The institutional consequences of a bespoke agreement with the UK based on a “close cooperation” model
THE INSTITUTIONAL CONSEQUENCES OF A BESPOKE AGREEMENT WITH THE UK BASED ON A “CLOSE COOPERATION” MODEL

STUDY

Abstract

This study, commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the AFCO Committee, considers the governance and institutional aspects of a potential agreement on the future economic relationship between the Union and the UK based on a “close cooperation” model. “Close cooperation” agreements involve a strong ambition for economic integration, based in practice upon a high degree of alignment by the third country to the relevant Union acquis. Although the UK’s circumstances may well be unique, there are few grounds to believe that the formal terms for a Union-UK “close cooperation” agreement should be radically different from the experience gained and lessons learned from comparable relationships between the Union and other third countries. The special situation of the UK would be more likely to manifest itself empirically, through the practical operation and tangible outputs of the governance and institutional structures and processes established under any “close cooperation” agreement.
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<tr>
<td><strong>CETA</strong></td>
<td>Comprehensive Economic and Trade Agreement</td>
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<td><strong>DCFTA</strong></td>
<td>Deep and Comprehensive Free Trade Area</td>
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<td><strong>ECHR</strong></td>
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<td>European Free Trade Association</td>
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<td><strong>EPA</strong></td>
<td>Economic Partnership Agreement</td>
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<td><strong>EU</strong></td>
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<td><strong>FTA</strong></td>
<td>Free Trade Agreement</td>
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<td><strong>OJ</strong></td>
<td>Official Journal of the European Union</td>
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<td><strong>TEU</strong></td>
<td>Treaty on European Union</td>
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<td><strong>TFEU</strong></td>
<td>Treaty on the Functioning of the European Union</td>
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<td><strong>UK</strong></td>
<td>United Kingdom</td>
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<td><strong>WTO</strong></td>
<td>World Trade Organisation</td>
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EXECUTIVE SUMMARY

“Close cooperation” agreements seek to extend the Union’s own model for economic integration between Member States, as far as possible, to a third country / countries. Such agreements need to take into account the particularities of the Union’s competences in the field of external relations; as well as the principles that protect the autonomy of Union law from outside interference. In practice, “close cooperation” agreements entail a high degree of alignment to the relevant Union acquis. The Union will also seek to agree robust governance and institutional provisions; together with adequate guarantees against asymmetry when it comes to the legal effects of the agreement within the internal legal system of each party.

“Close cooperation” agreements therefore imply a basic trade-off: the relevant third country needs to decide how far it is willing to adhere to extensive elements of Union law, with no direct decision-making participation in the formulation of such rules and only limited opportunities for overall influence (taking into account also the legal constraints arising from its own constitutional order).

It is against that background that one must evaluate the UK position. The UK Government interprets the 2016 referendum as a vote to “take back control” of the UK’s borders, laws and money. At the same time, the UK Government calls for a “deep and special partnership” with the Union. In the economic sphere, that seems to entail: continuing adherence to Union standards in certain fields; maintaining mutual market access despite regulatory divergence in other sectors; and the rejection of extensive alignment and / or reciprocity in other areas.

However, the Union institutions treat the UK’s “red lines” as an obstacle to a truly ambitious trade agreement. Unless the UK Government changes its political preferences, the future economic relationship will therefore take the form of a wide-ranging but still essentially limited free trade agreement.

It is possible to anticipate the basic institutional structures that would underpin such a free trade agreement. However, one complicating factor is likely to be the Union’s concern to ensure a strong level playing field with the UK and, in particular, how far that might also lead to calls for more detailed and robust governance provisions to ensure its effective supervision and enforcement.

Equally, it is possible to anticipate the agenda for enhanced institutional structures that would underpin a potential Union-UK “close cooperation” agreement, e.g. as regards oversight of the agreement’s implementation and application; rules of interpretation and principles for responding to future legal developments; dispute settlement and enforcement mechanisms; as well as the internal effects of the agreement within the parties’ respective legal systems.

Important questions nevertheless arise concerning how far the unique circumstances and characteristics of the UK might challenge and reshape (rather than merely conform to and reinforce) the established paradigm for and acquired experience from “close cooperation” agreements between the Union and third countries. In that regard:

- the UK’s desire for selective participation in the Single Market is difficult to reconcile with the Union’s insistence that the four freedoms are indivisible. The latter proposition may not have the status of a constitutional imperative, but it is self-evidently in the Union’s rational self-interest, particularly in the context of a Member State’s withdrawal.

- the UK proposes maintaining market access in certain sectors, but without full adherence to the techniques and disciplines of the relevant Union acquis. That proposal seriously underestimates
the degree to which mutual recognition is the hard-won product of legally complex and politically sensitive frameworks, structures and processes.

- the constitutional principles protecting the autonomy of Union law from external interference or influence impose important and inherent limits to how far any third country (including the UK) might participate in or influence decision-making by the Union’s institutions, bodies and agencies.

- the UK’s post-referendum political agenda of “taking back control” may pose particular problems for the Union’s legitimate interest in ensuring the independent and impartial administrative and judicial supervision and enforcement of any “close cooperation” agreement within the UK itself. Either one party will have to accept governance principles it regards as sub-optimal; or failure to agree more ambitious institutional provisions could limit the feasible scope and / or depth of substantive cooperation itself.

From that analysis, three overall conclusions emerge.

The circumstances and characteristics of the UK as a third country may well be unique. However, in the event that changed political preferences lead the UK to seek an enhanced economic relationship with the Union into the future, there are few grounds to believe that the formal terms for any such “close cooperation” agreement should be radically different from the experience gained and lessons learned from comparable relationships between the Union and other third countries. More than that: there seems no credible prospect of the Union agreeing to demands (such as those already suggested by the UK Government) that would effectively amount to superior treatment for the UK as a third country than the Member States are prepared to afford each other within the framework of the Union itself.

The special situation of the UK as a third country would therefore be more likely to manifest itself empirically, through the practical operation and tangible outputs of the governance and institutional structures and processes established under any “close cooperation” agreement, e.g. by meaningful pre-legislative consultations, particularly in sectors of particular interest to the UK; and through the value of expert input into Union deliberations, especially in fields of undoubted UK strength. More generally, the degree of UK influence will surely be conditioned also by the strategic importance to the Union of creating and maintaining a wide-ranging and well-functioning cooperation with the UK which extends beyond economic relations into fields such as security and defence.

Conversely, the prospect of a “close cooperation” relationship with the Union in the economic sphere also presents the UK with a particularly acute political dilemma. All “close cooperation” agreements require the relevant third country to make a similar basic trade-off (as identified above) between greater economic opportunities and contraints upon national autonomy. In the idiosyncratic case of the UK, that trade-off must be deliberated under the influence of two powerful yet diametrically opposed forces. On the one hand, there is the superficial ideological rhetoric of “taking back control” – which acts as a serious limitation on the ability of any UK Government to commit the UK to “close cooperation” with the Union and argues instead for a “complete break” from the EU (regardless of how implausible one might regard the supposed benefits of doing so). On the other hand, there is the undoubted reality that any “close cooperation” agreement means the UK effectively substituting its previous power of leadership and influence within the Union for a new position of relative subordination as a third country – a transformation which calls into question the constitutional logic and political sense of the very act of withdrawal itself.

Visit the European Parliament's homepage on Brexit negotiations
1. INTRODUCTION

This report considers the governance and institutional aspects of a potential agreement on the future economic relationship between the Union and the UK based on a “close cooperation” model.¹

For these purposes, “close cooperation” means an international agreement providing for the UK’s continued participation in the Single Market in a manner equivalent or at least akin to the European Economic Area (EEA);² and / or for the UK’s continued participation in a Customs Union in a manner equivalent or at least akin to the arrangements applicable between the Union and Turkey.³ A defining characteristic of any such “close cooperation” agreement is that it would seek an ambitious level of market integration between the parties based upon an extensive commitment by the UK to continued harmonisation, approximation and other forms of regulatory alignment (on an ongoing basis) with the relevant Union acquis.⁴

Thus understood, a “close cooperation” agreement may be distinguished from other international treaties aimed at promoting greater economic cooperation between the parties but at a considerably lower level of ambition.⁵ Even a modern and wide-ranging free trade agreement (such as the existing Comprehensive Economic and Trade Agreement (CETA) between the Union and Canada⁶ or the pending Economic Partnership Agreement (EPA) between the Union and Japan⁷) seeks, e.g. to reduce tariff levels and other customs barriers between the parties, but without entailing participation in any more fully-fledged customs union also vis-à-vis third countries; and, e.g. to promote cross-border regulatory cooperation or even to facilitate some degree of convergence, but without providing for the binding harmonisation or approximation of internal laws across broad economic sectors – let alone doing so using the Union’s own regulatory standards as the common template.

On the one hand, in order to explore the governance and institutional aspects of a potential Union-UK “close cooperation” agreement, we can usefully draw upon a range of existing reference points. Obviously, the most important are the two arrangements which virtually define what it means today for the Union to engage in “close cooperation” with third countries: the EEA and the customs union with Turkey. However, one can also refer to the provisions of certain other international agreements, which are based upon a similar principle of aligning third country rules with Union law, albeit in more limited sectors of economic activity: for example, the agreements establishing the Transport Community,⁸ the Energy Community,⁹ and the European Common Aviation Area.¹⁰ Along the same lines, appropriate reference can be made, e.g. to the Deep and Comprehensive Free Trade Area (DCFTA) provisions contained in the Association Agreement with Ukraine.¹¹

On the other hand, there are important limits on the extent to which existing “close cooperation” arrangements with third countries might inform our understanding of a potential “close cooperation”

¹ This report will not consider the potential for Union-UK cooperation in other fields, e.g. education, research, police and security, foreign policy or defence.
³ See Decision 1/95 of the EC-Turkey Association Council on implementing the final phase of the Customs Union (22 December 1995).
⁵ Referred to as “distant areas models” by A F Fernández Tomás, ibid.
agreement between the Union and the UK. After all, the Union’s existing “close cooperation” agreements have been concluded with a range of different countries, over an extended period of time, in a diverse range of contexts and under a wide range of circumstances. It is therefore unsurprising to find that, as regards both their substantive scope / content and their governance / institutional arrangements, those agreements each reveal distinctive and divergent characteristics. This report will not seek to summarise the key features of or differences between the Union’s existing “close cooperation” agreements; but rather aims to identify various common themes and important lessons – from their limitations or weaknesses as well as from their strengths or successes.

Otherwise, this report is based on the premiss that any “close cooperation” agreement between the Union and the UK would equally be of a bespoke character. As we shall see, that raises important questions about how far the distinctive features of the UK situation might qualify or even depart from the expectations for any “close cooperation” agreement generated precisely by the Union’s existing practice and experience: those questions are explored in greater detail in Chapter 4. For now, suffice to note that the premiss of a bespoke relationship between the Union and the UK rules out the direct extension or replication of any existing “close cooperation” model with other third countries. Thus, we will not consider the option of the UK simply seeking membership of the European Free Trade Association (EFTA) and thence the EEA alongside Norway, Iceland and Lichtenstein.12 Similarly, we assume that the Union would not be willing to countenance another “Swiss model” based on the negotiation, over a prolonged period of time, of a complex and ad hoc network of bilateral sectoral agreements, lacking any central governance and institutional arrangements for their systematic and coordinated implementation, updating and dispute settlement.13

Finally, note that we will not explore the specific issues raised by the potential timescale for conclusion of a new agreement to govern the future economic relationship between the Union and the UK – in particular, the question of whether the transitional period which has been provisionally agreed between the Union negotiator and the UK, for inclusion in the withdrawal agreement intended to be adopted under Article 50 TEU,14 might eventually prove (in)sufficient to negotiate, conclude and ratify any agreement on the future economic relationship and thereby (fail to) guarantee that public and private actors need undergo “only one regulatory change” across the entire process from UK withdrawal to the entry into force of a new agreement with the Union.15

The remainder of this report is structured as follows. Chapter 2 explains some of the underlying issues that will be used as reference points throughout the subsequent analysis. We recall the overall agenda to be addressed in any international negotiation aimed at promoting closer economic cooperation between the parties; together with some key empirical lessons about the challenges facing agreements that aspire to a genuinely ambitious level of market integration. We then summarise the Union’s own model for economic cooperation between its Member States, which is generally recognised as a system of market integration unparalleled in its ambition and sophistication. That model provides the yardstick against which all other forms of third country trade agreements are to be measured – not only free trade agreements but also (indeed especially) “close cooperation” arrangements. Yet in addition, Union constitutional law imposes certain limits on the Union’s ability to enter into agreements with third countries: for example, through the principles which safeguard the autonomy of the Union legal

13 For a recent expression of the Union’s longstanding concerns, see, e.g. Council conclusions on EU relations with the Swiss Confederation (28 February 2017).
order against interference from external actors. Putting all those factors together, it is clear that third countries seeking genuinely ambitious forms of “close cooperation” with the Union in the economic sphere must accept the obligation to adhere to extensive elements of Union law, with no direct decision-making participation in the formulation of such rules, and only limited opportunities for overall influence.

Chapter 3 explores how the same overall agenda, empirical lessons and constitutional constraints will be relevant also to the UK as it seeks to negotiate a new framework for its future economic relationship with the Union. Based upon the political preferences thus far expressed by both the UK and the Union about the fundamental elements of their future economic relationship, we can anticipate the outlines of the governance and institutional structures likely to be included in any future free trade agreement between the two parties, e.g. as regards responsibility for administration and implementation, dispute settlement mechanisms and the internal legal effects of the agreement. However, changes in the UK’s political preferences might yet prompt the Union to upgrade its current offering – leading to a more ambitious “close cooperation” agreement on economic cooperation based on continued UK participation in the Single Market and/or Customs Union. If so, such an agreement would naturally call for more sophisticated governance and institutional structures, in order to fulfil the demand for effective and dynamic homogeneity in the alignment of UK law with the relevant Union acquis.

Chapter 4 then discusses how far the unique circumstances and characteristics of the UK as a third country might challenge and reshape (rather than merely conform to and reinforce) the established paradigm for and acquired experience from the Union’s existing “close cooperation” agreements. First, we explore the implications of a potential UK request for only partial participation in the Single Market – thereby challenging the Union’s assertion that the “four freedoms” are to be considered indivisible and there cannot be “cherry picking” through a sectoral approach to Single Market membership. Secondly, we evaluate the implications of a potential UK request for mutual recognition based on the principle of home state control, without the UK being bound by the same techniques and disciplines of market integration as the Union’s own Member States (or indeed as the EFTA-EEA states / Turkey). Thirdly, we explain the nature and limits of the opportunities for any third country (including the UK) to participate in / influence decision-making by the Union institutions; and recall the rules governing third country (including UK) participation in the activities of the Union’s offices, bodies and agencies. Finally, we discuss the challenge of agreeing adequate structures for the independent and impartial administrative and judicial supervision and enforcement of any “close cooperation” agreement within the UK itself.

Chapter 5 concludes with some overall observations. In particular, there are few grounds to believe that the formal terms for any Union-UK “close cooperation” agreement should be radically different from the experience gained and lessons learned from comparable relationships between the Union and other third countries. Instead, the special situation of the UK as a third country seems more likely to manifest itself empirically, through the practical operation and tangible outputs of the governance and institutional structures and processes established under any “close cooperation” agreement – bearing in mind also the Union’s broader strategic interest in creating and maintaining a wide-ranging and smooth functioning relationship with the UK which also extends beyond the economic sphere.
2. AN AGENDA FOR ECONOMIC COOPERATION: THE IMPORTANCE OF THE UNION’S OWN MODEL AND THE CHALLENGES FACING “CLOSE COOPERATION” WITH THIRD COUNTRIES

KEY FINDINGS

- Any truly ambitious trade agreement will seek to tackle regulatory as well as fiscal and discriminatory barriers to cross-border commerce. That task is considerably more difficult in the context of services than goods. It calls for not only extensive substantive obligations but also strong governance and institutional structures. Realistically, standard setting (insofar as provided for) will be based on the rules of the economically stronger party.

- “Close cooperation” agreements seek to extend the Union’s own model for economic integration between its Member States, as far as possible, to a third country / countries. Such agreements need to take into account the particularities of the Union’s competences in the field of external relations; as well as the principles that protect the autonomy of Union law from outside interference.

- In practice, “close cooperation” agreements entail a high degree of alignment to the relevant Union acquis (as expressed in the expectation of dynamic homogeneity). The Union will seek to agree robust governance and institutional provisions. It will also want adequate guarantees against asymmetry when it comes to the legal effects of the agreement within the internal legal system of each party.

- “Close cooperation” agreements therefore imply a basic trade-off: the relevant third country needs to decide how far it is willing to adhere to extensive elements of Union law, with no direct decision-making participation in the formulation of such rules and only limited opportunities for overall influence (taking into account also the legal constraints arising from its own constitutional order).

This Chapter will explain some of the underlying concepts and issues relevant to international negotiations seeking to promote greater economic integration between the Union and third countries. These concepts and issues will then serve as key reference points throughout our subsequent analysis of the potential for a “close cooperation” agreement between the Union and the UK in the field of trade.

2.1. A general agenda for economic cooperation agreements, particularly those aspiring to “close cooperation”

In any international negotiation aimed at promoting closer cooperation between the parties, particularly in the economic sphere, there are a range of fundamental issues that need to be addressed and agreed upon.

Some such issues concern the substantive content of the agreement. For example:

- What will be the basic scope and fields of cooperation covered by the agreement?

- What will be the ambition for the depth of market integration to be achieved within each relevant field?
• Which specific techniques and instruments will be employed by the parties in order to realise such ambitions for mutual cooperation?

• What should be the permissible exclusions from, limits to or derogations from the planned degree of economic integration between the parties?

• What range of flanking policies will be necessary in order to prevent distortions of competition, restrict unfair competition and otherwise ensure a level playing field?

Another set of fundamental issues concerns the governance and legal effects of the agreement. For example:

• What institutional structures will be agreed, at the political and administrative levels, in order to operationalise the agreement?

• By which corpus of legal principles and judicial caselaw will the agreement be interpreted? And what will be the significance for the smooth functioning of the agreement of any subsequent developments in the relevant legal framework of each party?

• Which dispute settlement mechanisms will the agreement employ, at a political and / or judicial level?

• What will be the system of sanctions, safeguards and balancing measures under the agreement, e.g. as a consequence of a finding of non-compliance by one party with its obligations?

• What provisions (if any) will the agreement contain concerning its internal effects within the domestic legal system of each party?

In addition, the parties will be concerned about the compatibility of any agreement with their existing obligations. For example:

• Is the agreement compatible with the internal constitutional requirements of each party?

• Is the agreement consistent with the existing international commitments of each party, e.g. as regards obligations undertaken in the context of World Trade Organisation (WTO) membership?

When it comes to addressing that complex agenda of issues for negotiation and agreement, experience has obviously taught us some basic lessons about the underlying nature of and key challenges facing cross-border economic cooperation, particularly when it comes to agreements that aspire to a genuinely more ambitious level of market integration between the parties.

First: in order to be truly ambitious, the agreement needs to extend beyond basic guarantees of non-discrimination in the treatment of goods and services and / or standard levels of cross-border regulatory cooperation between public authorities; and seek also to tackle what is undoubtedly the main challenge in international trade, i.e. regulatory barriers to cross-border commerce which arise from mere differences in the way that separate jurisdictions legislate for and supervise the provision of goods and services within their respective territories.16

Secondly: such regulatory barriers are difficult enough to address in the field of goods, where the solution will often depend upon some degree of legislative convergence in the applicable public

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interest standards governing the manufacture and marketing of the relevant products, thereby paving the way for some degree of mutual recognition between the parties based upon a reciprocal principle of home state control. However, regulatory barriers are significantly more challenging to address when it comes to services, especially in highly sensitive and tightly regulated sectors. The relevant barriers generally relate more to intangible standards governing service quality (e.g. qualifications and competence) as well as amenability to ongoing supervision and effective sanction. A greater degree of legislative convergence, administrative cooperation and mutual trust is thus required in order to facilitate a workable system of mutual recognition based on reciprocal home state control.\textsuperscript{17}

Thirdly: it is therefore obvious that more ambitious agreements, seeking to deliver “close cooperation” between the parties, involve the assumption of more extensive obligations, leading to commensurately more significant limits on domestic regulatory autonomy: the more ambitious the deal, the more extensive the obligations; the more extensive the obligations, the more a party’s theoretical regulatory autonomy may be constrained in practice.

Fourthly: that is especially true when it comes to the governance and institutional arrangements underpinning the agreement. Indeed, the ambition of any international trade deal is strongly conditioned by the willingness of the parties to agree political, administrative and judicial arrangements that will operationalise the agreement in a truly effective manner and allow for its smooth functioning even in the face of changing and / or problematic circumstances, e.g. allowing for the dynamic evolution of cooperation; providing credible guarantees for even-handed implementation and enforcement; capable of settling disputes and penalising non-compliance in a satisfactory manner.\textsuperscript{18}

Finally, however: underpinning all these important lessons is another key reality of international trade negotiations, i.e. that relative size matters. Put simply: larger economies will naturally seek to exercise a greater degree of influence over the “rules of the game” upon which the proposed system of cross-border cooperation will be based, e.g. when it comes to determining the basis for legislative convergence, setting the expectations for administrative cooperation or identifying the principles of judicial interpretation. Smaller economies must decide how far that is a price worth paying, particularly for the benefits of an ambitious programme of “close cooperation”.

2.2. The Union’s own model for market integration between its Member States

When it comes to translating into more practical and detailed terms, both our overall agenda for pursuing greater cross-border economic integration, and our empirical lessons about what it means to pursue an ambitious level of “close cooperation”, one model stands out from all others: the Union’s own system for managing economic relations between its Member States. That Union model is generally recognised as the “gold standard” in international trade – a system of “close cooperation” unparalleled in its ambition and sophistication. It is worth recalling briefly the essential features of the Union own model.

- A comprehensive scope: the creation of a fully-fledged Customs Union and an extensive Single Market covering all “four freedoms” and extending across all economic sectors.

- A strong ambition that economic integration should extend far beyond guarantees of non-discrimination, so as also to tackle regulatory barriers that arise from mere differences in national law.

\textsuperscript{17} See similarly, e.g. the in-depth analysis by F Kainer for the IMCO Committee, \textit{The Consequences of Brexit on Services and Establishment: Different Scenarios for Exit and Future Cooperation} (PE 602.035, June 2017).

\textsuperscript{18} See similarly, e.g. S Norberg, “UK-EU relations after Brexit: Which arrangements are possible?” [2017] \textit{Europarättslig Tidskrift} 469.
That ambition is to be achieved through uniquely advanced techniques of market integration – generally based upon complex combinations / degrees of Union-level harmonisation, home state control and mutual recognition.

The Union is to guarantee a strong level playing field encompassing, e.g. competition rules, state aid controls and minimum standards of social protection in fields such as employment and the environment; as well as detailed flanking policies to facilitate the smooth functioning of the Single Market in sectors such as data protection and consumer protection.

The Union is endowed with autonomous legislative institutions (Council and European Parliament) capable of adopting the measures necessary to deliver the requisite degree of legislative convergence, administrative cooperation and mutual recognition.

The Union is also capable of effective administrative supervision and enforcement through the activities of the Commission and Union-level agencies; as well as the creation of close networks of cooperation among, and duties of effective implementation upon, national regulators and other public authorities.

Judicial supervision and enforcement is entrusted to the Court of Justice acting in partnership with the national courts of each Member State – based upon a highly developed body of principles and rules to govern the relationship between Union law and the domestic legal systems, aimed at securing the effective and uniform application of Union rules.

In the words of the Commission, the Union own model of market integration between the Member States in fact amounts to an “ecosystem” – aptly capturing the idea of a complex of substantive and institutional rules and structures, which have co-evolved over a period of several decades, and now become so inter-dependent and carefully balanced, that they cannot be disaggregated or unpicked, without risking to destabilise the entire system.19

Moreover, the unique nature of the Union own model of market integration between the Member States has been recognised at a constitutional level by the Court of Justice, e.g. in its 2014 Opinion on Union accession to the European Convention on Human Rights (ECHR).20 It is worth quoting the relevant passages in full:

“157. As the Court of Justice has repeatedly held, the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals....

166. ....[A]s the Court of Justice has noted many times, EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States... and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.

167. These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged... in a ‘process of creating an ever closer union among the peoples of Europe’.


168. This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded.... That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.

....

172. The pursuit of the EU’s objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute—each within its specific field and with its own particular characteristics—to the implementation of the process of integration that is the *raison d’être* of the EU itself.

173. Similarly, the Member States are obliged... to ensure, in their respective territories, the application of and respect for EU law. In addition... the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU....

174. In order to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law.

175. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual’s rights under that law....

2.3. Free trade and “close cooperation” agreements with third countries judged against the yardstick of the Union own model and the limits of Union constitutional law

The unique nature of the Union’s own model for market integration between its Member States provides the yardstick against which all other forms of third country deals are to be measured and assessed – whether they be less ambitious free trade agreements or more extensive “close cooperation” arrangements.

In the first place: it is automatically and inherently the case that – no matter how close – cross-border trade cooperation with third countries will fall short of the exceptional degree of economic integration provided by the Union own model. Since third countries cannot be fully assimilated into the Union’s unique substantive and institutional ecosystem, they can neither be subject to the same level of obligations and disciplines, nor enjoy the same range of rights and privileges.

In the second place: in any relationship aspiring to “close cooperation” between the Union and a third country, the Union will have particular political concerns that need to be addressed in the relevant negotiations. For example, where a generous degree of market access is offered to a third country, it will invariably be on terms which involve its convergence with the Union’s own regulatory standards. As such, there will need to be clear guarantees to ensure the timely adoption and effective implementation of the relevant Union rules within that third country’s domestic legal system. That is especially true taking into account the risk of potential asymmetries or imbalances arising from discrepancies in the parties’ respective systems for internalising the rights and obligations provided for under their agreement: e.g. the Court of Justice has long held that the provisions of international agreements are (in principle) capable of producing direct effect within the legal orders of the Union and its Member States; whereas the relevant third country may not have any equivalent system for
recognising that the same agreement is capable of being directly invoked within its internal legal system even in the absence of full and timely legislative implementation.\textsuperscript{21}

In the third place: regardless of such political concerns, a series of particular constitutional constraints limit the Union’s legal capacity to reach ambitious arrangements – especially those involving “close cooperation” – with third countries. Two sets of constraints are especially important.

The first stems from the fundamental principle of conferred powers laid down in Article 5(2) TEU. That principle requires that every Union action – including in the field of external relations – must find an appropriate legal basis under the Treaties. Such legal basis will prescribe the precise nature of the Union’s competence to take external action, as well as the detailed procedure for the exercise of such competence. Each of those features will in turn influence the role (if any) to be played by the Member States themselves, over and above the functions ascribed to the Union’s own institutions under the relevant Treaty provisions.

Of particular relevance here is the distinction between exclusive and shared Union competence; together with the possibility of an external agreement being classified as a “mixed agreement”.\textsuperscript{22} The latter arises where: either an agreement involves shared competences and the Member States insist upon mixity as a political choice (which is the more common explanation);\textsuperscript{23} or an agreement contains provisions falling altogether outside the Union’s powers so that mixity becomes a positive constitutional requirement (though that is somewhat rarer).\textsuperscript{24} Either way, mixed agreements need to be agreed and ratified also by the Member States themselves.\textsuperscript{25}

Even though the Treaty of Lisbon broadened the scope of the Union’s exclusive external competences,\textsuperscript{26} and the Court of Justice has since played its part in confirming their expansive interpretation,\textsuperscript{27} rulings such as the Opinion on the Singapore Free Trade Agreement remind us that Union competences in general, and exclusive competences in particular, still have their limits and therefore the possibility of mixity remains an important element of Union external relations law.\textsuperscript{28}

The second body of constraints consists of the constitutional principles developed by the Court of Justice so as to safeguard the “autonomy of Union law”.\textsuperscript{29} Those principles act as non-derogable constitutional limits to the exercise of Union external competences, with the purpose of protecting the internal functioning of the Union’s own institutional system from the impact of any external interference or influence.


\textsuperscript{22} See further, e.g. A Dashwood, M Dougan, M Ross, E Spaventa and D Wyatt, \textit{Wyatt and Dashwood’s European Union Law} (6th ed, 2011, Hart Publishing) Ch 27.

\textsuperscript{23} As with the EU-Ukraine Association Agreement or the CETA with Canada.

\textsuperscript{24} See further, e.g. P Koutrakos (ed), \textit{Mixed Agreements Revisited: The EU and Its Member States in the World} (2010, Hart Publishing).

\textsuperscript{25} Subject to the possibility of a Council decision pursuant to Article 218(5) TFEU for provisional application by the Union of an international agreement before its entry into force. See further, e.g. G van der Loo and R Wessel, “The non-ratification of mixed agreements: legal consequences and solutions” (2017) 54 CML Rev 735.

\textsuperscript{26} Articles 3(1) and 3(2) TFEU; but particularly in the field of the common commercial policy under Article 207 TFEU.


It is worth pointing out immediately that these principles have been developed using a caselaw methodology based on ad hoc judgments delivered over a considerable period of time. The relevant cases often invoke relatively nebulous concepts, which only make full sense when translated into their more fact-specific contexts. Moreover, it can sometimes be difficult to separate the specific principles which protect the “autonomy of Union law” from other related concepts or rules that happen to arise in the same dispute or ruling.30 Finally, one must be wary of assuming that extant Union international agreements fully and faithfully reflect the standards and expectations imposed by the caselaw on the “autonomy of Union law”: the degree of actual compliance might well depend upon various factors, such as the date of the relevant agreement, especially compared to the evolution of the pertinent caselaw; as well as whether any issue of (in)compatibility was specifically raised before the Court of Justice, e.g. before the agreement was finalised, ratified and entered into force.31

Nevertheless, despite all those caveats, it is certainly possible to identify a core body of binding legal principles. To begin with: an international agreement cannot affect the essential character of the powers conferred upon the Union and the Union’s own institutions by the Treaties, e.g. by seeking to alter the distribution of competences laid down between the Union and its Member States or the distribution of powers laid down between the Union institutions inter se. In particular: while it is possible for an international agreement to confer additional external functions upon the Union institutions, i.e. in relation to the activities, authorities or natural / legal persons of a third country, such external functions cannot affect the essential character of the powers conferred upon the Union institutions under the Treaties. For example: an international agreement may provide for the courts or tribunals of a third country to make preliminary references to the Court of Justice, concerning the interpretation of that agreement or Union law which is referred to thereunder; but the Court’s interpretations delivered pursuant to such preliminary references must be explicitly treated as binding upon the relevant third country courts or tribunals – since the Treaties do not give the Court any power to provide advisory rulings on interpretation and a mere international agreement cannot create a type of judicial competence which does not already exist under the Treaties.

In addition: an international agreement cannot bind the Union institutions to a particular interpretation of Union law as regards the exercise of their internal powers. To be more precise: in principle, an international agreement may well create a court or tribunal for its interpretation and the decisions of such court or tribunal may well be treated as binding upon the Union in general and the Court of Justice in particular. But neither an international agreement nor a court or tribunal created thereunder can infringe upon the Court’s exclusive jurisdiction to decide on the definitive interpretation of Union law (both primary and secondary) for the purposes of the Union legal order itself. Nor can an international agreement deprive the Court of its power and duty to ensure the effective judicial protection of individual rights within the Union legal order (e.g. when it comes to safeguarding respect for fundamental rights).

Furthermore, the Court has held that ensuring consistency and uniformity in the interpretation of Union law is a joint responsibility shared also by the national courts of the Member States. On that basis, an international agreement cannot affect the autonomy and effectiveness of the preliminary reference procedure under Article 267 TFEU. Similarly, an international agreement cannot deprive the national courts of their power and duty to ensure the effective judicial protection of rights arising under Union law, e.g. by purporting to establish a tribunal capable of adjudicating over Union provisions but whose activities (in the event of non-compliance with the standards expected under Union law) would

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30 E.g. the “specific characteristics” of the Union legal order referred to in Opinion 2/13, Accession to ECHR, ECLI:EU:C:2014:2454. See further, e.g. C Contartese, “The autonomy of the EU legal order in the ECJ’s external relations case law: From the ‘essential’ to the ‘specific characteristics’ of the Union and back again” (2017) 54 CMLRev 1627.

31 See further, e.g. B de Witte, “A Selfish Court? The Court of Justice and the Design of International Dispute Settlement beyond the European Union” in M Cremona and A Thies (eds), The European Court of Justice and External Relations Law: Constitutional Challenges (Hart Publishing, 2016).
not be subject to the possibility of enforcement proceedings brought by the Commission and / or of incurring liability to make reparation to individuals whose Union law rights were infringed (in accordance with the famous Francovich caselaw).32

In certain respects, those two bodies of constitutional constraints – the procedural, arising from the division between exclusive and shared competence and the possibility of mixity; as well as the substantive, arising from the need to protect the autonomy of Union law from external interference or influence – clearly act as limits on the Union’s room for manoeuvre during international negotiations. For example: the prospect of mixity means that the Union must negotiate with third countries mindful of the need eventually to secure the active support of every single Member State; which includes anticipating and addressing the potential concerns and objections of each national (and where relevant regional) parliament.33 Similarly: respecting the autonomy of Union law places inherent limits on the institutional structures that the Union might possibly be capable of designing under an international agreement, e.g. concerning the scope for third countries to participate in the Union’s own decision-making processes; or the degree to which dispute settlement bodies can purport to engage in the interpretation of Union legal concepts or acts.34

But of course, such constraints may also act as a source of strength in the Union’s international negotiations (particularly when combined with its sheer economic size and influence). For example: the need for individual approval from each Member State at the national level can offer the Union a useful backstop for resisting certain third country demands or insisting upon certain exemptions or safeguards. The negotiating potential of mixity is obviously enhanced in the case of “close cooperation” agreements: after all, the more ambitious and wide-ranging the agreement, the more likely it will be to touch upon areas of shared competence between the Union and its Member States, and thereby qualify as a mixed agreement requiring individual national ratifications.

Just as importantly: the caselaw on protecting the autonomy of Union law has the potential to create a mutually reinforcing link between the substantive and the institutional aspects of any international trade agreement. Again, that is particularly true of a “close cooperation” agreement between the Union and a third country. Such an ambitious degree of market integration can only be achieved through a relatively strong commitment to legislative convergence (as well as administrative cooperation and dispute settlement). Smaller economies will have to accept that such convergence will be based on the Union’s own terms. As a matter of constitutional requirement, the core components of those Union terms must be both decided and interpreted autonomously by the Union institutions themselves.

For example: it is standard practice for the administration and implementation of an international trade agreement to be entrusted to a Joint Committee comprising representatives of both parties, able to adopt binding decisions as provided for under the agreement, acting by consensus / mutual agreement between the parties. The responsibilities of the Joint Committee will often include, e.g. determining the implications for the smooth functioning of the agreement of developments in either the caselaw or the legislation of both the Union and the relevant third country; and acting as a political forum for the settlement of disputes that may arise between the parties concerning the interpretation and application of the agreement.

In the case of a free trade agreement characterised by relatively low levels of ambition as regards the promotion of economic integration between the parties, e.g. concentrating on the lowering or elimination of tariffs and making provision for limited forms / degrees of regulatory cooperation, Union

33 A point whose importance was reinforced by the experience of both the EU-Ukraine Association Agreement (impact of Dutch referendum) and the CETA with Canada (regional parliamentary ratification in Belgium).
law will play only a marginal role in defining the substantive content of the agreement and the Joint Committee may well perform its functions with little reference to Union legislation and caselaw.\textsuperscript{35}

However, when it comes to agreements which seek to create a stronger degree of “close cooperation” with the Union, e.g. by seeking to integrate a third country into elements of the Customs Union and / or Single Market, such “close cooperation” will be defined primarily by reference to the relevant provisions of Union law. As a direct result, the decision-making power and discretion of the Joint Committee will be inherently constrained by the need to respect the underpinning Union frameworks and concepts. For example, the third country may be obliged under the agreement to adapt its national law to new developments in Union legislation; the Joint Committee will generally be expected to update the relevant annexes to the agreement (possibly subject to certain adaptations or exemptions so as to accommodate the needs or interests of the third country) or otherwise to determine the negative consequences of legislative divergence for continued third country access to the Union market.\textsuperscript{36} Similarly: in discharging its dispute settlement functions, the Joint Committee will usually be instructed to respect the relevant jurisprudence of the Court of Justice;\textsuperscript{37} and (at least in the case of provisions of the agreement which are identical or equivalent in substance to Union rules or concepts) the parties may even be empowered to seek a binding interpretative ruling directly from the Court.\textsuperscript{38}

\subsection*{2.4. The general profile of “close cooperation” agreements between the Union and third countries}

Chapter 1 acknowledged that those existing international agreements which exemplify or otherwise involve “close cooperation” between the Union and third countries in the field of trade are diverse. They certainly do not conform to a single model or template and, in crucial respects, they may no longer even satisfy the evolving political expectations or legal requirements of the Union. Nevertheless, Chapter 2 has sought to expose a framework – comprising an overall agenda for negotiation, certain empirical lessons from current practice and various constitutional constraints imposed by Union law – which allows us to identify a range of common issues / features.

- Notwithstanding the conclusion of certain more sectoral relationships, the basic scope of an ambitious “close cooperation” will be broad. It is exemplified, as regards participation in the Single Market, by the EEA and, as regards participation in the Customs Union, by the customs agreement with Turkey.

- Within its scope of application, an ambitious “close cooperation” agreement seeks to achieve a relatively high level of market integration with the relevant third country – aiming for as close as possible to the Union’s own model of economic relations between the Member States.

- To deliver on that level of ambition, the techniques and disciplines of market integration need to be of a commensurately sophisticated nature and extent – which in practice means a close degree of alignment to the relevant Union \textit{acquis} (as expressed in the expectation of dynamic homogeneity).

- To realise an effective implementation and enforcement of those techniques and disciplines, the Union will seek to agree robust governance and institutional provisions. Such provisions must

\textsuperscript{35} E.g. as with the CETA with Canada.
\textsuperscript{36} The prime example being the work of the EEA Joint Committee.
\textsuperscript{37} E.g. as with the Multilateral Agreement on the establishment of a European Common Aviation Area (see Article 20).
\textsuperscript{38} Again: as under the EEA Agreement (see Article 111); or (broader still) the Multilateral Agreement on the establishment of a European Common Aviation Area (see Article 20).
respect the autonomy of the Union’s own law and institutions. They must also provide adequate guarantees against asymmetry when it comes to the legal effects of the agreement within the internal system of each party.

The strong Union law basis to such agreements therefore implies a basic trade-off: when it comes to seeking genuinely ambitious forms of “close cooperation” with the Union in the economic sphere, the relevant third country needs to decide how far it is willing to adhere to extensive elements of Union law, with no direct decision-making participation in the formulation of such rules and only limited opportunities for overall influence (taking into account, of course, also the legal constraints arising from its own constitutional order). The more extensive the alignment to the Union’s own regulatory model, the greater the degree of economic integration that will be possible, but the more acute will be the loss of national decision-making autonomy. The less extensive the alignment to the Union model, the greater the degree of national decision-making autonomy, but the more limited will be the potential scope for economic integration with the Union.

If anything, the underlying problems which have been identified with the Union’s existing “close cooperation” agreements – especially the EEA and the customs agreement with Turkey – confirm and reinforce the above analysis. Suffice for present purposes to recall the relevant issues only briefly.

In the case of the EEA:39

- its scope is surely ambitious but still not comprehensive, e.g. since the EFTA-EEA states do not participate in the Customs Union (leading to complaints by Union businesses about the costs of customs procedures);

- notwithstanding the central role of the Joint Committee and the characteristic “two pillar” structure (including the functions and powers of the EFTA Surveillance Authority and EFTA Court), both the fundamental principle of dynamic homogeneity and the autonomy of Union law impose considerable constraints on the scope for deviation from the relevant Union acquis;

- nevertheless, the goal of dynamic homogeneity can be complicated / risks of asymmetry or imbalance may materialise in practice due to a range of operational problems: e.g. the Union’s persistent concerns about increased EFTA-EEA state requests for adaptations to EEA-relevant acts; and about delays / problems of proper / timely implementation of EEA-relevant acts by the competent EFTA-EEA national authorities;

- conversely, although the EFTA-EEA states (exemplified by Norway) regard the agreement as central to their fundamental domestic and foreign policy orientations, they also acknowledge the significant democratic costs entailed by their EEA membership.40

The experience with Turkey is equally illuminating.41

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40 See, in particular, Official Norwegian Reports NOU 2012:2, Outside and Inside: Norway’s Agreements with the European Union (January 2012).
41 See, in particular: Commission, Study of the EU-Turkey Bilateral Preferential Trade Framework, Including the Customs Union, and an Assessment of Its Possible Enhancement (Final Report, 26 October 2016). Note also: World Bank, Evaluation of the EU-Turkey Customs Union (Report No 85380-TR, 28 March 2014).
the scope of the agreement is limited to the creation of a partial customs union together with associated policies on trade in goods – falling short of a fully-fledged customs union that would eliminate all tariffs and customs processes while also failing to cover, e.g. trade in services or public procurement;

the Union has expressed concerns about persistent problems of effective and timely implementation / compliance by the Turkish authorities, exacerbated by relatively underdeveloped governance and institutional structures, especially when it comes to judicial dispute settlement, as well as a marked asymmetry in the internal legal effects of the agreement within the Union as compared to Turkey;

for its part, Turkey has also voiced reservations (first) about the strong Union law basis to the agreement, which again entails a significant degree of “rule taking” by the Turkish authorities, who enjoy only limited opportunities for decision-making influence and (secondly) about the lopsided effects of the agreement in relations with third countries, i.e. whereby Turkey must abide by the terms of free trade agreements concluded by the Union, without any guarantees of being able to benefit from the relevant preferences in Turkey’s own trade relations with the relevant states;

for those reasons, the Commission has proposed a significant modernisation of the customs and trade relationship with Turkey, aimed at addressing both the Union’s and Turkey’s concerns, so as to improve the scope, depth and smooth functioning of the parties’ existing “close cooperation”.

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42 See further, e.g. Commission Staff Working Document, Executive Summary of the Impact Assessment accompanying the Recommendation for a Council Decision authorising the opening of negotiations with Turkey on an Agreement on the extension of the scope of the bilateral preferential trade relationship and on the modernisation of the Customs Union, SWD (2016) 476 Final; and also European Parliamentary Research Service Briefing, Reinvigorating EU-Turkey bilateral trade: Upgrading the customs union (PE 599.319, March 2017).
3. FUTURE RELATIONS BETWEEN THE UNION AND THE UK: OVERALL ISSUES

### KEY FINDINGS

- The UK Government interprets the 2016 referendum as a vote to “take back control” of the UK’s borders, laws and money. At the same time, the UK Government calls for a “deep and special partnership” with the Union. In the economic sphere, that seems to entail: continuing adherence to Union standards in certain fields; maintaining mutual market access despite regulatory divergence in other sectors; and the rejection of extensive alignment and / or reciprocity in other areas.

- However, the Union institutions treat the UK’s “red lines” as an obstacle to a truly ambitious trade agreement. Unless the UK Government changes its political preferences, the future economic relationship will therefore take the form of a wide-ranging but still essentially limited free trade agreement.

- It is possible to anticipate the basic institutional structures that would underpin such a free trade agreement. However, one complicating factor is likely to be the Union’s concern to ensure a strong level playing field with the UK and, in particular, how far that might also lead to calls for more robust governance provisions to ensure its effective supervision and enforcement.

- Equally, it is possible to anticipate the agenda for enhanced institutional structures that would underpin a potential Union-UK “close cooperation” agreement, e.g. as regards oversight of the agreement’s implementation and application; rules of interpretation and principles for responding to future legal developments; dispute settlement and enforcement mechanisms; as well as the internal effects of the agreement within the parties’ respective legal systems.

Chapter 2 summarised the general agenda that must be negotiated and agreed in order to achieve an international agreement that will deliver an ambitious programme of “close cooperation” in the economic sphere. The Union’s own model of market integration between the Member States provides the international “gold standard” for the design and functioning of such relationships – in the light of which “close cooperation” agreements with third countries will be not only measured but also designed, influenced and constrained.

The same overall agenda, empirical lessons and basic expectations are relevant also to the UK as it seeks to negotiate a new framework for its relationship with the Union, particularly in the field of international trade, after British withdrawal in March 2019.43

Needless to say, the UK situation presents some highly distinctive features. In particular, the UK is undergoing an unprecedented change of status: from being a Member State which fully benefitted from (and indeed played a leading role in creating) the Union’s own model of economic integration; to becoming a third country which now needs to decide how far it is willing to trade its own decision-making autonomy as the price for maintaining some alternative form of “close cooperation” with the Union.

Yet the underlying calculations remain essentially the same, even if the starting context is rather different. Any new relationship – no matter how close – will automatically and inherently fall short of

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43 Subject to the proposed transitional regime, which is planned to run until 31 December 2020, under Part Four of the draft Agreement on the withdrawal of the United Kingdom from the European Union: TF50 (2018) 35 (19 March 2018).
the exceptional degree of economic integration provided by the Union own model: the UK may well be seeking to minimise the loss of existing market access, rather than to acquire it de novo; but there can be no question of a third country outside the Union ecosystem enjoying the same rights and privileges as a Member State.

Moreover, in the absence of an ambitious “close cooperation” agreement, it is inevitable that the regulatory conditions governing trade between the UK and Union markets will become substantially less favourable than they are today – actively creating a potentially vast array of barriers to trade which will (at best) increase costs and (at worst) seal off markets either in law or in fact. Indeed, the potential for economic disruption relates not only to the complex problems surrounding regulatory barriers to trade in goods and services (as a consequence of leaving the Single Market); but extends even to more basic hindrances such as customs checks and related formalities (bound up with departure from the Customs Union).

Sections 3.1 and 3.2 will summarise the political preferences thus far expressed by both the UK and the Union (respectively) about the fundamental elements of their future economic relationship. On that basis, Section 3.3 sketches out the basic governance and institutional structures likely to be included in any future free trade agreement between the two parties. Section 3.4 then explains how a change in political preferences, favouring a more ambitious “close cooperation” agreement between the parties, would naturally call for more sophisticated governance and institutional structures – in principle at least, conforming to the experience and expectations of the Union’s existing “close cooperation” agreements.

### 3.1. The UK’s political preferences and constitutional constraints: What we know so far

Building upon the UK Prime Minister’s “Lancaster House Speech” from January 2017,44 the UK Government’s ideas concerning future economic relations with the Union were first presented in the White Paper on The United Kingdom’s exit from and new partnership with the European Union.45 For present purposes, the contents of the White Paper can be boiled down to three important elements:

- the UK lays down various “red lines” for its future relations with the EU, e.g. ending the free movement of persons and the jurisdiction of the Court of Justice;
- in consequence, the UK has decided to leave Single Market and instead wants to negotiate a bespoke and ambitious trading relationship with the Union;
- similarly, the UK will leave the Customs Union but again wants to secure a bespoke and ambitious customs relationship with the Union.

The UK Government’s aspiration for a unique, deep and special partnership with the Union, particularly in the field of economic relations, was reaffirmed by the UK Prime Minister in her “Florence Speech” in September 2017.46 For present purposes, the key elements of that intervention can be summarised as follows:

- the UK affirmed its intention to leave the Single Market and the Customs Union;
- instead, the UK seeks a close economic partnership based on a new balance of rights and

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45 UK Government, The United Kingdom’s exit from and new partnership with the European Union (Cm 9417, February 2017).
obligations;

- given that the UK and the Union are starting from a position of close regulatory convergence, the focus should be on managing future regulatory divergences and their impact on mutual market access;

- the new partnership should be based on a series of shared values, e.g. the avoidance of tariffs, a commitment to high regulatory standards and opposition to anti-competitive practices;

- the new partnership will need to be underpinned by a strong and appropriate dispute resolution mechanism – but this cannot be the Court of Justice.

The UK Government’s thinking on certain specific issues surrounding future relations with the Union were fleshed out in a series of “future partnership papers” published shortly before and after the “Florence Speech”. 47 Subsequently, in early 2018, senior members of the UK Government delivered a coordinated set of speeches intended to clarify and elaborate upon the UK’s official position concerning important aspects of its future relationship with the Union – particularly (though not exclusively) in the field of economic relations. 48 From those various interventions, it is possible to extract several key points that appear to sum up the UK’s current (if still essentially nebulous) political preferences, specifically concerning its future trading relationship with the Union:

- the UK Government has chosen to interpret the 2016 referendum result as a vote to “take back control” in 3 main ways, i.e. of the UK’s borders, of its laws and of its money;

- that interpretation confirms the basic nature of the UK’s “red lines” in negotiations with the Union over their future economic relationship, i.e. opposition to the free movement of persons, to the direct jurisdiction of the Court of Justice and to making large financial payments to the Union budget;

- respecting those “red lines” in turn confirms the UK’s basic policy choice to leave both the Single Market and the Customs Union, yet the UK also recognises that its “red lines” may need to be softened somewhat, in order to deliver on its ambition of agreeing a “deep and special [economic] partnership” with the Union, e.g. since continued UK participation in certain Union agencies will entail recognition of limited Court of Justice jurisdiction and a certain degree of financial contribution;

- against that background, the UK proposes a variegated approach to managing its future economic relations with the Union;

- in some sectors, the “deep and special [economic] partnership” could mean that the UK accepts to abide by not only the essential objectives of Union policy but also its more precise regulatory techniques and disciplines (hereafter referred to for convenience as the “Full Basket”);

47 E.g. Future Partnership Paper on future customs arrangements (August 2017); Future Partnership Paper on enforcement and dispute resolution (August 2017); Future Partnership Paper on the exchange and protection of personal data (August 2017); Future Partnership Paper on providing a cross-border civil judicial cooperation framework (August 2017); Future Partnership Paper on collaboration on science and innovation (September 2017); Future Partnership Paper on foreign policy, defence and development (September 2017); Future Partnership Paper on security, law enforcement and criminal justice (September 2017).

48 E.g. Foreign Secretary, “Uniting for a Great Brexit” (14 February 2018); Prime Minister, Speech at Munich Security Conference (17 February 2018); Secretary of State for Exiting the European Union, “Foundations of the Future Economic Partnership” (20 February 2018); Secretary of State for International Trade, “Britain’s Trading Future” (27 February 2018); Prime Minister, “Our future economic partnership with the European Union” (2 March 2018); Chancellor of the Exchequer, Speech on Financial Services at HSBC (7 March 2018).
in other sectors, the “deep and special [economic] partnership” could instead mean that, while the UK agrees to share the essential objectives of Union policy, the UK will nevertheless seek to achieve them through its own set of regulatory techniques and disciplines (hereafter referred to for convenience as the “Half Basket”);

- in a final set of sectors, the UK does not want to participate in either the Union’s underlying policy objectives or its more precise regulatory techniques and disciplines – though it accepts that this may have adverse consequences for mutual market access between the two parties (hereafter referred to for convenience as the “Empty Basket”).

Chapter 4 will explore in greater detail the potential legal and governance implications of some of the UK’s proposals, should they be reiterated within the context of formal negotiations with the Union over the future economic relationship. In the meantime, it may be helpful to recall some of the main legal / political observations / criticisms made in respect of the current UK position.\(^{49}\)

For example, the UK Government has consistently been accused of setting out unrealistic and indeed unreasonable expectations – the so-called “cake and eat it” philosophy – whereby (in general terms) the UK can decide to leave the Union’s unique substantive and institutional ecosystem but still retain many of the same rights and privileges as a Member State and / or (in specific terms) the UK can propose to exempt itself from many of the Union’s specific regulatory techniques and disciplines but still retain the benefits of mutual recognition based on the principle of reciprocal home state control.\(^ {50}\)

The UK Government has also been accused of communicating contradictory messages about its commitment to fair competition based on maintaining high regulatory standards – with some ministers having previously suggested that the UK might “retaliate” against the Union’s failure to agree a satisfactory trade relationship by fundamentally changing the UK’s current socio-economic model,\(^ {51}\) while more recent speeches seek to reassure the Union that the UK will not engage in a “race to the bottom” in regulatory, social and environmental standards.\(^ {52}\) At the same time, uncertainty remains about the nature of the UK’s future trade policy towards other third countries and its potential impact upon UK regulatory standards and economic cooperation with the Union.\(^ {53}\)

Moreover, the UK’s current political preferences concerning its future economic relations with the Union are the source of particular challenges when it comes to avoiding a “hard border” and protecting North-South cooperation between the Republic of Ireland and Northern Ireland.\(^ {54}\) Yet it remains unclear how far the UK’s explicit commitment to finding a satisfactory resolution to those challenges in accordance with the terms of the Joint Report of December 2017 may yet lead to a significant change

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\(^ {49}\) Note that the House of Commons Exiting the European Union Committee produces periodic reports critically assessing the UK Government’s position and the conduct of negotiations under Article 50 TEU, e.g. The Process for Exiting the European Union and the Government’s Negotiating Objectives (HC 815, 14 January 2017); The Government’s Negotiating Objectives: The White Paper (HC 1125, 4 April 2017); The Progress of the UK’s Negotiations on EU Withdrawal (HC 372, 1 December 2017); The Progress of the UK’s Negotiations on EU Withdrawal: December 2017 to March 2018 (HC 884, 18 March 2018); The Future UK-EU Relationship (HC 935, 4 April 2018). The House of Lords European Union Committee also produces various detailed studies concerning the future economic relationship between the Union and the UK, e.g. Brexit: The Options for Trade (HL 72, 13 December 2016); Brexit: Financial Services (HL 81, 15 December 2016); Brexit: Trade in Goods (HL 129, 14 March 2017); Brexit: Trade in Non-Financial Services (HL 135, 22 March 2017); Brexit: The Future of Financial Regulation and Supervision (HL 66, 27 January 2018); Brexit: Competition and State Aid (HL 67, 2 February 2018).

\(^ {50}\) An issue specifically explored in greater detail in Section 4.2 (below).


\(^ {52}\) E.g. Secretary of State for Exiting the European Union, “Foundations of the Future Economic Partnership” (20 February 2018).

\(^ {53}\) As noted repeatedly by Michel Barnier, e.g. intervention de Michel Barnier à la conférence “Obbligati a crescere – l’Europa dopo Brexit” (Rome, 9 November 2017); speech at the Centre for European Reform on “The Future of the EU” (20 November 2017). See further the discussion in Section 3.3 (below).

or at least qualification of its existing approach to future economic relations with the Union, i.e. entailing continued participation in the Customs Union and at least certain elements of the Single Market, whether specifically as regards the status of Northern Ireland or perhaps even in respect of the entire territory of the UK.\footnote{See Joint Report by Union negotiator and UK Government: TF50 (2017) 19, especially paras 49-51.}

It is worth noting that the preferences currently expressed by the incumbent UK Government are not necessarily shared by other key political actors within the UK itself. For example, the Scottish Government has consistently expressed its view that – so long as Scotland remains within the United Kingdom rather than becoming an independent state with aspirations to full Union membership of its own – the interests of Scotland would be best served by continuing UK participation in both the Customs Union and the Single Market.\footnote{E.g. Scottish Government, Scotland’s Place in Europe (20 December 2016). See also: Scottish Government, Scotland’s Place in Europe: People, Jobs and Investment (15 January 2018).} For its part, the Labour Party (which is designated as the Official Opposition to the UK Government) has suggested that the UK should seek a customs union with the EU and a close relationship to the Single Market – albeit subject to various provisos, e.g. whereby the Union and the UK might pursue joint trade agreements with other third countries;\footnote{An issue specifically explored in greater detail in Section 4.3 (below).} and e.g. whereby the UK should enjoy special exemptions from various Union regulatory regimes on issues such as state aid.\footnote{In particular: speech by Jeremy Corbyn, “Britain After Brexit” (26 February 2018) available at https://labour.org.uk/press/jeremy-corbyn-full-speech-britain-brexit/.} Finally, there have been various attempts within Parliament to impose certain statutory constraints upon the direction of UK Government policy in relation to future economic relations with the Union, e.g. through suggested amendments to the Trade Bill which would express / impose a preference for agreeing some form of customs union between the UK and the EU\footnote{See Trade Bill and Explanatory Notes (published on 7 November 2017). For updates on the Bill’s progress through Parliament, see https://services.parliament.uk/Bills/2017-19/trade/documents.html.} as well as potential amendments to the European Union (Withdrawal) Bill which would express / impose a preference for seeking continued membership of the Single Market via the EEA Agreement.\footnote{See European Union (Withdrawal) Bill and Explanatory Notes (published on 7 November 2017; republished on 18 January 2018). For updates on the Bill’s progress through Parliament, see https://services.parliament.uk/Bills/2017-19/europeanunionwithdrawal/documents.html.}

In addition to summarising the current state of the UK’s political preferences for its future economic relationship with the Union, it may be useful to recall the key constitutional constraints that will inform the UK’s negotiation, ratification and implementation of any eventual international trade agreement between the UK and the Union.\footnote{See further, e.g. House of Commons Library Briefing Paper, Parliament’s Role in Ratifying Treaties (No 5855 of 17 February 2017).}

As a dualist state, the UK may undertake contractual relations with other states and international organisations on the international plane; but the UK must subsequently implement those obligations at the domestic level in order for them to produce their intended legal effects within the national legal system. Given the degree of constitutional uncertainty surrounding the framework that might eventually govern the UK’s future external relations policy – particularly as regards the internal distribution of competences between the central government and the central legislature, as well as between the central authorities (on the one hand) and the devolved administrations (on the other hand) – it is perhaps safest simply to recall the currently applicable rules.

The ratification of international agreements is governed by the Constitutional Reform and Governance Act 2010: ratification is essentially a matter for the executive; subject to the possibility of Parliamentary
objection; though the latter merely has the effect of delaying ratification (albeit that in some cases, such delay may prove potentially indefinite).⁶²

Insofar as the relevant international agreement calls for domestic legislative implementation, the latter will be governed by and subject to the principle of parliamentary sovereignty.⁶³ Put simply: each Parliament enjoys unlimited legislative authority, such that no Parliament can bind its successors to a particular legislative regime; subsequent legislative measures will therefore take priority over all previous enactments, either through express repeal, or by implied repeal in the event of a conflict or incompatibility. It is constitutionally possible for Parliament to limit the practical possibilities of implied repeal: that was certainly the case with the European Communities Act 1972, which provided the basis for UK membership of the Union and operationalised the principle of supremacy within the UK legal system,⁶⁴ and it also appears envisaged to be the case at least with the citizens’ rights provisions of the Withdrawal Agreement currently being negotiated under Article 50 TEU.⁶⁵ However, it is not generally regarded as constitutionally possible for one Parliament to rule out the express repeal of its legislation by a subsequent Parliament. In the sphere of international relations, the UK Government accepts that this means the UK could theoretically enter into a state of non-compliance with any of its international obligations—in anticipation of which an appropriate system of sanctions / counter-balancing measures may need to be designed.⁶⁶

As for the devolved authorities in Scotland, Wales and Northern Ireland: responsibility for international relations is reserved exclusively to the central UK authorities; the devolved authorities play no formal role in the negotiation or ratification of international agreements by the UK as a whole.⁶⁷ However, when it comes to domestic implementation, the devolved administrations may well become more directly involved: either because the relevant international agreement creates obligations which fall within the scope of devolved competences and will be implemented through regional legislation; or because the Government proposes central implementing legislation covering matters that normally fall within the scope of devolved competences—in which case, as a matter of constitutional convention (even if it is not strictly legally enforceable) the devolved administrations must give their prior consent.⁶⁸

3.2. The Union’s political preferences and constitutional constraints: What we know so far

When it comes to the Union’s political preferences concerning its future relationship with the UK, particularly in the field of trade and economic cooperation, the main reference point remains the European Council’s Guidelines from April 2017⁶⁹ Bearing in mind the phased approach to negotiations under Article 50 TEU laid down in these Guidelines, which means that the future relationship will only be fully progressed and concluded after formal UK withdrawal has taken place, we can extract the following key points for the purposes of our current analysis:

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⁶² Sections 20-25. Note that the Article 50 TEU withdrawal agreement will be exceptional in that regard: the Government proposes that that agreement will be approved by primary legislation (i.e. the as-yet-unpublished Withdrawal Agreement and Implementation Bill).
⁶⁴ I.e. as interpreted by the UK courts in cases such as R v Secretary of State for Transport, ex parte Factortame (No 2) [1990] 3 WLR 818 and R v Secretary of State for Employment, ex parte Equal Opportunities Commission [1995] 1 AC 1.
⁶⁶ See, e.g. Prime Minister, “Our future economic partnership with the European Union” (2 March 2018).
⁶⁷ Though the devolved authorities have various opportunities to exercise more informal influence over UK international affairs: see further, e.g. House of Commons Library Briefing Paper, The Trade Bill (No 8073 of 8 January 2018) Ch 5.
⁶⁸ See, in particular, UK Supreme Court in R (on the application of Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5.
⁶⁹ European Council (Article 50), Guidelines of 29 April 2017.
• the European Council welcomes and shares the UK’s desire for a close partnership;
• even though no such partnership can offer the same benefits as Union membership, there is nevertheless a common interest in strong and constructive ties;
• any free trade agreement should be balanced, ambitious and wide-ranging, but it cannot amount to participation in the Single Market or parts thereof;
• in particular, the four freedoms are indivisible and there can be no “cherry picking” through sector-by-sector participation in the Single Market;
• any free trade agreement must ensure a level playing field (e.g. as regards competition and state aid rules), safeguard against unfair competitive advantages (e.g. as regards tax, social, environmental and regulatory measures / practices) and safeguard the Union’s financial stability / respect its regulatory regimes;
• the future partnership must include appropriate enforcement and dispute settlement mechanisms, but these cannot affect the Union’s autonomy as regards its decision-making procedures;
• no future Union-UK agreement may apply to Gibraltar without an agreement between Spain and the UK.

Having concluded that “sufficient progress” had been achieved during the “first phase” negotiations, the European Council meeting in December 2017 adopted additional guidelines which, inter alia, elaborate on important elements of the future economic relationship between the Union and the UK: 20

• the European Council affirms that an agreement on the future relationship can only be finalised and concluded once the UK has become a third country;
• however, the Union stands ready to engage in preliminary and preparatory discussions with the aim of identifying an overall understanding of the framework for the future relationship;
• to that end, the European Council plans to adopt additional guidelines in March 2018 – though in the meantime, the Union calls upon the UK to provide further clarity on its position;
• an overall understanding of the framework for the future relationship should be elaborated in a political declaration accompanying and referred to in the Withdrawal Agreement under Article 50 TEU;
• the European Council will calibrate its future guidelines on trade and economic cooperation in the light of the UK’s intention to leave both the Single Market and the Customs Union;
• such cooperation must ensure a balance of rights and obligations, preserve a level playing field, avoid upsetting existing relations with other third countries and preserve the integrity and proper functioning of the Single Market.

As anticipated, the European Council meeting in March 2018 indeed saw the adoption of fresh guidelines setting out a more detailed understanding of the Union’s future economic relationship with the UK: 21

20 European Council (Article 50), Guidelines of 15 December 2017.
21 European Council (Article 50), Guidelines of 23 March 2018.
• the Union must base its position on the UK’s stated “red lines”, which will inevitably limit the possible depth of any future partnership – but the European Council is willing to reconsider its offer, should the UK position evolve in the future;

• for now, the UK’s decision to leave the Customs Union and the Single Market will lead to inevitable friction and negative economic consequences, particularly for the UK;

• the autonomy of Union decision-making excludes the participation of the UK as a third country in the Union’s institutions and the participation of the UK in decision-making by the Union’s bodies, offices and agencies;

• the core of the future economic partnership will be a free trade agreement;

• that agreement should include a comprehensive deal on goods, e.g. no customs duties, no quantitative restrictions, appropriate “rules of origin”, maintaining existing reciprocal access to fisheries waters and resources, appropriate customs and regulatory cooperation;

• the agreement should also include a more limited deal on services, e.g. based on market access under host state control, to the extent possible and appropriate for a third country;

• the Union should seek agreement on other economic issues, e.g. public procurement, intellectual property and the protection of geographical indications;

• the Union should also seek agreement on cooperation over global challenges such as climate change, sustainable development and cross-border pollution;

• the agreement should include ambitious provisions on the mobility of natural persons, based on reciprocity and non-discrimination between the Member States, as well as agreement on related fields such as social security coordination and the recognition of professional qualifications, plus relevant cross-border cooperation in civil matters (subject to appropriate safeguards for the protection of fundamental rights);

• the Union and the UK should pursue cooperation on other socio-economic matters, e.g. through agreements on aviation and other transport modes, e.g. through UK participation (as a third country) in the Union’s various research and educational programmes;

• the European Council stresses the importance of robust guarantees to ensure a level playing field, so as to prevent the UK from engaging in unfair competition;

• the agreement will have to safeguard the Union’s financial stability and respect its regulatory and supervisory regime and standards;

• the governance structures of the agreement will need to address management, supervision, dispute settlement and sanctions / cross-retaliation – taking into account the content and depth of the future relationship, the need for effectiveness and legal certainty and also the autonomy of Union law.

It is worth noting, of course, that the work of the European Council has been informed by the more detailed perspectives and input presented by the Commission. For example, Michel Barnier has repeatedly stressed the importance of being realistic about the manner in which the UK’s own “red lines” substantially reduce the prospects for any ambitious model when it comes to the future
economic relationship between the Union and the UK. A similar message emerges from the Commission’s more detailed slides, which were prepared for the purposes of the Union’s internal preparatory discussions over the framework for a future relationship with the UK.

For its part, the European Parliament has repeatedly expressed its views on the terms and conditions which should guide internal discussions as well as eventual negotiations with the UK when it comes to the future economic relationship. Many of those views are faithfully reflected in the relevant statements of the Commission and guidelines of the European Council – though neither of the latter institutions has thus far formally endorsed the European Parliament’s stated preference for the future Union-UK relationship to take the form of a wide-ranging “association agreement” within the specific terms of Article 217 TFEU.

3.3. Consequent expectations for the governance arrangements of a future Union-UK free trade agreement

Taking in account the range of factors discussed in Chapter 2, the political preferences thus far expressed by the UK and (more coherently and realistically) by the Union allow us to anticipate at least the outlines of the governance / institutional structures likely to be included in any future free trade agreement, i.e. based on a relatively low level of market integration (as compared to a “close cooperation” agreement); as expressed in terms of its overall scope and ambition as well as its more specific techniques and disciplines.

First, it is likely that the agreement will provide for joint political oversight and direction by a high level council comprising representatives from the Union and the UK; and for its administration and implementation to be entrusted to a Joint Committee empowered to adopt binding decisions and recommendations (by mutual agreement) in the discharge of various duties and powers as explicitly provided for under the agreement. The Joint Committee is likely to be assisted by several more specialised committees entrusted with responsibility for cooperation in specific sectors under the agreement. However, various key functions will be reserved directly to the Joint Committee, e.g. undertaking a periodic review of the agreement; or determining the impact on the agreement of future accessions to the Union.

Secondly, when it comes to interpretation of the agreement, there will be the usual reference to employing the standard principles and methods of public international law. However, insofar as limited elements within the overall free trade agreement might contain rights and obligations identical or equivalent in substance to those found in Union law, the Union would insist that such provisions be interpreted and applied in accordance with relevant Court of Justice caselaw as it exists at the date of the agreement. The implications of subsequent Court of Justice caselaw (or the emergence of divergences through the development of UK caselaw) would be assessed by the Joint Committee with

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72 Including the (now famous) slide presented to the European Council on 15 December 2017 – see TF50 (2017) 21 (19 December 2017). Note also Déclaration presse par Michel Barnier suite à l’adoption d’une recommandation visant à entamer les discussions relatives à la phase suivante du retrait ordonné du Royaume-Uni de l’Union européenne (20 December 2017).

73 E.g. on fisheries (17 January 2018); aviation (17 January 2018); governance (19 January 2018); security, defence and foreign policy (24 January 2018); police and judicial cooperation in criminal matters (24 January 2018); level playing field (31 January 2018); international agreements (6 February 2018); services (6 February 2018); mobility (21 February 2018); regulatory issues (21 February 2018); transport (21 February 2018).

74 E.g. Resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union; Resolution of 3 October 2017 on the state of play of negotiations with the United Kingdom; Resolution of 13 December 2017 on the state of play of negotiations with the United Kingdom; Resolution of 14 March 2018 on the framework of the future EU-UK relationship.

75 E.g. Resolution of 14 March 2018 on the framework of the future EU-UK relationship, para 5.
a view to ensuring the smooth functioning of the agreement or (in the absence of an agreed approach) to initiating the relevant dispute settlement mechanism.

Thirdly, when it comes to the adoption of new legislation by either the Union or the UK within the fields governed by the agreement, the implications of such new legislation would be assessed by the Joint Committee according to the more precise framework and content of the agreement. For example: insofar as limited elements within the overall free trade agreement might oblige the UK to align its national law to particular elements of the Union *acquis*, the Joint Committee might be obliged or empowered to update the list of relevant Union legislation as it evolves. Similarly: the Joint Committee might be required to decide whether new legislation adopted by the UK is compatible with its obligations under the agreement when it comes to equivalency vis-à-vis Union standards, or insofar as it might create barriers to market access for Union goods and services; and (in the absence of an agreed approach) may decide to initiate the relevant dispute settlement mechanism.

Fourthly, when it comes to dispute settlement, one would expect the agreement to contain explicit rules to govern the potential for parallel recourse to overlapping dispute settlement routes under the agreement itself and through other international legal channels (such as the WTO). Within the agreement itself, the political resolution of disputes would be entrusted to the Joint Committee. If and insofar as it might be relevant to certain elements within the overall agreement, the Union would insist that the Joint Committee’s discretion be limited by the need to respect the autonomy of Union law, so that dispute resolution decisions adopted by the Joint Committee cannot bind the Union internally to any particular interpretation of Union law. The agreement is also likely to include a channel for the judicial settlement of disputes, i.e. through recourse to an independent arbitration panel. Again, however, if and insofar as it might be relevant to certain elements within the overall agreement, the Union would insist that the powers of any such panel be limited by the need to respect the autonomy of Union law, so as to preserve the Court of Justice’s exclusive competence over the definitive interpretation of Union law within the Union legal order.

Of course, different parts of the agreement may provide for recourse to different dispute settlement mechanisms, e.g. political resolution as a general rule and judicial avenues only for certain provisions. In similar vein, the agreement could also introduce a wider range resolution procedures: e.g. the possibility of mediation between the parties; or investment dispute provisions directly accessible by natural and legal persons, i.e. of the sort piloted in the CETA with Canada. Note, however, that the latter provisions are currently the subject of a request by Belgium that the Court of Justice assess their compatibility with the Treaties. In the longer term, the Union’s preference is to negotiate the establishment of a multilateral investment dispute court that would assume responsibility for the resolution of investor-state disputes under a wide range of international trade agreements.

Fifthly, the agreement would contain provisions governing the adoption of enforcement measures: whether as unilateral safeguard measures adopted by either party in the event of certain prescribed contingencies; or instead as sanctions imposed in consequence of a dispute settlement process under the agreement. Such enforcement measures would be likely to include: the possibility of financial compensation for injuries suffered as a consequence of infringements of the agreement; the temporary

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77 E.g. as under the CETA with Canada.

78 Opinion 1/17 (pending) which poses the question: ‘Is Chapter Eight (‘Investments’), Section F (‘Resolution of investment disputes between investors and states’) of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, signed in Brussels on 30 October 2016, compatible with the Treaties, including with fundamental rights?’

79 See, in particular: Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes (12981/17 ADD 1 DCL 1).
suspension of certain obligations under the agreement (usually circumscribed by requirements of proportionality etc); and the possibility of adopting counter-measures, e.g. in response to safeguard measures that create imbalances in the parties’ rights and obligations under the agreement (again subject to requirements of proportionality etc).

Needless to say: the agreement would of course include provisions governing the possibility of termination in toto – whether in the event of an unresolved dispute or simply through the giving of due notice. To help regulate the consequences of termination, particularly for natural and legal persons, the agreement might also contain skeleton provisions on the protection of acquired rights.

Finally, although the agreement would be binding under international law and each party would be subject to standard duties of bona fides implementation and application, the precise legal effects of the agreement within the legal systems of the Union and the UK (respectively) would generally be for each party to determine for itself – though subject to any more specific provisions set out in the agreement.

Thus, on the Union side, the agreement would be enacted internally through measures adopted by the Union institutions, but certain provisions might also (in principle) be capable of having direct effect before the Union and national courts. Administrative supervision would fall within the relevant responsibilities of the Commission, Union agencies and national authorities; while judicial enforcement would be a matter for the Court of Justice and the national courts – all acting in accordance with the standards required under Union law. On the UK side, the agreement would need to be enacted internally through measures adopted by Parliament and / or the devolved legislatures – in the absence of which its provisions would not (in principle) be capable of producing autonomous legal effects. Administrative supervision and judicial enforcement would be a matter for the relevant UK authorities and courts (respectively).

However, the agreement itself might contain more detailed provisions on certain aspects of the internal legislative, administrative and judicial structures and principles that should govern its domestic implementation and application: e.g. an express direction that the agreement (or at least certain of its constituent parts) shall not create any rights or obligations for natural and legal persons capable of direct invocation before the parties’ respective courts and tribunals;\(^{80}\) and / or the imposition of a general duty on each party to ensure that natural and legal persons enjoy access to fair and impartial administrative and judicial procedures in the event of disputes arising in fields covered by / as regards provisions derived from the agreement.\(^{81}\)

On the whole, therefore, the governance / institutional provisions of a future Union-UK free trade agreement should not be a source of particular controversy. However, one complicating factor is likely to be the Union’s concern to ensure a strong level playing field with the UK and, in particular, how far that might also lead to calls for more robust governance provisions to ensure its effective supervision and enforcement.

Chapter 1 recalled that it is a core fixture on any agenda for cross-border economic cooperation that the parties should agree provisions on a level playing field: the precise range of policies (competition law, state aid restrictions, social and environmental guarantees etc) and the appropriate nature of the guarantees (ranging from compliance with basic international standards to full adherence to the Union’s own regimes) which are required to prevent distorted and / or unfair competition, such as would undermine the smooth functioning or even call into question the very sustainability of the agreement.

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\(^{80}\) E.g. as with the CETA with Canada (Article 30.6).

\(^{81}\) E.g. as with the CETA with Canada (Article 27.4).
However, as the European Council’s March 2018 Guidelines clearly stress: even in the context of a relatively less ambitious free trade agreement, the issue of ensuring a level playing field is of particular concern in the context of the Union’s future relations with the UK – given the latter’s geographical proximity, the sheer size of the UK market, and the degree of its interconnection with the Union’s economy. Such concerns are exacerbated by two further important factors (already mentioned briefly above but worth further discussion now).

In the first place, as Michel Barnier has repeatedly stressed throughout the Article 50 TEU process thus far: there is continued uncertainty about the scope and depth of the UK’s long term commitment to maintaining a social market economy on the European model. Such uncertainty is fuelled especially by the rhetoric, if not genuine policy aspiration, of many leading Leave campaigners, i.e. that withdrawal from the Union presents a golden opportunity to hold a “bonfire of regulations” and / or to engage in a fundamental reorientation of the UK towards a more aggressively neo-liberal capitalist model based on lower taxes and greater deregulation.

In the second place, uncertainty is not merely a matter of the UK’s internal dynamics but also extends to the UK’s future external trade policies with other third countries such as the USA, China and India. It is well known that the UK currently lacks extensive independent capacity and experience in the field of international trade negotiations; and that the UK Government is under considerable pressure to deliver quick results to vindicate its claims about “making a success of Brexit” through an ambitious agenda for “Global Britain”. Whether by conscious design or as the price for securing favourable trade terms with other global economic powers, the UK may well agree to market access conditions for foreign goods and services that could have the effect of compromising the maintenance of high regulatory standards.

In a series of speeches during early 2018, various UK Government figures sought to reassure the Union that the UK is indeed determined to compete on the basis of a “race to the top” (not to the bottom) in regulatory standards. And obviously, if the UK were to change its fundamental policy preferences and seek a “close cooperation” arrangement with the Union based on some combination of Single Market and / or Customs Union membership, that would in itself indicate a long term resolve for the UK to retain its European socio-economic model. However, the political situation remains sufficiently confused and volatile that the Union is surely correct from the very outset to treat the question of a level playing field as central to any future relationship.

In that regard, among the issues to be addressed are the following.

- The range of policy areas to be treated as relevant to the Union-UK level playing field, i.e. whether these should extend beyond traditional sectors such as competition, state aid, environment and labour protection; so as also to include, e.g. issues such as consumer welfare or corporate taxation. The last issue, in particular, might raise some awkward questions about the extent of the Union’s own internal level playing field, given that certain Member States do indeed regard competition on the basis of levels of corporate taxation as a legitimate exercise of their national prerogatives.

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83 See Section 3.1 (above).
84 E.g. speech at the Centre for European Reform on “The Future of the EU” (20 November 2017).
85 The main example usually cited in this context is the prospect of the UK agreeing to the importation of foodstuffs such as chlorinated chicken from the USA.
86 E.g. Secretary of State for Exiting the European Union, “Foundations of the Future Economic Partnership” (20 February 2018); Prime Minister, “Our future economic partnership with the European Union” (2 March 2018); Chancellor of the Exchequer, Speech on Financial Services at HSBC (7 March 2018).
87 For further discussion of the legal and political issues surrounding the future of UK policies in fields such as employment and environmental law, see the contributions in M Dougan (ed), The UK After Brexit: Legal and Policy Challenges (Intersentia Publishing, 2017).
The nature of the guarantees, within each relevant sector, that will provide the basis for a satisfactory level playing field. Here, it is unlikely that the Union will settle for the UK merely committing to observe baseline international standards – particularly in fields such as environmental and employment protection. The Union will surely press for the UK to retain its current standards and indeed may even insist that the UK commit to matching future developments in relevant Union standards – in effect, treating level playing field issues not merely as flanking measures which exist alongside the main economic cooperation provisions, but as an integral part of the overall bargain which serves to underpin and operationalise preferential conditions of market access.

Strong mechanisms for ensuring the implementation and supervision of the applicable level playing field guarantees as well as for dispute settlement and robust sanction in the event of non-compliance. That is particularly important given the centrality of parliamentary sovereignty to the UK’s constitutional structures: in principle, the UK could at any time legislate so as to deviate from or repudiate its international obligations with few domestic legal constraints. The Union therefore has a strong interest, e.g. in including an “early warning mechanism” based on prior notification of, joint consultation over and standstill obligations in respect of any proposed UK legislation relevant to compliance with its level playing field obligations under any agreement (whether free trade or “close cooperation”); as well as the possibility of imposing interim and / or unilateral measures to safeguard Union interests in the event of UK action that (actually or potentially) undermines the level playing field.

3.4. Enhanced expectations for governance arrangements in the event of a future Union-UK economic agreement based on “close cooperation”

The governance / institutional structures sketched out in Section 3.3 match the level of ambition for the sort of far-ranging yet nonetheless essentially limited free trade agreement between the Union and the UK that forms the current working assumption of various Union institutions (even if it does not tally with the more bespoke aspirations set out by the UK Government).

However, as the European Council’s March 2018 Guidelines state: the Union remains open to exploring different ideas, should the UK position evolve in the near future. In principle, therefore, the door remains open for the UK to review its current policy preferences and propose a future relationship with the Union based on a more ambitious model of “close cooperation”, i.e. EEA-level participation in the Single Market and / or Turkey-style membership of a Customs Union.

The purpose of this report is not to offer any in-depth political or economic evaluation or recommendation concerning the potential or comparative benefits and costs of such a “close cooperation” agreement between the Union and the UK. Suffice to recall the key points which emerged from our analysis in Chapter 2: “close cooperation” would apply across a wide scope of policy fields, seeking to achieve a high level of market integration, employing relatively advanced techniques and disciplines, all based on or at least strongly coloured by the Union’s own model of economic cooperation between the Member States. As we know, more extensive rights and obligations naturally

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88 Note the expectations expressed by the European Parliament in that regard, e.g. Resolution of 13 December 2017 on the state of play of negotiations with the United Kingdom, para 8; Resolution of 14 March 2018 on the framework of the future EU-UK relationship, paras 4 and 14.

89 Note Michel Barnier’s suggestion for a “non-regression clause” (e.g. as regards environmental standards) in any future FTA with the UK, e.g. Remarks at Green 10: “Is Brexit a threat to the future of the EU’s environment?” (European Parliament, 10 April 2018).

call for more sophisticated governance / institutional structures under any “close cooperation” agreement.

In addition, within the context of any future negotiations between the Union and the UK for a potential “close cooperation” agreement, one would expect the Union to apply the lessons it has learned from the limitations and weaknesses of its existing “close cooperation” relationships. For example: the Union would place particular emphasis on rules, structures and processes to ensure that the UK observed the fundamental principles of effective and dynamic homogeneity in the alignment of its national law with that of the Union itself – no doubt seeking to address some of the concerns about excessive requests for individualised legislative adaptations and / or backlogs in domestic implementation which have arisen, e.g. in the context of the EEA. Similarly: the Union might express a strong preference for any customs union to be fully comprehensive in its scope of application so as to cover all categories of goods, and for the UK to adhere fully and faithfully to the Union’s own external trade policies in its relations with other third countries, both of which would be required in order to provide a genuinely effective solution to the challenge of avoiding a “hard border” between the Republic of Ireland and Northern Ireland, within the context and at the level of an overall Union-UK “close cooperation” agreement.

Against that background: it is possible to identify certain enhanced expectations for the governance / institutional structures of a potential Union-UK “close cooperation” agreement.

- At the very least, the general decision-making capacity and discretion of the Joint Committee would be significantly constrained (first) by the fact that “close cooperation” would be based largely on UK adherence / alignment to the Union’s own regulatory regimes and (secondly) by the need for those Union regulatory regimes to be developed, interpreted and applied in full respect for the autonomy of Union law.91

- When it comes to interpretation of the agreement, and more specifically the impact of subsequent caselaw developments, the Union would be likely to insist upon stronger obligations than in a standard free trade agreement. Such obligations might reflect those adopted pursuant to the EEA Agreement – requiring the UK to pay “due account” to subsequent Court of Justice rulings,92 in practice, perhaps even leading to a presumption of homogenous interpretation (albeit on a voluntary basis) so as to avoid the emergence of discrepancies capable of adversely impacting upon mutual market access.93 The Union might even seek to insist, whether for the entire agreement or at least designated elements thereof, upon obligations equivalent to those imposed upon Turkey in the context of its customs union agreement: provisions identical in substance to Union law must be interpreted and applied in conformity with (all) relevant Court of Justice caselaw.94

- Similarly, when it comes to future legislative developments, whether across the entire agreement or at least in specific fields: the Joint Committee’s duty to ensure the smooth functioning of the agreement might be based upon a strong presumption that the UK’s obligations are to be defined in the light of changing Union legislation and other binding Union acts; while the scope for agreeing on the compatibility or equivalency of UK measures, or for granting the UK legitimate

91 See the more detailed discussion of exactly these points in Section 2.3 (above).
92 See Article 3(2) of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice. See further, e.g. P Christiansen, “The EFTA Court” (1997) 22 ELRev 539; H H Fredriksen, “The EFTA Court 15 Years On” (2010) 59 ICLQ 731.
94 See Article 66 of Decision 1/95 of the EC-Turkey Association Council on implementing the final phase of the Customs Union.
exemptions from or adaptations to duties derived from Union law, would also be correspondingly more limited.

- However, as with the EEA Agreement and the Union-Turkey customs union, a “close cooperation” agreement between the Union and the UK could include specific provisions facilitating the involvement (consultation, exchange of views etc) of UK authorities / experts in the formulation of draft Union legislation as well as the exercise by the Commission of its delegated / implementing powers.\(^{95}\)

- The Union might prefer the dispute settlement mechanisms of a “close cooperation”\(^{96}\) agreement to be subject to a rule of exclusivity: the parties should have recourse only to the procedures provided for under the agreement in order to resolve disputes arising in relation to that agreement.\(^{97}\)

- Political dispute settlement by the Joint Committee would be subject to an express obligation to respect the caselaw of the Court of Justice; and might also include the possibility of the parties (jointly but perhaps also separately) referring certain matters directly to the Court of Justice for a binding determination (if no agreed resolution can be found by the Joint Committee within a given timescale).\(^{98}\)

- Any possibility of judicial dispute settlement by an independent arbitration panel would also call for stronger mechanisms to guarantee the autonomy of Union law, e.g. to ensure that the panel cannot interpret provisions identical or equivalent in substance to Union measures in a definitive or binding manner; cannot rule on the division of competences between the Union and its Member States (including for the purposes of identifying the correct respondent in any dispute); cannot question the legality of Union acts under the Treaties; and cannot infringe upon the duty of the Court of Justice (and the national courts of the Member States) to ensure the effective judicial protection of rights created under Union law. Such extensive limitations on the adjudicative competence of the independent arbitration panel are likely to call for a system of preliminary references allowing designated issues to be resolved through binding rulings from the Court of Justice itself.\(^{99}\)

- As for the internal legal effects of any “close cooperation” agreement between the Union and the UK: this issue will be discussed in greater detail in Chapter 4.\(^{100}\) Suffice for now to observe that the Union may insist upon more detailed provisions, e.g. to recognise that certain rights created under the agreement are indeed capable of direct invocation before the domestic courts of each party. For its part, the UK has already indicated that it is prepared to accept the possibility of certain Union institutions and agencies performing limited administrative or supervisory roles within or for the purposes of its internal legal order (and to recognise a commensurate degree of jurisdiction for the Court of Justice).\(^{101}\) Where Union institutions or agencies do perform certain functions directly in

\(^{95}\) See, e.g. Articles 99-101 of the EEA Agreement; and Articles 55-60 of Decision 1/95 of the EC-Turkey Association Council on implementing the final phase of the Customs Union. See further the discussion in Section 4.3 (below).


\(^{97}\) As with the draft Withdrawal Agreement under Article 50 TEU; see Article 161 of TF50 (2018) 35 (19 March 2018).

\(^{98}\) E.g. as with the Multilateral Agreement on the establishment of a European Common Aviation Area (see Article 20); and also the Treaty establishing the Transport Community (see Article 37). Note that the Court of Justice has expressed serious reservations about the idea of joint tribunals combining judicial personnel from both the Union and the relevant third country / countries: see Opinion 1/91, EEA Agreement, ECLI:EU:C:1991:490.

\(^{100}\) See Section 4.4 (below).

\(^{101}\) In particular: Prime Minister, “Our future economic partnership with the European Union” (2 March 2018).
relation to the UK, their powers and activities must respect the fundamental requirements imposed by the autonomy of Union law.\textsuperscript{102}

- In any event, it is common practice for Union agreements based on or aspiring to “close cooperation” with third countries to include other institutional fora for bilateral dialogue, e.g. between the European Parliament and the relevant domestic assembly; e.g. as regards the interests and concerns of civil society; e.g. between the judicial authorities of the Union and the relevant third country.\textsuperscript{103}

In line with the overall agenda for promoting cross-border economic cooperation set out in Chapter 2, the Union would have to consider how far any proposed “close cooperation” agreement with the UK might interface with the Union’s existing external relations and international commitments. Of course, that includes ensuring that any Union-UK agreement is compatible with the fundamental obligations underpinning the WTO regime. But it also includes assessing the impact of a “close cooperation” relationship between the Union and the UK upon existing agreements with third countries: for example, whether / in what manner the EFTA-EEA states must / should agree to any de facto expansion of the Single Market, so as to include another third country, which takes place outwith the existing structures of the EEA Agreement itself.\textsuperscript{104}

However, in line with the existing paradigm and acquired experience of “close cooperation” agreements between the Union and third countries summarised in Chapter 2, the main implications of shifting away from the free trade agreement currently under discussion, and towards a significantly more integrated economic partnership, would fall upon the UK itself. It is obvious that full or even extensive participation in the Single Market would require the UK to surrender its “red line” over ending the free movement of persons. Similarly, full or even extensive participation in the Customs Union would clearly oblige the UK to abandon or at least significantly qualify its plans to conceive and operate an independent external trade policy. But most importantly: as the experience of other “close cooperation” relationships has confirmed, the underlying effect of such an agreement would effectively be to transform the UK from being a leading member of the Union, into a rule-taking third country; significant elements of UK economic and social policy would be determined – whether in greater or in lesser detail – by the institutions of the Union with little or no direct participation by the UK authorities.

The next question is: how far might the unique circumstances and characteristics of the UK challenge and reshape (rather than merely conform to and reinforce) that established paradigm for and acquired experience from “close cooperation” agreements between the Union and third countries?

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\textsuperscript{102} See Chapter 2 (above).

\textsuperscript{103} As with, e.g. the EEA Agreement or the Association Agreement with Ukraine.

\textsuperscript{104} See further, e.g. C Hillion, “Brexit means Br(EEA)xit: The UK withdrawal from the EU and its implications for the EEA” (2018) 55 CMLRev 135.
4. FUTURE RELATIONS BETWEEN THE UNION AND THE UK: SPECIFIC ISSUES

**KEY FINDINGS**

- Important questions arise concerning how far the unique circumstances and characteristics of the UK might challenge and reshape (rather than merely conform to and reinforce) the established paradigm for and acquired experience from “close cooperation” agreements between the Union and third countries.

- First, the UK’s desire for selective participation in the Single Market is difficult to reconcile with the Union’s insistence that the four freedoms are indivisible. The latter proposition may not have the status of a constitutional or legal imperative, but it is self-evidently in the Union’s rational self-interest, particularly in the context of a Member State’s withdrawal.

- Secondly, the UK proposes maintaining market access in certain sectors, but without full adherence to the techniques and disciplines of the relevant Union acquis. That proposal seriously underestimates the degree to which both mutual recognition, and the high level of mutual trust upon which it depends, are the hard-won products of legally complex and politically sensitive substantive and institutional frameworks, structures and processes. In effect, the UK is here asking for significantly better treatment than the Member States are even prepared to afford each other.

- Thirdly, the constitutional principles protecting the autonomy of Union law from external interference or influence impose important and inherent limits to how far any third country (including the UK) might participate in or influence decision-making by the Union’s institutions, bodies and agencies.

- Finally, the UK’s post-referendum political agenda of “taking back control” may well pose particular problems when it runs up against the Union’s legitimate interest in ensuring adequate structures for the independent and impartial administrative and judicial supervision and enforcement of any “close cooperation” agreement within the UK itself. Ultimately: either one party will have to accept governance principles it regards as sub-optimal; or failure to agree more ambitious institutional provisions could limit the feasible scope and / or depth of substantive cooperation itself.

The situation of the UK presents certain distinctive features, any or all of which might argue for a different approach or experience as compared to other models of “close cooperation” between the Union and third countries. Such features include:

- the unique context of withdrawal;
- the unusual size, diversity and importance of the UK economy;
- the Union’s strategic interest in anchoring the UK to the European economic and social model;
- the Union’s strategic interest in securing close UK cooperation in other fields, e.g. security and defence.

With those features in mind, this Chapter will explore a series of more specific issues, each of which raises questions about how far the UK might request or expect “special treatment” in the context of a “close cooperation” agreement on trade with the Union:
• a potential UK request for only partial participation in the Single Market – thereby challenging the Union’s assertion that the “four freedoms” are to be considered indivisible;

• a potential UK request for mutual recognition without being bound by the same techniques and disciplines of market integration as the Union’s own Member States;

• the nature and limits of the opportunities available for third countries to participate in / influence decision-making by the Union’s institutions, bodies and agencies;

• adequate structures for the independent and impartial administrative and judicial supervision and enforcement of any “close cooperation” agreement within the UK itself.

4.1. Scope of cooperation: the indivisibility of the four freedoms?

When it comes to determining the overall scope of any “close cooperation” agreement between the Union and the UK, there is at least one major issue where the demands / expectations of each party might significantly diverge: the potential divisibility of the “four freedoms” faced with a British request for only partial participation in the Single Market.

The question of the divisibility of the four freedoms is particularly relevant, having regard to the UK’s suggestion of an “Empty Basket” in certain fields which would otherwise be considered an integral part of Single Market membership, i.e. whereby it would be possible for the UK to agree a far-reaching economic partnership with the Union, while nevertheless excluding certain fields from the scope of that “close cooperation” agreement, on the basis that the UK shares neither the objectives, techniques nor disciplines of Union action in the relevant sectors. The main exclusion thus proposed by the UK is, of course, the free movement of persons; but the UK Government has made other similar suggestions, e.g. that the UK would not wish to continue full participation in the Digital Single Market.\(^{105}\)

However, the Union’s position on this issue is well known and robust: the Union must protect the integrity of the Single Market; for which purpose, the four freedoms are to be considered indivisible; and there can be no “cherry picking” through sector-by-sector participation in the Single Market. That position is shared by the European Council, the Commission and the European Parliament.\(^ {106}\)

In response, the UK Government has implied that the Union position is not only somehow unreasonable but also inconsistent.\(^ {107}\) Certainly, the UK political discourse refers to existing Union-third country agreements that supposedly demonstrate how the four freedoms are in fact perfectly divisible: for example, the effective exemption of Lichtenstein from compliance with the full free movement of persons under the EEA Agreement; or the exclusion of any general system to facilitate the free movement of persons under the Association Agreement with Ukraine. Similarly, the UK political discourse also refers to existing Union-third country agreements that supposedly show how it is possible to have a sector-by-sector membership of the Single Market: for example, the complex network of bilateral agreements with Switzerland that provide for the latter’s selective participation in certain Union policies, frameworks and programmes. Indeed, it is not uncommon to hear certain UK politicians attribute the Union’s refusal to accede to the UK’s demands, for a more selective approach to Single Market participation, as part of a deliberate policy of “punishing” the UK for its decision to

\(^{105}\) See further, in particular, Prime Minister, “Our future economic partnership with the European Union” (2 March 2018).

\(^{106}\) E.g. European Council (Article 50), Guidelines of 23 March 2018; European Parliament, Resolution of 14 March 2018 on the framework of the future EU-UK relationship.

\(^{107}\) E.g. Prime Minister, “Our future economic partnership with the European Union” (2 March 2018).
withdraw from the Union.\textsuperscript{108}

What should we make of this divergence of preferences? As a matter of strict theory, there is nothing explicit or inherent in Union constitutional law or the Union’s external relations competences that absolutely requires the Union to treat the four freedoms as indivisible in all contexts; or that precludes the conclusion of sectoral agreements offering preferential degrees of access to the Single Market (so long as such agreements respect the Union’s existing external commitments, in particular under WTO law).\textsuperscript{109}

Technically, of course, there may well be benefits to a holistic understanding of “close cooperation” in the various fields covered by the Single Market: for example, the smoothest possible freedom of movement for goods and services would undoubtedly be facilitated by full participation in the Union’s Digital Single Market so as to avoid perpetuating ancillary barriers to trade in the relevant regulatory sectors. However, such technical advantages do not necessarily lead to the conclusion that the four freedoms are indivisible; nor do they necessarily rule out the possibility of sectoral participation in the Single Market. For example: it would be perfectly possible, from a technical perspective, to operate a regime of “close cooperation” which guaranteed the free movement of services (including a degree of cross-border mobility for natural persons which did not entail their direct or formal participation in the host state’s labour market) without also entailing the full free movement of workers or that of economically inactive persons.\textsuperscript{110}

However, to ask whether the Union is explicitly or inherently or absolutely required to treat the four freedoms as indivisible, or to exclude sectoral participation in the Single Market, by reference to the constitutional framework governing its relations with third countries, is surely to pursue an entirely false enquiry.

Chapter 2 discussed the unique nature of the Union’s own model for “close cooperation” between its Member States, as recognised and endorsed by the Court of Justice in rulings such as the Opinion on ECHR Accession.\textsuperscript{111} The Union in general and the Single Market in particular form an “ecosystem” which is both comprehensive in its scope and unprecedented in the depth of its substantive rules, institutional structures and enforcement disciplines.

The Union is therefore entirely correct to recall, throughout its deliberations about future relations with the UK, that no third country can expect to be treated the same as a Member State; but must seek instead a different and inevitably less ambitious balance of rights and obligations. But the point needs to be pushed even further than that. The Union also has a strong political imperative to ensure that any agreement it might reach with a third country does not pose an external threat to the smooth functioning, underlying cohesion or indeed very legitimacy of the Union’s own internal ecosystem. In particular, the Union must ensure that the complex and interdependent elements which together make up the Single Market between its Member States are not undermined or called into question by the possibility of a third country being able to disaggregate, unravel or pick-and-choose between those

\textsuperscript{108} Such language about “punishment” of the UK by the EU is particularly associated with the UK’s (Eurosceptic) International Trade Secretary, Liam Fox; see, e.g. the remarks reported in https://www.theguardian.com/politics/2017/oct/22/brexit-not-bluffing-on-no-deal-brexit-says-liam-fox.

\textsuperscript{109} Though note the rather more far-reaching critique of the Union’s position on the indivisibility of the four freedoms by C Barnard, “Brexit and the EU Internal Market” in F Fabbriini (ed), The Law and Politics of Brexit (Oxford University Press, 2017).

\textsuperscript{110} Consider, by way of analogy, the Union’s standard post-accession transitional regimes on the free movement of persons between pre-existing and new Member States (which generally introduce temporary restrictions on the free movement of workers while immediately introducing full free movement rights for other categories of natural and legal persons). See further, e.g. M Dougan, “A Spectre is Haunting Europe... Free Movement of Persons and the Eastern Enlargement” in C Hillion (ed), Enlargement of the European Union: A Legal Approach (Hart Publishing, 2004).

\textsuperscript{111} Opinion 2/13, Accession to ECHR, ECLI:EU:C:2014:2454.
very elements.112

That is especially true having regard to the symbiotic relationship which exists between the scope and the depth of economic cooperation within the Single Market. It would clearly be easier for the Union to agree on a selective or sectoral approach to economic cooperation with a third country, where the degree of market integration pursued between the parties is relatively shallow, e.g. consisting essentially of reductions in tariffs, mechanisms for bilateral regulatory cooperation or limited / static regimes on regulatory equivalency. But where the depth of market integration between the parties is to be more profound – approaching that of the Single Market itself – it becomes correspondingly more difficult to justify adopting a selective approach to the overall scope of their economic relationship. Such an approach would directly challenge the network of bargains, balances, compromises and trade-offs that are eventually required to bind together the entire edifice of “close cooperation”.

Two further contextual points are worth noting. In the first place, the essentially political (rather than strictly constitutional) imperative for the Union to be seen to protect the integrity of its own Single Market and the indivisibility of the four freedoms is neither new nor unique to the case of UK withdrawal. For example, those same concepts have played an explicit role (endorsed by previous UK Governments) in the Union’s management of its bilateral relationship with Switzerland – as we can see in the Council’s conclusions of 16 December 2014 assessing the implications for Union-Swiss cooperation of the controversial referendum on restricting “mass immigration”.113

In the second place, we discussed in Chapter 2 how the Union’s strategic choices about the scope of and limits to economic cooperation with third countries are influenced by a wide range of factors: not only formal considerations such as the negotiating constraints imposed by Union constitutional law (procedural, when it comes to mixed agreements and substantive, in safeguarding the autonomy of Union law); but also more empirical factors such as the capacity of the Union to pursue its rational self-interest, having regard to its relative strength and bargaining power (which usually favours the Union’s interests in negotiations with smaller economies). This is the true relevance of the general exclusion of freedom of movement for persons from the scope of the Ukrainian association agreement: that was not a request for exclusion by Ukraine but rather a limitation on the scope of cooperation imposed by the Union; no doubt taking into account the mixed nature of the agreement and the need to avoid elements which would surely have caused (even greater) problems at the stage of national ratifications.114

Against that background: the force of the Union’s political imperative to be seen to protect the integrity of the Single Market and the indivisibility of the four freedoms – even if it is neither new nor unique – has certainly acquired even greater potency in the context of the Article 50 TEU negotiations. Put simply: it is evidently in the Union’s rational self-interest to use its relative bargaining power in order to ensure that a departing Member State is not able to unravel fundamental elements of the Union’s unique ecosystem from the outside. That would be true in the case of any withdrawing state; but it is especially true in the case of the UK. Consider the following pertinent factors:

- The UK was a leading Member State which had already secured a series of special privileges as compared to the treatment of other Member States: having voted to leave the Union altogether, there must come a political limit to the Union’s willingness to accommodate the British desire for exceptional treatment.

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112 A point repeatedly stressed by Michel Barnier, e.g. speech on German Employers’ Day (Deutscher ArbeitgeberTag) 2017 (29 November 2017).
113 Council conclusions on a homogenous extended single market and EU relations with Non-EU Western European countries (16 December 2014), especially at para 45.
114 We refer, of course, to the 2016 Dutch referendum whose negative outcome complicated national ratification of the Association Agreement.
After withdrawal, the UK will remain a major international player and partner: for the Union to make significant concessions to the British demands for “special treatment” could pose substantially greater challenges to the coherence and legitimacy of the Union’s internal model of economic cooperation than in the case of smaller or less strategically important economies. Of course, that point also links up to the true relevance of the general accommodation offered to Lichtenstein when it comes to the free movement of persons within the context of the EEA: there is simply no tenable comparison on this point with the political, economic or social situation prevailing in the UK.115

The UK’s request for an “Empty Basket” in fields such as the free movement of persons is based precisely on a desire to secure exemptions from the full scope of “close cooperation” with the Union, while still enjoying the full depth of economic integration in other fields covered by the agreement. As we have seen, seeking to separate the scope from the depth of cooperation in this manner is especially problematic in terms of preserving an acceptable balance of trading rights and obligations under conditions of fair and equal competition.

The UK’s requests for sectoral exclusions from any potential “close cooperation” agreement are much more likely to provoke political objections and thus serious procedural hurdles, when it comes to securing the ratification of any (mixed) agreement at the domestic level by the national / regional parliaments of the Member States.

4.2. Techniques for cooperation: mutual recognition without harmonisation?

When it comes to the precise techniques and disciplines governing cross-border economic integration, within those sectors covered by a potential Union-UK “close cooperation” agreement, there is another key issue where the demands / expectations of each party might significantly diverge.

It will be recalled that the UK has suggested a “Half Basket”: sectors where the UK shares the Union’s policy objectives but seeks the freedom to pursue them using its own particular regulatory techniques and disciplines; yet without thereby compromising mutual market access, effectively on Single Market terms, for relevant goods and services. In that latter regard, the UK certainly seems to be suggesting a form of economic cooperation going far beyond the Union’s existing systems for unilaterally recognising the (limited and conditional) equivalency or adequacy of third country regulatory regimes in specific fields.116 Indeed, the UK proposal seems to consist of requesting the continued benefits of a systematic approach to mutual recognition based on the principle of reciprocal home state control; but without having to comply with the same techniques and disciplines, particularly in terms of regulatory harmonisation; and instead offering guarantees that UK law would meet certain equivalent or adequate standards.

The precise details of the UK’s vision remain unclear; for example, as regards which range of economic sectors or activities would fall into the “Half Basket”; the criteria for identifying an acceptable degree of divergence within a framework of shared regulatory objectives; or the exact degree of / limits to mutual market access which the “Half Basket” should deliver.117 Nevertheless, the principle at least is clear enough to be amenable to preliminary analysis: in defiance of normal expectations and empirical


117 Consider the UK’s thoughts thus far on future cooperation in the field of financial services, e.g. Chancellor of the Exchequer, Speech on Financial Services at HSBC (7 March 2018).
experience, the UK is aspiring to preserve a similar level of market integration to that which it currently enjoys as a Member State, but instead as a third country, without the same full range of Union obligations. How feasible is that prospect?

It is useful to begin here by observing that – in much of the UK’s political discourse about the future economic relationship with the Union – the challenge of securing full market access based upon mutual recognition of reciprocal home state control is often presented as a simple matter of each territory promising to maintain equivalent substantive rules and equivalent supervisory authorities. Readers should by now readily appreciate that that assumption is seriously misplaced.

Mutual recognition between states is fundamentally dependent upon the existence of a high level of mutual trust and confidence. Such mutual trust does not self-generate and self-perpetuate somehow spontaneously. It is built and maintained through long and hard labour, often challenged by points of particular tension or even threatened by moments of genuine crisis. It is the purpose of the Union’s own model of “close cooperation” to generate and perpetuate sufficient mutual trust between the Member States to allow the Single Market to function on the basis of a uniquely far-reaching programme of mutual recognition. As we have seen, that model is built upon an extensive body of substantive law seeking to harmonise the regulatory standards that protect essential public interests across the Member States. But it is also dependent upon an entire institutional framework that legislates for, implements and supervises the “rules of the game” – including the construction of extensive networks and processes, e.g. for sharing information, assessing risks and apportioning jurisdiction. It furthermore relies upon a highly developed legal system, common to the Member States, which offers concrete guarantees, e.g. that rules of the Single Market can be directly enforced against national public authorities in the event of non-compliance; and e.g. that the beneficiaries of Union law are entitled to effective remedies before the national courts to vindicate their rights.

A system like the EEA seeks to offer a sufficiently close replication of the Union’s own model as to enable its participating states to enjoy a comparable level of mutual trust and thence mutual recognition. But it is simply impossible to imagine that a third country which does not observe the same techniques and disciplines, participate in same networks and processes and guarantee the same level of administrative and judicial enforcement etc., can nevertheless claim that sufficient mutual trust exists to install and support a fully fledged system of mutual recognition, offering the same or even a similar level of market integration as we see within the Union or the EEA. In effect: through its “Half Basket” proposal, the UK is actually asking for significantly better treatment and privileges than the Member States are prepared to provide even towards each other within the framework of the Union.

The extent to which mutual recognition is dependent upon the Union’s own model of “close cooperation” has not just a political but also a constitutional significance. Moreover, the legal inter-relationship between mutual recognition and Union membership is not merely an abstract constitutional consideration, but can also be seen operating in concrete disputes that come before the Court of Justice. The Court is sometimes called upon to assess the potential justification of prima facie barriers to trade created by a Member State which affect certain third country goods (in free circulation and lawfully marketed within the Union and thus entitled to certain rights of free movement along with Union-origin goods) or third country capital (where the relevant Treaty provisions explicitly protect free movement in/out of as purely within the Union). Even in those situations where third country goods/capital enjoy a degree of privileged treatment within the Single Market, the Member States are permitted to justify barriers to trade and thereby limit the principle of mutual recognition in ways which would not be permissible in the case of purely intra-Union disputes – and to do so explicitly taking

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118 Again: a point repeatedly stressed by Michel Barnier, e.g. speech at BusinessEurope Day 2018 (1 March 2018); speech at the Eurofi Highlevel Seminar 2018 (26 April 2018).
119 E.g. Opinion 2/13, Accession to ECHR, ECLI:EU:C:2014:2454; Case C-284/16, Achmea, ECLI:EU:C:2018:158.
account of the fact that third countries cannot provide the same (substantive and / or institutional) assurances for the protection of essential public interests as does Union membership itself.\(^{120}\)

It is therefore difficult to imagine that the Union would depart from its own normal expectations and empirical experience by agreeing to the UK’s proposal for a “Half Basket” to any significant degree or in any systematic manner. Even if, in strictly limited fields or for certain specific issues, the Union were willing to consider offering the UK the possibility of mutual recognition based on shared objectives, without common techniques and disciplines, that would require, e.g. a clear set of ex ante criteria, conditions and limits; a robust system for approval on a case-by-case basis; and a particularly strong emphasis on effective surveillance and enforcement as well as robust (and potentially unilateral / autonomous) sanctions for non-compliance.

4.3. UK participation in Union decision-making

Any potential Union-UK “close cooperation” agreement could also raise certain more specific governance or institutional issues – with the prospect of significant differences between the two parties again capable of challenging our normal expectations based on empirical experience.

In particular, it will be recalled that the UK already agrees that, in some sectors, economic cooperation with the Union should proceed on the basis of a “Full Basket”: the UK shares not only the Union’s policy objectives, but also accepts the Union’s more precise regulatory techniques and disciplines. Obviously, in the event of a “close cooperation” agreement based on extensive participation in the Single Market and / or Customs Union, one assumes that the “Full Basket” approach would be the standard template for economic integration between the Union and the UK across every relevant sector (particularly taking into account the slim chances that the Union would agree to the UK’s alternative suggestion of permitting “Half Baskets” in various fields).

At the same time, however, it is easy to envisage a negotiating position whereby the UK insists: even though we are prepared to share the Union’s objectives, techniques and disciplines, we are not willing simply to become a mere passive rule taker across significant fields of economic and social policy. The question would then arise: what is the permissible scope for UK influence over the Union’s own decision-making institutions and processes?

As regards the Union’s formal institutions (European Council, European Parliament, Council, Commission etc); the rules governing the autonomy of Union law provide a clear answer, i.e. as a third country, the UK cannot participate directly in their membership, functioning or decision-making.\(^{121}\) Any prospect of third country influence over the development of Union law and policy at the institutional level must therefore be handled more indirectly: for example, through pre-legislative consultation and discussion at the Joint Committee; the possibility to make amendments / adaptations to Union measures insofar as they will eventually become applicable to the relevant third country; as well as the opportunity to involve third country representatives and experts in the Commission’s preparatory deliberations concerning legislative, delegated and implementing acts.\(^{122}\)

Nevertheless, there are surely limits to how far such indirect influence could possibly extend, before it would be regarded as problematic in terms of the autonomy of Union law. Consider, for example, the “red card” for national parliaments which was agreed by the European Council in February 2016 as part

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120 Consider recent rulings such as Case C-525/14, Commission v Czech Republic, ECLI:EU:C:2016:714 (goods) and Case C-464/14, SECEL, ECLI:EU:C:2016:896 (capital).
121 See Chapter 2 (above).
122 Compare with, e.g. Articles 99-101 of the EEA Agreement; and Articles 55-60 of Decision 1/95 of the EC-Turkey Association Council on implementing the final phase of the Customs Union.
of the UK’s “new deal” on membership in preparation for its June 2016 referendum: if 55% of the votes from national parliaments participating in a proposal for Union legislation objected to its contents on subsidiarity grounds, within 12 weeks from being notified of the draft text, the Council committed itself to dropping the initiative altogether – unless it could find a way to accommodate those domestic concerns. That mechanism was to be introduced without direct Treaty amendment, as part of the internal institutional procedures of the Council.\textsuperscript{123}

By allowing external institutions directly to influence the functioning of the Union’s own institutions and decision-making processes, that proposal would have been saved from breaching the autonomy of Union law (if at all) only because the Council retained ultimate discretion to form an independent judgment and room for action which eliminated any degree of automaticity from the external input of the national parliaments. By analogy: while it might be possible for a “close cooperation” agreement to provide that the Union institutions would pay due regard to issues, concerns or objections raised by the UK as a third country in respect of proposed Union action in certain fields, such an agreement could not go so far as formally to allow the UK a de facto veto or otherwise to exercise a decisive influence over the internal functioning and decision-making competence of the Union itself.

As regards the Union’s various bodies, offices and agencies: it would be possible for a “close cooperation” agreement to provide for the potential involvement of the UK directly in their activities – but only where their founding regulations so permit and upon conclusion of a specific international agreement setting out the precise terms of such participation (including the fixing of an appropriate financial contribution).\textsuperscript{124} As is well known, the founding regulations of the Union’s various offices, bodies and agencies contain varying provisions on third country participation: sometimes, there is no scope for such participation at all; in many contexts, participation is limited to operational matters with no possibility to participate in the exercise of decision-making powers.\textsuperscript{125} If the Union were minded to extend the opportunities for UK participation, e.g. in the activities of the European Medicines Agency, it would have to enact suitable amendments to the relevant parent legislation.\textsuperscript{126}

Taken together, the experience of the EEA Agreement suggests that – although the fundamental proposition remains true, that “close cooperation” on the Union’s terms comes at a significant cost in terms of the relevant third country’s theoretical regulatory autonomy – it is nevertheless possible for third countries to make effective use of their opportunities for formal and / or informal participation in the activities of the Union’s institutions and agencies, so as to exercise an appreciable (if still limited) influence over the direction of the Union’s decision-making agenda and / or the content of substantive Union proposals – particularly so as to ensure that specific issues, concerns or characteristics relevant to that third country are brought to the attention of / suitably taken into account by the competent Union authorities.\textsuperscript{127} In that regard, one may safely anticipate that the potential influence of the UK would be significantly greater than that of any of the EFTA-EEA states; particularly if its political capital were targeted at shaping the agenda or content of Union action in fields where the UK had a strong presence, interest and / or technical expertise.

Ultimately, however, the main safety-valve available to a third country which regards the democratic price of “close cooperation” with the Union to outweigh the economic benefits remains the same: either to diverge from the Union’s terms of business and suffer the prescribed consequences in terms

\textsuperscript{123}Decision of the Heads of State or Government, meeting within the European Council, Concerning a New Settlement for the United Kingdom within the European Union (18-19 February 2016).

\textsuperscript{124}See, e.g. Articles 450-452 of the Association Agreement with Ukraine.

\textsuperscript{125}See further, e.g. House of Commons Library Briefing Paper, EU Agencies and Post-Brexit Options (No 7957 of 28 April 2017).


of sanctions, retaliation or counter-balancing measures; or ultimately to repudiate the agreement and terminate the system of “close cooperation” altogether.

One final issue deserves particular attention under this heading. It concerns a potential “close cooperation” agreement based upon the creation of a full or partial customs union between the Union and the UK. As we noted in Chapter 2, Turkey has expressed longstanding concerns about the lopsided effects of its existing customs agreement with the Union, specifically as regards relations with other third countries with which the Union enters into preferential trade arrangements: Turkey must abide by the relevant terms of the Union’s evolving free trade agreements, without any guarantees of being able to benefit from the same preferences in Turkey’s own trade relations with the relevant states. More broadly, it is clear that the respective external commercial policies of the Union and of Turkey have diverged over time, thus exerting pressure on the smooth functioning of the parties’ own customs union through increased risks of trade distortions / diversions.128

The Union already takes certain steps to help ameliorate that imbalance: consider, for example, the joint declaration attached to the Association Agreement with Ukraine, by which the Union exhorts Ukraine to enter into negotiations with Turkey, with a view to securing a future bilateral free trade agreement between those two third countries, so as to promote the smooth functioning of the Union’s customs union agreement with Ankara.129 Beyond that, the Commission has proposed a significant modernisation of the customs and trade relationship with Turkey.130 That process will surely involve additional measures to promote better coordination of the parties’ external trade policies: for example, stronger provisions on information and consultation within the Joint Committee and / or through the establishment of a dedicated sub-committee.131

That similar concerns would become immediately relevant in the context of a potential Union-UK “close cooperation” agreement in the field of customs is evident from the speech by Labour Party leader Jeremy Corbyn on 26 February 2018:132

“Labour would seek to negotiate a new comprehensive UK-EU customs union to ensure that there are no tariffs with Europe and to help avoid any need for a hard border in Northern Ireland. But we are also clear that the option of a new UK customs union with the EU would need to ensure the UK has a say in future trade deals. A new customs arrangement would depend on Britain being able to negotiate agreement of new trade deals in our national interest. Labour would not countenance a deal that left Britain as a passive recipient of rules decided elsewhere by others. That would mean ending up as mere rule takers…. So I appeal to MPs of all parties, prepared to put the people’s interests before ideological fantasies, to join us in supporting the option of a new UK customs union with the EU, that would give us a say in future trade deals.”

It is unclear how far the Labour Party is thus calling for a model which goes beyond a customs union agreement where the Union and the UK each still pursue an independent trade policy, thereby creating inevitable risks of asymmetry and trade distortion / diversion, albeit ameliorated through various

128 See the detailed assessment in Commission, Study of the EU-Turkey Bilateral Preferential Trade Framework, Including the Customs Union, and an Assessment of Its Possible Enhancement (Final Report, 26 October 2016) Ch 7.
130 See further, e.g. Commission Staff Working Document, Executive Summary of the Impact Assessment accompanying the Recommendation for a Council Decision authorising the opening of negotiations with Turkey on an Agreement on the extension of the scope of the bilateral preferential trade relationship and on the modernisation of the Customs Union, SWD (2016) 476 Final; and also European Parliamentary Research Service Briefing, Reinvigorating EU-Turkey bilateral trade: Upgrading the customs union (PE 599.319, March 2017).
131 See further: Commission, Study of the EU-Turkey Bilateral Preferential Trade Framework, Including the Customs Union, and an Assessment of Its Possible Enhancement (Final Report, 26 October 2016) Ch 14.
processes of information and consultation as managed by or through the relevant Joint Committee. In particular, it is possible that the Labour Party proposal is implicitly calling for the UK to exercise a more formal influence over the future direction of the Union’s external commercial policy – perhaps even extending to the direct coordination, conduct and conclusion of joint (trilateral) trade negotiations. Regardless of how far the Union might be politically willing to endorse such proposals, e.g. for the sake of combining the UK’s economic capacity with that of the Union itself so as to maximise the parties’ overall negotiating power, the need to respect the autonomy of Union law would again impose inherent constitutional limits on the degree to which the Union’s own decision-making competences, institutions or processes could be influenced, constrained or even effectively vetoed by any third country.

4.4. Administrative and judicial supervision and enforcement in the UK

We know already that with enhanced substantive obligations come enhanced institutional expectations. This Section will explore some of the issues likely to be raised by a “close cooperation” agreement between the Union and the UK, specifically as regards the challenge of agreeing adequate structures for the independent and impartial administrative and judicial supervision and enforcement of such an agreement within the UK.

We can deal first with administrative enforcement. On the one hand, the Union may be reluctant to accept a “close cooperation” agreement wherein domestic administrative supervision and enforcement is left solely and entirely to the UK’s own national authorities.133 On the other hand, the UK is equally unlikely to accept any agreement which entails the exercise of generalised supervisory and enforcement powers by the Commission in respect of UK territory, authorities or natural and legal persons.

In the context of the EEA Agreement, the same dilemma was resolved through the “two pillar” structure whereby the Commission’s supervision and enforcement responsibilities in relation to the Member States are replicated by the EFTA Surveillance Authority in respect of the EFTA-EEA states.134 However, it would be difficult to recreate such a multilateral solution in the context of a future “close cooperation” agreement between the Union and the UK: given that the relationship is purely bilateral, it would not be so easy to design a genuinely independent supervisory and enforcement authority which was nevertheless focused solely on the activities of the UK.135

It has been suggested that a future Union-UK “close cooperation” agreement could resolve this dilemma by calling directly upon an existing multilateral body, precisely such as the EFTA Surveillance Authority, to perform comparable administrative supervisory and enforcement functions in relation to the UK ("docking").136 However, such a solution would require significant amendments to the founding regulations, composition and jurisdiction of the EFTA Surveillance Authority: even besides the obvious legal hurdles of negotiation and ratification, that prospect raises difficult questions about whether the EFTA-EEA states would be politically willing to consider substantial changes to the nature and functioning of an already well established body, purely so as to meet the extraneous needs of another third country.

133 Note that previous Swiss proposals to that effect have been rejected by the Union, in the context of discussions on institutional reform of the Union-Swiss relationship.

134 See Article 108 of the EEA Agreement and the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice.


136 Note that previous Union proposals to that effect were rejected by Switzerland, in the context of discussions on institutional reform of the Union-Swiss relationship.
Dealing secondly with judicial enforcement, the Union may again be reluctant to accept a “close cooperation” agreement wherein domestic judicial supervision and enforcement is left solely and entirely to the UK’s own national courts. The obvious solution would be for the Union to request a system of preliminary references between the UK courts and the Court of Justice. After all: various international agreements between the Union and third countries, providing for “close cooperation” in particular sectors on the basis of alignment to the Union’s own regulatory standards, allow for preliminary references to the Court concerning the interpretation and application of provisions identical or equivalent to Union law – with scope for variations about precisely which domestic courts can participate or how far references should be compulsory rather than discretionary; though always on the condition that the Court’s rulings should have binding effect (i.e. so as to satisfy the requirements of the autonomy of Union law).

However, the UK is again equally unlikely to accept any agreement which entails the exercise of some generalised jurisdiction by the Court of Justice in respect of UK territory, authorities or natural and legal persons (even if the UK is prepared to swallow a more limited role for the Court, e.g. commensurate with the need for judicial review in respect of specific functions performed by certain Union agencies in which the UK participates). Once again, the EEA Agreement already points to the sort of compromise regarded as workable by the Union: the “two pillar” model entails that the EFTA-EEA States accept the jurisdiction of the EFTA Court, operating in parallel (though also linked) to the role of the Court of Justice within the Union itself.

Yet the same problems arise with judicial as with administrative supervision: the difficulty of establishing a genuinely independent tribunal to oversee the UK courts’ interpretation and application of any “close cooperation” agreement in the context of a purely bilateral relationship; together with the legal and political hurdles which would arise from any proposal to draw upon an existing multilateral body such as the EFTA Court itself for the purposes of judicial oversight within the UK.

In any case: the Union would also need to consider how far a future deal with the UK which goes beyond the current expectation of a free trade agreement, to embrace a more ambitious vision of “close cooperation”, should also contain enhanced rules governing the internal legal effects of the agreement within the UK. As we have seen, the dualist nature of the UK legal order makes the implementation of its international obligations entirely dependent upon national action; which in turn makes full and effective compliance vulnerable to the constitutional centrality of the principle of parliamentary sovereignty through implied as well as express repeal; which leads in its wake to concerns about ongoing compliance problems and an appreciable imbalance in the legal effects of the agreement as compared to its status under Union law.

Among the measures the Union might request the UK to introduce into its domestic legal system, in order to secure a more effective and symmetrical compliance with any “close cooperation” agreement, consider the following examples:

- permitting natural and legal persons to invoke certain provisions of the agreement directly before the domestic courts (akin to the Union principle of direct effect);"}

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137 Readers will no doubt have in mind the system for judicial oversight as regards the citizens’ rights provisions of the draft Withdrawal Agreement under Article 50 TEU: TF50 (2018) 35 (19 March 2018).
138 Not only the EEA but also, e.g. the Multilateral Agreement on the establishment of a European Common Aviation Area (see Article 16) and the Treaty establishing the Transport Community (see Article 19). Note also Article 322 of the Association Agreement with Ukraine, concerning dispute settlement via an arbitration panel, relating to regulatory approximation under / in relation to certain provisions of the DCFTA.
139 See Article 108 of the EEA Agreement and the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice.
• ensuring that the agreement and/or measures adopted for its implementation take priority over incompatible provisions of purely domestic law,\textsuperscript{141} which (in the UK’s specific constitutional context) would entail an express limit to the possibility of implied repeal (even if it cannot safeguard against explicit repeal by a future Parliament);\textsuperscript{142}

• other specific directions about the responsibilities of the UK courts when adjudicating in disputes involving the agreement, e.g. obligations of consistent interpretation with Union law/Court of Justice caselaw; duties of effective judicial protection in the provision of adequate remedies to natural and legal persons.\textsuperscript{143}

In short: the structures for internal administrative and judicial supervision and enforcement (as well as the more detailed internal legal effects) of a “close cooperation” agreement between the Union and the UK together provide a potential example of divergent expectations which would need to be resolved: either by one party accepting to abide by governance provisions it regards as sub-optimal; or by recognising that failure to agree more ambitious institutional provisions may well limit the feasible scope and/or depth of substantive cooperation itself.\textsuperscript{144}

For those purposes, it is worth noting that the UK’s likely objections would not be based on fundamental or absolute barriers of a constitutional nature. In principle, Parliament can provide for Union institutions and agencies to exercise binding decision-making and judicial powers in relation to UK public authorities, natural and legal persons; and/or for an international agreement with the EU and acts recognised or adopted thereunder to produce a range of specific and autonomous legal effects (including the potential for direct effect and supremacy) within the UK’s domestic legal system. There is thus no inherent legal or constitutional need for the UK to insist upon a “two pillar” solution akin to or indeed docking with that of the EEA.

Instead, the UK’s likely objections would be of an essentially political nature – directly bound up with the narrative of “taking back control” which drove the 2016 Leave campaign and continues to underpin the incumbent Government’s particular interpretation of the acceptable nature and terms of UK withdrawal.\textsuperscript{145} Such political objections may well evolve over time – especially if they threaten the very viability of a “close cooperation” agreement which the UK comes to regard as in its national interest; and also taking into account the fact that (as the EEA experience shows) more effective provisions on internal administrative supervision, judicial enforcement and legal effects reduce the potential for non-compliance and thus the need to invoke formal dispute settlement/risk potential sanctions between the parties under the agreement itself.\textsuperscript{146}

\textsuperscript{141} Cp. the position under the EEA Agreement: see, in particular, Protocol 35 on the implementation of EEA Rules.

\textsuperscript{142} Cp. again the citizens’ rights provisions of the draft Withdrawal Agreement under Article 50 TEU: see Article 4 of TF50 (2018) 35 (19 March 2018); read together with the Joint Report by the Union negotiator and the UK Government (TF50 (2017) 19).

\textsuperscript{143} E.g. precisely under principles analogous to that established by the Court of Justice in Joined Cases C-6/90 & C-9/90, Francovich, EU:C:1991:428. Cp. the position under the EEA Agreement as interpreted by the EFTA Court in rulings such as Case E-09/97, Sveinbjörnsdóttir v Iceland (10 December 1998).


\textsuperscript{145} I.e. consistently since UK Government, The United Kingdom’s exit from and new partnership with the European Union (Cm 9417, February 2017).

\textsuperscript{146} The Standing Committee of the EFTA States considers that the EEA cooperation mechanisms work sufficiently well as to explain why the Article 111 EEA dispute settlement procedure has never been used in practice: see Note by Sub-Committee V on Legal and Institutional Questions, The Two-Pillar Structure of the EEA: Surveillance and Judicial Control available at http://www.efta.int/media/documents/eea/16-531-the-two-pillar-structure-surveillance-and-judicial-control.pdf.
5. CONCLUSIONS

This study has considered the governance and institutional aspects of a potential agreement on the future economic relationship between the Union and the UK based on a “close cooperation” model.

“Close cooperation” agreements connote a relatively strong ambition for economic integration between the Union and a third country, in practice based upon a high degree of alignment by that third country to the relevant Union acquis. Such substantive obligations must be underpinned by robust governance and institutional provisions. The Union will also expect adequate guarantees concerning the internal legal effects of the agreement, when it comes to administrative and judicial supervision and enforcement. Various principles of Union constitutional law further reinforce that already strong link between substantive and institutional cooperation – not least the need to respect the autonomy of Union law.

In addition to the “key findings” summarised at the opening of each Chapter, these conclusions will now offer three brief closing observations.

First, the circumstances and characteristics of the UK as a third country may well be unique. However, in the event that changed political preferences lead the UK to seek an enhanced economic relationship with the Union into the future, there are few grounds to believe that the formal terms for any such “close cooperation” agreement should be radically different from the experience gained and lessons learned from comparable relationships between the Union and other third countries. More than that: there seems no credible prospect of the Union agreeing to demands (such as those already suggested by the UK Government) that would effectively amount to superior treatment for the UK as a third country than the Member States are prepared to afford each other within the framework of the Union itself.

Secondly, the special situation of the UK as a third country would therefore be more likely to manifest itself empirically, through the practical operation and tangible outputs of the governance and institutional structures and processes established under any “close cooperation” agreement, e.g. by meaningful pre-legislative consultations, particularly in sectors of particular interest to the UK; and through the value of expert input into Union deliberations, especially in fields of undoubted UK strength. More generally, the degree of UK influence will surely be conditioned also by the strategic importance to the Union of creating and maintaining a wide-ranging and well-functioning cooperation with the UK which extends beyond economic relations into fields such as security and defence.

Thirdly and conversely, the prospect of a “close cooperation” relationship with the Union in the economic sphere also presents the UK with a particularly acute political dilemma. All “close cooperation” agreements imply a basic trade-off: the relevant third country needs to decide how far it is willing to adhere to extensive elements of Union law, with no direct decision-making participation in the formulation of such rules and only limited opportunities for overall influence. In the idiosyncratic case of the UK, that trade-off must be deliberated under the influence of two powerful yet diametrically opposed forces. On the one hand, there is the superficial ideological rhetoric of “taking back control” – which acts as a serious limitation on the ability of any UK Government to commit the UK to “close cooperation” with the Union and argues instead for a “complete break” from the EU (regardless of how implausible one might regard the supposed benefits of doing so). On the other hand, there is the undoubted reality that any “close cooperation” agreement means the UK effectively substituting its previous powers of leadership and influence within the Union for a new position of relative subordination as a third country – a transformation which calls into question the constitutional logic and political sense of the very act of withdrawal itself.
KEY REFERENCES

The footnotes contained throughout this study contain full references to all relevant primary and secondary materials. The following references are intended as suggestions for further reading from the available scientific literature.

- P Christiansen, “The EFTA Court” (1997) 22 European Law Review 539
- A Coll, “The EFTA Court’s role in strengthening the homogeneity objective of the EEA Agreement: An examination in light of Brexit” [2016] International Trade Law and Regulation 119
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- S Van den Bogaert (ed), Special Issue on Brexit (2018) 55 Common Market Law Review Special Issue 2/1
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This study, commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the AFCO Committee, considers the governance and institutional aspects of a potential agreement on the future economic relationship between the Union and the UK based on a “close cooperation” model. “Close cooperation” agreements involve a strong ambition for economic integration, based in practice upon a high degree of alignment by the third country to the relevant Union acquis. Although the UK’s circumstances may well be unique, there are few grounds to believe that the formal terms for a Union-UK “close cooperation” agreement should be radically different from the experience gained and lessons learned from comparable relationships between the Union and other third countries. The special situation of the UK would be more likely to manifest itself empirically, through the practical operation and tangible outputs of the governance and institutional structures and processes established under any “close cooperation” agreement.