads of Europol National Units meetings and may participate in the EU Policy Cycle.³¹¹ Moreover, the UK will lose direct access to Europol databases, but exchanges of data can continue if an international agreement is concluded (or an adequacy decision is adopted with respect to the UK on the basis of Article 36 of Directive (EU) 2016/680). For example, some third countries with which Europol has concluded operational agreements can store data in the Europol Information System and make queries, but only through the Europol Operational Centre, as they do not have direct access to the system.³¹² As regards the secure information exchange network application (SIENA), Europol's secure messaging platform, some third countries, which have an operational agreement, currently exchange information using SIENA (Australia, Canada, Norway, Switzerland, the USA, Liechtenstein and Moldova). In 2016, according to Europol, 32 third parties

³⁰⁸ [Agreement on Operational and Strategic Cooperation between the Kingdom of Denmark and Europol](#). See also European Commission, [Commission welcomes Europol's new mandate and cooperation agreement with Denmark](#), Statement, 29 April 2017.

³⁰⁹ Directive (EU) 2016/680 of 27 April 2016 on [the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data](#).

³¹⁰ There is no differentiation between Schengen and non-Schengen third states with regard to Europol cooperation.

³¹¹ [EU Policy Cycle - EMPACT](#), Europol.

³¹² [Europol Information System](#), Europol.

(law enforcement authorities) were connected to SIENA (19 third parties connected directly and 13 third parties connected indirectly).³¹³

Moreover, the UK could send liaison officers to Europol. The UK would also be able to participate in analysis projects if Member States agree and if the project is relevant to the UK or data that is processed within the project concerns the UK. Finally, the UK would be able to take part in real time investigations.

In the UK's view, however, cooperation on this basis alone would not allow maintenance of the current level of UK contribution to Europol's activities. Indeed, Europol cooperation agreements fall short of the level of participation and access to information and intelligence the UK enjoys as an EU Member State. In this context, the UK has even expressed willingness to accept, in certain cases, the jurisdiction of the CJEU in exchange for more access to Europol activities. Furthermore, such agreements have taken years to conclude (five years normally, but also up to twelve years when the exchange of personal data was concerned); nevertheless, in the case of the UK, as a former Member State, that negotiation process may take less time.³¹⁴ In addition, the UK would be one of the first states to conclude an agreement covering the exchange of personal data with the EU under the new Europol Regulation (Article 25) – see the procedure in Article 218 TFEU.³¹⁵

Box 15 – Agreements with third countries under the new Europol regulation

Under the Commission recommendations for the mandates for negotiation of such new agreements with eight Middle East and North African countries, the agreements will contain 'an effective dispute settlement mechanism with respect to (...) interpretation and application', and the respective partners will set up a 'system of oversight by one or more independent public authorities responsible for data protection' over their public authorities handling personal data, which will also have the competence of engaging in legal proceedings. Moreover, the EU will support these countries' accession to the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.³¹⁶ In this context, it must be noted that the EU Court of Justice will still have jurisdiction over the agreement's compliance with EU law (Article 218 (11)).

Eurojust

Brexit is also expected to greatly impact cooperation within Eurojust, where the UK has participated actively. It also made active use of the Joint Investigation Teams.³¹⁷

Like Europol, Eurojust has concluded cooperation agreements with third countries. At the end of 2017, Eurojust had cooperation agreements in place with nine countries (Norway, USA, Switzerland, Montenegro, Moldova, former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Ukraine), while another with Albania is about to be concluded.³¹⁸ These countries may, inter alia, second liaison prosecutors to Eurojust. Currently, the USA, Norway and Switzerland second liaison

³¹³ [Annual Review 2016](#), Europol, April 2017.

³¹⁴ R. Hanratty, [The effect of Brexit on the fight against crime](#), Archbold Review, 4, 2018, pp. 4-9.

³¹⁵ For the time being, no international agreement has been concluded between the EU and third states on the basis of the new Europol Regulation. In December 2017, the Commission recommended opening negotiations with eight Middle East and North African countries: [Algeria](#), [Egypt](#), [Israel](#), [Jordan](#), [Lebanon](#), [Morocco](#), [Tunisia](#) and [Turkey](#). The EP [approved](#) the Commission recommendations on 4 July 2018. See also: European Data Protection Supervisor, [Opinion 2/2018](#) on eight negotiating mandates to conclude international agreements allowing the exchange of data between Europol and third countries, 14 March 2018. See also R. Davidson, [Brexit and criminal justice: the future of the UK's cooperation relationship with the EU](#), Criminal Law Review, 5, 2017, pp. 395-397.

³¹⁶ [Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data](#), Council of Europe, Treaty 108.

³¹⁷ [Joint Investigation Teams Practical Guide](#), Council of the EU, 6128/1/17, 14 February 2017.

³¹⁸ Eurojust, Third States and organisations. See also [Albanian Minister of Justice visits Eurojust President: enhanced cooperation on agenda](#), 29 May 2018; [Eurojust Annual Report 2017](#), 2018; and the Agreement on cooperation between Eurojust and Albania [2018/0807\(CNS\)](#), Legislative Observatory, European Parliament.

prosecutors to Eurojust. Since 2017, Eurojust has acquired the legal framework to post liaison magistrates to third states, besides the 'contact points' that it maintains in non-EU European states.³¹⁹

A Eurojust cooperation agreement with the UK would seem desirable for both the UK and the EU-27 in light of the high level of cooperation so far, even though the UK argues that future UK participation in Eurojust on the terms of existing third country cooperation agreements would lead to fewer opportunities to contribute to the work of Eurojust, as well as reduced capability for both the EU and UK in tackling organised crime.³²⁰ Conversely, while other agreements with third countries have taken five to seven years, arguably reaching agreement with the UK as a former member of Eurojust might take less, if there is political will to do so.³²¹ A precedent in this sense is the agreement with the USA, which was concluded within a year.

Under this framework, the UK could appoint contact points and liaison magistrates to Eurojust to facilitate data exchange. Nevertheless, the UK would lose direct access to the Eurojust Case Management System or case-files. If Member States agree, however, the UK could take part in Eurojust cases and may use the Eurojust On-Call Coordination, a system enabling judicial authorities and law enforcement officials to request Eurojust's assistance on a 24 hour/7 day basis. Moreover, the UK would not be allowed to initiate and take the lead on Joint Investigation Teams. The legal basis for Joint Investigation Teams is Article 13 of the EU Convention on Mutual Legal Assistance (2000),³²² which means that third states such as Norway and Iceland, who have reached agreement with the EU to participate in the 2000 Convention,³²³ can also take part in JITs.³²⁴ Experts point to this precedent for future UK involvement in such teams post-Brexit, assuming that a similar arrangement can be reached in relation to the 2000 Convention.³²⁵ According to the Eurojust Annual Report 2017, in recent years, experience with cooperating with third states in the context of JITs has increased: 'The possibility of involving representatives of third States in coordination meetings greatly facilitates the setting up of JITs between EU and non-EU States. In addition, the presence of the Swiss and Norwegian Liaison Prosecutors at Eurojust has led to the successful establishment and development of JITs with Switzerland and Norway.'³²⁶ Indeed, the UK government has pointed to the Norwegian, Swiss and American models as possible precedents for a third state cooperation agreement.³²⁷ However, the UK government white paper of 12 July 2018, clarifies that it seeks 'full participation rights in JITs including the ability to initiate them'.³²⁸

³¹⁹ Please see [Legal framework](#) and [Successful results from intensified judicial cooperation in 2017](#), press release, Eurojust, 26 April 2018.

³²⁰ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

³²¹ [The implications of the UK's withdrawal from the EU for the AFSJ](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, December 2017.

³²² Council Act of 29 May 2000 [establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union](#).

³²³ Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on [the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto](#), OJ L 26. The agreement was signed in 2003 and entered into force in 2013.

³²⁴ Council Framework Decision [2002/465/JHA](#) of 13 June 2002 on joint investigation teams (JIT), OJ L 162.

³²⁵ R. Davidson, [Brexit and criminal justice: the future of the UK's cooperation relationship with the EU](#), Criminal Law Review, 5, 2017.

³²⁶ [Annual Report 2017](#), Eurojust, 2018. See also the [Conclusions of the Thirteenth Annual Meeting of National Experts on Joint Investigation Teams \(JITs\)](#), 17-18 May 2017.

³²⁷ R. Davidson, [Brexit and criminal justice: the future of the UK's cooperation relationship with the EU](#), Criminal Law Review, 5, 2017.

³²⁸ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

Finally, as a third state, the UK would no longer be represented on the Eurojust College, the agency's leading management body – made up exclusively of representatives of the EU Member States, and would thereby have no say on the agency's future evolution.

5.3.2. Mutual recognition instruments

On the basis of the mutual recognition principle, EU Member States recognise each other's judicial decisions in order to facilitate cooperation on exchanging evidence in criminal cases, on extraditing persons or on freezing and confiscating assets. This speeds up the processes between the issuing and the executing Member State and avoids the need for litigation in both states' courts.³²⁹ The European Arrest Warrant is the most famous example of an EU JHA instrument based on mutual recognition and has been widely used since its creation in 2002, both by the EU-27 in relations with the UK and vice-versa.³³⁰ The more recent European Investigation Order (EIO)³³¹ – the directive establishing the EIO had to be transposed by Member States by 22 May 2017 – replaces many of the mutual legal assistance arrangements in the EU, including the 2000 EU Mutual Legal Assistance Convention and Framework Decision 2008/978/JHA on the European Evidence Warrant. Under the EIO, a Member State must recognise and execute the request of another Member State for specific criminal investigative measures to be carried out, in the same way as that decision would have been adopted by its own authorities. After Brexit, both of these instruments will no longer apply to the UK, therefore new arrangements for future cooperation between the EU and UK will need to be identified. Moreover, the legal assistance arrangements in other police and judicial cooperation areas will need to be defined, including to potentially cover the more recent EU instruments that are now at the proposal stage, for example as regards cross-border access to electronic evidence.³³²

The European Arrest Warrant

The EAW has no provisions on cooperation with third countries and most experts consider that it would be impossible to replicate the EAW in a future treaty with the UK. The extradition of own nationals would be the main political obstacle post-Brexit,³³³ also due to the fact that some EU Member States (e.g. Germany) would need to amend their constitution to allow extradition of an own national to a non-EU country.³³⁴

The agreement on the surrender procedure with Iceland and Norway could offer a model, but that treaty, although very close to the EAW model, is not as comprehensive. For example, unlike the EAW, the agreement allows the parties to refuse to surrender their nationals and restricts the obligation to surrender suspects considered to have committed political offences (except for terrorism-related offences). Furthermore, the agreement took thirteen years to conclude and it is still not in force, almost four years after its conclusion,³³⁵ although, as UK extradition law is already aligned with the

³²⁹ R. Hanratty, [The effect of Brexit on the fight against crime](#), Archbold Review, 4, 2018.

³³⁰ Council Framework Decision 2002/584/JHA of 13 June 2002 on [the European arrest warrant and the surrender procedures between Member States](#), OJ L 190.

³³¹ [Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters](#), OJ L 130.

³³² [E-evidence - cross-border access to electronic evidence](#), European Commission.

³³³ [Uncorrected oral evidence: Brexit: the proposed UK-EU security treaty](#), House of Lords, Home Affairs Sub-Committee, 28 March 2018.

³³⁴ In this sense, the draft withdrawal agreement includes a reservation (Article 168) allowing Member States to refuse – upon a justified decision – extradition of own nationals to the UK during the transition period of 21 months, as the UK is set to become a third state on 30 March 2019. In return the UK may also refuse extradition of UK nationals to those particular Member States.

³³⁵ [Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway](#), OJ L 292. Council Decision [2014/835/EU](#) of 27 November 2014 on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, OJ L 343.

EU, a similar EU-UK agreement might be concluded more swiftly. In any case, the EU-Norway/Iceland surrender agreement offers an important model to the UK, also in terms of provisions on dispute settlement and the role of the CJEU therein. Accordingly, any disputes regarding the interpretation or the application of the agreement would be submitted to a meeting of government representatives of the State Parties to the treaty, to be settled within six months.³³⁶ Additionally, with the objective of obtaining uniform application and interpretation, the agreement provides for the creation of a mechanism to ensure regular mutual transmission of the related case law, as Norway and Iceland commit to keep the development of the case law of the CJEU under 'constant review', and vice versa: the EU Member States will keep the case law developments in Iceland and Norway under constant review.³³⁷

Unlike the EU-Iceland/Norway surrender agreement, the EU-US extradition agreement, in force since 2010, envisages the use of diplomatic channels for the surrender procedure, and relies mostly on the bilateral agreements the USA has concluded with Member States.³³⁸

An option, other than negotiating an agreement with the EU, would be to rely on the 1957 Council of Europe Convention on Extradition and its protocols, ratified by all EU Member States, including the UK.³³⁹ However, the procedures under the Convention would be significantly different to those under the EAW. Firstly, the Convention is not an entirely judicial process, as extradition requests are made through diplomatic channels and political decisions may be made on extradition requests at certain stages in the procedure. Secondly, the Convention maintains the dual criminality requirement for all offences (i.e. the conduct for which extradition is sought must be a criminal offence in both the issuing and the executing state), unlike the EAW which abolished dual criminality in respect to 32 serious offences. Thirdly, under the Convention, states may refuse to extradite their nationals or for political offences. Finally, unlike the EAW Framework Decision, which imposes strict time limits, the Convention does not, leading to lengthy procedures.³⁴⁰ The CJEU would have no jurisdiction in this scenario. On the other hand, relying on the 1957 Council of Europe Convention may not be that straightforward, also from the point of view of the EU-27. For example, since the EAW was established, some Member States have repealed domestic legislation needed to implement the 1957 Convention on extradition, so amendments to their national systems might be needed. In this context, an agreement on extradition between the EU and the UK post-Brexit would also be in the EU-27's interest.³⁴¹

The UK could also choose to negotiate bilateral surrender agreements with individual EU states, although the prospect of 27 separate negotiations may not be so appealing.³⁴² Another option would be for the UK to fall back on the Council of Europe Convention, and then conclude more comprehensive bilateral extradition agreements with those EU Member States where there is already intense cooperation in this area or much interest, e.g. with Poland, Spain and Ireland.³⁴³ In its July 2018 white paper, the UK government suggests that the arrangements for the EAW decided

³³⁶ Article 36 of [Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway](#), OJ L 292.

³³⁷ Article 37 of [Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway](#), OJ L 292.

³³⁸ [Agreement on extradition between the European Union and the United States of America](#), signed 25 June 2003, in force since 1 February 2010.

³³⁹ Council of Europe, [European Convention on Extradition](#), Treaty No 024. [Switzerland](#) for example relies on the Council of Europe Convention and its protocols for extradition.

³⁴⁰ R. Davidson, B. Lloyd, A. Payter, [Extradition law - recent developments and the potential impact of Brexit](#), *Criminal Law Review*, 10, 2016, pp. 743-764.

³⁴¹ House of Lords, 28 March 2018, fn. 191. See also J. Dawson, S. Lipscombe, S. Godec, [The European Arrest Warrant](#), House of Commons Library Briefing Paper, No. 07016, 18 April 2017.

³⁴² R. Davidson, B. Lloyd, A. Payter, op. cit.

³⁴³ House Of Lords, 28 March 2018.

in the draft withdrawal agreement that would be applied during a possible transition period should be the basis for the future EU-UK relationship on extradition.³⁴⁴

The European Investigation Order and other mutual legal assistance arrangements

The EIO is a rather new instrument, but as an important tool for investigations in the EU, it may become another issue for negotiations in this area for the UK government. For the time being, other third countries do not participate in the EIO; for this purpose, Norway and Iceland rely on the provisions of the 2000 EU Mutual Legal Assistance (MLA) Convention to which they acceded in 2013 (the 2008 Framework Decision on the European Evidence Warrant was not extended to these countries). As these two countries have also signed an agreement concerning the Prüm decision (see below), some observers regard this as a possible option for the UK to negotiate similar arrangements and maybe also get access to the EIO.³⁴⁵ Yet again, Norway and Iceland have a special status as countries associated to the Schengen *acquis*: before entering into agreement with the EU on the EU MLA Convention, these two states were already applying those relevant provisions of the Convention that represented a development of the Schengen *acquis*. Furthermore, with respect to the EIO, which is a mutual recognition instrument, a MLA regime is more discretionary.

Should the extension of the EU MLA regime to the UK, similarly to the Iceland/Norway agreement to participate in the 2000 EU MLA Convention, not be possible, the UK may either have to rely on the 1959 Council of Europe Convention and Protocols on mutual legal assistance,³⁴⁶ or on an MLA agreement similar to those concluded by the EU with third countries such as the USA or Japan. The 1959 Convention however offers fewer options in terms of flexibility and speed than the EU MLA convention, while the EU MLA agreements with third countries do not allow for the same level of cooperation as between EU Member States.³⁴⁷ The EU-US MLA agreement (signed in 2003, in force in 2010), just like the deal on extradition, makes use of diplomatic channels for this cooperation and mostly relies on bilateral MLA agreements with individual EU Member States.³⁴⁸ The EU-Japan MLA (signed in 2009 and entered into force in 2011) is the first 'self-standing' EU MLA with a third country (there are no bilateral MLAs between Japan and EU Member States).³⁴⁹ However, this is rather a conventional MLA agreement, where parties have a wide discretion in complying with MLA requests. Furthermore, experts point to the rather low number of cases between the EU and Japan that would require legal assistance, therefore the practical implications of the agreement are difficult to evaluate.³⁵⁰ In any case, the EU-Japan MLA option would fall short of the comprehensive and close relationship the UK is seeking.³⁵¹

³⁴⁴ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018. For the provisions of the draft withdrawal agreement see C. Cîrlig, S. Mazur, L. Tilindyte, [The EU-UK withdrawal agreement: Progress to date and remaining difficulties](#), EPRS, European Parliament, 12 July 2018.

³⁴⁵ R. Davidson, [Brexit and criminal justice: the future of the UK's cooperation relationship with the EU](#), Criminal Law Review, 5, 2017.

³⁴⁶ [European Convention on Mutual Assistance in Criminal Matters](#), Council of Europe, Treaty No 30.

³⁴⁷ R. Davidson, [Brexit and criminal justice: the future of the UK's cooperation relationship with the EU](#), Criminal Law Review, 5, 2017.

³⁴⁸ [Agreement on mutual legal assistance between the European Union and the United States of America](#), OJ L 181, 2003.

³⁴⁹ [Agreement between the European Union and Japan on mutual legal assistance in criminal matters](#), OJ L 39, 2010.

³⁵⁰ [Basic principles of mutual legal assistance and extradition agreements with third countries](#), Asser Institute, 2010.

³⁵¹ R. Davidson, [Brexit and criminal justice: the future of the UK's cooperation relationship with the EU](#), Criminal Law Review, 5, 2017.

5.3.3. Data and information exchange

The UK has looked at the EU agreements in this area with third countries such as Norway and Iceland. However, both states have full access to SIS II, due to their status as Schengen members, and to Eurodac, as Dublin members.

➤ SIS II and Eurodac

The EU granted access to SIS II³⁵² and Eurodac to third countries such as Norway, Iceland, Switzerland and Lichtenstein on condition of their accession to the Schengen Agreement and therefore adoption of the *acquis*. After Brexit, British law enforcement will most likely lose access to both SIS II and Eurodac, as the UK will no longer be part of the Dublin system.

SIS II is an essential tool in Schengen cooperation. It contains information on individuals who do not have the right to enter or stay in the Schengen area, or on those who are sought in relation to an EAW; it also contains information on missing persons, or on certain objects that may have been lost, stolen, or used to carry out a crime.³⁵³ Data processed in SIS II cannot be transferred or made available to third countries or to international organisations.³⁵⁴

Concerning Eurodac, the EU has concluded agreements with Iceland, Norway, Switzerland and Liechtenstein associating them to the Dublin/Eurodac *acquis*, in light of their association to the Schengen *acquis*.³⁵⁵ Denmark has also been associated to the Dublin/Eurodac *acquis* via an international agreement.³⁵⁶ There is an explicit requirement that 'the Dublin/Eurodac *acquis* be applied simultaneously with the Schengen *acquis*'.³⁵⁷ When the recast Dublin regulation enters in force, complementary agreements will have to be concluded to cover the access of law enforcement to Eurodac. Under the agreements in force, the associated countries accept the development of the Dublin/Eurodac *acquis* without exception, without taking however part in the adoption or amendment of related acts. Should one of these countries inform the EU of their decision not to accept an act related to the Dublin/Eurodac *acquis*, or not to apply such an act under the terms of the agreement, then the agreement is suspended in its entirety (guillotine clause). If, within 90 days, the situation is not remedied or the joint/mixed committee governing the application of the agreement does not decide otherwise, the agreement is terminated. Denmark, however, benefits from an extra 3 months after the 90 days deadline. Furthermore, there is a precondition for the associated states to implement or participate in the Prüm agreements in order to perform checks in

³⁵² Council Decision 2007/533/JHA of 12 June 2007 on [the establishment, operation and use of the second generation Schengen Information System \(SIS II\)](#), OJ L 205, 2007.

³⁵³ According to the EU-LISA [Report on the technical functioning of Central SIS II](#), July 2017: 'On 31 December 2016, there were over 70 million alerts stored in the system, showing a net increase of 51% in alerts stored since the entry into operation of the system in April 2013. In 2016, SIS II was searched almost 4 billion times, a billion more than in 2015.'

³⁵⁴ [Questions and Answers: Schengen Information System \(SIS II\)](#), European Commission, 9 April 2013.

³⁵⁵ [Agreement](#) between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway, OJ L 93, 2001; [Agreement](#) between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, OJ L 53, 2008; [Protocol](#) between the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, OJ L 160, 2011.

³⁵⁶ [Agreement](#) between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 66, 2006. Other two legal instruments were adopted to create obligations between the associated states and Denmark.

³⁵⁷ See for example the [Agreement](#) with Switzerland.

Eurodac.³⁵⁸ In this context again, alignment with the Schengen *acquis* implies a strong role for the CJEU. Associated countries are obliged to keep CJEU case law under constant review. In the situation of substantial divergence between the CJEU case law and the third states' interpretation, the matter is brought before the joint/mixed committee; failing agreement, the treaty may be terminated under the guillotine clause mentioned above. In the case of Denmark, the CJEU has jurisdiction for the interpretation and application of the agreement. Danish courts must submit questions on the validity or interpretation of the agreement for preliminary rulings to the CJEU under the same conditions as the other EU Member States. Denmark must take due account of the rulings of the CJEU. The CJEU is also responsible for ensuring compliance with the agreement: the Commission may bring a complaint before the CJEU against Denmark for non-compliance, while Denmark may bring a complaint to the Commission against another EU Member State.

➤ Prüm

The EU has an agreement with Norway and Iceland giving these two countries access to Prüm (not yet in force, although some parts are applied provisionally).³⁵⁹ The same provisions with respect to dispute settlement and keeping the developments of the CJEU under constant review apply as in the case of the EAW agreement. Negotiations are ongoing with Switzerland and Liechtenstein.

➤ ECRIS

While the UK has proposed its continued participation in ECRIS as part of the new treaty, no access to the ECRIS database is granted to non-EU countries. However, some authors advocate that, in light of the large number of EU citizens that will continue to live in the UK post-Brexit and of UK citizens in the EU, the sharing of criminal records information would constitute a necessity for effective cooperation and ECRIS would be the most appropriate and mutually beneficial instrument to this end.³⁶⁰

➤ Passenger name records

After Brexit, the EU Passenger Name Records (PNR) Directive 2016/681 adopted by the Council in April 2016 and applied since May 2016³⁶¹ will no longer apply to the UK, therefore the UK will no longer have access to PNR on intra-EU flights. The EU has concluded PNR agreements with third

³⁵⁸ See the European Commission, Explanatory memorandum to the [Proposal for a regulation](#) of the Council and the European Parliament on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast), COM/2016/0272 final, 4 May 2016.

³⁵⁹ [Council Decision 2010/482/EU](#) of 26 July 2010 on the conclusion of the [Agreement](#) between the European Union and Iceland and Norway on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime and Council Decision 2008/616/JHA on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, and the Annex thereto. See also [Stepping-up cross-border cooperation \(Prüm Decision\)](#), Eur-lex summaries of EU legislation and the Council of the EU, [International Agreements database](#).

³⁶⁰ A. M. Jackson, G. L. Davies, [Making the case for ECRIS: post-"Brexit" sharing of criminal records information between the European Union and United Kingdom](#), *International Journal of Evidence and Proof*, 2017, 21(4), pp. 330-350.

³⁶¹ [Directive 2016/681](#) of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, OJ L 119. EU Member States had to incorporate the directive into national law by 25 May 2018.

countries such as the USA,³⁶² Australia³⁶³ and Canada³⁶⁴. However, the EU-Canada PNR Agreement cannot yet enter into force, as CJEU Opinion 1/15, delivered in July 2017, found the agreement lacked appropriate safeguards and appropriate limits on the storage of data, which prompted the Commission to return to negotiations with Canada. Negotiations with Mexico began in July 2015.³⁶⁵ Argentina, Japan, Saudi Arabia, Qatar, the Republic of Korea and New Zealand have requested or are expected to request PNR agreements with the EU. On PNR there is no specific cooperation so far with Iceland and Norway. The UK could continue to exchange PNR and the results of processing PNR with the remaining Member States through an EU-UK PNR agreement. However, any agreement concluded with the UK on PNR would also have to comply with CJEU Opinion 1/15. The UK could also opt for bilateral agreements with the EU Member States, but these would not cover the entire EU and would probably differ in terms of the obligation to provide information.³⁶⁶ The UK has explicitly stated it would seek to maintain cooperation with the EU based on the EU PNR Directive (thereby including capabilities on analysis of PNR and access to PNR on intra-EU flights).³⁶⁷

On the substance, future access by the UK to these databases might be complicated by various issues. The current reform in the EU to improve interoperability of the systems in this area might become an obstacle for the UK, as some of the databases concern migration; it is unlikely the EU would subsequently grant the UK access to SIS II, as it will be no longer bound by freedom of movement rules. Furthermore, both Iceland and Norway would react should a more interesting deal be concluded with the UK (including on extradition): on the one hand these countries would likely wish to also take advantage of more favourable provisions; on the other hand, they would point out that, as Schengen states, they comply with more obligations than the UK, an argument the Commission also seems to support. Conversely, the remaining EU Member States also have an interest in preserving UK data, which would possibly prompt some flexibility on the side of the EU-27.³⁶⁸ Future access to the databases would above all be dependent on UK compliance with EU data protection standards.³⁶⁹ A Directive on protecting personal data processed for the purpose of criminal law enforcement cooperation was adopted by the EU in 2016, replacing a 2008 Framework Decision. The 2016 Directive, unlike the previous Framework Decision, covers both cross-border data transfer between law enforcement authorities, and data processing activities by national law enforcement. The UK government announced that it would transpose the Directive into UK law through its Data Protection Bill, now the Data Protection Act, after royal assent on 23 May 2018.³⁷⁰ The UK proposal for a comprehensive bespoke agreement on data protection would most likely not

³⁶² [Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security](#), signed 14 December 2011, in force since 1 July 2012.

³⁶³ [Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record \(PNR\) data by air carriers to the Australian Customs and Border Protection Service](#), signed on 29 September 2011, in force since 1 June 2012.

³⁶⁴ In June 2014, the EU and Canada signed a [new PNR agreement](#) to replace the [existing one](#) from 2006. The EP voted in November 2014 to refer the agreement to the CJEU for an opinion on the compliance of the agreement with the EU treaties and the Charter of Fundamental Rights. The CJEU adopted its [Opinion 1/15](#) on 26 July 2017. See also S. Monteleone, [CJEU Opinion on EU-Canada PNR agreement](#), EPRS, European Parliament, 5 September 2017.

³⁶⁵ [Joint statement: Beginning of negotiations between Mexico and the European Union on PNR data transmission](#), European Commission, 14 July 2015.

³⁶⁶ R. Davidson, [Brexit and criminal justice: the future of the UK's cooperation relationship with the EU](#), *Criminal Law Review*, 5, 2017. In the case of an EU Member States bilateral agreement, the latter would need to comply with EU law following the [Declaration on Article 218](#) of the Treaty on the Functioning of the European Union concerning the negotiation and conclusion of international agreements by Member States relating to the area of freedom, security and justice, OJ C 2010 83.

³⁶⁷ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

³⁶⁸ S. Peers, [UK/EU Security Cooperation After Brexit: the UK Government's Future Partnership Papers](#), EU Law Analysis Blog, 25 September 2017.

³⁶⁹ [The implications of the United Kingdom's withdrawal from the European Union for the Area of Freedom, Security and Justice](#), Policy Department on Citizens' Rights and Home Affairs, [study](#), December 2017.

³⁷⁰ [Data Protection Act 2018](#), UK Parliament.

be accepted by the EU, as it insists the EU adequacy rules must apply in the future to data exchanges with the UK. However, an EU adequacy decision (now possible for law enforcement), finding that UK standards for data protection offer an adequate level of protection is characterised by several constraints. Among them, the length of reaching such decisions, as well as their temporary character: adequacy decisions are granted for a specific period of time and reviewed by the Commission after at least four years, meaning that the UK would have to keep up with the changes in EU legislation in this field, in order to maintain its adequacy status, and be indirectly bound by EU decisions and institutions in this area.³⁷¹ The Commission has proposed to include a guillotine clause on data protection in the EU-UK security agreement that would terminate the agreement if the EU's adequacy decision is withdrawn or is declared invalid by the CJEU.³⁷²

5.3.4. Other issues

Respect for fundamental rights and freedoms as enshrined in the EU Charter on Fundamental Rights and the European Charter on Fundamental Rights (ECHR) would also be a factor in shaping future EU-UK cooperation. The fact that the UK government managed to have the EU Charter removed from the scope of the EU Withdrawal Act,³⁷³ and a possible future UK withdrawal from the ECHR, would render police and judicial cooperation with the EU extremely difficult, in particular as regards extradition. The Commission therefore insists that all future cooperation arrangements will have to be set against appropriate safeguards regarding fundamental rights as set out in the ECHR, so that the risk of the UK lowering standards of protection for individuals is minimised. In this context, a key safeguard for the EU with regard to fundamental rights would be that the UK remains party to the European Convention on Human Rights (ECHR). The Commission proposes the insertion of a guillotine clause in the future EU-UK agreement which would see the agreement terminated should the UK leave the Convention, or be condemned by the European Court of Human Rights for non-execution of a judgment in the area concerned. The 12 July 2018 white paper clarified that the UK is committed to continued membership of the ECHR.³⁷⁴

Finally, the issue of dispute resolution will be essential for the future partnership.³⁷⁵ The Commission has proposed that effective enforcement and dispute settlement provisions, and a mechanism for ensuring the reciprocal application of the agreement, are included in the future agreement, while pointing out that there was a lack of clarity as to the UK's preferred dispute settlement mechanism.³⁷⁶ Currently, the CJEU has jurisdiction over all measures into which the UK opted-in, over Europol and the EAW, and the Commission can refer Member States to the CJEU over implementation failures. Ending CJEU jurisdiction was one of the main elements at the origin of the UK's request for derogations and it continues to be a red line for the UK government in its position on a future agreement. The UK pointed to EU agreements with third countries that are not subject to CJEU jurisdiction, but rather resort to independent arbitration (for instance the Europol agreements with Norway and with Switzerland). Another example is the EU-US umbrella agreement, which contains an alternative dispute settlement mechanism, or the Europol-US operational agreement.³⁷⁷ Indeed, the EU has not insisted on maintaining CJEU jurisdiction beyond a transitional period, consistent with EU agreements in this field with third countries. Some of those agreements

³⁷¹ E. Haves, [Proposed UK-EU Security Treaty](#), House of Lords Library Briefing, 1 February 2018.

³⁷² European Commission, [Police and judicial cooperation in criminal matters \(slides\)](#), 18 June 2018.

³⁷³ European Union (Withdrawal) Act 2018, 26 June 2018. See also: J. Blitz, [May seeks united Conservatives as Brexit strategy tested by Commons](#), *Financial Times*, 11 June 2018.

³⁷⁴ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

³⁷⁵ H. F. Carrapico, op. cit.

³⁷⁶ [Police and judicial cooperation in criminal matters \(slides\)](#), European Commission, 18 June 2018.

³⁷⁷ H. Deane, A. Menon, op. cit.

however do include provisions on taking account of each other's case law and dispute settlement.³⁷⁸ Experts consider that, given that the EU will need to continue to comply with CJEU case law, 'even if the future EU-UK security agreement has a separate arbiter, it will still indirectly need to follow the ECJ'.³⁷⁹

³⁷⁸ S. Peers, [UK/EU Security Cooperation After Brexit: the UK Government's Future Partnership Papers](#), EU Law Analysis Blog, 25 September 2017.

³⁷⁹ H. F. Carrapico, *op. cit.*

6. Foreign policy, defence and development cooperation

On foreign policy and defence, both sides in the negotiation are pursuing the option of reaching a deal as soon as possible after the exit day, prompted by the fact that during transition the UK would not be represented in the EU institutions, so it would not have a say in the EU's common foreign (CFSP) and defence (CSDP) policies which largely rely on unanimity.³⁸⁰ The possibility of reaching an earlier agreement regarding CFSP/CSDP, during the transition period, is also envisaged in the draft withdrawal agreement.³⁸¹ While observers consider that defining a future EU-UK partnership in these areas would be easier compared to trade and economic cooperation, some disagreement has already arisen with respect to UK participation in the EU space programme, which may negatively impact the talks.

6.1. The UK role in CFSP/CSDP

Irrespective of the government in place, the UK has long been a promoter of intergovernmentalism in the EU's common foreign policy and defence policy, opposing any proposals for reform of these policies in the direction of diminishing the role and powers of the Member States in favour of the EU institutions.³⁸²

Box 16 – The evolution of EU CFSP and CSDP

Established by the 1992 Maastricht Treaty as the EU's second pillar, the CFSP provides for intergovernmental cooperation between EU Member States on foreign policy and security issues. It covers EU Member States' joint actions and common decisions in all matters of foreign policy and external security (e.g. diplomatic cooperation, imposition of sanctions on third countries or on persons suspected of terrorism), including the development of a common defence policy (which would later become the CSDP). Through a series of institutional and procedural changes, the Lisbon Treaty attempted to increase the coherence and the effectiveness of the EU's external action, among others by abolishing the EU's pillared structure, strengthening the role of the 'double-hatted' High-Representative for CFSP who became also Vice-President of the Commission, and by creating the EU's diplomatic service, the European External Action Service (EEAS), which coordinates a network of more than 130 EU delegations in third countries.

The EU's CSDP developed more slowly: the UK and France agreed to create the European Security and Defence Policy only in 1998, with the goal of autonomous action for the EU in response to international crises (but without prejudice to NATO). The CSDP covers today the EU's military operations and civilian missions in the performance of what is known as the 'Petersberg tasks' (e.g. conflict prevention and peace-keeping tasks, post-conflict stabilisation in third countries etc.), as well as Member States' actions for improving and coordinating their defence capabilities. The Lisbon Treaty aimed to increase the potential of CSDP through more political and operational flexibility and introduced some new possibilities for cooperation in this field. Inter alia, the concepts of permanent structured cooperation in defence (PESCO) and of a European armaments policy are included in the Treaty; a mutual assistance clause is also introduced, as well as the possibility for a group of Member States to take the lead in implementing certain defence tasks when not all Member States want to get involved.³⁸³

Even after these reforms, both the CFSP and CSDP have maintained their specific intergovernmental characteristics, with unanimous decision-making in most cases and limited roles for the Commission, the European Parliament and the CJEU. Member States maintain control over the formulation and conduct of their national foreign policies. Furthermore, the possibilities offered by the Lisbon Treaty, in particular regarding CSDP, have not been fully used, although significant steps have been made in recent years.³⁸⁴

³⁸⁰ A. Barker, [EU and UK seek speedy Brexit deal on defence and security](#), *Financial Times*, 4 February 2018.

³⁸¹ See Article 122(2) of the [Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#), 19 March 2018.

³⁸² R. G. Whitman, [The UK and EU foreign and security policy: an optional extra](#), *The Political Quarterly*, Vol. 87, No 2, 2016.

³⁸³ C. Cîrlig, A. Dobрева, [Common Foreign and Security Policy](#), EPRS, European Parliament, 2 March 2016.

³⁸⁴ E. Lazarou, [European defence – A year on from the global strategy](#), EPRS, European Parliament, July 2017.

In CFSP and CSDP, the UK has been considered an 'awkward partner',³⁸⁵ participating, but also preventing a more integrated policy, always careful not to undermine its special relationship with the United States and the role of NATO. It has, however, used foreign policy cooperation within the EU as an influence multiplier and as a means to advance its national security interests and priorities in the global arena. The review of the balance of competences carried out under the 2010-2015 UK government evaluated the UK's participation in the CFSP positively, identifying as benefits the increased impact of acting in coordination with the other EU-27 countries; the EU's comprehensive approach, combining trade, development and other tools; as well as the international weight of the EU's single market, among others.³⁸⁶ Reaching an agreement with Iran over its nuclear programme and the Serbia-Kosovo dialogue are illustrations of EU foreign policy successes that also advance some of the UK's priorities. Furthermore, the UK has benefited from the EU's weight in imposing restrictive measures against third states or individuals under the CFSP. For example, the UK has actively supported the imposition and renewal of EU sanctions against Russia following the annexation of Crimea in 2014. At the same time, in strategic and policy documents, the EU was not mentioned as a central tenet of the UK's foreign policy, but considered as only one network of influence for the UK as a foreign policy actor.

As regards the CSDP, the situation is similar. Although the UK must be credited with the impetus for the early development of the CSDP, the policy has not turned into a central component of British defence planning, unlike NATO. Despite its significant capabilities and military power, the UK has provided a rather modest contribution to CSDP missions and operations. While it has participated in most CSDP civilian missions, the UK has however provided less personnel to EU military operations, preferring action through NATO.³⁸⁷ Moreover, it has also hindered further enhancement of the role and budget of the European Defence Agency (EDA),³⁸⁸ as well as the creation of a permanent EU operational headquarters for conducting CSDP missions and operations³⁸⁹ (national headquarters were put at the EU's disposal by certain Member States – including the UK – or the EU conducted these missions using NATO facilities).³⁹⁰ The UK has also recently begun to place more emphasis on developing bilateral security and defence relations, notably with France (e.g. the 2010 Lancaster House treaties focused on nuclear cooperation and interoperability of their armed forces).

Since the referendum in June 2016, UK government representatives have repeatedly made reference to 'Global Britain' as the vision for the UK's foreign policy post-Brexit. In adapting to the changes, the UK intends not to isolate itself from world affairs but to become 'a Britain with global presence, active in every region'. While the relationship with the EU will be a major priority, with the UK aiming 'to establish a new, deep and special partnership with the EU and European states', the UK's alliance with the United States will remain the 'top priority' and the 'cornerstone' of the UK's foreign policy objectives. The UK will also look towards the Indo-Pacific region, while trying to remain a key player in the Middle East, and collaborate with the EU with regard to the European neighbourhood. Also mentioned as UK interests are Africa, and a commitment to multilateralism through the UN, as well as the Commonwealth.³⁹¹ Many, including in the UK Parliament, have denounced 'Global Britain' as a slogan devoid of clarity and concrete policy proposals. While taking

³⁸⁵ P.J. Cardwell, [The United Kingdom and the Common Foreign and Security Policy of the EU](#), *Croatian Yearbook of European Law and Policy*, 13 (2017), pp. 1-26.

³⁸⁶ P.J. Cardwell, *op. cit.*

³⁸⁷ The UK is the seventh largest [contributor](#) to CSDP civilian missions and the fifth to CSDP military operations.

³⁸⁸ [Quick Guide](#), European Defence Agency, 2016.

³⁸⁹ A military planning and conduct capability was recently established within the EU military staff to command the EU non-executive military missions.

³⁹⁰ R. G. Whitman, [The UK and EU foreign, security and defence policy after Brexit: integrated, associated or detached?](#), *National Institute Economic Review* No. 238, November 2016.

³⁹¹ [Global Britain](#), House of Commons, Foreign Affairs Committee, 12 March 2018. See in particular the Appendix: [Memorandum](#) from the Foreign and Commonwealth Office.

note of the array of resources at the UK's disposal, UK parliamentarians have underlined the lack of clarity over 'what the Government believes the UK should do with these resources and assets in the post-Brexit environment, and how the UK should exercise leadership on the most urgent and complex issues facing the international system'.³⁹²

6.2. UK and EU views on the future partnership in CFSP/CSDP

Most experts believe that Brexit will lead to a lose-lose situation for both the EU and the UK, in terms of foreign policy influence, as well as in security and defence matters.

The UK is one of the two EU Member States with a permanent seat on the United Nations Security Council, and one of the two EU nuclear powers. It is also an influential member of other groupings, such as the G7 and G20, and has a wide network of embassies and consulates around the world. Moreover, the UK is a significant contributor to aid for development, and one of the few EU Member States reaching the official development aid (ODA) target of 0.7 percent of Gross National Income (GNI).³⁹³ In terms of defence, the UK is one of the strongest European military powers, the biggest EU military spender,³⁹⁴ having some military capabilities and (strategic) assets that are in short supply among the other EU Member States. It also has one of the most developed defence industries in Europe and globally.³⁹⁵ Not to be forgotten is its intelligence network, in particular the Five-Eyes Alliance with the US, Canada, Australia and New Zealand. All these characteristics have been repeatedly emphasised by UK representatives throughout the Brexit talks.

With the UK's withdrawal, the EU will therefore lose in terms of diplomatic weight and access to important UK capabilities, although some observers consider that Brexit would also provide an impetus for the EU to advance its cooperation on defence (with several important developments already underway),³⁹⁶ and allow the EU to acquire a larger role in international fora.

On the other hand, the UK will lose the multiplier force of action through the EU and access to the EU's comprehensive approach and wide range of policy tools, as mentioned above, as well as its influence in the EU decision-making process. It will also be less able to influence the destination of EU aid toward projects or countries of interest to the UK. Against this background, the EU and the UK have indicated they aim to preserve cooperation in foreign policy and defence after Brexit.

6.2.1. The UK's position

UK Prime Minister Theresa May has expressed her desire to conclude a future security partnership with the EU, which would be based on:³⁹⁷

- regular consultation and coordination in diplomatic fora, including cooperation on sanctions;
- on operational cooperation through possible UK contribution to EU missions and operations and to EU development programmes and instruments;
- on capability development, including a future relationship with the European Defence Fund and the European Defence Agency (see below).

³⁹² Ibid.

³⁹³ [Statistics on International Development 2017](#), UK Government, 16 November 2017. See also [Net official development assistance from DAC and other countries in 2017](#), OECD, April 2018.

³⁹⁴ [How much is spent on defence in the EU?](#), Eurostat, 7 June 2017.

³⁹⁵ N. Koenig, EU external action and Brexit: relaunch and reconnect, Policy Paper 178, Delors Institute, 22 November 2016.

³⁹⁶ ['EU remains committed to strengthen security and defence'](#): Council adopts Conclusions, press release, 18 May 2017 and [Implementation Plan on Security and Defence](#), EEAS, updated 1 March 2018.

³⁹⁷ [PM speech at Munich Security Conference](#), UK Government, 17 February 2018.

While working with the EU on foreign policy, security and defence, the UK will focus on strengthening bilateral cooperation with EU nations, and strive to preserve the centrality of NATO, as expressed in the government's white paper of February 2017.³⁹⁸ Among the EU Member States, France, Germany and Ireland were mentioned as priorities for the UK.³⁹⁹

In its paper on foreign policy, defence and development of September 2017, the UK government sets out its view on a future partnership with the EU which would be 'deeper than any current third country partnerships' and 'unprecedented in its breadth' and 'degree of engagement'.⁴⁰⁰ Regular consultation on foreign and security policy, including the option of agreeing joint positions and of cooperating on sanctions through information sharing as well as alignment in certain cases, is mentioned. The UK proposes to use 'existing foreign policy mechanisms' to cooperate in areas of common interest and on shared threats, including on counterterrorism. As regards defence issues, the UK expresses readiness to cooperate in the context of CSDP missions and operations, but with appropriate UK implication (proportionate to the level of its contribution) in the process of planning those EU missions. Future UK cooperation in European Defence Agency projects and initiatives, as well as participation in the Commission's European Defence Fund (including both the European Defence Research Programme and the European Defence Industrial Development Programme),⁴⁰¹ is also sought. Other aspects of the future partnership could consist, in the UK's view, of cooperation and alignment on development policy and programming, as well as 'continued cooperation on early warning, conflict prevention and stabilisation'. Finally, the UK wishes to offer: reciprocal exchange of foreign and security policy experts and military personnel; classified information exchange to support external action; and mutual provision of consular services in third countries where either EU Member States or the UK lack a diplomatic presence, and continued co-location of diplomatic premises.

The presentation given on the framework for the UK-EU security partnership from May 2018⁴⁰² to the Commission's Article 50 Task Force sets out three main areas of future cooperation on external security with some concrete proposals: consultation; coordination in the diplomatic, development and defence areas; and research and development cooperation on capabilities. The technical note of 24 May 2018 on consultation and cooperation on external security⁴⁰³ provides further details on what form the future EU-UK external security partnership might take. The white paper issued on 12 July 2018 confirms the previously stated objectives, adding that the future EU-UK cooperation in this area is likely to require 'a combination of formal agreements enabling coordination on a case-by-case basis'.⁴⁰⁴

In essence, the UK position aims at keeping the UK involved as much as possible in CFSP/CSDP decision-making structures and processes, despite the lack of precedent for such an involvement for non-EU Member States.⁴⁰⁵ Finally, the UK welcomes the possibility to already agree and implement the future arrangements on CFSP and CSDP during the transition period.

³⁹⁸ [The United Kingdom's exit from and new partnership with the European Union White Paper](#), UK Government, 2 February 2017.

³⁹⁹ Global Britain, [Appendix: Memorandum from the Foreign and Commonwealth Office](#), House of Commons Foreign Affairs Select Committee, 12 March 2018.

⁴⁰⁰ [Future partnership paper on foreign policy, defence and development](#), UK Government, September 2017.

⁴⁰¹ See for example, the [Summary](#) on the Legislative proposal regarding the establishment of a European defence industrial development programme, European Parliament, 2017/0125(COD).

⁴⁰² [Framework for the UK-EU Security Partnership](#), UK Government, May 2018.

⁴⁰³ [Technical note: Consultation and cooperation on external security](#), UK Government, 24 May 2018.

⁴⁰⁴ [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

⁴⁰⁵ [CSDP after Brexit: the way forward](#), Policy Department for External Relations, European Parliament, 22 May 2018.

6.2.2. The EU's position

The EU-27 have also stated their willingness to build a strong future partnership between the EU and the UK in the fields of foreign, security and defence policy. According to the European Council guidelines from March 2018, 'a future partnership should respect the autonomy of the Union's decision-making, taking into account that the UK will be a third country, and foresee appropriate dialogue, consultation, coordination, exchange of information, and cooperation mechanisms. As a pre-requisite for the exchange of information in the framework of such cooperation, a Security of Information Agreement would have to be put in place'. The guidelines do not offer more detail on these mechanisms. Some observers argue that the EU-27 are still discussing which model of association in foreign policy and defence could be offered to the UK.⁴⁰⁶ Certain EU members are said to be reluctant to accept a special partnership with the UK that would give a degree of influence over EU policy to a non-EU country or are concerned about establishing precedents for other third countries (e.g. Turkey).⁴⁰⁷

The EU's HR/VP Federica Mogherini has pointed to the fact that the EU and the UK share the same strategic interests and the need for both to remain as close as possible in this area, expressing confidence that the future was 'one of close partnership and cooperation'.⁴⁰⁸

The EU's chief negotiator, Michel Barnier, has also stated that close cooperation and an ambitious partnership between the EU and the UK are possible even as the UK becomes a third state.⁴⁰⁹ However, this cooperation would have to be organised differently to that which was possible during the UK's EU membership, therefore the UK will not have the same rights as an EU Member State. In particular, the UK will no longer participate in EU decision-making; no longer shape and lead the EU's collective actions; and British entities will no longer have the same rights as EU entities. In Barnier's view, the future partnership could include five dimensions:

- close and regular consultations with the UK on foreign policy, including on restrictive measures and shared assessment of geopolitical challenges;
- possibility for the UK to contribute to EU development aid programmes/projects, as well as to CSDP missions and operations;
- possibility for the UK to participate in EDA projects, keeping in mind that industrial defence cooperation is based on EU internal market rules (in particular as regards the European Defence Fund);
- information exchange on cyber-incidents;
- exchange and protection of classified information, including intelligence-sharing, with the conclusion of a security of information agreement as a precondition.

As early as January 2018, the European Commission put forward ideas on future cooperation with the UK in the fields of security, defence and foreign policy, followed in June 2018 by another presentation taking into account the UK's proposals from the previous month. The autonomy of the EU's decision-making process; ensuring a balance of rights and obligations and avoiding that a non-EU country has the same benefits as a Member State, also remain the core principles guiding the negotiations with the UK in these areas. Existing frameworks of cooperation with third countries will

⁴⁰⁶ N. Koenig, [Towards Norway Plus? EU-UK defence cooperation post-Brexit](#), Blog Post, Jacques Delors Institut Berlin, 7 February 2018.

⁴⁰⁷ Th. Henökl, [How Brexit affects EU external action: The UK's legacy in European international cooperation](#), Futures, Vol. 97, March 2018, pp. 63-72.

⁴⁰⁸ [Remarks by HR/VP Mogherini](#) at the EU Institute for Security Studies event on 'The future of EU foreign, security, and defence policy post Brexit', 14 May 2018.

⁴⁰⁹ [Speech](#) by Michel Barnier at the EU Institute for Security Studies conference, 14 May 2018. See also [Barnier pledges 'close' security partnership with UK after Brexit](#), J. Brunnsden, T. Buck, Financial Times, 14 May 2018.

also be taken into account, as well as the EU's own security interests.⁴¹⁰ Finally, while recognising a certain convergence between the EU and UK on the strategic objectives and the components of the future partnership, the Commission points to differences as to the modalities proposed to achieve the aims of the future partnership. In particular, some of the British requests, if accepted, would imply a change in the EU applicable rules. In the Commission's view therefore, the future relationship should: 'reflect the third country status of the UK; include scalable and proportionate mechanisms depending on the level of commitment of the UK alongside the Union on a case-by-case basis; include reciprocity where relevant; and be formalised'.

6.2.3. Towards new arrangements in CFSP/CSDP: main issues for the negotiations

The CFSP and CSDP, as mentioned, are less integrated policy areas than, for example, trade and even justice and home affairs and, as such, a certain flexibility may be possible from the point of view of EU law. Nevertheless, agreeing to a privileged status for the UK in particular by meeting its demands for closer involvement in the EU's decision-making process after Brexit would be difficult for the EU-27, against the background of maintaining EU autonomy in decision-making and its current relationships with third countries in these two areas. Whereas EU decision-making autonomy is non-negotiable, a special relationship with the UK has not been entirely dismissed by the EU. For example, Michel Barnier has mentioned rather ambiguously that UK's involvement in EU defence will 'confer rights and obligations in proportion to the level of this participation'.⁴¹¹ However, the EU would need to tread carefully, so as not to be seen as discriminating against other third country partners. On the other hand, as some EU partners (Norway, Turkey) have long demanded to be involved to a higher degree in some aspects of the CFSP and, in particular, CSDP, and the EU has already started a reflection process on this issue (see below), the negotiations with the UK may provide additional impetus for devising mechanisms for closer participation in the future, not only for the UK but also for some other EU third country partners.

6.2.4. Common Foreign and Security Policy coordination

When the UK leaves the EU, it will be excluded from EU decision-making in the CFSP area and will thereby lose its ability to influence policy from the inside or veto the development of policy.⁴¹² The EU does not allow any third country to participate in its decision-making structures – the European Council, Foreign Affairs Council, Political and Security Committee (PSC) and related working groups. Moreover, third countries do not take part in Member States' coordination meetings organised by EU delegations in third countries, or at international organisations.

The main challenge for the negotiations in this area will be to identify those mechanisms that allow for a large degree of coordination between the EU and the UK, without compromising the autonomy of the EU's decision-making and upsetting other third country partners. The Commission envisages two options: using the existing cooperation mechanism with third countries, or setting up a specific dialogue and consultation mechanism with the UK, considering its status as one of the permanent five members of the UN Security Council.

The UK set out its proposals in May 2018 as regards the future cooperation arrangements. Accordingly, the EU and UK should establish a framework of consultation and cooperation on shared global challenges, up to leader level, to be flexible and thematic, as well as including a day-to-day exchange of views with Member States and EEAS. In crises situations, the UK proposes intensified

⁴¹⁰ [Slides on Security, Defence and Foreign Policy](#), European Commission, 24 January 2018; [Foreign, security and defence policy \(slides\)](#), European Commission, 15 June 2018.

⁴¹¹ Policy Department for External Affairs, European Parliament, op. cit.

⁴¹² R. G. Whitman, [The UK and EU foreign, security and defence policy after Brexit: integrated, associated or detached?](#), National Institute Economic Review, No 238, November 2016.

cooperation, including on consular protection. The EU-UK partnership should also include coordination of foreign policy levers; joint positions, statements and actions; UK support for EU programmes and election observation missions; as well as coordination in international organisations. The UK therefore proposes regular cooperation and consultation:

- with the EEAS : regular, day-to-day exchanges of views with the EEAS, including at Secretary General and Political Director levels, as well as thematic and geographic consultations at Director level, including with the Commission, where appropriate; weekly dialogues between the PSC Chair (a representative of the EEAS) and the UK Mission in Brussels;
- with the EU-27: the UK could attend ad hoc meetings of the Foreign Affairs Council in informal sessions or attend sessions of informal Council meetings; and ad hoc meetings with the PSC in informal sessions;
- in third countries or at international organisations: through regular contact between the EU Head of Delegation and the UK embassy or other diplomatic mission; ad hoc attendance at informal session of EU Heads of Mission meetings; and working level consultation with the EU in multilateral fora, such as the UN, G20, etc.
- on intelligence and analysis sharing: through the European Union Intelligence and Situation Centre (INTCEN), where the UK could establish a permanent liaison.

These consultations would lead to the possibility of joint outcomes, including joint statements, joint positions or *démarches*, as well as mutually supportive interventions or positions.

In its June 2018 paper to the EU-27, the Commission mentions that a future consultation mechanism on foreign policy should be: **reciprocal** (in scope, depth and timing of consultation); **scalable or proportionate** (political dialogue on geographic and thematic issues at various levels – Ministers, senior officials etc., but also intensified dialogue in crisis situations, or on the basis of a political UK commitment to engage with the EU in a specific policy field); formalised, for reasons of predictability, transparency, manageability and accountability; and finally, **centralised** (headquarters) or **local** – in third countries and international organisations – where the consultation organised by the EU delegations should facilitate a coordinated EU-27 and UK approach.⁴¹³

Regarding intelligence cooperation in particular, the Commission has proposed a mechanism that would allow timely and in-depth exchange of intelligence and sensitive information between the EU and the UK through: close interaction with UK points of contact and experts in specific fields; possible use of electronic networks to facilitate sensitive information exchange; and an administrative arrangement with the EU Satellite Centre to have access to products, services against cost-recovery, as well as the possibility to second imagery analysts. The Commission pointed out that the UK proposal to assign a permanent liaison presence to the EU's INTCEN but also to the EU Military Staff would amount to a status quo situation that would give the UK a similar treatment to EU Member States.

Box 17 – Foreign policy arrangements with third countries

Current arrangements with third countries vary in terms of institutionalisation and frequency of dialogue. For example, **Norway** does not have any formal agreements with the EU on foreign policy, however consultation takes place regularly, in particular with the EEAS, the EU Member States, and through ad hoc consultation with the EU's HR/VP. Moreover, in the context of the EEA Agreement, there is a biannual political dialogue on foreign policy issues. The EU also invites Norway and the other EFTA partners to consultations with the Council Working Groups. Norway is invited to align itself to EU common positions and declarations, which it generally does.⁴¹⁴

⁴¹³ [Foreign, security and defence policy \(slides\)](#), European Commission, 15 June 2018.

⁴¹⁴ [Norway and the EU: Foreign and security policy](#), Mission of Norway to the EU.

Another example is **Ukraine**, which has concluded an Association Agreement with the EU. The EU-Ukraine Agreement includes a political chapter setting out the objectives of foreign and security policy cooperation between the two, as well as the institutional fora for dialogue.⁴¹⁵ It contains commitments of the Parties to 'intensify their dialogue and cooperation and promote gradual convergence in the area of foreign and security policy, including the Common Security and Defence Policy (CSDP), and shall address in particular issues of conflict prevention and crisis management, regional stability, disarmament, non-proliferation, arms control and arms export control as well as enhanced mutually-beneficial dialogue in the field of space.' The institutional framework includes: regular political dialogue meetings at summit level; ministers' meetings within the Association Council (body set up by the Agreement), as well as meetings at foreign minister level; regular meetings at Political Director, Political and Security Committee and expert level, including on specific regions and issues; appropriate contacts in third countries and in international fora; regular meetings both at the level of high officials and of experts of the military institutions of the Parties; and finally any other mechanisms for political dialogue, including extraordinary consultations, are to be set up by mutual agreement. As in the case of Norway, there is a high degree of alignment on the part of Ukraine with the EU's statements and declarations on international and regional issues.⁴¹⁶

Restrictive measures (CFSP sanctions)

Restrictive measures are one of the areas where diplomatic cooperation between the EU and the UK would be necessary. The EU makes use of restrictive measures or sanctions as an essential foreign policy tool. CFSP sanctions may be imposed on governments of third countries, but also on entities, groups and organisations, as well as on individuals which are suspected of terrorist activities. These can take the form of arms embargos, trade restrictions, asset freezes and travel bans. The EU can impose sanctions autonomously, but applies also all sanctions decided by the UN Security Council (which are converted into EU law). The EU Member States are responsible for implementation.⁴¹⁷ Currently, the EU imposes restrictive measures in relation to over 30 countries, and terrorism-related sanctions against entities, organisations/groups and individuals. Whereas arms embargos and travel bans based on a Council CFSP decision (based on Article 29 TEU) are implemented directly by the Member States, economic sanctions such as asset freezes falling under trade and internal market competences require additional legislation, through an EU regulation (with direct effect) adopted by the Council on the basis of a joint proposal from the HR/VP and the Commission (according to Article 215 TFEU).⁴¹⁸

Box 18 – The UK Sanctions and Anti-Money Laundering Act

In light of Brexit, the UK has developed its own national powers to impose sanctions.⁴¹⁹ The UK government's Sanctions and Anti-Money Laundering Act provides the UK with a national sanctions legal framework and policy (it also updates the national anti-money laundering regime). The European Union Withdrawal Act copies existing EU-derived sanctions measures into UK law. The sanctions legislation will allow names to be added and removed to this retained EU law and provides a legal basis for imposing new sanction regimes. The Act replicates existing EU powers to impose sanctions, but with some changes, in

⁴¹⁵ See Title II on Political dialogue and reform, political association, cooperation and convergence in the field of foreign and security policy, EU-Ukraine [Association Agreement](#), OJ L 161, 2014.

⁴¹⁶ See for example: [EU-Ukraine Association Council - Joint communiqué](#), 8 December 2017.

⁴¹⁷ Please see [The EU Sanctions Map](#), Council of the EU, last update 16 May 2018; the Consolidated list of persons, groups and entities subject to EU financial sanctions, EEAS, last update 16 May 2018; [Sanctions](#), Service for Foreign Policy Instruments, European Commission.

⁴¹⁸ C. Cirlig, [Counter-terrorist sanctions regimes: Legal framework and challenges at UN and EU levels](#), EPRS, European Parliament, October 2016.

⁴¹⁹ See the [Sanctions and Anti-Money Laundering Act](#). For a complete overview of its provisions, see B. Smith, [The Sanctions and Anti-Money Laundering Bill 2017-19](#), House of Commons Library Briefing Paper CBP- 8232, 15 February 2018.

particular in order to give greater flexibility to impose sanctions, to create a more effective licensing system and to establish own guidance on compliance.⁴²⁰

In the UK's view, in the future, the EU and UK could share information, expertise and technical support for the substantiation of EU and UK sanctions designations, as well as closely cooperate and consult each other on the development and adoption of measures, to ensure the effectiveness of sanctions. In particular, consultation and cooperation on sanctions could include:

- exchange of information on listings and their justification;
- UK-EU sanctions dialogue; and
- intensive interaction when one of the parties is trying to adopt mutually supportive sanctions, including in crisis situations.

Maintaining cooperation with the UK on restrictive measures is also in the EU's interest, as the EU-27 will lose the UK's significant expertise in designing and substantiating the sanctions listings. While the EU's sanctions policy will be formulated on the basis of EU-27 interests, the EU will seek a coordinated approach with the UK to avoid diverging sanctions regimes, as the UK also benefits from the weight of the EU in the imposition and implementation of sanctions.⁴²¹ In the Commission's view, consultation with the UK on sanctions should aim at facilitating early information-sharing, minimising the risk of divergence and also eventually enable UK convergence with EU sanctions policy. The mechanism for consultation on foreign policy should comprise a formalised regular EU-UK sanctions dialogue (on EU and UK sanctions policy and practice; on the sanctions regimes in place and regarding the exchange of good practices), but also intensified dialogue and in-depth interaction at all appropriate policy stages, in situations when sanctions are reviewed, or new sanctions are imposed, or when existing sanctions regimes are lifted, provided that 'the UK commits to align with the EU foreign policy objectives that underpin the restrictive measures in question'.⁴²²

Experts consider, however, that sanctions are a 'highly complex issue to be resolved' in the EU-UK negotiations, due to the fact that restrictive measures are not a purely CFSP related matter, but are connected also to the internal market, as explained above.⁴²³ Some took the view that an institutional arrangement would be necessary to allow the UK to remain aligned to EU sanctions policy, but also to be involved in the design of new measures, having regard to its important role so far in designing sanctions and identifying their targets, and avoid the risk of 'sanctions dumping'. In this context, a 'new institutional formula of EU-27+1 in shaping and co-implementing sanctions' was suggested by some academics. In any case, clear mechanisms for cooperation will be critical for the credibility and effectiveness of the common EU-UK efforts in this area.⁴²⁴

Box 19 – EU coordination with third countries on sanctions

At present, the EU and third countries coordinate on sanctions in the following ways:⁴²⁵

- with the **USA**, there is formal EU-US coordination based on regular meetings and information sharing, exchange of best practices, and updates on new and existing sanctions regimes. The EU usually aligns to US sanctions;
- in the case of **non-EU European partners**, the EU invites partners to align to a new sanctions regime, after the decision has been taken at EU level. They are not involved in the EU decision-making process and there is no legal obligation for them to align to an EU restrictive measure.

⁴²⁰ B. Smith, [The Sanctions and Anti-Money Laundering Bill 2017-19](#), House of Commons Library Briefing Paper CBP-8232, 15 February 2018.

⁴²¹ [Slides on Security, Defence and Foreign Policy](#), European Commission, 24 January 2018.

⁴²² [Foreign, security and defence policy \(slides\)](#), European Commission, 15 June 2018.

⁴²³ P.J. Cardwell, [The United Kingdom and the Common Foreign and Security Policy of the EU](#), *Croatian Yearbook of European Law and Policy*, 13 (2017), pp. 1-26.

⁴²⁴ E. Moret, F. Pothier, [Sanctions after Brexit](#), *Survival* (00396338), Vol. 60 Issue 2, April 2018, pp.179-200.

⁴²⁵ Ibidem.

Switzerland coordinates through diplomatic channels with the EU regarding the implementation and enforcement of sanctions with which it chooses to align. Norway engages with the EU through dialogue on sanctions, but coordination and consultation are not regular or formalised. When it decides to align with an EU sanctions regime, Norway translates the Council's act enacting the sanctions, with modifications, into domestic law.

One important aspect when it comes to sanctions is the role of the CJEU. While in CFSP and CSDP matters the Court has a very limited role, it does have jurisdiction over sanctions issues. According to Article 275 TFEU, the CJEU has the power to review the legality of CFSP decisions providing for restrictive measures against natural or legal persons, but also of the EU regulations providing for the freezing of assets in implementation of CFSP decisions. The risk of divergence after Brexit will be real, as many challenges to EU sanctions before the CJEU are successful, leading to the removal of those sanctions, and probable consequences on capital movement between the EU and the UK.⁴²⁶

The exchange of classified information: a cross-cutting issue

According to both the EU and the UK, the future exchange of classified information in the framework of this partnership (including on sanctions or intelligence, but also regarding CSDP cooperation) should be based on a **security of information agreement** (SoIA). The EU has concluded SoIA agreements with around 20 countries and international organisations on the security of classified information, including the EU's neighbouring countries, the USA, Australia, and organisations such as NATO or the European Space Agency. In general, these agreements provide for the protection of classified information exchanged between the parties, they indicate the corresponding security classifications in the EU and in the third country or international organisation and establish the procedures for the exchange of such information.⁴²⁷

The UK published a technical note on the exchange and protection of classified information in May 2018.⁴²⁸ In its view, a SoIA with the EU should not prejudice existing or future bilateral agreements between the UK and EU Member States, and should cover a wide range of areas, essential among which are CSDP missions and operations, the EU's INTCEN,⁴²⁹ and cyber-threat reporting. The UK has indicated that the agreement with Canada is a useful model. In the UK's view, the SoIA sets out the general legal framework for the exchange of information, while further details may be set out in other supporting implementing arrangements – which may also serve to address specific programmes or topics. In this context, the UK is seeking specific arrangements at least as regards Galileo (see below). The UK will also seek appropriate arrangements for the exchange and protection of sensitive non-classified information.

6.2.5. Common Security and Defence Policy

A framework for consultation and coordination would also be needed with respect to UK possible participation in CSDP missions and operations, as well as in EU capability development programmes. However, no comprehensive EU framework applies to cooperation with third countries in CSDP, but instead different instruments and various degrees of involvement of third countries exist.⁴³⁰ Moreover, whereas the UK is seeking a certain degree of participation in the EU decision-making

⁴²⁶ S. Peers, [UK/EU Security Cooperation after Brexit: the UK Government's Future Partnership Papers](#), EU Law Analysis blog, 25 September 2017.

⁴²⁷ [Database of International Treaties and Agreements](#), Council of the EU.

⁴²⁸ [Technical note on the exchange and protection of classified information](#), UK Government, 24 May 2018.

⁴²⁹ [EU Analysis Intelligence Centre](#), formerly named EU Joint Situation Centre (SitCen) and based in the Council Secretariat since 1999, is now part of the EEAS. Its role is to provide 'intelligence analyses, early warning and situational awareness' to EU institutions and Member States in the fields of security, defence and counter-terrorism.

⁴³⁰ Policy Department for External Affairs, European Parliament, op. cit.

process, the Commission has already stated some red lines, in the field of **CSDP**, that apply in general to cooperation with third countries:⁴³¹

- no UK participation in Council (EU ministers) or Political and Security Committee (EU ambassadors) meetings;
- no lead as Battlegroup framework nation or in CSDP missions and operations;
- no provision of EU operation headquarters by the UK;
- participation in permanent structured cooperation (PESCO) by invitation only, under the criteria for third countries and subject to Council (in PESCO format) approval,⁴³²
- no participation in the management of the European Defence Agency; and
- no benefits from the European Defence Fund (EDF) equivalent to those of Member States.

As regards the UK, in the latest papers on cooperation with the EU on foreign policy and defence, the government has conditioned the potential scope of UK contributions to CSDP on the depth of the future arrangements. Accordingly, the UK proposes, based on the model of the suggested cooperation in CFSP, inter alia, regular political-military dialogue and consultation through participation in ad hoc meetings in informal sessions of the PSC and of the EU Military Committee; ad hoc participation in Council (meetings of the defence ministers) informal sessions or attending sessions of informal Councils; joint awareness and analysis through a permanent UK liaison to the EU military staff and INTCEN. The UK also seeks, as described below, a certain influence over CSDP missions and operations, to a greater extent than current EU cooperation with third countries allows, as well as a reinforced role through specific EU-UK consultation and dialogue as regards capability development.

CSDP missions and operations

Currently, third countries are invited to contribute to CSDP missions and operations⁴³³ – and around 45 non-EU countries have taken part in such missions and operations since their launch – but without decision-making powers over the operational plans of those missions; they are also involved rather late in the process of establishing the mission, and after the approval of their participation by the PSC. A committee of contributors is set up after a mission or operation is launched, which includes the contributing third countries, but even then, their involvement is reduced in comparison to the role of EU Member States.⁴³⁴ On the other hand, it is clear that third country contributions to CSDP missions and operations have been rather limited, although essential to filling some EU capability gaps. As mentioned, the UK has made a rather modest contribution to such missions and operations compared to its capabilities, and it remains to be seen to what extent it would want to participate as a third country in CSDP missions and operations.

According to the UK position, the UK could continue to cooperate with the EU on CSDP missions and operations, when in the mutual interest and ensuring independent decision-making for the EU and the UK. As mentioned, the scope of UK contributions would depend on the arrangements defined. The UK would therefore be willing to contribute, on a case-by-case basis, personnel, assets and expertise to such missions and would be willing to host the operational headquarters. In support of EU deployments, the UK could make important niche capabilities available, such as strategic airlift, and could cover the common costs and specific mission costs of its participation in a particular CSDP mission or operation on the same basis as other third states. However, it would seek ad hoc consultations in informal sessions at all political and military levels (Council, PSC, EU

⁴³¹ [Slides on Security, Defence and Foreign Policy](#), European Commission, 24 January 2018.

⁴³² [Council Decision \(CFSP\) 2017/2315](#) of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States, OJ L 331, 2017.

⁴³³ [CSDP handbook](#), European Security and Defence College, Vol. I, Third Edition, 2017.

⁴³⁴ T. Tardy, [CSDP: getting third states on board](#), EU ISS, March 2014.

Military Committee) in exchange, as well as UK participation in the Committee of Contributors set up for missions and operations. This latter request is in line with the current practice of involving third countries in CSDP missions and operations. Moreover, the UK seeks full involvement in force generation and calls for contributions, including a possible ongoing contribution to the EU force catalogue. The UK also makes the case for sharing classified and sensitive information to support EU planning and situational awareness. In particular, the UK proposes embedding experts and liaison staff in the EU military staff and EEAS, sharing of early planning documents for missions and operations and allowing the UK to provide input prior to the EU's decision to launch a mission. It will have to be seen to what extent the UK could be allowed to provide such input as a third country.⁴³⁵ Finally, the UK offers to provide diplomatic support to the EU as regards crisis management operations in other third countries.

In the EU's view, the future UK **contribution to CSDP missions and operations** would be based on one of three options: a framework participation agreement (FPA), an ad hoc agreement or a new model for cooperation.⁴³⁶

- **Framework participation agreements:** offer a longer term solution for operational cooperation in crisis management between the EU and other third states, rather than concluding agreements on a case-by-case basis. FPAs have been concluded by the EU with some 18 countries⁴³⁷ and represent the legal basis for these countries' participation in CSDP missions and operations, including provisions on the status of personnel and forces, the modalities of information exchange, the involvement of third states in the decision-making process and conduct of the operations, as well as financial aspects, both for civilian and military operations.⁴³⁸ The contribution of third states to CSDP operations is 'without prejudice to the decision-making autonomy of the Union'.
- **Ad-hoc agreements:** are concluded on a case-by-case basis, establishing the conditions for the participation of a third country in a specific CSDP mission or operation.⁴³⁹
- A **new and more ambitious framework** applicable to third countries: developing any more advanced model for cooperation with the UK should, in the EU's view, mean it is also made available to other third countries. Indeed, it is a longstanding demand from some third countries, such as Norway which already has a close cooperation with the EU in the field of foreign policy and defence, that the EU allow for 'closer involvement in discussions, 'decision-shaping' and information sharing as regards CSDP operations and missions. A more tailored approach based on differentiation between various partner countries, taking into consideration their individual characteristics has been called for.⁴⁴⁰ In this context, the closer involvement offered by NATO to some partner countries has been underlined (e.g. Finland and Sweden which have the status of 'enhanced opportunities partners' in NATO, and are extensively involved in relation to operations and policy deliberations).⁴⁴¹ A reflection process has also begun among EU

⁴³⁵ It appears that the EU is unwilling to renew seconded UK military personnel to EU bodies after Brexit. See D. Bond, A. Barker, [UK military secondments to EU to cease after Brexit](#), *Financial Times*, 6 June 2018.

⁴³⁶ [Slides on Security, Defence and Foreign Policy](#), European Commission, 24 January 2018.

⁴³⁷ T. Tardy, [CSDP: getting third states on board](#), EU ISS, March 2014. See also [List of FPAs](#) with third countries, Council of the EU.

⁴³⁸ E.g. [Framework Agreement](#) between the United States of America and the European Union on the participation of the United States of America in European Union crisis management operations.

⁴³⁹ E.g. [Agreement](#) between the European Union and Montenegro on the participation of Montenegro in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta).

⁴⁴⁰ Please see Speech of State Secretary Tone Skongen, [Norwegian Security Policy – including participation in the CSDP](#), 28 February 2018 and [Foreign and security policy](#), Mission of Norway to the EU.

⁴⁴¹ See: [Partnership tools](#), NATO, last update 24 June 2016.

Member States, with a view to developing a more strategic approach to CSDP third country partners. In its May 2017 conclusions, the Council underlined the importance of 'associating contributing partners as closely and as early as possible to the conduct of these missions and operations', but nevertheless 'in full respect of the EU's institutional framework and its decision-making autonomy'.⁴⁴² In particular, the EU would maintain regular dialogue with those countries with an FPA and regularly contributing to CSDP missions and operations, and inform them with regard to CSDP developments, while continuing work on facilitating their participation in CSDP missions and operations.

The FPA option has subsequently been highlighted by the Commission as the preferred mechanism for the UK's participation in CSDP missions and operations. What seems to be new is the Commission's vision of a scalable arrangement: conditional on a confirmed UK political commitment to **significantly** (in qualitative or quantitative terms) contribute to a CSDP mission or operation, the EU's interaction with the UK should intensify 'at relevant stages of the planning process, to allow the UK to best tailor its contribution and provide timely expertise to the EU'. The UK would participate in the Committee of Contributors of the CSDP mission or operation and in the force generation conference. The UK could also second staff to the operational headquarters of the mission or operation, in proportion to the UK contribution.⁴⁴³

The UK should also be able to participate in the EU's Battlegroups (the EU's rapid reaction force), according to the Commission. Some third countries – such as Norway, Ukraine, Serbia – have indeed contributed to the EU Battlegroups.⁴⁴⁴ In March 2018, the UK officially withdrew its battlegroup offer for the second semester of 2019 – for which it was a lead nation – in view of Brexit uncertainties.⁴⁴⁵ In this context, some UK officials are quoted as saying that future UK involvement in the EU Battlegroup programme will depend on whether the UK can negotiate greater involvement in decision-making and control than other third states over EU missions and operations in general. Officially, the UK has also indicated openness to future contributions to EU Battlegroups.

The UK has, however, joined a new initiative spearheaded by France – the European Intervention Initiative (EII) – alongside other EU Member States: Germany, Belgium, Denmark, the Netherlands, Estonia, Spain and Portugal. Established on 25 June 2018, the EII aims at ensuring coordination among national armed forces, as well as rapid reaction in critical situations, and is outside both the EU and NATO structures. As such, Brexit will have no consequences on full UK involvement in the EII.⁴⁴⁶

Capability development

Interest has been expressed from both the EU and the UK to continue cooperation in the field of capability development. In particular, both parties have indicated that an agreement between the UK and the European Defence Agency to work on specific capability projects would be appropriate. Furthermore, the UK expressed interest in participating in some recently established EU initiatives, such as the European Defence Fund, comprised of a research strand and a European Defence Industrial Development Programme, as well as in PESCO projects. Moreover, due to the UK's existing integration into the European Defence Technological and Industrial Base (EDTIB), the UK believes

⁴⁴² [Conclusions on Security and Defence in the context of the EU Global Strategy](#), Council of the EU, 9178/17, 18 May 2017.

⁴⁴³ [Foreign, security and defence policy \(slides\)](#), European Commission, 15 June 2018.

⁴⁴⁴ [EU Battlegroups](#), EEAS, Fact Sheet, 5 October 2017.

⁴⁴⁵ T. McTague, D. M. Herszenhorn, [Britain pulls out of EU defense force](#), *Politico Europe*, 20 March 2018.

⁴⁴⁶ D. Boffey, [Nine EU states sign off on joint military intervention force](#), *The Guardian*, 25 June 2018. See also: A. Gorka, [The European Intervention Initiative: a New Military Force Established in Europe](#), Strategic Culture Foundation, 27 June 2018; A. Pannier, [France's Defence Partnerships and the Dilemmas of Brexit](#), Policy Brief, German Marshall Fund, 30 May 2018.

that the future partnership should not disrupt supply chains, should support the operation of EU and UK defence companies and not disadvantage companies with EU-UK ownership.

➤ European Defence Agency (EDA)⁴⁴⁷

The possibility of concluding an administrative arrangement between the UK and the European Defence Agency (all Member States participating, except Denmark who has an opt-out) setting out specific areas of cooperation has been highlighted by both the EU and the UK. EDA cooperates with third countries and organisations by way of administrative arrangements (negotiated by the Head of the EDA and approved by the European Council), allowing the participation of these third partners in EDA projects and programmes. The EDA has arrangements in place with Norway (2006), Switzerland (2012), the Republic of Serbia (2013) and Ukraine (2015), as well as with organisations such as the Organisation for Joint Armament Cooperation (OCCAR), the European Space Agency and a cooperation arrangement with the European Aviation Safety Agency.

Should such an administrative arrangement with EDA be concluded after Brexit, the UK would have the possibility of participating in EDA projects and programmes as a third country without having to contribute to the agency's common costs.⁴⁴⁸ In 2016, the UK was the second largest contributor among the 27 participating Member States – of around €5 million – to the common costs of the Agency, after Germany.⁴⁴⁹ In the UK's view, an administrative arrangement with the EDA would enable: UK participation in EDA projects; a coordinated approach to European capability development and planning, including through prior consultation on capability development priorities and UK input into EU capability planning processes. In this context, the UK proposes a regular strategic dialogue on capability collaboration and industrial development; consultation on capability planning processes; ad hoc invitations to the EDA Ministerial Steering Boards, as well as ad hoc UK attendance at EDA Directors' meetings. In a wider perspective, a dialogue with the Commission would be established, with the objective of managing UK engagement in EDF projects (see below); as well as an exchange of expertise, including through a permanent UK liaison presence at EDA, as well as at the Commission. Access to sensitive information and commercial opportunities would be prerequisites for UK contributions to capability programmes.

In the Commission's view, while an administrative arrangement would allow for British participation in EDA ad hoc projects and working groups, the UK would be excluded from EDA management structures: EDA is governed by a Steering Board made up of the Head of the Agency, all EU Member States' defence ministers except Denmark and a Commission representative. However, based on EDA rules and procedures, the Commission envisages that the UK could possibly be invited to EDA steering boards/directors meetings (National Armaments Directors/Capability Directors/Research and Technology Directors), 'on a case-by-case basis and for items of common interest, without a decision-making role'.⁴⁵⁰ In addition, the UK would have the possibility to second personnel to the EDA.⁴⁵¹

It should be noted that the UK is also a member of the Organisation for Joint Armament Cooperation (OCCAR) together with France, Belgium, Germany, Italy and Spain, and of the Letter of Intent (LoI)

⁴⁴⁷ Please see [Member States](#), and [Long term review of the agency – conclusions and recommendations](#), EDA, 18 May 2017.

⁴⁴⁸ Third countries contribute to the costs of the programmes or projects in which they take part, on the basis of contractual arrangements (see for example the [EDA-Switzerland administrative agreement](#)). Third country participation in EDA ad hoc activities related to wider EU policies needs to be consistent with the relevant rules defined in the relevant EU regulations.

⁴⁴⁹ [2016 Annual Accounts](#), European Defence Agency, 30 June 2017.

⁴⁵⁰ [Foreign, security and defence policy \(slides\)](#), European Commission, 15 June 2018.

⁴⁵¹ Ibidem.

Framework Agreement with France, Italy, Germany, Spain and Sweden.⁴⁵² Both organisations, founded by intergovernmental agreements outside of the EU framework, have the objective of reinforcing European industrial defence cooperation through the management of common armaments programmes (OCCAR) and devising common regulatory and legislative procedures in this field (LOI/FA). However both have developed a close cooperation with EDA, and their continued functioning with the UK as a member may require some changes in the light of Brexit. Should OCCAR, for example, transform into an EU agency for military acquisitions in the future, then UK membership as a third country would raise some problems.⁴⁵³

➤ PESCO

The recently launched **PESCO** – one of the most important steps taken by 25 EU Member States in the field of defence cooperation – will focus on 17 projects agreed in March 2018 (e.g. European Medical Command), with others to be agreed later in 2018.⁴⁵⁴ Capabilities developed under PESCO remain in the ownership and control of the participating Member States. The UK has decided not to take part in PESCO for the time being. The UK government has however expressed a view that PESCO should keep open options for cooperation with third countries, and as mentioned above, has declared its readiness to participate in PESCO projects in the future.⁴⁵⁵ The governance structures for third-party participation are to be determined by the Council in PESCO format, and thus without the UK, by December 2018. According to the Council decision establishing PESCO, the general conditions for third-country participation – which may include an administrative template – will set out the requirements with which third states invited to take part in a specific project must comply.⁴⁵⁶ If the Council decides that the third country complies with the requirements, the administrative arrangements may be concluded between the participating states that will however 'respect the procedures and the decision-making autonomy of the Union'. Third countries will have thus no decision-making rights within the PESCO framework. The Commission further took the view that UK participation in PESCO projects should be decided 'on a case-by-case and exceptional basis by the Council in PESCO format, where it significantly participates in the fulfilment of the Union's level of ambition'; should the UK participation go beyond exceptional invitation, then the UK would receive better treatment than EU Member States themselves.⁴⁵⁷

It should be also noted that some of the PESCO projects could potentially be part-funded through the newly established **European Defence Fund** (EDF) and at a higher rate of EU financing (30 %) than that available to other collaborative projects set up with EDF funding (20 %).⁴⁵⁸

➤ The European Defence Fund (EDF)

⁴⁵² [Framework Agreement](#) between The French Republic, The Federal Republic of Germany, The Italian Republic, The Kingdom of Spain, The Kingdom of Sweden and The United Kingdom of Great Britain and Northern Ireland Concerning Measures to Facilitate the Restructuring and Operation of the European Defence Industry, 27 July 2000.

⁴⁵³ A. R. Ungaro, D. Fattibene, [L'impatto della Brexit per la difesa europea e transatlantica: tanti dubbi e poche certezze](#), Istituto Affari Internazionali, No 123, November 2016.

⁴⁵⁴ E. Lazarou, [Permanent structured cooperation \(PESCO\): Beyond establishment](#), EPRS, European Parliament, 9 March 2018.

⁴⁵⁵ One project of interest for the UK is the facilitation of military mobility across the EU, which combines cooperation in the PESCO framework with Commission action, for example in the area of transportation and customs. Therefore even if the UK participated in the relevant PESCO project, the application of other measures, such as customs relief, would probably apply only to the members of the internal market and the customs union. See: [Action Plan on military mobility: EU takes steps towards a Defence Union](#), European Commission, 28 March 2018; [Military Mobility in the EU](#), House of Commons European Scrutiny Committee, documents considered by the Committee on 2 May 2018.

⁴⁵⁶ [Council Decision \(CFSP\) 2017/2315](#) of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States, OJ L 331, 2017.

⁴⁵⁷ [Foreign, security and defence policy \(slides\)](#), European Commission, 15 June 2018.

⁴⁵⁸ C. Mills, [EU Defence: the realisation of Permanent Structured Cooperation \(PESCO\)](#), Commons Briefing papers CBP-8149, 2 May 2018.

Another important development in strengthening EU defence policy, the EDF was set up in June 2017 to support investment in joint research and the joint development of defence equipment and technologies.⁴⁵⁹ In its proposal for the next multiannual financial framework the Commission endows the EDF with €13 billion in support of a European defence research programme and collaborative capability development (a European Defence Industrial Development Programme (EDIDP) for new defensive technologies and Member State financing of joint defence acquisitions).⁴⁶⁰ Until 2020, the research pillar of the EDF was allocated €90 million from the EU budget, while, through the capability development pillar, up to €500 million are available for co-financing from the EU budget. The only non-EU country currently participating in the EDF, in the research part only, is Norway (as an EEA member state applying EU legislation on research and technological development). Norway has also expressed a desire to be included in the EDIDP for the development of capabilities (Norway would cover its own participation costs).⁴⁶¹ The UK, as mentioned above, has stated its aim to participate in both pillars of the EDF in the future. According to the Commission such participation would be possible under the conditions available to third countries (still to be decided at EU level);⁴⁶² furthermore, the 'industrial security and security of supply of the cooperative projects supported by the Fund should be preserved'.⁴⁶³

➤ Galileo

One contentious issue has arisen in negotiations with respect to **Galileo/EGNOS**, the European satellite navigation system managed jointly by the Commission and the European Space Agency (an intergovernmental body made up of 22 Member States, of which 20 are also Members of the EU).⁴⁶⁴ The Commission takes the view that, after Brexit, UK companies' access to sensitive security information related to the Galileo programme should be restricted, an idea contested by the UK, in light of its consistent contribution to the programme so far. For the future, the Commission has proposed a cooperation agreement with the UK on Galileo, as well as an agreement on access to Galileo's Public Regulated Service or PRS (encrypted signals with controlled access for specific users such as governmental bodies). As Michel Barnier recently explained, after Brexit, EU-UK cooperation on Galileo would have to be put on a new basis, as the EU's rules on Galileo – adopted with the UK as a Member State and meant to protect the EU's autonomy and security interests – prevent third countries (and their companies) from participating in the development of security-sensitive matters, such as the manufacturing of PRS security modules.⁴⁶⁵ If a new agreement is concluded, the UK would, however, be able to use/have access to Galileo's encrypted signal.⁴⁶⁶ The UK government, on the other hand, seeks continued use and participation in the development and operation of the open signal, as well as of the PRS – which would entail continued access to the relevant security information, but also a right for UK entities to compete for the related contracts. The UK's technical note on the exchange and protection of classified information mentions the UK's intention to

⁴⁵⁹ [A European Defence Fund: €5.5 billion per year to boost Europe's defence capabilities](#), Press release IP/17/1508, European Commission, 7 June 2017.

⁴⁶⁰ [A modern budget for a Union that protects, empowers and defends: Questions and Answers](#), Fact Sheet, European Commission, 2 May 2018. See also: [EU budget for the future: Defence](#), European Commission, May 2018; and C. Scheinert, [European defence industrial development programme \(EDIDP\)](#), EPRS, European Parliament, 7 June 2018.

⁴⁶¹ C. Mills, [European defence: where is it heading?](#), Commons Briefing paper 8216, 1 May 2018. See also Speech of State Secretary Tone Skongen, [Norwegian Security Policy – including participation in the CSDP](#), 28 February 2018.

⁴⁶² [European defence industrial development programme](#), EP Legislative Observatory, 2017/0125(COD).

⁴⁶³ [Foreign, security and defence policy \(slides\)](#), European Commission, 15 June 2018.

⁴⁶⁴ The [European Space Agency](#) (ESA) is an intergovernmental body made up of 22 Member States, of which 20 are also Members of the EU. See [Galileo/EGNOS](#) webpage, ESA.

⁴⁶⁵ See Article 3(5) of the [Decision No 1104/2011/EU of the European Parliament and of the Council of 25 October 2011 on the rules for access to the public regulated service provided by the global navigation satellite system established under the Galileo programme](#), OJ L 287, 2011.

⁴⁶⁶ Michel Barnier, [Speech](#) at the EU Institute for Security Studies conference, 14 May 2018. See also Policy Department on External Affairs, op. cit.

conclude with the EU 'all relevant agreements necessary to ensure that UK security requirements are met and that there is no gap in legal capability for UK industry and nationals to participate in the programme'. If proper arrangements are not found for EU-UK cooperation on Galileo, then the UK declared it would withdraw from the programme.⁴⁶⁷ Already, plans have been announced to start work on a British Global Navigation Satellite System, as an alternative option to Galileo.⁴⁶⁸ The Commission has in the meantime proposed a new regulation on the EU's space programme,⁴⁶⁹ which would bring some changes to its governance arrangements, including the role of the ESA. A presentation to the EU-27 in June 2018 further explains the Commission's approach to the UK future involvement in the EU's space programmes.⁴⁷⁰

6.2.6. Development aid

Brexit will have long-term implications for both EU and UK development aid, although their extent is unclear at present, as they largely depend on the future relationship. The UK is responsible for much of European development cooperation funding,⁴⁷¹ including through the EU budgeted instruments and through a large contribution to the (11th) European Development Fund which is outside the EU budget (around 15 %).⁴⁷² Therefore, Brexit will represent a big loss for EU development policy. An EP study has hypothesised three scenarios for future UK involvement in EU aid policy: nationalist, realist, and cosmopolitan, each with different consequences for the EU's share of world aid. In the first two scenarios, there is no future EU-UK cooperation, with UK aid being channelled bilaterally, arguably to countries with which the UK would like to strengthen political and economic ties beyond Europe. In the cosmopolitan scenario, the UK would maintain cooperation with the EU and choose to channel part of its aid budget through EU instruments (while opting also for other multilateral fora outside the EU, e.g. the OECD Development Assistance Committee), but possibly in exchange for some influence in EU decision-making.⁴⁷³

Post-Brexit cooperation in this field will also depend, beyond future UK budgetary pressures, on the EU's renegotiation with ACP countries of a successor treaty to the Cotonou agreement,⁴⁷⁴ on the future place of the European Development Fund in the EU's framework (the current Commission proposal for the future MFF (2021-2027) incorporates the Fund into the EU budget),⁴⁷⁵ as well as on the form that the other EU development instruments will take post-2021;⁴⁷⁶ the UK contribution will

⁴⁶⁷ [Framework for the UK-EU Security Partnership](#), UK Government, May 2018.

⁴⁶⁸ [UK Space Agency leads work on options for independent satellite system](#), UK Government, 2 May 2018. See also P. Hollinger, A. Barker, [UK could withhold security clearance for companies working on Galileo](#), *Financial Times*, 15 May 2018.

⁴⁶⁹ [Questions and Answers on the new EU Space Programme](#), Fact Sheet, European Commission, 6 June 2018, and [Proposal for a Regulation \(...\) establishing the space programme of the Union and the European Union Agency for the Space Programme \(...\)](#), COM(2018) 447, 6 June 2018. See also: P. Hollinger, [EU outmanoeuvres UK in latest battle over Galileo](#), *Financial Times*, 5 June 2018; B. Bowen, [Leaving Spaceship Europe: British space policy after Brexit](#), LSE Blog, 30 April 2018.

⁴⁷⁰ [Involvement in the EU's space-related activities](#), European Commission, 13 June 2018.

⁴⁷¹ EU Member States allocate aid bilaterally and/or through the EU development instruments. Collectively, in 2017 the EU and its Member States were the world's largest [provider](#) of official development assistance.

⁴⁷² A. D'Alfonso, [European Development Fund - Joint development cooperation and the EU budget: out or in?](#), EPRS, European Parliament, November 2014. To note that UK contribution to the EDF, as percentage of its GNI, has been larger than its overall contribution to the EU budget – see p. 11.

⁴⁷³ [Possible impacts of Brexit on EU development and humanitarian policies](#), Policy Department for External Affairs, April 2018.

⁴⁷⁴ [New EU partnership with Africa, the Caribbean and the Pacific](#), Commons Select European Scrutiny Committee, 31 January 2018. See also [Timeline: steps towards a new EU-ACP partnership after 2020](#), Council of the EU.

⁴⁷⁵ [Proposal for a Council Regulation laying down the multiannual financial framework for the years 2021 to 2027](#), COM(2018) 322 final, European Commission, 2 May 2018.

⁴⁷⁶ [New EU partnership with Africa, the Caribbean and the Pacific](#), European Scrutiny Committee, House of Commons, 31 January 2018.

also be determined by the extent these instruments will be open to third countries.⁴⁷⁷ Some non-EU states choose on a case-by-case basis whether to opt into various EU funds.⁴⁷⁸ For example, in the development area, both Norway and Switzerland contribute to the EU Emergency Trust Fund for Africa.⁴⁷⁹ Some observers point to the EEA and Norway grants that could provide a model for an instrument to continue UK engagement in EU development cooperation.⁴⁸⁰

Future EU-UK cooperation in the field of international development aid is not dealt with extensively in Commission documents; nevertheless, Michel Barnier has suggested the UK could make future contributions to the EU development programmes. The UK also indicated willingness to continue close cooperation with the EU in this area,⁴⁸¹ and to coordinate with the EU in the field of development and other external programmes. In the UK's view, the EU and the UK could agree to coordinate measures on geographic areas or across thematic issues to ensure complementarity, including through the creation of a cooperation mechanism. This would also allow for UK contributions to EU programmes or instruments, provided the UK was appropriately involved in the decision-making. In the white paper of 12 July 2018, the UK government includes a proposal for an overseas development assistance and international action accord with the EU that would allow UK participation in EU development programmes and instruments and in EU external spending programmes, subject to 'an appropriate level of influence and oversight over UK funds'.⁴⁸² Coordination could be enhanced through a reciprocal exchange of seconded humanitarian policy and development officials and through structured and flexible UK-EU dialogue and consultation. As in the case of the CFSP and CSDP proposals, the UK suggests UK attendance at the Council (development ministers) informal sessions or meetings; at informal sessions of EU Heads of Cooperation or Heads of mission meetings, as well as at meetings of Directors General on humanitarian aid and development. In response, the Commission has indicated that the UK participation in the EU's external assistance programmes, including development cooperation, will have to be based on the modalities for third country participation defined in the respective EU regulations and decisions. Cooperation along the proposed UK lines (joint EU-UK programming at strategic level, as well as no differentiation between UK and EU entities in the field of development assistance) would amount, in the Commission's view, to treatment exceeding existing third countries' arrangements.⁴⁸³

⁴⁷⁷ H. Evennett, *op. cit.*

⁴⁷⁸ M. Anders, [First clues for post-Brexit aid cooperation between EU and UK](#), 9 December 2016.

⁴⁷⁹ [EU Emergency Trust Fund for Africa](#), European Commission.

⁴⁸⁰ T. Henökl, [How Brexit affects EU external action: The UK's legacy in European international cooperation](#), *Futures* 97, March 2018, pp. 63-72. See also <https://eeagrants.org/>.

⁴⁸¹ H. Evennett, [Brexit: Overseas Development Assistance](#), House of Lords Library notes LLN-2018-0020, 6 February 2018.

⁴⁸² [The future relationship between the United Kingdom and the European Union](#), UK Government, 12 July 2018.

⁴⁸³ [Foreign, security and defence policy \(slides\)](#), European Commission, 15 June 2018.

7. Annex – Negotiating the framework for future EU-UK relations – Comparative positions

Issues	UK position	European Council	European Parliament	Commission's current considerations for discussion
Trade and Economic				
Future economic relationship	Economic partnership, covering more sectors and co-operating more fully than any other EU free trade agreement (FTA).	<ul style="list-style-type: none"> Balanced, ambitious and wide-ranging FTA. It should ensure a level playing field. Not the same benefits as EU Membership, no cherry picking of the rights derived from Single Market. 	<ul style="list-style-type: none"> Respect of 9 principles (including not giving the same rights and benefits as a Member State of the EU, of the EFTA or of the EEA; protection of the integrity of the internal market, of the customs union and the four freedoms; etc.). An association agreement (Article 8 TEU and Article 217 TFEU) with a consistent governance framework, including a robust dispute resolution mechanism. 	Current main basis for discussion is the FTA model (CETA or EU-South Korea model).
Trade in goods (tariffs, quotas, including preferential rules of origin)	<ul style="list-style-type: none"> Zero tariffs or quotas A common rulebook for rules to be checked at the border Participation in some regulatory EU agencies No preferential rules of origin (PRoO). 	<ul style="list-style-type: none"> Trade in goods for all sectors Zero tariffs and no quantitative restrictions With appropriate PRoO. 	<ul style="list-style-type: none"> PRoO based on EU standard EU producers' interests Avoid any free-riding by ensuring consistency in keeping a tuned tariff and quota system and rules of origin for products vis-à-vis third countries. 	No further details regarding market access in trade in goods.
Customs	<ul style="list-style-type: none"> Customs agreement through either a UK-EU customs partnership, or a highly streamlined customs arrangement. New UK proposal for a facilitated customs arrangement. 	<ul style="list-style-type: none"> Appropriate customs cooperation Preserving the regulatory and jurisdictional autonomy of the parties and the integrity of the EU Customs Union. 	Protection of the integrity and correct functioning of the internal market, the customs union and the four freedoms, without allowing for a sector-by-sector approach.	<ul style="list-style-type: none"> Customs cooperation (trade facilitation chapters in FTA). Customs checks as for third countries outside customs union. No loss of control over EU customs. Ensure practicality of the arrangement

Issues	UK position	European Council	European Parliament	Commission's current considerations for discussion
Fisheries	<ul style="list-style-type: none"> UK will leave the common fisheries policy (CFP) Annual negotiations on access to waters and fishing opportunities (including multi-annual agreements for appropriate stocks) Provision to promote sustainable fisheries Cooperation to manage shared stocks. 	<p>Maintaining existing reciprocal access to fishing waters and resources.</p>	<ul style="list-style-type: none"> A novel form of third-country-type of bilateral partnership agreement Ensuring stable and continued mutual access to waters and resources in accordance with CFP principles and governance provisions, Sustainable and common management of shared stocks Continuation of the UK's contribution to the scientific assessment of those stocks Access to the EU domestic market conditional on access for EU vessels to the UK fishing grounds and their resources, as well as on the level of cooperation in the management of shared stocks. 	<ul style="list-style-type: none"> EU-UK fisheries partnership agreement in line with UNCLOS provisions Mutual access to waters and resources. Provisions concerning fisheries management based on shared principles.
Trade in services and investments	<p>New barriers should only be introduced where absolutely necessary.</p>	<ul style="list-style-type: none"> Market access for services under host state rules, including as regards for right of establishment Market access consistent with the UK becoming a third country and no shared common regulatory, supervisory, enforcement and judiciary framework. 	<ul style="list-style-type: none"> The level of access to the EU market proportional to the continued convergence or alignment to EU technical standards and rules No sector-by-sector approach and preserving the integrity of the internal market FTA market access for services subject to exclusions, reservations and exceptions. 	<ul style="list-style-type: none"> Based on FTA model, subject to restrictions in sensitive sectors. The EU can top-up commitments undertaken in existing FTAs depending on MFN clauses in those FTAs. Regulatory autonomy of the parties.
Air Transport	<ul style="list-style-type: none"> Membership of the European Aviation Safety Agency. 	<ul style="list-style-type: none"> An air transport agreement. 	<ul style="list-style-type: none"> Ensure connectivity via an air transport agreement and aviation safety agreement. 	<ul style="list-style-type: none"> EU-UK Air Transport Agreement and an Aviation Safety Agreement

Issues	UK position	European Council	European Parliament	Commission's current considerations for discussion
	<ul style="list-style-type: none"> Maintaining reciprocal liberalised access through an Air Transport Agreement (such as EU-Canada Air Service Agreement). 	<ul style="list-style-type: none"> Combined with aviation safety and security agreements. A strong level playing field in highly competitive sectors. 	<ul style="list-style-type: none"> The degree of market access conditional on regulatory convergence and alignment with the EU acquis, and on a solid dispute settlement and arbitration mechanism. Future cooperation on projects of common interest. 	<ul style="list-style-type: none"> Market access will be depend on regulatory convergence and alignment. Membership of the Common Aviation Area requires compliance with the EU acquis.
Other Transport services	Continuity of maritime and rail services, and mutual access for road hauliers.	<ul style="list-style-type: none"> Agreements on other modes of transport Ensure a strong level playing field in highly competitive sectors. 	<ul style="list-style-type: none"> Degree of market access conditional on regulatory convergence and alignment with the EU acquis, and on solid dispute settlement and arbitration mechanism Future cooperation on projects of common interest. 	<ul style="list-style-type: none"> New framework outside of the single market. Commission is reviewing implications of MFN clauses in previously concluded FTAs.
Financial Services	<ul style="list-style-type: none"> Ability to access each other's markets, based on similar regulatory outcomes. A collaborative, objective framework that is reciprocal, mutually agreed, and permanent. Proposal for a new enhanced equivalence arrangement, going beyond existing unilateral equivalence system. 	<ul style="list-style-type: none"> Any future framework should safeguard financial stability in the Union Respect the EU regulatory and supervisory regime and standards and their application. 	<ul style="list-style-type: none"> UK loss of passporting rights for financial services and of the possibility of opening branches in the EU subject to UK supervision Equivalence of third country rules based on a proportional and risk-based approach Limitations of cross-border financial services customary in FTAs 	<ul style="list-style-type: none"> Horizontal provisions plus a financial service chapter as in other EU FTAs. Prudential carve-out and regulatory autonomy. Equivalence only on the basis of specific EU regulations (unilateral). Strong objections to the enhanced equivalence arrangement proposed by the UK.
Research and Development	Participation in EU programmes and networks with ongoing financial contribution.	UK participation subject to the relevant conditions for third countries as provided in the corresponding programmes.	UK participation as a third country in the EU Framework Programme for Research and Innovation and in the EU space programmes, without permitting any net transfers from the EU budget to the UK, or any decision-making role for the UK.	EU legal approach for 3rd countries in EU programmes.

Issues	UK position	European Council	European Parliament	Commission's current considerations for discussion
Audiovisual and Education and Culture	<ul style="list-style-type: none"> • Exploring options including mutual recognition to allow for continued transfrontier broadcasting • New EU-UK culture and education accord. 	<p>UK participation subject to the relevant conditions for third countries as provided in the corresponding education and cultural programmes.</p>	<p>Continued cooperation between the EU and the UK in those areas, including through relevant programmes such as Erasmus or Creative Europe.</p>	<ul style="list-style-type: none"> • Audiovisual services are usually excluded from FTA commitments • Only limited benefits from the Council of Europe Convention on Trans-frontier Television.
Regulatory cooperation	<ul style="list-style-type: none"> • Framework for regulatory cooperation. • UK associate membership in some EU agencies, respecting the remit of the CJEU and with appropriate financial contribution. • A common rulebook for goods' standards checked at the border. • Equivalence arrangements for agri-food standards not checked at the border • Enhanced equivalence arrangement for financial services • Mutual recognition of professional qualifications covering the same professions as the EU Directive. 	<ul style="list-style-type: none"> • A framework for voluntary regulatory cooperation; • Disciplines on technical barriers to trade (TBT) and sanitary and phytosanitary (SPS) measures; • Recognition of professional qualifications via negotiations of mutual recognition agreements (MRAs); • Respect the Union's regulatory and supervisory regime and standards and their application. 	<ul style="list-style-type: none"> • Guarantee the EU's autonomy in setting EU law and standards as well as the role of the CJEU • Focus on SMEs • Voluntary regulatory cooperation • Ensure the right to regulate in the public interest. • Unilateral nature of equivalence decisions; • prudential carve-out • With respect to food and agricultural products, access to the EU market is conditional on strict compliance with all EU law and standards • UK cooperation with EU agencies in specific cases in a strictly regulated manner requiring compliance with all relevant rules and financial contributions. • UK continued adherence to international obligations and the Union's legislation and policies in the fields of consumer protection, public health, SPS measures, animal health and welfare. 	<ul style="list-style-type: none"> • No general mutual recognition of standards possible in FTAs. • Principles: ensure level playing-field, safeguard financial stability and respect regulatory and supervisory regime and standards, preserve the Union decision-making autonomy and the role of the CJEU. • Good regulatory practices; regulatory cooperation on a voluntary basis; TBT and SPS chapters and sectoral annexes. • Possibility to conclude MRAs • Unilateral nature of equivalence decisions • Mutual recognition of qualifications based on negotiation of MRAs on a voluntary basis. • Explores limitations within current FTA models for regulatory cooperation in

Issues	UK position	European Council	European Parliament	Commission's current considerations for discussion
			<ul style="list-style-type: none"> Proposes UK full alignment to EU rules for public health and food safety. 	the field of vehicles, REACH and agri-food standards.
Public procurement	No discrimination between UK and EU service providers.	Access to public procurement markets.	Access to public procurement.	Discussions currently ongoing in the framework of the withdrawal agreement.
Intellectual property rights	The UK will introduce its own GI framework. The UK wants to remain in the unitary patent system after Brexit.	Protection of intellectual property rights, including geographical indications.	No mention.	Discussions currently ongoing in the framework of the withdrawal agreement.
Level-playing field issues: competition and state aid	<ul style="list-style-type: none"> Common rulebook on state-aid. sovereign discretion on tax Safeguard UK autonomy in relation to rules for payments to farmers and its future public procurement policy Arrangements on cooperation in the area of competition policy. 	Robust guarantees which ensure a level playing field to prevent UK unfair competitive advantage through undercutting of levels of protection.	A level playing field, in particular in relation to the UK's continued adherence to the standards laid down by international obligations and the EU's legislation and policies in this field.	<ul style="list-style-type: none"> An ad hoc model including substantive rules equivalent to EU state-aid, including transparency Enforcement through ex ante control by an independent State aid authority Dispute resolution and remedies (possibility of interim measures).
Level-playing field issues: Taxation	Sovereign discretion with regard to direct and indirect tax rates.	Robust guarantees which ensure a level playing field to prevent UK unfair competitive advantage in this field.	<ul style="list-style-type: none"> Recalls the high level of alignment between the Single EU VAT Area and the UK. Within the future agreement ensure maximum cooperation between the EU and the UK in the field of corporate taxation. The UK adherence to the EU acquis standards on taxation and anti-money laundering legislation. The UK should address the non-compliance of its dependent territories with EU good governance 	<p>Proposal include:</p> <ul style="list-style-type: none"> tax good governance clause; binding requirements on exchange of information, anti-tax avoidance measures public CbCR for credit institutions and investment firms code of conduct on business taxation mirroring EU code Horizontal dispute settlement applicable for

Issues	UK position	European Council	European Parliament	Commission's current considerations for discussion
			criteria and transparency requirements.	any breach with sanction regime.
Level-playing field issues: Environment and Labour	<ul style="list-style-type: none"> • A non-regression clause in relation with environmental and labour standards • For climate change the UK mentions only its intention to maintain high standards • Cooperation with the EU in international fora and uphold international obligations. 	<ul style="list-style-type: none"> • Close cooperation to address global challenges, in particular in the areas of climate change and sustainable development, as well as cross-border pollution, • Robust guarantees ensuring a level playing field to prevent UK unfair competitive advantage through undercutting of levels of protection. 	Ensure a level playing field via: <ul style="list-style-type: none"> • UK's continued adherence to the standards laid down by international obligations and the Union's legislation and policies in these fields • Proposes for the UK to remain fully aligned with current and future EU legislation for action against climate change, and for public health and food safety • Alternatively, arrangements between the EU and the UK to ensure close cooperation and high standards on those issues and to deal with trans-boundary environmental issues; • Access to justice and a proper complaints mechanism must be guaranteed for citizens and NGOs with respect to enforcement. 	<ul style="list-style-type: none"> • Proposal include principles and substantive provisions anchored in EU and international law • Principles of non-lowering of standards and non-regression clause • Provision requiring the upholding of standards across whole territory • Dispute settlement procedures and sanctions applicable horizontally to all LPF provisions.
Level-playing field issues: enforcement	No particular mention.	<ul style="list-style-type: none"> • Adequate mechanisms to ensure effective implementation domestically • Enforcement and dispute settlement mechanisms in the agreement • Union autonomous remedies. 	<ul style="list-style-type: none"> • Robust governance structures to include appropriate management, supervision, dispute settlement and enforcement mechanisms with sanctions and interim measures where necessary. • With a requirement for both parties to establish, where relevant, independent institutions capable of effectively overseeing and enforcing implementation. 	<ul style="list-style-type: none"> • Dispute settlement mechanism applicable horizontally to all LPF provisions. • Two stage dispute settlement: consultation and dispute settlement phase. • CJEU to interpret EU law concepts.

Issues	UK position	European Council	European Parliament	Commission's current considerations for discussion
				<ul style="list-style-type: none"> Sanctions such as suspension of obligations, temporary compensations, financial sanctions, cross retaliation, 'guillotine clause', interim measures (in the context of state aid).
Energy	<ul style="list-style-type: none"> Protect the single electricity market in Ireland/ Northern Ireland. Explore UK participation in EU internal energy market; Close association with Euratom. Broad energy cooperation with the EU including arrangements on trade in electricity and gas, cooperation in EU agencies, data sharing and on technical and regulatory energy arrangements. 	No mention.	<ul style="list-style-type: none"> Third-country arrangements should be made in the areas of energy. Respect the integrity of the internal energy market. Contribute to energy security, sustainability and competitiveness and take account of interconnectors between the EU and the UK. Expects the UK to comply with the highest nuclear safety, security and radiation protection standards, including for waste shipments and decommissioning. 	Discussions regarding Euratom are taking place for the moment in the framework of the withdrawal agreement. No document published specifically on energy in the future partnership.
Data protection and data flows	<ul style="list-style-type: none"> Data protection arrangement with more depth than an adequacy arrangement A transparent framework to facilitate dialogue EU data protection authorities' cooperation with UK Information Commissioner's Office (ICO). 	<ul style="list-style-type: none"> Include rules on data. As regards personal data, protection, Union rules on adequacy remain applicable. 	An adequacy decision is the preferred and most secure option.	<ul style="list-style-type: none"> Adequacy decision for data flows needed.
Dispute resolution and enforcement	<ul style="list-style-type: none"> The jurisdiction of the CJEU in the UK must end. The UK will 'respect the remit' of the CJEU for example where the 	<ul style="list-style-type: none"> Management and supervision, dispute settlement and enforcement, 	<ul style="list-style-type: none"> Robust dispute settlement mechanism and governance structures. 	Looking at the three levels of governance in an international agreement: ongoing management and supervision;

Issues	UK position	European Council	European Parliament	Commission's current considerations for discussion
	<p>UK participates in EU agencies. In the framework of the proposed common rulebook for goods, the UK recognised the CJEU's exclusive competence to interpret EU law.</p> <ul style="list-style-type: none"> Set an independent arbitration mechanism. In case of non-compliance, sanctions may take the form of financial penalties or suspension of parts of the agreement. 	<p>including sanctions and cross-retaliation mechanisms.</p> <ul style="list-style-type: none"> The overall governance shall depend on: <ol style="list-style-type: none"> the content and depth of the future relationship; the necessity to ensure effectiveness and legal certainty; the requirements of the autonomy of the EU legal order, including the role of the CJEU. 	<ul style="list-style-type: none"> Joint committee responsible for overseeing the implementation of the agreement, addressing divergences of interpretation and implementing agreed corrective measures, and fully ensuring the EU's regulatory autonomy. EU representatives on the joint committee subject to appropriate accountability mechanisms involving the European Parliament. For provisions based on EU law concepts, obligation to provide for referral to the CJEU; For the provisions other than those relating to EU law, an alternative dispute settlement mechanism to be envisaged only if it offers guarantees of independence and impartiality equivalent to the CJEU. 	<p>two-phase dispute settlement (a political phase and a judicial phase); enforcement mechanism after dispute settlement via sanctions.</p>
Justice and Home Affairs				
<p>Internal security: general cooperation</p>	<ul style="list-style-type: none"> A new security treaty preserving operational capabilities, respecting the parties' sovereignty Dispute resolution mechanism Data protection arrangements. Cooperation on the basis of existing EU measures. Treaty mechanisms enabling the UK to cooperate on future versions of current tools; and on new tools 	<ul style="list-style-type: none"> The future partnership should cover effective exchanges of information, support for operational cooperation between law enforcement authorities and judicial cooperation in criminal matters, taking into account that the UK will be a third country outside Schengen. 	<ul style="list-style-type: none"> Continued security cooperation to face shared threats, especially terrorism and organised crime, and avoids the disruption of information flows in this field. For third countries (outside the Schengen area): no privileged access to EU instruments, including databases, and no UK participation in setting priorities and the development of the multiannual strategic goals or lead operational action plans in the context of the EU policy cycle. 	<ul style="list-style-type: none"> Third country outside Schengen model. Exchange of information, operational police cooperation, judicial cooperation in criminal matters.

Issues	UK position	European Council	European Parliament	Commission's current considerations for discussion
	<ul style="list-style-type: none"> Cooperation on wider security issues: asylum and illegal migration; cyber security; counter-terrorism and countering violent extremism; civil protection and health security. 	<ul style="list-style-type: none"> Strong safeguards regarding fundamental rights and effective enforcement and dispute settlement mechanisms. 		
Information exchange, including access to EU databases	Maintaining the capabilities based on EU tools that allow for the secure and timely exchange of information (Schengen Information System II, European Criminal Records System and Passenger Name Record Directive).	The future partnership should cover effective exchanges of information.	Non-Schengen third-country arrangements enabling the exchange of security-relevant data and operational cooperation with EU bodies and mechanisms (such as Europol and Eurojust).	Third country outside Schengen model.
Mutual recognition instruments	<ul style="list-style-type: none"> Practical cooperation on the basis of EU measures such as the European Arrest Warrant, the European Investigation Order and the Prisoner Transfer Framework Decision. Full UK participation rights in the Joint Investigation Teams. 	Support for operational cooperation between law enforcement authorities and judicial cooperation in criminal matters.	Arrangements based on the UK as a third country as regards judicial cooperation in criminal matters, including on extradition and mutual legal assistance (MLA), instead of current arrangements such as the European Arrest Warrant.	Exploring options: <ul style="list-style-type: none"> Extradition: Fall-back the 1957 CoE Convention, or negotiating an agreement on extradition. Mutual legal assistance: Fall-back: 1959 CoE Convention and Protocols, or negotiating an agreement on MLA on the model of other third countries.
EU agencies	<ul style="list-style-type: none"> Multilateral cooperation through Europol and Eurojust. Deeper arrangement than the existing third country agreements. Respecting the remit of the CJEU where the UK participates in an EU agency. 	Support for operational cooperation between law enforcement authorities and judicial cooperation in criminal matters.	Non-Schengen third-country arrangements enabling the exchange of security-relevant data and operational cooperation with EU bodies and mechanisms (such as Europol and Eurojust).	Third country model for Europol and Eurojust: exchange of data with partners; liaison officers (Europol) and possibility to appoint contact points and liaison magistrates (Eurojust); no (direct) access to Europol databases and Eurojust Case Management System or case-files; participation in Europol

Issues	UK position	European Council	European Parliament	Commission's current considerations for discussion
				analysis projects and Eurojust cases if Member States agree.
Data protection for law enforcement purposes	Explore a separate bespoke UK-EU agreement (covering both business and law enforcement) for exchanging and protecting personal data, building on an EU adequacy decision.	<ul style="list-style-type: none"> • Include rules on data. • As regards personal data, protection, Union rules on adequacy remain applicable. 	<ul style="list-style-type: none"> • Cooperation to fully respect EU data protection standards and rely on effective enforcement and dispute settlement. • Preferred option to regulate future EU-UK data exchange in the field of law enforcement, intelligence and counter-terrorism is a Commission adequacy decision; in any case UK level of data protection that is as robust as EU data protection rules. 	Future cooperation depends on essentially equivalent data protection standards.
Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP) matters				
External security - general cooperation and coordination	<ul style="list-style-type: none"> • Tailored partnership on foreign and defence policy, including consultation and coordination, <i>inter alia</i> on sanctions • UK to play an appropriate role in shaping collective actions • Cooperative accord on development and external programming. 	<ul style="list-style-type: none"> • Strong EU-UK cooperation in foreign, security and defence policy. • Future partnership should respect the EU decision-making autonomy. • Appropriate mechanisms for dialogue, consultation, coordination, exchange of information, and cooperation. 	<ul style="list-style-type: none"> • No UK participation in the EU's decision-making process. • Envisage a Framework Participation Agreement (FPA) to cover all aspects of CSDP. • Consultation mechanisms allowing the UK to align with EU foreign policy positions, joint actions, notably on human rights, or multilateral cooperation. • Intelligence-sharing, training and exchange of military personnel. • Cooperation conditional on full compliance with international human rights law and international humanitarian law and EU fundamental rights. 	Options considered: Existing cooperation mechanisms with third countries or specific dialogue and consultation mechanism with the UK: <ul style="list-style-type: none"> • Dialogue and consultation, alignment (sanctions), exchange of intelligence, • Participation in EU-led operations.
Exchange of classified information	<ul style="list-style-type: none"> • Security of Information Agreement (SoIA) on classified information. 	Pre-requisite for the exchange of information: an SoIA.	Any sharing of EU classified information, including on intelligence, is conditional on a security of information agreement.	<ul style="list-style-type: none"> • Information-sharing with the UK via an SoIA.

Issues	UK position	European Council	European Parliament	Commission's current considerations for discussion
	<ul style="list-style-type: none"> Necessity to exchange sensitive but not classified information outside of an SoIA. 			<ul style="list-style-type: none"> Practical procedures to allow timely exchanges of intelligence with UK services.
Sanctions	<ul style="list-style-type: none"> UK-EU sanctions dialogue Exchange of information on listings and their justification Possibility of adopting mutually-supportive sanctions, including during crises. 	No details on this.	Coordination on sanctions policy and implementation, including arms embargos and the Common Position on arms exports.	Coordinated approach with UK on sanctions to minimise risk of diverging sanctions regimes.
CSDP missions and operations	<ul style="list-style-type: none"> Continued coordination and operational delivery on the ground; UK participation on case-by-case basis. Offer to host an Operational Headquarters and consider future contributions to EU Battlegroups. UK contributions to depend on defined arrangements, including sufficient insight into the planning of missions. 	No details on this.	Possibility for UK participation in civilian and military EU missions (with no lead role for the UK).	<p>Options:</p> <ul style="list-style-type: none"> FPA Ad-hoc agreements, or Developing a new and more ambitious framework applicable for third countries. Third countries do not host Operation headquarters for CSDP operations; they cannot be lead-nation or provide the operation commander or other high-level positions.
Capability development	<ul style="list-style-type: none"> Administrative arrangement with the European Defence Agency (EDA). Participation in PESCO projects as third party, in the European Defence Fund (EDF) and the European Defence Industrial Development Programme. 	No details on this.	<ul style="list-style-type: none"> Based on similar third-country arrangements, the UK could participate in EU programmes in support of defence and external security (e.g. European Defence Fund, cyber-security). Collaboration on armaments policy, including PESCO projects, without prejudice to and consistent with 	<ul style="list-style-type: none"> Possible administrative arrangement with EDA, excluding UK participation in EDA's management or ad-hoc activities. UK participation in PESCO projects and the EDF under the same conditions for third countries.

Issues	UK position	European Council	European Parliament	Commission's current considerations for discussion
	<ul style="list-style-type: none"> UK to participate in European capability development in cyber and in space. 		relevant EU positions, decisions and legislation.	
Galileo	Continued collaboration on the Galileo programme. UK use of the secure, encrypted signal (PRS) and participation in its development and operation.	No details on this.	Based on similar third-country arrangements, the UK could participate in EU programmes in support of defence and external security including Galileo.	Satellite Navigation Cooperation Agreement on Galileo/EGNOS and an Agreement on Access to PRS. No UK participation in developing security sensitive matters (manufacturing of PRS-security modules).
Development cooperation and external programming	Cooperative accord with the EU on development and external programming.	No mention.	<ul style="list-style-type: none"> EU-UK cooperation with possible UK contributions to the EU's external financing instruments in pursuit of common objectives, especially in the common neighbourhood. 	The EU is open to contributions from third countries and to local joint programming.

Following the European Council's additional guidelines of March 2018, the European Union (EU) and the United Kingdom (UK) have started discussions on their future relationship after Brexit. The aim is to agree on a political framework for their future partnership by autumn 2018, to be adopted alongside the withdrawal agreement. Conclusion of a treaty or treaties establishing future EU-UK relations will only take place after the UK leaves the Union and becomes a third country.

Both parties have expressed the desire to remain in a close partnership, which would cover several areas including trade and economic matters, internal security, foreign and security policy, and cooperation on defence. This study looks at the respective aims for, and principles underpinning, the negotiations, as expressed publicly to date by each party, and analyses some of the legal constraints and existing practices or precedents shaping EU cooperation with third-country partners. This allows assessment of the possibilities and limits of any future EU-UK partnership, in light of the stated objectives and 'red lines' officially announced, leading to the conclusion that, notwithstanding several common aims, significant divergences still persist with respect to the means of achieving the stated objectives.

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