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## **Brexit Means Brexit**

*A Substantive Analysis of the Withdrawal of the United Kingdom from the European Union*

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## Preface

By writing '*Brexit Means Brexit: A Substantive Analysis of the Withdrawal of the United Kingdom from the European Union*' the Double Degree Program of my Master's degree in *European Studies* at the University of Twente and the Westfälische Wilhelms-Universität Münster is completed. In two years, the Double Degree Program of *European Studies* dealt with a wide variety of subjects, from the legal framework of the European Union and international relations to the different civil society actors in global governance. Given that the Brexit considers economic, social, judicial, security and political components, my study on the withdrawal of the United Kingdom from the European Union becomes a convergence of diversity that is similar to the Double Degree Program of *European Studies*. For the last five months I have read a significant share of the academic literature on the withdrawal process of Article 50 TEU and Brexit, joined in on a forum of the ERA Academy of European Law in Brussels, and analysed any relevant international treaty that is referred to in the withdrawal agreement. As a result, this study on Brexit considerably contributed to my understanding of Union law and the international system, as also increased my interest in the European Union and the relations between states. All this work is only possible with the help of a few persons. First of all, I want to thank Prof. Dr. Wessel and Prof. Dr. Dietz for their excellent guidance and advice. My gratitude is also given to my aunt, who always made the time to discuss my analysis, and my brother, who created the visualisations of my findings. Lastly, I am grateful for all the support of my girlfriend and family during the process of creating this work.

Maikel Waelen

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## Abstract

On the 23<sup>rd</sup> of June 2016, a majority of the citizens of the United Kingdom voted for a Brexit in a referendum. A significant reason for this decision is described in the slogan of Brexiters “*to take back control*”. For the United Kingdom this mainly means a right to initiate new trade agreements with other nations, end the jurisdiction of the CJEU, restrain the freedom of movement for citizens to control for immigration, and cease the financial contributions to the Union. However, as the United Kingdom is a Members State for over 40 years, the *Europeanisation* affects the scope and complexity of a withdrawal from the European Union. By analysing the withdrawal process and the arrangements in the withdrawal agreement, the aim of this study is to determine the level of control for the United Kingdom after withdrawal on the basis of the British *red lines*, and so decide on the verity of “*Brexit means Brexit*”. Data originates from a variety of policy documents of the European Union and the United Kingdom, the forum ‘*Three Months to Brexit – Where Do We Stand?*’ by the ERA Academy of European Law, and academic literature. A selection of the arrangements of the withdrawal agreement is based on three different criteria, namely the level of control for the United Kingdom, the difference with the *status quo*, and the impact for citizens and organisations in the United Kingdom. Findings show that Article 50 TEU and the *backstop scenario* complicate the authority of the United Kingdom to pursue an independent trade policy, the jurisdiction of the CJEU is even broader on the basis of the withdrawal agreement, a right on a freedom of movement only exists in the United Kingdom until the end of the transition period, and the United Kingdom shall pay a financial settlement that is considered to be € 38 – 42 billion in a period of payment until 2064. Overall, a negotiation of almost two years between the United Kingdom and the European Union has resulted in a set of withdrawal arrangements that create a controversial divorce. On a variety of areas the United Kingdom is able to *take back control* from the European Union, as the standards and regulations of the Union do no longer apply and the sovereign decision-making power is returned to the United Kingdom. However, as *Europeanisation* is not reversed easily and the European Union acted to protect the interests of the different Member States, the United Kingdom also continues to be bound by Union law in many different areas, in which the *backstop scenario* creates a significant attenuation of the statement “*Brexit means Brexit*”. An agreed upon delay of the day of exit until the 31<sup>st</sup> of October 2019 may create an opportunity to still change the realisation of a Brexit.

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# I. Introduction

## §1.1 *Brexit Means Brexit*

On the 12<sup>th</sup> of July 2016, the newly elected Prime Minister of the United Kingdom May mentioned the following words: “*Brexit<sup>1</sup> means Brexit, and we are going to make a success of it*”(Cowburn, 2016). In hindsight, this statement may be considered as an informal start of the Brexit negotiations between the government of the United Kingdom and the European Union. In doing so, Prime Minister May honours the results of the European Union Membership Referendum of the 23<sup>rd</sup> of June 2016<sup>2</sup>, in which approximately 51.9 percent of the British voters favoured a Brexit. Herein the ‘Remain Campaign’ emphasized the economic risks of Brexit, while the ‘Leave Campaign’ primarily focussed on the limited sovereignty of the United Kingdom as a Member State (Hobolt, 2016). A well-known slogan for Brexiters became to “*take back control*”, aimed at the opportunity to reclaim control over British law-making, re-define immigration standards and regain power from the elites in Brussels (Craig, 2016). Notwithstanding the prognoses of many polls showing a small majority of support for the ‘Remain Campaign’, Hobolt (2016) argues that a triumph for Brexiters could have been anticipated on account of the ongoing Euroscepticism in the United Kingdom, Parliamentary opposition towards the European institutions and an overall increase of populism in Europe. Legally the European Union Referendum Act of 2015<sup>3</sup> stands for an advisory non-binding referendum, thereby not forcing the government of the United Kingdom to act upon the result. Nonetheless, political pledges forced the implementation of the public’s decision, and so effectively stimulating the United Kingdom to become the first Member State to initiate a withdrawal from the European Union.

Only since the Treaty of Lisbon in 2009 a withdrawal from the European Union is officially provided for in EU law, as a revision of Article I-60 TCE<sup>4</sup> led to the introduction of Article 50 in the Treaty on the European Union (TEU)<sup>5</sup>. Not a single treaty of the Union considered an explicit right to exit from the European Union before this moment. Wyrozumska (2013) suggests different reasons that may explain the lack of provisions on a withdrawal from the Union, namely that the drafters of EU treaties may have been neglectful on the rules or acted deliberately to preclude a right to withdraw. However, the demoralisation of Member States instead of denying the possibility to withdraw is most credibly the reason to not include any provisions on secession (Wyrozumska, 2013). By creating Article 50 TEU, the European Union acknowledged Member States the right to withdraw once the path of integration is no longer compatible with individual state aspirations. A letter of notification on the 29<sup>th</sup> of March 2017 stating the intention of the United Kingdom to exit the European Union put the motions of withdrawal already into action, whilst scholars hardly started the debate on the interpretation of the provisions as noted in Article 50 TEU, varying from the

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<sup>1</sup> An abbreviation for the term ‘British Exit’, defining the withdrawal of the United Kingdom from the Union.

<sup>2</sup> See Appendix 1 for a timeline of events for the Brexit.

<sup>3</sup> An act of Parliament to legally held an advisory referendum on whether the United Kingdom should remain a Member State of the European Union.

<sup>4</sup> Article I-60 of the Treaty establishing a Constitution for Europe (TCE) first described the possibility of a voluntary withdrawal from the Union.

<sup>5</sup> See Appendix 2 for a full transcript of Article 50 as formulated in the Treaty on the European Union.

requirements for withdrawal (Hofmeister, 2010) to the option of revoking the process (Lagerlof, 2018). As a result, in conformity with Article 50(2) TEU, the European Union was suddenly tasked upon to negotiate and conclude an agreement with the United Kingdom, setting out the arrangements of the withdrawal and considering the framework for a future relationship between both sides.

British membership of the European Union dates back to 1973 when the United Kingdom joined the European Community to profit from economic cooperation. In the following years, the Member States progressed to develop a form of *Europeanisation*, a phenomenon defined by Hofmeister (2010) as “a penetration of European rules, directives and norms into otherwise differentiated domestic spheres” (p. 601). A close interaction and cooperation of over 40 years results in a liaison of domestic legal orders that inherently affects governments, businesses and citizens (Wessel, 2017a). Moreover, Łazowski (2016) argues that the increased levels of integration between the Member States leads to a high complexity to withdraw from the European Union. A debate arose on the sort of relationship the United Kingdom intends to settle with the European Union, similar to whether a Member State is able to negotiate a desirable withdrawal agreement. Generally, the internal discussion consists of the variants of a so-called *hard* or *soft* Brexit, in which the former constitutes of an ending of the membership of the European Single Market and total control over national legislation and immigration regulations, while the latter often consists of strong economic connections, free movement of citizens and continued financial contributions to the European Union. Nevertheless, the opening statement in the letter of notification for withdrawal from Prime Minister May<sup>6</sup> evidently advocates for the continuation of a committed relationship between the United Kingdom and the European Union:

*On 23 June last year, the people of the United Kingdom voted to leave the European Union. As I have said before, that decision was no rejection of the values we share as fellow Europeans. Nor was it an attempt to do harm to the European Union or any of the remaining Member States. On the contrary, the United Kingdom wants the European Union to succeed and prosper. Instead, the referendum was a vote to restore, as we see it, our national self-determination. We are leaving the European Union, but we are not leaving Europe – and we want to remain committed partners and allies to our friends across the continent.*

Since the European Union respects the democratic decision of the United Kingdom to withdraw from the Union, the strive for an orderly withdrawal is not only by mandate of Article 50 TEU or other Union law (Hillion, 2018).

On the 8<sup>th</sup> of December 2017, the United Kingdom and the European Union stated in a joint report the progress on the withdrawal negotiations, in which details have been given on the protection of citizens’ rights, a framework for addressing the border of Northern Ireland and the financial settlement<sup>7</sup>. Nearly a year later, on the 14<sup>th</sup> of November 2018, the negotiators agreed upon the transitional agreements that realises the completion of a Brexit.<sup>8</sup> Additionally, a political declaration has been revealed on the 22<sup>nd</sup> of November 2018 that sets

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<sup>6</sup> See May’s letter of notification to withdraw from the European Union on the 29<sup>th</sup> of March 2017 for a full transcript.

<sup>7</sup> See the joint report of the 8<sup>th</sup> of December 2017 for details on the progress of the first phase of the negotiations for an orderly withdrawal.

<sup>8</sup> Any arrangement on the withdrawal of the United Kingdom from the European is noted in the draft withdrawal agreement of the 14<sup>th</sup> of November 2018.

out the framework of a future relationship between the United Kingdom and the European Union. For this reason, an analysis of the verity of “*Brexit means Brexit*” by means of the agreed upon arrangements of the withdrawal agreement becomes doable, and the dispute of *taking back control* versus *giving control away* is being settled.

### ***§1.2 State of the Art***

Last century is characterized by international conflicts and developments in globalisation, thereby increasing the interest of scholars in the behaviour of states. Known works of Morgenthau (1948) and Waltz (1979) revitalized the ideology of a (neo)realist notion on international relations, reasoning that states act solely in their own interest. Yet with neoliberalism or constructivism as one of many different outlooks on states’ affairs, the study of international politics provides for differing interpretations and analyses of the international system and reasons for state behaviour. Keohane (1984) argues that state behaviour is to be explained by the theory on rational choice thinking, meaning that a state acts rationally with a goal-directed focus to maximize the benefits of a situation. In this regard, a state’s sovereignty is a distinguishing feature that affects behaviour. A significant reason for the United Kingdom to become a member of the European Union has been to profit from economic cooperation. However, as European integration expanded to different areas over the years, the United Kingdom no longer fully recognises the economic benefits towards the compensations on state behaviour that membership of the Union demands. Brown and Ainley (2009) suggest that the increased range and scope of economic activity by states created a possibility for social policy in international politics. For this reason, the European Union may be considered as a result of onward institutionalisation of cooperation on different policy areas by which states developed continuing structures for international relations. Nonetheless, although the creation of the European Union comes forth out of sovereign powers, decision-making in the Union often requires a majority of voting, thereby diminishing the sovereignty of a single state (Brown & Ainley, 2009). Notably, the slogan “*take back control*” of Brexiters refers to the controversy on a loss of United Kingdom’s sovereignty to the European Union.

As a result of the novelty of Brexit, a considerable number of literature is introduced by scholars on the developments following the European Union Membership Referendum in 2016, the expectancy of British citizens on the withdrawal arrangements, and the implications of a withdrawal from the European Union. Hagemann (2018) notes that the British referendum campaign instigated attention for Euroscepticism in the domestic politics of the remainder Member States. In Germany, France and the Netherlands (known supporters of the European project) the political leaders presumably have an additional interest in the handling of the negotiation process and the kind of withdrawal agreement. Oliver (2016a) argues that the support for a withdrawal comes with reservations from the governments of Member States that generally align with the differing positions of the United Kingdom (e.g. Denmark, Hungary). A continued dubiety on the realisation of a Brexit by the United Kingdom and pro-European election results in other Member States increases the difficulty for the British to prevail on the withdrawal arrangements (Hagemann, 2018). Vasilopoulou and Talving (2018) discovered that British citizens consider trade to be the most important component of the Brexit negotiations, although the public is divided on whether the United Kingdom is required to leave the Customs Union. A disunity arises on the trade-off between

control over free movement of persons and remaining in the European Single Market, albeit that a majority of citizens prefers a continuation of access into the market. Finally, despite the finding that the British public mostly accepts citizens of the European Union residing, being employed and doing business in the United Kingdom, the mass is reluctant to share the welfare benefits with non-nationals (Vasilopoulou & Talving, 2018). Arguably, a significant proportion of analyses on the withdrawal of the United Kingdom from the European Union is to determine the effects and implications of Brexit on a variety of areas. Gamble (2018) argues that the result of the European Union Membership Referendum created a gap between the British Parliament and the voters, as most members of Parliament favoured to remain in the Union. Considering the diverging reasons for citizens to support the 'Leave Campaign', no clarity on the interpretation of the vote is given to the government of the United Kingdom with regard to the substance of a withdrawal from the European Union. As a result, in the two years following the vote, forms of populism increased in British politics, different politicians resigned and political organisations realigned positions (Gamble, 2018). On this basis, the realisation of Brexit shows clear indications of a significant impact on British politics. Ifelebuegu, Aidelojie and Acquah-Andoh (2017) analysed the implications of Brexit on the United Kingdom's Energy Security policy. Results show that the indefiniteness of the Brexit arrangements may probably reduce the investment flows to the sectors of petroleum, electricity and renewable energy. Consequently, the dependency on foreign energy imports may rise, thereby increasing the costs per unit of energy for British consumers. Moreover, in the scenario that the United Kingdom is withhold from a preferential entry to the Internal Energy Market by the European Union, the vulnerability towards an energy crisis is inherently expected to grow (Ifelebuegu et al., 2017). A probability of effects following Brexit on a specific policy area is also dealt with by Whitman (2016) and Matthews (2016), by which the former discussed the British Foreign, Security and Defence policy, and the latter focussed on the Agriculture and Food policy of the European Union. On a final note, Oliver (2016b) proposed different scenarios to analyse the impact of Brexit on the European Union. By doing so, a forecast on the position of the European Union in the international system in terms of unity of the different Member States, balance of power, political economy, security and global relations, and a relationship with the United Kingdom is made. Oliver (2016b) claims that the realisation of a scenario ultimately depends on a Member States' idea on European integration, the role of shared interests between both sides, commitments to international arrangements, influences by international factors, and the reactions of political leaders.

As the United Kingdom is the first Member State to initiate the process of Article 50 TEU, the nation is likely to enter a state of *terra incognita* with no guidance from earlier similar withdrawals. However, Łazowski (2012) believes that the United Kingdom may benefit from the accession procedures of the European Union, as stated in Article 49 of the TEU. Structures of accession can be transposed to the negotiations of a future relationship between the United Kingdom and the European Union, depending on the form of commitments both sides desire. Nonetheless, in a study on Brexit, scholars often still revert to the legal basis and the provisions of Article 50 TEU, or the alternatives for a relationship after the withdrawal process. Illustratively, Wessel (2017b) discussed the legal interpretation of Article 50 TEU, whereas Hofmeister (2010) rather focussed on the deficits and misconceptions deriving from the provisions in the Article. Lagerlof (2018) contemplates the procedural aspects of withdrawal and Hillion (2018) relates the process of Article 50 TEU towards the integrity of the EU legal order and laws of European integration. Moreover, Wessel (2018) explains the legal effects for international agreements, while Hix (2018) examines the future relationship

between both sides and Emerson (2016) considers alternative options for cooperation between the United Kingdom and the EU.

Since the result of the European Union Membership Referendum in 2016, different conceptions and developments of Brexit transpired rapidly over time, creating a sense of ambiguity and dubiety on the realisation of the matter. Accordingly, a study on the withdrawal of the United Kingdom from the European Union is prone to being overtaken by the actuality. So far a presumed majority of academic literature on the British withdrawal often remains a prognostic analysis of the implications of Brexit in relation to a variety of scenarios, simply by reason of the complexity and time of day in the negotiating process. However, the recently revealed draft agreement on the withdrawal of the United Kingdom from the European Union and the political declaration for a future relationship provides for clarity on the realisation of Brexit. For this reason, the focus of this study is to analyse the level of control for the United Kingdom on the basis of the withdrawal process and the Brexit agreements, and so determine to what extent Brexit substantially may be considered as a British exit (i.e. “*Brexit means Brexit*”). Moreover, by analysing the arrangements arising from the Brexit negotiations, the agreed upon ideas on the pragmatism of a British withdrawal may be related to the probability of prior hypothesised implications of an exit from the European Union. In doing so, the findings develop an academic relevancy as earlier contributions of literature can be tested against the backdrop of the factual progress and results of the Brexit negotiations. Illustratively, an implementation of the withdrawal process resolves the former discussion on the interpretation of the provisions of Article 50 TEU. Additionally, a societal relevancy can be derived from the negotiation progress and the Brexit arrangements. Gatti (2017) reasons that “*Article 50 TEU may function as a safety valve for European integration*” (p. 180), as a rise of Euroscepticism can be reduced in a controlled manner by the withdrawal of a Member State. By analysing the withdrawal of the United Kingdom and therewith the level of control that results from the Brexit arrangements, rising feelings of Euroscepticism may be affected in other Member States, as the impact of Brexit is presumed to be an indicator for a (re)consideration of support for the European project. Overall, a substantive analysis on the withdrawal of the United Kingdom from the European provides for insights on impending changes in a variety of areas for individual Member States and the Union as a whole.

### ***§1.3 Research Design***

An analysis of the arrangements of the withdrawal agreement provides for clarity on the exit of the United Kingdom from the European Union, in which the focus of this study is to assess the level of control for the United Kingdom in a variety of areas after withdrawal. In doing so, this work charts the stretch of the United Kingdom’s divorce from the European Union, alongside the developed forms of *Europeanisation* in the last decades. As regards the slogan “*take back control*” of Brexiters, a reflection is to be made whether the United Kingdom turns out to be a norm-maker or a norm-taker on the basis of the arrangements of the withdrawal agreement. Accordingly, the main research question of this study is formulated as follows:

*“To what extent is the United Kingdom able to take back control from the European Union via the Brexit arrangements?”*

Since the scope and complexity of a withdrawal from the European Union consists of a manifold of different areas, a differentiation is necessary to conduct a substantial analysis of the arrangements as set out in the withdrawal agreement. For this reason, a total of five sub-questions have been developed to fully comprehend the agreed upon arrangements of withdrawal on the level of control for the United Kingdom. Similar to the process and the different components of withdrawal, this analysis considers the legal implications of Article 50 TEU, the framework of the withdrawal agreement, all the rights of citizens residing in the United Kingdom or the Member States, any arrangements on an ongoing activity and the financial settlement, and the Protocol on Ireland and Northern Ireland<sup>9</sup>.

1. *“What are the legal implications of the provisions guiding a withdrawal from the European Union?”*

In chapter 2 a preliminary focus is on the provisions of Article 50 TEU as a first necessity to understand the legal implications of a withdrawal from the European Union. By analysing the specifications of the withdrawal clause, the level of control for the United Kingdom in negotiating the withdrawal arrangements can be defined. Moreover, Article 50 TEU binds a set of consequences to withdrawal that affects the level of control for the United Kingdom after withdrawal. Scholarly work on the interpretation of the provisions in Article 50 TEU, as well as guidelines of the European Council<sup>10</sup> on the framework to negotiate a withdrawal, form a meaningful starting point on the typology of effects related to an exit from the European Union.

2. *“How does the framework of the withdrawal agreement affect the level of control for the United Kingdom?”*

As of chapter 3, the arrangements of the withdrawal agreement are being analysed to indicate the level of control for the United Kingdom after withdrawal. A focus on the *common provisions* of the withdrawal agreement provides for insights on the legal interpretation and application of the arrangements. By also considering the governance structures of the withdrawal agreement, a coherent depiction of the United Kingdom’s implementation of the different arrangements is created. Since a transition period until the 31<sup>st</sup> of December 2020 is agreed upon, including a right to extend this period, the transitional arrangements may turn out to be fundamental for the level of control for the United Kingdom in the upcoming years.

3. *“To what extent is the United Kingdom given control to determine and monitor the rights of citizens?”*

Chapter 4 analyses the arrangements on the rights of citizens, a subject that relates closely to immigration. By defining the scope of the citizen’s rights, an indication is given on the impact of the arrangements on the level of control for the United Kingdom on this matter. A variety of provisions is considered, varying from a right to residency, the rights of workers, and the coordination of the social security system. In addition, the control of the United Kingdom to uphold and monitor the rights of citizens on British territory is taken into account, as the monitoring authority and the role of Union law is included.

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<sup>9</sup> Arrangements of the Protocol on Ireland and Northern Ireland determine that Northern Ireland stays in the European Single Market and the Customs Union, a scenario often defined as the backstop.

<sup>10</sup> See the guidelines of the European Union following the United Kingdom’s notification under Article 50 TEU of the 29<sup>th</sup> of April 2017.

4. “*In which areas is the United Kingdom still (temporarily) affected by Union law or policies after the transition period?*”

In chapter 5 clarity is given on the arrangements that settle the divorce at the end of the transition period. At the time of the transition period, the legal order of the European Union continues to apply in many different areas of activity in the United Kingdom. As organisations in the United Kingdom stay active and a cross-border cooperation may remain to be in effect, arrangements on *winding down* an ongoing process or EU program is of a necessity. Chapter 5 considers a variety of arrangements on economic and judicial areas, administrative cooperation procedures and the safeguards of data, as well as the construction of the financial settlement.

5. “*What are the implications of the Protocol on Ireland and Northern Ireland on the control for the United Kingdom?*”

A withdrawal of the United Kingdom from the European means that the external border of the Union is moved to the Republic of Ireland and Northern Ireland, a situation in which specific arrangements become necessary since the United Kingdom is no longer part of the European Single Market and the Customs Union, and the Belfast Agreement is to be respected. Chapter 6 considers the implications of the arrangements by analysing the framework of the Protocol on Ireland and Northern Ireland, the operational context of the backstop, and provisions on the North-South cooperation and the rights of citizens.

## ***§1.4 Methodology***

All the different research questions reveal that the focal point in this study is the level of control for the United Kingdom after withdrawal, in which the agreed upon arrangements as set out in the withdrawal agreement arise to be the determinative factor. For this reason, the provisions of Article 50 TEU that guide the withdrawal process, as well as the arrangements of the withdrawal agreement form the basis for a qualitative analysis that provides an insight on the level of control for the United Kingdom after withdrawal. A broad definition of control may be operationalised as the compliancy of the United Kingdom to the standards and regulations of the European Union. However, the *white paper* of the United Kingdom on the withdrawal indicates a set of principles to fulfil the democratic decision of the public to “*take back control*”, in which “*taking control of our own laws*”, “*controlling immigration*”, and “*securing new trade agreements with other countries*” stand out (HM Government, 2017). In addition, Thompson (2018) specifies that the intention of the United Kingdom (*red lines*) is mainly to restrain the legal right to enter the United Kingdom (i.e. free movement of citizens), cease the financial contributions to the United Kingdom, and end the jurisdiction of the Court of Justice of the European Union (CJEU) in the United Kingdom. Data is retrieved from policy documents of the European Union and the United Kingdom, as well as from materials of government officials and scholars analysing the implications of Brexit. A selection of the arrangements of the withdrawal agreement is based on three different criteria, namely the level of control for the United Kingdom, the difference with the *status quo*, and the impact for citizens and organisations in the United Kingdom. Moreover, additional information is gained by attending a forum named ‘*Three Months to Brexit – Where Do We Stand?*’, organised by the

ERA Academy of European Law in Brussels. On this event, a total of seven speakers lectured on different aspects of Brexit, all based on the arrangements as stated in the withdrawal agreement.<sup>11</sup> Notably, a sense of first-hand insights on the Brexit process has been given at the forum, as Van den Berghe consulted a Member State during the negotiations and Thompson acted at the *R. (Miller) v. Secretary of State for Exiting the European Union* case<sup>12</sup>. Overall, a convergence of a variety of information is gathered to attain a high standard of validity and reliability. Nonetheless, the overwhelming quantity of information on Brexit created by the media, scholars and government officials may form a limitation of this study, simply by reason of the bounded cognitive capacity of a single researcher. By manners of a well-founded and functional selection of data this detriment is to be surmounted. Lastly, the dubiety and unclarity of the realisation of a British withdrawal from the European Union during the process of conducting this study may be kept in mind.<sup>13</sup>

### ***§1.5 Progress of Brexit***

On the 21<sup>st</sup> of March 2019 the United Kingdom and the European Union agreed upon a delay of the day of exit. Since the British Parliament voted against the withdrawal agreement, as well as the complementary *Joint Instrument* for the Protocol on Ireland and Northern Ireland, a new deadline became necessary. A short-term delay of the day of exit<sup>14</sup> remained to be an insufficient time frame for the United Kingdom to come to new conclusions on the Brexit deal, and so the European Union decided to allow an extension that “*should last only as long as necessary and, in any event, no longer than the 31<sup>st</sup> of October 2019*”<sup>15</sup>. Given that the United Kingdom and the European Union negotiated on the withdrawal arrangements for over two years, the Union stresses that the new deadline cannot lead to an opening of the withdrawal agreement, and that “*any unilateral commitment, statement or other act*” shall be in conformity with, and may not hinder the implementation of, the arrangements in the withdrawal agreement.<sup>16</sup> However, as this study only analyses the Brexit arrangements up to April 2019, all yet to come adjustments and addenda cannot not be considered to determine the level of control for the United Kingdom after withdrawal from the European Union.

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<sup>11</sup> See Appendix 3 for a full list of speakers at the forum ‘Three Months to Brexit – Where Do We Stand?’.

<sup>12</sup> Case CO/3809/2016; CO/3281/2016: ‘*R. (Miller) v Secretary of State for Exiting the European Union*’ deals with the initiation of withdrawal from the European Union without permission by an Act of the British Parliament.

<sup>13</sup> See Appendix 4 for a labyrinth of Brexit scenarios as of January 2019.

<sup>14</sup> British Parliament has been given until the 12<sup>th</sup> of April 2019 to ratify the arrangements of the withdrawal agreement, whilst the day of exit has been moved to the 22<sup>nd</sup> of May 2019.

<sup>15</sup> See paragraph 2 of the conclusions of a special meeting of the European Council in relation to Article 50 TEU on the 10<sup>th</sup> of April 2019.

<sup>16</sup> See paragraph 4 of the conclusions of a special meeting of the European Council in relation to Article 50 TEU on the 10<sup>th</sup> of April 2019.

## II. Withdrawal from the European Union

A withdrawal from the European Union is governed by Article 50 TEU, therein stating the rules, procedures and consequences of the process to exit the Union. Article 50 TEU functions to preserve the sovereign right of a Member State to withdraw from the Union, as well as to establish a process that facilitates an orderly withdrawal. In chapter 2 the sub-question “*what are the legal implications of the provisions guiding a withdrawal from the European Union?*” is being analysed. By dealing with the different stages that provide for a possibility to leave the European Union, as drafted in Article 50 TEU, insights have been given on the level of control for the United Kingdom stemming from the withdrawal process. As follows, chapter 2 starts off by discussing the notification of withdrawal and concurrently the right of the United Kingdom to rescind the intention of withdrawal. In the following sections the focus is on the influence of the United Kingdom on the negotiation (and ratification) procedures of the withdrawal arrangements, as well as on the consequences of withdrawal in context of the decision-making power of the United Kingdom in relation to international agreements, domestic legislation and the policy of the European Union.

### ***§2.1 Notification of Withdrawal***

Only since the Treaty of Lisbon a withdrawal from the European Union is officially introduced with Article 50 TEU. By the creation of a withdrawal clause the Union acted upon to give a “*political signal to show that the European Union is not a rigid entity of which no Member State can leave*”<sup>17</sup>. Łazowski (2012) claims that an exit from an international organisation is not contingent on a specifying clause, being that the Vienna Convention on the Law of Treaties (VCLT) of 1969 and the principle of *rebus sic stantibus*<sup>18</sup> both justify a withdrawal of membership. Wessel (2017a) mentions that an inherent right of withdrawal can be based on the sovereignty of a state. Unilateral withdrawal of Greenland from the European Community in 1985 supports the idea that a noted provision is no conditionality for a possibility to withdraw. Nonetheless, given that Article 50 TEU demands no substantive conditions and consent of other Member States to exert the right to withdraw, Poptcheva (2016) believes that the conditions to exit the Union have been abated in comparison to former relevant international treaty law. An inclusion of Article 50 in the Treaty on the European Union mainly functions to govern an exit on the basis of EU constitutional law, as well as a framework to conform to an agreement for an orderly withdrawal (Hillion, 2018). By creating a specific set of rules for withdrawal, any form of a legal basis resulting from the application of international treaty law becomes irrelevant to leave the European Union.

Provisions of Article 50 TEU guide the modality of a withdrawal from the European Union. Article 50(1) TEU reads that “*any Member State may decide to withdraw from the Union*

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<sup>17</sup> Official comment in the Secretariat’s European Convention on the draft of the Constitutional Treaty, CONV. 724/1/03, 28 May 2003.

<sup>18</sup> A legal set of rules that permits for a treaty to become irrelevant as a result of a fundamental change of conditions.

*in accordance with its own constitutional requirements*". Arguably, a Member State cannot derive definite powers from this provision, as Hillion (2016) claims that only the decision to leave rests on domestic law, whereas the fulfilment of withdrawal remains to be governed by EU law. A Member State's authority to unilateral withdraw on the basis of constitutional requirements is contingent on the conformity of the decision to the legal order and values of the European Union<sup>19</sup>. Lagerlof (2018) states that *"the validity of an exit initiative under Article 50 TEU depends not only on the Member State's intention, but also on fulfilling the particular domestic rules and procedures related to such a decision"* (p. 112). If a state refrains to do so, the European Union may revert to Article 7 TEU<sup>20</sup> to withhold the right of withdrawal in order to safeguard the interests of the other Member states. Although the decision of the United Kingdom to withdraw from the European Union is not subject to the consent of other Member States, the CJEU may judge whether the domestic constitutional requirements have been consistent with EU law (Lagerlof, 2018). As a result, the decision of a Member State to withdraw from the European Union is not completely exempt from conformity to EU standards (Hillion, 2016).

Following the decision of a Member State to withdraw, the European Union is required to be informed in order to negotiate the arrangements of secession. For this reason, Article 50(2) TEU starts off by stating that *"a Member State which decides to withdraw shall notify the European Council of its intention"*. Clearly, as withdrawal is based on a unilateral decision, the notification must be done by the Member State that wishes to leave the Union. A lack of formality on the specifications of the form or timing of the notification implies a degree of discretion for the Member State to inform the European Council. Nonetheless, Hillion (2016) contends that the notification of a Member State is necessary to be unequivocal and not delayed, given that notifying the European Council on the decision is considered to be the formal start of the withdrawal process. Any discretion as to the timing of a notification is bound by the duty of cooperation as formulated in Article 4(3) TEU<sup>21</sup>. Gatti (2017) argues that *"a delay in the notification would bring about insecurity, which might prevent the Union from effectively pursuing its objectives"* (p. 173). Consequently, the Heads of State of the remaining 27 Member States declared that *"a notification on the intention to withdraw should be done as quickly as possible and no negotiations of any kind can start before the notification has taken place"*<sup>22</sup>. A delay of the notification of withdrawal by a Member State (i.e. violation of Article 4(3) TEU) may provide the European Commission with a substantial reason to start an infringement procedure against the withdrawing state (Gatti, 2017). For this reason, Hillion (2016) believes that a Member State is not able to instrumentalise the threat of an exit to increase the decision-making powers, or delay the notification to strengthen one's position in the negotiation of the withdrawal arrangements. As mentioned earlier, the United Kingdom notified the European Council on the decision to withdraw on the 29<sup>th</sup> of March 2017 by means of a formal letter specifying the reasons for leaving the Union. By setting a date for the notification of withdrawal, the United Kingdom vainly attempted to convince the European Council to allow the start of preparatory work to smoothen the process of the Brexit negotiations (Merrick,

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<sup>19</sup> Article 2 of the Treaty on the European Union states the values of respect on which the Union is created.

<sup>20</sup> Article 7 of the Treaty on the European Union determines that the Council may suspend any rights deriving from EU treaties to a Member State.

<sup>21</sup> Article 4(3) of the Treaty on the European Union reads that the Union and Member States shall comply with the rules of EU treaties and assist in achieving the Union's objectives.

<sup>22</sup> Statement of the Heads of State or Government of the 27 Member States during an informal meeting on the 29<sup>th</sup> of June 2016 in Brussel.

2016). Following the citizens' vote to exit from the Union on the 23<sup>rd</sup> of June 2016, the United Kingdom notified the European Council some 9 months later on the decision to withdraw.

Article 50(2) TEU gives no details on a right to rescind a notification of withdrawal. This hiatus may have significant implications for the withdrawal process, as (British) discomfort on the compromises in the withdrawal arrangements or domestic changes of situations can become a reason to revoke the notification (Van der Wel & Wessel, 2017). Interestingly, no clear insights on a right to rescind a withdrawal notification can be derived from the *R. (Miller) v. Secretary of State for Exiting the European Union* case, since the irrevocability of the notification has been taken for granted without providing for a set of arguments. Van der Wel and Wessel (2017) add by citing Sir David Edward, a former judge of the CJEU, that a revocation of the withdrawal process is likely to affect the politics of the situation. On the 4<sup>th</sup> of December 2018 the Advocate General Campos Sánchez-Bordona reasoned that Article 50 TEU provides for no definite answer on the possibility to rescind a notification of withdrawal, and as such is to be interpreted in congruency with the relevant provisions of the Vienna Convention on the Law of Treaties on which Article 50 TEU is based.<sup>23</sup> In this regard, Article 68 of the VCLT states that “*a notification may be revoked at any time before it takes effect*”. Advocate General Campos Sánchez-Bordona supports this reasoning by stating that “*a withdrawal from an international treaty is by definition a unilateral act of a state party and a manifestation of sovereignty*”, in which the argument is given that a rejection of a right to rescind a withdrawal notification means a forced exit from the European Union of a state party that continues to be a Member State in all respects<sup>24</sup>. Shortly after, the CJEU confirmed that a Member State that has notified the European Council of the intention to withdraw from the EU may unilaterally revoke the notification.<sup>25</sup> Reasonably, the CJEU determined that a possibility to rescind the notification exists as long as the withdrawal agreement concluded by the Member State and the European Union is not in effect, or, in a no-deal scenario, as long as the two-year period from the date of the notification, and any period of extension, is not expired. By revoking the withdrawal notification, all the rights of EU membership remains to be unchanged for the Member State as the withdrawal process is not completed. As a result of the ruling of the CJEU, the United Kingdom has a right to unilaterally revoke the notification of withdrawal, although this decision is dependent on the conformity to domestic constitutional requirements.

Any Member State that actually has withdrawn from the European Union must apply by the conditions and procedures of Article 49 TEU<sup>26</sup> to rejoin the European Union. In the words of Article 50(5) TEU, “*if a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49*”. In doing so, Article 50(5) TEU provides for no automatic right to rejoin the European Union, whilst Article 49 TEU appoints no priority rights to a former Member State. Although proposals on a waiting period of five to twenty years exist<sup>27</sup>, no timing restrictions on a request to rejoin the European Union have

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<sup>23</sup> See Press Release No. 187/18 on the opinion of the Advocate General in case C-621/18: ‘Wightman and Others v. Secretary of State for Exiting the European Union’.

<sup>24</sup> See Press Release No. 135/18 on the judgement of the CJEU in case C-327/18: ‘RO’.

<sup>25</sup> See Press Release No. 191/18 on the judgement of the CJEU in case C-621/18: ‘Wightman and Others v. Secretary of State for Exiting the European Union’.

<sup>26</sup> Article 49 of the Treaty on the European Union mentions the conditions and procedural aspects of becoming a member of the European Union.

<sup>27</sup> See the proposals of Vastagh and Lamassoure on amendments to the requirements of Union membership at the European Convention, 14 April 2003.

been included in the provisions (Wyrozumska, 2013). As a result, following the realisation of withdrawal from the European Union, the United Kingdom is regarded similarly as any other European state in terms of accession. Wessel (2017b) argues that the duration of the process to (re)join the European Union may differ between the United Kingdom and other European states, as EU legislation may not yet be adjusted to domestic regulatory preferences. Illustratively, when the United Kingdom decides to reapply for membership of the European Union rather soon after the withdrawal, the domestic legislation is expected to still be in conformity with the requirements of the Union, thereby increasing the process to rejoin the EU. In contrast, if Brexiters implement regulatory changes that contradict the conditions as noted in Article 49 TEU, a renewed British membership of the European Union is far off (Wessel, 2017b).

## ***§2.2 Negotiation Procedures***

Article 50(2) TEU continues by notifying that *“in the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament”*. A formal notification to the European Council brings about a responsibility to negotiate the withdrawal arrangements, while also setting the contours of a future relationship. To clarify, any explicit details on potential forms of cooperation after a withdrawal have been left for a second agreement. Given that the creation of a relationship is dependent on the completion of a Member State’s withdrawal from the European Union, Lagerlof (2018) notes that a second agreement will be with a non-EU entity, and thus will be concluded on the legal basis of an international agreement in conformity with the provision of Article 218 TEU<sup>28</sup>. In order to ensure an orderly withdrawal, the European Council created guidelines on the 29<sup>th</sup> of April 2017 to define a framework for the negotiations of a Brexit. However, as Advocate General Campos Sánchez-Bordona stated that a conclusion of an agreement is not a requirement for withdrawal<sup>29</sup>, Hillion (2016) claims that a negotiation of departure is merely based on an obligation of *best endeavours*. For this reason, Hofmeister (2010) advocates for the withdrawal agreement to be mandatory, by reason of limiting the disparity of influence of different Member States on the negotiations. After all, the size and power of a state affects the willingness and progress of the negotiations on withdrawal, and so reasonably gives the United Kingdom a more superior position than many other Member States. Nonetheless, considering that all Member States remain part of the Union until the completion of withdrawal, the European Council can rely yet again on a duty of cooperation and good faith of the Member States to get a fair result that is in the interest of all citizens (Hillion, 2018).

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<sup>28</sup> Article 218 of the Treaty on the Functioning of the European provides for the procedures of negotiations between the European Union and third nations.

<sup>29</sup> See also Article 50(3) TEU on the conditionality of withdrawal arrangements to exit the European Union.

By referring to Article 218(3) TFEU<sup>30</sup>, the withdrawal of a state is to be determined by the institutions of the European Union instead of the individual Member States. Article 50 TEU inherently confers an *exceptional horizontal competence* on the European Union, therewith authorising the Union to negotiate the terms and arrangements for an orderly withdrawal.<sup>31</sup> Guidelines of the European Council following the notification of Article 50 TEU state that the Union will act as a unity to reach a maximum result of a withdrawal.<sup>32</sup> As a result, Gatti (2017) contends that the Member States will not be directly involved in the negotiations of the British withdrawal, and so prevent the United Kingdom to exert to a divide-and-rule strategy. Moreover, the European Council concludes the withdrawal arrangements by a qualified majority vote, meaning that 72% of the remaining Member States that represent 65% of the total EU population need to be in favour of the deal. Not a single Member State is able to veto a withdrawal agreement, and so any intentions of the United Kingdom to resort to inter-state politics with an individual Member State is obviated.

As formulated in Article 50(2) TEU, consent of the European Parliament on the agreed upon withdrawal arrangements is a necessity, meaning that the European Parliament is given a power with significant control over the negotiation results. Lagerlof (2018) argues that, since Article 50(2) TEU refers specifically to Article 218(3) TFEU, the negotiation of a withdrawal is not subject to Article 218(10) TFEU, in which is stated that the European Parliament is to be fully informed at all stages of the creation of international agreements<sup>33</sup>. However, the European Parliament affirmed the belief that the negotiations between the United Kingdom and the European Union must be conducted in good faith and complete transparency, as full involvement of the European Parliament is a necessary condition for Members of the European Parliament (MEPs) to consent to any withdrawal agreement.<sup>34</sup> All the MEPs coming from the United Kingdom<sup>35</sup> remain in function until the completion of the withdrawal. Although citizens employed at institutions of the European Union do not officially represent a Member State, a conflict of interests could arise as British workers may be prone to defend the interests of the United Kingdom (Hillion, 2016). Consequently, the United Kingdom may be able to influence the European ratification of the withdrawal arrangements via the (British) members in the European Parliament.

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<sup>30</sup> Article 218(3) of the Treaty on the Functioning of the European Union reads that the European Council shall adopt a decision on the negotiations on EU foreign policy, whereas the Commission provides for recommendations to the European Council.

<sup>31</sup> Recommendation for a Council Decision authorising the Commission to open negotiations on an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union; COM(2017)218.

<sup>32</sup> See the guidelines of the European Union following the United Kingdom's notification under Article 50 TEU of the 29<sup>th</sup> of April 2017.

<sup>33</sup> See Article 218(10) of the Treaty on the Functioning of the European Union on the negotiation of international agreements with third nations.

<sup>34</sup> See the resolution of the European Parliament on the negotiations with the United Kingdom following the notification of withdrawal, 5 April 2017.

<sup>35</sup> As laid down in the Treaty of Lisbon, the European Parliament consists of 751 members from different Member States. As of January 2019, 73 MEP's come from the United Kingdom, comprising of 9.7% of the total members.

### ***§2.3 Consequences of Withdrawal***

A withdrawal from the European Union brings about different consequences for the departing Member State, regardless of any withdrawal arrangements that may have been agreed upon. Article 50(3) TEU reads that *“the treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period”*. Article 50(3) TEU dictates that all treaties of the European Union remain in effect for a withdrawing Member State until the day of exit from the Union. In doing so, the provision affects the sovereignty of Member States in a variety of areas. By the Member States’ decision to transfer a number of internal competences to be regulated at the EU level, as well as to task the European Union to deal with third nations on different affairs, the legal parameters of the Union’s external actions have been set and a division of competences is created<sup>36</sup> (Łazowski & Wessel, 2017). As a result of Article 50(3) TEU, this division of competences shall continue to apply for a Member State, meaning that the United Kingdom is not given the right to conclude any international agreements in areas of exclusive EU competences<sup>37</sup> as long as the withdrawal is not formally realised. For the time being, the guidelines of the European Council stress that the Union *“will continue to have its rights and obligations in relation to international agreements. In this respect, the European Council expects the United Kingdom to honour its share of all international commitments contracted in the context of its membership”*.<sup>38</sup> Łazowski and Wessel (2017) argue that *“in areas of shared competences the United Kingdom continues to be limited by the rules and principles guiding the division of competences”* (p. 627). Explanatory, whilst the United Kingdom is not authorised to take action in areas of pre-emptive competences of the Union, the duty of cooperation further hinders any British unilateral activity that may violate EU law. A principle on supremacy determines that European law prevails over domestic legislation, thereby forcing the United Kingdom to act in conformity with the agreed upon rules and standards of EU external relations law (Wessel, 2018). In other words, the United Kingdom is required to *play the game* by the rules of the European Union. For this reason, no competency is given to the United Kingdom to enter into an international agreement with a third nation as a Member State, as on most areas the European Union already concluded an agreement by virtue of the exclusive EU competences<sup>39</sup>.

Since Article 2(1) TFEU refers solely to the *adoption* of acts in areas of exclusive EU competences, and the necessity to maintain a uniform legal regime with the United Kingdom after withdrawal is no longer important, the debate on whether informal negotiations with a third nation can still be recognised as a violation of the duty of cooperation is relevant. On the 2<sup>nd</sup> of February 2016 former Secretary of State for Exiting the European Union Davis claimed

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<sup>36</sup> See Title I ‘Categories and Areas of Union Competence’ in the Treaty on the Functioning of the European Union for details on the division of competences of Member States and the Union.

<sup>37</sup> Article 2(1) of the Treaty on the Functioning of the European Union states that only the Union may legislate and adopt legally binding acts in areas of exclusive EU competence. Only by the implementation of Union acts or on authority of the European Union may Member States adopt legally binding acts.

<sup>38</sup> See the guidelines of the European Union following the United Kingdom’s notification under Article 50 TEU of the 29<sup>th</sup> of April 2017.

<sup>39</sup> Łazowski & Wessel (2017) mention that the EU treaty database lists over 1.100 international agreements concluded by the European Union or Euratom with third nations as of early 2017.

that a clear difference exists between the negotiations and conclusion of an international agreement, and for this reason allows the United Kingdom to have preliminary talks with a third nation (Łazowski & Wessel, 2017). To clarify, a definition of the term ‘negotiation’ includes “*every action prior to an agreement of any nature, the time of discussion and the concurrence of wills which will not be transformed into a legal act*” (Mazzuoli & Massa, 2016, p. 89). By means of case law, any clarity on the scope of solidarity to the European Union might be given by the CJEU. In the case of *Commission v. Germany (Inland Waterway)* the CJEU ruled that “*the adoption of a decision authorising the European Commission to negotiate a multilateral agreement on behalf of the Member States marks the start of a concerted action at the international level, and therefore instigates a duty of cooperation*”.<sup>40</sup> Case *Commission v. Sweden (PFOS)* determined that “*a duty of cooperation is in effect the moment a Member State acts internationally in a way that is likely to compromise the unity in the representation of the Union and the Member States, and so weakens the negotiating position of the European Union*”.<sup>41</sup> By taking this into account, a violation of the duty of cooperation perhaps occurs as soon as any informal negotiation between the United Kingdom and a third nation leads to draft directives that may be adverse to the negotiation position of the European Union (Wessel, 2018). In this regard, the considerations of the European Union to exclude the United Kingdom from briefings on trade policy is obvious, as the United Kingdom will become a competitor for trade deals after withdrawal (Von der Burchard, 2017). Any efforts of the United Kingdom to negotiate an international trade agreement is complicated by a lack of certainty on the situation after Brexit, as the state of affairs is to be defined by the withdrawal arrangements. A third nation is probably also not eager to negotiate a deal with a (former) Member State that violates EU law, as this indirectly burdens the relationship with the European Union. Nonetheless, the United Kingdom has already been able to sign bilateral trade agreements and mutual recognition agreements with over 30 different states that may enter into force after Brexit (Department for International Trade, 2019). Given that the United Kingdom violates the duty of cooperation by negotiating or signing an international trade agreement with a third nation, and thereby fails to fulfil the obligations stemming from EU treaties, Article 260(2) TFEU states that the CJEU may decide to impose a financial penalty on the United Kingdom<sup>42</sup>.

By exiting from the European Union, the legal identity of the United Kingdom in the international sphere shifts from a Member State to a state. As a result, the division of competences that exists in the Union no longer applies to the United Kingdom after withdrawal, thereby forcing the state to renegotiate the so-called *EU only agreements* to which a Member State is not a distinct party (Wessel, 2017a). In consideration of Article 50(3) TEU, the United Kingdom will no longer be covered by most of the international agreements concluded by the European Union, as Article 216(2) TFEU states that “*(international) agreements concluded by the union are binding upon the institutions of the Union and on its Member States*”.<sup>43</sup> Interestingly, whilst Article 216(2) TFEU is merely created to have an internal effect on the Member States of the Union, the implications on the external relations of the United Kingdom after withdrawal may be similarly significant. As Britain’s membership to the World

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<sup>40</sup> See case C-433/03: ‘Commission v. Germany (Inland Waterway)’ for details on the judgement of the CJEU.

<sup>41</sup> See case C-246/07: ‘Commission v. Sweden (PFOS)’ for details on the judgement of the CJEU.

<sup>42</sup> Article 260(2) of the Treaty on the Functioning of the European Union reads that a penalty may be imposed on a Member State if the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the treaties.

<sup>43</sup> Most international agreements concluded by the European Union apply to areas that fall in the scope of EU treaties.

Trade Organisation is bound by the membership of the European Union, the United Kingdom is required to settle an independent deal with the WTO. Being a member of the European Union, the United Kingdom participates in approximately 40 Free Trade Agreements (FTA) with over 70 other nations (House of Commons, 2018). By mostly copying the *EU only agreements* into an international agreement that covers the United Kingdom, Britain's International Trade Secretary Fox attempted to create a fast-track deal with the WTO on the terms of trade (i.e. schedule of concessions) after Brexit. However, as not all trading partners agreed with the tariff rate quotas, the United Kingdom is forced to modify and renegotiate the international agreements (Miles & Schomberg, 2018). For *mixed agreements*<sup>44</sup> the situation is different, as the United Kingdom is bound by the international agreement as a Member State directly under international law (Łazowski & Wessel, 2017). In this regard, a distinction is to be made between bilateral and multilateral agreements. Wessel (2018) mentions that in bilateral mixed agreements the Member States and the Union are often noted as a coalesced team, meaning that the United Kingdom may be compelled to withdraw by means of a notification to the third party. After all, otherwise the changing status of the United Kingdom will automatically convert a bilateral agreement into a multilateral agreement. As for multilateral mixed agreements, a notification on the changing situation and a few adjustments to the arrangements might be necessary, although the United Kingdom can most likely remain a party (Wessel, 2017a). Nonetheless, any continued participation of the United Kingdom in a *mixed agreement* is expected to be subject to a discussion between the European Union, the other Member States and a third nation or international organisation.

Over the years the European Union created many different regulations that apply directly to the Member States<sup>45</sup>. As a result, being a member of the Union involves, *inter alia*, the implementation of legal acts of the Union into domestic law in order to ensure equal rights and benefits to all the citizens of the European Union. Wessel (2017a) states that “*EU law is not just law between states, but also law within states*” (p. 204). However, by leaving the European Union, EU law will no longer have to apply in the legal regime of the United Kingdom as of the day of exit. On the 20<sup>th</sup> of June 2018 both Houses of Parliament in the United Kingdom agreed upon the *European Union (Withdrawal) Act 2018*, a decision that repeals the *European Communities Act of 1972*. Barnard (2017) argues, in conformity with the Supreme Court<sup>46</sup>, that the *European Communities Act of 1972* operates “*as a partial transfer of law-making powers, an assignment of legislative competences, by Parliament to EU institutions*” (p. 5). By repealing the *European Communities Act of 1972*, any form of primacy of legal acts of the European Union no longer exists in the United Kingdom, thereby fully returning the legislative power to British Parliament – albeit subject to international agreements and treaties.<sup>47</sup> The *European Union (Withdrawal) Act 2018* also converts existing EU law into domestic law<sup>48</sup> to overcome significant gaps in the legal statute of the United Kingdom, and so smoothen the legal

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<sup>44</sup> A mixed agreement is considered to be an (international) agreement between the European Union, the Member States and a third nation or international organisation.

<sup>45</sup> Article 288 of the Treaty on the Functioning of the European Union states that a regulation shall be binding in its entirety and directly applicable to all Member States.

<sup>46</sup> See paragraphs 67 – 68 on the judgement of the Supreme Court in Case CO/3809/2016; CO/3281/2016: ‘R. (Miller) v Secretary of State for Exiting the European Union’.

<sup>47</sup> Read the 2016 Party Conference speech of May for a political clarification to repeal the European Communities Act of 1972.

<sup>48</sup> No clarity is given by the House of Commons on the number of legal acts of the European Union to be converted, although of the 12.433 regulations an estimation of 7.000 laws is expected to be up for transposition (as of 2017).

transition from Member State to state (Caird, Miller & Lang, 2017). Moreover, the formerly named *Great Repeal Bill* grants powers to the British Parliament to alter or remove *retained EU law* afterwards. Poptcheva (2016) believes that the substantial number of legislation to be converted affirms that a complete isolation from the effects of the *EU acquis* is hardly feasible if the United Kingdom truly wants to stay a committed partner to the European Union. Given the complexity to adopt alternatives for certain regulations, for instance on the Union Customs Code<sup>49</sup> or customs tariffs<sup>50</sup> (Łazowski & Wessel, 2017), the United Kingdom might want to consider to reset the day of exit, as set out in Article 50(3) TEU, or an extension of the transition period.

From the start of the withdrawal process, the United Kingdom takes no longer part in any vote or discussion of the European Council and the Council of Ministers on matters of the British withdrawal. As provided for in Article 50(4) TEU, “*for the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it*”. Notwithstanding the right of a departing Member State to join any vote or discussion of the European Council and the Council of Ministers on different subjects, Lagerlof (2018) argues that the actual capacity of the United Kingdom to exert influence on the policy of the European Union is expected to be affected. However, since the exclusion of the United Kingdom refers not to many other institutions of the European Union, such as the European Parliament, the European Commission and CJEU, the interests of the British citizens in the Union will still be safeguarded (Hillion, 2016).

## **§2.4 Conclusion**

A decision to withdraw from the European Union is mostly based on a sovereign right of the United Kingdom, whereas the realisation of a withdrawal is governed by Article 50 TEU. For this reason, chapter 2 intends to provide insights on the sub-question “*what are the legal implications of the provisions guiding a withdrawal from the European Union?*”. Given that the United Kingdom continues to be a Member State until the day of exit, all the rules and principles stated in Union law remain to apply, which means that the behaviour of the United Kingdom is influenced by limitations imposed by the division of competences, the duty of cooperation and a primacy and direct effect of Union legal acts. A notification of withdrawal to the European Union is mandatory for the United Kingdom, in which the discretion to do so is limited by a duty of cooperation. Interestingly, the CJEU ruled that the United Kingdom has the right to unilaterally revoke the notification of withdrawal, as long as the divorce is not in effect or the period of extension is not yet expired. For the negotiations of a withdrawal agreement, the Union can *technically* rely yet again on the United Kingdom to comply with the duty of cooperation (and good faith), although the responsibility to negotiate may rather be defined as an obligation of *best endeavours*. Since Article 50 TEU confers an *exceptional horizontal competence* on the European Union, the Member States have not been directly

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<sup>49</sup> See Regulation 952/2013 of the European Parliament and the Council for details on the Union Customs Code, 9 October 2013.

<sup>50</sup> See Regulation 978/2012 of the European Parliament and the Council for details on customs tariffs, 25 October 2012.

involved in any negotiations of the British withdrawal, and so limits the possibility for the United Kingdom to exert a divide-and-rule strategy that may have resulted in a stronger position during the negotiation of the withdrawal arrangements. Nonetheless, as the British MEP's remain in function until the day of exit, the United Kingdom might be able to influence the ratification process of the withdrawal arrangements. As a result of the division of competences, the United Kingdom shall not be given the right to conclude any international agreements in areas of exclusive EU competences at the time of the withdrawal process. Moreover, in areas of shared competences the United Kingdom is restrained by the rules and principles guiding the division of competences. From the day of exit the United Kingdom is forced to renegotiate all international agreements that fall in an area of exclusive EU competence, whilst the United Kingdom is only given the competency to conclude an international agreement after the withdrawal from the European Union. In addition, the influence of the United Kingdom to determine the policy of the European Union is minimised after the day of exit, whereas the control to decide on domestic legislation increases by a repeal of the *European Communities Act of 1972*.

### III. Framework of the Withdrawal Agreement

On the 14<sup>th</sup> of November 2018 the negotiators of the United Kingdom and European Union agreed upon an orderly withdrawal by means of a withdrawal agreement. Content wise the withdrawal agreement considers a wide scope of arrangements, varying from the rights of citizens, economic and judicial areas, a financial settlement, and a Protocol on Ireland and Northern Ireland. Nonetheless, a coherent framework that guides the structures of the withdrawal agreement is the foremost condition that sets the level of control for the United Kingdom after withdrawal. For this reason, a focus is given on the sub-question “*how does the framework of the withdrawal agreement affect the level of control for the United Kingdom?*”. In chapter 3 a study is done on the legal interpretation and implementation of the withdrawal arrangements for the United Kingdom, whilst the parameters of the transition period, the institutional procedures and arbitration mechanisms that ensures an orderly withdrawal also have been taken into consideration.

#### ***§3.1 Application of the Withdrawal Arrangements***

*Part 1* of the withdrawal agreement sets out the legal interpretation, territorial scope and application of the arrangements that give effect to a withdrawal of the United Kingdom from the European Union<sup>51</sup>. Article 4 reads that the provisions shall have the same legal effects in the United Kingdom and the Member States of the European Union, meaning that any arrangement is subject to the EU law principles of primacy and direct effect. By means of domestic primary legislation, the United Kingdom is forced to act upon a compliancy with the principles of primacy and direct effect. For this reason, judicial and administrative authorities in the United Kingdom get powers to disapply domestic law that is inconsistent or incompatible with the provisions of the withdrawal agreement or EU law. Article 5 binds the United Kingdom and the European Union to a duty of good faith, thereby forcing both sides to support one another to implement the tasks as noted in the withdrawal agreement. In addition, the duty of good faith reflects that both the United Kingdom and the European shall apply the withdrawal arrangements with fairness, consistency and sincerity (Department for Exiting the EU, 2018a). A provision on the duty of good faith is included on behalf of the United Kingdom, as an attempt to ease the concerns on a lack of influence on new legal acts of the European Union at the time of the transition period (Cîrlig, Tilindyte & Mazur, 2018). By reason of a consistent interpretation of the withdrawal agreement, the general principles and methods of Union law within the European Union (e.g. the Charter of Fundamental Rights) apply to construe any provision that refers to Union law in the withdrawal agreement. Moreover, any withdrawal arrangement that relates to Union law is to be interpreted in conformity with the relevant case law of the CJEU, whilst the domestic courts in the United Kingdom also must remain to *pay due regard* to subsequent case law of the CJEU after the transition period. By doing so, Jancic (2018) claims that the domestic courts in the United Kingdom may still use case law of the CJEU to interpret the British law. Article 6 states that

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<sup>51</sup> Note that the agreed upon withdrawal arrangements also directly concern the European Atomic Energy Community instead of only the European Union.

“all references in this (withdrawal) Agreement to Union law shall be understood as references to Union law, including as amended or replaced, as applicable on the last day of the transition period”. Phrased differently, all references in the withdrawal agreement to Union law includes all amendments made until the last day of the transition period, which creates a significant possibility for Union law to *creep* into statute law of the United Kingdom without any scrutiny or consent of the British Parliament (Jancic, 2018). Exceptions apply for provisions on the financial settlement, simply to not impose extra obligations on the United Kingdom, and for clauses on the transition period, as Union law will continue to apply dynamically to and in the United Kingdom<sup>52</sup> (European Commission, 2018a). Since substantial aspects of the withdrawal arrangements (e.g. citizen’s rights) only come into force after the transition period, the EU law principles of primacy and direct effect shall not be limited to the transition period. As a result, the status of EU law in the United Kingdom at the end of the transition period is not fully clear, being that primacy and direct effect remains to apply in the United Kingdom (House of Lords, 2018). After all, the EU law principles of primacy and direct effect continue to apply to different arrangements of the withdrawal agreement, including provisions that refer to Union law once the United Kingdom realised the withdrawal (Elliot, 2018). In accordance to Article 50(4) TEU, the United Kingdom gives up the decision-making powers and representation rights in different institutions of the European Union<sup>53</sup>. *Part 1* of the withdrawal agreement concludes with Article 8, stating that, without prejudice to the outcomes of any negotiation on a relationship between the United Kingdom and the European Union after withdrawal, the United Kingdom shall lose “access to any network, any information system and any database established on the basis of EU law” at the end of the transition period.<sup>54</sup>

As of the day of exit, the United Kingdom repeals the *European Communities Act of 1972*, and so removes the legal mechanisms that gives effect to Union law in the United Kingdom.<sup>55</sup> However, at the time of the transition period the *status quo* remains to exist in the United Kingdom, which means that rulings of the CJEU continue to be binding on the United Kingdom, the supervision by the European Commission shall go on and enforceable rights of Union law still apply in the United Kingdom (Thompson, 2018). For this reason, the United Kingdom created the *European Union (Withdrawal Agreement) Bill*, a statutory law that includes transitional provisions to amend the *European Union (Withdrawal) Act 2018* by means of continuing the effect of the *European Communities Act of 1972* for the duration of the transition period<sup>56</sup> (Department for Exiting the EU, 2018a). In doing so, the necessity of the United Kingdom to apply Union law is determined on the basis of the withdrawal agreement, rather than on being a Member State (Clifford Chance, 2018).

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<sup>52</sup> Note that different aspects of the social security coordination for citizens, as stated in Part 2 of the withdrawal agreement, also form an exception.

<sup>53</sup> Any representative of the United Kingdom is also excluded from expert groups, unless otherwise noted in the provisions of the withdrawal agreement.

<sup>54</sup> Note that specific exceptions may apply on different parts of the withdrawal agreement.

<sup>55</sup> See ‘§2.3 Consequences of Withdrawal’ for further details on the repeal of the *European Communities Act of 1972*.

<sup>56</sup> Note that the *European Union (Withdrawal Agreement) Bill* is contingent on a ratification of the withdrawal agreement by Parliament.

### **§3.2 Transition Period**

Prime Minister May publicly advocated for a period of transition to implement the withdrawal arrangements<sup>57</sup> on the 22<sup>nd</sup> of September 2017 in Florence. Accordingly, the guidelines of the European Council reads that “*the negotiations may also seek to determine transitional arrangements which are in the interest of the Union and to provide for bridges towards the foreseeable framework for the future relationship in the light of the progress made*”.<sup>58</sup> Since the transitional arrangements become a part of the withdrawal agreement, the legal basis stems from the process of Article 50 TEU. By including a transition period, the many different businesses and citizens in the United Kingdom and the European Union have time to adjust to the changes that arise from Brexit. Moreover, Member States that closely relate to the United Kingdom, such as the Netherlands, France and Belgium, get extra time to develop and implement regulatory systems, processes and new policies (Eeckhout & Patel, 2017). A continuation of trade flows and consistent application of Union law allows for a smooth transition, whilst also creates a stable situation in which a future relationship between the United Kingdom and the European Union is to be negotiated and set out. For this reason, Łazowski (2018) argues that the *raison d'être* of the transition period is mainly to get additional time to negotiate an agreement that governs the relationship after Brexit.

Article 126 states that a transition period starts on the date of entry into force of the agreed upon withdrawal arrangements and ends on the 31<sup>st</sup> of December 2020<sup>59</sup>. In doing so, a consideration is given to the request of the United Kingdom for a two year period to implement the arrangements<sup>60</sup>, as well as to the European Parliament’s belief that a transition period is to be strictly limited in time (maximum of 3 years) and scope<sup>61</sup>. After all, an indefinite transition period may result in a continual process of adjusting and negotiating the optimal (trade) deals, thereby subverting the vote for Brexit and turning the transitional arrangements into the *status quo* (Eeckhout & Patel, 2017). At the time of the transition period, the *acquis* of the European Union continues to apply to the United Kingdom, although the United Kingdom loses all the decision-making powers in the institutions as a result of no longer being a Member State. Consequently, the United Kingdom continues to join in on the Customs Union, all the *four freedoms* of the European Single Market<sup>62</sup> and the different regulations of the European Union. As Union law (including amendments and new legislation) and the EU international agreements also remain to apply in the United Kingdom, Article 131 provides that all the supervision and enforcement instruments of the European Union shall be in effect (in relation to the United Kingdom), including the jurisdiction of the CJEU. At the same time, the United Kingdom maintains a similar recourse to the judicial review structures of the European Union (Department for Exiting the EU, 2018a). Reasonably, by reason of securing the integrity and homogeneity of the European Single Market and Customs Union, the

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<sup>57</sup> In the United Kingdom a period of transition after Brexit is often referred to as an ‘implementation period’.

<sup>58</sup> See the guidelines of the European Union following the United Kingdom’s notification under Article 50 TEU of the 29<sup>th</sup> of April 2017.

<sup>59</sup> A deadline that coincides with the end date of the long-term EU budget programs (Multiannual Financial Framework 2014 – 2020).

<sup>60</sup> See May’s speech in Florence on the 22<sup>nd</sup> of September 2017.

<sup>61</sup> See the resolution of the European Parliament on the negotiations with the United Kingdom following the notification of withdrawal, 5 April 2017.

<sup>62</sup> A European Single Market is created to guarantee a free movement of goods, capital, services and labour (i.e. four freedoms) in the different Member States.

transitional arrangements determine that the United Kingdom is still bound by the Union's exclusive competences, and refrains the United Kingdom *"from any action or initiative which is likely to be prejudicial to the Union's interests"*.<sup>63</sup> A right of nomination, appointment or election in the institutions of the Union, participation in the decision-making process and the governance of agencies in the European Union is no longer granted to the United Kingdom. Article 128 dictates that the parliament of the United Kingdom is not to be considered as a national parliament of a Member State, and therefore loses the right to initiate or submit proposals for Union legislation. In addition, the United Kingdom is not granted the right to take part in the activity of organisations set up by international agreements concluded by the EU, unless the British joins in on its own right or the United Kingdom is invited by the European Union. In the words of Łazowski (2018), *"during the transition period the United Kingdom will be out, but with still one leg on the doorstep"*. After all, the United Kingdom shall be able to negotiate and conclude any international agreement with a third party in the area of exclusive EU competences that enters into force after the 31<sup>st</sup> of December 2020. Nonetheless, the House of Lords (2018) indicates problems as a result of a lack of clarity on the United Kingdom's given authority to renegotiate the myriad of international agreements in which the responsibility is shared between the European Union and the individual Member States.

*Part 4* of the withdrawal agreement provides for specific arrangements (in relation the transition period) on international cooperation in different policy areas. Círlig et al. (2018) note that the United Kingdom is not allowed to participate in any cooperation set up after the withdrawal date, nor in any partnership of which no acts had been adopted before the withdrawal. Article 127(2) states that an agreement on a future relationship in the areas of the Common Foreign and Security Policy and the Common Security and Defence Policy (CSDP) is able to directly come into force at the time of the transition period. If so, all the relevant Union law in this area ceases to apply to the United Kingdom<sup>64</sup> from the date of entry into force of the new agreement, and so inherently deletes the primacy of the Union's foreign policy decisions. Nonetheless, for the time being all the provisions in the Common Foreign and Security Policy of the European Union apply to the United Kingdom, albeit that Article 129(7) stresses that the United Kingdom is given no capacity to lead CSDP missions or decide on the projects of any Common Foreign and Security Policy agency (European Commission, 2018a). In regard to Justice and Home affairs, the agreed upon provisions remain to apply for the United Kingdom. Similar to the Republic of Ireland, the United Kingdom benefited from an opt-out on new instruments adopted since the entry into force of the Treaty on Lisbon, yet with the possibility to opt-in either before or after the adoption of a measure<sup>65</sup>. Article 127(5) determines that the United Kingdom retains the possibility to opt-in on instruments that amend, replace or build on pre-existing measures at the time of the transition period, although being required to give up the right to opt-in on new instruments (Weyembergh, 2018). *Part 4* of the withdrawal agreement further includes transitional arrangements for the Common Fisheries Policy. Article 130 reads that the United Kingdom is to comply with the decisions of the European Union on fishing opportunities until the end of the transition period, although still being consulted during the annual decision-making processes. In the last year of the

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<sup>63</sup> See Article 129 of the withdrawal agreement for details on the transitional arrangements relating to the Union's external actions.

<sup>64</sup> Particularly the specific provisions on the Common Foreign and Security Policy noted in chapter 2 of the TEU.

<sup>65</sup> See Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of Freedom, Security and Justice.

transition period, the United Kingdom is given the opportunity to negotiate the fishing rates for the following years (Department for Exiting the EU, 2018b).

By decision of a Joint Committee, comprising of representatives of the United Kingdom and the European Union<sup>66</sup>, the transition period can be extended for up to one or two years. In doing so, the decision is not subject to veto powers of an individual Member State, although a consensus between the European Union and the United Kingdom is still necessary to be negotiated. Article 132(1) specifies that the Joint Committee can only use this option one time and must be decided upon before the 1<sup>st</sup> of July 2020. Van den Berghe (2018) considers the risk for the United Kingdom to become a *rule taker* more intense the longer the transition period lasts, as the nation remains to be subject to new Union law without any decision-making power. Overall, an opportunity to request extra time to adjust to the arrangements and to negotiate the relationship between the United Kingdom and the European Union for after the transition period is clearly provided for by the withdrawal agreement. All the transitional arrangements that apply at the time of the transition period remain in effect if the period of transition is to be extended, meaning that Union law and the jurisdiction of the CJEU continues to be highly important for the United Kingdom. However, the United Kingdom is regarded as a third party for the purposes of the *Multiannual Financial Framework* as of 2021, and therefore relies on a different legal basis to join in programs of this framework (European Commission, 2018a). In case of an extension of the transition the period, the United Kingdom is no longer part of the Common Agriculture Policy, and for this reason is free to introduce a different agricultural policy. Article 132(2) states that “*for the period from the 1<sup>st</sup> of January 2021 to the end of the transition period, the United Kingdom shall make a contribution to the Union budget*”. A fair contribution is decided upon by the Joint Committee and comes on top of the financial settlement that is noted in *Part 5* of the withdrawal agreement.<sup>67</sup> Interestingly, in the *backstop scenario* an additional contribution to the budget of the European Union is not necessary (House of Lords, 2018).

### ***§3.3 Governance Structures***

A shared understanding between the United Kingdom and the European Union on the meaning of the withdrawal agreement, the measures to fulfil the different arrangements, and an arbitration mechanism for disputes is important to create legal certainty for businesses and citizens (Department for Exiting the EU, 2018b). *Part 6* of the withdrawal agreement provides for the institutional procedures that set out the governance structures of the arrangements. As significant parts of the withdrawal agreement relate to Union law, a consistent interpretation with the same legal effects of the arrangements is to be upheld by a reliable authority. A decisive role is given to the CJEU, being that this institution is the legal authority for the legality of the withdrawal agreement and the interpretation of EU law<sup>68</sup> (Eeckhout & Patel, 2018). For this reason, any Member State is able to resort to the CJEU for a judgement on the compatibility of the withdrawal arrangements with Union law. Jancic (2018) beliefs

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<sup>66</sup> See Article 164 of the withdrawal agreement for details on the Joint Committee.

<sup>67</sup> See ‘§5.3 Financial Settlement’ for further details on the payments of the United Kingdom to the EU budget.

<sup>68</sup> ‘§4.3 Monitoring of Citizen’s Rights’ discusses the monitoring and application of citizen’s rights noted in the withdrawal agreement and the role of the CJEU therein (articles 158 – 163).

that the sole right of the CJEU to decide on the interpretation of Union law or the withdrawal agreement functions to safeguard the autonomy of Union law and the authority of the CJEU. At the same time, the House of Lords (2018) claims that a problem arises if the interpretation of the withdrawal agreement is left to the CJEU, as the institution is associated with the Union, and any possibility on biases is to be avoided.

Article 164(3) reads that a “*Joint Committee shall be responsible for the implementation and application of this Agreement. Both the European Union and the United Kingdom may refer to the Joint Committee any issue relating to the implementation, application and interpretation of this Agreement*”. By setting up the Joint Committee, the United Kingdom and the European Union initiate a means to recommend and decide upon the functioning of the withdrawal arrangements by mutual consent (European Commission, 2018a). A total of six specialised (sub)committees will be formed to assist the Joint Committee in covering issues that may occur following the provisions of the withdrawal agreement.<sup>69</sup> Since the Joint Committee gets the authority to amend withdrawal arrangements to overcome operational errors at the time of the transition period and four years thereafter, the absence of parliamentary oversight on this body may be considered as a significant transfer of power (House of Lords, 2018). For any dispute that may arise from the interpretation and application of the withdrawal arrangements after the transition period, a consultation in the Joint Committee between the United Kingdom and the European Union is the first *modus operandi* to come to an agreed upon solution. If no mutually agreed upon result is reached within three months<sup>70</sup>, the United Kingdom and the European Union may request the formation of an independent arbitration panel to decide on the dispute. Similar to the Joint Committee, the arbitration panel is to consist of members that have been selected by the United Kingdom and the European Union. Article 171(2) specifies that in total five persons “*whose independence is beyond doubt*” and “*possess specialised knowledge or experience of Union law and public international law*” shall be chosen for the arbitration panel. In addition, Article 181 states that “*members of an arbitration panel shall be independent, shall serve their individual capacity and shall not take instructions from any organisation or government*”.<sup>71</sup> Both the United Kingdom and the European have to nominate two members from a shortlist of aspirants, whereas a chairman is to be appointed by consensus of the members of the arbitration panel. All disputes that deal with the interpretation of Union law can be referred to the CJEU for an opinion, although the arbitration panel determines whether a request for a ruling by the CJEU is necessary. Nonetheless, depending on the reasoning of a judgement by the CJEU on the interpretation of Union law, the CJEU may have a significant influence on the settlement of a dispute. For this reason, the House of Lords (2018) argues that the referral mechanism risks the CJEU of judging on a matter in any dispute, thereby taking over the determinative role of the arbitration panel. Article 175 states that a ruling by the arbitration panel shall be binding on the United Kingdom and the European Union. However, if a party decides to not adhere to the judgement of the arbitration panel, a financial penalty may be imposed to incentivise compliancy. At a later date the complainant may even

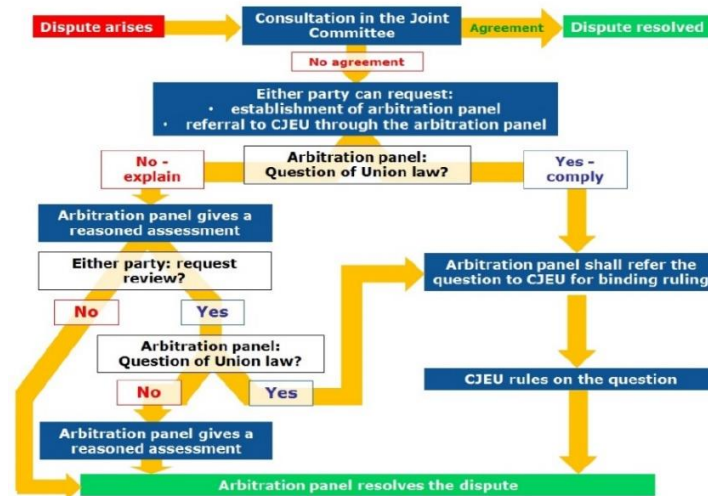
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<sup>69</sup> See Article 165 of the withdrawal agreement for details on the scope of the different (sub)committees.

<sup>70</sup> Following Article 170(2) of the withdrawal agreement, the creation of an arbitration panel is not necessarily contingent on a time period.

<sup>71</sup> See Part B of Annex IX of the withdrawal agreement for details on the code of conduct for members of the arbitration panel.

(temporarily) suspend the obligations that stem from the withdrawal arrangements or any other agreement<sup>72</sup>, albeit on review by the arbitration panel.



Arbitration mechanism for withdrawal arrangements (European Commission, 2018a).

### §3.4 Conclusion

A coherent framework guides the structures of the withdrawal agreement that sets out the legal interpretation, application and governance of the arrangements that give effect to a withdrawal of the United Kingdom from the European Union. Chapter 3 aims to analyse the sub-question “*how does the framework of the withdrawal agreement affect the level of control for the United Kingdom?*”. An influential role is given to the CJEU, being that this institution is the legal authority for the legality of the withdrawal agreement and the interpretation of Union law. Since the general principles and methods of EU law remain to apply for the withdrawal arrangements that refer to Union law, a consistent interpretation with the same legal effects shall exist in the United Kingdom and the European Union. Moreover, all the domestic courts in the United Kingdom must construe the withdrawal arrangements in conformity with any case law of the CJEU until 2020, and *pay due regard* to the CJEU’s case law after the transition period, which means that the case law of the CJEU may still be used for the interpretation of British laws after withdrawal. Given that all references to Union law in the withdrawal agreement include the amendments made until the last day of the transition period, a significant possibility for Union law to *creep* into the statute law of the United Kingdom with no control by British Parliament is created. At the time of the transition period the *status quo* shall be in effect in the United Kingdom, and so the enforceable rights of Union law still continue to apply, the United Kingdom is subject to a supervision by the European Commission and the rulings of the CJEU remain binding on the United Kingdom. In addition, the United Kingdom continues to join in on the Customs Union and all the *four freedoms* of the European Single Market. However, as the United Kingdom intends to withdraw from the

<sup>72</sup> Note that any obligations stemming from Part 2 of the withdrawal agreement (rights of citizens) cannot be suspended by a party.

European Union, the United Kingdom loses all rights of nomination or election of representatives in EU institutions and the right of participation in any decision-making process of the Union from the day of exit. By setting up a Joint Committee, the United Kingdom and the European Union initiate a means to recommend and decide upon the functioning of the withdrawal arrangements by mutual consent. For all disputes on which no agreed upon result is reached within three months, an arbitration panel may be formed to come to a decision that is binding on the United Kingdom and the Union. Any dispute that deals with the interpretation of Union law is to be referred to the CJEU for a preliminary ruling. Only by a decision of the Joint Committee may the withdrawal arrangements be changed to overcome operational errors at the time of the transition period and four years thereafter, whilst the Joint Committee may also decide upon an extension of the transition period for up to one or two years. If the United Kingdom fails to comply to the withdrawal agreement, or *vice versa*, the European Union is ultimately given the possibility to (temporarily) suspend the obligations that stem from the withdrawal arrangements, which substantially affects the control of the United Kingdom on policy.

## IV. Rights of Citizens

From the start of the negotiations of the withdrawal agreement, a priority of the United Kingdom and the European Union has been to safeguard the rights of citizens.<sup>73</sup> Based on data from Full Fact (2018), an independent fact-checking charity from the United Kingdom, over 3.7 million citizens of the European Union reside in the United Kingdom, whereas 1.3 million British citizens live in the different Member States of the Union. Guidelines of the European Council stress that the decision of the United Kingdom to exit from the Union may cause a significant disruption in the daily life of a citizen, being that a legitimate basis for the rights of citizens (i.e. rights flowing from British membership of the European Union) is no longer existent for the United Kingdom.<sup>74</sup> After all, for almost 25 consistent years citizens of both sides held the same rights, as in the form of nowadays, deriving from European Union citizenship (Van der Wel & Wessel, 2017). By providing clarity on a (continuing) form of citizenship, the arrangements on the rights of citizens contribute to an orderly withdrawal from the Union. Chapter 4 considers the sovereignty of the United Kingdom to decide on and uphold citizen's rights by analysing the sub-question *"to what extent is the United Kingdom given control to determine and monitor the rights of citizens?"*. Similar to *Part 2* of the withdrawal agreement, chapter 4 starts off by considering the scope of the rights of citizens. In the following paragraphs, the focus is on a citizen's right to residence, the rights for workers, the coordination of social security systems and the monitoring authority for the implementation of all the different rights of citizens.

### ***§4.1 Scope of Citizen's Rights***

Article 3(1) of the TEU states that the objective of the European Union is to promote the *"well-being of its peoples"*. By creating the European Convention on Human Rights (ECHR) in 1953, including a European Court of Human Rights (ECtHR) to judge on a dispute of rights in regard to the ECHR, the individual Member States of the Union<sup>75</sup> and 19 other states in Europe agreed upon a system to monitor and safeguard the rights of citizens in the Union. For this reason, Eeckhout and Frantziou (2017) argue that the United Kingdom and the European Union both have an obligation to respect and broadly construe the rights of the ECHR after withdrawal. Illustratively, the United Kingdom may not simply expel citizens of a Member State from British territory, since Article 8 of the ECHR provides for a right to remain in any host state<sup>76</sup> in which the citizen developed personal or family ties (Van der Wel & Wessel, 2017). In addition, Article 3(5) TEU reads that the European Union shall uphold and safeguard human rights in all the relations with a third nation. Any arrangement in the withdrawal agreement that limits the rights of citizens is not in conformity with the fundamental norms of the European Union. Moreover, Eeckhout and Frantziou (2017)

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<sup>73</sup> Arrangements on the rights of citizens fall in the first phase of the withdrawal negotiations, meaning that sufficient progress is to be made on this matter to continue the negotiations of the withdrawal agreement.

<sup>74</sup> See the guidelines of the European Union following the United Kingdom's notification under Article 50 TEU of the 29<sup>th</sup> of April 2017.

<sup>75</sup> All the Member States of the Union became a signatory of the European Convention on Human Rights.

<sup>76</sup> Note that a host state is to be defined as a single nation and not the European Union as a whole.

mention that a “*regression in the level of protection of any acquired rights can be constitutionally destabilizing to the extent that it is prejudicial to the principles of legal certainty and legitimate expectations*” (p. 726). Since all citizens in the United Kingdom have so far been able to rely on *civis europaeus sum*<sup>77</sup>, a removal of the European Union citizenship means an abrupt loss of the ability to claim rights in a political community. However, the European Commission registered a European Citizens’ Initiative<sup>78</sup> to guarantee that the rights of European Union citizenship cannot be lost once (British) citizens have attained the rights.<sup>79</sup>

Given that many citizens of the United Kingdom and the Union made life choices on the basis of European Union citizenship rights<sup>80</sup>, both the United Kingdom and the European Union agreed in an early stage of the negotiations of the withdrawal agreement to provide for a reciprocal protection of citizen’s rights. Article 10 specifies that the arrangements apply to all citizens (including frontier workers<sup>81</sup>) of the European Union that legally reside in the United Kingdom, or *vice versa*, before the end of the transition period and thereafter. Family members of those citizens have also been taken into consideration by the arrangements set out in the withdrawal agreement. Any relative that legally resides in the host state by the end of the transition period is covered by the arrangements on the rights of citizens. Citizens in scope of the arrangements can be joined by close family members<sup>82</sup> that reside in a different state at any time in the future, as long as the relationship (still) exists before the end of the transition period. Article 10 also reads that children of the citizens can rely on the arrangements, no matter if the child is born before or after the transition period, and if the child is born inside or outside the host state. As Article 12 provides that any form of discrimination in relation to nationality is not allowed, the citizens of both the United Kingdom and the Union can benefit in full from a right to equal treatment in comparison to host state nationals (European Commission, 2018a).

## ***§4.2 Rights of Residency & Employment***

Since the citizens of the United Kingdom and the European Union can continue to reside, study or work on similar substantive conditions as provided for in EU law, the European Commission (2018a) beliefs that the arrangements as noted in *Part 2* of the withdrawal agreement enables citizens of the United Kingdom and the European Union, as well as their family members, “*to continue to exercise the rights derived from Union law in each other’s territory, for the rest of their lives, where those rights are based on life choices made before the end of the transition period*” (p. 3). Article 39 confirms that all individuals covered by the arrangements on the rights of citizens shall be given those rights for the rest of their lifetime,

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<sup>77</sup> A concept introduced by Advocate General Jacobs in case C-168/91: ‘Christos Konstantinidis v. Stadt Altensteig’ in 1992 to indicate all the rights associated with European Union citizenship.

<sup>78</sup> A European Citizens’ Initiative named ‘Permanent European Union Citizenship’ is registered on the 18<sup>th</sup> of July 2018.

<sup>79</sup> Read Lashyn (2019) for a set of arguments that support the belief that citizens of the United Kingdom may retain the citizenship rights of the European Union.

<sup>80</sup> A cornerstone of the European Union is the right for all citizens to live, study or work in the different Member States of the Union (free movement of citizens).

<sup>81</sup> A frontier worker is a citizen that pursues or has employment in one state while residing in another state.

<sup>82</sup> See Article 2 of Directive 2004/38/EC for details on the interpretation of a close family member.

unless a citizen no longer meets the specific requirements necessary. A right of a citizen to reside in a host state is based on the provisions of Union law on free movement, in which the specific reference to Article 16(1) of directive 2004/38/EC (i.e. Free Movement Directive) means that any citizen that has resided legally for a continuous period of five years in the United Kingdom or a Member State at the end of the transition period shall have the right of permanent residency in the host state. Additionally, an accumulation of the period that a citizen resides (or works) in a host state before and after the transition period is in effect, as to not turn the timing of Brexit into a decisive factor for one's right of permanent residency. By doing so, all the citizens that have not yet been in the host state for at least five years still get the opportunity to continue residing in the host state and acquire the rights of permanent residency after the transition period (European Commission, 2018a). All citizens with a job, adequate financial resources or health insurance in a host state is also given a right of residency, although this right only exists for up to five years<sup>83</sup>. Generally, the European Commission (2018a) lists workers or self-employed persons, individuals with adequate financial resources or health insurance, family members of the citizens in scope of the arrangements, or citizens that already got the right to permanent residency to be eligible for permanent residency in a host state. A switch of status (e.g. from student to self-employed person) has no effect on the eligibility of a citizen to a get residency rights. Nonetheless, the House of Lords (2018) is not completely content of the arrangements on the rights of citizens, as citizens that do not qualify on the basis of the conditions set out in the Free Movement Directive (e.g. economically not active or no health insurance) may be excluded from residency rights. Since the right on a freedom of movement remains to exist in the United Kingdom until the end of the transition period<sup>84</sup>, Britain's Immigration Minister Nokes argued that *"there will remain scope, as a matter of law, for a person to be removed from the United Kingdom on those grounds"*.<sup>85</sup> Criticism is also given on the fact that the many different arrangements do not consider a lifelong right of return for citizens to a host state, or a right to retain voting rights in relation to the European Parliament for the 1.3 million British citizens residing in the Union (House of Lords, 2018). Article 15(3) reads that a right of permanent residency shall be lost by absence of the citizen from the host state for a period of five consecutive years, whereas criminality or an attempt to misuse or fraud the system is considered to be a legitimate reason to restrict rights to individuals<sup>86</sup> (Department for Exiting the EU, 2018b).

Both citizens of the European Union and the United Kingdom have the right to enter or exit the territory of the host state with a valid passport or national identity card. Only five years after the end of the transition period the host state may decide to no longer accept the identification documents, as an individual is required to be recognised by the standards of the Civil Aviation Organisation<sup>87</sup> that relate to biometric identification.<sup>88</sup> Since Article 18 considers the creation of a registration system, the United Kingdom set up the *EU Settlement Scheme* for citizens of the European Union and their family members to apply for a pre-settled

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<sup>83</sup> Conditions apply as a result of Article 13 referring to Article 6(1), 7(1) and 7(3) of Directive 2004/38/EC.

<sup>84</sup> Arrangements on the rights of citizens provide for no explicit clarity on any onward rights of free movement for citizens of the United Kingdom that reside in different Member States.

<sup>85</sup> See a written reply of Nokes on a citizen's query titled 'Immigrants: EU Nationals – 191403' on the 19<sup>th</sup> of November 2019 for details.

<sup>86</sup> Article 20 provides that the conduct of any individual that exercises rights on the basis of Part 2 of the withdrawal agreement may form a legitimate reason for restriction.

<sup>87</sup> Standards and Recommended Practices (SARPs) related to the verification of travel documents and border control processes is the responsibility of this United Nations Specialised Agency.

<sup>88</sup> See Article 14 for details on a citizen's right of exit and of entry.

or settled status to continue residing in the nation. To clarify, a pre-settled status simply gives a citizen the right to reside in the United Kingdom for an extra 5 year period in order to qualify for a settled status (House of Lords, 2018). Łazowski (2018) mentions that the United Kingdom specifically advocated for the creation of a new immigration status (e.g. settled status), in which the rights apply equally to all qualifying citizens of the European Union.<sup>89</sup> By creating the *EU Settlement Scheme*, the United Kingdom is able to verify if applicants may be eligible for the residency rights, and so provide clarity on the different citizens that legally reside in the United Kingdom by issuing official residency documents. However, as Article 13(4) determines that no discretion is given to a state to apply limitations or conditions on a citizen's right to residency, the influential capacity of a domestic registration system on granting a status to citizens is somewhat limited. All EU citizens residing in the United Kingdom before the end of the transition period have until the 30<sup>th</sup> of June 2021 to submit the application for a settled status.<sup>90</sup> Clearly, the arrangements on a citizen's status and right to entry or exit the host state inherently relate to the control of the United Kingdom on (illegal) migration. By basing the future immigration system on an individual's skills instead of the national origin, the United Kingdom chooses for a domestic immigration policy that limits the free movement (HM Government, 2018).

Similar to the agreed upon arrangements on residency rights in a host state, the rights of citizens on employment also directly refer to provisions in Union law. As a result, workers (including frontier workers) and self-employed persons in the United Kingdom and the European Union have the same rights to take up employment as known before. Illustratively, the citizens in a host state remain to have a right to employment assistance, a right to tax and social advantages, and a right for the children of workers to get education.<sup>91</sup> In addition, Article 27 affirms that the recognition of the professional qualifications<sup>92</sup> of a citizen, as noted in directive 2005/36/EC (i.e. Recognition of Professional Qualifications Directive) shall remain to be in effect in a host state, thereby granting citizens a right to pursue a profession on the basis of the same conditions as nationals.

European Union regulations on the coordination of social security continues to apply in the United Kingdom for all the citizens in scope of the arrangements set out in the withdrawal agreement.<sup>93</sup> By doing so, any citizen that moved from the European Union to the United Kingdom, or *vice versa*, before the end of the transition period maintains a right to access their pensions, healthcare and other social security benefits (European Commission, 2018a). Moreover, those citizens that work only has to pay into one social security system at a time, whilst a right to aggregate all paid contributions in different Member States is granted by reason of satisfying the conditions of the various social security systems in the Union or the United Kingdom (Department for Exiting the EU, 2018b). Article 31 states that both the United Kingdom and the Union have to take different decisions and recommendations of the Administrative Commission for the Coordination of Social Security Systems into

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<sup>89</sup> No jurisdiction of the CJEU on this matter is also a strongly advocated proposal for by the United Kingdom.

<sup>90</sup> Article 18(1b) reads that the deadline for submitting an application for a residency status shall not be less than 6 months from the end of the transition period.

<sup>91</sup> See Article 24(1) for a detailed list of rights for workers and self-employed persons in the host state.

<sup>92</sup> See Article 3(1) of directive 2005/36/EC for a definition of professional qualifications.

<sup>93</sup> Article 31 specifies that the rules and objectives of Article 48 TFEU and Regulations 883/2004 and 987/2009 of the European Parliament and the Council continues to apply.

consideration.<sup>94</sup> However, by way of derogation from Articles 7 and 8 as mentioned in *Part 1* of the withdrawal agreement<sup>95</sup>, the United Kingdom is able to exercise an advisory role at the discussions of the Administrative Commission (i.e. status of observer) and continues to take part in the Electronic Exchange of Social Security Information.

### ***§4.3 Monitoring of Citizen's Rights***

All the arrangements on the rights of citizens have been set down comprehensively and in detail, by reason for a clear interpretation and consistent application in the United Kingdom and the different Member States. Both the citizens of the United Kingdom and the European Union can rely directly upon their rights in domestic courts (European Commission, 2018a). Article 158 reads that, for any law case that started within eight years from the end of the transition period in the United Kingdom, a dispute on the interpretation of any arrangement on the rights of citizens may form a reason to request a preliminary ruling by the CJEU on the arrangement if the domestic court considers clarity on this matter to be important for a judgement. However, for any ambiguity that specifically relates to the status of residency for citizens and the concomitant registration system as set out in Article 18, a preliminary ruling by the CJEU may only be requested for a period of eight years starting from the day of exit. Cîrlig et al. (2018) note that a request for a judgement by the CJEU is similar to the procedures as noted in Union law, albeit with the difference that a referral to the CJEU is no longer mandatory for British high courts when the United Kingdom is no longer considered to be a Member State. Nonetheless, the CJEU is given a prolonged jurisdiction on particularly the rights of citizens in the United Kingdom long after Brexit is realised, in which the rulings of the CJEU have the same legal effects in the United Kingdom and the different Member States.

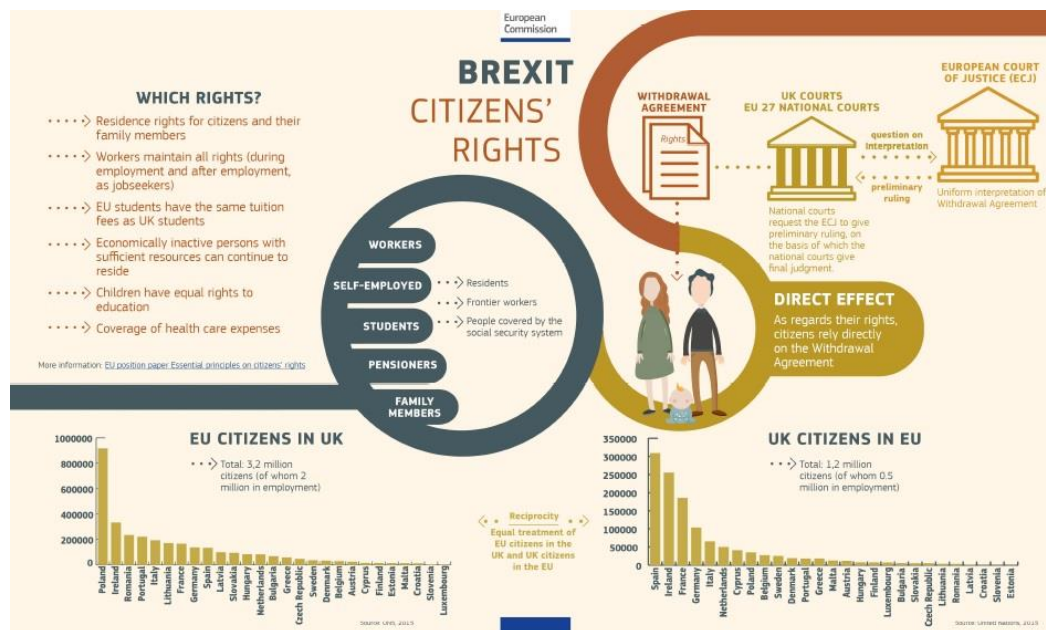
A consistent implementation and application of the arrangements set out in *Part 2* of the withdrawal agreement in the different Member States is monitored by the European Commission acting in conformity with the treaties of the Union (European Commission, 2018a). Article 159(1) determines that an independent domestic authority “*with powers equivalent to those of the European Commission*” is given the similar task to monitor the implementation and application of the rights of citizens in the United Kingdom. Generally, those powers vary from investigating complaints of citizens, conduct an inquiry on own initiative and bring alleged infringements of the arrangements to the domestic courts of the United Kingdom (Department for Exiting the EU, 2018b). Article 162 states that the European Commission is authorised to submit observations on the interpretation and application of the arrangements in all cases pending in the United Kingdom. Both the independent domestic authority in the United Kingdom and the European Union shall

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<sup>94</sup> See Part 1 of Annex I of the withdrawal agreement for details on the decisions and recommendations of the Administrative Commission.

<sup>95</sup> Article 7 reads that the United Kingdom is not able to participate in the governance of European Union institutions, whereas Article 8 determines that the United Kingdom loses access to information systems after the transition period.

exchange information annually via the Joint Committee on the measures taken to safeguard the rights of citizens in their territory<sup>96</sup> (European Commission, 2018a).



Arrangements on the rights of citizens (European Commission, 2018a).<sup>97</sup>

## §4.4 Conclusion

A withdrawal from the European Union means that a legitimate basis for the rights of citizens ceases to exist, which may cause a significant disruption in the daily life of any citizen in the United Kingdom. Since many citizens made life choices on the basis of Union citizenship rights, over 3.7 million citizens of the European Union reside in the United Kingdom (approximately 1.3 million British citizens in Member States), and a set of withdrawal arrangements is agreed upon to safeguard the rights of these citizens, the objective of chapter 4 is to assess “to what extent the United Kingdom is given control to determine and monitor the rights of citizens?”. A citizen may continue to reside, study or work on similar substantive conditions to Union law on the basis of the withdrawal arrangements. Any citizen of the European Union that legally resides in the United Kingdom before the end of the transition period, or *vice versa*, all their family members and (yet to be born) children can rely on the withdrawal arrangements and shall be given those rights for the rest of their lifetime. Given that any citizen that legally resides in the United Kingdom for a continuous period of five years<sup>98</sup> is granted a right of permanent residency, and all citizens with only a job, adequate financial resources or health insurance get the same right for up to five years, the effect of the

<sup>96</sup> Article 163 provides that also the CJEU and the highest courts of the United Kingdom shall commit to a regular dialogue in consideration of a consistent and clear interpretation of the arrangement on the rights of citizens.

<sup>97</sup> Note that the illustrated number of citizens in the United Kingdom and the European Union originates from data of the United Nations of 2015.

<sup>98</sup> Note that this continuous period of five years is to be started before the end of the transition period.

withdrawal is minimised for the daily life of a citizen. Only if a citizen is absent for five consecutive years in the host state, or by reason of criminality and an attempt to misuse or fraud the system, the United Kingdom may decide to abrogate a right of permanent residency. By creating the *EU Settlement Scheme*, the United Kingdom is able to verify if citizens of the European Union may be eligible for the residency rights, although no discretion is given for the registration system to apply domestic limitations or conditions on a citizen's right to residency. For any law case that started within eight years from the end of the transition period in the United Kingdom, the British courts have a choice (instead of being mandatory) to request a preliminary ruling by the CJEU on the interpretation of a withdrawal arrangement. A right on a freedom of movement remains to exist in the United Kingdom until the end of the transition period, whilst citizens of the European Union may enter or exit the territory of the United Kingdom with only a valid identification document for up to five years later. As a result of the withdrawal from the European Union, the United Kingdom is able to set up a domestic immigration policy after the transition period. An independent domestic authority is given the task to monitor and uphold the rights of citizens in the United Kingdom, whereas the European Commission may only submit observations on the interpretation of the withdrawal arrangements in all cases pending in the United Kingdom.

## V. Settling a Divorce

As long as the United Kingdom is considered to be a member of the European Union, the legal order of the Union continues to apply in many different areas of activity in the United Kingdom. However, as the activity of organisations is ongoing in an era of globalisation (i.e. not to be subject by a change of regime), the day of exit or the end of the transition period is not determinative for actors in the United Kingdom to disregard Union law. By creating clarity on the *winding down* of an ongoing process or activity in the United Kingdom, varying from goods placed on the market to judicial procedures, or in relation to any form of cooperation with the European Union, the applicability of Union law is gradually being reduced until an orderly withdrawal is fully in effect. For this reason, chapter 5 discusses a wide scope of agreed upon arrangements on a possibly ongoing process, transaction or activity of an organisation in different policy areas, and so intends to analyse the sub-question “*in which areas is the United Kingdom still (temporarily) affected by Union law or policies after the transition period?*” For any area on which no arrangements have been agreed upon, Union law remains to apply in the legal system of the United Kingdom as long as no new domestic legislation is created to overrule the withdrawal agreement. As follows, chapter 5 considers a variety of arrangements on economic and judicial areas, administrative cooperation procedures and the safeguards of data, as well as the details of the financial settlement that the United Kingdom and the European Union decided upon to conclude the withdrawal.

### ***§5.1 Area of Economic Activity***

Since the (cross-border) commercial activity of an organisation is an ongoing process that is not significantly limited by a withdrawal of the United Kingdom from the European Union, *Part 3* of the withdrawal agreement sets out arrangements on any supply of a good for distribution, consumption or use on the market before the end of the transition period. Article 41(1) determines that all identifiable goods legally put on the market of the United Kingdom or the Union before the end of the transition period may continue to circulate freely between both markets until the commodity reaches the end-user, without a necessity to modify the product.<sup>99</sup> As a result, all goods still in distribution by the end of the transition period do not have to comply with extra product requirements, whilst all previously initiated activity of compliancy is to be recognised by both the United Kingdom and the Union. However, different procedures apply for the movement of animals (or germinal products) and animal products, as, starting from the end of the transition period, this type of product is subject to the rules on import and sanitary controls at the border<sup>100</sup>, regardless of whether the commodity is put on the market before the end of the transition period (European Commission, 2018a). Reasonably, since a high sanitary risk and the need for veterinary controls related to animals

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<sup>99</sup> Article 41(2) notes that the requirements as set out in Article 34 and 35 TFEU and other relevant Union law shall apply to the goods legally put on the market of the United Kingdom and the European Union before the end of the transition period, meaning that a quantitative restriction on the import and export of goods is not allowed.

<sup>100</sup> See Annex II of the withdrawal agreement for details on the provisions of Union law that apply to the movement of animals (or germinal products) and animal products.

(or germinal products) and animal products requires a different set of rules to safeguard the standards to enter the market of the European Union (or the United Kingdom). Article 42 provides that any organisation that puts a good on the market bears the *burden of proof* to demonstrate that the commodity has been in distribution for the market of the United Kingdom or the Union before the end of the transition period.<sup>101</sup> In addition, the market surveillance authorities of the different Member States and the United Kingdom continue to share relevant information with regard to the goods put on the market, notify the European Commission on the risks of a commodity and inform one another on the measures taken in relation to non-compliant goods. Moreover, any activity that relates to ongoing product assessments or testing of goods before the end of the transition period obligates an authority in the United Kingdom to transfer documents and files to the different bodies in the Member States (Department for Exiting the EU, 2018b).

All ‘*Union goods*’ that circulate in the customs territory of the United Kingdom or the European Union<sup>102</sup> before the end of the transition period continue to fall in scope of Union law, meaning that the Union Customs Code remains in effect and no significant additional procedural requirements apply. Article 47(2) reads that the start of movement and a goods’ custom status is to be determined in order to retain the status as ‘*Union good*’.<sup>103</sup> By reason of confirming the status of goods, the declarations lodged at a customs office before the end of the transition period remain valid in the customs territory of the United Kingdom and the Union. All non-‘*Union goods*’ kept in temporary storage before the end of the transition period that will be up for discharge in the 12 months afterwards continues to be subject to the Union Customs Code rules (Department for Exiting the EU, 2018b). Administrative cooperation procedures for customs between a Member State and the United Kingdom that started within a period of three years after the end of the transition period may be completed<sup>104</sup>. For ongoing value added tax and excise duty matters directive 2006/112/EC (i.e. Common System of Value Added Tax Directive) continues to apply, signifying that Union law forms the basis for goods midway a transit of movement, commenced before the end of the transition period, between the customs territory of the United Kingdom and the European Union. In this regard, Article 51(2) provides that “*directive 2006/112/EC shall continue to apply until 5 years after the end of the transition period with regard to taxable person’s rights and obligations in relation to transactions with a cross-border element between the United Kingdom and a Member State*”. Any administrative cooperation related to indirect taxes (e.g. VAT transactions) between a Member State and the United Kingdom that is initiated before the end of the transition period is set to be continued for a period of four years. Since Articles 50 and 53 state that the United Kingdom is granted access to a variety of networks, information systems and databases<sup>105</sup> to comply with the arrangements on ongoing customs procedures and value added tax and excise duty matters<sup>106</sup>,

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<sup>101</sup> A burden of proof is to be demonstrated on the basis of any relevant document.

<sup>102</sup> See Article 5(23) of Regulation 952/2013 of the European Parliament and the Council for a broad definition of Union goods.

<sup>103</sup> Note that Article 47(2) shall not be in effect for Union goods transported by air or sea that originate from the customs territory of the United Kingdom or the European Union.

<sup>104</sup> Note that the continuation of an administrative cooperation procedure is dependent on a listing in Annex VI of the withdrawal agreement, whilst also being contingent on the inclusion of facts that happened before the end of the transition period.

<sup>105</sup> See Annex IV of the withdrawal agreement for a list of networks, information systems and databases that Articles 50 and 53 refer to.

<sup>106</sup> Since the United Kingdom shall have access to networks, information systems and databases, Article 50 TEU derogates from Article 8 as noted in Part 1 of the withdrawal agreement.

the United Kingdom is given a means to supervise the completion of movement of goods. Articles 99(3) and 100(2) further advocate for a sharing of information in order to optimize a continuation of cooperation on recovering customs debts, tax and duty debts.

In the European Union over 3.000 geographical indications (e.g. Parma ham, Feta cheese or Vinagre de Jerez) exist to identify a commodity whose quality, reputation or other characteristic is associated with the geographical origin. A geographical indication is covered in Union law as *sui generis* intellectual property rights for all the different Member States, including the United Kingdom (European Commission, 2018a). A withdrawal of the United Kingdom affects no intellectual property right that is granted before the end of the transition period.<sup>107</sup> Article 54(1) dictates that any owner of intellectual property rights shall “*become the holder of a comparable registered and enforceable intellectual property right in the United Kingdom under the law of the United Kingdom*”. Phrased differently, to prevent a loss of rights or a gap in protection on British territory, the United Kingdom grants national rights to replace the existing EU unitary intellectual property rights that cease to exist after the end of the transition period (Department for Exiting the EU, 2018b). For all pending EU unitary intellectual property rights at the end of the transition period, no automatic new right of the United Kingdom is given, although the holder may still register identical rights within a set period of time.<sup>108</sup> Geographical indications that bear a name originating from the United Kingdom (e.g. Welsh lamb) continues to be covered by Union law, resulting in a preservation of British geographical indications in the different Member States until a new economic relationship overrules the arrangements (European Commission, 2018a).

## ***§5.2 Areas of Security & Judicial Activity***

Similarly to areas of economic activity, security and judicial cooperation is an ongoing process that is not solely conditional on a membership of the European Union. *Part 3* of the withdrawal agreement also sets out arrangements on *winding down* procedures related to criminal matters. Article 62 considers a variety of provisions in Union law, as well as the European Convention on Mutual Assistance in Criminal Matters, that remain to apply in situations that involve the United Kingdom as long as the process is not yet completed. Illustratively, any criminal arrested on the basis of a European Arrest Warrant is to be extradited to the searching Member State, whilst a Joint Investigation team set up by the United Kingdom and the Union may continue an investigation<sup>109</sup> (European Commission, 2018a). However, specific ‘*trigger points*’ in the process determine whether a procedure is actually rightful to be continued until completion. Generally, a ‘*trigger point*’ relates to an official request for information or support by an authority, whereas for only a few procedures a specific measure<sup>110</sup> is considered to be the ‘*trigger point*’ (Department for Exiting the EU,

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<sup>107</sup> See Article 54 for details on the continued protection of EU unitary intellectual property rights (e.g. trademarks, registered Community design rights, or plant variety rights) in the United Kingdom.

<sup>108</sup> See Article 59 for details on the right of priority for pending applications and particularly the different periods of time to register intellectual property rights after the end of the transition period.

<sup>109</sup> See Articles 62 and 63 for details on all provisions of Union law that continues to apply in relation to ongoing security and judicial cooperation proceedings.

<sup>110</sup> Any procedure of a European Arrest Warrant is only to be completed if the criminal is arrested before the end of the transition period.

2018b). By means of completing the ongoing procedures on security and judicial cooperation, the United Kingdom is granted the right to use the Secure Information Exchange Network Application for a maximum of one year after the end of the transition period.<sup>111</sup>

Article 66 states that Union law on contractual obligations continues to apply if the contract entered into force before the end of the transition period. Additionally, Union law on international jurisdiction in cross-border civil disputes continues to apply for legal affairs that officially started before the end of the transition period.<sup>112</sup> Since the responsibility of high courts in the United Kingdom to hear a law case is based on Union law, the arrangements determine that the British high courts remain to be competent to judge on specific law cases after the end of the transition period (European Commission, 2018a). Rules on the recognition and enforcement of judgements apply specifically to cross-border civil and commercial matters, family cases and authentic instruments or court settlements concluded before the end of the transition period (Department for Exiting the EU, 2018b). Article 68 lists the set of provisions in Union law that remain to apply to ongoing judicial cooperation procedures, specifically relating to the European Judicial Network for requests of information and the service of documents.<sup>113</sup>

An orderly withdrawal from the European Union is also fairly dependent on a decreasing involvement of the United Kingdom in judicial procedures of the Union. Article 86(1) mentions that “*the CJEU shall have jurisdiction in any proceedings brought by or against the United Kingdom before the end of the transition period*”, in which all judgements and orders of the CJEU shall be completely binding on the United Kingdom.<sup>114</sup> As a result, legal certainty is given to individuals and organisations that may be affected by law cases involving the United Kingdom. Nonetheless, the United Kingdom is granted a right to intervene or participate in different law cases on which a final judgement or order by the CJEU is yet to be given<sup>115</sup>, to contest the validity of the legal acts or measures of the Union. Article 87(1) provides that the European Commission is given the authority, within four years after the end of the transition period, to start an infringement procedure before the CJEU if the United Kingdom acts in non-compliance with any treaty of the European Union or the arrangements as set out in *Part 4* of the withdrawal agreement at the time of the transition period. Moreover, in the scenario that the United Kingdom fails to comply with a decision of the CJEU on administrative procedures, the European Commission may bring the matter to the CJEU for up to four years following the decision.<sup>116</sup> A right to start new infringement procedures before the CJEU is consistent with the notion that a withdrawal from the European Union shall not affect the rights, obligations or legal situations of the United Kingdom or the Member States created prior to the realisation of Brexit (European Commission, 2018a).

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<sup>111</sup> By giving the United Kingdom access to the Secure Information Exchange Network Application, the arrangement derogates from Article 8 of the withdrawal agreement.

<sup>112</sup> See Article 67 for details on the provisions of Union law that continues to apply on the jurisdiction, recognition and enforcement of judicial decisions in relation to civil and commercial matters.

<sup>113</sup> Council Decision 2001/470/EC refers to the creation of a European Judicial Network in civil and commercial matters.

<sup>114</sup> Articles 280 and 299 TFEU shall apply in the United Kingdom in respect of the enforcement of the judgements and orders of the CJEU.

<sup>115</sup> See Article 90 for details on the different types of law cases or procedures before the CJEU for the United Kingdom to intervene or participate in.

<sup>116</sup> Any initiative of the European Commission to bring a matter to the CJEU is required to be in conformity with Articles 258 and 108(2) TFEU.

All ongoing European Union administrative procedures related to the United Kingdom (e.g. competition or state aid) initiated at the time of the transition period may be continued in conformity with the rules of Union law.<sup>117</sup> Article 92(4) considers a time-frame in which the Union is required to list all relevant individual ongoing administrative procedures to the United Kingdom, with a maximum of three months after the end of the transition period. For any state aid granted before the end of the transition period, the European Commission is authorised to start new administrative procedures or contest illegal state aid for up to four years after the transition period. Similarly, Article 93(2) reads that the European Anti-Fraud Office is given the right to initiate new investigations for a period of four years after the end of the transition period for information that refers to the situation before the end of the transition period, or for any customs debts that may arise after the end of the transition period. Both the European Commission and the European Anti-Fraud Office remain competent after the end of the four year period for any procedures that began before the end of this period.<sup>118</sup> Since a compliancy with Union law and a consideration of a level playing field by the United Kingdom remains in effect at the time of the transition period, the right to start new administrative procedures by institutions of the European Union is justified in case of deviant behaviour (European Commission, 2018a). Decisions adopted by the Union before the end of the transition period, or given in any initiated administrative procedure referred to in Articles 92 and 93, have a binding effect on the United Kingdom, although the CJEU can still review appeals of a decision<sup>119</sup>.

Over the years the United Kingdom and the Member States shared information and data for different reasons. Article 71 affirms that after the transition period “*Union law on the protection of personal data shall apply in the United Kingdom in respect of the processing of personal data of data subjects outside the United Kingdom*”, meaning that information and data continues to be dealt with along the high standards of the European Union.<sup>120</sup> An *adequacy decision* by the European Commission determines if the United Kingdom provides for an adequate level of safeguards to the data. By reaching an equivalent of the high standards of the Union, the United Kingdom shall be able to continue the free flow of personal data from British territory to the different Member States (Department for Exiting the EU, 2018b). Starting from the end of the transition period, the European Commission intends to assess whether to adopt an *adequacy decision* on the safeguards of data and information in the United Kingdom.<sup>121</sup>

### ***§5.3 Financial Settlement***

Guidelines of the European Council first advocated for a single financial settlement that covers the budget of the Union, the *winding down* of United Kingdom’s membership in institutions of the European Union and the involvement in funds or programs.<sup>122</sup> *Part 5* of the

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<sup>117</sup> Article 92 mentions the provisions of Union law and the different trigger points of the administrative procedures that apply.

<sup>118</sup> See Article 93 for details on the authority of the European Commission and the European Anti-Fraud Office on administrative procedures.

<sup>119</sup> Article 95 refers to Article 263 TFEU, which provides for information on the rules and conditions of a review by the CJEU on decisions.

<sup>120</sup> See Article 70 for details on the provisions of Union law that apply for the protection of personal data.

<sup>121</sup> Read Part 1 of the political declaration for details on data protection and the role of adequacy decisions.

<sup>122</sup> See the guidelines of the European Union following the United Kingdom’s notification under Article 50 TEU of the 29<sup>th</sup> of April 2017.

withdrawal agreement sets out the different components of the financial settlement, as well as the obligations for the United Kingdom to come to a fair contribution to the Union budget.<sup>123</sup> As a result, the financial settlement is based upon the notion that a Brexit requires no budgetary compensations of any other Member State<sup>124</sup>, the United Kingdom is forced to fulfil all payments related to the commitments of being a Member State<sup>125</sup>, and the United Kingdom shall neither pay more or sooner than if the nation had remained a Member State (European Commission, 2018a). For this reason, the financial settlement functions to address the mutual obligations that arise from the United Kingdom's participation in the Union budget, as well as to the projects that stem from being a member of the European Union (Department for Exiting the EU, 2018a).

Article 135(1) rules that the United Kingdom shall donate to and stay involved in carrying out the budgetary programs of the European Union, particularly for the Multiannual Financial Framework 2014 - 2020, for the years 2019 and 2020.<sup>126</sup> Moreover, the United Kingdom remains a party to the European Development Fund and continues to fulfil all outstanding commitments of EU Trust Funds and the Facility for Refugees in Turkey (Department for Exiting the EU, 2018b). By doing so, clarity is given to all the beneficiaries of the Union's different funds and programs on the expected aid. Article 139 states that the financial obligations of the United Kingdom after 2020 is based on a ratio between the resources provided by the United Kingdom in the period 2014 – 2020 and the resources made available by all Member States in the same time frame. A majority of the financial commitments after the end of the transition period refer to the 30<sup>th</sup> of June and the 30<sup>th</sup> of October of each year, whilst the European Union is required to inform the United Kingdom of the details on all the specific payments.<sup>127</sup> In sum, the financial settlement is considered to be a total of € 38 – 42 billion, although the House of Lords (2018) stresses that the exact contribution is dependent on future events (e.g. exchange rate of Sterling - Euro<sup>128</sup>).

<b>Components of the Financial Settlement</b>			
	Period of Payment	Amount	
		€ (Billion)	£ (Billion)
<b>UK participation in EU annual budgets to 2020</b>	2019 - 2020	18.1	16.3
<b>Reste à liquider (RAL)<sup>129</sup></b>	2021 - 2028	21.3	19.8
<b>Other net liabilities</b>	2019 - 2064	2.8	2.6
<b>Total</b>	2019 - 2064	42.2	38.7

Components and time periods of the British payments (Office for Budget Responsibility, 2018).

<sup>123</sup> Arrangements on the financial settlement refer mainly to the methodology used to come to the obligations of the United Kingdom to the budget of the European Union.

<sup>124</sup> Note that the United Kingdom is not obligated to put in additional funding to the EU budget, whilst the share of financial benefits remains similar to being a Member State.

<sup>125</sup> Article 156 lists the financial commitments of the United Kingdom until the end of the transition period, varying from the European Defence Agency to the European Union Satellite Centre.

<sup>126</sup> See also Article 137 for details on the United Kingdom's involvement in the implementation of the different programs of the European Union in the years 2019 and 2020.

<sup>127</sup> Article 148 mentions all the different financial obligations to be paid by the United Kingdom after 2020.

<sup>128</sup> Article 133 reads that all payments shall be done in Euro's.

<sup>129</sup> A sum of outstanding financial commitments is defined as 'reste à liquider'.

## **§5.4 Conclusion**

A day of exit and a transition period is set to realise the withdrawal of the United Kingdom from the European Union. As long as the United Kingdom is considered to be a Member State, Union law and EU policies continue to apply for organisations. Nonetheless, since the activity of an organisation is ongoing and not subject to a change of regime, chapter 5 intends to provide insights on the sub-question “*in which areas is the United Kingdom still (temporarily) affected by Union law or policies after the transition period?*”. A significant part of the withdrawal agreement is to create clarity on the *winding down* of an ongoing process or activity in the United Kingdom, varying from areas of economic activity to security and judicial activity, after the transition period. Generally, the standards and regulations of Union law and EU policy remain in effect for the circulation of a commodity or a ‘*Union good*’, administrative cooperation or on a value added tax and excise duty matter that is initiated before the end of the transition period. Geographical indications that bear a name that originates from the United Kingdom shall be covered by Union law until the future relationship overrules the withdrawal arrangements. For the areas of security and judicial activity, the United Kingdom is to act in conformity with Union law if the activity is not yet completed, in which a ‘*trigger point*’ in the process determines whether a procedure is rightful to be completed. Given that the CJEU continues to have jurisdiction in any law case brought by or against the United Kingdom before the end of the transition period, and the European Commission may start infringement procedures within four years after the transition period, the CJEU still has a significant control over the United Kingdom after withdrawal. A financial settlement is agreed upon to address the commitments of being a Member State, as the United Kingdom joined in on the Union budget and a variety of funds or programs. In total the financial settlement is considered to be € 38 – 42 billion in a period of payment until 2064, which is based on the notion that a Brexit forces no budgetary compensations on any other Member State, the United Kingdom is obliged to fulfil all financial commitments of being a Member State, and the payments shall not happen differently than if the United Kingdom remained a Member State. In addition, the United Kingdom shall donate to and stay involved in carrying out the budgetary programs of the European Union for the years 2019 and 2020.

## VI. Protocol on Ireland and Northern Ireland

On the 22<sup>nd</sup> of May 1998, a majority of the citizens of the island of Ireland agreed upon the Belfast Agreement<sup>130</sup>, an agreement that sets out a variety of arrangements on the status and government system of Northern Ireland in relation to the United Kingdom and the Republic of Ireland.<sup>131</sup> By dealing with subjects of self-determination, civil rights, justice, demilitarisation and a decommissioning of weapons, as also realising an inter-island and cross-border cooperation, the Belfast Agreement is considered to be the reason for the end of the ethno-nationalist conflict in the region. However, a withdrawal of the United Kingdom from the European Union means that the external border of the Union is moved to the Republic of Ireland and Northern Ireland, and so forcing constraints on the arrangements of the Belfast Agreement. For this reason, a Protocol on Ireland and Northern Ireland is included in the withdrawal agreement to address the situation until an agreement on the future relationship between the United Kingdom and the European Union is negotiated. In chapter 6 the sub-question “*what are the implications of the Protocol on Ireland and Northern Ireland on the control for the United Kingdom?*” is being analysed. As follows, chapter 6 considers the framework of the Protocol on Ireland and Northern Ireland, the operational context of the backstop, and the provisions on the North-South cooperation and the rights of citizens.

### *§6.1 Framework of the Protocol*

Both the United Kingdom and the European Union aspire to stay committed to all dimensions of the Belfast Agreement, to maintain the necessary conditions for a North-South cooperation on the island of Ireland and to avoid a *hard* border between Ireland and Northern Ireland.<sup>132</sup> All the arrangements of the Protocol on Ireland and Northern Ireland focus on securing those objectives in the scenario that the United Kingdom withdraws from the European Union (after the transition period) without an all-encompassing agreement on the future relationship.<sup>133</sup> Since the function of the withdrawal agreement is not to set up arrangements on a future relationship between the United Kingdom and the European Union, Article 1(4) of the Protocol reads that “*the provisions of the Protocol on Ireland and Northern Ireland are intended to apply only temporarily*” and that “*the provisions shall apply unless and until they are superseded, in whole or in part, by a subsequent agreement*”. By doing so, the intend of the Protocol on Ireland and Northern Ireland is clearly not to define a long-lasting relationship between the United Kingdom and the European Union. Given that both the United Kingdom and the Union have a unilateral right to initiate a review by the Joint Committee to determine whether the Protocol on Ireland and Northern Ireland, in full or in part, remains necessary to

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<sup>130</sup> Since the Belfast Agreement is signed on Good Friday (10<sup>th</sup> of April 1998), the agreement is often referred to as the Good Friday Agreement.

<sup>131</sup> See the Belfast Agreement of the 10<sup>th</sup> of April 1998 for details on the arrangements.

<sup>132</sup> See the joint report of the 8<sup>th</sup> of December 2017 for details on the reasons to include a Protocol on Ireland and Northern Ireland in the withdrawal agreement.

<sup>133</sup> Since the arrangements of the Protocol on Ireland and Northern Ireland only apply if the United Kingdom and the Union have not yet agreed upon an agreement for a future relationship, the backstop scenario is often considered to be an insurance policy for the European Union.

achieve the objectives or may cease to apply<sup>134</sup>, the temporary nature of the arrangements is yet again reinforced (Department for Exiting the EU, 2018b). Article 2 of the Protocol provides for a commitment of the United Kingdom and the Union to use *best endeavours* to conclude an agreement on a future relationship, by the 31<sup>st</sup> of December 2020, that supersedes the Protocol on Ireland and Northern Ireland. If the United Kingdom and the European Union by all means made not sufficient progress on a subsequent agreement, a request to extend the transition period, in conformity with Article 132, may be filed at any time before the 1<sup>st</sup> of July 2020. As a result, the United Kingdom is given a choice to either implement the arrangements of the backstop or request a single extension of the transition period for up to one or two years (Department for Exiting the EU, 2018b). Nonetheless, Barnard (2018) argues that the time frame still might remain to be short to conclude an agreement on a future relationship between the United Kingdom and the European Union, as an average of 42 months is often necessary to negotiate a trade deal. For any disputes on the review procedures to determine the necessity of the Protocol on Ireland and Northern Ireland or the obligations to use *best endeavours* to conclude an agreement on a future relationship, the dispute resolution process as noted in the withdrawal agreement shall apply<sup>135</sup>.

Similar to the arrangements of the withdrawal agreement, the United Kingdom shall be given the responsibility to implement and apply the provisions of Union law as noted in the Protocol on Ireland and Northern Ireland, whilst the European Union have the right to request information and control measures (European Commission, 2018b). All provisions in the Protocol on Ireland and Northern Ireland that refers to Union law includes the amendments or substitutions to that legal act, whereas any relevant case law of the CJEU is necessary to be considered by the United Kingdom. However, the United Kingdom and the Union may jointly decide to add to the Protocol on Ireland and Northern Ireland new areas of Union law that fall in the scope of the arrangements, which do not amend or substitute Union law already given effect by the agreement<sup>136</sup> (Department for Exiting the EU, 2018b). Article 14(4) of the Protocol states that the powers conferred upon all EU institutions and organisations by Union law shall remain to exist (with similar effects) in the areas to which the arrangements of the Protocol on Ireland and Northern Ireland apply EU law in Northern Ireland.<sup>137</sup> Moreover, the CJEU shall continue to have jurisdiction in areas to which the arrangements of the Protocol on Ireland and Northern Ireland apply Union law. For all other areas of the Protocol on Ireland and Northern Ireland, the different governance structures of the withdrawal agreement stay in effect to resolve disputes on the interpretation of the arrangements. Article 16 of the Protocol confers the creation of a (sub)committee<sup>138</sup>, which consists of representatives of the United Kingdom and the European Union, that is given the task to facilitate a consistent implementation and application of the arrangements of the Protocol on Ireland and Northern Ireland, as well as to consider the ideas or issues raised by

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<sup>134</sup> See Article 20 of the Protocol for details on the review procedures of the objectives of the Protocol on Ireland and Northern Ireland by the Joint Committee.

<sup>135</sup> See '§3.3 Governance Structures of the Withdrawal Agreement' to refresh your memory on the arbitration mechanisms for all disputes concerning the withdrawal agreement.

<sup>136</sup> Article 15(5) of the Protocol reads that the Joint Committee determines if a new legal act is to be adopted in relation to the Protocol on Ireland and Northern Ireland.

<sup>137</sup> See Article 14(4) of the Protocol for details on the specific arrangements that apply Union law in Northern Ireland.

<sup>138</sup> Article 17 of the Protocol specifies that a joint consultative working group is established to serve as a forum for the exchange of information and mutual consultation that is reported to the (sub)committee.

the United Kingdom, Union or the institutions of the Belfast Agreement<sup>139</sup>. Interestingly, both the United Kingdom and the European Union have a unilateral right to implement necessary safeguard measures if the Protocol on Ireland and Northern Ireland induces constant economic, societal or environmental difficulties, or a diversion of trade.<sup>140</sup> Article 18(2) of the Protocol specifies that when the safeguard measures cause any imbalances in the rights and obligations of the Protocol on Ireland and Northern Ireland, the other party “*may take such proportionate rebalancing measures as are strictly necessary to remedy the imbalance*”.<sup>141</sup>

On the 11<sup>th</sup> of March 2019, the United Kingdom and the European Union agreed upon a complementary *Joint Instrument* for the Protocol on Ireland and Northern Ireland.<sup>142</sup> Britain’s Attorney General Cox states that the *Joint Instrument* provides for “*clarifications, amplifications of existing obligations and some new obligations, which in certain significant respects would facilitate the effective enforcement of the UK’s rights in the event of a breach of the good faith and best endeavours obligations by the EU*”.<sup>143</sup> A few months earlier, Attorney General Cox reasoned that in international law the Protocol on Ireland and Northern Ireland is to last indefinitely until an agreement on a future relationship supersedes the arrangements. Moreover, the provisions of the Protocol on Ireland and Northern Ireland do not consider a right for the United Kingdom to legally exit the *backstop scenario* without the conclusion of a subsequent agreement, even if the negotiations remain ongoing years later or talks have stopped over time.<sup>144</sup> As noted in the *Joint Instrument*, the United Kingdom and the European Union believe that “*a systematic refusal to take into consideration adverse proposals or interests*” is incompatible with one’s obligations to adhere to the principles of mutual respect and good faith, and to use *best endeavours* to conclude an agreement on a future relationship.<sup>145</sup> A clarification for the term *best endeavours* is somewhat given by stressing that the negotiations shall be considered as a priority, and that, if an agreement on a future relationship is not concluded within one year after the end of the transition period, the efforts of the United Kingdom and the Union must be redoubled.<sup>146</sup> By reason of starting the negotiations rapidly, paragraph 6 of the *Joint Instrument* forces the United Kingdom and the European Union to set up specific operational structures right after the signing of the withdrawal agreement, which includes “*a negotiation track for replacing the customs and regulatory alignment in goods elements of the Protocol with alternative arrangements*” that involves a consideration of “*comprehensive customs cooperation arrangements, facilitative arrangements and technologies*”. Overall, Attorney General Cox mentions that, if the United Kingdom is able to demonstrate their efforts to be organised and to maintain an urgent pace of the negotiations, the *Joint Instrument* conforms the Union to not fail to match the *best endeavours* of the United Kingdom without being at risk of

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<sup>139</sup> A number of institutions is created to monitor and safeguard the arrangements of the Belfast Agreement.

<sup>140</sup> See Article 14(1) of the Protocol for details on the safeguards.

<sup>141</sup> Annex 10 of the Protocol notes the procedures that govern the safeguard and rebalancing measures.

<sup>142</sup> Read the *Joint Instrument*, the unilateral declaration by the United Kingdom, and a joint statement supplementing the political declaration of the 11<sup>th</sup> of March 2019 for a full oversight on the agreed upon commitments.

<sup>143</sup> See Attorney General Cox’s legal opinion on the *Joint Instrument* and unilateral declaration concerning the withdrawal agreement on the 12<sup>th</sup> of March 2019.

<sup>144</sup> See Attorney General Cox’s legal opinion on the legal effect of the Protocol on Ireland and Northern Ireland on the 13<sup>th</sup> of November 2018.

<sup>145</sup> See paragraph 4 of the *Joint Instrument* for details on the breach of obligations that hinders a solution for the backstop scenario.

<sup>146</sup> Read paragraph 5 of the *Joint Instrument* for additional information on the obligations in relation to the negotiations of a future relationship between the United Kingdom and the European Union.

breaching the obligations of the Protocol on Ireland and Northern Ireland. Additionally, when the European Union declines any feasible alternative arrangements that may form a solution to the backstop, the United Kingdom is given a reason to consider a breach of a duty of good faith and *best endeavours* by the European Union.<sup>147</sup> Paragraph 14 of the *Joint Instrument* provides for a binding ruling by an independent arbitration panel if a dispute arises on whether a party acts with the intention to apply the Protocol on Ireland and Northern Ireland indefinitely. Since a complainant has a right to suspend the obligations that stem from the arrangements of the Protocol on Ireland and Northern Ireland, as in conformity with Article 178(2), the *backstop scenario* may also be delayed until the Union clearly shows to adhere to a duty of good faith and a *best endeavours* to conclude an agreement on the future relationship. However, Attorney General Cox still argues that the legal risk for the United Kingdom remains the same, as simply intractable differences, instead of a demonstrable unwillingness of either party, provides for no legal right to exit from the arrangements of the Protocol on Ireland and Northern Ireland.<sup>148</sup>

## **§6.2 Backstop**

By withdrawing from the European Union, the United Kingdom decided to leave the European Single Market and the Customs Union as well. Nonetheless, the United Kingdom respects the integrity of the European Single Market and the European Union, as also the position of the Republic of Ireland therein (European Commission, 2018b). Since both the United Kingdom and the Union aspire to stay committed to the arrangements of the Belfast Agreement (e.g. avoidance of a *hard* border, North-South cooperation between Ireland and Northern Ireland, and the Common Travel Area<sup>149</sup>), Article 6(1) of the Protocol sets out the operational context of a single customs territory, which is comprised of the European Union and the United Kingdom. As a result, Northern Ireland is not part of a different customs territory to the rest of the United Kingdom in the *backstop scenario*. Nonetheless, given that Northern Ireland remains in the European Single Market and the Customs Union, Papazian (2018) argues that Northern Ireland is subject to a different regulatory regime than the rest of the United Kingdom. Article 6(2) of the Protocol reads that in Northern Ireland the Union Customs Code must apply<sup>150</sup>, whereas the United Kingdom is merely obligated to align with the Union's Common External Tariff and the Common Commercial Policy on trade in goods with third nations<sup>151</sup>. By doing so, the goods of Northern Ireland can circulate freely onto the European Union without any checks or a *hard* border between the Republic of Ireland and Northern Ireland. Article 7 of the Protocol considers United Kingdom's efforts to market access "*for goods moving from Northern Ireland to the rest of the United Kingdom's internal market*", being that Great Britain no longer is in the European Single Market and, for a trade in goods,

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<sup>147</sup> See paragraphs 7 and 8 of Attorney General Cox's legal opinion on the Joint Instrument and unilateral declaration concerning the withdrawal agreement on the 12<sup>th</sup> of March 2019 for additional information.

<sup>148</sup> Read paragraph 19 of Attorney General Cox's legal opinion on the Joint Instrument and unilateral declaration concerning the withdrawal agreement on the 12<sup>th</sup> of March 2019 for details.

<sup>149</sup> See also the guiding principles for the dialogue on Ireland/Northern Ireland of the 6<sup>th</sup> of September 2017.

<sup>150</sup> See Annex 5 for all provisions of Union law that relate to the movement of goods which remains to apply in Northern Ireland.

<sup>151</sup> Annex 2 of the Protocol gives details on the context of the single customs territory and the legal instruments.

is considered to be a third nation for Northern Ireland and the European Union<sup>152</sup>. Accordingly, border checks and risk assessments by Member States become inevitable for goods that move from Great Britain to the European Union as a means to sustain the EU standards and safeguard the consumers, economic traders and organisations in the European Single Market (European Commission, 2018b). A set of detailed rules on the trade in goods within the single customs territory is to be adopted by the Joint Committee before the 1<sup>st</sup> of July 2020.<sup>153</sup> No kind of customs duty or restriction on import or export is allowed in the single customs territory and the General Agreement on Tariffs and Trade shall apply (Department for Exiting the EU, 2018b). By reason of a fair and open competition in the single customs territory, a non-regression clause determines that the United Kingdom has got to prevent any decrease in the standards of environment or labour (social) protection<sup>154</sup>, and a harmonisation on an ongoing basis with the state aid rules of the European Union is necessary<sup>155</sup>. Altogether the arrangements of the Protocol on Ireland and Northern Ireland tie the United Kingdom closely to Union law across a variety of policy areas, whilst “*the membership of the single customs territory and the inherent requirement that the United Kingdom aligns with the Union’s Common Commercial Policy significantly curtails the United Kingdom’s freedom to pursue an independent trade policy*” (House of Lords, 2018, p. 36). Article 12 of the Protocol specifies that an independent authority in the United Kingdom<sup>156</sup> is given the responsibility to monitor and implement measures that affect trade between Great Britain and the Union, just as the European Commission is the competent authority for administrative arrangements that affect the trade between Northern Ireland and the European Union. Both the United Kingdom and the European Union must act to continue the North-South (and East-West) cooperation across a wide range of areas (e.g. healthcare, security, education) on the island of Ireland. Article 13(2) of the Protocol affirms a constant review by the Joint Committee to match the arrangements of the Protocol on Ireland and Northern Ireland with the necessary conditions for a North-South cooperation. Overall, the single customs territory is free from customs tariffs, quotas or checks on rules of origin between the United Kingdom and the Union, the United Kingdom remains aligned to a limited set of rules that relate to the European Single Market, a level playing field is created and Northern Ireland continues to comply with the Union Customs Code (European Commission, 2018b). Arrangements of the *backstop scenario* may be compared to a *swimming pool*, in which Northern Ireland sits in the deep end of integration with the European Single Market and Great Britain in the shallow end (O’Donoghue, 2018).

Human rights and equality form a fundamental dimension in the Belfast Agreement, given that the arrangements advocate for a commitment to “*the mutual respect, the civil rights and the religious liberties of everyone in the community*”.<sup>157</sup> For this reason, the United Kingdom

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<sup>152</sup> Attorney General Cox stresses this fact in his legal opinion on the legal effect of the Protocol on Ireland and Northern Ireland on the 13<sup>th</sup> of November 2018.

<sup>153</sup> Annex 3 of the Protocol on the rules within the single customs territory shall apply in the absence of a decision by the Joint Committee before the 1<sup>st</sup> of July 2020.

<sup>154</sup> Annex 4 of the Protocol provides for details to maintain an open and fair competition within the single customs territory.

<sup>155</sup> See Article 12 of the Protocol for extra information on state aid rules, whilst Annex 8 of the Protocol lists the provisions of Union law that apply.

<sup>156</sup> In the United Kingdom the Competition and Market Authority is given responsibility to enforce state aid rules.

<sup>157</sup> Paragraph 1 on the Rights, Safeguards and Equality of Opportunity of the Belfast Agreement provides for details on human rights.

and the European Union recognise that a withdrawal may not lead to any diminution of rights, safeguards and equality of opportunity as set out in the arrangements of the Belfast Agreement.<sup>158</sup> A total of six provisions of Union law on anti-discrimination<sup>159</sup> shall continue to apply, which indicates that Union law is a significant component in the framework that upholds the arrangements of the Belfast Agreements (Department for Exiting the EU, 2018b). O'Donoghue (2018) believes that a legal obligation for no diminution of civil rights may result in friction on the islands, as the United Kingdom is forced to grant equality rights in Northern Ireland, whilst the nation is not obliged to grant the same rights in the rest of Great Britain. Article 4(2) of the Protocol determines that the United Kingdom continues to uphold the human rights and equality standards of the Belfast Agreement by providing support to the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland.<sup>160</sup> All the rights and privileges of the Common Travel Area remain in effect in the *backstop scenario*, which means that citizens of the United Kingdom and the Republic of Ireland can still reside, work and study on similar substantive conditions in the other state.<sup>161</sup> Moreover, Article 5(1) reads that the United Kingdom and the Republic of Ireland “*may continue to make arrangements between themselves relating to the movement of persons between their territories*”. Since the House of Lords (2018) stresses the historical significance of the Common Travel Area for the cooperation between the United Kingdom and the Republic of Ireland, the commitment to retain the rights and privileges of the Common Travel Area probably contributes to the relationships on the islands after Brexit. Irish citizens that reside in Northern Ireland shall be given the same rights as any other citizen of the European Union in the United Kingdom. However, O'Donoghue (2018) argues that an equivalence of rights in the Republic of Ireland and Northern Ireland is necessary to stay committed to the Belfast Agreement, as, on this basis, a border community may be given different rights on equality or employment, depending on the side of the border an individual is.

### ***§6.3 Conclusion***

By including a Protocol on Ireland and Northern Ireland in the withdrawal agreement, both the United Kingdom and the European Union aspire to stay committed to all the different dimensions of the Belfast Agreement, to maintain the necessary conditions for a North-South cooperation on the island of Ireland and to avoid a *hard* border between the Republic of Ireland and Northern Ireland. All the arrangements of the Protocol on Ireland and Northern Ireland come in effect if the United Kingdom withdraws from the European Union without an agreement on a future relationship. For this reason, chapter 6 aims to analyse “*what the implications of the Protocol on Ireland and Northern Ireland are on the control for the United Kingdom?*”. Since the United Kingdom is no longer part of the European Single Market and the Customs Union after a withdrawal from the European Union, and a historical ethno-nationalist conflict forms a significant reason to avoid a *hard* border on the island of Ireland,

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<sup>158</sup> See Article 4 of the Protocol for details on the rights of individuals in relation to the Belfast Agreement.

<sup>159</sup> Annex 1 of the Protocol lists the provisions of Union law that remain to apply in this area.

<sup>160</sup> All the institutions have been established by reason of the Belfast Agreement.

<sup>161</sup> See Article 5 of the Protocol for details on the arrangements on the Common Travel Area in the backstop scenario.

Northern Ireland is subject to a different regulatory regime than the rest of the United Kingdom. In this *backstop scenario*, no customs tariffs, quotas or checks on rules of origin between the United Kingdom and the European Union exist, the United Kingdom remains aligned to a limited set of rules that relate to the European Single Market, a level playing field is created and Northern Ireland continues to comply with the Union Customs Code. Moreover, Union law on anti-discrimination shall continue to apply in the United Kingdom, as a withdrawal from the Union may not lead to a diminution of rights, safeguards and equality of opportunity as set out in the Belfast Agreement. As a result, the arrangements of the Protocol on Ireland and Northern Ireland tie the United Kingdom closely to Union law across a variety of policy areas, whilst the autonomy of the United Kingdom to pursue an independent trade policy is significantly influenced. All the governance structures of the Protocol on Ireland and Northern Ireland remain quite similar to the withdrawal agreement, with the CJEU as the legal authority in all areas for any withdrawal arrangement that refers to Union law. Only when an agreement on a future relationship is agreed upon, in which both the United Kingdom and the European Union have committed to a duty of good faith and *best endeavours* to do so, the United Kingdom may legally exit the *backstop scenario*. However, this brings a significant legal risk for the United Kingdom, as any intractable differences may result in an indefinite continuation of the *backstop scenario* (i.e. compliancy to the Protocol on Ireland and Northern Ireland).

## VII. Conclusion

Since the United Kingdom is the first Member State to initiate the process of Article 50 TEU, no paradigm exists that provides for clarity on the realisation of a withdrawal from the European Union. By analysing the different components of the agreed upon withdrawal agreement, the focus of this study is to determine the level of control for the United Kingdom on the basis of the withdrawal process and the arrangements, and so assess to what extent Brexit substantially may be considered as a British exit (i.e. “*Brexit means Brexit*”). In chapter 7 the objective is to combine all insights of the sub-questions to formulate a comprehensive conclusion on the research question “*to what extent is the United Kingdom able to take back control from the European Union via the Brexit arrangements?*”. Chapter 7 ends with the limitations of this study and a set of recommendations for additional research on the withdrawal of the United Kingdom from the European Union.

### §7.1 Reality of Brexit

Going into the European Union Membership Referendum, the notions of a Brexit focus mainly on *taking back control* from the European Union. For this reason, the United Kingdom’s most significant reasons for a withdrawal is to secure a right to initiate new trade agreements with other nations, end the jurisdiction of the CJEU, restrain the freedom of movement for citizens to control for immigration, and cease the financial contributions to the Union. However, as the United Kingdom is a Members State for over 40 years, the *Europeanisation* affects the scope and complexity of a withdrawal from the European Union. By analysing a variety of components of the Brexit, this study determines the level of control for the United Kingdom after withdrawal on the basis of the British *red lines*.

A transition period is agreed upon by the United Kingdom and the European Union to create time to adjust to the withdrawal arrangements and negotiate a future relationship after Brexit. At the time of the transition period the *status quo* remains to exist in the United Kingdom, which means that the United Kingdom is considered to be a Member State and all the rules and principles of Union law continue to be in effect. As a result, the United Kingdom also abides by the Customs Union and all the *four freedoms* of the European Single Market. Since the United Kingdom only repeals the *European Communities Act of 1972* after the transition period, the legal acts of the European Union still rely on primacy and direct effect in the United Kingdom, whereas the influence of the United Kingdom on the creation and direction of the European Union policy is minimised. From the day of exit the United Kingdom is forced to renegotiate all international agreements that fall in an area of exclusive EU competence. However, as Article 50 TEU states that no EU treaty shall cease to apply until withdrawal, the division of competences in the European Union disallows the United Kingdom to conclude an international agreement with a third nation at the time of the transition period. In the *backstop scenario*, the United Kingdom is obligated to align with the Union’s Common External Tariff and the Common Commercial Policy on trade in goods with third nations, which affects the authority of the United Kingdom to pursue an independent trade policy.

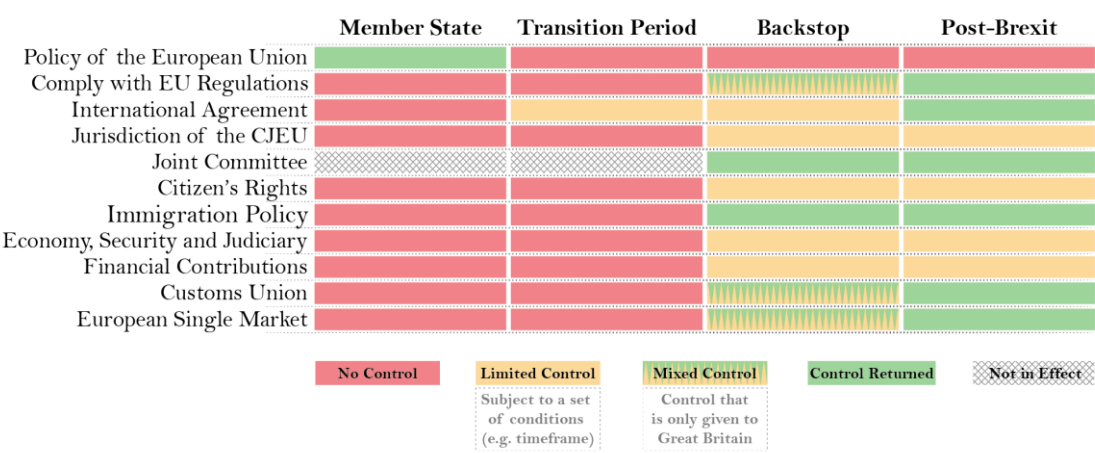
Given that the CJEU is the legal authority for the interpretation of Union law and the legality of the withdrawal agreement, the territorial jurisdiction of the CJEU still includes the United Kingdom. All the domestic courts of the United Kingdom must construe the withdrawal arrangements in conformity with case law of the CJEU until the transition period, and *pay due regard* to the CJEU's case law thereafter. At the time of the transition period, the United Kingdom is subject to a supervision by the European Commission, the enforceable rights of Union law apply, and the rulings of the CJEU remain binding on the United Kingdom. Moreover, the jurisdiction of the CJEU is even broader on the basis of the withdrawal agreement, as the CJEU creates validity to the withdrawal arrangements, the CJEU maintains an ongoing role for eight years on residents' rights, the CJEU rules on the interpretation of Union law in any dispute, and the CJEU continues to have jurisdiction in all law cases brought by or against the United Kingdom before the end of the transition period. Since the European Commission may decide to start infringement procedures within four years after the transition period, the CJEU is still given a significant control over the United Kingdom after withdrawal. Nonetheless, in the areas of economy, security and judiciary, Union law shall often only apply if an ongoing process is not yet completed by the end of the transition period. For all the arrangements of the Protocol on Ireland and Northern Ireland, the CJEU is the legal authority in areas for any withdrawal arrangement that refers to Union law. Only an agreement on a future relationship is considered to be a legitimate reason for the United Kingdom to exit from the *backstop scenario*, which creates the legal risk for the United Kingdom to comply to the Protocol on Ireland and Northern Ireland for an indefinite period of time, and so ties the United Kingdom closely to Union law (i.e. the jurisdiction of the CJEU) across a variety of policy areas for the same duration.

Many citizens in the United Kingdom made life choices on the basis of European Union citizenship rights. By reason of avoiding a significant disruption in the daily life of a citizen, the withdrawal arrangements determine that citizens may continue to reside, study or work on similar substantive conditions of Union law. All citizens that legally reside in the United Kingdom before the end of the transition period can rely on the withdrawal arrangements and shall be given those rights for the rest of their lifetime. Given that the lifelong protection of citizen's rights also applies to family members and (yet to be born) children, Union law on the rights of citizens may exist for another 120 years in the United Kingdom. Any citizen that legally resides in the United Kingdom for a continuous period of five years is automatically granted a right of permanent residency, as no discretion is given to the domestic registration system of the United Kingdom to apply conditions or limitations on a citizen's right to residency. A right on a freedom of movement only exists in the United Kingdom until the end of the transition period, whereas all the rights and privileges of the Common Travel Area remain in effect in the *backstop scenario*, which means that citizens of the United Kingdom and the Republic of Ireland can still reside, work and study on similar substantive conditions in the other state. By withdrawing from the European Union, the United Kingdom is able to set up a domestic immigration policy after the transition period.

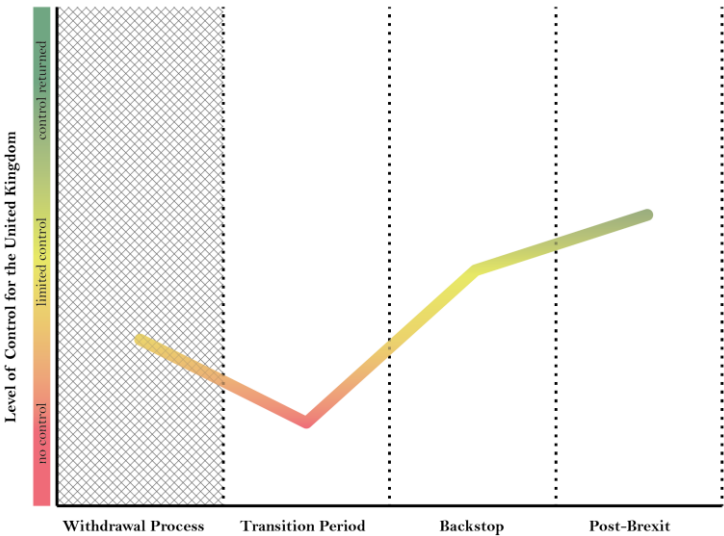
A financial settlement is to be paid by the United Kingdom to fulfil the commitments of being a Member State, as the United Kingdom joined in on the Union budget and a variety of funds or programs. For this reason, the United Kingdom shall contribute to fulfil the Multiannual Financial Framework 2014 – 2020 and other budgetary programs, and remain to be a party to the European Development Fund. Any financial obligations after the transition period is based on a ratio between the resources provided by the United Kingdom in the period

2014 – 2020 and the resources made available by all Member States in the same time frame, although a set annual financial contribution to the Union budget is no longer a necessity. In total the financial settlement is considered to be € 38 – 42 billion in a period of payment until 2064.

Overall, in consideration of the Brexit *red lines* of the United Kingdom, this study provides for insights on the research question “*to what extent is the United Kingdom able to take back control from the European Union via the Brexit arrangements?*”. A negotiation of almost two years between the United Kingdom and the European Union has resulted in a set of withdrawal arrangements that create a controversial divorce. On a variety of areas the United Kingdom is able to *take back control* from the European Union, as the standards and regulations of the Union do no longer apply and the sovereign decision-making power is returned to the United Kingdom. However, as *Europeanisation* is not reversed easily and the European Union acted to protect the interests of the individual Member States, the United Kingdom also continues to be bound by Union law in many different areas, in which the *backstop scenario* creates a significant attenuation of the statement “*Brexit means Brexit*”.



Matrix on the level of control for the United Kingdom.



Progress of the level of control for the United Kingdom.

## ***§7.2 Limitations & Recommendations***

By virtue of the scope and complexity of the withdrawal of the United Kingdom from the European Union, a set of limitations of this study is to be considered. Given that not only the 584 pages of the withdrawal agreement have been analysed, as also the withdrawal process and the works of scholars, a selection of the arrangements that relate to the level of control for the United Kingdom after withdrawal has been inevitable. Nonetheless, the possibility still exists that not all (semi-)relevant arrangements have been included in this study, or that, despite of the selection criteria, a personal judgement of an arrangement is not fully correct. In addition, the quantity of information on Brexit increases the risk that not all meaningful data have been used. Since the withdrawal process is ongoing at the time of conducting this study, any developments on Brexit (e.g. *Joint Instrument*) may overrule or affect earlier relevant findings. Lastly, the results on the level of control for the United Kingdom may not be exactly similar to any other Member State that intends to withdraw, as the *Europeanisation* and political concerns probably differ, and so limits the generalisation of this study.

A subject as Brexit creates many areas of interest for additional research that relates to the level of control for the United Kingdom after withdrawal. Both the United Kingdom and the European Union agreed upon a political declaration that sets out the future relationship. An analysis on the negotiations and outcomes of this future relationship between the United Kingdom and the European Union may indicate to what extent both sides will be obliged to set up a cooperation on policy areas and how this affects the United Kingdom's sovereignty. A study with an in-depth focus on a specific (policy) area of the withdrawal agreement is another recommendation, in which the *backstop scenario* is the most significant topic, as no indication of a solution for the border between the Republic of Ireland and Northern Ireland is yet feasible. Given that the British Parliament voted against the withdrawal agreement, a research on the objections of the United Kingdom to the arrangements, or the standpoints of the European Union on withdrawal, may lead to findings that help understand the developments in the withdrawal process and the realisation of the withdrawal agreement.

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# Appendix I

## Timeline of Events Brexit

	<b>23.03.16</b>	European Union Membership Referendum held in the United Kingdom (51.9% for Brexit).
May becomes Prime Minister of the United Kingdom.	<b>13.07.16</b>	
	<b>29.03.17</b>	Formal notification of British withdrawal sent to the European Union.
Publication of the Great Repeal Bill by the United Kingdom.	<b>30.03.17</b>	
	<b>19.06.17</b>	Start of the first phase of the negotiations on the withdrawal agreement.
Agreement on the first phase of the negotiations on the withdrawal agreement.	<b>08.12.17</b>	
	<b>19.03.18</b>	Publication of the first draft of the withdrawal agreement.
Agreement on the withdrawal agreement and the political declaration for the future relationship.	<b>14.11.18</b>	
	<b>25.11.18</b>	Heads of State of the 27 Member States endorse the withdrawal agreement and accept the political declaration on a future relationship.
CJEU rules that a unilateral revocation of the notification of withdrawal is a sovereign right of the United Kingdom.	<b>10.12.18</b>	
	<b>15.01.19</b>	British Parliament votes against the withdrawal agreement ('Meaningful Vote').
Agreement on the Joint Instrument to amend the Protocol on Ireland and Northern Ireland.	<b>11.03.19</b>	
	<b>12.03.19</b>	British Parliament votes against the new deal on the withdrawal agreement.
British Parliament votes against a 'no deal' scenario of Brexit.	<b>13.03.19</b>	
	<b>14.03.19</b>	British Parliament votes for a delay of the day of exit.
First agreement on a delay of exit by the United Kingdom and the European Union.	<b>21.03.19</b>	
	<b>29.03.19</b>	Original day of exit from the European Union.
Second agreement on a delay of exit by the United Kingdom and the European Union.	<b>10.04.19</b>	
	<b>12.04.19</b>	Former deadline for British Parliament to endorse the withdrawal agreement.
Former new day of exit from the European Union.	<b>22.05.19</b>	
	<b>31.10.19</b>	New day of exit from the European Union.

## Appendix II

### CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION

#### TITLE VI FINAL PROVISIONS

##### *Article 50*

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

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

## Appendix III

### ERA Academy of European Law, Three Months to Brexit – Where Do We Stand?

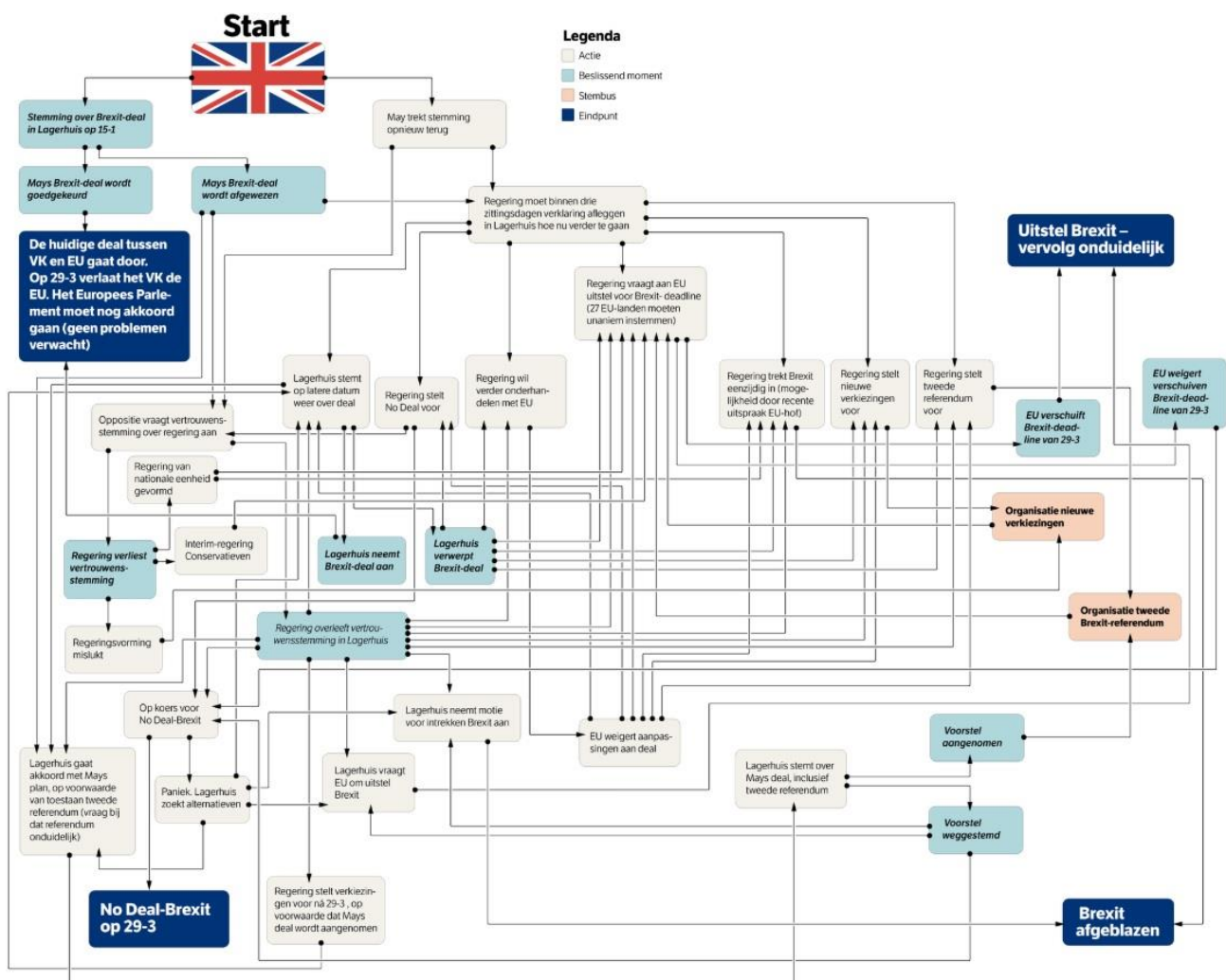
Brussels December 2018

List of Speakers at the ERA Forum.

Speaker	Profession	Topic
<b>Patrick van den Berghe</b>	Dutch Ministry of Economic Affairs	Outcome of negotiations and next steps for ratification in the case of the withdrawal agreement.
<b>Rhodri Thompson</b>	Matrix Chambers of London	Role of the CJEU and the UK courts and possible arbitration mechanism.
<b>Anne Weyembergh</b>	President of the Institute for European Studies	Consequences of Brexit for criminal justice cooperation.
<b>Adam Łazowski</b>	Professor of EU Law	From norm maker to norm taker: UK during the post-Brexit transition.
<b>Adam Łazowski</b>	Professor of EU Law	Status of EU citizens in the UK and vice versa.
<b>Aoife O'Donoghue</b>	Professor of International Law and Global Governance	To trade or not to trade: cherry-picking or Single Market ideologies?
<b>Aoife O'Donoghue</b>	Professor of International Law and Global Governance	Irish border: how to make possible the impossible.
<b>Catherine Barnard</b>	Professor of European Union Law	What does the future hold?

## Appendix IV

On the 15<sup>th</sup> of January 2019 the British Parliament voted on the withdrawal agreement as agreed upon by the United Kingdom and the European Union. Since all 40 economists polled by Reuters estimated a vote down of the withdrawal agreement by the Parliament, a variety of scenarios remain a possibility, of which the majority of the respondents expect another reading of the agreement, whereas 14 participants favour an extension of the deadline on the 29<sup>th</sup> of March 2019 (Cable, 2019). Accordingly, the Parliament rejected the withdrawal agreement with a staggering vote: *202 aye vs. 432 nay*. By means of showing the dubiety and uncertainty on the realisation of Brexit, the NRC (Garschagen, 2019) created a map of scenarios as of January 2019 (only in Dutch). Moreover, this *labyrinth* indicates a sense of the difficulty to conduct a study on the withdrawal of the United Kingdom from the European Union whilst the process of Brexit is still ongoing.



Labyrinth of Brexit scenarios as of January 2019 (Garschagen, 2019).