

Brexit and the European Union: General Institutional and Legal Considerations

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Directorate General for Internal Policies of the Union

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CONSTITUTIONAL AFFAIRS

CONSTITUTIONAL AFFAIRS

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STUDY

Abstract

This study was requested by the Committee on Constitutional Affairs of the European Parliament. It examines the political and institutional steps taken, or to be taken, both by the UK and by the EU in the context of the Brexit referendum vote, and into how matters may evolve in the coming months and years from a legal and institutional perspective. It analyses, in broad terms, the possibilities for a future relationship between the Union and its departing member and the consequences that the departure of a large Member State may entail for the rest of the policies of the Union and for the Union itself. The study also briefly examines the potential for institutional progress that opens with the departure of the United Kingdom.

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LIST OF ABBREVIATIONS

- CJEU** Court of Justice of the European Union
- EEA** European Economic Area
- EEC** European Economic Community
- EFTA** European Free Trade Association
- EP** European Parliament
- EU** European Union
- GSP** General System of Preferences
- OECD** Organisation for Economic Co-operation and Development
- TEU** Treaty of European Union
- TFEU** Treaty on the Functioning of the European Union
- UK** United Kingdom
- UKIP** United Kingdom Independence Party

1. BACKGROUND

On 23 June 2016, the United Kingdom (UK) voted to leave the European Union (EU) after 43 years of membership. The question adopted in the referendum statute that the electorate was confronted with was: *Should the United Kingdom remain a member of the European Union or leave the European Union?* 51.9 % voted for the country to “Leave” the EU while 48.1 % of voters backed “Remain”. The referendum turnout was 71.8 %, with more than 30 million people voting. England voted strongly in favour of leaving, by 53.4 to 46.6%, as did Wales. Scotland and Northern Ireland backed remaining in the Union by 62 % and 55.8% respectively.¹

The UK had eventually joined the then European Economic Community (EEC) in 1973, following a campaign under Prime Minister Edward Heath, after two previous unsuccessful bids to become part of the bloc in 1963 and 1967 both opposed by France’s President Charles de Gaulle.² Although a co-founder of the European Free Trade Association (EFTA), the UK soon turned its ambitions to the possibility of joining the EEC. EEC membership was strongly contested both within and between the two main political parties. As the UK entered the EEC under Conservative government, Labour’s electoral manifesto promised the citizens, not unlike the Conservative manifesto in 2015, that they would be consulted on whether or not to remain in the EEC. On 5 June 1975, the country held its first referendum on whether to stay in or leave the EEC. The electorate expressed significant support for membership with 17,378,581 people (67.2 %) voting to remain in the Common Market as it was called at the time.

Despite having produced a number of strong pro-EEC political figures, much of the country, England in particular, has always been quite unenthusiastic and uninclined towards European political integration. The political goals set forth in the Treaty of Rome have never seemed to be truly shared other than by a minority. More or less overtly, the declared goal of most UK governments – since the Labour government of Harold Wilson to the government of David Cameron – has been to keep further political or economic integration to a minimum and the pooling of sovereignty as limited as possible. Perception of European integration has usually been negative and European integration has been presented by much of the media as a process of losing, rather than sharing sovereignty³. Indeed, during the referendum campaign, a number of defenders of leaving the EU stressed a vision of a self-governing United Kingdom, “releasing the potential of its citizens through direct democratic control of both national and local government and providing maximum freedom and responsibility for its people”⁴. There is thus a rejection of concepts and ideas such as shared sovereignty, European multilevel governance, supranational democracy or an “ever closer union in which decisions are taken as close as possible to the citizen in accordance with the principle of subsidiarity”⁵. There seems not to be a widespread will to transcend traditional notions of national sovereignty or any criticism on its limits in the globalised world of the 21st Century.

The UK Independence Party, which received nearly four million votes (13 %) in the May 2015 election, has been campaigning openly for many years for a UK exit from the EU⁶. They were

¹ For a detailed breakdown across the UK: <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information>.

² http://news.bbc.co.uk/onthisday/hi/dates/stories/november/27/newsid_4187000/4187714.stm.

³ <http://ukandeu.ac.uk/the-uk-media-euroscepticism-and-the-uk-referendum-on-eu-membership/>
<https://www.psa.ac.uk/sites/default/files/conference/papers/2015/Discourses%20on%20European%20Integration%20in%20the%20UK%20Press.pdf>.

⁴ ‘Our Vision. The Leave Alliance’ <http://leavehq.com/vision.aspx>.

⁵ Preamble, Treaty on the European Union.

⁶ <http://www.ukip.org/manifesto2015>.

joined soon and openly by a number of MPs of the Conservative party⁷ and even six members of the Cabinet. The Labour Party, the Liberal Democrats, as well as the Scottish National Party were officially for remaining. The campaign led by the Labour Party was controversial in the UK since many believed that the party leadership was not as committed or convincing as was needed⁸.

The 2016 referendum campaign was launched by the Conservative government with the declared intention of remaining in the EU under the conditions negotiated by Mr Cameron's government with the other 27 Member States⁹. The conditions were intended to reassure the opponents of further political integration and address some sensitive issues, such as intra-EU labour migration. It was also proposed to introduce some restrictions on freedom of movement of EU citizens.

Prime Minister Cameron led the campaign for UK to remain a member of the Union. The government published, and provided for the public, an abundance of information about the special status of the UK in the Union, the alternatives to membership and various analyses regarding the procedure for withdrawing or the cooperation in the fields of justice or defence¹⁰. All major national and international economic organisations, in particular the IMF and OECD, published reports on the possible economic and financial consequences for the UK of a Brexit vote. Almost all of them forecasted a negative economic outlook in the case of an effective withdrawal of UK from the EU. The OECD warned of a 'Brexit tax' should the UK leave the EU¹¹.

Academia, a number of specialists, lawyers and economists, were also customarily advocating for remaining¹².

There was very little serious public debate about political integration, about sharing sovereignty or democratic accountability of supranational institutions. The debate mostly revolved around the economic benefits of the membership versus the freedom of movement and immigration troubles. Post-electoral analysis showed that the government's recommendation or "remainers" positions was rejected despite the leave campaign having failed to present a clear alternative. Messages such as "*Take back control*" and "*Britain first*" had strong impact in important sectors of the electorate. The electorate, or at least a substantial part of it, "were more focused on immigration, the UK financial contribution to the EU budget, and the democratic deficit in EU governance". At the end of the day the two decisive issues for those voting for "Leave" seemed to be national sovereignty and immigration¹³.

Decades of anti-European misrepresentation – with significant media putting forward a narrative about the conspiracies of Brussels to create a European super-state, or the alleged absence of democratic accountability of the European institutions – have been bolstered by increasing anguish over or rejection of immigration, European or not, which has crystallised

⁷ A BBC survey indicated that 138 Conservative MPs were in favour of Leave and 185 in favour of Remain, while only 10 Labour MPs declared to favour Brexit. See <http://www.bbc.com/news/uk-politics-eu-referendum-35616946>.

⁸ <http://www.mirror.co.uk/news/uk-news/jeremy-corbyn-really-give-122-8617013>.

⁹ The Policy Department on Citizens' Rights and Constitutional Affairs has published four studies on four aspects of the agreement concluded on the 19 February 2016 European Council. They dealt respectively with issues related to sovereignty, competitiveness, economic governance and immigration.

¹⁰ <http://www.eureferendum.gov.uk/publications/>.

¹¹ OECD, The Economic Consequences of Brexit: A Taxing Decision, OECD Economic Policy Paper No 16, April 2016.

¹² <http://www.telegraph.co.uk/news/2016/06/24/eu-referendum-how-the-results-compare-to-the-uks-educated-old-an/>; <http://www.newstatesman.com/politics/staggers/2016/06/how-did-different-demographic-groups-vote-eu-referendum>.

¹³ See for a comprehensive EU referendum analysis: <http://www.referendumanalysis.eu/>

in the sentiment of many people in England that the control of country “*needed to be taken back*”.

The role of the media has been very much emphasised by several commentators, who have pointed out the concentration of ownership in the UK newspaper industry, 80 % of which is owned by just four big corporations, all with a marked pro-Leave line. Five of the six most widely circulated daily newspapers supported the Leave campaign¹⁴. Content analysis of articles focused on the referendum found that 41 % were pro-Leave as against 27% pro-Remain, marking a dominant pro-Brexit bias, with six out of nine newspapers showing a dominance of pro-Leave articles. The UK television industry, including that of the BBC, has also been very much criticised in this respect¹⁵.

Other relevant commentators who have analysed the campaign and survey data stress that the divide between globalisation winners and losers was a key driver of the vote. Favouring Leave was particularly common among less-educated, poorer and older voters, and those who expressed concerns about immigration and multi-culturalism. Indeed, concern about immigration and the loss of distinct national identity were important to many who favoured Brexit, and they were issues that clearly divided the Leave and Remain camps¹⁶.

In fact, similar divisions have successfully been mobilised by populist parties across Europe, especially on the Right, supposedly by giving voice to the “ordinary people” in opposition to a political establishment that is perceived as failing to listen. The rise of these populist Eurosceptic movements presents a direct challenge to the EU¹⁷.

In conclusion, post-electoral analysis shows a mixture of causes for the outcome of the referendum, many enshrined in the particular relation of UK with the European integration process, others common to many other Member States. Since the Danish electorate rejected the Maastricht Treaty in 1992, referendums on European integration have often had elite-defying consequences. The Brexit is the most significant expression of this so far in Europe’s history (except perhaps the rejection of the Constitutional Treaty). The United Kingdom has always been a reluctant European partner, with a national media that is particularly aggressive towards the notion of European integration, but it would seem that this referendum cannot be dismissed “as just a sign of English insularity”. Concerns about immigration and the loss of distinct national identity are relevant also to many other Member States.¹⁸

The immediate period following the outcome of the referendum was marked by financial distress in European and world stock markets, the fall of the pound to historical lows against major currencies, and many worrying economic indicators¹⁹. On the political side, the aftermath was marked by disorientation in most political quarters, with David Cameron resigning as Prime Minister, the UKIP leader resigning while the Labour Party leader faced a no-confidence vote and was challenged in his own party.

In the months following the referendum, the economic instability partially subsided and, even though the stock markets remain volatile, the pound weak and the future economic slowdown almost a certainty in case of poor internal market arrangements, the economic operators may have realised that all they can currently evaluate are perceptions and probable

¹⁴ <http://www.telegraph.co.uk/news/0/heres-where-britains-newspapers-stand-on-the-eu-referendum/>

¹⁵ Ian Manners. University of Copenhagen, [Where Does The Brexit Debate Stand In The United Kingdom Right Now?: Presentation to the European Affairs Committee of the Danish Parliament](#)

¹⁶ Sara B. Hobolt. London School of Economic and Political Science, London, The Brexit vote: a divided nation, a divided continent, <http://www.tandfonline.com/doi/pdf/10.1080/13501763.2016.1225785?needAccess=true>.

¹⁷ “ Can Europe survive in an age of populism ?”, Daniel Gros <https://www.ceps.eu/publications/can-eu-survive-age-populism>

¹⁸ Sara B. Hobolt op. cit.

¹⁹ <https://www.theguardian.com/business/2016/jun/23/british-pound-given-boost-by-projected-remain-win-in-eu-referendum>.

evolutions of the UK-EU future relationship; that, from the legal point of view, the UK remains a full member of the Union, and that the political and economic consequences of the Leave vote will only be fully assessed in a still uncertain future when negotiations between the EU and UK are at an advanced stage. The clarification of the political situation in the UK, with the accession of a new prime minister and the serene and reassuring declarations by the Commission and European leaders about finding a mutually beneficial relationship, seemed to have appeased the economic and political state of affairs, for the moment. The British economy grew by 2.2 % in 2016, but – as pointed out by Andrew Haldane, Chief Economist of the Bank of England – the “slowdown is still possible”²⁰. The markets tend to react badly every time there are indications²¹ of a possible, so-called “hard Brexit”²².

On the European Union side, the reactions were of regret and disappointment regarding the results, but also of acceptance of the democratically reached outcome. Most European leaders stressed the need for the UK to launch the withdrawal negotiations as rapidly as possible, underlining the need to speed up proceedings in order to avoid instability and uncertainty. The European Parliament adopted on 28 June 2016²³ a resolution stressing that the will of the majority of UK citizens should be respected and calling for the activation of Article 50 of the Treaty on European Union (TEU)²⁴ as soon as possible. It also recalled that Parliament’s consent is required under the Treaties and that it must be fully involved at all stages of the procedures regarding the withdrawal agreement and any future relationship.

On 17 January 2017, PM May delivered a speech laying out the general plans for UK’s departure²⁵. In that speech she showed confident that a smooth and orderly Brexit was possible. Proclaimed the future birth of “Global Britain”, more internationalist and open to trade with the wider world. The UK’s place in the EU would have come at the expense of UK’s global ties. An EU’s bending towards uniformity and not flexibility would have been another reason for the departure. In her view, the referendum was a vote to restore UK’s parliamentary democracy, national self-determination. Supranational institutions as strong as those created by the European Union would “sit uneasily in relation with UK’s history and way of life”. She also was determined to end the jurisdiction of the CJEU in UK. In this first

²⁰ Financial Times, 6 January 2017.

²¹ <https://www.thesun.co.uk/news/2567422/pound-slumps-to-lowest-level-since-october-after-theresa-may-hints-britain-is-heading-for-a-hard-brexite/>

²² “Hard Brexit” is usually understood to mean the UK having no preferential political relationship with the EU, in particular without access to the Internal Market and relying only on WTO rules for trade of goods and services.

²³ European Parliament Resolution of 28 June 2016 on the decision to leave the EU resulting from the UK referendum (Texts adopted, P8_TA (2016)0294).

²⁴ Article 50 TUE provides that:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament. EN 7.6.2016 Official Journal of the European Union C 202/43
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3) (b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to re-join, its request shall be subject to the procedure referred to in Article 49.

²⁵ <http://www.independent.co.uk/news/uk/home-news/full-text-theresa-may-brexite-speech-global-britain-eu-european-union-latest-a7531361.html>

political speech after the referendum PM May stressed the importance of the trade and political relations between the Union and UK, in particular in defence and security and wished for a “new strategic partnership between the EU and UK”. Whilst giving up to the Single Market, she was confident in reaching the “freest possible trade in goods and services”, an ambitious Free Trade Association. She mentioned that no existing model enjoyed by other countries or partial membership was suitable for Britain. In her speech she stressed her wish to remain a good friend and neighbour to Europe and that the shared values in both sides make her confident that a positive agreement can be reached.

PM May’s speech is certainly valuable in some parts, in particular when setting clarity on the vision she has for Britain or the reasons for UK’s departure of the Union, but seems still quite vague, even contradictory, on how the future relations of UK with the Union would be, in particular the rejection of the Single market combined with the freest possible access to it but also in many other important areas such as security or defence or participation in other structural EU policies²⁶.

This paper looks into the political and institutional steps taken, or to be taken, both by the UK and by the EU in the context of the Brexit vote, and into how matters may evolve in the coming months and years. It analyses, in broad terms, the possibilities for a future association between the Union and its departing member and, finally, the consequences that the departure of a large Member State may entail for the rest of the policies of the Union and for the Union itself²⁷.

²⁶ See for instance, Financial Times Article on 24 January 2017, <https://www.ft.com/content/0d48300a-de3b-11e6-86ac-f253db7791c6>

²⁷ The Policy Department for Citizens’ Rights and Constitutional Affairs has launched or is about to launch a series of analyses and studies, to be published in the first semester of 2017 regarding “The impact of Brexit on the UK devolved territories and the OST of Gibraltar”, “The impact of Brexit on vested and acquired rights of UK and EU citizens” and on the “Different options for future relationship between the UK and the UE”. Other relevant studies are being prepared for the JURI committee on the EU officials of British nationality and for the PETI committee on the right of petition. Several other studies published by the Policy Department, such as that of the Composition of Parliament look also into partial aspects of the Brexit. The other EP Policy Departments and the Economic Governance Unit have also prepared or are preparing research on most of the EU’s sectorial policies. All these papers may be found at the Policy Departments websites or at the <http://www.europarl.europa.eu/thinktank/en/home.html>

2. LEGAL STATUS OF THE UK IN THE EU

The first thing to be considered here is a fact that has somehow been distorted by the media approach in the months following the referendum: from the legal point of view, the UK remains fully and for all purposes an EU Member State. Nothing has changed with the referendum outcome and, most probably, little will change in the following years. Not only will European citizens in the UK continue to enjoy the same protection as before the 23 June 2016, but also, for instance, all the structural and investment policies will continue to be implemented as agreed, and Europol will continue to have UK police officers working in the offices of its headquarters in The Hague. The same goes for all other policies or institutions and agencies. Any exceptions to this rule are of a political rather than legal rationale having to do with their institutional impact, such as the resignation of Commissioner Hill or the decision of the UK government to relinquish, for evident reasons, the rotating Presidency of the Council of the EU.

All other top EU officials of UK nationality at either Parliament, the Council, the Commission or the Court of Justice (CJEU) continue, or should continue, to work in the interest of the Union without any discrimination. Despite what is stated above, and in the light of the decision of not holding the EU Council Presidency, similar decisions may be taken as regards nominations to top jobs or even the recruitment of UK nationals as officials. In any event, from the constitutional point of view, nothing in the Treaties would seem to allow discrimination against UK or EU citizens, including European officials, before the withdrawal agreement comes into force.

The Lisbon Treaty for the first time introduced in the TEU a provision regulating the withdrawal of a Member State from the EU. Until then, a Member State was not able to leave the Union in a lawful and orderly manner. A single article, Article 50 TEU, is the legal basis for a Member State to withdraw from the EU. The Lisbon Treaty inherited Article 50 from the 2003 Constitutional Treaty, which included a secession clause that was upheld both by the federalists, or integrationists, and by their opponents. It should be noted, however, that members of the Convention on the Future of Europe have indicated that this clause was never expected to be used, which may explain its relatively undetailed character.²⁸ There is no other provision in the Treaties addressing this situation directly, and whilst Article 50 is quite clear and self-explanatory, it does not address all the particularities or incidences that may arise.

The first consideration is thus to acknowledge that the legal status of the withdrawing state after the referendum, before it has given formal notice of its intention to withdraw and during the negotiations, remains unchanged, except as regards the provision in Article 50 (4) that the withdrawing Member State shall not participate in Council or European Council discussions, or in decisions on this subject, or more precisely on those decisions foreseen in Article 50(2) and (3).

The Treaties do not provide details on any substantive aspect of the withdrawal and are limited to establishing procedural requirements only. The withdrawing Member State is not even obliged to justify or declare the reasons for its departure. There are not even provisions establishing the conditions for withdrawal, as there are under the 1969 Vienna Convention on the Law of Treaties²⁹.

It was considered that the CJEU was unlikely to be of much use at this preliminary stage, in particular regarding elaborating useful or practical interpretations of Article 50 TUE, since it

²⁸ Andrew Duff, <http://verfassungsblog.de/brexit-article-50>.

²⁹ Vienna Convention on the Law of Treaties, signed at Vienna 23 May 1969. Entry into force: 27 January 1980.

cannot be questioned *in abstracto* by the Commission or any other institution. The UK's High Court recent ruling, and the government's subsequent appeal to the UK's Supreme Court, was for some commentators a possibility for an early CJEU involvement in the form of a request for preliminary ruling on Article 50³⁰. The UK's Supreme Court, in its judgement of 24 January 2017, and in what is of interest here, has ruled that the government must consult the Parliament when triggering article 50, but did not opt to ask for any CJEU involvement.

As for the devolved powers – none of the current legal provisions give rise to legally enforceable obligations to involve them in the triggering process.³¹ So, the intervention of the CJEU on Article 50 will have to wait.

Either way, the CJEU may have a major role to play at a later stage. The withdrawal agreement, concluded between the Union and the withdrawing state is, by all measures, an international agreement and could be brought before the CJEU for review, giving it the possibility to elaborate further on Article 50. Pursuant to Article 263 TFEU, an action for annulment could be brought before the CJEU to review the legality of the Council decision concluding the withdrawal agreement, and, if the action is well founded, the agreement can be declared void. Pursuant to Article 218 (11) TFEU, a Member State, the Council, the Commission or the Parliament may also obtain from the Court an opinion as to whether the agreement, and all its parts, are compatible with the Treaties.

Some authors argue that making use of Article 218 (11) would not be possible since Article 50 TEU only refers to article 218(3) TFEU.³² We do not share this interpretation since the reference to article 218(3) regards only the procedure for negotiating the agreement, whilst the last paragraph of Article 218 establishes a general competence of the Court to interpret the compatibility with the Treaties of an envisaged agreement. There is no reason to conclude that this interpretative role is limited in the case of withdrawing agreements. In any case, it would be the CJEU that would eventually have to decide.

The idea of a preliminary ruling has also been mentioned as another possibility for the Court's intervention at that stage. Member State courts would be entitled to question the CJEU on the withdrawal agreement, once signed, thereby giving the Court the possibility to interpret Article 50 and the rights and obligations derived from the agreement. The right of UK courts to present questions under article 267 TFEU will depend on the transitional provisions established in the agreement³³.

It is worthwhile to point out that, except for the latter case, the CJEU interventions might have disruptive effects on the two-year deadline established in Article 50. It is, however, most likely that if such a situation arises, the European Council would use its prerogative to extend the two-year period.

Since the legal and constitutional *status quo* of the Union and its Member States remains unchanged, except as regards the above-mentioned Council and European Council discussions, Parliament's consent at the end of the negotiations would in principle be voted on by all MEPs, including those elected in the UK.

The UK has the right to choose the appropriate moment to present the request for withdrawal. Any Member State has the right to ask for clarity after a referendum or any other political decision of equivalent political force held in another Member State. The Union has, however, few mechanisms to force a Member State that has signalled a decision to leave, by declaring through its constitutionally appropriate bodies its intention to do so, to effectively

³⁰ See Peers (<http://eulawanalysis.blogspot.be/2016/11/brexit-can-ecj-get-involved.html>) and Duff (presentation AFCO Committee meeting of 8/11).

³¹ <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>

³² See for this interpretation C.M. Rieder, as quoted by EPRS note PE 577.971.

³³ See for this interpretation A. Lazowski, as quoted by EPRS note PE 577.971.

start the withdrawal procedure. Given the particularities of the process and its complexities, reasonable time should be given. In any case, nothing is said in Article 50 about when the request should be presented.

This liberty of the UK has in fact been accepted by the European Council which, in the statement of the 27 Heads of States or Governments of 29 June 2016³⁴, underlined the “need to organise the withdrawal of the UK from the EU in an orderly fashion”, but accepted that “it is up to the British government to notify the European Council of the UK's intention to withdraw from the Union”, all the while stressing, however, that “this should be done as quickly as possible”. The statement also set out some initial negotiating stances such as “the hope to have UK as a close partner of the EU” and the assumptions that “any agreement which will be concluded with the UK as a third country, will have to be based on a balance of rights and obligations” and that “access to the Single Market requires acceptance of all four freedoms”.

It is important to reduce this instability by clearly explaining that the path to an amicable divorce is established by the Treaty and by the interest of all parties in having a mutually beneficial relationship. Negotiations should be conducted in an “orderly fashion”, in line with the procedures established by the Treaties and with the Union’s practices as declared by the European Council on 29 June 2016.

As has been stressed, before the withdrawal agreement is ratified and comes into force, statuses do not change. The UK remains a Member State of the EU with all its rights and duties. This may last for years if we consider the many transitional protocols or interim agreements, with phasing out and phasing in “*passerelles*” possibly to be agreed for the different Union policies.

Negotiations will be complex, but should lead a mutually beneficial agreement with, nonetheless, clear consequences for the UK’s status within Europe and in the world.

³⁴ Statement of the Informal meeting of the 27 Heads of State or Government, Bratislava, 29 June 2016. 2016 <http://www.consilium.europa.eu/en/press/press-releases/2016/06/29-27ms-informal-meeting-statement/>

3. ARTICLE 50 AND THE NEGOTIATION PROCESS

3.1. Notification procedure

Article 50 TEU contains important but simple procedural requirements for the process of withdrawal. The withdrawal process is triggered by the formal notification by the Member State deciding to withdraw "in accordance with its own constitutional requirements". In this instance, the procedure did not start with the referendum or any other decision adopted in this direction by the Member State.

As already mentioned, the triggering of Article 50 by the UK government has been subject to domestic controversy. From a constitutional perspective, it was clear that the outcome of the referendum does not amount to the formal "notice of intention" of withdrawing, as it is for the UK government to trigger that process. This has been subject of the ongoing court case brought by Gina Miller, joined by number of other applicants (Case Miller versus Secretary of State for exiting the European Union³⁵).

The applicants filing this suit, and a number of constitutional experts, argued that the UK government is constitutionally unable to issue a declaration under Article 50 to trigger the withdrawal, as it would be a breach both of domestic law and of the obligation, under the TEU, of the withdrawing state to respect "national constitutional requirements", and that an act of Parliament is needed therefore. This is based on the consideration of the effects of such a declaration in the event of non-conclusion of a withdrawal treaty, leading to automatic application of the two-year "guillotine" and the abrogation of the European Communities Act from 1972. The government claimed that a declaration of withdrawal is within its executive powers, derived from the royal prerogative (a collection of executive powers used mostly in foreign policy), but invoking this prerogative in this instance could lead to undermining the statutes. The appellants and some constitutional experts therefore argued that Parliament must enact a statute empowering or requiring the Prime Minister to issue notice under Article 50 TEU, and empowering the government to make such changes to statutes as are necessary to bring about the exit from the European Union.³⁶ Some authors even claim that Parliament could conclude that status for Brexit wasn't made or was gained under false prospectus or that it would be contrary to the national interest, leading to lengthy authorisation process requiring government to provide clear perspectives of the withdrawal agreement.³⁷

On 3 November 2016, the UK High Court found against the government in the Miller case and declared that Article 50 should be triggered only after a decision of Parliament. The Court ruled that the essential instrument giving effect to the UK's accession was the European Communities Act of 1972 that gave effect to the EU law in the UK and created rights and obligations for the UK as a Member State of the EU.

The government appealed against this ruling before the UK Supreme Court, which heard the case in December 2016 and delivered a judgement on 24 January 2017 on the constitutional requisites for triggering Article 50. As said the Supreme Court upheld the High Court judgement, but did not further clarify whether or not Parliament needs to provide only an affirmative motion or whether the decision to trigger Article 50 must be subject to primary

³⁵ <https://www.judiciary.gov.uk/judgments/r-miller-v-secretary-of-state-for-exiting-the-european-union/>.

³⁶ See Adam Tucker, Adam Tucker: Triggering Brexit: A Decision for the Government, but under Parliamentary Scrutiny, <https://ukconstitutionallaw.org/2016/06/29/adam-tucker-triggering-brexite-a-decision-for-the-government-but-under-parliamentary-scrutiny/>.

For the debate see for instance P. Craig, Triggering Article 50 does not require fresh legislation, <https://www.lse.ac.uk/collections/law/news/Craig-50.pdf>.

³⁷ Barber, Hickman, King, Pulling the Art. 50 trigger: Parliament's indispensable role, UK Constitutional law blog, <https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/> retrieved 25-08-2016.

legislation. In the latter case, and if the two Houses of the UK legislature were entitled to table amendments, both procedural and substantive, it could arguably lead to delays in delivering the notification, but also enhance the ownership of Westminster over the nature of the Brexit, including the government's negotiation of so called 'red lines'.

In any event, this is a controversy in which the EU has little to say in principle and that can only be settled by the British courts and by the British parliament. The Union can only wait for the formal notification of the Member State. The notification will be presented to the European Council, most probably by letter of the Prime Minister addressed to the President of the Council by the end of March 2017.

3.2. The negotiation process

From the moment the notification letter is received, the countdown begins of the two-year deadline to conclude the withdrawal agreement. As stipulated in Article 50(3) TEU, the deadline is calculated from the date of transmission of the notice by the UK government to the European Council. It can be only extended by a unanimous agreement of the European Council.

Once it receives the notification, the European Council will issue guidelines on the basis of which the Council will negotiate the withdrawal agreement with the UK. In accordance with Article 50, this procedure will be governed by the provisions of Article 218(3) TFEU. This article sets roles both for the Commission, which submits recommendations with regard to the negotiations, and to the Council, which authorises negotiations and nominates a negotiator on behalf of the EU.

Article 50 TEU and Article 218(3) TFEU leave the Council room for manoeuvre on who will be leading the negotiation on behalf of the Union, *depending on the subject of the agreement envisaged*. The European Council should have decisive input here since Article 50 establishes that the Union shall negotiate in the light of the guidelines provided by this body. In light of Article 218(3) and Article 50 provisions, the European Council will, by consensus, provide guidelines and authorise the Union to negotiate.

The Parliament had a preference for the Commission being the Union's negotiator, as the Commission has traditionally led complex negotiations such as those on accession treaties³⁸. However, in practical terms, this does not seem to be a particularly relevant aspect since, independently of who leads the negotiations, only the Commission shall have the possibility to formulate "recommendations" or negotiating positions on the large range of EU policies to be negotiated. .

From the adoption by the Council of the decision authorising the opening of the negotiations by qualified majority, the dynamics of other important international agreements should probably be followed, with the Council having a special *committee* working together with the Commission and reacting in the different phases of the negotiations, modifying when necessary positions on the Commission's recommendation and deciding by qualified majority voting when pertinent (and always without the participation of the UK). The Treaties do not prevent the European Council from intervening further in the negotiation, if necessary, to clarify or change the guidelines.

³⁸ European Parliament resolution of 28 June 2016 on the decision to leave the EU resulting from the UK referendum (Texts adopted, P8_TA (2016)0294), point 9.

The principles described above have been confirmed and detailed at the Informal Meeting of the Heads of State or Government of the 27 Member States in Brussels on 15 December 2016³⁹. In that gathering, the Heads of State or Government, as well as the Presidents of the European Council and the European Commission, reaffirmed their statement of 29 June 2016 that “any agreement will have to be based on a balance of rights and obligations, and that access to the Single Market requires acceptance of all four freedoms”.

As regards the procedure for negotiating, this is detailed in an Annex to the Statement, which is expressly endorsed. The European Council will thus adopt the guidelines for the negotiations, setting the principles and overall positions. In accordance with the guidelines, the Council will be invited to open negotiations, following a recommendation by the Commission. The General Affairs Council will take the lead in the subsequent steps, adopting or amending the negotiating directives on substance (always, it is understood, on the Commission’s recommendations), and adopting also “detailed” arrangements governing the relationship between the Council, and its preparatory bodies, and the Commission. The European Council may also amend or update its negotiating guidelines.

The European Council has nominated the Commission as the “Union negotiator”. The Heads of State and Government have already welcomed the nomination of former Commissioner Michel Barnier as Chief negotiator. They also propose that the Union’s negotiator’s team should integrate representatives of the rotating Presidency as well as of the President of the European Council.

The “representatives of Parliament” will be invited to the preparatory meetings of the European Council. The Union’s negotiator is invited to keep Parliament “closely and regularly” informed throughout the negotiation: the President of the Council will inform and exchange views with Parliament both before and after European Council meetings, and the President of Parliament will be invited to be heard at the beginning of the meetings of the European Council (as it is already the case).

Chief Negotiator Barnier has provided information on a possible timeline for the negotiations in a presentation to the Conference of Presidents of Parliament on 30 November 2016, at a press conference on 6 December 2016 and in a presentation to the Conference of Committee Chairs of the EP on 12 January 2017.

It has been understood that, ideally (meaning that if there are no unforeseen delays in the notification, and no other surprise in the form of a possible involvement of the CJEU), the negotiations on withdrawal will be concluded by October 2018, allowing for the consent procedure to be finalised in good time for the 2019 European elections. The period of effective negotiation would be shorter than the specified time-limit of two years. It must be kept in mind that the two years include the time needed for the European Council to prepare the guidelines, and for the Council to adopt the negotiating directives following the Commission’s recommendations. Once the negotiations are concluded, they must then be adopted, and Parliament must give its consent. In addition, the UK will also have to ratify the agreements (by means of an appropriate national procedure). All this is to be accomplished within the two-year period. In Mr Barnier’s views, all in all, the time available will be less than 16-18 months. At the press conference on 6 December 2016, Mr Barnier acknowledged that the negotiations may start “a few weeks” after notification is received from the UK.

At its meeting of 29 September 2016, the Parliament’s Conference of Presidents decided that the follow-up to the UK’s decision to withdraw from the Union would, in the first phases⁴⁰, be

³⁹ <http://www.consilium.europa.eu/en/press/press-releases/2016/12/15-statement-informal-meeting-27/>

⁴⁰ The withdrawal process is described as having three phases: the first lasting until an official notification of withdrawal is presented, the second from the start till the end of negotiations, and the third starting after negotiations have been concluded.

dealt with by the Conference of Presidents, and appointed Guy Verhofstadt as Parliament's coordinator. The Conference of Presidents also decided to ask, in the initial phase, the parliamentary committees for contributions on the implications of UK withdrawal for their respective areas of responsibility; the committee reports should be available towards the end of January/February 2017. The Conference of Presidents stressed that it was important to ensure proper involvement of Parliamentary committees through all stages of the process.

In particular, the AFCO Committee has placed the issue high on its agenda and has prepared for the role established for itself in Rule 82 of Parliament's Rules of Procedure. Rule 82 provides that if a Member State decides to withdraw from the Union, the matter shall be referred to the committee responsible. That same rule refers to Rule 81 on accession treaties to be applied *mutatis mutandis* as regards parliamentary control.

The role of Parliament is important and mirrors that established for accession treaties in Article 49: consent after negotiations have been finalised and before they are concluded with the signature of the Council.

Parliament's Rules of Procedure have thus established a clear parallelism between the accession and withdrawal processes, and should thus rely on previous accession negotiations when setting out the terms for its participation in the withdrawal process. The leadership bodies of Parliament and the competent parliamentary committees should have a direct and privileged information channel with the negotiators, and Parliament should be able to decide on the level of transparency that should apply throughout the whole process. Parliament should also be able to approve political resolutions as it does in negotiations on accession treaties and association agreements.

Parliament has thus prepared itself for exerting its role on the withdrawal procedure, which only differs from accession procedures in that the final decision in the Council is taken by a so-called "super-qualified majority" instead of unanimity. For the rest, certain expert analysts consider some of the provisions of Article 218 TFUE applicable, in particular the necessity of fully informing Parliament at all stages (Article 218(10)) and seeking a ruling from the CJEU about the compatibility with the EU treaties of any "envisaged" Article 50 agreement or subsequent treaty with the UK (Article 218(11))⁴¹

At the meeting mentioned above, the Conference of Presidents also noted Parliament's intention to prepare input, in the form of a political resolution, for the guidelines to be agreed on by the European Council, and to adopt it before the European Council agrees the negotiating guidelines. Parliament's coordinator has informed the Conference of Committee Chairs that a Parliament resolution should be drafted shortly after the UK triggers the withdrawal procedure. This resolution should establish political recommendations for the Commission and the European Council as regards future negotiations.

In stressing the importance of keeping a united approach by the EU institutions and the 27 Member States, Mr Barnier has enumerated, in his presentations to Parliament, a number of principles that should be followed in the negotiations: the four freedoms must be indivisible; any transitional agreement must unambiguously be limited in time; EU membership must always remain the most advantageous status; any new relationship must be based on a level playing field and on respect for the rules of competition; the balance of rights and obligations agreed with other third states must be taken into account: and close cooperation is desirable in the field of defence and security.

⁴¹ Andrew Duff, presentation at the AFCO committee meeting of 8 November 2016.

The former Commissioner has always stressed the need build the agreement on the consent of Parliament all along the negotiating process, with permanent dialogue “not only on the political level but also on the technical one”.

It is the Council that concludes the withdrawal⁴²-agreement by means of a vote by the so-called super-qualified majority, as specified in Article 238(3) b TFEU: “*the qualified majority shall be defined as at least 72 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States*”. In a withdrawal procedure, the participating Member States include all but the withdrawing Member State. This translates here into a majority of 20 out of 27 Member States.

Conclusion of the withdrawal agreement requires the consent of Parliament by simple majority, including the UK Members. The deadline for the conclusion of the agreement is two years after the withdrawal notification. The European Council can extend the negotiations, in agreement with the negotiating Member State, only by a unanimous decision.

3.3. Revocability of notification

A peripheral though possibly significant issue in the withdrawal negotiations is whether, in the course of the negotiations, the UK could revoke or withdraw its notification, should it change its mind following either a change in government or any other unforeseen incident. The Treaty does not provide explicitly for such a contingency, which has not been dealt with *in extenso* in the academic literature, as it was assumed that a withdrawal decision would be definite.

The issue is controversial and both sides of the argument can be sustained. On the one hand, Article 68 of the Vienna Convention provides a general rule that “a notification or instrument provided for in Article 65 or 67 [regarding the procedures for withdrawal and termination] may be revoked at any time before it takes effect”. This argument is supported by several legal experts⁴³ on the grounds that “there is nothing in Article 50 formally to prevent a Member State from reversing its decision to withdraw in the course of the negotiations”⁴⁴, as well as the fact that the Treaty is generally aimed at preserving the Union and allowing for people to stay.

The contrary opinion is also maintained⁴⁵: in the first place, the fact that no reference to such a contingency is made in Article 50 TEU should not lead to the conclusion that a revocation is allowed unless the opposite can be inferred. In the present case, the reference in Article 50(6) of the possibility of reapplying for membership can be interpreted to mean that the drafters of the Treaty had in mind to address the possibility of a withdrawing state changing its mind, and provided the only possible answer: a new application⁴⁶. A more powerful argument in favour of irrevocability was put forward in the discussions at the Convention for

⁴² See also Andrew Duff. Brexit: What Brexit. Statement to the Constitutional Affairs Committee of the European Parliament.

⁴³ See for instance, Jean-Claude Piris, former director-general of the Council’s Legal Service in <https://www.ft.com/content/b9fc30c8-6edb-11e6-a0c9-1365ce54b926> and Sir John Kerr, Secretary-General of the Convention for the future of Europe in <http://www.bbc.com/news/uk-scotland-scotland-politics-37852628>.

⁴⁴ 11th report of the House of Lords EU select committee “the process of withdrawing from the European Union” HL, 138, 4may 2016.

⁴⁵ Cf. Rickford and Ayling: Brexit referendum and Article 50 of the TEU - a legal trap in need of legislation in <https://www.lse.ac.uk/collections/law/news/rickfordayling.pdf>.

⁴⁶ Lazowski also points out that Article 50 should be understood in a very narrow way so that only the mere decision to withdraw (“Any Member State may decide”) lies within the free choice of the Member State, whereas the details of a withdrawal and its procedure have to be set by the EU in its totality.

the Future of Europe addressing a similar article for the 2003 Constitutional Treaty: withdrawal should not be seen as a bargaining chip or a blackmailing instrument for Member States. The possibility of a revocation would mean that a Member State could notify its intention to withdraw, successfully negotiate terms for remaining, and subsequently revoke its notification only to submit it again later in order to continue bargaining.

The issue arose briefly during the court action on Brexit mentioned above. In this instance, the High Court, in points 10 and 11 of its ruling, stated the issue as “common ground between the parties”, alluding that both parties had agreed that notice under Article 50 TEU is irrevocable and cannot be conditional⁴⁷.

However, the High Court did not settle the issue as it was not considered relevant to the case. In any event, should the problem arise in practice, it will ultimately lie with the CJEU to make a determination if such an issue ever arises. No national court has jurisdiction to interpret Article 50. Some commentators were inclined to believe that the Supreme Court, when reviewing the High Court ruling, was unlikely to neglect the issue of revocability, and that it would feel bound by the provisions of Article 267 TFEU to refer the matter to the CJEU for a preliminary ruling. Some other commentators believe the opposite, that is, that the Supreme Court will do as the High Court and limit itself to the issue of Parliament’s consultation. This is what has finally happened in its decision of 24 January.

3.4. The withdrawal agreement and a new relationship framework

The withdrawal agreement set out in Article 50 TEU aims at “*setting out the arrangements*” for the withdrawal of the United Kingdom, while, as the article specifies, further “*taking account of the framework of the future relationship with the Union*”. It seems uncontentious that the future relationship is to be set out in an instrument separate from the withdrawal treaty. This is also inherent to the constitutional nature of both instruments. The withdrawal treaty will be concluded solely by the European Union and the UK (without its Member States, as this is not to be a “mixed agreement”), whereas the instrument framing the future relationship, which will have an impact on the existing rights and obligations of all Member States, will have to be concluded also by all 27+1+1 parties (27 Member States, the EU and the UK).

Even if the withdrawal agreement does not need to be ratified by the Member States, it will certainly imply changes in the Treaties: at the very least Article 52 TEU on the composition of the Union and several Treaty protocols concerning or referring to the UK will need to be revised or repealed as explained later in this paper.

The treaty provision establishing that the withdrawal treaty will be concluded in a manner “taking account” of the future relationship is also a challenge in several aspects. This implies that the content of that future relationship should be known not only at the time of the signature of the withdrawal agreement but, ideally, from start of the negotiations. The greater the level of understanding on the future relationship, the easier drafting the withdrawal agreement will be.

The deadline of two years following the triggering of Article 50 is not a clear-cut terminus for UK involvement in the EU. This guillotine principle would apply only in the event that there is no agreement, and it would arguably be more difficult for both the EU and the UK to start

⁴⁷Judgment Miller vs. Secretary of State for exiting the EU, 3rd November 2016, <https://www.judiciary.gov.uk/wp-content/uploads/2016/11/r-miller-v-secretary-of-state-for-exiting-eu-amended-20161122.pdf>.

the new relationship from scratch without having efficient transition times. If there is agreement in principle, the negotiation time can be extended, albeit probably under rather stringent conditions.

Expert commentators have raised some of the essential issues to be included in the withdrawal treaty. These include:

- Disengagement of UK from the EU budget or transitional contributions to the EU budget, including the winding down of EU spending programmes in the UK;
- Decision on the acquired rights of British nationals resident in other Member States, and of EU citizens living in the UK; how the principle of legitimate expectations is going to be dealt with by the departing MS and the EU
- British civil servants working in the EU institutions, including the unpicking of the European External Action Service;
- Preparing for the exit of British members from the European Parliament, the European Court of Justice, the Committee of the Regions, the Economic and Social Committee, etc.;
- Relocating EU agencies out of the UK – notably the hotly sought-after European Banking Authority and European Medicines Agency;
- Winding down UK military involvement from common security and defence policy missions, pulling UK police out of Europol and ending engagement in Frontex (or adopting interim agreements);
- Establishing new forms of frontier control, not least at Britain’s land borders in Northern Ireland and Gibraltar.
- Shared liabilities and entitlements; agreements should be reached on who is responsible for existing liabilities and who receives unallocated funds for projects or actors in UK or EU.
- Disentangling the UK from international treaties signed by the EU.⁴⁸

Though less detailed on these matters in his presentations Mr Barnier did state that the withdrawal negotiation would include, *inter alia*: the rights of citizens, which must be respected under any circumstance; the financial commitments undertaken by UK as a Member State (taking as a point of departure the figures provided by the Court of Auditors); border issues (in particular as regards the Republic of Ireland–United Kingdom border); the international commitments undertaken by the UK as a Member State and as a seat of EU agencies. Reviewing transitional measures, he also pointed at other issues to be addressed, such as the ongoing procedures at the CJEU or the Commission.

The financial arrangements appear to be particularly complex. Even if the UK decides to participate fully in the current multiannual financial framework until its expiry in 2020, its participation will progressively be wound down. It will have to consider whether to participate in long-running projects, for instance in the field of R&D, where the budgetary leverage of the EU level is substantially higher. The UK’s participation in the European Investment Bank and its constitutive capital will have to be reconsidered. At the moment, the Treaty reserves EIB participation for Member States only. Disentangling the EU’s international commitments and conventions can be very complicated, in particular as regards those that have been signed by both the EU and the UK, as is the case, for instance, of the Paris Agreement on climate change. On financial matters, the principle most likely to be followed is that of full respect for legal engagements and compromises.

⁴⁸ Duff, Andrew, ‘Everything you need to know about the Article 50 but were afraid to ask’, *Verfassungsblog*, retrieved 07-07-2016.

One of the most daunting tasks, requiring the full attention of both Parliament and Westminster, will be to resolve the issue of vested rights acquired by virtue of EU citizenship. It should be recalled that there are well over three million non-British EU citizens living in the UK, and well over two million British citizens living in the other Member States (see below point 3.5).

As said, the link between the two agreements must be considered carefully. If the technical part contained in the withdrawal treaty is still to take account of the future treaty, delicate orchestration is needed between the phasing in and phasing out of British involvement in the various policy areas and multiannual programmes, and the legal events foreseen in both treaties should ideally be concomitant. Although the Article 50 *guillotine* principle seems rather harsh, it was meant to benefit the withdrawing state: should there be any breakdown in the negotiations, after two years it can terminate its relationship with the EU.

Considering the complexity of the negotiation exercise and the conditions set out for the extension, it may be possible to set the time for the entry into force of the withdrawal agreement far in the future, to be concomitant with the entry into force of the future relationship treaty, or even to provide for direct linkage between the two. For instance, it could be envisaged that the entry into force of specific chapters of the withdrawal treaty is to be conditioned by the entry into force of related provisions in the future relationship treaty, or that provisions be made for their provisional, differentiated entry into force.⁴⁹

Some analysts have even suggested that the solution lies in adopting a new arrangement to govern relations between the end of Article 50 negotiations and the signing of a longer-term deal.⁵⁰ Such a formula does not seem to offer a very practical solution, in our view, as it would make things even more complicated, and should only be considered as a last resort. What seems desirable is that the withdrawing state has a clear projection of the future relationship when negotiating the withdrawal agreement, and that both agreements are negotiated in parallel. Ideally, when the rights and obligations deriving from the Treaties for the UK and its citizens extinguish, as agreed in the withdrawal agreement, the transitional provisions and/or the new partnership provide for a clear legal framework so there is as little legal vacuum as possible.

Although there is an explicit link between the two treaties, it must be ensured, as stated above, that the withdrawal treaty is limited in its scope in order to remain an EU-only agreement, avoiding the risk of becoming a mixed agreement that would require ratification by all 27 remaining Member States in accordance with their respective constitutional requirements.

In conclusion, interim solutions and temporary measures – such as, for instance, maintaining the customs union for some time in the event of a radical rupture in trade conditions – will have to be considered. An arrangement may also be considered whereby the entry into force of the Article 50 agreement is delayed until the new arrangements are put in place.⁵¹ The phasing out can be achieved by inclusion of sunset clauses in a number of areas (participation in EU programmes, the winding-down of financial commitments, participation in the EU Customs Union, etc.). The Commission seems considering organising the negotiation process with the UK around three “negotiation boxes”, whereby, together with the withdrawal agreement and the future relationship agreement, prominent place is given to transitional measures.⁵² Sequencing of the process and linking the three stages in order to avoid legal uncertainty will be one of the important challenges.

⁴⁹ See for instance Bruno de Witte, Bruno de Witte, ‘The United Kingdom: Towards exit from the EU or towards a different kind of membership?’ *Quaderni costituzionali* 3/2016, September, p. 581-583.

⁵⁰ See “Brexit and Beyond” Political studies Association, page 7

⁵¹ Duff, Andrew, ‘After Brexit. A new Association Agreement between Britain and Europe’, October 2016.

⁵² Technical Seminar for EU27 on Article 50 negotiations, held at the European Commission on 29 November 2016.

As his presentations referred to above indicate, Mr Barnier has so far not wanted to enter into great detail on this aspect. He has, however, acknowledged that the withdrawal agreement must take into account the future relationship, and that it is up to the UK, in the first place, to indicate what sort of relation it wants. He acknowledged that the future partnership will have a different legal nature and that, while both agreements cannot be concluded at the same time (the future agreement will be signed with a third country), an understanding on the future relationship may “enlighten” not only the transitional period but, “in some cases”, also certain elements of that future negotiation. On the transitional arrangements, the former Commissioner insisted these would only be of use if they prepared the ground for a future agreement. The transitional agreements will – and should – be part of the withdrawal agreement.

It is of course possible that, in the end, the negotiators fail to reach an agreement and the UK simply “falls out” of the Union after two years. In that event, the transitional arrangements should be of much more limited scope than if a future agreement is envisaged. Such a contingency is so far unlikely, but the principles reaffirmed so far by the EU, and the insistence, reaffirmed in PM May’s speech of January 2017, by the UK on not accepting freedom of movement for EU citizens or the jurisdiction of the Court of Justice, may make matters very complicated.

On the British side, as this analysis is being drafted, a clearer picture seems to be emerging about the UK government’s legal approach to give effect to the withdrawal agreement. A Great Repeal Bill will annul the 1972 European Communities Act, which gave effect to the EU *acquis* in the UK, including recognition of the jurisdiction of the European Court of Justice, and will transpose into the UK law the whole *acquis communautaire* in order that decisions may be taken later, case by case, on what pieces of legislation should be kept or disposed of. This will be one of the major challenges for the UK legislature. The UK Government would have to consider repealing, in advance, the European Parliament Elections Act of 2002, on the basis of which UK MEPs are elected, as well as the European Union Act of 2011 requiring UK to hold a referendum whenever EU treaties are amended, providing for the transfer of competences from the UK to the EU.

3.5. The challenge of “vested” or acquired rights

One problematic legal issue that is likely to crop up in the negotiations is that of the vested rights of EU citizens and businesses in the UK and, conversely, of UK citizens and companies operating in other Member States. In spite of this topic being central to the Brexit debate, it was beset by confusion. Would the complex web of rights and obligations suddenly disappear overnight? As a recent House of Lords EU Committee report indicated, “determining the acquired rights of the roughly 2 million UK citizens living in other Member States and EU citizens living in the UK [...] would be a daunting task”⁵³. We shall first examine the controversy regarding the continuation of vested rights, and the applicable principles of international law and customary international law, before exploring the options that could resolve such issues in the withdrawal agreement.

There is a degree of controversy about the existence and continuation of such rights. On the one hand, a number of legal experts point out that there is in principle nothing in the Treaties that provides for such an eventuality in the event of a withdrawal, and it would amount to a

⁵³ House of Lords, ‘The process of withdrawing from the European Union’, European Union Committee, 11th report of Session 2015-2016, <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/138/138.pdf>, retrieved 18-07-2016.

"new legal theory according to which "vested rights" would remain valid for millions of individuals, who, despite having lost EU citizenship, they would keep their advantages [...] (including [...] the right to vote and to be a candidate in the European Parliament). Such theory would not have any support in the Treaties and would lead to absurd consequences"⁵⁴ Therefore, only rights created by EU law and applying to third-country nationals (such as students, long-term residents and persons admitted for family reunification) would continue to apply.

Other experts hold the view that each Member State has vested nationals of the Member States, whether natural or legal persons, with a legal heritage of rights. EU law creates a number of individual rights directly enforceable in the courts, both horizontally (between individuals) and vertically (between the individual and the state). This argument is founded on the CJEU *Van Gend & Loos* jurisprudence⁵⁵, which was built on the idea that EU law confers rights on the nationals of the Member States, which become part of their "legal heritage". Limits of that legal heritage could be seen as resting with the national law that gives them effect.⁵⁶ Should the UK repeal bill rescind the effects of the Treaties, they could in principle not be invoked in the UK courts.

The Treaties are indeed problematic as they concern vested rights, especially when compared with a number of other international treaties. There is no mention of specific rights in the EU treaties with regard to the withdrawal process, and the relevant article only indicates that "the Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement" (Article 50(3) TEU). As some commentators have noted, the fact that there is no explicit obligation laid down in the Treaties to take into account acquired rights is in stark contrast with number of international treaties such as the European Convention on Human Rights (ECHR)⁵⁷ or the Energy Charter Treaty⁵⁸, which provide for specific protection of individual rights after the termination of the treaty. Finally, one can argue that the EU law is naturally not only a matter of law but also of the general principles recognised in EU law. One such principle pertains to the legal certainty established by the CJEU. However, in the event that no provision for such continuity of rights is made in the withdrawal agreement, or if the negotiations break down, these general principles will not constitute a justiciable source of law in the UK, meaning that UK citizens would automatically lose their EU citizenship and, thereby, their protection under EU law.

In the absence of provisions in EU law, one can turn to international law. A relevant principle is set out in the 1969 Vienna Convention on the Law of Treaties, which in Article 70.1(b) provides that "termination of an international treaty [...] does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination". However, in the commentary on the scope of this provision, the International Law Commission expressly rejected that its interpretation could give rise to acquired rights. Other experts simply consider that the Vienna Convention does not protect rights acquired by individuals under the treaty and that the term "parties" refers to parties of the specific

⁵⁴ Jean-Claude Piris, 'Should the UK withdraw from the EU: legal aspects and effects of possible options', Robert Schuman Foundation, *European Issues* No 335.

⁵⁵ Judgment of 5 February 1963, *van Gend & Loos*, C-26-62, ECR.

⁵⁶ See also Joachim Herbst, 'Observations on the right to withdraw from the European Union. Who are the "Masters of the Treaties"?', *German Law Journal*, 6/2005, p. 1755-1756.

⁵⁷ ECHR, Article 58(2) (Denunciation): "Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective." Parties remain bound by the convention with respect to actions prior to denunciation of the convention.

⁵⁸ Energy Charter Treaty, Article 47(3) (Withdrawal): "The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date."

treaty, namely the signatory States.⁵⁹ It should be noted, in any case, in this context that the EU is itself not a party to the Vienna Convention, nor are all its Member States.

Customary international law could also be invoked as legal basis for protecting certain rights acquired by virtue of the Treaties. However, the doctrine of protection and continuation of rights in customary international law is usually associated with the idea of protecting the rights created by domestic laws affected by state succession (e.g. Ruhr or Upper Silesia after World War I, or the break-up of Yugoslavia or Czechoslovakia) or expropriation (nationalisations). Such a principle is therefore applicable mainly as regards the continuation of contractual and property rights. An exception to this principle could be the protection of human rights. Although some experts of international law hold that human rights treaties can bind successor states, as acknowledged in the jurisprudence of the ECHR⁶⁰, the problem is that the core of EU rights are related to free movement, which are doctrinally not considered to be, *in stricto sensu*, "human rights".

It therefore remains for this issue to be settled with clarity in the withdrawal agreement. As a result of the principle of dualism that is predominant in the UK legal system, a number of EU norms have been transposed into national legislation and would be unlikely to change substantially. The UK will likely aim at retaining a number of laws of EU origin in order to continue to benefit from access to the internal market. Should the acquired rights be part of the negotiation, as a number of politicians in charge of Brexit already have suggested, the various reciprocal arrangements concerning the preservation and phasing out of such rights could be settled in the withdrawal treaty.

A number of models could be reverse-engineered from the pre-accession and post-accession arrangements set out for the 2004 EU enlargement. Such transitional measures were also essential for dealing with the withdrawal of Greenland (or its de-facto change of legal status within the EEC). In the latter case, the Commission considered, in its opinion 1/83 on the Status of Greenland, that the "proposed change of status may [...] raise certain transitional problems. This applies in particular to the question of the rights acquired by Community nationals in Greenland and vice versa when Community law applied to Greenland"⁶¹. It also raised other issues such as pension rights and the retention of Community rules with respect to workers: "the case-law of the Court of Justice that has already been established in favour of the retention of pension rights acquired by workers during periods of employment in a territory which has subsequently ceased to belong to the Community give no reason to suppose that there will be any major difficulties in that area, even if the future status of Greenland were to rule out the principle of free movement. It would however be preferable to retain the substance of the Community rules, at least in respect of Community workers employed in Greenland at the time of withdrawal".

In the same document, the Commission added that it was for the Council to adopt the proposal from the Commission on such transitional measures.⁶²

⁵⁹ Bowers et al., 'Brexit, some legal and constitutional issues and alternatives to EU membership', House of Commons Library, Briefing Paper Nr 07214, 28 July 2016.

⁶⁰ ECHR, judgement of 28 April 2009, application no. 11890/05, *Bielic v Montenegro and Serbia*.

⁶¹ 'Status of Greenland: Commission opinion' (COM (83)0066), 2 February 1983, p 12.

⁶² *Ibid*, p. 13.

4. MODELS FOR A FUTURE EU-UK RELATIONSHIP

This section aims to analyse the different options open to the UK once it leaves the EU, as far as there is an understanding on the need and scope of that relationship. If for whatever reason there is no such understanding, the UK economic and commercial relations with the EU will surely fall under the WTO rules. Other political, defence or security relations would need to be established *ex novo*, most probably on a case-by-case basis and hopefully building on the existing *acquis*.

On 17th January 2017, UK Prime Minister, Theresa May delivered a first major speech containing a number of announcements concerning UK's Brexit negotiations⁶³. We have to consider the speech to constitute a basic negotiation objective, and its announcements, with its inherent contradictions, to be a part of a negotiating tactics pursued by the UK government. The future relationship will finally have to combine number of solutions laid down in the existing association models explored below.

As said, the first imperative announced in PM May's speech was the intention of "taking back a control of (...) our own laws", which includes bringing an end to the jurisdiction of CJEU. A Great Repeal Bill announced earlier would then aim to incorporate existing EU legislation into the EU law. This corpus would be selectively reviewed on ad-hoc basis. Nevertheless any modern trade agreement, which extend in their scope over standards for goods, is seeking to reach a high degree of regulatory convergence. This in turn requires some degree of international jurisdictional oversight and arbitration. Those are living instruments that require a process to ensure both its evolution and efficient internalisation as we can see in the Swiss and Norway models.

Second came indications about a format of such agreement the UK is seeking to obtain. Although UK should strive for a Free Trade Agreement (FTA) with the EU that is "freest possible", its objective is to extend to both goods and services. It would aim not at "single market membership" but rather at "single market access". It would wish to retain some aspect of Customs Union, by becoming "associate members" of the Customs Union in some way, or to remain "signatories of part of it". But such statement comes with an outright rejection of Common Commercial Policy or even of a Common External Tariff. As the section on Customs Union shows solution to such contradictory objective will be uneasy. Nevertheless, such FTAs paired with a Customs Union of some undetermined shape should allow enough flexibility to conclude sectorial cooperation agreements on horizontal issues such as defence and security cooperation as Deep Comprehensive Trade Agreements already provide for.

Finally, PM in her speech recognized a need for a short period of transition containing number of phasing-out and phasing- in processes between the leaving of the EU and entering into the new FTA regime. She considered that number of those transitional solutions will have to be negotiated on a case-by-case basis. Although the phasing-in process is defined in number of cooperation models explored below, it this premised on the simultaneous increase of benefits and obligations, not on the contrary process consisting in reduction of commitments and access.

Leaving the Single Market, while ensuring a widest possible access to it, while in parallel and then negotiating "selective agreements" is very similar to the last of the models based on FTA proposed below, with parts "borrowed" to other more integrated models, allowing sectorial agreements on whatever the UK considers appropriate, such as defence or security, all the while securing "the greatest possible access to the internal market". It is,

⁶³ See point 1 of this paper

thus, still very pertinent to analyse the exiting different models of associating or working with the European Union. Most probably the future relation between the EU and the UK will conform to one or a combination of these.

	Free movement	Horizontal policies	Optional	Not included	Institutional	Net contribution per capita ⁶⁴	Comment
EU Membership	Goods Services Capital Persons	All	Enhanced cooperation	N/A except for opt-outs	Representation in European Council, European Commission, European Parliament, Council of the EU, Court of Justice	EUR 187	
EEA (Norway model)	Goods (energy, competition and state aid, trade facilitation, agriculture and fisheries products); Services (financial services, transport, postal services, electronic communication, information society); Capital; Persons (free movement, social security, recognition of qualifications)	Consumer protection, Education, Training & Youth, Research & Innovation, Enterprise, Health & Safety, Environment, Employment & Social Policy, Gender equality, Anti-discrimination	Justice & Home Affairs (Europol, Eurojust, Dublin); Schengen (associate membership)	Agriculture; Fisheries; Regional Policies; Social and Employment law; External Trade; Foreign Affairs	Monitoring by EFTA authority; EEA Joint Committee; No representation in EuCo, COM, EP, Council or Court; EFTA Court follows CJEU Jurisprudence	EUR 137	EU rules of origin apply
Bilateral agreements (Swiss model)	Persons; Goods	Procurement	Schengen Agreement; Dublin Regulation	Agriculture; Fisheries; Customs Union; Common Trade Policy	EFTA Surveillance Authority; EFTA Court	EUR 63	Over 100 agreements negotiated for market access

⁶⁴ Experts agree that it is inherently difficult to provide exact calculation of the contributions per capita. Based on estimates provided in "Brexit: some legal and constitutional issues and alternatives to EU membership", <http://researchbriefings.files.parliament.uk/documents/CBP-7214/CBP-7214.pdf>.

Customs union (Turkey model)	Goods (limited for primary agricultural products); Services excluded; Trade (customs, external tariff, GSP)	Alignment with <i>acquis communautaire</i> : industrial standards		Agriculture (only preferential concessions); Services; Public Procurement	EU-Turkey Association council; Has to accept interpretation by CJEU of the Association Agreement	No contribution	No trade sovereignty
FTA (Canada model)	Partial Goods; Number of agricultural products excluded; Limited services	Public Procurement; Regulatory cooperation			CETA Joint Committee; Investment Court System	No contribution	EU-Canada: seven years of negotiation; EU rules of origin apply; No influence on EU standards and regulation
Associate membership	Goods; Services; Capital; Labour (limited)	Selectively: Security & Defence, JHA/Anti-terrorism	To be determined	To be determined	Coordination of foreign policy position; Summit meeting; Associate Council; CJEU associate judges	To be determined	

Continental Partnership	Goods; Services; Capital; Labour (temporary)	All parts of <i>acquis</i> required for free movement (except of persons); Participation in common policies consistent with Single Market; Economy; Energy; Climate; Security & Defence	To be determined	To be determined	Inter-governmental: partnership council for decision-making and enforcement; Acceptance of jurisprudence related to Single Market Competition Policy enforcement	To be determined	
DCFTA (Deep and Comprehensive Free trade Agreement)	Goods (customs issues); Services; Capital; Trade remedies; Public Procurement; Competition Policy; Intellectual property	Economic cooperation, Security and defence, Energy, Transport, Environment, Consumer protection, Employment and social policy, Financial markets			Annual Summit; Association Council (dynamic configurations)	In accordance with participation in EU programmes	
WTO	Limited market access; Under MFN principle in application of TBT and GATS				Ministerial Conference; General Council as WTO Dispute Settlement Mechanism / Trade Policy Review Body	Based on Member's share of trade	

4.1. The Norway model / EEA / EFTA

Norway's relationship with the EU has been one of the first discussed models for a future relationship with the EU as it offers complete access to the single market, including services and capital, with crucial importance to the UK economy that is 80 % oriented towards the service sector. It is also proposed by a number of commentators⁶⁵ as a possible transition option from full EU Membership to a specific arrangement tailored to UK needs and as a political solution for providing some form of control of intra-EU migration. According to this model, the UK would first negotiate an association agreement that retains most of the internal market provisions intact, and could still include some of the JHA policies that remain important, such as participation in Europol and Eurojust. Assuming that an exit agreement and new transitory agreement based on the EEA/Norway model could be concluded in the two-year timeframe, there would then be breathing space for negotiating a new comprehensive agreement incorporating all the 'red lines' the UK government wishes to maintain (notably on intra-EU mobility).

Such an option would theoretically imply that the UK would join the European Free Trade Association (EFTA), and then the European Economic Area (EEA), alongside Norway, Iceland and Lichtenstein.⁶⁶ The former includes all non-EU EEA members plus Switzerland, which has chosen not to be part of EEA, preferring to be linked with the EU and its internal market through a series of bilateral agreements. Policies not covered by the EEA, such as rules on agriculture and fisheries, would no longer be applicable to the UK. It would retain control also over customs, trade and foreign policy, and would be free to set out a VAT regime. It could opt in, probably via supplementary agreements, to Justice and Home Affairs policies of interest to the UK, such as police and judicial cooperation. Recently, arguments have been presented to show that the UK, after withdrawing from the EU, could simply remain a member of EEA, as the only explicit way to leave the EEA is by invoking Article 127 of the EEA treaty.⁶⁷ The UK government is currently facing another potential legal battle over this issue⁶⁸.

Under the standard EEA formula, the UK would retain a large portion of legislation relating to the internal market – about 11 500 EU acts with EEA relevance that have been incorporated in the EEA Agreement through the acts of the EEA Joint Committee. These include free movement of imports and exports, freedom to provide and receive services, and free movement of capital and payments. More importantly, it also includes all three aspects of free movement of persons (citizens, workers and freedom of establishment). In that respect, it would be no solution to the immigration concerns within the UK. On top of this, with regard to financial services, the integration of legislation regulating this field into the EEA Agreement has some inherent limitations. For instance, the EEA Agreement does not cover the work of the European Supervisory Authorities. The City of London accounts currently for a high proportion of EU financial services, up to $\frac{3}{4}$ of EU foreign exchange as well as 40 % of global trading in euro that takes place there.⁶⁹ With regard to external

⁶⁵ See for instance Wolfgang Munchau, *Eurointelligence*, 15 July 2016.

⁶⁶ Article 128 of the EEA Agreement provides that "Any European State becoming a member of the Community shall, and the Swiss Confederation or any European State becoming a member of EFTA may, apply to become a party to this Agreement. It shall address its application to the EEA Council [...] That agreement shall be submitted for ratification or approval by all Contracting Parties in accordance with their own procedures".

⁶⁷ Article 127 only indicates that any party can leave with at least 12 months' notice.

⁶⁸ 'Brexit: Legal battle over UK's single market membership', <http://www.bbc.com/news/uk-politics-38126899>.

⁶⁹ CBI, 'Our Global Future: The Business Vision for a Reformed EU', November 2013.

policies, EFTA states also routinely coordinate their foreign policies with EU statements and participate in some Common Security and Defence Policy missions and operations.

In addition to the need to follow EU regulations while having only limited impact on their development, Norway does not belong to the customs union. Instead, it has concluded, within the framework of EFTA, a number of bilateral agreements. EFTA has currently around 24 such agreements that cover 33 countries. Although this model in theory allows a country to create its own trade policy agreements, in order to benefit from the freedom of movement of goods, such agreements must satisfy EU rules of origin requirements in order to enter duty-free into the EU. In the context of ever more complex global supply chains, verification of the satisfaction of the rules of origin becomes increasingly costly. In the context of an EEA-type of relationship, such costs would principally be borne by UK firms, and would limit their imports from outside of the EU. Infringement of such rules can also result in the UK being subject to anti-dumping measures.

Although by following this route the UK would lose access to the decision-making in the Council of the EU and the European Parliament, it would still have to contribute a sizable amount to the EU through the grant mechanism. According to some estimates provided by the Library of the House of Commons, its contribution would be reduced overall by a mere 17%.⁷⁰ EEA/EFTA countries contribute to the EU in two ways. Firstly, they contribute to the EU regional policy with specific grants, targeted at the 13 newer EU Member States plus Greece, Spain and Portugal. Here Norway provides the largest share of the contribution (97 %). EEA countries also contribute to the costs of EU programmes in which they participate, on the basis of the size of the GDP of the EEA/EFTA states relative to the total GDP of the European Economic Area.

For the EU, such a model would have the advantage that the negotiations on the future relationship could proceed smoothly and, in fact, quickly. Economic ties with the UK would not be disrupted and the UK could participate, in an almost unaltered manner, in several EU projects. The financial contribution of the UK as an EEA member would also help in reducing the adverse financial impact on the EU budget by the Brexit.

It has been suggested that the UK could simply re-join EFTA as an alternative to EEA membership. The UK was a co-founder of EFTA in 1960, together with Norway, Denmark, Sweden, Austria, Switzerland and Portugal, which was intended as an alternative to EEC membership operating as a free-trade area (excluding agricultural products). It would then get tariff-free access to the EU, without free movement of people or free trade in services. In the medium and long term, this would likely lead to more non-tariff barriers owing to the divergence between the EU and EFTA regulatory models. This was the objective of the 1960s, when EFTA was founded. Today, however, the issue has shifted from direct tariffs, to regulatory compliance. Direct tariffs were sizeably reduced through the World Trade Organisation, which explains the essential focus in today's negotiations in trade (such as in the context of the Transatlantic Trade and Investment Partnership, TTIP) towards non-tariff barriers and trade in services. Consequently, for the UK to follow such path would hold limited appeal.

Considering the current negotiation 'red lines' exposed by the UK government, i.e. to extricate itself from the jurisdiction of the CJEU and be able to set limits to immigration, the EFTA institutional dimension and enforcement might not be a satisfactory solution. Enforcement is managed by the EFTA Surveillance Authority and the EFTA Court, the latter subordinated to the rule that it must follow (or must at least not contradict) the case law of the CJEU. Concerning the limits on migration in the EEA/EFTA model, some experts have

⁷⁰ House of Commons Library (2013), 'The Economic Impact of the EU membership on the UK'.

pointed to the flexibility granted by the Council to the smallest EEA member – Lichtenstein – with quasi-permanent restrictions on labour mobility rules.

This is naturally an exceptional case, where the Council recognised that the microstate had “a very small inhabitable area of rural character with an unusually high percentage of non-national residents and employees” and acknowledged as well that “the vital interests of Lichtenstein was to maintain its own national identity”⁷¹. According to Article 112 of the EEA Agreement, Lichtenstein was entitled, “if serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising”, to invoke relevant safeguard measures. This was originally only a temporary expedient, before the EEA Joint Committee decided in 1999 that the specific geographical location justified “maintenance of certain conditions on the right to take up residence in that country” and Lichtenstein received a formal right to control the number of the workers entering the country, formalized as Annex VIII to the EEA Agreement (“Sectoral adaptations”). This temporary “sectoral adaptation” has become nearly permanent in nature, although it is formally reviewed every five years. Lichtenstein attributes its residence permits to about 60 economically active and 16 economically inactive people annually as a result of a lottery organized two times per year.⁷² It is a matter of political expediency to decide whether permanent limitations to the free movement of persons – which is a feature of EEA – could apply in the case of a much larger state, such as the UK, where the rationale for Lichtenstein evidently does not apply.

4.2. The Switzerland model

Although a member of EFTA, Switzerland decided, in a referendum in 1992, not to adhere to the EEA agreement. Following the referendum, it negotiated – in a very lengthy process – a special bilateral relationship with the EU, and is currently bound to the EU by a series of multiple bilateral agreements. The system also requires a mechanism for the update of implementing legislation similar to the one provided in the EEA Agreement. In principle, the sets of agreements that Switzerland has concluded with the EU since 1992 were intended to prepare the country to join the EU, but its application, lodged in 1992, became dormant until June 2016 when the Swiss parliament officially voted to withdraw it.⁷³

The bilateral agreements were negotiated in packages; the first such package of agreements made a large portion of EU law applicable to Switzerland – on air and road traffic, agriculture, technical barriers to trade, public procurement and science. This first generation of bilateral agreements was expressly formulated to be mutually dependent. If one package is terminated or not renewed, the other agreements will all cease to apply (a so called ‘guillotine procedure’). The first agreements were complemented by a second generation of bilateral agreements extending to security and asylum matters, as well as to Schengen membership, cooperation in the fight against fraud and a number of sectoral issues concerning agriculture, the environment, media, education and statistics. Switzerland is also taking part in some EU programmes such as the EU Framework Research Programme, the EU Media programme, Youth in Action and the Lifelong Learning programme.

⁷¹ Decision of the EEA Council 1/1995 of 10/03/1995, <http://www.efta.int/sites/default/files/documents/legal-texts/eea/other-legal-documents/adopted-decisions-of-the-EEA-council/eea-council-no1-95-1995-03-10-liechtenstein.pdf>.

⁷² Communication from the European Commission to the Council and The European Parliament, Lichtenstein Sectoral Adaptations – Review, COM(2015)0411, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0411&from=EN>.

⁷³ ‘Switzerland withdraws application to join the EU’, <http://www.politico.eu/article/switzerland-withdraws-application-to-join-the-eu/>, retrieved 23-08-2016.

More importantly, the EU-Swiss relationship also includes the free movement of people. However, on 9 February 2014 a majority of the Swiss electorate voted in favour of a legislative initiative to limit mass immigration that would result in a new immigration system running counter to some of the concluded EU bilateral agreements. Although the solution adopted by the Swiss government, namely not banning applications from EU citizens, but rather giving preference to local applicants, was found to be acceptable for the European Commission, it can hardly be considered a permanent fixture in the relationship. There is even a safeguard clause in the 1999 agreement with Switzerland: "in the event of serious economic or social difficulties, the Joint Committee shall meet, at the request of either Contracting Party, to examine appropriate measures to remedy the situation [...] [T]he scope and duration of such measures shall not exceed what is necessary to remedy the situation." Needless to say, the clause has never been activated, and constraints in using it certainly go beyond the concerns expressed by the Swiss electorate in 2014 referendum.

The Swiss option is problematic for both the UK and the EU for several other reasons as well. From the British point of view, the country would be part of the free movement of goods and persons, but not of services. Currently, however,, third-country financial institutions, including the Swiss ones, are operating in the EU market mainly via subsidiaries based in London. It has been claimed that a change to this situation would diminish substantially the attractiveness of London for third-country companies wishing to operate in the EU. Secondly, there would be a constant need to negotiate agreements to match the ever-evolving *acquis communautaire*.

The EU, for its part, is not keen to establish another such form of relationship. The Swiss regime is criticised in the EU for allowing too much margin of manoeuvre to the Swiss who want to "pick and choose" policies they like, while the Commission complains that Switzerland does not transpose, or does not transpose in time, new EU legislation. Since the Swiss vote on immigration, the EU has requested a new agreement that includes an automatic update of rules to match the EU and acceptance of the jurisdiction of the CJEU. In addition, the adoption of such a model for the EU-UK future relations would imply lengthy negotiations on each sector.

4.3. Customs Union (Turkey model)

The Ankara Agreement of 1995 established a Customs Union between the EU and Turkey. The scope of the Customs Union includes trade in manufactured products between Turkey and the EU, and also entails alignment by Turkey with certain EU policies, such as technical regulation of products, competition, and intellectual property law.

The agreement does not though cover some essential areas such as agriculture, where concessions are instead covered by a series of bilateral agreements. Following this model would allow the UK to retain the EU's common external tariff, as well as the import conditions imposed under the EU's free-trade or preferential agreements with third countries. This would mean that the UK would not be subject either to rules of origin documentation or to custom controls. Remaining in the Customs Union would also have the political advantage of avoiding custom controls on the border between Northern Ireland and the Republic of Ireland.

However, in this scenario the UK would find itself in the precarious position of having to give up trade sovereignty in order to gain access to the EU market, and would have to comply with a number of regulations covering industrial standards. In addition to not having access to the services markets, Turkey does not benefit from free-trade agreements that the EU

negotiates with other parts of the world, such as the TTIP or the CETA (see below), in which Turkey sought to be involved but was refused participation by the EU.

For the EU, such a form of relationship with the UK would be an easy option insofar as negotiations are concerned, although, as in the case of the WTO model, it would significantly hinder relations in areas set outside the scope of the Customs Union, such as services and investments. As free movement of persons would not be covered, EU and UK nationals would be treated as third-country nationals by the UK and the EU, respectively.

4.4. CETA (Canada model)

The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada was signed on 30 October 2016, but has yet to enter into force. Once applied, it will remove customs duties, end restrictions on access to public contracts, open up the services market, offer better conditions for investors and help prevent illegal copying of EU innovations and traditional products. Its main features include the provision that 98.6 % of goods are to be traded tariff-free, and deals on access to public procurement and regulatory compliance. It keeps restrictions on sensitive agricultural products such as poultry, eggs, beef and cheese. One of its objectives is the liberalisation of services, albeit with numerous caveats (such as in regard to banking services) that are largely absent in the Swiss arrangement.

David Davis, the new British minister for Exiting the European Union, has called CETA the “perfect starting point for our discussions with the Commission”⁷⁴. However, it also raises a number of difficulties. In the first place, negotiating it was a very lengthy, complex and time-consuming process (seven years, resulting in a 1600-page document). In addition, it does not cover all services (banking, for instance, falls outside its scope) and it imposes very strict rules of origin.

Given the fact that the Commission recently accepted that CETA should be subject to ratification by the national parliaments of the Member States (and even by certain regional parliaments), this could set a dangerous precedent for an agreement with the UK modelled on CETA. The agreement would be subjected to same lengthy process and blockages, complication is compounded when we consider that UK trade with the EU covers a number of sectors with strong regulatory protection, such as finance, nuclear equipment and pharmaceuticals.

Considering the current state of play, CETA may serve the UK more usefully as a template for modern trade agreements to be concluded in future negotiations, especially with developed countries such as the USA, Japan and Canada, than as a model for its association with the EU, with which its regulatory convergence and interdependencies are much higher.

It is a matter of political expediency whether, for the EU, such a form of relationship with the UK would be advantageous. It will certainly take a long time to negotiate, and would have to be modified significantly for political or trade reasons. As CETA does not have any general provisions regarding the free movement of persons (except as regards, in particular, businessmen), it does not provide a model suitable to the interests of the bulk of EU and UK nationals.

⁷⁴ ‘Canada’s trade deal with EU a model for Brexit? Not quite, insiders say’, The Guardian, <https://www.theguardian.com/world/2016/aug/15/brexit-canada-trade-deal-eu-model-next-steps>, accessed 23-08-2016.

4.5. Associate membership

Ever since the European Convention met to draft the Constitutional Treaty, a number of ideas providing for a looser association have been suggested. As Bruno de Witte points out the "Norway and Swiss models are [...] deeply unattractive for the UK as the country would then be excluded from the EU decision-making but still have to follow the lead of the EU legislator in the internal market and related matters". A number of options that would cater for a looser connection with the EU have been introduced. One of the most comprehensive, labelled as "associate membership", has been proposed by the Spinelli Group. Under such proposals, the associate member would participate in a number of the EU's policies and functions, and specific conditions on both financial and institutional policies would be set out for participation, while ensuring that participation does not impede common policies. EU agencies could be involved selectively for delivery of policies in certain matters. It would allow for selective institutional participation in the institutions of the EU (e.g. participation in Parliament, the Council and the European Council when the association treaty is being implemented, and in the Commission expert groups/consultation processes).⁷⁵ The overall idea of such a category is to cater to the needs of multi-tier governance in an ever more complex European Union while countering the centrifugal forces and providing for dignified political participation in the EU, without risking the operation of core policies such as the internal market or cohesion of the EU's positions on foreign policy.⁷⁶

Other proposals suggest, with the UK specifically in mind, that the new partial membership status should essentially consist in a codification and extension of the UK's current opt-outs, combined with a simpler and more coherent structure of the EU decision-making in those areas. The current bits-and-pieces of special status for the UK could be assembled in one treaty chapter (or, better still, in a single comprehensive 'UK protocol') listing all the policy areas in which the UK does not participate.

4.6. Continental Partnership (CP)⁷⁷

After the UK referendum, one of the first models for association of the EU and the UK was devised with the support of the academic think tank Bruegel in August 2016. The proposal appears to espouse the philosophy of associate membership, with additional focus on separating political from economic integration and on favouring intergovernmental decision-making.

The aim is to sustain deep economic integration, with full participation as regards mobility of goods, services and capital, and with temporary labour mobility, but excluding fully fledged free movement of workers as well as political integration objectives. Such cooperation would entail four distinct strands: (1) participation in the common market policies consistent with the single market, including relevant enforcement mechanism and jurisprudence; (2) involvement in a specific form of intergovernmental decision-making and enforcement; (3) relevant contribution to the EU budget; (4) close cooperation on other matter such as security and, possibly, defence matters. The structure of the Continental Partnership would then build on two circles, an inner circle constituted by a politically integrated EU committee to further

⁷⁵ Spinelli Group, 'A Fundamental law of the European Union', Bertelsmann Stiftung, 2013.

⁷⁶ Duff, 'Making the Case for Associate Membership of the European Union', LSE EUROPP, 6 March 2013, <http://blogs.lse.ac.uk/europpblog/2013/03/06/associate-eu-membership/>, retrieved 08-08-2016.

⁷⁷ Ferry et al., 'Europe after Brexit: A proposal for a continental partnership', August 2016, <http://bruegel.org/2016/08/europe-after-brexit-a-proposal-for-a-continental-partnership/>.

common political aims, with supranational constitutional structures and institutions, and an outer circle that would not share such aims or any supranational institutions, with the exception of mechanisms aimed at ensuring homogeneity of the internal market.

The proposed mechanism for establishing a Continental Partnership has raised a number of criticisms.⁷⁸ These address in particular issues at the institutional level, in particular the practicability of the suggested intergovernmental law making and law enforcement. EU law making is an iterative negotiation process, where the impact of the CP council in shaping EU legislation would irredeemably be superseded by political bargaining under the ordinary legislative procedure. Law enforcement, including the recognition of jurisprudence concerning the single market, is another sticking point: both are shaped by the existing supranational institutions, such as the Commission and the CJEU, or by similar institutional mechanism in the framework of the CP, which would be bound to emulate the mechanisms established under the EFTA umbrella.

4.7. Deep and Comprehensive Trade Agreement (DCFTA)

The Deep and Comprehensive Trade Agreements are a new generation of association agreements including a strong trade component that have been negotiated and concluded with certain neighbouring countries (Ukraine, Georgia and Moldova). The DCFTA format provides number of options with respect to the problems listed above. Their main advantage is their comprehensiveness (almost all major EU policies and competences are covered), the horizontal inclusion of three of four freedoms (goods, services and capital but not persons), including a number of institutional provisions. Although the agreements can be very long (some 2000 pages long), with a number of technical annexes, they are a useful tool for structuring deep economic cooperation.

The core FTA aspects of the agreements include provisions on customs matters (zero tariffs, customs procedure, technical standards and regulations for goods) and policies for preserving a level playing field (trade remedies, competition policy, intellectual property rights, public procurement and secondary matters such as basic rules for services and taxation). These are fundamental elements in the establishment of a close free trade agreement. Naturally, the UK could easily comply with such provisions, not least as regards customs and technical standards serving to limit technical barriers to trade.

The economic cooperation section of the DCFTA gathers a number of flanking policies concerning trade and the single market, notably as regards energy, transport, environment, consumer protection, employment and social policy, and financial markets. These are all areas that the UK government has expressed an interest to include in the future framework of relations. Michael Emerson notes that in some of these, such as the area for financial markets, "the agreement retains the same conditions for "pass-porting" as the EU's internal legislation. While Ukraine is nowhere in sight of meeting these conditions, UK of course is."⁷⁹

With respect to the other chapters not entirely related to trade but to a framework of mutual cooperation, the DCFTAs include provisions for participation in major EU programmes such as Horizon 2020, and involvement in a number of technical EU agencies, which would be in the interest of both the UK and the EU.

⁷⁸ See for instance Giorgio Maganza, 'Comments on Europe after Brexit: A proposal for a continental partnership', European Parliament, Committee on Constitutional Affairs, hearing held on 29 September 2016.

⁷⁹ Michael Emerson, Statement to the Constitutional Affairs Committee of the European Parliament, Tuesday 8 November 2016.

Finally, the political chapters of the Association Agreement also deserve attention. In addition to reiterating the EU's values and principles, they also provide for a closer cooperation in the field of foreign, security and defence policies. There are also specific arrangements concerning a number of policies related to justice and home affairs, such as cooperation in migration, asylum and border management (mainly geared at the prospect of visa liberalisation), but also a joint commitment to cooperate on combating international organised crime.

At the institutional level, we find an annual summit-level meeting, a ministerial Association Council in dynamic configurations and number of technical committees. The Association Council is empowered to extend the agreement by consensus by adopting annexes to it.

One advantage of the DCFTAs is that they provide useful drafting examples of texts of agreement that cover a number of areas relevant to UK-EU cooperation and, as such, should easily be replicable. A second advantage may well be their more comprehensive yet, at the same time, more selective scope: in comparison to the options focused on economic integration, such as the EEA model, the four freedoms are naturally more curtailed in DCFTA model. On the other hand, cooperation under latter extends to number of other fields of mutual interest (security and defence, justice and home affairs, etc.). Lastly, an important aspect of the DCFTAs is that they offer flexibility in their application, allowing for the provisional entry into force of a number of key provisions ahead of the process of national ratifications, which can be rather lengthy.

4.8. WTO

Once the UK triggers the Article 50 procedure, if no alternative agreement is reached within the specified time, and if it fails to achieve a unanimous extension of the negotiation timeframe, it would automatically fall into the WTO regime. As such, UK would enjoy access to the EU as other members of WTO, with the exception of countries with preferential FTAs or which have been granted preferential market access, for instance developing countries under the Generalised System of Preferences (GSP). In principle, the UK would benefit from all generic rights and obligations set out in the multilateral WTO agreements, eg. those on Technical Barriers to Trade (TBT) or Trade-Related aspects of Intellectual Property Rights (TRIPS). However, it must be pointed out that there is no automaticity with respect to the two major issues that define involvement in WTO: the bound tariff schedule and the schedule of reservations. The tariff schedule could remain at the level of that of EU Most Favoured Nation, with the exception of tariffs in areas in which it may want to adopt a more liberal regime, such as agriculture. WTO's general agreement on Trade in Services (GATS) contains a series of reservations limiting de facto market access. From the EU viewpoint, part of the reservations in trade of services is set at the EU level and part on the level of the Member States.

This would naturally lead to increased costs of exports to the EU for UK firms. As the trade in services is limited under the WTO regime, this would also mean reduced access to the EU market for service providers. In addition, the preferential trade agreements between the EU and third countries would cease to apply for the UK, which would have to reconstitute them bilaterally.

The institutional dimension of the WTO participation involves mainly the WTO Dispute Settlement Mechanism, which, besides providing a simple judicial panel, aims to resolve disputes by common agreement before triggering the full process of arbitration. The overall timeframe for settling a dispute for a standard case submitted to the WTO Dispute Settlement

Body is about 1.5 year⁸⁰. The executive dimension around which the WTO decision-making machinery turns is the General Council, which organises its work with the assistance of specialised organs and other subsidiary bodies.

From a strictly economic point of view, a WTO-type relationship would not be a suitable solution as it would suppress or at least hinder UK-EU economic ties, in particular in the field of services, and would raise practical issues with regard to the UK-Ireland border. It could have some political advantages, in the sense that the EU could demonstrate to other potential 'exiters' that there is no easy way out of the EU, but could in the long term be counter-productive and harmful to EU interests as well.

Also discussed in parallel are the options of linking the UK closer to its natural web of interests such as the one constituted by the Commonwealth, free from EU customs union. It could propose a free-trade area among Commonwealth countries, or join NAFTA along with the USA, Canada and Mexico. The fact remains, however, that for the UK, in a context in which the EU remains the largest integrated market, the second largest world exporter after China and the second largest importer after the USA, the EU makes for a very desirable trading partner.

It would seem, however, that political rather than economic considerations are the driving force for British government policy. It might well be that the prime minister "will prioritise restricting free movement and excluding European Courts, whatever the economic price"⁸¹. This latter consideration has become a bit closer to the truth after PM May's speech on 17 January 2017.

⁸⁰ See 'Understanding the WTO: Settling disputes: a unique contribution', https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

⁸¹ Charles Grant, intervention before the AFCO committee on 5th December 2016

5. CONSEQUENCES OF THE WITHDRAWAL FOR THE EUROPEAN UNION

No thorough or detailed evaluation is feasible until the UK sets out, in a precise manner, a minimum of key elements it wishes for the future relationship, and until the EU sets out its own preferences as well. As we have seen in points 3 and 4 of this study, PM May's speech of 17 January can hardly be considered to have dispelled all doubts about that future relationship. With this caveat, the following is an attempt to summarise the more general and institutional consequences for the Union's policies and institutions, both for the ongoing procedures in negotiating phases and from the moment of the withdrawal.

The UK has not yet notified the European Council of its intention to withdraw from the EU. As mentioned above, the UK government has announced its intention to notify the European Council by the end March 2017. It is not yet known which form this notification will take: a simple notification with a declaration of political intentions, or a much more complete, detailed proposal for a withdrawal agreement. Nor is it known whether the notification will incorporate details on the future relationship with the Union or will simply build on the PM's speech mentioned above. At present, it seems that the notification should incorporate elements key to the negotiation of both agreements.

Until it becomes much clearer what the UK aims to achieve in the negotiations, therefore, it would be speculative to make precise projections on how, how much and how many of the EU policies will be affected, both by the withdrawal treaty and the future relationship.

It should be pointed out that, so far, almost all available academic and legal literature, or political analysis, on the consequences of the UK's departure from the Union is written from the UK's perspective. These texts frequently present analyses of, for instance, how this parting is going to affect trade or the financial services industry, or how to incorporate in an appropriate way Union law currently in force in the UK into the UK's legal system, with discussions of which parts of the *acquis* should be amended, which rescinded and which maintained. This is logical, as the UK will likely face the greater disturbance to its economy and its legal framework because of the withdrawal⁸².

Very few analyses have been done on how Brexit would influence the EU and its policies. There are, however, several general considerations which can be made in that respect, most of them independently of the future relationship model.

As described before, the legal position of the UK in the Union has not changed at all. Its legal status has not been altered except as regards the provision in Article 50 TEU according to which the withdrawing state will not participate in the discussions or decisions foreseen in Article 50 (2) and (3). Consequently, the withdrawing Member State will continue in a 'business as usual' manner in all Union activities, participating in decision-making processes at all levels. The same goes for the Members of the European Parliament. They might even participate, if they wish, in all parliamentary work leading to the vote of consent at the end of the withdrawal negotiations. Considerations about whether they should or not participate in Parliament's works, to continue as rapporteur or be appointed as such, are merely political, without legal consequences; this holds true until the withdrawal agreement is signed and the UK elected Members lose their seats. The same applies for the judges and advocate general in the CJEU, and for other members of institutions or agencies appointed by or for the UK.

⁸² <http://knowledge.wharton.upenn.edu/article/how-brexit-could-boost-the-european-union/>

If the withdrawal negotiations are not completed prior to the 2019 EP elections, they will also have to be held in the UK, as it would still be a Member State.

5.1 Pending legislation

As regards pending legislative proposals, at this stage and throughout the negotiations, none can legally be affected by the referendum in the UK or even by the specifications or mandates of the future notification of withdrawal. They could be disturbed politically, and the UK may decide to abstain in some cases, or to take other political stances (as it has with regard to its EU Presidency), but always because of political considerations and not because of any legal constraint.

Neither the Union's legislative or budgetary negotiations nor the UK representatives' positions need to be shaped or determined by the withdrawal negotiations. How the UK is going to proceed and behave in the ongoing legislative negotiations remains to be seen, but, from a legal point of view, the UK cannot be obliged by the Commission or another Member State to adopt a particular approach, and vice versa. The principle of sincere cooperation (Article 4(3) TUE), obliging the Member States to show mutual respect by assisting each other in carrying out the tasks that flow from the treaties, and the same obligation established for the institutions (Article 13(2) TUE), assigns to the Member States a clear and binding duty of loyalty; the duty of sincere cooperation applies at all times, in a subsidiary form when the Treaties do not specify a particular duty of loyalty.⁸³

As usually happens with the duties of sincere cooperation and loyalty, what may be complex is to enforce this principle if either of the negotiating parties believes that the other is behaving disloyally or insincerely.

At the moment of effective withdrawal (two years after notification, or earlier if there is a quick agreement, or later if there is an extension), the situation of pending procedures will need to be evaluated, and must most surely be addressed in the withdrawal agreement and any relevant transitional arrangement. In the pending legislative proposals, it seems clear that from the moment the UK ceases to be member of the Union, it will no longer be able to participate in the legislative process. At the same time, however, it is likely that this horizon is going to have growing political influence on the Union's legislative calendar, once the withdrawal negotiations advance.

It needs to be recalled that the commencement of the withdrawal procedure does not mean that a Member State will ultimately leave the Union (at least until the reversibility issue is settled, as explained above), or that the future arrangements will leave the departing Member State completely strange to Union's law. The withdrawing state would be bound by the secondary legislation adopted by the Union, even during the negotiations. If the intention is to remain closely associated with the Union, it will also be interested in participating in the continuing legislative process. This gives the departing state a further incentive to remain involved in the daily business of the EU until at least the signature of the withdrawal agreement and – in the phasing-out mode until the agreement enters into force.⁸⁴ In any event, this state remains a full Member until the day of its agreed departure.

The issue of "pending files" touches on another issue that concerns legislative procedures: that of files "blocked" for political reasons, where it is claimed that a UK departure would

⁸³ Marcus Klamert, *The Principle of Loyalty in EU Law*, Oxford University Press, 2014.

⁸⁴ Adam Lazowski, 'Withdrawal from the European Union and alternatives to membership', *European Law Review* 2012

facilitate their resolution. An example would be legislation in the area of social rights, where advancement has frequently been blocked by UK. The *Maternity Leave Directive*, initiated in 2008, was approved by Parliament in first reading on 6 May 2009, but failed repeatedly to progress in the Council. Since it was last debated in the Council in December 2011, there have not been any further developments, and the Commission formally withdrew the legislative proposal in August 2015. The Commission intends to present new legislation in this area, in particular in the area of work-life balance, in 2017. The *Women on Boards Directive* passed first reading in Parliament on 20 November 2013 and was debated in the Council for the last time on 11 December 2014. There have been no further developments since. The UK has led opposition to these two legislative proposals, and to several others in this area. The UK was also the leading opponent, in the negotiations on the Lisbon Treaty, to abandoning unanimity in areas such as social security, the protection of workers when their employment contracts are terminated, collective bargaining and conditions of employment for third-country nationals.

However, it is premature to look to Brexit as a means of advancing these or other dossiers, since it is not improbable that other Member State have been "hiding" behind the UK's refusal to make compromises in certain subjects. Only the resumption of these legislative files will clarify this.

5.2. EU policies

As for the Union's policies, most will to a greater or lesser degree be affected by the UK's departure, even if only to the extent that technical arrangements need to be made.

Even policies in which the UK is not fully involved will need to be considered and monitored. To take an example, as regards the European arrest warrant (a scheme in which the UK participates), some voices in the UK wish to repeal it so the UK could go back to the "old" extradition process. This means that how the justice and interior policy is affected in the UK and in the Union will depend on how the policy is shaped in the future relationship. If the UK intends to be part of the justice and interior policies of the Union, and wishes to participate in EU procedural criminal law, the transitional arrangements for this policy will be very different from those that would apply if the UK were to withdraw totally from justice cooperation.

The same goes for structural and investment policies, as for all other major policies. The phasing out and phasing in of policies will depend on the political relationship that is agreed on, respectively, at the transitional agreement and at the option chosen for the future relationship. However, and independently of that future relationship, the principle of honouring legal engagements and commitments made should be fully respected. Chief negotiator Barnier has made this point very clear in the presentations referred to above.

In terms of structural policies, another and no less important matter, with potential international significance, is the impact of withdrawal to the Northern Irish institutions set up through the Good Friday Agreement. The 1998 Agreement, which was signed by the UK, the Republic of Ireland and almost all Northern Irish political parties, allowed for the normalisation of relations in Northern Ireland, the establishment of devolved institutions as well as a number of common UK-Irish and Northern Irish-Irish institutions. To a large extent, especially Strand Two of the agreement, establishes a North-South Ministerial Council entrusted to consider the EU dimension of relevant matters. EU has invested heavily in peace and reconciliation in Northern Ireland and funds several cross-border projects, usually

through joint institutions.⁸⁵ The most significant of such institutions is the SEUPB (Special EU Programmes Body), which manages European Structural Fund programmes in Northern Ireland, the Border Region of Ireland and Western Scotland.⁸⁶ The UK withdrawal will thus have a significant impact on the region – the more so as Northern Ireland voted to remain in the Brexit referendum. The impact will be both political, in particular since the Good Friday Agreement – an international agreement – will require alteration, which could lead to instability in the region as well as to tensions between Ireland and the UK, and economic/technical, as the re-establishment of a hard border between the North and the South could provoke a reversal of improvements in cross-border trade. The withdrawal agreement and the framework for future relations between the EU and the UK would need to provide solutions to these issues.

From the Union's perspective, however, regardless of the option agreed on for the future relationship, it seems clear that those policies that have financial implications, i.e. those covered by the Multiannual Financial Framework (MFF), would be the ones most affected. The Common Agriculture Policy, the Fisheries Policy and the Cohesion and Structural Policies will to a greater or lesser degree suffer the impact of the UK's departure. Here again, the future relationship will make the difference.

The budgetary consequences will thus need to be addressed and the pertinent measures taken; the rearrangements of the financing will depend much on whether or not the UK continues to contribute to the budget and, if so, to what degree. Most prospective analyses carried out so far present a non-catastrophic event, paradoxically thanks to the rebate negotiated by the UK in 1984. As the UK is the second or third economy of the Union (depending on euro-pound exchange rate), and therefore a net contributor, the impact on the EU budget would have been very substantial, had it not been for the 1984 rebate, and for the contributions to the budget that the UK would probably be prepared to continue to make if it wishes to have some access to the internal market, reducing so the consequences of the withdrawal.⁸⁷

Given the timeline, it has been suggested⁸⁸ that the simplest solution would be for the UK to continue to participate in the current MFF, which ends in 2020, and to meet its current commitments accordingly. This would spare the EU the need to rearrange the MFF, and the structure of the budget, and allow a smooth transition for both sides, in particular for British farmers and fishermen, but also for universities, research institutions or municipalities and regional governments.

The Fisheries Policy will probably be among those most affected by a withdrawal, not only – or even mainly – for budgetary reasons, but because the UK (and Scotland in particular) has sovereignty over waters rich in fishing grounds, because most of the fishing product is sold in the Union and because the ownership of an important share of the fishing fleet is in the hands of other Member State companies. Another Union policy for which withdrawal would have significant financial implications is the structural and investment policy. With a budget of more than EUR 450 billion for 2014-2020, the European Structural and Investment funds (ESIFs) are the European Union's main investment policy tool. With the national and cohesion programmes already adopted, and many projects in numerous areas already in progress, complex transitional arrangement will be needed, in particular – from the Union's perspective – for all cross-border programmes shared by the UK and Ireland.

⁸⁵ J. Tonge, 'The impact of Withdrawal from the European Union upon Northern Ireland', <http://onlinelibrary.wiley.com/doi/10.1111/1467-923X.12288/full>.

⁸⁶ <http://www.seupb.eu/Home.aspx>.

⁸⁷ CEPS Policy Brief No. 347, 'The impact of Brexit on the EU Budget: A non-catastrophic event',

⁸⁸ See Duff, Andrew, 'After Brexit'.

In other important policy areas, such as industry, research and energy, ongoing programmes with financial implications will need to be re-arranged, and the departure of the UK may have relevant repercussions for research programmes in which UK companies or universities participate. Adaptations will need to be made in legislation with geographical implications, such as in energy matters, for instance in the legislation ensuring gas supplies in the event of emergencies, where Ireland and UK are part of the same regional emergency plan. If the UK decides to detach itself fully from EU energy security plans, alternative plans will need to be approved.

In culture and education, several important policies and programmes are of interest. Erasmus+, Creative Europe and Europe for Citizens are all very successful programmes with active UK participation, especially in Erasmus+, which allows thousands of students from the UK and the rest of Europe to study abroad.

In the internal market, perhaps the most significant consequences are for the newly established patent system, based on an intergovernmental court system but only open to Member States. As the UK is a very relevant part of the system, its departure may require important changes.

In short, Union policies with financial and budgetary implications will certainly need adjustments and arrangements, and the depth and complexity of these would depend on the outcome of the withdrawal negotiations and the future partnership.

The right of petition (Article 227 TFEU) will also need to be considered. UK citizens remain full citizens of the Union until the day established in the withdrawal treaty, and are therefore entitled to submit petitions to the European Parliament. The committee of petitions cannot discriminate against these petitions because of a possible British departure. Losing EU citizenship will extinguish the right to petition (except for EU residents and other special cases). However, Parliament may decide to continue to consider and decide on petitions received from the UK. The same may hold true for the European Ombudsman (Article 228 TFEU) and other agencies and bodies dealing with issues of concern to citizens and companies. Respecting the rights of British citizens and companies should be the rule, and should ideally be dealt with in the transitional arrangements of the withdrawal agreement.

Not only the policies but also the functioning of the institutions and agencies will be affected by the withdrawal. The ongoing infringement cases and procedures concerning environmental or competition issues pursued by the Commission, in which the UK is part, should be finalised, and provisions should be made for the decisions to be implemented. As regards the CJEU, how long will UK judges be entitled to adjudicate or the UK advocate general to intervene? Most legal analyses conclude that the terms of the UK judges and advocate general should formally come to an end on the date on which the UK's withdrawal enters into force. This does not imply that in cases brought before the CJEU concerning UK's departure, through preliminary rulings or action for annulment, the jurisdiction of the Court would cease from the day of the departure; the Court may, and should, continue proceedings until the case in question is closed. The difference would only be that UK judges would no longer participate in the proceedings after the day established in the withdrawal agreement.

The same applies to UK Members of Parliament, who on the same date will lose their mandates, along with all other British representatives in the various EU bodies. It is not clear whether appropriate authorities could, by way of exception, extend individual mandates in specific cases, at least in certain EU bodies. British EU staff will also be affected, since, according to the EU Staff Regulations, only nationals of the Member States may serve as EU officials: in this particular case, however, the regulations contain provisions allowing for such exceptions.

As regards European agencies, the two existing agencies in the UK⁸⁹ will have to relocate to other Member States. This implies relevant legislative modifications in the legal texts establishing their seats, substantial costs for the relocation, and staff issues that need to be resolved. The same could be the case for the new divisionary section of the Unified Patent Court planned to be located in London (unless the future relationship agreement provides otherwise, and the UK remains in the European Patent System, which is currently restricted to Member States).

5.3. EU Legal order

The withdrawal will have a limited, but not negligible, impact on the Union's legal order. The European legal order is very complex and has been evolving for decades. The constitutional architecture of the Union is often explained as being that of a confederation of independent states, which organises and manages important competences in a federal way. Its exclusive and shared competences cover a huge spectrum, from internal market harmonisation to justice and fisheries. The legal implications of the withdrawal will therefore be substantial, but, as shown above, they will mostly be of concern to the UK. From the day of the withdrawal, the Union's legal order will cease to be applicable in the UK. There will certainly be transitional arrangements, and the withdrawal agreement should address this issue. UK legislators will certainly have to foresee a new legal regime for the days following the departure⁹⁰.

As regards the Union's secondary law - the body of EU legislation, the Law of the Union - meaning here all the legislation governing and regulating the various EU policies, be they with regard to competition policy, company law, banking regulations, copyright or any of the many other areas of the Union's shared or exclusive competences, the impact will be very specific and mainly requiring only technical adaptations, even if some of them could raise complex political issues. Parliament committees are currently scrutinising the legislation falling under their competences and will produce reports on the necessary adaptations.

With regard to primary legislation, constitutional matters, the modifications required would mostly be non-controversial, though challenging in procedural terms, as in Article 52 TFEU, which lists the countries in which Treaties shall apply, or in Article 355 TFEU, which mentions the Channel Islands. Deletions or amendments will also need to be made in protocols 15, 20, 21 and 30, and perhaps some others, and in declarations 55, 56, 62, 63, 64 and 65.

In fact, when the UK completes its withdrawal with the signature of the pertinent treaty, the EU will have to amend Article 52 TEU on the territorial scope of the EU law. Contrary to Article 49 TEU, which explicitly authorises "adjustments to the Treaties on which the Union is founded" to be made in the accession treaty between the Member State and the applicant country, the Article 50 does not mention any special rule for these arrangements. Since the withdrawal agreement is negotiated in accordance with Article 218 (3) TFEU, like any international agreement, and obviously cannot modify primary EU Law, this implies that, in

⁸⁹ There are currently two Union agencies established in the UK: the European Medicines Agency (EMA) with a staff of more than 600 - making it the largest EU body in Britain - and the European Banking Authority with a staff of approximately 160. (The European School in Culham has been scheduled to phase out its operation by the end of 2017 for reasons unrelated to Brexit.) In addition, the new Unified Patent Court - which has not yet been established - provides for a divisionary section on life sciences to be located in London.

⁹⁰ Delivering Brexit means repealing the European Communities Act (ECA) 1972 that gives effect to EU Law and gives primacy to EU law in cases of conflict. For details on how this might be implemented, see: https://www.psa.ac.uk/sites/default/files/Brexit%20%26%20Beyond_0.pdf

order to modify Article 52, resort should be made to the normal amendment procedure of Article 48 TEU.

Article 48 outlines two mechanisms: a “simplified” procedure and the ordinary procedure. The simplified provisions of Article 48(6) can only be used in order to revise “all or part of the provisions of Part Three of the Treaty on the Functioning of the EU”, and with the condition of not increasing the competences of the Union. Therefore, in order to modify Article 52 TEU, the Union must follow the ordinary procedure. This requires the Council to convene a Convention of representatives of the national parliaments, Heads of State and Government, the Commission and Parliament. However, pursuant to Article 48 (3), such a Convention may be avoided if the European Council decides by simple majority “not to convene a Convention should this not be justified by the extent of the proposed amendment”. This notwithstanding, a decision not to convene a Convention needs the consent of the EP, meaning that Parliament can insist – for whatever reason – on a Convention to be held in order to examine proposals for revisions of the EU Treaty⁹¹.

In addition to the aforementioned Treaty changes, two other major legal acts of quasi-constitutional nature will also need revision⁹²: the allocation of seats in the European parliament, and the rules on the financing of the EU. While revision of these legal acts do not call for treaty changes as such, special procedures are required that are akin to treaty revisions since they require the unanimity of the Member States, a decisive involvement on the part of Parliament and ratification by each Member State⁹³.

5.4. Strategic impact

The long-term or wide-ranging political or strategic consequences of the UK’s departure are certainly very significant and cannot be fully evaluated at this stage. The UK is one of the largest Member State, and the first ever to withdraw from the Union, and it is doing so in difficult times. The UK is a political and cultural power, a Member State with a very relevant impact – for the better or for the worse – on numerous relevant EU policies. Its departure is a blow to the European integration project, and the lasting repercussions and ramifications will mainly depend, as with the economic consequences, on the degree of detachment or closeness of the future relationship. A full evaluation of the withdrawal will most likely only be possible for historians and later analysts once the whole picture is available. However, a number of considerations can be made at this stage.

The UK accounts for roughly 16 % of the Union’s GDP and around 12 % of its population. It is an important advocate of free trade, an influential and high-ranking member of all major international organisations, has a permanent seat at the United Nations Security Council, has a strong military tradition and a modern army with nuclear capabilities (spending more on defence than any other Member State). The UK plays a particularly prominent role in the area of security and intelligence. It is a major powerhouse when it comes to research and education, and the reach of its education, media and cultural expression is very substantial and goes well beyond the EU’s frontiers. Its departure might well lessen the authority and influence of the Union in pursuing the objectives set out in Article 3 (5) TEU as regards promoting to the wider world European values, sustainable development, solidarity, mutual

⁹¹ How Brexit Opens a Window of Opportunity for Treaty Reform in the EU. Federico Fabbrini, 2016 http://www.delorsinstitut.de/2015/wp-content/uploads/2016/09/spotlight_europe_01_2016.pdf

⁹² Ibid

⁹³ On AFCO’s request the Policy department is preparing a workshop on the composition of the EP for early 2017.

respect among peoples, free and fair trade, the eradication of poverty and the protection of human rights and the principles of the United Nations Charter.

The UK's departure may thus in principle diminish the EU influence in world affairs, at least in principle. It would be a smaller Union, and one with less weight in world's affairs. The question that arises is whether it will be a more harmonious Union, more determined to "lay the foundations of an ever closer union among the peoples of Europe", as proclaimed in the preamble of the TEU, a Union more determined to achieve, together with the nation-states, the optimal degree of integration and multilevel governance, more ready to share sovereignty and to introduce common policies in order to make them more effective and democratic than they can be in the – in some way more limited – national sphere.

In the current state of the debate on this issue, a number of analysts have expressed a fairly gloomy view on the consequences of the UK's departure from the Union. These analysts fear a domino effect on other Member States with strong nationalistic tensions. States weakened by economic stagnation, globalisation and identity fears in decisive parts of their electorates could decide either to opt for withdrawal referenda or, more probably, to reject integrationist approaches, pressing for re-nationalisation of policies and causing paralysis in the ongoing effort to integrate vital EU policies in areas such as asylum and immigration, security and economic governance. Such a tendency would gradually transform the EU into a form of loose trade area, unravelling the post-war achievements in supranational integration and supranational democracy.

The UK's departure would also be a major shock to the European integration project since the reasons for its departure would not only be due to UK's particular circumstances but shared in other MS. Sovereignty issues and national control of immigration policy has been a major topic in the referendum. It is no coincidence that various populist movements throughout the EU have similar claims, and have called for the organisation of similar referenda in their countries in the hope of leaving the Eurozone or the EU⁹⁴. Most commentators see in this gradual weakening of the European idea a sign of potential disintegration, rather than a formal break-up, of the EU⁹⁵. Unfair as it might seem, at this moment the Brexit vote mirrors a minority-held yet widespread and often decisive public sentiment that questions the effectiveness and usefulness of the EU, and the accountability and transparency of its governing mechanisms.

At the same time, it must be said that the UK has always been, in some ways, a rather reluctant participant in the project of pursuing an ever-closer union and sharing sovereignty. Various significant opt-outs, notably from the Euro and from Justice and Home affairs, including the Schengen system, demonstrate, as if there were any doubt, the special status of the UK within the EU. Nor have its standing in world affairs and its defence capabilities seemingly helped much to make the EU a leading global actor or military power, except as a sum of its members.

5.5. What are the opportunities for the Union?

Despite what is said above, the shock of the Brexit seems to have reinforced the desire of permanence in the Union in almost all Member States (Greece and Finland excepted). The number of citizens that, in a hypothetical referendum, would vote for remaining in the Union amounts to an overwhelming majority, and has increased if compared to the situation a year

⁹⁴ Notably Marine Le Pen in France (<http://www.lefigaro.fr/flash-actu/2016/09/03/97001-20160903FILWWW00049-ue-marine-le-pen-organisera-un-referendum-de-sortie-si-elle-est-elue-presidente-en-2017.php>), but also Geert Wilders in The Netherlands and the Lega Nord party in Italy (<https://www.theguardian.com/politics/2016/jun/27/frexit-nexit-or-oexit-who-will-be-next-to-leave-the-eu>).

⁹⁵ See Munchau, <https://www.ft.com/content/1d98723c-9a14-11e6-b8c6-568a43813464>.

ago. Support for permanence has grown from 78 % to 80 % in Ireland and Spain, from 72 % to 75 % in Germany, from 65 % to 68 % in France and from 58 % to 60 % in Italy. In Denmark 61 % were in favour of permanence in 2015, and now the share is 75%. In Belgium support has grown 67 % to 74 %, and in Sweden from 60 % to 71 %. The Union would thus seem to have emerged stronger, with a larger number of citizens than before supporting the idea of remaining in the EU⁹⁶.

Most political analysis and parliamentary debate⁹⁷, focus on the constructive possibilities that may follow from the UK's withdrawal, from treaty revisions⁹⁸ to full and exhaustive implementation of the Lisbon Treaty on Foreign Affairs or Economic and Monetary Policy⁹⁹. The Committee on Constitutional Affairs has recently adopted two very important reports: *Report on improving the functioning of the European Union building on the potential of the Lisbon Treaty*¹⁰⁰ (Mercedes Bresso and Elmar Brok, rapporteurs), and *Report on possible evolutions of and adjustments to the current institutional set-up of the European Union*¹⁰¹ (Guy Verhofstadt, rapporteur). Both were undertaken by the AFCO Committee well before the Brexit vote, but they have become even more necessary now. They explore possible venues for the EU further integration and efficiency in implementing its competences, which may either be achieved within the existing Treaties or only through a future Treaty change.

The vote in the UK and the possible disengagement of the country from the historical European enterprise has only multiplied the initiatives and proposals to contain the Brexit spill over and foster closer integration, in line with the declaration "Greater European Integration: The way Forward" made jointly by the Presidents of the Italian, French, German and Luxemburgish parliamentary chambers, and currently endorsed by several national parliamentary chambers in the EU¹⁰², which states that more, not less, Europe is needed in order to respond the challenges Europe faces, both internally and externally.

Certainly, such a big watershed should logically push the Union towards reaffirming its historical objectives. As Andrew Duff has put it in a recent appearance before Parliament's Constitutional Affairs Committee, the UK's departure should at least be a chance for "a decent reassessment of the state of the Union". The structure of governance of the Union is already in "bad need of an overhaul". Things which were impossible to do with the UK as a member would now become possible.¹⁰³ The Commission's White paper on Economic Governance, promised for the spring 2017, should be ambitious in a policy which has shown shortcomings and limited democratic accountability.

Historically, in the long term, the Union has always been reinforced by crises it has faced. A more cohesive, harmonious Union may seize the opportunity to reaffirm its political integration goals, or at least to assess its need to reach for the objectives set out in the Treaties, and this not for any unjustified stubbornness, but because there is still wide consensus on the premise that certain policies are better and more effectively dealt with at supranational EU level. There are reasons to believe that the Economic and Monetary Union needs to be completed (for instance, through the establishment of a fiscal union and a proper banking union¹⁰⁴), consolidated and made more transparent, and to have greater democratic

⁹⁶ http://www.wingia.com/web/files/richeditor/filemanager/Europe_Release_ORB_-_WINGIA.pdf

⁹⁷ Debate in the Committee on Constitutional Affairs of the European Parliament, of 7 November 2016.

⁹⁸ Duff, Andrew, 'After Brexit'.

⁹⁹ See Policy Department for Citizens' Rights and Constitutional Affairs 2016 Studies on these subjects, PE 556.952 and PE 571.373.

¹⁰⁰ 2014/2249(INI)

¹⁰¹ 2014/2248(INI)

¹⁰² http://www.camera.it/application/xmanager/projects/leg17/attachments/shadow_mostra/altro_file_pdfs/000/024/057/Rome_Conference_on_Europe_Declaration_EN.pdf

¹⁰³ Andrew Duff, "After Brexit".

¹⁰⁴ See for instance <https://www.ft.com/content/643fb2f6-39e6-11e6-9a05-82a9b15a8ee7>

accountability. The survival of the European project may depend on the success of this endeavour. Other important areas also seem to call for a full reassessment following the departure of a major player; this is the case of security and defence. Of chief interest here is the advancement of European integration and the strengthening of European defence within NATO. The recently proposed European Defence Action Plan¹⁰⁵ is in line with this thinking.

Even if it is true that, as Mario Monti recently suggested¹⁰⁶, it is the situation of the national political systems that is mainly responsible for the problems facing the EU, and the current evolution of national politics is incompatible with European integration, most Member States, and Germany in particular¹⁰⁷, do not seem ready to give up the idea of “ever closer union”. German Chancellor Angela Merkel’s first move after the UK referendum was to convene the six original members of the EU, offering a reminder of the early times idealism.

As expressed in a recent analysis of the Dahrendorf Forum¹⁰⁸, Brexit could change the EU in different ways: it could weaken, it could muddle through, or it could end up more united. For the third scenario to succeed, a clear leadership role for the EU institutions and for the more influential Member States, is indispensable. In response to the challenges, dangers and risks that the Member States face – terrorist attacks, aggressive behaviour in the EU neighbourhood, economic and monetary instability, unemployment and social insecurity – the EU should lead the way. First and foremost, the EU needs to finalise Economic and Monetary Union, and it should advance in the integration of policies demanding a cooperative approach, such as internal and international security and defence, transnational taxation and social policy. In addition, and most importantly, it should do so in a way that ensures that the sovereignty to be shared is duly placed under the oversight by the parliaments of the Union: the European Parliament and the national parliaments, thus advancing towards a democratic complementarity of the Parliaments of the Union.

In the UK there seems to be a quite wide consensus on the idea that democracy is better, and richer, if exercised within the limits of the nation-state. Even some “formally” pro-European politicians seem to believe that such a thing as supra-national European democracy is chimeric. The UK’s vote to leave the Union could well be seen as a rejection of multi-tier governance and shared sovereignty among nation-states. It reaffirms the idea that the only legitimate form of self-determination is national, whilst in the rest of Europe the idea still seems to persist that, given the all-pervading political, social and political interdependencies, “a society is not sufficiently self-determining when it is only nationally self-determined”¹⁰⁹. UK Prime Minister Theresa May’s speech of 17 January 2017 outlining her Brexit objectives seems to go in this direction: democracy is only possible within the limits of the nation-state. She rejected explicitly European integration and the jurisdiction of Courts outside the UK, and declared the incompatibility of the UK’s political system with those of the continent. She called for collaboration between sovereign states, not integration.

Now more than ever, the European integration project needs to show that it is not only here to provide economic or social benefits, but to enrich the quality of democracy, making it possible that decisions are not only taken at the most appropriate level, but that every level of governance is scrutinised in a transparent and democratic manner

Most analysts thus agree that the Brexit will open a “window of opportunity”, and references are being made to the sixtieth anniversary of the EU founding treaty, the Treaty of Rome, in

¹⁰⁵ <http://ec.europa.eu/DocsRoom/documents/20372>

¹⁰⁶ AFCO meeting of 29 November 2016.

¹⁰⁷ *Financial Times*, 10 November 2016.

¹⁰⁸ Tim Oliver, ‘What impact would a Brexit have on the EU?’ *Dahrendorf Analysis*.

¹⁰⁹ Daniel Innerarity, *La política en tiempos de indignación*. Galaxia Gutenberg, 2015

March 2017. The *Bratislava Declaration*, adopted on the occasion of the meeting of the Council of Ministers in that city on 16 September 2016¹¹⁰, reaffirms the Union as the best instrument “for addressing the new challenges we are facing”. The Council has established a “roadmap”, setting certain priorities on migration and external borders, internal security, defence, and economic and social issues. However, it has not presented any concrete, forward-looking proposals on policy governance or closer integration. The Member States have preferred the approach of focusing on concrete projects that aim to demonstrate the added value in high priority areas such as security or migration. This is a possible way forward, but many, like the aforementioned AFCO Committee reports, consider such a strategy to be partial and insufficient, and that deeper reflexion is needed.

Flexibility has always been high on the list of the recipes advanced in moments of crisis. The UK’s departure could well prompt a Europe of different speeds, or the Europe of the *cercles concentriques* repeatedly suggested by Jacques Delors¹¹¹. Flexibility would be the only way to cope with the increasing heterogeneity of the Member States, since most future projects for deeper integration will require flexibility¹¹². It certainly always seems to be the easiest way forward. Flexibility comes in different forms, from differentiated memberships to more flexible rules. However, as is frequently pointed out, in a context of growing or deepening divisions, the cost of differentiated integration rise. The wrong kind of flexibility risks turning European integration into a set of transnational relationships and could reduce solidarity among the partners. Flexibility may seem very attractive, and somehow inevitable, as when the enhanced cooperation was introduced in the Treaties, but it also comes with a risk of fracture between different levels of integration¹¹³.

Consolidating a core of integration projects is surely the most accepted way forward: for instance the single market and its four freedoms are far from consolidated: an even more tangible added value for the citizens is perfectly possible here but, it still calls for a lot of work and political determination¹¹⁴. In particular and most importantly, the social dimension of the internal market should be an absolute priority of the Union, along with the EMU. Most commentators and analyst consider that if the EMU is going to survive in the long term, and withstand asymmetric shocks, it is likely to need a European treasury, some form of fiscal capability, a full-fledged banking union and a degree of debt mutualisation¹¹⁵.¹¹⁶ Political conditions for all these improvements of the EMU may not be present at this moment, but the need for them are gradually becoming more noticeable.

As mentioned above, the ordinary procedure for amending Article 52 gives the EP the opportunity to reject the simplified procedure to reform the TEU and to call for a Convention at which the long-term shortcomings of the Treaties are considered, in particular as regards the governance of the Union, reducing *inter-governmentalism* and making the decision-making processes more transparent and democratic¹¹⁷.

Two other major, quasi-constitutional reforms follow necessarily from Brexit, and in both the Union has a great opportunity to make substantial advancements.

¹¹⁰ <http://www.consilium.europa.eu/en/policies/future-eu/bratislava-declaration-and-roadmap/>

¹¹¹ Jean-François Drevet, ‘Quelles limites pour l’UE: Quelles relations avec un voisinage à géométrie variable?’, Notre Europe Institut, September 2013.

¹¹² <http://carneqieurope.eu/2016/09/08/how-to-build-more-flexible-eu-after-brexit-pub-64507>

¹¹³ *ibid*

¹¹⁴ <http://knowledge.wharton.upenn.edu/article/how-brexit-could-boost-the-european-union/>

¹¹⁵ Jean-Francois Drevet op cit

¹¹⁶ <https://www.ceps.eu/publications/european-fiscal-union-economic-rationale-and-design-challenges>

¹¹⁷ See the report Verhofstadt quoted above

The first is in regard to the composition of Parliament¹¹⁸, where this institution must make proposals and could be an important opportunity to launch the debate on transnational electoral lists or other measures aiming at enhancing EU democratic legitimacy.

The second major reform which must be done are the rules on the financing of the EU. This concerns mainly the MFF, to be passed by means of a regulation adopted by unanimity and with the consent of the EP (Article 312 TFUE), and a decision on the Union's own resources, adopted by unanimity by the Council after consulting Parliament, and which will enter into force only after ratification by all Member States (Article 311 TFUE).

The difficulty of negotiating these two major financial rules is a consequence of the manner in which the Union currently is funded¹¹⁹. The EU's own resources come mostly from Member State budgets, so the Member States, and their parliaments and citizens, consider the contributions made to the EU budget as "their" money and aggressively measure the difference between their contributions to, and their receipts from, the EU budget. This is of course an easy subject to use or abuse by populist and nationalist voices in the Union, and no government wishes to be seen to be transferring money to the EU budget for the benefit of another Member State¹²⁰. Following the UK's departure – and especially if this country decides not to participate in the internal market, and thus no longer to contribute to the EU budget – the debate on the own resources is going to be inevitable, with voices calling either for a reduction of expenditure, an increase in contributions or a new system altogether. Parliament has for a long time been calling for the development of an EU effective fiscal capacity based on real EU taxes. A report from the high-level group on own resources, known as the "Monti group", argues in the same vein¹²¹. The report rightly notes that that the current system pushes the Member States to consider their contributions in terms of "net costs" and "net benefits". This has always been considered "misleading" by impartial observers, because it ignores the fact that the EU-wide policies funded by these contributions have benefits for each of the 28 Member States.

In conclusion, Brexit, if it finally happens – as it seems to be the case at the time of writing – should be expected to stimulate reforms, and to force the Union to advance in its integration process. The message signalled by the UK's departure poses a threat to the core of the European ideal, by excluding the sharing of sovereignty as impractical or impossible, by considering extra-territorial jurisdiction an unacceptable foreign intervention, and by affirming that supranational democracy is neither possible nor desirable. Looking beyond the economic consequences, the real danger of Brexit is ideological and political, and the only possible response is to push European integration and democracy forward.

That said, in advancing towards further European integration, towards an ever closer Union, European leaders should nevertheless be aware that the referendum in UK makes even more evident the fact that European integration has moved away from the "permissive consensus" of the early period of integration towards a period in which the EU is an increasingly contested and politicised issue on the domestic political arena. The future of the EU hinges more than ever on the citizen's support for the European integration project. The challenge for European leaders, at both domestic and European level, is to find a way of addressing the concerns of the many citizens who have not felt the economic benefits of free trade and globalisation, and who fear that their distinct national identity and culture is under threat from immigration and European integration¹²². The involvement of national and regional politicians, and the

¹¹⁸ The Policy Department has published three briefings on the subject matter 2017 on request of the AFCE committee and following a planned workshop on 30th January.

¹¹⁹ Federico Fabbrini, "Taxing and spending in the Eurozone" (2014) 39 European Law Review 155

¹²⁰ Federico Fabbrini (2016)

¹²¹ http://ec.europa.eu/budget/mff/hlgor/index_en.cfm

¹²² Sara B Hobolt, The Brexit vote: a divided nation, a divided continent. Journal of European Public Policy, 2016. London School of Economics and Political Science.

parliaments where they are represented, is of paramount importance. A further step towards ever closer Union will only be possible if European civil society, and national politicians at every governance level, engage in the European project.

Abstract

This study was requested by the Committee on Constitutional Affairs of the European Parliament. It examines the political and institutional steps taken, or to be taken, both by the UK and by the EU in the context of the Brexit referendum vote, and into how matters may evolve in the coming months and years from a legal and institutional perspective. It analyses, in broad terms, the possibilities for a future relationship between the Union and its departing member and the consequences that the departure of a large Member State may entail for the rest of the policies of the Union and for the Union itself. The study also briefly examines the potential for institutional progress that opens with the departure of the United Kingdom.

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