
Complete EU Law: Text, Cases, and Materials (5th edn)
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# 16. Brexit

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## Abstract

Titles in the Complete series combine extracts from a wide range of primary materials with clear explanatory text to provide readers with a complete introductory resource. This chapter discusses Brexit, and in particular the EU–UK Withdrawal Agreement, the Political Declaration setting out the framework for the future relationship between the EU and the UK, the EU–UK Trade and Cooperation Agreement, and the UK's own domestic legislation corresponding to these, the EU Withdrawal Act 2018 and the Future Relationship Act 2020. These instruments set out the basis for the future legal and trade relationship between the UK and the EU now that the UK is no longer an EU Member State.

**Keywords:** Brexit, Article 50 TEU, Article 218 TFEU, European Free Trade Association, European Economic Area, Political Declaration, Withdrawal Agreement, Trade and Cooperation Agreement

## Key Points

By the end of this chapter, you should be able to:

- explain the mechanism by which a Member State can leave the EU;
- summarize the key provisions of the EU–UK Withdrawal Agreement;
- identify the key priorities for the UK and the EU in their future relationship; and
- summarize the key provisions of the EU–UK Trade and Cooperation Agreement (TCA).

## Introduction

The right of a Member State to withdraw from the EU was only introduced by the Treaty of Lisbon (2007) (see further 1.18). The provision which enshrines this right, Article 50 TEU, does not impose any substantive conditions which might prevent or make it difficult for a Member State to leave, but only sets out the procedure which must be followed in order for the withdrawal to take effect. Nonetheless, the legal and practical complications of a withdrawal, including the arrangements for the future relationship between the EU and the former Member State, are considerable—as both the UK and the EU have experienced and are likely to experience for some time to come.

## 16.1 The UK's referendum on EU membership

In June 2016, the British people were asked, in a national referendum, whether they wished to 'Leave' or 'Remain' in the EU. By a small, but decisive, majority, they voted to 'Leave' (see further 3.1 on the events leading up to the decision to hold a referendum and the possible reasons for the result). The combination of the words 'Britain' and 'exit' has led to this commonly being referred to as 'Brexit'. The result of the referendum was not legally binding on the UK government as a matter of domestic law (see further 3.1), but it immediately committed to acting on it.

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## 16.2 Withdrawal of a Member State from the EU

### 16.2.1 The legal mechanism for a Member State to leave the EU

The legal mechanism for a Member State to leave the EU is provided by Article 50 TEU.

## Article 50 TEU

> 1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
> 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That 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.
> 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
> 4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.
>
>    A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
> 5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

## Thinking Point

> What aspects of a Member State's departure from the EU does Article 50 TEU cover—and what does it not cover?

p. 646 ↵ The first thing to note is that the procedure *appears* simple: the leaving Member State simply gives notice to the EU's European Council (see 2.5 for an explanation of this institution). For example, the UK government gave notification of its withdrawal to the EU under Article 50 TEU on 27 March 2017. However, it should be noted that, as explained in Article 50(1), Article 50 deals only with the severing of the Member State's relationship with the EU. It does not address the domestic constitutional requirements of the withdrawing State, or whether it will retain those of its national laws that are in place because they have been required as a result of its EU membership. In relation to the UK, these domestic constitutional arrangements

are considered at 3.1, but it should be noted that the UK's Supreme Court, in *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (see also 3.1.3) ruled that the approval of the UK Parliament was required before the UK government could trigger Article 50 TEU, although the approval of the devolved parliaments of Northern Ireland, Scotland, and Wales was not.

Article 50 does not contain any express right for the withdrawing Member State to revoke its notice if it changes its mind, but, in C-621/18 *Wightman and others v Secretary of State for Exiting the European Union* EU:C:2018:999, the Court of Justice held that such a Member State may revoke its notice of intention to withdraw and may do so unilaterally, without having to obtain the agreement of the EU or the other Member States. Its reasoning was as follows.

1. Although the terms of Article 50 TEU did not expressly address the possibility of revocation, it provided for notification of intention, which, by definition, could change, and it provided for that notification to be given unilaterally, subject only to the Member State's own constitutional requirements.
2. The purpose of Article 50 was to enshrine the sovereign right of a Member State to withdraw from the EU and to establish a procedure to enable this to take place in an orderly fashion. The sovereign nature of the right of withdrawal supported the conclusion that the Member State concerned had a right to revoke notification of its intention to withdraw for as long as a withdrawal agreement had not entered into force or, in the absence of such an agreement, the two-year negotiation period (possibly extended, in accordance with Article 50) had not expired. In the absence of an express provision on revocation, that revocation was subject to the rules laid down in Article 50 for the withdrawal itself and so could be given unilaterally.
3. The context of Article 50 included the EU's objective of 'ever closer union' (see the Preamble to the EEC Treaty set out in the Introduction to this chapter), the values of liberty and democracy set out in the EU Charter (see further 9.4), the voluntary nature of EU membership, and the importance of EU citizenship, the rights attaching to which would be significantly impacted by the withdrawal of a Member State. In those circumstances, given that a State could not be forced to join the EU against its will, neither could it be forced to withdraw from it against its will as expressed in accordance with its constitutional requirements and following a democratic process through which it decided to revoke the notification of its intention to withdraw. The Advocate General in *Wightman* had earlier cited as examples of such a process a referendum, a parliamentary vote, or a general election, but the Court did not comment on these possibilities.

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4. This interpretation of Article 50 was consistent with evidence about the drafting process leading to the adoption of Article 50.
5. It was consistent with the Vienna Convention on the Law of Treaties, which provided that revocation could be unilateral.
6. Notification of revocation could not be made conditional on the unanimous approval of the European Council, since that would be incompatible with the principle that a Member State could not be forced to leave the EU against its will.

7. Finally, the Court noted that any revocation must be submitted to the European Council before a withdrawal agreement had entered into force or, in the absence of such an agreement, before the expiry of the two-year negotiation period (possibly extended, in accordance with Article 50) and must be unequivocal in that its purpose must be 'to confirm the EU membership of the Member State concerned *under terms that are unchanged as regards its status as a Member State*, and that revocation brings the withdrawal procedure to an end' (*Wightman*, at para 74, emphasis added). This means, for example, that the special arrangements which the UK had with the EU while it was still a Member State, such as its budget rebate and its opt-outs from membership of the euro and the Schengen Agreements (see 1.9), would have continued had it revoked its notification of withdrawal, whereas those arrangements would no longer apply if the UK were to apply to rejoin at a later date.

The next thing to note is that Article 50 TEU does not specify the future relationship, if any, between the former Member State and the EU. The reference in Article 50(2) to the agreement 'taking account of the framework for the [Member State's] future relationship with the [EU]' means that two agreements are required:

- one on withdrawal (governed by Article 50 TEU); and
- one on the future relationship of the withdrawing Member State and the EU (governed by Article 218 TFEU).

The two agreements reached between the EU and the UK are discussed at 16.2.2 and 16.3.4.

Article 50(2) provides that the terms of the withdrawal will be negotiated between the withdrawing State and the EU, and that the EU's position will be based on guidelines from the European Council (agreed on unanimously—Article 50(3) TEU). The withdrawing Member State may not participate in the discussions of the Council or the European Council (see further 2.2 and 2.5 for an explanation of these two different bodies) (Article 50(4)). An extension of the two-year time limit, which applies from the date of notification of withdrawal to the date on which the EU Treaties cease to apply to the withdrawing Member State, can be made only if all Member States agree. Article 50(2) also refers to Article 218(3) TFEU, which provides that the Commission shall submit Recommendations to the Council, which shall adopt a decision authorizing the opening of negotiations and nominating the EU's negotiator. Article 50(2) provides that any agreement must be approved by a qualified majority of the Council of the EU (see 1.5 on QMV and 2.2 for an explanation of the Council) and by the European Parliament (see 2.1 for an explanation of this institution).

p. 648 ↵ It should also be noted that Article 50(5) TEU explicitly anticipates the possibility of a former Member State subsequently applying to rejoin the EU, and states that this is governed by Article 49 TEU. Article 49 TEU lays down the procedure that must be followed in order for *any* candidate country to become a Member State of the EU; it does not differentiate between a country that used to be a Member State and a country that has never been a Member State.

### 16.2.2 The EU–UK Withdrawal Agreement and the UK's Withdrawal Act

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, OJ 2020 L29/7 (the Withdrawal Agreement) entered into force at 11pm GMT on 31 January 2020 ('exit day') (11pm rather than midnight because of the one-hour time difference between the UK and the EU institutions). The transition period, during which EU law continued to apply in the UK but the UK was no longer represented in the EU institutions, applied from then until 11pm GMT on 31 December 2020.

The Withdrawal Agreement covers not only issues relating to the withdrawal itself, but also some limited issues relating to the future relationship (discussed at 16.3.3). In relation to the withdrawal, it covers:

- separation issues, such as the free movement of goods placed on the market before the end of the transition period, the protection of existing intellectual property rights including geographical indications, and the use of data and information already exchanged (Part Three of the Agreement);
- the transition period (Part Four);
- the financial settlement between the UK and the EU (Part Five); and
- the governance structure for implementing the Withdrawal Agreement itself, including a Joint Committee of representatives of the EU and the UK to implement, apply, and interpret it (Part Six).

The governance structure for the implementation of the Withdrawal Agreement is summarized in Figure 16.1.

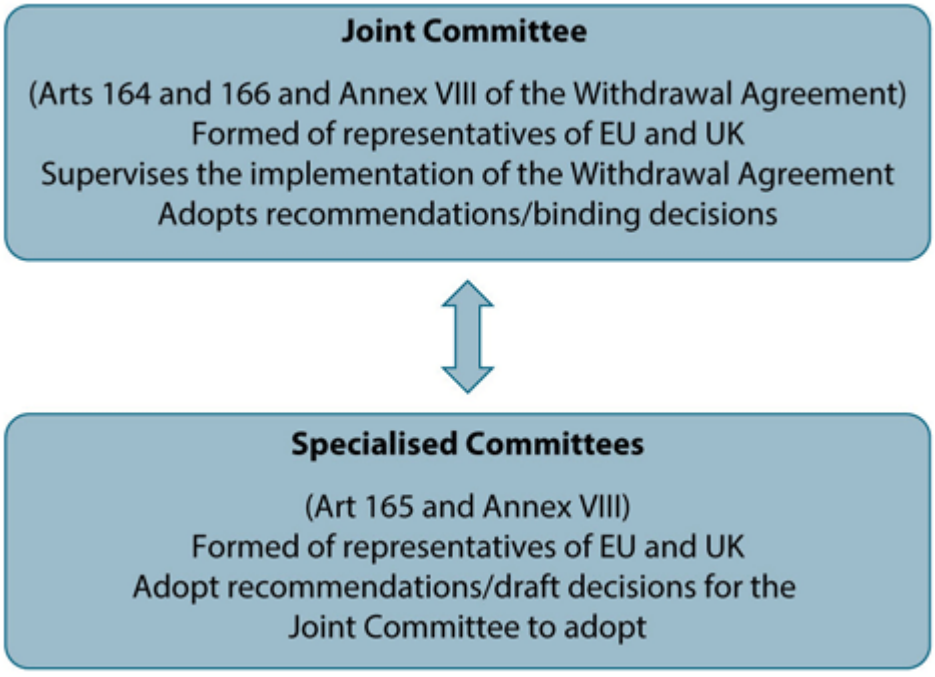


**Figure 16.1** Withdrawal Agreement governance structure

The EU has already taken formal infringement proceedings against the UK on two occasions, alleging breach of the Withdrawal Agreement by the UK. Since both sets of proceedings relate to the future relationship provisions of the Agreement, they will be discussed in that context at 16.3.3.

The Withdrawal Agreement was accompanied by the non-binding Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom of Great Britain and Northern Ireland, 19 October 2019 (the Political Declaration) (discussed at 16.3.3).

The European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020) is a piece of domestic UK legislation which implements the provisions of the Withdrawal Agreement as
p. 649 a matter of UK law, and makes arrangements ↵ to fill the legislative gap created when the UK left the EU and EU law ceased to apply automatically in the UK. Its provisions include the following:

- Section 1 repealed the European Communities Act 1972, which was enacted by the UK when it joined the EU in order to enable EU law to take effect in the UK, on exit day.
- Sections 2–7 converted the provisions of EU law at the end of the transition period into domestic UK law (referred to as 'retained EU law'—a process that has also been described as 're-importing' or 'onshoring') and preserved UK laws that were passed to implement EU law (referred to as 'EU-derived domestic legislation'). These include judgments of the Court of Justice and general principles of EU law recognized as such by the Court of Justice in a case decided before the end of the transition period. They do not include the right to damages under the ruling in C-6 & 9/90 *Francovich v Italy* [1991] ECR I-5357 (discussed at 5.2 and 5.3) or rights under the EU Charter of Fundamental Rights (discussed at 9.4).
- Section 8 gives the UK government the power to amend or repeal retained EU laws and EU-derived domestic legislation. However, this power is not unlimited; it lasts for only two years from the end of the transition period and it can be used only if the law is 'deficient' as defined in the Act, for example if provisions are redundant or refer to EU entities or reciprocal arrangements with the EU that (depending on the terms of the withdrawal negotiated between the UK and the EU—see the next bullet point) no longer apply. This is the so-called Henry VIII clause because it gives power to the executive, as opposed to the legislature, to legislate.
- Section 10 prevents the UK government from acting in a way which is incompatible with the Northern Ireland Act 1998 or the Belfast Agreement. These together made a commitment to peaceful democracy in Northern Ireland, created a number of cross-border bodies, allowed the UK government to devolve power to Northern Ireland, and provided that Northern Ireland would remain part of the UK unless a 'border poll' supported it becoming part of a united Ireland.

p. 650 ↵ The European Union (Legal Continuity) (Scotland) Act 2021 ('the Scottish Act') allows the Scottish government to make provision for the continued effect in Scotland of elements of EU law. In large part, the Scottish Act directly replicates the provisions and powers of the UK-wide European Union (Withdrawal) Act 2018, but with key powers under its provisions being exercised by the Scottish Parliament or the Scottish ministers. It also establishes a framework for environmental governance in Scotland post-Brexit in order to replace the environmental protection role that the EU and EU law previously fulfilled.

When the Scottish Act was still a Bill, the UK's Supreme Court held in *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill—A Reference by the Attorney General and the Advocate General for Scotland* (UKSC 2018/0080) that the Bill as a whole was within the competence of the Scottish Parliament because, although the relationship with the EU was not a devolved matter, the Bill did not relate to relations with the EU, but only regulated certain of the legislative consequences of the cessation of EU law as a source of domestic law (at para 33). However, the Supreme Court held that certain provisions of the Bill amounted to modifications of the European Union (Withdrawal) Act 2018 and were therefore outside the legislative competence of the Scottish Parliament. These provisions were removed by the Scottish government prior to enactment of the Act.

## 16.3 The future relationship between the EU and a withdrawing Member State

### 16.3.1 The legal mechanism for the conclusion of agreements between the EU and other countries

Article 218 TFEU makes provision for the negotiation of agreements between the EU and third countries (i.e. countries which are not EU Member States). This therefore applies to negotiations with a former Member State after it has withdrawn from the EU.

## Article 218 TFEU

1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.
2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.
3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

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[...]

6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

   Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

   (a) after obtaining the consent of the European Parliament in the following cases:

      (i) association agreements;

      (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;

      (iii) agreements establishing a specific institutional framework by organising cooperation procedures;

      (iv) agreements with important budgetary implications for the Union;

      (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

   The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

   (b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

[...]

> 8. The Council shall act by a qualified majority throughout the procedure. However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. …
>
> […]
>
> 10. The European Parliament shall be immediately and fully informed at all stages of the procedure.
> 11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

## Review Question

> What are the key procedural requirements that must be met in order to conclude an agreement on the future relationship between a withdrawing Member State and the EU?

p. 652 ↵ Article 218 TFEU requires that negotiations on any separate agreement on the future relationship between a withdrawing Member State and the EU be opened by the Council, conducted by the Commission, and concluded by the Council after either obtaining the consent of the European Parliament or consulting it, depending on the content of the agreement (see Article 218(6) TFEU). The Council's decision is likely to be required to be taken unanimously, but it may be possible for it to be taken by QMV (see 1.5), again depending on the content of the agreement. It is also worth noting that Article 218(11) TFEU provides that a Member State, the European Parliament, the Council, or the Commission may obtain the opinion of the Court of Justice as to whether a proposed agreement is compatible with the EU Treaties and, if the Court's opinion is that it is not, the agreement may not enter into force.

The UK's Constitutional Reform and Governance Act 2010 provides that although it is for the UK government on behalf of the UK to ratify any Treaty with the EU, this is subject to the prior approval of both the House of Commons and the House of Lords (the lower and upper chambers of the UK Parliament). The High Court, although not the House of Lords, has the power to block ratification of the Treaty by the government.

### 16.3.2 Possible options for the relationship between the EU and a former Member State

No EU Member State has ever left the EU before (although Greenland, which is an autonomous part of Denmark, withdrew in 1995). However, the EU has a variety of agreements with different countries that are not Member States, which are often referred to informally by reference to the countries involved. The first six of the following agreement types have only been concluded with countries that had not previously been EU Member States (and indeed most of them remain non-Member States) and have never been applied to a former EU Member State. None of them therefore create a direct precedent for the treatment of such a State. However, they are often considered as providing possible options for the relationship between the EU and a former Member State after it has left, and thus for the future relationship between the EU and the UK.

The seventh option is based on the position of Denmark, which is still a Member State, but part of which (Greenland) opted to leave the EU. This option is no longer available to the UK because it would have had to have been agreed prior to withdrawal. However, it is discussed here because it is the only example of a territory leaving the EU, prior to the UK's withdrawal (subject to arguments that Algeria or Saint Barthélemy left the EU when they ceased to be part of France).

#### Note

> A simplified summary of these options as compared to the agreement on the future relationship actually reached between the EU and the UK (the TCA) is provided at the end of 16.3.4. The TCA contains elements of all of these options.

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#### 16.3.2.1 The European Free Trade Association (EFTA) and the European Economic Area (EEA): the 'Norway option'

The European Free Trade Association (EFTA) was founded by the EFTA Convention (sometimes referred to as the Stockholm Convention) in 1960 to establish a free trade area amongst those European countries that did not wish to integrate economically as fully as the then EEC (now the EU) countries (see 1.4.1). In the 1970s, the EFTA States concluded free trade agreements with the EEC and, from the 1990s onwards, with various other countries in all parts of the world. Many of the EFTA States, including the UK, subsequently left and joined the EU. The current EFTA Member States are Iceland, Liechtenstein, Norway, and Switzerland, all of which are party to the EFTA Convention, which regulates free trade between them in goods and services, and the free movement of persons.

The institutional structure of the EFTA is as follows.

- The EFTA Council decides on policy issues and is made up of ministers from the EFTA countries, who meet twice a year, and ambassadors, who meet more frequently.
- There are various committees that deal with particular issues such as relations with third countries.

- The EFTA Secretariat supports activities under the EFTA Convention and EFTA's agreements with free trade partners.

The European Economic Area (EEA) was founded by the EEA Agreement in 1994 to create a single market (see 1.4.3 on the meaning of a single market) between the Member States of the EU and three of the EFTA Member States—Iceland, Liechtenstein, and Norway (often referred to as the EEA EFTA States). The EEA Agreement applies EU legislation on the free movement of goods (see Chapter 10), services (see Chapter 12), and capital and persons (see Chapter 11), and establishing common rules on competition (see Chapters 14 and 15). It also covers cooperation in areas including research and development, the environment, and social policy, but does not cover EMU (see 1.14), the CAP, the CFP, the CFSP (see 1.13), or JHA (see 1.13). The EEA Agreement consists of Articles containing the primary legislation, annexes containing the *acquis communautaire* of EU law (explained at 1.15) and certain non-binding measures, and protocols, which are generally not based on EU legislation and which contain provisions on specific issues. Unlike the EFTA Convention or the EU Treaties, the EEA Agreement is updated with new legislation on a monthly basis.

## Review Question

> What does the term *acquis communautaire* mean?
>
> *Answer*: If you have difficulty in remembering, look back at the definition in 1.15. The term *acquis communautaire* is used to refer to the accumulated body of EU law, including its objectives, policies, legislation, and case law.

p. 654 ↵ The institutional structure of the EEA is made up both of joint EU–EEA EFTA bodies, and EEA EFTA bodies.

- **Joint EU–EEA EFTA bodies**
  - The EEA Council is composed of the foreign ministers of the EU and EEA EFTA States, and provides political direction and guidance for the EEA Joint Committee.
  - The EEA Joint Committee is made up of representatives of those States and takes decisions (by unanimity) on the management of the EEA Agreement and the incorporation of further EU legislation.
  - The EEA Joint Parliamentary Committee comprises members of the national parliaments of the EEA EFTA States and members of the European Parliament (MEPs—see further 2.1) and engages in dialogue and debate in areas covered by the EEA Agreement.
  - The EEA Consultative Committee comprises members of the EFTA Consultative Committee and the European Economic and Social Committee (EESC) of the EU (see 2.8) and works to strengthen and develop cooperation in the economic and social aspects of the EEA Agreement.
- **EEA EFTA bodies**

- EFTA has a Standing Committee which is used as a forum for the EEA EFTA States to consult and reach a common position before meeting with the EU in the EEA Joint Committee. It is made up of representatives from Norway, Iceland, and Liechtenstein, and observers from Switzerland and the EFTA Surveillance Authority.
- The EFTA Court and EFTA Surveillance Authority monitor compliance with the EEA Agreement.
- The EFTA Surveillance Authority consists of three members appointed by the three EEA EFTA States. They must act independently, and their role (similarly, in part, to the role of the EU Commission—see 2.3) is to ensure that the EEA EFTA States fulfil their obligations under the EEA Agreement.
- The EFTA Court consists of three judges appointed by the three EEA EFTA States. It adjudicates in actions brought by the Surveillance Authority against those States to enforce the EEA Agreement, the settlement of disputes between those States and appeals from decisions of the EFTA Surveillance Authority, and gives advisory opinions to courts of those States on the interpretation of the EEA Agreement (see Chapter 6, Introduction).

The EEA EFTA countries are not represented in the EU's executive, legislative or judicial institutions (which are explained in Chapter 2).

### Thinking Point

> What disadvantages might this arrangement give rise to?

p. 655 ↵ The disadvantages of EFTA–EEA relationship include the requirement to adopt much EU legislation despite having had no input in the EU decision-making procedure by which it was enacted and the need to contribute to the EU's budget. Whether the acceptance of free movement of persons is perceived to be an advantage or a disadvantage by a particular country depends on whether it hopes to enable migrants to fill jobs that its citizens are not prepared or able to do or to enable its own citizens to seek work abroad, or whether it fears increasing pressure on jobs, public services, and community cohesion.

#### 16.3.2.2 EFTA and bilateral arrangements: the 'Switzerland option'

Switzerland is not a member of the EEA, but, in addition to its membership of EFTA, it has a series of bilateral agreements with the EU. These relate to matters including the free movement of persons, technical trade barriers, public procurement, agriculture, transport, scientific research, participation in the Schengen Agreements on enhanced free movement of persons (see 1.9 and Chapter 11), and the Dublin Regulation on refugees (see further 9.5.2). Although there are a number of gaps, and areas where the existing agreements are outdated, talks between the Swiss government and the EU on a new bilateral agreement were terminated in 2021 without any new agreement being concluded.

### Thinking Point

> What disadvantages might this arrangement give rise to?

While this relationship avoids the wholesale application of large parts of EU law, it nonetheless has the disadvantages of applying much EU law on a sector-by-sector basis without Switzerland having had any input in the decision-making procedure by which it was enacted and of requiring a contribution to the EU's budget. It also requires the acceptance of free movement of persons.

#### 16.3.2.3 The EU–Turkey Association Agreement: the 'Turkey option'

The Association Agreement between the then EEC (now EU) and Turkey, sometimes referred to as the Ankara Agreement, was signed in 1963 with the objectives of establishing a customs union (see 1.4.2) covering trade in goods and the free movement of workers (see Chapter 11). In order to achieve these objectives and potentially pave the way for Turkish membership of the EU, Turkey had to adopt a considerable part of the *acquis communautaire* (see 1.15). This process is ongoing: restructuring of some economic sectors is still required and there are concerns on the part of the EU about Turkey's record on human rights.

### Thinking Point

> What disadvantages might this arrangement give rise to?

p. 656 ↵ As with the relationship with Switzerland outlined at 16.3.2.2, the EU's relationship with Turkey avoids the wholesale application of large parts of EU law, but it nonetheless has the disadvantage of applying some EU law on a sector-by-sector basis without Turkey having had any input in the decision-making procedure by which it was enacted. A further potential disadvantage from some perspectives is that it applies only to free movement of goods and not to services. As to the free movement of persons, while this is not yet in place, it is envisaged by the Association Agreement.

The EU has similar agreements for customs unions (but not the free movement of persons) with Andorra and San Marino.

#### 16.3.2.4 Bilateral free trade agreements, including the 'Canada option'

The EU has a number of bilateral free trade agreements with countries with which it trades, including South Korea, Mexico, and South Africa. These bilateral agreements vary considerably in intensity and detail. Some of these are part of an association agreement with candidate countries for EU membership (for example with Albania).

The EU and Canada entered into the EU–Canada Comprehensive Economic and Trade Agreements (CETA) in 2017 to remove customs duties (see 1.4.1 and Chapter 10), remove restrictions on bidding for public contracts, open up the market in services, and enhance protection of intellectual property rights.

#### 16.3.2.5 A deep and comprehensive free trade area: the 'Ukraine option'

Deep and Comprehensive Free Trade Area (DCFTA) agreements have been entered into by the EU bilaterally with a number of third countries, including Ukraine, Georgia, and Moldova. These countries are not members of the EU's single market or customs union, but are still granted 'deep and comprehensive' access to the EU market and customs cooperation in return for aligning their domestic laws to EU law. These DCFTA agreements provide for the progressive removal of customs tariffs and quotas, and an extensive harmonization of laws in various trade-related sectors, in order to align key sectors of the third country's economy to EU standards. Unlike classic free trade agreements, they provide for freedom of establishment (of businesses) (see further Chapter 12) and the expansion of the internal market for a set of key services, and deals with trade-related energy issues. It has been estimated that Ukraine (whose agreement is the most advanced) will have to implement at least 80 per cent of the *acquis communautaire* (the existing body of EU law —see 1.15).

#### 16.3.2.6 No formal agreement: the 'World Trade Organization (WTO) option'

If a Member State withdraws from the EU without having negotiated any special arrangements, either based on one of those outlined above or something different, it would simply be treated as any other state that is not a member of the EU or EFTA and which has no special agreement with the EU. Both it and the EU would
p. 657 remain part of the World Trade Organization (WTO) ↵ and subject to its rules. The WTO is an international organization of 164 countries, including all of the EU Member States and the EU itself, which facilitates the removal of trade barriers between countries through its rules and enforcement of those rules.

The potential disadvantages of this option are set out in the following extract.

**House of Lords European Union Committee, *The Process of Withdrawing from the European Union*, 11th Report of Session 2015–16, HL Paper 138 (London: HMSO, 2016), footnotes omitted**

> 46. … [Professor Derrick Wyatt QC] told us the following consequences would be likely to ensue:
>
> > '… We leave the EU; we impose those tariffs on goods coming to us. The EU would be a third country; the EU would be imposing those tariffs on us. Of course, that would cost customers; it would cost people in the shops. We cannot disarm in tariff terms, because that is our ammunition in negotiating trade in goods. We also want to negotiate trade in services, where the WTO is not very good for us … There would be tariffs between the UK and the EU, many of them not very high but some of them—as the Government pointed out—would be 10% on cars and 35% on dairy products.'

#### 16.3.2.7 The 'reverse Greenland' option

As mentioned earlier, Greenland is part of Denmark and joined what is now the EU along with the rest of Denmark in 1973 (see 1.6), but subsequently left the EU (although it remains a part of Denmark). In the Danish referendum that preceded Denmark joining the EU, Greenland voted strongly against membership, whereas Denmark as a whole voted in favour, and in 1982 a non-binding consultative referendum held only in Greenland again resulted in a vote to leave. When Greenland finally left the EU in 1995, Denmark remained a Member State, and Greenland joined the category of 'Overseas Countries and Territories' (OCTs), which are countries and territories that have special constitutional links to a Member State and have preferential trading relationships with the EU—governed by Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union ('Overseas Association Decision'), OJ 2013 L344/1.

**Thinking Point**

> How might this be relevant where a Member State seeks to leave the EU?

It was suggested by some commentators that the UK could have remained in the EU, but that those parts of the UK which voted to leave (England and Wales) could have sought a territorial exemption in the same way as Greenland. The continuing UK Member State would have consisted of those areas that voted to remain in the EU (Scotland, Northern Ireland, and Gibraltar). However, it is by no means clear that this option would have been available to the UK or would be available to any future withdrawing Member State or territory, since

p. 658 Article 50 TEU (discussed at 16.2.1) did not exist in 1995 when Greenland left and so the arrangements ↵ for its withdrawal had to be devised in the absence of any mechanism for an entire Member State to leave the EU. Greenland is also a small part of Denmark in terms of population and economy, whereas England and Wales account for the vast majority of the UK's population and economy and allowing the majority of a Member State to leave and a small proportion of it to remain might have been unacceptable to other Member States, or simply unfeasible.

### Thinking Point

> Which of the above options do you think would have been best for the UK? When you have studied 16.3.4 and Table 16.1, review your answer and compare it to the agreement which the UK and the EU currently have (the TCA).

## 16.3.3 Principles governing the future relationship between the EU and the UK: the Withdrawal Agreement and the Political Declaration

The negotiations on the UK's withdrawal from the EU (see 16.2.2) were so protracted and complicated that there was little time available in the over four years between the UK's referendum and its withdrawal from the EU for negotiations on the future relationship to take place. Nonetheless, some very limited provisions on this relationship were included in the legally binding Withdrawal Agreement, and an outline of the future relationship was included in the non-binding Political Declaration.

In relation to the future relationship, the Withdrawal Agreement sets out:

- the rights of UK and other EU citizens who have exercised their rights of free movement from the UK to the rest of the EU or vice versa (Part Two of the Agreement);
- a Protocol on Ireland and Northern Ireland which is designed to ensure that there will be no hard border between Northern Ireland and Ireland, provides for the Common Travel Area between Ireland and the UK (which predates the accession of those countries to the EU) and the Single Electricity Market in Ireland to continue, and states that Northern Ireland is part of the customs territory of the UK;
- a Protocol on Gibraltar, which provides for the rights of frontier workers (those who reside in Gibraltar or Spain and cross the border to work) and cooperation between the Gibraltarian and Spanish authorities to combat fraud, smuggling, and money laundering, and to resolve tax-residence conflicts; and
- a Protocol on the UK's Sovereign Base Areas in Cyprus (military bases retained by the UK territory after Cyprus gained independence from the UK in 1960), which provides for the rights of Cypriots who live and work in those Areas.

p. 659 Key provisions of the Political Declaration which are of particular relevance to the subjects covered in this book (including the free movement of goods (Chapter 10) and persons ↵ (Chapter 11), and arrangements for the resolution of disputes (Chapters 6, 7, and 8)) are set out below. It should be remembered that the

Political Declaration is not legally binding, and it is also expressed in very general terms so that even if the parties agree to adhere to it there is considerable room for constructive interpretation. There have already been disagreements between the EU and the UK on the extent to which they have each observed the terms or the spirit of the Political Declaration. This is important because, as we shall see at 16.3.4, the legally binding agreement which has been reached on the future relationship of the EU and the UK can be terminated by either party on notice—which would leave only the Withdrawal Agreement and the Political Declaration in place.

The EU has already taken formal infringement proceedings against the UK on two occasions, alleging that the UK has breached the legally binding Withdrawal Agreement. The first proceedings, in 2020, related to the UK's United Kingdom Internal Market Bill which would have departed from the provisions of Protocol on Ireland and Northern Ireland and thereby also breached the obligation to act in good faith, as set out in Art 5 of the Withdrawal Agreement. The UK had openly acknowledged that this Bill would have breached its obligations under international law to abide by the Agreement, and eventually agreed to remove the offending provisions of the Bill (which subsequently became the United Kingdom Internal Market Act). The second proceedings, in 2021, also alleged a breach of the Protocol and Article 5, this time caused by the UK's unilateral delaying of the full implementation of the Protocol in relation to the movement of goods from Great Britain to Northern Ireland. At the UK's request, the EU agreed to pause proceedings in order to allow time for problems with the implementation of the Protocol to be resolved.

## Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom of Great Britain and Northern Ireland, 19 October 2019

### Introduction

[...]

2. The Union and United Kingdom are determined to work together to safeguard the rules-based international order, the rule of law and promotion of democracy, and high standards of free and fair trade and workers' rights, consumer and environmental protection, and cooperation against internal and external threats to their values and interests.

3. In that spirit, this declaration establishes the parameters of 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, foreign policy, security and defence and wider areas of cooperation. Where the Parties consider it to be in their mutual interest during the negotiations, the future relationship may encompass areas of cooperation beyond those described in this political declaration. This relationship will be rooted in the values and interests that the Union and the United Kingdom share. These arise from their geography, history and ideals anchored in their common European heritage. The Union and the United Kingdom agree that prosperity and security are enhanced by embracing free and fair trade, defending individual rights and the rule of law, protecting workers, consumers and the environment, and standing together against threats to rights and values from without or within.

p. 660

[...]

## Part I: Initial provisions

### I. Basis for cooperation

#### A. Core values and rights

[...]

7. The future relationship should incorporate the United Kingdom's continued commitment to respect the framework of the European Convention on Human Rights (ECHR), while the Union and its Member States will remain bound by the Charter of Fundamental Rights of the European Union, which reaffirms the rights as they result in particular from the ECHR.

   [...]

## Part II: Economic partnership

### I. Objectives and principles

[...]

17. Against this backdrop, the Parties agree to develop an ambitious, wide-ranging and balanced economic partnership. This partnership will be comprehensive, encompassing a Free Trade Agreement, as well as wider sectoral cooperation where it is in the mutual interest of both Parties. It will be underpinned by provisions ensuring a level playing field for open and fair competition, as set out in Section XIV of this Part. It should facilitate trade and investment between the Parties to the extent possible, while respecting the integrity of the Union's Single Market and the Customs Union as well as the United Kingdom's internal market, and recognising the development of an independent trade policy by the United Kingdom.

## II. Goods

### A. Objectives and principles

19. The Parties envisage having an ambitious trading relationship on goods on the basis of a Free Trade Agreement, with a view to facilitating the ease of legitimate trade.

20. These arrangements will take account of the fact that following the United Kingdom's withdrawal from the Union, the Parties will form separate markets and distinct legal orders. Moving goods across borders can pose risks to the integrity and proper functioning of these markets, which are managed through customs procedures and checks.

21. However, with a view to facilitating the movement of goods across borders, the Parties envisage comprehensive arrangements that will create a free trade area, combining deep regulatory and customs cooperation, underpinned by provisions ensuring a level playing field for open and fair competition, as set out in Section XIV of this Part.

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### B. Tariffs

22. The economic partnership should through a Free Trade Agreement ensure no tariffs, fees, charges or quantitative restrictions across all sectors with appropriate and modern accompanying rules of origin, and with ambitious customs arrangements that are in line with the Parties' objectives and principles above.

[...]

### D. Customs

24. The Parties will put in place ambitious customs arrangements, in pursuit of their overall objectives ....

[...]

## IX. Mobility

48. Noting that the United Kingdom has decided that the principle of free movement of persons between the Union and the United Kingdom will no longer apply, the Parties should establish mobility arrangements, as set out below.

49. The mobility arrangements will be based on non-discrimination between the Union's Member States and full reciprocity.

50. In this context, the Parties aim to provide, through their domestic laws, for visa-free travel for short-term visits.

51. The Parties agree to consider conditions for entry and stay for purposes such as research, study, training and youth exchanges.

52. The Parties also agree to consider addressing social security coordination in the light of future movement of persons.

53. In line with their applicable laws, the Parties will explore the possibility to facilitate the crossing of their respective borders for legitimate travel.

54. Any provisions will be without prejudice to the Common Travel Area (CTA) arrangements as they apply between the United Kingdom and Ireland.

[...]

57. These arrangements would be in addition to commitments on temporary entry and stay of natural persons for business purposes in defined areas as referred to in Section III of this Part. ...

### XIV. Level playing field for open and fair competition

77. Given the Union and the United Kingdom's geographic proximity and economic interdependence, the future relationship must ensure open and fair competition, encompassing robust commitments to ensure a level playing field. The precise nature of commitments should be commensurate with the scope and depth of the future relationship and the economic connectedness of the Parties. These commitments should prevent distortions of trade and unfair competitive advantages. To that end, the Parties should uphold the common high standards applicable in the Union and the United Kingdom at the end of the transition period in the areas of state aid, competition, social and employment standards, environment, climate change, and relevant tax matters. The Parties should in particular maintain a robust and comprehensive framework for competition and state aid control that prevents undue distortion of trade and competition; commit to the principles of good governance in the area of taxation and to the curbing of harmful tax practices; and maintain environmental, social and employment standards at the current high levels provided by the existing common standards. In so doing, they should rely on appropriate and relevant Union and international standards, and include appropriate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement. The future relationship should also promote adherence to and effective implementation of relevant internationally agreed principles and rules in these domains, including the Paris Agreement.

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[...]

## Part III: Security Partnership

80. The future relationship will provide for comprehensive, close, balanced and reciprocal law enforcement and judicial cooperation in criminal matters, with the view to delivering strong operational capabilities for the purposes of the prevention, investigation, detection and prosecution of criminal offences, taking into account the geographic proximity, shared and evolving threats the Parties face, the mutual benefits to the safety and security of their citizens, and the fact that the United Kingdom will be a non-Schengen third country that does not provide for the free movement of persons.

[...]

**Part III: Foreign policy, security and defence**

> 90. The Parties support ambitious, close and lasting cooperation on external action to protect citizens from external threats, including new emerging threats, prevent conflicts, strengthen international peace and security, including through the United Nations and NATO, and address the root causes of global challenges such as terrorism or illegal migration. They will champion a rules-based international order and project their common values worldwide.

## 16.3.4 The Trade and Cooperation Agreement and the Future Relationship Act

The EU and the UK finally agreed on their future relationship in late 2020. There are actually two agreements, plus a third agreement between Euratom (see 1.2) and the UK. These formally entered into force on 1 May 2021 (Council Decision (EU) 2021/689, OJ 2021 L149/2) after approval by the Council and the European Parliament, but had already entered into force provisionally at 11pm on 31 December 2020. However, it is important to remember that the detailed implementation of these agreements is an ongoing process which involves
p. 663 continuing ↵ negotiation. For example, the first meeting of the Partnership Council which supervises implementation (see further below) discussed the implementation of the new fisheries arrangements, law enforcement and judicial cooperation, and the participation of the UK in EU research programmes.

- The main trade agreement is the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ 2021 L149/10 (the TCA). The remainder of this chapter will focus on this agreement, since it is the most important and the most substantial of the three.
- The second agreement between the EU and the UK, is the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning Security Procedures for Exchanging and Protecting Classified Information, OJ 2021 L149/2540.
- The agreement between Euratom and the UK is the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the European Atomic Energy Community for Cooperation on the Safe and Peaceful Uses of Nuclear Energy OJ 2021 L150/1.

These three international agreements are implemented in UK law by the European Union (Future Relationship) Act 2020 (the Future Relationship Act).

The TCA consists of three main areas:

- A Free Trade Agreement (see further 1.4.1 on the meaning of free trade agreements) (Part Two of the TCA).
  - This covers trade in goods and services, but also competition, tax, air and road transport, energy, fisheries, data protection, and social security arrangements for EU citizens in the UK and UK citizens in the EU.

- It provides for zero tariffs and zero quotas on all goods that comply with the appropriate rules of origin of goods (i.e. goods whose country of origin can be proved to be the UK, or an EU Member State, as the case may be).
- There are non-discrimination provisions to ensure that EU suppliers and investors are treated no less favourably than those from the UK, and vice versa, but UK suppliers will no longer benefit from EU provisions on the country of origin of services principle (which automatically qualifies a service provider in one Member State to provide those services in another Member State).
- mutual recognition of qualifications, or 'passporting' (which enables banks and financial service providers which are authorized in one Member State to operate in another Member State with minimal additional authorization).
- The UK has left the Common Fisheries Policy (CFP) and there are provisions on quota arrangements for UK and EU fishers.
- There are some limited provisions for quota-free road transportation of goods, and for UK airlines to operate between the UK and the EU (but no longer between airports within the EU).

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- There are a number of provisions to ensure open and fair competition between the EU and the UK and prevent distortions to trade and investment, for example through subsidies or reduced protection of workers' rights or of the environment. These are referred to as 'level playing field' provisions. If either the EU or the UK takes action which could distort trade and investment, the other may take measures in response, for example by imposing tariffs. These are referred to as 'rebalancing' measures.

- A new framework for law enforcement and judicial cooperation in criminal and civil law matters (Part Three of the TCA).
  - This allows for continued cooperation between the national police and judicial authorities in the UK and the EU, in particular in relation to cross-border crime and terrorism.
  - Data from DNA, fingerprints, and vehicle registrations can continue to be exchanged through the EU's 'Prüm' system, but the European Arrest Warrant will no longer be available to the UK, it will lose access to the Schengen Information System (SIS) (an information sharing system for security and border management in Europe) and it will no longer be a member of Europol (see 1.13) or Eurojust (see 1.17).
  - The security cooperation can be suspended in case of violations by the UK of its commitment to continued adherence to the European Convention of Human Rights (see further 9.1).
- An agreement on governance (Parts One and Six of the TCA).
  - This establishes a Joint Partnership Council, comprised of representatives of the EU and of the UK, which will meet on request and at least annually. It will supervise the implementation, application and interpretation of the TCA and its decisions will be binding on the EU and on the UK.
  - A Parliamentary Partnership Assembly (PPA) may be set up, consisting of 35 members from the UK Parliament (the House of Commons and the House of Lords) and 35 from the European Parliament (see 2.1 on the European Parliament) to monitor the Partnership Council and to serve as 'a forum to

exchange views on the partnership' (Article 11 of the TCA). The Assembly will be informed of the decisions and recommendations of the TCA Partnership Council and can request information from and make recommendations to it.

- Specialised Committees are established, for example on Goods, Services, and Law Enforcement and Judicial Cooperation.
- If either the EU or the UK considers that the other party has breached the TCA they must enter into consultations in good faith in order to reach a mutually agreed solution.
  - The other party must respond to the request for consultations within ten days, and the consultations must be held within 30 days (unless the matter is urgent in which case the deadline is 20 days). In certain specified areas, the consultations must involve the Partnership Council or the relevant Specialised Committee.

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  - If there is no response to the request, the consultations are not held before the deadlines, the parties agree not to have consultations, or the consultations fail to reach a mutually agreed solution, the complaining party may request the establishment of an arbitration tribunal. If the parties cannot agree on the three arbitrators, they can each select one from previously agreed lists (drawn up within 180 days of the entry into force of the TCA), and the Partnership Council will appoint a third arbitrator as chair. The tribunal must deliver its ruling within 130 days of its establishment. If it finds a breach of the TCA, the party in breach must comply with the ruling immediately, and within 30 days notify the complaining party of the measures it has taken or intends to take.
- Both parties can engage in cross-sector retaliation in case of violations of the agreement. This cross-sector retaliation applies to all areas of the economic partnership.

The governance structure for the implementation of the TCA is summarized in Figure 16.2.

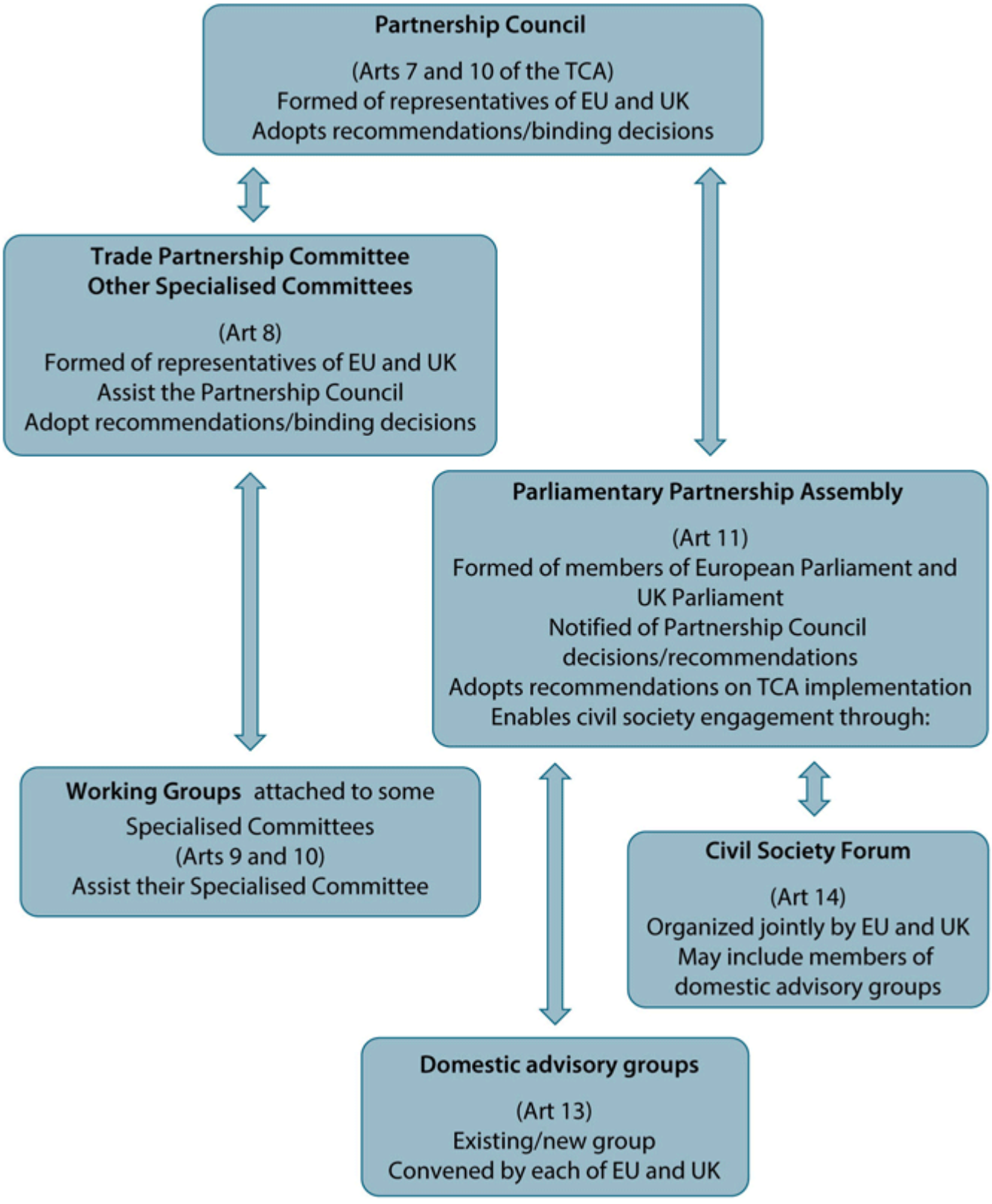


**Figure 16.2** TCA governance structure

p. 666 ↵ The TCA does not cover foreign policy, external security, or defence cooperation.

The TCA (Part Seven) provides for a review of the TCA every five years (Art 776) and for the possibility of termination by either the EU or the UK with 12 months' notice (Art 779). The TCA can be terminated more quickly if either party seriously and substantially breaches its 'essential elements', defined in the Preamble as 'their commitment to democratic principles, to the rule of law, to human rights, to countering proliferation of weapons of mass destruction and to the fight against climate change' (Art 772).

### Review Question

> Given what you have learned about the TCA, which of the options outlined at 16.3.2 do you think it most closely resembles?

A summary of the key similarities and differences between the TCA and these options is provided at Table 16.1.

**Table 16.1 Comparative summary of options for relationship between UK and EU**

| Key UK government objectives | 'Norway' option: Single market: | 'Turkey' option: Customs union: | 'Switzerland', 'Ukraine', 'Canada' options: Bilateral trade agreement | WTO option: No deal | TCA |
|---|---|---|---|---|---|
| Control free movement of persons to and from the EU | x | x | ✔ | ✔ | ✔ |
| End CJEU jurisdiction | x | x | x | ✔ | ✔<br>But remains for disputes over any issues of EU law |
| End applicability of EU law | x | x | Depends on specific agreement | ✔ | ✔ |
| Free trade with the EU | ✔ | ✔ | x | x | ✔<br>But although there are no tariffs (customs duties) or quotas, there are new customs formalities and other barriers e.g. technical regulatory barriers, health requirements for food products etc |

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## Summary

- In this Chapter you have learned about the mechanism enabling a Member State to withdraw from the EU, and some of the difficulties that arise when negotiating their future relationship.
- Article 50 TEU sets out the procedure for a Member State to withdraw from the EU.
- The Withdrawal Agreement between the EU and the UK covers separation issues, and includes a governance structure.
- The Withdrawal Agreement also includes some provisions on the future relationship, and the non-binding Political Declaration sets out an outline of what it should look like, but the vast majority of the provisions on the future relationship are contained in the TCA.
- The TCA deals with many aspects of the EU–UK trade relationship, including the need for a 'level playing field', and also sets out a governance structure.
- This governance structure is already being used for the complex ongoing negotiations about the implementation of the TCA.
- The TCA is subject to five-yearly reviews, and can be terminated by either the EU or the UK on 12 months' notice.

## Further Reading

### HM Government

***Brexit timeline: Events Leading to the UK's Exit from the European Union*, House of Commons Research Briefing, 6 January 2021**

Useful summary of key dates from the Brexit referendum to exit day and conclusion of the TCA.

***The Status of 'retained EU law'*, Briefing Paper No 8375, 30 July 2018**

Discusses how the UK's concept of 'retained EU law' will work after Brexit.

***The UK–EU Trade and Cooperation Agreement: Summary and Implementation*, House of Commons Research Briefing, 30 December 2020**

Provides an overview of the TCA and the Future Relationship Act.

***The UK–EU Trade and Cooperation Agreement: Governance and Dispute Settlement*, House of Commons Research Briefing, 19 February 2021**

Provides an overview of the governance and dispute settlement provisions of the TCA.

***The UK–EU Trade and Cooperation Agreement: Level Playing Field*, House of Commons Research Briefing, 20 May 2021**

Provides an overview of TCA provisions to ensure open and fair competition.

## Web Links

## Updating email services

Updating email services are useful in relation to the UK's relationship with the EU because of the fast-moving nature of developments. The UK Parliament itself provides two updating services in relation to the EU and Brexit, both of which are available for subscription at https://www.parliament.uk/brexit <https://www.parliament.uk/brexit>.

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## Question

Summarize the Article 50 TEU mechanism for a Member State to leave the EU.

**Visit the online resources for an outline answer to this question** <https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-16-guidance-on-answering-assessment-questions?options=showName>**, and additional self-test questions** <https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-16-self-test-questions?options=showName> **with feedback.**

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