Cases on the Website

Case 170/84, *Bilka-Kaufhaus*; Case C-392/92, *Schmidt*; Case 450/93, *Kalanke*; Case C-84/94, *United Kingdom* v. *Council*; Case C-13/95, *Süzen*; Case 303/98, *Simap*; Case 407/98, *Abrahamsson*; Case C-320/00, *Lawrence*; Case C-415/11, *Aziz*; Case C-370/12, *Pringle*; Case C-503/13, *Boston Scientific*; Case C-62/14, *Gauweiler*; Case 80/14, *USDAW*; Case C-16/15, *Pérez López*

19

Epilogue

Brexit and the Union: Past, Present, Future

Contents

Introduction

While a distinguished British war hero strongly commended the 'United States of Europe' in 1946,[1] when it came to joining the first supranational project – the 1951 European Coal and Steel Community – the view of the (then) British

[1] This had been done by none other than Sir Winston Churchill in 1946, see: www.youtube.com/watch?v=Ln4SRnt4VE0.

government was that 'the Durham miners simply won't wear it'.[2] The reasons for this early rejection of European integration were economic and political in nature. Not only did the British economy produce as much coal as the rest of Europe combined;[3] politically, irritations arose from the French insistence on 'supranationalism' – a 'foreign' idea that ran counter to the British ideal of parliamentary sovereignty.[4]

When it came, a few years later, to choosing between the British Commonwealth and the 1957 European Economic Community (EEC), the British government again unconditionally favoured the former over the latter.[5] Once more, economic reasons come to complement geopolitical ones. For not only would the 'common market' be incompatible with the imperial preference system that guaranteed cheap agricultural goods; British foreign policy still followed its 'three circles' logic in which Europe simply ranked last.[6]

To contain the consequences of its choice against the 'common market', the British government nevertheless quickly proposed an organisation to rival the EEC: the 1960 European Free Trade Association (EFTA). The creation of EFTA thereby followed a dual aim. Positively, it created a free trade area that would allow Britain to trade with six other European States, while at the same time keeping its imperial preference system.[7] Negatively, on the other hand, it was hoped that EFTA would dissolve the (supranational) common market in a (intergovernmental) free trade area 'like a lump of sugar in an English cup of tea'.[8] This second aim however turned out to be wishful thinking, and in an extraordinary act of pragmatic reorientation, membership in the European common market suddenly became a British priority in the early 1960s.[9] Yet Britain's first application to join the Union, made in 1961, was rejected by France. In a famous 1963 press conference General de Gaulle – then President of France – gave the following reasons for France's veto:

> Great Britain applied for membership of the Common Market. It did so after refusing earlier to participate in the community that was being built, and after then having created a free trade area with six other states, and finally … after having put some pressure on the Six in order to prevent the [putting into effect] of the Common Market from really getting started. Britain thus in its turn requested membership, but on its own conditions. This undoubtedly raises for each of the six States and for England problems of a very great dimension. England is, in effect, insular, maritime, linked through its trade, markets, and food supply to very diverse and often very distant countries. Its activities are essentially industrial and commercial, and only slightly agricultural. It has, throughout its [history], very marked and original customs and traditions. In short, the nature, structure, and economic context of England differ profoundly from those of the other States of the Continent.[10]

This rejection came as a shock. Britain had seriously overestimated its bargaining power; and it was a shock to be repeated when de Gaulle vetoed a second British application in 1967. Only the third membership application would succeed – and only once the French General had left the political stage. It led to the signing of the Accession Treaty on 22 January 1972; and on 1 January 1973, Britain joined the European Union (together with Ireland and Denmark). Ever since, however, Britain has never been the happiest of Member States. Doubts about European integration persisted; and while British governments subsequently embraced the liberal project of the 'single market', the idea of an accompanying 'political union' continued to be resolutely rejected. This rejection reached its climax in 2016, when a referendum on British EU membership yielded a popular majority for 'Brexit' – the British exit from the European Union.

This – separate – chapter aims to explore the past, present and future of that decision. Section 1 offers a historical overview of British membership in the Union. With its commitment to European integration often selective or minimal, the United Kingdom has come to be seen as an 'awkward partner' within the European Union.[11] Section 2 explores the process of withdrawal in some detail and here in particular the nature and content of Article 50 TEU – the provision that regulates the Brexit process. Section 3 subsequently analyses the future status of 'European Union' law after a repeal of the 1972 European Communities Act. Will all directly applicable European law suddenly disappear? And what, in particular, will happen to all international agreements concluded

2 This was the view of the Labour government of the time (see K. Morgan, *Labour in Power: 1945–1951* (Oxford University Press, 1985), 420).

3 M. Camps, *Britain and the European Community, 1955–1963* (Oxford University Press, 1964), 3.

4 S. George, *An Awkward Partner: Britain in the European Community* (Oxford University Press, 1996), 21; Camps, *Britain and the European Community* (n. 3 above), 4: 'Co-operation with Europe was desirable; integration with Europe was not.'

5 For the classic analysis here, see G. St. J. Barclay, *Commonwealth or Europe* (University of Queensland Press, 1970).

6 In Churchill's famous words (quoted ibid., 16): 'I feel the existence of three great circles … The first circle for us is naturally the British Commonwealth and Empire, with all that that comprises. Then there is also the English-speaking world in which we, Canada and the other British Dominions and the United States play so important a part. And finally there is United Europe.'

7 Unlike a 'common market', a 'free trade area' allows each Member State to retain its own commercial policy towards third countries. On this distinction, see below.

8 I am grateful to Anne Deighton for having pointed me to this wonderful 'British' treasure. For the historical context of the phrase, see J. Ellison, *Threatening Europe: Britain and the Creation of the European Community, 1955–58* (Palgrave, 2000), 2.

9 D. Gowland and A. Turner, *Reluctant Europeans: Britain and European Integration 1945–1998* (Longman, 2000), 115: 'By early 1960, therefore, the options available to British policymakers had narrowed down alarmingly. As a matter of fact, Macmillan and his colleagues faced an extremely simply choice: either to enter the [EU] on the same terms as the original founders – something that had so far been regarded as anathema – or to remain outside, with all the attendant economic and political risks … It must be emphasised that the decision to apply for entry was taken not in a fit of Euro-enthusiasm, but out of a reluctant recognition that it represented the lesser of two evils.'

10 A. G. Harryvan and J. van der Harst, *Documents on European Union* (Macmillan, 1997), 132 at 134.

11 George, *Awkward Partner* (n. 4 above).

by the Union? Section 4 finally tries to look even farther into the future and presents the alternative partnership options that are presently discussed. Will the United Kingdom join the EFTA States (again); or will it join a customs union with the EU; or will it favour a 'Canada plus' deal?

Let us look at all of these questions in turn.

1. Britain in the European Union: An 'Awkward Partner'?

a. 'Second Thoughts': The 1975 Membership Referendum

Having joined the 'common market' in 1973, 'second thoughts' about EU membership soon emerged. For once a Labour government had entered Downing Street in 1974, it instantly tried to renegotiate the 'Tory Terms' of EU membership.[12] Under pressure from its left wing, Harold Wilson – then Prime Minister and leader of the Labour Party – had been forced to promise a 'fundamental renegotiation' of the British membership of the Union.[13] The 1974 Labour Party Manifesto therefore read as follows:

> Britain is a European nation, and a Labour Britain would always seek a wider co-operation between the European peoples. But a profound political mistake made by the [Conservative] Government was to accept the terms of entry to the Common Market, and to take us in without the consent of the British people. This has involved the imposition of food taxes on top of rising world prices, crippling fresh burdens on our balance of payments, and a draconian curtailment of the power of the British Parliament to settle questions affecting vital British interests. This is why a Labour Government will immediately seek a fundamental renegotiation of the terms of entry ... In preparing to re-negotiate the entry terms, our main objectives are these:
> – Major changes in the Common Agricultural Policy, so that it ceases to be a threat to world trade in food products, and so that low-cost producers outside Europe can continue to have access to the British food market.
> – New and fairer methods of financing the Community Budget ...
> – As stated earlier, we would reject any kind of international agreement which compelled us to accept increased unemployment for the sake of maintaining a fixed parity, as is required by current proposals for a European Economic and Monetary Union ...
> – The retention by Parliament of those powers over the British economy needed to pursue effective regional, industrial and fiscal policies[.][14]

[12] On this point, see specifically Gowland and Turner, *Reluctant Europeans* (n. 9 above), ch. 13: 'Renegotiating "Tory Terms"'.

[13] *Ibid.*, 213: 'One of Wilson's main reasons for holding the referendum had been to prevent an irreparable split in the Labour ranks.'

[14] 1974 Labour Party Manifesto: 'Let us work together – Labour's way out of the crisis', available at www.labour-party.org.uk/manifestos/1974/Feb/1974-feb-labour-manifesto.shtml.

These four points represent four political cleavages that became fundamental fault lines in all future British–Union relations. Especially the budget issue became an intractable bone of contention. In the view of the British political establishment, the standard formula for membership contributions severely disadvantaged the United Kingdom; and the latter was therefore entitled to a 'rebate' so as to reduce its net contributions to the Union budget.

All these demands for a 'fundamental renegotiation' might have simply been rejected by the other Member States on the grounds that the ink of the 1972 Accession Treaty had barely dried; yet faced with a conflict in the 'honeymoon' period of British membership, the 1975 Dublin European Council found a compromise that offered some minor-yet-not-insignificant changes to please the British. The Labour Prime Minister therefore recommended continued membership in the Union; and the subsequent vote in Parliament supported the government's position – a result that was nevertheless overwhelmingly due to 'conservative' votes.[15] The Labour government had however also promised a referendum on Union membership and the Referendum Act 1975 therefore determined that the people themselves could, on 5 June 1975, decide whether the United Kingdom should remain or leave the European Union.[16] Two-thirds of the votes cast favoured continued Union membership; and this – almost enthusiastic – support provided strong democratic legitimacy to the British decision to join (and remain) in the Union.

b. A Market without a State: The Thatcher Vision

Would the 1975 referendum ease the 'awkward' relationship between Britain and the Union? With the coming into power of the Conservative Party in 1979, high hopes existed.[17] They were soon dashed. The rebate issue quickly returned to the fore and was henceforth pursued with unbending zealousness: Britain wanted its 'own money back'![18] And, in order to achieve this aim, Britain adopted a strategy of (un)civil disobedience by deliberately obstructing the Council in 1982 – a strategy inspired by France's empty chair policy 20 years earlier.[19] This policy

[15] The majority of Labour MPs had come to reject, against the wishes of its own government, the renegotiated terms as insufficient (137 votes in favour and 145 against); and without the overwhelming conservative support (249 votes in favour and 8 against), the United Kingdom would have left the European Union in 1975.

[16] The 1975 referendum question was: 'Do you think that the United Kingdom should stay in the European Community (Common Market)?' And again: while the Labour government recommended a positive vote, the official Labour Party line was negative.

[17] During the 1970s and 1980s, the Conservative Party was seen as the 'party of Europe'. This becomes even clearer if it is recalled that during much of the 1980s, the Labour Party's official policy was committed to a withdrawal from the Union (see A. Geddes, *Britain and the European Union* (Palgrave 2013), 224).

[18] For the famous part of the Thatcher speech, see: www.youtube.com/watch?v=pDqZdZ5iZdY.

[19] For a discussion of the empty chair crisis, see Chapter 1, section 2(b). However, unlike France, Britain lost this battle as, surprisingly, the Council called for a majority vote to

of obstructionism irritated France so much that it openly suggested that the UK should search for an alternative status to full Union membership – a suggestion that was instantly rejected. Progress on the British Budgetary Question, colloquially termed the 'Bloody British Question',[20] was finally made in 1984 when the 'Fontainebleau' European Council reached an agreement on a complex mechanism that still applies today (see Figure 19.1).[21]

Did the end of the rebate 'war' inaugurate a period of European 'peace'? A short peace indeed followed; yet short it was. In 1985, an 'ideological' alliance between Thatcher's Britain and the European Union had suddenly emerged in the form of the Commission's White Paper 'Completing the Internal Market'. The paper had a British 'father': Lord Cockfield – a close collaborator of Thatcher – who had become EU Commissioner for the Internal Market in 1985; and the 'British' idea was seized upon by (then) Commission President Jacques Delors. However, whereas for Britain 'the single market was an end in itself that could raise to a European stage the liberalizing and deregulatory elements of the Thatcherite project', for the European Commission and most Continental European States – it was 'a means to an end, that end being deeper economic and political integration'.[22]

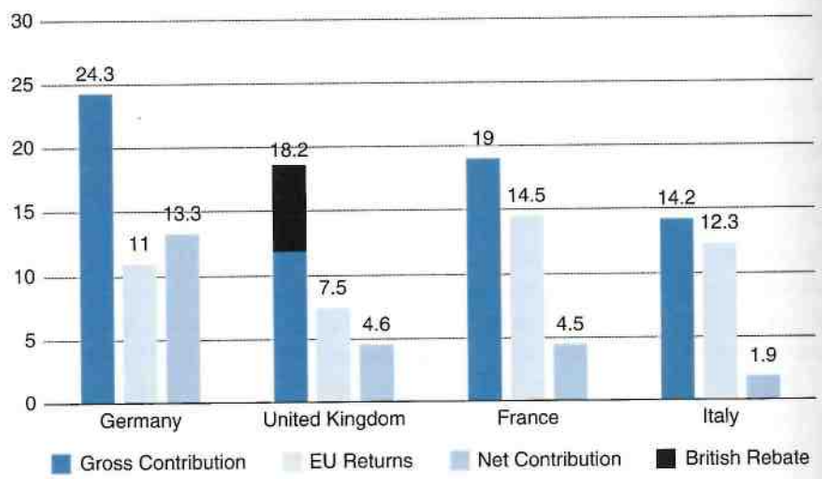

Figure 19.1 EU Membership Contributions (2014–20)

break the deadlock – a move that signalled the beginning of the end of the Luxembourg Compromise. A similar episode of British obstructionism would recur in 1996 in response to the ban on British beef following the BSE crisis. On the British policy of non-cooperation with the EU, see V. Miller, 'The Policy of Non-Cooperation with the EU', House of Commons Research Paper 96/74.

[20] R. Jenkins, *A Life at the Centre* (Pan Books, 1991), ch. 27.

[21] For the original mechanism, see Council Decision 85/257 on the Community's System of own Resources [1985] OJ L 128/15.

[22] Geddes, *Britain and the European Union* (n. 17 above), 70.

To that effect, the 1985 Milan European Council called for a major institutional reform of the Union: the 1986 Single European Act (SEA). The SEA was a decisive yet very small step towards political integration.[23] Yet the very idea that Europe could re-regulate markets and offer social rights to workers was anathema to the (then) British government. Furious to discover that the single market project was more that an exercise in deregulation, Thatcher set out her (Conservative) vision in 1988 in a famous speech at the College of Europe in Bruges:

> We have not successfully rolled back the frontiers of the state in Britain only to see them reimposed at a European level, with a European superstate exercising a new dominance from Brussels … [T]he Treaty of Rome itself was intended as a Charter for Economic Liberty … By getting rid of barriers, by making it possible for companies to operate on a Europe-wide scale, we can best compete with the United States, Japan and the other new economic powers emerging in Asia and elsewhere. It means action to *free* markets, to *widen* choice and to produce greater economic convergence through *reduced* government intervention. Our aim should not be more and more detailed regulation from the centre: it should be to deregulate, to remove the constraints on trade and to open up[.][24]

This speech became the prelude and source of accepted Euroscepticism within the Conservative Party;[25] and henceforth a section within the party would hold the 'Thatcherite' line – especially after the 1992 Treaty on European Union.

c. *From Maastricht to Lisbon: 'A Europe of Bits and Pieces'*

The 1992 Treaty on European Union represented 'a new stage in the process of European integration'.[26] Not only would it lay the foundations for 'Economic and Monetary Union' (EMU), a significant push towards political union had been made – especially by means of reducing the national veto in the Council.[27] Yet the 1992 TEU was also a constitutional compromise.

[23] Far from being a surrender to continental views, British interests had predominantly found their way into the SEA (see George, *Awkward Partner* (n. 4 above) 184: '[T]he British achieved real progress in areas that mattered to them. Majority voting was extended only in limited areas … [and] [s]pecifically excluded from the rules on majority voting were the areas of taxation, free movement of persons, health controls, and employees' rights … The other clear victory for the British view was that no major increase was proposed in the powers of the European Parliament').

[24] Harryvan and van der Harst, *Documents on European Union* (n. 10 above), 244–5 (emphasis added).

[25] Geddes, *Britain and the European Union* (n. 17 above), 229. The Bruges Speech led to the creation of one of the best-known Eurosceptic think tanks: the Bruges Group. For a self-presentation of the group, see: www.brugesgroup.com.

[26] Preamble of the TEU. [27] For a brief history, see Chapter 1, section 3.

Politically sensitive areas, like foreign and security policy and justice and home affairs, had remained intergovernmental; and even within the supranational parts of the European Union, the Maastricht Treaty had created 'a Europe of bits and pieces'.[28] With regard to EMU, for example, Britain had secured an opt-out;[29] and, having vehemently opposed further integration on social matters, it had received a second 'opt-out' here which meant that the envisaged social chapter within the EU Treaties had to be abandoned in favour of an 'Agreement on Social Policy concluded between the Member States of the European Community *with the exception of the United Kingdom of Great Britain and Northern Ireland*'.[30]

This second opt-out would eventually be dropped when a Labour government returned to power in 1997; yet the British ambivalence towards 'full' membership obligations remained; and when it came to the 1997 Treaty of Amsterdam, Britain (and Ireland) not only decided to opt out of the incorporation of the Schengen Agreement,[31] it also extrapolated itself from the Treaty Title on 'Visas, Asylum, Immigration and other Policies related to the Free Movement of Persons'.[32] The same strategy of 'differential' membership surfaced with the 2007 Lisbon Treaty, where the United Kingdom obtained a partial opt-out from the EU Charter of Fundamental Rights;[33] and even more remarkably, Britain was allowed a complete opt-out of the already existing (!) Union law on police and judicial cooperation in criminal matters.[34] This was cherry-picking at its best or worst – depending on one's point of view.

[28] The famous phrase comes from D. Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 CML Rev. 17.

[29] See Protocol On certain Provisions relating to the United Kingdom of Great Britain and Northern Ireland (1992) OJ C191/87, esp. preamble 1: 'Recognizing that the United Kingdom shall not be obliged or committed to move to the third stage of Economic and Monetary Union without a separate decision to do so by its government and Parliament'. The opt-out can today be found in Protocol No. 15 to the EU Treaties.

[30] The Agreement can be found in the Protocol On Social Policy (1992) OJ C191/90 (emphasis added).

[31] See Protocol On the Application of Certain Aspects of Article 7a of the Treaty Establishing the European Community to the United Kingdom and to Ireland (1997) OJ C340/97. The provisions can today be found in Protocols 19 and 20 to the present EU Treaties.

[32] See Protocol On the Position of the United Kingdom and Ireland (1997) OJ 340/99. The provisions can today be found in Protocol 21 to the present EU Treaties.

[33] See Protocol No. 30 On the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom. For a discussion of this partial opt-out, see Chapter 12, section 4(b/bb).

[34] See Protocol No. 36 On Transitional Provisions, esp. Art. 10. The possibility of an opt-out of all (!) acts in this area is here made in Art. 10(4), after a transitional period of five years; while Art. 10(5) allows the United Kingdom 'at any time, afterwards, [to] notify the Council of its wish to participate in acts which have ceased to apply pursuant to paragraph 4'. For an overview of the issues here, see House of Lords – EU Committee, 'EU Police and Criminal Justice Measures: The UK's 2014 Opt-Out Decision' (2013) HL Paper 159. The full opt-out was indeed used by David Cameron see below.

d. After Lisbon: The Path to Withdrawal from the Union

aa. From Lisbon to the Referendum: The Rise of Euroscepticism

By 2009, the United Kingdom was two-thirds in and one-third out of the European Union. While remaining a 'full' member in form, its various opt-outs had exempted it from core EU obligations and placed it at the margins of Europe. This strategy of semi-detachedness took a decidedly more Eurosceptic turn with the coming into power of the Conservative Party in 2010. Fearing to lose out to the United Kingdom Independence Party (UKIP) – founded in 1993 as a response to the Maastricht Treaty – the Conservatives had become an essentially Eurosceptic party.[35] And, although forced to work within a coalition, the Coalition Programme already heralded a 'nationalist' move away from closer European integration:

> The Government believes that Britain should play a leading role in an enlarged European Union, but that no further powers should be transferred to Brussels without a referendum. This approach strikes the right balance between constructive engagement with the EU to deal with the issues that affect us all, and protecting our national sovereignty …
> – We will ensure that there is no further transfer of sovereignty or powers over the course of the next Parliament. We will examine the balance of the EU's existing competences and will, in particular, work to limit the application of the Working Time Directive in the United Kingdom.
> – We will amend the 1972 European Communities Act so that any proposed future treaty that transferred areas of power, or competences, would be subject to a referendum on that treaty – a 'referendum lock'. We will amend the 1972 European Communities Act so that the use of any *passerelle* would require primary legislation.
> – We will examine the case for a United Kingdom Sovereignty Bill to make it clear that ultimate authority remains with Parliament.[36]

The external and internal outcomes of these commitments are well known. The most significant external expression is the completely senseless – though highly symbolic – veto of the EU Fiscal Compact by the British government so as to fulfil its first promise.[37] A response to the second and third – internal – commitments was the European Union Act 2011. The Act provided for a 'referendum lock' for future amendment treaties transferring new competences

[35] D. Baker et al., 'Sovereign Nations and Global Markets: Modern British Conservatism and Hyperglobalisation' (2002) 4 *British Journal of Politics and International Relations* 399 at 404.

[36] For a copy of the Coalition Programme, see: www.gov.uk/government/publications/the-coalition-documentation. The Programme also contained a commitment to exercise the opt-out in the area of police and judicial cooperation in criminal matters (see n. 34 above).

[37] See *Financial Times* (9 December 2011): 'Britain's Cold Shoulder for Europe'. The 'senselessness' of the decision stemmed from the fact that – in substance – these were reforms favoured by the Conservative government; and all that Cameron achieved was to remove Britain from the negotiating table when the eurozone decided to go ahead anyway.

to the Union,[38] while it also reconfirmed 'national' parliamentary sovereignty as the core constitutional principle of the British Constitution.[39]

But there would be more: in an attempt to win over Eurosceptic voters (and to please its own right wing), the Conservative Party finally promised – just as the Labour Party had done in 1975 – a 'fundamental renegotiation' of the British terms of EU membership and an 'in–out' referendum.[40] Winning the 2015 national elections, the Cameron government almost immediately set out its demands in a letter to the European Council in November of that year,[41] and a European Union Referendum Act 2015 was duly adopted. Following intense negotiations in early 2016, the European Council and the other Member States offered the United Kingdom an olive branch in the form of the – pompously styled – 'New Settlement for the United Kingdom within the European Union'.[42] Based on these not-insignificant concessions, a referendum was called for 23 June 2016; and a (slight) majority of voters within the United Kingdom here expressed their wish to leave the European Union.[43]

[38] For an analysis of the Act, see M. Gordon and M. Dougan, 'The United Kingdom's European Union Act 2011: "Who Won the Bloody War Anyway?"' (2012) 37 *EL Rev.* 3.

[39] For the text of s. 18 of the Act, see Chapter 4, section 2.

[40] An informal promise was first made, by David Cameron, on 23 January 2013 in his 'Bloomberg Speech'; and a formal promise was then made in the 2014 Tory Manifesto, which committed the Party to hold a referendum by the end of 2017. For the bellicose language of the manifesto, see (*ibid.*, 18): 'If you want more EU red tape, more interference from Brussels, a bigger EU budget and no referendum – vote Labour. They are the ones who signed away power after power to the EU and refused to give the British people a vote, and they are the ones who opened the door for uncontrolled migration.'

[41] For a copy of the letter, see: www.gov.uk/government/publications/eu-reform-pms-letter-to-president-of-the-european-council-donald-tusk.

[42] European Council, A New Settlement for the United Kingdom within the European Union (2016) OJ C69/1. This cannot be the place to fully analyse the Union concessions in any detail but the most important concession was probably a safeguard mechanism for 'situations of inflow of workers from other Member States of an exceptional magnitude over an extended period of time, *including as a result of past policies following previous enlargements*' (*ibid.*, 9, emphasis added). The 'New Settlement' here allowed a Member State to limit access to non-contributory in-work benefits for a period of up to four years from the commencement of employment. Conveniently, the Commission already declared, in advance, that such a situation presently existed in the United Kingdom and that the latter would consequently be 'justified in triggering the mechanism in the full expectation of obtaining approval' (*ibid.*, 15). The great irony with regard to this concession is, of course, that the entire situation is partly (or fully) the result of the United Kingdom's own choices. For when Eastern Enlargement took place in 2004, the United Kingdom (together with Ireland and Sweden) decided not to insist – as all other Member States did – on transitional limitations on the free movement of workers with the result that instead of the expected 13,000 migrants approximately 600,000 migrants had arrived by 2006 (House of Lords, European Union: Fifty-Third Report, available at: https://publications.parliament.uk/pa/ld200506/ldselect/ldeucom/273/27302.htm, para. 86).

[43] With a turnout of 72 per cent of the electorate, 52 per cent decided to leave, while 48 per cent voted to remain.

While constitutionally not binding, the referendum result was nevertheless accepted by all main parties as politically binding. The 'New Settlement' was called off the table;[44] and the United Kingdom henceforth began to prepare its withdrawal from the European Union.

bb. Triggering the Withdrawal Process: The Miller *Judgment*

Under British constitutional law, referenda do not have any binding legal force; and it was therefore clear that the British Parliament would need to 'ratify' the result of the popular vote. What was unclear, however, was whether this parliamentary 'ratification' would need to happen at the beginning or the end of the withdrawal process. Would Parliament need to be involved in 'triggering' the withdrawal process – laid down in Article 50 TEU? Or would it only need to give its consent to the repeal of the 1972 European Communities Act?

In order to exit the European Union, a Member State must notify its intention to the Union 'in accordance with its own constitutional requirements';[45] and within the United Kingdom, the question of which branch of the British State would be entitled to notify the referendum result soon gave rise to a constitutional battle between the British government (executive) and the British Parliament (legislative). Relying on the ancient powers of the royal prerogative, the former claimed that it alone was entitled to trigger Article 50. This view was challenged in *R. (Miller)* v. *Secretary of State for Exiting the European Union* on the grounds that a notification to the European Union required the *prior* consent of the British Parliament.[46]

In its *Miller* judgment, the United Kingdom Supreme Court was faced with two contradictory features of the – unwritten – British Constitution. According to a first principle, 'ministers generally enjoy a power freely to enter into and to terminate treaties without recourse to Parliament'; whereas, in accordance with a second principle, 'ministers are not normally entitled to exercise any power they might otherwise have if it results in a change in UK domestic law' unless authorised by a parliamentary statute.[47] These two principles can only be harmoniously combined in a classic dualist legal order, as any changes introduced by international treaties 'outside' the United Kingdom will – theoretically – have no automatic effects 'inside' the domestic legal order; and the Supreme Court consequently started out as follows:

[44] Joint Statement by the Presidents of the European Parliament, the European Council and the Commission (Brussels, 24 June 2016), available at: http://europa.eu/rapid/press-release_STATEMENT-16–2329_en.htm: '[T]he "New Settlement for the United Kingdom within the European Union", reached at the European Council on 18–19 February 2016, will now not take effect and ceases to exist. There will be no renegotiation.'

[45] Art. 50(1) TEU.

[46] *R. (Miller)* v. *Secretary of State for Exiting the European Union* [2017] UKSC 5.

[47] *Ibid.*, para. 5.

> There is little case law on the power to terminate or withdraw from treaties, but, as a matter of both logic and practical necessity, it must be part of the treaty-making prerogative … Subject to any restrictions imposed by primary legislation, the general rule is that the power to make or unmake treaties is exercisable without legislative authority and that the exercise of that power is not reviewable by the courts … This principle rests on the so-called dualist theory, which is based on the proposition that international law and domestic law operate in independent spheres. The prerogative power to make treaties depends on two related propositions. The first is that treaties between sovereign states have effect in international law and are not governed by the domestic law of any state … The second proposition is that, although they are binding on the United Kingdom in international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic law.[48]

But did this dualist reasoning apply to European Union law? In a judgment full of internal contradictions and intellectual gaps, the Supreme Court struggled to find a convincing answer that cut the Gordian knot created by the traditional–dualist British legal order and the modern–monist Union legal order. When discussing the effect of Union law in the United Kingdom, this is what the Supreme Court had to say:

> In one sense, of course, it can be said that the 1972 Act is the source of EU law, in that, without that Act, EU law would have no domestic status. *But in a more fundamental sense and, we consider, a more realistic sense, where EU law applies in the United Kingdom, it is the EU institutions which are the relevant source of that law. The legislative institutions of the EU can create or abrogate rules of law which will then apply domestically, without the specific sanction of any UK institution* … In our view, then, although the 1972 Act gives effect to EU law, it is not itself the originating source of that law. It is … the 'conduit pipe' by which EU law is introduced into UK domestic law. So long as the 1972 Act remains in force, its effect is to constitute *EU law an independent and overriding source of domestic law* … The 1972 Act effectively operates as a partial transfer of law-making powers, or an assignment of legislative competences, by Parliament to the EU law-making institutions (so long as Parliament wills it)[.][49]

The 1972 Act is here portrayed as a 'conduit pipe' or 'bridge' that allows directly applicable (!) EU law into the British legal order without the need for a *specific* act of transposition into British law. On the basis of this monist position,[50]

[48] *Ibid.*, paras. 54–5. [49] *Ibid.*, paras. 61, 65 and 68 (emphasis added).

[50] To repeat: under a classic dualist doctrine, there cannot be any 'directly applicable' European rights; and a withdrawal from the Union could therefore *never* change any British (!) rights, as all British rights are a result of British law – not European law. That this view was rejected by the Supreme Court for European Union law is confirmed in para. 90 when the Court admitted that '[i]n 1972, for the first time in the history of the United Kingdom, a dynamic, international [!] source of law was grafted onto, and above, the well-established existing sources of domestic law: parliament and the courts'. Alas, the owl of Minerva only spreads its wings with the fall of dusk!

Union law was – for the first time – expressly recognised as an 'independent' source of 'British' law and expressly placed above 'ordinary' parliamentary legislation. And it was this – monist – view that allowed the Court to argue that a withdrawal from the European Union would constitute 'a fundamental change which justifies the conclusion that *prerogative powers cannot be invoked to withdraw from the EU Treaties*'.[51] The Supreme Court consequently held that the British Parliament had to specifically empower the government before a notification to the European Council could take place. Parliament duly passed the European Union (Notification of Withdrawal) Act 2017 in which it authorised the British Prime Minister to trigger Article 50 TEU and to thereby begin the official Brexit process.[52]

2. Withdrawing from the Union: Article 50 TEU

The European Union is not a sovereign State but a Union of States; and unlike sovereign States, it allows its Member States to withdraw or 'secede' from the Union. With the 2007 Lisbon Treaty, this right to withdraw has been expressly codified in Article 50 TEU. The provision states:

> 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 …

What is the history and nature of the provision? While Article 50(1) TEU declares the sovereign right of each Member State to withdraw from the Union, its intention to do so must be formally notified to the European Council

[51] *Ibid.*, para. 83 (emphasis added).

[52] s. 1(1) of the Act states: 'The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU.'

according to Article 50(2). For the United Kingdom, this happened on 29 March 2017, when the British Prime Minister May sent a letter to the President of the European Council. This started the two-year negotiation period envisaged in Article 50(3).[53] How will the withdrawal be negotiated? Let us look at this question in this second section.

a. Article 50: Constitutional History and Nature

Most sovereign States categorically prohibit secessions from their territory;[54] while most international organisations implicitly permit withdrawals of their Member States.[55] Within the European Union, a sovereign 'right' to withdraw has always been implicit in the Union legal order.[56] The Lisbon Treaty has made

[53] Can the notification be withdrawn? The question has been hotly debated. For arguments in favour, see A. Sari, 'Reversing a Withdrawal Notification under Article 50 TEU: Can a Member State Change Its Mind?' (2017) 42 *EL Rev.* 451; P. Craig, 'Brexit: A Drama in Six Acts' (2016) 41 *EL Rev.* 447, esp. at 463–5. One important counter-argument here is however the so-called 'Kaufmann Amendment' (J. Dammann, 'Can Member States Rescind Their Declaration of Withdrawal from the European Union?' (2017) 23 *Columbia Journal of European Law* 265 at 302), which had suggested including the following sentence into Art. 50 (2) TEU: 'The notification to withdraw can be revoked at any time by a declaration addressed to the European Council'; and given that the amendment was not (!) included, it could be argued that a right to revoke the notification has been rejected. This however need not necessarily be the case. For in light of the numerous amendment proposals, the drafters of the provision may simply not have had time to specifically consider the issue; or they thought that the inclusion of an express reference to the right to withdraw from the withdrawal was simply unnecessary in light of the background principles offered by the Vienna Convention of the Law of Treaties. Art. 68 of the latter states: 'A notification or instrument provided for in article 65 or 67 [termination or withdrawal from an international treaty], may be revoked at any time before it takes effect.'

[54] Some federal States appear to be more tolerant with regard to secessionist claims by their constituent units. For the Canadian constitutional order, see *Reference Re Secession of Quebec* [1998] 2 SCR 217.

[55] On the 'sovereign' right of withdrawal, see T. Christakis, 'Article 56: Denunciation of or Withdrawal from a Treaty Containing No Provision regarding Termination, Denunciation or Withdrawal', in O. Corten and V. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary – Volume II* (Oxford University Press, 2011), 1251. This is not uncontested: see N. Feinberg, 'Unilateral Withdrawal from an International Organisation' (1963) 39 BYIL 189. Today, the 1969 Vienna Convention on the Law of Treaties has clarified that a right to withdrawal depends on whether the parties to a treaty agreed to it either expressly or implicitly.

[56] For the same view, see J. H. H. Weiler, 'Alternatives to Withdrawal from an International Organisation: The Case of the European Economic Community' (1985) 20 *Israel Law Review* 282. It is however unclear how that conclusion is reached. For while Weiler generally holds 'that orthodox *legal* analysis would confirm, in the context of the EEC, Feinberg's general conclusion against the automatic right of unilateral withdrawal' (*ibid.*, 287 – emphasis added), he nonetheless finds that, *politically*, and in the absence of techniques for avoiding all obligations arising under European law '[i]f a Member State cannot accept these obligations, better it be allowed to withdraw, even unilaterally' (*ibid.*, 298). For the opposite view, see T. Bruha and C. Nowak, 'Recht auf Austritt aus der Europäischen Union? Anmerkungen zu Artikel I-59 des Entwurfs eines Vertrages über eine Verfassung für Europa' (2004) 42 *Archiv des Völkerrechts* 1.

this implicit right explicit; yet the contours of the right have remained unclear. An overview of the history of Article 50 may here offer some insights.

aa. Drafting History during the European Convention

Article 50 was first conceived during the European Convention leading up to the (failed) 2004 Constitutional Treaty.[57] Whose brainchild Article 50 thereby is has been eagerly contested by two putative 'fathers'.[58] Yet it seems that the idea of a withdrawal clause first emerged from a contribution of the British member of the Convention, whose suggestion drew on the 'Cambridge Draft Treaty' edited by Professor Alan Dashwood.[59] This Cambridge draft advocated a unilateral and automatic right to withdraw for each Member State; and, importantly, in doing so, it did not even envisage a withdrawal agreement. All that was needed was a formal notification from the withdrawing Member State; while the Union was, in its turn, entitled to unilaterally adjust its institutional structure after the withdrawal.[60]

This 'State-centred' version was heavily criticised by the more 'integrationist' Convention members;[61] and it contrasts strikingly with the proposal made by the European Commission. In its 'Penelope Project',[62] the Commission indeed suggested a much more 'Union-centred' withdrawal provision. It read:

> 1. Where a revision to the Constitution has entered into force and a Member State has not been able to adopt it in accordance with its constitutional requirements, such State may, after a period of two years after the entry into force of that revision, apply to withdraw from the Union. In that case the Union shall commence negotiations with the Member State concerned in order to conclude an agreement governing their future relations ...

[57] For a brief discussion of the European Convention, see Chapter 1, section 4(a).

[58] The two auto-proclaimed 'fathers' are the Italian Giuliano Amato, then a Vice-President of the European Convention, and the British diplomat, Lord Kerr.

[59] See European Convention, Contribution by Mr P. Hain: Constitutional Treaty of the European Union, CONV 345/1/02 (Brussels, 16 October 2002).

[60] *Ibid.*, Art. 27: '1. Any Member State may withdraw from the European Union. It shall address to the Council its notice of intention to withdraw. 2. The Council, meeting in the composition of the Heads of State or Government and acting by unanimity, shall determine, after consulting the Commission and the European Parliament, the institutional adjustments to this Treaty that such withdrawal entails. 3. For the purpose of this Article, the Council, sitting in the composition of Heads of State or Government, and the Commission shall act without taking into account the vote of the nationals of the withdrawing Member State. The European parliament shall act without taking into account the position of the Members of Parliament elected in that State.'

[61] For an overview of the various amendment proposal here, see European Convention, Scheda di analisi delle proposte di emendamento riguardanti l'appartenenza all'Unione: Progetto di articoli relativi al titolo X della Parte I (articoli da 43 a 46), CONV 672/03 (Brussels, 14 April 2003).

[62] http://ec.europa.eu/archives/emu_history/documents/treaties/Penelope%20pdf_en.pdf.

3. If the agreement governing future relations between the Union and the requesting Member State is not concluded within a period of six months following the opening of negotiations, the Member State shall cease to be a member of the Union on 1 January of the year following the expiry of that period. In that case, the respective rights and obligations of the Union and the Member State leaving it shall, for no more than two years, continue to be governed by the law applicable on the day when the requesting State left the Union …
4. The Member State leaving the Union may continue to be a contracting party to the Agreement on the European Economic Area.[63]

The Commission draft here offered a *conditional* and *limited* right of withdrawal in one situation: where a Member State had been outvoted in the (newly suggested) qualified majority revision procedure,[64] it would not be forced to stay within the Union and could consequently leave after two years of unsuccessful ratification. The provision thereby evoked the idea of a future-relations agreement to be concluded within a period of six months after the opening of the negotiations; and where no agreement had been reached, the State would (almost) immediately cease to be a Union Member. However, in this case, the departing State would still be subject to a transitional arrangement that applied the unrevised (!) EU Treaties for another two years (maximum); and – mysteriously – the withdrawing State would also remain a party to the Agreement on the EEA.[65]

None of the two – extreme – draft versions would be adopted by the European Convention. The Presidium indeed offered a compromise. Although heavily based on the State-centred view and acknowledging a unilateral and unconditional right to withdrawal, it nevertheless insisted on the obligation that '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'.[66] The Presidium however quickly clarified that 'such an agreement should not constitute a condition for withdrawal so as not to void the concept of voluntary withdrawal of its substance';[67] and after a two-year period without reaching a withdrawal agreement, the membership obligations of the withdrawing State would therefore automatically cease.[68] It is, with minor amendments, this version that can today be found in Article 50 TEU.

[63] *Ibid.*, Art. 103.

[64] According to Art. 101 of the Commission Draft Treaty, future Treaty revisions were no longer subject to a unanimous agreement by all the Member States but henceforth allowed for a qualified majority of five-sixths or three-quarters of the Member States (depending on which part of the Constitutional Treaty would be amended).

[65] That this should – legally – not be possible will be explained below.

[66] European Convention, Presidium – Title X: Union Membership, CONV 648/03 (Brussels, 2 April 2003), esp. Art. 46(2).

[67] *Ibid.*, p. 9.

[68] *Ibid.*, Art. 46(3) (emphasis added): 'This Constitution shall cease to apply to the State in question as from the date of entry into force of the withdrawal agreement *or, failing that, two years after the notification* referred to in paragraph 2.'

bb. The Nature and Character of Article 50

What is the nature and character of Article 50? The provision represents a compromise between the 'State-centred' and the 'Union-centred' versions tabled during the European Convention. This compromise solution is however much closer to the former than the latter. For like the Cambridge draft, the right to withdraw from the Union is unconditional and unilateral; however unlike the Cambridge draft, this right is no longer automatic, since Article 50 imposes a procedural obligation to try to reach a mutual understanding in the form of a 'withdrawal agreement'.[69]

Importantly, unlike either the Cambridge and Commission drafts, Article 50 TEU today envisages two (!) separate agreements that a Member State may conclude after it has notified its wish to withdraw. A 'withdrawal agreement', designed to settle past commitments, is here distinguished from a future-relations agreement to be concluded after withdrawal. The withdrawal agreement should however already 'tak[e] account of the framework for [a withdrawing State's] future relationship with the Union', yet it is not to settle this relationship; nor will it deal with the future constitutional adjustments to the Union. For any changes to the EU Treaties require a unanimous Member State agreement, whereas the withdrawal agreement was specifically designed as an ordinary international agreement between the Union (!) and the departing Member State. Unlike an accession treaty, the withdrawal agreement will thus not constitute primary law of the Union and therefore cannot amend the EU Treaties.

Interestingly, the final version of Article 50 makes no mention of a transition period; nor does it refer to a continued EEA 'membership' of the departing state. These matters were rightly dropped, because the former can be dealt with in the withdrawal agreement itself, while the latter must be achieved by a future-relations agreement.

b. Negotiating Brexit: Institutional and Procedural Aspects

There is no obligation to *conclude* a withdrawal agreement under Article 50; yet, as was argued above, there is an obligation to *negotiate* on the Union and the United Kingdom. Who negotiates the withdrawal agreement, and according to which procedure(s)? Figure 19.2 offers a stylised outline of the various elements of the withdrawal process. We shall start with the institutional aspects and subsequently explore some of the procedural and substantive aspects of the negotiations.

[69] The wording of Art. 50 TEU only imposes an obligation to negotiate such an agreement on the Union; yet such a duty equally exists with regard to the United Kingdom. This duty, while not directly based on Art. 50 TEU, derives from the UK's (continued) status as a Member State of the Union and the duty of loyal cooperation under Art. 4(3) TEU. For the opposite view, insisting on a purely unilateral obligation on the Union, see C. Hillion, 'Accession and Withdrawal in the Law of the European Union', in A. Arnull and D. Chalmers (eds.), *The Oxford Handbook of European Union Law* (Oxford University Press, 2015), 126; A. Łazowski, 'Inside But Out? The UK and the EU', in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press, 2017), 493.

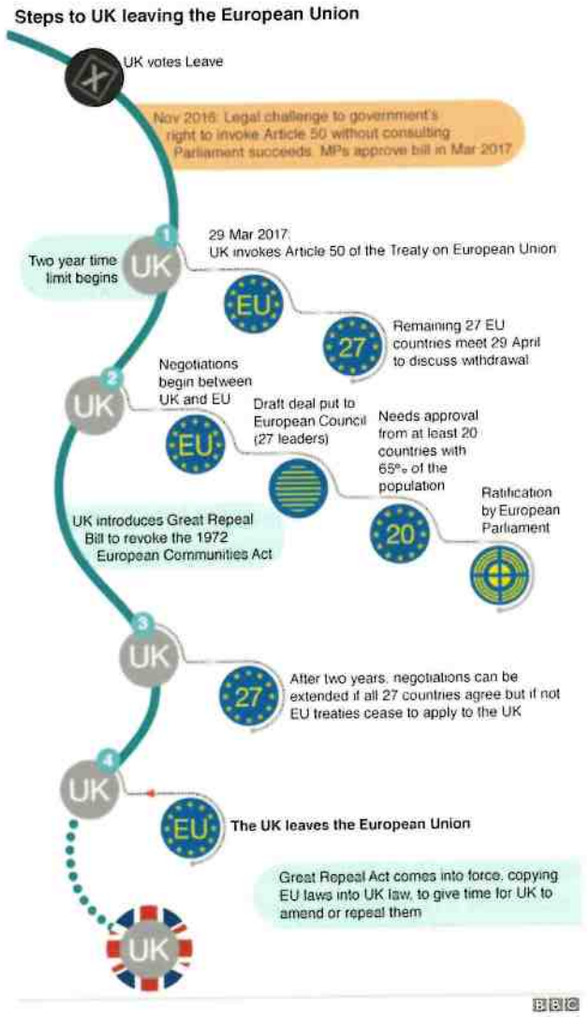

Figure 19.2 Stylised Withdrawal Process

aa. Institutional Structures and Negotiating Teams

In the aftermath of the Brexit Referendum, the United Kingdom created a new ministry: the Department for Exiting the European Union (DExEU) that is headed by its Secretary of State, David Davis (Figure 19.3). The Department's task is to ensure an orderly Brexit and to conduct the international negotiations with the European Union.[70] The Secretary of State

[70] DExEU's principal aims are set out in the government's 2017 White Paper 'The United Kingdom's Exit from and New Partnership with the European Union'. The paper is available at: www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper.

thereby heads the British negotiation team,[71] whose terms of reference were laid down in June 2017.[72]

In addition, a Joint Ministerial Committee on EU Negotiations has been established so as to allow the heads of the devolved administrations of Northern Ireland, Scotland and Wales direct input into the negotiations. And within the Westminster Parliament itself, the Select Committee on the European Union is tasked with scrutinising the government's negotiating strategy.

On the European Union side, Article 50 directly calls on the European Council to draw up 'guidelines'; and the remaining 27 Member States and the Union also have, inspired by a reference to Article 218(3) TFEU,[73] called on the Commission and the Council to draw up more specific 'negotiating directives' and to nominate the Commission as the Union negotiator.[74] The Commission has thereby set up an independent unit dealing specifically with Brexit: the Article 50 Task

Figure 19.3 DExEU Secretary of State: David Davis

[71] For the biographies of the Civil Service representatives of the British negotiating team, see: www.gov.uk/government/publications/biographies-of-the-civil-service representatives-for-the-negotiations-with-the-eu.

[72] For the terms, see: www.gov.uk/government/publications/terms-of-reference-for-the-article-50-negotiations-between-the-united-kingdom-and-the-european-union.

[73] The provision states: 'The Commission … shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominate the Union negotiator or the head of the Union's negotiating team.'

[74] Statement after the Informal Meeting of the 27 Heads of State or Government, 15 December 2016, available at: www.consilium.europa.eu/en/press/press-releases/2016/12/15/statement-informal-meeting-27.

Force.[75] Led by the EU Chief Negotiator, Michel Barnier (Figure 19.4), it consists of a small team of experts on issues ranging from the internal market to international trade. The Commission has thereby been asked to integrate representatives from the Council as well as the European Council; and the Union negotiator is also obliged to 'systematically report' to the European Council, the Council and the Parliament.[76]

bb. Procedural Stages and Substantive Issues

The European Council has insisted on a 'phased approach' to the negotiations that must concentrate exclusively on the 'withdrawal agreement'.[77] A first phase was to deal with issues directly resulting from withdrawal, whereas a second phase would eventually turn to the future 'framework' of cooperation between the United Kingdom and the Union.

During the first phase three main problems were discussed: the situation of citizens (and businesses) that have exercised their free movement rights, the 'Irish question', and a financial settlement for British commitments.[78]

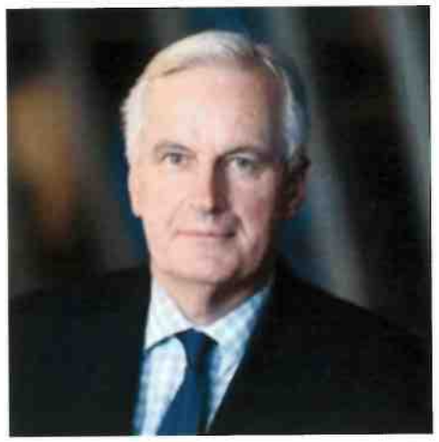

Figure 19.4 EU Chief Negotiator: Michel Barnier

[75] For an overview, see https://ec.europa.eu/info/departments/taskforce-article-50-negotiations-united-kingdom_en.

[76] Statement after the Informal Meeting of the 27 Heads of State or Government (n. 74 above), paras. 3 and 7.

[77] For the European Council Brexit Guidelines, see www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines. This approach had not been favoured by the British negotiation team, which had hoped to tie the United Kingdom's exit directly to a new partnership agreement. This was however already impossible from a practical point of view. And from a more theoretical perspective, the argument has even been made that the negotiation procedure for the withdrawal agreement is, in any case, a Union matter (see A. Łazowski, 'Withdrawal from the European Union and Alternatives to Membership' (2012) 37 *EL Rev.* 523 at 527: 'The TEU leaves the decision on withdrawal to the domestic constitutional laws, while at the same time providing an EU procedural framework for departure').

[78] European Council Brexit Guidelines (n. 77 above), paras. 8–11.

The first issue has been relatively uncontroversial: the rights of EU citizens in the UK and the rights of British citizens in the EU-27 'derived from Union law and based on past life choices' will be guaranteed.[79]

The second problem – the Irish border question – has proved to be the hardest problem; and at the time of writing this edition, a diplomatic formula has been chosen to postpone the issue to the second stage of the negotiations.[80]

The third issue turned out to be easier than originally expected. For the Union here followed a 'divorce model' and approached the outstanding financial commitments from the premise that '[a] single financial settlement should be based on the principle that the United Kingdom must honour its share of the financing of all the obligations undertaken while it was a member of the Union'.[81] This view sharply contrasted with a British opinion advocating a 'club model' and according to which 'Article 50 TEU allows the UK to leave the EU without being liable for outstanding financial obligations under the EU budget or other financial instruments'.[82] Yet again a compromise was found that allowed the negotiations to move to the second stage.

What will be discussed during the 'second phase' of the Brexit negotiations? The Guidelines adopted by the European Council here first and foremost concentrate on 'transitional arrangements' and a 'transitional period' of around two years.[83] Proposed by the British government itself, this period is meant to offer

[79] See Joint Report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Art. 50 TEU on the United Kingdom's orderly withdrawal from the European Union, available at: https://ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom_en, para. 6. Despite having found a general solution to the citizen problem, there remain, sadly, a number of unsettled specifics that will need to be worked out in the future!

[80] *Ibid.*, paras. 49–50: 'In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North–South cooperation, the all-island economy and the protection of the 1998 Agreement. In the absence of agreed solutions, as set out in the previous paragraph, the United Kingdom will ensure that no new regulatory barriers develop between Northern Ireland and the rest of the United Kingdom, unless, consistent with the 1998 Agreement, the Northern Ireland Executive and Assembly agree that distinct arrangements are appropriate for Northern Ireland. In all circumstances, the United Kingdom will continue to ensure the same unfettered access for Northern Ireland's businesses to the whole of the United Kingdom internal market.'

[81] Council, Directives for the negotiation of an agreement with the United Kingdom, available at: https://ec.europa.eu/commission/publications/negotiating-directives-article-50-negotiations_en, para. 25.

[82] House of Lords, European Union Committee, 'Brexit and the EU Budget', available at: https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/125/125.pdf, para. 133.

[83] European Council Guidelines (Second Phase), available at: www.consilium.europa.eu/media/32236/15-euco-art50-guidelines-en.pdf.

a smooth and orderly withdrawal; and, according to the Union, the United Kingdom would – while formally outside the Union – still need to apply all EU law and it would, in particular, need to 'continue to participate in the Customs Union and the Single Market (with all four freedoms) during the transition'.[84] Importantly: the transitional period would however not extend British 'membership' inside the Union; it would, rather, like a reverse accession process, extend the Union *acquis* to a third State on the basis of an international treaty.[85]

Finally, and most importantly, during the second phase of the negotiations, the 'framework' for the future relationship between the United Kingdom and the Union will need to be discussed. In the words of the European Council:

> While an agreement on a future relationship between the Union and the United Kingdom as such can only be finalised and concluded once the United Kingdom has become a third country, Article 50 TEU requires to take account of the framework for its future relationship with the Union in the arrangements for withdrawal. To this end, an overall understanding on the framework for the future relationship should be identified during a second phase of the negotiations under Article 50 TEU. We stand ready to engage in preliminary and preparatory discussions to this end in the context of negotiations under Article 50 TEU[.][86]

The second phase of the negotiations should thus end with a bridge from membership to partnership; yet again, this bridge is not the future (trade) agreement itself.

c. *Conclusion and Ratification I: The United Kingdom*

The British process of treaty ratification will be determined by two acts: the Constitutional Reform and Governance Act 2010 and the European Union Act 2011; but it is not yet clear how precisely the two acts will operate in relation to the withdrawal agreement.

According to section 20 of the 2010 Act, international treaties need to be laid before Parliament 21 sitting days prior to ratification and may only be concluded if neither House has opposed the ratification during this period. If a negative

[84] *Ibid.*, para. 4. According to the Guidelines this would also imply that 'changes to the acquis adopted by EU institutions, bodies, offices and agencies will have to apply both to the United Kingdom and the EU', '[a]ll existing regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures will also apply', and the United Kingdom 'will have to continue to comply with EU trade policy' (*ibid.*).

[85] In nature, these obligations should therefore be international law obligations; yet if the Union acquis is extended, the doctrines of supremacy and direct effect – these quintessential characteristics of European law – should be part of the withdrawal agreement. At the same time, 'as a third country, [the United Kingdom] will no longer participate in or nominate or elect members of the EU institutions' (*ibid.*, para. 3).

[86] European Council Brexit Guidelines (First Phase), para. 5.

vote however solely comes from the House of Lords, the Statute states that the treaty may still be ratified 'if a Minister of the Crown has laid before Parliament a statement indicating that the Minister is of the opinion that the treaty should nevertheless be ratified and explaining why'.[87] Following the 'ordinary' British treaty-making procedure therefore places Parliament's power between consultation and consent. For British constitutional law does not generally require a parliamentary debate or a positive parliamentary vote but simply relies on the absence in a negative vote in 'the Commons'.

For the European Union, however, a special procedure may apply, as section 23 of the 2010 Act expressly defers to 'a treaty that is subject to a requirement imposed by Part I of the European Union Act 2011'.[88] The latter contains a special ratification procedure in section 2:

> Treaties amending or replacing TEU or TFEU
> (1) A treaty which amends or replaces TEU or TFEU is not to be ratified unless –
> (a) a statement relating to the treaty was laid before Parliament in accordance with section 5,[89]
> (b) the treaty is approved by Act of Parliament, and
> (c) the referendum condition or the exemption condition is met.
> (2) The referendum condition is that –
> (a) the Act providing for the approval of the treaty provides that the provision approving the treaty is not to come into force until a referendum about whether the treaty should be ratified has been held throughout the United Kingdom or, where the treaty also affects Gibraltar, throughout the United Kingdom and Gibraltar,
> (b) the referendum has been held, and
> (c) the majority of those voting in the referendum are in favour of the ratification of the treaty.
> (3) The exemption condition is that the Act providing for the approval of the treaty states that the treaty does not fall within section 4.

The provision here replaces, within the context of European Union law, the negative vote of the Commons with a – stronger – positive vote in Parliament; and it even subjects *certain* EU Treaty amendments to a popular referendum.[90]

[87] Constitutional Reform and Governance Act 2010, s. 20(7) and (8).

[88] *Ibid.*, s. 23(1)(c).

[89] Section 5(1) of the European Union Act 2011 states: 'If a treaty amending TEU or TFEU is agreed in an inter-governmental conference, a Minister of the Crown must lay the required statement before Parliament before the end of the 2 months beginning with the date on which the treaty is agreed.'

[90] Section 4 here lists the situations in which a referendum is required and identifies these situations with EU treaty amendments where the Union's competences or powers are *extended*. Textually, then, a removal of Union competences (through withdrawal from the Union) would therefore not be subject to a referendum requirement. However, high politics may here once more trump legal analysis.

But would section 2 actually apply to the withdrawal agreement in the first place? The provision covers 'treaties amending or replacing [the] TEU or TFEU'; and while the withdrawal agreement cannot amend the EU Treaties,[91] the question arises whether 'withdrawing' from the EU Treaties can nevertheless be characterised as 'replacing' the EU Treaties. All depends here on the meaning of 'replacing'; and, in a restrictive sense, the withdrawal agreement is of course *not* replacing the EU Treaties, while in a broader sense one could argue that any transitional arrangements within the withdrawal agreement can be seen as having a 'replacing' effect for European Union law within the United Kingdom. If that argument is accepted, the 2011 Act would constitute both the *lex specialis* and *lex posterior* to the 2010 Act; and the withdrawal agreement would therefore require the unconditional and positive consent of the British Parliament. If that argument is not accepted, then the (residual) Constitutional Reform and Governance Act 2010 would apply – unless the British Parliament decided to impose the requirement of a 'meaningful vote' on the withdrawal agreement by other means.[92]

d. Conclusion and Ratification II: The European Union

What about the ratification of the withdrawal agreement by the European Union? For the Union, Article 50 TEU states that the agreement 'shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament'; and the provision also clarifies that the member of the Council 'representing the withdrawing Member State shall not participate in the discussions' in the Council, where a super-qualified majority, as defined in Article 238(3)(b) TFEU, is to apply.[93]

Let us unpack these requirements one by one.

First, both branches of the EU legislator need to give their respective consent. For the Council, a special majority applies: 'the qualified majority shall be defined as at least 72% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States'.[94] This 72 per cent of the 27 Member States equates to 20 Member States; and in a Union without the United Kingdom a blocking minority of 35% of the Union population translates into about 155 million people. Importantly, unlike

[91] On this point, see section 2(a/bb) above: the withdrawal agreement cannot amend the EU Treaties because the agreement is, unlike an accession treaty, not primary law.

[92] At the time of writing, this seems to be happening through an amendment added to the EU (Withdrawal) Bill. For an early analysis of this, see M. Elliott's blog, 'Does the Government Defeat on Clause 9 of the EU (Withdrawal) Bill Mean Parliament Has "Taken Back Control?"', at: https://publiclawforeveryone.com/2017/12/14/does-the-government-defeat-on-clause-9-of-the-eu-withdrawal-bill-mean-parliament-has-taken-back-control.

[93] Art. 50(2) and (4) TEU.

[94] Art. 238(3)(b) TFEU.

the general rule in Article 16(4) TEU, a blocking minority of only three – not four – states would seem to be sufficient.[95]

With regard to the European Parliament, Article 50 specifies that it must give its consent; and consent here means the 'majority of the votes cast'.[96] Would these votes include the British Members of the European Parliament? Article 50 does not contain an express exclusion rule here, and the argument has therefore been made that all MEPs – including the British MEPs – should be entitled to vote on the withdrawal agreement.[97] Teleological reasons strengthen this argument: MEPs do not represent their Member State but directly represent the European citizens as a collectivity.[98] The point is however not uncontested; and others have indeed argued that the exclusion rule within Article 50 with regard to the British representative in the (European) Council should also apply, analogously, to the European Parliament.[99]

What about the European Court of Justice? The argument has been made that 'the jurisdiction of the Court over the withdrawal agreement does not seem to be restricted'; and that, in particular, 'the *renvoi* in Article 50 TEU to Article 218 TFEU opens the possibility of the European Court of Justice intervening … by way of an advisory opinion based on Article 218 (11) TFEU'.[100] Textually, this is however not at all clear: for Article 50 TEU refers only to the third paragraph of Article 218 TFEU, which exclusively deals with the negotiation stage. This could, contrariwise, be taken to mean that all the other stages in the life of the withdrawal agreement are exclusively governed by Article 50; and since the provision is silent on the jurisdiction of the Court, it would appear that the *ex ante* jurisdiction of the Court under Article 218(11) is unavailable. This would also make enormous sense in light of the two-year time limit imposed by the provision. Because in the absence of an extension, a judicial objection would be tantamount to a judicial veto of the agreement.

[95] Alas, if Germany and France agreed to reject the agreement, they would only need another Member State with a population of 10 million to block the agreement.

[96] Rule 82 of the European Parliament's Rules of Procedure is entitled 'Withdrawal from the Union' and states: 'If a Member State decides, pursuant to Article 50 of the Treaty on European Union, to withdraw from the Union, the matter shall be referred to the committee responsible. Rule 81 shall apply *mutatis mutandis*. Parliament shall decide whether to give its consent to an agreement on the withdrawal by a majority of the votes cast.'

[97] In favour of this view, see D. Harvey, 'What Role for the European Parliament under Article 50 TEU?' (2017) 42 *EL Rev.* 585 at 600: '[U]ntil the day on which the withdrawal agreement enters into force, UK MEPs will continue to particulate in the workings of the European Parliament and, as a consequence, vote on any withdrawal agreement.'

[98] On this point, see Chapter 5, section 2.

[99] Łazowski, 'Withdrawal from the European Union' (n. 77 above), 528: 'It has to be emphasised that a departing country will be treated as a third country during such negotiations, and therefore will not participate in consensus-building in the European Council and the Council or in the voting, should that prove necessary. Although Art. 50 TEU is silent on this, it seems reasonable to expect that the same rule will apply to the elected members of the European Parliament from the departing country.'

[100] Hillion, 'Accession and Withdrawal' (n. 69 above), 141–2.

3. Transitioning Out: European Union Law after Brexit

As long as the United Kingdom remains inside the European Union, its formal membership is a full membership for all matters unrelated to Brexit. This must mean two things: positively, the United Kingdom remains formally entitled to participate in all the ordinary work of the EU institutions as if Article 50 TEU had not been triggered; while it must also, negatively, fulfil all its obligations as a current Member State. It is hard to see how there can be any differentiation of its 'ordinary' membership rights; while it is equally hard to accept that a departing member could already be relieved of some of its obligations. The better view therefore insists that all rights and obligations of a full member are retained; and this, in particular, means that during the withdrawal process the United Kingdom cannot behave as it were already outside the Union.[101]

Yet on 30 March 2019 (unless extended), the United Kingdom will have exited the European Union.[102] From the perspective of the *monist* Union legal order, European Union law will henceforth cease to apply within the United Kingdom. From the perspective of a classic *dualist* legal order, this would however not necessarily have to follow. For, as long as the European Communities Act 1972 was in existence, it could – following a strict dualism – be taken to mean that all European Union law 'created or arising by or under the Treaties' would continue to apply as long as the Act itself was not repealed. From a dualist perspective, European law would thus continue to extend to the United Kingdom until the 1972 Communities Act was itself repealed; and in order to do this, the British government has been preparing a 'Great Repeal Bill' – now more mundanely entitled the 'European Union (Withdrawal) Bill.[103]

a. The European Union (Withdrawal) Bill: Functions and Content

The functions of the Withdrawal Bill are manifold; and in the explanatory notes accompanying the government's original proposal, four such functions are identified. In addition to repealing the European Communities Act 1972, its main function is to 'convert EU law as it stands at the moment of exit into domestic

[101] As long as the UK is thus inside the Union it cannot negotiate, let alone conclude, international trade agreements. This is an exclusive competence of the European Union. On this point, see Chapter 7, section 2(a) and (online) Chapter 18B, section 1(a).

[102] EU membership only ends after the two-year period (or as extended) has expired. The withdrawing Member State is not allowed to depart earlier unless a mutual agreement has been reached. This follows from the mutual (!) obligation to reach an agreement within two years. The idea that a repeal of the 1972 Act would also end EU membership is based on a fallacy. For even if the repeal of the Act would remove the validity of EU law within the United Kingdom, Art. 50 TEU would still insist – from the EU perspective – on the continued membership of the departing state until the end of the two-year limit.

[103] The following section is based on the original draft bill, as introduced by the British government on 13 July 2017. Since it was first presented various amendments have been suggested. The original draft as well as the 'Explanatory Notes' and the subsequent amendments, can be found at: https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal/documents.html.

Table 19.1 European Union (Withdrawal) Bill

Clause	Provision
1	Repeal of the European Communities Act 1972
2	Saving for EU-derived Domestic Legislation
3	Incorporation of Direct EU Legislation
4	Saving for Rights under Section 2(1) ECA
5	Exceptions to Savings and Incorporation
6	Interpretation of Retained EU Law
7	Dealing with Deficiencies arising from Withdrawal
8	Complying with International Obligations
9	Implementing the Withdrawal Agreement
10	Corresponding Powers involving Devolved Authorities
11	Retaining EU Restrictions in Devolved Legislation
12–19	Financial, General and Final Provisions

law before the UK leaves the EU'.[104] This second function is especially necessary in light of the Supreme Court's *Miller* judgment – discussed above – according to which 'the ECA is not itself an originating source of EU law, but rather the "conduit pipe" through which EU law flows into UK domestic law' and which implies that all directly effective EU law would cease to apply after Brexit.[105] With regard to non-directly applicable EU law – like EU directives – such a 'conversion' from European into British law was seen as unnecessary as implementation legislation on the basis of section 2(2) of the European Communities Act had already achieved such a conversion into domestic law.

The content of the original European Union (Withdrawal) Bill can be seen in Table 19.1. Clause 1 here unambiguously states: 'The European Communities Act 1972 is repealed on exit day.' The rest of the Bill then tries to mitigate that result by first clarifying, in Clause 2, that 'EU-derived domestic legislation' 'continues to have effect in domestic law on and after exit day'. (This clarification was deemed necessary as, under British constitutional law, secondary legislation normally lapses with the primary legislation on which it is based.) By contrast, 'direct EU legislation', operating before exit day, will henceforth be incorporated as a 'part of domestic law' by means of Clause 3. But since the latter clause primarily covers EU secondary or tertiary law, adopted as EU regulations or decisions, Clause 4 subsequently expands the incorporation to any rights or obligations that have in the past arisen under EU primary law, and especially the

[104] Explanatory Notes, para. 2. [105] *Ibid.*, para. 19.

EU Treaties. The main exception here is the Charter of Fundamental Rights;[106] and the Union principle of State liability under *Francovich*.[107]

What is the status of 'retained' European Union law after the withdrawal? Clause 5 here offers the following rules:

> (1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day.
> (2) Accordingly, the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.
> (3) Subsection (1) does not prevent the principle of the supremacy of EU law from applying to a modification made on or after exit day of any enactment or rule of law passed or made before exit day if the application of the principle is consistent with the intention of the modification.

The provision clarifies that 'retained' Union law will continue to enjoy 'supremacy' over British law adopted *prior* to Brexit; whereas any British legislation adopted *after* Brexit will henceforth be able to amend or repeal 'retained' European Union law. Complex domestic questions are bound to arise under paragraph 3. The question here will inevitably be what constitutes a 'modification' (supremacy retained) as opposed to an 'amendment' or 'repeal' (supremacy not retained), especially if 'modifications' to European Union law are allowed to be made by the executive.[108] Be that as it may, as regards the British courts, Clause 6 underlines the judicial aspect of the supremacy question. It states:

> (1) A court or tribunal –
> (a) is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, and
> (b) cannot refer any matter to the European Court on or after exit day.
> (2) A court or tribunal need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so.
> (3) Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after exit day and so far as they are relevant to it –
> (a) in accordance with any retained case law and any retained general principles of EU law, and

[106] European Union (Withdrawal) Bill, s. 5(4). [107] *Ibid.*, sch. 1, s. 4.

[108] Clause 7 here states: 'A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate – (a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU.'

> (b) having regard (among other things) to the limits, immediately before exit day, of EU competences.
> (4) But –
> (a) the Supreme Court is not bound by any retained case law,
> (b) the [Scottish] High Court of Justiciary is not bound by any retained EU case law …

The jurisprudence of the European Court of Justice will consequently cease to be binding on British courts after Brexit; yet as regards retained EU law, the provision also states that its meaning will continue to be determined by 'retained case law', that is: the jurisprudence of the European Court of Justice before Brexit. The only two courts that are not bound by past precedents of the European Court are the British Supreme Court (and the highest Scottish criminal court) – both of whom will be allowed to (re)assert their position at the top of the judicial hierarchy within the United Kingdom.

b. *In Particular: International Agreements of the European Union*

In what must count as one of the greatest misrepresentations during the referendum campaign, Lord Lawson confidently told his BBC Radio 4 audience the following 'truth':

> First of all our trade relations with the rest of the world remain totally unchanged because the European Union did not negotiate as the European Union … [It is] not allowed to, [it is] not a member of the World Trade Organization, it negotiated on behalf of the member states. So all our arrangements with the rest of the world remain totally unchanged.[109]

Nothing could of course be further from the truth. For not only is the Union a member of the WTO, it generally concludes its international agreement under its 'own name'; and even if the Member States sometimes join the Union in what is called a 'mixed agreement',[110] the Union enjoys its own legal personality and assumes 'its' international obligations as distinct from those separately assumed by the Member States.

Leaving the European Union therefore – undoubtedly – means leaving behind those international treaties to which the United Kingdom is not an independent party, because with regard to all 'pure' Union agreements, only the Union – and

[109] BBC Radio 4, *The World at One* (29 February 2016). Lawson's words have been variously reported, *inter alia* by the BBC itself, see: www.bbc.co.uk/news/uk-politics-35698856. This was one of 'the' key moments when the lack of knowledge of EU law in the highest political classes of the United Kingdom became painfully obvious.

[110] On mixed agreements, see Chapter 8, section 4(a).

not the Member States – is a party to those agreements. On Brexit day, these Union agreements will simply dissolve for the United Kingdom.[111]

The situation is slightly more complex with regard to mixed agreements, that is: agreements to which both the Union and the Member States are joint parties. Technically, the United Kingdom is here an independent signatory to these treaties; and it could therefore – theoretically – continue to enjoy all the rights and obligations arising under international law after Brexit. Yet this reading has been put into question by EU external relations specialists, who have – rightly – pointed out that this logic will not hold for so-called 'bilateral' mixed agreements.[112] These are international agreements to which a Member State is a party qua membership of the Union.

A good illustration here is the EEA Agreement – discussed below. The Agreement is a mixed agreement, which defines its two 'contracting parties' as, on the one hand, the 'EFTA States' and, on the other hand, the '[Union] and the [EU] Member States'.[113] The United Kingdom, while listed as a Member State of the European Union, is nevertheless not an 'independent' signatory party to that international agreement. While formally listed as a State signatory, it is only a contracting party qua membership of the Union and once its Union membership is revoked, the EEA Agreement will cease to apply to the United Kingdom.[114]

With regard to 'multilateral' mixed agreements, on the other hand, matters are different. whenever the United Kingdom is an 'original' contracting party in its own right, all treaty obligations incurred under a mixed agreement will continue to apply to it after Brexit.[115] This is – with some minor exceptions – the case for the WTO Agreement.[116] The United Kingdom would indeed remain a member of the WTO after its withdrawal; and in the absence of an alternative partnership agreement with the Union, its relationship with the

[111] Under international law a seceding State may, sometimes, continues to be bound by an international treaty concluded by the entity from which it is seceding; yet this applies only to a very limited number of treaties. On this point, see T. Sparks, 'Brexit and the Bravehearted: An Independent Scotland, the European Treaties and the Law of Succession' (forthcoming).

[112] See especially M. Cremona, 'UK Trade Policy', in M. Dougan (ed.), *The UK After Brexit: Legal and Policy Challenges* (Intersentia, 2017), 247 esp. at 251ff.

[113] Agreement on the European Economic Area ('EEA Agreement') (1994) OJ L1/3, Art. 2(b) and (c).

[114] This is why, in my view, Art. 103(4) of the Commission's Penelope Draft was wrong.

[115] This may however not mean that a third party could not itself terminate the international agreement on the grounds that a fundamental change of circumstance has taken place when the United Kingdom is no longer a Member State of the Union. For the international principles governing a fundamental change of circumstances, see Art. 62 of the Vienna Convention of the Law of Treaties.

[116] Under Art. XI(1) WTO Agreement, 'original membership' is defined as the contacting parties of the GATT 1947 as well as the European Union; and since the UK – and not the European Union – was an original member of the GATT, it would remain an independent member of the WTO. For a long discussion with regard to Britain's WTO status, see L. Bartels, 'The UK's Status in the WTO Post-Brexit', in R. Schütze and S. Tierney (eds.), *The United Kingdom and the Federal Principle* (Hart, 2018 – forthcoming).

Union would fall back to be governed by WTO terms.[117] This 'hard Brexit' scenario is therefore often referred to as the 'WTO model'.

4. Frameworks for the Future: Alternative Relations with the Union

What will the future relationship between the United Kingdom and the European Union look like? The precise nature of that relationship can only be negotiated *after* the British exit; and the reason for the strict separation between the 'withdrawal agreement' and the 'future-relations' agreement is simply time. The negotiation of a comprehensive trade agreement may take between five and ten years, whereas the withdrawal agreement needs to be concluded within two years following notification; and even if Article 50 allows for an extension of this period,[118] it is unlikely to be extended for a significantly longer period of time.

What types of alternative partnerships are presently available? While the United Kingdom can, and will, of course try to get a 'bespoke' agreement that works best for itself, what models has the EU so far developed for third States wishing to be closely associated with the Union? Three such models shall be presented in this final section: the EEA model ('Norway model'), the Customs Union model ('Turkey model') and the Free Trade Agreement model ('Canada model'). In terms of economic association with the single market, each of these models will offer less than EU membership but more than WTO membership with the 'Norway model' offering the closest association and the 'Canada model' offering the loosest association in this context (see Figure 19.5).

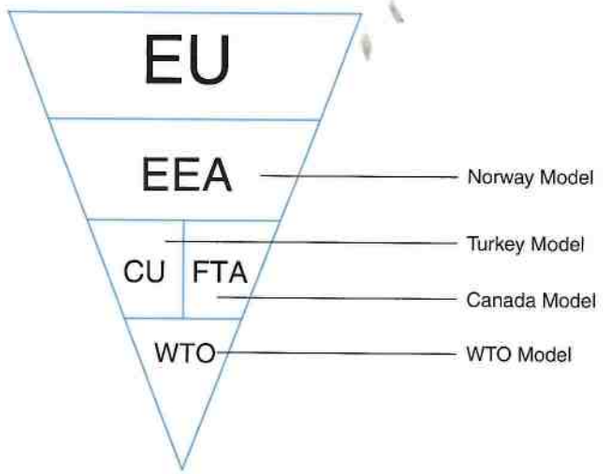

Figure 19.5 Declining Levels of Economic Integration

[117] For a brief overview of the structure of the WTO Agreement, see (online) Chapter 18B, section 1(c/aa).

[118] According to Art. 50(3) TEU, the European Council, acting unanimously, must here agree with the withdrawing Member State.

a. Joining the European Economic Area: The 'Norway Model'

The Agreement on the European Economic Area (EEA) was signed in 1992 and entered into force on 1 January 1994.[119] It brings together the European Union (and its Member States) with the EFTA States except for Switzerland.[120]

The agreement aims to establish a 'homogenous' free trade area;[121] and thereby covers the free movement of goods (Part II), the free movement of persons, services and capital (Part III), competition law (Part IV); while it also regulates flanking policies that are relevant to the four freedoms (Part V).[122] The provisions within Parts I-V are (almost) identical to those in the EU Treaties. However, the EEA is not a customs union but a 'fundamentally improved free trade area';[123] and the EFTA states have consequently retained their freedom to negotiate commercial agreements with third states. The EEA Agreement equally leaves the EFTA states free to autonomously act in other important areas of EU competence (see Table 19.2). They will however have to pay some sums into the Union budget.

Table 19.2 EEA Agreement: Substantive Coverage

EEA: Covered	EEA: Not Covered
Free Movement: Goods	Common Commercial Policy
Free Movement: Persons	Common Agricultural Policy
Free Movement: Services	Common Foreign and Security Policy
Free Movement: Capital	Area of Freedom, Security & Justice
Competition Law (and State Aid)	European Monetary Union

[119] EEA Agreement (n. 113 above).

[120] The EFTA comprises today four States: Iceland, Liechtenstein, Norway and Switzerland. The latter is however not part of the EEA, as the ratification of the EEA Agreement was rejected in a referendum. The EU–Swiss relations are therefore based on a wide range and great number of bilateral agreements (see S. Breitenmoser, 'Sectoral Agreements between the EC and Switzerland: Contents and Context' (2003) 30 CMLR 1137). The 'Swiss model' comes nevertheless substantively very close to the EEA model. The major 'institutional' difference relates to how regulatory homogeneity with Union legislation is achieved. The Union has here been highly critical of the Swiss model, and it may therefore not be a viable option for the future relations between the Union and the United Kingdom. In this sense, see C. Tobler, 'One of Many Challenges after "Brexit": The Institutional Framework of an Alternative Agreement – Lessons from Switzerland and Elsewhere?' (2016) 23 *Maastricht Journal of European and Comparative Law* 575.

[121] EEA Agreement (n. 113 above), Art. 1.

[122] Part V of the EEA Agreement contains rules on 'Social Policy', 'Consumer Protection', 'Environment', 'Statistics' and 'Company Law'.

[123] S. Norberg, 'The Agreement on a European Economic Area' (1992) 29 CMLR 1171 at 1173.

The central aim behind the EEA is 'to provide for the fullest possible realization of the free movement of goods, persons, services and capital within the whole European Economic Area, *so that the internal market established within the European Union is extended to the EFTA States*'.[124] And, in order to achieve that aim, the EEA Agreement does not only duplicate the European Union's provisions on 'negative integration'; on the contrary, a significant part of the Agreement deals with 'positive integration' so as to ensure regulatory alignment between the EU Member States and the EFTA Member States. This idea of a (dynamic) legislative homogeneity indeed 'is the key principle in the EEA'.[125]

Positive integration or legislative alignment is thereby achieved in a dual manner. On the one hand, all relevant pre-1992 Union acts – listed in the Agreement's Annexes – had to be incorporated into the domestic legal orders of the EFTA States. With regard to post-1992 developments, on the other hand, the Agreement calls on an 'EEA Joint Committee' to update the Agreement's Annexes and Protocols in light of new legislative developments within the Union.[126] The EEA Joint Committee is thereby composed of representatives of the Union and the EFTA States and will act 'by agreement between the [Union], on the one hand, and the EFTA States speaking with one voice, on the other'.[127] In the past, and in (almost) all cases, the EEA Joint Committee has agreed to simply 'rubber-stamp' the relevant EU acts;[128] and the principle of legislative homogeneity has therefore – uncharitably – been identified with European 'hegemony'; or at least with a significant democratic deficit.[129] For the

[124] Case C-452/01, *Ospelt and Schlössle Weissenberg Familienstiftung* (2003) ECR I-9743, para. 29 (emphasis added).

[125] G. Baur, 'Decision-making Procedure and Implementation of New Law', in C. Baudenbacher (ed.), *The Handbook of EEA Law* (Springer, 2016), 45 at 51. The EEA idea of a 'dynamic' adaptation is often contrasted with the 'static' adaptation under the Swiss bilateral model.

[126] See Art. 102(1) EEA Agreement: 'In order to guarantee the legal security and the homogeneity of the EEA, the EEA Joint Committee shall take a decision concerning an amendment of an Annex to this Agreement as closely as possible to the adoption by the [Union] of the corresponding new [Union] legislation with a view to permitting a simultaneous application of the latter as well as of the amendments of the Annexes to the Agreement. To this end, the [Union] shall, whenever adopting a legislative act on an issue which is governed by this Agreement, as soon as possible inform the other Contracting Parties in the EEA Joint Committee. These committees are listed in Protocol 37. The modalities of such an association are set out in the relevant sectoral Protocols and Annexes dealing with the matter concerned.' Union acts that are relevant for the EEA, are labelled as 'Text with EEA relevance'.

[127] *Ibid.*, Art. 93(2).

[128] Legislative exemptions and adaptions are nevertheless possible, see J. Jonsdottir, *Europeanization and the European Economic Area* (Routledge, 2012), 50–3. If it were to come to a disagreement between the Union and the EFTA States, the disputed part of the EEA Agreement would be provisionally suspended (EEA Agreement (n. 113 above), Art. 102(5)).

[129] See H. Haukeland Fredriksen and C. Franklin, 'Of Pragmatism and Principles: The EEA Agreement 20 Years on' (2015) 52 *CML Rev.* 629 at 633. This has been accepted by the

simple extension of Union legislation to the EFTA States means that it applies to States that have not been represented in the Union legislature.

However, there is nonetheless a degree of normative and substantive 'heterogeneity' between the EU and the EEA. The greatest normative difference here relates to the nature of EEA law: 'EEA law does not entail a transfer of legislative powers' because it lacks supremacy and direct effect.[130] There are moreover also substantive differences. For the commitment towards 'the fullest possible realization' of the single market does not signify its 'full' realisation. The Court of Justice has thus clarified that its fundamental freedoms jurisprudence 'cannot be transposed in its entirety' into the EEA Agreement 'since such movements take place in a different legal context'.[131] With regard to the free movement of persons, for example, the EEA Agreement indeed does not have provisions on 'citizenship' while it positively have – unlike the EU Treaties – a general safeguard clause that allows each contracting party to temporarily derogate from a fundamental freedom if 'serious economic, societal or environmental difficulties' were to arise.[132]

b. Joining a Customs Union: The 'Turkey Model'

The 1963 Association Agreement with Turkey ('Ankara Agreement') constitutes the oldest existing association agreement of the Union.[133] The purpose of the Ankara Agreement was 'to promote the continuous and balanced strength of trade and economic relations between the parties'; and this aim of a closer economic partnership was to be primarily pursued through a customs union.[134] This customs union covers trade in goods and would involve:

Norwegian government itself, which considers EEA membership as a form of 'integration without co-determination' (see EEA Review Committee (Norwegian government), 'Outside and Inside: Norway's Agreement with the European Union'), available at: www.europarl.europa.eu/meetdocs/2009_2014/documents/deea/dv/0226_13_/0226_13_en.pdf.

130 Case E-04/01, *Karlsson* (2002), esp. para. 28. The EFTA Court has however accepted the doctrines of indirect effect and state liability. For the former, see Case E-1/07, *Criminal proceedings against A* (2007), para. 39: '[N]ational courts are bound to interpret national law, and in particular legislative provisions specifically adopted to transpose EEA rules into national law, as far as possible in conformity with EEA law'. And, with regard to the latter, see Case E-09/97, *Erla María Sveinbjörnsdóttir* v. *Iceland* (1998), para. 62: '[I]t is a principle of the EEA Agreement that the Contracting Parties are obliged to provide for compensation for loss and damage caused to individuals by breaches of the obligations under the EEA Agreement for which the EFTA States can be held responsible.'

131 See Case C-540/07, *Commission* v. *Italy* (2009) ECR I-10983, para. 69.

132 Art. 112 EEA Agreement (n. 113 above).

133 Agreement establishing an Association between the European Economic [Union] and Turkey, signed at Ankara on 12 September 1963 by the Republic of Turkey, on the one hand, and by the Member States of the [EU] and the [Union], on the other ((1973) OJ C 113/1). Many provisions within the Ankara Agreement are further clarified by an additional Protocol: Additional Protocol and Financial Protocol ((1972) OJ L 293/4).

134 Ankara Agreement, Art. 2.

> – the prohibition between Member States of the [Union] and Turkey, of customs duties on imports and exports and of all charges having equivalent effect, quantitative restrictions and all other measures having equivalent effect which are designed to protect national production in a manner contrary to the objectives of this Agreement;
> – the adoption by Turkey of the Common Customs Tariff of the [Union] in its trade with third countries, and an approximation to the other [EU] rules on external trade.[135]

The Ankara Agreement also envisaged the future abolition of restrictions on the free movement of persons,[136] services[137] and capital;[138] yet these provisions were originally of a programmatic nature and therefore seen as non-legally enforceable norms. The implementation of the Ankara Agreement indeed heavily relied on a form of 'positive integration'; and the central decision-making body here was the 'Association Council'.[139] It consists of members of the Union (and its Member States), on the one hand, and Turkish representatives on the other; and it adopts its decisions by unanimous agreement.[140]

With regard to the free movement of goods, the Association Council's most important decision is Decision 1/95.[141] The latter establishes 'the rules for implementing the final phase of the Customs Union' by extending – almost always verbatim – the Union's own free movement of goods provisions to Turkey. In order to achieve this 'enlargement' of the internal market in goods, Turkey thereby promises to harmonise Turkish legislation of direct relevance to the operation of the internal market 'as far as possible with [Union] legislation'.[142]

135 *Ibid.*, Art. 10(2).

136 *Ibid.*, Art. 12: 'The Contracting Parties agree to be guided by Articles [45–7] the [FEU Treaty] Treaty for the purpose of progressively securing freedom of movement for workers between them.' And Art. 13: 'The Contracting Parties agree to be guided by Articles [49–52] and Article [54] of the [FEU] Treaty for the purpose of abolishing restrictions on freedom of establishment between them.'

137 *Ibid.*, Art. 14: 'The Contracting Parties agree to be guided by Articles [51, 52 and 54–61] of the [FEU] Treaty for the purpose of abolishing restrictions on freedom to provide services between them.'

138 *Ibid.*, Art. 20: 'The Contracting Parties shall consult each other with a view to facilitating movements of capital between Member States of the [Union] and Turkey which will further the objectives of this Agreement.'

139 Ibid., Art. 22(1): 'In order to attain the objectives of this Agreement the Council of Association shall have the power to take decisions in the cases provided for therein. Each of the Parties shall take the measures necessary to implement the decisions taken.'

140 *Ibid.*, Art. 23 – third indent.

141 Decision No. 1/95 of the EC–Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (1996) OJ L35/1.

142 *Ibid.*, Art. 54(1). These areas of direct relevance are defined as follows (*ibid.*, para. 2): 'Areas of direct relevance to the operation of the Customs Union shall be commercial policy and agreements with third countries comprising a commercial dimension for industrial

And were there to exist an – unresolvable – difference of opinion, the Union or Turkey can both 'take the necessary protection measures'.[143]

What is the substantive coverage of the EU–Turkey Customs Union? A customs union, unlike a free trade area, aims to abolish all customs-related barriers with regard to goods produced by the contracting parties but also third country goods 'in free circulation' within the customs Union. In order to achieve this aim and avoid deflections of trade,[144] the customs union will have a common commercial policy towards third states; and in the case of the EU–Turkish customs union, this 'common' policy is almost completely the European Union's commercial policy. Turkey has indeed promised to adopt 'substantially similar' commercial policy measures to those of the Union,[145] and in particular to 'align itself on the Common Customs Tariff'.[146] The customs union also aims to eliminate all non-tariff barriers to trade in goods;[147] and it equally incorporates much of the Union's competition rules.[148]

c. A (Preferential) Free Trade Agreement: The 'Canada Model'

The European Union has established a wide net of bilateral trade agreements with third States. Depending on whether or not they go beyond 'WTO treatment', one distinguishes between preferential and non-preferential trade agreements. An example of the latter could be seen in the 1994 Partnership and Cooperation Agreement between the Union and Russia, where the parties simply agreed to afford each other most-favoured-nation treatment.[149] Preferential trade agreements, by contrast, grant a specific advantage to a third state that goes beyond WTO treatment; and these agreements must – in order to be WTO conform – either create a customs union or a free trade area.[150]

A good illustration of such a preferential trade agreement is CETA: the free trade agreement concluded in 2017 between the European Union and

products, legislation on the abolition of technical barriers to trade in industrial products, competition and industrial and intellectual property law and customs legislation. The Association Council may decide to extend the list of areas where harmonization is to be achieved in the light of the Association's progress.'

143 *Ibid.*, Art. 58(2). These measures will subsequently be examined by the EU–Turkey Customs Union Joint Committee, but ultimately they will be subject to international arbitration (*ibid.*, Art. 61).

144 Deflections of trade occur when a third State chooses that Member State within a customs union that offers it the easiest entry into the union.

145 *Ibid.*, Art. 12. 146 *Ibid.*, Art. 13.

147 For example: Art. 5 of Decision 1/95 reproduces Art. 34 TFEU and states 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the parties.'

148 *Ibid.*, Arts. 32ff.

149 See 1994 Partnership and Cooperation Agreement between Russia and the European Communities [1997] OJ L 327/3, esp. Art. 10.

150 See Art. XXIV GATT.

Canada.[151] With CETA, the two contracting parties '[f]urther strengthen their close economic relationship'; and while building on their respective rights and obligations under the WTO, CETA's aim is to create a free trade area in the form of 'an expanded and secure market for their goods and services through the reduction or elimination of barriers to trade and investment'.[152]

Having been negotiated over seven years, and covering over 1,000 pages, CETA has 30 chapters that cover such diverse matters as trade in goods,[153] investment (capital)[154] and services,[155] as well as a wide range of flanking policies.[156] Within the context of the free movement of services, the Agreement also envisages a WTO-like form of the free movement of persons.[157] And while in no way representing anything close to the EEA or Customs Union arrangements, discussed above, CETA also contains a chapter on 'regulatory cooperation';[158] and it has set up a CETA Joint Committee, composed of representatives of the EU and Canada, that may take decisions by mutual consent.[159] The most controversial part of the Agreement originally related to its 'dispute settlement' mechanism;[160] and after severe reservations voiced by civil society, the original ISDS provisions have now been replaced by a court system that will exercise public – not private – powers.[161]

In light of its substantive scope and institutional infrastructure, CETA forms part of the 'new generation' of free trade agreements. Its principal effect will be an (almost) total reduction of tariffs and it also promises to significantly reduce non-tariff barriers in goods. And going beyond the substantive scope of a customs union arrangement, it enhances the legal commitments with regard to the liberalisation of services and investment; while it is also committed to a soft regulatory convergence. But because CETA creates – like EFTA – a free trade area, the Canada model allows each party to conduct its own commercial policy vis-à-vis the rest of the world.

d. Of Hard Choices and Red Lines: European and British Perspectives

Which of the three models comes potentially closest to the future trade relationship between the United Kingdom and the European Union? The three models, discussed above, offer three distinct association formats whose respective characteristics are summarised in Table 19.3.

151 CETA stands for Comprehensive Economic and Trade Agreement. The text of CETA can be found in (2017) OJ L11/23. The agreement provisionally applies but is not yet in force as all the Member States need to ratify it according to their constitutional requirements.

152 *Ibid.*, preamble 1 and 2. See also Art. 1.4: 'The Parties hereby establish a free trade area in conformity with Article XXIV of GATT 1994 and Article V of the GATS.'

153 *Ibid.*, Ch. 2. 154 *Ibid.*, Ch. 8.

155 *Ibid.*, see esp. Chs. 9, 13 and 14.

156 For example: competition policy (Chs. 17 and 18) as well as labour law matters (Ch. 23) and environmental policy (Ch. 24) are covered by CETA.

157 *Ibid.*, Ch. 10 ('Temporary Entry and Stay of Natural Persons for Business Purposes').

158 *Ibid.*, Ch. 21. 159 *Ibid.*, Arts 26.1 and 26.3. 160 *Ibid.*, Ch. 29.

161 ISDS stands for Investor State Dispute Settlement.

Table 19.3 Future Relationship Models: Comparison

	EEA 'Norway Model'	Customs Union 'Turkey Model'	Preferential FTA 'Canada Model'
Free Movement of Goods	High	High	Medium
... of agricultural Goods	Low	Low	Medium
Free Movement of People	High	Low	Low
Free Movement of Services	High	Low	Medium
Free Movement of Capital	High	Low	Medium
EU Competition Law	High	Medium	Low
EU Commercial Policy	Low	Medium	Low
Shadowing EU Legislation	High	Medium	Low

Importantly, and once again, none of the three models offers full access to the single market.[162] Full 'membership' of the single market can only be achieved through full membership of the Union; and all non-membership arrangements will consequently only offer *partial* access to the single market. The 'golden rule' of Union association is thereby this: the degree to which a third State is willing to accept positive integration via Union legislation will directly determine the degree to which it is entitled to enjoy the benefits of negative integration via access to the single market. This is the first 'constitutional' principle behind all European integration,[163] and if the Union were to give it up, the integrity of the Union would itself be endangered.

With full access to the internal market barred for third States outside the Union, the Union has also established a second 'red line': it insists that the single market, characterised by four fundamental freedoms, is itself indivisible. In the words of the European Council:

> Preserving the integrity of the Single Market excludes participation based on a sector-by-sector approach. A non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member. In this context, the European Council welcomes the recognition by the British Government that the four freedoms of the Single Market are indivisible and that there can be no 'cherry picking'.[164]

[162] In almost all official publications I have seen in the last two years, it is wrongly assumed that the EEA Agreement gives 'full' access (access as if a Member State of the Union) to the single market; yet this is simply not the case. All of the criteria in Table 19.3 must therefore be relative, ranging from a high degree to a low degree of access to the single market.

[163] On the relationship between negative and positive integration, see R. Schütze, *From International to Federal Union* (Oxford University Press, in preparation).

This Union 'red line' is not at all meant to 'punish' the United Kingdom;[165] it is simply based on the idea that the four fundamental freedoms are a living compromise between the 'economic' and 'political' aspects of European integration; and to unravel that compromise runs the danger of inviting other States to reduce the European Union to an essentially economic project without a 'human face'.[166]

What about the British wishes and the British 'red lines'? Her Majesty's Government has spelled out a number of principles in its White Paper, 'The United Kingdom's Exit from and New Partnership with the European Union'. The most important principle here are: 'taking [back] control of our own laws', 'maintaining the Common Travel Area' with Ireland, 'controlling immigration', 'ensuring free trade with European markets' and 'securing new trade agreements with other countries'.[167]

When measured against the three existing trade models, outlined above, which model comes closest to the British position? Each of the three models will formally give back full 'sovereignty' to the United Kingdom; yet, from a substantive point of view, participation in the EEA would still amount to following three-quarters of European Union legislation.[168] With regard to the ability to fully control immigration, the EEA option would also not work, as 'the free

[164] European Council Negotiating Guidelines (First Phase), para. 1.

[165] K. Nicolaidis, 'Brexit Arithmetics', in J. Armour and H. Eidenmüller, *Negotiating Brexit* (Beck-Hart-Nomos, 2017), 89 at 90: 'To restate the root of all misperceptions: For the EU, this is a truism; it would be absurd for Brussels to offer a deal to a third-country-to-be that is more valuable than the value of membership itself ... But the message sent is not the message received: the British side hears this EU statement as a desire to "punish" the UK.'

[166] This is not to say that the four freedoms cannot be legally separated; indeed, the very concept of a customs union is based on the idea that the free movement of goods can be separated from the other three freedoms. Yet the European (!) 'Single Market' as a package 'deal' comprising the four fundamental freedoms is a historical achievement of the Union that offers 'big' businesses as well as 'little' workers a stake in the European project. To reduce or take away the freedom of persons from that 'package deal' would, in my view, fundamentally undermine one of the values most associated with the benefits of European integration and further perilously undermine the popular legitimacy problems of the European Union. *Contra*, C. Barnard, 'Brexit and the Internal Market', in F. Fabbrini (ed.), *The Law & Politics of Brexit* (Oxford University Press, 2017), 201.

[167] White Paper, 'United Kingdom's Exit from and New Partnership with the European Union' (n. 70 above). Among the 12 principles mentioned, these are principles two, four, five, eight and nine.

[168] This is the estimate offered by the Norwegian government (n. 129 above).

movement of persons is a key element of the EEA Agreement'.[169] A customs union or a free trade agreement would thus present better options when it comes to the British principles of 'taking back' control and 'controlling immigration'. This seems to have been accepted by HM Government:

> The Government will prioritise securing the freest and most frictionless trade possible in goods and services between the UK and the EU. We will not be seeking membership of the Single Market, but will pursue instead a new strategic partnership with the EU, including an ambitious and comprehensive Free Trade Agreement and a new customs agreement.[170]

This choice will, however, in all probability, mean a lower degree of access to the single market; and it would also mean that the Irish border question remains, in principle, unresolved. For, as we saw above, the Union generally makes the degree of access to its single market dependent on the willingness of third states to shadow EU law; and the rejection of the free movement of persons should, in theory, mean that the common travel area with Ireland is impossible once the 'internal' border between the Republic of Ireland and Northern Ireland becomes an external border of the European Union.

Can the inherent 'trade-offs' within each model be negotiated away? The United Kingdom government hopes this can be done and has, optimistically, invoked the idea of a 'bespoke' agreement – whatever that means.[171] What relative bargaining power will it have to achieve a tailor-made British deal? Its absolute and relative trading power vis-à-vis the Union can be gleaned from Table 19.4. Constituting the fifth largest national economy in the world, the United Kingdom would certainly be in a stronger negotiating position than either Norway, Turkey or Canada; yet, in relative terms, it still only represents one-fifth of the economic size of the European Union (minus the UK). And the trade relations with the Union reflect that economic imbalance: for whereas the EU is by far the largest trading partner for the United Kingdom with approximately 50 per cent (!) of all total trade; British trade will only represent between 15 and 20 per cent of all trade conducted by the Union. So, even if the United Kingdom will be one of the most important trading partners of the EU after its withdrawal, its relative bargaining power will be significantly smaller than that of the EU.

[169] V. Reding, 'Free Movement of People and the European Economic Area', in EFTA Court, *The EEA and the EFTA Court: Decentred Integration* (Hart, 2014), 193. However, this does not (!) mean that there are no control or better safeguard mechanisms to limit the inflow of workers from other EEA States. We should assume that Art. 112 EEA Agreement will give at least – if not more – possibilities to the UK than the mechanism envisaged in the 'New Settlement' treaty negotiated by David Cameron (see n. 42 above).

[170] White Paper, 'United Kingdom's Exit from and New Partnership with the European Union' (n. 70 above), 35.

[171] House of Lords, Brexit: Options for Trade (House of Lords, 2016), para. 248: 'We are not clear what the Government means by this term.' The report can be found at: https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/72/7202.htm.

Table 19.4 Absolute and Relative Trading Power

Economic Size (GDP, $bn.)	EU Trading Partners (% EU trade)
United States (18.569)	United States (17.5)
European Union (16.398)	China (14.8)
China (11.199)	Switzerland (7.2)
Japan (4939)	Russia (6)
Germany (3467)	Turkey (4)
United Kingdom (2619)	Norway (3.5)
France (2465)	Canada (1.8)

This economic imbalance is joined by a 'legal' imbalance. Legally, the Union is simply not an 'easy' negotiating partner when compared to the unitary United Kingdom. The Union is composed of various and diverse Member States that will need to find a compromise among themselves; and in the best-case scenario, this means a qualified majority in the Council under the Union's Common Commercial Policy.[172] However, as the Canada Agreement shows, the Union may be forced, by its Member States, to choose a mixed agreement and in such a situation, the 'bespoke' British agreement would have to safely pass 27+1 parliamentary veto points. This is likely to make the Union much less flexible in its negotiations; and this degree of 'inflexibility' will be further increased by the very fact that the Union has a written constitution, whereas the United Kingdom has not. The Union negotiator as well as the Union's own legislature will indeed by bound by the fundamental principles of the Union legal order – a legal limitation that has, at times, perplexed a country that has come to reify the supremacy of parliamentary politics over the supremacy of constitutional principles.

Conclusion

From the very start, Britain's feelings towards European integration were complex. An imperial and global power at the end of the Second World War, its economic and ideological commitments often differed fundamentally from those in 'Europe'; and it therefore should have come as no surprise that the kind

[172] Art. 207(4) TFEU states: 'For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority. For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.' For a discussion of the scope and nature of the EU's Common Commercial Policy, see (online) Chapter 18B, section 1.

invitation to join the Schuman Plan was rejected. Britain's decision to join the 'common market' in the 1970s was predominantly of an economic nature; and its profound doubts towards any 'federal' or 'political' union have been a recurring theme throughout its membership.

Britain's critical attitude towards transfers of legislative powers to the European Union has found numerous expressions in a wide range of 'opt-outs'. They have given the United Kingdom, in the words of the British government, a unique place within the Union: 'No other country has the same special status in the EU.'[173] And yet, even this half-way house 'inside' and 'outside' the European Union could not prevent a British referendum in which the majority of British citizens decided to opt out of Union membership altogether. Triggering the 'withdrawal' procedure of Article 50 TEU, the reasons quoted for leaving, were the wish of the British people to restore 'national self-determination' and to become again a fully sovereign State in the international sphere.[174]

This chapter has tried to explore some of the – innumerable – legal issues created by the Brexit process. Section 2 started by giving a quick overview of the drafting history of Article 50 so as to better understand its nature and content. The provision grants, as we saw above, an unconditional and unlimited right of withdrawal from the Union. The only condition mentioned is the – procedural – obligation to negotiate a withdrawal agreement so as to guarantee a smooth exit. At the time of writing, this British withdrawal agreement is being drafted with the negotiations having moved into the second phase. Many issues however remain intractable, and most importantly of all: the Irish border question. Much here depends on what the 'future-relations' agreement between the United Kingdom and the Union will look like; and it is hoped that the withdrawal agreement or a transitional period will offer a – temporary – solution until a final alternative partnership arrangement is concluded.

Sections 3 and 4 analysed two sides of the future after Brexit. Section 3 looked at the British preparations for repealing the European Communities Act 1972 as well as the future status of (retained) European Union law in the United Kingdom. Section 4 presented the three main partnership models currently 'traded' as candidates for a future EU–UK relationship (see Figure 19.6).

Affiliation with the European Economic Area would undoubtedly represent the 'softest' Brexit. This option would not necessarily imply that the United Kingdom joins EFTA;[175] yet it would mean that it principally accepts the free

[173] HM Government, 'Alternatives to Membership: Possible Models for the United Kingdom Outside the European Union', at: www.gov.uk/government/publications/alternatives-to-membership-possible-models-for-the-united-kingdom-outside-the-european-union, para. 2.10.

[174] The official Art. 50 letter can be found at: www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50.

[175] Momentarily, the EEA Agreement is constructed as a bilateral relationship between the Union and EFTA and thus requires membership of either organisation. However, there is no legal reason why a (future) EEA Agreement could not be conceived as a trilateral or multilateral trade agreement, especially in light of the fact that the United Kingdom would, in all likelihood, economically and politically dominate EFTA.

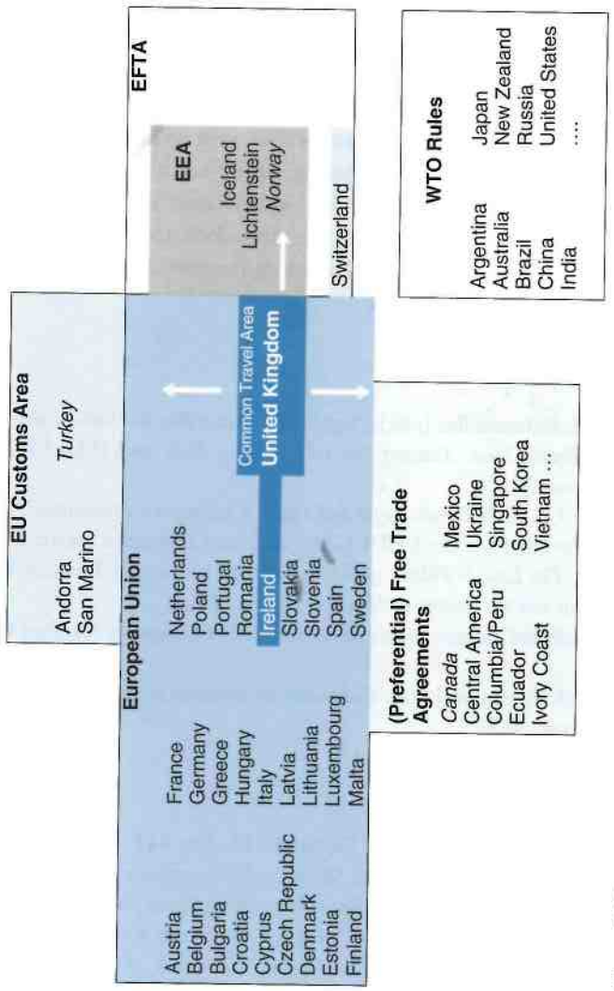

Figure 19.6 *Quo vadis* United Kingdom?

movement of persons while also committing itself to shadowing a significant proportion of EU legislation (and paying a partial membership fee). These consequences could to some extent be avoided if the United Kingdom joined a customs union arrangement. It would here retain control over immigration, yet it would not gain access to the EU internal market in services; and this arrangement would also significantly limit its capacity to conclude future international trade agreements with third States. What about a comprehensive free trade agreement? The latter option seems today the most likely route in light of the European and British negotiating positions; and a 'Canada plus' arrangement appears indeed very probable. However, it must not be forgotten that this option will also have its inherent 'trade-offs' and that other third States – including Canada – may become upset if too good a deal were to be struck.[176]

Be that as it may, no one knows what the future holds; and we must wait and see what the next years hold in stock for Great Britain as well as the European Union. From the European Union's side, the door to membership remains legally open – even once the United Kingdom has exited the Union.[177]

FURTHER READING

Books

J. Armour and H. Eidenmüller (eds.), *Negotiating Brexit* (Beck-Hart-Nomos, 2017)
K. Armstrong, *Brexit Time: Leaving the EU – Why, How and When?* (Cambridge University Press, 2017)
M. Dougan, *The UK After Brexit: Legal and Policy Challenges* (Intersentia, 2017)
EFTA Court, *The EEA and the EFTA Court: Decentred Integration* (Hart, 2014)
F. Fabbrini (ed.), *The Law & Politics of Brexit* (Oxford University Press, 2017)
A. Geddes, *Britain and the European Union* (Palgrave, 2013)
S. George, *An Awkward Partner: Britain in the European Community* (Oxford University Press, 1994)
D. Gowland and A. Turner, *Reluctant Europeans: Britain and European Integration 1945–1998* (Longman, 2000)

Articles (and Chapters)

P. Craig, 'Brexit: A Drama in Six Acts' (2016) 41 *EL Rev.* 447
L. Gormley, 'Brexit – Never Mind the Whys and Wherefores? Fog in the Channel, Continent Cut Off!' (2017) 40 *Fordham International Law Journal* 1175
C. Hillion, 'Accession and Withdrawal in the Law of the European Union', in D. Chalmers and A. Arnull (eds.) *The Oxford Handbook of European Union Law* (Oxford University Press, 2015), 126
A. Łazowski, 'Withdrawal from the European Union and Alternatives to Membership' (2012) 37 *European Law Review* 523

[176] European Council Guidelines (Second Phase), para. 7.

[177] Art. 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.' For a brief discussion of the accession process under Art. 49 TEU, see (online) Chapter 18B, section 4(d).

N. Neuwahl, 'CETA as a Potential Model for (Post-Brexit) UK–EU Relations' (2017) 22 *EFA Rev.* 279
S. Peers, 'Living in Sin: Legal Integration Under the EC–Turkey Customs Union' (1996) 7 *EJIL* 411
A. Tatham, '"Don't Mention Divorce at the Wedding, Darling!" EU Accession and Withdrawal after Lisbon', in A. Biondi et al. (eds.), *EU Law After Lisbon* (Oxford University Press, 2012), 128
C. Tobler, 'One of Many Challenges after "Brexit": The Institutional Framework of an Alternative Agreement – Lessons from Switzerland and Elsewhere?' (2016) 23 *Maastricht Journal of European and Comparative Law* 575
A. Young, *R. (Miller) v. Secretary of State for Exiting the European Union*: Thriller or Vanilla?' (2017) 42 *EL Rev.* 280

European Union Law

Second Edition

ROBERT SCHÜTZE

CAMBRIDGE
UNIVERSITY PRESS

Summary Contents