**AN AIRBAG FOR THE CRASH TEST DUMMIES? EU-UK NEGOTIATIONS FOR A POST-WITHDRAWAL “STATUS QUO” TRANSITIONAL REGIME UNDER ARTICLE 50 TEU**

*Michael Dougan\**

**1. Introduction**

On 8 December 2017, the Commission expressed the view that “sufficient progress” had finally been achieved in its Article 50 TEU negotiations with the UK, specifically as regards the famous trio of “priority” first phase separation issues: the protection of migrant citizens’ rights; the unique challenges facing Ireland; and a methodology for calculating the financial settlement.[[1]](#footnote-1) With the support of the European Parliament,[[2]](#footnote-2) the European Council formally endorsed the Commission’s assessment.[[3]](#footnote-3) Work will now continue with a view to reaching full and final agreement on the various separation issues: after all, most remain incomplete,[[4]](#footnote-4) some considerably so,[[5]](#footnote-5) while others have not yet even been discussed.[[6]](#footnote-6) But in addition, the second phase of negotiations will broaden their scope: the European Council is expected to adopt new guidelines in March 2018 that will steer preliminary and preparatory discussions with the UK about the framework for a future relationship.[[7]](#footnote-7) Even before that, in January 2018, the Commission was authorised to commence discussions with the UK on a transitional regime that would be included as an integral part of the Article 50 TEU deal.[[8]](#footnote-8) The UK Government hopes that political agreement on the terms of transition can be secured within a matter of weeks.[[9]](#footnote-9) Then all of that – a definitive legal text covering separation and transition, plus a political declaration on future relations to accompany the new treaty – is due to be finalised by October 2018, so as to allow sufficient time for both the EU and UK to secure their respective institutional approvals.[[10]](#footnote-10)

This article will focus on the question of transition. Section 2 will recall how the UK formally requested a post-withdrawaltransitional regime. Section 3 will then explore how the EU and the UK now express similar motivations for having a transition – even if the mutual desire to offer public authorities “more time to prepare” perhaps understates the scale of the challenges facing the UK; while the common aspiration that natural and legal persons should have to experience “only one regulatory change” seems tinged with optimism. Although the EU and the UK broadly agree that transition should be based on a temporary prolongation of the status quo, Section 4 argues that there are nevertheless various points of tension between the political preferences expressed by the two sides that will need quickly to be resolved. Furthermore, the UK’s insistence on a transition only after it has formally left the Union and become a third country raises some difficult legal issues. Section 5 asks the question: how exceptional are the powers conferred upon the Union under Article 50 TEU, when it comes to deviating from our normal constitutional expectations (in particular) about the procedural conduct of the Union’s external competences or protecting the autonomy of the Union legal system? In any case, Section 6 suggests that it is difficult to see how a post-withdrawal transitional regime between the EU and the UK could, in and of itself, resolve the myriad problems arising from the UK’s upended external relations with a large range of third countries and international organisations. Section 7 offers some brief conclusions.

**2. The UK’s Request for a Transitional (sorry, “Implementation”) Period**

Theresa May, in her speech in Florence on 22 September 2017, formally requested an “implementation period” between the date of UK withdrawal and the birth of a new “deep and special partnership” with the EU.[[11]](#footnote-11)

At the outset, it is important to be clear about what the UK is *not* asking for. In the first place, the UK has not requested a direct prolongation of its formal EU membership beyond the two years provided for (by default) under Article 50 TEU – whether by unanimous agreement with the EU27 (as explicitly envisaged by the Treaties); or by setting a postponed date of entry into force for the entire withdrawal agreement, which could be agreed by super-QMV within the Council acting with the consent of the European Parliament (a device which is not explicitly provided for under Article 50 TEU but would at least seem an arguable possibility).[[12]](#footnote-12) Either of those routes would be politically difficult for the UK Government to advocate, even regardless of how far the EU itself might be open to consider playing along with them.[[13]](#footnote-13) And so the date of withdrawal remains as planned: on 29 March 2019, the UK will become a third country in relation to the EU.[[14]](#footnote-14)

In the second place, the Florence speech also marked the point when the UK Government dropped the longstanding pretence that its “implementation period” should merely entail the phased entry into force of a final deal on its “deep and special partnership” with the EU – a deal that would also have been done and dusted by October 2018. Readers will no doubt recall that that was the transitional model originally proposed in the UK’s White Paper of February 2017.[[15]](#footnote-15) Of course, it was never a credible proposal – either legally or empirically – since there was no prospect whatsoever of reaching a final deal on the future relationship, while the UK was still a Member State, under the auspices of Article 50 TEU, and within such a restricted timescale. In Florence, May finally and explicitly accepted that there would be no “deep and special partnership” by the time of UK withdrawal and, obviously, there can be no phased implementation of an agreement which does not actually exist.

Instead, the UK has simply requested that the Article 50 TEU agreement – in addition to dealing with separation issues such as citizens’ rights, Ireland and divorce finances – should also provide for a post-withdrawal transitional period designed to ease the pain of what would otherwise amount to an imminent as well as an abrupt UK departure from the Union. The fact that the UK Government doggedly insists upon continued use of the phrase “implementation period”,[[16]](#footnote-16) as if nothing much had changed since the February White Paper, is simply an attempt to disguise its own fundamental political and diplomatic miscalculations in conceiving, approaching and handling the Article 50 TEU process.[[17]](#footnote-17) Yet such domestic (mis-)salesmanship does nothing to answer the real questions. What is it precisely that the UK has in mind? And what might the EU actually be prepared to consider? Not just at the political level, but also in legal terms?

Before proceeding, readers will of course appreciate that (at the time of writing) the EU-UK negotiations are still ongoing and “nothing is agreed until everything is agreed”.[[18]](#footnote-18) When it comes to the specific issue of transition, we are hampered by a particular lack of clear or precise sources – especially on the UK side. We have the false start of the February White Paper, the major policy reorientation of the Florence speech, then a series of public statements from various members of Government,[[19]](#footnote-19) culminating in the “Teesport Speech” of David Davis on 26th January 2018 – billed as a major event in setting out the UK’s transition stall but which actually said very little that could be called new or unexpected.[[20]](#footnote-20) Beyond that, the UK has failed to produce a position paper setting out its views on transition in a more systematic and coherent manner.

The situation is less exasperating on the EU front. Here, we have the over-arching European Council Guidelines from April 2017,[[21]](#footnote-21) which lay down the core principles governing all negotiations conducted under Article 50 TEU; followed by the new Guidelines dealing specifically and in greater detail with transition as adopted in December 2017.[[22]](#footnote-22) For its part, the Commission had already made some statements about transition in position papers published under the negotiating directives adopted by the Council in May 2017.[[23]](#footnote-23) But the key reference points are now the Commission’s recommendations on transition as published on 20 December 2017,[[24]](#footnote-24) which were then formally adopted (albeit with some important modifications) by the Council as supplementary negotiating directives on 29 January 2018.[[25]](#footnote-25) We can also draw upon various public statements on transition from Michel Barnier;[[26]](#footnote-26) as well as important pronouncements from the European Parliament in its resolutions on the Article 50 TEU negotiations – positions which the various negotiators and governments must take seriously, given the need for the European Parliament to consent to any agreement proposed under Article 50 TEU.[[27]](#footnote-27)

**3. Premises underpinning the common desire for a post-withdrawal “status quo” transition**

Let’s begin our substantive examination by asking: what are the motivations and premises underpinning the proposed transitional deal? The UK has evidently requested a transition because it judged one to be in the UK’s best interests. Equally, from the Union perspective, the April Guidelines indicate that the EU is willing to consider a UK request for transition provided that the latter would be in the Union’s own interests.[[28]](#footnote-28) The two sides’ respective concerns now appear to have converged around two main points: affording public authorities more time to prepare for the consequences of UK withdrawal; and trying to ensure that natural and legal persons only undergo a single regulatory change as the EU and UK move towards a different relationship. Moreover, those shared concerns have led to a reasonably clear consensus on the point of departure for more detailed negotiations: transition should, as far as politically acceptable and legally feasible, be based on a temporary but far-reaching prolongation of the existing Union status quo.

*3.1. More time for public authorities to make adequate preparations*

First, the EU and UK find common ground in their desire to give public authorities more time to prepare for the consequences which will flow from the very fact of withdrawal: for example, when it comes to the recruitment and training of personnel, or the physical preparation of ports and other infrastructure, as required for the introduction or massive expansion of customs controls. The UK tends to seek comfort in the idea that this is a pressing need on both sides: as May said in Florence, “neither the UK – nor the EU and its Member States – will be in a position to implement smoothly many of the detailed arrangements” that will govern their future relations.[[29]](#footnote-29) Michel Barnier has preferred to stress that the challenges lie more on the UK’s shoulders – not just as regards customs but also in fields such as nuclear safety. The Union’s own interests are thus more indirectly (though still quite legitimately) engaged: the UK may well be entirely the author of its own misfortunes, but the EU has no desire to experience at its own borders the knock-on consequences of any home-brewed British chaos.[[30]](#footnote-30)

However, it seems fair to say that neither side manages fully to convey the sheer scale of the challenges facing the UK authorities. Such is the mammoth task that the UK Government has brought upon itself, in order to prepare internally for withdrawal from the EU, without inviting the serious risk of experiencing wide-scale regulatory and administrative malfunction, that the UK simply needs more time in order to complete the necessary domestic work at even the minimum level of completeness and competence. We refer here not only to the vast amount of complex technical work, important policy choices and new institutional arrangements that need to be undertaken pursuant to the (already seriously delayed) European Union (Withdrawal) Bill, simply in order to safeguard basic standards of legal continuity and legal certainty.[[31]](#footnote-31) In addition, the UK needs to design and implement new regimes to govern entire sectors such as agriculture, fisheries, customs and (EU) immigration.[[32]](#footnote-32) That is besides reaching agreement on a resettlement of the devolution regimes for Northern Ireland, Wales and Scotland.[[33]](#footnote-33) And the challenges are not only internal: the UK still has a mountain to climb in regularising and / or rebuilding a wide range of its international relations in fields such as trade, the environment and security.[[34]](#footnote-34) It beggars belief that any developed country would willingly expose itself not only to challenges of such a nature and scale but also to any even vaguely serious chance that it might fail to fulfil them. Yet that is precisely what the UK has done. Requesting a “status quo” transitional period is, from the perspective of a UK Government tied up in its own ideological straightjacket, now the only credible method for reducing the risk to a more acceptable level – in effect, buying time to help make the preparations that any responsible country would have planned for well before holding such a referendum in the first place.

*3.2. “Only one regulatory change” for natural and legal persons?*

Secondly, the EU and UK have each expressed a similar wish to allow natural and legal persons (in the private as well as the public sector) more time to make their own operational preparations for the practical consequences of UK withdrawal and, meanwhile, consider it desirable to maintain regulatory continuity so as to minimise disruption and uncertainty. Of course, that makes enormous sense: all across Europe, existing supply chains may need to be adjusted, recruitment practices and training needs may need to be rethought, new legal structures may need to be adopted, fresh supervisory requirements may need to be fulfilled – though it is worth nothing that (as we shall see shortly) the transitional periods proposed by each side are shorter than many businesses would actually prefer.[[35]](#footnote-35)

However, if each side has understated the importance of transition for (British) public authorities, both the UK and the EU have perhaps tried to oversell the benefits of a “status quo” transition to (their respective) private actors – in particular, by suggesting that such a transition will offer businesses the chance to avoid undergoing two sets of regulatory adaptations (once at withdrawal, then again upon the future adoption of a new relationship) in favour of a single regime change (at the end of the transitional period itself, which would extend the regulatory status quo across the point of withdrawal and until the new relationship enters into force).

That suggestion has certainly been made repeatedly by the UK Government. For example, May’s Florence speech claimed not only that “people and businesses – both in the UK and in the EU – would benefit from a period to adjust to the new arrangements” but also that “people, businesses and public services should only have to plan for one set of changes in the relationship between the UK and the EU”.[[36]](#footnote-36) But more recently, a similar suggestion was endorsed by Michel Barnier: “cette transition permettra de répondre aux préoccupations de beaucoup d’entreprises… qu’elles ont besoin de stabilité pendant cette période de transition, c’est-à-dire d’une continuité du cadre réglementaire existant; qu’au-delà de cette continuité, de cette visibilité, elles ne veulent pas être obligées de s’adapter deux fois. Maintenir l’ensemble du cadre réglementaire, en particulier pour les entreprises, conduit à s’adapter une seule fois, à la fin de la période de transition, même s’il faut… se préparer dès maintenant à ce changement-là”.[[37]](#footnote-37)

Each in its own way and for rather different reasons, both the UK Government and the Union negotiator appear overly optimistic about the prospects that transition will mean “only one regulatory change”.

After all, the UK is proposing the negotiation of a bespoke and ambitious “deep and special partnership” with the EU in the fields of trade and security – but without yet offering any detailed and credible proposals for what such a new and unique relationship should look like.[[38]](#footnote-38) The main message to be garnered from the UK’s various 2017 “future partnership papers” is that the “deep and special partnership” should continue to provide most of the existing benefits, but without the UK having to suffer the current obligations, of Union membership itself.[[39]](#footnote-39) Even at the dawn of 2018, we know almost nothing concrete and meaningful about the UK’s vision for the future relationship – except for the recurrent insistence that (even if it cannot formally be signed off before withdrawal) a draft agreement could nevertheless be fully prepared by March 2019, or at the very latest finalised during a transitional period lasting around 24 months.[[40]](#footnote-40) Either way, the UK Government exudes confidence that there will be “only one regulatory change”.

That peculiar combination of ambition and timescale, based on so little tangible preparation or progress, is scarcely credible. Indeed, so difficult is it to believe that the UK Government even believes itself, one is forced to suspect that the main objective here is more cynical and politically self-serving, i.e. to reassure potential foreign investors and deter the implementation of business contingency plans: we finally admit that the UK will not have secured its final deal on a “deep and special partnership” with the EU by the date of withdrawal; but rest assured that a short transitional period will maintain the status quo until we can neatly tidy up the lose ends. It all makes leaving the Union sound as easy as changing mobile phone contracts: we’re switching tariff shortly, but we’ll keep the same data allowance, and there will be no interruptions to normal service.

For its part, the Union is considering something much less bespoke or ambitious: in particular, the adaptation of an existing “off the shelf” trade model, of the sort that have been developed and tested through long experience. Michel Barnier is clear in his assessment: looking at the range of existing possibilities, and taking into account the UK’s own self-imposed red lines, the only realistic option is a trade agreement of the sort already agreed with Canada or South Korea and now also lined up with Japan. Proceeding on that more modest basis: even if the Union’s goal is merely to secure a joint political declaration with the UK alongside the Article 50 TEU agreement, such a declaration can still clearly define the contours, framework and conditions of the future economic relationship, so that everyone knows already by March 2019 exactly which direction the EU and UK are heading towards.[[41]](#footnote-41) With less ambition and more fixed parameters, one can live with the limited progress thus far and indeed make do with even less time to finalise the end-deal: the Union envisages a transitional period of around 21 months.[[42]](#footnote-42) But during that time, natural and legal persons can actively prepare for the future, based on a reasonably clear understanding of the ultimate destination, again incurring “only one regulatory change”.

Even if it is markedly more realistic than that of the UK, the Commission’s approach still seems optimistic about the prospects for completing complex negotiations in such a short period of time – taking into account also the possibility / probability of the UK continuing to act as an unstable negotiating partner; the time required for and potential obstacles that might arise during domestic ratification of any mixed EU-UK agreement within the Member States; and the demands of reaching parallel agreements in additional fields of cooperation such as security, defence and foreign policy.[[43]](#footnote-43)

In short: transition will indeed buy valuable time for legislatures, regulators, public services and private actors to prepare for the ultimate consequences of UK withdrawal. But there is no guarantee of “only one regulatory change” across the elongated and uncertain processes of formal departure, transitional regime and future relationship. Even on a generous interpretation, it seems at least as likely that the UK’s requested transition will have expired, but negotiations over the future relationship will still be ongoing, or at least not yet cleared through the hurdles of successful ratification.[[44]](#footnote-44)

*3.3. Transition-as-bridge versus transition-as-extinction*

In any case, there is another important point to explore here: recent events suggest a significant change in the Union’s appreciation of the political premises underpinning transition. Of course, that is natural and inevitable: for example, the EU quickly moved from envisaging a “status quo” transition as one among various possibilities, to accepting that that is the only realistic model on the table.[[45]](#footnote-45) However, the more noteworthy change in political appreciation concerns the timing and sequence of the negotiations towards a transitional regime (on the one hand) and as regards the future relationship (on the other hand).

In the April Guidelines, the EU27 indicated that a transitional period only makes sense if it is acting as a bridge that will lead the parties from one state of being (Union membership) to a reasonably clear, even if not yet fully crystallised, vision of some alternative destination (the future third country relationship).[[46]](#footnote-46) Taken at face value, such an understanding of transition suggested that, if the UK failed to bring forward credible proposals for its “deep and special partnership” capable of actively attracting the Union’s support, there would be little point in negotiating a transitional regime: the latter’s real purpose would simply be to extinguish the current relationship more slowly.

Of course, such an understanding was never entirely compelling. Even the default position, of the UK simply becoming a third country with no preferential agreements, still amounts to a reasonably clear alternative destination – which means that transition can still act as a meaningful bridge to help the parties reach there, precisely through the slower extinction of their existing relationship. But in any case, by generating some degree of political expectation that a transitional agreement might be contingent upon tangible progress towards clarifying a more sophisticated future relationship, perhaps the EU27 had underestimated just how unprepared, chaotic, divided and unrealistic the UK government would prove itself to be. As such, actually making the opening of negotiations for a transitional regime dependent upon having already reached a reasonably clear understanding about the future relationship would effectively be to kill off the prospect of having any transition at all.

Surely for that reason, the EU27 position on the relationship between and sequencing of (on the one hand) progress on the future relationship and (on the other hand) talks on a transitional regime, now seems to have shifted. According to the December Guidelines, the Council should mandate the Commission to commence negotiations with the UK specifically on transition already in January 2018 – around 2 months before the European Council adopts its own additional guidelines outlining the Union’s approach towards eventual (preliminary and preparatory) discussions with the UK about the future relationship. A final agreement on transition and the political declaration on future relations need only converge in October 2018 as part of the final withdrawal package.[[47]](#footnote-47)

However, that change was surely prompted, not only by the Union’s evident desire to secure a transitional deal that would serve its own interests in any event – and do so notwithstanding the evident inability of the UK to meet the sequencing expectations originally expressed in the April Guidelines – but also by two other influential factors. In the first place, the EU27 must have assessed the position of the UK Prime Minister to be critical: another refusal to allow the Article 50 TEU negotiations to proceed to the second phase, or to frustrate the UK’s palpable desire to make urgent progress on transition, could have risked either derailing the talks altogether, toppling May from power, or both together – with none of those scenarios serving the Union’s own interests terribly well.

In the second place, the EU27 may also have calculated that the premises for transition suggested in the April Guidelines had been overtaken by another reality: the fundamental tenets of any future relationship with the UK are going to be imposed by the Union itself and (in accordance with Barnier’s considered assessment) the basic shape of the alternative destination is in fact already reasonably clear (at least when it comes to trade). From that perspective, the expectations set out in the April Guidelines concerning the relationship between tangible progress on the future framework and serious talks on a transitional regime in fact remain unchanged. It is merely that, by the time of the December European Council, the continued lack of any credible British proposals for a “deep and special partnership” were no longer to be considered problematic or even necessarily very relevant: the Union’s own understanding of both the future relationship and a transitional deal had crystallised enough already.

Nevertheless, that leaves an outstanding question: what happens if the negotiations reach October 2018; there is an agreed text for the withdrawal agreement covering both separation issues and transitional provisions; but there is no consensus on the accompanying political declaration concerning the future EU-UK relationship? Surely there would still be a compelling case for both sides to affirm their agreed “status quo” transition, even if it had become clear by that stage that the sole purpose of such a regime would be to deliver a slower phasing out of their current relationship. After all, transition-as-extinction would still give public and private actors more time to prepare for the practical consequences of withdrawal – arguably all the more important if circumstances turn out to be worse than expected and yet (without transition) even less time remains to adapt to their full implications. Those benefits would remain valid – even if the diminishing chances of a reasonably prompt deal on the future relationship would have significantly increased the prospect of natural and legal persons having to experience two sets of regulatory change.

**4. Political preferences concerning the detailed scope of and basis for a post-withdrawal “status quo” transition**

So: the shared interests (actual and / or perceived) of the EU and the UK have generated a common understanding that it would be desirable to agree a transitional regime based, in principle, upon a temporary prolongation of the status quo even after the UK has become a third country. This section will consider the political preferences of the Union and the British when it comes to the more detailed framework required to support continued cooperation during such a post-withdrawal transition.

*4.1. Basic scope of transition*

What would be the basic scope of any transitional arrangement, i.e. in principle, which fields of cooperation between the EU and the UK would such arrangements cover?

As usual, even in this context, the Florence speech mentioned only two fields: trade and security. Subsequent UK statements about transition have tended to offer examples drawn from those same restricted categories: for example, manufactured goods, agricultural goods, financial services and transport / aviation.[[48]](#footnote-48) Was that meant to imply that any transitional deal should not be designed to cover continued cooperation also in other fields, such as environmental protection, employment law or scientific research? It hardly matters, since the Union itself will clearly insist upon a much more comprehensive transitional arrangement, effectively covering the whole scope of existing EU law and policy – together with Euratom – though subject to specific provisions concerning the ability of the UK to opt into any new Union measures that might be adopted during transition in the Area of Freedom, Security and Justice.[[49]](#footnote-49) Although not explicitly spelt out, we can of course assume that other Union measures that would not have been binding upon the UK as a Member State would not fall within the scope of any transitional regime (for example, in the field of monetary union).[[50]](#footnote-50)

*4.2. More detailed basis for transition*

Within the basic scope of application of the transitional agreement, what would be the more precise basis for continued cooperation between the EU and the UK?

Here, the Florence speech suggested that any transitional period should be based on the EU’s current rules and regulations. The EU27 certainly agree.[[51]](#footnote-51) Indeed, the January 2018 negotiating directives go further: not only should the UK sign up to continued respect for the substantive content of Union policy, but Union law should continue to produce the same legal effects within the UK as it does across the rest of the Union during the transitional regime.[[52]](#footnote-52) On that point, the final version of the negotiating directives even went beyond the Commission’s original draft, by highlighting that such legal effects cover, in particular, the principles of direct effect and supremacy.[[53]](#footnote-53) However, it remains to be clarified how far the Union will insist that the entire apparatus of principles which structure the constitutional relationship between Union law and the national legal systems should continue to govern the status of Union law within the UK legal system: for example, also the principle of consistent interpretation; the principles of effective judicial protection for Union rights; the obligation to ensure the effective implementation of Union law more generally; the Court’s strict monopoly over the possibility of declaring Union measures to be unlawful; and last but not least, the continued application of the Charter of Fundamental Rights, as well as the general principles of Union law, whenever national authorities act “within the scope of the Treaties”.[[54]](#footnote-54)

That transitional proposition is a far cry from the British Government’s proposals for the UK legal system after withdrawal as set out in the European Union (Withdrawal) Bill published in July 2017.[[55]](#footnote-55) Under that Bill, many of the structural principles that currently govern relations between Union law and UK law would be heavily modified or simply obliterated. For example: those Union measures incorporated into UK law as “retained EU law” would no longer enjoy the quality of supremacy in the event of a conflict with subsequent national measures;[[56]](#footnote-56) the Charter of Fundamental Rights is not to be retained within the UK legal system at all;[[57]](#footnote-57) and even the general principles of Union law are to have only limited potential to act as grounds for judicial review against UK public authorities.[[58]](#footnote-58)

Will the UK be politically willing to accept that the full extent of its plans for the domestic legal system might need to be put on hold for the duration of a post-withdrawal transitional period? The experience of the Article 50 TEU negotiations so far could be thought to point in either direction. After all, the UK did eventually agree to introduce a post-withdrawal “mini-supremacy clause” into national law, specifically to protect the citizens’ rights provisions of the Article 50 TEU agreement, across the entire lifespan of their intended beneficiaries, from anything other than clear and express repeal by a future UK Parliament.[[59]](#footnote-59) But even that degree of compromise was apparently achieved only after much diplomatic wrangling. The Union’s transition proposals might seem both more and less contentious than the previous dispute over citizens’ rights: more, since the constitutional principles of Union law that the UK would be expected to continue to respect are obviously more far-reaching than supremacy alone and would also apply across the whole scope of Union law; yet less, because those obligations need only last for the duration of transition itself – after which, the UK could return to its original plans for the radically changed treatment of “retained EU law” within its domestic legal system.

In any case, it is worth pointing out: the UK might well insist upon explicit recognition for the principle that the Westminster Parliament can still chose clearly and expressly to deviate from the terms of Union law during any transitional regime;[[60]](#footnote-60) but that should not be interpreted as especially problematic, since the same principle has been true throughout the entire 40-odd years of the UK’s full Union membership and simply reflects a fundamental tenet of the UK constitutional order.[[61]](#footnote-61)

Returning to the precise basis for EU-UK cooperation during any transitional period, the December Guidelines also make clear that the date of formal withdrawal should not simply mark the beginning of some standstill period. Far from it: the UK would be obliged to follow any new changes in Union law – be they legislative, administrative or judicial in nature, thus including all new caselaw from the Court of Justice – that might be adopted during transition.[[62]](#footnote-62) The January 2018 negotiating directives are even clearer on this point: all new Union rules should apply to the UK “automatically”.[[63]](#footnote-63) The Commission’s recommendation, upon which the Council’s final instructions were based, had clearly been intended to rule out any possible British request for a screening or filtering mechanism, such as would permit the UK to exercise or argue for a degree of selectivity when it comes to identifying precisely which changes to Union law should be caught by its transitional obligations.[[64]](#footnote-64) But that was not quite enough to deter the UK from trying: just a few days before the relevant Council meeting, David Davis (in his Teesport speech) insisted that it was “very, very important” for any transitional agreement to include some means for the two sides to resolve any issues that might arise, where the UK had concerns about new “Union laws” that would run counter to the UK’s interests and as regards which the British did not have any say.[[65]](#footnote-65) If and when the UK finally makes some concrete proposals, we will learn just how steadfast the Union intends to be on this point.

For now, British Europhobes have already screeched their objections to the Union’s terms: this is part of a fiendish plan to reduce the UK to the status of some mere vassal state! Of course, if such critics were at all capable of rational self-reflection, they should really be asking themselves the rather awkward question: whatever happened to their promise that the UK was “holding all the cards”? But in any event, the actual implications of the Union’s terms are likely to prove more limited and more subtle. The Teesport speech certainly attempts to sweeten the pill: given how long it takes for the EU to pass major legislative measures, virtually all new “Union laws” adopted during transition would have been drafted while the UK was still a full member.[[66]](#footnote-66) While not fundamentally inaccurate, that paints a rather rosy as well as selective picture: for example, the Union legislature is capable of amending draft measures; and Davis says nothing about non-legislative acts, let alone the constant stream of new Union caselaw. In any case, it is obvious that the continuing flow of Union regulations and decisions, often based on a rapid entry into force, would be more relevant to the UK during transition than any newly adopted directives offering a standard two-year period for full domestic transposition.[[67]](#footnote-67) That said, the UK would have to rekindle its interest in any current or imminent directives whose deadline falls or would fall after March 2019 and which might thus have been assumed no longer to require implementation into UK law.

Assuming that the UK is politically willing / obliged to accept the Union’s proposed terms, there will be complex technical questions about how best to operationalise such a transitional deal, as part of the UK’s overall package of domestic withdrawal legislation.[[68]](#footnote-68) Within that context, an interesting question arises: looking beyond the EU27 demand that new Union measures should also continue to enjoy their standard legal effects within the UK legal system for the duration of the transitional period, what would be the eventual status of such Union measures under UK law into the future? The UK’s final package of withdrawal legislation will certainly need to provide us with a formal answer to that question. In particular, will the relevant date for identifying the precise range of Union measures that are to be considered part of “retained EU law” for the purposes of the European Union (Withdrawal) Bill be defined: *either* as the end of the transitional period; *or instead* as the moment of UK withdrawal? In the former case, all new Union measures adopted during transition would also be absorbed into and share the special legal characteristics of “retained EU law” as proposed under the Bill: for example, continuing supremacy in the event of a conflict with all domestic legislation adopted before the relevant date.[[69]](#footnote-69) Even if a transitional expansion in the scope of “retained EU law” were to prove small in quantitative terms, the political sensitivities of such a proposal when expressed in qualitative terms might lead the UK Government to prefer the latter scenario: the relevant date for identifying “retained EU law” should be that of withdrawal, not the end of transition. But that would only create fresh headaches of its own, since it would necessitate recognising yet another new category of Union measures within the UK legal system – those adopted after the date of withdrawal but before the expiry of the transitional regime – and deciding not only that their legal status should change within a relatively brief period of time, but also what their new legal effects should be and how this should differ (if at all) from either “retained EU law” or ordinary domestic measures.

*4.3. UK requests for special treatment*

Notwithstanding the UK Government’s request for a transitional deal that maintains mutual market access on current terms, the UK Prime Minister in her Florence speech did explicitly suggest some specific deviations from the status quo even during the proposed transitional period. Given that the April Guidelines require any transitional agreement to involve a balance of rights and obligations, and to respect the integrity of the Single Market, the Union will obviously bring a critical eye to bear upon any UK demands to exempt itself from existing constraints on its freedom of action.

Consider the persistent British request to ignore the Union’s exclusive competences in the field of external relations, so as to enter into and even conclude formal trade negotiations with third countries, albeit on the understanding that the entry into force of any new deals would have to be delayed until the UK’s transitional period with the EU had finally expired.[[70]](#footnote-70) The European Parliament had already indicated that it could live with such a suggestion.[[71]](#footnote-71) For its part, the Council perhaps proved more generous, at least than the UK had thus far publicly requested, though still with a political sting in the tail: during transition, the UK may not become bound by international agreements entered into in its own capacity, in fields of Union competence, unless authorised to do so by the Council itself.[[72]](#footnote-72) The Union is thus holding out the possibility of certain UK agreements, and not just in the field of trade, being able to enter into force even before the expiry of transition, notwithstanding the normal rules of Union external competence, though subject to Union control and dependent upon a case-by-case assessment.[[73]](#footnote-73) Perhaps the Union can afford to allow the UK a little slack on this point. After all, it is doubtful how much the UK might realistically achieve during any transitional period – especially when it is still seeking to finalise its future trading relationship with the Union itself – at least beyond continuing the UK’s current project, of seeking to replicate the EU’s existing trade agreements with third countries, from which the British are naturally due to be excluded in due course.[[74]](#footnote-74)

Potentially more problematic is the situation regarding the free movement of persons. The December Guidelines are quite clear: transition must cover the entire *acquis*, including all four of the Single Market’s indivisible freedoms.[[75]](#footnote-75) Moreover, the European Parliament has been particularly insistent on this point: its resolution from October 2017 states that the transitional agreement should preclude the UK from imposing “any new conditions” on the free movement of persons.[[76]](#footnote-76) The Commission’s recommendations from December 2017 said nothing specific on the issue, but in the final January 2018 negotiating directives, the Council proved surprisingly robust: not only must full free movement of persons be maintained, but the “specified date”, for the purposes of migrant EU and UK nationals qualifying for future protection under the citizens’ rights provisions of the Article 50 TEU agreement, should be changed from the date of UK withdrawal to the end of the transitional period.[[77]](#footnote-77)

No doubt due largely by the poisonous and dishonest xenophobic hysteria which now shamefully surrounds the whole subject, the UK Government’s position on the free movement of persons during transition has so far proved to be one of calculated ambiguity.[[78]](#footnote-78) In a statement to the House of Commons on 9 October 2017, May claimed (first) that, although EU nationals might continue to arrive in the UK during any transitional period, they would have to be registered with the authorities in preparation for the introduction of the UK’s new (albeit as-yet-undefined) immigration system; and (secondly) that the Government anticipated such individuals would become subject to the UK’s new (though again as-yet-undefined) rules on the long term settlement of EU nationals.[[79]](#footnote-79) However, subsequent pronouncements have tended to repeat only the first (not the second) of those claims;[[80]](#footnote-80) while also suggesting that there will be no other major changes to free movement during the transition itself.[[81]](#footnote-81)

At one extreme, it is therefore unlikely that the UK was ever minded to argue for a blunt rejection of the free movement of persons right from the moment of withdrawal: the only transitional restriction per se to have been suggested by the British is their proposed introduction of a registration requirement, of the sort that is already permitted to Member States as a matter of existing Union law anyhow.[[82]](#footnote-82) At the other extreme, it seems equally implausible that the UK was already thinking along the same generous lines as the Council’s new negotiating directives. That much seemed to be confirmed by Theresa May’s comments (made in China on 31 January 2018) to the effect that the UK will not accept transitional arrivals simply being assimilated to pre-withdrawal EU migrants.[[83]](#footnote-83) It therefore appears that the UK was minded to and still will argue for only a temporary continuation of the free movement of persons during the transition, but with the “specified date” for the purposes of triggering the Article 50 TEU citizens’ rights provisions remaining that of withdrawal in March 2019 – so that new arrivals from the EU would enjoy the last fruits of free movement law for only a limited time, since they would find themselves unilaterally transferred into the UK’s new (and presumably more restrictive) immigration regime upon expiry of the transitional period.[[84]](#footnote-84) If so, this issue could prove one of the most difficult elements in the negotiations to come.

*4.4. Institutional structures of transition*

As we all know: cooperation is not built merely on rules and regulations; it is also built on a complex network of institutions and processes – political, administrative and judicial – which make the entire system function effectively in practice. What would be the governance and enforcement structures for EU-UK cooperation during a post-withdrawal transition, and how far would such structures deviate from the notion that transition entails a temporary prolongation of the status quo?

The April Guidelines provide that no third country can enjoy the same rights and benefits as a Member State – a principle which is holds true just as much for any transitional deal as it does for the future relationship.[[85]](#footnote-85) In particular, the April Guidelines state that any transitional arrangements must be subject to effective enforcement mechanisms and, “[s]hould a time-limited prolongation of the Union *acquis* be considered, this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply”.[[86]](#footnote-86) Given that that is exactly what the transitional proposition now consists of, the Union is effectively setting down two main institutional conditions for the UK during transition, though each of them still leaves open questions that now need to be fully resolved.

In the first place, after its formal withdrawal, the UK will have to accept and respect the decision-making autonomy of the EU.[[87]](#footnote-87) In particular, the December Guidelines are clear that, as a third country, the UK would no longer participate in or nominate or elect members of the Union institutions.[[88]](#footnote-88) On that note, the Florence speech had already conceded that there would be no more UK seat at the top table in the European Council, or in the Council; and there would be no more British MEPs in the European Parliament.[[89]](#footnote-89) Neither the Commission nor the Court were explicitly mentioned, but the UK Government could not seriously have entertained the thought that the British might still be offered continued formal membership of such crucial Union institutions. Once again, the basic price of transition is made plain: the UK must transform itself voluntarily from leading rule-maker into passive rule-taker.

One remaining issue to be settled concerns the Union’s other bodies, offices and agencies. In a speech in Germany on 16 November 2017, David Davis claimed that a transitional period would mean the UK “keeping both the rights of a European Union member and the obligations of one… [including] staying in all the EU regulators and agencies during that limited period...”.[[90]](#footnote-90) How far can the UK hope to retain its membership and the benefits of Union agencies in fields such as medicines and chemicals regulation or cross-border police cooperation? On this point, it is interesting to note that the draft version of the European Council’s December guidelines referred to the end of UK participation only in the Union institutions *stricto sensu*.[[91]](#footnote-91) However, the final version as adopted on 15 December 2017 went further – expressly ruling out continued UK participation in the decision-making or governance of the Union’s bodies, offices and agencies.[[92]](#footnote-92) That the Union is prepared to consider only operational participation for the UK during transition was confirmed by the January 2018 negotiating directives. As a general rule, the UK will not attend meetings of comitology committees, Commission expert groups or Union agencies etc where Member States are represented. But the Article 50 TEU agreement should define precise conditions and a clear framework for inviting the UK to attend such meetings (exceptionally, on a case-by-case basis and without any voting rights) where either: the discussion concerns individual acts to be addressed to UK authorities, natural or legal persons; or the UK’s presence is necessary and in the Union’s interest, in particular, for the effective implementation of the *acquis* during transition.[[93]](#footnote-93)

Another issue still to be resolved concerns how far either the EU or the UK will push for the Article 50 TEU agreement to prescribe certain duties of sincere cooperation that go beyond the general obligation of bona fides implementation imposed by public international law. So far, the EU27 have stressed that the Union law duty of sincere cooperation remains binding upon the UK in full but only until the point of withdrawal.[[94]](#footnote-94) The December Guidelines are silent on whether this will need to be revisited in the context of transition, though some degree of loyal cooperation is surely implicit in the January 2018 negotiating directives.[[95]](#footnote-95) Beyond that, the UK’s continued participation in (and therefore capacity to frustrate the smooth operation of) extensive aspects of substantive Union law and policy could easily justify a Union demand for the UK to remain bound not only by an overarching duty of sincere cooperation equivalent to that found in Article 4(3) TEU but also by the rather extensive and precise (negative and positive) institutional obligations extrapolated from the bare Treaty text by the Court – though subject to suitable adaptations to take into account any particular dispensations in favour of the UK as agreed under Article 50 TEU.[[96]](#footnote-96) For their part, the British have perhaps been more vocal in expressing their expectation that certain duties of sincere cooperation should be imposed also upon the EU under any transitional agreement, as a counter-balance to the UK’s systematic exclusion from the Union’s institutions, governance and decision-making after withdrawal. For example, the Teesport speech claims that the Union will need to respect the UK’s rights and interests; that the UK will still makes its voice heard; that respect must flow both ways; and that each side must commit not to take any action that would undermine the other.[[97]](#footnote-97) As ever, though, concrete proposals are thin on the ground.[[98]](#footnote-98)

In the second place, the Union also insists that the UK (as a state but also its natural and legal persons) would remain subject to the continued enforcement powers of the Commission and the full jurisdiction of the Court during any transitional period.[[99]](#footnote-99) In principle, the UK again seems resigned to accepting these transitional arrangements. But once more, certain concrete issues remain to be settled.

To begin with: what would be the UK’s precise status (as an applicant or otherwise) within the Union’s judicial system during the transitional period? The Commission has already expressed its position on some of the more detailed procedural arrangements that should govern judicial proceedings relating to the separation issues covered by the Article 50 TEU negotiations: for example, “[i]n any procedure before the Court of Justice relating to the application and the interpretation of the Withdrawal Agreement and touching upon the interests of the United Kingdom, the United Kingdom should enjoy the same procedural rights as the rights enjoyed by… Member States under the Statute and the Rules of Procedures…”.[[100]](#footnote-100) But in the context of a broad “status quo” transitional regime, might the UK request and the Union agree to go even further? For example: should the UK enjoy standing to seek the annulment of Union measures, during transition, merely and under the same restrictive conditions as any other non-privileged applicant; or should it retain, even if only temporarily, more extensive rights of standing, perhaps even fully equivalent to those of the Union institutions and the Member States themselves?

Indeed, there may well be other questions to address, when it comes to deciding how the governance and enforcement structures of transition (on the one hand) and separation (on the other hand) might overlap or otherwise interact within the context of the final Article 50 TEU agreement. For example: the Commission has suggested that, in the event of alleged non-compliance with a ruling by the Court delivered pursuant to the separation provisions of the withdrawal agreement, either party should be able to request the Court either to impose financial penalties or to authorise the suspension of certain aspects of the withdrawal agreement itself (apart from the citizens’ rights provisions).[[101]](#footnote-101) Certainly, a power of suspension – whether judicially sanctioned or not – would represent a powerful tool to ensure compliance: should the Union now insist upon its inclusion also in the dispute settlement provisions which would be applicable to the transitional provisions of the withdrawal agreement, so as to strengthen the incentives for full UK adherence to its extensive transitional obligations, and thus counterbalance the risk that the UK might focus only on enjoying its extensive transitional privileges?

To end with: the UK has suggested that, even if transition starts out relying upon the Union’s own enforcement and dispute settlement mechanisms, the judicial functions of the Court of Justice should be replaced as soon as possible with alternative (though once more as-yet-undefined) arrangements.[[102]](#footnote-102) Many readers will surely find it difficult to fathom the irrational hatred of the Court that seems to torment the waking hours of the average British Europhobe – a hatred which is rarely capable of expressing itself as anything other than a frighteningly jumbled, shamelessly partisan and wilfully misleading grasp of either the Court as a complex institution or its highly particular judicial roles and powers. So far, the Union has shown not the slightest inclination to accommodate such political shenanigans – which would after all only generate needless extra work and pointless complexity, to say nothing of a potential imbalance of rights and obligations, merely for the sake of allowing the UK Government to accelerate its mirage of “taking back control” by a few extra months.

*4.5. Duration of transition*

What would be the duration of the EU-UK transitional regime?

The UK Government insists that any transitional regime should be strictly time limited: transition should not be some vaguely defined or potentially indefinite status. Otherwise, and apparently without any intentional irony, the UK has declared itself open minded and pragmatic about agreeing the precise duration of transition. Based on current thinking, the UK would expect the period to last “around 2 years” – though (as we have just seen, when it comes to the dispute settlement functions of the Court) that is subject to the suggestion that different parts of the transitional regime could be phased out or replaced at different times.[[103]](#footnote-103)

On the Union side, the EU27 also insist that any transitional agreement should be precisely limited in time.[[104]](#footnote-104) The European Parliament has been more explicit: its resolutions from April through to December 2017 call for transition to last a maximum of 3 years.[[105]](#footnote-105) However, it came as no great surprise when the Commission recommended and the Council agreed to mandate negotiations for a transitional period expiring no later than 31 December 2020.[[106]](#footnote-106) Michel Barnier has justified that choice based on a logical link between the UK’s post-withdrawal transition (on the one hand) and the remaining lifespan of the Union’s current multi-annual financial framework (on the other hand).[[107]](#footnote-107)

However, the apparent divergence between the preferences of the British and those of the Commission, specifically on the issue of duration, cannot be explained by the MFF link alone. As discussed above, this is also about differing appreciations of the underlying problems that transition is intended to solve – including differing understandings of the likely future relationship between the EU and the UK as well as the amount of time that relationship might take to negotiate and finalise.[[108]](#footnote-108) Yet viewed in context, the divergent EU-UK preferences over duration should hardly be exaggerated. On the one hand, an extra 21 or 24 months may well be just enough for public and private actors to prepare for the immediate regulatory and logistical consequences of UK withdrawal. On the other hand, neither period feels sufficient to guarantee “only one regulatory change” – not even towards the Commission’s more modest Canada-style trade agreement, let alone the UK’s ethereal “deep and special partnership”. The more striking point is that (as yet) neither side expresses any appetite to include within the Article 50 TEU agreement an explicit facility for extending the transitional period in order either to meet the foreseeable desire for extra time (to prepare, to agree, to ratify) or otherwise to deal with any unforeseen circumstances that might arise.

*4.6. Territorial scope of transition*

In their April Guidelines, the EU27 stated that, “[o]n the date of withdrawal, the Treaties will cease to apply to the United Kingdom, to those of its overseas countries and territories currently associated to the Union, and to territories for whose external relations the United Kingdom is responsible”.[[109]](#footnote-109)

Nevertheless, it remains to be clarified whether any transitional deal might extend beyond the UK itself, so as to maintain the status quo also for the benefit of those overseas countries and territories (such as the Falkland Islands, Cayman Islands or Bermuda) that currently enjoy a special status under EU law, thanks to UK membership, and would otherwise be immediately and directly affected by withdrawal in 2019.[[110]](#footnote-110)

However, perhaps the thorniest territorial issue surrounds Gibraltar. As is well known, Gibraltar is neither a Member State in its own right nor part of the UK qua Member State. Instead, pursuant to Article 355(3) TFEU, Gibraltar is a European territory for whose external relations the UK is responsible. As such, Gibraltar is and will remain subject to Union law,[[111]](#footnote-111) up until the time of the UK’s formal withdrawal in March 2019. In para 24 of their April Guidelines, the EU27 declared that, “[a]fter the United Kingdom leaves the Union, no agreement between the EU and the United Kingdom may apply to the territory of Gibraltar without the agreement between the Kingdom of Spain and the United Kingdom”.[[112]](#footnote-112) The January 2018 negotiating directives now provide that the transitional negotiations should also fully respect the various provisions of the April Guidelines concerning territorial scope “notably as regards Gibraltar”.[[113]](#footnote-113)

Strictly speaking, para 24 of the April Guidelines was located in the section dealing with preliminary and preparatory discussions about a framework for the future EU-UK relationship (not in the section covering the withdrawal agreement or its possible transitional provisions). Moreover, the withdrawal agreement, which is due to settle both separation and transition, is due to be finalised and approved under Article 50 TEU before (not after) the UK actually leaves the Union. For those twin reasons, it is not immediately obvious that the April Guidelines were ever originally intended to require positive Spanish consent (above and beyond the super-QMV in Council which is explicitly prescribed under the Treaties) in order for any transitional regime to extend to the territory of Gibraltar. And indeed, the more that we realistically perceive the negotiations to be working towards transition-as-extinction, rather than transition-as-bridge, the less sense it would make to regard a temporary prolongation of the status quo also for Gibraltar as falling within the spirit of para 24 and thus subject to a de facto Spanish veto. But ultimately, this is an issue which will be decided by politics rather than law, and legal scholars thus need to be wary of treating the political guidelines and choices of the Union institutions as if they were statutes: should the EU27 decide that Spain is to exercise a decisive say over Gibraltar’s proposed inclusion in any transitional regime, then it shall be so.

But lawyers need not despair. However much all these political preferences will dominate the Article 50 TEU negotiations over transition, there are still plenty of legal questions and difficulties that need to be addressed as well. After all, the April Guidelines explicitly provide that any transitional arrangements should be considered only to the extent that they are “legally possible”. That brings us on to our next set of discussions: what would indeed be “legally possible” – specifically in terms of post-withdrawal “status quo” transitional arrangements – under Article 50 TEU?

**5. Legal issues: how exceptional is the competence conferred by Article 50 TEU?**

Transitional periods are nothing new to Union law. We are used to certain types of transition being enshrined even in primary law: for example, for the gradual extension of full rights and obligations to newly acceded Member States;[[114]](#footnote-114) or to manage the orderly introduction of new institutional arrangements.[[115]](#footnote-115) Transitional periods are also an integral part of the practice of Union secondary law (whether laid down directly in legislative acts or created under delegated powers) so as to ensure the smooth replacement of one regime by another without adversely affecting the legitimate rights and interests of natural and legal persons.[[116]](#footnote-116) Moreover, the Court is sometimes called upon to evaluate the appropriateness and / or adequacy of national transitional regimes, under the primary Treaty provisions, during the process of investigating the objective justification of prima facie barriers to the free movement of goods or capital.[[117]](#footnote-117)

However, such previous experiences seem of little assistance to the very different context of designing a transitional regime for the outright withdrawal of a Member State from the Union legal order.[[118]](#footnote-118) Our attention needs to focus more directly upon Article 50 TEU: what is the nature of this legal basis, and in particular what are its limits, at least when it comes to transition? Certainly, the UK Government is firmly of the opinion that Article 50 TEU can provide an appropriate legal basis for the sort of transitional deal it has requested.[[119]](#footnote-119) Indeed, the Union has gone further, with the Commission suggesting that Article 50 TEU provides the only available legal basis under the Treaties for a transitional regime upon withdrawal.[[120]](#footnote-120) But while there is surely no doubt *in principle* that transition falls within the range of issues that can properly be dealt with under the auspices of Article 50 TEU – so as to help ensure an orderly withdrawal from the Union – the real questions concern the more detailed scope and content of such transition *in practice*.[[121]](#footnote-121)

The best starting point is, of course, the very wording of Article 50 TEU itself: the Treaties “shall cease to apply” to the UK upon its withdrawal (or more precisely, from the date of entry into force of the withdrawal agreement / failing that, two years after the UK’s notification of intention to withdraw, unless there is unanimous agreement on an extension). On its face, that suggests any transitional arrangement cannot be based upon a direct prolongation of the application of the Treaties, to a territory that has become a third country, just as if it were still a Member State. The withdrawal agreement would instead have to provide for the construction of a parallel system of cooperation which seeks (as far as possible) to replicate the rules, rights and obligations provided for under the Treaties (if only for a fixed period of time) when it comes to the entirely different context of international relations between the Union and its Member States (on the one hand) and a third country (on the other hand).[[122]](#footnote-122)

In principle, that should lead us to assume that any proposed agreement on transitional arrangements between the EU and the UK needs to comply with the normal constitutional rules that govern the existence, exercise and limits of EU external relations competences…. *Or should it?* Is the nature of Article 50 TEU such that it provides a special legal basis for dealing with the departure of an existing Member State, in ways that might deviate from our normal expectations under EU constitutional law, given the exceptional circumstances of an outright withdrawal? That is a question which deserves to be explored in relation to several separate (if inter-related) constitutional contexts.

*5.1. Exclusivity, Shared Competence and Mixity*

To begin with, we have the normal rules governing the existence and nature of Union external competences: the fundamental principle of conferral; the distinction between exclusive and shared Union competence; and the possibility of mixity.[[123]](#footnote-123) The latter arises where either an agreement involves shared competences and the Member States insist upon mixity as a political choice (which is the more common explanation);[[124]](#footnote-124) or an agreement contains provisions falling altogether outside the Union’s powers so that mixity becomes a positive constitutional requirement (though that is much rarer).[[125]](#footnote-125) Either way, mixed agreements need to be agreed and ratified also by the Member States themselves.[[126]](#footnote-126) Even though the Treaty of Lisbon broadened the scope of the Union’s exclusive external competences,[[127]](#footnote-127) and the Court has since played its part in confirming their expansive interpretation,[[128]](#footnote-128) rulings such as the *Opinion on the Singapore Free Trade Agreement* remind us that Union competences in general, and exclusive competences in particular, still have their limits and therefore the possibility of mixity remains an important element of Union external relations law.[[129]](#footnote-129)

If we apply those normal rules to the specific context of Article 50 TEU, we would expect that any agreement which sought to regulate matters falling outside the scope of exclusive Union competences could (in the case of shared competence) or would (in the case of exclusively national powers) be classified as a mixed agreement requiring national level ratifications. Since an ambitious “status quo” transitional regime, of the sort being contemplated by both the Union and the UK, is almost certain to regulate matters falling within the scope of shared competences, it would be open for the Member States to insist that such a transitional deal indeed be classified as a mixed agreement – in which case, the process of agreeing any transitional deal would suddenly become much more cumbersome, potentially prolonged and ultimately uncertain.[[130]](#footnote-130)

However, the Council in its negotiating directives, as adopted in May 2017, explicitly endorsed the Commission’s proposed understanding that Article 50 TEU gives the Union an exceptional power to negotiate the terms of withdrawal – exceptional at least to the extent that it empowers the Union alone to reach agreement with the UK, on behalf of the remaining Member States, even as regards issues which would normally be seen as falling within shared competence – thus seeking to avoid any possibility of the withdrawal agreement being treated as a mixed one, requiring individual national ratifications, in addition to the Union level endorsement explicitly provided for under Article 50 TEU itself.[[131]](#footnote-131) It is interesting to note that Michel Barnier, speaking in December 2017, referred to the need to factor in the time required for endorsement of the Article 50 TEU agreement on separation and transition by the European Parliament, the Council, the UK Government and the Westminster Parliament – omitting any mention of domestic ratification procedures by any other Member State.[[132]](#footnote-132)

The purpose of the political agreement expressed by the Council is clear: to prevent any single Member State from wielding a veto over the terms of departure for a withdrawing country. After all, that would run directly counter to the clear intention of the Treaty drafters, when they allowed for the withdrawal agreement to be approved by super-QMV rather than by unanimity.[[133]](#footnote-133) The problem is: that political agreement remains vulnerable to challenge by a disgruntled Member State, should the unity of the EU27 break down at a later stage in the negotiations (for example) over the treatment of the Irish border or the transitional status of Gibraltar. It is also possible that dissent might well up from other stakeholders, not least at the national constitutional level, if parliaments or regional assemblies do not agree with the political preference expressed by their national government within the Council – a preference which may well be justified by reasons of convenience in the conduct and conclusion of the Article 50 TEU negotiations, but undoubtedly comes at the potential expense of national competence and prerogatives.

*5.2. The autonomy of Union law*

That brings us on to the second (more substantive) context in which negotiations over a post-withdrawal “status quo” transitional regime under Article 50 TEU might test our normal expectations under EU constitutional law.

Here, we are referring of course to the fundamental rules which protect the “autonomy of the Union legal order” – a body of principles developed by the Court of Justice which act as non-derogable constitutional limits to the exercise of EU external competences, designed to insulate the internal functioning of the Union’s institutional and legal system from any degree of external interference or influence.[[134]](#footnote-134) Thus, for example, international agreements cannot affect the essential character of the powers conferred upon the Union or its institutions by the Treaties. Similarly, an international agreement cannot bind the Union institutions to a particular interpretation of Union law as regards the exercise of their internal powers. Those principles have particular implications when it comes to safeguarding the Court’s exclusive jurisdiction to provide for the definitive interpretation of Union law, as well as the protection of fundamental rights, within and for the purposes of the Union’s own legal order.[[135]](#footnote-135)

In the context of transition: compliance with the rules protecting the autonomy of the Union legal order would be relatively easy if the UK were merely asking for continued participation in particular EU policies or measures in ways that would anyhow be possible in accordance with the avenues that the EU itself already unilaterally offers to third countries under the relevant instruments of primary or secondary Union law: for example, as with the extension of free movement privileges to third country goods which have been placed in free circulation and lawfully marketed within the Union territory;[[136]](#footnote-136) or when it comes to the award of equivalency decisions in a field such as financial services,[[137]](#footnote-137) or of adequacy decisions in a field like data protection.[[138]](#footnote-138)

Similarly, respect for the autonomy of the Union legal order would also be relatively straightforward if the construction of additional mechanisms to facilitate continued cooperation on a transitional basis were only a matter of creating additional rights and obligations between the EU and the UK, of the sort that could be agreed between the Union and any third country in accordance with its accepted external relations competences as defined by the Treaties and interpreted in the Court’s caselaw: for example, an extensive agreement on market access in the field of services, equivalent to that enjoyed by the EFTA-EEA states;[[139]](#footnote-139) or a system of judicial extradition with the UK, based on the European Arrest Warrant which applies between Member States.[[140]](#footnote-140)

But what if the UK were to push further – in effect, asking for special privileges that would not normally be available to, or open for agreement with, any third country under the standard framework of Union law and / or would otherwise be seen as incompatible with respect for the autonomy of the Union legal order? For example, consider the UK’s suggestion that its national authorities should continue to participate fully in all of the EU’s existing regulators and agencies (even those where full membership and especially governance power is reserved for the Member States alone).[[141]](#footnote-141) The EU27 may well already have closed off that particular possibility at a political level but – assuming our normal constitutional expectations apply to Article 50 TEU as they do elsewhere across the Treaties – it is doubtful the Union would even be entitled to entertain it from a legal perspective, since it would self-evidently amount to allowing a third country to interfere in the Union’s internal decision-making processes.[[142]](#footnote-142)

Or again: imagine if the UK were to push for any post-withdrawal preliminary rulings, delivered by the Court at the request of British judges, to be merely advisory or persuasive in nature – whether for the purposes of the transitional regime as a whole, or even for more limited aspects of the withdrawal agreement (such as the 8 year extension of judicial dialogue that has already been agreed specifically in relation to the citizens’ rights provisions).[[143]](#footnote-143) Again – assuming we can extend our normal constitutional expectations to Article 50 TEU – such a request would lie beyond the Union’s constitutional gift, even if it were politically minded to agree: external agreements which allow preliminary references from third country tribunals to the Court must explicitly provide for the latter’s rulings to be binding, since the Court has no power under the Treaties to deliver advisory interpretations to national judicial authorities, and a mere external agreement cannot seek to create institutional competences that do not exist already.[[144]](#footnote-144)

Faced with such potential UK requests for special treatment, how far might the Union institutions consider Article 50 TEU capable of stretching beyond mere procedural specificity into more substantive exceptionality?

For starters: the mere fact that Article 50 TEU has been recognised by the Council as a exceptional power, specifically insofar as it allows the Union alone to finalise an agreement covering issues that also fall within shared competence, appears entirely irrelevant to the question of how far action under the legal basis of Article 50 TEU might also be considered capable of qualifying our familiar expectations about safeguarding the “autonomy of Union law”. After all: the Member States could not use their ordinary national powers to change the system or content of the Union’s own competences as laid down under the Treaties, so their consent to the possibility of sole Union external action even as regards matters that would normally be considered to fall within shared competences, within the specific context of withdrawal, cannot have any effect on the substantive scope or content of the Union’s own powers as regards matters falling within the Union’s own regulatory fields of responsibility.

On the contrary, the EU27 have indeed stressed from the very outset that any agreement reached under Article 50 TEU must respect the integrity and autonomy of the Union legal order – including the autonomy of its institutional and decision-making framework as well as the role of the Court of Justice.[[145]](#footnote-145) As Michel Barnier has reminded us on several occasions: whatever the outcome of the current negotiations, there will be no “business as usual” with the UK; the real transitional period actually began when the UK delivered its formal notification of intention to withdraw.[[146]](#footnote-146) Such statements suggest a clear institutional understanding whereby Article 50 TEU is not to be treated as some substantively exceptional competence to deviate from the normal constitutional rules of the game, just so as to accommodate the particular needs and desires of a departing state.

*5.3. Simply treating the UK as if it were still a Member State*

That said: the challenges that a post-withdrawal “status quo” transition are capable of posing for the autonomy of Union law are not limited to the prospect of specific UK requests for special treatment, capable of generating limited points of tension as they interface with the Union’s ordinary external relations powers. In fact, the potential problems might well run even deeper, or at least much broader, than that.

As observed above, Article 50 TEU adopts the fundamental premise that the Treaties will cease to apply to the UK, at the moment of its withdrawal, when it formally becomes a third country.[[147]](#footnote-147) However, the EU and the UK each appear to envisage an ambitious transitional agreement based on the wholesale extension of Union law to the UK just as if it were still a Member State (albeit subject to some important, though still limited, institutional and substantive exceptions).[[148]](#footnote-148) Rather than constructing an entire edifice of free-standing, comprehensive and detailed EU-third country cooperation mechanisms that would give specific legal expression to the two sides’ overall political conception of a “status quo” transition,[[149]](#footnote-149) in reality, the plan seems to be that vast tracts of the Treaties, Union legislation and other legal or policy instruments would not actually cease to apply to the UK from the moment of its withdrawal, but will instead be extended and applied wholesale to the territory, public authorities and natural or legal persons of a third country. The consequences of such an approach are no less far-reaching and significant for being so disarmingly obvious: across every field of Union activity, third country phenomena would be fully entitled to engage (say) in the exercise of rights, the exchange of information, the allocation of jurisdiction, the mutual recognition of standards and the enforcement of decisions, under legal frameworks, even in situations and through processes where such rights and obligations are explicitly reserved for Union actors alone.

On the one hand, there are good practical reasons for assuming that that is precisely the form that the EU-UK transitional plan will eventually take: given how much is still left to be done, and how little time remains to do it, there is simply no credible prospect of negotiating and drafting up the sort of free-standing, comprehensive and detailed cooperation mechanisms that would be required to express a politically ambitious transitional arrangement in terms more legally appropriate to relations between the Union and a third country.

On the other hand, a transitional plan which is based on the direct and wholesale (even if only temporary) extension of the Union legal order to the territory of a third country represents a highly expansive and truly exceptional conception of the competences conferred by Article 50 TEU. Such a conception is not only difficult to square with the explicit text of Article 50 TEU itself. It could also sit uneasily with myriad other provisions of Union law: for example, by calling for a broader understanding of the beneficiaries of the rights to free movement and equal treatment than that explicitly set out in the relevant Treaty provisions and their implementing legislation;[[150]](#footnote-150) or by expanding the category of privileged applicants, for the purposes of access to judicial review before the Union courts, beyond the restricted categories already expressly identified in the Treaties.[[151]](#footnote-151)

*5.4. Assessment*

So, the prospect of some ambitious and far-reaching transitional deal could pose not only difficult political questions, but also important legal challenges: just *how* exceptional can the Article 50 TEU competence *really* be?

Article 50 TEU may well need to be interpreted flexibly, in order to deal with the exceptional circumstances of its operation. Moreover, this rather skeletal Treaty text both offers a wide political discretion and requires significant political elaboration, in order to render it fully operational. But even an exceptional power cannot be an unlimited one.

After all, Article 50 TEU already explicitly provides for several ways simply to continue the wholesale application of Union law on a purely temporary basis for the benefit of a Member State which is nevertheless intent on its own departure.[[152]](#footnote-152) Yet for domestic political reasons, the UK deliberately chose not even to request a transitional model based on the legally straightforward routes provided for under the Treaties.[[153]](#footnote-153) And otherwise, the text of Article 50 TEU itself gives no express indication that it was intended to confer upon the Union institutions a substantively exceptional power, capable of derogating from our normal expectations about the constitutional nature and limits of Union powers. Moreover, once we accept the proposition that Article 50 TEU is to be considered somehow exceptional, how do we then decide – without drifting into merely subjective inclinations, motivated as much by our own end-goal preferences as by the tools of systemic logic – just when or how far any proposed withdrawal agreement need not comply with the supposedly fundamental principles and parameters laid down in the Treaties for defining the nature and limits of the Union’s own competences?

All these questions of interpretation would ultimately be for the Court to settle – even if testing them (urgently, if needs be) would take up yet more scarce time. If push comes to shove, one confidently assumes that the Court would robustly defend the “autonomy of Union law” against any specific UK requests for special treatment and, indeed, would object to any specific transitional provisions that purported to infringe the fundamental rights and values as laid down in the Charter and the general principles of Union law.[[154]](#footnote-154) However, it is perhaps more difficult to predict how the Court might react to a transitional plan which proves to be based, legally and not just politically, on the wholesale extension of Union law to (rather than the parallel replication of Union mechanisms to operate with) a third country.[[155]](#footnote-155)

Of course, the Court is fundamentally sympathetic to the importance of transition in order to safeguard legal certainty and to protect the rights and interests of individuals: “[i]t must be acknowledged that any transition from one law to another will not be immediate but will take a certain amount of time”.[[156]](#footnote-156) And the Court would surely be naturally reluctant to interfere in any fundamental way with a transitional regime that has the support of all the relevant and responsible decision-making actors, particularly within the confines of a strictly time-limited process that would scarcely allow for any fundamental efforts at redesign, such that judicial objection to the agreement could be tantamount to imposing a “no deal” (or at least a radically different deal) upon both the Union and the UK at relatively short notice – virtually the opposite outcome from the objectives of legal certainty and careful planning that the very notion of transition is meant to deliver.[[157]](#footnote-157)

That said, there is limited authority in the existing caselaw to suggest that the Court might indeed prove skeptical of institutional attempts to prolong the temporal application of Union law, beyond the date clearly prescribed by the Treaties themselves, by falling back upon a hierarchically inferior legal instrument – or at least one whose legal basis is open to contestation. In particular, *Parliament* v. *Council* concerned the Council’s attempt to extend the temporal application of a voluntary beef labelling system beyond the date clearly laid down by the relevant Union regulation. The Court held that the latter could only be amended on a legal basis equivalent to that on which it had been adopted; not (as here) by means of a subordinate measure enacted under powers conferred by the parent regulation itself.[[158]](#footnote-158) Transcribing that principle up one level within the Union hierarchy of norms, one might argue that the range of possible dates upon which the Treaties should cease to apply to the UK has been clearly identified by Article 50 TEU and could only be amended by changing the Treaties themselves; not (as here) by means of a subordinate international agreement which seeks to extend the temporal application of Union law directly to a state which has by then formally withdrawn and become a third country.

Nor should we overlook the highly pertinent backdrop provided by the landmark *Opinion on ECHR Accession*.[[159]](#footnote-159) Should not the special nature of EU membership – based on a particular balance of rights and obligations, supported by ambitious institutional structures, entrenched within a sophisticated constitutional order – incline us against a transitional model which seeks directly to extend that unique ecosystem to a non-Member State, and does do largely because of the latter’s own lack of responsible government preparations, combined with its self-generated internal political obsessions, which together conspire to rule out, either the simple prolongation solutions explicitly provided for by the Treaties, or the (admittedly more complex and time-consuming) transitional mechanisms properly called for by its true third country status?

Those are difficult questions, amenable to no clear answers. Of course, one assumes that the Union and the UK are actively exploring creative solutions capable of expressing their political preference for an ambitious “status quo” transitional regime in ways that will still feel legally comfortable if and when challenged before the Court. For example, we have proceeded on the entirely reasonable if not altogether compelling assumption that the Article 50 TEU agreement will be an international treaty between the EU and the UK, upon the entry into force of which the UK should and indeed must be re-categorised as a third country in relation to the Union and its Member States.[[160]](#footnote-160) But one could try to substitute a different (if less obvious) starting assumption: a withdrawn state is to be treated as a third country, not suddenly and absolutely, but rather in accordance with the terms of the Article 50 TEU agreement and thus subject to any transitional period designed to protect the Union’s interests in securing a smooth and orderly departure. It is indeed possible to be neither pregnant nor not-pregnant: the UK would most certainly have left the Union; but it would not just yet have become a fully-fledged third country.

If the annunciation of such a legal miracle feels uncomfortably like setting political convenience and imagination lose upon the bare text and apparent intentions of Article 50 TEU, then one could seek to express the same idea in a more precise and perhaps more legally plausible way. For example, the Article 50 TEU agreement might provide for different dates of entry into force for different sets of its own provisions, so that withdrawal explicitly becomes more a staggered process than a fixed moment in time: say, one date for UK “withdrawal” from the EU’s basic institutional framework, so as to begin the process of departure from the Union’s governance and decision-making structures; but another (later) date for the UK’s “withdrawal” from the full substantive rules of the Single Market, the Customs Union and other Union policies, as well as from the full structural principles that govern the status and treatment of Union law within the domestic UK legal system. That could offer a neater solution: not only from the perspective of fitting better with the express wording of Article 50 TEU itself; nor just when it comes to respecting the autonomy of the Union’s institutions and legal order; but also (for example) in providing a direct vehicle for resolving the treatment of the UK’s overseas countries and territories or the transitional status of Gibraltar.[[161]](#footnote-161)

**6. Other issues, particularly as regards external relations**

Transition raises certain other interesting legal issues. For example, we have already hinted at the fact that the negotiations will need to address the impact of any transitional regime upon the separation elements of the Article 50 TEU agreement: that is most obvious when it comes to defining the “specified date” (whether it should remain the UK’s withdrawal or shift to the end of transition) for the purposes of activating the citizens’ rights provisions; or when deciding how far the governance and enforcement provisions of the transition and separation elements of the withdrawal agreement should overlap or otherwise interact. Similarly, we have already nodded towards the complexities surrounding the UK’s need to design an effective system for the domestic implementation of the Article 50 TEU agreement which would cover both separation and transition – all of which needs to be carefully locked in synchronisation with parallel preparations for safeguarding legal continuity and legal certainty across the domestic legal system, through an unprecedented system for the post-withdrawal retention, incorporation, modification, replacement and judicial treatment of vast numbers of EU measures under UK law.[[162]](#footnote-162)

But we shall close our substantive analysis with some brief comments about the relationship between an EU-UK transitional regime and the challenges arising from the UK’s status in relation to the Union’s existing external agreements with third countries and other international organisations.

The general nature of the problem is now well known. As the April Guidelines say: after withdrawal, the UK will no longer be covered by agreements concluded by the Union, or by its Member States on the Union’s behalf, or by the Union and its Member States acting jointly.[[163]](#footnote-163) The basic scale of the challenge is also beyond doubt. Although the precise figures differ, this will certainly apply to many hundreds of international agreements, across every imaginable field of cross-border cooperation.[[164]](#footnote-164) The outlines of the required solution are also becoming clearer. The April Guidelines refer to a dialogue between the Union and the UK with a view to a possible common approach in relation to international commitments contracted before withdrawal.[[165]](#footnote-165) However, there seems little escaping the need for a case-by-case analysis of the UK’s potential legal status, rights and obligations in relation to each and every relevant international agreement – or from the widespread expectation that the UK will need actively to adjust and rebuild its international legal relations in a large number of situations with a large number of international partners based on an extensive programme of bilateral and multilateral negotiations.[[166]](#footnote-166) For example, as mentioned above: the UK is currently seeking to persuade a range of third countries to replicate the terms of their existing EU trade agreements with the UK on a purely bilateral basis; such agreements are then to be implemented into UK law (through sweeping powers of executive decree) as proposed under the 2017 Trade Bill.[[167]](#footnote-167) Conversely, it seems difficult to deny the danger that the UK’s departure from the EU will be taken by certain third countries as a just reason or at least a convenient excuse to seek to revisit and revise the terms of their existing agreements with the Union itself – thus risking to create havoc also with the latter’s own network of international treaties and relationships.[[168]](#footnote-168)

How might an EU-UK transitional agreement help with these challenges? On the one hand, there is nothing to stop the two sides agreeing to continue applying the terms of existing EU international agreements for the purposes of their own bilateral relations during a transitional period (for example) so that the UK will continue to tax and treat third country imports in accordance with the existing Union customs regime. Indeed, that appears to be the EU’s clear preference. The December Guidelines provide that, since the UK will continue to participate in the Customs Union and the Single Market during a transitional period, the UK must continue to comply with the Union’s trade policy, to apply the Union’s customs tariff and to collect Union customs duties, and to ensure that all Union checks are being performed on the border vis-à-vis other third countries.[[169]](#footnote-169) The January 2018 negotiating directives go further: during transition, the UK should remain bound by the obligations stemming from (all) agreements concluded by the Union, or by its Member States on the Union’s behalf, or by the Union and its Member States acting jointly.[[170]](#footnote-170)

On the other hand, whatever the EU and UK might agree bilaterally, transition cannot in itself provide a universal “status quo” solution capable of resolving – even temporarily – the real external relations challenges posed by withdrawal: how third countries will react to the fact and implications of UK withdrawal. Once again, the problem arises from the fact that the current plans are fundamentally premised on a post-withdrawal transition in which the UK has formally become a third country in relation to both the Union and its Member States. Not least given that so many of the Union’s existing international agreements are explicitly described as applicable only to the territories, authorities and nationals of the Union and its Member States, it seems difficult to see how such a transitional deal could (in and of itself) affect or alter the UK’s future status, rights and obligations under those international agreements and, in particular, how a transitional regime agreed between the EU and the UK could (in and of itself) oblige third countries to carry on treating the UK just as before. The requirement to undertake and obtain third country negotiation and consent seems inescapable. That means (for example) that while the UK might be obliged by transition to continue applying EU customs rules to all third country imports, the relevant third states need labour under no corresponding obligation to tax and treat UK goods as if they were still of EU provenance.[[171]](#footnote-171)

The Union knows that it lies outside its own gift either to declare unilaterally or even to agree with the UK some sort of universal “status quo” solution – even a temporary one – to the impact of withdrawal upon existing international agreements vis-à-vis the relevant third countries. As Michel Barnier said shortly after adoption of the January 2018 negotiating directives: “we cannot ensure in the Article 50 agreement that the UK keeps the benefits from these international agreements. Our partners around the world may have their own views on this, for instance the 70 countries covered by trade deals”.[[172]](#footnote-172) For its part, the UK now seems to have accepted the same conclusion. Although certain government voices had sometimes sounded complacently confident that a transitional deal would allow the British simply to continue with “business as usual” in their relations with third countries via the Union’s existing external agreements,[[173]](#footnote-173) the Teesport speech was considerably more measured: it is clearly in the interests of the UK, the Union and the relevant third countries that existing EU agreements should continue to apply also to the UK during any transitional period; all parties should therefore agree to that effect, while the UK continues to work on rolling over their legal effects into the longer term.[[174]](#footnote-174)

At best, therefore, transitional provisions of the sort currently envisaged by the EU and the UK might simply influence the immediate political environment in which a hefty programme of case-by-case legal analysis and diplomatic negotiation still needs urgently to be undertaken. Again – though still only in order to buy more time, for the completion of work which is ultimately to be considered essential – it might be worth considering other creative options for the legal construction of transition: for example, our differentiated dates for the entry into force of different elements of the EU-UK withdrawal agreement could mean that (strictly speaking) the UK would legitimately continue to be treated as a Member State for the purposes of the fulfilling the territorial, material and personal scope definitions of a wide range of existing international agreements.[[175]](#footnote-175)

**7. Concluding remarks**

Due entirely to its own choices, for which it should accept direct responsibility, the UK needs a transitional deal far more than the EU does. In theory, that should make it even easier and quicker to reach a negotiating consensus on the terms of a post-withdrawal “status quo” transitional regime as regards which the two sides already express a significant degree of common motivation and understanding.

Politically, the key questions are not about which of a potentially vast range of benefits should be offered to the UK as a third country; but instead about which limited reservations should be placed on continued cooperation with the UK as compared to its treatment as a Member State. From what we know of the two sides’ preferences, there are nevertheless a series of more or less important differences, which could create more or less difficult negotiating challenges – not least around issues such as continuing free movement of persons or the automatic application of changes to Union law.

Legally, the main issues concern how far the EU-UK desire for a post-withdrawal “status quo” transition can be neatly located within the novel legal basis provided by Article 50 TEU; particularly when the latter must in turn be viewed within the broader constitutional context provided by the Treaties and other basic principles of the Union legal order. From what we can work out, once again, there are a series of more or less important issues, which could generate more or less compelling legal objections – the most interesting conundrum being the extent to which the UK can still be treated as if it were a Member State when it is in fact a third country.

For both those sets of reasons – the political and the legal – the negotiation and conclusion of ambitious transitional arrangements on the basis of Article 50 TEU may prove to be more difficult and more controversial, and indeed take a longer period of time, than many politicians and other stakeholders appear to have assumed. Definitive answers to some of the most difficult legal questions can only be provided from Luxembourg – yet any judicial action (even if settled urgently) would just slow matters down even further. Either way, some of the main benefits to agreeing a quick transitional regime – at least when viewed from the perspective of the UK Government – may prove more difficult to deliver in practice than they appear in theory.[[176]](#footnote-176)

1. \* Liverpool Law School. This text was finalised on 1 February 2018. I am indebted to my colleagues on the CMLRev Editorial Board for their generous and invaluable suggestions; and also to participants at the 60th anniversary conference of the Europa Institute at Leiden University for their helpful comments.

   COM(2017) 784 Final (Commission Recommendation to European Council). To be read alongside TF50 (2017) 19 (Joint Report by Union negotiator and UK Government) and TF50 (2017) 20 (Joint Technical Note on Citizens’ Rights). [↑](#footnote-ref-1)
2. European Parliament, Resolution of 13 December 2017 on the state of play of negotiations with the United Kingdom. [↑](#footnote-ref-2)
3. European Council (Article 50), Guidelines of 15 December 2017. [↑](#footnote-ref-3)
4. The agreement on citizens’ rights comes closest to completion, but even that still requires further negotiation, e.g. on the UK’s new public authority to assist citizens with enforcement of their rights; or a mechanism for incorporating future changes to the Union’s social security cross-border coordination regime. [↑](#footnote-ref-4)
5. E.g. the challenges facing Ireland / Northern Ireland; as well as governance of the separation provisions of the withdrawal agreement. [↑](#footnote-ref-5)
6. E.g. status of existing IP rights; ongoing public procurement procedures; use of data / protection of information obtained / processed before withdrawal: see COM(2017) 784 Final, p 4. [↑](#footnote-ref-6)
7. European Council, December Guidelines, para 9. [↑](#footnote-ref-7)
8. European Council, December Guidelines, para 5. [↑](#footnote-ref-8)
9. E.g. D Davis’ Teesport Speech, “Implementation Period: A Bridge to the Future Partnership between the UK and EU” (26 January 2018). Also, e.g. G Clark, P Hammond and D Davis, Open Letter to Business Leaders (26 January 2018). [↑](#footnote-ref-9)
10. E.g. Déclaration presse par Michel Barnier suite à l’adoption d’une ecommendation visant à entamer les discussions relatives à la phase suivante du retrait ordonné du Royaume-Uni de l’Union européenne (20 December 2017). [↑](#footnote-ref-10)
11. Theresa May, “A New Era of Cooperation and Partnership between the UK and the EU” (22 September 2017) available at <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu> . [↑](#footnote-ref-11)
12. Based on the idea that Article 50 TEU gives explicit preference to an agreed departure, including as regards the effective date of withdrawal; and that that preference should hold true, even if the agreed date of withdrawal would fall beyond 2 years, which is mentioned in the Treaty text only in default of an agreement. [↑](#footnote-ref-12)
13. See, e.g. D Davis’ Teesport Speech, “Implementation Period: A Bridge to the Future Partnership between the UK and EU” (26 January 2018). [↑](#footnote-ref-13)
14. European Council (Article 50), Guidelines of 29 April 2017, paras 4 and 7. [↑](#footnote-ref-14)
15. UK Government, *The United Kingdom’s exit from and new partnership with the European Union* (Cm 9417). [↑](#footnote-ref-15)
16. Not only in the Florence speech itself; but also, e.g. PM Meeting with Donald Tusk (26 September 2017); PM Statement to the House of Commons on leaving the EU (9 October 2017); PM Statement to the House of Commons on the October European Council (23 October 2017); PM Statement to the House of Commons on EU negotiations (11 December 2017); PM Statement to the House of Commons on European Council (18 December 2017); Joint article by P Hammond and D Davis, “A Deep and Special Partnership” in *Frankfurter Allgemeine Zeitung* (10 January 2018); D Davis’ Teesport Speech, “Implementation Period: A Bridge to the Future Partnership between the UK and EU” (26 January 2018); G Clark, P Hammond and D Davis, Open Letter to Business Leaders (26 January 2018). [↑](#footnote-ref-16)
17. See further, e.g. Editorial Comments, “Theresa’s travelling circus: A very British entertainment trips its way from Florence to Brussels” (2017) 54 CMLRev 1613. [↑](#footnote-ref-17)
18. European Council, April Guidelines, para 2. [↑](#footnote-ref-18)
19. E.g. PM Statement to House of Commons on Leaving the EU (9 October 2017); David Davis’ Speech at UBS (14 November 2017); David Davis’ Speech to the Suddeutsche Zeitung Economic Summit (16 November 2017); PM Statement to the House of Commons on European Council (18 December 2017). [↑](#footnote-ref-19)
20. D Davis’ Teesport Speech, “Implementation Period: A Bridge to the Future Partnership between the UK and EU” (26 January 2018). [↑](#footnote-ref-20)
21. European Council (Article 50), Guidelines of 29 April 2017. [↑](#footnote-ref-21)
22. European Council (Article 50), Guidelines of 15 December 2017. [↑](#footnote-ref-22)
23. Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union (22 May 2017). See, e.g. Commission, Position Paper on Governance, TF50 (2017) 4 (12 July 2017). [↑](#footnote-ref-23)
24. Commission, COM(2017) 830 Final. [↑](#footnote-ref-24)
25. Council Decision supplementing the Council Decision of 22 May 2017, together with Annex containing supplementary directives (29 January 2018). [↑](#footnote-ref-25)
26. Especially: Déclaration presse par Michel Barnier suite à l’adoption d’une recommandation visant à entamer les discussions relatives à la phase suivante du retrait ordonné du Royaume-Uni de l’Union européenne (20 December 2017); Press Statement by Michel Barnier following the General Affairs Council (Article 50) on the adoption of negotiating directives on transitional arrangements (29 January 2018). [↑](#footnote-ref-26)
27. In particular: European Parliament, Resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union; Resolution of 3 October 2017 on the state of play of negotiations with the United Kingdom; Resolution of 13 December 2017 on the state of play of negotiations with the United Kingdom. [↑](#footnote-ref-27)
28. European Council, April Guidelines, para 6. [↑](#footnote-ref-28)
29. <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu> . Similarly, e.g. D Davis’ Teesport Speech, “Implementation Period: A Bridge to the Future Partnership between the UK and EU” (26 January 2018). [↑](#footnote-ref-29)
30. E.g. Déclaration presse par Michel Barnier suite à l’adoption d’une recommandation visant à entamer les discussions relatives à la phase suivante du retrait ordonné du Royaume-Uni de l’Union européenne (20 December 2017). [↑](#footnote-ref-30)
31. European Union (Withdrawal) Bill as published on 13 July 2017 (read together with Explanatory Notes and Memorandum concerning Delegated Powers in the Bill). [↑](#footnote-ref-31)
32. See UK Government, *The United Kingdom’s exit from and new partnership with the European Union* (Cm 9417) and Prime Minister’s Office, *The Queen’s Speech and Associated Background Briefing, on the Occasion of the Opening of Parliament* (21 June 2017). [↑](#footnote-ref-32)
33. See UK Government, *The United Kingdom’s exit from and new partnership with the European Union* (Cm 9417) – a process complicated considerably by the controversial proposals relating to devolution contained in the European Union (Withdrawal) Bill as published on 13 July 2017. [↑](#footnote-ref-33)
34. See the contribution by R Wessel in this Special Issue. [↑](#footnote-ref-34)
35. E.g. House of Commons Exiting the European Union Committee, *The progress of the UK’s negotiations with the EU on withdrawal* (Second Report of Session 2107-19, HC 372, 1 December 2017) para 83. [↑](#footnote-ref-35)
36. <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu> . Also, e.g. PM Statement to House of Commons on Leaving the EU (9 October 2017); David Davis’ Speech at UBS (14 November 2017); David Davis’ Speech to the Suddeutsche Zeitung Economic Summit (16 November 2017); Joint article by P Hammond and D Davis, “A Deep and Special Partnership” in *Frankfurter Allgemeine Zeitung* (10 January 2018); D Davis’ Teesport Speech, “Implementation Period: A Bridge to the Future Partnership between the UK and EU” (26 January 2018); G Clark, P Hammond and D Davis, Open Letter to Business Leaders (26 January 2018). [↑](#footnote-ref-36)
37. Déclaration presse par Michel Barnier suite à l’adoption d’une recommandation visant à entamer les discussions relatives à la phase suivante du retrait ordonné du Royaume-Uni de l’Union européenne (20 December 2017). Similarly: Press Statement by Michel Barnier following the General Affairs Council (Article 50) on the adoption of negotiating directives on transitional arrangements (29 January 2018). [↑](#footnote-ref-37)
38. UK Government, *The United Kingdom’s exit from and new partnership with the European Union* (Cm 9417) and <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu> . [↑](#footnote-ref-38)
39. See the UK Future Partnership Papers on, e.g. future customs arrangements (August 2017), enforcement and dispute resolution (August 2017), the exchange and protection of personal data (August 2017), providing a cross-border civil judicial cooperation framework (August 2017), collaboration on science and innovation (September 2017), foreign policy, defence and development (September 2017), security, law enforcement and criminal justice (September 2017). [↑](#footnote-ref-39)
40. E.g. D Davis’ Teesport Speech, “Implementation Period: A Bridge to the Future Partnership between the UK and EU” (26 January 2018), which suggests that the primary purpose of transition is to allow more time for the successful conclusion and ratification of the UK’s “deep and special partnership” with the EU. See also, e.g. the discussion in House of Commons Exiting the European Union Committee, *The progress of the UK’s negotiations with the EU on withdrawal* (Second Report of Session 2107-19, HC 372, 1 December 2017) paras 107-112. [↑](#footnote-ref-40)
41. Déclaration presse par Michel Barnier suite à l’adoption d’une recommandation visant à entamer les discussions relatives à la phase suivante du retrait ordonné du Royaume-Uni de l’Union européenne (20 December 2017). Also, e.g. Speech by Michel Barnier at the Trends Manager of the Year 2017 event (9 January 2018). [↑](#footnote-ref-41)
42. Council Decision supplementing the Council Decision of 22 May 2017 (29 January 2018), para 22 of the Annex: transitional arrangements should apply from the date of entry into force of the withdrawal agreement and should not last beyond 31 December 2020. [↑](#footnote-ref-42)
43. On which, note the Outcome of Proceedings of the General Affairs Council (Article 50) on 29 January 2018 (XT 21012/18): Annex, Council statement for the minutes, para 1. [↑](#footnote-ref-43)
44. See further below on the duration of transition, including the possibility of including a power of extension: section 4.5. [↑](#footnote-ref-44)
45. Consider especially European Council, April Guidelines, para 6. [↑](#footnote-ref-45)
46. European Council, April Guidelines, para 6. See also, e.g. Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union together with Annex containing Negotiating Directives (22 May 2017) para 19 of the Annex. [↑](#footnote-ref-46)
47. European Council, December Guidelines, paras 5 and 9. [↑](#footnote-ref-47)
48. E.g. D Davis’ Teesport Speech, “Implementation Period: A Bridge to the Future Partnership between the UK and EU” (26 January 2018); G Clark, P Hammond and D Davis, Open Letter to Business Leaders (26 January 2018). [↑](#footnote-ref-48)
49. European Council, December Guidelines, para 3; Council Decision supplementing the Council Decision of 22 May 2017 (29 January 2018), Annex, para 13. Note also the Outcome of Proceedings of the General Affairs Council (Article 50) on 29 January 2018 (XT 21012/18), Annex, Council statement for the minutes, para 1. [↑](#footnote-ref-49)
50. In accordance with Protocol No 15. [↑](#footnote-ref-50)
51. European Council, December Guidelines, para 4. [↑](#footnote-ref-51)
52. Council Decision supplementing the Council Decision of 22 May 2017 (29 January 2018), Annex, para 14. [↑](#footnote-ref-52)
53. Contrast with Commission, COM(2017) 830 Final, Annex, para 13. [↑](#footnote-ref-53)
54. See further, e.g. A Dashwood, M Dougan, M Ross, E Spaventa and D Wyatt, *Wyatt and Dashwood’s European Union Law* (6th ed, 2011, Hart Publishing). [↑](#footnote-ref-54)
55. European Union (Withdrawal) Bill as published on 13 July 2017 (read together with Explanatory Notes and Memorandum concerning Delegated Powers in the Bill). [↑](#footnote-ref-55)
56. Clause 5(1). [↑](#footnote-ref-56)
57. Clause 5(4), subject to Clause 5(5). [↑](#footnote-ref-57)
58. Clause 5(6) and Schedule 1, paras 2 and 3. [↑](#footnote-ref-58)
59. See Joint Report, TF50 (2017) 19, paras 33-36. [↑](#footnote-ref-59)
60. As with the citizens’ rights provisions of the withdrawal agreement: see TF50 (2017) 19 (Joint Report by Union negotiator and UK Government) para 36. [↑](#footnote-ref-60)
61. See further, e.g. M Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (2015, Hart Publishing). [↑](#footnote-ref-61)
62. European Council, December Guidelines, para 4. [↑](#footnote-ref-62)
63. Council Decision supplementing the Council Decision of 22 May 2017 (29 January 2018), Annex, para 13. [↑](#footnote-ref-63)
64. Commission, COM(2017) 830 Final, Annex, para 12. [↑](#footnote-ref-64)
65. D Davis’ Teesport Speech, “Implementation Period: A Bridge to the Future Partnership between the UK and EU” (26 January 2018). [↑](#footnote-ref-65)
66. D Davis’ Teesport Speech, “Implementation Period: A Bridge to the Future Partnership between the UK and EU” (26 January 2018). [↑](#footnote-ref-66)
67. Indeed, it is difficult to see how even the more limited obligations of “non-frustration” under caselaw such as Case C-129/96, *Inter-Environnement Wallonie*, ECLI:EU:C:1997:628 would be amenable to effective judicial enforceability against the UK during transition. [↑](#footnote-ref-67)
68. Comprising not only the European Union (Withdrawal) Bill but also, e.g. the subsequently announced though not yet published Withdrawal Agreement and Implementation Bill: see David Davis, Statement to House of Commons on 13 November 2017. [↑](#footnote-ref-68)
69. See Clause 5(2) of the Bill as published on 13 July 2017. [↑](#footnote-ref-69)
70. First made in the Florence speech but repeated, e.g. in PM Statement to House of Commons on Leaving the EU (9 October 2017); PM Statement to House of Commons on European Council (18 December 2017); D Davis’ Teesport Speech, “Implementation Period: A Bridge to the Future Partnership between the UK and EU” (26 January 2018). [↑](#footnote-ref-70)
71. European Parliament, Resolution of 13 December 2017, para 14. [↑](#footnote-ref-71)
72. Council Decision supplementing the Council Decision of 22 May 2017 (29 January 2018), Annex, para 16; read together with the Outcome of Proceedings of the General Affairs Council (Article 50) on 29 January 2018 (XT 21012/18), Annex, Council statement for the minutes, para 3. [↑](#footnote-ref-72)
73. Which will of course take into account the impact of any UK deals, e.g. on the integrity of the customs union and single market: see further section 6 (below). [↑](#footnote-ref-73)
74. See, e.g. Department for International Trade, *Preparing for our Future UK Trade Policy* (Cm 9470, published in October 2017). See further section 6 (below). [↑](#footnote-ref-74)
75. European Council, December Guidelines, paras 3 and 4. [↑](#footnote-ref-75)
76. European Parliament, Resolution of 3 October 2017 on the state of play of negotiations with the United Kingdom, para 3. [↑](#footnote-ref-76)
77. Council Decision supplementing the Council Decision of 22 May 2017 (29 January 2018), Annex, para 9. [↑](#footnote-ref-77)
78. Cp. House of Commons Exiting the European Union Committee, *The progress of the UK’s negotiations with the EU on withdrawal* (Second Report of Session 2107-19, HC 372, 1 December 2017) paras 97-98. [↑](#footnote-ref-78)
79. PM Statement to House of Commons on Leaving the EU (9 October 2017). [↑](#footnote-ref-79)
80. E.g. PM Statement to House of Commons on European Council (18 December 2017). [↑](#footnote-ref-80)
81. E.g. D Davis’ Teesport Speech, “Implementation Period: A Bridge to the Future Partnership between the UK and EU” (26 January 2018). [↑](#footnote-ref-81)
82. See Article 8 of Directive 2004/38 [2004] OJ L158/77. [↑](#footnote-ref-82)
83. As reported, e.g. at <http://www.bbc.co.uk/news/uk-politics-42896996>. [↑](#footnote-ref-83)
84. In fact, such a model clearly harks back to the UK’s original proposals for dealing with migrant Union nationals as set out in *Safeguarding the position of EU citizens living in the UK and UK nationals living in the EU* (June 2017). [↑](#footnote-ref-84)
85. European Council, April Guidelines, paras 1 and 3. [↑](#footnote-ref-85)
86. European Council, April Guidelines, para 6. [↑](#footnote-ref-86)
87. European Council, April Guidelines, paras 1 and 3. [↑](#footnote-ref-87)
88. European Council, December Guidelines, para 3. [↑](#footnote-ref-88)
89. <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu> . [↑](#footnote-ref-89)
90. Available at <https://www.gov.uk/government/news/david-davis-speech-to-the-suddeutsche-zeitung-economic-summit> . See similarly David Davis’ Speech at UBS (14 November 2017). [↑](#footnote-ref-90)
91. Draft Guidelines published on 8 December 2017, para 3. [↑](#footnote-ref-91)
92. European Council, December Guidelines, para 3. [↑](#footnote-ref-92)
93. Council Decision supplementing the Council Decision of 22 May 2017 (29 January 2018), Annex, paras 19-20. Para 21 also mentions specific consultations for the fixing of fishing opportunities during transition. Note also the Outcome of Proceedings of the General Affairs Council (Article 50) on 29 January 2018 (XT 21012/18): Annex, Commission statement for the minutes. [↑](#footnote-ref-93)
94. E.g. European Council, April Guidelines, paras 25-27. [↑](#footnote-ref-94)
95. E.g. the UK should take all necessary measures to preserve the integrity of the Single Market and its customs authorities should continue to act in accordance with the mission of EU customs authorities: Council Decision supplementing the Council Decision of 22 May 2017 (29 January 2018), Annex, para 16. [↑](#footnote-ref-95)
96. E.g. if indeed the UK is to be exempted from the obligation to respect and act in accordance with the Union’s ordinary external relations competences: see section 4.3 (above). [↑](#footnote-ref-96)
97. D Davis’ Teesport Speech, “Implementation Period: A Bridge to the Future Partnership between the UK and EU” (26 January 2018). Also, e.g. G Clark, P Hammond and D Davis, Open Letter to Business Leaders (26 January 2018). [↑](#footnote-ref-97)
98. The exception is the UK’s explicit demand for a mechanism to address concerns about the impact of new Union measures on British interests: see section 4.2 (above). [↑](#footnote-ref-98)
99. As well as any relevant competences (e.g. of supervision or control) exercised by other Union agencies etc: see Council Decision supplementing the Council Decision of 22 May 2017 (29 January 2018), Annex, para 18. [↑](#footnote-ref-99)
100. Commission, *Position Paper on Governance*, TF50 (2017) 4 (12 July 2017). [↑](#footnote-ref-100)
101. Commission, *Position Paper on Governance*, TF50 (2017) 4 (12 July 2017). [↑](#footnote-ref-101)
102. <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu> . [↑](#footnote-ref-102)
103. <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu> . Repeated, e.g. in PM Statement to House of Commons on Leaving the EU (9 October 2017). The “around 2 years” formula per se has been recited on a regular basis since Florence, e.g. in G Clark, P Hammond and D Davis, Open Letter to Business Leaders (26 January 2018). [↑](#footnote-ref-103)
104. European Council, December Guidelines, para 4. [↑](#footnote-ref-104)
105. E.g. European Parliament, Resolution of 5 April 2017, para 28; Resolution of 13 December 2017, para 12. [↑](#footnote-ref-105)
106. Commission, COM(2017) 830 Final, Annex, para 21; Council Decision supplementing the Council Decision of 22 May 2017 (29 January 2018), Annex, para 22. [↑](#footnote-ref-106)
107. Déclaration presse par Michel Barnier suite à l’adoption d’une recommandation visant à entamer les discussions relatives à la phase suivante du retrait ordonné du Royaume-Uni de l’Union européenne (20 December 2017). [↑](#footnote-ref-107)
108. See section 3 (above). [↑](#footnote-ref-108)
109. European Council, April Guidelines, para 4. [↑](#footnote-ref-109)
110. See Articles 198-203 TFEU read together with Article 355(2) TFEU and Annex II. [↑](#footnote-ref-110)
111. Except insofar as provided otherwise under the Treaty of Accession 1972, e.g. Case C-267/16, *Buhagiar*, ECLI:EU:C:2018:26. [↑](#footnote-ref-111)
112. European Council, April Guidelines, para 24. [↑](#footnote-ref-112)
113. Council Decision supplementing the Council Decision of 22 May 2017 (29 January 2018) Annex, para 5. Note also Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union (22 May 2017) Annex, para 7. [↑](#footnote-ref-113)
114. See, e.g. C Hillion (ed), *EU Enlargement: A Legal Approach* (2004, Hart Publishing). [↑](#footnote-ref-114)
115. E.g. as with Protocol No 36 on transitional provisions (implementing the institutional changes agreed under the Treaty of Lisbon 2007). [↑](#footnote-ref-115)
116. Particularly in fields such as agricultural policy: consider, e.g. Article 30 of Regulation 404/93 on the common organisation of the market in bananas [1993] OJ L47/1 as interpreted in rulings such as Case C-442/99, *Cordis* v. *Commission,* ECLI:EU:C:2001:493 and Case C-312/00, *Commission* v. *Camar*, ECLI:EU:C:2002:736. [↑](#footnote-ref-116)
117. E.g. Case C-309/02, *Radlberger*, ECLI:EU:C:2004:799; Case C-320/03, *Commission* v. *Austria*, ECLI:EU:C:2005:684; Case C-377/07, *STEKO Industriemontage*, ECLI:EU:C:2009:29. [↑](#footnote-ref-117)
118. Especially since, in the case of withdrawal and particularly having regard to the UK situation, both withdrawal and transition are being negotiated with no clear alternative end-state in sight. [↑](#footnote-ref-118)
119. E.g. <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu> - though UK parliamentary reports are more skeptical about how far Article 50 TEU can legally support transition, e.g. House of Commons Exiting the European Union Committee, *The progress of the UK’s negotiations with the EU on withdrawal* (Second Report of Session 2107-19, HC 372, 1 December 2017); House of Lords European Union Committee, *Brexit: Deal or No Deal* (Seventh Report of Session 2017-19, HL 46, 7 December 2017). [↑](#footnote-ref-119)
120. Commission, COM(2017) 830 Final, p 2. [↑](#footnote-ref-120)
121. On the nature of Article 50 TEU as a legal competence defined by the political objective of securing an orderly withdrawal, see the contribution by C Hillion to this Special Issue. [↑](#footnote-ref-121)
122. The EEA Agreement being an obvious model in this regard. [↑](#footnote-ref-122)
123. See further, e.g. A Dashwood, M Dougan, M Ross, E Spaventa and D Wyatt, *Wyatt and Dashwood’s European Union Law* (6th ed, 2011, Hart Publishing) Ch 27. [↑](#footnote-ref-123)
124. As with the EU-Ukraine Association Agreement or the CETA with Canada. [↑](#footnote-ref-124)
125. See further, e.g. P Koutrakos (ed), *Mixed Agreements Revisited: The EU and Its Member States in the World* (2010, Hart Publishing). [↑](#footnote-ref-125)
126. Subject to the possibility of a Council decision pursuant to Article 218(5) TFEU for provisional application by the Union of an international agreement before its entry into force. See further, e.g. G van der Loo and R Wessel, “The non-ratification of mixed agreements: legal consequences and solutions” (2017) 54 CMLRev 735. [↑](#footnote-ref-126)
127. Articles 3(1) and 3(2) TFEU; but particularly in the field of the common commercial policy under Article 207 TFEU. [↑](#footnote-ref-127)
128. On Article 207 TFEU, e.g. Case C-414/11, *Daiichi Sankyo*, ECLI:EU:C:2013:520; Case C-137/12, *Commission* v. *Council*, ECLI:EU:C:2013:675; Case C-389/15, *Commission* v. *Council*, ECLI:EU:C:2017:798. Though note rulings such as Opinion 3/15, *Marrakesh Treaty*, ECLI:EU:C:2017:114. [↑](#footnote-ref-128)
129. Opinion 2/15, *Singapore Agreement*, ECLI:EU:C:2017:376. Note the clarification in Case C-600/14, *Germany* v. *Council*, ECLI:EU:C:2017:935. [↑](#footnote-ref-129)
130. Again, as with the EU-Ukraine Association Agreement (impact of Dutch referendum) or the CETA with Canada (regional parliamentary ratification in Belgium). [↑](#footnote-ref-130)
131. Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union together with Annex containing Negotiating Directives (22 May 2017). See also Commission, Recommendation for a Council decision authorising the Commission to open negotiations on an agreement with the UK setting out the arrangements for its withdrawal from the European Union, COM(2017) 218 Final. [↑](#footnote-ref-131)
132. Déclaration presse par Michel Barnier suite à l’adoption d’une recommandation visant à entamer les discussions relatives à la phase suivante du retrait ordonné du Royaume-Uni de l’Union européenne (20 December 2017). [↑](#footnote-ref-132)
133. See further, e.g. Editorial Comments, “Withdrawing from the ‘ever closer union’?” (2016) 53 CMLRev 1491; P Eeckhout and E Frantziou, “Brexit and Article 50 TEU: A Constitutionalist Reading” (2017) 54 CMLRev 695. [↑](#footnote-ref-133)
134. E.g. Opinion 1/91, *EEA Agreement,* ECLI:EU:C:1991:490; Opinion 1/92, *EEA Agreement II,* ECLI:EU:C:1992:189; Opinion 1/00, *European Common Aviation Area,* ECLI:EU:C:2002:231; Cases C-402/05 & C-415/05, *Kadi,* ECLI:EU:C:2008:461; Opinion 1/09, *European and Community Patents Court,* ECLI:EU:C:2011:123. [↑](#footnote-ref-134)
135. See further, e.g. C Contartese, “The autonomy of the EU legal order in the ECJ’s external relations case law: From the ‘essential’ to the ‘specific characteristics’ of the Union and back again” (2017) 54 CMLRev 1627. [↑](#footnote-ref-135)
136. E.g. Case C-525/14, *Commission* v. *Czech Republic,* ECLI:EU:C:2016:714. [↑](#footnote-ref-136)
137. As discussed, e.g. in House of Lords European Union Committee, *Brexit: Financial Services* (HL 81, 15 December 2016). [↑](#footnote-ref-137)
138. See now Article 45 of the General Data Protection Regulation 2016/679 [2016] OJ L119/1. [↑](#footnote-ref-138)
139. Agreement on the European Economic Area [1994] OJ L1/3. [↑](#footnote-ref-139)
140. Consider the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway [2006] OJ L292/2. [↑](#footnote-ref-140)
141. See section 4.4 (above). [↑](#footnote-ref-141)
142. Cp. rulings such as Case C-28/12, *Commission* v. *Council*, ECLI:EU:C:2015:282 on the potential for unauthorised participation in the Union’s internal decision-making procedures, even by the Member States themselves, to violate the autonomy of Union law. [↑](#footnote-ref-142)
143. See Joint Report, TF50 (2017) 19, para 38. [↑](#footnote-ref-143)
144. E.g. Opinion 1/91, *EEA Agreement*, ECLI:EU:C:1991:490; Opinion 1/92, *EEA Agreement II,* ECLI:EU:C:1992:189. [↑](#footnote-ref-144)
145. E.g. European Council, April Guidelines, para 1. [↑](#footnote-ref-145)
146. E.g. Speech by Michel Barnier on German Employers’ Day (Deutscher Arbeitgebertag) 2017 (29 November 2017); Speech by Michel Barnier at the Trends Manager of the Year 2017 event (9 January 2018). [↑](#footnote-ref-146)
147. See also, e.g. Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union together with Annex containing Negotiating Directives (22 May 2017) paras 6 and 8 of the Annex. [↑](#footnote-ref-147)
148. E.g. Council Decision supplementing the Council Decision of 22 May 2017 (29 January 2018) Annex, para 13. [↑](#footnote-ref-148)
149. Again, the EEA Agreement providing a potential model in this regard. [↑](#footnote-ref-149)
150. In particular: Directive 2004/38 [2004] OJ L158/77. [↑](#footnote-ref-150)
151. Under Article 263 TFEU. See section 4.4 (above). [↑](#footnote-ref-151)
152. See section 2 (above). [↑](#footnote-ref-152)
153. E.g. D Davis’ Teesport Speech, “Implementation Period: A Bridge to the Future Partnership between the UK and EU” (26 January 2018). Even regardless of whether the Union would have been prepared to agree (especially given the prospect of European Parliamentary elections in May 2019): see, e.g. European Parliament, Resolution of 5 April 2017: the withdrawal agreement (and any transitional arrangements) should enter into force well before the May 2019 elections (para 3). [↑](#footnote-ref-153)
154. Recall robust rulings such as Cases C-402/05 & C-415/05, *Kadi,* ECLI:EU:C:2008:461. Note also rulings specifically on the judicial scrutiny of transitional provisions, e.g. Case C-33/08, *Agrana Zucker*, ECLI:EU:C:2009:367. [↑](#footnote-ref-154)
155. See also P Craig, “Brexit, A Drama: The Interregnum” (2017) 36 *Yearbook of European Law* 1. [↑](#footnote-ref-155)
156. Joined Cases C-159/10 & C-160/10, *Fuchs*, ECLI:EU:C:2001:508, para 95. Also, e.g. Case C-309/02, *Radlberger*, ECLI:EU:C:2004:799. [↑](#footnote-ref-156)
157. Contrast, e.g. with the situation surrounding Union accession to the ECHR as addressed in Opinion 2/13, *Accession to ECHR,* ECLI:EU:C:2014:2454. [↑](#footnote-ref-157)
158. Case C-93/00, *Parliament* v. *Council*, ECLI:EU:C:2001:689. [↑](#footnote-ref-158)
159. Opinion 2/13, *Accession to ECHR,* ECLI:EU:C:2014:2454. [↑](#footnote-ref-159)
160. As the EU27 have indeed said, e.g. European Council, December Guidelines, para 3; Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union together with Annex containing Negotiating Directives (22 May 2017) para 8 of the Annex. Similarly, e.g. A Lazowski, “Withdrawal from the European Union and Alternatives to Membership” (2012) 37 ELRev 523; P Eeckhout and E Frantziou, “Brexit and Article 50 TEU: A Constitutionalist Reading” (2017) 54 CMLRev 695. [↑](#footnote-ref-160)
161. However, see the contrary view expressed in European Parliamentary Research Service, *UK Withdrawal from the European Union: Legal and Procedural Issues* (March 2017) pp 7-8. [↑](#footnote-ref-161)
162. Particularly taking into account the uncertain relationship between the original European Union (Withdrawal) Bill, Clause 9 of which was meant to provide the legal basis for domestic implementation of the Article 50 TEU agreement; and the subsequently announced (but still to be published) Withdrawal Agreement and Implementation Bill, which is now meant to take over much of that intended role. Such uncertainty also links up with questions, e.g. about having a single / fixed or multiple / flexible “exit day/s” for the purposes of the withdrawal legislation package – which in turn will influence, e.g. whether the UK will end up being able simply to prolong or instead having to replicate the provisions and powers of the European Communities Act 1972 (in order to comply with its transitional obligations). [↑](#footnote-ref-162)
163. European Council, April Guidelines, para 13. [↑](#footnote-ref-163)
164. See the contribution by R Wessel in this Special Issue. [↑](#footnote-ref-164)
165. European Council, April Guidelines, para 13. [↑](#footnote-ref-165)
166. See further, e.g. M Cremona, “UK Trade Policy” in M Dougan (ed), *The UK After Brexit: Legal and Policy Challenges* (2017, Intersentia Publishing). The situation of the EEA Agreement has attracted particular attention: see further, e.g. D Sif Tynes and E L Haugsdal, “In, out or in-between? The UK as a contracting party to the Agreement on the European Economic Area” (2016) 41 ELRev 753; C Hillion, “Brexit means Br(EEA)xit: UK Withdrawal from the EU and its implications for the EEA” (2018) 55 CMLRev forthcoming. [↑](#footnote-ref-166)
167. See Trade Bill and Explanatory Notes (published on 7 November 2017). [↑](#footnote-ref-167)
168. E.g. consider the frosty reception afforded to the EU-UK joint letter of 11 October 2017 seeking to propose joint solutions to the issues raised by UK withdrawal when it comes to the World Trade Organisation. See further, e.g. G Messenger, “Membership of the World Trade Organisation” in M Dougan (ed), *The UK After Brexit: Legal and Policy Challenges* (2017, Intersentia Publishing). [↑](#footnote-ref-168)
169. European Council, December Guidelines, para 4. [↑](#footnote-ref-169)
170. Council Decision supplementing the Council Decision of 22 May 2017 (29 January 2018) Annex, para 15 (though without UK participation in any bodies established thereunder). Contrast with the Commission’s original proposals: COM(2017) 830 Final, Annex, para 14. [↑](#footnote-ref-170)
171. I am very grateful to Marise Cremona for pointing out the parallels here with the “lop-sided” nature of the EU-Turkey customs union agreement (Decision 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union). [↑](#footnote-ref-171)
172. Press Statement by Michel Barnier following the General Affairs Council (Article 50) on the adoption of negotiating directives on transitional arrangements (29 January 2018). [↑](#footnote-ref-172)
173. Consider, e.g. House of Commons Exiting the European Union Committee, *The progress of the UK’s negotiations with the EU on withdrawal* (Second Report of Session 2107-19, HC 372, 1 December 2017) para 81. [↑](#footnote-ref-173)
174. D Davis’ Teesport Speech, “Implementation Period: A Bridge to the Future Partnership between the UK and EU” (26 January 2018). Similarly, e.g. G Clark, P Hammond and D Davis, Open Letter to Business Leaders (26 January 2018). [↑](#footnote-ref-174)
175. See the suggestion in Section 5.3 (above). [↑](#footnote-ref-175)
176. On the idea of transition as a wasting asset: see further, e.g. House of Commons Exiting the European Union Committee, *The progress of the UK’s negotiations with the EU on withdrawal* (Second Report of Session 2107-19, HC 372, 1 December 2017). [↑](#footnote-ref-176)