The UK EU Referendum and the move towards Brexit

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ABSTRACT

After the Brexit referendum in 23 June 2016 both the EU and the UK were led to a political turmoil on account of the winning of the Leave campaign. The withdrawal procedure should be triggered by the UK Government, in accordance with the UK constitutional requirements. The main UK constitutional problem has been whether the Government can trigger the Article 50 TEU procedure to withdraw from the EU without involving the Parliament.

The judiciary had to solve this constitutional and political dilemma. The English High Court ruled first on Article 50 TEU in November 2016. Subsequently, this decision was appealed to the Supreme Court, which delivered its ruling in 24 January 2017. The key questions were about the interpretation of the royal prerogative and the status of the devolved legislatures in the context of Brexit. With regard to the prerogative powers, the Supreme Court confirmed that the UK government cannot trigger Article 50 procedure without an authorizing Act of Parliament. On the role of the devolved

1 Any views expressed in this article are personal and do not represent the positions of the Law Society of England and Wales, the Law Society of Scotland, the Law Society of Northern-Ireland or the Joint Brussels Office.
legislatures, the Supreme Court ruled that they do not have a veto on the UK’s decision to withdraw from the EU.

This controversy partly explains the delay to launch the withdrawal of the UK. Other reasons for the delay are more political and relate to the obscurity of the political will. The UK has to decide what it wants to achieve in the negotiations for the future relationship with the EU. In this article a few models are explored, but the models provide only speculative value at the moment. Although it currently seems that the UK government is leaning towards the hard, or in its own words "clean", Brexit, this article aims to clarify further the ‘hard Brexit’, ‘soft Brexit’ and reversed Greenland options. Therefore, the purpose of this article is to analyse the situation and the options that could be open for the UK rather than advocate any over another. In other words, it does not try to place any option over another and it does not aim to advocate what should happen next.

Keywords: Article 50 TEU, parliamentary sovereignty, rule of law, devolution, hard Brexit, soft Brexit, reversed Greenland

1. Introduction: The Referendum 23 June 2016 and Article 50 TEU

As is commonly known, the UK referendum on EU membership was held on Thursday 23 June, to decide whether the UK should leave or remain in the European Union. To the surprise of many, Leave won by 52% to 48%. This can be placed against the background that there have been for decades suspicious sentiments in Britain against the EU for its perceived bureaucracy or "red tape", democratic deficit and not taking subsidiarity and proportionality seriously enough, as highlighted by

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2 The BBC News, http://www.bbc.com/news/uk-politics-32810887. The referendum turnout was 71.8%, with more than 30 million people voting. England voted strongly for Brexit, by 53.4% to 46.6%, as did Wales, with Leave getting 52.5% of the vote and Remain 47.5%. Scotland and Northern Ireland both backed staying in the EU. Scotland backed Remain by 62% to 38%, while 55.8% in Northern Ireland voted Remain and 44.2% Leave.

the 2014 UK government balance of competences review conclusions\textsuperscript{3} - even though generally the review did not find any major issue where the UK would gain with re-appropriating powers back.

As to particular issues, gaining back control in the field of immigration and the UK contributions to the EU budget were perhaps the most decisive political arguments in favour of the nationalistic Leave campaign. Furthermore, in the press and public eye, it has been perceived that the UK stands apart from its Continental partners: the EU is run by a type of ‘French arrogance’ and idealism over pragmatism, which does not suit Britain’s outlook or interests. Even when it comes to the legal system, the UK, and in particular England, is different with its common law approach, while other Continental Member States belong to a ‘strange’ civil law system.

This all above points to an existence of a deeper questions, how the UK perceives itself in Europe is changing and whether due to this, the traditional reasons for the UK’s EU membership are not valid anymore. A British government’s White Paper in July 1971 enrolled the arguments in favour of the accession to the EEC as follows: "Our country will be more secure, our ability to maintain peace and promote development in the world greater, our economy stronger, and our industries and people more prosperous, if we join the European Communities than if we remain outside them."\textsuperscript{4} While this argument was used in the 2016 referendum, it failed to convince the majority of particularly elderly voters who have been living through the period of the membership.

It is clear that the political establishment was not ready for the result, though. The prime minister, David Cameron, and the key members of his Government had supported strongly the Remain


\textsuperscript{4} See D. Dinan, \textit{Ever Closer Union, An Introduction to European Integration} (second edition, Palgrave, 1999), p. 65. However, even this white paper commented the politically hot topic on sovereignty so that there is no question of any erosion of essential national sovereignty.
campaign, however he, with the Cabinet, decided to resign on the day after losing the referendum. This was not what he had declared what he would do in case of a Leave vote and revealed the fact that the UK Government had not been prepared for the Leave campaign’s victory. Following the Conservative Party deliberations, the former home secretary Theresa May became the new Prime Minister in July. Mrs May was against Britain leaving the EU but she announced that she will respect the will of the people, and she placed leading figures from the Brexit campaign into key places of the new Government. The Government and PM May have been clear that the outcome of the Brexit referendum means that the UK will leave the EU.\(^5\) According to the key speech by May in January 2017,\(^6\) where she was elaborating further the Government's Brexit vision, this means that the UK will not be seeking any arrangement that would resemble the EU membership. The aim for the Government is to make a "clean Brexit", whereby it will seek most likely to withdraw the UK from the EU single market.

However, as to the details of Brexit, there is no specific plan as to what, if any, relationship should the UK continue to have after the end of the EU membership. The Government published a White Paper on its priorities on 2 February 2017.\(^7\) Even though this document lays out the main 12 points of the Government’s priorities for the new UK – EU relationship, it does not include much detail or ideas as to how to achieve the desired negotiation result.

In the background, discussion ranges between a ‘hard Brexit’, meaning that the UK may be falling outside of any trade arrangements or have a rather limited arrangement based on international trade


framework with the EU, and a ‘soft Brexit’, which means that the UK will keep access to the internal market. As the Government is silent on the form, or even sometimes giving contradictory indications as to what it wants from these negotiations, it has led to this somewhat extraordinary and even chaotic situation, where it is difficult to give any accurate statements as regards the key question ‘what does Brexit mean?’

Against this background, there is still an on-going discussion as to the different options available for the UK. Article 50 TEU, while it gives a certain purpose and the procedural framework, it leaves gaps which now need to be filled. The first question for the UK was how to trigger Article 50 TEU, i.e. notify its EU partners that it wants to initiate the withdrawal procedure. This is an issue where neither the EU law nor the UK constitutional law prescribed an obvious answer. Another question for the UK, as well as the remaining EU Member States, relates to the possible agreement on a new relationship.


For the purpose of our analysis, it is beneficial to reproduce here the full text of Article 50 TEU:

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.
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.\(^8\)

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

In many respects Article 50 TEU leaves many relevant questions open. Most of the present uncertainties which have arisen in the context of the UK Brexit relate to the national competences to trigger the process. According to the division of powers between the EU and Member States, it is not for Article 50 TEU or EU law to clarify this as the relevant procedures for notifying the European Council are decided by the national laws, in the same way as it is for the national law of the acceding state to determine the process of accepting accession to the EU.

There is a central omission in the structure of Article 50 too. It fails to mention whether a withdrawing Member State may un-trigger the process during the withdrawal negotiations. It was discussed before the Supreme Court rendered its judgment, whether this question should be referred to the CJEU, in order to determine what is the effect for the UK for notifying the EU that it wants to start the

\(^8\) By way of derogation from point (a), where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, 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. This means in practice 20 Member States.
negotiations. However, the Government did not contest the applicants' claim on this point and therefore the Court did not need to make a referral to the CJEU.

Another issue, that is discussed further below, is whether Article 50 TEU can form a legal basis for the agreement on the new relationship between the EU and UK. Furthermore, there might be issues arising from the devolution of powers, as the process of changing the UK legal framework moves on. Therefore, it is clear that as the process goes on, many unforeseen legal problems and following this, legal challenges, may still arise. A good example is the recent challenge on the UK membership in the European Economic Area, where according to the claimants, the UK would need to separately withdraw from the EEA. This argument is not likely to be as successful as the Article 50 proceedings, because only EFTA states and EU states can currently be parties to the EEA. For the UK to stay in the EEA after exiting the EU, it would need to become a member of EFTA, and it would need to separately accept the EFTA arm of the EEA agreement, including the oversight of the EFTA Court. However, that does indicate that there are going to be challenges on the way.

This said, there are few things that are in our opinion clear. First, it is up to the UK when to trigger Article 50 TEU procedure. Second, the remaining EU Member States have announced that there will be no negotiations of any kind before the UK has notified the European Council of its intention to withdraw. This stance can clearly be based on the wording of Article 50 TEU, there is no change in status quo and therefore no basis for the negotiations before the notification is done and the procedure starts. Third, the Treaty sets out a two-year time limit for the exit negotiations and as there is a unanimity requirement for extending the negotiation period, this makes it very difficult to extend it in practice.

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9 As argued by Jolyon Maugham QC, Brexit: The Important Role of the Court of Justice, https://waitingfortax.com/2016/10/16/brexit-the-important-role-of-the-court-of-justice/?emailid=5655d008cb56e60fc6447e22&segmentId=488e9a50-190e-700c-cc1c-6a339da99cab.

10 See for example, the Financial Times, David Allen Green, Could Article 127 be used to keep the UK in the Single Market, 29 November 2017. A hearing on this case is to be held in the beginning of February and the decision will be likely later in February / early March.
3. The United Kingdom Constitutional Landscape: Royal Prerogative and Parliamentary Sovereignty

One of the most complex issues during the fall 2016 has been what is the correct constitutional procedure for the UK Government to trigger Article 50 TEU to start the UK-EU negotiations. As stated above, this falls for the national law to decide. However, the problem here is that neither the UK constitutional law nor the 2015 EU Referendum Act set out clearly the procedure for notification. The EU Referendum Act of 2015 did not give binding status for the EU referendum and provided simply that the referendum result is advisory. The question therefore arose whether the decision to notify the EU under Article 50 TEU can be simply approved by a royal prerogative, or if it needs to be submitted to a parliamentary approval, in other words that a debate and vote by both houses of the Parliament would need to take place. Thus the debate concerned the role and powers of the executive (Government) and the legislature (Parliament).

The Government argued forcefully that it has royal prerogative to trigger Article 50 in the EU. The royal prerogative is often used for matters relating to international affairs, but it was questioned, whether there are constitutional restraints based on the very core of the concepts of the Parliamentary sovereignty and even the rule of law. In consequence, several court proceedings were raised to protect the parliamentary involvement (e.g. cases Gina Miller or Mischon de Reva on behalf of its clients). One of the main claimants, Gina Miller, stated that the courts should uphold that the referendum was merely consultative and the democratically elected Parliament should decide whether to trigger the Article 50 procedure or not.

The Government's reasoning for the use of royal prerogative was published in response to the national court proceedings.\footnote{See e.g. The Queen on the application of Gina Miller, Dier Tozetti Dos Santos and Secretary of State for exiting the European Union, CO/3809/2016, CO/3281/2016, High Court of Justice, Queen’s Bench Division, Detailed Grounds of Resistance on Behalf of the Secretary of State. The Secretary of State submits that it would be entirely appropriate under the UK’s unwritten constitution for the Government to proceed to implement the outcome of the referendum using} The Government’s main claim rested on two factors: first, the notification under
Article 50 TEU is an administrative act under international plane which the Government should be entitled to do as it simply puts into effect the will of the people after the referendum; and second, the act of triggering Article 50 TEU itself would not entail any change in the UK’s legal obligations under European Communities Act 1972, amending which would require a parliamentary approval. For this purpose, the Government declared in October that it will present in the Queen's speech in spring a “Great Repeal Bill” for the Parliament, which (once approved) will aim to disconnect wholly the UK legal system from the EU. Parliament did not fully agree and the House of Lords constitution committee required an explicit parliamentary approval for the Brexit notification.

The High Court in London agreed with the claimants in the Miller-case in November in that the Government cannot side-step the UK Parliament. The royal prerogative can only be used in foreign affairs and where its use does not amend current statute law of the UK. According to the Court, the decision to trigger Brexit would strip the existing EU law and the provisions of the European Communities Act 1972 (the 1972 ECA) of their effect in national law. The primacy of Union law is confirmed by Section 2 of the 1972 ECA. This Act provides that all rights, powers, liabilities, obligations and restrictions created by or arising under EU Treaties will be recognisable or given effect to in UK law. The Court further considered that the 1972 ECA is one of the constitutional acts, which cannot be derogated from unless there is a parliamentary act that expressly aims to do so. Furthermore, the 1972 ECA creates a set of rights for EU citizens, UK citizens and businesses, which are conditional on continued EU membership. The High Court also pointed out that the 2015 prerogative powers and without the need for further Parliamentary authorization. The statement was dated on 2 September 2016.

13 The House of Lords constitution committee. “In our representative democracy, it is constitutionally appropriate that parliament should take the decision to act following the referendum. This means that parliament should play a central role in the decision to trigger the Article 50 process, in the subsequent negotiation process, and in approving or otherwise the final terms under which the UK leaves the EU”, The Guardian, 14 Sept. 2016.
15 It is noteworthy that in other Member States the supremacy of EU law can be based on the acquis communautaire, which in turn relates especially to the case law of the European Court of Justice and the primary and secondary EU norms.
Referendum Act was passed against a background including a clear briefing paper to parliamentarians explaining that the referendum would have advisory effect only.\textsuperscript{17}

The interpretation of the royal prerogative seemed to be a highly controversial issue, with the Belfast High Court arriving to a different opinion also in November. The Belfast High Court stated that neither the UK Parliament in London, nor the Northern Ireland Assembly, had to be asked for their consent before the UK government triggers the Article 50 procedure.\textsuperscript{18} The High Court in London took it for granted that once the Article 50 procedure is triggered, it cannot be stopped, whereas the High court in Belfast did not agree on this, holding the UK announcement as revocable. It further found that the decision to notify the EU of the intention to leave under Article 50 does not itself generate changes in law. Therefore, the UK’s Supreme Court faced a dilemma, which interpretation of the royal prerogative and Article 50 procedure it prefers.

The Government appealed the London High Court decision to the UK Supreme Court. In December 2016 the case was heard by the Supreme Court and it delivered its ruling in 24 January 2017.\textsuperscript{19} As regards the prerogative powers the Supreme Court confirmed by a strong majority of 8 to 3 that the UK government cannot trigger Article 50 procedure without an authorizing Act of Parliament. The prerogative powers may not extend to acts which result in a change to UK domestic law. Consequently, the Government must seek for an Act of Parliament before triggering Article 50, since it is obvious that withdrawal from the EU treaties would change domestic law, which in turn would remove some existing domestic rights of UK residents.

\textsuperscript{17} Ibid, para. 107. The Court stated: "Moreover, Parliament must have appreciated that the referendum was intended only to be advisory as the result of a vote in the referendum in favour of leaving the European Union would inevitably leave for future decision many important questions relating to the legal implementation of withdrawal from the European Union".

\textsuperscript{18} The claimant Mr McCord claimed that the Brexit could undermine a 1998 peace deal, reinstate a hard border with the Republic of Ireland and cut EU cross-community funding. Irrespective of all this the High Court found that the 1998 Northern Ireland Act created no substantive legitimate expectation that its people will be consulted on before withdrawing from the EU.

\textsuperscript{19} See Judgment given on 24 January 2017, R (Miller and Dos Santos) v Secretary of State for exiting the European Union (2017) UKSC 5.
The outcome of the ruling is not unpredictable, since further analogy in favour of the Parliamentary powers can be drawn from the British notion of rule of law, as exemplified in the Ponting case.\textsuperscript{20} The concept of the rule of law sets out the balance of power between the executive and the legislature, in which the Government is subordinate to Parliament.\textsuperscript{21} Accordingly, as the triggering of Article 50 TEU will have consequences for the UK legal framework and the rights of individuals, as pointed out by the High Court, it should be done jointly by the Parliament and the Government.

4. Comments on Devolution

It was argued also in the Supreme Court case that Brexit will have impact on the UK regional arrangements and thus on the devolved powers. This is the case in particular about the devolution in Scotland. While the Sewel Convention\textsuperscript{22} section 28(7) allows the UK Parliament to legislate in areas which fall under the devolved powers, the Government had declared that it expects that a convention is established whereby the UK Parliament will not normally exercise its legislative rights with regard to devolved matters without the agreement of the Scottish legislature. Furthermore, the section 2 of the 2016 Scotland Act provides that “the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.” The Supreme Court heard from the Scottish experts and the Government about their views on these provisions.

\textsuperscript{20} See \textit{R. v Ponting} (1985) Crim. L.R. p. 318-321. In the Ponting case the court had to weigh and balance between the requirement of loyalty of civil servants and the traditional British conception of Parliametarism.


\textsuperscript{22} Ibid, para. 136. The Sewel convention (1998) provides a political framework for the devolution. The convention was adopted as a means of establishing cooperative relationships between the UK Parliament and the devolved institutions, where there were overlapping legislative competences. In each of the devolution settlements the UK Parliament has preserved its right to legislate on matters which are within the competence of the devolved legislature.
Another possible issue arises from the stability of the border and other arrangements on the citizenship of those born in the island of Ireland between the Northern-Ireland and the Republic of Ireland,\textsuperscript{23} which may fall under the 1998 Good Friday Peace Agreement.\textsuperscript{24}

The Supreme Court ruled, however that the devolved legislatures do not have a veto on the UK’s decision to withdraw from the EU. The Supreme Court unanimously concluded that neither the Northern Ireland Act nor the Sewel Convention is of assistance in this case. From the legal point of view this outcome was not wholly unpredictable. For example, the political nature of the Sewel Convention has previously been recognised by Lord Reed in the Imperial Tobacco –case.\textsuperscript{25}

Yet, once the negotiations proceed the true significance of the devolution will be put to a test. The Government will need to propose several Bills which will have impact on the devolved powers and the use of those powers. The Government White Paper does recognise this but it does not provide any other promises than to hold talks with the devolved administrations.\textsuperscript{26} The devolved administrations may continue testing the limits of the Convention and the Acts against more specific proposals in future. Furthermore, the Scottish National Party has already in 2014 argued that the EU referendum should in fact require support of all four nations of the United Kingdom, namely England, Northern-Ireland, Scotland and Wales,\textsuperscript{27} and the Scottish executive is currently aiming to propose another independence referendum.\textsuperscript{28}

\section*{5. Constitutional Bills after the Ruling}

\textsuperscript{24} Even though the Belfast high court has now dismissed the legal challenge on Brexit, Belfast Times, 28 October 2016.
\textsuperscript{25} Ibid, p. 144 and the case Imperial Tobacco v. Lord Advocate 2012 SC 297, para 71.
\textsuperscript{26} Government White Paper, The United Kingdom’s exit from and partnership with European Union, section 3, Strengthening the Union.
\textsuperscript{27} See S. Tierney and K. Boyle, in P.J. Birkinshaw and A. Biondi (eds), Britain Alone!, p. 53.
After the Supreme Court ruling it looks like there will be two different Bills from the Government: The Bill authorising the Government to trigger Article 50 and the "Great Repeal Bill". The first Bill is simply asking the authority from the Parliament to trigger Article 50 procedure and start the negotiations for the UK to leave the EU. This would comply with the Supreme Court judgment as the Court did not request the Government to set out its negotiation objectives in the Bill. The Government published already within two days after the ruling a simple Bill, in which the Parliament is asked to give the Prime Minister the authority to issue notice of the UK’s intent to withdraw from the EU. This Bill is already on its way through the Parliament. The Commons had the first vote on it on 1 February, where the overwhelming majority voted in favour.

The Government will also introduce a "Great Repeal Bill" in Queen's speech in May. The purpose of this bill is to transpose all the current EU law into domestic UK law, in order to avoid a sudden legal vacuums as the UK exits from the EU legal framework. This Bill may potentially present many challenges, in particular it does not provide for sufficient answer where there are mutual cooperation frameworks between the UK and the EU. However, these challenges are outside the scope of this paper and to be considered in a later time when it will be more clear what the Government aims to present.

However, the referendum and these Bills set out only the basic position that the UK should withdraw from the EU, but not how or on what conditions. Given the Supreme Court decision, one can hardly

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29 The bill was published in 26 January 2017 and it’s aim is to “confer power on the Prime Minister to notify, under Article 50(2) of the Treaty on European Union, the United Kingdom’s intention to withdraw from the EU”. Granting this power to the Prime Minister would have effect "despite any provision made by or under the European Communities Act 1972 or any other enactment". This important bill has granted only 5 days of time in the House of Commons.

30 There were 498 votes in favour and 114 against.

31 There is quite some concern that the Bill would introduce the power for the Government to change EU law obligations through statutory instruments. While the Government argues that this kind of flexibility is needed, as the EU law governs very wide areas of law, there are some concerns that this would end with a great power transfer in favour of executive, see for example Sionaidh Douglas-Scott, "The Great Repeal Bill: Constitutional Chaos or Constitutional Crisis?", UK Constitutional Law Association, https://ukconstitutionallaw.org/2016/10/10/sionaidh-douglas-scott-the-great-repeal-bill-constitutional-chaos-and-constitutional-crisis/.

conclude that the triggering and proceeding with the Brexit is just ‘business as usual’ or simple ‘administrative acts’ in the field of foreign affairs. The enormous consequences of the Brexit in the UK should not be underestimated. As Birkinshaw and Varney have pointed out there is hardly an aspect of law that is not influenced, or completely occupied, by EU law. For example, one may refer to the laws of data protection, public procurement, environmental protection, competition, state aid, consumer protection or corporate laws.\textsuperscript{33} Therefore, it is clear that the Parliament will try to secure its right to exercise genuine input into the direction of the new UK-EU relationship and the manner in which the UK-EU negotiations shall proceed. Against the background outlined above, there is more than Brexit at stake.\textsuperscript{34}

6. The UK - European Union Relationship after the Brexit vote: A Tale of Two or Three Agreements

Then it is time to turn the attention to what is likely to happen after the triggering of Article 50 TEU. As stated before, there can be no formal withdrawal negotiations before the UK has notified European Council of its intention to withdraw. That is why nothing special seems to happen in the EU sphere, although informal discussions and diplomacy in the Brussels corridors do take place. The EU institutions have set their Brexit negotiation teams, with Michel Barnier leading at the Commission, Didier Seeuws at the Council and Guy Verhofstadt in the Parliament. In Brussels, it is commonly expected that the negotiations will take years to come. If this is the case, the negotiations will at least in principle require three stages: the withdrawal agreement and the future relationship agreement or agreements, and provided that there is a good prospect of a new EU – UK relationship, but the new

\textsuperscript{33} See P-J. Birkinshaw and M. Varney, ‘Britain Alone Constitutionally: Brexit and Restitutio in Integrum’, in P.J. Birkinshaw and A. Biondi (eds), \textit{Britain Alone!}, p. 34-37.

\textsuperscript{34} See for example the comment by Dr. Timothy Lyons, QC, The Law Society Gazette, 3. November 2016, \url{https://www.lawgazette.co.uk/comment-and-opinion/article-50-much-more-than-brexit-at-stake/5058646.article}. He rightly describes the struggle between the Crown (executive) and a democratically elected legislature.
agreement is not ready once the UK ceases to be an EU State, they may be need to put a transitional agreement in place.

One source of the complications here is Article 50 TEU. Article 50 sets out a separate ratification mechanism only for the withdrawal. The withdrawal agreement (“the divorce settlement”) is to be negotiated in accordance with Article 218(3) TFEU and based on Article 50 (2) TEU. Article 50 is more vague about the new arrangements, it only provides that the withdrawal process may take account of the framework of the new relationship of the withdrawing state from the Union. Furthermore, it provides that the withdrawal agreement and the arrangements for future agreement are to be concluded within two year time period, unless the Member States unanimously agree to extend the negotiating period.

Consequently, if the negotiations between the EU and the UK are successful in determining the conditions for withdrawing and the content of the new relationship, the date of the UK’s withdrawal would then be the date of entry into force of the withdrawal treaty. If the UK and EU fail to agree on the conditions of the withdrawal, it is presumed that the withdrawal will automatically happen two years after the notification of the UK’s Brexit decision to the European Council, unless there is a unanimous decision to extend the negotiations. This would have the effect that the UK will not have a place or representation at the EU institutions anymore, and also, importantly, that there is no special legal cooperation between the UK and the EU beyond what is provided in the WTO framework.

Against these conditions, it is possible that the UK and the EU will conclude a series of agreements. The first agreement on exit and after that they will seek another agreement on the new relationship. In order to ensure that there is no gap between the two, it is also possible to agree on a transitional agreement to tie in these two periods together.

35 See e.g. J-C. Piris, ‘Which Options Would Be Available for the United Kingdom in the Case of a Withdrawal from the EU’, in P.J. Birkinshaw and A. Biondi (eds), Britain Alone!, p. 111-137, at p. 113.
The fact that the Treaty gives only two years for the UK and EU to reach an exit agreement has increased the pressure on the UK Government to formulate its position prior the beginning of the negotiations. It has become very clear that the Government did not have a position ready at the time of the referendum, as even though PM Cameron insisted before the result was known that he would trigger Article 50, he was not able to do so. Rather, the Government has drafted its position for a relatively long time, with the clear intent that the Government is listening to the stakeholders in the UK as to their thoughts and priorities. The Prime Minister May revealed the Government’s starting position for the negotiations on 17 January 2017, in her speech at Lancaster House. She indicated that she wants to have a clean Brexit and warned the EU that the UK is prepared to crash out of the EU, if she cannot negotiate a reasonable Brexit deal. Subsequently the Government published the White Paper, which repeated the Prime Minister’s points and elaborated further on the thinking behind them.

Even though the speech and the White Paper give glimpses to the Government vision on Brexit, they do not elaborate any more fully what the UK will seek more specifically. The Government states that it does not seek internal market access as it wants the “best deal for the UK and the EU”, which allows the Government to take back control on migration and remove the Court of Justice’s jurisdiction. Yet, the Government recognises that, for example, that it may need to set up a separate dispute settlement mechanism to govern the new Treaty, it will not want to see border between the UK and the Republic of Ireland, and the Government will seek to have full access to the goods and services in the EU. Consequently, there are quite some legal contradictions, which will be difficult and complicated to negotiate. For example, the Prime Minister set out that the UK will leave the customs union, however, she will also seek to keep the UK within the no tariff zone.

At the same time, the Prime Minister is pushing the Parliament that the Government can trigger the Article 50 procedure by end of March 2017. This would of course fit well the European schedule.

The next elections to the European Parliament are going to be held in May 2019 and at this point it seems clear that neither the UK wishes to participate, nor the Member States want to see the UK taking part in these elections. Sir Julian King, the UK Commissioner appointed after the resignation of the Lord Jonathan Hill following the referendum, has been hailed as the last UK Commissioner. Against this background the negotiation of the special kind of Treaty on the new relationship together with the withdrawal Treaty seems to be unrealistic given the schedule of two years, in a situation where it is becoming clear is that the negotiations are going to include at least two different permanent Treaties: a withdrawal Treaty, which will sever the institutional link between the EU and the UK and set out the implications for the withdrawal, and separately the new agreement on the future relationship agreement between the EU and the UK. It normally takes years to negotiate trade treaties, for example, the CETA between the EU and Canada was launched in 2009, and it has only been finally signed for ratification in October 2016, it is expected that the new UK – EU relationship may take longer than the two years set for the exit.

All this might at least in principle necessitate a third Treaty, which will include transitional arrangements for trade access, while the details of the new relationship are being negotiated. It is understood that the latter will take place only if there is a good prospect for a new EU – UK relationship, and this prospect aims to create a more complex framework of cooperation than something that can be provided by an existing trade or internal market agreement structure, which could be taken directly off-the-shelf, even if it is unlikely that this could be done (more on that below).

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37 See for example the Wall Street Journal, 13 September 2016.
38 See the proposal for a Council Decision on the conclusion of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part, COM (2016) 443 final, 5 July 2016 and the text of the CETA, which contains 1598 pages, can be found in trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf.
39 However, given the PM May’s speech in 17 January 2017 it is not clear, whether the UK is willing to adopt any transitional arrangements for trade access. Her well-known stance is that ”No deal for Britain is better than a bad deal for Britain”.
5.1 Exit Agreement Setting out the “Divorce”

The reason why Article 50 TEU contains such a short time period for the exit agreement is because the exit from the EU in itself can be achieved simply agreeing on a limited number of issues on severing the institutional ties between the EU and the UK and the termination of the UK’s EU rights and obligations. Accordingly, following issues are likely to be included in the exit or divorce agreement:

1. The UK withdrawal from the EU institutional structures. This includes agreement as to the date of termination for the MEPs, the Commissioner’s or the Court of Justice’s Judges’ positions.
2. The final settlement on the UK budgetary contributions and receiving money from the EU funds. This includes the agreement on budgetary contributions for the EU civil servants, where those servants are UK nationals, e.g. on pensions.
3. This agreement may also contain provisions for acquired rights. This may include acquired rights for two different aspects. One, is the possibility for the UK citizens who have been working at the EU institutions (others than the MEPs, the Commissioner or the Judges) to continue being employed by the EU. Secondly, this may also include the ability of the EU citizens currently living in the UK, and the UK citizens currently living in the EU area to continue to live there under the old arrangement. The latter may become an issue in particular if there will be no free movement of persons in the new agreement, or no new agreement in sight.

5.2 Agreement on the new relationship between the EU and the UK

The agreement on the new relationship will aim to set the framework on the future relationship between the UK with the EU. The first question is what will be the legal basis, if the Article 50 TEU will not be suitable for the legal basis for the future relationship agreements? There are at least two
alternatives. The legal basis is Article 207 TFEU, if the agreement for future relationship falls within the scope of Common Commercial Policy. However, the most likely legal basis would be Article 218 TFEU, which concerns negotiation and conclusion of international agreements by the EU.\textsuperscript{40} The scope of Article 218 TFEU is much broader than the scope of Article 207 TFEU, under this provision it is possible for the EU to make an agreement where it has competences. It is also possible that the final agreement will be a so-called “mixed agreement” between the UK and EU and the Member States.

Even though the UK government has declared its aims for the negotiations, wishing for a clean break, it is still somewhat speculative to predict what kind of agreement this would be. It is still timely to take inspiration from some of the existing frameworks as possible options for the UK. For example, Piris has listed seven theoretical options for a legal framework to establish a new relationship between the UK and the EU after Brexit as follows:

1. The establishment of a new structured relationship would be provided for in the withdrawal treaty, adopted on the basis of Article 50, which could establish custom-made arrangements.

2. The UK could try to join the European Economic Area (EEA – Iceland, Norway, Liechtenstein)

3. The UK could re-join the European Free Trade Agreement (EFTA), which it left in 1973.

4. The UK could try and follow the current “Switzerland model” of concluding sectoral bilateral agreements with the EU (more than 120 agreements are in force between Switzerland and the EU).

5. The UK could negotiate a free trade agreement or an association agreement with the EU

6. The UK could negotiate a customs union with the EU, along the lines of the existing Association Agreement between Turkey and the EU.

\textsuperscript{40} It is noteworthy that based on Article 218(11) TFEU The European Court of Justice may give an Opinion, whether the planned agreement is in line with the Treaties. Such a procedure may cause an extra delay for the negotiation process.
7. The UK could become a third State vis-á-vis the EU, as the China, United States or other countries. This is the so called “WTO-model” and it comes to the fore, if no agreements were to be found between the UK and the EU.\(^{41}\)

It must be noted that these frameworks are only indicative at best. This is because, first of all, all trade, association and other agreements between the EU and third states are different from each other and tailored to the specific needs of the parties. Second, the situation with regard to the UK is also different simply because the UK has been an EU Member State since 1973 and it already applies all the EU obligations. Usually the core question for the negotiating parties is what can the parties gain by the agreement, by lowering the trade barriers and increasing the access to the markets and what areas of trade are acceptable for opening the access with. For example, one of the main reasons why Turkey has never been granted full access to the internal market, which would include the free movement of persons, is because the EU Member States are wary as to the consequences for the EU labour markets. Whereas the core question for the UK – EU negotiations will be where to erect the trade or free movement barriers and thus limit the application of the current arrangements.\(^{42}\) This has its impact on the negotiation dynamics from the get go and therefore it is possible for the EU Member States now demand that internal market access includes also free movement of persons.\(^{43}\)

On the basis that the core question for the negotiation here is different, it is now often pointed out that the UK and EU will have a special relationship, which can lead to either ‘hard Brexit’ or ‘soft Brexit.’ The first, ‘hard Brexit’ means that the future UK – EU relationship will be based on a trade agreement model. This can be as little as a WTO Agreement or as much as the EU – Canada CETA. ‘Soft Brexit’ is taken to mean that the UK will retain access to the single market and it will continue

\(^{41}\) See Piris 2016, p. 117-126. After PM May’s speech in 17 January 2017 even this alternative is realistic.

\(^{42}\) This is recognised also in the White Paper. The Government indicates that this may make the negotiations easier, not harder. Time will tell as there are no examples of the type of negotiations the UK and the EU are heading into.

\(^{43}\) Likewise as the EU is emphasising for the Swiss, see for example Guardian, 3 July 2016, [https://www.theguardian.com/world/2016/jul/03/eu-swiss-single-market-access-no-free-movement-citizens](https://www.theguardian.com/world/2016/jul/03/eu-swiss-single-market-access-no-free-movement-citizens).
to have some form of institutional relationship with the EU. The obvious models here are the EEA Agreement and the Swiss arrangements and even possibly the Overseas Countries and Territories regime which is applicable between those territories of the Member States which do not belong to the EU and the EU.\(^{44}\) The latter leads to the specific case of what if there could be a diversified alternative where different constituent parts of the UK have different EU relationship.

### 5.3 ‘Hard Brexit’ = ”Clean Brexit”?

The first and hardest option would be falling into the WTO arrangements. This essentially means that there will be no separate trade arrangement between the UK and EU. This can rather be described as a nuclear option, which may become as a result of a complete breakdown of the upcoming UK – EU negotiations, or if there is a failure to reach an agreement in the UK on the negotiation priorities. The EU, as well as the UK, are at least currently preparing for negotiations and a new relationship.

On the other end from the WTO option is a CETA-type of model, which refers to the freshly negotiated EU-Canada Treaty, i.e. to the Comprehensive Economic and Trade Agreement. The CETA will remove customs duties, end restrictions on access to public contracts, open-up the services market, offer predictable conditions for investors and help prevent illegal copying of EU innovations and traditional products.\(^{45}\) CETA is the by far the most far-reaching agreement ever concluded by EU with a third state in the area of services and investment, which are the key areas so far identified for the UK.

Considering current UK hostility towards the free movement of persons and to the jurisdiction of the Court of Justice and emphasising the need to have an agreement only on goods and services, the Government is quite clearly advocating a new relationship based on a free trade agreement (FTA) model. Here it looks like the CETA could provide a potential alternative, but maybe only in theory


\(^{45}\) See e.g. [http://ec.europa.eu/trade/policy/in-focus/ceta/](http://ec.europa.eu/trade/policy/in-focus/ceta/).
as this option is not without considerable difficulties either. It is still a ‘hard Brexit’, even though the Government does not wish to see it as such and rather prefers to call it clean Brexit instead. This type of FTA does not allow internal market type of access for the UK individuals or businesses, in particular as it does not abolish fully the trade barriers. This would re-erect barriers to where they do not exist, even in less controversial areas, and it does not include many of the other sectors that are included in the internal market, which might be desirable if not for the whole UK, at least parts of it, such as Scotland and Northern-Ireland. Finally, it might not be very easy to get a favourable trade agreement purely on sectoral issues from the EU partners either. This could politically be seen as ‘cherry-picking’ where the result would suit the needs of the UK, but not the EU.

5.4 ‘Soft Brexit’

As stated above, the EEA and Swiss arrangements lay the basis for the ‘soft Brexit.’ It is possible to say off the cuff that it is very unlikely that the Swiss arrangements will be repeated. With around 200 separate and interlinked agreements, the arrangement is too complicated to apply in practice and therefore not a desirable result. The EU is currently already trying to negotiate with Switzerland further clarity on the current arrangements of numerous sectoral bilateral agreements.

Therefore, what remains is in this category is an EEA type of agreement granting access to internal market. The objective of the EEA Agreement is to promote trade and economic relations between the contracting parties by setting a European Economic Area based on the free movement of goods, persons, services and capital and equal conditions for competition. In itself, the EEA-option seems improbable, since Norway has already announced that it is not willing to have the UK in the EFTA and EEA arrangement. Additionally, already the former PM Cameron excluded the EEA-option in 2015 and PM May has excluded it now again, although such an option would have had the advantage

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of simplicity.\textsuperscript{47} The ultimate reason why it may be excluded is that this would result in a considerable reduction in the current relationship. The EEA countries participate in a large part of the EU’s internal market and enjoy the four freedoms, but they are not committed to other EU policies, such as agriculture, fisheries, foreign policy or judicial affairs, nor in the customs union which may prove a crucial issue for retaining the open border between the UK and the Republic of Ireland.

If an internal market access will be deemed still desirable by the UK, it looks like the UK and EU will be building a special relationship. However, for that to be available, one of the most difficult question, the free movement of persons, needs to be solved. This may need political concessions from possibly both sides of the table. The UK Government is currently emphasising how free movement of persons needs to be limited, as it quotes the immigration as the ‘main reason’ for Brexit. As a counterpoint, several Member States have emphasised that the free movement of persons is an integral part of the internal market, with the the Visegrad-countries (Hungary, Poland, the Czech Republic and Slovakia) being worried that EU migrant population in UK should not become ‘second class citizens’. Also President Juncker has stated in the State of the Union in September 2016 that the free movement of workers is a core EU right.

Furthermore, the special arrangement will need to contain some form of institutional relationship between the UK and EU on both the agreement how the CJEU case law will be applied and how the UK may be able to, if not directly influence, at least take part in the future EU regulation falling in the scope of the agreement. Furthermore, another open question is what would happen if there were to be a disagreement between the UK and EU on the future direction of the regulation. All these aspects are currently part and parcel of the EEA as well. Arguably, it would be possible to grant the UK the possibility to opt-out of the EU regulation, as it has been able to do currently for example in the Area of Freedom, Security and Justice. However, there are already experiences of this kind of

\textsuperscript{47} See J-C. Piris, in P.J. Birkinshaw and A. Biondi (eds), \textit{Britain Alone!}, p. 119.
opt-out, where the relationship is based on international law, under the Danish Protocol. It is currently understood that the Protocol is very complex to apply with corresponding amount of uncertainty for the parties, individuals and businesses. Furthermore, this kind of opt-out option would be open to claims that the UK gets away with ‘cherry-picking’ on its relationship. Therefore, it is likely that the agreement would contain a punishment where the parties do not agree on the direction of the future regulation. However, the new institutional relationship, and the potential consequences for divergent approaches adopted by the EU and the UK raise much wider questions which fall outside the scope of this article.

5.5 Modelling after Overseas Countries and Territories: Reversed Greenland

One option that would take into account the regional preferences, which Piris did not mention in his list, is the so called reversed Greenland-option. Sarmiento has described this option in his blog article “Brexit or the art of doing a Greenland” as follows:

Greenland, although a part of Denmark with a special constitutional status, stopped being a territory of the European Communities in 1985. In fact, the trick was to change its status from an outermost region under Danish jurisdiction into an overseas territory. As is known, the EU Treaties allow some States with close ties with EU Member States, as well as some territories of EU Member States, to stand outside the territorial scope of application of the Treaties, but holding a special association status with the EU that grants them special rights of access to the internal market. These are the so-called Overseas Countries and Territories”.

One of the trickiest challenges the UK will face in the following years is how to handle Brexit and keep the country together. Scotland and Gibraltar voted overwhelmingly in favour of remaining in the EU, whilst Northern Ireland delivered a firm remain vote as well. Making Brexit come true and keeping Britain in one piece will be no easy task. That is exactly why “doing a Greenland” would be the UK’s best choice.
The United Kingdom could still be a member of the EU, but only after England and Wales withdraw from the territory of the EU, leaving Scotland, Northern Ireland and Gibraltar as “territories of the EU”. England and Wales would no longer be a part of the EU, but the Treaties could be modestly reformed, as they recently were for Mayotte, in order to embrace both regions as “overseas territories”, with total autonomy and freedom to do their own business and act accordingly. In fact, the Treaties could be minimally reformed to grant England and Wales a special status among the overseas countries and territories, being that the subject of upcoming negotiations with the EU.”

Sarmiento’s idea is fascinating and it has been gaining traction both in the Scottish establishment and in other blogs. It would embrace the basic idea of devolution and the outcome of the Brexit referendum in various areas of the UK.

However, there are many obstacles for the Greenland model to be adopted. First, on basis of the UK constitutional system, the Greenland model might turn out to be politically unrealistic. Even though the UK consists of diverse nations already, it would be unforeseeable that the UK’s participation in an organization of such an importance as the EU would be lead from Edinburgh and not from London or Westminster. The leading national unit would be comparatively small, with population of only 5 million inhabitants. It can be asked whether it would be acceptable for a state size of the UK to have the same voting power as Finland, which would be comparable in size to Scotland. Furthermore, the EU and some Member States in particular might fear the idea of separating the large EU countries to areas like that. Finally, it would increase the contemporary confusion in EU politics and it would again be open to ‘cherry-picking’ claims.

7. Conclusions

On basis of the issues outlined in the article it is practically impossible to comment precisely or predict with any accuracy what will be the influence of Brexit on the unwritten constitution of the

UK, to the relationship between the UK and the EU or to the cross-border trading and other relationships between the third countries and the UK. The first issue is that one cannot predict the influence of the Brexit decision to the constitutional landscape or procedures. In particular, the key question seems to have arisen in relation to the use of executive powers over Parliamentary sovereignty. The actions of the UK institutions, Government, Parliament and courts, will determine the separation of powers and the institutional relationships in this new era.

The second issue that arises is the framework for the future relationship between the UK and the EU at the current stage. Of course, it is true to say that nothing changes as long as the UK remains to be an EU Member State and the UK cannot formally open any negotiations with the EU before the withdrawal notification from the EU. However, once the UK internal constitutional hurdles have been overcome, it can proceed with the notification to withdraw from the EU.

Furthermore, at the moment the shape of the new relationship remains unclear. As analysed, there is no obvious solution available despite the recently published PM May’s negotiation plan, the Government’s White paper and the emphasis on “hard Brexit”. Both ‘hard Brexit’ and ‘soft Brexit’, and the ‘reversed Greenland’ simply lead to further question marks, which will need to be solved both by the UK and the remaining EU states by analysing what the both sides want out of the new relationship. That leads to the final conclusion that unless the will to negotiate the new relationship vanishes totally from the UK or EU side, we are going to be seeing negotiations for years to come.

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