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Special issue: On the never-ending road to 'Brexit': perspectives for the European Union

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On the never-ending road to Brexit: perspectives for the European Union – introducing this special issue

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Introduction

At the time of publication of this special issue, 17 months have passed since UK Prime Minister Theresa May notified the European Council of the UK's intention to withdraw from the EU. This decision was based on less than 52 per cent majority of votes cast for leaving the EU, in a non-binding referendum, which represented about 37 per cent of the votes of those entitled to participate. For reasons entirely particular to the UK voting system, this moved a Parliament with a majority for remaining in the EU before the referendum to consistently supporting the government in its aspiration to leave the EU.[1]

However, when it comes to how exactly the UK should leave the EU there is less agreement. The government has drawn stark lines in the sand, of course. One, 'Brexit' does not, actually, mean Brexit as a shorthand for 'British exit from the EU'. Instead, the UK government plans to withdraw those parts of the UK whose population has endorsed remaining in the EU out of the EU as well – this includes Northern Ireland, rendering 'Brexit' a misnomer. Second, withdrawal from the EU will also mean withdrawal from the Internal Market – or at least the part where people gain rights to move and be treated equally in the UK – as well as the liberation from the jurisdiction of the Court of Justice of the European Union (CJEU). While this so-called 'hard Brexit' will harm the UK citizens economically, especially in the North of England, Scotland,

* The special issue resulted from the conference 'Brexit – 15 Months On' in September 2017 at Queen's University Belfast. This conference was funded by the project Tensions at the Fringes of the European Union – Regaining the Union's Purpose (TREUP), through Jean Monnet Centre of Excellence by the European Commission (Project Number 564869-EPP-1–2015–1-UK-EPPJMO-CoE). For some more immediate impressions of the conference, consult <https://blogs.qub.ac.uk/tensionatthefringes/2018/02/01/academic-conference-brexit-15-months-on-socio-legal-perspectives-for-the-eu-and-europe>.

1 For example, the government had no difficulty in securing a majority for the European Union (Notification of Withdrawal) Act, (2017) <www.legislation.gov.uk/ukpga/2017/9/pdfs/ukpga_20170009_en.pdf> only days after the UK Supreme Court found that Parliament, not government, must take this decision (*R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5), nor failed to win parliamentary approval for the EU Withdrawal Act, which ends the viability of EU law in the UK as supranational law along with the authority of the CJEU and subjects most EU law to withdrawal by government regulation, reserving a parliamentary decision for only a few elements.

Wales and Northern Ireland,[2] this is unlikely to stop Brexit. For many, leaving the EU has become an emotional necessity,[3] partly related to a perceived English or British identity imagined as alien to 'Europe' or resulting from peculiar imaginations of sovereignty.[4]

The overall rationale of this issue

There is, of course, a good chance that the UK, after experiencing the reality outside the EU, returns to the fold in the future. However, this will depend on whether the EU emerges stronger from this withdrawal, which is closely connected to its recurrent crises over the last decade. Next to the UK's idiosyncratic reasons to withdraw from the EU,[5] those voting in favour of withdrawal also voiced more general concerns. Research frequently highlights a general discontent with underfunding of municipal services, deterioration of the economic situation and high unemployment or insecure employment conditions in certain regions, as well as anxiety around migration, estrangement from the EU institutions, and a perception that EU integration is an elite project, responsible for many ills of everyday life.[6]

Some of these sentiments are partially owed to the unique situation in the UK, which does not as a rule allocate tax income to regions in relation to tax revenue or necessary expenditure for public services.[7] If coupled with longstanding austerity politics, this may result in more negative impact on public services than in other Member States. Some of the sentiments are not, however, unique to the UK, even though they do not prompt citizens in other EU Member States to reject continued EU membership for their country. For example, anxieties around arrival of EU citizens from abroad are part of a growing unease with migration in a number of EU Member States, resulting in a surge of support for right-wing populist parties in many. Some Member States' governments, notably Poland and Hungary, have already started to dismantle guarantees conventionally associated with liberal justice.[8]

Further, the EU's reactions to the global economic crisis, which mainly resulted in demanding that Member States reduce spending, preferably for social policy, and reform their employment laws, have resulted in an increase of socio-economic hardship in many Member States. Whether this hardship is rightly or wrongly blamed on the EU, its increase

2 See the detailed references in John Doyle and Eileen Connoly, 'Brexit and the Northern Ireland Question', in Federico Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press 2017).

3 See Annette Bongardt and Francisco Torres, 'A Qualitative Change in the Process of European Integration', in Nazaré da Costa Cabral, José Renato Gonçalves and Nuno Cunha Rodrigues (eds), *After Brexit: Consequences for the European Union* (Palgrave Macmillan 2017) 102–27, 105–8, who relentlessly expose how the British electorate (minus the Scottish, and of course the Northern Irish) drifted towards supporting an ever harder Brexit between the referendum and the 2017 election.

4 Marlene Wind, 'Brexit and Euroscepticism. Will "Leaving Europe" be Emulated Elsewhere?' in Fabbrini (n 2) 219–46, 229–33.

5 See, for example, Anand Menon and John-Paul Salter, 'Brexit, Initial Reflections' (2016) 92(6) International Affairs 1297–318; Wind (n 4); Joseph H H Weiler, 'Brexit: No Happy Endings' (2015) 26 European Journal of International Law 1–7.

6 For an early post-referendum overview, see Sara Hobolt, 'The Brexit Vote: A Divided Nation, a Divided Continent' (2016) 23 Journal of European Public Policy 1259–77; with hindsight, see John Curtice, 'Why Leave Won the UK's EU Referendum' (2017) 55 Journal of Common Market Studies 19–37.

7 For a comparison of redistribution through taxes in the EU, see Anna Iara, *Wealth Distribution and Taxation in EU Member States* (European Commission 2015); for an assessment of whether free movement of persons actually results in strains on public services (and exposing that such strains are notoriously overestimated in the public), see Klára Fóti, *Social Dimension of Intra-EU Mobility: Impact on Public Services* (Eurofund 2015).

8 Laurent Pech and Kim Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3–47.

constitutes a challenge to the EU's *raison d'être*: the creation of the Internal Market (alias Common Market between 1957 and 1992) was never an aim in itself. Instead, the all-dominant economic integration served the purpose of improving the living and working conditions throughout Europe. If significant parts of the EU citizenry perceive EU law and politics as failing in this endeavour, the Union itself suffers from a serious crisis of identity.[9]

All this indicates that Brexit can be viewed as a symptom for a substantive crisis of the EU. This view contrasts with the presentation of the EU's perils as three successive crises:[10] the first of those was the global economic crisis emerging from volatile governance of the financial sectors in the USA (epitomised by the Lehmann Brothers bank crash in 2007), as well as some EU Member States, including the UK and Ireland. The second one was triggered by the surge in persons seeking refuge in Europe as a consequence of the 'Arab Spring' and the subsequent war in Syria from 2015, which again resulted from US and UK interventions in the region. Brexit is partially portrayed as an independent third crisis of potential escalating disintegration. The global financial crisis had repercussions in the EU of necessity, which exposed – depending on one's political standpoint – the weaknesses of the Eurozone based on the diversity of its constituent economies (lack of 'optimal currency area') or based on the incompleteness of economic and political integration achieved by the Maastricht Treaty due to hesitancy, among others, of the UK.[11] The surge of refugees culminating in 2015 has exposed the difficulty of the EU to command Member States' solidarity within the framework of EU law.[12] Instead of portraying Brexit as a crisis in its own right,[13] it can also be viewed as but one expression of Euroscepticism caused cumulatively by the Eurozone crisis and the surge in refugees.[14] While all these debates on individual crises have merit, we suggest that the

9 See on this Dagmar Schiek, 'Towards more Resilience for a Social EU: The Constitutionally Conditioned Internal Market' (2017) 13 European Constitutional Law Review 611–40.

10 Often referred to as 'triple crisis', e.g. James Caporaso, 'Europe's Triple Crisis and the Uneven Role of Institutions: The Euro, Refugees and Brexit' (2018) 56 Journal of Common Market Studies 1345–61.

11 See on this from socio-legal and interdisciplinary perspectives, Dagmar Schiek (ed), *The EU Economic and Social Model in the Global Crisis: Interdisciplinary Perspectives* (Ashgate 2013); Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014); from the perspective of political economy, see Peter Hall, 'Varieties of Capitalism in Light of the Euro Crisis' (2018) 25 Journal of European Public Policy 7–30; from the perspective of political science integration theory, Arne Niemann and Ioannou Demosthenes, 'European Economic Integration in Times of Crisis: A Case of Neo-Functionalism?' (2015) 22 Journal of European Public Policy 1–23. There are a number of recent expositions of macro-economic critique of the Eurozone law and practice, for example, Alison Johnston and Aidan Regan, 'Introduction: Is the European Union Capable of Integrating Diverse Models of Capitalism?' (2018) 23 New Political Economy 145–59 and further articles in this special issue (guest eds Alison Johnston and Aidan Regan).

12 See from legal perspectives recently Christina Molinari, 'The EU and its Perilous Journey through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns' (SSRN 2018) <http://dx.doi.org/10.2139/ssrn.3171983>; from international human rights perspectives see Rachael McNeilly, 'Common European Asylum System: Contradictions and Crises' (2017) 4 Carleton Review of International Affairs 54–65; from sociological perspectives, see Nick Dines, Nicola Montagna and Elena Vacchelli (guest eds), 'Special Issue: Migration and Crisis in Europe' (2018) 52 Sociology 439–625; from the perspective of political science on both those crises, Tanja Börzel and Thomas Risse, 'From the Euro to the Schengen Crises: European Integration Theories, Politicization, and Identity Politics' (2018) 25 Journal of European Public Policy 83–108 and Philippe Schmitter and Zoe Lefkofridi, 'Using Neo-functionalism to Understand the Disintegration of Europe' in Hideko Magara (ed), *Policy Change under New Democratic Capitalism* (Routledge 2016) 171–200.

13 Ben Rosamond, 'Brexit and the Problem of European Disintegration' (2016) 12 Journal of Contemporary European Research 865–71.

14 Paul Taggart and Aleks Szczerbiak, 'Putting Brexit into Perspective: The Effect of the Eurozone and Migration Crises and Brexit on Euroscepticism in European States' (2018) 25 Journal of European Public Policy 1194–214.

withdrawal of a Member State – even a notoriously reluctant one – illustrates that the individual crises of the EU add up to more than their sum, and suggest a deeper crisis of the EU,[15] relating to its substantive constitutional aims. If that is the case, the EU not only needs to administer the first ever withdrawal of a Member State in a measured manner, not impacting more than necessary[16] on relations with its stroppy North-westerly neighbour poised to enhance perceived competitiveness through a deregulation campaign.[17] There is also a necessity of reacting more fundamentally, and to refocus the EU on facing the future challenges of ecological and socio-economic sustainability while also re-engaging with its citizenry. Since the EU remains a project based on integration through law,[18] the medium and long-term plans for responding to this situation will have to be grounded in its legal order, without neglecting the societal and political embeddedness of law. This special issue tackles this challenge with a focus on the substantive law of the EU, asking whether and how the EU should react to Brexit. It does so based on the idea that it is from the fringes of the EU that the need for change can best be observed. Accordingly, the issue assembles authors from Ireland (North and South), Finland, Poland and the UK (although with origins in Germany and Greece). Alongside debates on the future of EU citizenship, and environmental and social policy, the articles also discuss aspects of the rule of law crisis in Poland and perspectives of the EU's break-up for the island of Ireland. This selection is far from eclectic, as it addresses core aspects of the future of the EU as well as the challenges emanating from its Eastern and Western fringes.

The never-ending flood of Brexit literature – socio-legal scholars

Brexit has been a godsend for academia in the UK and beyond, as it created the opportunity for intensive research and publication activities. As a result, much ground has been covered already. Nevertheless, we humbly submit that we add to the existing socio-legal literature.

Initially, socio-legal reflections were justifiably focused on the consequences that Brexit will have for the UK, summarising the consequences of severing the bonds resulting from more than 40 years of legal integration. Considering whether the slogan 'Britain Alone' could become viable in the twenty-first century,[19] the crème of British and Irish constitutional and public lawyers delivered the verdict that it would become very complicated, to say the least, and pose severe constitutional problems. At the same time the collection reflects on potential causes of Brexit, identifying the 'often haughtily detached decisions'[20] of the CJEU and the 'Death of Social Europe'[21] as particular problems. This book does address the substantive law of the EU, but is mainly focused on the reflections within the UK prior to and beyond its withdrawal. Similarly, the 2016

15 This is also indicated by Ben Rosamond, 'Brexit and the Problem of European Disintegration' (2016) 12 Journal of Contemporary European Research 865–71; Schmitter and Lefkofridi (n 12).

16 As demanded by those supporting the liberal project of free trade, e.g. Jo Weiler, 'The Case for a Kinder, Gentler Brexit' (2107) 15 International Journal of Constitutional Law 1–8, 1–4.

17 Thomas Sampson, 'Brexit: The Economics of International Disintegration' (2017) 31 Journal of Economic Perspectives 163–83.

18 See the contributions in Daniel Augenstein, *'Integration through Law' Revisited: The Making of the European Polity* (Ashgate 2012). For a critical assessment, see further Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015).

19 Patrick Birkinshaw and Andrea Biondi (eds), *Britain Alone! The Implications and Consequences of United Kingdom Exit from the EU* (Kluwer 2016).

20 Maria Kendrick, 'Judicial Protection and the UK's Opt Outs: Is Britain Alone in the CJEU?' in ibid §9.01

21 The title of Keith Ewing's chapter in ibid.

collection of short sections on Brexit by the European Law Review[22] mainly focuses on consequences for the UK internal order, while identifying that the EU will need to engage in some fundamental reflection.[23] Also, the consequences of Brexit on Economic and Monetary Union, alongside the role of austerity policies triggered by the EU's handling of the Eurozone crisis are reflected upon.[24] A 2017 edited collection is explicitly dedicated to identifying legal and policy challenges in the UK after Brexit, offering a wide-ranging presentation and analysis of relevant areas.[25] It should be added that all three publications also expose specific considerations for the UK's devolved regions: Northern Ireland, Scotland and Wales.[26] The elevated position of EU citizenship rights, both in the perception by the EU and UK courts before any referendum was ever announced, and in the EU negotiation strategy, have been brilliantly analysed by Elspeth Guild, pursuing the hypothesis that a rights-based conceptualisation of citizenship must seem as a monstrosity to those used to the status-based concept of British nationality. Again, this book is firmly based on an UK-centred perspective.[27] A critical internal perspective is also taken up in monographic length, but through a series of short essays in *Brexit Time*,[28] attempting to explain to the legally informed reader 'what the hell is happening next'.[29] Armstrong expands his approach later towards predicting in how far the UK will pursue the contrasting policies of regulatory alignment with or diversification from the EU.[30]

With the Brexit process moving on, socio-legal analysis proceeds as well, starting to go beyond the focus on the UK itself. Da Costa Cabral et als' collection of contributions by legal, political science and economic scholars[31] explores the consequences of Brexit for the EU, not the UK. Bongardt and Torres urge the reader to accept Brexit as a reality, and forgo indulgence in phantasies that it may not happen.[32] The main ambition of this volume is to predict the pragmatic legal consequences, such as regarding Brexit as a *force majeure* in relation to contractual obligations and to pragmatically develop different scenarios that could play out, such as developing models for social security coordination with the UK in the future.[33] There are also some normative elements, such as demanding a serious discussion of which society the EU integration process should promote.

22 See the introduction by Jukka Snell, 'Editorial – Brexit: The Age of Uncertainty' (2016) 41 European Law Review 445–6.

23 Anthony Arnull, 'Broken Bats' (2016) 41 European Law Review 473–4.

24 Alicia Hinarejos, 'Brexit and the Euro Area' (2016) 41 European Law Review 478–80.

25 Michael Dougan (ed), *The UK after Brexit. Legal and Policy Challenges* (Intersentia 2017).

26 See the chapters by Gordon Anthony on Northern Ireland, Stephen Tierney and Katie Boyle on Scotland, and Mike Varney on Wales in Birkinshaw and Biondi (n 19). See also David Edwards and Niamh Nic Shuibhne, '"While Europe's Eye Is Fix'd on Mighty Things": Implications of the Brexit Vote for Scotland' (2016) 41 European Law Review 481–3, on Scotland, alongside Dougan's chapter on the Irish border and Hunt's chapter on devolution in Dougan (n 25).

27 Elspeth Guild, *Brexit and its Consequences for UK and EU Citizenship: Or Monstrous Citizenship* (Brill & Nijhoff 2016).

28 Kenneth Armstrong, *Brexit Time. Leaving the EU – Why, How and When?* (Cambridge University Press 2017).

29 'Brexit – What the Hell Is Happening Now?' is the title of a journalistic exposure of the Brexit phenomenon aimed at a lay audience which has already seen its second edition: Ian Dunt, *Brexit: What the Hell Happens Now?* (2nd edn, Canbury Press 2018).

30 Kenneth Armstrong, 'Regulatory Alignment and Divergence after Brexit' (2018) 25 Journal of European Public Policy 1099–117.

31 Da Costa Cabral et al (n 3).

32 Bongardt and Torres (n 3).

33 Yves Jorens and Grega Strban, 'New Forms of Social Security for Persons Moving between the EU and the UK?' in da Costa Cabral et al (n 3) 268–313.

Similarly, a 2018 University College London publication[34] strives to rethink the future of Europe in shorter contributions by legal and political science scholars. Eight chapters address the consequences of Brexit for the UK and some other Member States and dependencies; four confront the future of the EU institutions; and six address EU constitutional questions, including how EU citizens will fare in the UK and vice versa, and the future of EU democracy. Further chapters attempt to predict the impact of Brexit on the euro area, and the EU's governmentality at large, while three more cover the EU's external policies. The three concluding chapters address the idea of Europe, and thus go to the ideational future of the EU.

Federico Fabbrini' s 2018 edited collection[35] constitutes a combination of fact-finding chapters and those pursuing a classical liberal vision of the future EU. Based on intergovernmental liberalism, Kalypso Nicolaïdis[36] sets the tone in theorising Brexit as yet another (legitimate) move of the UK to defend its control in a narrow conservative sense, a move which ultimately safeguards equilibrium. Catherine Barnard[37] carries this over into the realm of the Internal Market, scolding the EU for refusing to grant the UK a permanent exception from applying free movement of workers while still being part of the Internal Market. Uwe Puetter[38] proposes that the EU reconsiders the institutional balance, ensuring that the political weights are readjusted in order to achieve the 'control and equilibrium' proposed by Nicolaïdis. Member States, writes Puetter, 'cannot escape a paradoxical attitude towards integration, namely that they seek closer integration without supranational empowerment',[39] rendering Franco-German leadership as demonstrated during the Euro crisis[40] as problematic in the future in the absence of a British counterweight. Fabbrini[41] adds in his own chapter that the EU should take Brexit as an opportunity to 'fix . . . problems',[42] and proposes institutional reforms to enhance the democratic legitimacy of the Eurozone alongside the creation of a Eurozone budget.[43]

The contribution of this issue

While at first sight it seems a daunting enterprise to endeavour adding anything to this rich literature, on closer inspection, some gaps emerge. As we have seen, the Brexit debate is frequently focused on the UK and the future special relationship between this state and the EU. Even the two collections which, as per their titles, aspire to develop perspectives for the EU,[44] contain a substantive amount of debate focusing on how the UK can cope in the end with leaving the EU. While this certainly is very relevant, Bongardt and Torres refreshingly state a simple truth: 'Brexit is a priority for the UK. For the EU, it is a major

34 Benjamin Martill and Uta Staiger (eds), *Brexit and Beyond. Rethinking the Futures of Europe* (University College London 2018).

35 Fabbrini (n 2).

36 Kalypso Nicolaïdis, 'The Political Mantra: Brexit, Control and the Transformation of the European Order' in Fabbrini (n 2) 25–48.

37 Catherine Barnard, 'Brexit and the EU Internal Market' in Fabbrini (n 2) 201–18.

38 Uwe Puetter, 'Brexit and EU Institutional Balance: How Member States and Institutions Adapt Decision-making' in Fabbrini (n 2) 247–66.

39 Ibid 252.

40 Ibid 254.

41 Federico Fabbrini, 'Brexit and EU Treaty Reform: A Window of Opportunity for Constitutional Change?' in Fabbrini (n 2) 267.

42 Ibid 268.

43 The views on Brexit and Economic and Monetary Union have also been published in Federico Fabbrini, 'Brexit and the Reform of Economic and Monetary Union' in da Costa Cabral et al (n 3) 128–47.

44 Da Costa Cabral et al (n 3); Martill and Staiger (n 34).

and costly distraction from important common challenges.'[45] This truth must not, however, distract from the fact that the UK's withdrawal must be used as an chance to improve. Most importantly, the Union should use the opportunity to address popular discontent with its integration project on the one hand, and on the other hand tackle the thorny problem of coordinating policies which cannot stop at geographical borders through constructive engagement with the UK as a non-integrated close neighbour.

Both these necessities require engagement with the EU's substantive policies, rather than merely addressing institutional and governance issues. Because the EU continues to be a community of law, those socio-economic and political challenges should be addressed in socio-legal categories rather than exclusively as policy issues. The mission of this special issue is thus highly relevant, and not yet completed in other publications. In line with the main discontent with the EU, and the major problems which defy governance within the convenient constraints of secured borders, three partly interrelated themes emerge. EU citizenship is the first of these, followed by social and labour law and policy, and by realising environmental protection. Over all three of these themes, tensions between EU-wide rights guarantees and legal frames of integration on the one hand and regional policies and national closure movements on the other emerge. These tensions are epitomised by the EU's rule of law crisis and the challenges of maintaining hybrid territories and identities on the island of Ireland after Brexit.

Three articles engage with EU citizenship: as no other institutions, its introduction evoked the question of whether the peoples of Europe – the category referred to in Article 2(1) TEU – identify with the Union, and whether any such identification is justified by the granting of stable, consistent and reliable rights.

Stephen Coutts asks which possible avenues for the future direction of Union citizenship remain open after the UK's withdrawal, inter alia, on the grounds that 'citizens of nowhere' (Theresa May) were no longer countenanced. Instead of focusing on the individual fates of the many citizens who relied on citizenship rights and moved to the UK, the article asks the question whether Union citizenship as an additional category to national citizenship is viable or rather contradicts 'certain forms of national social life'. It contrasts communitarian with cosmopolitan citizenship concepts, finding that this outworn dichotomy does little to resolve the dilemmas of a multidimensional concept such as Union citizenship. He finds the dichotomy to be useful in so far as it illuminates the danger of Union citizenship being of use only for the privileged few. Counterintuitively, he concludes that more rather than less citizenship will be needed to overcome its social hollowness and inherent threat to national citizenship as an institution.

Massimo Fichera uses citizenship and free movement rights of economically active citizens as a case study for his hypothesis that the EU is fundamentally a security project. In his conceptual definition of security, the concept embraces the existential identity of a polity. Guaranteeing the rule of law, democracy and human rights thus become pure instruments to safeguarding semantic, spatial, temporal and epistemic dimensions of security. Applying these categories to the specific problems of Union citizenship, Fichera concludes that the EU as a security project requires differentiated integration. Extending the options available under the concentric circles paradigm would in his view prevent further disintegration as epitomised by Brexit. However, the challenge remains as to how to ensure that differentiation does 'not come at the expense of the economic and social constitution', and in particular not at the expense of social rights.

45 Bongardt and Torres (n 3) 121.

Konstanze von Papp takes up the challenges of also guaranteeing social citizenship rights for those citizens who are frequently accused of 'benefit tourism', a concept whose empirical validity she rejects. Nevertheless, she recognises that Member States may find difficulty in integrating EU citizens who are 'economically inactive' when they enter their territory. She frames the question under which circumstances EU citizens from other Member States must be granted equal treatment rights in relation to benefits as one of federalism. This leads her to an extensive comparison of case law (and legislation) in the USA and the EU around the free movement rights of the poor. This leads her to criticise the much-debated *Dano* judgment of the CJEU from a new angle. Concluding that there is, indeed, the potential of transnational solidarity in the EU, even in the alleged absence of a European 'demos', she nevertheless explores limits of transnational financial solidarity, concluding that EU-level 'social engagement' is required to overcome the economic hurdles against integration of poor movers.

This line of argument leads to the next theme, EU social and labour policy, which is discussed in two articles. Konstantinos Alexandris Polomarkakis discusses the question of whether the removal of the UK as a veto player in social policy must be viewed as the silver lining of the Brexit cloud. Applying Tsebelis' analytical framework, he explores the UK's veto player role in detail, distinguishing ideological, party policy-related and Eurosceptic reasons for using a veto. Unsurprisingly, he comes to the conclusion that there may well be other Member States stepping into the void left by the British veto. Specifying his examination in relation to the diverse elements pursued under the Social Pillar implementation, he comes to a sobering conclusion. On the positive side, he does not find the same level of ideologically supported social policy veto in other Member States. However, states as different as Hungary, France and Germany are viewed as having good reasons to veto some social policy measures on the basis of party policy or Euroscepticism. Nevertheless, the conclusion is cautiously optimistic in favour of a slow and steady realisation of the Social Pillar, as long as abrupt changes of national social policy are not required of Member States.

Łukasz Pisarczyk takes up the challenge of discussing the future of EU labour and employment law from the perspective of Poland as an Eastern EU country. His question is similar to that asked by Polomarkakis: will social policy accelerate post-Brexit? His prediction is that the Eastern Member States may well step into the alleged void left by the UK as a veto player. In his view, this is due to the political perception of comparative (economic) advantage in these countries: often, the lower costs of labour are still perceived as decisive for remaining competitive. This, in turn, can lead to a reluctance to embrace EU social standards which require change at national level. However, he also notes that, as a result of free movement rights for Polish workers, the government has felt compelled to promote the return of those highly skilled workers who were the first to find better pastures in other EU countries. Among other strategies, the improvement of central employment conditions, such as the level of the minimum wage at national level, has been used to achieve that goal. Brexit may be perceived as a blessing in disguise in this situation as Polish workers in the UK may no longer feel welcome there and consider returning to Poland, while also weighing other options.

Roderic O'Gorman discusses the challenges of environmental protection through EU law and policy post-Brexit. As pollution and other environmental problems do not tend to stop at geographical borders, this is an area where the EU will be challenged to find a new relationship with the UK which prevents undercutting of standards and transnational import of environmental problems. Preferably, that regime would be as efficient as EU membership itself – but this option seems excluded. O'Gorman carefully

develops the relevance of oft-rehearsed relationship models such as 'Swiss', 'Norwegian', Customs Union-only, and existing Association Agreements with neighbouring and other non-EU countries. After duly highlighting the complex legal problems, he suggests that an Association Agreement modelled upon the deep and comprehensive free trade agreements with neighbourhood countries offers the best perspective of respecting the UK's 'red lines' while not requiring the EU Member States to endure unregulated pollution through water, air and land. The conclusion is bleak in that we must recognise that no alternative to EU membership allows the same level of protection as EU membership itself.

The last two articles in the issue take up the specific issue arising at the fringes of the EU in the wake of Brexit. Robert Grzeszczak and Stephen Terrett explore the EU's role in policing the rule of law, reflecting on the current Article 7(1) TEU procedure pending against Poland. Maintaining functioning rule of law institutions in Member States may not appear immediately related to Brexit. However, as the Brexit vote has been viewed as one expression of right-wing populism's successes, the connection is not at all far-fetched. The dismantling of judicial protection, and thus the precondition of the protection of rights, seems eerily reminiscent of one of the UK government's red lines relating to judicial protection. Grzeszczak and Terrett argue that the current legal framework for protecting the rule of law in existing Member States is insufficient due to structural inability of the EU institutions to engage effectively with the threat to limit membership rights. They illustrate their claim through a detailed account of how the Polish government has 'debilitated' the Polish Constitutional Court, concluding slightly depressingly that the only hope is that, while the EU 'waits the problem out', Polish civil society manages to challenge the government effectively.

Dagmar Schiek takes up a problem at the Western fringe of the EU, where Brexit is discussed as a 'border problem' on the island of Ireland, with additional challenges to the protection of human rights and equality rights. She challenges this perspective, identifying instead that the UK's withdrawal from the EU will hinder the hybridity of identities and territories on the island of Ireland. Further, the focus on avoiding physical infrastructure at the border overlooks the preconditions for socio-economic improvement in the lives of people in Northern Ireland, which depend on functioning legal frames for economic and civic cooperation. Those rely on maintaining the direct effects of EU economic freedoms and citizenship rights. Identifying that the Protocol on Ireland/Northern Ireland does not maintain all the economic freedoms, and relegates the citizenship rights to the Common Travel Area, she concludes that the EU Commission, in focusing on the physical infrastructure on the border and the formula of 'no diminution of rights', has offered to give up the indivisibility of the Internal Market for Northern Ireland alone. This has not only reinforced the demand of the UK to be allowed membership in the Internal Market without free movement of persons, but also does not satisfy the needs of Northern Ireland.

Conclusion

In debating the demands of Brexit for the EU, a common thread of the special issue has emerged. Maintaining the EU's social legitimacy requires taking citizenship rights as seriously as the realisation of the Pillar of Social Rights. EU citizenship rights so far encompass free movement of workers underpinned by equal treatment rights – a concept that today is challenged even by academics who have based their careers on defending it prior to Brexit. Areas as different as environmental protection, rule of law and the situation on the island of Ireland further underline the importance of maintaining judicial

enforceability of EU rights after Brexit. From socio-legal perspectives, all this sounds like squaring a number of circles. On a positive note, this offers extensive opportunities for socio-legal research, not only up to the UK's withdrawal from the EU, but also beyond this point in relation to redefining citizenship rights, as well as social dimensions of economic freedoms, the safeguarding of efficient environmental protection and social and employment rights in the post-Brexit EU.

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Citizens of elsewhere, everywhere and . . . nowhere? Rethinking Union citizenship in light of Brexit

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Abstract

This article seeks to determine the extent to which the communitarian form of life expressed in the Brexit vote is compatible with Union citizenship. It is argued that, amongst other things, Brexit expressed a desire for a communitarian form of life, broadly speaking. Union citizenship is presented as a constitutionalised transnational status embodying values of integration and autonomy and displaying certain cosmopolitan features. Union citizenship thus conceived poses problems for a communitarian political community as expressed in Brexit. The conclusion reflects on broader global trends in citizenship and on possible avenues for the future direction of Union citizenship.

Keywords: Union citizenship; communitarianism; Brexit; immigration; cosmopolitanism; citizenship; integration; autonomy; transnational

The issue of citizens' rights is to form one of the three pillars of the Brexit withdrawal agreement. Without a doubt, it is one of the more difficult and sensitive issues to be dealt with during the Article 50 negotiations, and one with real human significance. At the current stage in the negotiations it would appear that some form of 'settled status' will be available to the 3 million non-UK EU nationals resident in the UK and the 1.3 million UK nationals resident in the remaining 27 Member States. However, as with the withdrawal agreement more generally, contentious institutional questions, including above all the role of the Court of Justice of the EU in policing the withdrawal agreement and the situation of such 'legacy citizens', remain to be resolved.[1]

The purpose of this article is not to address the precise situation and possible solutions for individuals that might be advanced and eventually adopted during the Article 50 negotiations.[2] Its purpose is to take a somewhat broader perspective and to view Union citizenship, its past development and its current shape through the prism of Brexit; to use Brexit and the underlying political and quasi-philosophical fault-lines it reveals to reflect on the nature of Union citizenship and whether it is or can be made

1 Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 16–18 March 2018 (Coloured Version).

2 For a recent proposal in this regard see Dora Kostakopoulou, 'Scala Civium: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens' (2018) 56 Journal of Common Market Studies 856. For an overview of one of the earlier British proposals, see Stephanie Reynolds, 'Explainer: UK's Offer to EU Citizens Living in the UK' (*The Liverpool View*, 12 July 2017) <https://livrepository.liverpool.ac.uk/3008428/>.

compatible with certain forms of national social life. The argument is that Brexit reflects in part a desire for a particular form of social life, communitarian and rooted with a socially constituted individual at its heart. This traditional, if not nostalgic view of the community, has been undermined and hollowed out in recent years. Moreover, another figure has arisen in the popular imagination and is presented as the antithesis of the rooted individual that emerges from this communitarian-styled community; the rootless cosmopolitan. Union citizenship can be said to both represent and contribute towards both of these developments – the hollowing of national citizenship on the one hand and the rise of the cosmopolitan as a threatening alternative on the other. Thus the article presents the manner in which Union citizenship can be said to epitomise at least some of the concerns at play in Brexit. These negative consequences of Brexit and in particular the characterisation (if not caricaturisation) of EU citizenship as a 'bad' cosmopolitan citizenship flow from its overly transnational and market-based character.

The paper shall proceed in the following steps. Firstly, I will outline the political–philosophical view of society and the individual that appears to be revealed in Brexit, namely communitarianism, arguing that Brexit constituted, amongst other things, a rejection of cosmopolitanism or at least an expression of a communitarian preference. Secondly, I will outline the manner in which Union citizenship can be conceived as having cosmopolitan features, addressing the core characteristics of Union citizenship. It is important here to point out that Union citizenship differs from cosmopolitan citizenship, but nonetheless does display some cosmopolitan features. In the third and fourth sections I will argue that Union citizenship played into the Brexit debate and ultimately the Brexit vote. Section three will address the perception that Union citizenship undermined key elements of the solidaristic national community. Section four will argue that the incompatibility between Union citizenship and the forms of life epitomised in a closed solidaristic community is not only of a political or practical kind but also of a conceptual kind, with the rootless, cosmopolitan, rights-bearing and unencumbered Union citizen presented as the antithesis of the rooted, encumbered, socially constituted citizen located in a bounded national community. Brexit in a sense therefore constitutes the most acute manifestation of a broader phenomenon of national retrenchment in the face of globalising tendencies, in the field of citizenship and community as much as in other dimensions of social and economic life. It will be argued that within citizenship today there are two parallel developments; the hollowing of national citizenship and the rise of the cosmopolitan citizen, both of which played a background role in Brexit. Union citizenship can be said to be both the expression of, and have contributed to, these developments. A conclusion will locate this analysis in current global trends in citizenship underlining the questions that Brexit poses for Union citizenship today.

Union citizenship is a largely judicial construction, developed over time by a supranational court in the absence of significant popular demand.[3] As signs of a political

3 See Michael Dougan, 'The Bubble that Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens' in Maurice Adams et al (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013). Although we should be mindful of the interaction between the legislature and the judiciary in the construction of Union citizenship as pointed out in Niamh Níc Shuibhne, 'The Third Age of EU Citizenship' in Phil Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012).

backlash emerge, and the Court of Justice adjusts its jurisprudence accordingly,[4] it is necessary to connect the legal and judicial construction of Union citizenship with political realities and reflect on its relationship with broader socio-political trends in the Union. This article therefore adopts a socio-legal approach in a broader sense, attempting to analyse the relationship between a particular legal construction and the form of life it represents and a particular socio-political phenomenon, namely Brexit.

A citizen of somewhere: Brexit and the communitarian ideal

Brexit means many things to many people and is the result of a myriad of different social, economic and political forces. Above all it is perhaps a result of a deep and pervasive insecurity understood in its broadest sense. Foremost is surely the economic dislocation in the new international political economy of growing inequality, reduced economic security and an undermining of the traditional welfare state, all of which have been radically exacerbated by the recent economic crisis and the subsequent politics of austerity it introduced.[5] The result is an increasing feeling of insecurity amongst citizens and downgrading of the status of modern Marshallian social citizenship.[6] This trend must also be placed in the context of a worldwide crisis in representative democracy. Peter Mair in a prophetic essay, published posthumously in 2013, noted the increasing distance between political elites and in particular their institutional form – the political party – and the public at large.[7] The rejection of the political establishment in the Brexit referendum can plausibly be linked to this broader, longer-term political trend, and indeed within this there is a special role for the EU in this hollowing-out of political space.[8] Finally, from the historical perspective of European integration, it should be noted that the UK has always been a somewhat reluctant partner in the EU. Its reasons for joining the Union have always been pragmatic and rather transactional in nature, a characteristic contributing towards the absence of British citizens' identification with and support for the European project.[9]

There are therefore no doubt many social, economic, historical and political causes of Brexit. There is another reason for Brexit, on which this article will focus. Brexit also perhaps represented an appeal for a return to a particular, more traditional form of social life of stable social structures and closer bonds of community, a form of life that is threatened intensely by the forces of economic and social dislocation that have been

4 Daniel Thym, 'Introduction: The Judicial Deconstruction of Union Citizenship' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart 2017). Indeed, for a specific example, see Charlotte O'Brien, 'The ECJ Sacrifices EU Citizenship in Vain: *Commission v United Kingdom*' (2017) 51 Common Market Law Review 209, analysing a judgment delivered immediately prior to Brexit in which '[t]he ECJ . . . played politics and lost' (at 1).

5 See generally Wolfgang Streeck, *How will Capitalism End?* (Verso 2016). For a discussion specifically in the context of Brexit, see Colin Crouch, 'Globalization, Nationalism and the Changing Axes of Political Identity' in William Outhwaite (ed), *Brexit: A Sociological Response* (Anthem Press 2017).

6 Bryan S Turner, 'We Are All Denizens Now: On the Erosion of Citizenship' (2016) 20 Citizenship Studies 679.

7 Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013). See also recent elections in the USA, Austria, the Netherlands and France.

8 Ibid ch 4.

9 Brigid Laffan, 'The Politics of Identity and Political Order in Europe' (1996) 34 Journal of Common Market Studies 81, 87; Michael A Wilkinson, 'The Brexit Referendum and the Crisis of "Extreme Centrism"' (2016) 17 German Law Journal 131, 135; and Thomas Risse, *A Community of Europeans? Transnational Identities and Public Spheres* (Cornell University Press 2010) 83–5. Risse notes the failure of British political elites to incorporate any European element into the British national identity, a absence of Europeanisation that is almost unique in the Union.

unleashed by globalisation and recent decades of a liberal political economy and one with which, rightly or wrongly, the EU has tended to find itself associated.[10] In reaction to Brexit, a number of sociologists situated Brexit in the context of globalisation and the financialisation of the UK economy and the significant economic and social disruption this has entailed. Brexit was, in their view, a reaction to this trend, which had generated a degree of frustration and alienation amongst significant sections of the population who had failed to benefit from these economic transformations.[11] Social and cultural transformations also figured in this general sense of alienation and frustration, and reasons to do with immigration as well as economic well-being ranked as the most important reasons leave voters cited as motivating their choice.[12] It is important to note that it is the perception of immigration and the threat it poses to the social fabric that is important rather than the reality. Thus, how the manner is presented by political elites and by the media is perhaps as important as the empirical reality of migration and attendant frustrations. Above all Brexit is presented as a rejection of a new national narrative fashioned by political elites over the past 20 years of a global, cosmopolitan Britain at home with economic globalisation abroad and multiculturalism at home. As put by Calhoun:

> Brexit was manifestly a vote against multiculturalism and for English nationalism. A large part of the British population felt as though their country was slipping away from them . . . [this] also reflected globalisation, immigration, international conflict and perhaps above all economic transformation. And the Brexit vote made clear that the cosmopolitan elites who shaped the new Britain failed to generate a new narrative, a new national self-understanding to make sense of the changes and membership in the transformed country.[13]

In philosophical terms Brexit could be said to be a reaffirmation of a rooted or closed community in which the individual is embedded in social structures that form and give meaning to his or her life. This is a gradually changing community, whose norms and values arise organically over time, reflecting a form of Burkean conservatism.[14] There is a solidity and sociality to this form of life that is linked to a tightly woven and rooted community giving rise to national and intergenerational solidarity. Values are transmitted and evolve over time in a quasi-organic fashion establishing social links and a collective sense amongst the community at large.[15]

This vision of Britain, while not radically nationalist in a narrow, ethnic and rigidly exclusionary sense, is nationalist in the broader, liberal sense[16] depicted by Anderson[17] and advocated by Miller.[18] This is the nation as 'an imagined community'[19] in which

10 See Craig Calhoun, 'Populism, Nationalism and Brexit' in Outhwaite (ed) (n 5); and Gerard Delanty, 'A Divided Nation in a Divided Europe: Emerging Cleavages and the Crisis of European Integration' in ibid.

11 See Outhwaite (n 5) and, in particular, contributions by Craig Calhoun, Colin Crouch and Gerard Delanty.

12 Harold D Clarke, Matthew Goodwin and Paul Whiteley, 'Why Britain Voted for Brexit: An Individual-level Analysis of the 2016 Referendum Vote' (2017) 70 Parliamentary Affairs 439.

13 Calhoun (n 10) 60.

14 Edmund Burke, *Reflections on the Revolution in France* (1790).

15 This is not unrelated to Durkheim's concept of organic solidarity: see Emile Durkheim, *The Division of Labour in Society*, George Simpson (tr) (The Free Press 1933).

16 For an account of liberal nationalism in the context of the EU, see Elke Cloots, *National Identity in EU Law* (Oxford University Press 2015) ch 4.

17 Benedict Anderson, *Imagined Communities* (2nd edn, Verso 2006).

18 David Miller, *On Nationality* (Clarendon 1995).

19 Anderson (n 17).

members feel a natural affinity with other members and with the community as a whole and who are bonded by certain core, shared characteristics which are moreover *known* to be shared by other members, hence giving rise to an interpersonal sense of reflexive identity.[20] Together these shared characteristics and collective, reflexive identity constitute a shared normative, social universe for these individuals, generating a sense of identity-security and interpersonal bonds that can in turn provide the foundations for interpersonal trust[21] allowing the creation of a political community and a community of solidarity.

Two aspects of this form of community need to be highlighted to understand the impact of Union citizenship on Brexit; its bounded nature and its link with solidaristic communities on which the modern welfare state has been founded. Firstly, such communities are generally conceived as being necessarily bounded and limited to insiders, with a clear distinction being drawn between insiders and outsiders.[22] Trust implies a sense of identification with others, which in turn is generally based on ongoing interactions and/or a sense of shared characteristics.[23] Identity – a we-feeling – is necessarily juxtaposed to alterity – the others.

Secondly, membership and the bonds of allegiance that it sustains are key to maintaining the relationship of collective solidarity that underpins national welfare systems for both practical and political reasons. This is solidarity in the 'communitarian' sense as outlined by de Witte; solidarity as 'the normative texture of a society; [it expresses] the moral commitments binding a certain group of people in a certain place in time on a certain territory'.[24] It is 'both social and relational and speaks to the commitments between citizens who are engaged in the creation, elaboration and reproduction of a certain community that reflects communal norms, values and modes of interaction'.[25] Philosophically, redistribution of wealth is justified by common membership of society and hence some form of common ownership over the goods produced by that society.[26] There are difficulties in extending solidarity towards individuals not forming part of the national community, as constructed by centralised

20 Miller (n 18) ch 2.

21 For the importance of the notion of trust in the formation of communities, see Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Clarendon Press 1995) 332–8.

22 For the concept of limited membership as a 'good' to be distributed, see Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 1984) ch 1. See Miller (n 18) for a defence of moral particularism, i.e. that our moral relations and, in particular, obligations to others differ depending on the nature of our relationships. For an analysis of the bounding of national welfare communities and the process of restructuring that has been taking place in the context of the EU, see Maurizio Ferrera, *The Boundaries of Welfare: European Integration and the New Spatial Politics of Social Protection* (Oxford University Press 2005), who on page 12 notes that '[t]he salience of boundaries has always been particularly high in the case of social citizenship, which touches on delicate issues of material redistribution and raises thorny dilemmas of equity, justice and reciprocity'.

23 See Cotterrell (n 21) 326–9.

24 Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015) 125.

25 Ibid.

26 In a Rawlsian sense, see John Rawls, *A Theory of Justice* (Harvard University Press 1971). See also Michael Dougan and Eleanor Spaventa, '"Wish You Weren't Here . . .": New Models of Social Solidarity in the European Union' in Michael Dougan and Eleanor Spaventa (eds), *Social Welfare and EU Law* (Hart 2005) 184–7.

state institutions during the twentieth century.[27] As put by Ferrera, '[b]oundaries are essential for constructing special purpose communities ready to share risk'.[28]

These aspects of the community ideal, epitomised in the reaction to Brexit and the post-Brexit turn in British politics, have been challenged by Union citizenship in a practical manner but also in a broader conceptual sense. For, if Brexit is supposed to be an affirmation of the 'citizen of somewhere', the rooted, bounded citizen, socially constituted and allowing for social and political bonds amongst membership, Union citizenship represents perhaps its antithesis – the cosmopolitan citizen.[29] While there a myriad of reasons for Brexit, some of which were explored above, the remainder of this article will highlight this particular aspect of Brexit; the affirmation of a communitarian ideal in opposition to the EU and perhaps to globalised modernity in general. Brexit, in this view provides us with the opportunity, and indeed necessity, to reflect on the compatibility of the Union and especially Union citizenship with the form of life expressed in this ideal.

Citizens of elsewhere and everywhere: the cosmopolitan face of Union citizenship

Union citizenship is primarily a transnational citizenship. If citizenship is a status that confers rights upon individuals, the rights that are associated with Union citizenship are generally exercised not against the Union as a whole but rather vis-à-vis other Member States. The rights are to equal treatment and free movement. These do not per se generate specific substantive rights guaranteed at a Union level. Rather they ensure that rights created under national law are extended to certain categories of non-nationals, primarily Union citizens. They are 'national rights guaranteed by supranational law'.[30] The supranational dimension to Union citizenship, namely citizenship of the Union itself, generating substantive, independent rights exercisable or guaranteed by Union law, while certainly emerging in recent years, remains in an embryonic stage.[31]

The two core transnational rights contained in Union citizenship, namely freedom of movement and non-discrimination, give rise in turn to two separate dimensions of Union citizenship, namely citizenship as a status of integration and citizenship as a status of autonomy. These two dimensions – at times complementary, at times in tension – in turn reflect different elements of Union citizenship.

Citizens of elsewhere: Union citizenship as a status of integration

Union citizenship is best known for being a status of integration.[32] Through the operation of the principle of non-discrimination on the basis of nationality, Union

27 For the difficulties associated with the relationship between migration and the welfare state, see Gary P Freeman, 'Migration and the Political Economy of the Welfare State' (1986) 485 Annals of the American Academy of Political and Social Science 51. See also Maurizio Ferrera, 'The Contentious Politics of Hospitality: Intra-EU Mobility and Social Rights' (2016) 22 European Law Journal 791, who notes the difficulty of finding a justification for what he terms 'transnational solidarity' (i.e. solidarity extended on an individual basis to individuals not originally forming part of the national community).

28 Ferrara (n 27) 793.

29 Or perhaps the accidental cosmopolitan citizen. See Alexander Somek, 'Europe: Political not Cosmopolitan' (2014) 20 European Law Journal 142, 144.

30 Paul Magnette, *La Citoyennéte Européenne* (Editions de l'Université de Bruxelles 1999) ch 1.

31 Although there certainly has been a resurgence in recent years, see the cases of Case C-165/14 *Alfredo Rendón Marín v Administración del Estado* EU:C:2016:675; Case C-304/14 *Secretary of State for the Home Department v CS* EU:C:2016:674; and Case C-133/15 *Chavez-Vilchez et al* EU:C:2017:354.

32 Loïc Azoulai, 'La Citoyenneté Européenne, un Statut d'Intégration Sociale' in Gérard Cohen-Jonathan et al (eds), *Chemins d'Europe: Mélanges en l'honneur de Jean Paul Jacqué* (Dalloz 2010).

citizenship allows individuals to move to and to integrate within societies of other Member States. The principle of integration interacts with the principle of non-discrimination and equal treatment in a dual sense. On the one hand integration is seen as the goal of the rights of equal treatment found in the Citizenship Directive and in the case law of the Court of Justice. On the other hand, further rights and a greater degree of equal treatment are seen as a reward in some sense for a degree of integration in the host Member State.[33] It is therefore a progressive status with an initial right of residence and (limited) equal treatment providing a seed of integration which in turn feeds back and strengthens the legal position of the individual the longer his or her residence has lasted and the extent to which he or she is integrated.[34] The effect of this, as Kostakopoulou has pointed out, is to render the borders of national communities within the Union more porous and open to others.[35] It challenges the exclusivity of national communities and opens them to nationals of other Member States. Strumia in turn identifies a 'mutual recognition of belonging' as lying at the core of Union citizenship.[36] There is a presumption of belonging elsewhere inherent in Union citizenship, a presumption that can become a reality in light of equal treatment and social integration.[37]

A citizen of everywhere: Union citizenship as a status of autonomy

But there is another side to Union citizenship, one that reflects the second part of Union citizenship: free movement. For, if Union citizenship grants rights for individuals to settle and become in a certain sense members of a host society, to become quasi-nationals, it also provides another set of rights; not to settle and make a life within another host society within the EU but rather to move around the Union, to build one's life across a number of Member States and in a number of places.[38]

In particular, a number of cases of Union citizenship associated with the principle of free movement emphasise the right to move around the Union, to enjoy rights and moreover to carry rights acquired in one Member State to another or back to one's original Member State. These vested or acquired rights,[39] passportable throughout the Union, reflect a broader overarching right; the right to build one's life in different Member States and carry that life throughout the Union. Judgments of the Court of

33 See Case C-325/09 *Secretary of State for the Home Department v Maria Dias* EU:C:2011:498, [2011] ECR I-6387, para 64.

34 See Azoulai (n 32) and Ségolène Barbou des Places, 'The Integrated Person in EU Law' in Loïc Azoulai, Ségolène Barbou des Places and Etienne Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart 2016).

35 Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' 68 Modern Law Review 233.

36 Francesca Strumia, *Supranational Citizenship and the Challenge of Diversity: Immigrants, Citizens and Member States in the EU* (Martinus Nijhoff 2013) (see in particular ch 6).

37 Indeed, the Court of Justice has found recently that the logical end point of Union citizenship is precisely full integration into the national community and the acquisition of home state nationality, in which case one is no longer elsewhere. See Case C-165/16 *Toufik Lounes v Secretary of State for the Home Department* EU:C:2017:862. Union citizenship thus in a sense supersedes itself.

38 See Gareth Davies, '"Any Place I Hang my Hat?" or: Residence is the New Nationality' (2005) 11 European Law Journal 43

39 Jan-Jaap Kuipers, 'Cartesio and Grunkin Paul: Mutual Recognition as a Vested Rights Theory Based on Party Autonomy in Private Law' 2 European Journal of Legal Studies 66.

Justice in relation to family reunification[40] and in relation to civil status, in particular the right to carry one's name,[41] throughout the Union clearly reflect this logic, allowing individuals who have acquired certain rights (to family reunification or to have one's name recognised in a particular format) in one Member State to be recognised in other Member States, including one's home Member State. In legislation, Regulation 883/2004/EU on the coordination of social security[42] also reflects this image of a citizen on the move, carrying with him or her the rights, here financial, acquired in particular Member States.

Union citizenship is in this sense 'a bundle of options within a physically broadened and functionally more differentiated space'.[43] The individual is thus an individual characterised by choice and autonomy and is provided with a series of life opportunities across a broader geographic space. It is not the individual who settles and builds a life among a particular defined community, integrating within that community, adopting its norms and forming ties towards other individuals within that space. Rather it is the free, liberal and autonomous individual moving around, independent from societal ties.

The result of the two dimensions of this transnational citizenship is to render Union citizenship into something quite unique in the world today; a form of post-national[44] citizenship displaying certain cosmopolitan features.[45] Union citizenship is post-national in the sense that it is explicitly not tied to any pre-political forms of (national) identification, be they in political, cultural or ethnic terms. In fact, the rejection of a substantial or thick supranational dimension to Union citizenship is precisely a rejection of a refounding of national citizenship at a Union level and an acknowledgment perhaps that a federal 'people' as such does not exist at a Union level. Rather what is at stake in Union citizenship is the right of individuals to move beyond their home state, to enjoy a constitutionally protected status of quasi-insider in *other* states, namely a right to belong 'elsewhere'.[46] However, the cosmopolitan characteristics of Union citizenship are broader and reflect not just individuals who wish to make their lives in another society, but who wish to make their lives across different societies and perhaps in none and to have that choice recognised by states and other authorities: that is to belong everywhere[47] – to exist within a broader multiplicity of political communities and to a certain extent to belong to all of them and to none.

40 For example, Case C-291/05 *Minister voor Vreemdelingenzaken en Integratie v R N G Eind* EU:C:2007:771, [2007] ECR I-10719. See most recently Case C-673/16 *Coman and Others v Inspectoratul General pentru Imigrări and Others* EU:C:2018:385 on the recognition of a same-sex marriage in one Member State (Belgium) in another (Romania).

41 Case C-148/02 C*arlos Garcia Avello v Belgian State* EU:C:2003:539, [2003] ECR I-11613.

42 Regulation 883/2004 on the coordination of social security systems [2004] OJ L 166/1.

43 Ulrich Preuß, 'Problems of a Concept of European Citizenship' (1995) 1 European Law Journal 267, 280.

44 See Yasemin Soysal, *Limits of Citizenship: Migrants and Postnational Membership* (University of Chicago Press 1994) and Christian Joppke, 'The Inevitable Lightening of Citizenship' (2010) 51 European Journal of Sociology 9. See also Linda Bosniak, 'Citizenship Denationalized' (1999–2000) 7 Indiana Global Legal Studies 447, 457 ff, characterising EU citizenship as possibly denationalised but with some reservations.

45 A fact that, as Kamminga points out, is conceptually incompatible with cosmopolitanism properly conceived, see Menno Kamminga, 'Cosmopolitan Europe? Cosmopolitan Justice against EU-centredness' (2017) 10 Ethics and Global Politics 1. Although see Kok-Chor Tan, 'Nationalism and Cosmopolitanism' in David Held and Garrett Wallace Brown (eds), *The Cosmopolitan Reader* (Polity Press 2010) for an account of a form of nationalism and cosmopolitanism that may be compatible.

46 See also Strumia (n 36) who speaks of the mutual recognition of belonging that lies at the heart of Union citizenship.

47 In the terminology of Tan (n 45). See Jeremy Waldron, 'What is Cosmopolitan?' in Held and Wallace Brown (n 45) (eds) for an account of cosmopolitanism as a legal concept by building on the Kantian notion of cosmopolitan right.

It is important to point out that, while Union citizenship displays features of cosmopolitan citizenship, it is not itself a form of cosmopolitan citizenship. Cosmopolitan citizenship entails a particular normative ideal, founded on a principle of liberal equality amongst individuals operating at a global level.[48] The cosmopolitan citizen therefore represents an ideal of the individual existing in a global political or normative society.[49] Two distinctions between this and Union citizenship can be identified. Firstly, while Union citizenship does contain free movement and equal treatment at its heart, these are a consequence of its origins in a transnational, constitutionalised market.[50] Thus, while Union citizenship displays features of cosmopolitan citizenship, these are merely incidental to its transnational market origins rather than any cosmopolitan ideal of a global society. Secondly, in addition to being an outgrowth of the internal market, Union citizenship has been used as a vehicle for the construction of a specifically European identity[51] and carries with it its own boundaries and exclusions. At best, Union citizenship represents a status with certain features of cosmopolitan citizenship that nonetheless remains bounded in space and as a community.

Citizens of nowhere: Union citizenship in the Brexit debate

Both dimensions of Union citizenship played a part in the Brexit phenomena, at different levels. On the one hand, Union citizenship and Union citizens – and in particular their rights to social services and social assistance – appear within the migration debate which seems to have been a major factor in the 'No' result on 23 June 2016.[52] On the other hand, it is argued that Union citizenship also reflects a related but broader opposition to what might be termed 'rootless cosmopolitanism', which in a certain sense is epitomised in the philosophy of Union citizenship.[53]

The hollowing-out of national citizenship: Union citizenship in the migration debate

On a practical but an extremely important level, Union citizenship and the immigration associated with it played an important role in the Brexit debate and the ultimate 'No' result on 23 June 2016. While in a certain sense this is a classic migration debate, with the usual concerns regarding social cohesion and welfare tourism, Union citizenship is perhaps particularly problematic from the classic national or communitarian position that appeared to animate much of the anti-immigrant debate in the UK. Union citizenship can be seen as a migration status, and indeed in its integration dimension this is perhaps appropriate. However, if it is a migration status it is one that is remarkably extensive in terms of rights and more legally entrenched than almost any other immigration status.

Firstly, Union citizens enjoy a status that comes close to that of nationals with an extraordinarily broad range of rights. There is a general right to enter visa-free extended to all Union citizens and a basic right of residence, condition-free initially and subsequently subject to limited financial or work-related conditions. Once legally resident Union citizens enjoy extensive rights to equal treatment across all areas that 'fall within

48 For a general account of cosmopolitanism see Waldron (n 47).

49 See Kok-Chor Tan, 'Cosmopolitan Citizenship' in Ayelet Shachar et al (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) for an overview of the different forms of cosmopolitan citizenship.

50 Niamh Níc Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 Common Market Law Review 1597.

51 Willem Maas, *Creating European Citizens* (Rowman & Littlefield 2007).

52 See Clarke et al (n 12).

53 Joppke (n 44).

the scope of the Treaties' a scope that in turn (in a rather circular manner) can be defined in terms of free movement.[54] All workers have rights to social assistance and other social benefits. In the 1990s and early 2000s these rights were extended to non-economically active individuals (subject to certain conditions),[55] obliging Member States to extend a certain degree of solidarity to needy Union citizens from other Member States. This extension of social assistance rights in particular entailed the rendering of boundaries between national communities of solidarity more porous and subject to penetration. Finally, and not unimportantly, these rights are extended to family members, even those who are not already resident in the Union, opening these rights to a potentially much greater group of individuals and opening Union citizenship to accusations of abuse.[56] In more recent years, the Court of Justice has been engaged in a process of reasserting national boundaries in this area, especially in the field of social assistance to economically inactive migrant Union citizens. In a series of cases[57] it has significantly limited the rights enjoyed by the non-economically active to access social benefits, allowing Member States to apply criteria of lawful residence to filter access to social benefits, where lawful residence is defined as residence on the basis of economic activity or self-sufficiency. While this move has certainly been in reaction to the broader political context of resistance and growing public frustration with perceived problems of EU migration,[58] it is evident this late turn in the Court's jurisprudence has not been sufficient to alter the public narrative on Union citizens. In any event, even with the rights of non-economically active Union citizens restricted, the fact remains that the thresholds of economic activity remain low and once exercising an economic activity or even a (relatively low) degree of economic self-sufficiency, Union citizenship offers an impressive status in terms of the range of rights and their constitutional quality.

Member States are obliged to extend a wide range of rights to non-citizens, in this case Union citizens and their families, individuals who are not part of the national community. The result is a certain denationalisation of the rights of citizenship on the one hand and a devalorisation of citizenship as a status on the other hand. Prevented from delimiting the social rights on the basis of nationality early in the history of the Union, Member States increasingly used residency as an alternative criteria on the basis of which to allocate rights to individuals.[59] The result, as pointed out by Davies in the

54 See Case C-209/03 *The Queen (on the application of Dany Bidar) v London Borough v Ealing, Secretary of State for Education and Skills* EU:C:2005:169, [2005] ECR I-2119. Although note that the enjoyment of such rights appears to be conditional on residence in compliance with the conditions contained in the Directive itself, significantly reducing the ability of non-economically active Union citizens to enjoy rights of equal treatment. See, in particular, Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* EU:C:2014:2358 and subsequent cases. For an analysis of this turn in the case law see the contributions in Thym (ed) (n 4).

55 Case C-85/96 *Maria Martinez Sala and Freistaat Bayern* EU:C:1998:217, [1998] ECR I-2694; Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* EU:C:2001:458, [2001] ECR I-6193; and *Bidar* (n 54).

56 See Case C-127/08 *Metock v Minister for Justice Equality and Law Reform* EU:C:2008:449, [2008] ECR I-6241.

57 In particular Case C-140/12 *Pensionsversicherungsanstalt v Peter Brey* EU:C:2013:565; *Dano* (n 54); Case C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* (Opinion of AG Wathelet) EU:C:2015:210; Case C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto and Others* EU:C:2016:114; and Case C-308/14 *Commission v UK* EU:C:2016:436.

58 The judgment in *Commission v UK* (n 57) was delivered *the day before* the referendum on Brexit, a fact leading O'Brien (n 4) 209 to make the apt comment that '[t]he ECJ has played politics and lost'.

59 Indeed, the UK's social welfare system was particularly susceptible to disruption by EU law and in particular the (over)constitutionalisation of rights to transnational social assistance in the Union. See Susanne K Schmidt, 'Extending Citizenship Rights and Losing It All: Brexit and the Perils of Over-Constitutionalisation' in Thym (ed) (n 4).

context of the EU, is a replacement of nationality with residence as the basis for allocating rights, including rights to social benefits.[60] Thus thicker social bonds founded on the notion of community bonds, which, as pointed out above, are essential for the political and normative justification for welfare states and social citizenship, are replaced with a temporary and transient criteria for membership and extension of rights and responsibilities between individuals.[61] It is questionable whether mere 'being here' is sufficient to provide the deep bonds of community necessary for the underpinning of national welfare programmes.[62] It can be argued that the Court of Justice (and indeed the legislature) has tried to balance this by introducing the principle of integration, seeking to ensure that, while national communities remain open to Union citizens, extending financial solidarity can be conditioned by that citizen demonstrating some level of belonging with the host Member State.[63] However, this has been difficult to apply in practice and conditioned by the operation of the proportionality principle.[64]

In turn (national) citizenship is devalorised; the range of rights that are distinct to the status of nationals is shrunk significantly, especially in the social realm.[65] Citizenship as a membership status carrying with it some kind set of rights, exclusive to the members of that community, is undermined. Citizenship no longer carries with it significant added value, on top of the status of Union citizen. Firstly, human rights and civil rights, and now social rights and rights to social assistance, have been extended beyond the community of national citizens.[66] There is a strong argument to be made that national citizenship only matters now in the political realm.[67]

However, it is not only the substance of Union citizenship and the rights it is associated with that are important in the impact of Union citizenship on the Brexit debate; it is also the constitutional nature or form of Union citizenship. For Union citizenship is a constitutionally guaranteed status that escapes control of national governments and actors. Migration rights are typically something in the gift of the state and are an area of maximum state discretion.[68] Although arguable, there is no legal right

60 See Davies (n 38).

61 Davies also points out that this leads to not only 'the absorption of foreigners but the rejection of expatriates', a result he terms 'disastrous'. See ibid 53.

62 Dougan and Spaventa (n 26). See also Alexander Somek, 'Solidarity Decomposed: Being and Time in European Citizenship' (2007) 32 European Law Review 787.

63 See Barbou des Places (n 34).

64 See again *Bidar* (n 54), although note the jurisprudence has been somewhat inconsistent on this point: see Case C-158/07 *Jacqueline Förster v IB Groep* EU:C:2008:630; and more recently *Dano* (n 54) and subsequent cases.

65 See Joppke (n 44).

66 Leading to the rise of the 'denizen': for an early account, see Tomas Hammar, *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration* (Ashgate 1990). See also, in the context of the Union, Neil Walker, 'Denizenship and Deterritorialisation in the European Union' in Hans Lindahl (ed), *A Right to Inclusion and Exclusion: Normative Faultlines of the EU's Area of Freedom, Security and Justice* (Hart 2009).

67 Even here there are some developments within Europe whereby political rights are extended to certain categories of non-nationals. See Jo Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space* (Cambridge University Press 2007).

68 A traditional paradigm that is undergoing significant alteration in the field of international law and in particular asylum law. See Alison Kesby, *The Right to Have Rights: Citizenship, Humanity and International Law* (Oxford University Press 2012). In the context of the EU, see Catherine Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016).

to migrate.[69] An individual's presence and the extent of the rights he or she enjoys in any particular state are something to be determined by that state. Union citizenship escapes this logic and thus escapes control by the Member State. A classic distinction made between citizens – governed by a system of rights and whose status is guaranteed – and foreigners – governed by a system of privileges and existing in a space of state discretion – is eliminated in the context of Union citizenship.[70] Union citizens, simply put, enjoy a rights-based status, constitutionally guaranteed by a supranational legal order that enjoys primacy over national law.

Union citizenship therefore also involves a significant loss of sovereignty on the part of Member States in relation to their immigration policy,[71] a point that could not have been more salient in the context of the Brexit debates (think 'take back control' of both migration and of sovereignty).[72] Moreover, it is a status the rights of which have been substantially fleshed out, not by the legislature (although this has certainly played its part)[73] but by a judicial actor: the Court of Justice. This is not an irrelevant detail in the context of Brexit. Sovereignty has always been a concern of the UK in relation to European developments. However, the nature of that concern has shifted. Gee and Young have described how, in contrast to the initial debate concerning the entry of the UK into the then European Economic Community, which focused on parliamentary sovereignty, discussions of sovereignty in the Brexit debate tended to concern judicial sovereignty (both in relation to the Court of Justice, and it must also be said, the European Court of Human Rights).[74]

Citizens of nowhere: Union citizenship as a cosmopolitan figure

However, the antipathy between Union citizenship and the communitarian ideal epitomised in Brexit goes further than the role played by Union citizenship as a supercharged status of migration, with all the problems that poses for the coherence of national communities of solidarity and welfare and its denationalising and devalorising impact on national citizenship. There is a deeper conceptual incoherence between the form of life epitomised by Union citizenship and the form of life reflected in the Brexit debate. In contrast to the rooted, socially constructed citizenship, embedded in a community of values and of trust, in which membership has an inherent and constituent value for individuals, Union citizenship can be said to represent a cosmopolitan figure and symbolises the fears and insecurities reflected in the choice of Brexit. This, however, is

69 Outside the scope perhaps of rights enjoyed by recognised refugees under the Geneva Convention. Strong arguments have been made in normative theory regarding a general international right of free movement. See Joseph Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49 The Review of Politics 251 for the classic statement.

70 For an early illustration of this point in the area of expulsion, see Gérard Lyon-Caen, 'La réserve d'ordre public en matiere de liberé d'etablissement et de libre circulation' (1966) Revue Trimestrielle de Droit Européen 693.

71 Emigration policy in the sense of controlling the exit of individuals from the state is likewise affected by EU law (see Case C-33/07 *Ministerul Administrației și Internelor – Direcția Generală de Pașapoarte București v Gheorghe Jipa* EU:C:2008:396, [2008] ECR I-5157) but is of course much less politically salient (if at all) than immigration policy.

72 Thus 'the entire point of Union migration law is to avoid, so far as possible, executive discretion in the treatment of fellow Union citizens'. See Eleanor Spaventa, 'Earned Citizenship: Understanding Union Citizenship through its Scope' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017) 217–18.

73 Níc Shuibhne (n 3).

74 Graham Gee and Alison Young, 'Regaining Sovereignty? Brexit, the UK and the Common Law' (2016) 22 European Public Law 131.

not the positive, idealised version of cosmopolitan citizenship of the stoics, the citizen of the world that is at home and welcome everywhere. Rather it is the denuded, rootless cosmopolitan detached from the national community and, moreover, that undermines the national community;[75] Theresa May's 'citizens of nowhere'. In this caricature, Union citizenship is rootless, instrumental, individualistic and exclusive.

Union citizenship in this sense is seen as a *dis*embedded citizenship; it is rootless. It is not founded in any particular community at a supranational level and, moreover, deliberately seeks to avoid integration or assimilation in any national community, be it the home national community or the host national community. It is liberal and individualistic. It is the individual of autonomous choice, who is self-constituting and who is capable of making use of the myriad of opportunities offered by Union citizenship throughout the Union. Note, for example, the use made by the Garcia Avello family not to seek equal treatment with Belgian children in Belgium, but rather to seek *different* treatment to avoid national regulations and national norms in relation to naming; to seek some form of special and individualised treatment on the basis of their transnational life.[76] Interestingly, the Belgian government argued that equal treatment was necessary in such a case to *ensure* integration: an argument that was rejected by the Court of Justice, which preferred to privilege the choice made by the Garcia Avello parents in how they wished their children's names to be registered. See also the attempt made by Ms Sayn-Wittgenstein to avoid national constitutional norms relating to the use of noble titles in Austria, seeking to ensure both the use of her chosen name and the pursuit of her cross-border business.[77]

It should be pointed out that there is a countervailing tendency in the jurisprudence of the Court of Justice to stress the social integration dimension of Union citizenship explored in the previous section. It is certainly true that these two aspects of Union citizenship are at times in tension with an emphasis on personal freedom and autonomy that is resistance to the locking-in of individuals in any particular national communities. More recent cases have seen an attempt by the court to reconcile these two dimensions; allowing the mutual recognition of acquired rights but only after an initial period of 'genuine residence' in the state in which those rights are acquired.[78] The concern is to avoid forum-shopping, with individuals moving briefly to other Member States to acquire rights and insisting they be recognised upon their return to their home Member States.

However, these very cases – whereby individuals sought to acquire rights in other Member States in the absence of integration – point to the second and perhaps more troubling aspect of Union citizenship that is to some extent built into its DNA and one that displaces any attempt to build a sense of community, let alone political community attached to it; its instrumental quality. Union citizenship, having developed from the internal market and the market freedoms associated with it, has, since its inception, been accused of being a 'market citizenship', one in which individuals were seen merely as factors of production (and also consumption) to be put in the service of the construction

75 Caricatured by Waldron (n 47).

76 *Garcia Avello* (n 41).

77 Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wein* EU:C:2010:806, [2010] ECR I-13693. While Ms Sayn-Wittgenstein's attempt was ultimately unsuccessful, it did bring core constitutional values of the Austrian Republic within the purview of EU law and subject it to a process of justification and proportionality. For more recent jurisprudence on this issue and an attempt by the Court of Justice to balance the individual right of autonomy with the (national) public interest, see Case C-541/15 *Mircea Florian Freitag* EU:C:2017:432.

78 See in particular Case C-456/12 *O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B* EU:C:2014:135, paras 51–6 and more recently *Coman* (n 40) para 40.

of the internal market. Union citizenship is still a status that is conditioned[79] primarily by economic activity and, moreover, its benefits are offered to those who are willing to move and make use of the economic opportunities offered by Brexit. In another, more subjective sense, Union citizenship is seen as instrumental: the holders of Union citizenship as a status may not necessarily see it as inherently valuable as a form of membership in a political community but rather see it simply as a bundle of rights to be used to advance private interests.

And, indeed, the interests promoted and protected by Union citizenship are precisely that: private and individual. The Union citizen is an inherently individualist character and the rights he or she deploys – to work, to study to participate as a service provider or consumer – are all related, if no longer to the market, certainly to the private sphere. Union citizenship is a status which enables its users to advance personal life plans, only now across the Union and the various possibilities it offers. It is a private and rights-based citizenship.[80] By contrast, it is not a political or public citizenship, seeking to link individuals to a broader group which can collectively exercise power. The identity and political dimensions of Union citizenship are notoriously underdeveloped from a sociological, institutional and legal point of view.

Finally, not only is the Union citizen a rootless, individualist character – in the words of Everson 'instrumental' and 'instrumentalised'[81] – intensely private and mostly devoid of a public dimension, but Union citizenship is a status that is instrumental and useful for a distinctly privileged section of society. The benefits accruing from Union citizenship (and indeed European integration more generally) are perceived and to a certain extent in fact tend to flow towards more advantaged sections of society; the educated, the mobile, the wealthy and those with social and economic capital. This is true for EU law more generally but is perhaps best epitomised in its individual status – Union citizenship. Fligstein has demonstrated that the social groups who benefitted most from European integration, economically, politically, culturally and socially have been those groups with the linguistic, economic and social capital to make use of the integration dynamic.[82] On the other hand, lower socio-economic groups have not seen the same benefit from

79 Or, in a recent rather euphemistic phrase of AG Cruz-Villalón, 'regulated', see Case C-308/14 *Commission v UK* (Opinion of AG Cruz Villalón) EU:C:2015:666, para 71.

80 Leading Joppke to characterise it as 'Roman to the core'. See Joppke (n 44) 161. Citing Pocock's analysis of the dual roots of citizenship in Roman and Greek conceptions of citizenship and their subsequent genealogy. See J G A Pocock, 'The Ideal of Citizenship since Classical Times' in Ronald Beiner (ed), *Theorizing Citizenship* (State University of New York 1995).

81 Michelle Everson, 'The Legacy of the Market Citizen' in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union* (Clarendon Press 1995) 85 ff; and more recently Michelle Everson, 'A Very Cosmopolitan Citizenship: But Who Pays the Price?' in Michael Dougan, Niamh Níc Shuibhne and Eleanor Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012).

82 Neil Fligstein, *Euroclash: The EU, European Identity and the Future of Europe* (Oxford University Press 2008). Although, as de Witte points, out this doesn't capture the full picture and in fact some more points of political contestation have arisen around precisely the less advantaged in society seeking to avail themselves of various social supports: see Floris de Witte, 'Emancipation through EU Law' in Azoulai et al (n 34).

European integration and in fact in certain cases have seen their relative position deteriorate generating a backlash against the European project.[83]

Conclusion

Aside from being a seismic event in the history of the EU and in the recent history of the UK, Brexit is an event with many complex endogenous and exogenous causes. The purpose of this paper is not to identify all of these causes or to draw some direct causal links between particular events, processes or institutions and the vote on 23 June 2016. It does not intend in any sense to 'explain Brexit'. Rather it is an attempt to address the question of the manner in which the figure of the Union citizen and Union citizenship as a legal construct can be located within the Brexit debate and the underlying socio-political context within which Brexit took place. Ultimately, it is to question whether the social life reflected in the choice for Brexit is compatible with Union citizenship as it is currently constructed. Within the Brexit process there appears to be a call for a return to or a reassertion of a way of life that is rooted in the community, that is bounded and one that is associated with clear social ties that underpin a solidaristic and normatively coherent community. Union citizenship, in its operation and in the form of life it projects, appears to be at least in tension with or to ask questions of that communitarian form of social life. It operates on national communities to open them up to (certain categories of) outsiders, effacing the distinction between nationals and non-nationals and in the process undermining the links that underpin solidaristic communities, denationalising membership and devalorising national citizenship. Moreover, it can be made to represent a contrary ideal or even antithesis of the rooted, communitarian citizenship that the Brexit vote reflects. A certain view (perhaps caricature) of Union citizenship is that of the rootless cosmopolitan – the infamous 'citizen of nowhere' – individual, individualist, pursuing private interests and shunning or even undermining the public sphere; the extreme liberal, valuing autonomy, choice, personal interests and actively repudiating values of community.[84]

Two phenomena have been witnessed on the global stage in relation to citizenship and membership. On the one hand there is a hollowing-out and an undermining of the traditional role of national citizenship and an evolution in its meaning. Its

83 '[T]he stratified nature of intra-EU mobility and transnational practices (involving mostly the highly educated, young and more privileged strata of the population) generates an anti-mobility reaction in the most sedentary part of the citizenry. One of Kuhn's findings. . . . warns that a legitimacy crisis can also be triggered by unintended backlash effects of a more mobile world'; Ettore Recchi, 'The Engine of "Europeanness"? Free Movement, Social Transnationalism and European Identification' in Thym (ed) (n 4) 148. For a particularly striking example, see the privileging of economic freedoms over labour rights in Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* EU:C:2007:772, [2007] ECR I-10779 and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* EU:C:2007:809, [2007] ECR I-11767.

84 There is, of course, a tension between these two processes in which Union citizenship can be said to undermine national citizenship. On the one hand Union citizens are portrayed as welfare tourists, undermining national welfare states and the trust that underpins solidaristic communities; this is typically not an economically privileged individual (as pointed out in passing by de Witte (n 82) 26, fn 36). On the other hand there is the multilingual, mobile, educated and economically privileged transnational citizen of the cosmopolitan ideal. It is submitted that both can and do exist in reality, and the presence of some individuals who make use of welfare systems in host member states certainly does not negate Fligstein's argument (n 82) that, on balance, European integration and Union citizenship in particular have benefitted particular, more privileged sectors of society. More importantly, however, is the fact that both of these phenomena exist in reality and that both also exist in the imagination and in particular in the popular political imagination displayed in the Brexit debate and vote.

denationalisation has led to a weakening of the link between citizenship and identity and rendered it a more instrumental and functional attribute rather than inherently valuable as a mark of membership and identity. The extension of human rights and, more recently, social rights to non-citizens within particular states reduces the number of exclusive citizenship rights to a core of political rights. Finally, duties – such as they were – are now either non-existent or are imposed on all legal residents. There is a distinct 'lightening of citizenship'.[85] At the same time, social citizenship, a major achievement of the post-war social settlement as described by Marshall, has been seriously undermined in recent years, leading Turner to declare – and not in a positive manner – that 'we are all denizens now'.[86] The result is a certain crisis in citizenship, having had its identify function undermined, its rights rendered general and the social inclusion promised by citizenship eroded. People feel a social, economic and identitarian insecurity. Secondly, in contrast has been the elevation of a new figure, an almost mirror image of the national, rooted and communitarian citizenship; the rootless cosmopolitan. Empowered by processes of globalisation and the economic and social opportunities it offers, this figure is educated, privileged and escapes national constraints and frequently national duties, including taxes. It is liberal, private, driven by individual choice and personal interests.

Union citizenship can be said to operate within this narrative and emerges from and contributes to both trends. On the one hand, the significant levels of migration, and the image of the 'welfare tourist' swamping local services and undermining social cohesiveness, contribute to the social insecurities reflected in Brexit and are the visible face of the hollowing-out of national citizenship as a meaningful status and the disruption to local communities. On the other hand, the privileged, mobile Union citizen, for whom the Union is his or her playground and who rejects national constraints and bonds of community, tends to both act as a representative figure, opposed to, and to a certain extent undermining, the national communitarian vision of citizenship expressed in the Brexit vote. For better or worse the cosmopolitan features of Union citizenship can be said to undermine this particular view of social life. If Union citizenship can be said to be in some sense an ideal of cosmopolitan citizenship, allowing citizens to be at home elsewhere, as privileged guests in other communities or indeed to be at home everywhere, to be citizens of the world, then Brexit is clearly a rejection of this ideal on the part of the British public, who instead seek a different form of social life, one more rooted and socially constituted.

Citizenship is a multidimensional concept; there is certainly more to Union citizenship than a naked market-driven, transnational citizenship denuded of any social or political dimension. However, it is certainly the case that it is this side of Union citizenship that has been privileged in its construction and, moreover, that is a side of Union citizenship that has contributed to the disruption of national communities. At its heart, as Strumia notes, is a mutual recognition of belonging between political communities that have decided to share their political destinies and foster a closer Union amongst the peoples of Europe. It represents a valuable political ideal that tames the destructive and exclusionary tendencies of classic nationalism and national citizenship.[87] Perhaps counterintuitively more, not less, Union citizenship may be necessary in order to render

85 Joppke (n 44).

86 Turner (n 6).

87 For the role of the EU in 'taming the nation-state', see Will Kymlicka, 'Liberal Nationalism and Cosmopolitan Justice' in Seyla Benhabib (ed), *Another Cosmopolitanism* (Oxford University Press 2006) and, specifically in relation to Union citizenship, see Joseph Weiler, 'To Be a European Citizen: Eros and Civilisation' in Joseph Weiler (ed), *The Constitution of Europe* (Cambridge University Press 1999).

it more compatible with national citizenship and the values national citizenship represents. Two interconnected strategies spring to mind: firstly, the further development of a supranational dimension to Union citizenship and, in particular, a set of supranational rights;[88] secondly, the development of the non-market or social aspect of Union citizenship. Together they represent the development of a supranational, non-market citizenship. This may appear as something directly opposed to the heretofore dominant picture of Union citizenship as a market-based, transnational status, and indeed it is true that it is, structurally and substantively, its opposite. However, in order to underpin and support the transnational dimensions of Union citizenship and all the virtues that are associated with that status – openness of national communities to others, a choice and greater degree of autonomy for individuals in order to fashion their own concept of the good from a broader set of 'spheres of justice' – a social and political Union citizenship needs to be fashioned at a supranational level. The supranational is explicitly envisaged as a complement and support for the transnational. While space precludes any detailed discussion of the future development of Union citizenship, if nothing else is clear from Brexit, it is the need to ask questions about the current state of the Union and of Union citizenship and the manner it can be adapted to respond to the deep concerns reflected in the Brexit vote within the context of an ever closer Union between the peoples of Europe.

88 In this vein, see, for example, the recent contribution of Daniel Sarmiento and Eleanor Sharpston, 'European Citizenship and its New Union: Time to Move On?' in Kochenov (ed) (n 72).

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Brexit and the security of the European project: citizenship and free movement as a case study

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Abstract

The article makes use of the notion of security as a heuristic device providing a descriptive and normative conceptual framework for the purposes of interpreting the events associated with Brexit. It claims that security can be identified as a meta-constitutional rationale of the European project. In particular, two discourses of power (security and fundamental rights) have been constitutive of the process of European polity-building, although they are characterised by ambiguities and contradictions. Brexit, and in particular the complex issues relating to free movement and citizenship rights, confirms such contradictions and enables us to consider more carefully the nature of the EU polity and the reasons underpinning its development. In other words, security emerges at the same time as an opportunity for growth and as a threat for the European project. The article suggests that, in order to safeguard EU integration, a move from a self-referential to a heterarchical form of security is necessary.

Keywords: discourses; EU citizenship; free movement; rights

1 Introduction

Following the start of the Brexit negotiations on 29 March 2017,[1] many scenarios of the relationship between the EU and the UK are being discussed. At this stage, virtually all of them, from the 'no deal' to the 'second referendum' scenarios, seem possible. A considerable degree of uncertainty and controversy permeates the public debate.

This article aims to take stock of the ongoing negotiations between the UK and the EU: in particular, the way a Member State's withdrawal affects citizens' rights reflects a broader impact on the nature of the EU as a polity and the reasons for its existence. Does Brexit suggest that EU citizenship has never really existed as a 'fundamental status of nationals of the Member States', but is rather a contingent status, as citizens and workers may at any time be converted into 'bargaining chips'? In other words, Brexit is considered as 'yet another crisis',[2] a litmus test – one among many recently – for the EU. As some

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1 On this date, the UK served its withdrawal notice to the European Council, in accordance with Article 50 TEU.

2 N Nugent, 'Brexit: Yet Another crisis for the EU' in B Martill and U Steiger (eds), *Brexit and Beyond: Rethinking the Futures of Europe* (UCL Press 2018) 54.

scholars argue, this event may either encourage other states to leave the EU (the centrifugal perspective) or promote further integration among the remaining countries (the centripetal perspective).[3] As free movement and citizenship are among the main aims of the EU, the loss of related rights casts doubt on the viability of the European project.

In order to illustrate the argument above, this article maintains that European constitutionalism is informed by the security meta-constitutional rationale, a 'superior reason' supporting the existence of the EU. The descriptive and normative conceptual framework employed in the article may thus serve as a guideline for future research in the field.

Security is interpreted here broadly, as a concept that goes beyond the mere notion of stability. It is associated with the identity of a polity and thus acquires an existential connotation.[4] In other words, this 'superior reason' is pursued by the EU beyond and sometimes even against the constitutional aims and principles that are set out in the Treaties and becomes particularly evident when the EU needs to adapt to or is challenged by events that undermine or endanger its existence.[5] One of the fundamental features of the EU is self-preservation in the face of threats and the emergence of such threats – whether real or purely imaginary – is a powerful self-justifying tool. The development of the EU is thus a process, in which European integration, security and crisis are closely interrelated: in this process, two ambiguous and contradictory discourses can be detected: security and 'fundamental' or 'individual' rights.[6] Security is expressed, for example, by important principles of EU law, such as the principles of autonomy and effectiveness/uniformity,[7] which have been employed by the Court of Justice of the European Union (CJEU) to assert the authority of EU law and manage conflicts. Correspondingly, the so-called *Melloni* doctrine conveys the idea that, whenever the application of national constitutional standards of protection of fundamental rights might compromise the primacy, effectiveness and unity of EU law, national courts ought to refrain from using them.[8] Yet, security is also an ambiguous notion which is characterised by tensions and contradictions. In particular, when the security meta-constitutional rationale becomes self-referential, namely when European integration is pursued for its own sake, the risk is that the European project may be unable to deliver what it promises. Brexit, which is an effect of self-referential security, is indeed likely to

3 M Cini and A Verdun, 'The Implications of Brexit for the Future of Europe' in Martill and Steiger (n 1) 63, 66. See also P Mindus, *European Citizenship after Brexit: Freedom of Movement and Rights of Residence* (Palgrave Macmillan 2017) 29.

4 For further details, see M Fichera, *The Foundations of the EU as a Polity* (Edward Elgar 2018), where this conceptual framework is used to analyse several 'crises' of the EU. This notion is thus different from traditional characterisations of security in the field of public order, or as national security. See e.g. J Richards, *A Guide to National Security: Threats, Responses and Strategies* (Oxford University Press 2012); H K Koh, *The National Security Constitution: Sharing Power after the Iran Contra Affair* (Yale University Press 1990); K Tuori, 'A European Security Constitution?' in M Fichera and J Kremer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Intersentia 2013) 39.

5 This concept is thus akin to the idea of '*raison d'Etat*' employed by Machiavelli, although the legal and historical context is very different. See N Machiavelli, *The Prince* (Clarendon Press 1891). One example of this is the adoption of measures during the Eurozone crisis, which were not always in line with EU law.

6 On this particular aspect see M Fichera, 'Security Issues as Existential Threat to the Community' in Fichera and Kremer (n 4) 85. I distinguish here between 'fundamental' rights and 'human' rights: see e.g. G Palombella, 'From Human Rights to Fundamental Rights: Consequences of a Conceptual Distinction' (2007) 93 Archiv für Rechts- und Sozialphilosophie 396. The EU cannot of course be compared to a human rights organisation. For the purposes of this article, I use the notions of 'fundamental' and 'individual' rights, or simply rights, interchangeably, as embracing both fundamental rights and fundamental freedoms.

7 See e.g. Case 43/75 *Defrenne v Sabena (No 2)* ECLI:EU:C:1976:56; Case 41/74 *Van Duyn v Home Office* ECLI:EU:C:1974:133; Joined Cases C-6/90 and C-9/90, *Francovich v Italy* ECLI:EU:C:1991:428.

8 Case C-399/11 *Melloni* ECLI:EU:C:2013:107.

cause a 'dramatic loss of rights',[9] especially considering that the UK began the two-year time limit prescribed by Article 50 of the Treaty on European Union (TEU) without a clear agenda.[10]

It is argued here that the EU should escape the trap of self-referential security and avoid the fragmentation of the internal market in the face of differentiated integration. The EU has followed a model of integration which has systematically sidetracked concern for the social embeddedness of transnational norms. Brexit suggests that, in order for the European project to persist, a move towards a heterarchically oriented security must be encouraged, by being responsive to the demands of the complex and diversified European society/ies and enhancing the economic and social constitution.

As will be seen below, Article 50 TEU[11] is an illuminating expression of the security meta-constitutional rationale, precisely because it was created with the aim of managing potential crises. As is well known, British diplomat John Kerr[12] drafted the text that sets out the procedure for leaving the EU as part of an embryonic EU constitutional treaty in the early 2000s. At that time, the Austrian Coalition government, which included the far-right Freedom Party of Austria, led by Jörg Haider, was a cause for concern for the European institutions. The idea was thus to have a procedure allowing a government to leave the EU at any time, in order to avoid the legal chaos deriving from not being able to strike an agreement. Whether such a procedure – as a result of the type of agreement struck between the countries involved – effectively protects the rights of EU citizens as free movers remains to be seen.

The following pages will: (a) sketch the essential features of the withdrawal process; (b) illustrate the relevance of the security meta-rationale; and (c) draw some conclusions relating more specifically to the consequences of Brexit as regards citizenship and free movement.

2 The procedure for the negotiation of a withdrawal agreement

This section aims to emphasise those aspects of the withdrawal process in which citizenship rights are prioritised. As is well known, Article 50 TEU sets out a procedure for the conclusion of a withdrawal agreement between the EU and the UK, taking into account the framework for the UK's future relationship with the Union.

As far as the negotiations are concerned, the European Council guidelines (adopted one month after the UK notification of withdrawal)[13] envisaged a 'two-phased approach' to the withdrawal negotiations.

9 D Kochenov (2016) 'Brexit and the Argentinisation of British Citizenship: Taking Care Not to Overstay Your 90 Days in Rome, Amsterdam or Paris' (*VerfBlog*, 24 June 2016) <https://verfassungsblog.de/brexit-and-the-argentinisation-of-british-citizenship-taking-care-not-to-overstay-your-90-days-in-rome-amsterdam-or-paris/>.

10 Scholars have had no hesitation in pointing out that the UK's departure from the EU might cause 'the most substantial loss of rights in Europe since the break-up of Yugoslavia in the 1990s': J Shaw, 'Citizenship and Free Movement in a Changing EU: Navigating an Archipelago of Contradictions' in Martill and Steiger (n 1) 156.

11 See Consolidated Version of TEU and TFEU [2012] OJ C 326.

12 See e.g. G Campbell, 'Article 50 Author Lord Kerr says Brexit Not Inevitable' (*BBC News*, 3 November 2016) <www.bbc.co.uk/news/uk-scotland-scotland-politics-37852628>.

13 European Council Guidelines, EUCO XT 20004/17, Brussels, 29 April 2017, 4. See also Directives for the negotiation of an agreement with the UK and Northern Ireland, XT 21016/17 ADD 1 REV 2, Brussels, 22 May 2017, 4 (hereinafter 'the negotiating directives') and Resolution of the European Parliament of 5 April 2017 (concerning negotiations with the UK following its notification that it intends to withdraw from the European Union) [2017] P8_TA-PROV(2017)0102.

In the first phase of the negotiations, settling the question of citizens' rights was a priority for the EU (part III.1 of the negotiating directives).[14] Analogously, 'securing the status of, and providing certainty to, EU nationals already in the UK and to UK nationals in the EU' is described as one of the UK government's 'early priorities' for the withdrawal negotiations.[15] This is why, according to para 8 of the European Council guidelines, 'agreeing reciprocal guarantees to safeguard the status and rights derived from EU law at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom's withdrawal from the Union will be the first priority of the negotiations'.[16]

The prioritisation of EU citizens' rights is confirmed by the EU negotiating directives, which state that the withdrawal agreement should 'safeguard the status and rights derived from Union law at the withdrawal date, including those the enjoyment of which will intervene at a later date as well as rights which are in the process of being obtained', both for citizens of other Member States residing (or having resided) and/or working (or having worked) in the UK, and vice versa.[17] Inevitably, a 'personal' and a 'material' scope of such rights is involved.

From the perspective of the EU, 'the personal scope' of the guarantees to be included in the withdrawal agreement should coincide with Directive 2004/38 (i.e. the 'Citizens Directive'),[18] so as to include 'both economically active, i.e. workers and self-employed, as well as students and other economically inactive persons, who have resided in the UK or EU27 before the withdrawal date, and their family members who accompany or join them at any point in time before or after the withdrawal date'. As far as 'the material scope' (the rights to be guaranteed) is concerned, the negotiating directives mention residence rights and rights of free movement as derived from the principle of non-discrimination based on nationality (Article 18 of the Treaty on the Functioning of the European Union (TFEU)), free movement of workers (Article 45 TFEU), freedom of establishment (Article 49 TFEU), and citizenship (Article 21 TFEU),[19] and as otherwise set out in the Citizens Directive.[20] The scope would thus include: residence rights based on the Treaties or the Citizens Directive and the procedural rules to be followed in order to document those rights; the social security coordination rules, including export of benefits and social security contributions made in different countries; the supplementary rights in the Regulation on free movement of workers, including workers' children's access to education; access to self-employment; and recognition of qualifications which were obtained before Brexit or which are in the process of being recognised on that date.

14 In the same vein, see Letter from Theresa May to the EU Citizens, 19 October 2017 <www.gov.uk/government/news/pms-open-letter-to-eu-citizens-in-the-uk>. As regards the negotiating directives, see n 13.

15 UK Department for Exiting the European Union, 'The United Kingdom's Exit from, and New Partnership with, the European Union' (Policy Paper, 15 May 2017) para 6.3 <www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2#controlling-immigration>.

16 European Council Guidelines (n 13).

17 As regards the negotiating directives, see n 13.

18 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L 158 (Citizens Directive).

19 Consolidated Version of TEU and TFEU (n 11).

20 For the Citizens Directive, see n 18.

Another issue concerns social security rights.[21] In this regard, the negotiating directives underline that the guarantees to be included in the withdrawal agreement should be reciprocal and 'based on the principle of equal treatment amongst EU27 citizens and equal treatment of EU citizens as compared to UK citizens, as set out in the relevant EU acquis' (para 20).[22]

The joint negotiation report of the European Commission and the UK and the Commission Communication on the negotiation progress, both of 8 December 2017, again focus on safeguarding EU citizens' free movement rights, as exercised in the past, as far as possible.[23]

During the second phase of the negotiations, a Statement of Intent on the EU Settlement Scheme, produced by the Home Office in June 2018, confirmed that 'safeguarding the rights of EU citizens and their family members living in the UK and ensuring reciprocal protections for UK nationals living in the EU' was the first priority in the negotiations.[24]

In particular, Part 2 of the Commission's Withdrawal Agreement[25] focuses on citizens' rights and social security provisions. Importantly, these provisions are justiciable, as Article 151 allows references for preliminary ruling to the CJEU concerning the interpretation of Part 2. Although this is only possible within eight years of the end of the transition period, the provisions should be read in conjunction with Article 152, which provides for an independent authority with the task of interpreting and applying Part 2. This body may not only exercise its powers of investigation upon receiving complaints from EU citizens and their family members, but may also conduct inquiries autonomously and bring a legal action before a UK court or tribunal.[26]

In the official documents mentioned above a clear emphasis on the need to protect EU citizens' rights can be detected. However, two fundamental questions emerge. A first line of inquiry ought to focus on what the real value of EU citizenship and free movement rights is, given that – as it seems – their status can be challenged or threatened when a Member State decides to withdraw from the EU. A second aspect that deserves attention is that the fate of EU citizens' rights in the withdrawal process illustrates the

21 Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, [2004] OJ L 166/1.

22 As regards the negotiating directives, see n 13.

23 Joint Report from the negotiators of the European Union and the UK Government on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the European Union TF50 (2017) 19; Commission to EU27, 8 December 2017; Communication from the Commission to the European Council (Article 50) on the state of progress of the negotiations with the UK under Article 50 of the TEU, Brussels, 8 December 2017 COM (2017) 784 final. See e.g. s 4(a) of the Communication: '[T]he principle underlying the Union's position are that the Withdrawal Agreement should protect the rights of Union citizens, United Kingdom nationals and their family members who, at the date of withdrawal, have enjoyed rights relating to free movement under Union law, as well as rights which are in the process of being obtained and the rights the enjoyment of which will intervene at a later date.'

24 UK Home Office EU Settlement Scheme: Statement of Intent, 21 June 2018, 5 <www.gov.uk/government/publications>.

25 European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, TF50 2018 (33) Commission to EU27, 28 February 2018 and TF50 2018 (33/2) Commission to UK, 15 March 2018.

26 As far as Part 3 (including inter alia free movement of goods) is concerned, Article 153 provides for the application of Articles 258, 260 and 267 TFEU. Moreover, without prejudice to Article 153, Article 162 includes the possibility of setting up a Joint Committee for the settlement of disputes concerning the interpretation and application of the agreement. Such disputes may in some circumstances be further submitted to the CJEU.

impact of a Member States' withdrawal on the nature of the EU as a polity and the reasons for its existence. In order to answer the two questions mentioned above, the following pages will attempt to provide the necessary conceptual framework offering both a descriptive and a normative account of the current events.

3 Brexit and the security dimensions

It is argued in this section that several security dimensions may be identified as distinctive to the EU polity: spatial, temporal, popular, ontological, epistemic and semantic (or reflexive). Each of these dimensions is expressed by a conceptual category, operates through a dichotomy and addresses one or two fundamental questions relating to European integration. While this is a general model applying to the EU, for the purposes of this article it is argued that the specific case of Brexit affects to some extent each security dimension.

Indeed, the expressions and concepts used in the negotiating directives and related documents (e.g. 'securing the status of, and providing certainty to, EU nationals already in the UK and to UK nationals in the EU', 'safeguard[ing] the status and rights derived from Union law at the withdrawal date', 'preserving the internal market') are more significant than may seem at first sight. The fact that both parties to the negotiation have placed emphasis on the priority of citizens' rights epitomises the nature of the EU polity and the reasons behind it.

In other words, the significance of the EU liberal project lies beyond the commitment to fundamental rights, the rule of law and democracy, which, of course, are all relevant values reaffirmed in the Preamble to the TEU and the Preamble to the Charter of Fundamental Rights (CFR),[27] as well as several provisions therein and the case law of the EU judiciary. The added value of the construction of the EU as a polity emerges from security, expressed by two ambiguous and contradictory discourses of power: security and fundamental rights.

Firstly, the EU liberal project, as a project aiming to ensure peace and safety across the European continent, has always relied upon a powerful and pervasive security discourse, focusing on two functions, namely both securing the smooth operation of the internal market and ensuring a secure marketplace.[28] Secondly, the emancipation of the individual from the moorings of the nation state, as an expression of the fundamental rights discourse, is pivotal to building up the EU polity. It is not by chance that Article 3(2) TEU is placed before Article 3(3) TEU. However, although the provision to EU citizens of an area of freedom, security and justice (AFSJ), where free movement is guaranteed, is prioritised over the establishment of an internal market, in practice the proclamation of the free movement paradigm is characterised by the prevalence of economic objectives over social needs.[29]

In light of the contradictions outlined above, multiple security dimensions may be identified and the Brexit negotiations are very helpful in clarifying how they ought to be viewed.

27 Charter of Fundamental Rights of the European Union, OJ C 326. See also Consolidated Version of TEU and TFEU (n 11).

28 As argued in M Fichera, 'Sketches of a Theory of Europe as an Area of Freedom, Security and Justice' in M Fletcher, E Herlin-Karnell and C Matera (eds), *The European Union as an Area of Freedom, Security and Justice* (Routledge 2016) 34.

29 See the discussion on the implications of Brexit later in this work.

Dimension	Conceptual category	Dichotomy	Questions
Spatial	Space	Inside/outside	Who is the Other? Where is it the Other located?
Temporal	Time	Past/future	In which direction are we moving?
Popular	People	Demos/no demos	What is constituent power?
Ontological	Nature of the EU	Federal state v loose international organisation	What is the best interpretative scheme?
Epistemic	Pluralism	One/many	How should multiple rationalities or claims of authority coexist?
Semantic or reflexive	Notion of security	Secure/insecure	What does it mean to be secure? How to be secure as a polity?

The table above illustrates how these dimensions may be articulated.[30] In the following pages an analysis of each dimension and related challenges is offered.

3.1 Semantic or reflexive security

Semantic or reflexive security concerns the question of how to be secure as a polity. As every polity attempts to ensure its own survival by devising institutions, legal principles, structures and techniques of governance that allow it to continue and expand, so the EU relies upon the security and rights discourses to avoid dissolution and chaos. These discourses are associated with threats and periods of crisis.

Change and permanence are thus interwoven in the European liberal project of integration, and this feature of adaptation to change, of permanence in the face of threats in the name of a 'superior reason', is what I call 'the security of the European project'. There exists a constant interplay between security and insecurity and, whenever the foundational values of any polity are questioned by an excessively high number of opponents, the very existence of the polity is at stake.[31] Thus, founding a polity also means attempting to secure its long-term survival. In particular, the meta-constitutional rationale of the security of the European project – which conveys the existential implications of the EU enterprise – is articulated in security and fundamental rights *as discourses of power*.

Discourses of power can in fact be constitutive of a polity, while at the same time being constantly in tension or overlapping each other. They shape meanings, condition actors' behaviour and choices, and correspond to activities, speech acts and rhetorical strategies that dominate in a given historical context. This does not happen by chance. Processes of production and interpretation of texts, as well as the social conditions within which they are generated, and other social practices, such as courts' rulings or other jurisdictional acts, are indicative of specific patterns or relations of power.[32] These discourses are constitutive of the EU as a polity because it is through them that the interaction between the EU institutions, as well as between the institutional apparatus and

30 The same table is used in Fichera (n 6).

31 Ibid 85, 92.

32 N Fairclough, *Language and Power* (Longman 1989) 26.

the citizens, takes place. They contribute to shaping a reality that is an integral part of the EU legal order. 'Discourses' are interpreted here as different from 'narratives', as the latter are (sometimes competing) forms of interpretation of reality employed to explain or justify events, and/or to support specific policies.[33]

In other words, discourses are considered essentially 'practices that systematically form the objects of which they speak'[34] and, more specifically, daily practices embedded in the very process of formation of a polity. They include all forms of formal and informal social relationships and interactions between economic and social actors (e.g. courts, parliaments, media, academic work, as well as social movements, trade unions etc.), which often clash with each other. The concept of 'discourse' employed here is thus potentially very wide and does not include merely 'groupings of utterances or statements', but 'whatever signifies or has meaning' and produces effects within a social and institutional context.[35] By observing such practices, it is almost inevitable to point out how, regardless of our personal judgement, dominance may be enacted and reproduced by subtle, routine, everyday forms of text and talk that appear 'natural' and quite 'acceptable'.[36] Importantly, attention is paid to that type of social power that is exercised by entrenched elites or specific sectors of society. A fundamental feature inherent in the notion of 'discourses of power' employed in this article is ideological and political struggle.[37]

From this viewpoint, the importance of the first foundational cases of EU law lies not only in their 'constitutional' significance, but also in the contribution they gave to the development of the intertwined security and fundamental rights discourses from the perspective of autonomy and effectiveness/uniformity. In particular, *Van Gend en Loos* and *Costa v ENEL* flow from the 'speciality' of the EU legal order, which, on the one hand (*Van Gend*), empowers individuals – the rights discourse – and, on the other hand (*Costa*), empowers the EU legal order itself – the security discourse. These rulings are part of a set of 'pre-dictions' and 'retro-dictions', from which not only the strategic moves of the main actors but also their semantic patterns have formed a judicial framework of principles that have crystallised at the foundations of the EU polity.[38] Even the principles of autonomy and effectiveness/uniformity[39] (as well as loyalty, proportionality and subsidiarity, and the notion of common constitutional traditions)[40] are expressions of the security discourse which is articulated in two directions.

First, the EU project can only be secure if EU law is capable of producing effects at the domestic level, which benefit EU citizens uniformly. As a result, national provisions, even having constitutional character, cannot undermine the unity and effectiveness of EU law.[41] Second, the autonomy claimed by the EU legal order is both normative and institutional and is often the result of the robust interpretive role performed by the CJEU, which has defended it vigorously.

33 R R Krebs, *Narrative and the Making of US National Security* (Cambridge University Press 2015).

34 M Foucault, *The Archaeology of Knowledge* (AM Tavistock 1972) 49.

35 D Macdonnell, *Theories of Discourse* (Blackwell 1986) 4.

36 T A van Djik, 'Principles of Critical Discourse Analysis' (1993) 4 Discourse and Society 249, 254.

37 M Pecheux, *Language, Semantics and Ideology* (Macmillan 1982).

38 A Vauchez, 'The Transnational Politics of Judicialization: Van Gend en Loos and the Making of the EU Polity' (2010) 16 European Law Journal 1, 5–6.

39 See e.g. Case 43/75 *Defrenne v Sabena (No 2)* ECLI:EU:C:1976:56; Case 41/74 *Van Duyn v Home Office* ECLI:EU:C:1974:133; Joined Cases C-6/90 and C-9/90, *Francovich v Italy* ECLI:EU:C:1991:428.

40 See e.g. Article 6(3) TEU.

41 Case 11/70 *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114, para 3; Case C-409/06 *Winner Wetten* ECLI:EU:C:2010:503, para 61; Case C-416/10 *Križan* ECLI:EU:C:2013:8, para 70.

As is well known, the idea that the EU legal order has a constitutional character has been repeatedly emphasised by the CJEU in its case law.[42] However, precisely because of the concerns deriving from the tension between the transnational and the national level, from the 1970s onwards the fundamental rights discourse has been a necessary legitimacy- and autonomy-enhancing tool, as part of the CJEU's weaponry. A constant effort to boost the EU's credentials as a distinct creature of transnational law has led to an assertion of autonomy, on the one hand, vis-à-vis its Member States,[43] and, on the other, vis-à-vis international law.[44] Such autonomy implies that the interpretation of fundamental rights that lies at the core of the EU legal system is in line with the EU's structure and objectives.[45] These moves may be interpreted as part of the EU ongoing strategy of self-justification and self-empowerment accomplished *in the name of the peoples of Europe* through the security and fundamental rights discourses.

The same discourses resurface time and again, not only in the case law of the CJEU, but also in official speeches in times of crisis. The EU liberal project cannot be interrupted, because people demand it. The *finalité* of European integration – sometimes overtly federalist, often leaving little space for reflexivity – simultaneously requires further enlargement and reinforced cooperation, because any alternative solution would lead to self-destruction and 'would demand a fatal price above all of our people'.[46]

In addition, domestic standards of protection of fundamental rights cannot prejudice either the standards provided by the CFR or the principles of primacy, unity and effectiveness of EU law.[47] The reason for this, as pointed out by the CJEU, is that Article 53 CFR prescribes that nothing in the Charter is to be interpreted as restricting or adversely affecting fundamental rights as protected by EU law and international law, international agreements and the Member States' constitutions. The CFR is thus the cornerstone of the EU legal system of protection of fundamental rights: its provisions must be respected not only by the institutions, bodies, offices and agencies of the EU, but also by the Member States when they implement EU law.[48] It is in light of the interplay between the security and fundamental rights discourses that the CJEU held that the draft agreement for the accession to the European Convention on Human Rights would affect 'the specific characteristics of EU law and its autonomy' and would therefore not be compatible with Article 6(2) TEU.[49]

A first important contradiction to be pointed out is that the CJEU tends to protect fundamental rights only to the extent that their recognition is instrumental to ensuring the primacy, uniformity and effectiveness of EU law: fundamental rights may be restricted for

42 See e.g. Case C-294/83 *Les Verts v Parliament* ECLI:EU:C:1986:166; Opinion 1 /91 Draft EEA Agreement ECLI:EU:C:1991:490.

43 Case 29/69 *Stauder v City of Ulm* ECLI:EU:C:1969:57; Case 11/70 *Internationale Handelsgesellschaft* (n 41); Case 4/73 *Nold v Commission* ECLI:EU:C:1974:51. More recently Case C-399/11 Melloni ECLI:EU:C:2013:107.

44 Joined Cases C-402/05 and 415/05 *Kadi and Al-Barakaat* ECLI:EU:C:2008:46; C-160/09 *Katsivardas- Nikolaos Tsitsikas* ECLI:EU:C:2010:293.

45 Case 11/70 *Internationale Handelsgesellschaft* (n 41) para 3; Joined Cases C-402/05 and 415/05 *Kadi and Al-Barakaat* (n 44) paras 281–5.

46 Joschka Fischer, 'From Confederacy to Federation: Thoughts on the Finality of European Integration' (Speech, Humboldt University, Berlin, 12 May 2000) 3–5.

47 See, more recently, Case C-399/11 *Melloni* ECLI:EU:C:2013:107, paras 58–60.

48 Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105, paras 17–21.

49 CJEU Opinion 2/13 ECLI:EU:C:2014:2454, para 200.

the purposes of achieving the objectives set out by the Treaties,[50] above all the establishment of a common market[51] or the stability of the financial system.

The negotiations over Brexit and the challenges and difficulties posed by it merely confirm other contradictions of the security and fundamental rights discourses. On the one hand, despite the 'united in diversity' and the 'ever closer Union' mottos,[52] there emerges a demand for an increasingly differentiated process of integration.[53] This seems to be for many scholars the best way to preserve the internal market (the security discourse). On the other hand, while one of the principal aims of EU law has been that of strengthening individual rights to free movement and, more generally, fundamental rights (the rights discourse),[54] there is an acknowledgment that free movement of persons might not be an essential feature of the internal market and its rules may be adjusted to allow third countries (including the UK as a future, albeit special, third country) to conclude flexible agreements with the EU.[55]

In addition, the ambiguity of the security discourse has allowed a shift towards a self-referential attitude of the EU in the last decades which has weakened the social embeddedness of EU law-making. Social rights, for example, have sometimes been merely protected as a consequence of the application of the principle of formal equality (*Griesmar*; *Mouflin*)[56] or with a view to protecting the free movement of workers (*Decker*, *Elsen*)[57] or of services (*Kohll*).[58] Moreover, although there have been positive developments in the case law of the CJEU, a variety of lines ('inside' and 'outside' regimes of protection by law) have been drawn between different categories, such as workers and non-workers, or workers who benefit from secure full-time jobs and workers who do not.[59] In the face of increasing fragmentation, one may thus wonder whether and to what extent the very configuration of the EU as a polity is at stake as a result of the negotiations on the UK's withdrawal. Brexit could be interpreted as yet another warning sign of such fragmentation.

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50 Case 11/70 *Internationale Handelsgesellschaft* (n 41) para 4, where the CJEU ruled that the protection of fundamental rights, 'whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structures and objectives of the Community'.

51 For example, in Case C-5/88 *Wachauf* ECLI:EU:C:1989:321, para 18, the CJEU points out that 'fundamental rights . . . are not absolute . . . but must be considered in relation to their social function', so that 'restrictions may be imposed on the exercise of those rights, in particular in the context of the organisation of a common market, provided that those restrictions correspond in fact to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights'.

52 See both Preambles to the TEU and the TFEU, as well as Article 1 TEU, Consolidated Version of TEU and TFEU (n 11).

53 B de Witte, 'An Undivided Union? Differentiated Integration in Post-Brexit Times' (2018) 55 Common Market Law Review 227; C Barnard and S F Butlin, 'Free Movement vs Fair Movement: Brexit and Managed Migration' (2018) 55 Common Market Law Review 203; K Nicolaïdis, 'Mutual Recognition: Promise and Denial, from Sapiens to Brexit' (2017) 70 Current Legal Problems 1.

54 D Edward, 'In Europe, History is the Unseen Guest at Every Table' (2018) 55 Common Market Law Review 251.

55 J Pisani-Ferry et al, 'Europe after Brexit: A Proposal for a Continental Partnership' (Bruegel Policy Paper, 29 August 2018) <http://bruegel.org/2016/08/europe-after-brexit-a-proposal-for-a-continental-partnership/>; Barnard and Butlin (n 53).

56 Case C-366/99 *Griesmar* ECLI:EU:C:2001:648; Case C-206/00 *Mouflin* ECLI:EU:C:2001:695.

57 Case C-120/95 *Decker* ECLI:EU:C:1998:167; Case C-135/99 *Elsen* ECLI:EU:C:2000:647.

58 Case C-158/96 *Kohll* ECLI:EU:C:1998:171.

59 On this, see C O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart 2017).

In other words, if (a) the European project is to be more than a self-referential conglomeration of legal arrangements aimed at ensuring the smooth functioning of the internal market for its own sake, and (b) has an effective claim to constitutional autonomy, what should we make of the negotiable character of EU citizenship rights? How to reconcile the potential significant loss of rights associated with Brexit with the identification of EU citizenship as 'destined to be the fundamental status of nationals of the Member States',[60] a state of grace that aims to 'provide the glue to help bind together nationals of all the Member States'?[61] Can a polity be secure if it itself is not able to guarantee that at least some of its inherent features (including precisely the state of EU citizens) are preserved for an unlimited duration, until at least such time as that very polity provides a sufficiently thick reflexive layer through which its members can recognise themselves as members? The questions highlighted above point towards a powerful challenge to semantic or reflexive security. Article 50 TEU is a response to this challenge, because, as argued below,[62] it leaves each Member State free to choose whether or not it wishes to take part in the European project. In other words, the answer to the question 'How to be secure?' is provided by a particular arrangement of the polity that allows a more or less wide margin of manoeuvre to its components. Such an arrangement thus follows a 'heterarchical' form of ordering. As a result, from such a heterarchical perspective, reflexive security indicates that a transnational polity such as the EU is secure as long as its principles and objectives (including autonomy, effectiveness, uniformity, common constitutional traditions) are not imposed unilaterally upon its members. It follows that each member ought to be allowed to leave whenever it no longer shares the core ideas and values behind the project of integration.

3.2 Spatial security

Spatial security addresses the question of who 'the Other' is through the conceptual dichotomy inside/outside. A space is normally divided into inside and outside. However, the EU space is fragmented, in the sense that several *insides* and *outsides* can be identified within it. As a consequence, rights and benefits are distributed in an unequal manner. This dimension is thus characterised by the paradox of 'large space' (as explained below). This state of affairs had already become evident in the recent episodes of enlargement, which have laid bare the tension between the functional and normative claims of the European project. Brexit merely reformulates the paradox and prompts us to wonder how inclusive the EU ought to be.

In other words, the fundamental questions associated with spatial security ('Who is the Other? Where is it located?') can only be answered by drawing lines – which is fundamentally a constitutional act. As a result, the underlying conceptual dichotomy, inside/outside, becomes crucial. In fact, one of the main justifications of sovereignty is that it shields a 'secure' inside against an 'insecure' outside. The demand for security leads to the creation of a *space*, in which several states share security as a common good.[63] Such space is the *locus* of a tension between normativity and functionality. In fact, EU liberalism contains a dangerous paradox: when it proclaims its neutrality and ability to include as many claims as possible, its ambition to universality risks turning into an imperialistic

60 Case C-184/99 *Grzelczyk v Centre Public d'aide sociale d'Ottignies-Louvain-la-Neuve* ECLI:EU:C:2001:458, para 31, and Article 20 TFEU.

61 C Barnard, *The Substantive Law of the EU* (4th edn, Oxford University Press 2013) 432.

62 See below, Section 3.3 on temporal and ontological security.

63 On the idea of space, see H Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford University Press 2013) 56.

claim, thus creating a Schmittian *large space*.[64] The EU model of transnational integration and enlargement is caught in this paradox.

The paradox can be unpacked as follows. One of the key contentions of EU law is that of being able to configure citizens as individuals entitled to transnational rights claims and states as cooperative actors operating on an equal footing. From this perspective, the argument from demoi-cracy[65] often draws on both the republican value of non-domination and the liberal value of mutual recognition to promote the principles of democratic integrity, non-discrimination and equal rights.[66] Yet, while EU law proclaims the existence of a 'sacred' space, namely a privileged area, legally, politically and morally distinct from other regions of the world, characterised by universal values that can be exported across the globe,[67] in fact these values remain inevitably confined within borders and boundaries. Stating that values not borders define Europe, and that enlargement is a matter of extending the zone of European values, is a mere fiction that exposes the rhetoric of the large space.[68] Where a space is reduced to 'a collection of juxtaposed places', it fails to create 'a sense of belonging to a defined stretch of territory'.[69] A collection of places is a *u-topia*, in the literal meaning of a non-place, where, although there are multiple *insides* and *outsides*, lines are blurred and the ambiguity of fundamental rights discourses is as pronounced as ever. Precisely, when this happens, we witness the risk of the EU turning from a transnational polity into a large space. Brexit has pierced through the EU rhetoric and shown that, when a space is merely a collection of juxtaposed places, EU citizens become displaced and their identities as EU rights-holders reshaped. In other words, as a result of the uncertainty and complexity of the UK–EU withdrawal process, the promises associated with EU citizenship are highly questionable.

Arguably, a plurality of *inside* and *outside* is inevitable in a transnational polity in which multiple regimes (not only national v EU law, but also Customs Union, Schengen, Eurozone, opt-in and opt-out provisions etc.) operate within the same space. Such plurality of insides and outsides, which generate separate categories of individuals – such as the 'EU citizen' as opposed to the non-EU citizen (i.e. the 'third-country national', or the 'mobile EU citizen' as opposed to the 'non-mobile EU citizen') – allows plural claims, which vary depending on the category within which individuals find themselves. Here the ambiguous character of the fundamental rights discourse is particularly evident. To have rights *as an EU citizen* thus means not merely being entitled to a particular set of rights, but also being inscribed within a specific horizon, which is shaped by patterns of inclusion and exclusion.[70] In other words, the regime of EU citizenship not only presupposes but also produces the subjects who are regulated by EU law. The formulation of citizenship rights already assumes the exclusion of certain categories of individuals, such as, for example, those who do not circulate, or those family members

64 See, in another context, M Fichera, 'Carl Schmitt and the New World Order: A View from Europe' in M Arvidsson, L Brännström and P Minkkinen (eds), *The Contemporary Relevance of Carl Schmitt: Law, Politics, Theology* (Routledge 2016) 165.

65 See, more recently, R Bellamy, J Lacey and K Nicolaïdis, 'European Boundaries in Question?' (2017) 39 Journal of European Integration 483.

66 Ibid 490.

67 Fichera (n 28) 34, 42.

68 Olli Rehn, 'Values Define Europe, not Borders' (Speech, Belgrade, 24 January 2005): 'the map of Europe is defined in the mind, not just on the ground', thus suggesting a potentially unlimited extension.

69 K Nicolaïdis and J Viehoff, 'Just Boundaries for Demoicrats' (2017) 39 Journal of European Integration 591.

70 B Golder, *Foucault and the Politics of Rights* (Stanford University Press 2015) 100.

who do not fall within the circumstances of justice prescribed by EU law. Rights discourses thus may be a vehicle for the disempowerment of individuals. For example, due to the existence of a number of exceptions to equal treatment and conditions for lawful residence, the provision of social assistance and social care for some categories of vulnerable individuals, including homeless citizens, may be very difficult. Although in theory access to social benefits and services should be ensured to citizens engaging in economic activities, the CJEU has not considered voluntary work in exchange for accommodation and maintenance by the Salvation Army (as part of a social reintegration scheme) as 'real and genuine economic activity'.[71]

Yet, spatial security can be viewed from another angle. From the point of view of self-preservation, it not only assumes but also necessitates that lines of inclusion and exclusion be drawn. This means that discourses of power are also about the empowerment of individuals as members of the EU polity, and as part of the self-justificatory conceptualisation of the EU. In fact, the ambiguity of the individual rights discourse can be interpreted as a form of openness that contains a 'democratic potential', in the sense of 'a solicitation to different groups within a polity to assert or to constitute themselves as rightful, co-equal members of that polity'.[72] However, for this emancipatory function to be performed, the act of drawing borders, both in the physical and in the normative sense, is inevitable. Otherwise, the distinction between *inside* and *outside* tends to blur: the abolition of spatial limits may then lead to the removal of the very category of 'the political'[73] and, with it, of the possibility of having a legal standing and formulating legal claims. Faced with the refugee crisis, for example, the EU as a polity and its legal system – typically, its institutional framework, built up both at the national and supranational level – are called upon to articulate and channel spatial demands through legal instruments. This type of demand, formulated by the categories of individuals generated by EU law, is inescapable and reflects both traditional, right-wing identitarian strategies and left-wing solidaristic arguments. The need for physical and normative borders can indeed also be expressed by emphasising the risk of compromising the social-democratic premises of continental Europe's *Rechtstaat*.[74]

Distinctions and refinements between multiple *insides* and *outsides* have also been produced during the negotiation on the UK withdrawal. For example, a 'special status' is conferred upon EU citizens in the UK and UK citizens in the EU who move before 'Brexit day' – 29 March 2019.[75] They will have the right to reside and work in the host state, as well as equal treatment rights. Moreover, these provisions are also addressed to spouses, registered partners, children and dependent parents or grandparents who are legally resident in the host state at the time of Brexit. Importantly, citizens' right to family reunification will be ensured, provided that the family link already existed before Brexit, even if the family member was not yet living in the host country. However, after Brexit

71 Case C-456/02 *Trojani* ECLI:EU:C:2004:488.

72 Golder (n 70) 90.

73 C Galli, *Spazi politici* (Il Mulino 2001) 170; R Esposito, *Da fuori- Una filosofia per l'Europa* (Einaudi 2016) 228.

74 A J Menéndez, 'The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration' (2016) 22 European Law Journal 388.

75 See e.g. Communication from the Commission to the European Council (n 23) 6.

day the strict requirements imposed by UK law will apply, thus removing the privileges associated with the status of EU citizen. To mention a few examples:[76]

(a) citizens who decide to live together as partners or marry after Brexit day do not benefit from EU citizenship rights;

(b) non-economically active migrants (such as those who renounce working to look after their children, or disabled and elderly individuals) may find it difficult or impossible to meet the requirements to acquire either 'settled' or 'pre-settled' status;

(c) there is uncertainty as regards the status of so-called '*Zambrano* carers' (non-EU citizens who are primary carers of EU citizens), who in some situations acquire the right to residency on the ground that their care is irreplaceable and would prevent genuine enjoyment of the substance of EU citizenship;[77]

(d) the margin of protection of UK citizens' free movement rights across Europe, children's rights or the migrant's right to return to the home country with his/her family members is either null or unclear. Importantly, 'any restrictions on grounds of public policy or public security related to conduct after the specified date will be in accordance with national law'.[78]

One may wonder to which extent the principle of non-discrimination on grounds of nationality can be respected as regards the provision of this 'special status'.

This state of affairs shows that concern for the social embeddedness of transnational norms is not necessarily present in the documents produced during the negotiations, which do not necessarily capture the complexity of the situations directly and indirectly covered by Brexit. Once again, the social constitution appears to be sidetracked or marginalised in the process of European integration.[79] In other words, from the point of view of spatial security, Brexit confirms that, while the EU portrays itself as a polity pursuing the liberal project of ensuring the privileged status of EU citizen uniformly, in practice, situations of discrimination and loss of rights are concrete possibilities. It is by pointing out such contradictions that the 'democratic potential' of citizenship rights (the empowerment aspect of rights), as 'the ability of different groups to assert themselves as co-equal members of the polity', may be brought to the surface.[80]

3.3 Temporal and ontological security

The temporal and ontological dimensions of security are closely interrelated. The former addresses the question of the direction of the EU polity through the conceptual category of time; the latter is about the nature of the EU.

76 On these issues, in particular the distinction between 'settled' and 'pre-settled' status, see 'EU Settlement Scheme: Statement of Intent' (UK Home Office, 21 June 2018) <www.gov.uk/government/publications/eu-settlement-scheme-statement-of-intent>; D Kostakopoulou, '*Scala Civium*: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens' (2018) Journal of Common Market Studies 1. A 'settled' status depends in most cases upon continuous residence in the UK for at least five years.

77 For more information, see Case 34/09 *Zambrano* ECLI:EU:C:2011:124.

78 Joint Technical Note on the comparison of EU–UK positions on citizens' rights, TF50 (2017) 17, 28 September 2017, para 27 <https://ec.europa.eu/commission/publications/joint-technical-note-eu-uk-position-citizens-rights-after-fourth-round-negotiations_en>.

79 K Tuori, *European Constitutionalism* (Cambridge University Press 2015).

80 This 'democratic potential' may also be expressed by claims that are not directly related to EU rights as such, e.g. the right to a free, fair and lawful vote: 'British Expats in EU Launch Brexit Legal Challenge', *The Guardian* (London, 14 August 2018).

Temporal security is a fundamental dimension of the European project. Its relevance goes beyond the mere idea of continuity. Just as space is stretched in the sense of a potentially unrestricted extension – thus producing the paradox of large space – so time is presumed to be infinite because Member States have limited their sovereign rights 'by creating a community of unlimited duration'[81] – thus generating the paradox of 'large time'. Temporal security is inherent in the very claim of autonomy and primacy of the EU as a legal order that is distinct from international law. Precisely because the European project stands above and beyond the national legal systems and purports to emerge as a unity that is more than the sum of its parts, it cannot admit of an end. The transfer of sovereignty to the EU polity and the binding force of EU law are necessary *for the very survival of the European project*, which is not a provisional arrangement for the achievement of a specific immediate objective. Yet, simultaneously, if time is extended indefinitely and integration is pursued for its own sake, the principle of self-determination of Member States as constituent parts of the European project is compromised.

Temporal security is in fact being challenged by Brexit. As shown in the table, temporal security addresses the question: 'In which direction are we moving?' There will be a 'before' and an 'after' Brexit day and this temporal *caesura* risks producing further inequality and ambiguity, in particular as regards personal situations, which fall in between the two phases. For example, the draft of the Withdrawal Agreement might be interpreted as incorporating the logic followed in *Lounes*,[82] so that naturalised migrant citizens continue to enjoy their EU rights, in addition to the rights they possess as nationals of the host state.[83] As seen earlier in this article, the result would be a 'special status' conferred upon a privileged category of individuals who exercise their free movement rights.[84] While this 'special status' may be justified by the need to encourage integration in the host state, one may still remark that a difference in treatment exists between free-movers and those who do not exercise free movement rights. Thus, from the perspective of temporal security, one may observe that rights associated with the status of EU citizen are not conferred for an indefinite period of time: they are still very much parasitic on the status of national citizen and, consequently, on whether or not the state of nationality retains membership of the EU. Ultimately, the answer to the question 'In which direction are we moving?' seems to be that further integration is for the moment very difficult to achieve.

Ontological security (addressing the question: 'What is the best interpretative scheme to understand the EU?') is also challenged by Brexit. The notion of ontological security is fundamental for a polity: its premise is that 'states and other political actors seek to promote not only material and strategic interests but also some form of self-identity in their interactions with other actors in the international arena'.[85] What the EU is and how it represents itself is crucial for its development, because it is indicative of the type of

81 Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66, para 3. See also Case 7/71 *Commission v France* ECLI:EU:C:1971:121, as well as Articles 53 TEU and 356 TFEU: 'This Treaty is concluded for an unlimited period.' Similarly, the failed European Political Community (EPC) was declared 'indissoluble' (Article 1 EPC Treaty). By contrast, the Treaty of Paris (1951) setting the European Coal and Steel Community (ECSC) had a limited duration of 50 years.

82 Case C-165/16 *Lounes* ECLI:EU:C:2017:862.

83 Article 9(1)(a) and (b): citizen rights apply to citizens who exercised their right to reside in either a Member State or the UK in accordance with EU law before the end of the transition period and continue to reside there thereafter.

84 On the 'special status' conferred upon EU citizens in the negotiations, see Communication from the Commission to the European Council (n 23).

85 V Della Sala, 'Homeland Security: Territorial Myths and Ontological Security in the European Union' (2017) 39 Journal of European Integration 545, 548.

values that are expressed over a period of time and are subject to threat in specific circumstances. From this perspective, it may be argued that a true constitutional community should be able to preserve the rights associated with EU citizenship to their full extent even where one of its Members States withdraws. The argument would rely on the almost 'missionary' nature of EU citizenship as an independent and fundamental status.[86] However, quite apart from the political feasibility of this teleological interpretation of EU law, it has been noted above that the nationality of a Member State is a condition not only for the acquisition but also for the retention of EU citizenship, with the result that the latter is lost once that state is no longer a member. Inevitably, these considerations affect our configuration of the EU as a polity. Would the normative force of citizenship and the values protected by Article 2 TEU, as well as the structure of general principles and fundamental rights expressed by EU law, warrant an extensive or rather a narrow interpretation of citizenship rights? The answer is that constitutional principles related to the integrity of the EU legal framework are at stake: for example, it is not entirely clear whether and to what extent the transitional provisions contained in the agreement will have direct effect. It is also not clear whether, at the moment of adjudicating on the possibility of individuals relying on those provisions, the integrationist mind frame (and related principles, such as effectiveness, uniformity of EU law etc.) will still inform their interpretation.

A reference for preliminary ruling from the District Court of Amsterdam addressed some of these questions.[87] However, the Higher Court has in the meantime decided that the parties' claims were too general and hypothetical and could be dismissed without having recourse to preliminary questions.[88]

Although the preliminary ruling procedure has been interrupted, those questions can still be answered from a broad perspective.

In fact, threats to temporal and ontological security point towards a number of flaws in the European liberal project. In other words, the idea of the irreversibility of the process of European integration is now, for the first time, strongly disputed (the paradox of 'large time'). Just as in the other security dimensions, here too Brexit may thus reveal important contradictions or ambiguities of the EU polity.

In particular, Brexit seems to signal the failure of the programmatic nature of the 'ever closer union' provisions in the Treaty of Lisbon.[89] Nevertheless, the formulation of Article 50 TEU does not necessarily go against – and may actually be interpreted as bolstering – the security of the European project. In other words, Article 50 TEU may be configured as a compromise provision. It is precisely by allowing Member States to leave, according to explicit guidelines and within the framework of EU law, that the European project is reinvigorated, for those states which decide to remain may have a stronger reason to foster integration. Article 50 TEU is, in this sense, also a coming-of-age provision, which consolidates the claim of autonomy of EU law, as general international law on the right of withdrawal (such as *rebus sic stantibus*, impossibility of

86 Case C-184/99 *Grzelczyk* (n 60).

87 The preliminary questions were the following: a) does the withdrawal of the UK from the EU automatically lead to the loss of EU citizenship of UK nationals and thus to the elimination of rights and freedoms deriving from EU citizenship? b) If the answer to the first question is in the negative, should conditions or restrictions be imposed on the maintenance of the rights and freedoms to be derived from EU citizenship? See C/13/640244/KG ZA 17–1327 Rechtbank Amsterdam.

88 ECLI:NL:GHAMS:2018:2009.

89 As noted earlier (n 52).

performance or material breach of the Treaty)[90] may be interpreted as inapplicable, in light of the exclusive jurisdiction of the CJEU.[91]

Article 50 TEU may also be read in a new light, if considered from the perspective of differentiated integration.

In the recent Rome Declaration, a cautious version of the formula of differentiated integration was rendered as follows: 'We will act together, at different paces and intensity where necessary, while moving in the same direction, as we have done in the past, in line with the Treaties and keeping the door open to those who want to join later.'[92] This statement echoed a bolder version of the option of differentiation presented by the European Commission in its White Paper on the Future of Europe published on 1 March 2017.[93] Among the five possible scenarios for the EU's future, one was identified by the Commission as '[t]hose who want more do more': this scenario envisages the creation of several 'coalitions of the willing' that would carry forward new cooperation projects in areas such as defence, security and justice, taxation, and social policy; and the other Member States would be able to join those projects at a later stage, as soon as they would be ready or willing to do so. This scenario seems to be much more in line with the passage from self-referential to heterarchical security as suggested in this article.

Of course, it may also be argued that the very fact that Brexit 'will be conducted through Article 50 TEU is to accept the continuing political and legal authority of the EU until withdrawal has occurred'.[94]

However, despite the considerations above, there are no guarantees that principles and values underpinning European constitutionalism will be fully respected during the Brexit negotiations. Hence, even in the context of temporal and ontological security, the ambiguity of the security and fundamental rights discourses can be observed.

3.4 Popular and epistemic security

Popular security is about the *demos*. This is a well-known and controversial theme, which does not need to be reprised here. It may be noted briefly that *demos* (or the absence thereof) speaks to the security of a constitutional arrangement because of its deeply entrenched identitarian connotations. People(s) and *demos* are strictly interrelated concepts, although they do not necessarily coincide, as the latter may also be understood in a narrow sense, embracing those individuals who take part in the democratic process of a polity.[95] However, when conceptualised as *demos*, the idea of people(s) is often associated with 'a sense of social cohesion, shared destiny and collective self-identity

90 See, in particular, Articles 60 to 62 (and related Articles 54 and 56) Vienna Convention on the Law of the Treaties, 23 May 1969, UNTS vol 1155, 331, as well as customary international law.

91 Article 344 TFEU, referring to Article 259 TFEU. For this argument, see e.g. J A Hill, 'The European Economic Community: The Right of Member State Withdrawal' (1982) 12 Georgia Journal of International and Comparative Law 335, 351.

92 Rome Declaration of the Leaders of 27 Member States and of the European Council, the European Parliament and the European Commission, 25 March 2017 <www.consilium.europa.eu/en/press/press-releases/2017/03/25/rome-declaration/pdf>.

93 European Commission White Paper on 'The Future of Europe' COM (2017) 2025, 1 March 2017.

94 K A Armstrong, *Brexit Time – Leaving the EU: Why, How and When?* (Cambridge University Press 2017) 210.

95 M E Jolly, *The European Union and the People* (Oxford University Press 2007) 68.

which, in turn, result in and deserve loyalty'.[96] Be that as it may, whether viewed as a source of law, as an almost mythical 'nation',[97] or as an exclusionary category, subject to the principle of the constitutive outside – in such a way that it is always bound to exclude certain categories and include certain others[98] – popular security lies at the foundations of a polity. For, despite all potential and actual contradictions that can be found in the tautology of the people(s),[99] the evocative power of this imagery is one that binds together and brings to unity what is initially not unified.

Yet, the popular dimension of security is being challenged by the idiosyncratic mechanisms of governance in recent decades, which have dismissed many of the democratic tenets practised by the Member States: recent events have essentially confirmed both the deficiencies which were denounced by the critics and the disaffection in the population at large with the way decision-making takes place.[100]

The waves of left-wing and right-wing populism in many European countries are but one symptom of this 'political' turmoil.[101]

The failure of the EU machinery to embrace the complexity of the people(s) and the extent to which, for better or worse, they are a fundamental construct of European integration, speaks to the need to delve deeper into the importance of the popular dimension. In order to do so, it is useful to engage with the epistemic dimension, too.

Epistemic security is also being challenged by Brexit. In this context, the dichotomy 'one–many' is central and allows us to understand better the failure of the one-size-fits-all model that has at times resurfaced in the official rhetoric of the EU (i.e. a model of integration that does not take sufficiently into account national idiosyncrasies). The crucial question of epistemic security is to what extent multiple rationalities or claims of authority can co-exist. How can we ensure the survival of a transnational polity in which the conflictuality among several levels is not only visible but is also growing? This has turned into a recurring theme not only among EU law scholars, but also beyond their inner circle.[102] Although Brexit in itself does not increase multi-level conflicts, it indicates that such conflicts exist and may resurface, sometimes unexpectedly, as occurred with the

96 J Weiler, U Haltern and F Mayer, 'European Democracy and its Critique' (1995) 18 West European Politics 4, 11. On the debate on the no-demos thesis, see also inter alia D Grimm, 'Does Europe Need a Constitution?' (1995) 1 European Law Journal 282; J Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos, and the German Maastricht Decision' (1995) 1 European Law Journal 219; W Streeck, 'Neo-Voluntarism: A New European Social Policy Regime?' (1995) 1 European Law Journal 31; A Moravcsik, 'In Defence of the Democratic Deficit: Reassessing the Legitimacy of the European Union' (2004) 40 Journal of Common Market Studies 603.

97 E De Sieyès, *Qu'est-ce que le Tiers état?* (Editions du Boucher 2002) 53: 'La nation existe avant tout, elle est l'origine de tout. Sa volonté est toujours légale, elle est la loi elle-même. Avant elle et au-dessus d'elle il n'y a que le droit *naturel*.' (original emphasis)

98 B Bosteels, 'Introduction: The People Which is Not One' in A Badiou et al (eds), *What is a People?* (Columbia University Press 2016) 1, 2–3.

99 J J Rousseau, 'On the Social Contract, or Principles of Political Right' in J J Rousseau, *Basic Political Writings* (D A Cress tr) (Hackett 1987) 147: 'before examining the act whereby a people chooses a king, it would be well to examine the act whereby a people is a people. For since this act is necessarily prior to the other, it is the true foundation of society'.

100 Armstrong (n 94)98; A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015) 159; C Dupré, 'The Unconstitutional Constitution: A Timely Concept' in A von Bogdandy and P Sonnevend (eds), *Constitutional Crisis in the European Constitutional Arena* (Hart 2015) 351, 368.

101 S Champeau, 'Populist Movements and the European Union', in S Champeau, C Closa, D Innerarity and M P Maduro (eds), *The Future of Europe: Democracy, Legitimacy and Justice after the Euro Crisis* (Rowman & Littlefield 2015) 195.

102 M Avbelj and J Komarek, *Constitutional Pluralism in the European Union and Beyond* (Hart 2012).

2016 referendum. Moreover, it may represent a precedent for the future. Ultimately, it may be observed that challenges to popular and epistemic security confirm once again the flaws deriving from the self-referential character of security.

4 The consequences of Brexit

In light of the conceptual framework adopted in the previous pages, which has shown how Brexit affects all dimensions of the security of the European project, it is argued in this section that Brexit points towards the need for further differentiated integration in the EU. The phenomenon of differentiated integration was formalised by the Treaty of Maastricht, which created areas, such as the Economic and Monetary Union (EMU), including only a selection of Member States. In particular, the UK adamantly opposed the creation of the EMU and the transferral of new competences to the EU in the area of social policy. In the case of the EMU, an opt-out was agreed for the UK and Denmark. In the case of social policy, a special Protocol enabled 11 Member States to opt in to a separate Social Policy Agreement laying down new competences for the EU. Once again, the UK was excluded.

In the Treaty of Amsterdam, a new opt-out regime (concerning free movement and immigration and asylum law) was set up, while at the same time incorporating the Schengen regime in the Treaties. The opt-out provisions concerned both the UK and Ireland. The Lisbon Treaty added a further layer of differentiation: in the field of police cooperation and criminal justice; in return for the adoption of the Community method in that policy area, the UK was entitled to an opt-out from future developments, as well as from existing Third Pillar legislation.

Finally, an agreement between the EU Member States and the UK concluded in February 2016 (but never entered into force) increased the degree of flexibility by allowing the implementation in the UK of special provisions, in particular concerning the free movement of persons.[103]

Following the start of the Brexit negotiations, a few options are currently open.

1. the Norwegian Approach, which implies joining the European Economic Area (EEA), including the provisions on the free movement of goods, services, people and capital;
2. the Swiss model, which involves the negotiation of a series of bilateral treaties governing relations with the EU in specific areas of common interest, especially free trade. In particular, the UK may rejoin the European Free Trade Association (EFTA), although technical barriers to trade in goods and services and free movement of persons are not covered by EFTA rules and would have to be the subject of separate bilateral agreements. While losing voice, the UK would retain significant financial obligations to the EU;
3. the World Trade Organization model which has no free movement of labour provisions and few provisions on the liberalisation of trade in services;
4. a Customs Union following the Turkish model; or
5. a modern generation trade and investment agreement following the Canadian model.

103 Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union, EUCO 4/16, Brussels, 2 February 2016; Draft Declaration of the European Commission on issues related to the abuse of the right of free movement of persons, EUCO 8/16, Brussels, 2 February 2016.

Whatever option is finally chosen, one should bear in mind that Brexit is the outcome of decades of short-sighted policies which should not have ignored the deep challenges associated with UK membership (as with other countries). Consequently, the solution would be to embrace diversity as a fact of life and at the same time push the European project forward, but only for a core number of Member States which share common values and ideas for future action. This would, on the face of it, represent a mere reformulation of 'multi-speed Europe' or of the 'concentric circles' model.[104] The Eurozone countries could thus form a selected group and operate in specific areas of cooperation, such as the Internal Market, social policy and the AFSJ. The remaining countries would instead cooperate with each other, but would remain free to join in at a later time. Yet, differentiation should not come at the expense of the economic and social constitution. Self-referential security (whether it has pushed for more unification or for more diversification) has promoted a model of integration which has systematically sidetracked concern for the social embeddedness of transnational norms. While this was by no means the only factor behind Brexit, it is certainly a major aspect that should be taken seriously into account when evoking any 'future of Europe' scenario.

5 Conclusions

The events associated with Brexit may provide relevant elements to assess the nature of the European project and the reasons behind it. The argument detailed in this article is that security can be identified as a meta-constitutional rationale, namely a 'superior' reason that operates beyond and sometimes also in contrast to the explicit provisions of EU constitutional law. Security is expressed by two discourses of power (security and fundamental rights) which have been constitutive of the process of European polity-building and yet are characterised by ambiguities and contradictions. Brexit confirms this consideration in the specific case of EU citizenship and free movement rights, which normally have an important role in creating bonds between the members of a transnational polity and are thus a key element of these discourses. However, they seem to be easily removable or at least endangered in the case of withdrawal of one Member State.

In particular, it is possible to observe how all six dimensions of security – spatial, temporal, ontological, popular, epistemic and reflexive – have been affected to some extent by Brexit. Reflexive security addresses the question of how a polity can be secure. In the particular case of Brexit, the challenge consists of guaranteeing that at least some of the EU polity's inherent features (including the status of EU citizen) are preserved. By leaving each Member State free to choose whether or not it wishes to take part in the European project, Article 50 TEU responds in part to this challenge, although there is considerable uncertainty as regards the status of EU citizens. Spatial security looks at the question of the 'Other' through the conceptual dichotomy 'inside/outside'. Brexit confirms that, behind the drive for the implementation of relevant principles of EU law (e.g. unity and effectiveness), situations of discrimination and loss of rights are concretely possible, for example when an unpredicted event, such as the withdrawal of a Member State, takes place. Highlighting these situations is very important because it enhances, at least in theory, the ability of those groups that are affected by Brexit to assert their rights as co-equal members of the polity. Temporal and ontological security (addressing, respectively, the questions of the direction of EU integration and the nature of the EU polity) are challenged by the failure of the programmatic nature of the 'ever closer union'

104 See e.g. J A Usher, 'Variable Geometry or Concentric Circles: Patterns for the European Union' (1997) 46 International and Comparative Law Quarterly 243.

provisions in the Treaty and again it is useful to point out the constitutional relevance of Article 50 TEU as a security-oriented provision. The popular dimension of security may help us to emphasise the failure of the EU machinery to embrace the complexity of the people(s) and is intimately connected to the recurring debate on the *demos*. Epistemic security, relating to the question of the extent to which multiple rationalities or claims of authority can coexist, must deal with the degree of conflictuality between different levels of governance, which Brexit, as well as other 'crises' currently undermining the European project, have highlighted.

In addition to the descriptive analysis mentioned above, security may also provide a normative conceptual framework to understand Brexit and its relationship with EU law: such a framework emerges simultaneously as an opportunity for growth and as a threat to the European project. Brexit should be considered a lesson for the future, because self-referential, navel-gazing security (i.e. pursuing the European project for its own sake – whether pushing for more unification or for more diversification) has promoted a model of integration which has not necessarily taken into account the diversified needs of the Member States. In other words, although the EU should make more effort to avoid the fragmentation of the Internal Market, differentiated integration should not be dismissed too easily, and future policies and regimes should take the economic and social constitution more seriously. The hope is that both conceptual frameworks employed in the article – descriptive and normative – will provide a starting point for future research in the field.

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'Benefit tourism' post-Brexit: tackling the ghost by more EU social engagement

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Abstract

This article argues that welfare migration, although ill-defined and yet to be proven empirically, needs to be addressed by the EU. The negative perception of immigration has given rise to anti-EU, nationalist sentiment. Financial solidarity between EU citizens is subject to caveats, although there is hope for increased solidarity between pro-EU citizens post-Brexit. The EU should foster this by introducing 'associate citizenship'. It can take guidance from the USA and provide for basic EU social standards while guaranteeing free movement for the rich and the poor.

Keywords: migration; social benefits; solidarity; federalism; *Dano*; social union; associate citizenship; EU minimum social standard; EU funding

Introduction

In a federation or organisation of states based on free movement of citizens, people can make their living wherever they think they and their families will thrive best. This is typically incentivised insofar as migrants contribute to the host society. But what about those who are not yet, or not currently, providing for themselves in terms of housing, basic income or health insurance? Such migrants are typically deterred in one form or another, for example by limiting social protection in the host state, or by limiting free movement of those who are not self-sufficient. Challenging such practices, it will be argued that deterring migration of poor people in a 'federal' system[1] with otherwise open borders is neither workable nor can it be a valid policy option.

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1 Following James Madison (*The Federalist* No 39), power in a 'federal system' lies in more than one central governmental unit. The reference to federal *systems* as opposed to federal *states* is meant to capture the supranational structure of the EU. Functionally, the EU is a federal system, regardless of whether it achieves the same level of integration as a nation state: see Ingolf Pernice, *Harmonization of Legislation in Federal Systems* (Nomos 1996) 9, 15. Employing a political science perspective, see Ernest A Young, 'What Can Europe Tell Us about the Future of American Federalism' (2017) 49 Arizona State Law Journal 1109, 1110: both the EU and the USA fulfil the criteria of geopolitical division, independence (i.e. different bases of electoral authority), and direct governance.

When newcomers to a country with relatively high social standards claim public benefits, their entitlement is often questioned. At worst, they are suspected of having moved solely in order to enjoy this higher social standard compared to their home country (pejoratively referred to as 'social tourism', or 'benefit tourism'): the larger the group of benefit recipients, the bigger the risk of a decrease in social standards in the affected countries. Although not uncontroversial, this might ultimately lower the overall standard within the federation or organisation, as no country wants to attract more poor people than its neighbouring countries (in a 'race to the bottom').

This is not a new problem for the EU. The (failed) EU constitutional project, including the separately adopted Fundamental Rights Charter, and the EU Citizenship Directive[2] prompted discussion of the Member States retaining powers to limit their financial exposure. However, the problem has been aggravated since the Brexit referendum campaign, in which 'benefit tourism' served as a tool to discredit the freedom of movement and the authority of the Court of Justice of the European Union (CJEU). Euroscepticism may well showcase an increased reluctance vis-à-vis international law and cooperation more generally.[3] However, the focus in this article will be on the 'cultural backlash' that is caused by public resentment against immigration.[4] Drawing on sociological research and a comparative outlook into US law, I will argue that if free movement is coupled with equal access to social benefits this needs to be combined with minimum social provision at the EU level.

1 The empty slogan of 'benefit tourism'

There is no empirical proof that people move across borders in order to improve their social status by obtaining benefits in another country. At best, the evidence is mixed.[5] However, policymakers appear to take the possibility of welfare migration into account when regulating, even if this may be more of a perceived than a real risk.[6] The fear of

2 Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States: OJ L 158/77, 29 April 2004.

3 Catherine E De Vries, 'Waning Public Support for International Cooperation? Some Lessons from Europe' (6 October 2017), essay prepared for the 'Challenges to the Contemporary World Order' Workshop, Filzbach, 6–7 October 2017 <http://ssrn.com/abstract=3082899>, uses voting patterns for Eurosceptic parties across the EU as different explanations for Brexit: an economic 'interest explanation' (people feeling 'left behind' by globalisation), an 'identity explanation' (people feeling exclusively national), and 'risk-taking' or 'benchmarking' (comparing the situation of third countries such as Norway and Switzerland). See also Catherine Barnard, '(B)Remains of the Day: Brexit and EU Social Policy' in Frank Vandenbroucke, Catherine Barnard and Geert De Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017) 477.

4 Ronald Inglehart and Pippa Norris, 'Trump, Brexit, and the Rise of Populism: Economic Have-nots and Cultural Backlash' (Harvard Kennedy School Faculty Research Paper Series, August 2016) <https://research.hks.harvard.edu/publications/getFile.aspx?Id=1401>.

5 Regarding the USA, see A P van der Mei, 'Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law' (2002) 19 Arizona Journal of International and Comparative Law 803, 822–3 with further references; regarding the EU see Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015) 73 with further references.

6 Jan K Brückner, 'Welfare Reform and the Race to the Bottom: Theory and Evidence' (2000) 66 Southern Economic Journal 505 (for the USA). For the EU, see Charles R Bean, Samuel Bentolila, Giuseppe Bertola and Juan Dolado, *Social Europe: One for All?* (Monitoring European Integration 8, Centre for Economic Policy Research 1998) 39ff, 83. More recently, see Stephanie Reynolds, '(De)Constructing the Road to Brexit' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity within the EU* (Hart 2017) 55, 82 with further references. D Thym (ibid 2) illustrates this with German policies explicitly directed at disincentivising welfare migration in 2013.

migration suggests a 'downward bias' simply because there is the perception that benefits need to be capped so as to avoid them becoming a 'welfare magnet'.[7]

However, even in theory it is not clear what 'benefit tourism' is supposed to mean. In EU law, one very broad definition can be found in the *Trojani* case, where Advocate General Geelhoed defined 'social tourism' as 'moving to a Member State with a more congenial social security environment' (*Trojani*-test).[8] While this is a clear-cut objective test, it would catch all scenarios in which an EU citizen from a poorer Member State moves to a richer one. At least, one must add the condition that the newcomer claims social benefits in the richer Member State. But even this leaves an over-inclusive definition that potentially applies to students, jobseekers, and former workers or service providers who are currently on leave (voluntarily or involuntarily), or in transition between jobs, and pensioners with a low income. This goes too far as it does not account for either the length of or reason for economic inactivity. Therefore, the EU citizen's situation at the point in time he or she actually entered the host Member State becomes crucial. The *Trojani*-test makes sense only if limited to people who *already at the time of entry into the host state* are either economically inactive or already in receipt of benefits. The objective factors thus narrowed down would require that a citizen from a Member State with a less congenial social environment moves to another Member State at a point in time where he or she is not self-sufficient, and then claims benefits in the host Member State.

This sharpens the focus on people like family members, students or jobseekers; in other words, EU citizens who at the time of entry were 'economically inactive'. All these might qualify as potential 'social tourists' – at least as soon as they claim benefits in a Member State richer than their home state. This shows that there is an important element missing so far: an inquiry into the state of mind within which the non-active EU citizen exercised his or her free movement rights. A different test, looking at subjective factors, would address this element. One example is the relevant provision of the German Social Code at the heart of the *Dano* case, which will be analysed in more detail below. It excluded from the right to social assistance 'foreign nationals who have entered national territory *in order to* obtain social assistance . . . and their family members'.[9] The obvious downside is that it will normally prove very difficult, if not impossible, to determine the precise intentions with which someone moves from one country to another. For example, a jobseeker by definition does not have a secured income yet. Do jobseekers who know or should know that their chances of finding employment in the host Member State are extremely low already meet the subjective threshold? There will typically be more than one motivating factor for the move to another country; so how should one determine which one is the paramount factor? Any workable test should therefore combine objective and subjective analysis.

One important objective factor is the overall amount of benefits received, contrasted with the overall amount of taxes paid by (a specific group of) migrants. Worth noting is

7 Brückner (n 6) 507–8, 519 (USA). For the EU, see Giuseppe Bertola, Juan F Jimeno, Ramon Marimon and Christopher Pissarides, 'Welfare Systems and Labor Markets in Europe: What Convergence before and after EMU? (MIT 2000) <www.frdb.org/be/file/_scheda/files/copy_0_report1_3luglio99.pdf> with the example of actual reduction in German unemployment benefits due to increased labour migration following the Single European Act (75). See generally Hans Werner Sinn and Wolfgang Ochel, 'Social Union, Convergence and Migration' (CESifo Working Paper No 961, June 2003).

8 Opinion of Advocate-General Geelhoed in Case C-456/02 *Trojani* [2004] ECR I-07573 para 13.

9 Case C-333/13 *Dano* ECLI:EU:C:2014:2358 para 26 (emphasis added), referencing para 23 of Book XII of the German Social Code (SGB XII).

the empirical study by Dustmann and Frattini,[10] based on data from 2000 onwards. It showed that foreigners from the European Economic Area (EEA) in total contributed positively rather than burdened the UK economy. This suggests that at least in overall fiscal numbers there has been no 'social tourism' of migrants from the EEA within the UK. With regard to out-of-work benefits, the *Financial Times* in September 2017 published a figure of only 1.9 per cent (for the year 2015/2016) that were claimed by EEA nationals.[11] Again, this shows that the numbers of individual EU citizens that may (or may not) classify as 'benefit tourists' is low. This is important because the CJEU case law suggests that the 'burden' on public resources is the *sum* of benefit claims.[12]

This much-criticised case law[13] has implicitly followed an approach very similar to the one suggested here: it has looked at *objective* factors of integration of EU citizens – either with regard to the employment market, or with regard to the society of the host state more generally. It appears to have done so with a view to establishing the *subjective* mindset of the migrant, which may make sense as a matter of theory. But in practice, as an analysis of *Dano* will show, people are likely to have better reasons for migration than merely reaching out for higher social standards.

2 Waiting requirements for new residents?

Welfare migration needs to be tackled since it is a perceived ('ghost') problem that policymakers address. It will now be argued that this cannot be done by disincentivising migration of the poor.

2.1. US LAW AS POINT OF COMPARISON

Although there remain important differences between the USA and the EU, the former can well serve as a point of comparison for the EU since both are structured as federal systems.[14] Welfare migration in both systems has already been compared from a constitutional law point of view.[15] The aim here is to add a sociological perspective, with particular regard to the events leading to and following the UK's decision to leave the EU.

The – perceived[16] – problem of 'social tourism' exists in the USA to the extent that social policies and some benefits remain within the power of the states, leading to a divide between states with robust social welfare systems and those with weaker ones. Therefore, similarly to the EU, the question became whether states could protect their public finances against claims by new arrivals. In the 1969 case of *Shapiro v Thompson*[17] the US Supreme Court had to decide whether Connecticut, Pennsylvania and the District of Columbia could lawfully limit access to social welfare by requiring new residents to wait for one year before making claims. The US Supreme Court held that they could not:

10 Christian Dustmann and Tommaso Frattini, 'The Fiscal Effects of Immigration to the UK' (2014) 124 Economic Journal 563.

11 Gavin Jackson, 'EU Migrants' Claims for Unemployment Benefits Fall', *Financial Times* (London, 2 September 2017) < www.ft.com/content/520f183e-8bdd-11e7–9084-d0c17942ba93>.

12 Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597 para 62.

13 See e.g. Herwig Verschueren, 'Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in Dano' (2015) 52 Common Market Law Review 363.

14 See n 1 above.

15 For an in-depth discussion, see van der Mei (n 5). For a discussion from an EU fundamental rights perspective, see Konstanze von Papp, *Die Integrationswirkung von Grundrechten in der Europäischen Gemeinschaft* (Nomos 2006) 246–89.

16 See nn 6–7 and accompanying text.

17 394 US 618 (1969).

> On the basis of this sole difference [between those who have already resided for at least a year and those who have not] the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist – food, shelter, and other necessities of life.[18]

It added that:

> If a law has no other purpose than to chill the assertion of constitutional rights [here, the right to travel within the US from one state to another] by penalising those who choose to exercise them, then it [is] patently unconstitutional.[19]

Even the narrower question of whether combatting 'social tourism' in the subjective sense (people who move with the intention of claiming higher benefits in another state) might constitute a legitimate purpose of state legislation was answered in the negative. First, the legislation at stake applied to all new residents, irrespective of their qualifying as 'social tourists'. Second, it was legitimate for US citizens to have regard to the standard of living and welfare when choosing their place of residence.

By contrast, the Supreme Court held that the introduction of an objective test of residency, fraud prevention and encouraging early entry into the workforce were legitimate aims. However, the legislation remained unconstitutional because it was not rationally related to either of these purposes. Some of the reasoning here could well be extrapolated into the EU context.

In 1999, the Supreme Court scrutinised a Californian law that limited benefits for new arrivals in their first year to the amount they would have received in the state of their former residence. While this legislation had been enacted with federal approval, it was obviously motivated by the narrower aim of discouraging 'social tourism': there is no windfall immediately to be obtained in the new state, so people are either moving for reasons other than higher social standards, or show a willingness to fully integrate. Nevertheless, the Supreme Court in *Saenz v Roe*[20] still found this unconstitutional since by discriminating against newcomers (who did not get the higher Californian welfare rate) it created a 'hierarchy of 45 subclasses of similarly situated citizens based on the location of their prior residence'.

The US Supreme Court clarified that:

> Were we solely concerned with actual deterrence to migration, we might be persuaded that a partial withholding of benefits constitutes a lesser incursion on the right to travel than an outright denial of all benefits . . . But since the right to travel embraces the citizen's right to be treated equally in the new state of residence, the discriminatory classification is itself a penalty.[21]

Whereas the precise doctrinal basis for the holding in *Saenz v Roe* is a different one from that employed in *Shapiro*, the ultimate outcome in both cases rests on a somewhat stricter scrutiny applied to the equal protection clause.[22]

The CJEU has based its case law on the same link between citizens' free movement rights and non-discrimination.[23] Does this mean that, as in the USA, deterring welfare migration as such is not a valid policy option in the EU?

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18 Ibid 627.

19 Ibid 631, with reference to *United States v Jackson*, 390 US 570 (1968).

20 526 US 489 (1999).

21 Ibid 504ff.

22 See von Papp (n 15) 261–7. The limits of an analogy with EU free movement law are discussed ibid at 269–86.

23 Case C-85/96 *Sala* [1998] ECR I-2691 para 62. See also Cases C-184/99 *Grzelczyk* [2001] ECR I-6193 and C-140/12 *Brey* ECLI:EU:C:2013:565 para 44.

2.2. Political theory underlying the access-to-welfare cases: can the EU be compared to the US?

In the words of Justice Cardozo, quoted by the Supreme Court in *Saenz*:

> The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division.[24]

The Supreme Court thus relied on equal citizenship rights as a matter of political philosophy or theory. The question becomes whether a similar understanding of EU citizenship is possible, applying equal treatment strictly to social rights. Despite the similar doctrinal approach – tying free movement and non-discrimination – it is questionable whether this originates from a similar political theory in the EU. In the absence of a European 'nation', the somewhat vague notion of EU 'solidarity'[25] would arguably come closest to building the necessary bridge to such a unionist philosophy.[26] It is here understood as preparedness to *share public resources*.

2.2.1. EU solidarity in theory

It can be left open here whether solidarity has any legal bite, for example by amounting to a general principle of EU law.[27] Solidarity in the literature is often discussed hand-in-hand with citizenship[28] and hence ultimately the democratic legitimacy of the EU given its (lack of) *one demos*.[29] It is important, however, to differentiate, since associative relationships as the basis for solidarity can be described at different levels. We are here looking not at the political, but at the societal level into what could be labelled *communitarian solidarity*.[30] The assumption is that the place of residence – more precisely, *actual* or *bona fide* residence – serves as one important point of reference for people of all nationalities because they have a natural interest in local (and eventually, national) matters that affect them. Societal bonds thus exist between people belonging to the same community, with smaller communities potentially yielding the stronger bonds.[31] Residents in a particular place are normally recognised as legitimate 'stakeholders' with very close to equal rights when compared to full citizens.[32] This makes sense from a *fairness* perspective,

24 *Baldwin v GAF Seelig, Inc,* 294 US 511, 523 (1935), which is quoted at 526 US 489, 511 (1999).

25 See the literature review by Dimitri Kochenov, 'The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?' (2013) 62 International and Comparative Law Quarterly 97, 123ff. See also Malcolm Ross, 'Solidarity – A New Constitutional Paradigm for the EU?' in Malcolm Ross and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford University Press 2010).

26 Frank Vandenbroucke, 'The Idea of a European Social Union' in Vandenbroucke et al (n 3), distinguishes an 'idealised' EU social model (transferring redistributive policies to the EU level) from a 'realist' model (leaving these with the Member States, but tasking the EU with enabling the actual achievement of social justice).

27 See Catherine Barnard, 'Solidarity and the Commission's Renewed Social Agenda', in Ross and Borgmann-Prebil (n 25).

28 Dagmar Schiek, 'Perspectives on Social Citizenship in the EU: From Status Positivus to Status Socialis Activus via Two Forms of Transnational Solidarity' (CETLS Online Paper Series vol 4, 2015); see also the collection of essays by Thym (n 6), and n 62 below.

29 Peter L Lindseth, 'European Solidarity and National Identity: An American Perspective' (2012) Berliner Online-Beiträge zum Europarecht Nr 79. See section 4 below.

30 de Witte (n 5). Communitarian solidarity can be seen as playing out on a 'societal' level, thus distinct from 'market solidarity' and 'political solidarity'. Ibid.

31 See section 2.2.2 below.

32 Peter Spiro, *Beyond Citizenship: American Identity after Globalization* (Oxford University Press 2008) 81; Pavlos Eleftheriadis, 'The Content of European Citizenship' (2014) 15 German Law Journal 777, 792.

since there is some basic level of reciprocity between all permanent residents (and citizens) as 'cooperative agents' in the respective state.[33]

On an abstract level, solidarity can be contrasted with market dynamics. As such it plays a role in different contexts of EU law.[34] The context of specific interest here is free movement and citizenship law to the extent it dealt with access to social benefits in actual cases. In the landmark case involving a French student in Belgium, the court famously held that '*Union citizenship is destined to be the fundamental status of nationals of the Member States*';[35] and '*there is a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties . . . are temporary.*'[36] The court clearly postulates some form of financial solidarity – but does this exist in reality?

2.2.2 'Financial solidarity' between residents?

The Court in *Grzelczyk* explicitly addressed solidarity not between EU Member States, but between *people* in the Member States. Therefore, I will focus on *solidarity between EU citizens*. More precisely, the question is whether there is financial solidarity between *actual residents*. There may be a plausible argument that some solidarity between national and non-national residents within a community exists at least at the local level.[37] The fact that EU citizens as residents have active and passive voting rights in municipal elections (Article 22 Treaty on the Functioning of the EU (TFEU)) illustrates this. Similarly, the court may be implicitly acknowledging the importance of attachment to a place when relying on (lawful) residency as a basis for an equal treatment claim to social benefits.[38] More specifically, a case that was handed down very shortly before the 2016 UK referendum found room for Member States subjecting *in-work* benefits such as child benefits to a habitual residence requirement.[39] This corresponds with the sociological insight that the prerequisite of solidarity is social freedom,[40] which in turn is strongest in places where people know each other.[41] The particular importance of small communities in this respect is evidenced by empirical research in the US, where sociologists have concluded that solidarity-building is one purpose of civic engagement on the local level.[42] The same is true for the EU,[43] and also globally.[44]

33 Eleftheriadis (n 32).

34 Especially EU asylum policy and the monetary union in times of crises. See e.g. Daniel Thym and Lilian Tsourdi, 'Searching for Solidarity in the EU Asylum and Border Policies: Constitutional and Operational Dimensions' (2017) 24 Maastricht Journal of European and Comparative Law 605; and the collection of essays by Amandine Crespy and Georg Menz (eds), *Social Policy and the Eurocrisis* (Palgrave Macmillan 2015).

35 Case C-184/99 *Grzelczyk* (n 23) para 31 (emphasis added).

36 Ibid para 44 (emphasis added).

37 This is where the notion of 'communitarianism' (n 30 above) is most convincing.

38 Case C-85/96 *Sala* (note 23) para 63.

39 Case C-308/14 *Commission v UK* ECLI:EU:C:2016:436 (finding an indirect discrimination that is justified). For a detailed critique see Jaan Paju, *The European Union and Social Security Law* (Hart 2017).

40 This goes back to Emile Durkheim, referenced by Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014) 266.

41 Ibid 265.

42 Gianpaolo Baiocchi et al, 'The Civic Imagination: Political Culture in Contemporary American Cities' (American Political Science Association 2013) 25–9 <https://ssrn.com/abstract=2304198>.

43 Tom Inglis and Susie Donnelly, 'Local and National Belonging in a Globalised World' (2011) 19 Irish Journal of Sociology 127 (based on data collected between 2000 and 2007): despite increased mobility, the level of identification with national and local places is high. It is evidenced regarding 'deep rooted belonging' (people brought up in one place) and 'elective belonging' (people who chose to move there).

44 As illustrated by the resurgence of area studies, see the collection by Tony Chafer, 'Area Studies in the Global Age: Community, Place, Identity' (2017) 25 Journal of Contemporary European Studies 510.

However, the crucial question is the following: from which point in time do nationals of the host state consider newcomers as sufficiently integrated in the sense that they are seen as entitled to social benefits? From the point of arrival? Or should newcomers have to earn their social entitlement? Empirical research in the EU points to the latter, as is revealed in particular by the data underlying the afore-mentioned study by Dustmann and Frattini:[45] according to a European Social Survey dating from 2008, only 8 per cent of EU citizens thought that newcomers should have access to social welfare from the point of arrival. At the opposite end of the spectrum, another 8 per cent thought that immigrants should never have the same rights as natives. But there is a broad consensus among the remaining majority that migrants must demonstrate that they deserve social benefits in the host state. However, this majority is almost evenly split between those who believe newcomers have earned their rights to social benefits once they have worked and paid taxes for a year (38%); and those who believe that access to welfare should be limited to those who have acquired citizenship of the host state (37%). Hence, there is an obvious problem of defining the exact point in time from which migrants can generally be regarded as sufficiently integrated into the host society, so that the local population is willing to let them share in social benefits. Defining this point in time correctly is particularly challenging given that the range is between one year and the acquisition of full citizenship. This can best be seen in cases involving students, where other indicators (such as taxpaying) normally do not apply.

The presumption of financial solidarity with a foreign student in Mr Grzelczyk's situation arguably falls within these parameters for two reasons. First, when Mr Grzelczyk claimed benefits he had been studying in Belgium for three years. He could thus have achieved what the court in later case law referred to as a '*real and effective degree of connection*'[46] with the host state. Apart from education in the relevant state, the court in other student cases saw the following elements as indicative of such a real connection: 'family, employment, language skills or the existence of other social and economic factors'.[47] Second, students from other EU Member States have a special status in the sense that they are not expected to fully integrate into the host society as they might ultimately complete their education elsewhere, and/or enter their respective professions in their home state. But what about other non-active citizens?

3 Ms Dano as prototype of the not deserving,[48] non-active citizen?

While case law at some point loosened the 'lawful residence' requirement,[49] the court in *Dano* reaffirmed its importance regarding rights of non-active EU citizens. In addition, *Dano* exemplifies a line of enquiry into the proximity between the relevant EU citizen and the host state. This case will now be analysed in more detail for two reasons: first, its

45 See n 10.

46 Joined Cases C-523/11 and C-585/11 *Prinz and Seeberger* para 37ff (emphasis added) (maintenance grant requests from the *home* state for studies abroad).

47 Ibid.

48 Eleanor Spaventa, 'Earned Citizenship: Understanding Union Citizenship through its Scope' in Dimitri Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2016). See also Dion Kramer, 'Earning Social Citizenship in the European Union' (2016) 18 Cambridge Yearbook of European Legal Studies 270.

49 Contrast Case C-127/08 *Metock* [2008] ECR I-6241 para 62 with Case C-109/01 *Akrich* [2003] ECR I-9607 paras 53ff.

theoretical reasoning constitutes an important breaking point with earlier case law;[50] second, its factual background illustrates how wrong the presumption of 'benefit tourism' can be. It will be argued that the court's reasoning is sound in theory, but it fails to account for Ms Dano's real-life situation.

3.1 *Dano*: the facts

Ms Dano was a very young Romanian mother who, at the age of 20, had a baby son born in Germany in 2009. While her original arrival date remained unclear, she last entered Germany in late 2010. At this point she received an unlimited residence certificate from the city of Leipzig in mid-2011, followed up by a duplicate certificate in early 2013. Ms Dano had moved in with her sister in Leipzig, who was supporting her and the child. Ms Dano, who was in receipt of federal child benefits (€184 per month) and social assistance by the city for children and young people (€133 per month), then applied in vain for basic provision under the German Social Code. This was denied by reference to para 23(3) of the relevant part of the Social Code SGB XII, excluding foreign nationals from claims if they entered German territory to obtain social assistance.[51]

3.2 *Dano*: the judgment by the CJEU

The CJEU held that excluding Ms Dano from these benefits was lawful. There was 'nothing to indicate that Ms Dano has looked for a job', so she was 'not seeking employment and . . . did not enter Germany in order to work'. This is an inference from objective factors to Ms Dano's subjective mindset. Having been in Germany for longer than three months but shorter than five years, her residency status under the EU Citizenship Directive 2004/38 was subject to Articles 7(1) and 14(2) (sufficient resources); and specific regard was due to recital 10 in the preamble (not becoming an unreasonable burden). The court held that under the Directive, 'economically inactive Union citizens [are thus prevented] from using the host Member State's welfare system to fund their means of subsistence'. While this may be true – although the primary objective of the Directive according to its recital 3 could be understood as facilitating free movement – the question that would normally have followed is whether primary law requires an exception, given the individual circumstances.[52] A right to reside may also have followed from the national residency certificate[53] which Ms Dano had.

The court in *Dano* did not, however, follow these lines of enquiry, and instead based its conclusion solely on secondary law: since Ms Dano was making a request for basic provision, she did not have sufficient resources. If she did not have sufficient resources, she did not have a right to reside as a non-economic active EU citizen. This kind of circular reasoning has been technically ruled out since *Grzelczyk,* at least for temporary neediness. A preferable approach would thus have been the one followed by the

50 *Dano* went straight to the problem of whether an EU citizen can become an illegal resident in the host state merely due to insufficient financial resources. Subsequent cases such as Case C-67/14 *Alimanovic* (n 12) and Case C-299/14 *Garcia Nieto et al* ECLI:EU:C:2016:114 are less significant in that they concerned newly arrived migrants, confirming the general rules under the Citizenship Directive. See also the analysis by F Wollenschläger, 'Consolidating Union Citizenship: Residence and Solidarity Rights for Jobseekers and the Economically Inactive in the Post-*Dano* Era' in Thym (ed) (n 6) 171.

51 See n 9 above.

52 Case C-140/12 *Brey* (n 23).

53 Case C-456/02 *Trojani* (n 8) paras 20–4 (minimally remunerated services as part of a social reintegration programme might constitute employment). Mr Trojani's situation warranted access to welfare on the basis of lawful residence, derived from a national permit. The outcome in this case can well be understood to be influenced by Mr Trojani's services to society.

Advocate-General in reliance on previous case law: even though Ms Dano may still be lawfully resident and thus have the right to equal treatment, her exclusion from benefits may be justified by showing a burden on the social assistance system of the host state, and by demonstrating that the criterion used by the national legislator in order to establish a 'genuine link' between the EU citizen and the host Member State is proportionate.

3.3 *Dano*: objective factors demonstrating (in)sufficient societal integration

The CJEU relied on findings by the German court that Ms Dano had neither completed school education, nor undergone any professional training, nor ever had a job. Moreover, while her oral understanding of German seemed sufficient, she could not write in German and her ability to read texts was limited. Assuming that Ms Dano did not qualify as a jobseeker, the court considered not her chances of finding employment, but other factors such as education and language skills (with an emphasis on reading and writing in German). Whereas language skills are one of the traditional requirements for demonstrating societal integration,[54] the consideration of Ms Dano's level of education could be taken as inquiring into her *potential* for qualifying as a jobseeker at some later point, or her *potential* to contribute to the society of the host Member State in some (other) way. Seen in this light, her lack of sufficient language skills could also be understood as showing that she *currently* did not contribute to German society. It seemed therefore plausible to conclude from these objective factors that Ms Dano *intended* to move to Germany for benefit purposes. Although the decision does not explicitly rest on it, this intention must be inferred in order for Ms Dano to fall under the relevant German law.[55]

3.4 A critique of *Dano*

Ms Dano was a young and single immigrant mother raising a small child. Hence, she suffered multiple disadvantages on grounds of age, ethnicity and gender, which put her in one of the structurally weakest groups in society.[56] Childcare obligations at least provide a solid reason for not being in paid employment. Alternatively, childcare for one's own child born in the host state could qualify as a societal contribution, which would have allowed Ms Dano to be treated more like Mr Trojani or Mr Baumbast.[57] Moreover, Ms Dano's young age rendered it unlikely that she would qualify as a former worker.[58] Looking at this real-life scenario behind her appearance as 'economically inactive', one could have argued that her need was only temporary in the *Grzelczyk* sense, that is, until her son was at school and she able to find low-skilled part-time work and attend German language classes.

Moving on to the subjective mindset – the question of why Ms Dano moved to Germany – are there any motives other than 'benefit tourism'? Ms Dano had joined her older *sister* in Germany. This could have been a straightforward case of family reunification. However, the Citizenship Directive 2004/38 does not recognise the bond

54 Spiro (n 32).

55 See n 9 above.

56 See generally Sandra Fredman, 'Intersectional Discrimination in EU Gender Equality and Non-discrimination Law' (European Commission 2016) 11: 'Migrant women with childcare obligations have particular difficulty in accessing ways of learning the dominant language, compared to migrant men, and non-migrant women.' More specifically, see Philip Martin, Lisa Scullion and Philip Brown, 'Roma Persons and EU Citizenship' in Frans Pennings and Martin Seeleib-Kaiser (eds), *EU Citizenship and Social Rights: Entitlements and Impediments to Accessing Welfare* (Elgar 2018) 173.

57 Eleftheriadis (n 32). For *Trojani*, see n 53.

58 Case C-507/12 *St Prix* ECLI:EU:C:2014:2007 shows a much more generous approach to economic inactivity due to the constraints of late pregnancy and childbirth.

between siblings as strong enough to warrant derived rights of residence automatically (had Ms Dano joined her parents in Germany upon whom she depended for a living, she would have benefitted from a right to reside under Article 2(2)(c)). Nevertheless, according to recital 6:

> . . . in order to maintain the unity of the family in a broader sense . . . the situation of those persons who are not included in the definition of family member . . . and who therefore do not enjoy an automatic right of entry and residence . . . should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted . . . taking into consideration [the] relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen (see also Article 3(2)).[59]

This makes perfect sense given that family ties are the strongest bond of solidarity[60] within any broader parts of society.

Hence, there were strong indications that Ms Dano was *not* a benefit tourist. Although portrayed as a typical case of 'economic inactivity', one could well have argued temporary financial solidarity. This shows that the formal dichotomy active–inactive cannot fully address people's real situations. Tackling migration by denying social rights to perceived benefit tourists is therefore not an appropriate tool.

4 Access to benefits: the citizenship angle

To recap, solidarity can be looked at from either an economic, a societal, or a broader political perspective.[61] Moving on to the latter, the question is whether we can assume solidarity between EU citizens that is independent from their attachment to the market or a local community. Therefore, the notion of EU citizenship becomes important, but from a *functional* perspective rather than an examination of its precise content, following different citizenship models.[62] The question is: what role can EU citizenship play when it comes to welfare migration and its public perception?

4.1 The decline of the idea of nation-building?

The traditional view is that, in contrast to the USA, the EU does not constitute a nation since the socio-political requirements necessary for the emergence of a pan-European society are lacking.[63] This is also why solidarity on a political level has been referred to as 'aspirational' only.[64] On a theoretical level, one could counter this by saying that European nation-building in a traditional sense is *not* (necessarily) the purpose of EU

59 Case C-83/11 *Rahman et al* ECLI:EU:C:2012:519 stresses the duty to facilitate effectively the entry and residence of other family members.

60 Jürgen Habermas, 'Democracy, Solidarity and the European Crisis' in Anne-Marie Grozelier et al (eds), *Roadmap to a Social Europe* (Social Europe Report 2013) 4, 10 <www.socialeurope.eu/wp-content/uploads/2013/10/eBook.pdf>, sees the family as 'quasi-natural' community with *ethical* obligations as a strong basis for solidarity.

61 See n 30 above.

62 Contrast 'market citizenship' (e.g. Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 Common Market Law Review. 1597) with 'social citizenship' (e.g. Kramer (n 48); Schiek (n 28)). Functionally, citizenship is the basis for EU democracy (e.g. Gareth Davies, 'Social Legitimacy and Purposive Power' in Gráinne de Búrca and Dimitry Kochenov (eds), *Europe's Justice Deficit?* (Hart 2015)); or federalism (Dimitry Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' in Kochenov (n 48)).

63 E.g. Stefano Giubonni, 'European Citizenship and Social Rights in Times of Crisis' (2014) 15 German Law Journal 935.

64 de Witte (n 5).

citizenship.[65] From a global perspective, one could argue that the assimilation of the legal position of permanent residents to that of nationals (as is the case under EU law) goes some way towards diminishing the importance of the nation state.[66] But apart from its structural role,[67] EU citizenship also has a specific function ensuring fairness in a more substantive sense.[68] Seen in this way, it is the potential driving force for developing solidarity within European societies.[69] I am here following Ulrich Beck's suggestion that the 'horizontal'[70] level of Europeanisation (deriving from the actual lives of people) is the most important element in achieving solidarity. Jürgen Habermas'[71] proposal to foster solidarity simply by improving EU democratic structures ('vertical' Europeanisation in Beck's terminology) appears too theoretical and overly optimistic. In other words, I understand the purpose underlying EU citizenship along the lines of *transnational fairness*, while relying overall on the structural framework originating in the literature on EU democratic deficit. This means that we are looking at the potential of EU citizenship to bring about a 'European way of life' that includes people embracing a social safety-net for all EU citizens as such. What is the impact of Brexit on such a vision?

4.2 Brexit as a breaking point

Brexit stands as a synonym for 'taking back control' and hence the return of the nation state. With specific regard to migration, it is revealing the limits of European integration – or, more broadly, globalisation – by reasserting the power of the state. What does this imply for solidarity between EU citizens as such? One possible line of argument would see Brexit as ending this aspiration, stressing the anti-globalisation and anti-EU sentiment (from both the political left and right) that Brexit stirred in the UK and elsewhere. However, from a political theory perspective, this does not necessarily have to mean the end of a European collective identity: arguably, it is still better to have a *pan*-European discourse than to have none at all, even if this discourse is 'contest-driven' instead of searching for a consensus.[72] At least in the UK, awareness and knowledge of the EU have been increasing since June 2016. Nevertheless, the problem is that anti-EU sentiment has also led to strong election results for nationalist parties in countries such as France, Germany and Austria – although immigration from outside the EU appears to have played a major role here. It is generally acknowledged that the public perception of immigration as a 'threat' to either the culture or the economy is a *salient* factor for the rise of right-wing parties.[73] Even proponents of a more controversial political discourse acknowledge that in federal systems[74] this poses the risk of eventual disintegration of the central unit, in particular if there is an exit option such as Article 50 of the Treaty on

65 Eleftheriadis (n 32) 783.

66 Spiro (n 32).

67 See above text accompanying n 62ff. It can be left open here whether this role should be modelled against the template of national democracies, or designed as post-national citizenship. See Somek (n 40) 205, 261ff.

68 Eleftheriadis (n 32).

69 On a philosophical level, this would correspond with the 'bottom-up' approach ensuring the democratic basis of EU integration, see Ulrich Beck, *German Europe* (Polity Press 2013) 76 with further references.

70 Ibid 71.

71 Jürgen Habermas, 'Core Europe to the Rescue: A Conversation with Jürgen Habermas about Brexit and the EU Crisis' (12 July 2016) < www.socialeurope.eu/core-europe-to-the-rescue>.

72 See generally for this distinction Andreas Follesdal, 'Democracy, Identity and European Public Spheres' in Thomas Risse (ed), *European Public Spheres: Politics Is Back* (Cambridge University Press 2014) 247.

73 Lewis S Davis and Sumit S Deole, 'Immigration and the Rise of the Political Right: The Role of Cultural and Economic Concerns over Immigration' (2015) <https://papers.ssrn.com/abstract=2641016>.

74 See n 1 above.

European Union.[75] If nationalism is the alternative to the EU (instead of EU reform), the risk of failure of the EU project is real. So this would corroborate an argument *against* EU citizenship as a solid pathway to solidarity after Brexit.[76]

Another, more optimistic line of thought would see Brexit as a breaking point in a promising sense: faced with a choice, 48 per cent of UK voters overall wanted to remain part of the EU. Those of them who are convinced Europeans ('remainers', in contrast to 'soft remainers' without a real sense of belonging) have teamed up with EU citizens elsewhere – i.e. not along but *across* national boundaries. They have spoken out more loudly in favour of the EU than ever before. This can be evidenced, for example, by the rise of the newspaper *The New European* and, most recently, by the foundation of Renew (a new anti-Brexit party),[77] as well as Our Future Our Choice (OFOC) (a new campaign group initiated by young people opposed to Brexit).[78] Given the crucial role of the media and campaigning with respect to people forming a political opinion, this allows for a pan-European political discourse that consolidates knowledge about the EU, and is also consensus-driven[79] since it aims to foster the EU project. In other words, there is now a basis for more solidarity among those parts of European societies who have been rendered more aware of the advantages of the EU and have elected (or would elect) to stay European. I will refer to them as 'new EU citizens'.

4.3. The case for increased solidarity among the new EU citizens

Sociologists associate identity with the feeling of belonging to a certain culture and social psychology.[80] While it has become evident that European societies are divided, Brexit is likely to strengthen the sense of belonging to the EU amongst the new EU citizens. This article's argument is that the bond between new EU citizens has larger potential than the diffuse anti-EU sentiment, which superficially unites UK 'leavers' and EU-critics elsewhere. This can best be seen when looking at EU citizens in the UK and UK citizens in other Member States following Brexit: these feel the immediate consequences of the 2016 referendum, which has put their vested EU rights and hence their legal status in jeopardy. Their interests in preserving as much of the status quo as possible are aligned perfectly with territorial focus on the EU. In other words, European society is divided, but not along national frontiers. There is now realisation of a new form of discrimination in the UK against EU citizens as a group. This is cause for concern,[81] but also noteworthy in that 'EU nationals'[82] are treated as one group. Immigrants in the UK are being singled out not for being foreign (i.e. non-UK), nor for being from *another Member State*, but for being *European*. The alarm or even shock over this experience is being absorbed by new pro-EU activist groups, both in the UK (e.g. the3million) and abroad (e.g. British in Europe and Pulse of Europe). In short, Brexit nurtures solidarity amongst the new EU citizens.

75 See Follesdal (n 72).

76 See the less optimistic analysis by Dora Kostakopoulou, 'What Fractures Political Unions? Failed Federations, Brexit, and the Importance of Political Commitment' (2017) 42 European Law Review 339.

77 James Torrance, 'This Is Why We've Set Up Renew – The New Political Party That Will Stop Brexit', *The Independent* (London, 21 February 2018) <www.independent.co.uk/voices/renew-britain-party-new-brexit-uk-politics-end-eu-why-a8221141.html>.

78 See the general information available under <www.ofoc.co.uk>.

79 See above, text accompanying n 72.

80 Kenneth L Karst, *Belonging to America: Equal Citizenship and the Constitution* (Yale University Press1989) 13.

81 'Feindbild Europäer?' Frankfurter Allgemeine Zeitung (FAZ) (10 January 2018) <www.faz.net/aktuell/politik/brexit-sorgt-fuer-anfeindungen-gegen-europaeer-15398223.html>.

82 'EU Nationals Facing Rising Discrimination' *The Guardian* (London, 12 September 2017).

Solidarity may also increase with changing business structures *post*-Brexit. The risks associated with an exit from the EU and existing models of affiliation with the Internal Market, including the Customs Union, is prompting firms and EU agencies in the UK to reconsider their location. Ironically, Brexit is triggering *more* free movement in the sense that businesses need to find territorial bases in the EU to ensure continued access to the EU market. This increases the chances of UK citizens living and working abroad, thus experiencing the economic benefits of the EU and becoming embedded in the societies of other Member States. Recent empirical evidence suggests that the use of 'opportunity structure' for social interaction is to a certain extent related to a country's level of economic interactions and the process of economic integration.[83] This cautious conclusion is based on data from 2007 to 2011, so may be influenced by the financial crisis. In any event, Euroscepticism is relatively low amongst those who are mobile across national borders, or those who have lived in another EU country: the more 'transnational' in that sense an individual is, the more pro-European he or she is likely to be.[84] So the level of Europeanisation, which in the UK is lower than in other EU Member States,[85] is likely to improve for those UK citizens who following Brexit are willing to relocate with their jobs.

4.4 Brexit as a shared memory

From a sociological perspective, the above-mentioned factors support the argument that despite its divisional force there is also promise in Brexit. This is because solidarity (sometimes also referred to as 'trust') requires a collective identity, which presupposes some form of self-awareness that is construed vis-à-vis 'the other',[86] and a collective memory.[87] The unfolding of Brexit – the debate, the choice, the consequences – will constitute such a collective memory for people in the UK and the EU. It is likely to be strongest for UK citizens in the EU and EU citizens in the UK who (together with UK remainers) feel immediate consequences. Their collective memory is thus sharper and likely to be more powerful, especially if it continues to be echoed among wider parts of (pro-)EU societies. In any event, whether as a positive or negative image, Brexit will shape public opinion and hence the collective memory of people in the EU.[88]

4.5 The impact of increasing numbers of dual nationals

The impact of new EU citizens with a European sense of belonging is likely to deepen in the longer run. This is because mobile EU citizens directly affected by Brexit are now much more likely to apply for a second passport in light of the uncertainties for residency and other rights following Brexit. This is generally evidenced by the rising number of citizenship applications in the UK: Home Office statistics published by the BBC in

83 S Israel, F Butler, C Ingensiep and C Reiman, 'Connected Europe(ans): Does Economic Integration Foster Social Interaction?' (2017) 25 Journal of Contemporary European Studies 88 (although sociological studies do not fully corroborate the traditionally presumed link between economic and social integration).

84 Theresa Kuhn, *Experiencing European Integration: Transnational Lives and European Identity* (Oxford University Press 2015) 64ff (based on evaluation of *Eurobarometer* data between 2006 and 2008).

85 Israel et al (n 83).

86 Karst (n 80). There is a relational component for the sense of belonging that may lead to 'interlocking' identities, depending on the chosen comparator (local or national outsider). See Inglis and Donnelly (n 43) 140.

87 Ireneusz P Karolewski, *Citizenship and Collective Identity in Europe* (Routledge 2010) 8ff.

88 Similarly De Vries (n 3).

August 2017 have shown the number of citizenship applications by EU nationals almost doubling, rising from 15,871 in 2015/2016 to 28,502 in 2016/2017.[89] These numbers focus on the UK only, but there is also evidence of rising citizenship applications by British nationals in other EU Member States, totalling 6555 in 2016 (up from 2478 in 2015).[90] Even if this does not lead to dual nationality in all cases, there will be a political voice for pro-European citizens in the UK that was formerly lacking in the 2016 referendum. The same is true for UK expats in other Member States. This may well confine or reduce the current role of anti-EU, nationalist parties: people with two nationalities embody an understanding of different cultures – they can bridge discrepancies or misunderstandings. In other words, the more shared (national) identities there are, the clearer becomes the awareness of 'the other', which will increase tolerance[91] and, ultimately, mutual trust.

Moreover, if these increased applications do lead to dual nationality, those EU citizens would then have the right to vote in more than one Member State, thus increasing their voice within the EU as a whole. It remains for the EU Member States to decide whether they want to relax their regulations regarding the possibility of dual citizenship, which has traditionally been discouraged. However, there are signs that in the aftermath of Brexit some EU Member States will allow for dual nationality of their citizens in the UK,[92] or UK citizens abroad.[93] While the underlying motive for the increase in passport applications is likely to be a pragmatic desire for security, this does not exclude that at some point there has been, will be, or still is a genuine feeling of belonging to the EU and the host state. Crucially, EU citizens with a second nationality will become fully integrated *politically*, forming part of the future electorate of their second home country.

Thus, there is a case for increased solidarity between (new) EU citizens following Brexit. This would have to be acknowledged in future case law in a way similar to the US metaphor of 'sinking or swimming together'.[94] The question remains whether the increase in tolerance and political participation will be enough to change attitudes towards 'benefit tourism', or migration that may be perceived as such. It has been shown by analysing *Dano* that tackling migration of poor (inactive) people relies on inapt tools and can cause unfair results. The circuitous reasoning of *Dano* can render a migrant poor EU citizen illegal under EU law. It would be an interesting question for further empirical

89 'EU Applications for UK Citizenship up 80% since Brexit' (*BBC News*, 25 August 2017) <www.bbc.co.uk/news/uk-41053684>.

90 Federica Cocco, 'Britons Seeking EU Citizenship More Than Doubles', *Financial Times* (London, 9 April 2018) <www.ft.com/content/6e0dd592–3c05–11e8-b7e0–52972418fec4>, based on Eurostat data showing most applications in Germany (2704, up from 594), Sweden and the Netherlands.

91 Karst (n 80) 96ff.

92 *The Guardian* reported on 10 October 2017 that the Dutch government assured its citizens in the UK that they would be allowed dual UK/Dutch citizenship *post*-Brexit, see Daniel Boffey, 'Brexit: Dutch Nationals Living in Britain Will Be Allowed Dual Citizenship', *The Guardian* (London, 10 October 2017) <www.theguardian.com/world/2017/oct/10/durch-nationals-living-britain-allowed-dual-citizeship-brexit>.

93 The BBC quoted the former German Minister for Foreign Affairs (Sigmar Gabriel) in July 2016 as considering this, see Claudia Allen, 'Brexit: Dual Nationality Available for Britons?' (*BBC News*, 4 July 2016) <www.bbc.co.uk/news/uk-politics-eu-referendum-36703037>.

94 See n 24. Brexit alone will give rise to many lawsuits that could find their way to the CJEU. One example is the need for clarification of the status of British nationals in the EU (n 110) and EU nationals in the UK post-Brexit. Regarding the latter, concerns that vulnerable people may not be able to secure their status have been voiced by Madeleine Sumption and Zovanga Kone, 'Unsettled Status? Which EU Citizens Are at Risk of Failing to Secure their Rights after Brexit?' (Report of the Migration Observatory, University of Oxford, 12 April 2018) <http://migrationobservatory.ox.ac.uk/wp-content/uploads/2018/04/Report-Unsettled_Status.pdf>.

research whether new EU citizens directly affected by Brexit are now more likely to empathise with Ms Dano – having experienced how quickly one could become an 'illegal migrant'. However, if the cautious optimism regarding solidarity between (new) EU citizens as such does not necessarily extend to *financial* solidarity and sharing of public benefits. This will be addressed with some general caveats, which underlie the conclusion in the final section that more EU social engagement is needed, either in some form of minimum harmonisation and/or financing.

5 Limits of financial solidarity: more EU social engagement?

5.1 The limits of financial solidarity in fact and in law

The first caveat is that the new EU citizenry might to a large extent consist of people who have previously enjoyed free movement. By definition, these are likely to be part of a particular 'class'[95] of what could be referred to as a global 'elite', or more neutrally, 'transnationally mobile'[96] people – namely those who can afford to travel and most easily fulfil the requirements that EU law imposes on free movement.[97] Unless they have experienced temporary financial distress themselves (e.g. caused by job loss, change in status, or illness), they might not necessarily feel increased *financial* solidarity with fellow EU citizens.

The second caveat results from the fact that burden-sharing within any given society is easier in economically robust times.[98] There is generally a connection between a rights-based, generous approach by the judiciary and the economic climate in which the relevant cases reach the courts. The *Dano* case exemplifies this.[99] Hence, there is a concern that in the aftermath of severe EU crises (stretching from the financial and Euro crises to Brexit itself) state funds will remain strained, and it will be unlikely that people are prepared to share.[100] As indicated above,[101] simply improving democratic structures within the EU – albeit a necessary start – is not sufficient to remedy this.

Thirdly, it must be noted that, as a matter of legal doctrine, the case for a strict application of equality of EU citizens in *all* circumstances is weaker than in the USA, where the Supreme Court held in *Saenz* that 'the discriminatory classification [of US citizens as either newcomers or more established residents] is itself a penalty'.[102] Attempting a similar argument for the EU would face the problem that the principle of non-discrimination on grounds of nationality applies similarly to EU fundamental rights

95 Charlotte O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 Common Market Law Review 937.

96 Kuhn (n 84). See also N Fligstein, *Euroclash: The EU, European Identity, and the Future of Europe* (Oxford University Press 2008).

97 Fritz Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"' (2010) 8 Socioeconomic Review 218.

98 Karst (n 80). This can be corroborated by the so-called 'group threat theory', see Davis and Deole (n 73).

99 See also M Seeleib-Kaiser, 'Citizenship, Europe and Social Rights' in S Seubert et al (eds), *Moving Beyond Barriers: Prospects for EU Citizenship?* (Elgar 2018) <www.researchgate.net/publication/318745118>.

100 On the upside, crises arguably bring people closer together: see Beck (n 69) on the basis of a global risk society (e.g. there is now an EU-wide understanding of the Greek economy). While this argument may be generally valid, it does not necessarily lead to people sharing *money*.

101 Text accompanying n 70ff.

102 US 489, 504ff (1999). See n 20ff above.

only 'within the scope of EU law'. Although this can be a very low threshold at times,[103] it remains an important signpost that can be put into practice where needed. This also means that Member States may ultimately deport illegal migrants from other Member States – a possibility that appears more than merely theoretical following *Dano*, which strictly subjects free movement to narrowly interpreted secondary law.

5.2 The need for institutional actors to facilitate and promote EU solidarity

This is where actors other than the citizens themselves are called for. Solidarity can be incentivised as a matter of governance, namely either by the Member States or the EU itself. My argument is that solidarity should be especially incentivised by the EU. The role of the Member States is limited given that they use 'benefit tourism' as a narrative to depict themselves as victims: the very purpose is finding the stopping point for a state's financial exposure. But in terms of solidarity on the political level, Member States can – and do – play an important role. By increasingly allowing for dual nationality,[104] Member States can abolish a traditional hurdle that had assumed an individual's indivisible (national) identity. More flexibility here would pave the way for the above-mentioned diversification and sharing of identities that enables tolerance and trust amongst the new EU citizens.

For the same reasons, the EU could play an important part by offering UK citizens an optional 'associate EU citizenship' post-Brexit. Although the proposed amendment to the treaties[105] appears to be withdrawn,[106] the idea itself should remain under consideration.[107] It would demonstrate a concern of the EU for its citizens, which could greatly enhance the public perception of the EU as more than one central administration based in Brussels.[108] Moreover, it would create an EU citizen 'by choice'. One critical factor will be the costs for this ('membership fee'),[109] which carries the risk that only those who are well off could afford it. This concern could be tackled by drawing the financing into a wider EU-level action plan (see below).

Alternatively, solutions could be developed by case law, starting with *vested rights* of British expats in the EU. The pathway to such a solution may have been opened since the

103 See A G Bobek in Case C-298/16 *Ipsas* ECLI:EU:C:2017:650 paras 32–65. More recently, Case C-64/16 *Associação Sindical dos Juízes Portugueses* suggests an even lower threshold, at least insofar as judicial protection is concerned. For a critique of *Dano* from a fundamental rights perspective see K von Papp, 'A Federal Question Doctrine for EU Fundamental Rights Law: Making Sense of Articles 51 and 53 of the Charter of Fundamental Rights' (2018) 43 European Law Review (forthcoming).

104 See the Dutch and German examples at nn 92–3.

105 Arguably there is no need for treaty revision, see Volker Roeben, Jukka Snell, Petra Minnerop, Pedro Telles and Keith Bush, 'The Feasibility of Associate EU Citizenship for UK Citizens Post-Brexit: A Study for Jill Evans MEP' (Swansea University 2017) 34ff <www.open-access.bcu.ac.uk/5590>.

106 See 'My Plan for Associate EU Citizenship' by MEP Charles Goerens (*PanEuropean*, 30 April 2017) <https://thepaneuropean.eu/2017/04/30/my-plan-for-associate-eu-citizenship-mep-charles-goerens>.

107 See European Parliament resolution of 5 April 2017 on negotiations with the UK following its notification that it intends to withdraw from the EU (2017/2593(RSP)) para 27 ('mitigating' the loss of EU citizenship for UK citizens).

108 See Lindseth (n 29), noting the risk of a 'persistent disconnect' between EU citizens and 'Brussels bureaucracy'.

109 'Can Britons Keep their EU Citizenship after Brexit?' *The Economist* (London, 12 April 2017) <www.economist.com/news/britain>.

issue of the exact consequences of Brexit for EU citizenship of UK citizens in the Netherlands has been considered by the Dutch courts.[110] The EU law protection of *dual* nationals is already quite robust, as can be seen from the case of Ms Ormazabal, a Spanish national who after her studies in the UK remained as a worker in the UK, acquired British nationality in addition to her Spanish nationality, and could still successfully rely on EU (primary) law regarding derivative rights for her Algerian husband:

> [i]t would be contrary to the underlying logic of gradual integration that informs Article 21(1) TFEU to hold that such citizens, who have acquired rights under that provision as a result of having exercised their freedom of movement, must forego those rights – in particular the right to family life in the host Member State – because they have sought, by becoming naturalised in that Member State, to become more deeply integrated in the society of that State.[111]

5.3 The case for more social engagement at the EU level

At the societal level and as a matter of EU policy, it would be important to enable free movement of all – the rich and the poor. This is because the EU is based upon free movement and anti-discrimination. If this causes a perceived risk for a decline in social standards and hence a reaction by policymakers (see section 1), this 'ghost' can only be tackled by increased social engagement at the EU level.[112] Acknowledging that EU competences in the area of social policy are limited,[113] there is still an economic argument that as long as states fear (negative) spill-over effects of national regulation, this constitutes a collective action problem that can only be solved at a central level.[114] In EU terminology, this would suggest a need for minimum harmonisation.

From a political philosophy perspective, a similar argument could rest on the need to create more democratic structures at the supranational level in order to constrain a pure market rationale by political considerations of non-economic interests. Habermas' conclusion regarding the implications of the financial crisis can be generalised for the place of social policies in an economically highly integrated system: 'welfare state and democracy together form an inner nexus that in a [currency] union can no longer be secured by the individual nation state alone'.[115] As indicated above,[116] formal improvements to EU democracy are a necessary but not sufficient condition for achieving

110 Lisa O'Carroll, 'British Group Wins Right to Take Brexit Case to European Court', *The Guardian* (7 February 2018) <www.theguardian.com/politics/2018/feb/07/british-group-wins-right-to-take-brexit-case-to-european-court>. The Amsterdam Court of Appeal decided that the case cannot (yet) be referred to the CJEU, given the ongoing Brexit negotiations: 'Appeal Judges Reject British EU Citizenship Claim, Won't Refer to EU Court' (*DutchNews*, 19 June 2018) <www.dutchnews.nl/news/2018/06/appeal-judges-reject-british-eu-citizenship-claim-wont-refer-to-eu-court>. But the court acknowledged that the case raised questions of EU law: decision of 19 June 2018. See <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2018:2009&showbutton=true>.

111 Case C-165/16 *Toufik-Lounes* ECLI:EU:C:2017:862 para 58.

112 Regarding increased calls for more EU intervention in the social policy field following the Eurocrisis and the effects of austerity, see e.g. Ben Crum, 'A Multi-layered Social Europe? Three Emerging Transnational Social Duties in the EU' in Crespy and Menz (n 34), referencing Maduro's proposal of an EU employment agency, training and mobility programmes. However, the idea of more EU social responsibility is older than this, see e.g. the proposal of an EU minimum welfare scheme by Bertola et al (n 7) 86 with further references.

113 Geert De Baere and Kathleen Gutman, 'The Basis in EU Constitutional Law for Further Social Integration' in Vandenbroucke et al (n 3) 344.

114 Robert D Cooter and Neil S Siegel, 'Collective Action Federalism: A General Theory of Article I, Section 8' (2010) 63 Stanford Law Review 115.

115 See n 71 above.

116 Text accompanying nn 69–71.

more fairness in the EU: it is also essential that the EU takes on some financial responsibility for realising social rights. This could be done by redirecting *existing* EU finances such as the Structural and Cohesion Funds, which could focus on disadvantaged *EU citizens* instead of *EU regions*.[117] Alternatively, one could consider setting up *new* EU funds, either tax-based,[118] or financed from membership fees for 'associate EU citizenship' (while ensuring that there is a waiver system in place for people who cannot afford this fee). This proposal ties partially with the more general call for an EU tax based on citizenship that Stiglitz made in the wake of the Euro crisis.[119] It does not necessarily call for fully Europeanised social redistribution. Instead, special funds could be allocated to the Member States whose public resources are 'unreasonably burdened'[120] to ensure an EU-defined minimum social standard.

In the longer run, one could consider combining some basic financing with flexible forms of EU regulation, for example by taking guidance from the US Medicaid programme: this has become the most important block of the controversial Affordable Care Act,[121] but – unlike social security – is *not* fully federalised. Instead, it relies on cooperation with states by offering federal grants for financing state health insurance plans that broadly match federal definitions.[122] Calling for EU social engagement does not yet have to side with either a 'unionist' perspective, favouring Europeanisation of social standards including redistribution by EU policies,[123] or the traditional decentralised model, seeing social redistribution as a quintessential power of states. While the latter would appear more realistic in the short term,[124] working towards the former should be a mid- to longer-term task. The EU needs to provide the necessary policy objectives and resources to accommodate the losers of free trade and open borders.[125]

Finally, one could also define as a matter of EU (case) law what minimum social standard an EU citizen is entitled to (in abstract terms such as basic claims to food, shelter, clothes, health coverage etc.). The amount necessary to finance this basic standard could vary from one Member State to another (depending on effective purchasing power). This would ideally be combined with the suggested EU financial assistance described in

117 The implementation could either be left to the Member States, or regulated EU-wide, e.g. by way of EU 'basic income'. As to the latter (on a global scale) see Philippe Van Parijs and Yannick Vanderborght, 'Basic Income in a Globalized Economy' in Reza Hasmath (ed), *Inclusive Growth, Development and Welfare Policy: A Critical Assessment* (Routledge 2015) 229. For the EU see C Bruzelius, C Reinprecht and M Seeleib-Kaiser, 'Stratified Social Rights Limiting EU Citizenship' (2017) Journal of Common Market Studies <https://onlinelibrary.wiley.com/doi/abs/10.1111/jcms.12555>.

118 Beck proposed a European financial transaction tax to support a new 'Social Contract' between debtor and creditor EU countries (n 69) 85.

119 Joseph E Stiglitz, *The Euro and its Threat to the Future of Europe* (Penguin Random House 2016) 261.

120 See n 12.

121 Edward Berkowitz, 'Getting to the Affordable Care Act' (2017) 29 Journal of Policy History 519. One important goal of the Trump administration was to limit Medicaid, see most recently the Presidential Order requesting policy changes to put recipients into work: Glenn Thrush, 'Trump Signs Order to Require Recipients of Federal Aid Programs to Work', *New York Times* (New York, 10 April 2018) <www.nytimes.com/2018/04/10/us/trump-work-requirements-assistance-programs.html>.

122 Brietta R Clarke, 'Medicaid Access and State Flexibility: Negotiating Federalism' (Legal Studies Paper 2017–41, Loyola University 2018) <https://ssrn.com/abstract=3056532>.

123 See Helder De Schutter, 'The Solidarity Argument for the European Union' in Vandenbroucke et al (n 3) 68, 74ff.

124 Maurizio Ferrera, 'The European Social Union: A Missing but Necessary Political Good' in Vandenbroucke et al (n 3) 47, 63ff.

125 See generally Joseph E Stiglitz, *Globalization and its Discontents* (Norton 2002). Similarly with regard to the EU, see Dagmar Schiek, 'Towards More Resilience for a Social EU: The Constitutionally Conditioned Internal Market' (2017) 13 European Constitutional Law Review 611.

the preceding paragraph. I would base this least intrusive proposal, variations of which can be found in the literature since the late 1990s and early 2000s,[126] on an analogy to the Californian legislation at stake in *Saenz v Roe*.[127] Member States would remain free (e.g. in an explicit derogation from the otherwise applicable equal treatment principle) to provide a higher standard above this EU minimum to their own nationals and to permanent residents. This would give some comfort to the richer Member States and, at the same time, secure free movement and equal rights to basic necessities for all. Achieving this has become more important post-Brexit than before.

126 Bertola et al (n 7) 76ff, 86ff with further references.

127 See n 20.

NILQ 69(3): 291–310

The UK out, Social Europe in? Rethinking EU social integration in the wake of Brexit

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Abstract

This article considers the impact of Brexit on the future of Social Europe. Through recourse to key moments in the history of European social integration, where Britain more often than not vehemently opposed any coming together, its role as an important veto player in EU social policy-making is established. With the UK set to leave the Union, the option for further social integration is no longer inconceivable. It is featured as one of the possible scenarios in the Reflection Paper on the Social Dimension of Europe, and recent developments, such as the European Pillar of Social Rights, together with its accompanying initiatives, appear to lay the groundwork towards that. The article concludes that, although the realisation of Social Europe is more likely post-Brexit, there are other Member States willing to take over the UK's role and act as veto players on their own terms.

Keywords: Brexit; European Union; social integration; Social Europe; veto player

1 Introduction

The UK has not traditionally been an ally of Social Europe. Any support ensued after giving up fierce resistance, either subsequent to change in domestic party politics or, as a price to pay for gaining advantage from other measures that came as part of an overall package. Those measures were almost always linked to a liberal, economic and free-market-oriented paradigm, which the UK framed as the essence of its EU membership. Mainly, the UK faced the social dimension of EU integration with disgruntlement and wariness, increasingly so during the period preceding the Brexit referendum. This is said to have contributed, possibly significantly, to the pro-Leave majority. Now that the UK is set to leave the EU, will the latter's social dimension finally draw level with its economic one?

Social Europe had been in a stalemate until recently, despite the Lisbon Treaty's proclamation of the social market economy as a key paradigm for the Union. At the same time, the aftermath of the global economic and financial crisis is still lingering. The resulting anti-austerity narrative, calling for a reorientation of the EU's agenda, might, together with the UK's departure, act as a key catalyst, as epitomised by Jean-Claude Juncker's pledge for a more Social Europe following his 2014 election as European

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Commission President. The unveiling of the European Pillar of Social Rights, accompanied by social policy consultations and proposals, demonstrates accelerated momentum, indicating that the departure of a persistent objector may enable the Union to finally move forward.

The article's key aim is to test the hypothesis that Brexit would strengthen the social dimension of EU integration. To do so, it employs an analytical framework rooted in the political science theory of veto player, coined by Tsebelis in 1995.[1] By looking at the structure and evolution of EU social policy-making, and through recourse to key moments where progress towards further social integration was stalled due to the UK's opposition, the paper establishes Britain's role as a veto player on the basis of three grounds: (1) ideology, (2) party politics and Euroscepticism (3) and external interference. It then proceeds to present the policy change that a veto player's departure would prompt in relation to current policy development indicated by the Reflection Paper on the Social Dimension of Europe (specifying an aspect of the White Paper on the Future of Europe) and the European Pillar of Social Rights, alongside accompanying initiatives. Their viability is ascertained in light of the UK's departure, with reference to European Scrutiny Committee reports and other pertinent UK government documents in order to substantiate observations on the British position towards these initiatives. The latter will allow an assessment of whether Brexit will have the assumed emancipatory outcome for Social Europe. Following that, the key constraints to the aforementioned position are analysed based on other Member States' attitudes toward the social dimension of EU integration, to show that, whilst the British departure might give social integration a push, there will be other obstacles that can impede the realisation of a truly social Social Europe.

2 The UK as a veto player

2.1 The veto player theory as an analytical framework

The veto player theory made its initial appearance in two pivotal comparative politics studies of the early 1990s, which used terms such as 'veto points' or 'constitutional structure'.[2] Interestingly enough, both studies were focused on social policies developed in national settings. They investigated the influence of the power dynamics between different institutional and political actors on the decision-making processes and resulting policy outcomes. As Immergut argued: 'welfare state programs . . . are not simply the product of long-term social and political trends; such programs have been introduced in steps, through discrete instances of legislative conflict'.[3] It is not only the underpinning ideologies in a country's society and governing political elite that leave their mark on social policy development, but also the end product of the law-making processes in which compromises are sought between actors with various competing interests.

While these discussions were significant in providing a new perspective on the policy-making discourse, Tsebelis's seminal work conceived the notion of 'veto player' and introduced it into the dictionary of political science. According to him, 'a veto player is

1 George Tsebelis, 'Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism' (1995) 25(3) British Journal of Political Science 289.

2 Ellen Immergut, *The Political Construction of Interests: National Health Insurance Politics in Switzerland, France and Sweden, 1930–1970* (Cambridge University Press 1992); Evelyn Huber, Charles Ragin and John Stephens, 'Social Democracy, Christian Democracy, Constitutional Structure, and the Welfare State' (1993) 99(3) American Journal of Sociology 711.

3 Immergut (n 2) 32.

an individual or collective actor whose agreement is required for policy decisions'.[4] The flexibility and adaptability of the concept to different systems and settings, including supranational institutions,[5] led to a plethora of applications in an array of diverse ways and scenarios.[6] This article engages with the axiomatic use of the veto player theory,[7] drawing on its pre-existing application to EU-level policy-making[8] and makes reference to the key moments of UK opposition towards furthering Social Europe, in order to test the hypothesis that Brexit will favour a stronger EU social dimension.

2.2 Veto players at EU level

Veto player theory, though initially conceived through comparative studies of national policy-making was soon used to analyse dynamics of EU policy-making by Tsebelis himself. He concluded that, up to the introduction of the Single European Act in 1987, each Member State was an autonomous veto player; this still applies in areas that require unanimity for EU legislation and as regards Treaty revisions, which require ratification by all Member States (Article 48 Treaty on European Union (TEU)).[9] Post-1987, with the gradual introduction of qualified majority voting (QMV) in the Council of the EU and the expansion of co-legislation of Council and Parliament in today's ordinary legislative procedure, many EU decision-making processes are now imbued by the presence of collective veto players, found in the amalgamations of the key institutions.[10]

While as autonomous veto players Member States can independently block reforms, as collective veto players they need to forge coalitions with other Member States to advance or veto policy proposals[11] through avoiding or achieving blocking minorities, as well as influencing voting in the Parliament. EU policy-making thus requires finding allies among countries and politicians sharing the same vested interests, underpinning ideologies and/or policy preferences. In many areas, including social policy, unanimity remained important post-1987 for EU legislation, and it is still required for extending the social dimension through Treaty reform.[12] The individual role of a Member State as veto player thus retains its relevance for the social dimension of EU integration.

2.3 The UK as a veto player in EU social policy-making

This section showcases the numerous instances where EU social integration was rejected by the UK government. Since 1973, when the UK became an EU Member State, Labour and Conservative governments have succeeded each other in power, and a Conservative–Liberal Democrat coalition government was in charge between 2010 and 2015. Inevitably,

4 Tsebelis (n 1) 293.

5 Mark Hallerberg, 'Empirical Applications of Veto Player Analysis and Institutional Effectiveness' in Thomas König, George Tsebelis and Marc Debus (eds), *Reform Processes and Policy Change: Veto Players and Decision-Making in Modern Democracies* (Springer 2011) 24-5.

6 Steffen Ganghof, 'The Empirical Uses of Theoretical Models: The Case of Veto Player Theory' (2015) 15(1) Political Studies Review 49.

7 Ibid.

8 Hallerberg (n 5) 36.

9 George Tsebelis, 'Lessons from the Greek Crisis' (2016) 23(1) Journal of European Public Policy 25, 39.

10 George Tsebelis, *Veto Players: How Political Institutions Work* (Princeton University Press 2002).

11 Herman Lelieveldt and Sebastiaan Princen, *The Politics of the European Union* (Cambridge University Press 2011).

12 The Single European Act introduced QMV in the area of health and safety of workers, but not in others. Niklas Bruun and Bob Hepple, 'Economic Policy and Labour Law', in Bob Hepple and Bruno Veneziani (eds), *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries 1945–2004* (Hart 2009) 48.

this means that different governments, at different points in time, rejected some of the reforms for different reasons. This section groups the British grounds of veto into three categories: (1) rejections due to the ideological underpinnings of the ruling party; (2) rejections due to internal party politics and the diffusion of embedded Euroscepticism; and (3) rejections due to concerns about external interference. Whilst there is unavoidably some overlap between the reasons behind the vetoing of social reforms at EU level, and all three groupings are in a way manifestations of scepticism over Social Europe, the categories were coined on the basis of the key reason underlying each rejection.

2.3.1 Ideological rejections

This section is almost exclusively dedicated to vetoes by the Conservative Party, fuelled by a liberal ideology and a strict commitment to shielding the British liberal social model from any pro-welfare initiative.[13] Whilst Labour also rejected aspects of EU integration, for example in campaigning for the 1975 referendum, their ideological orientation called for the outright rejection of EU integration based on its economic roots, supported by an anti-market sentiment on behalf of most trade unions, which did not translate to ideological opposition to EU social reforms.[14] The Conservative Party's ideology did not conflict with the initially predominantly economic nature of the European project: the Treaty of Rome left social matters to the Member States, despite the momentum building during the Paris negotiations in the 1950s, in an arrangement modelled after the 'embedded liberalism' paradigm.[15] This allowed the Heath government to negotiate the British accession to the block in 1972.

A resurgence of Social Europe in the 1970s did not face British opposition, whose Labour government was able to nominate the Commission's Director-General for Social Affairs, Michael Shanks.[16] The 1980s proved more tempestuous: the Thatcher government, elected in 1979, adhered to a liberal agenda and vetoed any legislative proposals, e.g. directives covering the rights of fixed-term and part-time workers, or parental leave.[17] The Thatcher government embraced the Single Market project, perceiving it as supportive of the market liberalisation it aspired to for the UK. It opposed any social initiative that could undermine competitiveness and the welfare state retrenchment that was underway in Britain.[18] It was also thought that having to comply

13 According to leading typologies on the varieties of capitalism and the worlds of welfare capitalism, the UK had the majority of the characteristics pertaining to a liberal market economy, or a liberal welfare state respectively: Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press 1990); Peter Hall and David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press 2001). Nonetheless, it has been argued that during periods of Labour-led governments such characteristics were weakened to make room for collectivist elements, which were once again attacked during the more recent Coalition government: Damian Grimshaw and Jill Rubery, 'The End of the UK's Liberal Collectivist Social Model? The Implications of the Coalition Government's Policy during the Austerity Crisis' (2012) 36(1) Cambridge Journal of Economics 105.

14 David Butler and Uwe Kitzinger, *The 1975 Referendum* (Palgrave Macmillan 1996) 107.

15 Dagmar Schiek, 'Towards More Resilience for a Social EU: The Constitutionally Conditioned Internal Market' (2017) 13(4) European Constitutional Law Review 611, 615–17.

16 Michael Shanks, 'The Social Policy of the European Communities' (1977) 14(4) Common Market Law Review, 375.

17 Jeff Bridgford and John Stirling, 'Britain in a Social Europe: Industrial Relations and 1992' (1991) 22(4) Industrial Relations Journal 263.

18 Robert Geyer, Andrew Mackintosh and Kai Lehmann, *Integrating UK and European Social Policy: The Complexity of Europeanisation* (CRC Press 2005).

with EU social legislation would increase bureaucratisation and impose additional regulatory burdens on employers' business plans.[19]

Under such circumstances the introduction of QMV by the Single European Act 1987 had limited impact on European social policy in the years immediately following its adoption: QMV was extended in the social field only to the area of health and safety of workers,[20] leaving unanimity as the rule in the rest of the social arena. This was a concession to the British position.[21] Moreover, in the mid-1980s, various stakeholders prompted a reorientation of the Community's priorities, by criticising the solely economic nature of the 1985 internal market programme, which – perhaps unsurprisingly – had been drafted under the direction of Lord Cockfield, a Conservative Commissioner from the UK.

The criticisms resulted in the subsequent adoption of various working papers pushing for a stronger social dimension at EU level, with proposals in the areas of health and safety of workers, employee participation, and benefits for those who exercise their free movement rights.[22] The proposals came to a crescendo with the adoption of the Community Charter of the Fundamental Social Rights of Workers, in December 1989, which, nonetheless, was fiercely opposed by the UK, contributing to the final document's non-binding nature and, thus, weak influence over the establishment of concrete and justiciable labour rights.[23]

At the end of the 1990s, the next obstacle to Social Europe by the UK was observed in the talks for the Charter of Fundamental Rights, during which Britain opposed a comprehensive inclusion of social rights.[24] Interestingly enough, this was instigated by a Labour government, which initially displayed a constructive approach to EU policy-making with the endorsement of the Social Chapter in 1997.[25] Of course, this was not just any Labour government, but the one crafting the paradigm-change to New Labour, abandoning a quasi-socialistic ideology in favour of market economics. Thus, the social policy choices at EU level made initially by Labour faded away over time, coinciding with the erosion of the party's social-democratic heritage under the Third Way paradigm,

19 In relation to the nexus between decrease in working standards in the UK during the Thatcher era and its opposition to protective measures: Alasdair Blair, John Leopold and Luchien Karsten, 'An Awkward Partner? Britain's Implementation of the Working Time Directive' (2001) 10(1) Time and Society 63, 65. Further discussion on the deregulation of employment laws during the 1980s: Simon Deakin 'Equality under a Market Order: The Employment Act 1989' (1990) 19 Industrial Law Journal 1. Although the election of the conservative Kohl government, with its liberal tendencies, in Germany in 1982 also contributed to the stalemate, its position was arguably more accommodating compared to its British peers: Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press 1998).

20 The resurgence in the area of health and safety of workers only happened in the late 1980s–early 1990s, and this was among the very few aspects of the envisaged European social area where legislative initiatives actually materialised. For more see: Bob Hepple, 'The Crisis in EEC Labour Law' 16(1) Industrial Law Journal 77; Karen Anderson, *Social Policy in the European Union* (Palgrave 2005).

21 Linda Hantrais, 'Assessing the Past and Future Development of EU and UK Social Policy' (2018) 17(2) Social Policy and Society 265, 270.

22 H G Mosley, 'The Social Dimension of European Integration' (1990) 129(2) International Labour Review 147, 154–7.

23 S J Silvia, 'The Social Charter of the European Community: A Defeat for European Labor' (1991) 44(4) Industrial and Labor Relations Review 626.

24 Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 European Constitutional Law Review 375.

25 Simon Bulmer, 'New Labour, New European Policy? Blair, Brown and Utilitarian Supranationalism' (2008) 61(4) Parliamentary Affairs 597.

normatively bridging social and market policies, but in practice veering to the anti-welfare, neoliberal discourse of the right.[26]

2.3.2 Internal party politics and Eurosceptic rejections

This persistent hostility by the British authorities to the strengthening of Social Europe cannot be attributed solely to the Conservative government of that time, but also to the Euroscepticism towards the reach of EU law that prevailed even among Labour politicians and trade unionists, preventing any support for a change of approach.[27] The Conservative Major government of 1990 softened the UK's stance towards the EU, yet retained the former position towards Social Europe. Rifts in the Conservative Party around the Thatcher legacy affected the acceptance of enhanced social policy provisions at EU level in particular. As a result, Prime Minister John Major had no choice but to reject the Social Chapter proposed for the Treaty of Maastricht as a substantive policy change.[28]

The British opt-out of the Social Chapter led to its displacement as an Agreement on Social Policy, annexed to the Treaty as a Protocol.[29] This instance represents a good example of the 'exploitation' by the UK side of the unanimity required for Treaty reform, and therefore of its power as a veto player therein post-1987. Only in 1997, when Tony Blair's New Labour government came to power in the UK, was the opt-out reversed and the Social Chapter finally included in the Treaty of Amsterdam. This enabled the EU to better involve social partners and more comprehensively tackle policy fields such as working conditions and labour market activation. UK opposition in another area requiring unanimity, that of equality under the then Article 141 EC, led to redirecting the planned Pregnant Workers Directive towards the competence base of health and safety of workers, which provided for QMV, but required the withdrawal of the aspects not related to health and safety.[30]

The emergence of Euroscepticism as the new trend within the Conservative Party was fuelled by David Cameron's utilitarian view of the EU as something desirable as long as its benefits outweigh its costs. Cameron displayed enmity and discontent with the widened scope of integration, and in particular the extended influence on the sphere of social policy.[31] Welfare benefits for EU citizens who exercised their free movement rights were particularly targeted. That resurgence of the anti-welfare Eurosceptic rhetoric, brought the UK back as an active veto player. This time it was not content to only veto, but strove to abandon existing – and already agreed – levels of integration.

With the pledge for an EU referendum to please the anti-EU side of the Conservative Party and his subsequent win in the general election making it happen, Cameron further pushed Europe to water down the reach of welfare benefits for EU migrants in the text of the so-called 'EU Reform Deal'.[32] The looming referendum arguably motivated the

26 Paul Smith, 'New Labour and the Commonsense of Neoliberalism: Trade Unionism, Collective Bargaining and Workers' Rights' (2009) 40(4) Industrial Relations Journal 337.

27 Bob Hepple, 'The Implementation of the Community Charter of Fundamental Social Rights' (1990) 53(5) Modern Law Review 643.

28 Anthony Forster, *Britain and the Maastricht Negotiations* (Palgrave 1999).

29 David Baker and Pauline Schnapper, *Britain and the Crisis of the European Union* (Palgrave 2015).

30 Roberta Guerrina and Annick Masselot, 'Walking into the Footprint of EU Law: Unpacking the Gendered Consequences of Brexit' (2018) 17(2) Social Policy and Society 319, 323.

31 Nathaniel Copsey and Tim Haughton, 'Farewell Britannia? "Issue Capture" and the Politics of David Cameron's 2013 EU Referendum Pledge' (2014) 52(1) Journal of Common Market Studies 74.

32 Anita Heindlmaier and Michael Blauberger, 'Enter at Your Own Risk: Free Movement of Citizens in Practice' (2017) 40(6) West European Politics 1198.

Court of Justice of the EU (CJEU) in *Commission v United Kingdom* to backtrack its jurisprudence – and consequently the social acquis on social security benefits – in order to accommodate the UK's pre-referendum demands.[33] But the result of the referendum favoured the exit from the EU project over any concessions on certain, partly social policy-related aspects of that.

This rejection of the acquis communautaire was also shared by circles within Labour and the Liberal Democrats. After all, their overarching stance throughout the last decade was that of a wary, half-hearted embracement of the European project, pegged on to the UK's prevailing national interests, something that outside the peculiar domestic context of Britain could even amount to soft Euroscepticism when compared to the political discourse of their West-European peers.[34]

2.3.3 External interference rejections

Arguably, most rejections to social integration at EU level could be grouped under the aegis of the first two categories, given the perseverance of their underlying reasons. Nonetheless, a moment in the not-so-distant past merits its own categorisation under the banner of rejections of external interference. As a continuation of its neoliberal turn described above, New Labour, to appease concerns that were expressed in relation to an increase in the external influence of the EU on the UK legal order, vouched to secure an opt-out from the Charter of Fundamental Rights, in light of its binding force with the adoption of the Lisbon Treaty.[35]

With much fanfare the UK government announced that it had managed to secure an opt-out in Protocol 30 annexed thereto, which was still linked to demurs over the justiciability of the rights enshrined in the Charter's Solidarity Chapter, and the fear of creeping EU interference.[36] Yet, what was presented as an opt-out was an opt-out in name only. The Select Committee commented that it represented more of a clarification on the horizontal scope of the Charter and a reaffirmation of the fact that it does not extend the EU's competences to the UK, than a declaration that the UK is not bound by its provisions.[37]

In any case the fact remains that while for a left-wing party such as Labour it was almost preordained to adopt and follow more easily a pro-social agenda, even when 'imposed' by the EU, the fact that it was this supranational body that instigated the policy change had the ability to shift the focus of national debates from the traditional notions of left and right to other antithetic pairs such as centre–periphery, national–supranational, us–them.[38] External interference was somewhat vilified in these debates, and, in order to remain in power, New Labour had to find a way to tame the emerging national concerns.

33 Case C-308/14 *Commission v United Kingdom* [2016] ECLI:EU:C:2016:436. Further discussion in: Charlotte O'Brien, 'The ECJ Sacrifices EU Citizenship in Vain: Commission v United Kingdom' (2017) 54(1) Common Market Law Review 209.

34 Isabelle Hertner and Daniel Keith, 'Europhiles or Eurosceptics? Comparing the European Policies of the Labour Party and the Liberal Democrats' (2017) 12(1) British Politics 63.

35 Catherine Barnard, 'The "Opt-Out" for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?' in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer 2008).

36 Steve Peers, 'The "Opt-out" that Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights' (2012) 12(2) Human Rights Law Review 375.

37 Barnard (n 35).

38 Katerina Linos, 'How Can International Organizations Shape National Welfare States? Evidence from Compliance with European Union Directives' (2007) 40(5) Comparative Political Studies 547, 564.

3 Brexit's potential for Social Europe

Through the milestones presented in the previous section, the UK could be perceived as a vocal veto player, impeding progress in the realisation of Social Europe, its rejections centred around three cores. To put the potential significance of Brexit in context, it is useful to note Tsebelis's observation that 'if a veto player with significant differences enters or leaves . . . important policy changes will follow'.[39] This implies that Brexit may signal a watershed moment for Social Europe. The matrix of collective veto players, prominent at EU level, is likely to be shaken upon the UK's departure, thus altering the output of the Union's institutions to reflect a more pro-welfare line, once the most prominent veto player is no longer part of the block.[40] It has become clear from the preceding analysis, that the UK in the European social arena possessed most of the characteristics of a significantly divergent Member State in this respect. Britain's inability to influence the debate on Europe's future post-Brexit might act as a liberating event for the EU.

Nevertheless, adopting a more social stance may not be the only option forward for the EU, as demonstrated by the Commission's White Paper on the Future of Europe of 1 March 2017[41] with its five different scenarios: maintaining the status quo; focusing solely on the Single Market; shaping coalitions within a multi-speed Europe; enhancing progress in certain areas whilst leaving others behind; and, lastly, integrating further.[42] The White Paper's core function was to test the waters by expressing in very general terms potential directions for the EU, in the light of its 60th anniversary and the impending trigger of Article 50 TEU by the UK. While social considerations were briefly mentioned, the White Paper's inherently broad nature meant that all specifications were left to five more focused reflection papers,[43] among them the Reflection Paper on the Social Dimension of Europe of 26 April 2017,[44] showcasing the importance the EU institutions placed on the Union's social aspirations. This should come as no surprise after Juncker's 2014 speech which introduced the new position of Vice-President for the euro and social dialogue, and pledged for a social triple-A rating for Europe, of equal importance to the economic and financial one.[45] Nowadays, the social is clearly featured as one of the Commission's – and consequently the Union's – key priorities. While the Reflection Paper makes no reference to Brexit, the fourth chapter's heading 'A Possible Way Forward for the EU 27' indicates that the UK's withdrawal was considered in its drafting.

The Reflection Paper aims to 'galvanise Europe's social spirit',[46] by seeking to map out the possible avenues for this to be translated into EU actions. It kicks off by presenting the different views on the current state of Social Europe, followed by its ongoing and future challenges. These pave the way for the diverse resolutions that are presented as alternatives therein. Due to the nature of the Reflection Paper as a follow-up to the White

39 Tsebelis (n 1) 314.

40 George Tsebelis, 'Veto Players and Institutional Analysis' (2000) 13(4) Governance 441.

41 European Commission, 'White Paper on the Future of Europe' COM (2017) 2025.

42 Ibid 15–25.

43 The other four being the Reflection Paper on Harnessing Globalisation, the Reflection Paper on the Deepening of the Economic and Monetary Union, the Reflection Paper on the Future of European Defence, and the Reflection Paper on the Future of EU Finances.

44 European Commission, Reflection Paper on the Social Dimension of Europe COM (2017) 206.

45 Jean-Claude Juncker, 'Time for Action – Statement in the European Parliament Plenary Session ahead of the Vote on the College' (Strasbourg, European Parliament plenary session) < http://europa.eu/rapid/press-release_SPEECH-14-1525_en.htm>.

46 European Commission (n 44) 3.

Paper on the Future of Europe, it incorporates a table addressing the consequences of the White Paper's five scenarios for Social Europe.[47] Notwithstanding that, moving forward, it groups the possible outcomes for the social dimension of Europe into three categories: a limited Social Europe as a side-note of free movement; a multi-speed Social Europe; or a further integrated Social Europe among the EU 27.[48]

The first option presented is that of scaling back and stripping down the social acquis to only those aspects that are vital to free movement. In this vision, the social dimension is anything but, becoming instead a facilitator of free movement of persons. Such a functionalist approach departs from the EU citizens qua citizens approach and the enhanced levels of social integration that – should – come with it, drifting back into the EU citizens qua economic actors dogma.[49] In the latter, there is only space for rules on the transferability of social security contributions and health care coverage, or the simplification of the posting of workers.[50] Any substantive social development, such as the right to paid annual leave, the framework on employee consultation, the regulation of health and safety in the workplace, the minimum standards for temporary agency and part-time work and the Open Method of Coordination (OMC) in the area, could all be easily sacrificed on the altar of free movement and deregulatory gains.[51]

Ultimately, the aim of this scenario is to tackle concerns over the bureaucratisation of the internal market, the single most important thing the EU has to offer according to some, a position long shared by the UK.[52] This position, if proclaimed, would also vindicate the more deterministic views on Social Europe, which see the latter as almost always subordinate to the European economic constitution, rendering the national level the sole playing field for any deeper social dimension to take place.[53] The position, apart from appeasing the UK demands, should the country wish to remain a Member State, is problematic for two reasons. First, the market-first thesis, also articulated by the CJEU in the *Laval Quartet* case,[54] is gradually giving way to more balanced worldviews in the aftermath of the global economic and financial crisis.[55] Second, the laws and measures threatened with extinction under this scenario have been less problematic in practice, compared to those that are to be retained; the saga surrounding the regulation of posted workers is a good example of that. Thus, the viability of this option is questionable, and becomes even more so in light of Brexit: if the UK, which even contemplates rescinding limitations on working time,[56] leaves the EU, it is difficult to imagine that the remaining

47 Ibid 23.

48 Ibid 24–31.

49 Eleanor Spaventa, *Free Movement of Persons in the European Union: Barriers to Movement in their Constitutional Context* (Kluwer 2007).

50 European Commission (n 44) 26.

51 Ibid.

52 Geoffrey Garrett, 'International Cooperation and Institutional Choice: The European Community's Internal Market' (1992) 46(2) International Organization 533.

53 Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015) 266–8.

54 Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, avd. 1, Svenska Elektrikerförbundet* [2007] ECR I-11767; Case C-346/06 *Rechtsanwalt Dr Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989; and Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

55 Simon Deakin, 'In Search of the Social Market Economy' in Niklas Bruun, Klaus Lörcher and Isabelle Schömann (eds), *The Lisbon Treaty and Social Europe* (Hart 2012).

56 Tony Dobbins, 'Tory Attack on Working Time Directive Signals a Post-Brexit Race to the Bottom' *The Conversation* (20 December 2017).

Member States would retain the impetus for such ambitious deregulation of basic social rights. Even if they did, then there would be no social policy for the remaining Member States and/or institutions in which to act as veto players. The Commission also appears rather dismissive of this scenario, establishing in the Reflection Paper that its negatives outweigh any potential benefits.[57]

The second scenario of the Reflection Paper depicts a situation not much different to the current one. Thus, according to this scenario, minimum standards of protection would remain the norm, with the mechanism of enhanced cooperation open to groups of Member States that wish to do more in the field.[58] It is a tad paradoxical that the possibility for willing Member States to boost their social policies together under enhanced cooperation is presented as something novel by the Reflection Paper. After all, the notion of Europe à la carte has been trending since the 2000s, as a process that allows for different responses by separate groups of like-minded Member States to emerge.[59]

It seems though, and the emphasis placed on that matter in the Reflection Paper makes it clear, that the inclusion of this scenario is laid out as a possible remedy to the social deficit within the Economic and Monetary Union (EMU), which was exacerbated during the years of the crisis.[60] It alludes to the inherently asymmetric structure of the EMU, which shows a Europe veering to a neoliberal, primarily economic model with just an atrophic social side attached to it.[61] These asymmetries, not limited to but particularly connected to the EMU, have led to deterministic accounts highlighting the impasse the EU is faced with when enacting policies to 'socialise' the landscape.[62] Indeed, any efforts to enhance the social dimension of the EMU based on soft integration through Europe 2020 and the European Employment Strategy have not been very successful, calling for more concrete legally binding measures as the way forward.[63] The enhanced cooperation proposed by the Reflection Paper appears to fit these criteria, despite the – similar to the first scenario – danger of a race to the bottom and regulatory divergence between the Eurozone members and the rest of the EU. In terms of potential vetoes by the Member States, then, differentiated integration could lead to a coming together solely of those wishing to advance the social acquis, with veto players arising in concentrated cases of reforms that would de facto affect a group of countries, for example those of the Eurozone.

Nonetheless, the differences between EMU and non-EMU members might not be as great as they first appear to be. Studies have shown that in terms of social expenditure

57 European Commission (n 44) 27.

58 Ibid 28.

59 On the basis of the underpinning ideologies of the political elites in power therein: Maurizio Cotta and Federico Russo, 'Europe à la Carte? European Citizenship and its Dimensions from the Perspective of National Elites' in Heinrich Best, György Lengyel and Luca Verzichelli (eds), *The Europe of Elites: A Study into the Europeanness of Europe's Political and Economic Elites* (Oxford University Press 2012).

60 European Commission (n 44) 28.

61 Amy Verdun, 'An "Asymmetrical" Economic and Monetary Union in the EU: Perceptions of Monetary Authorities and Social Partners' (1996) 20(1) Journal of European Integration 59; Andreas Bieler, *The Struggle for a Social Europe: Trade Unions and EMU in Times of Global Restructuring* (Manchester University Press 2006).

62 Fritz Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy' (2015) 21(3) European Law Review 384.

63 Caroline de la Porte and Elke Heins, 'Game Change in EU Social Policy: Towards More European Integration' in Maria João Rodrigues and Eleni Xiarchogiannopoulou (eds), *The Eurozone Crisis and the Transformation of EU Governance: Internal and External Implications* (Routledge 2015); Caroline de la Porte and Elke Heins, 'A New Era of European Integration? Governance of Labour Market and Social Policy since the Sovereign Debt Crisis' in Caroline de la Porte and Elke Heins (eds), *The Sovereign Debt Crisis, the EU and Welfare State Reform* (Palgrave Macmillan 2016).

the patterns between Eurozone and non-Eurozone Member States during the crisis did not differ significantly, exhibiting a form of peer pressure for retrenchment throughout the Union.[64] Scharpf speculates that only an EU-wide crisis shaking up the current institutional framework could remedy the inherent asymmetries that overshadow social integration;[65] in that regard, Brexit could play the role of such a wake-up call.

Yet, if Brexit is to instigate radical change at EU level, it is not difficult to imagine a path departure from the well-worn regime of the second scenario in relation to Social Europe. This is precisely what the third scenario stands for. Unlike the disintegrationist first, this one imagines a firm commitment to a more social EU, by taking new actions and elevating the efforts to reinforce its social dimension in lieu of merely reaffirming what is already there.[66] Despite calling for the re-evaluation of the admittedly limited competence regime on social policy, together with the extension of the legislative reach for setting minimum standards to harmonisation, the Reflection Paper underlines the fact that the 'centre of gravity for action in the social field should and will always remain with national and local authorities and their social partners'.[67] This vision allows us to draw parallels with scholarly views that see a future for Social Europe in tandem with the retention – to varying degrees – of national welfare states.[68]

It seems that this scenario is the one endorsed by the drafters of the Reflection Paper. Its envisioned impact in practice appears much more multi-fold compared to the first two, and its pros-and-cons list contains only two negatives; that of the difficulty of reaching consensus among the EU 27 and the feeling of detachment some of their citizens might feel due to an increase in centralised EU decision-making.[69] Furthermore, the third scenario explicitly refers to and builds on the Rome Declaration of the EU 27 leaders and of the European Council, the European Parliament and the European Commission.[70] The declaration is among the first since the Brexit referendum from which the UK is absent. According to the Rome Declaration, an enhanced Social Europe is among the key agenda items the EU is going to work towards achieving in the next decade.[71] Moreover, the vision is also supported by the commitment of the Juncker Commission to widen the scope of Europe's social dimension.[72] It signals a policy change that should come as the natural consequence of a veto player's departure, according to the pertinent literature.[73]

4 The proposals for a stronger social dimension of the EU

This section sets out to examine the elements of the proposed policy change. The viability of the third scenario of the Reflection Paper is further boosted by some accompanying actions that EU institutions have taken recently, signalling a 'social renaissance'. They corroborate the commitment to bolster the social dimension of the

64 Olivier Bontout and Terezie Lokajickova, 'Social Protection Budges in the Crisis in the EU' (Social Europe Working Paper 1/2013, European Commission 2013) .

65 Scharpf (n 62).

66 European Commission (n 44) 30.

67 Ibid.

68 For a succinct overview see: Dagmar Schiek, 'The EU's Socio-economic Model(s) and the Crisi(e)s: Any Perspectives?' in Dagmar Schiek (ed), *The EU Economic and Social Model in the Global Crisis: Interdisciplinary Perspectives* (Routledge 2013) 13–14.

69 European Commission (n 44) 31.

70 Council of the EU, 'The Rome Declaration' (Press Release 149/17, 25 March 2017).

71 Ibid.

72 Juncker (n 45).

73 Tsebelis (n 1).

Union. The timing of the unveiling of these actions, which coincides with the Brexit negotiations and with a UK absent from crucial meetings about the EU's future, cannot help but cement the thesis that the country's intended departure – and its prior role as a veto player – is likely to have liberating effects for the EU 27 and Social Europe more specifically. In addition to that, Brexit could be just the tip of the iceberg, the final act not closely related to but still coming after a series of spirited reactions to a neoliberal European agenda, whose adverse effects grew exponentially during the crisis.[74] That agenda was also promulgated by the CJEU, which has now cautiously started to revise its position.[75] Brexit, thence, is what caused the alarm bell for the future of Social Europe to finally ring and led to more concrete actions to be put forward. It is these actions, the recent developments made public en masse around the middle of 2017, that spurred on the euphoria of the proponents of a more pronounced EU social dimension and pinpointed a deeper social integration as the way forward for the future without Britain. Or, at least, that is what this 'social' experiment stands for.

4.1 The European Pillar of Social Rights

The measures that led to the resurgence of attention towards the social dimension of the EU were presented, together with the Reflection Paper, with much fanfare. These included the launch of the consultation processes to address the challenges of access to social protection for people in all forms of employment[76] and to revise the Written Statement Directive (Directive 91/533/EEC),[77] the proposal for a work–life balance directive for parents and carers to repeal Council Directive 2010/18/EU,[78] and the interpretative communication on the implementation of the Working Time Directive.[79] [80] The aforesaid initiatives were all taken under the aegis of the simultaneously launched European Pillar of Social Rights,[81] the highlight of them all, which was proclaimed by the triad of the key EU institutions during the Gothenburg Social Summit for fair jobs and growth in November 2017.[82] It being proclaimed so fast shows an allegiance to galvanise the discourse towards achieving a more comprehensive EU social dimension. This might

74 Deakin (n 55).

75 Konstantinos Alexandris Polomarkakis, 'A Tale of Two Approaches to Social Europe: The CJEU and the Advocate General Drifting Apart in Case C-201/15 AGET Iraklis' (2017) 24(3) Maastricht Journal of European and Comparative Law 424.

76 European Commission, 'Consultation Document of 26.4.2017' C (2017) 2610 final.

77 European Commission, 'Consultation Document of 26.4.2017' C (2017) 2611 final.

78 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Work–Life Balance for Parents and Carers and Repealing Council Directive 2010/18/EU' COM (2017) 253 final.

79 European Commission, 'Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning Certain Aspects of the Organisation of Working Time' C (2017) 2601.

80 It also included the publication of two Staff Working Documents on the implementation of the Active Inclusion and Investing in Children Recommendations. For more, consult: European Commission, 'Commission Staff Working Document on the Implementation of the 2008 Commission Recommendation on the Active Inclusion of People Excluded from the Labour Market' SWD (2017) 257 final; European Commission, 'Commission Staff Working Document Taking Stock of the 2013 Recommendation on "Investing in Children: Breaking the Cycle of Disadvantage"' SWD (2017) 258 final.

81 European Commission, 'Commission Recommendation of 26.4.2017 on the European Pillar of Social Rights' C (2017) 2600 final. The Pillar also came with a Social Scoreboard to monitor progress by the Member States in achieving the Pillar's objectives.

82 Council of the EU, 'European Pillar of Social Rights: Proclamation and Signing' (Press Release 673/17, 17 November 2017).

subsequently lead to the Pillar gaining Treaty-like status by the next Treaty amendment, in a similar way that the Charter of Fundamental Rights of the EU did.[83]

The Pillar, while initially conceived for the Eurozone members, is now addressed to all Member States, as its Preamble 13 states.[84] The latter also includes the bases of its inception, found in: the elusive concept of social market economy embedded in Article 3 TEU; the horizontal social clause of Article 9 of the Treaty on the Functioning of the EU; the social policy chapter of the Treaties together with other closely related provisions such as those on free movement of workers; and the Charter of Fundamental Rights of the EU.[85] Accordingly, and in trying to awaken the dormant social side of the European project, the Pillar contains 20 rights and principles which are grouped in three Chapters: equal opportunities and access to the labour market; fair working conditions; and social protection and inclusion. These rights and principles involve a wide spectrum of social policy areas, such as equality, education, labour market policies, social dialogue, workers' rights, health and safety in the workplace, social inclusion, care, housing, and social security. It is a comprehensive list that aims to call attention to fields of EU policy-making that were left neglected compared to economic integration.

The Pillar's key function is to act as a stimulus to push for further and more concrete actions to enrich the Union's social acquis. That is why the rights and principles included therein are for the most part not new at EU level. Instead, they are catalogued in the Pillar, complemented by it in such a way as to take into account the new social realities, in the hope of raising awareness, but most importantly, their 'actual take-up'.[86] The chosen way to achieve these aims is through a flexible – predominantly soft law – approach, allowing for a melange of methods mainly at the level of the Member States, paying due respect to the principle of subsidiarity.[87] According to the Pillar, the EU takes on a mostly supporting and supervisory role, to lay down the appropriate framework, to make sure that the ground is fertile enough for the relevant initiatives to be adopted, and to monitor any progress using the Social Scoreboard.[88] The EU toolkit, as shown through the proposals accompanying the unveiling of the Pillar, may include both legislative and non-legislative measures.[89]

83 Zane Rasnača, 'Bridging the Gaps or Falling Short? The European Pillar of Social Rights and What It Can Bring to EU-Level Policymaking' (ETUI Working Paper 2017.05, 2017) 38.

84 It seems that most EU documents referring to the Pillar include the expression that it is 'primarily conceived for the euro area but applicable to all EU Member States wishing to be part of it'. This was altered with the proclamation of the Pillar, in that Preamble 13 thereof states that 'the European Pillar of Social Rights is notably conceived for the euro area but it is addressed to all Member States'. There was a change from a voluntary to a more stringent approach. In addition, following a systematic review of the Pillar's preamble and substantive provisions as proclaimed in the Social Summit, it appears that there are no rights or principles applicable exclusively to the euro area Member States, and neither are there limitations as to what can be done by and for the Member States that do not belong to the Eurozone. The voluntary character of the taking-up of the Pillar's provision by the non-Eurozone Member States as accentuated by the pre-proclamation documents, thus, seems superfluous considering the soft law approach embedded in the Pillar. The latter does not distinguish between Member States that are part of the euro area or not; no hard law obligations are imposed towards the euro area Member States by the Pillar whatsoever, something that can also be attributed to its particular legal nature.

85 Preambles 1 to 6 European Pillar of Social Rights.

86 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Establishing a European Pillar of Social Rights' COM (2017) 250 final 7.

87 Ibid 2–4.

88 Ibid 6–7.

89 Ibid 3.

4.2 Accompanying measures

As said *supra*, the Pillar was accompanied by a series of legislative and non-legislative initiatives that aim to reinforce the Union's renewed interest towards its social side. The most tangible and concrete among them was the proposal for a work–life balance Directive aimed at both parents and carers, to repeal the Council Directive on parental leave (2010/18/EU).[90] The proposal was made by the Commission through its power to initiate legislation, omitting negotiations with the social partners, as the employers' side, BusinessEurope and UEAPME more specifically, did not support any new legislative action in the area.[91] Endeavouring to achieve higher levels of work–life balance, gender equality and labour market activation for women, to acknowledge the thorny area of carers, and to raise the number of men taking up parental leave and flexible working arrangements,[92] the proposed Directive guarantees parental leave's level of pay (Article 8), introduces a stand-alone paternity leave of 10 days (Article 4) and a carers' leave of five days a year (Article 6), and expands flexible working arrangements (Article 9).

While not ground-breaking and certainly diluted to gather the approval of both the Parliament and the Council,[93] the proposal for the Directive represents a step forward in trying to shape a fairer and more social Europe. This might be easier to materialise upon the UK's departure. Britain's initial refusal to accept the Agreement on Social Policy allowed the first Directive on parental leave (96/34/EC) to be adopted under the Agreement without having to stumble upon the UK veto, since the country was excluded from its application. The UK's absence from the negotiating table might also lead to stronger provisions making their way to the final version of the Directive, given that country's dismissive attitude, requiring concessions and watered-down proposals, which at times did not even manage to guarantee its agreement.[94]

Going back to the measures that accompanied the unveiling of the Pillar, the two consultation processes launched in April 2017 to address the challenges of access to social protection for people in all forms of employment and to revise the Written Statement Directive bore fruit. The Commission combined them and, by exercising its legislative initiative once more, proposed a new Directive on transparent and predictable working conditions in December 2017, after seeing no light at the end of the tunnel in relation to the involvement of the social partners, faced anew with opposition by the employers' representatives.[95]

The Directive aims to tackle new social risks and contemporary challenges of industrial relations by going a step further as regards the minimum harmonisation of social protection of workers in all forms of employment, introducing in Article 2 thereof an EU-wide definition of worker emanating from the CJEU case law. Furthermore,

90 European Commission (n 78).

91 European Commission, 'Commission's Statement Accompanying the Commission Proposal for a Directive of the European Parliament and of the Council on Work–life Balance for Parents and Carers and Repealing Council Directive 2010/18/EU' <http://ec.europa.eu/social/BlobServlet?docId=17644&langId=en>.

92 European Commission, 'Explanatory Memorandum' COM (2017) 253 final 2017/0085(COD).

93 In order to avoid perhaps the fate of the Maternity Leave Directive. For a more thorough discussion, consult: Ania Plomien, 'EU Social and Gender Policy beyond Brexit: Towards the European Pillar of Social Rights' (2018) Social Policy and Society Online First doi:10.1017/S1474746417000471 9–11.

94 Colette Fagan and Jill Rubery, 'Advancing Gender Equality through European Employment Policy: The Impact of the UK's EU Membership and the Risks of Brexit' (2017) Social Policy and Society Online First doi:10.1017/S1474746417000458 4–5.

95 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Transparent and Predictable Working Conditions in the European Union' COM (2017) 797 final.

Chapter III of the proposed Directive lays down a new set of minimum requirements for their working conditions. The draft also includes stringent sanctions and provisions for redress, much more thorough than those of the Written Statement Directive. Arguably, if these proposals go forward, the revamped Directive, rather neglected in its current form, is likely to achieve its Cinderella moment at last.[96]

The UK opposition to the Written Statement Directive was first and foremost ideologically driven, Britain already having in its legal system an obligation on employers to issue written statements to employees.[97] Nevertheless, given the ongoing 'colonisation' of labour law through deregulation and re-regulation,[98] for Britain to remain competitive in the global marketplace,[99] it is unlikely that the aforesaid proposal would be welcomed with open arms if the UK chose to remain in the EU. On the contrary, introducing minimum rights that would affect non-standardised forms of employment could be seen as an attack on the country's competitive advantage.

The rest of the accompanying initiatives either refer to already well-established legislative measures, such as the Working Time Directive,[100] or concern a soft law approach, like the documents on the implementation of the Active Inclusion and Investing in Children Recommendations,[101] and, thus, UK opposition would be implausible. The proposed measures are complemented by the new plans under the Commission's Work Programme, also known as the Social Fairness Package, for a European Labour Authority and a European Social Security Number, which are currently underway. Apart from a supervisory role, ensuring the proper adherence to EU labour and social standards, these developments could lay the seeds for a more institutionalised concept of EU social citizenship.

5 Reflections: will policy change follow?

5.1. Brexit Britain's position

Moving on to the UK side, the consultation phase for the European Pillar of Social Rights which preceded all other initiatives occurred simultaneously with the run-up to the Brexit referendum in the first half of 2016. The rest of the aforementioned initiatives coincided with the period following the referendum result. The political reality in post-referendum Britain inevitably influenced the country's position apropos the new social developments at EU level. In that regard, the European Scrutiny Committee's reports are quite enlightening. While the first report on the matter does not offer much insight on the UK's position due to its exploratory nature,[102] the second one incorporates Brexit into the debate. The report underscores its defining character as to how the future relationship with the EU is to be shaped, on which the country's stance towards the EU's social proposals would depend.[103] If the UK chooses regulatory convergence or approximation

96 Jon Clark and Mark Hall, 'The Cinderella Directive? Employee Rights to Information about Condition Applicable to their Contract or Employment Relationship' (1992) 21(2) Industrial Law Journal 106.

97 Jeff Kenner, 'Statement or Contract? Some Reflections on the EC Employee Information (Contract or Employment Relationship) Directive after Kampelmann' (1999) 28(3) Industrial Law Journal 205, 213–14.

98 Robert MacKenzie and Miguel Martínez Lucio, 'The Colonisation of Employment Regulation and Industrial Relations? Dynamics and Developments over Five Decades of Change' (2014) 55(2) Labor History 189.

99 Philip Cerny, 'The Competition State Today: From Raison d'État to Raison du Monde' (2010) 31(1) Policy Studies 5.

100 European Commission (n 79).

101 European Commission (n 80).

102 European Scrutiny Committee, *Twenty-Ninth Report* (HC 2015–16, 342-xxvii) 15–19.

103 European Scrutiny Committee, *Eighth Report* (HC 2016–17, 71-vi) 31–6.

for example, some apposite social proposals would merit further exploration. In its third report, published in February 2017, the Committee welcomes the UK's involvement in the Pillar, notwithstanding the Leave vote, on the basis of commitments made by the Prime Minister to maintain most of the European social acquis;[104] fast-forward to the end of 2017, and such guarantees became shaky.[105]

In addition to the above, it is also important to look at the evidence submitted by the UK government as a response to the Commission's consultation on the Pillar. The document, apart from praising the country's position as regards its adherence to and compliance with the principles and rights set out therein, suggests that no further actions by the EU are needed, showcasing once more Britain's negative stance towards further social integration.[106] In the Explanatory Memorandum on the White Paper on the Future of Europe, the Department for Exiting the EU switched roles from that of a veto player to one of a leaver, by simply deferring to the EU 27. The same position was adopted in relation to some of the Reflection Papers as well, acknowledging that this was essentially instigated by Brexit. The developments are a sign of the emancipatory effect the UK's departure might have for European integration; a veto player is no longer sitting at the table.

On the other hand, if the UK reconsidered and chose to remain, it is difficult to reconcile the proposed reforms with the categories of objections presented in section 2 of this article. The policies adopted by the Conservative government continue the austerity paradigm and embed the neoliberal underpinnings of the welfare-to-workfare mantra. Market-correcting measures such as those proposed come in direct confrontation with that, hinting a possible ideological rejection. The party unity rejection could also be invoked, given the current state of division within the political elite and the Eurosceptic hysteria by some party members.[107] Not only that, but the proclamation of the Pillar and the proposals under the Social Fairness Package may also raise concerns about an extension of the EU's competences without the appropriate treaty reform, bringing the external interference rejection into play. Potentially rejecting the proposals on all three grounds means that Brexit could avert a catastrophe for the social acquis, given the UK's likelihood of veto.

5.2. Constraints: the other veto players

Whilst it could plausibly be argued that Brexit would facilitate the realisation of a stronger social dimension for Europe, it is not certain that this would be the end result. The concretisation of the Pillar and its accompanying initiatives is still at an early stage, and it is not certain if, when and to what extent this would materialise. Its cautious approach relying heavily on soft law measures, which lack the bite of legislative ones, casts doubts on its effectiveness in the long run. This was picked up by the relevant stakeholders, who called for more concrete measures in their responses to the Pillar's consultation phase.[108] In particular the European Trade Union Congress (ETUC) has been critical of the overstatement of the

104 European Scrutiny Committee, *Thirty-First Report* (HC 2016–17, 71-xxix) 112–15.

105 Dobbins (n 56).

106 Evidence in response to the consultation on a European Pillar of Social Rights <http://ec.europa.eu/social/BlobServlet?docId=17273&langId=en>. Note that in its submission, the Scottish government exhibited a much more welcoming stance.

107 Will Jennings and Martin Lodge, 'Brexit, the Tides and Canute: The Fracturing Politics of the British State' (2018) Journal of European Public Policy Online First: doi.org/10.1080/13501763.2018.1478876.

108 For example: European Anti-Poverty Network, 'Last Chance for Social Europe?' (Position Paper on the European Pillar of Social Rights, EAPN 2016).

social acquis and the alleged improvements to the labour market, the lack of linkages to economic integration and the disregard of collective bargaining.[109] The Pillar being at an early stage ought not to be used as an excuse not to evaluate its progress and outcomes, as a more comprehensive social agenda should have already been in the making.[110]

Policy-making under the shadow of the veto threatens not only the coming of an EU law into existence, but its actual content as well. Thus, other Member States, smaller veto players on the fringes, may even substitute the UK in diluting the furthering of Social Europe. In such a scenario, a common denominator would need to be sought, which is likely to be the lowest one, putting the proposals in danger of being watered down in order to become accepted. This is especially relevant to areas where unanimity is still required, since compromises will inevitably occur therein. Yet, without its *enfant terrible* and the polar opposite views that came with it, Social Europe might come a step closer to materialising, even through the road of compromises. The 'socialness' of the final outcomes is likely to be improved post-Brexit.[111] The UK departure may not be fully liberating, but, be that as it may, less controversial reforms would more easily move forward as their dogmatic opponent would no longer sit at the table.

The proposed reforms' actual content and reach are of paramount importance, in a similar way that their take-up by the Member States is for the Pillar's success. The danger that lurks with this approach is that even if Britain – the key veto player in EU social policy-making – leaves, there will be others that may take up its position, and which have been relatively quiet so far. A few years ago, the now abandoned amendments to the Directive on maternity leave were rejected not exclusively because of the UK's opposition: it formed a blocking minority together with Germany, Hungary, Ireland, Latvia, Malta, the Netherlands and Sweden to achieve this.[112]

The latter was not the only instance where the UK was not the sole Member State opposing a social proposal. Examples go as far back as the 1980s, when the harmonisation proposals in the areas of employment rights and industrial democracy were blocked by the British government, but as Bruun and Hepple note 'with the active or tacit support of some other governments'.[113] Indeed, hiding behind the UK's skirt has been a tactic for some Member States prior to the 2004 enlargement, with a noted path-dependence of a blocking minority consisting of the UK, Denmark, Germany and Ireland on social matters, such as the proposals on information and consultation in the event of collective redundancies, or the temporary agency work Directive.[114] Following Eastern enlargement, the post-socialist Member States have been perceived as forging a 'market-making coalition' with Britain, opposing any market-correcting measure. While Brexit might come as shock, their ambition to leave their stamp in EU policy-making may render them the new vocal veto players.[115]

109 ETUC, 'Reflection Paper on the Social Dimension of Europe: ETUC Assessment (position)' (2017) <www.etuc.org/sites/www.etuc.org/files/document/files/en-reflection-paper-social-dimension.pdf>.

110 Rasnača (n 83).

111 Nick Parsons and Philippe Pochet, '"Social" Europe' in Kenneth Dyson and Angelos Sepos (eds), *Which Europe? The Politics of Differentiated Integration* (Palgrave Macmillan 2010) 254.

112 Fagan and Rubery (n 94).

113 Bruun and Hepple (n 12) 47–8.

114 Peter Nedergaard, 'Blocking Minorities: Networks and Meaning in the Opposition against the Proposal for a Directive on Temporary Work in the Council of Ministers of the European Union' (2007) 45(3) Journal of Common Market Studies 695, 703–6.

115 Nicole Lindstrom, 'What's Left for "Social Europe"? Brexit and Transnational Labour Market Regulation in the UK-1 and the EU-27' (2018) New Political Economy Online First doi.org/10.1080/13563467.2018.1484719.

It is thus true that, while Britain was the most overt of the veto players, and perhaps the more consistent opponent of Social Europe, in recent years it was not the sole Member State voting down legislative proposals. A study found that, during 2009–2015 in employment and social affairs, in the Council of Ministers Germany was in the minority as often as the UK was.[116] These changes and the introduction of other players ties in well with the discussion in the veto player literature of the change in power dynamics within the EU institutions with the introduction of QMV and the expansion of the ordinary legislative procedure. The literature argues that in an enlarged EU with diverse policy interests and an increased role of QMV policy changes will be difficult to materialise, resulting in high levels of policy stability and increasing the role of bureaucracy (the Commission) and the CJEU.[117] Voting in the Council has become extremely difficult, and it has been advanced that this would likely stall any policy-making going beyond the status quo.[118] The proposed reforms, in trying to alter the social acquis, might become victim to that. Whilst trying to find more Member States to openly oppose a proposal might have sounded more difficult in the past, in an EU of 27 this is no longer such an arduous task, as the Central and Eastern European countries or the building coalition of the New Hanseatic League show.

In addition to that, it is not inconceivable that some of the rejection categories presented in section 2 could also apply in relation to some of the EU 27. Whilst the ideological rejections are in a way more endemic to the liberal British social model,[119] Emmanuel Macron's proposed welfare cuts in France invite comparison with New Labour's paradigmatic change of social policy narrative. His attitude might also impact upon the country's stance vis-à-vis the social reforms at EU level. It is indicative, for example, that in the Franco-German Meseberg Declaration of June 2018, social reforms do not get much attention whatsoever.[120] The second type of rejections, the Eurosceptic and party unity ones, can also be triggered by some of the EU 27. Euroscepticism has been diffused in almost all Member States' party systems, in parties of the left and the right, forging competing poles even within a single party.[121] As for the last category of fears of external interference, countries already in dispute with the EU, for example Poland, may not welcome further reforms on that basis. This would not be the first time Poland exhibits such traits, given its opt-out from the Charter sitting alongside the British one in Protocol 30 thereof. The veto player drama does not seem to have an end in sight; just a change of cast.

The previous remarks are especially important for the enactment of any legislative proposal, which is more likely to induce significant policy change. The adoption process gives significant negotiating – and consequently veto – power to the Member States. On the other hand, in relation to non-legislative or soft law initiatives, such as those included in the text of the Pillar, other difficulties lie ahead, again, involving the Member States.

116 Simon Hix and Sara Hagemann, 'Does the UK Win or Lose in the Council of Ministers?' (*LSE EUROPP Blog*, 2 November 2015) <http://blogs.lse.ac.uk/europpblog/2015/11/02/does-the-uk-win-or-lose-in-the-council-of-ministers>. It even exhibited this in the 1980s according to Hepple (n 20).

117 Tsebelis (n 10).

118 George Tsebelis and Xenophon Yataganas, 'Veto Player and Decision-making in the EU after Nice: Policy Stability and Bureaucratic/Judicial Discretion' (2002) 40(2) Journal of Common Market Studies 283, 304.

119 Refer to the discussion in n 13.

120 Press and Information Office of the Federal Government, Meseberg Declaration: Renewing Europe's Promises of Security and Prosperity (No 214 2018).

121 Paul Taggart and Aleks Szczerbiak, 'Putting Brexit into Perspective: The Effect of the Eurozone and Migration Crises and Brexit on Euroscepticism in European States' (2018) 25(8) Journal of European Public Policy 1194.

The deferential soft law approach requires persevering commitment for the measures' full potential to be unleashed. Otherwise, it risks becoming a halfway house, a flawed mechanism much like the OMC, and leading to a catastrophe similar to that of the Lisbon Strategy.[122] Even in its proclaimed form the Pillar is largely dependent on the Member States' discretion. Peer pressure is the only effective way under which its principles would be acted upon, if legislating is not on the horizon, and it is here where the looming Brexit might help, but perhaps not conclusively as this section has shown.

6 Conclusion

The referendum of June 2016 was the first step towards the UK's departure from the EU, following what has been, admittedly, an uneasy relationship over the years. The British stance over Social Europe exemplifies the uncomfortable moments of that relationship, moments that can be traced back to the early attempts to establish a formalised social dimension for the Union. The successive Conservative governments of Margaret Thatcher and John Major saw any such development as a threat to their neoliberal worldviews and to internal party politics in some instances, perceiving the then Community as a synonym of free trade. New Labour's takeover in 1997 saw a change of approach initially, endorsing the institutionalisation of certain social policies at EU level, a largely symbolic gesture to make amends with the party's socialist past. Its position was rescinded a few years later, coinciding with its widespread turn to more liberal policies, by securing a new opt-out from the Charter, also in fear of external interference. By opposing social integration so often, the UK was the key veto player in EU policy-making therein.

Up until 2016, the UK was known for its opt-outs from Social Europe. The anti-welfare and Eurosceptic rhetoric of the new Conservative government, wishing to scale back on what the UK had already agreed at EU-level social policy-wise, led to a new change of circumstances: the 'Bropt-outs' are dead, long live Brexit! From a veto player, the UK would eventually become a spectator. This, in turn, could be a positive development for Social Europe, which could finally start getting into full swing, as the third scenario of the Commission's Reflection Paper shows. The latter, in a similar way to the White Paper, contemplates the challenges the social side of the European project is facing in the wake of the Brexit referendum. Its third scenario advocating for a further integrated Social Europe skirts around the dangers of deregulation, a divided EU and a race to the bottom, yet it requires strong political commitment in order for its initiatives to be taken up and not to result in EU scapegoating and citizens of other Member States demanding to 'take back control'. It also requires the elimination of all opposition by other veto players, something that at present looks unlikely, at least in the short term.

Nevertheless, with Britain gone, a key player advocating against the advancement of the social acquis is lost. Moreover, together with the publication of the Reflection Paper, which makes it clear that further integration is the most beneficial route for Social Europe, the Commission presented its proposals for the European Pillar of Social Rights, accompanied by a series of other social initiatives, cementing Juncker's vow to revive the social side of the Union. These developments showcase a commitment, at least on behalf of the Commission, towards achieving enhanced social standards EU-wide, which can only become more daring now that their familiar foe is no longer at the negotiating table, if for nothing else than to test the waters for further integration in the field. A plan for policy change has been put on the table, following the veto player's departure.

122 Vassilis Hatzopoulos, 'Why the Open Method of Coordination Is Bad for You: A Letter to the EU' (2007) 13(3) European Law Review 309.

Consequently, it would be naïve to disregard the potential of the social initiatives that have emerged in the wake of the Brexit referendum. Granted, some, such as the EU Pillar of Social Rights, were in the making before that in order to tackle the rising levels of dissatisfaction towards the EU in crisis-ridden Member States. However, their momentum and scope has undoubtedly been revisited post-June 2016. The prospect of the British departure acted as a wake-up call, but also liberated the strained EU social agenda by opening up room for more far-reaching experiments, such as the proposals for work–life balance and transparent and predictable working conditions for EU workers in all forms of employment Directives, or the European Labour Authority. With the persistent objector out of the equation, things might finally be able to move forward.

It is still too early to speculate on the exact direction the EU would pursue in the future, and, for the purposes of this article, to predict with certainty whether the UK's departure would trigger the necessary impetus for further social integration to actually meaningfully materialise at EU level. Was the UK the only weight to be taken off in order to finally achieve Social Europe? It may be so, but other veto players are still lurking in the remaining Member States, particularly in the Central and Eastern European ones, which perceive aspects of social integration burdensome for their competitiveness.[123] They are also lurking in the collective – institutional – structures, such as the European Parliament, following the post-1987 developments as the veto player theory suggests. This, coupled with Eurosceptic and deregulatory attitudes elsewhere in Europe, on which it is still too soon to evaluate the looming Brexit's impact, might mean that there are still a few obstacles Social Europe has to overcome prior to materialising.

As for the EU developments, they need to reflect determination and include legislative initiatives, not just soft law measures, so that they trigger acceptable compliance levels to solidify Social Europe's position in the European landscape. If the aforementioned proposals manage to cultivate the right climate and get the majority of Member States on board, then peer pressure in combination with the opposing Member States' less unmalleable – compared to the UK at least – red lines, might allow them to be persuaded without weakening the reforms themselves. On a different note, the Brexit referendum showed that every so often a significant number of citizens feel detached from Europe, something that the national political elites readily take advantage of.[124] What better way to welcome them back to the EU then, than by showing that the Union cares, through the – long overdue – expansion of its social dimension?

123 Petr Kopecký and Cas Mudde, 'The Two Sides of Euroscepticism: Party Positions on European Integration in East Central Europe' (2002) 3(3) European Union Politics 297.

124 Sara Hobolt, 'The Brexit Vote: A Divided Nation, a Divided Continent' (2016) 23(9) Journal of European Public Policy 1259.

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The consequences of Brexit for the labour market and employment law: challenges for the EU from a Polish perspective

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Abstract

One of the most important problems arising from Brexit will concern labour law and the labour market – specifically the future development of labour law at the European level, the situation in domestic labour markets, and (as a consequence) changes in national legislations. At present, it is difficult to draw any precise conclusions regarding the impact of Brexit; however, it is possible to identify some of the more likely scenarios and consequences. There are substantial questions concerning: the future of EU law after Brexit and how Brexit will affect British labour law; the situation of multinational labour law institutions (e.g. European Works Councils), as well as the posting of workers. A lot depends on the final agreement between the UK and the EU. A close economic partnership may enforce the maintenance of the most important labour standards and mechanisms which are necessary to guarantee equilibrium between the partners.

Keywords: Brexit; employment; labour; market; standards; protection; worker; employer

1 Introduction

One of the most important problems arising from Brexit will concern social legislation and the labour markets, not only in the UK, but throughout the EU. The most profound question is related to European social policy after the withdrawal of the UK: is this a threat or a chance for European social policy to accelerate? Brexit will inevitably influence British labour (employment) law; it is, however, unclear to what extent and in what areas.[1] The position of migrant workers, who were perceived as one of the most important reasons for the dissatisfaction of British citizens, is particularly delicate.[2] It is also worth asking if Brexit may influence other labour law systems – particularly those of the home countries of

1 This problem was discussed, inter alia, by Jeremias Prassl, 'When the Tide Goes Out: UK Employment Law after Brexit' (Conference on the EU without the UK: Implications and Legal Consequences of Brexit, University of Warsaw, 26 November 2016). According to media analyses, those voting to leave were frequently convinced that large numbers of migrant workers were entering the UK, which was said to have had an immensely negative impact on public services and the social security system (see polling evidence available at <http://lordashcroftpolls.com/2016/06/how-the-united-kingdom-voted-and-why>; <www.bsa.natcen.ac.uk/media/39149/bsa34_brexit_final.pdf>); for a critical assessment see Niamh Nic Shuibhne, 'Reconnecting Free Movement of Workers and Equal Treatment in an Unequal Europe' (2018) 43(4) European Law Review 477, 478ff.

2 Unless specified otherwise, throughout this article the terms migrant and migrant worker(s) refer to EU citizens moving to other EU Member States and not to non-EU citizens moving to the EU.

migrant workers. The next point is the future of transnational institutions with British involvement (e.g. posting of workers, European Works Councils (EWCs), transnational collective agreements). Finally, one should consider the potential consequences Brexit may have on labour markets, both in the UK and in the home countries of migrant workers, as well as labour markets in countries to which those workers may migrate. At present it is difficult to draw any precise legal conclusions.[3] A lot depends on the final results of negotiations between the UK and the EU. However, it is possible to identify some of the more likely scenarios and consequences,[4] as well as to articulate some proposals. This article examines the consequences of Brexit, using a Polish perspective for developing such proposals with reference to UK and European institutions. Selecting the Polish case is justified by the scale of Polish immigration to the UK, as well as the position and structure of the Polish labour market, which is the largest one in Central and Eastern Europe (CEE).[5] The Polish example is, to an extent, symptomatic of the whole region. Moreover, strong Eurosceptic views have been observed in Poland. While Poland's dependency on EU subsidies might mitigate against this, another EU exit scenario does not presently seem improbable.

2 Legal background

When the two-year period for the UK's withdrawal from the EU under Article 50 of the Treaty on European Union (TEU) ends on 29 March 2019, the Treaties will cease to apply and EU legislation will be converted into British law.[6] It is still not yet known how those laws will be amended in the future. The British government has declared that it intends to maintain workers' rights, but has specified no time frames. Modifications to the

3 In any case, more transparency is needed. Such a need has been confirmed by other trade talks, e.g. concerning TTIP (Transatlantic Trade and Investment Partnership) and CETA (EU–Canada Comprehensive Economic and Trade Agreement) see: European Trade Union Confederation (ETUC), 'Brexit Negotiating Guidelines: ETUC Calls for Workers' Rights to Be Resolved Rapidly' (Press Release, ETUC, 31 March 2017) <www.etuc.org/press/brexit-negotiating-guidelines-etuc-calls-workers-rights-be-resolved-rapidly#.WstIxS_UToA>.

4 When it comes to the British perspective, see further: Secretary of State for the Home Department by Command of Her Majesty, 'The United Kingdom's Exit from the European Union. Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU', presented to Parliament, June 2017, Cm 9464, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/621847/60093_Cm9464_NSS_SDR_Print.pdf>.

5 According to the data published by the UK Office for National Statistics, the largest group of migrants from CEE are Polish citizens. At the moment, there are around 1,021,000 Polish citizens in the UK. With regard to the dynamics of immigration over recent months, there has been an increase in the numbers of workers from Bulgaria and Romania <www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/datasets/populationoftheunitedkingdombycountryofbirthandnationalityunderlyingdatasheets>. Polish immigration is divided into two groups: the old immigrants and the new immigrants. The old immigration encompasses people who remained or emigrated to the UK just after the Second World War and during the communist period in Poland. The new immigration began after the Polish accession to the EU in 2004. At the same time Poland is the largest labour market in CEE. In the first quarter of 2018, the number of employed persons in Poland amounted to 16,344,000 <https://tradingeconomics.com/poland/employed-persons>.

6 See European Union (Withdrawal) Act 2018 (An Act to repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU, 2018) ch 16 <www.legislation.gov.uk/ukpga/2018/16/introduction>. In short, under this legislation EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day. However, the Charter of Fundamental Rights is not part of domestic law on or after exit day. See also Jonathan Cooper, 'The Fate of the Charter of Fundamental Rights in English Law after Brexit is Sealed' (*Oxford Human Rights Hub*, 20 June 2018) <http://ohrh.law.ox.ac.uk/the-fate-of-the-charter-of-fundamental-rights-in-english-law-after-brexit-is-sealed>.

mechanisms connected with the labour market will be influenced heavily by whatever model of cooperation between the UK and the EU emerges after Brexit. Theoretically, an alternative is the so-called Norwegian model. The UK could join the European Economic Area (EEA) (via the European Free Trade Agreement) with all freedoms comprising the foundation of the EU, including freedom of movement for workers. This would imply the application of European legislation. However, this seems unlikely for many reasons. First, such a change would not lead to the achievement of the political goals declared by Brexiteers (including regaining sovereignty). Second, the UK would lose its influence on the creation of legal standards. Third, the UK would be deprived of some privileges derived from membership without appropriate compensation. Fourth, the results of the Brexit referendum may be interpreted as an opposition to closer cooperation (especially when it comes to the free movement of workers).[7]

According to recent statements, membership in the EU Internal Market will be replaced by an as-yet undefined 'close economic partnership'.[8] As the jurisdiction of the Court of Justice of the EU (CJEU) will no longer apply to the UK, the provisions for EU residents under British law will necessarily change.[9] Some doubts have been clarified in the Joint Report from EU and UK Brexit negotiators[10] and the subsequent Draft Withdrawal Agreement.[11] However, neither the report nor the Draft Withdrawal Agreement are legally binding, and there are recurrent reports on potential further changes. Moreover, these documents address only a part of Brexit consequences. The overall objective of the Withdrawal Agreement with respect to citizens' rights is to provide reciprocal protection for Union and UK citizens, to enable the effective exercise of rights derived from Union law and based on past life choices, where those citizens have exercised free movement rights by the specified date. All EU citizens, regardless of when they arrived in the UK, will need to apply to the Home Office for permission to stay and, if successful, will receive a document enabling them to continue to live and work legally

7 See e.g. Adam Lazowski, 'Norwegian Model for the UK: Oh Really?' (*The UK in a Changing Europe*, 30 March 2016) <http://ukandeu.ac.uk/norwegian-model-for-the-uk-oh-really/>.

8 See HM Government, 'The Future Relationship between the United Kingdom and the European Union' (Policy Paper, July 2018) <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>.

9 Secretary of State for the Home Department by Command of Her Majesty, 'The United Kingdom's Exit from the European Union. Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU', presented to Parliament, June 2017, Cm 9464, at 4. The problem could be that negotiations concerning workers constitute a part of trade talks, see ETUC (n 3); while worker rights should not been used as bargaining chips, see Statement Adopted by the Executive Committee, 'Statement of the ETUC on the Notification of the UK to Withdraw from the European Union', Malta 15–16 March 2017 (ETUC, 20 March 2017) <www.etuc.org/documents/etuc-statement-notification-uk-withdraw-european-union#.WstRoy_UTVo>.

10 Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, 8 December 2017 <https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf>.

11 European Commission TF50 (2018) 35 – Commission to UK <https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf>.

in the UK.[12] However, the British government may wish to limit access to the labour market.[13] Finally, if the UK and the EU achieve close economic partnership, the maintenance of specific labour standards may turn out to be necessary (in particular to avoid inequality between the partners). There is still a possibility of regulating some institutions and mechanisms, particularly those of a cross-border nature, although a lot depends on the final shape of the agreement.

3 European labour law

There is a substantial question concerning the future of EU law after Brexit. There are some expectations that the Union without the UK will be able to accelerate in the social sphere. Although Brexit is considered to be a serious threat for the whole idea of European integration, some positive aspects for social policy are also indicated. The UK played a very specific role as regards the adoption of employment standards within the Union. For many years the British government blocked attempts at a more active social policy.[14] Eventually, this was reflected in the concept of a two-speed EU. Even after the Lisbon Treaty,[15] the UK has been rather reluctant to embrace social reforms. The British Protocol to the Charter of Fundamental Rights was of a symbolic character – its aim was to demonstrate that there is no agreement in the UK to more interference from Europe in British domestic affairs. At the same time, the need to further develop the social field has become obvious.[16] Economic freedoms, however, important in and of themselves, cannot guarantee sustainable development. Without stronger social reforms, the European project will be put at risk.

From this perspective Brexit may eliminate one of the obstacles to social development.[17] The Union is trying to capitalise on this opportunity and change the relationship between its economic and social objectives. It is hardly an accident that the Union proclaimed the European Pillar of Social Rights during Brexit negotiations. The idea of the Pillar is to deliver more effective but also new rights for individuals. The social goals have been divided into three groups: equal opportunities and access to the labour market; fair working conditions; and social protection and inclusion.[18] As President Jean-Claude Juncker has suggested, the Pillar would give citizens the opportunity to avoid

12 See the Statement of Intent by the UK Home Office on the UK Settlement Scheme <www.gov.uk/government/publications/eu-settlement-scheme-statement-of-intent> which does not fully comply with the Report: see Dagmar Schiek, 'The Home Office "Statement of Intent" for EU Citizens' Settled Status in the UK: For What It Is Worth' (*QPOL*, 26 June 2018) <http://qpol.qub.ac.uk/home-office-statement-intent-settled-status> and the subsequent draft statement of change to immigration rules, establishing the basis for a trial by selected EU citizens <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727752/CCS207_CCS0718116274-001_Cm_9675_Immigration_Rules_Accessible.pdf>.

13 Secretary of State for the Home Department (n 9) 7–8. See also the UK government's White Paper on the UK's new partnership with the EU, 32ff <www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper>.

14 See e.g. Roger Blanpain, *European Labour Law* (14th revised edn, Kluwer Law International 2013) 72. The UK adheres to legal non-interventionism (91).

15 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C 306/1.

16 See Anthony Arnull, 'Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights: Part II – Reflections on the EU Charter of fundamental Right* (Hart 2014) 1599–1602.

17 See on this Konstantinos Polimakarkis, in this issue.

18 See Sacha Garben, 'The European Pillar of Social Rights: Effectively Addressing Displacement?' (2018) 14 European Constitutional Law Review 210–30.

social dumping and social fragmentation. It is slated to be one of the instruments aimed at strengthening the Union and overcoming current difficulties. Concurrently, the Pillar emphasises goals which (in some respects) would be unacceptable to the UK.

Of course, the Social Pillar must be seen in a broader perspective. There have been a lot of factors encouraging a more active social policy. The economic crisis changed a lot. However, Brexit has been a strong stimulus because it revealed the weakness of the European project, for example, the deficit of appropriate social protection. Of course, it may turn out that the legal instruments offered by the Pillar are considered to be soft and insufficient, nor can we predict the future results of balancing European values. But, even in the past, the economic approach was criticised (see the reactions to *Viking*, *Laval* etc.)[19] and the Pillar may therefore support a more social approach to European values.[20]

One should avoid overstating the UK's relevance here, as the British approach is not the only hindrance to social development. Nevertheless, without the UK some changes will probably be easier to carry out, since opponents of harmonisation of working conditions will lose an important ally, easing the promotion of protective solutions common in the 'Old Union'. The first signal was the discussion about the revision of the Posted Workers Directive. Despite the opposition of some CEE countries, the amendments discussed have been adopted.[21] One can expect that further initiatives will also be successful, which process will lead to the application of a social model characteristic of advanced capitalist countries. From this perspective, Brexit may cause significant changes for the whole Union.

Paradoxically, the CEE countries might step into the void left by the UK. Social partners and politicians in the CEE countries are concerned that the adoption of a more advanced European social model by CEE countries will considerably raise the cost of labour and thus eliminate one of the most important comparative advantages of their countries.[22] CEE countries find themselves confronted with a difficult choice: either to increase the level of protection (also in the field of remuneration) or be pushed out from the main stream of European integration. Brexit and new social standards may finally change the structure of investments in Europe (limiting transfers to the East), whilst

19 See e.g. A C L Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' (2008) Industrial Law Journal 126–48; and Christian Joerges, Florian Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval' (2009) European Law Journal 1.

20 See e.g. Zane Rasnaca and Sotiria Theodoropoulou 'Strengthening the EU's Social Dimension: Using the EMU to Make the Most out of the Social Pillar' (ETUI Policy Brief No 5, 2017) <www.etui.org/Publications2/Policy-Briefs/European-Economic-Employment-and-Social-Policy/Strengthening-the-EU-s-social-dimension-using-the-EMU-to-make-the-most-out-of-the-Social-Pillar>.

21 Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Text with EEA relevance), Official Journal of the European Union L 173/16, 9 July 2018.

22 According to the Eurostat, in 2017 average hourly labour costs were estimated at €26.8 in the EU28. However, there are significant gaps between EU Member States. The lowest hourly labour costs are to be found in Bulgaria (€4.9) and Romania (€6.3), while the highest are to be found in Denmark (€42.5) and Belgium (€39.65), while Polish hourly labour costs (€9.6) are just above a third of the median and the UK (€25.7) hovers around the median (€26.7) <https://ec.europa.eu/eurostat/statistics-explained/index.php/Hourly_labour_costs>. Béla Galóczi attributes the low labour costs in CEE countries to their heritage rather than a deliberate strategy of low-cost competition, while suggesting that the low-wage economy has reached its limits: 'Why Central and Eastern Europe Needs a Pay Rise?' (European Trade Union Institute, 2017) 22, 18.

weakening the position of undertakings from new Member States which are currently able to compete thanks to lower labour costs.[23]

Problems with the adoption of new European standards appeared in relation to the draft of a new Directive on work–life balance for parents and carers.[24] According to the draft, Member States will take the necessary measures to ensure that workers have an individual right to parental leave of at least four months to be taken before the child reaches a given age which shall be at least 12. Where Member States allow one parent to transfer their parental leave entitlement to the other parent, they shall ensure that at least four months of parental leave cannot be transferred. In Poland, the proposed law has been seriously criticised by the social partners (mainly employers) and also by the Polish Parliament.[25] The Union has been accused of attempting to destroy the traditional family model because fathers will be forced to participate in parental leave (otherwise families will lose four months of that leave). According to such allegations, it will change the current structure of leave connected with parenthood.[26] Although the draft concerns only selected social matters, it reflects different approaches to employee rights and the safeguarding of the individual's position.[27]

The increase of the role of social rights may fundamentally change the Union. It could even be a new way and a new opportunity for the development of Europe. However, it is too early to assess the importance of the Pillar in balancing the values on which the EU is founded.

23 Doubts were formulated, for example, during the discussion on the amendments to the Posted Workers Directive: see e.g. European Parliament Briefing, 'The Revision of the Posting of Workers Directive' (Policy Department for Economic, Scientific and Quality of Life Policies, October 2017) <www.europarl.europa.eu/RegData/etudes/BRIE/2017/607346/IPOL_BRI%282017%29607346_EN.pdf>. See also Commentary of the Union of Entrepreneurs and Employers on the text of the revised Directive on the posting of workers (PWD – Posting Of Workers Directive 96/71/EC) <http://zpp.net.pl/en/commentary-of-the-union-of-entrepreneurs-and-employers-on-the-text-of-the-revised-directive-on-the-posting-of-workers-pwd-posting-of-workers-directive-9671ec>. One could even suspect that, alongside providing for employee protection, the countries which constitute the core of the Union want to protect their internal markets (in some sense contrary to the idea of integration).

24 See 'Proposal for a Directive of the European Parliament and the Council on work–life balance for parents and careers and repealing Council Directive 2010/18/EU', Brussels, 26 April 2017, COM(2017) 253 final, 2017/0085 (COD); Council of the European Union, 'Proposal for a Directive of the European Parliament and of the Council on work–life balance for parents and carers and repealing Council Directive 2010/18/EU – Progress report' (2017/0085 (COD)) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2017%3A253%3AFIN>.

25 Council of the European Union (n 24); Mateusz Adamski, 'Unia chce obowiązkowego 4-miesięcznego urlopu rodzicielskiego dla ojców' ('The Union Wants Mandatory 4-Month Parental Leave for Fathers' (*Rzeczpospolita*, 17 May 2017) <www.rp.pl/Kadry/305179940-Unia-Europejska-chce-obowiazkowego-4-miesiecznego-urlopu-rodzicielskiego-dla-ojcow.html>; Uchwała Sejmu Rzeczpospolitej Polskiej z dnia 22 czerwca 2017 r. w sprawie uznania projektu dyrektywy Parlamentu Europejskiego i Rady w sprawie równowagi między życiem zawodowym a prywatnym rodziców i opiekunów oraz uchylającej dyrektywę rady 2010/18/UE za niezgodny z zasadą pomocniczości (Resolution of the Lower House of Polish Parliament of 22 June 2017 on recognition of the draft Directive of the European Parliament and of the Council on work–life balance for parents and careers and repealing Council Directive 2010/18/EU as incompatible with the principle of subsidiarity (22 June 2017) <www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/JURI/NP/2018/03-27/1129470PL.pdf>.

26 See more Zbigniew Hajn and Leszek Mitrus, 'Poland' in Roger Blanpain and Frank Hendrickx (eds), *International Encyclopaedia of Laws: Labour Law and Industrial Relations* (Kluwer Law International 2016) 161–2.

27 It does not matter that a part of the allegations is not justified. See further Council of the European Union (n 24).

4 Transnational institutions and mechanisms

A further problem will be the situation of transnational labour law institutions. The most obvious example is that of EWCs (more than 200 of which are based in the UK). One will need to distinguish between EWCs established under the jurisdiction of an EU Member State (will British members of EWCs retain their mandates?) and EWCs established in Britain. At the Conservative Party Conference held in Birmingham, government members declared on 2 October 2016 that the legislation concerning EWCs will not be amended.[28] Thus EWCs in the UK, a large proportion of which were established prior to adoption of the relevant domestic rules, and membership of British representatives in other EWCs would be retained. Irrespective of such retention, Brexit will most likely result in the necessity to renegotiate the current rules governing the operation of EWCs.[29] After Brexit, the UK will not be bound by European legislation and CJEU judgments any more, which may seriously affect the position of councils established under British law. As a result, some companies, to avoid uncertainty, may try to move their councils to other jurisdictions (e.g. to Ireland).[30] This, in particular, may apply to non-EEA-headquartered companies (i.e. in about 23% of cases). Approximately 25 per cent of these EWCs have chosen British EWC implementation laws as applicable.[31]

Some problems may also arise for European Framework Agreements, frequently concluded in the context of transnational companies which also have EWCs. At the moment they are concluded on a voluntary basis with dubious legal effects,[32] which means that Brexit will probably not cause additional problems with their application. Although there are currently no such plans, the situation may change if the EU decides to create a legal framework for European Framework Agreements.[33]

Another problem that will arise concerns the mechanism for the posting of workers. Although the principles of the EU's Posted Workers Directive are not implemented in a separate legal Act, they essentially correspond to EU standards.[34] Posted workers from EU countries are not registered, and there are no control procedures. Among the EU Member States, the UK currently has the seventh largest number of posted workers (around 50,000);[35] that number has increased steadily. British workers are, of course, also

28 EWC Academy, 'Brexit: What Consequences for European Works Councils?' <https://www.ewc-academy.eu/en/consulting/brexit.html>.

29 Rebecca Gumbrell-McCormick and Richard Hyman, 'What about the Workers? The Implications of Brexit for British and European Labour' at 8 <http://eprints.bbk.ac.uk/18986/3/18986.pdf>.

30 Denis McShane, 'European Works Councils: Another Brexit Victim' (*Social Europe*, 5 January 2017) <www.socialeurope.eu/european-works-councils-another-brexit-victim>.

31 Stan De Spiegelaere and Romuald Jagodziński, 'European Works Councils and SE Works Councils in 2015: Facts and Figures' (European Trade Union Institute 2015) <www.etui.org/Publications2/Books/European-Works-Councils-and-SE-Works-Councils-in-2015.-Facts-and-figures> 17.

32 See e.g. Silvana Sciarra, Maximilian Fuchs and André Sobczak, 'Towards a Legal Framework for Transnational Company Agreements' (Report to the ETUC 2014) 12.

33 Compare e.g. 'Building and Enabling Environment for Voluntary and Autonomous Negotiations at Transnational Level between Trade Unions and Multinational Companies (ETUC 2016).

34 Jeffrey Kenner, 'The United Kingdom and Posted Workers: Before and after Brexit' (Seminar on Posting of Workers, European Union and National Legal Orders: Problems and Perspectives, University of Naples Federico II, 13 October 2017). However, there are some problems connected with the implementation. There are questions concerning the implementation of the nucleus of rights (in accordance with Luxembourg case EU-Court, C-319/06 *Commission v Luxembourg* [2008] ECR I-4323), the lack of extension on collective agreements in construction sector, or restrictions on strike action.

35 Alan Beattie, 'Curbs on Posted Workers Will not Fix the EU Labour Market' (*Financial Times*, 24 October 2017) <www.ft.com/content/8bf67744-b8a2-11e7-9bfb-4a9c83ffa852>.

sent to other Member States, and the problem of posted workers is thus not dissimilar to the issue of migrant workers. The UK could theoretically maintain the current rules after Brexit, as Norway does, but this could be difficult from a political point of view (as discussed above), and it seems more probable that restrictions will be established for companies sending workers to other countries.

At the same time, the whole mechanism of posting workers is undergoing serious changes. The coalition composed of CEE countries and the UK defeated the campaign to maintain liberal posting rules. The Directive limits the period of posting as well as extending the protection in the field of remuneration (ensuring equal pay with local workers).[36] It can be viewed as one of the first consequences of Brexit. First, as already discussed, the social approach prevailed over the liberal one and so the new rules are going to be more protective (illustrating the French idea of 'a Europe that protects').[37] It could also lead to amendments in the functioning of the common market. Secondly, the solution reflects the weakening position of the UK as it awaits its withdrawal from the EU. It needs to influence the position of countries that represent a more liberal approach to the European project. If the Brexit negotiations safeguard the posting mechanism, the amended standards may also influence the situation of workers posted between the UK and the EU.

5 Domestic institutions of labour law

Even if some migrant workers are formally allowed to stay in the UK, they may be forced to leave due to changes in the labour market or the system of social security. Some workers may choose to work in another Western European country where the remuneration is higher, while some will undoubtedly return to their home countries, including to Poland. Waves of returning workers may also have an adverse effect on local labour markets, again, for example, in Poland, and it may become necessary to adjust working conditions in response to changing circumstances.

Over recent years, the Polish government has taken a number of social initiatives intended to improve working and living conditions (worker-friendly reforms). These have included the introduction of special family allowances, increasing protection of workers who are not employees and lowering the pensionable age. These changes may contribute to convincing Polish migrant workers to return to their country. However, new social policies may also pose some risks. The Polish economy in some areas still depends on direct foreign investment and increasing labour costs may therefore deter potential investors, although workers' protection in Poland will certainly be increased. It is unclear whether the Polish economy is sufficiently strong and innovative to fill the gap. The reforms are relatively expensive and have been undertaken during a period of prosperity (visible growth in gross domestic product). Any economic slowdown may lead to serious financial problems. Moreover, Poland has not reformed the legal framework for collective relations, which are undergoing a deep crisis (its main manifestation being the very low level of coverage by collective agreements).[38] A wave of returning migrant employees could create new challenges for the labour market and the government may be forced to

36 Directive (EU) 2018/957 (n 21); European Commission, 'Posted Workers', <http://ec.europa.eu/social/main.jsp?catId=471>.

37 Sophie Maes, 'EU: New European Rules for Posted Workers' (*Ius Laboris*, 25 June 2018) <www.iuslaboris.com/en-gb/resources/insights/a/new-european-rules-posted-workers>.

38 See further Łukasz Pisarczyk 'The Impact of the Economic Crisis on Collective Agreements in Poland' in S Laulom (ed), *Collective Bargaining Developments in Times of Crisis* (Bulletin of Comparative Labour Relations 99, Kluwer Law International 2018) 63ff.

integrate a large group of workers with experience gained abroad and relatively high expectations. Some support for the employers may be also needed. While there is no typical autonomous instrument (collective agreement) which could reconcile what the workers expect with what the employers can offer, more flexible legislation may be needed.[39] To summarise, growing costs and new challenges may further slow down social reforms and bring some changes which will be unfavourable for workers.

There are also concerns about how Brexit will affect British labour law. Many of its institutions have been introduced or developed to implement European standards. Moreover, due to the lack of a written UK constitution, EU standards have played a role that in other countries is reserved for constitutional standards (international guarantees are usually not precise enough to maintain the level of protection).[40]

It is difficult to predict how the economic situation of the UK will develop after Brexit. British companies may need structural support to compete internationally in an environment governed by World Trade Organization standards, and the deregulation of employment standards may be viewed as a solution. Although this can be treated as an internal problem for the UK, the level of protective standards may influence labour markets in countries with which the UK trades. Protective standards derived from EU law will become a part of the British domestic legal system. However, the UK, no longer bound by EU law and the judgments of the CJEU, will be able to change the legislation shaped during the period of its membership in the EU. The standards that have been introduced as regulations (i.e. secondary legislation) are the most exposed to changes. Moreover, 'sectoral collective bargaining has now largely disappeared from the private sector, removing an essential component of the pre-WTD [Working Time Directive] protections'.[41]

Employment standards can be divided into two groups. First, in some areas EU membership has induced a significant increase in the level of protection. An example is

39 The process of flexibilisation has been observed over recent years. For instance, in 2013, Poland introduced new instruments allowing for flexibilisation of working time. See Dagmara Skupień, Maciej Łaga and Łukasz Pisarczyk, 'Poland: Recent Development in Polish Labour and Social Security Law – The Social Dialogue, Flexibility and Welfare State' in Martin Stefko (ed), *Labour Law and Social Security Law at the Crossroads – Focused on International Labour Standards and Social Reforms* (Charles University in Prague Faculty of Law 2016).

40 Sandra Fredman, Alan Bogg, Alison Young and Meghan Campbell, 'The Human Rights Implications of Brexit' (*Oxford Human Rights Hub/The UK in Changing Europe* 2018) <http://ukandeu.ac.uk/wp-content/uploads/2018/04/The-continuing-impact-of-Brexit-on-equality-rights.pdf>.

41 Ibid. The UK government has stated that UK maternity leave is higher than required by EU legislation, as leave was extended to a maximum of 52 weeks by regulation in 2012, while the EU Pregnancy Directive only requires 14 weeks of maternity leave, of which at least two weeks must be compulsory (Directive 92/85/EEC, OJ L 348, 28 November 1992, at 1, consolidated version at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01992L0085-20140325>. However, the requirement to claim maternity leave from one's employer 15 weeks before commencement limits maternity rights, as well as the additional requirement of having accrued 26 weeks of employment for the additional period. The limitations of maternity pay in the UK, and the protection against dismissal of pregnant women, constitute further practical barriers (dismissal of a pregnant woman or women on maternity leave is only deemed unfair if it is based on the leave or pregnancy itself (Maternity and Parental Leave etc. Regulations 1999, SI 1991/3312, last changed by Maternity and Parental Leave etc. (Amendment) Regulations 2014, SI 2014/3221). There are concerns that the withdrawal from EU membership will affect the future trajectory of UK gender equality law, see Roberta Guerrina and Annick Masselot, 'Walking into the Footprint of EU Law: Unpacking the Gendered Consequences of Brexit' (2018) 17(2) Social Policy and Society 327.

the working time regulations following Directives 93/104[42] and 2003/88.[43] Although the UK adopted a liberal model of protection in the area of working hours (through the option of waiving the mandatory daily and weekly norms of working time),[44] it was a significant change compared to the traditional approach to working time in Great Britain[45] with a maximum weekly norm of working hours (48) which, in some aspects, limited the freedom to organise working time and impacted the costs of economic activity. As a result, after 'Brexit' working time standards may become a target of liberalisation advocates.[46].

From the perspective of freedom of economic activity, the protection of employees at the transfer of an undertaking is also contested (Directive 2001/23).[47] Before the implementation of the first transfer Directive, British law did not recognise the automatic change of employers as a consequence of a takeover of an undertaking (business) or its part.[48] The obligation to continue employment relationships with the same working conditions deeply affects the transferee position. Moreover, British legislation went relatively far by extending the concept of transfer to cover outsourcing procedures (even second-generation outsourcing). Far-reaching protection, such as the restrictions on harmonising conditions of work after the transfer, have been criticised for inconveniencing employers.[49] Some problems will also appear in the field of cross-border transfers. Even today it is unclear whether such changes are covered by the protection arising from Directive 2001/23. In case of a transfer between EU Member States and states that are outside the Union, it is problematic to expect that courts would hold the transferred entities to have retained their identity (taking into account a significant change of the attendant legal background).

Among other standards that will be maintained post-Brexit are fundamental rules which govern the relationship between the employer and the employee, predominantly anti-discrimination law.[50] The UK government has vowed to keep the standards arising

42 Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time [1993] OJ L 307/18.

43 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299/9.

44 However, British law recognised opting out of the 48-hour working week (see reg 5 the Working Time Regulations 1998, SI 1998/1883).

45 See e.g. Stephen Hardy, *Labour Law and Industrial Relations in Great Britain* (3rd revised edn, Kluwer Law International 2007) 124–5; and Simon Honeyball, *Textbook on Employment Law* (13th edn, Oxford University Press 2014) 10–11.

46 Tony Dobbins, 'Tory Attack on Working Time Directive Signals a Post-Brexit Race to the Bottom' (*The Conversation*, 20 December 2017) <http://theconversation.com/tory-attack-on-working-time-directive-signals-a-post-brexit-race-to-the-bottom-89395>; Doug Pyper, 'Brexit: Employment Law' (Commons Briefing Paper 7732, 10 November 2016) <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7732 >.

47 Council Directive 2001/23/EC of 21 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertaking or businesses [2001] OJ L 82/16, replacing Council Directive 77/187/EEC of 14 February 1997 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of business [1977] OJ L 61/26.

48 About the implementation consequences see Hardy (n 45) 166ff.

49 Anthony Fincham, Finlay McKay, Alison Woods, Graham Paul, Gillian MacLellan and Sarah Ozanne, 'The Impact of Brexit on UK Employment Law' (*CMS Cameron McKenna LLP*, 2016) 3 <www.lexology.com/library/detail.aspx?g=4f793105-7fa5-4a01-82b2-9a91a52d6564>.

50 About the impact of Brexit on equality rights, see Sandra Fredman et al (n 40).

from EU law and unified in 2010.[51] Moreover, the protection arising from the EU standards will be supported by the application of CJEU judgments which will be applied to preserve EU-derived law. However, there will be an important time limitation as only the judgments binding on the UK on the day of its departure from the EU will continue to apply.[52]

6 Brexit and migrant workers

The first important question concerns the future rights of workers who arrived in the UK before Brexit (or before another date negotiated with the EU). Clear guarantees for this group of people were widely expected to be established in other EU Member States. Until Brexit, EU citizens will continue to enjoy the full rights guaranteed them by the Treaties. An important element of the new system is the so-called 'settled' status. EU citizens granted this status will be free to reside in the UK, undertake any lawful activity and continue to have access to social services. According to the Settlement Scheme, to obtain settled status EU citizens will generally need to have lived continuously in the UK for five years. Those with less than five years' continuous residence will be granted pre-settled status and be able to apply for settled status once they reach the five-year point. There will be no change to the current rights until the end of the implementation period on 31 December 2020, and the deadline for applications to the scheme for those resident in the UK by the end of 2020 will be 30 June 2021.[53] The first applications have just been submitted. However, the scheme is not due to fully open until 30 March 2019.[54]

The UK and the EU will also need to deal with the problem of migrant workers who wish to move to the UK in the future. A common market with freedom of movement could theoretically be maintained. This scenario is unlikely to become reality because 'uncontrolled immigration', inter alia in relation to its alleged impact on the labour market, was one of the key reasons for the Brexit vote, and the UK government has vowed that free movement will cease to exist.[55] The immigration policy that replaces freedom of movement will depend on the situation of the British labour market: despite claims to the contrary during the referendum campaign, there are numerous sectors of the British economy that rely on migrant workers. If the UK introduces a system of permits, the EU will probably expect a special (simplified) procedure for its citizens. Poland recently introduced a simplified procedure for workers from certain Eastern non-EU European countries, largely to facilitate the recruitment of Ukrainian workers. Although the regular procedure required permits to be issued by public authorities, the simplified procedure requires only that the public authorities be notified.[56]

51 Department for Exiting the EU, 'Legislating for the United Kingdom's withdrawal from the European Union', presented to Parliament by the Secretary of State for Exiting the EU by Command of Her Majesty, London, March 2017, Cm 9446, 16, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf>.

52 European Union Withdrawal Act 2018 (n 6) ch 16 does not provide any role for the CJEU in the interpretation of that new law, and does not require the domestic courts to consider the CJEU's jurisprudence. In that way, the Act allows the UK to take control of its own laws.

53 Home Office, EU Settlement Scheme: Statement of Intent (21 June 2018) <www.gov.uk/government/publications/eu-settlement-scheme-statement-of-intent>.

54 'Brexit: First Applications from EU Nationals for Settled Status (*BBC News,* 28 August 2018).

55 Secretary of State for the Home Department (n 9) 7.

56 Act of 20 April 2004 on employment promotion and labour market institutions (Journal of Laws, consolidated text from 2017, item 1265, and the implementing Acts, in particular Decree of Ministry of Family, Labour and Social Policy of 7 December 2017 on issuing work permits for foreigners and entry of declaration of entrusting work to a foreigner into the register of declarations (Journal of Laws from 2017, item 2345).

There are further doubts regarding the criteria applied to migrant workers. If the UK wants to limit immigration to skilled workers, it will be necessary to determine a set of qualifications, and perhaps to differentiate the period for which people of different levels of qualification are allowed to reside in the country. Regardless of how the UK revises its immigration policy, it is worth mentioning the International Labour Organization (ILO) Convention concerning Migration for Employment (revised 1949),[57] as well as obligations under other international instruments.[58] Obviously, the UK has declared that it will continue to honour its international commitments and follow international law.[59] In the past, the Committee of Experts assessed rather positively the British legislation in this area. The Committee noted, for example, that the Equality Act of 2010[60] prohibited discrimination on the basis of a number of grounds including sex, religion and race, which also includes nationality.[61]

The ILO Convention requires equal treatment of workers migrating for employment at the level of statutory standards and actions. The states bound by the ILO Convention are obliged to apply to immigrants lawfully within their territory – without discrimination in respect of nationality, race, religion or sex – treatment no less favourable than that which applies to their own nationals in respect of the following matters:

(a) in so far as such matters are regulated by law or regulations, or are subject to the control of administrative authorities:
    (i) remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home-based work, minimum age for employment, apprenticeship and training, women's work and the work of young persons;
    (ii) membership of trade unions and enjoyment of the benefits of collective bargaining;
    (iii) accommodation;
(b) social security (in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to some limitations;[62]

57 The term migrant for employment, under this Convention, refers to a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment (Article 11.1). The Convention does not apply to (a) frontier workers; (b) short-term entry of members of the liberal professions and artists; and (c) seamen; (International Labour Conference (32nd Session) Convention C097 Migration for Employment C097, Revised, 1949 (No 97), Geneva, 1 July 1949).

58 See Article 19 of the European Social Charter, under which migrant workers who are nationals of a Contracting Party and their families have the right to protection and assistance in the territory of any other Contracting Party.

59 Department for Exiting the EU (n 51) 15: 'It is abundantly clear that the UK is in breach of international law if it does not uphold its treaty commitments. But at domestic level, little or no weight is given to this fact.' See Fredman et al (n 40).

60 Equality Act 2010.

61 <www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101_COMMENT_ID:2300593> However, there were some concerns, e.g. about the situation of overseas domestic workers.

62 '(i) there may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition; (ii) national laws or regulations of immigration countries may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension'.

(c) employment taxes, dues or contributions payable in respect of the person employed; and

(d) legal proceedings relating to the matters referred to in this Convention (Art. 6).[63]

The ILO Convention allows, under certain conditions, for more detailed arrangements between states.[64]

7 The situation of the UK and Polish labour markets

The UK is one of the largest labour markets in Europe and is often a destination of choice for EU citizens. Its popularity is due to the relatively high level of remuneration, a developed social protection system, access to non-material goods (culture, sport), and the opportunities offered by a multicultural society. These conditions have resulted in immigration on a large scale: more than 10 per cent of workers are foreign citizens[65] and between January and March 2017 approximately 7 per cent of workers were from other Member States.[66] There are various sectors of the British economy (e.g. agriculture) which particularly depend on this workforce.

While the Polish labour market is also one of the largest in the EU – there are around 16.5 million workers,[67] including around 13 million employees[68] – Poland has traditionally faced the problem of emigration. There have been several waves, starting in the immediate post-war period, and continuing throughout the 1970s and 1980s. After the central and eastern enlargement of the EU in 2004 the UK opened its labour market to workers from new Member States, which had serious social and economic consequences. In the early 2000s, the unemployment rate in Poland reached 20 per cent[69] (despite the introduction of labour law reforms), resulting in another wave of emigration to Ireland and the UK. The new wave of workers suffered from less favourable working conditions – including lower pay – accompanied by a low level of unionisation (around 8%; much lower than among UK workers). Due to lower costs of employment and a weaker bargaining position, these workers were considered to be more attractive than British workers; however, there were

63 'A migrant for employment who has been admitted on a permanent basis and members of his family who have been authorised to accompany or join him shall not be returned to their territory of origin or the territory from which they emigrated because the migrant is unable to follow his occupation by reason of illness contracted or injury sustained subsequent to entry, unless the person concerned so desires or an international agreement to which the Member is a party so provides (Art. 8.1.) When migrants for employment are admitted on a permanent basis upon arrival in the country of immigration the competent authority of that country may determine that the provisions of paragraph 1 of this Article shall take effect only after a reasonable period which shall in no case exceed five years from the date of admission of such migrants.'

64 'In cases where the number of migrants going from the territory of one Member to that of another is sufficiently large, the competent authorities of the territories concerned shall, whenever necessary or desirable, enter into agreements for the purpose of regulating matters of common concern arising in connection with the application of the provisions of this Convention (Art. 9).'

65 Cinzia Rienzo, 'Migrants in the UK Labour Market: An Overview' (*The Migration Observatory*, 17 March 2017) <http://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/Briefing-Migrants_in_the_UK_Labour_Market.pdf>.

66 Feargal McGuiness, 'Employment of Other EU Nationals in the UK' (House of Commons Briefing Paper, 3 August 2017) 3 <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8069#fullreport>.

67 Trading Economics, 'Poland Employed Persons 2010–2018' <https://tradingeconomics.com/poland/employed-persons>.

68 Central Statistical Office of Poland, 'Quarterly Information on the Labour Market in the 3rd Quarter of 2017' <http://stat.gov.pl/en/topics/labour-market/working-unemployed-economically-inactive-by-lfs/quarterly-information-on-the-labour-market-in-the-3rd-quarter-of-2017,8,27.html>.

69 Central Statistical Office of Poland, 'Unemployment Rate 1990–2018' <https://stat.gov.pl/en/topics/labour-market/registered-unemployment/unemployment-rate-1990-2018,3,1.html>.

problems of social integration, and allegations that migrant workers were abusing the social security system. It led to an increase in tension between British citizens and migrant workers. Aversion to migrant workers has become a catalyst for a deterioration in attitude towards the EU and one of the reasons for the referendum result.[70]

The Polish labour market has changed significantly, subsequent to Poland's accession to the EU. In 2017, the employment rate was the highest in recorded history (around 16.5 million),[71] while the unemployment rate had decreased to around 6.5 per cent.[72] Nevertheless, in many sectors a labour shortage could be observed. This applies to both low-skilled workers (e.g. in the retail sector) and highly skilled employees (e.g. in the healthcare sector). As it happens, Polish workers from these same sectors are emigrating to the Western EU countries, presently still predominantly to the UK. Such a situation provokes questions about the relationship between the education system and employment policy. Education in some areas (e.g. medical studies or IT studies) is very expensive and, for a large number of students, funded by the state. At the same time, young university graduates in these subjects emigrate to countries offering better working conditions and a higher level of remuneration than Poland. The demand for employees seen in Poland over recent years has caused some significant changes in the Polish labour market. First, it has led to an increase in remuneration. The statutory minimum wage increased from PLN824 in 2004[73] to PLN2100 in 2018.[74] The average remuneration in the national economy has now exceeded the threshold of PLN4200, whereas in 2004 it hovered around PLN 2300.[75] Thanks to this, the Polish labour market has become more attractive for workers, especially those from poorer European countries, including non-EU countries (predominantly Ukraine). From the Ukrainian perspective, Polish wages appear relatively high which, in combination with the liberalisation of immigration rules,[76] has contributed to a considerably increased migration of Ukrainian workers to Poland. Moreover, the Polish authorities expect that the current situation will also change the attitude of Polish workers by, it is hoped, reducing the rate of internal immigration within Poland and encouraging Poles living abroad to return. Second, there is also the necessity to fill the gap in the labour market, to which the liberalisation of immigration rules for citizens of some countries (including Ukraine) has contributed. On top of that, the government is striving to reverse current tendencies and encourage Poles living abroad (mainly in the UK) to return, in particular highly skilled employees. This was explicitly confirmed by the Polish Prime Minister during a recent visit to the UK. Brexit may only serve to enhance such trends. While some Poles may anticipate growing pressure and a less welcoming atmosphere,

70 Gumbrell-McCormick and Hyman (n 29). See also Catherine Barnard and Sarah Fraser Butlin, 'Free Movement vs Fair Movement: Brexit and Managed Migration' (2018) 55 Common Market Law Review 203–4.

71 Trading Economics (n 67).

72 Central Statistical Office of Poland, 'Knowledge Database Labour Market', <http://swaid.stat.gov.pl/en/RynekPracy_dashboards/Raporty_predefiniowane/RAP_DBD_RPRA_17.aspx>.

73 Regulation of Council of Ministers dated 9 September 2003 on the amount of minimum remuneration for work in 2004 (Journal of Laws, No 167, Item 1623) <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20031671623/O/D20031623.pd>.

74 Regulation of Council of Ministers dated 12 September 2017 on the amount of minimum remuneration for work and minimum hourly rate in 2018 (Journal of Laws 2017, Item 1747) <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20170001747/O/D20171747.pd>.

75 Central Statistical Office of Poland, 'Average Monthly Gross Wage and Salary in National Economy 1950–2017' <https://stat.gov.pl/en/topics/labour-market/working-employed-wages-and-salaries-cost-of-labour/average-monthly-gross-wage-and-salary-in-national-economy-1950-2017,2,1.html>.

76 Act of 20 April 2004 (n 56).

others may be motivated by the much higher costs of living in the UK, in spite of the higher level of wages and quality of social protection in the Britain.

In the UK, the labour market has already started to change as a result of the Brexit referendum. Although there are still more EU citizens coming to the UK than leaving, the number of those leaving the UK has increased.[77] Some groups of migrant workers began to leave almost immediately after the Brexit referendum, due to uncertainty about their future employment status and an increasingly negative atmosphere for foreign employees. In general, there has been a decrease among workers from those Member States that joined the EU in 2004. This is due in part to the racially motivated abuse experienced in the aftermath of the referendum, but also to the stronger position of other nations within the common European labour market. Increasingly, Polish workers are searching for work in other European countries. Very popular directions are Germany, the Netherlands and (recently) Belgium.[78] Many workers are also choosing the Scandinavian countries. In the UK there has been an increase in the number of workers from Bulgaria and Romania, both of which joined the EU more recently.[79] Migrant workers are essential in those sectors (agriculture is one example) where the low pay and poor working conditions are not attractive for British citizens, and there are plans to establish special visa programmes for Ukrainian and Turkish citizens. These provisions, which will lead to maintaining the current rights of migrant workers in respect of access to the British labour market, however, raise questions about the real justification behind Brexit.

8 Conclusions

The implementation of Brexit will pose many challenges to the labour law systems at European and national levels. Brexit may eliminate one of the obstacles to social development. The Union is trying to capitalise on this opportunity and change the relationship between its economic and social objectives. It is hardly an accident that the Union proclaimed the European Pillar of Social Rights during Brexit negotiations. Paradoxically, the role of the UK could in future be taken over by CEE countries. For them, adoption of a more developed social model may lead to losing one of their most important advantages – the lower cost of work. However, after the withdrawal of the UK, the position of the 'liberal group' will get much weaker. This was clearly confirmed by the amendment to the Posted Workers Directive. A further problem will be the situation of multinational labour law institutions. However, there is still a possibility of regulating some of these issues in the Brexit agreement.

There are also concerns about how Brexit will affect British labour law. Many of its institutions have been introduced or developed to implement European standards. Waves of returning workers may also have an adverse effect on the labour market in their own countries, and it may become necessary to adjust working conditions in response to increased unemployment rates.

77 Office for National Statistics, 'Migration Statistics Quarterly Report: July 2018 (rescheduled from May 2018)' 2 <www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/migrationstatisticsquarterlyreport/july2018revisedfrommaycoveringtheperiodtodecember2017>.

78 Central Statistical Office of Poland, 'Main Directions of Emigration and Immigration in the Years 1966–2014 (Migration for Permanent Residence)' <https://stat.gov.pl/en/topics/population/internationa-migration/main-directions-of-emigration-and-immigration-in-the-years-1966-2014-migration-for-permanent-residence,2,2.html>.

79 Allan Travis, 'Number of Romanians and Bulgarians in UK Rises to 413,000' (*The Guardian*, 11 October 2017) <www.theguardian.com/uk-news/2017/oct/11/number-of-romanians-and-bulgarians-in-uk-rises-413000>.

The next question concerns guarantees for workers who are currently employed in the UK; it will then be necessary to establish new mechanisms regulating access to the British labour market, and to determine the length of the transition period. Although it seems unlikely that the current standard of freedom of movement will be maintained, there may end up being a clash between political expectations and the needs of the British economy. In addition, there are numerous technical questions that may hinder the application of the newly adopted rules. There are also fundamental questions concerning European labour law and transnational institutions after Brexit.

Finally, Brexit will affect labour markets in many other European countries. In the UK, there will naturally consequences for British citizens while other Member States will experience a wave of returns. Numerous workers will leave Great Britain and move to their home countries or other European states, which may have the effect of threatening the current social equilibrium.

A lot depends on the agreements regulating Brexit and the UK's future cooperation with the EU. The closer this relationship is, the higher will be the standards of employment that have to be maintained. Moreover, there is also an opportunity to protect or re-establish transnational mechanisms and institutions which may be a trigger for future collaboration.

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EU environmental law and policy post-Brexit: models for engagement between the EU27 and the UK

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Abstract

The UK's departure from the EU will have significant impact on the existing EU environmental protection regimes. This article examines the possible options for the new relationship between the EU27 and the UK and how the environment might be protected under this. This is done through an analysis of how environmental law is dealt with under the EU's existing relationship models with non-member states. These models are examined in conjunction with the negotiating lines that have been set down by both the UK and EU to see which is most politically feasible, and what impact it will have on how the EU protects the environment.

Keywords: Brexit; environmental law; climate change law; no-deal; EU law

1 Introduction

Just as in all other fields, the departure of the UK from the EU is going to have a major impact on environmental law and policy, both in that country and across the remaining 27 Member States. The transnational nature of EU law and its ability to maintain coherence in the legal regimes of all the Member States has represented an unprecedented means of setting and achieving environmental goals. The unified nature of this system, and the various thematic environmental legal regimes established through it, will now be diminished, irrespective of claims by Environment Secretary Michael Gove about the prospect of a 'Green Brexit'.[1]

There has already been significant commentary about the potential negative impacts of Brexit for UK environmental law.[2] As the March 2019 departure deadline draws closer, it is appropriate that consideration is also given to the possible post-Brexit environmental

1 'New Environmental Protections to deliver a Green Brexit' (Press Release, Department for Environment, Food and Rural Affairs, 12 November 2017) <www.gov.uk/government/news/new-environmental-protections-to-deliver-a-green-brexit>.

2 Maria Lee, 'Accountability for Environmental Standards after Brexit' (2017) 19(2) Environmental Law Review 89–92; Colin T Reid, 'Brexit and the Future of UK Environmental Law' (2016) 34(4) Journal of Energy and Natural Resources Law 407–15; Chris Hilson, 'The Impact of Brexit on the Environment: Exploring the Dynamics of a Complex Relationship' (2017) 7 Transnational Environmental Law 1–25. Lee outlines some potential (though it is submitted here, unlikely) upsides for the UK in moving away from the EU approach to environmental regulation which, he argues, is centred around the needs of the Internal Market: Robert Lee, 'Always Keep a Hold of Nurse: British Environmental Law and Exit from the European Union' (2017) 29 Journal of Environmental Law 155–64.

regime that will exist between the UK and the EU27 and how this can best maintain the coherence of existing EU environmental norms. Any measures that address environmental law in the new relationship will operate within the wider legal and institutional arrangements that will be agreed. In order to better understand the potential options for the future relationship, this article considers the existing legal frameworks that the EU has entered into with non-member states, and the environmental law implications of each of these.

Section 2 examines the types of legal relations that the EU has formed with third countries: European Free Trade Area (EFTA) membership combined with bilateral agreements (the Swiss approach); the European Economic Area (EEA) Agreement model; third-country membership of the EU's Customs Union; Association Agreements; trade relationships based on the Common Commercial Policy (CCP); the EU's express treaty-making power in the area of the environment; and the European Neighbourhood Policy (ENP). The key characteristics and institutional arrangements of each are described, as well as specific aspects related to environmental policy, using examples of individual agreements where appropriate. While some of these models have already been explicitly ruled out by the British government, it is submitted that the continued lack of clarity on the present Prime Minister's preferences on a post-Brexit deal, the uncertainty surrounding what would be acceptable in the Conservative Party and the realistic possibility that the final negotiations may be undertaken by a Labour government after another general election justify discussing all potential options.

Notwithstanding these uncertainties, broad parameters of the future relationship between the EU and the UK have been sketched by the UK government and the EU negotiators. In light of these, Section 3 outlines what type of new arrangement might be politically feasible and the extent to which it would allow for the maintenance of the consistency of the EU's environmental regime.[3] Consideration is also given to the coherency of this regime in the event of a 'no-deal' scenario.

2 EU–third-country relationships in the field of environmental law

The approach to how the EU interacts with third countries has evolved over time.[4] Emerson has identified 13 different sets of graduated arrangements regulating the EU's relationship with neighbouring countries.[5] This section considers the structure of relationships between the EU and contiguous states, near-neighbours, and industrialised non-neighbourhood states, with a focus on how environmental issues are addressed in these relationships.

2.1 European Free Trade Agreement membership combined with bilateral agreements with the EU (the Swiss Model)

Founded in 1960, the EFTA is an intergovernmental organisation, comprising four states: Iceland, Liechtenstein, Norway and Switzerland.[6] The four members form a free trade area, and the EFTA negotiates free trade agreements with third countries on their behalf.

3 While the fields of agriculture and fisheries have significant impacts on the environment, they are omitted from the scope of this article due to the particularly unique legal provisions around the EU's Common Agricultural Policy and the Common Fisheries Policy. As such, the focus of this article is legal measures related to the environment, climate change and sustainable development.

4 Panos Koutrakos, *EU International Relations Law* (2nd edn, Hart 2015) 359.

5 Michael Emerson, 'Just Good Friends? The European Union's Multiple Neighbourhood Policies' (2011) 46(4) The International Spectator 45–62, 45.

6 Convention Establishing the European Free Trade Association (Stockholm, 4 January 1960).

Only one of the four – Switzerland – is not also a signatory of the EEA Agreement (discussed in Section 2.2 below), having voted against membership in a referendum in 1992. While Switzerland shares a free trade area with the EFTA and EU states, it is not participating in the EU Internal Market. As a consequence, it only has limited access in the area of free movement of goods under bilateral agreements negotiated with the EU.[7] And it is also outside of the Customs Union. As with the EEA states, Switzerland can conclude trade agreements with non-EU states.

Due to its rejection of EEA membership, each element of EU–Swiss legal relations has to be negotiated on a bilateral basis. There are over 100 such agreements and, while there is no internalised obligation within Swiss law to adhere to these, the risk of a retaliatory blockage of access to free movement of goods by the EU in the event of non-compliance means that, in reality, Switzerland chooses to align itself with many EU laws.[8] This alignment is based on the principle of equivalence of law.[9] The arrangement lacks the supervisory and dispute resolution institutional structures present under the EEA Agreement. The sole EFTA membership model has been criticised due to the perceived 'fragility' of the bilateral approach of Switzerland.[10] This criticism is reflected in the efforts by the EU to reform the manner in which legal relations between the EU and Switzerland operate, with a particular focus on each agreement being interpreted in conformity with the case law of the Court of Justice of the European Union (CJEU).[11] Similarly, only three of the bilateral agreements are dynamic, to the extent that the agreements are updated as EU law changes.[12]

2.1.1 Swiss–EU relationship and environmental law and policy

Switzerland is engaged in environmental cooperation with the EU on a number of grounds, primarily on the basis of the bilateral agreements such as the Agreement on Air Transport (addressing noise emissions) and the Agreement on the Carriage of Goods and Passengers by Rail and Road (placing environmental taxes on heavy road haulage).[13] The influence of the EU in terms of the environment can also be seen with pieces of EU legislation being substantially mirrored within domestic law, such as the Chemicals Ordinance on Protection against Dangerous Substances and Preparations, which significantly copies the EU REACH Regulation on chemicals.[14] A recent agreement will see the emissions trading systems of the EU and Switzerland being linked.[15]

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7 *Alternatives to Membership: Possible Models for the United Kingdom Outside the European Union* (Foreign and Commonwealth Office, March 2016) 26.

8 Ibid. The authors note particular alignment in the fields of competition law, state aid and environmental regulation.

9 Sieglinde Gstöhl and Christian Frommelt, 'Back to the Future? Lessons of Differentiated Integration from the EFTA Countries for the UK's Future Relations with the EU' (2017) 6(4) Social Sciences 1–17, 2.

10 Ciarán Burke, Ólafur Ísberg Hannesson and Kristin Bangsund, 'Life on the Edge: EFTA and the EEA as a Future for the UK in Europe' (2016) 22(1) European Public Law 69–96, 95, fn 120.

11 Christa Tobler, 'One of Many Challenges after "Brexit": The Institutional Framework of an Alternative Agreement – Lessons from Switzerland and Elsewhere?' (2016) 23 Maastricht Journal of European and Comparative Law 575–94, 578, 581.

12 Ibid 590–1.

13 Federal Office for the Environment, 'Relations between Switzerland and the EU in the Area of the Environment' <www.bafu.admin.ch/bafu/en/home/topics/international-affairs/organisations/relations-between-switzerland-and-the-eu-in-the-area-of-the-envi.html>.

14 Ondřej Filipec, *REACH Beyond Borders: Europeanization Towards Global Regulation* (Springer 2017) 122.

15 'EU and Switzerland Sign Agreement to Link Emissions Trading Systems', European Commission <https://ec.europa.eu/clima/news/eu-and-switzerland-sign-agreement-link-emissions-trading-systems_en>.

Unlike EFTA–EEA states, Switzerland is unable to submit formal comments during the drafting stage of EU legislation, limiting its capacity to influence the final content. However, Swiss representatives do attend informal meetings of EU environmental ministers. Switzerland has also made financial contributions to the 2004 and 2007 accession states in order to improve their national infrastructure on a number of headings, including the environment.[16]

2.2 The European Economic Area Agreement

The EEA Agreement, signed at the Treaty of Oporto in 1991, allows three of the four EFTA states (Iceland, Liechtenstein and Norway) to participate in the EU's Internal Market. EU legislation relating to the Internal Market, research and development policy, social policy, education, consumer protection and environmental protection is incorporated into the EEA Agreement and is therefore applicable within those three states.[17] As EU legislation in these areas changes, the EEA Agreement is continuously updated through decisions of the EEA Joint Committee, one of the institutions established to oversee the implementation of the Agreement. These EEA Acts ensure the applicability of EU law in the EEA states.[18] The EEA Joint Parliamentary Committee undertakes scrutiny of decisions taken by the Joint Committee.

The EFTA Surveillance Authority mirrors the European Commission's role in ensuring that states abide by their obligations under the Agreement. It can undertake investigations of potential breaches and initiate an action against one of the component states at the EFTA Court. The EFTA Court rules on infringement actions brought either by the Surveillance Authority or another signatory state against a signatory state. It has competence to hear appeals against decisions taken by the Surveillance Authority and can give advisory opinions about the interpretation of the EEA Agreement. Unlike the CJEU, the EFTA Court does not have the power to impose a fine on states. EEA legislative measures within EEA states do not enjoy supremacy and direct effect in the same way as EU law within Member States, but there are three means of achieving similar ends: the obligation on the states to conform to their interpretation, the doctrine of state liability and Protocol 35 to the EEA Agreement (which states that in the event of a clash between EEA rules and other statutory provisions, the state undertakes to introduce a statutory provision to allow the EEA rules).[19]

2.2.1 The European Economic Area Agreement and environmental law and policy

The elements of environmental law covered by the EEA Agreement are primarily set out in Annex XX (Environment), while Annex II (Technical Regulations, Standards, Testing and Certification) also contains a section on environmental protection which enumerates a significant amount of applicable legislation. Annex XX also lists a number of pieces of EU environmental legislation which are specified as not being covered by the EEA Agreement, encompassing both legislation in existence at the time the agreement was signed and new laws subsequently passed. These exclusions cover broad areas such as

16 Federal Council, 'Switzerland's Contribution to an Enlarged EU' <www.erweiterungsbeitrag.admin.ch/erweiterungsbeitrag/en/home.html>.

17 Damien Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Text and Materials* (3rd edn, Cambridge University Press 2014) 31.

18 'How EU Acts Become EEA Acts and the Need for Adaptations', Note by Subcommittee V on Legal and Institutional Questions, EEA Standing Committee of the EFTA States, Ref 1113623 (23 May 2013).

19 Burke et al (n 10) 79–80.

wildlife protection, some water quality rules, radiation control and the Kyoto Protocol.[20] As such, the listed legislation is not binding in the states that have signed up to the EEA Agreement.

While EFTA–EEA states do not have the capacity to directly amend draft regulations and directives through the Council of Ministers and the European Parliament, it has been noted that they can bring some influence to bear on the shaping of EU legislation through the submission of written comments on draft documents and participation in expert groups of the Commission or in comitology committees.[21] A case study published by the EFTA outlines the interactions that it had with the EU during the drafting of the REACH Regulation on chemicals,[22] comprising a series of engagements over a six-year period including meetings of ministers and of experts, as well as written responses to the EU White Paper and successive drafts.[23] While acknowledging the difficulty in measuring any specific EFTA impact due to the large number of other stakeholders involved, it notes that one EFTA priority – substituting dangerous substances for less dangerous ones where possible – is included in the legislation and another – the placing of a duty of care on manufacturers – is referred to in the Regulation's preamble.[24] The EEA states must also make contributions to the 'EEA and Norway Grants' scheme, which provides funding for a number of EU beneficiary states to undertake projects under a number of headings, including the environment.[25]

2.3 Customs Union membership

The EU Customs Union includes the 28 Member States, along with some territories of the UK which are not part of the EU (Isle of Man, Guernsey, Jersey, Akrotiri and

20 Council Directive 76/160/EEC of 8 December 1975 on the quality of bathing water (The Bathing Water Directive) [1976] OJ L 31/1; Council Decision 77/795/EEC of 12 December 1977 establishing a common procedure for the exchange of information on the quality of surface fresh water in the Community [1977] OJ L 224/29; Council Directive 78/659/EEC of 18 July 1978 on the quality of fresh waters needing protection or improvement in order to support fish life [1978] OJ L 222/1; Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (The Birds Directive) [1979] OJ L 103/1; Council Directive 79/923/EEC of 30 October 1979 on the quality required of shellfish waters [1979] OJ L 281/47; Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (The Habitats Directive) [1992] OJ L206/7; Council Directive 96/29/Euratom of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionising radiation [1996] OJ L 159/1; Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein [1997] OJ L 61/1; Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder [2002] OJ L 130/1; Council Directive 2003/122/Euratom of 22 December 2003 on the control of high-activity sealed radioactive sources and orphan sources [2003] OJ L 346/57; Decision No 280/2004/EC of the European Parliament and of the Council of 11 February 2004 concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol [2004] OJ L 9/1; Directive 2006/7/EC of the European Parliament and the Council of 15 February 2006 concerning the management of bathing water quality [2006] OJ L 64/37; Directive 2006/44/EC of the European Parliament and of the Council of 6 September 2006 on the quality of fresh waters needing protection or improvement in order to support fish life [2006] OJ L 264/20; Council Directive 2006/117/Euratom of 20 November 2006 on the supervision and control of shipments of radioactive waste and spent fuel [2006] OJ L 337/21.

21 See Gstöhl and Frommelt (n 9) 10.

22 Regulation (EC) No 1907/2006 of the European Parliament and of the Council on Registration, Evaluation, Authorisation and Restriction of Chemicals [2006] OJ L396/1.

23 'Decision Shaping in the European Economic Area' (EFTA Bulletin 1/2009, Brussels 2009) 26–7.

24 Ibid 26.

25 <https://eeagrants.org>

Dhekelia) and Monaco. These states have abolished internal tariffs between them and have agreed to charge the same external tariffs on goods entering the Customs Union. Beyond the removal of customs duties, the key benefit from membership of the Customs Union is that goods are not subject to quotas, checks and inspections for safety or routine customs processes such as providing customs declarations.[26] Nor do goods have to comply with burdensome Rules of Origin, which is of particular importance in the context of products made from a number of components.[27]

The EU has also entered into a Customs Union with Turkey, Andorra and San Marino. As these non-EU states are now bound by the EU's common external tariff, they can only enter into subsequent free trade agreements with third countries which comply with the EU's external tariff regime.[28] Linked to this, where the EU enters into a trade agreement with a third country, the non-EU Customs Union member must permit the goods of that third country to enter its territory, but has to negotiate separately the entry of its goods into the third country.

In terms of market size, the 1996 Customs Union Agreement (CUA) with Turkey is the most significant CUA which the EU has entered into.[29] It requires Turkey to apply the EU common external tariff to the majority of industrial products and also to the industrial components of processed agricultural goods.[30] Trade in primary agricultural products is excluded.[31] The agreement provides for an informal right of consultation with Turkey when the EU draws up new legislation relevant to the Customs Union.[32] Turkey is also to be informed of any decision to alter the EU's Common Customs Tariff.[33] The overall implementation of the Agreement is overseen by a Customs Union Joint Committee.[34] Its role is primarily one of providing recommendations and options about the proper functioning of the Customs Union.[35]

2.3.1 Customs Union and environmental law and policy

Within their wider role, customs officials undertake measures related to the environment, including controlling import of exotic species, rare timber and confirming that requirements surrounding the live transportation of animals are met.[36] They ensure the products coming into the EU meet the particular environmental requirements across a broad range of areas such as chemicals, ozone-depleting substances, fluorinated greenhouse gases, endangered species and waste.[37] Full membership of the Customs Union thus requires a non-member state to be compliant with a significant range of environmental regulations and directives.

26 *Future Customs Arrangements: A Future Partnership Paper* (HM Treasury, HM Revenue & Customs, and Department for Exiting the European Union, 15 August 2017) 6.

27 *Alternatives to Membership* (n 7) 10.

28 Ibid 29.

29 Decision No 1/95 of the EC–Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (96/142/EC) [1996] OJ L 35/01.

30 *Evaluation of the EU–Turkey Customs Union* (Report No 85830-TR, World Bank, 28 March 2014).

31 Article 2.

32 Article 55.

33 Article 14.

34 Article 52.

35 Steve Peers, 'Living in Sin: Legal Integration under the EC–Turkey Customs Union' (1996) 7 European Journal of International Law 411–30, 420.

36 *The EU Customs Union: Protecting People and Facilitating Trade* (European Commission Directorate-General for Communication 2014) 3.

37 <http://trade.ec.europa.eu/tradehelp/environmental-requirements>

2.4 Association Agreements

The authority to negotiate an Association Agreement with other states or international organisations has been open to the EU since the Treaty of Rome and is now provided for in Article 217 Treaty on the Functioning of the European Union (TFEU). The provision itself is vague as to what Association Agreements should cover, other than that they involve 'reciprocal rights and obligations, common action and special procedure'.[38] This lack of detail on what they contain has led Association Agreements to being described as 'formal frameworks for privileged relations without strict rules as to the possible substantive scope of those relations'.[39] A range of differently titled legal agreements have sprung from this provision including Association Agreements, Europe Agreements, Stabilisation and Association Agreements, and Cooperation and Partnership Agreements. Indeed, two of the set of legal arrangements already addressed in this article, the EEA and the EU–Turkey Customs Union, are both formed on the basis of Association Agreements.[40]

Association Agreements are often undertaken with an expectation that they will lead to future membership of the EU.[41] However, they do not always provide a path to accession and can be used as an alternative to provide a preferential relationship with a state that is structurally unprepared or even unwilling to join the EU.[42] Association Agreements will contain provisions for the creation of an institutional structure around the agreement to ensure its implementation, with a council, committee and often a parliamentary assembly, each made up of equal representation from the EU and the signatory state.[43]

2.4.1 Environmental provisions in Association Agreements

Association Agreements may contain environmental cooperation and integration clauses.[44] The Association Agreement of 2014 between the EU and Moldova constitutes a recent example.[45] As with all Association Agreements in the EU's neighbourhood, it constitutes a deep and comprehensive free trade agreement (DCFTA),[46] with its main legal base in Article 217 TFEU.[47] Two of the Association Agreement's chapters are of particular relevance to environmental protection. Chapter 16 on the Environment states that the EU and Moldova will 'develop and strengthen their cooperation on environmental issues, thereby contributing to the long-term objective of sustainable

38 Article 217 TFEU.

39 Koen Lenaerts and Eddy De Smijter, 'The European Community's Treaty Making Competence' (1996) 16 Yearbook of European Law 1–57, 17.

40 Koutrakos (n 4) 380.

41 Lenaerts and De Smijter (n 39) 20.

42 Ibid 19.

43 Ibid 16.

44 Gracia Marín Durán and Elisa Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Bloomsbury 2012) 2.2.

45 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014] OJ L 260/4.

46 Article 1.2(g).

47 Council Decision 2014/492/EU of 16 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014] OJ L 260/1. The Decision also cites Article 37 TEU as a legal base. With respect to Section 2.7 below, it is relevant to note that while there are two brief references to the ENP in the Preamble to the Agreement, but there is no reference to Article 8 TEU as regards legal base.

development and greening the economy'.[48] Fourteen topical areas are listed for cooperation.[49] Chapter 17 on Climate Change lists the areas where the parties should cooperate in this field.[50] Each chapter contains an article stating that Moldova will undertake approximation of its legislation to the EU Acts and international instruments referred to in annexes to the Agreement (Articles 91 and 97 respectively). Between the two annexes, 29 directives and regulations are listed, covering broad areas such as, inter alia, chemicals regulation, nature protection, environmental governance, air quality, water quality and climate.[51] Instead of a requirement to implement each piece of legislation in total, the Annex sets out which specific provisions need to be harmonised by Moldova and outlines a timeframe within which this must take place for each legislative act.

The Agreement also contains a chapter on Trade and Sustainable Development.[52] Within this, a range of sub-categories is addressed, including multilateral environmental agreements (referencing the UN Framework Convention on Climate Change and Kyoto Protocol),[53] biological diversity,[54] and sustainable management of forests and trade in forest products.[55] Significantly, provision is made for the establishment of a Trade and Sustainable Development Subcommittee which will oversee the implementation of this chapter, including any cooperative activities undertaken.[56] A procedure is established whereby either party may seek consultations with the other regarding any matter arising under the Trade and Sustainable Development chapter by delivering a written request to the contact point of the other party.[57] If the consultations do not address the matter, the party can seek to have a panel of experts convened to address the issue.[58] The panel produces a report with findings of fact and recommendations. The parties then discuss what measures need to be taken, in light of the panel of experts' report.[59]

2.5 Relationship based on the Common Commercial Policy

The CCP represents the EU's trade with third countries, based on the common external tariff. Since the Lisbon Treaty, Article 3(e) TFEU states that the CCP remains an exclusive competence of the EU. Article 207 TFEU sets out the parameters of the CCP, and outlines a special procedure for the adoption of agreements based on the CCP, as an exception to the process for ratifying international agreements outlined in Article 218 TFEU. The exercise of the CCP and agreements made based on it must be done in a manner compatible with the EU's internal powers, including the environment.[60]

48 Article 86.
49 Article 87
50 Article 93.
51 Annex XI, Annex XII.
52 Chapter 17.
53 Article 366
54 Article 368
55 Article 369
56 Article 376(2–3).
57 Article 378(2).
58 Article 379(1).
59 Article 379(7), (8).
60 Marise Cermona, 'External Relations and External Competences of the European Union: The Emergence of an Integrated Policy' in Paul Craig and Grainne De Búrca (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press 2011) 217–68, 229.

2.5.1 Bilateral free trade agreements and the environment

The free trade agreement concerning goods, services and establishment entered into between the EU and South Korea is an example of an EU agreement which relies on Article 207 TFEU as one of its legal bases.[61] The fact that it covered a broad range of areas, including intellectual property rights, competition and governance, and contained significant provisions on environmental and labour standards means that it is classified as a DCFTA, though, unlike the agreement with Moldova, this description is not clearly stated in the text.[62] The agreement incorporates a significant number of environmental concerns within the chapter on Trade and Sustainable Development.[63] The regulatory divergence provided by a free trade deal is recognised as each party may 'establish its own levels of environmental and labour protection' and 'adopt or modify accordingly its relevant laws and policies'.[64] Article 13.11 states a commitment to cooperate on trade-related aspects of environmental (and social) policy, with the fields of such cooperation outlined in Annex 13 of the agreement.[65] A Committee on Trade and Sustainable Development is established to oversee the implementation of this chapter.

More recently, a broad free trade area between the EU and Canada was established through the signing of the Comprehensive Economic and Trade Agreement (CETA) in 2017.[66] Like the agreement with South Korea, it also relies on Article 207 TFEU as one of its legal bases.[67] It also features a chapter on Trade and Sustainable Development (chapter 22) but, in contrast to the South Korean agreement, there is a full chapter entitled Trade and Environment (chapter 24), a reflection of the fact that the EU's environmental competence provision in Article 192(1) TFEU is also referenced as a legal base for the agreement. It is stated that the combined aim of these two chapters, along with that on Trade and Labour, is that the parties will: promote sustainable development; uphold their environmental protection objectives in a context of open and free trade; enhance enforcement of their respective environmental law; and promote public consultation and participation in the discussion of sustainable development issues.[68]

The Trade and Environment chapter recognises that each state may set its own environmental priorities, establish its own levels of environmental protection, and adopt its laws and policies accordingly and in a manner consistent with any multilateral

61 Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L 127/6; Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L 127/1.

62 Koutrakos (n 4) 380.

63 Articles 13.12.3–4; 15.2.1(e).

64 Article 13.3.

65 These fields include: cooperation in international fora responsible for social or environmental aspects of trade; cooperation to promote the ratification of multilateral environmental agreements with an impact on trade; exchange of views on the trade impact of environmental regulations; cooperation on trade-related aspects of the current and future international climate change regime; and cooperation on trade-related aspects of biodiversity, promoting sustainable fishing and tackling deforestation.

66 Council Decision (EU) 2017/37 of 28 October 2016 on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/1.

67 Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/23.

68 Article 21.1.3(a)–(e).

environmental agreements to which it is a signatory.[69] It also contains a statement that it is inappropriate for state parties to encourage trade or investment by weakening levels of protection afforded in environmental law.[70]

Institutional structures, similar to those in the Association Agreement with Moldova, in the form of a Committee on Trade and Sustainable Development are established and charged with responsibility for the implementation of the chapters on Trade and Sustainable Development, Trade and Labour, and Trade and Environment.[71] A process for resolution of disputes about issues covered in the Trade and Environment chapter is outlined, comprising an initial consultation on the disputed issue between the parties,[72] followed by referral to a panel of experts for a decision.[73] The panel makes findings of fact and a determination which is communicated to the parties.[74] If it determines that a party has not conformed with its obligations, the parties must engage in discussions to take necessary measures or agree a mutually acceptable plan to address the issue.[75]

2.6 Express treaty-making power in the area of the environment

Since the Single European Act and the addition of what are today Articles 191 and 192 TFEU, the EU has had an express competence to conclude treaties with third parties in the field of the environment.[76] The use of Article 192 TFEU as the sole legal base for signing international environmental agreements has been challenged before the CJEU a number of times where the agreement in question also covered trade issues and allegedly required Articles 192 and 207 TFEU as a joint legal base. The key significance here is the special procedure required for agreements adopted under Article 207 TFEU, as an exception to the general rules for international agreements under Article 218 TFEU.

When the EU signed the Cartagena Protocol (Convention on Biological Diversity), the decision approving this was adopted under Article 191 TFEU. The Commission argued for a joint legal base consisting of Articles 191 and 207 TFEU.[77] The court found that its primary objective was an environmental one, justifying the use of Article 192 as the sole legal base.[78] Neither the fact that international trade agreements often had multiple objectives, nor the requirement to give the CCP a broad interpretation stopped the environment from being the core element of the Protocol, even though it could have some impacts on trade.[79]

The court reached the opposite conclusion in the *Energy Star Agreement* case, concerning an agreement between the EU and the USA regarding an energy-efficiency labelling programmes.[80] While the court accepted that this would have had some positive environmental effects stemming from reduced energy consumption in more efficient

69 Article 24.3.

70 Article 24.5.

71 Article 22.4.

72 Article 24.14.

73 Article 24.15.

74 Article 24.15.10.

75 Article 24.15.11.

76 Article 191(4) TFEU: 'Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.'

77 Opinion 2/00 [2001] ECR I-9713 (Caragena Protocol).

78 Ibid paras 29, 31.

79 Ibid para 40.

80 Case C-281/01 *Commission v Council* [2002] ECR I-12049 (*Energy Star Agreement*).

machines, this was an indirect effect, compared to the direct and immediate impact on trade in office equipment.[81] Subsequently, in relation to the Rotterdam Convention (on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade), the court found the commercial elements to be not purely incidental and that some of its provisions had direct and immediate effects on trade in hazardous chemicals,[82] while recognising that the protection of human health and the environment was foremost in the minds of all signatories of the Convention.[83] In both cases, the court annulled the contested decisions on the basis that Article 207 TFEU should have been used as a joint legal base along with Article 191 TFEU.

In light of these and other decisions, it has been argued that international agreements being only concerned with environmental matters to a degree to warrant sole reliance on the environmental legal base would be exceptional.[84] The provisions do form a shared legal base for a substantial number of bilateral agreements between the EU and other organisations, but also individual states. It has already been referenced how Article 192 TFEU is one of the treaty provisions relied upon in the decision adopting CETA. However, the Council decision applying the 2017 EU–Swiss agreement to link their emissions trading systems is solely based on the same article, reflecting the primacy of environmental and climate change issues in that agreement.[85]

2.7 The European Neighbourhood Policy

The EU's interaction with 16 states on or close to its borders is governed through the ENP. The states involved are divided into the south (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, Syria and Tunisia) and east (Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine). The differences in the needs of the two separate groups would see the subsequent creation of two regional-specific programmes in 2008–2009, discussed below.[86] The ENP originated on the basis of a Commission Communication in 2004.[87] However, its status was given a legal base within the EU treaties at Lisbon, where Article 8(1) TEU states:

> 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.

The positioning of the legal basis for the ENP as a separate article outside of the external action title has been noted as indicating that it is not necessarily linked to any of the specific fields outlined in that title.[88]

The Commission has suggested that trade relations with ENP states should be pursued in the context of DCFTAs.[89] These have been achieved in the context of the

81 Ibid para 41.

82 Ibid para 42.

83 Case C-94/03 *Commission v Council* [2006] ECR I-1 (Rotterdam Convention) para 37.

84 Ludwig Kramer, *EU Environmental Law* (8th edn, Sweet & Maxwell 2015) 91.

85 Council Decision (EU) 2017/2240 of 10 November 2017 on the signing, on behalf of the Union, and provisional application of the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems [OJ] L 322/1.

86 Cermona (n 60) 238.

87 Communication from the Commission, *European Neighbourhood Policy Strategy Paper*, Brussels, COM (2004) 373 final, 12 May 2004.

88 Paul Craig and Grainne De Búrca, *EU Law: Text, Cases and Materials* (6th edn, Oxford University Press 2015) 340.

89 Koutrakos (n 4) 405; see Emerson (n 5) 50.

bilateral Association Agreements signed between the EU and Moldova, Ukraine and Georgia. Even in the absence of Association Agreements, the model of working within the ENP is seen as strongly bilateral.[90] The key components of the EU's interaction with each state is outlined within an action plan which sets out that state's agenda for political and economic reforms over a three- to five-year period.[91] Environmental law and policy measures feature as a section of action plans, with a focus on convergence, both with international law measures and the EU acquis.[92] However, it has been recognised that the environmental elements of action plans have not been implemented very diligently, due to a range of reasons, including the fact that the environment is not a priority in the context of the ENP, the consequent unwillingness to take strong action against states not implementing their environmental commitments, and the non-mandatory language generally used in the environmental sections of action plans, making it difficult to establish if a state is implementing the measures.[93]

2.7.1 Union for the Mediterranean

The EU Member States engage with countries from the southern and eastern Mediterranean, along with the European Commission, through the Union for the Mediterranean (UfM).[94] The UfM is described as an 'intergovernmental organisation . . . to enhance regional cooperation and dialogue in the Euro-Mediterranean region'.[95] It is operated by a Secretariat with a separate legal personality.[96] The UfM works to complement the bilateral legal relations established by many states in the region with the EU through Association Agreements.[97]

Two of the six 'priority areas' identified for the UfM's work include Energy & Climate Action and Water & Environment. The Mediterranean Solar Plan seeks to create a common regulatory approach as regards solar energy between EU and non-EU Mediterranean states and create a regional renewable energy market, while the Depollution of the Mediterranean project works to reduce pollution of sea water.[98] While there has been some progress in these areas, it has been recognised that environmental concerns do not form a central feature of the Euro-Mediterranean policies.[99]

2.7.2 Eastern Partnership

Formed in 2009, the Eastern Partnership (EaP) sees the EU engage with six eastern states – Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine. At the time, it was seen as a method of differentiating elements of the ENP by creating a separate entity for post-

90 Federica Bicchi, 'The Union for the Mediterranean, or the Changing Context of Euro-Mediterranean Relations' (2011) 16 Mediterranean Politics 3–19, 9.

91 The ENP Action Plans – Association Agendas for Eastern Partner Countries <https://eeas.europa.eu/headquarters/headquarters-homepage/8398/enp-action-plans_en>.

92 Oriol Costa, 'Convergence on the Fringe: The Environmental Dimension of Euro-Mediterranean Cooperation' (2010) 15(2) Mediterranean Politics 149–68, 154.

93 Ibid 156.

94 Albania, Bosnia and Herzegovina, Egypt, Jordan, Lebanon, Mauritania, Montenegro, Tunisia, Algeria, Israel, Monaco, Morocco, Palestine, Syria, Turkey.

95 <http://ufmsecretariat.org/who-we-are/>

96 Angelos Katsaris, 'Managing Climate Change in the Mediterranean: The Union for the Mediterranean and the Challenges of Fragmentation' (2015) 20(2) Mediterranean Politics 288–94, 290.

97 Koutrakos (n 4) 400.

98 Katsaris (n 96) 289.

99 Costa (n 92) 150; Katsaris (n 96) 290.

soviet states.[100] Within these six countries, the nature of the relationship with the EU varies, with three having indicated a desire for EU membership, and the others pursuing different alignments.[101]

Like the UfM, the EaP is seen as primarily for the creation of bilateral relations between the EU and the six states.[102] They meet with the EU in the context of annual EaP summits. The results of such bilateral engagement, primarily Association Agreements, contain the most significant measures towards improving environmental quality and addressing climate change within these states.[103] Along with the principle bilateral element, the EaP also has a number of multilateral platforms.[104] The Economic Integration and Convergence with EU Policies platform includes a panel addressing 'Environment and Climate Change'.[105]

2.8 Relationship models and their level of consistency with EU environmental law

In examining the models outlined here for their ability to maintain the consistency of the EU's environmental protection regime, considerations of breadth of coverage, compliance and enforcement are paramount. Clearly, EEA membership is the only one that comes anywhere close to replicating the coverage of EU environmental law, and even that omits some of the most successful measures in the areas of nature protection and water quality. The incorporation of pieces of EU environmental law not excluded from the EEA Agreement into Annex XX on an ongoing basis as EEA Acts would ensure their applicability within the UK. While issues of environmental law do come before both the EFTA Court and Surveillance Authority, obviously these do not possess the same level of institutional enforcement capacity as exists across the CJEU and the European Commission, nor are they applying rules that benefit from supremacy over domestic legislation. Nevertheless, EEA membership represents adherence to a substantial body of EU environmental law and a sophisticated set of enforcement institutions.

This institutional element would be missing if the UK followed the Swiss model of EFTA-only membership. Also absent would be the certainty as to what legislation would apply. Rather, the requirement to negotiate individual bilateral agreements would be time-consuming and would mean that it would be virtually impossible to create as comprehensive a system of multi-sectoral environmental protection as exists under EU law. Further, the non-dynamic nature of many of the existing agreements limits their efficacy and it is suggested that this is particularly relevant in a field such as environmental law where standards may need to be adjusted with some regularity. However, even where a bilateral agreement is not present, the close trade links between the EU and Switzerland have meant that the latter is often in a position where it must replicate EU legislation within its national law, including in fields as complex as chemical regulation. Here, the EU again is in the position of rule-setter, thus ensuring the diffusion of its environmental standards. Significantly, this situation lacks any institutional enforcement mechanism.

100 Vlad Vernygora, David Ramiro Troitino and Sigrid Vastra, 'The Eastern Partnership Programme: Is Pragmatic Regional Functionalism Working for a Contemporary Political Empire?' in Tanel Kerikmäe and Archil Chochia (eds), *Political and Legal Perspectives of the EU Eastern Partnership Policy* (Springer 2016) 7, 8.

101 Marge Mardisalu-Kahar, 'Preface', in Kerikmäe and Chochia (n 100) vi.

102 Ibid.

103 Hamed Alavi, 'The European Union and Protection of Environment in Eastern Partnership Countries', in Kerikmäe and Chochia (n 100) 137, 144.

104 Ibid.

105 <https://eeas.europa.eu/sites/eeas/files/work_programme_2012_13_platform2_en.pdf>

If the UK was to maintain its membership of the Customs Union, even if only for a transitionary period, it would continue to be bound by all the EU acquis covering the Customs Union. Should it depart but subsequently seek to enter into a new bespoke CUA, it would likewise be bound in totality by that. This will require compliance with EU standards in all areas covered by the agreement and as such a substantial range of environmental laws as regards the content and manufacturing of goods would be binding upon the UK. In the event that agriculture products were included in a CUA, the environmental impact would be even broader. However, the requirement for compliance and any enforcement structures set up under the agreement would not apply beyond those tradeable goods covered.

The Association Agreements and the free trade agreements discussed here have all included some reference to environmental concerns. In the field of the environment, existing Association Agreements have required the non-EU party to harmonise its laws with listed pieces of EU environmental legislation, thus facilitating the spread of EU norms. As Association Agreements are often used as a precursor to EU membership, the desirability of this objective enables the EU to raise its requirement for what it expects of signatory states. It has been less demanding in the environmental requirements which it has negotiated into free trade agreements with states where accession is not a consideration. The goal of pre-accession Association Agreements has been to advance the process of approximating national law with EU norms. Within the free trade agreements, there has to be much greater room for regulatory divergence between the EU regime and that of the other state. This difference in approach can be seen when comparing the free trade agreements entered into with both Korea and Canada and that signed with Moldova. Both Association Agreements and free trade agreements provide a mechanism for resolving compliance issues specifically related to the environment, though the approach is primarily one of negotiation and arbitration.

Thematic cooperation on regional-specific issues with non-EU neighbouring states is encouraged under the ENP, and the environment does feature as one of these themes. While the action plans for each state form a basis for environmental improvement, the examples cited above indicate that this cooperation works best in specific project-based interactions which, while undoubtedly positive, are narrow in focus and are a long way from the broad environmental regimes that EU legislation seeks to create. The common theme in the EU's relations with states in the ENP is that they take place in the context of economic disparity, with the EU supporting specific projects, as opposed to large-scale cooperation on environmental policies. It is unlikely that the model as currently practised would work in the context of a developed economy and political system such as that of the UK.

3 Which model for the UK's relationship with the EU?

3.1 Working between 'red lines' and 'closing doors'

Efforts to conceptualise the new legal relationship between the EU and the UK, and the position of environmental law and policy within this, must, for the time being at least, operate within the boundaries of the so-called 'red lines' articulated by Prime Minister Theresa May at her Lancaster House speech in early 2017.[106] These self-declared prerequisites for any deal – taking back powers from the CJEU, control over immigration

106 Speech by Theresa May (Lancaster House, London, 17 January 2017) <www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>.

policy and the pursuit of an independent trade policy – clearly limit what sort of new arrangement is possible. Nevertheless, in both the Lancaster House speech and her subsequent Florence speech, Prime Minister May stated a desire to create a comprehensive and ambitious economic partnership between the UK and the EU.[107] It is significant to note that she also expressed a clear desire to go beyond the economic realm and form a new relationship in the sphere of security – 'a bold new strategic agreement that provides a comprehensive framework for future security, law enforcement and criminal justice co-operation'.[108] Such an arrangement would not match any of the existing models of how the EU engages with its neighbours and would require a new form of relationship, or at minimum a combination of some of the options outlined.

At the same time, the insistence on the 'red lines' has led Michel Barnier, the EU's chief Brexit negotiator, to state that the UK is 'closing doors' and limiting the EU's offer to a free trade agreement.[109] It is clear that absolute maintenance of the current British negotiating position would lead to a comparatively restricted new relationship, solely in the field of trade. Barnier has also spoken about the EU's goals for the relationship in the specific context of environmental policy, where he linked the UK desire for an ambitious partnership to compatibility with the European regulatory model, including in the field of environmental standards.[110] He specified the need for a non-retrogression clause, which would mean the maintenance by the UK of 'key pre-Brexit standards'. He cited the example of the model used in CETA, but stated it should go further. He also made reference to the need for 'effective oversight and enforcement of environmental rules'. Environmental concerns have also featured in the stance of the European Parliament, which has stated that it will only endorse a future relationship where the UK continues to meet standards set down internationally and in EU legislation in a range of fields, including climate change and the environment.[111] The Parliament also stresses the need for alignment with future EU legislation in these two fields.[112]

Another element that has some relevance is the position of Northern Ireland within the final agreement. In the March 2018 Draft Withdrawal Text, the UK agreed that there would be no hard border between Northern Ireland and Ireland and that Northern Ireland would enjoy full alignment with the rules of the EU's Internal Market and the Customs Union until an alternative scenario was agreed.[113] Interestingly, this document also states that EU environmental law relating to the control of the import, export, release, or transport within the EU of substances, materials, plants or animals listed in an Annex would apply to the UK in respect of Northern Ireland.[114]

107 Speech by Theresa May (Florence, 22 September 2017) <www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>.

108 Ibid.

109 Speech by Michel Barnier (Hannover Messe, 23 April 2018) <http://europa.eu/rapid/press-release_SPEECH-18–3511_en.htm>.

110 Remarks by Michel Barnier, Green 10: 'Is Brexit a Threat to the Future of the EU's environment?', European Parliament, 10 April 2018 <http://europa.eu/rapid/press-release_SPEECH-18–3162_en.htm>.

111 European Parliament resolution of 14 March 2018 on the framework of the future EU–UK relationship (14 March 2018) 2018/2573(RSP) para 4.

112 Ibid para 35.

113 Recitals 6 and 8, Protocol on Ireland/Northern Ireland, Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (19 March, 2018).

114 Ibid Article 7.

3.2 A model that fits and is consistent with EU environmental law

As the model that requires the widest adherence to EU environmental regulations outside of membership, and which provides significant enforcement mechanisms, undoubtedly EEA membership is the next best option for maintaining the coherence of EU environmental law. The British demand to regain control from the CJEU would be met, and signing the EEA Agreement without also entering a Customs Union would allow for the pursuit of an independent trade policy. However, EEA membership would immediately fall foul of the British goal to regain control over immigration and, indeed, the Prime Minister explicitly rejected this option in the Florence speech. While following the Swiss option of EFTA membership without acceding to the EEA Agreement would also remove the role of the CJEU and allow for an independent trade policy, it is suggested that the prospect of the UK being cast in the role of a 'rule-taker' – practically compelled to adopt EU laws while having no say in their drafting – would be vigorously resisted by Brexit advocates.[115] Both EEA and EFTA-only models also involve a financial contribution from the Member States, a requirement unlikely to be welcomed considering the resentment generated in the UK on foot of its mandatory contributions to the EU budget. In light of the fact that the Swiss option has also been ruled out by the Prime Minister and is one which, as described above, the EU itself seeks to alter, it is unlikely to provide a route suitable for the UK.[116]

In her Florence speech, the Prime Minister also ruled out a Customs Union with the EU, a model that would significantly resolve issues in the context of the land border between Northern Ireland and Ireland. The principal issue with staying in the Customs Union is that it would radically restrict the UK's scope for a fully independent trade policy, as the UK would be bound by the EU tariffs and thus be precluded from negotiating new free trade agreements with third countries. The British Labour Party has now staked out a clearly different approach on this point, committing to continued membership of the Customs Union during the transitional period after Brexit and to renegotiating a new Customs Union arrangement following this.[117] Support for at least exploring this option was also demonstrated by a strong majority in the House of Lords, which voted for an amendment that would require the government to set out what would need to be done in order to negotiate a new Customs Union,[118] though a subsequent amendment to a Customs Bill to make membership of the Customs Union mandatory was narrowly rejected in the House of Commons.[119] If this option is adopted, it will mean that the UK would continue to be bound by the measures outlined above in the short term. In any negotiations for a new Customs Union arrangement, Barnier's statement regarding the EU view on the European regulatory model and the place of environmental standards within it would hopefully point to the inclusion of these standards within any future customs arrangement, with suitable institutional structures to ensure compliance.

115 Tom McTague, 'Brexiteers Fear "Swiss Trap" Trade Deal' (*Politico*, 15 October 2018) <www.politico.eu/article/brexiteers-fear-swiss-trap-deal-for-britain>.

116 Tobler (n 11) 578, 581, 590–1.

117 Speech by Jeremy Corbyn (Coventry, 26 February 2018) <https://labour.org.uk/press/jeremy-corbyn-full-speech-britain-brexit>.

118 Henry Mance, 'Government Suffers Two Brexit Defeats in House of Lords' *Financial Times* (London, 18 April 2018) <www.ft.com/content/fce0bc2e-4323–11e8–803a-295c97e6fd0b>.

119 Benjamin Kentish, 'Theresa May Wins Knife-edge Customs Bill Vote as Defence Minister Resigns amid Tory Rebellion' *Independent* (London, 16 July 2018) <www.independent.co.uk/news/uk/politics/brexit-latest-theresa-may-guto-bebb-defence-minister-customs-bill-vote-a8450356.html>.

The March 2018 European Council guidelines on the framework for post-Brexit relations with the UK are particularly cognisant of Prime Minister May's rejection of both the Single Market and the Customs Union. In light of this, they set out an EU offer based primarily around a free trade agreement.[120] The guidelines reference 'specific partnerships' in fields such as law enforcement and judicial cooperation in criminal matters, and foreign, security and defence policy.[121] They also state that the new relationship should address global challenges like climate change, sustainable development and cross-border pollution, with close cooperation between the EU and UK in these areas.[122] These guidelines suggest that the relationship will be no less than a free trade agreement negotiated under the CCP. It has been shown that, where the EU has already entered into such free trade agreements, they do contain environmental provisions. Again, citing Barnier's statement, there is reason for optimism that the EU will insist on the maintenance of the existing level of environmental protections being written into the agreement's provisions.[123]

Assuming, in light of the 'Green Brexit' comments, that the UK is serious about undertaking some structured and coherent cooperation in the field of the environment and climate change, an Association Agreement would represent a more comprehensive means of achieving this, beyond a free trade agreement. EU statements to date place great emphasis on a non-regression clause as regards environmental standards. In the context of the UK, initially at least this would be no more than recognising the status quo, as the UK should already comply with existing EU measures. A key question from the point of view of future consistency between the EU and UK regimes will be whether the EU can insist on the inclusion of an 'environmental advancement principle' to ensure a drive for continuously higher standards.[124] This would leave the UK in the position of a rule-taker in the environmental field and it is highly questionable whether it would agree to this in the context of an Association Agreement. Much will hinge on whether, in the context of the new relationship, the EU actually places a high enough priority on environmental issues to insist upon a quid pro quo between these and the areas the UK places a premium on, but it is significant that the European Parliament, which must approve the final Brexit deal, has indicated support for the environmental advancement principle.

In the event that an Association Agreement is not acceptable, the UK could form its relationship with the EU in the context of a free trade agreement and looser cooperation through a new model based under the ENP – a potential 'British Isles Partnership'. While this would allow for cooperation in specified areas, it would require that this be done on a bilateral basis, thus addressing British fears about the loss of sovereignty. Such a relationship could have an environmental dimension and may be particularly useful for supporting specific cross-border environmental projects between Northern Ireland and Ireland. However, this would require changes in the EU's approach to the ENP to take account of the shared level of economic and political development and the environmental standards already existing.

One obvious mechanism for continued engagement between the EU and UK on environmental issues would be for the latter to maintain its membership of the European

120 European Council (Article 50) Guidelines on the Framework for the Future Relationship with the UK, 23 March 2018, para 8. <www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf>.

121 Para 13.

122 Para 9.

123 Robert Lee (n 2) 161.

124 Charlotte Burns, Andrew Jordan and Viviane Gravey, 'UK Environmental Policy Post-Brexit: A Risk Analysis' (Report for Friends of the Earth, Brexit and Environment, March 2018) 39.

Environment Agency. Established in the early 1990s, the European Environment Agency was tasked with providing Member States with 'objective, reliable and comparable information at European level enabling them to take the requisite measures to protect the environment, to assess the results of such measures and to ensure that the public is properly informed about the state of the environment'.[125] All Member States of the EU are members, along with the three EEA states.[126] Switzerland's membership is governed by a bilateral agreement with the EU.[127] The European Environment Agency can also engage with third countries and international organisations, under the heading of 'International Cooperation'.[128] Of particular relevance here is the capacity for non-EU countries to join the Agency and regional cooperation with states who are not members or partnered with it, but which 'cover geographical areas with close or transboundary geographic or geo-political links to the EU, and where there are well-defined EU policies'.[129] Turkey, which joined as a member in 2003, offers a model for the UK in that it demonstrates a working membership outside the context of the EU, EEA or the EFTA.[130] As the Agency is primarily about the compilation of information on the environment and performs no regulatory, legislative or adjudicative functions, it is submitted that retaining full membership would not cross any of the red lines established by the British Prime Minister. Such a development would allow the Agency to continue to receive environmental information from the UK, maintaining the range of its data sources.

3.3 No-deal scenario

While this article focuses on the diverse options for the future relationship between the EU and UK, the possibility of there being no clear agreement has to be at least considered. The Prime Minister's statement in the Lancaster House speech that 'no deal for Britain is better than a bad deal for Britain' has continued to remain a mantra for her government.[131] The consequences of such a situation would be immense, with major implications for the environment as in all other fields. In the UK, there would be a need to immediately enhance its regulatory capacity to meet the gap created by the removal of EU equivalents in the event of a no-deal situation, compared to the possibility of equivalence or mutual recognition agreements being put in place as part of a negotiated agreement.[132] As such, Brexit planning within the UK's Department for Environment, Food and Rural Affairs is progressing on the basis of a no-deal situation being a possible scenario.[133]

125 Council Regulation (EEC) No 1210/90 of 7 May 1990 on the establishment of the European Environment Agency and the European Environment Information and Observation Network (1990) OJ L 120/1, Article 1(2)(a).

126 <www.eea.europa.eu/about-us/countries-and-eionet>

127 <www.eda.admin.ch/dea/en/home/bilaterale-abkommen/ueberblick/bilaterale-abkommen-2/umwelt.html>

128 <www.eea.europa.eu/about-us/international-cooperation>

129 Ibid.

130 <www.eea.europa.eu/highlights/Ann1043764126>

131 May (n 106).

132 House of Commons Foreign Affairs Committee, 'Article 50 Negotiations: Implications of "No Deal"' (HC 1077, March 2017) para 48.

133 National Audit Office, 'Implementing the UK's Exit from the European Union: The Department for Environment, Food and Rural Affairs' (HC 647 2017–19) 15.

It has been noted that a no-deal scenario may make a political necessity of the UK entering into more liberal trade arrangements with third countries.[134] Such arrangements could necessitate reduced regulation and the lowering of environmental standards.[135] This so-called 'Singapore-on-Thames' model could pose a real difficulty for the EU successfully competing for business.[136] However, it has also been contended that due to the extraterritoriality of EU law – the so called 'Brussels effect' – the UK will find that in trade negotiations with third countries there will be a political requirement to align standards with those of the EU, due to its influence and market power.[137] The REACH legislation, the Restriction of Hazardous Substances Directive and the EU's emission-trading scheme have all been cited as examples of where EU norms in the form of legislation have become de facto international standards.[138] The irony that, even following a withdrawal with no replacement agreement, EU standards still impact upon the UK, would hopefully not be lost on Brexiteers.

In a no-deal scenario, and, indeed, irrespective of the nature of the UK's relationship with the EU, the UK will still be bound by the range of international environmental agreements that it has signed up to on an individual basis, most of which would also be binding within EU law. The obligations contained in these offer some prospect for the maintenance of coherence, at least initially, between the laws of the EU27 and of the UK, though international rules are weaker and enforcement mechanisms are less effective.[139] The extent of these treaties is beyond the scope of this article, but have been explored in detail in a report by the UK Environmental Law Association.[140]

4 Conclusion

Although what exactly the UK desires its new relationship with the EU to be is still unclear, it is obvious that it seeks a model different to any which exist to date. Close integration on three of the four freedoms (while keeping control over the admittance of non-nationals), no scrutiny of national decisions by supra-national courts, an unencumbered ability to enter into free trade deals around the world, and a new security agreement represent an à la carte list of desires on behalf of the non-member state. The current nature of the EU's relationship with non-member contiguous neighbours falls into the category of benefits and obligations without a voice in the case of industrialised states like Norway, Switzerland and Iceland, or a supportive engagement with prospective members or non-applicant developing states through trading relationships and improving their economic and social governance. The nature of these existing relationships generally is mirrored in each case in the context of the specific field of environmental law.

134 Siyi Feng, Myles Patton, Julian Binfield and John David, '"Deal" or "No Deal"? Impacts of Alternative Post-Brexit Trade Agreements on UK Agriculture' (2017) 16(3) EuroChoices 27, 32.

135 Jonathan Gaventa, 'Brexit and the EU Energy Union: Keeping Europe's Energy and Climate Transition on Track' (E3G Working Paper, April 2017) 4.

136 Jeevan Vasagar, 'Singapore-on-Thames? This Is No Vision for Post-Brexit Britain' *The Guardian* (London, 24 November 2017) <www.theguardian.com/commentisfree/2017/nov/24/singapore-on-thames-post-brexit-britain-wealthy-city-state>.

137 Annegret Engel and Ludivine Petetin, 'International Obligations and Devolved Powers: Ploughing through Competences and GM Crops' (2018) 20(1) Environmental Law Review 16–31, 29.

138 Anu Bradford, 'The Brussels Effect' (2012) 107 Northwestern University Law Review 1–67, 26–31.

139 Charlotte Burns, Andrew Jordan and Viviane Gravey, 'The EU Referendum and the UK Environment: The Future under a "Hard" and a "Soft" Brexit' (ESRC UK in a Changing Europe Initiative 2016) 10.

140 *The UK and International Environmental Law after Brexit* (Brexit and Environmental Law Series, UK Environmental Law Association, September 2017).

The novel nature of the arrangements that the UK is seeking opens the possibility that it could look to make specific arrangements on discrete environmental issues. The UK is recognised as one of the EU states that has promoted strong policies to tackle climate change.[141] It may well wish to continue to be linked to some of the EU's policies in this regard. This could be done through an agreement whereby it would remain part of the European Trading Scheme, or link its system to that of the EU, as Switzerland has done.[142] However, the indications as to the degree of importance that the British government is placing on environmental matters is mixed. A statement from a senior civil servant in the Foreign and Commonwealth Office that '[t]rade and growth are now priorities for all posts . . . [s]ome economic security-related work like climate change and illegal wildlife trade will be scaled down' has raised concerns.[143] Climate change and the environment were each only referenced once in the Prime Minister's Florence speech, the latter in the context of the future British environment and neither term featured in the Lancaster House speech. The failure to reference these issues in two speeches seen as key explanations of British goals in the negotiating process is worrying. More positively, it is worth nothing that the British Department for the Environment has hired almost 1200 new staff to deal with the volume of work created by British exit, which at least suggests an understanding of the scale of the task ahead.[144] Similarly, in the Prime Minister's Mansion House speech of March 2018, she made a number of references to strong environmental protection, though this was again focused on the internal British regime post-Brexit.[145]

All of the scenarios outlined here represent a retreat from the existing set of environmental protection regimes. In the medium term post-Brexit, the prospect of ensuring consistency in standards and subsequent enforcement between the EU27 and British environmental systems is significantly diminished, as the UK will lack the accountability mechanisms previously provided by the European Commission and the CJEU to ensure adherence to legislative requirements.[146] Within the EU itself, the UK's departure has been noted as being a potential threat to its environmental ambition in certain areas, particularly climate, with a shift in the balance of power in the Council towards states less inclined to support policies that seek continued cuts in emissions.[147] At a time when coherent global and regional cooperation and ambitious action are understood as key pillars in combatting environmental challenges like climate change and transboundary pollution, there are few positives to be seen for EU environmental law across the potential post-Brexit models for relations between it and the UK.

141 Eloise Scotford and Megan Bowman, 'Brexit and Environmental Law: Challenges and Opportunities' (2016) 27(3) King's Law Journal 416–19, 418.

142 *Brexit and the EU ETS* (Sandbag, May 2017) 10.

143 Sam Coates, 'Climate Change and Wildlife Suffer in Race for Trade Deal' *The Times* (London, 10 April 2017) <www.thetimes.co.uk/article/climate-change-and-wildlife-suffer-in-race-for-trade-deal-gffqtsx3r>.

144 Laura Hughes, 'UK Environment Department Hires 1,150 Staff to Deal with Brexit' *Financial Times* (London, 26 April 2018) <www.ft.com/content/89a441c2-4977-11e8-8ae9-4b5ddcca99b3>.

145 Speech by Theresa May (Mansion House, London, 2 March 2018) <www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union>.

146 Maria Lee (n 2) 89.

147 Burns et al (n 124) 23; Fay Farstad, Neil Carter and Charlotte Burns, 'What Does Brexit Mean for the UK's Climate Change Act?' (2018) 89 The Political Quarterly 291–7, 294–5.

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The EU's role in policing the rule of law: reflections on recent Polish experience

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Abstract

Although Brexit has understandably been the primary focus of much recent EU-related discussion, it is not the only threat to the EU's long-term stability. The growing impact of populism has already influenced the Brexit referendum result and an anti-liberal resurgence within the EU. Events in Poland have led to criticism of the EU's apparent impotence in counteracting governments determined to implement an anti-liberal, national-populist legislative agenda that threatens the rule of law. This article offers a critical analysis of the mechanism contained in Article 7 TEU and the tools created by the European Commission within its New Framework, viewed through the prism of escalating violations of the rule of law in Poland, with particular focus on the destabilisation of the Constitutional Tribunal. It analyses whether such criticisms are justified and, if so, whether a more robust framework for addressing anti-liberal populism is required. We compare the EU's evolution into an organisation that protects individual human rights with its fledgling evolution into an organisation that seeks to police the rule of law. We argue that, in contrast to its successful human rights evolution, the EU's current efforts towards enforcing the rule of law give little cause for optimism.

Keywords: EU; rule of law; Article 7; New Framework; European law; democratic backsliding; Polish Constitutional Court

1 Introduction

On 20 December 2017, the European Commission invoked the Article 7(1) procedure of the Treaty on European Union (TEU) for the first time by submitting a Reasoned Proposal for a Decision of the Council on the determination of a clear risk of a serious breach of the rule of law by Poland.[1] However, at least until the time of writing this analysis, the procedure has not progressed beyond the initial stage and Poland's hearing at the European Council on 26 June 2018. Many factors influenced this process, some of which will be discussed herein. Of course, the confines of this analysis do not allow every interesting or relevant aspect to be taken into account, let alone analysed thoroughly. Consequently, the scope of this analysis is the result of subjective choices made by the authors – for this reason, certain aspects will be examined in greater depth (policing the rule of law in the EU; the inefficacy of Article 7 TEU and the EU's New Framework to Strengthen the Rule of Law (the New Framework); and the debilitation of the Polish

1 Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law COM/2017/0835 final – 2017/0360 (NLE).

Constitutional Court), while some will merely be highlighted (the evolution of the EU's human rights and rule of law competences; and the *growing impact of populism*), and others will be omitted altogether.

This article argues that recent events in Poland highlight the inadequacy of the EU's existing mechanisms for reacting to perceived rule of law crises, namely Article 7 TEU and the European Commission's New Framework. It compares the EU's evolution into an organisation that protects human rights within its field of jurisdiction with its fledgling evolution into an organisation that also seeks to police the rule of law. It concedes that the evolution of the EU's role in protecting human rights has been lengthy and is subject to an ongoing debate. While its journey towards efficient protection of the rule of law cannot be expected to be less difficult, it is submitted that there is as yet little cause for optimism that it will proceed as far as the human rights protection instrumentarium.

As a case study to our discussion of the EU's current inability to deal effectively with rule of law crises, this article focuses on the Polish government's reform of the Constitutional Tribunal. This is merely one of numerous national reforms which have sparked rule of law concerns, including reforms which have enabled the government to establish de facto control over the Supreme Court (*Sąd Najwyższy*), the state prosecutorial agency, and public television and radio. We concur entirely with Ewa Łętowska, one of Poland's most renowned academics and a former judge of the Constitutional Tribunal, who notes that Poland's current situation cannot be fully understood merely by undertaking an isolated legal analysis of the reforms implemented by the new government.[2] Nevertheless, we focus almost exclusively here on the government's reform of the Constitutional Tribunal because this was only one of the first significant reforms to be implemented following the elections in 2015, but it was also a *sine qua non* to ensuring that later reforms were not challenged as unconstitutional.

2 Comparisons between the evolution of the EU's human rights competences and rule of law competences

Since the 1950s,[3] the institution currently known as the European Union has undergone a radical transformation of its institutional interests and competences regarding human rights and the rule of law. These two latter terms are not entirely synonymous, but they are clearly interrelated.

Any denial of fundamental human rights which derives from a systemic failure to protect principles such as equality before the law, legality of executive power, legal certainty and the independence of the judiciary will also inevitably give rise to a systemic threat to the rule of law.[4] Yet it must not be forgotten that, during its early years of existence, the European Economic Community (EEC) was, from an organisational perspective, clearly not one which concerned itself with human rights at an individual

2 Ewa Łętowska, 'Zmierzch liberalnego państwa prawa w Polsce' (2017) 1–2 Kwartalnik o Prawach Człowieka 5. The Irish High Court (Case C-216/18, ECLI:EU:C:2018:586) arrived at a similar conclusion, noting at paras 124–1 that: 'certain changes, when viewed in isolation, may not self-evidently appear to violate the rule of law. [However] . . . the composition and independence of the Constitutional Tribunal has been compromised and [such reforms] come within a concerted legislative package to politicise the judiciary and to take away its independence'.

3 That is following the creation of the European Coal and Steel Community 1951 and the European Atomic Energy Community (Euratom) and EEC of 1957.

4 See Annexes to the Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, Annex I: The Rule of law as a foundational principle of the Union, Brussels, 11 March 2014, COM(2014) 158, final.

level, and certainly played no role in policing systemic threats to the rule of law per se.[5] Human rights were effectively considered to be a matter of national law and outside the purview of the EEC itself. Equally, the rule of law was deemed to be a national matter until the Treaty of Amsterdam (1999) introduced this term into the lexicon of EU law.

The current rule of law crises present a comparable problem for the EU by posing a threat to the EU's core values, which, according to Article 2 TEU, include the rule of law and human rights. If the EU is unable to prevent or redress rule of law crises at a systemic level, this brings into question its ability to ensure the Member States' enforcement of individual human rights. In turn, this undermines the proper functioning of numerous areas of EU law. Thus, an inability to effectively deal with rule of law crises in individual Member States inevitably escalates into a threat to the credibility of European integration on multiple levels.

2.1 Development of human rights protection by the EU

From a historical perspective, the EU's growing influence, competences and membership increased the pressure to develop mechanisms for protecting individual human rights.[6] The initial response of the Court of Justice of the European Union (CJEU) to the 'human rights predicament' of the 1960s was to develop the doctrine of 'general principles of law' which allowed it to subsume human rights principles and protect them as a matter of *European Community* law. At first, this occurred via the ad hoc recognition of certain human rights principles derived primarily from the Member States' national constitutions.[7] Later, it became slightly more structured and coherent by referring more frequently to rights contained in the European Convention on Human Rights (ECHR) to which all the

5 See, for example, Case 1/58 *Friedrich Stork and Cie v High Authority of the European Coal and Steel Community* [1959] EU:C:1959:4, in which the CJEU effectively declined to exercise jurisdiction in a case concerning human rights issues, since the latter were deemed to fall outside the scope of the EU's founding Treaties as they then existed.

6 It is no coincidence that the CJEU's willingness to enforce human rights as part of EEC law occurred following its 'supremacy' judgment in Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] EU:C:1963:1 and the German Bundesverfassungsgericht's apparent rejection of this document insofar as EEC law failed to protect human rights that were available to German citizens in the *Grundgesetz*. The CJEU's change of stance led to a softening of the judicial Cold War which had existed in the EEC since the *Van Gend* judgment. On the German Bundesverfassungsgericht's approach in the *Solange-I* judgment (*Internationale Handelsgesellschaft von Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, decision of 29 May 1974, BVerfGE 37, 271 [1974] CMLR 540) and the subsequent acceptance of EU supremacy in the *Solange-II* judgment (*Wünsche Handelsgesellschaft* decision of 22 October 1986, BVerfGE 73, 339, case number: 2 BvR 197/83): see Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11(4) Human Rights Law Review 645–682 and 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43 Common Market Law Review 629; Christopher McCrudden, 'The Future of the EU Charter of Fundamental Rights' (Jean Monnet Working Paper 10/2001, Jean Monnet Centre 2010) <https://jeanmonnetprogram.org/archive/papers/01/013001.html>.

7 This concept was originally seen in the cases of Case 29/69 *Erich Stauder v City of Ulm – Sozialamt* [1969] EU:C:1969:57 and Case 11/70 *Internationale Handelsgesellschaft mbH*, EU:C:1970:114 *Nold v Commission*, 4/73, EU:C:1974:51, para 13. In the latter of these cases, the CJEU confirmed that human rights principles which were 'common to the Member States' legal systems' would be protected as a matter of EEC law per se. As an example of concrete rights being derived from the Members States' national constitutions, see case C-100/ 88 *Oyowe and Troare v Commission* [1989] EU:C:1989:638 at para 16, in which the CJEU recognised that: 'the duty of allegiance to the Communities imposed on officials in the Staff Regulations cannot be interpreted in such a way as to conflict with the freedom of expression, a fundamental right which the Court must ensure is respected in Community Law'. See Grainne De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 2 Maastricht Journal of European and Comparative Law 168–84.

Member States were signatories.[8] The Treaty of Maastricht (1993) first introduced the protection of human rights as a principle for the EU into the Treaties. These developments form the historical backdrop to two aspects of the EU's evolution into an organisation which protects *individual* human rights within its field of competence: firstly, the stated desire (and then commitment) for the EU to accede as a member of the ECHR itself; and, secondly, the entry into force of the EU's own Charter of Fundamental Rights.[9]

These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'. This legal structure is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.[10]

Much has been written about both of these developments, and there is no need to explore them in depth here. Nevertheless, they demonstrate how the EU's evolution into an organisation that effectively protects human rights was, firstly, born from an initial negative fear (regarding Member States' support for the supremacy doctrine) and, secondly, was the result of ongoing Treaty developments and CJEU jurisprudence.[11]

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8 The CJEU has stated that the ECHR has special significance, see judgments in *ERT*, C 260/89, EU:C:1991:254, para 41; *Kadi and Al Barakaat International Foundation v Council and Commission*, C 402/05 P and C 415/05 P, EU:C:2008:461, para 283.

9 Until its entry into force with the Treaty of Lisbon on 1 December 2009, the Charter's legal status was uncertain and it lacked full legal effect. On 7 December 2000, the European Parliament, the European Council and the European Commission proclaimed the Charter of Fundamental Rights of the EU in Nice (OJ 2000 C 364, 1). The Charter, which at that time was not a legally binding instrument, has the principal aim, as is apparent from the preamble thereto, of reaffirming 'the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the [CJEU] and of the [ECtHR]' (see, to that effect, judgment in *Parliament v Council*, C 540/03, EU:C:2006:429, para 38). For further details, see Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument* (Hart 2015); Wojciech Sadurski, 'Charter and Enlargement' (2002) 8 European Law Journal 340; Sionaidh Douglas-Scott, 'The Charter of Fundamental Rights as a Constitutional Document' (2004) European Human Rights Law Review 37.

10 Opinion 2/13 of the Court of Justice of the European Union, ECLI:EU:C:2014:2454, paras 166–7; for more, see Bruno de Witte and Sejla Imamović, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) 40(5) European Law Review 683–705; Steve Peers, 'The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection' (*EU Law Analysis*, 18 December 2014) <http://eulawanalysis.blogspot.com.es/2014/12/the-cjeu-and-eus-accession-to-echr.html>; Sionaidh Douglas-Scott, 'Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell from the European Court of Justice' (*UK Constitutional Law Association*, 24 December 2014) <https://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/>; Steve Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare' (2015) 16(1) German Law Journal 213–22.

11 See generally Armin von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights at the Core of the European Union' (2000) 37 Common Market Law Review 1307; Koen Lenaerts, 'Respect for Fundamental Rights as a Constitutional Principle of the European Union' (2000) 6 Columbia Journal of European Law, 1, 15; Grainne De Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105(4) American Journal of International Law 649–93; Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart 2014).

2.2 The EU's move towards policing the rule of law

Historically, the rule of law principle was introduced into the EU legal framework by the ruling in the *Les Verts* case,[12] in which the CJEU explicitly recognised it as a founding principle of the EU. It follows from this ruling (in 1986!) that the EU is a community of law, which implies that both the Member States and the institutions are subject to review as regards their compliance with the Treaties, which were also classified as basic constitutional texts in this judgment. Subsequently, the rule of law was codified by the Member States in the Treaty of Amsterdam, and the Treaty of Lisbon confirmed it as a founding principle of the EU, common to all the Member States (Article 2 TEU).

The amendments introduced by the Treaty of Amsterdam enabled the EU to address systemic deficits of its Member States which threaten the rule of law. Two main developments are noteworthy in this context; firstly, the requirement for applicant states to adhere to the rule of law as a precondition for EU membership and, secondly, the possibility to suspend certain rights (albeit not expel a Member State) and to impose sanctions in the event of a serious and persistent breach of the rule of law in a Member State.

The effectiveness of the first development (the accession criteria) has, unsurprisingly, been assessed positively by some[13] and negatively by others.[14] Certainly, the accession criteria, and related decisions to acceptance (approval) of the membership of certain candidate countries, have not been devoid of controversy.[15] However, since these criteria were inapplicable to any countries which were already EU Member States at the time of their adoption, and since they cease to be applicable per se to any candidate country that acquires membership, there is no need to discuss the extent to which the accession criteria are capable of being used to deal with rule of law crises in current EU Member States. Indeed, the essence of contemporary rule of law crises has been described as democratic *backsliding*,[16] which aptly epitomises the manner in which Member States are capable of sliding back (with the help of some considerable legislative/executive pushing) from a constitutional system which adequately protected the rule of law into one which ceases to do so.[17] Nevertheless, the accession criteria remain a significant development in the EU's growing focus on *systemic* human rights failings, as opposed to merely individual human rights per se.

12 Judgment of the CJEU of 23 April 1986 in case C-294/83 *Parti Écologiste 'Les Verts' v European Parliament*, ECLI: EU: C: 1986: 166.

13 Laurent Pech, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 European Constitutional Law Review 367.

14 Ugo Mattei and Laura Nader, *Plunder: When the Rule of Law is Illegal* (Wiley-Blackwell 2008) 54.

15 Turkey's ongoing attempt to accede to the EU represents perhaps the most obvious example of such controversy. The protracted accession negotiations have been delayed by a half-hearted approach towards compliance with the accession criteria and various worrying anti-democratic developments within Turkey that seem to openly flout those same criteria. This has led to vetoes being announced by individual EU Member States and, more recently, to the European Parliament calling for a complete cessation of negotiations, following a government crackdown against judges, academics and members of the military after a failed attempted coup. For details of the European Parliament's response to such developments, see its Joint Motion for a Resolution dated 23 November 2016 <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+P8-RC-2016-1276+0+DOC+XML+V0//EN>.

16 Nancy Borneo, 'On Democratic Backsliding' (2016) 27 Journal of Democracy 5–19.

17 Wojciech Sadurski, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding' (Legal Studies Research Paper No 18/01, Sydney Law School 2018) 17–31.

The second aspect of this shifting focus, and most relevant for the purposes of the present discussion, is the adoption of Article 7 TEU, which purportedly enabled the EU to flex its institutional muscles against *existing* EU Member States in the event of a serious and persistent breach of the rule of law. However, it will be argued that, just as it is difficult for anyone to flex their muscles when their hands are tied behind their back, Article 7 cannot seriously be expected to successfully deal with the political situation currently facing the EU – namely where multiple Member States simultaneously exhibit authoritarian tendencies and make rapid radical changes to their national constitutional systems which threaten the rule of law.

The adoption of, and the support given to, the Commission's New Framework demonstrates a perception, at both EU and Member State levels, that Article 7 by itself is inadequate to remedy simultaneous threats to the rule of law in multiple Member States (and perhaps even in a single Member State). However, reliance on the New Framework to date has done little to convince sceptical observers that it is any more likely to resolve rule of law crises than Article 7 itself. Thus far, Article 7 has not generated any tangible signs of preventing or reversing national constitutional reforms entailing rule of law concerns.

2.3 The EU's protection of the rule of law today

An inability to redress threats to the rule of law in certain Member States must be viewed as an inability to ensure full human rights protection throughout the Union as a whole. Nevertheless, the EU at present appears to be ill equipped to act as a forum for effectively protecting the rule of law within its Member States. The EU's reputation as an organisation which both respects and enforces human rights must surely be at risk if it proves unable to adequately respond to national reforms which threaten the rule of law. As noted above, despite the rule of law and individual human rights operating at different legal levels, the existence of an independent judiciary and court system is a *sine qua non* for the effective enforcement of individual human rights.

National courts are the first bastion for protecting the rule of law. They are bound by the Simmenthal rule, which lies at the heart of the principle of EU law supremacy and provides an example of the 'EU mandate' held by national courts. EU law permits national courts inter alia the right to refuse to apply national law which conflicts with EU law. However, it is not realistically possible for the EU to rely on national courts, in the spirit of the Simmenthal formula, when those courts have been subjugated to the executive power, as is the case in Poland and Hungary.[18]

Despite the abundance of material and analysis pointing towards the conclusion that a serious threat to the rule of law exists which entails a serious threat to the Union's ability to ensure the enforcement of human rights in its Member States, the EU has been unable to practically impact on the situation in Poland, or indeed Hungary. The reasons for this lie in certain inherent weaknesses of the EU law procedures and mechanisms designed to address rule of law crises. These weaknesses are considered next.

18 For more, see generally Editorial Comments, 'Safeguarding EU Values in the Member States: Is Something Finally Happening?' (2015) 52 Common Market Law Review 619, 625–7; Editorial Comments, 'The Rule of Law in the Union, the Rule of Union Law and the Rule of Law by the Union: Three Interrelated Problems' (2016) 53 Common Market Law Review 597; Editorial Comments, 'About Brexit Negotiations and Enforcement Action against Poland: The EU's Own Song of Ice and Fire' (2017) 54 Common Market Law Review 1309; Guest Editorial, 'A Potential Constitutional Moment for the European Rule of Law: The Importance of Red Lines' (2018) 55 Common Market Law Review 983–96.

3 The inefficacy of Article 7 TEU and the New Framework

Article 7 TEU was intended to function as a corollary of the Copenhagen criteria which must be adhered to by any country wishing to accede to the EU, including stable democratic institutions, guarantees for democracy, the rule of law and human rights, and respect for and protection of minorities. Compliance with these criteria is not only a prerequisite for accession but is also a duty which continues after accession.[19] Having been warned of the potential for political extremism amidst its own Member States, following the election of Jörg Haider's far-right Austrian government in 2000, the EU was well aware of the risks posed by the accession of 10 formerly communist countries from Central and Eastern Europe. Accordingly, Article 7 TEU (which had originally been introduced to EU law by the Treaty of Amsterdam in 1999) was amended by the Treaty of Nice in 2001 and entered into force in February 2013, shortly before the A10 accessions took place, with the aim being for it to allow the Union to respond to any democratic backsliding which threatened the EU's fundamental values, as expressed in Article 2 TEU.[20]

The situation in Austria in 2000 provided an occasion to launch the Article 7 procedure, but this was not taken. However, action taken by the EU outside the scope of Article 7 (and non-EU actions) proved to be counterproductive and, in fact, intensified nationalistic sentiment in Austria.[21] This explains why the formation of a similar coalition government in Italy in 2001 was tacitly accepted by the EU. Equally, when it transpired that a number of EU Member States had participated in clearly unlawful political activities such as the CIA-sponsored prisoner transfer programme, no decision was taken to engage Article 7. Diplomatic efforts, combined with the broader cooperation between European governments and the Bush administration, proved to be much more effective in removing the threat than the difficult procedural requirements contained in Article 7.

Article 7 TEU appears to create a powerful weapon to be wielded against any Member State which threatens to depart from the EU's values, as outlined in Article 2 TEU, including the rule of law. It not only allows the European Council to 'determine that there is a clear *risk* of a serious breach . . . of the values referred to in Article 2' and the Council to determine that such a 'serious and persistent breach' exists, but also to 'suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council'. Nevertheless, when faced with simultaneous rule of law crises in multiple Member States, the stringent voting requirements laid down by this Article vastly reduce the likelihood that it will actually be put into practice. Such problems are evident in each of the constituent paragraphs of Article 7, which will be examined next.

19 Robert Grzeszczak, 'The European Transformation of the Legislative, Executive and Judicial Power in Poland' in Ireneusz Paweł Karolewski and Monika Sus (eds), *The Transformative Power of Europe* (Nomos Verlagsgesellschaft 2015) 19; see Sergio Carrera, Elspeth Guild and Nicholas Hernanz, 'The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU, Towards an EU Copenhagen Mechanism' (Centre for European Policy Studies 2013) <www.ceps.eu/system/files/Fundamental%20Rights%20DemocracyandRoL.pdf>.

20 Dimitry Kochenov, 'Behind the Copenhagen Facade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law' (2004) 8(10) European Integration Online Papers 1–24 <http://www.eiop.or.at/eiop/pdf/2004–010.pdf>; Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2008); see also Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016).

21 Wojciech Sadurski, 'Adding Bite to the Bark: The Story of Article 7, EU Enlargement, and Jörg Haider' (2009) 16 Columbia Journal of European Law 385–426.

3.1 Problems surrounding Article 7: a double-edged sword

The first paragraph of Article 7, which may result in the Council determining the existence of a 'clear risk of a serious breach' of the rule of law, requires the Council to act by a majority of four-fifths of its members (not including the recalcitrant Member State). This translates into a requirement that 22 Member States support such a determination. This does not seem to be an unduly arduous burden, given the highly charged nature of the allegations that such a determination entails. However, the absence of any such declaration to date has created a deafening silence that perhaps speaks more than words.

The problems surrounding Article 7(1) are essentially threefold. Firstly, so far, the potential initiators of this procedure have been reluctant to adopt a reasoned proposal. Secondly, there is uncertainty as to whether the Council would agree with such a proposal. Thirdly, even if the Council would approve such a proposal it is unlikely to result in constructive change. These issues will now be examined in turn.

Firstly, the Council's ability to determine the existence of a 'clear risk of a serious breach' of the rule of law is made conditional upon the existence of a 'reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission'. A worrying sign regarding the EU's political will to deploy even the weakest part of Article 7 is that, despite the abundance of evidence which pointed towards the existence of a serious threat to the rule of law in Poland, none of the potential initiators of the Article 7 procedure adopted a reasoned proposal until the Commission did so in December 2017.[22] This is an incredibly slow reaction time, given that a reasoned proposal may be made by a mere nine Member States or by the European Parliament. As regards Hungary, the European Parliament resolved in May 2017 to begin work on a reasoned proposal.[23] In November 2017, it also resolved to work on a proposal regarding Poland.[24] However, no proposal materialised from the Parliament. It is rather difficult to avoid the conclusion that both the Member States and the European Parliament seemed to delegate entirely the task of initiating the Article 7 procedure to the Commission which, in turn, appeared overly determined to avoid Article 7 altogether and work within the auspices of its New Framework, discussed below.

Secondly, even once a reasoned proposal has been made by one of the potential initiators of Article 7(1), there is no guarantee that the Council would confirm the position(s) expressed in the proposal with the required majority. Given the unwillingness of even nine Member States to create a reasoned proposal themselves, it should not be taken for granted that the support of 22 Member States will be forthcoming. Hungary's

22 See Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland: Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law, Brussels, 20 December 2017 COM(2017) 835 final, 2017/0360 (APP).

23 See 'Hungary: MEPs to Assess whether There Is a Risk of Seriously Breaching EU Values' (Press Release, European Parliament, 11 October 2017) <www.europarl.europa.eu/news/en/press-room/20171011IPR85823/hungary-meps-to-assess-whether-there-is-a-risk-of-seriously-breaching-eu-values>.

24 See 'Rule of Law and Democracy in Poland at Risk: Parliament Ready for Next Steps' (Press Release, European Parliament, 15 November 2017) <www.europarl.europa.eu/news/en/press-room/20171110IPR87824/rule-of-law-and-democracy-in-poland-at-risk-parliament-ready-for-next-steps>.

Prime Minister has already declared that Hungary would not support any deployment of Article 7 against Poland[25] and the same would presumably prove true vice versa, although the Polish government has not issued a comparable official statement. Other Member States might also refrain from supporting Article 7 actions against Poland or Hungary for a variety of reasons relating to their own political agendas. The UK is currently engaged in awkward negotiations with the EU regarding Brexit and future trade relations. Although the 'Brexit deal' itself can be approved by 20 of the 27 remaining EU countries, provided that such countries also represent 65 per cent of the EU population, any future trade deal between the UK and the EU will almost certainly require the unanimous support of all Member States and therefore be vulnerable to a veto by either Hungary or Poland. Accordingly, the UK's concerns for its own future trade relations may trump any concerns it may otherwise have vocalised regarding the rule of law situation in Poland and Hungary. The point here is not to estimate the likely outcome of any vote on Article 7(1) but merely to emphasise that national political concerns may reduce the number of Member States willing to vote in favour of action against those states. A number of recent political events, including the Brexit referendum and the most recent American elections, (should) have taught us to be sceptical about claiming an ability to predict voting results *ex ante*, and we submit that this may also apply to any vote on Article 7(1).

An additional issue concerning the Council's approval of a reasoned proposal is that it will inevitably further delay any EU reaction to the rule of law crises underway in Hungary[26] and Poland. The essence of any constitutional capture is that it happens rapidly and, if unchecked, can quickly destabilise existing constitutional mechanisms in a manner that makes it very difficult to restore the original balance.[27] Nevertheless, aside from the delays in formulating a reasoned proposal, the procedural requirement contained in Article 7(1) for the Council to 'hear the Member State in question' before voting on the proposal will invariably further delay the Council's determination, not least of all because the manner in which such a 'hearing' would occur remains undefined and would perhaps lead to disagreements amongst the Member States. Moreover, the possibility for the Council to 'address recommendations to [the recalcitrant State], acting in accordance with the same procedure' also opens the door to potentially extensive delays in the Council voting on the proposal itself. We do not suggest that no procedural safeguards should exist to protect a Member State accused of violating the values in Article 2, but merely wish to highlight the dichotomy between the delays caused by such procedures and the need to ensure early intervention which prevents or at least limits the extent of any national constitutional capture. One may question whether, in light of the ongoing dialogue which occurs between the EU and the relevant Member State within the scope of the New Framework, the understandable desire to protect the *et audi alteram partem* principle is not already sufficiently protected and need not be duplicated in the manner envisaged in Article 7(1), which was drafted prior to the New Framework's existence. If this were considered too radical a proposition, at least one should consider

25 See 'Hungary's Orban vows to Defend Poland from EU Sanctions' *Financial Times* (London 22 July 2017) <www.ft.com/content/b1bd2424-6ed7-11e7-93ff-99f383b09ff9>.

26 Zoltan Szente, 'Challenging the Basic Values: Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them' in Andras Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2016) 466.

27 See Laurent Pech and Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU* (Cambridge Yearbook of European Legal Studies 2017) 19, 3–47; and Laurent Pech and Kim Lane Scheppele, 'Poland and the European Commission, Part II: Hearing the Siren Song of the Rule of Law' (*Verfassungsblog*, 6 January 2017) <http://verfassungsblog.de/poland-and-the-european-commission-part-ii-hearing-the-siren-song-of-the-rule-of-law>.

whether the 'hearing' envisaged in Article 7(1) should be organised as expeditiously as possible, given the Member State's ongoing ability to present its viewpoints within the New Framework's procedure.

The third, and perhaps most significant, observation regarding the likely inefficacy of Article 7(1) is that, even if a reasoned proposal is formulated and approved, we consider that it would have little practical effect on a country accused of having created a 'clear risk of a serious breach' of the rule of law, given the specific political situation which exists in such countries. As regards the situation in Hungary and Poland, by the time any serious thought was given to deploying Article 7, the nationalist governments in control of those countries had already built up political support based on radical reforms to their national legal (and/or constitutional) systems. Any backtracking or delays regarding those radical reforms, which lie at the heart of the rule of law crises in those countries, could have catastrophic political consequences for those national governments. Accordingly, any attempts by the EU to broker a political solution, at a time when such reforms were well underway, seems doomed to failure.[28] Accordingly, the first paragraph of Article 7 appears unhelpful if it will only be deployed against a Member State which has crossed the political Rubicon and burned its diplomatic bridges.

Article 7(2) TEU states that:

> The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

The procedural difficulties of this part of Article 7 are so blatant as to require little or no explanation. The unanimity requirement and the inherent unlikeliness of fulfilling this requirement have already been discussed above.

If a determination is unanimously approved under Article 7(2), the Council, acting by a qualified majority, may decide to suspend 'certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council'.

Certain aspects of Article 7(3) are relatively clear, such as the fact that the suspension of a Member State's right to vote in the Council would also result in the simultaneous suspension of its participation at all levels (working groups, Permanent Representatives Committee) which are responsible for making the real arrangements regarding EU law. Other possible sanctions may include the suspension of the right to participate in the election of Commissioners or the suspension from structural funds and assistance programmes within the Common Agricultural Policy, which may prove extremely painful for Poland.[29] Equally, it is clear that the imposition of sanctions does not release a Member State from its duty to continue fulfilling its obligations under EU law.

28 Laurent Pech and Kim Lane Scheppele refer to a 'dialogue of the deaf' when discussing this. See Laurent Pech and Kim Lane Scheppele, 'Poland and the European Commission, Part I: A Dialogue of the Deaf?' (*Verfassungsblog*, 3 January 2017) <http://verfassungsblog.de/poland-and-the-european-commission-part-i-a-dialogue-of-the-deaf>; Robert Grzeszczak and Ireneusz Paweł Karolewski, 'Bialowieza Forest, the Spruce Bark Beetle and the EU Law Controversy in Poland' (*Verfassungsblog*, 27 November 2017) <http://verfassungsblog.de/bialowieza-forest-the-spruce-bark-beetle-and-the-eu-law-controversy-in-poland>.

29 Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures', in Closa and Kochenov (n 20) 105–32 .

However, the full extent and nature of such sanctions is not clear and it is regrettable that an Article concerning the rule of law should leave such an apparently wide scope of discretion to a political body, with no clear boundaries drawn by the legislation itself.

3.2 The effectiveness of the New Framework

The inherent problems contained within the various parts of Article 7 led José Manuel Barroso, the then President of the European Commission, to state: 'we need a better developed range of instruments – it is no longer enough to choose between the soft power of political persuasion and the radical solution of Article 7 of the Treaty'.[30] In a resolution in 2013 the European Parliament called upon the EU institutions to create a new mechanism to ensure that all Member States continued to adhere to the EU's common values and the Copenhagen accession criteria.[31] As a result, the foreign ministers of four Member States (Germany, the Netherlands, Denmark and Finland) proposed a special mechanism to monitor the protection of the rule of law in EU countries.[32] In March 2014, the European Commission presented the Communication 'A new EU framework to strengthen the rule of law'.[33]

The adoption of the New Framework was not without controversy. An opinion prepared by the Legal Service of the EU Council in May 2014 stated that the New Framework was inconsistent with the principle of conferral contained in Article 5 TEU, according to which the EU only has such competences as have been conferred on it by the Member States. However, this opinion has been widely criticised.[34]

The New Framework procedure consists of three stages. In the first stage, the European Commission assesses whether there is a real systemic threat to the protection of the rule of law in a given country. In this respect, the Commission relies on the analysis of its own materials, the opinions of independent institutions (such as the Venice Commission and the European Union Agency for Fundamental Rights) and information from Member States and other available sources. If the Commission considers that such a threat really exists, it starts a 'structural dialogue' with the country concerned.

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30 President of the European Commission State of the Union 2012 Address, Plenary session of the European Parliament/Strasbourg, 12 September 2012 <http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm>.

31 European Parliament resolution on the situation of Roma and on freedom of movement in the European Union <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0312+0+DOC+XML+V0//EN>.

32 European Parliament, Working Document I on the situation of fundamental rights in the European Union in 2012, LIBE Committee, Rapporteur: Louis Michel, PE514.668, 21 June 2013, 4. On the discussion in the General Affairs Council, see <www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/genaff/136915.pdf>. On the conclusions of the Justice and Home Affairs Council, see <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf>.

33 Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM(2014) 158 of 10 March 2014.

34 Legal Service, Council of the European Union, Opinion on the Commission's proposed Framework on the Rule of Law of 27 May 2014 (10296/14) and its critique: see for example Armin von Bogdandy, Carlino Antpoehler and Michael Ioannidis, 'A New Page in Protecting European Constitutional Values: How to Best Use the New EU Rule of Law Framework vis-a-vis Poland' (*Verfassungsblog*, 24 January 2016) <https://verfassungsblog.de/a-new-page-in-protecting-european-constitutional-values-how-to-best-use-the-new-eu-rule-of-law-framework-vis-a-vis-poland/>; also Dimitrij Kochenov and Laurent Pech, 'Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation' (2016) 54(5) Journal of Common Market Studies 1062–74.

At the second stage of the procedure (unless the matter has been clarified earlier), the Commission publishes a 'rule of law recommendation' addressed to the Member State concerned based on the information collected and the government's response. It is difficult to predict what consequences such a recommendation might have on the credibility of a given Member State, in particular on issues that require mutual trust between countries (e.g. an adequate level of protection of rights and freedoms in the event of a European arrest warrant being executed). As part of the third stage of the procedure, the implementation of recommendations is subject to control by the Commission (so-called follow-up) both in terms of how and when they have been carried out (the recommendation will indicate a specific deadline for their completion). Only if none of these actions bring about the desired effect, in the third stage, the Commission may request the Council to launch one of the mechanisms specified in Article 7 TEU.

In general, the soft procedure aims to fill the gaps between the application of the procedures set out in Article 7 TEU and other soft forms of guaranteeing the basic EU principles. Although the rule of law enforcement procedure is legally independent from Article 7 TEU, this is called 'preparation for article 7'. The practice of initiating this procedure for the first time in EU history certainly ensures that Poland features heavily in textbooks on EU law. Conclusions from problems encountered by the European Commission and probable ineffectiveness of this procedure will affect its further shape. And reform seems necessary and inevitable. The open question is whether it will take the form of a change to the EU Treaties or be an entirely new document and a new procedure. Everything, so far, speaks for the first option.[35]

It is worth recalling that, even as regards the comparatively successful human rights endeavour, an important leg of this journey remains uncompleted – namely the EU's formal accession to the ECHR. A comparable development regarding rule of law is unlikely for the reasons explained here. Neither of these features is likely to be repeated with any degree of success as regards the current rule of law crises. Any proposed amendments to the founding Treaties, designed to strengthen the EU's capacity to react to rule of law crises, would be extremely unlikely to garner the necessary unanimity amongst the Member States. Accordingly, the evolution of the EU's capacity to deal with rule of law crises is likely to be a lengthier and bumpier ride than the equivalent journey when it acquired human rights competences. The accession has been made legally possible following the Lisbon Treaty's enactment of Article 6(2) TEU to overcome the obstacle created by the CJEU in its Opinion 2/94 on European Community Accession to the ECHR (1996 ECR 1–01759) and following the ratification of Protocol 14 to the ECHR by all Member States of the Council of Europe. Article 17 of Protocol 14 declares that the ECHR is to be amended to provide that the 'European Union may accede to this Convention'.[36] The inter-institutional

35 See Dimitry Kochenov and Laurent Pech, 'Upholding the Rule of Law in the EU: On the Commission's "Pre-Article 7 Procedure" as a Timid Step in the Right Direction' (Working Paper RSCAS 2015/24, European University Institute, Robert Schuman Centre for Advanced Studies 2015) 11.

36 For the CJEU's discussion (and ultimate rejection) of the EU's accession to the ECHR, see in particular Opinion of the Court of 28 March 1996 on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Opinion 2/13 of the Court (Full Court) of 18 December [2014] EU:C:2014:2454, analysed inter alia by Peers, 'The CJEU and the EU's accession to the ECHR: A Clear and Present Danger to Human Rights Protection' (n 10); see Roberto Baratta, 'Accession of the EU to the ECHR: The Rationale for the ECJ's Prior Involvement Mechanism' (2013) 50(5) Common Market Law Review 1305–32; Steve Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare' (2015) 16 German Law Journal 213; Daniel Halberstam, '"It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on the EU Accession to the ECHR, and the Way Forward' (2015) 16 German Law Journal 105.

complexities and political vagaries associated with journeys of this kind should not be underestimated.

It was not clear as to whether the provisions of EU law which concern the rule of law are capable of forming the subject matter of references to the CJEU or will be sufficient basis for the successful launch procedure under Article 258 TFEU. Since the judgment in the *Celmer* case, it is already clear that this material is applicable to proceedings before the CJEU.[37] Also, the political stakes are far higher when discussing threats to the rule of law than when discussing individual human rights breaches. Furthermore, when implementing and enforcing its human rights regime, the EU has relied heavily on the assistance and support of national courts, either as the source of preliminary references (which allowed the CJEU to develop the EU's human rights mandate) or as the mechanism for enforcing the CJEU's judgments at a national level. Conversely, in situations where the rule of law is threatened, it is highly likely that the national court system forms part of the problem, as opposed to part of the solution. When national courts have been brought under the de facto control of a government whose actions threaten the rule of law, the EU and the CJEU are deprived of an important piece of the jigsaw for developing EU law.

The EU's inability to rely on national courts when policing the rule of law means that it will be compelled to rely almost exclusively upon its own institutions and mechanisms. However, these mechanisms are much weaker than those which apply to individual human rights enforcement. Both Article 7 TEU and the Commission's New Framework contain procedural limitations making them unlikely to successfully resolve rule of law crises, especially if they occur simultaneously in multiple Member States.

4 Mechanisms to protect the rule of law within the EU 'in action': the debilitation of the Polish Constitutional Court

Since the Polish parliamentary elections of 2015 were won by the *Prawo i Sprawiedliwość* (Law and Justice) party, it has implemented a series of reforms which it claimed were necessary to 'de-communise' the country – namely to remove all aspects of the Soviet system which, in its view, continued to exist despite the fall of communism in 1989. The government has sought to legitimise many of its reforms by comparing them with legal institutions, mechanisms or procedures which function in other European countries and by claiming that such reforms are required in Poland in order to improve the overall efficiency of the justice system.

These reforms should be viewed systemically and holistically to appreciate the full extent to which the justice system has become entwined with executive power. Viewed as a whole, these reforms constitute wide-reaching restrictions on the scope of individual freedom. They lay the groundwork for an increasingly arbitrary, non-transparent executive which is not subject to any effective judicial supervision.[38] However, as noted above, this article focuses solely on the debilitation of the Constitutional Tribunal as the fundamental reform which represented a *sine qua non* for implementing subsequent reforms, particularly because the Polish government has implemented de facto changes to the Polish

37 In the *Celmer* case C-216/18 *Minister for Justice and Equality v Artur Celmer*, ECLI:EU:C:2018:586, the CJEU was asked by the Irish High Court to address one of the most serious current legal challenges of the EU: the consequences of restrictions imposed upon judicial independence in one Member State for other Member States of the Union.

38 Position of the Helsinki Committee in Poland – February 2018 <www.hfhr.pl/wp-content/uploads/2018/02/HCiP_statemenet_15022018.pdf>.

Constitution without possessing the necessary parliamentary majority that would entitle it to enact *de jur*e constitutional amendments.[39]

The fact that the Polish government sought to paralyse the Constitutional Tribunal's functionality almost immediately upon taking office is not coincidental. The clear aim was to establish control over the Tribunal and thereby preclude any successful challenges to subsequent legislation that would de facto implement constitutional reforms on a wide range of areas without formally amending the constitution. The Polish government had no intention of accepting delays to its legislative agenda that the Tribunal might cause by negative judgments and quickly sought to render the Tribunal toothless by adopting two separate Constitutional Tribunal Amendment Acts (on 19 November and 22 December 2015). The latter of these was the most controversial but, for the sake of simplicity, they will be considered together. The essence of the reforms contained in these two amending Acts was twofold.

Firstly, the government focused on *personal* (or *personnel*) reforms. The early termination of a Tribunal judge's mandate would no longer be decided upon by the Tribunal's General Assembly but by the *Sejm* (i.e. the lower chamber of Parliament). Disciplinary proceedings, as a precursor to dismissal, would be capable of bring initiated against a Tribunal judge by the President of Poland or the Minister of Justice. The reforms terminated the tenure of the incumbent President and Vice President and introduced a three-year tenure for the Tribunal's presidency, renewable only once. They stipulated that a Tribunal judge's term of office would formally commence at the moment at which their oath was accepted by the Polish President. Finally, the amendments removed certain core provisions which had previously applied to the Tribunal's judiciary, such as those guaranteeing the independence of Tribunal judges, those governing the composition of the Tribunal and those concerning the preclusion on seeking re-election to the Tribunal.

The second aspect of the government's reforms in the amending Act was to focus on certain *procedural* characteristics of the Tribunal, again with a view to hamstringing its ability to delay the awaiting constitutional onslaught. Accordingly, the amendment Act increased (from 9 to 13) the quorum of judges required in the Tribunal's most important cases and introduced a two-thirds majority requirement for adopting a judgment.

Another debilitating procedural reform was the removal of the Tribunal's autonomy to organise its own workload by prioritising the order in which it heard cases (i.e. preventing the Tribunal from hearing cases in accordance with their importance). The amendments required that the Tribunal should hear cases in a strictly chronological order, according to the date on which they were filed. It also subjected all pending constitutional proceedings to a six-month 'suspensory period', so that no hearing could occur until this time-delay had passed. Even (unrealistically) assuming that the Tribunal had no backlog of cases on the date the new claim was filed, the effect of these reforms was to guarantee that controversial legislation would remain in force for a considerable period of time before it could be reviewed by the Tribunal.

39 Law and Justice received 37.6% of the votes cast, which entitled it to 235 (i.e. 51%) of the 460 seats in the *Sejm* (the lower chamber of the Polish Parliament) and 61% of the seats in the Senate (the upper chamber). Although these results were sufficient to enable it to form the first single-party government since the fall of communism, this clearly fell short of the two-thirds majority required by the Polish Constitution for introducing constitutional amendments. As the Venice Commission noted in its Opinion on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108th Plenary Session, Opinion 860/2016, CDL-AD(2016)026 (Venice, 14–15 October 2016) para 127: 'the Polish Parliament assumed powers of constitutional revision which it does not have when it acts as the ordinary legislature, without the requisite majority for constitutional amendments'.

Ironically, the first litmus test of the Tribunal's ability to respond to unconstitutional legislation was the new Constitutional Tribunal Amendment Act itself. Amongst the many parts of this Act which gave cause for significant concern, certain provisions appeared to clearly contradict the unambiguous text of the Polish Constitution. For example, the new requirement for Tribunal judgments to be approved by a two-thirds majority does not sit easily alongside a constitutional provision stating that: 'Judgments of the Constitutional Tribunal shall be made by a majority of votes.'[40] Despite containing such clearly *contra legem* provisions, the entry into force of the amendment Act occurred instantly, without the customary 14-day *vacatio legis*.[41] This not only prevented the Tribunal from annulling the statute before it entered into force, but it also led to a number of practical problems regarding whether, and how, its legality should be properly assessed.

Considerable disagreement arose regarding whether the constitutionality of the amendment Act should be reviewed in accordance with the new procedure it itself had laid down, or in accordance with the hitherto procedure. This created a catch-22-style paradox.[42] If the Tribunal applied the *new* procedure, contained in the very Act whose constitutionality it was reviewing, and concluded that the Act was unconstitutional (as it ultimately did), critics of the Tribunal would claim that this judgment was non-binding, since it was based on unconstitutional statutory rules (i.e. the unlawful Act). Conversely, if the Tribunal applied the hitherto procedure and concluded that the amending Act was unconstitutional, the judgment would be criticised as non-binding as it had not followed the proper (new) procedure.

After the Constitutional Tribunal was turned into an appendage of the ruling party, the next step was to restructure the ordinary courts, the National Council of the Judiciary and the Supreme Court, which was undertaken simultaneously by a law which was initially adopted in 2017 and subject to a number of amendments in 2018. On 29 July 2017 the European Commission launched infringement proceedings against the Polish Law on the Ordinary Courts inter alia as regards the legality of its provisions governing the retirement of judges and their impact on the independence of the judiciary. The European Commission referred this case to the CJEU on 20 December 2017.

Since early 2016, no significant government legislation has been found to be unconstitutional and it appears likely that this will continue to be the case. Professor Ewa Łętowska has aptly referred to the Tribunal's emasculation as a Pyrrhic victory of politics over the law.[43] Despite large-scale public demonstrations and protests being held, the ultimate victor was the newly elected government. Having rendered toothless the Constitutional Tribunal, the Polish government was able to move on to other significant – and undoubtedly *constitutional* – reforms, safe in the knowledge that its legislation would not be declared invalid, regardless of its content, reach or impact. Such reforms established political control over the Supreme Court, the common courts and the judiciary as a whole, the prosecutorial authorities, the secret service and intelligence agencies, the police, the national media and the right to organise mass protests. When

40 The Constitution of the Republic of Poland of 2 April, 1997, as published in Dziennik Ustaw (1997) 78, item 483, Article 190(5).

41 The *vacatio legis* period of a statute may only be shortened in the event of 'an important interest of the state necessitating immediate effectiveness', Article 4 of the Law on the publication of normative acts and some other legal acts, Dziennik Ustaw (2017) item 1523.

42 For a further discussion of this paradox, see Tomasz Gizbert-Studnicki, 'A State of Constitutional Necessity Versus Standard Legal Reasoning' (*Verfassungsblog*, 3 June 2017) <https://verfassungsblog.de/a-state-of-constitutional-necessity-versus-standard-legal-reasoning>.

43 Ewa Łętowska and Aneta Wiewiórowska-Domagalska, 'A "Good" Change in the Polish Constitutional Tribunal?' (2016) 1 Osteuropa Recht 79–93.

reviewing this package of reforms, during the assessment of an application to surrender a person to Poland pursuant to a European Arrest Warrant, the Irish High Court described them as a 'deliberate, calculated and provocative legislative dismantling by Poland of the independence of the judiciary, a key component of the rule of law'. On the basis of the information in the reasoned proposal of the European Commission and of the findings of the Commission for Democracy through Law and taking into account the effects of the recent legislative reforms to the polish system of justice, the referring court has concluded that, as a result of the cumulative impact of the legislative changes that have taken place in Poland since 2015 concerning, in particular, the Constitutional Court, Supreme Court, the National Council for the Judiciary, the organisation of the ordinary courts, the National School of Judiciary and the Public Prosecutor's Office, the rule of law has been breached in that Member State. The referring court bases that conclusion on changes found by it to be particularly significant:

- the changes to the constitutional role of the National Council for the Judiciary in safeguarding independence of the judiciary, in combination with the Polish government's invalid appointments to Constitutional Tribunal and its refusal to publish certain judgments;
- the fact that the Minister for Justice is now the Public Prosecutor and is entitled to play an active role in prosecutions and that he has a disciplinary role in respect of presidents of courts, which has the potential for a chilling effect on those presidents, with consequential impact on the administration of justice;
- the fact that the Supreme Court is affected by compulsory retirement and future appointments and that the new composition of the National Council for the Judiciary will be largely dominated by political appointees;
- and, lastly, the fact that the integrity and effectiveness of the Constitutional Court have been greatly interfered with in that there is no guarantee that laws in Poland will comply with the Polish Constitution, which is sufficient in itself to have effects throughout the criminal justice system.[44]

It is virtually inconceivable that a fully functioning Tribunal would have permitted this package of reforms to enter into force unchallenged. The extent to which the Polish court system has regressed from traditional European values of judicial independence is perhaps best indicated by the refusal to implement an interim injunction imposed by the CJEU on the continuation of tree felling in the Białowieża primeval forest.[45]

The current controversies surrounding the reform of Poland's Supreme Court resemble the conflict over the Constitutional Tribunal in 2015 to 2016 to some extent. However, the Supreme Court took new steps on 2 August 2018, when it referred five questions to the CJEU and requested a preliminary ruling. All five questions relate (more or less directly) to the principles of (1) independence of the courts and (2) the judicial independence under the circumstances of the rule of law crisis in Poland and thus have a potential of becoming a key aspect of the Polish rule of law crisis.[46]

44 Judgment C-216/18 *Celmer* (n 37) paras 123 and 21.

45 Robert Grzeszczak and Mateusz Muchel, 'Provisional Measures against EU Member States: An Example of the Białowieża Forest' (2018) 2(2) Eastern European Journal of Transnational Relations 21–35 <http://hdl.handle.net/11320/6819>.

46 For more see Robert Grzeszczak and Ireneusz Pawel Karolewski, 'The Rule of Law Crisis in Poland: A New Chapter' (*Verfassungsblog*, 8 August 2018) <https://verfassungsblog.de/the-rule-of-law-crisis-in-poland-a-new-chapter>.

There can be no real doubt as to the fact that the recent reforms in Poland represent a considerable threat to the rule of law. This much has been made clear in the various opinions of the Venice Commission. In March 2016, when evaluating the aforementioned amendments to the Constitutional Tribunal, the Venice Commission concluded that they had had 'severe consequences on the proper functioning of the Constitutional Tribunal [which] will make the Tribunal ineffective as a guarantor of the Constitution'.[47] A separate opinion noted that 'numerous other provisions of the adopted Act would considerably delay and obstruct the work of the Tribunal and make its work ineffective, as well as undermine its independence by exercising excessive legislative and executive control over its functioning'.[48] This meant that the Tribunal 'cannot play its constitutional role as the guardian of democracy, the rule of law and human rights'.[49] When reviewing the government's extension of secret surveillance powers available to Poland's law enforcement and intelligence agencies, the Venice Commission concluded that 'the procedural safeguards and material conditions set in the Police Act for implementing secret surveillance are still insufficient to prevent its excessive use and unjustified interference with the privacy of individuals'.[50] Likewise, when reviewing other aspects of the government's reform package, the Venice Commission concluded that:

> . . . the merger of the office of the Minister of Justice and that of the Public Prosecutor General, the increased powers of the Public Prosecutor General vis-à-vis the prosecution system, the increased powers of the Minister of Justice in respect of the judiciary (Act on the Organisation of Common Courts) and the weak position of checks to these powers (National Council of Public Prosecutors) result in the accumulation of too many powers for one person. This has direct negative consequences for the independence of the prosecutorial system from political sphere, but also for the independence of the judiciary and hence the separation of powers and the rule of law in Poland.'[51]

Subsequent reforms to the Polish Supreme Court and common courts were described as creating 'a serious risk for the functioning of Polish democracy' and, at least to some degree, 'the proposed system is even worse than its Soviet predecessor'[52] and 'jeopardises the stability of the Polish legal order'.[53] Accordingly, it is patently clear that the Venice Commission considered the situation in Poland to represent a serious threat to the rule of law.

The negative opinion of Poland's legislative reforms was also shared by the European Commission in a number of Opinions regarding the rule of law in Poland. The Commission has noted that the reforms 'prevented [the Polish Constitutional Tribunal]

47 See Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session, Opinion 833/2015, CDL-AD(2016)001 (Venice, 11–12 March 2016) para 88.

48 See Opinion on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108th Plenary Session, Opinion 860/2016, para 123.

49 Ibid para 128.

50 See Opinion on the Act of 15 January 2016 amending the Police Act and certain other Acts, adopted by the Venice Commission at its 107th Plenary Session, Opinion 839/2016, CDL-AD(2016)012 (Venice, 10–11 June 2016) para 132.

51 See Opinion on the Act on the Public Prosecutor's office, as amended, adopted by the Venice Commission at its 113th Plenary Session, Opinion 892/2017, CDL-AD(2017)028 (Venice, 8–9 December 2017) para 115.

52 See Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, adopted by the Commission at its 113th Plenary Session, Opinion 904/2017, CDL-AD(2017)031 (Venice, 8–9 December 2017) paras 43 and 61.

53 Ibid para 63.

from fully ensuring an effective constitutional review [so that] there will be no effective scrutiny of compliance with fundamental rights of legislative acts. This raises serious concerns in regard of the rule of law'.[54] As early as July 2016 the European Commission had officially declared that 'there is a situation of a systemic threat to the rule of law in Poland.'[55] This clear acknowledgment of the seriousness of the situation in Poland was repeated in other Commission Recommendations made in December 2016,[56] July 2017[57] and December 2017.[58]

5 Conclusion

The foregoing analysis demonstrates the ineffectiveness of instruments designed to compel respect for and compliance with the EU's core values. Such inefficacy limits the possibility of adequate responses in the event that those values are violated and prevents the effective protection of a vital EU interest – maintaining the integrity of its value.

The EU's transformation, from being an institution which essentially dealt with purely economic matters into one which has developed and implemented its own human rights regime, has been complex and impressive. However, its evolution into an organisation capable of reacting to, and remedying, threats to the rule of law represents a far more complex and difficult transition. This article began by arguing that certain comparisons can be made between the EU's development into an institution which effectively enforces *individual* human rights and the first tentative steps towards becoming an effective policer of the rule of law. Perhaps history will show the two developments to have ended with an equally satisfying denouement. At present, however, whereas the EU's first tentative steps towards policing the rule of law may bear some superficial similarity to its journey into human rights protection, the differences between these two excursions are more apparent than the similarities.

Firstly, whereas some initial wariness undeniably existed amongst the Member States as the EU began to enforce human rights as an issue of supranational European law, there did not exist the extent of uncertainty or opposition to human rights protection as exists regarding rule of law issues at the heart of a state's constitutional arrangements. In fact, the CJEU's first steps towards human rights protection were taken precisely because certain Member States, notably Germany, had criticised the absence of such protection at a European level.

Secondly, whereas the EU's human rights competences were progressively developed by the CJEU's jurisprudence, no such possibility exists in relation to the New Framework

54 See Commission Opinion of 1 June 2016 regarding the Rule of Law in Poland, Brussels, 1 June 2016 C(2016) 3500 final <http://phavi.umcs.pl/at/attachments/2016/1001/122909-ruleof-law-opinion-poland-1-6-2016.pdf>.

55 See Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland, Brussels, 27 July 2016 C(2016) 5703 final [2016] OJ L 217/53 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016H1374&from=EN>.

56 See Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374 [2017] OJ L 22/65 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017H0146&from=EN>.

57 See Commission Recommendation of 26 July 2017 regarding the rule of law in Poland, complementary to Commission Recommendations (EU) 2016/1374 and (EU) 2017/146, C(2017) 5320 final <https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice/rule-law/rule-law-framework_en>.

58 See Commission Recommendation of 20 December 2017 regarding the rule of law in Poland complementary to Commission Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, C(2017) 9050 final <http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49107>.

or Article 7, since the CJEU is effectively unable to rule on the core aspects of those mechanisms.

Thirdly, as a corollary of the point above, whereas the EU's adoption of the Charter of Fundamental Rights heavily relied upon, and often codified, the CJEU's case law developments, very little scope exists as regards developing the content of the rule of law. It remains unlikely that the Member States would be capable of adopting EU legislation to provide a clearer, European-wide definition of this principle.

The EU's present inability to remedy rule of law crises seems unquestionable. Viktor Orban's dismantling of the Hungarian constitutional system has been ongoing since 2014. The rule of law in Poland has been progressively undermined since the elections of 2015. The EU's long-term inability to prevent, revert or even hinder perturbing reforms within its Member States clearly demonstrates the absence of any effective EU law weapons for reacting to such crises. This does not mean that the EU has become ineffective as an organisation for enforcing individual human rights – the rule of law and individual human rights are not entirely synonymous concepts. However, they are clearly interrelated. An important aspect of human rights protection is to prevent the arbitrary use of state power against individuals. When the national courts are brought under the control of the national government, their ability and willingness to protect individuals against such arbitrary state power are clearly undermined. The absence of national judicial independence may, like a cancer, eat away at the checks and balances which are crucial to the healthy functioning of any democracy. With time, the erosion of the rule of law inevitably erodes the protection of individual human rights. Accordingly, for the EU to continue operating effectively at the level of individual human rights, it is crucial that it develops the capacity to prevent rule of law crises at a systemic level. Currently, however, the prognosis does not look promising.

Accordingly, at the time of writing, it seems unlikely that neither Article 7 nor the New Framework will offer any workable solution to rule of law crises that occur in multiple (even if only two) Member States simultaneously. Both mechanisms rely upon an unlikely degree of cooperation on the part of the wayward Member State or, alternatively, upon securing a seemingly unachievable level of consensus amongst the Member States.

The authors accept that no one could have predicted the existence of simultaneous rule of law crises in multiple Member States. Certainly, this does not appear to have been taken into account when drafting Article 7. Bitter experience has taught us that, given the EU's current level of legal integration, it is improperly equipped to police the rule of law per se. An equally depressing conclusion (based on the experiences in Poland and Hungary) is that Member States' internal mechanisms, designed to guarantee the rule of law, can be relatively easily dismantled by a government which is determined to do so. The practical results of the EU's attempts to police the rule of law have fallen far short of the sublime rhetoric surrounding its potential to do so. The participation of other actors, such as the Council of Europe (Venice Commission) and the Organization for Security and Co-operation in Europe, also appear to have had limited practical significance.

The above essentially leaves the EU with three main policy options. Firstly, it could develop a procedure which enables a more effective response to rule of law crises. However, this is extremely unlikely since it would invariably require Treaty amendments that require unanimity and are therefore impractical at the present moment. Secondly, the EU could resign altogether from its journey towards offering effective protection of the rule of law. However, this would be a political, legal and image disaster for the EU itself and would raise questions about its legitimacy and efficacy at a time of already

unprecedented EU scepticism. Thirdly, the EU could simply choose to wait out the storm until the currently wayward governments are replaced with ones that are less likely to block Treaty amendments needed to render Article 7 workable in practice. No one, including the authors, can be sure which of these approaches will be adopted by the EU. The greatest danger lies in the possibility that, by such time, the constitutional and political arrangements of certain Member States may have been altered and captured to the point that it becomes extremely difficult to implement a reversal.

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Brexit on the island of Ireland: beyond unique circumstances

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Abstract

This article offers an original analysis of Ireland's and the UK's common EU membership in the light of Brexit, identifies socio-economic decline and threats to the functionality of the Good Friday Agreement as decisive threats emanating from Brexit, and suggests that these can be counteracted by providing a sustainable legal framework for hybridity of Northern Ireland in the categories of citizenship and territory, as well as for deepening socio-economic and civic integration on the island of Ireland, alongside securing antidiscrimination law in Northern Ireland. Instead of protecting these elements, the Draft Protocol on Ireland/Northern Ireland to the EU–UK Draft Withdrawal Agreement sacrifices the indivisibility of the Internal Market by limiting Northern Ireland's access to markets in goods. Concise changes to the draft are proposed to address these shortcomings and to secure participation of Northern Ireland's representatives in its implementation.

Keywords: Ireland/Northern Ireland; Brexit; European Union law; Draft Protocol Ireland/Northern Ireland Withdrawal Agreement; hybrid citizenship; antidiscrimination law

1 Introduction

The position of the island of Ireland – comprising Ireland and Northern Ireland – has gained prominent recognition in negotiating the first ever departure of a Member State from the European Union (EU). A special task force of the EU Commission and the UK negotiating teams on the withdrawal process addressed the 'unique circumstances on the island of Ireland',[1] and a special chapter in the Draft Withdrawal Agreement is dedicated to them. Initially, the Commission had even pledged not to negotiate as much as the outline of the EU–UK future relationship before these unique circumstances were addressed. However, the 'Irish question' has since escaped any agreed solution, although the Draft Withdrawal Agreement has reduced it to the aim of avoiding two ills: a hard border between

* Thanks go to feedback by the anonymous referees and discussants of these thoughts at the conference from which this work originates, as well as in the context of the TREUP project (see also introduction to this issue). All internet sources were last accessed on 28 August.

1 This term was included in the European Council's (Article 50 TEU) negotiation mandate for the EU Commission of 22 May 2017 (Council of the European Union, XT 21016/17 <www.consilium.europa.eu/media/21766/directives-for-the-negotiation-xt21016-ad01re02en17.pdf>.

Ireland and Northern Ireland and the diminution of rights in the context of the Good Friday Agreement.

This article argues that the unique circumstances on the island of Ireland are of pivotal relevance to the EU as a whole. Since the UK and Ireland acceded to the European Economic Community (EEC) without being required to address human rights violations or territorial conflicts first, their EU membership has been based on the assumption that such problems would be solved by membership itself. The 'Irish question' thus highlights the potency of the EU's socio-economic integration project for enabling sustainably peaceful relations between the peoples of Europe. It is thus imperative for the EU to solve the 'Irish question'. Accordingly, the temptation may become compelling to redefine it narrowly and/or to agree to a feigned solution. Both strategies not only fail to solve the 'Irish question', but also have the potential to undermine the EU integration project as a whole.

In order to develop this argument, the article proceeds as follows: section two recalls the state of affairs on the island of Ireland at the time of UK and Irish accession to the EEC, identifying the unresolved status of Northern Ireland as the core problem. Next, it considers the relevance of common EU membership for the Good Friday Agreement, which after all is viewed as having resolved that problem. This part concludes that EU law is indispensable for the realisation of two central ambitions of the Agreement, namely a hybrid position of Northern Ireland in terms of territory and citizenship and the improvement of the socio-economic position in Northern Ireland. Section three summarises how the 'Irish question' has been reflected upon academically and politically in relation to the UK's withdrawal from the EU. This part concludes with an analysis of the relevant parts of the Draft Withdrawal Agreement in relation to the two central areas where EU membership remains a pivotal precondition for the Good Friday Agreement. The fourth part discusses how far the Draft Withdrawal Agreement must be considered as betraying the indivisibility of the Internal Market as a central EU value, and how this is likely to impact on the conclusion of the withdrawal process. In conclusion, tentative perspectives to overcome its shortcomings will be offered.

2 The UK and Ireland in the EEC, EC and EU

It is worthwhile to recall the concurrent accession of Ireland and the UK to the EEC in order to identify the specific problems caused for the island of Ireland by the UK's unilateral withdrawal from today's EU.[2]

2.1 Joining the EEC: Northern Ireland as a core issue

While both states joined at the same time, their motives could not have been more different.[3] For Ireland, EEC membership constituted a further step towards full

2 Today's EU started out as European Economic Community in 1957, which was its name when the UK and Ireland acceded. The Maastricht Treaty (1993), in force when the Good Friday Agreement was negotiated, renamed the EEC to EC, while also creating the EU as a roof over three pillars, the EC (to which the EEC was re-baptised), the Common Security and Justice Policy, and its three-pillar structure triggered a long-lasting academic discussion on whether the EU was an independent entity and the overarching identity of the EC and the EU or whether the EC was the only relevant category. This debate is now superfluous, as the Treaty of Lisbon has merged the EC and EU into the EU.

3 Anthony M Collins, 'EU Law in Ireland Post-Brexit'(2018) 21 Trinity College Law Review 9–30, 8.

international recognition of the young state,[4] as well as the opportunity to overcome the structural disadvantages of a small state through pooling of sovereignty.[5] Joining the EEC underlined its aspiration to open up the country to international trade, and offered the opportunity to lessen the pressure of external competition as a lever to modernisation, an aim that would also be eased by access to EEC structural funds and agricultural subsidies. The concern of losing access to the UK market competed with the aim of overcoming an 'unbalanced economic relationship with Britain',[6] while the option to soften the division of the island of Ireland constituted an added advantage.[7] The accession process was accompanied by a public debate, stressing the progressive nature of European integration, and completed by a referendum, just as any future Treaty change,[8] resulting in a relatively high level of public awareness of the EEC, EC and EU.

By contrast, the UK is viewed as a reluctant applicant.[9] It rejected the offer to participate in the European Coal and Steel Community (1951) and the EEC (1957) on the grounds that it wished to retain preferential trade relations with the Commonwealth countries and could not succumb to free movement of workers. It aspired to a free trade association of the Organisation for European Economic Co-operation states with the new EEC, which would allow it to access the Common Market without such obligations. When the EEC states refused such an arrangement, the UK supported the Norwegian initiative to form a European Free Trade Association (EFTA), which did not cover factor mobility and had no judicial authority. The ink under the 1960 EFTA agreement had barely dried when the UK applied for EEC membership in 1961: the access to the EEC Common Market appeared more relevant due to its size. These economic motives to accede to the EEC became more pressing with a weakening economy, forcing the UK to apply for International Monetary Fund support in 1967, and inflating unemployment figures at the turn of the next decade.[10] The accession was portrayed as merely related to the Common Market. When acceptance by a referendum was sought in 1975, this was for internal political reasons rather than as a constitutional requirement.

While joining the EEC, the UK and Ireland had an ongoing territorial disagreement: The UK claimed Northern Ireland as part of its territory, and also effectively governed the province, while the Irish Constitution of 1937 stated in Article 2 that Ireland encompassed all 32 counties on the island of Ireland, though Article 3 conceded that

4 Ireland had only became formally independent from the UK in 1922, i.e. 50 years before joining the EEC, at the price of giving up sovereignty over six of its 32 counties. It fully surpassed its status as a UK dominion and Member of the British Commonwealth as late as 1949. Its membership application to the UN only succeeded in 1955. See further Birgit Laffan and Jane O'Mahoney, *Ireland and the European Union* (Palgrave Macmillan 2008) 12–17.

5 Laffan and O'Mahoney (ibid) refer to sharing (13) or pooling of sovereignty (31), while Katy Hayward wonders why Ireland would give up sovereignty to the EU: Katy Hayward, *Irish Nationalism and European Integration* (Manchester University Press 2009) 11, 45.

6 Collins (n 3) 13.

7 This motive is stressed by Adrian Guelke, 'Britain after Brexit: The Risk to Northern Ireland' (2017) 28 Journal of Democracy 42–52, 43; see also Hayward (n 5) who depicts the accession to the EU as (among others) motivated by feeding a new narrative for Irish nationalism which would include the North.

8 Gavin Barrett, *Why Does Ireland Have All Those EU Referendums?* (Institute for International and European Affairs 2012). See, on the rejection of the Treaty of Lisbon, Anthony Arnull, 'Ireland and the Lisbon Treaty: All's Well that Ends Well?', in Anthony Arnull (ed), *A Constitutional Order of States?* (Hart 2011) 77–91.

9 See for a summary with hindsight, Simon Bulmer and Lucia Quaglia, 'The Politics and Economics of Brexit' (2018) 25 Journal of European Public Policy 1089–98, 1090–2; from a contemporary perspective, see Lee Burke, 'Britain and the EEC' (1967) 130 World Affairs 163–76.

10 Desmond Dinan, *Europe Recast: A History of the European Union* (2nd edn, Palgrave Macmillan 2014) 99–100, with further references.

Irish parliamentary legislation would not encompass Northern Ireland. In Northern Ireland, the dispute was one of the bases for a paramilitary conflict between two ethno-political groups: the Unionists (often of Protestant affiliation) supported the union between Britain and Northern Ireland, while Nationalists (predominantly Catholic) endeavoured a united Ireland.[11] British rule in Northern Ireland was punctuated by state activities provoking litigation under the European Convention on Human Rights (ECHR), with the practice of imprisoning persons without trial ('internment') as a prominent example.[12] There were also considerable socio-economic problems in Northern Ireland, with poverty and destitution particularly pronounced among the Catholic population.[13]

Today, a dubious human rights record would prevent any accession to the EU under Articles 6, 48 and 49 of the Treaty on European Union (TEU),[14] and border disputes presently halt accession of Bosnia-Herzegovina and Serbia.[15] However, in 1972, the EEC was just developing human rights protection,[16] and territorial disputes between applicant countries were not discussed at all.

Since the EEC was, as the EU is today, a peace project based on the equality and cooperation of its Member States, the conflict had to be overcome, however. One can only assume in hindsight that the optimism for the effectiveness of the European integration project outweighed any concern that the EEC had just acquired two potentially warring Member States.

2.2. Impact of EEC membership in Ireland and the UK and Northern Ireland

Common EEC membership benefitted both Ireland and the UK through offering a larger market and triggering expansion and efficiency gains, while both countries became net recipients through the EEC structural funds. Both countries profited from free

11 Terminology is fraught with ideology here. The term conflict competes with the term 'Troubles' (with and without capital 'T'), while some classified the conflict as civil war, and claimed that any prisoners were prisoners of war under the UN's Geneva Convention. See, for an extensive explication, Brice Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford University Press 2010) 5–6). The conflict is not fundamentally religious, and reference to Protestants and Catholics does not include adherents of those religions who came to Northern Ireland from countries other than the UK and Ireland. On the erroneous classification of the so-called sectarian conflict as neither ethnic nor racial, see Chris Gilligan, *Northern Ireland and the Crisis of Anti-Racism* (Manchester University Press 2017) in particular 23–44. Nowadays, when Islamophobia becomes an accepted and EU-funded field of study (see, for example, Ian Law, Amina Easat-Daas and Salman Sayyid, *Dominant Counter-narratives to Islamophobia: Comparative Report* (CIK Working Paper, University of Leeds2018); there is a whole new dimension in which analysis of Northern Ireland could once again become leading in antidiscrimination law.

12 For a thorough discussion of the only partially successful challenges under the ECHR, see Dickson (n 11); Onder Bakircioglu and Brice Dickson, 'The European Convention in Conflicted Societies: The Experience of Northern Ireland and Turkey' (2017) 66 International and Comparative Law Quarterly 263–94.

13 John Coakely, 'The British–Irish Relationship in the Twenty-First Century' (2018) 17 Ethnopolitics 306–24, 315.

14 See on the example of Serbia Beata Huszka, 'Human Rights on the Losing End of EU Enlargement: The Case of Serbia' (2018) 56 Journal of Common Market Studies 352–67.

15 While the absence of border conflicts is not formally an accession criterion, the recent dispute between Croatia and Slovenia over their common border, a heritage of the dissolution of Yugoslavia, before the Court of Justice (case number C-457/18) has motivated the EU Commission to insist on any other border issues to be resolved before accession of other former Yugoslavian sub-states (see answer of Mr Hahn for the Commission to a question in the European Parliament of 6 May 2018 <www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2018–001063&language=EN>.

16 On the relation of the EU to human rights, see Marton Varju, *European Union Human Rights Law: The Dynamics of Interpretation and Context* (Edward Elgar 2014).

movement of workers initially by being able to 'export' their work-force, often through temporary works agencies. Irish workers moving between Ireland and the UK saw their rights underpinned by EU law and its predecessors, which had enormous practical consequences in particular for cross-border workers, a category most relevant on the island of Ireland.

For Ireland, modernisation meant moving from a mainly agricultural country towards an industrialised and high-tech one with a significant financial sector.[17] Ireland managed its industrial modernisation through a social partnership policy, among others, while also introducing social benefits for the first time.[18] It achieved a remarkable degree of trade diversification, reducing the UK-share of its exports from over 55 per cent in 1973 to a mere 18 per cent in 2004.[19]

In the case of the UK, the access to the Common Market offset the decline of its industrial base. In most EU Member States, state social policy (in most cases underpinned by rights) softened the negative impact of the restructuring of industries on citizens' livelihoods, by instruments such as expensive redundancy plans by employers and employment agencies, which increasingly also had retraining programmes. In the UK, there was no such cushioning, and from 1979 the Conservative Prime Minister Margaret Thatcher ran roughshod over any remaining social consciousness with her explicit disdain for society at large.[20]

Socio-economic developments on the island of Ireland were contradictory, though. While the Ireland of the 26 countries transformed through modernisation beyond industrialisation, the establishment of an effective service and financial sector, and a differentiation of trade to reduce dependency from the UK, Northern Ireland suffered from economic decline. The former industrial strength of the six counties, depending on shipyards and other heavy industry, became a victim of the fundamental shifts in the global economy. Further, the continuing conflict, with paramilitary violence and an extensive presence of British troops, caused widespread destruction and impacted on the economy as a whole, while business retreated from the province and left behind mainly the agricultural and the public sectors, the latter with a certain emphasis on security. Thus, upon entering the EEC, the socio-economic discrepancy between Ireland and Northern Ireland diminished, while at the same time economic exchange became formally easier. In spite of those frictions, overall concurrent Common Market access emerged as instrumental to deepen the economic integration on the island of Ireland.

At the same time, regular meetings of Irish and UK government representatives in the monthly meetings of the Council of Ministers offered ample opportunities for diplomatic rapprochement, facilitating negotiations resulting in improving the governance of

17 The 26 counties, prior to joining the EU, were even referred to as an 'agricultural backwater', while the six counties were the most industrialised and advanced until the early 1960s, which came with a certain regional price: Collins (n 3) 14.

18 Laffan and O'Mahoney (n 4).

19 Central Statistical Office Ireland, *Ireland and the EU 1973–2003 Economic and Social Change* (2004), table 8.

20 The impact of some of the Conservative government's social policy on the result of the UK's EU referendum is debated in a special issue of the Journal of Social Security Law; see Charlotte O'Brien, 'Brexit, Social Security and EU Nationals in the UK: A Recent History of Welfare Segregation, and an Administrative Storm Brewing' (2018) 25 Journal of Social Security Law 1–3.

Northern Ireland.[21] Incrementally, specific negotiations between the UK and Ireland succeeded, for example, enabling common transport and energy sectors in the island of Ireland. They relied on the legal framework provided by the EEC and later the EU.

2.3 Relevance of the legal framework and its supranational quality

The relevance or the specific character of Community law is difficult to quantify, but it certainly constituted a factor in the success of all this. It rendered the EEC and renders the EU much more than a negotiation space.

In 1972, the supranational character of the then EEC was not just a slogan used in its initial negotiation. Instead the Court of Justice had developed the doctrine of direct effect and supremacy of Community law, starting with the pivotal judgments in *Van Gend en Loes* and *Costa v ENEL*.[22] The effects of EU law comprise direct effects – i.e. the ability of citizens to rely on the relevant provisions before national courts – and supremacy – i.e. the capacity of overruling national law. Direct effect, while only explicitly demanded for regulations and decisions (Article 288 TFEU) also encompasses Treaty provisions and Directives if these are phrased in such a way as to be applicable by judges without legislative implementation, though for Directives only in relations between citizens and the state or its emanations. Supremacy comprises indirect and incident effects of all EU law, also such which has no direct effect through the principles of interpretation of national law in line with EU law and of non-applicability of provisions breaching EU law. As a last resort, the citizen can also claim damages from the Member State which did not implement an EU Directive or any other source of EU law correctly. This is relevant, because both states have a dualist disposition towards international law generally. Nevertheless, Irish[23] and UK[24] courts generally accepted the EU law doctrine of supranationality, and also engaged in extensive judicial dialogue with the Court of Justice. Without these supranational elements, the EEC Treaty would not have had the capacity to become a legally binding and practically reliable basis for cross-border cooperation.

This legal regime had multiple effects on the relations between Ireland and the UK on the island of Ireland. One important example is the EEC's programme to legislate in order to obfuscate physical borders in the Community. While the Treaty created directly effective and supreme provisions guaranteeing free movement of goods, services, persons

21 For an early example, see John McGarry and Brendan O'Leary, *Explaining Northern Ireland* (Blackwell 1996) 279–82, 302–6; see also Elizabeth Meehan, '"Britain's Irish Question: Britain's European Question?' British–Irish Relations in the Context of European Union and the Belfast Agreement' (2000) 26 Review of International Studies 83–97.

22 ECJ 5 February 1963 *Van Gend & Loes* Case 26/62 ECLI:EU:C:1963:1; ECJ 15 June 1964 *Costa v ENEL* Case 6/64 ECLI:EU:C:1964:66; for standard textbook coverage on this see Paul Craig and Grainne de Búrca, *European Union Law* (6th edn, Oxford University Press 2015) 185–315.

23 This even held for the disputed austerity measures, see Peter Charleton and Angelina Cox, 'Accepting the Judgements of the Court of Justice of the EU as Authoritative: The Supreme Court of Ireland, the European Stability Mechanism and the Importance of Legal Certainty' (2016) 23 Maastricht Journal of Comparative and European Law 204–15.

24 Paul Craig, 'Britain in the European Union' in by J Jowell, D Oliver and Colm O'Cinneide (eds), *The Changing Constitution* (Oxford University Press 2015) ch 4; Anthony Arnull, 'Keeping their Heads Above Water? European Law in the House of Lords' in James Lee (ed), *From House of Lords to the Supreme Court* (Oxford University Press 2011) 129–48. The UK Supreme Court ruling in *Miller* (on which see below text to n 42), though contestable in relation to the Good Friday Agreement, is a model case demonstrating how the Supreme Court follows the doctrine of supremacy and direct effect of EU law.

and capital by the end of the transitional period in 1965,[25] the existence of different national systems for VAT and the absence of a uniform pre-declaration of customs consignments meant that border controls remained necessary in the Community, and also on the island of Ireland. The first ever Treaty Reform, the Single European Act of 1987, facilitated adoption of legislation realising Commission President Jacques Delors' ambitious Internal Market programme, which contained the Community Customs Code, adopted in 1992.[26] It was this code that eliminated the necessity for controlling goods crossing the borders within the Internal Market, since all levies as well as VAT could be administered after the border crossing. Together with the Schengen Agreement on free movement of persons without passport controls, this code removed the necessity of border posts in the EU. While the UK rejected the relaxation of person borders through the Schengen agreement, and Ireland followed this policy, the Common Travel Area (CTA) in practice replaced this instrument – with the related weaknesses resulting from its informality and complete lack of legal enforceability.[27] Taken together, the Customs Code and CTA, which was expressly acknowledged as compatible with Community law in a Treaty Protocol, made border controls superfluous. Any further checks on the Irish border were purely motivated by security concerns.[28]

2.4 EU Membership and the Good Friday Agreement

These decisive contributions of EEC membership for normalisation of the situation on the island of Ireland are not usually considered.[29] Instead, the Good Friday Agreement[30] is often viewed as the high point and provisional culmination of a 'peace process', in which the contribution of the EU is recognised, though not viewed as decisive.[31] Accordingly, when the EU Commission's negotiation mandate on 'Brexit' as issued by the European Council (Article 50 TEU) included a commitment to upholding the Good Friday

25 Dating the Internal Market's substantive creation to 1993 (e.g. C McCall, 'Brexit, Bordering and Bodies on the Island of Ireland' (2018) Ethnopolitics 17(3), 292–305) is factually wrong.

26 Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, OJ L 302/1–50 of 19 October 1992, and Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, OJ L 253/1 of 11 October 1993, 1. This framework has now been replaced by the Union Customs Code (Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, 2013), which entered into force in two stages in 2013 (to enable daughter regulations) and in 2016 (for application at national levels). The new code aims at completely modernising customs procedures for importing into and exporting from the EU, and is still progressively implemented (see for an official explainer <https://publications.europa.eu/en/publication-detail/-/publication/807e82ea-52ab-11e8-be1d-01aa75ed71a1/language-en/format-PDF/source-search>.

27 See also John Doyle and Eileen Connoly, 'Brexit and the Northern Ireland Question' in Federico Fabbrini (ed), *The Law and Politics of Brexit* Oxford University Press 2017) 145–7; on the CTA's insufficiency as legal frame, see Bernhard Ryan, *The Implications of UK Withdrawal for Immigration Policy and Nationality Law: Irish Aspects* (Immigration Law Practitioners Association 2016).

28 See on these and the symbolic relevance of the border, Mary Daly, *Brexit and the Irish Border: Historical Context* (Royal Irish Academy and British Academy 2017); on internal constitutional determinants, see Gordon Anthony, *Brexit and the Irish Border: Legal and Political Questions* (Royal Irish Academy 2017).

29 For exceptions, see Meehan (n 21); Mary Murphy, *Northern Ireland and the European Union* (Manchester University Press 2014), though from a political science and not from a socio-legal perspective.

30 Terminology around this Agreement is ideologically loaded. While those in Northern Ireland referred to as Nationalists or Catholics usually use Good Friday Agreement, those referred to as Unionists or Protestant often prefer 'Belfast Agreement': Guelke (n 7) . The EU Commission has opted for '1998 Agreement', while the European Council, in its negotiation mandate for this same Commission (below n 41), uses Good Friday Agreement. This notion shall be used in the remainder of the article.

31 Guelke (n 7) 46; Katy Hayward and Mary Murphy, 'The EU's Influence on the Peace Process and Agreement in Northern Ireland in the Light of Brexit' (2018) 17 Ethnopolitics 276–92, 278.

Agreement,[32] some noted their surprise on this development.[33] However, common EEC membership had been stressed by the UK government as a reason to ensure new arrangements for Northern Ireland consensually with Ireland as early as 1972, and the first framework document for negotiating the Good Friday Agreement of 1994 again stressed that EU-related matters should be discussed in the North–South bodies. Subsequently, because of opposition of the Unionist parties to a strong role of common bodies of Ireland and the UK in governing Northern Ireland, the EU aspect was given less prominence.[34] In order to gauge how the EU should react to the Northern Ireland conflict and its remainder in dealing with the UK's withdrawal, it is vital to recognise how EU membership underpins the Good Friday Agreement at every corner.

2.4.1 Short overview of the Good Friday Agreement

The Good Friday Agreement[35] mainly establishes an institutional framework to manage the fallout from the contestation of Northern Ireland as a territory within its society, attempting to induce peace through governance. The Agreement provides three levels of institutions for governing Northern Ireland: the Northern Irish level (consisting of Legislative Assembly and Executive – Strand One), the North–South level (consisting of the North South Ministerial Council (NSMC) – Strand Two) and the East–West dimension (consisting of the British Irish Council (BIC) and the British Irish Intergovernmental Conference (BIIC)[36] – Strand Three).[37] Strand One is characterised by the requirement to share power between Unionists and Nationalists, referring to the two communities at

32 Para 11 of the negotiation guidelines of April 2017, which remain unchanged: EUCO XT 20004/17 <www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf>. See also n 94 below.

33 Colin Harvey, 'Brexit, Human Rights and the Constitutional Future on These Islands' (2018) European Human Rights Law Review 10–12, 10.

34 Guelke (n 7).

35 For introductory coverage with further references, there are ample recent publications by political scientists Guelke (n 7); Hayward and Murphy (n 31) 6; David Phinnemore and Katy Hayward, *UK Withdrawal ('Brexit') and the Good Friday Agreement* (European Parliament 2017); and some by legal experts as well, see Brice Dickson, *Law in Northern Ireland* (3rd edn, Hart 2018) 1.27–37; Richard Humphreys, *Beyond the Border. The Good Friday Agreement and Irish Unity after Brexit* (Merrion Press 2018). The Agreement text can be found on the web pages of the Irish and UK governments <www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/northernireland/good-friday-agreement.pdf> and <www.gov.co.uk/governmentpublications/the-belfast-agreement> as well as on the UN peacemaker webpage, where some editing has removed duplicate headings contained in the signed version <https://peacemaker.un.org/uk-ireland-good-friday98>.

36 In contrast to the BIC (see n 41 below) the BIIC was established by a specific Treaty between Ireland and the UK <www.dfa.ie/media/dfa/alldfawebsitemedia/treatyseries/uploads/documents/treaties/docs/200027.pdf>. This very short Treaty reaffirms the commitment of both governments to the Multiparty Agreement (Good Friday Agreement). When common EU membership of Ireland and the UK ceases, the BIIC remains as the only forum where 'in recognition of the Irish Government's special interest in Northern Ireland and of the extent to which issues of mutual concern arise in relation to Northern Ireland, there will be regular and frequent meetings of the Conference concerned with non-devolved Northern Ireland matters, on which the Irish government may put forward views and proposals' (BIIC, No 5).

37 The Three Strand Architecture and the power-sharing principles between the two communities and 'neutrals' were not an entirely new invention: in 1973 the British government had introduced these same principles, and these were later confirmed in the Sunningdale Agreement based on cross-community negotiations under participation of the Irish and British governments. At the time, they were opposed by Unionists, who called a general strike (which was enforced by paramilitaries) and intensified paramilitary activity. See Gordon Gillespie, 'Northern Ireland 1963–1998' <www.qub.ac.uk/sites/irishhistorylive/IrishHistoryResources/Articlesandlecturesbyourteachingstaff/NorthernIreland1963–1998/#d.en.189201>; Paul Dixon, 'Why the Good Friday Agreement in Northern Ireland Is not Consociational' (2005) 76 The Political Quarterly 357–67; Siobhán Fenton, *The Good Friday Agreement* (Biteback Publishing 2018) 500–52.

several places in the Agreement. It also establishes the principle that some powers are 'devolved' to the Northern Irish institutions. These three strands are framed by a chapter on Constitutional Questions (see below) and chapter 6 on 'Rights, Safeguards and Equality of Opportunity' (also see below), as well as chapters 7 to 10 on decommissioning, security, policing and justice, prisoners and validation implementation and review. The governance arrangements are not discussed here, with the exception of the principle to govern Northern Ireland under the tenet of cross-community consent; nor are chapters 7 to 10 considered. This reductionist view is justified by the focus on those provisions for which common EU membership of Ireland and the UK is formally relevant.

2.4.2 Explicit reference to common EU membership in the Good Friday Agreement

Despite some efforts to downplay its relevance in the negotiations, common EU membership of the UK and Ireland was prominently underlined in the Good Friday Agreement, and even more so in the International Agreement between the governments of the UK and Ireland to which it is annexed. While the former agreement is frequently characterised as merely political,[38] the latter is an agreement under international law[39] and as such registered with the United Nations.[40] It should thus be of some significance that the British and Irish governments concluded this agreement 'wishing to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union'. The Good Friday Agreement itself refers to the EU in the three strands dedicated to the institutions governing Northern Ireland. For Strand One, which establishes the democratic institutions in Northern Ireland, paragraph 31 demands that Assembly representatives and the UK government will agree terms ensuring effective coordination and policy input including on EU issues. The NSMC (to be established under Strand Two) shall 'consider the European Union dimension of relevant matters', while arrangements are made to ensure that its views are represented at the relevant EU meetings (paragraph 17). An annex to Strand Two identifies relevant EU programmes as one of the areas covered by the NSMC. The British Irish Council (BIC), to be established under a new British Irish Agreement under Strand Three,[41] should discuss 'approaches to EU issues' (paragraph 5).

2.4.3 Brexit and the Good Friday Agreement: the UK constitutional law perspective

Despite this prominence of the EU in the International Agreement between the UK and Ireland and the Good Friday Agreement itself, the UK Supreme Court in its *Miller* judgement[42] rejected the argument that the UK's withdrawal of Northern Ireland from the EU constitutes a 'change in the status of Northern Ireland'. Such a change would legally require the consent of the majority of the people of Northern Ireland under Article I(iii) of the UK–Ireland International Agreement.[43] The UK government has

38 Humphreys (n 35) 21–3, 229.

39 Ibid. See also Colin Murray, Aoife O'Donoghue and Ben Warwick, *Policy Paper: The Place of Northern Ireland within UK Human Rights Reform* (Durham University/Newcastle University 2015) 16–22.

40 As 'Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes). Belfast, 10 April 1998', 2114 UNTS 473.

41 The British–Irish International Agreement, to which the Good Friday Agreement is annexed, is deemed to be the basis for the BIC from the point in time when it entered into force. The BIC establishes a forum for cooperation between all parts of the British Islands, except for England, which has neither the status of a region with devolved powers nor of a Crown Dependency (as the Isle of Man and the Channel Islands).

42 *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61.

43 According to that provision the 'two Governments . . . acknowledge that . . . it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people'.

consistently stressed that in leaving the EU it would not respect the regional referendum result in Northern Ireland, which returned a 55.5 per cent majority for remain. Instead, the UK should leave the EU as one.[44] This position would seem to be violating the Agreement's provision just cited. The Supreme Court ruling constitutes a contestable[45] reflection of the UK constitutional approach, which – as mentioned – includes a dualist position to international agreements, rendering their legal effects within the UK wholly dependent on the decision of the UK institutions. This municipal legal perspective is beyond the scope of this article, except for illustrating the superiority of common EU membership or the endurance of supranational law on another basis to any other international agreement between the UK and Ireland.

2.4.4 EU membership and substantive aspects of the Good Friday Agreement

Beyond the explicit references to common EU membership of the UK and Ireland, the EU was and is decisive for the effectiveness of two themes central to the Good Friday Agreement: the hybrid status of Northern Ireland and its citizens, and the Agreement's mission to promote socio-economic prosperity in Northern Ireland, as well as the role of all-island socio-economic processes for achieving and underpinning both.

2.4.4.1 Hybridity of territories and citizenship

The endeavour to establish a hybrid identity for Northern Ireland is expressed in chapter 2 of the Good Friday Agreement. Article 2 of the legally binding agreement between the UK and Ireland confirms this by committing the 'British and Irish Governments' to accepting as legitimate any choice by the majority of the people of Northern Ireland between supporting the Union with Great Britain and a sovereign united Ireland. The fifth paragraph of the chapter ensures that any sovereign government with jurisdiction over Northern Ireland will govern with rigorous impartiality and respect for equality of civil, political, social and cultural rights, as well as freedom of discrimination for all citizens. In addition, there is a specific obligation to govern with parity of esteem for identity, ethos and aspirations of both communities, defined by their wish to either retain the Union with Great Britain or aspire to a sovereign united Ireland. This is followed by the commitment to recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as British or Irish or both, which includes the right to either or dual citizenship, irrespective of any future change of Northern Ireland's status. The Good Friday Agreement under the heading 'Constitutional Issues' asserts that the participants of the negotiations endorse the governments' commitments and also pledge that they will recognise any free choice by the peoples of Northern Ireland and Ireland as to whether Northern Ireland remains a part of the UK or joins Ireland, while also supporting the principle of governing the province with rigorous impartiality.

Strand Three of the Good Friday Agreement further underlines this hybridity in paragraph 5 under 'British–Irish Intergovernmental Conference' (BIIC), according to

44 The UK position on EU withdrawal and the Good Friday Agreement is summarised in a 16-page paper of August 2017 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf>, on which see <http://qpol.qub.ac.uk/position-paper-uk-government>, as well as in some remarks in the White Paper on the Future Relationship with the EU: HM Government (UK), *The Future Relationship between the United Kingdom and the European Union* (HM Government 2018) 9.

45 Christopher McCrudden and Daniel Halberstam, 'Miller and Northern Ireland: A Critical Constitutional Response', in Daniel Clarry (ed), *The UK Supreme Court Yearbook* (Appellate Press 2018) 299–344.

which the 'Irish Government's special interest in Northern Ireland' is recognised and regular and frequent meetings of the BIIC are demanded on non-devolved Northern Ireland matters, on which the Irish government may put forward views and proposals. The BIIC may also 'contribute as appropriate' to 'any review of the overall political agreement arising from the multi-party negotiations', without any power to 'override the democratic arrangements set up by (it)', namely the rules on Strand One. Since anything coming close to joint government of the UK and Ireland over Northern Ireland is rejected by the Democratic Unionist Party (DUP), the BIIC has not met since 2007, when the Strand One institutions were restored after a 10-year lapse under the joint leadership of the DUP (Ian Paisley sr) and Sinn Fein (Martin McGuinness). It resumed its activities in July 2018, following the relapse of the Strand One institutions in early 2017, stressing explicitly that the 'bilateral co-operation' enabled by the conference 'needed to be maintained and, where possible, strengthened following the departure of the United Kingdom from the European Union'.[46]

Though not explicitly referred to, common EU membership arguably constitutes a precondition of the hybrid status of regions as well as of persons. Hybridity of regions is facilitated by the possibility of establishing common administrative units and processes by the states for regions which, although formally divided by a state border, constitute a natural and/or socio-economic unit. Such regions are officially referred to as 'border regions', and subject to extensive EU research and funding.[47] This funding is based on the opportunities provided by common EU membership. These include the option of pooling resources in order to establish transport systems, educational or health services or upgrade the e-communication infrastructure for regions.

Hybridity of people's allegiances (to avoid the contested term identity) is at the core of the EU's socio-economic project, which relies on cooperation of people and businesses even more than on state cooperation. The process of European integration was designed to stabilise transnational interaction between socio-economic actors in order to engender solidarity between the peoples of Europe and thus perpetuate peace between their states.[48] Early integration theory defined European integration as the changing of socio-economic and civic actors' allegiances from merely resting with the nation states to encompassing European-level activities,[49] relying on the idea that transactions between individuals would foster identification of citizens with the wider project.[50] Today's revival of transactionalist approaches to European integration[51] offers

46 <www.gov.uk/government/news/joint-communique-of-the-british-irish-intergovernmental-conference-25-july-2018>

47 See European Commission, *Boosting Growth and Cohesion in EU Border Regions* COM (2017) 534 (European Union 2017).

48 Robert Schuman, 'CVCE.eu' <www.cvce.eu/en/obj/declaration_by_robert_schuman_paris_9_may_1950-en-fa872cf5–67fa-4848-ae00-fbc4d4715e96.html> (Jean Monnet Memoires, Fayard, 1976) 323.

49 Ernest B Haas, *The Uniting of Europe: Political, Social and Economic Forces 1950–1957* (2nd edn, University of Notre Dame Press 1968 [1958]), known as neofunctionalism originally, and today also informing theories of federalism and social constructivism.

50 These are known as transactionalist approaches, founded in the 1950s: Karl Deutsch, 'The Growth of Nations: Some Recurrent Patterns of Political and Social Integration' (1953) 5 World Politics168–95; Karl W Deutsch et al, *Political Community and the North Atlantic Area. International Organization in the Light of Historical Experience* (1st edn, Princeton University Press 1957).

51 Sabine Israel et al, 'Connected Europe(ans): Does Economic Integration Foster Social Interaction?' (2016) 26 Journal of Contemporary European Studies 1–19; Theresa Kuhn, *Experiencing European Identity: Transnational Lives and European Identity* (Oxford University Press 2014); Steffen Mau and Jan Mewes, 'Horizontal Europeanisation in Contextual Perspective: What Drives Cross Border Activities within the European Union?' (2012) 14 European Societies 7–34.

empirical evidence of whether and in how far these assumptions can be confirmed. As the EU is constituted as a Community of Law, these aspirations are pursued by guaranteeing judicially enforceable rights. Primary EU law, established by the Treaties, provides rights of economic actors related to free movement of goods, services, persons (as workers and entrepreneurs) and capital, alongside some rights conventionally classified as social rights (free movement for EU citizens irrespective of their economic status under Article 21 of the Treaty on the Functioning of the European Union (TFEU), employees' rights to equal pay irrespective of sex under Article 157 TFEU). Rights to free movement of natural persons (Articles 45 and 49 TFEU) also have a social dimension in that they entail rights to equal treatment in the host country, which provides equal employment rights and secures access to social institutions such as healthcare, education, social services and social benefits. Secondary EU law creates the frameworks for utilising these rights, including, but not limited to their social dimensions.

It is worth noting that in enabling hybrid citizenship, the rights to free movement of persons as self-employed entrepreneurs, employees, service providers and recipients, and in a civic capacity are possibly more relevant than the right to trade across borders. While it is cross-border trade which triggers immediate control needs through border posts in the absence of the EU Customs Code, transnational identities are – if at all – encouraged by the option of cross-border lives (i.e. the right to work, shop, convene and stroll across borders). EU law underpins these activities by rights which are – by contrast to the Good Friday Agreement – enforceable in UK and Irish courts, with the European Court of Justice as an arbitrator. In a region where human rights abuses were a daily occurrence, this is not negligible. Further, the regulatory service of the EU, in areas such as social security coordination, access to healthcare, education and social benefits for frontier workers and EU citizens in general, is invaluable in a region with a largely dysfunctional Parliament which is mostly served by orders, rather than dedicated legislation issued by the central Parliament.

2.4.4.2 Socio-economic improvement in Northern Ireland

Chapter 6 of the multiparty agreement contains a number of substantive guarantees, under two identical (repeated) headings 'Rights, Safeguards and Equality of Opportunity'.[52] The first paragraphs are focused on governing Northern Ireland, and demand that this government actively protects human rights, in particular: the right of free political thought, freedom and expression of religion; the right to pursue democratically national and political aspirations; the right to seek constitutional change by peaceful and legitimate means; the right to freely choose one's place of residence; the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity; the right to freedom from sectarian harassment; and the right of women to full political participation.

The second section, with the subheading 'Economic, Social and Cultural Issues', requires for the UK government to promote 'sustained economic growth and stability' in Northern Ireland, as well as promoting social inclusion 'including in particular community development and the advancement of women in public life'. This is underlined by specific political commitments to devise a regional development strategy for Northern Ireland, which addresses the 'divided society', alongside strengthening the physical infrastructure of the region, an obligation to adopt measures guaranteeing employment equality, including through antidiscrimination legislation, as well as measures to combat unemployment with

52 The repeated headings appear in the officially signed versions lodged with the UK and Irish governments, while the version published on the UN peacemaker webpage is redacted to omit the repetition, see n 35 above.

specific attention to eliminating the difference in unemployment rates between 'the two communities'. The UK and Ireland are both required to support linguistic diversity, consisting of the Irish language, Ulster Scots and languages of the various ethnic communities, with an emphasis on promoting the Irish language and the signing of the Council of Europe Charter for Regional or Minority Rights.

These guarantees are only partly paralleled by hard guarantees under EU law. These parallels are strongest in relation to two complexes: first, the right to freely choose one's place of residence is underpinned by EU Treaty rights – the four economic freedoms proscribe any detriments deriving from working (as employee or self-employed) in another EU Member States or across a formal state border in the EU; and EU citizenship rights partly extend this to those who are still in education, retired or not working for other reasons. Second, socio-economic equal opportunity regardless of religion and belief, disability, gender and ethnic or racial origin is the aim of EU antidiscrimination law and policy, based on today's Articles 19 and 157(3) TFEU[53] and incorporating Articles 21–26 of the Charter of Fundamental Rights of the European Union.

Beyond any explicit parallelism of rights, there is also a more general common thread running through the Good Friday Agreement and the EU Treaties. All aim to engender integrated societies: the former across the ethno-political-cultural divide, as well as across a border; the latter through making national borders permeable and superfluous, as well as through creating European-level socio-economic institutions. The conviction that social change can and must be driven through rights-based socio-economic integration underpins both the EU and the Good Friday Agreement.[54]

Bradley[55] recalls that, while the Good Friday Agreement was being negotiated, little attention was dedicated to the socio-economic conditions of ensuring prosperity and thus securing peace in Northern Ireland, criticising in particular the limited scope of the socio-economic authority of the Strand One institutions, as well as the ill thought-through list of matters to which the BIIC should direct its attention (transport, agriculture, education, health, the environment and tourism). However, one could argue that the lack of more extensive deliberation on socio-economic policies during the negotiations was due to the recognition that common EU membership would alleviate the problems related to the necessity of including Northern Ireland in an all-island economy: the Common Market would support such an economy regardless of the exact terms of the Good Friday Agreement.

2.4.5 Relevance of common EU membership for Ireland, the UK and Northern Ireland

Overall, common EU membership is not only explicitly specified as informing the bilateral International Agreement to which the Good Friday Agreement is annexed, but also referred to in each of the three institutional strands of the Good Friday Agreement as such. The Good Friday Agreement's substantive provisions presuppose common EU membership in so far as the 'Constitutional Issues' establish Northern Ireland as a hybrid territory and its citizens as hybrid citizens, and the section 'Rights, Safeguards and

53 Which, in 1998, had just been created in Articles 13 and 141, para 3 of the EC Treaty (version of the Treaty of Amsterdam).

54 See on this already Dagmar Schiek, 'Hard Brexit: How to Address the New Conundrum for the Island of Ireland' <http://dx.doi.org/10.2139/ssrn.2949264>; see also Phinnemore and Hayward (n 35).

55 John Bradley, 'The Irish–Northern Irish Economic Relationship: The Belfast Agreement, UK Devolution and the EU' (2018) 17 Ethnopolitics 263–75.

Equality and Opportunity' demands the improvement of the socio-economic situation in Northern Ireland, as well as creating conditions of equal treatment irrespective of race, ethnicity and religion within society.

Rights and political processes established as legally binding concepts by the UK's and Ireland's common EU membership enable the realisation of socio-economic and civic projects to be extended into the whole of both regions though artificially separated by state borders. Guaranteed rights of free movement and equal treatment irrespective of nationality presently bolster the socio-economic position of Irish citizens in Northern Ireland, as they would have bolstered the socio-economic position of UK citizens after a future choice of Northern Ireland to become part of Ireland had the UK not decided to withdraw. The rights basis of more diverse and modern societies, as epitomised by Ireland perhaps more than by Northern Ireland, are also served by EU law, in particular in its legislation requiring Member States to adopt antidiscrimination legislation in employment and beyond.

Accordingly, the UK's withdrawal from the EU fundamentally challenges the functionality of the Good Friday Agreement, amounting to a change of the basis of Northern Ireland as a socio-economic and political entity. The preamble of the International Agreement seems even to suggest that the UK should have consulted Ireland before lodging its application for withdrawal from the EU. All this would lead us to expect that the question of how the functionality of the Good Friday Agreement can be maintained even though the UK plans to withdraw from the EU would be addressed in the negotiations of the withdrawal agreement. Moreover, because the EU's fundamental ethos is mirrored in the rights-based construction of the Good Friday Agreement, the centrality of maintaining its functionality in the withdrawal negotiations is not surprising at all. The next section analyses how far these expectations are met by the debate about the withdrawal process and its implementation.

3 The challenge of Brexit for the island of Ireland

If EU membership resulted in socio-economic improvement on the island of Ireland, providing the preconditions for the Good Friday Agreement and for socio-economic integration across the island, as well as between Britain and Northern Ireland, how will Brexit factually affect this?

3.1 Identifying the challenge: academic writing and think-tanks

3.1.1 Socio-economic risks

From 2015, well before the referendum closed, there have been stark warnings on the specific consequences for Ireland,[56] which have been confirmed by studies in 2018.[57]

One cluster of problems arises from the island's geographic position on the Western outskirts of the Union: it will be cut off from the rest of the EU by the UK as a third country. This poses logistical problems for the trade in goods with the rest of the EU. The EU's initiatives aimed at alleviating this problem include providing funding for

56 Alan Barrett et al, *Scoping the Possible Economic Implications of Brexit on Ireland* (Economic and Social Research Institute 2015).

57 Copenhagen Economics, *Ireland and the Impact of Brexit. Strategic Implications for Ireland Arising from Changing EU UK Trade Relations – Study Prepared for the Department of Business, Enterprise and Innovation, for the Government of Ireland* (Copenhagen Economics 2018); International Monetary Fund, *Ireland Country Report* (International Monetary Fund Publication Services 2018).

increased sea transport from Ireland directly to other EU countries[58] and to agree to the control-free transport of sealed containers with goods.[59]

The economic consequences of Brexit for the island also result from the pertaining orientation of trade to the UK (or Britain in the case of Northern Ireland).[60] While those studies are sometimes quoted to support the argument that trade with Britain is more important than trade across the inner-Irish border, such a conclusion disregards the existence of all-island supply chains, which would be interrupted by eliminating the legal framework of the Internal Market.[61] Maintaining supply chains in the absence of the Internal Market requires additional bureaucracy and thus time-lags and costs impeding competitiveness. These economic issues are amplified for Northern Ireland through the economic detriment of its small size, which renders a close relationship towards if not actual reunification with Ireland an economically valuable option.[62]

Even positive impacts of Brexit, such as the enhanced traction of Ireland as a base for financial and legal service providers in the light of so-called passporting rights into the EU,[63] entail economic risk due to an already stretched housing market[64] and challenges for recruiting qualified and low-skilled workers.[65] For Northern Ireland, the latter risk is particularly austere, since its economy may lose access to the EU labour market.[66] Accordingly, to enable socio-economic prosperity in the far-eastern corner of Ireland, an integration with an all-island economy, as well as an outward-looking orientation beyond the UK are all viewed as necessary,[67] alongside overcoming persistent infrastructure deficiencies and counteracting outward movement of young and qualified populations.[68] An additional risk emerges from the fact that EU funding, relating to agricultural policy and regional and social funds, has favoured Northern Ireland more starkly than the other areas of the UK, due to differing policy preferences of the EU and the UK respectively.

58 The present plans unfortunately are based on current freight routes, which of course cross through the UK. It is to be hoped that direct routes to France and Spain receive more priority. See <www.politico.eu/article/commission-frances-exclusion-from-brexit-trade-route-reflects-traffic-flows-shipping-ireland>.

59 Lisa O'Carrol, 'Ireland Seeking Brexit Side-deal with EU to Avoid Border checks' *The Guardian* (London, 6 September 2018) <www.theguardian.com/politics/2018/sep/06/ireland-hopes-side-deal-with-eu-could-allow-it-friction-free-trade-across-border>.

60 See for an overview Copenhagen Economics, *Brexit and the Impact on Ireland* (Dublin 2017) (study commissioned by the Irish government); Adele Berginab et al, *Modelling the Medium to Long Term Potential Macroeconomic* (ESRI 2016).

61 Department of Finance (Ireland), *Analysis of Import Exposures in an EU Context* (Dublin, March 2018).

62 Paul Gosling, *The Economic Impact of an All-island economy: A Draft Report for Consultation* (Dublin, Self-published 2018); Gunther Thumann and Mark Daly, *Northern Ireland's Income and Expenditure in a Reunification Scenario* (Joint Committee on the Implementation of the Good Friday Agreement 2018).

63 Michael Randall, 'Brexit and Financial Services: What Comes Next?' (2018) 22 Edinburgh Law Review 149–55.

64 International Monetary Fund, *Ireland Country Report* (n57).

65 Barrett et al (n 56).

66 Paul Macflynn, *The Economic Implications of BREXIT for Northern Ireland* (Nevin Economic Research Institute 2016).

67 Bradley (n 55) 271–3.

68 The infrastructure problems, which consist of a total lack of motorways and railways in the three western counties, have been highlighted by business for decades, see for example <www.ibec.ie/IBEC/Press/PressPublicationsdoclib3.nsf/vPages/Newsroom~ibec-cbi-set-out-ambitious-plan-for-all-island-economy-24–07–2016?OpenDocument?OpenDocument>.

While it is recognised that economic aspects are not the sole factor to be considered here, these aspects alone support the argument for Northern Ireland to remain part of the EU if possible,[69] or at least in the European Economic Area (EEA).[70] They further would justify enhanced state aid for the island of Ireland, and possibly even a specific status aligned to outermost territories, in order to perpetuate a specific state-aid regime.[71]

3.1.2 Mainly a border problem?

While these challenges are undisputable, current academic and think-tank reflection[72] tends to focus on the 'border issue'. This is related to the characterisation of the Good Friday Agreement's main achievement as the resolution of a border conflict,[73] which results in defining socio-economic measures, such as maintaining free movement of goods and persons into Northern Ireland, as border issues only.[74] Similarly, a Europeanisation perspective on the inner-Irish border may identify the achievements of the EU as a mere restructuring of the border, culminating in the warning that free movement of workers contributes to the UK's preoccupation with border security.[75] Such contributions provoke the legal critique that the Good Friday Agreement does not formally require the elimination of an inner-Irish border, while it establishes institutions to manage cross-border cooperation.[76] Such thinking can be complemented by elaborate proposals for smart border technology to make border crossings run more smoothly.[77] However, even high-tech border posts are expected to bring back traumatising memories of the past abuse of the border for intimidating those crossing it,[78] to re-enforce the border in the mind,[79] and potentially provoke a re-emergence of tensions between Unionists and Nationalists, which some believe have been overcome.[80] Legal scholars[81] may also differentiate the border into different subject areas, such as a goods border, a person border and a non-physical border, emerging from withdrawing mutual residency rights of UK citizens in Ireland and vice versa post-Brexit.

69 Nikos Skoutaris, 'Territorial Differentiation in EU Law: Can Scotland and Northern Ireland Remain in the EU and/or the Single Market?' (2017) 19 Cambridge Yearbook of European Legal Studies 1–24; Schiek (n 54).

70 B Doherty et al, *Northern Ireland and Brexit: The European Economic Area Option* (European Policy Centre 2017).

71 Schiek (n 54).

72 While there is a rich literature on the relation of Ireland to the EU (Central Statistical Office Ireland (n 19); Laffan and O'Mahoney (n 4); Murphy (n 29)), in discussing Brexit focus on the last three years is certainly justified.

73 Phinnemore and Hayward (n 35) 24, drawing on Hayward's longstanding research on Northern Ireland and the EU from the perspective of bordering; see Katy Hayward, *Defusing the Conflict in Northern Ireland: Pathways of Influence* (European Union. Working Paper Series, EU Border Conflict Studies 2004).

74 See also Katy Hayward, 'The Pivotal Position of the Irish Border in the UK's Withdrawal from the European Union' (2018) Space and Policy <www.tandfonline.com/doi/abs/10.1080/13562576.2018.1505491>.

75 McCall (n 25).

76 Victoria Hewson and Austen Morgan, 'A Hard Question? Managing the Irish Border Through Brexit' (2017) Irish Journal of European Law 38–52, 51.

77 Lars Karlsson, *Smart Border 2.0: Avoiding a Hard Border on the Island of Ireland for Customs Control and the Free Movement of Persons* (European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs 2017).

78 Daly (n 28).

79 Cathy Gormley-Heenan and Arthuer Aughey, 'Northern Ireland and Brexit: Three Effects on the Border in the Mind' (2017) 19 British Journal of Politics and International Relations 497–511.

80 Tim Durrant and Alex Stojanovic, *The Irish Border after Brexit* (Institute for Governance 2018).

81 Michael Dougan, 'The "Brexit" Threat to the Northern Irish Border: Clarifying the Constitutional Framework' in Michael Dougan (ed), *The UK after Brexit: Legal and Policy Challenges* (Intersentia 2017) 53–72.

3.1.3 Human rights, equality and 'rights'

The human rights dimension of Brexit in a Northern Irish context is another focus of literature, including studies by and for Irish and Northern Irish human rights organisations. Gordon Anthony goes as far as arguing that the threat to withdraw from the ECHR is more fatal for the Good Friday Agreement than Brexit;[82] and Donoghue and Warwick have discussed how the idea to withdraw from the ECHR as a complement to EU withdrawal constitutes a violation of international law in this very journal long before the referendum.[83] The focus on human rights and equality is not surprising, as the related guarantees differentiate the Good Friday Agreement from power-sharing arrangements in the 1970s. Convincingly, the authors referred to so far recognise that human rights protection as required by the Good Friday Agreement is not necessarily impacted upon negatively by Brexit. A number of authors stress the fact that the motives which resulted in the overall UK majority for withdrawing from the EU may well be indicative of a heightened need for protection of human rights, in particular from ethnic and racist discrimination and human rights violation in the context of immigration policy. In this regard, Harvey, and Smith, McWilliams and Yarnell agree that Brexit may have the advantage of rejuvenating discussions on a human rights Bill for Northern Ireland, which had already been envisaged in the Good Friday Agreement. They admit that this is not required by EU law, and thus not directly impacted upon by Brexit.[84]

As already mentioned, there is some overlap of general human rights policies and rights guaranteed under EU law, as well as some rights to which the parties underwriting the Good Friday Agreement are committed. On this basis, the Joint Committee of the Irish Human Rights Commission and the Northern Ireland Human Rights Commission have raised far-reaching concerns on the potential 'diminution of rights', encompassing the scope of antidiscrimination law, data protection rights, the emerging inequality of those citizens of Northern Ireland who, as Irish citizens, remain EU citizens and those who do not wish to claim an Irish passport for that reason, as well as a range of EU-derived rights for cross-border workers. Based on an academic report,[85] the Joint Committee takes the view that citizens in practice rely on rights derived from multiple sources to support and protect their lives on the island of Ireland. They also define as their remit the protection of citizens, irrespective of whether they are British, Irish, other EU citizens or indeed non-EU citizens. Under this logic would fall EU Treaty rights and secondary instruments, such as Directives underpinning the antidiscrimination acquis, Treaty rights, regulations and Directives protecting frontier workers, as well as the EU Services Directive, which can be used as a basis for parents living in Northern Ireland and working in Ireland to use tax credits received in the UK for funding childcare in Ireland. The Joint Committee thus raises the point that EU-guaranteed rights, even if they are not human rights *strictu sensu*, are useful to challenge administrative hurdles and even national

82 Gordon Anthony, 'Britain Alone! A View from Northern Ireland' in Patrick Birkinshaw and Andrea Biondi (eds), *Britain Alone! The Implications and Consequences of United Kingdom Exit from the EU* (Wolters Kluwer 2016) 82–102.

83 Aoife O'Donoghue and Ben Warwick, 'Constitutionally Questioned: UK Debates, International Law and Northern Ireland' (2015) 66 Northern Ireland Legal Quarterly 93–104.

84 Harvey (n 33); A Smith, M McWilliams and P Yarnell, 'Does Every Cloud Have a Silver Lining: Brexit, Repeal of the Human Rights Act and the Northern Ireland Bill of Human Rights' (2016) 40(1) Fordham International Law Journal 76–129.

85 Colin Murray, Aoife O'Donoghue and Ben Warwick, *Discussion Paper on Brexit* (Irish Human Rights Commission 2018).

legislation due to their supranational character.[86] The EU economic freedoms and citizenship rights, though not an element of human rights, thus emerge as functionally equivalent to constitutional rights in the UK without a formal constitution, while they complement the Irish Constitution where it does not guarantee those rights. A similar point is made by McCrudden[87] and the Northern Irish Human Rights Consortium.[88]

3.2 Ireland/Northern Ireland in the withdrawal negotiations

3.2.1 August 2016: an early positioning of the Northern Ireland executive

While the institutional arrangements of the Good Friday Agreement and its national implementation have not been sufficient to establish a government in Northern Ireland for a period of more than a year now, it is worthwhile pointing out that the former First Minister, Arlene Foster, and the late Deputy First Minister, Martin McGuinness, did communicate a common position to the UK Prime Minister by a letter of 10 August 2016.[89] The letter opened with a demand that the border must not impede free movement of persons, goods and services, thus stressing its socio-economic relevance. Next, it stated the necessity of avoiding a situation in which the border could develop into a focal point for criminal activity, or a complication in the lives of citizens. The next paragraphs address Northern Ireland's economy: business in Northern Ireland (whether indigenous or based on foreign direct investment) should not lose the ease of trade with nor access to labour from the EU, both skilled and unskilled, emphasising that the public sector too is dependent on the ability to employ EU citizens and non-EU citizens on the terms generated by EU law. The letter also highlighted that the common electricity sector and the all-island agri-food industry required a reliable legal framework, and stressed the relevance of agricultural funds for Northern Ireland (10% of the EU agricultural funds for the UK being allocated to farmers in Northern Ireland), pointing out that agricultural products are predominantly exported to the EU and non-EU countries, which meant that partaking in inner EU trade as well as profiting from EU trade agreements with third countries were of utter relevance. Given the fact that policy-making in Northern Ireland should be based on cross-community consent, there are very good reasons under the Good Friday Agreement to take this positioning as a starting point for identifying the position of Northern Ireland towards the EU after the UK withdraws from the Union.

3.2.2 UK and Irish position

The UK government has focused on avoiding physical infrastructures at the border between Ireland and Northern Ireland,[90] the continuation of the CTA as well as the Common Electricity Market and payments of 'Peace Money' (programmed to expire in 2020) to Northern Ireland. It has launched its position paper on Northern Ireland, later

86 See above text surrounding footnotes 22–24.

87 Christopher McCrudden, *The Good Friday Agreement, Brexit and Rights* (Royal Irish Academy and British Academy 2017).

88 Human Rights Consortium, *Rights at Risk: Brexit, Human Rights and Northern Ireland* (Human Rights Consortium 2018).

89 The Executive Office of Northern Ireland – letter of 10 August 2016, retrievable from <www.executiveoffice-ni.gov.uk/sites/default/files/publications/execoffice/Letter%20to%20PM%20from%20FM%20%26%20dFM.pdf> (21 November 2017).

90 HM Government Northern Ireland and Ireland Position Paper, London 16 August 2017 <www.gov.uk/government/publications/northern-ireland-and-ireland-a-position-paper>.

complemented by the White Paper on the Future Relationship to the European Union.[91] The White Paper on the future relationship repeats the principles established around February 2017: the UK will leave the EU Customs Union and its Internal Market (referred to as the Single Market), and no longer be subject to the jurisdiction of the Court of Justice. In particular, there will be no free movement of persons into the UK, and any EU citizens accepted will have no claim to equal treatment with UK citizens. This position has been branded as making a hard border inevitable, at the very least for goods crossing a border. As regards movement of persons and services, it will require controls within the UK (and Northern Ireland) which will disrupt economic and civic activity not only if and when borders are actually crossed, but in Northern Ireland generally.

The Irish government has undertaken intensive consultation within Ireland on the position of the island post-Brexit, and early on positioned itself with the aim of maintaining the option of uniting Ireland without the need to undergo an accession process for the whole or part of the country, as well as to avoid a so-called hard border on the island of Ireland. In this context the current Taoiseach has promised that 'no government will ever again leave North behind'.[92] It chimes with the adoption of a cross-party motion in the Dail calling on the government to pursue a special designated status for Northern Ireland in the EU in February 2017, and the overarching focus on addressing socio-economic risks emerging from Brexit by the government, as well as key interest organisations in Ireland.[93] Nevertheless, the Irish policy is not wholly focused on Northern Ireland. The government also aims at avoiding any restrictions on trade between Britain and Ireland. That position has more in common with the UK government's than one would think, as the rhetoric is focused on trade in goods and services, but not on free movement of workers without a border. The Irish government is also seriously concerned that violence might resurge in Northern Ireland.

3.2.3 EU Council negotiation mandate

The EU perspective on the Irish problem was first evidenced by the European Council (Article 50) statement to the minutes of its meeting on 29 April 2017, relating to Article I(i), (ii) and (iv) of the UK–Ireland International Agreement, which taken together confirm the option of the people of Northern Ireland to opt for a 'sovereign united Ireland'. The Council:

> . . . acknowledges that the Good Friday Agreement expressly provides for an agreed mechanism whereby a united Ireland may be brought about . . . and . . . that, in accordance with international law, the entire territory of such a united Ireland would thus be part of the European Union.[93a]

The prominence of the 'Irish question' is further mirrored in the negotiation guidelines for the EU Commission regarding the agreement on the UK's withdrawal from the EU. In paragraph 11, it states:

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91 HM Government, *The Future Relationship Between the United Kingdom and the European Union* (July 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf>.

92 As reported widely in the media, for example, in the *Irish Times* in December 2017, alongside a further promise that this would not focus only on Irish citizens in Northern Ireland <www.irishtimes.com/news/politics/oireachtas/varadkar-clarifies-offensive-remark-on-northern-ireland-1.3325231>.

93 Brigid Laffan, 'Negotiating Brexit: Irish Approaches and Dynamics' in *Negotiating Brexit: What Do the UK's Negotiation Partners Want?* (University of East Anglia/University of Surrey 2018) 20-5, 23-5.

93a European Council (Article 50), Minutes, 29 April 2017 EUCO XT 20010/17 <http://data.consilium.europa.eu/doc/document/XT-20010-2017-INIT/en/pdf>.

> The Union has consistently supported the goal of peace and reconciliation enshrined in the Good Friday Agreement in all its parts, and continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance. In view of the unique circumstances on the island of Ireland, flexible and imaginative solutions will be required, including with the aim of avoiding a hard border, while respecting the integrity of the Union legal order. In this context, the Union should also recognise existing bilateral agreements and arrangements between the United Kingdom and Ireland which are compatible with EU law.[94]

The 'Irish question' was among those to be resolved in the agreement on the UK's withdrawal from the EU under Article 50 TFEU. The staged process proscribed by Article 50 TFEU means that the future relationship between the EU and a former Member State is not fully addressed in the Draft Withdrawal Agreement, though the withdrawal agreement has to be negotiated in view of the future relationship. Maintaining this distinction is important from legal perspectives, inter alia because the withdrawal agreement has the same quality as EU law, and arguably also falls under the jurisdiction of the Court of Justice of the EU.[95]

3.2.4 Joint declaration of negotiating parties of December 2017

On 15 December, the European Council, sitting without the UK in accordance with Article 50 TEU, was satisfied that the negotiations between the EU Commission and the UK[96] had reached a stage where the negotiations could proceed to consider the outlines of the future relationship between the UK and the EU. In the preceding negotiations, the EU Commission has stressed that the solution of the Irish problem was a precondition for that progress. However, now the Commission recognised the provisional character of the 15 paragraphs addressing the unique circumstances of the island of Ireland,[97] demanding continuation of negotiations on the 'Irish question' in a specific strand of discussions.

The 'December compromise' reconfirmed the EU and UK's commitment to honour the Good Friday or Belfast Agreement ('1998 Agreement', paras 42–44), defining the 'hard border' – which is to be avoided – as 'including any physical infrastructure or related checks and controls' (para 43). Also, the right of people of Northern Ireland to identify as British, Irish or both was mentioned, alongside the commitment to EU antidiscrimination law, maintaining the CTA without affecting Ireland's obligations under EU law and free movement of all EU citizens (para 52–54), and a promise to honour the current PEACE and INTERREG programme, while any future funding beyond 2020 is subject to negotiation (para 55). Both parties specifically committed to recognise the constitutional status of Northern Ireland and the principle of consent (para 44). In addition, the UK pledged to respect Ireland's place within the EU's Single Market while

94 European Council (Article 50) on Brexit Negotiations (Special Meeting) Guidelines, 29 April 2017, EUCO XT 20004/17 <www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf>.

95 Collins (n 3).

96 Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union TF50 (2017) 19 – Commission to EU27 <https://ec.europa.eu/commission/publications/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union_en>.

97 COM (2017) 784 final <https://ec.europa.eu/commission/sites/beta-political/files/1_en_act_communication.pdf>.

it leaves the EU. The UK also unilaterally committed to 'preserving the integrity of its internal market and Northern Ireland's place within it' (para 45).

The agreement that safeguarding Ireland/Northern Ireland will not be contingent on the EU–UK future relationship (para 46) was elaborated by paragraphs 49 and 50, whose convoluted language bears witness to late-night negotiations. These offer the UK the concession that a 'hard border' on the island of Ireland may be avoided through its future relationship to the EU. Failing that, there are three fall-back options: first, 'specific solutions to address the unique circumstances on the island of Ireland' to be proposed by the UK; failing that, the UK committed unilaterally to maintain 'full alignment' with aspects of the Internal Market and the Customs Union supporting North–South cooperation, an all-island economy and the Good Friday Agreement, while also ensuring that 'no new regulatory barriers' between Northern Ireland and Ireland develop, unless the Northern Ireland Executive and Assembly agree such new barriers, respecting the principle of consensus. Irrespective of such consensus, the UK ensured access for Northern Ireland's business to the UK internal market.

Finally, there was recognition that Ireland's unique geographic situation requires more than maintaining the Good Friday Agreement in relation to transit of goods to and from Ireland via the UK is concerned.

3.3 Draft Protocol on Ireland/Northern Ireland (EU Withdrawal Agreement)

While the debate continues, the Draft Protocol on Ireland/Northern Ireland in the Draft Withdrawal Agreement's version of 19 March 2018 constitutes the last specified point of reference.[98] Its analysis reveals that the focus on the border, which is shared by a large portion of the academic discussion and the UK government's position, has acquired exceptional prominence, while the demand to avoid diminution of rights is also addressed. Socio-economic concerns beyond avoiding hard border posts are delegated to a subsection of the Joint Committee to be established under the withdrawal agreement, without any attention to representation of Northern Ireland on this committee, nor consideration of the power-sharing principles.

3.3.1 Content summary

The Draft Protocol consists of five chapters with varying scope. Chapter I, headed 'rights of individuals', commits the UK to ensuring that 'rights, safeguards and equality of opportunity as set out in that part of the 1998 Agreement' are not diminished as a result of its withdrawal from the EU. It also puts the UK under an obligation to facilitate the work of institutions and bodies set up under the Good Friday Agreement, including those dedicated to the protection of human rights and equality. Paragraph 1 either commits the UK to something it cannot achieve, or is void of legal content: the ambitions of the Good Friday Agreement's two sections headed 'Rights, Safeguards and Equality of Opportunity' contain commitments to uphold rights that go beyond the realm of the EU.

98 European Commission, *TF50 (2018) 33: Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* (European Union 2018): this version highlights those provisions which are agreed (Articles 2, 8 and 10 out of 15 Articles of the Draft Protocol on Ireland/Northern Ireland) or partly agreed (Articles 1, 6, 9 and 13 out of 15 Articles of that same Protocol). For first commentaries see Sylvia de Mars et al, *Commentary on the Protocol on Ireland/Northern Ireland in the Draft Withdrawal Agreement* (Durham University/University of Birmingham/Newcastle University 2018); House of Commons Library, *Brexit: The Draft Withdrawal Agreement* (Parliament 2018) 67–80; Dagmar Schiek, 'The Island of Ireland and "Brexit": A Legal-political Critique of the Draft Withdrawal Agreement' (1 April 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3150394>.

Those rights that are within the EU's ambit are partly of such a nature that the UK is unable to uphold them on its own. For example, the right to choose a place to live is partly underpinned by the EU economic freedoms, as any national legislation placing an EU citizen under a detriment on the basis of his or her place of residence while exercising one of those freedoms is in breach of EU law.[99] These rights are, however, are reciprocal. Since the UK is unable to guarantee that EU Member States maintain rights to free movement for EU citizens, this obligation is overbearing. The provision may still have legal content in relation to EU antidiscrimination law, which is mainly secondary law. The UK can commit to maintaining the implementing legislation.

Chapter II's sole Article 2 states that the UK and Ireland may continue the CTA as long as it respects citizens' rights under EU law, and also obliges the UK to ensure that the CTA and associated rights can continue to operate without compromising Ireland's obligations under EU law. This has been read to prevent the UK from requiring Ireland to operate UK immigration control of EU citizens at the Irish border.[100] Again this provision is hardly of major importance.

Chapter III introduces a Common Regulatory Area, which has been interpreted in the media as including Northern Ireland in the Internal Market.[101] However, the Common Regulatory Area only maintains free movement of goods – including electricity and agricultural products – for Northern Ireland, as well as extending the frontiers of the EU Customs Union to include Northern Ireland.[102] This has been smugly identified as contrasting with the indivisibility of the Internal Market, which the EU insists on upholding as a principle[103] – but for Northern Ireland. In a rather illogical fashion, the Protocol also proposes to subject the Northern Irish economy to the EU's state-aid regime, while not mentioning the other provisions of the Treaty chapter on competition law (Article 9). This is most probably triggered by the 2015 legislation on enabling the Northern Irish institutions to reduce corporate tax, which is viewed as potentially violating state-aid rules.[104] However, as this inclusion would also apply to companies providing services and thus remaining excluded from the EU Internal Market with all the accompanying risks, this could be viewed as an unfair allocation of burdens. Chapter III Article 8 demands that the conditions for North–South cooperation in the areas specified in the Good Friday Agreement[105] must be maintained in the course of implementing the Protocol and empowers the Joint Committee with its specialised Committee on Ireland/Northern Ireland (Article 157, 158 of the Draft Withdrawal Agreement's main body) to make appropriate recommendation to the EU and the UK in this respect. Those areas include fields belonging to the service sector, such as healthcare,

99 For example, free movement of workers is interpreted as preventing a Member State to withhold a tax credit for acquiring a family home from a frontier worker on the basis of her place of residence (ECJ 16 October 2008 C-527/06 Renneberg ECLI:EU:C:2008:566).

100 de Mars et al (n 98).

101 See, for example, Pat Lehay in the *Irish Times* of 28 August 2018 <www.irishtimes.com/news/politics/brexit-progress-on-future-relationship-key-to-backstop-says-coveney-1.3609400>.

102 On the exact legal technique to achieve that, see Schiek (n 98) 6–7.

103 Anand Menon, *The Guardian* (London 28 February 2018) <www.theguardian.com/commentisfree/2018/feb/28/brexit-eu-draft-agreement-britain>.

104 See with extensive references also to the EU Commission's position, Anthony Seeley, *Corporation Tax in Northern Ireland* (House of Commons Library 2018); from a comparative perspective see Alberto Vega, 'The Impact of European Union Law on Regional Autonomy in Corporate and Value Added Taxation' (2016) 24 REAF 11–45 <www.raco.cat/index.php/REAF/article/download/314595/405125>. It should be noted that the interpretation is not necessarily the only one possible, and that no attempt has been made to explore options of justifying state aid on the grounds of Northern Ireland's extremely weak socio-economic position.

105 See above text around n 55.

telecommunications and tourism, as well as areas where an all-island economy depends on freedom of establishment (justice, if comprising the services of solicitors). Further, employers and trade unions in those very sectors have pointed out that they depend on continuation of free movement of workers. Thus, one wonders whether, through implementing the Protocol, the Joint Committee is empowered to extend the coverage of Chapter III to encompass freedom to provide services and freedom of establishment, as well as free movement of workers.[106]

Chapter IV provides two different routes to enforcing the Protocol: under Article 10, the Specialised Committee for Ireland/Northern Ireland should cooperate with the NSMC established under the Good Friday Agreement, but not with the Northern Ireland institutions or the BIC. Article 11 ensures that the EU institutions execute their powers in relation to Chapter III as under EU law, and that any acts adopted in this regard will have the same effect in the UK as EU law. Thus, the part-inclusion of Northern Ireland in the Internal Market encompasses retaining a supranational legal order thus far.

Chapter V includes those provisions of the Draft Withdrawal Agreement's main body which relate to the role of the Court of Justice, though extending the authority of the Court of Justice case law beyond the point in time when the UK leaves the EU (Article 12(2) and (3)). This allows for the 'backstop' to continue functioning until the future relationship between the EU and the UK makes its continued existence superfluous. Article 12 also enables representatives of the UK to participate in the EU's comitology procedures if necessary in relation to the Ireland/Northern Ireland Protocol (Article 12 (4)), and extends EU data protection law and the Treaty reservation in favour of national security (Article 346 and 347) to the UK in respect of Northern Ireland. All this is complemented by more traditional international law-type safeguards, allowing the UK to take rebalancing measures.

3.3.2 Avoiding a hard border and 'diminishing of rights'

While the draft explicitly focuses on the issues defined as material during the academic and policy advice debate, it is actually doubtful whether it addresses the related problems adequately.

The inclusion of Northern Ireland in the EU Customs Union and the Internal Market for goods, including agricultural goods and electricity, will go a long way to eliminate the necessity to control movements of goods across the island of Ireland. Thus, for this purpose border posts will not be needed. However, the movement of persons is fully entrusted to the CTA and its continued operation, which is totally reliant on national law and not based on any formal agreement between Ireland and the UK. As a consequence, even the immigration status of Irish citizens in the UK is not addressed properly. Further, the CTA only extends to UK and Irish citizens. In the era of free movement of persons, and some openness of the EU to immigration from beyond its borders, there is a considerable proportion of EU citizens from other Member States and of non-EU citizens on both parts of the island. Certainly, these populations are also targeted as tourists and business visitors post-Brexit. Thus, the question arises how free movement of EU citizens into Ireland will be secured after Brexit, without compromising the immigration targets of the UK. Article 2 of the Protocol lays the burden on the UK to achieve this: there can be no requirement to limit movement into Ireland in order to assert UK immigration targets. All these controls must be established by the UK, either at its own shores or in Northern Ireland. There is no barrier in the Draft Withdrawal Agreement to this.

106 See with further references Schiek (n 98) 7.

In so far as 'diminishing of rights' is addressed, the Protocol operates a high degree of trust towards the UK. Article 1 does not refer to concepts of Union law, and thus is not encompassed by the jurisdiction of the European Court of Justice under Article 12(2). While the UK remains bound to maintain all EU law protections during the transition phase, there is no protection for the time thereafter at all. In so far as the rights addressed by the Good Friday Agreement go beyond the EU's limited remit in the field of human rights, this limitation is justified. However, the extensive human rights protection required by the 1998 Agreement continues to demand specific measures by the UK and Irish governments irrespective of EU law.[107]

However, antidiscrimination law constitutes a policy field in which the Good Friday Agreement's demands reflect EU legislation: in 1998, the Treaty of Amsterdam had just been adopted, and with it the explicit competence for the EU to legislate in the field of antidiscrimination law (today Articles 19 and159(3) TFEU). The institutions were already discussing drafts of the relevant Directives protecting from discrimination other than sex discrimination, building on their extensive experience in this field.[108] Interestingly, the UK insisted on inserting an exception for the discrimination on grounds of religion for Northern Ireland because, on a conservative reading of the EU Directives, positive action would constitute a violation. This exception would arguably not cover the most widespread discrimination in Northern Ireland, which is based on ethno-political allegiance rather than religion. However, UK legislation has implemented the principles of 'Fair Employment' into Northern Ireland with reference to religion and political opinion independently from EU pressures. Both the Fair Employment legislation and the antidiscrimination Directives were implemented in Northern Ireland by order, namely without the consent of the Northern Ireland Assembly. These pieces of legislation are retained by the EU Withdrawal Act for the time being, while not excluding future change. Further, the authority of the Court of Justice on their interpretation ends, alongside the option to make references to the Court for national courts. As the supranational character of EU law ends as well, there will be no remedy (such as interpretation in conformity, limited horizontal effect or damage claims against state authorities) in case of incomplete implementation or inadequate interpretation of implementing law. This constitutes a diminishing of rights in this area, which is so important for Northern Ireland and correspondingly spelled out in the Good Friday Agreement. The Draft Withdrawal Agreement would not require any change whatsoever. Such change could easily be achieved by replacing the words 'As regards Chapter III' in Article 11 by 'As regards Chapters I, II and III'. As the draft stands, it does not meet the expectations raised in the academic discourse on the protection of rights so far.

3.3.3 Hybridity of Northern Ireland: territory and citizenship

There is considerable doubt whether the Draft Withdrawal Agreement and Protocol sufficiently safeguard hybridity of identities and territories underlying the Good Friday

107 See Harvey (n 33); and Smith et al (n 84).

108 It is safe to assume that the as yet unspecified annex will refer to a set of EU Directives obliging Member States to outlaw discrimination on grounds of sex, ethnic or racial origin, religion and belief, age and sexual orientation in occupation and employment, for sex and ethnic origin also in some other sectors. The main Directives are Directive 2000/43/EC on equal treatment irrespective of racial and ethnic origin in employment and occupation, education, health care and access to goods and services, Directive 2000/78/EC on equal treatment irrespective of religion and belief, sexual orientation, disability and age in employment and occupation, Directive 2004/113/EC on equal treatment between men and women in the access to and provision of goods and services and Directive 2006/54 on equal opportunities and equal treatment of women and men in employment and occupation (recasting Directives first originating in 1975 and 1976)

Agreement in the same way as EU law. While EU citizenship of Irish citizens in Northern Ireland is protected in principle, UK citizens will lose their EU citizenship. The fact that those who fall into the category of 'citizen of Northern Ireland' are entitled to claim Irish citizenship does not fully alleviate this concern: under the Good Friday Agreement there should be no nudging into an identity not aspired to by the citizens of Northern Ireland.

More importantly, the hybridity of identities relies on the full ambit of EU citizenship rights, comprising economic citizenship and its civic aspects. Economic citizenship comprises the right to move for work and consumption, as well as providing services across borders. Presently, the draft agreements do not allow the continuation of cross-border services, or for service providers to maintain or create establishments in Ireland and Northern Ireland. While the latter is encompassed by the CTA, the legal reliability of this instrument is dubious. Civic citizenship encompasses the right to move to and stay in other countries for purposes other than economic ones, for example, participating in charitable activity, political association or for educational purposes. As far as the CTA protects some of the related rights for Irish and UK citizens, it lacks legal enforceability. Further, those citizens who have moved to Northern Ireland and Ireland from elsewhere would not have the legally protected right to engage in those activities, and thus civil society would be thrown back on a narrow definition of the citizenry, depending on where a person was born (only those born in Northern Ireland are citizens of Northern Ireland)[109] and the residence status of their parents.

The Good Friday Agreement also safeguards hybridity of identities and territories through the principle of consent, in particular between Unionists and Nationalists. This is established through the requirement of consensual government in Northern Ireland and the role of both Ireland and the UK in the NSMC and the British–Irish institutions. The Draft Withdrawal Agreement creates new competences of the UK in relation to Northern Ireland without ensuring that the people of Northern Ireland are represented in accordance with these principles. Thus, there is no requirement on the UK to ensure that the members of the Northern Ireland/Ireland subcommittee of the Joint Committee are appointed in such ways that Northern Ireland is represented in accordance with the two communities. Similarly, where the UK participates in EU comitology institutions for Northern Ireland, there is no guarantee that this participation is actually by representatives for Northern Ireland. The institutional elements of the Good Friday Agreement have only ever functioned for limited periods of time, and are presently dysfunctional. If the Draft Protocol was factually committed to power-sharing, it should have established its own modalities to ensure that Northern Ireland representation for the purposes of implementing the Protocol is not actually UK representation without reflecting this principle.

3.3.4 Socio-economic improvement

The sectorial access of Northern Ireland to the Internal Market (reduced to goods, including agricultural goods, and electricity) is also problematic with regards to the commitment to develop the Northern Irish economy to approximate a mature developed economy. The all-island economy, mentioned in the joint negotiator report in December 2017, is actually characterised by significant divergence between the Irish and Northern Irish economies.[110] The Northern Irish economy has not yet compensated for the loss of

109 This is not part of the Good Friday Agreement, but instead established by an agreed interpretation annexed to the British–Irish International Agreement (see above nn 38–40).

110 Gosling (n 62).

traditional industrial sectors, such as shipbuilding and shirt-making, by developing a service economy. Instead, replacement industrial sectors could be stimulated while the agricultural and public sectors provide additional employment and growth. While in recent years some progress in expanding the service economy has been made,[111] being excluded from the integrated EU market in services is likely to have an additional stymying effect, not only on growth in this important sector, but also on the desired rebalancing of the Northern Ireland economy and the creation of employment opportunities in a more inclusive way than possible by growing public sector, manufacturing and agricultural employment. Depriving Northern Ireland of access to the EU service sector (which also requires freedom of establishment and free movement of labour) will continue to limit its adequate economic development.

4 Betraying the EU's mission?

The Draft Protocol constitutes an even more problematic inroad into the EU's resolve to safeguard the integrity of its legal order, and in particular of the Internal Market. This is duly mirrored in the European Council's (Article 50) negotiation mandate for the EU Commission, which states:

> Preserving the integrity of the Single Market excludes participation based on a sector-by-sector-approach. A non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member. In this context, the European Council welcomes the recognition by the British Government that the four freedoms of the Single Market are indivisible and that there can be no 'cherry picking'.[112]

The Draft Northern Ireland/Ireland Protocol betrays this particular commitment by offering to Northern Ireland the approach which is chastised as cherry-picking if applied to the whole of the UK.

The indivisibility of the Internal Market is increasingly questioned by UK-based EU lawyers. Remarkably, even those who have dedicated their academic lives so far to free movement of persons in the EU partly demand a diminution of individual rights, conjuring the spectre of fair movement as superior to free movement.[113] Catherine Barnard, for example, carefully exposes how the first drafts for the EEC Treaty did not fully realise free movement of labour. Instead, the Spaak Report, of 21 April 1956,[114] did envisage an incremental increase in the number of workers allowed into the Member States, which indicated that labour markets were still perceived as being under state control. Barnard's question of how the gap between this approach and the guarantee of free movement of workers under the condition of equal treatment at their destination was closed can be answered, though: the conference of Messina was accompanied by dialogue of management and labour, at the location of Val Duchesse.[115] The recently

111 Eoin Murphy, Michael Scholes and Aidan Stennet, *The Executive's Forthcoming Revised Economic Strategy for Northern Ireland: Preliminary Considerations* (Northern Ireland Assembly 2016).

112 European Council (n 94).

113 Catherine Barnard, 'Free Movement vs Fair Movement: Brexit and Managed Migration' (2018) 55 Common Market Law Review 203–26.

114 The full text of 169 pages is only available in French: for example, from <https://web.archive.org/web/20080227172535/http://www.unizar.es/euroconstitucion/library/historic%20documents/Rome/preparation/Spaak%20report%20fr.pdf>. A 20-page summary of the most important points in English is also available <http://aei.pitt.edu/995>.

115 See the historical documents available at <www.cvce.eu>, under <www.cvce.eu/en/recherche/unit-content/-/unit/02bb76df-d066–4c08-a58a-d4686a3e68ff/24cea7ea-2551–4a63-bbe5–92ab407bf809>.

documented openness of post-war Western-European social democracy for international trade[116] did not go as far as supporting a common market for capitalists only, as a contemporary caricature summarised it.[117] This was the reason why the Common Market already entailed factor mobility, notably committing the founding states to free movement of workers by the end of the transition period (1965), while free movement of capital was conceptually postponed.

Barnard is correct in highlighting that each accession round saw the Member States waver in their resolve to maintain the indivisibility of the Internal Market: free movement of workers was curtailed by extensive transition periods in 1985/1987 (accession of Greece, Portugal and Spain) and 2004, 2007 and 2013 ('Eastern Enlargement', lastly with the accession of Croatia). However, this should not be a reason to support the factually incorrect media narrative that the UK has been subjected to higher rates of mobility by EU citizens than other Member States.[118] A number of Member States, including Ireland, host a higher share of EU citizens in relation to the size of their populations.

The present Treaties uphold the principle of economic free movement rights as indivisible, while allocating slightly less generous rights to EU citizens moving for purposes other than participating in the Internal Market.[119] Nevertheless, this prominent critique highlights the necessity to analyse the normative justification for the Internal Market's indivisibility. The creation of the Common Market, and later the Internal Market, constituted an alternative model to traditional liberal free-trade expansion: instead of only offering free trade to producers of goods and services, those whose labour is contracted in producing those goods were granted equal liberty, alongside individual entrepreneurs who wished to move to other states. As evidenced by the amount of initial EU social legislation, this infused the Common Market with social policy elements from the start. The principle of equal treatment of free movers (whether employed or self-employed) in their country of destination constitutes a measure to protect those already labouring in that country of destination from exposure to exploitative competition and a downgrading of their livelihoods. Demanding to give up on equal treatment may be in line with the increasingly conservative, and even right-wing, inclination of the EU's electorates. However, it is not appropriate to alleviate the concerns of those 'feeling threatened' by free movement at any substantive level.[120]

The EU Commission itself has given up the indivisibility in its proposal for or against Northern Ireland. One could conclude that an EU Commission and Irish government, both dominated by conservative parties, pursue the same agenda as the Conservative Party of the UK: to truncate free movement of workers, and eliminate equal treatment rights of those who seek better pastures.

116 Brian Shaev, 'Liberalising Regional Trade: Socialists and European Economic Integration' (2018) 27 Contemporary European History 258–79.

117 <www.cvce.eu/en/recherche/unit-content/-/unit/02bb76df-d066–4c08-a58a-d4686a3e68ff/24cea7ea-2551–4a63-bbe5–92ab407bf809/Resources#eae300d8–362b-464e-8ebe-fd40668c4284_en&overlay>

118 For an illustration, see Dagmar Schiek et al, *EU Social and Labour Rights and EU Internal Market Law*, Directorate General for Internal Politics, Policy Department A: Economic and Scientific Policy European Parliament (eds) (European Union, 2015) 104–6, with data up to 2014, i.e. the start of the UK Conservative Party's campaign for leaving the EU.

119 See the extensive analysis by Niamh Nic Shuibhne, 'Reconnecting Free Movement of Workers and Equal Treatment in an Unequal Europe' (2018) 43 European Law Review 477–510.

120 For a more elaborate discussion with further references see Dagmar Schiek et al (n 118) 21–4, 49–52.

5 Conclusion: is there any way forward?

It is difficult to conclude in any constructive way on the eve of yet another round of negotiations, previous iterations of which did not bring substantive progress. It seems highly unlikely that the UK will be able to address the 'Irish question' with any ingenuity. The present government's dependence on a sectarian Unionist party from Northern Ireland defies the imagination that a balanced proposal on this difficult project will be received in time for any compromise before November 2018. Thus, any solution will have to come from the EU. The EU will have to consider the specific positioning of the UK with regard to the support and supply agreement between the DUP and the Conservative government. This very situation makes it advisable to not offer anything to Northern Ireland which is not available for the 'Union' (between Britain and Northern Ireland) as a whole. This strategic consideration alone should have deterred the Commission from drafting a partial inclusion of Northern Ireland within the Internal Market.

As has been argued above, limiting Northern Ireland's Internal Market access to free movement of goods does not even satisfy the minimum necessary for its socio-economic recovery. It arguably also falls short of protecting those elements of the Good Friday Agreement which originally relied on and were underpinned by common EEC membership of the UK and Ireland. The EU Commission should thus revise the Draft Protocol to include the full ambit of the Internal Market, maintaining its commitment to its indivisibility as required by the negotiation mandate. The UK could then still request that its whole territory is encompassed by what is offered to Northern Ireland alone, and the EU could accept this request. This would also have the advantage of providing a model of maintaining UK Internal Market membership without distortion of the EEA by the inclusion of a new member much larger than the current EFTA states. Even if it is unlikely that the present UK government would commit to this strategy, a change in direction would inflict less harm on the EU's Internal Market project in itself.

Thus, the Draft Withdrawal Agreement should add free movement of persons, services and capital to the common regulatory area (Article 3). This would require inserting additional Articles into Chapter III, as well as the expansion of the suggested Annex by all the legislation in this area, in particular the legislation on mutual recognition of professional qualifications, on free movement of workers including the coordination of social security and those partitions of Directive 2004/48 relating to economically active citizens, as well as the Services Directive and Directives in the area of financial and online services.

As mentioned above, the Good Friday Agreement's functionality is further threatened by eliminating the institution of EU citizenship from Northern Ireland. Presently, Irish citizens will remain protected if they already use their free movement rights, but the protection of those who do not in their future lives in the UK (including Northern Ireland) relies on a legally non-binding CTA. In order to address this, Chapter II of the Draft Protocol could be enhanced by establishing that the people of Northern Ireland, as well as EU citizens who wish to move to Northern Ireland, continue to enjoy EU citizenship rights, in particular under Directive 2004/38, by an addition to Article 2. This would relieve the UK from undergoing a commitment which is impossible to fulfil, namely to magically ensure that no diminution of rights results from withdrawing EU citizenship rights from a part of Northern Ireland's population.

Further, as regards the first chapter, an additional sub-paragraph to Article 1 should state that EU Treaty provisions and secondary law guaranteeing equal treatment on the grounds of sex, ethnic and racial origin, religion and belief, disability, sexual orientation and age continues to apply in Northern Ireland.

In order to ensure that the additional rights and protections partake in the specific quality of EU law, the jurisdiction of the European Court of Justice should be extended to these chapters. This could be achieved by deleting the words 'As regards Chapter III' in Article 11, in addition to some editorial revisions in Article 2.

Finally, the lack of representation of the people of Northern Ireland in the administration and also adjudication of the Protocol should be safeguarded. The Protocol or the main text of the Draft Withdrawal Agreement should specify that UK members of the subcommittee on Northern Ireland of the Joint Committee must be recruited from the institutions established by Strand One of the Good Friday Agreement, and during times of their dysfunctionality by citizens of Northern Ireland elected in accordance with the principle of community consent. Since the Court of Justice of the EU would acquire a permanent role in Northern Ireland, measures to ensure a corresponding input should be taken. For example, a permanent Advocate General from the island of Ireland could be installed, with the proviso that he or she always advises the Court in matters pertaining to Northern Ireland. For the General Court, a similar provision could be made. All this would require revising Articles 8 and 12 of the Draft Protocol and Article 158 of the main part of the Draft Withdrawal Agreement.

All these issues would of course only be a 'back-stop', as already specified in Article 15 of the Draft Protocol. However, that Article should specify that the safeguards for the functioning of the Good Friday Agreement and socio-economic prosperity in the Draft Protocol must be in place before the Protocol becomes inapplicable.

The EU should also not forget the interests of the larger part of the island of Ireland in approaching Brexit. The commitment of the Joint Declaration of the negotiation parties to alleviate the socio-economic threat of Brexit for the island of Ireland needs to be addressed.