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# The EU–UK Partnership and Implications for Differentiation Within the EU and Between the EU and Third Countries

*Jannike Wachowiak  
and Fabian Zuleeg*



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# The EU–UK Partnership and Implications for Differentiation Within the EU and Between the EU and Third Countries

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## Abstract

The UK's departure from the EU represents a unique process of disintegration that fundamentally changes EU–UK relations. This paper discusses the nature of the Trade and Cooperation Agreement (TCA) as the new basis of EU–UK relations, as well as its sustainability, legitimacy and effectiveness. It finds a thin and unfinished relationship with inbuilt possibility for better or for worse, but with politics pointing to growing estrangement and divergence over time. The loss of trust over the last five years has been bleeding into all levels of the relationship, raising the question whether the technocratic governance structure can work in the high-friction context of EU–UK relations. Given the UK's economic and political weight in Europe, the paper looks at the implications for differentiation within the EU and between the EU and third countries. It illustrates how the introduction of a new mode of external differentiation in Europe – a former member state with no intention of membership in the future – impacts existing modes of differentiation. It finds that the reality of Brexit suggests a more hard-line approach towards third countries, sending the message to members and non-members alike that membership matters. Flexibilities are thus a benefit for EU member states that have signed up to the EU's core principles in full. The paper concludes that the EU needs to stay attentive to evolving perceptions of Brexit, and show that EU membership remains attractive, also for candidate countries, and is a relevant framework for dealing with global challenges that cannot effectively be addressed at the national level.

Jannike Wachowiak is a Policy Analyst in the Europe's Political Economy programme at the European Policy Centre (EPC). Fabian Zuleeg is Chief Executive of the EPC.

# Introduction

The UK's departure from the EU represents a unique instance of disintegration. As such, the British decision sent shockwaves through the other member states, raising questions about the specificities of the UK's exit and the core principles of EU membership, as well as what it means to be "in or out". The fact that the UK was a member state with considerable economic and political weight implied its decision to leave would have far-reaching implications, including for differentiation within the EU and between the EU and third countries.

However, the relationship between Brexit and differentiation, defined as "any modality of integration or cooperation that allows states (members and non-members) and sub-state entities to work together in non-homogeneous, flexible ways",<sup>1</sup> is contested and complex.

For example, the UK's exit fuelled debates about new forms of collaboration, such as a continental partnership with an inner and an outer circle, acknowledging that none of the existing models of external differentiated relations suited the EU–UK relationship.<sup>2</sup> However, Brexit also triggered fears of a domino effect that might unravel the EU project. This political reality cautioned the EU against setting the precedent of a preferential partnership. At the same time, Brexit raised expectations about deeper and/or faster internal integration in certain policy areas, seeing that the UK's exit removed a reluctant member with a considerable number of opt-outs.

These considerations played a role in informing the EU and UK's red lines, which subsequently defined the withdrawal process as well as the future partnership negotiations, leading to the conclusion of the Trade and Cooperation Agreement (TCA).

Whilst there was palpable relief about having pulled back from the brink of a no-deal cliff edge in December 2020, the new relationship is far more distant and conflictual than originally intended. This poses questions about whether the TCA will be an effective, sustainable and legitimate model to govern EU–UK relations, and what its implications are for the remaining member states and the EU's ecosystem of external differentiation.

## 1. The Brexit process and the nature of deal

### 1.1 The Brexit process

The EU and the UK concluded negotiations on the TCA on Christmas Eve of 2020. It was provisionally applied before formally entering into force on 1 May 2021. The Agreement is thin and precarious in nature (Wachowiak and Zuleeg 2021b) and was significantly shaped by the structural and procedural features of the UK's withdrawal and future relationship negotiations.

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1 As defined in the EU IDEA project description. For more information see the project website: <https://euidea.eu>.

2 One such proposal, which received a lot of positive and negative attention at the time, was published by Bruegel in August 2016. See Pisani-Ferry et al. (2016).

Structurally, there was a clear power asymmetry between the two sides in terms of market size, interdependency and experience in negotiating trade deals. The EU represents a Single European Market of 440 million, the UK a market of 65 million, with the EU as a whole being the UK's largest trading partner. The UK had an overall trade deficit of -79 billion pounds with the EU in 2019 (Ward 2020). From the outset, this implied an uneven distribution of costs and benefits, as well as limited leverage for the UK, which also lacked in negotiating experience compared to the EU.

In addition to holding less material negotiating power, the switch from member state to being on the outside considerably weakened the UK's institutional bargaining power. During its membership the UK often defended the status quo against further integration, giving it power particularly in areas that require unanimity. In the Brexit negotiations the UK lost "the power that EU rules of treaty change confer upon status quo defenders" (Schimmelfennig 2018: 1160), with the EU27 now defending the status quo of what it meant to be a member, and the UK demanding revision and privileged access.

Furthermore, the principal-agent structure on the EU side worked to its advantage. Article 50 does not determine which institution should lead the negotiations. The decision to delegate their conduct to the European Commission, a supranational institution with an interest in defending the status quo against disintegrative forces (Schimmelfennig 2018), reassured smaller member states that bilateralism would be kept at bay and collective interests put front and centre.

By maintaining these institutional structures throughout the entire process, as well as a sole chief negotiator in Michel Barnier, the EU's position demonstrated focus and coherence, enabling it to shape the process to its advantage. The UK, on the other side, struggled with the referendum's domestic repercussions, as reflected in changing UK chief negotiators and Prime Ministers, as well as divisions between and within the political parties. The lack of focus and strategy on the UK side is exemplified by the first round of withdrawal negotiations in June 2017, which the UK entered without "a particularly clear policy on anything", and realising the "whole debate about sequencing had been settled while the [UK general] election was going on without DD [David Davis, UK Brexit Secretary at the time] really being involved in it" (Ruparel 2020: 13).<sup>3</sup> Procedurally, the EU's decision to take a phased approach, i.e., to negotiate the withdrawal first and the future partnership second, significantly increased the EU's bargaining power in both phases. It enabled the EU to settle some of its fundamental goals early on, particularly on citizens' rights and Northern Ireland, as a condition to move to the next stage. It also dispelled UK leverage by dealing with the financial settlement separately from the future relationship (Patel 2018). Furthermore, the EU was able to successfully create linkages to increase its leverage even in areas of relative UK strength. For example, it successfully linked the overall trade deal to an agreement on fisheries by negotiating all areas of the future partnership in parallel.

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3 Raoul Ruparel was Special Advisor to the Secretary of State for the Department for Exiting the EU from October 2016 until July 2018, and Special Advisor to the Prime Minister on Europe from August 2018 until July 2019.



While similar structural and procedural factors play into most EU–third country negotiations, there are some features which are unique to Brexit: the unusually short negotiating period, the prevalence of politics over economics, the no-deal threat, negotiating down not up after 47 years of common rules, and the EU’s united response when faced with an existential threat.

The short negotiating period made it more difficult to build rapport between negotiating teams and left no time for businesses and/or other actors to familiarise themselves with the new rules. This was made more acute by the covid-19 pandemic, which took political bandwidth away from Brexit, and should have resulted in an extension of the transition period (Lock et al. 2020). In addition to both sides’ firm red lines,<sup>4</sup> the immense time pressure limited the ambition of the deal from the outset.

That is not to say that the relationship’s depth and breadth was predetermined. The evolution of the UK’s Brexit policy as outlined in Theresa May’s speeches – Lancaster, Florence and Mansion House – culminated in the Chequers plan in July 2018, proposing a common rulebook for goods. That means her vision of the future relationship included “ongoing harmonisation with EU rules on goods” (UK Government 2018: 1), which is far away from Johnson’s red lines. Equally, under May’s Northern Ireland “backstop” the entire UK would have been part of a customs union with the EU. Boris Johnson rejected the backstop as “inconsistent with the UK’s desired final destination” (UK Government 2019). As the price for a more distant relationship, he agreed an effective trade border down the Irish Sea. He also set the UK on the trajectory for a thin and precarious deal, by rejecting the previously signed vision in the Political Declaration, threatening to renege on the Withdrawal Agreement, and giving precedence to sovereignty (i.e., no alignment with EU rules) over market access.

The nature of Brexit as an instance of disintegration removed the possibility of falling back onto a status quo in case negotiations failed. On the UK side, Prime Minister Boris Johnson utilised this to create a “this deal or no-deal” narrative which allowed him to push through a last-minute deal with little domestic scrutiny. On the EU side, Number 10’s flirtation with no-deal and its apparent willingness to renege from what it had agreed to in the Withdrawal Agreement caused long-term damage to trust that outlasts the immediate negotiations. It thus introduced an element of precariousness that was reflected in the EU’s insistence on a robust governance framework.

Trading partners usually negotiate up not down; that is, they aim for closer ties to everyone’s benefit. In the case of the Brexit negotiations this was turned upside down: the EU and the UK negotiated a more distanced settlement after having been bound by common rights and obligations, the EU *acquis*, for 47 years. Hence, neither the EU nor the UK gained economically compared to the status quo of British EU membership. The EU saw the relationship as “scalable” (Interviews 2 and 3) with the possibility of decreasing or increasing access (and consequently economic cost)

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4 Particularly the UK’s decisions to leave the Single Market and Customs Union and to reject oversight from the European Court of Justice as set out by Theresa May in her Lancaster Speech in January 2017, as well as the EU’s insistence on no cherry-picking of the Single Market.

proportionate to the level of obligations. However, the UK government decided to prioritise political considerations over economic concerns, driven by ideological views, as well as considerations of internal party management and retention of power. As a result, negotiators designed a more distant relationship to manage divergence over time (while limiting the economic damage relative to a no-deal scenario). The EU side showcased remarkable unity throughout the entire process, which complemented its structural and procedural bargaining power. The Task Force for Relations with the United Kingdom (UKTF) led by chief negotiator Michel Barnier pursued a strategy based on transparency and continuous consultation with the member states and EU institutions (Gostyńska-Jakubowska and von Ondarza 2020, Greubel 2019). This enabled Barnier to effectively defend the EU's collective interests, while ensuring political buy-in from all relevant actors.

## 1.2 Consistency with EU principles and objectives

Faced with the prospect of an economic heavyweight on its doorstep, the EU aimed to safeguard its material interests, such as settling financial obligations undertaken during the UK's membership; an agreement on fisheries upholding the pre-Brexit status quo of reciprocal access conditions and quota shares; as well as robust commitments to prevent unfair competitive advantages for the UK.

The Withdrawal Agreement settled the financial contribution early on. Whilst unable to satisfy the rather maximalist demands on fisheries, the TCA fulfils the overall negotiating objectives set by the European Council (2018). It secures a single overarching framework, an agreement on fisheries<sup>5</sup> and robust commitments that ensure a level playing field (LPF). Particularly, the LPF provisions are significant and could become a template for future trade deals (Interview 2).

Beyond the Union's material interests, the TCA also broadly secures its strategic objectives. The EU had three main goals in the wider process of the UK's exit: peace and stability in Ireland/Northern Ireland, the integrity of the Single Market and good relations with the UK (Interview 1).

These objectives each allude to something bigger. Firstly, there is the importance of solidarity, which is the idea that when one member state's fundamental interests are at stake, these interests become a collective priority, which is especially significant for the smaller member states. Secondly, there has to be a difference between being in or out, with the integrity of the Single Market and the indivisibility of the four freedoms assuming an economic as well as political significance (Interview 1). Lastly, the objective of a good relationship explicitly expressed in "the Union's determination to have as close as possible a partnership with the UK in the future" (European Council 2018: 2) acknowledges that – regardless of Brexit – there will be

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<sup>5</sup> The EU maintains its access over the next five years with a gradual reduction in quotas. The end of the adjustment period in fish coincides with the adjustment period for UK access to the European energy market, giving the EU leverage.

a relationship between the EU and UK as next-door neighbours that share values and interests across borders.

While these objectives have been broadly met, the TCA establishes a relationship that is more distant and less comprehensive than the Union envisioned. This is the case compared to other forms of partnership, particularly participation in the Single Market, but more significantly also in relation to the ambitions set out by the Political Declaration. Worthy of note is the lack of a mobility chapter, the absence of any formal arrangements on foreign and security policy, and the UK's decision to drop out of the Erasmus programme, all of which would have been desirable to include from an EU perspective.

## 1.3 Governance effectiveness

With the UK having left the EU's multi-level governance framework, the TCA introduces a complex institutional framework to manage the new relationship (Trade and Cooperation Agreement Title III: Institutional Framework). This includes a Joint Partnership Council<sup>6</sup> and a plethora of committees and working groups as well as binding enforcement and dispute settlement mechanisms. Needless to say, trade and cooperation will be more difficult outside the framework of EU membership. The question therefore is whether the Agreement will serve as an effective instrument a) to mitigate (economic and political) disruption, b) to prevent and/or resolve disputes and c) to deal with joint (global) challenges facing the EU and the UK.

### a) Effectiveness to mitigate disruption

A no-deal would have been an economic and political rupture, which might have resulted in the total break-down of the relationship. While having a deal is infinitely better, the TCA falls short of some of the supposed benefits of reaching a deal. Its ability to mitigate disruption, for example, is rather limited. The new economic settlement ambitiously agrees tariff- and quota-free movement for goods. However, preferential trade terms are subject to rules of origin and non-tariff measures still make trade more cumbersome and costly. The former is an important caveat, as in practise, many companies either do not qualify for tariff-free trade or struggle with the complexities of utilising the preferential terms. As reported by the BBC, an analysis by the Trade Policy Observatory shows that up to 3.5 billion pounds of British exports faced tariffs in the first three months since the TCA became operational (Islam 2021). Furthermore, the TCA's limited provisions on trade in services have created new barriers for many industries, including financial services and the creative sector.

In the first three months of 2021, EU–UK trade experienced a sharp fall, with EU exports to and imports from the United Kingdom dropping by 14.3 per cent and 35.4 per cent respectively (Eurostat 2021). These numbers are not just a sign of teething

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<sup>6</sup> The Partnership Council, co-chaired at the ministerial level (EU Commissioner and UK Minister), will oversee the attainment of the Agreement's objectives, supervise and facilitate its implementation, and provide a forum to resolve disputes at the political level.

problems, but of structural changes, rendering certain supply chains and business models unviable.

The level of disruption was reinforced by the lack of an implementation period, exposing businesses and individuals to new rules almost overnight. However, the fact that businesses are still experiencing disruption six months into the relationship illustrates how fundamentally trading relations have changed. Furthermore, implementation on the UK side is falling short of what was agreed, causing further disruption, particularly with a view to the Northern Ireland Protocol. The continuous threats by the UK government to take unilateral action and breach agreements they have signed heightens precariousness, especially since the EU functions as a community of law and treaties.

Politically, the new relationship is also off to a rocky start: the (now resolved) disagreement over the status of the EU Ambassador in London, disputes over the implementation of the Northern Ireland Protocol and the row over fishing rights in Jersey's waters set the scene for a bumpy and conflictual relationship.

A breaking down of relations has been avoided, but concluding a deal has not eased tensions, and expectations are that things will get worse before they get better (Interview 3).

## **b) Effectiveness to prevent/resolve disputes**

The deal provides an in-built dynamism in form of several grace periods, transitional periods and reviews of (parts of) the Agreement. This includes a general review of the Agreement after five years, a review of the fisheries provisions four years after the end of the adjustment period, and the possibility for either party to request a review of the deal's trade provisions after four years (Trade and Cooperation Agreement: Art. 776, 510 and 411).

These reviews are partly linked with EU and UK electoral cycles and/or create political linkages between areas of strategic importance. For instance, the adjustment periods on energy and fisheries both end in 2026. These linkages across vital sectors create points of leverage, which in a politically heated environment can have an escalating effect (as exemplified by the French government considering leveraging electricity supplies to Jersey in the dispute over post-Brexit fishing rights). Furthermore, the next UK general election and European Parliament election are likely to fall into the year before the first review, creating a political backdrop which could turn the review from a technocratic exercise into an election issue.

Given that the TCA's evolution takes place in a highly politicised context, its technical mechanisms could become enablers for further friction. This could go as far as the collapse of (parts of) the current arrangements. Even if this can be avoided, there is a strong possibility of ongoing friction, which is economically and politically costly.

Reflecting the EU's desire for a robust governance framework, the Agreement provides binding enforcement and dispute settlement mechanisms, including some

innovative elements on the LPF. For example, environmental and labour standard non-regression clauses now have enforcement mechanisms that are absent in other free trade agreements (FTAs). The TCA also provides a list of remedial, rebalancing and safeguard measures, for instance to address disputes over divergence, allowing for quick and harsh retaliation in cases of noncompliance (European Commission UKTF 2021).

While dispute settlement mechanisms have rarely been invoked in the EU's FTAs, the EU–UK agreement differs from most FTAs. It governs an economic relationship that is highly intertwined, implying that any noncompliance would have a major impact. The EU can therefore be expected to place more emphasis on enforcement, which is also in line with an overall shift in EU trade policy, as demonstrated by the recent creation of a Chief Trade Enforcement Officer. Also setting the TCA apart from other FTAs is the fact that its mechanisms manage divergence instead of convergence, and that in a highly politicised context. If used, they could unbalance the whole Agreement, by escalating into a tit-for-tat (Wachowiak and Zuleeg 2021b: 5).

In the absence of a constructive and trusting political relationship, the governance structures might not suffice to prevent smaller problems from spiralling out of control.<sup>7</sup> Trust is in short supply and can only be rebuilt through dialogue, including on the highest political level. The TCA does not prevent high-level dialogue, but neither does it provide any concrete tools for rebuilding relations.

There seems to be a more general clash on how both sides view the joint governance structure. The EU has relegated the relationship to a third-order issue, wherever possible to be dealt with in the TCA's technocratic committees and working groups. On part of the UK government, there is less enthusiasm for the overarching institutions, which run counter to the British negotiating aims of securing sectoral agreements, as well as ruling out structured cooperation and any form of dynamic alignment.

This reluctance is exemplified by the decision to delay the activation of the joint governance structure until after full ratification. For the current government and Lord David Frost, the Minister in charge of EU–UK relations, reservations against the institutional framework are driven by fear of “British officials going native and quietly doing deals” with their counterparts (Interview 3), eventually “trapping the UK in too close a relationship” (Interview 3). The UK government's emphasis on eradicating the “internalised principles of EU law and EU ways of thinking about things” (House of Commons 2021: Q58) might interfere with the effective functioning of the joint structures.

## c) Effectiveness to tackle joint global challenges

The EU and the UK share a lot of the same interests globally, be it on climate change, multilateralism or security in the European neighbourhood. The TCA explicitly recognises “the importance of global cooperation to address issues of shared

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<sup>7</sup> Discussions held as part of the closed “EU-UK track 2” initiative, organised by the European Policy Centre on 27 April 2021.

economic, environmental and social interest” (Trade and Cooperation Agreement: Art. 770), and reiterates “the Parties shall endeavour to cooperate on current and emerging global issues of common interest such as peace and security, climate change, sustainable development, cross-border pollution, environmental protection, digitalisation, public health and consumer protection, taxation, financial stability, and free and fair trade and investment”. It is worthy of note that the language on a shared global agenda is more ambitious than is usually the case in these kinds of agreements (Interview 1), but at the same time it does not provide any mechanisms to further these aspirations.

The current UK government has been unequivocal in its rejection of any institutionalised cooperation with the EU. For instance, it explicitly decided against any formal foreign and security policy arrangements.<sup>8</sup> The recently published Integrated Review of Security, Defence, Development and Foreign Policy confirms that “we will work with the EU where our interests coincide” (UK Government 2021: 21), affirming an ad-hoc approach to cooperation. The lack of institutionalised, regular dialogue on global challenges will lead to less coordination and thus predictability. It also means that there is no structure to anticipate or resolve disagreements when they arise.

Furthermore, the UK’s preference for bilateralism is rendered ineffective in areas where the EU member states have an interest in a common EU approach. Since Brexit ended Britain’s participation in the Dublin Regulation, the UK has been unable to strike any bilateral return arrangements to realise the Home Office’s proposals to remove asylum seekers to “France and other EU countries” (Townsend 2021).<sup>9</sup>

One way of allaying ideological concerns on the UK side might be via strengthening EU–UK–US triangular cooperation. With the momentum of the Biden administration and hopes for reviving transatlantic relations there is a window of opportunity for creating avenues of cooperation which would be difficult for Boris Johnson to turn down. Climate cooperation in the run-up to COP26 could be an opportunity to test this.

However, a predominant problem is who reaches out to whom. Particularly, as there are doubts on the EU side about bringing in the US as an intermediary, with the view being that the EU needs to have its own bilateral relationships (Interview 5). From the member states’ perspective there are also concerns about elevating the UK to the same level as the US. Equally, the UK government is unlikely to take initiative given that any form of triangulation with a pro-European US administration might be a rather uncomfortable prospect (Interview 3).

## 1.4 Democratic legitimacy and sustainability

It is one thing to agree on a new partnership framework, another to make it work. For the TCA to be sustainable, its governance arrangements must not only be effective,

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<sup>8</sup> For further details on the EU’s foreign, security and defence policy relations with third countries and their relevance to the EU’s co-operation with the UK in these areas see Bond (2020).

<sup>9</sup> For further background on EU–UK negotiations on the movements of third-country nationals see Comte (2020).

but also “be considered legitimate in the eyes of the affected societies” (Lavenex and Križić 2019: 18), in this case EU and UK citizens. Arguably, the effects of Brexit – in terms of economic fallout and political reverberations – will be felt more strongly by British citizens. Particularly affected groups such as fishermen or the creative industries have already expressed their dismay. General public confidence (or lack thereof) in the post-Brexit arrangements could manifest itself at the ballot box, nationally or at a devolved level. It is still early days for the new relationship, but some (public) concerns about its implementation are worth noting.

First, the main reasons why people voted to leave – namely immigration and sovereignty (Carl 2018) – imply that a majority of leave voters considered the transfer of decision-making authority from the UK to the EU as problematic. The TCA addresses this concern by leaving the orbit of EU law. However, not all of the UK’s constituent parts supported Brexit. This divide creates concerns about the acceptance of the new settlement, particularly in Scotland and Northern Ireland.

The Northern Ireland Protocol is heavily contested by some of the affected communities. Surveys commissioned by the Queen’s University show that views in Northern Ireland on the appropriateness and benefits<sup>10</sup> of the Protocol are divided. However, a majority of respondents assess the current impact of the Protocol as negative overall, and trust in most actors involved in its implementation is low.<sup>11</sup>

An important source of legitimacy comes from “the right of participation of relevant actors” (Lavenex and Križić 2019: 19). The revised Withdrawal Agreement introduces a consent mechanism. The Northern Ireland Assembly will periodically be asked to vote whether the trade arrangements in Articles 5–10 of the Protocol should continue to apply. Whilst formalising participation, the process itself is contested in Northern Ireland. The Democratic Unionist Party (DUP) criticises that the vote can be conducted by simple majority, thus undermining the principle of consent in the Good Friday Agreement. The party joined other unionists in tabling legal action, challenging the process for the consent mechanism and the Protocol on these grounds (Sargeant 2021). The leader of the nationalist Sinn Fein party warned against changes that would grant the DUP a veto, otherwise “there will be no Assembly here in Belfast” (Cordon 2019). This shows the volatility surrounding the mechanism, but also the power-sharing arrangements in Northern Ireland, which could collapse once again.

With a view to the long-term functionality of the Protocol, there is a need to ensure that those affected by its implementation are not absent in the decision-making structures (Nguyen 2020). It is clear that the Protocol’s implementation cannot be something that is “is done ‘to’ Northern Ireland”, but must “[involve and be] responsive to the needs and interests of Northern Ireland” (Hayward and Phinnemore 2021a).

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10 While a majority agree that particular arrangements are needed for Northern Ireland, only 46 per cent consider the Protocol appropriate for managing Brexit, 42 per cent disagree; 43 per cent agree that the Protocol is on balance a good thing, 44 per cent disagree. For more details see Hayward and Phinnemore (2021b).

11 This is particularly true of UK actors, such as the UK government and Whitehall civil servants, but Northern Irish institutions and the joint EU-UK committee only fare marginally better. For more details see Hayward and Phinnemore (2021b).

This could involve drawing much more on local expertise and knowledge from Northern Ireland, for example by inviting local representatives to Commission expert groups, offering Northern Ireland a seat on the Committee of the Regions and an observer status in European Parliament committees.<sup>12</sup> Partly due to the polarised nature of Brexit in the UK, domestic consultations with a wide variety of stakeholders have been rather limited. It remains to be seen how the UK government handles inclusiveness and consultations in this new stage of Brexit. Early signs are that its attempts to maintain a gatekeeper function for contacts on the sub-national level are fuelling polarisation. Particularly Scotland criticised David Frost's letter asking devolved authorities to inform the UK government about the "fact and content" of their interactions with the EU, as well as to "support the UK Government's position in such contacts" (Gallardo 2021).

Importantly, the TCA foresees a parliamentary assembly and a civil society forum which should be set up without delay. In the longer run, the involvement of these actors in the implementation and regular exchanges between EU and UK civil society, officials and parliamentarians will be important tools in rebuilding trust and enhancing the deal's legitimacy.

## 2. The implications of Brexit for modes of differentiated European integration

### 2.1 Pre-Brexit modes of European integration through differentiation

The EU is at the centre of a European ecosystem of differentiated modes of integration. Broadly speaking, in pre-Brexit Europe countries related to European Integration as: a) a third country, b) a (potential) candidate country or c) an EU member state. These modes vary in their level of integration, the possibilities for influence and their permanency.

#### a) Mode 1: EU–third country relations

The countries of the European Free Trade Association (EFTA), Iceland, Liechtenstein, Norway and Switzerland, fall under this mode of permanent external differentiation, which allows for deep economic integration at a political price. The EFTA countries are essentially rule-takers.

Within this group Iceland, Liechtenstein and Norway form part of the European Economic Area (EEA), while Switzerland rejected EEA membership in 1992 and subsequently agreed a series of bilateral agreements with the EU (the so-called

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<sup>12</sup> Discussions held as part of the closed EPC "EU-UK track 2" initiative on 27 April 2021.

“Bilaterals I” in 1999 and “Bilaterals II” in 2004).

The EEA states participate fully in the Internal Market, including the four freedoms and dynamic alignment with EEA-relevant EU acts (EFTA 2013). The Agreement is managed by a two-pillar structure through which the EEA EFTA states mirror key EU institutions, while also establishing joint bodies to implement and develop the Agreement (EFTA 2013). Given the dynamic nature and legal quality of their alignment, they can be described as “quasi-EU members” (Lavenex 2011: 376) without formal decision-making powers.

Unlike the EEA countries, Switzerland only has partial access to the Single Market, with limited market access in services. Formally, the relationship is more static in nature. In practice, however, Swiss–EU relations are highly dynamic, leading to a situation similar to the EU–EEA relationship as one between policy-maker and policy-taker (Vahl and Grolimund 2006).

Pre-Brexit these models created a permanent relationship below the threshold of membership. They are dynamic with the intention of maintaining the status quo, not to manage divergence over time.

## b) Mode 2: EU–(potential) candidate country relations

This mode of external differentiation is intended to be a temporary waiting room on the way to membership. It currently encompasses Albania, the Republic of North Macedonia, Montenegro, Serbia and Turkey as candidate countries, as well as Bosnia and Herzegovina and Kosovo as potential candidate countries that have been offered the prospect of membership once they are ready.

While Turkey has the status of a candidate country, it should be considered as somewhat of an outlier. Accession negotiations with Turkey were effectively frozen in June 2018, particularly in response to backsliding in areas like democracy and rule of law. Given Turkey’s size and strategic importance the EU has struggled to find a well-functioning framework, torn between transactional considerations (e.g., in areas of strategic importance such as migration and counter-terrorism) and a principle-based approach (e.g., with a view to the deterioration of democratic standards) (Toygür 2021).

Relations between the EU and the Western Balkan countries are characterised by the long-term wish to become part of the club, driven by strategic considerations and dissatisfaction with having no political voice. Candidate countries are expected to fully align with the EU *acquis* by the time of accession. At most, transitional arrangements can be agreed for certain areas, provided full compliance over time can be ensured.<sup>13</sup>

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13 European Commission website: *Steps Towards Joining*, [https://ec.europa.eu/neighbourhood-enlargement/policy/steps-towards-joining\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/steps-towards-joining_en).

Otherwise, there is no room for divergence, even less so than for some EU member states. For example, while Denmark obtained an “opt-out” from entering the third stage of Economic and Monetary Union, joining members commit, in principle, to introduce the euro.

Given the destination of ever-closer partnership, the EU offers trade concessions, economic and financial assistance, and assistance for reconstruction, development and stabilisation.<sup>14</sup>

The EU also has distinct externally differentiated relations with the 16 countries of the European Neighbourhood Policy (ENP). The ENP creates a framework for third countries that will not be considered potential candidate countries for the foreseeable future, and are not as deeply integrated as the EFTA countries. These relations, particularly the Deep and Comprehensive Free Trade Areas with Ukraine, Georgia and Moldova, go beyond traditional free trade agreements, requiring alignment with a large proportion of the EU *acquis*, but are not as comprehensive as relations with the EFTA countries. Overall, the focus is more on regional stabilisation (politically, economically and with a view to security concerns).

### c) Mode 3: EU membership

Already before Brexit, it was clear that the Union would not accommodate negative divergence from its core policies. But within the EU internal differentiation is already an established feature, with the Eurozone and Schengen being the most prominent examples.

Internal positive differentiation broadly fulfils one of two (or both) purposes:

1) *Overcoming stalemates*. The EU has utilised the creation of permanently differentiated mechanisms to buy consent for further integration. For example, Denmark and the UK were granted a permanent opt-out from participating in the third stage of the Economic and Monetary Union and thus from introducing the euro. While this form of differentiation carries the danger of sustaining a core-periphery divide, it has clearly been effectively used to overcome stalemates in the EU that grew to 28 members.

2) *Moving at a faster speed*. The EU treaties (Article 20 of the Treaty on European Union and Title III of the Treaty on the Functioning of the EU) foresee the possibility of enhanced cooperation between a minimum of nine EU member states, which can set up advanced integration or cooperation in a particular field. In addition, there are specific Treaty provisions for differentiated cooperation within the EU Common Foreign and Security Policy.

The underlying belief is that integration by an avant-garde of member states in one policy sector leads to technical pressures pushing other member states to follow. The intention goes further than overcoming short-term opposition, and is about

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14 Ibid.

changing member states' preferences in the long term (Chopin and Lequesne 2016: 534).

So far, however, enhanced cooperation has rarely been used. Examples are in the area of law applicable to divorce and legal separation, unitary patent on the European level, property regime rules for international couples, and the establishment of a European Public Prosecutor's Office. So far, this has been a testing of the waters, rather than a mainstreaming process (Wessels and Gerards 2018).

## 2.2 Post-Brexit modes of European integration through differentiation

Brexit introduces a new mode of external differentiation in Europe: a former member state with no intention for membership in the future. The introduction of this new mode also has implications for existing differentiation within the EU and between the EU and third countries and (potential) candidate countries.

### 2.2.1 A new mode: EU–former member state

The EU–UK relationship is fundamentally different from previous forms of external differentiation in two ways. The relationship is designed with the intention of disintegration, not integration. Furthermore, its in-built dynamism explicitly allows for divergence over time (and at a cost).

In terms of its regulatory scope, the Agreement is based on international law. There is no reference to the European Court of Justice (ECJ) in the TCA, apart from a limited role related to the UK's participation in EU programmes such as Horizon Europe. The Agreement does not require the UK to dynamically align with EU law. However, it is worth noting that there is a role for the ECJ in the implementation of the Withdrawal Agreement, and Northern Ireland will remain aligned to a limited set of Single Market rules.

More generally, the new EU–UK partnership does not follow the same logic as the EU's existing patterns of external relations (see Lavenex 2011). The TCA does not corroborate the notion of concentric circles that decrease in intensity with growing distance from the EU. On the contrary, it establishes a distant relationship with limited economic integration between immediate neighbours. Neither does the new EU–UK relationship follow a functional logic of sectoral interdependence. Given the primacy of sovereignty concerns, it does not even cover all areas of EU–UK economic relations, let alone cooperation in other spheres (Justice & Home Affairs, foreign policy). Finally, it is also not a relationship that aims for eventual membership.

Instead, sovereignty concerns trump both geography and functionality. That does not mean the UK escapes its geography as proximity, size and interconnectedness still play an important role in determining the level of binding obligations. The sovereignty doctrine also hints at the future direction of travel as it stipulates that there is no real

“punishment” associated with having no voice.

## 2.2.2 Implications for differentiation within the EU and between the EU and third countries

The reality of Brexit acts as a negative incentive not to devise generous forms of third-country access, suggesting a more hard-line approach towards non-EU members.

### a) Mode 1: EU–third country

The four-and-a-half-year debate about what it means to be “in or out” consolidated the principles underpinning EU–third country relations. The message to both EU member states and third countries is that membership matters and divergence comes at a cost.

There can be no cherry-picked access to the Single Market and the four freedoms – goods, capital, services and labour – are indivisible. Furthermore, relations should be governed by an overarching institutional framework, with linkages between specific areas of cooperation.

In addition, there is a correlation between geographic proximity, size and interdependence and the balance of rights and obligations that can be struck. While these principles also applied before Brexit, they are now irrefutable with a view to the EU’s approach to its neighbours. The fact that the UK joins the circle of European third countries – albeit with a very unique type of relationship – reinforces the notion of this group as “perma-outs” with implications for all its members.

This becomes evident with a view to the EU-Swiss relationship. Since 2014 the EU and Switzerland have tried to conclude a new Framework Agreement with the intention of addressing the lack of an overarching framework governing the Swiss participation in the Single Market. The Swiss decision on 26 May 2021 not to sign the agreement was met with regret by the EU side, but also with a hard-nosed warning that the bilateral relationship will grow increasingly outdated. For example, the EU-Switzerland Mutual Recognition Agreement for Medical Devices ceased to apply on the same day (26 May). The EU has been clear that an update cannot be considered absent a Framework Agreement (European Commission 2021).

### b) Mode 2: EU–(potential) candidate country

The impact of Brexit on the EU’s relations with (potential) candidate countries is less obvious and/or it is too early to tell. Possibly, it sets the bar to get in even higher. It might also act as an incentive to offer less beforehand in terms of access or temporary derogation. On the other hand, if a candidate country is willing to fulfil the conditions, the EU should be clear that fast and easy accession is possible and desirable.

In a post-Brexit world the EU should draw a clear line in the sand between being in or out, unless it is very clear that the country will join. The intention should be to prevent an accidental model of associate membership that might give privileged access without the corresponding obligations. At the same time, an enlarged EU could demonstrate that it is an attractive and relevant actor with critical mass in Europe and globally. This should be an incentive to move faster where possible.

### c) Mode 3: EU membership

In a post-Brexit world, the EU should place even greater importance on demonstrating that membership matters and is relevant. That implies that the scope for differentiation is limited. But it also means that the EU must be a relevant and effective actor in addressing cross-border problems.

1) *Overcoming stalemates*. Pre-Brexit four member states – the UK, Ireland, Denmark and Poland – held opt-outs. Nonetheless, given its size the UK's opt-outs carried particular weight, for example as the largest non-euro country. The UK was also the member with the greatest proportion of opt-outs, making the EU more homogenous after its exit. This raises the question whether there are any lessons to be drawn from the experience with the UK's membership and exit for how the EU should deal with members that are unwilling to move at the same speed as the rest and/ or are demanding opt-outs from certain areas of integration.

Arguably, allowing for British opt-outs enabled the EU to integrate further. But this came at a cost, seeing that the possibility of opting out increasingly dominated the UK's thinking. British governments spent more and more intellectual and institutional capital on exploring where and how to disengage, thereby creating an increasingly negative vision of their place in the EU (Interview 3). This psychological effect should be kept in mind when dealing with other Eurosceptical governments.

It would however be too simplistic to conclude from Brexit that opt-outs either pave the way for disintegration or do not go far enough in accommodating individual preferences. It is crucial to understand that the UK has always been a reluctant member state, giving its membership a *sui generis* character.

Overall, flexibilities should remain possible, but they need to be designed and policed carefully. Brexit reinforces the view that "you have to be fully in to avail from the opt-outs" (Interview 2). Crucially, the EU should not grant opt-outs from its core principles. In other words, it should place even greater importance on the Single Market, the role of the court and the indivisibility of the four freedoms as integral parts of EU membership. Another area where there can be no exemptions is the EU's founding values as laid out in Article 2 of the Treaty on European Union (Interview 4).

In some areas, such as migration and the rule of law, the EU faces the problem of informal (or unilateral) opt-outs with some member states refusing to be compelled. This form of internal divergence poses a difficult challenge and cannot be addressed through traditional routes of differentiated integration. It also goes to show that *ex ante* conditionality does not guarantee *ex post* compliance.

2) *Moving at a faster speed.* What does the UK's exit mean for the EU's ability to advance integration systematically and/or for some/all members' ability to agree to greater cooperation on certain files?

On the former, Brexit may have invigorated debates on differentiated integration, but there is no evidence that the principle of a more comprehensively differentiated EU/Europe enjoys sufficient political support. One could even make the opposite case, as the differentiated deal offered to Prime Minister David Cameron in 2016 did not change the UK's trajectory. Neither does differentiation currently feature prominently in debates about the Conference on the Future of Europe, which display a palpable hesitancy to promise systematic (treaty) changes, and instead focus on process and a wide variety of policy areas.

With a view to greater cooperation, the UK's exit has had some enabling effects. Interestingly, rather than incentivising differentiated cooperation through selected members, the EU moved ahead as one. This is particularly the case for the areas of recovery and defence, as well as in the Brexit process itself.

Albeit a counterfactual, there is broad consensus that the decision on the recovery fund and budget would not have been possible with the UK at the table (Interviews 1, 2, 3, 4 and 5). Moreover, security and defence have emerged as policy fields where EU cooperation has been advanced in response to Brexit.

But the enabling effect of Brexit should not be overstated. Overall, Brexit does not remove internal obstacles to deeper integration. The UK certainly was not the only reluctant force and some medium-sized and smaller member states used to rely on British opposition.

In general, smaller member states that would traditionally have sided with the UK can now be picked off more easily by big member states. Some mid-sized members might attempt to take up a leadership role on these traditional UK causes themselves. This can be observed in the case of the Dutch government emerging as the leader of a frugal coalition with Finland, Sweden and Denmark during the negotiations on the budget and recovery fund – albeit not very successfully.

## Conclusions

The TCA is a *sui generis* agreement suited to the specific needs of the EU–UK relationship, particularly its geographic proximity, size and interdependence. Resulting from both sides' red lines the deal is the base for a thin and precarious relationship. Fundamentally, the Agreement is about disintegration and managing divergence, setting it apart from any other existing model of differentiated integration. As a result, it is unlikely and undesirable that it should be emulated by other European countries.

Nonetheless, the introduction of the EU–UK agreement into the ecosystem of integration in Europe has implications for the EU itself and for its externally differentiated relations.

*The EU must show that its core principles are non-negotiable:* The EU needs to be clear on what constitutes the core principles of EU membership – the role of the Court, the integrity of the Single Market and the indivisibility of the four freedoms. These principles are non-negotiable if you want to be a member of the club. Equally, you have to be fully in to be offered any flexibility, i.e., desired divergence is a core benefit of membership.

*The EU must be attentive to (evolving) perceptions of Brexit:* For the EU to successfully preserve its interests now and into the future, it matters how the perception of Brexit will evolve over time. So far, the reality of Brexit has had a deterrent effect on other EU member states. The TCA sends the clear signal to the UK and EU27 that membership matters.

However, if Boris Johnson succeeds in selling any success as a Brexit dividend, while blaming any fallout on the EU, the perception of Brexit might begin to shift. Additionally, if Johnson continues to escape any political reckoning, the politics of Brexit could gain in appeal for other Eurosceptic leaders (Wachowiak and Zuleeg 2021a). With a view to averting a future Brexit domino effect, the lessons from the Michel Barnier era should be brought into this new, post-Brexit phase by ensuring a clear mandate for the Commission's Service for the EU–UK Agreements (UKS), transparency, and the continuous coordination of and consultation with the EU member states and institutions.

*The EU should apply the lessons from the Barnier method (with the UK and elsewhere):* The EU should reflect on its proven ability to keep a united front and apply the lessons learnt to its relations with the UK and other countries. So far, it is encouraging that the EU is continuing some of the structures of inter-institutional and -member state governance. Apart from the UKS which succeeds the Barnier Task Force, the Council decided to keep its Brexit Working Party to ensure coordination and exchange of information with the EU27. Member states have already started to speak with the UK on bilateral issues that matter to them, for example Spain on social security cooperation (Interview 5). While this is legitimate and normal, it is important to avoid any divisive bilateralism and maintain solidarity. An example of this is the UK's plan to apply higher post-Brexit work visa fees for five EU member states. Inter-institutional and -member state coordination is required to take an unequivocal stand and not let this type of differentiated treatment cause internal division.

The EU should take on the lessons from the Barnier method and apply it to other negotiations too. Particularly, the use of transparency as a tool to build trust, a clear mandate, and strategic coordination of and consultation with the member states and EU institutions could strengthen collective discipline also vis-à-vis other (difficult) economic and political partners.

*The EU must show that membership is relevant:* The EU must be attentive to the fact that exit is an option; it is no longer just a theoretical treaty provision, but a living possibility (Interview 4). Considering that Brexit reaffirms the fact that EU membership is voluntary, the EU cannot simply be about shared problems, but “needs to remind itself collectively that membership needs to be relevant” (Interview 4) and provide actual solutions to joint challenges.

If EU membership is a relevant framework for dealing with global challenges that cannot be addressed effectively at the national level, it should follow that membership of the candidate countries should be encouraged. While the conditions for membership need to be fulfilled, the EU should send a clear signal that it is serious about wanting these states to join the club. Eventually, this could come with increased critical mass for the EU in the global context.

*The EU should invest in trust-building:* There are serious concerns regarding the TCA’s effectiveness and sustainability. It is an unfinished relationship with inbuilt dynamism for better or for worse, however politics point to growing estrangement and divergence over time. The loss of trust over the last four years has been bleeding into all levels of the relationship, raising the question whether the technocratic governance structure can work in the high-friction context of EU–UK relations. With levels of trust at a low point the mechanisms risk being politicised, possibly leading to severe economic penalties and a tit-for-tat tariff escalation. Only time will tell, but there is a need to invest in trust-building. If that is currently not possible at the highest political level, the EU should focus more energy on the sub-national level and promote relations between sub-state actors such as devolved administrations, regions and cities, civil society, academia and think tanks.

*The EU should be open for new avenues of cooperation:* The lack of a deep and comprehensive partnership covering all areas from trade to foreign and security policy has implications for the capacity of the EU and the UK to effectively pursue joint global goals. On the positive side, there are some innovative elements on the LPF, particularly with a view to enforceability of non-regression and ambitious language on climate, which might serve as a template for future FTAs. But ambitious language does not suffice when the avenues for cooperation are lacking and political will is lukewarm.

The 26th UN Climate Change Conference of the Parties (COP26) in Glasgow in November 2021 will be a test case for EU–UK cooperation. While both sides are closely cooperating on the technical level – particularly through the UK’s COP presidency – the Brexit fallout has seeped into political avenues of cooperation. But without these avenues both sides will struggle to jointly formulate strategic goals.<sup>15</sup>

The EU might have to accept that the current UK government is very unlikely to agree on any form of institutionalised cooperation with the EU institutions. In this context, it might be helpful to strengthen bilateral and/or plurilateral ties between certain

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15 Closed workshop on EU–UK climate cooperation post-Brexit, organised by the European Policy Centre on 19 May 2021.



member states and the UK. This comes with the caveat that this should always happen in support of the EU's global role, adding value to the EU's capacity to act, not undermining it. Another avenue to explore is triangulation with the US.

Overall, the lessons from Brexit illustrate that the EU will have to tread a very fine line when it comes to differentiation. While differentiation in Europe is a reality, the EU should avoid blurring the lines between members and non-members in a way that unbalances rights and obligations. Once a country has become an EU member state, and has signed on to the EU's core principles in full, flexibilities are possible. Differentiation should make the EU a more relevant actor and add value to the EU's overall objectives, not undermine its core principles and its leverage when dealing with member states, candidates and third countries.

# List of interviews

Interview 1 with EU official, 18 May 2021

Interview 2, 20 May 2021

Interview 3, 21 May 2021

Interview 4 with university professor, 26 May 2021

Interview 5 with European Commission official, 1 June 2021

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EU Integration and Differentiation  
for Effectiveness and Accountability

**Differentiation has become the new normal in the European Union (EU)** and one of the most crucial matters in defining its future. A certain degree of differentiation has always been part of the European integration project since its early days. The Eurozone and the Schengen area have further consolidated this trend into long-term projects of differentiated integration among EU Member States.

A number of unprecedented internal and external challenges to the EU, however, including the financial and economic crisis, the migration phenomenon, renewed geopolitical tensions and Brexit, have reinforced today the belief that **more flexibility is needed within the complex EU machinery**. A Permanent Structured Cooperation, for example, has been launched in the field of defence, enabling groups of willing and able Member States to join forces through new, flexible arrangements. Differentiation could offer a way forward also in many other key policy fields within the Union, where uniformity is undesirable or unattainable, as well as in the design of EU external action within an increasingly unstable global environment, offering manifold models of cooperation between the EU and candidate countries, potential accession countries and associated third countries.

EU IDEA's key goal is to address **whether, how much and what form of differentiation is not only compatible with, but is also conducive to a more effective, cohesive and democratic EU**. The basic claim of the project is that differentiation is not only necessary to address current challenges more effectively, by making the Union more resilient and responsive to citizens. Differentiation is also desirable as long as such flexibility is compatible with the core principles of the EU's constitutionalism and identity, sustainable in terms of governance, and acceptable to EU citizens, Member States and affected third partners.



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