12. Brexit

Parlement européen

Communiqué de presse

Lignes rouges sur les négociations pour le Brexit

Séance plénière [06-04-2017 - 09:48]

Une écrasante majorité du Parlement (516 voix pour, 133 contre, 50 abstentions) a adopté une résolution fixant officiellement les principes et les principales conditions du Parlement européen en vue de l'approbation de l'accord de retrait du Royaume-Uni. Un tel accord, suite aux négociations entre l'UE et le Royaume-Uni, devra être approuvé par le Parlement européen.

Les députés soulignent qu'il est essentiel d'assurer un traitement juste et équitable des citoyens vivant au Royaume-Uni et des citoyens britanniques résidant dans l'UE. Ils rappellent également que le Royaume-Uni demeure un membre de l'Union jusqu'à son départ officiel, ce qui implique des engagements financiers qui pourraient courir au-delà de la date de retrait.

La résolution met en garde contre toute tentative de compromis entre la sécurité et l'avenir de la relation économique entre l'UE et le Royaume-Uni. Elle s'oppose également à toute forme de ''choix à la carte'' et à une relation économique fragmentée caractérisée par des accords sectoriels. Elle rappelle par ailleurs l'indivisibilité des quatre libertés du marché unique: la libre circulation des marchandises, des capitaux, des services et des personnes.

Enfin, la résolution précise que des négociations sur des dispositifs transitoires ne pourront commencer qu'une fois que des ''progrès tangibles'' auront été réalisés dans les négociations sur l'accord de retrait. Ces dispositions ne pourront pas durer plus de trois ans, tandis qu'un accord sur un partenariat futur ne pourra être conclu qu'une fois le Royaume-Uni en-dehors de l'UE.

Les citoyens d'abord

Les intérêts des citoyens doivent être la priorité dès le début, affirme la résolution qui poursuit en signalant que les citoyens irlandais ''seront particulièrement affectés''. Les députés exhortent toutes les parties à rester engagées dans le processus de paix en Irlande du Nord et à éviter la mise en place d'une frontière physique. Les circonstances particulières qu'implique la situation doivent être donc traitées prioritairement dans l'accord de retrait.

La résolution alerte également le Royaume-Uni contre toute tentative de limiter les droits relatifs à la liberté de circulation avant la date de retrait du Royaume-Uni de l'Union européenne et demande aux 27 États membres d'examiner comment répondre à la crainte des citoyens britanniques selon laquelle le Brexit entraînera la perte de leurs droits actuels en matière de citoyenneté européenne.

Principes de négociation

Les députés demandent aux deux parties d'agir de bonne foi et en toute transparence afin d'assurer une sortie ordonnée.

La résolution note que ce serait une violation du droit européen si le Royaume-Uni négociait des accords commerciaux avec des pays tiers avant de quitter l'Union européenne et prévient que tout accord bilatéral entre un ou plusieurs des autres États membres et le Royaume-Uni, sur des points entrant dans le champ d'application de

Communiqué de presse

l'accord de retrait ou produisant des effets sur la future relation de l'Union européenne avec le Royaume-Uni serait également contraire aux traités.

Obligations continues

Le Royaume-Uni continuera à bénéficier de ses droits en tant que membre de l'Union jusqu'à son départ. Dans le même temps, il devra également assumer ses obligations, y compris les obligations financières découlant notamment du budget actuel à long terme de l'UE.

Le Parlement européen étroitement impliqué

Le Parlement européen a l'intention de s'appuyer sur les éléments énoncés dans cette résolution au fur et à mesure que les négociations se développeront, par exemple en adoptant d'autres résolutions, y compris sur des questions spécifiques ou sur des questions sectorielles.

Débat plénier avant le vote

Plus tôt, les dirigeants des groupes politiques du Parlement européen ont débattu de leurs priorités dans les négociations sur le retrait du Royaume-Uni de l'UE. Le rôle crucial des députés au cours des négociations a été souligné par le Président de la Commission européenne, Jean-Claude Juncker, et le négociateur en chef de l'Union européenne sur le Brexit, Michel Barnier, qui a également participé au débat.

En ouvrant le débat, le Président du Parlement européen, Antonio Tajani, a déclaré que "le vote du Parlement serait décisif pour le résultat final des conditions pour le retrait du Royaume-Uni et pour les futures relations UE-Royaume-Uni. Les attaques terroristes récentes indiquent clairement que tous les pays européens devront continuer à travailler en étroite collaboration".

Le débat a démontré une forte volonté au sein des différents partis de donner la priorité à la protection des intérêts des citoyens les plus concernés par le Brexit. La majorité des dirigeants des groupes politiques ont aussi souligné que s'il est essentiel que les négociations se tiennent dans un climat serein, l'UE des 27 devra rester unie et défendre avec force ses propres intérêts. Tous les groupes représentant les partis de gauche ont aussi déclaré qu'une priorité absolue pour eux était la préservation d'un haut niveau de protection sociale.

Plusieurs chefs de groupes politiques ont également insisté sur le fait que le Brexit devait servir de catalyseur pour changer l'UE, dans le sens où il démontre combien les États membres sont intrinsèquement liés les uns aux autres.

Les dirigeants des groupes EFDD et ENL se sont réjouis du lancement de la procédure de retrait et ont accusé l'UE de chercher à '"punir" le Royaume-Uni.

Cliquez sur les noms des députés pour revoir leurs déclarations

Introduction par le Président du PE, Antonio Tajani

Manfred Weber (PPE, DE)

Gianni Pittella (S&D, IT)

Helga Stevens (ECR, BE)

Guy Verhofstadt (ADLE, BE)

Gabriele Zimmer (GUE/NGL, DE)

Philippe Lamberts (Verts/ALE, BE)

Nigel Farage (EFDD, UK)

Communiqué de presse

Marcel De Graaf (ENL, NL)

Danuta Hübner, présidente de la commission des affaires constitutionnelles

Ian Borg, représentant la présidence du Conseil européen

Jean-Claude Juncker, Président de la Commission européenne

Michel Barnier, négociateur en chef de l'Union européenne sur le Brexit

En savoir plus

- Le texte adopté (2017/2593(RSP)) sera prochainement disponible ici (05.04.2017): http://www.europarl.europa.eu/plenary/en/texts-adopted.html
- Enregistrement vidéo du débat (cliquer sur 05.04.2017): http://www.europarl.europa.eu/ep-live/fr/plenary/search-by-date
- EbS+ (05.04.2017) : http://ec.europa.eu/avservices/ebs/schedule.cfm?sitelang=en&page=3&institution=0&date=04/05/2017
- Temps fort Brexit incluant tout le contenu afférent: note d'information, infographie et vidéo sur l'article 50: http://www.europarl.europa.eu/news/fr/top-stories/20160701TST34439/brexit
- Enregistrement de la conférence de presse du Président du Parlement européen, Antonio Tajani et du coordinateur de la conférence des présidents pour le Brexit, Guy Verhofsdadt: http://www.europarl.europa.eu/news/en/news-room/20170331IPR69339/antonio-tajani-guy-verhofstadt-ep-coordinator-for-negotiations-with-uk
- Parcours législatif: http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2017/2593(RSP)&l=fr
- Think tank du PE: Retrait du Royaume-Uni de l'UE - les questions juridiques et procédurales (27.03.2017, en anglais): http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/599352/EPRS_IDA%282017%29599352_EN.pdf
- Matériel audiovisuel pour professionnels: http://www.audiovisual.europarl.europa.eu/brexit-article-50

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The Brexit Negotiations: An Assessment of the Legal, Political and Institutional Situation in the UK

IN -DEPTH ANALYSIS

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DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

CONSTITUTIONAL AFFAIRS

The Brexit Negotiations: An Assessment Of The Legal, Political And Institutional Situation In The UK

IN-DEPTH ANALYSIS

Abstract

Upon request by the AFCO Committee, the Policy Department for Citizens' Rights and Constitutional Affairs commissioned an in-depth analysis on the political and institutional situation in the United Kingdom following the referendum on the UK's withdrawal from the EU. The research analyses the post-Brexit political developments in the UK, the various parameters that should be taken into account, by both the UK government and the 27, in view of the Article 50 negotiations and the possible shape of the final deal and the future economic relationship, taking into account the EU obligations and the constraints of Theresa May's government.

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Policy departments provide independent expertise, both in-house and externally, to support European Parliament committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny over EU external and internal policies.

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DISCLAIMER

CONTENTS

LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
DExEU	Department for Exiting the EU
DIT	Department for International Trade
EFTA	European Free Trade Association
EU	European Union
FCO	Foreign and Commonweath Office
FTA	Free Trade Agreement
GDP	Gross Domestic Product
UKIP	UK Independence Party

KEY FINDINGS

- **Theresa May has set out her plan for Brexit**: the UK will leave the single market and the customs union, and seek a free trade agreement (FTA) with the EU. But in Brussels key policy-makers worry that she may not succeed – either because the 'Article 50' divorce talks collapse in a row over money, or because the two sides cannot agree on the transitional arrangements that would lead to the FTA.

- EU officials are pessimistic because they observe the pressure she is under from hard-liners to take a very tough approach to the negotiations. They see limited pressure on May for a softer Brexit. But **several factors could favour a less-than-very-hard Brexit**: a majority of MPs wants to retain close ties with the EU, as do business lobbies; and an economic downturn (if it happens) could steer public opinion away from supporting a clean break.

- In May's government, **10 Downing St takes all the key decisions**. The downside of this centralisation is that decision-taking may be delayed, and particular proposals may be tested on too narrow a circle of experts.

- The outcome of the Brexit talks will be shaped to a large degree by the EU governments. They are mostly united in taking a hard line. Worried about the cohesion and unity of the EU, they do not want populist leaders to be able to point to the British and say, "They are doing fine outside the EU, let us go and join them." Exiting must be seen to carry a price.

- The British government has yet to decide what it wants on some key issues, such as: what sort of immigration controls should it impose? What kind of special deal, if any, should it seek for the City of London? What customs arrangements will it ask for? What sort of court or arbitration mechanism would it tolerate? And what transitional arrangements does it want?

- **Britain's strongest card is its contribution to European security**. The arrival of Donald Trump could help the UK, by making continentals think they need to hold it close; but if the British get too close to Trump, they will lose the goodwill of EU governments. Britain's other cards are weaker. It regards the City of London as a European asset that should be cherished by all – but that is not how most of the 27 see it. Nor should the UK try to claim that since the 27 have a trade surplus with it, they need a good trade deal more than it does; the reality is that Britain depends more on EU markets than vice versa. Finally, May's threat to respond to a bad deal by transforming Britain into a low-tax, ultra-liberal economy lacks credibility.

- There are **only three possible outcomes of the Brexit talks**: a separation agreement plus an accord on future relations including an FTA; a separation agreement but no deal on future relations, so that Britain has to rely on WTO rules; and neither a separation agreement nor a deal on future relations, so that Britain faces legal chaos and has to rely on WTO rules.

- Once Britain triggers Article 50, it is in a weak position: it must leave in two years, and if it has not signed a separation agreement before doing so, it risks economic chaos. So if Britain wants a half-decent deal, it needs the goodwill of its partners. That means ministers should be polite, sober and courteous. Grandstanding and

smugness will erode goodwill towards the UK. As for the substance of the negotiations, the more moderate are Britain's demands, the more likely are the 27 to offer a favourable deal.

- **Whatever happens in the negotiations, Brexit will be hard**. That is because both the UK and the 27 are placing politics and principles ahead of economically optimal outcomes. In the very long run, once both the UK and its partners have understood that a hard separation is not in anyone's interests, serious politicians will start thinking about how to engineer closer relations.

1. INTRODUCTION

Ever since the early 1960s, when Harold Macmillan sought to take Britain into the then European Economic Community, Britain has been locked into a never-ending series of negotiations with its European neighbours – for accession (twice), renegotiating the terms of membership (twice), major changes to the founding treaties (six times) and new laws (thousands of times). The context of all these negotiations was that Britain would move closer to the other members, stay conjoined to them once differences had been settled, jointly plan the club's future or work on improving the rules for everyone's benefit. Britain and the others felt a commonality of interest that lubricated the negotiations and encouraged compromise.

But the Brexit talks are about divorce and very different. Rational minds will point out that, even when the British leave the club, they and the 27 will still have common interests – notably in terms of economics and security – and that they should wish each other well. But divorces often involve acrimony and a lot of self-righteous posturing.

Britain has decided that it no longer wishes to share its destiny with the continental nations. At a time of global uncertainty, exacerbated by the arrival of Donald Trump in the White House, Britain's decision baffles its partners. They feel snubbed, hurt and (at least in some cases) insecure. Many of the factors that would have pushed them to satisfy Britain's preferences during previous negotiations no longer apply. The Brexit negotiations will be the most difficult in the EU's history.

Theresa May does not like the term 'hard Brexit'. That is because a hard Brexit – meaning a withdrawal that cuts many of the ties binding Britain and the EU – will inevitably have negative economic consequences. And when considering key decisions on Brexit, the British prime minister has been unwilling to acknowledge the trade-offs between sovereignty and economic well-being. But speaking in Lancaster House in January, May was fairly clear about the kind of Brexit she wants, and she edged towards recognising the trade-offs.

Ms. May wants a hard Brexit: freed of the jurisdiction of the Court of Justice of the European Union (CJEU) and EU rules on free movement, Britain will leave not only the single market but also the essentials of the customs union – which means restoring customs checks on the EU-UK border. She wants "**a bold and ambitious free trade agreement**" to govern the future economic relationship, and a "**phased process of implementation**" to cover the period between leaving and when the new arrangements take full effect.[1]

The prime minister does not want the very hard Brexit favoured by some eurosceptics, according to which the UK would leave the EU and simply rely on World Trade Organisation (WTO) rules. Nevertheless some key officials in Brussels and other capitals fear that Britain may face a much harder Brexit than May imagines: exiting to WTO rules, or perhaps even falling out of the EU without any separation agreement, leading to legal chaos for companies and individuals.

This pessimism stems from these officials' reading of UK politics. They note that the domestic political pressures on May are nearly all from one side, the shrill eurosceptic lobbies and newspapers that want a very hard Brexit. The officials worry that these pressures may prevent May from striking the kinds of compromise necessary – for example, over the money Britain supposedly 'owes' the EU – for a deal to be reached.[2] They also fret that the British government is deluded over the strength of its negotiating hand; the reality, they (correctly) surmise, is that once Article 50 is triggered, determining

[1] Theresa May, 'A global Britain', speech at Lancaster House, January 17th 2017.
[2] Alex Barker, 'The €60 billion Brexit bill: how to disentangle Britain from the EU budget', CER Policy Brief. February 2017.

that the UK must leave in two years, it is in a weak position. They fear that UK politics may drive May to walk away from the Article 50 negotiations and seek a bigger parliamentary majority in a general election.

Despite such worries, Britain's partners welcomed much of the Lancaster House speech, and the White Paper that followed a few days later[3]. They liked the clarity over Britain's intentions, and the warm words about the EU (which contrasted with the many rude things Donald Trump has said). But they did not like the suggestion that Britain's FTA could "**take in elements of current single market arrangements**" for the car industry and financial services. That sounded like 'cherry-picking' to the 27, who believe that the single market is all-or-nothing. Nor did they like May's comment that if the EU offered a punitive deal, the UK would walk away and turn its economic model into something akin to Singapore, with light-touch regulation and low taxes.

The most alarming passage in the speech was the pledge to negotiate not only the Article 50 separation agreement within two years, but also the FTA and everything else required to govern future relations on security, research, migration, energy and so on. Britain's partners think **that is unrealistic**, especially since there will be not much more than a year for real negotiations, between the formation of a new German government towards the end of 2017 and the need to start the process of European Parliament ratification in late 2018. **FTAs normally take at least five years** to negotiate and several more to ratify.

UK officials talk confidently of bringing "bold ambition" and "political will" to the negotiations. They say that because EU and UK rules are already aligned, an FTA can be sorted out quickly. Britain's partners beg to differ, pointing out Britain's desire to be able to change the rules, its focus on ensuring good access for service industries, and the need to sort out sensitive issues like state aid and competition policy, will make the negotiations fiendishly complex.

If all goes well, the 27 believe, **two years** could suffice for **the completion of the Article 50 deal** and a **sketch of the future relationship in a political declaration**. That would fit the wording of Article 50, which says the Union should write the withdrawal agreement "taking account of the framework for its future relationship with the Union". The details of the future relationship could then be negotiated during the transitional phase, after Britain leaves the EU. But the fact that May proclaimed that everything could be done in two years makes Britain's partners worry that 10 Downing St is not fully in touch with reality. They wonder if, following the departure in January of Britain's EU ambassador, Sir Ivan Rogers – who annoyed some in the government by pointing to the many pitfalls that lie ahead – there remain enough officials willing to speak uncomfortable truths to power.

The biggest worry of Britain's partners is that **London does not realise how weak its cards are**. The strongest card – repeatedly mentioned by May in Lancaster House – is Britain's contribution to European security, via co-operation on policing, intelligence, defence and foreign policy. Any attempt by Britain to make its help in these areas conditional on a good trade deal would be viewed as cynical and damage its reputation. But handled deftly, Britain's contribution on security could help generate goodwill.

A related card cited by British officials is **Donald Trump**. His questionable commitment to European security, and the increasingly dangerous nature of the world, could make partnership with Britain more valuable to continental governments. But the Trump card could easily end up hurting the British. The more that British ministers cosy up to Trump, and avoid criticising his worst excesses, the more alien the British appear to other Europeans, and the more the UK's soft power erodes.

[3]"The United Kingdom's exit from and new partnership with the European Union" in https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf

The British try to play **the City of London** as another card, claiming that it adds value to the entire European economy. Therefore, they say, the 27 should give the UK financial services industry a special deal, so that it can continue to do business across the EU. The British are right that the continent would incur an economic cost if it lost access to the City. Few EU governments, however, view the City as a European jewel whose sparkle should be preserved. While some view it as a symbol of "wicked Anglo-Saxon capitalism", several others are keen to pick up the business that could leave the City post-Brexit.

May's threat in Lancaster House to turn Britain into **a lightly-regulated, low-tax economy is a card that lacks credibility**, given that in the same speech she spoke in favour of employee rights, workers on boards, industrial strategy and a fairer society. There is no majority in the Conservative Party or the country at large for creating an ultra-liberal economy, and the 27 know this.

Given the weakness of these cards, a half-decent deal will require the goodwill of Britain's partners. And that means that May and her ministers should conduct the talks in a sober, courteous and modest manner. She will help to foster a positive atmosphere if she seeks a relatively soft Brexit in some key domains, such as free movement of people or co-operation on security.

Some of the 27 are sceptical that the state of British politics will permit May to veer in a softer direction. But in fact May's political position is strong: the Labour Party is weak and divided, while hard-line Tory europhobes have been partially disarmed by her pledges in Lancaster House. However weak May's hand may be in Europe, in the UK she may be in a stronger position than she herself realises.

The focus of this paper is the future economic relationship between the EU and the UK. May's government will also have to negotiate on issues like foreign and defence policy co-operation, counter-terrorism and policing, as well as research, universities, climate and energy.[4] But for many people, the trade and investment relationship will determine whether Brexit is a success or not.

The paper examines the pressures that may push Theresa May and her ministers towards a harder or a softer Brexit; how the centralisation of the British government may affect the negotiations; the priorities of the other Member-States, and the EU institutions; the issues on which the British government has yet to made up its mind; the strength of the cards that Britain may be able to play; and the most plausible outcomes of the Brexit talks. The paper concludes by suggesting how the British government can achieve the best possible deal for the UK.

[4] Charles Grant, 'Theresa May's six-pack of difficult deals', CER insight, July 2016. See also Camino Mortera-Martinez, 'Plugging Britain into EU security is not that simple', CER Bulletin 111, December 2016-January 2017.

2. THE PRESSURES ON THERESA MAY

One of the reasons why Brussels officials expect a hard Brexit is that they observe **Britain's domestic political debate**. They may not be engaged in 'pre-negotiations' with their British counterparts, but they do read Britain's newspapers and the speeches of its politicians. Brussels officials see a lot of pressure on May's government for a clean break with the EU and considerably less pressure for maintaining close economic ties.

Britain's eurosceptic lobbies are certainly well-organised, well-funded and noisy, with many allies in the press. If they decide they want something, they can raise the pressure and make it hard for the government to resist. For example, hard-line Leavers wanted the scalp of Ivan Rogers, whom they believed to be insufficiently committed to making a success of Brexit. 10 Downing St denied Sir Ivan fulsome support and he resigned.

The arrival of President Trump has boosted the self-confidence of those who want to cut ties with the EU. They argue that with the UK becoming America's best friend in a renewed special relationship, involving a bilateral trade deal, good access to EU markets is now less important. The performance of the UK economy since the referendum has also strengthened the hand of the 'clean-breakers': thanks to higher than expected consumption after the referendum, **the economy grew at about 2 per cent in 2016,** faster than any other G7 economy.

The way the prime minister has chosen to talk about Brexit reassures those who want it to be hard. Although she was a (reluctant) Remainer, May now presents herself as **the voice of the 52 per cent who voted Leave**, and of the 'left behind' people who want change. Her government's rhetoric is markedly less sympathetic to big business and the City than that of the Cameron government. The dictionaries of quotations will surely remember the key section of her party conference speech: "*Too many people in positions of power behave as though they have more in common with international elites than with the people down the road. … But if you believe you are a citizen of the world, you are a citizen of nowhere. You don't understand what citizenship means*." [5] The use of such words makes it hard for her to ignore the views of those – whether Brexiteer backbenchers or eurosceptic columnists – who claim to represent ordinary people against global elites.

Yet there are at least **four reasons** why May and her government may end up pursuing a softer version of Brexit than that desired by the hardest eurosceptics. These reasons, however, are unlikely to push the government towards the sort of Brexit that many businesses would like to see.

First, **Britain's courts and Parliament** have ended up playing a bigger role than May would have liked. May's starting position was that Parliament should not be involved in triggering Article 50 or in monitoring the negotiations. Then in January 2017 the Supreme Court ruled that the government must pass an act of Parliament before invoking Article 50. However, this ruling has not delayed the Brexit process. Although there is a House of Commons majority for a soft Brexit, a big majority of MPs voted in favour of the Brexit bill in early February. Indeed, many pro-Remain MPs are so scared of their voters – and the organised Brexit lobbies – that they were unwilling to make their support for the bill conditional on the government accepting amendments (one amendment, asking the government to guarantee the right of EU nationals to remain in the UK, came close to passing). The House of Lords has an even stronger majority for Remain than the Commons, and passed two amendments to the bill in March – one guaranteeing the right of EU nationals to remain in the UK, the other obliging the government to submit the final deal to a vote in Parliament. The House of Commons then overturned these amendments.

[5] Theresa May, speech to the Conservative Party conference in Birmingham, October 5th 2016.

Nevertheless Parliament has gradually nudged the government to do things that it was reluctant to do. Most MPs wanted a White Paper on the government's Brexit strategy, and they got one soon after the Lancaster House speech (though the White Paper added little of substance).[6] MPs wanted the right to vote on the final deal, so the government ceded the point in order to smooth the passage of the bill through the Commons. It has **promised to submit the final deal to Parliament,** before the European Parliament votes on it (though the government did not want this point embedded in the Article 50 legislation). This means that MPs and peers will probably vote on the terms of Brexit in the autumn of 2018.

It is not clear how much of a concession the government has really made on this point. On the one hand, ministers are adamant that if Parliament rejects the deal, they will not return to the negotiating table, and Britain will simply leave the EU without any agreement – a position which could make it very hard for Parliament to vote no. On the other hand, Labour's Brexit spokesman, Sir Keir Starmer, reckons that a parliamentary defeat would put strong pressure on the government to go back to the EU and seek to improve the terms. The significance of this concession will probably depend on the state of public opinion at the time of the vote. If voters have shifted towards regretting the referendum result, and MPs are emboldened to vote down the deal, the government may be obliged to return to the 27 and ask for a softer variant of Brexit. (It is virtually impossible to imagine circumstances in which Parliament would ask the government to revoke Article 50 and/or hold another referendum.)

The second reason why a softer Brexit is still possible is that **business lobbies** are getting their act together and **speaking out more loudly in defence of their interests**. Many businesses that said nothing during the referendum campaign are now trying to influence the government's negotiating stance. For example, pharmaceutical firms are concerned that leaving the single market may endanger their right to sell drugs across the EU. Airlines worry about the consequences of the UK quitting the European Common Aviation Area. Car and aerospace manufacturers, as well as retailers, are worried about the impact of Britain leaving the customs union. Sometimes lobbying appears to work: Nissan demanded 'reassurances' before committing to new investments in Sunderland, and received a (secret) letter that persuaded it go ahead.

Banks and other financial firms, realising that they have probably lost '**passporting'** (the right for UK-regulated financial firms to do business across the EU) are hoping that provisions on '**equivalence'** will allow them to retain access to EU markets (equivalence enables the EU to recognise a third country's rules as similar to its own; financial firms based in that country may then do business in the Union). Many large financial firms have made it clear that they will shift jobs out of the UK if they are not given sufficient assurances (one recent study suggested that Brexit would lead to the City losing 10,000 financial jobs, and a further 20,000 in supporting business services).[7] Their priority, like that of many other businesses, is for the UK to obtain a transitional deal that provides for a few years' continuity while they consider their long-term options.

The third reason is that the economy may start to turn down while the government is enmeshed in the Article 50 talks. If and when that happens, the Treasury and others who want to maximise ties with the EU will be emboldened to try and nudge 10 Downing St towards a softer Brexit. Early in 2017, the resilience of the economy was delighting Leavers, although the fall of the sterling was beginning to push up prices. In the long term, uncertainty about the future EU-UK relationship is bound to affect levels of investment and thus productivity and growth.[8] That may influence public opinion.

[6] 'The United Kingdom's exit from and new partnership with the European Union', British government white paper, February 2017.
[7] André Sapir, Dirk Schonemaker, Nicolas Veron, 'Making the best of Brexit for the EU27 financial system', Bruegel policy brief, February 2017.
[8] Simon Tilford, 'Britain's economy: enjoy the calm before the storm', CER bulletin 112, February-March 2017.

The economic outlook could have a big impact on Scottish politics. The Scots voted to stay in the EU by 62 per cent and many in the Scottish National Party (SNP) hope for a second independence referendum, so that a solo Scotland can join the EU. Yet Scottish opinion has not shifted significantly towards independence since June 23rd, mainly because of concerns about the economic consequences; Scotland exports four times as much to England as to the 27, and new barriers on the border between them could endanger some of that trade.[9] However, the SNP is already making the case that Conservative England – with very little opposition from the Labour Party – is pursuing a hard version of Brexit that will harm Scotland. If in the long term, Brexit is seen to damage the Scottish economy – for example through job losses to the financial services industry, or labour shortages in tourism – support for independence may rise. And then **the need to placate the Scots would be another reason for London to pursue a softer Brexit**. In fact in March 2017 there is some evidence of growing support for independence in Scotland, and the chances of the SNP going for another referendum are rising.

Fourth, senior figures in the government are gradually learning more about the EU. Many of them are starting from a low level of knowledge, but officials report that ministers are taking home and digesting long briefing notes. May herself has a track record of being empirical on Europe. In 2013, when the government exercised its right under the Lisbon Treaty to opt out of all existing justice and home affairs laws, she, as the then Home Secretary, had to decide which areas Britain would opt back into (even though doing so would mean accepting the jurisdiction of the ECJ). May listened to the advice of the police, the security services and other experts and chose to opt back in to key measures like the European Arrest Warrant, Europol, Eurojust and the Schengen databases – much to the annoyance of hard-line eurosceptics. The more the prime minister and her aides and ministers understand how the EU works – and the domestic politics of the other Member-States – the more likely they are to set objectives that are realistic and economically less harmful for the UK.

[9] Some Scots also hesitate over going for independence because of the low oil price, and the EU's insistence that it sign up for the euro before acceding.

3. THE CENTRALISATION OF THE BRITISH GOVERNMENT

Ever since June 24th, the UK's partners have worried about the capacity of the British government machine to deliver a coherent strategy on Brexit, and to manage the complex negotiations that will unfold after Article 50 is triggered. They have probably been right to worry. These talks may prove to be the most difficult and complex negotiation conducted by a British government since the Congress of Versailles after World War I.

During the autumn of 2016, there was talk in Westminster and Whitehall of the government struggling to get a grip on the Brexit dossier. In November, a leaked memo from the Deloitte consultancy said that the government had no plan for Brexit, that it would take another six months for it to decide on its priorities, that civil servants had had little guidance on what to work on, that an extra 30,000 civil servants would be needed to make Brexit happen, that ministers were divided and that 10 Downing St took all they key decisions.

The surprise resignation of Ivan Rogers, the UK Permanent Representative to the EU, in January, did not help the government's image elsewhere in the EU. In his leaked resignation letter, Sir Ivan wrote that "*the structure of the UK's negotiating team and the allocation of roles and responsibilities to support that team need rapid resolution*", implying that the UK Representation in Brussels – with its in-depth knowledge of the views of the other 27 – was playing a less central role than it should. And Sir Ivan urged his colleagues to "*continue to challenge ill-founded argument and muddled thinking [and] to never be afraid to speak the truth to those in power*."

Given the mammoth and unprecedented task of Brexit, and the creation of two new ministries – the **Department for Exiting the EU (DExEU)** and the **Department for International Trade (DIT)** – some delay in formulating objectives, and a certain amount of chaos, was to be expected. By the early months of 2017 the government appeared to be getting its act together. Nevertheless the way that May has organised her government has in some ways added to the confusion.

The most striking feature of the May government, compared with its predecessors, is the **centralisation of power in 10 Downing St**. Under Tony Blair, Gordon Brown's Treasury was an important rival centre of power. When Brown became prime minister, his government was more centralised, but senior ministers such as Alasdair Darling, Alan Johnson and David Miliband also had clout. Under David Cameron, George Osborne's Treasury was a second, though not necessarily rival, locus of power.

On Brexit, as on most other key issues, the big decisions are taken in No 10 by May and her closest advisers (the most important are Fiona Hill and Nick Timothy). The most influential ministers on Brexit questions are David Davis in DExEU and Philip Hammond in the Treasury. Of the 'three Brexiteers' (the others being Foreign Secretary Boris Johnson and DIT Secretary Fox), Davis has the most at stake in the outcome of the negotiations, and seems to have established a good working relationship with 10 Downing St. Despite his swashbuckling manner and longstanding euroscepticism, Davis is becoming an increasingly serious figure in the government. Hammond is the leading voice for moderation. He has also long been sceptical about the EU, but came out for Remain during the referendum campaign. He is an economic liberal who listens to the voices of business. He has known May since they were at Oxford University and is trusted by her, though he is a weaker Chancellor than Brown was to Blair or Osborne was to Cameron.

The views of Boris Johnson also count, because he sits on the cabinet committee that deals with Brexit and because of his popularity in the Conservative party and the country. However, his relationship with No 10 is tense at times and, as an institution, the Foreign

and Commonwealth Office (FCO) has been marginalised on Brexit. Liam Fox appears to be outside the innermost circles of decision-making.

The most important official working on Brexit is Olly Robbins, who doubles up as permanent secretary in DExEU and the prime minister's personal adviser on Brexit. Sir Tim Barrow, the career diplomat who has replaced Ivan Rogers, is playing a major role (he has worked in the past on Russia and security policy as well as the EU). Sir Jeremy Heywood, the cabinet secretary, is also closely involved in Brexit matters. Peter Storr, a former Home Office official, and Denzil Davidson, a longstanding Conservative special adviser, are part of the Europe Unit in 10 Downing St that advises May.

There may be upsides to the centralisation of decision-making in 10 Downing St. By confining the decision-making on key issues to a small circle of trusted allies, the prime minister can ensure that sensitive discussions do not leak. And when the prime minister decides what she wants, she should be able to execute her wishes quite quickly, with minimal foot-dragging from other Whitehall departments. But there are evidently downsides. People in the inner circle may become over-stretched, so that important decisions are delayed. And centralisation may discourage the tapping of outside expertise. In May's government, there appear to be relatively few people at a very high level with significant expertise in areas such as the EU, diplomacy, economics, financial markets or business (many of her inner circle have a Home Office background). If too small a group of people is involved in decision-making on Brexit strategy, policies may emerge that are not viable. One example is the commitment in the Lancaster House speech to negotiate not only the Article 50 deal but also the future EU-UK arrangements on trade and everything else in just two years.

4. WHAT THE 27 WANT

The kind of deal that Britain ends up with will depend, to a large extent, on what the EU is prepared to offer. So far, the Member-States and the institutions have achieved a unity and strength of purpose that has surprised many of them – as well as British officials. The mainstream view, set by the Germans, the French and the Brussels institutions, is to be tough on the British. There can be no negotiations until Article 50 is invoked. And given that Britain wants to restrict the free movement of EU workers, it cannot remain in the single market. Most governments also insist that they will not deal with the UK bilaterally, and that it must talk to the EU as a whole.

Then there are some specific issues on which the EU will be very tough. The 27 are demanding that **Britain hand over a large sum** – perhaps as much as €60 billion – before it leaves. The greater part of that figure stems from Britain having committed to support many EU projects on which the money has not yet been spent. The 27 also want Britain to pay towards **future pension payments to EU staff**, and any **contingent liabilities** that may turn sour (for example, EU loans to Ukraine or Ireland).[10] The Commission, and some of the 27, are adamant that unless Britain agrees to hand over most of this money – allowing progress to be made on the Article 50 separation talks – they will be unwilling to start talks on the future relationship (however, many EU governments reckon that in practice the Article 50 talks will have to run in parallel to those on the future).

The EU will also be tough on the transitional arrangements that Britain will ask for. If Britain wants to remain in aspects of the single market after it leaves, it will be asked to accept both free movement and the rulings of the European Court of Justice – and perhaps also to pay into the budget.

The 27 will also be obdurate on **financial services**. They have no desire to give the British a deal that would allow the City of London to emerge unscathed from Brexit. Few of the 27 view it as a European asset that should be preserved. Some see it as a malignant entity that has the potential to destabilise the Eurozone.

Wolfgang Schäuble, the German finance minister, talks with a softer tone: "*London offers financial services of a quality that one doesn't find on the continent…. That would indeed change a bit after a separation, but we must find reasonable rules here with Britain*." [11] Such views, however, are not common among EU leaders, or even in Germany.

A hard EU line on such issues could provoke a **crisis in the Brexit talks**. Europe's leaders, however, are not very scared by the prospect of an acrimonious Brexit. They believe that though the severing of economic ties would cause the 27 some harm, the UK would suffer much more, given its greater dependency on EU markets than vice versa.

In any case, for Angela Merkel and for most other leaders, politics matters more than economics. They do not want populist eurosceptics in countries like France, Italy or the Netherlands to be able to profit from Brexit, by saying to voters "Look at the Brits, they are doing fine outside the EU, let us go and join them!" EU leaders also worry about some parties in power. For example, in France one hears concerns that Poland's government could use the example of a successful Brexit to argue that the Poles would also be better off out.

[10] Alex Barker, 'The €60 billion Brexit bill: how to disentangle Britain from the EU budget', CER policy brief, February 2017.
[11] Interview with *Tagesspiegel*, February 5th, 2017.

Thus most of the 27 do not want the British, in the words of Boris Johnson, to be able to "have their cake and eat it". The French say this more directly than the Germans, as when President François Hollande said of the Brexit talks in October 2016: "*There must be a threat, there must be a risk, there must be a price*".[12] But Berlin, too, thinks that the British have to be seen to be worse off out.

Most EU governments want to **prevent not only contagion to other Member-States but also the institutional unravelling of the EU**. If the British were given a special deal that allowed them to stay in the single market without having to accept all the rules, other countries – inside or outside the EU – might demand similar provisions, and then the institutional strength and the coherence of the Union would be undermined. The governments claim an economic rationale for this political point: once the British are allowed to pick holes in the single market, it will be harder to stop others erecting barriers.

The Brussels institutions are particularly sensitive to innovations that could weaken their role. There is a profound **institutional conservativism** in the thinking of many EU leaders and officials, which is one reason why David Cameron found it so hard to engineer serious reforms during his renegotiation. Although the 'indivisibility' of the four freedoms – of goods, services, capital and people – is a dogma in Brussels, there are sound arguments behind it. Economically, free movement makes the single market fairer and more efficient (many services cannot cross frontiers unless people are free to move), while politically, it is widely viewed as **a great achievement** rather than a problem to be managed.[13]

What matters most is not what the institutions think, but rather the views of France and (especially) Germany. They will want to ensure that they keep a close eye on the Commission as it leads the negotiations. In December 2016, the European Council decided that a representative of Donald Tusk, its president, should take part in the negotiations – and also that the rotating presidency of the Council of Ministers should send an official to join the Commission team.

Merkel's key concern is to maintain the **strength and stability of the EU**, and to keep the 27 together. That means considering the interests of the entire Union as much as what is good for the German economy. Britain's departure leaves Germany more dependent on France; Germany must therefore respect and to some degree go along with France's desire for a hard line on Brexit. Merkel often repeats that the four freedoms are indivisible. Many British eurosceptics wrongly imagine that Germany will allow its narrow economic interest in close ties with the UK to determine its strategy.[14]

Once the negotiations begin, it may be harder for the 27 to remain united. A disparate collection of countries may be tempted to cut bilateral deals with the British: Poland and Hungary, which share some of their euroscepticism and hostility to Brussels institutions; Ireland, which is particularly worried about the impact of Brexit on its economy and the Northern Irish peace process; and perhaps Sweden, whose leaders think like the British on economic issues such as free trade and the single market. But as one German diplomat points out: "*The British should be careful what they wish for; the more disunited the 27 become, the more that will delay negotiations, and increase the risk of Britain crashing out with no deal*."

In any case, the views of Dublin or Warsaw are unlikely to push the EU's centre of gravity far from the line established by Berlin, Paris and Brussels. Nor should the British expect the French or German elections to lead to more UK-friendly policies. Unless Marine Le Pen wins in France (which appears unlikely at the time of writing), the next French president is likely

[12] Speech at the Hotel de Lassay, Paris, October 6th 2016.
[13] Camino Mortera-Martinez and Christian Odendahl, 'What free movement means to Europe and why it matters to Britain', CER Policy Brief, January 2017.
[14] Charles Grant, 'Why the 27 are taking a hard line on Brexit', CER Insight, October 2016; and 'Brussels prepares for a hard Brexit', CER Insight, November 2016.

to maintain Hollande's tough line, because that is what the French establishment considers to be in the French national interest. The independent candidate and current favourite, Emmanuel Macron, says he will be "*pretty tough*" on the UK because the EU must "*convey the message that you cannot leave without consequences*".[15] If Merkel remains Chancellor after the general election in Germany, its policy on Brexit will not change. And if Martin Schulz caused an upset by stealing her crown, a Social Democrat-led government would be tougher on the British than Merkel's Christian Democrats.

[15] Interview with the UK's Channel 4 news, February 13th, 2017.

5. THE KEY DECISIONS MRS MAY STILL HAS TO MAKE

May's Lancaster House speech, and the White Paper that followed, left several crucial issues open. What sort of migratory regime will she seek? What will she propose for EU citizens living in the UK? Will she seek to stay in parts of the EU's customs union? Will she prioritise a special deal for the City of London? What kind of judicial or arbitration mechanisms will resolve disputes between Britain and the EU? And, perhaps the most difficult of all, **what kind of transitional arrangements will she ask for**?

The most contentious issue for many Britons will be how May restricts **migration from EU countries**. This need not be negotiated with the EU – it is a sovereign decision for the UK to make. Nevertheless the model that Britain chooses will influence the stance of the 27 in the Brexit talks.

Neither May nor have her ministers said much in public on the scheme they want to adopt. However, key officials have suggested that the limits must be tough enough to bring about a significant fall in the number of EU migrants. (Ironically, some of the most senior Leave ministers, such as Brexit Secretary Davis, and Foreign Secretary Johnson, probably favour a more liberal regime than the prime minister, who voted Remain.)

Some system of **work permits**, with **numerical quotas** set for **particular sectors**, is likely. The government has yet to decide whether to have similar or different systems for skilled and unskilled labour, and whether to distinguish between EU and non-EU nationals. But some ministers have hinted that both skilled workers and EU nationals will be treated more leniently. The White Paper suggested that it may take several years to introduce the new rules.

One issue that will feature prominently in the Article 50 talks is the '**acquired rights'** of the nearly three million EU citizens living in the UK, and of the roughly one million British citizens living in the 27. **This subject need not be controversial** in terms of British domestic politics. Not only Remain politicians, but also virtually all those who led the Leave campaign want EU citizens in Britain to be allowed to stay – irrespective of what reciprocal rights are offered.

In December 2016 the British government sought a provisional accord on this point, speaking to many Member-States individually. The EU rebuffed the British, because their initiative raised fears of a divide-and-rule strategy, and because they seemed to be attempting a 'pre-negotiation' before triggering Article 50. This rebuff was unfortunate, since it made the EU appear dogmatic and indifferent to the real insecurities of continentals living in the UK (To many of those EU citizens, May's government also appears indifferent, in resisting the pleas of British politicians to guarantee unilaterally their right to stay).

In any case May and her ministers will prioritise the issue of EU citizens in the UK when substantive talks commence, and the EU will probably do the same. But it remains far from clear how the rights of EU nationals in the UK will be guaranteed. Presumably they will need to register and provide proof that they have lived in the UK for a certain period of time. But will the cut-off point be the date of the referendum, or of Article 50's triggering or of Brexit – or some other day? The EU will surely say that people who moved to the UK until the day of Brexit were exercising their legal right to do so and should be allowed to stay.

EU officials fear that, even with goodwill on all sides, **the technicalities involved** will make this **a difficult negotiation**. For example, the definition of a 'resident' is different in Britain and in France. What family members would an EU citizen living in Britain be able to bring into the country? And what kinds of welfare and healthcare would residents be

entitled to (these issues are largely the responsibility of national governments, which may encourage the UK to seek bilateral deals with particular capitals)?

The only substantially new announcement in the Lancaster House speech was the decision to leave the essentials of the EU customs union, namely the Common Commercial Policy and the Common External Tariff. Britain's manufacturers, retailers and farmers had been hoping Britain would stay in, so that UK-EU trade could remain free of tariffs, bothersome rules of origin and customs procedures (the recent House of Lords report on trade criticised the government for not having done enough work to quantify the cost of leaving the customs union)[16]. But staying in the customs union would have prevented Liam Fox from striking trade deals with other countries. It would also require some mutual recognition of things like product standards and safety requirements (and this could, arguably, give the ECJ an indirect role). The British would have to adopt not only European tariffs without having a vote on them, but also some European regulations.[17]

Yet there was some ambiguity over the customs union in the Lancaster House speech. May said she wanted a customs agreement with the EU and asked whether Britain could "become an associate member of the customs union in some way, or remain a signatory to some elements of it … I have an open mind on how we do it". The prime minister has said that the issue of the customs union is not a binary decision, which might be taken to imply that certain industries could stay in the union and others leave it. But that would breach WTO rules, which state that a customs union, like an FTA, must apply to substantially all trade in goods between two entities. Nevertheless in her speech she singled out the car industry for special treatment in the FTA that she will seek with the EU. She may have meant that if Britain and its partners agreed to recognise each other's regulations on cars and their components, customs controls could be minimal. The more the UK and the 27 can strike mutual recognition agreements, the less there is a need for customs checks. But with Britain outside the common commercial policy and external tariff there would still have to be checks for tariffs (when tariffs apply) and rules of origin (lest goods made in the UK with a high proportion of non-EU components 'escape' the EU's external tariff).

That is a particular problem for the Irish. With Britain out of the customs union, the British and Irish governments may be obliged to restore customs posts between Northern Ireland and the Republic (passport controls will probably not be needed, since the UK is unlikely to require EU citizens to obtain a visa before visiting). The appearance of customs posts could be provocation to terrorists. There is a strong desire in Dublin, Belfast and London to find some clever system which would obviate the need for customs controls on the border. The good news is that Michel Barnier, the Commission's chief Brexit negotiator, is very keen to help. The less good news is that nobody has yet found the clever system that will solve the problem.

The Lancaster House speech also singled out **the freedom to provide financial services across borders** as another objective for the FTA. The British government is resigned to losing 'passporting', since the 27 consider it part of the single market. 'Equivalence' could be another way of enabling UK-based firms to access European financial markets from outside the EU. But equivalence is very much a poor man's substitute for passporting: it does not operate in some financial sectors, like commercial banking and certain sorts of insurance; the Commission decides whether to grant it; and the Commission may revoke equivalence at 30 days' notice.

The big financial firms in London are not sure how much May really cares about their fate. Of the 78 pages in the White Paper on Brexit, only one covers financial services, one of Britain's strongest economic sectors. Philip Hammond and the Treasury have certainly listened to the City's concerns. But to judge from her public comments, May is less of an

[16] House of Lords, European Union committee, 'Brexit: the options for trade', December 2016.
[17] John Springford, 'Customs union membership is not way out of the Brexit trap', CER insight, December 2016.

enthusiast for the City than her predecessors Tony Blair, Gordon Brown and David Cameron. Paying particular attention to the fortunes of over-paid foreign financiers would hardly fit with her narrative that the government is focused on the 'just about managing' classes.

Nevertheless the government will surely not ignore this industry in the Brexit talks; it contributed £70 billion in taxes last year, and ran a trade surplus of £63 billion. The Treasury hopes for an FTA that will provide something better than the current system of equivalence. It would be happy if the UK and EU both undertook to abide by globally-agreed standards; that each of them started out by recognising the other's rules as equivalent; and that if and when either wanted to change its rules, a joint committee would decide whether they remained equivalent. It would also hope for equivalence to become a legally watertight concept, rather than one which – as at present – can be revoked at the whim of the Commission. However, the EU is unlikely to agree to a deal that implies equality of status in rule-making between the 27 and the UK, and it will want the ECJ to play a role in arbitrating disagreements.

Indeed, **dispute settlement** may well cast a long shadow over much of the negotiations. The government appears to recognise this, having added a four-page annex covering various types of dispute resolution mechanism to the White Paper. Ever since her party conference speech in October 2016, May has singled out the avoidance of ECJ rulings – alongside restrictions on free movement – as her top priority for the Brexit deal. But some British officials wish she had been less categorical and that she had left herself some wiggle room.

It is true that the EU's FTAs with other countries include arbitration mechanisms that do not involve the ECJ, and the UK will presumably ask for similar provisions in its own FTA. But when the UK asks for special arrangements that resemble single market membership, or other sorts of very close relationship – as it may do on financial services, or data transfers, or aviation, or the European Arrest Warrant – the EU will insist that its court be the arbitration body.

The British are thinking about other models of arbitration that could be adapted, such as the EFTA court, which polices the rules of the European Economic Area for its three non-EU members – Liechtenstein, Norway and Iceland. The court is based in Luxembourg and its judges are nominated by those three countries. It has some leeway to enunciate its own principles, though it has never contradicted the ECJ. But if the UK were to ask for something similar, it would have to contend with the strong belief in Brussels and many Members-States that the authority of the ECJ should not be diluted.

The most difficult part of the negotiation may be over the transitional arrangements that the British will request. May said in her Lancaster House speech that the entire future relationship could be worked out in two years, alongside the Article 50 negotiation. But the view of nearly all officials, in London, Brussels and the Member-States, is that an FTA between the UK and the EU will take much longer than two years to sort out. All the experts giving evidence to the House of Lords' EU committee, for its recent report on trade, said that two years would be impossible.[18] The Canada-EU FTA took seven years to negotiate and a further two to ratify.

Businesses want a transitional deal to provide regulatory stability during the period between when the UK leaves the EU, probably in spring 2019, and whenever the FTA enters into effect. Without a transition, they would face a 'cliff-edge', falling out of the single market with only the rules of the World Trade Organisation to protect them – meaning tariffs on many goods, very high tariffs on some farm exports and sharply reduced market access for many service industries.

[18] House of Lords, European Union committee, 'Brexit: the options for trade', December 2016.

After taking some time to acknowledge that it will need transitional arrangements, the UK government has come round to the idea. The White Paper says that after leaving the EU, a "phased process of implementation" could cover "immigration controls, customs systems or the way in which we co-operate on criminal and civil justice matters. Or it might be about the future legal and regulatory framework for business." The White Paper then goes on that some of these interim arrangements will need to last longer than others.[19]

Both what Britain will ask for on the transition, and how the 27 will respond, remain uncertain. It seems unlikely Britain will want to stay in the single market during this phase – and if it did, the EU would insist on free movement, payments into the budget and the ECJ, which the UK government could probably not accept. A transition that retained the customs union for a period would be easier to agree upon, but by no means easy; the EU could still insist on a role for the ECJ.

The precise timing of the talks on the transition will be particularly contentious. The UK will want interim arrangements to be fixed as soon as possible in the separation talks, to dissuade footloose companies from quitting the UK. But the EU may well exploit this British requirement by demanding concessions in other parts of the negotiation. In any case, EU officials see strong reasons to leave the transition talks until near the end of the two-year Article 50 process: it would not make sense to talk of a transition without knowing the outlines of the future FTA. Yet there will not be time to grapple with the FTA, they say, until difficult Article 50 issues are sorted out (such as budget contributions, the rights of EU citizens in the UK, giving certainty to legal contracts, and so on).

It is because the negotiation of the transition is likely to be so fraught that a smooth Brexit, leading to an FTA, cannot be taken for granted.

[19] 'The United Kingdom's exit from and new partnership with the European Union', British government white paper, February 2017.

6. HOW STRONG ARE BRITAIN'S CARDS?

Once Article 50 is triggered, Britain has just two years to strike a deal (technically, that period can be extended, but only by unanimity, and given that most of the 27 are firm on the two-year period, an extension is unlikely). The clock will be ticking and if there is no deal at the end of the period, companies and individuals would face great uncertainty and there would be legal chaos. As far as many EU governments are concerned, this puts the British in a weak position: the pressure of time running out may force May's government to accept a deal on the EU's terms.

The response of many Britons is: "*But that would damage our and your economies, which is not in your interests*." However, as this paper has argued, the 27, like the British, are not being driven primarily by economics. The best-informed British officials understand that the UK will be in a weak position during the Brexit talks. But there is a risk that those who are brave enough to explain this fact will be attacked by newspaper columnists or in social media as "remoaners", "defeatists" or "people who talk their country down".

Because of the patchy expertise in London on EU matters, there is a real risk that the British will overplay their hand in the forthcoming negotiations. Many British eurosceptics are convinced that May can achieve a good deal because, they believe, she has many strong cards to play. They mention Britain's contribution to European security; the arrival of Donald Trump in the White House; the strength of the City of London; the UK's large trade deficit with the rest of the EU; and the threat to turn the UK into a low-tax, deregulated Singapore-style economy. Some of these cards could help Britain in the forthcoming talks, but only if handled deftly, and none of them gives it a great deal of clout.

The strongest card is Britain's contribution to European security, a point mentioned several times in the Lancaster House speech. The UK has a permanent seat on the UN Security Council, skilled diplomats, capable armed forces, effective intelligence services and considerable expertise on fighting terrorism and organised crime. A leading member of NATO, Britain is one of the few countries to meet that Alliance's 2 percent of GDP target for defence spending. It recently sent about 1,000 troops to Estonia and Poland. Given this contribution to European security, some government advisers have suggested, EU Member-States – and especially those in Central Europe – should go the extra mile to give the UK a generous exit settlement.

However, this argument, if handled unsubtly, could backfire on Britain. Some Baltic and Polish politicians who heard it last summer were miffed, saying they had thought the UK was sending troops because it cared about their security; but it now appeared to be a cynical move to ensure better terms on a trade deal.

So **the British should not seek a trade-off between security and trade**. Rather, they should appreciate that the more they contribute to European security, the more this generates goodwill, and – in the long run – should help them secure a favourable trade deal. May got the tone right in Lancaster House, saying that she wanted "practical arrangements on matters of law enforcement and the sharing of intelligence material with our EU allies" and "to work closely with our European allies in foreign and defence policy".

Some Britons believe that the election of Donald Trump strengthens Britain's security card. Given Trump's initially at least ambiguous attitude to NATO and his softness towards Russia, many Central Europeans and others are fearful. Therefore, the thinking in London goes, the continentals need the UK's contribution to their security more than ever. There is some merit in this argument, but the British need to be careful about the way they play the Trump card. If the UK is seen as too friendly to the new president – a point discussed in the penultimate section – its attractiveness as a partner diminishes.

A third card, often cited by eurosceptics and those more favourable to the EU, is the strength of the City of London. They argue that since the City benefits Europe as a whole, the EU would be silly to harm it – for example, by preventing London-based firms from serving EU clients, or by forcing the clearing of euro derivatives into the Eurozone.

The Bank of England's governor, Mark Carney, has argued that a bad deal for the City would lead to a greater risk of financial instability on the continent than in the UK.[20] That assertion is over-the-top, but the fragmentation of Europe's financial markets would raise the cost of capital for many continental companies. They depend on the City to raise money, trade currencies, hedge risk and provide financial expertise. Some 8,000 continental financial firms benefit from passporting into British markets, compared to the roughly 5,000 which passport out of the UK into other EU countries. The Bank of England is probably right to argue that if business left the City, as much of it would relocate to non-European centres (such as New York or Hong Kong) as to rival European cities.

But that is not how it looks to a lot of top EU politicians and officials. They do not want to give the City special treatment. Indeed, some of them laugh when they hear the argument that hurting the City could rebound on the 27. Some European politicians blame the City for the financial crisis of 2008, viewing it as a haven of crooked Anglo-Saxon finance capitalism; others are intent on attracting City business to their own financial centres. The 27 are firm that the UK should lose passporting, and as for equivalence, the Commission recently launched plans to make the rules more onerous, so that the UK would find it harder to meet standards set by the EU. France, Germany and the European Central Bank are strongly committed to shifting the clearing of euro-derivatives from London into the Eurozone. It will be very difficult for the UK to achieve any kind of special deal for the City.

A third card, often cited by eurosceptics, is Britain's trade deficit with the EU. In 2015, the last year for which full figures are available, the UK exported goods and services worth £222 billion to the EU, and imported £290 billion worth from it, leaving a trade deficit of £68.5 billion. Therefore, eurosceptics have said again and again, the EU has much more to lose than the UK in any trade war.

But trade deficits are not particularly problematic, so long as the country concerned can finance them sustainably. From an economic perspective, the benefits of free trade accrue mostly to consumers, who get better and cheaper products thanks to imports. But if one wishes to focus simply on the relative dependency of British and EU economies, the 27's exports to the UK account for 3 percent of their GDP, while British exports to the 27 make up 13 percent of its GDP.[21]

The UK is much more dependent on trade with the 27 than vice versa, and will therefore be hurt more in any trade war. It is true that the Germans will not want to endanger their car exports to the UK. But a UK-EU free trade agreement is likely to eliminate tariffs on goods, which will make life easy for German manufacturers. The problem for Britain is that its greatest strength is in services, which are not covered by traditional FTAs; zero tariffs on goods do nothing to help the City of London.

The final card comes in the form of a threat. The British know that their partners are worried that they might steal business by cutting social and environmental standards, or tax rates. The government therefore keeps threatening to turn the economy into something resembling Singapore in the North Atlantic. Philip Hammond has hinted at this in several

[20] Evidence to the House of Commons Treasury select committee, January 11th 2017.
[21] Crude trade balance figure include exports that contain inputs imported from elsewhere, so a more accurate measure is the share of total domestic value added (the basic ingredient of GDP) that is exported to the other side. The latest OECD figures, for 2011, put the domestic added value contained in the EU's exports to the UK at 2 percent of the total; meanwhile for the UK the equivalent figure is 11.7 percent of its total domestic value added.

speeches and the prime minister repeated the threat at Lancaster House. She said that in the event of being offered "a punitive deal that punishes Britain" she would consider **no deal to be better than a bad deal**. "We would be free to set the competitive tax rates and embrace the policies that would attract the world's best companies and biggest investors. And, if we were excluded from accessing the single market, we would be free to change the basis of Britain's economic model." [22]

There are three problems with this threat. First, it undid some of the good that May's positive and courteous tone had achieved in the first three quarters of the speech. Second, threats that lack credibility sound hollow. And given that May, earlier in her speech, had praised employee rights, workers on boards, industrial strategy and a fairer society, her brand of Conservatism is clearly distant from the kind of libertarian Thatcherism that she was threatening to establish.

And third, the 27 have been warned and are preparing counter-measures. Lodewijk Asscher, the Dutch deputy prime minister, has written to fellow Socialist leaders, warning of the dangers of May's government creating an ultra-liberal economy: "*Let's fight the race to the bottom for profits taxation [which harms] our support for our social security systems*." He wrote that they should not sign an FTA with the UK unless "*we can agree firmly on tackling tax avoidance and stopping the fiscal race to the bottom*".[23]

Several governments say they would veto any trade agreement that permitted the UK to engage in excessively competitive tax cuts. Commission officials claim that they are already preparing mechanisms that would allow the EU to curb access to European markets or raise tariffs, if the British went for social or fiscal 'dumping'. But the EU could find that difficult: Ireland already has corporation tax of 12.5 per cent (on trading income), while Britain's main rate of 20 per cent is due to fall to 17 per cent by 2020. The EU could insist that the FTA commit all parties to respecting international rules on unfair tax competition, and the provisions on state aid and competition policy could seek to prevent the British behaving in ways that distorted the single market. But the EU can hardly punish Britain for setting a rate of corporation tax that is higher than Ireland's. So perhaps the counter-measures are not much more credible than the threat.

[22] Theresa May, speech at Lancaster House, January 17th 2017.
[23] Cited in Dan Boffey, 'Netherlands will block EU-UK deal without tax avoidance measures', *Guardian*, January 14th 2017.

7. WHAT KIND OF BREXIT DEAL IS LIKELY?

Only **three possible options** remain for Britain's future relationship with the EU: an Article 50 agreement, including transitional arrangements that lead to an FTA and other deals covering future relations; an Article 50 agreement that merely leads to reliance on WTO rules; and no Article 50 agreement, plus reliance on WTO rules.

Of the three options, **an FTA would be by far the best for the UK economy**.[24] With luck, an FTA would provide for low or zero tariffs on industrial goods, and remove some farm tariffs. A conventional FTA would not require the UK accept free movement or the authority of the ECJ (though all FTAs establish dispute settlement procedures or special arbitration courts). The problem with FTAs is that, traditionally, they do not do a great deal to open up services markets (a British strength) or remove non-tariff barriers to trade.

The deepest FTA that the EU has hitherto negotiated, with Canada, takes some tentative steps to open up telecom, postal and shipping services, and parts of public procurement, but leaves out financial services, aviation, audio-visual media and many other services. If Britain does request an FTA, it will certainly hope for a better deal than Canada. But it should not assume that it will succeed, given that several UK industries are stronger and more threatening to their EU competitors than are Canada's (for example, finance, consulting, law, accounting, airlines and outsourcing). Furthermore, Canada needed the deal far less than the UK will need its FTA. In negotiating the deal, the EU may demand greater budgetary contributions – and fewer restrictions on free movement – in return for market access in particular sectors.

As already explained, an FTA will require a transitional deal, given the time that the former will take to negotiate. If the UK and the EU find the difficulties of negotiating a transitional deal too great to overcome, Britain will face an abrupt exit from the EU, falling back on WTO rules. Those rules set maximum tariff levels for goods. Britain would face the EU's common external tariffs on its exports. While quite low for many products, they are high for others – 10 per cent on cars, 12 per cent on clothing, 20 per cent for beverages and confectionary, and more than 40 per cent for many kinds of meat. Moreover, WTO rules do virtually nothing for services: the General Agreement on Trade in Services (GATS) is a WTO treaty that sets general principles and provides some transparency and legal predictability, but it does not open markets.

Some hard-line British eurosceptics favour the WTO option, on the grounds that it would be quick and simple, and obviate the need for years of complex FTA talks with the EU bureaucracy. They are confident that new trade deals with emerging powers and English-speaking countries would soon make up for lost EU commerce (however, some recent economic research suggests that new trade deals will do little to compensate for the loss of EU trade that will stem from Brexit).[25] Furthermore, some eurosceptics oppose the principle of a transitional deal per se, because they worry that interim arrangements could drag on for many years, or perhaps forever, with the result that the UK would never properly leave the EU. They also fear that the EU may extract a high price for the transition, such as free movement and the jurisdiction of the ECJ.

One particular group of libertarian Brexit economists, led by Patrick Minford, a professor at Cardiff Business School, argues that once it has left the EU, Britain should unilaterally

[24] John Springford et al, 'The economic consequences of leaving the EU', CER report, April 2016

[25] Monique Abell estimates that an FTA with the EU would, in the long term, cut the UK's total trade by 22 per cent. Meanwhile new trade deals with the five BRICS countries, as well as the US, Canada, Australia and New Zealand, would boost British trade by 5 per cent. See her 'Will new trade deals soften the blow of hard Brexit?' National Institute for Economic and Social Research, January 27th 2017. See also John Springford et al, 'The economic consequences of leaving the EU', CER report, April 2016.

remove all tariffs (as well as scrapping many taxes, and social and environmental rules).[26] That policy would take away the UK's bargaining chips in future negotiations on FTAs; but these libertarians are not particularly bothered whether Britain achieves FTAs with other countries. Turning the UK into an Asian tiger in the North Atlantic would, they argue, generate a massive boom in economic activity, with or without trade deals. Minford admitted during the referendum campaign that such a course would eliminate much of Britain's manufacturing industry. It would also finish off many British farmers. However, May's government is unlikely to go down such a controversial path. There is no majority in the Conservative Party for Minford's ultra-Thatcherite medicine.

One outcome that would cause even more economic damage than the WTO option remains possible. That would be a breakdown of the Article 50 talks followed by WTO rules.

Those talks could collapse over, for example, the EU's insistence that Britain pay the €60 billion it claims is owed. If May stormed out of the negotiations, perhaps to fight a general election on a eurosceptic platform, Britain might then leave the EU without any agreement at all. This would create great legal uncertainty for companies and people who have invested, traded or moved across borders. There would be arguments over which law applied to contracts. Maritime commerce and aviation between the UK and the EU might be disrupted, at least in the short term. An enormous number of lengthy and complex legal cases would clog up international courts, covering issues like budget payments, pensions and residency rights, as well as regulatory and trade questions. It is highly unlikely that financial markets would react calmly.

Such an outcome would cause huge damage to the British economy and some damage to the rest of the EU. But that does not mean it cannot happen. Some of the most senior EU officials think it possible, because – in their view – the British over-estimate the strength of their cards, and are being driven more by eurosceptic emotion than economic self-interest. Ivan Rogers shared some of these concerns and thought that a breakdown of the talks was possible.

[26] Patrick Minford, 'Unilateral free trade is far more attractive than membership of the single market', BrexitCentral, September 21st 2016.

8. HOW THERESA MAY CAN GET A BETTER DEAL?

Given the weakness of May's hand, a half-decent agreement will require the **goodwill of Britain's partners**. Some of the government's conduct has eroded that goodwill. To generate goodwill, May and her ministers need to think carefully about their style and tactics, and then come up with requests on the substance of the negotiations that generate a relatively warm response.

Ministers should be serious and courteous, while avoiding anti-EU rhetoric. To quote a senior official in one northern capital, "*if you want a good deal, keep the negotiations boring and technical. The more your ministers grandstand, the more we become defensive and unhelpful*."

To be fair to May's government, many of its senior figures are gradually getting the message. But not all of them. When Boris Johnson said in November that the idea of free movement being a founding principle of the EU was "a total myth" and "bollocks", he was not only factually wrong but also offensive. The Foreign Secretary was at it again in January, when President François Hollande said that Britain's Brexit deal would have to be worse than membership. Johnson quipped that Hollande wanted "to administer punishment beatings to anyone who wishes to escape, rather in the manner of some World War Two movie" – humour that did not travel well.

Smugness and bravura should be avoided. Speaking to the Corporation of London in November, David Davis said that he was "not really interested" in a transitional deal, but that since the UK's sudden departure could harm the EU's financial stability, he would "be kind" and agree if the EU asked for a transition.[27]

Ministers should also consider how their closeness with certain governments may affect attitudes in Berlin, Paris, Brussels and other key EU capitals. Theresa May's welcome of the Polish and Hungarian prime ministers to 10 Downing St was frowned upon, since their governments' track record on the independence of state media and the judiciary has made them the black sheep of the European family (it is unusual for a British prime minister to pick up a visitor from the airport, as May did for Poland's Beata Szydlo).

More problematic has been London's attitude to the election of Donald Trump. Johnson's enthusiastic response in November, telling EU leaders to "*snap out of the general doom and gloom about the result [and the] collective whinge-o-rama*", and his boycotting of an EU dinner to discuss the president-elect did not enhance his already shaky relations with fellow EU foreign ministers. Then in January, shortly before Trump's inauguration, Johnson boycotted a conference of 70 nations in Paris that reaffirmed support for the two-state solution to the Palestine problem. He subsequently vetoed a motion in the EU's foreign affairs council that backed the conference. The Foreign Office pointed out that it had not changed its policy on Palestine and that the timing of the Paris event had been provocative to the incoming US administration. Nevertheless the British moves reinforced the impression that Britain was more concerned to carry favour with the new Trump administration than stand by its European allies.

Of course, for the UK to court the incoming US administration, and potential friends in Budapest and Warsaw, is legitimate and rational; it needs all the allies it can find. But British ministers should be aware that there are potential costs, particularly if they mishandle the theatre of diplomacy. With the Trump administration, in particular, some British politicians seem unaware of the potential downsides of cosying up.

[27] Alex Barker, 'David Davis rebuffs City hopes for a transition deal', *Financial Times*, December 9th 2016.

During May's trip to the US, at the end of January 2017, she generally got the balance right. Speaking to Republicans in Philadelphia, she said there was "nothing inevitable" about an eclipse of the West, and that its values must be upheld. The European project was vitally important: "It remains overwhelmingly in our interests – and in those of the wider world – that the EU should succeed." [28] And when she went on to Washington she persuaded Trump to agree with the statement that he was 100 per cent behind a strong NATO. But then when she came home to the news that Trump had banned visitors from seven Muslim countries, she was slow to say she disapproved.

Trump's behaviour will present the British with constant challenges. If the way May handles Trump implies that Britain shares significant parts of his worldview – despite his line on Russia, Palestine, Iran, climate and trade being radically different from British (and European mainstream) policy – she will do great damage to Britain's reputation. There is a real risk that as the British government attempts to straddle the widening gap between the two sides of Atlantic, it may fall down the middle.

Britain's image in the EU would benefit from the prime minister making a big speech somewhere on the continent, setting out a positive vision for what the UK could contribute to post-Brexit. For example, she could build on her Lancaster House and Philadelphia speeches by offering to make Britain's expertise on foreign policy, defence, counter-terrorism and policing available to the EU, in pursuit of common policies and objectives. She could offer ships and border guards for policing and strengthening the EU's external frontier – goals which would evidently benefit Britain. She could aspire to make Britain a closer partner of the EU on security policy than any other non-member – and come up with some concrete proposals on how to achieve that.

On the future economic relationship, May would impress the 27 if she aimed for a high level of integration, within the parameters set out in Lancaster House and in the White Paper. She might signal a willingness to **accept the authority of some judicial body that was similar to but not the ECJ**, in a **dispute settlement mechanism**.

She could **offer money** for the **funds that support the development of poorer EU members** (the Central Europeans will probably lose out from Brexit, since richer states will be reluctant to replace Britain's contribution to EU regional funds). Such an offer could reduce the scale of the 'Brexit bill' (consisting mainly of unspent budgetary commitments) that the 27 expect Britain to pay upfront. It could also spur the 27 to offer Britain a more generous FTA.

As for free movement, if May proposes less stringent controls on EU citizens than those from other continents, she will earn some goodwill. But if the new regime cuts the numbers of EU migrants sharply, goodwill will be lost.

In addition to reinforcing British soft power, May and her ministers need to think hard about how best to use the Whitehall machine. Lord Kerr, a former permanent representative to the EU, had some trenchant advice in a recent article. "*The first rule of good policy-making is rigorous pre-launch testing*", he wrote. He suggested that ministers should convene a wide circle of experts to consider the practicalities of, and possible objections to, each policy proposal. "*Keeping the circle too small leads to disasters like Mrs Thatcher's poll tax*". He emphasised the importance of understanding how the 27 would react to British ideas. "*To dismiss realism as defeatism, and damn dissent as disloyalty, is to court disaster*".[29] It is perhaps surprising that as the government has prepared its strategy for Brexit, it has seldom sought the advice of Lord Kerr or other former permanent representatives to the EU.

[28] Theresa May, 'Speech to the Republican Party', Philadelphia, January 26th 2017
[29] John Kerr, 'Honest advice is a tradition worth preserving', *Financial Times*, January 7th 2017.

The EU will get annoyed if the UK regularly seeks to bypass the official negotiations by talking informally to particular governments. But there will be occasions when the British need to do this. They should certainly nurture informal channels with Berlin – a capital where May and her ministers probably need to invest more. There is a view in May's government that David Cameron over-emphasised the importance of Germany: in the end Merkel failed to stop the appointment of Jean-Claude Juncker as Commission president or to give Cameron as much as he wanted in the renegotiation of February 2016. Cameron may have counted too much on the German relationship, but May – to the alarm of some British officials – seems to have under-invested in Berlin.[30]

May and Merkel have reacted to the election of Trump in different ways, which has not made their relationship easier. But even though Germany does not control the EU, it remains more influential than any other country and will be crucial in corralling support for a final deal with the UK. London needs to focus on Berlin.

[30] Peter Foster, 'Exclusive: Brexit alarm in Whitehall over Theresa May's 'almost non-existent' relationship with Angela Merkel', *The Telegraph*, January 4th, 2017.

9. CONCLUSIONS

Although an acrimonious divorce that damages all parties is possible, the UK and the 27 may in the end agree on some kind of FTA, with transitional provisions. One of May's strengths is that at least some of the time she believes in evidence-based policy-making. If she concludes that the national interest requires it, she may find the courage to break with the hard right and go for a not-so-hard Brexit.

But even on the most optimistic scenarios, the Brexit deal will be fairly hard. One reason is that **the British government's strategy is not about achieving economically optimal outcomes**. The prime minister will prioritise restricting free movement and excluding the European Court of Justice, whatever the economic price. For the British government to pursue such a strategy is perfectly legitimate, though it has – unsurprisingly – been shy of admitting the likely economic costs.

The second reason is that the 27, too, are being driven more by politics than economics. Many EU leaders are rather franker than the British government on this point. They say that the cohesion, unity and strength of the EU count for much more than the loss of some trade with the UK.

Neither side seems particularly bothered that even the best possible deal that is feasible will harm the economic well-being of all concerned. Such views are unlikely to shift in the next year or two, especially since the atmosphere in the divorce talks will probably be fraught.

In the very long run, however, **a better deal**, giving Britain many of, though not all, the benefits of membership, **could become more plausible**. A group of eminent analysts outlined such a model in a paper published by the think-tank Bruegel in August 2016 – suggesting that Britain and other non-members could participate in the single market, be consulted on its rules and be excused from freedom of movement, so long as they accepted the ECJ.[31]

Such a model is **not politically acceptable** in either the UK or the EU **at present**. In the longer term, however, when Britain has experienced the chill winds of solitude; when its erstwhile partners see the potential economic benefits of drawing the British closer; and when the EU itself is more open to reform and new ideas – then schemes such as those promoted by Bruegel may return to the agenda.

Thinking about issues other than economics could help to bring about a reconciliation of the British and the EU. Given the unstable neighbourhood surrounding the EU, and the many threats to the continent's security, the 27 could benefit from the UK providing resources and expertise. That is why Theresa May was right to talk about security in her Lancaster House speech. Her government should come up with concrete proposals for the role that Britain could play in European foreign, defence and security policy. Working together in this area could help to establish a climate in which closer economic relations become imaginable.

[31] Jean Pisani-Ferry, Norbert Röttgen, André Sapir, Paul Tucker and Guntram Wolff, 'Europe after Brexit: a proposal for a continental partnership', Bruegel, August 2016.

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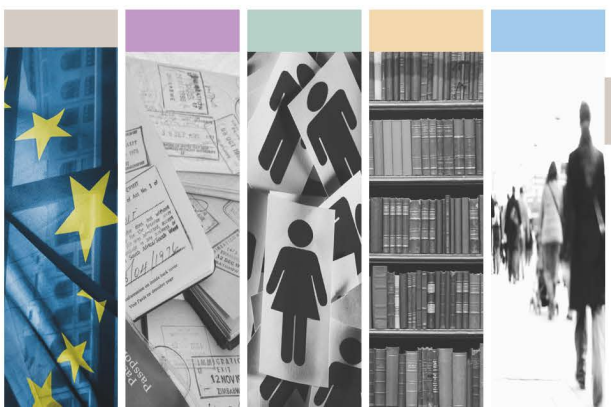

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Brexit and the European Union: General Institutional and Legal Considerations

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Directorate General for Internal Policies of the Union

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EN

DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT FOR CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

CONSTITUTIONAL AFFAIRS

Brexit and the European Union:

General Institutional and Legal Considerations

STUDY

Abstract

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

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To contact the Policy Department for Citizens' Rights and Constitutional Affairs or to subscribe to its newsletter please write to: poldep-citizens@europarl.europa.eu

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CONTENTS

LIST OF ABBREVIATIONS

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

1. BACKGROUND

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

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

Despite having produced a number of strong pro-EEC political figures, much of the country, England in particular, has always been quite unenthusiastic and uninclined towards European political integration. The political goals set forth in the Treaty of Rome have never seemed to be truly shared other than by a minority. More or less overtly, the declared goal of most UK governments – since the Labour government of Harold Wilson to the government of David Cameron – has been to keep further political or economic integration to a minimum and the pooling of sovereignty as limited as possible. Perception of European integration has usually been negative and European integration has been presented by much of the media as a process of losing, rather than sharing sovereignty [3]. Indeed, during the referendum campaign, a number of defenders of leaving the EU stressed a vision of a self-governing United Kingdom, "releasing the potential of its citizens through direct democratic control of both national and local government and providing maximum freedom and responsibility for its people"[4]. There is thus a rejection of concepts and ideas such us shared sovereignty, European multilevel governance, supranational democracy or an "ever closer union in which decisions are taken as close as possible to the citizen in accordance with the principle of subsidiarity"[5]. There seems not to be a widespread will to transcend traditional notions of national sovereignty or any criticism on its limits in the globalised world of the 21st Century.

The UK Independence Party, which received nearly four million votes (13 %) in the May 2015 election, has been campaigning openly for many years for a UK exit from the EU[6]. They were

[1] For a detailed breakdown across the UK: http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information.
[2] http://news.bbc.co.uk/onthisday/hi/dates/stories/november/27/newsid_4187000/4187714.stm.
[3] http://ukandeu.ac.uk/the-uk-media-euroscepticism-and-the-uk-referendum-on-eu-membership/ https://www.psa.ac.uk/sites/default/files/conference/papers/2015/Discourses%20on%20European%20Integration%20in%20the%20UK%20Press.pdf.
[4] 'Our Vision. The Leave Alliance' http://leavehq.com/vision.aspx.
[5] Preamble, Treaty on the European Union.
[6] http://www.ukip.org/manifesto2015.

joined soon and openly by a number of MPs of the Conservative party[7] and even six members of the Cabinet. The Labour Party, the Liberal Democrats, as well as the Scottish National Party were officially for remaining. The campaign led by the Labour Party was controversial in the UK since many believed that the party leadership was not as committed or convincing as was needed[8].

The 2016 referendum campaign was launched by the Conservative government with the declared intention of remaining in the EU under the conditions negotiated by Mr Cameron's government with the other 27 Member States[9]. The conditions were intended to reassure the opponents of further political integration and address some sensitive issues, such as intra-EU labour migration. It was also proposed to introduce some restrictions on freedom of movement of EU citizens.

Prime Minister Cameron led the campaign for UK to remain a member of the Union. The government published, and provided for the public, an abundance of information about the special status of the UK in the Union, the alternatives to membership and various analyses regarding the procedure for withdrawing or the cooperation in the fields of justice or defence[10]. All major national and international economic organisations, in particular the IMF and OECD, published reports on the possible economic and financial consequences for the UK of a Brexit vote. Almost all of them forecasted a negative economic outlook in the case of an effective withdrawal of UK from the EU. The OECD warned of a 'Brexit tax' should the UK leave the EU[11].

Academia, a number of specialists, lawyers and economists, were also customarily advocating for remaining[12].

There was very little serious public debate about political integration, about sharing sovereignty or democratic accountability of supranational institutions. The debate mostly revolved around the economic benefits of the membership versus the freedom of movement and immigration troubles. Post-electoral analysis showed that the government's recommendation or "remainers" positions was rejected despite the leave campaign having failed to present a clear alternative. Messages such as "*Take back control*" and "*Britain first*" had strong impact in important sectors of the electorate. The electorate, or at least a substantial part of it, "were more focused on immigration, the UK financial contribution to the EU budget, and the democratic deficit in EU governance". At the end of the day the two decisive issues for those voting for "Leave" seemed to be national sovereignty and immigration[13].

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

[7] A BBC survey indicated that 138 Conservative MPs were in favour of Leave and 185 in favour of Remain, while only 10 Labour MPs declared to favour Brexit. See http://www.bbc.com/news/uk-politics-eu-referendum-35616946.
[8] http://www.mirror.co.uk/news/uk-news/jeremy-corbyn-really-give-122-8617013.
[9] The Policy Department on Citizens' Rights and Constitutional Affairs has published four studies on four aspects of the agreement concluded on the 19 February 2016 European Council. They dealt respectively with issues related to sovereignty, competitiveness, economic governance and immigration.
[10] http://www.eureferendum.gov.uk/publications/.
[11] OECD, The Economic Consequences of Brexit: A Taxing Decision, OECD Economic Policy Paper No 16, April 2016.
[12] http://www.telegraph.co.uk/news/2016/06/24/eu-referendum-how-the-results-compare-to-the-uks-educated-old-an/; http://www.newstatesman.com/politics/staggers/2016/06/how-did-different-demographic-groups-vote-eu-referendum.
[13] See for a comprehensive EU referendum analysis: http://www.referendumanalysis.eu/

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

The role of the media has been very much emphasised by several commentators, who have pointed out the concentration of ownership in the UK newspaper industry, 80 % of which is owned by just four big corporations, all with a marked pro-Leave line. Five of the six most widely circulated daily newspapers supported the Leave campaign[14]. Content analysis of articles focused on the referendum found that 41 % were pro-Leave as against 27% pro-Remain, marking a dominant pro-Brexit bias, with six out of nine newspapers showing a dominance of pro-Leave articles. The UK television industry, including that of the BBC, has also been very much criticised in this respect[15].

Other relevant commentators who have analysed the campaign and survey data stress that the divide between globalisation winners and losers was a key driver of the vote. Favouring Leave was particularly common among less-educated, poorer and older voters, and those who expressed concerns about immigration and multi-culturalism. Indeed, concern about immigration and the loss of distinct national identity were important to many who favoured Brexit, and they were issues that clearly divided the Leave and Remain camps[16].

In fact, similar divisions have successfully been mobilised by populist parties across Europe, especially on the Right, supposedly by giving voice to the "ordinary people" in opposition to a political establishment that is perceived as failing to listen. The rise of these populist Eurosceptic movements presents a direct challenge to the EU[17].

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

The immediate period following the outcome of the referendum was marked by financial distress in European and world stock markets, the fall of the pound to historical lows against major currencies, and many worrying economic indicators[19]. On the political side, the aftermath was marked by disorientation in most political quarters, with David Cameron resigning as Prime Minister, the UKIP leader resigning while the Labour Party leader faced a no-confidence vote and was challenged in his own party.

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

[14] http://www.telegraph.co.uk/news/0/heres-where-britains-newspapers-stand-on-the-eu-referendum/
[15] Ian Manners. University of Copenhagen, Where Does The Brexit Debate Stand In The United Kingdom Right Now?: Presentation to the European Affairs Committee of the Danish Parliament
[16] Sara B. Hobolt. London School of Economic and Political Science, London, The Brexit vote: a divided nation, a divided continent, http://www.tandfonline.com/doi/pdf/10.1080/13501763.2016.1225785?needAccess=true.
[17] " Can Europe survive in an age of populism ?, Daniel Gros https://www.ceps.eu/publications/can-eu-survive-age-populism
[18] Sara B. Hobolt op. cit.
[19] https://www.theguardian.com/business/2016/jun/23/british-pound-given-boost-by-projected-remain-win-in-eu-referendum.

evolutions of the UK-EU future relationship; that, from the legal point of view, the UK remains a full member of the Union, and that the political and economic consequences of the Leave vote will only be fully assessed in a still uncertain future when negotiations between the EU and UK are at an advanced stage. The clarification of the political situation in the UK, with the accession of a new prime minister and the serene and reassuring declarations by the Commission and European leaders about finding a mutually beneficial relationship, seemed to have appeased the economic and political state of affairs, for the moment. The British economy grew by 2.2 % in 2016, but – as pointed out by Andrew Haldane, Chief Economist of the Bank of England – the "slowdown is still possible"[20]. The markets tend to react badly every time there are indications[21] of a possible, so-called "hard Brexit"[22].

On the European Union side, the reactions were of regret and disappointment regarding the results, but also of acceptance of the democratically reached outcome. Most European leaders stressed the need for the UK to launch the withdrawal negotiations as rapidly as possible, underlining the need to speed up proceedings in order to avoid instability and uncertainty. The European Parliament adopted on 28 June 2016[23] a resolution stressing that the will of the majority of UK citizens should be respected and calling for the activation of Article 50 of the Treaty on European Union (TEU)[24] as soon as possible. It also recalled that Parliament's consent is required under the Treaties and that it must be fully involved at all stages of the procedures regarding the withdrawal agreement and any future relationship.

On 17 January 2017, PM May delivered a speech laying out the general plans for UK's departure[25]. In that speech she showed confident that a smooth and orderly Brexit was possible. Proclaimed the future birth of "Global Britain", more internationalist and open to trade with the wider world. The UK's place in the EU would have come at the expense of UK's global ties. An EU's bending towards uniformity and not flexibility would have been another reason for the departure. In her view, the referendum was a vote to restore UK's parliamentary democracy, national self-determination. Supranational institutions as strong as those created by the European Union would "sit uneasily in relation with UK's history and way of life". She also was determined to end the jurisdiction of the CJEU in UK. In this first

[20] Financial Times, 6 January 2017.
[21] https://www.thesun.co.uk/news/2567422/pound-slumps-to-lowest-level-since-october-after-theresa-may-hints-britain-is-heading-for-a-hard-brexit/
[22] "Hard Brexit" is usually understood to mean the UK having no preferential political relationship with the EU, in particular without access to the Internal Market and relying only on WTO rules for trade of goods and services.
[23] European Parliament Resolution of 28 June 2016 on the decision to leave the EU resulting from the UK referendum (Texts adopted, P8_TA (2016)0294).
[24] Article 50 TUE provides that:
1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament. EN 7.6.2016 Official Journal of the European Union C 202/43
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.
A qualified majority shall be defined in accordance with Article 238(3) (b) of the Treaty on the Functioning of the European Union.
5. If a State which has withdrawn from the Union asks to re-join, its request shall be subject to the procedure referred to in Article 49.
[25] http://www.independent.co.uk/news/uk/home-news/full-text-theresa-may-brexit-speech-global-britain-eu-european-union-latest-a7531361.html

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

PM May's speech is certainly valuable in some parts, in particular when setting clarity on the vision she has for Britain or the reasons for UK's departure of the Union, but seems still quite vague, even contradictory, on how the future relations of UK with the Union would be, in particular the rejection of the Single market combined with the freest possible access to it but also in many other important areas such as security or defence or participation in other structural EU policies[26].

This paper looks into the political and institutional steps taken, or to be taken, both by the UK and by the EU in the context of the Brexit vote, and into how matters may evolve in the coming months and years. It analyses, in broad terms, the possibilities for a future association between the Union and its departing member and, finally, the consequences that the departure of a large Member State may entail for the rest of the policies of the Union and for the Union itself[27].

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

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

2. LEGAL STATUS OF THE UK IN THE EU

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

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

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

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

The Treaties do not provide details on any substantive aspect of the withdrawal and are limited to establishing procedural requirements only. The withdrawing Member State is not even obliged to justify or declare the reasons for its departure. There are not even provisions establishing the conditions for withdrawal, as there are under the 1969 Vienna Convention on the Law of Treaties [29].

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

[28] Andrew Duff, http://verfassungsblog.de/brexit-article -50.
[29] Vienna Convention on the Law of Treaties, signed at Vienna 23 May 1969. Entry into force: 27 January 1980.

cannot be questioned *in abstracto* by the Commission or any other institution. The UK's High Court recent ruling, and the government's subsequent appeal to the UK's Supreme Court, was for some commentators a possibility for an early CJEU involvement in the form of a request for preliminary ruling on Article 50[30]. The UK's Supreme Court, in its judgement of 24 January 2017, and in what is of interest here, has ruled that the government must consult the Parliament when triggering article 50, but did not opt to ask for any CJEU involvement.

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

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

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

The idea of a preliminary ruling has also been mentioned as another possibility for the Court's intervention at that stage. Member State courts would be entitled to question the CJEU on the withdrawal agreement, once signed, thereby giving the Court the possibility to interpret Article 50 and the rights and obligations derived from the agreement. The right of UK courts to present questions under article 267 TFUE will depend on the transitional provisions established in the agreement[33].

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

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

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

[30] See Peers (http://eulawanalysis.blogspot.be/2016/11/brexit-can-ecj-get-involved.html) and Duff (presentation AFCO Committee meeting of 8/11).
[31] https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf
[32] See for this interpretation C.M. Rieder, as quoted by EPRS note PE 577.971.
[33] See for this interpretation A. Lazowski, as quoted by EPRS note PE 577.971.

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

This liberty of the UK has in fact been accepted by the European Council which, in the statement of the 27 Heads of States or Governments of 29 June 2016[34], underlined the "need to organise the withdrawal of the UK from the EU in an orderly fashion", but accepted that "it is up to the British government to notify the European Council of the UK's intention to withdraw from the Union", all the while stressing, however, that "this should be done as quickly as possible". The statement also set out some initial negotiating stances such as "the hope to have UK as a close partner of the EU" and the assumptions that "any agreement which will be concluded with the UK as a third country, will have to be based on a balance of rights and obligations" and that "access to the Single Market requires acceptance of all four freedoms".

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

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

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

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

3. ARTICLE 50 AND THE NEGOTIATION PROCESS

3.1. Notification procedure

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

As already mentioned, the triggering of Article 50 by the UK government has been subject to domestic controversy. From a constitutional perspective, it was clear that the outcome of the referendum does not amount to the formal "notice of intention" of withdrawing, as it is for the UK government to trigger that process. This has been subject of the ongoing court case brought by Gina Miller, joined by number of other applicants (Case Miller versus Secretary of State for exiting the European Union[35]).

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

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

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

[35] https://www.judiciary.gov.uk/judgments/r-miller-v-secretary-of-state-for-exiting-the-european-union/.
[36] See Adam Tucker, Adam Tucker: Triggering Brexit: A Decision for the Government, but under Parliamentary Scrutiny, https://ukconstitutionallaw.org/2016/06/29/adam-tucker-triggering-brexit-a-decision-for-the-government-but-under-parliamentary-scrutiny/.
For the debate see for instance P. Craig, Triggering Article 50 does not require fresh legislation, https://www.lse.ac.uk/collections/law/news/Craig-50.pdf.
[37] Barber, Hickman, King, Pulling the Art. 50 trigger: Parliament's indispensable role, UK Constitutional law blog, https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/ retrieved 25-08-2016.

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

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

3.2. The negotiation process

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

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

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

The Parliament had a preference for the Commission being the Union's negotiator, as the Commission has traditionally led complex negotiations such as those on accession treaties[38]. However, in practical terms, this does not seem to be a particularly relevant aspect since, independently of who leads the negotiations, only the Commission shall have the possibility to formulate "recommendations" or negotiating positions on the large range of EU policies to be negotiated. .

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

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

The principles described above have been confirmed and detailed at the Informal Meeting of the Heads of State or Government of the 27 Member States in Brussels on 15 December 2016[39]. In that gathering, the Heads of State or Government, as well of the Presidents of the European Council and the European Commission, reaffirmed their statement of 29 June 2016 that "any agreement will have to be based on a balance of rights and obligations, and that access to the Single Market requires acceptance of all four freedoms".

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

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

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

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

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

At its meeting of 29 September 2016, the Parliament's Conference of Presidents decided that the follow-up to the UK's decision to withdraw from the Union would, in the first phases[40], be

[39] http://www.consilium.europa.eu/en/press/press-releases/2016/12/15-statement-informal-meeting-27/
[40] The withdrawal process is described as having three phases: the first lasting until an official notification of withdrawal is presented, the second from the start till the end of negotiations, and the third starting after negotiations have been concluded.

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

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

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

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

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

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

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

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

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

It is the Council that concludes the withdrawal[42]-agreement by means of a vote by the so-called super-qualified majority, as specified in Article 238(3) b TFEU: *"the qualified majority shall be defined as at least 72 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States*". In a withdrawal procedure, the participating Member States include all but the withdrawing Member State. This translates here into a majority of 20 out of 27 Member States.

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

3.3. Revocability of notification

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

The issue is controversial and both sides of the argument can be sustained. On the one hand, Article 68 of the Vienna Convention provides a general rule that "a notification or instrument provided for in Article 65 or 67 [regarding the procedures for withdrawal and termination] may be revoked at any time before it takes effect". This argument is supported by several legal experts[43] on the grounds that "there is nothing in Article 50 formally to prevent a Member State from reversing its decision to withdraw in the course of the negotiations"[44], as well as the fact that the Treaty is generally aimed at preserving the Union and allowing for people to stay.

The contrary opinion is also maintained[45]: in the first place, the fact that no reference to such a contingency is made in Article 50 TEU should not lead to the conclusion that a revocation is allowed unless the opposite can be inferred. In the present case, the reference in Article 50(6) of the possibility of reapplying for membership can be interpreted to mean that the drafters of the Treaty had in mind to address the possibility of a withdrawing state changing its mind, and provided the only possible answer: a new application[46]. A more powerful argument in favour of irrevocability was put forward in the discussions at the Convention for

[42] See also Andrew Duff. Brexit: What Brexit. Statement to the Constitutional Affairs Committee of the European Parliament.
[43] See for instance, Jean-Claude Piris, former director-general of the Council's Legal Service in https://www.ft.com/content/b9fc30c8-6edb-11e6-a0c9-1365ce54b926 and Sir John Kerr, Secretary-General of the Convention for the future of Europe in http://www.bbc.com/news/uk-scotland-scotland-politics-37852628.
[44] 11th report of the House of Lords EU select committee "the process of withdrawing from the European Union" HL, 138, 4may 2016.
[45] Cf. Rickford and Ayling: Brexit referendum and Article 50 of the TEU - a legal trap in need of legislation in https://www.lse.ac.uk/collections/law/news/rickfordayling.pdf.
[46] Lazowski also points out that Article 50 should be understood in a very narrow way so that only the mere decision to withdraw ("Any Member State may decide") lies within the free choice of the Member State, whereas the details of a withdrawal and its procedure have to be set by the EU in its totality.

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

The issue arose briefly during the court action on Brexit mentioned above. In this instance, the High Court, in points 10 and 11 of its ruling, stated the issue as "common ground between the parties", alluding that both parties had agreed that notice under Article 50 TEU is irrevocable and cannot be conditional[47].

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

3.4. The withdrawal agreement and a new relationship framework

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

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

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

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

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

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

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

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

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

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

[48] Duff, Andrew, 'Everything you need to know about the Article 50 but were afraid to ask', Verfassungsblog, retrieved 07-07-2016.

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

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

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

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

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

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

[49] See for instance Bruno de Witte, Bruno de Witte, 'The United Kingdom: Towards exit from the EU or towards a different kind of membership?' *Quaderni costituzionali* 3/2016, September, p. 581-583.
[50] See " Brexit and Beyond " Political studies Association, page 7
[51] Duff, Andrew, 'After Brexit. A new Association Agreement between Britain and Europe', October 2016.
[52] Technical Seminar for EU27 on Article 50 negotiations, held at the European Commission on 29 November 2016.

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

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

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

3.5. The challenge of "vested" or acquired rights

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

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

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

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

Other experts hold the view that each Member State has vested nationals of the Member States, whether natural or legal persons, with a legal heritage of rights. EU law creates a number of individual rights directly enforceable in the courts, both horizontally (between individuals) and vertically (between the individual and the state). This argument is founded on the CJEU Van Gend & Loos jurisprudence[55], which was built on the idea that EU law confers rights on the nationals of the Member States, which become part of their "legal heritage". Limits of that legal heritage could be seen as resting with the national law that gives them effect.[56] Should the UK repeal bill rescind the effects of the Treaties, they could in principle not be invoked in the UK courts.

The Treaties are indeed problematic as they concern vested rights, especially when compared with a number of other international treaties. There is no mention of specific rights in the EU treaties with regard to the withdrawal process, and the relevant article only indicates that "the Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement" (Article 50(3) TEU). As some commentators have noted, the fact that there is no explicit obligation laid down in the Treaties to take into account acquired rights is in stark contrast with number of international treaties such as the European Convention on Human Rights (ECHR)[57] or the Energy Charter Treaty[58], which provide for specific protection of individual rights after the termination of the treaty. Finally, one can argue that the EU law is naturally not only a matter of law but also of the general principles recognised in EU law. One such principle pertains to the legal certainty established by the CJEU. However, in the event that no provision for such continuity of rights is made in the withdrawal agreement, or if the negotiations break down, these general principles will not constitute a justiciable source of law in the UK, meaning that UK citizens would automatically lose their EU citizenship and, thereby, their protection under EU law.

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

[54] Jean-Claude Piris, 'Should the UK withdraw from the EU: legal aspects and effects of possible options', Robert Schuman Foundation, *European Issues* No 335.
[55] Judgment of 5 February 1963, *van Gend & Loos*, C-26-62, ECR.
[56] See also Joachum Herbst, 'Observations on the right to withdraw from the European Union. Who are the "Masters of the Treaties"?', *German Law Journal*, 6/2005, p. 1755-1756.
[57] ECHR, Article 58(2) (Denunciation): "Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective." Parties remain bound by the convention with respect to actions prior to denunciation of the convention.
[58] Energy Charter Treaty, Article 47(3) (Withdrawal): "The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date."

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

Customary international law could also be invoked as legal basis for protecting certain rights acquired by virtue of the Treaties. However, the doctrine of protection and continuation of rights in customary international law is usually associated with the idea of protecting the rights created by domestic laws affected by state succession (e.g. Ruhr or Upper Silesia after World War I, or the break-up of Yugoslavia or Czechoslovakia) or expropriation (nationalisations). Such a principle is therefore applicable mainly as regards the continuation of contractual and property rights. An exception to this principle could be the protection of human rights. Although some experts of international law hold that human rights treaties can bind successor states, as acknowledged in the jurisprudence of the ECHR[60], the problem is that the core of EU rights are related to free movement, which are doctrinally not considered to be, *in stricto sensu*, "human rights".

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

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

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

[59] Bowers et al., 'Brexit, some legal and constitutional issues and alternatives to EU membership', House of Commons Library, Briefing Paper Nr 07214, 28 July 2016.
[60] ECHR, judgement of 28 April 2009, application no. 11890/05, *Bielic v Montenegro and Serbia*.
[61] 'Status of Greenland: Commission opinion' (COM (83)0066), 2 February 1983, p 12.
[62] Ibid, p. 13.

4. MODELS FOR A FUTURE EU-UK RELATIONSHIP

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

On 17th January 2017, UK Prime Minister, Theresa May delivered a first major speech containing a number of announcements concerning UK's Brexit negotiations[63]. We have to consider the speech to constitute a basic negotiation objective, and its announcements, with its inherent contradictions, to be a part of a negotiating tactics pursued by the UK government. The future relationship will finally have to combine number of solutions laid down in the existing association models explored below.

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

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

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

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

[63] See point 1 of this paper

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

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

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

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

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

4.1. The Norway model / EEA / EFTA

Norway's relationship with the EU has been one of the first discussed models for a future relationship with the EU as it offers complete access to the single market, including services and capital, with crucial importance to the UK economy that is 80 % oriented towards the service sector. It is also proposed by a number of commentators[65] as a possible transition option from full EU Membership to a specific arrangement tailored to UK needs and as a political solution for providing some form of control of intra-EU migration. According to this model, the UK would first negotiate an association agreement that retains most of the internal market provisions intact, and could still include some of the JHA policies that remain important, such as participation in Europol and Eurojust. Assuming that an exit agreement and new transitory agreement based on the EEA/Norway model could be concluded in the two-year timeframe, there would then be breathing space for negotiating a new comprehensive agreement incorporating all the 'red lines' the UK government wishes to maintain (notably on intra-EU mobility).

Such an option would theoretically imply that the UK would join the European Free Trade Association (EFTA), and then the European Economic Area (EEA), alongside Norway, Iceland and Lichtenstein.[66] The former includes all non-EU EEA members plus Switzerland, which has chosen not to be part of EEA, preferring to be linked with the EU and its internal market through a series of bilateral agreements. Policies not covered by the EEA, such as rules on agriculture and fisheries, would no longer be applicable to the UK. It would retain control also over customs, trade and foreign policy, and would be free to set out a VAT regime. It could opt in, probably via supplementary agreements, to Justice and Home Affairs policies of interest to the UK, such as police and judicial cooperation. Recently, arguments have been presented to show that the UK, after withdrawing from the EU, could simply remain a member of EEA, as the only explicit way to leave the EEA is by invoking Article 127 of the EEA treaty.[67] The UK government is currently facing another potential legal battle over this issue[68].

Under the standard EEA formula, the UK would retain a large portion of legislation relating to the internal market – about 11 500 EU acts with EEA relevance that have been incorporated in the EEA Agreement through the acts of the EEA Joint Committee. These include free movement of imports and exports, freedom to provide and receive services, and free movement of capital and payments. More importantly, it also includes all three aspects of free movement of persons (citizens, workers and freedom of establishment). In that respect, it would be no solution to the immigration concerns within the UK. On top of this, with regard to financial services, the integration of legislation regulating this field into the EEA Agreement has some inherent limitations. For instance, the EEA Agreement does not cover the work of the European Supervisory Authorities. The City of London accounts currently for a high proportion of EU financial services, up to ¾ of EU foreign exchange as well as 40 % of global trading in euro that takes place there.[69] With regard to external

[65] See for instance Wolfgang Munchau, *Eurointelligence*, 15 July 2016.
[66] Article 128 of the EEA Agreement provides that "Any European State becoming a member of the Community shall, and the Swiss Confederation or any European State becoming a member of EFTA may, apply to become a party to this Agreement. It shall address its application to the EEA Council [...] That agreement shall be submitted for ratification or approval by all Contracting Parties in accordance with their own procedures".
[67] Article 127 only indicates that any party can leave with at least 12 months' notice.
[68] 'Brexit: Legal battle over UK's single market membership', http://www.bbc.com/news/uk-politics-38126899.
[69] CBI, 'Our Global Future: The Business Vision for a Reformed EU', November 2013.

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

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

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

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

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

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

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

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

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

4.2. The Switzerland model

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

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

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

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

[73] 'Switzerland withdraws application to join the EU', http://www.politico.eu/article/switzerland-withdraws-application-to-join-the-eu/, retrieved 23-08-2016.

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

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

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

4.3. Customs Union (Turkey model)

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

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

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

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

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

4.4. CETA (Canada model)

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

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

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

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

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

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

4.5. Associate membership

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

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

4.6. Continental Partnership (CP)[77]

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

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

[75] Spinelli Group, 'A Fundamental law of the European Union', Bertelsmann Stiftung, 2013.
[76] Duff, 'Making the Case for Associate Membership of the European Union', LSE EUROPP, 6 March 2013, http://blogs.lse.ac.uk/europpblog/2013/03/06/associate-eu-membership/ retrieved 08-08-2016.
[77] Ferry et al.,' Europe after Brexit: A proposal for a continental partnership', August 2016, http://bruegel.org/2016/08/europe-after-brexit-a-proposal-for-a-continental-partnership/.

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

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

4.7. Deep and Comprehensive Trade Agreement (DCFTA)

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

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

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

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

[78] See for instance Giorgio Maganza, 'Comments on Europe after Brexit: A proposal for a continental partnership', European Parliament, Committee on Constitutional Affairs, hearing held on 29 September 2016.
79 Michael Emerson, Statement to the Constitutional Affairs Committee of the European Parliament, Tuesday 8 November 2016.

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

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

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

4.8. WTO

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

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

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

Body is about 1.5 year[80]. The executive dimension around which the WTO decision-making machinery turns is the General Council, which organises its work with the assistance of specialised organs and other subsidiary bodies.

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

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

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

[80] See 'Understanding the WTO: Settling disputes: a unique contribution', https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.
[81] Charles Grant, intervention before the AFCO committee on 5th December 2016

5. CONSEQUENCES OF THE WITHDRAWAL FOR THE EUROPEAN UNION

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

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

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

It should be pointed out that, so far, almost all available academic and legal literature, or political analysis, on the consequences of the UK's departure from the Union is written from the UK's perspective. These texts frequently present analyses of, for instance, how this parting is going to affect trade or the financial services industry, or how to incorporate in an appropriate way Union law currently in force in the UK into the UK's legal system, with discussions of which parts of the *acquis* should be amended, which rescinded and which maintained. This is logical, as the UK will likely face the greater disturbance to its economy and its legal framework because of the withdrawal[82].

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

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

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

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

5.1 Pending legislation

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

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

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

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

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

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

[83] Marcus Klamert, *The Principle of Loyalty in EU Law*, Oxford University Press, 2014.
[84] Adam Lazowski, 'Withdrawal from the European Union and alternatives to membership', *European Law Review* 2012

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

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

5.2. EU policies

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

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

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

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

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

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

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

Given the timeline, it has been suggested[88] that the simplest solution would be for the UK to continue to participate in the current MFF, which ends in 2020, and to meet its current commitments accordingly. This would spare the EU the need to rearrange the MFF, and the structure of the budget, and allow a smooth transition for both sides, in particular for British farmers and fishermen, but also for universities, research institutions or municipalities and regional governments.

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

[85] J. Tonge, 'The impact of Withdrawal from the European Union upon Northern Ireland', http://onlinelibrary.wiley.com/doi/10.1111/1467-923X.12288/full.
[86] http://www.seupb.eu/Home.aspx.
[87] CEPS Policy Brief No. 347, ,The impact of Brexit on the EU Budget: A non-catastrophic event,
[88] See Duff, Andrew, 'After Brexit'.

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

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

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

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

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

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

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

As regards European agencies, the two existing agencies in the UK[89] will have to relocate to other Member States. This implies relevant legislative modifications in the legal texts establishing their seats, substantial costs for the relocation, and staff issues that need to be resolved. The same could be the case for the new divisionary section of the Unified Patent Court planned to be located in London (unless the future relationship agreement provides otherwise, and the UK remains in the European Patent System, which is currently restricted to Member States).

5.3. EU Legal order

The withdrawal will have a limited, but not negligible, impact on the Union's legal order. The European legal order is very complex and has been evolving for decades. The constitutional architecture of the Union is often explained as being that of a confederation of independent states, which organises and manages important competences in a federal way. Its exclusive and shared competences cover a huge spectrum, from internal market harmonisation to justice and fisheries. The legal implications of the withdrawal will therefore be substantial, but, as shown above, they will mostly be of concern to the UK. From the day of the withdrawal, the Union's legal order will cease to be applicable in the UK. There will certainly be transitional arrangements, and the withdrawal agreement should address this issue. UK legislators will certainly have to foresee a new legal regime for the days following the departure[90].

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

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

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

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

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

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

Article 48 outlines two mechanisms: a "simplified" procedure and the ordinary procedure. The simplified provisions of Article 48(6) can only be used in order to revise "all or part of the provisions of Part Three of the Treaty on the Functioning of the EU", and with the condition of not increasing the competences of the Union. Therefore, in order to modify Article 52 TEU, the Union must follow the ordinary procedure. This requires the Council to convene a Convention of representatives of the national parliaments, Heads of State and Government, the Commission and Parliament. However, pursuant to Article 48 (3), such a Convention may be avoided if the European Council decides by simple majority "not to convene a Convention should this not be justified by the extent of the proposed amendment". This notwithstanding, a decision not to convene a Convention needs the consent of the EP, meaning that Parliament can insist – for whatever reason – on a Convention to be held in order to examine proposals for revisions of the EU Treaty[91].

In addition to the aforementioned Treaty changes, two other major legal acts of quasi-constitutional nature will also need revision[92]: the allocation of seats in the European parliament, and the rules on the financing of the EU. While revision of these legal acts do not call for treaty changes as such, special procedures are required that are akin to treaty revisions since they require the unanimity of the Member States, a decisive involvement on the part of Parliament and ratification by each Member State[93].

5.4. Strategic impact

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

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

[91] How Brexit Opens a Window of Opportunity for Treaty Reform in the EU. Federico Fabbrini, 2016 http://www.delorsinstitut.de/2015/wp-content/uploads/2016/09/spotlight_europe_01_2016.pdf
[92] Ibid
[93] On AFCO's request the Policy department is preparing a workshop on the composition of the EP for early 2017.

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

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

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

The UK's departure would also be a major shock to the European integration project since the reasons for its departure would not only be due to UK's particular circumstances but shared in other MS. Sovereignty issues and national control of immigration policy has been a major topic in the referendum. It is no coincidence that various populist movements throughout the EU have similar claims, and have called for the organisation of similar referenda in their countries in the hope of leaving the Eurozone or the EU[94]. Most commentators see in this gradual weakening of the European idea a sign of potential disintegration, rather than a formal break-up, of the EU[95]. Unfair as it might seem, at this moment the Brexit vote mirrors a minority-held yet widespread and often decisive public sentiment that questions the effectiveness and usefulness of the EU, and the accountability and transparency of its governing mechanisms.

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

5.5. What are the opportunities for the Union?

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

[94] Notably Marine Le Pen in France (http://www.lefigaro.fr/flash-actu/2016/09/03/97001-20160903FILWWW00049-ue-marine-le-pen-organisera-un-referendum-de-sortie-si-elle-est-elue-presidente-en-2017.php), but also Geert Wilders in The Netherlands and the Lega Nord party in Italy (https://www.theguardian.com/politics/2016/jun/27/frexit-nexit-or-oexit-who-will-be-next-to-leave-the-eu).
[95] See Munchau, https://www.ft.com/content/1d98723c-9a14-11e6-b8c6-568a43813464.

ago. Support for permanence has grown from 78 % to 80 % in Ireland and Spain, from 72 % to 75 % in Germany, from 65 % to 68 % in France and from 58 % to 60 % in Italy. In Denmark 61 % were in favour of permanence in 2015, and now the share is 75%. In Belgium from support has grown 67 % to 74 %, and in Sweden from 60 % to 71 %. The Union would thus seem to have emerged stronger, with a larger number of citizens than before supporting the idea of remaining in the EU[96].

Most political analysis and parliamentary debate[97], focus on the constructive possibilities that may follow from the UK's withdrawal, from treaty revisions[98] to full and exhaustive implementation of the Lisbon Treaty on Foreign Affairs or Economic and Monetary Policy[99]. The Committee on Constitutional Affairs has recently adopted two very important reports: *Report on improving the functioning of the European Union building on the potential of the Lisbon Treaty*[100] (Mercedes Bresso and Elmar Brok, rapporteurs), and *Report on possible evolutions of and adjustments to the current institutional set-up of the European Union*[101] (Guy Verhofstadt, rapporteur). Both were undertaken by the AFCO Committee well before the Brexit vote, but they have become even more necessary now. They explore possible venues for the EU further integration and efficiency in implementing its competences, which may either be achieved within the existing Treaties or only through a future Treaty change.

The vote in the UK and the possible disengagement of the country from the historical European enterprise has only multiplied the initiatives and proposals to contain the Brexit spill over and foster closer integration, in line with the declaration "Greater European Integration: The way Forward" made jointly by the Presidents of the Italian, French, German and Luxemburgish parliamentary chambers, and currently endorsed by several national parliamentary chambers in the EU[102], which states that more, not less, Europe is needed in order to respond the challenges Europe faces, both internally and externally.

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

Historically, in the long term, the Union has always been reinforced by crises it has faced. A more cohesive, harmonious Union may seize the opportunity to reaffirm its political integration goals, or at least to assess its need to reach for the objectives set out in the Treaties, and this not for any unjustified stubbornness, but because there is still wide consensus on the premise that certain policies are better and more effectively dealt with at supranational EU level. There are reasons to believe that the Economic and Monetary Union needs to be completed (for instance, through the establishment of a fiscal union and a proper banking union[104]), consolidated and made more transparent, and to have greater democratic

[96] http://www.wingia.com/web/files/richeditor/filemanager/Europe_Release_ORB_-_WINGIA.pdf
[97] Debate in the Committee on Constitutional Affairs of the European Parliament, of 7 November 2016.
[98] Duff, Andrew, 'After Brexit'.
[99] See Policy Department for Citizens' Rights and Constitutional Affairs 2016 Studies on these subjects, PE 556.952 and PE 571.373.
[100] 2014/2249(INI)
[101] 2014/2248(INI)
[102] http://www.camera.it/application/xmanager/projects/leg17/attachments/shadow_mostra/altro_file_pdfs/000/024/057/Rome_Conference_on_Europe_Declaration_EN.pdf
[103] Andrew Duff, "After Brexit".
[104] See for instance https://www.ft.com/content/643fb2f6-39e6-11e6-9a05-82a9b15a8ee7

accountability. The survival of the European project may depend on the success of this endeavour. Other important areas also seem to call for a full reassessment following the departure of a major player; this is the case of security and defence. Of chief interest here is the advancement of European integration and the strengthening of European defence within NATO. The recently proposed European Defence Action Plan[105] is in line with this thinking.

Even if it is true that, as Mario Monti recently suggested[106], it is the situation of the national political systems that is mainly responsible for the problems facing the EU, and the current evolution of national politics is incompatible with European integration, most Member States, and Germany in particular [107], do not seem ready to give up the idea of "ever closer union". German Chancellor Angela Merkel's first move after the UK referendum was to convene the six original members of the EU, offering a reminder of the early times idealism.

As expressed in a recent analysis of the Dahrendorf Forum[108], Brexit could change the EU in different ways: it could weaken, it could muddle through, or it could end up more united. For the third scenario to succeed, a clear leadership role for the EU institutions and for the more influential Member States, is indispensable. In response to the challenges, dangers and risks that the Member States face – terrorist attacks, aggressive behaviour in the EU neighbourhood, economic and monetary instability, unemployment and social insecurity – the EU should lead the way. First and foremost, the EU needs to finalise Economic and Monetary Union, and it should advance in the integration of policies demanding a cooperative approach, such us internal and international security and defence, transnational taxation and social policy. In addition, and most importantly, it should do so in a way that ensures that the sovereignty to be shared is duly placed under the oversight by the parliaments of the Union: the European Parliament and the national parliaments, thus advancing towards a democratic complementarity of the Parliaments of the Union.

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

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

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

[105] http://ec.europa.eu/DocsRoom/documents/20372
[106] AFCO meeting of 29 November 2016.
[107] *Financial Times*, 10 November 2016.
[108] Tim Oliver, 'What impact would a Brexit have on the EU?' *Dahrendorf Analysis*.
[109] Daniel Innerarity, La política en tiempos de indignación. Galaxia Gutenberg, 2015

March 2017. The *Bratislava Declaration*, adopted on the occasion of the meeting of the Council of Ministers in that city on 16 September 2016[110], reaffirms the Union as the best instrument "for addressing the new challenges we are facing". The Council has established a "roadmap", setting certain priorities on migration and external borders, internal security, defence, and economic and social issues. However, it has not presented any concrete, forward-looking proposals on policy governance or closer integration. The Member States have preferred the approach of focusing on concrete projects that aim to demonstrate the added value in high priority areas such as security or migration. This is a possible way forward, but many, like the aforementioned AFCO Committee reports, consider such as strategy to be partial and insufficient, and that deeper reflexion is needed.

Flexibility has always been high on the list of the recipes advanced in moments of crisis. The UK's departure could well prompt a Europe of different speeds, or the Europe of the *cercles concentriques* repeatedly suggested by Jacques Delors[111]. Flexibility would be the only way to cope with the increasing heterogeneity of the Member States, since most future projects for deeper integration will require flexibility[112]. It certainly always seems to be the easiest way forward. Flexibility comes in different forms, from differentiated memberships to more flexible rules. However, as is frequently pointed out, in a context of growing or deepening divisions, the cost of differentiated integration rise. The wrong kind of flexibility risks turning European integration into a set of transnational relationships and could reduce solidarity among the partners. Flexibility may seem very attractive, and somehow inevitable, as when the enhanced cooperation was introduced in the Treaties, but it also comes with a risk of fracture between different levels of integration[113].

Consolidating a core of integration projects is surely the most accepted way forward: for instance the single market and its four freedoms are far from consolidated: an even more tangible added value for the citizens is perfectly possible here but, it still calls for a lot of work and political determination[114]. In particular and most importantly, the social dimension of the internal market should be an absolute priority of the Union, along with the EMU. Most commentators and analyst consider that if the EMU is going to survive in the long term, and withstand asymmetric shocks, it is likely to need a European treasury, some form of fiscal capability, a full-fledged banking union and a degree of debt mutualisation[115].[116] Political conditions for all these improvements of the EMU may not be present at this moment, but the need for them are gradually becoming more noticeable.

As mentioned above, the ordinary procedure for amending Article 52 gives the EP the opportunity to reject the simplified procedure to reform the TEU and to call for a Convention at which the long-term shortcomings of the Treaties are considered, in particular as regards the governance of the Union, reducing *inter-governmentalism* and making the decision-making processes more transparent and democratic[117].

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

[110] http://www.consilium.europa.eu/en/policies/future-eu/bratislava-declaration-and-roadmap/
[111] Jean-François Drevet, 'Quelles limites pour l'UE: Quelles relations avec un voisinage à géométrie variable?', Notre Europe Institut, September 2013.
[112] http://carnegieeurope.eu/2016/09/08/how-to-build-more-flexible-eu-after-brexit-pub-64507
[113] ibid
[114] http://knowledge.wharton.upenn.edu/article/how-brexit-could-boost-the-european-union/
[115] Jean-Francois Drevet op cit
[116] https://www.ceps.eu/publications/european-fiscal-union-economic-rationale-and-design-challenges
[117] See the report Verhofstadt quoted above

The first is in regard to the composition of Parliament[118], where this institution must make proposals and could be an important opportunity to launch the debate on transnational electoral lists or other measures aiming at enhancing EU democratic legitimacy.

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

The difficulty of negotiating these two major financial rules is a consequence of the manner in which the Union currently is funded[119]. The EU's own resources come mostly from Member State budgets, so the Member States, and their parliaments and citizens, consider the contributions made to the EU budget as "their" money and aggressively measure the difference between their contributions to, and their receipts from, the EU budget. This is of course an easy subject to use or abuse by populist and nationalist voices in the Union, and no government wishes to be seen to be transferring money to the EU budget for the benefit of another Member State[120]. Following the UK's departure – and especially if this country decides not to participate in the internal market, and thus no longer to contribute to the EU budget – the debate on the own resources is going to be inevitable, with voices calling either for a reduction of expenditure, an increase in contributions or a new system altogether. Parliament has for a long time been calling for the development of an EU effective fiscal capacity based on real EU taxes. A report from the high-level group on own resources, known as the "Monti group", argues in the same vein[121]. The report rightly notes that that the current system pushes the Member States to consider their contributions in terms of "net costs" and "net benefits". This has always been considered "misleading" by impartial observers, because it ignores the fact that the EU-wide policies funded by these contributions have benefits for each of the 28 Member States.

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

That said, in advancing towards further European integration, towards an ever closer Union, European leaders should nevertheless be aware that the referendum in UK makes even more evident the fact that European integration has moved away from the "permissive consensus" of the early period of integration towards a period in which the EU is an increasingly contested and politicised issue on the domestic political arena. The future of the EU hinges more than ever on the citizen's support for the European integration project. The challenge for European leaders, at both domestic and European level, is to find a way of addressing the concerns of the many citizens who have not felt the economic benefits of free trade and globalisation, and who fear that their distinct national identity and culture is under threat from immigration and European integration[122]. The involvement of national and regional politicians, and the

[118] The Policy Department has published three briefings on the subject matter 2017 on request of the AFCO committee and following a planned workshop on 30th January.
[119] Federico Fabbrini, "Taxing and spending in the Eurozone" (2014) 39 European law Review 155
[120] Federico Fabbrini (2016)
[121] http://ec.europa.eu/budget/mff/hlgor/index_en.cfm
[122] Sara B Hobolt, The Brexit vote: a divided nation, a divided continent. Journal of European public Policy, 2016. London School of Economics and Political Science.

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

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

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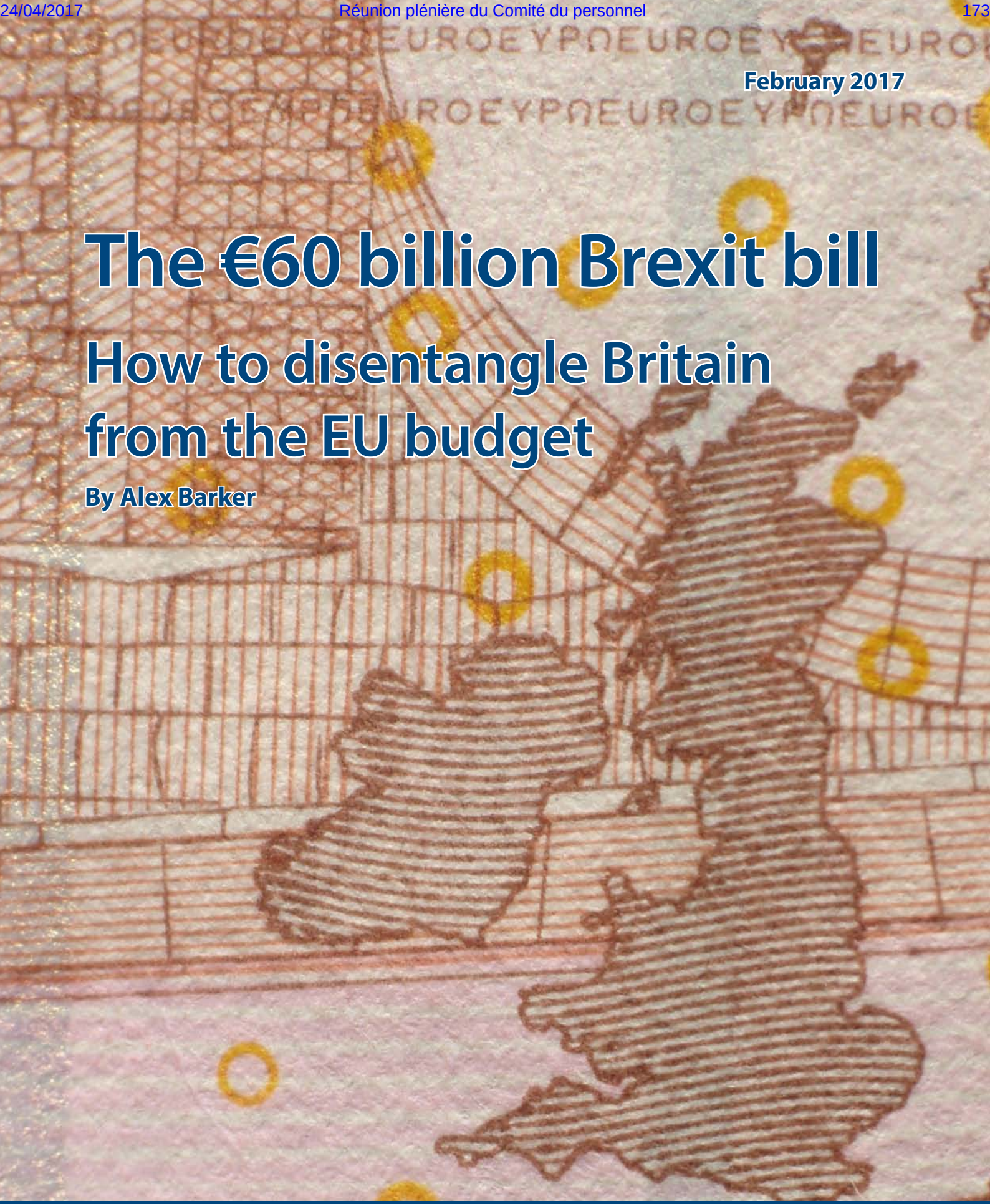

February 2017

The €60 billion Brexit bill

How to disentangle Britain from the EU budget

By Alex Barker

CENTRE FOR EUROPEAN REFORM

The €60 billion Brexit bill: How to disentangle Britain from the EU budget

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★ Britain's EU exit bill is possibly the single biggest obstacle to a smooth Brexit. The European Commission calculates that the UK has €60 billion of charges to settle. Britain is confident it will face down what it considers to be spurious demands. Both sides are entering the Brexit money negotiations with unrealistic expectations. Ultimately, this political collision could bring the Brexit talks to a sudden and premature end.

★ The issues are surmountable. In pure economic terms, even that €60 billion estimate is relatively insignificant, especially when paid over many years. But disputes over EU money are almost always highly-charged and occasionally nasty. A mismanaged negotiation of the bill could easily poison Brexit divorce talks and future UK-EU trade relations.

★ The make-up of the bill is little understood, even by EU-27 countries. The €60 billion covers Britain's potential obligations in three main areas: legally binding budget commitments that will be paid after Britain leaves; pension promises to EU officials; and contingent liabilities – such as bailout loans to Ireland – that would only require payments in certain circumstances.

★ The most legally contentious relate to support for EU investment projects that will be paid for after Britain leaves. These liabilities come in two forms: project commitments that have yet to be paid; and structural funds promised to EU member-states, which will largely be turned into 'budget commitments' and paid for between 2019 and 2023.

★ Both sides are confident in their legal case, and it is hard to predict who would prevail in court. There are few clear legal precedents regarding the liability of departing members of international organisations. But in the Brexit talks, the issues will largely be settled by politics, not law. Some EU negotiators want Britain to promise to honour its financial obligations as a precondition for trade and transition talks.

★ The EU-27 are confident Britain will eventually pay, because the costs of a disorderly Brexit are much higher. Theresa May is open to limited contributions to participate in future EU programmes. But she has ruled out paying "huge sums" to the EU after Brexit. An angry reaction in Westminster to a perceived ransom demand from Brussels would further constrain her options.

★ There are differences in view between the EU institutions and the EU-27 member-states. Some countries were surprised by the Commission's aim-high approach. But over time, they could harden their positions and rally around the Commission. After all, Britain's exit leaves a significant gap in the EU budget. Net-contributors do not want to pay more, and net-recipients do not want to lose out.

★ Any compromise should be built around three broad principles: on an annual basis, any UK legacy payments must be less than its EU membership contribution; the settlement should be presented as 'Brexit implementation costs' rather than tied to specific liabilities, like EU pensions; and Brexit should not leave the EU out of pocket for the last two years of its current long-term budget (2019 and 2020). Britain should separately negotiate terms and contribution rates to stay in EU research programmes and the European Investment Bank.

"I want my money back ... I must be absolutely clear about this. Britain cannot accept the present situation on the budget. It is demonstrably unjust. It is politically indefensible: I cannot play Sister Bountiful to the Community."

Margaret Thatcher at the Dublin Summit, 1979

"On June 23rd we will face a historic choice ... to take back control of huge sums of money – £350 million a week – and spend it on our priorities such as the NHS."

Boris Johnson, ITV referendum debate, June 2016

"The principle is clear: the days of Britain making vast contributions to the European Union every year will end."

Theresa May, Lancaster House speech, January 2017

A bill of up to €60 billion is standing in the way of Britain's smooth exit from the EU. It is a withdrawal charge bigger than the UK's annual defence budget, and a far cry from the £350 million-a-week bounty promised by Brexit campaigners during the referendum campaign. Few understand how it is calculated by the European Commission, or what impact the negotiations over it will have on British domestic politics. But ultimately it will confront Westminster with a problem over which the Brexit talks could collapse.

Made up of promises accumulated since 1973, the bill includes financial liabilities that stretch decades into the future, for longer, indeed, than the UK's 40-odd years of EU membership. Pension pledges, infrastructure spending plans, the decommissioning of nuclear sites, even assets like satellites and the Berlaymont building – all these must be divvied up in a settlement if Brexit is to be anything but a hard, unmanaged, unfriendly exit.

There is something about negotiating budgets that raises the hackles of EU leaders. Small as it is in national terms – under 2 per cent of public spending by member-states – the EU budget has always been an outsized source of tension in Brussels and Westminster. One of the European project's earliest and biggest crises – the 1960s French 'empty chair' – was sparked by a dispute over Community spending. And since then it has regularly brought out the Scrooge in Europe's statesmen, with national leaders arguing late into the night over as little as a few hundred million euros.

Part of the reason is that budget squabbles are about more than money; they are a quantifiable, bankable measure of diplomatic prowess. And when Margaret Thatcher refused to "play Sister Bountiful" to the Community and won a rebate for her doggedness, she also secured a special place for the EU budget in British political lore.

Remarkably, the possibility of an EU exit charge never featured in the UK's referendum campaign. And since that vote, a chasm has opened between UK and EU-27 expectations. The Commission surprised even EU-27 member-states with its unofficial €60 billion estimate. But it is determined to collect those dues, or at least make member-states realise what it would cost them to let Britain off the hook.

Some of the legal arguments supporting the €60 billion bill are at best untested and at worst tenuous. But the Commission knows it has a largely plausible case and it is in the driving seat of the negotiations; whatever the size of the exit bill, for Britain it will dwarf the cost of walking away and wrecking relations with its main trading partner. The Commission sees the laws of political gravity on its side. And in pure financial terms, for once the EU-27 net contributors to the budget and the net recipients are united. It is in everybody's interest to make Britain pay.

That sets the stage for a dangerous stand-off. These budget issues are still little understood in Westminster. When the *Financial Times* first reported that the size of the exit bill was €20-40 billion, ardent Brexiters barely made a fuss. When the paper reported that the Commission was using more aggressive assumptions and floating figures of €40-60 billion, again there was hardly a murmur from London. Some dismissed it as irrelevant because Britain would not pay a penny; others saw the advantages of a nasty falling out over money in advancing the case for a sharp break from the Union.

Britain will refuse the basis of the €60 billion bill. May's Brexit negotiators feel the law and common sense is on their side. As a negotiating tactic, however, they also know money is leverage. It is a telling fact that within the Department for Exiting the EU, 'market access' and the 'budget' are grouped within the same directorate. And in her Lancaster House speech, May left open the possibility of making "appropriate" payments to the EU in future for participation in "specific programmes".

But in Westminster this is seen as a minimal fee to secure future benefits, such as co-operating on research funding, not legacy costs. That assumption was gold-plated by May promising to end "vast contributions", and to ensure that after leaving "we will not be required to contribute huge sums to the EU budget". Those words leave some room for manoeuvre on the €60 billion bill. But not much.

How does the EU justify the €60 billion?

EU budgeting is complex. But the Commission sees the issues at stake as quite simple. Britain made legally-binding financial commitments to the EU that it must honour, whether it is inside or outside the Union. To reject these financial obligations would imperil Britain's standing as a law-abiding member of the international community.

The EU budget is the biggest multinational attempt to pool money in history. Running at around €142 billion this year, the core EU budget is more than five times the size of the combined spending of UN agencies. But in national terms, it remains relatively small beer, just 1 per cent of the EU's GDP.

Britain's exit charge is calculated by valuing the EU's assets and liabilities at the point of the UK's exit, and dividing the net liability by the UK's share of EU budget contributions (around 12-15 per cent). The calculations, and indeed the principles behind them, are naturally tremendously contentious.

The key reference point is the EU's consolidated annual accounts. These 143 pages cover the main areas but they are not entirely comprehensive. There are some off-balance sheet items – such as obligations to the European Investment Bank, or development spending – which make the calculation more complex. The Commission will aim for a single, consolidated financial settlement for Brexit under Article 50.

"The Commission sees the issues at stake as quite simple. Britain made legally-binding financial commitments to the EU."

As an opening gambit Michel Barnier, the EU's chief Brexit negotiator, will start high. He has told some EU officials he will demand an exit settlement of €40-60 billion, others that it will be €55-60 billion. The detailed calculations have not been shared, even with the EU-27. But the principles are becoming clearer. This paper independently calculates the exit bill on the basis of those principles, using publicly available data.

The main parts of the bill are unpaid budget appropriations (basically the EU's credit card)[1]; unused national allocations of investment spending, which Britain approved for the 2014-20 period; and the cost of the pension promises made to EU officials. The obligations are partly offset by flows of money back to Britain from its share of assets, budget receipts and the payment of the UK rebate.

The liabilities: Unpaid commitments

Much of EU spending relates to projects that are approved and paid for over a period of several years. This multi-annual structure is particularly important for 'cohesion' spending, which aims to raise living standards in parts of the Union that are economically lagging.

For the past decade, much of that funding has been devoted to reducing the economic gap between regions, particularly in the eight ex-communist countries that joined the Union in 2004. Both directly and indirectly Britain played a role in supporting this expenditure; it pushed for more regional spending when it first joined, and was one of the biggest champions of enlargement.

These alleged obligations roughly fall into two categories: unpaid expenditure comitments made in annual budget rounds prior to 2019 (the *reste à liquider*); and additional legal promises to provide investment funding that will appear as a specific project commitment in annual budgets after 2019 (outstanding spending allocations).

1: These are budget commitments to projects or spending made in an annual EU budget that have yet to be paid for.

Reste à liquider (RAL)

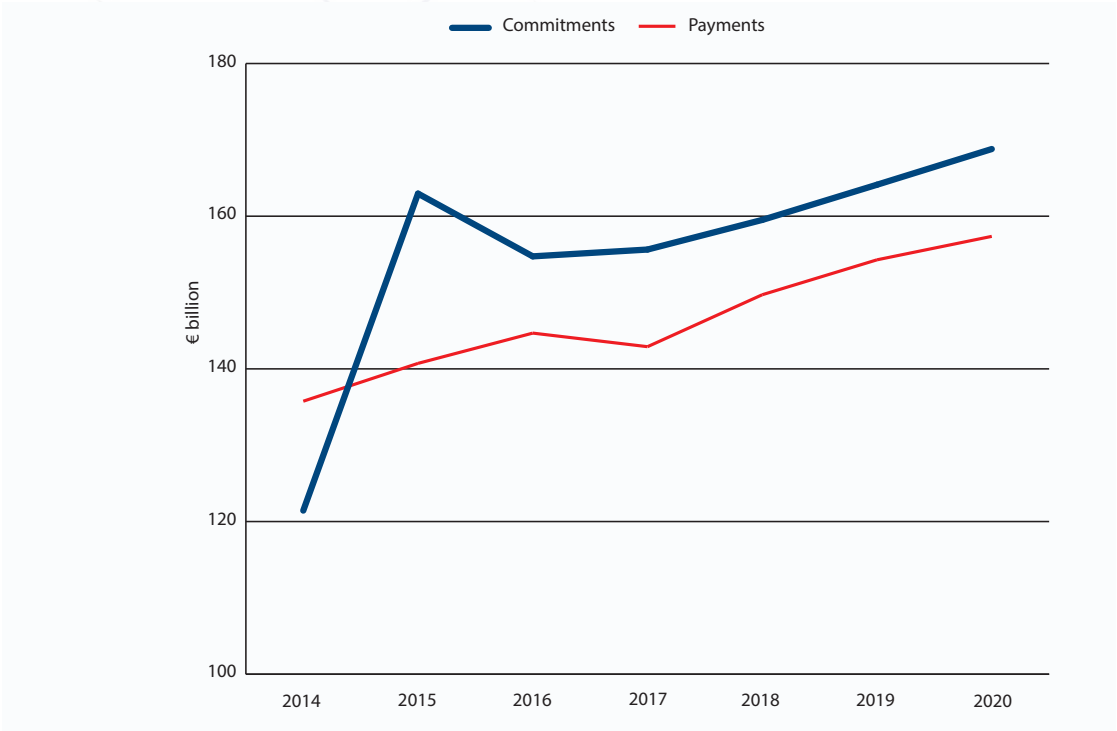
Roughly translated as "yet to be paid", the *reste à liquider* is essentially a €241 billion bill that has ballooned since 2000 as the EU has piled on projects to its schedule of works and investment. While that €241 billion must be paid by all member-states of the EU, it represents the biggest portion of the Brexit charge.

It effectively arises from political divisions over the EU budget, which mean the EU systematically commits to more spending projects than its member-states are willing to pay for in a given year. This is managed through a forked accounting method. Inspired by a bygone French bookkeeping technique, the EU adopted a system of budgeting that splits its accounts into 'commitments' (basically appropriations to spend money for a specific purpose or project) and payments (to actually execute those commitments).

The EU's long-term budget sets ceilings for both annual commitments and payments. But crucially, the annual commitment ceiling is almost always bigger than payments. That leaves a (usually increasing) overhang of unpaid commitments. So in a typical budget year, the EU can be paying for the implementation of commitments first registered in the EU's annual budget anywhere from one and 20 years previously. Most commitments from the 2014-20 budget are supposed to be paid for by 2023.

Chart 1: The EU budget commitments and payments, 2014-20

Source: European Commission.



This runs against the grain of the British public finances, which operate on the basis of accruals. If a high-speed rail line is approved in the UK, it will only appear in the annual budget once a payment is actually made.[2]

Britain's fixation with payments has driven its diplomacy in Brussels. Along with other net-contributor states, it saw the giant RAL as proof of financial mismanagement by the Commission.[3] In practice the Treasury's strategy for parsimony was to largely ignore the overhang, and instead focus on maintaining discipline over annual payments, much to the irritation of the Commission and European Parliament.

That largely worked for London. But Brexit may have dramatically changed the calculus. The RAL will stand at up to €241 billion by the end of 2018, a few months before Britain's expected exit date from the EU. More than half is made up of cohesion spending, and a fifth each by research and agricultural spending. As a result of the latest long-term budget being delayed, the EU is off to a later start on big project spending than usual; most of the cohesion spending is backloaded, to be executed in the years after the UK has left.

Britain's share of the RAL, based on its typical contribution rate, would be around €29-36 billion.

2: Not all EU budget promises become spending outlays. Around 2 to 3 per cent of regional policy commitments are 'decommitted', usually because of legal issues around contracts (such as fraud). But these are a relatively small proportion of overall commitments. The vast bulk of commitments are honoured eventually.

3: During negotiations on the long-term budget, net-contributor member-states such as Britain, Germany, the Netherlands, Sweden and Denmark would doggedly reject the principle that the RAL should be paid off and would insist it was managed through annual payment ceilings.

Outstanding spending allocations

When the *Financial Times* first attempted to estimate Britain's exit bill in October 2015, it put the gross figure at €40 billion. That fitted the initial calculations of several EU-27 member-states. But it fell short of the Commission's estimate for one main reason: it assumed Britain would not be liable for any budget commitments made after 2019. There was, in other words, a cut-off date for commitments.

Barnier takes a more expansive view of Britain's liabilities. The Commission's argument is that the UK jointly approved around €143 billion of investment spending that is legally binding on the EU but will only be paid once Britain has left. In EU law, these are legal commitments that become budget commitments once money is reserved to pay for them in the EU's annual budget round. The pledges are in addition to the commitments already in the RAL, and the Commission wants Britain to honour its share. It is by far the most contentious part of the exit bill.

Some have wrongly assumed Mr Barnier is demanding Britain pay the final two years of the EU's long-term budget, the Multiannual Financial Framework, which runs from 2014-20. Legally there is an important distinction. The crucial issue for him is not the MFF and its budget ceilings, but the laws underpinning it from which the legal commitments flow. These 'allocations' are basically investment funding promises – legal obligations on the EU – that are not included in the RAL at present, but will be in future.

An obscure law – Regulation No. 1303/2013 – is critical. Dubbed the 'common provisions' regulation, few in the UK would ever have heard of it. But it may leave Britain on the hook for its share of the €143 billion of cohesion and rural development spending executed after Brexit.

This 'common provisions' regulation lays down the rules and allocated resources for the European Strategic Investment Funds (ESI Funds), which are sometimes known as structural funds.[4] Most significantly for Brexit talks, Article 76 empowers the Commission to agree programmes and promise resources to individual member-states for these projects. Spending promises in these 'programmes' are a binding EU legal commitment, which appear as a liability on its accounts.[5]

"The cost of retirement benefits for EU officials may well be the most politically charged issue."

This form of spending has special political resonance because it amounts to a direct funding pledge to a member-state. Under cohesion spending, Poland stands to receive €82.2 billion in 2014-20, and €23.1 billion will be paid respectively to Hungary and the Czech Republic (see Chart 2).[6] It is the main fruit of the EU budget for many net-recipient countries. And these national allocations – or 'envelopes' in the Brussels jargon – are the basis on which member-states proceed with finding, scoping and initiating investment projects.

The trouble is that only 25-30 per cent of the biggest ESI cohesion funds will have actually been spent by the time Britain leaves the Union in 2019 (see Chart 3).[7] Britain's share of the rest is up for negotiation. And if it is not paid by Britain, the Commission sees it as a liability of the Union that must be paid by other EU member-states.

4: The funds co-ordinated include: the European Regional Development Fund (ERDF), the European Social Fund (ESF), the Cohesion Fund, the European Agricultural Fund for Rural Development (EAFRD), and the European Maritime and Fisheries Fund (EMFF). In total the ESI Funds have a budget of €454 billion for the years 2014-20.

5: Article 76 of Regulation 1303/2013 states: "The decision of the Commission adopting a programme shall constitute a financing decision within the meaning of Article 84 of the Financial Regulation and once notified to the Member State concerned, a legal commitment within the meaning of that Regulation". Article 85 of the Financial Regulation states: "a legal commitment is the act whereby the authorising officer enters into or establishes an obligation which results in a charge" [for the EU].

6: The figures reflect the narrow "heading 1b" in the EU budget. See Annex 6, Analysis of the budgetary implementation of the European Structural and Investment Funds in 2015, European Commission, 2016.

7: 'Mid-Term Review Staff paper', European Commission, September 2016.

Chart 2: Allocations of structural investment funds, 2019-20

Source: European Commission. Note: Excludes agricultural fund (EAGF) market-related expenditure and direct payments.

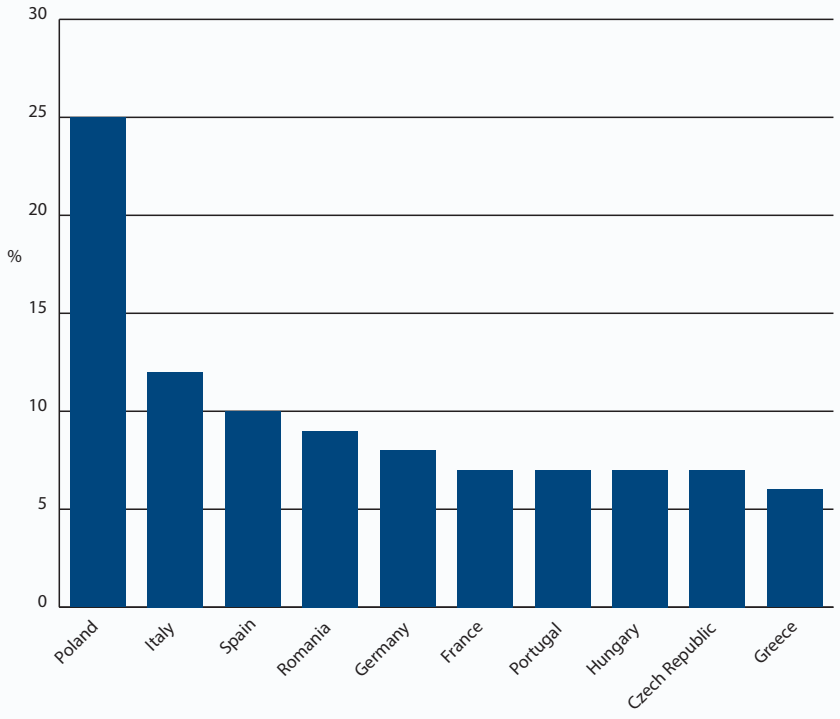
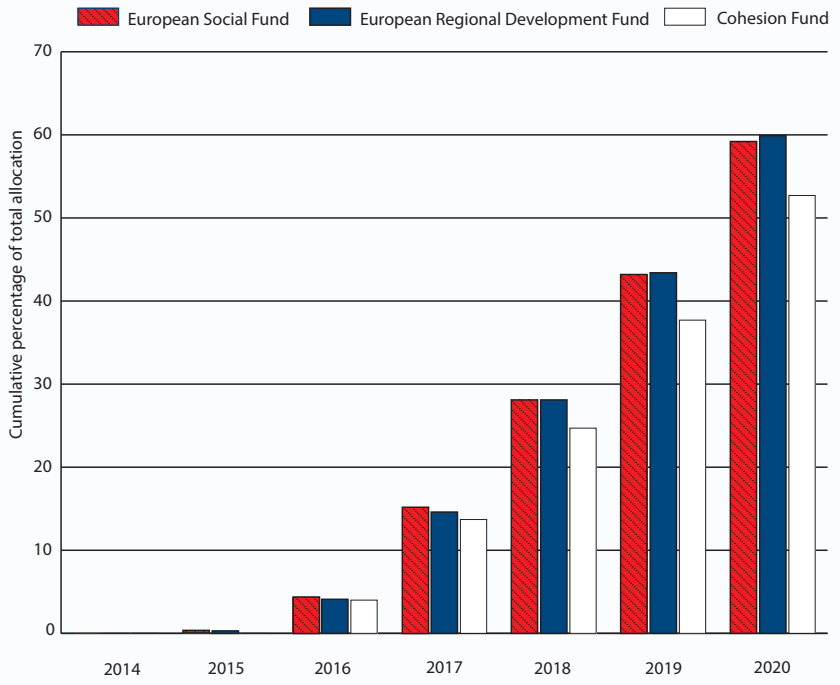


Chart 3: Forecast of cohesion fund payments

Source: European Commission.



The liabilities: Pension promises to EU officials

The cost of retirement benefits for EU officials – a liability of €63.8 billion – is not the biggest part of the Brexit bill. But it may well be the most politically charged issue. Costs will run decades into the future, for as long, indeed, as a eurocrat would hope to live.

The Pension Scheme of European Officials (PESO) is extremely generous by comparison to the private sector and most EU public sector schemes. In 2014, the average retirement benefit was €67,149 a year.[8] It is also wholly unfunded. Like most British public sector pensions, it operates on a 'pay as you go' basis, with costs covered by the annual EU budget as they arise. There is no pension fund.

The legal basis for this is Article 83 of the Staff Regulations:

> Benefits paid under this pension scheme shall be charged to the budget of the Communities. Member-states shall jointly guarantee payment of such benefits in accordance with the scale laid down for financing such expenditure.[9]

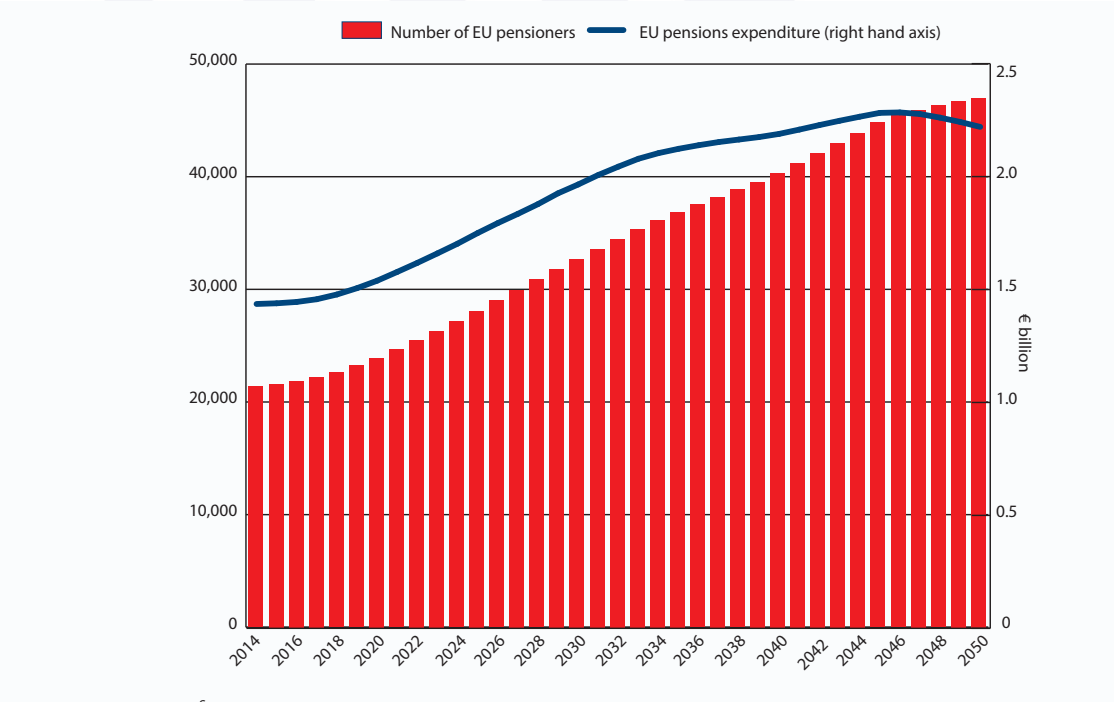
Officials are supposed to cover a third of the cost of their future benefits through a contribution amounting to around 9 per cent of salary, around €426 million in 2016. There are more active EU staffers than retirees at the moment, and their annual contributions currently exceed pension expenses. But the payments are not set aside for the future, when pension costs will rise (see Chart 4).[10] Instead they are ploughed into the general EU budget and spent.

It is unclear why a pension fund was not established when the PESO scheme was set up in 1962. There was initially a fund for European Coal and Steel Community staff, but this was dismantled. One senior EU official described PESO as "a giant Ponzi scheme". That is unfair of course, but only to the extent that the guarantees offered by member-states are honoured in the future.

In its Brexit settlement, one option would be for the UK to cover the costs of the Brits within the EU institutions. Around 3.8 per cent of serving EU officials hold British passports, and Brits make up almost 8 per cent of the roughly 22,000 drawing benefits from the PESO scheme. Paying their benefits would cost €80 million this year.

Chart 4: EU pensions expenditure and recipients to 2050

Source: European Commission.



8: Calculated from 'Eurostat study on the long-term budgetary implications of pension costs', European Commission, July 2016. Various reforms have reduced the benefits to future retirees. The retirement benefits are exempt from tax in EU member-states, covered instead by a relatively low special EU tax.

9: British officials would read this as implying a country must be a member-state, and subject to the EU treaty, for its guarantees to hold.

10: Assuming EU staff levels remain the same, pension costs will keep on rising until the 2040s when the scheme reaches maturity and the number of deceased retirees in a year is matched by the number of new beneficiaries. At its peak in 2046, pension expenditure is expected to hit €2.3 billion a year. The number of beneficiaries will rise from 21,400 in 2014 to 49,100 in 2064.

But the Commission sees London as liable not just for British nationals working for the EU, but for its share of promises made to all EU officials – that is, its share of the full €63.8 billion shown in the EU consolidated accounts. To the Commission, the nationality of officials is beside the point: they all worked for the Union when Britain was a member. As a lump sum that amounts to a liability of some €7-10 billion – a similar amount to the cost of building Britain's two new aircraft carriers. Alternatively Britain could agree to cover its share of annual expenditure, around €120 million this year, rising to €218 million by 2045.

The liabilities: Other legal obligations

The Commission will seek to secure Britain's share of funding for those commitments that are seen as legally binding, either because they are in multi-annual allocations, or arise from contracts that have already been signed. Examples include:

★ Connecting Europe Facility (CEF): EU liability €10.1 billion. The CEF funds cross-border European infrastructure projects for energy, transport and telecommunications.

★ Copernicus and Galileo programmes: EU liability €3.1 billion. The Copernicus European system involves developing and building a network of observational satellites and sensors for monitoring the earth from space. Galileo is Europe's Global Navigation Satellite System, which is also under development.

★ Miscellaneous: EU liability €3.4 billion. The EU has various unspecified contractual commitments, including around €2 billion relating to nuclear fusion research, and €388 million for building contracts for the European Parliament. The EU also owes €373 million under fishing agreements.

★ European Fund for Strategic Investments (EFSI): EU liability €16 billion. Known to some as the 'Juncker Plan', the EFSI aims to stimulate private investment in infrastructure projects by using €16 billion of guarantees from the EU budget to the European Investment Bank (EIB).

★ Contingent liabilities and off-balance sheet items. Contingent liabilities are EU payment obligations triggered by specific circumstances. Calculating an exit 'share' is much harder because it requires quantifying, say, the risk of Ukraine or Portugal defaulting on their EU loans. The main examples include:

Guarantees and provisions: €23.1 billion.
These are mostly budget guarantees on loans granted by the EIB to non-EU countries, including countries in membership talks. In addition there are guarantees related to research projects under Horizon 2020 and other smaller initiatives. There are around €1.7 billion of other provisions, which mainly relate to the clean-up costs of some nuclear sites.

Loans: €56.1 billion.
The EU has extended loans through three main facilities: Macro-financial assistance (MFA), Balance of Payments (BOP) assistance and the European Financial Stabilisation Mechanism (EFSM). At the point the 2015 EU accounts were drawn up, these included outstanding loans to Hungary (€1.5 billion), Ireland (€22.5 billion), Portugal (€24.3 billion) and Ukraine (€1.2 billion).

The main question with all the contingent liabilities is how to account for the downside risks. Some loans are obviously more risky than others. Ireland is hardly on the verge of bankruptcy. But guarantees on some EIB loans may well be called, and a Ukrainian default is far from inconceivable.

There are three main ways to divvy up any losses. One is to require a contribution when and if necessary. Another way would be for the UK to pay its whole share of the contingent liabilities upfront, and for the EU to eventually reimburse it with any unused money. That is perhaps the most implausible, but may nonetheless be the Commission's starting point in talks.

A third option is to calculate the risk on each loan or guarantee. That would again require upfront cash, and could easily open the door to two years of squabbling over these calculations alone.

The crucial point from the EU perspective is that a sound relationship would be required with the UK, in order for it to have confidence in a payment plan that defers contributions.

Off balance-sheet items.
The most significant commitments excluded from the EU's consolidated accounts relate to the EIB. And indeed due to the sheer complexity of the issues at stake – and parallel negotiations about continued UK participation – the EIB is excluded from this paper's exit bill calculations.[11]

The second relates to development spending and trust funds. Britain made legally binding commitments to the European Development Fund, which is outside the EU

11: Britain has a 16 per cent share of EIB capital; it accounts for €3.5 billion of the paid-in capital (on balance sheet) and €35.7 billion of the callable capital (off balance sheet). Financing for UK projects represented 8.2 per cent of the EIB loan portfolio at end 2015, making the UK the fifth largest beneficiary.

budget but managed by the Commission. Member-states are expected to contribute approximately €9 billion in 2019 and 2020. The UK contributes around 15 per cent of the fund, which amounts to €1.4 billion of unpaid commitments post 2019. Separately Britain has also made pledges totalling some €327 million to various EU 'trust funds', offering financial assistance to refugees in Turkey, Africa and Syria.

The offset: Assets, rebates, inflows and the UK share

Britain's exit obligations are expected to be offset by its share of EU assets. In the EU's accounts, the EU's total assets amount to €8.6 billion of property, plant and equipment, and €13.9 billion of assets available for sale.

These cover an eclectic assortment of items, from €2.1 billion of Galileo project satellites to the Berlaymont Commission headquarters, with a book value of €344 million, and an EU outpost in Dar es Salaam. The EU also owns the former headquarters of the British Conservatives in Smith Square, Westminster.

There may well be a disagreement over the value of these assets; Britain could demand a revaluation to capture their present market value, which is likely to be higher than the book value, which was the price originally paid. The Commission will insist on sticking to the book value in accounts.

Some money would also flow back to the UK from the EU budget if it were still a member. The biggest item is the last payment of Margaret Thatcher's rebate. This is disbursed in the following budget year, meaning Britain should receive around €5-6 billion in 2019, after it has left (if relations are amicable).

On top of that, if Britain accepts it is responsible for a share of past commitments, it will doubtless demand its share of RAL and cohesion spending as well. It is hard to calculate Britain's expected share of receipts from public data. In private discussions between EU institutions and officials from member-states, a figure of €9 billion is currently being netted off Britain's gross bill. For simplicity I have used this estimate in my calculations.

Taking account of these receipts – assets, spending plans in the UK, and the rebate – provides a net figure for the UK bill.[12]

The final question is how to calculate Britain's share. This is also likely to be contentious. In principle, Britain would want this to be based on its average contributions after the rebate. Using this method, its net share comes to 12.1 per cent, based on an average of the years 2012-16.

However, some EU officials in the Commission and Council want to calculate Britain's share based on its gross national income alone. Using the pre-rebate contribution rates, the UK share rises to around 15 per cent.

The calculation method

Method one in the table below calculates a net exit bill of €57-€73 billion, depending on whether the UK share of liabilities is 12 or 15 per cent. It takes a maximalist view of Britain's obligations, while minimising UK receipts by excluding the 2018 rebate payment. It would also require Britain to pay for its share of contingent liabilities upfront, with the expectation that unused funds would be paid back. This would be the most hardline EU-27 opening position.

Method two estimates the bill to be €48-€61 billion. This is the calculation that is closest to the €60 billion figure that the Commission is likely to demand. It takes an ambitious view of Britain's legal commitments to spending after 2019. But unlike method one, it excludes contingent liabilities. In line with the Commission's practice, Britain's approximately €6 billion rebate for 2018 is excluded from the exit bill calculation (although it would still be paid).

Method three calculates a net bill of €25-€33 billion, which is more aligned with the initial views of some net-contributor countries. This requires Britain to honour commitments made in annual budgets – but no more. It excludes contingent liabilities and includes the rebate in the calculation of receipts.

12: This is quite different from the traditional view of Britain's net contribution. That looked at public sector receipts from the budget (for agricultural funding, for instance) and money flowing independently to the private sector (research funding). Much of that annual spending would stop once Britain leaves and it is excluded from Britain's Brexit settlement bill. So for instance in 2013, Britain paid €21.4 billion in gross contributions, and received a rebate of €4.3 billion, public sector receipts of €4.9 billion and private sector funding of €1.4 billion. This brought the net contribution down to around €10.8 billion. See 'European Union Finances 2015', HM Treasury.

The Brexit bill calculations

	EU end 2018 € billions	UK share (12%) € billions	UK share (15%) € billions
LIABILITIES			
Pension liabilities	63.8	7.7	9.6
Reste à liquider (RAL) end 2018	241.0	29.2	36.2
ESI Funds Cohesion: Outstanding allocation 2019-20	113.0	13.7	17.0
ESI Funds Rural/Fish: Outstanding allocations 2019-20	30.4	3.7	4.6
Copernicus	2.9	0.4	0.4
Connecting Europe Facility	10.1	1.2	1.5
EFSI Capital	16.0	1.9	2.4
European Development Fund and Trust Funds	-	1.7	1.7
TOTAL	**€477.2**	**€59.6**	**€73.3**
CONTINGENT LIABILITIES			
Guarantees/Provisions	23.1	2.8	3.5
EU loans	56.1	6.8	8.4
TOTAL	**€559.7**	**€69.1**	**€85.2**
OFFSET PAYMENTS: UK RECEIPTS			
Assets	22.5	2.7	3.4
UK rebate for 2018 (approx)	-	6.0	6.0
Receipts for UK projects (approx)	9.0	9.0	9.0

METHOD 1: Maximum liabilities, includes contingent liabilities paid upfront, excludes rebate			
UK share of liabilities	-	59.6	73.3
Contingent liabilities (UK share upfront)	-	9.6	11.9
UK receipts	-	11.7	12.4
NET TOTAL		**€57.4**	**€72.8**

METHOD 2: Maximum liabilities, excludes contingent liabilities and rebate			
UK share of liabilities	-	59.6	73.3
UK receipts	-	11.7	12.4
NET TOTAL		**€47.9**	**€60.9**

METHOD 3: Excludes 2019-20 allocations, maximum receipts			
UK share of liabilities	-	42.2	51.8
UK receipts including rebate	-	17.7	18.4
NET TOTAL		**€24.5**	**€33.4**

How solid are the Commission's arguments?

Britain's exit bill is not easy to explain in everyday terms. And the Commission's legal arguments are plausible but far from bulletproof. It might struggle to win a case in court. But the crucial point is that the technical details are probably going to be a secondary issue. The Brexit money dispute will begin as law, and conclude as politics.

The legal situation

There are some, but not many, potentially relevant precedents. International organisations have in the past chased up departing members for old debts, admittedly in some terrifically awkward circumstances. Brexit negotiators have looked at the League of Nations dissolution, for instance, a sorry affair that saw Ethiopia harried for unpaid budget dues (albeit with a one-year discount in fees to acknowledge the Italian invasion of 1935).

The collapse of the International Tin Council in the mid-1980s offers some other legal pointers, particularly on the issue of legal liability.[13] The ITC left debts of £900 million and its creditors sought to recover some of it from members (which incidentally included the then European Economic Community).

Like the EU today, the ITC had a separate legal personality, able to enter agreements in its own right. That is important in determining the liability of members. Britain and other ITC members refused to compensate creditors, arguing that the organisation's legal independence limited their secondary liability. The UK court rulings went in their favour, but as one appeal judge made clear there was "no clearly settled jurisprudence" about liability under international law.

The Brexit case is different but turns on a related question. As the EU is a separate legal entity, Britain would argue that its financial obligations must be covered by the EU's own assets, or through funding requests to members at the point of need. Britain paid its annual dues as a member. Its liability would basically start and end with membership; with the payment of its final annual budget it would have honoured its obligations.

By contrast, underlying the Commission's legal analysis is an assumption that it ultimately has a claim on Britain's past commitments. Brussels reads the EU treaties as casting all member-states as jointly and severally liable for the Union's debts. Indeed these treaty promises to provide financial support[14] underpin the EU's Aaa or AA credit rating (granted in spite of the Union's liabilities substantially exceeding its assets).

Moreover, the EU will say Britain did not just passively accumulate the liability, it positively acted to create the financial commitments. The Union's long-term budget is agreed by unanimity, as are the Council regulations that allocated cohesion spending 'envelopes' to member-states. Britain had the choice to block all these measures – it could have used a veto – but instead it gave its approval to laws enshrining every euro of the obligations.

Britain's counter case turns on a narrower reading of its responsibilities under the treaty. The word 'binding' appears once with regard to the EU budget, and it relates to the annual budget, not overall commitments or future liabilities accrued by the Union. The annual budget round transforms commitments into payment requests, agreed through a legislative process. That – and only that – is a binding requirement on member-states. In the past the gist of this argument was backed by net-contributors such as Germany, the Netherlands and Sweden.

> *"If negotiations collapse, the case is likely to end up in the International Court of Justice in The Hague."*

In short Britain will insist that responsibility for the overhang of bills lies with EU institutions. The EU was funded on an annual basis but decided to live beyond its means. The Commission decided to run an unfunded pension scheme and make more commitments to investment projects than the money available in any given year. These decisions created liabilities that are the responsibility of the EU to meet, as a legal entity in its own right. They are not, in London's view, strictly the responsibility of member-states and certainly not of a departing state.

London's interpretation is partly backed up by credit ratings agencies, which have largely maintained their assessment of the EU's creditworthiness not because Britain will honour its past commitments, but because the remaining EU states will pay its bills and have the means to do so. DBRS even excluded Britain from its 'core group' of contributors when reaffirming the EU's AAA status after the referendum.

Finally there is the secession issue. Debt-sharing after the partition of a country represents a quite different question from Brexit. But since the UK vote to leave the EU, some old British government statements issued during the Scottish independence referendum campaign have been dredged up in Brussels and read with interest.

13: Andrew Stumer, 'Liability of member-states for acts of international organizations: Reconsidering the policy objections', Harvard International Law Journal, 2007.

14: Treaty on the Functioning of the European Union, Article 323: "The European Parliament, the Council and the Commission shall ensure that the financial means are made available to allow the Union to fulfil its legal obligations in respect of third parties."

The UK Treasury analysis papers from 2013 on national debt and a sterling currency Union make two important points. Firstly, that "the international law principle of equitable division" would be applied to the UK's assets and liabilities in any negotiations on Scottish independence.[15] The EU will see that principle applying to Britain's EU exit too.

The second point is that the UK would honour existing debts, but ask Scotland to take on "a fair and proportionate share". The "full spectrum" of past, future and contingent debts and liabilities would have to be considered in exit talks, the Treasury said. The EU would expect nothing less in Brexit talks.

In response Britain may look back even further to past EU accession negotiations. Why was it, for instance, that when Austria joined the EU in 1995 there was no great budget reckoning? Austria was relatively wealthy and immediately became a net EU budget contributor. There was no netting process, in which its share of assets or liabilities were calculated and recognised. It just joined, taking on responsibility for pension promises stretching back almost 40 years. Britain will be hoping to leave in similar fashion.

If the EU doesn't bother to net-off assets and liabilities on entry, why should that be required on exit?

If negotiations collapse, the case is likely to end up in the International Court of Justice in The Hague. The key reference text will be Article 70 of the Vienna Convention on the law of treaties, 1969. Britain may opt to take its chances over the article's meaning, hoping that it suggests Britain's financial commitments to the EU would end if it left with no withdrawal agreement.

Article 70: Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(a) Releases the parties from any obligation further to perform the treaty;

(b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

The political reality

Unless talks break down, the reality is that the size of Britain's budget settlement will be a function of negotiating strength, rather than legal fairness.

The Commission's €60 billion is an upper estimate of legal obligations, a starting point for talks. But regardless of the quality of the Commission's legal arguments, the cash call can always be overridden if a weighted majority of the EU-27 decides to compromise in a withdrawal agreement.

That is good and bad for the UK. It means every element of the budget is theoretically negotiable. And Britain's willingness to pay large sums would give London some potential leverage in talks.

Such a position would probably be intolerable for London. But Michel Barnier and the EU-27 will be sorely tempted to take such an uncompromising approach. They know that once Article 50 is invoked, the two-year clock is running against the UK. The tactical advantage is firmly on the EU-27 side. The simplest negotiating strategy will be brute force; laying out their expectations and brushing off British counter arguments with "oh, look at the time".

Britain's perceived debts may fortify support for that approach. The Commission is spending time explaining to net-recipient member-states how Britain's €60 billion is not just theoretical; it represents cohesion money owed and promised directly to them.

> *"Unless talks break down, the size of Britain's budget settlement will be a function of negotiating strength, not legal fairness."*

That plays to a bigger concern for the EU-27. Britain's exit is a potential bomb under the politics of the EU's shared budget. The €60 billion alone would mean Germany having to pay up to €15 billion extra by 2023 and the Netherlands an additional €4 billion, most of which will not flow back. Berlin in particular has no interest in topping up the spending, and wants commitments cut instead.

An even harder question may be what happens if the UK no longer makes a substantial ongoing annual budget

15: "It is right to say that the international law principle of equitable division applies to certain UK assets and liabilities and that this principle would be important in any negotiation should Scotland vote for independence." 'UK debt and the Scotland independence referendum', HM Treasury, 2013. See also 'Scotland analysis: Assessment of a sterling currency Union', HM Government, 2013.

contribution. Assuming future long-term budgets were flat, that would entail net-contributors covering the net UK contributions of €6-8 billion a year. Such financial sacrifices are of course possible; this is small change to some member-states. But the decisions will be taken in a far less forgiving political context than past MFFs. Germany and other net contributors are fed up with eastern member-states forgetting the spirit of solidarity when it comes to accepting migrants; some in Berlin and Brussels want to demonstrate the financial consequences of that in future budget settlements. This could easily turn ugly.

During the Brexit talks a number will eventually emerge on Britain's bill. At that point the budget issue could take on a political life of its own on both sides of the Channel. In Westminster, if Brexit negotiating success is measured in money terms, it is hard to see how May will emerge victorious. Future payments could easily be sold to the public as an annoying but worthwhile price for implementing Brexit. But should Brexiters become unhappy with May's handling of the exit negotiations, money is the perfect political weapon to drive home their point.

Similarly, Brexit brings an uncommon sense of unity to the EU-27 side over money; the net-recipients want what was promised, and the net-contributors do not want to pay more to cover for the absent British. These are relatively small sums compared to national budgets, but that has not prevented some ferocious summit squabbling in the past between EU leaders. If cash targets settle in their minds, it is hard to see what political constraints will naturally emerge to rein in EU-27 expectations.

Is there space for a compromise?

Some dangerous political forces are at play on the budget. Admittedly, we are still in a phase of diplomatic chest-beating. Talks have not started. But in Brussels there is evident confidence – perhaps even over-confidence – that Britain will ultimately have to pay its fair share. Little serious thought has gone into an extreme no-deal scenario. This is because officials in the Commission struggle to take seriously the prospect of Britain destroying its relations with its biggest trading partner and taking the risk of an unfriendly, unmanaged exit. Some think London is cornered.

At the same time the political ground has not been prepared in Westminster, where the complexities of the exit bill are not fully understood. Debate has focused on paying for future benefits, rather than settling old bills. May has raised expectations that the days of 'huge' multi-billion euro payments are over. Other Brexiters know the pledge to regain control of £350 million a week will not easily be forgotten by voters. The fighting spirit is hard-wired into British politics when it comes to EU budgets. Once the real politics hove into view for the Tory party, the scope for a serious compromise will narrow sharply. Britain's political class may decide it is better to walk away than buckle to an unjust ransom demand.

The risk of a breakdown in talks is high. But if the issue is handled with care there is a potential landing zone. Finding it requires three presentational slights of hand.

First, any settlement payments must be significantly smaller than Britain's old annual membership contribution. The UK Treasury, in its November 2016 budget, set aside what it would have paid in EU contributions after 2019 for other uses. To sell a deal, British politicians will need to be able to say Britain will meet its exit costs without any unplanned borrowing. This is hardly a £350 million-a-week windfall. But May needs to show some savings on annual contributions will be made. Stretching legacy payments out over many years would help, but May has indicated that she wants to avoid sizeable annual contributions.

> *"Securing a contribution from Britain will at least delay the looming east-west standoff over money and solidarity."*

This ties in with the second negotiating point: any exit payment needs to be presentable as an 'implementation cost' of Brexit. Linking charges to specific liabilities – especially when it comes to Eurocrat pensions – could make the deal unsellable to British voters and the press. Relating it to a specific benefit – market access, transitional arrangements and the like – is decidedly more palatable. With some creative labelling and judicious ambiguity in drafting, this could be achieved. However the deal is called and portrayed, the EU-27 will need to see it as a lump sum payment for Britain's past liabilities.

Finally, the EU-27 will need to be compensated to at least cover the payments gap in the 2014-2020 long-term budget created by Britain's exit. EU leaders will need to show Britain is making a fair contribution to cover legacy commitments. But the €60 billion is an opening position that is politically unachievable. Pushing Britain to pay for projects that it did not commit to in an annual budget round is unlikely to wash. A bad

outcome for the EU-27 is a collapse in talks with Britain over money that immediately precipitates a fall-out among the EU-27 over how to fill the gap. Securing a contribution from Britain will at least delay the looming east-west standoff over money and 'solidarity'. That is valuable in itself.

So what could a deal look like?

★ On exit Britain would pay £14.5 billion[16] (approximately €16.9 billion) to the EU, equivalent to its net contribution for 2019 and 2020 had it remained an EU member. This would be part of the UK's 'Brexit implementation plan' costs. It would receive no rebate in 2019, no farming subsidies via the EU, and lose infrastructure spending not channelled via the EIB.

★ Britain would negotiate additional EU contributions to cover its future participation in programmes (such as research), market access, or new fees for the use of some EU agencies. (UK payments for pension costs and other long term liabilities could be disguised in post-2020 contributions.)

★ Britain would remain a member of the European Investment Bank.

★ Costs from contingent liabilities – such as loans to member-states – would be shared as they arise in future.

★ An arbitration panel or the International Court of Justice would adjudicate on whether Britain was liable for any investment spending beyond 2019. The UK could pledge to follow the ruling. The EU-27 would accept Britain had honoured its commitments as an EU member.

There are many potential flaws to such a deal. At the moment, both sides would say the terms are unacceptable. It assumes a close enough post-Brexit relationship for the EU to feel confident that the UK would meet the agreed medium and long-term commitments to the EU. Britain would still probably have to separately pay for farm subsidies and half-completed projects. And it banks on a willingness to compromise – and the political space to do it – on both sides. Hardliners may make that impossible.

Theresa May faces a big challenge to avoid playing sister bountiful to the EU. When Margaret Thatcher negotiated Britain's budget rebate, she drew her bargaining power from a veto that was virtually impregnable and impossible to circumvent, much to the chagrin of her fellow leaders. Time was on her side.

As Britain exits, that balance of power flips. May can refuse to pay, but she cannot just freeze the status quo – she would have to live with the economic consequences of an abrupt, disorderly Brexit. And in this negotiation over EU money, time is running against her.

Alex Barker
Brussels bureau chief, *Financial Times*

February 2017

16: 'Economic and fiscal outlook', Office of Budget Responsibility, November 2016. Britain provisioned to make a total of £26.4 billion in contributions in 2019 and 2020. The net £14.5 billion is calculated by taking the 55 per cent average net contribution from 2010-2014, taking account of the rebate and public and private sector receipts.

EUROPEAN POLICY CENTRE

9 February 2017

DISCUSSION PAPER

Brexit: the launch of Article 50

Andrew Duff

"Every time we say goodbye, I die a little.
Every time we say goodbye, I wonder why a little."
Cole Porter

Well, we know what has happened so far. In June 2015 the House of Commons, at the behest of Prime Minister David Cameron, voted by 544 votes to 53 to hold a referendum on withdrawal from the European Union. In the subsequent referendum on 23 June 2016, 52% voted to leave the EU. Mr Cameron left in disgrace. In December MPs voted by 461 to 89 to support Prime Minister Theresa May's decision to invoke Article 50 by the end of March 2017. Following the intervention of the UK Supreme Court, the government was obliged to bring forward parliamentary legislation in order to empower Mrs May to proceed as planned. Accordingly, the Commons voted on 1 February by 498 to 114 for the critical second reading of the bill.

The emasculation of the Westminster Parliament

One assumes that the bill will pass through all its parliamentary stages in both Houses in time for the prime minister to inform the European Council at its meeting on 9-10 March that she is at last invoking Article 50. Several Westminster parliamentarians have talked about amending the bill so as to lay down conditions on the parliamentary process and to stipulate some red lines on the content of the Brexit negotiations; but it is unlikely that they will succeed in constraining the government's freedom of action. What becomes clearer by the day is that once Parliament had recourse to the referendum, it effectively emasculated itself. Given the chance, the British people decided to leave the EU; the government has taken them at their word; and Parliament is side-lined.

Some MPs persist in the belief that if they are soft now on the matter of the government's commencement of the Article 50 talks, they can toughen up their stance later as the Brexit process nears its conclusion. This is a dangerous error. For one thing, the Remainers have no settled view amongst themselves about what would be a superior deal to the one outlined by the government. The fact is that if there is to be an Article 50 treaty in a couple of years' time it will be a compromise acceptable to both the UK and the EU. The withdrawal treaty itself will be fairly technical, and its negotiation will have been serious. If an agreement is reached, there will be no mass rejoicing but rather a general relief that a deal has been done at all, that collateral damage is limited and that a new partnership between the UK and the EU can at that stage begin to be engaged.

No turning back

Failure to conclude an Article 50 treaty would be to cause the EU treaties simply to cease to apply to the UK. Although the House of Commons has the constitutional right to a 'negative' vote that would reject the Article 50 treaty, it cannot by doing so revert to the status quo of continuing Britain's current membership of the EU. The government has now promised MPs a 'positive' vote on the final draft package, but the same rules apply. If Westminster were to reject the draft, the European Parliament will not assent to the treaty.

After the humiliating and costly failures of both Cameron and May, it is fanciful to imagine that the EU institutions and its 27 member states could be persuaded that they should give a third Tory prime minister a chance to attempt yet another renegotiation of Britain's terms of EU membership. Europe's tolerance for British particularism is already at breaking point. The referendum was for real. Article 50 gives both sides two years to conclude their negotiations. If a withdrawal agreement can be reached within the two years, it will be implemented. If it cannot be reached – or if having been reached in Brussels it is rejected at Westminster – Europe says goodbye and Britain slides off the cliff edge.

There has been much speculation among academics and lawyers – even involving current litigation in the Irish courts – about whether Article 50 once invoked could be revoked.[1] None of the co-authors of Article 50 believe that not to be the case: there is nothing in the EU treaties to say otherwise. But whether or not the European Council and the European Parliament would accept a reversal of Brexit is another matter altogether and would depend entirely on the legal and political circumstances prevailing at the time. A change of mind late in the day, or a frivolous meander from the path of negotiation, or an attempt to subvert the triggering of Article 50 by a method known not to be in accordance with the UK's constitutional requirements, would surely be dismissed. The Article 50 two-year timetable can be extended by a unanimous decision of the European Council, and a short extension in order to expedite a proper completion of the negotiations – perhaps to wait for a court judgment – would be manageable. But EU27 will never permit an attempt by a recalcitrant UK to procrastinate, to delay for delay's sake. Nor will they be impressed by the threat of a second referendum on the outcome of the Article 50 negotiation: rather the contrary.

Pulling the trigger

Working on the assumption that Parliament at Westminster has no more to say on the matter, the European Council on 9 March will register the receipt of Theresa May's notification of her government's intention to withdraw from the Union. In doing so it will evince neither surprise nor regret, having been forewarned first by Mr Cameron on 28 June and then by Mrs May herself at the two subsequent meetings of the European Council in October and December. The heads of government also read the newspapers. They have analysed as best they can the prime minister's speech at Lancaster House (17 January) in which she set out her government's case for Brexit. The speech was supplemented by a white paper published on 2 February.[2]

Her European Council colleagues will wish to quiz the prime minister on a number of points that both her speech and the white paper have left unclear. These points of ambiguity concern:

- the timing and sequencing of the negotiation of the Article 50 withdrawal agreement, on the one hand, and a putative new treaty between the UK and EU27, on the other;
- the nature of the transitional arrangements that will kick in the day Brexit happens and prevail until any new partnership treaty enters into force;
- the kind of customs arrangements the UK seeks once it leaves the EU's current customs union;
- the question of judicial oversight of the future trade and other relationships between the UK and the EU.

By way of a response to the British government's recent statements, the European Council will prepare to issue guidelines as to how it intends the proceedings to unfurl. These guidelines will take the form of a lengthy annex to the conclusions of an extra meeting of the European Council. The date of this extra meeting

of the heads of government is delicate, needing to avoid the Easter weekend (14-17 April), the French presidential elections (23 April-7 May) and the Schuman Day holidays (8-9 May). A possible date for the special meeting of the European Council (also to bid farewell to President Hollande) is 20-21 April.

The guidelines are bound to reiterate the principles first enumerated in the European Council's statement of 29 June 2016.[3] The UK will be welcomed as a prospective "close partner" of the EU; any agreement will be "based on a balance of rights and obligations"; "access to the single market requires the acceptance of all four freedoms". Expect a reference to be made to the hitherto rather neglected Article 8 TEU, which reads:

"1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.

2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation."

Mention will also be made of the modalities of the negotiations, first broached in the conclusions of the European Council meeting of 15 December.[4]

As laid down in Article 218(3) TFEU, the European Council's guidelines will lead the Commission to make recommendations to the General Affairs Council (GAC), which will then take the formal decision to open the negotiations with the UK. That decision will not be taken before there is a new French minister of Europe. (We are now in June.) True to its word, the Council will establish a special committee to monitor the progress of the Article 50 talks, and a representative of a Council working party, chaired by Belgian mandarin Didier Seeuws, will be present at all the meetings between the Commission and the British.

The European Council will review the progress of the negotiations at each of its meetings, issuing revised guidelines as appropriate; and the GAC can be expected to address further operational directives to the Commission from time to time. It will be up to the Commission to propose to the Council that an agreement can be concluded (Article 218(5)). The Council does not need unanimity to decide to approve the agreement but can act, after obtaining the consent of the European Parliament, by a special qualified majority of 20 out of the 27 states. It is not to be excluded that a special body will have to be set up to monitor the application of the agreement, to smooth the operation of the divorce settlement and to settle lingering disputes – for instance, over legacy budgetary issues – for a certain, probably ill-defined transitional period.

For all their interest in the process, the European Council and Council will be right to give Michel Barnier, the Commission's chief negotiator, ample room to negotiate. They will be keen to avoid a situation in which different vested interests of the 27 states are accentuated to an extent that would allow the UK to exploit those differences. In spite of the fact that the solidarity of the EU27 has been impressive to date, London is already suspected of trying to divide and rule. Here the explicit calls for EU solidarity of the current Maltese presidency of the General Affairs Council are impressive – and doubly so because Malta is a faithful member of the Commonwealth, the organisation in which many Brexiteers invest so much faith.[5]

Including the European Parliament

Both Council and Commission will also be keen to manage the participation in the talks of the European Parliament's Brexit negotiator, Guy Verhofstadt. While some member states are keen to limit its involvement, and as Mr Verhofstadt will no doubt observe, the engagement of the European Parliament is essential in at least three important respects:

- the European Parliament has the right under Article 50 to grant or withhold consent to the final Brexit treaty;
- MEPs have the right to be immediately and fully informed at all stages of the procedures (Article 218(10)),

as supplemented by an inter-institutional agreement between Commission and Parliament and elaborated further by the practical precedent of Parliament's inclusion in other international negotiations;[6]
- Parliament also has the right to dispatch the final agreement to the European Court of Justice in order to verify its compatibility with the EU treaties (Article 218(11)).

In their engagement with the process, MEPs can be expected to evince special interest in the plight of EU citizens left stranded in the UK after Brexit and in the legacy rights of British nationals resident in the EU, as well as in the budgetary settlement. Ancillary but important questions arise about what to do at the next European Parliamentary elections in 2019 with the 73 seats vacated by British MEPs – a question on which the Parliament has the dutiful right of initiative (Article 14(2) TEU).[7]

The European Parliament needs to organise itself in a way that its contribution to the Brexit negotiations is efficient and, where necessary, discreet. It will be aware that its privileged access to the Article 50 exercise is regarded jealously by some national parliaments, especially in Berlin and The Hague but also, ironically, at Westminster. MEPs should be open to hearing the views of the UK's devolved executives and parliamentary assemblies in Belfast, Edinburgh and Cardiff, as well as Gibraltar. The voice of British local government and civil society might also get overlooked at the level of the official negotiations between the EU institutions and the UK government. The quality and scope of the European Parliament's first resolution on Brexit, foreseen even for mid-March, will be closely observed.

Mr Barnier's dilemma

There is already tension between London and Brussels on the matter of the timing and sequencing of the negotiations. As far as the EU is concerned, Mr Barnier's mandate is to disentangle the UK from its rights and obligations as an EU member state. His first job will be to get a methodology for the talks agreed: British theatrics will go down very badly. The topics he has to address are quite straightforward, if complex. They include dismantling the British end of the EU budget; relocating EU agencies out of the UK; providing new arrangements for border crossings (particularly in Ulster); dealing with British personnel in the EU institutions, including pensions; and ensuring the interests of EU citizens resident in the UK.

The timetable is tight: we have noted that the proper negotiations will not start until June 2017, and Mr Barnier has suggested a target of October 2018 for their conclusion in order to give time for the European Parliament to vote its consent, for the Council to reach its decision on the package, and for the UK's own constitutional procedures to be completed, all within the two year deadline.

Undoubtedly, the most difficult issue will be money. The British need to be persuaded to pay all that they owe the EU – but not a penny more. Estimates touted in the press suggest that the UK will owe between EUR 40bn and EUR 60bn. The UK is contracted for the whole of the EU's current multi-annual financial framework (MFF) which lasts for the seven years from 2014. If Britain wishes to opt out of the MFF before time, there will be a penalty to pay. It makes more sense, both financially and administratively, for it to be agreed that the UK should continue within the EU budget in terms both of revenue and expenditure until the end of 2020.

Some significant expenses to which the UK is committed by virtue of its EU membership lie outside the general EU budget: these include the Galileo project and other space activities, certain common security and defence missions as well as its annual contributions to the European Development Fund. There will also need to be an agreement on the disaggregation of assets, such as the UK claim on EU investment in Brussels real estate. But the EU's liabilities are much larger than its assets.

At any rate, the Commission would be wise not to provoke the British with the abrupt presentation of a single long and large invoice, but to prepare to schedule the settlement of accounts over several, perhaps many years. And at the same time the Commission will need to manage the short-term impact of the departure of a large net contributor to the EU budget, a blow which is bound to open up new tensions

between the remaining net contributors and net recipients in the run-up to the negotiation of the next MFF. The UK government has already indicated that in the context of its sought-after 'new partnership' with the EU, it would wish to keep its membership of certain EU agencies, such as Europol: agreeing on the price tag for Britain's shopping list will feature prominently in the later negotiations of Britain's future relationship.

Making the transition

It is clear that there will be two treaties: the first is the Article 50 withdrawal agreement; the second is to settle the long-term relationship, which Mrs May describes as a comprehensive free trade agreement plus political cooperation.

The UK government, however, appears to want a third treaty by way of transition towards the new situation. London prefers a separate, temporary agreement in order to bridge the gap between the actual date of Brexit – say, April Fools' Day 2019 – and the entry into force, possibly some years later, of the new permanent treaty. One problem is that such a transitional treaty would be classed under EU law as a 'mixed agreement' which, unlike the Article 50 withdrawal agreement but just like the final treaty, would require national ratification by all 27 EU states. A transitional treaty would be very difficult to negotiate because it would effectively pre-empt decisions on the final 'new partnership' before the detailed content of the future free trade agreement were known.

As far as the Commission is concerned, transitional measures will certainly be needed to wind down the UK's rights and obligations, sector by sector, according to various but existing legal bases. But in its view this exercise can best be undertaken by EU secondary legislation that will simply adjust the EU's common policies and spending programmes, including the financial regulation, to the EU's new, post-Brexit situation.

Mr Davis' 'Great Repeal Bill'

Such a phasing-out at the EU level should be crafted to coincide with the workings at Westminster of the 'Great Repeal Bill' and the abolition of the European Communities Act 1972 which gave effect to EU law within the UK. Certainly, it is in the interests of both parties to the negotiation to avoid a massive legal black hole for business and public administration at the moment of formal Brexit.

David Davis, the UK Brexit minister, is optimistic that the Great Repeal Bill will allow the UK ample time to sift and fillet what of the corpus of EU law it wishes to keep, amend or ditch. His optimism may be misplaced: the legal effect of EU regulations and directives if orphaned from the executive, legislative and judicial institutions which spawned them will be dubious at best and jeopardised at worst. Once bereft of their parentage, EU laws will lose the primacy they formerly enjoyed. Moreover, much of EU law has cross-border ramifications and is realised by reciprocal obligations in other member states: such reciprocity will no longer apply once the UK leaves the EU. Nor will the EU regulatory framework still pertain in the UK to enforce compliance with the law, leaving Britain the job of creating *de novo* its own bespoke regulatory regime. Liberation from Brussels may prove to be lovely, but Britain is about to rediscover the heavy hand of the Men from the Ministry in Whitehall and the hob-nailed boots of the local constabulary.

'New partnership' versus 'special relationship'

The European Council's guidelines are being written in full cognisance of this early divergence of view between London and Brussels about the nature and purpose of the transitional measures. The EU will have to state categorically that, while there can be informal talks about Britain's future place in Europe in parallel with the start of the Article 50 negotiations, nothing for the future will be agreed by the EU, even in general terms, until such time as the Article 50 talks have progressed to a point where the British are seen to be committed wholeheartedly to their successful conclusion.

Both sides face a challenge in that Article 50(2) prescribes that the agreement with the UK should set out "the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union". Theresa May's speech is a necessary basis for the start of political discussions about the future framework but not a sufficient guarantee of their conclusion. If words are to be agreed by the European Council that define the nature of the EU's new "special relationship" with the UK (Article 8 TEU), the British will have to become much more specific about committing themselves to an institutional connection with their erstwhile partners along the lines of a formal association agreement (Article 217 TFEU). In short, it is not enough for the UK to claim that its harmonisation with the *acquis communautaire* on 1 April 2019 is its passport to a future relationship with the EU: in addition it will need to put in place a new regulatory framework to ensure continued technical equivalence at official level, a ministerial and parliamentary apparatus to facilitate political collaboration, and a form of judicial tribunal to arbitrate disputes.

As things stand, it is difficult to avoid the impression that the British have forgotten that it is they who have decided to leave the EU, and not the other way around. The white paper sets out London's case baldly:

"[W]e want to have reached an agreement about our future partnership by the time the two year Article 50 process has concluded. From that point onwards, we believe a phased process of implementation, in which the UK, the EU institutions and Member States prepare for the new arrangements that will exist between us, will be in our mutual interest. … For each issue, the time we need to phase in the new arrangements may differ; some might be introduced very quickly, some might take longer. And the interim arrangements we rely upon are likely to be a matter of negotiation. The UK will not, however, seek some form of unlimited transitional status. That would not be good for the UK and nor would it be good for the EU."[8]

In riposte, the European Council guidelines need to be as blunt. Whatever its present frustrations with the British, the EU is obliged by treaty to develop a new 'special relationship' with the UK in a spirit of 'good neighbourliness'. For the EU, which likes to do things in tidy packages, the fact that it has recently designed an Association Agreement with Ukraine, provides a template which could be adapted to suit the British case. This is clearly a more difficult concept for Mrs May, who told her Lancaster House audience that she did not want Britain to be left "half-in, half-out" of the EU, as an associate member. "We do not seek to hold on to bits of membership as we leave", she added. (Although, of course, she does.)

Liberation from foreign jurisdiction

The British government must know that to strike a formal economic and security relationship with the EU requires any third country to respect the EU's constitutional order. Technical engagement between the UK and the EU will be necessary to ensure regulatory equivalence without which free trade is impossible. Political interaction is necessary to maintain effective cooperation in internal and external security matters. While the UK after Brexit will have escaped the jurisdiction of the European Court of Justice, it will not be able to evade its jurisprudence. This last seems to present a particular difficulty for Prime Minister May. She would be wise as soon as possible to demonstrate that she no longer suffers from what one British official calls the 'opt-out-itis' that afflicted her term as Home Secretary. She should drop her evident strongly held antipathy towards the European Court.

We note that the white paper at least recognises that this is an unresolved issue. An annex discusses, albeit superficially, various forms of international trade dispute resolution, including CETA, Switzerland, NAFTA, Mercosur and the WTO – but not EFTA or an EU Association Agreement, thereby scrupulously avoiding the touchy but ultimately unavoidable question of the role of the European Court of Justice. Once the negotiations get going that issue must be confronted squarely.

Fond farewell

We have already argued that the Article 50 negotiations will not and cannot succeed unless the framework of Britain's future relationship becomes more clearly articulated. It is part of the job of Michel Barnier to

nudge the British towards gradually defining the exact location of their country's future landing zone. If the UK makes concessions on the institutional side, an Association Agreement would do the trick. An Association Agreement is not associate membership of the EU.[9] Nor does an Association Agreement presage future re-entry to the Union as a full member state.

The British government's white paper adds very little of substance to the prime minister's earlier speech. It barely conceals the deep uncertainty which lies at the heart of the government's high-risk Brexit strategy. In the prime minister's speech and again in the white paper comes the bold cliché that "no deal for the UK is better than a bad deal for the UK". Yet the swagger is tempered by a sign that the British government is aware of the danger of a breakdown. The white paper warns:

"In any eventuality we will ensure that our economic and other functions can continue, including by passing legislation as necessary to mitigate the effects of failing to reach a deal".[10]

One wonders if any of the Brexit campaigners had envisaged the need for a State of Emergency.

In contrast to the amateurishness of the British, the EU side looks highly professional. The imminent guidelines of the European Council must work hard to install some semblance of dignity into the business of Brexit. The goal must be to expedite the departure of the British without wrecking the rest of Europe.

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The views expressed in this Discussion Paper are the sole responsibility of the author.

1 For pithy comment on all this, see Allott, Philip (2017), "Taking Stock of the Legal Fallout from the EU (Notification of Withdrawal) Act 2017", available at https://ukconstitutionallaw.org/
2 https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper. I have written previously about May's speech and European reactions to it for the European Policy Centre and Policy Network, both 24 January.
3 http://www.consilium.europa.eu/en/policies/eu-uk-after-referendum/
4 http://www.consilium.europa.eu/en/press/press-releases/2016/12/15-statement-informal-meeting-27/
5 Malta is followed in the six-monthly Council presidency by Estonia in July 2017, Bulgaria and Austria in 2018, and Romania and Finland in 2019.
6 See Annex XIII to the European Parliament's Rules of Procedure, available at http://www.europarl.europa.eu/sipade/rulesleg8/Rulesleg8.EN.pdf
7 Guy Verhofstadt has suggested that these 73 ex-British places be filled by an election in a pan-European constituency from transnational lists.
8 White Paper, para. 12.2.
9 See my evidence to the House of Lords, December 2016, available at http://www.parliament.uk/brexit-uk-eu-trade-inquiry
10 White Paper, para. 12.3.

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Is Brexit an opportunity to reform the European Parliament?

Robert Kalcik and Guntram B. Wolff

Executive summary

- **THE UNITED KINGDOM'S** departure from the European Union will have implications for the European Parliament. Seventy-three of its 751 members are elected in the UK. Brexit offers a political opportunity to reform the allocation of seats to member states.
- **THE EUROPEAN PARLIAMENT** is a highly unequal parliament: large countries are underrepresented while small countries are overrepresented. This is desired in the EU treaties. But the EU treaties also emphasise the importance of equality and equal treatment of citizens by EU institutions. Inequality of representation in the European Parliament has been criticised as reducing its democratic legitimacy. The European Parliament itself has called for increased "electoral equality," or enhanced equality of representation.
- **WE EXPLORE DIFFERENT** options for reform and their implications for equality of representation and distribution of seats to countries. We do so within the constraints set by the EU treaties.
- **ONE OPTION WOULD** be simply to drop the 73 seats currently occupied by MEPs elected in the UK. However, this would increase the inequality of representation in the European Parliament. We also consider other pragmatic options but they would not yield significantly different outcomes.
- **ALTERNATIVELY, THE ALLOCATION** of MEPs to member states could be reconsidered with a view to reducing the inequality of representation within the constraints set by the EU treaties. We use two measures of inequality and perform a mathematical optimisation.
- **BY ONE MEASURE** of inequality of citizens' representation, the European Parliament would shrink to 639 MEPs. By the other measure, it would shrink to 736 MEPs. Inequality can be reduced by around 25 percent, making the parliament somewhat more comparable to the levels of inequality of representation seen in the British and French national parliaments. The European Parliament would still be twice as unequal, however.
- **WE ALSO CONSIDER** the idea of a transnational list, an option that would require treaty change, and offer an online tool to explore other options that would require treaty change.
- **AT A TIME** of a shrinking EU budget and high levels of scepticism about the legitimacy and efficiency of EU institutions, Brexit offers an opportunity to reform the European Parliament to address some of the criticisms. However, we note that only a change to the EU Treaties would enable changes to make the European Parliament comparable to national parliaments in terms of equality of representation.

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1 Introduction

As the United Kingdom leaves the European Union, one issue for the EU to resolve is the implications of the departure for the European Parliament. Currently, 73 members of the European Parliament (MEPs) are elected in the UK, but the UK is likely to have left the EU by the time of the next European elections in 2019. This raises the question of whether these 73 seats should be dropped or reallocated to the remaining 27 EU countries. And if they are to be reallocated, how should it be done? How will the European Parliament change without the UK?

Even before the UK's Brexit referendum, the Council of the European Union in 2013 called on the European Parliament to make a proposal in time for the 2019-24 parliamentary term for the allocation of seats to EU countries *"in an objective, fair, durable and transparent way, translating the principle of degressive proportionality,"*[1] with 'degressive proportionality' meaning that more populated EU countries have more citizens per MEP than their less-populated counterparts. Prior to the UK Brexit vote, the European Parliament itself called for a reform to increase equality of representation[2].

Brexit offers a unique political opportunity to revive the discussion on the distribution of seats and to reassess the resulting political and geographical balance in the parliament. The current distribution of seats is the result of long political negotiations and represents a compromise. The departure of one of the largest EU countries means there is new opportunity for political compromises on the composition of the European Parliament.

We explore different possible distributions of seats in the European Parliament after Brexit. In particular, we present two options that fulfil the requirements of the EU treaties, in particular on minimum and maximum thresholds and degressive proportionality, but that also aim to achieve the greatest possible equality of representation, as demanded by the European Parliament within the treaty constraints. We analyse the implications of those changes in terms of degressive proportionality, equality of representation, number of seats per country, and possible impact on the share of seats of the political groups in the European Parliament[3]

2 Why does the allocation of seats to countries matter?

The allocation of European Parliament seats to countries has a number of implications. An obvious point is that different weights for different countries imply different distributions of

1 See Article 4 of 'European Council Decision establishing the composition of the European Parliament', 28 June 2013. Degressive proportionality is required by Article 14 of the Treaty on European Union.

2 The European Parliament itself aims to reinforce the concept of *"citizenship of the Union and electoral equality"*. In its resolution of 11 November 2015, the European Parliament discussed the reform of the electoral law of the EU. It called for *"providing for the greatest possible degree of electoral equality and participation for Union citizens."* See European Parliament resolution of 11 November 2015, P8_TA(2015)0395, 'Reform of the electoral law of the EU,' in which the Parliament: *"Decides to reform its electoral procedure in good time before the 2019 elections, with the aim of enhancing the democratic and transnational dimension of the European elections and the democratic legitimacy of the EU decision-making process, reinforcing the concept of citizenship of the Union and electoral equality, promoting the principle of representative democracy and the direct representation of Union citizens in the European Parliament, in accordance with Article 10 TFEU, improving the functioning of the European Parliament and the governance of the Union, making the work of the European Parliament more legitimate and efficient, enhancing the effectiveness of the system for conducting European elections, fostering common ownership among citizens from all Member States, enhancing the balanced composition of the European Parliament, and providing for the greatest possible degree of electoral equality and participation for Union citizens".*

3 We also complement this paper with an online tool that shows how the number of European Parliament seats per EU country would change, depending on different variables.

votes across party groups, because of differing national voting patterns. For example, while 35 percent of Germany's European Parliament seats went to the conservative European People's Party (EPP) group in the 2014 European elections, the EPP secured only 27 percent of seats in France. Assuming voting patterns remain the same, a change in the relative number of seats allocated to France and Germany would have an impact on the strengths of different political groups. Of course, the absence of the UK MEPs by itself will already change the shares of seats held by different groups in the European Parliament. Hix *et al* (2016) document the voting patterns of MEPs from the UK: their departure would immediately change voting patterns.

However, beyond the impact on voting patterns of changes in the allocation of seats, a deeper and more controversial question is how the distribution of seats to countries affects the legitimacy of the European Parliament. With the Lisbon Treaty, the European Parliament has become the parliament that represents EU citizens. But the notion of representing EU citizens seems to be at odds with the principle of degressive proportionality, which gives different weights to EU citizens depending on the country in which they live. Degressive proportionality also appears to be at odds with the basic call of the EU treaties to ensure equality of all citizens and, in particular, that citizens should receive equal attention from EU institutions (Art 9 TEU)[4]. However, degressive proportionality is enshrined in the treaties (Art 14 TEU) so that large countries do not dominate the European Parliament.

The EU treaties are therefore somewhat ambiguous on the question of whether the European Parliament represents primarily EU citizens or citizens of EU states. In other words, the treaties still differentiate between, say, French and Slovenian EU citizens in elections to the European Parliament, while considering that the parliamentarians represent EU citizens and not national citizens with nationally determined preferences. Implicitly, the treaties therefore assume that a French and a Slovenian MEP could decide differently in a vote based on their nationality and not based on political preferences. In line with that reasoning, the European Parliament's former rapporteur for electoral procedure, Andrew Duff, summarised that the European Parliament *"reflects a giant historical compromise between the international law principle of the equality of states and the democratic motto of 'One person, one vote'"* (Duff, 2014).

The constraints in the EU treaties on the allocation of seats to countries are therefore at odds with the principle of equality of representation. It is broadly desired that small member states should have more seats than their population sizes would suggest. Figure 1 on the next page shows the distribution of seats across EU citizens as it is currently implemented, based on the constraints of the EU treaties and current electoral agreements.

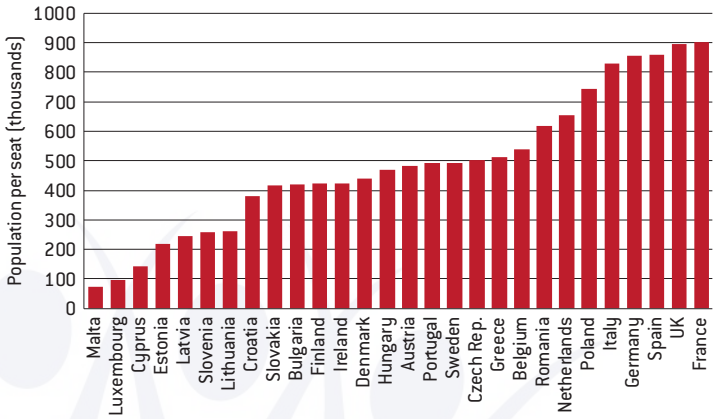
The intellectual and political foundations for the current composition of the European Parliament are given in the European Parliament report by Lamassoure and Severin (2007), which also defines the concept of degressive proportionality. It was revised in a 2013 European Parliament report by Gualtieri and Trzaskowski (2013), in which the 'Cambridge Compromise' is introduced (Grimmett *et al*, 2011, see the next section). The call of the European Parliament for more electoral equality therefore suggests that it increasingly leans towards an interpretation of its role in which the nationality of MEPs matters less as voting patterns are the result of political preferences and not nationality.

The extent of proportionality is also a highly controversial issue in the legal discussion. In a landmark ruling of the German constitutional court (BVerfG, 2009), equality of representation in the European Parliament is explicitly mentioned to not be satisfied, measured against requirements placed on democracy in states. The German court concluded that the EU's *"structural democratic deficit"* cannot be resolved in an association of states and that the European Parliament cannot close this *"structural democratic deficit"*. This is not the place to

4 Article 9 of the Treaty on European Union (TEU) says that *"In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies."* Article 14(2) of the TEU says of the European Parliament that it *"shall be composed of representatives of the Union's citizens."* However, the same article also specifies the principle of degressive proportionality.

discuss the advantages and shortcomings of the rulings of the German court, but it is important to keep in mind that the Court's decision constrains German institutions in a number of respects, and plays a major role in the constitutional and political debate in Germany and elsewhere on the legitimacy of the European Parliament.

Figure 1: EU countries, population per MEP



Source: Eurostat, European Parliament.

3 Degressive proportionality and the Cambridge Compromise

First introduced into EU primary law with the Lisbon Treaty, the principle of degressive proportionality has seen several revisions and attempts to operationalise the term. Lamassoure and Severin (2007) developed the first adopted definition: *"[The European Parliament] considers that the principle of degressive proportionality means that the ratio between the population and the number of seats of each Member State must vary in relation to their respective populations in such a way that each Member from a more populous Member State represents more citizens than each Member from a less populous Member State and conversely, but also that no less populous Member State has more seats than a more populous Member State."*

In 2011, a Symposium of Mathematicians was commissioned by the European Parliament's Committee on Constitutional Affairs to recommend a mathematical 'formula' for the apportionment of seats, the Cambridge Compromise (Grimmett *et al*, 2011). Together with the principal recommendation of the method for apportionment, the commission also advised that the Parliament's size should be reduced and proposed a new definition of degressive proportionality. The new definition requires that the number of seats allocated to member states be degressively proportional before rounding to whole numbers.

The recommendation was subsequently adopted by the Parliament's decision of 13 March 2013 resulting in the following formulation, which is currently in force (European Parliament, 2013): *"The ratio between the population and the number of seats of each Member State before rounding to whole numbers shall vary in relation to their respective populations in such a way that each Member of the European Parliament from a more populous Member State represents more citizens than each Member from a less populous Member State and, conversely, that the larger the population of a Member State, the greater its entitlement to a large number of seats."*

However, the European Parliament's Committee on Constitutional Affairs did not adopt

the recommendations of the group of mathematicians that proposed the Cambridge Compromise, but rather opted for a *"pragmatic solution"*. Instead of following the Cambridge Compromise, the pragmatic solution meant that seats were distributed according to the principle that no state should gain seats and none should lose more than one.

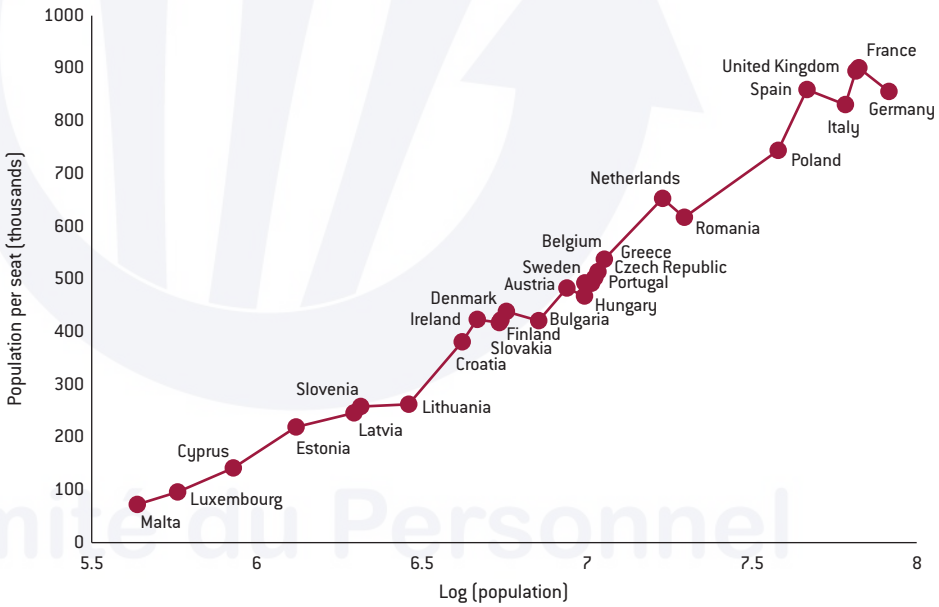
4 The distribution of seats in the European Parliament and in national parliaments

The EU treaties specify the distribution of seats in the European Parliament. The minimum number of seats a country can have is six, and the maximum is 96, with a total of 751 (750 plus a president).

In line with the principle of degressive proportionality, the number of citizens per MEP increases with the size of the country, meaning citizens of smaller EU countries are over-represented relative to their counterparts from large countries. Degressive proportionality thus implies inequality of representation. We define equality of representation to mean that the population per MEP would be the same for all countries.

Figure 2 shows how the principle of degressive proportionality has been implemented. This implementation is the result of a compromise reached on 13 March 2013 (European Parliament, 2013).

Figure 2: Degressive proportionality as currently implemented in the European Parliament



Source: Bruegel based on Eurostat, European Parliament. Note: Population represented per MEP over the logarithm of population.

As Figure 2 shows, the degressive proportionality requirement is broadly fulfilled because the curve slopes upward. However, there are deviations. For example Slovakia has a larger population than Ireland, but a smaller population per MEP than Ireland. However, these deviations are quite small. In many cases, they can be explained by rounding: after all, it is not possible to have half an MEP. But in some instances, the treaty requirements are, in fact, not fulfilled because of the *ad-hoc* nature of the allocation of seats in the compromise of 2013.

But how does the allocation of seats in the European Parliament compare to other legisla-

tures in terms of equality of representation?

Table 1 shows indicators of equality of representation for the European Parliament compared to the US, the UK, Germany, France and Italy (for charts, see the Annex). In this group, the European Parliament is by far the most unequal. When equality of representation is measured using a version of the Gini coefficient[5] (with a score of zero meaning perfect equality while a score of 100 would imply that all seats go to one country), the European Parliament's score is 17.5 compared to only 2.2 in the US House of Representatives or 3.4 in the Bundestag. France and the UK have the highest Gini coefficients in our group but at about 6 in each case, their values are still only a third of the European Parliament value.

Another measure is the coefficient of malapportionment[6], which measures the percentage of seats that would need to move in order to achieve equality. On this indicator, the European Parliament scores 14 percent, more than three times the score of the worst performing national parliaments in our sample, which are the UK and France.

Table 1: Equality of representation in selected parliaments

Lower House	Apportionment	Seats	Gini	Malap.
European Parliament (2014)	Pragmatic solution implemented since 2014	751	17.5%	14.37%
US House of Representatives (2016)	One seat per congressional district	435	2.2%	1.42%
German Bundestag (2013)	Mixed system depending on direct and proportional mandates	631	3.4%	2.47%
UK House of Commons (2015)	One seat per constituency	650	6.1%	4.25%
Italy Chamber of Deputies (2013)	Semi-proportional system	630	2.7%	1.74%
France National Assembly (2012)	Two round system with one seat per constituency	577	6.4%	4.54%

Source: Bruegel based on European Parliament, Eurostat, Destatis, Bundestag, US Census, UK The Electoral Commission, Ministero Dell'Interno (Italy), Ministère de l'Intérieur (France). Note: Malap. = coefficient of malapportionment.

5 Reform options in the framework of the EU treaties

The 73 MEPs from the UK could be reallocated in various ways, and reallocation should ideally be done in time for the 2019 European Parliament elections.

The simplest approach would be to reduce the number of MEPs by 73. After all, the UK will have left the EU, the EU budget will have shrunk and parliamentarians cost taxpayers money. We calculate that the cost per MEP to the taxpayer is €554,881 per year[7]. In line with

5 The Gini coefficient is used by a number of authors in the literature that assesses equality of representation of parliaments. See for example: Rose (2012), Tailor and Véron (2014).

6 This indicator is also frequently used in the literature, see for example, Charvát (2015), Samuels and Snyder (2001). Other indicators can be used but they do not change the broad message (see the Annex).

7 About 22 percent of the European Parliament's 2017 expenditures are appropriated to MEPs' expenses, including salaries, costs for travel, offices and the pay of personal assistants (*General budget of the European Union for the financial year 2017*, 2016). We are thus only considering variable costs and not the costs for the EU parliament's general operations.

this approach, the European Parliament would shrink to 678 MEPs. The number of seats per country would remain unaltered, which may be politically the easiest solution. However, the Gini coefficient and the indicator of malapportionment would both increase, worsening the European Parliament's problem of inequality of representation.

A second option would be to distribute the 73 seats to all remaining countries while keeping within the constraint of a national maximum of 96. This would dramatically increase the inequality of representation. Evenly distributing seats following the current proportions of MEPs per country would lead to an increase in inequality.

Finally, all or some seats could be redistributed to try to minimise inequality within the constraints of the treaties (Box 1 describes how the mathematical optimisation is structured to achieve this reduction in inequality). By following this approach, the optimal number of MEPs would be 639 or 736, depending on how inequality of representation is measured. If such an approach were pursued, the Gini index would fall from 17.5 to 14.2, and the malapportionment index would fall from 14.4 to 10.5, a decline of more than a quarter.

Table 2: Comparison of possible allocations in terms of Gini and malapportionment coefficients

Lower House	Apportionment	Seats	Gini	Malap.
European Parliament	Pragmatic solution implemented since 2014	751	17.5%	14.4%
Different scenarios for the European Parliament:				
Redistribute only 73 seats, no treaty change required	Dropping of 73 MEPs	678	↑18.3%	↑14.8%
	Distribute seats equally between countries	751	↑22.6%	↑18.2%
	Distribute seats following the current proportions of MEPs per country	751	↑19.7%	↑15.6%
	Distribute seats to increase representativeness	751	↓14.8%	↓10.6%
Cambridge Compromise, no treaty change required	Current EP size	751	↓15.1%	↓10.8%
	EP size to minimize Gini	639	↓14.2%	↓11.3%
	EP size to minimize malapportionment	736	↓14.6%	↓10.5%
Change of TEU Art. 14(2) required	Allocate 73 seats to a transnational list following Duff (2011)	751	↓16.5%	↓13.3%

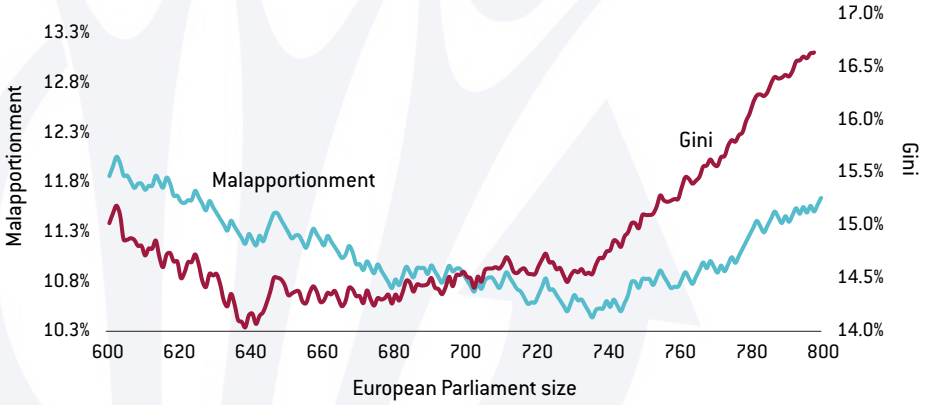
Source: Bruegel based on European Parliament, Eurostat.

Box 1: Choosing the optimal size of the European Parliament

The core recommendation of the Cambridge Apportionment Meeting was a method of distributing seats to member states termed 'Base+prop method' (Grimmett *et al*, 2011). In a first stage, a fixed base number of seats is allocated to each country, ie five seats. In the second stage, the remainder is distributed proportionally to population sizes with upwards rounding. The recommended method is a compromise that follows the principle of equality among states with the base number of seats, and the principle of equality among citizens by the proportional part.

For a given minimum and maximum number of permissible seats per state, the method can be used to determine a parliament size that minimises inequality. While a large parliament would mean that several countries hit the upper limit of seats, a low total number of MEPs would lead to more overrepresentation of countries at the lower limit. Figure 3 shows this U-shaped relationship with the percentage of malapportionment and the Gini index for each parliament size using the 'Base+prop' method.

Figure 3: Inequality of representation as a function of the size of the European Parliament while applying the Cambridge Compromise formula



Source: Bruegel.

The parliament sizes that would minimise the Gini score and malapportionment are 639 and 736, respectively. The Gini is more sensitive to under/over-representation of individual countries, in particular in the middle of the distribution, while malapportionment quantifies the percentage of seats that would need to move to achieve a proportional distribution. We also used other measures of inequality of apportionment but the optimisation results were either close to the malapportionment measure or the Gini coefficient measure (see the Annex).

Table 3 shows the number of seats currently allocated to the EU countries except the UK, and the allocations at optimal parliament sizes: first with a total of 639 seats (which would minimise inequality as measured by the Gini coefficient), and second with a total of 736 seats (which would minimise the degree of malapportionment).

Table 3: Allocation of seats to EU countries according to the Cambridge Compromise, with Parliament sizes of 639 and 736

	European Parliament without UK			Cambridge Compromise 639 seats				Cambridge Compromise 736 seats			
	Pop. %	Seats	%	Seats	%	Diff.	Pop. / seats	Seats	%	Diff.	Pop. / seats
Germany	18.5%	96	14.2%	96	15.0%		855854	96	13.0%		855854
France	15.0%	74	10.9%	79	12.4%	+ 5	843818	96	13.0%	+ 22	694392
Italy	13.6%	73	10.8%	73	11.4%		831035	89	12.1%	+ 16	681635
Spain	10.4%	54	8.0%	57	8.9%	+ 3	814709	70	9.5%	+ 16	663406
Poland	8.5%	51	7.5%	47	7.4%	- 4	807813	58	7.9%	+ 7	654607
Romania	4.4%	32	4.7%	27	4.2%	- 5	731851	33	4.5%	+ 1	598787
Netherlands	3.8%	26	3.8%	24	3.8%	- 2	707463	29	3.9%	+ 3	585487
Belgium	2.5%	21	3.1%	18	2.8%	- 3	627214	21	2.9%		537612
Greece	2.4%	21	3.1%	17	2.7%	- 4	*634913*	20	2.7%	-1	*539676*
Czech R.	2.4%	21	3.1%	17	2.7%	- 4	620814	20	2.7%	-1	527692
Portugal	2.3%	21	3.1%	17	2.7%	- 4	608314	20	2.7%	-1	517067
Sweden	2.2%	20	2.9%	16	2.5%	- 4	*615689*	19	2.6%	-1	*518475*
Hungary	2.2%	21	3.1%	16	2.5%	- 5	*614405*	19	2.6%	-2	*517394*
Austria	2.0%	18	2.7%	15	2.3%	- 3	580031	18	2.4%		483360
Bulgaria	1.6%	17	2.5%	13	2.0%	- 4	550291	15	2.0%	-2	476919
Denmark	1.3%	13	1.9%	12	1.9%	- 1	475604	13	1.8%		439019
Finland	1.2%	13	1.9%	12	1.9%	- 1	457276	13	1.8%		422101
Slovakia	1.2%	13	1.9%	12	1.9%	- 1	452188	13	1.8%		417404
Ireland	1.0%	11	1.6%	11	1.7%		423503	12	1.6%	+ 1	388211
Croatia	0.9%	11	1.6%	10	1.6%	- 1	419067	11	1.5%		380970
Lithuania	0.6%	11	1.6%	9	1.4%	- 2	320951	9	1.2%	-2	320951
Slovenia	0.5%	8	1.2%	8	1.3%		258024	8	1.1%		258024
Latvia	0.4%	8	1.2%	8	1.3%		246120	8	1.1%		246120
Estonia	0.3%	6	0.9%	7	1.1%	+ 1	187992	7	1.0%	+ 1	187992
Cyprus	0.2%	6	0.9%	6	0.9%		141387	7	1.0%	+ 1	121188
Luxembourg	0.1%	6	0.9%	6	0.9%		96042	6	0.8%		96042
Malta	0.1%	6	0.9%	6	0.9%		72401	6	0.8%		72401
Total	**100%**	**678**	**100%**	**639**	**100%**	**- 39**		**736**	**100%**	**58**	

Source: Bruegel based on Eurostat, European Parliament. Note: European Parliament apportionment of seats for EU27 at 1) current distribution, 2) Cambridge Compromise method with a total of 736 and 3) Cambridge Compromise method with a total of 639 seats. The table shows share of population, number of seats in each scenario, share of seats in the EP, difference to current allocation and population-to-seats ratio. Population-to-seats ratios which are not strictly increasing with population are italicised.

In a European Parliament of 27 countries with 639 seats, France, Italy and Estonia would gain seats, eight countries would be unaffected and 16 would receive fewer seats. Although Germany's number of MEPs would not change, its share of the European Parliament total would increase by 2.2 percentage points (see Table A1 in the Annex for current allocation). Romania and Hungary would lose the most, with five fewer seats each. However, Romania's share of the seats in the European Parliament would be unchanged, and Hungary's share would be 0.3 percentage points lower. The ratio of population to seats would be the same or would fall in three instances. This is in accordance with the current definition of degressive proportionality, which requires the proportion of population to seats to increase before rounding. The apparent deviation from degressive proportionality is thus only a result of the fact that there can be no shared MEPs across countries.

This 639-seat option would decrease the inequality of representation in the European Parliament by almost 20 percent. At the extremes, France, which currently has the largest number of people per MEP, has 12.4 times more people than the country with the lowest number of MEPs, Malta. In a 639-seat parliament, that multiple would fall to 11.8. The minimisation of inequality of representation as measured by the Gini coefficient would thus lead in particular to an adjustment for the countries in the middle of the range – while the constraint of a minimum of six and a maximum of 96 seats prevents adjustments for the smallest and largest countries. In other words, the EU treaty limits the reduction of inequality that can be achieved. Nevertheless, the reduction of inequality would lead to a Gini coefficient that would at least be somewhat closer to the levels of inequality of representation in the French and UK parliament, even though it would still be more than twice as large than in both cases.

Distributing seats according to the Cambridge Compromise in a Parliament with 736 seats, a third of countries would gain and seven countries would receive a smaller number of seats. France, as the currently most underrepresented country, would receive the largest number of additional MEPs (22) followed by Italy (16) and Spain (16). The countries that would lose seats are Portugal, Sweden, Greece, the Czech Republic, Hungary, Bulgaria and Lithuania. The losses in terms of shares of total European Parliament seats would be below 0.3 percentage points compared to current shares.

In this option, the 73 UK seats can, thus, be used to increase the equality of representation of citizens in the European Parliament – reducing the measure of malapportionment – while limiting the loss of seats to a minimum. In three cases – Greece, Hungary and Sweden – the ratio of population to seats would not increase for more populous countries. The EU treaties again limit the adjustment for the smallest and for the largest member states. Nevertheless, one can achieve a reduction of the extent of malapportionment that makes the European Parliament somewhat more comparable to the French and UK parliament, even though inequality would still be more than twice as large, respectively.

Finally, we simulate the Andrew Duff proposal to create a transnational list to which the 73 UK seats would be allocated. This would require EU treaty change and is therefore unlikely to be implemented but, since it is discussed in Brussels, we want to show its effects on inequality and malapportionment. As Table 2 shows, the option would also substantially decrease inequality. However, we note that if treaty change is an option, much more significant changes in electoral equality could be achieved. The interested reader can explore various options that would drop various EU treaty constraints via an online tool that accompanies this Policy Contribution. However, we consider the debate in this area to be a long-term one.

In political terms, changes in seat distribution could lead to changes in the relative shares of political groups in the European Parliament (Table 4). Without the 73 British MEPs, the Socialists and Democrats group (S&D) would lose out while the European People's Party (EPP) would gain. Assuming current country-level voting patterns, it is possible to estimate the distribution of seats between political groups in a European Parliament of 639 or 736 seats. The EPP would gain most, with increases of 2.9 and 2.7 percentage points, respectively. The centrist Alliance of Liberals and Democrats for Europe group (ALDE) and the Greens group would benefit from a smaller parliament in which Germany has a greater weight.

Table 4: Political groups in the European Parliament assuming national percentages of votes based on the 2014 elections

Political Group	Current		Brexit: Drop 73 MEPs		Cambridge Compromise, 639 seats		Cambridge Compromise, 736 seats	
European People's Party (EPP)	217	28.9%	217	32.0%	203	31.8%	232	31.6%
Progressive Alliance of Socialists and Democrats (S&D)	189	25.2%	169	24.9%	159	24.9%	183	24.9%
European Conservatives and Reformists (ECR)	74	9.9%	53	7.8%	49	7.7%	56	7.6%
Alliance of Liberals and Democrats for Europe (ALDE)	68	9.1%	67	9.9%	63	9.9%	72	9.7%
United Green Left (GUE/NGL)	52	6.9%	51	7.5%	49	7.7%	56	7.7%
Greens/European Free Alliance (Greens/EFA)	50	6.7%	44	6.5%	42	6.6%	47	6.4%
Europe of Freedom and Direct Democracy (EFDD)	44	5.9%	24	3.5%	23	3.6%	28	3.8%
Europe of Nations and Freedom (ENF)	39	5.2%	38	5.6%	38	5.9%	46	6.2%
Non-attached members	18	2.4%	15	2.2%	13	2.0%	16	2.1%
Total	**751**	**100%**	**678**	**100%**	**639**	**100%**	**736**	**100%**

Source: Bruegel. Note: Distribution of seats across political groups 1) currently, 2) without the 73 British MEPs, 3) at a Cambridge Compromise allocation with 736 seats and 4) with 639 seats. The number of seats in the latter two scenarios are approximated using voting patterns from the 2014 parliamentary election.

6 Conclusions

The departure of the UK from the EU offers a political opportunity to change the number and allocation of seats in the European Parliament. The European Parliament has itself called for a reassessment and for greater equality of representation. A straightforward option would be to drop the 73 seats currently allocated to the UK – this would also be a cost saving option, but it would increase electoral inequality. Another option would be to share out some of the seats between EU countries. Our two scenarios for optimal redistribution would reduce inequality of representation in the European Parliament, as measured by the Gini coefficient and the malapportionment coefficient, within the constraints of the EU treaties. In these scenarios, the number of European Parliament seats would shrink by 112 or 15.

We consider it important to reform the parliament to increase equality of representation with a view to increase its legitimacy as a parliament representing EU citizens equally. At a time when the EU budget will shrink and scepticism about EU institutions is high, the EU should carefully explore our options. It should also consider whether a smaller parliament would be more efficient. However, within the constraints of the Treaties, only limited increases of equality are possible so that our reform options will not fully settle the debate. With a treaty change, equality of representation could be achieved that would render the

European Parliament more comparable to a lower house in a national parliamentary context. But we consider such treaty change and debate unlikely, which is why we have not presented such options in this paper. We hope that our computations and the online tool will contribute to transparency in the upcoming debate on the European Parliament, which no doubt will be highly controversial.

References

BVerfG (2009) 'Judgement of the Second Senate of 30 June 2009, 2 BvE 2/08 - pars. (1-421)', Bundesverfassungsgericht, Karlsruhe

Charvát, J. (2015) 'Apportionment amongst Member States and the Value of a Vote in the 2014 European Parliamentary Elections', *Revista de Stiinte Politice* no 48, pp179-190

Duff, A. (2011) 'Report on a proposal for a modification of the Act concerning the election of the Members of the European Parliament by direct universal suffrage of 20 September 1976', (2009/2134(INI)). A7–0176/2011, Committee on Constitutional Affairs, Brussels

Duff, A. (2014) 'Foreword, in Pukelsheim, Friedrich, *Proportional Representation*, Springer International Publishing, Cham, Switzerland

European Parliament (2013) 'Composition of the European Parliament with a view to the 2014 elections', 2012/2309(INL), European Parliament resolution of 13 March

European Parliament (2015) 'Reform of the electoral law of the EU', P8_TA(2015)0395, European Parliament resolution of 11 November

Fry, V. and McLean, I. (1991) 'A note on Rose's proportionality index', *Electoral Studies* 10(1), pp. 52–59.

European Commission (2016) *General budget of the European Union for the financial year 2017*, COM(2016) 300, vol 1, sec 1

Grimmett, G., Laslier, J.-F., Pukelsheim, F., Gonzalez, V. R., Rose, R., Slomczynski, W., Zachariasen, M. and Zyczkowski, K. (2011) 'The allocation between the EU member states of the seats in the European Parliament Cambridge Compromise', PE 432.760, Policy Department C - Citizens' Rights and Constitutional Affairs, European Parliament

Gualtieri, R. and Trzaskowski, R. (2013) 'Report on the composition of the European Parliament with a view to the 2014 elections', A7–0041/2013, Committee on Constitutional Affairs, European Parliament

Hix, S., Hagemann, S. and Frantescu, D. (2016) 'Would Brexit matter? The UK's voting record in the Council and the European Parliament', *VoteWatch Europe*, Brussels

Lamassoure, A. and Severin, A. (2007) 'Report on the composition of the European Parliament', A6–0351/2007, Committee on Constitutional Affairs, European Parliament

Loosemore, J. and Hanby, V. J. (1971) 'The theoretical limits of maximum distortion: Some analytic expressions for electoral systems', *British Journal of Political Science* 1(04), pp. 467–477

Marcelino, D. (2016) 'SciencesPo: A tool set for analyzing political behavior data', www.CRAN.R-project.org/package=SciencesPo, accessed 26 January 2017

Rose, R. (2012) 'Representation in Parliamentary Democracies: The European Parliament as a Deviant Case', in T. Evas, U. Liebert and C. Lord (eds) *Multilayered Representation in the European Union*, Nomos Verlagsgesellschaft mbH & Co. KG

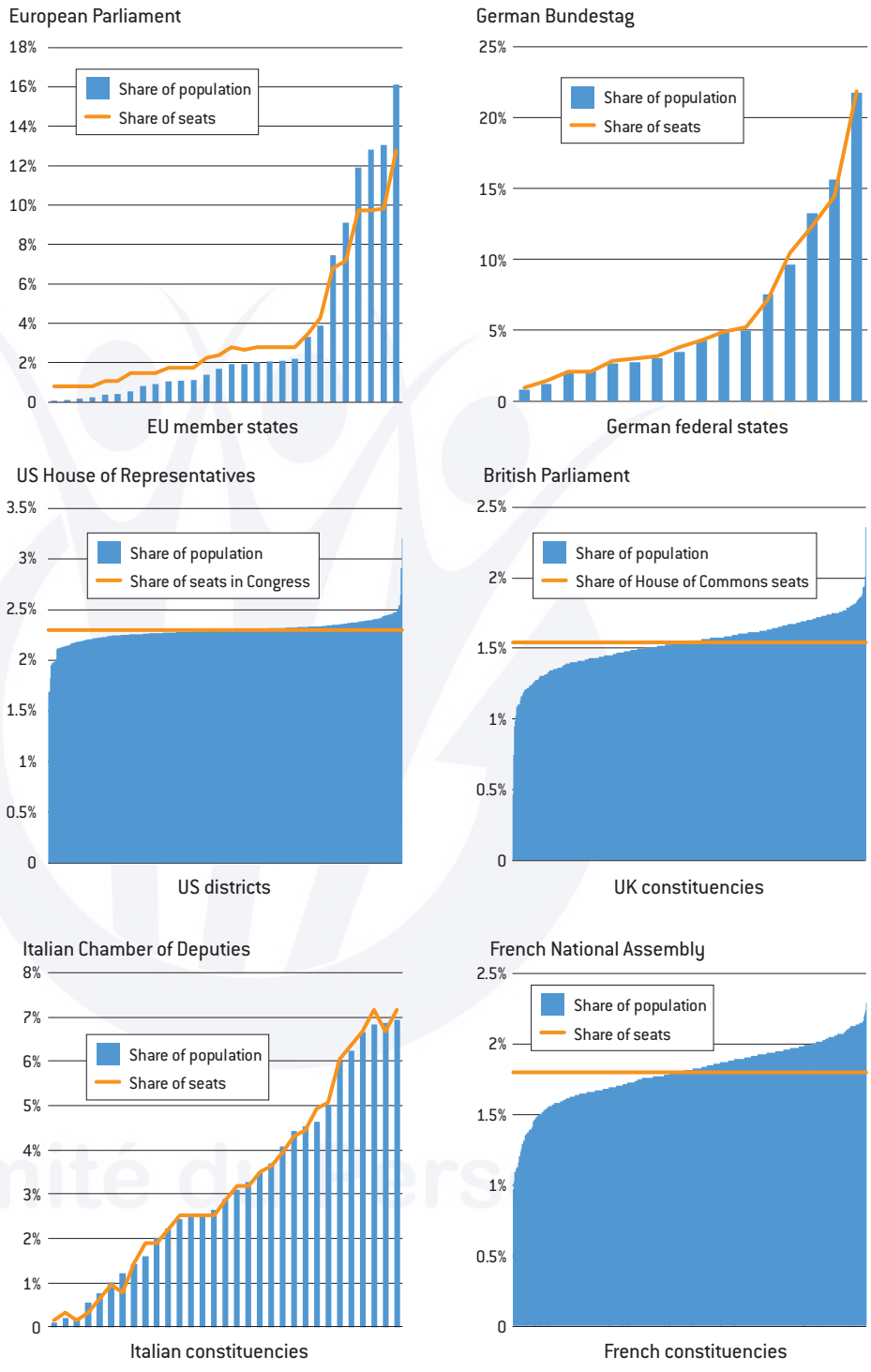
Samuels, D. and Snyder, R. (2001) 'The value of a vote: malapportionment in comparative perspective', *British Journal of Political Science* 31(04), pp. 651–671

Taagepera, R. and Grofman, B. (2003) 'Mapping the indices of seats–votes disproportionality and inter-election volatility', *Party Politics* 9(6), pp. 659–677

Tailor A. and Véron, N. (2014) 'How unequal is the European Parliament's representation?', www. voxeu.org/article/inequality-european-parliament-representation, accessed 26 January 2017

Annex

Figure A1: The European Parliament in comparison to other parliaments



Source: Bruegel.

Table A1: Allocation of seats in the European Parliament

Country	Pop. %	Seats	%	Pop./seats
Germany	16.1%	96	12.8%	855,854
France	13.1%	74	9.9%	900,833
United Kingdom	12.8%	73	9.7%	895,085
Italy	11.9%	73	9.7%	831,035
Spain	9.1%	54	7.2%	859,971
Poland	7.4%	51	6.8%	744,455
Romania	3.9%	32	4.3%	617,499
Netherlands	3.3%	26	3.5%	653,043
Belgium	2.2%	21	2.8%	537,612
Greece	2.1%	21	2.8%	513,977
Czech Republic	2.1%	21	2.8%	502,564
Portugal	2.0%	21	2.8%	492,444
Sweden	1.9%	20	2.7%	492,551
Hungary	1.9%	21	2.8%	468,118
Austria	1.7%	18	2.4%	483,360
Bulgaria	1.4%	17	2.3%	420,811
Denmark	1.1%	13	1.7%	439,019
Finland	1.1%	13	1.7%	422,101
Slovakia	1.1%	13	1.7%	417,404
Ireland	0.9%	11	1.5%	423,503
Croatia	0.8%	11	1.5%	380,970
Lithuania	0.6%	11	1.5%	262,596
Slovenia	0.4%	8	1.1%	258,024
Latvia	0.4%	8	1.1%	246,120
Estonia	0.3%	6	0.8%	219,324
Cyprus	0.2%	6	0.8%	141,387
Luxembourg	0.1%	6	0.8%	96,042
Malta	0.1%	6	0.8%	72,401
Total	**100%**	**751**	**100%**	

Measures of electoral inequality

Inequality in the apportionment of seats quantifies the deviation from proportional representation. Taagepera and Grofman (2003) discuss the multitude of existing indicators for disproportionality and evaluate these by practically and theoretically desirable criteria such as simplicity or response to transfers. This Policy Contribution uses the voting Gini and the Loosemore and Hanby (1971) indicator for malapportionment to estimate the degree of inequality in the European Parliament and compare it to other parliamentary bodies.

The Loosemore-Hanby indicator for malapportionment has been widely applied to measure inequality of representation and offers an intuitive interpretation. It measures the proportion of seats which would need to be redistributed to achieve perfect equality (Samuels and Snyder, 2001). The formula is:

$$D=1/2 \sum|s_i-v_i|$$

Where s_i stands for the percentage of all seats allocated to country i and v_i for the percentage of the overall population. A drawback of this indicator is that it does not capture transfers between overrepresented countries or between underrepresented countries as these would not change the total difference in seats to proportional representation. The voting Gini, as specified in Fry and McLean (1991), improves upon the Loosemore-Hanby indicator in terms of capturing transfers at the expense of being harder to interpret.

The minimisation of inequality with respect to the European Parliament size – described in Box 1 – has been repeated for six other indices of malapportionment provided by Marcelino (2016). The results are robust as each indicator either implies an optimal parliament size of

639 or 739. The class of indicators including Loosemore-Hanby specify a linear penalty for differences to proportionality while the class including the Gini have a larger penalty for deviations.