

**European Circuit of the Bar**  
**Annual Meeting at Bordeaux**  
**19-20 September 2024**  
**The future of EU-UK relations**  
**Alastair Sutton**  
**Speaking Notes**

**Preliminary caveat**

My view of the current relationship between the EU and the UK is coloured by my 51 years working in and on the European Project, mainly in Brussels.<sup>1</sup> I experience, on a daily basis, the views of friends and colleagues (of all ages) working in the EU Institutions, in Member State Missions in Brussels, and in European, American and other third country trade associations. I also experience, mainly through my membership of the English Bar, the disappointment and frustration at the economic, professional and personal effects of Brexit – and a desire to do everything possible to restore the situation which existed before UK withdrawal in 2020. I understand the need for a positive and pro-active approach to repairing the damage done by Brexit, including through amendments or additions to the current bilateral relationship under the WA and the TCA.

In essence however (and this is spelt out in more detail below):

- a) Brexit is merely the culmination of 75 years of uncertainty and prevarication by the UK on “Europe”. Cameron’s gamble in 2016 was a quasi-criminal<sup>2</sup> act of political ignorance and irresponsibility, but it was not a “one-off”. Wilson’s gamble in 1975 succeeded; Cameron’s in 2016 did not;
- b) After Brexit on 31 January 2020, the EU27 and the UK were like two ships leaving harbour and steaming in opposite directions. The

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<sup>1</sup> Also for 5 years in the Commission Delegation in Tokyo from 1979-84.

<sup>2</sup> I use this term advisedly. Cameron’s decision to call an “in/out” but non-binding referendum was not on the objective merits of one or other European policy, but rather an attempt to settle the unending dispute in the Conservative Party on EU membership. Neither he nor any of his successor as Prime Minister had the slightest idea of an alternative to EU membership. This remains the case today under Labour Prime Minister Starmer (“re-setting” relations with the EU is not a policy!).

policy of regulatory divergence (“taking back control”<sup>3</sup>) may now have ceased, but in the absence of an arrangement like the EEA and despite the “level playing field” provisions of the TCA, the regulatory gap will inevitably widen over time as the EU pursues its own policies in areas such as digital markets and AI;

- c) More importantly, the centre of gravity of the European Project has moved, probably irreversibly, to the East. The accession of Western Balkan countries, but especially Ukraine, will only underline this “tectonic shift”. The risk is that the UK’s status as an off-shore island will only consolidate as time goes by.

If my remarks today seem unduly pessimistic, this is because my half-century of first-hand experience in the European Project, including the catastrophic handling of the withdrawal proves by successive UK Governments, convinces me that repairing the relationship will involve:

- a) A fundamental change of attitude by the UK, essentially a realistic re-appraisal of its role in the world;
- b) A pragmatic, step-by-step re-building of stronger economic and political relations with the EU, based on mutual knowledge, trust, confidence and respect, but with an acceptance that the new bilateral relationship is not one of equals, but one where an off-shore jurisdiction to a market of 450 million citizens must inevitably involve significant alignment with the law and policies of the more powerful neighbour;
- c) Recognition that any realistic prospect of re-joining the evolving EU is probably unrealistic for the foreseeable future.

### **Background and context for an appraisal of the current EU-UK relationship.**

Since 1945 (or longer) the UK has failed to develop and implement a clear policy of engagement with “Europe”. This is part of a wider failure of foreign policy which, in my lifetime, has been marked by:

- a) Decolonisation, imperial sunset, nostalgia, retrospection, “Global Britain”, Suez/Afghanistan/Iraq, taking for granted a “special relationship” with the United States and the Commonwealth;

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<sup>3</sup> Governance by slogans.

- b) Complacency flowing from “winning” the Second World War, permanent membership of the UN Security Council, G7 and G20 status; but
- c) Industrial decline relative to major competitors, the United States, but also Japan, China, ASEAN, several Global South countries and EU Member States;
- d) EU membership poisoned from the start by the 1975 referendum and 6 or more “opt-outs” from core areas of EU law and policy (monetary union, euro/ECB, social policy, CFSP, CJHA etc.);
- e) Brexit - announced in 2013, referendum in 2016, prolonged negotiation of Withdrawal Agreement (with Irish Protocol unilaterally and overtly broken<sup>4</sup>), belated and hasty negotiation of the Trade and Cooperation Agreement (TCA), formal withdrawal on 31 January 2020<sup>5</sup>, acrimonious relations with successive Conservative Governments (Cameron, May, Johnson, Truss and Sunak, together with their negotiators, Davis, Raab, Gove, Frost etc.) until July 2024 – 11 years marked by frictions with neighbours across the Channel and Irish Sea, aggravating harm caused by Covid, Ukraine, Trump and Middle East conflict; highlighting internal failures of governance, related in part to unresolved constitutional issues.

**The UK has not been a reliable partner, friend and ally of its European neighbours (perhaps especially Ireland) for 70 years. Starmer’s “reset” policy is welcome but will take many years to establish its credibility. Cooperation on security and defence (NATO/ Ukraine/ Russia) is necessary but (by far) not sufficient.**

Unless or until there is an unequivocal commitment by the UK to the<sup>6</sup> European Project (such as that made by candidate States in the accession process under Article 49 TEU), the UK will remain a “third country” for the foreseeable future (“beyond the Pale”), with the prospect of continued “drift” and divergence from EU law and policy.

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<sup>4</sup> Possibly the first time in history that British Ministers have openly recognised a unilateral and intentional breach of an international agreement.

<sup>5</sup> The transition period lasted until 31 December 2020.

<sup>6</sup> Or, perhaps, a new European Project, for example emerging from Macron’s European Political Community initiative (however unlikely this seems at the moment).

**“Red Lines” - a term which implies intransigence, rather than the openness and flexibility which are indispensable to any international negotiation, based on compromise.**

### **UK “red lines”**

The “will of the people” established in the 2016 referendum is (apparently) of indefinite duration. Keynes/Samuelson said: “When the facts change, I change my mind. What do you so Sir?”. One thing is crystal clear: the world today is very different from 2016. So are the challenges facing the UK and EU. When, if ever, would it be “democratically appropriate” for a UK Government to change its mind and adopt a European policy which enables the UK and the EU to play a role in world affairs commensurate with their economic strength?

For the moment, no “root and branch” renegotiation of the TCA.

No application to “rejoin” the Customs Union or Single Market (legally meaningless in any event<sup>7</sup>).

No return to free movement of EU citizens (students, workers etc.) in the UK, despite need for qualified immigrants in areas such as health, hospitality, agriculture/horticulture, public services.

No re-joining Erasmus; fear of “reciprocity” demands from EU? Is this now being reconsidered?

### **EU position (“red lines”?)**

2026 is a review of 5 years implementation of the TCA. It is not an occasion for its revision.

[Note: of course, **any** Party to an international agreement may at **any** time propose **any** amendment. Whether the other Party agrees is a different matter.]

EU priority now is that the Withdrawal Agreement (plus Irish Protocol) and the TCA be correctly implemented. Current concerns include the treatment of EU citizens in the UK, the treatment of goods passing from the UK to Northern Ireland. Infringement procedures have been launched on

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<sup>7</sup> Although the EEA offers affiliation to the (indivisible) “4 freedoms”, without “membership” of the Customs Union. It does however bring with it institutional commitments which would (for the moment) be unacceptable to the UK.

the former issue, with a Reasoned Opinion being sent to the UK on 24 July 2024. Resolving these “implementation” issues is a pre-condition to any discussions on additions to the TCA (probably “side-agreements” and not amendments).

Overall, the EU is satisfied with the combined effect of the WA and the TCA (provided these international agreements are correctly implemented in good faith). The EU would not, at this stage, propose any changes.

The EU will not accept “opportunistic” or cherry-picking attempts by the UK to secure changes for its own benefit. Touring musicians!

For the EU, relations with the UK are politically and economically important (but the WA, TCA, WTO, NATO, OECD, UN Charter etc. provide an adequate legal framework to protect these interests). However, under the new “mandate” beginning in November, the EU has other priorities - widening and deepening, security and defence (in cooperation with all NATO Members), completing the internal market (services, capital market, IT/AI, competitiveness, strategic autonomy). Implementing Letta, Draghi and European Council agenda and (perhaps most challenging of all) further enlargements (Ukraine and Turkey being the most challenging, but 8 other “candidates” waiting with increasing impatience and frustration).

**Note** the UK (together with Switzerland, Monaco, Andorra and San Marino) has a separate administrative unit in the Secretariat General to monitor and manage the bilateral relationship. **Note also** however that all Commission departments in sectors covered by the TCA (e.g. data protection) are closely monitoring legal and political developments in the UK (e.g. “regulatory divergence”, “retained EU law”, respect for the “level playing field” obligations in the TCA - etc.).

**Note** the “constitutional” issues for both sides which a major overhaul of the TCA would involve (“mandates”, Parliamentary discussions etc.). These “procedural” issues should not be under-estimated, especially on the EU side and even for relatively minor changes to international agreements like the TCA.

**What is the EU-UK agenda now in September 2024?**

“Summit” between Starmer and von der Leyen postponed, possibly until early 2025? There is currently **no agreed agenda other than the review in early 2026.**

**The EU’s priority** is to secure the accurate and comprehensive implementation of the WA (and Irish Protocol) and the TCA (especially citizens’ rights).

**The UK priority** is vague and undefined, limited to “resetting” the relationship. Talk of a security arrangement, improved access for agricultural products etc., are, for the moment, mere speculation.

### **Making the most of the Institutional framework of the TCA (Partnership Council, Sub-Committees and Advisory Groups.**

Although the scope and potential impact of the TCA in preserving and enhancing bilateral economic relations has been emphasised by both sides, the “relegation” of the UK to “third country” status after 47 years is a dramatic change which should not be under-estimated. It means, in particular:

- a) The exclusion of the UK from the institutional structure of the EU, crucially the (literally) hundreds of committees, working groups, agencies etc., where in the last the UK has played an important role;
- b) The fact that the TCA (and the WA) are “classical” public international law agreements, lacking direct effect and enforceability in national and EU law;
- c) Emphasis on trade in goods, to the exclusion of trade in services (including digital) and other areas (e.g. health, security, defence, justice and home affairs etc.).

**Nonetheless, the TCA Partnership Council offers considerable (and hitherto under- exploited) possibilities for discussions.<sup>8</sup>**

The May 2024 Council covered:

Energy and climate, including Transmission System Operators (electricity and gas<sup>9</sup>) and energy regulators, North Sea Energy Cooperation and

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<sup>8</sup> Not “negotiations”.

<sup>9</sup> Note that electricity and gas are “products” under EU and WTO law.

security of supply; trade and the level playing field<sup>10</sup>; cooperation and exchange of information in competition matters;<sup>11</sup> consumer protection and product safety; health security; fisheries; security, including information exchange on vehicle registration data; road transport and safety; UK association to Horizon Europe and mobility of researchers.

**Note** the close direct or indirect of all these issues to trade in goods.

### **Coverage of sub-Committees and Advisory Groups**

Apart from the (consultative) advisory groups, specialised committees have been created for: social security coordination, energy, fisheries, law enforcement and judicial cooperation, air transport, aviation safety, road transport, participation in Union Programmes, trade in goods, customs cooperation and rules of origin, sanitary and phytosanitary (SPS) measures, technical barriers to trade (TBTs), services, investment and digital trade, IP, public procurement, regulatory cooperation, LPF for open and fair competition; administrative cooperation on VAT and recovery of taxes and duties.

Although many sub-committees are not directly relevant to trade in goods (the “core” of the TCA), they are all aimed at facilitating the implementation of the WA and/or TCA. Examples include:

- a) The sub -committee on **law enforcement and judicial cooperation** has discussed the adoption of standard forms for mutual legal assistance under Article 635 TCA, mutual assistance for traffic offences under Article 640(7) TCA, updating passenger name records under Article 552(4), discussions of the impact of CJEU rulings on anti-money laundering on beneficial ownership under Article 654 TCA) and exchanges of DNA and other information under Title II of Part Three of the TCA;
- b) The sub-committee on **Services, Investments and Digital Trade** covered in its third meeting<sup>12</sup> Article 158 TCA and recognition of

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<sup>10</sup> Note that UK respect for the level playing field commitments are amongst the most important commitments in the TCA for the EU, with the General Secretariat and each individual DG monitoring compliance on a daily basis.

<sup>11</sup> Especially important in the high technology and IT fields.

<sup>12</sup> See further in the Minutes the need for further “technical” discussions on architects, the presentation by the UK of the Professional Qualifications Act 2022 and the UK Regulated Professions Register. **Note also** that on legal services “the UK asked questions about the conditions under which UK lawyers can

professional qualifications (architects, lawyers and transparency under Article 145 TCA<sup>13</sup>); data flows under Article 201 TCA; updates on new regulatory measures in the UK and EU on digital trade; EU cybersecurity certification scheme for Cloud Services; international mobile roaming under the UK-Norway-Iceland agreement; touring and creative artists; **note** the EU's complaint on the complexity and lack of transparency faced by EU stakeholders in meeting the obligations of the UK visa sponsorship system when attempting to provide a service in the UK. The UK said that "enhancements were in progress";

- c) The sub-committee on **Participation in Union Programmes** met in September 2022 to discuss UK participation in EU scientific and research programmes. The issues raised then (UK breach of Irish Protocol and EU linkage of this breach to UK accession to the Protocols on science and research) are now resolved, but the minutes of this meeting show 1) the friction which characterised the bilateral relationship in 2022-2023 and 2) the opportunities which exist for accession to other EU programmes;
- d) The sub-committee on **Level Playing Field for Open and Fair Competition and Sustainable Development** (meeting of 4 October 2023) illustrates the importance of the LPF provisions in the TCA for the EU.

### **Making the most of the present (WA/TCA) framework**

For a variety of reasons, some linked to the political, economic and constitutional "reconstruction" of the UK and others flowing from the (literally) unprecedented challenges facing the EU, any major reform of the Treaty framework for the EU-UK bilateral relationship in the foreseeable future is unlikely. This does not include areas of genuine mutual interest such as security (in its widest sense<sup>14</sup>) and defence (including, potentially, industrial cooperation in this critical sector). However, industrial cooperation is very closely related to trade (including standards, public procurement, IT, supply chains, state aids and competition). Fortunately,

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provide designated legal services in one Member State. The EU informed the UK of the preparations of the legal measure clarifying these conditions. The Parties welcomed the progress to date and agreed to continue engaging on the implementation of the measure in pursuit of a swift clarification."

<sup>13</sup> On transparency the UK "appreciated the progress" made by the EU on the EU Immigration Portal.

<sup>14</sup> Including for example migration issues and the civil and criminal justice issues linked to migration.



the TCA provides an adequate legal basis for cooperation in these areas of mutual interest, making best use of the institutional framework provided by the TCA (as illustrated above.)

In a nutshell, any future progress will need to be pragmatic, step-by-step and accompanied by a rebuilding of trust, respect and confidence, requiring a significant investment of time by UK Ministers with their EU counterparts. **The next 9 months will be crucial in this respect, as the new EU Institutions take on the multiple internal and external challenges facing them.** It will be for the UK to make the running in this respect. A major step forward would be to reinforce the UK Mission to the EU in Brussels, as a tangible and visible effort by the UK to re-engage not only with the EU Institutions, but with the 27 Member States' representations in Brussels.

The UK must keep in mind that the **EU is satisfied with the status quo.** It is the UK which has lost access to the largest market in the world, for example in services. The EU's priority here will be to ensure that the **level playing field provisions of the TCA are respected and that there is no (intentional or accidental regulatory divergence) by the UK.** Any new concessions made by the EU (e.g. in financial or business services) will need to be compensated by equivalent concessions in the UK.

Above all, any new initiative by the UK (and indeed the management of relations under the WA/TCA) need the most careful detailed preparation. In the Brexit negotiations, the UK were – quite simply – outclassed by the EU. Internal squabbling and uncertainty in the UK allowed the EU (Commission) to prepare virtually the entire text of the Withdrawal Agreement (WA), with which the UK had no choice but to agree. In the case of the TCA, the UK scored an “own goal” by threatening a “hard Brexit” with “no deal”, and then having to “make do” with an “old-fashioned” trade agreement, covering trade in goods, with market access and cooperation in other areas being left to future discussions within the Partnership Council framework.

Looking to the future and given the UK's absence from virtually the entire institutional framework of the EU, the burden of preparing future negotiations will fall largely on the UK's representatives in Brussels and the EU's national capitals (notably Paris, Berlin, Rome, Madrid and Warsaw).<sup>15</sup>

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<sup>15</sup> Notably to monitor the rapidly evolving EU law and policy in cutting edge areas such as digital technology, so that any new initiatives by the UK take fully into account the EU's vested interests.

This will require raising the morale of UK diplomats and civil servants, strengthening EU-related departments by attracting the best talent for engagement notably with the Commission, Parliament and Council (Secretariat and rotating Presidency).<sup>16</sup>

One final word in this context. The UK became used, over 47 years, to being an “insider” and, very often, getting its own way. Those days have gone. Respect lost through successive opt-outs and then an acrimonious withdrawal process, will take many years to recover. The “hangover” from 47 years membership tends to obscure the reality of “third country status”.

### **The UK’s relationship with the European Project in historical perspective.**

I add these words now only to emphasise the fact that the UK’s current relationship with its European neighbours is not merely the result of Brexit, but rather as part of a continuum which has now lasted 80 years at least. Thus, the current challenge is not to reverse Brexit and “re-join “ the European Project. It is rather to reverse a long-standing foreign policy (“Global Britain”) which has now outlived its sell-by date. The absence of a credible European dimension to UK foreign policy needs to be replaced by a policy of “constructive engagement” directed in the first instance to reinforced cooperation in areas of mutual interest.

In 1945, the UK had a “once in a lifetime” opportunity to establish a leading role in European reconstruction. Greater than defeated and occupied Germany (unconditional surrender of sovereignty) and France (after 4 years of German occupation). Benelux support for UK leadership would have been unconditional. Some EFTA countries and Ireland may have followed the UK. By combining a European and Global vocation (through the “special relationship” with the United States, permanent membership of the Security Council, a leading role in NATO and the Council of Europe, and with the Commonwealth), the UK could have shaped a global role for itself within the European Project as a reality rather than “Johnson’s Illusion” of a “Global Britain”.

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<sup>16</sup> In this context, devoting disproportionate time and resources to relations with the CPTPP would be to miss the wood for the trees.

UK history in the 20<sup>th</sup> century is one of “missed chances”.<sup>17</sup> Complacency and appeasement failed to prevent the First and Second World Wars. Failure to join and lead the European Project after World War II, compounded by Brexit - initially simply a failure of UK foreign policy, now threatens to weaken Europe in the face of Russian aggression and in a post-War, rule-based system, hitherto dominated by the Western Alliance, which is now disintegrating, probably irreversibly.<sup>18</sup>

**Joining the European Project in 1973 was late, but not too late to lead.**

Unfortunately, membership was immediately followed by the 1975 referendum called by the then Labour Government, under Prime Minister Harold Wilson. This was followed by successive “opt-outs” most importantly from EMU (ECB + euro). Between 1951 and 1973, France and Germany established the “twin locomotive” which de facto excluded the UK. The “kiss of death” for the UK in Europe was the 2013 decision by Prime Minister Cameron to call a (non-binding) referendum, leading to the 2016 vote and 8 years (ongoing) of legal and political uncertainty.

**It is unlikely that the UK will ever rejoin the EU in its present form, because membership of the Project is not indispensable either for the UK or for the EU. Each has more important issues on its agenda, meaning that the “critical mass of political will” is unlikely ever to be brought together, at least in the foreseeable future.**

**The UK is therefore destined to remain a “third country” indefinitely and, as a result of “power politics”, to have its relations with the EU set in Brussels, Berlin, Paris, Warsaw, Rome and Madrid. So much for “taking back control”!**

**The UK’s priorities for the next 20 years will be almost exclusively internal (economic, social, regional and constitutional). These are pre-conditions to the UK having greater influence (and respect) externally.**

**The EU’s priorities for the next 5-10 years are also internal (economic competitiveness and prosperity combined with greater autonomy<sup>19</sup>) because these are pre-conditions for retaining public support for the**

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<sup>17</sup> See Sir Roy Denman, *Missed Chances: Britain and Europe in the Twentieth Century* (1996).

<sup>18</sup> I refer to the Global South’s alignment with Russia and China, notwithstanding the flagrant breach of perhaps the most fundamental provision of the UN Charter by Russia, in waging aggressive war on Ukraine.

<sup>19</sup> Especially from the United States, including in security and defence.

project in each Member State. Without democratic support in Member States, any future enlargement is impossible.

**An ironical final word – under EU law (article 49 TEU) re-joining the EU is relatively simple.**

**Note** that Article 49 TEU (the legal basis for accession) **depends almost entirely on the political will of the applicant State and Member States.**

The detailed conditions to be met by each applicant are set out in secondary legislation which can be adapted at any time by unanimous agreement between the existing Members. Thus, the UK could re-join almost immediately if this political will were present, in the UK and in the EU. Unfortunately, it is not. <sup>20</sup>

Alastair Sutton, Brussels, London and Bordeaux, 19 September 2024

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<sup>20</sup> **Note** that the text of Article 49 is **predominantly political**: “Any European State which respects the values referred to in Article 2 [The EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail.] and is committed to promoting them may apply to become a member of the Union. The EP and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the EP, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council [Heads of State and Government] shall be taken into account. The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.”