

## A UK-EU Association Agreement: making use of treaty provisions from 1957 originally drafted for the UK

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*If the UK's post-Brexit relationship with the EU takes the form of an association agreement, it will be based on treaty provisions that in 1957 were drafted by 'the Six' very much with the UK in mind. UK officials, in receipt of 'under the counter' copies of key documents from the Val Duchesse negotiations on establishing the European Economic Community, were not only very much aware of the drafting process but, with ministerial approval, also sought to influence directly the wording.*

EU leaders met on 23 March 2018 to discuss progress in the negotiations on the United Kingdom's withdrawal from the EU. In doing so, they adopted [guidelines](#) regarding the framework for the future, post-Brexit relationship between the UK and the EU. They called for 'as close as possible a partnership with the UK in the future' with the partnership covering 'trade and economic cooperation as well as other areas, in particular the fight against terrorism and international crime, as well as security, defence and foreign policy'.

What the form and the substance of that relationship will be remains unclear. The goal of the UK Prime Minister, Theresa May, is the establishment of '[the broadest and deepest possible partnership – covering more sectors and co-operating more fully than any Free Trade Agreement anywhere in the world today](#)'.

Given such ambition, it is quite possible that negotiations will ultimately lead to the conclusion of some form of 'association agreement'. This would be in line with a recently adopted resolution of the [European Parliament](#) as well as proposals from the former MEP [Andrew Duff](#). The House of Commons [Exiting the European Union Committee](#) has also viewed an association agreement favourably as an option.

Association agreements are provided for in Article 217 of the [Treaty on the Functioning of the European Union](#) (TFEU). It states: 'The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure'.

If a UK-EU association agreement is concluded the UK will be benefitting from treaty provisions originally included in the Treaties of Rome of 1957 in order [to facilitate the establishment of a close relationship with the UK](#). Indeed, not only the existence of the treaty provision for association, but also its wording owes much to the UK. Officials drafting the Treaties of Rome as part of the 'Val Duchesse' negotiations more than 60 years ago included the provision very much with the UK in mind and with UK officials seeking to shape the wording

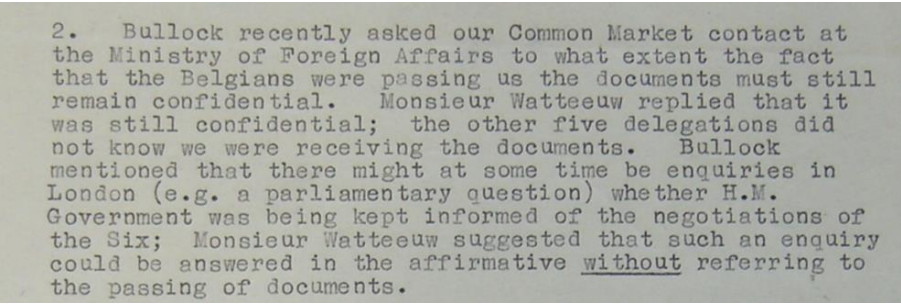
This may sound quite odd given that UK officials were not participating in the Val Duchesse negotiations. The UK had been represented at the initial stages of the discussions that preceded the negotiations, but its representative, Russell Bretherton, eventually [stopped attending](#) meetings.

Moreover, while the Six – Belgium, France, (West) Germany, Italy, Luxembourg and the Netherlands – were negotiating the Treaties of Rome and how they might establish a customs union among them, the UK was actually championing an alternative European free trade area initiative in the context of the Organization for European Economic Cooperation. Indeed, there were suggestions, [disputed](#), that the UK initiative was designed to sabotage the plans of the Six.

Nevertheless, documents in [The National Archives at Kew](#) show that the UK had privileged knowledge of various discussions taking place in the Val Duchesse negotiations. This was because selected documents were being covertly passed to UK embassy staff in Brussels. The archives also reveal that the UK officials were actively seeking to influence the drafting of what was referred to at the time as ‘the Customs Union Treaty’.

The goal was to ensure that the plans of the Six could accommodate the UK government’s European free trade area initiative. Indeed, in October 1956 Harold Macmillan, Chancellor of the Exchequer, wrote to the chair of the Val Duchesse negotiations, Paul-Henri Spaak, the Belgian Foreign Minister, requesting that he keep things ‘as fluid as possible, so as to permit us and other countries to associate with the Customs Union in a wider free trade area if we find we can do so’ (*Macmillan to Spaak*, 3 October 1956, FO 3711/122035)

Macmillan’s request did not fall on deaf ears. Spaak was certainly keen to find some way of involving the UK with the customs union plans of the Six. In January 1957, the UK Ambassador to Belgium noted Spaak’s ‘determination’ to bring the United Kingdom into the plans of the Six ‘by all means possible’ (*Labouchere to Selwyn Lloyd*, 21 January 1957, FO371/130887). Indeed it was Spaak who instigated the sharing of documents with the UK government. It was a strictly bilateral arrangement kept secret from the Dutch, French, German, Italian and Luxembourg officials and politicians involved in the negotiations. It was made clear to UK officials, the supply of ‘under the counter’ copies of documents was not news to be shared.



2. Bullock recently asked our Common Market contact at the Ministry of Foreign Affairs to what extent the fact that the Belgians were passing us the documents must still remain confidential. Monsieur Watteeuw replied that it was still confidential; the other five delegations did not know we were receiving the documents. Bullock mentioned that there might at some time be enquiries in London (e.g. a parliamentary question) whether H.M. Government was being kept informed of the negotiations of the Six; Monsieur Watteeuw suggested that such an enquiry could be answered in the affirmative without referring to the passing of documents.

(Chancery to Department, M611/13, 4 January 1957, FO371/128331)

However, Spaak showed little enthusiasm for the UK’s free trade area plans. He was nevertheless keen for a bilateral association of the UK with the proposed European Economic Community and its customs union. He was also keen to ensure that he kept the UK government informed of the progress of the Val Duchesse negotiations. In December 1956 plans were made for him to visit London on 14-15 January 1957.

In anticipation of the visit, UK officials considered how the customs union plans of the Six could be reconciled with UK plans for a wider European free trade area. Key to any solution would be ‘flexibility’ on the part of the Six and some ‘subsequent adjustment (not radical revision)’ of the treaty that the Val Duchesse negotiators were drafting. UK officials noted five areas where adjustments would be necessary: ‘timing and method of tariff reductions; and of remaining quotas; escape clauses, the use of quotas in balance of payments difficulties; definition of origin of goods for customs purposes’ (Briefing note, M611/35, undated, FO371/128332)

So that the treaty adjustments could be facilitated, UK officials focused on ensuring that a ‘modification’ or ‘flexibility’ clause would be included in the new treaties.

Indications in early January 1957 were that Spaak was willing to see ‘essential alterations’ to the text of the Treaty of Rome ‘before signature’ to allow for the UK’s ‘association’ with the Six (*Labouchere to*

*Foreign Office*, M613/7, 9 January 1957, FO371/128375). The UK Ambassador to Brussels reported on 9 January, however, that ‘any modifications we propose must surely be of such a nature as to convince all the Messina partners [the ‘Six’] that they really are essential to British participation and not merely adventitious’ (*ibid*).

In practice, given the pressure Spaak was under to conclude the Val Duchesse negotiations, there was no time to even consider, let alone accommodate any proposed UK alterations to the treaty generally. The focus was, therefore on securing a clause allowing modifications to be made to the Treaty of Rome. The President of the Board of Trade, Peter Thorneycroft, and his officials were not optimistic that Spaak would react positively to the idea.

On 10 January 1957, the officials met to discuss how Spaak’s forthcoming visit could be used to secure the desired ‘modification clause’. The following day, two drafts were circulated to officials in the Board of Trade based on drafts already prepared by legal advisers in the Foreign Office (*Dennehy to Glave-Smith*, 11 January 1957, BT11/5552). The first stated:

A. Any provisions of the present Treaty may be suspended, amended or varied by the provisions of an Agreement for the creation of a European Free Trade Area, provided that all the Members of the Customs Union and any other sovereign power or powers are parties to that Agreement. Any such suspension, amendment or variation of any provision of the present Treaty shall only become effective if the Agreement is accepted by all the Members of the Customs Union.

The second, regarded as ‘less automatic in its effect’ and therefore ‘weaker’:

B. The Members of the Customs Union agree that, if proposals are made for the creation of a European Free Trade Area, and these proposals are acceptable to them, they will consult together in order to agree upon the necessary amendments to this Treaty and will use their best endeavours to secure speedy acceptance of these amendments, it being understood that none of these amendments shall become effective until the Agreement establishing the Free Trade Area has been accepted by all the Members of the Customs Union and has entered into force.

Spaak arrived in London on 14 January and began a series of meeting with members of the new UK government. Anthony Eden had resigned as Prime Minister five days previously, being replaced by Macmillan. Spaak’s first meeting was with the Foreign Secretary, Selwyn Lloyd. This was followed by meetings with the President of the Board of Trade (David Eccles, appointed on 13 January) and his officials; and with Macmillan and key ministers, namely the new Chancellor of the Exchequer (Peter Thorneycroft, previously President of the Board of Trade), Selwyn Lloyd and Eccles.

Records of these meetings do not indicate whether the draft treaty provisions were actually passed to Spaak. However, a note referencing Spaak’s meeting with Eccles indicates that Spaak ‘agreed that the Customs Union Treaty ought to make some express provision for adjustment of its provisions as a result of subsequent negotiations for a [OEEC] Free Trade Area’ (*Kirk to Bretherton*, 17 January 1957, BT11/5552). Another note, which also records Spaak handing over to Foreign Office officials ‘the current text of the Treaty and “Notes on Clauses”’, states that Spaak ‘promised to produce a clause dealing with the need for flexibility, in view of the possibility of the Free Trade Area, to discuss with his colleagues and let us see a text’ (*Edden to Boothby*, M613/32, 22 January 1957, FO 3711/128376). A further note, records Spaak as having ‘read out possible forms of words’, albeit ones not yet seen in writing (*Bretherton to Kirk*, 19 January 1957, BT11/5552).

Belgian sources indicate that Spaak confirmed that the Customs Union Treaty would contain a clause allowing for modification of the Customs Union Treaty in the case of an association, whether in the form of a free trade area or otherwise, of a country or group of countries. The modifications would, however, have to be approved by the national parliaments of the Six (Direction générale P, Note, 17 January 1957).

Furthermore, Spaak invited the UK government to inform him within the next few weeks and before the end of the Val Duchesse negotiations of any provisions in the Customs Union Treaty that would render the establishment of a free trade area either impossible or very difficult. He would then bring these to the attention of the negotiators with a view to their 'modification éventuelle' (*ibid*).

UK officials came away from the meetings satisfied that the desired flexibility would be contained in the Customs Union Treaty. Spaak's assurances were regarded as 'a most valuable assurance which removes what could otherwise have proved a serious obstacles' (*Hankey to Undén*, M611/121, 1 February 1957, FO 371/128334)

UK officials continued their work on options for a close relationship with the Six. By the end of January 1957, officials in the Board of Trade had produced a paper on 'Possible Forms of Association by the United Kingdom with the European Common Market' (31 January 1957, T234/701). Meanwhile, the British Embassy in Brussels reported confirmation from Jean-Charles Snoy et d'Oppuers, the Belgian Chef de Délégation at Val Duchesse and close confidante of Spaak, that the Customs Union Treaty 'would contain provisions for changes as a result of future negotiation with other countries who wished to associate with the customs union, either as a free trade area or otherwise' (*Labouchere to Foreign Office*, M613/45, 31 January 1957, FO 371/128376). The text was not, however, currently available.

It was, however, being drafted. Spaak indicated as much to heads of delegation at the Val Duchesse negotiations at their meeting on 21-22 January 1957 (Ch. Del 248, 25 January 1957, MAE 295). Indeed, [A first draft of the provision on association](#) was produced on 21 January 1957, so after Spaak's visit to London. Of note was that the official in the 'Groupe de Rédaction' leading on the drafting of the provision was Yves Devadder, Head of the Legal Service in the Belgian Foreign Ministry and therefore directly answerable Spaak. Devadder's draft stated:

Jeder europäischer Staat kann einen Antrag auf Abschluß eines Assoziationsvertrages mit der Gemeinschaft stellen, auf grund dessen er bestimmte Rechte und Pflichten der Mitgliedstaaten übernimmt und in gewissen Grenzen an der Tätigkeit der Gemeinschaft teilnimmt.

Any European state can apply to conclude an association agreement with the Community, on the basis of which it will assume certain rights and obligations of the member states and participate subject to certain limitations in the activity of the Community (own translation)

There was also provision for 'erforderlichen Anpassungen des Vertrages' ('necessary adjustments to the treaties'). This was the 'flexibility' clause.

Three weeks later, on 8 February, a revised draft of the association provision was circulated. The first paragraph read:

La Communauté peut conclure avec des Etats tiers, unions d'Etats ou organisations internationales des accords créants une association caractérisée par des droits et obligations réciproques, des actions en commun et des procédures particulières. Ces

accords sont conclus par le Conseil agissant à l'unanimité [sic] et [après consultation / avec l'approbation] de l'Assemblée (Ch. Del 297, 8 février 1957, MAE 447 f/57).

[The Community may conclude with third states, unions of states or international organisations agreements establishing an association involving reciprocal rights and obligations, common actions and special procedure'. These agreements are concluded by the Council acting unanimously and [after consulting / with the approval] of the Assembly' (own translation)]

Then came the flexibility clause

Lorsque ces accords impliquent des amendements au présent Traité, ces derniers doivent être préalablement adoptés selon la procédure prévue à l'article ... pour les modifications du Traité (*ibid*).

[Where such agreements call for amendments to the this Treaty, the latter shall first be adopted in accordance with the procedure laid down in Article ... for the modification of the Treaty' (own translation)]

On the one hand, the new text was more general on who could be an associate – third states, unions of states or international organizations – and on what sort of changes ('amendements') association might entail for the new treaty. They did not have to be required. On the other hand, the revised draft was more specific on what association would involve: 'reciprocal rights and obligations, common actions, and special procedures'. It also envisaged a role for the Assembly.

Within a week, and after some pestering of the Belgian Ministry of Foreign Affairs, the UK government had sight of the draft text. The response was generally positive (*Chancery to Department*, M611/206, 14 February 1957, FO371/142495).

Further refinement of the provisions took place in late February and early March 1957. The most significant change was that the Assembly would only be consulted on the conclusion of an association agreement. Also discussed was how amendments to the Treaty would be adopted: whether using a standard procedure involving an intergovernmental conference and the unanimous decision of the member states, or approval by the Council, acting unanimously, following the approval of the Assembly. The final version of the provisions, appearing as Article 238 of the Treaty establishing the European Economic Community (TEEC) and Article 206 of the Treaty establishing the Atomic Energy Community (Euratom), revealed that the standard procedure would be used.

UK officials gained sight of the final provisions on association shortly before the Six gathered in Rome for the signing ceremony. The assessment was not exactly enthusiastic. For one Treasury official, Article 238 TEEC was 'reasonably satisfactory, though unfortunately it appears to envisage that the Six will enter corporately into such agreements with other countries' (*McKean to Edden*, 21 March 1957, T234/704). He added: 'In any event it would hardly seem feasible at this stage to undertake the major diplomatic initiative which would be necessary if we wanted to try and get this article amended' (*ibid*).

Having consulted, the same Treasury official noted: 'The Board of Trade do not like the shape of the provision very much but agree that there is nothing so objectionable in it that we ought to undertake any major diplomatic initiatives to try and get it amended, which indeed would hardly be possible at this stage, The Foreign Office agree' (*McKean to Figures*, 22 March 1957, T234/704). Summarizing he added 'I think we just have to live with this provision of the Customs Union Treaty as with others which are more objectionable, and this particular one is not really too bad' (*ibid*).

Whether UK officials in the coming years will share such a view remains to be seen. If Article 217 TFEU – the current location of the EU’s provisions for the conclusion association agreements – does provide the legal basis for the UK’s post-Brexit relationship with the EU, the UK will have to accept an arrangement involving ‘reciprocal rights and obligations, common action and special procedure’ just as it would have had to had it pursued the option of association in the 1950s and 1960s. It did not.

What officials will need to note, however, is that the original flexibility clause no longer exists. Having been moved out of Article 238 with the entry into force of the TEU on 1 November 1993, it was subsequently deleted by the Treaty of Lisbon. The TEU and the TFEU can of course be amended to facilitate an association agreement; the ordinary revision procedure in Article 48 TEU could be used. But the flexibility clause expressly linked to association agreements has gone. Or at least it has for association agreements with the EU. The flexibility clause included in Article 206 TEAEC for [association with Euratom](#) stills exists.