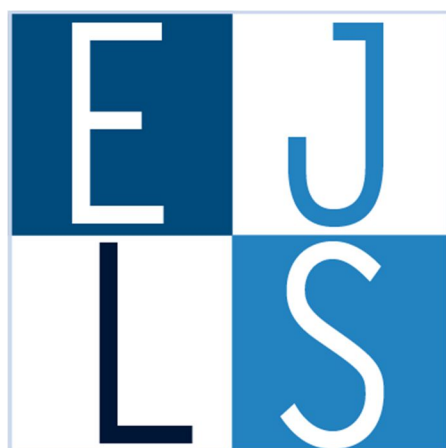




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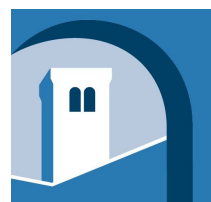
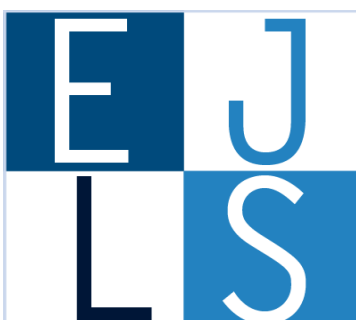
Editor-in-Chief
European Journal of Legal Studies
Villa Salviati, Via Bolognese 156
50139 Firenze, Italy

The name of the author and contact details should appear only on a separate cover sheet to facilitate objective, anonymous evaluation. The Journal is committed to multilingualism and accepts submissions in any European language within the competence of the Board.

Published 29 October 2019

Catalogue no.: QM-AZ-19-026-EN-N

ISSN: 1973-2937



European
University
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OF LAW



European Journal of Legal Studies
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GUEST EDITOR'S INTRODUCTION

THE BREXIT NEGOTIATIONS AND THE MAY GOVERNMENT

Federico Fabbrini*

I. INTRODUCTION

In an apocryphal statement – later explained as a translation misunderstanding – Chinese leader Zhou Enlai famously answered a question about the effects of the French Revolution of 1789 by saying that it was too soon to tell. By the same token, it is definitely too early to form a final judgment about Brexit – the process whereby the United Kingdom (UK) is seeking to leave the European Union (EU). When this special issue was going to press at the end of summer 2019, the UK had not yet exited the EU – 38 months after the UK citizens had voted in a referendum to leave, and 29 months after the UK had notified its intention to do so under Article 50 of the Treaty on EU (TEU). Yet, Brexit has already had profound consequences for the UK – not least on the premiership of Theresa May, who was appointed Prime Minister on 13 July 2016, and resigned on 7 June 2019. What turned out to be one of the shortest premierships in UK modern history was heavily shaped by the avalanche of events put in motion by the referendum held on 23 June 2016. After all, the unprecedented decision by an EU Member State to secede from what is admittedly the most successful example of regional integration worldwide, opened a Pandora's box of legal and political problems, which became all the more evident during two years of complicated and contentious withdrawal negotiations. As a result, a growing body of literature in law, economics and political science has started to analyze the causes and consequences of Brexit.¹

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¹ See Federico Fabbrini (ed) *The Law & Politics of Brexit* (OUP 2017).

This special issue – which includes contributions originally presented at a conference hosted by the Brexit Institute of Dublin City University in March 2019 – expands the analysis of Brexit by focusing specifically on the last two years of negotiations between the EU and the UK. Its aim is to assess the legal and political dynamics that played out in this crucial phase, and thus to offer an historical record of Theresa May's Government in the UK. As such, the special issue covers the period from the UK general elections in June 2017 (right after the notification of the UK intention to leave the EU pursuant to Article 50 TEU in March 2019) to the European Parliament (EP) elections in May 2019, in which the UK participated against all odds. The volume therefore analyzes the key issues in the withdrawal negotiations – as reflected in the November 2018 draft withdrawal agreement and the accompanying political declaration outlining the framework for future EU-UK relations – and considers the reasons that ultimately lead the UK, in March and April 2019, to seek an extension of its EU membership, hence postponing Brexit.

As things currently stand, the UK is set to leave the EU on 31 October 2019. However, much uncertainty remains; indeed, both a 'hard Brexit' – that is a disorderly exit with no deal – or a further extension of UK membership in the EU – perhaps to hold a people's vote on 'no Brexit' – are potentially on the table. This special issue however does not engage in speculation. The interest here is not to predict what will happen, but rather to understand what happened – identifying the key themes and challenges that emerged in a period of unprecedented Brexit negotiations. From a research point of view, this has the heuristic value of shedding light on the difficulties which a country faces when going down the road of seeking to exit the EU. And from a policy point of view, this may offer some useful lessons as navigation continues forward in the rough Brexit waters. As such, this Editorial is structured as follows: Sections II to VI provide an overview in chronological order of the succession of events that unfolded in the last two years, while Section VII summarizes the ten contributions I have guest edited for this Special Issue. Section VIII concludes.

II. THE UK GENERAL ELECTIONS AND THE NEGOTIATIONS

The notification by the UK to the European Council of its decision to leave the EU on 29 March 2017 started the two-year time-frame set by Article 50

TEU to negotiate an orderly withdrawal.² However, UK Prime Minister Theresa May's decision to call snap elections in June 2017 resulted in a political boomerang. In the general elections of 8 June 2017, the Tory Party lost its tiny majority, being forced into a confidence and supply agreement with the Democratic Unionist Party, and thus started negotiations with the EU from a weaker position. The EU imposed successfully its strategy to divide the negotiations in two phases – with a first phase focused on settling the outstanding withdrawal issues, with discussions on the framework for future EU-UK relations postponed to a subsequent future phase.³ In particular, following the priorities set by the European Council⁴ and the European Parliament,⁵ the European Commission Brexit Task Force – lead by Michel Barnier – identified three main items for the first phase of the negotiations: 1) the protection of the rights of EU citizens in the UK, and conversely of UK citizens in the EU; 2) the resolution of the problem of the border between Ireland and Northern Ireland, with the aim to avoid the return of a 'hard border'; and 3) the settlement of the financial claims the UK owed the EU before leaving.⁶

Talks between the two parties proceeded extremely slowly for much of the fall of 2017. With the exception of citizens' rights – which was the subject of an early agreement between the UK and the EU⁷ – most issues in the withdrawal talks remained outstanding.⁸ While Prime Minister Theresa May sought to chart a negotiating strategy, conceding that the UK had to pay a contribution to the EU as part of the withdrawal deal,⁹ the UK Government

² Prime Minister Theresa May, Letter to European Council President Donald Tusk (29 March 2017).

³ See Kenneth Armstrong, *Brexit Time* (CUP 2017).

⁴ European Council Guidelines, 29 April 2017, EUCO XT 20004/17.

⁵ European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union, P8_TA(2017)0102.

⁶ See Council Decision (EU/Euratom) of 22 May 2017 authorizing the opening of negotiations with the United Kingdom setting out the arrangements for its withdrawal from the European Union, Doc. XT21016/17.

⁷ See also European Parliament resolution of 3 October 2017 on the state of play of negotiations with the United Kingdom, P8_TA(2017)0361, para 7.

⁸ European Council Conclusions, 20 October 2017, EUCO XT 20014/17.

⁹ Prime Minister Theresa May, Speech, Florence (22 September 2017).

lagged behind the European Commission in outlining its positions.¹⁰ However, thanks to the efforts of EU Chief Negotiator Michel Barnier, on 8 December 2017 a break-through occurred when the negotiators published a joint report, which outlined in diplomatic terms the consensus reached by the two negotiating teams on the terms of the withdrawal.¹¹ In particular, the joint report included a compromise solution to deal with the thorny issue of the Irish border, which foresaw a form of regulatory alignment between Northern Ireland and the Republic of Ireland, to remove the need for physical checks on the free movement of goods in the island of Ireland, while reaffirming the constitutional integrity of the UK.¹²

On the basis of the joint report, the European Council in December 2017 concluded that sufficient progress had occurred in the first phase of the Brexit negotiations, thus opening the way to preliminary talks on the framework for the future EU-UK relationship.¹³ As a result, in early 2018, the

¹⁰ This asymmetry in the preparation of the two parties was made evident by the fact that the European Commission quickly started releasing in May 2017 a series of working papers outlining its positions on the negotiating issues. See e.g. European Commission Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, Working paper 'Essential Principles of Citizens' Rights' (24 May 2017); Working paper 'Essential Principles on Financial Settlement' (24 May 2017); Position paper transmitted to EU 27 on Governance (28 June 2017); Position paper transmitted to EU 27 on Issues Related to the Functioning of the Union Institutions, Agencies and Bodies (28 June 2017); Guiding principles transmitted to the EU27 for the Dialogue on Ireland/Northern Ireland (6 September 2017) TF50(2017) 15. The UK Government, on the other hand, only began releasing its position papers in August 2017. See e.g. HM Government, 'Future customs arrangements: A future partnership paper' (15 August 2018); 'Northern Ireland and Ireland: Position paper' (16 August 2017); 'Enforcement and dispute resolution: A Future partnership paper' (23 August 2017); 'Foreign policy, defense and development: A future partnership paper' (12 September 2017); 'Security, law enforcement and criminal justice: A future partnership paper' (18 September 2017).

¹¹ 'Joint report from 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 orderly withdrawal from the European Union' (8 December 2017) TF50(2017)19.

¹² Ibid para 49.

¹³ European Council Guidelines, 15 December 2017, EUCO XT 20011/17.

EU and the UK negotiators engaged in a concerted effort to, on the one hand, turn the diplomatic joint report into a legally binding withdrawal treaty, and, on the other, identify the priorities for future EU-UK cooperation. In quick response to the former, on 28 February 2018 the European Commission Brexit Task Force came up with a fully-fledged draft withdrawal agreement,¹⁴ 75 per cent of which was swiftly agreed by the UK Government on 19 March 2018.¹⁵ In particular, the UK Government accepted those sections of the EU draft withdrawal agreement concerning citizens' rights, the financial settlement and a newly devised transition period, which allowed the UK to remain part of the EU internal market and customs union for an extra 22 months after withdrawal, until 31 December 2020.¹⁶ Crucially, however, the UK did not approve the provisions on the governance of the agreement – which gave a role to the European Court of Justice (ECJ) in the resolution of disputes – and the draft Protocol on Northern Ireland – which was designed to put in legally binding terms the solution to avoid a hard border on the island of Ireland.¹⁷

This produced a major stall in the negotiations, which carried on for all the spring and summer of 2018,¹⁸ even though on 19 June 2018 the UK and the EU communicated that they had reached consensus on the text of another handful of minor and mostly technical provisions of the draft withdrawal treaty.¹⁹ In the absence of progress in settling the terms of withdrawal,

¹⁴ European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, TF50(2018) 33.

¹⁵ 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, 19 March 2018, TF50 (2018) 35.

¹⁶ See also HM Government, 'Draft text for discussion: Implementation period' (20 February 2018).

¹⁷ See also HM Government, 'Technical note: Temporary customs arrangements' (7 June 2018).

¹⁸ See European Council Conclusions, 29 June 2018, EUCO XT 20006/18.

¹⁹ Joint statement from the negotiators of the European Union and the United Kingdom Government on progress of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union (19 June 2018) TF50(2018) 52.

however, also the discussions on the framework of future relations were halted, with talks on an ambitious EU-UK partnership covering trade, internal security, foreign affairs and sectoral cooperation being put on hold.²⁰ Moreover, since both parties had made clear that they regarded the negotiations as being driven by the principle that 'nothing is agreed until everything is agreed',²¹ the paralysis in the talks led to growing concerns that a 'hard Brexit' would materialize – with the UK leaving the EU with no withdrawal agreement, and thus no framework for future relations.²² In fact, in July 2018 the European Commission published a communication on preparedness and contingency planning in case of a no deal scenario,²³ and in August 2018 the UK Government started releasing batches of technical notes to inform citizens and business on how to prepare in the case of no deal.²⁴

III. THE UK INSTITUTIONAL TENSIONS AND POLITICAL INFIGHTING

The challenges in negotiating a mutually satisfactory deal between the EU and the UK were certainly due to a number of asymmetries between the parties. While on the EU side negotiations were delegated from an early stage to a special Task Force within the European Commission – a trusted body with experience in handling international trade talks – on the UK side, the Government had to scramble in setting up from scratch a new administration – the Department for Exiting the EU, and the Department for International Trade, which took significant time to acquire capacity and skills to engage meaningfully with its counterparties in the EU and the rest of the world.²⁵ Nevertheless, a deeper cause of the difficulties in the negotiation laid in the

²⁰ See also European Parliament resolution of 14 March 2018 on the framework of the future EU-UK relationship, P8_TA(2018)0069.

²¹ European Council Guidelines, 23 March 2018, EUCO XT 20001/18, para 1.

²² See also Federico Fabbrini, 'The Institutional Consequences of a 'Hard Brexit'', in-depth analysis requested by the European Parliament Constitutional Affairs Committee (May 2018).

²³ European Commission Communication, 'Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019' (19 July 2018) COM(2018)556 final.

²⁴ HM Government, 'Preparation for a "no deal" scenario' (23 August 2018).

²⁵ See Lewis Lloyd, 'The Brexit Effect: How Government has Changed since the EU Referendum', Institute for Government (March 2019).

institutional tensions and political infighting that Brexit created within the UK itself. If in the EU the states and institutions were happy to leave the Commission to run the negotiations and back its work – focusing their discussions on other controversial issues – in the UK Brexit sparked an all-out tag war.

At the institutional level, in the absence of a written constitution, Brexit unsettled the relationship between Government and Parliament – as well as between London and Edinburgh, Cardiff and Belfast.²⁶ In particular, effort by the UK Government to legislate for Brexit with the adoption of a flagship bill repealing the European Communities Act 1972 with effects from 29 March 2019 run into tremendous obstacles both in Westminster and in the devolved governments.²⁷ The EU (Withdrawal) Act became law by the tiniest of margins on 26 June 2018,²⁸ with the House of Commons overruling the House of Lords, which had sought inter alia to bind the UK in a customs union with the EU and to retain the EU Charter of Fundamental Rights as part of UK law post-Brexit.²⁹ Moreover, in order to win support for her bill, Prime Minister May had to accept the principle that the UK Parliament would have a meaningful vote on the final withdrawal treaty³⁰ – even though this solution went beyond the provisions of the Constitutional Reform and Governance Act 2010.³¹ And, since the UK Government did not seek the consent of

²⁶ See Vernon Bogdanor, *Beyond Brexit: Britain's Unprotected Constitution* (Bloomsbury 2019).

²⁷ See also Department for Exiting the European Union, 'Legislating for the Withdrawal Agreement between the United Kingdom and the European Union' (30 July 2018) Cm 9674.

²⁸ European Union (Withdrawal) Act 2018.

²⁹ See House of Lords, Select Committee on the Constitution, 'European Union (Withdrawal) Bill' (29 January 2018) HL 69.

³⁰ European Union (Withdrawal) Act 2018, sec 13(1). See also House of Commons, Procedure Committee, 'Motions under Section 13(1) of the European Union (Withdrawal) Act 2018' (16 November 2018) HC1664.

³¹ Constitutional Reform and Governance Act 2010, sec 20 (stating that an international treaty must be laid for 21 sitting days before both Houses of Parliament before it can be ratified).

devolved legislatures, the Scottish Parliament³² and the Welsh Assembly³³ adopted Continuity Bills challenging the gist of the EU (Withdrawal) Act 2018. While eventually Wales retracted its position,³⁴ and the UK Supreme Court – in its first ever judgment reviewing the federal division of competences between Scotland and the UK – ruled that Holyrood had exceeded its powers,³⁵ relations between the central administration and the devolved governments on the direction of the Brexit negotiations remained sour despite efforts by the UK Cabinet Office to devise common frameworks.³⁶

At the political level, in fact, Brexit fostered an ideological polarization and party fragmentation.³⁷ Political clashes were particularly virulent within the Conservative Party, with a 'hard Brexit' and a 'soft Brexit' faction opposing each other. Prime Minister Theresa May sought to balance the factions within her cabinet and develop a position which could command a consensus within her party, but she ultimately failed to do so.³⁸ In fact, her own position significantly changed over time – expect, perhaps, on the issue of curbing

³² See UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill 2018.

³³ See Law Derived from the European Union (Wales) Bill 2018.

³⁴ See Welsh Government, 'Welsh Government agrees deal on Brexit Bill that respects devolution' (24 April 2018).

³⁵ UK Supreme Court, Judgment of 13 December 2018, *The UK Withdrawal from the European Union (Legal Continuity) Bill – A reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64.

³⁶ See Cabinet Office, 'The European Union (Withdrawal) Act and Common Frameworks: 26 June 2018 to 25 September 2018' (13 November 2018). But see also Concordat concerning the implementation of the Gibraltar Protocol to the Withdrawal Agreement and related memoranda of understanding between HM's Government of Great Britain and Northern Ireland and HM's Government of Gibraltar (15 November 2018), codifying the consent of the Government of Gibraltar to the conclusion of the withdrawal agreement by the UK Government.

³⁷ See Goeffrey Evans & Anand Menon, *Brexit & British Politics* (Polity 2017).

³⁸ See also House of Commons, European Scrutiny Committee, 'The draft EU/UK Withdrawal Agreement' (8 March 2019) HC 1798, paras 10-11 (stating that the handling of the process of negotiations internally 'left the Government vulnerable to internal divisions and therefore capable of undermining its own negotiating position with the EU').

migration³⁹ – under the realization that the negotiating space with the EU was very limited. Hence, while in February 2017 she had boldly claimed that 'a no deal [wa]s better than a bad deal'⁴⁰ a year later she conceded that Brexit required trade-offs,⁴¹ and that the UK was willing to compromise in order to maintain close security ties with the EU and continuing access to its market.⁴² On 6 July 2018 the Prime Minister advanced at a cabinet meeting in Chequers a plan for future EU-UK trade relations that sought to bind the UK in a free trade zone with the EU, with regulatory alignment for goods and agri-food products and a facilitated customs arrangement.⁴³ While Prime Minister Theresa May's proposal was rejected by the EU as unworkable,⁴⁴ it promptly led to the resignation from the UK Government of pro-Brexit ministers, including the Secretary for Foreign Affairs Boris Johnson and the Secretary of State for Exiting the EU David Davis, who saw this as too compromising toward the EU.

Similar political divisions also characterized the Labour Party, which under the leadership of Jeremy Corbyn, a well-known Eurosceptic, failed to propose an alternative Brexit plan.⁴⁵ In fact, notwithstanding a growing popular movement calling for a second referendum, which culminated in a political rally in London in October 2018 where 700.000 people protested to ask for a new people's vote on Brexit,⁴⁶ the priority of the Opposition remained to seek new general elections to topple the May Government.

³⁹ See HM Government, 'The UK's future skilled-based migration system' (19 December 2018) Cm. 9722.

⁴⁰ Prime Minister Theresa May, speech, Lancaster House (17 January 2017).

⁴¹ Prime Minister Theresa May, speech, Mansion House (2 March 2018).

⁴² Prime Minister Theresa May, speech, Munich Security Conference (17 February 2018).

⁴³ See Statement from HM Government, Chequers (6 July 2018). See further HM Government, 'The Future Relationship between the United Kingdom and the European Union', 12 July 2018, Cm 9593.

⁴⁴ See EU Chief Negotiator Michel Barnier, statement (20 July 2018) and European Council President Donald Tusk, remarks after the Salzburg informal summit (20 September 2018).

⁴⁵ See Leader of the Opposition Jeremy Corbyn, speech (26 February 2018).

⁴⁶ BBC, 'People's Vote March: Hundreds of thousands attend London protest', *BBC News* (20 October 2018) <<https://www.bbc.com/news/uk-45925542>> accessed 27 September 2019.

When Labour signaled its openness toward a new referendum at its 2018 Party Conference,⁴⁷ it had been clear to experts that there would be not enough time to approve the legislation needed for a second popular vote before March 2019. Yet the reality remained that the UK was not ready to leave the EU in March 2019 with no deal. As pointed out by the UK National Audit Office,⁴⁸ the UK was entirely unprepared to manage its borders from day one in a case of a 'no-deal' Brexit, reflecting a material impossibility to pull out of the EU in such a short period of time. On the EU side, instead, preparations for a no deal had steadily advanced, and even intensified during autumn 2018.⁴⁹

IV. THE DRAFT WITHDRAWAL AGREEMENT AND ITS REJECTION

It is against this background that eventually the UK and the EU managed to walk the last mile and agree on a draft Brexit deal for an orderly UK withdrawal from the EU. On 14 November 2018 the European Commission and the UK Government published a draft withdrawal agreement⁵⁰ – a 585-page international treaty – which was accompanied by an outline political declaration on the framework of future relations between the UK and the EU⁵¹ – a much lighter document which was formally endorsed by the 27 heads

⁴⁷ Leader of the Opposition Jeremy Corbyn, speech at Labor Party Annual Conference, Brighton (26 September 2018).

⁴⁸ National Audit Office, 'The UK Border: Preparedness for EU Exit' (24 October 2018) HC 1619. But see also House of Commons, Committee of Public Accounts, 'Defra Progress toward Brexit' (14 November 2014) HC 1514 (reporting unpreparedness of the UK Department of Environment Food and Rural Affairs).

⁴⁹ European Commission Communication, 'Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: A Contingency Action Plan' (13 November 2019) COM(2018)880 final; and European Commission Communication, 'Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: Implementing the Commission's Contingency Action Plan' (19 December 2018) COM(2018)890 final.

⁵⁰ 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, as agreed at negotiators' level on 14 November 2018 (14 November 2018) TF50(2018) 55.

⁵¹ Outline of the political declaration setting out the framework for the future relationship between the European Union and the United Kingdom of Great

of state and government in the European Council on 25 November 2018.⁵² The draft withdrawal agreement included detailed provisions to guarantee the continuing protection of EU citizens in the UK; it codified a methodology to calculate the UK's outstanding contributions to the EU budget; and established governance and dispute resolution mechanisms.

Moreover, the draft withdrawal agreement also codified a transition period – going from March 2019 until December 2020, but potentially extendable once until December 2022 – allowing the UK to remain within the EU internal market for an implementation phase. Finally and crucially, the draft withdrawal agreement also included a lengthy Protocol on Ireland/Northern Ireland – known in jargon as the 'backstop' – that would enter into force after the end of the transition period, in case the EU and the UK had not agreed a future trade deal that removed the need for customs control, to avoid the return of a hard border on the island of Ireland.⁵³

The Brexit deal, however, immediately received strong opposition in the UK Parliament, with the second Secretary of State for Exiting the EU, Dominic Raab, resigning in protest. In particular, the Irish backstop quickly emerged as the main point of contention: by maintaining the UK in a single customs territory with the EU post-Brexit and requiring Northern Ireland to keep regulatory alignment with Ireland and the EU, the backstop rallied opposition within the Tory Party and its junior partner, the Democratic Unionist Party of Northern Ireland, as it deprived the UK of the autonomy to run an independent trade policy,⁵⁴ and put Northern Ireland in a different regulatory regime than Great Britain.⁵⁵ The EU sought to allay these concerns

Britain and Northern Ireland, as agreed at negotiators' level on 14 November 2018 (14 November 2018) TF50(2018) 56.

⁵² European Council Conclusions, 25 November 2018, EUCO XT 20015/18.

⁵³ See also European Commission Fact Sheet, 'Brexit Negotiations: What is in the Withdrawal Agreement' (14 November 2018); and House of Lords, European Union Committee, 'Brexit: the Withdrawal Agreement and Political Declaration' (5 December 2018) HL 245.

⁵⁴ Department for International Trade, 'Preparing for our future UK trade policy' (9 October 2017) Cm 9470.

⁵⁵ See UK Attorney General Geoffrey Cox, Letter to Prime Minister Theresa May, Legal Effect of the Protocol on Ireland/Northern Ireland (13 November 2018). But see HM Government, 'UK Government commitments to Northern Ireland and its

by clarifying that it regarded the backstop as a simple insurance policy, never intended to enter into operation.⁵⁶ Yet this did not change the legal reality that the UK would not have a unilateral right to exit the backstop.⁵⁷ At the same time, an Opinion of the Advocate General of the ECJ delivered on 4 December 2018⁵⁸ – and affirmed by the full court on 10 December 2018⁵⁹ – confirmed that the UK always had the option to unilaterally revoke in good faith its intention to withdraw from the EU under Article 50 TEU, effectively reducing the incentive to support the withdrawal agreement among those Members of Parliament (MPs) who were against Brexit and favorable to organize a new people's vote.

On 9 December 2018, therefore, UK Prime Minister Theresa May decided to postpone a vote in Westminster on the withdrawal agreement, which she was due to lose. This prompted a party leadership challenge within the Conservative Party, which she won.⁶⁰ But the inevitable happened on 15 January 2019, when the House of Commons resoundingly rejected the deal negotiated by the UK Government with the EU by a vote of 432 to 202 – a historic margin of 230 against.⁶¹ The day after the single greatest loss in Parliament by the UK Government in a century, Theresa May was subject to a parliamentary vote of no-confidence tabled by the Opposition, which,

integral place in the United Kingdom' (9 January 2019) 4 (outlining the UK Government commitment to secure 'no divergence in practice between the rules in Great Britain and [Northern Ireland]').

⁵⁶ See European Council Conclusions (13 December 2018) EUCO XT 20022/18; and European Council President Donald Tusk and European Commission President Jean-Claude Juncker, Joint Letter to Prime Minister Theresa May (14 January 2019).

⁵⁷ See HM Government, 'EU Exit: Legal Position on the Withdrawal Agreement' (4 December 2018) Cm 9747.

⁵⁸ Case C-621/18 *Wightman* [2018], Opinion of AG Campos Sanchez-Bordona, ECLI:EU:C:2018:978.

⁵⁹ Case C-621/18 *Wightman* [2018], ECLI:EU:C:2018:999.

⁶⁰ BBC, 'Brexit: Prime Minister Theresa May wins vote after leadership challenge', *BBC News* (13 December 2018) <<https://www.bbc.co.uk/newsround/46536473>> accessed 27 September 2019.

⁶¹ See House of Commons, Exiting the European Union Committee, 'Response to the Vote on the Withdrawal Agreement and Political Declaration: Options for Parliament' (16 January 2019) HC 1902.

however, she survived. This opened a phase of uncertainty, with the UK Government seeking to devise a plan B going forward.⁶² On 29 January 2019, the UK Parliament approved a motion requesting that the UK Government renegotiate the withdrawal agreement – specifically seeking alternative arrangements to replace the Irish backstop⁶³ – but simultaneously rejected a proposal to rule out a hard Brexit by postponing withdrawal absent a deal.

In the subsequent weeks, Prime Minister Theresa May and her new Secretary of State for Exiting the EU Stephen Barclays, the third to take up the job, engaged in new negotiations with the EU which in the meanwhile had proceeded in authorizing the ratification of the withdrawal deal.⁶⁴ On 11 March 2019, the two parties agreed on complementing the agreement with an Instrument relating to the withdrawal of the UK from the EU.⁶⁵ This was a legally binding interpretative declaration which clarified the meaning of the withdrawal treaty, in particular confirming the commitment of the EU and the UK to enter in good faith into future trade negotiations at the earliest, so as to prevent the need to ever apply the backstop foreseen in the Northern Ireland Protocol. In addition, they published a Joint Statement supplementing the Political Declaration,⁶⁶ a non-legally binding add-on to the outline of the future EU-UK relations. Moreover, the UK Government also advanced a unilateral declaration, where it clarified its interpretation of the withdrawal agreement, stressing its readiness to pull out of the backstop if the EU failed in bad faith to negotiate on alternative solutions after the end

⁶² See House of Commons, Exiting the European Union Committee, 'Response to the Vote on the Withdrawal Agreement and Political Declaration: Assessing the Options' (28 January 2019) HC 1908.

⁶³ See further, House of Commons, Northern Ireland Affairs Committee, 'The Northern Ireland Backstop and the Border' (9 March 2019) HC 1850.

⁶⁴ See Council Decision (EU) 2019/274 of 11 January 2019 on the signing, on behalf of the European Union and of the European Atomic Energy Community, of the Agreement on the Withdrawal of the United Kingdom from the European Union, OJ 2019 L 471/1.

⁶⁵ Instrument relating to the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (11 March 2019) TF50(2019) 61.

⁶⁶ Joint Statement supplementing the Political Declaration setting out the framework for future relationship between the European Union and the United Kingdom of Great Britain and Northern Ireland (11 March 2019) TF50(2019) 62.

of the transition period.⁶⁷ The following day, on 12 March 2019, Theresa May brought the deal as renegotiated back to the House of Commons. Nevertheless – partially worried by the legal opinion of UK Attorney General Geoffrey Cox, who confirmed that as a legal matter the UK continued to face the risk of remaining bound to the backstop indefinitely, given the impossibility of a unilateral exit⁶⁸ – the UK Parliament again roundly rejected the deal: 391 to 241, a loss of 149 votes.⁶⁹

V. THE EXTENSION

This precipitated a theatrical showdown in the UK Parliament. In fact, as promised by the Prime Minister, following the new rejection of the deal, Westminster was immediately called to vote on new resolutions: on 13 March 2019 on whether to endorse a no-deal withdrawal, which it rejected, and on 14 March 2019 on whether to seek an extension of Article 50 TEU, which it approved. With the exit date of 29 March 2019 looming, and facing a situation of significant lack of preparation for a hard Brexit,⁷⁰ on 20 March 2019 therefore the UK Prime Minister, in a letter to the President of the European Council, formally requested an extension of UK membership in the EU under Article 50(3) TEU until 30 June 2019.⁷¹ However, considering the legal and political difficulties that an extension going beyond the date of

⁶⁷ Declaration by Her Majesty's Government of the United Kingdom of Great Britain and Northern Ireland concerning the Northern Ireland Protocol (11 March 2019).

⁶⁸ UK Attorney General Geoffrey Cox, Letter to Prime Minister Theresa May, Legal Opinion on Joint Instrument and Unilateral Declaration concerning the Withdrawal Agreement (12 March 2019).

⁶⁹ See House of Commons Exiting the European Union Committee, 'Response to the 12 March Vote on the Withdrawal Agreement and Political Declaration' (13 March 2019) HC 2073.

⁷⁰ See National Audit Office, 'Contingency Preparations for Exiting the EU with No Deal' (12 March 2019) HC 2058; House of Commons Committee of Public Accounts, 'Brexit and the UK Border' (12 March 2019) HC 1942, p. 3 (stating that government 'departments have continued to struggle to prepare should the UK leave the EU without a deal' and reporting embarrassing cases of mismanagement of contingency preparations).

⁷¹ See Prime Minister Theresa May, Letter to European Council President Donald Tusk (20 March 2019).

the approaching EP elections of 23-26 May 2019 would pose for the EU,⁷² on 21 March 2019 the European Council responded to the UK request by agreeing

to an extension until 22 May 2019, provided the Withdrawal Agreement is approved by the House of Commons next week. If the Withdrawal Agreement is not approved by the House of Commons next week, the European Council agrees to an extension until 12 April 2019 [the latest date by which the UK had to start domestic procedures to run EP elections in May] and expects the United Kingdom to indicate a way forward before this date for consideration by the European Council.⁷³

While the European Council decision⁷⁴ kicked back the ball into the UK court, on 25 March MPs decided to grab control of parliamentary procedures – a prerogative traditionally belonging to the government in the British system⁷⁵ – and organized a round of indicative voting to see whether any options commanded a majority in the House of Commons. On 28 March, however, sequential votes by MPs on eight alternative solutions to the Brexit impasse, showed no majority for any option.⁷⁶ Despite resistance by the Speaker of the House John Bercow, who had invoked a 1604 precedent to prevent a new vote on a motion which was substantially the same to one already considered by Parliament,⁷⁷ the UK Government brought back the deal for a third time in the House of Commons – this time asking MPs to vote only on the withdrawal agreement, without the political declaration. Yet,

⁷² See European Commission President Jean-Claude Juncker, Letter to European Council President Donald Tusk (11 March 2019) (stating that the UK exit 'should be complete before the [EP] elections that will take place between 23-26 May [2019]. If the United Kingdom has not left the European Union by then, it will be legally required to hold these elections, in line with the rights and obligations of all Member States as set out in the Treaties').

⁷³ European Council Conclusions (21 March 2019) EUCO XT 20004/19, para 3.

⁷⁴ European Council Decision (EU) 2019/476 taken in agreement with the United Kingdom of 22 March 2019 extending the period under Article 50(3) TEU, OJ L 80 I/1.

⁷⁵ See Adam Tomkins, 'The Struggle to Delimit Executive Power in Britain' in Paul Craig & Adam Tomkin (eds) *The Executive and Public Law* (OUP 2006) 16.

⁷⁶ BBC, 'No Majority for Any Option after MPs' Votes', *BBC News* (28 March 2019) <<https://www.bbc.com/news/uk-politics-47728333>> accessed 27 September 2019.

⁷⁷ House of Commons Hansard, Speaker's Statement (18 March 2019).

despite promises by the Prime Minister to her fellow Conservative MPs that she would step down if her deal was approved, on 29 March 2019 – the day when the UK was originally expected to leave the EU – Westminster once more rejected the agreement: by 58 votes. With the default exit day now postponed to 12 April,⁷⁸ and with Parliament unable to compromise on any other exit alternative,⁷⁹ on 2 April 2019 Prime Minister May belatedly decided to cross the aisle and work with the Opposition, seeking 'national unity to deliver the national interest.'⁸⁰

While constructive talks between the Majority and the Opposition took off, ten days before the new exit date approaching Parliament passed in record time legislation to avert a hard Brexit.⁸¹ As a result, Prime Minister Theresa May on 5 April 2019 submitted to the European Council a further request to extend UK membership of the EU, once more seeking a postponement of exit day to 30 June 2019.⁸² In a special European Council meeting of 10 April 2019, the European Council accepted the UK request, but set a different, flexible extension.⁸³ The European Council agreed to an extension to be 'as long as necessary and, in any event, no longer than 31 October 2019'⁸⁴ – the date when the new Commission would take office. However, it decided that

⁷⁸ See European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) Regulations 2019.

⁷⁹ BBC, 'Brexit votes: MPs fail to back proposals again', *BBC News* (1 April 2019) <<https://www.bbc.com/news/uk-politics-47781009>> accessed 27 September 2019.

⁸⁰ Prime Minister Theresa May, Statement (2 April 2019).

⁸¹ See European Union (Withdrawal) Act 2019.

⁸² See Prime Minister Theresa May, Letter to European Council President Donald Tusk (5 April 2019).

⁸³ In the meanwhile, a number of EU member states had adopted domestic legislation to prepare for a 'hard Brexit'. See e.g. Loi n° 2019-30 du 19 janvier 2019 habilitant le Gouvernement à prendre par ordonnances les mesures de préparation au Retrait du Royaume Unie de l'Union européenne (Fr.); Real decreto-ley 5/2019, de 1 marzo, por el que se adoptan medidas de contingencia ante la retirada del Reino Unido de Gran Bretaña e Irlanda del Norte de la Union Europea sin que se haya alcanzado el acuerdo previsto en el artículo 50 del Tratado de la Union Europea (Sp.); Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019 (Ir.).

⁸⁴ European Council Conclusions 10 April 2019, EUCO XT 20015/19 para 2.

'if the Withdrawal Agreement is ratified [...] before this date, the withdrawal will take place' earlier.⁸⁵ Moreover, it clarified that:

This decision shall cease to apply on 31 May 2019 in the event that the United Kingdom has not held elections to the European Parliament in accordance with applicable Union law and has not ratified the Withdrawal Agreement by 22 May 2019.⁸⁶

Finally, addressing concerns that the UK may become a disrupter within the EU, the European Council underlined that 'the extension cannot be allowed to undermine the regular functioning of the Union and its institutions.'⁸⁷ While calling on the UK to act in a constructive and responsible manner throughout the extension in accordance with the duty of sincere cooperation,"⁸⁸ the European Council also pointed out that where appropriate, the other 27 EU Member States 'will continue to meet separately at all levels to discuss matters related to the [EU] situation after the withdrawal of the United Kingdom.'⁸⁹

IV. THE EUROPEAN PARLIAMENT ELECTIONS AND THE END OF THE MAY GOVERNMENT

Despite six weeks of good faith negotiations between the sherpas of the Labour and the Conservative parties, on 17 May 2019 the Leader of the Opposition Jeremy Corbyn informed the Prime Minister that talks had gone as far as they could.⁹⁰ Crucially, disagreement remained between the two parties among others on the policy goal to pursue a future permanent UK membership of the EU customs union, which was supported by Labour but rejected by the Conservatives.⁹¹ On 21 May 2019 Prime Minister May made a

⁸⁵ Ibid.

⁸⁶ See European Council Decision (EU) 2019/584 taken in agreement with the United Kingdom of 11 April 2019 extending the period under Article 50(3) TEU, OJ L 101/1, Art 2.

⁸⁷ European Council Conclusions, 10 April 2019, EUCO XT 20015/19 para 3.

⁸⁸ Ibid para 7.

⁸⁹ Ibid para 8.

⁹⁰ See Leader of the Opposition Jeremy Corbyn, Letter to Prime Minister Theresa May (17 May 2019).

⁹¹ See also House of Lords, European Union Committee, 'Brexit: the customs challenge' (20 September 2018) HL 187.

last ditch effort to convince Westminster to approve the Brexit deal, putting forward a revised UK withdrawal bill,⁹² but the effort received a strong pushback from within the Conservative Party itself. Therefore, on 23 May 2019 citizens in the UK were called to the polls to elect members of the EP.⁹³ The fact that the UK had to host elections for the EP – exactly 35 months after voting to leave the EU – was a demonstration of the failure of the Brexit process. But the EP elections results also turned into a political earthquake, as UK citizens skillfully used the polls to express their discontent for the way in which Brexit was being managed.

The EP elections' result confirmed a major restructuring of the British party system.⁹⁴ With both Labour and the Conservatives uncertain as to whether they would even run an electoral campaign, the triumph at the ballot box was for the newly-founded, single-issue Brexit Party of Nigel Farage: running on a simple Leave platform, the Brexit Party topped the national competition drawing almost 32 per cent of the national vote, and securing for itself 29 out of 73 UK seats in the EP. However, the EP elections also showed an excellent performance for parties which explicitly embraced a Remain position, in particular the Liberal Democrats (Lib-Dems), the Greens, as well as the Scottish National Party (SNP) and Plaid Cymru: with 16, 7, 4 and 1 EP seats each, all these forces improved their performance compared to the 2014 EP elections. Instead, the vote was a bloodbath for Labour – and particularly for the Tories. While Labour payed for its indecisive position on Europe, drawing just 14 per cent of the vote, slicing by half its contingent at the EP (from 20 to 10 EP seats) and ending up in third position in the ranking, the Conservative Party ended up in fifth place, with a meager 9 per cent of the national votes, and 4 EP seats (15 seat less than in 2014).

On 24 May 2019, therefore, in an emotional speech Prime Minister Theresa May tendered her resignation as premier and leader of the Conservative Party, acknowledging her failures to deliver Brexit.⁹⁵ Her resignation opened a succession process, which started on 7 June 2019 and concluded on 22 July

⁹² Prime Minister Theresa May, Speech (21 May 2019).

⁹³ See European Parliamentary Elections (Appointed Day of Poll) Order 2019.

⁹⁴ 2019 European elections results, available at <<https://election-results.eu/>> accessed 27 September 2019.

⁹⁵ See Prime Minister Theresa May, Statement (24 May 2019).

2019 with the appointment as Prime Minister of Boris Johnson, a strong supporter of Brexit, who was chosen also for his ability to ward off an electoral threat coming from the Brexit Party on the right.⁹⁶ Yet, this development – with the prospect of a no deal withdrawal from the EU by default on 31 October 2019 – also reignited secessionist calls within the UK, with Scottish First Minister Nicola Sturgeon advancing legislation on 27 May 2019 to organize a new independence referendum in Scotland.⁹⁷ Moreover, it shed dark clouds on the relations between the Government and Parliament, as the latter remained fundamentally hostile to the idea of a 'hard Brexit'.⁹⁸ Three years after the Brexit referendum, therefore, the UK remained highly divided on the matter. In fact, while the EU, which just started a new institutional cycle, indicated its openness to a further Brexit extension,⁹⁹ the ongoing UK constitutional crisis following the attempt by the Prime Minister to prorogue the UK Parliament¹⁰⁰ suggest that rough waters lie ahead in the process of UK withdrawal from the EU.

VII. THE STRUCTURE OF THIS SPECIAL ISSUE

The summary of the chronological events that unfolded in the two-year withdrawal negotiations suggest that Brexit is a process, rather than a moment; perhaps a mirage or a nightmare, but so far not a game with a clear-cut end. In fact, alternative scenarios remain possible – and only the future will tell where the UK will be landing in its effort to leave the EU. For that, new analyses will be necessary. For now, however, it is important to assess

⁹⁶ See <<https://www.conservatives.com/>> accessed 27 September 2019.

⁹⁷ Referendum (Scotland) Bill.

⁹⁸ See House of Commons Speaker John Bercow, speech at 'Festival dell'Economia', Trento (1 June 2019) (indicating that it would be unthinkable for Parliament to be evacuated from the center-stage in deciding about Brexit).

⁹⁹ See also European Commission President-elect Ursula von der Leyen, speech at the European Parliament, Strasbourg (16 July 2019) (indicating that the Commission is willing to further extend UK membership of the EU in October but that the withdrawal agreement cannot be renegotiated).

¹⁰⁰ BBC, 'Parliament suspension: Queen Approves PM's Plan', *BBC News* (28 August 2019) <<https://www.bbc.com/news/uk-politics-49493632>> accessed 27 September 2019. But see now also UK Supreme Court, *R (on the application of Miller) v. Prime Minister* [2019] UKSC 41 (holding that the suspension of Parliament for six weeks by the Prime Minister was unlawful and devoid of any effect).

what has happened from the 2017 UK general elections to the 2019 EP elections, with the aim to map the legal and political dynamics of the Brexit negotiations – and to set the historical record of Prime Minister Theresa May's Government. This is the purpose of this special issue, which brings together a distinguished set of lawyers and political scientists from leading British, Irish and European universities to offer an up-to-date evaluation of the key developments in the negotiations on the UK withdrawal from the EU. Thanks to its comprehensive outlook and interdisciplinary perspective, the special issue provides analytical insights and policy lessons on a two-year critical time-phase in the Brexit story spanning from June 2017 to June 2019, covering the negotiations led by Prime Minister Theresa May's Government.

Specifically, the ten contributions included in this special issue cover the following topics. The first three articles look at process, explaining some *key words* that popped up in the withdrawal talks. Emily Jones assesses the negotiating strategy of the EU and the UK, and offers a critical analysis of the mistakes that the May Government made, from triggering Article 50 TEU too early, before adequate preparations had been made, to failing to win domestic support for the negotiated deal. Kenneth Armstrong focuses on the notion of transition – or, in UK parlance: implementation – a time-devised that was crafted during the negotiations to secure a smooth UK landing outside the EU. In fact, as Armstrong explains, Article 50 TEU makes no reference to an idea of transition, but this quickly appeared as a necessary tool to negotiators, and was codified in the draft withdrawal agreement – which foresaw a transition period until December 2020, potentially extendable till December 2022, in which the UK would remain within the EU internal market and customs union, while being outside the EU as such. Federico Fabbrini and Rebecca Schmidt consider instead the notion of extension, which (contrary to transition) is foreseen in Article 50(3) TEU and was granted twice by the European Council in Spring 2019 at the request of, and in agreement with, the UK. As Fabbrini and Schmidt point out, extension differs from transition, as the UK maintains the rights and obligations of a Member State – but its application just ahead of the EP elections also created special challenges for the EU and the functioning of its institutions.

The next four articles look instead at substance, considering the *key issues* that arose in the negotiations. Catherine Barnard and Emilija Leinarte examine

the issue of citizens' rights, analyzing the reciprocal efforts by the UK and the EU to guarantee on an ongoing basis the rights of EU citizens resident in the UK, and UK citizens resident in the EU. However, Barnard and Leinarte also discuss the UK Government's proposal to fundamentally overhaul the UK immigration system after Brexit, emphasizing how curbing migration continued to remain a rallying cry for Prime Minister May. Eileen Connolly and John Doyle focus on the problem of the Irish border, explaining its technical difficulty as well as its geo-political implications: in fact, as Connolly and Doyle point out, a 'hard Brexit' with the return of a hard border in the island of Ireland would undermine the peace process started with the Good Friday Agreement of 1998, potentially leading to new waves of violence. Paola Mariani and Giorgio Sacerdoti map the negotiations on trade issues, examining the positions of the EU and the UK, the solutions found in the draft withdrawal agreement and the World Trade Organization rules which would govern EU-UK trade and customs relations in the absence of a deal. Ben Tonra considers another issue which – in fact – actually played a rather limited role during the negotiations: security cooperation. As Tonra argues, while the EU and the UK clearly share an interest in maintaining close ties in the field of defense and foreign affairs, security did not feature prominently in the withdrawal talks, as it was overshadowed by other priorities, but could garner greater attention by policy-makers in the future.

The last three contributions, finally, consider some *key challenges* that the two-year Brexit negotiations pose for the future. Sionaidh Douglas-Scott reflects on how the Brexit talks further unsettled the UK territorial constitution, dramatizing trends that the Brexit referendum had already exposed. In particular, Douglas-Scott considers growing impatience for the status quo in Scotland, which has now decided to seek a new independence referendum, as well as in Northern Ireland, where calls for a border poll to reunify with Ireland are growing. This is also the topic of the article by Etain Tannam, which focuses on Brexit and the future of the relations between the UK and Ireland: as Tannam points out, the decision of the UK to withdraw from the EU came at a time of unprecedented positive relations between the two countries, but the Brexit negotiations badly damaged bilateral rapports, unearthing traditional stereotypes which bode ill for the future. Finally, Federico Fabbrini considers the future of the EU 27 and argues that while the EU has been remarkably united in dealing with the UK during the Brexit

negotiations, important cleavages remain among the 27 other Member States, in important areas like economic & monetary union, the management of migrations and respect for the rule of law. As such, he considers a number of alternative scenarios, suggesting that the future of Europe remains wide open, and may require additional adjustments in constitutional structures and forms of institutional governance.

VIII. CONCLUSION

The period of time going from the June 2017 UK general elections (following the March 2017 UK notification of its intention to leave the EU) to the May 2019 EP elections constitutes an extraordinarily interesting and rich phase in the relationship between the UK and the EU. Over two years, leaders and lawyers endeavored to negotiate an orderly UK withdrawal from the EU, facing daunting technical problems and novel political challenges. The purpose of this special issue is to shed light on this stage of Brexit negotiations, offering also an historical record of Theresa May's Government in the UK. In fact, what turned out to be one of the shortest premierships in modern UK history was shaped from start to end by the struggle over Brexit, proving how profound the impact of the June 2016 referendum has already been. As this special issue was going to press at the end of summer 2019 – at record speed, thanks to the efforts of the European Journal of Legal Studies staff – the UK had not yet left the EU, and it remains uncertain whether it will. The postponed exit date is now set for 31 October 2019, but the struggle between the new UK Prime Minister and Parliament suggests that the Brexit course remains yet to be decided. New analyses will no doubt be needed down the road to assess the future shifts and turns in the withdrawal process – and the Brexit Institute will be there for that. This special issue, however, takes stock of the important developments that have taken place so far in the two-year Brexit negotiations, offering rigorous analytical insights and helpful policy lessons of the key words, issues and challenges that emerged in one of the most looked-at stories in contemporary global affairs.

GENERAL ARTICLES

THE NEGOTIATIONS: HAMPERED BY THE UK'S WEAK STRATEGY

Emily Jones*

Brexit negotiations were always going to be incredibly tough given the complexity of issues and the deep political divides among UK citizens in the wake of the EU referendum. Theresa May's government compounded these challenges with a poorly executed negotiation strategy: the UK government embarked on negotiations with other EU countries without a clear set of negotiating objectives; it was unable to represent itself as a unified negotiating team; it often found itself on the back foot, responding to EU proposals on both sequencing and content; and UK politicians pursued an ill-judged strategy that did not reflect the nature of the underlying negotiating problem or the UK's relative power position. These weaknesses were the result of ongoing political divides within the UK cabinet, the wider Conservative Party, and UK Parliament. Domestic divisions impeded negotiations with the EU and ultimately led to the rejection of the Withdrawal Agreement by the UK Parliament. The Brexit negotiations are a powerful illustration of how failure by a government to effectively navigate domestic politics can derail international negotiations.

Keywords: Brexit, negotiations, strategy, UK government, EU

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I. INTRODUCTION

At the outset of Brexit negotiations, UK prime minister Theresa May said she wanted Britain to be a 'great, global trading nation that is respected around the world and strong, confident and united at home'.¹ Yet the Brexit negotiations have damaged the UK government's international reputation and precipitated a political and constitutional crisis at home. Why did this happen?

During the Brexit negotiations, the UK government needed to negotiate effectively on two levels: internationally to secure a deal with the EU, and

¹ Theresa May, 'The Government's Negotiating Objectives for Exiting the EU: PM Speech' (17 January 2017) <<https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>> accessed 15 October 2019.

domestically to ensure that any deal would be ratified by the UK Parliament.² Brexit negotiations were always going to be incredibly tough given the complexity of issues and the deep political divides among UK citizens in the wake of the EU referendum. Theresa May's government compounded these challenges with a poorly executed negotiation strategy. I identify specific weaknesses in the UK's strategy towards the EU: the UK government embarked on negotiations with other EU countries without a clear set of negotiating objectives; it was unable to represent itself as a unified negotiating team; it often found itself on the back foot, responding to EU proposals on both sequencing and content; and UK politicians pursued an ill-judged distributive strategy that did not reflect the nature of the underlying negotiating problem or the UK's relative power position.³

Weaknesses in the UK strategy stemmed from continuing political divisions at home. The failure of the UK cabinet to agree a common position resulted in the UK negotiating without a clear set of objectives and a lack of political direction generated tensions within the UK negotiating team. In turn, this enabled the EU to seize the initiative in the negotiations and decisively shape the outcome. Despite the role of the UK Parliament as a veto player in ratification of any Brexit deal, the May government marginalised MPs rather than seeking to build alliances across party lines, resulting in the negotiation of an agreement with the EU that was rejected by the UK Parliament.

The Brexit negotiations are a powerful illustration of how failure to effectively navigate domestic politics can lead to 'involuntary defection', where the government is unable to secure domestic ratification of the deal it has negotiated at the international level.⁴ Scholars have shown that it is surprisingly common for international negotiations to be derailed by

² On international negotiations as two-level games see Robert D Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (1988) 42 *International Organization* 427.

³ Negotiation theory commonly distinguishes between distributive approaches which are used to resolve pure conflicts of interest, and integrative approaches where the aim is to find common or complementary interests and solve problems confronting both parties. See Richard E Walton and Robert B McKersie, *A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System* (2nd ed, ILR Press 1991).

⁴ Putnam (n 2).

governments misreading their own domestic politics, rather than disagreements with their international counterparts.⁵ In the Brexit negotiations, weaknesses in the UK government's strategy did not arise from insufficient information about the nature of domestic politics or opposition from powerful interest groups, but rather from the challenges of forging a cross-party coalition in the context of a majoritarian parliamentary system.

This article is organised chronologically, starting in the aftermath of the EU referendum in June 2016 and ending when Theresa May stepped down as Prime Minister in June 2019. Section 2 provides a brief reminder of the challenging context in which Theresa May's government found itself straight after the EU referendum. Section 3 examines the moves made by the UK and EU²⁷ as they prepared for formal negotiations. Sections 4 and 5 analyse the first phase and second phase of formal negotiations, while Section 6 examines the politics of domestic ratification in the UK. It concludes with a brief reflection on the UK government's strategy and lessons for future negotiations.

The article draws on a range of publicly available sources including parliamentary reports, government documents, and newspaper articles, and insights from political science and negotiation studies.

II. STARTING POINT: THE NEGOTIATIONS THAT WEREN'T MEANT TO HAPPEN

Theresa May took the helm of the UK government in July 2016, days after a referendum in which a majority narrowly voted for the UK to leave the European Union.⁶ In many ways Theresa May was an unlikely Prime Minister. She was not seen as an obvious leadership candidate within or outside the Conservative Party, was known for being technocratic and had a

⁵ See for instance Peter B Evans, 'Conclusion: Building an Integrative Approach' in Peter B Evans, Harold K Jacobson and Robert D Putnam (eds), *International Bargaining and Domestic Politics: Double-Edged Diplomacy* (University of California Press 1993).

⁶ See Federico Fabbrini (ed), *The Law & Politics of Brexit* (Oxford University Press 2017).

low profile.⁷ Theresa May's refusal to take sides during the EU referendum campaign propelled her into the leadership position, almost by default. She was the 'last one standing' when it came to electing a new Conservative Party leader.⁸

The referendum outcome was a profound shock to the country's political and economic leadership. Theresa May inherited a civil service completely unprepared to deliver on the 'biggest and most complex task in its peacetime history'.⁹ David Cameron, Theresa May's predecessor, had been so confident that the government would win the referendum that he famously told the civil service not to prepare for a 'leave' outcome, a decision that the UK's Foreign Affairs Select Committee later concluded was an 'act of gross negligence'.¹⁰

Theresa May also faced a bitterly divided Conservative Party. The UK's relationship with the EU has been a perennial challenge for Conservative Party leaders and disputes over UK relations with Europe ultimately cost Margaret Thatcher, John Major, and David Cameron their premierships.¹¹ Following the EU referendum campaign, rifts ran deep, with rival factions in

⁷ Sam Knight, 'Theresa May's Impossible Choice' *The New Yorker* (30 July 2018) <<https://www.newyorker.com/magazine/2018/07/30/theresa-mays-impossible-choice>> accessed 15 October 2019

⁸ Ibid.

⁹ Jeremy Heywood, 'How the Civil Service Is Preparing for Brexit' (Civil Service Blog, 11 July 2017) <<https://civilservice.blog.gov.uk/2017/07/11/how-the-civil-service-is-preparing-for-brexit/>> accessed 15 October 2019; see also Joe Owen, Lewis Lloyd and Jill Rutter, 'Preparing Brexit: How Ready Is Whitehall?' (Institute for Government 2018) <<https://www.instituteforgovernment.org.uk/sites/default/files/publications/IFGJ6279-Preparing-Brexit-Whitehall-Report-180607-FINAL-3c.pdf>> accessed 15 October 2019.

¹⁰ Foreign Affairs Committee, 'Equipping the Government for Brexit' (*Parliament*, 20 July 2016) <<https://publications.parliament.uk/pa/cm201617/cmselect/cmaff/431/43106.htm>> accessed 15 October 2019.

¹¹ Andrew Grice, 'Europe Killed the Careers of the Last Three Conservative PMs – and Now It's Set to Destroy Theresa May' *The Independent* (12 July 2016) <<https://www.independent.co.uk/voices/europe-killed-the-careers-of-the-last-three-conservative-pms-and-now-its-set-to-destroy-theresa-may-a7132651.html>> accessed 15 October 2019.

the Conservative Party advocating radically different visions of the type of Brexit that the UK should pursue.

As has been exhaustively analysed elsewhere, there were a variety of options for structuring future UK-EU trade relations, ranging from full or partial membership of the single market and customs union (which was quickly dubbed 'soft Brexit' in public discussions), which would entail maintaining very close economic, legal and political relations, to the negotiation of an arms-length free trade agreement or leaving without any agreement at all (forms of 'hard Brexit').¹² The Eurosceptic faction of the Conservative Party sought an arms-length relationship with the EU and advocated for 'hard Brexit' while others in the Conservative Party supported 'soft Brexit'. Emboldened by the surge of support for the UK Independence Party (UKIP) and the victory of the leave campaign in the EU referendum, the Eurosceptic faction gained power within the Conservative Party. Theresa May made sure Eurosceptics were well represented in Cabinet, allocating them the key Brexit portfolios, a decision that proved critical in shaping the course of the negotiations.

The Labour Party, the main opposition party, also faced challenges in the wake of the EU referendum. The vast majority of Labour MPs and grassroots Labour Party members had supported the remain campaign, but after the EU referendum many Labour MPs found themselves representing constituencies in which the majority of voters had voted to leave. This hampered the Labour Party's ability to forge a unified approach to the Brexit negotiations and hold the government to account on its Brexit strategy.

III. PREPARING TO NEGOTIATE (JULY 2016 - JULY 2017)

Following the UK's EU referendum in June 2016, the UK and the 27 other EU Member States (hereafter 'EU') worked to appoint negotiating teams and decide their negotiating objectives. On 29th March 2017 the UK government wrote to Donald Tusk, President of the European Council, to formally notify him of the UK's intention to leave, thereby triggering Article 50 of the Treaty

¹² See Giorgio Sacerdoti, 'The Prospects: The UK Trade Regime with the EU and the World: Options and Constraints Post-Brexit' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (Oxford University Press 2017).

on European Union (TEU) and starting the clock on the two-year period that the Treaty set out for the parties to agree the terms of withdrawal and nature of the future relationship.¹³

Given the scope of the issues to be negotiated, three agreements needed to be reached. First, agreement on the terms of the UK's withdrawal or 'divorce', covering immediate issues such as: the rights of EU citizens living in the UK and UK citizens living in the EU; financial liabilities, including UK contributions to the EU budget cycle for 2014-2020 and pension contributions; and the relocation of EU institutions based in the UK. Second, a new UK-EU relationship would need to be agreed, including on the access the UK and EU would have to each other's markets; the extent to which the UK would adhere to EU laws and have influence over EU rules and regulations; UK participation in EU research programmes; and the nature of security and defence cooperation.

While Article 50 TEU required the UK and EU27 to reach agreement on the framework for future relations, an agreement on a future relationship between the UK and EU27 could only be finalised and concluded once the UK had become a third country.¹⁴ As a result, a third agreement would also be needed to govern the transition period between the point of the UK's exit (two years after the triggering of Article 50) and the point at which a new UK-EU relationship had been concluded, which was likely to be several years later.

1. The UK's Ambiguous Negotiating Objectives

Initially the UK government appeared to have a coherent set of negotiating objectives focused on delivering a 'hard Brexit' agreement. Within days of assuming office, Theresa May announced her Cabinet, choosing to put three staunch leave-supporting politicians at the helm of the Brexit negotiations: Boris Johnson was appointed Foreign Secretary; David Davis was appointed to the new role of Secretary of State for Exiting the EU; and Liam Fox was

¹³ Theresa May, 'Prime Minister's Letter to European Council President Donald Tusk' (29 March 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_Letter_to_European_Council_President_Donald_Tusk.pdf> accessed 15 October 2019.

¹⁴ See Armstrong in this issue.

appointed to the post of Secretary of State for International Trade. To accompany these posts, the government announced the creation of two new ministries, the Department for Exiting the EU (DexEU) and Department for International Trade (DIT). In appointing a Secretary of Trade and investing considerable resources in a new trade ministry, the government signalled that it was prioritising the autonomy of future UK trade policy, an objective that aligned with the UK's exit from the EU customs union and single market.

Early signs that the UK government would pursue a 'hard Brexit' policy were reinforced by a series of high-profile public speeches in which Theresa May set out the government's negotiating objectives. In her speech at the Conservative Party conference in October 2016, Theresa May emphasised that the 'authority of EU law' in Britain, including the jurisdiction of the European Court of Justice (ECJ), would be 'ended forever', and promised UK control over immigration from the EU.¹⁵ She also promised to trigger Article 50 and embark on formal negotiations no later than the end of March 2017.¹⁶ Meanwhile, Liam Fox, the newly appointed Secretary of State for Trade, set out a vision for negotiating free trade agreements around the world.¹⁷ The stage looked set for the UK negotiating a deal that would result in an arms-length relationship with the rest of the EU, based on a free trade agreement.

Yet, as time went on, the UK's position became more ambiguous. The White Paper in February 2017 explicitly stated that the UK would leave the EU single market and would pursue 'an ambitious and comprehensive free trade agreement', but it also stated that it would pursue a 'new customs agreement' with the EU and that a future agreement might 'take in elements of current single market arrangements in certain areas'.¹⁸ This introduced

¹⁵ Theresa May, 'Theresa May's Keynote Speech at Conservative Party Conference October 2016' *The Independent* (5 October 2016) <<https://www.independent.co.uk/news/uk/politics/theresa-may-speech-tory-conference-2016-in-full-transcript-a7346171.html>> accessed 15 October 2019.

¹⁶ Ibid.

¹⁷ E.g. Jon Stone, 'TTIP Trade Deal Might Never Happen, Trade Secretary Liam Fox Says' *The Independent* (8 September 2016) <<https://www.independent.co.uk/news/uk/politics/ttip-liam-fox-uk-british-never-happen-stop-international-trade-brex-it-a7231786.html>> accessed 15 October 2019.

¹⁸ HM Government White Paper, 'The United Kingdom's Exit from, and New Partnership with, the European Union' paras 8.1–3

contradictions in the heart of the UK's negotiating position, as any customs union agreement that enabled the free circulation of goods would require a harmonised external tariff, which would inevitably curtail the UK's ability to strike free trade agreements with third countries. Meanwhile, incorporating elements of the single market would result in some continued jurisdiction of the ECJ, or an equivalent body, in the UK, breaching one of the red lines Theresa May had set out in her party conference speech.

In retrospect it is remarkable how little attention was paid to the implications of Brexit for peace in Northern Ireland in the EU referendum campaign and first months of Theresa May's government. It was only in a Brexit White Paper (February 2017) and in the letter triggering Article 50 (March 2017) that the UK government started to grapple with the question of how its proposals would affect the border between Northern Ireland and the Republic of Ireland, and its commitments under the Good Friday Agreement. The White Paper recognised the need to 'find a practical solution that keeps the border as seamless and frictionless as possible, recognising the unique economic, social, and political context'.¹⁹ The Article 50 letter stated that the UK wanted to 'avoid a return to a hard border'.²⁰ Yet this objective was hard to reconcile with the UK's stated ambition of leaving the single market and customs union, both of which implied the introduction of physical checks at the border between Northern Ireland and the Republic of Ireland.²¹

Thus, even before any formal engagement with the EU, contradictions and ambiguities in the UK negotiating position were becoming apparent. The decision to trigger Article 50 and launch formal negotiations before agreeing a coherent negotiating position was a major flaw in the UK strategy. It led the

<<https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-2>> accessed 15 October 2019.

¹⁹ Ibid 8.49.

²⁰ May, 'Prime Minister's Letter to European Council President Donald Tusk' (n 14).

²¹ On the tensions in the UK position see Emily Jones and Calum Miller, 'The Brexit Impossibility Triangle' [2019] *Project Syndicate* <<https://www.project-syndicate.org/commentary/brexit-impossibility-triangle-by-emily-jones-and-calum-miller-2019-04>> accessed 15 October 2019.

UK to table unrealistic negotiating proposals, including a proposal for the UK to have a customs arrangement with the EU that would ensure frictionless trade and avoid a hard border with Ireland, while also leaving the EU customs union in order to have a fully sovereign trade policy. This proposal was dubbed a 'Schroedinger's Customs Union' by Ivan Rogers, the UK's former Permanent Representative to the EU, as it was hard to conceive how such an arrangement would work in practice.²²

2. The EU's Clear Negotiating Objectives and Agenda-Setting Moves

While the UK tied itself in knots, the EU developed its own negotiating guidelines²³ and directives.²⁴ The EU and UK positions shared common elements, including the desire to safeguard the rights of citizens and provide clarity and legal certainty, but there were major differences. The EU insisted that the four 'fundamental freedoms' of the EU single market were indivisible, which meant that agreeing to free movement of goods, services, and capital would necessarily entail accepting freedom of movement of people too, a red line for the UK. The EU explicitly excluded the possibility of a sector-by-sector approach to participation in the single market, in direct opposition to the UK's desire to 'take in elements of the single market'.²⁵ The EU insisted that any future free trade agreement must 'ensure a level playing field' to safeguard against any moves the UK might make to lower regulatory standards in areas such as tax and social and environmental standards.²⁶

²² Ivan Rogers, 'Sir Ivan Rogers' Speech on Brexit' (13 December 2018) <<https://news.liverpool.ac.uk/2018/12/13/full-speech-sir-ivan-rogers-on-brexit/>> accessed 15 October 2019.

²³ European Council, 'European Council (Art. 50) Guidelines for Brexit Negotiations' <<https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/>> accessed 15 October 2019.

²⁴ Council of the European Union, 'Directives for the Negotiation of an Agreement with the United Kingdom of Great Britain and Northern Ireland Setting out the Arrangements for Its Withdrawal from the European Union' <<https://www.consilium.europa.eu/media/21766/directives-for-the-negotiation-xt21016-ado1re02en17.pdf>> accessed 15 October 2019.

²⁵ European Council, 'European Council (Art. 50) Guidelines for Brexit Negotiations' (n 24) pt 1.1.

²⁶ European Council, 'European Council (Art. 50) Guidelines for Brexit Negotiations' (n 24) pt 1.1.

The EU also set out a series of stipulations about the negotiating process. The EU Member States would speak with one voice and, to ward off any attempt by the UK to try and capitalise on differences among the EU27, the EU appointed a European Commission Task Force to conduct the negotiations with the UK. It stated that it would engage the UK exclusively through the official negotiating channels and there would be 'no separate negotiations' between the UK and individual Member States. Crucially, the EU also insisted on a two-phase approach to the negotiations,²⁷ structuring discussions to its advantage by frontloading the issues on which it wanted to secure commitments from the UK, including on citizens' rights, the financial settlement, and the Northern Ireland border, before it would negotiate on the future trading relationship, which was of particular interest to the UK.

The EU's proposals on how the negotiations should be sequenced conflicted with the UK's proposals. In the letter triggering Article 50, the UK proposed that the terms of the future partnership be agreed 'alongside' those of the UK's withdrawal from the EU.²⁸ Perhaps in a move to push the UK into accepting its preferred structure, the European Commission negotiating mandate only covered those issues it wanted to discuss in phase one. This meant that if the UK wanted to negotiate issues in a different sequence, the European Commission would have had to go back to the Member States to obtain authorisation, delaying the start of the formal negotiations.

3. May's Political Miscalculation Further Muddies the Negotiation

In the run up to formal negotiations with the European Union, Theresa May called a snap general election in a bid to strengthen her negotiating hand. Her government was operating with a wafer-thin majority of only 12 MPs in Parliament and the prime minister was concerned that such a slim majority would enable opposition parties to frustrate the Brexit negotiations. Opinion polls showed the Conservative Party had a twenty-point lead over Jeremy

²⁷ Council of the European Union (n 25) pt 3.9.

²⁸ May, 'Prime Minister's Letter to European Council President Donald Tusk' (n 14)

Corbyn's Labour Party²⁹ and May saw an opportunity to win a much larger majority and greater control over Parliament.

This move backfired spectacularly as Theresa May lost her parliamentary majority altogether. The prime minister campaigned badly on a manifesto that failed to win public support. She proved herself unable to connect with citizens on the campaign trail, appearing robotic and uneasy. Meanwhile Jeremy Corbyn ran an effective grassroots campaign. The Conservative Party suffered a net loss of 13 seats, producing a hung Parliament. In order to secure a working majority in Parliament, Theresa May entered into an alliance with the 10 MPs from the socially conservative Democratic Unionist Party (DUP) of Northern Ireland, who supported a 'hard' Brexit.

The parliamentary arithmetic that resulted from the ill-judged decision to call a general election left May with a serious political challenge. She needed to deliver a Brexit agreement that worked for the EU and would command the support of a majority of MPs in the UK Parliament, yet she did not command a majority in Parliament and her own party was bitterly divided. There was the option of brokering an agreement with the Labour Party. Had cross-party discussions started in earnest at this early stage it is conceivable that they would have yielded a set of negotiating objectives and ultimately a deal (focused on remaining in a customs union and in the EU single market), which would have been supported by a majority of MPs. But reaching out to the Labour Party ran the risk of alienating Eurosceptic MPs and splitting the Conservative party, a risk Theresa May was not prepared to take. Instead she held fast in her determination to deliver a parliamentary majority through support from Conservative and DUP MPs. This in turn meant that any deal would need to have the support of Conservative MPs who prioritised remaining in the customs union and single market as well as of those who insisted on the UK gaining 'full sovereignty' in external trade policy. This proved to be an impossible task.

²⁹ Sebastian Payne, 'UK General Election: Theresa May Seizes the Moment to Bank Poll Lead' *FT.com* (18 April 2017) <<https://www.ft.com/content/7ef72c62-2425-11e7-a34a-538b4cb30025>> accessed 15 October 2019

IV. PHASE I OF FORMAL NEGOTIATIONS (JUNE 2017 – MARCH 2018)

Formal negotiations between the UK and EU began in June 2017, eleven days after the snap elections and with Theresa May's government weak and fragmented. The Department for Exiting the EU, which had responsibility for leading the Brexit negotiations, lost two of its four ministers in the wake of the elections and there were major divisions within the Cabinet on how to approach Brexit. Disagreement at the political level made it hard for civil servants to make clear and detailed proposals at the negotiating table.³⁰ A photograph from the second day of the formal negotiations captured the mood. It was taken at the European Commission's headquarters and showed the EU and UK negotiating teams facing each other across a glass table. The EU's side had a raft of documents, while the UK team had a single, slender notebook among them.³¹

1. *The UK's (Wrong-Footed) Strategy*

The first issue to be negotiated was the sequencing of the negotiations. David Davis, UK Brexit Secretary said, in a widely-quoted media interview, that agreeing on the sequence of negotiations would be the 'row of the summer'.³² The UK would insist that negotiations on the new trade relationship start immediately, in direct opposition to the EU's proposal for a two-phase schedule that left trade negotiations to the second phase. Yet, despite all the

³⁰ Kylie MacLellan and William James, 'Brexit Negotiations Have Not Begun Well for UK, Says Former Top Diplomat' *Reuters* (7 August 2017) <<https://uk.reuters.com/article/uk-britain-eu-negotiations/brexit-negotiations-have-not-begun-well-for-uk-says-former-top-diplomat-idUKKBN1AN12V>> accessed 15 October 2019.

³¹ Thierry Charlier, "'No Notes' Davis Riles Anti-Brexit Camp in Negotiations' (*Reuters*, 17 July 2017) <<https://www.reuters.com/article/us-britain-eu-notes/no-notes-davis-anti-brexit-camp-in-negotiations-idUSKBN1A213Z>> accessed 15 October 2019.

³² Oliver Wright, 'Timetable for Brexit Talks Will Be Row of Summer, Says Davis' *The Times* (15 May 2017) <<https://www.thetimes.co.uk/article/timetable-for-brexit-talks-will-be-row-of-summer-says-davis-zronsmrxr>> accessed 15 October 2019.

bravado, the UK accepted the EU's proposals on the first day of negotiations.³³ The EU had succeeded in structuring the process in its favour.

Although Theresa May appointed several remain supporters into her Cabinet, including Philip Hammond as Chancellor, her decision to put staunch Eurosceptics into pivotal Brexit roles set the UK on course for a hard-line, distributive negotiating strategy. Negotiation theory distinguishes between distributive negotiation strategies that are designed to resolve pure conflicts of interest, and integrative approaches which seek to find common or complementary interests and solve problems confronting both parties.³⁴ The approach adopted by the politicians in charge of the negotiations suggests that they perceived the UK and EU as having conflicting interests, overlooking the common interests that both parties had in achieving a negotiated settlement and minimising economic disruption.³⁵ While passing mention was made of shared values and the need to cooperate, the UK's leading politicians showed little interest in understanding the interests of EU Member States and the constraints within which they had to operate, and were not perceived by the EU as trustworthy interlocutors.³⁶ Instead of seeking to build trust and a spirit of collaboration to address a complex set of challenges faced by both parties, public pronouncements from Theresa May and leading ministers focused on classic distributive tactics including tabling unrealistic demands and making frequent threats to walk away.

The EU was framed by the UK's political leaders as being unreasonable and demanding a 'punitive deal'. Time and again UK leaders declared that 'no deal

³³ Andrew Sparrow, 'UK Appears to Capitulate on Sequencing on First Day of Brexit Talks - as It Happened' *The Guardian* (19 June 2017) <<https://www.theguardian.com/politics/blog/live/2017/jun/19/boris-johnson-and-gove-both-back-may-as-tory-leadership-speculation-continues-politics-live>> accessed 15 October 2019.

³⁴ Walton and McKersie (n 3).

³⁵ A common mistake on the part of untrained negotiators is to assume that parties' interests are directly and completely opposed. See Leigh L Thompson, *The Mind and Heart of the Negotiator* (5th ed, Pearson 2012) 94.

³⁶ See for instance Angelique Chrisafis, Luke Harding and Arthur Neslen, '"Outrageous" and "a Liar" – Germany and France Lead Criticism of Boris Johnson' (14 July 2016) <<https://www.theguardian.com/politics/2016/jul/14/french-foreign-minister-boris-johnson-is-a-liar-with-his-back-against-the-wall>> accessed 15 October 2019.

was better than a bad deal' and said the UK was prepared to walk away from the negotiating table.³⁷ Constant references were made to the costs to EU Member States if the UK walked away and frequent pronouncements were made about a Global Britain that would be better off without close ties with the EU as it would be able to enter into an array of trade deals with other countries.³⁸ As Theresa May said in her speech in October 2016,

Countries including Canada, China, India, Mexico, Singapore and South Korea have already told us they would welcome talks on future free trade agreements. And we have already agreed to start scoping discussions on trade agreements with Australia and New Zealand.³⁹

Emphasis was placed on strengthening ties to commonwealth countries, a vision that civil servants reportedly dubbed 'Empire 2.0'.⁴⁰

While a hard-line distributive strategy is useful when negotiating the price of a second-hand car, as one party wins what the other party loses, it is rarely productive in complex public policy negotiations, where parties typically have a mix of complementary and competing interests. Hard-line approaches risk antagonising the other party, damaging future relations, and usually fail to generate deals that maximise value, even for the stronger party.⁴¹ The UK's decision to adopt a distributive strategy in Brexit negotiations was

³⁷ See for instance George Parker, 'Theresa May Warns UK Will Walk Away from "Bad Deal"' *Financial Times* (17 January 2017) <<https://www.ft.com/content/c3741ca2-dcc6-11e6-86ac-f253db7791c6>> accessed 15 October 2019.

³⁸ For instance, in a remark designed to capture media headlines, the UK Foreign Secretary told his Italian counterpart that Italy would agree to the UK's demands as Italy would lose prosecco exports if it didn't. BBC, 'Boris Johnson Attacked over "Prosecco Insult"' *BBC* (16 November 2016) <<https://www.bbc.com/news/uk-37995606>> accessed 15 October 2019.

³⁹ Theresa May, 'Theresa May- Her Full Brexit Speech at Conservative Conference' *The Independent* (2 October 2016) <<https://www.independent.co.uk/news/uk/politics/theresa-may-conference-speech-article-50-brexit-eu-a7341926.html>> accessed 15 October 2019.

⁴⁰ Sam Coates, 'Ministers Aim to Build "empire 2.0" with African Commonwealth' *The Times* (6 March 2017) <<https://www.thetimes.co.uk/article/ministers-aim-to-build-empire-2-0-with-african-commonwealth-after-brexit-v9bs6f6z9>> accessed 15 October 2019.

⁴¹ E. g. William I Zartman and Jeffrey Rubin (eds), *Power and Negotiation* (University of Michigan Press 2000).

particularly ironic as the UK was not negotiating from a superior power position. While the costs of a no-deal scenario were substantial for both the UK and EU, impact assessments showed they were much higher for the UK, as the EU Member States were a more important export market for the UK, than the UK was for them: while UK exports to the EU were equivalent to 12.2 per cent of UK GDP, EU exports to the UK were equivalent to only 2.6 per cent of EU GDP.⁴² While the threat of walking away with no deal would be costly to some EU Member States, notably Ireland, Germany, the Netherlands, Belgium and France, 19 of the 27 EU Member States had a trade-related exposure to Brexit of less than 2 per cent of GDP. The cost to the UK of walking away was further increased by the immense short-term uncertainties it would create as many of the rules underpinning the UK's economic and regulatory structure would disappear.⁴³

The UK's frequently invoked alternative options also lacked credibility. A trade deal with the United States was often held up as an alternative to the EU, but only 18 per cent of UK exports were destined for the US, compared with 43 per cent to the EU.⁴⁴ Moreover, the negotiation of a UK-US trade deal would meet strong domestic opposition within the UK. Much touted trade relations with all 51 commonwealth countries, including Canada, Australia, New Zealand and India, only accounted for 9 per cent of UK exports.⁴⁵ Meanwhile, UK attempts to initiate trade talks with third countries and invoke these alternative options were rebuffed, as third countries wanted to see the outcome of Brexit talks before engaging in substantive discussions.⁴⁶

⁴² The UK in a Changing Europe, 'Cost of No Deal Revisited' (The UK in a Changing Europe 2018) 18 <<https://ukandeu.ac.uk/research-papers/cost-of-no-deal-revisited/>> accessed 15 October 2019.

⁴³ The UK in a Changing Europe (n 43).

⁴⁴ Office of National Statistics, 'Who Does the UK Trade With?' (3 January 2018) <<https://www.ons.gov.uk/businessindustryandtrade/internationaltrade/articles/whodoestheuktradewith/2017-02-21>> accessed 15 October 2019.

⁴⁵ 'Trade with the Commonwealth,' (Full Fact, 2 June 2017), <<https://fullfact.org/economy/uk-trade-commonwealth/>> accessed 15 October 2019.

⁴⁶ Patrick Wintour, 'May Woos Modi as UK Pursues Free-Trade Deal with India' *The Guardian* (18 April 2018) <<https://www.theguardian.com/world/2018/apr/18/uk->

Rather than shore up the UK's negotiation position, the UK's distributive moves, coupled with its ambiguous negotiating objectives, undermined its credibility as a negotiating partner. The UK was slow to table proposals, giving the EU the opportunity to set the agenda and terms of the discussion. David Davis, Secretary of State for Exiting the EU, defended this approach explaining that

At the end, we may well publish an alternative proposal, but at the moment the proper approach, to get the right outcome in the negotiation, is to challenge what it [the EU] is doing.⁴⁷

The UK's failure to table detailed proposals frustrated progress and enabled the EU to attribute responsibility to the UK for the lack of progress. As Michel Barnier, the EU chief negotiator, stated during the negotiations, 'clarification of the UK's position is indispensable to negotiate and achieve ""sufficient progress"" on the settlement.'⁴⁸

In several instances the UK declared a strong position publicly, only to back down, illustrating the perils of pursuing a distributive strategy when threats to walk away lacked credibility. On the issue of financial commitments for instance, the UK tried to link negotiations to discussions on future trade arrangements, insisting that it would only negotiate its financial commitments if the EU agreed to negotiate the future trade agreement in parallel. EU negotiators swiftly rebutted this move and the UK acquiesced.⁴⁹

and-india-sign-agreement-laying-ground-for-free-trade-deal-brexite> accessed 15 October 2019; Jon Stone, 'Brexite: India "not in a Rush" to Sign Trade Deal with Britain, Ambassador Says' *The Independent* (6 April 2018) <<https://www.independent.co.uk/news/uk/politics/brexite-india-uk-trade-deal-britain-ambassador-yashvardhan-sinha-a8292091.html>> accessed 15 October 2019.

⁴⁷ David Davis, Uncorrected oral evidence: David Davis evidence session, July 11, 2017, 4, <<http://data.Parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/david-davies-evidence/oral/69275.pdf>> accessed 15 October 2019.

⁴⁸ Cited in Arabella Lang, Terry McGuinness, and Vaughne Miller, 'Brexite: The July Negotiations,' Research Briefings Parliament, August 2, 2017, <<https://researchbriefings.Parliament.uk/ResearchBriefing/Summary/CBP-8068#fullreport>> accessed 15 October 2019.

⁴⁹ Vaughne Miller, Terry McGuinness, and John Curtis, 'Brexite: The September Negotiations,' Research Briefings Parliament, October 6, 2017,

As negotiations got underway, tensions emerged among the UK politicians and civil servants on the UK negotiating team. Theresa May's public pronouncement in October 2016 that the UK would withdraw from the ECJ reportedly astonished senior officials, as there had not been a detailed internal discussion or assessment of the implications.⁵⁰ Similarly, her declaration in the same speech that Article 50 would be triggered by the end of March 2017 reflected the advice of her political advisers, who argued that she needed to be seen by the UK public to be delivering on Brexit, and went against the advice of senior civil servants. Senior civil servants were, rightly, worried that the UK would give the EU an advantage in the negotiations if Article 50 was triggered before the UK government had agreed on what it wanted Brexit to look like.⁵¹

Tensions were running so high between politicians and civil servants that, even before negotiations began, Ivan Rogers, the UK's permanent representative to the EU, resigned because his relationship with Theresa May and her team had broken down. In his resignation letter he highlighted the risks associated with the UK's lack of clarity in its Brexit negotiating objectives, tensions between the UK's team in Brussels and colleagues in London, and a lack of serious multilateral negotiating expertise in Whitehall. He urged colleagues to 'continue to challenge ill-founded arguments and muddled thinking' coming from London.⁵² Meanwhile splits within the cabinet led Theresa May to move Olly Robbins, the UK's chief negotiator, to the Prime Minister's Office so that he would report directly to her. This sidelined David Davis, the ministerial lead for the negotiations, although he remained nominally in charge.⁵³

A serious gap was also emerging between the UK government and Parliament, as the government failed to keep Parliament fully briefed on the

<<https://researchbriefings.Parliament.uk/ResearchBriefing/Summary/CBP-8104>> accessed 15 October 2019.

⁵⁰ Knight (n 7).

⁵¹ Ibid.

⁵² Ivan Rogers, 'Sir Ivan Rogers' Letter to Staff in Full' (BBC, 4 January 2017) <<https://www.bbc.com/news/uk-politics-38503504>> accessed 15 October 2019.

⁵³ Ian Dunt, 'David Davis: In the End, There Was Nothing behind the Swagger' (Politics, 9 July 2018) <<https://www.politics.co.uk/blogs/2018/07/09/david-davis-in-the-end-there-was-nothing-behind-the-swagger>> accessed 15 October 2019.

negotiations. This failure to reach out and build trusted relations in Parliament cost the May government dearly when it came to ratification of the Withdrawal Agreement. Despite very delicate Parliamentary arithmetic, the government made no attempt to forge alliances within Westminster. Discussions in Parliament after the first round of negotiations in July 2017 revealed that the Brexit Secretary had not thought about a mechanism for keeping Parliament's EU Select Committee briefed.⁵⁴ The government failed to publish impact assessments on the impact of different Brexit scenarios and reports by Parliament's researchers relied on the EU for information about what was happening in the negotiating room.⁵⁵

2. The EU Strategy: Clarity and Unity

Given the manifold weaknesses in the UK strategy, it wasn't hard for the EU's negotiating strategy to look impressive. The EU was clear about its negotiating objectives, which focused on maintaining the integrity of the EU project and supporting Ireland in its determination to ensure there would be no hard border. Throughout the negotiations the EU negotiators appeared to be one step ahead, with the UK largely reacting to EU proposals.

Although the European Commission faced an unenviable task of negotiating Brexit on behalf of 27 Member States, it had decades of experience in leading international trade negotiations on behalf of the EU and using its domestic constraints as a source of leverage.⁵⁶ In the Brexit negotiations, the EU managed to preserve unity, showing few of the internal tensions that were so apparent across the Channel. Michel Barnier was a former French Minister who had also served as European Commissioner for Internal Market and Services. He worked hard to keep the leaders of the EU Member States aligned and briefed and quickly earned their trust and respect. Unlike their

⁵⁴ Lang, McGuinness and Miller (n 48) 6.

⁵⁵ Sylvia de Mars, 'Brexit: Negotiations Update (March-June 2018),' Research Briefings Parliament, June 20, 2018, <<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8339>> accessed 15 October 2019; Committee of Public Accounts, 'Exiting the European Union Eighteenth Report of Session 2017–19,' Publications Parliament, February 7, 2018, <<https://publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/467/467.pdf>> accessed 15 October 2019.

⁵⁶ Sophie Meunier and Kalypso Nicolaïdis, 'The European Union as a Conflicted Trade Power' (2006) 13 *Journal of European Public Policy* 906.

UK counterparts, Barnier's team was delegated substantial autonomy to negotiate with the UK and his team of negotiators worked effectively together and with their political principals.⁵⁷

Although civil servants on the UK and EU negotiating teams formed a productive working relationship, relations at the political level were tense and became strained, hampering progress. At one stage during the formal negotiations, David Davis and his counterpart Michel Barnier spent only four hours in face-to-face talks during a six-month period.⁵⁸

3. *The Joint Report (December 2017)*

After six months of intense negotiations from June to December 2017, the UK and EU reached preliminary agreement on phase one of the negotiations, issuing a Joint Report in December 2017.⁵⁹ On citizens' rights, the parties reached a 'common understanding' on how to provide reciprocal protection, while on the financial settlement they agreed on a methodology for calculating the UK's financial obligations.

The most challenging and fraught negotiations were over the UK's border with Ireland. The EU was firm that there would be no hard border on the island of Ireland, and the UK government agreed, but this was hard to square with the UK government's determination to leave the EU custom's union and single market, which implied new border checks. In August 2017 the UK had tabled a proposal for a UK-EU customs partnership arrangement under

⁵⁷ Jennifer Rankin, 'Why the UK's Brexit Negotiation Tactics Drew a Blank' *The Guardian* (31 October 2018) <<https://www.theguardian.com/politics/2018/oct/31/why-the-uks-brexite-negotiation-tactics-drew-a-blank>> accessed 15 October 2019.

⁵⁸ Alex Barker, George Parker and Guy Chazan, 'David Davis Has Spent Just 4 Hours in Talks with Michel Barnier This Year' *FT.com* (29 June 2018) <<https://www.ft.com/content/9e3aacfo-7b9c-11e8-bc55-50daf1b720d>> accessed 15 October 2019.

⁵⁹ Negotiators of the EU and the UK Government, 'Joint Report from the Negotiators of the European Union and the United Kingdom Government on Progress during Phase 1 of the Negotiations under Art. 50 TEU on the United Kingdom's Orderly Withdrawal from the European Union' (2017) <https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf> accessed 15 October 2019.

which both parties could have different external tariffs and rules of origin and yet have frictionless trade between them.⁶⁰ Under the UK's proposal, the UK would essentially implement two parallel systems at its borders. For goods coming into the UK that were destined for the EU, the UK would act on behalf of the EU, levying EU tariffs and checking products met EU standards. For goods destined for sale in the UK, it would levy UK tariffs and check products met UK standards. The UK government acknowledged this would need a 'robust enforcement mechanism' and the tracking of goods to ensure that they reached their intended destination.⁶¹ The UK negotiators also proposed measures to streamline customs procedures, the use of technology to enable any checks to be carried out virtually, and continued regulatory alignment in agricultural products.⁶²

Unsurprisingly, the UK's complex proposals were met with scepticism by the EU and few were persuaded that they were viable. As Ireland's Foreign Minister Simon Coveney stated,

What we do not want to pretend is that we can solve the problems of the border on the island of Ireland through technical solutions like cameras and pre-registration and so on. That is not going to work.⁶³

Unable to agree on a detailed solution on the UK-Ireland border, the UK and EU agreed on a set of overarching principles that focused on upholding the Good Friday Agreement and avoiding any physical infrastructure at the border, as well as preserving the integrity of the UK's internal market by ensuring that there would be no customs border between Northern Ireland

⁶⁰ HM Government, 'Future Customs Arrangements' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/637748/Future_customs_arrangements_-_a_future_partnership_paper.pdf> accessed 15 October 2019.

⁶¹ Ibid.

⁶² Ibid. See also HM Government, 'Northern Ireland and Ireland Position Paper' (2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf> accessed 15 October 2019.

⁶³ 'The EU Already Has the Technology to Enforce an Electronic Border' *The Times* (20 August 2017) <<https://www.thetimes.co.uk/article/the-eu-already-has-the-technology-to-enforce-an-electronic-border-h8onkfr22>> accessed 15 October 2019.

and the rest of the UK. The Joint Report committed the parties to upholding these principles 'in all circumstances'.⁶⁴ These principles were particularly contentious for the Eurosceptic wing of the Conservative Party as upholding them implied maintaining a very close economic relationship with the EU, which threatened to undermine UK sovereignty in external trade policy.

V. PHASE II OF FORMAL NEGOTIATIONS (MARCH 2018 – NOVEMBER 2018)

Following the end of phase one and the publication of the Joint Report, the EU agreed that 'sufficient progress' had been made for the negotiations to move to the second phase, which included negotiating a framework for future trade relations between the UK and EU. Donald Tusk, President of the European Council, warned that agreeing to a deal by the March 2019 deadline would be 'dramatically difficult' and that the Phase II would be 'more demanding, more challenging than the first phase'.⁶⁵

1. *The EU Holds the Pen*

Once again, the EU played a decisive role, shaping the trajectory and outcome of the negotiations. The European Commission proposed detailed negotiating guidelines for phase two of the negotiations, which were published by the European Council as negotiating directives in January 2018.⁶⁶ These asked the EU team to negotiate a 'standstill' transition period where the UK would be outside the EU and no longer participate in or nominate or elect members of the EU institutions, but would be bound by

⁶⁴ Negotiators of the EU and the UK Government (n 59) 8.

⁶⁵ John Ashmore, 'Donald Tusk Warns That Phase Two of Brexit Talks Will Be "More Challenging" than the First' (PoliticsHome, 16 December 2017) <<https://www.politicshome.com/news/uk/foreign-affairs/brexit/news/91514/donald-tusk-warns-phase-two-brexit-talks-will-be-%E2%80%98more>> accessed 15 October 2019.

⁶⁶ Council of the European Union, 'ANNEX to the COUNCIL DECISION Supplementing the Council Decision of 22 May 2017 Authorising the Opening of the Negotiations with the United Kingdom of Great Britain and Northern Ireland for an Agreement Setting out the Arrangements for Its Withdrawal from the European Union' <<https://www.consilium.europa.eu/media/32504/xt21004-ado1re02en18.pdf>> accessed 15 October 2019.

the whole of the EU acquis. In line with Article 50, agreement on a future relationship would only be finalised and concluded once the UK had left the EU, although the EU would be ready to engage in preliminary and preparatory discussions with the aim of identifying an overall understanding of the framework for the future relationship. This was in direct opposition to the UK's proposal to enter into substantive negotiations on a future trade agreement during phase two.⁶⁷

The EU negotiating directives were drafted to be very specific and to provide little room for negotiation. In a move to gain the upper hand in the negotiations, the EU codified its detailed negotiating directives, as well as the principles that had been agreed in the Joint Report, and tabled them in the form of a draft legal text.⁶⁸ The draft text was circulated by the European Commission for internal discussion by its Member States before being forwarded to the UK.⁶⁹ This text was then used as the basis for the negotiations: the EU negotiators were holding the pen.

The UK accepted major aspects of the EU's proposals for the transition period and, in doing so, agreed to provisions that crossed many of the red lines Theresa May had set out in 2016. Although the UK would have technically left the EU, during the 21-month transition period divergence from EU law would not be possible and the ECJ would continue to be a binding source of authority in the UK, the UK would remain in the EU's customs union and

⁶⁷ John Curtis et al, 'Brexit: "Sufficient Progress" to Move to Phase 2' (2017) <<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8183>> accessed 15 October 2019.

⁶⁸ 'European Commission Draft Withdrawal Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community' <https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf> accessed 15 October 2019.

⁶⁹ European Commission, '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' <https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf> accessed 15 October 2019.

adhere to its trade policies, and free movement of people would continue.⁷⁰ The UK agreed to stay in the Common Fisheries Policy with no formal voting rights over fishing quotas during the transition period, although it had the right to be consulted.⁷¹ The UK did manage to secure agreement that it could negotiate and sign, although not implement, trade deals with third countries during the transition period.

2. *UK Finally Clarifies Its Negotiating Objectives – or Does It?*

Negotiations continued at the technical level in a wide range of areas such as protection of data, police and judicial cooperation, and dispute settlement. But negotiations about how to operationalise the agreed principles with regards to Northern Ireland and on the future of UK-EU relations were painfully slow. The EU proposed a 'backstop' in the draft Withdrawal Agreement of March 2018 that would uphold the Good Friday Agreement by creating a customs and regulatory border down the Irish Sea, something to which Theresa May declared that 'no United Kingdom prime minister could ever agree to' as it would undermine the UK's own internal market and territorial integrity.⁷² Subsequent amendments to the UK Customs Bill in

⁷⁰ Sylvia de Mars, 'Brexit: Council Directives for Negotiations on Transition,' March 9, 2018, <<https://researchbriefings.Parliament.uk/ResearchBriefing/Summary/CBP-8234#fullreport>> accessed 15 October 2019 and Vaughne Miller et al, 'Brexit: The Draft Withdrawal Agreement,' March 26, 2018, <<https://researchbriefings.Parliament.uk/ResearchBriefing/Summary/CBP-8269#fullreport>> accessed 15 October 2019.

⁷¹ Kait Bolongaro, 'FAQ: Behind the Brexit Fisheries Transition Deal' (*Politico*, 21 March 2018) <<https://www.politico.eu/article/uk-government-faq-behind-the-brexit-fisheries-transition-deal/>> accessed 15 October 2019 and Department for Exiting the European Union HM Government, 'Draft Text For Discussion: Implementation Period' 7 <<https://www.gov.uk/government/publications/draft-text-for-discussion-implementation-period>> accessed 15 October 2019.

⁷² 'Prime Minister's Oral Answers to Questions, 28 February 2018' (2018), <<https://hansard.Parliament.uk/Commons/2018-02-28/debates/E91093BE-192E-4E01-ABCE-3CEB6973074B/PrimeMinister>> accessed 15 October 2019.

July 2018, proposed by Eurosceptic Conservative MPs, ruled out a customs border in the Irish Sea, forcing its renegotiation.⁷³

Progress on future UK-EU relations continued to be impeded by on-going divisions within the UK cabinet on the nature of post-Brexit relations. This caused frustration among the EU Member States, with European leaders calling on the UK for 'further clarity' and 'realistic and workable proposals'.⁷⁴ Finally, in July 2018, only nine months before the UK was due to leave the EU, Theresa May held a meeting to try and unify her cabinet around a single vision for UK-EU relations. After fraught discussions, the cabinet agreed a position, which was then set out in a White Paper.⁷⁵ The White Paper set out a vision of future relations based on a free trade area for goods, with the phased introduction of a Facilitated Customs Arrangement and a 'common rulebook' with the EU for goods. The Facilitated Customs Arrangement was based on the UK's previous proposal (tabled in August 2017 and which the EU had already roundly rejected) where the UK would administer two separate arrangements at its borders. With regard to common rules, the UK proposed a binding treaty commitment to continued harmonisation with EU rules on agri-food (but not services); continued participation in EU regulatory institutions; a common rulebook on state aid; cooperation on competition measures; and a 'non-regression' provision in areas including labour and environment. However, the UK was adamant that freedom of movement would end. The UK position was premised on being able to opt in to some aspects of the EU single market and out of other aspects, a position that was in direct contradiction to the EU's own negotiating mandate.

Although the cabinet collectively signed up to the new position, two days later David Davis resigned, stating that 'the current trend of policy and

⁷³ BBC, 'Leo Varadkar: "no Cause for Panic" on UK Backstop Position' (BBC, 17 July 2018) <<https://www.bbc.com/news/uk-northern-ireland-44857742>> accessed 15 October 2019.

⁷⁴ European Council, 'European Council (Art. 50) Meeting (29 June 2018) - Conclusions' (2018) Press Release <<https://www.consilium.europa.eu/media/35966/29-euco-art50-conclusions-en.pdf>> accessed 15 October 2019.

⁷⁵ HM Government White Paper, 'The Future Relationship between the United Kingdom and the European Union' <<https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>> accessed 15 October 2019.

tactics' was making it look 'less and less likely' that the UK would leave the EU customs union and the single market.⁷⁶ His resignation was followed by that of Boris Johnson and eight other ministers and senior officials who supported a 'hard Brexit' agreement. Outside of cabinet, the White Paper was criticised by MPs within the Conservative Party, particularly members of the Eurosceptic European Research Group, for ceding too much sovereignty. It was also criticised by opposition parties. The UK Labour Party argued that it did not resolve the problems of the Northern Ireland border and that the Facilitated Customs Arrangement would be a 'bureaucratic nightmare, unworkable, and costly for business' and reliant on 'technology that does not currently exist'.⁷⁷

3. The Withdrawal Agreement and Political Declaration (November 2018)

Although the UK's position was unpopular at home, it nonetheless formed the basis of UK proposals to the EU. Theresa May pitched the UK's proposals at an informal meeting of EU leaders in Salzburg in September 2018, but she proved to be a poor diplomat. She insisted that the UK proposals, as set out in the White Paper, were the only viable option for future relations and appeared to be trying to impose them on EU leaders, a move that only served to antagonise. Donald Tusk, European Council President, declared that while there were 'positive elements' in the UK's proposals 'the suggested framework for economic cooperation *will not work*. Not least because it risks undermining the single market [emphasis added]'.⁷⁸ The EU's flat rejection of the UK's vision for the future partnership reportedly 'stunned' the UK government, suggesting that the UK had a poor

⁷⁶ David Davis and Theresa May, 'Brexit: David Davis' Resignation Letter and May's Reply in Full' (9 July 2018) <<https://www.bbc.com/news/uk-politics-44761416>> accessed 15 October 2019.

⁷⁷ Keir Starmer, 'EU: Future Relationship White Paper' (2018), <<https://hansard.parliament.uk/commons/2018-07-12/debates/5C45D798-0286-4298-BBDE-44C860396ECD/EUFutureRelationshipWhitePaper>> accessed 15 October 2019.

⁷⁸ Donald Tusk, 'Remarks by President Donald Tusk after the Salzburg Informal Summit' (20 September 2018) <<https://www.consilium.europa.eu/en/press/press-releases/2018/09/20/remarks-by-president-donald-tusk-after-the-salzburg-informal-summit/>> accessed 15 October 2019.

understanding of their negotiation counterparts. Theresa May accused the European leaders of showing a lack of respect and declared negotiations to be at an 'impasse'.⁷⁹

Eventually, after a series of missed deadlines, the UK and EU reached agreement on 14 November 2018 on a 585-page Withdrawal Agreement that set out the 'divorce terms' and an accompanying 26-page Political Declaration which outlined the future UK-EU relationship.⁸⁰ Several areas of the Withdrawal Agreement remained largely unchanged from the March 2018 draft agreement, including on citizens' rights.⁸¹ New features included a review clause that provided for the extension of the transition period if agreement on future relations had not been reached within the initial 21-months. It also provided for the use of independent arbitration to resolve disputes during the transition period, although matters of EU law would be referred to the ECJ.

The Withdrawal Agreement included a lengthy Protocol on Northern Ireland, which came to be known as the 'backstop', designed to prevent the return of a hard border on the island of Ireland. This was ensured through a hybrid of two mechanisms. It had UK-wide elements, providing for the creation of a single customs territory between the EU and UK in the event that the UK and EU failed to reach an agreement on future relations by the

⁷⁹ Arthur Snell, 'Salzburg Brexit Failure Stems from Insular UK Government' (Politico.eu, 23 September 2018) <<https://www.politico.eu/article/brexit-salzburg-theresa-may-failure-stems-from-inward-looking-uk-government/>> accessed 15 October 2019.

⁸⁰ European Council, 'Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as Endorsed by Leaders at a Special Meeting of the European Council on 25 November 2018' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf> accessed 15 October 2019.

⁸¹ House of Commons Exiting the European Union Committee, 'The Progress of the UK's Negotiations on EU Withdrawal- The Withdrawal Agreement and Political Declaration' (House of Commons, December 9, 2018), <<https://publications.parliament.uk/pa/cm201719/cmselect/cmexeu/1778/1778.pdf>> accessed 15 October 2019.

end of the transition period. It also had elements that only pertained to Northern Ireland, committing the region to continued harmonisation with a series of EU technical rules and regulations, while the rest of the UK could diverge from them.⁸²

Reflecting continuing disagreement on the nature of future UK-EU relations, the Political Declaration was not the substantive and detailed document that the UK and EU negotiators had promised. While expressing a high level of ambition about the nature and scope of the future relationship, the document only set out a series of options for the UK's future trade with the EU and established a framework for ongoing conversations across a range of areas.⁸³ In effect, the UK and EU agreed to kick the can down the road, leaving the tough decisions over the nature of future relations for negotiation during the transition period, after the UK had left the EU.

VI. THERESA MAY FAILS TO WIN SUPPORT AT HOME (DECEMBER 2018 – JUNE 2019)

With a deal agreed between the UK and EU, it needed to be ratified in their respective parliaments. Prime Minister Theresa May said the deal 'delivered for the British people' and set the UK 'on course for a prosperous future'.⁸⁴ Yet the deal she had negotiated met strong opposition in the UK Parliament, and the UK was catapulted into a period of political crisis. As the two-year deadline imposed by Article 50 drew near, there was mounting concern that the UK might 'crash out' of the EU with no deal in place. Fully aware of the

⁸² European Council, 'Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as Endorsed by Leaders at a Special Meeting of the European Council on 25 November 2018' (n 80) at 301.

⁸³ 'Political Declaration Setting out the Framework for the Future Relationship between the European Union and the United Kingdom' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759021/25_November_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom_.pdf> accessed 15 October 2019.

⁸⁴ Laurence Peter and Robbie Hawkins, 'Reaction as EU Signs off UK's Withdrawal' (BBC, 25 November 2018) <<https://www.bbc.com/news/live/uk-politics-46329073>> accessed 15 October 2019.

Parliamentary arithmetic in the UK and the possibility that the Withdrawal Deal might be defeated in the UK Parliament, Jean-Claude Juncker, President of the European Commission, cautioned that the Withdrawal Deal was the 'best' and 'only possible' deal.⁸⁵ He warned the UK Parliament that the EU was not interested in renegotiating the deal, even if the UK Parliament wanted amendments.

1. The Deal Is Rebuffed by the UK Parliament (1st Attempt)

The role of the UK Parliament in the Brexit ratification process had been strengthened by an amendment to the EU Withdrawal Act that had passed in 2017, which required any Brexit deal to be enacted by statute rather than implemented by government order.⁸⁶ This ensured that the UK Parliament would be given a final 'meaningful' vote on the Withdrawal Agreement.

It rapidly became clear that the Withdrawal Agreement and Political Declaration did not have the backing of a majority of MPs in the UK Parliament. Given the delicate Parliamentary arithmetic, Theresa May needed almost all Conservative and DUP MPs on board. Yet Eurosceptic Conservative MPs strongly opposed the wording of the Northern Ireland backstop, arguing that it could permanently 'trap' the UK into a customs union with the EU. The backstop also crossed a red line for the DUP as it implied regulatory divergence and checks between Northern Ireland and the rest of the UK. At the other end of the political spectrum, pro-European Conservatives disliked the Withdrawal Agreement as it failed to ensure frictionless trade with the EU, while the Labour Party and smaller opposition parties also opposed the Agreement.

Despite the veto power that the UK Parliament had over the negotiations, the government had not invested in cultivating an effective working relationship with MPs. MPs were deeply frustrated at the government's reticence to share information. Only a few days before the meaningful vote was scheduled, MPs found the government to be in contempt of Parliament for the first time in the UK's history. The vote was prompted by the

⁸⁵ Ibid.

⁸⁶ European Union (Withdrawal) Act 2018.

government's refusal to publish all of the legal advice that it had received on the Withdrawal Agreement, despite a legally binding Parliamentary vote passed in November 2018 that required it to do so.⁸⁷ The DUP voted against the government, exposing the fragility of the government's working majority.

In light of the strong parliamentary opposition, Theresa May withdrew the 'meaningful vote' on the Withdrawal Agreement on 10 December 2018, one day before it was scheduled. She announced that the vote would be held in January 2019 and she would, meanwhile, seek further assurances from the EU about the Northern Ireland backstop.⁸⁸ As before, her strategy focused on winning over members of the European Research Group.

Despite EU leaders issuing a formal statement at the UK's request, it fell short of the legal commitment Theresa May had hoped for and failed to reassure Eurosceptic MPs.⁸⁹ The first meaningful vote on the Withdrawal Agreement took place in mid-January 2019 and the government suffered the largest defeat of any government in modern Parliamentary history, losing by 230 votes.⁹⁰ This prompted the Labour party to table a motion of no confidence, which the government narrowly won.⁹¹

⁸⁷ Benjamin Kentish, 'Theresa May Government Found in Contempt of Parliament over Failure to Publish Full Brexit Legal Advice' *The Independent* (4 December 2018) <<https://www.independent.co.uk/news/uk/politics/contempt-Parliament-vote-theresa-may-brexit-legal-advice-government-geoffrey-cox-a8667086.html>> accessed 15 October 2019.

⁸⁸ Theresa May, 'PM's Statement on Exiting the European Union: 10 December 2018' (2018) <<https://www.gov.uk/government/speeches/pms-statement-on-exiting-the-european-union-10-december-2018>> accessed 15 October 2019.

⁸⁹ European Council, 'Special Meeting of the European Council (Art. 50) (13 December 2018)- Conclusions' (2018) Press Release <<https://www.consilium.europa.eu/media/37508/13-euco-art-50-conclusions-en.pdf>> accessed 15 October 2019.

⁹⁰ Heather Stewart, 'May Suffers Heaviest Parliamentary Defeat of a British PM in the Democratic Era' *The Guardian* (16 January 2019) <<https://www.theguardian.com/politics/2019/jan/15/theresa-may-loses-brexit-deal-vote-by-majority-of-230>> accessed 15 October 2019.

⁹¹ Heather Stewart, Jessica Elgot and Peter Walker, 'Theresa May Survives Vote, but Britain Remains in Brexit Deadlock' *The Guardian* (17 January 2019) <<https://www.theguardian.com/politics/2019/jan/16/mays-government-survives-no-confidence-vote-after-brexit-defeat>> accessed 15 October 2019.

2. *The Deal Is Rebuffed by the UK Parliament (2nd Attempt)*

Following the government's resounding defeat, Theresa May promised to change approach and be 'more flexible, open and inclusive' in engaging with Parliament and she held her first proper discussions with opposition parties. Looking to win over Labour MPs, she promised to 'embed the strongest possible protections on workers' rights and the environment'.⁹² The Labour Party tabled specific changes to the Political Declaration that it wanted to see enshrined in law to secure its support for a deal. These included a permanent and comprehensive UK-wide customs union; close alignment with the EU single market and dynamic alignment on rights and protections so that UK standards keep pace with evolving standards across Europe; clear commitments on participation in EU agencies and funding programmes, including in areas such as the environment, education, and industrial regulation; and unambiguous agreements on the detail of future security arrangements, including access to the European Arrest Warrant and vital shared databases.⁹³

The proposals from the Labour Party may well have been amenable to the EU as they did not require the renegotiation of the Withdrawal Agreement, and it is conceivable that a revised Political Declaration would have won a majority in the UK Parliament. Yet accepting the Labour Party's proposals would have alienated Eurosceptic MPs and risked splitting the Conservative Party, a move that Theresa May was still not prepared to make. Instead the prime minister adopted a strategy of 'running the clock down' hoping that, as the March 29 deadline for leaving the EU approached and the risk of leaving without a deal increased, more MPs would support the Withdrawal Agreement.

⁹² Theresa May, 'Statement under Section 13(4) of the European Union (Withdrawal) Act 2018: Written Statement- HCWS1258' <<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-01-21/HCWS1258/>> accessed 15 October 2019.

⁹³ Jeremy Corbyn, 'Jeremy Corbyn's Letter to Theresa May Spelling out Brexit Demands' (7 February 2019) <<https://www.politicshome.com/news/uk/political-parties/labour-party/news/labour-party/101667/read-full-jeremy-corbyns-letter>> accessed 15 October 2019.

Following more talks in Brussels in early March, Theresa May secured a package of interpretations and clarifications on the Withdrawal Agreement and Political Declaration aimed at placating the Eurosceptic wing of her party.⁹⁴ Yet these changes did not go far enough to secure a majority in Parliament, and the UK government lost a second meaningful vote on 12 March 2019 by 149 votes.⁹⁵ While a smaller margin than the previous meaningful vote, it was still a historic loss. With only two weeks to go before the UK was due to leave the EU, the government's negotiating strategy was in tatters, and the UK appeared to be without a functioning government. 'This is a circus that is beyond comprehension' said one senior EU diplomat working on Brexit. Another senior Brussels figure involved in talks likened it to 'dealing with a failed state'.⁹⁶

With the UK government failing to show leadership, backbench MPs tried to exert control over the Brexit process, passing a parliamentary motion to reject a 'no deal' scenario.⁹⁷ Theresa May sought to bring her deal back for a third time but, in a surprise turn of events, she was blocked by the Speaker of the House of Commons, on the basis of a 400-year old guide to parliamentary procedure, which prevented the government bringing back a motion that was 'fundamentally the same' during the same parliamentary session.⁹⁸

⁹⁴ John Curtis and Sylvia de Mars, 'The "Strasbourg Package"' (House of Commons 2019) Commons Briefing Paper <<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8525#fullreport>> accessed 15 October 2019.

⁹⁵ 'Government's Brexit Deal Defeated Again in "Meaningful Vote"' (*www.parliament.uk*, 12 March 2019) <<https://www.parliament.uk/business/news/2019/march/key-brexit-vote-as-meaningful-vote-returns-to-the-commons/>> accessed 15 October 2019.

⁹⁶ Alex Barker, 'EU Frustration with UK Rises as Brexit Talks near Final Hours' *Financial Times* (Brussels, 20 March 2019) <<https://www.ft.com/content/80bcd6a-4b19-11e9-bbc9-6917dce3dc62>> accessed 15 October 2019.

⁹⁷ UK Parliament, 'Government's Brexit Deal Defeated Again in "Meaningful Vote"' (*www.parliament.uk*, 12 March 2019) <<https://www.parliament.uk/business/news/2019/march/key-brexit-vote-as-meaningful-vote-returns-to-the-commons/>> accessed 15 October 2019.

⁹⁸ Jessica Elgot, 'Brexit: John Bercow Rules out Third Meaningful Vote on Same Deal' *The Guardian* (18 March 2019) <<https://www.theguardian.com/politics/2019/mar/18/brexit-john-bercow-rules-out-third-meaningful-vote-on-same-deal>> accessed 15 October 2019.

3. *The UK Requests Article 50 Extension*

With the UK facing what was widely described as a constitutional crisis, Theresa May wrote to Donald Tusk, President of the European Council on 20 March 2019, to ask for an extension to Article 50 until 30 June 2019. She argued that this would provide sufficient time for her to attain parliamentary support for the Withdrawal Agreement.⁹⁹

The EU agreed to extend the Article 50 deadline but rejected the UK's proposed extension date. Following intense internal negotiations and reported tensions between President Merkel of Germany and President Macron of France, the EU leaders offered a shorter extension period until 22 May 2019, provided that the Withdrawal Agreement 'is approved by the House of Commons next week'.¹⁰⁰ In the event that the Withdrawal Agreement was not approved, the European Council offered an even shorter extension until 12 April 2019 stating that it 'expects the United Kingdom to indicate a way forward before this date for consideration by the European Council'.¹⁰¹ The 12 April date was chosen as it was the last point at which the UK, by law, had to state whether it would participate in elections for the European Parliament, scheduled for May 2019.

4. *The Deal Is Rebuffed by the UK Parliament (3rd Attempt) and Theresa May Steps Down*

Having secured a brief respite from the EU, backbench MPs held a series of 'indicative votes' on different Brexit scenarios to try and break the parliamentary deadlock. But, despite two rounds of voting, there was no majority for any of the options tabled.¹⁰² Meanwhile Theresa May, still

⁹⁹ Theresa May, 'Prime Minister's Letter to President of the European Council' (20 March 2019) <<https://www.gov.uk/government/publications/prime-ministers-letter-to-president-tusk-20-march-2019>> accessed 15 October 2019.

¹⁰⁰ European Council, 'European Council (Art. 50) Conclusions, 21 March 2019' (2019) <<https://www.consilium.europa.eu/en/press/press-releases/2019/03/21/european-council-art-50-conclusions-21-march-2019/>> accessed 15 October 2019.

¹⁰¹ Ibid.

¹⁰² UK Parliament, 'House of Commons Holds Second Round of Indicative Votes' (www.parliament.uk, 1 April 2019) <<https://www.parliament.uk/business/news/2019/april/house-of-commons-holds-second-round-of-indicative-votes/>> accessed 15 October 2019.

determined to get the Withdrawal Agreement passed rather than change her strategy for navigating domestic politics, found a way through parliamentary procedure and held a third meaningful vote on 29 March 2019 on the Withdrawal Agreement (without the Political Declaration). But the government was defeated once again.¹⁰³

With neither the UK government nor backbench MPs able to find a way forward, Theresa May placed the UK's fate in the hands of EU leaders, writing once again to Donald Tusk asking for the Article 50 deadline to be extended to 30 June 2019.¹⁰⁴ EU leaders held an emergency summit on 10 April 2019 to consider their response. After an intense debate they offered the UK an extension until 31 October 2019, providing the UK with six months to try and find a resolution to its fraught domestic politics.¹⁰⁵

With the date for UK exit postponed, the UK was legally obliged to participate in the EU elections to select new Members of the European Parliament. Nigel Farage, former UKIP leader, created a new political party, the Brexit Party, which committed to 'making sure that the UK leaves the EU'.¹⁰⁶ The election results revealed the depth of political polarisation in UK society. The staunchly Eurosceptic Brexit Party won with just over 30 per cent of the vote share, giving it 29 of the UK's 73 allocated MEPs, while the staunchly pro-European Liberal Democrats came second, winning twenty per cent of the vote share and 16 MEPs. The two main parties performed very poorly, with the Labour Party winning 14 per cent of the vote share and the Conservative Party only nine per cent, placing it in fifth place behind the

¹⁰³ UK Parliament, 'Commons Votes to Reject Government's EU Withdrawal Agreement' (www.parliament.uk, 29 March 2019) <<https://www.parliament.uk/business/news/2019/march/mps-debate-and-vote-on-the-withdrawal-agreement-with-the-european-union/>> accessed 15 October 2019.

¹⁰⁴ Theresa May, 'Prime Minister's Letter to President Tusk: 5 April 2019' (5 April 2019) <<https://www.gov.uk/government/publications/prime-ministers-letter-to-president-tusk-5-april-2019>> accessed 15 October 2019.

¹⁰⁵ European Council, 'Special Meeting of the European Council (Art. 50) (10 April 2019) – Conclusions' <<https://www.consilium.europa.eu/media/39042/10-euco-art50-conclusions-en.pdf>> accessed 15 October 2019.

¹⁰⁶ See <https://www.thebrexitparty.org/>.

Green Party.¹⁰⁷ This was the Conservative Party's worst ever result in a national election since the party was founded in 1834. Theresa May stepped down as party leader in early June 2019.

VII. CONCLUSION: FAILURE TO BROKER DOMESTIC COALITIONS

The UK government's Brexit negotiating strategy was surprisingly weak given its strong civil service and cadre of experienced diplomats. This article has shown how Theresa May's government embarked on negotiations with other EU countries without a clear set of negotiating objectives; was unable to represent itself as a unified negotiating team; often found itself on the back foot, responding to EU proposals on both sequencing and content; and its UK politicians pursued an ill-judged distributive strategy that did not reflect the nature of the underlying negotiating problem or the UK's relative power position.

I have argued that these weaknesses can be attributed to continued divisions within the UK, and the failure of Theresa May to broker agreement within her cabinet and forge a majority coalition in the UK Parliament. The failure of cabinet to agree a common position resulted in the UK negotiating without a clear set of objectives and this lack of political direction generated tensions within the UK negotiating team. In turn, this enabled the EU to seize the initiative in the negotiations and decisively shape the outcome.

At the level of parliamentary politics, it is striking that Theresa May decided not to try and forge a cross-party coalition for the Brexit negotiations from the outset, despite presiding over a minority government and facing deep splits within her own party. Given these constraints, a cross-party approach to the negotiations provided the best prospects for negotiating a deal that could be ratified. The Labour Party's proposals in February 2019 suggest that relatively minor amendments to the Political Declaration, including a credible commitment to the UK remaining in a customs union and aligning with the EU single market, could have yielded a parliamentary majority. Yet

¹⁰⁷ BBC News, 'European Election 2019: UK Results in Maps and Charts' (BBC News Online, 27 May 2019) <<https://www.bbc.co.uk/news/uk-politics-48403131>> accessed 15 October 2019.

forging a cross-party coalition in Parliament risked splitting the Conservative Party, a move that Theresa May was unwilling to take.

Would a different leader have fared any better? It is tempting to attribute faults in the UK strategy to Theresa May's weaknesses as a politician. Yet even the most astute politician would have faced major challenges in trying to forge a cross-party coalition. The winner-takes-all logic of the UK's electoral system is a formidable barrier to collaboration between the two dominant political parties, even when such collaboration is in the national interest.

AFTER EU MEMBERSHIP: THE UNITED KINGDOM IN TRANSITION

Kenneth A Armstrong*

One of the fundamental risks of a 'No Deal' Brexit would be the loss of a transition period between the United Kingdom's (UK) departure from the European Union (EU) and the entry into force of subsequent agreements establishing the future relationship between the UK and the EU. The idea of a transitional period of legal and economic continuity and certainty was suggested by the UK Government at the outset of the Article 50 TEU negotiations and accepted (with qualifications) by the EU. However, the early consensus around creating a 'safety net' against the parties falling over the cliff-edge of a disorderly departure and a 'bridge' to a future relationship changed after the negotiations were concluded. For those opposed to the negotiated Withdrawal Agreement, the transition period – like the Irish 'backstop' – seemed more like a 'trap' or a 'trampoline' to maintain alignment with the EU post-Brexit. The first aim of this article is to analyse what the UK and the EU sought to achieve in the negotiations by agreeing a transition period. The second aim is to consider whether – in combination with other factors – the outcome of the negotiations on a transition period contributed to the failure of the UK to exit the EU as intended on 29 March 2019. The article concludes that the Article 50 negotiation process underestimates the way in which the momentous nature of a decision to leave the EU unleashes political forces that inhibit a smooth and orderly exit and transition.

Keywords: Brexit, Article 50, transition, No Deal, Irish backstop

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I. INTRODUCTION

The United Kingdom (UK) was scheduled to end its membership of the European Union (EU) on the 29th March 2019. Had things gone to plan, the EU and the UK would subsequently have entered into a 'transition period' operational immediately upon the UK's exit from the Union. Recognising that a future relationship between the Union and the UK would only be negotiated and agreed once the UK had formally left the Union,¹ the intention behind the transition period was to offer certainty and stability to the legal relations between the parties, and between the economic and social actors located in their respective territories. The EU rules and norms applicable during the transition period – and the legal discipline they exert – would produce a form of 'shadow membership' substituting for the past legal discipline of EU membership and for alternative default rules, including the discipline of the World Trade Organisation (WTO) agreements.²

The UK's departure from the Union – and the commencement of the transition period – did not proceed as intended. The UK Government failed to secure parliamentary approval for the texts of the Withdrawal Agreement and Political Declaration negotiated and agreed between the Union and the UK, despite two formal approval votes, and one vote simply on the text of the

¹ See Sacerdoti and Mariani in this issue.

² Kenneth A Armstrong, 'Regulatory Alignment and Divergence After Brexit' (2018) 25 *Journal of European Public Policy* 1099.

Withdrawal Agreement.³ This led the UK Prime Minister to write on two occasions to the President of the European Council, Donald Tusk to request an extension to the period provided for in Article 50 TEU, and to delay 'Brexit' till 31 October 2019.⁴ It also resulted in the resignation of Theresa May as leader of her party and as Prime Minister, throwing more political uncertainty into the divisive politics of Brexit.⁵ On 24 July 2019, Boris Johnson became the new British Prime Minister, vowing that the UK would leave the European Union by 31 October 2019, 'no ifs no buts'.⁶ Failure to secure a revised agreement with the EU by this deadline would see the UK leaving the Union without a deal and without a transition period.

This article pursues two central aims. The first is to comprehend how the EU and the UK understood the role to be played by a transition period in the wider withdrawal process. Through an analysis of the negotiations and the text of what became the provisions on transition within the Withdrawal Agreement, the article pinpoints key ambiguities about the purposes of transition and the management of the Brexit process. Metaphorically, a transition period could be understood as a kind of 'safety net' to prevent the UK simply falling over the 'cliff-edge' once the treaties ceased to apply to the UK as a Member State of the Union. But it could also act as a 'bridge' to a future relationship with the EU, thereby offering a high level of continuity in

³ The term 'formal approval vote' is used here to indicate a vote in terms of Section 13 of the European Union (Withdrawal) Act 2018 which requires Parliament to approve the texts of the Withdrawal Agreement and the Political Declaration prior to its ratification and entry into force. The votes were held on 15 January 2019 and 12 March 2019. The texts of the Withdrawal Agreement and Political Declaration are published at [2019] OJ C66 I. For further discussion see Jones in this issue.

⁴ See further below and in more detail in Fabbrini and Schmidt in this issue.

⁵ For a preliminary analyse of the impact of Brexit on the 'Westminster model' of decision-making see: Gianfranco Baldini, Edoardo Bressanelli and Emanuele Massetti, 'Who Is in Control? Brexit and The Westminster Model' (2018) 89 *The Political Quarterly* 537. For Brexit's wider political implications see: Andrew Gamble, 'Taking Back Control: The Political Implications of Brexit' (2018) 25 *Journal of European Public Policy* 1215.

⁶ 'Boris Johnson's first speech as Prime Minister' (GOV.UK, 24 July 2019) <<https://www.gov.uk/government/speeches/boris-johnsons-first-speech-as-prime-minister-24-july-2019>> accessed 11 October 2019.

legal and economic relations between the parties as a precursor to the negotiation and conclusion of a long-term relationship. As against these benign depictions, the concept of a transition period could also be viewed with suspicion. The creation of a short-term 'shadow membership' might be considered as less of safety net and more as a 'trap' by keeping the UK closely aligned to EU rules and regulations notwithstanding the UK's departure from the Union. When taken together with the provisions relating to the so-called Irish 'backstop', the safety net of a transition period might also act as a 'trampoline' bouncing the UK into a future relationship with the Union based on regulatory alignment with the EU.

The second aim of this article is to follow the common thread which runs through all the contributions to this special issue, namely to understand the interaction of law and politics throughout the Article 50 withdrawal negotiations. More specifically in the context of this article, the intention is to reflect upon whether the pursuit of a transition period contributed to the failure of the negotiations to produce an agreement that could obtain the domestic approval of the UK House of Commons. Although much of the political attention understandably has focused on the contentious nature of the Irish 'backstop', arguably some of the same anxieties about regulatory alignment and democratic control were present in discussions about a transition period.

The article expands on these research aims beginning in Section 2 with an unpacking of the different purposes that transition might serve. Given the problems experienced in delivering Brexit, it is clear that one of the central purposes of transition – to ensure stability and certainty to allow affected interests to plan for a time after EU membership – has effectively been lost. Rather than being able to organise on the basis of the rules and norms applicable during a transition period, 'No Deal' contingencies have had to be put in place including the hasty promulgation of more than five hundred statutory instruments.⁷ Under the premiership of Boris Johnson, No Deal contingency planning intensified. Without it being clear which set of rules and norms would apply – the body of EU law applicable during a defined transition period or a body of amended 'retained EU law' applicable for an

⁷ See 'EU Withdrawal Act 2018 statutory instruments' <<https://www.gov.uk/eu-withdrawal-act-2018-statutory-instruments>> accessed 11 October 2019.

unknown period of time – economic undertakings have made contingency plans based on worst case scenarios.⁸

Section 3 focuses on the outcome of the Article 50 negotiations in respect of the scope and legal effect of a 'standstill' transition period created by the Withdrawal Agreement. While the analysis is focused on giving continuing effect to 'internal' Union law during a period of transition, the analysis also draws attention to the 'external' dimension of Union law, including implications for the European Economic Area Agreement. The evident intention of the parties was to maximise legal certainty through continuity in legal relations between the UK and the EU (and beyond). Yet this aspiration for legal certainty can be seen to be in tension with a domestic politics fearful of being trapped in regulatory alignment with the EU without democratic representation in the institutions of the EU.

Section 4 examines the different terminology deployed by the EU and the UK during the negotiations to describe an interim legal framework following withdrawal. It discloses contrasting assumptions about the phasing of the negotiations and the function of transition. Paradoxically, the UK's failure to build a domestic consensus on where negotiations on a future relationship might lead both made the need for a transition period more urgent but also contributed to the failure to attain approval for a Withdrawal Agreement which would create such a transitional legal framework.

The competence to create a transition period, and the legal and political considerations which shaped the construction of that period are analysed in Section 5. In particular, the temporal limitations on transition illustrate the way in which time shapes Brexit.⁹ Significantly, the need for transition to be time-limited heightens the politics surrounding the so-called Irish 'backstop' that would come into effect at the end of a transition period if neither alternative arrangements nor a subsequent trade and cooperation agreement

⁸ 'Retained EU law' refers to domesticated EU law applicable as of 'exit day' in terms of the European Union (Withdrawal) Act 2018. In a 'No Deal' scenario this body of law comes into legal effect with any consequential amendments made by statutory instruments to correct any 'deficiencies' (section 8 of the Act).

⁹ Kenneth A Armstrong, *Brexit Time - Leaving The EU: Why, How and When?* (Cambridge University Press 2017).

between the EU and the UK was in force. The controversy around the backstop contributes to the problems in bringing transition into effect.

Sections 6 and 7 continue the temporal theme analysing, respectively, the intended duration of the transition period and the implications of extending the Article 50 period in curtailing the duration of transition. As will become clear, the more the UK's membership of the EU is extended, the more doubtful it becomes that transition can serve a useful purpose.

The article concludes that it is entirely possible that if the UK leaves the EU on 31 October as promised by the new UK Prime Minister, it will do so without a transition period coming into effect and with no Withdrawal Agreement in force. While the negotiators of the Withdrawal Agreement may have thought that they were creating a vehicle for economic stability and legal certainty in a post-membership period, they underestimated just how much domestic politics – and the UK itself – is in transition following the 2016 referendum.

II. THE PURPOSES OF TRANSITION

In her letter notifying the President of the European Council of the United Kingdom's intention to withdraw from the Union, Prime Minister May set out a key purpose of transition:¹⁰

Investors, businesses and citizens in both the UK and across the remaining 27 member states – and those from third countries around the world – want to be able to plan. In order to avoid any cliff-edge as we move from our current relationship to our future partnership, people and businesses in both the UK and the EU would benefit from implementation periods to adjust in a smooth and orderly way to new arrangements.

In evidence before the House of Commons Select Committee on Exiting the EU on 25th October 2017, the then Secretary of State for Exiting the EU

¹⁰ 'Prime Minister's letter to Donald Tusk triggering Article 50' (GOV.UK, 29 March 2017) <<https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50>> accessed 11 October 2019.

David Davis identified three main reasons for seeking an 'implementation period':¹¹

- To give business clarity about what they might need to do to prepare for the UK's withdrawal rather than simply having to prepare for a worst-case scenario;
- To give the UK government more time to put in place arrangements for life outside the EU; and
- To give other EU states time to make any consequential adjustments.

The first rationale clearly chimes with the sentiment behind the Prime Minister's Article 50 notification. At its simplest it is the idea that the UK should not fall off a 'cliff-edge' after the expiry of the two-year period laid down in Article 50 TEU for the negotiation of a withdrawal agreement, with a negotiated transition period acting as a kind of 'safety net'. There is, however, an important variant of this rationale which also considers the number of adjustments that businesses, people and states should make as the UK leaves the Union. The purpose of transition could also be to act as a 'bridge' to the future, giving economic, social and political actors a predictable adjustment path along different vectors depending on what the EU and the UK were to agree. The creation of a legal 'standstill' transition based on the continuing application of EU law to the UK for a defined period of time (as explained in Section 3 below) is certainly intended to serve the purpose of affording legal certainty and predictability in the period between withdrawal and the entry into force of any subsequent agreement on the future relationship.

Brexit represents a significant shock to the UK administrative system. The second rationale for transition recognises that after decades of shared administrative capacity with the EU and with other EU states, Brexit requires the expansion of UK domestic administrative and regulatory capacity as responsibilities are 'on-shored' – e.g. state aid control – while in other fields capacity might be reduced as regulatory responsibilities move away from successful UK regulators – e.g. the Medicines and Healthcare

¹¹ House of Commons Exiting the European Union Select Committee, 'The progress of the UK's negotiations on EU withdrawal', (2017-19), second report, HC 372.

products Regulatory Agency ('MHRA') – to the regulatory authorities of EU Member States. A transition period would facilitate this process of adjustment.

However, it is not just the United Kingdom that is in transition. Brexit produces externalities for other EU states – 'Brexternalities'.¹² For example, the national authorities of the EU27 need to put in place and have administrative capacity to manage registrations from UK citizens seeking to reside in their territories after Brexit.¹³ These Brexternalities are different from unintended consequences because they are foreseeable and predicable. Certain Brexternalities are highly visible and political – the creation of an EU external frontier on the island of Ireland and its effects on North-South relations – while others are opaque and relatively depoliticised – the transfer of registrations of licences and authorisations from UK competent authorities in areas like pharmaceuticals and financial services to the regulators of the EU27. Therefore, a third rationale for a transition period is to smooth this process of adjustment for other countries as part of an Article 50 process intended to manage the externalities of a Member State's withdrawal.

Omitted from Davis' list are three other purposes for a transition period. Most obviously, one of the central functions of a transition period is to give the Union and the UK time to negotiate a new future relationship. True, the UK could negotiate a trade arrangement with the Union without a transition period and for some, politically, it would be preferable to do so rather than spending time in a transition period during which the UK would continue to be bound by EU rules. Indeed, this seems to be the philosophy and strategy of the Johnson Government. Nonetheless, opening up trade negotiations following a disorderly departure from the Union is also highly problematic.

A further purpose of transition is to allow the UK to manage its external relationships beyond the EU in ways that mirror the purposes of transition

¹² Kenneth A Armstrong, "'Brexternalities', Article 50 and The UK's Grossly Irresponsible Attempt to Export Its Own Problems' *Prospect Magazine* (28 June 2019) <<https://www.prospectmagazine.co.uk/world/brexternalities-article-50-and-the-uks-grossly-irresponsible-attempt-to-export-its-own-problems>> accessed 11 October 2019.

¹³ See Barnard in this issue.

between the UK and the EU, namely to maintain on an interim basis certain legal relationships on existing terms and to facilitate the negotiation of new international agreements. With the consent of those countries, a transition period facilitates the continuity of legal obligations and enhances legal certainty rather than a disorderly and complex disentangling of them at the moment of withdrawal from the Union.

The final function of a transition period is to avoid customs and regulatory checks on the border between Ireland and Northern Ireland at the moment that the treaties cease to apply to the UK.¹⁴ The transition period would create a default set of rules post-membership to govern economic relations between the Union and the UK to meet the commitments made by the UK and the EU to avoid a hard border on the island of Ireland. However, having created this interim framework, the issue would always be what would happen once the transition period expired. In terms of the Joint Report agreed between the EU and the UK negotiators in December 2017,¹⁵ in the absence of agreed alternative arrangements to avoid a hard border on the island of Ireland, post-transition, the UK would commit to maintaining full alignment with the rules of the customs union and the internal market for the purposes of maintaining North-South cooperation, the all-Ireland economy and the protection of the 1998 Belfast 'Good Friday' Agreement (the so-called 'backstop').¹⁶ The precise extent of that alignment was later agreed in a Protocol on Ireland/Northern Ireland attached to the Withdrawal Agreement (the 'Irish Protocol'). However, a major stumbling block in gaining parliamentary approval for the negotiated Withdrawal Agreement was a fear that a transition period and the backstop were devices to trap the UK in continuing regulatory alignment with the EU rather than temporary adjustment mechanisms. Looking longer term, both the transition period

¹⁴ See further Connolly and Doyle in this issue.

¹⁵ 'Joint Report from the Negotiators of the European Union and the United Kingdom Government on progress during phase one of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union – TF50' (GOV.UK, 2017) 19 <<https://www.gov.uk/government/publications/joint-report-on-progress-during-phase-1-of-negotiations-under-article-50-teu-on-the-uks-orderly-withdrawal-from-the-eu>> accessed 11 October 2019.

¹⁶ Ibid. paras 49-50. For detailed analysis of the backstop see Connolly and Doyle in this issue.

and the backstop could also be understood as serving the purpose of bouncing the UK into a future relationship of close regulatory alignment with the EU.

By unpacking these different understandings of the purposes of transition it becomes evident that the different metaphors of 'safety net', 'bridge', 'trap' and 'trampoline' highlight a deep tension between the uncertain and contested politics of Brexit, and the aspiration for legal certainty and continuity of economic and social relations post-membership.

III. THE SCOPE AND LEGAL EFFECTS OF A TRANSITION PERIOD

In this section the analysis focuses on how the concept of a transition period was turned into legal text during the negotiations. In the December 2017 Joint Report on the progress of the negotiations, the UK signalled its desire that there be 'an agreement as early as possible in 2018 on transitional arrangements'.¹⁷ A developed version of the transition period was already in place in the February 2018 draft text of the Withdrawal Agreement.¹⁸ This was further refined during the negotiations to produce the text contained in the Withdrawal Agreement (WA) but the principle of a 'standstill' transition based on the continuing application of Union law to the UK for a defined period post-membership remained unchanged from the February draft.

The scope of application of the transition period is established in Article 127 WA. According to this provision, 'Union law' shall remain applicable to the UK during the transition period. 'Union law' is defined in Article 2 WA as:

- the Treaty on European Union ('TEU'), the Treaty on the Functioning of the European Union ('TFEU') and the Treaty establishing the European Atomic Energy Community ('Euratom Treaty'), as amended or supplemented, as well as the Treaties of Accession and the Charter of Fundamental Rights of the European Union, together referred to as 'the Treaties';
- the general principles of the Union's law;

¹⁷ Above n 15, para 96.

¹⁸ European Commission, Draft Withdrawal Agreement – TF (2018) 33 (28 February 2018) <https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf> accessed 11 October 2019.

- the acts adopted by the institutions, bodies, offices or agencies of the Union;
- the international agreements to which the Union is party and the international agreements concluded by the Member States acting on behalf of the Union;
- the agreements between Member States entered into in their capacity as Member States of the Union;
- acts of the Representatives of the Governments of the Member States meeting within the European Council or the Council of the European Union ('Council').

The following analysis is divided into two sub-sections. The first sub-section deals with the scope of application and effects of 'internal' primary and secondary Union law adopted before and after the UK's withdrawal from the Union. The second sub-section focuses on 'external' Union law in the form of international agreements, with specific attention being given to the continuing application of the European Economic Area Agreement during the transition period.

1. Creating a Legal 'Stand-Still' – the Continuing Application of Union Internal Law

With the exception of provisions of Union law that were not binding on the UK during its membership – e.g. relevant provisions on Schengen and the area of freedom, security and justice; enhanced cooperation measures such as the law applicable on divorce – or which would be inappropriate post-membership – the provisions of the Charter of Fundamental Rights on 'Citizenship of the Union' – primary and secondary EU law would continue to apply to the UK during the transition period as if the UK were a Member State. As made clear in Article 6 WA, the definition of 'Union law' includes, unless otherwise provided by the Agreement, Union law – including as amended or replaced – 'as applicable on the last day of the transition period'. Therefore, instruments adopted after withdrawal would also be applicable to the United Kingdom.

The significance of Article 6 WA becomes clearer when read in conjunction with Article 7 WA. While the UK would remain a Member State for the

purposes of the continued application of Union law, under Article 7 WA it loses its representation in the institutions, bodies, offices and agencies of the Union. Article 128 WA makes clear that Article 7 WA applies to the transition period. In other words, the UK could not participate in the decision-making structures that would promulgate new rules during the transition period. In terms of the administration and implementation of Union law, although Article 7 WA excludes the UK from participating in the work of expert committees following its withdrawal, Article 128(5) WA derogates from Article 7 WA during the transition period, by allowing its participation at the invitation of the Union where the discussions of expert groups and committees concerns acts addressed to natural or legal persons residing or established in the UK or where the presence of the UK is necessary and in the interests of the Union for the effective implementation of Union law. However, and of some significance, UK regulatory authorities like the MHRA will not be able to act as a 'leading authority' carrying out risk assessments whether on behalf of the European Medicines Agency for the purposes of the centralised authorisation of medicines, or at the level of the Member States for the purposes of decentralised authorisation of medicines (see Article 128(6) WA). This is a crucial and significant departure from the 'standstill' approach with the effect that the MHRA loses an important part of its regulatory business and the fee income associated with it.

The body of law applicable to the UK during transition is not, however, reducible to the instruments that make up the Union *acquis*. These instruments are embedded within a legal order that not only claims its autonomy from national law but also imposes its own demands in terms of the effects which this body of law can produce within the domestic legal order. In their interactions with this legal order, the legal systems of the Member States, including the United Kingdom, have accepted and mediated the legal discipline deriving from EU law in different ways.¹⁹ Nonetheless, it is a feature of the primacy principle that it derives from EU law as an 'independent source of law', while the capacity of this body of law to be domestically enforced in national courts through 'direct effect' applies

¹⁹ Bruno De Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in Paul Craig and Gráinne De Búrca (ed), *The Evolution of EU Law* (Oxford University Press 2011).

'independently of the legislation of the Member States'.²⁰ The Withdrawal Agreement seeks to ensure that whatever the UK does in domestic legal terms, the qualities of primacy and direct effect – as they apply to the Agreement and the law it makes applicable to the UK – continue to derive from EU law.

In specifying the 'methods and principles' relating to the effect, implementation and application of the Agreement, Article 4(1) WA states a general proposition:

The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.

The reference to 'provisions of Union law made applicable by this Agreement' would clearly apply to Union law during the transition period and indeed Article 127 WA makes this absolutely explicit. Importantly, Article 4 WA goes on to state in express terms that natural or legal persons may rely on the direct effect of provisions of the Agreement itself as well as those referred to in the Agreement, provided those provisions meet the normal justiciability requirements for direct effect. Article 4(2) requires the UK to ensure compliance with Article 4(1) WA through domestic primary legislation to allow judicial and administrative institutions 'to disapply inconsistent or incompatible domestic provisions'. In this way, the legal – indeed 'constitutional' – discipline produced by primacy and direct effect are to be extended during the transition period to the Union's relationship with a post-membership United Kingdom.

Nonetheless, in a dualist system like the UK there still needs to be a mechanism in national law to allow the Withdrawal Agreement and the law made applicable by it to be deployed domestically.²¹ During its membership, the function of the European Communities Act 1972 was to recognise and give effect to EU law as a source of law available within the domestic legal order. It would have been an option for the UK to retain the 1972 Act and add

²⁰ Respectively *Costa v. ENEL*, Case 6/64, EU:C:1964:66 and *Van Gend en Loos*, Case 26/62, EU:C:1963:1.

²¹ Paul Craig, 'Constitutional Principle, The Rule of Law and Political Reality: The European Union (Withdrawal) Act 2018' (2019) 82 *The Modern Law Review* 319.

the Withdrawal Agreement to the list of instruments to which it gave effect. That would have given continuity post-Brexit not just to the instruments of the Union *acquis* during transition, but also afforded confidence to the Union in terms of the domestic application and enforcement of this body of law. Politically, however, the repeal of the 1972 Act would be a clear signal that the UK was withdrawing from the Union. Therefore, the European Union (Withdrawal) Act 2018 repeals the 1972 Act when its relevant provisions are commenced. It would be the function of a European Union (Withdrawal Agreement) Bill to ensure that the demands of Article 4 WA and Article 127 WA could be met in domestic law. Yet, the failure by Parliament to approve the text of the Withdrawal Agreement meant that the Bill remained unpublished let alone enacted by the time that Theresa May stood down as Prime Minister.

2. International Agreements and the European Economic Area Agreement

The Withdrawal Agreement states that international agreements shall continue to apply during transition as if the UK were still a Member State and still bound by these agreements. This reflects the UK's own wish to avoid disruption in its, and the Union's legal relationships with third countries.²² However, the consent of third countries is required in order to maintain the desired legal effects and in a footnote to Article 129 WA, the Union indicates that it will notify the other parties to international agreements that the UK is to be treated as a Member State for the purposes of the agreements during the transition period. The Union will also notify them if there is an extension to the transition period pursuant to Article 132.

However, the issue for third countries and for the UK itself is whether temporary continuity during transition should simply rollover and produce agreements replicating the terms of existing agreements once transition ends or whether the transition period offers time and the opportunity to negotiate new and different terms.²³ After all, pursuit of 'an independent trade policy' was identified by the UK Government in its 'Chequer's Plan' as delivering on

²² HM Government, 'Technical Note: International Agreements During the Implementation Period' (February 2018).

²³ House of Commons Library, 'UK replacement of the EU's external agreements after Brexit', Briefing Paper No. 8370 (23 May 2019).

the result of the 2016 referendum.²⁴ It also resonated with an aspiration to forge a post-Brexit identity for the UK as 'Global Britain', intended to project an image of the UK as a confident outward-looking actor on the world stage.²⁵ Be that as it may, the uncertainty over whether the UK would approve a Withdrawal Agreement or leave the EU without a deal prompted the UK to announce a set of temporary tariffs and tariff-free access to UK markets without demands for reciprocity.²⁶ This undermined negotiations on rolling over the EU-negotiated trade deals like the Canada-EU Trade Agreement given that on the basis of the 'No Deal' arrangements, Canadian exporters would benefit from tariff-free access in many areas and yet Canada could impose tariffs on UK imports on products.²⁷ This unilateral step by the UK frustrated the intention behind the transitional framework of providing a smooth adjustment path that could – if the UK and its international partners were so minded – produce reciprocal trade liberalisation agreements in a post-transition period. At its simplest, the lack of clarity as to whether there would or would not be a transition period, and whether there would or would not be temporary No Deal rules, meant that non-EU partners like Canada found themselves unable to agree terms to rollover the trade agreements they had concluded with the EU.

In respect of the UK's ability to negotiate new agreements with non-Member States during the transition period, Article 129 WA states:

... during the transition period, the United Kingdom may negotiate, sign and ratify international agreements entered into in its own capacity in the areas

²⁴ HM Government, 'The Future Relationship between the United Kingdom and the European Union', Cm 9593.

²⁵ As a House of Commons Foreign Affairs Select Committee Report notes, the term 'Global Britain' has been deployed frequently as a means of articulating the UK's external identity post-EU membership but without specificity as to what this entails: Foreign Affairs Committee, 'Global Britain', 6th Report (2017-19), HC 780.

²⁶ Department for International Trade, 'MFN and tariff-rate quotas of customs duty on imports if the UK leaves the EU with no deal' (GOV.UK, 29 March 2019) <<https://www.gov.uk/government/publications/temporary-rates-of-customs-duty-on-imports-after-eu-exit/mfn-and-tariff-quota-rates-of-customs-duty-on-imports-if-the-uk-leaves-the-eu-with-no-deal>> accessed 11 October 2019.

²⁷ 'Canadian businesses need more than optimism from Boris Johnson' (CBC News, 24 July 2019) <<https://www.cbc.ca/news/politics/canada-uk-trade-boris-wednesday-1.5221984>> accessed 11 October 2019.

of exclusive competence of the Union, provided those agreements do not enter into force or apply during the transition period, unless so authorised by the Union.

The problem this might create is that third countries may be keen to establish a new economic relationship with the UK during the transition period but the Union may be reluctant to see those new trading terms applied before the UK finalises its future economic relationship with the EU. In this way – and particularly if the UK and EU extend transition because a new trade and economic partnership between the Union and UK is not finalised – the UK and third countries could find their scope to develop new international trade deals to be constrained during the transition period.

It is also worth briefly noting the particular approach which has been taken to the European Economic Area Agreement. While there has been debate over whether the UK should forge a future relationship with the EU based on EFTA membership and the EEA Agreement, some consideration has also been given to using the EEA vehicle as a form of interim or transitional framework for the UK post-Brexit, particularly as an alternative to the transition period established by the Withdrawal Agreement in the event of a No Deal Brexit.²⁸ Nonetheless, and on the assumption that a Withdrawal Agreement would enter into force, the United Kingdom negotiated an agreement with Norway, Liechtenstein and Iceland to shadow the terms of the Withdrawal Agreement.²⁹ This parallel agreement would have particular relevance for the protection of the rights of EEA nationals.³⁰ It would also

²⁸ 'Norway for Now – or Never?' *The Economist* (3 November 2018) <<https://www.economist.com/britain/2018/11/03/norway-for-now-or-never>> accessed 11 October 2019.

²⁹ Draft Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom's membership of the European Union: <https://www.efta.int/sites/default/files/documents/eea/eea/legal-texts/2018_12_20_UK-EEA-EFTA_separation_agreement.pdf> accessed 11 October 2019.

³⁰ Indeed, because of fears of a No Deal Brexit, the UK and participating EFTA states also agreed a separate legal text covering citizens' rights: Draft Agreement on arrangements regarding citizens' rights between Iceland, the Principality of

secure the continuing application of the EEA Agreement and Union acts incorporated into the EEA Agreement during the transition period. Reflecting that the EEA Agreement does not give rise to direct effect and primacy in the same way as Union law,³¹ the parallel provision to Article 4 WA accepts that the obligations created will be given effect within the domestic law of the contracting parties with their judicial and administrative institutions having 'due regard' to the Agreement.³²

All of this leaves open the question of the kind of relationship between the UK and the EFTA states to which transition might lead. The draft agreement anticipates a new future relationship but there is no equivalent of the Political Declaration to guide and so the preamble to the draft agreement simply considers that the parties will:

... take all necessary steps to begin as soon as possible the formal negotiations of one or several agreements governing their future relationship with a view to ensuring that, to the extent possible, those agreements apply from the end of the transition period.

In this way, transition under the draft agreement between the EFTA states and the UK is primarily about creating a safety net rather than a bridge.

IV. A 'TRANSITION' OR 'IMPLEMENTATION' PERIOD

A potent symbol of the politics of Brexit – and the way in which law interacts with that politics – can be found in the different legal terminologies deployed by the EU and the UK throughout the negotiations to refer to the interim period following membership and before a new relationship could begin. While the European Council's Guidelines on the Article 50 negotiations anticipated 'transitional arrangements' and the Union consistently referred

Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union and the EEA Agreement: <https://www.efta.int/sites/default/files/documents/eea/eea/legal-texts/EEA_EFTA-UK_no_deal_CR_agreement.pdf> accessed 11 October 2019.

³¹ Halvard H. Fredriksen and Christian N.K. Franklin, 'Of Pragmatism and Principles: The EEA Agreement 20 Years On' (2015) 52 *Common Market Law Review* 629.

³² Above n 29, Article 4.

to a 'transition period', the UK preferred the terminology of an 'implementation period'. This was not a mere linguistic preference but instead revealed a very different understanding of how the UK would end its membership and start a new post-membership relationship with the EU.

For the EU, negotiations have to follow a sequential path with the phases of negotiations governed by distinct legal provisions in the treaties. The Article 50 negotiations cover the settlement of the terms of withdrawal – including provisions on citizens' rights, the financial settlement, Northern Ireland – and provisions on transition, whereas any agreement on a future relationship is governed by alternative legal bases in the treaty depending on what sort of relationship the parties agreed to pursue. The UK, however, wanted to have parallel tracks to the negotiations in the hope that a future relationship could be settled during the Article 50 negotiations and then 'implemented' once the UK had left the EU.

The EU's approach to the negotiations prevailed. The 'phased approach to negotiations' was made clear in the Guidelines given by the European Council for the conduct of the Article 50 negotiations on behalf of the Union.³³ The legal text of the Withdrawal Agreement refers throughout to a transition period – Part Four of the Agreement is entitled 'Transition' and Article 126 has the heading 'Transition Period' – but as a concession to the UK, the substance of the text of Article 126 states that '[T]here shall be a transition or implementation period ...'; the only other reference to an 'implementation period' being found in the Preamble.

However, the politics that gives rise to a Member State's withdrawal is the same politics that has to determine the shape of the future relationship. A sequenced approach to negotiations and the facility of a transition period as a bridge to a future relationship only really works if a political consensus on the future relationship is either clear at the point of the decision to withdraw or emerges early on in the withdrawal process. In the case of Brexit, its politics has proved to be highly contested. Days before the UK's scheduled departure from the EU on 29 March 2019, the UK Government and MPs were still at loggerheads over what kind of post-membership relationship the

³³ European Council (Art.50) guidelines following the United Kingdom's notification under Article 50 TEU (29 April 2017).

UK really wanted. A series of 'indicative votes' in the House of Commons failed to find a majority for any alternative to the Government's direction of travel as agreed with the EU and set out in the Political Declaration.

That the debate about the future relationship took place late on in the Article 50 process, that it did not produce a consensus, and that the framework for the future relationship would be contained in a 'political' declaration rather than a legally binding instrument did nothing to produce the political circumstances in which it would have been possible for the UK to leave the EU on 29 March 2019 and enter into a transition or implementation phase as intended.

V. THE LAW AND LEGALITY OF A TRANSITION PERIOD

The European Council guidelines on the negotiations cautiously accepted the legal possibility of the negotiation of a transition period under certain conditions:

To the extent necessary and legally possible, the negotiations may also seek to determine transitional arrangements which are in the interest of the Union and, as appropriate, to provide for bridges towards the foreseeable framework for the future relationship in the light of the progress. Any such transitional arrangements must be clearly defined, limited in time, and subject to effective enforcement mechanisms.

The text of Article 50 TEU is silent on what kind of transition is or is not 'legally possible'. From the perspective of the attributed competence of the Union, Article 50 TEU has been considered by the Council as conferring on the Union a particularly broad legal power to manage the terms of withdrawal. The Article 50 'negotiating directives' agreed by the Council state that:³⁴

...Article 50 of the Treaty on European Union confers on the Union an exceptional horizontal competence to cover in this agreement all matters necessary to arrange the withdrawal. This exceptional competence is of a

³⁴ Council Decision of 22 May 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union (XT 21016/17).

one-off nature and strictly for the purposes of arranging the withdrawal from the Union.

Framed in this way, the Council sought to draw a distinction between a unique and broad Union competence to manage all aspects of withdrawal, and the specificities and limits on Union competence under legal bases of the treaties which could be used to negotiate a future relationship between the Union and the UK. The difficulty is that a transition period is intended to bridge the past and the future. The legal limit, therefore, is that a transition cannot be a permanent arrangement without being incompatible with the use of Article 50 as a legal basis. Therefore, and notwithstanding the breadth of the competence under Article 50, the transition period had to have a temporal limitation in order to be lawful.

This temporal limit had one obvious and profound implication for the negotiations, and that concerned the 'backstop'. Had it been possible for the EU and the UK to negotiate a parallel track agreement on their future relationship, and provided that agreement was consistent with the commitments made in the Joint Report, there would be little need for a transition period or a 'backstop'. But with negotiations being phased, it became clear that the backstop could come into effect following the expiry of a time-limited transition period if alternative and subsequent arrangement on a future relationship had not entered into force by the expiry of the transition period.

With the backstop proving to be a fundamental political problem for the UK in obtaining approval for the Withdrawal Agreement, one means of avoiding the backstop being deployed would be to keep all of the UK in transition for longer to facilitate the negotiation of alternative arrangements. A more 'open' transition – with the legal discipline it produced being substituted as new agreements entered into force – would have had an obvious appeal were it not politically difficult – the spectre of 'Brexit in Name Only' – and legally problematic inasmuch as the end of transition would depend on an uncertain future event rather than a specific date.³⁵

³⁵ Kenneth A Armstrong, 'Transition Time: 3 Options For Extending The Transition Period' (2018) University of Cambridge Faculty of Law Research Paper No. 61/2018 <<https://ssrn.com/abstract=3272851>> accessed 11 October 2019.

Nonetheless, it is worth noting that while a clear end-point was generally accepted as a precondition for the lawfulness of a transition period based on Article 50, rather different considerations seem to have been applied to the duration of the backstop which also has its legal basis in Article 50. It was stated by the then UK Prime Minister that 'the treaty is clear the backstop can only ever be temporary',³⁶ and in its unilateral Declaration on the Irish Protocol, the Government expressed its view that the Withdrawal Agreement to which the Protocol is attached 'is based on Article 50 TEU [and] does not aim at establishing a permanent future relationship between the Union and the United Kingdom'.³⁷ Despite political pressure to have an end-point or exit clause written into the backstop, the counter-argument that a backstop ceases to fulfil its purpose if it can be exited prevailed. All of which might suggest that *mutatis mutandis* a more open-ended transition period – with the application of EU law ceasing to have effect once new subsequent agreements came into force – could have been considered as being capable of being lawfully based on Article 50 TEU.

Of course, keeping the whole of the UK in transition for longer, and subject to the EU *acquis* as a means of avoiding triggering the backstop, incurs its own political costs. Nonetheless, the more one presses precise temporality as a precondition for the lawfulness of transition based on Article 50, the more one has to question why the same considerations did not apparently apply to the backstop.³⁸ And as we will consider below, the shorter the duration of transition, the more likely it would be that the backstop would be deployed.

³⁶ 'Prime Minister's Statement on the European Council' (GOV.UK, 17 December 2018) <<https://www.gov.uk/government/speeches/pm-statement-on-european-council-17-december-2018>> accessed 11 October 2019.

³⁷ 'Declaration by Her Majesty's Government of the United Kingdom of Great Britain and Northern Ireland concerning the Northern Ireland Protocol' (GOV.UK, 11 March 2019) <<https://www.gov.uk/government/publications/11-march-withdrawal-agreement-and-political-declaration-laid-before-parliament-following-political-agreement>> accessed 11 October 2019.

³⁸ A similar point is made in a 'View from Brussels' briefing by Herbert Smith Freehills: 'Using EU law to improve the Brexit deal along the lines requested by the UK Parliament' (4 February 2019). Similarly the legal advice offered by the Attorney General on the Irish Protocol underscores that the EU had insisted that Article 50 could only serve as a legal basis for arrangements that were a 'bridge to a

Although the limits on Union competence are a primary aspect of legality from an EU perspective, other normative considerations might also condition the legality – and duration – of transition. A more open-ended transition during which time the UK would continue to be bound by EU rules and norms – including new rules adopted during the transition period – but without political representation in the Union, could be considered to be incompatible not only with the Union's own commitments to respect the principle of democracy (Articles 2 and 10 TEU), but also the principle of representative democracy enshrined in Article 3, Protocol 1 attached to the European Convention on Human Rights. As Peretz argues, it is the temporary nature of the transition period which is intended to immunize this aspect of the Withdrawal Agreement from legal criticism.³⁹

VI. THE DURATION OF TRANSITION

Operating within the temporal requirements for the lawful use of Article 50 TEU, it would, nonetheless, be possible to specify the duration of transition in different ways depending upon the purpose that transition served (see Section 2 above). If, for example, the purpose was to facilitate regulatory capacity-building in the UK, this could take a rather different amount of time from that which might be required, for example, to negotiate a future trade agreement with the EU or with non-EU states. If transition also served the ends of avoiding triggering the 'backstop', that would suggest a transition period at least of the duration of negotiations on alternative arrangements.

more permanent arrangement': Attorney-General, 'Legal effect of the Protocol on Ireland/Northern Ireland' (13 November 2018). It is unclear why strict temporality is a condition of the legality of a transition period but not of the backstop which also has its legal basis in Article 50 TEU.

³⁹ See George Peretz QC, 'The Brexit Withdrawal Agreement May Violate The European Convention on Human Rights', *Prospect Magazine* (11 October 2018) <<https://www.prospectmagazine.co.uk/politics/the-brexit-withdrawal-agreement-may-violate-the-european-convention-on-human-rights>> accessed 11 October 2019. Peretz notes that this line of argument is augmented in an EU context by the judgment of the European Court of Human Rights in *Matthews v United Kingdom*, Application No. 24833/94 (1999) 28 EHRR 361 which was concerned with the denial of a right to vote in elections to the European Parliament.

The UK wanted a flexible and functional transition period of 'around 2 years' with the duration determined 'simply by how long it will take to prepare and implement the new processes and new systems that will underpin the future partnership'.⁴⁰ However, in its position paper, the Union negotiating team defined the duration of transition in precise terms: it would begin on the date of entry into force of the Withdrawal Agreement and end on 31 December 2020.⁴¹ This was in line with the revised negotiating directives proposed by the Commission and agreed by the Council.⁴² It is the deadline that is contained in Article 126 of the Withdrawal Agreement.

The political reasons for having a deadline for the end of the transition period are apparent on both sides. For the UK, an agreement that kept the UK subject to EU rules and contributing to the EU budget without any of the benefits of participation in EU decision-making could only ever be a short-term measure. While the UK originally wanted some flexibility, a more fixed endpoint for the transition should have helped the UK Prime Minister to sell the negotiated agreement to those who might otherwise be anxious that a more open transition would keep the UK in a 'zombie' quasi-EU membership. On the other hand, and as explained, it dramatized the potential for the Irish backstop to be triggered if no new arrangements were in place at the end of a short transition. For the EU side, a time-limited transition was consistent with the Union's position on the temporary nature of a transition based on Article 50 TEU and was in line with the European Council's guidelines. More directly, a transition period ending in 2020 neatly coincides with the end of the current Multiannual Financial Framework that

⁴⁰ HM Government, 'Draft Text for Discussion: Implementation Period' (21 February 2018): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/682894/Draft_Text_for_Discussion__Implementation_Period__1_.pdf> accessed 11 October 2019.

⁴¹ Position Paper, 'Transitional Arrangements in the Withdrawal Agreement' TF50 (2018) 30 (7 February 2018) <<https://ec.europa.eu/commission/sites/beta-political/files/transition.pdf>> accessed 11 October 2019.

⁴² Council Decision supplementing the Council Decision of 22 May 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union (XT 21004/18).

guides the EU budget and so avoids having to include the UK in budgetary planning over the next financial period.

Nonetheless, during the course of the Brexit negotiations, it became apparent that the duration of the transition period might need to be revisited. Firstly, if a practical purpose of the transition period was to create time to negotiate subsequent agreements including on the future relationship, then the deadline set in the Withdrawal Agreement seemed unrealistic. Expecting negotiations to be conducted and finalised between the UK's formal withdrawal from the EU and the end of 2020 seemed improbable, and given how long it had taken to negotiate the Withdrawal Agreement itself, highly questionable. The ambitious scope of the intended negotiations and the need for new agreements to obtain domestic approval and ratification prior to their entry into force before the expiry of the transition period demands a longer transition.

Secondly, the lack of realism about what might be achieved in the limited time available was exacerbated by domestic political conflict over the terms and nature of a future relationship with the EU. Although the EU insisted that formal negotiations on a future relationship could not begin until the UK had left the EU, had the UK Government forged a domestic consensus on what it wanted by way of a future relationship, the Union and the UK would have been able to start formal negotiations with a sense of momentum and clarity of purpose. By contrast, the UK Prime Minister's attempt to get MPs to back the Withdrawal Agreement without approval of the text of the Political Declaration suggested that the Government was even prepared to countenance a relatively 'blind' Brexit, none of which would facilitate expedited post-withdrawal negotiations on the future relationship.

The third driving force was the continuing difficulty in agreeing the 'backstop'. If there was a risk that the transition period could end in 2020 without a new future relationship in place, then the assurances that the UK Government gave about the backstop as an 'insurance policy' that need never be deployed would simply lack credibility. With domestic political attention focusing on whether it would be possible for the UK unilaterally to exit the backstop and with the EU unified around a position that the backstop was not up for renegotiation, extending the transition period to give more time

for negotiations on agreements that would avoid the backstop being deployed appeared to be a useful way of helping the UK to sell its Brexit deal.

Despite good reasons to revisit the 31 December 2020 deadline, any attempt to change or extend the transition period still had to confront the political and legal limits described previously. Implausibly, the UK Prime Minister initially intimated that the UK might seek a facility to extend the transition period by only a matter of months. In the end, a new provision was added to the draft Withdrawal Agreement to allow the transition period to be extended by one or two years. Accordingly, Article 132(1) provides for the Joint Committee established under the Agreement to make a 'single decision' before 1 July 2020 on whether to extend the transition period for one or two years. This capacity to extend in annual increments also requires a corresponding budgetary contribution to be made by the UK.

The thought that transition could extend to 2022, with the UK still bound by EU rules and still making contributions to the EU budget more than six years after the referendum on EU membership, is no doubt an unhappy one for many politicians and voters. The idea that this could be as a result of a decision of a 'Joint Committee' may also cause some alarm and it is unclear what sort of parliamentary scrutiny would accompany any decision to extend transition. Yet, before the transition period can be extended it has to come into being upon the entry into force of the Withdrawal Agreement. With the UK House of Commons unable to give statutory approval for the texts of the Agreement and the Political Declaration, attention has focused instead on a different type of extension, namely extension of the UK's membership of the Union. It is to this extension that attention turns because it has profound implications not just for the duration of transition, but whether any transition period takes place at all.

VII. EXTENDING EU MEMBERSHIP AND ITS IMPLICATIONS FOR TRANSITION

Article 50(3) TEU permits the Union, following notification of an intention to withdraw and in agreement with the withdrawing state, to extend the two-year period after which the treaties would otherwise cease to apply to the

withdrawing state.⁴³ The effect of such a decision – to be taken by the European Council with the unanimous agreement of the Member States – is to extend the withdrawing Member State's membership of the Union.

Following failed attempts to gain parliamentary approval for the texts of the Withdrawal Agreement and Political Declaration, on 20 March 2019 the then UK Prime Minister formally requested an extension till the end of June 2019.⁴⁴ The Union, however, was only prepared to offer an extension till 22 May on the condition of approval by MPs of the deal negotiated with the Union before 29 March or, in the absence of such approval till 12 April.⁴⁵ Despite severing the text of the Political Declaration and only seeking approval of the Withdrawal Agreement,⁴⁶ MPs once again failed to approve the Agreement leaving the Prime Minister to once again seek an extension.⁴⁷ Her request for an extension again to the end of June – but with a hope that it might end sooner and so avoid the need to hold elections in the UK to the European Parliament on 23 May – was countered by the EU who – despite clear reservations from France about the shadow that Brexit would cast over the EP elections – would only agree a longer extension to the end of October 2019.⁴⁸

Extending the Article 50 withdrawal process has very significant implications for a transition period. First, if an extension of the Article 50 process results

⁴³ See Fabbrini and Schmidt in this issue.

⁴⁴ 'Prime Minister's Letter to President of the European Council' (GOV.UK, 20 March 2019) <<https://www.gov.uk/government/publications/prime-ministers-letter-to-president-tusk-20-march-2019>> accessed 11 October 2019.

⁴⁵ European Council Decision (EU) 2019/476 taken in agreement with the United Kingdom of 22 March 2019 extending the period under Article 50(3) TEU: [2019] OJ L80I/1.

⁴⁶ This tactic was compatible with EU law in that Article 50 TEU is fundamentally concerned with the negotiation of a withdrawal agreement, but would not have constituted a formal statutory approval in terms of section 13 of the European Union (Withdrawal) Act 2018 which demands that both texts be approved.

⁴⁷ 'Prime Minister's Letter to Donald Tusk' (GOV.UK, 5 April 2019) <<https://www.gov.uk/government/publications/prime-ministers-letter-to-president-tusk-5-april-2019>> accessed 11 October 2019.

⁴⁸ European Council Decision (EU) 2019/584 taken in agreement with the United Kingdom of 22 March 2019 extending the period under Article 50(3) TEU: [2019] OJ L101/1.

in a Withdrawal Agreement entering into force, the period of such an extension also reduces the duration of a transition period as the end point of the transition period is fixed in the Withdrawal Agreement. In other words, the longer the extension the less time is available for negotiations on a future relationship. The extension to 31 October 2019 reduced the transition period by seven months, making the likelihood of the Joint Committee extending transition a near certainty.

Second, while a transition period following a short extension is manageable, the longer the extension, the more that the purpose of any transition would come into question. Instead it might be better simply to continue to extend the UK's EU membership and focus on negotiating the new future relationship between the Union and the UK. Quite obviously, such an approach would run counter to everything the EU had said about not undertaking negotiations on the future until the UK left the Union. It would undermine the strategy of the phased and sequential negotiations before and after withdrawal. And it would conflict with the new UK Prime Minister's stated intention for the UK to leave the EU by 31 October 2019. But at a pragmatic level – and perhaps also as a way of avoiding having to trigger the backstop at the expiry of a shortened transition – it might be less disruptive to seek to negotiate a package of agreements concerning not just withdrawal from the Union but also the future relationship.

Thirdly, the failure to leave the Union and the grant of a further extension played into domestic politics in a profound way. Instead of using the period of the extension to conduct another 'meaningful vote' on the Brexit deal, Theresa May changed tack and announced her intention to bring forward the European Union (Withdrawal Agreement) Bill – which would give domestic legal effect to a Withdrawal Agreement – complete with new safeguards to try to appeal to MPs. However, the strength of opposition she encountered led to her resignation. Confronting the choice between seeking a further extension to membership to negotiate an orderly departure or winning back voters who had deserted the Conservatives for the Brexit Party, Prime Minister Boris Johnson's political mantra has been to 'Get Brexit Done' and to secure that the UK leaves the EU by 31 October 2019, with or without a Withdrawal Agreement.

VIII. CONCLUSIONS

Looking back at the negotiations that led to the Withdrawal Agreement, the need for a transition period was a logical consequence of the phasing of negotiations in terms of the management of the UK's exit from the Union and the agreement of the terms of a new relationship. In this way, the purpose behind a transition period was to give the parties a safety net against a cliff-edge departure and a bridge to a future relationship. Legal certainty and the continuity of economic and social relationships would be preserved through a 'stand-still' transition.

However, this aspiration for legal certainty and continuity has been undermined by the contested politics of Brexit which has inhibited the intended entry into force of a Withdrawal Agreement and the commencement of the transition period. For some, the anxiety relates to the absence of a consensus as to the ultimate endpoint of Brexit in the sense of a lack of clarity as to the terms of a future relationship that is not expressed in a legally binding Withdrawal Agreement but instead a framework Political Declaration. Yet while some have concerns about a 'Blind Brexit' a more fundamental concern, particularly within the ruling Conservative Party, is that transition is neither a safety net nor a bridge but a legal trap that keeps the UK too closely aligned to the EU ('Brexit in name only'). If a No Deal Brexit is to be avoided, these concerns will need to be overcome.

On reflection, the smooth and orderly exit of a Member State as anticipated by the legal language of Article 50 simply fails to comprehend that the sort of politics that initiates a withdrawal from the EU will also struggle to handle it. In a country like the UK with a political constitution, a political crisis is also a potential constitutional crisis, further exacerbating its capacities for political will-formation either to end the Brexit process or to continue towards post-membership with or without a Brexit deal. The decision by Prime Minister Johnson to suspend Parliament in the run up to 'Exit Day' – a decision successfully challenged in litigation in the courts of Scotland, Northern Ireland and England – dramatises the strained relationship between the Executive and Parliament and between law and politics that Brexit has produced.

One way or another, the UK will be in transition.

THE EXTENSION OF UK MEMBERSHIP IN THE EU: CAUSES AND CONSEQUENCES

Federico Fabbrini* & Rebecca Schmidt**

Article 50(3) TEU foresees that a Member State which has notified its intention to withdraw from the EU will leave the EU two years after the notification, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period. In March and April 2019, based on a request by the UK Government, the European Council twice granted an extension under Article 50(3) TEU, postponing Brexit. This article offers a comprehensive analysis of the legal, political and institutional aspects of the most recent extension of the Brexit withdrawal period. For this purpose, it first provides an overview of the law of extension and in particular the relationship between extension, transition and revocation. Subsequently, it analyzes the politics of extension, explaining the reasons that pushed the UK to request it in spring 2019, and the conditions that the European Council attached to its decision allowing extension. Finally, the article discusses the consequences of an extension on EU institutions, particularly the European Parliament, as well as on the functioning of the EU.

Keywords: Brexit, United Kingdom, European Union, Extension, Law, Politics

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I. INTRODUCTION

Leaving the European Union (EU) is easier said than done – as the United Kingdom (UK) realized in the Brexit process. Article 50(3) Treaty on the EU (TEU) states that,

The Treaties shall cease to apply to the [withdrawing Member State] from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, *unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*¹

The last sentence of the abovementioned provision allows postponing the exit date of a Member State which has notified its intention to leave the EU under Article 50(1) TEU, extending its membership of the EU beyond the two-year period triggered by the notification of withdrawal. Extension is decided by the European Council acting unanimously, and with the agreement of the withdrawing Member State.

Even though Article 50(3) TEU explicitly foresees the possibility to postpone the exit date, a triggering of this provision appeared as beyond the realm of possibility for most of the Brexit negotiating process. When on 29 March 2017 the UK notified its intention to withdraw from the EU, then Prime Minister Theresa May clearly indicated that her country would leave the EU by 29 March 2019² – a statement she subsequently repeated ad tedium.³ However, in spring 2019 – faced with the reality of the draft withdrawal agreement being voted down three times by the UK Parliament, and conscious of the gigantic problems that a disorderly, no-deal Brexit would

¹ Emphasis added.

² Prime Minister Theresa May, Letter to European Council President Donald Tusk, 29 March 2017; and United Kingdom notification under Article 50 TEU, XT 20001/17, 29 March 2017

³ See, for instance, 'May - We are leaving the EU on March 29' *Reuters* (16 January 2019) <<https://www.reuters.com/article/uk-britain-eu-may-article50/may-we-are-leaving-the-eu-on-march-29-idUSKCN1PA1Mo>> accessed 23 August 2019.

create to the national economy – the UK Prime Minister was forced to request twice an extension of UK membership in the EU,⁴ postponing Brexit to 31 October 2019.

The purpose of this article is to analyze from a law and politics perspective the mechanism of extension, discussing also its short and long-term implications for the functioning of the EU. As the article claims, extension paradoxically confirms *a contrario* the resilience of the EU project, by revealing how difficult it is for a Member State to disentangle itself from one of the most successful systems of regional integration, without undermining its economy and unsettling its politics. At the same time, as the article points out, the extension of EU membership of a withdrawing Member State also creates new challenges for the EU itself. Because, contrary to what would happen in a transition period, in an extension period a withdrawing state maintains the rights and obligations of an EU Member State, the postponement of Brexit directly affected all the other 27 EU Member States (EU27), posing novel institutional challenges.

In particular, the article explains that the extension of the UK's membership of the EU had both short and long-term effects. On the one hand, in the short run, the postponement of Brexit created complications for the European Parliament (EP), as the UK had to participate in the elections for the 9th EP on 23 May 2019. However, because seats for the EP 2019-2024 had been reallocated among the EU27, extension implied that the EP composition had to be re-adapted last minute to include 73 UK-elected members of the EP (MEPs). This put on hold 27 seats that had in the meanwhile been re-distributed to other 14 Member States – a situation likely to create litigation, since the 73 UK MEPs are supposed to leave after Brexit, while the new MEPs remain on hold. On the other hand, in the longer term, the extension of UK membership in the EU also forced the EU27 to deal with the new scenario of a withdrawing state which remains part of the EU, becoming a potential nuisance in the functioning of the EU.

⁴ Prime Minister Theresa May, Letter to European Council President Donald Tusk, 20 March 2019; and Prime Minister Theresa May, Letter to European Council President Donald Tusk, 5 April 2019.

As the article suggests, therefore, the experience of the Brexit extension raises important lessons on the process of negotiating a withdrawal from the EU, as well as on the organization of the EU itself. If the postponement of Brexit is a boost for the irreversibility of the project of European integration, it is also a challenge for the EU, as a free Union of free states. If a Member State were to feel caged into the EU against its will, it could become a nuisance in the functioning of the EU itself. In fact, this risk quite quickly revealed itself with Brexit, as immediately following the second UK request for extending Article 50, leading Euroskeptic member of the UK Parliament Jacob Rees-Mogg called for the UK to become 'as difficult as possible', using the veto and other tricks to obstruct and oppose the EU from within.⁵ While the European Council sought to minimize this threat by calling on the UK to abide by the principle of sincere cooperation, it remains to be seen whether this will have any effect. In this context, therefore, the article concludes that it is in the EU's interest to draw lessons from the Brexit extension to reorganize its constitutional setup in such a way that Member States which are laggards in the process of integration do not interfere with the ambitions of others.

As such, the article is structured as follows. Section II analyses in legal terms the characteristics of extension, as regulated by the TEU – explaining its difference from both transition and revocation. Section III overviews the practical application of Article 50(3) TEU in spring 2019, explaining the political and economic reasons that led the UK on 20 March and 10 April 2019 to ask for an extension, and the institutional conditions that the European Council set in accepting the UK's requests. Section IV then considers the short-term implications of the Brexit extension, focusing on the changes and challenges this posed on the composition of the 9th EP. Section V, in contrast, discusses the long-term implications of the Brexit extension, reflecting on how this forces the EU27 to adapt its internal way of operation. It also considers how the EU can minimize the potential disruption posed by ongoing UK membership, including the effect this may have for differentiated integration in Europe's future.

⁵ See tweet by Jacob Rees-Moog stating: 'If a long extension leaves us stuck in the EU we should be as difficult as possible. ...' @Jacob_Rees_Mogg (Twitter, 5 April 2019).

II. THE LAW OF EXTENSION

1. General Considerations

Article 50 TEU establishes a three-step process by which a Member State can leave the EU in an orderly fashion. These are: first, the notification to the European Council outlining the intention to withdraw; second, the negotiation and conclusion of an agreement with arrangements regarding the withdrawal, taking into account the future relationship between the state and the Union; and finally the actual withdrawal.⁶ If after two years since the notification of the intention to leave the EU the withdrawing state and the EU have not concluded a withdrawal agreement, the withdrawing state could leave without an agreement. If however both the withdrawing state and the EU want to avoid a scenario of a disorderly exit, it is possible for the European Council, acting unanimously, and in agreement with the withdrawing state, to extend membership – postponing the exit date.⁷

⁶ Paul Craig, 'How Brexit will be Carried out? The Process of Withdrawal' in Federico Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press 2017) 49.

⁷ The issue of extension has so far received limited in-depth analysis in scholarship. See Steve Peers, 'Trick or Treaty? The legal issues of the second extension of the UK's EU membership', *EU Law Analysis* (10 April 2019) <<http://eulawanalysis.blogspot.com/2019/04/trick-or-treaty-legal-issues-of-second.html>> accessed 23 August 2019; Oliver Patel and Clément Leroy, 'Extending Article 50: Legal and Political Considerations' UCL European Institute, *Brexit Insights Series* (15 March 2019) <https://www.ucl.ac.uk/european-institute/sites/european-institute/files/article_50_extension_paper_final_o.pdf> accessed 23 August 2019; Sam Fowles, 'Extending Article 50: Key Legal Issues' LSE Brexit Blog (20 March 2019) <<https://blogs.lse.ac.uk/brexit/2019/03/20/extending-article-50-the-key-legal-issues/>> accessed 23 August 2019. For a more general analysis of withdrawal, including references to the possibility of extension see Christophe Hillion, 'Withdrawal under Article 50 TEU: An integration-friendly process' (2018) 55 *Common Market Law Review* 29-56; Piet Eeckhout and Eleni Frantziou, 'Brexit and Article 50 TEU: A Constitutionalist Reading' (2017) 54 *Common Market Law Review* 695-733; EU Parliament Briefing, 'Article 50 TEU: Withdrawal of a Member State from the EU' (February 2016) <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI\(2016\)577971_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf)> accessed 23 August 2019.

Extension is an option explicitly foreseen by Article 50(3) TEU. However, this Article only provides a fairly rudimentary framework, and, for instance, does not clearly indicate the possible purposes of an extension. In fact, the provision only sets out a number of procedural requirements to trigger the extension of the withdrawal period by stating that '[...] the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.'

As can be seen, Article 50(3) TEU describes extension in purely procedural terms. In particular, an extension of the withdrawal period can occur, provided that: 1) the European Council makes a unanimous decision and 2) that the concerned Member State agrees. This raises a number of questions regarding the specific nature of the extension foreseen in Article 50 (3) TEU. The first concerns the relationship between the European Council and the withdrawing state in the exercise of granting the extension. So far, in the case of Brexit, it was the withdrawing state which requested the extension.⁸ However, the language of Article 50 TEU does not require that the withdrawing state makes such an application. In fact, albeit less likely, it seems possible that a decision to extend may be initiated also by the EU. What is, however, necessary in both cases is the unanimity of the European Council and the agreement by the Member State concerned. Therefore, an extension can never be put in place unilaterally but requires that all parties approve it.

Article 50(3) TEU is instead silent on the substantive regulation of extension. However, once an extension is decided, the Member State which has notified its intention to leave the EU remains a Member State, with full rights and obligations. Yet, since that Member State is still on its way out of the EU, and therefore finds itself in the special situation foreseen by Article 50(4) TEU, it seems conceivable that the European Council may introduce conditions that apply to an extension. In fact, it must be emphasized that according to Article 50(3) TEU the European Council is under no obligation to grant the extension. In light of this, it appears justified for the European Council to make an extension dependent on conditions. However, a relevant legal

⁸ See Prime Minister Theresa May, Letter to European Council President Donald Tusk, 20 March 2019 and Prime Minister Theresa May, Letter to European Council President Donald Tusk, 5 April 2019.

question is how far-reaching such conditions can be. Since the withdrawing state is still a Member State during the extension, it seems clear that the European Council cannot impose conditions that would go against the letter and the spirit of the EU treaties. For instance, if during an extension period the European Council were to ask the withdrawing Member State to apply rules from which it is exempted under the treaties, this would likely violate EU law. In fact, the conditions that the European Council may set during extension would still have to be consistent with the duty of sincere cooperation enshrined in Article 4(3) TEU.⁹

In summary, Article 50(3) TEU does not provide any rules regarding the specific arrangement of the extension. The Treaty only introduces a procedural requirement that extension be approved unanimously by the European Council in agreement with the withdrawing Member State. Instead it leaves open to the former the possibility to introduce conditions on extension, provided these are not incompatible with the EU treaties.

2. Comparing Extension to Transition and Revocation

From this viewpoint, extension differs from transition on the one hand, and revocation on the other. The Withdrawal Agreement concluded on 14 November 2018,¹⁰ and the accompanying political declaration setting out the framework for the future relationship between the EU and the UK,¹¹ crucially put in place a so-called transition period which is intended to lead to the conclusion of a future trade agreement.¹² The transition – or in UK parlance: implementation – period was conceived as a time-limited device which would allow the UK, after leaving the EU to maintain some privileges of EU

⁹ Article 4(3) TEU: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.'

¹⁰ See 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, as agreed at negotiators' level on 14 November 2018 (14 November 2018) TF50 (2018) 55.

¹¹ See Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom (22 November 2018) XT 21095/18.

¹² Draft Agreement (n 10) Arts 126 - 132.

membership, including access to the internal market and customs union, in exchange for respect of EU laws and contributions to the EU budget. The focus here will be on how the transition period differs from the extension period.

A transition period is not a legal requirement set out in Article 50 TEU but, in the case of Brexit, was put into the withdrawal agreement for practical considerations. In the case of the UK-EU agreement the transition period would have been set for an initial period until 31 December 2020, but with the possibility to extend it once further till December 2022. During the transition period the UK will no longer be an EU Member State, and as such will not be participating in the EU institutions. However, the UK would continue to be part of the EU customs union and the single market,¹³ and EU legislation, rules and court decisions would apply to the UK as to any other EU Member State.¹⁴ Furthermore, the jurisdiction of the ECJ was to continue during this time,¹⁵ and the principle of supremacy and direct effect of EU law would also remain unchanged for this period. Importantly, the transition is more than just a timeframe to unwind existing relationships; rather it is designed to negotiate the actual post-withdrawal framework. As the outline political declaration concluded by the EU and UK in November 2019 is still fairly open regarding the future EU-UK relationship, both sides would need to use this period to arrive at an actual final agreement.

Compared to extension, a transition period comes with a number of similarities and one particular difference. In both circumstances Union law mostly applies and the UK remains bound by it. However, though being treated similar to a Member State for the time of the transition period, the UK is no longer a Member State. Membership would, in fact, require a renewed application under Article 49 TEU. Not being a Member State also means that the UK no longer participates in EU institutions. This is different in the context of an extension. The UK remains a Member State with full duties and rights of membership. Furthermore, as will be outlined below, it

¹³ Ibid Art 127 and Art 2a.

¹⁴ European Commission, 'Fact Sheet Brexit Negotiations: What is in the Withdrawal Agreement' (14 November 2018) <http://europa.eu/rapid/press-release_MEMO-18-6422_en.htm> accessed 23 August 2019.

¹⁵ Draft Agreement (n 10) Art 131.

continues to have the ability to unilaterally revoke its intention to withdraw, thus staying a full EU member without any additional requirements.

Whereas during the transition period the exiting state ceases to be an EU Member State but might be treated similarly to one in certain areas, the situation is very different in the case of a revocation. In this scenario the concerned state stays in the Union and continues to be a full Member State without any further plans of exiting.

Article 50 does not explicitly mention the revocation of the notification of withdrawal. The European Court of Justice (ECJ), however, ruled in *Wightman* that this is a possibility.¹⁶ The case was initiated by members of the UK Parliament, the Scottish Parliament and the EP before the Court of Session in Scotland. In their petition they asked whether Article 50 TEU can be unilaterally revoked by the UK with the result that the UK could remain in the EU. On 3 October 2018 the Court of Session referred the case to the ECJ.¹⁷ In its ruling in December 2018 the ECJ, following the advice of the Advocate General,¹⁸ held that the UK does have the option to unilaterally revoke its withdrawal notification. As reasons the ECJ stated that

the sovereign nature of the right of withdrawal enshrined in Article 50(1) TEU supports the conclusion that the Member State concerned has the right to revoke the notification of its intention to withdraw from the European Union, for as long as a withdrawal agreement concluded between the European Union and that Member State has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in Article 50(3) TEU, possibly extended in accordance with that provision, has not expired.¹⁹

Furthermore, the ECJ stressed that the option of revocation of the notification is also linked to the 13th recital in the preamble to the TEU, the first recital in the preamble to the TFEU and Article 1 TEU regarding the creation of an ever closer Union;²⁰ as well as the importance of the values of

¹⁶ Case C-621/18 *Wightman and Others* EU:C:2018:999.

¹⁷ Ibid para 9-17.

¹⁸ Case C-621/18 *Wightman and Others Opinion of Advocate General Campos Sánchez-Bordona*, delivered on December 4 2018 EU:C:2018:978, para 170.

¹⁹ Case C-621/18 *Wightman and Others* EU:C:2018:999, para 57.

²⁰ Ibid para 61.

liberty and democracy as enshrined in the second and fourth recitals of the preamble to the TEU.²¹ According to the ECJ, an automatic end of membership after notification without the possibility to revoke that notification would amount to forced withdrawal of a Member State from the EU, if that state no longer wishes to exit. Such an outcome would be 'inconsistent with the Treaties' purpose of creating an ever closer union among the peoples of Europe'.²² At the same time, the ECJ clarified that revocation had to be conducted in good faith, and that this required the withdrawing state to follow for revocation the same domestic constitutional procedure it had used to notify its intention to withdraw.²³

If a Member State were to revoke its intention to leave the EU, according to the ECJ ruling the effect of this would be to return the state to its pre-Article 50 status, as a full Member State of the EU, with all rights and obligations. Revocation, in other words, would terminate the withdrawal process. In this it differs from extension, since during the latter the withdrawing Member State maintains all its rights and obligations of membership, but is also still a *withdrawing* state, since it has notified its intention to leave the EU – and as such is subject to a special status, resulting from Article 50(4) TEU.

In summary, extension constitutes a unique state where the withdrawing state remains a full Member State of the Union, with all rights and obligations (a difference from the transition period) and at the same time it also remains a withdrawing state, which still intends to end its EU membership (a difference from revocation). The unique circumstances of extension, therefore, create peculiar challenges, which will be discussed in the next section.

III. THE POLITICS OF EXTENSION

As mentioned, the European Commission Article 50 Task Force and the UK negotiators reached an agreement on a draft withdrawal treaty with an outline political declaration in November 2018.²⁴ However, this agreement

²¹ Ibid para 62.

²² Ibid para 67.

²³ Ibid para 75.

²⁴ Draft Agreement (n 10).

was rejected by the UK Parliament on 15 January 2019 by a historic margin.²⁵ Furthermore, despite additional reassurances made by the EU,²⁶ Parliament also turned the agreement down in a second vote on 12 March 2019.²⁷ With the exit date of 29 March 2019 approaching, and on the clear understanding that a no-deal Brexit would have dramatic consequences for the UK economy²⁸ – not to mention the lack of preparation of the UK administrative state for a disorderly withdrawal²⁹ – the option of extending Article 50 TEU suddenly became politically palatable in the UK.

As a result, on 20 March 2019 the UK Prime Minister requested a first extension of UK membership of the EU under Article 50(3) TEU until 30 June 2019, with the aim to buy time to make another attempt at ratifying the withdrawal deal in Westminster.³⁰ The European Council accepted the UK's request. However, aware of the legal and political difficulties that an extension would create on the approaching EP elections,³¹ the European

²⁵ See House of Commons Exiting the European Union Committee, Response to the Vote on the Withdrawal Agreement and Political Declaration: Options for Parliament, HC 1902, 16 January 2019.

²⁶ See Instrument relating to the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 11 March 2019, TF50 (2019) 61.

²⁷ See House of Commons Exiting the European Union Committee, Response to the 12 March Vote on the Withdrawal Agreement and Political Declaration. Thirteenth Report of Session, HC 2073, 13 March 2019.

²⁸ HM Government, 'HM Treasury analysis: the long-term economic impact of EU membership and the alternatives' (April 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/517415/treasury_analysis_economic_impact_of_eu_membership_web.pdf> accessed 23 August 2019.

²⁹ See National Audit Office, Contingency Preparations for Exiting the EU with No Deal, HC 2058, 12 March 2019; House of Commons Committee of Public Accounts, Brexit and the UK Border', HC 1942, 12 March 2019, 3 (stating that government 'departments have continued to struggle to prepare should the UK leave the EU without a deal' and reporting embarrassing cases of mismanagement of contingency preparations).

³⁰ See Prime Minister Theresa May, Letter to European Council President Donald Tusk, 20 March 2019.

³¹ See European Commission President Jean-Claude Juncker, Letter to European Council President Donald Tusk, 11 March 2019 (stating that the UK exit 'should

Council only granted an extension until 12 April 2019 (the last date by which the UK had to organize the holding of EP elections), unless the UK Parliament approved the withdrawal agreement before 29 March 2019.³² Yet, the UK Parliament rejected the deal a third time on 29 March 2019 – the day when the UK was originally expected to leave the EU. As a result, on 5 April 2019 the then Prime Minister Theresa May sent a letter to the European Council asking once again for an extension until 30 June 2019.³³

On 11 April, the European Council again accepted the request, but rejected the UK timeframe and rather set a flexible deadline.³⁴ Specifically, the European Council stated that:

Such an extension should last as long as necessary and, in any event, no longer than 31 October 2019. The European Council also recalls that, under Article 50(3) TEU, the Withdrawal Agreement may enter into force on an earlier date, should the Parties complete their respective ratification procedures before 31 October 2019. Consequently, the withdrawal should take place on the first day of the month following the completion of the ratification procedures or on 1 November 2019, whichever is the earliest.³⁵

Moreover, the European Council clarified that the extension would end, with an automatic UK withdrawal on 1 June 2019, if the UK was still a member of the EU on 23–26 May 2019, had not ratified the Withdrawal Agreement by 22 May 2019, and had failed to hold elections to the EP. The European Council justified this, by stressing that extension

will have the consequence that the United Kingdom will remain a Member State until the new withdrawal date, with full rights and obligations in accordance with Article 50 TEU, and that the United Kingdom has a right

be complete before the European Parliament elections that will take place between 23–26 May [2019]. If the United Kingdom has not left the European Union by then, it will be legally required to hold these elections, in line with the rights and obligations of all Member States as set out in the Treaties’).

³² European Council Decision (EU) 2019/476 taken in agreement with the United Kingdom of 22 March 2019 extending the period under Article 50(3) TEU [2019] OJ L 80 I/1.

³³ See Prime Minister May, Letter to European Council President Donald Tusk, 5 April 2019.

³⁴ European Council Conclusions 10 April 2019, EUCO XT 20015/19, paras 2 and 3.

³⁵ Ibid para 9.

to revoke its notification at any time. If the United Kingdom is still a Member State on 23-26 May 2019, and if it has not ratified the Withdrawal Agreement by 22 May 2019, it will be under an obligation to hold the elections to the European Parliament in accordance with Union law. In the event that those elections do not take place in the United Kingdom, the extension should cease on 31 May 2019.³⁶

By so doing, the European Council effectively made extension conditional on the UK holding EP elections. Yet, as was outlined above,³⁷ this is justified by the fact that the UK remains a member of the EU during the extension period, and as such is subject to EU obligations, including participating in EP elections. The European Council request is thus based on pre-existing obligations of the UK as a Member State rather than constituting a new condition imposed on the UK.

At the same time, the European Council stressed the UK's responsibility as a continuous Member State of the EU, clarifying that '[t]his further extension cannot be allowed to undermine the regular functioning of the Union and its institutions.'³⁸ In this regard, the European Council took note of the 'commitment by the United Kingdom to act in a constructive and responsible manner throughout the extension period in accordance with the duty of sincere cooperation'³⁹ and stressed that it:

expects the United Kingdom to fulfil this commitment and Treaty obligation in a manner that reflects its situation as a withdrawing Member State. To this effect, the United Kingdom shall facilitate the achievement of the Union's tasks and shall refrain from any measure which could jeopardise the attainment of the Union's objectives, in particular when participating in the decision-making processes of the Union.⁴⁰

Finally, the European Council also pointed out that where appropriate, the other 27 EU Member States 'will continue to meet separately at all levels to

³⁶ Ibid para 10.

³⁷ See above, section II.1.

³⁸ European Council Conclusions EUCO XT 20015/19 (n 34) para 10.

³⁹ Ibid.

⁴⁰ Ibid.

discuss matters related to the situation [of the EU] after the withdrawal of the United Kingdom.'⁴¹

This condition set out by the European Council makes clear, therefore, that extension is subject to the UK acting in good faith vis-à-vis the EU. The European Council is thus not adding any additional obligations or burdens, but seeks to affirm at the highest political level that the UK should not use the extension to disrupt the functioning of the EU. What the European Council is intending here is to prevent the extension period from being used as potential weapon to jeopardize from within the functioning of the EU institutions, perhaps as a strategy to leverage concession in the withdrawal process. That said, it remains to be seen whether that risk can be truly avoided: the obligation to act in good faith applies to the UK government in the European Council and the Council, but cannot be required for instance from individual UK-elected MEPs. Since the recent EU elections brought about a significant number of Eurosceptic MEPs, it is likely that their actions will not abstain from 'undermining the functioning of the Union and its institutions.'

As it is thus clear, the current extension does not only have consequences for the future of the withdrawal process and for UK internal political processes; it also affects the EU and its institutions. In fact, extension directly changes and challenges in significant and unprecedented ways also the composition of the EP, which is the focus of the next section.

IV. THE INSTITUTIONAL CONSEQUENCES OF THE EXTENSION

The Brexit extension had significant consequences for the incoming 9th EP (2019-2024).⁴² Pursuant to Article 14 TEU, the EP shall consist of a maximum of 751 members. EP seats are allocated among the Member States according to the principle of degressive proportionality, on the basis of European Council decision, adopted unanimously on a proposal by the EP and with its consent. On 28 June 2018, the European Council had adopted a new decision

⁴¹ Ibid para 8.

⁴² See further Federico Fabbrini and Rebecca Schmidt, 'The Composition of the EP in Brexit Times' (2019) 44 *European Law Review* 710, from which this section draws.

on the composition of the EP for the 9th EP term (2019-2024).⁴³ Taking stock of the decision of the UK to leave the EU (and therefore, of the reduction of the total EU population), the European Council decided to lower the overall number of MEPs from 751 to 705.⁴⁴ At the same time, it decided to re-allocate 27 of the 73 seats previously assigned to the UK to 14 other EU Member States, in order to better fulfil the criteria of degressive proportionality,⁴⁵ hence producing the re-allocation of seats described here.

⁴³ European Council Decision (EU) 2018/937 of 28 June 2018 establishing the composition of the European Parliament [2018] OJ L 165I.

⁴⁴ An issue which goes beyond the remit of this article concerns instead the modalities of the elections of MEPs. On this see European Parliament legislative resolution of 4 July 2018 on the draft Council decision amending the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976, P8_TA(2018)0282.

⁴⁵ See also Leonard Besselink et al, 'The Impact of the UK's Withdrawal on the Institutional Set-up and Political Dynamics within the EU', study commissioned by the European Parliament Committee on Constitutional Affairs (April 2019).

Member State	MEPs 2014-2019	MEP 2019-2024 (after Brexit)	Variation
Belgium	21	21	
Bulgaria	17	17	
Czech Republic	21	21	
Denmark	13	14	+1
Germany	96	96	
Estonia	6	7	+1
Ireland	11	13	+2
Greece	21	21	
Spain	54	59	+5
France	74	79	+5
Croatia	11	12	+1
Italy	73	76	+3
Cyprus	6	6	
Latvia	8	8	
Lithuania	11	11	
Luxembourg	6	6	
Hungary	21	21	
Malta	6	6	
Netherlands	26	29	+3
Austria	18	19	+1
Poland	51	52	+1
Portugal	21	21	
Romania	32	33	+1
Slovenia	8	8	
Slovakia	13	14	+1
Finland	13	14	+1
Sweden	20	21	+1
UK	73	0	-73
Total	751	705	

Nevertheless, the 2018 European Council decision on the new composition of the EP also envisioned a safeguard clause. In anticipation of a (possible, although then unlikely) scenario where the UK were to remain an EU

Member State at the time of the May 2019 EP elections, Article 3(2) of European Council Decision (EU) 2018/937 stated that

in the event that the United Kingdom is still a Member State of the Union at the beginning of the 2019-2024 parliamentary term, the number of representatives in the European Parliament per Member State taking up office shall be the one provided for in Article 3 of the European Council Decision 2013/312/EU until the withdrawal of the United Kingdom from the Union becomes legally effective.⁴⁶

Moreover, that same provision foresaw that, '[o]nce the United Kingdom's withdrawal from the Union becomes legally effective, the number of representatives in the European Parliament elected in each Member State shall be the one provided' by the new allocation criteria, with the consequence that:

All representatives in the European Parliament who fill the additional seats resulting from the difference between the number of seats allocated in the first and second subparagraphs shall take up their seats in the European Parliament at the same time.⁴⁷

The Brexit extension therefore had significant consequences for the incoming 9th EP (2019-2024). As was clearly requested by the European Council in granting the second extension,⁴⁸ the UK had to participate in EP elections on 23 May 2019. This required as a necessity to continue the old allocations of seats applied in the 8th EP term (2014-2019),⁴⁹ scrapping at the last minute the new plan to re-allocate seats. This had two main consequences: on the one hand, the Brexit extension produced a suspensive condition for the extra 27 MEPs elected in 14 Member States; and on the other hand, it also produced a resolute condition for the 73 UK-elected MEPs who joined the 9th EP but are supposed to vacate their seats after Brexit has taken effect. Both of these situations raise novel legal issues.

⁴⁶ European Council Decision (EU) 2018/937 (n 43) Art 3(2).

⁴⁷ Ibid.

⁴⁸ European Council Conclusions EUCO XT 20015/19 (n 34) para 3.

⁴⁹ European Council Decision 2013/312/EU of 28 June 2013 establishing the composition of the European Parliament [2013] OJ L 181, Art 3.

1. Suspensive condition

There are 27 future MEPs who were not able to take up their mandate at the start of the new EP term on 2 July 2019, being held back from taking seats in the EP until the UK leaves the EU. This raises at least three distinct issues. First, how can the ex-post allocation be organized from a logistical point of view? Second, is it possible from a constitutional law perspective to elect MEPs based on a suspensive condition, or is this at odds with the rights of their mandates? And finally, and related to the last point, is such conditional election in line with the constitutional requirements of the electoral process?

Concerning the first issue, the last-minute extension of the withdrawal period caused logistical challenges regarding the allocation of MEPs. However, some Member States had foreseen in their domestic legislation how to deal with the possibility that the UK could remain in the EU, and therefore that the extra EP seats assigned to the country pursuant to European Council Decision (EU) 2018/937 could not be actually be put into action. Ireland's European Parliament Elections (Amendment) Act 2019, for instance, envisaged the scenario of a delayed Brexit and therefore included a clause that allows limiting the accession of the extra MEPs to the EP until the Brexit issue is resolved.⁵⁰ Section 6 of the 2019 Act provided that the newly elected extra MEPs 'shall not take up their seats in the European Parliament until such time as a date has been specified by the Parliament for the taking up of such seats.'⁵¹

Moreover, other Member States adopted last minute, ad hoc legislative measures to deal with the UK's continuing membership and its impact on the forthcoming EP elections. For instance, France approved a special statute on 22 May 2019 – four days before the EP elections – which temporarily put on hold the five additional seats that France would have received according to the new composition of the EP.⁵² Similar provisions were made in other Member States affected by European Council Decision (EU) 2018/937,

⁵⁰ See European Parliament Elections (Amendment) Act 2019.

⁵¹ Ibid sec 6(j).

⁵² See Loi n° 2019-487 du 22 mai 2019 relative à l'entrée en fonction des représentants au Parlement européen élus en France aux élections de 2019, JORF n°0119 du 23 mai 2019.

including Spain⁵³ and Poland.⁵⁴ There are, however, also Member States which did not adapt their national legislation. Yet, this does not necessarily mean that these countries do not have a procedure in place to deal with the issue and will not be able to allocate the additional seats at a later point in time. For instance, in Austria, which uses an electoral system of proportional representation (PR) with the application of the d'Hondt system to return seats, together with the option to name or rank individual candidates from the party list, a ranking will clearly establish which candidate can enter the EP.⁵⁵ While it remains to be seen how smoothly such unprecedented procedures will run in the affected Member States once Brexit does materialize, the first, logistical issue appears to be manageable, despite its novelty.

A legally more complicated question is instead the second one – whether from a constitutional point of view a suspensive condition is at odds with the rights and privileges linked to the office of MEPs. However, here it is important to reiterate that the MEP status for the 27 representatives that will only join the EP after Brexit is conditional. Thus, they will only receive their

⁵³ See Real Decreto 206/2019 (1 de abril, 2019) (stating that '[d]e conformidad con el artículo 3.2 de la Decisión (UE) 2018/937 del Consejo Europeo, una vez sea jurídicamente efectiva la salida del Reino Unido, los cinco nuevos escaños que corresponden a España serán asignados por la Junta Electoral Central a las candidaturas a las que puedan corresponder como consecuencia de la aplicación de las reglas establecidas en el artículo 216 de la Ley Orgánica 5/1985, de 19 de junio, a los resultados del proceso electoral celebrado el 26 de mayo de 2019, sin que sea necesario realizar nuevas elecciones.')

⁵⁴ See Law of 4 April 2019 establishing principles of the order of filling in the mandates of the deputies for the European Parliament elected by Poland for 2019-2024 term (Dz.U. 2019 poz 708) (foreseeing that, applying existing provisions of the Electoral Code, the National Electoral Commission indicates which electoral committee received 52nd quotient. In the next step, the National Electoral Commission checks which MEP elected from the list of that committee received the lowest number of votes). Since Art 329 § 1 of the Electoral Code states that Poland elects as many MEP as indicated in EU law no further amendments were necessary.

⁵⁵ See Bundesgesetz über die Wahl der Mitglieder des Europäischen Parlaments, § 75 (Ermittlung des vorläufigen Wahlergebnisses durch die Bundeswahlbehörde) in combination with § 77 (Ermittlung der Mandate durch die Bundeswahlbehörde) and § 78 (Zuweisung der Mandate, Niederschrift, Verlautbarung).

mandates if the suspensive condition – Brexit – occurs. French legislation in this regard is particularly explicit as it states that '[c]es candidats prennent leur fonction de représentants au Parlement européen à compter de la date du retrait du Royaume-Uni de l'Union européenne.'⁵⁶ This point was further clarified in the press release of the Council of Ministers which approved the emergency legislation as meaning that 'tant qu'ils n'entrent pas effectivement en fonction, les droits et obligations attachés à la qualité de représentants au Parlement européen ne leur sont pas opposables, notamment en matière d'incompatibilités.'⁵⁷

It is important to note that all legislatures foresee the possibility of members joining at a later stage in the case that the originally elected representative is no longer able to fulfil his or her mandate.⁵⁸ There is, however, a qualitative difference between such a procedure and the case at hand. Substitute candidates are not elected but are simply on a substitute list. The 27 future MEPs under discussion here are instead elected, even though they can only take up their seats at a later stage of the parliamentary period. Given the nature of a suspensive condition, and the uncertainty around the UK's withdrawal from the EU, this later stage might never even materialize. Nonetheless, given that these MEPs in waiting have not taken up their mandate they have not yet attained the rights and privileges linked to it. Consequently, the suspensive condition does not violate constitutionally protected rights linked to the status of MEP.

Related to these considerations is the third issue, which concerns the effects of a suspensive condition on the representational system. The 2019 EP elections provide the novelty of a partially conditional election. The materialization of the people's vote will depend on an outside factor – Brexit. To the best of our knowledge, there has not been any precedent for such an approach and it is unclear whether this procedure has any impact on the

⁵⁶ See Loi n° 2019-487 du 22 mai 2019 relative à l'entrée en fonction des représentants au Parlement européen élus en France aux élections de 2019, JORF n° 0119 du 23 mai 2019, Art. unique.

⁵⁷ 'Compte rendu du Conseil des ministres du 24 avril 2019' <<https://www.gouvernement.fr/conseil-des-ministres/2019-04-24/entree-en-fonctions-des-representants-au-parlement-europeen>> accessed 23 August 2019.

⁵⁸ See for instance Legge 24 gennaio 1979, n. 18 Elezione dei membri del Parlamento europeo spettanti all'Italia, G.U. n. 29 del 30 gennaio 1979, Art 6.

credibility and the trust in the electoral system. If an elected candidate is not able to take up her office due to ongoing political negotiations about Brexit, her electorate might consider their vote to be cast in vain. This might cause doubts on the democratic nature of the elections and in turn of the Union, which is clearly envisaged in Article 13 TEU. However, the recent elections indicate that such fears are unfounded. Rather than doubt and suspicion about democratic representation within the Union, the May 2019 EP elections saw the highest participation in the history of the Union. Thus, it appears that, among other factors, the ongoing political debates about Brexit revitalized democratic processes within the Union rather than stifling them.⁵⁹

In sum, it seems that the issues arising from the suspensive effects of a prolonged Brexit are in line with broader EU constitutional law requirements. The EU and its Member States have taken legislative measures to regulate the problem. As a result, this procedure, albeit novel, will be based on legal grounds. Furthermore, the 27 MEPs which would have been elected had it not been because of a Brexit extension, will not take up their mandate until after the UK withdraws from the EU. Thus, they will not be bestowed with any official right or obligations; and the Brexit condition will therefore not interfere with any prerogatives linked to the mandate.

2. Resolutive condition

More problematic about the current arrangement is the situation of the 73 MEPs which were elected in the UK. According to the European Council Decision, these MEPs are supposed to leave the EP after Brexit has materialized.⁶⁰ Article 3(2) of European Council Decision 2018/937 seems to consider this almost a technicality, by envisaging a termination of the UK mandates and an automatic transition to the new EP composition-key.

⁵⁹ See French President Emmanuel Macron, Letter, 4 March 2019, available at: <https://www.elysee.fr/es/emmanuel-macron/2019/03/04/pour-une-rennaissance-europeenne>.fr accessed 13 September 2019 (citing Brexit as a reason to participate to EU elections).

⁶⁰ European Council Decision (EU) 2018/937 (n 43), Art 3(2). European Council Decision (EU) 2019/584 taken in agreement with the United Kingdom of 11 April 2019 extending the period under Article 50(3) TEU [2019] OJ L 101, recital 11.

However, here the question arises whether, and under what conditions, these MEPs can be required to give up their seats and leave the EP before the termination of their regular term of office. Unlike the MEPs on the "waiting lists" discussed above, these 73 MEPs have fully taken their office with the elections on 23 May 2019. Thus, at the time when they are supposed to leave the EP they have a valid mandate and fully enjoy the rights and privileges that come with the status of being a MEP. The fact that Brexit could have a resolute effect on the mandate of UK-elected MEPs raises profound constitutional questions.

A series of arguments are mentioned to support this conclusion. First, from the perspective of classic public international law, a Member State's withdrawal from a treaty entails exit by its representatives from all the treaty institutions.⁶¹ Second, from the perspective of administrative law, Brexit deprives UK-elected MEPs of the citizenship requirements to serve within the EU institutions.⁶² And third, from the perspective of democratic theory, it may seem unfair for UK-elected MEPs to take decisions that affect EU citizens after the UK is no longer an EU Member State.⁶³

Yet, none of these arguments seem to withstand careful scrutiny. First, the ECJ has repeatedly argued that the EU constitutes a new legal order,⁶⁴ and that EU constitutional law rather than public international law governs its functioning.⁶⁵ Second, the administrative view seems to clash with the fact that not only UK citizens can be elected as MEPs in the UK; in fact, EU law entitles EU citizens to run in EP elections in the UK,⁶⁶ and UK electoral law

⁶¹ See Vienna Convention on the Law of the Treaties, 1155 UNTS 331, Art 70.

⁶² See also Herwig CH Hoffmann, 'The impact of Brexit on the legal status of European Union officials and other servants of British nationality', study commissioned by the European Parliament Committee on Constitutional Affairs (December 2017).

⁶³ See Robert A Dahl, *On Democracy* (Yale University Press 1998) 78 (explaining that democracy is based on the principle of affected interests, whereby people vote on matters that affect them).

⁶⁴ Case C-26/62, *Van Gend en Loos* EU:C:1963:1.

⁶⁵ Case C-621/18 *Wightman and Others* EU:C:2018:999.

⁶⁶ See Charter of Fundamental Rights of the European Union, Art 39 ('1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the

extends the passive suffrage even to non-EU citizens.⁶⁷ As a result, there is a handful of MEPs elected in the UK on 23 May 2019 who are either dual nationals or actually not British citizens at all.⁶⁸ Clearly, Brexit would not remove the EU citizenship requirement to hold office (at least for them). Third, the democratic argument disregards the fact that already today UK-elected MEPs were fully involved within the EP even in deciding matters – for example on the governance of the Eurozone, or Schengen – to which the UK was not actually participating in, due to its various opt-outs from key areas of European integration.⁶⁹

In fact, there are strong constitutional arguments why the 73 UK-elected MEPs cannot be forced to leave their seats after Brexit.⁷⁰ Whereas the old text of Article 189 TEC stated that the EP represented 'the peoples of the States brought together in the Community', Article 14(2) TEU proclaims that the 'European Parliament shall be composed of representatives of Union citizens', and Article 14(3) states that 'members of the European Parliament shall be elected for a term of five years.' As a result, the EP today is an institution which represents EU citizens, and not citizens of the EU Member

European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.')

⁶⁷ See European Parliament Elections Act 2002, sec. 10(3A). See also Case C-145/04 *Spain v. United Kingdom* EU:C:2006:543 (upholding the UK legislation extending the franchise for EP elections to third-country nationals who are Commonwealth citizens residing in Gibraltar).

⁶⁸ See also 'The Brexit Vote: Here are all the MEPs elected for Britain and Northern Ireland', *The Journal* (28 May 2019) <<https://www.thejournal.ie/british-european-vote-meps-brexit-4654763-May2019/>> accessed 23 August 2019 (reporting the names of all the 73 MEPs elected in Great Britain and Northern Ireland, and indicating that among others Henrik Overgaard-Nielsen (Brexit Party) has dual British and Danish citizenship; Irina Von Wiese (Lib Dems) has British and German citizenship; Christian Allard (SNP) has British and French citizenship; and Martina Anderson (Sinn Féin) has only Irish (not British) citizenship).

⁶⁹ See for a discussion of this problem: Deirdre Curtin and Cristina Fasone, 'Differentiated Representation: Is a Flexible European Parliament Desirable?' in Bruno De Witte et al (eds) *Between Flexibility and Disintegration: The State of EU Law Today* (Edward Elgar Publishing 2017).

⁷⁰ Federico Fabbrini, 'The Institutional Consequences of a 'Hard Brexit'', study commissioned by the European Parliament Committee on Constitutional Affairs (May 2018).

States. This is evidenced by the fact that current members of the EP elected in the UK have been voted into office also by non-British EU citizens resident in the UK who exercised their voting rights for EP elections in accordance with Article 22(2) TFEU, Article 39 EU Charter of Fundamental Rights, and Directive 93/109/EC.⁷¹ In fact, contrary to what has occurred in the European Council and the Council since the notification of withdrawal, MEPs elected in the UK have not been excluded from Brexit-related deliberations and decisions within the EP.

In light of the above, it seems possible to claim that the constitutional principle of representative democracy codified in Article 10(2) TEU, according to which 'citizens are directly represented at Union level in the European Parliament', allows MEPs elected in the UK to serve their role for the full length of their five-year mandate.⁷² Moreover, another institutional factor has to be accounted for in support of this conclusion. The new EP elects a new European Commission. Pursuant to Article 17(7) TEU the President of the European Commission 'shall be elected by the European Parliament by a majority of its component member'; the EP scrutinizes the candidates put forward by the Member States for the role of Commissioners; and '[t]he President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament.'⁷³ The fact that the EP is constitutionally mandated to approve the formation of the new Commission means that a relation of confidence is developed between these two institutions.⁷⁴ Modifying the composition of the EP in the course of its 9th term, therefore, would unsettle the inter-institutional relation between the EP and the Commission, potentially affecting the confidence in the Commission itself.

⁷¹ Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals [1993] OJ 1993 L 329/34.

⁷² See also Protocol (No 7) on the privileges and immunities of the European Union, Art 9.

⁷³ Art 17(7) TEU.

⁷⁴ See Editorial comments, 'After the European elections: *Parliamentary games and gambles*' (2014) 51 Common Market Law Review 1047.

In fact, an ex post change in the composition of the EP, with a departure after Brexit of 73 UK-elected MEPs – the third largest national delegation in the EP – would inevitably alter the political equilibria within the EP. This is particularly relevant in 2019 since the President-elect of the European Commission Ursula von der Leyen – who was nominated by the European Council on 2 July 2019,⁷⁵ following a long wrangling between the heads of state and government, which led to the abandonment of the *Spitzenkandidaten* method⁷⁶ – was approved in her post by the EP on 16 July 2019 with a margin of only nine votes: 383 for, 327 against, with 22 blank and one annulled votes – the required majority being 374 votes.⁷⁷ As it quickly appeared, in securing President Von der Leyen's election, the votes of a number of UK-elected MEPs proved influential, including the ten Labour MEPs (who sit in the Socialists & Democrats group), the four Conservative Party MEPs (who sit in the group of European Conservative and Reformists) and crucially the 16 Liberal Democrats (Lib-Dems) members of the newly created group Renew Europe. If, of course, such MEPs were to leave the EP after Brexit – although together with the 29 MEPs of the Brexit Party, who strongly opposed President Von der Leyen – this will affect the political equilibria within the EP, potentially depriving the European Commission of the mathematical majority on which it relies within the EP, and forcing a governmental crisis in the EU.

V. CONCLUSION: BEYOND EXTENSION

In conclusion, the Brexit extension created short-term changes and challenges to the functioning of the EP, which are likely to lead to litigation. As we explained, the suspensive condition that Brexit has on 27 MEPs seems to be legally acceptable, and practically manageable, since these individuals

⁷⁵ See European Council Conclusions, 2 July 2019, EUCO 18/19.

⁷⁶ See European Council President Donald Tusk, statement, 28 May 2019 (indicating that 'there can be no automaticity' in the appointment of the European Commission President in light of EP election results).

⁷⁷ See European Parliament, 'Press Release - European Parliament Elects Ursula von der Leyen as first Female Commission President' (16 July 2019) <<http://www.europarl.europa.eu/news/en/press-room/20190711IPR56824/parliament-elects-ursula-von-der-leyen-as-first-female-commission-president>> accessed 23 August 2019.

do not actually acquire any prerogative as MEPs until a future point in time when the UK leaves the EU. Instead, profound constitutional questions would result from the resolutive condition. Constitutional arguments related to the nature of MEPs, and institutional considerations connected to the electoral relation between the EP and the Commission, suggest that UK-elected MEPs cannot be forced to vacate their seats after Brexit, and before the end of their five-year mandate. Yet, as Article 14 TEU sets a fixed, maximum number of 751 MEPs, if the 73 UK-elected MEPs do not forfeit their seats after Brexit, it becomes impossible for the extra 27 MEPs that could be subsequently re-deployed from 14 other Member States to take up these seats. The adoption of a special protocol would therefore be required, as we suggested elsewhere.⁷⁸

However, the Brexit extension has implications also for the other EU institutions. On 19 August 2019, the UK Government announced that it will stop attending most meetings of the Council of the EU as of 1 September 2019.⁷⁹ As explained by the UK Secretary of State for Exiting the EU, Stephen Barclay, '[t]his will free up time for Ministers and their officials to get on with preparing for our departure on October 31 [2019].'⁸⁰ Nevertheless, the UK Government clarified that it will continue to attend meetings of the Council of the EU, 'where the UK has a significant national interest in the outcome of discussions'⁸¹ – listing meetings on UK exit, sovereignty, international relations, security, or finance as examples. As such, while the UK Government indicated that this 'decision is not intended in any way to frustrate the functioning of the EU'⁸² – and correspondingly arranged to delegate pursuant to Article 239 TFEU its voting rights to Finland, as the Member State holding the six-month presidency of the Council of the EU –

⁷⁸ See Fabbrini and Schmidt (n 42).

⁷⁹ UK Government, 'Press release, UK officials will stop attending most EU meetings from 1 September' (20 August 2019) <<https://www.gov.uk/government/news/uk-officials-will-stop-attending-most-eu-meetings-from-1-september>> accessed 23 August 2019.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

the move signaled a willingness to continuously leverage its involvement in the EU to protect its 'ongoing national interest'.⁸³

Moreover, on 23 August 2019, the UK Government also announced that it would not nominate a UK Commissioner for the 2019-2024 term.⁸⁴ Even though pursuant to Article 17(5) TEU, as amended by a decision of the European Council, the Commission shall consist of one national for each Member State,⁸⁵ the UK refrained from nominating 'a UK Commissioner for the new Commission' in view of the intention of the new Prime Minister to leave the EU by 31 October 2019.⁸⁶ As the UK Permanent Representative to the EU Sir Tim Barrows explained in a letter to the head of the transition team of the new European Commission President, this move is 'not intended to stop the EU appointing a new Commission,'⁸⁷ and the UK

will not object to the Council, in accordance with Article 17(7) [TEU] and in agreement with the President-elect, adopting the list of candidates for the appointment as members of the Commission and communicating that list to the European Parliament.⁸⁸

As a result, by deciding unilaterally not to exercise its right to nominate a European Commissioner, and by choosing selectively whether to exercise its right to participate in EU Council meetings, the UK has been affecting the composition and decision-making process of other EU institutions.

⁸³ Ibid.

⁸⁴ UK Government, 'Press Release, The UK will not nominate a new Commissioner to the EU' (23 August 2019) <<https://www.gov.uk/government/news/the-uk-will-not-nominate-a-new-commissioner-to-the-eu>> (accessed 29 August 2019).

⁸⁵ See in fact European Council Decision 2013/272/EU of 22 May 2013 concerning the number of members of the European Commission, [2013] OJ L 165/98, Art 1 (stating that '[t]he Commission shall consist of a number of members [...] equal to the number of Member States'). Technically this sets a fixed number for the size of the college of Commissioner: 28, so it remains to be seen how this can be squared if the UK extends further its EU membership without appointing a Commissioner.

⁸⁶ Ambassador Sir Tim Barrow, 'Letter to the Head of Transition Team (European Commission President-elect) and the Secretary General of the Council of the European Union' (23 August 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/827315/Nomination_of_a_Commissioner_-_FINAL.pdf> accessed 29 August 2019.

⁸⁷ Ibid.

⁸⁸ Ibid.

Therefore, while still remaining during the extension period an EU Member State 'with full rights and obligations',⁸⁹ the UK is carving out for itself a diminished membership status, with only partial involvement in the governance of the EU. Yet, this condition of semi-membership could drag on for a much longer time, raising important constitutional questions for Europe's long-term future. In fact, the new President of the European Commission, Ursula Von der Leyen, already indicated that she would be open to a further extension of UK membership.⁹⁰ This scenario is likely given the constitutional crisis that has played out in the UK since Boris Johnson took over as Prime Minister.

Following the decision by Prime Minister Johnson on 28 August 2019 to prorogue Parliament, on 3 September 2019 Westminster voted to seize control of the parliamentary agenda. With an emergency motion it tabled for discussion a piece of legislation designed to take the risk of a hard Brexit off the table and impose on the PM the duty to seek with the EU a further extension under Article 50 TEU in case a deal had not been found.⁹¹ The bill, which was drafted by Labour MP Hillary Benn, the Chairman of the Brexit Select Committee, was approved at record speed on 4 September 2019, by a majority of 328 to 301, with the crucial vote of moderate Tory MPs. It specifically requires the UK Government to seek an extension until at least 31 January 2020, thus further proroguing the UK membership in the EU, to buy extra time to arrange an orderly exit and avert a no-deal.

However, the ongoing membership of a withdrawing Member State poses institutional issues for the future of the EU: the EU is a free Union of free states, all of which have willingly decided to share their sovereignty on a reciprocal basis to federate into a supranational organization. In fact, if a state were to feel caged into the EU against its will, this may challenge the constitutional compact on which the Union is based, and such state could become a nuisance in the functioning of the EU itself. We have already

⁸⁹ See European Council Conclusions EUCO XT 20015/19 (n 34) para 6.

⁹⁰ See European Commission President-elect Ursula von der Leyen, speech at the European Parliament, Strasbourg, 16 July 2019 (indicating that the withdrawal agreement cannot be renegotiated but that the Commission is willing to further extend UK membership of the EU in October 2019 if necessary).

⁹¹ European Union (Withdrawal) Act (No. 2) 2019.

mentioned the threat of Jacob Rees Mogg, a leader of the pro-Brexit camp, to make the UK as difficult as possible during the extension period.⁹² With the recent appointment of Boris Johnson as the new UK Prime Minister, Rees Mogg has now become Leader of the House – that is the chief whip of the Tory majority in the House of Commons – and there is a risk that such strategy of undermining the Union from within may be put into action.⁹³ If faced with further extensions such sentiments are likely to grow. Even though a UK government might not adopt such a subversive position outright, it will be pressured by these forces, as it has been before and throughout the Brexit process. Thus, it will likely oppose policies that, although highly beneficial for the EU itself, might be less so for a third state. And the longer the extension lasts the more likely it is that these problems will intensify.

It is precisely to avert this threat that the European Council in accepting the second extension requested the UK government to act in a constructive and responsible manner throughout the extension period in compliance with the Treaty-based duty of sincere cooperation.⁹⁴ Yet, it is not clear whether this can be expected, and much less enforced – which raises the important question of whether the EU should in fact start thinking about more structural institutional solutions to accommodate different tiers of membership within its ranks. If two years of Brexit talks have proved the difficulties of leaving the EU, the 2016 Brexit referendum unearthed uneasiness with the EU that the Union would ignore at its own peril. And if the UK is due to remain in the EU for a while more, with Brexit postponed *ad Kalendas Graecas*, it is certainly in the EU's interest to reorganize its constitutional setup in such a way that states who are laggards in the process of integration do not interfere with the ambitions of others.⁹⁵

⁹² Tweet by Jacob Rees-Mogg (n 5).

⁹³ Alistair Smout, 'UK PM Johnson appoints Rees-Mogg as leader of the House of Commons' *Reuters* (24 July 2019) <<https://www.reuters.com/article/us-britain-eu-leader-reesmogg/uk-pm-johnson-appoints-rees-mogg-as-leader-of-the-house-of-commons-idUSKCNtUJ3tI>> accessed 23 August 2019.

⁹⁴ See European Council Conclusions EUCO XT 20015/19 (n 34) para 7.

⁹⁵ See e.g. Ivan Krastev, *After Europe* (Penn Press 2017); George Soros, 'How to Save Europe' *Project Syndicate* (29 May 2018); and Sergio Fabbrini, *Europe's Future* (CUP 2019).

In other words, the EU itself should promote constitutionally entrenched mechanisms of institutional differentiation where states with diverse visions of integration can coexist without undermining each other. The way for the EU to do so is to assume a clear constitutional differentiation between the internal market, on the one hand, and a political and economic union, on the other.⁹⁶ Effectively, there are two Europes in the EU today — one political and economic in nature and another purely focused on market integration. These Europes have coexisted for many years, but Brexit has actually made their difference crystal clear. If the Brexit postponement is a boost for the irreversibility of the project of European integration, it is also a challenge for a free Union of free states. In this context, a treaty reform to differentiate tiers of membership and levels of commitments between Member States must emerge as an indispensable way forward.

⁹⁶ See further Federico Fabbrini and Miguel Poiars Maduro, 'Is the EU Prepared if the UK Were to Stay?', EU News (10 January 2019) <<https://www.eunews.it/2019/01/10/eu-prepared-if-the-uk-were-to-stay-bremain/112827>> accessed 23 August 2019.

BREXIT AND CITIZENS' RIGHTS

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Immigration was a major point of debate and disagreement in the United Kingdom (UK) during the 2016 Brexit referendum. Following three years of negotiations, the European Union (EU) and the UK came to an agreement – though not yet in force – on the protection of citizens' rights post-Brexit. This, however, covers only those EU nationals who come to the UK (and vice versa) before the UK's withdrawal from the EU. The future mobility framework is yet to be determined. This article discusses the citizens' rights negotiated by the parties and the possible mobility regimes for the future EU-UK relationship. It suggests that whatever future policy is chosen, it will, as the UK government insists, be far removed from the free movement notion under EU law. This is particularly the case in a no-deal Brexit scenario.

Keywords: Brexit, European Union, withdrawal agreement, free movement of persons, mobility, citizens' rights, no-deal Brexit, GATS, Mode 4 mobility, Settlement Scheme

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† The authors are working with the 'UK in a Changing Europe' programme. They have been supported through ESRC funding ES/N015436/1.

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I. INTRODUCTION

The European Union (EU) has insisted that withdrawal from membership of the EU under Article 50 of the Treaty on European Union (TEU), like the process of accession to the EU, should follow a phased approach.¹ The EU made clear that the Parties could not advance to the next phase of negotiations until the European Council had concluded that sufficient progress had been made in the previous phase. Ensuring citizens' rights – namely the rights of EU citizens already resident in the UK and UK citizens in the EU – was one of the three main issues for first phase of negotiations, the other two being the so-called Brexit bill and the Northern Ireland border.²

While immigration was a major point of debate and disagreement in the UK during the campaign leading up to the 2016 referendum, reaching a consensus

¹ See Jones in this issue.

² European Council, 'Guidelines following the United Kingdom's notification under Article 50' (29 April 2017) EUCO XT 20004/17.

with the EU on citizens' rights in fact proved easier than might have been expected. However, Phase I of the negotiations – which ultimately led to the 25 November 2018 Withdrawal Agreement (WA) – were limited to the protection of the rights already acquired by EU citizens prior to withdrawal and, potentially, also those during the transition period (also called the 'implementation period' by the UK government). Importantly, the WA (or any other withdrawal agreement, should the Parties decide to re-negotiate) does not provide for 'onward' free movement rights, that is, rights applicable to UK nationals living in one EU state who, after the transition period or after the withdrawal date, want to move to another EU State. This is considered to be an issue to be dealt with under any future trade negotiations and thus a separate agreement on the future relationship³ which is covered by Phase II of the negotiations. A 'future mobility framework' is due to be negotiated as part of a future relationship agreement.

This article addresses citizens' rights both under the November 2018 Withdrawal Agreement (Section II) and, more speculatively, under a future mobility framework (Section III). The implications of a no-deal Brexit for citizens' rights will also be discussed. Finally, Section IV will look into international mobility rights, specifically the default position as provided by the General Agreement on Trade in Services (GATS) provisions of the World Trade Organization (WTO). It will be argued that while the rights of EU citizens already in the UK (and vice versa) are fairly generously protected under the WA, a no-deal Brexit threatens that security, particularly for UK nationals in the EU. It will also be argued that even with a future trade agreement, the future mobility framework will, intentionally, be far removed from any notion of free movement as it is currently understood. In the event of a no-deal Brexit, reliance on GATS as the vehicle for future mobility for UK nationals into the EU for work purposes will be very limiting and will necessitate a very different approach to migration from the current one.

We begin by looking at mobility rights under the Withdrawal Agreement (WA), noting that at the time of writing the WA has not passed through the

³ Section II of this article will nevertheless address the future mobility framework envisioned by UK policy makers.

UK parliament, despite three attempts.⁴ The third meaningful vote, which took place in the House of Commons on 23 March 2019, resulted in a rejection of the UK Government's motion to approve the WA by 344 votes to 286 and led to the extension of the Article 50 negotiating period until 31 October 2019. If the UK Parliament fails to approve the WA (or a renegotiated version of the WA), the Article 50 process will result in a no-deal Brexit. The discussion below reflects the content of the WA, bearing in mind that at present the WA is not a binding commitment in the form of an international treaty.

II. CITIZENS' RIGHTS UNDER THE WITHDRAWAL AGREEMENT

In its 29 April 2017 Guidelines, the European Council said:

Agreeing reciprocal guarantees to safeguard the status and rights derived from EU law at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom's withdrawal from the Union will be the first priority for the negotiations.⁵

Citizens' rights were the subject of an early agreement in principle between the parties during Phase I of the negotiations under Article 50 TEU, the results of which were first laid out in the 8 December 2017 Joint Report⁶ and then translated into a legal text, the Withdrawal Agreement. The agreement on citizens' rights can be found in Part II of the WA.

The governing principle of the Joint Report and the WA is the reciprocal protection of residence rights for those citizens of the EU Member States in

⁴ 'Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community', as agreed at negotiators' level on 25 November 2018 <https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_o.pdf> accessed 30 August 2019. The UK Parliament has rejected the agreement on three occasions, and it is therefore unclear whether it will be adopted.

⁵ European Council Guidelines (n 2), para 8, p 5.

⁶ 'Joint Report from the Negotiators of the European Union and the United Kingdom Government on Progress during the Phase I of Negotiations under Article 50 TEU on the United Kingdom's Orderly Withdrawal from the European Union of 8 December 2017', European Commission <https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf> accessed 30 August 2019.

the UK and UK citizens in the EU who have exercised free movement rights by the specified exit date. This section addresses whose rights are protected (subsection 1), the content of citizens' rights (subsection 2), and the relevant institutional framework (subsection 3). Subsection 4 concludes with a brief discussion of what might happen in the event of a no-deal Brexit.

1. The Scope of Application of Citizens' Rights

The UK and the EU have agreed to preserve residence rights acquired before the UK's withdrawal from the Union. Citizens who, in accordance with Union law, legally reside in the UK, and UK nationals who, in accordance with Union law, legally reside in one of the EU²⁷ Member States, as well as their family members, fall within the scope of protection. The UK Government's White Paper on immigration⁷ indicates that during the transition period, the Government will implement the EU Settlement Scheme. This scheme is in fact already being rolled out.⁸ The aim of the scheme is to ensure a post-Brexit continuation of the residence rights of EU citizens already resident in the UK and of those who arrive in the UK during the transition period. Similar arrangements will be negotiated with EFTA states (Norway, Iceland, Liechtenstein and Switzerland).

As of March 2019,⁹ the UK has opened up the EU Settlement Scheme¹⁰ not just for EU nationals but also for EEA nationals and Swiss citizens, who must

⁷ 'The UK's Future Skills-based Immigration System' (December 2018), Cm 9722 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766672/The-UKs-future-skills-based-immigration-system-accessible-version.pdf> accessed 30 August 2019.

⁸ 'A Call to Apply for the EU Settlement Scheme' <<https://www.gov.uk/settled-status-eu-citizens-families>> accessed 30 August 2019.

⁹ Prior to that there had been testing of the scheme on certain employers in certain geographic areas: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752872/181031_PBI_Report_Final.pdf> accessed 30 August 2019. On the roll out, see <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-12-20/HCWS1226/> accessed 30 August 2019.

¹⁰ See the Statement of Intent <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718237/EU_Settlement_Scheme_SOI_June_2018.pdf> accessed 30 August 2019 and then the changes to the immigration rules: <<https://assets.publishing.service.gov.uk/government/>

apply by 30 June 2021 if they wish to continue living in the UK after that date (those who have Irish nationality or have indefinite leave to remain do not need to apply). The scheme will be open until six months after the end of transition period. The EU Settlement Scheme is in line with the WA which states that Union citizens and UK nationals, and their respective family members, who have resided legally in the host State in accordance with Union law for a continuous period of five years or for the period specified in Article 17 of Directive 2004/38/EC,¹¹ shall have the right to reside permanently in the host State.¹² It is important to emphasise that the scheme is subject to the conclusion of the WA with the EU which would provide for a transition period. A policy paper published by the UK Government, however, says that the UK will continue to run the EU Settlement Scheme for those residing in the UK by exit day in a 'no-deal' scenario.¹³

While the Joint Report does not specify the end date for acquiring residence rights, the WA sets out a transition period¹⁴ during which free movement applies.¹⁵ If concluded by both parties, the WA may extend free movement of persons to the end of 2020, with a possible extension up to the end of

uploads/system/uploads/attachment_data/file/784060/CCS207_CCS0319710302-002_HC_1919_Immigration_Rules_EXPLANATORY_MEMO_PRINT_.pdf > accessed 30 August 2019. The website is: <<https://www.gov.uk/settled-status-eu-citizens-families/applying-for-settled-status>>.

¹¹ Art 17 of the Directive 2004/38/EC lists cases when the right of permanent residence in the host Member State may be enjoyed before completion of a continuous period of five years of residence (e.g. incapacity to work, retirement and other).

¹² Art 15(1) of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 25 November 2018 <<https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration>> accessed 30 August 2019.

¹³ 'Citizens' Rights – EU citizens in the UK and UK nationals in the EU', Department for Exiting the European Union <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790570/Policy_Paper_on_citizens_rights_in_the_event_of_a_no_deal_Brexit.pdf> accessed 30 August 2019.

¹⁴ See Armstrong in this issue.

¹⁵ For details: Immigration (European Economic Area) Regulations 2016 <<http://www.legislation.gov.uk/ukSI/2016/1052/made>> accessed 30 August 2019.

2022.¹⁶ In such a case, residence rights of citizens who moved before that point,¹⁷ and family members,¹⁸ as well as those whose entry was facilitated¹⁹ would retain such rights after the transition period. Those who, on the specified date, are working as frontier workers also fall within the scope of protection.²⁰

Those protected as family members must already be resident or already be a family member or have been born or adopted by someone already qualifying as a family member.²¹ EU and UK citizens and their family members will retain their residence rights as provided for under the EU treaties and the Citizens' Rights Directive 2004/38.²² Under the WA, those with permanent residence will acquire 'settled status' under the same rules as those under Directive 2004/38/EC.²³ That status can be lost after five years' departure (as compared with two years under the Directive 2004/38/EC).²⁴ Those without five years of residence will enjoy 'accumulation of periods' under Article 16 of the WA which essentially means that these individuals will acquire 'pre-settled status' prior to acquiring settled status. In that period prior to five years, individuals can change their status, for example, from being a worker to a student.²⁵

In addition to family members who are already resident, the WA also discusses the rights of certain categories of family members, irrespective of their nationality, who were not residing in the EU/UK before the specified date (i.e. the end of the transition period under the WA, if adopted) to join a

¹⁶ Art 132(2) of the WA.

¹⁷ Art 10(1)(a)-(d) of the WA.

¹⁸ Art 10(1)(e)-(f) of the WA.

¹⁹ Art 10(2)-(3) of the WA, which refer to Art 3(2) of Directive 2004/38/EC. Facilitation concerns those family members who do not have a right of entry and residence but who fall under the discretionary list of those whose entry the host Member State should facilitate.

²⁰ Art 10(1)(c) of the WA, para 15, p 2 of the Joint Report.

²¹ Art 10(1)(e) of the WA.

²² Art 13 of the WA.

²³ Art 15(1) and (2) of the WA.

²⁴ Art 15(3) of the WA.

²⁵ Art 17 of the WA.

Union citizen or UK national.²⁶ Such family members may include family members as referred to in Article 2 of the Directive 2004/38/EC²⁷ and children born or legally adopted.

The acquisition of residence rights and of the right of permanent residence before the end of the transition period (again, only if the EU and the UK conclude the WA which provides for a transition period) is subject to conditions under EU law. The Joint Report states that the conditions for acquiring the right of residence under the WA are those set out in Articles 6 and 7 of Directive 2004/38/EC. The Directive distinguishes different conditions depending on whether the length of stay is three months (Article 6) or longer (Article 7). EU and UK nationals, and their family members, will continue to have the reciprocal right of residence for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport. A stay exceeding three months is limited to:

- workers or the self-employed (Article 7(1)(a))
- those with sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host State (Article 7(1)(b))
- those enrolled at a private or public establishment for the principle purpose of study or have comprehensive sickness insurance cover in the host State (Article 7(1)(c))
- family members joining a Union citizen who falls under one of above categories (Article 7(1)(d))

As for the acquisition of the right of permanent residence, the conditions listed in the Directive 2004/38/EC apply. Article 16 states the general rule which requires residence for a continuous period of five years. Continuity of residence shall not be affected by temporary absences not exceeding a total

²⁶ Art 9(a) of the WA, para 12, p 2 of the Joint Report.

²⁷ Under Art 2 of the Directive 2004/38/EC family members include: the spouse, a registered partner, the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner, the dependent direct relatives in the ascending line and those of the spouse or partner.

of six months in a given year. Article 17 lists exemptions from this general rule for people who may acquire permanent residence rights before completion of a continuous period of five years of residence. Such people include, for example, workers or the self-employed who at the time they stop working become entitled to an old-age pension.²⁸

According to the Joint Report, the EU and the UK can require persons concerned to apply to obtain a residence status and be issued with a residence document attesting to the existence of that right.²⁹ The WA contains a lot of detail on the practicalities of attaining these new statuses. It requires that the relevant administrative procedures be 'smooth, transparent and simple' and that unnecessary administrative burdens be avoided.³⁰ Application forms must be short, simple, and user-friendly; applications by families must be considered together.³¹ Applications must be free of charge or for a fee not exceeding that imposed on nationals.³² Those already with the right of permanent residence can simply swap the documentation subject to criminality and ID check.³³ What is different about the new procedures is that criminality and security checks are carried out systematically.³⁴ There must, however, be judicial and administrative redress for those affected by the State's decisions.³⁵ Protection is for life,³⁶ unless the individual leaves the country for five years.

It can thus be concluded that the scope of application of citizens' rights as negotiated during Phase I is limited and only partially reflects the extent of

²⁸ Art 17(1)(a) of the Directive 2004/38/EC.

²⁹ Para 16, p 3 of the Joint Report.

³⁰ Art 18(1)(e) of the WA, para 17, p 3 of the Joint Report. See also a technical note prepared by the UK Government which sets out proposed procedures under its national law, which it will continue to develop over the coming months: <<https://www.gov.uk/government/publications/citizens-rights-administrative-procedures-in-the-uk>> accessed 30 August 2019.

³¹ Art 18(1)(f) of the WA, para 17(c) of the Joint Report.

³² Art 18(1)(g) of the WA, para 17(e) of the Joint Report (the UK has in act waived the fee).

³³ Art 18(1)(i) of the WA.

³⁴ Art 18(1)(p) of the WA, para 24 of the Joint Report.

³⁵ Art 18(1)(r) of the WA, para 18 of the Joint Report.

³⁶ Art 39 of the WA.

free movement rights under EU law. The latter applies to all EU citizens who have already moved or *will* move to another Member State in the future, whereas citizens' rights under the WA are applicable only to those who exercise(d) their free movement rights within a limited period of time. In effect, only Britons who move(d) to one of the EU Member States and EU citizens who move(d) to the UK before the end of transition/withdrawal date will enjoy rights currently offered under EU law. Such rights will not be offered to those who move post-exit/transition date. This 'beat the clock' policy did not result in increased migration flows to the UK. On the contrary, EU net migration has fallen sharply since the Brexit referendum to a level last seen in 2013.³⁷ Future uncertainty about immigration status may well be one cause of this.³⁸ Neither does the number of those who have applied to the EU Settlement Scheme indicate a great hurry to ensure their right to remain in the UK post-Brexit, with only approximately 30 per cent of EU/EEA and Swiss nationals (excluding Irish nationals) living in the UK having registered under the Scheme so far.³⁹ The number of applications to the EU Settlement Scheme is, however, gradually increasing, possibly as a result of the Brexit deadline.⁴⁰

2. The Content of Citizens' Rights

During Phase I of negotiations, the EU and the UK agreed to commit to the principle of non-discrimination with respect to the treatment of citizens, the cornerstone principle of the free movement framework under EU law. The

³⁷ 'Migration Statistics Quarterly Report: February 2019', Office for National Statistics <<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/migrationstatisticsquarterlyreport/february2019>> accessed 30 August 2019.

³⁸ Jonathan Portes, 'When It Comes to Immigration, the UK is Already in a Post-Brexit Era' (UK and EU, 30 May 2019) <<https://ukandeu.ac.uk/when-it-comes-to-immigration-the-uk-is-already-in-a-post-brexit-era/>> accessed 30 August 2019.

³⁹ 'The Progress of the EU Settlement Scheme So Far', the House of Commons Library <<https://commonslibrary.parliament.uk/home-affairs/immigration/the-progress-of-the-eu-settlement-scheme-so-far/>> accessed 30 August 2019. The source indicates that the data is based on the number of EU, EEA or Swiss nationals living in the UK (3.35 million), estimated using surveys since there is no centralized record of the number of EU citizens living in the UK.

⁴⁰ Ibid.

principle of non-discrimination and full reciprocity with respect to the *future* mobility framework has also been set out in paragraph 51 of the non-binding Political Declaration annexed to the WA, which is discussed in Section III below.

The WA says that any discrimination on grounds of nationality will be prohibited in the host State and the State of work in respect of Union citizens and UK nationals, as well as their respective family members covered by the agreement.⁴¹ Family members will continue to have access to employment;⁴² equal treatment continues to apply for EU/UK nationals and their family members.⁴³ The differences apply in respect of criminal matters. Criminal behaviour will be assessed by EU standards if it occurs before the end of the transition period,⁴⁴ but by (stricter) national standards afterwards.⁴⁵ However, the rights of appeal in EU legislation will still apply.⁴⁶ Recognition of qualifications will also continue.⁴⁷

The EU and the UK have agreed that social security coordination rules will apply.⁴⁸ Those citizens covered by the social coordination scheme will continue to be eligible for healthcare reimbursement, including under the European Health Insurance Card (EHIC) scheme,⁴⁹ as long as they stay, reside or continue treatment in the host State. While access to social security for Union citizens was one of the key points of contention during the debates leading up to the 2016 referendum, the right to equal treatment with respect to social security for those citizens who have acquired residence rights before the end of transition period (or the date of withdrawal in case of a no-deal Brexit) will continue to apply within the limits established under EU law.⁵⁰

⁴¹ Art 12 of the WA.

⁴² Art 22 of the WA.

⁴³ Art 23 of the WA.

⁴⁴ Art 20(1) of the WA.

⁴⁵ Art 20(2) of the WA.

⁴⁶ Art 21 of the WA.

⁴⁷ Arts 27-9 of the WA.

⁴⁸ Art 31 of the WA, para 28, p 4 of the Joint Report. Social security coordination rules set out in Regulations (EC) No 883/2004 and (EC) No 987/2009 will apply.

⁴⁹ The European Health Insurance Card scheme will be governed by the Regulation (EC) No 883/2004.

⁵⁰ Art 23 of the WA, para 31, p 5 of the Joint Report.

It is important to re-emphasise that while key principles of EU law, such as equal treatment, have been reaffirmed by the parties during Phase I of negotiations, they will apply only to a small group of people, namely those citizens who move to the EU/UK before the end of transition period/withdrawal. In effect, the parties have agreed on an exceptional extension of personal and territorial scope of EU citizenship to a limited category of people: British nationals who move to the EU before the end of the transition period will continue to enjoy some of the significant rights under EU law while no longer being citizens of the EU; EU nationals who move to the UK will enjoy those rights in the territory of a state which is no longer a member of the EU.

3. The Institutional Framework

The WA provides for a dual institutional framework for the implementation and application of the citizens' rights. The European Commission will be a designated institution on the Union's side, whereas the UK will have to set up an Independent Authority – with similar powers to those of the European Commission – to assist EU27 citizens in the UK.⁵¹ The latter will have the power to conduct enquiries on its own initiative concerning breaches of citizens' rights by the administrative authorities of UK. It will also receive complaints from EU citizens as to how they are treated. The European Commission will be able to submit observations in UK cases.⁵² The scope and functions of the Independent Authority, including its role in acting on citizens' complaints, will be discussed between the parties in the next phase of the negotiations and reflected in the WA. There should be regular exchange of information between the UK Government and the Commission.

The role of the Court of Justice of the EU ('the Court'), a highly contentious issue during the 2016 referendum debates, was also addressed during Phase I of the negotiations. The Court, which is the ultimate authority for the interpretation of Union law, will retain its interpretative authority in the context of the application or interpretation of citizens' rights.⁵³ Accordingly,

⁵¹ Art 159 of the WA, para 40, p 6 of the Joint Report.

⁵² Art 162 of the WA.

⁵³ Para 38, p 6 of the Joint Report.

the UK courts will have due regard to relevant decisions of the Court.⁵⁴ UK courts and tribunals can (but are under no obligation to) refer cases to the Court; the Court's rulings will have the same effects as a preliminary reference under Article 267 TFEU in national law.⁵⁵ This mechanism should be available for litigation brought within eight years from the date of application of the citizens' rights.⁵⁶

4. Implications of a No-Deal Brexit

Protection of citizens' rights as negotiated during Phase I is subject to the conclusion of a WA.⁵⁷ At the time of writing the WA has not been approved by the UK parliament (in the form of the Withdrawal and Implementation Bill) nor has it been approved by the European Parliament. This suggests that the UK is heading towards a no-deal Brexit, albeit subject to the delay envisaged by the Hillary Benn Act, the EU (Withdrawal) (No.6) Act, which entails that there should be no no-deal Brexit until the end of January 2020 unless Parliament says otherwise. A no-deal Brexit would mean a separation without any agreed arrangements between the UK and the EU. Without a binding agreement, Part II of the WA cannot be enforced by the parties. In the event of a no-deal Brexit, the UK Government has committed itself to continue running the EU Settlement Scheme for those EU nationals resident in the UK by exit day.⁵⁸ The basis for qualifying for status under the scheme will remain the same as proposed in a 'deal' scenario and will be focused on residence in the UK. This means that any EU citizen living in the UK by exit day will be eligible to apply to this scheme, securing their status under UK law. Those resident on exit day will have until 31 December 2020 to apply for the settled status under the scheme. Until then, EU citizens will continue to be able to rely on their passport (as a British citizen may) or national identity

⁵⁴ Art 4(5) of the WA.

⁵⁵ Art 158(2) of the WA.

⁵⁶ Art 158(1) of the WA.

⁵⁷ Para 5, p 1 of the Joint Report.

⁵⁸ 'Citizens' Rights - EU citizens in the UK and UK nationals in the EU', Department for Exiting the European Union <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790570/Policy_Paper_on_citizens_rights_in_the_event_of_a_no_deal_Brexit.pdf> accessed 30 August 2019.

card if they are asked to provide evidence of their right to reside in the UK when, for example, applying for a job.

However, as the UK points out,⁵⁹ in a 'no-deal' scenario there will be some significant differences as compared to the position under the WA. Firstly, as there would be no agreed transition period, the settled status guarantee would apply only to EU citizens who are resident in the UK by exit day. Second, judicial remedies before the EU Courts will no longer be available. Due to the unilateral nature of the protection of citizens' rights, EU citizens would have the right to challenge a refusal of UK immigration status under the EU Settlement Scheme only by way of administrative review and judicial review under UK law; there would be no preliminary reference procedure to the Court of Justice of the EU. The EU deportation threshold would continue to apply to crimes committed before the exit day. However, the UK would apply the UK deportation threshold to crimes committed after that date.

For UK nationals living in the EU, the position is much less clear. Some may be able to acquire the nationality of the host State under national law and thereby retain the right to reside. Others may benefit from the Long-term Residents Directive 2003/109⁶⁰ which contains some protection for third-country nationals including limited onward free movement rights. Those not covered will be dependent on any bilateral arrangements concluded between the UK and the EU Member States.⁶¹ A number of Member States have, however, put in place some contingency arrangements.⁶²

As for those EU nationals wishing to come to the UK after exit day, in the event of a no deal, the position is more complicated. When Boris Johnson became Prime Minister, his new Home Secretary, Priti Patel, announced that

⁵⁹ Ibid.

⁶⁰ [2003] OJ L16/44. See further Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (6th edn, Oxford University Press 2019), ch 10.

⁶¹ For example, see for Spain: <<https://www.lamoncloa.gob.es/lang/en/brexit/howtoprepare/Paginas/190109socialsecurity.aspx>>. There is also draft UK legislation: The Healthcare (International Arrangements) Bill 2017.

⁶² https://ec.europa.eu/info/brexit/brexit-preparedness/citizens-rights_en#spain.

free movement would end immediately on exit day.⁶³ Legally, this would be true because, under the operation of Article 50 TEU, the EU Treaties would cease to apply to the UK. However, there are no mechanisms to distinguish between EU nationals already resident in the UK on exit day, but who have not yet acquired settled status, and those arriving after exit day. This problem had already been recognised by Patel's predecessor, Sajid Javid, who had outlined the following unilateral no-deal arrangements:

If Britain leaves the EU without agreeing a deal, the Government will seek to end free movement as soon as possible and has introduced an Immigration Bill to achieve this. For a transitional period only, EEA citizens and their family members, including Swiss citizens, will still be able to come to the UK for visits, work or study and they will be able to enter the UK as they do now. However, to stay longer than 3 months they will need to apply for permission and receive European Temporary Leave to Remain [Euro TLR], which is valid for a further 3 years.⁶⁴

Patel was eventually persuaded that her predecessor's plans made sense and she changed her position.⁶⁵ Successful applicants to the Euro TLR scheme will be granted a period of 36 months' leave to remain in the UK, running from the date the leave is granted. They will then have to apply under the new points-based immigration system, due to be introduced from January 2021, to secure their status.⁶⁶ The following section addresses this new scheme in more detail.

In conclusion, with or without a withdrawal agreement, free movement of persons will end once the UK leaves the EU. Even if the parties conclude the Withdrawal Agreement, citizens' rights under EU law, such as the right to

⁶³ <<https://www.politicshome.com/news/uk/home-affairs/immigration/news/105979/priti-patel-wants-eu-free-movement-end-31-october-under>>; <https://www.civilserviceworld.com/articles/news/home-office-officials-study-singapore-priti-patel-%E2%80%98seeks-immediate-end-eu-free>.

⁶⁴ Press release on 28 January 2019 <<https://www.gov.uk/government/news/government-outlines-no-deal-arrangements-for-eu-citizens>> accessed 30 August 2019.

⁶⁵ <<https://www.gov.uk/government/publications/no-deal-immigration-arrangements-for-eu-citizens-moving-to-the-uk-after-brexit/no-deal-immigration-arrangements-for-eu-citizens-arriving-after-brexit>>.

⁶⁶ Ibid.

residence and access to social security, will apply only to a small portion of the population, that is, only those who have/will acquire their rights before the end of the transition period. A no-deal scenario will bring an end to free movement, leaving many people, including UK nationals in the EU, without the security they have enjoyed for almost five decades.

III. THE FUTURE MOBILITY FRAMEWORK

Unlike the citizens' rights provisions which were negotiated during Phase I for EU citizens living in the UK and UK citizens in the EU, the future mobility regime will be negotiated as part of the framework for the future relationship between the UK and the EU. The agreement for the future relationship falls outside the scope of the WA under Article 50 TEU. The WA must only 'take account' of the framework for the future relationship.⁶⁷ The non-binding Political Declaration⁶⁸ on the future relationship annexed to the WA provides brief indicators of the future mobility framework. Its content reflects the UK's decision to end free movement of persons between the Union and the UK.⁶⁹ The document calls for visa-free travel for short-term visits.⁷⁰ It also states that the parties agree to consider conditions for entry and stay for purposes such as research, study, training and youth exchanges, in addition to temporary stays for business purposes.⁷¹ The parties further agree to consider addressing social security coordination in the light of future movement of persons.⁷²

On the UK side, the Government published its vision of its future immigration regime, not just for EU nationals but those from the rest of the world, in the December 2018 White Paper on immigration ('the White

⁶⁷ Art 50(2) TEU.

⁶⁸ 'Political Declaration Setting Out the Framework for the Future Relationship between the European Union and the United Kingdom', 22 November 2018, XT 21095/18 <<https://www.consilium.europa.eu/media/37059/20181121-cover-political-declaration.pdf>> accessed 30 August 2019.

⁶⁹ Ibid. para 50.

⁷⁰ Ibid. para 52.

⁷¹ Ibid. para 53.

⁷² Ibid. para 54.

Paper').⁷³ The White Paper follows almost all of the recommendations of the Migration Advisory Committee's (MAC) 18 September 2018 Report on Migration ('MAC Report').⁷⁴ Both documents largely reflect the UK Government's position on future immigration laid out in the so-called Chequers Plan published in July 2018.⁷⁵

The UK Government's proposals are built on two assumptions. Firstly, the White Paper is based on the premise that UK immigration policy is not included in an agreement on the future EU-UK relationship. The central principle of immigration policy proposed in the White Paper is to grant EU citizens no more favourable treatment than citizens from non-EU States. However, while the UK, upon its withdrawal from the EU, will be able to decide unilaterally on its immigration policy, its policies will nevertheless be subject to the conclusion of negotiations between the EU and the UK on their future relationship. The Chequers Plan of July 2018, the first coherent attempt by the UK to set out what it wanted out of the future relationship between the UK and the EU,⁷⁶ while otherwise largely in line with the White Paper, focuses on the need to obtain reciprocal immigration arrangements with the EU and does not mention that EU citizens and non-EU nationals will be treated alike. That is, unlike the White Paper, which focuses on the single regime for all nationalities, the Chequers Plan is based on a plan to agree a new and deep trade deal with the EU without obliging the

⁷³ The UK's future skills-based immigration system, December 2018, Cm 9722 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766672/The-UKs-future-skills-based-immigration-system-accessible-version.pdf> accessed 30 August 2019.

⁷⁴ Migration Advisory Committee, 'EEA Migration in the UK: Final Report' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/741926/Final_EEA_report.PDF> accessed 30 August 2019.

⁷⁵ 'The Future Relationship between the United Kingdom and the European Union', July 2018, Cm 9593 <<https://static.rasnet.ie/documents/news/2018/07/the-future-relationship-between-the-united-kingdom-and-the-european-union-web-version.pdf>> accessed 30 August 2019.

⁷⁶ <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786626/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf>.

Government to establish a single immigration regime for EU and third-country nationals.

Secondly, some elements of the new regime are based on the assumption that there will be a transition period.⁷⁷ Specifically, the White Paper lays out the EU Settlement Scheme discussed above, which will be implemented during the transition period. According to the White Paper, the new immigration system will start to operate from the end of this transition period.⁷⁸ While in case of a no-deal Brexit the UK Government has committed itself to continue running the EU Settlement Scheme for those resident in the UK by exit day, and the EuroTLR scheme for new arrivals from the EU, EEA and Switzerland, it is likely that a points-based, skills-based immigration system will be adopted in the event of a no-deal Brexit.⁷⁹

Keeping these two assumptions in mind, we now address the content of the post-Brexit immigration system as proposed in the White Paper.

1. The Post-Brexit Immigration System: Introduction

The cornerstone of the new UK immigration system proposed in the White Paper is that, following the transition period (if any), during which the status quo will remain, free movement of persons – a fundamental freedom under EU law – will end. Following the transition period, non-nationals coming to the UK, including EU citizens, who intend to work, study or join family will need permission to do so, normally in the form of an electronic status which must be obtained before coming to the UK. The same holds true for British citizens entering an EU Member State as a non-EU national (though this is subject to EU rules).⁸⁰ These UK reforms will not apply to citizens of the Republic of Ireland, who are covered by arrangements made between Ireland

⁷⁷ See Armstrong in this issue.

⁷⁸ The White Paper 9.

⁷⁹ <<https://www.gov.uk/government/publications/home-secretary-tasks-mac-on-australian-style-points-based-immigration-system>>.

⁸⁰ Regulation (EU) 2019 /592 of the European Parliament and of the Council of 10 April 2019 amending Regulation (EU) 2018/1806 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, as regards the withdrawal of the United Kingdom from the Union.

and the UK under the Common Travel Area (CTA) before the UK's accession to the EU.

As we have seen, the essential feature of the immigration policy under the White Paper is the replacement of a two-tier immigration system for (i) non-EU nationals and (ii) EU citizens with a single immigration regime. The policy is consistent with the post-2016 referendum pledge, so often expressed by the then Prime Minister Theresa May, to introduce a controlled migration regime.⁸¹ The perception was that the almost unrestricted migration from the EU was pushing up numbers of immigrants to the UK to unsustainable levels and thereby preventing the UK delivering on the Conservative Party's election manifesto pledge of reducing immigration to the tens of thousands.⁸² In practice, however, non-EU migration, over which the UK Government has always had full control, has been higher than EU migration. Long-term EU immigration has fallen since 2016 and is at its lowest since 2013.⁸³ Long-term non-EU immigration has gradually increased over the last five years to similar levels as those seen in 2011.⁸⁴ As the Office for National Statistics points out,

long-term international net migration data show that migrants continued to add to the UK population as an estimated 258,000 more people moved to the UK with an intention to stay 12 months or more than left in the year ending December 2018. Over the year, 602,000 people moved to the UK (immigration) and 343,000 people left the UK (emigration).⁸⁵

⁸¹ For example, in her Lancaster House speech of 17 January 2017, then-Prime Minister Theresa May stated 'As Home Secretary for six years, I know that you cannot control immigration overall when there is free movement to Britain from Europe' (full text of the speech available at: <https://static.rasset.ie/documents/news/theresa-may-speech.pdf>, accessed 30 August 2019).

⁸² The Conservative Party, 'The Conservative Manifesto 2017', 54 <<https://www.conservatives.com/manifesto>> accessed 30 August 2019.

⁸³ Office of National Statistics, 'Migration Statistics Quarterly Report: February 2019' <<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/migrationstatisticsquarterlyreport/february2019#non-eu-net-migration-has-increased-while-eu-net-migration-has-decreased>> accessed 30 August 2019.

⁸⁴ Ibid.

⁸⁵ Office of National Statistics, 'Migration Statistics Quarterly Report: May 2019', <<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration>>

The current two-tier system allows only highly skilled workers from outside the EU to be admitted to the UK, while workers of all skill levels can be admitted from the EU. This regime will be replaced with a single route which gives access to highly skilled workers from all countries. Those EU citizens arriving in the UK after the new UK regime has been introduced will be subject to the single immigration policy applicable to persons of all nationalities. Highly skilled workers will be allowed to bring dependents, to extend their stay and switch to other immigration routes (e.g. specialist route, such as scientific researchers), and, in some cases, to settle permanently. The proposed scheme establishes different regimes for (i) visitors, (ii) workers, and (iii) others (students, self-employed, pensioners).

2. *Visitors*

There will be no visa requirement for EU citizens coming to the UK as visitors.⁸⁶ This includes, for example, tourists and those coming to see their friends and family. The White Paper anticipates a reciprocal arrangement from the EU. The proposals concerning visitors laid out in the White Paper therefore reflect the guidelines suggested in the July 2018 Chequers Plan, which calls for a reciprocal visa-free regime for short-term visitors. Most visitors will be able to stay in the UK for up to six months. Visitors may not study for more than 30 days, work or access public funds.

The visitors category also covers short-term business activity, such as coming to the UK for meetings to negotiate and sign business contracts, presentation of research, collaboration, collaboration with UK colleagues on specific projects, working with companies who have bought goods from a foreign manufacturer or where a UK company is supplying a company overseas, coming to UK to investigate and secure funding, etc. Save for some exceptions, paid activity is not generally permitted.

on/internationalmigration/bulletins/migrationstatisticsquarterlyreport/may2019> accessed 30 August 2019.

⁸⁶ The White Paper, para 11, p 12.

3. *Workers*

Those seeking to stay permanently in the UK to work will be required to get prior permission. The White Paper envisages two new work routes:

1. One for skilled workers entitled to stay for longer periods, to bring dependents and in some cases to settle permanently, who will mainly⁸⁷ need to be sponsored by an employer – this will be open to migrants of all nationalities.
2. Another for temporary short-term workers at all skill levels, not sponsored, but subject to strictly defined conditions. This will be a transitional route and will only be open to migrants from specified low-risk countries.

A. Skilled workers

Currently, skilled workers mainly come to the UK on a Tier 2 visa. This is a bureaucratic and expensive process.⁸⁸ As it currently stands, organisations wishing to employ non-EEA nationals must hold a Tier 2 sponsor licence. The application fee for the licence varies depending on whether an organisation is considered to be a small company (£536) or a medium/large company (£1,476). Once an organisation has a sponsor licence, it will then need to issue a Certificate of Sponsorship to any individuals who are to be sponsored, the cost of which is £199. In addition, in 2017, the Immigration Skills Charge was introduced. The charge (£1,000 per year in the case of large companies and £364 per year for small companies) applies in the majority of other circumstances.⁸⁹ In addition, there is a health surcharge (£400 per person per year⁹⁰) as well as the visa charge itself (£1220 per person).

⁸⁷ There will be some exceptions from the requirement for skilled workers to be sponsored by their employer, such as in relation to innovative industries. For example, supernumerary researchers who come to the UK under the skilled work route may be supported by Awards and Fellowships and members of established research teams may be sponsored by UK Higher Education Institutions and the Research Councils, see the White Paper, para 6.7, p 45.

⁸⁸ See further Kern Alexander, Catherine Barnard, Eilís Ferran, Andrew Lang and Niamh Moloney, *Brexit and Financial Services* (Hart Publishing 2018) ch 2.

⁸⁹ The charge is not payable in relation to those who are switching from the Tier 4 to Tier 2 category.

⁹⁰ <<https://www.gov.uk/healthcare-immigration-application/how-much-pay>>.

Employers must also satisfy the 'resident labour market test' (RLMT), advertising the job for 28 days and considering applications from resident workers before offering it to a non-resident person. The individual must also have the requisite level of skill and pay (see below).⁹¹ These financial and procedural burdens may provide a disincentive to organisations to employ foreign workers. Once a single immigration regime is introduced, EEA nationals will be subject to the same Tier 2 visa requirements as non-EEA nationals. However, the White Paper proposes eliminating a number of significant restrictions currently in place.

Firstly, the White Paper suggests a significant change as to the volume of immigration: the current cap of 20,700 places a year for skilled workers is to be eliminated and a no-limit system is to be introduced. Secondly, the White Paper considers abolishing the resident labour market test (RLMT) to reduce the administrative burdens on employers currently using the non-EEA system. The document implies that the RLMT does not offer effective protection against employers seeking migrant labour when domestic alternatives are available.⁹² Instead, according to the Migration Advisory Committee (MAC), the best way to protect against employers under-cutting UK-born workers is a 'robust approach to salary thresholds and the Immigration Skills Charge'.⁹³ Thirdly, the White Paper suggests lowering the points-based skills threshold to cover current workers with intermediate skills. Under the current system, non-EU workers with intermediate skills are unable to come to UK on the high-skilled route (Tier 2), which is limited to occupations at Regulated Qualification Framework (RQF) 6 and above (i.e. graduate and postgraduate level jobs). The White Paper proposes to open the skilled workers route to workers from RQF 3 upwards. In its report, MAC recommended maintaining the minimum salary threshold of £30,000 for those with intermediate skills if the skilled route is expanded to include intermediate skills, although this proposal is now being reviewed.⁹⁴ The

⁹¹ <<https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-j-codes-of-practice-for-skilled-work>>.

⁹² The White Paper, 143.

⁹³ MAC Report, para 7.34.

⁹⁴ 'Sajid Javid orders review into £30,000 salary threshold for immigrants post-Brexit' (PoliticsHome, 24 June 2019) <<https://www.politicshome.com/news/uk/politics/>>.

£30,000 minimum salary requirement is currently met by 40 per cent of existing jobs in the UK. How this number would correlate with post-Brexit statistics is yet to be seen. The White Paper leaves the question of the salary threshold open.

Skilled workers will have a range of entitlements (e.g. to bring their dependants). They will be allowed to settle in the UK after a period of five years.

B. Workers at All Skills Levels

The White Paper does not suggest opening an immigration route for unskilled labour, thus maintaining the current policy for non-EU citizens, except possibly for seasonal agricultural workers. There will be no general use of schemes tailored to particular industries. There will, however, be flexibility for short-term workers.

The White Paper suggests that during the transitional period, there should be a new route for temporary short-term workers from specified countries (e.g. low-risk countries)⁹⁵ at any skill level to come to work in the UK. This route will be narrow: it will not only be subject to visa requirements, but there will also be restrictions on nationalities (e.g. only nationals of low risk countries with which the UK negotiates migration commitments and mobility proposals) and duration.⁹⁶ The temporal scope will also be limited to a maximum of twelve months, to be followed by a cooling-off period of a further twelve months to prevent long-term working. This means that a short-term worker who has worked in the UK for 12 months will not be able to return to work during the following 12 months. The possible need to extend a route for temporary workers post-transition period will be considered by 2025.⁹⁷

news/104817/sajid-javid-orders-review-%C2%A330000-salary-threshold-immigrants-post> accessed 30 August 2019.

⁹⁵ The White Paper does not indicate whether EU Member States will fall under the category of low-risk countries. The current list of low-risk countries is available here: <<https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-h-tier-4-documentary-requirements>> accessed 30 August 2019.

⁹⁶ The White Paper, paras 26-32, pp 16-17.

⁹⁷ Ibid. para 31, p 17.

4. *Other*

The new immigration regime will not affect the number of EU students coming to study in the UK. As per the current situation, the White paper foresees no limit on the number of international students coming to study in the UK. However, EU students will be subject to the same arrangements as students from the rest of the world, including the requirement to be sponsored by the institution at which they are studying.⁹⁸ Upon graduating with an undergraduate degree from a UK university, students will be able to remain in the UK for six months after completing their studies.⁹⁹

The White Paper states that self-employed persons coming from EEA countries may be able to come to the UK through a variety of routes such as the entrepreneur route (if they meet the eligibility criteria, including a requirement to have access to at least £50,000 in investment funds).¹⁰⁰ In addition, the self-employed may be able to use the new skilled worker route, under temporary work routes, or enter as service suppliers through Mode 4 arrangements (see below).

The White Paper notes that 'leaving the EU means that for the first time in generations we can take control of the social security system we apply to EU citizens'.¹⁰¹ Under the new regime, social benefits will only be available once a person has made significant contributions to the UK economy. Accordingly, only EU pensioners with settled status or pre-settled status will be able to access healthcare, pensions, and other benefits and services in the UK. Depending on reciprocal agreement with the EU, pensioners should retain the option to export their state pension.¹⁰²

For those seeking controls on migration, the new immigration regime is clearly beneficial; for those who lament the demise of free movement, the new regime will disappoint. It seems the latter group is growing. While the government's policy is responding to the concerns raised in 2016, the state of affairs is starting to change: EU immigration numbers continue to fall and

⁹⁸ Ibid. para 7.7, p 63.

⁹⁹ Ibid. para 7.13, p 64.

¹⁰⁰ Ibid. 148.

¹⁰¹ Ibid. para 14.7, p 96.

¹⁰² Ibid. para 14.8, p 96.

public attitudes towards migration are not the same as they were at the time of the referendum. An Ipsos Mori online survey has revealed a positive shift in the attitudes to immigration in the years following the Brexit referendum. In 2015, around 35 per cent of Britons saw immigration as positive; that number has risen to 45 per cent since 2016.¹⁰³ The trend is reversed with respect to those who see immigration as negative for UK: around 41 per cent in 2015 and 31 per cent in 2018.¹⁰⁴ Immigration is, of course, different from free movement. Nevertheless, while the majority of Britons are still in favour of reduced migration¹⁰⁵, there is now more recognition of how much immigrants contribute to the UK, with 51 per cent noting that the discussions over the past few years have highlighted this point.¹⁰⁶ Another recent study found that there is a generational difference in the shift of attitudes towards migration between 2002 and 2017.¹⁰⁷ According to this study, those born between approximately 1920 and 1960 are among the most negative about immigration, whereas there is a small but significant shift towards more positive attitudes among the younger generations.

In summary, the framework for the new immigration system laid out in the government's White Paper has nothing in common with free movement enjoyed under EU law. Instead of allowing unrestricted immigration from the EU, the new regime places EU nationals in the general customs queue with travellers from other third countries. While the discussed regime was published under Theresa May's administration, there has so far been no indication that the new Prime Minister Boris Johnson would offer EU citizens any greater privileges. It is yet to be seen what reciprocal system will

¹⁰³ Ipsos MORI, 'Attitudes towards immigration: Survey conducted on behalf of IMiX' <<https://www.ipsos.com/ipsos-mori/en-uk/britons-are-more-positive-negative-about-immigrations-impact-britain>> accessed 1 September 2019.

¹⁰⁴ Ibid.

¹⁰⁵ The Migration Observatory, 'UK Public Opinion toward Immigration: Overall Attitudes and Level of Concern' <<https://migrationobservatory.ox.ac.uk/resources/briefings/uk-public-opinion-toward-immigration-overall-attitudes-and-level-of-concern/>> accessed 1 September 2019.

¹⁰⁶ Ibid.

¹⁰⁷ Lauren McLaren, Anja Neundorff and Ian Paterson, 'Diversity and Perceptions of Immigration: How the Past Influences the Present' NICEP Working Paper:2019-01 <<https://nicep.nottingham.ac.uk/wp-content/uploads/2019/07/2019-01-McLaren-Neundorff-Paterson.pdf>> accessed 1 September 2019.

be adopted by the EU, but it is highly unlikely that it will offer Britons anything close to free movement either.

IV. INTERNATIONAL MOBILITY

We have so far focused on the UK's planned immigration regime. However, as we have seen, this regime does not take into account what might be agreed in a future trade agreement with the EU, which is subject to Phase II of any negotiations. While we are still waiting for the second phase of negotiations to start, the following section will look at international mobility rules and the EU's dealings with third countries in order to explore the possible future EU-UK arrangement. In this section we look at the international context, namely Mode 4 mobility under the General Agreement on Trade in Services (GATS) and Free Trade Agreements (FTAs) negotiated by the EU with third countries, before addressing UK's Mode 4 access post-Brexit (subsection 1). Subsection 2 will briefly address another cornerstone international rule of mobility – the most-favoured-nation clause (MFN) – and its implications for a future FTA between the UK and the EU. It will be suggested that neither Mode 4 mobility nor mobility under the EU's association agreements (AAs) is anywhere near the notion of free movement as currently understood.

1. Mobility under Mode 4

The basis of any international regime on economic mobility of nationals from other countries lies in the GATS under the WTO regime.¹⁰⁸ Labour was excluded from the WTO framework for a long time. However, during the Uruguay Round negotiations in the 1990s, labour was included in the WTO regime through GATS commitments. GATS access covers four modes:

- cross-border supply ('Mode 1'): services supplied from one country to another (e.g. GATS Article I:2(a))
- consumption abroad ('Mode 2'): consumers or firms making use of a service in another country such as tourism (GATS Article I:2(b))

¹⁰⁸ See Sacerdoti and Mariani in this issue.

- commercial presence ('Mode 3'): a foreign company setting up subsidiaries or branches to provide services in another country (GATS Article I:2(c))
- presence of natural persons ('Mode 4'): individuals travelling from their own country to supply services in another (GATS Article I:2(d))

The term 'Mode 4' therefore refers to one of the four ways through which services can be supplied internationally.¹⁰⁹ The fourth mode signifies trade in services through presence of natural persons, i.e. natural persons who are either service suppliers themselves or who work for a service supplier and who travel from one state to another to provide a service. Mode 4 does not cover persons seeking access to employment in the host state; it is restricted to temporary entry for business purposes. Mode 4 access is of particular relevance to this article. What is noteworthy is that it is about *temporary* provision of services only, not permanent immigration which makes it essentially different to the free movement regime enjoyed by EU nationals in the EU Member States.

A. Mode 4 Access under GATS

Calls have been made to expand Mode 4 access under the WTO framework, most notably in the Hong Kong Ministerial Conference in December 2005.¹¹⁰ However, liberalisation under GATS Mode 4 remains rather limited. In most cases, Member States of the WTO did not initially bind themselves to Mode 4 access and then qualified this general exemption by granting admission to selected categories of service providers, primarily persons linked to a commercial presence (e.g. intra-corporate transferees) and highly skilled persons (managers, executives and specialists). This is often referred to as a 'positive listing' method: sectors where access is granted are expressly listed and commitments do not apply unless the sector and/or specific sub-sector is inscribed in the schedule. For example, France, Belgium, the Netherlands, Spain and Italy are not committed to GATS Mode 4 for legal

¹⁰⁹ Peter van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases, Materials* (2nd edn, Cambridge University Press 2012) 486.

¹¹⁰ See Annex C to Ministerial Declaration: Annexes, Adopted on 18 December 2005 <https://www.wto.org/english/thewto_e/minist_e/mino5_e/final_annex_e.htm> accessed 30 August 2019.

services. Therefore, falling back exclusively on GATS mobility provisions in the post-Brexit UK-EU trade relations would pose a significant risk for the UK's services sector: on the one hand, this would increase the risk of skilled labour shortage in the UK; on the other hand this would limit the scope of UK services being exported to the EU. This could have serious consequences given that the EU is the single largest destination for UK service providers.

While trade in services under Mode 4 remains a very small part of overall trade in services (around 1-2 per cent)¹¹¹, the reasons for limited access under Mode 4 include political concerns (lack of control over immigration), regulatory concerns (how to check on the qualifications and skill levels of those proposing to come to the host country), concerns of temporary entry leading to permanent entry, and fears that national labour markets might be undermined by lower-wage foreign services suppliers (so-called 'social dumping').¹¹²

In the absence of any special arrangement, such as a free trade agreement, Mode 4 access under GATS, where agreed, is the default position under international law and will be the applicable legal regime for UK nationals wishing to provide their labour in EU Member States. Due to its temporary nature and limited sectoral scope, Mode 4 is far removed from the free movement concept. Accordingly, in case of a no-deal Brexit, access to the UK/EU would be highly restricted.

B. Mode 4 Access under Free Trade Agreements

In addition to the basic WTO framework, somewhat more generous temporary movement provisions may be negotiated in broader trade or association agreements (AAs). In this section, we look briefly at the mobility clauses in a selection of FTAs to see if they provide a template for the future EU-UK relationship. Some of the agreements provide for full liberalisation of labour mobility, such as the EU, the European Free Trade Association, and

¹¹¹ World Trade Organization, 'Movement of natural persons' <https://www.wto.org/english/tratop_e/serv_e/movement_persons_e/movement_persons_e.htm> accessed 6 October 2019.

¹¹² 'Mode 4 of the GATS - An Overview', Ministry of Foreign Affairs of Japan <<https://www.mofa.go.jp/policy/economy/event/symp00301-6.pdf>> accessed 6 October 2019.

the Australia–New Zealand Closer Economic Relations Trade Agreement. A number of other trade agreements, while not establishing the full free movement of workers, nevertheless go beyond the GATS rules. For example, the US–Jordan agreement covers a broadened range of service providers (e.g. independent traders).¹¹³ Similarly, the EUROMED EU-Tunisia AA covers the movement of all workers, not just service suppliers,¹¹⁴ while the ASEAN Framework Agreement¹¹⁵ commits members to liberalising trade in services by expanding the depth and scope of liberalisation beyond those undertaken by Member States under the GATS. A similarly forward-looking approach is taken in the CARICOM Revised Treaty, which seeks to achieve full labour mobility through phased implementation for different skill categories.¹¹⁶

Mode 4 access is also typically provided for in the new-generation FTAs. The UK, as an EU Member State, is currently bound under the EU's FTAs with non-EU countries, such as the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada which entered into force provisionally in September 2017.¹¹⁷

FTAs focus primarily on trade in goods and services as well as investment promotion, which is facilitated by some form of movement of persons (e.g. service providers and investors travelling for business purposes). The White Paper, addressed in the previous section, as well as its predecessor MAC

¹¹³ Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area <<https://ustr.gov/sites/default/files/Jordan%20FTA.pdf>> accessed 30 August 2019.

¹¹⁴ Article 64, Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States, of the One Part, and the Republic of Tunisia, of the Other Part <<https://library.euneighbours.eu/content/eu-tunisia-association-agreement>> accessed 30 August 2019.

¹¹⁵ Article 1(c), ASEAN Framework Agreement on Services <https://asean.org/?static_post=asean-framework-agreement-on-services> accessed 30 August 2019.

¹¹⁶ Articles 32(1), 33(1), 36(1), 37(1), Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy <https://caricom.org/documents/4906-revised_treaty-text.pdf> accessed 30 August 2019.

¹¹⁷ The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada <<http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-article-by-article/>> accessed 30 August 2019.

Report, reflect mobility rights typically included under the new-generation FTAs, such as CETA.

Mode 4 access is broader under CETA than under GATS. Unlike GATS, which mainly applies a positive listing method for Mode 4 access, CETA applies a combination of positive and negative listing. Negative listing means that all service sectors are liberalised by default and a party must list any sectors or sub-sectors it wishes to limit or exclude from the commitments. This results in a broader liberalisation overall, at least *de jure*, under CETA. This does not mean, of course, that CETA provides for access anywhere near comparable to free movement provisions under EU law; it contains a number of broad explicit carve-outs, such as services supplied in the exercise of government authority, most air services, and audio-visual services.

With respect to the time limits for stay, the principle of a minimal-duration stay, according to which workers stay for no longer than the time period required to complete a specific engagement, applies. The time periods differ depending on the categories of persons described above. For example, under CETA intra-corporate transferees (ICT), senior personnel and specialists are allowed to stay in the contracting state for up to three years, whereas graduate trainees cannot stay longer than one year.

Other FTAs provide similar mobility rights, save for some variation in the categories of covered individuals. For example, under the EU-Japan FTA, short-term business visitors, business visitors for establishment purposes (in CETA, business visitors for investment purposes), ICTs and investors, as well as contractual service suppliers and independent professionals are granted entry and temporary stay.¹¹⁸ Similar provisions are provided in the EU's association agreements (AA), typically under the heading 'temporary presence of natural persons for business purposes'. For example, the EU-Ukraine AA provides for entry and temporary stay of key personnel, graduate trainees, business service sellers, independent professionals, and contractual service providers. The agreement states that the parties reaffirm their respective obligations arising from their commitments under the GATS as

¹¹⁸ Annex 8-B III, para 6, EU-Japan Economic Partnership Agreement <http://trade.ec.europa.eu/doclib/docs/2018/august/tradoc_157233.pdf#page=203> accessed 30 August 2019.

regards entry and temporary stay of contractual services suppliers.¹¹⁹ Almost identical categories are provided in the EU-Moldova AA.¹²⁰

The EU-Ukraine AA sets identical time limits for stay to those established under CETA, with an exception for the contractual services and independent professionals category (CETA permits stays up to 12 months, whereas the EU-Ukraine AA sets a six-month limit).

Mobility under existing FTAs or under EU's association agreements are far removed from the concept of free movement offered by EU membership. While the scope of Mode 4 is broader under a number of FTAs, in comparison to that under GATS, access under FTAs is nevertheless limited to mobility of service providers. And while AAs, such as the EU-Ukraine AA, typically contain provisions on mobility of workers and movement of persons, these too are in no way comparable to free movement of persons under EU law. With respect to mobility of workers, the EU-Ukraine AA merely upholds existing access to employment for Ukrainian workers accorded by EU Member States under bilateral agreements and creates only a very general obligation to examine the granting of other more favourable provisions in additional areas (Article 18 of the EU-Ukraine AA). Article 15 of the EU-Moldova AA provides an analogous obligation to take gradual steps towards the shared objective of a visa-free regime in due course.

As for the application of national immigration laws, the EU's partners under AAs retain the right to regulate the entry of natural persons into, or their temporary stay in, their respective territories, including those measures necessary to protect the integrity of natural persons, to the extent not covered by the AAs' rules on temporary stay of persons (e.g. Article 85 of the EU-Ukraine AA). The right to maintain national immigration rules is not

¹¹⁹ Article 101, Association Agreement between the European Union and its Member States, of the One Part, and Ukraine, of the Other Part <http://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155103.pdf> accessed 30 August 2019.

¹²⁰ Article 217, Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the One Part, and the Republic of Moldova, of the Other Part <http://www.3dcftas.eu/system/tdf/EU-Moldova%20AA_o.pdf?file=1&type=node&id=70&force=>> accessed 30 August 2018.

affected by the full liberalisation of establishment rights. The EU-Ukraine AA provides that, subject to the gradual transition of Ukraine to full regulatory approximation, there are to be no restrictions on the freedom of establishment of juridical persons of the EU or Ukraine in either territory, as well as no restrictions on the freedom to provide services by a juridical person. However, such treatment does not include the right to take up and pursue activities as self-employed persons and shall not prevent Ukraine from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders (Article 4 of Annex XVII).

Furthermore, as a general rule, regulatory approximation under the EU AAs is directed by the EU: the EU maintains its right to adopt new legislation or amend its existing legislation in the sectors concerned by regulatory approximation, whereas Ukraine has an obligation to transpose and implement the legislation into its domestic legal system (Article 5 of Annex XVII). Therefore, the EU's partners under association agreements are rule-takers, which is hardly in line with the famous Leave Campaign Brexit slogan 'Take Back Control'.

In sum, neither Mode 4 access under the currently existing FTAs nor mobility under the EU's association agreements can offer free movement similar to that enjoyed by EU Member States. Mobility under FTAs, though broader in scope in comparison to that under GATS, is nevertheless highly restricted. And while access to employment is available under, for example, the EU-Ukraine AA, it comes at the price of losing a degree of sovereignty over national legislation. Future mobility negotiations may thus be limited to two alternatives: almost no mobility or some free movement in exchange of regulatory approximation. As will be discussed below, the UK Government seems to tend towards the first option.

C. UK's Mode 4 Access post-Brexit

The White Paper envisages Mode 4 access as part of the post-Brexit immigration system:

We are also willing to expand, on a reciprocal basis, our current range of "GATS Mode 4" commitments which we have taken as part of EU trade deals.¹²¹

Exactly how this is to be done, the White Paper does not make clear. Due to CETA's negative listing method, 'GATS+' mobility can be seen as mobility under CETA. It is thus possible that the drafters of the White Paper had in mind CETA Mode 4 access with a negative listing method (at least in part).

Before addressing the similarities between the system proposed in the White Paper and CETA, it is important to re-emphasise a significant difference. Labour mobility rights under CETA (like under any other typical FTA and like GATS Mode 4 access) do not cover routes which lead to *permanent* employment, nor do they regulate rights to residence or social rights. As mentioned before, the White Paper does establish a route for skilled workers to come to the UK for longer periods which may lead to settlement. CETA, like other FTAs, provides only for short-term business access. CETA 'carves out' temporary business visits from the general visa regime under the EU's Schengen Agreement, but the general visa-regime remains (e.g. for workers).

While the White Paper does not provide detailed categories of post-Brexit Mode 4 access (these will be subject to negotiations for reciprocal rights), it does indicate that future access *may* cover independent professionals, contractual service suppliers, intra company transfers and business visitors – that is, the categories designated under CETA for Mode 4 rights. According to the White Paper:

By agreeing 'Mode 4' commitments in future free trade agreements, trading partners can provide service industries with greater certainty as to their ability to move key personnel across borders to supply services and fulfil contracts.¹²²

As for how long persons have access under CETA mobility rights, that depends on the category of persons. For example, as noted above, senior personnel intra-corporate transferees are allowed to stay in the contracting state up to three years, whereas graduate trainees cannot stay longer than one year.

¹²¹ The White Paper, para 5, p 12.

¹²² Ibid. para 6.75.

The White Paper sets a general visitors' stay period of a maximum of six months. It is estimated that over 95 per cent of business visits from EEA nationals are for less than 15 days, which is an indication that the vast majority of business visits will likely be unaffected by a maximum six-month duration for visits. However, the White Paper leaves open the possibility of changing the current policy in relation to EEA nationals in line with economic needs.

The Mode 4 access laid out in the White Paper largely reflects the government's proposals stated in the July 2018 Chequers Plan. This document refers to a visa-free regime for short-term business visitors and intra-corporate transferees and states that the 'UK will also discuss how to facilitate temporary mobility of scientists and researchers, self-employed professionals, employees providing services, as well as investors'.¹²³ The guiding principle is that of reciprocity; the UK will 'seek reciprocal mobility arrangements with the EU, building on current WTO GATS commitments'.¹²⁴

2. Most-Favoured-Nation Clause

Lastly, an important feature of FTAs (e.g. CETA, the EU-South Korea FTA, and others) is the 'most-favoured-nation' (MFN) clause. An MFN clause is a non-discrimination requirement.¹²⁵ It means that if you provide some favourable treatment to one trading partner, you have to give it to all partners who benefit from an MFN clause. Thus, any commitments which parties to the CETA afford under other agreements must also be extended under CETA. An MFN clause also largely applies to provisions on temporary entry and stay of natural persons. Article 9.5 of CETA states that the MFN obligation applies to trade in services, except if a measure provides for, among

¹²³ The 2018 July Chequers Brexit plan, para 81, p 33.

¹²⁴ Ibid. para 76, p 33.

¹²⁵ Art 1(1) of the General Agreement on Tariffs and Trade 1994 entitled 'General Most-Favoured-Nation Treatment' states that 'any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties'.

other things, 'recognition' (i.e. acceptance of each other's standards, such as professional qualifications, as sufficient).

MFN exemptions are listed separately and primarily arise due to preferential agreements outside the WTO framework. This may explain why, for example, the EU reserves the right to discriminate in favour of Switzerland in a number of areas. The EU may be 'grandfathering' (e.g. carving out from its GATS commitments) sectoral deals with Switzerland that existed before 1994. It is as yet unclear whether the UK and EU will want to 'grandfather' preferences post-Brexit. This will depend on whether the EU and UK will agree on a preferential treatment for labour mobility.

It is also unclear what impact an MFN clause under the UK's free trade agreements will have on the future EU-UK agreement. As noted above, the White Paper emphasises that the dual immigration policy will be replaced by a single policy which treats EU and non-EU nationals alike. Even if the UK were to decide to change its red lines and afford EU nationals rights reflecting those currently enjoyed under the free movement provisions, an MFN clause under CETA should not be a barrier since Annex II of CETA establishes additional reservations applicable in the EU, one of which states that the EU reserves the right to adopt an agreement with a third country which creates an internal market in services and investment. Even if no such reservations existed, it is questionable whether the EU's trading partners would find it practical to challenge larger benefits under a future EU-UK deal. As it currently stands, however, an MFN clause will probably not be relevant with respect to the future UK-EU mobility agreement, given the emphasis placed in the White Paper on a 'single policy for all' approach.

To conclude, international mobility rules are far removed from the free movement concept under EU law. Mode 4 access under GATS is about temporary provision of services within a limited list of services and while Mode 4 under FTAs typically covers more services, it too is restrictive in nature. Mobility under association agreements may offer broader routes for access, but comes with the requirement to abide by EU's rules and regulations. Leaving the EU but being obliged to follow its rules is hardly the result that would appeal to either Leave or Remain proponents. It is therefore unsurprising that the current position of the UK government (at least as developed under Theresa May's administration), is to fall back on

Mode 4 access in its future relationship with the EU. This option, however, will greatly disappoint those who see value in free movement.

V. CONCLUSIONS

The future UK immigration regime is a multi-dimensional puzzle. Despite the announcement of a single regime for all immigrants post-Brexit, the reality will be quite different. There will be differences in the applicable regime depending on when a given EU/EEA/Swiss national arrived in the UK. Firstly, there will be those EU/EEA/Swiss nationals (and their family members) who arrived before exit day and/or by the end of the transition period, who will have settled or pre-settled status which broadly resembles the right to permanent residence under EU law. Secondly, there will be those EU/EEA/Swiss nationals arriving after exit day and/or the end of the transition period but before the new regime applies with Euro TLR. A third category will be those to whom this new regime will apply. While the White Paper has mapped out the shape of that regime, it is contingent on what happens in any future EU-UK trade negotiations, assuming they happen at all. The current position of the UK government suggests that Brexit will lead to an end of free movement. Whether a highly restricted Mode 4-type access or mobility under some form of association with the EU is chosen for the future relationship, it will not offer *free* movement accompanied by the right to equal treatment. That is the benefit of EU membership.

An end to free movement is a significant change from a legal, practical, and human rights perspective. EU citizens will no longer have unlimited access to the job market in the UK and will have to compete with other third-country nationals. Even if they are accepted in the UK, they will no longer benefit from equal treatment, including in the area of social protection. The EU citizenship rights of approximately one million British nationals living in the EU will also be taken away, since Brexit entails the loss of their EU citizenship. Overall, Brexit will diminish the rights of around half a billion people. For those who voted for Brexit, this is clearly good; 'Remainers' might not agree. Meanwhile in the complexity of individual people's lives, Brexit will create uncertainty and, inevitably, litigation.

BREXIT AND THE IRISH BORDER

Eileen Connolly* and John Doyle**

The question of the Irish land border was the most problematic aspect of the negotiations on the United Kingdom's (UK) withdrawal from the European Union (EU). The Irish border aspects of the Brexit negotiations have demonstrated that the border and the maintenance of the Good Friday Agreement is not just an issue for British-Irish relations, but one that now has a strong EU dimension. This article analyses the political impact of alternative proposals tabled during the Brexit negotiations on Northern Ireland and the question of the Irish Border. It places this discussion in the post-conflict context and in the highly politicised nature of the Brexit referendum debate in Northern Ireland. It examines how the issue was framed, following a tortuous negotiation process, in the draft Withdrawal Agreement of 2018 and the ultimate failure of the UK government to ratify that agreement in Parliament. It evaluates the political impacts of the crisis in British politics caused by Brexit and the way in which Brexit has undermined the political stability created by the Good Friday Agreement and at the same time changed the discourse on Irish unity. It argues that failure of the British Government to accurately assess the EU27 position is at the heart of their failure to negotiate a Withdrawal Agreement, for which they could build UK parliamentary support. It is this failure of political judgement that has led to the rejection of the negotiated Withdrawal Agreement and continued to block agreement on a way forward, in the period prior to the October 2019 deadline.

Keywords: Brexit, Northern Ireland, peace, Good Friday Agreement, conflict

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I. INTRODUCTION

The question of the Irish land border was the most problematic aspect of the negotiations on the United Kingdom's (UK) withdrawal from the European Union (EU). This issue had not been part of the 2016 referendum campaign debate outside of Ireland, but from the beginning of the negotiation process, in 2017, it became an increasingly prominent aspect of the mainstream Brexit debate.¹ It was the inclusion of a 'backstop' provision to address the problem of a hard border on the island of Ireland in the draft Withdrawal Agreement that ultimately led to the defeat of the draft Withdrawal Agreement in the UK Parliament. For the Irish government, and the nationalist parties in Northern Ireland, the threat of Brexit for the maintenance of peace in Northern Ireland, the quality of life in the border communities, and for economic development, was clear from the time of the 2016 referendum campaign. Following the referendum vote, the Irish Government proactively conducted a strong diplomatic campaign in the EU institutions and amongst the other Member States, seeking support for its position that there could be no negotiated hard border on the island of Ireland. The Irish government's case was that Brexit challenged the basis of the peace process by raising the possibility that the frontier could again become a customs, regulatory and security border, a site of armed attacks, and an indication that the Good Friday Agreement had been reversed. The British government's negotiating strategy appeared to some of those closely involved to rest on the key assumptions that they did not accept that there was a threat to the peace process and that the EU as a whole would prioritise achieving a trade

¹ See John Doyle and Eileen Connolly, 'Brexit and the Northern Ireland Question' in Federico Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press 2017).

agreement with the UK over any EU commitment to the Irish Government.² The Irish border aspects of the Brexit negotiations have demonstrated that the border and the maintenance of the Good Friday Agreement is not just an issue for British-Irish relations, but one that now has a strong EU dimension. The failure of the British Government to accurately assess the EU27 position is at the heart of their failure to negotiate a Withdrawal Agreement, for which they could build UK parliamentary support, with the resultant political chaos in parliament and widening divisions in UK society.

The border on the island of Ireland will be the only significant post-Brexit land border between the EU and the UK, and at the core of the disagreement on the form the border should take are the contested views on the desired relationship between Northern Ireland, Ireland and the British state.³ The 1998 Good Friday Agreement, an international treaty lodged with the United Nations that ended 30 years of armed conflict, had redefined this set of relationships and shifted both the reality, and the perception, of British sovereignty in Northern Ireland. The Irish government proposed that customs and security infrastructure on the Irish land border could be avoided by leaving the border open while having the necessary regulatory and customs checks for the UK/EU border at the airports and seaports – in effect a de-facto 'border' in the Irish Sea. This makes economic sense for a small island economy, and it would be particularly beneficial for Northern Ireland's underdeveloped post-conflict private sector. While exports from Ireland to the UK as a whole have been declining as a proportion of all Irish exports for many years and now represent less than 10 per cent of total exports, cross-border trade between the two parts of the island increased substantially after the 1994 ceasefires, from €1.6 billion to €3.7 billion per annum. While the growth was evenly shared in both directions, it was more significant for the

² Perspectives of Irish and EU officials involved in the process, as articulated in discussion with the authors during 2017, 2018 and 2019 – multiple discussions and different officials.

³ There is one other land border, Gibraltar, which has however, because of the very different context, not become a major issue. See Maria Mut Bosque, 'Ten Different Formulas for Gibraltar Post-Brexit' (2018). DCU Brexit Institute - Working paper N. 6 - 2018 <<https://ssrn.com/abstract=3212246>> accessed 14 October 2019.

much smaller Northern Ireland economy.⁴ The British government's refusal to support this solution has its roots in the long-term relationship between Britain and Ireland and the political divisions in Northern Ireland that were the basis of the 20th century conflict. In its negotiations to find a way of keeping the Irish border open while strengthening the place of Northern Ireland in the UK, the UK government did not give sufficient weight to the EU's absolute requirement to ensure that the UK's future single market access does not provide more favourable terms than those available to Member States and that, in this regard, the enforcement of regulatory issues was as important as the control of customs. The UK government also miscalculated the primary motivation of the EU's support for the Good Friday peace agreement, in that it would support a Member State against a departing state, but also that the EU has a strongly internalised view of its own history as a peace project.⁵ The EU has its own interests in supporting the peace process in general and the open border as a central part of the peace agreement. The EU was never likely to agree to a Withdrawal Agreement, or a future trade deal, that impacted on the core interests of a Member State, and which was perceived to pursue a narrow trade interest at the expense of peace.

This article analyses the political impact of alternative proposals tabled during the Brexit negotiations on Northern Ireland and the question of the Irish Border. Section 2 discusses the post-conflict context and the highly politicised nature of the Brexit referendum debate in Northern Ireland. Sections 3, 4 and 5 then proceed to analyse how the border was dealt with in the various phases of negotiations between the EU and the UK, how the issue was framed in the draft withdrawal agreement of 2018 and the ultimate failure to ratify that agreement in the UK Parliament. Finally, section 6 explores the political impacts of the crisis in British politics caused by Brexit and how Brexit has undermined the political stability created by the Good Friday Agreement and changed the discourse on Irish unity.

⁴ See 'Inter-Trade Ireland statistics' <<https://intertradeireland.com/insights/trade-statistics/>> accessed 15 October 2019.

⁵ See, for example, Gëzim Visoka and John Doyle, 'Neo-Functional Peace: The European Union Way of Resolving Conflicts' (2016) 54(4) *Journal of Common Market Studies* 862.

II. THE THREAT OF BREXIT FOR THE IRISH PEACE PROCESS

After the signing of the Good Friday Agreement in 1998, British army security installations were gradually removed and closed cross-border roads were re-opened so that within a few years no hard border existed on the island of Ireland. This is one of the most visible and also the most symbolic outcomes of the peace process. It is the potential loss of the open border that is seen as the greatest threat resulting from Brexit by the majority of the population of Ireland. Although Ireland and the UK have operated a common travel area since Irish independence in 1922, given the tensions that followed the partition of the Ireland and different customs rules (until 1992), the border, while porous in many respects, did act as a tangible barrier to cross-border social and economic cooperation. This was heightened by the sporadic conflict that existed through the mid-twentieth century and in particular the intensified levels of conflict from the end of the 1960s. That meant that the border was closely monitored, with over 200 cross-border roads barricaded by the British Army and large-scale military posts on the main 'official' crossing points. The disruption of the road closures and border checks, with frequent delays at crossing points, and the negative experience of the heavy British Army security presence, severely curtailed cross-border traffic and trade. Even following the implementation of the EU single market from 1992, which removed customs posts, the security installations on the border were a significant barrier to cross-border trade.⁶

The 1998 Good Friday Agreement changed this situation and allowed an open border, as envisaged by the EU's ongoing integration project, as well as reflecting the Irish nationalist community's strong political desire for greater all-island cooperation. Re-imposing a border, as a result of Brexit, will have a negative impact on Northern Ireland's already weak economy. As a post-conflict economy, the public sector still provides approximately 60 per cent of Gross Value Added,⁷ while direct EU funding, including subsidies from the Common Agricultural Policy and the designated Peace Funds, was equivalent

⁶ Donnacha Ó Beacháin, *From Partition to Brexit: The Irish Government and Northern Ireland* (Manchester University Press 2018).

⁷ Nevin Economic Research Institute, 'Quarterly Economic Observer' (2017) 9-11 <http://www.nerinstitute.net/download/pdf/qeo_spring_2017_final_version.pdf> accessed 15 October 2019.

to approximately 8.4 per cent of Northern Ireland's GDP in the period 2007-13.⁸ Northern Ireland is more reliant on the EU as an export market than the rest of the UK and will be more affected by a withdrawal from the EU and from the single market. The Republic of Ireland is Northern Ireland's largest single destination for exports, accounting for 21 per cent of all exports and 37 per cent of EU exports.⁹ The combination of the disruption to the slowly emerging post-conflict, all-island economic integration and the loss of EU subsidies will have a significant impact on the economy of Northern Ireland that may have serious consequences for political stability. There were significant levels of politically related violence in Northern Ireland in the summer of 2019 in both working class Irish nationalist and unionist areas.¹⁰ An economy in recession is likely to see unemployment rise in these communities. The impact of a recession in working class communities is likely to be amplified in the specific circumstances of Northern Ireland, as in the absence of an agreement to restore the power-sharing executive, Northern Ireland's specific deal postponing the implementation of British Governments cuts to social services spending in the rest of the UK, will expire in March 2020, leading to substantial cuts in welfare spending.¹¹

⁸ Leslie Budd, 'The Consequences for the Northern Ireland Economy from a United Kingdom exit from the European Union' (2015) Briefing Note: Committee for Enterprise, Trade and Investment <<http://crossborder.ie/site2015/wp-content/uploads/2015/11/2015-03-22-brexite-ceti-specialist-advisor.pdf>> accessed 15 October 2019.

⁹ UK Parliament Northern Ireland Affairs Committee, 'Northern Ireland and the EU Referendum' (2016) <<http://www.publications.parliament.uk/pa/cm201617/cmselect/cmniaf/48/4804.htm#footnote-104>> accessed 15 October 2019.

¹⁰ See for example Mahita Gajanan 'A Journalist's Killing in Northern Ireland Comes as Tensions Threaten to Boil Over' *Time* (24 April 2019) <<https://time.com/5574194/northern-ireland-violence-lyra-mckee/>> accessed 15 October 2019 and Patrick Cockburn, 'The English are Blindly Driving Northern Ireland to Conflict – The Fear Is That They Are Too Stupid to Care' *Independent (UK)* (1 March 2019) <<https://www.independent.co.uk/voices/northern-ireland-backstop-the-troubles-theresa-may-brexite-european-union-red-lines-a8803336.html>> accessed 15 October 2019.

¹¹ Northern Ireland Audit Office, 'Report on Welfare Reform' (2019) <<https://www.niauditoffice.gov.uk/publications/welfare-reforms-northern-ireland-0>> accessed 15 October 2019.

In political terms, the Good Friday Agreement defined a bi-national polity, with a system of consociational power-sharing in its internal governance structures. The bi-national nature of the settlement was also demonstrated in the special position accorded to the Irish government in the affairs of Northern Ireland and in the legal commitment from the UK government to legislate for Irish unity should concurrent majorities vote for unity in Ireland, North and South.¹² The success of the Good Friday Agreement was premised on the fact that it did not establish an end point but began a process, which had no predetermined outcome. This meant that the Irish government, and the Irish nationalist community, were not asked to abandon their political objective of Irish unity, but they agreed to pursue it by exclusively peaceful means. The unionist population were not asked to abandon their desire to remain part of the UK, but they were required to acknowledge that if a majority of the population of Northern Ireland voted for Irish unity, they would acquiesce to this while also retaining their British citizenship. This fluidity is essential to the on-going success of the peace process, as it has allowed both unionists and nationalists to work within its framework.¹³ It has also resulted in the border areas becoming more integrated, both socially and economically. Local communities now fear the imposition of a hard land border, both for the disruption that this will entail in their personal lives and also because they fear that the inevitable border infrastructure will become a focus of attacks by dissident republican groups that have opposed the peace process, and that this will result in a spiral of renewed violence.¹⁴

Brexit also has the potential to disrupt the high level of cross border collaboration that has developed in a number of areas of public provision, such as emergency ambulance services, as well as in economic development.

¹² Good Friday Agreement (1998). Annex: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, Annex A, Schedule 1.

¹³ Jennifer Todd, 'Nationalism, Republicanism and the Good Friday Agreement' in Jennifer Todd and Joe Ruane (eds), *After the Good Friday Agreement* (University College Dublin Press 1999).

¹⁴ Peter Mandelson 'EU exit risks peace process and return to violence' *Belfast Newsletter*, (15 March 2016), 'Brexit: Protests held along Irish border' (BBC, 30 March 2019) <<https://www.bbc.com/news/uk-northern-ireland-47761230>> accessed 15 October 2019.

For Irish nationalists it will raise fears that the gradual process of reform and integration at the heart of the 1998 Agreement has ended. For hard-line unionists, in contrast, the reversal of North-South cooperation and integration would be a welcome aspect of Brexit. From their perspective, a hard border will weaken the link to Ireland and to the EU and strengthen links to the UK. They are willing to risk disruption along the border, and the possibility of a return to violence, as the price for the reassertion of the Britishness of Northern Ireland. The EU negotiation team argued in a published report that reversing North-South cooperation in Ireland would risk a return to violence, indicating that the public position of the EU team reflected the analysis of the Irish Government on this point.¹⁵

III. THE REFERENDUM AND ITS EFFECTS ON NI POLITICS

In the debate on Brexit, the threat to the Good Friday Agreement was recognised in both parts of the island of Ireland from the beginning and it played a key part in the campaign in Northern Ireland, in contrast to the rest of the UK, where the impact of Brexit on the peace process was very rarely discussed by the main political actors in the referendum campaign.¹⁶ In Northern Ireland, the campaign was dominated by the specific impacts of Brexit on the peace process and on the economy, rather than immigration and the regulatory aspects of the EU that dominated the debate in Britain.

The two major Irish nationalist parties, Sinn Féin and the Social Democratic and Labour Party (SDLP), called for a vote to remain in the EU, as did the smaller pro-union party, the Ulster Unionist Party (UUP) and the centrist (but traditionally pro-union) Alliance Party. The largest unionist party, the Democratic Unionist Party (DUP), and the small and more conservative Traditional Unionist Voice campaigned to leave. Sinn Féin and the SDLP

¹⁵ See for example, European Commission, 'Mapping of North-South Cooperation and Implementation Bodies: Report and Key Findings of the Exercise' (2019) <https://ec.europa.eu/commission/publications/mapping-north-south-cooperation-implementation-bodies-report-and-key-findings-exercise_en> accessed 15 October 2019.

¹⁶ Gerard McCann and Paul Hainsworth, 'Brexit and Northern Ireland: the 2016 referendum on the United Kingdom's membership of the European Union' (2017) 32(2) *Irish Political Studies* 327.

focused on the negative economic impact of leaving and the undermining of the peace process.¹⁷ As the largest unionist party and the largest party actively campaigning for Brexit, the DUP reflected its long-standing opposition to European integration and from this position its campaign strategy was to deny the potential threats to the economy or to the peace process.¹⁸ As early as 2016 the possibility of a de-facto 'border' between the EU and the UK situated in the Irish Sea was discussed as a response to the need for regulatory and customs checks. Those in favour of this solution argued that, notwithstanding the political sensitivities, introducing additional checks on goods in two airports and two ports was achievable, and less politically disruptive, than seeking to carry out such checks along the 499km land border. The prominence of this question from the beginning of the Brexit debate in Northern Ireland meant that the question of the location of the future border-checks between the UK and the EU single market was a key issue for unionists during the referendum. The UUP, whose official position was to support remaining in the EU, argued that the experience during the conflict meant that 'it is not possible to fully secure the border' and that Brexit could result in a border that was at 'Great Britain's ports and airports – Cairnryan, Gatwick, Heathrow', which in their view had the potential to weaken the Union.¹⁹ Pro-Remain unionists feared that this 'existential threat to the United Kingdom' would be strengthened if Scotland looked for a second referendum on independence as a way of staying in the EU in the context of Brexit.²⁰ Sinn Féin also identified Irish unity as the route through

¹⁷ Statement from Party President Gerry Adams TD (Sinn Féin, 9 June 2016) <<http://www.sinnfein.ie/contents/40268>> accessed 15 October 2019; 'Sinn Féin Launches Campaign against UK Brexit' (RTE, 3 June 2016) <<https://www.rte.ie/news/2016/0603/793106-brexit-campaign/>> accessed 15 October 2019.

¹⁸ See, for example, party adverts and statements by party leader Arlene Foster, *Belfast Telegraph* (17 June 2016).

¹⁹ 'UUP Manifesto for 2016 NI Assembly Election' (Ulster Unionist Party 2016). See also post Brexit call from SDLP leader Colum Eastwood for any border controls imposed post-Brexit to be imposed between the islands of Ireland and Great Britain, 'Eastwood: Impose Border with Britain, Not on Island', *Londonderry Sentinel* (24 June 2016) <<http://www.londonderrysentinel.co.uk/news/eastwood-impose-border-with-britain-not-on-island-1-7448357>> accessed 15 October 2019.

²⁰ See <http://uup.org/news/4128#.WNUq_BIrK-o> accessed 15 October 2019.

which Northern Ireland could remain in the EU, arguing that in the event of a UK referendum result for leaving the EU, with a Northern Ireland majority for remaining, 'there would then be a democratic imperative for a border poll to provide Irish citizens with the right to vote for an end to partition and to retain a role in the EU'.²¹ Some civil society groups and individuals from the unionist community in Northern Ireland campaigned for the UK to remain in the EU. In 2016, the level of campaigning was low, as these groups did not think Brexit was likely; however, they became much more vocal and visible as the chances of a 'no-deal' Brexit increased.²²

In the 2016 referendum vote, the 'remain' vote in Northern Ireland was 56 per cent, with a major divide between the two main political traditions, reflecting their views on the 'national question'. This division was demonstrated by a survey of 4,000 adults in Northern Ireland by the Northern Ireland Assembly Election Study²³. This survey found that 88 per cent of self-defined Irish nationalists voted to remain in the EU, while 66 per cent of self-defined unionists voted to leave; 70 per cent of those who chose to identify as 'neither' voted to stay in the EU.²⁴ This voting behaviour largely reflects the positions of the Northern Ireland political parties²⁵, but the results also show that a significant bloc of unionist voters did not follow their parties' lead, while a much smaller proportion of nationalist voters deviated from the parties' positions and voted to leave. Although the UUP had called for a vote to remain, 58 per cent of their voters voted for Brexit and the party changed to being pro-Brexit after the poll. 25 per cent of DUP supporters also voted to remain, despite their party being the leading voice in the local Brexit campaign.

²¹ Gerry Adams, *Irish Independent*, (18 June 2016).

²² Gerard McCann & Paul Hainsworth. Brexit and Northern Ireland: the 2016 referendum on the United Kingdom's membership of the European Union, (2017) 32:2 *Irish Political Studies*, p. 333.

²³ John Garry, 'The EU referendum Vote in Northern Ireland: Implications for our understanding of citizens' political views and behaviour', (2016) *Northern Ireland Assembly Knowledge Exchange Seminar Series*.

²⁴ John Garry, 'The EU referendum ...'

²⁵ All of the significant political parties in Northern Ireland are local and none of the mainstream UK parties have any significant electoral support in Northern Ireland.

The changing dynamics of underlying political party support was also demonstrated in the Northern Ireland elections of March 2017, precipitated by the collapse of the Northern Ireland Executive in January following the resignation of the Deputy First Minister Martin McGuinness of Sinn Féin. This resignation was a response to the DUP's refusal to negotiate on a range of equality-related matters including Irish language rights, marriage equality for gay couples, and the question of how to deal with legacy issues from the conflict. The DUP used a technical provision called a Petition of Concern, designed to prevent the abuse of majority rule, to veto legislative changes that had the support of a majority of the NI Assembly, even though the issues could not reasonably be argued to represent a fundamental threat to the unionist community as a whole. The on-going tensions in the Assembly moved to a total collapse of the Executive following new allegations of widespread corruption in the handling of a subsidy scheme for renewable energy, which had been run by the department led by Arleen Foster before she became First Minister and leader of the DUP.

The elections that followed in March 2017 produced for the first time since partition a representative assembly in Northern Ireland that did not contain a majority of members who could be described as unequivocally unionists, that is, committed in every circumstance to Northern Ireland remaining in the UK. Only 45 per cent of the population voted for traditional unionist parties, while 40 per cent voted for parties committed to Irish unity, with just under 15 per cent voting for smaller parties and independents who did not prioritise the national question but many of which had been supportive of EU membership during the referendum.²⁶ The fact that for the first time less than 50 per cent of the population of Northern Ireland voted for parties for whom opposition to Irish unity is a core policy demonstrates the way in which on-going demographic change has intersected with the debates on EU membership and open-borders, shifting the dynamics of public sentiment on the national question.²⁷ The elections did not, however, lead to a new

²⁶ See full results Northern Ireland Assembly, 'Election Report: Northern Ireland Assembly Election, 2 March 2017' Research and Information Service Research Paper <<http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2017-2022/2017/general/2217.pdf>> accessed 15 October 2019.

²⁷ Northern Ireland Executive, 'Statistical - Labour Force Survey Religion Report 2015' (2017).

Executive being formed as the same issues that led to its collapse remained unresolved, and the capacity of the parties in Northern Ireland or the sovereign governments to negotiate an agreed way forward was further weakened by the deep divisions on Brexit.

IV. NEGOTIATING THE IRISH BORDER

There had only been a very limited discussion on the Irish border issue in the mainstream debate within Britain during the referendum campaigns, with both sides ignoring the issue.²⁸ However, the question of the land border between Ireland and the UK quickly became central to the post-referendum Brexit debate and to the negotiations with the EU, and it was the major stumbling block in the British government's attempts to get the negotiated Withdrawal Agreement passed through the British parliament.

The initial post-referendum public stance of the UK government was to minimise the significance of the question of the Irish border. Although the relationship between the UK and Ireland was one of the 12 key points of a major speech by Prime Minister Theresa May in January 2017, it only contained a commitment to 'the maintenance of the Common Travel Area with the Republic, while protecting the integrity of the United Kingdom's immigration system'.²⁹ The UK government's opening position in negotiations had made it clear that they wished to leave both the EU single market and the customs union, and were also not willing to allow free movement of workers between the EU and the UK following their withdrawal. That these objectives 'require a hard border between north and south in Ireland' was confirmed by Peter Sutherland, a former Secretary

²⁸ Matt O'Toole, 'Ireland an Afterthought During Brexit Campaign When I Was Cameron Adviser' *The Irish Times* (4 October 2017) <<https://www.irishtimes.com/opinion/ireland-an-afterthought-during-brexit-campaign-when-i-was-cameron-adviser-1.3242732>> accessed 15 October 2019.

²⁹ Speech by Theresa May, Lancaster House (17 January 2017) <<https://www.independent.ie/business/brexit/theresa-mays-brexit-speech-in-full-35374214.html>> accessed 15 October 2019.

General of the WTO,³⁰ and by Michel Barnier, the EU's chief negotiator.³¹ Prime Minister May's Article 50 TEU letter of March 2017, which triggered the two-year negotiation period, stated that the UK wanted to 'avoid a return to a hard border' on the island of Ireland and 'to make sure that nothing is done to jeopardise the peace process in Northern Ireland'. While reiterating her determination to leave the customs union, May also stated that a hard border between Northern Ireland and the rest of the UK was 'unacceptable',³² proposing a range of technical solutions, none of which had been successfully deployed in other contexts.³³

The Irish Government had from September 2016 lobbied intensely on the negative impact that a post-Brexit hard border would have on Ireland and on the Northern Ireland 'peace process'.³⁴ The success of this lobbying was demonstrated on 29 April 2017, when the European Council agreed that the EU's Article 50 negotiation guidelines would include the Irish border question as one of three key issues to be addressed in the initial phase of

³⁰ Harry McGee, 'Sutherland Rejects Claim Brexit Would Not Bring Hard Border' *The Irish Times* (2 September 2016) <<https://www.irishtimes.com/news/politics/sutherland-rejects-claim-brexit-would-not-bring-hard-border-1.2776397>> accessed 15 October 2019..

³¹ Michel Barnier, EU Chief Negotiator with the United Kingdom, in a speech to the Irish *Oireachtas* (parliament) on 11 May 2017 said 'Customs controls are part of EU border management. They protect the single market. They protect our food safety and our standards'. See <<https://static.rasset.ie/documents/news/michel-barnier-address-to-the-oireachtas.pdf>> accessed 15 October 2019.

³² Theresa May's speech on future UK-EU relations (2 March 2018) <<https://www.bbc.com/news/uk-politics-43256183>> accessed 15 October 2019.

³³ 'Irish Border Technology "Not Answer to Trade"' (BBC, 11 April 2019) <<https://www.bbc.com/news/uk-northern-ireland-47895982>> accessed 15 October 2019.

³⁴ See formal Government of Ireland press release on Brexit strategy, 2 May 2017 – referencing as priorities the land-border, the common travel area with the UK, and the peace process (para 2) <http://www.taoiseach.gov.ie/eng/News/Government_Press_Releases/Government_Statement_on_Brexit_Preparations.html> accessed 15 October 2019; see also European Council statement on Article 50 negotiation guidelines of 29 April 2017, which also include references to these three issues. <<http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/>> accessed 15 October 2019.

negotiations.³⁵ The guidelines defined the phased nature of the EU's approach, with a requirement to finalise the Withdrawal Agreement before any discussion on the future EU-UK relationship. This meant that there had to be substantial progress on the arrangement to avoid a hard border on the island of Ireland before the negotiations could move to the framework of future EU-UK relations.³⁶ The EU also expressed concerns about the impact of Brexit on Northern Ireland: its negotiation directives published on 22 May 2017 explicitly stated that nothing in the final agreement with the UK should 'undermine the objectives and commitments set out in the Good Friday Agreement' and that negotiations should 'in particular aim to avoid the creation of a hard border on the island of Ireland', while respecting the Union's legal order.³⁷ The position of the Irish government was also strengthened by the formal decision of the European Council that in the event of a future vote in favour of Irish unity, Northern Ireland would be deemed to be automatically within the EU, without the need for a Treaty agreement or a vote of other members.³⁸ This decision relied heavily on the German precedent, whereby former East Germany became part of the EU as a result of its unification with West Germany. For the Irish government, this was a long-term safety net and not a short-term priority. The UK government was surprised at these decisions and was even more surprised that both the

³⁵ Council of The European Union, 'Directives for the Negotiation of an Agreement with the United Kingdom of Great Britain and Northern Ireland Setting out the Arrangements for its Withdrawal from the European Union' (22 May 2017) <https://ec.europa.eu/commission/publications/negotiating-directives-article-50-negotiations_en> accessed 15 October 2019.

³⁶ Eoin Tannam, 'Brexit and the British-Irish Relationship' (2018) DCU Brexit Institute Working Paper <<http://dcubrexitinstitute.eu/2018/01/brexit-and-british-irish-relationship/>> accessed 15 October 2019.

³⁷ Council of The European Union (n 35) para 14.

³⁸ European Parliament, 'Outcome of the special European Council (Article 50) meeting of 29 April 2017' <[http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/603226/EPRS_ATA\(2017\)603226_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/603226/EPRS_ATA(2017)603226_EN.pdf)> accessed 15 October 2019.

EU negotiation team and the wider EU27 remained united on this issue even when the talks became difficult.³⁹

In April 2017, Theresa May announced that there would be an early general election in June of that year, which she called in a bid to secure a larger parliamentary majority for her Brexit negotiation strategy. This decision backfired; she lost her majority in parliament and in order to form a government had to enter a 'confidence and supply' agreement with Northern Ireland's DUP. This gave the DUP a privileged position in Downing Street and a disproportionate influence on the Brexit negotiations. In practice this meant that any solution that would avoid a hard border on the island of Ireland, which would inevitably entail a 'special status' for Northern Ireland, could be vetoed by the DUP, along with hard-line elements of the Conservative Party.

The UK Government issued a position paper on Northern Ireland in August 2017.⁴⁰ It reiterated its desire to avoid a hard land border on the island of Ireland but also strongly ruled out any 'customs border' between Northern Ireland and Britain. The UK proposed a number of approaches which they believed could resolve the apparent contradictions in their positions.⁴¹ These included the idea of a 'customs partnership', which would have involved the UK acting on the EU's behalf, applying the EU's own tariffs and rules of origin to all goods arriving in the UK intended for the EU, and suggested that new technology could be used to track whether items eventually ended up in the UK or crossed into the EU; tariffs would be charged accordingly. There was no commitment in this proposal to ensure that single market regulations were protected on issues such as food safety and, though unstated, it was

³⁹ "'Entire territory" of Ireland Would Be Part of EU if Unity Referendum Passed' (RTE, 28 April 2017) <<https://www.rte.ie/news/2017/0428/871185-brexit-northern-ireland-eu/>> accessed 15 October 2019.

⁴⁰ UK Government, 'Position Paper on Northern Ireland' (2017) <<https://www.gov.uk/government/publications/northern-ireland-and-ireland-a-position-paper>> accessed 15 October 2019.

⁴¹ For a good summary see 'Brexit: Customs and Regulatory Arrangements' House of Commons Research Paper (2018) <<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8309#fullreport>> accessed 15 October 2019.

assumed that the EU would introduce an equivalent system for third-country goods moving from the EU into the UK.

The EU rejected this proposal on the grounds that it was simply impractical and met none of the EU's own requirements. The EU's collective starting position was that a non-member could not have more advantageous access to the single market than EU Member States. The UK proposal was not considered viable as it would have been both expensive and administratively complicated, but most importantly because it did not include a mechanism to ensure UK goods met single market regulatory standards.⁴²

A second UK proposal, called 'maximum facilitation' or 'max-fac', sought to utilise new technologies to automate procedures and remove the need for physical customs checks wherever possible.⁴³ This was also rejected by the EU as being impractical, as the proposed technological solutions had not been deployed or proved workable on any other international border. Furthermore, they did not meet the requirements of keeping the Irish land border open or dealing with the issue of checks to ensure compliance with single market regulations.

The EU made it clear that they would be willing to support a long-term arrangement whereby Northern Ireland was in de-facto terms treated as being within the single market. This followed a similar logic to the Republic of Cyprus accession agreement,⁴⁴ which recognised the government of the Republic of Cyprus as the sovereign power for the island as a whole, but pragmatically allows goods produced in Northern Cyprus to enter EU markets as 'EU goods' once they are certified as being produced in Northern Cyprus by the Turkish Cypriot Chamber of Commerce.⁴⁵ EU special status for Northern Ireland was acceptable to the EU as a response to needs of the

⁴² Patrick Smith and Pat Leahy, 'EU leaders reject Theresa May's Brexit proposals' *The Irish Times* (21 September 2018).

⁴³ 'Brexit: The Government's Customs Options' (BBC, 2 May 2018) <<https://www.bbc.com/news/uk-43979180>> accessed 15 October 2019.

⁴⁴ Art. 2, Protocol 10 to the Act of Accession.

⁴⁵ Nikos Skoutaris, 'From Britain and Ireland to Cyprus: Accommodating "Divided Islands" in the EU Political and Legal Order' (2016) EUI Working Papers AEL 2016/02 <http://cadmus.eui.eu/bitstream/handle/1814/42484/AEL_2016_02.pdf?sequence=1> accessed 15 October 2019.

peace process, the particular circumstances of Northern Ireland, and the UK's international commitments under the Good Friday Agreement. The very small size of Northern Ireland's private sector also means that it is not an economic threat to the EU. This would also have been in line with the a wide range of other flexible territorial arrangements, from Greenland to the French Overseas Territories, that have previously been agreed by the EU.⁴⁶ The geographical context would also make any agreement between the UK and the EU likely to be judged as compatible with the 'frontier traffic exception' of Art. XXIV. 3 of GATT.⁴⁷ In practice this approach would have kept the Irish land border completely open but would require Northern Ireland to maintain regulatory equivalence with the single market. It would also require the introduction of checks on goods crossing the Irish Sea in order to ensure compliance with the customs union and the single market. The UK government objected to any approach that would, in its view, introduce an element of separation between Northern Ireland and the rest of the UK and make the international status of Northern Ireland ambiguous.⁴⁸

In the face of UK opposition, and in the absence of any other concrete proposals, the EU proposed, in the Joint Report of 2017, to postpone a decision on the precise model to be adopted, while legally committing both sides to keeping the border open.⁴⁹ This commitment to keep the Irish land border open, regardless of what future relationship the UK had with the single market, was agreed between the EU and the UK and became known as the 'Irish backstop'. Initially the EU proposed in the draft Withdrawal

⁴⁶ Dimitry Kochenov (ed), *On Bits of Europe Everywhere. Overseas Possessions of the EU Member States in the Legal-Political Context of European Law* (Kluwer Law International 2013).

⁴⁷ See Giorgio Sacerdoti, 'The Prospects for the UK after Brexit: How can Britain trade with the EU and the World?' in Federico Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press 2017).

⁴⁸ Prime Minister Theresa May's spokesperson, *The Guardian* (15 October 2018).

⁴⁹ 'Joint Report from 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' (2017) <https://ec.europa.eu/commission/publications/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union_en> accessed 15 October 2019.

Agreement of March 2018 that the backstop would only apply to Northern Ireland but, in order to reach a draft agreement, they reluctantly agreed to extend this provision to the whole of the UK at the suggestion of the British government, who wanted to avoid the accusation that they were agreeing to the differential treatment of Northern Ireland.⁵⁰

V. THE DRAFT WITHDRAWAL AGREEMENT

The draft withdrawal agreement, finalised in November 2018, included a lengthy Protocol on Northern Ireland, the 'backstop' to avoid a hard border on the island of Ireland.⁵¹ The agreement also allowed for the continuation of the Common Travel Area between Ireland and the UK and of the Single Electricity Market on the island of Ireland. It set out a framework involving a transition period, to the end of 2020, during which time all EU single market and customs rules would continue to apply to the UK as a whole and not only to Northern Ireland. It also allowed for the extension of the transition period, once only for a time-limited period; a decision to extend would have to be made by July 2020. During the transition period, both sides would 'use their best endeavours' to negotiate a new trade relationship between the EU and the UK, part of which would be measures to avoid a hard border on the island of Ireland. If no long-term trade deal had been agreed by the end of 2020, or by the end of an agreed extension period, then a backstop would be triggered. The backstop would consist of 'a single customs territory between the (European) Union and the United Kingdom'. Within this single customs territory, Northern Ireland would remain aligned with the rules and regulations of the EU single market in order to avoid regulatory checks on

⁵⁰ European Commission, 'Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union' (2018) <https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_o.pdf> accessed 15 October 2019.

⁵¹ European Union, '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, as Agreed at Negotiators' Level on 14 November 2018' (2018) <https://ec.europa.eu/commission/files/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-agreed-negotiators-level-14-november-2018_en> accessed 15 October 2019.

the Irish border, even if the regulatory framework in place in the rest of the UK deviated from that of the EU. In these circumstances, some checks on Irish Sea crossings could be required, in addition to those already in place regarding animal and plant health and safety. Under this agreement, the UK would be required to meet 'level playing field conditions', to ensure it could not gain a competitive advantage by increasing state aid to industry or by dropping environmental standards or social protections. Those level playing conditions would continue as new regulations are passed. Either side would be able to request a review of the backstop, but it would require a joint decision of both the UK and the EU to end it.

The Protocol was the most difficult section of the draft agreement to negotiate and once agreed it resulted in a number of resignations from the British government.⁵² It continued to be a source of contention for the DUP and elements of the pro-Brexit lobby of the Conservative Party, who argued, correctly, that the 'backstop' tied the UK for an indefinite period into a customs union with the EU, preventing it from having an independent trade policy. From the perspective of the EU, extending this special position to the whole of the UK was a major concession to UK sensitivity, something which has not been recognised in the British political discourse.⁵³

The support given to the Irish Government's position by the other EU Member States and the mechanism to avoid a hard border drew intense criticism from pro-Brexit MPs, who made the special 'backstop' arrangement for Northern Ireland, and its implications for the rest of the UK, the focus of their attacks on the Prime Minister's negotiating position and on the draft agreement. It also led to a series of highly charged anti-Irish attacks by leading Conservative MPs, including a statement that '[t]he Irish really should know their place' and even a threat to impose food export restrictions from the UK to force Ireland to reconsider.⁵⁴ Ireland's ambassador to the

⁵² 'Brexit: What is the Withdrawal Agreement?' (BBC, 25 November 2018) <<https://www.bbc.com/news/uk-46237012>> accessed 15 October 2019.

⁵³ James Forsyth, 'Divide and Rule: How the EU used Ireland to Take Control of Brexit' *The Spectator* (20 October 2018) <<https://www.spectator.co.uk/2018/10/divide-and-rule-how-the-eu-used-ireland-to-take-control-of-brexit/>> accessed 15 October 2019.

⁵⁴ 'Brexit: Tory resentment of Irish power within EU' (BBC, 11 December 2018) <<https://www.bbc.com/news/uk-politics-46528952>> accessed 15 October 2019;

UK, Adrian O'Neill, wrote a public letter to the *Spectator* magazine stating that the 'prevailing tone and tenor' of articles about Ireland and Brexit had been 'with the occasional exception' anti-Irish.⁵⁵

The Withdrawal Agreement was widely welcomed in Northern Ireland as a pragmatic solution that could preserve the peace process in the context of Brexit, even though the preferred position of the majority was that the UK remain in the EU. This majority included Irish nationalists, the centrist pro-UK Alliance Party of Northern Ireland, most business organisations, and the main civil society networks in Northern Ireland. However pro-Brexit unionists in the DUP rejected the Withdrawal Agreement based on their opposition to the Irish backstop. Although the DUP had stated that it did not want to see a closed border, they also do not support all-Ireland integration and cross border cooperation. The DUP believe that the Withdrawal Agreement would create a context where business, public policy and trade ties to the EU would be strengthened, as in these circumstances Northern Ireland would have a comparative advantage over the rest of the UK. The DUP leadership feared that in these circumstances political interests, and even perhaps political identity in Northern Ireland, would be increasingly shaped by that European focus, strengthening the case for Irish unity in the future.

An opinion poll in December 2018 asked respondents in Northern Ireland if they agreed that the 'main business organisations in Northern Ireland (including the Ulster Farmers Union) are correct to back the UK government's current EU Withdrawal Agreement'. 54 per cent agreed with this statement, 37 per cent disagreed, and 9 per cent were unsure. When broken down by community, 86 per cent of self-defined Irish nationalists, 25 per cent of self-defined unionists, and 46 per cent of those who said they were neutral on the constitutional question agreed with the statement.⁵⁶

Bobby McDonagh, 'Priti Patel's Boorish Brexit Comments Showed Ignorance About Ireland: She's Not Alone' *The Guardian* (10 December 2018).

⁵⁵ Ronan McGreevy, 'Irish Ambassador to UK Accuses British Magazine of Anti-Irish Bias over Brexit' *The Irish Times* (12 April 2019).

⁵⁶ <<https://www.lucidtalk.co.uk/single-post/2018/12/07/LT-NI-Tracker-Poll---Winter-2018>> accessed 15 October 2019.

As the debate developed, with a possible 'Northern Ireland-only backstop' proposed (with consequent checks on the Irish Sea crossing), public opinion on the 'backstop' solution largely reflected the referendum result. 58.4 per cent of respondents said they would support a Northern Ireland-only backstop, with NI more closely aligned with the EU than the rest of the UK.⁵⁷ Broken down by party support, an NI-backstop and checks in the Irish Sea were supported by 98 per cent of supporters of the two major Irish nationalist parties, Sinn Féin and the SDLP, 89 per cent of Alliance Party voters, 86 per cent of Green Party voters, 27 per cent of Ulster Unionist voters, and 5 per cent of DUP voters. By self-defined community membership, this represented approximately 93 per cent of self-defined Irish nationalists, 20 per cent of self-defined unionists, and 71 per cent of those who do not self-define as nationalist or unionist. This pattern of Irish nationalists and 'others' strongly supporting a Northern Ireland backstop largely reflects the breakdown of the 2016 referendum vote.

When the UK parliament failed in early 2019 to approve the Withdrawal Agreement, or any other approach to managing their withdrawal, the EU and the Irish government re-affirmed that an open Irish border was not negotiable, with Michel Barnier saying that the

backstop is currently the only solution we have found to maintain the status quo on the island of Ireland ... Let me be very clear. We would not discuss anything with the UK until there is an agreement for Ireland and Northern Ireland.⁵⁸

The EU also insisted that even in the event of 'no deal', the question of Northern Ireland would be reflected in EU terms for any future trade agreement. These views are also reflected in the US, where the Speaker of the House of Representatives, Nancy Pelosi said in a speech to the Irish parliament that 'if the Brexit deal undermines the Good Friday accords there

⁵⁷ <<https://www.lucidtalk.co.uk/single-post/2019/08/20/LT-NI-Opinion-Panel-Quarterly-Tracker-Poll-%E2%80%93-August-2019>> accessed 15 October 2019.

⁵⁸ Rory Carroll, 'Barnier Pledges EU Support for Backstop in Event of No-Deal Brexit' *The Guardian* (8 April 2019) <<https://www.theguardian.com/world/2019/apr/08/barnier-eu-support-backstop-ireland-no-deal-brexit>> accessed 15 October 2019.

will be no chance of a US-UK trade agreement'.⁵⁹ At the same time, the EU repeatedly sought to 'de-dramatise' the backstop in their public statements and documents by emphasising their determination to find a commonly agreed long-term solution. This was explicitly done, for example, in the Joint Interpretative Instrument of 11 March 2019.⁶⁰ In spite of this clarification, the Withdrawal Agreement was defeated in the UK Parliament on 15 January 2019 and subsequently on 12 and 29 March 2019. Parliament was also unable to find any agreement on alternative ways forward. One proposal on which there was majority agreement, which became known as the 'Brady amendment', rejected the backstop in the Withdrawal Agreement and called on the Government to negotiate 'alternative arrangements', without specifying what those arrangements would be. European newspapers reported the House of Commons' decisions using terms like 'madness', 'crisis' and 'uncertainty'.⁶¹ In the wake of the failure of these motions, the British government continued negotiations with the EU, focusing on finding an agreement that would allow the backstop provision to be removed and therefore enable the agreement to achieve majority support in the British Parliament. The EU, however, remained united on its agreed position as reflected in the Withdrawal Agreement, including on the Northern Ireland provisions.

Opposition to the backstop focused on the grounds that it limited British sovereignty and freedom to negotiate trade deals. However, the UK government did not accept a more limited 'Northern Ireland-only backstop' as proposed by the EU, on the grounds that it might appear to diminish UK sovereignty over Northern Ireland and that it was opposed by the DUP, who

⁵⁹ *Financial Times* (17 April 2019).

⁶⁰ European Commission, 'Instrument Relating to the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community' (2019 <<https://ec.europa.eu/commission/sites/beta-political/files/instrument.pdf>> accessed 15 October 2019).

⁶¹ See for example summaries of major European newspapers' coverage in *The Guardian* on 28 and 30 March 2019 <https://www.theguardian.com/politics/2019/mar/28/european-press-view-on-brexite> and <<https://www.theguardian.com/politics/2019/mar/30/from-shock-to-shrugs-europes-press-react-to-third-brexite-deal-defeat>> accessed 15 October 2019.

were giving parliamentary support to the minority Conservative government. In a reputable opinion poll of Conservative Party members, almost 60 per cent of respondents said they would choose to proceed with Brexit even if it led to Northern Ireland and Scotland leaving the UK, suggesting a more England-focused sense of sovereignty and a prioritisation of state agency, rather than traditional territorial state sovereignty.⁶² The lack of clarity on what the UK parliament would support in practice made it very difficult for the EU to respond with concrete proposals.

During debates on the Withdrawal Agreement in the UK Parliament and in the Conservative Party leadership contest from early June 2019, the articulation of what was meant by 'alternative arrangements' was frequently vague and when specifics were itemised they had already been demonstrated to be unacceptable to the EU. A repeated demand throughout these debates was to make the backstop time-limited. But as the only purpose of the backstop was to provide clarity in the event of no other agreement, a time-limited backstop does not fulfil this function and is therefore unacceptable to the EU. The discussion in the Conservative party, both around the response to the failure to pass the Withdrawal Agreement and in the leadership contest, has demonstrated an apparent lack of awareness of the negotiating position of the EU and the diplomatic position of the Irish Government within the EU. A vague technological solution was again repeatedly raised in the Conservative Party leadership contest, with one Conservative Party candidate offering to pay for the infrastructure on the border, as though the cost of construction rather than the political and economic impact of the infrastructure was the key factor in the debate.⁶³ This failure to positively engage with the EU is further demonstrated by the interim report, published in June 2019, of a conservative-linked think tank, the Alternative Arrangements Commission. This report again focused on technological solutions and also proposed a single regulatory area covering the UK and Ireland for agri-food as a means to deal with the border issue.

⁶² 'You Gov Poll of Conservative Party Members' 19 (YouGov, 19 June 2019) <<https://yougov.co.uk/topics/politics/survey-resultse>> accessed 15 October 2019.

⁶³ See BBC summary of leadership candidates positions: <<https://www.bbc.com/news/uk-northern-ireland-48583352>> accessed 15 October 2019.

This would in effect mean Ireland leaving the single market, a prospect unacceptable to both Ireland and the EU as a whole.⁶⁴

The EU agreed to extend the deadline for the UK to leave the EU with a negotiated agreement to 31 October 2019 and, following this decision, the focus of the debate in UK has been on both the failure of the Government and Parliament to find a majority for any possible way forward and on the internal divisions in both the Conservative government and party. But at the core of this impasse is the apparent impossibility of achieving parliamentary support for the negotiated Withdrawal Agreement while it contains the Northern Ireland backstop and the failure of the political parties to come up with an alternative proposal that would be acceptable to the EU.

The UK Parliament re-convened in September 2019 with a very clear position from Prime Minister Boris Johnson that the UK would leave the EU on 31 October 2019, with or without a Withdrawal Agreement. This meant that the question of final negotiations was at the heart of the debate for the UK. The Prime Minister reiterated that he wanted a deal and that he would not build infrastructure on the Irish Border. However according to EU sources, no new proposal of any kind was tabled which could replace the Irish backstop and meet the EU requirements of protecting the EU single market while also keeping the Irish border fully open.⁶⁵ Prime Minister Johnson suggested he might accept an all-island agri-food area if the DUP did, but this

⁶⁴ <<https://www.prosperity-uk.com/aacabout/>>. For reaction see Tony Connelly, 'Report Suggests New Agri-food Area for Ireland, UK (RTE, 24 June 2019) <<https://www.rte.ie/news/brexit/2019/0624/1057201-alternative-arrangements/>> and Lisa O'Carroll 'Brexit: Alternative to Irish Backstop "Feasible in Three Years"' *The Guardian* (24 June 2019) <<https://www.theguardian.com/politics/2019/jun/24/irish-border-kept-open-within-three-years-after-no-deal-brexit-says-report>> accessed 15 October 2019.

⁶⁵ 'Brexit: How the EU is Responding to Latest Uncertainty' (DW, 5 September 2019) <<https://www.dw.com/en/brexit-how-the-eu-is-responding-to-latest-uncertainty/a-50294103>> accessed 15 October 2019; Kitty Donaldson, Robert Hutton and Nikos Chrysoloras 'EU Says UK Has Failed to Deliver New Proposals: Brexit Update (Bloomberg, 4 September 2019) <<https://www.bloomberg.com/news/articles/2019-09-04/johnson-readies-for-more-defeats-in-parliament-brexit-update>> accessed 15 October 2019.

was not developed into a concrete proposal.⁶⁶ The *Telegraph* newspaper reported on 2 September that two separate sources had confirmed that senior UK government advisor Dominic Cummings had said the discussions with the EU were a sham. The paper also reported that the UK Attorney General, Geoffrey Cox had warned Prime Minister Johnson on 1 August that his insistence on dropping the Northern Irish backstop was a 'complete fantasy'. By September 2019, a clear majority in the House of Commons was seeking to block a no-deal exit, while the majority of the Conservative Party were publicly saying that the UK should leave without a deal if its demands were not met.⁶⁷

VI. BREXIT, THE BORDER AND THE POLITICAL IMPACTS

Brexit, and particularly the debate on the Irish border, has had an on-going political impact on the island of Ireland, on the British state and on the international response to the political relationship between Ireland and the UK. In her keynote speech of January 2017, Theresa May had expressed her intention of working with the devolved administrations of the UK as part of the Brexit negotiations, but in Northern Ireland this engagement was not possible as Northern Ireland has not had a functioning power-sharing Executive or Assembly since January 2017. It is, however, unlikely that a functioning Assembly or Executive in Northern Ireland could have had a significant impact on the wider political challenges of Brexit. The Assembly collapsed when Sinn Féin withdrew from government as a result of a political dispute over alleged corruption by their partners in government, the DUP, and also in response to the DUP's continued use of a veto to block legislation on same sex marriage and on Irish language rights. Restoring the Executive was made more difficult following the UK general election in 2017, when the DUP agreed to support the Conservative government in parliament. From this point there was no incentive for the DUP to re-enter government in Northern Ireland as they now had direct access to the British Prime

⁶⁶ 'Brexit: Boris Johnson Open to All-Ireland Food Zone as Backstop Solution' (BBC, 3 September 2019) <<https://www.bbc.com/news/uk-northern-ireland-49566657>> accessed 15 October 2019.

⁶⁷ UK Parliament, 'House of Commons Debates' (4 September 2019) <<https://hansard.parliament.uk/commons/2019-09-04>> accessed 15 October 2019.

Minister, who needed their votes to stay in office. Furthermore, even if the Assembly could not procedurally force an Executive response, the DUP would have been politically embarrassed by a pro-Remain majority using the Assembly to highlight the limited public support for the DUP's hard-line pro-Brexit position. The DUP had opposed the Good Friday Agreement in 1998 and had later only agreed to enter the power-sharing Executive as an alternative to some form of informal power-sharing between the British and Irish Governments.⁶⁸ While the Executive had functioned well under the leadership of former DUP leader Ian Paisley, the party was not ideologically committed to a power-sharing government in Northern Ireland. As Sinn Féin and the DUP hold diametrically opposed positions on EU membership, on the border and on the Withdrawal Agreement, even if the Northern Ireland Executive had been functioning they could not have agreed a common 'Northern Ireland' position on Brexit and therefore they could not have made an input into the negotiations or provided a coherent voice representing the interests of Northern Ireland, because such a voice does not exist.

The major political impact in Northern Ireland of the Brexit debate is the shift of political opinion as a result of the threat of a 'hard' border. The Irish nationalist population in Northern Ireland prior to Brexit was divided on the timing of a vote on a united Ireland, given that, following the 1998 agreement, most Irish nationalists were willing to take a long-term perspective on constitutional change, with only a minority supporting the holding of a border poll in the short-term. Following the Brexit referendum, the Irish nationalist community in Northern Ireland has become both more unified and more militant in their views on the question of unity. Opinion polls show Irish nationalists much more willing to positively support a referendum on Irish unity, marking a distinct break with previous polling trends, with the qualification that polling data on support for a united Ireland is very sensitive to the precise wording of the questions, to the methodology, and to the political context at the time of polling.

⁶⁸ Eileen Connolly and John Doyle 'Ripe Moments for Exiting Political Violence: An Analysis of the Northern Ireland Case' (2015) 26 *Irish Studies in International Affairs* 147.

In the aftermath of the Good Friday Agreement, opinion polls suggested that many Irish nationalists in Northern Ireland were content with the evolving status quo. They were not seeking a border poll in the short term and would not vote for unity if such a referendum was held.⁶⁹ In response to a 2002 opinion poll, which asked respondents how they would vote if a referendum was held 'tomorrow', only 58 per cent of Catholics said they would vote yes, 20 per cent would vote no and the rest were either undecided or did not reply. In the same poll, only 3 per cent of Protestants and 18 per cent of those who did not identify with either of the main religious communities said they would vote for unity 'tomorrow'. By comparison, following the Brexit referendum a December 2018 poll found that 35 per cent of nationalists wanted a border poll to be held in 2019, 79 per cent wanted one within 5 years, and 89 per cent wanted a poll within 10 years.⁷⁰ In the same survey, 93 per cent of nationalists said they would vote to leave the UK, and a further 5 per cent of nationalist 'probably would', if the poll was held in 2019 in the context of 'no deal'.⁷¹ In another opinion poll in January 2019, 94 per cent of nationalists, 32 per cent of unionists, and 71 per cent of 'others' thought Brexit would make a united Ireland 'more likely in the next 10 years'.⁷² This shift in nationalist opinion – in seeking a border poll in a relatively short time span; in their own declared voting intentions; and in their predictions about constitutional change – are all radical departures from pre-Brexit referendum polling, which showed a more divided nationalist community.

There is also evidence that a majority of the centrist 15 per cent of the population, who do not vote for mainstream Unionist or Irish nationalist parties, would, in the context of a 'hard' or 'no-deal' Brexit, shift their support from the status quo within the UK and would consider voting for Irish unity

⁶⁹ See for example 'NI Life and Times 2002 poll' <https://www.ark.ac.uk/nilt/2002/Political_Attitudes/REFUNIFY.html>

⁷⁰ <https://docs.wixstatic.com/ugd/024943_b89b42d32364461298ba5fe7867d82e1.pdf> accessed 15 October 2019.

⁷¹ <https://docs.wixstatic.com/ugd/024943_b89b42d32364461298ba5fe7867d82e1.pdf> accessed 15 October 2019.

⁷² <https://docs.wixstatic.com/ugd/024943_b195541bffa647a7882be133023ff803.pdf> accessed 15 October 2019.

in order to stay in the EU.⁷³ This shift is driven by the potentially very negative economic outcomes of Brexit for Northern Ireland in particular, but it has also been facilitated by the liberalisation of the Irish state, which on the basis of referenda passed legislation to legalise same-sex marriage in 2015, to liberalise access to legal abortions in 2018, and liberalise divorce laws in 2019.⁷⁴ In 2018, 37 per cent of 'others' in Northern Ireland wanted a border poll within 5 years, with 68 per cent wanting this within 10 years. If there was no deal, 70 per cent of such voters said they were certain or likely to vote for Irish unity, whereas if Brexit did not proceed their responses moved to 'uncertain' or 'probably remain in the UK'.⁷⁵

The overall picture from post-referendum opinion polls is that Northern Irish nationalists have become more supportive of Irish unity in the context of Brexit, even in the short term, while the traditionally pro-UK union bloc has become more fragmented at the margins. This fragmentation is reflected in the publicly stated views of individuals from a unionist background, involved in business, trade or cross-border engagement, who campaigned in Northern Ireland for the UK to remain in the EU.⁷⁶ It also reflects the views of the major economic interest groups including the Ulster Farmers Union and the Confederation of British Industry (CBI) in Northern Ireland, who supported the draft Withdrawal Agreement of November 2018, and specifically the 'Irish backstop', if the alternative was a hard Brexit rather than a vote to remain in the EU.⁷⁷ The volatility in the 2018 and 2019 polls is

⁷³ Lucid Talk, 'Tracker Polling in Northern Ireland' (2018) <<https://www.lucidtalk.co.uk/single-post/2018/12/07/LT-NI-Tracker-Poll---Winter-2018>> accessed 15 October 2019.; *Irish Times* (7 March 2019).

⁷⁴ For a good summary of recent economic reports, see Tony Connelly 'Double Whammy: A No-deal Brexit and Northern Ireland' (RTE, 15 June 2019) <<https://www.rte.ie/news/analysis-and-comment/2019/0614/1055418-double-whammy-a-no-deal-brexit-and-northern-ireland/>> accessed 15 October 2019.

⁷⁵ <https://docs.wixstatic.com/ugd/024943_b89b42d32364461298ba5fe7867d82e1.pdf> accessed 15 October 2019.

⁷⁶ Gerard McCann and Paul Hainsworth, 'Brexit and Northern Ireland: The 2016 Referendum on the United Kingdom's Membership of the European Union' (2017) 32(2) *Irish Political Studies* 333.

⁷⁷ 'Brexit Deal: PM Thanks NI Business Leaders for Support' (BBC, 22 November 2018) <<https://www.bbc.com/news/uk-northern-ireland-46296605>> accessed 15 October 2019.

significant compared to the relative stability of previous polling, but for the first time since modern polling has been conducted in Northern Ireland, credible opinion polls are showing that in the event of a 'hard Brexit', a majority of the population could vote to join a united Ireland in order to re-join the EU.⁷⁸

The Irish Government does not want the debate on the Brexit negotiations to become complicated by a call for a border poll and its policy is to defend the Good Friday Agreement as providing the framework for the peaceful development of the island of Ireland by preventing a hard border.⁷⁹ It anticipates that in a post-Brexit world, if there is a negotiated agreement that does not impose a hard border, then the demand for Irish unity will again become more muted. Others, including former President of Ireland Mary McAleese, have argued that the Brexit referendum was an example of how *not* to conduct serious constitutional reform and that before any referendum on Irish unity there should be a full and lengthy public debate.⁸⁰ In the circumstances where there is an increased demand for a united Ireland, under the terms of the Good Friday Agreement, the British Secretary of State for Northern Ireland is obliged to call a referendum, if it appears to them that 'a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland'.⁸¹ The Agreement also commits the British government in the event of a vote for Irish unity to legislate for a united Ireland.⁸² The British Secretary of State has some discretion and can use their judgement on the question of whether or not the level of public support for a united Ireland justifies the calling of a referendum, but when a majority clearly exists they are bound by the Agreement to hold a referendum.

⁷⁸ Lucid Talk poll data <<https://www.lucidtalk.co.uk/>> accessed 15 October 2019.

⁷⁹ Foreign Minister Simon Coveney, quoted in Elaine Edwards 'Coveney Says Calls for Border Poll "Not Wise and Not Welcome"' *Irish Times* (30 May 2018) <<https://www.irishtimes.com/news/politics/coveney-says-calls-for-border-poll-not-wise-and-not-welcome-1.3514226>> accessed 15 October 2019.

⁸⁰ Speech by former President of Ireland Mary McAleese to the DCU Brexit Institute on 29 March 2019. See <<http://dcubrexitinstitute.eu/official-speeches/>> accessed 15 October 2019.

⁸¹ Good Friday Agreement (1998) Annex A.

⁸² Good Friday Agreement (1998) Annex A.

During the Brexit negotiations the UK government experienced the practical diplomatic impact which the Good Friday Agreement has had on Northern Ireland's status. The international recognition of the agreement has changed how UK sovereignty over Northern Ireland is perceived internationally, shifting it from one of unqualified UK sovereignty over Northern Ireland to the international recognition of an agreement between the UK and Ireland. The Good Friday Agreement reformulated the legal basis of British sovereignty over Northern Ireland, with the recognition that British rule rested on the consent of the people of Northern Ireland. The Good Friday Agreement gave a legal basis to the recognition of the rights of Irish nationalists in Northern Ireland and the rights of the Irish government as a signatory to the treaty. During the negotiation process, this shift was seen in the support given by the EU to Ireland's demand that there should be no hard border on the island.

The experience of the referendum, the Brexit negotiations, and the failure to pass the Withdrawal Agreement through the UK parliament, have fractured and undermined the British state and the strength of the union between its component parts. The decision by the British government to refuse to consider the option of an 'Irish Sea' border and the entrenched conservative nationalism of the DUP and sections of the Conservative Party made an agreement with the EU difficult to achieve. It has therefore been impossible to find a parliamentary majority willing to support the draft Withdrawal Agreement. While the imposition of a land border on the island of Ireland will be problematic for security, social and economic reasons, it also could bring a 'united' Ireland closer as a means of dealing with these problems. While this new situation will also have potential difficulties, it is unlikely to undermine the Irish state or hinder its economic development. However, it seems unlikely that the UK will easily recover from the deep divisions and political upheavals engendered by the Brexit process, whatever the final outcome is. The failure to reach agreement has heightened internal political tensions in Northern Ireland and the EU remains determined that it will not accept a Withdrawal Agreement which disrupts cross-border travel and cooperation prior to the withdrawal date of 31 October 2019.

VII. CONCLUSION

The draft Withdrawal Agreement finalised in November 2018 would minimise the risks for Ireland compared to a unilateral withdrawal by the UK from the EU, as it would keep the border open; a hard border is the most immediate and serious threat. Even if the current Withdrawal Agreement was accepted by the UK parliament there would still be negative underlying trends: the UK 'post-Brexit' would become a more insular society, increasingly detached from the rest of Europe, and in those circumstances Northern Ireland would be likely to face a period of economic and political decline and new political tensions. With the UK outside the EU, the management of the peace process will be significantly weakened, as the UK would no longer be part of the framework of EU regional cooperation and policy development that underpins the cross border integration aspects of the peace process. It will also reduce the potential for ongoing informal meetings between Irish and UK ministers at the margins of EU meetings. This lack of regular interaction post-Brexit is unlikely to be addressed by the same level of bi-lateral contacts and will potentially weaken inter-governmental cooperation. This will in turn inhibit the development of measures to promote the economic development of the border regions and the management of the peace process in the difficult context of adjustment post-Brexit.

A disruption to cross-border cooperation would reflect the *de facto* policy aims of the DUP by stopping or slowing the process of neo-functional cooperation by erecting barriers, physical and cultural, between the two parts of the island of Ireland and seeking to cement Northern Ireland's dependency on Britain. In these circumstances, Irish nationalists, rather than working within the framework of the Good Friday Agreement for a gradual process of change, may instead mobilise for a referendum on Irish unity. The political outcome of these pressures and their capacity to undermine the peace process depends on the disposition of the political middle ground in Northern Ireland, in terms of how much they prioritise re-joining the EU and whether they would be willing to support Irish unity to achieve EU membership. The Brexit debate and the divisions on the location of the 'border' have already increased internal political tensions in Northern Ireland, as evidenced by the failure to restore the devolved power-sharing

government during the pre-withdrawal period. These dynamics can also be seen in the escalation of inter-communal tensions compared to the peace process era and in a return to divisive political relationships, with the potential this has for a resumption of armed conflict.

While the bleak post-Brexit scenario explains the determination of the Irish government to avoid a hard border on the island of Ireland, the reasons why the British government so trenchantly opposed the 'Irish Sea border' solution and a Northern Ireland-only backstop are more complex. The insistence of the DUP that it would not continue to provide support for the minority Conservative party government if they agreed to any solution that involved a special status for Northern Ireland, even one that was to their economic advantage, is only part of the explanation. A significant number of Conservative MPs, including leading figures in the party, also opposed any change in the status of Northern Ireland which would weaken its position as an integral part of the UK or diminish British sovereignty over the region. While a Northern Ireland-only backstop would allow the UK to pursue an independent trade policy for Great Britain, for this element of the Parliamentary Conservative Party such trade opportunities are seemingly not as important as keeping Northern Ireland fully within the UK. This is the case even though the majority of the wider rank and file membership of the Conservative Party prioritise achieving Brexit over keeping Northern Ireland within the UK.⁸³ The UK cabinet rejected a Northern Ireland-only backstop, either believing a UK-wide backstop would receive parliamentary support or assuming that the EU would drop the backstop completely once the threat of no-deal became imminent. However, although the Withdrawal Agreement had the support of Prime Minister Theresa May and other leading members of the party, it did not have the support of the majority of the party. Underlying the refusal of Conservative MPs to support the negotiated agreement seemed to be the belief that the EU would not hold firm on this issue. As the debate progressed during 2019, the overwhelmingly majority of the Parliamentary Conservative Party were willing to leave the

⁸³ See 'Most Conservative members would see party destroyed to achieve Brexit' (YouGov, 18 June 2019) <<https://yougov.co.uk/topics/politics/articles-reports/2019/06/18/most-conservative-members-would-see-party-destroye>> accessed 15 October 2019.

EU without a deal rather than accept the Withdrawal Agreement negotiated during May's term as Prime Minister.

Ultimately, many UK policy-makers expected that the EU, as a result of internal divisions, would drop its support for Ireland and abandon the backstop provision from the Withdrawal Agreement (or agree a 'time-limited' backstop). This strategic miscalculation reflects a core part of what a section of the UK's political elites believe it means to be British and their perception of the place the UK occupies in the world. The UK government never believed that the EU's own interests required a backstop and during the leadership contest following Theresa May's resignation most candidates framed the issue as a bi-lateral one between the UK and Ireland. That this view was not shared by the EU Member States, and the EU collectively, was not internalised by the UK government or the Conservative Party. It was the central issue that made the negotiations so frustrating and inexplicable for the EU negotiators and the governments of the other Member States. The EU's initial position was for a Northern Ireland-only backstop, allowing the rest of the UK to move outside of the customs union and single market. The EU27 reluctantly agreed to a UK-wide backstop at the insistence of UK negotiators. It has been difficult for the EU to understand why the UK was unable to deal with the question of the Irish border and the requirements of the single market in a manner which did not escalate the language to one of state sovereignty. The EU's own experience of sharing and occasionally fudging sovereignty in order to reach agreements may have led them to underestimate the strength of this traditional view within the Conservative Party. However, even when it became absolutely clear in August/September 2019 that the EU would not shift their position on the Irish border, the Conservative Party did not table any substantial proposal to resolve the issue. As a result, apart from the negative political impacts in Northern Ireland, the Brexit negotiations have also led to an increased negativity towards the UK position across the EU27 and a shift from a widespread hope that Brexit could be reversed towards a growing view that continued UK membership of the EU, with repeatedly postponed decisions on its final status, is bad for Europe.

If the UK leaves the EU without a withdrawal agreement, it remains unclear what will happen on the Irish border. Both the Irish government and the EU refrained from speculation on this issue during the period of negotiation and

while the draft Withdrawal Agreement remains on the table. The Irish government's priority has been to secure a withdrawal agreement that ensures that there will not be a hard border between Ireland and Northern Ireland and it has not engaged in a discussion of other scenarios. In response to the increased likelihood that the UK will leave the EU without a deal, Taoiseach Leo Varadkar stated that a Withdrawal Agreement without a backstop is just as bad for Ireland as a no-deal exit by the UK and that Ireland, therefore, has no interest in agreeing to have the backstop weakened or removed to allow the UK parliament to pass the draft Withdrawal Agreement.⁸⁴ If Ireland did agree to the removal of the backstop provision, this would end that phase of negotiations. It would cement the idea of a hard international border on the island and future negotiations would be focused on how to technically deal with this and not how to re-open the border. Undesirable as a no-deal exit would be for Ireland, it would still leave the Irish border as an open question in future negotiations between the UK and the EU. Since Johnson became Prime Minister, the UK government, in framing the issue as a bi-lateral one and in suggesting a joint Irish-UK agri-food market, requiring Ireland to leave the EU single market,⁸⁵ has not understood the Irish position and it has also not appreciated that Ireland's interests, even in the worst case scenario of a no-deal Brexit, are linked to remaining a full part of the EU and its single market. On the questions of a backstop-type provision and of support for the peace process in any Withdrawal Agreement, or indeed any future trade deal, the UK Government has from 2016 onwards consistently underestimated the degree of EU solidarity with Ireland and the degree to which the EU's own interests were reflected in its negotiation stance. It is this failure of political judgement that has led to the rejection of the negotiated Withdrawal Agreement and continues to block agreement on a way forward.

⁸⁴ 'No Backstop as Bad for Ireland as No Deal – Varadkar' (RTE, 15 June 2019) <<https://www.rte.ie/news/brexit/2019/0615/1055513-ireland-brexit/>> accessed 15 October 2019.

⁸⁵ Tony Connelly, 'Report Suggests New Agri-Food Area for Ireland, UK' (RTE, 24 June 2019) <<https://www.rte.ie/news/brexit/2019/0624/1057201-alternative-arrangements/>> accessed 15 October 2019.

BREXIT AND TRADE ISSUES

Paola Mariani & Giorgio Sacerdoti*

This article explores the post-Brexit EU-UK trade relations as they can be anticipated on the eve of the approaching exit day on 31 October 2019. A key piece of the Brexit negotiation concerned the issue of future trade relations between the UK and the EU after the withdrawal. The first part of the article discusses the framework of EU-UK future trade relationship as it emerges through the stand taken by the parties during the negotiations and in the final acts, the Withdrawal Agreement and the Political Declaration. In its second part, the article focuses on WTO constraints to the UK post-Brexit international trade with third countries, including those with which the EU currently has trade agreements in place, which will become inapplicable to the UK upon its exit from the EU. The analysis shows that taking back control over the trade policy will not be an easy task for the UK, leaving the EU with or without a deal.

Keywords: Backstop, Brexit, European Union, Northern Ireland, United Kingdom, World Trade Organization, Withdrawal Agreement, Political Declaration

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I. INTRODUCTION

On 29 March 2017 the United Kingdom (UK) formally notified the European Council of its intention to leave the European Union (EU). In November 2018, before the end of the two-year time limit established by Article 50 TEU to achieve an agreement on the UK departing terms, the EU and the UK closed an intense negotiation with the signature of the Withdrawal Agreement and the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom.¹ A key piece of the Brexit negotiation concerned the issue of future trade relations between the UK and the EU after the withdrawal. However, as is well known, the UK Parliament has refused to accept the results of the negotiation. At the date of finalisation of this paper² it is not clear whether Brexit will occur with or without a deal – if at all.

The main initial target of the UK was to associate the negotiations on the terms of withdrawal with those concerning the two parties' future cooperation. However, at the EU's insistence the definition of the framework for the future trade relationship was pushed back to the very last phase of the negotiation and is not enshrined in a binding agreement but

¹ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C1 144/I.

² This article was completed at the end of September 2019.

rather in a political declaration. The different positions of the parties converged in the Political Declaration, a non-binding legal instrument open to different interpretations and developments. The only trade arrangement binding for the parties is the so-called 'backstop' solution for avoiding a hard border between Ireland and Northern Ireland, agreed by the parties in the Protocol on Ireland/Northern Ireland that forms an integral part of the withdrawal agreement.³

In its first part, this article discusses the features of future EU-UK post-Brexit trade relations according to the positions manifested by the parties during the negotiation and in the final acts, taking into account the position adopted by Prime Minister Boris Johnson's government, notably with his letter to EU Council President Donald Tusk on 19 August 2019.⁴ In its second part, the paper focuses on World Trade Organization (WTO) constraints to the UK's post-Brexit international trade with third countries, including those with which the EU currently has trade agreements in place which will become inapplicable to the UK upon exit. The so-called 'roll-over' – aimed for by the UK – of existing Free Trade Agreements (FTA) and other trade arrangements currently in place between the EU and third countries requires the conclusion of new agreements by the UK. They are meant to enter into force subject to the exit of the UK from the EU, the end of any Transition Period and the ability of the UK to conduct thereupon its own international trade policy freely. The latter is dependent on the UK not being encumbered by the restrictions stemming from the UK being part of a custom union with the EU, as currently envisaged by the 'backstop'.

The conclusions of our analysis show the considerable constraints that the UK faces in devising such a policy and entering into such agreements, including with countries such as the US which currently have no FTAs in place with the EU. Since the UK-EU trade represents for the UK about half

³ According to Article 182 of the withdrawal agreement, 'The Protocol on Ireland/Northern Ireland, the Protocol relating to the Sovereign Base Areas in Cyprus, the Protocol on Gibraltar, and Annexes I to IX shall form an integral part of this Agreement'.

⁴ Letter of Prime Minister Boris Johnson to European Council President Donald Tusk (19 August 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826166/20190819_PM_letter_to_His_Excellency_Mr_Donald_Tusk.pdf> accessed 6 September 2019.

of the total import-export of the UK⁵, the legal framework of this trade relationship affects the terms of any other agreement with other WTO members. As such, this represents a situation of uncertainty as to the future trade relations of the UK with the EU.

II. THE NARROW PATH TOWARDS AN EU-UK ECONOMIC PARTNERSHIP POST-BREXIT

I. Past and future in the interpretation of Article 50 TEU: the separation of the trade negotiations

Article 50 TEU does not draw a clear line between the undefined 'arrangements [...] for the withdrawal' to be included in a bilateral treaty between the Union and the exiting member, and 'the future relations' to be taken into account in the negotiation of the treaty.

This vague formulation of the provision allowed at the very beginning of the Brexit process two opposite lines of interpretation: either a comprehensive negotiation process, combining both the past and the future, or a negotiation trajectory defined by a clear separation between the assessment of the past and discussion on the future.

Prime Minister May's letter triggering Article 50 TEU expressed the will of the UK to negotiate and agree both the terms of separation and the future relations in parallel.⁶ This proposal of the UK government met, however, with a firm opposition from the EU, based on the very terms of Article 50. The European Council's first Guidelines⁷ split the negotiations in two

⁵ 'In 2018 the UK exported £289 billion of goods and services to other EU member states. This is equivalent to 46% of total UK exports. Goods and services imports from the EU were worth £345 billion (54% of the total)': House of Commons Library, Briefing Paper, 'Statistics on UK-EU trade', 7851, (24 July 2019) 4.

⁶ Letter of Prime Minister Theresa May to European Council President Donald Tusk (29 March 2017) <<http://data.consilium.europa.eu/doc/document/XT-20001-2017-INIT/en/pdf>> accessed 19 August 2019.

⁷ According to Article 50 TEU, the Union shall negotiate and conclude an agreement with the withdrawing state 'in the light of the guidelines provided by the European Council'. In the Brexit negotiation, the European Council adopted three set of Guidelines. The first one was adopted at the beginning of the process one month after the UK withdrawal notification: European Council Guidelines (April

phases: a first phase exclusively devoted to the arrangements for an orderly withdrawal and a second phase, conditioned by reaching sufficient progress and a satisfactory agreement on the first phase issues as assessed by the EU Council, devoted to achieving an overall understanding on the framework for the future relationship. The main EU legal justification was that an agreement on a future relationship between the EU and the UK would be 'finalised and concluded once the United Kingdom has become a third country'.¹⁸ Behind the legal argument, there was the determination of the EU to subordinate the negotiations on the future to reaching an agreement on the three paramount objectives of the Article 50 negotiations: first, the protection of the rights of EU citizens presently residing in the UK and those of UK citizens living in the EU;⁹ second, the settlement of the UK financial obligations towards the Union; and third, avoiding the re-establishment of an hard border between the Republic of Ireland and Northern Ireland.¹⁰

The roadmap proposed by the European Council was accepted by the UK. Indeed, in the Terms of Reference for the Article 50 TEU negotiations,¹¹ agreed by both parties, the issues on the table were the Citizens' rights, the Financial Settlement, other separation issues and a dialogue on Ireland/Northern Ireland. No mention was made as to the future relationship between the Union and the UK.

Legally speaking, the position of the EU was correct. According to Article 50, the withdrawal agreement is a sole Union agreement, concluded by a Council decision adopted by a qualified majority vote and subject to the consent of the European Parliament. An agreement on the future relationship falls within a different scope of the EU's external action, since the UK will forfeit its membership and become a third country. The agreement should have a different legal base: Article 207 TFEU in case future relationships were limited to trade matters, or Article 217 TFEU in case of a wider area of

29 2017) EUCO XT 20004/17, para II <<http://data.consilium.europa.eu/doc/document/XT-20004-2017-INIT/it/pdf>> accessed 19 August 2019.

⁸ Ibid para 5.

⁹ See contribution by Catherine Barnard in this volume.

¹⁰ See contribution by John Doyle & Eileen Connelly in this volume.

¹¹ Terms of Reference for the Article 50 TEU negotiations, <https://ec.europa.eu/commission/publications/terms-reference-article-50-treaty-european-union-negotiations_en> accessed 29 April 2019.

cooperation extended to EU policy areas other than trade and putting the base for deeper cooperation in the form of Association.¹²

2. *The EU and UK negotiations: trade in goods*

The first formal step towards a definition of a framework for the future relationship arrived only at the end of March 2018 when the European Council delivered the third set of Guidelines – delivered by the EU, rather than by the UK.¹³ This does not mean that the UK did not engage in political discussion on the kind of economic and trade relations it intended to establish with the EU.¹⁴ However, the British political elite was highly divided on the kind of future trade relation it sought with the EU, and the UK government only formalised its proposal in the White Paper commonly known as the Chequers plan in July 2018.¹⁵ The time-lag uncovers the weak negotiating position of the UK.¹⁶ When the 585-page Draft Agreement on the Withdrawal was agreed at negotiators' level on 14 November 2018, the common ground for the negotiation of the future relationship was outlined

¹² Takis Tridimas, 'Article 50: An Endgame without an End?' (2016) *King's Law Journal* 297; Hannes Hofmeister, 'Should I Stay or Should I Go?' A Critical Analysis of the Right to Withdraw from the EU' (2010) 16 *ELJ* 589; Christophe Hillion, 'Withdrawal Under Article 50 TEU: An Integration-Friendly Process' (2018) 55 *CML Rev* 29; Piet Eeckhout and Eleni Frantziou, 'Brexit and Article 50 TEU: A constitutionalist reading' (2017) 54 *CML Rev* 695.

¹³ European Council Guidelines (March 23, 2018) EUCO XT 20001/18 (hereafter 2018 Guidelines) <<https://www.consilium.europa.eu/media/33504/23-euco-art50-guidelines-it.pdf>> accessed 19 August 2019.

¹⁴ Prime Minister Theresa May, speech on our future economic partnership with the European Union, Guildhall (2 March 2018).

¹⁵ White Paper of the UK Government on 'The future relationship between the United Kingdom and the European Union' (17 July 2018), Cm (9593), (hereafter Chequers plan) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786626/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf> accessed 19 August 2019.

¹⁶ See contribution by Emily Jones in this volume.

in a seven-page document defining general principles and aspirations consistent with different forms of trade agreements.¹⁷

In the 2018 Guidelines, the European Council reaffirmed the Union's determination to build a close partnership with the UK, 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.'¹⁸ Once again, it was left to the European Council to draw the road map and the formal outcome: 'the negotiations on the overall understanding of the framework for the future relationship [...] will be elaborated in a political declaration accompanying and referred to in the Withdrawal Agreement.'¹⁹ In other words, no binding instruments for the future, just a political commitment from both parties. A free trade agreement (FTA) could be finalised and concluded only once the UK is no longer a Member State.

In response to the red lines laid down by Prime Minister Theresa May in her various political speeches,²⁰ the European Council adopted its own red lines for a future trade deal. They were: the UK cannot have all the benefits of membership of the single market without the corresponding obligations; the preservation of the integrity of the single market, meaning unity of the four freedoms and the exclusion for the UK to participate in the single market on a sector-by-sector base; the Union autonomy in its decision-making process; and the central role of the Court of Justice of the European Union.

¹⁷ Outline of the political declaration setting out the framework for the future relationship between the European Union and the United Kingdom of Great Britain and Northern Ireland, as agreed at negotiators' level on 14 November 2018 <https://ec.europa.eu/commission/sites/beta-political/files/outline_of_the_political_declaration.pdf> accessed 19 August 2019.

¹⁸ 2018 Guidelines (n 9) 1.

¹⁹ Ibid 3.

²⁰ Ending jurisdiction of the European Court of Justice in the UK; ending free movement of EU citizens into the UK; a fully independent UK trade policy; and no compulsory contributions to the EU budget. See Prime Minister Theresa May, Plan for Britain, including the 12 priorities that the UK government will use to negotiate Brexit, Lancaster House, London (17 January 2017); Prime Minister Theresa May, Florence speech: a new era of cooperation and partnership between the UK and the EU, Florence (23 September 2017).

According to the 2018 Guidelines, the FTA would cover trade in goods, trade in services and access to public procurement markets, investments and protection of intellectual property rights. Differently, in the long-awaited Chequers Plan, the UK proposed a bilateral free trade area for goods, proposing that it could be established without introducing border controls. The UK proposal was in line with the EU position expressed in the 2018 Guidelines in terms of avoiding tariffs and quotas, but differs in its approach to border controls. In the traditional dichotomy between customs unions and free trade areas defined by Art. XXIV of the GATT,²¹ only a customs union in which Member States adopt a common external tariff eliminates the necessity of border controls on the origin of goods. The UK proposal was intended instead to conciliate the freedom of the UK to autonomously set its own tariff levels, as in a classical free trade area, with the avoidance at the same time of 'friction at the border' (as in custom unions), notwithstanding the possible introduction of tariffs, quotas, and checks for health and safety. This tailor-made new approach to trade in goods was elaborated not just to allow a smooth circulation of final products, but also to 'protect the uniquely integrated supply chains and "just-in-time" processes that have developed across the UK and the EU over the last 40 years.'²² The two pillars of the UK proposal were two 'innovative' instruments: the Common Rulebook and the Facilitated Customs Arrangement (FCA).²³

²¹ Article XXIV of the GATT is the provision allowing for regional integration exceptions. The most-favoured-nation (MFN) obligation (Art I GATT) can be derogated to permit the formation of customs unions and Free Trade Areas. In a customs union, the members must eliminate duties and 'other restrictive regulations of commerce' with respect to substantially all trade between them and they must apply substantially the same duties and other regulations of commerce to their external trade. According to the GATT definition, the customs union members are required to eliminate internal trade barriers as well as establish a common commercial policy. Differently, in a free trade area members are only required to eliminate internal trade barriers. See Michal Ovádek and Ines Willemyns, 'International Law of Customs Unions: Conceptual Variety, Legal Ambiguity and Diverse Practice' (2019) EJIL 363; 'Article XXIV of the GATT contains the most important contemporary legal definition of the concept of a CU in international law.'

²² Chequers Plan (n 15) 13.

²³ Ibid 16ff and 89ff.

The Common Rulebook would set forth the agreed rules on standards for goods, including agri-foods. In the 'desiderata' of UK these common rules would enable the UK and the EU to reduce or avoid border checks on the basis that common standards were observed. The implementation of the common regulation at the domestic level should be sufficient to qualify the goods for FTA treatment, meaning the respect of standards and regulations and the UK origin. The same would happen for EU27 exports to the UK. This system would depend in large measure on customs declarations and returns made by firms given 'trusted trader' status, and on maximum use of modern technology. It would ensure interoperability between UK and EU supply chains, and avoid the need for manufacturers to run separate production lines for the separate markets. The EU would continue to lead the definition of standards and the 'UK would make an upfront choice to commit by treaty to ongoing harmonisation with the relevant EU rules, with all those rules legislated for by Parliament or the devolved legislatures'.²⁴

The FCA would be the mechanism to allow the elimination of UK/EU border controls while permitting an independent UK international trade policy. According to the proposal, the UK would apply its own trade policy and tariffs to imports of goods intended for consumption in the UK, while for goods in transit for the EU that entered via the UK, the UK would apply the EU's tariffs and trade policy.²⁵ The FCA would aim to eliminate the need for customs controls for trade in goods from the UK to the EU, including customs declarations for tariff classification purposes, routine rules of origin requirements, and entry and exit declarations, since the UK would act as agent for EU customs authorities. It would mean that the UK would guarantee the integrity of the EU customs union, ensuring that tariffs are properly applied and collected, and that EU standards for goods entering the EU via the UK are respected.

The FCA proposal is unique in the context of international relations between sovereign entities. In fact, the system is founded on the outsourcing of a sovereign power (administration of customs) to another state. The UK was suggesting that the Union and its Member States give up their customs sovereignty to a third country, without reciprocity. The system would be

²⁴ Ibid 8.

²⁵ Ibid 16.

based on a full trust in a soon-to-be third country. However, due to its ineffective implementation of customs controls on imports from third countries, the UK as a member of the EU has not proved to be reliable in taking action to prevent customs evasion. Following an OLAF report and a Commission inspection, it emerged that the UK has under-valuated a fraud scheme relating to the importation of textiles and footwear originating in China since 2007,²⁶ which has resulted in an infringement procedure pending against the UK.²⁷ Despite having been asked to take appropriate risk control measures, according to the Commission the UK failed to take action to prevent the fraud. The UK's infringement of EU legislation resulted in losses to the EU budget amounting to EUR 2.7 billion during the period from November 2011 until December 2017.²⁸

It is not surprising that EU Chief Negotiator Michel Barnier rejected the UK proposal for a Facilitated Customs Arrangements, arguing that the EU could never agree to outsource any part of its customs administration to a non-Member State.²⁹ What would be the interest of a third country to improve the customs control on behalf of the EU and its financial interests? Without the incentive to reduce the national contribution to the EU budget and the pressure on UK taxpayers, and lacking the deterrent effect of the infringement procedure, what would be the UK's incentive to guarantee the correct implementation of foreign legislation? When the UK customs authorities will be requested to check the goods in transit for the EU, they may be tempted to facilitate trade with faster, seamless import procedures, instead of carrying out burdensome customs controls, in order to attract more traffic with fewer customs controls. As such, the implementation of a dual customs system by UK officials could create new loopholes originating from the different tariffs and trade policies. In fact, since in the aspirations

²⁶ European Anti-Fraud Office (OLAF), 'The OLAF Report 2017', 26.

²⁷ *Commission v United Kingdom*, Case C-213/19.

²⁸ European Commission, Formal notice Art. 258 TFEU (8 March 2018) <http://europa.eu/rapid/press-release_MEMO-18-1444_EN.htm> accessed 29 April 2019; European Commission, Reasoned opinion Art 258 TFEU (24 September 2018) <http://europa.eu/rapid/press-release_IP-18-5807_EN.htm> accessed 29 April 2019.

²⁹ European Commission, Press statement by Michel Barnier following the July 2018 General Affairs Council (Article 50), STATEMENT 18/4626.

of the UK Government, the new UK trade policy should reduce the standards and the tariffs compared the current EU's ones,³⁰ it is easy to foresee frauds to unduly extend the FTA treatment to non-UK origin goods.

3. *The EU and UK negotiations: trade in services*

It is important to note that the Free Trade Area would not extend to services. The Chequers Plan, searching for different market access rights for service providers, relies on the provisions of the General Agreement on Trade in Services (GATS).³¹ However, it does not accept one of its main principles, according to which FTAs are obliged to cover all modes of services supply and to have substantial sectoral coverage.³² The guiding philosophy seems instead to be exiting the single market for services, in exchange for the UK being allowed to deconstruct single market principles of free movement of persons.³³ In fact, the proposal on services is a selective recourse to EU mutual recognition of professional qualifications legislation. This is done in order to reach more 'deep commitments' on market access and national treatment, to guarantee that foreign service providers are treated the same as equivalent local providers, with any exceptions kept to a minimum only for the business services.³⁴

³⁰ 'Britain's destiny is to be a global champion of trading freedoms.' See the International Trade Secretary Liam Fox, 'Britain's place in the global trading system', policy Exchange, London (1 February 2019).

³¹ The General Agreement on Trade in Services (GATS) is the only multilateral agreement regulating trade in services. It is one of the agreements administered by the WTO. Markus Krajewski, 'General Agreement on Trade in Services ([1994]2011)' Max Planck Encyclopedia of Public International Law [MPEPIL].

³² In general, on service trade according to GATS rules in a post-Brexit scenario see Adlung, Rudolf, 'Brexit from a WTO/GATS Perspective: Towards an Easy Divorce?' (2018) 52 *Journal of World Trade* 721–744.

³³ The GATS distinguishes between four modes of supplying services: cross-border trade, consumption abroad, commercial presence, and presence of natural persons. In the EU internal market, the distinction is less important since the free circulation of persons allows all the modes. The end of the free movement of people between the UK and EU implies that the delimitation of trade of services is strictly connected to the conditions of circulation of services providers and recipients.

³⁴ Chequers Plan (n 15) 26.

The end of free movement of people risks becoming a barrier to trade in services by preventing businesses from having access to skills and talent, a crucial concern for a number of sectors, especially professional services, financial services and technology. The approach adopted by the Chequers Plan is to deal with the issue of mobility of skilled workers and professionals by using the framework of services trade, shifting the issue of access to skills and labour from the realm of free circulation of people and workers, to access to particular jobs in selected service sectors.

Concerning financial services, the Chequers Plan is based on abandoning the current system of 'passporting' based on the 'mutual recognition' principle covering many finance service areas as investments services, banking, insurance, insurance mediation, payment services and issuing electronic money. Instead, the UK proposal is to rely on a new economic and regulatory arrangement that is an expanded and modified version of the EU third-country equivalence regimes, which provide limited access for some of its third-country partners to some areas of EU financial services markets. The limit of equivalence is twofold: instability and lack of comprehensiveness.³⁵

In the short run the UK regulatory regime will continue to be entirely equivalent to the one applicable among the EU27, but in the long run to maintain the equivalence means to negotiate standards and regulations with the EU, in view of the asserted autonomy of the UK to develop its own regulatory system. The White Paper proposes a number of processes designed to encourage continued convergence and to manage the process if the laws diverge, involving both parties. The regulatory autonomy also means the end of any supervisory control of EU organs, including the Commission and the European Supervisory Authorities, over the UK financial market and its actors.

The current EU equivalence framework does not apply to all EU regulated financial services. Access may depend on the type of clients (eligible counterparty, professional or retail) and regimes are different for cross-border operations and for established firms. From an EU legislative perspective, in order to expand the current equivalence regime into the new

³⁵ Eddy Wymeersch, 'Third-Country Equivalence and Access to the EU Financial Markets Including in Case of Brexit' (2018) 4 *Journal of Financial Regulation* 211.

economic and regulatory arrangement proposed by the UK it would be necessary to recast a number of directives.

As such, the post-Brexit arrangement proposal on services seems as vague as it is unfeasible. It is completely blind to one of the EU's red lines, the integrity of the single market. As the EU Council recalled in its 2018 Guidelines:

the four freedoms are indivisible and that there can be no "cherry picking" through participation in the Single Market based on a sector-by-sector approach, which would undermine the integrity and proper functioning of the Single Market.³⁶

4. Trade matters covered in the Withdrawal Agreement: application to the UK of EU FTAs and the issue of the Irish border

The Withdrawal Agreement is a complex treaty consisting in 185 articles structured in six Parts (further divided into Titles and Chapters), three Protocols and nine Annexes. The main goal of the agreement is to provide legal protection of the status and rights derived from EU law to EU and UK citizens and their families affected by the UK's withdrawal, and to define a financial settlement to assess the financial obligations undertaken while the UK was a member and still due.

As already highlighted, the Withdrawal Agreement does not deal with post-Brexit trade relations and therefore does not protect acquired economic rights of businesses. The uncertainties for the EU businesses trading with and operating in the UK, and for UK businesses trading with and operating in the EU, are only temporarily addressed by a short transition period (ending on 31 December 2020, with a possible extension for up to one or two years) of continuous application of the EU *acquis* to the UK. During this Transition Period the UK would not be participating in any EU institutions and agencies, although new EU rules would be applicable to the UK.³⁷

As per Article 129, the EU *acquis* in force during the transition period includes the international agreements concluded by the EU, or by Member States

³⁶ 2018 Guidelines (n 13) 3. For a critical approach to the indivisibility of the four freedoms, see Catherine Barnard, 'Brexit and the EU Internal Market' in Federico Fabbrini (ed) *The Law & Politics of Brexit* (Oxford University Press 2017) 203.

³⁷ See contribution by Kenneth Armstrong in this volume.

acting on its behalf, or by the EU and its Member States acting jointly. While the UK continues to be bound by the obligations stemming from those agreements, at the same time it regains the power to 'sign and ratify international agreements in the areas of exclusive competence of the Union, provided those agreements do not enter into force or apply during the transition period, unless so authorised by the Union' (Article 129, para 4).

From a trade perspective, the UK would remain part of the EU's common commercial policy until the end of the transition period and would still implement the EU's common external tariff, including preferential tariffs under the more than 40 FTAs that the EU has concluded. As indicated in a footnote at Article 129, '[t]he Union will notify the other parties to these agreements that during the transition period the United Kingdom is to be treated as a Member State for the purposes of these agreements'. This approach is however problematic from an international treaty law perspective. Since the UK participation to the FTAs is a direct consequence of EU membership, the change of status after its withdrawal eliminates the international obligation of the FTA partners to extend the market access to the UK even if the UK is treated by the EU as if it were still a member for the purpose of application of EU regulations. The notification of the EU to its partners sounds more like an invitation to these countries to go on treating the UK as a EU member in the absence of any strict obligation for the partner countries to do so.³⁸ Their acceptance of the partner countries may also be

³⁸ Extending the territorial scope of application of a treaty to a third state needs the consent of all the parties to a treaty. The general rule regarding the amendments of a treaty requires the agreement between the parties (Vienna Convention on the Law of Treaties, Art 39) and the creation of rights and obligations for a third states needs the consent of the third state and the parties of the treaty (Arts 34, 35 and 36). The UK Government considered necessary an agreement of the parties 'to interpret relevant terms in these international agreements, such as "European Union" or "EU Member State", to include the UK [...] The key requirement would be the clear agreement of the parties that the underlying treaty continued to apply to the UK during the implementation period'. UK Government, Technical Note on international Agreements during the Implementation Period (8 February 2018) <<https://www.gov.uk/government/publications/technical-note-on-international-agreements>> accessed 21 August 2019.

tacit.³⁹

The most controversial part of the Withdrawal Agreement is the one addressing the Irish border. The Irish border question concerns the resolution of two conflicting aspirations: preserving the integrity of the Good Friday agreement,⁴⁰ implying an open border between the UK and the Republic of Ireland, on one side; and satisfying the UK 'red-lines' of ending the single market principles on free movement, leaving the EU's customs union, and not having a separate regime for Northern Ireland in respect of the rest of the UK, on the other.

The Irish border question is defined in Protocol 2 to the Withdrawal Agreement, which together with its ten Annexes accounts for 173 of the 585 pages of the Withdrawal Agreement. The Protocol sets out the so-called 'backstop' solution for avoiding a hard border between Ireland and Northern Ireland. In principle, the solution to the Irish border question is devolved to the future EU-UK arrangement negotiated under the Political Declaration. However, if the EU and UK fail to agree a solution by the time the transition period expires the 'backstop' would come into place. The core of this solution is the establishment of an 'ambitious customs arrangements' that would 'build on the single customs territory'.⁴¹ The backstop means substantially that the whole UK would remain in a customs union with the EU.⁴²

This single customs territory between the UK and the EU entails the movement of goods on a duty and quota-free basis, with low levels of administrative obligation at the border, and a deep level of integration

³⁹ On these issues before the negotiations started see Giorgio Sacerdoti, 'The Prospects: The UK Trade Regime with the EU and the World – Options and Constraints Post- Brexit' in Federico Fabbrini (ed) *The Law & Politics of Brexit* (Oxford University Press 2017) 72-91.

⁴⁰ See contribution by John Doyle & Eileen Connelly in this volume.

⁴¹ According to the Preamble of the Protocol, 'The Union and the United Kingdom [...] HAVING REGARD to the Union's and to the United Kingdom's common objective of a close future relationship, which will establish ambitious customs arrangements that build on the single customs territory provided for in this Protocol, in full respect of their respective legal orders'.

⁴² Joseph Weiler, 'A Frontstop Approach to the Backstop Conundrum' (EJIL: Talk!, 29 January 2019) <www.ejiltalk.org/a-frontstop-approach-to-the-backstop-conundrum/> accessed 3 May 2019.

between the UK and the EU, particularly with respect to Northern Ireland.⁴³ Article 6 of Protocol 2 stipulates that a very large part of EU law, as defined in Annex 5, shall apply to the single customs territory. Annex 5, which runs close to 70 pages, is a list of the EU legislation on general matters, such as trade and customs, or the marketing of products, and specific matters, from animal health, to food safety, to motor vehicles to chemicals and pesticides. All these rules should be applied together with Articles 30 and 110 TFEU 'to and in the United Kingdom in respect of Northern Ireland'. Other annexes deal with harmonisations of the UK commercial policy with that of the EU, commitments on state aid, environmental protection, labour standards, and fair taxation. Services are not covered by the backstop.

In particular, Article 3 of Annex 2, under the title 'Customs Tariff applicable to trade with third countries', provides that the UK shall align the tariffs and rules applicable in its customs territory with the Union's Common Customs Tariff, the Union's rules on the origin of goods and the Union's rules on the value of goods for customs purposes. Alignment means for the UK to implement the EU External Tariff without any voice in the related decision making process.⁴⁴ The UK is, in fact, prevented from applying to its customs territory a customs tariff which is lower than the Common Customs Tariff, or from applying or granting in its customs territory tariff preferences on the basis of different rules of origin or from applying or granting in its customs territory any quotas, tariff-rate quotas or duty suspensions.

⁴³ The commitment of the UK Government to preserving the integrity of the UK's internal market by avoiding different regulatory regimes between Northern Ireland and the rest of the United Kingdom excluded a customs union solution only for Northern Ireland. Joint report from 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, para 50, <https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf> accessed 22 August 2019.

⁴⁴ According to Art. 3.3 of the Annex, 'The United Kingdom shall be informed of any decision taken by the Union to amend the Common Customs Tariff, to suspend or reintroduce duties and any decision concerning quotas, tariff-rate quotas or duty suspensions in sufficient time for it to align itself with that decision. If necessary, consultations may be held in the Joint Committee.'

The EU's Common Customs Tariff, combined with the free circulation of goods in the single customs territory, implies that the UK must also grant free circulation to the goods from third countries which are in free circulation in the EU. This would undermine the leverage of the UK in negotiating wider free trade agreements with partners having already free access to its market of goods. This replicates the same limitations Turkey is facing, due to its participation in a customs union with the EU.⁴⁵

The Irish backstop has proved one of the most contemptuous issues blocking the acceptance of the Withdrawal Agreement by the UK Parliament. In the absence of a different solution under the backstop, the UK will be prevented from having its own independent trade policy, one of the main objectives of Brexit.⁴⁶ The automatic application of the backstop, in the case of the parties failing to finalize an agreement on the future relationship by 31 December 2020, means for the UK the definitive abdication of the ambition of an independent trade policy.

5. The future trade regime and the Political Declaration

The Political Declaration is a non-binding statement of intent framing the future relationship between the EU and the UK.⁴⁷ The framework of a future relationship, which according to Article 50 TEU should have been taken into account during the withdrawal process, in the Brexit case arrived only at the end of the negotiation when the terms of separation had already been settled and transposed in a draft international treaty. Non-alignment between the assessment of the past and the scheme of future relations is the product of both parties' conduct: the EU's for demanding that negotiations on the future relationship start only once the UK had left the Union, and the UK's for lacking a clear vision on the kind of relationship it wished to build with

⁴⁵ For an updated presentation for these issues see Ovádek, Willemyns et al (n 21) 376.

⁴⁶ Letter of Prime Minister Boris Johnson to European Council President Donald Tusk (19 August 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826166/20190819_PM_Letter_to_His_Excellency_Mr_Donald_Tusk.pdf> accessed 6 September 2019.

⁴⁷ Article 50 TUE procedure introduce a general duty to negotiate. See Opinion of AG Campos Sánchez-Bordona, *Wightman v Secretary of State for Exiting the European Union*, [2018] ECLI: EU:C:2018:978, para 97.

the Union after its exit. The 'structural limitation in the Article 50 procedure' allowed this outcome.⁴⁸

The negotiation of a trade deal replacing the participation of a WTO member in a customs union is something new in the realm of FTAs. The starting point of every negotiation of a trade deal are the existing WTO commitments of the parties involved, intending to build within the framework of Article XXIV GATT a closer integration between their economies. The standard objective is the elimination of duties and other restrictive regulations of trade in goods⁴⁹ and possibly an extension of the free trade area to services, and various other matters (investment, competition policy, intellectual property and so forth). In the case of Brexit, the situation is reversed: the starting point is that both parties participate in a customs union and the EU's single market, the deepest form of economic integration between sovereign states in existence. The negotiations between the EU and the UK are aimed at reducing the current level of full liberalisation, reintroducing barriers to trade.

The Political Declaration on trade in goods has, however, not solved the tension between the aspirations of the UK to run an independent trade policy and avoid border checks on UK-EU trade, and the aspirations of the EU to preserve the unity of its customs territory and the integrity of the Good Friday agreement.

⁴⁸ Kenneth Armstrong, 'An 'Implementation Protocol' to Unblock the Brexit Process: A Proposal for a Legal Bridge between a Revised Political Declaration and the Withdrawal Agreement' (2019) University of Cambridge Faculty of Law Research Paper No. 9/2019 <<https://ssrn.com/abstract=3336966>> accessed 5 September 2019.

⁴⁹ Art. XXIV (8) GATT allows customs unions and free trade areas only when duties and other restrictive regulations of commerce are eliminated on 'substantially all the trade' in goods originating in the territories of the parties. 'One concerns the meaning of the term "substantially all the trade" on which barriers between the parties must be eliminated. In purely quantitative terms, many earlier regional trade agreements liberalized as little as 70–80 per cent of trade; more recent agreements liberalize around 90–95 per cent of trade. There has never been an agreement on the volume of trade that must be liberalized under WTO rules.'; Lorand Bartels, 'Regional Trade Agreements' (2013) Max Planck Encyclopaedia of Public International Law [MPEPIL].

The binding and default trade arrangements set out in the backstop provisions of the Withdrawal Agreement heavily shaped the terms of the political declaration. As it results from paragraph 23 of the Political Declaration on tariffs:

The economic partnership should ensure no tariffs, fees, charges or quantitative restrictions across all sectors, with ambitious customs arrangements that, in line with the Parties' objectives and principles above, build and improve on the single customs territory provided for in the Withdrawal Agreement which obviates the need for checks on rules of origin.

While trade in goods has been prominent in the UK political debate concerning the future relations with the Union, the less debated future regulation of trade of services will affect much more the UK economy, since services account for nearly 80 per cent of the UK's GDP.⁵⁰ The Political Declaration, following the UK position manifested in the Chequers Plan, adopts the downgrading from the single market model to a model of service liberalisation closer to the GATS, including the full sector coverage opposed to the selective approach proposed by the UK. The Political Declaration states that the future deal

should include provisions on market access and national treatment under host state rules for the Parties' service providers and investors, as well as address performance requirements imposed on investors. This would ensure that the Parties' services providers and investors are treated in a non-discriminatory manner, including with regard to establishment.⁵¹

The baseline of negotiations seems to be the EU Most Favoured Nation (MFN) level of market access and national treatment according to GATS.

⁵⁰ 'Services are the sector that account for the largest part of the economy – in 2017, they accounted for 79% of economic output, the production sector for 14%, construction for 6% and agriculture for 1%', House of Commons Library, Research briefing, Components of GDP: Key Economic Indicators (10 April 2019). In 2017 services accounted for 45 per cent of total UK exports, £277 billion. The EU received 40 per cent of British services exports, the highest proportion of any UK trading partner. Unlike goods, where it runs a deficit, the UK ran a total trade surplus in services of £112 billion. Office of National Statistics (ONS), UK balance of payments, *The Pink Book*: 2018.

⁵¹ Political Declaration (n 17) para 31.

The need for an explicit reference to the establishment of service providers and investors is a consequence of the end of the free movement of persons. In addition, the temporary entry and stay of natural persons for business purposes, in defined areas, would be part of the service arrangements.⁵²

As is well known, the main barriers to the liberalisation of services are regulatory. Unlike the free movement of goods, the EU single market for services is not completely realized and regulatory barriers persist in the EU.⁵³ The light regime of 'voluntary regulatory cooperation in areas of mutual interest, including exchange of information and sharing of best practice' delineated by the Declaration is going to expose UK service providers operating in the EU market to Member States' regulatory barriers. These are illegal within the single market, and the UK will be left without the judicial protection EU citizens and businesses enjoy in case of violation of EU law.

A specific section concerns the financial services trade. The best outcome to be expected is market access based on reciprocal 'equivalence'. From an EU perspective, equivalence means that access to the internal market is admitted only for third country firms complying with their national rules that are deemed 'equivalent' to EU rules. The European Commission unilaterally, discretionally and constantly reviews the equivalence decisions. Of course, this will be the same for the UK, but the cost for London-based financial actors to lose free access to the EU27 market is much higher than the cost for the EU financial firms to lose free access to the UK market.⁵⁴

⁵² Ibid para 32.

⁵³ Panagiotis Delimatsis, 'From Sacchi to Uber: 60 years of Services Liberalization, Ten Years of the Services Directive in the EU' (2018) 37 YEL 192.

⁵⁴ Michaela Hohlmeier and Christian Fahrholz, 'The Impact of Brexit on Financial Markets—Taking Stock' (2018) 6(3) Int J Financial Stud 65: 'Around 8000 financial companies from the EU27 Member States use EU passports for their activities in the UK and just under 23,500 EU passports for their financial services and products (Financial Conduct Authority 2016). In the opposite direction, 5500 British companies use EU passports for their activities in EU27 countries and around 335,000 EU passports for their financial services and products.'

6. What next? Options for the UK and the EU in an orderly exit scenario

Although the UK Parliament has rejected the Withdrawal Agreement negotiated by the Government, also the option of leaving the EU without a deal has been ruled out.⁵⁵ Since the EU27 has ruled out (at least as per the end of September 2019) the option of reopening negotiations on the Withdrawal Agreement,⁵⁶ the three most likely scenarios are the following:

- 1) The UK Parliament approves the Withdrawal Agreement as it is (maybe after another short extension) and negotiations for the future trade agreement begins once the UK ceases to be an EU Member State;
- 2) The UK and the EU agree on a further long Article 50 extension and on continuing the UK's EU membership until an acceptable alternative to the backstop will be in place to meet the shared UK-EU objective of preventing a hard border returning between Northern Ireland and Ireland; or
- 3) The UK withdraws by default without a deal, as nothing else is agreed – so-called 'hard Brexit'.

In any scenario, it is crucial for the UK to adopt a clear approach to the future trade relations with the EU. The Political Declaration is a compromise between the UK approach to innovative form of cooperation and the EU preference to pattern future relations with the UK on existing FTA models. Such models are offered by the recently negotiated agreement between the EU and Canada (CETA) and by the European third countries-style relationship, such as the European Economic Area (EEA) which brings together the EU, Norway, Iceland and Lichtenstein. The reference in the Political Declaration to the ending of free movement of people between the UK and EU and the development of an independent trade policy for the UK are non-binding and the UK and EU could move beyond these parameters in a future agreement.

⁵⁵ For a detailed account of the UK Parliament votes on the withdrawal agreement and alternatives options, see House of Commons Library, Briefing Paper, 'Brexit: Proposals for the future UK-EU relationship', 08483, (17 April 2019) 10-19.

⁵⁶ European Council (Art 50) Conclusion (April 10, 2019), EUCO XT 20015/19.

In fact, the House of Commons debate on the future relationship with the EU covered a wider range of options, including the customs union and EEA single market membership. These are, however, incompatible with the statements in the Political Declaration. The Parliamentary debate did not lead to a majority on one specific model to pursue in the negotiation on the new trade agreement with the EU,⁵⁷ leaving all the viable options open.

The so-called 'Canada model' is the option nearest to the framework designed by the Political Declaration. The baseline is given by the WTO commitments and the process is intended to deliver additional liberalisation of the market on a sector-by-sector approach. For trade in goods, this kind of agreements eliminates existing tariffs on industrial products in general, but the agricultural and food market liberalisation is more limited. Differentiations in goods treatment compels border controls. In trade in services, the extent of liberalisation is even more limited than for trade in goods. CETA, for example, does not involve commitments that really go beyond the WTO baseline, being limited to 'binding the actual level of liberalisation in the open economies of Canada and the EU.'⁵⁸

What should be the starting point for negotiations of an FTA between the EU and the UK? The current deep level of integration resulting from UK membership of the single market will be subject to a reverse-liberalisation process. The negotiations will necessarily result in a reduction of the actual level of market access for goods and services and the existing level of deregulation and regulatory alignment. The Canada model would allow the UK to develop its own trade policy, but reducing integration with the EU risks weakening the UK economy, especially due to the loss of unimpeded access to the European internal market. Even if it were able to conclude FTAs with its other major trade partners promptly, it is not clear whether the UK would be able to compensate for the economic disadvantage deriving from leaving the single market, especially if this would happen without a custom union or a strong FTA with the EU.

⁵⁷ On the indicatives votes of Commons on the future relationships, see (n 55) 16.

⁵⁸ European Commission (Directorate-General for Trade), 'The Economic Impact of the Comprehensive Economic and Trade Agreement (CETA)', Luxembourg (2017) 22.

In any case, a Canada-type deal between the UK and the EU would imply border checks and customs controls at the Ireland-Northern Ireland border. Thus, such a solution would not be compatible with the backstop between the EU and the UK as envisaged by Article 2 of the Protocol on Ireland/Northern Ireland. In view of the refusal of the UK Government to accept Northern Ireland remaining in a common regulatory area for goods and customs with the rest of the EU, other types of partnership have been discussed.

The first one is the so-called 'Turkey model', based on a customs union which covers industrial goods but excludes agriculture.⁵⁹ This regime creates an 'asymmetrical' relationship since the EU's external tariff is extended to Turkey; when the EU enters into a trade deal, Turkey automatically opens its goods market to the third country, without benefitting from preferential access in return.⁶⁰ The current model of customs union could be upgraded in a 'Turkey plus' in which the UK and the EU would negotiate together the new trade agreements with third countries. It would be difficult for the EU to accept such a solution because it would grant to the UK a veto power or a conditional say on trade deals that EU Member States do not enjoy. This is because the EU customs union is an area of exclusive competence (Article 3 TFEU) and for the negotiation and conclusion of such agreements, the Council decides by qualified majority (Article 207, paragraph 4). In any case, a customs union, even in an upgraded version of the current Turkey model, would prevent the UK from pursuing an autonomous and independent trade policy.

The backstop impasse has revived one of the first options supported by the EU: the 'Norway scenario'.⁶¹ This is the softer EU exit solution because the UK, becoming part of the EEA or in a similar agreement, would remain in the EU single market but at the same time would manage its own external trade

⁵⁹ Steve Peers, 'Living in the Sin: Legal Integration under the EC-Turkey CU' (1996) EJIL 411.

⁶⁰ Ç Nas and Y Özer, *Turkey and EU Integration: Achievements and Obstacles* (Routledge 2017), especially Chapter 2.

⁶¹ The Common Market 2.0 cross party MP's Group, A Brexit deal everyone can support (March 2019) <<http://betterbrexit.org.uk/wp-content/uploads/2019/03/Common-Market-2.0.pdf>> accessed on 18 June 2019.

relations. The EU's common external tariff would not apply to the UK and the UK would be free to negotiate its own FTAs and economic partnerships. The Norway solution would have the merit to maintain UK access to the EU market of services, and a commitment to free movement would enable the process of keeping a soft border between Northern Ireland and the Irish Republic. Being part of the single market would prevent all the regulatory controls, and the border controls would be limited to customs – unless the UK decides to include a customs union with the EU – so-called 'Norway plus'. Moreover, the adoption of a tested model through an existing multilateral treaty would accelerate the negotiation, reducing the length of any kind of transition.

On the other hand, the Norway model is the less popular among Brexiteers because it entails free movement of people and high levels of integration with the EU, especially on the regulatory side. Indeed, EEA membership involves implementation of EU rules relating to the single market without any decision-making role in their formation for the associated countries. Not to mention the financial contribution to the EU required from the EEA members.

III. WTO RULES AND THE UK'S INTERNATIONAL TRADE RELATIONS FRAMEWORK POST-BREXIT

I. Trade with the EU in case of no-deal

In case of a no-deal the UK would immediately, upon exit from the EU, be subject to all WTO rules as a full 'independent' member of the Organisation. The WTO regime that would govern the UK-EU trade relations would be the same as the one that will be generally applicable between the UK and the rest of the world post-Brexit, until an FTA of a sort would be agreed.

This is in sharp contrast with the current situation. As between the UK and the rest of the EU, the WTO multilateral rules are currently inapplicable because the EU Member States are part of the customs union governed by EU law in conformity with Art. XXIV GATT. In respect of the EU, the UK situation post-Brexit in this case would be similar to that of any other WTO member which has no trade agreement in place with the EU. The EU custom tariff, according to its list of commitments ('schedule') at the WTO, would

apply as UK custom tariff to UK exports to the EU (and vice versa) and to any other WTO member.⁶² This is the MFN tariff applicable to exports into the EU from any member of the WTO with which the EU has no comprehensive trade agreement, such is the case currently in respect of the USA, Australia or New Zealand.

The UK may not unilaterally apply a zero-tariff on imports from the EU (as it has hastily been suggested by some non-experts) without extending such a regime to all other WTO members in compliance with the MFN principle.⁶³ All other WTO disciplines, such as the WTO Agreement on Anti-Dumping, the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Measures (SPS), would apply reciprocally between the UK and the EU in the absence of specific bilateral agreements in this respect. The EU would be able to levy anti-dumping and countervailing duties against UK exports sold at less than their "normal" value or subsidized, applying the rules and procedures of its anti-dumping and anti-subsidy regulations. The UK could do the same once it has established an anti-dumping authority able to perform anti-dumping and countervailing investigations in compliance with WTO rules.

As to imports, the UK will apply its post-Brexit trade policy, custom regulation and custom duties (tariffs) to imports from the EU at the initially applicable rate. This will in fact be the one set by the EU, as the UK has – for obvious practical reasons – decided to initially apply as its own the regime currently in force for it as a member of the EU.⁶⁴

⁶² The average tariff is estimated to amount to 4-5 per cent ad valorem on average on industrial goods: WTO, ITC and UNCTAD, 'World Tariff Profiles 2018 – Applied MFN tariffs' <https://www.wto.org/english/res_e/booksp_e/tariff_profiles18_e.pdf> 81, accessed 23 May 2019.

⁶³ See Stuart Harbinson, 'Leaving On WTO Terms' – Lifting Some Of The Fog', UK Trade Forum (9 February 2019) <<https://uktradeforum.net/2019/02/09/>> accessed 23 May 2019; answering to Global Britain & Labour Leave, '30 Truths about leaving on WTO terms' (9 February 2019) <<https://globalbritain.co.uk/wp-content/uploads/2019/01/GBLL-paper-30-Truths-Final-05.01.19.pdf>> accessed 23 May 2019.

⁶⁴ See Joint letter from the EU and the UK Permanent Representatives to the WTO, 11 October 2017 <https://ec.europa.eu/commission/publications/joint-letter-eu-and-uk-permanent-representatives-wto_en> accessed 23 May 2019. On 24 July

2. UK Trade with non-EU countries under the WTO post-Transition Period or in case of no-deal

It should be recalled that the UK, which was an original contracting party of the GATT in 1947, is also an original member of the WTO, as is the EU in its own right, by virtue of both the WTO Agreement and EU law. The WTO Agreement, comprising the agreement establishing the WTO and the various multilateral and plurilateral agreements annexed to it, have been concluded and ratified as 'mixed agreements', that is, also by all the individual members of the EU. There is thus no issue of state succession, nor any need for admission of the UK as an individual member of the international organization.⁶⁵ The UK was, is and remains a member of the WTO so that the EU schedule, which is also currently the UK's schedule, remains its schedule.

The UK will be able to act, from the day that Brexit is effective, as a full-fledged WTO member, participating in its bodies, in any negotiations (with the limits of being part of a custom union with the EU or other WTO members, should this be the case), and as a party in dispute settlement proceedings. However, should the Withdrawal Agreement ultimately be agreed and enter into force, during the Transition Period the UK's ability to negotiate tariff deals ('concessions') will be limited by the fact that it will still be part of the EU custom union. The UK will also be able to participate in other negotiations. The UK has immediately seized this opportunity by negotiating its accession to the plurilateral Government Procurement Agreement (GPA), in which the UK participates currently as a member of the EU. As agreed on 27 November 2018 with its other 18 members (not counting the EU and its Member States), the UK has replicated its current

2018 the UK submitted its goods schedule for certification at the WTO and on 3 December 2018 the UK completed the same step for its services schedule. The schedules were published on 7 December 2018 at <<https://www.gov.uk/government/publications/uk-goods-and-services-schedules-at-the-wto>> accessed 23 May 2019. 'The schedule seeks to replicate UK's existing commitments under the GATS and gives overseas businesses the same level of guaranteed access to the UK service sector as they currently have.' UK Government, Press release (3 December 2018) <<https://www.gov.uk/government/news/liam-fox-submits-services-schedule-to-wto>> accessed 23 May 2019.

⁶⁵ Sacerdoti (n 39) 82.

market access coverage under the EU schedule with minor technical adjustments, effective at the end of the transition period.⁶⁶

As mentioned above, initially the UK custom regime and specifically the custom duties will be those applying under the EU Common Custom tariff at exit day or at the end of the transition period. The UK will of course be free to change it – and intends to do so – in the absence of a custom union with the EU, at the end of the transition period or after the end of the backstop. The Trade Bill, introduced on 7 November 2017, represents a significant step in preparing to leave the EU. It aims at putting in place essential legal powers and structures to enable the UK to operate an independent trade policy. The Taxation (Cross-border Trade) Act, which received Royal Assent on 13 September 2018, establishes a standalone customs regime and ensures that VAT and excise arrangements operate effectively upon EU exit. It also contains trade-related tax measures.

In theory, other WTO members should not be able to object to having the EU (EU28) split between the EU27 and the UK since, in principle, this would not affect negatively the original, previous balance of benefits and obligations. Establishing a new WTO schedule would entail instead a painstaking process of negotiations, which would not necessarily lead to replicating the EU schedule, especially if the UK aimed to obtain more concessions from other members than those reflected in the schedule in force (or vice-versa).⁶⁷

This approach has been expressed in the joint UK and EU letter of 11 October 2017, where it states:

Specifically, the EU and UK intend to maintain the existing levels of market access available to other WTO Members. To this end, we intend that the future EU's (excluding the UK) and the UK's (outside the EU) quantitative commitments in the form of tariff-rate quotas be obtained through an

⁶⁶ 'UK set to become a party to the Government Procurement Agreement in its own right' (www.wto.org, 27 February 2019) <www.wto.org/english/news_e/news19_e/gpro_27febr19_e.htm, accessed 5 September 2019> accessed 6 September 2019.

⁶⁷ See Anwarul Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO: Procedures and Practices (WTO Internal Only)* (Cambridge University Press 2018).

apportionment of the EU's existing commitments, based on trade flows under each tariff-rate quota.⁶⁸

However, the EU/UK proposal has been met with some opposition at the WTO. Individual countries have considered that an apportionment of existing commitments even if based on actual trade flows data would cause them prejudice.⁶⁹ The most complex issue, which is clearly addressed by the EU and the UK in their joint letter, is the apportionment between the EU and the UK of the EU tariff rate quotas (TRQs) in force with many suppliers of agricultural products. The UK and the EU have agreed to split the existing quotas on the basis of the UK's share of the total EU imports of each product under the TRQs over a recent three-year period. The putting into force of the new TRQs, however, needs in principle the agreement of the beneficiaries, following completion of negotiations with WTO members having a principal or substantial supplying interest in relation to each tariff rate quotas under Article XXVIII GATT. Most of these members have objected on various grounds, arguing that their access to the henceforth-separate UK market would be diminished and challenging the three-year period basis chosen by the EU and the UK.⁷⁰ In fact different WTO members currently benefiting from a given EU TRQs may have – and do have

⁶⁸ Joint letter to the WTO (n 64).

⁶⁹ 'While the US is supportive of the UK establishing itself as an independent member of the WTO, it will not accept an EU-UK approach to TRQs that is prejudicial to our existing rights' the USA said at the WTO Council for Trade in Goods meeting this week, according to a Geneva-based trade official. 'The current approach to Brexit TRQ negotiations is unacceptable and we are eager to engage [with the EU] to ensure our rights are maintained'; Hannah Monicken, 'U.S. and others urge UK, EU to address TRQs during Brexit extension', *Inside U.S. Trade*, Washington (19 April 2019).

⁷⁰ In the WTO Council for Trade on Goods on 12 November 2018 more than 20 countries registered their objections on the EU-UK joint proposal, see for a summary <https://www.wto.org/english/news_e/news18_e/good_12nov18_e.htm> accessed 23 May 2019. Similar objections had been voiced at the WTO Market Access Committee held in October 2018 by the U.S., Russia, Australia, Japan, China and Canada, that are almost all major agricultural exporters, see for a summary <https://www.wto.org/english/news_e/news18_e/mark_11oct18_e.htm> accessed 23 May 2019.

– a different interest towards the EU27 and the UK markets, depending upon their established trade flows and commercial relations.

In view of these difficulties, the EU has therefore decided to proceed unilaterally for the time being, adopting on 30 January 2019 an ad hoc Regulation based on the abovementioned principles.⁷¹ The EU remains committed to continue to negotiate at the WTO in order to reach satisfactory agreements using the delegation granted to the Commission in Regulation 2019/216 to amend the TRQs this context.⁷²

3. UK agreements with WTO members post-Brexit

It is accepted that when EU law ceases to apply to the UK, deal or no-deal, the UK will not be able to remain a member in its own right of any EU FTA or other similar trade agreement currently applicable to the UK as an EU member whose territory is part of the EU custom territory to which such agreements apply.⁷³ The bilateral FTAs and similar 'Partnership' agreements currently applicable to the UK could not become trilateral and cover the UK after it has ceased to be a EU member and its territory is no more 'equated' to that of the EU, as during the Transition period under Article 129 of the Withdrawal Agreement discussed in the next paragraph. The EU Commission has officially informed interested parties that 'as of the withdrawal date, the EU preferential trade agreements with third countries in the field of the common commercial policy and customs no longer apply to the UK'.⁷⁴

⁷¹ Regulation (EU) 2019/216 on the apportionment of tariff rate quotas included in the WTO schedule of the Union following the withdrawal of the United Kingdom from the Union, and amending Council Regulation (EC) No 32/2000, [2019] OJ L38.

⁷² WTO Committee on Agriculture (26-27 February 2019), for a summary of the meeting see <https://www.wto.org/english/news_e/news19_e/agcom_06mar19_e.htm> accessed 23 May 2019.

⁷³ Sacerdoti (n 39) 81.

⁷⁴ See European Commission, 'Notice to Stakeholders. Withdrawal of the UK and the EU Rules in the field of customs and external trade, Preferential rules of origin' (4 June 2018) <http://trade.ec.europa.eu/doclib/docs/2018/june/tradoc_156913.pdf> accessed 23 May 2019.

One must distinguish the transition period, if any, from the subsequent period in time when the UK would not be part of any customs union with the EU (except if the backstop would enter fully into force). As mentioned above, in this period the UK will not be a member of the EU anymore. However, it will maintain a single custom union with the EU. In view of the peculiar features of this arrangement one could say that the EU custom territory to which EU FTAs and similar agreements are applicable will still include the UK. The issue has been resolved, at least in the bilateral relations, by Article 129 of the Withdrawal Agreement:

during the transition period, the UK shall be bound by the obligations stemming from the international agreements concluded by the Union, by Member States acting on its behalf or by the Union and its Member States acting jointly.

This requires that the other parties agree to consider the UK as still belonging to the territory to which the agreement applies. However, as mentioned above, any third country could challenge this framework and decide not to go on applying the current agreements with the EU to the UK.⁷⁵ Should this be the case, EU FTA partner countries may consider UK goods (or even EU goods having UK content) not qualifying any more as having EU preferential origin. UK inputs incorporated in goods obtained in third countries with which the EU has a preferential trade arrangement and imported in the EU will be 'non-originating' with the effect that the whole product may not qualify in the EU as having a preferential origin.⁷⁶

The UK is seeking to establish links with major economies to replace the FTAs covering a sizeable share of its non-EU international trade and has been negotiating with a host of third countries starting in 2018-2019. The EU participates in around 40 FTAs with over 70 countries. According to UK Government, '[i]n 2017, ONS [Office for National Statistics] data showed that trade with third countries with EU free trade agreements accounted for around 12 [per cent] of the UK's total trade.'⁷⁷ Since these agreements provide

⁷⁵ See para 2.4.

⁷⁶ European Commission (n 74).

⁷⁷ Guidance of the Department of International Trade and others on 'Existing trade agreements if the UK leaves the EU with no deal' (19 December 2018) <<https://www.gov.uk/government/publications/existing-free-trade-agreements-if->

benefits to businesses, consumers and investors in terms of reductions in import tariff rates and regulatory requirements for goods, access to the service market and to public procurement and protection for intellectual property, the strategy of the UK Government is to seek to replicate EU trade agreements to ensure continuity to UK business to trade on preferential terms after the withdrawal.⁷⁸ Not all of the EU's trade partners have, as yet, accepted to enter in the roll-over agreements.⁷⁹ In any case the concluded agreements are transitional towards new trade deals to be negotiated when the UK's partnership with the EU is decided and the UK negotiation leverage assessed.⁸⁰

In relation to the post-transition period there are two further issues to be discussed. First, such agreements can enter into force only starting from the day when the UK will not be bound in a custom union with the EU as provided by the single EU-UK custom area during the transition period.⁸¹ If this regime will go on due to the entry into force of the backstop, this deadline will be postponed accordingly. Secondly, prospective candidates to negotiations need to know what kind of FTA, if any, the UK will conclude with the EU before being in a position of engaging in such negotiations. 'Rolling-over' the present regime under the EU FTAs seems a quick solution in respect of countries with which the UK has currently FTAs in place as a member of the EU, but several of those governments have signalled that a permanent agreement will require renegotiation and more concessions from

theres-no-brexiteal/existing-free-trade-agreements-if-theres-no-brexiteal> accessed 23 May 2019.

⁷⁸ Ibid.

⁷⁹ For the list of the Trade Agreements signed by UK see Guidance of the Department of International Trade and others on 'Existing trade agreements if the UK leaves the EU with no deal' (22 August 2019) available at <<https://www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries-in-a-no-deal-brexiteal>> accessed on 6 September 2019.

⁸⁰ See article 8 of the Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation (11 February 2019).

⁸¹ See Art 129.4: 'during the transition period, the UK may negotiate, sign and ratify international agreements entered into in its own capacity in the areas of exclusive competence of the Union, provided those agreements do not enter into force or apply during the transition period, unless so authorized by the Union'.

the UK.⁸² In fact, the negotiating weight of the UK is not comparable to that of the EU.

It is no surprise, therefore, that in principle only two agreements have so far been reached with important partners, namely Switzerland and Israel.⁸³ They are two countries that have important links with the EU but at the same time face periodic problems in streamlining their relations with this "big brother". This is a fate that may be similar to the one awaiting the UK. In case of a no-deal scenario, UK imports and exports with countries with which the UK has not finalized a trade agreement would be subject to tariff at the current EU MFN rate. The UK also has an interest in negotiating FTAs with countries with which the EU has no agreement, at least not yet, such as the USA, Australia and New Zealand. Notwithstanding this early start, negotiations with the USA, the most important prospective partner, do not look easy. Especially US agricultural sectors have signalled that they expect an easier entry for their products, quotas, tariffs and standards than has been the case until now with the EU.⁸⁴

IV. CONCLUSION

Conclusively, our analysis shows that 'taking back control' and establishing an independent trade policy is not and will not be an easy task for the UK. Above all, the type of relation the UK will establish with the EU impacts on the choices and contents of future trade agreement between the UK and the rest of the world. Even in case of no-deal Brexit, the dominant importance for the UK economy of trade flows towards EU will de facto limit the choices available to the UK in its trade negotiations with the rest of world.

⁸² See the Editorial Board, 'Britain faces a bumpy road ahead at the WTO', *Financial Times* (2 November 2018).

⁸³ By 22 August 2019 UK had signed twelve trade agreements and the one with South Korea is announced to be agreed in principle. Guidance of the Department of International Trade on 'Existing trade agreements if the UK leaves the EU with no deal' (n 79).

⁸⁴ US Trade Representative, 'United States-United Kingdom Negotiations Summary of [US] Specific Negotiating Objectives' (February 2019) <https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf> accessed 23 May 2019.

BREXIT AND SECURITY

Ben Tonra*

The article opens with a brief review of the UK's central place in European security and defence but highlights its ambivalent position towards security and defence cooperation within the EU. It tracks the impact of Brexit on EU debates and the catalytic effect that this appears to have had on a substantive acceleration in EU defence cooperation over the last three years. After highlighting the need for a continued security and defence partnership, the article goes on to identify – first from an EU and then from a UK perspective – the possible scenarios for such cooperation. It notes the very limited intersection of these scenarios and sets out the likely horizon for future negotiations. It concludes by suggesting that both partners – while suffering a net loss as a result of Brexit – nonetheless have vital strategic interests in crafting a new bilateral partnership.

Keywords: UK, Brexit, CFSP, CSDP, security, defence, European Union

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I. INTRODUCTION

The decision of the United Kingdom electorate in the 2016 referendum to withdraw from the European Union poses significant challenges to both the UK as a foreign policy actor and to the future of the Union's Common

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Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP). The goal of this article is to assess where security and defence "fits" in the Brexit negotiations, the UK's place and role in this major policy portfolio and the options available – and their implications – for future EU-UK cooperation in this area. The argument presented is that notwithstanding the UK's central place within European security and its success in defining the shape of EU defence cooperation to date, the prospects for future cooperation are limited in the short to medium term. For both partners this represents a substantial loss of capacity and influence, but domestic UK politics and an EU determination to defend the rights of members over the interests of 'third countries' leaves very little room for manoeuvre. This of course is despite the fact that both partners face the same threat assessment and that cooperation on the bilateral and multilateral levels will continue and likely even deepen.

The UK was an early supporter of foreign and later defence policy cooperation in the EU and is arguably, by default, one of the major architects of the CFSP and CSDP as we know them today.¹ In part this is for negative reasons in as much as the UK was determined – alongside others – to ensure that EU cooperation in this realm remained firmly intergovernmental in nature and that it never cut across the primacy of the North Atlantic Treaty Organization (NATO). As a major military power – with both capacity and will to deploy globally – the UK has also traditionally represented a significant proportion of the overall collective military capacity of the EU. In recent years, however, the UK – at both political and operational levels – has pulled back from EU engagement. In the last years of its membership, the UK was only the fifth largest contributor to CSDP missions after France, Italy, Germany and Spain, accounting for just 3.6 per cent of contributions to

¹ Sven Biscop, 'The UK and European defence: leading or leaving?' (2012) 88(6) *International Affairs* 1297-1313; Nicholas Wright, 'Winding Up the Machine: How the UK Engages with the CFSP' in Nicholas Wright (ed) *The EU's Common Foreign and Security Policy in Germany and the UK* (Palgrave Macmillan, 2019) 87-109; Douglas Hurd, 'Developing the common foreign and security policy' (1994) 70(3) *International Affairs* 421-428.

EU military operations.² This of course has to be set against the fact of the UK's prioritisation of its NATO commitments and Britain's ongoing and leading role in European security and defence more broadly, in both bilateral and other multilateral fora. This apparent contradiction has been a function of both the heightened politicisation of "Europe" within domestic UK politics and a reflection of UK anxiety that the ambitions for the EU in some European capitals compromised the core role of NATO.

Foreign policy and defence was a minor element in the Brexit debates leading up to the referendum itself. Advocates for withdrawal claimed the prospect of a European 'army' was on the horizon and that the UK was being dragged into a federalised military structure. For them this represented an unacceptable compromise of the UK's strategic independence. These concerns had practical consequences for EU and UK policy makers who were acutely anxious not to stir the sometimes fervid imagination of EU opponents. UK ministers and officials were therefore not just to be found among those advocating against deeper defence cooperation in an EU context. Additionally, they were determined to hold the line against any developments which could be characterised as further integration and thus often frustrated even practical means by which existing cooperation might be made more effective.

With the decision to withdraw, both the EU and the UK now face an enormously challenging dilemma: how to create a partnership, which both sides implicitly acknowledge as being necessary to their respective interests, while at the same time dealing with the realities of the UK as a 'third country'.³ Paradoxically, for some in the EU, the UK's withdrawal – while entailing a substantive drop in the Union's material defence capacity – also represents an opportunity. The absence of the UK, so it is argued, will allow the Union to pursue deeper defence cooperation without British

² Lee David Turpin, 'UK-EU Military Cooperation and Brexit from a Neoclassical Realist Perspective: No Big Deal?' in Cornelia-Adriana Baciú and John Doyle (eds) *Peace, Security and Defence Cooperation in Post-Brexit Europe* (Springer 2019) 3-27.

³ Cornelia-Adriana Baciú and John Doyle (eds) *Peace, Security and Defence Cooperation in Post-Brexit Europe: Risks and Opportunities* (Springer 2019).

obstructionism and vetoes.⁴ Since the Brexit vote, in fact, we have already witnessed a substantial acceleration and deepening of EU cooperation, including the initiation of Permanent Structured Cooperation (PESCO) in the field of defence. For its part, the UK, determined to maintain if not augment its global standing, seeks a unique bilateral relationship with the EU to address shared threats. This is also seen as necessary in London to ensure close NATO-EU cooperation and to forestall the threat of closer EU cooperation destabilising balances within the Atlantic Alliance. It is as yet an open question as to whether these two sets of aims can, in fact, be brought into alignment.

What has been remarkable in the Brexit negotiations is the extent to which security and defence – identified early on as being among the strongest cards in the UK's negotiating hand – has been missing from the Brexit negotiations. As we shall see, this was not for want of trying. In the earliest dispatches from London the need for an ongoing security and defence partnership was clearly flagged and UK negotiators came perilously close to being seen as consciously using this as leverage in the wider EU-UK talks.⁵ In the end, of course, the EU's absolute determination to forestall any negotiations over the future relationship prior to settling the terms of withdrawal triumphed. This left the UK's defence card as yet unplayed but its shadow is clearly evident in the non-binding Political Declaration which was appended to the Withdrawal Agreement.⁶

This article thus opens with a brief review of the UK's central place in European security and defence but highlights its ambivalent position towards security and defence cooperation within the EU. It tracks the impact of Brexit on EU debates and the catalytic effect that this appears to have had on

⁴ Peter van Ham, 'Brexit: Strategic Consequences for Europe. A scenario study' (2016) <<https://www.clingendael.org/sites/default/files/pdfs/Brexit%20Report%20February%202016.pdf>> accessed 8 September 2019.

⁵ Carina O'Reilly, 'May's warning to EU over security has been called blackmail – but it's more likely a bluff' (*The Conversation*, 31 March 2017) <<http://theconversation.com/mays-warning-to-eu-over-security-has-been-called-blackmail-but-its-more-likely-a-bluff-75492>> 8 September 2019.

⁶ The draft repeatedly underlines the UK's ambition to retain close engagement with EU foreign, security and defence policy. Its prominence suggests that will be a major point of discussion in subsequent negotiations on a final agreement.

a substantive acceleration in EU defence cooperation over the last three years. After highlighting the need for a continued security and defence partnership, the article goes on to identify – first from an EU and then from a UK perspective – the possible scenarios for such cooperation. It notes the very limited intersection of these scenarios and sets out the likely horizon for future negotiations. It concludes by suggesting that both partners – while suffering a net loss as a result of Brexit – nonetheless have vital strategic interests in crafting a new bilateral partnership.

II. THE STARTING POINT

As noted, the UK leaves the EU having shaped the development of the Union's foreign and defence capacities almost from their inception. Indeed, the UK was even for a time a champion of deeper defence cooperation, launching in 1999, alongside France, the process which led to the creation of the CSDP itself. However, with the Conservative Party in office from 2010 – long subject to bitter internal divisions over "Europe" – that position gave way.⁷ In part this was a function of longstanding British exceptionalism, characterised by its permanent seat at the UN Security Council, its leadership role in NATO, its bilateral relationship with the United States and its global ties to the Commonwealth. Within the EU the UK was also at the core of the triumvirate – alongside France and Germany – that shaped policy and institutional development. At one and the same time, the UK offered leadership to those Member States less enamoured of Franco-German ambitions and determined to respect the intergovernmental nature of decision making. The UK also offered a geo-strategic balance to French policy priorities, providing an often more wholistic global perspective to a sometimes more Africa-centric French approach.

While the substance of the arguments surrounding the EU's debates on foreign, security and defence policy remain much the same, the UK's withdrawal has shifted the balance between them quite substantially. All eyes

⁷ Clare Marina O'Donnell, 'Britain's coalition government and EU defence cooperation: undermining British interests' (2011) 87(2) *International Affairs* 419-433; Richard G Whitman, 'The UK and EU foreign, security and defence policy after Brexit: integrated, associated or detached?' (2016) 238(1) *National Institute Economic Review* R43-R50.

now look toward Paris and Berlin to determine what dynamics will appear. The 'Atlanticist' constituency within the EU – substantially reinforced following the 2004 EU enlargement to Central Europe – has lost a big-power patron. That coalition is no less determined, both individually and collectively, to defend the principle and practice of NATO primacy in security and defence matters and anxious to retain the UK's engagement in continental European defence. Certainly, the voices of both the Commission and the High Representative of the Union for Foreign Affairs and Security and Vice President of the Commission (HRVP) are in the ascendant within EU defence debates, freed of their anxiety not to aggravate domestic British sensitivities. In sum, the UK's departure has sharpened internal debates and shifted the centre of gravity towards greater EU strategic autonomy.

For both the Union and the United Kingdom, Brexit is a net loss for European defence and security. Both parties will see their geopolitical weight reduced; the UK's substantially and the EU's significantly. The loss for the UK will be all the sharper by reason of the loss of the EU's collective weight behind particular UK policy priorities, while the Union will be less capable of representing a comprehensive European view. In practical terms too, both sides lose. EU policy making will lose the contribution of the UK's global diplomatic and intelligence networks as well as its full-spectrum military capacity (accounting for an estimated 20-25 per cent of total EU capacity⁸) and one of the two permanent European seats at the UN Security Council. The UK has also contributed important enabling capabilities to the CSDP, notably the use of the UK's Permanent Joint Headquarters at Northwood which commanded the EUNAVFOR Operation Atalanta (which has since moved to Spain) as well as particular strategic assets such as tactical airlift and intelligence, surveillance and reconnaissance capacities, airborne early-warning and control aircraft and unmanned aircraft systems. At over €40 billion, the UK also spends more on defence than any other EU Member

⁸ J Black, A. Hall, K. Cox et al. *Defence and Security after Brexit: Understanding the Possible Implications of the UK's Decision to Leave the EU* (CA: RAND Corporation, 2017); Jan Joel Andersson, Daniel Fiott and Antonio Missiroli (eds) *After the EU Global Strategy – Consulting the Experts: Security and Defence* (European Union Institute for Security Studies, 2016) <<http://www.iss.europa.eu/publications/detail/article/after-the-eu-global-strategyconsulting-the-experts-security-and-defence/>> accessed 1 May 2019.

State and its defence budget is the fifth largest in the world.⁹ For its part, the UK will lose its often decisive input to the framing of a collective European policy platform as well access to the Union's developing foreign policy and defence infrastructure including the Foreign Affairs Council (FAC), the Political and Security Committee (PSC), the EU Military Committee, the European Defence Agency (EDA), Europol, EEAS, and their myriad of technical and support units and programmes. Absent any agreement, the UK will also be excluded from existing and new EU research, development, industrial and procurement programmes in the realm of defence.

At the same time, both parties have a deep-seated self-interest in maintaining the closest possible strategic relationship, especially at a time when Europe as a whole faces a deteriorating security environment. They share priorities and interests across the entire spectrum of foreign, security and defence policy. With both the Union's 2016 Global Strategy (EUGS) and the UK's 2015 Strategic Defence and Security Review they speak in common terms of addressing issues such as radicalisation, terrorism, state failure, active Russian destabilisation of the EU's eastern partners and cyber security, all while seeking to strengthen the rule-based global order. Both actors also prioritise meeting broader global challenges, including migration, climate change and global health security, from a shared base of principle and practice. Nothing suggests any change to their respective threat assessments arising directly from Brexit. Moreover, given their shared history, location, exposure and interests, there is nothing on the horizon to suggest any medium or longer-term re-evaluation.¹⁰

The EU and UK also share a concern with the trajectory of the United States and the impact of US policy towards NATO.¹¹ The US question essentially boils down to whether or not the policies pursued by President Donald J. Trump represent a temporary aberration or a logical culmination of evolving

⁹ Noel Dempsey, 'UK Defence Expenditure' (2018) Briefing Paper Number CPB 8175, House of Commons Library.

¹⁰ Nick Wright, 'Brexit and the re-making of British foreign policy' (2017) Working Paper, UCL European Institute, London, 13 December.

¹¹ M. Chalmers, 'UK foreign and security policy after Brexit' (2017) RUSI Briefing Paper, Royal United Services Institute, London; L. Freedman, 'Brexit and the law of unintended consequences' (2016) 58(3) *Survival* 7–12.

US policy towards NATO over the last number of decades. President Trump's widely flagged ambivalence towards NATO and his transactional approach to Alliance members' defence spending have raised European anxieties and prompted calls for intensified European defence cooperation.¹² The associated European debate, however, is divided between those who see the urgent need for Europe to take on greater responsibility for its own security – at a minimum in terms of hedging against the prospect of US disengagement – and those that fear that any moves in that direction will actually accelerate a weakening in the US commitment. Those debates, common to the Member States within both NATO and EU contexts, are now profoundly rebalanced as a result of Brexit, with the UK facing the prospect of being an EU outsider at precisely the moment when it sees the urgent need to ensure that EU Member States do not take steps which it might see as undermining European and transatlantic solidarity.

The UK's outsider status in these forthcoming EU debates will have material consequences for the direction of these debates and their conclusions. Already, the row over the exclusion of UK contractors from the Galileo GPS system has highlighted the legal, strategic and diplomatic consequences of 'third country status'.¹³ Without deep institutionalisation, a drift in bilateral EU-UK relations is inevitable – with potentially serious adverse strategic consequence for both parties.

Meanwhile, the EU is proceeding to develop and further institutionalise its security and defence capacity. The EU's Global Strategy was launched in late June 2016, just days after the Brexit referendum result was declared. Speaking later, the High Representative spoke of the extensive advice she had received to delay if not even cancel the launch. The Union, so it was argued, had suffered a body blow and now was the time to reflect, regroup and then reconsider a diminished Europe's place in the world. Federica Mogherini did not take that advice. Indeed, she took the opportunity to assert the even

¹² Federico Fabbrini, 'Do NATO Obligations Trump European Budgetary Constraints' (2018) 9 *Harvard National Security Journal* 121; Jolyon Howorth, 'EU–NATO cooperation: the key to Europe's security future' (2017) 26(3) *European Security* 454–459.

¹³ Monica Horten, 'Britain will be scrambling hard to put Galileo at the centre of a new security partnership' (2018) *LSE Brexit* 1–3.

greater urgency in Europe's need to marshal its capacity to meet existential challenges both at home and abroad.¹⁴ She noted the calls from a variety of European leaders for a strengthening of the Union's international capacity. She also highlighted the breadth and depth of public support for the Union to reinforce its cooperation in the fields of defence and security and she described the enormous potential for such cooperation in delivering greater overall security and defence capacity at lower costs to national governments. In sum, she described the low hanging fruit that security and defence offered to the European project at a moment of existential crisis.

This marked the beginning of a process in which a detailed implementation plan for security and defence was swiftly drawn together.¹⁵ These efforts also worked with the grain of longstanding EU Commission ambitions to develop the European Defence Technological and Industrial Base (EDTIB).¹⁶ Dating back to 2007, the Commission had been pressing an agenda for investment and research in new technologies and systems which would deliver greater security and defence capacities to the Member States. In addition – and in the post-Brexit political storms – several Member State governments and prime ministers/presidents went on the record to declare their support for more ambitious goals in the field of security and defence.¹⁷

Federica Mogherini's implementation plan for the EU Global Strategy did indeed pluck a fair bushel of CSDP fruit. It has pursued a re-engineering of

¹⁴ Federica Mogherini presents the EU Global Strategy (29 June 2016) <<https://www.youtube.com/watch?v=Nj55LNZtuVM>> last accessed 8 September 2019.

¹⁵ Implementation Plan on Security and Defence, Council of the European Union (14 November 2016) <14392/16 https://eeas.europa.eu/sites/eeas/files/eugs_implementation_plan_st14392.en16_o.pdf> last accessed 8 September 2019.

¹⁶ 'A Strategy For The European Defence Technological And Industrial Base' (Brussels, 14 May 2007) <https://www.eda.europa.eu/docs/documents/strategy_for_the_european_defence_technological_and_industrial_base.pdf> last accessed 8 September 2019.

¹⁷ 'France, Germany to table defence plan at Bratislava ministerial meeting' (*Euractive*, 2016) <<https://www.euractiv.com/section/global-europe/news/france-germany-to-table-defence-plan-at-bratislava-ministerial-meeting/>> accessed 9 September 2019; Andrew Rettman, 'Italy lays out vision of EU army' (*EU Observer*, 2016) <<https://euobserver.com/foreign/135235>> accessed 8 September 2019.

the 'battlegroups' concept and funding,¹⁸ raised the prospect of central EU funding for military operations (replacing the complex ATHENA funding mechanism),¹⁹ and boosted the budget and role of the European Defence Agency.²⁰ It has also secured an EU-NATO Declaration on Strategic Partnership,²¹ initiated a coordinated annual review on defence budgeting and planning (CARD),²² instituted new operational structures in civilian/military planning and conduct capability (MPCC),²³ and set up permanent structured cooperation (PESCO) in the field of defence.²⁴ This latter initiative has created a sub-group of 25 Member States within CSDP dedicated to the completion of 34 specific capacity-building projects. Critically too, this activity has been fused onto the Commission's EDIDP²⁵

¹⁸ Jan Joel Andersson, 'Adapting the Battlegroups' (2017) European Institute for Security Studies Issue Alert 1-2.

¹⁹ 'The Arrangement for Cooperation between the European Defence Agency and the ATHENA Mechanism' (Brussels, 1 February 2019) <<https://www.eda.europa.eu/docs/default-source/documents/arrangement-for-cooperation-between-eda-and-the-athena-mechanism.pdf>> accessed 8 September 2019.

²⁰ Pierre Haroche, 'Supranationalism strikes back: a neofunctionalist account of the European Defence Fund' (2019) *Journal of European Public Policy* 1-20.

²¹ 'Joint Declaration on EU-NATO Cooperation' (10 July 2018) <https://www.nato.int/cps/en/natohq/official_texts_156626.htm> last accessed 8 September 2019.

²² 'Council Recommendation of 15 October 2018 concerning the sequencing of the fulfilment of the more binding commitments undertaken in the framework of permanent structured cooperation (PESCO) and specifying more precise objectives' (15 October 2018) <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018H1016\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018H1016(01))> last accessed 8 September 2019.

²³ COUNCIL DECISION (EU) 2017/971 determining the planning and conduct arrangements for EU non-executive military CSDP missions (8 June 2017) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017D0971>> last accessed 8 September 2019

²⁴ 'Notification on Permanent Structured Cooperation (PESCO) to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy' <<https://www.consilium.europa.eu/media/31511/171113-pesco-notification.pdf>> last accessed 8 September 2019.

²⁵ 'Commission implementing decision on the financing of the European Defence Industrial Development Programme and the adoption of the work programme for the years 2019 and 2020' (19 March 2019)

programme and an ambitious proposed agenda of €40+ billion in new spending on research and development on defence technologies and the design and procurement of associated defence systems over the next seven to eight years. All of this is directed towards a profound deepening of defence cooperation and even defence integration in some areas, although it falls short of the shared defence of European borders which is still provided by NATO for most EU Member States.

It is important to note too that this new phase of intensified defence cooperation is not being constructed solely within the traditional intergovernmental structures which the UK championed and defended. As has been noted above, the EDF, for example, is an initiative of the Commission with a significant decision-making input and authorisation by the European Parliament.²⁶ As a result, its management, decision-making and funding will be subject to the Community method, inevitably complicating potential efforts to engage third countries such as the United Kingdom. Even though PESCO is situated within the intergovernmental decision-making structures of the CSDP, it too has a supranational dimension with privileged access to EDF funding and the associated engagement of the European Parliament. So, starting from this base, what then can be foreseen in terms of the future EU-UK security and defence relationship?

III. SCENARIOS AND OPTIONS

The key point of departure for any discussion on the bilateral security and defence relationship is that – like the rest of the Brexit agenda – the relationship can only deteriorate. Even with the best will in the world on both sides and an entirely (and unlikely) benign geostrategic context, the EU and UK must negotiate a relationship that will be less close, less integrated and less mutually reinforcing than that which they currently enjoy. Thus, any newly established bilateral relationship can only entail a minimisation of costs – there is no significant added-value to either party. A second key point

<<https://ec.europa.eu/docsroom/documents/34515/attachments/2/translations/en/renditions/native>> accessed 8 September 2019.

²⁶ 'A European Defence Fund: €5.5 billion per year to boost Europe's defence capabilities' (7 June 2017) <http://europa.eu/rapid/press-release_IP-17-1508_en.htm> accessed 8 September 2019.

in framing potential scenarios is that maintaining security and defence cooperation – especially at this moment in the CSDP's evolution – will face the exceptionally stiff headwinds of unravelling the UK from the Union's trade and economic framework.²⁷ This has, for example, obvious and complex implications for trade and economic sanctions already in place to address foreign policy challenges or additional sanctions which may be sought in the immediate future.²⁸ Even more significantly, however, is the fact that the UK will be excising itself from the Union's market and industrial and research and development (R&D) policies precisely at the point when the Union applies some of their principles to security and defence. As noted, this was exemplified in the controversy surrounding UK access to the Galileo project.²⁹ Now these very same arguments and difficulties will apply in a multiplying series of defence and security contexts. Finally, building this new relationship cannot be divorced from wider political dynamics. As any bilateral negotiations on a final relationship between the EU and UK begin, their inevitable twists and turns and underlying political dynamics – positive and negative – will undoubtedly impact upon conversations on the security relationship.

The economic/industrial impacts are exemplified in the area of defence export controls. Changes here could be a key driver of Brexit's wider impacts on defence and security policy. In regulations governing the export of dual use goods for example, EU trade policy exercises an 'exclusive competence'. To date, the UK control list and licencing system are updated automatically with EU policy changes. Any divergence here will be a significant departure from European coordination. More generally, with respect to arms exports, the EU common position simply sets standards for the control of transfers of military goods, and the application of eight 'common criteria' when assessing arms exports to avert human rights abuses. Should the UK choose significantly to diverge from EU policy here (in the pursuit, for example, of new trade deals) it could set up a competitive dynamic between UK and EU-

²⁷ See also article by Sacerdoti and Mariani in this journal issue.

²⁸ Thierry Tardy, 'CSDP: getting third states on board' (2014) 6 European Institute for Security Studies Brief 6.

²⁹ Sophia Besch, 'A Hitchhiker's Guide to Galileo and Brexit' (3 May 2018) <<https://www.cer.eu/insights/hitchhikers-guide-galileo-and-brexit>> accessed 8 September 2019.

based suppliers for markets, with a consequent likely weakening in respective priorities for human rights. Finally, there is the area of actual arms embargoes instituted by the European Union above and beyond shared UN commitments, such as in the cases of Russia and Syria. While not part of the 'exclusive competence' of the EU, the UK has legislation which makes EU sanctions automatically apply at the national level.³⁰ A first set of regulations, published in 2019, now establishes an autonomous national regime in the UK which operates post-Brexit, but these have already signalled some substantive divergence from their EU analogues.³¹ As a third country, the UK will lose decisive influence over EU embargo decision making, although like Norway it may seek means by which to consult on them.

1. EU Scenarios

For the EU, the potential scenarios for the UK's future relationship with the EU essentially revolve around two core facts: that the UK will be a third country but at the same time a strategic partner. The UK will become a third country from the perspective of the EU CSDP as the inevitable consequence of Brexit. This would entail the loss of all foreign, security and defence cooperation at EU level, necessarily refocusing such efforts at the bilateral level and through other multilateral structures such as NATO and the OSCE. Without mitigation, such an eventuality creates not only a significant gap in the Union's material capacity and the loss of the UK's considerable input to policy making, but it also sets up the prospect for a destabilisation of NATO-EU cooperation. This, in turn, would likely exponentially worsen the kinds of frictions, already evident, which arise from Greek-Turkish relations across NATO and the EU. At the same time there are voices within the EU that insist that the engagement of third countries within CSDP must be based on the equal treatment of such partners. This implies that variable geometry cannot and should not be applied to distinguish, say, between Turkey, the United Kingdom and the United States as third countries.

³⁰ Erica Moret and Fabrice Pothier, 'Sanctions After Brexit' (2018) 60(2) *Survival* 60 179-200.

³¹ White and Case, 'Sanctions after Brexit – the first UK sanctions regime's (1 March 2019) <<https://www.whitecase.com/publications/alert/sanctions-after-brexit-first-uk-sanctions-regimes>> accessed 8 September 2019.

Nonetheless, it appears that the Union seeks to go beyond a simple 'third country' relationship, declaring that: 'The EU stands ready to establish partnerships in areas unrelated to trade, in particular the fight against terrorism and international crime, as well as security, defence and foreign policy.'³² While the self-interest of both parties should logically lead them together to address shared strategic challenges from a common standpoint, we have seen that logic, rationality and self-interest have not been notable drivers of Brexit. There is considerable scope to tailor just such a bilateral relationship, with a menu of options to ensure consultation, cooperation and coordination. At the same time, the Union is determined to maintain respect for its legal order and each partner's own decision-making system.

Whether formal or informal, partnerships have become an established feature of EU relations with several key allies and the potential here is significant. The Union has a variety of possible templates. Norway for example, participates in EU sanctions and also supports EU CSDP operations with troops and financing. Informal consultative mechanisms thus exist to exchange views on key policy issues. Such a model however does not entail full and formal engagement in policy and decision-making. Any model that went beyond consultation, cooperation and coordination – one which sought to preserve key elements of a 'common' foreign, security and defence policy – would be legally, constitutionally and politically challenging for the Union.

2. UK Scenarios

For the UK the spectrum of scenarios is wider and arguably more complex as it also encompasses a wider divergence of domestic preferences. On the night of the Brexit vote, senior UK defence officials telephoned their EU counterparts to reassure them of the UK's continuing commitment and engagement in European security and to insist that Brexit did not represent a shift to isolationism. This was also restated publicly at least in part to offset any temptation on the part of adversaries that the UK might be resiling from its existing security commitments. The UK set out a broad vision of a 'new, deep and special partnership' with the EU in a series of seven policy-based

³² European Council, 'Conclusions: Negotiating Guidelines for Brexit' EUCO XT 20004/17, 7.

papers published in September 2017. In the Foreign Policy, Defence and Development paper,³³ the UK Government underscored the complementarity of UK and the EU's foreign policy priorities – to such an extent that one analyst noted that that these nearly appeared to make 'a case for being part of the EU, rather than setting out a "new" arrangement.'³⁴

The document was said by one senior official in an off-the-record briefing, to be deliberately 'forward leaning', reflecting bilateral feedback from EU partners as to what they sought from a post-Brexit UK. It was also at the limits of what the British political system could offer. British officials however quickly acknowledged that the proposal landed badly in Brussels, where they were immediately characterised as demanding the benefits of membership without its obligations. The document went to great lengths to itemise what it was that the UK would bring to the table in the context of negotiations to establish 'a deep and special relationship' in the field of security and defence. It is notable that within the 22-page document the first 17 are devoted to a laundry list of the UK's contributions to, and strengths within, global affairs. The final few pages then set out the general principles from which the UK wished to establish a new bilateral framework. In the realm of defence and the CSDP specifically, the UK was seeking:

- Consultation on common CFSP positions, particularly in the field of sanctions;
- Participation in civil and military crisis management CSDP missions, including their political and strategic planning;
- Engagement in defence industry financing programmes such as the Preparatory action on defence research (PADR), the European defence industrial development program (EDIDP), PESCO, and the future development of the EDF;

³³ HMG, 'Foreign policy, defence and development: a future partnership paper' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643924/Foreign_policy_defence_and_development_paper.pdf> last accessed 8 September 2019

³⁴ Paul James Cardwell, 'The United Kingdom and the Common Foreign and Security Policy of the EU: From Pre-Brexit "Awkward Partner" to Post-Brexit "Future Partnership"?' (2017) 13(13) *Croatian yearbook of European law & policy* 21.

- Working with the EU in the field of space and dual-use technologies, particularly in the framework of the Galileo and Copernicus programmes; and
- Participation in the Union's emerging defence market and collaboration with the European Defence Agency (EDA).

On 9 May 2018, the UK Government published its 'Framework for the UK-EU Security Partnership'. It reflected on the ambitions set out the previous September, but now set these against the progress achieved towards the Political Declaration associated with the formal Withdrawal Agreement.³⁵ Therein, the acknowledgement of the EU's autonomy of decision-making finally entailed formal recognition that the UK could no longer aspire to direct engagement in collective decision-making. Nonetheless, it called for a unique and deep relationship that went well beyond the EU's traditional relationship with other third countries. A series of options are set out which encompass regular and structured consultations at all political levels, an exchange of officials, and agreement on the exchange of sensitive material. The option to participate in CSDP missions with associated planning and command roles is also raised, as is engagement with EDA planning, the option of participation in PESCO, EDF and other specific programmes (including Galileo).

Notwithstanding this official outline of a special relationship with the EU, the motif of "Global Britain" has been in the ascendant. Thus, the first UK scenario for consideration is based on the ambition for the UK to carve out a new role for itself as an essentially liberal, free trading state focusing on traditional partners (the US and the Commonwealth) as well as so-called rising powers such as China and others in the far-east. It therefore assumes a de-centring of UK foreign policy *away* from a European to a greater global perspective. This has prompted much speculation, for example, about the scope for refocused UK attention to the so-called 'Five Eyes' intelligence

³⁵ HMG, 'Framework for the UK-EU Security Partnership' (May 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705687/2018-05-0_security_partnership_slides_SI_FINAL.pdf> accessed 20 September 2019.

partners and the broader Anglophone world.³⁶ In her pivotal 'Lancaster House' speech on 17 January 2017, the then Prime Minister Theresa May had insisted that in their vote to leave the EU, the British people had voted 'to embrace the world' based on its history, its exceptionalism and its potential.³⁷ The contradictions between this and the above-outlined special relationship with the EU is obvious and has entailed demands from the British side to find solutions that are both 'creative' and 'practical' and which entail 'new thinking' and the need to be 'imaginative' to square the obvious circles.³⁸

The US plays a special role in this Global Britain scenario in both trading and strategic terms. Strategically, it is envisaged here that the 'special relationship' – always a problematic construction from the US side – can come to play a more meaningful role in British foreign and defence policy, with the two Anglophone powers working in concert globally in pursuit of a liberal trading regime and dedication to democratic values.³⁹ Here again the question arises of the extent to which the Trump administration's mercantilist trade preferences and the President's personal predilection for dealing with authoritarian leaders will cut across such a set of norm-based ambitions as "Global Britain" would ostensibly seek to pursue.

Moreover, for some sceptics, the "Global Britain" brand has already been linked to a less attractive 'Empire 2.0' strategy, relying on historic ties which are either long-past their sell-by date or else profoundly misunderstood and misrepresented within the British discourse.⁴⁰ This is specially the case for

³⁶ Claudia Hillebrand, 'With or without you? The UK and information and intelligence sharing in the EU' (2017) 16(2) *Journal of Intelligence History* 91–94.

³⁷ Speech by Theresa May, Lancaster House (London 17 January 2017) <<https://www.europeansources.info/record/speech-by-theresa-may-lancaster-house-london-17-january-2017/>> last accessed 9 September 2019.

³⁸ Prime Minister Theresa May, 'A new era of cooperation and partnership between the UK and the EU' (Florence, 22 September 2017) <<https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>> accessed 9 September 2019.

³⁹ W Rees, 'America, Brexit and the security of Europe' (2017) 19(3) *British Journal of Politics and International Relations* 558–572.

⁴⁰ B Martill, 'Britain has lost a role, and failed to find an empire' (2017) UCL European Institute Comment <<http://www.ucl.ac.uk/european-institute/analysis/2016-17/martill-may-speech>> accessed 21 August 2018; Satnam Virdee and Brendan

the Commonwealth, China and the US.⁴¹ For the Commonwealth countries, a British "return" has limited strategic appeal. As a loose association of states formerly part of the British Empire, the diplomatic glue which holds the Commonwealth together is weak and their shared strategic interests tend to the general rather than the specific. For major players such as China and Japan a key part of the UK's comparative utility was precisely its membership of the European Union and how that could be leveraged through close bilateral ties. Much the same is true for the United States at the global level. From the US perspective post-Brexit London arguably becomes a less valuable diplomatic asset as it can no longer be seen as either a sounding board for, or advocate of, shared Atlanticist interests within the EU.

A second scenario is one in which the UK refocuses itself as an Atlanticist mini-hegemon. Reflecting the diminished resources which consecutive UK governments have made available to defence,⁴² this would see the UK prioritising itself as having a regional rather than global focus but from a firmly Atlanticist perspective. NATO would rest at the centre of UK defence policy but from that framework the UK would press its allies to maintain a clear hierarchy in which NATO served core defence and security interests while EU/NATO members would be encouraged to focus more on soft security tasks as well as conflict prevention, management and resolution. This would offer a clear division of labour between the two institutions but would certainly cut across the declared ambition of a number of EU Member States for the PESCO framework. This would also potentially sharpen tensions in EU-NATO cooperation, potentially degrading cooperation

McGeever, 'Racism, Crisis, Brexit' (2018) 41(10) *Ethnic and racial studies* 1802-1819; Oliver Daddow, 'Global Britain™: the discursive construction of Britain's post-Brexit world role' (2019) *Global Affairs* 1-18.

⁴¹ Rebecca Adler-Nissen, Charlotte Galpin, and Ben Rosamond, 'Performing Brexit: How a post-Brexit world is imagined outside the United Kingdom' (2017) 19(3) *The British Journal of Politics and International Relations* 573-591; Thomas Henökl, 'How Brexit affects EU external action: The UK's legacy in European international cooperation' (2018) 97 *Futures* 63-72; Jie Yu, 'After Brexit: Risks and Opportunities to EU-China Relations' (2017) 8 *Global Policy* 109-114.

⁴² Paul Cornish and Andrew Dorman, 'National defence in the age of austerity' (2009) 85(4) *International Affairs* 733-753.

between the two institutions and reinforcing some of the dynamics evident in Turkey's security and defence relationship with the EU.

A third potential scenario is the UK looking to intensify defence cooperation in Europe but from outside the EU. With NATO remaining at the core of its defence policy, the UK might then choose to pursue a more proactive agenda of working with key European partners and through a variety of mini-lateral and bilateral frameworks in pursuit of shared European defence and security interests. It might, for example, reinforce its 2010 Lancaster House framework with France, and try to replicate this with other key partners such as Germany or Poland.⁴³ At their 2018 summit, for example, the French and British leaders agreed to create a 10,000-strong military expeditionary force which could be ready to deploy by late 2020. Similarly, the UK might look to develop the model instituted by President Macron in his 2018 European Intervention Initiative (EI2), thus building a network of other military frameworks outside the penumbra of the European Union. The UK already has significant commitments deriving from NATO, such as its own Joint Expeditionary Force, combined joint task forces such as Operation Inherent Resolve, and the UK–Netherlands Amphibious Force which the UK might decide to augment and further develop. Such models might also be applied with a range of other partners. Finally, the UK could seek to extend further its bilateral security and defence relationships with both non-EU and EU Member States, the latter partly with a view to maximising influence over the EU's agenda.

The fourth potential scenario is one of the aforementioned 'unique' partnership with the Union. Here the UK would indeed seek to maintain a presence within the decision-making structures of CFSP and CSDP. UK political leaders have already mooted options such as maintaining a seat at the ministerial table and developing structures to accommodate a formal UK input to policy making which would fall short of a UK "vote" but accommodate a significant UK "voice" in European councils. This has already generated some internal EU debates with the European Council's Legal Service commenting, in response to a letter from the Government of Cyprus, that no 'outside interference' in the EU's decision-making process

⁴³ Peter Ricketts, 'National Security Relations with France after Brexit' (2018) RUSI Briefing Paper.

could be allowed.⁴⁴ The November 2018 Political Declaration on the future of EU-UK cooperation in defence had spoken about the prospect of 'flexible consultation' between the UK and EU and mooted informal structures of ministers and officials at 'working' level to facilitate same.⁴⁵ The Legal Services insisted, however, that while informal consultations were always possible, no written documents or formal positions deriving from such informal consultations could ever be used to shape EU policy. They reassured the Cypriot Government that the draft Political Declaration had enshrined 'strong guarantees [...] written in to ensure that the work of the Council and its preparatory bodies is effectively protected from outside interference'.⁴⁶

The overlap between these six scenarios is limited and is a function of domestic UK political choices, EU Member State dynamics and – perhaps most significantly – EU treaties and the *acquis*. Within the UK, it is unlikely for example, that a close bilateral relationship with the EU in security and defence terms would be politically palatable. As with the ongoing trade discussions, for Brexiteers, the whole point of the exercise is to disentangle the UK from its EU obligations. Similarly therefore, efforts to construct a 'unique' and close strategic partnership with the European Union will be subject to much the same political opposition. This will only be exacerbated when any such relationship, from the EU side, would inevitably be predicated by demands for political and financial commitments. The 'Norway model' is here again illustrative.⁴⁷ Norway's ad hoc engagement with CFSP/CSDP has

⁴⁴ Tony Connolly, 'EU rules out UK role in foreign and defence decisions post-Brexit' (RTE, 25 November 2018) <<https://www.rte.ie/news/brexit/2018/1125/1013219-uk-eu-security/>> accessed 9 September 2019.

⁴⁵ 'Draft Political Declaration setting out the Framework for the Future Relationship between the EU and the UK' <<https://www.consilium.europa.eu/en/press/press-releases/2018/11/22/draft-political-declaration-setting-out-the-framework-for-the-future-relationship-between-the-eu-and-the-uk-and-article-132-of-the-draft-withdrawal-agreement/>> accessed 9 September 2019.

⁴⁶ Ken Sweeney, 'Cyprus blocks EU defence and foreign cooperative role for UK post-Brexit' (Europa United, 26 November 2018) <<https://europaunited.eu/2018/11/26/cyprus-blocks-eu-defence-and-foreign-cooperative-role-for-uk-post-brexit/>> accessed 9 September 2019.

⁴⁷ Kristin Haugevik, 'Diplomacy through the back door: Norway and the bilateral route to EU decision-making' (2017) 3(3) Global Affairs 277-291; Christophe Hillion

delivered cooperation and coordination – where both parties desire the same – but its framework for consultation is weak and is profoundly asymmetrical.⁴⁸ While the UK's geostrategic weight is greater and can be assumed to garner extra attention in Brussels, two further factors militate against early agreement on a strong bilateral arrangement.

The dynamics of EU Member State interaction within CFSP/CSDP are complex. While formally they are structured around a strict intergovernmental system of decision making, that system is overlaid atop an intense and ongoing political and diplomatic interplay, which is deeply institutionalised and has become part of the fabric of Member State foreign policies. Within those debates there are – as has been signalled above – contrasting views as to how far and how deeply EU foreign, security and defence policy integration should proceed. Even on daily policy discussions in arriving at a common position on particular issues, the subtleties of particular decisions can be a function of many diverse inputs across the EU policy agenda. Thus, to "plug-in" a third party to such debates – even at the level of policy discussion and absent a formal vote – is at a minimum problematic. If such a third party sees itself as necessarily having a distinctive and unique weight in such discussions, the issue becomes exponentially more complex.⁴⁹

However, even if such political considerations could be overcome in pursuit of shared strategic goals, the legal and institutional barriers to such a unique partnership are formidable. The treaties and the Union's *acquis* set very precise terms for EU relations with third parties and the rights/obligations of members which cannot be set aside. To leave the Union axiomatically entails a loss of substantive "voice" which can only partially be ameliorated by a diverse set of informal diplomatic routines and practices which leave only

and Alfred Pierre, 'Norway and the changing common foreign and security policy of the European Union' (2019) NUPI Report.

⁴⁸ Nina Græger, 'Need to have or nice to have? Nordic cooperation, NATO and the EU in Norwegian foreign, security and defence policy' (2018) 4(4-5) Global Affairs 363-376.

⁴⁹ European Parliament, 'Policy Department for External Relations, CSDP after Brexit: the way forward' (May 2018) <[http://www.europarl.europa.eu/RegData/etudes/STUD/2018/603852/EXPO_STU\(2018\)603852_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/603852/EXPO_STU(2018)603852_EN.pdf)> last accessed 9 September 2019.

limited room for influence. Again, in the case of Norway, diplomats and officials based in both Oslo and Brussels seek to vindicate Norwegian interests through negotiations with the EU institutions, and attempt to 'work closely' with the EU in CFSP/CSDP issues.⁵⁰ It is difficult to conceive even of an institutionalised system which would at one and the same time respect the Union's existing decision making order while accommodating the UK's clearly expressed desire for a substantive input and consultation on policy making.

These three limitations to a bespoke or unique bilateral strategic partnership are further challenged by the Union's accelerated pursuit of strategic autonomy. The concept is one which attempts to walk a fine line between strengthening the Union's defence capacity while at one and same time, for NATO Member States, maintaining the integrity of the Alliance.⁵¹ Institutionally, as noted above, it includes a review of the use of EU 'battlegroups', the prospect of central funding for military operations, the establishment of the Coordinated Annual Review on Defence, new operational structures in the Military Planning and Conduct Capability headquarters and PESCO itself. It is also being defined in the allocation of new resources through the European Defence Fund, a new European Defence Research Programme (EDRP) and the European Defence Industrial Programme (EDIP). The engagement of third countries in both PESCO projects and the EDF as a whole has already become an issue of intra-NATO tension with both the US and Turkey and is likely only to be exacerbated with the UK's withdrawal.

IV. CONCLUSIONS

There appears to be only one definitive conclusion to be drawn from an analysis of Brexit's implications and the potential shape of the EU-UK

⁵⁰ Mission of Norway to the European Union, 'Norway and the EU' (Utenriksdepartementet, 2019) <<https://www.norway.no/en/missions/eu/about-the-mission/what-we-do/>> accessed 29 August 2019.

⁵¹ Daniel Fiott, 'Strategic Autonomy: Towards "European sovereignty" in defence?' (2018) EUISS Issue Brief, No. 12 <https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief%2012__Strategic%20Autonomy.pdf> accessed 9 September 2019.

security/defence relationship into the future and that is that both parties are diminished as a result. The best that can therefore be hoped for is the minimisation of the associated costs and the maintenance of a strong strategic link.

For the European Union early analyses suggested that the loss of the UK as a Member State left it substantially diminished and further marginalised from the emerging geopolitical mainstream. It was more evidence of Europe's historical decline and a testament to the need for the Union to lower its ambitions to better marry these with its diminished capacity. What we have thus far seen, however, is a European Union accelerating its defence integration and raising the rhetorical stakes on the goals of that integration. Significantly too, new resources have been dedicated to that end - with much promised even though little is as yet delivered. This is of course further reinforced by European anxiety surrounding the direction of the United States and a deteriorating European security environment. While it is difficult to ascribe weighted causality to each of these three factors, the critical issue is that they are mutually reinforcing towards greater European defence integration.

For the UK, the picture is as yet still too complex to draw a definitive conclusion. The absence of any domestic consensus on what Brexit was meant to deliver frustrated early on efforts to divine what the shape of the UK's post-Brexit security and defence relationship with the EU might be. Simple disengagement ran with the grain of much Brexit sentiment but was contrary to stated UK strategic interests and the expressed goals of the UK Government, particularly as eventually defined in the Political Declaration. At the same time, attempting to square that circle by seeking a 'bespoke' relationship satisfied neither – at least within the Union's own political and legal parameters.

Brexit has also shifted sensitive political balances within the EU. In the absence of a common strategic culture, EU Member States still differ between those that prioritise migration and instability from the south and those that emphasise the need for collective territorial defence from Russia in the east. There is further differentiation between convinced Atlanticists and determined Europeanists for a definition of EU strategic autonomy and whether this amounts to hedging against the prospect of US withdrawal, a

necessary reinforcement of NATO or even an emancipation from dependence upon a fickle United States. The withdrawal of a more globally-facing UK may also temper the Union's own ambitions, perhaps contributing to a more parochial Union or re-orienting the Union closer to its own immediate hinterland of Africa and Eurasia at the expense of engagement in the Far and Middle East.

One might in such circumstances expect that traditional engine of European integration, Franco-German cooperation, to engage further gears in response to the loss of the UK. Thus far this has not been the case. The dynamic between Paris and Berlin has not yet delivered a coherent programme of policy responses to the broad EU agenda – and certainly delivered even less in foreign and defence policy terms. The fact that President Macron has created his European Intervention Initiative outside the EU context is a portent of his own frustration at the pace of development of the CSDP in operational terms (and the over-inclusiveness, in French minds, of PESCO). Certainly, these two partners have not as yet built meaningfully from the relaunch of their Aachen Treaty. They have not as yet substantively addressed the practical issues surrounding deeper CSDP/CFSP engagement.

Thus, in such a fluid context, it is only possible to try and outline the most basic parameters of the precise "win-set" between the variety of scenarios sketched out above. If we exclude the extreme outcomes – a full breach between the UK and EU or UK integration within CSDP – we have seen that the outline of a potential framework for cooperation clearly exists. The EU already has security partnerships which facilitate third party contributions to civilian and military missions and defence cooperation. These, however, do not yet encompass a strategic input to policy planning and decision-making such as within the Political and Security Committee (PSC) or the Foreign Affairs Council (FAC). As also noted, the Political Declaration (Articles 92-104) has affirmed the EU's willingness to grant the UK only an informal role in CSDP.

Sven Biscop, among others, has by contrast proposed an 'opt-in' model for the UK in respect of the CSDP/CFSP, including a non-voting seat in the FAC when discussing operations with direct UK involvement. This 'pay and play' model has potential, if it can logically address the issue of the UK as a third-party being treated differently to Norway, Turkey or the Union's existing

security partners such as Montenegro, Serbia or Switzerland.⁵² Such a unique position would also likely entail continued UK contributions to the Union's security and defence budget, likely raising political storms in London. While most EU Member States would certainly welcome continued UK involvement in CSDP operations, the Union would certainly not countenance the use of UK vetoes.

On the more operational side of defence policy the prospects for ongoing cooperation are perhaps brighter. An association agreement between the UK and the EDA might be part of such a menu, as might access to a limited range of PESCO projects, again on a 'pay to play' basis. Therefore, in the short to medium run post-Brexit, the expectation must be that the UK will maintain its commitments to European security and defence, both through NATO and a much-intensified series of bilateral and minilateral defence engagements. Where possible and where practicable, the UK will also engage actively in those EU agencies, programmes and policies where third-country participation is available. This will potentially build a pattern of bilateral good-faith cooperation that, over time, may then be institutionalised or packaged within a wider bilateral framework. It is therefore not likely that the ambitious scope for bilateral defence cooperation, set out in the UK's September 2017 framework, will be pursued in the negotiation of the future relationship. For the moment, therefore, the UK's road to Brussels will be diverted through NATO headquarters and 27 national capitals.

The UK will continue be a major European power – with global ambitions – for some time to come. The European Union is visibly moving towards to a more integrated foreign, security and defence policy, with a high level of ambition, albeit not yet sustained by commensurate resources and political will. These two European actors also share too much to work in isolation or potentially at cross purposes. Whether that cooperation is structured bilaterally through NATO or multilaterally in ad hoc structures and frameworks remains to be seen but work together they must if they are to meet their respective goals. The overriding question to such a comparatively benign scenario is how the associated variables to EU-UK defence

⁵² Sven Biscop, 'Brexit, Strategy, And The EU: Britain Takes Leave. Egmont Paper 100' (February 2018).

cooperation will be impacted by the degree of success/failure of the wider negotiations on the shape of the future EU-UK relationship.

THE FUTURE OF THE UNITED KINGDOM

Sionaidh Douglas-Scott*

The article examines the impact of Brexit on the UK's constitutional settlement, most particularly within the field of devolution. The focus of this article is on devolution, as it argues that the voices of the three devolved nations have been too much ignored in Brexit manoeuvres, especially given that Scotland and Northern Ireland voted to remain in the EU Referendum. This article questions whether, in leaving one union (the EU), Britain may in fact destroy its own union (the UK). Does the UK have the constitutional materials to safeguard against this?

Keywords: Brexit, Constitutional Settlement, Devolution, United Kingdom, Scotland, Wales, Northern Ireland, Ireland, England

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I. INTRODUCTION

Jacob Burckhardt, the 19th Century Swiss historian, entitled the first section of his famous work, *The Civilization of the Renaissance in Italy*, 'The State as a Work of Art.'¹ If statecraft is a work of art, then this is a skill that has been lost or forgotten in the contemporary United Kingdom (UK). Ever since the 2016 EU Referendum, perhaps before, British governance seems to have stumbled, and to have lost its way.

Brexit is occurring at a time of constitutional instability and flux, when old certainties about the UK's Constitution have been diminishing. It is challenging a Constitution that is already 'unsettled.'² The essence of the British Constitution has long been characterized as resting on the sovereignty of Parliament, as unwritten, flexible, uncoded in nature, with political conventions and ministerial accountability often taking the place of hard law or a Constitutional Court.³ However, this organic Constitution has in recent decades undergone a creeping reform process, provoked by certain developments which have affected sovereignty and lines of authority. These include EU membership which has challenged parliamentary supremacy; the weak entrenchment of the Human Rights Act,⁴ bringing increased judicial power to shape a human rights culture; and devolution in Scotland, Wales and Northern Ireland, challenging any notion of a "unitary" UK. All of this has rendered the UK and its Constitution less unitary and more heterogeneous, more willing to recognise centres of power elsewhere, without, however, bringing any coherence or consolidation of constitutional form.

As Lord Hennessey stated in the House of Lords shortly after the EU Referendum:

The referendum was like a lightening flash illuminating a political and social landscape long in the changing [...] we need to look at our internal constitutional arrangements — the relationships between the nations,

¹ J. Burckhardt, *The civilization of the Renaissance in Italy* (New York Harper 1958).

² Neil Walker, 'Our Constitutional Unsettledness' (2014) Public Law 529-548.

³ See e.g. A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan 1950)

⁴ The Human Rights Act does not give courts the power to set aside legislation for breach of human rights.

regions and localities of the United Kingdom. In my darker moments, I think that 23 June lit a fuse beneath the Union.⁵

This article explores the impact of Brexit on the UK's constitutional settlement. In particular, its focus lies in the field of devolution, examined through the lens of the EU Withdrawal Act (EUWA)⁶ which establishes a new post-Brexit constitutional landscape. I argue that the voices of the three devolved nations have been too much ignored⁷ in Brexit manoeuvres, especially given that Scotland and Northern Ireland voted to remain in the EU Referendum. As Anthony Barnett has argued: 'It was England's Brexit'⁸ or, as Fintan O'Toole writes: 'Brexit is an essentially English phenomenon'.⁹ I question whether, in leaving one union – the EU – Britain may in fact destroy its own union – the UK. Does the UK have the constitutional materials to safeguard against this? And, more importantly: 'Can the 19th century constitutional theory of the sovereign and unitary State be applied to the world of the 21st century?'¹⁰

This article is structured as follows. Part II briefly discusses the key points of the EU Withdrawal Act, which ushers in a new post-Brexit legal landscape for the UK, including for the devolved nations, while parts III and IV considers how Brexit will impact Devolution. Part V moves away from Brexit to discuss the status of the UK's existing territorial constitution and part VI

⁵ House of Lords, Hansard 05 July 2016, Volume 773, at column 1963.

⁶ References to a Withdrawal Agreement in this chapter are to the Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union [14 November 2018] TF50, 55.

⁷ And of course, not to forget Gibraltar!

⁸ Barnett highlights that, while Scotland (24 per cent remain majority), Northern Ireland (12 per cent remain majority) and London (nearly 20 per cent remain majority) voted to remain, and Wales narrowly voted to leave, what Barnett calls 'England-without-London' voted leave by an 11 per cent majority, in both its 'left behind' communities, and in well-off Home Counties. A Barnett, *The Lure of Greatness: England's Brexit and America's Trump* (Unbound Books 2017).

⁹ F O'Toole, *Heroic Failure: Brexit and the Politics of Pain* (Head of Zeus Books 2018) xvi.

¹⁰ See R Schütze and S Tierney, *The United Kingdom and the Federal Idea* (Hart Publishing 2018) v.

discusses a possible federal future for the UK. Part VII concludes by reiterating the difficulties that Brexit poses for the territorial Constitution.

II. A NEW LEGAL SYSTEM?

A large part of this article focusses on devolution arrangements in the UK. But first, it briefly considers the basic framework for UK law and the Constitution after Brexit: the EU Withdrawal Act 2018 (EUWA), which became law on 26 June 2018. This Act will change the constitutional landscape considerably, especially with regard to the UK's four nations.

Brexit will usher in new constitutional procedures for the UK. This is partly because the EUWA introduces new categories of law. The EUWA's purpose is not – in contrast to any Withdrawal Agreement¹¹ agreed with Brussels – to decide the terms of Brexit, but to provide structures and mechanisms to prepare the UK legal system for Brexit.

The EUWA provides the apparatus for the huge revision of the UK legal system necessary as a consequence of the UK's forthcoming exit from the EU. This is 'a legal undertaking of a type and scale that is unique and unprecedented.'¹² Because so much UK law has derived from the EU since 1973, it is impossible for it to be replaced with new UK legislation by any "exit day". Therefore, the EUWA provides for continuity by preserving EU law as it exists immediately before Brexit, converting it into domestic law, and then, where perceived to be necessary, repealing or amending it.

A crucial point is that, if no Withdrawal Agreement is concluded, and/or if Article 50 TEU is not revoked, the EUWA will automatically apply in the event of a 'No Deal' Brexit. If, on the other hand, Parliament votes to accept a deal, the EUWA will apply after any transitional period agreed to in the Withdrawal Agreement expires. Therefore, the EUWA will, assuming Brexit takes place, form the constitutional basis of a great deal of domestic law in the future. Its impact on the UK constitution is therefore of the first importance.

¹¹ The Withdrawal Agreement (n 6).

¹² Per House of Lords Constitution Committee, European Union (Withdrawal) Bill [29 January 2018] HL 69 2017–19, 3.

The EUWA itself is hugely complex and somewhat obscure. Its main functions, however, could be summarized as the following: first, the EUWA provides for repeal of the European Communities Act 1972 (ECA); second, it provides for legal continuity when Brexit takes place by converting EU law into national law; third, it grants ministers huge law-making powers to deal with a withdrawal from the EU; fourth, it sets out important and controversial provisions regarding devolution; and fifth, it provides for Parliament to approve any negotiated Withdrawal Agreement and framework for the future relationship with the EU. The EUWA was also notably enacted without the consent of the Scottish Parliament. It was therefore in breach of the Sewel Convention¹³ which states that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.¹⁴

The EUWA raises controversial issues, down to its very title, which was changed from the former grandiose 'Great Repeal Bill,' to the much more mundane EU Withdrawal Act. During its passage through the House of Commons in autumn 2017, Dominic Grieve described the bill as an 'astonishing monstrosity', and Chris Bryant, in the House of Commons, said:

This bill is utterly pernicious, it is dangerous, it is fundamentally un-British and I think that it has at its heart a lie. It pretends to bring back power to this country, but it actually represents the biggest peace time power grab by the executive over the legislature, by the government over parliament, in 100 years.¹⁵

A key emphasis in the EUWA is continuity: the existing body of EU law is frozen as of exit day, and adopted as UK law. For this reason, if no other, the EUWA represents a momentous undertaking. However, continuity is

¹³ Further information about the Sewel Convention is available at the UK Parliament website: <<https://www.parliament.uk/site-information/glossary/sewel-convention/>> accessed 17 September 2019.

¹⁴ And indeed, the Scottish Parliament adopted its own 'Continuity Bill', which was later subject to litigation in the UK Supreme Court – see further below.

¹⁵ A Cowburn, 'Senior Tories attack "astonishing monstrosity" of Theresa May's EU Withdrawal Bill', *The Independent* (September 17 2017) <<https://www.independent.co.uk/news/uk/politics/brexit-latest-theresa-may-withdrawal-bill-attacked-ken-clarke-a7934956.html>> accessed 17 September 2019; Chris Bryant MP's speech is available on Hansard for 11 September 2017, Vol 628 Col 455.

accomplished by means of considerable complexity. And crucially, ministers will then have considerable powers (under Sections 7 and 8 EUWA) to amend or repeal retained EU law.

Despite the general conversion of EU law into national law, Section 5(4) EUWA provides that the Charter of Fundamental Rights is not part of domestic law as from exit date. Moreover, there is to be no right of action after exit 'based on a failure to comply with any of the general principles of EU law.'¹⁶ Therefore, actions based on fundamental rights post-Brexit will be radically different from at present, and individuals will not be able to pursue remedies currently available. Leading civil rights bodies have warned of a human rights deficit in the UK due to Brexit.¹⁷

As Vernon Bogdanor has argued,¹⁸ the EUWA (and Brexit more generally) achieves something unprecedented in the UK's constitutional history. For the withdrawal of the UK from the EU transforms a protected constitution (i.e. one that contains entrenched provisions) into an unprotected one. While the UK remains a member of the EU, because of the supremacy of EU law, neither the EU Charter, nor rights provisions in EU treaties and legislation, may be repealed by the UK Parliament, and national courts are empowered to disapply domestic legislation incompatible with those rights, as in *Benkharbouche*.¹⁹ Contrast this with the traditional British system of unbridled UK parliamentary sovereignty, where no entrenchment is possible and so ultimately, it is not possible to protect against abuse of legislative power. Notably, this exclusion of the Charter in the EUWA differs to the

¹⁶ Schedule 1, paragraph 3(1).

¹⁷ See 'EU Withdrawal Bill will not protect UK rights: open letter' (Equality and Human Rights Commission, 14 January 2018) <<https://www.equalityhumanrights.com/en/our-work/news/eu-withdrawal-bill-will-not-protect-uk-rights-open-letter>> accessed 10 September 2019.

¹⁸ Vernon Bogdanor, 'How Brexit will erase your rights' (*Prospect* magazine, May 2018) <<https://www.prospectmagazine.co.uk/magazine/how-brexit-will-erase-your-rights>> accessed 13 September 2019.

¹⁹ *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62: the Supreme Court found provisions in the State Immunity Act 1978 breached Chapters 6 and 14 ECHR and that the Charter required those provisions to be disapplied insofar as they barred employment law claims within the scope of EU law.

position that would have been adopted under the Scottish Continuity Bill (see further below) which would have preserved the Charter in Scottish law. It also leaves open the question as to how there will exist 'equivalent rights' in Northern Ireland and Ireland after Brexit.²⁰ In many ways human rights have become devolved in the UK; for example, Scotland²¹ and Northern Ireland²² have devolved human rights jurisdictions, aside from the Human Rights Act. Therefore, the imposition of a unified approach by Brexit will be keenly felt in the devolved nations.

At time of writing, much is uncertain. But Brexit has, to date, involved a forceful centralization. At present, the danger seems to be that the devolutionary aspects of Brexit have been ignored or side-lined, while negotiations between the EU and UK government proceed. Given that England lacks devolution, and the English government is merged into the general UK government, this seems to empower England over the devolved nations.

III. DEVOLUTION: THE TERRITORIAL CONSTITUTION IN THE BREXIT LEGISLATION AND NEGOTIATIONS

It is all too easy to forget that the UK is a state of four nations, yet the devolved dimensions are amongst the most problematic features of Brexit. Both the Scotland Act 2016 and the Wales Act 2017 state that devolution is a permanent part of the UK constitution, and could be abolished only by consent through popular votes in Scotland and Wales.²³ Legal and constitutional protection for devolution in Northern Ireland is set out in the 1998 Belfast or 'Good Friday' Agreement (B/GFA),²⁴ which is an international treaty, implemented in the UK by the Northern Ireland Act

²⁰ See further, Chris McCrudden, 'The Good Friday Agreement, Brexit, and Rights' (Royal Irish Academy Brexit Briefing, October 2017).

²¹ Human Rights are devolved under the Scotland Act 1998 although the Human Rights Act 1998 is reserved to the UK overall by Schedule 4 Scotland Act 1998.

²² The Northern Ireland Act 1998 includes various human rights and equality provisions, such as section 75, which requires public bodies to have due regard to promote equality between people on the certain specific grounds.

²³ Section 1 Scotland Act 2016; section 1 Wales Act 2017.

²⁴ Agreement Reached in the Multi-Party Negotiations, April 10 1998 ['Belfast/Good Friday Agreement'].

1998. This provides unique constitutional arrangements for Northern Ireland – such arrangements being necessary for continued peace after the 'Troubles'. At time of writing, however, devolution in Northern Ireland has been suspended.

UK devolution since 1998 has taken place in the context of EU membership. To an extent perhaps not appreciated, the EU has provided overarching frameworks for devolved areas such as agriculture. With Brexit this will change. Once the UK leaves the EU, competences once exercised at EU level must be transferred back to the UK. But a key question is who should exercise those returned competences? Some, such as agriculture, fisheries and environment, are devolved, but others, such as trade, are reserved to the UK overall. The problem of which legal category – devolved or reserved – to return these areas of activity to has led to friction between the UK and the devolved governments.

Sections 10, 11 & 12, along with Schedules 2 & 3 EUWA, are the main provisions dealing with devolution. They are confusing and opaque, and, while supposedly transitional, this is not at all clear from the face of the EUWA. Most controversial is Section 12 EUWA, which amends the main devolution statutes to regulate devolved competence regarding retained EU law.

Section 12 EUWA now prevents devolved authorities from amending retained EU law relating to devolved matters in ways already proscribed by regulations made by UK ministers. Before such regulations can be made, devolved legislatures must be consulted. However, ultimately they cannot block UK ministers from limiting their powers to amend retained EU law. This means the EUWA enables the UK Government unilaterally to limit devolved powers in these areas.

1. Scotland

The final form of Section 12 EUWA satisfied the Welsh Government, which recommended legislative consent to the Bill. However, the Scottish Parliament refused to grant its consent to the relevant sections of the EUWA, which was nonetheless adopted in Westminster, in spite of this. In addition, in March 2018, the Scottish Parliament adopted the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Act

2018 by 95 votes to 32. This Scottish Continuity Bill shared its structure and approach with the EUWA, seeking to complement it. However, it diverged from the EUWA in some areas. For example, it did not exclude the Charter, and allowed Scotland to keep pace with EU developments in the future. It also, in its Section 17, required consent of Scottish ministers should UK ministers wish to alter or repeal retained EU law within devolved areas – a provision crucial to protecting Scotland's interests, but lacking in the EUWA itself.

The legal competence of this Scottish legislation was challenged by the UK Government before the UK Supreme Court, and this lawsuit made constitutional history by being the first Act of the Scottish Parliament referred to the Supreme Court by the Attorney General under Section 33 Scotland Act 1998. In a long and complex judgement, the Court found only Section 17 to be outside the Scottish Parliament's competence, due to enactments in the EUWA (subsequent to the adoption of the Scottish Continuity legislation), which prohibited its own modification.²⁵ This effectively killed off the Continuity Bill. However, it is hard not to conclude that the Continuity Bill was largely competent when adopted by the Scottish Parliament in March 2018. If so, surely it follows that the UK government may challenge any devolved legislation it dislikes, thus suspending its application while the matter is *sub judice*, and in the meantime adopting its own 'protected legislation', which by coming into force automatically trumps the devolved legislation. Does this not undermine the devolution settlement?

It is likely that post-Brexit, common 'frameworks' of shared governance will need to be established over policy areas where there is an element of devolution²⁶ to ensure common UK approaches where necessary. Such frameworks would be a novel concept for both devolution and the UK

²⁵ For further commentary see eg S Douglas-Scott, 'Brexit legislation in the Supreme Court: A Tale of Two Withdrawal Acts?' (Centre on Constitutional Change, 17 December 2018) <<https://www.centreonconstitutionalchange.ac.uk/opinions/brexit-legislation-supreme-court-tale-two-withdrawal-acts>> accessed 10 September 2019.

²⁶ The UK White Paper on the 'Great Repeal Bill' (Legislating for the United Kingdom's withdrawal from the European Union, Cm 9446, March 2017) speaks of 'frameworks' in this context (at 8, 28), but it is not clear what it has in mind, and 'framework' is not used in the EUWA.

Constitution. The problem is that UK devolution came about within the structures of the larger EU single market, so it was unnecessary to provide the detailed framework of a UK single market. How common frameworks and a UK single market may be introduced in a UK that is no longer a 'unitary' state (at least from devolution perspectives) is at present unclear.

2. Northern Ireland

The prospect of a post-Brexit external border between EU (Ireland) and non-EU territory (Northern Ireland) is highly problematic, not least because of memories of the role that border played in the violent recent past. The situation of Northern Ireland presents singular issues, given that the B/GFA also involves Ireland and that its terms were predicated on the joint commitment of the UK and Ireland to EU law. The EUWA therefore contains specific provisions relating to the border between Northern Ireland and Ireland and the continuation of north-south co-operation.

Section 10 EUWA requires that a minister (or devolved authority) must act in accordance with the Northern Ireland Act 1998 and have regard to the 'Joint Report'²⁷ of the EU and UK negotiators. No regulations made under the EUWA may reduce any north-south co-operation provided for in the B/GFA or create any Northern Ireland border arrangements involving physical infrastructure unless agreed between the UK and the EU.

The 'Joint Report' also contained an important guarantee that '[t]he UK commits to ensuring that no diminution of rights is caused by its departure from the EU'.²⁸ But how the EUWA's exclusion of the EU Charter sits with the seeming guarantee in the Joint Report that there is to be no diminution of rights for Northern Ireland and the B/GFA provision that human rights protected in Northern Ireland are to be equivalent to those in the Republic, and vice versa, is entirely unclear.²⁹ If there is to be no diminution, those rights must include all rights protected by general principles of law and the

²⁷ 'Joint report from the negotiators of the EU and the UK Government on progress during phase 1 of negotiations under Chapter 50 TEU on the United Kingdom's orderly withdrawal from the European Union' (8 December 2017) TF50(2017)19.

²⁸ Joint report from the negotiators of the EU and the UK (n 27) para 53, 8.

²⁹ Chris McCrudden (n 20).

Charter. Yet, in most respects, the EUWA does not distinguish between how rights in Northern Ireland and in the rest of the UK are treated.

It is unclear how the EUWA will interact with any Withdrawal Agreement, and future EU-UK agreements. In her Mansion House speech in March 2017, Theresa May maintained that she had 'consistently put upholding the Belfast Agreement at the heart of the UK's approach' to Brexit.³⁰ The Protocol on Northern Ireland to the EU/UK draft Withdrawal Agreement is intended to act as an insurance policy in case the future UK-EU relationship does not meet the commitments made in the December 2017 Joint Report. It provides a 'backstop' arrangement whereby, in the absence of a future agreed UK-EU relationship, there will be a 'common EU-UK customs territory' and certain regulatory alignments between the EU and Northern Ireland.³¹

However, since then the UK government has on many occasions said that the backstop arrangement is untenable as it conflicts with UK red lines on leaving the single market and customs union, as well as threatening the 'constitutional integrity of the UK'.³² However, the UK already agreed to these terms on the backstop in the Joint Report. Indeed, by backtracking on its former agreed position on the backstop, the UK government risks years of peace under the B/GFA. As such, the whole backstop problem is entirely of the UK Government's making, due to Theresa May's insistence that Brexit means the UK leaving the customs union and single market.

Furthermore, the UK has been unable to submit any workable proposals as to how a hard border could be avoided if all of the UK (including Northern Ireland) remains committed to leaving the customs union and single market. It may also be argued that the 'backstop' arrangement does not threaten the

³⁰ Teresa May, 'PM speech on our future economic partnership with the European Union' (Gov.uk, 2 March 2018) <<https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union>> accessed 10 September 2019.

³¹ See e.g. Art 8(1) Protocol which states: 'Without prejudice to the provisions of Union law referred to in Annex 5, the lawfulness of placing goods on the market in Northern Ireland shall be governed by the law of the United Kingdom as well as, as regards goods imported from the Union, by Chapters 34 and 36 TFEU.'

³² See e.g. 'Brexit deal will not jeopardise UK integrity, vows Raab', *BBC News* (2 November 2018) <<https://www.bbc.com/news/uk-northern-ireland-46065909>> accessed 17 September 2019.

constitutional integrity of the UK, as there is already considerable differentiation within UK legal and constitutional arrangements. This point will be discussed further below.

IV. THE THREAT TO DEVOLUTION

EU membership provided support and reinforcement for UK devolution. A UK single market was supplanted by an EU single market, enabling a different sort of devolution settlement, with less direct control from London. Membership of the EU also sheltered devolved nations from a unitary UK approach by, for example, distributing EU funding on a more favourable basis to some areas of the UK than others (as with agriculture). This approach is unlikely to continue after Brexit, and in its place, a unified UK approach is more likely, however detrimental to devolved interests. The EU setting also diminished the significance of the border across Ireland, and reconciliation between the UK and Ireland took place within the framework of common EU membership.

The UK lacks a codified Constitution, but devolution statutes have functioned as mini-constitutions,³³ directly binding devolved legislatures to EU law and the ECHR. There has been a visible trend over the past 20 years of divergence and differentiation regarding UK constitutional arrangements, as well as the growth of more progressive constitutional forms in devolved nations. In particular, the Scotland Act 2016 and Wales Act 2017 brought extensive new powers. Neil MacCormick has publicized the concept of 'post sovereignty',³⁴ a concept embraced by those who view the EU as providing for authority and competences to be divided, pooled and shared both above and below state level.

³³ They set out the principal governance arrangements for these nations, as well as legal standards, such as EU law, and the European Convention on Human Rights, that must be complied with.

³⁴ N MacCormick, 'On Sovereignty and Post-Sovereignty' in N MacCormick *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (OUP 1999).

Nonetheless, there exist deficiencies in the devolution structures and processes. To be sure, the UK acknowledges its 'nations'³⁵ of England, Scotland, Wales and Northern Ireland, but their autonomy remains limited. Most notably, UK devolution appears to leave Westminster parliamentary sovereignty unaffected. Sovereignty has not actually been legally divided as in federal systems, and the weak Sewel Convention (even in its statutory form³⁶), requiring that Parliament should not normally legislate with regard to devolved matters without devolved consent, governs instead. The adoption of the EUWA without the consent of the Scottish Parliament affirms Parliamentary sovereignty, and is significant and controversial.³⁷ While such consent is not legally necessary, it is required as a matter of constitutional convention — a convention which Westminster itself recently legislatively endorsed. The UK Supreme Court held in *Miller* that the Sewel Convention is not *legally* enforceable, it is only a convention.³⁸ Westminster is supreme and may legislate on any matter, including devolved issues. However, the EUWA's adoption without Scottish consent illustrates how mechanisms based on self-restraint and mutual trust may break down, and have sober implications for the stability of the UK.

Furthermore, even prior to the EU referendum, devolution was characterised by weak institutional relationships between the UK central government and the devolved institutions. For example, the Joint Ministerial Committee (JMC) functioned informally, its structures set out in MOUs, with no legal powers, and even failed to operate at all from 2002–2007.³⁹ Brexit has further revealed the lack of shared approaches, and lack of trust, between devolved

³⁵ Notably, in 2010, Spain's Constitutional Court stated that 'The interpretation of the references to "Catalonia as a nation" and to "the national reality of Catalonia" in the preamble of the Statute of Autonomy of Catalonia have no legal effect.'

³⁶ See Scotland Act 1998, s28(8), as inserted by Scotland Act 2016, s2.

³⁷ Notably, the Scottish Government also declined to recommend the Scottish Parliament consent to other Brexit Bills, namely the Healthcare and Agriculture Bills, due to the UK Government's proceeding in spite of refusal of consent to the EUWA, which the Scottish Government views as effectively suspending the Sewel Convention.

³⁸ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 148.

³⁹ See House of Lords Constitutional Committee: 'Inter-governmental relations in the UK' (11th Report, session 2014–15, HL Paper 146) which found the JMC to be working unsatisfactorily.

and central governments. Matters were not improved when the EUWA returned from the Lords to the Commons in June 2018, and no Scottish MP was given time to speak on this topic, and all SNP members walked out of the Chamber. This was dismissed by some as a 'stunt',⁴⁰ but is a serious matter, given that the Scottish Parliament had already refused legislative consent to the EUWA and adopted its own 'Continuity Bill' rivalling the EUWA.

The exclusion of devolved government participation in the Brexit negotiations is significant. Although the Scottish Government argued for a differentiated Brexit solution for Scotland, to reflect the different referendum vote, in its paper, 'Scotland's Place in Europe', this was rejected by the UK Government.⁴¹ This rejection left no space for Scotland to protect its interests, in a situation where the UK government has embraced a unitary, top-down approach, excluding devolved governments from negotiations.⁴²

Equally relevant is the current absence of devolved government in Northern Ireland. This effectively excludes a Northern Irish voice in Withdrawal negotiations, with the exception of the currently powerful voice of Democratic Unionist Party (DUP) MPs, who are supporting, via a confidence and supply agreement, the UK government at Westminster. How does this square with the requirement for UK government neutrality in the B/GFA? The B/GFA sets out complex constitutional arrangements to achieve a peace settlement in Northern Ireland. One such provision in effect

⁴⁰ Pippa Crerar, Peter Walker and Libby Brooks, 'SNP MPs walk out of Commons in protest over Brexit debate', *The Guardian* (14 June 2018) <<https://www.theguardian.com/politics/2018/jun/13/snp-mps-walk-out-of-commons-in-protest-over-brexit-debate>> accessed 17 September 2019.

⁴¹ 'Scotland's Place in Europe' (The Scottish Government 2016) <<http://www.gov.scot/Resource/0051/00512073.pdf>> accessed 10 September 2019.

⁴² See further on this S Douglas-Scott 'Brexit and the Scottish Question' in F Fabbrini (ed) *The Law and Politics of Brexit* (OUP 2017). On 5 March 2019, Nicola Sturgeon stated in the Scottish Parliament (of Theresa May): 'Perhaps her one and only note of consistency in all of this, over the past two-and-a-half years, has been her contempt for Scotland and the position of the Scottish Parliament.' See further: Andrew Learmonth, 'Historic day as Scottish and Welsh parliaments reject May's Brexit deal' (The National, 5th March 2019) <<https://www.thenational.scot/news/17478439.historic-day-as-scottish-and-welsh-parliaments-reject-mays-brexit-deal/?ref=mr&lp=8>> accessed 10 September 2019.

sets out a legal means for Northern Ireland to secede⁴³ from the rest of the UK (the only UK nation to have this set out in law).⁴⁴ This ensures Northern Ireland's consent to remaining in the UK. Opponents of the 'backstop' express the view that it threatens the 'constitutional integrity' of the UK.⁴⁵ However, leaving open the possibility of 'No Deal' and a return to a physical border across Ireland, this may lead to the re-emergence of a mainstream Irish unity debate in Northern Ireland⁴⁶ and a majority vote in Northern Ireland for unity with Ireland. The government's handling of Brexit is a departure from the careful constitutional approach of the B/GFA and could constitute a greater threat to the constitutional integrity of the UK.

Finally, it must be noted that England was omitted from the devolution legislation, and unlike the other three nations, lacks its own dedicated Parliament. Although EVEL ('English votes for English laws') provides some mitigation – albeit mitigation of extreme complexity – there is no obvious solution to the asymmetric patterns of devolution in the UK, an element which has caused ill-feeling and may have contributed to the rise of English nationalism. Notably, both EVEL and the EU in-out referendum were Conservative election manifesto pledges in 2015 – both unsatisfactory

⁴³ Under Constitutional Issues, s 1(ii) of the B/GFA states that 'it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right to self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of people of Northern Ireland'.

⁴⁴ Unlike Scotland, which in the context of the 2014 independence referendum, was specifically authorized by UK ministers under a 's.30 order' (of the Scotland Act 1998) to conduct the referendum.

⁴⁵ See e.g. 'Brexit deal will not jeopardise UK integrity, vows Raab', *BBC News* (2 November 2018) <<https://www.bbc.com/news/uk-northern-ireland-46065909>> accessed 17 September 2019.

⁴⁶ See further for research indicating this: A Kramer, *Brexit, Northern Ireland, and Devolution* (Centre on Constitutional Change, 1 October 2018) <<https://www.centreonconstitutionalchange.ac.uk/opinions/brexit-northern-ireland-and-devolution>> accessed 10 September 2019.

remedies for rising English nationalism, as they have divided the UK, and failed to stem the rise of English nationalism.⁴⁷

Therefore, Brexit places the UK's fragile territorial constitution in sharp relief. Brexit was supposed to be about 'taking back control' and regaining sovereignty. Yet Brexit imperils the very national sovereignty and self-determination that its advocates believe it will bring. It risks shattering the delicate balance and stability of the UK by threatening the peace settlement in Northern Ireland and raising the possibility of another independence referendum in Scotland. Indeed, on 28 May 2019, the Scottish Government introduced a Referendums (Scotland) Bill⁴⁸ to set the rules for any referendum within the competence of the Scottish Parliament. Unlike the 2014 independence referendum, this Bill has been designed to avoid the need for UK approval by means of a 's.30 order' granting the Scottish Parliament the competence to hold an independence referendum.

The process has also clearly illustrated the lack of possibilities for UK sub-state entities to input or influence vital decisions made on Brexit, as well as how the UK government has insisted on centralizing and proclaiming its domination of the whole withdrawal process. We might conclude here that, within the existing Westminster parliamentary framework, the (minority) UK government has been able to appropriate a great deal of executive power to control the Brexit process for its own purposes. Yet Brexit has consequences of huge constitutional importance, not least for the devolution system, and the capacity to destabilise the UK's own constitutional foundations.

V. BRITAIN'S AMBIVALENT TERRITORIAL CONSTITUTION

Is it possible to preserve the UK in the face of Brexit? It seems unlikely that structures provided by the 1688 constitutional settlement, which gave rise to parliamentary supremacy, can resolve the revolution unleashed by Brexit, partly because the devolved nations have now experienced constitutional

⁴⁷ See further on this, 'Will England ever get its own Parliament?', *BBC News* (7 June 2018) <<https://www.bbc.com/news/uk-politics-44208859>> accessed 17 September 2019.

⁴⁸ The Bill may be found here: <<https://www.parliament.scot/parliamentary-business/Bills/111844.aspx>> accessed 10 September 2019.

transformation, and are more open to modified and circumscribed sovereignty than England. Part of the problem is the inconclusive nature of Britain's current constitutional arrangements. Britain is a devolved polity but what does this mean? And how does devolution compare to federalism, or to a 'unitary' or 'union' state? Pufendorf, in the 17th century, described the Holy Roman Empire as an irregular body like some misshapen monster,⁴⁹ and the UK today might appear irregular and misshapen, if not monster-like.

I. 'Unitary' state?

For example, parliamentary supremacy notwithstanding, it would not be correct to describe Britain as a 'unitary' state. The term 'unitary state' suggests a constitutional order with a single, ultimate legal competence, subscribing to a fundamental 'rule of recognition',⁵⁰ placing a central authority or Institution, for example the Queen in Parliament, in a position of indisputable authority. While the UK is often characterized as a 'unitary' state, such a classification fails to convey the diversity within it.⁵¹

Devolution is not symmetric. There exist different constitutional settlements in each of the devolved nations, as well as in England, which lacks devolution (other than at local government level). The Scottish and Welsh Parliaments and governments are stated in UK legislation to be permanent,⁵² and Scotland is now one of the most devolved territories anywhere in Europe,⁵³ including, since the Scotland Act 2016, its shared taxation powers. (However, Section 28 Scotland Act 1998 explicitly sets out the ultimate sovereignty of the Westminster Parliament over Scotland, and Scotland and Northern Ireland were not able to protect overall votes for 'Remain' in the

⁴⁹ S Pufendorf, *Of the law of nature and nations*, in B Kennet (trans) (London 1717) vi-9, 152.

⁵⁰ See HLA Hart, *The Concept of Law* (Oxford Clarendon Press 1961).

⁵¹ See further: R Schütze and S Tierney, *The United Kingdom and the Federal Idea* (Hart Publishing 2018).

⁵² E.g. Scotland Act 2016.

⁵³ Partly as a result of attempts in the 2016 Scotland Act to follow up on the 'Vow' of Unionist parties in the run up to the 2014 independence referendum and proposals of the Smith Commission thereafter.

EU Referendum).⁵⁴ The B/GFA set up a power sharing assembly in Northern Ireland, but also a North-South council (Eire-Northern Ireland) and East-West (Northern Ireland-Westminster) institutions. There also exists some entrenchment in the Northern Ireland Act 1998 due to its provisions on a referendum on continued UK membership. There never has been a UK-wide system for allocating resources according to need. Instead, each of the devolved nations has its own funding settlement negotiated bilaterally with the centre.

In these ways, the ultimate control of the centre seems to be undermined and there exist competing constitutional narratives in the periphery of the UK to the concept of a unitary UK state. Yet the working of these arrangements has been challenged by Brexit.

2. 'Union' state?

It has been suggested that Britain should be classified as a 'union' rather than a unitary state. The concept of union is much used by scholars in political and constitutional studies to denote the consolidation of distinct, extant units into one, single entity, and Rokkan and Urwin⁵⁵ have used the term to describe a polity distinct both from the unitary and the federal state.

Vernon Bogdanor characterized devolution as 'the start of a new song [...] in which the United Kingdom is becoming a union of nations, each with its own identity and institutions.'⁵⁶ The Union of Scotland and England was the founding act of the UK in 1707. Before then, there was no British state. This

⁵⁴ In 2014 David Cameron, then Prime Minister, stated in response to an SNP proposal that the UK should only leave the EU if a majority in each of the UK's four constituent parts had voted to do so: 'We are one United Kingdom. There will be one in/out referendum (for the EU) and that will be decided on a majority of those who vote.' See 'Cameron rejects giving Scotland veto in EU referendum' *Reuters*, (29 October 2014) <<https://uk.reuters.com/article/uk-britain-eu-scotland/cameron-rejects-giving-scotland-veto-in-eu-referendum-idUKKBN0II1EV20141029>> accessed 17 September 2019.

⁵⁵ S Rokkan and D Urwin, *Economy, Territory, Identity: Politics of West European Territories* (Sage Publications 1983).

⁵⁶ V Bogdanor, *Devolution in the UK* (OUP 1998) 287.

was labelled an 'incorporating'⁵⁷ union, yet Scotland always maintained a distinctive profile secured in the Treaty and Articles of Union. Scotland's Parliament was dissolved, but Scotland maintained its judiciary and legal system, most of its local government, its universities and Presbyterian church – so in many ways, this was a partial union.⁵⁸ In 1801, the Union of Great Britain and Ireland abolished the Dublin Parliament and provided for direct rule from Westminster. But it also set out protections for Ireland, although more limited than those for Scotland.⁵⁹ This illustrates that, even prior to devolution, the UK was asymmetric. However, what is perhaps curious, is that these Acts of Union, these 'constituting treaties', came to be seen as ordinary legislation under the prevalent paradigm of a Diceyan parliamentary sovereignty.⁶⁰ So guarantees given to the Scots in the Act of Union appeared worthless. However, as Lord Cooper stated in the Scottish Court of Session: 'The principle of the unlimited sovereignty of parliament is a distinctively English principle which has no counterpart in Scottish constitutional law'.⁶¹

Nevertheless, by the later 19th century, pressure for increasing differentiation was mounting. In Ireland, 'home rule,' was demanded, namely, repatriation of most competences and an Irish Parliament overseeing all domestic matters. Westminster passed the 1914 Government of Ireland Act, but this was not implemented due to the First World War, and in 1916 the Easter Rising took place, followed by the Irish war of independence. In 1922 Ireland acquired Dominion status – a constitutional compromise between British authorities and Irish nationalist rebels, who demanded a complete break from the UK. In 1937, the 1922 Dominion Constitution was replaced by Ireland's existing Constitution. Prior to then, however, Ireland was

⁵⁷ Interestingly, the initial requirement of the Scottish commissioners was for the formation of a 'federal union', by which they meant a loose association retaining separate parliaments. See e.g. W Ferguson, 'The Making of the Treaty of Union of 1707' (1964) 43 *The Scottish Historical Review* 89, 103.

⁵⁸ See eg J D Ford, 'The Legal Provisions in the Acts of Union' (2007) 66 *Cambridge Law Journal* 106.

⁵⁹ See further on this, A Jackson, *The two Unions: Ireland, Scotland, and the survival of the United Kingdom, 1707-2007* (OUP 2012).

⁶⁰ Dicey stated that no 'limitations imposed by law on the absolute authority of Parliament has any real existence.' A V Dicey, *Introduction to the Study of the Law of the Constitution*, (Macmillan 1950 ed) 68-70.

⁶¹ *MacCormick v Lord Advocate* 1953 SC 396, 1953 SLT 255.

partitioned so Northern Ireland remained part of the UK.⁶² The current constitutional settlement in Northern Ireland, set up as part of the peace process, suggests that pragmatic, variegated constitutional solutions are needed, rather than absolutist and uncompromising Acts of Union.⁶³

Returning to Scotland, from the 1990s, a different type of Scottish nationalism surfaced, along with devolution, which enabled more progressive constitutional forms, for example different voting systems for the Scottish Parliament making it more representative of the electorate. However, it also posed a challenge to unitary parliamentary sovereignty. The Scottish Parliament and Government have been portrayed as representing the 'sovereign' right of the Scottish people.⁶⁴ The discord between these two approaches is visible with Brexit, where Scotland voted to remain in the EU – a discord which may well lead to a second Scottish independence referendum. In March 2017, Nicola Sturgeon requested the UK Government to adopt a section 30 order for a second Scottish Independence Referendum before the spring of 2019. This request was rejected by Theresa May, but the issue has not gone away, and in May 2019, the Scottish Government introduced a Referendums (Scotland) Bill, enabling the Scottish Government to launch an independence referendum, without the need for UK government approval by means of a 's30 order' under s30 Scotland Act 1998.⁶⁵ The suggestion is that such a referendum might be held later in 2020.

Surprisingly, regardless of the challenge of the Scottish independence referendum in 2014, there has been little debate about what the 'Union' or 'UK' is or should be, despite further devolution legislation (Scotland Act 2016 and Wales Act 2017) having since been adopted. The historical nature and

⁶² See further on partition TE Hachey, 'One people or two? The origins of partition and the prospects for unification in Ireland', (1973) *Journal of International Affairs* 232.

⁶³ See further J Tonge, 'The impact of withdrawal from the European Union upon Northern Ireland' (2016) *Political Quarterly* 1.

⁶⁴ See further, on popular sovereignty in Scotland, N MacCormick, 'Sovereignty: Myth and Reality' (1995) *Scottish Affairs* 1.

⁶⁵ See eg Jess Sargeant, 'A second referendum on Scottish independence' (Institute for Government, 30 May 2019) <<https://www.instituteforgovernment.org.uk/explainers/second-referendum-scottish-independence>> accessed 13 September 2019.

meaning of the union, and of Britain, has been largely ignored, and there exists no written Constitution nor legal tradition to explain the constitutional identity of the United Kingdom.

The historian, Linda Colley⁶⁶ uses the term 'composite state' as a concept essential to understanding the UK Union.⁶⁷ A key feature is that of consent, whereby the several peoples of a composite state may renegotiate their relationships with each other. Colley's point is that the existence of a composite state depends upon competent management, as well as a vision to hold it together. At present, the UK appears to have neither. Without shared conceptions of a British nation, or shared constitutional doctrines, the rationale for keeping the Union is largely negative, its continued existence dependent on primarily pragmatic reasons, such as economic and social benefits. Yet Brexit threatens these very benefits.

In her Mansion House speech in March 2017, Theresa May stated that she 'would not allow anything that would damage the integrity of our precious Union.'⁶⁸ Yet there is no longstanding, unchanging identity to this union. From 1707, it has been characterized by a dynamic, fluctuating character, which has enabled it to accommodate serious challenges such as the loss of Ireland and end of the Empire. At the same time, there has also always been a risk that the Union may disintegrate in the future. As a result of devolution, the UK has been 'hollowed out', yet, as Tierney writes, 'this has been without any sense of coherent planning,'⁶⁹ and the purpose of devolution has never clearly been articulated.

⁶⁶ L Colley, *Acts of Union and Disunion* (Profile Books 2014).

⁶⁷ Historians such as David Armitage explain how composite statehood was a feature of early modernity, D Armitage, *Ideological Origins of the British Empire* (CUP 2000); see also L Benton, *A Search for Sovereignty: Law and Geography in European Empires 1400-1900* (CUP 2010).

⁶⁸ T May, 'Speech on our future economic partnership with the European Union', speech at Mansion House (Gov.uk, 2 March 2018) <www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union> accessed 17 September 2019.

⁶⁹ S Tierney, 'Drifting towards Federalism?' in Schutze and S Tierney (eds) *The United Kingdom and the federal idea* (Hart 2018) 102.

VI. A FEDERAL FUTURE?

Could a federal UK and/or a written constitution emerge out of the constitutional morass of Brexit? Some commentators have advocated federalism⁷⁰ as a solution for the UK. Part of the purpose of federalism is to foster diversity in union, which fits well with the UK's existing diverse form. The UK is already a devolved state, and the rise of 'post sovereignty' arguments, referenced earlier, raise issues about the relationship of Britain's component parts to the centre, each other, and to the EU, questions clearly part of the federalist mindset.

Undoubtedly, Britain has demonstrated some federalist tendencies. The 1707 Treaty of Union with Scotland demonstrated such tendencies, which resurfaced in the 1860s with the Irish movement for Home Rule, and a bit later with the Imperial Federation movement.⁷¹ Winston Churchill even considered a federal union with France in 1940.⁷² Bogdanor described the UK as 'quasi-federal'.⁷³ Since the 1990s these federal tendencies have gained momentum. The 1998 Human Rights Act could be compared with Bills of Rights operating in federal constitutions, and the UK Supreme Court, brought into existence in 2009, has increasingly taken on characteristics of a

⁷⁰ See further e.g. G Brown, 'Brexit is an opportunity to make a federal United Kingdom' *Financial Times* (March 28 2017) <<https://www.ft.com/content/c4658ba8-130a-11e7-b0c1-37e417ee6c76>> accessed 13 September 2019; A Blick, 'Devolution, federalism and the UK Constitution: Lessons and implications of the Brexit process' *The Federal Trust* (June 2018) <<https://fedtrust.co.uk/the-united-kingdom-a-federal-perspective/the-changing-uk-constitution/devolution-federalism-and-the-uk-constitution/>> accessed 13 September 2019; 'The United Kingdom: Federalism or Bust?' collected essays of the Federal Trust (June 2015) <https://fedtrust.co.uk/wp-content/uploads/2015/06/Federalism_or_Bust.pdf> accessed 13 September 2019; S Douglas-Scott 'Britain and the European Union: Federalism and Differentiation' in Schutze and S Tierney (eds) *The United Kingdom and the federal idea* (Hart 2018).

⁷¹ See e.g. W Roy Smith, 'British Imperial Federation' (1921) 36 *Political Science Quarterly* 274-297.

⁷² See further, M Burgess, *The British Tradition of Federalism* (Leicester University Press 1995); John Kendle, *Federal Britain* (Routledge 1997).

⁷³ Bogdanor, *Devolution in the UK* (OUP 2001).

Constitutional Court one might find in a federal jurisdiction,⁷⁴ with an increased caseload involving human rights or constitutional issues. As stated, the devolution statutes have the capacity to function as 'mini constitutions,' for example, setting out a division of competences between reserved and devolved matters.

However, the UK is not a federal state. Although there was a brief period of enthusiasm before the First World War for 'home rule all round',⁷⁵ nothing came of this and federalism has never operated within the UK. Somewhat ironically, Britain helped generate federations elsewhere – in Canada, Australia, South Africa and India – mostly devised to provide structures in which diverse ethnic groups and cultures could get along, side by side. Yet Britain's own current federal traits should not be overemphasised. Constitutional supremacy in the UK resides in Parliament, not in a codified constitutional text interpreted by courts. Also, the House of Lords, Britain's upper parliamentary chamber, does not function on a territorial basis, as a states' chamber, as it might do in a federal system. A major reason why the UK has not developed as a federal state lies in a fixation on parliamentary sovereignty, which has put a stop to exploration of other constitutional forms. Indeed, in some quarters there might seem to be an antipathy to federalism, characterized as 'Neurosis' by Marquand.⁷⁶

However, the concept of federalism is itself open to contestation. As Halberstam suggested, federalism can be a charged and confusing word.⁷⁷ Some view it as enabling decentralization, whereas, for others, on the contrary, it indicates a strong central government. In his notable work, Wheare defined federalism as 'the method of dividing powers so that the general and regional governments are each, within a sphere, coordinate and independent.'⁷⁸ Yet this definition seems to ignore cooperative elements of federalism by which various levels of governance are not necessarily

⁷⁴ I.e. determining cases, often involving matters of competence, coming from only one of the UK's national jurisdictions.

⁷⁵ In 1886, the Liberal Unionist Joseph Chamberlain called for 'home rule all round'.

⁷⁶ D Marquand, 'Federalism and the British: Anatomy of a Neurosis' (2006) 77 *The Political Quarterly* 150

⁷⁷ D Halberstam, 'Federalism: Theory, Policy, Law', in M Rosenfeld and A Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 578.

⁷⁸ KC Wheare, *Federal Government* (OUP 1946) 11.

autonomous but compete and intermingle.⁷⁹ Alternatively, Elazar's account of federalism as a combination of 'self-rule plus shared rule' extended federalism's scope so it is perhaps better seen as 'a family of ideas and practices that developed and diverged across history and in multiple contexts'.⁸⁰

Trading arrangements post-Brexit raise federal questions. Federal and other non-unitary states have made provision to ensure policy harmonization. For example, the US federal Constitution contains the Commerce Clause, which states that the US Congress shall have power '[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes'.⁸¹ However, post-Brexit, it is difficult to determine what the UK Government has in mind – whether it plans some new intra-governmental machinery, or legislation for UK-wide free movement principles which courts could enforce.⁸²

A federal future for Britain might be a 'strategic compromise',⁸³ averting the approach of first-past-the-post politics. This 'winner-takes-all' approach had the result that, even with a close referendum result, and two nations voting to remain, the UK government focussed on those voting leave, affording little accommodation to those wishing to remain in the EU. But could proponents of federalism ever get beyond the brick wall of parliamentary sovereignty?

Federalism has some political support in the UK. In 2016, the Constitution Reform Group,⁸⁴ a group of those desiring to retain the UK Union, argued

⁷⁹ See e.g. Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP 2009).

⁸⁰ Per D Armitage, 'We have always been federal' in Schütze and Tierney in Schütze and S Tierney (eds) *The United Kingdom and the federal idea* (Hart 2018) 278.

⁸¹ United States Constitution (Chapter I, Section 8, Clause 3).

⁸² See further, C Barnard, 'Brexit and the EU Internal Market' in F Fabbrini (ed) *The Law and Politics of Brexit* (OUP 2017).

⁸³ See further Seema Syeda, 'Brexit, federalism and Scottish independence' (UCL Constitutional Unit, February 23, 2017) <<https://constitution-unit.com/2017/02/23/brexit-federalism-and-scottish-independence/>> accessed 10 September 2019.

⁸⁴ Further information is available on the group's website at <<http://www.constitutionreformgroup.co.uk>>.

for radical constitutional change.⁸⁵ They argued that devolution should be 'turned upside down' to create a federal Britain, advocating replacing the existing union with fully devolved government in each part of the UK, each with complete sovereignty over its own affairs. The group proposed that shared UK functions would include the monarchy as head of state, foreign affairs, defence, national security, immigration, international treaties, human rights, the supreme court, a single currency, a central bank function, financial services regulation, income and corporation tax powers, and the civil service. Other functions would be controlled by the nations, similar to the 'devo-max' proposal often promoted in Scotland.⁸⁶ The Group's proposals were drafted into a (Private Member's) Act of Union Bill,⁸⁷ introduced in the House of Lords in October 2018 by Lord Lisvane and currently awaiting a second reading.⁸⁸

The Constitution Reform Group is only one of several proposals⁸⁹ for a more federal UK. A further example is that of Welsh former First Minister Carwyn Jones, who proposed that a UK Council of Ministers would take over from

⁸⁵ Martin Kettle, 'Brexit vote paves way for federal union to save UK, says all-party group' *The Guardian* (10 July 2016) <<https://www.theguardian.com/politics/2016/jul/10/brexit-vote-paves-way-for-federal-union-says-all-party-group/>> accessed 10 September 2019.

⁸⁶ 'Devo-max' would give Holyrood the power over most reserved matters, except defence and foreign affairs. It was discussed but not offered on the ballot in the 2014 Scottish Independence Referendum.

⁸⁷ Available at <<http://www.constitutionreformgroup.co.uk/wp-content/uploads/2018/10/CRG-Act-of-Union-Bill.pdf>> accessed 9 September 2019; discussion paper and explanatory notes are available at <<http://www.constitutionreformgroup.co.uk/publications/>> accessed 9 September 2019.

⁸⁸ This Bill also contains provisions enabling it to be put to the electorate in a post-legislative referendum.

⁸⁹ Kezia Dugdale, former Leader of the Scottish Labour Party, called for a federal solution in December 2016 ('Kezia Dugdale calls for 'new Act of Union', *BBC News* (7 December 2016) <<https://www.bbc.com/news/uk-scotland-scotland-politics-38223719>> accessed 17 September 2019). See also the 2006 Steel Commission, spearheaded by the Scottish Liberal Democrats, which advocated 'fiscal federalism' ('Steel Commission calls for major powers to go to Holyrood', *The Scotsman* (5 March 2006) <<https://www.scotsman.com/news/politics/steel-commission-calls-for-major-powers-to-go-to-holyrood-1-1409905>> accessed 17 September 2019).

the current JMC, which he dismissed as a 'talking shop'.⁹⁰ A federal constitution would allow Scotland, Wales, and Northern Ireland to considerably increase their powers. For instance, they could acquire the authority to issue work permits granting the right to work in devolved territories, but not elsewhere in the UK. Such a solution would mandate considerable new intergovernmental arrangements for the UK, possibly transforming the House of Lords into a territorial second Chamber, such as exist in federal states.

Admittedly, there would be problems with such a solution, not least the seemingly intractable problem of how to include England, which accounts for about 85 per cent of the UK population, and has no devolved government to date. There is also the challenge of gaining support for a written, federal constitution, which would probably need to be agreed by some form of Constitutional Convention, in other words a gathering of individuals to agree a formal text. At present both devolved and the UK governments seem uninterested, given that the UK government appears to ignore the devolved governments and, in Scotland, calls for independence are more often heard than for federalism. First Minister Nicola Sturgeon has claimed that a second independence referendum must be held by May 2021 if Brexit goes ahead, and a Referendums (Scotland) bill, has already been introduced. There are plans for a 'citizens assembly' in Scotland to discuss Brexit and independence.⁹¹ Support for Irish reunification has grown since the 2016 Brexit referendum. Many Northern Ireland economists and business leaders worry that a 'No deal' Brexit would lead to a hard border with Ireland, which could cripple the economy, and threaten the peace under the B/GFA. Polls have shown support for a reunification approaching 50 per cent in Northern Ireland and Ireland, especially if Britain leaves without an agreement.⁹²

⁹⁰ 'Brexit an opportunity to reinvent the UK - Carwyn Jones' *BBC News* (17 June 2017) <<https://www.bbc.co.uk/news/uk-wales-politics-40274840/>> accessed 9 September 2019.

⁹¹ See 'Indyref2 'framework' bill published at Holyrood' *BBC News* (29 May 2019) <<https://www.bbc.com/news/uk-scotland-scotland-politics-48435198>> accessed 10 September 2019.

⁹² See e.g. Nick Eardley, 'Brexit: "Very real" chance of Irish unity poll if no deal' *BBC News* (8 February 2019) <<https://www.bbc.co.uk/news/uk-politics-47170711>> accessed 13 September 2019.

Such attitudes, and distinct political identities, register against a comprehensive attempt to manage issues of disputed authority and the challenges of Brexit. On the other hand, federalism is a flexible concept, giving rise to many constitutional and institutional possibilities. And, in Madison's words, it provides for 'Ambition to counteract Ambition'⁹³ – a situation that seems to be lacking in the UK at present, where the executive supremacy of the UK government controls most constitutional affairs.

Brexit is not the first occasion on which Britain has encountered challenges to its very constitutional identity. Past 'acts of union and disunion' such as the loss of former US colonies and the British Empire, the admission of Scotland and Ireland into the UK Union, their departure or possible departure, and UK's membership in the EU since 1973, all provide precedents which help understand how a British constitutional identity has been shaped or dismantled. They show how it has determined and dealt with issues of union, sovereignty and devolution of power, and how such multiple and various relationships might play their part in the future of an EU without Britain as a member. The UK might have weathered these past incidents, but is it capable of managing Brexit?

VII. CONCLUSION

Brexit could precipitate the disintegration of the UK. The UK is not federal, but is profoundly diverse with some federal qualities, comprising four nations each possessing distinct historical, political, cultural and linguistic traditions. If the UK is to function effectively as a single state, then constitutional structures must acknowledge this variety. Yet, at present, the UK lacks a constitutional form acceptable to all parts of the Union. Instead, Brexit has been allowed to compress parliamentary sovereignty into an executive sovereignty that, by imposing a uniform approach, threatens the UK Union. Britain has a tradition of autonomous executive power deriving from a Hobbesian concept of absolute sovereignty. As Marquand argues, this is a 'highly eccentric' understanding: 'Sovereignty, in this understanding, is a kind of billiard ball – impermeable, indivisible and unshareable [...] You are either in government or in opposition. You are either the majority or the

⁹³ James Madison, 'Federalist Papers, No 51' in Clinton Rossiter (ed) *The Federalist Papers* (Mentor 1961) 320.

minority.⁹⁴ What Marquand terms a 'billiard ball' concept of sovereignty makes federalism impossible, because it sees sovereignty as indivisible, and thus impossible to share between different levels of British government.

Yet this sovereignty is a confused one⁹⁵ and also essentially English. Indeed, in his famous work, Dicey referred to the 'English' rather than 'British' Constitution.⁹⁶ And this notion of parliamentary sovereignty has been a visceral barrier to Britain's relationships with the EU. Why else the demand for 'Take Back Control'⁹⁷ in the referendum, and also the reference in the Government White Paper on the 'Great Repeal Bill' which stated that, '[a]t the heart of that historic decision was sovereignty. A strong, independent country needs control of its own laws. That, more than anything else, was what drove the referendum result: a desire to take back control.'⁹⁸ But now this affective, irrational belief in a central parliamentary sovereignty presents a barrier to a divided sovereignty in the UK and the possibility of a federal Britain.

Brexit has revealed many flaws in Britain's aged Constitution. Too many of its uncodified rules and conventions are unclear or ambiguous, including many of serious national importance. There is so much that is uncertain: what is the status of an 'advisory' referendum? What exactly are the powers of the executive? How can Scotland be one of the most devolved territories in the world, and yet play so small a part in Brexit negotiations and find that its 62 per cent vote in favour of Remain is seemingly irrelevant? What input can devolved governments have in Brexit policy? Can devolved governments continue to apply the EU Charter after Brexit? Surely the answers to such

⁹⁴ D Marquand, 'Federalism and the British: Anatomy of a Neurosis' (2006) 77 *The Political Quarterly* 150.

⁹⁵ On this, see S Douglas-Scott, 'Brexit and the Siren-like allure of sovereignty' in E Fahey and T Ahmed (eds) *On Brexit: Law, Justices and injustices* (Elgar 2019)

⁹⁶ Dicey (n 3).

⁹⁷ This expression was used constantly by the Leave campaign in the run up to the 2016 referendum – for an elucidation of its significance, see eg T Haughton, 'It's the slogan, stupid: The Brexit Referendum', available at <<https://www.birmingham.ac.uk/research/perspective/eu-ref-haughton.aspx>> accessed 17 September 2019.

⁹⁸ *Legislating for the United Kingdom's withdrawal from the European Union*, Cm 9446 (March 2017) 7.

questions should be easier to ascertain. What is the point of asserting a strong, unitary British Constitution, if that Constitution fails to deliver anything like stability when needed, as it has with Brexit?

But even if it is desirable to codify the constitution, how to bring that about? By some sort of Constitutional Convention? Or possibly a 'People's Assembly'? But it is possible that the Brexit crisis, far from constituting a 'constitutional moment', has deepened existing divisions in society. A lack of concern to resolve things in common, along with very distinct political identities, militate against the calm, mature reflection necessary to address issues of contested authority in a holistic manner. The present turbulent circumstances foster passion, not reason.

Brexit may have both centripetal or centrifugal effects⁹⁹ for the internal structure of the UK. It is possible these may be centripetal: there may be pressures towards recentralization as Westminster reasserts its sovereignty and the European legal framework is replaced by the British one. Brexit will return powers from the EU, but they will concentrate in Westminster, which could establish itself as the state core. Scottish, Irish and Welsh unionists might choose the UK union over the European union, regardless of whether they were Leave or Remain supporters.

On the other hand, there exist centrifugal forces. A potential exists for state disintegration if Scotland secedes or Ireland reunifies. A united Ireland would be a Member State of the EU; an independent Scotland would have a good prospect of joining. Such a scenario would keep both territories within the EU, but involve new borders with the remaining United Kingdom.

I conclude with an excerpt from Mohsin Hamid's *Exit West*, which seems to capture very well the current situation:

Reading the news at that time one was tempted to conclude that the nation was like a person with multiple personalities, some insisting on union and some on disintegration, and that this person with multiple personalities was furthermore a person whose skin appeared to be dissolving as they swam in a soup full of other people whose skins likewise seemed to be dissolving. Even

⁹⁹ See on 'centripetal' and 'centrifugal', J Bryce, 'The Action of Centripetal and Centrifugal Forces on Political Constitutions' in J Bryce, *Studies in History and Jurisprudence*, vol 1 (Oxford Clarendon Press 1901).

Britain was not immune from this phenomenon, in fact some said Britain had already split, like a man whose head had been chopped off and yet still stood, and others said Britain was an island, and islands endure, even if people who come to them change, and so it had been for millennia and so it would be for millennia more.¹⁰⁰

Will the future of the UK be characterized by union or disintegration? The thistle, rose, leek and flax flower are the symbols of the four nations of the United Kingdom, and are joined together, under the Greek letter Omega – symbolising finality – in the official emblem of the UK Supreme Court, in Parliament Square in London. Yet, will this Court emblem (or for that matter, the 'Union Jack' flag of the UK) survive Brexit? The eventual outcome of Brexit may be that, in leaving one union – the EU – Britain may in fact destroy its own union – the UK.

¹⁰⁰ Mohsin Hamid, *Exit West* (Riverhead Books 2017) 158.

THE FUTURE OF UK-IRISH RELATIONS

Etain Tannam*

This article examines the impact of Brexit on the British-Irish intergovernmental relationship and places the assessment in the context of the contemporary history of the relationship. In particular it highlights the importance of the intergovernmental relationship since 1985 and its role in the peace process and the Belfast/Good Friday Agreement. First, the importance of the British-Irish relationship and the EU in achieving a peace process in Northern Ireland is examined and the implications of Brexit are assessed. The challenges of Brexit are then outlined, before Brexit's impact to date is evaluated. Finally, in conclusion, potential methods of managing the relationship between the UK and Ireland after Brexit are outlined and it is argued that stronger use of the British-Irish Intergovernmental Conference is necessary to ensure future cooperation, as well as developing stronger institutional links across a range of policy areas.

Keywords: Brexit, Good Friday Agreement, British-Irish cooperation, British-Irish Intergovernmental Conference

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I. INTRODUCTION

The outcome of Brexit was always going to be a challenge to British-Irish relations, but few would have expected the perfect storm of events that ensued: a weak UK government, a confidence-and-supply arrangement between the British Conservative Party and the Northern Ireland Democratic Unionist Party (DUP), the death of Martin McGuinness, one of the original signatories and negotiators of the Good Friday Agreement, and a collapsed Northern Ireland Executive. The period from June 2016 to March 2019 created great stress in the British-Irish relationship. In this article the importance of the British-Irish relationship and the EU in achieving the peace process in Northern Ireland from 1990 to 1998 is examined and the implications of Brexit are assessed. In Section III, the challenges of Brexit are analysed and, in Section IV, Brexit's impact from June 2016 to March 2019 is evaluated. Finally, in conclusion, potential methods of managing the relationship after Brexit are outlined. In assessing levels of cooperation, the focus is on the rhetoric from both governments.

II. THE SIGNIFICANCE OF THE BRITISH-IRISH RELATIONSHIP AND THE EU IN THE IRISH PEACE PROCESS

British-Irish cooperation was central to the success of the peace process in Northern Ireland and the signing of the Belfast/Good Friday Agreement on 10 April 1998.¹ The two parties had many conflicts of interest about the best means of achieving peace from the 1960s to the 1980s, but from the mid-1980s a process of cooperation developed.² The '3 strands approach' to

¹ David Mitchell, Etain Tannam and Sarah Wallace, '20 Years of the Good Friday Agreement: Political Dimensions' (2008) *Irish Political Studies* 283 – 310.

² Etain Tannam, *Cross-Border Cooperation in Ireland and Northern Ireland* (Basingstoke Palgrave 1999).

conflict resolution became central to the peace process, in the context also of EU membership. UK and Irish membership of the EU from 1973 was regarded by many observers as a factor in increasing British-Irish cooperation; as O'Brennan notes, before 1973, no British Prime Minister had visited Ireland since 1921.³

1. John Hume and the '3 Strands Approach'

Cooperation did not evolve spontaneously, but reflected the strategy of John Hume, former leader of the Social Democratic Labour Party (SDLP), and his influence on Irish policy-making. Hume's '3 strands approach'⁴ was based on the argument that the conflict in Northern Ireland was an identity conflict between nationalists, on the one hand, whose democratic rights were not protected in a unionist regime, and unionists, on the other, who feared that they were under threat from irredentist Irish governments and nationalists. The '3 strands approach' was based on the argument that the key to resolving the conflict was to reassure both communities that their rights were protected and the key to achieving such reassurance was through ensuring that three sets of relations – or strands – were cooperative: 1) relations between communities in Northern Ireland; 2) cross-border relations on the island of Ireland; and 3) relations between British and Irish governments.

Strand 1 aimed to create democratic, legitimate institutions in Northern Ireland that represented both nationalists and unionists and would respect their rights. Strand 2 would develop institutions to encourage cross-border economic cooperation to maximise economic potential, but also bring about greater social communication and cooperation. Strand 3 was important because the UK and Ireland were kinship states. In other words nationalists looked to the Irish government for protection, but that protection had not been forthcoming up until the outbreak of the conflict. The unionists thus looked to the UK government for protection. By ensuring both communities

³ John O'Brennan, 'Requiem for a Shared Independent Past: Brexit and the deterioration of in UK-Irish Relations' (2019) 5 *Capital and Class* 1-15.

⁴ 'Hume says new structures are needed and endorses three-strand approach', *Irish Times* (August 18 1997) <<https://www.irishtimes.com/news/hume-says-new-structures-are-needed-and-endorses-three-strand-approach-1>> accessed 1 October 2019.

felt protected their members would be less likely to resort to violence. These strands became integral to the Good Friday Agreement.

In short, conflict resolution in Northern Ireland rested on the totality of the relationship between Ireland, Northern Ireland and Britain. Hume's emphasis on two identities co-existing and on the ability to aspire to be a united Ireland, yet also accept the legitimacy of being in the UK state, was based on his appreciation of the EU as a successful experiment of post-war cooperation. Repeatedly he cited the example of the Franco-German reconciliation, stating that if France and Germany could cooperate after World War II and centuries of hostility, then so too could nationalists and unionists in Northern Ireland. The EU framework of cooperation was vital to identify common economic interests and build trust on that basis within that institutional framework.

In 1984, despite the UK government's misgivings, the European Parliament issued a report, known as the Haagerup Report, that defined the conflict in Northern Ireland as an 'identity conflict', thus echoing the Irish government and John Hume's approach.⁵ It was an historic event in that it was the first time the EU became involved in the Northern Ireland conflict. Although it is difficult to provide evidence of the EU's causal role in British-Irish cooperation, or in the peace process itself,⁶ the former's involvement and approach legitimised the Irish government and Hume's idea, making it more difficult for opponents to undermine it.

The identity approach, combined with the conception of Northern Ireland as an example of a failure of majoritarian democracy, contributed to an emphasis on institutionalising the Irish dimension and on British-Irish cooperation as a way to resolve the conflict. By enshrining institutionally an Irish role in policy towards Northern Ireland, nationalists would feel protected; and by ensuring any Irish role was in conjunction with the UK's role, unionists would feel protected. Cross-border cooperation would also reassure both communities about the merits of economic cooperation and increase networking, so that trust increased between nationalists and

⁵ Katy Hayward, 'Reiterating National Identities: The European Union Conception of Conflict Resolution in Northern Ireland' (2006) 41(3) *Cooperation and Conflict* 261-284.

⁶ Tannam (n 2).

unionists. Internally, developing democratic power-sharing institutions in Northern Ireland that represented both communities was central. Strand 3 – the British-Irish relationship – was the necessary condition to achieving cooperation in Strands 1 and 2. Without it, the other levels of cooperation would not develop.

The failure of the Sunningdale Agreement in 1973⁷ in the face of unionist opposition created an awareness that unless both British and Irish government stood firm in a joint approach to Northern Ireland, any efforts to create peace would be thwarted by either Sinn Féin, or the DUP.⁸ Thus, in 1980 Charles Haughey, then Irish Prime Minister, met with his UK counterpart, Margaret Thatcher, to begin a new era of cooperation.

2. The Anglo-Irish Agreement

Under the 1985 Anglo-Irish Agreement, the Anglo-Irish Conference was established. It was the first time in Northern Irish history that a UK government did not yield to unionist pressure not to engage with the Irish government and that both governments supported each other in following through with the agreement.⁹ Thousands of unionists marched against the 1985 Agreement, in protest at the Irish role in the Anglo-Irish Conference. However, the Conservative party, led by Margaret Thatcher, refused to yield to the pressure, with both governments stating that the Agreement, unlike the Sunningdale Agreement, had been ratified as an international treaty in the UN and could not be revoked except by mutual consent of both governments. As such, the Agreement remained intact.¹⁰

⁷ The Sunningdale Agreement created a power-sharing executive in Northern Ireland and a Council of Ireland representing the Irish government and Northern Irish devolved government. The Council of Ireland was to have executive powers over key policy areas including policing. Many unionists strongly opposed the Agreement for that reason and the agreement was brought down following a strike by Ulster Workers Council. It was never ratified at the UN, so did not have the status of international treaty.

⁸ Brendan O'Leary, 'The Limits to Coercive Consociationalism in Northern Ireland' (1989) 4 *Political Studies* xxxvii 455-65.

⁹ Ibid.

¹⁰ Brendan O'Leary and John McGarry, 'The Politics of Antagonism' (Athlone Press 1996).

The 1985 Agreement comprised seven articles, all of which laid out the role and operation of the Conference, giving the Irish government a consultative role in matters of concern to nationalists. Its areas were listed as political matters, security and related matters, and legal matters, including the administration of justice and the promotion of cross-border cooperation.¹¹ Under article 3, it was stated that:

The Conference shall meet at Ministerial or official level as required. The business of the Conference will thus receive attention at the highest level. Regular and frequent Ministerial meetings will be held and in particular special meetings shall be convened at the request of either side.¹²

The Anglo-Irish Agreement laid the groundwork for the 1998 Good Friday Agreement, not just in its broad principle of enshrining an Irish role in policy of Northern Ireland, but also in its negotiation process, whereby a joint British-Irish strategy emerged.¹³ Anglo-Irish relations emerged as a central part of that cooperation.

From 1985 onwards senior British and Irish civil servants continued to meet regularly and developed an exceptional working and, in some instances, personal relationship.¹⁴ Many civil servants observed how, over time, problem-solving became a joint exercise.¹⁵ Both the conceptualisation of a problem and its solutions emerged organically from both governments and adversarial policy making declined. It was this approach that typified the negotiations that preceded the Good Friday Agreement.

The strategy that emerged from the British-Irish policy process was one coined 'coercive consociationalism'.¹⁶ The aim was to achieve a consociational settlement in Northern Ireland, implying a power-sharing devolved government that protected the nationalist minority by giving all parties a

¹¹ Department of Foreign Affairs and Trade, The Anglo-Irish Agreement (1985) <<https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/northernireland/Anglo-Irish-Agreement-1985.pdf>> accessed 1 October 2019, Art 2.

¹² Ibid Art 3.

¹³ O'Leary and McGarry (n 10) 238.

¹⁴ Etain Tannam, 'Explaining the Good Friday Agreement: a learning process' (2001) 36(4) *Government and Opposition* 493-518.

¹⁵ Ibid 500.

¹⁶ O'Leary (n 8).

veto over any policy that undermined a vital interest of its community. The coercive aspect referred to the carrot-and-stick strategy of enticing Sinn Féin, the Ulster Unionist Party (UUP), and the DUP to cooperate so as to have democratic power, but threatening to exclude them from negotiations if they did not cooperate. Overall from the mid-1980s the British-Irish relationship was characterised by a joint policy making approach and an emphasis on both governments as honest brokers.¹⁷ Eventually, this made them co-guarantors of the Belfast/Good Friday Agreement.

3. *The Belfast/Good Friday Agreement*

The Good Friday Agreement was signed on April 10 1998. It was not simply consociational, but a bespoke version, 'consociation plus',¹⁸ encompassing Hume's '3 strands approach'. Strand 2 of the Agreement provided for the cross-border North-South Ministerial Council representing Irish and Northern Irish ministers and their civil servants to decide policy in six areas of cooperation. Strand 3 resurrected and modified the old Anglo-Irish Conference, but re-named it the British-Irish Intergovernmental Conference. It also provided for a new British-Irish Council to represent Northern Ireland, Ireland, Britain, Scotland, Wales and the Crown Dependencies.

The British-Irish Intergovernmental Conference, 'dealing with the totality of the relationships',¹⁹ was to meet frequently, like the Anglo-Irish Conference. Unlike the Anglo-Irish Conference, however, the Belfast/Good Friday Agreement stipulated that the British-Irish Intergovernmental Conference was to meet at summit level (that is with both Prime Ministers

¹⁷ Etain Tannam, 'Cracks Beginning to Show in British-Irish Relationship' (LSC Blogs, 26 July 2017) <<https://blogs.lse.ac.uk/brexit/2017/07/26/cracks-are-beginning-to-appear-in-british-irish-relations/>> accessed 14 September 2019.

¹⁸ Brendan O'Leary 'The Twilight of the United Kingdom and Tiocfaidh ar Lá: Twenty Years after the Good Friday Agreement', in Tannam (ed) *Beyond the Good Friday Agreement in the midst of Brexit* (London Routledge 2018) 2.

¹⁹ Belfast/Good Friday Agreement (1998) available at <<https://www.britishirishcouncil.org/agreement-reached-multi-party-negotiations/strand-3-british-irish-council-and-intergovernmental>> Strand 3, para 1.

in attendance) 'as required',²⁰ but otherwise at ministerial level as appropriate. The Council enshrined the Irish government's role:

In recognition of the Irish Government's special interest in Northern Ireland and of the extent to which issues of mutual concern arise in relation to Northern Ireland, there will be regular and frequent meetings of the Conference concerned with non-devolved Northern Ireland matters, on which the Irish Government may put forward views and proposals. These meetings, to be co-chaired by the Minister for Foreign Affairs and the Secretary of State for Northern Ireland, would also deal with all-island and cross-border co-operation on non-devolved issues.

Co-operation within the framework of the Conference will include facilitation of co-operation in security matters. The Conference also will address, in particular, the areas of rights, justice, prisons and policing in Northern Ireland (unless and until responsibility is devolved to a Northern Ireland administration) and will intensify co-operation between the two Governments on the all-island or cross-border aspects of these matters.²¹

Strand 3 also provided for the British-Irish Council, a consultative body to discuss sectoral policy issues, and comprising ministers from Ireland, Northern Ireland, Scotland and the Crown Dependencies as well as the Irish and UK Prime Ministers or their delegates. Its function was to 'promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands.'²² Furthermore, it was to meet 'at summit level, twice per year; in specific sectoral formats on a regular basis, with each side represented by the appropriate Minister; in an appropriate format to consider cross-sectoral matters.'²³

The EU was also mentioned explicitly in the Agreement under Strand 2.²⁴ A specific cross-border body, the Special EU Programmes Body, was created to administer EU funding. However, the EU's implicit relevance was far greater than the explicit relevance. The multi-level non-territorial conception of identity and the functional logic of cooperation were regarded as important contextual factors in the Agreement not simply for Northern Ireland, but for

²⁰ Ibid Strand 3, para 3.

²¹ Ibid Strand 3.

²² Ibid Strand 3, para 1.

²³ Ibid Strand 3, para 3.

²⁴ Ibid Strand 2.

the British-Irish relationship. Afterall, the Agreement was negotiated and ratified in the context of the recently created Single European Market (SEM), removing non-tariff obstacles to freedom of movement of goods, services, capitals and people.²⁵

EU membership affected the British-Irish relationship in three ways. To begin with, it paradoxically advanced Irish national sovereignty vis-a-vis the UK, where it was once perceived to be an 'un-equal sovereign'.²⁶ The EU created a more symmetrical relationship, highlighting that Ireland was a state with its own government and policies. In addition, as new EU policies emerged, Ireland and the UK often had common interests and were allies in the EU, for example in taxation and social welfare policies. Finally, the EU created a neutral framework where British and Irish diplomats and politicians met regularly, both formally and informally. One former Irish ambassador to the UK commented that there were on average 25 meetings a day in Brussels where Irish and UK representatives met.²⁷

Clearly British-Irish intergovernmental cooperation was central to stability in Northern Ireland and the EU's role was also significant, both normatively and practically. As Jennifer Todd perceptively observed in 2014:

The settlement in Northern Ireland was achieved and later stabilised only in the context of a strong British-Irish relationship [...] This was a conjunctural achievement of the 1990s and early 2000s. There was no reason to expect it to be permanent.²⁸

Indeed, Todd predicted that 'as attention slips from senior officials and politicians, so the prospects of slippage in the stability of the Northern Ireland settlement increases'.²⁹ Although it was not known to Todd and

²⁵ O'Brennan (n 3).

²⁶ Patrick Keatinge, 'Un-Equal Sovereigns: the diplomatic dimension of Anglo-Irish Relations' in PJ Drudy (ed) *Ireland and Britain Since 1922* (Cambridge University Press 1984) 139-161.

²⁷ Ambassador Daniel Mulhall, evidence to House of Lords European Union Committee, Brexit: UK-Irish relations, 6th Report of Session 2016-17, 42, para 171.

²⁸ Jennifer Todd, 'The vulnerability of a (quasi-)constitutional settlement: Northern Ireland after 1998 and the British-Irish relationship' (2014) Working Paper 112, Institute for British-Irish Studies, University College Dublin, 20.

²⁹ Todd (n 28) 20.

others at the time, an event a few years later would indeed have the potential to remove attention away from Northern Ireland and the peace process. In the next section, the challenges of this event – Brexit – to intergovernmental cooperation are summarised and an analysis of Brexit's impact to date is provided.

III. BREXIT'S CHALLENGES TO THE BRITISH-IRISH RELATIONSHIP

Brexit posed various challenges to the British-Irish relationship: first, a potential resurgence of the Irish unification issue; second, potential damage to the Belfast/Good Friday Agreement; third, the creation of conflicts of interest; and fourth, the removal of the EU framework for cooperation.

I. Irish Unification

As noted by Connelly and Doyle in this special issue,³⁰ the Belfast/Good Friday Agreement sought to detoxify the issue of unification by providing a settlement that attempted to reflect both unionist and nationalist voices and had no pre-determined outcome. Opinion surveys repeatedly show that nationalists are happy to remain in the UK under the Belfast/Good Friday Agreement's provisions. In addition, the data shows that the largest portion of people in Northern Ireland identify themselves as neither unionist nor nationalist.³¹ However, under the Belfast/Good Friday Agreement, if a majority in Northern Ireland support Irish unification, then both governments are obliged to legislate for unification.³² However, the nationalist community's support for Remain during the Brexit referendum raised immediately the issue of Irish unification with the argument being made that if there was unification, Northern Ireland could stay in the EU. Sinn Féin called for a border poll and although they wavered in their emphasis

³⁰ Eileen Connelly and John Doyle, 'Brexit and the Irish Border' in this Special Issue.

³¹ Katy Hayward and Cathal McManus, 'Neither/Nor: the rejection of Unionist and Nationalist identities in post-Agreement Northern Ireland' (2019) *Capital and Class*.

³² John Doyle and Eileen Connolly 'Brexit and the Northern Ireland Question' in Federico Fabbrini (ed) *The Law and Politics of Brexit* (Oxford University Press 2017) 153.

However, this would undoubtedly involve onerous change administratively and institutionally and probably create pressure for greater decentralisation of the highly centralised Irish state. It is precisely these questions that are becoming the focus of academic attention.³⁹ However, all the main parties in Ireland are aware that a poll on unification would further destabilise and polarise Northern Ireland and do not want to aggravate the new tensions created by Brexit.

2. *The Belfast/Good Friday Agreement*

Although an unintended and indirect consequence of Brexit, following the June 2017 UK election, the DUP's Confidence and Supply arrangement with the Conservative-led UK government immediately brought into question the UK's role, enshrined by the Belfast/Good Friday Agreement, as an honest neutral broker in the politics of Northern Ireland. The DUP's pivotal position in the UK government contributed to provocative language from the Taoiseach Leo Varadkar. For example, in December 2017 he stated that 'no Irish government will ever again leave Northern nationalists and Northern Ireland behind.'⁴⁰

More specifically, as Connelly and Doyle note in this special issue,⁴¹ Brexit potentially undermines Strand 2 of the Belfast/Good Friday Agreement, by creating a hard border between Northern Ireland and Ireland, thereby damaging cross-border cooperation. It was also unclear whether EU funding to Northern Ireland would continue.⁴² Thus, from June 2016, the Irish

³⁹ For example, there are two recently launched research projects: John Coakley, Paul Gillespie, Jennifer Todd, 'Constitutional Futures After Brexit', Institute for British-Irish Studies, University College Dublin, available at <<https://www.ucd.ie/ibis/newsevents/>> and Alan Renwick et al, 'Unification Referendums on the Island of Ireland', The Constitution Unit, University College London.

⁴⁰ Marie O'Halloran, 'Varadkar clarifies 'offensive' remark on Northern Ireland', *Irish Times* (12 December 2017) <<https://www.irishtimes.com/news/politics/oireachtas/varadkar-clarifies-offensive-remark-on-northern-ireland-1.3325231>> accessed 14 September 2019.

⁴¹ Connelly and Doyle (n 30).

⁴² Jonathon Tonge, 'The Impact of Withdrawal from the European Union upon Northern Ireland' (2016) 87(3) *Political Quarterly* 338 – 342.

government lobbied vigorously for four priorities to be included in the EU's Brexit bargaining agenda: first, to maintain the 1948 Common Travel Area (CTA) between Ireland and the UK; second, to protect the Belfast/Good Friday Agreement; and third, to protect a soft border between Northern Ireland and Ireland – freedom of movement of trade and services and to protect the rights of Irish citizens in the UK.⁴³

Fourthly, the Irish government lobbied to ensure that these issues would be resolved in the withdrawal negotiations and not form part of the negotiations on the future trading relationship between the UK and the EU. In other words, the negotiations about Northern Ireland and about the EU-UK future trading relationship respectively would occur sequentially, not simultaneously. The Irish government suspected that, if simultaneous negotiations occurred, the UK government would use the Northern Irish issue as a bargaining chip to gain trade concessions from the EU. In such a bargaining game, it was feared that a soft border could be sacrificed in the final outcome.

3. Trust issues and conflicts of interest

Thus, Brexit immediately lessened trust between both governments by placing them on opposite sides of the table in the negotiations. It also revealed a divergence between both governments in their emphasis on Northern Ireland. Connelly and Doyle show how this divergence was obvious from the period of the Brexit referendum campaign onwards.⁴⁴ One adviser to David Cameron reported how the then UK leader refused to include the negative impact of a Brexit vote on Northern Ireland in the Brexit campaign.⁴⁵ After the referendum, although many UK politicians were aware of the serious implications for Northern Ireland, not least the House of

⁴³ Etain Tannam, 'Intergovernmental and Cross-Border Cooperation: the Good Friday Agreement and Brexit' (2018) 17(3) *Ethnopolitics* 255.

⁴⁴ Connelly & Doyle (n 30).

⁴⁵ Matthew O'Toole, 'Ireland an afterthought during Brexit campaign when I was Cameron adviser', *Irish Times* (4 October 2017) <<https://www.irishtimes.com/opinion/ireland-an-afterthought-during-brexit-campaign-when-i-was-cameron-adviser-1.3242732>> accessed 14 September 2019.

Lords Brexit committee,⁴⁶ it was only under Irish governmental influence that the UK government began to focus at all on Northern Ireland. Even then there were various reports that some Conservative politicians believed the EU would not prioritise Northern Ireland, once the UK agreed its 'divorce bill' with the EU. Similarly, there were reports that UK politicians believed that the EU's support for the Irish government's position would waver and, as a consequence, UK officials lobbied in EU capitals in an effort to 'divide and conquer' EU states.⁴⁷ These very different and conflictual perceptions created a new cleavage between UK and Irish governments and periodically contributed to blunt megaphone diplomacy not heard since the 1980s, for example during the H-Block hunger strikes in 1981.

The incompatibility between the UK leaving the EU, including its customs union and single market, and maintaining an open border in the island of Ireland made a bespoke solution, or special status for Northern Ireland the only possible solution in the negotiations. The so-called 'backstop' in the Withdrawal Agreement, negotiated by Theresa May's government and the EU, was immediately opposed by unionists⁴⁸ and by Brexiteers who argued it undermined Northern Ireland's constitutional status in the UK. Thus, by March 2019, sources of tension in the British-Irish relationship coalesced around the backstop's inclusion in the Withdrawal Agreement, despite the fact that Theresa May and her team had agreed the backstop with the EU in the negotiations.

Worryingly, although all attention was focused on the backstop and the border issue, Brexit also posed other deep long-term challenges to the British-Irish relationship. Almost immediately after the 2016 referendum, there were implications for trust and sharing of information between both governments. The Irish government feared that Northern Ireland would be used as a pawn by the UK government to achieve a more favourable final trade

⁴⁶ House of Lords, "Brexit Inquiry", Brexit and British-Irish Relations, House of Lords, London, 12 December 2016.

⁴⁷ Daniel Boffey, 'UKs pre-summit push to 'divide and rule EU27' impeded Brexit talks', *The Guardian* (29 October 2017) <<https://www.theguardian.com/politics/2017/oct/29/uks-pre-summit-push-to-divide-and-rule-eu-27-impeded-brexit-talks>> accessed 14 September 2019.

⁴⁸ Doyle and Connolly (n 32).

deal for the UK. For that reason it successfully lobbied the other EU Member States and the Commission to ensure that trade talks and the withdrawal agreement were not negotiated simultaneously, as the UK government preferred, but sequentially. The border issue must be resolved first before trade talks could begin. This preference was immediately at odds with UK preferences, again creating tension between both governments.

4. Removal of EU framework for cooperation

A fourth challenge is that the opportunities for communication offered by the EU will vanish with Brexit. The frequency with which British and Irish officials and politicians met with each other in Brussels will be difficult to replicate when the UK leaves the EU. Moreover, when the UK leaves, Ireland will lose an ally in the EU. Both governments often converged in their attitudes on a number of EU issues, including taxation and social policy. Ireland relied on the UK to serve its cause. The absence of that informal alliance removes a pillar of cooperation from the bilateral relationship.

The challenges posed by Brexit were aggravated by the collapse of the Northern Ireland Executive in January 2017, by a weak and divided UK government in disarray, relying on the DUP after the June 2017 election, and by Jeremy Corbyn's lacklustre support for the EU. The challenges took their toll on the British-Irish relationship. Since June 2016 there have been three main periods in the British-Irish relationship, where tensions have ebbed and flowed. As the next paragraphs show these tensions have heightened at specific times.

IV. BREXIT AND THE BRITISH-IRISH RELATIONSHIP, 2016-2019

In the immediate aftermath of the Brexit referendum result the Irish government was clearly deeply disappointed, but the rhetorical response was low-key. Enda Kenny, then Taoiseach, issued a statement pledging to adopt 'the same spirit of partnership that has underpinned the peace process and has transformed relationships on this island since the Good Friday Agreement'⁴⁹ and emphasised how he and David Cameron 'worked closely

⁴⁹ Enda Kenny, 'Statement by An Taoiseach, Enda Kenny TD, on the UK Vote to Leave the European Union' (Merriestreet.ie, 24 June 2016)

together at a time of unprecedented warmth in relations between our two countries.' ⁵⁰

However, the issue of Irish unification raised its head quickly. In July 2016, Enda Kenny stated that a border poll on Irish unity should be considered because a majority of the Northern Ireland electorate voted to remain in the EU.⁵¹ Both Fianna Fáil and Sinn Féin called for a border poll. Sinn Féin later said that unification was a long term strategy, implying it did not want a poll quickly. Fianna Fáil and the Irish government also ceased mentioning it, although Fianna Fáil initiated a study of different options for Irish unification.

Overall, the aftermath of the Brexit referendum was marked by a noticeable lack of engagement from the UK government, contributing to an increasingly strained relationship.⁵² In addition, the UK government sought to divide and conquer EU states so as to undermine the Irish government's lobbying efforts to prioritise the border issue and agree on that priority first before moving to trade negotiations. In April 2017, the then Minister for Foreign Affairs, Charlie Flanagan, expressed frustration at the UK government's failure to communicate directly with the Irish government.⁵³ A significant change in the conduct of relations was highlighted by the UK government's announcement via the UK Embassy in Dublin that it was withdrawing from the 1964 Fisheries Convention that allowed fishing in coastal waters from the coast. The Irish Minister for Agriculture stated that he had only learnt of the

<https://merriestreet.ie/en/News-Room/Speeches/Statement_by_An_Taoiseach_Enda_Kenny_TD_on_the_UK_Vote_to_Leave_the_European_Union.html> accessed 14 September 2019.

⁵⁰ Enda Kenny (n 48).

⁵¹ Pat Leahy, 'Kenny Says Border Poll Should Be Considered in Brexit Talks', *Irish Times* (16 July 2016) <<https://www.irishtimes.com/news/politics/kenny-says-border-poll-should-be-considered-in-brexit-talks-1.2726382>> accessed 14 September 2019.

⁵² Mary C Murphy, *Europe and Northern Ireland's Future: negotiating Brexit's Unique Case* (Agenda 2018) 115.

⁵³ Pat Leahy, 'Minister criticises British government over Brexit strategy' *Irish Times* (24 December 2016) <<https://www.irishtimes.com/news/politics/minister-criticises-british-government-over-brexit-strategy-1.2916819>> accessed 14 September 2019.

decision from media channels, despite having met with the UK Minister for Agriculture about the Convention in early July.⁵⁴

Similarly, in July 2017, the Taoiseach Leo Varadkar spoke bluntly in a media briefing stating that '[w]hat we're not going to do is to design a border for the Brexiteers because they're the ones who want a border. If anyone should be angry it's us, quite frankly.'⁵⁵ Whereas in the 1990s, both governments consulted with each other before making statements of relevance to the relationship, in September 2017, the then Minister for Foreign Affairs Simon Coveney stated his government's opposition to any technical solutions to the Irish border, thereby for the first time explicitly opposing the UK government's policy statement about the border.

The UK government's official response was muted and in that way tensions did not escalate. However, it was the absence of direct communication from the UK and the infrequency of prime ministerial meetings that often aggravated tensions. Theresa May and the then Taoiseach Enda Kenny had two meetings from June 2016 to January 2017,⁵⁶ which given the potential impact of Brexit on Ireland and Northern Ireland was lower than might be expected. The UK government frequently stated that they were wedded to a frictionless border and that there would be no return to the borders of the past. However, there was no engagement about how to achieve that aim in the context maintaining the integrity of the EU single market. In addition, some UK media depictions of Ireland and of the Taoiseach became negative at times and some Irish media analyses of the UK also reverted to stereotypes of 'lost empire'.

⁵⁴ 'British ban on foreign trawlers 'unhelpful', says Creed', *Irish Times* (2 July 2017) <<https://www.irishtimes.com/news/environment/british-ban-on-foreign-trawlers-unhelpful-says-creed-1.3140783>> accessed 1 October 2019.

⁵⁵ 'Ireland "will not design a border for the Brexiteers", says Taoiseach', *The Guardian* (28 July 2017) <<https://www.theguardian.com/world/2017/jul/28/taoiseach-leo-varadkar-ireland-not-design-border-brexiteers>> accessed 14 September 2019.

⁵⁶ Department of Taoiseach, available at <<https://merriestreet.ie/en/search/?cof=FORID:013125773314712361818:nn3au9egkg4&ie=UTF-8&q=meetings%20with%20theresa%20may>>.

The Irish government's concerted lobbying effort succeeded, as Connelly and Doyle note.⁵⁷ The EU made it clear that the Brexit negotiations would not move on to future trade relations unless the Irish government was satisfied about the Northern Ireland border issue.⁵⁸ Indeed, as Fabbrini has noted, the EU has been remarkably united in its approach to Brexit.⁵⁹ The EU stated that all issues would have to be addressed to the satisfaction of the EU before phase two of the negotiations would be dealt with. The EU's strong commitment to the border issue contributed to increased British engagement with the issue. However, despite the many sources of tension and the above examples of negative political rhetoric, there was a noticeable decline in megaphone diplomacy from December 2016 to December 2018, as the next section shows.

First of all, the EU's commitment to Northern Ireland influenced the UK government's Position Paper on Northern Ireland in August 2017.⁶⁰ Although the paper was short on detail, it dealt with each EU priority systematically and pledged to have no physical infrastructure on the border. The Irish government welcomed it cautiously, stating there were still unanswered questions and from this period onwards, while lobbying intensively, the Irish Minister for Foreign Affairs particularly was at pains to show an understanding of Theresa May's domestic constraints.⁶¹ However, there were no prime ministerial meetings and continued weakness in

⁵⁷ See Connelly & Doyle (n 30).

⁵⁸ 'Ireland will have final say on progress of Brexit talks, says EU', *The Guardian* (1 December 2017) <<https://www.theguardian.com/politics/2017/dec/01/ireland-will-have-final-say-on-progress-of-brexit-talks-says-eu>> accessed 14 September 2019.

⁵⁹ Federico Fabbrini, 'The Future of the EU 27' in Federico Fabbrini (ed) *The Law and Politics of Brexit*, 2nd ed (Oxford University Press 2019).

⁶⁰ 'Position Paper on Northern Ireland', (Gov.uk, 16 August 2017) <<https://www.gov.uk/government/publications/northern-ireland-and-ireland-a-position-paper>> accessed 14 September 2019.

⁶¹ 'Coveney says Brexit deal can be sold persuasively over two-and-a-half weeks', *Irish Times* (26 November 2018) <<https://www.irishtimes.com/news/ireland/irish-news/coveney-says-brexit-deal-can-be-sold-persuasively-over-two-and-a-half-weeks-1.3711280?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fireland%2Firish-news%2Fcoveney-says-brexit-deal-can-be-sold-persuasively-over-two-and-a-half-weeks-1.3711280>> accessed 1 October 2019.

developing joined-up high level engagement on the UK side. Moreover the UK government's Florence Speech in September 2017 was regarded in Dublin as a disappointment, as it devoted very little attention to the Northern Ireland issue.⁶²

In contrast, in December 2017 a joint report between the EU and UK negotiators was published,⁶³ following a delay caused by DUP opposition.⁶⁴ It included a commitment to a backstop solution to the Irish border if the UK left the customs union and the single market. The solution was that if the UK did leave the customs union and the single market, Northern Ireland would remain aligned to the EU single market rulebook and hence trade freely with Ireland and the rest of the EU. Regulatory alignment would occur to ensure Northern Irish goods were subject to EU quality standards. The December 2017 joint report was welcomed by the Irish government and its key provisions were included in the final draft Withdrawal Agreement published in November 2018.⁶⁵

The interim period from December 2017 to November 2018 was characteristically volatile, but in general saw a marked decline in negative rhetoric from the Irish governments. This was despite the particularly stressful European Council summit in Salzburg in September 2018, when Theresa May gave a stark uncompromising speech in response to the EU rejecting the UK government's White Paper – the Chequers Plan.⁶⁶ In

⁶² Etain Tannam, 'Theresa May's Florence speech and Northern Ireland: subtle change?' LSE Brexit Blog (29 September 2017) <<https://blogs.lse.ac.uk/brexit/2017/09/29/is-the-negative-tide-of-british-irish-relations-receding/>> accessed 14 September 2019.

⁶³ European Commission, Joint Report (8 December 2017), available at <https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf>.

⁶⁴ Tony Connelly, *Brexit and Ireland: the dangers, the opportunities and the inside story of the Irish response* (Penguin 2017).

⁶⁵ '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, as agreed at negotiators' level' (14 November 2018), available at <https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_o.pdf>.

⁶⁶ *Policy Paper The future relationship between the United Kingdom and the European Union*, (Gov.uk, 17 July 2018) <<https://www.gov.uk/government/publications/the-future->

addition, the Irish Tánaiste Simon Coveney explicitly emphasised that 'the challenges of these Brexit negotiations should never be twisted into tools for a constitutional agenda for Northern Ireland,'⁶⁷ thereby rejecting using unification as a political football.

In November 2018, the Withdrawal Agreement between the UK and the EU was finally announced amid moving responses from both Leo Varadkar and Simon Coveney. The former stated that 'I want to acknowledge Prime Minister May's integrity in honouring her promise to protect the Peace Process and the Good Friday Agreement. And her commitment to avoid a hard border. She has been true to her word'.⁶⁸

Yet, the period of relief was short-lived, as immediately the Irish government's success in EU bargaining was met with wrath by Brexiteers.⁶⁹ In February 2019, continuing disarray in the UK parliament's ratification process led to Theresa May supporting the Brady Amendment.⁷⁰ This called for the removal of the backstop from the Withdrawal Agreement, thus reneging on the Withdrawal deal she herself had agreed with the EU in November 2018. Her apparent reneging on the Withdrawal Agreement led to hard-line rhetoric once more from both Simon Coveney and Leo Varadkar.

Theresa May requested that she meet with Leo Varadkar in Dublin on 8 February 2019, following her meeting in Brussels the day before, and reports stated that the meeting was cordial and useful.⁷¹ An extension of the UK exit

relationship-between-the-united-kingdom-and-the-european-union> accessed 14 September 2019.

⁶⁷ Simon Coveney, 'Tánaiste's Speech at the British-Irish Association Conference', (Oxford, 8 September 2018) Department of Foreign Affairs and Trade.

⁶⁸ 'Statement by Taoiseach Leo Varadkar on Withdrawal Agreement', (MerrionStreet.ie, 14 November 2018) <https://merrionstreet.ie/en/News-Room/News/Statement_by_Taoiseach_Leo_Varadkar_on_Withdrawal_Agreement.html> accessed 14 September 2019.

⁶⁹ See Federico Fabbrini in this Special Issue.

⁷⁰ House of Commons Order Paper No.240: Part 1, 21, 29 January 2019.

⁷¹ Kevin Doyle, 'No breakthrough' on Brexit deal as Varadkar and May meet in Dublin', Irish Independent (8 February 2019) <<https://www.independent.ie/irish-news/no-breakthrough-on-brexit-deal-as-varadkar-and-may-meet-in-dublin-37798007.html>> accessed 14 September 2019.

date to October 31 2019 was granted by the EU. The hope was that revision of the EU's interpretive statement or political declaration on the future trading relationship would occur and revision of the political declaration was mentioned by one Irish politician in the ruling party Fine Gael.⁷²

However, Theresa May announced her resignation on May 24 2019,⁷³ with Boris Johnson taking over as Prime Minister in July 2019. As such, divisions in the UK will continue, as shown by the success of the UK Brexit Party in the EP elections in May 2019.

V. THE FUTURE OF THE BRITISH-IRISH RELATIONSHIP

The above overview of trends in the British-Irish relationship since 2016 leads to some observations about the relationship during the Brexit era and also some prescriptions for its future management. Brexit has clearly cast a deep cloud over the British-Irish relationship. Relations have not been as tense since the early 1980s and political rhetoric that had vanished by the 1990s re-emerged. The joined-up thinking and mutual problem-solving that typified the peace process and began in the mid-1980s were not evident. There were no joint statements by both governments and very few joint press conferences after meetings. Indeed, there were very few meetings between both Prime Ministers given the magnitude of the Brexit crisis. The core questions are whether the relationship has been irreparably damaged and how best to manage the relationship after the UK has left the EU.

The escalation in tensions at various times since summer 2016 has been a source of surprise for seasoned observers of the relationship. The speed with which apparently deep cooperation regressed was startling. While the above section has highlighted that both governments attempted to manage the relationship diplomatically and hard-line language was only used for strategic

⁷² Neale Richmond, RTE Prime Time (12 March 2019), available at <<https://www.rte.ie/player/series/prime-time/SI0000000825?epguid=IH000368177>> accessed 14 September 2019.

⁷³ Denis Staunton, 'May Defiantly Defended Record Before Her Voice Began To Crack', *Irish Times* (25 May 2019) <<https://www.irishtimes.com/news/world/uk/defiance-as-may-defends-record-before-her-voice-begins-to-crack-1.3903650>> accessed 8 October 2019.

reasons, there has been a clear departure from the cooperative intergovernmentalism that began in the mid-1980s.

Specifically, the British-Irish Intergovernmental Conference did not meet regularly in the ten years before the Brexit referendum. This weakness is partially explained by a reduction in the number of non-devolved policy areas in Northern Ireland following the 2006 St Andrews Agreement.⁷⁴ However, it also reflected a deeper weakness in implementing the Good Friday Agreement that stemmed from both governments placing less priority on Northern Ireland. Although the peace process 'brought a new British-Irish rhetoric of "best friends" [...] the informal British-Irish mode of implementing the Agreement [...] was dependent on the states' prioritisation of Northern Ireland. After 2010 this weakened.'⁷⁵ Given its sensitivity for unionists, the failure to meet regularly in a routine way made it far harder to resurrect it post-2016. Yet it was the obvious institution for both governments to discuss Brexit's challenges.

The British-Irish Council did meet regularly. Indeed by 2017 it had met 29 times and had produced 'a formidable volume of useful reports'⁷⁶ on policy areas of common interest. However, its 'precise value is unclear.'⁷⁷ It is purely consultative and no UK Prime Minister has attended its meetings since Tony Blair.⁷⁸ Indicative of the greater attention paid to Northern Ireland by Irish governments, all Irish Taoisigh have attended the British-Irish Council meetings since its creation.

The Brexit era has shown that British-Irish cooperation was not as embedded as previously assumed. In fact, it highlighted that although the Belfast/Good

⁷⁴ John Coakley, 'British-Irish Institutional Structures: towards a new relationship' (2014) 29(1) Irish Political Studies 81.

⁷⁵ Jennifer Todd, 'The Vulnerability of the Northern Ireland Settlement: British-Irish Relations, Political Crisis and Brexit' (2015) 40(2) Etudes irlandaises 4.

⁷⁶ John Coakley 'The British-Irish Relationship in the 21st Century' in Tannam (ed) *Beyond the Good Friday Agreement: in the midst of Brexit* (London Routledge 2018) 97.

⁷⁷ Mary C Murphy, *Europe and Northern Ireland's Future: negotiating Brexit's Unique Case* (Agenda 2018) 107.

⁷⁸ Etain Tannam, 'Intergovernmental and Cross-Border Cooperation: the Good Friday Agreement and Brexit', in Tannam (ed) *Beyond the Good Friday Agreement: in the midst of Brexit* (London Routledge 2018) 27.

Friday Agreement and its accompanying British-Irish Agreement are international treaties, there was no obligation that the British-Irish Intergovernmental Conference would meet regularly. There was a set schedule for meetings of the North South Ministerial Council, subject to Strand 1 institutions being in place, and there was also a set schedule for the British-Irish Council. However, there was no legally binding schedule for British-Irish Intergovernmental Conference meetings. The frequency of meetings is therefore a function of political will and given potentially 'grave clashes of interest' between the British and Irish sides, there is potential for deterioration in the relationship as the Brexit negotiations proceed.⁷⁹ These clashes of interest are also likely after the Brexit era, given the UK's absence from the EU.

Although not directly related to Brexit, a stark warning of the need for legally binding agreements occurred in June 2019 when the Scottish government called for the Irish government to call on Irish fishermen fishing off Rockall island to cease fishing immediately within the 12 mile exclusion zone, or face enforcement action.⁸⁰ Rockall is between Donegal and Scotland and is by agreement part of UK sovereign territory. However the Irish government claims that Rockall is part of EU fisheries policy giving equal access to both states. In practice the issue was ignored for decades and according to Donegal politicians, Irish fishermen had not increased their fishing activities at Rockall, but the Scottish action highlighted how issues can escalate when contextual conditions alter.⁸¹ The SNP-led Scottish government is pro-remain, but the Scottish fishing community supports Brexit. Arguably the Scottish government behaved in an adversarial manner about Rockall to gain the fishing community's support despite the SNP's remain stance.

In addition, post-Brexit, there will be an obvious temptation for UK governments to lobby Irish governments to influence the EU in the UK's

⁷⁹ Coakley (n 76) 99.

⁸⁰ 'Fisheries Dispute Breaks out Between Ireland and Scotland', RTE News (8 June 2019) <<https://www.rte.ie/news/2019/0607/1054110-fishing-dispute-rockall/>> accessed 14 September 2019.

⁸¹ There was no reference made by the Scottish government to any connection between the UK withdrawal from the 1964 Fisheries Convention and the Rockall issue.

favour on specific policy issues, but Irish governments will resist such efforts, potentially causing more tension.

The risks to future relations necessitate a more formalised relationship. A key condition for future British-Irish cooperation is that regular prime ministerial meetings occur and that the Belfast/Good Friday Agreement's institutions are used robustly. Since 2006, Strand 1 received far more attention politically than the other strands of the Belfast/Good Friday Agreement. For many, Strands 2 and 3 were a package deal to placate nationalists who wanted strong cross-border institutions (Strand 2) and Unionists who wanted East-West institutions (Strand 3). However, as this article has shown, the concept of the totality of the relationship and John Hume's strategy emphasised all three strands working in tandem. Indeed, the peace process and the success of Strand 1 rested on close British-Irish cooperation.

As table 1 shows, Theresa May and Leo Varadkar met nearly every month from February 2018 to February 2019. However, it is equally evident that if the EU had not prioritised the Northern Irish issue, it would have been far more difficult to engage the UK Prime Minister's attention.

Table 1. Meetings between Theresa May and Leo Varadkar, February 2018-February 2019⁸²

February 2018	
12 th	Meeting with PM May, Stormont House, Belfast
March 2018	
22 nd – 23 rd	March European Council - Taoiseach meets with PM May in margins.
May 2018	
17 th	Taoiseach met with PM May in the margins of the EU-Western Balkans Summit in Sofia.
June 2018	
28 th	Taoiseach met with PM May at European Council
September 2018	
20 th	Taoiseach and MoS EU McEntee meet with PM May (Informal European Council, Salzburg)
October 2018	
17 th	Taoiseach meets bilaterally with PM May in margins of European Council
November 2018	
25 th	Taoiseach spoke briefly with PM May on the margins at Special European Council meeting (Art 50)
December 2018	
13 th	Taoiseach met with PM May at European Council
February 2019	
8 th	Taoiseach met with PM May in Farmleigh House
25 th	Taoiseach met with PM May at Arab-EU Summit

⁸² Source: Department of Taoiseach, Dublin.

The voluntary basis to the British-Irish Intergovernmental Conference is at odds with the EU model of cooperation so espoused by John Hume and oft-cited after the Belfast/Good Friday Agreement was signed. Specifically, the European Council – representing EU Heads of State and Government and analogous to the British-Irish Intergovernmental Conference – is obliged to meet at least every six months under Article 15(3) of the Treaty on European Union, and in fact practically meets almost every other month. According to institutionalist logic and John Hume's strategy, the decline in communication after June 2016 and the resurrection of tension in the British-Irish relationship require institutionalised formalised meetings. Therefore, as a minimum requirement for helping to ensure future British-Irish cooperation, the British-Irish Intergovernmental Conference should be legally obliged to meet at regular intervals.

More robust use of the Belfast/Good Friday Agreement's bilateral institutions, while a necessary condition for future cooperation, is not necessarily sufficient. The EU's dense institutional framework and extensive policy competence implies that a multi-layered institutional framework is needed for British-Irish cooperation to continue and deepen. Therefore, as well as greater use of the Agreement's bilateral institutions, and agreements related to areas of common British-Irish concern, for example the CTA, energy and infrastructure, provided they do not encroach on EU policy competence, would help emulate the EU's policy framework.

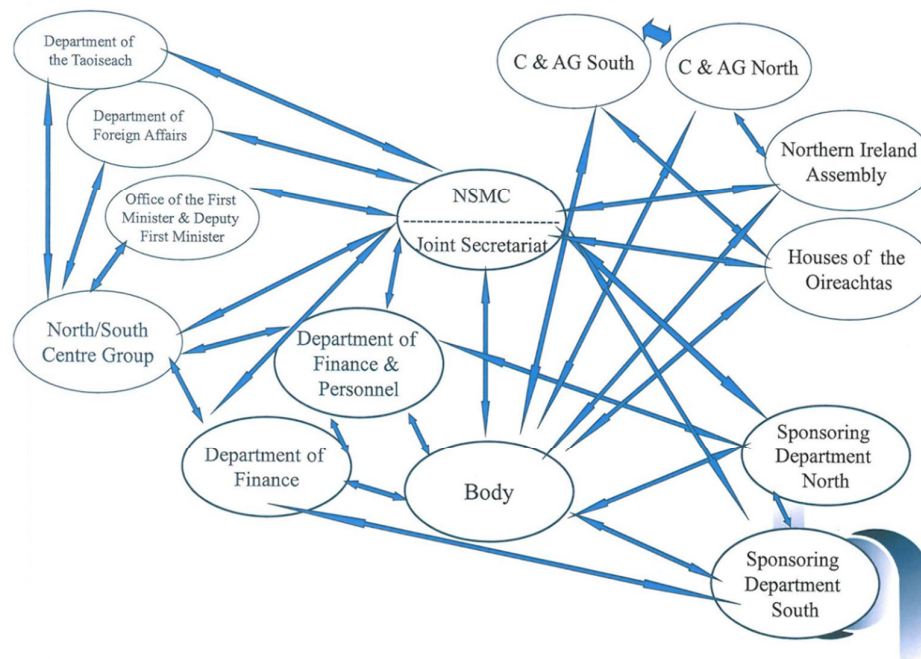
Although a Strand 2 cross-border institution, the North South Ministerial Council provides a template for organising sectoral cross-border meetings. Six cross-border bodies were created, following unionist pressure to minimise the number of bodies created: the Trade and Business Development Body (Intertrade Ireland), Waterways Ireland, the Food Safety Body (SafeFood), Foyle, Carlingford and the Irish Lights Commission, The Language Body, and the Special EU Programmes Body (SEUPB).⁸³ In addition, six areas of cooperation, without joint bodies, were identified: 1) Agriculture: Common Agricultural Policy issues, Animal and Plant Health

⁸³ NSMC, 'North South Implementation Bodies' (2016) <<https://www.northsouthministerialcouncil.org/content/north-south-implementation-bodies>>.

Policy and Research Rural Development; 2) Education: Education for children with special needs, educational under-achievement, teacher qualifications and school, youth and teacher exchanges; 3) Environment: Environment protection, pollution, water quality management and waste management in a cross-border content; 4) Health: Accident and emergency planning, co-operation on high technology equipment, cancer research and health promotion; 5) Tourism including Tourism Ireland: The promotion of the island of Ireland overseas as a tourist destination via the establishment of a new company, known as Tourism Ireland; and 6) Transport: Co-operation on a strategic road and rail infrastructure and public transport ⁸⁴

Before the creation of the NSMC, administrative cooperation between officials was patchy. Indeed there were conflicts of interest between many departments, north and south of the border. However, gradually after the establishment of the NSMC, cooperation flourished, despite the many problems caused by the collapsed Executive and by unionist suspicion of cross-border cooperation. Although policy dynamism did not develop for Northern Irish political reasons, contacts between civil servants were reported in some sectors to be strong, for example in agriculture. Table 2 shows the web of cooperation across the civil service caused by preparation for NSMC sectoral meetings.

⁸⁴ NSMC, 'Areas of cooperation' (2016) <<https://www.northsouthministerialcouncil.org/areas-of-cooperation>>.

Table 2. Civil Service Cooperation Under NSMC⁸⁵

A series of bilateral sectoral agreements in areas of common concern, obliging officials and ministers to meet regularly, could emulate the NSMC idea, without necessitating a coordinating institution.

It is likely that both governments will support increased legalisation of current arrangements. Indeed, Simon Coveney stated that the British-Irish Intergovernmental Conference in July 2018 'will take forward proposals for future East-West cooperation [...] this should be comprehensive across all policy areas of shared concern and should culminate in meetings at the highest political levels'.⁸⁶ Similarly, Theresa May stated that

we already have the British-Irish Intergovernmental Conference and regular Summits between UK and Irish politicians. But as we leave the European

⁸⁵ Source: Etain Tannam, *British-Irish Relations in the 21st Century* (Oxford University Press, forthcoming).

⁸⁶ Coveney (n 67).

Union, we will need to establish new ways of coming together to develop further our unique relationship.⁸⁷

Clearly, bilateral policy agreements could be established under the British-Irish Intergovernmental Conference framework. Moreover in May 2019 both governments signed a Memorandum of Understanding to codify the CTA.⁸⁸

Overall, cooperation necessitates a multi-pronged institutional approach to ensure that, at any given time, various civil servants and ministers from both jurisdictions are in both formal and informal contact. Thus, fuller use of the British-Irish Intergovernmental Conference and the British-Irish Council, as well as policy-based bilateral agreements stemming from the British-Irish Intergovernmental Conference would attempt to partially fill the gap left by the UK's departure from the EU.

VI. CONCLUSION

The future path of the British-Irish relationship is paved with many risks and the optimism of the pre-Brexit era has waned. The period from 2016 to 2019 showed how quickly the habit of cooperation can be reversed, but it also showed how aware senior officials and diplomats are of the need to manage the relationship. In particular the Irish government during this period stepped back from using Irish unification as a political football and Irish diplomats lobbied intensively to ensure that greater attention was paid by the UK government to both Northern Ireland and to the Irish government. Over time, the UK government responded, albeit under pressure from the EU also.

Despite the tensions, both governments are aware that the relationship cannot be taken for granted and, as this article has noted, recently both the UK Prime Minister and the Irish Minister for Foreign Affairs have referred

⁸⁷ Theresa May, 'PM Speech in Belfast' (Gov.uk, 5 February 2019) <<https://www.gov.uk/government/speeches/pm-speech-in-belfast-5-february-2019>> accessed 14 September 2019.

⁸⁸ Denis Staunton, 'British and Irish Governments Sign Common Travel Area agreement', *Irish Times* (8 May 2019) <<https://www.irishtimes.com/news/politics/britain-and-ireland-to-sign-common-travel-area-deal-1.3884176>> accessed 8 October 2019.

to the need to make better use of the British-Irish Intergovernmental Conference. It is likely that in securing more robust use of the Strand 3 institutions, the Irish government will lead the efforts, partly because the UK government will have a daunting policy agenda. However, the Irish government has proved adept at lobbying and therefore while the halcyon days of the 1990s will not return, the relationship is likely to be relatively cooperative in the decades ahead, 'in the shadow and shelter'⁸⁹ of each other.

⁸⁹ Simon Coveney citing President Michael D Higgins (n 67).

THE FUTURE OF THE EU27

Federico Fabbrini*

This article examines the future of the European Union (EU) beyond Brexit, contrasting the unity of the EU27 in the Brexit negotiations with the disunity that emerged among the EU27 in the management of the euro-crisis, migration crisis and rule of law crisis. The article overviews the efforts to restore a European consensus that have been made in the context of the debate on the future of Europe, but underlines how the emergence of strong regional alliances – and the political polarization resulting from the recent European Parliament elections – have challenged this rhetorical exercise. As such, the article considers alternative scenarios for the future of the EU27 and suggests that, while the strength of path dependency cannot be underestimated, the EU may be moving towards greater differentiation, if not outright decoupling among its Member States.

Keywords: European Union, Brexit, future of Europe, crises, scenarios

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I. INTRODUCTION

One of the most remarkable aspects of Brexit – the decision of the United Kingdom (UK) to withdraw from the European Union (EU) – has been the degree to which the 27 other Member States of the EU (EU27) have been united in their dealings with the UK. Contrary to the expectations of some, the EU27 have never divided during the Brexit negotiations. With the marginal exception of Italy's legal challenge against the EU Council decision to relocate the European Medical Agency from London to Amsterdam, rather than Milan¹ – the EU Member States have remained consistently united, delegating all Brexit talks to the ad hoc European Commission Article 50 Task Force, and backing the work of the Chief Negotiator Michel Barnier.² Yet, one would be mistaken to believe that the unity of the EU27 vis-à-vis the UK reflects a generally high level of harmony within the EU. In fact, during the two-year Brexit negotiations, tensions and contrasts among the EU27 have actually increased in a number of policy areas. Besides Brexit, the EU has recently faced several other important crises – from the euro-crisis, to the migration crisis, and the rule of law crisis – which have tested the integrity of the Union, and raised urgent questions on the future of Europe.

The purpose of this article is to explore the future of Europe beyond Brexit, examining the centrifugal pressures that recent crises have exerted on the EU27 and reflecting on the challenges that this poses for the future of European integration. In particular, the article focuses on the deep wounds that the euro-crisis, the migration crisis and the rule of law crisis have left in the fabric of the Union, highlighting growing divisions among the EU27 in

¹ See Regulation (EU) 2018/1718 of the European Parliament and of the Council of 14 November 2018 amending Regulation (EC) No 726/2004 as regards the location of the seat of the European Medicines OJ [2018] L291/3.

² See European Council Conclusions, EUCO XT 20015/18, 25 November 2018, §3 (thanking 'Michel Barnier for his tireless efforts as the Union's chief negotiator and for maintaining the unity among EU27 Member States throughout the [Brexit] negotiations').

the key fields of Economic & Monetary Union (EMU), migration, and respect for EU foundational values. Moreover, the article evaluates the degree to which such cleavages have been overcome in the context of the debate on the future of Europe. In fact, shortly after the June 2016 Brexit referendum, the EU27 started a process of self-reflection designed to build consensus on a common vision of the future ahead. Nevertheless, as this article underlines, this rhetorical reaction has not been able to bridge fractures among the EU27 – a fact confirmed by the growing tendency of states to caucus in regional coalitions pushing conflicting policy agendas, as well as by the increasing polarization of citizens' views as reflected in the recent elections for the European Parliament (EP) on 23–26 May 2019.

This article considers several alternative scenarios for the EU's future. As the article points out, the impact of path dependency should certainly not be underestimated, meaning that a scenario in which the EU muddles through in its current format and resists all difficulties cannot be ruled out. Nevertheless, the article indicates that growing differentiation among the Member States – if not outright decoupling, with the creation to the side of the existing EU of a new, smaller union including only a minority of Member States – are possibilities which should not be excluded either. While the article does not seek to predict the future, which of course remains uncertain, it endeavors to conceptualize three alternative models of constitutional development in the EU, defining their features and highlighting the drivers of both continuity and change in the process of European integration. As such, the article is structured as follows. Section 2 examines three key crises recently challenging the EU – the euro-crisis, the migration crisis, and the rule of law crisis – and explains their centrifugal consequences on European unity. Section 3 looks at the efforts since Brexit to strengthen EU unity, underlining how the rise of regional alliances and political polarization has exposed continuing divisions within the EU27. Section 4 considers possible alternative scenarios for the future of Europe, and discusses path dependency, greater differentiation, or outright decoupling as three options. Section 5, finally, briefly concludes.

II. CRISES

Besides Brexit, the EU has recently been facing a plurality of other crises, which have tested the unity of EU27. In fact, since the start of the Brexit negotiations, tensions among the Member States have possibly even increased on issues such as the governance of EMU, the management of migration, and the respect for the foundational values of the EU. In particular, the euro-crisis and its legacy have caused a cleavage between Northern and Southern Member States; the migration crisis one between Western and Eastern Member States; and the rule of law crisis one between New and Old Member States. Hence, the united face of the EU vis-à-vis the UK effectively concealed a house divided, with multiple centrifugal pressures challenging the integrity of the Union.

1. *Euro-crisis*

The euro-crisis hit the EU well before Brexit. In fact, by the time of the Brexit referendum, the worst of the crisis had already been overcome: while the EU27 had reformed the architecture of European economic governance to tighten budgetary constraints and create mechanisms to financially support states,³ the European Central Bank (ECB) had taken decisive steps to save the Eurozone.⁴ Nevertheless, the crisis had a lasting legacy, tainting inter-state relations throughout the Brexit negotiations, and hampering efforts to deepen EMU, which to this day remains incomplete.⁵ To begin with, from an economic viewpoint, the crisis left a trail of divergence in the macro-economic performance of Member States, and EMU remains fragile due to low growth and high unemployment in some countries.⁶ This was evident in the case of Greece, which in 2018 ended with much fanfare its third bailout program but as part of the post-program surveillance framework was

³ See further Federico Fabbrini, *Economic Governance in Europe* (Oxford University Press 2016).

⁴ See ECB President Mario Draghi, speech at the Global Investment Conference, London, 26 July 2012 (stating that the ECB will 'do whatever it takes to save the euro').

⁵ See Henrik Enderlein et al, 'Repair and Prepare: Growth and the Euro after Brexit', Bertelsmann Stiftung & Jacques Delors Institut 2016.

⁶ Kerstin Bernoth et al, 'Happy Birthday? The euro at 20', study commissioned by the European Parliament Economic Affairs Committee, January 2019, 6.

then forced by the Eurogroup to commit to maintaining 'a primary surplus of 2.2 per cent of GDP on average in the period from 2023 to 2060'⁷ – a target which most observers regarded as impossible to meet.⁸

Moreover, from a political viewpoint, the crisis fueled recriminations and animosity between Member States.⁹ In fact, perceived unfairness in the architecture of EMU propelled forward political forces calling more explicitly for exiting the Eurozone – particularly in Italy, the third largest Eurozone economy. Following parliamentary elections in March 2018, the two parties which had emerged victorious – the *Lega* and the *Movimento 5 Stelle* – joined in a sovereigntist coalition with an explicit plan to abandon the Eurozone.¹⁰ Only the veto of the Italian President of the Republic forced the coalition parties to backtrack.¹¹ Yet the new Italian government clearly embraced a confrontational stand against the EU: in presenting its 2019 draft budget bill to the Commission pursuant to the procedure foreseen by the European semester, the government openly admitted that it was violating the EU deficit rules set out in the Stability and Growth Pact, which led the Commission to invoke for the first time ever its power to request a redrafting

⁷ Eurogroup statement on Greece, 22 June 2018.

⁸ See Jeromin Zettelmeyer et al., 'How to Solve the Greek Debt Problem' Peterson Institute for International Economics Policy Brief 10/2018.

⁹ See also French President Emmanuel Macron, speech, Athens, 7 September 2017 (defining the euro-crisis as 'une forme de guerre civile interne [a form of internal civil war]') (my translation).

¹⁰ See Alessandro Trocino, 'M5S-Lega, il contratto di governo: uscita dall'euro e cancellazione del debito', *Il Corriere della Sera*, 15 May 2018 (reporting a leaked draft of the coalition agreement between the League and the Movimento 5 Stelle including a plan to exit the Eurozone).

¹¹ See Italian President Sergio Mattarella, speech, Rome, 27 May 2018 (opposing the appointment as Minister of the Economy of a person 'che potrebbe provocare, probabilmente, o, addirittura, inevitabilmente, la fuoruscita dell'Italia dall'euro [who could provoke, probably or even inevitably, the exit of Italy from the euro]') (my translation).

of the budget bill,¹² and to activate the excessive deficit procedure (EDP).¹³ Mostly under the pressure of the financial markets, the Italian Government temporarily compromised and agreed to revise its budget bill by postponing some expenditure to reduce the deficit.¹⁴ But this turned out just to be a stopgap and in June 2019 the Commission was again forced to threaten EDP sanctions against Italy for violating the debt criteria of the Stability & Growth Pact.¹⁵

Given the decreasing trust between states, it is unsurprising that major difficulties have been encountered on the road towards completing EMU, including by setting up a fiscal capacity and the last pillar of banking union through a common European deposit insurance scheme (EDIS).¹⁶ In fact, while the efforts of French President Emmanuel Macron favored a convergence between France and Germany, which jointly proposed in November 2018 the establishment of a Eurozone budget with a stabilization function,¹⁷ a coalition of Northern countries known as the Hanseatic League, which groups both Eurozone and non-Eurozone states, came out to rally against the Franco-German proposal, calling instead for a strengthening of the European Stability Mechanism (ESM)¹⁸ as a 'police authority' on the

¹² European Commission opinion of 23 October 2018 on the draft budgetary plan of Italy and requesting Italy to submit a revised budgetary plan, 23 October 2018, C(2018) 7510 final.

¹³ European Commission report on Italy prepared in accordance with Article 126(3) of the Treaty on the Functioning of the European Union, 21 November 2018, COM(2018) 809 final.

¹⁴ European Commission letter to the Government of Italy, 19 December 2018, Ares(2018) 7351969 (welcoming amendments to the Italian draft budget law to assuage the Commission's fiscal concerns).

¹⁵ See European Commission report on Italy prepared in accordance with Article 126(3) of the Treaty on the Functioning of the European Union, 5 June 2019, COM(2019) 532 final.

¹⁶ See ECB President Mario Draghi, speech at the session of the plenary of the European Parliament to mark the 20th anniversary of the euro in Strasbourg, 15 January 2019 (stating that 'EMU remains incomplete').

¹⁷ See Franco-German Proposal on the architecture of a Eurozone Budget within the Framework of the European Union, 16 November 2018.

¹⁸ See Treaty Establishing the European Stability Mechanism, 25 March 2011.

Member States' budgets.¹⁹ In December 2018, the Eurogroup in an inclusive format (that is also open to non-Eurozone Member States) eventually agreed on a package deal of reforms,²⁰ which the Euro Summit endorsed,²¹ including boosting the ESM's authority and the creation of a limited Eurozone budget. However, the EU27 reached a minimalist consensus²² and in June 2019 they unveiled a budgetary instrument only for competitiveness and convergence, but not stabilization²³ and failed to make progress on the EDIS,²⁴ suggesting that the North-South ideological divide between risk-reduction vs. risk-sharing remains a stumbling block towards completing EMU.²⁵

2. Migration crisis

Like the euro-crisis, the migration crisis had peaked by the time of the Brexit referendum. Although fears of uncontrolled migration into the UK were cynically exploited by the Brexiteers in the referendum campaign, by 2016 the EU had succeeded in reducing the inflow of people moving into the Schengen free-movement zone, at the cost of outsourcing to third countries (with dubious human rights records) the task of controlling the EU's external borders.²⁶ Nevertheless, the management of the migration crisis has remained a point of contention among the Member States during the time of the Brexit negotiations and tensions over the functioning of the European

¹⁹ Shared views from the Finance Minister of Denmark, Estonia, Finland, Ireland, Latvia, Lithuania, the Netherlands and Sweden, 6 March 2018.

²⁰ Eurogroup report to Leaders on EMU Deepening, 4 December 2018, PRESS 738/18.

²¹ Euro Summit statement, 14 December 2018, PRESS 790/18.

²² Eurogroup President Mario Centeno, remarks, 13 June 2019.

²³ Council of the EU, Term sheet on the Budgetary Instrument for Convergence and Competitiveness, 14 June 2019.

²⁴ See also European Commission Communication Deepening Europe's Economic and Monetary Union: Taking stock four years after the Five Presidents' Report – European Commission's contribution to the Euro Summit on 21 June 2019, 12 June 2019, COM(2019) 279 final, 10 (stating, with regard to EDIS that 'regrettably, the impasse that characterized the past several years has persisted and no tangible progress has been made').

²⁵ See further Federico Fabbrini and Marco Ventoruzzo (eds), *Research Handbook on European Economic Law* (Elgar 2019).

²⁶ See EU-Turkey statement, 18 March 2016, Press release 144/16.

Common Asylum System (ECAS) have in fact increased.²⁷ The EU migration policy had been developed in good time, but the Dublin regulation,²⁸ which identified the Member State responsible for processing asylum applications of third-country nationals, was particularly ill-designed to cope with a sudden surge of asylum applications. Yet, the EU27 were dramatically divided on the issue of how to handle this crisis, with Central and Eastern European Member States refusing any form of burden sharing vis-à-vis the coastal Member States, which had been the main points of entry for immigrants.

In September 2015, under the pressure of events, the Council adopted by majority a decision establishing a temporary relocation mechanism to the benefit of Greece and Italy, which foresaw the relocation of 160,000 asylum seekers to the other EU Member States pro-quota, with the aim of relieving Greece and Italy of the increasing workload resulting from the sudden inflow of migrants from the Middle East and North Africa.²⁹ Although this number was a drop in the ocean compared to the almost 4 million migrants who had entered the EU in 2015, Hungary and Slovakia challenged the Council decision in the European Court of Justice (ECJ). And although in September 2017 the ECJ ruled that the Council had acted legally in adopting the decision by majority,³⁰ the Visegrad countries (Poland, Hungary, Czechia and Slovakia) bluntly continued to refuse applying the Council decision. As the Commission had to acknowledge in June 2017 in its periodic report on the

²⁷ See generally Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2015).

²⁸ See Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ [2013] L180/31.

²⁹ See Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ [2015] L239/146 and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece OJ [2015] L248/80.

³⁰ See Case C-643/15 and C-647/15 *Slovakia & Hungary v. Council of the EU*, ECLI:EU:C:2017:631

relocation system, progress in the implementation of the measure had been 'insufficient'.³¹

In fact, disagreement among the Member States within the Council paralyzed any efforts at reforming the ECAS and, despite the encouragement of the European Council,³² the Commission's proposals to overhaul the system³³ – including by introducing a permanent relocation mechanism to increase its fairness – have gone nowhere. Furthermore, as in the case of EMU, the legacy of the crisis combined with the inequities of the system have fueled political movements which have explicitly called for drastic responses, including fully suspending Schengen and reintroducing national borders.³⁴ Ironically, this has happened not only in Northern Member States like Austria and Denmark, but also in coastline countries such as Italy and Spain, where xenophobic right-wing parties have gained momentum in national and regional elections. Nonetheless, the cleavage on the migration issue has mostly run on an East-West divide and the ideological conflict between EU Member States on how Europe should handle the migration crisis soured to the point that Luxembourg Minister of the Interior Jean Asselborn even suggested that Hungary should be expelled from the EU for the way it treats migrants.³⁵

3. *Rule of law crisis*

Compared to the euro-crisis and the migration crisis, the third crisis got much worse in the midst of the Brexit negotiations. Even if the first signs of backsliding regarding respect for the rule of law in a number of EU Member States in Central and Eastern Europe were evident from the early 2010s, in the years after the UK voted to leave the EU the phenomenon known as the

³¹ See European Commission Thirteenth report on relocation and resettlement, 13 June 2017, COM(2017) 330 final.

³² See European Council conclusions 28 June 2018, EUCO 9/18, §12 (calling for a 'speedy solution to the whole package' of reforms).

³³ See European Commission communication, A European Agenda on Migration, 13 May 2015, COM(2015) 240 final.

³⁴ See European Commission communication, Preserving and strengthening Schengen, 27 September 2017, COM(2017) 570 final.

³⁵ Madeline Chambers & Marton Dunai, 'EU should expel Hungary for mistreating migrants, Luxembourg minister says', *Reuters*, 13 September 2016.

rule of law crisis both deepened and widened.³⁶ Although Article 2 TEU proclaims that 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' several EU Member States, particularly among those that joined the EU in the 2004/7 enlargements, have experienced legal and political developments that have challenged basic constitutional principles such as the independence of the judiciary, separation of powers, and the fairness of the electoral process.³⁷ Such developments constitute a major threat to the integrity of the EU. Yet Hungarian Prime Minister Viktor Orbán proudly defended this path, explicitly arguing that his country was intent on establishing an authoritarian democracy.³⁸ The Hungarian example has increasingly served as a template for other new Member States which had joined the EU in the 2004/7 enlargements, notably Poland and Romania, but also Slovakia and Malta.³⁹

Although arguably with excessive delay, the EU institutions have started to take action against this phenomenon with the support of several other Member States and the main European political parties. In particular, as part of the preparatory work for the next multi-annual EU budget, the Commission proposed to introduce a mechanism to freeze structural funds for EU Member States which failed to respect the rule of law.⁴⁰ In addition, in December 2017 the Commission activated the Article 7 TEU procedure against Poland, calling on the Council to determine that the country faced a

³⁶ See generally Andras Jakab and Dimity Kochenov (eds.), *The Enforcement of EU Law and Values* (Oxford University Press 2017).

³⁷ See Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3.

³⁸ Hungarian Prime Minister Viktor Orban, speech at the XXV. Bálványos Free Summer University and Youth Camp, 26 July 2014 (stating that 'the new state that we are building is an illiberal state, a non-liberal state').

³⁹ See European Parliament resolution of 28 March 2019 on the situation of the rule of law and the fight against corruption in the EU, specifically in Malta and Slovakia, P8_TA(2019)0328.

⁴⁰ European Commission proposal for a regulation of the European Parliament and the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, 2 May 2018, COM(2018) 324 final.

clear risk of a serious breach of the rule of law.⁴¹ And in September 2018 the EP approved a resolution to initiate the same process against Hungary.⁴² Nevertheless, limited progress has been made by the Council in considering whether the situation in Poland and Hungary require an EU determination that corrective action is necessary. In fact, in the first semester of 2019, when the Presidency of the Council was held by Romania – a Member State which had been strongly criticized by the EP for its rule of law record and limited efforts to fight corruption⁴³ – the discussion of the Article 7 procedure against Poland and Hungary was even removed from the agenda of the General Affairs Council meeting.⁴⁴

In this context, the ECJ was also involved in the matter. Seized through a preliminary reference by the Irish High Court, the ECJ held that backsliding regarding respect for the rule of law – if this resulted in the reduction of the due process rights of a convicted person, to be assessed cases by case – could justify a judicial decision not to execute a European Arrest Warrant toward Poland.⁴⁵ In addition, ruling in an infringement proceeding brought by the Commission, the ECJ enjoined Poland from giving effect to a highly controversial law which altered the composition of the state Supreme Court.⁴⁶ Yet, while the ECJ has so far managed to command respect, its

⁴¹ European Commission reasoned proposal in accordance with Article 7(1) Treaty on European Union for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, 20 December 2017, COM(2017) 835 final.

⁴² European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, P8_TA(2018)0340.

⁴³ European Parliament resolution of 13 November 2018 on the rule of law in Romania, P8_TA(2018)0446.

⁴⁴ See General Affairs Council, Outcome of meeting, 8 January 2019, Doc 5039/19.

⁴⁵ See Case C-216/18 PPU, *LM*, ECLI:EU:C:2018:586.

⁴⁶ Case C-619/18 R, *Commission v. Poland*, Order of the Vice-President of the Court, 19 October 2018, ECLI:EU:C:2018:910 (ordering the immediate suspension of the application of the provisions of national legislation relating to the lowering of the retirement age for Polish Supreme Court judges); Case C-619/18 R, *Commission v. Poland*, Opinion of AG Tanchev, 11 April 2019, ECLI:EU:C:2019:325; Case C-

ability to halt the erosion of the rule of law based system at the national level is likely to face challenges in the long term, given the absence of EU coercive power and the growing rise of populism across Europe. In fact, while the rule of law crisis has mostly polarized Old vs. New Member States, the formation of sovereigntist, Euro-skeptic government coalitions in an ever greater number of EU Member States – including Austria and Italy – makes it unlikely the EU intergovernmental institutions will mobilize to respond to domestic threats to the rule of law in forms analogous to what was done at the time of the Haider affair,⁴⁷ casting dark shadows on the future functioning of the EU.

III. REACTIONS AND FRACTURES

Facing the first case of disintegration with a Member State intent on leaving the EU, the EU27 have since Brexit endeavored to reaffirm European unity with a number of initiatives designed to build consensus on a common way forward. However, this rhetorical exercise has run afoul of the reality of actions taken by groups of Member States caucusing in regional blocs: this has exposed conflicting strategies to deal with the EU's multiple crises and increasingly irreconcilable visions on the future of Europe. In fact, the cleavages cutting through the EU27 were ultimately reflected in the May 2019 EP elections, which revealed growing polarization among EU Member States and citizens.

1. The Debate on the Future of Europe and the Leaders' Agenda

While the EU27 had already reaffirmed their unity in the face of Brexit in September 2016,⁴⁸ the process of reflection on the future of Europe was formally started in connection with both the 60th anniversary of the Treaties of Rome and the UK's notification of its intention to withdraw from the EU.

619/18 R, *Commission v. Poland*, judgment of the Court, 24 June 2019 (finding the Polish law in breach of EU law).

⁴⁷ Wojciech Sadurski, 'Adding Bite to Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider' (2010) 16 *Columbia Journal of European Law* 385.

⁴⁸ Bratislava Declaration, 16 September 2016.

As described elsewhere,⁴⁹ in February 2017 the EP adopted a package of resolutions outlining its vision for the future of the EU,⁵⁰ in March 2017 the European Commission published a whitepaper on the future of Europe,⁵¹ and in the same month the leaders of the EU institutions and Member States signed a declaration in Rome pledging their support for European integration and defining the 'Union [a]s undivided and indivisible'.⁵² Along the same lines, the European Commission promoted a broad public deliberation on the future of Europe,⁵³ and the President of the European Commission Jean-Claude Juncker used his final state of the union addresses before the EP in 2017 and 2018 to call for a stronger, more united, and more democratic Union,⁵⁴ and to make the case for European sovereignty as a vision for the future.⁵⁵

However, given the strategic nature of the challenges faced by the EU it has mainly been within the European Council – as the institution responsible for defining the general political direction of the EU – that efforts were made to address the EU's crises and chart a united way forward at 27. In October 2017, in particular, the President of the European Council, Donald Tusk launched a new working method known as the 'Leaders Agenda', which foresaw a more structured conversation among national leaders around thematic issues – including migration, trade, internal and external security, and economic affairs – with the aim of 'resolving deadlocks or finding solutions to key

⁴⁹ Federico Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press 2017).

⁵⁰ European Parliament resolution of 16 February 2017 on improving the functioning of the European Union building on the potential of the Lisbon Treaty, P8_TA(2017)0049 and European Parliament resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union, P8_TA(2017)0048

⁵¹ European Commission, whitepaper 'The Future of Europe', 1 March 2017.

⁵² Rome Declaration of the leaders of 27 Member States and of the European Council, the European Parliament and the European Commission, 25 March 2017.

⁵³ See European Commission, Citizens' Dialogue and Citizens' Consultations: Key conclusions, 30 April 2019.

⁵⁴ European Commission President Jean-Claude Juncker, State of the Union Address 2017, Brussels, 13 September 2017.

⁵⁵ European Commission President Jean-Claude Juncker, State of the Union Address 2018, Brussels, 12 September 2018.

political dossiers'.⁵⁶ In November 2017, the EU27 gathered in Goteborg, Sweden, to proclaim the European Pillar of Social Rights, a set of 20 non-binding principles designed to reaffirm the EU commitment to a social Europe. Moreover, under the leadership of the President of the EP, Antonio Tajani, the heads of state and government of the EU27 were invited to present their vision of the future of Europe in front of the EP plenary in the build-up to the EP elections. Starting with Irish Taoiseach Leo Varadkar in January 2018,⁵⁷ the 16 months before the EP election recess saw the Prime Ministers and Presidents of 20 Member States present to the EP their national priorities and programs for the future of Europe.⁵⁸

This process of reflection culminated in a special summit held on Europe Day, 9 May 2019, in Sibiu, Romania where EU leaders approved a declaration on the future of Europe.⁵⁹ Days before the EP elections, the Presidents of the EU political institutions and the heads of state and government of the EU27 reaffirmed their conviction that 'united, we are stronger in this increasingly unsettled and challenging world'⁶⁰ and spelled out ten commitments 'of a new Union at 27 ready to embrace its future as one'.⁶¹ The first among these

⁵⁶ European Council, Leaders Agenda, 17 October 2017.

⁵⁷ Irish PM Leo Varadkar, speech Strasbourg, 17 January 2018.

⁵⁸ Croatian PM Andrej Plankovic, speech Strasbourg 6 February 2018; Portuguese PM Antonio Costa, speech Strasbourg, 14 March 2018; French President Emmanuel Macron, speech Strasbourg, 17 April 2018; Belgian PM Charles Michel, speech Strasbourg, 3 May 2018; Luxembourg PM Xavier Bettel, speech Strasbourg, 30 May 2018; Dutch PM Mark Rutte, speech Strasbourg, 13 June 2018; Polish PM Mateusz Morawiecki, speech Strasbourg, 4 July 2018; Greek PM Alexis Tsipras, speech Strasbourg, 11 September 2018; Estonian PM Juri Ratas, speech Strasbourg, 3 October 2018; Romanian President Klaus Iohannis, speech Strasbourg, 23 October 2018; German Chancellor Angela Merkel, speech Strasbourg, 13 November 2018; Danish PM Lars Lokke Rasmussen, speech Strasbourg, 28 November 2018; Cypriot President Nicos Anastasiades, speech Strasbourg, 12 December 2018; Spanish PM Pedro Sanchez, speech Strasbourg, 16 January 2019; Finnish PM Juha Sipilä, speech Strasbourg, 31 January 2019; Italian PM Giuseppe Conte, speech Strasbourg, 12 February 2019; Slovak PM Peter Pellegrini, speech Strasbourg 7 March 2019; Swedish PM Stefan Lofven, speech Strasbourg, 3 April 2019; Latvian PM Krišjānis Kariņš, speech Strasbourg, 17 April 2019.

⁵⁹ Sibiu Declaration, 9 May 2019.

⁶⁰ Ibid.

⁶¹ Ibid.

commitments was a pledge, echoing the Declaration on the Reunification of Europe signed in Warsaw on 1 May 2019 by the 13 new Member States that had joined the EU since 2004,⁶² to 'defend one Europe – from East to West, from North to South',⁶³ honoring the 30th anniversary of the fall of the Iron Curtain and the 15th anniversary of the major enlargement into Central and Eastern Europe. Furthermore, on the same day, the heads of state of 21 Member States (those with an elected president rather than a monarch) signed a joint call for Europe ahead of the EP elections, which stated that 'unity is essential and that we want to continue Europe as a Union'.⁶⁴

2. Regional Caucuses and National Initiatives

Despite repeated rhetorical calls to unity, however, the EU has recently witnessed a growing tendency among Member States to caucus in regional groupings, pushing conflicting policy agendas. In particular, besides well-known formats such as the Benelux (Belgium, the Netherlands and Luxemburg) or the Baltics (Estonia, Latvia, and Lithuania), the Visegrad group (bringing together Poland, Hungary, Slovakia and Czechia) emerged as a powerful lobby to resist any form of burden-sharing in the management of the migration crisis.⁶⁵ In response, seven Southern countries (Portugal, Spain, France, Italy, Malta, Greece and Cyprus) established in 2016 the Euro-Med group, which met recurrently to call instead for greater EU solidarity.⁶⁶ At the same time, under the leadership of Austria, ten Balkan states – which included both EU and non-EU members (Bulgaria, Croatia, Slovenia, Albania, Bosnia, Kosovo, Macedonia, Montenegro and Serbia) but excluded Greece – met informally in 2016 to discuss how to halt migration via the South-Eastern European route. And, as mentioned, at the behest of the Netherlands, a group known as the Hanseatic League – which included both Eurozone and non-Eurozone members (Denmark, Finland, Sweden, Ireland,

⁶² See Warsaw Declaration on the Reunification of Europe, 1 May 2019.

⁶³ Sibiu Declaration, 9 May 2019.

⁶⁴ Joint Call for Europe ahead of the European Parliament elections in May 2019, 9 May 2019.

⁶⁵ See <http://www.visegradgroup.eu/>.

⁶⁶ See <https://www.southeusummit.com/about/>.

Estonia, Latvia, Lithuania, as well as at times Czechia and Slovakia) – coalesced to resist EMU reforms.

In the context of this increasing regional fragmentation, an important counter-point was offered by the re-starting of the Franco-German integration engine, thanks to the effort of the new French President Emmanuel Macron. In January 2018, at the occasion of the 55th anniversary of the 1963 Elysee Treaty, France and Germany committed to an agenda of growing political, economic and social convergence,⁶⁷ and in June 2018 they concluded in Meseberg a declaration on the future of Europe with a specific roadmap to deepen integration in the fields of security and defense, migration and economic policy, including completing EMU.⁶⁸ On this basis, in November 2018 the Minister of Finance of the two countries brought forward specific proposals for a Eurozone budget,⁶⁹ which were followed by common positions in the field of digital tax⁷⁰ and competition policy.⁷¹ And while the Assemblée Nationale and the Bundestag resolved to establish a joint Franco-German Parliamentary Assembly, designed to 'draft propositions on all questions of interest for franco-german relations with the aim to go towards a convergence of French and German law',⁷² renewed Franco-German cooperation reached its climax with the conclusion in January 2019 of the Treaty of Aachen, which paved the way for ever greater socio-economic and cross-border integration between the two countries as a way to push Europe forward.⁷³

⁶⁷ See Déclaration conjointe à l'occasion du 55^e anniversaire de la signature du Traité sur la coopération franco-allemand du 22 janvier 1963, 22 January 2018.

⁶⁸ Franco-German Declaration, Meseberg, 19 June 2018.

⁶⁹ See n 17.

⁷⁰ Franco-German Joint Declaration on the taxation of digital companies and minimum taxation, 4 December 2018.

⁷¹ Franco-German Manifesto for a European industrial policy fit for the 21st century, 19 February 2019.

⁷² Accord parlementaire franco-allemand, 25 March 2019, Art. 6 ('formuler des propositions sur toute question intéressant les relations franco-allemandes en vue de tendre vers une convergence des droits français et allemande')(my translation).

⁷³ Traité entre la République française et la République fédérale d'Allemagne sur la coopération et l'intégration franco-allemand, Aachen [hereinafter: Treaty of Aachen], 22 January 2019.

In fact, since his election in May 2017, French President Macron has emerged as the leading figure advancing an ambitious vision for the future of Europe. In particular, in his speech at Sorbonne University in September 2017, he made a passionate case in favor of true European sovereignty as a way for the EU to face the challenges of the new century,⁷⁴ a point he subsequently repeated in May 2018, when receiving the Prix Charlemagne,⁷⁵ and in November 2018, when speaking in the Bundestag on the occasion of the 100th anniversary of the end of World War I.⁷⁶ Yet, significantly for an initiative which was officially entitled 'For a sovereign, united, democratic Europe', President Macron admitted that it was unlikely that the EU27 could move in this direction together and clarified that if no state should be excluded, 'no country should be able to block those who want to move further and faster'.⁷⁷ In fact, Macron's vision, while supported by some,⁷⁸ has come to represent the target of public attacks by self-proclaimed populist leaders – including Hungarian Prime Minister Viktor Orban, Italian Deputy Prime Minister Matteo Salvini, and Polish leader Jarosław Kaczyński – who have advanced an alternative, sovereigntist plan for the future of Europe.⁷⁹

3. European Parliament Elections

The clash between these conflicting visions of the future of Europe was vividly reflected in the elections for the 9th EP, which took place between 23 and 26 May 2019.⁸⁰ In the second largest democratic exercise in the world (after India) pro and anti-European parties fought explicitly on alternative

⁷⁴ French President Emmanuel Macron, speech at Université La Sorbonne 'Pour une Europe souveraine, unie, démocratique', 26 September 2017.

⁷⁵ French President Emmanuel Macron, speech at the award of the Prix Charlemagne, Aachen, 11 May 2018.

⁷⁶ French President Emmanuel Macron, speech at the Bundestag on the commemoration of the 100th anniversary of the end of World War I, Berlin, 18 November 2018.

⁷⁷ Macron (n 74) ('aucun pays ne doit pouvoir bloquer ceux qui veulent avancer plus vite ou plus loin')(my translation).

⁷⁸ See German Minister of Finance Olaf Scholz, speech Humboldt Universität, Berlin, 28 November 2018.

⁷⁹ See Barbara Fiammeri, 'Salvini da Kaczyński: al via il 'progetto' sovranista in UE', *Il Sole 24 Ore*, 9 January 2019.

⁸⁰ See 2019 European elections result, available at: <https://www.election-results.eu/>

visions of Europe. While French President Macron took up the leadership of the pro-European forces, addressing an open letter to all European citizens (written in the 22 official languages of the EU) *pour un renaissance européenne*,⁸¹ sovereigntist forces made clear their ambition to take control of the EU machine and fundamentally weaken the system from within. In fact, during spring 2019 tensions between pro-European and Euro-skeptic forces soured to the point that they spilled over from the political to the diplomatic realm: In an unprecedented move, France recalled its ambassador from Italy after the Italian Deputy Prime Minister Luigi di Maio, leader of the *Movimento 5 Stelle*, met the self-proclaimed mastermind of the *Gillet Jaunes* movement, which had openly suggested staging a military *coup d'état* against French President Macron.⁸²

The EP elections,⁸³ in which the UK also eventually participated, constituted a political watershed, confirming a sentiment that had been captured by the Spring 2019 Eurobarometer.⁸⁴ To begin with, for the first time since 1979, the two political families which had traditionally dominated the EP – the European People's Party (EPP) and the Socialists & Democrats (S&D) – lost a majority of 751 EP seats.⁸⁵ By contrast, the elections resulted in impressive gains for liberal democratic and environmentalist parties – which increased their EP seats, respectively, from 67 to 105, and from 50 to 69 – as well as by sovereigntist and populist forces. While pro-European parties managed overall to cling on to control of the EU institutions – mostly thanks to the sudden rise in electoral participation, which increased almost 10 per cent compared to 2014 – the vote strengthened the anti-European factions within

⁸¹ French President Emmanuel Macron, Letter, 4 March 2019, available at: <https://www.elysee.fr/es/emmanuel-macron/2019/03/04/pour-une-rennaissance-europeenne.fr>

⁸² See 'La France rappelle son ambassadeur en Italie à la suite d'«attaques sans précédent»', *Le Monde*, 7 February 2019.

⁸³ See for all data 2019 European elections results, available at: <https://election-results.eu/>

⁸⁴ Eurobarometer Spring 2019, 25 April 2019.

⁸⁵ Corinne Deloy, 'La progression des populistes est contenue par la hausse des libéraux et des écologistes aux élections européennes', Fondation Robert Schuman, June 2019.

the EP, with conservatives, populists and nationalist parties now holding 63, 43 and 73 EP seats apiece.

Nevertheless, the election also exposed relevant national variation. In particular, in Hungary and Poland the governing right-wing parties, *Fidesz* and *PiS*, topped the polls with 53 per cent and 45 per cent of the vote respectively, while in Italy the *Lega*, a nationalist party lead by fire-brand Deputy Prime Minister Matteo Salvini won the national vote with 34 per cent support and 28 EP seats. By contrast, S&D parties performed well in Spain, Portugal and the Netherlands, and the EPP won the elections in Ireland, Greece and Germany, where *Die Grünen* (the Greens) emerged as the biggest electoral surprise, coming in second place with 20 per cent of the vote. Moreover, while in France President Macron's movement trailed Marine Le Pen's *Rassemblement nationale* (National Rally), pro-European forces overall secured a higher number of EP seats, thanks again to a surprising performance by environmentalist parties, which secured 13 per cent of the vote.

The fragmentation in the composition of the 10th EP, combined with the ideological and regional cleavages reflected in the elections, complicated the start of the new institutional cycle, with the appointment of new EU leaders and the adoption of a new strategic agenda for the EU. As regards the former, two meetings on 20 June 2019⁸⁶ and on 1 July 2019⁸⁷ were not enough for the European Council to reach a compromise on the nominees for the top EU jobs.⁸⁸ Regarding the latter, the EU27, with input from the European Commission⁸⁹ and the President of the European Council,⁹⁰ managed to map

⁸⁶ See European Council President Donald Tusk, statement, 20 June 2019.

⁸⁷ See European Council President Donald Tusk, statement, 1 July 2019.

⁸⁸ See European Council Conclusions, 2 July 2019, EUCO 18/19 (nominating Ursula von der Leyen as President of the European Commission).

⁸⁹ See also European Commission contribution to the informal EU27 leaders' meeting in Sibiu Romania on 9 May 2019, Europe in May 2019: Preparing for a more united stronger and more democratic Union in an increasingly uncertain world, 30 April 2019.

⁹⁰ See European Council, Leaders' Agenda: Strategic Agenda 2019-2024 – outline, 8 May 2019.

a strategic agenda for 2019-2024,⁹¹ but this was so lacking in detail, as a condition to keep all Member States on board, as to look almost empty. In this context, it is worth noting that the liberal democratic group within the EP decided to rename itself 'Renew Europe', while the main sovereigntist force has called itself 'Identity & Democracy', suggesting that a strong polarization will characterize the functioning of the EP in its 9th term.

IV. SCENARIOS

The crises described in section 2 have created centrifugal pressures challenging the unity of the EU. At the same time, the reactions since the Brexit referendum surveyed in section 3 have not bridged these cleavages: despite the rhetorical exercise of the debate on the future of Europe, the emergence of strong regional alliances, and the polarization in the EP elections confirmed the existence of strong fractures within the EU and of conflicting visions of integration. In this context, a number of scholars and commentators have started to reflect critically and constructively on several possible scenarios for the future of the EU,⁹² many of which imply a greater differentiation among, if not outright decoupling between, EU Member States. Yet, one should not underestimate the dynamics of path dependency within the EU. In what follows, three possible competing models of future integration are outlined.

1. *Path Dependency*

One cannot exclude that, despite all the challenges the EU is currently facing, things may simply continue as they have done previously. After all, the EU is not new to weathering crises. In fact, crises have been a recurrent feature in the history of the EU, from De Gaulle's Empty Chair⁹³ to the failure of the

⁹¹ See European Council Conclusions, 20 June 2019, EUCO 9/19, Annex I: A New Strategic Agenda.

⁹² See e.g. Ivan Krastev, *After Europe* (Penn Press 2017); George Soros, 'How to Save Europe', *Project Syndicate*, 29 May 2018; and Alberto Estella, 'EU Scenarios for 2027', Real Instituto Elcano WP 19/2018.

⁹³ See Piers Ludlow, 'Challenging French Leadership in Europe: Germany, Italy, the Netherlands and the Outbreak of the Empty Chair Crisis of 1965-1966', (1999) 8 *Contemporary European History* 231.

European Constitution⁹⁴ and beyond. Hence, the EU may simply be able to resist yet another set of crises and muddle through. In fact, there are a number of policy areas where the EU is actually delivering – effectively – with its current governance and policy structures. In the field of international trade, for example, the EU has been able to achieve its objectives successfully. In the last five years, the EU has initiated a major free trade agreement with Japan⁹⁵ and started negotiations for new economic partnerships with, among others, Australia.⁹⁶ Moreover, despite a challenge by the Belgian region of Wallonia,⁹⁷ the EU Council signed a comprehensive economic trade agreement with Canada⁹⁸ and the European Commission received a mandate to start new trade negotiations with the US,⁹⁹ averting (so far) the threats of a tariff war with the Trump administration.¹⁰⁰

The fact that the EU works – at least in some policy areas – is not irrelevant, as it strengthens the status quo and reduces the impetus for reform. In fact, as economists have shown, institutional systems follow a logic of path dependency, and reforms usually occur only when they are 'Pareto-optimal'. Path dependency means that once an economic process or a governance arrangement is in place over-time, it becomes locked-in and it will be difficult to change it, as institutional actors become accustomed to the status quo.¹⁰¹ Pareto-optimality refers to a state of allocation of resources from which it is impossible to reallocate so as to make any one individual or preference criterion better off without making at least one individual or preference criterion worse off: this means that improvements to a given equilibrium can

⁹⁴ See Nick Barber et al (eds), *The Rise and Fall of the European Constitution* (Hart 2019).

⁹⁵ See EU-Japan Economic Partnership Agreement.

⁹⁶ See European Commission press release, 'EU and Australia launch talks for a broad trade agreement', 18 June 2018, IP/18/4164.

⁹⁷ Opinion 1/17 on CETA, Judgment of 30 April 2019, (fining CETA's mechanism for the settlement of disputes between investors and states as compatible with EU law).

⁹⁸ See EU-Canada Comprehensive Economic Trade Agreement OJ [2017] L11/23.

⁹⁹ See Council decision of 15 April 2019 authorizing the opening of negotiations with the United States of America for an agreement on the elimination of tariffs for industrial goods, Doc 6052/19.

¹⁰⁰ Joint EU-US Statement, 25 July 2018, STATEMENT/18/4687.

¹⁰¹ See Kurt Dopfer, 'Toward a Theory of Economic Institutions: Synergies and Path Dependency' (1991) 25 *Journal of Economic Issues* 535.

only occur if no one loses out of the change. Applied to the EU, these insights suggest that reforming the EU at 27 will be a daunting task if states and EU institutions are accustomed to existing governance practices, and if reform scenarios threaten to make some countries worse off, given the requirement that any amendment to the EU Treaties be made by unanimous consent.¹⁰²

However, one cannot underestimate the novelty of the challenges the EU is facing today. Moreover, the ability of the EU to work in given areas, such as international trade, conceals the fact that this is a special domain where the institutional structures of the EU actually support effective governance. In fact, the EU treaties make the common commercial policy an exclusive competence of the EU,¹⁰³ vesting the power to handle international negotiations in the European Commission, subject to the mandate of the Council, which operates under qualified majority voting, and to the oversight of the EP.¹⁰⁴ Yet, in most other areas of high politics, the EU does not follow the same supranational logic. On the contrary, intergovernmental modes of governance generally prevail, with the European Council mostly in charge of decision-making. As is well known, this has led to paralysis and increased inter-state tensions, since intergovernmental institutions are unable to overcome the conflicting national interests of the Member States and thus solve the problems at hand.¹⁰⁵ In this context, it is not clear that states will have an interest in maintaining the status quo, or that the system will be strong enough to withstand pressures for change.¹⁰⁶

2. Differentiation

It is for these reasons that an alternative scenario is one of increasing differentiation within the EU, a mode of integration which tries to reconcile heterogeneity within the EU by allowing Member States to participate in

¹⁰² See Art. 48 TEU.

¹⁰³ Art. 3 TFEU.

¹⁰⁴ Art. 207 TFEU.

¹⁰⁵ See Federico Fabbrini, 'Constitutional Crisis and Institutional Reform: The European Union at the Crossroad' (2017) 32 Connecticut Journal of International Law 285.

¹⁰⁶ Dermot Hodson and Uwe Puetter, 'The European Union in Disequilibrium', (2019) Journal of European Public Policy 3.

specific EU policies on a voluntary basis.¹⁰⁷ Differentiation is by no means new to the EU, as it finds its roots in the Treaties of Maastricht and Amsterdam and the establishment of opt-outs (notably on euro-membership) and closer cooperation (including in the field of defense).¹⁰⁸ Nevertheless, in recent times differentiated integration has increasingly become a tool to deal with deadlock and diverging ideological preferences in highly salient policy areas.¹⁰⁹ For instance, the project of establishing a European Public Prosecutor Office (EPPO)¹¹⁰ to investigate transnational crimes against the financial interests of the EU moved forward through enhanced cooperation with the support of only 20 Member States: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Germany, Greece, Spain, Finland, France, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovenia and Slovakia. Not surprisingly, among the non-participating Member States are Poland and Hungary, two countries subject to the Article 7 procedure.¹¹¹ The efforts by the Romanian government to oppose the appointment of a Romanian anti-corruption prosecutor to lead EPPO¹¹² signaled how differentiation in policy areas connected to the area of freedom, security and justice is perhaps inevitable at a time when the rule of law is under threat in a number of Member States.

The idea of embracing differentiation as a strategy to pursue integration at challenging times has been officially endorsed not only by the Commission, as one of its scenarios for the Future of Europe,¹¹³ but also by several states, including the Eurozone big four: Germany, France, Italy and Spain.¹¹⁴ In fact,

¹⁰⁷ See generally Alex Stubb, 'A Categorization of Differentiated Integration', (1996) 34 *Journal of Common Market Studies* 283.

¹⁰⁸ See Bruno De Witte et al (eds), *Between Flexibility and Disintegration* (Elgar 2017).

¹⁰⁹ See also Maria Demertzis et al., 'One size does not fit all: European Integration by Differentiation', Bruegel Policy Brief 3/2018.

¹¹⁰ See Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office OJ [2017] L283/1.

¹¹¹ See n 41-42.

¹¹² See Kit Gillet, 'Ex Corruption Fighter in Romania, Shortlisted for Top E.U. Job, Faces Foes at Home', *The New York Times*, 10 February 2019.

¹¹³ European Commission whitepaper (n 51).

¹¹⁴ See Déclaration au Sommet informel Allemagne, Espagne, France, Italie à Versailles, 6 March 2017.

France recently launched a form of differentiation to break the deadlock at EU level in setting up a solidarity-based system to manage the migration influx, by striking a deal with 13 other EU Member States on a voluntary basis.¹¹⁵ Even the EP, albeit with some reluctance, referred to differentiated integration in an ad hoc resolution in January 2019.¹¹⁶ As it pointed out, differentiated integration 'has sometimes allowed for the deepening and widening of the EU to be pursued simultaneously'.¹¹⁷ As a consequence, the EP underlined that 'one cannot oppose differentiation and integration, nor can one present differentiation as an innovative path for the future of the Union'.¹¹⁸ Nonetheless, noting that differentiation 'is often perceived as a path towards the creation of first- and second-class Member States',¹¹⁹ it concluded that 'that differentiation should only be conceived of as a temporary step on the path towards more effective and integrated policymaking'.¹²⁰

Whatever the benefits of differentiation, it is well known that this strategy suffers from a number of difficulties, not least the risk of actually being unable to effectively differentiate. The case of cooperation in the field of defense is telling from this point of view.¹²¹ Following the decision of the UK to leave the EU, the European Council eventually agreed for the first time in June 2017 on the need to launch an inclusive and ambitious Permanent Structured Cooperation (PESCO) in the field of defense pursuant to Article 42(6) TEU.¹²² In December 2017, the Council formally approved the creation of PESCO on the understanding that Member States participating in the military cooperation 'shall make contributions which fulfill the more binding

¹¹⁵ 'Migrants: 14 pays européens s'accordent sur un 'mécanisme de solidarité'', *France24*, 22 July 2017.

¹¹⁶ European Parliament resolution of 17 January 2019 on differentiated integration, P8_TA-PROV(2019)0044.

¹¹⁷ *Ibid.*, §E.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, §C.

¹²⁰ *Ibid.*, §3.

¹²¹ See Federico Fabbrini, 'Do NATO Obligations Trump European Budgetary Constraints?' (2018) 9 *Harvard National Security Journal* 121.

¹²² See European Council Conclusions, 22-23 June 2017, EUCO 8/17, §8.

commitments which they have made to one another'.¹²³ In March 2018, the Council gave its blessing to the first operational projects.¹²⁴ Nevertheless, the heterogeneity of the 25 participating Member States, all except Denmark and Malta, quickly diluted the impact of the project, leading France – the EU Member State with traditionally the greater strategic culture and military projection, as confirmed by its seat within the UN Security Council and its possession of the nuclear deterrent – to establish an alternative European Intervention Initiative.¹²⁵ This project, which involves only 10 countries (including the UK and Denmark), is designed to bring together EU states sharing a common vision regarding security concerns, thereby creating a framework for selective cooperation outside the structures of the EU. This may be a model to be used elsewhere.

3. *Decoupling*

It is in this framework that the scenario of decoupling – involving the outright separation of those Member States favoring more and those favoring less integration into two distinct organizations – has also conceptually emerged as a possible option for the future.¹²⁶ The idea that a subset of Member States could consolidate their cooperation through separated structures outside the EU has led some to suggest that the Eurozone should become the framework for the creation of a 'core Europe'.¹²⁷ In response to the euro-crisis, Eurozone states have adopted *inter se* treaties outside the EU legal order to deepen their integration, including by establishing a Euro Summit as an ad hoc body grouping the leaders of the Eurozone countries,¹²⁸

¹²³ Council Decision (CFSP) 2017/2315 of 11 December 2017 Establishing Permanent Structured Cooperation (PESCO) and Determining the List of Participating Member States, OJ [2017] L 331/57, Art 3(1).

¹²⁴ Council Decision (CFSP) 2018/340 of 6 March 2018 establishing the list of projects to be developed under PESCO, OJ [2018] L65/24.

¹²⁵ French Minister of Defence Florence Parly, speech at the European Council on Foreign Relations, Paris, 28 May 2018.

¹²⁶ See in particular Sergio Fabbrini, *Europe's Future* (Cambridge University Press 2019).

¹²⁷ See especially Jean-Claude Piris, *The Future of Europe: Towards a Two-Speed EU?* (Cambridge University Press 2012).

¹²⁸ See Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 2 March 2012, Art. 12.

an ESM to assist failing states,¹²⁹ and a Single Resolution Fund to support failing banks.¹³⁰ But monetary union requires even greater federalization, particularly in order to establish a fiscal capacity, with the connected problems of taxation and representation.¹³¹ In the future, if efforts to deepen and complete EMU were to succeed, therefore, this may lead to the consolidation – de facto to the side of the EU, through a web of separate international treaties – of a new organization, with its own institutions and governance rules for Member States of the Eurozone. In such a scenario, the EU27 would not disappear but it would be increasingly shadowed by a separate union for a smaller subset of Member States, those which decided 20 years ago to share a single currency, a hallmark of sovereignty.

However, the potential ability of the Eurozone to operate as a union within the Union faces two limitations. First, not least because Donald Tusk – who comes from a non-Eurozone state (Poland) – was in 2014 appointed as President of the Euro-Summit, ongoing debates around EMU reform have been extended to non-Eurozone countries and are thus now undertaken in an inclusive format.¹³² While this catered to the interests of countries such as those of the Hanseatic League – which by involving non-Eurozone countries can restrict the dominance of France and Germany on Eurozone matters, including their shared ambition to complete EMU – it is clear that this weakens the ability of the Eurozone to operate as a platform to promote further integration between a core group of states. Second, the attacks of the populist Italian government against the EMU institutional architecture and fiscal rules suggest that this framework may actually be too inclusive to act as the springboard for a renewal of the EU project. As such, the feasibility of a scenario in which the Eurozone served to underpin greater integration among a subset of Member States is by no means certain, at least in the short term.

¹²⁹ See ESM Treaty (n 18).

¹³⁰ See Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund, 21 May 2014.

¹³¹ See further Federico Fabbrini, 'A Fiscal Capacity for the Eurozone: Constitutional Perspectives', study commissioned by the European Parliament Constitutional Affairs Committee, February 2019.

¹³² Euro Summit, Leaders' Agenda, 23 March 2018.

If this were the case, then, efforts to push for further European integration might occur on an even smaller scale. In this regard, the recent conclusion by France and Germany of the Treaty of Aachen in January 2019 indicates a possible way forward.¹³³ In this bilateral agreement, the two core EU/Eurozone Member States committed to deepening their integration at all levels, including with the aim of achieving a 'franco-german economic zone endowed with common rules'.¹³⁴ In fact, the Treaty also creates a new organizational structure for Franco-German cooperation¹³⁵ and a commitment to advance joint proposals on all major European issues.¹³⁶ While the Preamble of the Treaty affirms that the two countries are interested 'to deepen their cooperation in the field of European policies with the aim to favor the unity, effectiveness and cohesion of Europe, keeping open this cooperation to all Member States of the European Union'¹³⁷ it is clear that it could represent the nucleus of a new Europe, decoupled from the EU, to which only a few other like-minded EU Member States could be associated. Nonetheless, this scenario has raised concerns, which Germany itself has sought to allay,¹³⁸ suggesting that its feasibility remains uncertain.¹³⁹

¹³³ See Treaty of Aachen (n 73).

¹³⁴ Ibid., Art. 20 ('zone économique franco-allemand dotée de règles communes')(my translation).

¹³⁵ Ibid. Arts 23-26.

¹³⁶ Ibid. Art. 2.

¹³⁷ Ibid. Preamble ('à approfondir leur coopération en matière de politique européenne afin de favoriser l'unité, l'efficacité et la cohésion de l'Europe, tout en maintenant cette coopération ouverte à tous les États membres de l'Union européenne')(my translation).

¹³⁸ See Declaration of the Visegrad Group and the Federal Republic of Germany, 7 February 2019 (stating that 'There is no place for East–West, North–South, Old–New divides in the current European Union. [...] Unity is the key').

¹³⁹ But see Hungarian Prime Minister Viktor Orban, Interview, *La Stampa*, 1 May 2019 (stating that 'oggi ci sono già tre Europe, ma fingiamo sia soltanto una [today there are already three Europes, but we pretend it is only one]')(my translation) and Bundestag President Wolfgang Schäuble, Interview, *Le Monde*, 26 May 2019 (stating that 'nous devons aller plus loin que le Traité de Lisbonne afin de rendre l'Europe plus efficace [we need to go beyond the Lisbon Treaty with the aim to make Europe more effective]')(my translation).

V. CONCLUSION

This article has analyzed three scenarios for the future of Europe beyond Brexit. As pointed out, while the EU 27 have been remarkably united in negotiating with the UK, they are heavily divided among themselves on crucial issues like EMU, migration and respect for foundational EU values. In fact, the euro-crisis, the migration crisis and the worsening rule of law backsliding in a number of EU Member States have left deep scars in the fabric of the EU. While rhetorical efforts have been made at the highest EU institutional level to chart a united way forward for the EU27 post-Brexit, Europe remains fractured along regional and political cleavages, as reflected in the the EP election. In this context, this article has outlined alternative scenarios for the future of Europe. As suggested, while the influence of path dependency in the functioning of the EU cannot be minimized, greater differentiation could become an inevitable response to Europe's current challenges. In fact, one cannot even exclude the possibility that, step by step, a new, separate organization of integration may emerge alongside the EU – either around the Eurozone or a smaller alliance of states championed by France and Germany, along the lines of the Treaty of Aachen – following a logic of outright decoupling.

None of these scenarios may be appealing for the future of Europe. An EU that simply muddles though the current difficulties will fail to address the citizens' calls for change,¹⁴⁰ made clear in the recent EP elections, a prospect which could be deleterious for the EU in the long-term, given citizens' growing expectations from, and scrutiny of, the EU.¹⁴¹ Yet, if incrementalism may have reached its limits, an EU that differentiates with ever growing frequency will run into challenges of its own,¹⁴² while the creation of an inner core of Member States pursuing deeper integration through a parallel organization would put an expensive geopolitical price-tag on the road

¹⁴⁰ See Ronan McCrea, 'Forward or Back: The Future of European Integration and the Impossibility of the Status Quo' (2017) 23 *European Law Journal* 66.

¹⁴¹ See Catherine de Vries, *Euroskepticism and the Future of European Integration* (Oxford University Press 2018).

¹⁴² See Bruno de Witte, 'The Law as Tool and Constraint of Differentiated Integration' EUI RSCAS Working Paper No 47/2019.

toward European federalism.¹⁴³ Nonetheless, this scenario could become a more attractive option if, for instance, the UK extends its membership of the EU for much longer, creating a greater need to differentiate tiers of membership internally.¹⁴⁴ In the end, the future of Europe remains to be written, but whatever happens with Brexit and the future relations between the EU and the UK, one can expect that the question of Europe's *finalité*, and the consequential issue of its institutional set-up, will occupy the energy and attention of the EU27 in the near future.¹⁴⁵

¹⁴³ See Hannes Hoffmeister (ed), *The End of the Ever Closer Union?* (Nomos 2018)

¹⁴⁴ See Fabbrini and Schmidt in this volume.

¹⁴⁵ See also European Commission President-elect Ursula von der Leyen, 'A Union that Strives for More: My Agenda for Europe.' Political Guidelines for the Next European Commission 2019-2024, 16 July 2019, 19 (calling for a Conference on the Future of Europe in 2020 and indicating opens to Treaty change to reform the EU democratic architecture).