**So Long, Farewell, Auf Wiedersehen, Goodbye: The UK’s Withdrawal Package**

*Michael Dougan\**

*Abstract: The United Kingdom left the European Union at midnight CET on 31 January 2020. This article provides a critical analysis of the Withdrawal Package concluded by the Union and the UK. As regards the Withdrawal Agreement designed to facilitate an orderly departure, we analyse the provisions on: governance arrangements; the transition period; citizens’ rights; and the Ireland / Northern Ireland border. We then discuss the prospects for future EU-UK relations as expressed in their joint Political Declaration and developed in their respective post-withdrawal negotiating positions.*

**1. Introduction**

Or should that be “good luck”?

The United Kingdom left the European Union at midnight CET on 31 January 2020.[[1]](#footnote-1) This article provides a critical analysis of the Withdrawal Package concluded by the Union and the UK in order to facilitate an orderly departure (Withdrawal Agreement) and outline the nature of their future relationship (Political Declaration).[[2]](#footnote-2)

We will not revisit, but simply take for granted that readers are familiar with, many of the broader factors and debates that led to this outcome: for example, the gaping chasm between the reality of the UK as a leading Member State and the distorted portrayal / perception of Union membership among large parts of the British media / public opinion; the alleged origins of the 2016 referendum as a tool primarily of internal Conservative Party management and electoral posturing; a referendum campaign in which the lacklustre Remain effort was far surpassed by the systematic dishonesty of the Leave movement;[[3]](#footnote-3) extensive academic as well as journalistic and political efforts both to explain the factors behind, and interpret the significance of, Leave’s 51.9%-48.1% victory; the intense scholarly investigation which erupted into the legal framework for withdrawal provided for under Article 50 TEU; and not least, the often wearisome experience of the EU-UK negotiations together with the equally protracted (though at least entertainingly tragi-comedic-dramatic) process of British parliamentary approval.

That said, Section 2 will summarise the essential legal and political factors that decisively shaped the nature and contents of the final Withdrawal Package – particularly when it came to the crucial question of defining the proper scope, sequence and timing of negotiations under Article 50 TEU. Section 3 will then provide a critical overview of the Withdrawal Agreement (hereafter: the Agreement) on the UK’s orderly departure from the Union – focusing on the key issues of governance arrangements, the transition period, citizens’ rights and the Irish border. In Section 4, we will discuss the prospects for future EU-UK relations as set out in the Political Declaration and further developed in each party’s post-withdrawal negotiating positions. Section 5 offers some brief concluding observations.

**2. Legal and Political Context of the Withdrawal Package**

The principal aim of Article 50 TEU is not to grant Member States a right to withdraw from the Union: that prerogative was widely assumed to exist well before and regardless of the Lisbon Treaty reforms.[[4]](#footnote-4) Rather, Article 50 TEU is intended to facilitate a Member State’s orderly withdrawal from the Union on the basis of a negotiated settlement and, to that end, lays down the bare bones of the legal process required to achieve such an outcome.[[5]](#footnote-5)

Of course: the very act of withdrawal will, in any event, require certain unilateral measures by the relevant State, the Union institutions and the remaining Member States, so as to prepare their respective internal legal orders for those consequences which are inherent in or inevitable from departure. For example, as regards the Union: besides the physical relocation of UK-based EU agencies,[[6]](#footnote-6) the Commission undertook a screening exercise which resulted in amendments to various Union regulatory regimes so as to reflect the fact of UK departure – but otherwise assumed that references to the UK in primary and all remaining secondary Union law could effectively be treated as defunct pending their formal amendment or repeal in due course.[[7]](#footnote-7) For its part, the task facing the UK was significantly more daunting: given the high degree to which Union law is integrated into the legal system of every Member State, the UK had to implement a scheme that would protect basic standards of legal continuity and certainty by retaining and adapting all existing provisions of Union law;[[8]](#footnote-8) at the same time as designing entirely new regimes in fields (such as trade, customs, agriculture, fisheries and immigration) where the replication of Union rules (even with extensive changes) would be insufficient to plug the regulatory gap directly resulting from withdrawal.[[9]](#footnote-9) And all that is just the basic prelude to the longer term processes of constitutional change unleashed by Brexit: de-Europeanisation of the UK legal system;[[10]](#footnote-10) and the future institutional and legal evolution of the Union itself now free (for better and for worse) from British influence.[[11]](#footnote-11)

And of course: Union law allows for outcomes other than a negotiated withdrawal under Article 50 TEU. For example: it remained a substantial possibility, throughout the entire period after June 2016, that the UK might leave (by default) without any agreement – forcing the Union, as well as the UK itself, to undertake contingency plans aimed at reducing the adverse impacts of such a “no deal Brexit”.[[12]](#footnote-12) Or again: there was a chance (albeit only ever slim) that the UK might change its mind and exercise its right (as confirmed by the CJEU in *Wightman*) to revoke its original notification of intention to withdraw and simply remain a Member State under its current constitutional terms.[[13]](#footnote-13) But each of those alternative outcomes was effectively ruled out following the Conservative Party victory in the UK’s general election of December 2019: there would indeed be a deal; though there would be no second referendum to verify whether withdrawal on those terms still reflected the will of the UK population.

And so, in the end, Article 50 TEU fulfilled its purpose of producing an orderly withdrawal based on a negotiated settlement. To some extent, the final Withdrawal Package is the natural product of logical deduction and responsible management: conscientious civil servants identifying relevant issues and working out appropriate solutions informed by insight and experience. However, the Withdrawal Package is also the direct spawn of various legal and political factors, affecting both the EU and the UK, which together had a decisive impact upon the very agenda of the Article 50 TEU negotiations as well as the more detailed contents of the parties’ ultimate agreement.

*2.1. The EU’s negotiating position under Article 50 TEU*

*2.1.1. Institutional roles and responsibilities*

The UK delivered its formal notification of intention to withdraw on 29 March 2017.[[14]](#footnote-14) In accordance with Article 50 TEU, the European Council then drew up initial guidelines for handling the UK’s intended withdrawal.[[15]](#footnote-15) On the basis of a Commission recommendation,[[16]](#footnote-16) the Council opened negotiations and appointed the Union negotiator.[[17]](#footnote-17) Formal talks with the UK commenced on 19 June 2017 (after another delay created by its Government’s decision to call an early general election in June 2017).[[18]](#footnote-18) The Council and the Commission maintained a close working relationship throughout the process: for example, an ad hoc Working Party on Article 50 TEU held regular meetings;[[19]](#footnote-19) additional negotiating directives were proposed and adopted as the discussions proceeded.[[20]](#footnote-20) Ultimately, Article 50 TEU provides that any withdrawal agreement must be concluded by the Council (acting by super-QMV) after obtaining the consent of the European Parliament.[[21]](#footnote-21) There is no express provision for the approval of any accompanying political declaration outlining the future relationship: it was simply assumed that that would be granted directly by the European Council and indirectly by the other institutions (for example, by the European Parliament when endorsing the withdrawal treaty).

Beyond the basic institutional responsibilities laid down in Article 50 TEU itself, several features of the Union’s approach to withdrawal, perhaps not so immediately obvious from the bare text of the Treaties, nevertheless proved central to the conduct and outcome of the EU-UK negotiations.[[22]](#footnote-22)

First, the role and influence of the European Council were far from exhausted by adoption of the initial guidelines foreseen under Article 50 TEU. On the contrary: those very guidelines declared that the European Council would remain permanently seized of the Article 50 TEU situation:[[23]](#footnote-23) for example, reviewing the state of play at regular points in the negotiations;[[24]](#footnote-24) deciding whether sufficient progress had been achieved as to justify broadening or deepening the agenda;[[25]](#footnote-25) adopting additional guidelines to determine the scope and conduct of the withdrawal discussions;[[26]](#footnote-26) and granting political approval to the proposed withdrawal package as a whole and in prelude to initiating the formal procedure for approval of the withdrawal agreement under Union law.[[27]](#footnote-27) Needless to say, that continuing oversight of a major event in the Union’s constitutional life falls squarely within the European Council’s mandate to provide the Union with the necessary impetus for its development and define its general political directions and priorities.[[28]](#footnote-28)

Secondly, not only the European Council but also the European Parliament made an important contribution to the conduct of negotiations with the UK under the Article 50 TEU process. In fact, the European Parliament made it clear almost from the very moment of the 2016 referendum result that it wished to use the requirement for its eventual consent to any agreement as leverage to play an active and influential role in shaping the terms of UK withdrawal.[[29]](#footnote-29) And indeed, by passing well-timed resolutions expressing its own (often detailed and critical) assessment of the negotiations, the European Parliament sought to exercise significant influence over the formulation of Union positions, not only by the Commission, but also by the European Council (in adopting its periodic assessments and guidelines) and the Council (in settling the detailed negotiating directives and liaising with the Commission via the ad hoc Working Party).[[30]](#footnote-30)

Thirdly, the withdrawal negotiations quickly identified certain issues which were to be considered of major concern to specific Member States. The prime example is the extraordinary economic and political impact of the UK’s departure on Ireland; but important issues were also raised by Cyprus as regards the future of the UK’s Sovereign Base Areas in that Member State; and by Spain when it came to the treatment of Gibraltar in the context of UK withdrawal. The Union institutions sought to respect the importance and sensitivity of those special national interests when making political judgments about the overall progress and outcomes of the negotiations.[[31]](#footnote-31) Even if no Member State held a formal veto over conclusion of the withdrawal agreement as a matter of Union law, it is arguable that the Union in practice acted only with the consent of certain Member States, at least on certain issues – and in the case of Ireland, even for the agreement as a whole.[[32]](#footnote-32)

Fourthly, however, the Union did not go so far as to contemplate any possibility of the Agreement being treated as a mixed agreement and as such open for the Member States to insist upon the need for ratification by their national institutions as well by the Union itself – and this was so, even despite the fact that certain provisions of the draft treaty (such as those concerning the future treatment of UK citizens residing within the EU27) clearly intruded upon issues of national competence. In particular, the Council explicitly endorsed the Commission’s proposed understanding that Article 50 TEU gives the Union an exceptional horizontal power to negotiate all matters necessary to arrange for 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 fall within shared competence.[[33]](#footnote-33) But the Council also stressed that this exceptional power was solely and strictly for the purposes of arranging withdrawal; it would not affect in any way the distribution of competences between the Union and the Member States as regards future instruments in the areas concerned.[[34]](#footnote-34)

*2.1.2. The European Council’s “core principles”*

The initial guidelines adopted by the European Council in April 2019 assumed a position of central importance in the entire withdrawal process, insofar as they identified a series of “core principles” which would be treated as applicable to any and all negotiations conducted under the auspices of Article 50 TEU.[[35]](#footnote-35)

Many of those “core principles” were primarily legal in character: the European Council sought to recall certain basic rules that should underpin the Article 50 TEU process, often derived / adapted from the existing caselaw of the Court of Justice. For example: the Union must preserve its own autonomy as regards both decision-making and the role of the CJEU – an obvious reference to the constitutional principles developed by the Court in its caselaw and designed to protect the Union legal order from external interference.[[36]](#footnote-36) Or again: there should be no separate negotiations by individual Member States on matters pertaining to the UK’s withdrawal – this time implicitly referencing the special obligations of loyal cooperation previously identified by the Court in situations where the Commission submits proposals for concerted action by the Union institutions.[[37]](#footnote-37) A final illustration: the European Council also sought to explain how the general duty of sincere cooperation under Article 4(3) TEU should be adapted to the unprecedented situation in which the UK continued to be a Member State but was also actively engaged in proceeding to its own eventual withdrawal: the general principle should be “business as usual”; but subject to various adaptations (for example) as regards the UK’s exclusion from all relevant institutional discussions and decisions – an approach again (though this time only later) endorsed by the CJEU in rulings such as *R O* and *Wightman*.[[38]](#footnote-38)

Other “core principles” identified by the European Council were more political in nature. In particular, the April 2017 Guidelines contain the seeds of the Union’s four key negotiating objectives, in a clear order of priority. First, the Union attached overriding importance to preserving its own unity within and between the Union institutions and the 27 remaining Member States. Brexit cannot endanger the solidarity or indeed the survival of the Union as a whole. Every competent actor should therefore present a common front in the Article 50 TEU process – going above and beyond whatever formal institutional roles might be prescribed under the Treaties and surpassing whatever basic legal requirements might derive from the duty of sincere cooperation. Thus (for example) the European Council proclaimed that the Union should approach the negotiations with unified positions and engage with the UK exclusively through the channels provided for under Article 50 TEU.[[39]](#footnote-39)

Secondly and of equal importance, the Union must protect the cohesion and legitimacy of the EU legal order as a whole. The UK cannot be allowed to enjoy better treatment by leaving the Union than it enjoyed as a (particularly privileged) Member State or indeed as compared to the situation of the remaining Member States. Such concessions could call into question the very principle of Union membership based on the reciprocity of a particularly far-reaching network of rights and obligations. It would also risk destabilising the Union’s existing relations with a wider range of third countries. So (for example) the European Council recalls that no third country can enjoy the same rights and benefits as a Member State; any agreement with the UK must be based on a balance of rights and obligations, ensure a level playing field and preserve the integrity of the Single Market.[[40]](#footnote-40) Again, those political imperatives arguably go beyond the strict legal or technical limits inherent in constitutional principles such as those protecting the autonomy of Union law.[[41]](#footnote-41)

The Union’s remaining negotiating objectives were to be pursued entirely subject to those two overriding political aims. Thirdly, the Union would seek to deliver the UK’s withdrawal in a smooth and orderly (rather than chaotic and damaging) manner – as far as possible, preserving legal certainty and minimising disruption for public authorities, private businesses and individual citizens. Thus (for example) the April 2017 Guidelines provide that the Article 50 TEU negotiations should be carefully phased so as to prioritise reaching an agreement that addresses the immediate challenges posed by the very fact of UK withdrawal.[[42]](#footnote-42) Fourthly and finally: the Union’s longer term objective is to reach a future relationship with the UK that will succeed (if at all possible) in keeping its erstwhile Member State still firmly within the Union’s own legal orbit and sphere of influence. So (for example) the April 2017 Guidelines insist that, once formal negotiations over a new EU-UK relationship commence, the Union’s clear desire is to have the UK as a close partner into the future.[[43]](#footnote-43)

Those four political objectives effectively governed the Union’s entire subsequent interpretation and application of Article 50 TEU as a legal basis for managing the process and outcomes of UK withdrawal. The Union was always going to be the dominant party in the negotiations. But the EU’s natural position of strength was considerably reinforced and amplified by the (perhaps surprising) determination and success of both the Union institutions and the remaining Member States in defending and promoting their shared fundamental political interests as expressed in the April 2017 Guidelines.

*2.2. Legal and political factors affecting the UK*

*2.2.1. An unorthodox allocation of institutional responsibilities*

Although the Supreme Court in *Miller* insisted that the UK’s initial notification of intention to withdraw must be directly authorised by Parliament,[[44]](#footnote-44) one would then normally expect that the subsequent negotiation, conclusion and ratification of any international agreement falls within the prerogatives of the central UK government.[[45]](#footnote-45) UK law generally provides that Parliament plays only a limited role in the pre-ratification scrutiny of proposed treaties;[[46]](#footnote-46) its main responsibility lies in the post-ratification implementation of the UK’s international commitments into domestic law.[[47]](#footnote-47)

However, at an early stage in the withdrawal process, even the UK Government recognised that this exceptional situation called for a different approach – promising (albeit obscurely) that any draft withdrawal deal would be presented to Parliament for approval before its formal conclusion.[[48]](#footnote-48) After the loss of its parliamentary majority in the June 2017 general election, the UK Government was forced into further concessions, which were eventually enshrined in section 13 of the European Union (Withdrawal) Act 2018: any proposed Withdrawal Package (formal agreement and political declaration) must be approved by the House of Commons; even then, Parliament must adopt the necessary implementing legislation, as well as conduct its normal treaty scrutiny functions, before the Government may proceed to final ratification of the Agreement.[[49]](#footnote-49) The section 13 process decisively changed the institutional dynamic of the UK’s engagement in the Article 50 TEU process – though it is worth noting that Parliament also sought to influence the conduct of the withdrawal negotiations through additional means: for example, by issuing various statutory instructions about how the Government should approach discussions over the Northern Irish border.[[50]](#footnote-50)

*2.2.2. An unusual degree of political instability and incoherence*

Managing the Article 50 TEU process may well have prompted the UK into some unorthodox constitutional experiments. But in addition, Brexit rather dented the UK’s reputation for stable and competent government. The political chaos which immediately followed the June 2016 referendum revealed the full extent of the Government’s lack of preparation or planning for a Leave victory. For their part, the leading advocates of withdrawal had failed to offer any credible and coherent vision for the future, preferring to flood the public domain with a torrent of vague, contradictory and undeliverable promises. When the Government eventually began to define its position, albeit without any serious parliamentary or public discussion, it insisted that withdrawal should lead to a much more distant EU-UK relationship – “taking back control of our borders, money and laws”, to use the phrase which came to define just how “Brexit means Brexit” – which involved leaving not just the Union but also the Customs Union and Single Market.[[51]](#footnote-51)

Once again, however, the June 2017 general election proved a decisive moment. Rather than admit that the public had recoiled from the Government’s hardline interpretation of the referendum result, and seek to engage in cross-party dialogue with a view to building some meaningful consensus on an alternative way forward, Prime Minister May instead preferred to focus her efforts on maintaining the fragile coalition between moderates and extremists within her own Conservative Party – forming a minority administration that was, moreover, only propped up in power through the support of the Democratic Unionist Party – a hard right, pro-leave, essentially sectarian (protestant) and certainly partisan (loyalist) party from Northern Ireland.[[52]](#footnote-52)

The consequences of all those political shenanigans were predictable. The UK’s official policy towards negotiations under Article 50 TEU was (as the now wearisome colloquial phrase goes) to “have its cake and eat it”.[[53]](#footnote-53) On the one hand, the UK wished to enjoy a deep and special partnership with the EU, which would in practice amount to preserving many of the same benefits as its former membership in the fields of economic and security cooperation. On the other hand, the UK insisted upon various red lines around issues such as the free movement of persons and the jurisdiction of the CJEU – indeed, thanks to the DUP, new red lines were introduced, concerning also the Northern Irish border – all of which placed inherent limits upon the scope for / nature of any negotiated agreement / future relationship between the Union and the UK. Yet to keep its powerbase intact, the Government had to avoid either confessing that that policy was unsustainable, admitting the true nature of the challenge or explaining the compromises required. But such tactics could not be sustained indefinitely. When reality finally arrived, the combination of (first) a mutually incompatible governing coalition, (secondly) a jilted and hostile opposition and (thirdly) the need nevertheless to secure positive parliamentary approval for the outcome of negotiations, virtually guaranteed a political implosion.

In comparison to the Union, the UK was always going to occupy a weaker position in the Article 50 TEU process. But the UK’s natural disadvantage was considerably reinforced and amplified by the abject disunity of its political class, the self-inflicted fragility of its governing administration and the blatant contradiction of its official negotiating objectives.

*2.3. Negotiating with Theresa May and then with Boris Johnson*

Putting together the legal and political factors affecting both the Union and the UK, it is easy to understand the relative chaos that marked so much of the negotiations during the Prime Ministerial tenancy of Theresa May.[[54]](#footnote-54) It took nearly a year from the referendum for withdrawal talks to commence – including several months of formal negotiating time lost thanks to the early UK general election.[[55]](#footnote-55) Nevertheless, the two parties hoped that a withdrawal package could still be concluded and approved in time for the UK’s planned departure on 31 March 2019.[[56]](#footnote-56) However, several major stumbling blocks to any agreement on an orderly withdrawal rapidly emerged, driven largely by the (mis-)management of domestic UK political tensions: for example, disputes about the extent of protection for citizens’ rights; posturing about the methodology for calculating the UK’s financial settlement towards the Union; arguments about political governance, dispute settlement and legal interpretation of the withdrawal treaty; above all, trying to untangle the knot created by the UK Government around the Ireland/Northern Ireland border.[[57]](#footnote-57)

Finding common ground on the terms for future EU-UK relations was no easier. It took until July 2018 for the UK Government even to publish its “Chequers Plan”:[[58]](#footnote-58) a series of senior ministerial resignations immediately revealed just how fractious and unstable the UK administration really was;[[59]](#footnote-59) while the critical reaction of the European Council, at the informal Salzburg summit in September 2018, demonstrated how little attention the UK was paying to finding proposals that might prove acceptable to its actual negotiating partners.[[60]](#footnote-60) All the while, even senior UK Government figures pandered to their domestic supporters: (for example) with threats to renege on the UK’s due financial obligations under any withdrawal agreement, as a means to pressurise the EU into offering improved future trading terms;[[61]](#footnote-61) and (above all) under the mantra that “no deal is better than a bad deal”, despite the overwhelming evidence of how deeply damaging any such outcome would be not only to the EU27 but especially for the UK itself.[[62]](#footnote-62)

Even when a first Withdrawal Package was finally agreed between the UK Government and the European Council in November 2018,[[63]](#footnote-63) that only heralded a new period of chaos as Theresa May sought to steer her deal through the section 13 parliamentary approval process, just as her unhappy governing coalition finally began to unravel. Perhaps underestimating how far “no deal” had morphed into the positively-preferred outcome of many Tory MPs, the Prime Minister attributed opposition to the proposed Withdrawal Package primarily to the compromises reached in order to avoid a “hard border” across the island of Ireland.[[64]](#footnote-64) Over the succeeding months, the UK Government sought additional political assurances from the Union about the full legal implications of the proposed Irish border arrangements.[[65]](#footnote-65) But those assurances did nothing to prevent a series of humiliating parliamentary defeats;[[66]](#footnote-66) successive requests for the European Council to defer the effective date of UK withdrawal;[[67]](#footnote-67) and the Conservative Party’s electoral embarrassment in the European elections of May 2019.[[68]](#footnote-68)

Theresa May’s replacement as Prime Minister by Boris Johnson in July 2019 brought about a decisive change in the UK’s political orientation. Proudly reprising his role as Brexiter-in-Chief, Johnson promised to deliver an entirely new withdrawal settlement (or at least Irish border plan) with the EU.[[69]](#footnote-69) However, many commentators assumed (primarily from the evidence of his own behaviour) that Johnson was planning merely a sham renegotiation, to hide his true preference for a “no deal Brexit” on the revised departure date of 31 October 2019.[[70]](#footnote-70) If that was indeed his plan, then successful parliamentary efforts to rule out any such denouement effectively forced Johnson into undertaking more serious talks with the EU.[[71]](#footnote-71) A final round of intense negotiations produced the revised Withdrawal Package of October 2019,[[72]](#footnote-72) which contained two main (inter-related) changes as compared to the parties’ previous arrangements: significant amendments to the border plans that would apply under the Agreement to the island of Ireland (much to the horror of Johnson’s former DUP allies);[[73]](#footnote-73) and various alterations to the Political Declaration that foretold a significantly more distant future EU-UK relationship than even Theresa May had suggested (much to the delight of Tory Ultras).[[74]](#footnote-74)

If Johnson had still genuinely hoped to complete the section 13 parliamentary process in time for the UK’s projected withdrawal on 31 October 2019, the House of Commons again managed to defy him: voting to delay any further approval of the revised Withdrawal Package;[[75]](#footnote-75) and thereby directly forcing the Government to request yet another extension to the UK’s “exit day” – this time until 31 January 2020.[[76]](#footnote-76) Johnson may not have “got Brexit done” by his very own “do or die” deadline – but by this stage, it was nevertheless evident that Johnson stood a strong chance of eventually succeeding where May had repeatedly failed: even though his new approach to the Irish border had cost him the support of the DUP, his more hardline stance on future EU-UK relations had won him back the more extreme Tory rebels; and it seemed likely that sheer “Brexit fatigue” would now persuade enough moderate Conservatives as well as several Labour MPs also to support the Government under section 13. Yet rather than continue with the search for parliamentary approval of his revised Withdrawal Package, Johnson instead pressed for a different route: calling another UK general election. Despite having refused to agree to that request several times already,[[77]](#footnote-77) the main UK opposition parties were eventually persuaded to acquiesce – perhaps hoping that voters would swing against the Conservatives altogether, or at least do so in sufficient numbers as to make a second referendum on EU membership part of any future coalition talks.[[78]](#footnote-78)

If that was their calculation, the opposition parties could not have been more wrong. The Conservatives won 43.6% of the popular vote in December 2019, which translated into an 80-seat majority in the House of Commons. Moreover, the Tories were now a very different political movement from previous generations: entirely purged of moderate pro-Europeans; significantly more right wing in orientation. For his part, Johnson’s gamble had paid off handsomely: at this point, for the first time since June 2016, Brexit became inevitable. The UK Government published draft legislation which would abolish the troublesome section 13 process altogether and instead simply provide for domestic implementation of the Agreement in those situations where it was positively required – as well as (for example) explicitly ruling out any extension to the post-withdrawal, status quo transition period;[[79]](#footnote-79) and re-diluting Parliament’s promised role in the forthcoming negotiations over future EU-UK relations.[[80]](#footnote-80) The European Union (Withdrawal Agreement) Act 2020 was duly adopted by a now-compliant Parliament – paving the way for formal signature of the Agreement by the UK Government;[[81]](#footnote-81) as well as the granting of consent by the European Parliament and conclusion by the Council.[[82]](#footnote-82)

*2.4. Scope, sequence and timing of the negotiations*

Among the legal and political factors that shaped the conduct and outcome of the Article 50 TEU process, perhaps the single most important concerned the scope, sequence and timing of the UK’s withdrawal negotiations.

It was evident from soon after the 2016 referendum that UK withdrawal would entail three distinct if inter-related sets of discussions. First, the separation issues involved in ensuring that the very act of departure took place in an orderly fashion: for example, citizens’ rights; the financial settlement; the Irish border. Secondly, the terms of the future relationship between the Union and the UK which should apply after withdrawal itself was completed: in fields such as trade, security and research. Thirdly, there was the possibility of negotiating some form of transition period to help smooth the way between the immediate priority of delivering an orderly withdrawal and the eventual entry into force of the framework for future EU-UK relations.

However, more serious differences in approach between the Union and the UK emerged concerning the precise sequence and timing of those various sets of discussions. On the one hand, the UK Government claimed in its White Paper from February 2017 that there should be single (or at least parallel) negotiations covering both the immediate separation issues and the future relationship, to be concluded and ratified before the effective date of UK withdrawal; followed by a phased implementation of the new arrangements – allowing public and private actors to prepare for the introduction of new regulatory regimes which had already been agreed and were simply awaiting entry into force.[[83]](#footnote-83) That approach was consistently reflected in subsequent UK official statements.[[84]](#footnote-84) It was arguably a logical extension of the UK’s “cake and eat it” philosophy towards the entire Article 50 TEU process – particularly in seeking to reassure businesses and investors that the economic impacts and disruptions of withdrawal would be minimal.

On the other hand, the European Council’s April 2017 Guidelines declared that the main purpose of the Article 50 TEU negotiations was to ensure an orderly withdrawal. The process should therefore commence with a “first phase” aimed at providing as much clarity and certainty as possible on the immediate effects of UK withdrawal. By contrast, any agreement on the future EU-UK relationship could only be finalised and concluded *after* the UK’s withdrawal. However, an overall understanding of that future relationship could and should be identified during a “second phase” of the Article 50 TEU negotiations. To that end, the Union would be ready to engage in preliminary and preparatory discussions with the UK, as soon as the European Council were to decide that sufficient progress had been made on the “first phase” issues. To the extent necessary and legally possible, the Article 50 TEU negotiations might also seek to determine transitional arrangements, in order to provide a post-withdrawal bridge towards some foreseeable future relationship.[[85]](#footnote-85)

The European Council’s approach to the question of sequence and timing was evidently and radically different from that of the UK Government. But the European Council’s plan was fully supported by other Union actors;[[86]](#footnote-86) and (unsurprisingly) was subsequently confirmed in the Council’s negotiating directives for the Commission from May 2017.[[87]](#footnote-87) The UK Government suggested that a major row over sequence and timing could consume the negotiations just as soon as they had (finally) started.[[88]](#footnote-88) And indeed, it was only with Theresa May’s “Florence Speech” in September 2017 that the UK finally accepted the reality of the situation and began to work within the parameters laid down by the Union institutions.[[89]](#footnote-89)

The dispute over sequence and timing proved fundamental to the entire Article 50 TEU process and its resolution had far reaching consequences not only for the conduct but also the eventual outcomes of the withdrawal negotiations: for example, concentrating time and attention on the Agreement as a legal text that would resolve the immediate separation issues in an orderly manner; ruling out any possibility of the future EU-UK relationship being formally negotiated (let alone concluded) before withdrawal had already taken place; conjuring into existence the need for a political declaration that would nevertheless outline the parties’ mutual understanding and aspirations for what that future relationship might consist of; and creating the pressing need for an appropriate transitional regime, more wide-ranging in scope and more onerous in character than either party had originally envisaged, so as to bridge the inevitable gap which would arise between the act of withdrawal and the subsequent conclusion of a new relationship.

To some extent, the European Council’s decision on sequence and timing was a direct product of its four-tiered political objectives about how to manage the UK’s withdrawal: maintaining the unity of the Union and protecting the integrity of its legal order took overriding priority; in light of which, the limited time available for negotiations should focus on delivering a smooth and orderly withdrawal; with that job done, the parties could address the significantly more difficult challenge of forging a new relationship together. And of course, that political understanding was much more realistic than the preference expressed by the UK Government: after all, the time required to settle not just the separation issues but also the future relationship would surely exceed the two years available by default under the Treaties; to have followed the UK approach would have incorporated a substantial risk of outright failure into the entire withdrawal negotiations right from their very outset. Needless to say, subsequent events undoubtedly proved the European Council’s initial political evaluation to be entirely sound.

But the European Council’s decision on sequence and timing was not solely political. It also reflected the desire to find an interpretation of Article 50 TEU that would fit satisfactorily within the wider constitutional framework of the EU legal system: the treaty governing the nuts-and-bolts of withdrawal should be separate and distinct from any agreement on the longer term EU-UK relationship. After all, the very text of Article 50 TEU explicitly distinguishes between (on the one hand) “an agreement… setting out the arrangements for [the relevant State’s] withdrawal” and (on the other hand) “the framework for [the relevant State’s] future relationship with the Union”: the former agreement is to be negotiated and concluded simply “taking account of” (not addressing or incorporating or otherwise giving concrete legal expression to) the latter framework.[[90]](#footnote-90) Earlier versions of the withdrawal clause, drafted during the Convention on the Future of Europe, had indeed suggested that the withdrawal agreement should directly settle both the separation issues and the future relationship – but the final text of Article 50 TEU was amended to make clear that the two issues were to be handled separately.[[91]](#footnote-91)

Moreover, the Treaty drafters decided that conclusion of a withdrawal agreement under Article 50 TEU should be possible with the support of a (super-)majority in the Council; and (as we have seen) the Council further agreed that Article 50 TEU conferred an exceptional competence upon the Union institutions alone to conclude any withdrawal treaty (even as regards areas falling within shared competence, with no possibility of ratification also by domestic institutions).[[92]](#footnote-92) That approach and understanding may well have been constitutionally tolerable in respect of an agreement dealing only with the immediate and inherent challenges of withdrawal. But it would not be nearly so persuasive in the case of a wide-ranging cooperation agreement between the Union and an external partner intended to last far into the future: to interpret Article 50 TEU as a valid legal basis not only for separation issues but also the future relationship, exempted from the normal constitutional rules governing issues such as mixity, and without any compelling textual or contextual reason for doing so other than political convenience for the withdrawing State, would override our standard expectations concerning the division of competence between the Union and its Member States.

If Article 50 TEU could not provide an appropriate legal basis for the Union to conclude an agreement also covering the future relationship with the UK, that left the question: which other Treaty provisions might provide an alternative legal basis for the Union to reach a parallel agreement on that future relationship, before withdrawal had actually taken place? Here, there was little room for ambiguity: all of the relevant alternative provisions and legal bases provided for under the Treaties make clear that the Union can negotiate and conclude agreements “with third countries”.[[93]](#footnote-93) For that reason, the European Council adopted the view that the Union institutions could not legitimately exercise their existing external relations competences so as to engage in (let alone conclude) formal negotiations with an existing Member State – even one which has notified its intention to withdraw under Article 50 TEU, but which otherwise remains a Member State subject to all of the relevant provisions of Union law.[[94]](#footnote-94)

For those reasons, there are strong grounds for arguing that the European Council’s approach to the sequence and timing of negotiations was not only politically more realistic and empirically grounded, but also legally more robust than the alternative interpretation championed by the UK. Ultimately, however, the issue was decided at the political rather than the strictly legal level: the Court was never called upon to clarify the precise nature of the Union’s competences under Article 50 TEU.[[95]](#footnote-95)

**3. The Withdrawal Agreement**

Besides its preamble, the Agreement comprises six main parts, three protocols and nine annexes.[[96]](#footnote-96) However, our discussion will focus on four key issues of high legal as well as political importance: governance of the Agreement, including its interpretation, dispute settlement and internal legal effects (3.1); the post-withdrawal, status quo transition period (3.2); the protection of citizens’ rights (3.3); and the challenge of avoiding a “hard border” across the island of Ireland (3.4).

Needless to say, the Agreement addresses a host of other salient issues – but considerations of space and relative significance preclude any further discussion: for example, of the precise methodology for calculating the UK’s financial settlement;[[97]](#footnote-97) the detailed rules regulating a lengthy series of “other separation issues” involving the orderly completion of various ongoing procedures under Union law and / or the future treatment of certain existing legal rights, obligations and relationships;[[98]](#footnote-98) those provisions addressing the specific situation of the UK’s Sovereign Base Areas in the Republic of Cyprus;[[99]](#footnote-99) and the settlement reached in respect of Gibraltar.[[100]](#footnote-100)

It is worth noting that there were a series of additional “separation issues” which one or other party had hoped address in the Agreement but that did not eventually form the basis of more detailed negotiations or ultimately benefit from any explicit provisions in the final Agreement: for example, the legal regime that should govern the winding-up of cross-border services in the course of being provided between the Union and the UK on the basis of Article 56 TFEU as at the end of the transition period.[[101]](#footnote-101) Nor should one overlook that the two parties also sought to cooperate together for the resolution of various additional Brexit problems albeit outside the legal framework provided by the Agreement itself: for example, as regards working out the full implications of withdrawal for the position of both the Union and the UK within the WTO.[[102]](#footnote-102)

*3.1. Governance*

In certain respects, the governance provisions of the Agreement feel entirely familiar from standard international practice and caused no particular trouble in the negotiations. In particular, Article 164 WA establishes a Joint Committee (comprising representatives of the Union and the UK) responsible for the overall implementation and application of the Agreement. Article 165 WA also creates various specialised committees (for example) on citizens’ rights, Ireland/Northern Ireland and the financial settlement – though their existence shall not prevent either party raising any matter directly before the Joint Committee.[[103]](#footnote-103) The Joint Committee shall (*inter alia*): prevent problems in the areas covered by / resolve disputes arising under the Agreement;[[104]](#footnote-104) adopt decisions as provided for under the Agreement and make appropriate recommendations (always acting by mutual consent);[[105]](#footnote-105) and adopt amendments as provided for under the Agreement.[[106]](#footnote-106) Similarly, the Joint Committee may (*inter alia*): delegate certain responsibilities to, change the tasks of, establish additional or dissolve existing specialised committees; and amend certain parts of the Agreement in order to correct errors, address deficiencies or deal with unforeseen situations.[[107]](#footnote-107) Decisions of the Joint Committee shall be binding on the parties and enjoy the same legal effects as the Agreement itself; the Union and the UK are obliged to implement those decisions.[[108]](#footnote-108)

In other respects, however, the governance provisions proved to be a sore point in the Article 50 TEU process and were only settled in the very final stages of the negotiations that resulted in the first Withdrawal Package of November 2018. Three issues warrant discussion: interpretation of the Agreement; dispute settlement and enforcement; and the internal legal effects of the Agreement.

* + 1. *Interpretation of the Agreement by the Parties*

The Agreement contains various basic principles of interpretation which are binding on the parties individually as well as within the Joint Committee, for example: identifying the instruments that comprise “Union law” as referred to in the Agreement;[[109]](#footnote-109) providing that “Union law” generally means the relevant instruments as applicable on the last day of the transition period;[[110]](#footnote-110) defining the geographical scope of the Agreement, particularly when it comes to the various territories associated with the UK;[[111]](#footnote-111) and specifying the precise dates for entry into force of different provisions of the Agreement.[[112]](#footnote-112) Two provisions on interpretation are particularly important.

First, Article 7(1) WA provides that references to Member States and competent national authorities in those provisions of Union law made applicable by the Agreement shall include the UK and its competent authorities; except as regards membership of, attendance at meetings of, or participation in decision-making by Union institutions, bodies and agencies etc; and as regards attendance at meetings of comitology committees and expert groups etc of the Commission and Union bodies and agencies etc (unless otherwise provided for in the Agreement).[[113]](#footnote-113)

Secondly, Articles 4(3)-(4) WA establishes that provisions of the Agreement referring to concepts or provisions of Union law shall be interpreted and applied in accordance with the methods and general principles of Union law itself; and in particular, in conformity with any relevant caselaw of the CJEU delivered before the end of the transition period. There is no explicit provision to govern the relevance of subsequent CJEU caselaw for the parties’ interpretation of the Agreement; though the Union’s representatives in the Joint Committee would obviously be bound to respect all relevant CJEU jurisprudence when exercising their functions and powers.[[114]](#footnote-114)

* + 1. *Dispute Settlement and Enforcement under the Agreement*

Without prejudice to the application of Union law pursuant to the Agreement, Article 5 WA provides that the parties shall (in full mutual respect and good faith) assist each other in carrying out the tasks which flow from the Agreement; take all appropriate measures (general or particular) to ensure fulfilment of their obligations; and refrain from any measure which could jeopardise attainment of the Agreement’s objectives. For those purposes, Article 167 WA states that the parties shall endeavour to agree on the interpretation and application of the Agreement and make every attempt to arrive at a mutually satisfactory resolution of any matter affecting its operation. However, in the event that a dispute does arise, the Union and the UK agree to have recourse only to those procedures provided for under the Agreement.[[115]](#footnote-115)

For those purposes, the Commission had proposed that the CJEU should act as the primary dispute settlement body under the Agreement as a whole, including as regards the interpretation and application of those provisions applicable after expiry of the transition period.[[116]](#footnote-116) The UK objected on the basis that its “red lines” included the UK breaking free of the jurisdiction of the CJEU; but in any case, it would be inappropriate for the court of one party to have jurisdiction over the agreement for both parties. The UK argued instead for an independent arbitral body to settle post-transition disputes arising under the Agreement.[[117]](#footnote-117) Although the Union was ultimately willing to concede that the CJEU would not act as the sole or even primary forum under the Agreement for the settlement of post-transitional disputes,[[118]](#footnote-118) the Union also had its own red lines – including the non-derogable constitutional principle that the CJEU must enjoy final jurisdiction over the interpretation of Union law in any situation where such interpretation would become binding upon the Union institutions.[[119]](#footnote-119) Given the extent to which the Agreement refers to and depends upon Union provisions and concepts, it was therefore imperative that any dedicated dispute settlement body created for the purposes of this treaty should respect the fundamental requirement to protect the autonomy of Union law, in particular, by creating a preliminary reference mechanism for the delivery of a binding CJEU ruling on the proper interpretation of Union law.

Thus, in the case of disputes arising after expiry of the transition period, the following system shall apply.[[120]](#footnote-120) To begin with, the parties shall endeavour to resolve any dispute through consultations in good faith within the Joint Committee in an attempt to reach a mutually agreed solution.[[121]](#footnote-121) If no such solution has been reached by the Joint Committee within 3 months, either party may request the establishment of an arbitration panel (or sooner, by mutual agreement).[[122]](#footnote-122) The Agreement contains detailed rules on the establishment and composition of an arbitration panel as well as the procedure and time-frames for its proceedings.[[123]](#footnote-123) However, under Article 174 WA, where a dispute submitted for arbitration raises a question about the interpretation of Union law concepts or Union law provisions as referred to in the Agreement,[[124]](#footnote-124) the arbitration panel must request the CJEU to give a ruling on that question – for which purpose, the CJEU shall have jurisdiction and its ruling shall be binding on the referring panel.[[125]](#footnote-125)

Otherwise, Article 175 WA provides that an arbitration panel ruling shall be binding on the parties,[[126]](#footnote-126) which must adopt any measures necessary to comply in good faith, within an agreed and reasonable period of time.[[127]](#footnote-127) If at the end of that period, the complainant considers that the respondent has failed to comply, it may request another arbitration panel ruling (again subject to oversight by the CJEU as regards the binding interpretation of relevant Union law);[[128]](#footnote-128) and may further request the imposition of a lump sum or penalty payment.[[129]](#footnote-129) The respondent’s further non-compliance – either with the original arbitration ruling or with an order to make financial settlement – will entitle the complainant to suspend rights and obligations under the Agreement (apart from those contained in Part Two on citizens’ rights) or under any other agreement between the Union and the UK (under the conditions provided for therein) in a proportionate manner and on a temporary basis.[[130]](#footnote-130) If by this stage the parties remain in dispute over compliance, either may request a further arbitration panel ruling (still subject to the provisions on CJEU jurisdiction) that may order termination of the complainant’s suspension / the respondent’s penalty.[[131]](#footnote-131)

As in other international contexts, the Agreement’s complex provisions concerning arbitration, enforcement and compliance should act as a powerful incentive for the parties to avoid post-transition disputes through political dialogue in the Joint Committee. But conversely, if (for the sake of argument) the UK Government were determined to provoke disagreement over interpretation and / or application of the Agreement, the latter’s dispute settlement mechanism may well furnish the Union with only a relatively cumbersome and ineffective means of correction or redress.

* + 1. *Internal Legal Effects of the Agreement*

Many agreements deal only with interpretation, dispute settlement and enforcement under the treaty itself as between the parties and as a matter of public international law. When it comes to the legal effects of the agreement within the internal legal systems of each party, that is often left entirely to their respective constitutional rules in accordance with the traditional distinction between monist and dualist systems. However, it is well known that an entirely laissez-faire approach to domestic legal effects can risk certain “enforcement asymmetries” between the parties – especially in the case of agreements that contain relatively detailed and concrete rights and obligations; and particularly if one side operates a monist system whereas its counterpart acts as a dualist order. Since the Union is effectively a monist system, it often insists that its international agreements contain specific provisions to determine the appropriate legal status of the treaty within each contracting party: sometimes ruling out any direct internal legal effects, other times insisting upon explicit provisions to ensure such effects, either for the entire agreement or at least as regards parts thereof.[[132]](#footnote-132)

The Agreement falls into precisely this category of potentially asymmetrical agreements between the monist EU and the dualist UK. For that reason, the Union insisted that this treaty contain detailed provisions describing its intended legal effects also within the legal system of each party.[[133]](#footnote-133) Articles 4(1)-(2) WA provides that both the Agreement and Union law made applicable thereunder shall produce, in respect of and within the UK, the same legal effects as within the Union and its Member States. In particular, natural and legal persons must be able to rely directly on any relevant Agreement or Union law provisions which meet the conditions for producing direct effect. The UK must ensure compliance with that obligation through primary legislation, including the power of judicial and administrative authorities to disapply inconsistent or incompatible provisions of domestic law. Moreover, in addition to the general principle that Union law for the purposes of the Agreement must be interpreted and applied in accordance with the methods and general principles of Union law, and in accordance with CJEU caselaw delivered before the end of transition, Article 4(5) WA further states that the UK’s judicial and administrative authoritiesshall have “due regard” to any relevant CJEU caselaw delivered *after* that date.[[134]](#footnote-134)

The European Union (Withdrawal Agreement) Act 2020 makes provision for the legal effects of the Agreement within the UK legal system.[[135]](#footnote-135) In theory, the principles of direct effect and primacy should therefore remain part of UK law, not just during the transition period, but also for a considerable period thereafter, in accordance with the relevant provisions of the Agreement (for example) on citizens’ rights and the Irish border. But in practice, UK constitutional lawyers may yet have to decide how far the domestic constitutional principle of parliamentary sovereignty has indeed been nuanced or qualified by the UK’s clear international obligations – especially in a situation where subsequent primary legislation conflicts with the terms of the Agreement and the traditional principle of implied repeal would normally require the 2020 Act to be set aside rather than the subsequent (contradictory) legislation to be disapplied.[[136]](#footnote-136)

*3.2. Transition period*

We noted above how the UK had originally proposed settling the future EU-UK relationship before withdrawal took place, leading to an “implementation period” during which the new arrangements could gradually be brought into force.[[137]](#footnote-137) By contrast, the European Council insisted that formal negotiations on the future relationship could only begin after withdrawal had been completed, but suggested that the Article 50 TEU negotiations might nevertheless include clearly defined, time-limited transitional arrangements to provide the bridge to some foreseeable new settlement. Insofar as such arrangements might include a temporary prolongation of the Union *acquis*, that would require existing Union instruments and structures to apply.[[138]](#footnote-138)

Having lost the battle over sequence and timing, the UK was forced radically to revise its withdrawal plans and negotiation strategy. In her “Florence Speech” of September 2017, Theresa May accepted that the UK would be leaving the Union without any agreement on the future relationship and instead requested a transition period during which the Union *acquis* would be prolonged almost in its entirety – a far cry indeed from the original UK proposals, but also much further even than the European Council had envisaged.[[139]](#footnote-139) After outlining the essential provisions contained in Part Four of the Agreement, we will focus on how far transition might fulfil its various objectives; together with some of the key political and legal controversies it raises.

*3.2.1. Main provisions on transition*

The basic principle is set out in Article 127(1) WA: unless otherwise provided for, Union law shall be applicable to and in the UK during the transition period.[[140]](#footnote-140) Article 126 WA provides that transition will expire on 31 December 2020 (corresponding to the end of the Union’s current multiannual financial framework). However, Article 132 WA also provides that the Joint Committee may (before 1 July 2020) adopt a single decision extending transition for “up to one or two years”.[[141]](#footnote-141)

The continued applicability of Union law to the UK during transition includes not only the substantive rules, but also those Union law methods and general principles governing their interpretation, as well as their legal effects within the UK legal system.[[142]](#footnote-142) Obviously, transition also covers any legislative, administrative or judicial developments in Union law that might occur during the relevant period – a point which proved particularly contentious within the UK, since Leave activists claimed that the EU might adopt measures deliberately designed to harm British interests.[[143]](#footnote-143) The UK Government therefore triedbut failed to secure an explicit mechanism for the Joint Committee to address disputes about the applicability of new Union measures to the UK.[[144]](#footnote-144) Undeterred, the UK Government claimed that the general duty of good faith under Article 5 WA, together with the ordinary powers of the Joint Committee, would be sufficient to meet British concerns about unwanted infra-transition changes to Union law.[[145]](#footnote-145) However, it is worth stressing that the obligation to act in good faith is explicitly without prejudice to the application of Union law as prescribed under the Agreement; while the Joint Committee enjoys no power of adaptation or exemption as regards transitional developments in Union law.[[146]](#footnote-146) Still undeterred, the UK’s domestic implementing legislation now purports to provide for the parliamentary “review” of Union measures adopted or proposed during the transition period and considered to raise matters of “vital national interest” to the UK.[[147]](#footnote-147)

Notwithstanding the “status quo” basis for transition, various provisions of Union law as at the date of withdrawal do not apply to the UK during transition: for example, measures not binding upon the UK as a Member State (in fields such as EMU, the AFSJ and under enhanced cooperation);[[148]](#footnote-148) and those concerning Union citizens’ political rights (citizens’ initiatives and voting in local elections).[[149]](#footnote-149) Furthermore, the Agreement describes other situations in which the UK is subject to special treatment: for example, no British participation in any future enhanced cooperation;[[150]](#footnote-150) restrictions on the UK’s ability to opt-into additional AFSJ measures;[[151]](#footnote-151) British exclusion from PESCO under Article 42 TEU;[[152]](#footnote-152) restrictions on UK access to certain security-related sensitive information;[[153]](#footnote-153) the exclusion of UK nationals from recruitment as Union officials etc;[[154]](#footnote-154) and the possibility for Member States to cease surrendering own nationals to the UK during transition pursuant to the European Arrest Warrant.[[155]](#footnote-155)

However, the most extensive deviations from the “status quo” assumption underpinning transition concern the UK’s institutional status under Union law. In accordance with Article 7 WA, the UK is excluded from membership, decision-making and governance as regards all Union entities and structures also during the transition period.[[156]](#footnote-156) There are only limited exceptions: for example, UK representatives may attend meetings of certain Union committees and expert groups etc, on an exceptional and invited basis, where the Member States also take part, and either the discussion concerns individual acts addressed to UK actors, or the UK’s presence is necessary and in the Union’s interest for the effective implementation of Union law.[[157]](#footnote-157) Further implications of the UK’s institutional non-existence as from the point of withdrawal are also spelled out in the Agreement: for example, the UK parliament cannot issue “reasoned opinions” objecting to Union proposals on subsidiarity grounds;[[158]](#footnote-158) and the UK is not entitled to submit proposals or requests as if it were still a Member State.[[159]](#footnote-159) Article 130 WA also makes specific provision as regards fisheries: for the purposes of Article 43(3) TFEU, as regards any period falling under transition, the UK will merely be consulted as regards fishing opportunities relating to the UK; though the Union commits to maintaining its relative stability keys for the allocation of relevant fishing opportunities.[[160]](#footnote-160)

Despite its institutional exclusion, the UK remains bound by the duty of sincere cooperation throughout the transition period.[[161]](#footnote-161) In addition, Part Four of the Agreement contains provisions on supervision and enforcement during transition.[[162]](#footnote-162) Under Article 131 WA, the Union’s institutions, bodies and agencies etc shall have their powers under Union law in relation to UK authorities, natural / legal persons and residents etc (for example, as regards Commission competition and state aid investigations).[[163]](#footnote-163) In particular, the CJEU shall have jurisdiction as provided for in the Treaties: thus allowing (say) for enforcement proceedings against the UK and preliminary references from British courts; also (during transition) as regards interpretation and application of the Agreement itself.[[164]](#footnote-164) Moreover, the Agreement includes a further body of rules on the conclusion of judicial and administrative proceedings still pending at the expiry of the transition period or arising from facts which occurred before the end of transition.[[165]](#footnote-165) It is worth noting that the Commission had originally proposed additional powers of enforcement vis-à-vis the UK for the duration of transition – including the power to suspend certain benefits of the UK’s continued Single Market participation – but those proposals were eventually excluded from the final Agreement.[[166]](#footnote-166)

*3.2.2. Objectives of transition and likelihood of their delivery*

What were the main objectives behind the UK’s request for a post-withdrawal, status quo transitional regime and how likely is it that those objectives will be realised in practice? From the UK’s perspective, transition might serve four main purposes: two that were originally acknowledged in the Florence Speech; another that was explicitly added into the mix by the UK Government later in the negotiations; and a final goal that certain more cynical observers (the present author included) have speculated about, based on the words and deeds of certain senior British politicians over the passage of time.

First, Prime Minister May claimed that transition would give both parties more time to plan for the full consequences of the UK’s withdrawal, in terms of their respective internal legal and logistical preparations: certainly useful in the EU’s case, particularly as regards raising awareness among those public and private actors across the Member States most likely to be affected in practice by the UK’s departure;[[167]](#footnote-167) absolutely essential for the UK, given its almost total lack of pre-referendum preparations and the sheer scale of the task facing even just the Government and Parliament simply to ready the UK legal system for the very act of withdrawal.[[168]](#footnote-168) Transition was originally meant to provide a baseline extra 20 months for post-withdrawal planning – but in the end, the Article 50 TEU process dragged on for so long that much of that extra time was made available simply by repeatedly extending the UK’s formal membership, leaving transition itself to supply only an additional 11 months for Brexit preparations.[[169]](#footnote-169) Yet that extra time was still critical for the UK to carry on with its basic legislative and regulatory planning for life entirely outside the Union.[[170]](#footnote-170)

Secondly, the Florence Speech also made clear that transition was intended to give the parties more time to finalise the terms of their future relationship, so that public and private actors need only experience the expense and inconvenience of a single major regulatory change, i.e. at the end of transition, rather than once at the time of withdrawal and then again upon the entry into force of an agreement on future relations. That original objective is closely related to the UK’s third goal for transition, which emerged somewhat later in the negotiations, though both considerations together prompted the British to request the power of extension now contained in Article 132 WA.[[171]](#footnote-171) In particular, the UK Government became increasingly concerned that, should transition expire without any future relationship agreement in place, it would not only lead to “two regulatory changes” but also trigger automatic application of the “Irish backstop” provisions agreed by Theresa May in 2018 (in the face of virulent opposition from Europhobic Tories).[[172]](#footnote-172) Among the measures requested by the UK in order to help avoid such an outcome (and deter a parliamentary rebellion) was the potential to extend transition: if it appeared likely that January 2021 would arrive with no future relationship agreement in place, the UK could at least choose between either further prolonging the status quo, in the expectation of still reaching a prompt new settlement that would deliver only “one regulatory change” as well as supersede the “Irish backstop”; or instead allowing transition to expire, thus letting the “Irish backstop” become operable, and also accepting that “two regulatory changes” would eventually be needed.[[173]](#footnote-173)

Given the change in political direction heralded by the 2019 UK general election, neither of those objectives is now likely to be delivered. Indeed, the previous UK desire for some mechanism to avoid triggering the “Irish backstop” is no longer even relevant: the old May arrangements have been replaced by a Johnson alternative which the UK Government seems entirely happy to invoke without any risk of splitting the Conservative Party.[[174]](#footnote-174) And as for guarding against “two regulatory changes”: whether through self-confidence in its own negotiating prospects or indifference as to the consequences of its actions, the Johnson Government has ruled out requesting any extension of the transition period as provided for under Article 132 WA – indeed, even going so far as to enshrine its position in primary legislation.[[175]](#footnote-175) In such circumstances, it is simply not credible to expect that the future relationship will be properly settled in time for 31 December 2020. It therefore appears that the Agreement and its transition period will only have postponed the dreaded “regulatory cliff-edge” and Brexit will ultimately entail “two regulatory changes” – the very twin prospects which had so discombobulated Johnson’s predecessor.

Fourthly and finally, many commentators have suggested (drawing not least upon the conduct of various UK politicians within as well as outside government over a sustained period of time) that the post-withdrawal, status quo transition period might serve another useful if rather more cynical purpose: to create significant space and time between the actual act of departure (on the one hand) and the eventual emergence of its true consequences (on the other hand) – sufficient to establish a plausible deniability that any negative impacts upon the UK should actually be attributed to leaving the EU; and to limit the extent to which the relevant decision-makers could convincingly be held responsible and accountable in the court of public opinion. “Brexit got done” on 31 January 2020 – so whatever might happen many months later (i.e. when an unextended transition expires with no replacement deal ready to take effect) can hardly be the fault of Brexit or the Brexiters….[[176]](#footnote-176)

*3.2.3. Other legal and political controversies associated with transition*

On the UK side, transition might (partially) serve several (more or less legitimate) political objectives, but it has been controversial chiefly because of the criticism that it reduces the UK to a “vassal state” of the Union – bound by almost all of the latter’s rules but without any say over their adoption.[[177]](#footnote-177) There is obviously some truth in that criticism, though it is usually voiced without any countervailing acknowledgment of the fact that it was the UK Government that proposed transition in its current form, in order to shield fundamental British interests from the consequences of the UK’s own choices. Nevertheless, perceptions about the one-sided nature of transition were reinforced by the UK’s limited success in changing the terms originally proposed by the Commission: for example, the UK failed not only in its attempt to control which transition-era Union measures would become automatically binding, but also in its effort to insist that “exit day” (rather than expiry of the transition period) should act as the relevant date for ending free movement of persons and calculating entitlement to citizens’ rights protection under the Agreement.[[178]](#footnote-178)

The UK’s demands bore greater fruit in the field of external relations. True, the UK was again soundly rebuffed when it challenged the Union proposal whereby the British might negotiate, sign and ratify international agreements in areas of exclusive Union competence but could only bring such treaties into force during transition with the Council’s specific authorisation.[[179]](#footnote-179) But the UK did manage to secure certain concessions: for example, as regards new Council decisions under Chapter 2, Title V TEU on the CFSP, the UK may declare that, for vital and stated reasons of national policy, the UK exceptionally will not apply a particular decision;[[180]](#footnote-180) and the Agreement also provides that, should the EU and the UK manage to conclude a new agreement in the field of CFSP / CSDP during the transition period, it may displace the need for continued UK adherence to the relevant provisions of Union law.[[181]](#footnote-181)

On the EU side, the transitional arrangements were less politically sensitive, but still raise some interesting constitutional questions – not least, the legality of treating what had in fact become a third country just as if it were still a Member State, for a vast array of regulatory purposes, including a significant number of situations in which primary as well as secondary Union law suggested that the relevant rights and obligations should be enjoyed / imposed only by Member States and / or their nationals.[[182]](#footnote-182) On the one hand, it is true that Article 50 TEU is an unusual legal basis designed to deal with a novel situation.[[183]](#footnote-183) Moreover, we have already noted how the Union institutions signalled their understanding that Article 50 TEU confers an exceptional competence which might in some respects deviate from our ordinary expectations under Union constitutional law.[[184]](#footnote-184) On the other hand, Article 50 TEU is unequivocally premised upon the fact that the Treaties shall cease applying to the UK, which is immediately transformed into a third country, as from the very moment of its withdrawal. Is it really within the competence of the Union institutions to “pretend” that the UK is still a Member State for all manner of purposes – particularly when the UK could have achieved at least some of the same basic results as transition, but chose not to do so for its own domestic political reasons, using the means explicitly foreseen by the Treaties: simply by extending its period of formal Union membership as provided for under Article 50 TEU?[[185]](#footnote-185)

Such questions and concerns might now appear more theoretical than real: after all, the Member States did not object to the proposition that Article 50 TEU ousts any possibility of shared competence or mixity; while challenging the Union’s very competence to contract such a far-reaching transition regime will soon appear practically pointless or positively mischievous. But even now, it is possible to envisage scenarios where difficult competence queries might still arise: for example, if the UK were to allow the deadline of 1 July 2020 to pass without requesting any additional transition, only for changing circumstances to render the prospect of “no deal” on 1 January 2021 utterly unpalatable even for the Johnson Government, and lead the parties to consider directly amending or supplementing the Agreement itself so as indeed to allow for an alternative extension. Could Article 50 TEU still provide a valid legal basis for any such agreement? If not: could the UK be offered the same or even a similar “de facto Member State” status under the Union’s external competences elsewhere under the Treaties? In either event: would it really be possible once again for the Union institutions to deny the very existence of shared competence and even the possibility of national ratifications?

In any case: for both parties, the agreement on transition created certain common challenges – particularly as regards existing Union external agreements with other third countries / international organisations. Article 129(1) WA states that the UK shall remain bound by existing international agreements concluded by Union, by the Member States acting on the Union’s behalf, or by the Union and the Member States acting jointly.[[186]](#footnote-186) A footnote then provides that “[t]he Union will notify the other parties to these agreements that during the transition period the UK is to be treated as a Member State for the purposes of these agreements”.[[187]](#footnote-187) Yet a purely bilateral agreement between the Union and the UK was no guarantee that third countries would automatically consent to maintain the legal effects of existing international agreements in their relations with the post-withdrawal UK. Indeed, there might be political and / or economic incentives to do otherwise: for example, if some other third country were to treat withdrawal as a convenient opportunity to exert pressure on and / or renegotiate terms with either the UK or the Union. The success of the Agreement’s approach to existing external agreements therefore depended on the parties’ ability to persuade their other international partners to acquiesce in the assumptions underpinning the post-withdrawal, status quo transition.[[188]](#footnote-188)

*3.2.4. At the end of transition*

At the end of the transition period, whether or not it is extended in accordance with Article 132 WA, the UK will finally experience what it really means to become a third country.

Of course, the UK will remain bound by its obligations under the Agreement, many of whose provisions will only then become fully effective: for example, the future protection of citizens’ rights and the regime governing the Irish border;[[189]](#footnote-189) as well as the “other separation provisions” concerning (*inter alia*) the customs treatment of goods currently moving between the Union and UK territories, the final winding-up of ongoing Union proceedings involving UK actors in the field of cross-border criminal cooperation, the protection of personal data processed before the end of transition or in accordance with the Agreement itself, or determining the ownership, rights of use and consumption of special fissile materials upon the UK’s full extraction from Euratom.[[190]](#footnote-190)

Otherwise, the UK will find its relations, not only with the EU but also with every other international actor, governed by whatever multilateral and bilateral arrangements that do continue to exist or are created de novo under international law.[[191]](#footnote-191) Moreover, we will discover whether the 11 months of additional time afforded by transition were indeed sufficient for public and private actors to complete their preparations for the internal consequences of UK withdrawal. And in due course, commentators will be able to assess whether Theresa May was right to warn against the costs of multiple regulatory adaptations of the sort which have effectively been guaranteed by the Johnson Government’s decision to rule out any extension to the transition period.

*3.3. Citizens’ Rights*

Deliberate misinformation about the nature and effects of the free movement of persons between the EU and the UK played a prominent role in the Leave campaign during the 2016 referendum.[[192]](#footnote-192) Hostility towards Union citizens was then quickly adopted by the UK Government effectively as official policy: contemptuous language about “citizens of nowhere”, promises to “take back control of our borders” and vows to deal with European “queue jumpers” became commonplace in British political discourse.[[193]](#footnote-193) Of course, the long term costs of such pandering to post-truth populism will be measured, through the UK’s decision to end free movement and indeed any more favourable immigration regime with the EU, in the implications for broader relations in trade, security and other fields of cross-border cooperation.[[194]](#footnote-194) But the immediate question raised by the referendum was: what would happen to the millions of UK and EU27 nationals who had already exercised their existing free movement rights in good faith? We need not recount in detail, but it is still important to stress, the terrible personal and professional costs created by the UK’s decision to leave: prolonged uncertainty and anxiety about what the future might hold; aggravated by troubling incidents, often linked to the UK’s broader “hostile environment” policy, ranging from “deportation letters” being sent to longstanding Union citizens to a recorded rise in racist incidents and widespread evidence of private sector discrimination against EU nationals.[[195]](#footnote-195)

The UK Government resisted repeated parliamentary calls for the UK to offer unilateral protection to affected individuals.[[196]](#footnote-196) Instead, its February 2017 White Paper expressed a desire for the two parties to reach an agreement offering full guarantees to all relevant UK and EU27 citizens.[[197]](#footnote-197) And indeed, the issue of citizens’ rights became central to the Article 50 TEU process. Yet despite the UK’s promise not to use individuals as bargaining chips, its opening negotiating position fell far short of a “full guarantee to all”.[[198]](#footnote-198) Serious disputes about the personal and material scope of protection to be offered under the withdrawal treaty were only resolved in late 2018.[[199]](#footnote-199) We will discuss the general scheme on citizens’ rights as provided for under Part Two of the Agreement (together with the special provisions on interpretation and enforcement in this field contained elsewhere in the Agreement).[[200]](#footnote-200) However, it is important to note that the text of the Agreement cannot be read in isolation: the regime on citizens’ rights still offers the UK and each of the EU27 discretionary choices that need to be made and implemented within their respective national legal systems; including the possibility, as regards most but not all of the Agreement’s provisions, that the UK and / or EU27 states might offer more generous treatment under domestic law.[[201]](#footnote-201)

*3.3.1. EU law as the general baseline for citizens’ rights protection*

The general starting point adopted under the Agreement is that existing Union law should provide the basis for identifying both who is protected into the future and what the content of their rights should be. Thus, Article 10(1)(a)-(b) WA identifies for protection those UK or EU27 citizens who exercised their right to reside in the host state in accordance with Union law before the end of the transition period and continue to reside in the host state thereafter.[[202]](#footnote-202) For the rest of their lives (provided they continue to meet the relevant conditions),[[203]](#footnote-203) those citizens will enjoy a defined series of rights and protections: for example, the right to continue residing in the host state in accordance with applicable Union law;[[204]](#footnote-204) the possibility of acquiring permanent residence (based on continuous lawful residence in accordance with Union law, taking into account periods both before and after the end of transition);[[205]](#footnote-205) the right to change status (say) between student, worker and economically inactive person;[[206]](#footnote-206) various rights relating to work / self-employment and to equal treatment on grounds of nationality in accordance with applicable Union law;[[207]](#footnote-207) and limited provision for continuing protection as regards existing decisions on / pending applications for the mutual recognition of professional qualifications.[[208]](#footnote-208) In addition, Articles 30-36 WA provide for a continuing regime of social security coordination between the Union and the UK, in respect of a broader category of persons: for example, as regards the future aggregation and exportation of pensions in the event of cross-border retirement; in respect of authorised medical procedures ongoing / medical cover for emergencies during any trip in progress as at the end of the transition period; and as regards the award of family benefits to which certain individuals are entitled as at the expiry of transition.[[209]](#footnote-209)

The decision to rely on existing Union law as a general baseline for the protection of citizens’ rights under the Agreement might sound uncontroversial – but it is still potentially problematic. In particular, limiting entitlement to protection (in most situations) to economically active and financially independent citizens as defined under Union free movement law leads to potential problems: first, as regards those with “non-linear” or “non-standard” migration experiences (such as insecure or irregular work, careers breaks due to care responsibilities, and vulnerable children in social care); and secondly, for those resident outside the strict scope of Union law yet without any objection by their host country (such as students or retired people lacking comprehensive sickness insurance).[[210]](#footnote-210) If a given State were to enforce the Agreement at face value, that decision could have serious consequences for many individuals whose residency was never previously questioned and who sincerely believed that their status was unproblematic.[[211]](#footnote-211) Nor is it enough to retort: one cannot lose what one never had in the first place. As Spaventa has pointed out: any change in or loss of status under Union law is usually flexible and temporary; one can leave and come back, one might lose a job then find another, one can rectify an irregular situation. But a change in or loss of status under the Agreement is potentially definitive and permanent: failing to qualify for protection, or later ceasing to satisfy the continuing requirements thereof, could well lead to the total loss of protected status with no possibility that it might ever be regained.[[212]](#footnote-212)

The fact that the Agreement generally provides only a minimum standard is particularly important in this regard. For example, the UK announced that qualification for “settled status” under domestic rules implementing the Agreement would be based primarily on residence, without necessarily demanding full compliance with Union free movement rules as regards (say) comprehensive sickness insurance for economically inactive persons.[[213]](#footnote-213) However, that could still leave individuals awaiting qualification for permanent residency vulnerable to a change in policy (or indeed simply to instances of adverse treatment) once the transition period expires – especially since it remains unclear what might be the precise legal basis and status of rights which are recognised through an admittedly more generous but still unilateral application of the Agreement and without being strictly grounded in the citizens’ rights provisions themselves.[[214]](#footnote-214)

*3.3.2. Deviations from the EU law baseline: better, worse, future and no protection*

Notwithstanding the Union law baseline for future protection, there are various situations where the Agreement provides for certain deviations. In a few instances, the Agreement in fact foresees higher standards of protection than existing free movement rules. For example: the UK and Ireland may continue their longstanding arrangements of special treatment for each other’s nationals – arrangements born less out of brotherly love than the fact that there is no easy way for the UK to distinguish between Irish nationals from the Republic and those from Northern Ireland.[[215]](#footnote-215) Irish nationals are not therefore required to register for “settled status” in the UK – though there may still be advantages to engaging with the system (for example, as regards the future legal status of non-UK/Irish family members).[[216]](#footnote-216) Another example: protected citizens will forfeit their right to permanent residence after five (rather than the normal Union law benchmark of two) consecutive years’ absence from the host state – partial compensation for the potentially definitive and permanent consequences of losing protected status under the Agreement.[[217]](#footnote-217)

However, in other situations, the Agreement allows for restrictions on citizens’ rights that would not comply with existing Union free movement law – as illustrated by several examples. First, the range of family members entitled to rights by association with a protected citizen is reduced – particularly as regards the ability of existing but especially future family members to join a protected citizen within the host state after the end of the transition period.[[218]](#footnote-218) Secondly, any given host state may (at its own discretion) make qualification for future protection under Part Two subject to a system of compulsory registration.[[219]](#footnote-219) That is precisely what the UK decided to do through its “settled status” scheme.[[220]](#footnote-220) On the one hand, the Agreement text suggests that compliance with any such compulsory registration system is constitutive (not merely declaratory) of the very right to protection under the Agreement: the host state may require relevant individuals “to apply for a new residence status *which confers the rights* under this Title”.[[221]](#footnote-221) On the other hand, Part Two does at least lay down various specifications for any such system: for example, a minimum six-month application deadline from the end of transition for persons residing in the host state before that date;[[222]](#footnote-222) provision for that deadline to be extended in the event of technical problems; flexibility in situations where the applicant had reasonable grounds for failing to meet the deadline; smooth, transparent and simple procedures for which certain controlled fees may be charged;[[223]](#footnote-223) detailed rules on appropriate documentation to prove identity, lawful residency and family status etc; and certain presumptions of protection pending the outcome of any application or appeal.[[224]](#footnote-224) But host states requiring registration are entitled to conduct systematic criminality and security checks on all applicants, to determine whether any grounds exist for refusing protected status.[[225]](#footnote-225)

Thirdly and in that regard, Article 20 WA provides that criminal conduct committed before the end of transition is to be assessed in accordance with Union free movement law – but criminal conduct committed thereafter may be dealt with under national law (raising concerns about the potential imposition upon protected citizens of disproportionate immigration penalties for relatively minor criminal offences).[[226]](#footnote-226) Fourthly, own nationals are generally not covered by the citizens’ rights provisions of the Agreement as regards relations with or treatment by their home state. That restriction is potentially significant in certain situations: for example, as regards a British national who returns to the UK with a third country family member (under the *Surinder Singh* caselaw);[[227]](#footnote-227) or for UK children in the UK with a primary carer of third country nationality (under the *Ruiz Zambrano* caselaw)[[228]](#footnote-228) – though the UK indicated that it would unilaterally offer a degree of protection, at least for individuals who have already claimed rights under the relevant provisions of Union law by the end of the transition period.[[229]](#footnote-229)

In addition, there are several situations where the Agreement allows for the potential imposition of additional future restrictions on citizens’ rights that again would not be permitted under existing Union law. For example: five years after the end of transition, the host state may decide no longer to accept national ID cards for entry / exit purposes, where such documents do not comply with certain security and data specifications.[[230]](#footnote-230) Or again: the Joint Committee may decide that the UK will not align its national legislation with various future amendments to the Union rules on cross-border social security coordination (say) if the EU proposes to make certain additional benefits exportable from the competent state by non-resident claimants.[[231]](#footnote-231)

Last but not least, the Agreement allows for the total loss even by protected citizens of certain rights provided for under existing Union law. A first example: there is no provision for individuals to continue to enjoy voting rights in local elections within the host state: the Union treated this as a bilateral issue for the UK and individual Member States.[[232]](#footnote-232) Secondly, there is no legal basis for the mutual recognition of future professional qualifications, even as regards individuals falling within the protective scope of Part Two: the Commission maintained that this was outside the scope of its negotiating mandate and must be dealt with under negotiations about the future EU-UK relationship.[[233]](#footnote-233) Thirdly and on the same basis, the Commission refused to include within the Agreement any provision for protected UK migrants to enjoy onward movement rights across the rest of the EU.[[234]](#footnote-234) Affected British nationals are thus placed in a potentially difficult position – the so-called “golden cage”: their status may well be protected within their chosen state of residence; but they are unable to claim any further free movement under Union law (say, to change residence to, or conduct an economic activity within, another Member State); unless they qualify for certain onward migration rights under the Union rules on long-term resident third country nationals.[[235]](#footnote-235)

*3.3.3. Special provisions on Interpretation and Enforcement of Part Two*

The provisions on governance of the Agreement as a whole are also applicable to Part Two on citizens’ rights: the Joint Committee and relevant specialised committee; dispute settlement through arbitration (subject to the jurisdiction of the CJEU and the exclusion of Part Two from the system of sanctions for non-compliance) etc.[[236]](#footnote-236) By their very nature, however, issues about interpretation and enforcement of the citizens’ rights regime are more important at the level of domestic implementation. In that regard, commentators anticipated that the Agreement would give rise to numerous empirical challenges. Within the UK, for example, it was widely assumed that the “settled status” scheme would generate problems simply through the novelty of the system and sheer number of people affected; including particular concerns about uptake by those with only limited prior engagement with the immigration system and / or by relatively vulnerable citizens; and specific reservations about the clarity of the criteria governing the exercise of administrative discretion in those situations (involving the verification of appropriate documentation or assessment of criminality checks) where the immigration authorities enjoy the power to reject applications.[[237]](#footnote-237)

For such reasons, several important legal provisions relate specifically to interpretation and enforcement under Part Two of the Agreement. In the first place, and besides the general provisions on consistent interpretation of the Agreement as a whole, including by the UK and its domestic judicial or administrative authorities,[[238]](#footnote-238) Article 158 WA provides that, for cases commenced within eight years from the end of transition, in which a question arises concerning the interpretation of Part Two, where a UK court considers that a decision is necessary to enable it to render judgment, that court may send a preliminary reference to the CJEU and will be bound by the latter’s response.[[239]](#footnote-239) That rather arbitrary deadline of eight years is simply a pragmatic compromise between the Union’s original desire for ongoing dynamic alignment on citizens’ rights under the direct guidance of the CJEU *versus* the UK’s starting point of declaring a “red line” over the jurisdiction of the Union courts after the expiry of transition.[[240]](#footnote-240) Nevertheless, the Commission hopes that eight years will still manage to provide a realistic period of time for building up a new jurisprudence on citizens’ rights under the Agreement.[[241]](#footnote-241)

In the second place, and again besides the general provisions on domestic enforcement of the Agreement, including through the possibility of direct effect and primacy for all relevant provisions within the UK legal order,[[242]](#footnote-242) the Agreement contains specific rules on access to administrative and judicial procedures in respect of any refusal of or restriction upon residency rights as contained in Part Two.[[243]](#footnote-243) Furthermore, Article 159 WA obliges the UK to establish an independent monitoring authority for citizens’ rights: to be fully operational as from the end of the transition period; enjoying powers equivalent to those of the Commission; able to act on its own initiative or in response to complaints; and including the power to seek judicial redress.[[244]](#footnote-244)

However, one legitimately fears that the Agreement’s dedicated provisions on interpretation and enforcement under Part Two will do little to tackle the risk of private (rather than public) sector confusion, abuse and discrimination. Given the novelty and complexity of the new immigration system applicable to protected individuals, it seems inevitable that certain employers, landlords and other service providers might struggle to interact with or indeed seek deliberately to exploit migrant UK or Union citizens.[[245]](#footnote-245) Those risks are only heightened by the fact that Article 18(1) WA allows for the host state to issue digital-only residence documentation. Certainly, the UK Government ignored multiple calls to provide Union citizens with hard copy proof of status.[[246]](#footnote-246)

*3.4. Ireland and Northern Ireland*

Of all the regions of the UK, Northern Ireland is likely to be most deeply affected by withdrawal (even though a clear majority of the population there voted Remain in the 2016 referendum); while of all the Member States of the Union, Ireland will be most significantly impacted by the UK’s departure (even though the Republic’s population obviously had no direct say in the 2016 referendum).[[247]](#footnote-247) The Union therefore has a legitimate interest in and particular responsibility for the consequences of Brexit across the island of Ireland: not only due to the direct threat to the fundamental interests of a Member State; but also thanks to the Union’s role in the peace process centred around the Good Friday Agreement;[[248]](#footnote-248) as well as the fact that Northern Ireland now contains a substantial and permanent non-resident population of Union citizens; and having regard to the future possibility of the North’s reunification with the Republic inside the Union.[[249]](#footnote-249)

There are certain Brexit challenges facing the island of Ireland that the Agreement itself cannot do very much to address: for example, the economic risks for Northern Ireland, through its relative dependence on public employment, agricultural support and the labour of Union citizens, all of which make it particularly sensitive to any UK downturn and / or relevant policy changes;[[250]](#footnote-250) or the extraordinary degree to which the Republic’s own economy (from manufacturing supply chains to financial service networks) is interwoven with that of the UK, rendering it especially vulnerable to the economic rupture now being pursued by the Johnson Government.[[251]](#footnote-251) Brexit also poses other real headaches for British-Irish relations which will need to be addressed within the context of the negotiations on future EU-UK relations as a whole: for example, trying to maintain effective cooperation between the competent authorities in Northern Ireland and the Republic, without full UK access to the common instruments of police and judicial cooperation provided by Union law, particularly in fields such as terrorism and organised crime.[[252]](#footnote-252) Nevertheless, there are certain Brexit-derived concerns that the Agreement does indeed seek to alleviate, through a dedicated Protocol on Ireland/Northern Ireland: for example, the importance of Union law in providing firm legal guarantees of non-discrimination within Northern Ireland;[[253]](#footnote-253) the indispensable role of Union legislation in facilitating the operation of the Single Electricity Market across the island of Ireland;[[254]](#footnote-254) and the contribution of Union law to effective North-South cooperation in fields such as the environment, health, transport, education, tourism and sport.[[255]](#footnote-255)

*3.4.1. The Border Problem Provoked by Brexit*

Yet the key Brexit challenge facing the island of Ireland is how to maintain an open border between the two constituent territories outside the context of common Union membership.[[256]](#footnote-256)

An open frontier is not just a matter of enormous economic and social importance, especially for the border communities whose daily lives have been built around the current arrangements. Nor it is just a matter of sensible logistics, faced with the almost impossible task of securing and patrolling such a complex boundary punctuated by hundreds of formal and innumerable informal crossing points. Above all, the open border is of the utmost political significance. The Good Friday Agreement ended (or at least very significantly downgraded) the de facto civil war in Northern Ireland during which thousands were killed, tens of thousands were injured and entire communities were forced from their homes. Social division, often complete segregation, persists between unionists (largely Protestant and wanting Northern Ireland to remain within the UK) and nationalists (largely Catholic and wishing for reunification with the Republic) – but at least those differences can be addressed under the conditions of relative peace and stability created by the Good Friday Agreement. Part of the latter’s genius is that it allowed both main communities to feel that the existing constitutional settlement serves their respective interests: unionists were reassured that Northern Ireland would remain part of the UK for as long as a majority of its population desired;[[257]](#footnote-257) and while nationalists might have to regard reunification as a more distant aspiration, in the meanwhile, one could move freely across the island – with the only obvious difference being the change on roadsigns from miles to kilometres. In short: the absence of a physical frontier is a crucial part of the wider political settlement that helps secure and maintain cross-community support for the peace process.

The terrible prospect raised by Brexit was that UK withdrawal from the Union might lead to the erection of a “hard border” across the island of Ireland: either for the movement of people or for the passage of goods.

Insofar as Brexit threatens the imposition of a physical frontier for the movement of *people* between the North and the Republic, addressing that problem in fact has little to do with Union law. After all, the UK and Ireland were never fully part of the Schengen system.[[258]](#footnote-258) They have instead maintained their own Common Travel Area – albeit informally as a matter of mutual understanding and internal practice, rather than under any explicit international agreement or obligation between or upon the two states.[[259]](#footnote-259) Keeping an open border for persons is therefore primarily a bilateral issue to be resolved between the UK and Ireland. The Agreement simply recognises their continued prerogatives – subject to Ireland’s duty to uphold the rights of entry and residence conferred upon Union citizens and their protected family members under the Treaties.[[260]](#footnote-260) Otherwise, the UK Government accepted that withdrawal should not impair the future functioning of the CTA;[[261]](#footnote-261) and subsequently signed a Memorandum of Understanding with Ireland explicitly affirming their joint commitment to uphold the CTA.[[262]](#footnote-262) Insofar as the British might harbour concerns about Ireland acting as a “soft underbelly” for illegal entry, residence or work in the UK by either EU or non-EU nationals, the British authorities will simply have to rely on more effective internal enforcement of their own immigration restrictions (for example, at the point of seeking employment or access to public services).[[263]](#footnote-263) The CTA and with it an open border for persons are therefore safe – at least for now. After all, there is nothing to stop a future UK administration from renouncing the CTA, regardless of the consequences for British-Irish relations in general or the situation of Northern Ireland in particular. But equally, the Republic itself might well decide to terminate the CTA and could then (in addition) exercise its right under Union law to become a full member of the AFSJ – though any such possibility is only conceivable in the future event of reunification with the North and thus the elimination of any threat of a “hard border”.[[264]](#footnote-264)

*3.4.2. The Challenge of Avoiding a Hard Border for the Movement of Goods*

Far more serious problems were involved in the challenge of avoiding a “hard border” for the movement of *goods* across the island of Ireland. Of course, the constitutional framework applicable to trade in goods is fundamentally different from that applicable to the movement of persons. After all, external customs and trade relations between the Single Market and third countries falls within the Union’s exclusive competence: finding a solution to the Irish border on goods was therefore a matter for the EU and the UK.[[265]](#footnote-265) But in and of itself, that allocation of responsibility was neither here nor there. The real difficulties facing the island of Ireland were entirely of the UK Government’s making.

After the 2016 referendum, as we have seen, the UK Government announced that the UK would be leaving not just the EU but also the Customs Union and the Single Market.[[266]](#footnote-266) In itself, that announcement implied the creation of separate customs and regulatory territories, together with all their accompanying checks and formalities, not only between the Union and the UK but also between Ireland and Northern Ireland. However, when the serious dangers posed by that policy finally dawned upon the UK Government, the latter made a second promise: there would be no return to a hard border on the island of Ireland under any circumstances.[[267]](#footnote-267) Now, the only feasible way to deliver that second promise, as well as keep the first, would be for Northern Ireland to remain within the Customs Union and at least parts of the Single Market (even if the rest of the UK did not). But under pressure from the hardline unionist DUP, upon whose parliamentary votes its very survival now depended, the UK Government also made a third promise: Northern Ireland would be leaving the Customs Union and the Single Market along with the rest of the UK and there would be no new barriers to trade erected within the UK itself.[[268]](#footnote-268) Yet surely the only way to keep that third promise was… for the UK as a whole to remain within the Customs Union and the Single Market!

Having promised entirely irreconcilable outcomes to different constituencies of people, the UK Government was then obliged to negotiate some more credible solution directly with the Union.[[269]](#footnote-269) In their Joint Report of December 2017, the Commission and the UK Government agreed that a “hard border” for goods would best be avoided through the overall future EU-UK relationship.[[270]](#footnote-270) However, those negotiations were not due to commence until after withdrawal was completed, might take a considerable period of time, might not find any workable solution to the Irish border problem and indeed might not produce any final agreement at all. To guard against those contingencies, the two parties therefore agreed that the Agreement should include a “backstop” to prevent the return of a hard border across the island of Ireland in any event. In particular, “the United Kingdom [would] maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the [Good Friday] Agreement”.[[271]](#footnote-271)

*3.4.3. One, two, then three “backstop” models*

It was obvious that the UK Government would struggle to present credible proposals for a future economic relationship that could simultaneously permit the UK to leave the Customs Union and the Single Market, yet without introducing trade barriers between the Union and the UK as a whole, and therefore between the Republic and the North in particular.[[272]](#footnote-272) But although that only increased the importance of the default guarantee provided by the “backstop”, finding an acceptable model for inclusion in the Agreement proved a torturous affair. Three main proposals assumed draft or final legal form.

To begin with, in February 2018, the Union suggested a Northern Ireland-only backstop: the establishment of a “common regulatory area” permitting the free movement of goods between the Union and Northern Ireland; based on the latter’s continued inclusion within the Union customs territory as well as its alignment with a wide range of Union regulatory standards and level playing field guarantees; but also necessitating the expansion / introduction of checks on goods travelling by sea or air between Northern Ireland and Great Britain.[[273]](#footnote-273) In other words, the UK can keep its first and second promises, but only by breaking its third. However, the UK Government (egged on by its incandescent DUP allies) rejected those proposals as an unacceptable attempt to undermine the territorial, constitutional and economic integrity of the UK.[[274]](#footnote-274) It is fair to say that many observers were perplexed by that reaction. After all, it is self-evident that Northern Ireland is already treated very differently from the rest of the UK for all manner of (not only financial and regulatory) purposes.[[275]](#footnote-275)

But the ball was now in the UK’s court and its second body of proposals – this time for a UK-wide backstop mechanism – ultimately provided the basis for agreeing the first Withdrawal Package of November 2018.[[276]](#footnote-276) The centrepiece of that alternative backstop consisted of a de facto customs union between the EU and the whole of the UK so as to remove tariffs in trade between the two parties and thereby solve half of the Irish border problem. Naturally, that customs arrangement was constructed almost entirely on the Union’s own terms: for example, the UK would have to comply with the Union’s tariff system and much of the latter’s trade regime in relations with third countries; as well as respect a wide range of minimum standards in fields like competition, state aid, environmental and labour protection. Above all, this de facto customs union had no definite expiry date: the two parties might hope to replace it with an alternative in the future; but once activated, the backstop would remain in place unless and until the Union itself agreed to amend, replace or abolish it. Even then, an EU-UK customs union would only solve half the Irish border problem. The remaining challenge, of avoiding regulatory checks on goods moving across the island of Ireland, would be addressed by Northern Ireland indeed remaining aligned with all relevant Single Market rules and processes and in turn expanding / introducing various checks on goods travelling from Great Britain into Northern Ireland. In other words, the UK Government would keep its second promise (no hard border in Ireland) but only part of its first promise (the UK as a whole might be leaving the Single Market, but would effectively stay in the Customs Union) and only part of its third promise (Northern Ireland might well be treated the same as the rest of the UK in customs, but not for regulatory purposes).

This time, Tory Europhobes and the DUP clambered to outperform each other with outrage and indignation. And as we know, May attempted in vain to salvage her Withdrawal Package in general, and backstop proposals in particular, by securing additional political assurances from the EU (for example, that neither party regarded the draft Protocol arrangements as desirable and both sides would work hard to replace them as soon as possible with some more durable model);[[277]](#footnote-277) but without the UK Government managing to make good on its promise to secure more radical, legally binding amendments to its own original proposals (either a fixed time-limit on the backstop’s lifespan, or a unilateral right for the UK to terminate the backstop of its own free will).[[278]](#footnote-278)

The third and final set of proposals to avoid a “hard border” for the movement of goods across the island of Ireland emerged from the new UK Government under Boris Johnson, who approached the problem with a very different set of priorities and calculations from those which had so taxed his immediate predecessor.[[279]](#footnote-279) Those proposals formed the basis of further intensive negotiations,[[280]](#footnote-280) culminating in a new Protocol on Ireland/Northern Ireland, within the revised Withdrawal Package of October 2019, on the basis of which UK withdrawal duly occurred.[[281]](#footnote-281) In effect, May’s UK-wide backstop has been replaced by another Northern Ireland-specific regime: after all that, it was the UK’s inconvenient third promise that indeed gave way in the end.[[282]](#footnote-282) However, the final agreement is not quite the same as the Union’s original proposals for a “common regulatory area”: Northern Ireland will remain formally within the UK customs territory, at the same time as being treated de facto as part of the Union’s customs zone, and directly subject to an (albeit more limited) array of Single Market regulation.

*3.4.4. What complicated webs we weave…*

In the first place, the Protocol makes provision for Northern Ireland’s future place within the Union’s customs and regulatory area. In particular, Northern Ireland will remain subject to large swathes of Union legislation covering customs, trade, the manufacture and marketing of goods, VAT, excise duties and state aid.[[283]](#footnote-283) Such legislation will apply to Northern Ireland on a dynamic basis.[[284]](#footnote-284) The Joint Committee will also address the implications of the future adoption of entirely new Union rules that nevertheless fall within the scope of application of the Protocol.[[285]](#footnote-285) Unlike so much of the rest of the Agreement, all relevant Union concepts and provisions must be interpreted fully in accordance with the CJEU’s evolving caselaw.[[286]](#footnote-286) In return, Articles 30 and 110 TFEU will continue to apply to Northern Ireland;[[287]](#footnote-287) quantitative restrictions shall be prohibited between the Union and Northern Ireland;[[288]](#footnote-288) and placing Union goods on the market in Northern Ireland shall otherwise be governed by Articles 34 and 36 TFEU.[[289]](#footnote-289)

By those means, the Union succeeds in protecting the basic integrity of the Customs Union and Single Market whilst also avoiding a hard border for the movement of goods across the island of Ireland. But this did involve making some important compromises. For example, as Weatherill has pointed out, the Union was forced to qualify its staunch political mantra that the four freedoms of the Single Market must be regarded as “indivisible”;[[290]](#footnote-290) albeit by reference to the equally important slogan that the unique challenges for Ireland posed by Brexit call for unique solutions.[[291]](#footnote-291) More significantly, the Union has accepted that an external frontier of the Customs Union and Single Market will in future be policed by a third country: many of the Union rules applicable to Northern Ireland will have to be enforced on the ground by the UK authorities.[[292]](#footnote-292) That is an especially noteworthy concession, given that the latter currently stand accused of failing to tackle serious border fraud as regards the importation of third country goods into the Single Market.[[293]](#footnote-293)

However, those British authorities enforcing Union law in Northern Ireland will be subject to certain forms of Union supervision – including the duty to provide information on request, the right of Union representatives to be present during relevant activities and even the power of Union officials to order their UK colleagues to carry out control measures in individual cases for duly stated reasons.[[294]](#footnote-294) Moreover, as regards the core Union rules made applicable to Northern Ireland by the Protocol,[[295]](#footnote-295) the Union’s institutions, bodies and agencies etc shall exercise those powers conferred upon them by or under the Treaties.[[296]](#footnote-296) In that regard, the Protocol specifies several particularly noteworthy features. For example, the relevant Union entities are to exercise their applicable powers in relation to the entire UK, as well as natural and legal persons resident or established anywhere in the UK – not just in relation to, or those located in, Northern Ireland itself. The text also makes particular reference to the jurisdiction of the CJEU – including the possibility for all competent UK courts to make preliminary references as regards relevant provisions of the Protocol / Union law made applicable thereunder.[[297]](#footnote-297) In addition, the relevant acts of competent Union entities must produce the same legal effects for the UK as they do within the Union and its Member States: poor Brexiters – there really is no escape from direct effect and primacy.[[298]](#footnote-298)

In the second place, the Protocol also makes provision for Northern Ireland’s future place within the UK’s own trading system. The starting point is supposedly that Northern Ireland will form part of the customs territory of the UK;[[299]](#footnote-299) and the placing of goods on the Northern Irish market will take place in accordance with UK law.[[300]](#footnote-300) And indeed: the Johnson Government has repeatedly claimed that, under its “great new Brexit deal”, there will be no border of any kind down the Irish Sea.[[301]](#footnote-301) But those initial propositions are entirely subject to (and the UK’s political claims are directly contradicted by) the explicit obligations contained in the Protocol as well as Union law made applicable to Northern Ireland thereunder.[[302]](#footnote-302) The relevant obligations are sufficiently extensive that Northern Ireland’s position within the UK trading system can at best politely be described as “complicated”.

To begin with, customs and regulatory checks will indeed take place on trade between Northern Ireland and Great Britain – something which we were told no British Prime Minister could ever agree to, because it would destroy the sovereignty and integrity of the UK.[[303]](#footnote-303) On the one hand, trade *from Great Britain into Northern Ireland* will be subject to all relevant border checks in accordance with Union customs rules; and GB goods must be placed on the Northern Irish market in accordance with the applicable Union legislation.[[304]](#footnote-304) The Joint Committee may make recommendations to avoid or minimise controls at Northern Ireland’s ports and airports.[[305]](#footnote-305) But future EU-UK regulatory divergence may well mean (for example) that toys manufactured in England or Scotland, even with no ambition for export beyond the UK, nevertheless still need to be adapted specifically for the Northern Irish market. On the other hand, as regards trade *from Northern Ireland to Great Britain*, the Johnson Government maintained its predecessor’s promise to guarantee “unfettered market access” to England, Scotland and Wales.[[306]](#footnote-306) Yet the plain text of the Protocol makes it clear that that is not entirely true: the Agreement specifically envisages certain trade restrictions from Northern Ireland to Great Britain (for example, as regards controlled goods subject to international export requirements).[[307]](#footnote-307) In any case, the UK will still need to know which goods coming from Northern Ireland are in fact of EU rather than purely domestic origin (for example, so as to apply UK customs duties in compliance with its WTO obligations).[[308]](#footnote-308)

The highly specific provisions governing Northern Ireland’s trade with Great Britain aggravate an already complex and sensitive task: deciding on the future design and operation of the UK internal market itself.[[309]](#footnote-309) Readers may be aware that UK devolution was only created during and within the context of EU membership. The devolved authorities have since been promised that Brexit will lead to a significant increase in their local autonomy.[[310]](#footnote-310) Like any other state divided into territories with independent regulatory powers, the UK now needs to decide which domestic barriers to trade and distortions of competition are to be considered unacceptable; as well as which principles, instruments and institutions will ensure the smooth functioning of its own internal market. Those discussions have already proved controversial and remain as yet unresolved – not least given the inherent demographic, economic and constitutional superiority of England over its smaller and more vulnerable partners.[[311]](#footnote-311) But the fact that Northern Ireland will now be governed by very different domestic trade rules means that the UK internal market will be asymmetrical from the very moment of its birth.

In addition, recall that Johnson insisted on Northern Ireland being formally included within the UK customs territory and thus able to share in the aspirant benefits of an independent UK trade policy (for example, through reduced tariffs on trade with third countries).[[312]](#footnote-312) But as a direct result, Northern Ireland will become subject to two distinct customs regimes running simultaneously in respect of the same territory. The Protocol foresees a nightmarish system for determining and administering which goods pay Union duties, UK duties or no duties at all.[[313]](#footnote-313) The presumption is that Union duties should apply to all goods entering Northern Ireland from outside the Union itself; unless it is proven (in accordance with more detailed criteria to be adopted by the Joint Committee) that the relevant goods are not at risk of subsequently being moved into the Union (whether by themselves or as part of other goods following processing); in which case they will pay UK duties (if originating from a third country) or no duties (if they come from Great Britain).[[314]](#footnote-314) The Protocol also foresees a system of refunds by the UK authorities, for example, in respect of goods shown not to have entered the Union.[[315]](#footnote-315) The whole model is reminiscent of the 2018 Chequers Plan for a “customs partnership” between the EU and the UK as a whole – proposals which were widely dismissed at the time as untested, speculative, massively bureaucratic and damaging to competitiveness.[[316]](#footnote-316) Yet Northern Ireland is now being used as the guinea pig for precisely such a scheme and risks being left worse off under the Johnson Protocol than it would have been under the previous backstop proposals from either the Commission or Theresa May.

In the third place, the Protocol ponders its own anticipated longevity and eventual mortality. In theory, the entire system will continue to apply, unless and until replaced in whole or in part by any new EU-UK deal.[[317]](#footnote-317) But in practice, that is unlikely to happen, given the revised preferences of the Johnson Government for the future EU-UK relationship.[[318]](#footnote-318) So in reality, and as the Commission has repeatedly stressed, the border arrangements contained in the Protocol should be treated as permanent.[[319]](#footnote-319) For that reason, the parties agreed to create not only various dedicated governance tools to help promote the smooth long-term functioning of the Protocol;[[320]](#footnote-320) but also a specific “consent mechanism” to ensure that the population of Northern Ireland might periodically reaffirm their willingness to remain subject to the border provisions contained in the Protocol.[[321]](#footnote-321) On a rolling basis, commencing four years after the end of the transition period: if the border regime receives cross-community support within the Northern Irish Assembly, it will extend for another eight years; if there is a simple majority but without cross-community support, the relevant Protocol provisions will extend for another four years; whereas in the event of non-consent, the border arrangements will cease to apply after a further two years of operation (giving at least some time for all relevant parties to decide / prepare for what might happen next).[[322]](#footnote-322)

In effect, for as long as they remain within the UK, and for as long as the latter remains outside the EU, the Northern Irish get to decide whether they would rather have a hard border than continue to live with the Protocol. But at least the consent-conditionality provision in the Protocol makes it easier to reconcile with Article 50 TEU as a legal basis supposedly limited to settling “orderly withdrawal” issues rather than establishing long term future relations.[[323]](#footnote-323)

*3.4.5. The Irish border: Risks and prospects*

The Good Friday Agreement was meant to bring relative stability to Northern Ireland – offering time and space for divisions to heal and differences to soften. After the 2016 referendum, anything but the softest of soft Brexits was bound to be a problem for the island of Ireland.  Now that the Johnson Government is determined to pursue a hard Brexit (deal or no deal), the challenges facing the North and the Republic are considerably worse. The common hope is that the revised Protocol will provide a credible and durable solution to the Irish border problem that not only protects the peace in Northern Ireland, but also respects the Union’s customs and regulatory concerns, while also satisfying the UK’s demand for an independent trade policy.

But the Protocol contains considerable economic risks for every relevant party.[[324]](#footnote-324)  The Union’s own borders will be policed by a third country which has already proven itself unreliable in that task and whose Government insists on making misleading statements about its own obligations under its own Agreement. The UK itself now faces significant uncertainty and disruption within its fledgling internal market, whose design and operation are already marked by difficult tensions with Wales and especially Scotland.  For Northern Ireland itself, political salesmen like to claim that it will soon occupy a uniquely privileged position, enjoying the best of both worlds by straddling the EU and UK markets – but in reality, the Protocol is based on the experiment of a dual customs regime, once dismissed even by Johnson as damaging and unworkable.

Nor should one overlook the fact that the Protocol is already damaging political stability within Northern Ireland.  In the trade barriers that will soon exist across the Irish Sea, unionists perceive a serious threat to their British identity.  Among nationalists, Brexit in general and the Protocol in particular have revived dreams of reunification far sooner than many had expected. It should be a cause of serious concern that the Protocol effectively reduces the collective incentive to make the Good Friday Agreement work, at the same time as rekindling rather than defusing the tensions of sectarian identity politics.

Even a small risk that the Protocol system may simply break down is still too high – not least since every other pathway leading away from such a scenario would only present even greater problems of its own.  For example: what would we do, if the Union were effectively forced to impose a hard border across the island of Ireland, so as to protect its own Customs Union and Single Market, faced with the intolerable provocation of a British government that simply refuses to respect and enforce the terms of the Agreement and shows little concern about the impact of its own behaviour upon Northern Ireland?  An unlikely, yet not entirely fanciful prospect. Would a better solution to the entire problem of Brexit and the difficulties of the revised Protocol really lie (as many now believe) in a border poll leading to Irish reunification within the Union? An entirely possible, yet still not straightforward outcome. After all, there are also significant dangers in a premature push for reunification, before both main communities feel genuinely comfortable at the idea, and until we are sure that the Republic itself is willing and able to handle the consequences of such a momentous event.

**4. The Future Relationship**

The future EU-UK relationship is currently under negotiation.[[325]](#footnote-325) Once more concrete terms emerge, they will doubtless provide the subject for extensive analysis. For present purposes, it must suffice to highlight some of the key constraints, preferences and choices that have already shaped the negotiations and will influence their eventual outcomes.

*4.1. Context of and background to the Political Declaration*

The common experience of humanity provides us with a familiar agenda for international cooperation in fields such as trade and security – a closely inter-related bundle of decisions to be made about the overall level of ambition the parties are willing to pursue; the specific legal instruments they are willing to employ to pursue that goal; an appropriate and commensurate range of ancillary or flanking policies and safeguards; the institutional structures and processes that will operationalise the agreement; the principles and disciplines governing its interpretation, application and enforcement. Likewise, experience has taught us various empirical lessons about the likely challenges facing negotiations aimed at closer international cooperation: for example, that integrating markets for services is significantly more difficult than for goods; that geography matters, insofar as greater proximity increases the opportunities for and intensity of trade relations; that size matters, since larger players simply bring greater economic and political clout to the table; that the parties’ willingness to create effective institutions is central to any genuinely ambitious agreement.[[326]](#footnote-326)

Future EU-UK relations will not be magically exempt from that agenda and those lessons.[[327]](#footnote-327) In addition, however, both parties must live with several inescapable features of the EU constitutional order concerning the conduct of external relations: for example, the complex division of competences between the Union and its Member States, including the possibility of mixity, which then precipitates national as well as Union level ratification;[[328]](#footnote-328) the non-derogable principles developed by the CJEU to protect the autonomy of the EU legal system from external interference by third countries or other international bodies;[[329]](#footnote-329) and the particular status of international agreements within the Union legal order itself, which creates a strong knock-on pressure to ensure reciprocity of internal legal effects (either by levelling-up or by levelling-down) with the Union’s international partners.[[330]](#footnote-330) It is worth noting that the UK itself lacks many comparable constitutional constraints: whatever conventions or statutes might currently apply to the conduct of international relations or conclusion of international agreements, as regards the division of labour between executive and legislature, or between the central and devolved authorities, are easily overcome or overturned by a London Government with a working Commons majority.[[331]](#footnote-331) The UK’s negotiating partners need only really worry about the implications for reciprocity of the dualist nature of its domestic legal order.

Against that background, the European Council articulated its overall position towards future relations with the UK in its guidelines from April 2017,[[332]](#footnote-332) as well as in additional guidelines adopted in March 2018.[[333]](#footnote-333) As we have seen, the Union desires a close partnership with the UK, but not at any cost: preserving the integrity of the Union’s own policy ecosystems is paramount; in particular: the Union will not allow “cherry-picking” from within the Single Market. Furthermore, the Union insists upon a fair balance of rights and obligations: for example, robust level playing field commitments to ensure free and fair competition between the Union and UK markets; plus various human rights and data protection guarantees as a precondition for cross-border cooperation between police and security forces as well as in the sphere of criminal justice.[[334]](#footnote-334)

However, the UK debate took place almost regardless of those legal and political realities. The Leave campaign never properly defined its vision for the future, preferring instead to make entirely fantastical and mutually contradictory promises in order to win the referendum. Yet the basic choice facing Brexit Britain was simple.[[335]](#footnote-335) Either the UK could aim for a relatively close future relationship with the Union: that would minimise disruption in trade and security; and also make the Irish border problem less difficult to manage as part of a UK-wide settlement; but it would come at the price of the UK aligning itself to the Union and its regulatory standards without exercising any appreciable degree of influence. Or the UK could settle for a relatively distant future relationship with the Union: that might appear to tally with the political slogan of “taking back control” (and offer the Leave Right greater freedom to depart from the hated European economic and social model); but it would come at the cost of much greater dislocation in trade and security; and also increase the pressure to address the Irish border problem by treating Northern Ireland very differently from the rest of the UK. However, since its very survival depended precisely on obscuring and avoiding that very choice, the May Government maintained its official “cake and eat it” policy for as long as possible: the British desired a deep and special partnership, with the UK retaining many of the benefits of Union membership, without having to accept the corresponding obligations.[[336]](#footnote-336)

That façade cracked upon publication of the Chequers Plan in July 2018.[[337]](#footnote-337) When the May Government was eventually forced to choose, the original Political Declaration of November 2018 effectively prioritised minimising EU-UK trade disruption and finding a UK-wide solution to the Irish border problem (at least in the short and medium term):[[338]](#footnote-338) on its face, the parties envisaged only a relatively distant future EU-UK relationship, with the UK entirely outside the Customs Union and the Single Market, albeit willing to consider alignment with Union rules across various sectors; but the “Irish backstop” contained in the corresponding version of the Agreement meant that, in reality, the UK would remain much more closely linked to the EU in a wide range of policy fields for at least the foreseeable future.[[339]](#footnote-339) However, when the Johnson Government came to renegotiate the Withdrawal Package, it brought a very different set of priorities to the table: “taking back control” demanded that a genuinely distant future EU-UK relationship be put in place as soon as possible, so that the UK could exercise its freedom to diverge from Union regulatory standards and embark upon its “Global Britain” trade policy; significant dislocation and disruption in existing trade and security relations, as well as the legal and economic segregation of Northern Ireland from the rest of the UK internal market, were prices worth paying to realise that objective. The Political Declaration was therefore redrafted to dilute still further the ambition for future EU-UK relations;[[340]](#footnote-340) and the Protocol on Ireland/Northern Ireland was revised to ensure that the Irish border problem did not stand in Johnson’s way.[[341]](#footnote-341)

*4.2. Revised Political Declaration of October 2019: key points*

The Political Declaration states that the future EU-UK relationship will be based on a balance of rights and obligations, taking into account the “principles” expressed by each party: for the Union, protecting the autonomy of its own decision making, respecting the integrity of the Single Market / Customs Union and upholding the indivisibility of the four freedoms; for the UK, respecting its sovereignty, protecting its own internal market, the development of an independent trade policy and ending the free movement of people. The future relationship needs to take account of the unique context of EU-UK relations: while it cannot amount to the rights or obligations of Union membership, it should still be approached with high ambition as regards its scope and depth.

The future relationship should be underpinned by shared values – including the UK’s continued commitment to respect the ECHR. Given the overall importance of data flows to the future relationship, the Commission will assess the UK’s data protection standards with a view to adopting an adequacy decision (in accordance with existing Union law) before 2021. The UK will do the same under its own regulatory framework. The parties will also establish general terms and conditions for UK participation (in accordance with applicable Union legislation) in a range of Union programmes; as well as working together on other joint initiatives such as renewed funding for peace and reconciliation in Northern Ireland; and exploring other options such as the UK’s future relationship with the European Investment Bank Group.

However, the bulk of the Political Declaration is dedicated to two main topics. In the first place, an economic partnership between the Union and the UK – based on a Free Trade Agreement and wider sectoral cooperation. Space precludes us from doing more than highlighting a few key points. In the field of goods, the parties will form separate customs and regulatory territories, but will aim for no tariffs or quantitative restrictions across all sectors, and to engage in customs and regulatory cooperation with a view to minimising trade barriers. As regards services, the parties will negotiate provisions on market access and national treatment under host state rules, together with arrangements on the temporary entry / stay of natural persons for business purposes, and possibly also rules to govern the mutual recognition of certain professional qualifications. When it comes to financial services in particular, the Union will assess the relevant UK regimes with a view to adopting equivalency decisions (in accordance with existing Union law) before July 2020. The UK will do the same under its own regulatory framework.

There are also more detailed provisions for other specific sectors, for example: digital, intellectual property, public procurement, transport, energy and global cooperation in fields such as environmental protection and financial stability. Several sections are of particular note. For instance, the Political Declaration reflects the UK’s low future tolerance for the mobility of people (other than with Ireland): the parties should simply aim for reciprocal visa-free travel for short-term visits, possibly also arrangements on entry / stays for research and study, maybe some cross-border social security coordination and judicial cooperation in family law. Another example concerns fisheries: the parties will cooperate in bilateral and international fora to ensure sustainable fishing and protect the marine environment, including the management of shared stocks; together with a new agreement covering access to waters and quota shares – using best endeavours to reach such an agreement by July 2020, so it can provide the basis for determining fishing opportunities after expiry of the transition period.

Central to the economic partnership provisions of the Political Declaration is the section on a level playing field. The original version agreed by the May Government provided that the future relationship should include provisions on state aid, competition, employment and environmental standards and relevant tax matters – but building on the corresponding arrangements provided for in the Agreement, in particular, the alignment obligations contained in the UK-wide “Irish backstop”.[[342]](#footnote-342)  However, the revised Political Declaration now states that the future relationship should encompass robust commitments to prevent distortions of trade and unfair competitive advantages – to which end, the parties should uphold the common high standards applicable at the end of transition in the areas of state aid, competition, employment and environmental standards and relevant tax matters – a less onerous though still important non-regression commitment.[[343]](#footnote-343)

In the second place, the Political Declaration also devotes considerable attention to a security partnership between the Union and the UK. Again, space precludes us from doing more than highlighting a few key points. As regards EU-UK cooperation in criminal matters, the parties desire a comprehensive, close, balanced and reciprocal system of cooperation – but reflecting the commitments the UK is willing to make as regards (for example) regulatory alignment, dispute settlement and enforcement; and taking into account the fact that the UK will be a non-Schengen third country that does not provide for the free movement of persons. On that basis, the security partnership will address: EU-UK data exchanges, including in fields such as passenger name records and the Prüm system; operational cooperation between law enforcement authorities and cross-border judicial cooperation in criminal matters; and cooperation as regards money-laundering and terrorist financing. The Political Declaration also describes the parties’ aspirations in the fields of foreign policy, security and defence: flexible and scalable cooperation; including appropriate mechanisms for dialogue, consultation and coordination. Particular provisions address issues such as: sanctions; UK participation in CSDP missions and operations; UK collaboration in the development of European defence capabilities; thematic cooperation in fields such as cyber-security, illegal migration and counter-terrorism; and the need for agreements on the protection of classified and sensitive information.

The Political Declaration also sketches out the parties’ thinking about the structure and governance of their future relationship. The precise legal form will be determined in due course, but should include an overarching institutional framework, which could take the form of an association agreement, while allowing for more specific governance arrangements in particular areas. As well as dialogue at appropriate levels to provide strategic direction, the parties will also support inter-parliamentary and encourage civil society exchanges. But as usual, the core governance institution will be a Joint Committee; the parties will seek to ensure consistent interpretation and application of their agreements; dispute settlement as necessary through an independent arbitration panel; a preliminary reference system so as to protect the CJEU’s exclusive jurisdiction over the binding interpretation of Union law; and a system of sanctions for non-compliance as well as general safeguards and rebalancing measures.

*4.3. Post-Withdrawal Negotiating Positions*

The Political Declaration is not intended to be legally binding or enforceable: it is a good faith expression of the parties’ common political understanding which “accompanies” the Agreement and is intended to provide the framework for subsequent formal negotiations.[[344]](#footnote-344) The latter might well produce a new agreement on the future EU-UK relationship either similar to or very different from that envisaged in the Political Declaration itself. Equally, the talks could well lead to no successful outcome; or produce only a very limited set of future arrangements. Moreover, the Political Declaration is in many places so sketchy that it effectively offers no more than a basic checklist for the negotiating agenda, but can hardly be said to provide a meaningful guide to what the parties even intended let alone what they might ultimately achieve.[[345]](#footnote-345)

Article 184 WA provides that the Union and the UK shall use their best endeavours in good faith to negotiate and ratify the agreements governing their future relationship with a view to their application from the end of the transition period – permitting that crucial “single regulatory change” which would at least lessen the disruption caused by Brexit. To help realise that exceptionally ambitious timetable, the Political Declaration proposes that parallel negotiations covering the various strands of the future relationship should begin as soon as possible after the UK’s formal withdrawal and that a high level meeting should convene in June 2020 to take stock of progress – no doubt taking account the deadline by which the Joint Committee may agree a one-off extension to the transition period in accordance with Article 132 WA.[[346]](#footnote-346)

The Council adopted the Commission’s formal negotiating mandate on 25 February 2020.[[347]](#footnote-347) It contains no great surprises – largely following the European Council’s previous guidelines from April 2017 and March 2018 as well as the terms of the revised Political Declaration as approved in October 2019.[[348]](#footnote-348) For its part, the UK published a parliamentary statement about its negotiating objectives on 3 February 2020 which made clear that the Government did not regard itself even as morally bound to respect the terms of its own revised Political Declaration: Johnson here revives his tired “cake and eat it” act (for example) by peddling the fantasy that the UK should enjoy full tariff-free access to the Single Market without having to undertake anything more than the minimal level playing field commitments contained in standard free trade agreements; but essentially, the UK Government now proposes an extreme form of “clean break Brexit” which rejects any form of regulatory alignment with the EU, any form of supranational control over UK law in any area, or any constraint upon the future autonomy of the UK legal system in any way.[[349]](#footnote-349) When more details were released a few weeks later, in the UK’s official “Approach to Negotiations”, it became clear that the UK was indeed intent on pursuing an even more distant model of future relations with the Union (if indeed it had any genuine intention of reaching any serious agreement at all).[[350]](#footnote-350)

The UK position as set out in February 2020 is not only a significant departure from the revised Political Declaration, but also light years away from the Union’s negotiating mandate in a variety of important respects.[[351]](#footnote-351)

First and foremost, the parties are embarking from very different (almost philosophical) starting points. On the one hand, the Union regards its future relationship with the UK as of particular importance in terms of trade, security and strategic interests: the UK may be a third country, but it is in a unique situation relative to the Union – for a wide range of historical, geographical, demographic, economic and political reasons – which together call for an especially close relationship, not only in terms of privileges but also regards obligations. On the other hand, the Johnson Government regards the EU-UK relationship almost with indifference – merely one component in the grand designs of “Global Britain”: trade can be conducted on terms similar to that offered to Canada or Japan; other interests can be managed through ad hoc arrangements if indeed there need to be any at all; nothing can intrude upon the sovereignty of the UK once it “fully recover[s] its economic and political independence”.[[352]](#footnote-352) If anything, we would do well to bear in mind that a substantial proportion of the UK’s current ruling party are ideologically hostile to the Union’s very existence: far from seeing these negotiations as the route to maintaining close and friendly cooperation, they measure the success of their beloved Brexit only relative to the damage it might inflict, and that they can blame, on the despised “EUSSR”.[[353]](#footnote-353)

Secondly, the UK has thrown the very scope and structure of the future relationship entirely into the air. Whereas the EU bases its mandate on the vision of an overall institutional framework plus broad economic and security partnerships as agreed in October 2019, the Johnson Government now rejects the idea of any such comprehensive framework. Instead, the UK proposes only a free trade agreement; together with a series of more limited and entirely separate agreements on specific issues (providing for cooperation in sectors such as air transport, energy, nuclear and law enforcement / criminal justice). The concept of a distinct security partnership (including any particular provisions on foreign policy, security or defence) simply disappears.[[354]](#footnote-354) And the UK shows no particular interest in any more general expression of common values; in institutionalised structures to engage in overall strategic discussions; or in regular opportunities for dialogue on matters of mutual interest. Indeed, the UK has remarkably little to say at all on the entire subject of governance – concentrating its energy on repeatedly asserting the importance of its own untrammelled sovereignty.[[355]](#footnote-355)

Thirdly, even within the economic partnership / free trade agreement, the two parties are simply diametrically opposed on the central question of the nature of a level playing field to guarantee free and fair competition. The Union takes the Political Declaration as its starting point but significantly fleshes out the implications and expectations – based on the maxim, “no tariffs, no quotas, no dumping”.[[356]](#footnote-356) In fields such as employment and the environment, the parties should uphold Union standards as they stand at the end of transition; but there should also be a mechanism for raising standards over time – using Union law as a reference point and with an additional commitment to non-regression for the purposes of encouraging trade / investment;[[357]](#footnote-357) and the Union should be able to take autonomous measures to react quickly against relevant disruptions in competition. In the realm of state aid, the Commission’s mandate goes even further: Union law should apply to and in the UK on a dynamic basis, enforced by an independent UK authority working closely with the Commission, and amenable to dispute settlement through arbitration (subject to adequate protections for the autonomy of Union law). In stark contrast, the UK entirely downplays the importance of the level playing field and renounces the approach agreed in the Political Declaration: the UK will enact its own state aid regime and disputes over its application should not be amenable to dispute settlement under the agreement; similarly, the UK’s autonomous standards on employment and environmental protection should merely be subject to a non-regression duty specifically on grounds of encouraging trade / investment.

Fourthly, an equally wide chasm separates the parties over the vexed question of fisheries. Besides cooperation over the conservation and management of fish stocks, the Union’s primary objective is to maintain the status quo as regards reciprocal access to waters and the allocation of quota shares, so as to avoid economic dislocation for Union fishermen that have carried out activities in UK seas – explicitly linking the conclusion of such an agreement to the conditions for UK access to the Single Market. However, the UK wants trade in fisheries products to be dealt with under the proposed FTA, with an entirely separate agreement on access to waters and cooperation on conservation and management issues – based on annual negotiations; rejecting the relative stability mechanism employed under Union law; and with a heavy emphasis on combatting illegal fishing activities.

Fifthly, major divergences in approach are apparent as regards not only the economic partnership but also security cooperation. For example, the Union insists that, as part of the essential conditions that underpin their entire future relationship, the UK must uphold existing human rights commitments as provided for under the ECHR. In the context of the proposed security partnership, the Commission’s mandate goes even further: should the UK denounce the ECHR, the provisions on law enforcement and judicial cooperation in criminal matters should be automatically terminated; while if the UK were to change its domestic law so as to deprive the ECHR of direct internal legal effects, those same provisions should be automatically suspended. The UK Government once again takes a highly sovereigntist approach: its more narrow agreement on security cooperation must not constrain the UK’s autonomy in any way, including by specifying how the UK should protect human rights within its own legal system; though the treaty should include a general and unrestricted power for either party to suspend or terminate its provisions in whole or in part.[[358]](#footnote-358)

Last but far from least, the parties hold very different views on the timescales for negotiating their future partnership. While the EU continues both to stress the difficulty of achieving agreement before the end of 2020 and to highlight the possibility of extending the transition period in accordance with Article 132 WA, the UK Government has declared itself absolutely adamant that there will be no such extension under any circumstances – not only in its general election manifesto,[[359]](#footnote-359) but also in major policy statements since December 2019,[[360]](#footnote-360) and indeed now explicitly enshrined in primary legislation.[[361]](#footnote-361) Thus, the transition period looks set to expire on 31 December 2020 and the new EU-UK relationship will commence on the basis of whatever happens to be in place after that date. For the UK: if that means “no deal” (now disingenuously described as an “Australia-style” Brexit) then so be it. Indeed, in its “Approach to Negotiations”, the Johnson Government declares that, if the June 2020 stock-take cannot identify the broad outlines of an agreement that is capable of being finalised by September 2020, the UK may well walk away from further talks altogether.[[362]](#footnote-362)

Of course, and particularly given the sweeping distance now separating the parties, there seems scant chance that such complex and sensitive negotiations will be progressed and completed within such short timescales and deadlines – even without making due allowance for the possibility of judicial action before the CJEU about the compatibility of any proposed agreement with Union law;[[363]](#footnote-363) and for the potential requirement that any mixed agreement may call also for Member State ratifications.[[364]](#footnote-364) Even on the most optimistic assessment: if a deal is done, on terms acceptable to both parties, in time for entry into force in 2021, it would involve such a transformation / downgrading in EU-UK relations that (for many sectors and actors) there may as well be no deal at all. But it seems far more likely that negotiating time will run out and the transition period will expire with no significant / comprehensive agreement in place – in which case, Johnson’s right wing supporters will have succeeded in procuring the “hard Brexit” they had always hoped for. And even if a deal does eventually emerge at some later point down the line, that will only mean “two regulatory changes” – something the transition period and the possibility of extension were precisely designed to avoid.[[365]](#footnote-365)

*4.4. Prospects for future EU-UK relations*

On paper, Boris Johnson may have “got Brexit done”: the UK is no longer a Member State of the European Union. But in practice, many of the real questions about future relations between the UK and the EU remain to be settled.

On the one hand, it might fairly be said that the UK Government under Boris Johnson finally pulled itself free of the excruciating period when leading Leave campaigners, and then the administration of Theresa May, promised all things to all people and either believed or pretended that that could ever possibly happen in reality. The current UK position on future relations with the EU is at least possessed of greater internal coherence and demonstrates a higher level of political realism.

On the other hand, the cost of such clarity is that the UK Government is driving headlong towards a serious rupture in relations with the EU – a far cry from many of the Leave promises made back in 2016 and repeated consistently thereafter – and crucially, that will be true regardless of whether there is a deal or whether there is none. The British decision to rule out any transitional extension only exacerbates the situation by making “two regulatory changes” more likely in due course. And of course, there remains a striking contradiction between Johnson’s proud depiction of “Global Britain” as the champion of free trade *versus* the reality of a Government poised to commit the single gravest act of economic segregation in modern history.

Besides the damage which will inevitably flow from the UK’s decision deliberately to dislocate and distance itself from the Union, that choice also has various important internal consequences for the UK itself: for example, the customs tensions affecting Northern Ireland will only grow in proportion to the degree of Great Britain’s divergence from Union law; and the same is true as regards the management of internal trade between England, Scotland and Wales. But most of all: one wonders why the Johnson Government appears so fixated on the power to diverge from Union regulatory standards, many of which are only minimum in nature and do not prevent the UK from pursuing higher levels of protection. Perhaps “taking back control” is just an exercise in nationalist political rhetoric.[[366]](#footnote-366) Or maybe the Tories do indeed harbour dreams of dismantling UK adherence to Europe’s distinctive socio-economic model.

Moreover, the UK’s increasingly abrasive approach to the future relationship also poses serious challenges for the EU itself. Above all: the risk of an aggressive competitor on our very doorstep, actively undertaking market deregulation and encouraging social dumping as an alternative economic model; as well as constantly engaging in attempts to undermine the political unity and solidarity of the Member States.[[367]](#footnote-367) Even looking beyond the current generation of Tory politicians in office: the further and harder the UK does drift away from the European norm, the more difficult life will eventually be, even for a new administration more sympathetic to close relations with or indeed renewed membership of the Union. But in the meantime, we should continue firmly to locate the debate on future EU-UK relations within the wider geo-political landscape currently afflicting the developed world: the UK Tories are now fully converted to the cause of hard right, post-truth populism, in international cahoots with their equally dangerous allies in the likes of Trump’s USA and Bolsonaro’s Brazil. Until the present crisis passes or at least recedes, the Union and its friends are effectively acting in existential defence of liberal social market democracy – and that point should never drift far from the minds of those responsible for negotiations with the UK.

**5. Concluding Remarks**

The UK’s Withdrawal Package is the product of certain empirical facts, as well as various constitutional and legal constraints, together with myriad political choices – many of which, particularly those originating in the corridors of Westminster and Whitehall, only made an already challenging situation even more difficult to manage. The Withdrawal Agreement has its strengths – not least in providing a much higher degree of certainty compared to the confusion and disruption that would otherwise have accompanied an entirely unilateral UK departure from the Union. But the Agreement also has its weaknesses – particularly as regards the often formalistic and in several respects limited protection afforded to migrant citizens; as well as the complex and potentially unstable settlement forced upon Northern Ireland at the insistence of the Johnson Government. As for the Political Declaration: it took only a few weeks for its true value to be revealed, as the UK set about systematically back-pedalling from many of the commitments and aspirations it had already agreed with the Union. And whatever new treaties are concluded in due course between the EU and the UK, the Johnson Government appears determined to force through a far-reaching rupture in their political, economic, social, cultural and legal relations.

The triumph of post-truth political populism that brought about the dramatic demise of the UK as a leading power within the world’s largest alliance of liberal social market democracies is a tragic and cautionary tale from which the Union and its Member States must learn some serious lessons – about the dangers posed by rampant Europhobic propaganda and delusional nationalist fantasies, as well as the risks of pandering to political extremists who will never be satisfied, but only grow more demanding with every concession and more confident with every victory.

But lawyers can always console themselves with the fact that even the bleakest of tragedies always manage to generate novel legal phenomena and fresh avenues for scholarly research. We now have an entire branch of Union law that barely existed before – the law of withdrawal – even if it is a field we hope never to study again. Whatever the outcome of the future partnership negotiations, we will certainly have a new frontier of EU external relations to explore. And sooner or later, we might have an interesting set of accession challenges to ponder, as and when a future generation of British (or Scottish) Europeans manage to steer the UK (or an independent Scotland) back towards the Union mainstream. In the meantime, Brexit has forced us all to address some vitally important questions – not least: what does it really mean, to be a Member State of the European Union, and why should we regard membership as both special and valuable? And of course, the UK’s departure will also profoundly affect the internal dynamics of the Union – not only its institutions, but also their interaction with the Member States, as well as relations between the Member States themselves. Having taken back control from the British, after a lifetime of their threats to veto and obstruct, the Union will now evolve according to the wishes of the 27 – and when the UK finally returns to the fold, it will have to consider rejoining whatever the Union has decided to make of itself, for itself.

1. \* University of Liverpool. I am indebted to my colleagues on the CML Rev. Editorial Board for their invaluable comments and suggestions. This article is based on the materials publicly available as at 1 March 2020.

   And Euratom: Art 1 Withdrawal Agreement (hereafter: WA). [↑](#footnote-ref-1)
2. OJ 2019, C 384 I. [↑](#footnote-ref-2)
3. The present author described the Leave campaign as guilty of “dishonesty on an industrial scale”: see <<https://www.youtube.com/watch?v=ic8A7KXFkKY>>. [↑](#footnote-ref-3)
4. Further, e.g. Dashwood et al, “Draft Constitutional Treaty of the European Union and Related Documents”, 28 EL Rev. (2003), 3; Łazowski, “Withdrawal from the European Union and Alternatives to Membership”, 37 EL Rev. (2012), 523. [↑](#footnote-ref-4)
5. Further, e.g. Eeckhout and Frantziou, “Brexit and Article 50 TEU: A Constitutionalist Reading”, 54 CML Rev. (2017), 695; Hillion, “Withdrawal under Article 50 TEU: An integration-friendly process”, 55 CML Rev. (2018), Special Issue 29. [↑](#footnote-ref-5)
6. European Medicines Agency (The Netherlands); European Banking Authority (France); Galileo Security Monitoring Centre back-up site (Spain). [↑](#footnote-ref-6)
7. In particular: COM(2018) 556 Final/2; COM(2018) 880 Final; COM(2018) 890 Final; COM(2019) 195 Final; COM(2019) 276 Final; COM(2019) 394 Final. Those documents also contain examples of measures expected from Member States and private actors. [↑](#footnote-ref-7)
8. European Union (Withdrawal) Act 2018 (hereafter: EU(W)A 2018) as amended by European Union (Withdrawal Agreement) Act 2020 (hereafter: EU(WA)A 2020). [↑](#footnote-ref-8)
9. Consider the “Brexit Bills” in the Government’s legislative agenda (Queens’ Speech) of 21 June 2017. [↑](#footnote-ref-9)
10. See Introduction to Dougan (ed), *The UK After Brexit: Legal and Policy Challenges* (Intersentia, 2017). [↑](#footnote-ref-10)
11. Including under the process envisaged by the Conference on the Future of Europe: see European Council, Conclusions of 12 December 2019, paras 14-16. [↑](#footnote-ref-11)
12. For the Union: see the documents listed in note 7 (above). For the UK: HMG, *UK Government’s preparations for a “no deal” scenario* (first published 23 August 2018, updated thereafter); but especially the “Operation Yellowhammer” report Parliament forced Government to publish on 11 September 2019. [↑](#footnote-ref-12)
13. Case C-621/18, *Wightman*, C:2018:999. See further, e.g. Cuyvers, 56 CML Rev. (2019), 1303. [↑](#footnote-ref-13)
14. Prime Minister’s notification letter to President of the European Council (29 March 2017). The delay was partly due to the litigation culminating in the Supreme Court’s confirmation that notification must be directly sanctioned by Parliament: see *Miller* [2017] UKSC 5; European Union (Notification of Withdrawal) Act 2017. Note other attempts to challenge the legality of the UK referendum / notification, e.g. *Shindler* [2016] EWCA Civ 469; *Webster* [2018] EWHC 1543 (Admin). Including before the CJEU, e.g. Case T-458/17, *Shindler*, T:2018:838. [↑](#footnote-ref-14)
15. European Council (Art 50), *Guidelines following the United Kingdom’s notification under Article 50 TEU* (29 April 2017). [↑](#footnote-ref-15)
16. COM(2017) 218 Final. [↑](#footnote-ref-16)
17. 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). [↑](#footnote-ref-17)
18. See Terms of Reference for the Article 50 TEU negotiations (19 June 2017). [↑](#footnote-ref-18)
19. See Council Decision 2017/900, OJ 2017, L 138/138. [↑](#footnote-ref-19)
20. E.g. COM(2017) 830 Final; Council Decision supplementing the Decision of 22 May 2017 (29 January 2018). [↑](#footnote-ref-20)
21. For those purposes: Art 50 TEU provides that the relevant State is excluded from the calculation of voting thresholds in the Council; but its MEPs are still entitled to vote on the proposed withdrawal agreement in the European Parliament. [↑](#footnote-ref-21)
22. Note that only limited opportunities for input were afforded to other interested parties such as the EFTA-EEA states. See further, e.g. Hillion, “Brexit means Br(EEA)xit: The UK Withdrawal from the EU and its Implications for the EEA”, 55 CML Rev. (2018), 135. [↑](#footnote-ref-22)
23. A point already made, e.g. at the Informal meeting of the Heads of State or Government of 27 Member States as well as the Presidents of the European Council and the European Commission (15 December 2016) Annex, para 1. [↑](#footnote-ref-23)
24. E.g. European Council (Art 50) meetings of 20 October 2017, 29 June 2018 and 17 October 2018. [↑](#footnote-ref-24)
25. E.g. European Council (Art 50) meeting of 15 December 2017. [↑](#footnote-ref-25)
26. E.g. European Council (Art 50) meetings of 15 December 2017 and 23 March 2018. [↑](#footnote-ref-26)
27. E.g. European Council (Art 50) meetings of 25 November 2018 and 17 October 2019. [↑](#footnote-ref-27)
28. Art 15(1) TEU. [↑](#footnote-ref-28)
29. E.g. European Parliament, *Resolution on the decision to leave the EU resulting from the UK referendum* (28 June 2016). [↑](#footnote-ref-29)
30. In particular: European Parliament, *Resolution on negotiations with the UK following its notification that it intends to withdraw from the European Union* (5 April 2017); plus subsequent resolutions of 3 October 2017, 13 December 2017, 14 March 2018 and 18 September 2019. [↑](#footnote-ref-30)
31. E.g. in the case of Ireland: the Commission maintained a regular dialogue with the Irish government; the European Council President held bilateral meetings with the Taoiseach throughout the Art 50 TEU process. [↑](#footnote-ref-31)
32. Consider, e.g. Remarks by President Donald Tusk after his meetings with Taoiseach Leo Varadkar on 1 December 2017 and 8 March 2018. [↑](#footnote-ref-32)
33. COM(2017) 218 Final. [↑](#footnote-ref-33)
34. Council Decision of 22 May 2017. [↑](#footnote-ref-34)
35. European Council, Guidelines of 29 April 2017. The key themes were already evident from European Council, *Statement from Informal Meeting at 27* (29 June 2016). [↑](#footnote-ref-35)
36. E.g. Opinion 1/91, C:1991:490; Opinion 1/92, C:1992:189; Opinion 1/00, C:2002:231; Opinion 1/09, C:2011:123; Opinion 1/17, C:2019:341. [↑](#footnote-ref-36)
37. E.g. Case C-266/03, *Commission* v*. Luxembourg,* C:2005:341; Case C-433/03, *Commission* v. *Germany,* C:2005:462. [↑](#footnote-ref-37)
38. Case C-327/18, *R O*, C:2018:733; Case C-621/18, *Wightman*, C:2018:999. Note also Case C-661/17, *M.A.*, C:2019:53. [↑](#footnote-ref-38)
39. Para 2. [↑](#footnote-ref-39)
40. Para 1. [↑](#footnote-ref-40)
41. Further, on the integrity of the Single Market as political and legal phenomena, e.g. Editorial Comments, “Is the ‘indivisibility’ of the four freedoms a principle of EU law?”, 56 CML Rev. (2019), 1189. [↑](#footnote-ref-41)
42. Paras 4-5. [↑](#footnote-ref-42)
43. Paras 1 and 18. [↑](#footnote-ref-43)
44. [2017] UKSC 5. [↑](#footnote-ref-44)
45. Further, e.g. House of Commons Library, *Parliament’s Role in Ratifying Treaties* (Briefing Paper 5855, 17 February 2017). [↑](#footnote-ref-45)
46. In accordance with sections 20-25 Constitutional Reform and Governance Act 2010. [↑](#footnote-ref-46)
47. Note that the devolved administrations have no formal role in the negotiation / conclusion of international agreements by the central UK authorities; though they may well be closely involved in / responsible for their subsequent domestic implementation. [↑](#footnote-ref-47)
48. See HMG, *The United Kingdom’s exit from and new partnership with the European Union* (Cm 9417, 2 February 2017) paras 1.11-1.12. [↑](#footnote-ref-48)
49. Compare with the Government’s original proposals: HMG, *Legislating for the United Kingdom’s withdrawal from the European Union* (Cm 9446, 7 March 2017); European Union (Withdrawal) Bill 2017 (13 July 2017). [↑](#footnote-ref-49)
50. Consider, e.g. section 10 EU(W)A 2018 (as enacted); sections 54-55 Taxation (Cross Border Trade) Act 2018 (as enacted). [↑](#footnote-ref-50)
51. In particular: Theresa May, *Lancaster House Speech: The Government’s Negotiating Objectives for Exiting the EU* (17 January 2017). [↑](#footnote-ref-51)
52. In particular: Confidence and Supply Agreement between the Conservative and Unionist Party and the Democratic Unionist Party (26 June 2017). [↑](#footnote-ref-52)
53. In particular: HMG, Cm 9417 of 2 February 2017. [↑](#footnote-ref-53)
54. This Review provided regular analysis of the withdrawal process through its Editorial Comments, e.g. 53 CML Rev. (2016), 875; 53 CML Rev. (2016), 1491; 54 CML Rev. (2017), 1309; 54 CML Rev. (2017), 1613; 55 CML Rev. (2018), 1; 56 CML Rev. (2019), 611; 56 CML Rev. (2019), 1447. Also: 55 CML Rev. (2018) *Special Issue on Brexit* (May 2018). [↑](#footnote-ref-54)
55. I.e. from 23 June 2016 to 19 June 2017 (including formal notification on 29 March 2017 and the general election on 8 June 2017). [↑](#footnote-ref-55)
56. See European Council, Guidelines of 29 April 2017, para 7. [↑](#footnote-ref-56)
57. See the statements delivered by the EU and UK negotiators after their monthly talks during the earlier stages of the negotiations (e.g. on 20 July, 31 August, 28 September, 12 October and 10 November 2017). Later “negotiation milestones” include: Joint Report from the EU and UK negotiators (8 December 2017); Colour-Coded Draft Withdrawal Agreement (19 March 2018); Joint Statement on the Progress of Negotiations (19 June 2018). [↑](#footnote-ref-57)
58. HMG, *The Future Relationship between the United Kingdom and the European Union* (Cm 9593, 17 July 2018). [↑](#footnote-ref-58)
59. Including David Davis (Secretary of State for Exiting the EU) and Boris Johnson (Foreign Secretary). [↑](#footnote-ref-59)
60. Informal Summit of the Heads of State or Government meeting in Salzburg (19-20 September 2018). Note also Theresa May’s (rather disingenuous) response: *PM Brexit Negotiations Statement* (21 September 2018). [↑](#footnote-ref-60)
61. See, e.g. Dominic Raab, *Commons Statement on the future relationship between the UK and the EU* (12 July 2018). Also, e.g. <<https://www.politico.eu/article/brexit-theresa-may-uk-to-eu-play-fair-or-we-wont-pay-our-bill/amp/>>; <<https://www.politico.eu/article/raab-britain-to-refuse-paying-divorce-bill-without-trade-deal/>>. [↑](#footnote-ref-61)
62. The phrase was famously used by Theresa May, *Lancaster House Speech* (17 January 2017) and repeated in the Conservative Party Manifesto for the June 2017 general election. Still, e.g. by Theresa May, *Brexit Negotiations Statement* (21 September 2019). By contrast, e.g. House of Commons Foreign Affairs Committee, *Article 50 Negotiations: Implications of “No Deal”* (HC1077, 12 March 2017); House of Commons Exiting the EU Committee, *The Government’s negotiating objectives: the White Paper* (HC1125, 4 April 2017); House of Lords EU Committee, *Brexit: Deal or No Deal* (HL46, 7 December 2017); House of Commons Exiting the EU Committee, *The Consequences of No Deal for UK Business* (HC2560, 19 July 2019). [↑](#footnote-ref-62)
63. OJ 2019, C 66 I. Note also European Council (Art 50), Conclusions of 25 November 2018 – including various statements to be entered in the minutes. [↑](#footnote-ref-63)
64. E.g. Theresa May, *Statement on Exiting the European Union* (10 December 2018); *Statement to the House of Commons* (21 January 2019). [↑](#footnote-ref-64)
65. See Section 3.4.3 (below). Note May’s other attempts to win Commons support for her Withdrawal Package of November 2018, e.g. promises of greater parliamentary involvement in negotiations over future EU-UK relations; commitments to uphold employment standards under UK law; promises of investment in economically deprived towns (the so-called “cash-for-votes” fund announced on 4 March 2019). [↑](#footnote-ref-65)
66. Including the infamous “section 13” defeat in the Commons on 15 January 2019 – reputedly the worst government loss in Parliament in modern British history. Also the further Commons defeats on 12 and 29 March 2019. Note that neither a series of backbench “indicative votes” in the Commons, nor Tory-Labour Party compromise talks, produced any meaningful breakthrough to the political deadlock in Westminster. [↑](#footnote-ref-66)
67. See European Council, Decision 2019/476, OJ 2019, LI 80/1 and Decision 2019/584, OJ 2019, L 101/1. [↑](#footnote-ref-67)
68. The Tories won less than 10% of the UK vote and took only 4 seats in the European Parliament. [↑](#footnote-ref-68)
69. See, e.g. Boris Johnson, *First Speech as Prime Minster* (24 July 2019); *Statement on Priorities for the Government* (25 July 2019); *Letter to Donald Tusk* (19 August 2019). Note also the new UK Government’s announcements, e.g. to self-exclude from most EU meetings (20 August 2019); and not to nominate a new Commissioner (23 August 2019). [↑](#footnote-ref-69)
70. Taking into account, e.g. that Government claims about making progress in EU-UK talks were publicly contradicted by the Union; and that Johnson’s decision unlawfully to close Parliament (*Miller* [2019] UKSC 41) was generally attributed to his desire to prevent public scrutiny / thwart Commons attempts to block “no deal”. [↑](#footnote-ref-70)
71. In particular: European Union (Withdrawal) (No 2) Act 2019. [↑](#footnote-ref-71)
72. OJ 2019, C 384 I. [↑](#footnote-ref-72)
73. Section 3.4 (below). [↑](#footnote-ref-73)
74. Section 4 (below). [↑](#footnote-ref-74)
75. On 19 October 2019. [↑](#footnote-ref-75)
76. In accordance with the European Union (Withdrawal) (No 2) Act 2019. That request was granted by the European Council, Decision 2019/1810, OJ 2019, LI 278/1. [↑](#footnote-ref-76)
77. In Commons votes on 4 September, 9 September and 28 October 2019. Note: the Fixed Term Parliaments Act 2011 effectively gave opposition parties a veto over attempts to call an election. [↑](#footnote-ref-77)
78. Early Parliamentary General Election Act 2019. [↑](#footnote-ref-78)
79. See Sections 3.2 and 4.3 (below). [↑](#footnote-ref-79)
80. European Union (Withdrawal Agreement) Bill 2019 (19 December 2019). Contrast with the previous version (21 October 2019, especially Clause 31). And with the May Government’s plans, e.g. HMG, *Legislating for the Withdrawal Agreement between the UK and the EU* (Cm 9674, 24 July 2018); Prime Minister, *Commons Statement on New Brexit Deal* (22 May 2019). [↑](#footnote-ref-80)
81. On 24 January 2020. Note, in particular, sections 31-32 EU(WA)A 2020. [↑](#footnote-ref-81)
82. On 29 and 30 January 2020 (respectively). [↑](#footnote-ref-82)
83. HMG, Cm 9417 of 2 February 2017. [↑](#footnote-ref-83)
84. E.g. Prime Minister’s notification letter to the European Council President (29 March 2017); HMG, Cm 9446 of 7 March 2017. And indeed, commanded broader Parliamentary support, e.g. House of Commons Exiting the EU Committee, *The Process for exiting the European Union* (HC815, 14 January 2017). [↑](#footnote-ref-84)
85. European Council, Guidelines of 29 April 2017, paras 4-6. [↑](#footnote-ref-85)
86. E.g. European Parliament, Resolutions of 28 June 2016 and 5 April 2017. [↑](#footnote-ref-86)
87. Council Decision of 22 May 2017. [↑](#footnote-ref-87)
88. E.g. <<https://www.ft.com/content/01396086-38ae-11e7-821a-6027b8a20f23>>. [↑](#footnote-ref-88)
89. Theresa May, *Florence Speech: A New Era of Cooperation and Partnership between the UK and the EU* (22 September 2017). Contrast, e.g. with David Davis’ comments at the 3rd round of EU-UK negotiations (31 August 2017) and *Update to the House of Commons* (5 September 2017). Though British grumbling continued for another while yet, e.g. David Davis, *Update to the House of Commons* (17 October 2017). [↑](#footnote-ref-89)
90. In French: “en tenant compte du cadre de ses relations futures avec l’Union”. Similarly, e.g. in Spanish: “teniendo en cuenta el marco de sus relaciones futuras con la Unión”. [↑](#footnote-ref-90)
91. In particular: the original proposals contained in CONV 648/03; their amended version in CONV 850/03; and their final version in OJ 2004, C 310. [↑](#footnote-ref-91)
92. Section 2.1.1 (above). [↑](#footnote-ref-92)
93. E.g. Arts 216 and 218 TFEU. [↑](#footnote-ref-93)
94. Subject to the explicit qualifications contained in Art 50(4) TEU. [↑](#footnote-ref-94)
95. The ruling in Case C-621/18, *Wightman*, stressing that the purpose of Art 50 TEU is to deliver an orderly withdrawal, is hardly a conscious judicial endorsement of the Council’s interpretation. [↑](#footnote-ref-95)
96. Art 182 WA: the Protocols and Annexes shall form an integral part of the Agreement. [↑](#footnote-ref-96)
97. Part Five WA. [↑](#footnote-ref-97)
98. Part Three WA. [↑](#footnote-ref-98)
99. Protocol relating to the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus (hereafter: Cyprus Protocol). [↑](#footnote-ref-99)
100. Protocol on Gibraltar. [↑](#footnote-ref-100)
101. See Council Decision of 22 May 2017, Annex, para 10. Further, e.g. Mariani, “La protection des citoyens et des opérateurs économiques à la suite de la sortie du Royaume Uni de l’Union européenne: Régimes transitoires et droits acquis”, 123 *Revue Générale de Droit International Public* (2019), 653. [↑](#footnote-ref-101)
102. E.g. Joint Letter from the Union and the UK to other WTO members (11 October 2017). Further, e.g. Messenger, “Membership of the World Trade Organization” in Dougan (ed), *The UK After Brexit: Legal and Policy Challenges* (Intersentia, 2017). [↑](#footnote-ref-102)
103. See also Annex VIII on the Rules of Procedure of the Joint Committee and Specialised Committees. Note sections 15B-15C EU(W)A 2018 (as amended). [↑](#footnote-ref-103)
104. Art 164 WA. [↑](#footnote-ref-104)
105. Art 166 WA. [↑](#footnote-ref-105)
106. E.g. Art 36(4) WA (cross-border social security coordination); Art 172 WA (dispute settlement rules of procedure); Art 181 WA (arbitration panel code of conduct); Art 10(1) Cyprus Protocol (references to Union law in the Protocol). [↑](#footnote-ref-106)
107. Though not in relation to Parts One, Four and Six; only for four years after the end of the transition period; and provided such decisions do not amend essential elements of the Agreement. [↑](#footnote-ref-107)
108. Art 166 WA. [↑](#footnote-ref-108)
109. Art 2(a) WA. Note also Art 7(2) WA: unless otherwise provided for in the Agreement, references to the Union include Euratom. [↑](#footnote-ref-109)
110. Art 6 WA: except for Parts Four (transition) and Five (financial settlement); and unless otherwise provided for under the Agreement, e.g. in the Protocol on Ireland/Northern Ireland (see Section 3.4.4 (below)) and under the Cyprus Protocol (Art 1(4)). Note that various provisions also govern the potential incorporation into the Agreement of certain future amendments to Union instruments made applicable by the Agreement, e.g. in the Protocol on Ireland/Northern Ireland (see Section 3.4.4 (below)); and under Art 36 WA on future amendments to Union social security legislation (see Section 3.3.2 (below)). [↑](#footnote-ref-110)
111. Art 3 WA. [↑](#footnote-ref-111)
112. Art 185 WA. [↑](#footnote-ref-112)
113. See, e.g. Art 34(1) WA; Art 1(5) Cyprus Protocol; also Sections 3.2.1 and 3.4.4 (below). [↑](#footnote-ref-113)
114. However, see Section 3.1.3 (below) on internal legal effects of the Agreement, particularly for the UK’s judicial and administrative authorities. Note also that the Agreement contains certain specific provisions on dynamic interpretation in accordance with evolving CJEU caselaw, e.g. Art 13(2) Protocol on Ireland/Northern Ireland (hereafter: PINI); Art 1(2) Cyprus Protocol. [↑](#footnote-ref-114)
115. Art 168 WA. [↑](#footnote-ref-115)
116. See Commission, *Position Paper on Governance* (12 July 2017). [↑](#footnote-ref-116)
117. See UK, *Technical Note on Implementing the Withdrawal Agreement* (13 July 2017). Also: UK, *Future Partnership Paper on Enforcement and Dispute Resolution* (23 August 2017). [↑](#footnote-ref-117)
118. Though note certain special provisions on enforcement, e.g. CJEU enforcement proceedings against the UK as regards elements of Part Five: Arts 160 and 161 WA. [↑](#footnote-ref-118)
119. E.g. Opinion 1/91, C:1991:490; Opinion 1/92, C:1992:189; Opinion 1/00, C:2002:231; Cases C-402/05 & C-415/05, *Kadi,* C:2008:461; Opinion 1/09, C:2011:123; Opinion 2/13, C:2014:2454; Opinion 1/17, C:2019:341. [↑](#footnote-ref-119)
120. See Art 185 WA on the entry into force of the post-transition dispute settlement mechanism. Note other provisions governing continuation of CJEU jurisdiction even post-transition: e.g. Title X, Part Three on winding up ongoing procedures; Art 158 WA on citizens’ rights; Art 160 WA on the financial settlement; Art 13(1) PINI on Irish border arrangements; Art 12 Cyprus Protocol on UK Sovereign Base Area arrangements. For disputes arising during the transition period, see Section 3.2.1 (below). [↑](#footnote-ref-120)
121. Art 169 WA. [↑](#footnote-ref-121)
122. Art 170 WA. [↑](#footnote-ref-122)
123. Arts 171-173 WA. Note Art 181 WA on independence and immunity; Annex IX on Rules of Procedure. [↑](#footnote-ref-123)
124. Or a question about whether the UK has complied with its obligations under Art 89(2) WA. [↑](#footnote-ref-124)
125. The relevant provisions of Art 161 WA shall apply. [↑](#footnote-ref-125)
126. Note also Art 180 WA: the arbitration panel shall make every effort to decide by consensus but may act by majority (though without issuing dissenting opinions). All rulings are binding on the EU and the UK and shall be made public (subject to the protection of confidential information). [↑](#footnote-ref-126)
127. Art 176 WA contains detailed provisions on determining a “reasonable time” for compliance. [↑](#footnote-ref-127)
128. Art 177 WA. [↑](#footnote-ref-128)
129. Art 178 WA. [↑](#footnote-ref-129)
130. Art 178 WA. If the respondent considers that the extent of suspension is not proportionate, it may request a temporary standstill pending another arbitration panel ruling. [↑](#footnote-ref-130)
131. Art 179 WA. [↑](#footnote-ref-131)
132. Contrast, e.g. the sophisticated enforcement provisions of the EEA Agreement with the limited internal legal effects of the EU-Canada agreement. Sometimes the CJEU itself addresses asymmetries through the criteria for direct internal legal effects of particular international agreements, e.g. as with the WTO agreements (Case C-149/96, *Portugal* v*. Council,* C:1999:574; Case C-377/02, *Van Parys,* C:2005:121). [↑](#footnote-ref-132)
133. Note also certain special provisions concerning post-transition domestic legal effects within / as regards the UK: e.g. preliminary references as regards Part Two on citizens’ rights (Arts 158 and 161 WA); the independent monitoring authority (Art 159 WA); preliminary references as regards elements of Part Five on the financial settlement (Arts 160 and 161 WA); under Arts 12-13 Cyprus Protocol. [↑](#footnote-ref-133)
134. Note also the provisions on post-transition cooperation as regards domestic judicial enforcement under Arts 161-163 WA. [↑](#footnote-ref-134)
135. In particular: EU(W)A 2018 (as amended); as well as the substantive provisions of EU(WA)A 2020. [↑](#footnote-ref-135)
136. Particularly having regard to section 38 EU(WA)A 2020: parliamentary sovereignty subsists notwithstanding the domestic legal effects attributed to parts of the Agreement and nothing in the legislation derogates from the sovereignty of Parliament. [↑](#footnote-ref-136)
137. HMG, Cm 9417 of 2 February 2017. [↑](#footnote-ref-137)
138. European Council, Guidelines of 29 April 2017, paras 4-6. [↑](#footnote-ref-138)
139. Though for a considerable time, the UK Government still referred to transition as the “implementation period” (and even insisted upon an explicit reference in the Agreement itself: Art 126 WA). [↑](#footnote-ref-139)
140. Note also Art 127(6) WA: during transition, references to a “Member State” in applicable Union law shall generally be understood as including the UK. [↑](#footnote-ref-140)
141. Though under slightly different terms and conditions: see Art 132 WA. [↑](#footnote-ref-141)
142. Art 127(3) WA. [↑](#footnote-ref-142)
143. A point publicly contested by the UK Government, e.g. D Davis, *Teesport Speech: Implementation Period – A Bridge to the Future Partnership between the UK and EU* (26 January 2018). [↑](#footnote-ref-143)
144. See HMG, *Draft Text for Discussion: Implementation Period* (21 February 2018). See instead Art 128(7) WA on limited consultation with the UK as regards certain draft Union acts during transition; and Art 129(5) WA on case-by-case coordination with the UK in respect of Union external relations. [↑](#footnote-ref-144)
145. E.g. D Davis, *Statement on EU-UK Article 50 Negotiations* (19 March 2018). [↑](#footnote-ref-145)
146. See Arts 5, third paragraph and 164 WA. [↑](#footnote-ref-146)
147. See section 13A EU(W)A 2018 (as amended). [↑](#footnote-ref-147)
148. Art 127(1), second paragraph, subparagraph (a) WA. [↑](#footnote-ref-148)
149. Art 127(1), second paragraph, subparagraph (b) WA. [↑](#footnote-ref-149)
150. Art 127(4) WA. [↑](#footnote-ref-150)
151. Art 127(5) WA. The UK had requested more extensive opt-in rights as regards AFSJ measures: see *Draft Text for Discussion,* note 144 above. [↑](#footnote-ref-151)
152. Art 127(7)(a) WA. [↑](#footnote-ref-152)
153. Art 127(7)(b) WA. [↑](#footnote-ref-153)
154. Art 127(7)(c) WA. [↑](#footnote-ref-154)
155. Art 185 WA – in which case, the UK may take reciprocal (in)action. See Declaration by the European Union (made in accordance with Art 185 WA), OJ 2020, L29/188, listing Germany, Austria and Slovenia. The Agreement contains other specific derogations from the “status quo” principle underpinning transition, e.g. in Part Five on the financial settlement. [↑](#footnote-ref-155)
156. Art 128(1) WA. [↑](#footnote-ref-156)
157. Art 128(5) WA. See also Art 34(1) WA on administrative cooperation as regards social security coordination. [↑](#footnote-ref-157)
158. Art 128(2) WA. [↑](#footnote-ref-158)
159. Art 128(3) WA. See also Art 128(4) WA on the ECB / ESCB; Art 128(6) WA on lead authorities for risk assessments etc under Union law; Art 129(7) WA on operational leadership under the CFSP / CSDP. [↑](#footnote-ref-159)
160. The UK had requested the need for prior EU-UK agreement on the UK’s fishing quotas (see *Draft Text for Discussion,* note 144 above) but this was refused. [↑](#footnote-ref-160)
161. A point specifically reinforced in respect of Union external relations: Art 129(3) WA. [↑](#footnote-ref-161)
162. Note that various provisions concerning supervision and enforcement (e.g. UK preliminary references and independent monitoring authority as regards citizens’ rights; e.g. dispute settlement via Joint Committee and by arbitration panel) will only apply from the end of transition: Art 185 WA. [↑](#footnote-ref-162)
163. Also: Art 95 WA on the binding force and enforceability of Union decisions vis-à-vis the UK. [↑](#footnote-ref-163)
164. Also: Art 89 WA on the binding force and enforceability of CJEU rulings vis-à-vis the UK. [↑](#footnote-ref-164)
165. See Title X, Part Three; especially Arts 86-87 (judicial proceedings) and 92-93 (administrative proceedings). Note other provisions governing the CJEU’s continuing jurisdiction after transition, e.g. Arts 158 and 160 WA; Art 13(1) PINI; Art 12 Cyprus Protocol. [↑](#footnote-ref-165)
166. See: Commission, *Position Paper on Transitional Arrangements*, TF50 (2018) 30; proposed Art 165 of the draft Withdrawal Agreement (TF50 (2018) 33/2). [↑](#footnote-ref-166)
167. Consider, e.g. the Commission’s numerous “preparedness” notices available via <<https://ec.europa.eu/info/brexit/brexit-preparedness/preparedness-notices\_en>>. [↑](#footnote-ref-167)
168. See Section 2 (above). [↑](#footnote-ref-168)
169. I.e. from 1st February – 31st December 2020. [↑](#footnote-ref-169)
170. E.g. the UK Government only announced its new plans for post-Brexit immigration in February 2020: see Home Office, *The UK’s Points-Based Immigration System* (19 February 2020). At the time of writing, Parliament is still to adopt primary legislation setting out the framework for post-Brexit regimes in fields such as agriculture and fisheries. [↑](#footnote-ref-170)
171. Confirmed by the European Council President in remarks to the European Parliament (24 October 2018). [↑](#footnote-ref-171)
172. See Section 3.4 (below). [↑](#footnote-ref-172)
173. E.g. Theresa May, *Statement on European Council* (22 October 2018). [↑](#footnote-ref-173)
174. See Section 3.4 (below). [↑](#footnote-ref-174)
175. See Section 4.3 (below). [↑](#footnote-ref-175)
176. Note reports about the UK Government’s attempts to restrict the official use of words such as “Brexit” after 31 January 2020, e.g. <<https://www.theguardian.com/politics/2020/feb/04/no-more-deal-or-no-deal-no-10s-brexit-diktat-to-foreign-office>>. [↑](#footnote-ref-176)
177. See, e.g. <<https://www.theguardian.com/politics/2018/jan/24/david-davis-rejects-vassal-state-claim-over-brexit-transition>>. [↑](#footnote-ref-177)
178. See UK Policy Statement, *EU Citizens Arriving in the UK During the Implementation Period* (28 February 2018). [↑](#footnote-ref-178)
179. Art 129(4) WA. See the UK proposals contained in *Draft Text for Discussion,* note 144 above. [↑](#footnote-ref-179)
180. Art 129(6) WA – though the UK must then refrain from action likely to conflict with / impede Union action based on that decision. [↑](#footnote-ref-180)
181. Art 127(2) WA – though this possibility appears to have been rendered defunct by the Johnson Government’s decision not to pursue any new agreement with the Union in the field of CFSP / CSDP: see Section 4.3 (below). Note that the UK sought but failed to secure a similar “displacement” provision also in respect of AFSJ measures: see *Draft Text for Discussion*, note 144 above. [↑](#footnote-ref-181)
182. Further, e.g. Dougan, “An airbag for the crash test dummies? EU-UK negotiations for a post-withdrawal ‘status quo’ transitional regime under Article 50 TEU”, 55 CML Rev. (2018), Special Issue 57. [↑](#footnote-ref-182)
183. E.g. House of Commons Exiting the EU Committee, *The progress of the UK’s negotiations with the EU on withdrawal* (HC372, 1 December 2017); House of Lords EU Committee, *Brexit: Deal or No Deal* (HL46, 7 December 2017). [↑](#footnote-ref-183)
184. See Section 2.1.1 (above). [↑](#footnote-ref-184)
185. Further, e.g. Łazowski, “Exercises in Legal Acrobatics: The Brexit Transitional Arrangements”, 2 *European Papers* (2017), 845. [↑](#footnote-ref-185)
186. Also: Art 129(2) WA making limited provision for UK participation in any bodies etc established by / under such agreements. Note the UK’s request for more extensive rights of attendance: see *Draft Text for Discussion,* note 144 above. See also the specific provision relating to fisheries: Art 130(3) WA. [↑](#footnote-ref-186)
187. Another footnote, to Art 132(1) WA, provides for further notification by the Union in the event of an extension to transition. See Commission, *Template for the Note Verbale sent to International Partners after signature of the Withdrawal Agreement* (31 January 2020). [↑](#footnote-ref-187)
188. As acknowledged by Michel Barnier, *Press Statement on the adoption of negotiating directives on transitional arrangements* (29 January 2018); HMG, *Technical Note on International Agreements during the Implementation Period* (8 February 2018). See, e.g. Wessel, “Consequences of Brexit for international agreements concluded by the EU and its Member States”, 55 CML Rev. (2018), Special Issue 101. [↑](#footnote-ref-188)
189. See Sections 3.3 and 3.4 (below). [↑](#footnote-ref-189)
190. Art 185 WA: with only limited exceptions, the “other separation provisions” contained in Part Three become applicable from the end of transition. Note also Art 8 WA on ceasing the UK’s access to Union networks, information systems and databases; which is nevertheless subject to a series of exceptions, e.g. under Arts 29(2) and 34(2) WA as regards citizens’ rights. [↑](#footnote-ref-190)
191. Consider, e.g. the “continuity agreements” negotiated between the UK and various other third countries with a view to replicating existing EU agreements (particularly in the field of trade) either in the event of a “no deal” Brexit or upon expiry of the transition period. [↑](#footnote-ref-191)
192. Perhaps the worst example being Nigel Farage’s “Breaking Point” poster campaign (June 2016). [↑](#footnote-ref-192)
193. E.g. Theresa May, *Speech at Conservative Party conference* (5 October 2016); *Lancaster House Speech* (17 January 2017); *Speech to CBI* (19 November 2018). [↑](#footnote-ref-193)
194. See Section 4 (below). [↑](#footnote-ref-194)
195. E.g. House of Lords EU Select Committee, *Brexit: Acquired Rights* (HL82, 14 December 2016). Testimonials from affected EU citizens in the UK are recorded in Remigi, Martin and Sykes, *In Limbo* (2017: ISBN 9781548026080). For the experience of UK citizens across the EU27, see Remigi, Williams, De Cruz, Pybus, Killwick and Blackburn, *In Limbo Too* (2018: ISBN 9781721674244). [↑](#footnote-ref-195)
196. E.g. House of Lords EU Committee, *Brexit: Acquired Rights* (HL82, 14 December 2016); House of Commons Exiting the EU Committee, *The Government’s Negotiating Objectives: The Rights of UK and EU Citizens* (HC1071, 5 March 2017); House of Lords EU Committee, *Brexit: UK-EU Movement of People* (HL121, March 2017). The UK Government eventually offered a unilateral guarantee for Union citizens’ rights: HMG, *Citizens’ Rights: EU Citizens in the UK and UK Nationals in the EU* (6 December 2018); note also Home Office, *European Temporary Leave to Remain in the UK* (28 January 2019). [↑](#footnote-ref-196)
197. While suggesting that the EU was preventing progress here: HMG, Cm 9417 of 2 February 2017. [↑](#footnote-ref-197)
198. Contrast Commission, *Position Paper on Essential Principles on Citizens’ Rights* (12 June 2017) with HMG, *Safeguarding the position of EU citizens living in the UK and UK nationals living in the EU* (26 June 2017). [↑](#footnote-ref-198)
199. See, e.g. the “joint technical notes” on citizens’ rights published by the Commission and the UK (e.g. on 20 July, 31 August and 28 September 2017); culminating in the Joint Report from the EU and UK negotiators (8 December 2017) and Joint Technical Note on Citizens’ Rights (TF50 (2017) 20). [↑](#footnote-ref-199)
200. Art 185 WA: with only limited exceptions, the provisions of Part Two (as well as Arts 158-159 WA) are applicable only from the end of transition. Note that separate agreements protecting citizens’ rights have been concluded between the UK and the EFTA-EEA states (as part of the EFTA-EEA Separation Agreement) as well as with Switzerland (under the dedicated Swiss Citizens’ Rights Agreement). The Agreement allows those extraneous treaties to be linked into the EU-UK provisions concerning cross-border social security coordination: Art 33 WA. [↑](#footnote-ref-200)
201. Art 38(1) WA – excluding the social security coordination rules under Arts 30-36 WA. [↑](#footnote-ref-201)
202. Specific provision is also made for frontier workers: Arts 9(b) and 10(1)(c)-(d) WA. Note also Art 1, Protocol on Gibraltar. [↑](#footnote-ref-202)
203. Art 39 WA. [↑](#footnote-ref-203)
204. Arts 13(1) and (4) WA. Art 14 WA covers rights of exit and entry. [↑](#footnote-ref-204)
205. Arts 11, 15 and 16 WA. [↑](#footnote-ref-205)
206. Art 17 WA. [↑](#footnote-ref-206)
207. Arts 12 and 23-25 WA. [↑](#footnote-ref-207)
208. Arts 27-29 WA. [↑](#footnote-ref-208)
209. Note also Annex I. [↑](#footnote-ref-209)
210. See further, on the vulnerable position of Union citizens within the UK, O’Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart, 2017). [↑](#footnote-ref-210)
211. The Agreement contains certain standards of fair treatment, e.g. Art 18(1) WA contains a principle of evidential flexibility; Art 13(4) WA provides that discretion in applying the relevant limitations / conditions shall be applied only in favour of the applicant. However, such benefits still presuppose that the claimant meets the objective requirements laid down in the Agreement / imposed under applicable Union law. [↑](#footnote-ref-211)
212. See Spaventa, *Update of the Study on the Impact of Brexit in Relation to the Right to Petition and on the Competences, Responsibilities and Activities of the Committee on Petitions* (European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs: PE 604.959, April 2018). Note the very limited exception provided for in Art 19(4) WA. [↑](#footnote-ref-212)
213. Home Office, *EU Settlement Scheme: Statement of Intent* (21 June 2018). [↑](#footnote-ref-213)
214. A strict approach (e.g. akin to Joined Cases C‑424/10 and C‑425/10, *Ziolkowski and Szeja*, C:2011:866 and Case C-333/13, *Dano*, C:2014:2358) might argue that only legal qualification under the strict terms of Union law counts for protection under the Agreement; whereas a more generous approach (e.g. akin to Case C-85/96, *Sala,* C:1998:217and Case C-456/02, *Trojani*, C:2004:488) would suggest that, if the host state offers or recognises protected status under the Agreement, the individual is entitled to its full range of protections (even if they do not strictly satisfy its basic requirements). [↑](#footnote-ref-214)
215. Art 38(2) WA. See further Section 3.4.1 (below). [↑](#footnote-ref-215)
216. See further below, on the treatment of the family members of protected Union citizens: although limited, those provisions may still be more generous than those applicable to the family members of UK and Irish nationals under purely domestic UK immigration law. [↑](#footnote-ref-216)
217. Arts 11 and 15(3) WA. Contrast with Art 20(3) Directive 2004/38, OJ 2004, L 158/77. [↑](#footnote-ref-217)
218. See Arts 9(a), 10(1)(e)-(f), 10(2)-(5), 24(2) and 25(2) WA. Contrast with the relevant provisions of Directive 2004/38, especially Arts 2 and 3. Note that family members qualifying for protection under the Agreement are offered a series of rights: e.g. Arts 13(2)-(4) WA on continuing residency in accordance with applicable Union law; e.g. Art 14 WA on rights of exit and entry; e.g. Arts 15 and 16 WA on acquisition of permanent residence; e.g. Art 22 WA on the pursuit of economic activities in their own right; e.g. Arts 12 and 23 WA on equal treatment with own nationals. However, the Agreement imposes certain restrictions on the ability of family members to change their status under Part Two: Art 17 WA. [↑](#footnote-ref-218)
219. Art 18 WA. Note also Art 26 WA on compulsory documentary certification by frontier workers. [↑](#footnote-ref-219)
220. Home Office, *EU Settlement Scheme: Statement of Intent* (21 June 2018). [↑](#footnote-ref-220)
221. Art 18(1) WA (emphasis added) – an approach also reflected in the drafting of other provisions throughout Part Two. Note also, e.g. HMG, *Technical Note: Citizens’ Rights – Administrative Procedures in the UK* (8 November 2017). [↑](#footnote-ref-221)
222. The registration system is allowed to run, on a voluntary basis, during the transition period: Art 19 WA. [↑](#footnote-ref-222)
223. Though no fees can be charged for exchanging existing permanent residence or equivalent documents: Art 18(1)(h) WA. Note that the UK eventually decided to waive the fee for its “settled status” scheme: Theresa May, *Statement to the House of Commons on Brexit* (21 January 2019). [↑](#footnote-ref-223)
224. Arts 18(2)-(3) and 19-21 WA. [↑](#footnote-ref-224)
225. Art 18(1)(p) WA. [↑](#footnote-ref-225)
226. E.g. Spaventa, *Update of the Study*, note 212 above. [↑](#footnote-ref-226)
227. Case C-370/90, *Surinder Singh*, C:1992:296. [↑](#footnote-ref-227)
228. Case C-34/09, *Ruiz Zambrano*, C:2011:124. [↑](#footnote-ref-228)
229. Home Office, *EU Settlement Scheme: Statement of Intent* (21 June 2018), para 6.12. The Agreement’s restrictive scope in this regard appears less significant for Union citizens, i.e. who either return to their home state from the UK with a non-EU family member (covered by *Singh* through natural extension) or are resident in their home state with a non-EU (including UK) primary carer (protected directly by *Zambrano*). [↑](#footnote-ref-229)
230. Art 14(1) WA. [↑](#footnote-ref-230)
231. See the detailed provisions contained in Art 36 WA. [↑](#footnote-ref-231)
232. E.g. TF50 (2017) 10; TF50 (2017) 17, #34. The UK has instead reached bilateral arrangements on maintaining local voting rights with several Member States, e.g. treaties announced with Spain (21 January 2019) and Portugal (13 June 2019). [↑](#footnote-ref-232)
233. E.g. Joint Technical Note on Citizens’ Rights, TF50 (2017) 20, #58. See further Section 4 (below). [↑](#footnote-ref-233)
234. See Art 9(c) WA and, e.g. Joint Technical Note on Citizens’ Rights, TF50 (2017) 20, #58. Note that the European Parliament sought to apply pressure for the Union to be more generous towards migrant UK nationals here, e.g. Resolution of 13 December 2017, para 3; Resolution of 14 March 2018, para 52. Also the UK Parliament, e.g. House of Commons Exiting the EU Committee*, The Progress of the UK’s negotiations on EU withdrawal: December 2017 to Match 2018* (HC884, 18 March 2018). [↑](#footnote-ref-234)
235. In particular: Directive 2003/109 concerning the status of third country nationals who are long term residents, OJ 2004, L 16/44. For an alternative perspective, see Spaventa, “Mice or Horses? British Citizens in the EU27 after Brexit as ‘Former EU Citizens’”, 44 EL Rev. (2019), 589. [↑](#footnote-ref-235)
236. See Section 3.1 (above). [↑](#footnote-ref-236)
237. Further, e.g. House of Commons Exiting the EU Committee, *The Progress of the UK’s Negotiations on EU Withdrawal: The Rights of UK and EU Citizens* (HC1439, 23 July 2018); House of Commons Home Affairs Committee, *EU Settlement Scheme* (HC1945, 30 May 2019). [↑](#footnote-ref-237)
238. See Sections 3.1.1 and 3.1.3 (above). [↑](#footnote-ref-238)
239. In respect of decisions about an application for protection under the UK’s compulsory registration scheme, the eight-year time limit begins to run from the date of the scheme’s (voluntary) introduction. [↑](#footnote-ref-239)
240. Note other provisions on continuing CJEU jurisdiction even post-transition: e.g. Title X, Part Three on winding up ongoing procedures; Art 160 WA on the financial settlement; Art 13(1) PINI on Irish border arrangements; Art 12 Cyprus Protocol on UK Sovereign Base Area arrangements. [↑](#footnote-ref-240)
241. E.g. Remarks by Michel Barnier at the press conference on the Joint Report (8 December 2017). [↑](#footnote-ref-241)
242. See Section 3.1.3 (above). [↑](#footnote-ref-242)
243. See Arts 18(1)(r) and 19-21 WA. [↑](#footnote-ref-243)
244. In particular: section 15 and Schedule 2 EU(WA)A 2020. The Joint Committee may decide (after eight years from the end of transition) that the UK may abolish the monitoring authority: Art 159(3) WA. [↑](#footnote-ref-244)
245. E.g. House of Commons Exiting the EU Committee, *The Progress of the UK’s Negotiations on EU Withdrawal: The Rights of UK and EU Citizens* (HC1439, 23 July 2018). Concerns shared by the European Parliament: *Resolution on implementing and monitoring the provisions on citizens’ rights in the Withdrawal Agreement* (15 January 2020). [↑](#footnote-ref-245)
246. Most recently: by rejecting attempts in the House of Lords to amend the European Union (Withdrawal Agreement) Bill 2019 so as to provide protected Union citizens with a formal residency document. See House of Commons, *European Union (Withdrawal Agreement) Bill: Explanatory Notes on Lords Amendments* (21 January 2020). [↑](#footnote-ref-246)
247. Further, e.g. House of Lords EU Committee, *Brexit: UK-Irish Relations* (HL76, 12 December 2016). [↑](#footnote-ref-247)
248. Belfast (or Good Friday) Agreement of 10 April 1998. [↑](#footnote-ref-248)
249. Similar to the German experience following reunification between the GDR and West Germany in 1990. [↑](#footnote-ref-249)
250. Further, e.g. House of Commons Northern Ireland Affairs Committee, *Northern Ireland and the EU Referendum* (HC48, 26 May 2016); J Temple Lang, *Brexit and Ireland: Legal, Political and Economic Considerations* (European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs: PE 596.825, November 2017). [↑](#footnote-ref-250)
251. See Section 4 (below). [↑](#footnote-ref-251)
252. Further, e.g. House of Lords EU Select Committee, *Brexit: The Proposed UK-EU Security Treaty* (HL164, 11 July 2018) Ch 7. [↑](#footnote-ref-252)
253. Art 2 PINI (applicable as from the end of transition: Art 185 WA). Note section 23 and Schedule 3 EU(WA)A 2020. Further, e.g. Phinnemore and Hayward, *UK Withdrawal and the Good Friday Agreement* (European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs: PE 596.826, November 2017). [↑](#footnote-ref-253)
254. Art 9 PINI (applicable as from the end of transition: Art 185 WA). [↑](#footnote-ref-254)
255. Art 11 PINI (applicable as from the end of transition: Art 185 WA). Note the outcomes of the EU-UK joint “mapping exercise”: TF50 (2019) 63. Note also section 10(3) EU(W)A 2018 (as amended). [↑](#footnote-ref-255)
256. Further, e.g. Dougan, “The ‘Brexit’ Threat to the Northern Irish Border: Clarifying the Constitutional Framework” in Dougan (ed), *The UK After Brexit: Legal and Policy Challenges* (Intersentia, 2017). [↑](#footnote-ref-256)
257. Note Art 1 PINI (applicable as from the entry into force of the Agreement: Art 185 WA). [↑](#footnote-ref-257)
258. See Protocols 19-21 to the Treaties. [↑](#footnote-ref-258)
259. The CTA is already recognised under existing Union law: Art 2, Protocol 20 to the Treaties. Further, e.g. Ryan, “The Common Travel Area between Britain and Ireland”, 64 MLR (2013), 831; House of Commons Library, *The Common Travel Area and the Special Status of Irish Nationals in UK Law* (Briefing Paper 7661, 15 July 2016). [↑](#footnote-ref-259)
260. Art 3 PINI. See also Section 3.3.2 (above). [↑](#footnote-ref-260)
261. That stance was not entirely obvious from HMG, Cm 9417 of 2 February 2017; but was set out more clearly in HMG, *Position Paper on Northern Ireland and Ireland* (16 August 2017) Section 2. [↑](#footnote-ref-261)
262. Memorandum of Understanding between the Government of Ireland the Government of the UK concerning the Common Travel Area and Associated Reciprocal Rights and Privileges (8 May 2019). [↑](#footnote-ref-262)
263. E.g. HMG, Position Paper of 16 August 2017, para 33. [↑](#footnote-ref-263)
264. In accordance with Art 4, Protocol 19 and Art 8, Protocol 21 to the Treaties. [↑](#footnote-ref-264)
265. Arts 2(1) and 3 TFEU. [↑](#footnote-ref-265)
266. In particular: HMG, Cm 9417 of 2 February 2017. [↑](#footnote-ref-266)
267. Once again: that stance was not entirely obvious from HMG, Cm 9417 of 2 February 2017; but was set out more clearly in HMG, Position Paper of 16 August 2017, section 3 (to be read alongside HMG, *Future Customs Arrangements* (16 August 2017)). [↑](#footnote-ref-267)
268. E.g. HMG, Position Paper of 16 August 2017, para 45. Note that, throughout many crucial points in the Art 50 TEU negotiations, Northern Ireland’s devolved institutions were effectively in abeyance and the population was thus deprived of any cross-community leadership. [↑](#footnote-ref-268)
269. In addition to the European Council Guidelines of April 2017 and the Council Decision of 22 May 2017, see Commission, *Guiding Principles for the Dialogue on Ireland / Northern Ireland* (20 September 2017). [↑](#footnote-ref-269)
270. Joint Report from the EU and UK negotiators (8 December 2017). [↑](#footnote-ref-270)
271. Joint Report, para 49. Note also Joint Report, para 50 and Prime Minister, *Open Letter on Commitments to Northern Ireland* (8 December 2017) – both intended to reassure unionists about Northern Ireland’s position within the UK. [↑](#footnote-ref-271)
272. Consider, in particular, the proposals contained in HMG, Cm 9593 of 17 July 2018. Note that ardent Leave campaigners insisted on technological solutions to the Irish border problem, despite the lack of evidence from international practice to demonstrate their feasibility: consider, e.g. Karlsson, *Smart Border 2.0: Avoiding a hard border on the island of Ireland for customs control and the free movement of persons* (European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs: PE 596.828, November 2017); House of Commons Northern Ireland Affairs Committee, *The Land Border between Northern Ireland and Ireland* (HC329, 16 March 2018). [↑](#footnote-ref-272)
273. TF50 (2018) 33. [↑](#footnote-ref-273)
274. E.g. <<https://www.bbc.co.uk/news/uk-politics-43224785>>; Theresa May, *Letter to Donald Tusk* (19 March 2018). Also: House of Commons Northern Ireland Affairs Committee, HC329 of 16 March 2018. [↑](#footnote-ref-274)
275. Note that Northern Ireland was only recently brought into line with the rest of the UK on issues such as marriage equality, in the face of the DUP’s insistence that Northern Ireland be treated entirely differently. [↑](#footnote-ref-275)
276. Published in OJ 2019, C 66 I. Note that, in the interim, the UK did offer other (half-baked) Irish border suggestions, e.g. HMG, *Technical Note on Temporary Customs Arrangement* (7 June 2018); to which the Commission swiftly reacted, e.g. TF50 (2018) 39. [↑](#footnote-ref-276)
277. E.g. European Council (Art 50), Conclusions of 13 December 2018; Exchange of Letters between the President of the European Council, the President of the Commission and the UK Prime Minister of 14 January 2019; “Strasbourg Deal” of 11 March 2019 (Instrument relating to the Withdrawal Agreement and Joint Statement relating to Political Declaration). Note also HMG, *Commitments to Northern Ireland and its integral place in the United Kingdom* (9 January 2019); Prime Minister, *Speech in Belfast* (5 February 2019); HMG, *Unilateral Declaration concerning the Northern Ireland Protocol* (12 March 2019). [↑](#footnote-ref-277)
278. Note Attorney General’s Legal Advice of 13 November 2018; Theresa May, *Statement to the House of Commons on Brexit* (12 February 2019); Attorney General’s Revised Legal Advice of 12 March 2019. [↑](#footnote-ref-278)
279. *Letter from the Prime Minister to the President of the European Commission* and *Explanatory Note on UK proposals for an amended Protocol on Ireland / Northern Ireland* (2 October 2019). [↑](#footnote-ref-279)
280. Having been rejected, in and of themselves, by the Commission: e.g. Michel Barnier, *Statement at the European Parliament Plenary Session* (9 October 2019). [↑](#footnote-ref-280)
281. OJ 2019, C 384 I. Note the detailed rules on entry into force of the Protocol contained in Art 185 WA. [↑](#footnote-ref-281)
282. Note the Statement from the Democratic Unionist Party (17 October 2019). [↑](#footnote-ref-282)
283. In particular: Arts 5, 7, 8 and 10 PINI – which include various specific exceptions / modifications, e.g. Art 5(3) PINI on fisheries and aquaculture products; Art 7 PINI on Northern Ireland matching the VAT exemptions / reductions application in Ireland; Art 10(2) PINI on state aid for Northern Irish agriculture. [↑](#footnote-ref-283)
284. Art 13(3) PINI (unless otherwise provided for). [↑](#footnote-ref-284)
285. Art 13(4) PINI. [↑](#footnote-ref-285)
286. Art 13(2) PINI. [↑](#footnote-ref-286)
287. Art 5(5) PINI. [↑](#footnote-ref-287)
288. Art 5(5) PINI. [↑](#footnote-ref-288)
289. Art 7(1) PINI. [↑](#footnote-ref-289)
290. Weatherill, “The Protocol on Ireland / Northern Ireland: Protecting the EU’s internal market at the expense of the UK’s” in (forthcoming) *European Law Review* Special Issue on the Withdrawal Package. [↑](#footnote-ref-290)
291. E.g. Michel Barnier, *Speech at the William J Clinton Leadership Institute* (27 January 2020). [↑](#footnote-ref-291)
292. Art 12(1) PINI. Note a similar acceptance, in a less controversial context, under the Cyprus Protocol. Contrast, e.g. with Michel Barnier, *Speech on German Employers’ Day 2017* (29 November 2017). [↑](#footnote-ref-292)
293. Case C-213/19, *Commission* v. *United Kingdom* (pending). But note Art 5(6) PINI: Union customs duties collected by the UK are not remitted to the Union; and (subject to Union state aid rules) the UK may (e.g.) reimburse such duties or compensate undertakings to offset the impact of Union customs legislation. See also Art 7 PINI on the remission of VAT and excise duties. [↑](#footnote-ref-293)
294. Arts 12(2)-(3) PINI. Note also Arts 13(5)-(6) PINI on limits to access to Union databases etc / acting as lead authorities etc by UK authorities. [↑](#footnote-ref-294)
295. Specifically: Art 5 PINI on customs and goods; Art 7 PINI on technical assessments and approvals etc; Art 8 PINI on VAT and excise; Art 9 PINI on the Single Electricity Market; Art 10 PINI on state aid; and Art 12(2), second subparagraph PINI on monthly information exchanges as regards liability to pay customs duties in accordance with Arts 5(1)-(2) PINI. [↑](#footnote-ref-295)
296. Art 12(4) PINI. Note, in particular, Art 13(1) PINI: Part Six of the Agreement shall apply without prejudice to the provisions of this Protocol. [↑](#footnote-ref-296)
297. See also Arts 12(6)-(7) PINI. [↑](#footnote-ref-297)
298. Art 12(5) PINI. [↑](#footnote-ref-298)
299. Art 4 PINI. [↑](#footnote-ref-299)
300. Art 7(1) PINI. [↑](#footnote-ref-300)
301. E.g. <<https://www.theguardian.com/politics/2019/nov/08/boris-johnson-goods-from-northern-ireland-to-gb-wont-be-checked-brexit>>. [↑](#footnote-ref-301)
302. Arts 4 and 7(1) PINI. [↑](#footnote-ref-302)
303. E.g. Theresa May, *Statement on the Salzburg Summit* (21 September 2019). [↑](#footnote-ref-303)
304. E.g. M Barnier, *Le choix de la responsabilité, le choix du partenariat* (30 October 2019). [↑](#footnote-ref-304)
305. Art 6(2) PINI. [↑](#footnote-ref-305)
306. Indeed, in the very text of Art 6(1) PINI. Cp. para 50 of the Joint Report from 8 December 2017. [↑](#footnote-ref-306)
307. Art 6(1) PINI. [↑](#footnote-ref-307)
308. I.e. the “most favoured nation” principle. [↑](#footnote-ref-308)
309. Further, e.g. <<https://www.youtube.com/watch?v=kLRMjDUbOA8>>. [↑](#footnote-ref-309)
310. E.g. HMG, Cm 9593 of 17 July 2018. [↑](#footnote-ref-310)
311. Further, e.g. Dougan, *Briefing Paper on the UK Internal Market,* Finance and Constitution Committee of the Scottish Parliament (June 2019) available at << https://www.parliament.scot/S5\_Finance/Meeting%20Papers/Public(6).pdf>>. [↑](#footnote-ref-311)
312. Art 4 PINI. Note the widespread suspicion that one of Johnson’s primary motivations in this regard was to allow the UK Government to avoid infringing the statutory limitations imposed under section 55 Taxation (Cross Border Trade) Act 2018. [↑](#footnote-ref-312)
313. Art 5 PINI. [↑](#footnote-ref-313)
314. Art 5 PINI also provides for certain customs exemptions, e.g. personal property of UK residents; consignments of negligible value; goods sent between individuals; goods contained in travelers’ personal baggage. [↑](#footnote-ref-314)
315. Art 5(6) PINI. [↑](#footnote-ref-315)
316. HMG, Cm 9593 of 17 July 2018. [↑](#footnote-ref-316)
317. Art 13(8) PINI. [↑](#footnote-ref-317)
318. See Section 4 (below). [↑](#footnote-ref-318)
319. E.g. M Barnier, *Remarks at the press conference on the Commission Recommendation to the European Council to endorse the agreement reached on the revised Protocol on Ireland/Northern Ireland and revised Political Declaration* (17 October 2019). In particular, note the deletion, from the final version of the Protocol, of original Arts 1(4), 2-3 and 20 PINI as agreed in November 2018 (which stressed the purely temporary nature of the “backstop” provisions): see OJ 2019, C 66 I. [↑](#footnote-ref-319)
320. Art 14 PINI (specialised committee) and Art 15 PINI (joint consultative working group). [↑](#footnote-ref-320)
321. Specifically: Arts 5-10 PINI. [↑](#footnote-ref-321)
322. See the detailed provisions contained in Art 18 PINI. Also: HMG, *Declaration concerning the operation of the “Democratic Consent in Northern Ireland” Provision of the Protocol on Ireland/Northern Ireland* (19 October 2019). Cp. the original consent provisions contained in para 50 of the Joint Report from 8 December 2017. [↑](#footnote-ref-322)
323. See Section 2.4 (above). [↑](#footnote-ref-323)
324. Even allowing for the various safeguard clauses contained in the Protocol: Arts 13(7), 16 and 17 PINI. [↑](#footnote-ref-324)
325. See Terms of Reference on the UK-EU Future Relationship Negotiations (28 February 2020). [↑](#footnote-ref-325)
326. Further, e.g. Dougan, *The Institutional Consequences of a Bespoke Agreement with the UK Based on a “Close Cooperation” Model* (European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs, at the request of the Constitutional Affairs Committee: PE 604.962, May 2018). [↑](#footnote-ref-326)
327. Further, e.g. Tobler, “The Institutional Framework of an Alternative Agreement: Lessons from Switzerland and Elsewhere?”, 23 MJ (2016), 575; Norberg, “UK-EU Relations after Brexit: Which arrangements are possible?” [2017] *Europarättslig Tidskrift* 469. [↑](#footnote-ref-327)
328. Recently, e.g. Opinion 2/15, C:2017:376; Case C-600/14, *Germany* v. *Council*, C:2017:935. [↑](#footnote-ref-328)
329. Recently, e.g. Opinion 2/13, C:2014:2454; Opinion 1/17, C:2019:341. [↑](#footnote-ref-329)
330. I.e. in the light of the caselaw based on Case 12/86, *Demirel*, C:1987:400. [↑](#footnote-ref-330)
331. As the experience of section 13 EU(W)A 2018, repealed by section 31 EU(WA)A 2020, so vividly demonstrates. [↑](#footnote-ref-331)
332. European Council, Guidelines of 29 April 2017. [↑](#footnote-ref-332)
333. European Council, Guidelines of 23 March 2018. See also European Council (Art 50), Conclusions of 25 November 2018 and 13 December 2019. [↑](#footnote-ref-333)
334. See further the Commission’s extensive series of slides on internal EU preparatory discussions concerning the framework for future relations (published between January and June 2018). [↑](#footnote-ref-334)
335. Readers may recall the famous “staircase slide” produced by the Commission: TF50 (2017) 21. [↑](#footnote-ref-335)
336. In particular: HMG, Cm 9417 of 2 February 2017. See further the UK’s extensive series of “Future Partnership Papers” (published between August 2017 and July 2018). Note House of Commons Exiting the EU Committee, *The future UK-EU relationship* (HC935, 4 April 2018); House of Lords EU Committee, *UK-EU relations after Brexit* (HL149, 8 June 2018). [↑](#footnote-ref-336)
337. HMG, Cm 9593 of 17 July 2018. [↑](#footnote-ref-337)
338. OJ 2019, C 66 I/185. [↑](#footnote-ref-338)
339. See Section 3.4.3 (above). [↑](#footnote-ref-339)
340. OJ 2019, C 384 I/178. [↑](#footnote-ref-340)
341. See Section 3.4.4 (above). [↑](#footnote-ref-341)
342. OJ 2019, C 66 I/185, para 79. [↑](#footnote-ref-342)
343. OJ 2019, C 384 I/178, para 77. [↑](#footnote-ref-343)
344. OJ 2019, C 384 I/178, para 1. [↑](#footnote-ref-344)
345. E.g. para 105: “[t]he Parties should consider appropriate arrangements for cooperation on space”. [↑](#footnote-ref-345)
346. See Section 3.2 (above). [↑](#footnote-ref-346)
347. Council Decision authorising the opening of negotiations with the United Kingdom for a new partnership agreement (25 February 2020); based on Commission recommendation COM(2020) 35 Final. [↑](#footnote-ref-347)
348. See also the Commission’s series of slides on internal EU preparatory discussions concerning the future relationship (published in January-February 2020 as UKTF (2020) 1-13). [↑](#footnote-ref-348)
349. HMG, *Written Statement to Parliament: The Future Relationship between the UK and the EU* (3 February 2020). [↑](#footnote-ref-349)
350. HMG, *The Future Relationship with the EU: The UK’s Approach to Negotiations* (CP211, 27 February 2020). [↑](#footnote-ref-350)
351. There are many other detailed issues on which the parties’ public positions already reveal actual or potential divergences: e.g. inclusion of audiovisual services; protection of geographical indications of origin; withdrawal of autonomous equivalency decisions on financial services; treatment of Gibraltar. [↑](#footnote-ref-351)
352. HMG, CP211 of 27 February 2020, para 2. For an earlier insight into Johnson’s views, consider *Uniting for a Great Brexit: Foreign Secretary’s Speech* (14 February 2018). [↑](#footnote-ref-352)
353. In which regard: note the public rebuke issued by the European Council President on 4 October 2018. Recall that, during the 2016 referendum campaign, Johnson compared the EU to Nazi Germany: see, e.g. <<https://www.politico.eu/article/boris-johnson-compares-eu-to-nazi-superstate-brexit-ukip/>>. [↑](#footnote-ref-353)
354. Note concerns that the UK might attempt to use security cooperation as leverage in trade negotiations, e.g. “Boris Johnson ‘is turning security into Brexit trade talks bargaining chip’” (*The Guardian*, 1 March 2020). Note also that other important topics are barely mentioned either, e.g. public procurement; rail and maritime transport; global cooperation; money-laundering and terrorist financing; cyber-security. [↑](#footnote-ref-354)
355. HMG, CP211 of 27 February 2020, especially paras 4-8 and 83. [↑](#footnote-ref-355)
356. E.g. Michel Barnier, *Le choix de la responsabilité, le choix du partenariat* (30 October 2019); Commission President von der Leyen, “Time for the EU and the UK to build a new future together” (8 January 2020); Remarks by Michel Barnier at the European Commission Representation in Sweden (9 January 2020). [↑](#footnote-ref-356)
357. In line with other recent Union FTAs, e.g. Art 12.1(3) EU-Singapore Agreement; Art 16.2(2) EU-Japan Agreement; Art 23.4 EU-Canada Agreement. [↑](#footnote-ref-357)
358. Note the assumption of continued UK adherence to the ECHR which seemed to underpin the CJEU’s rulings in Case C-327/18, *R O* and Case C-661/17, *M.A.*. [↑](#footnote-ref-358)
359. According to the Conservative Manifesto 2019: “[w]e will negotiate a trade agreement next year… and we will not extend the implementation period beyond December 2020”. [↑](#footnote-ref-359)
360. E.g. HMG, CP211 of 27 February 2020, para 9. [↑](#footnote-ref-360)
361. See section 15A EU(W)A 2018 as amended by section 33 EU(WA)A 2020. [↑](#footnote-ref-361)
362. HMG, CP211 of 27 February 2020, para 9. [↑](#footnote-ref-362)
363. In accordance with Art 218(11) TFEU. [↑](#footnote-ref-363)
364. The legal basis of any EU-UK agreement, the division between Union and Member State competences, and the possible need for national ratifications, are all left to be determined in due course: Commission, *Future EU-UK Partnership: Questions and Answers on the Negotiating Directives* (25 February 2020). [↑](#footnote-ref-364)
365. See Section 3.2.2 (above). [↑](#footnote-ref-365)
366. Note the (rather disingenuous) claims made by Boris Johnson, *Speech in Greenwich* (3 February 2020). [↑](#footnote-ref-366)
367. Note that Michel Barnier has already, for a considerable time, challenged the UK to clarify whether it intends to depart from the European socio-economic model, e.g. *Intervention à la conférence “Obbligati a crescere – l’Europa dopo Brexit”* (9 November 2017); *Speech at the Centre for European Reform on “The Future of the EU”* (20 November 2017). And continues to do so, e.g. *Statement at the presentation of the Commission’s proposal for a Council recommendation on directives for the negotiation of a new partnership with the UK* (3 February 2020). [↑](#footnote-ref-367)