Brexit and the Trade and Cooperation Agreement: Implications for Internal and External EU Differentiation

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ABSTRACT
Brexit represents a unique process of European disintegration. It has introduced a new model of external differentiation that is likely to have future implications for existing differentiation both within the EU and between the EU and third countries. An analysis of the new thin, distant and unfinished EU-UK relationship points to likely growing divergence over time. The technocratic governance structure of the Trade and Cooperation Agreement (TCA) is strained by high-friction politics, and its effectiveness, sustainability and legitimacy remain highly contested. The TCA is a testament to a more hard-line EU approach towards third countries, attempting to signal strongly that membership matters, with flexibilities only benefitting those that sign up to the EU’s core principles.

KEYWORDS
Brexit; differentiated integration; Trade and Cooperation Agreement; EU-UK relationship

The United Kingdom (UK)’s departure from the European Union (EU) represents a unique instance of disintegration with far-reaching implications for differentiation within the EU, and between the EU and third countries, not least since the UK was a member state with considerable economic and political weight. It has been characterised as “a living experiment in the transition from internal to external differentiation in the EU” (Laffan 2021).

Long before Brexit, differentiation was established as a vital feature of European integration and has been in academic discussion especially since the early 1990s (Gänzle et al. 2020), and reliance on differentiated forms of integration has been in the forefront in the last decades as a consequence of the enlargement process (Martill 2021). The examples of Schengen and the Eurozone prove that differentiated integration is “an established practice” (Wessels and Gerards 2018) that also played an important role in the Brexit vote as it was “one of the major issues of the UK renegotiation process” (Chopin and Lequesne 2016, 544). Brexit has had a significant impact on the EU’s role at the centre of a European ecosystem of differentiated modes of integration. Broadly speaking, in pre-Brexit Europe, countries related to European integration as: a third country; a (potential) candidate country; or an EU member state. These modes vary in the level of integration, possibilities for influence and permanency.

The relationship between Brexit and differentiation, defined as “any modality of integration or cooperation that allows states (members and non-members) and sub-state entities to work together in non-homogeneous, flexible ways”,¹ is contested and

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

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complex (Burk and Leuffen 2019). While Brexit fuelled scholarly debates about new forms of EU-third country collaboration (Martill 2021) acknowledging that none of the existing models of external differentiated relations suited the new EU-UK relationship, it also triggered fears of a domino effect that might unravel the European project. The debate of whether Brexit will lead to a higher or lower level of European differentiation is still ongoing (Martill 2021), despite the dangers that can occur from opting out. On the one hand, various scholars maintain that Brexit will be the driving force of a more differentiated Europe (Burk and Leuffen 2019), whereas others claim that Brexit will not affect the status quo of differentiation since the UK’s exit removed a reluctant member with a considerable number of opt-outs (Bickerton 2019). While Brexit is an ongoing process, it cannot be fully assessed whether it will lead to new forms of external differentiation or to faster and more coherent internal integration in certain policy areas (Lord 2015).

However, it is important to underline that this new political reality cautioned the EU against setting the precedent of a preferential partnership. These considerations played a role in informing the EU and UK’s red lines, which subsequently defined the withdrawal process as well as the future partnership negotiations, leading to the conclusion of the Trade and Cooperation Agreement (TCA). Whilst there was palpable relief about having pulled back from the brink of a no-deal cliff edge in December 2020 (Wachowiak and Zuleeg 2021a), the new relationship is far more distant and conflictual than originally intended. This poses questions about whether the TCA will be an effective, sustainable and legitimate model to govern EU-UK relations, and what its implications are for both the internal and external differentiation.

In this article, the Brexit process and the nature of the deal reached between the EU and the UK will be described in order to bring greater clarity regarding the unique features of this unprecedented European disintegration and the consequences for future cooperation and/or conflict. The implications of Brexit for differentiated integration will also be examined, contrasting the pre-Brexit modes of interaction of the EU with third countries with the new modes emerging in the wake of Brexit.

Three conceptual characteristics of the Brexit differentiation process are discussed – effectiveness, sustainability and legitimacy – as they provide a consistent link to the analytical question of what sets the EU-UK relationship apart from previous external differentiation arrangements. Concluding, the EU-UK relationship differs from ‘traditional’ differentiated integration as it concerns the emergence of differentiated disintegration, “a process of unequal reduction in the level, scope, or membership of the EU” resulting in downward divergence costs rather than integration or convergence benefits (Schimmelfennig 2018, 1156).

This contribution is based on a qualitative approach, incorporating contextual understanding from being closely involved in the Brexit process, and including interviews, observations and critical analysis of its impact on differentiation. Specifically for this

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2For example, some conclusions were drawn in the framework of a think tank advisory group for the European Commission’s Taskforce on Article 50 negotiations with the United Kingdom, coordinated by the European Policy Centre (EPC), and the subsequent EPC “Track 2” project, an initiative which provides a forum for new ideas and a safe space for critical, expert input and discussion on areas of EU-UK cooperation, involving opinion formers and decision makers on both sides. Given the nature of these exchanges, a number of these sources of information remain confidential and anonymous.
article, five structured interviews\textsuperscript{3} were conducted with analysts and officials in order to provide an analytical framework of the post-Brexit state of differentiation as well as the implications that arose. They provided insightful examples and inputs regarding the sustainability of the TCA and whether it can lead to closer cooperation or wider divergence.

The article is structured as follows: the first section analyses the Brexit process and the unique features of the deal that was reached between the EU and the UK. It is divided into two sub-sections, examining effectiveness, and sustainability and legitimacy of the TCA respectively; this lays the foundations of this article’s argumentation regarding the implications of Brexit on differentiation. It also creates a solid basis to answer the questions of what sets the EU-UK relationship apart from the previous forms of differentiation and how this affects the notion of differentiation in Europe. Following the background and features of the Brexit process, the next section delves into the implications of Brexit for differentiation, focusing on the changes that Brexit has implied for external differentiation and the potential future consequences for both external and internal differentiation. In light of these findings, the last section draws conclusions and provides avenues for further research.

**The Brexit process: measuring the effectiveness-sustainability-legitimacy of the TCA**

The EU and the UK concluded negotiations on the TCA on Christmas Eve of 2020 (Wachowiak and Zuleeg 2021a). It was provisionally applied before formally entering into force on 1 May 2021. The Agreement is thin and precarious in nature and was significantly shaped by the structural and procedural features of the UK’s withdrawal and future relationship negotiations (Wachowiak and Zuleeg 2021b). Structurally, there was a clear power asymmetry between the two sides in terms of market size, interdependency and experience in negotiating trade deals; this implied an uneven distribution of costs and benefits, as well as limited leverage for the UK, which also lacked negotiating experience compared to the EU (Wachowiak and Zuleeg 2021a). In addition, the switch from member to non-member considerably weakened the UK’s institutional bargaining power. During its membership, the UK often defended the status quo against further integration, giving it power particularly in areas that require unanimity. In the Brexit negotiations, the UK lost “the power that EU rules of treaty change confer upon status quo defenders” (Schimmelfennig 2018, 1160), with the EU27 now defending the status quo of what it meant to be a member, and the UK seeking revision and privileged access (Beaumont 2019). Furthermore, the principal-agent structure on the EU side worked to its advantage. The decision to delegate the conduct of the negotiations to the European Commission, a supranational institution with an interest in defending the status quo against disintegrative forces, reassured smaller member states that bilateralism would be kept at bay and collective interests put front and centre. By maintaining these institutional structures throughout the entire process, as well Michel Barnier as the sole chief negotiator, the EU’s position demonstrated focus and coherence, enabling it to shape the process to its advantage (Schimmelfennig 2018).

\textsuperscript{3}The interviews were conducted with informed consent between May and June 2021.
The UK, on the other side, struggled with the referendum’s domestic repercussions, as reflected in changing UK chief negotiators and prime ministers, as well as divisions between and within the political parties. The lack of focus and strategy on the UK side is exemplified by the first round of withdrawal negotiations in June 2017, which – as in the words of Raoul Ruparel, Special Advisor to the Secretary of State for the Department for Exiting the EU from October 2016 to July 2018 and Special Advisor to the Prime Minister on Europe from August 2018 to July 2019 – the UK entered without “a particularly clear policy on anything” and realising the “whole debate about sequencing had been settled while the [UK general] election was going on without DD [David Davis, UK Brexit Secretary at the time] really being involved in it” (Ruparel 2020, 13). Procedurally, the EU’s decision to take a sequenced approach, that is, to negotiate the withdrawal first and the future partnership second, significantly increased the EU’s bargaining power in both phases. It enabled the EU to settle some of its fundamental goals early on, particularly on citizens’ rights and Northern Ireland, as a pre-condition to move to the next stage. It also diminished UK leverage by dealing with the financial settlement separately from the future relationship (Patel 2018).

While similar structural and procedural factors also play into most EU-third country negotiations, there are some features that are unique to Brexit: the unusually short negotiating period, the prevalence of politics over economics, the no-deal threat, negotiating down rather than up after 47 years of common rules and the EU’s united response when faced with an existential threat. The short negotiating period made it more difficult to build rapport between negotiating teams and left no time for businesses and/or other actors to familiarise with the new rules. This was made more acute by the Covid-19 pandemic, which took political bandwidth away from Brexit, with many arguing that it should have resulted in an extension of the transition period (Lock et al. 2020). In addition to both sides’ firm red lines, the immense time pressure limited the ambition of the deal from the outset.

That is not to say that the relationship’s depth and breadth were predetermined. The evolution of the UK’s Brexit policy as outlined in Prime Minister Theresa May’s speeches – Lancaster, Florence and Mansion House (Schimmelfennig 2018) – culminated in the Chequers plan in July 2018, proposing a common rulebook for goods: her vision of the future relationship included “ongoing harmonisation with EU rules on goods” (HM Government 2018, 1), which was far away from her successor Boris Johnson’s red lines. Equally, under May’s Northern Ireland “backstop”, the entire UK would have been part of a customs union with the EU. Her successor Boris Johnson instead rejected the backstop as “inconsistent with the UK’s desired final destination” (Johnson 2019, 2). As the price for a more distant relationship, Johnson agreed to an effective trade border down the Irish Sea. He also set the UK on the trajectory for a thin and precarious deal, by rejecting the previously signed vision in the Political Declaration threatening to renege

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4Interview 5 with European Commission official, 1 June 2021.

5Particularly the UK’s decisions to leave the Single Market and Customs Union and to reject oversight from the European Court of Justice as set out by Theresa May in her Lancaster Speech in January 2017, as well as the EU’s insistence on no cherry-picking of the Single Market.

6The Political Declaration is a non-legally binding text that was agreed between the EU-UK and set out the framework for the future relationship negotiations. It was agreed alongside the revised text of the Withdrawal Agreement at the European Council summit in October 2019. It focused on building a partnership across trade and economic cooperation between the EU-UK and on other areas of cooperation and of security.
on the Withdrawal Agreement\(^7\) and giving precedence to sovereignty (that is, no alignment with EU rules) over market access (Ibid.). On the UK side, Boris Johnson utilised this to create a “this deal or no-deal” narrative that allowed him to push through a last-minute deal with little domestic scrutiny (Brunner 2019). On the EU side, Number 10’s flirtation with no-deal and its apparent willingness to renege on what it had agreed to in the Withdrawal Agreement caused long-term damage to trust that outlasts the immediate negotiations. It thus introduced an element of precariousness, which led to the EU’s insistence on a robust governance framework, and made external differentiation introduced by the Brexit process different from previous models.

Trading partners usually negotiate up rather than down; that is, they aim for closer ties to everyone’s benefit. With Brexit, this was turned upside down: the EU and the UK negotiated a more distanced settlement after having been bound by common rights and obligations, the EU acquis, for 47 years. Hence, neither the EU nor the UK gained economically compared to the status quo of British EU membership. The EU saw the relationship as “scalable”,\(^8\) with the possibility of decreasing or increasing access (and consequently economic cost) proportionate to the level of obligations. However, the UK government decided to prioritise political considerations over economic concerns, driven by ideological views, as well as considerations of internal party management and retention of power. As a result, negotiators designed a more distant relationship to manage downward divergence over time. The EU side also showed remarkable unity throughout the entire process, which complemented its structural and procedural bargaining power (Greubel 2019). The Commission’s EU-UK task force, led by Michel Barnier, pursued a strategy based on transparency and continuous consultation with the member states and EU institutions (Gostyńska-Jakubowska and von Ondarza 2020; Greubel 2019). This enabled Barnier to effectively defend the EU’s collective interests, while ensuring political buy-in from all relevant EU actors.

Faced with the prospect of an economic heavyweight on its doorstep, the EU aimed to safeguard its material interests, including settling the financial obligations undertaken during the UK’s membership, which was resolved with the Withdrawal Agreement in the first phase of negotiation (Schimmelfennig 2018). The EU was also seeking an agreement on fisheries upholding the pre-Brexit status quo of reciprocal access conditions and quota shares, as well as robust commitments to prevent unfair competitive advantages for the UK. The TCA fulfils the overall negotiating objectives set by the European Council (2018). It secures a single overarching framework, an agreement on fisheries (albeit unable to satisfy maximalist demands) and robust commitments that ensure a level playing field (LPF). The latter are particularly significant and could become a template for future trade deals.\(^9\)

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

\(^7\)The Withdrawal Agreement establishes the terms of the UK’s withdrawal from the EU, in accordance with Article 50 of the Treaty on European Union. It entered into force on 1 February 2020, after being agreed on in October 2019.

\(^8\)Interview 2, 20 May 2021; Interview 3, 21 May 2021. Both interviewees were directly involved in the Brexit process but asked for strict confidentiality, without mention of their role or organisation.

\(^9\)Interview 2, 20 May 2021.
relations with the UK. Each of these objectives alludes to something bigger. First, there is the importance of solidarity, which is the idea that when one member state’s – in this case, Ireland’s – fundamental interests are at stake, these interests become a collective priority, which is especially significant for the smaller member states. Second, there has to be a difference between being in or out, with the integrity of the Single Market and the indivisibility of the four freedoms assuming an economic as well as political significance (Schimmelfennig 2018). Lastly, the objective of a good relationship explicitly expressed in “the Union’s determination to have as close as possible a partnership with the UK in the future” (European Council 2018) acknowledges that – regardless of Brexit – there will be a relationship between the EU and UK as next-door neighbours that share values and interests across borders.

While these objectives have been broadly met, the TCA establishes a relationship that is more distant and less comprehensive than the Union envisioned (Wachowiak and Zuleeg 2021a). This is the case compared to other forms of partnership, particularly participation in the Single Market, but more significantly also in relation to the ambitions set out by the Political Declaration. In order to measure the effectiveness of a policy, it is vital to take a causal approach, that is, “developing a counterfactual scenario on how a policy area would have evolved in the absence of the differentiated institution but with all other factors equal” (Lavenex and Križić 2019, 10). Therefore, effectiveness can be measured based on the output, outcome and impact of the TCA (Gutner and Thompson 2010). The questions that arise and will be addressed in the next sub-sections are how effective the TCA is as a model of differentiation and whether it can sustain a stable relation between the EU and the UK.

**Governance effectiveness**

With the UK having left the EU’s multi-level governance framework, the TCA introduces a complex institutional framework to manage the new relationship (TCA 2021, Title III: Institutional Framework). This includes a Joint Partnership Council and a plethora of committees and working groups as well as binding enforcement and dispute settlement mechanisms. Trade and cooperation will be more difficult outside the framework of EU membership, so the question is whether the Agreement will serve as an effective instrument to mitigate (economic and political) disruption, to prevent and/or resolve disputes, and to deal with joint (global) challenges facing the EU and the UK.

While reaching an agreement avoided the economic and political rupture of a no-deal, which might have resulted in the total breakdown of the relationship, the TCA falls short in a number of areas, including in mitigating disruption. While the new economic settlement ambitiously envisages tariff- and quota-free movement for goods, preferential trade terms are subject to rules of origin, and non-tariff measures (Wachowiak and Zuleeg 2021a) still make trade more cumbersome and costly; in practice, many companies either do not qualify for tariff-free trade or struggle with the complexities of utilising

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10 Interview 1 with EU official, 18 May 2021.
11 The Partnership Council, co-chaired at the ministerial level (EU Commissioner and UK Minister), will oversee the attainment of the Agreement’s objectives, supervise and facilitate its implementation, and provide a forum to resolve disputes at the political level.
the preferential terms. Furthermore, the TCA’s limited provisions for trade in services have created new barriers for many industries, including financial services and the creative sector. The level of disruption was reinforced by the lack of an implementation period, exposing businesses and individuals to new rules almost overnight. However, businesses are still experiencing disruption one year into the relationship, illustrating how fundamentally trading relations have changed. This points to structural disruption rather than teething problems, rendering certain supply chains and business models unviable (Wachowiak and Zuleeg 2021a). Furthermore, implementation on the UK side is falling short of what was agreed, causing further friction, particularly with a view to the Withdrawal Agreement’s Northern Ireland Protocol. The continuous threats by the UK government to take unilateral action and breach agreements signed previously heightens precariousness, especially since the EU functions as a community of law and treaties.

A breaking down of relations has been avoided, but concluding a deal has not eased tensions, and expectations are that things will get worse before they get better. Politically, the new relationship is off to a rocky start: the (now resolved) disagreement over the status of the EU Ambassador in London, disputes over the implementation of the Northern Ireland Protocol and the rows over fishing rights set the scene for a bumpy and conflictual relationship. The deal has an in-built dynamism in form of several grace periods, transitional periods and reviews of (parts of) the Agreement (Wachowiak and Zuleeg 2021a), including a general review of the Agreement after five years, a review of the fisheries provisions four years after the end of the adjustment period and the possibility for either party to request a review of the deal’s trade provisions after four years (TCA 2021, Art. FINPROV.3; Art. FISH.18; and Art. 9.4). These reviews partly coincide with EU and UK electoral cycles and/or create political linkages between areas of strategic importance. For example, the adjustment periods on energy and fisheries both end in 2026 (House of Commons 2021). These linkages across vital sectors create points of leverage, which in a politically heated environment can have an escalating effect (as exemplified by the French government considering leveraging electricity supplies to Jersey in the dispute over post-Brexit fishing rights). Furthermore, the next UK general election and European Parliament election are likely to be held in the year before the first review, creating a political backdrop that could turn the review from a technocratic exercise into an election issue. Given that the TCA’s evolution takes place in a highly politicised context, its technical mechanisms could become drivers of further friction, which could lead to the collapse of (parts of) the current arrangements.

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12 An analysis by the Trade Policy Observatory shows that up to £3.5bn of British exports faced tariffs in the first three months after the TCA became operational (Islam 2021).
13 As indicated in the first three months of 2021, where EU-UK trade experienced a sharp fall, with EU exports to and imports from the United Kingdom dropping by 14.3 per cent and 35.4 per cent respectively (Eurostat 2021).
14 During Brexit negotiations, it was agreed that protecting the 1998 Good Friday Agreement was necessary to maintain sustainable relations. The Protocol’s objective was to avoid a hard border between Northern Ireland and the Republic of Ireland. Therefore, under the Protocol, Northern Ireland remains de facto in the EU’s customs union and internal market. However, the fragility of the Protocol together with the turbulent political relations between the EU and the UK makes its stability contested. The current challenge for the UK and the EU is “to demonstrate that the Protocol can work in a way that causes least disruption” and “impact[s] as little as possible the everyday life of communities” (Hayward and Phinnemore 2021b).
15 Interview 3, 21 May 2021.
16 Ibid.
Reflecting the EU’s desire for a robust governance framework, the Agreement provides binding enforcement and dispute settlement mechanisms, including some innovative elements on the LPF. For example, environmental and labour standard non-regression clauses now have enforcement mechanisms that are absent in other free trade agreements (FTAs). The TCA also provides a list of remedial, rebalancing and safeguard measures, for example, to address disputes over divergence, allowing for quick and harsh retaliation in cases of noncompliance (Task Force for Relations with the United Kingdom 2021). While dispute settlement mechanisms have rarely been invoked in the EU’s FTAs, the EU-UK agreement is different. It governs an economic relationship that is highly intertwined, implying that any noncompliance would have a major impact. The EU can therefore be expected to place more emphasis on enforcement, which is also in line with an overall shift in EU trade policy. Also setting the TCA apart is the fact that its mechanisms manage downward divergence instead of convergence, in a highly politicised context. If used, they could unbalance the whole Agreement, by escalating into a tit-for-tat. In the absence of a constructive and trusting political relationship, the governance structures might not suffice to prevent small problems from spiralling out of control.  

17 Trust is in short supply and can only be rebuilt through dialogue, including at the highest political level. The TCA does not prevent high-level dialogue, but neither does it provide concrete tools for rebuilding relations.

There seems to be a more general clash on how both sides view the joint governance structure.  

18 The EU has relegated the relationship to a third-order issue, wherever possible to be dealt with in the TCA’s technocratic committees and working groups. On part of the UK government, there is less enthusiasm for the overarching framework, which runs counter to the British negotiating aims of securing sectoral agreements, as well as for any structured cooperation or dynamic alignment. This reluctance was exemplified by the decision to delay the activation of the joint governance structure until after full ratification. For the current government and Lord David Frost, the Minister in charge of EU-UK relations (until December 2021), reservations against the institutional framework are driven by fear of “British officials going native and quietly doing deals” with their counterparts, eventually “trapping the UK in too close a relationship”.  

19 The UK government’s emphasis on eradicating the “internalised principles of EU law and EU ways of thinking about things” (Frost 2021) might interfere with the effective functioning of the joint structures.

Globally, the EU and the UK share a lot of the same interests, be it on climate change, multilateralism or security in the European neighbourhood. The TCA (2021) explicitly states that

the Parties shall endeavour to cooperate on current and emerging global issues of common interest such as peace and security, climate change, sustainable development, cross-border pollution, environmental protection, digitalisation, public health and consumer protection, taxation, financial stability, and free and fair trade and investment.

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17 Discussions held as part of the closed EPC “EU-UK Track 2” initiative on 27 April 2021, which is a discussion forum under Chatham House rules organised by EPC by invitation only.

18 Interview 3, 21 May 2021.

19 Ibid.
It is worthy of note that the language on a shared global agenda is more ambitious than is usually the case in these kinds of agreements, but at the same time it does not provide any mechanisms to further these aspirations.

Despite the language in the TCA, the current UK government has been unequivocal in its rejection of any institutionalised cooperation with the EU. For example, it explicitly decided against any formal foreign and security policy arrangements (Bond 2020). The recently published Integrated Review of Security, Defence, Development and Foreign Policy confirms that “we will work with the EU where our interests coincide” (HM Government 2021, 21), affirming an ad-hoc approach to cooperation. The lack of institutionalised, regular dialogue on global challenges will lead to less coordination and thus predictability. It also means that there is no structure to anticipate or resolve disagreements when they arise. Furthermore, the UK’s preference for bilateralism is rendered ineffective in areas where the EU member states have a stake in a common EU approach. For instance, since Brexit ended Britain’s participation in the Dublin Regulation, the UK has been unable to strike any bilateral return arrangements to realise the Home Office’s proposals to remove asylum seekers to “France and other EU countries” (Townsend 2021; see also Comte 2020).

**Sustainability and legitimacy**

For the TCA to be successful in its entirety, its governance arrangements must not only be effective, but also “be considered legitimate in the eyes of the affected societies” (Lavenex and Križić 2019, 18), in this case EU and UK citizens. It is one thing to agree on a new partnership framework, another to make it work. The existing literature measures legitimacy from different perspectives: European citizens, citizens of EU member states that have opted out of the relevant differentiated integration and differentiated non-member states. Therefore, an important source of legitimacy comes from “the right of participation of relevant actors” (19).

Arguably, the effects of Brexit – in terms of economic fallout and political reverberations – will be felt more strongly by British citizens. Particularly affected groups such as fishermen or the creative industries have already expressed their dismay. General public confidence (or lack thereof) in the post-Brexit arrangements could manifest itself in national and/or devolved political processes. It is still early days for the new relationship, but some (public) concerns about its implementation are worth noting.

First, the main reasons why people voted to leave – namely immigration and sovereignty (Carl 2018) – imply that a majority of leave voters considered the transfer of decision-making authority from the UK to the EU as problematic. The TCA addresses this concern by leaving the orbit of EU law. However, not all of the UK’s constituent parts supported Brexit. This divide creates concerns about the acceptance of the new settlement, particularly in Scotland and Northern Ireland. The Northern Ireland Protocol is heavily contested by some of the affected communities. Surveys commissioned by the Queen’s University show that views in Northern Ireland on the appropriateness and benefits of the Protocol are divided. However, a majority of respondents assess the current impact of the Protocol as negative overall, and trust in most actors involved in its implementation is low (Hayward and Phinnemore 2021a).

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20 Interview 1, 18 May 2021.
21 Ibid.
22 With the obvious exception of EU citizens residing in the UK.
The revised Withdrawal Agreement introduces a consent mechanism. The Northern Ireland Assembly will be asked periodically to vote whether the trade arrangements in Articles 5–10 of the Protocol should continue to apply. However, the Democratic Unionist Party (DUP) criticises that it is a simple majority vote, claiming it undermines the principle of consent in the Good Friday Agreement and, with other unionists, tabled legal action, challenging the Protocol on these grounds (Sargeant 2021). The leader of the nationalist Sinn Féin party warned against changes that would grant the DUP a veto, otherwise “there will be no Assembly here in Belfast” (Cordon 2019). This shows the volatility surrounding the mechanism, but also the power-sharing arrangements in Northern Ireland, which could collapse once again. With a view to the long-term functionality of the Protocol, there is a need to ensure that those affected by its implementation are not absent in the decision-making structures (Nguyen 2020). It is clear that the Protocol’s implementation cannot be something that “is done ‘to’ Northern Ireland” but must involve and be “responsive to the needs and interests of Northern Ireland” (Hayward and Phinnemore 2021b). From the EU perspective, this could involve drawing much more on local expertise and knowledge from Northern Ireland, for example, by inviting local representatives to Commission expert groups, offering Northern Ireland a seat on the Committee of the Regions and an observer status in European Parliament committees.23

Partly due to the polarised nature of Brexit in the UK, domestic consultations with stakeholders have been rather limited. It remains to be seen how the UK government handles inclusiveness and consultations in this new stage of Brexit. Early signs are that its attempts to maintain a gatekeeper function for contacts on the sub-national level are fuelling polarisation. Particularly Scotland criticised David Frost’s letter asking devolved authorities to inform the UK government about the “fact and content” of their interactions with the EU, as well as to “support the UK Government’s position in such contacts” (@gallardo_ortega 2021). Importantly, the TCA foresees a parliamentary assembly and a civil society forum, but these have been slow to get set up. In the longer run, the involvement of these actors in the implementation and regular exchanges between EU and UK civil society, officials and parliamentarians, including also in non-formal settings, such as the EPC’s “EU-UK Track 2” initiative, may be important tools in rebuilding trust and enhancing the deal’s legitimacy.

**Implications for EU differentiation**

The reality of Brexit acts as a negative incentive, suggesting a more hard-line approach towards non-EU members. The four-and-a-half-years debate about what it means to be ‘in or out’ consolidated the principles underpinning EU-third country relations. The EU’s unified core message to EU member states and third countries is that membership matters, and divergence comes at a cost. Relations need to be governed by an overarching institutional framework, with linkages between specific areas of cooperation. As seen in the example of EFTA countries, the relationship that has been built is highly dynamic. Similar to the EU-EFTA relationship, 24 it might imply a situation as one between policy-maker and policy-taker (Vahl and Grolimund 2006). Pre-Brexit, these models created

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23Discussions held as part of the closed EPC “EU-UK Track 2” initiative on 27 April 2021.

24The European Economic Area (EEA) brings together the EU member states and the three EEA EFTA states, Iceland, Norway and Liechtenstein. The aim of the EEA Agreement “is to establish a dynamic and homogenous EEA between these 30 States”. For more information see EEA (2013).
a permanent relationship below the threshold of membership. They are dynamic with the intention of maintaining alignment, not of managing downward divergence over time, and they fully respected the four freedoms of the Single Market (EEA 2013, 1). In addition, there is a correlation between geographic proximity, size and interdependence and the balance of rights and obligations that can be struck. While these principles also applied before Brexit, they are now irrefutable in the EU’s approach to its neighbours if they are to be closely integrated in the Single Market.

Free movement of people remains a contentious issue in the EU-UK relationship. A free movement agreement between the EU and the UK is unrealistic for the moment, “as it was one of the central elements of the Brexit campaign, which presented immigration to the UK as ‘out of control’” (Acosta 2021, 4). This implies that there are inevitable consequences for the UK’s integration in the Single Market. The differentiated approach to free movement of people can be illustrated by contrasting Switzerland and Ukraine. The Agreement on the Free Movement of Persons (AFMP) between Switzerland and the EU places Swiss nationals on a similar position with EU citizens regarding the rights to enter, work and remain in a member state (Ibid.). In the case of the agreement between the EU-Ukraine, the latter enjoys the elimination of tariffs and the “internal market treatment” (Oppenheim 2018), but there are still restrictions on some domains such as freedom of movement. In case of further integration, derogation periods for free movement of people would most probably be sought by the EU, but if a fear of in-migration to the EU is predominant, it could act as a barrier to further integration into the Single Market.

Regarding the EU relations with (potential) candidate countries, they are characterised by their long-term wish to become part of the club. Upon accession, they are expected to be fully aligned with the EU acquis with, at most, transitional arrangements for certain areas, provided full compliance over time can be ensured (European Commission 2021a). Given the destination of ever-closer partnership, the EU offers trade concessions, economic and financial assistance, and assistance for reconstruction, development and stabilisation, but there is no room for significant divergence; rather it is intended to be a process of gradually deepening alignment. The EU also has distinct externally differentiated relations with the 16 countries of the European Neighbourhood Policy (ENP), which creates a framework for third countries that are not considered potential candidate countries for the foreseeable future. These relations can go beyond traditional free trade agreements, for example those with Ukraine, Georgia and Moldova, which require alignment with a large proportion of the EU acquis, but are not as comprehensive as relations with EFTA countries (Gstöh 2015).

In the post-Brexit period, however, it seems that the above-described scenario has changed with the introduction of differentiated disintegration in Europe (Gänzle et al. 2020), which has created a new mode, that is, a former member state with no intention of future membership. Therefore, the question that is raised is, what are the implications of Brexit for existing differentiation within the EU, and between the EU and third countries? The UK becoming a third country – albeit with a unique type of relationship – reinforces the notion of ‘perma-outs’, with implications for the relationship with these countries, while the TCA’s in-built dynamism explicitly allows for divergence over time (but at a cost). More concretely, the new EU-UK partnership does not follow the same logic as the EU’s existing patterns of European external relations (Lavenex 2011). The TCA

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25Interview 4 with university professor, 26 May 2021.
establishes a distant relationship with limited economic integration between immediate neighbours and, given the primacy of sovereignty concerns for the UK, it does not even cover all areas of EU-UK economic relations, let alone cooperation in other spheres (Justice and Home Affairs, foreign policy). The sovereignty doctrine also hints at the future direction of travel as, from this myopic perspective, there is no real ‘punishment’ associated with having no voice in the EU. However, while UK sovereignty concerns trump both geography and functionality, the UK does not escape its geography as proximity, size and interconnectedness will still play an important role in determining the scope and nature of UK adherence to EU conditions.

A concrete example of Brexit’s implications for existing forms of differentiation is the new Framework Agreement that the EU and Switzerland have tried to conclude since 2014, intending to address the lack of an overarching framework governing the Swiss participation in the Single Market. The Swiss decision on 26 May 2021 not to sign the agreement was met with regret by the EU side, but also with a firm warning that the bilateral relationship will grow increasingly outdated (European Commission 2021b). For example, the EU-Switzerland Mutual Recognition Agreement for Medical Devices ceased to apply on the same day (26 May). The EU has been clear that an update cannot be considered absent a Framework Agreement (European Commission 2021c). However, the impact of Brexit on the EU’s relations with (potential) candidate countries is less obvious and/or it is too early to tell. Possibly, it may set the bar to get in even higher, as well as acting as an incentive for the EU to offer less beforehand in terms of access or temporary derogations. At the same time, it might well be possible that, if and only if, a candidate country is willing to fulfil the conditions, the EU could respond by making it clear that fast and straightforward accession is feasible and desirable. In a post-Brexit world, the EU is likely to draw a clearer distinction between being in or out, aiming to prevent an accidental model of associate membership giving privileged access without the corresponding obligations. But if it is very clear that a country will eventually join, this could create an incentive to move faster, as an enlarged EU would also demonstrate that it is an attractive and relevant actor with critical mass in Europe as well as globally.

After Brexit, the EU is indeed likely to place even greater importance on demonstrating that membership matters, implying that the scope for differentiation is limited. But it also implies that the EU acts as a relevant and effective actor in addressing cross-border problems. Pre-Brexit, four member states – the UK, Ireland, Denmark and Poland – held opt-outs. Nonetheless, given its size, the UK’s opt-outs carried particular weight, for example, as the largest non-Euro country. The UK was also the member with the greatest proportion of opt-outs, making the EU more homogenous after its exit (Martill 2021, 9). Arguably, allowing for British opt-outs enabled the EU to integrate further but this came at a cost, as the possibility of opting out increasingly dominated the UK’s thinking. British governments spent more and more intellectual and institutional capital on exploring where and how to disengage, thereby creating an increasingly negative vision of their place in the EU.26 This psychological effect may also play out in other Eurosceptical governments (Webber 2019), implying that granting opt-outs could lead to further distancing over time. It would however be too simplistic to conclude from

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26Interview 3, 21 May 2021.
Brexit that opt-outs either pave the way for disintegration or do not go far enough in accommodating individual preferences. It is crucial to understand that the UK has always been a reluctant member state, giving its membership a *sui generis* character.\(^{27}\)

Brexit reinforces the view that “you have to be fully in to avail from the opt-outs”.\(^{28}\) It is likely that flexibility remains possible, but unless it is designed and policed carefully, it could well lead to a similar distancing as we have seen with the UK. Crucially, if the EU grants opt-outs from its core principles, including the role of the Court, the Single Market and the indivisibility of the four freedoms, it would undermine the foundations of European integration. Another area where there can be no exemptions is the EU’s founding values as laid out in Article 2 of the Treaty on European Union.\(^{29}\) In some areas, such as migration and the rule of law, the EU faces the problem of informal (or unilateral) opt-outs with some member states refusing to abide by. This form of internal divergence poses a difficult challenge and cannot be addressed through traditional routes of differentiated integration. It also shows that *ex-ante* conditionality does not guarantee *ex-post* compliance, as it involves Central and Eastern European countries.

With a view to greater cooperation, the UK’s exit has had an enabling effect, including the unified response throughout the Brexit process (Schimmelfennig 2018). Rather than incentivising differentiated cooperation, in some policy fields, for example security and defence, integration has been advanced in response to Brexit. The decision on the Recovery Fund and budget would most likely not have been possible with the UK at the table.\(^{30}\) But the enabling effect of Brexit should not be overstated (Webber 2019). Overall, Brexit does not remove internal obstacles to deeper integration. The UK certainly was not the only reluctant force, and some medium-sized and smaller member states used to rely on British opposition. Nonetheless, the member states that traditionally would have sided with the UK can now be isolated more easily. To be sure, some mid-sized members might attempt to take on a leadership role on traditional UK causes: for example, the Dutch government emerged as the leader of a ‘frugal’ coalition with Finland, Sweden and Denmark during the negotiations on the budget and Recovery Fund. However, so far this approach has not been effective.

**Conclusion**

The foregoing analysis revealed that the TCA is a *sui generis* agreement suited to the specific needs of the EU-UK relationship, particularly their geographic proximity, size and interdependence. Resulting from both sides’ red lines, the deal is the basis for a thin and precarious relationship. The first lesson learned from the Brexit process is its fundamental difference from any existing model of differentiated integration, given its highly politicised character and focus on disintegration and managing downward divergence (Schimmelfennig 2018). Nonetheless, the EU-UK agreement has wider implications for the EU itself and for its externally differentiated relations.

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\(^{27}\) Interview 1, 18 May 2021.

\(^{28}\) Interview 2, 20 May 2021.

\(^{29}\) Interview 4, 26 May 2021.

\(^{30}\) Interviews 1, 2, 3, 4 and 5.
In the Brexit process, the EU proved its ability to keep a united front (Patel 2018), and is continuing some of the structures of inter-institutional and member state governance, such as the Service for the EU-UK Agreements31 and the Brexit Working Party, to ensure coordination and exchange of information with the EU27. Member states have already started to speak with the UK on bilateral issues that matter to them, for example, Spain on social security cooperation.32 While this can be seen as legitimate and normal, there have also been concerns about potentially divisive bilateralism and EU cohesion. Without inter-institutional and member state coordination, differentiated relations could cause internal divisions. What also needs to be further investigated is whether/how the lessons from the Barnier method can be further applied to other negotiations and whether/how the use of transparency as a tool to build trust, as well as strategic coordination of and consultation with the member states and EU institutions, enhances collective discipline (Greubel 2019).

Another conclusion drawn with respect to the TCA is that a more distant relationship has been established, raising doubts regarding the TCA’s effectiveness, sustainability and legitimacy, with political trajectories pointing to growing estrangement and divergence over time. Based on our analysis, concluding a deal does not mean easing tensions; even though the EU and the UK share the same interests in some domains, their perceptions on joint governance structures differ widely, creating a ‘partnership quagmire’ that can have implications for the capacity of the EU and the UK to effectively pursue joint global goals. An area of future investigation is whether avenues such as bilateral agreements can, for example, facilitate cross-border mobility between the EU-UK (Acosta 2021), even in the context of a diverging and conflictual relationship.

In order for the TCA to be sustainable, it must combine effectiveness and legitimacy. However, the loss of trust over the four years of negotiations has affected all levels of the relationship (Wachowiak and Zuleeg 2021b), leading to an unstable Agreement. Regarding legitimacy and sustainability, a question arises about the different treatment of the Northern Ireland Protocol, and its separate but linked nature as part of the Withdrawal Agreement. Since Brexit is an ongoing process, the lack of consensus in the Northern Irish community33 can affect the legitimacy and the future of EU-UK relations.

While differentiation has become an established feature of the EU, Brexit shows that divergence comes at a cost, and membership matters. The emergence of a new type of external differentiation has created a distant relationship between the EU-UK with limited economic integration that reinforces ‘perma-outs’. The impact of Brexit on the relationship with, for example, the EFTA countries is an interesting area of future research. In future, the EU is likely to seek to re-emphasise core principles of EU membership, but the perception of Brexit through time is of high importance for the stability of European integration. The scenario of the UK escaping a political reckoning could appeal to other Eurosceptic leaders, leading to a domino effect (Wachowiak and Zuleeg 2021b).

Overall, the Brexit process has proven that exiting the EU is no longer a theoretical treaty provision, but a living possibility,34 reaffirming that EU membership is voluntary. The integration process is highly politicised, and “differentiated integration is a deeply

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31The successor to the European Commission’s Taskforce on Article 50 negotiations with the United Kingdom.
32Interview 5, 1 June 2021.
33EU-UK Track 2 Conference: Making the Protocol sustainable: Evidence and experience in Northern Ireland (European Policy Centre, November 2021).
34Interview 4, 26 May 2021.
political process [...] with winners and losers” (Fossum 2015). The EU-UK relationship is closer to divergence than to differentiated integration and impacts internally and externally the future of differentiated integration. Therefore, evolving perceptions of Brexit and the sustainability, legitimacy and effectiveness of the TCA will impact not only on the future EU-UK relationship but also on the EU’s relationship with other third countries and, indeed, on the future of differentiated integration within the Union itself.

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