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EU Substantive Law: Internal Market and Beyond

FREE MOVEMENT OF GOODS AND NEW AGREEMENTS IN THE AFTERMATH OF BREXIT

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Introduction

This work attempted to reconstruct the evolutionary process and consequences of Britain's exit from the European Union following the 2016 Referendum. It reflected upon the new trade and economic relations between the European Union and the United Kingdom based on the new Trade and Cooperation Agreement concluded on Christmas Eve 2020.

Brexit (Britain + exit) is an unprecedented historic event of leaving the economic and social integration process of the European Union by a Member State. Brexit symbolizes the transformation of political thought and fundamental changes in British society, revealed as a result of the Brexit referendum of 2016. Before it has come to the British departure from the EU, the United Kingdom has played an important role in the European integration process, from Winston Churchill's idea of creating the "United States of Europe", to becoming the first Member State in history to withdraw from the European Union[1].

Two opposing strands emerged in the long process of negotiation between the two sides that led to the formalization of the Withdrawal Agreement based on Article 50 TEU and subsequently the crystallization of the new trade relationship between the UK and the EU in the Trade and Cooperation Agreement.

On the one hand, it is highlighted that the concept of national sovereignty was undoubtedly the central theme throughout the Brexit process. "Take back control",

[1] Despite this, in the Anglo-Saxon historical tradition, two main foreign policy directions can be found: the Atlantic one, associated with the natural British propensity toward the ocean, and the European one, the result of London's inevitable focus on continental political dynamics. Along these two directions it is also possible to read the often controversial relationship that has developed between London and the European integration process. An effective exemplification of this can be found in the four opting-outs negotiated by the United Kingdom with its EU partners: in fact, London has not adopted the euro, thus maintaining its own monetary policy; it does not adhere to the Schengen agreements on the gradual elimination of border controls; and it is not bound by the EU rules provided for police and judicial cooperation in criminal matters. Moreover, the Court of Justice of the European Union does not have jurisdiction over the compatibility of English rules with the Charter of Fundamental Rights of the European Union. Finally, it is worth mentioning the long-standing dispute over *rebate* (literally "refund"), under which the United Kingdom, one of the largest contributors to the EU budget, obtains a refund of part of its contributions. Obtained in 1984 by then Prime Minister Margaret Thatcher on the grounds that the UK was receiving less in agricultural subsidies, this institution is criticized and deemed unjustified by many Eu members, as well as by the Commission itself. For a more in-depth analysis, see further Chapter I, paragraph 1.2.1, UK Membership: A Partner with Reserves and a Different Understanding of European Integration.

the official slogan of Leave supporters aimed to remark a link between sovereignty and control as if to reiterate how the increased integration that had taken place over the years had hindered economic growth and a return to nationalism was the way forward to prosper in the years to come. Throughout its membership, the UK was one of the Member States that consistently adopted a minimalist approach to reinforce supranationalism and expand EU competencies. From Maastricht onwards, the UK resorted to defend sovereignty, especially regarding central state powers, by promoting differentiated forms of integration. Therefore, the Brexit result points to a fundamental clash between two different models of exercising sovereignty: the EU way and the UK way. The 27 Member States of the Union are no less sovereign than the United Kingdom, but they choose to exercise their sovereignty profoundly differently. The UK's concern with regaining control demonstrates a profound hostility to the pooling and joint exercise of sovereignty that characterizes membership in the EU.

However, on the other side, the nationalist sirens clash with the reality around us of goods and services produced to be traded outside national borders. The UK has become a real hub for business and trade thanks in part to European integration. Despite its particular position as a partner with reserves, also due to the fact that the UK has always remained outside the most integrated areas of Europe, in the history of the European Single Market it has played and continues to play a fundamental role. The UK is now outside structures it helped create and that were fundamental to UK efforts over six decades to avoid being economically disadvantaged in Europe.

There has long been a discussion and a debate, from 2016 to 2020, about the future shape of economic and trade relations following Brexit. The road achieving commonality of purpose has been impassable. As much as a no-deal was avoided, several barriers to trade were introduced in the Trade and Cooperation Agreement signed in late December 2020 about the benefits provided by the single market. The purpose of this thesis is to discuss the new institutional arrangement and governance of the new EU-UK relationship. These characteristics will be examined by attempting to provide an overall picture of the new relationship while also highlighting key implementation issues.

The United Kingdom Internal Market Act 2020 introduces a new field of enquiry for scholars. It allows reflection on the model of an internal market chosen by the United Kingdom to regulate relations between its four constituent elements now that, after Brexit, the authority of the EU's common rules has come to an end. It allows comparison and contrasts between the UK's chosen model and the longer established patterns of the EU internal market. It is an invitation to develop a comparative study of the law of internal markets.

To be the clearest possible during my analysis the work is articulated into three chapters. The first chapter will first provide an overview of the regulatory framework concerning the Internal Market of the European Union and United Kingdom, in particular the provisions concerning trade and the free movement of goods. This work's ambition is to explain the shape of the UK Internal Market and to compare and contrast it with the EU's Internal Market. It also aims to demonstrate the political sensitivity of the choices that need to be made in designing an internal market against the background competing tensions of unhindered market access and respect for the regulatory autonomy enjoyed by the constituent units. Among all the rules governing the EU Internal Market and the differences with the UK Internal Market, derogations from the free movement of goods in the EU and the *mandatory requirement* doctrine[2] occupy a central and critical role. The second chapter will be devoted to an analysis of the complex relationship between the European Union and the United Kingdom. In particular, it will be examined the history of Brexit, seeking to trace the milestones of this long journey that led to UK's exit from the European Union. A specific insight will be devoted to the historical and ideological motivations, as well as the legal implications, that led United Kingdom to activate the Article 50 TEU procedure and come to the conclusion of its nearly 50-year membership with the Union. The third chapter will

[2] Court of Justice of the European Union, judgment of February, 20, 1979, case C-120/78, *Cassis de Dijon*, EU:C:1979:42, para. 8: *Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision , the protection of public health , the fairness of commercial transactions and the defence of the consumer*"; see further Chapter I, paragraph 1.3.3, Article 36 TFEU and Mandatory Requirements Jurisprudence: Derogations from the Prohibition of Quantitative Restrictions.

be focused to a normative analysis of the provisions of the Trade and Cooperation Agreement. Through this illustration, the aim is to show how, as a result of many years of negotiation and compromises between the two parties, a new arrangement may have designed this relationship in a new guise. It is intended to explore the main provisions on trade in goods in the aftermath of Brexit, under the TCA and the main implementation issues, highlighting in particular the complex role played by the Court of Justice of the European Union and how the protection of rights and subjective situations is so far envisaged and how it will develop in light of the new dispute settlement mechanism set forth in the TCA.

Chapter I – The Main Principles of EU Internal Market vs the New UK Internal Market: A Background

1.1 The Internal Market of the European Union

The history of the European Union, of its undeniable achievements, is essentially the history of the common market, of the unitary European space in which goods, persons, services, and capital circulate outside the old national borders. The European Union was founded in 1957 as an economic organization[3], as indicated by its original name, the European Economic Community. The creation of an internal market among European countries has been its central objective[4] and remains so to this day[5]. Since the Union's founding, its economic objectives have been seen as a part of a broader political mission. In the early days of the Union, the goal was to promote a general rapprochement between the countries of Western Europe and to enable Germany's reconciliation with its former enemies in World War II (as well to ensure the long-term containment of Germany's re-emerging economic power)[6]. While the political environment has changed significantly since then, the political ambition to promote greater openness of European countries towards one another has remained unchanged. Article 1(2) of the Treaty on European Union (TEU) reads: "*This Treaty marks a new stage in the process of creating an ever-closer Union among the people of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizens*". The creation of such an ever-closer Union among the peoples of Europe appears to be the central project of the Union, which the Internal Market must support[7]. The Internal Market must therefore be understood in the context of the wider political objectives of the Union. This is expressed most clearly in Article 3(3) of the TFEU which defines

[3] F. Fauri, *L'Unione Europea. Una Storia Economica*, Bologna, 2017, p.45.
[4] According to Article 26(2) of the Treaty on the Functioning of the European Union (TFEU), "*The internal market shall comprise an area without internal frontiers, in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty*".
[5] F. Weiss, C. Kaupa, *European Union Internal Market Law*, Cambridge, Cambridge University Press, 2017, pp. 1-17.
[6] A. Milward, The European Rescue of the Nation State, London, Routledge, 2000, p. 104.
[7] J. L. M. Pelkmans, D. Hanf, M. Chang, *The EU Internal Market in Comparative Perspective: Economic, Political and Legal Analyses*, Brussels, Peter Lang, 2008, pp. 30-55.

the tasks of the European Union[8]. This provision expressed the expectation that the Internal Market can contribute to achieve objectives as diverse as balanced economic growth, social progress, and improving the quality of the environment[9]. The Internal Market as an economic instrument was conceived and designed to serve also social goals.

1.1.1 The History of the EU Market: From Common to Internal Market

The construction of a European market has been at the heart of the European integration project from the very beginning[10]. The initial paradigm was the "Common Market". As envisaged in the Spaak Report[11] that prepared the ground for the Treaty of Rome in the early days of integration, the European market was to combine freedom and fairness and would be largely achieved by the legislative activity of the European Union[12]. The Spaak Report advocated merging separate national markets into a common market[13] to halt and reverse Europe's perceived international decline in the early years of the European Economic Community

[8] Article 3(3) TFEU reads: "*The Union shall establish an internal market. It shall work for sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity and shall ensure that Europe's cultural heritage is safeguarded and enhanced*".

[9] N. N. Schuibhne, *Regulating the Internal Market*, Cheltenham, Edward Elgar Publishing, 2006, Chapter 1.

[10] M. Egan, *Single Market* in E. Jones, A. Menon, S. Weatherill, *The Oxford Handbook of the European Union*, Oxford, Oxford University Press, 2012, pp. 407-422.

[11] Spaak Report was published on April 21, 1956. It sets out the broad lines of a future European Economic Community and European Atomic Energy Community.

[12] P-H Laurent, *Paul Henry Spaak and the Diplomatic Origins of the Common Market, 1955-1956*, 1970, Political Science Quarterly Vol. 85, p. 373.

[13] Three sets of actions were proposed in the Spaak Report: first, national protections that created barriers to trade were to be removed. This involved the abolition of customs duties and quotas as well as those national regulations that resulted in the practical elimination or control of foreign competition. At the same time, it was recognized that common European regulations were necessary in the public interest or because of the nature of production or particular markets. Second, distortions of competition had to be addressed whether they resulted from trade practices, state aids or disparities between national laws. Third, the conditions for common growth were to be secured by inviting firms to adapt competition and modern methods of production and by freeing the movement of factors of production.

(EEC[14]). The EEC Treaty followed closely the pattern established in the Report[1516]. The Common Market was a carefully calibrated mix of freedom and fairness. Markets would be open, but in a controlled way[17]. There would be no creative destruction but a manged process of adjustment, adaptation, and fair competition. The first years of market integration proceeded successfully. Customs duties and quotas were effectively dismantled but harmonization of national rules did not proceed as planned. The "empty chair" crisis and the Luxembourg Compromise[18] of the mid-1960s had replaced the expected majority voting rules in the Council with the requirement of unanimity, and this made it difficult to commit to successful harmonization. Moreover, the task of creating a Common Market was probably more ambitious than expected. In the words of R. Baldwin: "*The lowering of tariffs was in effect like the draining of a swamp. The lower water level revealed all the traps and strains of non-tariff barriers that have yet to be removed*[19]". Further technical and other developments showed that more and more issues needed to be addressed and laws that had actually been successfully adopted at the EU level required frequent revisions.

The paradigm began to shift in the 1970s[20]. The Court of Justice stepped in to take the lead. In the early 1970s it found in a series of cases that the four freedoms,

[14] The European Economic Community (EEC) was established by the 1957 Treaty of Rome signed between governments of France, Italy, Federal Republic of Germany, Belgium, the Netherlands and Luxembourg.

[15] For goods, there were rules on the elimination of customs duties and quotas and also a new provision outlawing measures of equivalent effect. For persons and services, instruments and a process of liberalization were established. For capital, a more modest degree of liberalization was envisaged, again as a result of legislative initiatives.

[16] A. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, London, UCL Press, 1999, pp. 46-55.

[17] D. Dinian, *Europe Recast: A History of European Union, Basingstoke*, Palgrave Macmillan, 2004, pp. 87-108.

[18] The Luxembourg Compromise was signed on January 29, 1966, among EEC Member States. It put an end to the so-called 'empty chair crisis 'that opened on June 1930, 1965 with French President Charles de Gaulle's decision to boycott meetings of the EEC Council of Ministers, blocking EEC activity, De Gaulle's decision was a response to the proposal put forward by the EEC Commission in 1965, which suggested a strengthening of the European Parliament and the extension of the use of qualified majority voting (instead of unanimity) in the Council of Ministers.

[19] R. Baldwin, *Non-Tariff Distortions of International Trade*, Washington DC, Brookings Institution, 1970, quoted in MP Egan, *Constructing a European Market: Standards, Regulations and* Governance, Oxford, Oxford University Press, 2001, p. 41.

[20] A. J. Menéndez, *The Existential Crisis of the European Union*, 2013, German Law Journal Vol. 14, pp. 453, 471-484.

except for capital, were directly effective and could be applied even in the absence of the legislative activity required by the Treaty[21]. Beginning in the late 1970s, the Court reinforced this by creating the principle of mutual recognition. Treaty freedoms went beyond simple non-discrimination rules and required the host country to accept into its market goods, services or economic actors that meet the home country's requirements, unless the host State had good reasons to oppose such market access and did so in a proportionate manner[22]. The Commission sought to make the most of the Court's rulings[23]. It issued a Communication setting forth a broad interpretation of the mutual recognition principle[2425]. The initial reaction of Member States was hostile. However, over time they became more receptive: a national experiment in socialism had failed in France and the French government shifted from autarkic policies to support liberalization of the Internal Market; Margaret Thatcher's Britain was pursuing a liberalization program and the Christian Democrats had replaced the Social Democrats in government in Germany. European companies were lobbying hard for greater economic integration to strengthen their position against US and Japanese competitors. The result was a revival of integration under the banner of the Single Market[26].

In 1985, Jacques Delors, the President of the European Commission, responded with his ambitious plan for the Single Market. Under the direction of the British Commissioner Lord Cockfield, the White Paper for the completion of the Internal

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[21] P. Craig, *Once upon a Time in the West: Direct Effect and the Federalization of EEC* Law, 1992, Oxford Journal of Legal Studies, Vol. 12, pp. 453, 463-467.

[22] T. Horsley*, Institutional Dynamics Reloaded, The Court of Justice and the Development of the EU Internal Market*, in P. Koutrakos and J. Snell, *Research Handbook on the Law of the EU's Internal Market*, Edward Elgar, 2017, Chapter 18, pp. 401-426.

[23] J. Pelkmans and A. Correia de Brito, *Enforcement in the EU Single Market*, Brussels, CEPs Paperback, 2012, p. 107.

[24] Communication from the Commission concerning the consequences of the judgement given by the Court of Justice on 20 February 1979 in Case 120/78 (*Cassis de Dijon*), OJ 1980 C 256/2, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31980Y1003%2801%29.

[25] K. J. Alter, S. Meunier-Aitsahalia, *Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision*, 1994, Comparative Political Studies, Vol. 26, No. 4, pp. 535-561.

[26] According to K. Nicolaïdes, *Kir Forever? The Journey of a Political Scientist in the Landscape of Recognition* in M. Poiares Maduro and L. Azoulai (Des), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome* Treaty, Oxford, Hart Publishing, 2010, p. 448: "When I recently asked Lord Cockfield, Commissioner for the internal market, what he considered the greatest achievement of his career, he answered without a beat: to have exported Cassis from the European Court of Justice and goods to the single market Europe 1992 program".

Market[27] was drafted, which focused on removing the barriers that continued to hinder free movement: physical barriers to trade, technical barriers to trade and fiscal barriers. The most visible element of the Single Market was the adoption of a new treaty to amend the Treaty of Rome, the Single European Act[28], which followed the Commission's White Paper on completing the Internal Market and came into force in 1987. From a conceptual point of view, with the Single Act, the notion of "Internal Market" took the place of that of "Common Market". The Internal Market is defined in the TFEU as "*an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured*[29]". The notion is certainly broader than that of the Common Market, a few principles of the four fundamental freedoms are integrated and enriched with new competencies attributed to the Community and a broad vision of the aim pursued. The Single Market paradigm had several advantages. It aligned Treaty harmonization and standardization. It abandoned unattainable ambitions of full harmonization. It left room for experimentation and local differences. Above all, it was realistic.

1.1.2 The EU Internal Market: A Finished or an Ongoing Project

Finally, although the deadline for the completion of the Single Market was 1992, in fact the Single Market is not yet complete. As the European Commission states, the creation of a truly integrated market is not a finished task but rather an ongoing process, requiring constant effort, vigilance and updates as technological and political developments occur. The environment in which the Single Market functions is constantly changing. The advent of the Digital Single Market is a good example of this. Although many obstacles have been removed, others are coming to light and will continue to do so and need to be addressed. This is why the realization of the Single Market is an ongoing project and not an historical artifact, a point more recently confirmed by the now defunct New Settlement Deal of February 2016: "*The creation of an internal market in which the free movement of*

[27] European Commission White Paper, *Completing the Internal Market*, COM/85/310 final, 1985.
[28] Single European Act 17 February 1986, OJ L 169/1, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51985DC0310&from=EN.
[29] Article 26 of the Treaty on the Functioning of the European Union.

goods, persons, services and capital is guaranteed is an essential objective of the Union, and to secure this objective and generate growth and jobs the European Union must improve competitiveness". However, the success of the Single Market has been affirmed even if the paradigm has never been completely stable. Suffice it to say that the services sector is of crucial importance to European economies, yet its market remains highly fragmented, with only 20% of services provided in the European Union having a cross-border dimension[30].

For advocates of further integration, the Single Market was insufficient. It was a construct of logic and economic advantage. It lacked emotional pull; it did not instill *Europatriotism* in citizens. According to Jacques Delors, President of the European Commission during the Single Market project, "*It is difficult to fall in love with the single market*[31]". Some of the fiercest resistance that the European project has encountered has been due to attempts to extend the Single Market. In this context, the enlargement of the Union is a significant factor. The 2004 and subsequent expansions have brought into the European Union a large number of countries that are at a very different level of economic development from the existing Member States[32]. The differences and resistances were variously highlighted and analyzed in the Report for the Commission on the Relaunch of the Single Market by Professor Mario Monti in 2010. He advocated the creation of a stronger Single Market but also noted the need to build consensus to support it as "*Today the single market is viewed by many Europeans with suspicion, fear and sometimes open hostility*". One uncomfortable feature of the Single Market emerges strongly from the consultations even though it is rarely highlighted explicitly: "*The single market is more unpopular than ever and yet it is more necessary than ever*". He emphasizes that the Single Market is key to the stability of the Economic and Monetary Union to put Europe back on a path of sustainable economic growth. A single, integrated,

[30] K. Nicolaïdis and S. K. Schmidt, *Mutual Recognition 'On Trial': The Long Road to Services Liberalization*, 2007, Journal of European Public Policy, Vol. 14, p. 717.
[31] Address given by Jacques Delors to the European Parliament, January 17, 1989, Bulletin of the European Communities, 1989, Supplement 1/89
[32] H. Enderlein, E. Rubio, *25 Years After the Delors Report: Which Lessons for Economic and Monetary Union?*, April 30, 2014, Policy Paper 109, Notre Europe Jacques Delors Institute.

and flexible market is a prerequisite for the optimal functioning of a common monetary area[33].

1.2 UK Membership: Accession to the European Economic Community in 1973

In this context of Euro-patriotism, in 1973, the United Kingdom accessed the EEC. The accession to the EU was not easy nor short-lived. For ten years it has been a rollercoaster of hopes and fears, successes and defeats, disappointments and satisfactions. From October 10, 1961, when the first negotiations between the UK and the EEC for British membership began, to June 23, 2016, the road has not only been long and rough, but many approaches have had to be changed.

The first English request for membership did not arouse appreciation or enthusiasm everywhere; London's refusal to join the ECSC was still alive, and many people suspected that England aimed more at destroying the Common Market than actually entering it, or at least trying to alter its structures and distorting its spirit to avoid making a choice between the Commonwealth and Europe. It was feared that London was trying to reconcile its residual imperialistic interests and its desire not to be marginalized by the Continent, without paying the price, political as well as economic, of such a reconciliation. It was General De Gaulle who put these suspicions and fears in the public square with the famous press conference of January 14, 1963, which represents for history the first French veto to the entry of Great Britain in the EEC market. He denounced England's "insular and maritime" characteristics, its system of imperial preferences with the countries of the Commonwealth, its peculiar agricultural market, its political and military ties with the United States as factors incompatible with the spirit and the letter of the Treaty of Rome; if Great Britain did not renounce all this "it is to be expected that the cohesion among the Member States will not last long and that in the end it will appear as a colossal Atlantic community under American dependence and direction

[33] M. Monti, *A New Strategy for the Single Market: At the Service of Europe's Economy and Society*, May 2010.

that will soon absorb the European Community". If United Kingdom "will one day become sufficiently transformed to be part of the European Community, without restrictions and without reservations, then the six will open the doors to her and France will not put up any obstacles". If not, Charles De Gaulle added, there would be nothing to prevent the conclusion of an association agreement with Great Britain[34]. The underlying thought was that with the acquisition of membership status the UK would have to undergo a very profound economic and political transformation. If it had entered without the full conviction that it wanted to commit itself 100% to the European project, submitting to the constraints that it envisaged, it would have represented an enormous risk for the entire structure of the Community. If it had not submitted the standards of the Common Agricultural Policy (CAP), it would have risked jeopardizing the balance of the Common Market. France could in no way allow this to happen, as at the time it was the strongest Community country in the system and could not afford to see it implode[35].

Emblematic, in describing the path that led to almost 50 years of European membership, are also the words pronounced by the same Charles de Gaulle during the press conference of November 27, 1967. In this press conference, the French President spoke at great length about the request of the UK to join the European Economic Community. In opposing negotiations with London, Charles De Gaulle had acutely identified certain characteristics that, in his view, made British entry impossible unless the British revolutionized their "way of being in the world". He stated, in substance, that Great Britain wanted to join the European Community not because it shared its principles but because it considered it a lifeline[36].

[34] F. Gozzano, *L'Ingresso dell'Inghilterra nel Mercato Comune Europeo*, Associazione Italiana per gli studi di politica estera, 13 Settembre 1013, Vol. 11, pp. 5-22.
[35] E. Di Nolfo, *Storia delle Relazioni Internazionali. Dal 1918 ai Giorni Nostri*, Laterza, 2008, pp. 327-331.
[36] In fact, the Suez Canal crisis of 1956, which had seen France, England and Israel lined up against the Egyptians, Canada for the first time in opposition to Great Britain, and the USA and the USSR in imposing peace, had weakened the Washington-London axis and highlighted the fact that Commonwealth was changing nature. In addition, the European Free Trade Association (EFTA), created in 1960 just between the countries that could not or did not want to join the European Community had proved weak.

It took another two years for hopes for the enlargement of the Community to reopen. At the end of April 1969, Charles De Gaulle was defeated in the referendum on regional reform and resigned. His successor, Georges Pompidou, immediately revealed himself to be a pragmatic and realistic man and adopted a much softer and more flexible attitude towards the "English problem[37]".

So, this accession, since its conception, was wanted for economic reasons, to get out of that tunnel of crisis generated by the loss of the Empire. Great Britain had lost its power, joining the EU mean to remedy this problem because it is through trade that a nation remains prosper and independent. The will at the base was never to dilute its national sovereignty, and this concept is well understood by British elites. The United Kingdom has benefited greatly from membership in the European Union, but then its social structure as in any country has changed over time. Some of the institutional innovations desired by European elites have not found favour with their British counterparts: these are those innovations that go in the direction of closer political integration of European States. Britain has recovered thanks to the European Union but is now rediscovering its imperial vocation in the context of a globalized economy. With the Commonwealth that exists and is alive, Great Britain has a gateway to Asia with New Zealand and Australia, which is the first country of Chinese investment[38].

Attempts at political integration contrast with a spirit of accomplished national sovereignty and the European economy does not seem as attractive as it was during the economic crisis. Rereading the speech given by Winston Churchill at the University of Zurich in 1946, we can have a clear key to understand the attitude that the UK world has had over times towards the process of integration. He pronounced these revealing words: "Great Britain, the British Commonwealth of Nations, mighty America and I trust Soviet Russia, for then indeed all would be well, must be the friends and sponsors of the new Europe[39]." United Kingdom would therefore

[37] R. Menon, *Britain's History of Hedging on Europe*, The National Interest, January 25, 2013.
[38] C. Martinelli*, L'Isola e il Continente, Un Matrimonio di Interesse e un Divorzio Complicato. Dai Discorsi di Churchill alle Sentenze Brexit*, Associazione Italiana dei Costituzionalisti, 2017, Vol. 1.
[39] W. Churchill, Speech delivered at the University of Zurich, September 19, 1946, The Churchill Society, available at http://www.churchill -society-london.org.uk/astonish.html.

be the sponsor and friend of the new Europe, it would not be a part of it. The way in which Britain perceived the formation of a united Europe was from the outset characterized by friendship, support, strong involvement but substantial estrangement. The idea of a united Europe has spanned centuries of the Continent's history. The United Kingdom has always been partially excluded from such a project, even for its own will and geopolitical conception. It could be said that the UK has been one of the main actors in European politics, but there has always been a great isolationism due to the formation of a global maritime power[40]. The United Kingdom has always had a different understanding of European integration that the Continent's more determined idealists and federalists. To the recognition of the advantages of a European market within which customs duties were abolished, the English continued to oppose their reluctance to accept progressive centralization of powers in the community institutions and a deep distrust towards plans such as the Common Agricultural Policy[41] (the UK feared to give up too many competencies on agricultural policies, with inevitable consequences on the possibility of controlling the prices of British agricultural products[42]).

1.2.1 UK Membership: A Partner with Reserves and a Different Understanding of European Integration

The most emblematic example of English attitude is represented by the events of the European Monetary System (EMS). The EMS came into force in March 1979, but the Thatcher Government was always against participating in it, believing that it would have damage British interests. More generally, it can be said that United Kingdom, during the years of membership, was the Member State, together with Denmark, that negotiated the greatest number of opt-outs, i.e., the exemption from

[40] F. Savastano, *Cronaca Istituzionale del Processo di Separazione*, Federalismi.it, Osservatorio Brexit, No. 1/2017.
[41] In the first half of the 1980s, nearly 80% of the EU budget was devoted to the Common Agricultural Policy (CAP), which in turn was directed disproportionately more towards France and other continental countries than towards British farmers.
[42] A. Menon, M. Villa, A. Villafranca, *Regno Unito: Dentro o Fuori l'Europa*, luglio 2013, Osservatorio di Politica Internazionale, No. 77.

the obligation to apply certain provisions contained in the Treaties or in Community legislation[43].

They concerned:

- Schengen Convention. Signed in 1990 and in force since 1995, it has been integrated into the Community *acquis* since 1999. Twenty-six countries participate in the Schengen Area, including twenty-two EU Member States. Ireland and the United Kingdom have chosen to maintain controls at their external borders (the Common Travel Area is in force between the United Kingdom and Ireland).[44]
- Economic and Monetary Union (EMU). Provided by the Maastricht Treaty in 1992, all Members of the EU except the United Kingdom and Denmark[45], participate in the third phase of the EMU, which foresees the adoption of the Euro, as a single currency, and the unification at European level of national monetary policies.
- Charter of Fundamental Rights of the European Union. Incorporated into the Community *acquis* with the entry into force of the Treaty of Lisbon in 2009, Poland and UK obtained the annexation of a Protocol to the Lisbon Treaty[46] that clarifies the application of the Charter. The Protocol states that

[43] The progressive enlargement of the European Community has required adjustments of its rules. These modulations have softened the original characteristic of Community rules and laws of typically aiming to be applied in a uniform manner by each Member State. This has become necessary in order to meet the particular needs that some Member State have asked for and obtained in the enlargement negotiations.

[44] In accordance with the Protocol annexed to the Treaty of Amsterdam, the United Kingdom and Ireland may participate fully or partially in the provisions of the Schengen acquis after a unanimous vote by the Council of the thirteen States parties to the agreements and the representative of the government of the State concerned. The United Kingdom and Ireland therefore do not automatically participate in the Schengen acquis or in Title IV and are authorized to maintain checks on persons entering their territory from other Member States. Reciprocally, the other Member States are authorized to maintain checks on persons entering their territory from the United Kingdom or other territories whose external relations are under its responsibility, as well as on persons coming from Ireland.

[45] Nineteen EU Member States including most recently Lithuania, have entered the Economic Monetary Union and have adopted the euro as their currency. Only Denmark, today, whose EU membership predates the introduction of the euro, has a legal opt-out from the EU Treaties granting an exemption from this obligation. The remaining seven non-euro Member States (six from January 2023, since Croatia will enter EMU) are obliged to enter EMU once they comply with all convergence criteria.

[46] Protocol No. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, OJ C 202/312, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016E%2FPRO%2F30.

the Charter "*does not extend the jurisdiction of the Court of Justice of the European Union or any other court of Poland or the UK to hold that the laws, regulations or administrative provisions, practices or actions of Poland or the UK are inconsistent with the fundamental rights, freedoms and principles that it reaffirms*[47]".

- European Area of Freedom, Security and Justice. With the signing of the Lisbon Treaty, the United Kingdom, Ireland, and Denmark obtained the right to choose on a case-by-case basis whether to participate in the legislative process in this area, which includes judicial cooperation, police cooperation and border policies. The measures adopted are therefore binding on all other Member States, but not on them. It should also be noted that the United Kingdom and the Czech Republic have refused to adopt the Fiscal Compact signed by the other 25 EU Member States in March 2012.

1.2.2 UK Membership: A Member State for almost 50 years

The UK accession to the European Union was certainly not a linear and clear process but in 1973 began a common path that has led to almost 50 years of membership. Despite its particular position as a partner with reserves, also due to the fact that the UK has always remained outside the most integrated areas of Europe, in the history of the European Single Market it has played and continues to play a fundamental role[48]. The UK is now outside structures it helped create and that were fundamental to UK efforts over six decades to avoid being economically disadvantaged in Europe[49].

Indeed, scholars who study legal policies and trade regulations often see UK as bringing a particular perspective that would otherwise have been lacking in Europe.

[47] Article 1 of the Protocol No. 30, OJ C 202/312.
[48] It is sufficient to consider the statistics of Eurostat, Intra and Extra-EU Trade by Member State and by product group to see that the EU is the UK's largest trading partner with which it exchanges goods and services worth over 400 billions of euros, 84% of UK trade in 2012.
[49] A. Sapir, *The Double Irony of the New UK-EU Trade Relationships*, January 12, 2021, Bruegel, available at https://www.bruegel.org/2021/01/the-double-irony-of-the-new-uk-eu-trade-relationship/

Arguably, these perspectives have given UK outsized influence. Conventional wisdom about the workings of the European Union suggests that the United Kingdom has often clashed with its continental partners when voting in many areas of legal and economic policy. As a large Member State, the UK vote in the European Council had a considerable impact, and in varying coalitions, in some cases the British voice in negotiations on EU law may have driven EU policy away from paths that it might have otherwise taken. In other areas, it may have prevented some desirable or undesirable European harmonization or directed harmonization into a different direction. In yet other areas, Britain has been the driving force behind EU law policies and has created the impetus for EU action that otherwise would not have occurred[50]. It is important to explore the importance of UK membership to the development of EU law in the past and to understand why the British voice may be greatly missed in the future[51].

In the area of *financial regulation*, United Kingdom has played an important role, given the size of London's financial market that has made the UK a major player in debates about European regulatory architecture. The United Kingdom was part of the liberal (with the Nordic countries and the Netherlands) and market-orientation coalition that generally opposed a prescriptive, one-size-fits-all approach supported by other Member States such as France, Spain, and Italy, whereas Germany wavered between both positions. After the financial crisis, liberal policies lost some ground. The UK remained vigilant, however, in monitoring the limits of EU powers in financial regulation, challenging potential overreach in court.[52] Post-Brexit, UK financial regulation may bend more toward uniformity and become less liberal.

The UK imprint is also evident in the case of the *European Insolvency Regulation* (EIR), which is important for the resolution of cross-border insolvencies. During the 1990s the United Kingdom did not sign the draft Convention on Insolvency

[50] E. Ligas, *Regno Unito e Integrazione Europea, Dal Primo Dopoguerra ad Oggi*, Critical Risks for Integration and Solidarity, 2021, Bologna.
[51] M. Gelter, *EU Law with the UK – EU Law without the UK*, October 24, 2017, Fordham International Law Journal, Vol. 40, Issue No. 5, Article 1.
[52] N. Moloney, *EU Securities and Financial Markets Regulation*, Oxford, Oxford University Press, 2014, 3rd Ed., pp. 8-19.

Proceedings, which consequently did not enter into force. The European Union then promulgated the original EIR in 2000 with the consent of the British Government, but the EIR suffered from similar problems, such as an unclear criterion for determining jurisdiction, and a focus on liquidation rather than reorganization. UK courts have pragmatically interpreted the EIR and thus made it more suitable for corporate reorganization. The 2015 revision of the EIR[53] also contemplates a debtor-in-possession and reflects UK practice in the insolvency of cross-border groups[54].

The UK also played an important role in the area of *company law*. In board structures and legal capital, which were "traditional" projects of company law harmonization even before the United Kingdom became a member — German law was historically influential, while the United Kingdom typically put brakes on harmonization, which resulted in the derailment of some projects and compromises in others that completely changed the original plans. During the 1990s and 2000s, when EU company law harmonization became more focused on capital markets, UK law became the model, whereas Continental European jurisdictions tended to object. In this case, Brexit will be irrelevant for these areas because the general trajectory and needs of capital markets will remain the same, with or without UK membership[55].

One of the areas in which UK's influence is more evident is *competition law*. Looking both at the activities of individual officials and the larger policy, the UK was instrumental in aligning antitrust more strongly with economic ideas. This means that the consideration of efficiency effects has gained weight relative to the preservation of competitive market structures as such. This can be seen in the "more

[53] Regulation 2015/848/EU of the European Parliament and the Council of 20 May 2015 on insolvency proceedings, OJ 141/19, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848.
[54] S. Block-Lieb, *The UK and the EU Cross-Border Insolvency Recognition: From Empire to Europe to "Going it Alone"*, 2017, Fordham International Law Journal, Vol. 40, No. 5, Research Paper No. 3030185.
[55] M. Gelter, A. M. Reif, *The UK's Influence on EU Company Law*, 2017, Fordham International Law Journal, Vol. 40, pp. 1413-1441.

economic approach" of the 2004 EU Merger Regulation[56]. Similarly, British influence led to increased challenges to the State's role with respect to utilities[57].

In *consumer law,* in most respects, the United Kingdom was a recipient of European consumer legislation, and some changes can be expected after Brexit. In some areas, the departure of the United Kingdom may lead to a "rejuvenation" of consumer law harmonization projects that it previously resisted. After Brexit, the United Kingdom might also innovate in certain areas of consumer law, since will no longer be constrained by existing EU harmonization and better positioned to experiment with new approaches. However, even if the United Kingdom decides to loosen consumer protection requirements, British industry can be expected to largely conform to European requirements (e.g., in general contract terms), given that otherwise British firms will likely be penalized by market forces[58].

Finally, more in general, it can be said that the UK common law influence had a significant impact on the *judicial style* of the Court of Justice of the European Union and was a source of preoccupation for the European Commission since the early 1960s. While the Court in Luxembourg was initially heavily influenced by the French *Conseil d'Etat*, it began to use common law techniques such as *stare decisis* and careful analysis of its own precedents after the UK accession in 1973. The combination of civil and common law style still resulted in minimalist *per curiam decisions* that allowed the Court to make policy while giving relatively few justifications. At the same time, English statutory interpretation was influenced by Luxembourg, as UK judges became more inclined to espouse purposive over purely literal interpretation, and at times depart from relying solely on the tradition of parliamentary sovereignty through the mechanism of preliminary references. Even if preliminary references will no longer be possible after Brexit, the common law

[56] Council Regulation 2004/139/EC of 20 January 2004 on the Corneal of Concentrations Between Undertakings.
[57] G. Monti, *EU Law beyond EU Borders: the Extraterritorial Reach of EU Law*, in M. Cremona, J. Scott, Oxford, Oxford University Press, 2019, pp. 174-196.
[58] S. Augenhofer, *Brexit – Marriage 'With' Divorce? – The Legal Consequences for Consumer Law*, 2017, Fordham International Law Journal, Vol. 40, pp. 1475-1504.

influence on the Luxembourg judicial style will persist whereas the UK judiciary will continue to closely monitor the jurisprudence of the Court of Justice[59].

Therefore, it is evident that UK influence on EU policies has been considerable. The pathways through which British ideas had an influence differ among sources of law – legislation, domestic judicial interpretation of EU instruments, commissioners and advocates general, and, maybe most subtly, the outlook of judges as reflected in judicial style. In many areas close to business, such as financial regulation, insolvency law, some areas of company law and antitrust, the United Kingdom has taken the lead or UK ideas have predominated over time. In some fields, such as consumer protection or some areas of company law, the United Kingdom often put the brakes on the harmonization train.

1.3 The Nature of the EU Internal Market and the Free Movement of Goods

All markets need freedom. Suppliers of products must be able to buy and sell. In the European Union the four freedoms of movement of goods, persons, services, and capital guarantee this. However, all markets also need rules, and the European Union's Internal Market is no exception. Rules create the market: they establish the property rights and contracts without which a market would not exist. They regulate which goods can be sold and bought and which goods cannot. Rules set the health and safety requirements that products must meet to be legally marketed or the qualifications that service providers must have to trade legally[60].

Many Western countries responded to the Great Depression of the 1930s with massive protectionism. After World War II, Western industrialized countries attempted to quickly establish a minimum of global free trade. Trade liberalization in Europe took place under the auspices of the Organization for European Economic

[59] F. Nicola, *National Legal Tradition at Work in the Jurisprudence of the Court of Justice of the European Union*, 2017, American Journal of Comparative Law, Vol. 64, No. 4, pp. 865-889.
[60] J. Snell, *The Internal Market and the Philosophies of Market Integration*, in *European Union Law*, Oxford, January 2020, 3rd Edition, p. 335.

Cooperation[61]. At the same time, the General Agreement on Tariffs and Trade was designed to liberalize trade globally. The European Economic Community (EEC) was then created by the 1957 Treaty of Rome in a climate of trade liberalization.

One of the main purposes of the Internal Market is to allow European producers to sell the same product in all Member States, thus achieving economies of scale similar to those of the United States and creating prosperity throughout the region. In fact, it is important to remember, that the Internal Market was promoted not only by the Europeans but also by American initiative known as the Marshall Plan[62].

Of the four fundamental freedoms the one concerning the movement of goods is the most important instrument for the realization of the common market[63]. Community dimension of the markets, since 1958, has been developed primarily by removing existing barriers to trade in industrial products. A prerequisite for achieving this objective was the creation of a Customs Union: an economic area in which, in accordance with international law, the participants contractually undertake not to introduce in their mutual trade any duties, charges having equivalent effect or quantitative restrictions and to establish a common external customs tariff vis-à-vis third countries. The decision to establish a Customs Union entailed the political choice to rule out the possibility of building the Community on a simple Free Trade Area[64]. The idea of commercial integration implies the opening of national markets

[61] The Organization for European Economic Cooperation (OECE) was an international organization active from 1948 to 1961. It was established on April 16, 1948, to oversee the distribution of US Marshall Plan aid for the reconstruction of Europe after World War II and to foster cooperation and collaboration among member countries.

[62] This Plan to revive and improve the European economies after World War II was accomplished by the Economic Cooperation Act of 1948 which contained the following policy statement:
"*Realizing the advantages enjoyed by the United States through the existence of a large internal market without internal trade barriers and believing that similar advantages may accrue to the European countries, it is thereby declared to be the policy of the people of the United States to encourage these countries through joint organization to exert sustained join efforts, which will speedily achieve that economic cooperation in Europe which is essential to lasting peace and prosperity*".

[63] P. Oliver, S. Enchelmaier, *Free Movement of Goods: Recent Developments in the Case Law*, 2007, Common Market Law Review, Vol. 44, pp. 694-704.

[64] A Free Trade Area means, according to Article XXVI of the General Agreement on Tariffs and Trade of 1947, an international trade agreement between States with the aim of breaking down barriers and reducing tariffs between the States parties to the Agreement. However, It is a form of economic integration less intense than the customs union, because individual countries are free to choose which commercial and customs policies to adopt in relation to third countries (i.e. countries

to trade with other countries. In the case of Community integration, this has taken the form of a process of merging the markets of Member States into the European Internal Market[65].

For the European Commission "*The free movement of goods is one of the successes of the European project*[66]". The core of the rules on goods is found in Article 28 TFEU[67]. It can be seen from this that the free movement of goods has an internal and an external dimension: goods originating from the European Union enjoy the rights of the free movement between Member States without customs duties and charges having equivalent effect, while goods originating from outside the European Union enjoy free movement only once the common customs tariff has been paid, if due.

However, the Customs Union only cover tariffs. Non-tariff barriers can also create significant barriers to trade and in this case the rules on the free movement of goods in Articles 34-36 TFEU apply.

1.3.1 Customs Union and Tariff Barriers (Articles 28-30 TFEU)

Customs duties are charges imposed on goods simply because they cross a border between Member States: they are the most obvious obstacles to trade. They are special types of taxes, with their own denomination, calculated as a percentage of the value of the goods and levied, as a rule, at the moment of crossing the border.

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that are not part of the agreement. In fact, since there is no process of harmonization in the definition of a trade policy by the signatory countries of the FTA, each country is free both to adopt trade and customs strategies based on restrictive or limiting measures toward third counties, and to enter into preferential agreements with any third country without having to negotiate such agreement with the member countries of the FTA.

[65] A. Arena, F. Bestagno, G. Rossolillo, *Mercato Unico e Libertà di Circolazione nell'Unione Europea*, Torino, Giappichelli Editore, 2020, pp. 59-61.

[66] European Commission, Commission Notice – Free Movement of Goods: Guide to the application of Treaty provisions governing free movement of goods (Articles 28-30 EC), SEC(2009) 673, 7.

[67] Article 28 TFEU states: "*The Union shall comprise a customs union which shall cover all trade in goods, and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges of equivalent effect, and the adoption of a common customs tariff in their relations with third countries*".

The prohibition of customs duties in the Union is provided for in Article 30 TFEU: "*Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature*".

In trade between Member States, both imports and exports customs duties are subject to an absolute ban. The reason why customs duties are abolished within a custom union is linked to the effects that such duties produce. Their imposition causes, in fact, an increase in cost of imported or exported products affected by them and therefore puts these products in a disadvantageous and worse position compared to the corresponding national goods that are exempt.

From an interpretative point of view, the identification of the concept of customs duties within the meaning of Articles 28 and 30 TFEU has not posed any difficulty. The customs duties provided for by each Member State were listed in a single regulatory instrument: the customs tariff. On the other hand, the application of the corresponding prohibition of charges having equivalent effect has been more problematic. The purpose of this prohibition is to prevent the liberalizing effect deriving from the abolition of customs duties from being frustrated, by allowing Member States to levy taxes on imported or exported goods which, even though they may have the most varied names and taxation techniques, have the same effects as a real customs duty. The Treaty does not contain any definition of a charge having equivalent effect and therefore the delicate task of defining this concept has been left to the Court of Justice of the European Union.

The landmark ruling on the definition of charge of equivalent effect is the *Diamond* case[6869]. The Court pronounced the famous statement: "*Any pecuniary charge, however small and whatever its designation and mode of application, which is*

[68] Court of Justice of the European Union, judgment of July 1, 1969, *Sociaal Fonds voor de Diamantarbeiders (Diamonds)*, case C-2/69, EU:C:1969:30.
[69] In this case, Belgium had established a Social Fund for diamond workers, the purpose of which was to award social benefits to those workers, all imports of unworked diamonds were subject to a contribution intended to enable the fund to fulfil its task. The amount of the contribution was 0.33% of the value of the unworked diamonds imported.

imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a custom duty in the strict sense constitutes a charges having equivalent effect within the meaning of Articles 28 and 30 of the Treaty, even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect or if the product on which the charge is imposed is not in competition with any domestic product[70].”

Therefore it must be a pecuniary charge, the performance required of the obligor must consist of a payment of money; it must be a charged imposed only on goods crossing the national border[71]; it is irrelevant that the amount of the charge is minimal (any charge constitutes an obstacle to free movement, no de minimis rule); lastly, the concept of a charge of equivalent effect is not limited to taxes imposed for the benefit of the State, although this is probably the most common situation: charges may constitute taxes even if they are not discriminatory or protective.

It is important to note that the Court has consistently held that the prohibition of customs duties and charges having equivalent effect is a fundamental rule which admits no exceptions. Notwithstanding the Court’s strict approach to customs duties and charges having equivalent effect, there are two situations which may escape the prohibition of Article 30 TFEU: a) when the payment is a consideration for a service rendered; or b) when it concerns inspections required by Community law. These exceptions must be interpreted strictly, Article 30 TFEU is therefore not subject to the exceptions provided for by Article 36 TFEU[72].

1.3.2 Quantitative Restrictions and Measures of Equivalent Effect (Articles 34-36 TFEU)

[70] *Diamond* case, see above n., para. 2.
[71] The ontologically discriminatory nature of the charge of equivalent effect excludes from the scope of the prohibition the internal charges to which Article 110 TFEU applies, and which also affect the corresponding domestic goods.
[72] Article 36 TFEU was confined to regulatory restrictions and could not be extended to fiscal charges.

The Treaty provisions on quantitative restrictions and measures having equivalent effect are more complex than those relating to customs duties and charges having equivalent effect.

First, the prohibition of such measures is articulated in two distinct provisions: the firs, Article 34 TFEU, prohibits quantitative restrictions and measures of equivalent effect on imports; the second, Article 35 TFEU, contains a prohibition that mirrors Article 34 for exports. Article 34 TFEU states: "*Quantitative restrictions and measures having equivalent effect shall be prohibited between Member States*". Quantitative restrictions mean legal obstacles to trade which cannot be overcome by the payment of a sum of money. Those measures, according to the Court, have the character of total or partial prohibition of importing, exporting or transiting, certain goods[73].

In examining the concept of measures of equivalent effect it should be noted that since the effect of a quantitative restriction is to reduce the quantity of imports or exports which could be carried out in its absence, measures of equivalent effect are all those measures taken by a Member State which, regardless of their type or denomination, produce the same result. However, it must be borne in mind that the notion of measures having equivalent effect has been interpreted in various way by the Court of Justice. The best way to examine its case law is in chronological order, considering the three main rulings:

A) *Dassonville* and Boarder Measures

Dassonville is one of the most misunderstood and controversial case in the history of European law. The judgment can only be understood if placed in its historical-legal context. The economic system was governed by the international model of the Internal Market, reflected in the Commission's first definition of measures of

[73] Court of Justice of the European Union, judgement of July 12, 1973, *Riseria Geddo v. Ente Nazionale Risi*, case C.2/73, EU:C:1973:89.

equivalent effect contained in Directive 70/50[74]. This liberalization directive distinguished between two types of such measures: distinctly applicable measures and indistinctly applicable measures. Only the former were in principle prohibited[75].

It was in this scenario that the Court ruled in the *Dassonville* case[7677]. In the context of a preliminary ruling, the Belgian court asked whether the certification requirement constituted a measure having equivalent effect to quantitative restrictions and the Court's famous answer was: "*All trading rules, enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Union trade are to be considered as measures having equivalent effect to quantitative restrictions*[78]".

The definition given in the judgment, also known as the *Dassonville* formula, appears particularly broad and strict: firstly, for the prohibition in Article 34 TFEU to be triggered, it is sufficient that the legislation of a Member State may give rise to an obstacle to trade. Secondly, it is not possible to limit the scope of the definition in relation to the type of measures: the qualification "trading" that appears in the *Dassonville* formula is generic and has not prevented the Court from considering regulations relating to the production of certain goods as prohibited by Article 34 TFEU. Thirdly, the extent of the restrictive effect also seems irrelevant: it follows

[74] Directive 70/50/EEC of the Commission of December 22, 1969, which finds its normative source in the provisions of Article 33 paragraph 7 of the Treaty, concerning the abolition of measures having equivalent effect to quantitative restrictions not covered by other provisions adopted under the EEC Treaty (OJ L 13 22.12.1969, p. 29, CELEX: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31970L0050).

[75] This choice was informed by a fundamental constitutional choice: unlike the import measures, the product requirements equally applicable to domestic and imported goods were outside the scope of Article 34, since their restrictive effects on the free movement of goods were not seen because of the measures of individual States, but rather as inherent in the disparities between the rules applied by the Member States. These legislative disparities were not to be removed by negative integration but were to be eliminated through the Union's positive harmonization powers. Article 34 was thus primarily aimed at national rules that discriminated against imports.

[76] Court of Justice of the European Union, judgment of July 11, 1974, *Dassonville*, case C-8/74, EU:C:1974:82.

[77] The case referred to a Belgian regulation which, for the importation of products with a controlled denomination, required a certificate of origin issued by the State of origin. Dassonville had imported into Belgium a consignment of John Walker, a Scottish whiskey purchased in France, without the required certificate and was therefore duly prosecuted by the Belgian authorities.

[78] *Ibidem* para. 5

that all the measures which hinder trade to a minimal degree are not therefore exempt from the prohibition. The *de minimis* principle does not apply to the free movement of goods[79]. Finally, the obstacle to trade may be indirect or potential, and it is not necessary to show that the legislation in question expressly concerns imports or that it has caused a reduction in imports[80].

B) *Cassis de Dijon* and Product Requirements

The most important case in all the free movement law is Cassis de Dijon[81]. The Court ruled out: "*Obstacles to movement within the Union resulting from disparities between national laws relating to the marketing of the products in question, must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer. The requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Union*[82]".

As a result of the judgment, the legislation of a Member State concerning the technical requirement of products may also be applied to products imported from

[79] Court of Justice of the European Union, judgment of December 3, 1998, *Bluhme*, case C-67/97, EU:C:1998:584, para. 68. In this case, a ban on keeping certain species of bee applicable to an island representing less than 1 per cent of Danish territory was held to fall under Article 34.
[80] Court of Justice of the European Union, judgment of November 24, 1982, *Commission v. Ireland (Buy Irish)*, case C-249/81, EU:C:1982:402. The defendant contended that the contested advertising campaign encouraging the public to buy domestic products in preference to imports was not a measure having equivalent effect because imports had actually risen since the campaign begin. The Court pointed out that imports might have increased even more in the absence of the campaign.
[81] The case involved a German law that set the minimum alcohol content of liqueurs at 25%. This national rule prohibited the importation and sale of Cassis de Dijon as a liqueur in Germany because the famous French drink, which was regularly marketed in the State of production, had an alcohol content of less than 20%. Formally, the national measure applied equally to foreign and domestic goods. The question then arose as to whether this product requirement had a disproportionately restrictive effect within the meaning of Directive 70/50.
[82] Court of Justice of the European Union, judgment of February 20, 1979, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, case C-120/78, EU:C:1979:42.

other Member States, without this resulting in a violation of the prohibition of Article 34 TFEU under the following conditions (Cassis test):

A) The legislation must be justified by overriding requirements relating to the protection of interests of a general order of the kind referred to in the judgment (effectiveness of fiscal control, protection of public health, fair trading and consumer protection)
B) Legislation must comply with the principle of proportionality and must therefore be appropriate to the general interest objective pursued and not entail excessive restrictions in the sense that there are no other less restrictive means of achieving the same result[8384].

Otherwise, the prohibition in Article 34 TFEU requires the importing Member State to allow the marketing of products that do not comply with its technical regulations but are legitimately manufactured and sold in the State of origin. The prohibition covers not only the imposition of additional technical requirements to those provided for by the legislation of the Member State of origin, but also the submission of imported products to different technical controls provided for by indistinctly applicable legislation of the importing Member State, when such controls are additional to those already carried out in the State of origin. The judgment implicitly subverted the central substantive presumption of Directive 70/50, namely that restrictions on trade resulting from disparities between equally applicable product requirements would qualify only exceptionally as measures having equivalent effect to quantitative restrictions. From this point on, a different logic applied: unless there were mandatory requirements in the general interest that the Member State could invoke, the State had no right to impose its national product standards on imported goods. This presumption has become known as the principle of mutual recognition. This principle is the – federal – cornerstone of the European Union's internal market. It simply means that Member States must in principle

[83] Court of Justice of the European Union, judgment of July 11, 1985, *Cinéthèque*, joined cases 60-61/84, EU:C:1985:329, para. 22.
[84] Court of Justice of the European Union, judgment of March 12, 1987, *Commission v. Germany*, case C-178/84, EU:C:1987:126, para. 28.

mutually recognize each other's product standards[85]. It is this principle of mutual recognition that transforms the presumption of legality for product requirements into a presumption of illegality. Cassis de Dijon fundamentally changes the economic principle underlying Article 34 TFEU from host State to home State rule[86], and this triggered a transition from an international model to a federal model of integration[87].

C) *Keck* and Selling Arrangements

In a third period of case-law, the Court actually seemed to favor a broader point of view. The Cassis test was initially conceived with a view to its application to technical regulations relating to products. However, the Court soon found itself applying it to a different type of national legislation: the provisions governing, in each Member State, the conditions under which products may be sold or the methods of sales promotion allowed.

A relevant example of this trend is the *Torfaen* case[88]. The case was one of the famous *Sunday Trading* cases[8990]. Unlike the technical regulations considered above, these provisions do not concern the product per se, but the way the products are sold or promoted. However, the Court initially considered that the rules on

[85] K. Nicolaïdis, *Trusting the Poles? Constructing Europe through Mutual Recognition*, 2007, Journal of European Public Policy, Vol. 14, p. 682.
[86] In the host country control model, the rules of the country in which the economic activity takes place apply: if a good is produced in one country but then marketed in another, it must comply with the requirements of the host country; in the home country control model the rules that applies to a given product or factor of production is that of its country of origin. There is a community rule of mutual recognition.
[87] R. Schütze, *From International to Federal Market*, Oxford, Oxford University Press, 2017, Chapter 3.
[88] Court of Justice of the European Union, judgment of November 23, 1989, *Torfaen Borough Council v. B&Q*, case C-145/88, EU:C:1989:593.
[89] For a deep analysis of these cases see C. Barnard, *Sunday Trading: A Drama in Five Acts*, 1994, Market Law Review, Vol. 57, p. 449; A. Arnull, *What shall We Do on Sunday?*, 1991, European Law Review, Vol. 16, p. 112.
[90] [90] It was brought by the Torfaen City Council which claimed that B&Q had violated the British Shop Act of 1950 by opening and selling on Sundays. The defendant contended that the British restriction on shop opening hours constituted a measure having equivalent effect to quantitative restrictions. It argued that the national law reduced the absolute amount of total sale; and since a percentage of these sales were foreign products, the Sunday trading ban constituted a restriction on imports. Indeed, the Court held that the Shops Act would constitute a measure of equivalent effect if the effects of these domestic regulations revealed that this was necessary to achieve that purpose.

selling arrangements, like the products requirements, can produce a restrictive effect on imports. In view of the potentially restrictive effect caused by rules on selling arrangements, the Court initially subjected them to a test similar to the Cassis test. Such regulations were considered prohibited by Article 34 as measures having equivalent effect to a quantitative restriction unless: a) they were justified by imperative requirements linked to the need to protect a general interest, and b) the principle of proportionality was respected.

Flooded with cases, the Court gradually realized that its case law had gone too far and soon made an unprecedented regression in *Keck*. In *Keck and Mithouard*[91], a criminal proceeding had been brought against a supermarket manager who had allowed the sale at loss of products. This form of sales promotion was prohibited in France, but Keck argued that the prohibition constituted a measure having equivalent effect to quantitative restriction because it limited intra-Union trade in goods[92]. To the surprise of many, the Court disagreed. While upholding the *Dassonville* formula, it insisted that some measures would be covered by Article 34 only if they were discriminatory.

The case constituted a symbolic revolution. Drawing a distinction between product requirements and selling arrangements Keck clarified that the latter constitute measures having equivalent effect to quantitative restrictions only if they discriminate against the marketing of foreign goods. Only discriminatory selling arrangements would violate the provision on the free movement of goods. The distinction between product requirements and selling arrangements had become the classificatory battle in post-Keck case law. The test developed in the Keck judgment, in order to assess whether or not a national regulation on selling arrangement produces an effect equivalent to a quantitative restriction and thus falls within the scope of Article 34, is whether the regulation indirectly discriminate against products from other Member States in terms of market access.

[91] Court of Justice of the European Union, judgment of November 24, 1993, *Criminal Proceedings against Keck and Mithouard*, joined cases C-267-8/91, EU:C:1993:905.
[92] *Ibidem*, para. 3

1.3.3 Article 36 TFEU and the Mandatory Requirements Doctrine: Derogations from the Prohibitions of Quantitative Restrictions

Article 36 TFEU was introduced into the EEC Treaty with the specific aim of attenuating the rigidity of the prohibitions imposed on Member States by Articles 34 and 35, allowing State measures justified by non-economic interests listed exhaustively in the Article 36 TFEU[93].

This provision can be traced back to clauses which are normally found in Treaties on commercial matters, and which are often referred to as "general exceptions": in these clauses, the parties specify that the commitments imposed by the Treaty do not constitute an obstacle to the adoption, by one of the contracting parties, of the measures necessary to protect certain national public interests[94]. The Court considers the list of general interest contained in Article 36 TFEU to be exhaustive. Therefore, the Member States cannot invoke this rule to justify restrictive measures which pursue objectives which may be qualified as interests of a general order, but which are different from those expressly mentioned. However, despite limiting the scope of Article 36 TFEU in such a significant way, the Court after *Cassis de Dijon* has allowed implicit derogations, the so-called overriding needs jurisprudence.

The Court was therefore strict on the explicit grounds mentioned in Article 36 and at the same time allowed additional implicit grounds for justification. The explanation behind this apparent paradox is that Article 36 was originally conceived against the background of the international market model within which it was to be applied to discriminatory domestic measures. But once Article 34 was interpreted broadly, including also non-discriminatory measures, the Court was confronted

[93] Article 36 TFEU reads: "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit, justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of industrial and commercial property. However, such prohibitions or restrictions shall not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".

[94] The first examples of clause of this type can be found in customs convention concluded in the period between the Two World Wars, but the historically most important provision is undoubtedly Article XX of the GATT 1947, which seems to have directly inspired the formulation of the same Article 36 TFEU afterwards.

with a dilemma: on the one hand, it wanted to recognize that the expansion of the material scope of Article 34 must necessarily lead to an expansion of the grounds of justification; however, on the other hand, this expansion could not take place within Article 36 because it might invite Member States to use the new grounds of justification also for discriminatory measures and thus undermine the Court's strict position. The way out this dilemma was bold but ingenious: the Court simply constructed a second justification route but only for those measures that do not fit within the international market model. With the emergence of the federal model in Cassis, the Court began to exempt obstacles to the free movement of goods, that were necessary to meet imperative needs relating in particular to the effectiveness of fiscal control, protection of public health, the fairness of commercial transactions and consumer protection[95].

The "mandatory requirements" doctrine, alternatively known as the "rule of reason" allows Member States to protect interests that are justified under Community law provided that these restrictions are not-discriminatory and proportionate to the end that they pursue. The main difference between Article 36 TFEU exemptions and those based on Cassis mandatory requirements was that the former applied to both directly and indirectly discriminatory measures, whereas the latter could only exempt non-discriminatory (or equally applicable) measures.

1.4 The UK Internal Market after the Internal Market Act 2020

The UK's Internal Market Act 2020 introduces a new field of inquiry. It allows to reflect on UK's chosen Internal market model for regulating the relationships among its four constituent elements now that, after Brexit, the authority of the EU's common rules has come to an end. It allows comparisons and contrasts to be made between the UK's chosen model and more established EU Internal Market model.

The most significant point of contrast with the EU one is that the UK model is less tolerant of regulatory diversity among its constituent elements than it is in EU free

[95] Case *Cassis de Dijon* see above n. 76, para. 5.

movement law. The ability to justify rules that impede trade within the UK is less generous than in the EU, with the consequence that the UK's internal market has a more deregulated flavor than the EU's[96].

The EU, as explained above, is committed to its Internal Market. The entry into force of the United Kingdom Internal Market Act in December 2020 means that the UK too is committed to its Internal Market. The concept of a UK Internal Market is new: no doubt it has long been assumed to exist in some form, but it was never discussed in these terms before the UK joined what is now the EU in 1973. On 1 January 2021 everything changed. It is therefore a post-Brexit problem. The EU's Internal Market reflects the aspiration to convert markets historically fragmented along national lines into a single economic space. The UK Internal Market Act 2020 comes from exactly the opposite direction. The Act reflects an aspiration to prevent a historically unified market from becoming fragmented depending on different regulatory choices made within the UK post-Brexit, to the detriment of a single economic space encompassing the entirety of the UK.

UK Internal Market Act does not provide a broad definition of the Internal Market, nor does it contain anything as elegantly simple as the EU Treaty's brief provisions on free movement and competition. Instead, in three distinct and briefly written parts, the Act addresses markets for goods, services and professional qualifications, and seeks to promote the functioning of the UK Internal Market by establishing principles of UK market access. This is clearly motivated by a concern to provide statutorily defined answers and to reduce room for judicial creativity.

UK law establishes two principles of market access. They are a principle of mutual recognition and a principle of non-discrimination. They are designed to prevent

[96] This model of limited availability to protect local regulatory autonomy over unrestricted intra-UK trade does not consider the sensitivities of Scotland and Wales, while Northern Ireland's position, locked into the protocol attached to the EU-UK Withdrawal Agreement, is different but also fragile. Internal markets have economic motivations and are built on legal rules, but they involve political choices and have policy implications. The UK's Internal Market Act presents challenges to the stability of the UK itself.

fragmentation of the UK Internal Market[97]. It is a feature of the Act that no attempt has been made to write generally applicable principles with elegant simplicity. Instead, although common patters can be discerned, goods, services, and professional qualifications are subjected to detailed separate treatment. But as a summary, the mutual recognition principle is designed to ensure access to the UK domestic market for goods and services wherever they are produced, while the non-discrimination principle protects traders selling those goods and services from differential treatment once they are active in their destination market. This is entry and treatment in the market of destination.

1.4.1 Principle of Mutual Recognition

The principle of mutual recognition for goods is clarified in Section 2 of the Act. It provides that goods which have been produced or imported in one part of the United Kingdom, "the originating part", and which may be sold in that part without contravening any applicable relevant requirement are entitled to be sold in any other part of the United Kingdom, free from any relevant requirement that would otherwise apply in that other part.

Section 3 deals with the definition of "relevant requirements". The principle of mutual recognition applies where the product faces a "relevant requirement" in its destination territory that would not have been breached in the party of origin. Section 3(2) does the heavy lifting. What is at stake in the notion of a "relevant requirement" is a legal requirement that prohibits the sale of the goods or imposes an obligation or condition that, if not met, results in a prohibition on the sale of the goods. This is amplified by Section 3(3) which sets out the range of matters to which a legal requirement may refer for these purposes, such as characteristics of the goods, matters related to presentation, any matters related to production, inspection and certification, the documentation that must be kept or the information that must be recorded, and – noting that this is an attempt to provide a broad definition of a

[97] In the EU, neither the Treaties nor secondary legislation make such an explicit provision. However, the Court of Justice, as explained, has over time shaped its own distinctive market access principles applicable in the EU Internal Market.

phenomenon that cannot be defined exhaustively – anything not listed "that must (or must not) be done to, or in relation to, goods before they are permitted to be sold". This would easily cover rules associated with the composition, packaging, or labeling of products.

The Act makes a key distinction between such relevant requirements, which involve the application of the principle of mutual recognition, and what is called a "manner of sale requirement", which does not.

1.4.2 Principle of Non-Discrimination

Section 5 of the Act lays down the non-discrimination principle for goods. This is defined by Section 5(1) as the principle that the sale of goods in one part of the United Kingdom should not be affected by relevant requirements that directly or indirectly discriminate against goods that have a "relevant connection" with another part of the United Kingdom. This "relevant connection" is defined by Sections 5(4) and 5(5). Goods possess that triggering relevant connection if they or any of their components are produced in that other part, are produced by a business based in that part, or come from or pass through that part before reaching the part which is their destination. The non-discrimination principle covers statutory provisions which address the circumstances or way goods are sold, the handling or display of goods, inspection or certification of goods and the conduct or regulation of businesses that engage in the sale of certain types of goods.

Section 7 of the Act addresses direct discrimination, Section 8 indirect discrimination. Direct discrimination is the subject of an intricately drawn definition contained in Section 7, but the core concept holds that it occurs when incoming goods are put at a disadvantage compared to local goods which are materially the same, as defined in Section 7(3). Indirect discrimination is – as ever – more awkward. According to Section 8 it arises where incoming goods are put at a disadvantage in circumstances where there is no direct discrimination but where

"it has an adverse market effect" and where "it cannot reasonably be considered a necessary means of achieving a legitimate aim".

1.4.3 Main differences between the UK and the EU Internal Market: a) Principle of Mutual Recognition and Non-Discrimination

The mutual recognition principle and the non-discrimination principle which shape the UK's Internal Market, are structurally close cousins of EU law's separation of obstacles to inter-State trade from restrictions on free movement. The terminology used is not the same, but the question remains if the outcome is the same in EU law as in UK law. The answer is that they are much more similar than different, but the patterns are not identical. There is plentiful case law of the Court of Justice dealing with national measures which obstruct trade because they impose standards on matters of or associated with product composition which are different from those applicable in the State in which the product was made or marketed[98]. Such measures would easily be treated as "relevant requirements" within the meaning of Section 3 of the UK's Act, provided they are of a legislative character, and so in the UK they would be subject to the Act's mutual recognition principle.

The inquiry into discrimination foreseen by the UK's Act is structurally close to that found in EU law. EU law asks what the comparator is, and then, if differential treatment is identified, it asks what is allowed as justification, and also examines the means used to check their aptitude and compliance with the principle of proportionality. However, the detail of the indirect discrimination test, in particular its inquiry into the adverse market effect, seems more cumbersome and convoluted in the UK than under EU law; and the permitted scope of justification recognized by the UK statute is narrower.

1.4.4 b) The Nature of a Controlled Measure

[98] *See Cassis de Dijon:* Court of Justice of the European Union, judgment of 20 February 1979, *Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*), case C-120/78, EU:C:1979:42.

A clear difference between the UK and the EU lies in the nature and source of a measure that is subject to control. Under UK law, only requirements imposed by legislation are subject to control. This is specified in the application to both goods and services and attaches to both the principle of mutual recognition and the principle of non-discrimination[99].

Section 58 makes clear that legislation in this sense covers not only an act of the British Parliament but also covers both primary and secondary legislation. This is considerably narrower than EU free movement law, which has been granted a very wide scope of application as a result of the Court's interpretation of the relevant Treaty provisions so as to promote the effective functioning of the Internal Market.

EU law covers not only legislative but also administrative measures[100]. It is even able of catching statements made by a public official that give the impression of counting as an official position taken by the State[101]. This is supported by a rationale which assumes that any such intervention could reduce legal certainty and serve as a deterrent to taking advantage of the full opportunities of the Internal Market. EU free movement law covers too practices at a regional or municipal level within the public sector of a Member State[102] as well as practices of parties that are in legal form private in nature, but which have been granted some degree of State support so that they have become quasi-public entities[103]. The Court long ago ruled that even truly private parties may be subject to the prohibitions contained in the Treaty where they impede inter-State trade through their collective action[104].

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[99] UK Internal Market Act 2020, Sections 3(8), 6(10), 17(3), and 17(4).
[100] E.g., Court of Justice of the European Union, judgment of May 9, 1985, *Commission v. France*, case C-21/84, EU:C:1985:184; Judgment of September 23, 2003, *Commission v. Denmark*, case C-192/01, EU:C:2003:492.
[101] Court of Justice of the European Union, judgment of April 17, 2007, *A.G.M. v. Cos.met*, case C-470/03 EU:C:2007:213.
[102] E.g., Court of Justice of the European Union, judgment of July 25, 1991, *Aragonesa de Publicidad v. Departamento de Sanidad de* Cataluya, Case C-1/90, EU:C:1991:327; judgment of July 9, 1992, *Commission v. Belgium*, case C-2/90, EU:C:1992:310.
[103] Court of Justice of European Union, judgment of November 24, 1982, *Commission v. Ireland*, case 249/81, EU:C:1982:402; judgment of July 12, 2012, *Fra.bo SpA v. Deutsche Vereinigung des Gas*, case C-171/11, EU:C:2012:453.
[104] This applies, for example, to governing bodies in sports and to labor unions, following a rationale whereby such an extension of the binding effect of European free movement law maximizes its force

There is much to say about why one might (or might not) choose to extend legal controls of this nature to the outer reaches of bodies exercising public functions and even beyond[105]. It is sufficient to conclude that the UK Internal Market, by focusing on legislative acts, takes a relatively narrow approach to the type of practice, which is governed by the market access principles, whereas the EU Internal Market is considerably more intrusive on this point.

1.4.5 c) Justifications

The most intriguing of the many differences in approach between EU and UK Internal Market law relates to the ability to justify measures that impede trade between the constituent elements. Any system of trade regulation, whether national or transnational, that establishes a general check on the regulatory autonomy of constituents within a larger economic space must choose how tolerant it will be of local practices that stray from the scope of trade integration. On this point, the EU is surprisingly more tolerant than the United Kingdom. Put another way, through market access principles, the UK drives its Internal Market project more aggressively than the EU does.

UK law operates to exclude the application of the market access principles when threats to human, animal or plant health are at stake, but under a very narrow set of conditions[106]. It is sanitary and phytosanitary risks that are recognized, not public health generally. It does not appear this narrow list can be expanded by judicial questioning. Any change would have to come from the political process and the UK

and avoid variation among Member States as a result of different local approaches to the division between public and private law.

[105] See e.g. S. Prechal, S. De Vries, *Seamless Web of Judicial Protection in the Internal Market*, 2009, European Law Review, Vol. 34, No. 5; H. Schepel, *Freedom of Contract in Free Movement Law: Balancing Rights and Principles in European Public and Private Law*, 2013, 21 European Review of Private Law 1211; S. Enchelmaier, *Horizontality: The Application of the Four Freedoms to Restrictions Imposed by Private Parties*, in P. Koutrakos, J. Snell, *Research Handbook on the Law of the EU's Internal* Market, Cheltenham, Elgar Publishing, 2017.

[106] Section 10's first sub-section refers to Schedule 1, which, contains provisions excluding the application of the UK market access principles in certain cases. Schedule 1 excludes the application of the market access principles where threats to human, animal or plant health are at stake.

Act provides that secondary legislation can be made to add additional head of justification to the list[107]. However, there is no obvious political appetite to make such an addition. There is no general public health exception for market access throughout the UK, nor is there a broader or richer recognition of other types of values that could cause one or more of the devolved administrations in the UK to intervene in the market. This is in stark contrast to EU law.

In the EU, the Court of Justice plays a central role in defining the scope of justification for national measures that restrict interstate commerce. It has been enormously creative and has been unwilling to limit itself to issue recognized by the Treaty as legitimate reasons to protect national regulatory choices from the deregulatory energy of free movement law[108]. *Cassis de Dijon*[109] was famously the springboard and it is well understood today that apart from cases of direct discrimination, national measures that impede interstate trade can in principle be justified under a broad public interest test.

Thus, the Court case law is rich and varied. It contrasts free movement with national initiatives to conserve biodiversity, to protect media, to promote animal welfare and so on. Many in-depth studies in recent years have explored the Court's techniques and choice of priorities when asked to apply Internal Market law to socially, culturally, and politically sensitive policies pursued at the national level.

No one doubts the EU Court's centrality, and no one doubts how much responsibility it has assumed for matters that might be thought to belong to the domain of political contestation. The United Kingdom wants to take a different path. Many issues shaped by the Court in the EU internal market have been nailed down with textual rigor through the political process in the UK Internal Market Act.

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[107] Section 10(2) envisages a power to amend the Schedule 1 by the adoption of secondary legislation. The lists may be adjusted according to procedures set out in Section 10(8)-(12).

[108] See S. Weatherill, *The Internal Market as a Legal Concept*, Oxford, Oxford University Press, 2016, Chapter 8.

[109] Case *Cassis de Dijon*, where the European Court began to exempt obstacles to the free movement of goods, that were necessary to meet imperative needs relating to the effectiveness of fiscal control, protection of public health, fairness of commercial transactions and consumer protection.

And, with reference to the scope of justification available for trade restrictive measures, UK law seem far less rich and pluralistic. This appears to be a striking difference with EU law must it is not quite as radical as may first appear. The difference needs to be assessed with an awareness of the regulatory competence of the devolved administrations in the UK. They do not have general competence but rather a range of matters are reserved to London. The narrow range of exceptions in the UK Act is partly explained by the narrow range of powers enjoyed by the devolved administrations, which clearly are not comparable to the general regulatory competence enjoyed by a Member State, or the interpretative power of the ECJ[110].

1.4.6 d) Institutional Choice

What is strikingly different between the UK's Act and EU law is that in EU law detailed understanding of the scope of free movement law is not much driven by reference to the primary Treaty provisions, which are thinly and echo the terminology of 1950s international economic law. The Luxembourg Court is little helped, or constrained, by the terms of the Treaty and there is no useful generally applicable secondary legislation either. Aside from the distant Directive 70/50[111], the EU legislature has left it to the Court to shape free movement law[112]. This is not a common law system, but the Court's case law must be considered to understand the complexities of many areas of EU law[113]. Free movement is prominent among them, and the Commission Notice published in 2021 under the title "Guide on Articles 34–36 of the Treaty on the Functioning of the European Union" moans

[110] J. Snell, *Who's Got the Power? Free Movement and Allocation of Competences in EC Law*, 2003, Yearbook of European Law, Vol. 22 p. 323.
[111] Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 33(7), on the abolition of measures which have an effect to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty, OJ L013, 19/01/1970, pp. 29-31, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31970L0050.
[112] See, on the role of the Court, T. Horsley, *Institutional Dynamics Reloaded: The Court of Justice and the Development of the EU Internal Market*, in Koutrakos and Snell, *Research Handbook on the Law of the EU's Internal Market*, Cheltenham, Edward Elgar, 2017.
[113] See e.g., M. Derlen, J. Lindholm, *Peek-a-Boo, It's a Case Law System! Comparing the European Court of Justice and the United States Supreme Court from a Network Perspective*, 2017, German Law Journal, Vol.18, p. 647.

under the weight of hundreds of judicial decisions[114]. In contrast, in the UK, the Internal Market Act goes into much more detail in the legislative text. Statutory language elaborates the reach of the UK's regime, and answers questions, such as how to review price controls in Section III.A or how to define discrimination, in Section III.B, which have been developed by the Court of Justice in the EU. Nevertheless, it has been explained that the Act does not cover every possible eventuality, and tantalizing questions about its intended impact will certainly emerge. Looking ahead, it will be intriguing to see how far, if at all, practice and dispute settlement under the Act are driven by new problems which emerge in the practical management of the UK Internal Market to explore beyond the statutory language. How will these issues be addressed; how will the legislative text be interpreted? Will the, obvious and useful, analogies to EU law be used, despite the UK government's sullen refusal to refer to EU practice when formulating the law in 2020?[115]

In conclusion, it must be bear in mind how EU rules have been shaped by the Court with the Treaty in background, while the UK has introduced a relatively narrow regulatory framework that is designed to limit the space for judicial creativity. It can be stated that the UK approach offers a high degree of predictability and furthermore can be considered constitutionally attractive because the choices at stake are openly deliberated and decision makers can be held accountable[116].

1.5 The EU Common Commercial Policy and the post-Brexit Scenario

In describing and addressing the future relationship between the European Union and the United Kingdom in the aftermath of Brexit is necessary to analyze the

[114] European Commission, Commission Notice – Guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU), OJ C100/38, 23 March 2021, Vol.64, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC0323(03)&from=EN.
[115] S. Weatherill, *Comparative Internal Market Law: The UK and the EU*, 2021, Yearbook of European Law, Vol. 40, No. 1, pp. 431-474.
[116] K. Armstrong, *The Governance of Economic and Collaborative Unionism after the United Kingdom Internal Market Act*, 1 November 2021, Modern Law Review, Vol. 85, Issue 3, pp. 635-660.

Common Commercial Policy of the Union and the competence in the conclusion of tariffs and trade agreements, a topic more relevant today than ever.

The notion of Common Commercial Policy is found in Article 207(1) TFEU, according to which "*The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariffs rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign investment rights, the standardization of liberalization measures, export policy and trade protection measures, including those to be taken in case of dumping and subsidies. The common commercial policy is conducted within the framework of the principles and objectives of external action and the Union*". The European Court of Justice in its opinion 1/75 of November 11, 1975, and in the subsequent 1/78 of October 4, 1979, has given this notion an extensive interpretation. In the latter opinion the Court stated that "*The competence of the Community extends also to ancillary aspects, insofar as they are closely linked to the object of the Agreement and to the tasks of the organs*[117]". This extension of competences responds to the need to allow for a more rational distribution of competences between the Union and the Member States than would result from a strict distinction by subject matter.

Among the aims of the Union there is the one of promoting trade between Member States and third countries. To this end, Article 32 TFEU states: "*In carrying out the tasks entrusted to it under this Chapter, the Commission shall be guided by the need to promote trade between Member States and third countries*". Article 21 TEU (Title V – External Action) indicates the aims of the Union's international relations, among which is that of encouraging the integration of all countries into the world economy, including through the abolition of restrictions on international trade. The common commercial policy is based on uniform principles that must inspire above all tariff charges, trade agreements, commercial aspects of intellectual property, liberalization, export policy and trade protection.

[117] Opinion of the Court of 4 October 1979. Opinion given pursuant to the second subparagraph of Article 228(1) of the EEC Treaty – International Agreement on National Rubber, Opinion 1/78, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61978CV0001.

The Lisbon Treaty strengthened the role of the European Parliament in trade and investment matters. On a procedural level, the implementation framework of the common commercial policy is subject to deliberation by the European Parliament and the Council according to the ordinary legislative procedure. In fact, it can be said that, while the free movement of goods pertains to the internal dimension, the common commercial policy pertains to the external dimension and is fundamental and functional to the Internal Market and the Customs Union. The common commercial policy is one of the areas in which Member States have easily ceded their sovereignty, recognizing the need for joint action to maximize development objectives.

The EU is well inserted in multilateral contexts involving trade practices, such as the World Trade Organization (WTO) which provides the legal framework to conclude free trade agreements between states and mechanisms for resolving trade disputes[118]. At the WTO level, the European Union acts as a single actor and being part of the WTO, it has also integrated the GATT (General Agreement on Tariffs and Trade) into its trade policy. Here, during negotiations and for the conclusion of agreements with other third countries, the EU replaces its Member States in matters of its exclusive competence. For example, to facilitate trade and make markets more accessible, the EU in 2017 concluded the FTA with Canada, the CETA. Of opposite sign the negotiation with the United States of America, the Transatlantic Trade and Investment Partnership which has not yet been concluded to the protectionist opposition of the Trump administration[119].

Central role in the current debate that affects the external action of the EU in general and the common commercial policy more specifically, occupies the "Brexit" that

[118] P. Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambdridge, Cambridge University Press, 2008.
[119] D. Veraldi, *La Politica Commerciale Comune: un Settore dell'Azione Esterna dell'Unione Europea*, 9 Febbraio 2021, Diritto e Consenso.

has seen the United Kingdom pass from the Customs Union to a national trade policy that characterizes it as a third State and no longer as a Member State[120].

The UK, as an EU Member, became a WTO Member in 1995. Even if it is an individual WTO Member, the EU concludes on its behalf various WTO commitments on market access (e.g., bound tariff rates and access to services markets), goods (e.g., agricultural subsidies and domestic support) and services (e.g., bindings on national treatment)[121]. The UK as an EU Member, benefited from the legal regime of EU-third countries free trade agreements (FTAs) that entered into force and of those that have already been concluded. The WTO Director General, Mr. Roberto Azevido, confirmed that the UK would continue being a WTO member after Brexit, but that there will definitely need to be trade negotiations. The UK would need to renegotiate all these FTAs and will not participate as an EU Member State in the negotiation of future FTAs such as the Transatlantic Trade and Investment Partnership[122].

1.6 Brexit: New Agreements and Legal Framework

On January 31, 2020, the United Kingdom left the European Union – 47 years and 31 days after joining. After a year and a half of this new EU-UK post-Brexit relationship, it is important to highlight the legal framework that governs this relationship.

1.6.1 Article 50 TEU as a Clause of Style

A clause providing for the right to withdraw from the European Union was not recognized by the Founding States in the Treaties of Rome because of their deep

[120] S. Switzer, A. MacMahon, *Devolution and post-Brexit Trade Agreements. Towards a Joint Trade Policy Committee*m 2019, Edinburgh Law Review, Vol. 23, Issue No. 2, pp. 266-272.
[121] This means that the UK will need to renegotiate its WTO Schedules of Concessions (i.e., list of bound tariff rates) with the WTO membership when it leaves the UK.
[122] P. Vergano, T. Dolle, *The Trade Law Consequences of Brexit*, 2016, European Journal of Risk Regulation, No. 7.

faith and conviction in the European integration project, whose main objective was economic development but, above all, the achievement of lasting peace.

Article 50 of the Treaty on the European Union, introduced by the Treaty of Lisbon in 2007, contains the mechanism of voluntary and unilateral withdrawal applicable to Member States wishing to withdraw from the European Union. The decision to include an explicit rule on the right of withdrawal was seen as a gesture to reassure Member States that the Union was not a "fortress[123][124]". This Article was considered in doctrine as a rule whose procedure would never be implemented. The right of withdrawal was seen as a purely virtual right, which was unlikely ever to be put into practice.

The picture has begun to change since, on the occasion of the renewal of the Westminster Parliament, the government led by David Cameron promised voters, in the event of victory, a referendum on whether or not the United Kingdom, should remain in the European Union. Having won the elections, the new Cameron government found itself politically committed to keep its promise. The outcome of the referendum therefore took everyone by surprise. The Member States and the institutions of the Union, on the one hand, and the United Kingdom, on the other, found themselves faced not only with the difficulty of managing a traumatic event such as the exit, after more than 40 years, of one of the four largest Member States, but also of putting into practice a rule which, until then, had remained "on paper". Since then, the attention of the doctrine has increased, and many new contributions dedicated to the withdrawal have appeared. The most delicate aspect of Article 50 TEU deals with the Withdrawal Agreement.

As is well known, while outlining the withdrawal as an individual right of each State (par. 1), Article 50 TEU assumes that the withdrawing State and the Union negotiate and conclude an Agreement which regulates the modalities of

[123] C. Blumann, Brexit: *Coup de Tonnerre dans un Ciel Chargé*, in La Semaine Juridique, Edition Générale, No. 41, p. 3.
[124] This message was particularly important for the new Member States of Central and Eastern Europe, veterans, as they were, of the not remote membership of the Soviet bloc, from which the exit was, *de iure* or *de facto*, impossible

implementation of the withdrawal. In this way, the rule aims to transform the withdrawal from a merely unilateral event of the withdrawing State into a moment of negotiation with the Union. In fact, a withdrawal whose modalities are agreed upon by the parties has a better chance of reducing the difficulties that inevitably arise.

The conclusion of a withdrawal agreement is not compulsory[125]; what is really obligatory is only the negotiation which must take place between the withdrawing state and the Union in order to define the modalities of withdrawal. However, these negotiations must no last longer than two years. If this period elapses unsuccessfully, withdrawal becomes effective. Nevertheless, the preference for withdrawal accompanied by an agreement is *in re ipsa*. This is also apparent from the second part of paragraph 3, according to which the two-year period may be extended by the European Council acting unanimously in agreement with the withdrawing State.

1.6.2 UK-EU Withdrawal Agreement and Northern Ireland Protocol

The UK's Withdrawal from the EU represents a momentaneous event which was set in motion by the referendum held on June 23, 2016. The result of two and a half years of tense and technical negotiations, the Agreement on the Withdrawal of the United Kingdom from the European Union and the European Atomic Energy Community (Euratom) is a detailed and comprehensive legal document that ensures the orderly exit of the UK from the European Union.

The legal nature of the withdrawal agreement that the Union concluded with the UK was that of a simple international agreement within the meaning of Article 218 TFEU. This document, adopted on the basis of Article 50 of the TEU, sets out the terms and conditions of the United Kingdom's exit from the European Union, including the basic terms and conditions for withdrawal from the EU.

[125] R. Mehdi, *Article I-60 – Le Retrait Volontaire de L'Union*, in L. Burgorgue-Larsen, A. Levade, F. Picod, *Traité établissant un Constitution pour l'Europe: Commentaire Article par Article*, Brussels, 2007, p. 746, which speaks of an obligation of means and not of result.

The substantive aspects of the Withdrawal Agreement concern the citizens' rights, the financial settlement and the Irish border. Particularly important is the Part on Northern Ireland, a jurisdiction with the UK acutely affected by the nature of the Brexit debate and the process[126].

Northern Ireland and the issue of the border immediately became one of the key priorities in the Brexit negotiations. It is plain that the objectives of the Irish government were central concerns for the EU also. The dynamics on the island of Ireland reflect the divisions and tensions within an overall Brexit process that resulted in the location of an external border of the EU on the island.

The avoidance of a hard border on the island of Ireland, the protection of the Belfast Good Friday Agreement[127], and continuing North–South cooperation were explicitly identified by the EU in the negotiating guidelines governing the withdrawal talks[128]. Arguably, the EU directed more attention to the unique regional anxieties of Northern Ireland than the UK government. The European Council adopted negotiating guidelines[129] that stressed the phased nature of its approach, as well the "unique circumstances" of Northern Ireland/Ireland.

The Preamble[130] acknowledges the "unique challenge to the island of Ireland" posed by Brexit, and that "it is necessary to address the unique circumstances on

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[126] For a comprehensive examination of the history and politics of Northern Ireland, see B. O'Leary, *A Treatise on Northern Ireland: Vols I–III (Colonialism, Control, Consociation and Confederation*, Oxford, Oxford University Press, 2019.

[127] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland 1998, Belfast, April 10, 1998, entered into force in December 2, 1999, Irish treaty Series 2000 No. 18. The Preamble states: "*Wishing to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbors and as partners in the European Union*".

[128] European Council (Article 50) Guidelines for the Brexit Negotiations, April 29, 2017, available at https://ec.europa.eu/info/publications/european-council-article-50-guidelines-brexit-negotiations_en.

[129] European Commission, Guiding Principles for the Dialogue on Ireland/Northern Ireland, September 21, 2017, available at https://ec.europa.eu/commission/publications/guiding-principles-dialogue-ireland-northern-ireland_en.

[130] "AFFIRMING that the Good Friday or Belfast Agreement of 10 April 1998 between the Government of the United Kingdom, the Government of Ireland and the other participants in the multi-party negotiations, the "1998 Agreement", which is annexed to the British–Irish Agreement

the island of Ireland through a unique solution". The Protocol contains a strong commitment to the Belfast Good Friday Agreement and subsequent agreements.

The Protocol addresses matters of alignment on the island of Ireland, recognizing the need to ensure that it is treated as a "single regulatory zone[131]". In particular, the Protocol sets out where Northern Ireland will remain aligned to EU rules in order to achieve the agreed negotiating objectives in areas such as customs, the free movement of goods, value-added tax (VAT), and excise duties, and the single electricity market[132]. Northern Ireland will be, in principle at least, part of the customs territory of the UK, and is intended to have "unfettered access" to the UK's Internal Market[133]. However, in reality it will be following the EU customs regime, as well as a broad range of relevant EU rules, and whatever has been said and promised politically by politicians in the UK, the law clearly requires that there will be checks within the UK. The scale of the alignment is significant, with Annex 2 to the Protocol containing hundreds of EU regulations and directives. These provisions will be governed and enforced by many of the traditional methods of EU law[134]. These themes will be analyzed more in-depth in the following chapter.

1.6.3 The UK Internal Market Act 2020

The UK Internal Market Act 2020, which became law on 17 December 2020, will govern the trading relationship between the nations of the UK, after the exit from the Internal Market of the EU following Brexit. The problem to which the Act is a solution is that hinders to trade within the UK may arise in so far as different rules governing goods or services are applied in its four constituent elements (England, Scotland, Wales and Ireland).

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of the same date (the 'British–Irish Agreement'), including its subsequent implementation agreements and arrangements, should be protected in all its parts".

[131] Explainer for the New Northern Ireland/Protocol and the Political Declaration on the Future Relationship, para. 15, 18 October 2019, available at https://www.gov.uk/government/publications/new-protocol-on-irelandnorthern-ireland-and-political-declaration.

[132] See Northern Ireland Protocol, Articles 5–10.

[133] Northern Ireland Protocol, Article 6, Protection of the UK Internal Market.

[134] Northern Ireland Protocol, Article 12, Implementation, Application, Supervision and Enforcement.

It is a "post-Brexit" problem. While the UK was a member of the EU, the latter's common rules acted as a blanket which held together the integrity of the UK Internal Market without it ever being depicted in those terms. On 1 January 2021, that changed. Rulemaking previously subject to the disciplines of EU membership became the preserve of the UK Government and the devolved administrations in Northern Ireland, Scotland and Wales, according to choices made within the UK about how to distribute them[135].

The Act introduces a new market access regime, comprising mutual recognition and non-discrimination principles. The regime means that goods which are sold in one part of the UK (where they originate from or are imported to) are automatically accepted across all other parts of the UK, regardless of the rules there; and where provision of a service is regulated across the UK, the authorization for that service in one part of the UK authorization will be recognized in all other parts.

1.6.4 Trade and Cooperation Agreement

The new trade relationship between UK Internal Market and the EU one is today regulated, since the Christmas Eve 2020, when the Agreement was signed, by the Trade and Cooperation Agreement[136] that sets out preferential arrangements and develops peaceful and good-neighborly relations between the parties.

In its legal form, the TCA was concluded as an association agreement under Article 217 of the Treaty on the Functioning of the European Union, however, due to the similarity of the TCA's trade chapters to free trade agreements, the TCA is typically analyzed by comparing its trade rules with those under free trade agreements.

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[135] S. Weatherll, *Will the United Kigdom survive the UK Internal Market Act*?, Commentary in UK in a Changing Europe, May 7, 2021.

[136] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community and the United Kingdom of Great Britain and Northern Ireland, OJ L 149, 30.4.2021, p. 10–2539, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.149.01.0010.01.ENG&toc=OJ%3AL%3A2021%3A149%3ATOC.

The Agreement is structured into 7 Parts:

- Part 1 covers the common and institutional provisions in the Agreement;
- Part 2 covers trade and other economic aspects of the relationship, such as aviation, energy, road transport, and social security;
- Part 3 covers cooperation on law enforcement and criminal justice;
- Part 4 covers so-called "thematic" issues, notably health collaboration;
- Part 5 covers participation in EU Programmes, principally scientific collaboration through Horizon;
- Part 6 covers dispute settlement;
- Part 7 sets out final provisions.

The United Kingdom and the European Union have agreed to unprecedented 100% tariff liberalizations. This means there will be no tariffs or quotas on the movement of goods we produce between the EU and the UK. This is the first time the EU has agreed a zero-tariff zero-quota deal with any other trading partner. The Chapter on goods is the most comprehensive part of the TCA. The approach to the movement of goods has much more in common with the World Trade Organisation's (WTO) provisions on goods, on which the TCA draws heavily, than EU law. From a *political* perspective, this shift to a "WTO plus" approach is because the UK government considered that the Brexit vote gave a green light for a total break with the EU's rules. From a *legal* perspective, the movement of goods between the UK and the EU is covered by the Heading on Trade, which is part of a Free Trade Agreement, not part of the Single Market, with all the consequences which flow from this shift.

Trade in goods is governed by Title I of Heading One "Trade" of Part Two of the TCA and the title is further subdivided into thematic chapters which closely resemble the different agreements of the WTO:

- Chapter 1: National treatment and market access for goods (including trade remedies);
- Chapter 2: Rules of origin (RoO);

- Chapter 3: Sanitary and phytosanitary (SPS) measures;
- Chapter 4: Technical barriers to trade (TBT);
- Chapter 5: Customs and trade facilitation.

Chapter II – EU-UK post-Brexit Relationship: A New Framework for A New Partnership

2.1 Brexit History and the Question of Sovereignty

The exit of the United Kingdom from the European institutions is the central point of a path of at least 30 years, triggered by the reaction to the birth of the European Union as a political project, in the preparatory phase of the Maastricht Treaty in 1990-1991. According to a well-known formula of Liesbet Hooghe and Gary Marks in the attitudes of citizens towards Europe, Maastricht is a decisive turning point in the transition from permissive consent to constrictive dissent[137]. In the forty-six years of British membership of the European institutions it is difficult to find examples of the first attitude, the country, also through the famous speech of Margaret Thatcher in Bruges in 1998[138], is the undisputed home of Euro-skepticism.

Significant are the words released by the former President of the European Commission Juncker: "*It will not be a consensual divorce, but neither was it a great love story*[139]". What makes this brief statement interesting is the reference to the detachment from a properly communitarian vision, which has always characterized the coexistence of the United Kingdom within the European Union. The typical British attitude to give priority to their own domestic reality and to make economic rather than political integration prevail has been widely discussed. From the outset, the United Kingdom's detached and uninvolved attitude within the Community was evident, as evidenced by the delay in joining the Community, only sixteen years later, in 1973. What for many has represented a new face of Great Britain following

[137] H. Kriesi, *Rejoinder to Liesbet Hooghe and Gary Marks, a Postfunctional Theory of European Integration: From Permissive Consensus to Constraining Dissensus*, January 1, 2009, British Journal of Political Science, Vol. 39, Issue 1, pp. 221-224.

[138] In her sparkling, original and undoubtedly fascinating speech she stated: "*Europe is not the creation of the Treaty of Rome. Nor is the European idea the property of any group or institution. The European Community is one manifestation of the European identity, but it is not the only one. Let Europe be a family of nations, understanding each other better, appreciating each other more, doing more together but relishing our national identity no less than our common European endeavor*".

[139] An interview with German public TV Ard, reiterating a willingness to begin negotiations with London immediately ahead of Brexit

the Referendum, represents the inexorable epilogue of a sometimes non-parallel path between London and Brussels, marked by little involvement of the former in Community interests and by purely opportunistic consideration.

A phrase that more than any other has marked an era in relations between Great Britain and the European Union was pronounced by Margaret Thatcher at the first European Summit[140] in which she participated as British Prime Minister after entering Downing Street in 1979: "*I want my money back*". Margaret Thatcher specified: "*We are not asking for a penny piece of Community money for Britain, what we are asking is for a very large amount of our money back*". She was referring to the contributions that the United Kingdom paid to the Union, which amounted to 3.2 billion ECU in 1985, and that the Iron Lady only partially succeeded in decreasing. A leader of the purest isolationism, typical of British heritage, the Iron Lady considered the European Union as a utopian project in which the adoption of the single currency constituted a threat to demarcation, a resignation to her independence, and an abdication of her sovereignty[141].

The concept of sovereignty has always played a central role in the Brexit debate. It was and still is at the heart of the Brexit project. Those who fought to take the United Kingdom out of the European Union successfully deployed the powerful and vivid slogan "take back control" during the referendum. The emphasis on "taking back[142]" implies regaining or restoring something that has been lost.

In this context, the dynamics of European integration and the consequences of EU membership for political, legal, and popular sovereignty are crucial. The fear of

[140] European Union Dublin Council, November 29, 1979

[141] Regarding monetary sovereignty, her political testament in Parliament on November 22, 1990, the last year of her government, is famous: "*A country that loses the power to mint its own currency is a country that has given up the power to govern itself. Such a country would no longer be free or truly democratic because its people could no longer determine their own future in national elections. My friend, to give up the pound, to give our power of self-government, would mean betraying all that previous generations over the centuries have given their lives to defend*".

[142] "Taking control of our own laws" of the White Paper, The United Kingdom's Exit from and New Partnership with the European Union, February 2017, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf

losing sovereignty has influenced the United Kingdom's policy on European integration and has never lost its political vigor during the United Kingdom's forty-six years of membership in the European Union.

Well before Britain joined the European Economic Community in 1973, concerns about sovereignty were evident as Europe sought to rebuild institutional cooperation after the trauma of World War II. At the Hague Congress and subsequent negotiations on the Council of Europe, London strongly favored intergovernmental structures and did not accept agreements that might compromise sovereignty[143]. This was a taste of what followed in the 1950s and early 1960s, when the United Kingdom sought a Europe-wide free trade agreement instead of the European Economic Community. Throughout its membership, the UK was one of the Member States that consistently adopted a minimalist approach to reinforcing supranationalism and expanding EU competencies[144]. From Maastricht onwards, the UK resorted to defending sovereignty, especially regarding central state powers, by promoting differentiated forms of integration. As outlined in the previous chapter, the UK became the champion of opt-outs, particularly for Economic and Monetary Union, Schengen, and Justice and Home Affairs, all policy areas that touched on national sovereignty. Sovereignty dominated the discourse of the Leave campaign and its leadership. Micheal Gove in justifying his commitment to the Leave movement stated: "*My starting point is simple. I believe that the decisions that govern all our lives, the laws we all have to obey and the taxes we all have to pay, should be decided by people we choose and who we can throughout if we want to change*[145]". For Micheal Gove, Brexit was about independence and leaving the

[143] S. Wall, *Reluctant European: Britain and the European Union from 1945 to Brexit*, Oxford, Oxford University Press, 2020, Chapter 3.

[144] As regards the UK, the constitutional aspects of accession have been characterized throughout its membership period by an effort to combine maximum economic benefits with minimum loss of sovereignty: 'Ever since the relationship between the United Kingdom and the European Union has remained complex. Fundamentally opposed to the idea of federal Europe. The United Kingdom has consistently favored an ever-wider over an ever-deeper European Union; and while the British government has traditionally supported the liberalization of the common market, it has been deeply critical towards European market regulation.

[145] M. Gove, Statement on the EU Referendum, 20 February 2016, available at: http://www.voteleavetakecontrol.org/statement_from_michael_gove_mp_secretary_of_state_for_justice_on_the_eu_referendum.html

Union would be Independence Day, a restoration and regaining of independence and sovereignty.

It was up to Theresa May, reluctant remainder, to translate the referendum mandate into a plan to exit the European Union. In two landmark speeches at the Conservative party Conference on October 5, 2016, and at Lancaster House on January 17, 2017, the Prime Minister laid out her vision for Brexit and the process that would follow: "*We are going to be a fully independent, sovereign country, a country that is no longer part of a political union with supranational institutions that can override national parliaments and courts. And that means we are going once more to have the freedom to make our own decisions on a whole host of different matter, from how we label our food to the way we chose to control immigration*[146]".

After exit, laws will be made in Westminster and interpreted by UK courts "only as the authority of EU law in Britain will end". The desire of independence was further elaborated in his speech at Lancaster House in January 2017: "*Control over laws by bringing to and end the jurisdiction of the European Court of Justice; control over immigration by ending free movement; a free trade agreement but non membership of the single market, an ability to reach trade agreements with their countries which implied an end of membership of the EU customs union, the common commercial policy and the common external tariff*[147]".

In her Lancaster House speech but also during the "leave" campaign two central elements were recurrent, as analyzed before. The first was that of "taking back control" and the second was a desire to escape the jurisdiction of the CJEU and "write and judge our own laws" as Theresa May put in her speech. So, we are talking in other words about the "reclaiming of British sovereignty from the

[146] Theresa May, Address to the Conservative Party Conference, Conservative Home, 2 October 2016
[147] Theresa May, The Government's Negotiating Objectives for Exiting the EU, 17 January 2017

technocrats in Brussels[148]". Or in the words of Nigel Farage: "Britain should reassert itself as a proud and patriotic country that is in control of its borders, represent itself on the world stage and makes its own laws in our sovereign parliament[149]".

Those speeches set the UK on the path to a profound transformation of its economic and trade relations with Europe, a hard Brexit. The Prime Minister's justification was rooted in ideas of independence, self-government, freedom and regaining control, in a word: sovereignty.

The question of sovereignty has, however, haunted the British debate on the EU for decades, if not centuries. What parliamentary sovereignty implies, in its most conventional sense, is as Albert Venn Dicey points out: "Parliament can make all the laws it wants; that no "higher" law or constitutional principles bind Parliament's legislative authority; and those other institutions, including the courts, must accept as valid the laws duly enacted by Parliament[150]". According to his view, the fact that the British Parliament respects fundamental rights is not due a written constitution or supranational courts or conventions, but simply to a deliberate policy choice made by Parliament itself. This echoes Richard Bellamy's definition of political constitutionalism[151], as opposed to legal constitutionalism, where parliament is seen as limited by a constitution, courts, or international conventions. According to Mark Elliot[152], the UK is quite alone in this conception of sovereignty in the EU. Most countries since World War II have adopted forms of legal constitutionalism (as opposed to political constitutionalism): "constitutional" as opposed to "majoritarian democracy" emphasizes the sovereign majority in

[148] I. Tahroor, *Brexit and Britain's delusions of empire*, March 31, 2017, Washington Post, available at: https://www.washingtonpost.com/news/worldviews/wp/2017/03/31/brexit-and-britains-delusions-of-empire/?utm_term=.ad5dbeff2103.
[149] M. Elliot, R. Thomas, *Public Law*, Oxford, Oxford University Press, 2014, 3rd edition, pp. 228-256
[150] A. V. Dicey, *Introduction to the study of the Law of the Constitution*, London, Macmillan, 1915, pp. 36-73
[151] M. Bellamy, Political Constitutionalism, Cambridge, Cambridge University Press, 2007, pp. 143-144.
[152] M. Elliot, Parliamentary Sovereignty in a Changing Constitutional Landscape, in J. Jowell, C. O'Cinneide, The Changing Constitution, Oxford, Oxford University Press, 2019, pp. 29-57

parliament as elevated above other balancing powers, including the courts[153][154]. The main finding when it comes to the British withdrawal from the EU has been, among other reasons, the country's conception of sovereignty as a zero-sum game[155].

Therefore, the Brexit result points to a fundamental clash between two different models of exercising sovereignty: the EU way and the UK way. The 27 Member States of the Union are no less sovereign than the United Kingdom, but they choose to exercise their sovereignty in a profoundly different way. The United Kingdom's preoccupation with regaining control demonstrates a profound hostility to the pooling and collective exercise of sovereignty that characterizes membership in the EU. In June 2016 a particular set of political factors led the British electorate to choose to exit over participation. The remaining EU Member States continue to opt for a voice, a collective seat at the table, and the ability to influence EU developments.

It is in this political, ideal, and historical context that the UK faced the June 23, 2016, referendum, with the outcome of 51.89% in favor of Leave[156].

2.1.1 Europe's Position on Brexit and Future Perspectives

It is important to assess how the European Union has been affected by the United Kingdom's decision to leave, and what this means for the future of European Integration. The departure of a large, rich, and influential Member State must prompt a rethink of the EU constitutional settlement. Immediately after the Brexit Referendum, the EU and its Member States started a debate on the future of Europe and this process is now moving from rhetoric to reality with the institution of the

[153] R. Dworkin, *Freedom's Law: The Moral Reading of American Constitution*, Harvard, Harvard University Press, 1996
[154] The fact that the UK is completely alone is not entirely true, as a similar conception of sovereignty, democracy, and the role of parliament can be found among the Scandinavian countries.
[155] M. Wind, Brexit and Euroskepticism, in F. Fabbrini, The Law and Politics of Brexit, Oxford, Oxford University Press, 2017, Chapter 11.
[156] R. Masera, Le Radici della Brexit: per una Rivisitazione Critica della Conventional Wisdom sulla Relazione tra Regno Unito e Europa, DB Editoriali, 2016.

Conference on the Future of Europe[157]. The Conference on the Future of Europe can serve as an innovative means to reform, tackling the transitional issues left by the UK's withdrawal and addressing the more structural, substantive, and institutional weaknesses dramatically exposed by the plurality of other crises the EU has recently weathered.

The EU institutions and the other Member States reacted to Brexit with remarkable unity, and this remained a distinctive feature of the EU's position throughout the entire withdrawal negotiations. On the one hand, the EU developed organizational arrangements that allowed it to negotiate with the UK as one; and on the other hand, the EU identified clear strategic priorities that were successfully advanced in the Brexit process. However, the Brexit also absorbed the EU's energy in other ways, as during the nearly 44 months from the referendum to the final exit. Brexit was at the forefront of the EU's agenda during the whole withdrawal period, demonstrating its importance to the EU.

The European Union stood vis-à-vis the United Kingdom during Brexit. However, the EU27 heavily divided in responding to the multiple other crises that have shattered the EU in the past decade besides Brexit. The case for reforming the European Union after Brexit is strong. The withdrawal of the UK from the EU is a momentous event, which represents a watershed in the history of European integration. For the first time, a Member State has decided to leave the EU, ending 60 years of uninterrupted EU enlargement and deepening, and shattering the narrative of EU irreversibility. To blame this event simply on the UK's idiosyncratic approach to European integration is an underestimation of the deep centrifugal dynamics at play in the EU. And to downplay the Brexit, while continuing to do business as usual, is a failure to appreciate the significance of this development. While it is a matter of opinion whether the UK's departure represents a tragic development for the EU, or rather an opportunity for further integration[158],

[157] F. Fabbrini, *Brexit and the Future of the European Union: The Case for Constitutional Reforms*, Oxford, Oxford University Press, 2021, Chapter 5.
[158] The Economist, *The EU's recovery fund is a benefit of Brexit*, May 30, 2020, arguing that the UK's withdrawal from the EU facilitated the Commission proposal in favour of a recovery plan, by removing the UK veto.

there is no doubt that the Brexit has had pervasive consequences for the EU and continues to do so[159]. As such, the Brexit is an exceptional historical development that must be studied for its lasting consequences for the EU but also taken as a warning call to begin a process of constitutional reform in the EU. In fact, reforms are not necessary for the sake of reform itself: rather, they are much needed to make the EU more united, sovereign, and democratic, and the UK's withdrawal from the EU should be seen as removing any brake to the contrary. As the first visible case of disintegration in the fabric of the EU, the Brexit demonstrates that there can no longer be complacency among national and EU leaders about the status quo: the current constitutional set-up of the EU is unsustainable, and reforms are needed, not only to address the issues surrounding the UK's withdrawal, but also to improve the effectiveness and legitimacy of the EU, so that it is ready to meet the demands of post-Covid 19 recovery, and fit to meet the geopolitical challenges of new era[160].

In fact, the EU27 opened a reflection on the future of Europe already during the Brexit, showing awareness of the need to respond to the withdrawal of the United Kingdom with an appropriate action play. Today, beyond Brexit the debate on the future of Europe is final about to move from rhetoric to reality with the launch of the Conference on the Future of Europe. This idea originally belongs to French President Emmanuel Macron, who on March 4, 2019, in an open letter addressed to all European citizens *pour une renaissance européenne*, recommended convening "with representatives of the European institutions and the Member States, a Conference for Europe to propose all the changes our political project needs, with an open mind, even to the modification of the Treaties[161]". The Conference on the Future of Europe is a welcome initiative, potentially constituting

[159] No later than June 19, 2020 nearly six months after the United Kingdom's formal withdrawal from the EU on January 31, 2020, Brexit was still on the agenda of the European Council: at a summit that was primarily meant to facilitate preliminary negotiations among heads of state and government on the European Commission's grand strategy for a post-Brexit recovery plan, four leaders discussed the high-level meeting the EU had had four days earlier with British Prime Minister Boris Johnson to take stock of negotiations on the future framework for EU-UK relations, which will shape the relationship between the EU-27 and the United Kingdom after the Brexit transition period ends.

[160] C. Curti Gialdino, Oltre la Brexit: Brevi Note sulle Implicazioni Giuridiche e Politiche per il Futuro Prossimo dell'Unione Europea, 2016, Federalismi.it, No. 13/2016.

[161] French President Emmanuel Macron, Letter, 4 March 2019, available at: https://www.elysee.fr/es/emmanuel-macron/2019/03/04/pour-une-renaissance-europeenne.fr.

an innovative undertaking to reform the EU and increase its effectiveness and legitimacy. The Conference could be an innovative model for renewing the EU, similar to previous out-of-the-box initiatives that were crucial at earlier moments in Europe's history to restructuring the EU and reviving integration. The Conference on the Future of Europe has the potential to be a groundbreaking initiative to address the shortcomings of the EU's governance system, blatantly exposed by the series of recent crises[162]. Otherwise, the need to reform the EU to increase its effectiveness and legitimacy is further compounded by the demands of the post-Covid 19 recovery, which with the deployment of unprecedented fiscal measures calls for supporting these structural changes with appropriate constitutional adjustment. Thus, if Covid-19 has delayed the original timetable for launching the Conference, it has also made it more urgent than ever[163].

2.2 Brexit History: The Timeline

After the Referendum, in March 2017, the United Kingdom officially notified the European Union, its intention to leave the bloc and the United Kingdom and European Union began negotiations on the terms of the UK's withdrawal[164]. The Brexit was originally scheduled for March 2019, but the British Parliament was unable to find a way forward due to divisions over what the Brexit should look like and challenges related to the future of the border between Northern Ireland (part of the UK) and the Republic of Ireland (an EU Member State).

In early 2019, the UK Parliament repeatedly rejected the Withdrawal Agreement (WA) negotiated between then-Prime Minister Theresa May's government and the European Union, including indicating opposition to a no-deal scenario in which the United Kingdom would leave the European Union without a withdrawal agreement

[162] A. Bongdart, F. Torres, A Qualitative Change in the Process of European Integration, in N. De Costa Cabral, J. R. Gonçalves, N. Cunha Rodrigues, After Brexit, Consequences for the European Union, Cham, Palgrave Macmillan, 2017, Chapter 6, pp. 115-121.
[163] F. Fabbrini, Brexit and the Future of the European Union: The Case for Constitutional Reforms, Oxford, Oxford University Press, 2021, Chapter 6.
[164] The UK notified the European Union by formally invoking Article 50 TEU the legal mechanism under which a Member State may withdraw from the European Union.

negotiated between the parties[165]. Unable to break the deadlock on Brexit in Parliament, Prime Minister Theresa May resigned as leader of the Conservative party in June 2019. She was succeeded by Boris Johnson, who became prime minister in July 2019. After taking office, Prime Minister Johnson announced his intention to negotiate a new Withdrawal Agreement with the European Union. Johnson's main goal was to discard Northern Ireland's controversial backstop provision[166], which was the main reason the British Parliament repeatedly rejected the WA negotiated by Theresa May.

In October 2019, EU and UK negotiators concluded a new Withdrawal Agreement[167] with a renegotiated Protocol on Ireland and Northern Ireland aimed at maintaining an open border on the island of Ireland. Prime Minister Johnson continued to face challenges in securing approval of the agreement by the British Parliament. After taking office, Prime Minister Johnson announced his intention to negotiate a new Withdrawal Agreement. However, in an early election held on December 12, 2019, Johnson's Conservative Party won a decisive victory in the House of Commons (365 of 650 votes).

The Withdrawal Agreement replicated most of the main elements of the original agreement reached in November 2019 between the EU and the May government. The UK's Withdrawal from the Union on January 31, 2020, initiated a transition period and immediately propelled the two sides into new negotiations on the framework of its future relationship. After Covid-19, pandemic slowed negotiations, disagreeing on a number of issues. Among growing concerns that the transition period would end without an agreement on the future relationship, the

[165] see also D. E. Mick, *Brexit: Status and Outlook*, CRS Report R45944.
[166] The Northern Ireland backstop provision in the original Withdrawal Agreement concluded in November 2018 would have required the United Kingdom to remain in the EU customs union until the two sides agreed on their future trade relationship. Fearing negotiations with the EU could take as long as 5-10 years, many Members of Parliament strongly opposed the backstop arrangement, viewing its potentially curbing UK's sovereignty and limiting the UK's ability to conclude free trade deals. The purpose of the backstop was to prevent a hard border with customs and security checks on the island of Ireland and to ensure Brexit would not compromise the rules of the EU single market
[167] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 2019/C 384 I/01, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12019W%2FTXT%2802%29.

two sides announced on December 24, 2020, that they had entered into a Trade and Cooperation Agreement.

Many States have a broad interest in the Brexit. Brexit-related developments are likely to have implications for the global economy, US-UK political, economic, trade relations and transatlantic foreign policy and security cooperation. In 2018, the Trump administration formally notified Congress under the Trade Promotion Authority of its intention to initiate negotiations for a US-UK free trade agreement after the United Kingdom leaves the Union[168]. Congress may consider how the development of Brexit will affect the prospects for a potential agreement if President Joe Biden's administration continues negotiations and may consider implementing legislation for any final agreement[169].

2.3 Brexit and the Withdrawal Agreement

The Withdrawal Agreement[170], as a "divorce agreement", should have focused on dissolving the United Kingdom's membership in the European Union. This is what Article 50 of the Treaty on European Union required. Yet, as in a real divorce, ongoing ties remain after a long relationship is formally dissolved. For the EU-UK relationship, two areas are particularly important. First, the legitimate expectations of citizens who have moved to the EU or the UK relying on continuity of EU citizenship rights require special protection, which is assigned in Part II WA. Second, the Northern Ireland's hybridization needed to be protected. Although it was the Belfast Good Friday Agreement that allowed the territory to change allegiance from the United Kingdom to Ireland, and its inhabitants to identify themselves as British, Irish, neither, or both, this territorial and individual hybridity

[168] Office of the US Trade Representative (USTR), 'Trump Administration Announce Intent to Negotiate Trade Agreements with Japan, the European Union, and the United Kingdom', October 16, 2018.
[169] S. Akhtar, R. Fefer, B. Schwarzenberg, *Brexit and Outlook for a US-UK Free Trade Agreement*, CRS in Focus IF11123
[170] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the Economic Atomic Energy Community, 2020, IJ L29, changed by Decision No. 1/2020 of the Joint Committee of June 12, 2020, amending the Withdrawal Agreement, OJ L225, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020D1022.

rested on EU integration[171]. This challenge is addressed by the Ireland/Northern Ireland Protocol, attached to the WA. Because of these continuing links, implementation of the WA is a long-term feature of the EU-UK relationship, along with the Trade and Cooperation Agreement (TCA) of December 24, 2020, and any future pact between the EU and the UK[172].

The Agreement brings legal certainty where the UK's withdrawal from the EU created uncertainty. It includes six Parts in order to (a) guarantee for the rights of nearly three million European citizens residing in the UK and nearly one million Britons residing in the Union (Part II) ; (b) commit the UK to pay outstanding financial and budgetary commitments to the European Union, likely amounting more than 30 billion over the next three decades (Part V)[173]; and (c) include a transition period lasting until 2020, in which the UK must follow all rules governing the European Union's Single Market while the two sides negotiate their future relationship and implement the steps necessary to effect a separation (Part IV).

Part II is dedicated to citizens' rights: the WA applies to a) EU citizens who were residing in the UK and UK nationals who were residing in one of the 27 EU Member States at the end of the transition period, where such residence is in accordance with EU law on free movement; b) family members that are granted rights under EU law who do not yet live in the same host state as the EU citizen or the UK national will be able to join them in the future. The WA also protect children, wherever they are born, before or after the UK's withdrawal and frontier workers and frontier self-employed persons in the countries where they work[174]. EU citizens and UK nationals, as well as their family members can continue to live, work or study in their host country. The rights protected by the WA concern residency rights, social

[171] See J. Doyle, E. Connolly, *Brexit and the Northern Ireland Question*, in F. Fabbrini, *The Law and Politics of Brexit*, Oxford, Oxford University Press, 2017. On the notion of hybridity see D. Schiek, *Brexit on the Island of Ireland: Beyond Unique Circumstances*, 2018, Northern Ireland Legal Quarterly, Vol. 69, p. 367.
[172] S. Peers, D. Harvey, Brexit: The Legal Dimension, in C. Barnard, S. Peer, European Union Law, Oxford, Oxford University Press, 2017, Chapter 26, pp. 850-851.
[173] M. Keep, *Brexit: The Financial Settlement - In Detail*, House of Commons Library, December 30, 2020
[174] Withdrawal Agreement, Part II, Article 10, Personal scope of application

security, rights of workers[175] and self-employed persons[176] and the recognition of professional qualifications[177].

The WA holds out hope that some degree of EU integration can be maintained after Brexit: it not only preserves some EU citizenship rights and includes Northern Ireland in the EU's Internal Market for trade in goods, but also maintains directly effective rights and supranational models of conflict resolution. This contrasts with the TCA's ambition to undo decades of integration by abolishing direct rights, rebuilding barriers to trade except tariffs and quotas, and relying on negotiation, arbitration and retaliation as conflict resolution mechanisms. The implementation of Part II and the Protocol will thus provide a permanent site of struggle not only between its signatories, but also between the EU and the UK and their respective citizens.

2.4 Brexit and Northern Ireland Protocol

The Northern Ireland Protocol attached to the Withdrawal Agreement resolved the problematic issue of the trade border between the European Union and the United Kingdom paving the way for the finalization of the Trade and Cooperation Agreement. That a trade border was necessary to protect the integrity of the single market was accepted by both sides, and the purpose of the Protocol was to avoid the imposition of a hard border on the island on Ireland, which the Irish government argued would undermine the provisions of the 1988 Belfast Good Friday Peace Agreement[178]. Since the beginning of the Brexit negotiations, the Northern Ireland question has been a contentious issue, as the location of the trade border between Ireland and the United Kingdom is central to political divisions in Northern Ireland

[175] Withdrawal Agreement, Part II, Chapter 2, Article 24, Rights of workers
[176] Withdrawal Agreement, Part II, Chapter 2, Article 25, Rights of self-employed persons
[177] Withdrawal Agreement, Part II, Chapter 3, Article 27, Recognized professional qualifications.
[178] The Belfast Agreement is also known as the Good Friday Agreement, because it was reached on Good Friday, 10 April 1998. It was an agreement between the British and Irish governments, and most of the political parties in Northern Ireland, on how Northern Ireland should be governed. The talks leading to the Agreement addressed issues that had caused conflict during previous decades. The aim was to establish a new, devolved government for Northern Ireland in which unionists and nationalists would share power.

and Northern Ireland's relationship with Ireland. With the inclusion of the Protocol in the WA, these policy decisions are now part of the permanent institutional relationship between the EU and the UK, and because the framework of this new relationship still requires detailed negotiation in many areas, the Protocol will be one aspect of these negotiations. The dynamics of the ongoing political situation on the island of Ireland will be influenced not only by the negotiations over the EU-UK relationship, but also by the instability of the British political system in the form of growing demands for a radical constitutional change, including Scottish independence and a growing sympathy for Welsh separatism.

Northern Ireland's primary goal was to avoid a hard border on the island of Ireland that would have undermined the fragile stability of the 1988 Belfast Good Friday Agreement. The agreement on this Protocol was one of the most difficult aspects of the Brexit negotiations, it was opposed by the British government because of its inevitable impact on the internal politics of the United Kingdom, because of the repercussions it would have on Unionist opinion in Northern Ireland and the perceived weakening of the constitutional structure of the United Kingdom as a whole.

Internal conflict has been an old story in Ireland since 1921 when as a colonial power, the British government divided the Irish island after a violent conflict by agreeing to the creation of an independent state in the south of the island. The conflict in Northern Ireland was not resolved by the Good Friday Agreement in Belfast, as the key political difference between those who wanted Northern Ireland to remain a British territory and those who wanted it to be reunited with Ireland remains the fundamental political division.

The Agreement reorganized Northern Ireland as a contested territory with a binational identity and provided a framework in which democratic politics could function and political violence was virtually eliminated. Although the EU was not a significant player in the peace process, its institutional framework did support this

agreement. Key to this was the absence of a visible border on the island in the context of the Single Market[179].

Although not without its problems, the Agreement managed to create a fragile balance that facilitated greater cross-border integration and the subsequent appearance of normal life. This balance was disturbed by the Brexit debate, the referendum, and the negotiations that followed as on the island of Ireland the issue of the border and the relationship between the two parts of the island was inevitably part of the debate. What became clear during the Brexit negotiations was that the Belfast Good Friday Agreement, as an international agreement signed by Ireland, a Member State of the EU, had changed external perceptions of the UK's sovereignty over Northern Ireland. This was a very significant shift from the position that existed before the Agreement, when the absolute sovereignty of the UK state was internationally recognized. In the British public debate during the 2016 referendum and its immediate manifestations, the impact of Brexit on Northern Ireland was hardly mentioned[180].

The Irish government has been lobbying other EU Member States intensively since September 2016 about the negative impact a post-Brexit hard border would have on Ireland and the Northern Ireland peace process[181]. There was concern that Brexit would lead to a closed border, to the weakening of cross-border institutions that facilitated economic and social integration, to damage economic development on both sides of the island and disrupt the lives of the border community. There was also concern that the combination of the disruption of island-wide economic integration and the loss of EU subsidies would have a significant impact on Northern Ireland's weak economy, which, coupled with the failure of the peace

[179] J. Doyle, Brexit and the Northern Ireland Question, in F. Fabbrini, The Law and Politics of Brexit, Oxford, Oxford University Press, 2017, Chapter 7.
[180] In a major speech at Lancaster House, in January 2017, UK Prime Minister Theresa May ignored the question of Northern Ireland and referred only to the relationship between the UK and Ireland focusing on "the maintenance of the Common Travel Area within the Republic"
[181] Formal Government of Ireland Press Release on British strategy, 2 May 2017, referencing as priorities. The land-border, the common travel area with the UK and the peace process; see also European Council statement on Article 50 negotiation guidelines of 29. April 2017 which also include references to these three issues

process that a hard border would symbolize, would have serious consequences for political stability.

The Union endorsed the Irish government's position when on April 29, 2017, the European Council determined that the Union's guidelines for the Article 50 TEU negotiations would include the Irish border issue as one of three key issues to be addressed in the initial phase of negotiations[182]. The EU negotiating guidelines published in May 2017 explicitly stated that nothing in the final agreement with the United Kingdom should weaken the objectives and commitments set out in the Good Friday Agreement and that the negotiations should, in particular, aim to avoid the creation of a hard border on the island of Ireland, while respecting the Union's legal order[183].

In March 2018, the European Commission put forward a proposal for a Northern Ireland-only solution, requiring customs declarations and controls on goods entering Northern Ireland from Britain, so that they could then enter Ireland and the EU without further controls. The British government led by Theresa May initially rejected this position and later that year a different solution was considered, the backstop, allowing the entire UK to remain in effect inside the Single Market. However, that solution was rejected on three occasions by the UK Parliament[184], with Ireland's Unionists joining those who voted to reject it. As a result, in October 2019, Britain's new PM Johnson prioritized leaving the Single Market and approved the Northern Ireland Protocol.

2.4.1 Content of the Protocol: a) Rights of Individuals and Common Travel Area

[182] European Council, *European Council Article 50 Guidelines for Brexit Negotiations*, European Council Press Release, 29 April 2017, XT 20004/17, available at: https://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf.
[183] Council of the European Union, *Directives for the Negotiation of an Agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its Withdrawal from the European Union*, European Commission, 22 May 2017, XT 21016/17, available at: https://www.consilium.europa.eu/media/21766/directives-for-the-negotiation-xt21016-ad01re02en17.pdf.
[184] E. Connolly, J. Doyle, *Brexit and the Irish Border*, 2019, European Journal of Legal studies, Vol. 11, p. 153.

The Protocol's Articles 2 and 3 constitute a symbolic nod to the relevance of individual rights and movement of persons for the Belfast Good Friday Agreement. The UK must ensure that there is no diminution of rights, guarantees, or equal opportunities as set out in the Withdrawal Agreement by facilitating the activities of institutions that uphold human rights standards[185] and the UK and Ireland can continue the Common Travel Area (CTA)[186], while it is again the UK that must ensure that any consequence of the CTA does not conflict with Ireland's obligations under EU Law. Article 2 is misleadingly drafted because the UK's withdrawal from the EU must lead to a diminution of citizens in Northern Ireland and will also impact rights to cross-border economic and civil activities. The UK's obligations under Article 2 are primarily limited to maintaining legislation implementing EU anti-discrimination law, as well as facilitating the work of the human rights institutions created by the Belfast Good Friday Agreement. In relation to Article 3 of the Protocol and Ireland's explicit authorization to treat UK nationals, i.e., third-country nationals, more favorably than EU nationals from other Member States in Article 18 of the WA, there remains a risk that the WA may be challenged legally because such discrimination against EU nationals has not been accepted in the past.

2.4.2 b) Northern Ireland's Place between Two Internal Markets

Under the Northern Ireland Protocol, the territory of Northern Ireland remains subject to the rules of the Single Market and the EU Customs Union and therefore goods moving from Great Britain to Northern Ireland must be checked to ensure that they meet EU standards and EU rules of origin, so that they can cross the Irish land border and be released for free trade into the Union without further controls.

It is the most contentious part of the Protocol and ensures that Northern Ireland retains access to the EU Internal Market for goods and applies the EU Custom Code[187], while the UK remains free to allow "free access" of Northern Irish

[185] Protocol on Northern Ireland, Article 2, Rights of Individuals.
[186] Protocol on Northern Ireland, Article 3, Common Travel Area.
[187] Northern Ireland Protocol, Article 5, Customs and movement of goods.

products to the UK market[188]. Northern Ireland also applies the technical regulations[189], the Union's VAT system[190], and the State aid regime[191]. This leads to the claim that the Protocol "undermines the British domestic market". Thus, the controls required by the Union Customs Code for the composition of goods, as well as their compliance with central regulatory regime must be conducted for goods flowing from Great Britain to Northern Ireland. Although goods remaining in Northern Ireland are exempted[192], the need for separate cargo and other formalities could lead to products being restocked from Northern Ireland or Ireland. The detailed provisions of the Protocol itself and Annexes 2-6 make much of the UK's implementation a quasi-automatic process with limited room for discretion.

The high level of support for Northern Ireland Protocol on the island and internationally would also have been accorded to any negotiated solution that met the criterion of not weakening the Belfast Good Friday Agreement and avoided a hard land border on the island. However, in the absence of a viable alternative, the manner in which the United Kingdom implements the Northern Ireland Protocol will be a key deterrent to its future relationship with the European Union even under the Trade and Cooperation Agreement.

2.4.3 USA Position Towards UK and the Role of the Protocol

The Protocol will also be an aspect of the UK government's relationship with the US administration that will in turn impact on its relationship with the EU. Nancy Pelosi, speaker of the House of Representatives made it clear that "*If the Brexit deal undermines the Good Friday Agreement, there will be no US-UK Trade deal*[193]".

[188] Northern Ireland Protocol, Article 4, Customs territory of the United Kingdom and Article 6, Protection of the UK Internal Market.
[189] Northern Ireland Protocol, Article 7, Technical regulations, assessments, registrations, certificates, approvals and authorizations.
[190] Northern Ireland Protocol, Article 8, VAT and excise.
[191] Northern Ireland Protocol, Article 10, State aid.
[192] Northern Ireland Protocol, Article 5(2), Customs and movement of goods.
[193] N. Pelosi, 17 April 2019, Financial Times and she repeated the same view later on 14 August 2019, Irish Times.

This support was enhanced by Joe Biden's election as President of the United States of America in 2020. During the campaign he stated: "*We cannot allow the Good Friday Agreement that brought peace to Northern Ireland to become a casualty of Brexit. Any trade deal between the US and UK must be contingent upon respect for the Agreement and preventing the return of a hard border period*[194]". If the new US administration continues to believe that any action by the UK government that jeopardizes the Good Friday Agreement will negatively impact a future US-UK trade deal, this will increase the cost to the UK of withdrawing from the Agreement with the European Union and strengthen the likelihood that the Protocol will continue to be implemented. However, the way in which the UK chooses to implement the Protocol, increased political opposition from the Unionist community, or negative impacts of EU-UK disputes in other areas are all likely to make implementation problematic, as the first months of the Protocol's operation demonstrated.

This poses serious concerns because the UK is a major US trade and economic partner. Given their scope, size, economic and political significance, US-UK trade relations are of congressional interests. In 2020, the UK was the United States' seventh-largest goods trading partner by country, and its largest services trading partner. The UK comprised 5% of total US trade and the United States was nearly one-fifth of total UK trade[195]. The United States and the UK historically have been leading forces for global trade liberalization. Their trading relationship is relatively open, but some tariff and non-tariff barriers remain. While their trade policies are aligned on many fronts, frictions emerge periodically on specific issues, such as on tariffs during the Trump Administration. President Biden has "conveyed his intention to strengthen the UK-US special relationship and revitalize transatlantic ties". The two countries signed a "New Atlantic Charter" in 2021 that emphasizes "open and fair trade".

[194] Joe Biden Twitter account during campaign, https://twitter.com/joebiden/status/1306334039557586944?lang.

[195] According to US Bureau of Economic Analysis (BEA) and the UK Office for National Statistics (ONS), in 2021, total US goods trade with the UK was $118 billion. This exceeded the 2020 level.

Brexit opened the possibility of a US-UK Free Trade Agreement (FTA). The Biden Administration has been reviewing the bilateral trade negotiations that occurred during the Trump Administration under the latest Trade Promotion Authority. The two countries have held five negotiation rounds in 2020 but did not reach a final FTA. For the UK, a trade deal with the United States has been a major priority to showcase its post-Brexit competitiveness. Some experts are optimistic about the success of any future US-UK FTA negotiations, given historical similarities in US and UK trade approaches, but flashpoints could reemerge in such talks. Many in US industry see an FTA as a way to enhance market access and regulatory alignment. The Congress may continue to monitor US trade and economic interests at stake in the TCA's implementation. They also may consider whether to press the Administration to continue the prioritize resolving specific trade issues, and/or renew broader US-UK FTA negotiations. Many in Congress and in US industry support a US-UK FTA. Many Members tie their support to ensuring that Brexit outcomes, as I said before, do not undermine the Northern Ireland peace process[196].

2.4.4 Concluding Remarks

Deep division in Northern Ireland over its constitutional status will remain a source of friction in EU-UK relations. While the Trade and Cooperation Agreement established a new framework for EU-UK relationship, the politically problematic nature of the Northern Ireland Protocol attached to the Withdrawal Agreement means that its implementation will go beyond trade regulation. It could be a potentially dangerous strategy, as the TCA, which shapes the relationship between the EU and the UK, is still subject to detailed negotiations across a range of issues. In these circumstances, the Northern Ireland Protocol is not an historic episode that has been resolved; it is an integral part of the EU-UK relationship and will be an ongoing issue in these negotiations. As a mechanism to regulate trade across the EU-UK border, the Protocol can be used by either side as a mean of dealing with disputes. Brexit broke the fragile political balance that was put in place by the Belfast Good Friday Agreement, and while the Protocol preserves the integrity of

[196] S. I. Akhtar, US-UK Trade Relations, February 17, 2022, Congressional Research Service.

that Agreement, the debate on Brexit and the process of the negotiation of the TCA have both deepened and shifted political cleavages in Northern Ireland. Even if the Protocol can function smoothly and without disputes, the clock cannot be reset, and politically the island of Ireland is a different place in 2021 compared to 2016, prior to the Brexit referendum. Constitutional change and a possible referendum on Irish unity are now a significant political demand in a way they were not in 2015. Irish unity also allows Northern Ireland automatically to re-enter the EU.

The implementation of the Protocol of Northern Ireland indicates a heightened potential for struggle and disruption in the relationship between the EU and the UK throughout this process. The question is what the permanent friction to be expected, entail for the credibility of the WA, the continued relationship between the EU and the UK and whether they ultimately endanger or support the constitutional quality of EU law as such. Full answers for these questions will have to wait until more experience with WA implementation has been gained. However, the critical analysis of the implementation so far allows some cautious conclusions. There are some frictions that need to be overcome outside of Protocol enforcement. Oversight and enforcement are much more efficient when it comes to the transportation of goods than the rights of citizens. Some of the frictions related to citizens' rights can be mitigated by unilateral action by EU Member States. The situation of EU citizens in the UK will worsen and will require a sustained effort to secure their rights. However, the UK in particular will need to be reminded that the rights of EU citizens should not be neglected. Some aspects of the Protocol will need further development. For example, the criticism that the Protocol fragments the EU Internal Market by opening only the goods partition for Northern Ireland is fully justified. The expansive application of Article 11 of the Protocol, allowing for the extension of its substantive coverage through amendments to the WA, may be a first step in achieving this goal. Ultimately, this would create a permanent relationship between the EU and the UK in relation to Northern Ireland that goes beyond the mandate of a WA. To avoid legal challenges, it would be advisable to place this on the basis of a separate treaty.

2.5 Brexit and Trade: Perspectives on a New Partnership

During the transition period, UK and European Union have engaged in complex negotiations about the future relationship between the UK and the EU, ended in the Trade and Cooperation Agreement. In line with the Political Declaration[197] accompanying the Withdrawal Agreement, the two sides have sought to discuss "an ambitious, broad, deep and flexible partnership" focused on trade and economic relations that also includes "wider areas of cooperation". The Brexit introduced significant changes to the trade and investment relationship between the UK and the European Union, previously anchored by the UK's participation in the European Union's Customs Union and Single Market and the European Union's exclusive responsibility for trade policy outside the EU.

The signature of the Trade and Cooperation Agreement and its parliamentary ratification through the EU's Future Partnership Act 2020[198] represent the dawn of this new cycle in the history of this relationship. The issues at stake are varied and complex. The focus is on the implications of the wording with which the Political Declaration[199], setting out the framework for the future relationship between the EU and the UK, signed in October 2019, defined the economic and legal prospects of the future relationship: separate markets and separate legal orders.

Separate markets mean that the search for identity will have to be transformed from a moral idea to an economic issue. It is important to analyze how legal systems will provide the regulatory framework for separate markets, to understand the effects of mutual influences and the intellectual debt that each view owes to the other. The hypothesis can be tested by looking beyond the awkwardness of the Brexit process and asking contemporary legal minds whether "an institutional culture can help to

[197] Political Declaration, 19.10.2019, *Political declaration on setting out the framework for the future relationship between the European Union and the United Kingdom* 2019/C 384 I/02 (2019), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12019W%2FDCL%2801%29.
[198] UK Government, 31.12.2020, EU Future Relationship Act, The European Union Future Relationship Act 2020, Commencement No. 1, Regulations 2020
[199] see note 60.

look to the future of a shared past[200]". Looking at the intellectual legacy, a classic study of parliamentary government in England notes that "every period of rapid social change faces the danger that its legal habits may not keep pace with the political decisions it must interpret[201]". The relationship between the two domestic markets, the English and the European, will live on and develop. A key issue is the new Treaty signed on Christmas Eve 2020, a new Free Trade Agreement between the UK and the EU which includes the regulation of future trade relations between the two powers[202].

2.6 Brexit and Trade: Trade and Cooperation Agreement

As of January 1, 2021, the relationship between the European Union (EU) and the United Kingdom (UK) will be based on a new framework, characterized by a sharper detachment of the UK from the EU ecosystem. Following its withdrawal from the EU on January 31, 2020, and during the 11-month transition period established by the Withdrawal Agreement, the UK negotiated a new treaty with the EU, the Trade and Cooperation Agreement[203], provisionally applicable as of January 1, 2021, and fully in force as of May 1, 2021. This Agreement culminates a process that lasted throughout the 2020s and faced unprecedented challenges, not least due to the outbreak of the Covid -19 pandemic. As negotiations on this new Agreement have been intertwined with disputes over the faithful implementation of the WA, talks between the EU and the UK have been on the brink of breaking down at several points. However, exogenous and endogenous factors finally pushed the parties to avoid a damaging no deal, and they eventually signed the TCA just eight days before the end of the transition period on December 31, 2020. The new framework for EU-UK relations is the latest phase in the Brexit story. After all, while the June 23, 2016, referendum in which the United Kingdom voted to leave

[200] G. Galasso, in G. Amato, E. Moavero Milanesi, G. Pasquino, L. Reichlin, *The History of the European Union: Constructing Utopia*, London, Hart Publishing, 2019
[201] H. J. Laski, *Parliamentary Government in England*, Allen & Unwin, London, 1938
[202] P. B. Whyman, A. I. Petrescu, The Economics of Brexit, Cham, Palgrave Macmillan, 2020, pp. 77-103.
[203] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community and the United Kingdom, OJ L 149/10

the EU was a historic event, what followed can only be characterized as a historic process.

While the terms of future EU-UK cooperation had been broadly outlined in a non-binding Political Declaration[204] attached to the WA, agreeing on the details of the future relationship proved extremely complex. Indeed, while the political declaration had envisioned a broad and comprehensive EU-UK partnership, the TCA in the end is a rather thin agreement that leaves out many economic and security issues: the TCA covers free trade in goods and cooperation in justice and home affairs, but, for example, does not include a passport for financial services, mobility of persons, or coordination in foreign affairs and defense.

The framework for the new EU-UK relationship confirms that Brexit continues to be driven by law and politics and that the process is far from reaching the end of the game. The UK's political desires to assert EU sovereignty and legal constraints on what could be agreed upon have profoundly shaped the negotiation from WA to TCA, and its outcome. At the same time, if the TCA opens a new phase in EU-UK cooperation, it is unlikely to provide a stable solution not only because the TCA still creates new transition periods in specific policy areas, but also because, by excluding important areas from its scope, it requires new EU-UK sectoral agreements in the near future. Otherwise, since the end of the transition period, EU-UK relations have also been affected by the full implementation of the Ireland/Northern Ireland Protocol attached to the WA, which quickly proved to be highly controversial.

The EU mandate for negotiating the Trade and Cooperation Agreement (TCA) between the EU and the UK sketched “an ambitious, broad, deep and flexible partnership across trade and economic cooperation with a comprehensive and balanced Free Trade Agreement at its core, law enforcement and criminal justice,

[204] Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, OJ 2020 C 34/01.

foreign policy, security and defense and wider areas of cooperation[205]". The Trade and Cooperation Agreement despite its similarity to other preferential free trade agreements concluded by the European Union with other trading partners, represents a peculiarity in the regulation of the Union's trade relations with a third country. For the first time in history, provisions modeled on trade liberalization agreements are used to establish and manage a less open regime[206].

2.6.1 Basic Features of the EU/UK Trade in Goods Regime in the Trade and Cooperation Agreement

The TCA is something new in the world of Free Trade Agreements. The formal similarity to the types of preferential agreements the EU has signed with other trading partners can be misleading, especially given the UK's granitic belief that an uncritical transposition of the same provisions negotiated by the EU and Canada was not only possible but also beneficial to a Member State leaving the EU[207]. According to Article 514 of the TCA, the free trade area is established by the parties "in accordance with Article XXIV of the GATT[208] and Article V of the GATS[209]". Article XXIV is explicit in allowing the establishment of free trade zones if it means increasing freedom of trade[210]. The purpose of free trade agreements concluded under the GATT umbrella is to facilitate trade and develop closer integration between the economies of the States parties to those agreements. As a result, FTAs are usually concluded between parties eager to open their respective markets and

[205] Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom 2019/C 384 I/02 (2019) available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1592316528275&uri=CELEX%3A12019W/DCL%2801%29.
[206] C. Eckes, P. Leino-Sandberg, *The EU-UK Trade and Cooperation Agreement - Exceptional Circumstances or a New Paradigm for EU External Relations*, 2021, The Modern Law Review, Vol. 85, No. 1, pp. 164-197.
[207] As to the EU, the legal basis of the TCA is article 217 TFEU (on EU-only association agreements), while the CETA with Canada is a mixed agreement based on Article 207 TFEU.
[208] General Agreement on Tariffs and Trade, Geneva, July 1986.
[209] General Agreement on Trade in Services, 1995.
[210] Article XXIV of GATT, para 4 reads as follows: "The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories".

remove barriers more than allowed by WTO rules. The success of free trade agreements has been measured in the terms of trade flows. In 2019 the development of trade between the European Union and its main preferential trading partners resulted in an EU trade surplus of €113 billion, a 12 percent increase over the previous year's surplus[211]. Exceptionally, Brexit is a reverse process designed to end open and liberal trade relationships rather than create them and to erect barriers to trade rather than remove them. This is especially true because the United Kingdom prioritized sovereignty over market access in the negotiations. The starting point for the economic relationship between the UK and the 27 EU Member States at the time the TCA came into force was the single market and a customs union, the deepest form of integration of national economies in the world. This is the first time that provisions designed to maximize trade liberalization have been used to establish and operate a less open regime. The move from a customs union to a free trade zone was expected to have negative effects on trade flows between the parties, as the first few months of implementation of the Agreement have confirmed[212].

The red tape and border controls that have affected unsuspecting traders and exporters, especially in the UK, since January 1, 2021, confirm the well-known fact that standards, certifications, controls and rules of origin are currently the real obstacles to trade, far more than customs duties: the absence of the latter does not in itself guarantee an unimpeded flow of goods across borders. The success of the TCA will be measured in terms of trade flows, in the sense of its ability to avoid disruption and a drastic drop in the current exchange of imports and exports between the parties. Another peculiarity of the new EU-UK trade system is that a part of the UK territory, Northern Ireland, is under a different regime of trade in goods, regulated in the Withdrawal Agreement by the Ireland/Norther Ireland

[211] Commission, Report to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Implementation of EU Trade Agreements: 1 January 2019-31 December 2019, COM(2020) 705 final, 6, available at: https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2020)705&lang=en.
[212] P. Foster, J. Evans, D. Thomas, *Brexit One Month On: What Has Changed?*, Financial Times, 31 January 2021.

Protocol[213], so outside the TCA. The compromise reached by the UK and the EU in the Withdrawal Agreement keeps Northern Ireland in the EU goods market even though it is part of the UK's single customs territory. The consequence of this unusual solution is the application of two customs regimes in Northern Ireland: goods entering Northern Ireland for domestic use are subject to the UK tariffs regime; any good imported into Northern Ireland, including from Great Britain, that are at risk of later being transferred to the Republic of Ireland or the rest of the EU must undergo EU standards certification.

In order to avoid border controls within the island of Ireland, British authorities are charged with enforcing post-Brexit Northern Ireland customs rules for goods transported by sea between Northern Ireland and the rest of the United Kingdom, thus establishing a de facto custom of sorts within a sovereign State[214]. Leaving aside concerns about the implementation of such a complex regime, from a purely legal perspective many questions arise about how these regimes will interact and affect each other. Suffice it to say that while the TCA in principle does not produce direct effect, the Withdrawal Agreement in its entirety, including the Northern Ireland Protocol is explicitly capable of direct effect, according to Article 4[215]. In addition, according to the same Articles all provisions contained in the Withdrawal Agreement that refer to EU law must be interpreted in accordance with rulings of the Court of Justice rendered before December 31, 2020.

In any event, the provisions of the Northern Ireland Protocol that refer to EU law must be interpreted in accordance with all relevant ECJ case law, including post-withdrawal case law. In contrast, Article 4(3) of the TCA clearly states that the

[213] P. Mariani, G. Sacerdoti, *The Negotiations on the Future Trade Relations* in F. Fabbrini, *The Law and Politics of Brexit, Volume II: The Withdrawal Agreemen*t, Oxford, Oxford University Press, 2020 p. 212 ff.
[214] C. Harvey, *The Irish Border* in F. Fabbrini, *The Law and Politics of Brexit, Volume II: The Withdrawal Agreement*, Oxford, Oxford University Press, 2020, pp. 158 ff.
[215] Article 4 of the Withdrawal Agreement on methods and principles relating to the effect, the implementation and the application of this Agreement reads as follow: "The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States. Accordingly, legal, or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law".

interpretation of the Agreement "given by the courts of either party shall not be binding on the courts of the other party[216]". Finally, the TCA left many of the details of the new EU-UK relationship to be further determined by the Partnership Council or the various joint committees and working groups established by the TCA. In this sense, the UK-EU TCA contains several provisions covering commitments to further negotiations: the TCA is a "work in progress", the beginning of a process.

Whether it will be cooperative or fragile will depend on the goodwill and interest of the parties. A network of committees and working groups established by the TCA are charged with review and consultation procedures to maintain dialogue between the parties. Although this feature is relatively common in trade agreements, the TCA stands out for its extensive use of this tool. In fact, in addition to the Partnership Council, Article 8 of the TCA establishes six thematic committees[217] for trade in goods. All these committees are based on equal representation of the parties and require the consensus of both to reach a decision. Each of these committees has the power to monitor and ensure the proper functioning of the Agreement with regard to issues related to their area of expertise.

[216] A. Lazowski, *Mind the Fog, Stand Cleat of the Cliff! From the Political Declaration to the Post-Brexit EU-UK Legal Framework — Part 1*, 2020, European Papers, Vol. 5, No. 3, p. 1125.

[217] The list comprises the Trade Specialized Committee on Goods, the Trade Specialized Committee on Customs Cooperation and Rules of Origin; the Trade Specialized Committee on Sanitary and Phytosanitary Measures; the Trade Specialized Committee on Technical Barriers to Trade; the Trade Specialized Committee on Level Playing Field for Open and Fair Competition and Sustainable Development; and the Trade Specialized Committee on Administrative Cooperation in VAT and Recovery of Taxes and Duties

Chapter III – Trade and Cooperation Agreement: EU-UK Trade Relations, Institutional and Governance Structures

3.1 Preliminary Remarks

The slim Canadian-style free trade agreement, the Trade and Cooperation Agreement[218] between the European Union and the United Kingdom, after 10 months of contentious negotiations and on the brink of the end of the transition period, marks the beginning of the Union's new trading relationship with the United Kingdom[219], which finally became a full-fledged third country to the Union on January 1, 2021.

In this Chapter, it will be carried out the analysis of the provisions in comparison with the rules that derive from the WTO, to which the EU and the UK are both parties. It is important to analyze it under the lens of the WTO model because the TCA is a treaty built along the lines of the FTAs in the WTO regulatory space. Then it will be analyzed the issues from the overall reading of the provisions and from the course of negotiations that proved and prove to be the most critical and problematic aspects, including the controversial issue on the role in the European Union Internal Market of Northern Ireland.

[218] It was signed on December 24, 2020, intended to apply provisionally after the end of the Brexit transition period on December 31, 2020. The TCA before formally entering into force, awaited ratification by the UK Parliament, the European Parliament, and the Council of the European Union. The UK House of Commons approved the Agreement on December 30, 2020, while the European Parliament and the Council approved the Agreement on April 27 and 29, 2020, respectively. It entered into force at the end of the period of provisional application on May 1, 2021.

[219] As for the territorial scope of the Agreement, it applies to the territory of the United Kingdom and the European Union. It does not apply to Gibraltar, which was also part of the Union, but for which a separate negotiation is being conducted between the United Kingdom, Spain, and the EU. The agreement applies to the Isle of Man, Guernsey, and Jersey (which have given their consent) regarding trade in goods and fishing. With respect to Northern Ireland, the provisions on trade in goods do not apply, as those (as well as provisions on application of EU law in that area and involvement of the European Court of Justice) are governed by a protocol to the Withdrawal Agreement. See European Commission, "*Questions and answers: EU-UK Trade and Cooperation Agreement*", December 24, 2020.

Commentators note that the Trade and Cooperation Agreement[220] reflects the British government's priority of reclaiming sovereignty[221] over maintaining economic integration with the European Union. The Agreement meets several goals promoted by Brexit supporters[222].

First, the ending of the free movement of people. Maintaining closer ties to the EU's Single Market would likely have required the UK to continue to grant EU citizens the right to enter, reside and work freely in the UK. Mutual treatment of Member States' citizens is one of the fundamental principles of the European Union. The British government felt that ending the free movement of people was essential to regaining sovereignty over immigration policy. Under the Trade and Cooperation Agreement, certain rights guarantees apply to those with pre-existing residency status, and EU citizens can continue to apply for residency in the United Kingdom. Second, freedom from European rules. Although the UK has agreed to maintain the principles of the level playing field, entirely exiting the EU's Single Market and customs union frees the UK to set its own national regulations and conduct its own national trade policy. The UK can choose to exit the Union to regain sovereignty over its trade policy but doing so it could have consequences for UK-EU trade and economic relations, potentially including the imposition of tariffs by the EU. Third, freedom from EU courts. With the end of the transition period, most decision-making in the UK is no longer subject to the case-law of the Court of Justice of the European Union[223]. A UK-EU Partnership Council[224] oversees the operation of the TCA with decisions made by mutual agreement and an independent arbitration tribunal managing dispute resolutions. The European Courts have no role in the Trade and Cooperation Agreement disputes. However, failure to comply with an arbitral decision could result in economic retaliation or partial suspension of the

[220] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community and the United Kingdom of Great Britain and Northern Ireland, OJ 149/10, 30.4.2021, pp. 10-2539.
[221] For an overview on the sovereignty question and on its role in the EU-UK relationship see Chapter II, para. 2.1.
[222] C. Grant, *Ten Reflections on a Sovereignty-First Brexit*, Centre for European Reform, December 28, 2020.
[223] On the dispute mechanisms settlement in the TCA see further paragraph 3.10.
[224] Trade and Cooperation Agreement, Part I, Title III, Article 7, Partnership Council.

Agreement. Despite all this, the United Kingdom is not entirely free from the Court of Justice of the European Union. The Court retains jurisdiction over the interpretation and application of the operational elements of the Withdrawal Agreement, including citizens' rights issues and the Ireland/Northern Ireland Protocol[225]. The CJEU also retains jurisdiction over any case pending before the end of the transition period, including appeals, and the TCA four years from the end of the transition period to bring claims against the UK for offenses alleged to have occurred during the transition period[226].

3.2 Analysis of the TCA: Trade in Goods Provisions

The rationale for the TCA is clear from the outset: to manage divergence rather than promote convergence[227]. Generally, by removing tariffs and restrictions, free trade agreements seek to promote trade by establishing harmonization mechanisms and encouraging convergent approaches to future regulation. Overturning this logical order, the goal of the TCA depicts a fundamentally different situation: to guide how jurisdictions whose rules are largely harmonized and whose markets are deeply integrated will diverge in the future[228]. It is worth remarking on the highly unusual nature of the Brexit negotiations. As Pascal Lamy observed in January 2020, the EU-UK Trade and Cooperation Agreement (TCA), which is essentially a zero-tariff

[225] On the role of the Court of Justice of the European Union in the aftermath of Brexit see further paragraph 3.10.2.
[226] S. De Mars, *Brexit Next Steps: The Court of Justice of the EU and the UK*, House of Commons Library, February 7, 2020.
[227] The EU-UK Trade Agreement Explained – European Commission DG Trade, January 1, 2021.
[228] It is 50 years since both parties did the opposite thing. When the UK was negotiating whether to join what was then the European Economic Community (EEC), the two parties started off with barriers and then discussed how to remove them. There was much analysis of whether the trade-creation effects of the UK joining the EEC might be overwhelmed by trade diversion, lowering economic welfare in UK. The analysis of James Meade, and before him Jacob Viner, showed that this might be possible, a demonstration which initiated what has become known as the general theory of the second best. And when the UK joined the EEC, there was undoubtedly trade creation in industrial products, but there was also clear trade diversion because of joining a protectionist Common Agricultural Policy. Nevertheless, these static gains and losses were almost certainly swamped by the dynamic effects of economies of scale, and the benefits of greater competition, things which have emerged with the creation of the Single European Market (SEM) of the European Union.

free trade agreement, resulted from "the first negotiation in history where both parties started off with free trade and discussed what barriers to erect[229]."

The Chapter on trade in goods consists of 107 articles out of the 783 articles in the main body of the TCA[230]. The Chapter contains the substantive legal provisions with operative details incorporated into several annexes on medicines, vehicle parts, organics, wines, chemicals and agreed standards. The TCA's Chapter on goods covers all traditional trade policy issues: tariff reductions, elimination of quantitative restrictions, trade-related issues such as avoiding technical barriers, fair and equitable domestic regulation, actions against unfair subsidies, measures concerning animal and plant health, trade facilitation in the form of customs and administrative cooperation, and government procurement. The UK and EU have agreed not to apply tariffs or quotas on goods traded between them. The decision of the UK to prioritize sovereignty and regulatory autonomy over access to the EU market has made leaving the customs union and opting for a free trade area inevitable[231].

Trade in goods is governed by Title I of Heading One of Part II of the TCA. The Title is further divided into thematic chapters: Chapter I covers national treatment and market access for goods, including trade remedies; Chapter II covers rules of origin (RoO); Chapter III, sanitary and phytosanitary measures (SPS); Chapter IV, technical barriers to trade (TBT); and Chapter V, customs, and trade facilitation. The chapter titles are closely reminiscent of the various WTO agreements: the WTO

[229] Pascal Lamy, interviewed by *The Week in Westminster*, BBC, 1 February 2020.
[230] As outlined in Chapter I, para. 1.6.4 The Trade and Cooperation Agreement, the TCA is structured into seven parts:
Part 1 covers the common and institutional provisions in the Agreement.
Part 2 covers trade and other economic aspects of the relationship, such as aviation, energy, road transport and social security.
Part 3 covers cooperation on law enforcement and judicial cooperation in criminal matters.
Part 4 covers so-called "thematic" issues, notably health and cybersecurity collaboration.
Part 5 covers participation in Union programmes, sound financial management and financial provisions.
Part 6 covers dispute settlement and horizontal provisions.
Part 7 sets out final provisions.
[231] In the traditional dichotomy of customs union/free trade area, as defined by Article XXIV of the GATT, only customs unions in which the member states adopt a common external tariff eliminate the necessity of reciprocal border controls on the origin of goods.

Agreement on Rules of Origin, the Agreement on the Application of Sanitary and Phytosanitary Measures. A similar structure for trade in goods was provided in both the UK and EU draft proposals for a free trade agreement.

The Chapter headings in Title I already indicate that the trade in goods chapter governed by the TCA is essentially different from the free movement of goods regime under EU law. While under EU law, tariffs and quotas on EU-UK trade are prohibited (the so-called zero-zero Agreement)[232], unlike under EU law, regulatory restrictions (i.e., measures of equivalent effect)[233] are not. As a result, there is no free movement of goods between the UK and the EU imported goods must undergo regulatory control at the border. In addition, goods originating in third countries imported into the EU through the UK must comply with the appropriate and complex rules of origin. All goods, including those originating in the UK, must undergo a complex origin examination to verify their origin and apply the proper tariff, a zero tariff for British goods and a special tariff for foreign goods. Given that trade in goods under the TCA shows little, if any, resemblance to the free movement of goods regime under EU law[234], the question then is: how liberal is the EU-UK Agreement? Indeed, it is easy to see that the TCA is heavily modelled on the WTO framework and is not a scaled-down version of the EU's rules on the free movement of goods. From a political perspective, this shift to a "WTO plus" approach is because the UK government felt that the Brexit vote gave the green light to a complete break with EU rules. On the other hand, from a legal perspective, the movement of goods between the UK and the Union is covered by the Title on Trade, which is part of a free trade agreement, not part of the single market, with all the consequences that come with this shift.

[232] Trade and Cooperation Agreement, Part Two, Heading One, Title I, Chapter 1, Articles 21 and 26. Article 21 prohibits customs duties on all goods originating in the other Party; Article 26 prohibits import and export restrictions.
[233] The Trade and Cooperation Agreement does not contain a provision such as Article 34 or 35 TFEU which also prohibit measures having equivalent effect to quantitative restrictions on imports and on exports.
[234] C. Barnard, E. Leinarte, *Movement of Goods under the TCA*, April 29, 2021, Global Policy, Vol. 13, Issue No. 2, pp. 106-118.

As far as the legal basis of the agreements in EU law is concerned, the TCA is based on Article 217 of the Treaty on the Functioning of the European Union (TFEU)[235] which concerns association agreements and is used as the substantive legal basis in conjunction with the procedural legal basis of Article 218, paragraphs 6, 7 and 8 TFEU[236]. Still, on the subject of the conclusion of agreements, it should also be pointed out that the Council[237] , accepting the proposal put forward by the European Commission, in line with the case-law of the Court of Justice[238], has considered that they concern matters of exclusive competence of the Union or shared competence of the Union and the Member States and do not affect the competence reserved to the latter[239]. Making, therefore, a clear political choice, it has opted for the conclusion of the Agreement at the level of the Union only, according to the "*EU only*" formula[240], excluding the mixed agreement, which would have required, instead, the ratification of the 27 Member States, subject to the authorization of the national parliaments and, in some systems, also of the regional ones, according to their respective constitutional rules[241].

3.2.1 Principle of Non-Discrimination

This paragraph will examine the TCA provisions and their underlying principles in light of EU Internal Market principles and the WTO system. It is crucial to this

[235] In the case of free trade agreements, such as the one with Canada, it has been referred to Article 207 TFEU.
[236] These rules entrust the Council with the power to adopt the decision on the signing and provisional application of the agreements, but at the same time allow it to empower the negotiator (in this case the European Commission) to approve, on behalf of the Union, the amendments to the agreements when, as in the present case, the latter provide for them to be adopted by a simplified procedure or by the Partnership Council established by the agreements themselves. Final entry into force requires a further decision by the Council, after approval by the European Parliament.
[237] See *The Brexit Deal,* Council Legal Service Opinion, in EU Law Analysis, January 27, 2021.
[238] Court's Opinion 2/15 of 16 May 2017, on the draft Free Trade Agreement between the European Union and the Republic of Singapore, OJ C, C/239.
[239] C. Curti Gialdino, *Prime Considerazioni sugli Accordi concernenti le future relazioni tra il Regno Unito e l'Unione Europea*, Federalismi.it, Vol. 4/2021, pp. VI-VIII.
[240] D. Kleimann, *The Legitimacy of "EU-only" Preferential Trade Agreements*, in M. Hann, G. Van der Loo, *Law and Practice of the Common Commercial Policy*, Brill, 2020, Studies in EU External Relations, Vol. 18, pp. 461-485.
[241] In its legal form, the TCA was concluded as an association agreement under Article 217 TFEU, however, due to the similarity of the TCA's trade chapters to free trade agreements, the TCA is typically analyzed to comparing its trade rules with those under free trade agreements.

analysis due to the TCA's uniqueness in the free trade agreements panorama concluded under the WTO legal framework[242].

• The EU Approach

The role of the principle of non-discrimination in international economic law varies in different economic cooperation frameworks. On the one hand, the EU Treaties, as interpreted by the Court in the *Dassonville* case and *Cassis de Dijon* on mutual recognition[243] prohibit any restriction on the free movement of goods unless one of the exceptions, the so-called market access approach, applies. Subsequent case law suggests that Article 34 TFEU only prohibits measures that directly or indirectly discriminate against imported goods. However, the criticism remained that the *Dassonville* formula was potentially so broad as to mean that Article 34 TFEU could be used to challenge national rules that circumscribe general commercial freedoms in various non-discriminatory ways. In response to this criticism, the Court eventually carved out a category of non-discriminatory national measures restricting certain sales agreements from the scope of Article 34 TFEU in *Keck*. Thus, the principle of non-discrimination in the context of free movement of goods can be considered one of the conditions of free trade.. The Court's interpretation of the conditions for the creation and functioning of the single market is based on the prohibitions of barriers to trade, whether discriminatory or not. This approach, combined with significant levels of Union harmonization legislation, significantly limits the regulatory powers of Member States. This is why the UK has chosen to be outside the EU single market and a more distant trading relationship with the

[242] As outlined in F. Liberatore, *Brexit: Laboratorio di un nuovo modello?*, 23 Aprile 2021, Istituto per gli Studi di Politica Internazionale, in the TCA there are at least three categories of regulatory provisions: those that are unique and unrepeatable (typically, the regulation of relations with Northern Ireland, but not only); those already provided for in the most recent agreements and which we could now consider almost "normative standards for the future"; and those that are unique to date but could be replicated in future agreements to be negotiated by the EU and the UK and which, of course, could be implemented in the renegotiation of existing agreements (one among all, the Pan-Euro-Mediterranean Regional Convention, provided that it does not consolidate in the current, sometimes very divisive, proposed amendment).

[243] C. Barnard, R. Schutze, *The Cassis de Dijon Judgement and the European Commission* in A. Albors-Llorens, C. Barnard and B. Leucht, *Cassis de Dijon: 40 Years On*, Oxford, Hart Publishing, 2021.

EU. Instead, trade in goods under the TCA is used on, and limited to, the principle of national treatment. In the TCA there are no provisions that clearly outlaw non-discriminatory measures, nor establish the principle of mutual recognition, nor does it apply the principle of market access.

• The National Treatment Approach

The national treatment approach has deep roots in international economic law and is at the heart of the multilateral trading system conceived after World War II. The Most Favored Nation treatment constitutes the non-discrimination principle of WTO law and has been since the General Agreements on Tariffs and Trade (GATT) of 1947. National treatment prohibits discrimination between similar imported and domestically produced goods. The principle, enshrined in Article IIII of the GATT, covers domestic taxation and other government regulations. Paragraph 1 of Article III states: "*The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulation requiring the mixture, processing or use of products in specified amounts or proportion, should not be applied to imported or domestic products so as to afford protection to domestic production*". Article 19 of the TCA incorporates Article III of the GATT[244]. It reads: "*Each Party shall accord national treatment to the goods of the other Party under Article III of the GATT 1994, including its notes and supplementary provisions. To this end, Article III of GATT 1994 is incorporated into and made part of this Agreement.*" Given the direct incorporation of Article III of the GATT into the TCA, it is likely that in the event of a dispute under the TCA, the principle of national treatment will be interpreted in line with WTO case-law[245].

[244] The incorporation of GATT Article III into free trade agreements is not unique to the TCA. It can also be seen, for example, Article 2.3 CETA, Article 2.3 of the EU-Singapore FTA, Article 2.1 of the EU-Vietnam FTA.
[245] P. Butchard, S. Fella, The UK-EU Trade and Cooperation Agreement: Governance and Dispute Settlement, August 3, 2021, House of Commons Library, Research Briefing

- Most Favoured Nation Principle

The Most Favored Nation principle underpins WTO Agreements. This means that countries cannot normally discriminate between their trading partners. Thus, under WTO laws, States have the right to impose tariffs on imported goods, provided that those tariffs are the same, regardless of whether the goods come from a State with which the importing State has good relations or from another State with which the importing State has less good relations. The EU's new generation Free Trade Agreements (FTAs), including the TCA, do not include an MFN requirement. The EU is not obliged to extend zero-tariff treatment under the TCA to its other trading partners. It is unlikely that the UK's free trade agreements with third countries, such as the UK-Australia Free Trade Agreement, provide for zero-tariffs trade either directly or indirectly. The absence of a most-favoured-nation obligation in FTAs is logical - the very idea of negotiating preferential trade agreements between two or more trading partners would lose its logic if the same treatment, then had to be granted to all other trading nations. Although the most-favoured-nation obligation is central to the WTO regime, the WTO allows an exception to this principle in the case of preferential treatment under a Regional Trade Agreement that satisfies Article XXIV of the GATT[246].

3.3 0,0 Agreement: Zero Tariffs, Zero Quotas and Rules of Origin

3.3.1 Zero Tariffs

The National Treatment Approach applies only once a product has entered the market - it does not prohibit customs duties on imports[247]. The TCA prohibits customs duties on both imports (Article 21 TCA) and exports (Article 22 TCA) for goods that comply with UK and EU rules of origin (Articles 37-53 and Annex 3). The zero-tariffs treatment on all products under the TCA distinguishes it from other trade agreements - tariffs apply to trade between WTO Members (but cannot exceed

[246] This explains why negotiation of the new generation FTAs, including the TCA, is allowed under the WTO law.
[247] Tariffs are permitted under WTO laws, subject to the Most Favored Nation (MFN) principle.

"bound" rates, i.e., rates included in members' schedules). At the same time, the CETA[248] eliminates tariffs on most, but not all, products. However, all is not as it seems[249]. In the case of the EU-UK TCA, only goods that meet the relevant EU or UK rules of origin are eligible for preferential treatment and zero TCA tariffs. Goods that do not meet the rules of origin can still be traded and exchanged but will not qualify for preference under the TCA and may have to pay the standard "Most Favored Nation" (MFN) tariffs that the EU and UK apply to imports under World Trade Organization (WTO) rules. For exports to the EU, this will be the Union's Common External Tariff (CET); for imports into the UK, this will be the UK's global tariff. These rules are set out in the TCA and determine the origin of goods based on the origin of the products or materials (or inputs) used in their production. The rules of origin provisions in the TCA are outlined in two parts:

- General: these rules apply to all products traded under preference; they include both primary and administrative requirements
- Product-specific rules of origin (PSRs): these are specific rules that establish, for each product according to its Harmonized System (HS) Code, what the requirements are for that product to be considered "originating". To qualify for a preferential tariff, products must be sufficiently worked or processed within the parties to the Agreement. Non-originating materials are materials imported from a third country, but non-originating may also refer to materials whose origin is

[248] EU-Canada Comprehensive Economic and Trade Agreement, 21 September 2017.
[249] If a French good enters the UK from France, it is not subject to tariffs. If a French good enters the UK from France and then is exported to Ireland, it will be subject to a tariff unless it has undergone processing. This made "groupage" (the consolidation of several shipments, often from multiple companies, onto one truck) difficult. The UK used to be a hub for groupage of products (using large distribution centers that served the rest of the UK and Ireland and from Ireland to the EU). But groupage does not count as processing and therefore does not confer UK/EU origin and therefore are subject to tariffs on re-export to the EU.

unknown or impossible to determine[250]. A product may be considered "originating" in two ways[251]:

- Wholly obtained: a product wholly obtained or produced in the territory of either country.[252]
- Sufficiently processed or transformed: this is based on three basic rules, namely the Value-Added Rule, the change of tariff classification and the manufacture from a certain product or through a specific process. According to the mechanism of bilateral cumulation[253], materials originating in the EU, as well as production carried out within the EU on non-originating materials, can be considered as originating in the UK and vice versa[254].

Once the product has obtained originating status, it is considered 100% originating. This is very useful because if that product is incorporated into the production of another product, its total value is deemed to be originating, the non-originating materials within that product will not be considered[255].

To enjoy the preferential tariffs, the importer will have to claim the preference on his customs declaration and provide a statement showing that the goods comply

[250] Questions about rules of origin will be important in several strategic sectors for the UK economy. The automotive industry is particularly exposed, as parts frequently cross and re-cross the English Channel multiple times for processing before being incorporated into finished vehicles. Nearly two-thirds of small and medium-sized businesses in England have suffered additional costs for imported parts since Brexit took effect, according to a survey to be released by the Southwest Manufacturing Advisory Service, in P. Goodmman, S. Castle and E. Nelson, *53 Tons of Rotting Pork and Other Brexit Nightmares*, 12 February 2021, The New York Times.

[251] Trade and Cooperation Agreement, Part Two, Heading One, Title I, Chapter Two, Section 1, Article 39, General Requirements.

[252] Shall be considered as wholly obtained within the meaning of Article 41 TCA: mineral products extracted or taken from the soil or its seabed; plants and products of the vegetable kingdom cultivated or harvested there; live animals born and raised there; products obtained from slaughtered animals born and raised there; products obtained from live animals raised there; products obtained from aquaculture if the aquatic organisms are born or raised from reproductive material; products of sea fishing(…).

[253] Cumulation is an important part of modern Free Trade Agreements. It provides a system that allows originating products from one party to be treated as if they are originating in another when deciding if a good is able to meet a product-specific rule (Article 40 TCA).

[254] There is an example in the Government guidance of TCA, Using the Harmonized System and product-specific rules for trade between the UK and the EU published on 6 October 2021: "If an UK-manufactured engine contains 30% non-originating content but meets its rule of origin, if that engine is used in the production of a car in the UK or EU, 100% of the value of that engine can be counted towards the originating content of the car".

[255] Z. Kaehler, *Rules of Origin and Trade and Cooperation Agreement between the UK and the EU*, 10 February 2021, Alliots LLP.

with the rules of origin. The wording of the declaration is contained in the TCA. It should be included on the sales invoice or similar commercial document, including a description that identifies the goods to enable identification. A claim for preferential tariff treatment shall be based on the following elements:

a) a statement of origin issued by the exporter in which the product is declared as originating on an originating product.

b) a confirmation by the importer that the goods are of EU or UK origin, sufficient on the importer's knowledge of the product's originating status[256].

It can now be said that even though the TCA is based on zero tariffs, for some traders proving origin to get the preferential tariff (zero tariffs) can be so demanding or burdensome that they choose to pay the UK/EU MFN tariff instead[257]. The importer is responsible for the accuracy of the application for preferential tariff treatment and for meeting the requirements of Chapter 2, Part II, Title I of the TCA. The request for preferential tariff treatment is submitted at the time of importation, and the basis for this request must be included in the customs import declaration.

The origin can also be declared based on the importer's "knowledge" of the product's originating status (importer knowledge procedure). This proof, which can be in the form of supporting documents or commercial records, must be based on information providing that the product originates and meets the required conditions. Importer knowledge is a simplification conditioned by the cooperation between seller and buyer in the exchange of information, without which the standard proof of origin included in the invoice must be used. For a claim for preferential tariff treatment, the importer's "knowledge of the originating status of the product" could be a risky but decisive way of proving origin. The customs authority of the importing party may verify whether a product is originating or whether other requirements of the Agreement are met based on risk assessment methods that may include causal selection. Suppose the importer applies for preferential treatment based on his own knowledge. In that case, he should be sure to have information

[256] Trade and Cooperation Agreement, Part Two, Heading One, Title I, Chapter Two, Section 2, Article 54: Claim for Preferential Tariff Treatment.
[257] HM Revenue & Customs, *Introduction to Rules of Origin and Claiming Preferential Tariffs (duties)*, 29 December 2020.

showing that the product is originating and satisfies the required rules of origin under Article ORIG.21, paragraph 1 of the TCA.

3.3.2 Zero Quotas

Article 26 of the TCA provides that: "*A Party shall not adopt or maintain any prohibition or restriction on the importation of any good of the other Party or on the exportation or sale for export of any good destined for the territory of the other Party, except in accordance with Article XI of GATT 1994, including its Notes and Supplementary Provisions. To that end, Article XI of GATT 1994 and its Notes and Supplementary Provisions are incorporated into and made part of this Agreement, mutatis mutandis*". Article 34 TFEU also prohibits quantitative restriction but goes further in its prohibition on measures having equivalent effect (MEEs) (i.e., non-tariffs barriers). There is a stark divergence between the TCA and EU law, in this respect.

3.4 The TCA: Technical Barriers to Trade (TBT)

3.4.1 Preliminary Remarks: Divergent Technical Regulations

While the TCA provides for "zero tariff and zero quotas" trade in goods, it does not eliminate another significant barrier to interstate trade: technical regulations. Technical Barriers to Trade (TBT)[258] and Sanitary and Phytosanitary Standards (SPS)[259] are regulations and standards that manufacturers must meet to market their products in the importing State's market. TBT and SPS requirements pose a particular problem for trade liberalization, as national safety standards can be justified based on protecting the public, animal and plant health but can also be misused as disguised protectionism. Before the UK's withdrawal from the EU, the double burden of complying with divergent technical regulations was avoided either through EU harmonization or through the principle of mutual recognition, which ensured that producers only had to comply with one set of rules, that of the

[258] Regulated by Part Two, Heading One, Title I, Chapter 4 of the TCA, Articles 88-100.
[259] Regulated by Part Two, Heading One, Title I, Chapter 3 of the TCA, Articles 69-87.

State of origin. The combination of these two principles means that in most cases, manufacturers are only required to meet one set of technical requirements - EU rules or if the rules are not harmonized, the internal rules of the exporting Member State. The TCA does not provide for mutual recognition, which means that UK producers will have to meet the Technical Barriers to Trade and Sanitary and Phytosanitary Standards requirements of each EU Member State and vice versa.

3.4.2 TBT: The Right to Regulate

While the European Union essentially eliminates TBT and SPS barriers to trade enacted by the 27 Member States through regulatory harmonization at the EU level, the new generation of Free Trade Agreements generally follow the WTO approach of allowing States to regulate almost freely. Article 90 of the TCA incorporates Articles 2-9 of the WTO TBT Agreement. These TBT provisions allow States to introduce technical regulations and standards, as well as conformity assessment procedures, including packaging, marking and labelling requirements. In other words, the WTO framework, and the TCA, which is modelled on it, follow the principle that national regulation is permitted unless prohibited. This is the opposite of the "prohibited unless permitted" approach under EU law. While the right to regulate is not absolute and must be, among other things, non-discriminatory between two similar products, State parties to FTAs may regulate as long as they do not impose "unnecessary barriers to international trade". The direct incorporation of key provisions of the TBT Agreement into the TCA means that EU-UK trade will be subject to domestic product requirements. As a result, the principle of non-discrimination will be the primary tool for limiting the adverse effects of technical barriers in EU-UK trade. This means that domestic product requirements are, albeit conditional on equal treatment and necessity, allowed, with the result that exported products will have to meet the technical requirements of each importing market, placing a heavy burden on producers. TBT provisions cover a wide range of national standards. Annex 1 of the TBT Agreement and the TCA, by incorporating Annexes 1-3 of the TBT Agreements in Article 90, defines technical regulations as mandatory documents that establish product characteristics

or related processes and methods of production. Defining the limits of the latter category has caused debate among WTO members, particularly in relation to non-product-related PPMs that do not affect the physical characteristics of the product but distinguish how they were produced (e.g., whether members can discriminate between wood products from sustainably managed forests and wood where the production method is unknown, or goods produced using child labor).

As an example of the EU's right to regulate, to further remove regulatory barriers to trade, the EU has introduced a CE mark required for many products and shows that the product has been assessed to meet EU safety, health, and environmental requirements. By placing the "CE mark", the manufacturer guarantees that the product complies with all EU requirements and has undergone conformity assessment. In addition, CE marking allows the manufacturer to sell products throughout the EU, whether made in the EU or abroad, without checking compliance separately in each import market. While the UK wants to introduce its own UKCA mark, manufacturers intend to continue using the CE mark (which they can do as long as UK rules don't diverge from EU rules); they should have used the UKCA mark from January 1, 2021. However, the government has made "an important concession to UK businesses by extending the deadline for companies to adopt a new UKCA safety and quality mark for their goods after Brexit".

3.5 The TCA: Sanitary and Phytosanitary Standards (SPS)

The Technical Barriers to Trade Agreement[260] does not apply to sanitary and phytosanitary measures governed by a separate SPS Agreement[261]. The SPS

[260] The Technical Barriers to Trade Agreement (TBT) is an international agreement administered by the WTO. It was negotiated during the Tokyo Round and renegotiated during the Uruguay Round of the General Agreements on Tariffs and Trade. With its present form entering into force with the establishment of the WTO at the beginning of 1995. It aims to ensure that technical regulations, standards, and conformity assessment procedures are non-discriminatory and do not create unnecessary obstacles to trade. At the same time, it recognizes WTO members' right to implement measures to achieve legitimate policy objectives, such as the protection of human health and safety, or protection of the environment. The TBT Agreement strongly encourages members to base their measures on international standards as a means to facilitate trade. Through its transparency provisions, it also aims to create a predictable trading environment.

[261] The Sanitary and Phytosanitary Agreement (SPS) is an international agreement administered by the WTO. It was negotiated during the Uruguay Round of the General Agreements on Tariffs and

Agreement covers requirements that aim to protect human or animal health from foodborne risks or diseases carried by animals or plants, as well as animals and plants from pests or diseases. As with the TBT regime, the SPS rules of the TCA are modelled on the WTO framework: Article 72 of the TCA reaffirms the rights and obligations of the WTO SPS Agreement.

Under the WTO regime, members are free to choose the level of protection they deem necessary and establish measures to implement the desired level of protection (Article 2). However, national standards must be based on accepted and recommended international organizations' standards (Article 3). Furthermore, while a scientific risk assessment may justify any stricter protection, Article 5(7) allows countries to adopt SPS measures based on "relevant available information" in cases where relevant scientific evidence is insufficient. Article 74 of the TCA says that the UK and the EU affirm their commitment under Article 5(2) of the SPS Agreement to the need for scientific evidence in risk assessment. Thus, as with TBT, the starting point is the right of members to regulate (and therefore impose additional barriers to international trade). To reduce the adverse effects of domestic regulation on interstate trade, the WTO framework recommends that Members accept other members' measures as equivalent[262], even if those measures differ from their own, if the exporting member "objectively demonstrates" to the importing state that its measures achieve "an adequate level of sanitary and phytosanitary protection". While the SPS Agreement further encourages states to enter into bilateral agreements to recognize the equivalence of specific SPS measures (Article 4), the EU rejected the UK's request to include the equivalence regime in the TCA. The EU's rejection of equivalence under the TCA is a political choice. The absence of equivalence under the TCA means that agricultural exporters are forced to meet all EU SPS import requirements and vice versa, significantly limiting trade. In addition, as the House of Lords noted, UK negotiators failed to secure an agreement to reduce physical checks to a

Trade. With its present form entering into force with the establishment of the WTO at the beginning of 1995.

[262] Article 2.7 of the TBT Agreement and Article 4 of the SPS Agreement.

predetermined low level of the type found in the EU-New Zealand Veterinary Agreement[263].

The result is that the TCA offers little more in terms of removing technical barriers to trade than the parties would have been subject to WTO rules in the event of a "no-deal" situation. In the absence of the Union's positive harmonization instrument, the result is a zero-tariffs-and-quotas agreement only in theory, because significant barriers to trade remain.

3.6 The TCA: The Principle of Mutual Recognition

While equivalence is a tool developed under the WTO law to reduce the adverse effects of domestic regulation, the free movement of goods under EU law is based on another very significant trade liberalization principle, that of mutual recognition. Under EU law, the free movement of goods is based on market access; domestic measures that impede trade within the EU are prohibited unless one of the exceptions applies. In the landmark case examined in the first Chapter, *Cassis de Dijon*, the Court established the principle of mutual recognition, which replaced the double regulation of a product (by both the State of origin and the host State) with a single regulation (State of origin).In this case, the Court has famously established that any product imported from another Member State must, in principle, be admitted in the territory of the importing Member State if it has been legally produced, i.e., following the rules and manufacturing processes that are customarily and traditionally accepted in the country of export and is marketed in the territory of the country of export.

Mutual recognition is beneficial for exporting manufacturers because it reduces the burden of complying with the different regulatory requirements of importing states. Because of its importance to trade liberalization, mutual recognition has become a tool of economic cooperation in the EU. Moreover, its use has expanded outside the

[263] The level of random physical checks for SPS products imported into the EU is set between 30% (for most meat, fish, and dairy products) and 1% for a small number of products including hay and straw.

EU, particularly with respect to mutual recognition agreements (MRAs)[264]. State parties to an MRA recognize the competence of a designated testing body in the exporting country to perform the assessment based on the technical requirements of the importing country and vice versa. In this way, MRAs avoid duplicative testing in global trade without requiring states to harmonize their technical requirements. MRAs can be part of a trade agreement (integrated into the text of a regional FTA or as a separate agreement) or constitute a stand-alone MRA[265].

3.6.1 The Position under the TCA

Given the substantial benefits of mutual recognition for trade liberalization, it is no surprise that the UK government wanted to include a Mutual Recognition Agreement in the post-Brexit UK-EU trade relationship. An "enhanced" MRA based on equivalence or alignment of technical requirements was not an option due to the UK's rejection of EU regulatory harmonization. Prime Minister Johnson called for the inclusion of a "mutual recognition agreement focused on conformity assessment, with full coverage of relevant sectors". In this FTA draft, the UK proposed that the EU apply full mutual recognition of certification to industrial goods. However, as with its decision to reject an equivalence regime to remove technical barriers, the EU ruled out offering the UK a conformity assessment MRA. As a result, the TCA does not include mutual recognition, placing a heavy burden on UK manufacturers who will have to meet the regulatory requirements of each Member State, as well as undergo conformity testing in the EU by an EU-accredited body (and vice versa)[266]. In Annex ORIG.3, The TCA provides for a limited supplier declaration of conformity: the SDoC regime. An SDoC is a written assurance by the supplier of a product of compliance with the applicable technical regulation of the country of import. However, this regime is only available for low-

[264] MRAs between trading partners facilitate market access by allowing a product manufactured and certified in state A to be exported to state B without undergoing additional testing in state B.
[265] According to 2016 OECD data, more than 130 MRAs have been concluded globally, mostly in recent decades. In the European Union have been concluded 7 FTAs in the recent years and there are ongoing trade negotiations for several other agreements.
[266] B. Fliess, F. Gonzales, R. Schonfeld, *Technical Barriers to Trade: Evaluating the Trade Effects of Supplier's Declaration of Conformity*, OECD Trade Policy Papers, 2008, No 78.

and medium-risk products and only where these arrangements existed before the TCA.

3.7 Level Playing Field (LPF)

Within the trade chapters of the Trade and Cooperation Agreement, of crucial importance are the provisions that intend to maintain a level playing field[267] between the UK and the EU markets. These provisions ensure that competition is open and fair and that businesses of one party do not gain a competitive advantage and undercut their rivals in another country by avoiding the costs of more stringent regulations. Addressing this issue was justified by the magnitude of trade flows between the two parties (in absolute amounts and as a percentage of their total imports and exports) due to the geographic proximity and complementarity in supply value chains as a result of 46 years of integration of the British economy into the EU Internal Market.

During the negotiations, the EU had made it clear that the provisions ensuring a level playing field between UK and EU companies in the Internal Market were essential to maintain fair competition – especially in the absence of customs duties – since the UK would no longer be bound by the provisions of EU law on subsidies and State aids. On the other hand, UK companies could benefit in the future from more generous support from UK authorities that could artificially bolster their competitiveness. Similarly, the European Union was concerned that British companies might enjoy undue advantages if the UK decided to reduce worker protections and social standards or lower environmental requirements. From the beginning of the negotiations, the UK Government clearly did not intend to remain part of the EU's Internal Market[268]. In the absence of specific provisions (which are

[267] In commercial law, a level playing field is a concept of fairness, not that every player has an equal chance of success, but that everyone plays by the same set of rules.
[268] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community2019/C 384 I/01, OJ C 384I, 12.11.2019, p. 1-177.

not usually found in FTAs in this respect)[269], the only mutual protection against government support for domestic firms that distort competition would be found in the WTO's Agreement on Subsidies and Countervailing Measures. This Agreement governs two distinct but closely related topics. Multilateral disciplines governing the provisions of subsidies and the use of countervailing measures to offset the injury caused by subsidized imports. Given the importance of EU-UK trade, the limited WTO disciplines on subsidies, the complexity of this regime, and the disruption that countervailing duties by the importing country designed to offset foreign subsidies cause to trade relations, it makes reliance on WTO disciplines alone inappropriate. Substantive WTO obligations, such as the ban on export subsidies, would have provided a baseline for EU-UK conduct on subsidies without stricter bilateral rules. Coordination between the specific regime under the TCA and the overlapping WTO rules will be a challenge in the future application of the TCA in this area, despite the specific provisions on the relationship between the TCA and the WTO agreements[270]. Given that the UK was adamantly opposed to being bound by future EU rules and principles in this regard, while the EU would not agree to subject its future domestic regulation to coordination with the UK, now a third country, the only possible solution was to establish in the TCA a tailored stand-alone regulation.

A related issue is that such regulation requires a mutual commitment and readily available enforcement tools for the Party that considers itself harmed by the other Party's breach of commitments. In turn, there must be an independent adjudication of any resulting dispute, to negate a chain of unilateral countermeasures or retaliation. Such a mechanism must also be efficient and quick in order not to prejudice market opening and indirectly encourage or condone breaches. In this respect, the WTO system may be a model, but not in respect of promptness. The

[269] G. Messenger, *EU-UK Relations at the WTO: Towards Constructive Creative Competition*, in J. Santos Vara, R. A. Wessel, P. R. Polak, *The Routledge Handbook on the International Dimension of Brexit*, Routledge, 2020, pp. 135-137.
[270] As to the application of WTO law in the post-Brexit EU-UK regime see G. Messenger, *EU-UK relations at the WTO: Towards Constructive Creative Competition*, in J. Santos Vara, R. A. Wessel, P. R. Polak, *The Routledge Handbook on the Internal Dimension of Brexit*, Routledge 2020, 1st Ed., pp. 135-147.

general provisions on dispute settlement between the UK and EU laid down in the TCA also represent a model, but only up to a certain point. This is because this mechanism has been devised for disputes and lacks the teeth sought in matters directly affecting traders[271]. As such, an examination of the LPF regulation in the TCA also requires, at the same time, an analysis of the specific dispute settlement provisions adopted in this respect.

3.7.1 Scope of the LPF Provisions

The provisions of the TCA in Title IX, which provide a level playing field for open and fair competition and sustainable development, cover competition, subsidies, labour, and environmental standards. General Provisions govern the Agreed Settlement, including "the principles and objectives" in Article 355 where: "*The Parties recognize that trade and investment between the Union and the United Kingdom on the terms set out in this Agreement require conditions that provide a level playing field for open and fair competition between the Parties and that ensure that trade and investment take place in a manner conducive to sustainable development*". The statements found in the general provisions are typical of the approach followed in the TCA in many respects. On the one hand, the common aims and shared objectives reflect the common views and concerns prevalent in the EU and the UK. They include sustainable and social development, environmental protection, the ambition to achieve economic climate neutrality by 2050, and adopting the precautionary approach principle when there are reasonable grounds for concern that there are potential threats of serious or irreversible damage to the environment or human health. Finally, they also include the consideration by each party of relevant and available scientific and technical information of international standards, guidelines and recommendations in the preparation or implementation of measures to protect the environment or working conditions that may affect trade or

[271] P. Mariani, G. Sacerdoti, *Trade in Goods and Level Playing Field*, in F. Fabbrini, *The Framework of New EU-UK Relations*, *The Law and Politics of Brexit, Vol III*, Oxford, Oxford University Press, 2021, p. 102.

investment. On the other hand, the complete autonomy of each party in pursuing these objectives is clearly indicated, as are the limits of the joint commitment[272][273]. Chapter Two on competition is relatively brief. It is based on recognizing the importance of free and undistorted competition in the trade and investment relationship between the United Kingdom and the European Union. It commits the Parties to maintain competition laws that effectively address the typical anti-competitive business practices listed therein, reflecting existing EU competition law. Each Party agrees to maintain one or more operationally independent authorities responsible for effectively enforcing its competition laws. As outlined in Article 362, such authorities shall endeavour to cooperate and coordinate their enforcement actions regarding the same conduct or transactions, whenever possible and appropriate, by exchanging information and entering into a separate cooperation and coordination agreement. Chapter III of Title IX sets forth the principles to be followed in granting subsidies. First, they must pursue a specific public policy objective to remedy an identified market failure or meet an equity rationale, such as commercial pollution or distributional concern[274].

[272] UK Government, UK-EU Trade and Cooperation Agreement: Summary, December 2020. This has been highlighted by the UK Government as a political success in the following terms: 'The Agreement's provisions in this area, implementing commitments made in 2019 Political Declaration, were the subject of considerable controversy during the negotiations. The EU was forced to drop its ambitious demands for dynamic alignment and for the UK to be legally required to maintain equivalent legislative systems to the EU's in some areas. The system that has been agreed upon does not compromise the UK's sovereignty in any area, does not involve the European Court of Justice in any way, and is reciprocal. Both sides have the right to set their own laws, subject to the broad constraints of this Agreement in this area as in any other. And both sides have the right, in certain constrained ways, and subject to arbitration, to take countermeasures if they believe they are being damaged by measures taken by other Party in subsidy policy, labour and social policy, or climate and environment policy. If such measures are used too frequently, either side can trigger a review of these provisions and the trade aspects of the Treaty more broadly, aiming to end with a different balance of rights and obligations.

[273] Regarding the limits of the common engagement, in the European Parliament Recommendations on EU-UK Negotiations adopted on 18 June 2020, Parliament shared the EU position that the scope and the ambition of the FTA was conditional on and had to have a direct link with the UK agreeing to comprehensive and enforceable provisions related to the LPF, due to the size and geographical proximity of the UK, as well as the economic interdependence and connectedness between the EU and the UK. Parliament recalled its determination to prevent any kind of "dumping" in the framework of future EU-UK relationship and the LPF should preserve competitiveness, high social and sustainability standards, including the fight against climate change, and non-regression clauses with a view to dynamic alignment. The Agreement had to be conditional on respect for the Paris Agreement and the promotion of the UN's sustainable development goals and should enshrine the precautionary principle.

[274] Trade and Cooperation Agreement, Part Two, Title XI, Chapter 3, Article 366(1.a), Principles.

This Chapter also addresses the definition of relevant subsidies, including tax measures. It addresses subsidies granted to compensate for damage caused by natural disasters or other non-economic exceptional events. A particular focus is on the recovery of unduly granted subsidies, which in paragraph 7 of Article 373 is recognized as "an important remedial tool in any system of subsidy control".

3.7.2 Disputes Concerning Subsidies[275]

The subsidies chapter provides two separate treaty mechanisms for a Party that believes the other Party is not granting or monitoring subsidies following the above conditions. However, the primary assurance of compliance is at the national level in each Party. First, Article 371 commits each party to establish or maintain independent authorities or bodies. Parties "encourage" their respective independent authorities or bodies to cooperate on matters of common interest within their specific function. Furthermore, according to Article 371(2), "*The Parties, in their respective independent authorities or bodies, may agree on a separate framework for cooperation between these independent authorities*". Second, Article 372 commits the Parties to ensure judicial review of grant decisions with the power to impose effective remedies, including suspension, prohibition, or compulsion of action by the granting authority, award of damages, and recovery of a grant from its recipient with a right of action for interested parties.

Article 370 provides for "Consultations on subsidy control" at a bilateral level. If, after receiving the information requested, the requesting Party still considers that the subsidy granted or intended to be granted by the other Party has or could harm trade or investment between the parties, the requesting Party may call for consultations within the "Trade Specialized Committee on the Level Playing Field for Open and Fair Competition and Sustainable Development". The Committee shall make every attempt to arrive at a mutually satisfactory resolution of the matter within a tight timeframe. In the second place, a unique mechanism, possibly the

[275] In the TCA there are these specific provisions relating to disputes concerning subsidies which differ from the general dispute settlement mechanism provided for in Part Six of the TCA.

most relevant novelty in the TCA to ensure LPF, is provided in Article 374 "*regarding a subsidy that it considers causes, or there is a serious risk that it will cause a significant negative effect on trade or investment between the Parties*". The procedure evokes a ping-pong game that may result in a specific, quick arbitral mechanism. If consultation fails to resolve the issue within 60 days, the requesting Party may unilaterally take appropriate remedial measures if there is evidence of a significant adverse effect on trade or risk thereof. The requesting Party must provide to the other Party all relevant information in relation to the remedial measures that it intends to take "to enable the Parties to find a mutually acceptable solution" within fifteen days.

The TCA includes a unique rebalancing mechanism to ensure a level playing field for open and fair competition and sustainable development. This rebalancing mechanism allows each Party to unilaterally reduce market access if it assesses that the other Party's actions in areas such as labour, environmental, and social issues, as well as state aid, result in market-distorting subsidies. A joint EU-UK arbitration panel will then decide whether the imposed tariffs can remain. This mechanism may allow the UK to diverge from EU rules, while allowing the EU to protect the integrity of the Single Market[276].

3.8 The Northern Ireland Protocol and the Trade in Goods Regime

With the Northern Ireland Protocol attached to the UK Withdrawal Agreement, the Parties were all committed to supporting peace in Northern Ireland and supporting the Good Friday Agreement[277], which meant that there should be no hard border

[276] According to the Trade and Cooperation Agreement, Part Two, Title XI, Chapter 3, Article 370(8), Consultation on Subsidy Control, the measures taken shall be restricted to what is strictly necessary and proportionate to remedy the significant negative effect caused or to address the serious risk of such an effect.

[277] The Belfast Agreement, also known as the Good Friday Agreement, because it was reached on Good Friday April 10, 1998, was an agreement between the British and the Irish governments, and most of the political parties in Northern Ireland on how Northern Ireland should be governed. Issues relating to sovereignty, governance, discrimination, military and paramilitary groups, justice and policing where central to the Agreement. It restored self-government to Northern Ireland on the basis of "power-sharing" and it included acceptance of the principle of consent, commitment to civil and political rights, cultural parity of esteem, police reform, paramilitary disarmament. The Agreement

between the North and South of Ireland. While the UK and Ireland were both Members of the Single Market, this was relatively easy to do; after Brexit, this became significantly more challenging. In essence, the parties wanted to achieve three conflicting goals:

1) No hard border between the North and the South of Ireland.
2) No control on the East border (i.e., between Britain and Northern Ireland).
3) The UK must leave the EU Customs Union and Single Market.

This so-called Brexit trilemma was irresolvable. Theresa May's solution, when she was Prime Minister, was to keep the UK as a whole in the EU Customs Union, thus avoiding most of the North/South and East/West controls and Northern Ireland in the Single Market for goods. Unfortunately, this solution meant that the third condition of the trilemma was not met and was rejected by the Cabinet. When he became Prime Minister in 2019, Boris Johnson opted for a different approach. He agreed that Northern Ireland would remain in both the EU and the UK Customs Union, but Britain would leave the EU Customs Union and the Single Market. However, this decision inevitably meant there would be controls on the East/West border, as manufactured goods entering Northern Ireland potentially end up in the South and then the EU. These would have to be checked to comply with all TBT and SPS rules. Boris Johnson famously denied that this would be the case. Still, the reality has been that border controls have proved deeply unpopular with the Unionist community, who have opposed "a border along the Irish Sea".

3.8.1 The Content of the Protocol

Article 4 of the Northern Ireland Protocol (NIP) clarifies that "*Northern Ireland is part of the customs territory of the United Kingdom*". So Northern Ireland is part of the UK Customs Union, which means that "*Nothing in this Protocol shall prevent the United Kingdom from including Northern Ireland within the territorial scope of any agreement it may enter into with third counties, provided that such agreements do not affect the application of this Protocol*[278]". Being in the UK Customs Union

also created a number of institutions between Northern Ireland and the Republic of Ireland (North – South) and between the Republic of Ireland and the United Kingdom (East – West).

[278] Northern Ireland Protocol, Article 4(2), Customs Territory of the United Kingdom.

also means that "no customs duty is payable on goods brought into Northern Ireland from another part of the UK[279]" and that "nothing in this Protocol prevents the UK from providing free market access for goods moving from Northern Ireland to other parts of the UK domestic market". Legally evident is the extent to which Northern Ireland is included not only in the EU Customs Union but also, in fact, in parts of the EU single market for goods. For Northern Ireland's membership of the EU Customs Union:

- Article 5(3) NIP provides that "*The legislation defined in Regulation 952/2013/EU[280] shall apply to and in the United Kingdom in respect of Northern Ireland*". This legal language hides the reality, unpopular with some, that Northern Ireland remains in the EU Customs Union
- Article 5(5) NIP provides that "*Articles 30 and 110 TFEU shall apply to and in the United Kingdom in respect of Northern Ireland*".

Regarding Northern Ireland's accession to the EU single market for goods:

- Article 5(5) states that: "*Quantitative restrictions on exports and imports should be prohibited between the Union and Northern Ireland*", although there is no reference to measures having equivalent effect.
- Article 5(4) NIP states that "*The provisions of Union law listed in Annex 2 to this Protocol, shall also apply, under the conditions set out in that Annex, to and in the United Kingdom with respect to Northern Ireland*". Annex 2 lists over 300 measures - most of the single market acquis for goods, including the CE mark, and the list is dynamic. So Northern Ireland is also bound by any new legislation. Article 7(1) adds, "*Without prejudice to the provisions of Union law referred to in Annex 2 to this Protocol, the legality of placing on the market in Northern Ireland shall be governed by the law of the United Kingdom and, in respect of goods imported to the Union, by Articles 34 and 36 TFEU*".
- Regarding the areas covered by the Protocol, Article 12(4) NIP allows the Commission to initiate an enforcement proceeding against the United Kingdom

[279] Northern Ireland Protocol, Article 5(1), Customs, Movement of Goods.
[280] Regulation EU No. 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code.

in case of violations of EU law in Northern Ireland[281]. Claims may also be brought in the courts of Northern Ireland by virtue of the principle of direct effect[282]; those courts may continue to refer Article 267 TFEU to the Court of Justice[283]. Northern Ireland courts are also required to continue to apply the case-law of the Court of Justice in the areas covered by the Protocol, as they did before Brexit[284].

3.8.2 The Working Problems with the Protocol

Inevitably there have been problems with the Protocol's operation from the outset. Particular issues have arisen concerning goods imported from Great Britain to Northern Ireland "at risk of being subsequently moved into the Union[285]". Article 5(2) NIP presumption is that all goods are "*deemed to be at risk of being subsequently moved into the Union*" unless specific criteria are met, including that the goods will not be subject to commercial processing in Northern Ireland. Goods at risk may be subject to tariffs. The Joint Committee was given the authority to make two decisions on the application of tariffs under Section 5(2) NIP:

- The conditions under which goods brought into Northern Ireland from outside the Union are considered not to be subject to commercial processing (considering the nature, scale, and result of processing)
- The criteria for determining whether a good brought into Northern Ireland from outside the Union is not at risk of being subsequently transferred into the Union.

[281] This is one of the crucial differences in the law applicable to Northern Ireland compared to England in the post-Brexit era. Under the Protocol, the institutions of the Union and most importantly, the Court of Justice, continue to play a fundamental role in overseeing the application of and compliance with the Protocol.
[282] UK Withdrawal Agreement, Article 4, Methods and Principles Regarding to the Effect, the Implementation and the Application of this Agreement.
[283] Northern Ireland Protocol, Article 12(4), Implementation, Application, Supervision and Enforcement.
[284] In addition, EU law applies in respect of electricity, VAT and excise (Article 8 NIP and Annex 3), equality law (and perhaps some social law) will continue to operate directly (Article 2). The breadth of the rules on goods which apply to Northern Ireland and the fact that Northern Ireland is subject to the full range of EU enforcement, including direct effect, shows the level of integration of Northern Ireland into the EU Single Market.
[285] Northern Ireland Protocol, Article 5(1), Customs, Movement of Goods.

These issues were resolved by the Joint Committee's 4/2020 decision in December 2020[286], just before the conclusion of the TCA. The underlying problem is that the UK does not think the NIP works well. It thinks Northern Ireland is too much a part of the EU's single market and not enough a part of the UK's domestic market. So, it has made several proposals, including putting the bonus on traders to declare the destination of goods for customs purposes. In addition, for SPS goods bound for Ireland, it has been proposed that the UK commit to enforcing EU rules. He also suggested a comprehensive dual regulatory regime: goods, whether manufactured or SPS, could circulate in Northern Ireland if they complied with UK or EU rules and labelled accordingly. These proposals are under consideration by the European Commission.

3.9 TCA's Main Concerns and Application Issues

It was a divorce and then a long negotiation process, along with a political drama in the UK. Now that the Trade and Cooperation Agreement has been signed, the EU and Britain should enter into new bilateral relations. The most relevant question is: Will it work? Is the Trade and Cooperation Agreement establishing an effective governance scheme for these bilateral relations?

A few key elements must be agreed upon for a bilateral relationship to thrive. Over the past 30 years, the European Union has tried to avoid undeveloping bilateral relationships with neighbouring countries. As a result, there have always been joint negotiations in all enlargement processes. The acceptance by the EU of global cooperation to address issues of shared interest on a bilateral basis with the UK is thus a fundamental step for the EU. Moreover, recognizing the bilateral nature of

[286] Decision No 4/2020 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 17 December 2020, OJ L 443/6.

these neighbourhood relations[287] is even explicit in the TCA[288]. Three issues have complicated the negotiations: the United Kingdom's access to the single market and the question of sovereignty, in compliance with the rules on State aid, the dispute resolution mechanism and the role of the Court of Justice, and the regulation of fishing in the North Sea. Whether the delicate compromises reached between the two Parties to the Agreement will lead to a stable and fruitful cooperation is yet to be determined. Doubts are many, starting with the thorny issue on fisheries[289].

3.9.1 The Perspective of Sovereignty in the TCA

It is necessary to assess the TCA from the perspective of sovereignty, as this has been the main driver of the UK's strategy in negotiations[290]. Indeed, although the UK's negotiating team presented the choice of sovereignty as a binary option – either you have it (outside the EU), or you do not (inside the EU) – in practice, it is a matter of degree[291]. All treaties between nations, or contracts between people, involve some cession of sovereignty – the freedom to act unilaterally – in exchange for specific commitments by the other Party to do the same, for a common good. The UK had initially sought an Agreement like what the EU had agreed to with Canada. This Agreement with Canada, which entered into force provisionally in

[287] Article 1 of the TCA states: "This Agreement establishes the basis for a road relationship between the parties, within an area of prosperity and good neighbourliness". The reference to an area of prosperity and good neighbourliness is a direct reference to the wording of Article 8 TEU defining the EU neighbourhood policy.

[288] Article 2 of the TCA states: "Where the Union and the United Kingdom conclude other bilateral agreements between them, such agreements shall constitute supplementing agreements to this Agreement, unless otherwise provided for in those agreements".

[289] See below Section 3.9.3, Impact of TCA on Fisheries.

[290] See B. Laffan, *Sovereignty: Driving British Divergence*, in F. Fabbrini, *The Law and Politics of Brexit, Vol. III, The Framework of New EU-UK Relations*, Oxford, Oxford University Press, 2021, pp. 241-248. All through its membership, the UK was one of the Member States that persistently adopted a minimalist approach to strengthening supranationalism and expanding EU competences. From Maastricht onwards, the UK resorted to defending sovereignty especially relating to core state powers by promoting forms of differentiated integration. The UK became the champion of 'opt-outs', notably, from Economic and Monetary Union (EMU), Schengen and Justice and Home Affairs, all policy fields that touched on national sovereignty.

[291] This "freedom of manoeuvre" concept of sovereignty is distinct from the legal one relating to the primacy of EU over national law. The latter concept of sovereignty (which only became explicitly treaty enshrined when the Lisbon Treaty was agreed in 2007) became contentious in 2021 when Poland (a member of the EU) argued that under its constitution Polish law remained supreme within Polish borders. This interpretation has been vigorously contested by the EU. This matter ceased to be an issue for the UK when that country departed the EU in 2020, and in this respect, at least, the UK can be said to have fully regained its sovereignty.

2017, eliminates tariffs on a wide range of goods and services without any obligation to align Canada's regulatory framework with that of the EU. The EU was unwilling to grant the UK a similar deal because it believed that the UK's geographic proximity to the EU would make it a competitive threat if it was not sufficiently aligned with the EU's regulatory structure.

Has the UK been able to regain sovereignty in the TCA? The UK left the EU legislative space in January 2021, but it may not have left the EU's regulatory orbit. Leaving the regulatory space is the next step because the UK is no longer a Member of the Union's regulatory agencies, networks, and information systems. Also, as a third country, the UK will not be part of future regulation or dynamic alignment[292]. Post-withdrawal, the UK does not start with a clean slate because the effects of Union membership on UK policies, laws, and regulations are deeply entrenched. The 2018 Union Withdrawal Agreement repealed the European Communities Act of 1972 but left behind a significant body of Union law converted into domestic UK law and remains part of the UK's regulatory framework. In areas of competition policy, copyright, consumer protection, food safety standards, gas and electricity, and environmental policy, the United Kingdom has opted for a high level of continuity, essentially copying and pasting EU law into domestic law[293].

The battle regarding the interconnected issues of a level playing field and governance was essentially about the UK's sovereign claim to diverge from and not be bound by the Union's rules and jurisdictional reach[294]. This posed a severe dilemma for the Union because it wanted a close economic relationship with the UK on the one hand, but not at the cost of creating an imbalance between EU market access rights and obligations on the other. The UK argued during the negotiations that this was not a problem as both sides were already converging, and the UK did not want to undermine social or environmental standards in any case. However, those arguments did not convince the EU, given the number of times UK

[292] D. Lawrence, *Dynamic Alignment and Regulatory Cooperation between the UK and the EU after Brexit*, September 2019, Trade and Justice Movement.
[293] In environmental policy, for example, the UK retained more than 500 items of EU environmental law.
[294] D. Davis, *Foundations of the Future Economic Partnership*, 20 February 2018, Gov.UK.

representatives talked about the divergence and the advantages it would give the UK in its relations with its neighbours. Before the start of negotiations on the future EU-UK relationship, the Chancellor of the Exchequer Said Javid said in an interview with the Financial Times: "There will be no training, we will not be rule takers, we will not be in the single market, and we will not be in the Customs Union and we will do it by the end of the year[295]". Commission President Ursula Von der Leyen reacted immediately, saying: "The more divergence there is, the more distant the partnership must be[296]".

The controversial issue of the level playing field remained on the agenda until the final stage of negotiations. The Union's request was designed to prevent UK firms from undercutting EU firms with unfair competition. The size of the UK economy and its proximity to the European Union ensured that the quid pro quo for tariff- and quota-free access to the Single Market was provisions in workers' rights, competition and State aid policy, taxation, and social and environmental protections. The TCA's level playing field provisions represent a compromise on the maximalist positions of both the United Kingdom and the European Union. The EU conceded that the Court of Justice would not oversee the level playing field provisions in the eventual agreement. This was a concession to the UK's red line of ending the CJEU's jurisdiction and thus could be seen as a gain in sovereignty for the UK. However, the EU insisted on LPF provisions in all these areas, thus keeping the UK within its regulatory orbit.

Essentially, the Trade and Cooperation Agreement recognizes the right of each Party to determine its future policies and priorities regarding labour and social, environmental, or climate protection as it relates to subsidy control, which in effect was the inclusion of a sovereignty claim in the TCA. However, the TCA provides for unilateral rebalancing measures in certain circumstances: Article 9.4.2 specifies that in the event of significant divergences that have had a material impact on trade or investment, either Party may take appropriate rebalancing measures to address

[295] Financial Times*, Forget Staying Close to EU After Brexit, Chancellor Tells Business*, FT 17 January 2020.
[296] *Boris Johnson and Ursula von der Leyen have positive meeting*, The Guardian, 18 January 2020.

the situation. As a result, the UK has had to concede that the EU will unilaterally oppose the exercise of UK sovereignty that results from significant divergences in these areas in certain circumstances. However, the asymmetry of the relationship and the EU's determination to protect the single market have led the UK to accept a much more robust level playing field and governance mechanisms than it originally wanted. The UK retained the right to diverge theoretical sovereignty, but this right did not come at zero cost[297]. This raises the question of how the UK might use its new sovereignty in the future. These are crucial normative questions for the UK and its future relationship with the European Union. The UK's actual latitude to pursue divergent regulation while maintaining the no-tariff, no-quota Agreement, and consequently the TCA's big negotiating victory, will be determined not only by the UK but also by the level playing field provisions that will only be tested when a divergence process begins. For UK businesses, the TCA provides a degree of certainty, but the dispute resolution mechanisms, the potential for unilateral action and rebalancing introduce an element of instability, which is detrimental to business planning and investment. It is unclear how the EU will respond to the UK's divergence and how vigilant it will be in monitoring developments in the UK.

By pursuing a "sovereignty first" Brexit, the UK has made it significantly more difficult for its exporting companies to maintain control over their business models, supply chains, and business environment. In 2019, 43% of UK exports went to the EU, and 52% of imports originated from the EU; services accounted for 42% of UK exports to the EU[298][299]. Prime Minister Johnson's Brexit model has made the trade in goods and services more difficult and expensive. Although the Prime Minister claimed there would be no non-tariff barriers to trade as a result of the TCA, this is demonstrably not true: there are burdensome and time-consuming customs checks, new VAT requirements, rules of origin certification, weak access to services, and other regulatory barriers, particularly in the agri-food sector.

[297] L. Dalingwater, *Britain's post Brexit Trade Deals: Taking Back Control or a Threat to Sovereignty?*, Angles New Perspectives on the Anglophone World, Vol. 13/2021.
[298] M. Ward, Statistics on UK-EU Trade, UK Parliament, House of Commons Library, 3 December 2021, Research Paper No. 7851.
[299] See paragraph 3.9.2 on the Impact of Brexit on UK Economy and Trade.

To preserve its freedom to manoeuvre, the UK has not accepted the requirements that accompany simplified controls for goods of plant or animal origin, nor has it accepted conformity assessment. Moreover, the desire to control free movement led the government to recast a Union offer for visa-free travel for specific categories of people. According to Sam Lowe, the British Government explicitly prioritized regaining the ability to make its own laws over "maintaining the economic benefits of EU membership[300]".

3.9.2 Impact of Brexit on UK Economy and Trade

The impacts of Brexit on the UK economy and trade continue to evolve. In 2016, following the Brexit Referendum, the British pound fell to a record low, and inflation rose, while real wages fell[301]. As a result, numerous concerns have emerged about widespread damage to the UK economy from Brexit. In 2018 and 2019, the UK economy saw its lowest annual growth rate (1.3%) since 2012 (1.5%), among challenges of weak business investment, productivity, and income growth[302]. Moreover, facing the effects of both Brexit and the Covid-19 pandemic, the UK economy shrank by 10% in 2020, the most significant contraction of any G7 country[303].

For nearly five years, as each new deadline in the Brexit negotiations approached, many businesses in the UK talked about contingency measures to prepare for trade disruptions – expected if the result was a hard Brexit or an EU-UK Trade deal. For example, some businesses in the UK reported stockpiling food, medicine, and auto parts and planning for additional warehouse space to deal with potential backlogs at the border. The TCA has reduced some economic uncertainty and boosted business confidence. Still, the full implications of the Agreement – with its exceptions, limitations, and transition periods – will take time to become fully

[300] S. Lowe, Brexit Deal Means Freedom but at a Cost, CER Opinion, 27 December 2020.
[301] J. Portes*, Macroeconomic Outlook, in Brexit and Beyond, UK in a Changing Europe*, January 2019, 2021, p. 101.
[302] International Monetary Fund, World Economic Outlook, October 2020.
[303] IMF, World Economic Outlook Update, January 2021; J. Douglas and A. Barnett, *British Economy, Post-Brexit and Pummeled by Covid, Is Worst in G-7*, Wall Street Journal, January 25, 2021.

apparent. The first few months of full Brexit have been marked by reports from many businesses in the UK of supply chain disruption, delays in customs checks and other challenges to trade with the European Union, in some cases, along with the ongoing trade restrictions due to the Covid-19 pandemic[304]. The UK Government previously estimated that the deal would result in 215 million customs declarations for 7 billion in costs[305] each year.

The long-term impacts of Brexit on the UK economy and trade depend on several factors, including how the TCA is fully implemented and how outstanding issues under the TCA are resolved, as well as the UK's ability to enter into other new trade agreements with countries outside the European Union. As aspects of the TCA and the overall Agreement are subject to future discussion and revision, the United Kingdom and the European Union may agree to further trade liberalization at some point[306]. However, the extent that businesses adapt to current trading conditions, any future UK-EU trade liberalization benefits could be limited[307].

3.9.3 Impact of the TCA on Fisheries

The fishing regulation in the North Sea proved particularly complex, given the British desire to regain possession of its coastal waters[308]. A further complication stemmed from the fact that most UK fish was sold to EU Member States and most of the fish consumed in the UK came from the EU, thus linking it to the trade flows of the negotiations. On the politically dedicated front of regulating North Sea

[304] UK Office for National Statistics, UK Trade: January 2021, March 21, 2021.
[305] P. Pylas, *What Now for British Economy with UK-EU Trade Deal Reached?*, Associated Press, December 5, 2020.
[306] W. Wright, *Brexit & the City: Some Initial Reflections*, New Financial, January 2021.
[307] P. Stafford, C. Hodgson, C. Giles, *London Unlikely to Regain Lost EU Share Trading Warn City Figures*, Financial Times, January 6, 2021.
[308] The UK's desire to remove itself completely from the Common Fisheries Policy (CFP) clashed with the EU's insistence on maintaining an access by establishing ad hoc provisions to be contained in the international agreement under negotiations. Indeed, The TCA, that it must be recalled is concluded under Article 217 TFUE addressed this issue and sets forth an obligation on this matter. On this it should be considered that in many provisions under Part Two, Heading Five, Fisheries, the Agreement reached calls for a 25% reduction in the EU catch in the UK waters over a period of 5 years and a half (until June 2016). The UK would have wanted a 60% reduction over three years, and it is therefore clear that the UK's desire to break away completely from the policy on EU fisheries was not respected. Britain had to take a significant step backwards.

fisheries, Brussels explained that the EU catch in UK coastal waters will decrease by 25% over five years and a half period (until June 2026). After the transition period is over, the discussion will be annual. Initially, the British government would have wanted a 60% reduction over three years. Clearly, Britain has had to take a significant step backwards.

According to the spokeswoman, on April 30, 2021, the EU Commission received a notification from the UK authorities to grant 41 licenses to European fishing vessels to operate from May 1 in Jersey territorial waters. However, additional conditions had been attached to the licenses. Brussels indicated to London that the fisheries provisions of the post-Brexit Agreement, had not been complied with, as all additional conditions attached to the licenses must be based on clear and scientific reasons and must not be discriminatory. The request for additional conditions also had to be notified in advance to allow time for the parties to assess and respond, reiterating that full compliance with the post-Brexit Agreement for Brussels is essential.

Since the beginning of the year, the UK and France have been at loggerheads over fishing licenses in UK waters post-Brexit; dialogue is moving forward but both countries have threatened drastic action. In addition, some distortions in translations of official statements have further worsened the situation[309]. Under the post-Brexit Trade and Cooperation Agreement, French fishers can continue to fish between six and twelve miles off the British coast and off Guernsey and Jersey until 2026, as long as they have a discretionary license issued by London[310]. France claims that for the area between six and twelve miles off Guernsey and Jersey, only 210 licenses out of 454 requested have been granted; the United Kingdom instead claims to have issued 1700 licenses, approving 98% of the requests received from the European Union. But the number also includes licenses for fishing in the UK's exclusive economic zone, between 12 and 200 miles from the coast, which are

[309] J. Henley, *La Guerra del pesce tra Francia e Regno Unito*, The Guardian, UK, 4 novembre 2021.
[310] In order to get the license, fishermen must prove that they have already fished in those waters between 2012 and 2016, but the two countries disagree about the evidence to be presented and the amount of past activity needed to be eligible for the license.

issued automatically under the terms of the TCA. The crux of the matter is that the TCA determines[311] which vessels are eligible for a license based on their past activity in the disputed areas but does not provide details on the evidence required. The situation then quickly escalated, in the last days of October 2021, two English fishing vessels were stopped by the French maritime gendarmerie during controls in the Seine Bay and one was diverted to the port of Le Havre. These usual controls "during the scallop fishing season" are also part of the tightening of controls in the English Channel, as part of licensing discussions with the UK and the European Commission. British Prime Minister Boris Johnson later personally urged French President Emmanuel Macron to tone down the post-Brexit fishing license dispute in the Channel, hoping Paris would withdraw its threats of retaliation considered unjustified by London[312]. Johnson expressed deep concern to Macron over recent threats attributed to some in the French government. And he warned that the detention of two British fishing boats by the Paris authorities in recent days for supposed controls represents a violation of the TCA signed by the United Kingdom with Brussels for the post-Brexit period[313]. As a final step, on December 11, 2021, the UK granted 23 additional licenses to French fishers the day after Paris set a deadline to resolve the conflict over fishing rights post-Brexit. In a note, the European Commission called London's decision "an important step in a long process aimed at the full implementation of the Trade and Cooperation Agreement".

3.10 TCA Dispute Settlement Mechanisms

The institutional and dispute settlement arrangements constitute one of the most important and central provisions in the TCA and therefore need to be assessed rigorously. These elements that make up what has been called the "governance" structure of the Agreement were one of the stumbling blocks that prevented the

[311] Trade and Cooperation Agreement, Part Two, Heading Five, Chapter 1, Article 495(1), Definitions.
[312] French Minister for the Sea, Annick Girardin, post via Twitter.
[313] Emmanuel Macron had said: "When we talk about the issue of fisheries and the issue of the Northern Irish Protocol, it is not a bilateral issue between France and the UK: it is an EU issue and compliance with the agreement, the EU Commission is on our side. I don't want escalation; I want an agreement. But now the ball is in the British court: if they don't make obvious moves to respect the agreements, retaliatory measures will be confirmed". G20 in Rome 30-31 October 2021.

conclusion of the Agreement early enough so that it could be scrutinized by Parliaments and ratified before the expiry of the transition period on December 31, 2020.

Given the wish of the UK to "take back control" and escape from the jurisdiction of the Court of Justice of the EU, it is rather important to consider, first, how disputes can be settled and, second, whether they can be resolved "definitively[314]". The settlement process was a sensitive part of the TCA negotiations and given that the Court of Justice of the EU has ended up with no role in the process[315] (a point the UK was insistent on), it represents a significant concession on the part of the EU. Specific dispute resolution provisions are contained in Articles 734 through 762. According to Article 736, the two parties agreed to use only the mechanism created by the agreement to resolve disputes and not to use other options[316].

Regarding the dispute settlement mechanism envisaged by the TCA, two institutional bodies come to the fore. Firstly, a Partnership Council constituted *ad hoc* for the occasion, which comprise the representatives of the EU and UK and is co-chaired by a member of EU Commission and a ministerial level representative of UK government. It is a joint committee and oversees UK and EU implementation, application and interpretation of the TCA. It has several governing tasks within the TCA and supplementing agreements between the parties[317]. The Partnership Council may meet only at the request of one of the Parties, although the Agreement provides for the organization of at least one formal meeting each year[318]. The Partnership Council shall oversee the attainment of the objectives of this Agreement and any supplementing agreement. It shall supervise and facilitate the

[314] P. Nicolaides, *The Dispute-Settlement Provisions of the EU-UK Trade and Cooperation Agreement: Are they Adequate for the Task?*, Luiss School of European Political Economy, Working Paper 15/2021, p. 7.
[315] There are some minor exceptions where the CJEU retains a role for example in relation to the application of the Northern Ireland Protocol under the Withdrawal Agreement (2019).
[316] Given England's strong opposition to retaining the Court of Justice's jurisdiction over the interpretation and application of the Treaty, arbitration was deemed the only viable route. Alternative solutions, existing in the international regulatory landscape could be inquiry or good offices, mediation or conciliation, or negotiations.
[317] Trade and Cooperation Agreement, Part I, Title I, Article 2, Supplementing Agreements.
[318] Trade and Cooperation Agreement, Part I, Title III, Article 7, Partnership Council.

implementation and application of the TCA and of any supplementing agreement. Each Party may refer to the Partnership Council any issue relating to the implementation, application and interpretation of the TCA[319].

A necessary structure to settle any disputes because even if the paths of the two entities seem common on several points, the fact that they are two separate entities could foresee some low blow from one or the other party. Britain's objective is undoubtedly to impose itself economically on the continent. A head-to-head that sees Boris Johnson's government at an advantage considering that this is free from EU regulations. The United Kingdom, in many ways, no longer has an obligation to comply with EU regulations. It has done so from the outset, as in the case of the Covid-1 vaccines approved in advance of EMA procedures. This regulatory freedom could create a gap that could allow the UK to relaunch its economic model based on the innovation sectors for some years now. This is also demonstrated by the fact that it has maintained its position within the European research development program. Secondly, to resolve disputes that may arise between the two parties, reference is made to the instrument of Arbitration.

There are two main stages to settling a dispute: first there is a phase of consultation in good faith between the Parties with the aim of reaching a mutually agreed solution. The consultation is deemed concluded within 30 days of the date of the delivery of the written request[320]. Secondly, recourse to arbitration is permissible if the responding party does not reply within the 10-day period; the consultations are

[319] Article 7(4) of the TCA states that the Partnership Council shall have the power: a) to adopt decisions in respect of all matters where this Agreement or any supplementing agreement so provides; b) to make recommendations to the Parties regarding the implementation and application of this Agreement or of any supplementing agreement; c) to adopt, by decision, amendments to this Agreement or to any supplementing agreement in the cases provided for in this Agreement or in any supplementing agreement; d) except in relation to Title III of Part One, until the end of the fourth year following the entry into force of this Agreement, to adopt decisions amending this Agreement or any supplementing agreement, provided that such amendments are necessary to correct errors, or to address omissions or other deficiencies; e) to discuss any matter related to the areas covered by this Agreement or any supplementing agreement; f) to delegate certain of its powers to the Trade Partnership Committee or to a Specialized Committee, except those powers and responsibilities referred to in point g); g) by decision, to establish Trade Specialized Committees and Specialized Committees, other than those referred to in Article 8(1), dissolve any Trade Specialized Committee or Specialized Committee or change the tasks assigned to them and, h) to make recommendations to the Parties regarding the transfer of personal data in specific areas covered by this Agreement or any supplementing agreement.

[320] Trade and Cooperation Agreement, Part Six, Title I, Chapter 2, Article 738, Consultations.

not held within the right timeframes; the consultations are concluded without finding a mutually agreed solution or the Parties agree not to have consultations[321]. The establishment of the arbitration tribunal may be requested by the complaining Party in the above-mentioned cases by a written request delivered to the respondent Party. In its request, the complaining Party shall explicitly identify the measure at issue and explain how that measure constitutes a breach of the covered provisions in a manner sufficient to present the legal basis for the complaint clearly[322]. No provision of the TCA establishes a role or a form of involvement for the Partnership Council in the arbitration procedure and in the settlement of such disputes.

The arbitration tribunal decides disputes between the Parties under the TCA framework. Articles 738 through 745 outlined the rules and procedures for consultations, time, limits, provision of relevant information, the establishment of arbitral tribunals, composition, functions and decision-making rules of arbitral tribunals, and the rights and obligations of the "claimant" and "defendant" parties. Arbitration is commenced by a written request which identifies the measures at issue and explains how the measure breached the relevant provisions in a manner sufficient to present the legal basis for the complaint clearly. Tribunals will compose of three independent arbitrators[323] one of whom shall sit as the Chairperson. Under the TCA, the tribunal has up to 160 days to issue a final ruling[324]. It may either be a unanimous or a majority decisions and dissenting opinions will be not available[325].

Article 746 provides that if an arbitral tribunal finds a breach of obligations under the Agreement, the defendant party shall take the necessary measures to comply immediately and notify the plaintiff of such measures within a reasonable period of

[321] Trade and Cooperation Agreement, Part Six, Title I, Chapter 2, Article 739(1), Arbitration Procedure.
[322] Trade and Cooperation Agreement, Part Six, Title I, Chapter 2, Article 739(2), Arbitration Procedure.
[323] Trade and Cooperation Agreement, Part Six, Title I, Chapter 2, Article 740, Establishment of an Arbitration Tribunal.
[324] Trade and Cooperation Agreement, Part Six, Titile I, Chapter 2, Article 745, Ruling of the Arbitration Tribunal.
[325] Trade and Cooperation Agreement, Part Six, Title I, Chapter 4, Article 754, Arbitration Tribunal Decisions and Rulings.

time[326]. If the claimant is not satisfied, it may again request the tribunal to decide the matter[327]. Any subsequent disagreement over the application of compliance measures is also subject to a decision by the arbitral tribunal[328]. Arbitral tribunals "*shall make every effort to make rulings and decisions by consensus*", otherwise they shall decide by majority vote[329]. The decisions and awards are binding on the EU and the UK, but not on their domestic courts, which do not have jurisdiction in resolving disputes between the Parties but are free to interpret the relevant provisions of domestic law. In addition, decisions and judgments do not create rights or obligations for natural or legal persons. This can lead to discrepancies between a court's interpretation of the provisions of the Agreement and a domestic court's assessment of the Agreement's implementation. The Agreement is silent on what can happen if such a discrepancy occurs. The Agreement does not authorize arbitral tribunals to confirm compliance with their judgements and decisions.

The dispute settlement mechanism provided in the TCA is a State-to-State mechanism, so individuals and legal entities have no standing under the TCA. They would have to undertake lobbying efforts in order to persuade the UK or the EU to bring a case. However, the tribunal is entitled to accept amicus curiae submissions from private parties provided they are "*independent from the governments*" of the UK or EU and subject to the specific rules outlined in the TCA[330]. Finally, the TCA is very clear on this point: tribunal rulings "*shall not create any rights or obligations with respect to natural and legal persons*[331]".

It is crucial to note that the Agreement allows the two Parties to take unilateral measures before initiating dispute resolution proceedings by either Party. The

[326] Trade and Cooperation Agreement, Part Six, Title I, Chapter 3, Article 747, Reasonable Period of Time.
[327] Trade and Cooperation Agreement, Part Six, Title I, Chapter 3, Article 748, Compliance Review.
[328] Trade and Cooperation Agreement, Part Six, Title I, Chapter 3, Article 750, Review of any Measure Taken to Comply after the Adoption of Temporary Remedies.
[329] Trade and Cooperation Agreement, Part Six, Title I, Chapter 4, Article 754, Arbitration Tribunal Decisions and Rulings.
[330] See Rule 39 under the ANNEX-INST: RULES OF PROCEDURE FOR DISPUTE SETTLEMENT.
[331] Trade and Cooperation Agreement, Part Six, Title I, Chapter 4, Article 754(2), Arbitration Tribunal Decisions and Rulings

Agreement requires the Party taking such unilateral measures to notify the other Party who may request consultations and possibly establish an arbitral tribunal. In addition, the two Parties may take corrective, rebalancing, or safeguard measures[332] if they consider that the other party has violated the Agreement's provisions or if their interests are damaged[333]. In a sense, they are authorized to "take the law into their own hands[334]".

The ultimate incentive for compliance with the terms of the Agreement is harm for retaliatory action by the other Party. The weakness of this dispute resolution system is precisely that arbitral tribunals do not have the power to impose punitive measures for non-compliance or non-compliance with a previous non-conformity award. This system is inefficient because it conflates one retaliation with another and introduces politics of power into the decision to launch or not to launch a retaliatory action.

3.10.1 Dispute Settlement in the EU and UK before and after Brexit

One of the most critical aspects of the dispute resolution mechanism within the Trade and Cooperation Agreement concerns the final remedy provided for by the Agreement against non-compliance, namely, retaliatory action. While it is true that the Agreement requires the Parties to ensure that such action is "strictly proportionate" to the harm suffered, it leaves it up to the aggrieved party to

[332] Such unilateral measures take several forms: 1) remedial measures that are permitted in relation to harmful subsidies (Article 374) and regulation of road transport (Article 469); 2) rebalancing measures, are permitted in the event of "significant differences" between the parties in labor, social, environmental or climate protection or subsidy control (Article 411); 3) compensatory measures are permitted when fishing rights are withdrawn or suspended (Article 501); 4) safeguard measures are permitted when there are serious economic, social or environmental difficulties of a sectoral or regional nature (Article 773).

[333] Trade and Cooperation Agreement, Part 6, Title I, Chapter 5, Articles 760-762, Specific Arrangements for Unilateral Measures.

[334] P. Nicolaides, *The Dispute-Settlement Provisions of the EU-UK Trade and Cooperation Agreement: Are they Adequate for the Task?*, Luiss School of European Political Economy, Working Paper 15/2021, p. 11.

determine the necessity and proportionality of its corrective, rebalancing, or safeguard measures[335].

These shortcomings in the Agreement's dispute resolution mechanism can be seen more clearly when comparing it to the corresponding EU jurisdictional structure. First, the EU institutions typically decide by qualified or simply majority, while controversies in the Partnership Council must be resolved by mutual agreement, i.e., each party holds a veto[336]. Second, the Agreement does not provide for an institution separate from the Parties to initiate proceedings. Because of the absence of an independent "gatekeeper" to the Agreement, "politics of power" enter the calculus. Whether and how a dispute is resolved may be influenced by totally unrelated issues and concerns. Again, such a possibility erodes the predictability of the rules of the Agreement and its processes and does not effectively end disputes. Third, the Agreement has no provisions that provide penalties for failure to comply with an arbitration decision. The only consequence of non-compliance is the possibility of corrective action, i.e., retaliation by the other Party. In contrast, in the EU, sanctions are financial in nature to not disrupt trade or investment. More importantly, there are modulated according to the size of the Member State, the seriousness of the infringement and the duration of the infringement or continued infringement after a ruling by the EU Court of Justice[337]. Fourth, the Agreement is silent about whether arbitral tribunals can be guided by precedent or prior court rulings. This cuts both ways. On the one hand, each tribunal will be free to re-interpret and consider the evolving state of bilateral relations. On the other hand, however, continuity of interpretation over time provides predictability and legal certainty. As the Court of Justice has said, uniform interpretation between the

[335] Although the other party may request the establishment of an arbitral tribunal to examine the proportionality of such a measure, the system that has been created ultimately allows action by the parties that creates new distortions in bilateral trade or investment.
[336] A Party with a grievance must raise it first in the relevant committee and then in the Partnership Council and if it is not satisfied by the response of the other Party it may proceed to initiate the dispute resolution procedure. If, for whatever reason, the complaining Party backs down because it fears retaliatory action or non-cooperative behaviour by the other Party, the dispute will be left unresolved, and the rules of the Agreement will lose clarity.
[337] P. Nicolaides, *The Dispute-Settlement Provisions of the EU-UK Trade and Cooperation Agreement: Are they Adequate for the Task?*, Luiss School of European Political Economy, Working Paper 15/2021, pp. 13-15.

Member States is the "cornerstone of the EU judicial system[338]". The very purpose of any agreement is to limit the parties' discretion. Intergovernmental agreements define only the constraints that the parties are willing to accept. It is well known that the EU was in favour of retaining the jurisdiction of the Court of Justice. It is also known that this was anathema to the UK. Since one of the goals of the Brexit was for the UK to "take back control", it is understandable that the UK did not want rules that mimicked the role of the ECJ. However, given that the two Parties to the Agreement had the discretion to design it as they saw fit, without duplicating EU mechanisms, they could have considered alternative arrangements of a more binding nature with the possibility of sanctions. For example, at the beginning of the dispute resolution process, the Parties could have prevented the "politics of power" calculus from creeping into the Agreement by establishing an independent body to oversee the operation of the Agreement. At the other end of the process, they could have authorized arbitration tribunals, or a body separate from the tribunals to impose sanctions.

In the case of the EU-UK Agreement, the absence of provisions preventing unilateral action or restrictive measures in the event of non-compliance with a court decision and the lack of an independent "gatekeeper" led to the conclusion that dispute resolution will ultimately depend not on principles but on the political and commercial considerations of the moment.

3.10.2 The Role of the European Court of Justice in the TCA's implementation

The complexity of this Agreement stemmed in part from another critical point in the negotiations: the role of the EU Court of Justice. Following Brexit, and at the end of the transition period, disputes between the EU and the UK will no longer be settled by the Court of Justice but by an ad hoc body: the parties have in fact chosen the tool of Arbitration to settle their disputes[339].

[338] Opinion 2/13 of the Court of Justice of 18 December 2014, Accession of the Union to the ECHR, EC:C:2014:2454, paragraph 176, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CV0002.
[339] Articles 738-745 of the TCA outlined the rules and procedures for consultations, time, limits, provision of relevant information, the establishment of arbitral tribunals, composition, functions

Indeed, as another symbol of failures of membership, giving the Court any say in dispute resolution or interpretation of the TCA was ruled out by British negotiators, even against the EU's rebuttal that when it came to issues of EU law there was a clear obligation for the Union to use the CJEU for final decisions[340]. While the UK accepted the EU's line for the Withdrawal Agreement, it was unwilling to budge on this, ultimately securing a dispute resolution system that did without it. At the same time, the UK had to give ground on the EU's desire to create a single governance framework for the post-member relationship, rather than separate, narrow entities like the Swiss model. This is not the first time that the UK government has sought to challenge the jurisdiction of the Court of Justice and, indeed, it could be argued that the role of the judges in Luxembourg has been one of the emblematic aspects of the controversial relationship between the EU and the UK[341].

Therefore, it is no surprising that the dispute resolution mechanism to be incorporated in the Withdrawal Agreement has represented one of the most politically sensitive points of the negotiations for the exit of the United Kingdom from the European Union. And although the doctrine is not unanimous on this point, it could also be argued that the letter of Article 50 TEU – by not making any reference to the Court of Justice and consequently not giving it a precise role during the negotiation phase – implicitly ousts the Kirchberg judges from the actors involved in the withdrawal procedure[342]. As known from Theresa May's own

[340] This does not mean that the Court of Justice ceases to play a role in relations with UK. Indeed, it remains central to the interpretation of the Withdrawal Agreement and the Northern Ireland Protocol.
[341] The United Kingdom has never accepted the jurisdiction of the Court of Justice in relation to the measures of the former third pillar and with the Lisbon Treaty has requested a special transitional regime in relation to the same (Article 10 of Protocol no. 36 annexed to the TEU and TFEU) in order to be able to decide the only measures to which it wishes to be bound and in relation to which to recognize the jurisdiction of the Court of Justice.
[342] Article 50 TEU, introduced with the Lisbon Treaty, states: "Any Member State may decide in accordance with its own constitutional requirements to withdraw from the Union. The Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines laid down by the European Council, the Union shall negotiate and conclude an agreement with that State aimed at defining the modalities of its withdrawal, taking into account the framework of its future relations with the Union. The agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority after obtaining the consent of the European Parliament. The Treaties shall cease to apply to the State concerned from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph

words: “The UK is keen to regain total control over its own law and drastically end the jurisdiction of the Court of Justice in the UK[343].” Nonetheless, the delicacy of the interests at stake has led the European institutions to adopt a tough approach towards the United Kingdom even in the matter of dispute resolution: in fact, the main documents published by the European institutions, according to the time scales established by Article 50 TEU, do not hint any hesitation and testify to the compactness of the EU to impose the jurisdiction of the Court of Justice on the United Kingdom.

This has been one of the knots to unravel for the entire negotiations and has created tensions in the last weeks of 2020. Then, at the very end of 2020, was signed the Agreement that came into force on December 31, 2020. This Agreement deals with regulating the relationship between the two entities and felt the need to include a discipline that would deal with who would have jurisdiction in case of disputes between the two. Fortunately, the two entities have points in common and continue to walk hand in hand in many areas such as those relating to the environment or social finding common points and equal conditions, especially under the aspect of transparency.

A common path that serves to prevent that the EU and the UK after almost 50 years of close collaboration enter into competition damaging each other. However, some rules are clear, such as those on the level playing field in terms of State aids[344]. This is a loophole that Europe wanted to bind the UK to EU competition rules; a loophole that leaves no time to be found given that the British are no longer obliged to maintain the rigidity required by EU rules. Precisely for this reason, a rebalancing

2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period”.

[343] The Rt Hon. Theresa May, *The government’s Negotiating Objectives for Exiting the EU*: PM Speech, Lancaster House, 17 January 2017: “So we will take back control of our laws and bring an end to the jurisdiction of the European Court of Justice in Britain. Leaving the European Union will mean that our laws will be made in Westminster, Edinburgh, Cardiff and Belfast. And those laws will be interpreted by judges not in Luxembourg but in courts across this country. Because we will not have truly left the European Union if we are not in control of our own laws”. Available at https://www.gov.uk/government/speeches/thegovernments-negotiating-objectives-for-exiting-the-eupm-speech.

[344] Neither of them will be able to provide unlimited State aid, but only in special cases already provided for, and if they sign agreements with companies, they are obliged to disclose all the details.

mechanism has also been foreseen in the event of a violation, a mechanism that the UK has, however, wanted to be subject to an arbitrator and not to the Court of Justice.

A different situation arises about disputes concerning the interpretation and application of the Ireland/Northern Ireland Protocol. While the Union has accepted that the supervision of products destined for the Union through Northern Ireland be delegated to the British authorities, the United Kingdom has accepted that the European institutions, and in particular the Commission and the Court of Justice, maintain their supervisory role in the areas of customs controls, regulatory standards, VAT, the single electricity market and state aid; and, consistently, the principles of supremacy and direct effect continue to apply in these areas. The Commission, therefore, retains its role as "guardian" of the Protocol and, as such, may exercise its function, including that concerning infringement proceedings under Article 258 TFEU, and the Court retains its jurisdiction over such actions and preliminary rulings on the interpretation of Protocol's rules. This continued supervision of the institutions of the Union is inevitable since through the Protocol, rules of Union law apply, and the principle of autonomy of the law of the European Union requires the exclusive jurisdiction of the Court of Justice in its interpretation[345]. Despite this, and inevitably given the political tension, the role of the institutions is strongly contested by the United Kingdom, which in the Command Paper of July 2021[346] has made it clear that the *governance* of the Protocol should be that of a typical international treaty such as the Trade and Cooperation Agreement. For its part, the Commission has made it clear on more than one occasion that the European Union is not prepared to renegotiate the Protocol[347]. In any case, as mentioned above, the principle of autonomy of EU law cannot legally be affected by Agreements with third countries. Apart from the role

[345] This principle, affirmed by constant case-law, has recently been confirmed in the Court of Justice's Opinion 1/17 of April 30, 2019, CETA, EU:C:2019:341, as well as in the judgement of March 6, 2018, case C-284/16, *Achmea*, EU:C:2018:158 and Opinion 2/13 of December 18, 2014, ECHR, EU:C:2014:2454.
[346] Northern Ireland Protocol Command Paper, published by the UK Government, July 21, 2021.
[347] See most recently Commission Statement of September 24, 2021, following the 9th Meeting of the Specialized Committee on Implementation of the Protocol on Ireland/Northern Ireland, available at https://bit.ly/3q9Nwbf.

of the EU institutions, the governance of the Protocol is ensured both by a specialized committee according to Article 165 of the Withdrawal Agreement[348] and by a joint consultative working committee[349].

3.11 Some Conclusive Remarks on TCA Provisions

The Trade and Cooperation Agreement was intended to mark and institutionalize the beginning of a new phase in EU-UK relations after the end of membership. This has been successful at the legal instrument level, with ratification completed in April 2021. But at the political level, the impression is much less positive. In particular, there does not seem to be a clear trajectory for future relations, either in the implementation of the Withdrawal Agreement and the TCA, or in the use of these or other means to conduct a stable set of interactions[350]. The negotiation process has done nothing to improve relations between the two sides, in fact it has probably made them worse because trust has been undermined and the willingness to make deals has been reduced. The UK's perceived otherness now had a material basis, coupled with a political imperative of performative divergence. Moreover, the increasingly problematic implementation of the withdrawal agreement laid the groundwork for questions about whether the same would be true for the TCA. Even with the various adjustment periods contained in the latter, the EU repeatedly noted that the UK did not appear to have undertaken the necessary infrastructure or policy work to ensure that the provisions were fully operational in time[351].

Despite these concerns over implementation, the conclusion of the TCA potentially draws a line under any active efforts on either side to move things along[352]. The EU has now secured both its core interests in the Withdrawal Agreement and protected

[348] Northern Ireland Protocol, Article 14, Specialized Committee.
[349] E. Spaventa, *Il Protocollo sull'Irlanda del Nord fra "Grazie" e "Disgrazie"*, Eurojus, Vol. 4/2021, pp. 114-116.
[350] Northern Ireland Protocol and its implementation and fisheries with all the internal matters are at stake.
[351] M. Šefčovič, "Press Statement by Vice-President Maroš Šefčovič Following Today's Joint Committee and Partnership Council Meetings", Press Release, 9 June 2021, available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_21_2927.
[352] S. Hix, *Brexit: Where is the EU-UK Relationship Heading?*, 2018, Journal of Common Market Studies, Vol. 56-S1, pp. 11-27.

itself in the TCA and appears to have minimal interest in pushing for any further cooperation. Brexit has undoubtedly been an essential part of the EU's work since 2015, but it has empire had to share attention with other priorities: the very success of the model used for Article 50 in containing and managing the UK has meant that the European Councils have devoted minimal time to the issue since the Salzburg meeting in September 2018[353].

Thus, the real test will be the extent to which the UK is prepared to force treaty limits and the extent to which the EU will tolerate it. With few signs in early 2021 that trust-building is a priority, the relationship should be expected to get worse before it gets better[354].

[353] S. Usherwood, *Our European Friends and Partners? Negotiating the Trade and Cooperation Agreement*, 2021, Journal of Common Market Studies, Vol. 59, pp. 115-123.
[354] F. Fabbrini, *The Framework of New EU-UK Relations, The Law and Politics of Brexit*, Volume III, Oxford, Oxford University Press, 2021, Chapter 5.

Conclusion

For the British people, the European Union represented different possibilities. The EU was a promise of peace, stability, and security through the continent, promoting the emergence of better global governance[355]. Today, the UK understands the EU both as a heavy bureaucratic apparatus and as the cause of many negative changes in their society, such as immigration, rising housing costs and inequality[356]. The vote for Brexit was also a way of reinvigorating past UK "greatness" with the UK becoming an economic power on its own. Thus, the opposition is deeper than structural or institutional factors alone.

Exemplifying England's attitude is what Lord Palmerston said, which answers many questions. As a great British statesman, as early as the 19th century he stated: "*We have no eternal allies, and we have no perpetual enemies. Our interests are eternal and perpetual, and those interests it is our duty to follow*[357]". United Kingdom's attitude two centuries later has remained unchanged, and the Brexit was further confirmation of this: the UK has long been shorn of its empire, now it will be shorn of Europe too[358].

In her speech at Lancaster House[359], Theresa May launched a rather nostalgic vision of the UK as a new dominant player on the global stage dominating the Commonwealth which, according to Ishaan Taharoor, some anonymous government officials have even labelled Empire 2.0[360]. As Tom Whyman says:

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[355] R. Prodi, *A Wider Europe – A Proximity Policy as the key to stability*, Brussels, December 5, 2002, "Peace, Security and Stability – International Dialogue and the Role of the EU" Sixth ECSA-World Conference, Jean Monnet Project.
[356] M. Leonard, *Europe Seen from the Outside—The British View*, European Council on Foreign Relations, 2016.
[357] L. Palmerston, *Speech in the House of Commons*, March 1, 1848.
[358] M. O'Sullivan, D. Skilling, *From Great Britain to Little England?*, March 29, 2017, Project Syndicate, available athttps://www.project-syndicate.org/commentary/uk-post-brexit-small-economy-model-by-michael-o-sullivan-and-david-skilling-1-2017-03?barrier=accessreg.
[359]T. May, *Speech at Lancaster House*, January 17, 2017, available at http://www.telegraph.co.uk/news/2017/01/17/theresa-mays-brexit-speech-full/.
[360] I. Tahroor, *Brexit and Britain's delusions of* empire, Washington Post, March 31, 2017, available at https://www.washingtonpost.com/news/worldviews/wp/2017/03/31/brexit-and-britains-delusions-of-empire/?utm_term=.ad5dbeff2103.

"Brexit is rooted in imperial nostalgia and myths of British exceptionalism that clash with the reality that Britain is no longer a major world power[361]".

Ursula von der Leyen, President of the European Commission, commented on reaching the Agreement on Brexit: "Much of the debate has been about sovereignty, but what does sovereignty mean in the 21st century? For me it means having the ability to work, study and do business in 27 countries, strengthening each other and speaking with one voice in a world full of great powers. And then, in times of crisis, helping each other get back on their feet instead of trying to get back on their own feet". Words of great wisdom and foresight that prompt reflection: a return to nationalism is by no means the answer to our society's problems, and the very concept of sovereignty needs to be scaled back. This is perhaps the greatest lesson to be learned today from the political handling of the United Kingdom's exit from the European Union. A lesson that the British will have to come to terms with sooner or later.

This reflection makes it possible to examine the innovations that the European Communities, and later the European Union, since their foundation present in comparison with other international organizations have led to the identification of a method of functioning and operation, namely, the EU communitarian soul, marked by its main outcome i.e. direct effect. It makes it possible to compare it with the intergovernmental soul, which is instead a trend found mainly in the conclusion of free trade agreements with third countries. These two souls, coexist within the Union: in fact, on the one hand, to promote the process of European integration it was necessary to overcome the particularisms and different political visions of national governments in order to foster a common vision and interests[362]. On the

[361] T. Whyman, *Opinion – Theresa May's Empire of the Mind*, The New York Times, February 15, 2017, available at https://www.nytimes.com/2017/02/15/opinion/theresa-mays-empire-of-the-mind.html?_r=0.

[362] Since the establishment of the CECA and the European Economic Community, the communitarian soul has been present in that they were and are based on proposals developed by a sui generis supranational authority (then ECSC High Authority, today the European Commission) independent of and third party to the Member States. The system's uniqueness is emphasized as early as its establishment: a supranational order consisting of institutions provided for the purpose and representing diverse interests. The Peoples of Europe in the system so delicate by the Treaties

other hand, however, in addition to the properly European-sovereign-communitarian soul, which is to be preferred without hesitation, there is to be found in the treaties and especially in the management of certain sensitive matters the opposing intergovernmental soul, which constitutes an alternative political/legislative system to the communitarian method with a marked intergovernmental imbalance[363][364]. The novelties of the European Communities in relation to this model are brought out with particular sharpness by the celebrated judgment of the Court of Justice *Van Gend en Loos*, which offers a theoretical and systematic reconstruction of the EEC and its legal system, aimed, moreover, primarily at affirming the direct effect of the Treaty rules. As is well known, in that judgment the Court of Justice declares that "*the purpose of the EEC Treaty, namely the establishment of a common market whose operation directly affects the subjects of the Community, implies that it goes beyond an agreement which would merely create mutual obligations between the contracting states*", and that "*the Community constitutes a legal order of a new kind in the field of international law, in favor of which the states have renounced, even if in limited areas, their sovereign powers, an order which recognizes as subjects not only the member states but also their citizens*[365]". This contrast took shape with the exit of the UK from the Union. There has been a negotiation of a Treaty, the TCA, in which the intergovernmental soul

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are represented by the European Parliament, which confronts diverse interests, the Commission and the Council: thus, a trialogue is realized in the dialectic of the Community method.

[363] It seems that there can be no doubt that the Community method should be preferred, since it is consistent with the systematic framework of the Union's legal system and its distinctive features. It should be added that the adoption of this method makes it easier to achieve the objectives of the Union and with more streamlined procedures. It would not be justified, however, to "demonize" the intergovernmental method. After all, the two methods, communitarian and intergovernmental, have always coexisted, in a shifting balance due to the political temperament, corresponding to the dual nature of the European Union, a union of peoples, on the one hand, and of states, on the other. Not surprisingly, it has been authoritatively suggested by Angela Merkel to overcome the dichotomy in question by adopting a "Union method", consisting of coordinated action in a spirit of solidarity, each, States and European institutions, in the area for which they are responsible, but all working toward the same goal. Experience shows, moreover, that sometimes the intergovernmental method has set in motion a positive development that, having started outside the Union, has since been integrated into its order, such as the Schengen Agreements.

[364] The intergovernmental method can be found in the Common Foreign and Security Policy and in aspects of judicial or police cooperation. This method is characterized by the following main elements: the Commission's right of initiative is shared with the EU countries or limited to specific areas of activity; the European Council often plays a key role and generally acts unanimously; and the European Parliament has a purely advisory role while in the Community method it holds co-decision power with the Council.

[365] Court of Justice of the European Union, judgment of February 15, 1963, case C-26/62, *Van Gend en Loos*, EU:C:1963:1.

has been seen to prevail both in its application and in the resolution of disputes that may arise in the future.

The EU has lost a Member State and a precedent has been set on how to dissolve membership obligations, while a new style of EU trade relationship with a neighboring state has been established that is no longer based on the ambition of closer integration with the EU's single market regulatory framework. The "British-style" relationship can be added to the growing list of alternative models for EU membership, along with the Norwegian/Swiss and Ukrainian EEA-style relationships[366] (Deep and Comprehensive Free Trade Agreement). Central to the conclusion of the Trade and Cooperation Agreement is the lengthy negotiation that pitted the EU27 and the UK against each other. Indeed, the common commercial policy constitutes the exclusive competence of the Union under Article 207 TFEU. Regardless of the UK's intentions, the ability of the UK to enter into many bilateral agreements with third countries will also depend on the willingness of other countries to remove their trade restrictions. It remains to be seen how many countries will be interested in spending time negotiating with a country whose economy is only a seventh of the EU's size and whose consumers account for only an eighth of the EU's total. Exiting from the EU's customs union will free the UK to conclude its own trade agreements. However, this freedom is not costless. Companies trading with the EU will have to comply with rules of origin. In fact, given the "Brussels effect", UK companies may also choose to comply with EU regulations after the UK's formal withdrawal.

One important conclusion, concerning the UK, relates to the delicate issue of the United Kingdom's internal regional cohesion. Brexit has triggered new rifts as the politics of nationalist movements in Scotland, Wales, and Northern Ireland have been infused with a new logic of succession by the UK to facilitate regaining its membership in the EU. First and foremost, there is the issue of Scotland, which held a referendum on its independence, the result of which was decisively influenced by the United Kingdom's status as an EU member state. In addition, Northern Ireland

[366] R. G. Whitman, *EU-UK Relations: Time for a "New Normal" post-Brexit*, January 5, 2021, Chatham House, available at https://www.chathamhouse.org/2021/01/eu-uk-relations-time-new-normal-post-brexit

will find itself in a complicated situation regarding Ireland, which will continue to be a member of the EU and therefore will have to impose controls at the border with the northern part of the island. Gibraltar will also suffer a clear change because of the United Kingdom ceasing to be a member of the EU, as it will again be in a situation like the one it was in before Spain became an EU member state: Its residents will lose the privileges of traveling to and establishing themselves in Spain. Intergenerational cohesion will also be affected following the very different voting habits in the referendum by younger and older people. The British government led by Boris Johnson has been forced to accept that the UK's Internal Market cannot function uniformly throughout its territory.

Even with all the issues raised, the United Kingdom remains one of the European Union's least difficult neighbours. For the UK, the persistent issue remains that of the lack of strategic purpose for leaving the EU. The 2016 referendum led to a decision without logic, and the only person who has ever been able to support a plan with a solid parliamentary majority, Boris Johnson, has yet to explain how withdrawal fits into a coherent vision of the UK's role in the world. The concept of "Global Britain" hardly fits with the deliberate refusal to consider any explicit cooperation with the EU, on political issues, or to pursue full economic integration. The EU now appears in British discourse as a completely outsourced "other", to be blamed for problems and positioned as a competitor. The fact that this has continued beyond the TCA negotiations suggests that this was not a tactic, but a default, and one that will continue throughout the life of this government. This means that however imperfect and challenging the new architecture of relations may be, it will be the one that must be used for the foreseeable future: neither side has an acceptable alternative, even if it were to endure yet more negotiations.

In conclusion, EU-UK relations are now based on a new framework, which is complex and unstable. On the one hand, the Ireland/Northern Ireland Protocol created a state of semi-permanent friction between the parties, which interplays with their new trade relations. In fact, UK failure to implement the Protocol faithfully almost resulted in the EP vetoing the conclusion of the TCA. On the other hand, the new Trade and Cooperation Agreement, concluded under the WTO legal

framework creates only a "shallow trading relationship[367]" between the two Parties, because UK's preference for not committing to regulatory alignment with the EU ruled out the possibilities of integration flowing from common rules or recognition agreements. The TCA is, in other words, a "run of the mill trade agreement[368]". Several UK negotiating redlines and the EU's willingness to do favours also ruled out other deeper models of trade integration[369].

It should be emphasized that in the entire Brexit negotiation process, including in the TCA's negotiation, critical and crucial has been the role played by the Court of Justice of the European Union and the new dispute settlement mechanism under the new Trade and Cooperation Agreement. There has been a tug-of-war and it should therefore come as no surprise that the dispute settlement mechanism to be incorporated into the Withdrawal agreement has been one of the most politically sensitive points in the negotiations for the UK's exit from the European Union. This is not the first time that the British government has sought to challenge the jurisdiction of the Court of Justice and beyond[370]. Indeed, it could be said that the role of the Court in Luxembourg has been one of the emblematic aspects of the controversial relationship between the EU and the UK[371]. The European Union, at least with reference to the Withdrawal Agreement, was not in favour of a different approach, proposed by UK and "forced the UK to accept a markedly different

[367] For a preliminary assessment of the TCA's effects on EU-UK trade, see I. Fusacchia, L. Salvatici and L.A. Winters, *The Consequences of the Trade and Cooperation Agreement for the UK's International Trade*, in Oxford Review of Economic Policy, 2022, No. 38, p. 31.
[368] P. Eeckhout, *Brexit after the negotiation of the Trade and Cooperation Agreement: who takes back control of what*?, in Revista de Derecho Comunitario Europeo, 2021, No. 25, p. 14.
[369] For an overview of model trade agreements concluded by the European Union in the WTO landscape, see Chapter 2, paragraph 2.6 Brexit and Trade: Trade and Cooperation Agreement.
[370] Suffice it to mention here the opt-in and opt-out mechanisms invoked by the United Kingdom with reference to old Third Pillar measures (on which, see, for all, S. Montaldo, *L'Integrazione Differenziata e la Cooperazione Giudiziaria e di Polizia in Materia Penale nell'UE: il Caso degli Opt-Out di Regno Unito, Irlanda e Danimarca*, in legislazionepenale.eu) and the regime this State enjoyed under Protocol No. 21 with respect to the entire Area of Freedom, Security and Justice (see above, Chapter I, paragraph 1.2.1, UK Membership: A Partner with Reserves and a Different Understanding of European Integration.
[371] So much so that this State has never accepted the jurisdiction of the Court of Justice with respect to the measures of the former third pillar and with the Lisbon Treaty requested a special transitional regime in relation to the same (see Article 10 of Protocol No. 36 annexed to the TEU and the TFEU) in order to be able to decide the only measures to which it wants to bind itself and with respect to which it recognizes the jurisdiction of the Court of Justice.

discipline for the protection of citizens' rights[372]". What has just been said is confirmed by the understanding reached on Article 126 of the Draft Withdrawal Agreement, which provides for the full jurisdiction of the Court of Justice over the interpretation and application of the Agreement[373]. Following Brexit, and at the end of the transition period, disputes between the EU and the United Kingdom will no longer be settled by the Court of Justice but by an ad hoc body: the parties have in fact chosen the tool of Arbitration to settle their relations and potential disputes. Through a return to a State-to-State method, the rights and obligations of those companies and economic operators active on the market are also at risk of being compromised. This marks a "return to the past" in line with that shift from one of the strongest existing forms of cooperation and integration to a new relationship characterized by less understood forms of integration and cooperation.

Whether such an instrument will be effective, and meet the needs of both parties, will have to be evaluated over time, and implementation practice will prove it.

On the other hand, the Trade and Cooperation Agreement has established a basic platform for EU-UK cooperation in several policy areas, but it is unlikely to represent the end of the Brexit process. Formal approval of the TCA marks the beginning of a "new normality" in EU-UK relations, and the symbolic nature of reaching a formal agreement after the said political turmoil may be the basis for concrete and tangible cooperation beyond trade. It creates a framework in which the EU and the UK are expected to continue adjusting their relationship. This is not only resulting from the obligation to "review the implementation of this Agreement

[372] On this point, the understanding between the UK and the EU had already been found in the Joint Report of December 8, 2017, which can be found at: https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf. For an initial comments, see A. CIRCOLO, Brevi Note sulle Conclusioni del Primo Accordo di Recesso: Brexit Deal, December 21, 2017, at http://www.eurojus.it.

[373] See Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union, Art. 126, Supervision and enforcement, Pending cases before the Court of Justice of the European Union: "*During the transition period, the institutions, bodies, offices and agencies of the Union shall have the powers conferred upon them by Union law in relation to the United Kingdom and natural and legal persons residing or established in the United Kingdom. In particular, the Court of Justice of the European Union shall have jurisdiction as provided for in the Treaties. The first paragraph shall also apply during the transition period as regards the interpretation and application of this Agreement*".

and supplementing agreements and any matters related thereto five years after the entry into force of this Agreement and every five years thereafter[374]", but also from multiple other provisions scattered throughout the TCA, which foresee continuing negotiations between the parties, for example on annual fishing quotas or regulatory cooperation – or new transitional regimes, for example in data protection.[375] In fact, the EU and the UK also reserve the possibilities to enrich the TCA with other separate agreements – an option which is of particular value considering the important areas, for example financial services and foreign affairs, which are currently not covered by this deal. As such, the TCA, combined with the ongoing controversy over the application of the Protocol, opens a new stage in the Brexit process, which promises to be as challenging and unpredictable as the prior ones.

In this leap into the unknown, the European Union must have enough foresight to reaffirm the principles and values that have allowed Europeans to enjoy a model of coexistence unseen anywhere else on the planet.

Looking at the Brexit scenario from an outside perspective tells us that there will be no winners. We can only try to minimize the losses on both sides – and how heavy they will be – depends only on the parties' future relations following the negotiations. Predicting the future is an impossible task, as the result of the 2016 Brexit referendum proved. We can only guess at what the future will bring. Arron Bank, one of the main campaigners to leave the Union, reflected on the referendum saying, 'The Brexit was a war. We won. The use of militaristic language touches on something true for many leavers. The vote for leave was in many ways a knee-jerk reaction, a rose-tinted desire to regain control, a nostalgia for the glory days of imperial power. An emotional appeal with which those who supported the EU could not compete. The UK was a victim of mismanagement of expectations, and it was right on cue.

[374] Trade and Cooperation Agreement, Part Six, Title III, Article 776, Review.
[375] Trade and Cooperation Agreement, Part Six, Title III, Article 782, Interim provision for transmission of personal data to the United Kingdom.

As successful as the *Breexiters* may have been in convincing the UK to take this step into unfamiliar territory, after the financial crisis of 2008 and its economic fallout and the refugee crisis in 2015, it is only a matter of time until the first negative impacts become apparent. It was certainly a shock to the EU when the UK decided to leave, but the EU27 looked to the future and continued its day-to-day work[376]. "I'm going to miss my British neighbors, but I'm not going to cry like a baby, climb a tree with my toys and not come down". With that, EU Transport Commissioner Violeta Bulc may have just hit the nail on the head. The EU 27 will continue to support democracy, peace and prosperity and make the lives of its 447 million inhabitants as progressively free and secure as possible. After the negotiations are finalized, the reality remains that we will still be neighbors. But the ties that bind us together will be that little bit looser – and the extent to which we synchronize our movements remains to be seen. As the UK moves forward into unknown territory, we can only hope that they, and we, are able to adopt the attitude of Queen Victoria: "we will not have failure – only success and new learning[377]".

[376] This attitude is well illustrated in the aftermath of the end of the negotiations for the Trade and Cooperation Agreement, in the EC Press Conference on 24 December 2020, by the words of the President of the EU Commission, Ursula von der Leyen: "It was worth fighting for this deal. We now have a fair and balanced agreement with the UK. It will protect out EU interests, ensure fair competition and provide predictability for our fishing communities. Europe is now moving on. At the end of successful negotiations, I normally feel joy. But today I only feel quiet satisfaction and, frankly speaking, relief. I know this is a difficult day for some. And to our friends in the United Kingdom I want to say: parting is such sweet sorrow. But to use a line from TS Eliot: What we call the beginning is often the end. And to make an end is to make a beginning. So, to all Europeans I say: It is time to leave Brexit behind. Our future is made in Europe. Thank you so much".

[377] E. Brok, A. Liekenbrock, *Brexit - The Negotiation Position of the EU 27*, in F. Kainer, R. Repasi, *Trade Relations after Brexit*, Baden-Baden, Hart Publishing, 2019.

Bibliography

Books

R. G. Adam, *Brexit, Causes and Consequences,* Cham, Springer, 2020.

R. Adam, A. Tizzano, *Manuale di Diritto dell'Unione Europea,* Torino, G. Giappichelli Editore, 2020.

A. Arena, F. Bestagno, G. Rossolillo, *Mercato Unico e Libertà di Circolazione nell'Unione Europea*, Torino, Giappichelli Editore, 2020, pp. 59-61.

R. Baldwin, *Non-Tariff Distorsions of International Trade*, Washington DC, Brookings Institution, 1970, quoted in MP Egan, *Constructing a European Market: Standards, Regulations and* Governance, Oxford, Oxford University Press, 2001, p. 41.

C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, Oxford, Oxford University Press, 2019.

C. Barnard, S. Peers, *European Union Law*, Oxford, Oxford University Press, 2020.

C. Barnard, R. Schutze in A. Albors-Llorens, C. Barnard and B. Leucht, *Cassis de Dijon: 40 Years On*, Oxford, Hart Publishing, 2021.

A. Bradford, *The Bruxelles Effect: How the European Union Rules the World*, Oxford, Oxford University Press, 2020.

E. Brok, A. Liekenbrock, *Brexit - The Negotiation Position of the EU 27*, in F. Kainer, R. Repasi, *Trade Relations after Brexit*, Baden-Baden, Hart Publishing, 2019.

N. C. Cabral, J. R. Goncalves, *After Brexit, Consequences for the European Union*, Cham, Palgrave and Macmillan, 2017.

D. Chalmers, *The Single Market: From Prima Donna to Journeyman* in J. Shaw and G. More (eds), *New Legal Dynamics of European Union*, Oxford, Oxford University Press, 1995.

G. Contaldi, *Diritto Europeo dell'Economia*, Torino, G. Giappichelli, 2019.

L. Daniele, *Diritto del Mercato Unico Europeo e dello Spazio di Libertà, Sicurezza e Giustizia*, Milano, Giuffrè, 2021.

G. Davies, *European Union Internal Market Law*, Routledge Cavendish, 2001.

G. De Burca, *The EU and WTO: Legal and Constitutional Issues*, Oxford, Hart Publishing, 2001.

M. J. Dedman, *The Origins and Development of the European Union 1945-2008*, Routledge, 2nd edition, 2008.

D. Dinian, *Europe Recast: A History of European Union*, Basingstoke, Palgrave Macmillan, 2004.

U. Draetta, F. Bestagno, A. Santini, *Elementi di diritto dell'Unione europea - Parte Istituzionale e Parte Speciale*, Milano, Giuffrè Francis Lefebvre, 2018.

M. Egan, *Single Market* in E. Jones, A. Menon, S. Weatherill, *The Oxford Handbook of the European Union*, Oxford, Oxford University Press, 2012.

M. Egan, *Brexit and the Single Market*, in J. Laible, S. Greer, *EU after Brexit*, Manchester, Manchester University Press, 2020.

F. Fabbrini, *Brexit and the Future of the European Union: The Case for Constitutional Reforms*, Oxford, Oxford University Press, 2021.

F. Fabbrini, *The Framework of New EU-UK Relations, The Law and Politics of Brexit*, Volume III, Oxford, Oxford University Press, 2021.

F. Fauri, *L'Unione Europea. Una Storia Economica,* Bologna, 2017, p. 45

F. E. Foldvary, *Dictionary of Free Market Economics*, Northampton, Edward Elgar Publishing Inc., 1998, p. 48.

G. Galasso, in G. Amato, E. Moavero Milanesi, G. Pasquino, L. Reichlin, *The History of the European Union: Constructing Utopia*, London, Hart Publishing, 2019.

T. C. Hartley, *European Union Law in a Global Context*, Cambridge, Cambridge University Press, 2004.

C. Harvey, *The Irish Border* in F. Fabbini, *The Law and Politics of Brexit, Volume II: The Withdrawal Agreement*, Oxford, Oxford University Press, 2020, pp. 158 ff.

C. Hill, *The Future of British Foreign Policy: Security, Diplomacy in a World After Brexit*, Cambridge, Polity, 2019.

T. Horsley, *Institutional Dynamics Reloaded: The Court of Justice and the Development of the EU Internal Market* in P. Koutrakos and J. Snell. *Research Handbook on the Law of the EU's Internal Market*, Edward Elgar, 2017.

D. Kleimann, *The Legitimacy of "EU-only" Preferential Trade Agreements*, in M. Hann, G. Van der Loo, *Law and Practice of the Common Commercial Policy*, Brill, 2020, Studies in EU External Relations, Vol. 18, pp. 461-485.

K. Krishna, A. Krueger, *Rules of Origin and Hidden Protectionism*, in J. Levinsohn, A. Deardorff, R. Stern, *New Directions in Trade Theory*, Ann Arbor, MI, University of Michigan Press, 1995, pp. 149-198.

A. Krueger, *Free Trade Areas as Protectionist Devices: Rules of Origin*, in J. Melun, J. Moore, R. Riezman, *Trade Theory and Econometric Essays in Honour of John Chipman*, London, Routledge, 1999.

A. Lang, *Art. 110 TFEU*, Comm. Pocar - Baruffi, p. 889.

H. J. Laski, *Parliamentary Government in England*, Allen & Unwin, London, 1938.

P. Mariani, G. Sacerdoti, *The Negotiations on the Future Trade Relations* in F. Fabbrini, *The Law and Politics of Brexit, Volume II: The Withdrawal Agreemen*t, Oxford, Oxford University Press, 2020 p. 212 ff.

G. Messenger, *EU-UK Relations at the WTO: Towards Constructive Creative Competition*, in J. Santos Vara, R. A. Wessel, P. R. Polak, *The Routledge Handbook on the International Dimension of Brexit*, Routledge, 2020, pp. 135-137.

A. Milward, *The European Rescue of the Nation State*, London, Routledge, 2000, p. 104.

W. Molle, *The Economics of European Integration: Theory, Practice, Policy*, Aldershot, Ashgate, 2006.

A. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, London, UCL Press, 1999, p. 46.

K. Nicolaïdes, *Kir Forever? The Journey of a Political Scientist in the Landscape of Recognition* in M. Poiares Maduro and L. Azoulai (Des), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome* Treaty, Oxford, Hart Publishing, 2010, p. 448.

J. Pelkmans ,A. Correia de Brito, *Enforcement in the EU Single Market*, Brussels, CEPs Paperback, 2012, p. 107.

J. L. M. Pelkmans, D. Hanf, M. Chang, *The EU Internal Market in Comparative Perspective: Economic, Political and Legal Analyses*, Brussels, Peter Lang, 2008.

J. C. Piris, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge, Cambridge University Press, 2016, p.104.

M. Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution*, Oxford, Hart Publishing, 1998.

A. Rosas, *Dassonville and Cassis de Dijon* in M. Poiares Maduro and L. Azoulai, *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome* Treaty, Oxford, Hart Publishing, 2009.

R. Santaniello, *Il Mercato Unico Europeo*, Bologna, Il Mulino, 2014.

N. N. Schuibhne, *Regulating the Internal Market*, Cheltenham, Edward Elgar Publishing, 2006.

R. Schütze, *European Union Law*, Cambridge, Cambridge University Press, 2018, 2nd Edition, Ch. 13 p. 523.

R. Schütze, *From International to Federal Market*, Oxford, Oxford University Press, 2017, Ch. 3.

J. Snell, *The Internal Market and the Philosophies of Market Integration*, in *European Union Law*, Oxford, January 2020, 3rd Edition, p. 335.

J. Snell, *Private Parties ad the Free Movement of Goods and Services*, in M. Andenas and W. H. Roth, *Services and Free Movement in EU law,* Oxford, Oxford University Press, 2003.

P. Stevens, *Britain Alone, the Path from Suez to Brexit*, London, Faber & Faber, 2021.

M. Thatcher, *Downing Street Years*, London, Harper Collins, 1993.

R. Toombs, *This Sovereign Isle, Britain In and Out of Europe*, London, Allen Lane, 2021.

D. R. Troitino, T. Kerikmae, A. Chochia, *Brexit, History, Reasoning and Perspectives*, Cham, Springer, 2018.

P. Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge, Cambridge University Press, 2008.

K. Von Wogau, *Brexit — The Internal Market in a Reverse Gear*, Independently Published, 2019.

S. Wall, *Reluctant European: Britain and the European Union from 1945 to Brexit*, Oxford, Oxford University Press, 2020.

S. Weatherill, *The Internal Market as a Legal Concept*, Oxford, Oxford University Press, 2017, p. 1-2.

F. Weiss, C. Kaupa, *European Union Internal Market Law*, Cambridge, Cambridge University Press, 2017, p. 1-17.

P. B. Whyman, A. I. Petrescu, *The Economics of Brexit,* Cham, Palgrave Macmillan, 2020.

Articles and Papers

S. Akhtar, R. Fefer, B. Schwarzenberg, *Brexit and Outlook for a US-UK Free Trade Agreement*, CRS in Focus IF11123.

K. J. Alter and S. Meunier-Aitsahalia, *Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision*, 1994, Comparative Political Studies, Vol. 26, No. 4, pp. 535-561.

E. Ares, D. Carver, S. Fella, D. Ferguson, I. Josepa, A. Seely, A. Shalchi, T*he UK-EU Trade and Cooperation Agreement: Level Playing Field*, 20 May 2021, House of Commons Library, Briefing Paper No. 9190.

J. Armour, *Brexit and Financial Services*, 2017, Oxford Review of Economic Policy, Vol. 33, No. 1, pp. 54-69.

K. A. Armstrong, *Regulatory Alignment and Divergence after Brexit*, 2018, Journal of European Public Policy, Vol. 25, No. 8, pp. 1099-1117.

K. A. Armstrong, *The Governance of Economic and Collaborative Unionism after the United Kingdom Internal Market Act*, 1 November 2021, Modern Law Review, Vol. 85, Issue 3, pp. 635-660.

A. Arnull, *What shall We Do on Sunday?*, 1991, European Law Review, Vol. 16, pp. 112-124.

A. Bennet, D. Vines, *The EU-UK Trade and Cooperation Agreement: Lessons Learnt*, 2022, Oxford Review of Economic Policy, Vol. 38, No. 1, pp. 68-81.

C. Barnard, *Sunday Trading: A Drama in Five Acts*, 1994, Market Law Review, Vol. 57, p. 449.

C. Barnard, *Restricting restrictions: Lessons for the EU from the US?*, 2009, Cambridge Law Journal, Vol. 68, p. 575.

C. Barnard, E. Leinarte, *Movement of Goods under the TCA*, November 2021, Legal Studies Research Paper Series, University of Cambridge, Paper No. 31/2021.

C. Barnard, S. Butlin, *Free Movement vs Fair Movement: Brexit and Managed Migration*, 2018, Common Market Law Review, Vol. 53, No. 3, pp. 203-226.

N. Bernard, *Discrimination and Free Movement in EC Law*, 1996, 45 The International and Comparative Law Quarterly 82, pp. 82-103.

N. Bernard, *The Future of European Economic Law in the Light of the Principle of Subsidiarity*, 1996, Common Law Market Review, Vol. 33, pp. 633-637.

T. Blair, Speech at the London Business School: Making the Case for Britain in Europe, London, 27 July 1999, available at https://www.theguardian.com/business/1999/jul/27/emu.theeuro2.

S. Buckledee, *The Language of Brexit: How Britain Talked its Way Out of the European Union*, Bloomsbury USA Academic, 2018.

S. Byrne, J. Rice, *Non-Tariff Barriers and Goods Trade: a Brexit Impact Analysis*, 2018, Research Technical Paper, No. 7.

F. Capriglione, *Brexit: Un Divorzio Antistorico che può Cambiare l'UE*, 2016, Federalismi.it.

P. J. Cardwell, *The 'Hokey Cokey' approach to EU Membership: Legal Options for the UK and EU*, 2016, 23 Journal of European Public Policy 9, pp. 1285-1293.

F. Casolari, *Il Recesso dell'Unione Europea: per una Lettura dell'Articolo 50 TUE tra Diritto Sovranazionale e Diritto Internazionale*, 2019, Rivista di Diritto Internazionale, p. 1006.

E. Connolly, J. Doyle, *Brexit and the Irish Border*, 2019, European Journal of Legal studies, Vol. 11, p. 153.

P. Craig, *Once upon a Time in the West: Direct Effect and the Federalization of EEC* Law, 1992, Oxford Journal of Legal Studies Vol. 12, pp. 453, 463-467.

P. Craig, *The European Union Act 2011: Locks, Limits and Legality*, 2011, Common Market Law Review, Vol. 48, pp. 1915-1944.

B. Cruz, *Free Movement and Private Autonomy*, 1999, European Law Review, Vol. 24, pp. 603-620.

H. Curtain, H. Jackson, *The EU-UK Trade and Cooperation Agreement: What does it mean for Consumer Protection and Product Liability?*, 10 March 2021, Henderson Chambers.

C. Curti Gialdino, *Prime Considerazioni sugli Accordi concernenti le Future Relazioni tra il Regno Unito e l'Unione europea*, 10 Febbraio 2021, federalismi.it.

O. Daddow, *The UK and Europe: From Permissive Consensus to Destructive Dissent*, 2012, International Affairs, Vol. 88, No. 6, pp. 1219-1236.

L. Dalingwater, *Britain's post Brexit Trade Deals: Taking Back Control or a Threat to Sovereignty?*, Angles New Perspectives on the Anglophone World, Vol. 13/2021.

S. De Mars, *Brexit Next Steps: The Court of Justice of the EU and the UK*, House of Commons Library, February 7, 2020.

M. Derlén, J. Lindholm, *Peek-a-Boo, It's a Case Law System! Comparing the European Court of Justice and the United States Supreme Court from a Network Perspective*, 2017, German Law Journal, Vol. 18, p. 647.

F. De Ville, G. Siles-Brügge, *The Impact of Brexit on EU Trade Policy*, 2019, Politics and Governance, Vol. 7, No. 1, pp. 7-18.

J. Douglas and A. Barnett, *British Economy, Post-Brexit and Pummeled by Covid is Worst in G-7*, Wall Street Journal, January 25, 2021.

C. Dupont, B. Moore, *Brexit and the EU in Global Climate Governance*, 2019, Politics and Governance, Vol. 7, No. 3, pp. 51-61.

C. Eckes, P. Leino-Sandberg, *The EU-UK Trade and Cooperation Agreement - Exceptional Circumstances or a New Paradigm for EU External Relations*, The Modern Law Review, Vol 85 no. 1, 2021 pp. 164-197.

P. Eeckhout, *Brexit after the negotiation of the Trade and Cooperation Agreement: who takes back control of what*?, in Revista de Derecho Comunitario Europeo, n. 25, 2021, p. 14.

P. Eeckhout, E. Frantziou, *Brexit and Article 50 TEU: A Constitutionalist Reading*, 2016, London UCL European Institute.

M. Egan, *EU Single Market(s) after Brexit,* 16 September 2019, Cogitatio, Politics and Governance, Vol. 7, Issue 3, pp. 19-29.

M. Egan, M. H. Guimarães, *The Single Market: Trade Barriers and Trade Remedies*, 2017, Journal of Common Market Studies, Vol. 55, No. 2, pp. 294-311.

H. Enderlein, E. Rubio, *25 Years after the Delors Report: Which Lessons for Economic and Monetary Union?*, 30 April 2014, Policy Paper 109, Notre Europe Jacques Delors Institute.

A. Evans-Pritchard, *Brexit Vote is about the Supremacy of Parliament and Nothing Else: Why I am Voting to Leave the EU*, Daily Telegraph on-line, 13 June 2016.

S. Fella, D. Ferguson, D. Webb, I. Josepa, E. Ares, S. Kennedy, *The UK-EU Trade and Cooperation Agreement: Summary and Implementation*, 30 December 2020, House of Commons Library, Briefing Paper No. 09106.

S. Fella, *The UK-EU Trade and Cooperation Agreement: Governance and Dispute Settlement*, 3 August 2021, House of Commons Library, Briefing Paper No. 09139.

B. Fliess, F. Gonzales, R. Schonfeld, *Technical Barriers to Trade: Evaluating the Trade Effects of Supplier's Declaration of Conformity*, OECD Trade Policy Papers, 2008, No. 78.

C. Fontana, C. Parson, *One Woman's Prejudices: Did Margaret Thatcher Causes Britain's Anti-Europeanism?*, 2015, Journal of Common Market Studies, Vol 53. No. 1, pp. 89-105.

P. Foster, J. Evans, D. Thomas, *Brexit One Month On: What Has Changed?*, Financial Times, 31 January 2021.

J. O. Frosini, *Is Brexit Ripping Up the Unwritten Constitution of the United Kingdom*, 2019, The Italian Journal of Public Law Vol. 11, No. 1, pp. 1-7.

J. O. Frosini, M. F. Gilbert, *The Brexit Car Crash: Using E. H. Carr to Explain Britain's Choice to Leave the European Union in 2016*, Journal of European Public Policy, Vol. 27, pp. 761-778.

I. Fusacchia, L. Selvatici, L. A. Winters, *The Consequences of the Trade and Cooperation Agreement for the UK's International Trade*, 2022, Oxford Review of Economic Policy, Vol. 38, No. 1, pp. 27-49.

M. Gelter, *EU Law with the UK - EU Law without the UK*, August 2017, Fordham International Law Journal 40, n. 5.

D. Giraldin, *Brexit e Corte di Giustizia dell'Unione Europea*, 10 giugno 2016, Eurojus.

P. Goodmman, S. Castle and E. Nelson, *53 Tons of Rotting Pork and Other Brexit Nightmares*, 12 February. 2021, The New York Times.

F. Gozzano, *L'Ingresso dell'Inghilterra nel Mercato Unico Europeo*, Luglio 1971, Affari Esteri, Associazione Italiana per gli Studi di Politica Estera, Vol. 11, pp. 5-22.

C. Grant, T*en Reflections on a Sovereignty-First Brexit*, Centre for European Reform, December 28, 2020.

J. Henley, *La Guerra del pesce tra Francia e Regno Unito*, The Guardian UK, 4 November 2021.

S. Hix, *Brexit: Where is the EU-UK Relationship Heading?*, 2018, Journal of Common Market Studies, Vol. 56, pp. 11-27.

Z. Kaehler, *Rules of Origin and Trade and Cooperation Agreement between the UK and the EU*, 10 February 2021, Alliots LLP.

D. T. Keeling, *The Free Movement of Goods in EEC Law: Basic Principles and Recent Developments in the Case Law of the Court of Justice of the European Communities*, 1992, The International Lawyer, Vol. 26, No. 2, pp. 467-483.

M. Keep, *Brexit: The Financial Settlement - In Detail*, House of Commons Library, December 30, 2020.

K. Krishna, *Implementing Free Trade Areas: Rules of Origin*, 1995, National Bureau of Economic Research Working Paper No. 4983.

C. Ingenito, Il Ruolo e il Peso della Corte di Giustizia nell'Accordo tra Regno Unito ed Europa, 28 Novembre 2018, Federalismi.it.

A. Isaac, *10 Key Detail in the UK-EU Trade Deal*, 27 December 2020, Politico.

P-H Laurent, *Paul Henry Spaak and the Diplomatic Origins of the Common Market, 1955-1956*, 1970, Political Science Quarterly, Vol. 85, p. 373.

B. Laffan, *How the EU27 Came to Be*, 2019, Journal of Common Market Studies, Vol. 57, No. 1, pp. 13-27.

D. Lawrence, *Dynamic Alignment and Regulatory Cooperation between the UK and the EU after Brexit*, September 2019, Trade and Justice Movement.

A. Lazowski, *Mind the Fog, Stand Cleat of the Cliff! From the Political Declaration to the Post-Brexit EU-UK Legal Framework — Part 1*, 2020, European Papers, Vol. 5, No. 3, p. 1125.

F. Liberatore, *Brexit: Laboratorio di un Nuovo Modello?*, 23 Aprile 2021, Istituto per gli Studi di Politica Internazionale.

E. Ligas, *Regno Unito e Integrazione Europea, dal Primo Dopoguerra ad Oggi*, Critical Risks for Integration and Solidarity, 2021, Bologna.

S. Lowe, *Brexit and Rules of Origin: Why Free Trade Agreements =/ Free Trade*, 2018, London, Center for European Reform available at https://www.cer. eu/insights/brexit-and-rules-origin-why-free-trade- agreements-=/-free-trade.

C. Martin, *Resist, Reform or Re-run? Short and long-term reflections on Scotland and Independence Referendums*, Blavatnik School of Government, Oxford, April 2021.

C. Martinelli, *L'Isola e il Continente, un Matrimonio d'Interesse e un Divorzio Complicato. Dai Discorsi di Churchill alle Sentenze Brexit*, Associazione Italiana dei Costituzionalisti, Rivista 1/2017, 2017.

M. Mendez-Parra, D. W. Velde, L. A. Winters, *The Impact of the UK's post-Brexit Trade Policy on Development*, September 2016, UK Trade Policy Observatory

A. J. Menéndez, *The Existential Crisis of the European Union*, 2013, German Law Journal, Vol. 14, pp. 453, 471-484.

A. Menon, M. Villa e A. Villafranca, *Regno Unito: Dentro o Fuori l'Europa*, Luglio 2013, Osservatorio di Politica Internazionale.

S. Micossi, *Trent'anni di Mercato Unico Europeo*, 2016, Center for European Policy Studies.

V. Miller, A. Lang, B. Smith, D. Webb, D. Harari, M. Keep, P. Bowers, *Exiting the EU: UK Reform Proposals, Legal Impact and Alternatives to Membership*, House of Commons Library Briefing Paper No. HC 07214, available at http://researchbriefings.parliament.uk/ResearchBriefing/Summary/ CBP-7214#fullreport.

P. Mindford, S. Gupta, V. Mahambare, *Should Britain Leave the EU? An Economic Analysis of a Troubled Relationship — Second Edition*, Cheltenham, IEA and Edward Elgar, 2015.

D. Mix, S. I. Akhtar, K. Archick, *Brexit: Overview, Trade and Northern Ireland*, 24 March 2021, Congressional Research Service, R46730.

S. Mogavero, *La Risoluzione delle Dispute nel Regno Unito post-Brexit (Parte I)*, 23 Marzo 2021, Ius in Itinere.

M. Morris, *The Brexit EU-UK Trade Deal: A First Analysis*, 27 December 2020, The Institute for Public Policy Research.

K. Mortelmans, *The Common Market, the Internal Market and the Single Market, What's in a Market?*, 1998, Common Market Law Review, Vol. 35, pp. 101-102.

M. Monti, *A New Strategy for the Single Market: At the Service of Europe's Economy and Society*, May 2010, available at http://cms.horus.be/files/99931/ Newsletter/MM%201%20- %20Single- Market- New- Strategy- Monti- Report-09.05.10.pdf.

M. Morris, The Agreement on the Future Relationship: A First Analysis, December 2020, Institute for Public Policy Research.

P. Nicolaides, *The Dispute-Settlement Provisions of the EU-UK Trade and Cooperation Agreement: Are they Adequate for the Task?*, Luiss School of European Political Economy, Working Paper 15/2021.

K. Nicolaïdis and S. K. Schmidt, *Mutual Recognition 'On Trial': The Long Road to Services Liberalization*, 2007, Journal of European Public Policy, Vol. 14, p. 717.

K. Nicolaïdis, *Trusting the Poles? Constructing Europe through Mutual Recognition*, 2007, Journal of European Public Policy, Vol. 14, p. 682.

P. Oliver and S. Enchelmaier, *Free Movement of Goods: Recent Developments in the Case Law*, 2007, Common Market Law Review, Vol. 44, pp. 649-704.

S. Peers, *Analysis of the Brexit deal: EU/UK Trade and Cooperation Agreement — Overview*, 31 December 2020, EU Law Analysis.

S. Peers, *So Close, yet so Far: The EU/UK Trade and Cooperation Agreement*, 2022, Common Market Law Review, Vol. 59, Issue No. 1, pp. 49-80.

J. Portes, *Macroeconomic Outlook, in Brexit and Beyond*, UK in a Changing Europe, January 2019, 2021, p. 101.

J. E. Powell, *The Common Market: The Case Against*, London, Elliot Right Way Books, 1971.

P. Pylas, *What now for British Economy with the UK-EU Trade Deal Reached?*, Associated Press, December 5, 2020.

N. Reich, *Binnenmarkt als Rechtsbegriff*, 1991, Europäische Zeitschrift für Wirtschaftsrecht, Vol. 7, p. 203

B. Romano, *Brexit: Intesa tra UE e Regno Unito. Londra cede sulla pesca e lascia Erasmus*, 24 Dicembre 2020, Il Sole 24ore.

G. Sacerdoti, *Il Regime degli Scambi del Regno Unito con l'Unione Europea e i Paesi Terzi dopo la Brexit: Opzioni e Vincoli Internazionali*, 2018, Rivista di Diritto Internazionale.

F. Savastano, *Cronaca Istituzionale del Processo di Separazione*, Federalismi.it, Osservatorio Brexit N 1/2017.

S. Schomburg, *General Provisions under the EU-UK Trade and Cooperation Agreement*, 2021, New Journal of European Criminal Law, Vol. 12, No. 2, pp. 202-212.

J. Snell, *Who's Got the Power? Free Movement and Allocation of Competences in EC Law*, 2003, Yearbook of European Law, Vol. 22, p. 323.

J. Snell, *The Notion of Market Access: A Concept or a Slogan?*, 2010, Common Market Law Review, Vol. 47, p. 437.

P. Stafford, C. Hodgson, C. Giles, *London Unlikely to Regain Lost EU Share Trading Warn City Figures*, Financial Times, January 6, 2021.

E. Spaventa, *From Gebhard to Carpenter: Towards a (Non-) Economic European Constitution*, 2004, Common Market Law Review, Vol. 41, pp. 743, 757-8.

E. Spaventa, *Il Protocollo sull'Irlanda del Nord fra "grazie" e "disgrazie"*, Eurojus, Vol. 4/2021, pp. 114-116.

S. Switzer, J. A. McMahon, D*evolution and post-Brexit Trade Agreements. Towards a Joint Trade Policy Committee*, 2019, Edinburgh Law Review, Vol. 23, Issue No. 2, pp. 266-272.

G. Thompson, D. Harari, *The Economic Impact of EU Membership on the UK*, 2013, House of Commons Library Briefing Paper, SN/EP/6730, available at http:// researchbriefings.parliament.uk/ResearchBriefing/Summary/ SN06730#fullreport.

H. Thompson, *Inevitability and Contingency: The Political Economy of Brexit*, 2017, British Journal of Politics and International Relations, Vol. 19, No. 3, pp. 434-449.

A. Torello, *Libertà di Circolazione delle Merci e Aspetti Doganali: Due Punti Centrali per Esaminare il 'Punto Franco'*, Ricerche Giuridiche, Vol. 6, 1 Giugno 2017.

C. Tovo, *Recesso dall'Unione e Soluzione delle Controversie: il Ruolo della Corte di Giustizia dell'UE*, 1 Giugno 2020, Federalismi.it.

S. Usherwood, *Getting Brexit Done, or Getting Brexit Done Right?*, 2019, Political Insight, Vol. 10, No. 4, pp. 32-34.

S. Usherwood, *Our European Friends and Partners? Negotiating the Trade and Cooperation Agreement*, 2021, Journal of Common Market Studies, Vol. 59, pp. 115-123.

D. Veraldi, *La Politica Commerciale Comune: Un Settore dell'Azione Esterna dell'Unione Europea*, Diritto e Consenso, 9 febbraio 2021.

P. Vergano, T. Dolle, *The Trade Law Consequences of Brexit*, 2016, European Journal of Risk Regulation, Vol. 7, Issue No. 4, pp. 795-800.

S. Vetter, *The Single European Market 20 Years on — Achievements, Unfulfilled Expectations & Further Potential*, 31 October 2013, Deutsche Bank EU Monitor European Integration.

U. Von der Leyen, *European Commission Speech at the Press Conference on the Outcome of the EU-UK Negotiations*, Brussels, 24 December 2020, available at https://audiovisual.ec.europa.eu/embed/index.html?ref=I-200672&lg=undefined.

S. Wall, *Reluctant European: Britain and the European Union from 1945 to Brexit*, Oxford, Oxford University Press, 2020.

M. Ward, *Statistics on UK-EU Trade*, UK Parliament, House of Commons Library, 3 December 2021, Research Paper No. 7851.

S. Weatherill, *Comparative Internal Market Law: The UK and the EU*, 2021, Yearbook of European law, Vol. 40, No.1, pp. 431-474.

S. Weatherill, *The Several Internal Markets*, 2017, Yearbook of European Law, Vol. 36, pp. 125-178.

D. Wincott, C. Murray, G. Davies, *The Anglo-British Imaginary and the rebuilding of the UK's Territorial Constitution after Brexit — Unitary State or Union State?*, 2021, Territory, Politics, Governance, Vol. 9.

W. Wright, *Brexit & the City: Some Initial Reflections*, New Financial, January 2021.

Index of Legislation, Acts and Documents

LEGISLATION

Treaties and Conventions

Treaty establishing the European Economic Community [1957] (*EEC*)

Single European Act [1986] OJ L 169/1 (*SEA*)

Codified Version of the Treaty establishing the European Economic Community [1992] OJ C 224 (*Maastricht Treaty*)

General Agreement on Tariffs and Trade, Consolidated Version of July 1986 (*GATT*)

General Agreement on Trade in Services, Consolidated Version of January 1995 (*GATS*)

Treaty of Amsterdam amending the Treaty on the European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340 (*Treaty of Amsterdam*)

Consolidated Version of the Treaty on European Union [2012] OJ C 326/12 (*TEU*)

Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ 326/12 (*TFEU*)

EU – Canada Comprehensive and Economic Trade Agreement [2017] OJ L 11 (*CETA*)

Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C 384/01 (*WA*)

Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community and the United Kingdom of Great Britain and Northern Ireland [2021] OJ L 149/10 (*TCA*)

EU – Regulations

Council of the European Union, Regulation 1612/68/EEC of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257/2, 1968.

Council of the European Union, Regulation 2913/92/EC of 12 October 1992 establishing the Community Customs Code, OJ L 302/1, 1992.

Council of the European Union, Regulation No 139/2004 on the Control of Concentration between Undertakings, OJ L 24, 2004.

European Parliament and Council of the European Union, Regulation 764/2008/EC laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No. 3052/95/EC, OJ L 218/21, 2008.

EU – Directives

European Commission and Council of the European Union, Directives for the Negotiation of an Agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its Withdrawal from the European Union, XT 21016/17, 2017.

European Commission, Directive 70/50/EEC concerning the abolition of measures having equivalent effect to quantitative restrictions not covered by other provisions adopted under the EEC Treaty, OJ L 13, December 1969.

European Parliament and Council of the European Union, Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68, OJ L 158/77, 2004.

European Parliament and Council, Directive 2006/123/EC of 12 December 2006 on services in the internal market (*Services Directive*), OJ L 376/36, 2006.

European Parliament and Council, Directive 2008/95/EC of 22 October 2008 to approximate the laws of the Member States relating to trade marks, OJ L 299/25, 2008.

EU- Decisions

Decision No 4/2020 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 17 December 2020, OJ L 443/6, 2020.

European Council Decision of 26 July 1966 on the abolition of customs duties and the prohibition of quantitative restrictions between Member States and on the application of Common Customs Tariff duties for products other than those listed in Annex II of the Treaty, COM/1966/197, OJ 165/2971, 1966.

National Legislation and Soft Law

UK Parliament, United Kingdom Internal Market Act, December 2020.

UK Government, The European Union Future Relationship Act, Commencement No. 1, Regulations, December 2020.

UK Department for Business, Energy and Industrial Strategy, UK Internal Market White Paper, July 2020.

UK Government, White Paper on the United Kingdom's Exit from and New Partnership with European Union, February 2017.

ACTS AND DOCUMENTS

Soft Law, Reports, Communications, and Proposals

European Commission, Notice "Guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU)", OJ C 100/38, March 2021.

European Commission, A Single Market for Citizens – Interim Report to the Spring 2007 European Council, COM/2007/60 final, February 2007.

European Commission, Report to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Implementation of EU Trade Agreements: 1 January 2019 – 31 December 2019, COM/2020/705 final, 2020.

European Commission, White Paper, Completing the Internal Market, COM/85/310 final, 1985.

European Commission, Communication concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 (*Cassis de Dijon*), OJ C 256/2, 1980.

European Parliament, Mapping the Costs of non-Europe 2014-2019, PE 603.239, March 2014.

European Commission, Explanatory Memorandum, annex to the Proposal for a Council Decision on the conclusion on behalf of the Union, of the Trade and Cooperation agreement between the European Union and the European Atomic Energy Community, of the one part, COM/2020/856 final, 2020.

European Commission, Free Movement of Goods: Guide to the Application of Treaty Provisions governing free movement of goods (Articles 28-30 CE), SEC 673/7, 2009.

Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom OJ C 385/02, 2019.

UK Government, Guidance of TCA, Using the Harmonized System and product-specific rules for trade between the UK and the EU, October 2021.

HM Revenue & Customs, Introduction to Rules of Origin and Claiming Preferential Tariffs (duties), December 2020.

Press Release of the European Commission and European Council

European Commission, Internal Market Scoreboard No. 11, November 11, 2002

European Council, European Council Article 50 Guidelines for Brexit Negotiations, European Council Press Release, XT 20004/17, April 2017.

Table of Cases

Judgements of the Court of Justice of the European Union

55/79 *Commission v. Ireland* [1980] ECLI:EU:C:1980:56.

249/81 *Commission v. Ireland* [1982] ECLI:EU:C:1982:402 (*Buy Irish*).

15/81 *Gaston Schul Douane Expediteur BV v. Inspecteur der Invoerrechten en Accijnzen Roosendal* [1982] ECLI:EU:C:1982:135 (*Schul*).

132/82 *Commission v. Belgium* [1983] ECLI:EU:C:1983:135.

51/83 *Commission v. Italy* [1984] ECLI:EU:C:1984:261.

60-61/84 *Cinéthèque SA and others v. Fédération nationale des cinémas français* [1985] ECLI:EU:C:1985:329.

98/86 *Ministère Public v. Mathot* [1987] ECLI:EU:C:1987:89.

178/84 *Commission v. Germany* [1987] ECLI:EU:C:1987:126.

193/85 *Cooperativa Co-Frutta Srl v. Amministrazione delle finanze dello Stato* [1987] ECLI:EU:C:1987:210.

356/85 *Commission v. Belgium* [1987] ECLI:EU:C:1987:353.

18/87 *Commission v. Germany* [1988] ECLI:EU:C:1988:453.

145/88 *Torfaen Borough Council v. B&Q* [1989] ECLI:EU:C:1989:593.

267-8/91 *Criminal Proceedings against Keck and Mithouard* [1993] ECLI:EU:C:1993:905.

275/92 *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler* [1994] ECLI:EU:C:1994:119.

412/93 *Leclerc-Siplec v. TFI Publicité* [1995] ECLI:EU:C:1995:26.

368/95 *Familiapress v. Bauer* [1997] ECLI:EU:C:1997:325.

265/95 *Commission v. France* [1997] ECLI:EU:C:1997:595.

67/97 *Bluhme* [1998] ECLI:EU:C:1998:584.

97/98 *Jägerskiöld v. Gustafsson* [1999] ECLI:EU:C:1999:515.

112/00 *Schmidberger* [2003] ECLI:EU:C:2003:33.

322/01 *DocMorris NV* [2003] ECLI:EU:C:2003:664.

110/05 *Commission v. Italy* [2009] ECLI:EU:C:2009:66 (*Trailers*).

518/06 *Commission v. Italy* [2009] ECLI:EU:C:2009:270 (*Motor Insurance*).

284/16 *Achmea* [2018] ECLI:EU:C:2018:158.

619/18 *Commission v. Poland* [2019] ECLI:EU:C:2019:531.

78/18 *Commission v. Hungary* [2020] ECLI:EU:C:2020:1029.