

The Institutional Consequences of a 'Bespoke' Agreement with the UK based on a 'Distant' Cooperation Model



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STUDY

Abstract

This study, commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the AFCE Committee, examines the impact for the European Union’s legal system and institutions of a “bespoke” agreement based on a “distant” cooperation model (with the EU/Ukraine and the EU/Canada agreements as main illustrations). The analysis of these agreements’ main characteristics reveals that even “distant” cooperation already has quite impressive consequences. These should be better taken into consideration in the present Brexit negotiation.

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LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
DCFTA	Deep and Comprehensive Free Trade Agreement
DSB	Dispute Settlement Body
CETA	Comprehensive Economic and Trade Agreement
DSU	Dispute Settlement Understanding
EC	European Community
ECA	European Communities ACT
ECAA	European Common Aviation Area
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEA	Europeam Economic Area
EFTA	European Free Trade Area
EP	European Parliament
EU	European Union
EUWB	European Union Withdrawal Bill
FRFA	Future Relationship Framework Agreement
FTA	Free Trade Agreements
ICS	Investment Court System
ISDS	Investor-State Dispute Settlement
GATS	General Agreement on Trade and Services
MRA	Joint Committee on Mutual Recognition of Professional Qualifications
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

UK United Kingdom

WA Withdrawal Agreement

WTO World Trade Organisation

EXECUTIVE SUMMARY

1. This report examines the implications for the institutions and, more generally, the EU legal system, of a bespoke agreement on Brexit between the EU and the UK. This is, of course, an extremely broad topic, and it is only possible to indicate the most important implications.
2. Both the EU/Ukraine and the EU/Canada agreements, which have been adopted as the templates of such a bespoke agreement, confirm that the essential problems in trade negotiations no longer concern tariffs or defence measures, but regulatory conflicts. Those are both broader, more numerous and tougher to settle. Hence the substantially higher complexity of this new generation of trade agreements. Hence, too, the greater importance of institutional arrangements to implement properly these new agreements. The implementation of a great number of often technical and changing regulations on various topics requires a very solid legal system.
3. The comparison between the EU/Ukraine and the EU/Canada agreements reveals a fundamental difference between two types of bespoke agreement. On one side, the EU/Canada legal regime (which resembles in some aspects the arrangements between the EU and Switzerland) is modestly constraining. It relies on cooperation between administrations and regulators, and agreements about equivalence of standards. The EU/Ukraine legal regime (which resembles in other aspects the arrangement between the EU and the EEA countries) relies largely on 'approximation', which is essentially an alignment on EU standards. This legal regime is constrictive. The implications for the EU and its institutions are thus quite different.
4. The EU/Canada model will offer the UK limited access to the EU single market, especially for services. Even if there is complete UK alignment on EU standards at first, there will be no legal certainty if the fate of future alignment is not clearly defined. The EU/Ukraine model could potentially offer greater access to the EU single market, because the UK would begin from a situation of complete regulatory alignment (which is the opposite of Ukraine's). This would require, however, a reorientation of the system, and a drastic surveillance system overlooking any UK potential regulatory deviation in the future. Whatever model is chosen, the fundamental nexus between important access to the single market and important institutional constraints remains at the heart of the matter.
5. The comparison between these agreements reflects the fact that various arrangements have been made regarding the scope and the intensity of cooperation between the EU and its partners. From this perspective, the debate about cherry picking is misplaced. As the comparison between the agreements (and also with other agreements) reveals, each agreement results from different preferences and choices. What is not accepted, however, is the disruption between the benefits and constraints of cooperation, or, put more technically, the essential link between the importance of access to the single market and the importance of institutional constraints. More cooperation with the EU, defined since its creation by its grounding in the rule of law, inevitably requires more legal constraints.
6. The EU/Canada model would offer very limited solutions for the problems dealt with by the Brexit Withdrawal Agreement. It does not establish a customs union and would thus require controls at the Northern Irish border. It does not establish regulatory alignment for goods, which would require more controls. The EU/Ukraine model suffers partly from these limitations. It creates no customs union but requires a strong regulatory alignment. It could be more easily adapted.

7. Both models create important challenges for the single market's management, especially the EU/Ukraine model. Though prudence is required, since both international agreements are quite new, they are extremely ambitious. To offer wide access in goods only, the EU/Canada model would require the conclusion of many agreements recognising the equivalence of standards. The multiplication of such procedures, especially for services, could be quite cumbersome, not least given the regular appearance of new trade obstacles. The EU/Ukraine requires not only the preliminary 'approximation' of EU regulations, but also the permanent surveillance of its implementation. In both frameworks, there is thus a growing workload for the EU institutions involved.

8. This applies in particular to the EU/Ukraine model. The EU Commission is meant to exercise control in all sectors covered by approximation. Additionally, in the event of conflicts, ECJ competence has been very clearly defined. These institutions' roles are more important at both levels than they are in the EEA framework. If this model were applied to the UK, it could become a challenge for EU institutions later on.

9. Until now, insufficient attention has been given to the implications of deep cooperation between the EU and the UK in the field of police and justice. What both the EU and the UK are contemplating in that field would go beyond what has previously been seen in EU relations with Third States. This will require, once more, strong institutional arrangements.

10. The additional workload for EU institutions will be especially important if the bespoke agreement remains devoid of direct effect. In consequence, the surveillance role of the EU institutions will be proportionally greater than in the 27 Member States, since the absence of direct effect will severely curtail individuals' ability to introduce legal action for violation of single market principles and regulations.

11. It is worth noting that the EU/Ukraine model aims to establish strong participation in the EU single market, a much greater integration than the original common market, with a much weaker institutional framework. If approximation expands in many areas, it is far from certain that such a limited institutional framework will be sustainable.

12. A Brexit bespoke agreement could benefit from the introduction of more flexible institutional mechanisms. The new generation of EU trade agreements suffers from quite cumbersome processes. It could be useful to envisage the simplification of mutual recognition agreements, given that the new EU/UK relationship will begin with complete alignment, for example. More rules could also be introduced at the level of annexes, which would simplify any ulterior adaptation.

13. From the institutional point of view, the creation of a bespoke agreement with the UK will also make the global management of the single market more difficult. One must not underestimate the difficulty of simultaneously managing the single market and multiple forms of very deep integration with Third States. In this context, adding a bespoke UK agreement to various external agreements with EFTA countries, Switzerland, Canada, Japan, Mexico and Mercosur, and the possible deepening of cooperation with Turkey, etc., could present a huge challenge.

14. Brexit will, in any case, have a huge impact on the design of the EU Neighbourhood Policy (ENP). It could present the opportunity to develop a common vision of all partnerships involved, and possibly of some common institutional mechanisms (from that point of view, the EEA already offers some possibilities). This policy has thus far covered many countries of different sizes, levels of development

and strategic importance. From all points of view, the UK is different. This is the first time the EU will have to deal with a third country that is big, developed and strategically essential (for example, for defence, internal security or research). This will require an additional adjustment. EU relationships with neighbourhood countries have always been characterised by some degree of asymmetry. Brexit could also change this, in some measure.

15. Finally, Brexit must be seen as a unique event, in the sense that it has no precedent. It can, however, also be seen as the beginning (or the next step) of a slow re-ordering of the whole system of international cooperation in the European continent. Since the launch of the single currency and the authorisation of enhanced cooperation in the EU Treaties, the creation of a two-tier (or even three-tier) Europe has been foreseen. The revival of the EEA, the adoption of the EU/Ukraine agreement, and the deepening of EU/Turkey economic cooperation can also be analysed as steps in the same direction.

16. Whether a multi-tier Europe develops or not, such considerations confirm the strong EU need for a positive outcome for the EU too. There are naturally important immediate economic benefits involved. However, many other strategic interests are concerned: the general evolution of EU trade policy, the organisation and rationalisation of new supply forms of cooperation in Europe, the preservation of internal security and defence cooperation with the UK after Brexit. These should be taken into better consideration during the Brexit negotiations.

Visit the European Parliament's homepage on [Brexit negotiations](#).

GENERAL INFORMATION

On 24 June 2016, United Kingdom (UK) voters approved by referendum a proposal to exit the European Union (EU). Pursuant to Article 50 TEU, the British government presented a formal notification to the EU authorities on 29 March 2017. Negotiations opened both on a withdrawal agreement and the shape of the future relationship between the EU and the UK. The European Council defined its first guidelines for this relationship on 29 March 2018. The UK has developed general orientations based on the concept of a 'bespoke agreement'.

The debate about the future relationship between the EU and the UK has, from the beginning, discussed various models. For the bespoke agreement, it was most often either the 2014 EU/Ukraine agreement¹ (sometimes linked to the largely similar EU/Moldova or EU/Georgia agreements) or the 2016 EU/Canada agreement.² The present study aims to analyse these agreements and to evaluate the impact that concluding such an agreement with the UK would have on the EU institutions and legal system, and also the topics covered by the Brexit Withdrawal Agreement.

The study is divided into two parts. The first provides a general outline of these two basic models (with comments on occasional variations with other agreements like those concluded with Moldova or Georgia). The outline is general since the agreements are extremely long and detailed. Furthermore, numerous analyses have already been provided about the details of each option. Particular examples have thus been chosen to clarify any possible impact on the future functioning of the EU.

The second part endeavours to examine the possible long-term consequences. This is the most difficult part. First, these agreements have only recently concluded. Their implementation has thus remained quite limited. The experience of the previous generation of trade agreements is not very relevant. Second, a bespoke Brexit agreement would aim to achieve something fundamentally different. Both the EU/Ukraine and the EU/Canada agreements aim to suppress trade barriers by using various elements to limit the regulatory autonomy of all parties. The Brexit bespoke agreement's objective will be to increase this regulatory autonomy. Legally, this creates a whole different (and generally unknown) framework.

Brexit is happening in an environment full of pressing uncertainties for the EU. Brexit is, of course, in itself a source of uncertainties for the EU. The creation by the Lisbon Treaty of a Member State's right to withdraw from the EU constituted a very important change in the nature of the international organisation. The WA between the EU and the UK is, in itself, a hybrid legal act. It is concluded by the EU and one of its Member States but will be implemented as an international agreement between the EU and a Third State. This is an additional source of uncertainty. Another one, less commented upon, is that Brexit is going to change profoundly what is known as the Neighbourhood Policy of the EU. The UK has some unique economic and political characteristics which are bound to modify the relationship between the EU and this group of countries.

¹ Council Decision of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Article 1, and Titles I, II and VII thereof, OJ L 161, 29.5.2014.

² Council Decision (EU) 2017/37 of 28 October 2016 on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11, 14.11.2017.

1. THE AVAILABLE SOLUTIONS

The two models generally proposed for a 'bespoke' Brexit agreement based on a "distant" cooperation are the EU/Ukraine and the EU/Canada agreements. Both are recent and have innovative features.

The EU/Ukraine agreement, signed in 2014, is a mixed association agreement, concluded by Ukraine with the EU and its Member States. It is extremely extensive and covers a large number of topics. It takes up more than 2,100 pages in the Official Journal, comprising 46 annexes, 3 protocols and a joint declaration. This agreement has been the template for the negotiations of two other association agreements with Georgia and Moldova. All agreements aim to replace the outdated Partnership and Cooperation Agreements which were previously a legal framework for the EU Neighbourhood Policy.

The EU/Canada agreement, signed in 2016, is also a mixed agreement, a Comprehensive Economic and Trade Agreement (CETA), concluded by Canada with the EU and its Member States. It is covered in 'only' around 1,100 pages in the Official Journal, comprehending 33 annexes and 3 protocols, and no fewer than 38 statements by various parties.

Both treaties belong to the new generation of trade treaties. These treaties have been developing under the simultaneous pressure of two long-term evolutions. First, due to the evolution of economic activity (growing weight of services, intellectual property and investment, multiplication of new digital activities), numerous new trade barriers have emerged. Second, due to its increasing heterogeneity and the rebalancing of trade between advanced and emerging countries, the WTO has been unable to deal with these problems. This has engendered a proliferation of numerous and complex new agreements. These agreements centre around the reduction of non-tariff barriers. In this aspect, they rely on numerous processes: 'regulatory harmonization of technical regulations, standards, and/or conformity assessment procedures; mutual recognition or equivalence of technical regulations, standards, and/or conformity assessment procedures; and information exchange or transparency.'

Such agreements thus present two important characteristics. They have very extensive scope. This is reflected by their title: the EU/Ukraine agreement is 'deep and comprehensive', whereas the EU/Canada is only 'comprehensive'. Additionally, they rely on a substantially more complex institutional setting than the previous generation of agreements.

1.1. Legal bases

Association agreements, like that for the EU/Ukraine, constitute, in theory, a special category established by Article 217 TFEU among EU external agreements; They imply 'reciprocal rights and obligations, common action and special procedure'. EU practice, however, remains blurred.

In their initial phase, association agreements were used to establish deep relationships between the EU (then EEC) and its systemic partners. Sometimes they were seen as a way to prepare a future adhesion. This was clearly the case, for example, with the 1963 association agreement with Turkey.³ This was repeated with the Central and Eastern European countries in the 1990s, during preparation for the 2004 enlargement. Sometimes, it covered very old relations with Third States. This was the case with the first Lomé Convention, concluded with third-party independent states that were previously colonies of Member States.⁴ Association agreements can also be used to establish deep partnerships without an adhesion perspective. This is the case, for example, with the 1991 EEA Agreement,⁵ or recently the EU/Ukraine agreement.

Trade agreements have a more specific, though already broad, objective. They aim to facilitate international exchanges through the reduction of barriers. They are based on Articles 206 and 207 TFEU. The EU's trade competence was interpreted broadly for a long time by the ECJ. This changed at the beginning of the 1990s with the ratification of the Uruguay Round Agreements. A long series of complex judgments and ambiguous Treaty revisions ensued. Finally, the Lisbon Treaty has adopted a new text. It has received a generally broad interpretation by the ECJ in its opinion on the EU/Singapore agreement.⁶

This Opinion defined a broad EU exclusive competence about trade. In this, it largely draws on a more teleological interpretation. This applies among other things to environmental or social measures, for example. However, for the Court, the EU has only shared competence in the fields of non-direct investment and Investor-State Dispute Settlement (ISDS). By consequence, the conclusion of the EU/Singapore agreement still required the added ratification of the Member States.⁷

The two templates used for the negotiation of a bespoke agreement thus rely on a different legal basis. The difference between them, however, appears more formal than real. Both aim principally to reduce trade obstacles. Both present a mixed nature, and thus require ratification both at the EU and the Member States' level. Both establish a quite complex institutional setting. There remain, nonetheless, differences, and some of them are essential.

1.2. A general comparison

It is useful to begin with a general comparison of the template agreements. This comparison reveals important variations, generally more on the substance of policies than on institutional aspects. (For a systematic comparison, see Annex 1).

The most important differences are commented on below. However, there are many others. Even aside from the EU/Canada agreement, a simple comparison between the EU/Ukraine, EU/Moldova and EU/Georgia agreements already reveals a multitude of dichotomies.⁸ For example, according to Article 17 of the EU/Ukraine agreement, 'treatment accorded to workers who are Ukrainian nationals and who

³ OJ L 217, 29.12.1964.

⁴ OJ L 25, 30.1.1976.

⁵ OJ L 01, 03.01.1994.

⁶ Opinion 2/15 of the Court (Full Court) of 16 May 2017.

⁷ See Cremona, M., 'Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017: Free Trade Agreement with Singapore', 14 *European Constitutional Law Review* (2018), pp. 231-259.

⁸ For a more systematic analysis, see Van der Loo, G., The EU's Association Agreements and DCFTAs with Ukraine, Moldova and Georgia: A Comparative Study, 3 DCFTAs, 2017, at :

http://www.3dcftas.eu/system/tidf/Comparative%20GVDL%2024.6.17_final_0.pdf?file=1&type=node&id=360 (accessed 25 May 2018).

are legally employed in the territory of a Member State shall be free of any discrimination based on nationality as regards working conditions, remuneration or dismissal, compared to the nationals of that Member State.' No such essential provision exists in the two other agreements. The reduction and elimination of tariffs is based on a negative list in the framework of the EU/Moldova and EU/Georgia agreements, whereas it is not in the EU/Ukraine agreement, which is thus substantially more restrictive. All reductions and eliminations must be listed. The EU has also introduced more reservations in the lists on establishment and on key personnel, graduate trainees and business sellers for Moldova and Georgia.

In that context, the debate about cherry picking clearly appears to be misplaced. As the comparison between these agreements (and also with others) reveals, each agreement results from different preferences and choices. What is not accepted, however, is the disruption between the benefits and constraints of cooperation, or, put more technically, the essential link between the importance of access to the single market and the importance of institutional constraints. More cooperation with the EU, defined since its creation by its grounding in the rule of law, inevitably requires more legal constraints. This remains the core of the negotiation, as synthesized by P. Eeckhout :

what is often missing from the debate is a deeper understanding of the basic distinction between what this study will term the market integration and trade liberalization paradigms. That distinction divides the different models, with Norway, Switzerland and Ukraine broadly on the market integration side, and Turkey, Canada and the WTO on the trade liberalization side. This is a divide which, if not unbridgeable, is deeper than is often assumed. The reasons and causes are of an economic, political, and particularly also of a legal and institutional nature (lawyers would in fact say 'constitutional').⁹

The EU can show flexibility in the negotiations about the scope and the substance of trade openings. However, though the present British authorities do not seem to have fully understood this yet, the EU will have very little margin of manoeuvre concerning the need for control of the EU institutions (ECJ included) on the implementation of market integration commitments. This constitutes the core of the single market.

1.3. Goods

The EU/Ukraine agreement has established a free trade area for trade in goods. Tariffs have been largely eliminated. Their reduction is asymmetrical, as foreseen by many EU agreements concluded with less developed partners. The agreement also foresees a phasing out of existing export duties applied by Ukraine to products such as livestock and raw hide materials, seeds of some types of oil-yielding crops and types of scrap metal. Quantitative restrictions on imports and exports are also prohibited, unless allowed by the relevant WTO rules. This exception for quantitative restrictions seems somewhat surprising considering the general level of integration pursued by the agreement.

As required, this free trade agreement establishes origin rules. They define when products are wholly obtained from the territory of one of the parties, or when products have undergone sufficient working or processing. This allows them to obtain an 'EUR.1' movement certificate or an invoice declaration. Classically, four different criteria for 'sufficient processing' are possible for each product . They are generally: i) a change of tariff heading (e.g. a screw will originate from Ukraine if it is made from imported materials of any other heading); ii) a minimum value added (e.g. for passenger cars, the value of all the non-originating materials used to manufacture the car may not exceed 40% of the total value of the product); iii) specific processing or working requirements; or iv) a combination of the first three requirements. The agreement also promotes bilateral cumulation. This means that producers in both partner states can use materials and components originating in each others' country as if they originated in them when seeking to qualify for preferential treatment.

⁹ Eeckhout, P., *Future trade relations between the EU and the UK: options after Brexit*, European Parliament, Policy Department for External Relations, Directorate General for External Policies of the Union, 2018, p. 6.

A great deal of attention has been given by the EU/Ukraine agreement to the proper functioning of customs services. This has been provoked by many problems with bad administration in Ukraine. The agreement thus establishes key principles for customs legislation and procedures. It also endeavours to enhance various forms of cooperation between the customs services of the EU and Ukraine. The first consequence of this is that Ukraine has to incorporate generally the EU customs code, as laid down by Regulation 450/2008/EC. This new version determines the general rules and procedures applicable to goods brought into or out of the EU customs territory. It introduced changes to allow IT solutions for a simple and paperless environment for customs and trade. It defines electronic data-processing techniques for all required exchanges of data, accompanying documents, and notification between customs authorities, and between economic operators and customs authorities. There are, however, provisions of the customs code that Ukraine is not obliged to implement, either because they are excluded or because approximation is based only on the 'best endeavours' principle (see Annex XV).

Trade in goods also requires compliance with various standards, either for industrial or agricultural products. In that framework, Ukraine must 'approximate' a lot of EU legislations and standards at three levels. First, it has to incorporate general principles and reference provisions for the marketing of products established by Decision 768/2008/EC, the requirements for accreditation, and market surveillance established by Regulation 765/2008/EC, and the general safety requirements on any product placed on the market established by Directive 2001/95/EEC (see Article 56 and note 1). Second, it has to apply dozens of sectoral Directives about groups of products (see Article 56 and Annex III). Third, it has to apply thousands of products standards.

This reveals some important terminological ambiguity, as will be seen later. The EU/Ukraine agreement evokes endlessly the 'approximation' of EU rules. However, the words 'replication' or 'alignment' seem generally more adequate to describe the extent of Ukraine's real commitment in this field.

CETA aims to simplify trade in goods according to a different method. It has incorporated most of the WTO Agreement concerning Technical Barriers to Trade. Furthermore, according to Article 4(3), 'the Parties shall strengthen their cooperation in the areas of technical regulations, standards, metrology, conformity assessment procedures, market surveillance or monitoring and enforcement activities'. Finally, Article 4.4.2 opens a procedure for 'a Party that has prepared a technical regulation that it considers to be equivalent to a technical regulation of the other Party having compatible objective and product scope (which) may request that the other Party recognise the technical regulation as equivalent'.

This should, in fact, increase the use of mutual recognition in the framework of EU/Canada trade in goods. It already applies in various areas. Experience indicates, however, that this approach is not always efficient, and is sometimes even costly, especially in highly regulated industrial sectors.¹⁰

For the agricultural and food sector, the agreement follows the same strategy. Article 5.4 integrates the WTO SPS Agreement. According to Article 5(6), 'the importing Party shall accept the SPS measure of the exporting Party as equivalent to its own if the exporting Party objectively demonstrates to the importing Party that its measure achieves the importing Party's appropriate level of SPS protection'.

Whereas approximation is the heart of the EU/Ukraine agreement, regulatory cooperation is the core of the EU/Canada agreement. If the provisions are long and numerous, they remain nonetheless indicative and are not legally constraining. As confirmed by Article 21.2.6, 'the Parties may undertake regulatory cooperation on a voluntarily basis'.

¹⁰ See Correia de Brito, A., Kauffmann, C. and Pelkmans, J., 'The contribution of mutual recognition to international regulatory co-operation', *OECD Regulatory Policy Working Papers*, No. 2, OECD Publishing, Paris, 2016, at: <http://dx.doi.org/10.1787/5jm56fqsfxmx-en>

1.4. Services

In Chapter 6, the EU/Ukraine agreement distinguishes three categories of principles: Establishment (Section 2), Cross-border supply of services (Section 3) and Temporary presence of natural persons for business purposes (Section 4). They correspond to the WTO provision for various modes of services.

The analysis is not simple since each category uses different techniques to formulate commitments. Furthermore, the agreement is also asymmetrical, since it introduces more reserves on the EU side.

According to Article 86(9), establishment means

as regards legal persons of the EU Party or of Ukraine, the right to take up and pursue economic activities by means of setting up, including the acquisition of, a legal person and/or create a branch or a representative office ... and (b) as regards natural persons, the right of natural persons of the EU Party or of Ukraine to take up and pursue economic activities as self-employed persons, and to set up undertakings, in particular companies, which they effectively control.

Most-favoured and national treatment both apply (Art. 88). Both parties have adopted reservations. They are enumerated in the annexes to the agreement (Annex XVI-A and D). They largely correspond to the reservations adopted by the parties in the framework of the GATS. These reservations form a negative list. Consequently, all activities that are not restricted are opened to free trade.

According to Article 86(15), cross-border services are provided '(a) from the territory of a Party into the territory of the other Party; (b) in the territory of a Party to a service consumer of the other Party'. Most services are free, except 'a) audio-visual services; (b) national maritime cabotage; and (c) domestic and international air transport services, whether scheduled or un-scheduled, and services directly related to the exercise of traffic rights'.

Temporary presence of natural persons for business purposes, finally, covers key personnel, graduate trainees, business services sellers, contractual services suppliers and independent professionals.

These principles and restrictions must then be combined with the chapters covering specific sectors. For example, financial services are governed by Articles 125-133. Again, the official terminology looks soft, but the obligations are not. According to Article 133(1), 'the Parties recognise the importance of the approximation of Ukraine's existing legislation to that of the EU. Ukraine shall ensure that its existing laws and future legislation will be gradually made compatible with the EU acquis.' The annexes are, in fact, clearer. According to Annex XVII, however, 'the applicable provisions of the following EU acts shall be applicable'. Approximation is thus simply the application of the EU rules. No fewer than 51 EU laws are covered by this obligation.

According to Article 127, Ukraine also has to make 'its best endeavours' to implement international standards in that field. Consequently, there is no real regulatory alignment obligation. The situation, however, changes completely when these standards have been incorporated into EU legislation. When the Bank for International Settlements Basel III rules on capital requirements have been incorporated into EU regulations, they have to be fully implemented.

Annex XVII-6 adds some stringent provisions about implementation. According to Article 3, 'once Ukraine is of the view that a particular EU legal act has been properly implemented, it shall inform the EU thereof. Ukraine shall transmit to the competent Commission service the internal act with a cross-comparison table ("transposition table") showing in detail the correspondence with each article of the EU legal act'. According to Article 4, 'Ukraine shall ensure that authorities and bodies under its jurisdiction which are responsible for the effective application of the national legislation ...

continuously apply and adequately enforce all legislation for which the EU's formal assessment of Ukraine's approximation efforts had previously been positive as well as all future EU legislation'.

Contrary to what has often been said, CETA also covers services. It has even used the principle of the negative list for Modes 1, 2 and 3. This is quite an ambitious method (also used by the WTO). It means that all services sectors are liberalised by default. If a party wants to restrict liberalisation, it has to list the sectors or sub-sectors it wants to exclude, and indicate the type of restriction it wants to maintain. This method is generally presented as ambitious.¹¹ One must, however, be careful about generalisations. It depends a lot on the number of excluded sectors and restrictions.

CETA is, as a matter of fact, a very good illustration of that caveat. Modes 1 and 2 (cross-border) are covered by Chapter 9, Mode 3 (commercial presence) by Chapter 8, and Mode 4 (movement of natural persons) by Chapter 4. All services supplied by governmental authorities (except when competitive) have been excluded. This also applies to most air transport. The EU has additionally excluded audio-visual services. Annex 1 enumerates all existing restrictions which the parties intend to maintain. Annex 2 opens the possibility of new restrictions for a great number of reasons. This results in hundreds of pages of reservations.

Financial services reflect the carefulness of the approach. They are covered by Chapter 13. Here again, the WTO principles (national treatment, market access, most-favoured-nation treatment) apply. Article 13(10) enumerates a long series of reservations. Additionally, Article 13(16) establishes a prudential carve out. Parties can still adopt prudential measures. This agreement does not prevent a party from adopting or maintaining

reasonable measures for prudential reasons, including: (a) the protection of investors, depositors, policy-holders, or persons to whom a financial institution, cross-border financial service supplier, or financial service supplier owes a fiduciary duty; (b) the maintenance of the safety, soundness, integrity, or financial responsibility of a financial institution, cross-border financial service supplier, or financial service supplier; or (c) ensuring the integrity and stability of a Party's financial system.

Consequently, a Financial Services Committee has been created 'to carry out a dialogue on the regulation of the financial services sector with a view to improving mutual knowledge of the Parties' respective regulatory systems and to cooperate in the development of international standards'.

1.5. Free circulation of people

According to Article 19(2) of the EU/Ukraine agreement, 'the Parties shall also endeavour to enhance the mobility of citizens and to make further progress on the visa dialogue'. They must also insure the full implementation of two 2007 bilateral agreements about the Readmission of Persons and the Facilitation of the Issuance of Visas. A whole Visa Liberation Action Plan has been elaborated. Conditionality and approximation apply here too.

Essentially, Ukraine has to adopt measures to guarantee document security (biometric passports, fingerprints database...), integrated border and migration management (fight against illegal immigration, crime, movement of persons and return policies...), public order and security, and, finally, fundamental rights. After a legislative phase, an implementation phase was required. The Commission finally concluded that Ukraine had satisfied all these benchmarks. Consequently, in 2017, the EU finally adopted a visa-free regime for Ukrainians.¹²

¹¹ See Magntorn, J., and Alan Winters, L., 'European Union services liberalisation in CETA', *University of Sussex Economics Working Paper Series 08-2018*, p. 4.

¹² See Regulation (EU) 2017/850 of the European Parliament and of the Council of 17 May 2017 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ L133, 22/5/2017).

Free circulation of people under CETA aims to facilitate trade in services and investments between the EU and Canada. The agreement's scope is thus limited to business objectives. It facilitates the temporary entry and stay of natural persons for business purposes (Chapter 10), as well as the mutual recognition of professional qualifications (Chapter 11). The treaty's authors anticipated the need for thorough monitoring. For example, Article 10(5) identifies the EU, Canada and Member States' organs responsible for allowing the temporary entry and stay of natural persons. It also enumerates their duties. The problem is still greater for professional qualifications, since this is a decentralised competency in both the EU and Canada. Additionally, there are a great number of bodies in charge. A 2008 study identified some 440 in Canada alone.¹³

Article 26(2) thus establishes the Joint Committee on Mutual Recognition of Professional Qualifications ('MRA Committee'). Article 11(3) foresees a very complex and progressive process to negotiate numerous agreements on the mutual recognition of professional qualifications.

1.6. Market disciplines

Competition has been covered by Chapter 10 of the EU/Ukraine agreement. Article 254 basically reproduces the interdictions of Articles 101 and 102 TFEU. Article 255 deals with the implementation. It defines mainly procedural requirements protecting the parties in competition processes at the level of the competition authorities and the courts. Article 256 imposes an 'approximation' of some important EU regulations.¹⁴

The principles on public subsidies are defined by Article 262. Here too, the provision largely reproduces the interdictions of Article 107 TFEU. As specified by Article 266, they do not cover agricultural products and services not listed in Annex XVI of Chapter 6. Rules of transparency are defined by Article 263. They require that

each Party shall notify annually to the other Party the total amount, types and the sectoral distribution of state aid which may affect trade between the Parties. Respective notifications should contain information concerning the objective, form, the amount or budget, the granting authority and where possible the recipient of the aid. For the purposes of this Article, any aid below the threshold of EUR 200.000 per undertaking over a period of three years does not need to be notified.

Article 264 in fact requires an alignment of Ukraine's administrative practice in this domain on 'the criteria arising from the application of Articles 106, 107 and 93 of the Treaty on the Functioning of the European Union, including the relevant jurisprudence of the Court of Justice of the European Union, as well as relevant secondary legislation, frameworks, guidelines and other administrative acts in force in the European Union'. This constitutes another form of 'approximation'.

Revealingly, the approach in the EU/Canada agreement is quite different. In Article 17.2, rather simply, 'the Parties recognise the importance of free and undistorted competition in their trade relations, acknowledge that anti-competitive business conduct has the potential to distort the proper functioning of markets and undermine the benefits of trade liberalisation' and endeavour to take 'appropriate measures to proscribe anti-competitive business conduct'. With this in view, they will apply the 1999 Agreement between the European Communities and the Government of Canada Regarding the Application of their Competition Laws.¹⁵

¹³ See Brender, N. 2014. 'Across the Sea with CETA: What New Labour Mobility Might Mean for Canadian Business.' Briefing, July. Ottawa, ON: The Conference Board of Canada, 15.

¹⁴ This concerns: (1) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty; (2) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation); (3) Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices; (4) Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81 (3) of the Treaty to categories of technology transfer agreements.

¹⁵ OJ 1999 L175, 17/06/1999.

For subsidies, the EU/Canada agreement largely refers to the WTO agreement on subsidies, and not to the TFEU Treaty. This applies also for transparency. Article 7.2(2) even indicates that 'notifications provided to the WTO under Article 25.1 of the SCM agreement are deemed to meet the requirement set out in paragraph 1'. Furthermore, Article 7.3 establishes a consultation process for subsidies or government support in services.¹⁶

1.7. Flanking policies

Different EU policies aim to protect non-economic interests and collective goods: taxation, social and environmental. The two models for a Brexit bespoke agreement deal with these in different ways.

Taxation is covered by Chapter 4 of title V of the EU/Ukraine agreement. The requirement of good governance in the taxation area is even repeated by Articles 349 and 350.

In the field of social policy, Chapter 21 enumerates general objectives and a few consultation processes. In fact, Article 417 seems the only constraining provision. Ukraine shall gradually approximate its legislation to the EU *acquis*, as set out in Annex XXXIX to this agreement, while avoiding barriers to trade. This annex enumerates a long list of directives, recommendations about labour law, anti-discrimination, and health and safety at work. The condition of 'avoiding barriers to trade' appears somewhat puzzling, since these EU texts have not been adopted with this in mind. Article 291 also recognises the Parties' commitment to 'multilateral labour standards and agreements'. Simultaneously, 'the Parties stress that labour standards should not be used for protectionist trade purposes. The Parties note that their comparative advantage should in no way be called into question.' It is not very clear how all these multiplied, and sometimes contradictory, statements will be interpreted.

In the field of environmental policy, Article 289 recalls many general environmental objectives; these objectives are detailed in Article 361. Article 363 establishes the real legal constraints: 'Gradual approximation of Ukrainian legislation to EU law and policy on environment shall proceed in accordance with Annex XXX to this Agreement.' This annex covers various sectors of EU environmental regulation: environmental governance, air quality, water and resource management, water quality, nature protection, industrial pollution and hazards, climate change and protection of the ozone layer, genetically modified organisms.

The EU/Canada agreement is clearly less constrictive.

For taxation, Article 28(7)'s main objective is to protect the national taxation systems from the encroachment of the agreement. Most provisions thus enumerate what effect the agreement will *not* have. This provision is, in fact, a very long list of discriminations which are formally allowed.

In the social field, the articulation between social protection and trade appears to be very different to the EU/Ukraine texts. The provisions establish some kind of priority for social protection. According to Article 23(4), 'the Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their labour law and standards'. Consequently, 'a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour law and standards, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory.'

In the environmental field, Article 22.1 recalls many general objectives. Article 22.3 promotes cooperation and promotion of trade supporting sustainable development. Article 22.4 establishes the Committee on Trade and Sustainable Development. Again, as for social matters, the balance between

¹⁶ Most curiously, the Article's title appears misleading, since it mentions 'Consultations on subsidies and government support in sectors other than agriculture and fisheries'. Goods are, as a matter of fact, not covered by the provision.

trade and environmental protection is more defined in favour of the environment than it is in the EU/Ukraine agreement.

1.8. Investment protection

The option chosen for investment protection in the two models is extremely different. On the one hand, there is no chapter dealing with this topic in the EU/Ukraine agreement, though future negotiations are expected. On the other hand, the chapter in the EU/Canada agreement is very developed and has provoked considerable debates linked to parties' regulatory autonomy and also the dispute settlement regime.

In Chapter 8 of the EU/Canada agreement, Article 8.4 guarantees market access, Article 8.6 national treatment, and Article 8.7 most-favoured-nation treatment. Article 8.10 recalls very firmly the parties' right 'to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity'. Two points have been widely debated in the ratification debates of the EU/Canada, both in the European Parliament and at the national level. The first one is the protection of regulatory autonomy. The second is the need for more transparency and formalism in the functioning of the judicial remedies.

The Brexit negotiation over a new partnership will have to deal with this. On one side, after the entry into force of the Lisbon Treaty, the EU has begun to negotiate investment treaties with third partners.

In the EU, the main reason for the initial development of investment provisions in international agreements in separate BITs derives from a question of distribution of competences between the EU and its Member States. While the EU is competent to negotiate trade agreements, up until the Lisbon Treaty, investment treaties were in the purview of EU Member States' foreign policy. Today, the Treaty of Lisbon gives exclusive competence to the EU in dealing with foreign direct investment. Thanks to Regulation 1219/2012, Member States' bilateral investment treaties with third countries remain in force until the EU has concluded an agreement with those third countries. The EU is therefore now starting to include investment agreements in negotiations on FTAs.¹⁷

Another new factor has been added with the ECJ's 2/15 Opinion about the EU/Singapore agreement. In this opinion, the Court indicated that there remained an area of national competence in non-direct foreign investment and dispute settlement between investors and states.¹⁸ Following Opinion 2/15, the Commission indicated its intention to recommend splitting provisions related to investment, which would require approval by the EU and all its member states, and other trade provisions falling under the exclusive competence of the EU. Most probably, the negotiation of a new EU/UK relationship should follow the same line.

1.9. The central role of recognition of approximation and equivalence

Approximation is a central component of the whole progressive integration of Ukraine in the EU single market. Economically, too, it is essential. In a revealing way, economic analysis indicates that legal approximation and reduction of non-tariff barriers are more important than tariff reductions for trade gains.¹⁹ It is, however, a difficult concept, because it is used in a lot of different contexts and is not very clearly defined.

¹⁷ Puccio L., Investment rules in trade agreements Developments and issues in light of the TTIP debate, European Parliamentary Research Service, 2015, p. 11.

¹⁸ Opinion 2/15.

¹⁹ Movchan V. and Shportyuk V., First results of DCFTAs with the EU: cases of Georgia, Moldova and Ukraine, Institute for Economic Research and Policy Consulting, 2016, p. 1.

There are various approximation clauses in three titles of the EU/Ukraine agreement: IV (trade matters), V (economic and sector cooperation), and VI (financial cooperation). Additionally, other titles evoke 'European and international standards' but they do not establish a clear obligation to incorporate EU legislation. Article 474 lists 44 annexes establishing a clear Ukraine commitment. In the field of trade, approximation is clearly identified as a preliminary Ukraine condition to get access to the EU internal market.

To give an example, for technical barriers to trade, Article 56(1) establishes a clear Ukraine obligation 'to achieve conformity with EU technical regulations and EU standardisation, metrology, accreditation, conformity assessment procedures and the market surveillance system, and undertakes to follow the principles and practices laid down in relevant EU Decisions and Regulations'. The word 'approximation' is clearly misleading here. Article 56(2) is crystal clear. Ukraine must 'incorporate the relevant EU *acquis* into its legislation'. Furthermore, it must 'make the administrative and institutional reforms that are necessary to implement', respect deadlines and present regular reports.

The terminology is extremely important. Such ambiguity could engender various consequences. At the substantial level, this could occasionally lead to a quite different interpretation of general rules concerning the freedoms of circulation, competition or technical rules.

1.10. A heavy institutional framework

The EU/Ukraine agreement benefits from a reinforced institutional framework compared to more traditional agreements. Apart from the formal Annual Summit meetings, an Association Council composed of ministers is the essential organ and has the power to update and amend the AA Annexes. It also organises the exchange of information on the process of approximation of laws. According to Article 463(1), the Association Council may 'adopt its decisions and recommendations by agreement between the Parties, following completion of the respective internal procedures'. The Association Council is assisted by an Association Committee, with specialised subcommittees composed of civil servants. These various bodies also address the technical aspects of approximation of Ukraine's trade laws with the EU *acquis*.

Other organs still exist. A Parliamentary Association Committee has been created. It can make recommendations for the Association Council. A Civil Society platform, composed of representatives from the European Economic and Social Committee and civil society from Ukraine, is meant to ensure better knowledge and understanding between the parties. Some subcommittees have already been created by the agreement. For example, Article 63 establishes the Sanitary and Phytosanitary Management Subcommittee. The Association Committee can also meet in Trade configuration (it then becomes the 'Trade Committee').²⁰ Furthermore, Article 466(1) authorises the Association Council 'to set up any special committee or body in specific areas necessary for the implementation of this Agreement, and shall determine the composition, duties and functioning of such bodies.'

The participation in other EU instruments is largely opened. According to Article 450, 'Ukraine shall be allowed to participate in EU agencies relevant to the implementation of this Agreement and other EU agencies, where their establishing regulations permit, and as laid down by these establishing regulations. Ukraine shall enter into separate agreements with the EU to enable its participation in each such agency and to set the amount of its financial contribution.' A similar participation in EU budgetary programmes is foreseen by Article 451.

Though CETA is not an association agreement, its institutional framework is also quite weighty. Article 26(1) has created the CETA Joint Committee, co-chaired by the EU Commissioner for Trade and the Canada Minister of International Trade. This committee has 'for the purpose of attaining the objectives

²⁰ Art. 29 EU/Ukraine Agreement.

of this Agreement, (...) the power to make decisions in respect of all matters when this Agreement so provides'. Article 26(2) additionally establishes a great number of specialised committees. Furthermore, to coordinate the work of those multiple institutional bodies, Article 26(5) requires both parties to create a CETA contact point.

1.11. An innovative dispute settlement regime

The EU/Ukraine agreement uses a three-track approach for the settlement of disputes. For disputes relating to the interpretation or application of provisions of the agreement apart from the comprehensive trade provisions, Articles 476 to 478 lay down a diplomatic procedure involving consultations within the Association Council, the Association Committee or some more specialised body. If consultations result in an agreed settlement, it will be enshrined in a binding decision of the Association Council; if no agreement can be reached within three months of the date of notification of the formal request for dispute settlement, the complaining party may take 'appropriate measures', such as the suspension of part of the agreement, though not of the DCFTA.

Secondly, the general regime for the comprehensive trade provisions is set out in Chapter 14 of Title IV, in Articles 303 to 323. It develops the model of dispute settlement which has been inserted into EU free trade agreements since 2000 (beginning with the EU/Mexico FTA) and is largely based on the WTO Dispute Settlement Understanding (DSU). If traditional consultations fail, an arbitration panel of three arbitrators is established on request. The rulings of arbitration panels are binding on the parties. Each party is required to take any measures necessary to comply in good faith with the ruling of the panel and they must try to agree on the time to be taken over compliance.

Thirdly, a specific mechanism covers regulatory approximation. If a dispute arises concerning the interpretation or application of provisions of EU law brought into play as a result of the process of approximation of legislation under the agreement, then according to Article 322, the arbitration panel shall not decide the question, but request the ECJ to give a ruling, suspending its proceedings in the meantime. This concerns, in Title IV, Chapter 1 (Technical Barriers to Trade), Chapter 4 (Sanitary and Phytosanitary Measures), Chapter 5 (Customs and Trade Facilitation), Chapter 6 (Establishment, Trade and Services and Electronic Commerce), Chapter 8 (Public Procurement) and Chapter 10 (Competition). This also concerns other provisions 'which otherwise impose upon a Party an obligation defined by reference to a provision of EU law'. This constitutes an important addition that can still widen the scope of competence of the ECJ. The ECJ's ruling will be binding on the arbitration panel.

For the EU/Canada agreement, Chapter 29 contains provisions for dispute settlement between the parties. It provides for arbitration as the main dispute resolution procedure, prioritising amicable solutions at first. One must notice that a special dispute settlement regime has also been established for resolution of investment disputes between investors and states (Articles 8.18 to 8.43) in establishing an Investment Court System (ICS).

Chapter 29 is largely inspired by the WTO panels system. The parties participate in the composition of the panel. When one is found in violation of its commitments, a choice can be made between correction or compensation.

Disputes may initially be resolved by consultation and mediation. If this fails, they can be referred to an arbitration panel, whose rulings are binding. The composition of the panel is agreed between the Parties. If the Parties cannot agree, a list is used to select the panel, which includes one national of each party, as well as one national of a third country who will act as chair. This panel decides by consensus or, if that is not possible, it reverts to a majority decision. The procedure is long and complex. In the first instance, the panel produces an interim report, determining if there is a violation of the Agreement. Here, the Parties can make comments on the report and the panel could reconsider any questions put before it. Then, the report will be a binding final report. Following this,

the Joint Committee sends it to the Parties. Following its reception, the Parties have 20 days to inform the Joint Committee of their plans to comply with it. At this moment, the procedure introduces traditional public international law elements in an original way, because, if the loser party does not comply, the winner can choose between suspension (of treaty obligations regarding the other part) and compensation.²¹

²¹ Fernandez Tomas, A., The settlement of disputes arising from the United Kingdom's withdrawal from the European Union, European Parliament Directorate General for internal policies - Policy department for citizens' rights and constitutional affairs, 2017, p. 28.

2. THE IMPACT ON THE EU

2.1. Limited impact on Brexit Withdrawal Agreement

The Brexit Withdrawal Agreement must deal with many consequences of the end of UK membership. The EU and the UK concluded a political agreement on this in December 2017.²² Both parties are committed to maintaining the Good Friday Agreement concluded in 1998 between the UK and Ireland to pacify the Northern Ireland border. In March 2018, the European Commission published a Draft Withdrawal Agreement with an important protocol covering all aspects of the Northern Ireland border.²³ The UK has meanwhile debated various customs regimes that aim to maintain the absence of border controls.

The technical difficulty of preserving the Good Friday Agreement in such a context must not be underestimated. The total abandonment of all border checks and the suppression of all physical infrastructure require the reorganisation of all controls normally maintained at the border. There is no parallel to this situation anywhere on the EU's external border. There are controls even at the EEA border and at the Turkish border. The EEA agreement establishes a free trade zone, and thus requires a distinction between goods produced in the parties' territory and those produced in other states. This requires the application of origin rules and the consequent application of various tariffs according to the origin. There are also controls at the EU/Turkey border despite the existence of a customs union. The customs union does not cover all products (agricultural and steel products are an exception). It is not based on a full regulatory alignment either.

Even very high technology standards will not allow the total elimination of checks and physical infrastructure at the border. In a very precise and detailed study for the European Parliament, L. Karlsson presented the possible final outcome thus:

*A company in Northern Ireland needs to move goods to a client in the UK. The company is pre-registered in the AEO database (AEO status or application for AEO Trusted Trader), a simplified export/import declaration is sent, including a unique consignment reference number. The transporting company is pre-registered in the AEO database and the driver of the truck is pre-registered in the Trusted Commercial Travellers database. The simplified export/import declaration is automatically processed and risk assessed. At the border the mobile phone of the driver is recognized/identified and a release-note is sent to the mobile phone with a permit to pass the border that opens the gate automatically when the vehicle is identified, potentially by an automatic number plate registration system. A post-import supplementary declaration is submitted in the import country within the given time period. Potential controls can be carried out by mobile inspection units from EU or UK with right of access to facilities and data, as required.*²⁴

At first sight, the parties in the Brexit negotiation appear committed to an objective that goes beyond what all existing free trade agreements, customs unions and technological means allow: the elimination of all physical checks and infrastructures at the Northern Ireland border. This led some to conclude that 'prospects for a bespoke, tariff-free Northern Ireland–EU cross-border trade arrangement appear slim, whilst a continuing Common Travel Area is in jeopardy'.²⁵ This result does not yet appear certain.

²² Joint report from the negotiators of the European Union and the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, 9/12/2017, at: https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf (accessed 25/06/2018).

²³ TF50 (2018) 35–Commission to EU27.

²⁴ Karlsson, L., *Smart Border 2.0 Avoiding a hard border on the island of Ireland for Customs control and the free movement of persons*, Policy Department for Citizens Rights and Constitutional Affairs, 2017, p. 11.

²⁵ Tonge, J., *The Impact and Consequences of Brexit for Northern Ireland*, Policy Department for Citizens' Rights and Constitutional Affairs, 2017, p. 11.

The commitment undertaken in December 2017 can basically lead to two very different situations. In the first scenario, Northern Ireland will acquire a specific trade status in the UK, and an internal border will appear. In the second scenario, the whole UK will acquire a specific trade status, which would be a very close and deep trade relationship. Both will be new concepts. For the EU institutions, however, the former will be substantially more difficult to organise than the latter.

2.2. An addition to a large panoply of new complex trade agreements

Whichever template is chosen, a bespoke Brexit agreement will add to the already large panoply of existing trade agreements (contrary to any UK participation in the EEA). Possibly it could even increase its complexity substantially.

This will be the case, for example, if some new provisions are drafted to take the UK's exceptional situation into consideration. The provisions would acknowledge the complete initial regulatory alignment of the UK and define some margin of regulatory autonomy. This would also be the case if the new agreement established regulatory alignment for goods but not for services.²⁶

The multiplication of trade agreements of various scope, regulatory alignment, constraining nature, and judicial remedies should, in any case, be considered as a potential problem for the EU legal system. All these agreements aim to provide different levels of access to the EU single market. Most of them rely on a limited or large regulatory alignment. This geographical increase of the single market will depend on an increasingly scattered and complex institutional setting. In fact, it is worth noting that the EU/Ukraine model aims to establish strong participation in the EU single market – a much greater integration than the original EU common market, with a much weaker institutional framework. One essential Brexit impact will be a rapid acceleration of this evolution.

2.3. A partial redefinition of the single market

The adoption of a bespoke agreement with the UK, added to the conclusion of many comprehensive trade agreements with broad regulatory alignment, will probably make the global management of the single market more difficult. One must not underestimate the ultimate difficulty of managing simultaneously the single market itself and multiple forms of very deep integration with Third States. In this context, the addition of a bespoke agreement with the UK to other various agreements with EFTA countries, Ukraine, Moldova, Georgia, Canada, Japan, Mercosur, and the possible deepening of the cooperation with Turkey, etc., could become a huge challenge. The EU will not be able to multiply ad infinitum regimes of deep trade cooperation.

The comprehensive nature of these agreements will extend the concept of integration. It is revealing, for example, to notice that the EU/Ukraine Agreement is presented as 'a framework of integration between the two Parties'²⁷ or even 'a new legal instrument of integration without membership'.²⁸ Also revealing is the perception that their efficient implementation requires giving these agreements primacy over national laws, including those guaranteed by the national constitution in the case of Ukraine, Georgia and Moldova.

²⁶ Though it must be remembered that the present EU/Turkey customs union agreement already foresees a partial regulatory alignment for goods. See Ott, A., 'The EU-Turkey Association and Other Parallel Legal Orders in the European Legal Space', *LIEI*, 42 (2015), p. 6. Interestingly, there remain problems in areas where regulatory alignment does not apply. 'In areas where the elimination of TBTs requires the adoption of mutual recognition approach, an EU Member State of destination has to allow Turkish products free access to its market, as long as the products provide an equivalent level of protection of the various legitimate interests involved. The same applies for products originating in an EU Member State, destined for Turkey. Both Turkey and the EU Member State of destination have the right to verify the equivalence of the level of protection provided by the product under scrutiny as compared to that provided by its own national rules.' (Dawar, K., and Togan, S., *Bringing EU-Turkey trade and investment relations up to date?*, European Parliament Directorate General for external policies policy department, 2016, p. 17).

²⁷ Spiliopoulos, O., 'The EU-Ukraine Association Agreement as a Framework of Integration between the Two Parties', 9 *Procedia Economics and Finance* (2014), pp.256-263.

²⁸ Petrov, R., Van der Loo, G., and Van Elsuwege P., 'The EU-Ukraine association agreement: a new legal instrument of integration without membership?', *Kyiv-Mohyla Law and Politics Journal* (2015), pp. 1-19.

Article 19(2) of Law of Ukraine 'On International Treaties of Ukraine' provides that 'If duly ratified international treaty of Ukraine contains other rules then relevant national legal act of Ukraine, rules of the respective international treaty should be applied'. Article 19 of the Moldovan Law No. 595-XIV 'On International Treaties' of 24th September 1999 states: 'international treaties shall be complied with in good faith, following the principle of *pacta sunt servanda*. The Republic of Moldova shall not refer to provisions of its domestic legislation to justify its failure to comply with a treaty it is a party to' (Monitorul Oficial, 2 March 2000, No. 24). Article 6 (1) of the Law of Georgia 'On International Treaties' states that an international treaty of Georgia is an inseparable part of the Georgian legislation. 'Parlamentis Utskebani', 44, 11/11/1997.²⁹

2.4. Some potential discrepancies concerning policies

First of all, the analysis of the existing agreements reveals that they are various and flexible. According to the parties' preferences, the scope of the sectors covered, the intensity of interdictions, and the method of cooperation may vary. This is important, since it has sometimes been affirmed during the Brexit negotiations that any 'cherry picking' was impossible or forbidden.³⁰ This has not been confirmed at all in practice. Even in a single category of agreements (like Ukraine, Moldova and Georgia), there are, in fact, variations. Each agreement is, in fact, tailor-made in some ways. As confirmed by M. Dougan,

*There may well be benefits to a holistic understanding of 'closer cooperation' in the various fields covered by the Single Market: for example, the smoothest possible freedom of movement for goods and services would undoubtedly be facilitated by the full participation to the Union's Digital Single Market so as to avoid perpetuating ancillary barriers in the relevant regulatory sectors. However, such technical advantages do not necessarily lead to the conclusion that the four freedoms are indivisible; nor do they necessarily rule out the sectoral participation in the Single Market.*³¹

Some comparisons reveal strange results. For example, it is quite surprising that the EU/Canada agreement, though it establishes a limited trade relationship, especially for services, has created a very precise investment protection regime, whereas the EU/Ukraine, which establishes a much stronger trade relationship, does not cover investment protection at all. Another striking illustration is the very strong integration of Ukraine inside the single market, whereas freedom of movement of people remains quite restricted and closely monitored. Clearly, the four freedoms do not appear to be universally indivisible. Many other illustrations can be found. For example, for reasons that appear difficult to explain at first sight, in the field of technical barriers to trade, the EU/Ukraine agreement requires Ukraine to approximate to 27 directives,³² whereas the EU/Georgia agreement limits Georgia's to 21 directives,³³ and the EU/Moldova agreement to 20 directives.³⁴

The comparison between the different models also reveals quite different approaches concerning the EU flanking policies (taxation, social, environmental), sometimes with paradoxical results. In the EU/Canada agreement, which establishes limited integration with the single market, the regulatory autonomy of the parties is strongly protected, whereas the EU/Ukraine agreement, which establishes a much stronger integration, gives a greater priority to trade interests.

²⁹ Petrov R., The New Generation of The European Union Association Agreements with Ukraine, Moldova and Georgia, note 7, at: <http://kolegia.sgh.waw.pl/pl/KES/struktura/kue/publikacje/Documents/THE%20NEW%20GENERATION%20OF%20THE%20EUROPEAN%20UNION%20-%20Petrov.pdf> (accessed on 02/06/2018).

³⁰ See, for example, the speeches by Michel Barnier, Chief Negotiator for the Preparation and Conduct of the Negotiations with the United Kingdom of 22/3/2017, 2/11/2017 and 27/2/2018.

³¹ Dougan, M., *The institutional consequences of a bespoke agreement with the UK based on a 'close cooperation' model*, European Parliament Directorate General for internal policies - Policy department for citizens' rights and constitutional affairs, 2018, p. 41.

³² Emerson M. and Movchan V., eds., *Deepening EU-Ukrainian Relations. What, why and how?* Centre for European Policy Studies, Rowman & Littlefield International, 2016.

³³ Emerson M. and Kovziridze T., eds., *Deepening EU-Georgian Relations. What, why and how?* Centre for European Policy Studies, 2016.

³⁴ Emerson M. and Cenușă, C., eds., (2016) *Deepening EU-Moldovan Relations. What, why and how?* Centre for European Policy Studies, 2016.

Slight variations of rules in a patchwork of agreements can produce a rather difficult implementation, especially if they concern neighbouring countries, which can even benefit from cumulation of origin. When many agreements of such nature have to be implemented with various partners, generally with various dispute settlement systems, the rise of conflicting interpretations does not appear impossible. This could become a substantial legal problem in a single market where larger segments will belong progressively to Third States. It is important that the future Brexit agreement does not increase this threat.

Additionally, it must be remembered that, economically, the distinction between goods and services is partly artificial. There is a growing share of services inputs in goods. Furthermore, and more fundamentally, in the information society, goods are more frequently offered in a bundle with services. Certainly, the expansion of the internet of things will increase this tendency.

2.5. The particular requirements of cooperation in police and justice matters

Both parties to the Brexit negotiation have indicated their desire to create deep cooperation in police and justice matters, apparently largely recreating the existing one. This constitutes a very important innovation for which there are few precedents. The existing agreements with Third States (and especially the models studied here) thus offer limited lessons.

However, insufficient attention has been given until now to the implications of a deep cooperation between the EU and the UK in these fields. Certainly, the dispute settlement regimes established by the EU/Ukraine and EU/Canada agreements do not offer the proper legal guarantees for such cooperation. The role of the individuals is also much too limited, and the protection of fundamental rights is insufficiently guaranteed.

2.6. An additional workload for the EU Institutions

The progressive development of the single market's extension in Third States and in various legal settings will certainly increase the workload of the EU institutions, beginning with the European Commission. This will especially be the case when regulatory alignment is important. A Brexit bespoke agreement can but contribute to this evolution. Due to the particular characteristics of the British economy, its impact will most likely be stronger than other deep cooperation agreements like those with Ukraine or Canada.

The additional workload for the EU institutions will be still greater if the Brexit bespoke agreement remains devoid of direct effect³⁵. Building extensions of the single market without its normal judicial processes represents a huge change. Broad individual access to national and European justice has been one of the essential pillars of the single market. That's why this integration mode has so often been presented as a system based on the rule of law. If this access is abandoned for a growing section of the single market, the national governments and EU institutions will have a proportionally greater role in its management. This will also increasingly politicise the settlement of disputes. Furthermore, it will increase the weight of EU courts compared to national courts.

³⁵ For example, according to Article 5 of Decision 2014/295 EU concerning the conclusion of the EU/Ukraine agreement, "the Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts or tribunals." Some uncertainties remain however around the impact of such clauses. Some authors consider that they do not prevent the use of some clear and precise treaty provisions (see for example Van der Loo, G., *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area - A New Legal Instrument for EU Integration Without Membership*, Nijhoff/Brill, 2016, pp. 76-77). Articles 35 (key personnel) and 48 (movement of capital) are given as illustrations. This invokes the ECJ judgment *Simukento* (Case C-265/03, judgment of 12 April 2005). It must however be underlined that this judgment concerned the application of a cooperation treaty between the EU and Russia, where such clause precisely had not been introduced. On the other side, the EU practice of introducing such a clause in the treaty's ratification decision, and not in the treaty itself, does not solve definitively the question.

From a management point of view, the surveillance role of the EU institutions (European Commission and ECJ) will be proportionally greater than in the 27 Member States of the EU, since the absence of direct effect will severely limit the individual states' ability to introduce legal action for violation of single market principles and regulations before the national courts. It will require more coordination inside the European Commission and the European Parliament between the various organs in charge of the single market and external relations. At the level of the EU courts, this will probably increase the workload of the ECJ rather than that of the General Court.³⁶

2.7. Dispute settlement

The multiplication of new generation trade agreements has provoked many debates on the creation of new dispute settlement mechanisms and their possible compatibility with the ECJ's jurisprudence. Interest in this question has been compounded by the British authorities' generally hostile position towards the ECJ. Getting out of the ECJ competence has remained persistently among the 'red lines' of the British government.³⁷ This is a complex area for the EU too, since the ECJ has not yet defined its analysis of this in the framework of the Lisbon Treaty. It is to be hoped that a 2017 request from Belgium for an Opinion will remedy this uncertainty.³⁸

The impact of a bespoke Brexit agreement will be quite important for the EU institutional system because related problems have recently appeared in the framework of other trade arrangements. The absence of an adequate solution has provoked difficulties in the EU/Switzerland negotiations. It also complicates the project of deepening the customs union with Turkey. Finally, even within the EEA framework, the alignment on EU regulations covering the banking union has generated occasional difficulties.

2.8. A completely new EU neighbourhood

The EU neighbourhood has undergone tremendous changes in the last five years. These changes have been provoked by multiple causes: relative failure of previous policy, new geopolitical environment (often associated with rising threats in the context of Ukraine or the Middle East), multiplication of bilateral trade agreements linked to the WTO paralysis, and so on. The EU has tried (rather painfully) to adapt. This could also be said *mutatis mutandis* about the new comprehensive trade agreements concluded with various partners (CETA, but also Singapore, Japan, etc.). They have been partly provoked by the WTO's paralysis and the adversarial trade strategy of the new US administration.

The UK Brexit decision thus has to be implemented in a complex context which will inevitably modify it. Its adhesion to EFTA and the EEA would have a similarly strong impact on their institutional bodies and functioning. If the UK is a third state, it will modify considerably the meaning of neighbourhood policy. It is very near, unlike Canada or Japan. It is very developed, unlike Turkey or Ukraine. It is quite big, unlike Norway or Switzerland. Finally, it is exiting the EU, which means that alignment must be presumed at the beginning but is likely to weaken later.

The need for greater coherence in the European Neighbourhood Policy will be increased by Brexit. It is quite apparent as far as trade, the legal system and the institutions are concerned. However, it goes beyond this, and also requires a political analysis.³⁹

³⁶ As such, this should thus be taken into consideration in the reflections about the coming reform of the CJEU. See Dehousse, F., *The reform of the EU courts – The need of a management approach*, TEPSA/Egmont Papers n° 53, 2011 ; *The reform of the EU Courts (IV). The Need for a Better Focus on the European Court of Justice's Core Mission*, TEPSA/Egmont Paper n° 96, 2017.

³⁷ See Dehousse, F., and Miny, X., 'What are the Judicial Options for the future EU/UK agreement?', *CERIS Journal of European Studies* 1 (2018), pp. 1-26 and references. at: <http://www.ceris.be/fileadmin/library/Research-Papers-Online/Journal-of-European-Studies-1.pdf> (accessed 26/05/2018).

³⁸ Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU, Opinion 1/17.

³⁹ On this, see Emerson, M., 'The Strategic Potential of the Emerging Wider European Economic Area', *CEPS Policy Insights* 2018/05.

CONCLUSION: THE STRONG NEED FOR A MORE SYSTEMIC AND LONG TERM STRATEGY

It is extremely difficult to anticipate the impact on the EU of the conclusion of a bespoke agreement with the UK in Brexit, either modelled on the CETA or the Ukraine agreements. Both models are brand new, very ambitious, and would additionally apply to a completely different type of partner. In a nutshell, this constitutes a very new type of legal framework for a very new type of partner. The CETA agreement is, of course, less ambitious than the Ukraine agreement. However, in the long-term perspective of the WTO practice, or of EU trade policy, it remains a very ambitious agreement, too. Another common feature of these agreements is that both establish a free trade zone and not a customs union.

This is an important restriction in the particular framework of Brexit. Of course, establishing a free trade zone, especially in the context of a wide regulatory alignment – as is the case in the framework of the EEA and potentially of the EU/Ukraine agreement – already offers the EU (and the UK) important benefits in the trade of goods. These benefits can, however, only remain partial. A basic distinction remains between the goods coming from the partner and those coming from the Third States, which requires the application of (now quite complex) origin rules. This distinction has become more important in recent decades. Globalisation has deepened both in breadth and substance. Trade exchanges are more planetary, cover more products, and represent a bigger proportion of GDP. Complex chains of production have generated more dependency. Finally, the absence of a customs union prevents the elimination of physical controls at the Northern Ireland border.

There are, of course, many differences between the two agreements. The essential one remains that the EU/Ukraine agreement establishes an integration of Ukraine in the single market, based on a wide process of regulatory alignment, and a strengthened role for the European Commission and the ECJ. Adopting this strategy for the UK and adding this new agreement to many other new trade agreements, will have important consequences for the single market's functioning and the EU institutions. Strikingly, this could also impose more constraints on the UK than participation in the EFTA and EEA. In EFTA countries, EEA implementation and controls rely first on public servants and judges from EFTA countries, whereas in the case of Ukraine, Georgia and Moldova they rely first on the European Commission and the ECJ.

Additionally, from a technical point of view, for the EU the 'bespoke agreement' model presents different weaknesses compared to the EEA model. First, it must be emphasised that its implementation has just begun. As a matter of fact, the ECJ has not been consulted about its judicial aspects. Second, a fortiori the consequences for the EU of a multiplication of various external systems can hardly be foreseen. The simultaneous application of various legal systems to various neighbouring partners of the EU all benefiting from various levels of access to the single market could easily run into serious difficulties.

Third, in many aspects, the EEA system appears in the long term a more efficient solution, for the EU but also for all partners involved. (1) It has already been tested, whereas most of the others have not. (2) It allows a deeper integration of the partner countries in the single market. (3) It recognises a greater role for the individuals. (4) It is preferable to the multiplication of various regulatory approximation and dispute settlement systems, with various scopes, mandates, competences and procedures (5). Institutionally, it is simpler and more complete; without it, various administrative decisions must be taken in each treaty framework. This is important. The UK will not be a standard neighbourhood partner for the EU. Its economy is much bigger than the other partner countries, it is more developed, and nearer. The legal problems that this implies will most probably be different, more numerous and more litigious. From this point of view, it seems that the Brexit negotiations focus too much on immediate political gains rather than long-term economic and strategic benefits for the two parties.

The use of a template based on the EU/Ukraine agreement for Brexit, with the aim of establishing more regulatory divergence, will be a systemic challenge for the EU. In a nutshell, this agreement must comprise two parts on trade. The first part establishes a traditional free trade zone, which is already operational with the UK, with the aim of allowing free trade in goods and establishing a few regulatory principles for services. The second part is only an institutional framework aiming to allow subsequent negotiations. These future negotiations can, progressively and conditionally, build the foundations of free trade for services. On this, the EU/Ukraine agreement, in fact, closely resembles the GATS framework for free trade in services, which is also progressive and conditional.

It remains to be seen whether such a framework is adequate to cover trade for Brexit. The EU/Ukraine framework is built to allow progressive convergence in as many areas as possible, whereas Brexit is about progressive divergence, possibly in some areas but not others. This does not mean that the EU/Ukraine agreement provides an inadequate framework, but certainly its original objective was totally different, and this would require subtle changes in the drafting method.

Whatever the chosen technical solution, it will be a huge change for the EU. During the last decade, many new EU external agreements have tried to operate some kind of extension of the single market, and even sometimes of other policies with a broader geographical scope. It remains a challenge to do this with somewhat weaker institutional support. It could be said that the stability of the project relies more on the power asymmetry between the EU and its partners than on the legal instruments. This, however, could provoke more problems in the more balanced relationship between the EU and the UK. It suffices to imagine what future conflicts may arise in the financial services sector.

Faced with such a challenge, a global approach that attempts to harmonise as far as possible the various integration mechanisms, preferably on the EEA model, would bring rather greater added value than a piecemeal solution. One fundamental reality must be remembered. The EU/Ukraine model aims to establish strong participation in the EU single market – a much stronger integration than the original common market but with a much weaker institutional framework. If approximation expands in many areas, it is far from certain that such a limited institutional framework will be sustainable, especially if applied to a great variety of rules and external agreements. The EU will have to look for solutions to prevent the ultimate weakening of its own institutions.

REFERENCES

Legislation

Council Decision (EU) 2017/37 of 28 October 2016 on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11, 14.11.2017.

Regulation (EU) 2017/850 of the European Parliament and of the Council of 17 May 2017 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 133, 22.5.2017.

Council Decision of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Article 1, and Titles I, II and VII thereof, OJ L 161, 29.5.2014.

Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81 (3) of the Treaty to categories of technology transfer agreements, OJ L 175, 17.6.1999.

Decision of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation, OJ L 01, 3.1.1994.

Council Regulation (EEC) No 199/76 of 30 January 1976 on the conclusion of the ACP-EEC Convention of Lomé, OJ L 25, 30/1/1976.

Agreement creating an association between the European Economic Community and Turkey, OJ L 217, 29.12.1964, available at:

https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf

Joint report from the negotiators of the European Union and the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, 9/12/2017, available at: https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf (accessed 25/06/2018).

Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community highlighting the progress made (coloured version) in the negotiation round with the UK of 16-19 March 2018, TF50 (2018) 35–Commission to EU27, available at:

https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf

Opinion 2/15: Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU, OJ C 363, 3.11.2015.

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation), OJ L 24, 29.1.2004.

Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010.

Books and Articles

Brender, N. 2014. 'Across the Sea with CETA: What New Labour Mobility Might Mean for Canadian Business.' Briefing, July. Ottawa, ON: The Conference Board of Canada, p.15.

Correia de Brito, A., Kauffmann, C. and Pelkmans, J., 'The contribution of mutual recognition to international regulatory co-operation', *OECD Regulatory Policy Working Papers*, No. 2, OECD Publishing, Paris, 2016, available at:

<http://dx.doi.org/10.1787/5jm56fqsfxmx-en>

Cremona, M., 'Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017: Free Trade Agreement with Singapore', 14 *European Constitutional Law Review* (2018), pp. 231-259.

Dawar, K., and Togan, S., *Bringing EU-Turkey trade and investment relations up to date?*, European Parliament Directorate General for external policies policy department, 2016, p. 17.

Dougan, M., *The institutional consequences of a bespoke agreement with the UK based on a 'close cooperation' model*, European Parliament Directorate General for internal policies - Policy department for citizens' rights and constitutional affairs, 2018, p. 41.

Dehousse, F., and Miny, X., 'What are the Judicial Options for the future EU/UK agreement?', *CERIS Journal of European Studies* 1 (2018), pp. 1-26 and references, available at:

<http://www.ceris.be/fileadmin/library/Research-Papers-Online/Journal-of-European-Studies-1.pdf>

(accessed 26/05/2018).

Dehousse, F., *The reform of the EU courts – The need of a management approach*, TEPSA/Egmont Papers n° 53, 2011 ; *The reform of the EU Courts (IV). The Need for a Better Focus on the European Court of Justice's Core Mission*, TEPSA/Egmont Paper n° 96, 2017.

Emerson, M., 'The Strategic Potential of the Emerging Wider European Economic Area', *CEPS Policy Insights* 2018/05.

Emerson M. and Movchan V., eds., *Deepening EU–Ukrainian Relations. What, why and how?* Centre for European Policy Studies, Rowman & Littlefield International, 2016.

Emerson M. and Kovziridze T., eds., *Deepening EU–Georgian Relations. What, why and how?* Centre for European Policy Studies, 2016.

Emerson M. and Cenusă, C., eds., (2016) *Deepening EU–Moldovan Relations. What, why and how?* Centre for European Policy Studies, 2016.

Eeckhout, P., *Future trade relations between the EU and the UK: options after Brexit*, European Parliament, Policy Department for External Relations, Directorate General for External Policies of the Union, 2018, p. 6.

Fernandez Tomas, A., *The settlement of disputes arising from the United Kingdom's withdrawal from the European Union*, European Parliament Directorate General for internal policies - Policy department for citizens' rights and constitutional affairs, 2017, p. 28.

Karlsson, L., Smart Border 2.0 Avoiding a hard border on the island of Ireland for Customs control and the free movement of persons, Policy Department for Citizens Rights and Constitutional Affairs, 2017, p. 11.

Magntorn, J., and Alan Winters, L., 'European Union services liberalisation in CETA', *University of Sussex Economics Working Paper Series 08-2018*, p. 4.

Movchan V. and Shportyuk V., First results of DCFTAs with the EU: cases of Georgia, Moldova and Ukraine, Institute for Economic Research and Policy Consulting, 2016, p. 1

Ott, A., 'The EU-Turkey Association and Other Parallel Legal Orders in the European Legal Space', *LIEI*, 42 (2015), p. 6.

Petrov, R., Van der Loo, G., and Van Elsuwege P., 'The EU-Ukraine association agreement: a new legal instrument of integration without membership?', *Kyiv-Mohyla Law and Politics Journal* (2015), pp. 1-19.

Petrov R., The New Generation of The European Union Association Agreements with Ukraine, Moldova and Georgia, note 7, available at:
<http://kolegia.sgh.waw.pl/pl/KES/struktura/kue/publikacje/Documents/ THE%20NEW%20GENERATION%20OFF%20 THE%20EUROPEAN%20UNION%20-%20Petrov.pdf> (accessed on 02/06/2018).

Puccio L., Investment rules in trade agreements Developments and issues in light of the TTIP debate, European Parliamentary Research Service, 2015, p. 11.

Spiliopoulos, O., 'The EU-Ukraine Association Agreement as a Framework of Integration between the Two Parties', 9 *Procedia Economics and Finance* (2014), pp.256-263.

Tonge, J., *The Impact and Consequences of Brexit for Northern Ireland*, Policy Department for Citizens' Rights and Constitutional Affairs, 2017, p. 11.

Van der Loo, G., The EU's Association Agreements and DCFTAs with Ukraine, Moldova and Georgia: A Comparative Study, 3 DCFTAs, 2017, available at :
<http://www.3dcftas.eu/system/tdf/Comparitve%20GVDL%2024.6.17%20final%200.pdf?file=1&type=node&id=360> (accessed 25 May 2018).

Van der Loo., G., *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area A New Legal Instrument for EU Integration Without Membership*, Nijhoff/Brill, 2016, pp. 76-77).

ANNEX: SUBJECTS COVERED BY EXTERNAL AGREEMENT BETWEEN THE EUROPEAN UNION AND UKRAINE – MOLDOVA – CANADA⁴⁰

Association Agreement between the EU and Ukraine	Association Agreement between the EU and Moldova	Comprehensive trade Agreement between the EU and Canada
Title I : General principles	Title I : General principles	Chapter 1: general definitions and initial provisions
Title II : Political dialogue and reform, cooperation in the field of foreign and security policy	Title II : Political dialogue and reform, cooperation in the field of foreign and security policy	
Title III : Freedom, security and justice - Respect of human rights and fundamental freedoms (article 14) ; - Protection of personal data (article 15) ; - Cooperation on migration , asylum and border management (article 16) ; - Treatment of worker (article 17) ; - Mobility of workers (article 18) ; - Movement of persons (article 19) ; - Money laundering and terrorism financing (article 20) ; -Cooperation in the fight	Title III : Freedom, security and justice - Rule of law (article 12) ; - Protection of personal data (article 13) ; - Cooperation on migration, asylum and border management (article 14); / / - Movement of persons (article 15) ; - Money laundering and terrorism financing (article 18); -Tackling illicit drugs (article 17);	Chapter 16: Electronic commerce – this chapter includes rules that ensures protection of personal information / / / / / /

⁴⁰ The author thanks Mrs Manon Wuine for her help in this endeavour.

against illicit drugs, and on precursors and psychotropic substances (article 21) ; - Fight against crime and corruption (article 22) ; - Cooperation in fighting terrorism (article 23) ; - Legal cooperation (article 24).	- Preventing and combating organised crime, corruption and other illegal activities (article 16) ; - Combating terrorism (article 19) ; - Legal cooperation (article 20).	Chapter 21 : Regulatory cooperation.
Title IV : TRADE AND TRADE-RELATED MATTERS <u>Chapter 1 : National treatment and market access for goods</u> <u>Chapter 2 : Trade remedies</u> <u>Chapter 3 : Technical barriers to trade, standardization , metrology, accreditation and conformity access</u> <u>Chapter 4 : Sanitary and phytosanitary measures</u> <u>Chapter 5 : Customs and trade facilitation</u> <u>Chapter 6: Establishment, trade in services and electronic commerce</u> <u>Chapter 7: Current payments and movement of capital</u> <u>Chapter 8: Public procurement</u> <u>Chapter 9: Intellectual property rights</u> <u>Chapter 10: Competition</u> <u>Chapter 11: Trade related energy</u>	Title V : TRADE AND TRADE-RELATED MATTERS <u>Chapter 1 : National treatment and market access for goods</u> <u>Chapter 2 : Trade remedies</u> <u>Chapter 3 : Technical barriers to trade, standardization, metrology, accreditation and conformity access</u> <u>Chapter 4 : Sanitary and phytosanitary measures</u> <u>Chapter 5 : Customs and trade facilitation</u> <u>Chapter 6: Establishment, trade in services and electronic commerce</u> <u>Chapter 7: Current payments and movement of capital</u> <u>Chapter 8: Public procurement</u> <u>Chapter 9: Intellectual property rights</u> <u>Chapter 10: Competition</u> <u>Chapter 11: Trade related energy</u>	<u>Chapter 2: National treatment and market access for goods</u> <u>Chapter 3: Trade remedies</u> <u>Chapter 4 : Technical barriers to trade</u> <u>Chapter 5 : Sanitary and phytosanitary measures</u> <u>Chapter 6 : Customs and trade facilitation</u> <u>Chapter 16: Electronic commerce</u> <u>Chapter 9: Cross border trade in services</u> <u>Chapter 28: Exception – article 28.4 Temporary safeguard measures with regard to capital movements and payments</u> <u>Chapter 19: Government Procurement</u> <u>Chapter 20: Intellectual property rights</u> <u>Chapter 17: Competition policy</u> /

<u>Chapter 12: Transparency</u> <u>Chapter 13: Trade and sustainable development</u> <u>Chapter 14: Dispute settlement</u> <u>Chapitre 15 : Mecanism of mediation</u>	<u>Chapter 12: Transparency</u> <u>Chapter 13: Trade and sustainable development</u> <u>Chapter 14: Dispute settlement</u> <u>Chapter 15: General provisions on approximation under Title V</u>	<u>Chapter 27: Transparency</u> <u>Chapter 21: Trade and sustainable development</u> <u>Chapter 29: Dispute settlement</u>
Title V : ECONOMIC AND OTHER SECTORAL COOPERATION <u>Chapter 1 :Energy cooperation, including nuclear issues</u> <u>Chapter 2 : Macro-economic cooperation</u> <u>Chapter 3 : Management of public finances: budget policy, internal control and external audit</u> <u>Chapter 4 : Taxation</u> <u>Chapter 5 : Statistics</u> <u>Chapter 6 : Environment</u> <u>Chapter 7 : Transport</u> <u>Chapter 8 : Space</u> <u>Chapter 9 : Cooperation in science and technology</u> <u>Chapter 10 : Industrial and enterprise policy</u> <u>Chapter 11 : Mining and metals</u>	Title IV : ECONOMIC AND OTHER SECTORAL COOPERATION <u>Chapter 14 : Energy cooperation</u> <u>Chapter 2 : Economic dialogue</u> <u>Chapter 7 : Management of public finances: budget policy, internal control and external audit</u> <u>Chapter 8 : Taxation</u> <u>Chapter 6 : Statistics</u> <u>Chapter 16 : Environment</u> <u>Chapter 15 : Transport</u> / <u>Chapitre 24 : Cooperation in research, technological development and demonstration</u> <u>Chapter 10 : Industrial and enterprise policy</u> <u>Chapitre 11 : Mining and raw materials</u>	/ / / <u>Chapter 28 : Exceptions – article 28.7 : Taxation</u> / <u>Chapter 24 : Trade and environment</u> <u>Chapter 9 : Cross-border trade in services – services covered are also transport</u> <u>Chapter 25: Bilateral dialogues and cooperation – article 25.5</u> Enhanced cooperation on science, technology and innovation <u>Chapter 18: State enterprises, monopolies and enterprises</u> <u>Chapter 25 : Bilateral dialogues – article 25.4 : Bilateral dialogues on Raw materials</u>

<u>Chapter 12: Financial services</u>	<u>Chapter 9: Financial services</u>	<u>Chapter 13 : Financial services</u>
<u>Chapter 13 : Company law, corporate governance, accounting and auditing</u>		/
<u>Chapter 14 : Information society</u>	<u>Chapter 3 : Company law, corporate governance, accounting and auditing</u>	/
<u>Chapter 15 : Audio-Visual policy</u>	<u>Chapter 18 : Information society</u>	<u>Chapter 28 : Exceptions</u> – article 28.9: exceptions applicable to culture
<u>Chapter 16 : Tourism</u>	<u>Chapter 25 : Cooperation on culture, audio-visual policy and media</u>	<u>Chapter 9: Cross border trade in services - covers tourism</u>
<u>Chapter 17 : Agriculture and rural development</u>	<u>Chapter 19 : Tourism</u>	<u>Chapter 7: Subsidies</u> – article 7.5: agriculture and export subsidies
<u>Chapter 18 : Fisheries and maritime policies</u>	<u>Chapter 12 : Agriculture and rural development</u>	/
<u>Chapter 19 : Danube</u>	<u>Chapter 13 : Fisheries and maritime policies</u>	/
<u>Chapter 20 : Consumer protection</u>	/	/
<u>Chapter 21 : Cooperation on employment, social policy and equal opportunities</u>	<u>Chapter 5 : Consumer Protection</u>	/
<u>Chapter 22 : Public health</u>	<u>Chapter 4 : Employment, social policy and equal opportunities</u>	/
<u>Chapter 23 : Education, formation et youth</u>	<u>Chapter 21 : Public health</u>	/
<u>Chapter 24 : Culture</u>	<u>Chapter 23 : Cooperation on education, training, multilingualism, youth and sport</u>	/
<u>Chapter 25 : Cooperation in the field of sport and physical activity</u>	<u>Chapter 25 : Cooperation on culture, audio-visual policy and media</u> <u>v. Chapter 23</u>	/
<u>Chapter 26 : Civil society cooperation</u>	<u>Chapter 26 : Civil society cooperation</u>	Chapter 28 : Exceptions
<u>Chapter 27 : Cross-Border and regional cooperation</u>	<u>Chapter 20 : Regional development, cross-border</u>	

<u>Chapter 28 : Participation in EU agencies and programmes</u>	<u>and regional level cooperation</u> <u>Chapter 28 : Participation in EU agencies and programmes</u>	
Title VI : Financial assistance and anti-fraud and control provisions	Title VI : Financial assistance and anti-fraud and control provisions	
Title VII : Institutional, general and final provisions	Title VII : Institutional, general and final provisions	<u>Chapter 26: Administrative and institutional provisions</u> <u>Chapter 30: Final Provisions</u>
Annexes and protocols	Annexes and protocols	Annexes
	<u>Chapter 1 : Public administration reform</u> <u>Chapter 22 : Civil protection</u> <u>Chapter 27 : Cooperation in the protection and promotion of the rights of the child</u> <u>Chapter 17 : Climate action</u>	<u>Chapter 7: Subsidies</u> <u>Chapter 8: Investment</u> <u>Chapter 10: temporary entry and stay of natural persons for business purposes</u> <u>Chapter 11: mutual recognition of professional qualifications</u> <u>Chapter 12: Domestic regulation</u> <u>Chapter 14 : International maritime transport services</u> <u>Chapter 15 : Telecommunications</u> <u>Chapter 16 : Electronic commerce</u> <u>Chapter 23 : Trade and labour</u>

Source: Author

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCE Committee, examines the impact for the European Union's legal system and institutions of a "bespoke" agreement based on a "distant" cooperation model (with the EU/Ukraine and the EU/Canada agreements as main illustrations). The analysis of these agreements' main characteristics reveals that even "distant" cooperation already has quite impressive consequences. These should be better taken into consideration in the present Brexit negotiation.

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