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Economic and Monetary Affairs

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**Internal Market and
Consumer Protection**



Legal Implications of Brexit

Study for the IMCO Committee



**DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY**

Legal Implications of Brexit

Customs Union, Internal Market Acquis for Goods and Services, Consumer Protection Law, Public Procurement

STUDY

Abstract

This study addresses the implications of several scenarios of the UK withdrawing from the EU in relation to the EU Customs Union, the Internal Market law for Goods and Services, and on Consumer Protection law, identifying the main cross-cutting challenges that have to be addressed irrespective of the policy choices that will be made in due course. The analysis takes the fully-fledged EU membership as a point of departure and compares this baseline scenario to a membership of the UK in the European Economic Area (EEA), the application of tailor-made arrangements, as well as the fall-back scenario, in which the mutual relationship is governed by WTO law. Following an analysis of the EU, legal framework defining the withdrawal of a Member State from the EU the study develops an analytical framework that allows for the identification of the legal impact of different Brexit scenarios on policy fields falling within the ambit of the IMCO Committee. In this context, the general impact of the EEA model, the tailor-made model and the WTO model on key pieces of the currently existing acquis communautaire in these policy areas are highlighted.

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LIST OF ABBREVIATIONS

CETA Comprehensive Economic and Trade Agreement

CJEU European Court of Justice

DCFTA Deep and Comprehensive Free Trade Area

EEA European Economic Area

EFTA European Free Trade Association

FTA Free Trade Agreement

GATS General Agreement on Trade in Services

GATT General Agreement on Tariffs and Trade

GC General Court

GPA Agreement on Government Procurement

TEU Treaty on European Union

TFEU Treaty on the Functioning of the European Union

UK United Kingdom of Great Britain and Northern Ireland

WTO World Trade Organization

EXECUTIVE SUMMARY

A withdrawal of the UK from the EU raises many complex legal questions that can be placed in several main categories, including the substantive legal obligations arising from Article 50 TEU concerning the withdrawal of the Member State from the EU; the possible legal nature and scope of the UK's future (legal) relationship with the EU; and the implications of this future legal relationship for the EU internal market law and notably the policy fields falling within the ambit of the IMCO Committee. This study makes, based on a review of the available academic literature and materials produced for governments and Parliaments, a preliminary assessment of the legal implications of a possible withdrawal of the United Kingdom from the EU on the policy areas relating to the internal market for goods and services (excluding financial services), to consumer protection and to the customs union.

At the outset it has to be stressed that since major policy choices regarding the nature of the future relationship between the UK and the EU are still to be made, any assessment of the legal impact of the future relationship between the EU and the UK on EU policy fields is for the time being a measured approximation to a moving target. Beyond the analysis of the legal implications of Article 50 TEU namely for the policy fields falling within the ambit of the IMCO Committee, the main purpose of this first in-depth study is thus to provide an analytical framework that allows for the identification of the legal impact of different Brexit scenarios.

Brexit – The Constitutional Dimension

Based on Article 50 TEU the withdrawal of a Member State from the EU results either from 'the entry into force' of a so-called withdrawal agreement or, in the absence thereof, two years after the formal notification to the European Council from the Member State that wishes to withdraw. Since the UK government notified the European Council of the intention of the United Kingdom to withdraw from the EU on 29 March 2017, the negotiation period of two years elapses on 30 March 2019 at 00:00 (Brussels time).

The withdrawal agreement is '**backward looking**', in the sense that it deals with the legacy of currently applicable EU law. In the absence of a withdrawal agreement at the end of the two-year period, primary and secondary Union law cease to apply without any (transitional) legal arrangements governing the relationship between the withdrawing Member State and the EU. A prolongation of the negotiation period is possible, but, next to the agreement by the withdrawing Member State, requires a unanimous vote in the European Council. As becomes clear from the inclusion of the two-year deadline, an agreement is not a *conditio sine qua non* for the withdrawal of a Member State, and a country may leave the EU without concluding such an Article 50 TEU withdrawal agreement with the EU27.

There is considerable disagreement in legal scholarship as to whether the Article 50 TEU process can be reversed unilaterally by the United Kingdom after it has handed in its notification of withdrawal. In other words, could the UK Government change its mind after the 'Brexit' process has been set in motion (but the Member State has not yet left the EU)? This uncertainty is linked to the fact that Article 50 TEU has never been triggered before by a Member State wishing to leave the EU. There are arguments both in favour of and against recognising the existence of such a unilateral right for the withdrawing Member State, but the prevailing view seems to be that the process of leaving the Union could nevertheless be reversed in agreement with the EU27. However, what is not in doubt is that when the withdrawal of the departing Member State becomes a reality, there is arguably no returning to the former status by means of some form of 'withdrawal from the withdrawal'. The path to re-joining the EU is an application for membership pursuant to Article 49 TEU.

Next to a withdrawal agreement, the future relationship between the UK and the EU has to be determined ('**forward-looking**' agreement). While the withdrawal agreement and the agreement setting out the future relationship between the EU and the UK have to be considered as two separate items, Article 50 TFEU links these two agreements by stating that the withdrawal agreement should set out the arrangements for the withdrawal, thereby 'taking account of the framework for its future relationship with the Union'. The requirement to take into account the framework for the future EU-UK relationship mostly becomes relevant in a scenario involving tailor-made solutions, as under the EEA and WTO scenarios the framework for the future relationship would be defined by EEA and WTO law respectively. The applicable decision-making procedure in the case of a free trade agreement depends on the substance of the agreement (qualified majority or unanimity in the Council after obtaining the consent of the European Parliament).

As the debate in legal scholarship stands today, comprehensive free trade agreements are considered mixed agreements, thereby requiring ratification by all Member States in accordance with their respective constitutional requirements. The EU Treaties and protocols may also need to be amended in order to take stock of the post-Brexit reality. Ideally, both the withdrawal and future agreements should be negotiated and concluded within the same two-year period, though legal and practical reasons discussed in the study may demand otherwise.

The Council further needs to obtain the consent of the European Parliament, which requires a simple majority of at least one third of the total number of MEPs. Throughout the 'Brexit' negotiations, the Commission and Council have to inform the committee responsible regularly and fully on the progress of the negotiations, if necessary on a confidential basis. At any stage of the negotiations, the Parliament may adopt recommendations and require that these be taken into account before the conclusion of the Article 50 agreement. When the negotiations are completed, the draft agreement must be submitted to the Parliament.

There is disagreement between commentators as to whether the British MEPs may still participate in the vote on the withdrawal agreement in the European Parliament once this agreement is concluded. Article 50 TEU is silent on this issue, but it is argued in the study that the British MEPs will be participating in the vote as they represent the citizens of the Union and not just of their home Member State. Further, the British MEPs will continue to be involved in the on-going legislative files until 'Brexit' becomes a reality.

The withdrawal agreement does not need to be ratified by the national parliaments of the Member States. There is, however, ambiguity about the UK constitutional requirements on the role of the UK Parliament in the process leading to 'Brexit'. Though it was clarified by the UK courts in the case of *Miller* that the UK Parliament's approval was required before triggering Article 50 TEU, it is not yet clear what would be required for the ratification of the withdrawal agreement once it is concluded. The Constitutional Reform and Governance Act 2010 requires that the agreement be submitted for review by the UK Parliament, acting separately, under the negative resolution procedure. However, the regime under the 2010 Act may not be held to be applicable if some greater parliamentary involvement is required, with some commentators arguing that an Act of Parliament and a referendum may be needed.

The European Commission must report regularly to the European Parliament on the progress of the 'Brexit' negotiations (Article 207(3) TFEU). The role of the European Parliament in the negotiation and conclusion of the future EU-UK agreement is spelled out in Article 218 TFEU, and the default position is consultation by the Council with the European Parliament. A comprehensive trade agreement would require the consent of the European Parliament. The Par-

liament will further need to pass all the necessary legislation in the course of Britain's withdrawal from the EU. Furthermore, it may request the opinion of the CJEU as to whether the envisaged EU-UK agreement is compatible with the EU Treaties.

The role of the European Parliament in the operation of trade agreements is, however, limited. It is suggested that interparliamentary cooperation would strengthen the role of the European Parliament in the operation of the future EU-UK agreement. Such cooperation may take different forms. Notably, interparliamentary activities could be either informal or embedded in a future EU-UK agreement.

Various scenarios for shaping the future relationship between the UK and the EU in legal terms

In legal terms, this future relationship may take different legal shapes, depending on the policy choices that the EU and UK have yet to make. The present study identifies on an abstract level the parameters that determine the basic scope of a future trade cooperation, therewith offering an overarching analytical grid for future references. These include the intensity of trade cooperation (ranging from mere information obligations to full harmonisation), the legal means to implement trade cooperation (ranging from non-discrimination principles to setting common standards), as well as the compliance mechanisms (ranging from mere consultation obligations to direct effect with a centralised Treaty-based court). These parameters can differ in relation to different economic sectors. Applying this set of factors to the currently existing forms of trade cooperation between the EU and third countries (such as KOREU with South Korea, CETA with Canada or DCFTA with Ukraine) reveals that all these forms of trade cooperation fall short of the state of trade cooperation achieved within the EU internal market. Hence, any free trade agreement between the EU and the UK that merely replicates one of these existing FTAs will result in a significant deterioration of the trading conditions for both EU market operators in the UK and UK market operators in the EU.

The discussion on the various 'Brexit' scenarios commences with the baseline scenario of EU membership, which is the status quo. The focus then shifts to the 'fall-back' scenario of 'hard Brexit' with no EU-UK arrangements. It is noted that the UK is a member of the WTO in its own right but does not have an individual schedule of concessions. Instead, it is part of the EU's combined schedules. The United Kingdom would have to negotiate its own schedule on tariffs, quotas and subsidies, which would then need to be approved by all other 163 WTO members, including the EU. Alternatively, an agreement could be concluded between the EU and the withdrawing Member State, which would separate the WTO commitments of the EU and the UK. This would again demand the approval of all other WTO members. The UK would further have to consider whether it would sign and ratify a number of special WTO agreements that are not compulsory for WTO members but have been ratified by the EU.

The 'Brexit' scenario that comes closest to the baseline scenario in terms of trade cooperation is the European Economic Area (EEA) option. Assuming that the UK would implicitly lose EEA membership if it left the EU, a return to the European Free Trade Association (EFTA) would be necessary in order for the UK to be part of the EEA Agreement. The terms and conditions for such participation would be the subject of an agreement between the Contracting Parties to the EEA Agreement (Norway, Iceland and Liechtenstein) and the applicant state. The study further examines the possibility of the EU and the UK making tailor-made arrangements for their future cooperation. Such tailor-made arrangements can differ widely on the parameters examined above, and the study draws on the examples of the DCFTA with Ukraine, CETA with Canada, and KOREU with South Korea. This broad range of 'Brexit' scenarios reinforces uncertainties amongst citizens and internal market operators as to the legal fate of their current status and their future activities. At this moment of time it appears unpredictable in

which way rights lawfully acquired under EU law will be maintained (if at all) and how the status of UK citizens and UK based market operators on the territory of the EU27 Member States and vice versa will look like.

Policy documents by the UK and the EU27 published so far sketch the future relationship to be embodied in a free trade agreement that includes some sort of dispute settlement mechanism. Yet, neither the scope nor the intensity of trade is yet defined by the parties in these documents. Hence, at this point of time, uncertainties created by the Brexit vote are not addressed in a manner that would reduce them. Whilst the vagueness in the policy documents is not surprising at the current very early stage of negotiations, uncertainties linked to the unprecedented withdrawal of a Member State from the EU create a major problem for economic operators and citizens.

Estimating the implications of Brexit scenarios in legal terms – A two-step test to assess the impact of a scenario on EU policy areas

Based on these considerations it can be observed that the impact of Brexit on EU law increases the more the EU and the UK opt for a trade cooperation that resembles the WTO principles of free trade, rather than the full harmonisation model including mutual recognition of standards under the terms of EU membership. The more the future relationship between the EU and the UK takes after trade cooperation based on negative integration the less existing and future *acquis communautaire* can be applied to goods and services from the UK. In such a constellation, the focus must shift from questions revolving around how to extend the *acquis* and its further development to the UK to questions addressing the challenge how to protect the high standards set by the *acquis* against any weakening through a free trade agreement. The *acquis* then turns into a trade barrier for UK goods and services, which are subject to the rules of negative integration. Depending on the scope of negative integration, the *acquis* would only be affected if it discriminates directly or indirectly against UK products or otherwise creates unjustifiable restrictions. In this scenario, the EU must focus on broad possibilities to justify the current *acquis* and its further development.

Having established the range of trade cooperation that can be realised between the EU and the UK, the study identifies the policy areas and legal rules in the current EU framework that will be affected the most by a Brexit. To this end a two-step test is developed and applied. First, it has to be established whether the change of the legal regime (from EU law to UK law) entails a change of the applicable law to a cross-border legal situation involving the EU and the UK. This is done by applying so-called conflict rules. Secondly, if a change of the applicable law applies, it is assessed whether principles of intertemporal law require the continuous application of the previously applicable 'old' law. This relates to cases of 'acquired rights' (which are to be understood as only covering absolute property rights) that were created lawfully under the previous legal regime, as well as to cases of legitimate expectations, according to which an individual can, in principle, rely on the fact that the currently applicable law continues to apply in the same manner. The presumption of legitimate expectations is however rebutted in the case of explicit rules that prevent the creation of such expectations. In the context of 'Brexit', arguably reference can be made to Article 50(3) TEU. With the formal notification of a Member State to withdraw from the Union, it may be argued that individuals cannot expect any longer that EU law continues to apply in the future, as Article 50(3) TEU states that even if there is no withdrawal agreement, EU law ceases to apply two years after the notification.

Applying the two-step test for assessing the impact of Brexit scenarios on policy areas falling within the ambit of the IMCO committee

In the following this two-step test is applied to the policy areas and implementing rules falling within the ambit of the IMCO Committee. What results from this is that, first of all, the impact of Brexit on consumer protection is relatively limited inasmuch as consumers purchase products that were directed or advertised to them (active sales). The international procedural law and private international law applicable in the EU and in the UK (the present study shares the view that after a Brexit materialises the 1968 Brussels Convention and the 1980 Rome Convention will revive on the UK territory) designate the law of the Member States where the consumer is domiciled as the applicable law. By that, contracts that are concluded by EU domiciled consumers with UK professionals are subjected to EU consumer protection law. This assessment changes, however, once consumers purchase products from professionals that do not direct their activities to the home countries of these consumers (passive sales).

With a view to this constellation and to the other policy areas, the first step of the analytical framework establishes that the change of the legal regime entails also a change of the applicable law. Yet, in relation to services and public procurement, 'acquired rights' come into play that require the continuous application of EU law. This concerns EU professional qualifications for service providers that exercise at the time of the withdrawal of the UK from the EU a regulated profession in the UK and vice versa, as well as awards and concessions granted to EU tenderers by UK contracting authorities under the application of EU public procurement law and vice versa. In the same context, legitimate expectations are to be respected as to the rules on contract performance under EU public procurement law for such awards and concessions so that modifications will not require new public procurement procedures under the legal regime.

In the remaining areas the withdrawal of the UK from the EU will result in an immediate application of the rules of the new legal regime. The impact of Brexit on these areas that, in particular, cover standards such as product safety rules will be significant. This can be addressed by including a mechanism into an agreement on the future relationship between the EU and the UK that leads to an incorporation of EU product safety rules into UK domestic law (comparable to EEA or DCFTA). If such an agreement provides for a dynamised common standard-setting option with binding effect on the EU and the UK, sufficient Parliamentary involvement must be ensured. If a bilateral solution is not attainable, it is recommended that the EU includes equivalence mechanisms comparable to the one in Article 46 of Regulation No 600/2014 on markets in financial instruments (MiFiR, [2014] OJ L 173/84) into its legislation on standards for goods and services. Under this mechanism, the Commission is empowered to unilaterally adopt equivalence decisions granting third-country products access to the entire internal market without further restrictions (which would be justifiable under WTO law), if the safety and protection standards and their supervision in the home country is equivalent to the one under EU law.

Finally, it should be noted that, also in relation to goods, the impact of a Brexit is significant. The trade cooperation between the EU and the UK would, in the event of a Brexit without any arrangements concerning the future relationship, not only fall back on the non-discrimination principles under WTO law. The UK would also have to re-negotiate its schedules and commitments under WTO law that are currently held by the EU on behalf of the UK. Not only would a separation of the EU28 schedules require a consent by the EU, but also by all the other WTO members.

1. INTRODUCTION

This study makes, based on a review of the available academic literature and materials produced for governments and Parliaments, a preliminary assessment of the legal implications of a possible withdrawal of the United Kingdom from the EU on the policy areas relating to the internal market for goods and services (excluding financial services), to consumer protection and to the customs union. Such analysis builds on the overarching constitutional dimension of 'Brexit' concerning all EU policy areas. The outcome of such analysis at this stage of the process can only be an approximation to a moving target. Although both the UK government and the EU have further clarified their intentions in relation to the outcome of the negotiations,¹ these outlines remain too vague in order to base a proper legal assessment on them. The UK government seeks to establish a 'deep and special partnership that takes in both economic and security cooperation', the terms of which it should be agreed 'alongside those of our withdrawal from the EU'.² In its white paper on the new partnership with the EU, published on 2 February 2017, the UK government only referred to the aim of the 'freest possible trade in goods and services between the UK and the EU' and a 'new customs agreement',³ which should 'ensure that cross-border trade with the EU is as frictionless and seamless as possible'⁴ in specifying what it considers to be the content of the future partnership in relation to the internal market and the customs union. The EU 'shares' this perspective, whilst at the same time such partnership 'cannot offer the same benefits as Union membership'.⁵ In the eyes of the EU, the future agreement cannot 'amount to participation in the Single Market or parts thereof [...] It must ensure a level playing field, notably in terms of competition and state aid, and in this regard encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices'.⁶

With this reservation in mind, it must be noted that the findings of the present study are preliminary and may need to be adapted and deepened once the more concrete policy choices have been made, allowing for a more study of the consequences of these choices. This understanding of the preliminary nature of any analysis at this point of time has also been taken up by the Briefing Paper for the British House of Commons that analyses the impact of 'Brexit' across policy fields. Thus, for example with regard to consumer protection it is noted:

*'As already mentioned, the consumer protection regime in the UK is a complex combination of EU and national law and covers a very wide range of goods and services. It is impossible to calculate the impact of withdrawal in any meaningful way without knowing the basis on which the UK would continue to interact with the EU. Clearly, the crucial question is whether the UK retains any sort of access to the European Single Market, and if so, how much and in return for what?'*⁷

¹ See for the UK: May, UK Prime Minister's letter to Donald Tusk triggering Article 50, 29 March 2017, www.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf; for the EU: European Council, Guidelines following the United Kingdom's notification under Article 50 TEU (29 April 2017), EUCO XT 20004/17.

² May, (n 1), p. 3.

³ Department for Exiting the European Union and The Rt Hon Davis Davis MP, 'The United Kingdom's Exit from and New Partnership with the European Union White Paper' (2 February 2017), <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper>, p. 35.

⁴ Department for Exiting the European Union and The Rt Hon Davis Davis MP (n 3), p. 46.

⁵ European Council (n 1), p. 8, para 18.

⁶ European Council (n 1), p. 8, para 20.

⁷ Briefing Paper, Brexit: impact across policy areas, 26 August 2016, p. 154. See in this context also Adam Łazowski, 'EU Withdrawal: Good Business for British Business?', *European Public Law* 22, no. 1 (2016), 115-130, 1238, who observes that: "... the exact legal parameters of EU withdrawal hinge upon the model that will be

Formulating a position on the latter questions raised in this statement currently forms the core of the policy debate and is reflected by the majority of the available literature and materials.

1.1. Available literature and materials on the legal consequences of 'Brexit' for specific policy areas

It should be noted from the outset that the legal academic literature available at the time of writing focuses largely on the withdrawal of a Member State from the EU and its EU as well as UK constitutional challenges. When it comes to question of the legal impact of 'Brexit' on specific matters falling within the policy areas relating to the internal market of goods and services (excluding financial services), consumer protection and the customs union, which are the policy areas covered by the competence of the IMCO Committee, there is, in our opinion, only fairly limited literature.⁸ This can be readily explained by the fact that the impact of 'Brexit' on single market and customs union issues is highly contingent upon the arrangements that will govern the future EU-UK relationship, which are yet to be devised, as well as the fact that Article 50 was only recently triggered by the UK Government.

Whilst this observation certainly holds true for academic literature, it can also be upheld in relation to materials commissioned by governments, Parliaments and other public bodies before the referendum and even thereafter in terms of depth concerning legal implications on specific policy areas. It could be said that in particular the absence of precise information on the impact of a 'negative' vote prior to the referendum might raise doubts as to the degree of knowledge that was made available for citizens to anticipate the massive consequences of voting in favour for the UK leaving the EU.⁹

Materials that have been produced or at least made publicly available since the Brexit vote for the time being remain sketchy and reluctant. Both can be explained by the fact that serious scientific legal research can only be conducted on the basis of clear, precise and publicly available policy choices. For this reason the Briefing Paper for the British House of Commons plainly stated, as cited above, that '[i]t is impossible to calculate the impact of withdrawal in any meaningful way without knowing the basis on which the UK would continue to interact with the EU'.¹⁰ It follows from this that, from a legal perspective, the only two scenarios that can unequivocally be analysed at this moment of time are the full EU membership scenario, implying no changes of the current situation, and the scenario in which no agreements are concluded between the UK and the EU. In the latter scenario the future legal relationship between the EU and the UK will be governed by WTO law and transitional questions will be legally framed by general principles of intertemporal law. These principles will be further outlined later (see section 4.2) and imply that all EU law stops to be applicable in the territory of the United Kingdom at the moment of the coming into effect of the withdrawal from the EU with few limited exceptions concerning certain rights legally acquired under EU

chosen for future relations between the United Kingdom and the EU. This will remain unknown until negotiations are completed."

⁸ The picture is slightly different when looking at the economic implications. Here, studies cover assumed effects on policy areas covered by the IMCO committee within their broader analyses of the impact of Brexit on trade: Aichele & Felbermayr, "Costs and benefits of a United Kingdom exit from the European Union", Gütersloh: Bertelsmann Stiftung (2015); Busch & Matthes, "Brexit—the economic impact. A Meta-Analysis", IW-Report 10 (2016); Kierzenkowski et al., "The economic consequences of Brexit: a taxing decision", OECD Economic Policy Papers 16 (2016): 1; Lawless & Morgenroth, "The Product and Sector Level impact of a hard Brexit across the EU", ESRI, WP No 550 (2016); Ottaviano et al., "The Costs and Benefits of Leaving the EU: Trade Effects", Centre for Economic Performance Technical Report (2016); Rojas-Romagos, "Trade effects of Brexit for the Netherlands", CPB background document, June (2016).

⁹ Reference is made to Articles 6 and 7 of the EU Referendum Act 2015, which establishes information obligations on the part of the UK Government in relation to the rights and obligations linked to the EU membership of the UK.

¹⁰ Briefing Paper, Brexit: impact across policy areas, 26 August 2016, p. 154.

law in the period before the withdrawal.¹¹ The legal position could be different if the EU27 and the UK reached an agreement on transitional arrangements before the end of the two-year (or the extended) period. Moreover, it should be noted that the so-called Great Repeal Bill will, when adopted, incorporate all the existing EU acquis into UK domestic law at the time of exit.¹² More specifically, the Bill will convert directly applicable EU laws (such as EU Regulations) into UK law and preserve the laws that have been made in the UK to implement EU obligations (flowing from EU Directives).¹³ From that moment on the UK will be free (subject to any limitations flowing from international law including the ECHR¹⁴ and/or agreed to in a potential withdrawal agreement) to modify rules that previously were of EU origin. Moreover, in this situation, such rules of EU origin may be subject to domestic judicial interpretation without the rights and obligations arising from Article 267 TFEU on the preliminary reference procedure.

All other 'Brexit' scenarios depend highly on concrete and precise policy choices still to be made by both the United Kingdom and the EU. The number of possible scenarios situated between the above-mentioned two antipodes exceeds what can be explored in the context of this first study on the possible consequences of Brexit within the available timeframe. An example in the field of product safety rules may clarify this. In this area, the future relationship could be governed by a model according to which there is a mutual recognition of standards set by the EU and by the UK. Such an extensive mutual recognition of standards would be a novelty in free trade agreements.¹⁵ Besides, a possible agreement could include a mechanism for mutually recognising conformity decisions, by which UK authorities would confirm that UK products are produced in compliance with EU rules. At the same time, the UK would reserve the right to adopt its own product safety standards. The compliance of EU producers with these UK standards could be certified by EU authorities. Moreover, the UK and the EU could establish a new mechanism that allows uniform standard-setting between both in some type of regulatory cooperation. Such regulatory cooperation could be legally binding or merely consultative. Finally, it could be that the EU and the UK decide that product safety rules are mutually recognised only in relation to certain, but not all, product categories.

These glimpses at possible legal relationships between the EU and the UK in the area of product safety illustrate the complexity of an abstract assessment of all possible withdrawal scenarios situated between the antipodes of full EU membership and no agreement at all. Against this background, it can be easily explained why a vast majority of written reflections refer to the scenario in which the UK leaves the Union without having any kind of agreement, whereas detailed discussions on legal implications in relation to specific policy areas in case of a future partnership agreement between the EU and the UK are – for the time being – rather rare.

With these reservations in mind, the present study builds on an up-to-date review of existing material on 'Brexit'. This includes key academic literature, materials produced for public institutions and relevant case law on 'Brexit', the emphasis being on the EU and the UK constitutional requirements for terminating UK's membership of the EU and the existing material on 'Brexit' for the single market (in areas of IMCO competences), the customs union, and consumer protection. The literature drawn upon includes leading Dutch, English, French, and

¹¹ Cf. Markus Kotzur, *Intertemporal Law*, in: Max Planck Encyclopedia of Public International Law.

¹² See Department for Exiting the European Union, The Rt Hon Davis Davis MP and the Rt Hon Theresa May MP, 'The Great Repeal Bill: White Paper' (30 March 2017) <https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper> accessed 11 April 2017.

¹³ *ibid* 13 paras 2.4-2.5.

¹⁴ This will be further explained in section 4.2.

¹⁵ Please note that the term 'free trade agreement' refers to all kinds of international agreements that will be concluded in the future between the EU and the UK governing their trade relations.

German-language law journals (all general and some sector-specific publications in areas of IMCO competence), materials produced for governments and Parliaments, and the most authoritative online blogs on issues of EU and UK law. These are listed in detail in the list of references.

Based on the review of the currently available literature, it is possible to provide a map of the relevant literature. The first 'wave' of Brexit literature primarily concerned the UK referendum and the ensuing *Miller* litigation and accordingly focused extensively on the requirements of UK constitutional law for serving a notification of withdrawal under Article 50 TEU. It further focused on the EU constitutional law requirements for exiting the EU. There were, however, a number of early works that were published in the immediate aftermath of the UK referendum and focused in detail on the impact of 'Brexit' on specific policy areas.¹⁶ This body of work was followed by a second strand of literature focusing on the impact of Brexit on a number of policy areas which are regulated by the EU, either exclusively or together with the Member States (trade in goods and services, customs union, financial services, consumer protection, intellectual property, tax, and so on). These were mostly academic writings, but the UK House of Lords' EU Committee has produced a series of reports on a vast array of policy areas and issues affected by Brexit. These reports cover (in order of publication): the role of the UK Parliament in scrutinising Brexit;¹⁷ UK-Irish relations after Brexit;¹⁸ security and police cooperation;¹⁹ fisheries;²⁰ environment and climate change;²¹ Gibraltar;²² Brexit and the EU budget;²³ free movement of persons;²⁴ trade in goods;²⁵ civil justice cooperation;²⁶ trade in non-financial services;²⁷ the Crown Dependencies,²⁸ and agriculture.²⁹ These extensive reports have, together with the academic writings published thus far, greatly enriched the discussion on the legal, economic and political implications of Brexit and are discussed in this study where appropriate.

1.2. Structure of the study

Taking into account the current material, hereafter the analysis is structured as follows. The discussion commences with the EU legal framework for defining the future relationship between the EU and the UK (chapter 2). The focus then shifts to the basic Brexit scenarios (chapter 3). First, an introduction to the various degrees of trade cooperation is provided (chapter 3.1.). This is followed by an analysis of four basic scenarios that have been defined by the European Parliament (IMCO): full EU membership, including full access to the internal market as the baseline scenario (chapter 3.2.), a 'hard Brexit' with (chapter 3.3.) and without (chapter 3.4.) arrangements concerning the WTO as the 'fall-back option', UK accession to

¹⁶ See, e.g., Malte Kramme, Christian Baldus and Martin Schmidt-Kessel (eds.), *Brexit und die juristischen Folgen*, 2016.

¹⁷ European Union Committee, *Scrutinising Brexit: The role of Parliament* (first report) (2016-17, HL 33); European Union Committee, *Brexit: parliamentary scrutiny* (fourth report) (2016-17, HL 50).

¹⁸ European Union Committee, *Brexit: UK-Irish relations* (sixth report) (2016-17, HL 76).

¹⁹ European Union Committee, *Brexit: future UK-EU security and police cooperation* (seventh report) (2016-17, HL 77).

²⁰ European Union Committee, *Brexit: fisheries* (eighth report) (2016-17, HL 78).

²¹ European Union Committee, *Brexit: environment and climate change* (twelfth report) (2016-17, HL 109).

²² European Union Committee, *Brexit: Gibraltar* (thirteenth report) (2016-17, HL 116).

²³ European Union Committee, *Brexit and the EU budget* (fifteenth report) (2016-17, HL 125).

²⁴ European Union Committee, *Brexit: UK-EU movement of people* (fourteenth report) (2016-17, HL 121).

²⁵ European Union Committee, *Brexit: trade in goods* (sixteenth report) (2016-17, HL 129).

²⁶ European Union Committee, *Brexit: justice for families, individuals and businesses?* (seventeenth report) (2016-17, HL 134).

²⁷ European Union Committee, *Brexit: trade in non-financial services* (eighteenth report) (2016-17, HL 135).

²⁸ European Union Committee, *Brexit: the Crown Dependencies* (nineteenth report) (2016-17, HL 136).

²⁹ European Union Committee, *Brexit: agriculture* (twentieth report) (2016-17, HL 169).

the European Economic Area (EEA) Agreement (chapter 3.5.), and other tailor-made arrangements (chapter 3.6.). Preliminary conclusions in relation to the advantages and the disadvantages of the various Brexit scenarios, from the perspective of the EU27, are then discussed (chapter 3.7.2.) and assessed against policy choices made so far (chapter 3.7.3.). Thereafter, a framework for analysing the impact of a withdrawal of the UK from the EU on the Union's laws and policies is developed (chapter 4). This analytical framework is thereafter applied to study the impact of 'Brexit' on areas of IMCO competence (chapter 5). To this end, policy areas or legislation in force which are likely to feature as part of the future EU-UK agreement are identified (Annexes I and II). The study ends with conclusions based on the findings of the study (chapter 6).

2. THE EU LEGAL FRAMEWORK DEFINING THE FUTURE RELATIONSHIP BETWEEN THE EU AND THE UK

In legal terms the 'future EU-UK relationship' is, for the time being, impossible to determine, as major policy choices have yet to be made both by the United Kingdom and the EU. Still, an examination of the EU Treaties reveals already at this early stage of the political process that a distinction has to be made between two types of agreement defining the future relationship between the EU and the UK. One addresses the legacy of currently applicable EU law (backward-looking), whereas the other deals with the definition of the further evolution of EU law, its implementation into the UK domestic legal order and the future position of the UK in the EU legal order (forward-looking).

In legal terms, Article 50 TEU, constituting the legal base for the withdrawal agreement, in principle only deals with the 'backward-looking', whereas for the 'forward-looking', depending on the policy choices made, another legal base for an agreement has to be utilised, such as Article 207 TFEU for the negotiation and conclusion of comprehensive trade agreements in case of tailor-made arrangements. To be sure, from the wording of Article 50(2) TEU it becomes clear that both the agreement on 'backward-looking' and the agreement on 'forward looking' are linked, as the drafters of this provision have envisaged that one cannot be negotiated without taking account of the other, as will be explained hereafter in chapter 2.2.

2.1. Dealing with the legacy of currently applicable EU legal framework: the withdrawal agreement under Article 50 TEU

It becomes clear from the second paragraph of Article 50 TEU that the legacy of the currently applicable EU legal framework (backward-looking) has to be determined by an agreement of the Union with the UK 'setting out the arrangements for its withdrawal'. It derives from Article 50(3) TFEU that this agreement has to be negotiated within a period of two years following the formal notification of the UK to the European Council of its intention to withdraw from the Union. If no agreement has been reached at the end of the two-year period, primary and secondary Union law cease to apply in the UK without any (transitional) arrangements. Hence, while it becomes clear from the wording of Article 50 TEU ('setting out the arrangements for its withdrawal') that the drafters of this provision aimed at ensuring an orderly withdrawal of a Member State through the completion of an agreement that determines the legacy of the currently applicable EU law (backward-looking), neither the Union nor the UK for that matter are under any legal obligation to conclude such an agreement. Such an agreement is thus not a *conditio sine qua non* for the withdrawal of a Member State. A prolongation of the negotiation period is possible, but requires a unanimous vote in the European Council.

Opinions differ among commentators as to whether the Article 50 TEU process can be reversed once the withdrawal procedure has been set in motion by handing in the requisite notification under Article 50. Article 50 has never been utilised, and it is silent on this issue.³⁰ Craig (2016) and Skouris (2016) argue that the process can be reversed and that this is – in the words of Craig – 'the natural textual meaning' to be accorded to Article 50(3) TEU.³¹ Craig (2016) moreover argues that once the withdrawing Member State changes its mind, there is no decision to withdraw from the EU in accordance with the constitutional requirements of that country as required by Article 50(1) TEU.³² This view is further supported by

³⁰ Also noting the absence of any practical experience with Article 50 TEU e.g. L.E.J. Korsten, 'Het hoe en wat van de Brexit', *Bb* 2016/70, 240, 242.

³¹ Paul Craig, 'Brexit: A Drama in Six Acts' (2016) 41 *European Law Review* 447, 464; Vassilios Skouris, 'Brexit: Rechtliche Vorgaben für den Austritt aus der EU', *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 2016, 806, 807.

³² *ibid* 464.

arguments of principle, which draw on Articles 65-68 of the Vienna Convention on the Law of the Treaties (VCLT) – notably, on Article 68 VCLT, which provides that '[a] notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect.'³³ It is further supported by arguments of teleology, which highlight 'the very considerable gain where a Member State decided to remain in the EU when on the brink of departure, having realized the benefit of membership', as well as the withdrawing Member State's wish that the voters be consulted on a withdrawal agreement the terms of which would be worse than the rights and obligations attached to EU membership (as they will most likely be).³⁴ Craig further argues that the contrary interpretation precluding reversal would lead to the following 'untenable conclusion':

It would mean that invocation of art.50 could not be altered within the two-year period, even if there had been a change of government following an intervening national election fought on whether the Member State should exit; it would mean that withdrawal would have to proceed even if invocation of art.50 threatened or triggered an economic meltdown in the country; and it would generate intractable problems if the state required a referendum to complete the exit, since the withdrawal agreement might be rejected by the voters.³⁵

Similar views are expressed by Wyatt (2016), who argues that:

There is nothing in the wording to say that you cannot. It is in accord with the general aims of the Treaties that people stay in rather than rush out of the exit door. There is also the specific provision in Article 50 to the effect that, if a State withdraws, it has to apply to rejoin de novo. That only applies once you have left. If you could not change your mind after a year of thinking about it, but before you had withdrawn, you would then have to wait another year, withdraw and then apply to join again. That just does not make sense. Analysis of the text suggests that you are entitled to change your mind.³⁶

Skouris (2016) observes that that it would be 'deplorable', if in case a country decided to remain in the EU Union law would force that country to still leave the EU.³⁷ Michl (2016) supports this view by referring to general principles of International law, such as the principle of 'favor contractus', which is reflected by Article 68 VCLT, which allows for unilateral revocation of a notification to withdraw under International law.³⁸ Lord Kerr himself, who was involved in drafting Article 50 TEU, has argued that 'it is not irrevocable' and that 'legally they [i.e., the other Member States] couldn't insist that you leave'.³⁹ It is further argued by commentators that abuses of the withdrawal process – such as a State changing its mind after 23 months after realising that it is not going to get a 'good' deal (or any deal at all)

³³ *ibid* 463-64; Paul Craig, 'Brexit: Foundational Constitutional and Interpretive Principles: II' (OxHRH Blog, 28 October 2016) <http://ohrh.law.ox.ac.uk/brexit-foundational-constitutional-and-interpretive-principles-ii/> accessed 12 December 2016. See also Carlos Closa Montero, 'Is Article 50 Reversible? On Politics Beyond Legal Doctrine', *VerfBlog*, 2017/1/04, <http://verfassungsblog.de/is-article-50-reversible-on-politics-beyond-legal-doctrine/>.

³⁴ Craig (n 31), 465.

³⁵ *ibid* 464.

³⁶ See Derrick Wyatt's response to Question 3 in Revised transcript of evidence taken before The Select Committee on the European Union, Inquiry on the Process of Leaving the European Union, Evidence Session No. 1, 8 March 2016, discussed in European Union Committee, The Process of Withdrawing from the European Union (eleventh report) (2015-16, HL 138) ch 2.

³⁷ Skouris (n 31), 807.

³⁸ Walther Michl, 'Die formellen Voraussetzungen für den Austritt des Vereinigten Königreichs aus der Europäischen Union', *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* 2016, 1365, 1367.

³⁹ Glenn Campbell, 'Article 50 Author Lord Kerr Says Brexit Not Inevitable' (BBC News, 3 November 2016) <http://www.bbc.com/news/uk-scotland-scotland-politics-37852628> accessed 12 December 2016.

agreed inside 24 months, revoking the notice of withdrawal, and then submitting another notice of withdrawal a few months later and trying again – could be dealt with by the CJEU if need be. The CJEU could construe Article 50 such that if there were repeated attempts to trigger it, which constituted a single sequence of events, the two year period should be interpreted to apply to the event as a whole.⁴⁰

However, not all commentators agree that the Article 50 TEU process of exiting the EU could be reversed unilaterally.⁴¹ According to this opinion, a unilateral right to revoke the notification of withdrawal is not in line with either the purpose or the structure of Article 50. It is argued that the process could only be reversed in agreement with the EU27. This interpretation also has the merit of deterring a State from triggering Article 50 unless it is absolutely sure that it wants to run the risks of getting a bad deal, which is, in this opinion, in line with the purpose of Article 50.

Beyond legal reasoning some authors argue that in political reality it would be difficult to envisage that the European Council would reject an attempt by the Member State concerned to withdraw from the withdrawal.⁴²

It should be further noted that it was common ground between the parties in the *Miller* case in the UK High Court that 'a notice under Article 50(2) TEU [could not] be withdrawn' and that '[o]nce a notice [was] given, it [would] inevitably result in the complete withdrawal of the United Kingdom from the European Union and from the relevant Treaties at the end of the two year period, subject only to an agreement on an extension of time between the United Kingdom and the European Council.'⁴³ Triggering Article 50 was regarded as akin to firing a bullet that would inexorably reach its target ('Brexit') by the end of the two-year (or the extended) period. Working within an adversarial system has the consequence that the contending parties place the opposing arguments before the court,⁴⁴ yet neither party suggested that the notice was revocable.

The ultimately negotiated agreement is concluded after a qualified majority vote in the Council and the consent of the European Parliament. Poptcheva (2016) notes that 'Article 50 TEU does not establish any substantive conditions for a Member State to be able to exercise its right to withdrawal, but only procedural requirements.'⁴⁵ The European Council, that is, the Heads of State or Government of the remaining Member States, have to issue guidelines for the negotiations to take place between the EU and the UK. The withdrawal agreement has to be concluded by the Council of the EU, that is, by the national ministers of the EU Member States, acting by a qualified majority, and not by unanimity. Such 'super' qualified majority is defined as at least 72% of the members of the Council, comprising at least 65% of the

⁴⁰ Craig (n 33); Menelaos Markakis, 'Legal Issues Arising from the Brexit Referendum: A UK and EU Constitutional Analysis' (2017) 45(1) *International Journal of Legal Information* 14, 20.

⁴¹ See, e.g., Jake Rylatt, 'The Irrevocability of an Article 50 Notification: Lex Specialis and the Irrelevance of the Purported Customary Right to Unilaterally Revoke' (U.K. Const. L. Blog, 27 July 2016) <<https://ukconstitutionallaw.org/2016/07/27/jake-rylatt-the-irrevocability-of-an-article-50-notification-lex-specialis-and-the-irrelevance-of-the-purported-customary-right-to-unilaterally-revoke/>> accessed 14 September 2016.

⁴² Armin Cuyvers, 'Artikel 50 VEU en Brexit: de juridische contouren voor een politiek drama', *NtEr* september 2016, nr. 7, 221, 225; Menelaos Markakis (n 40), 20.

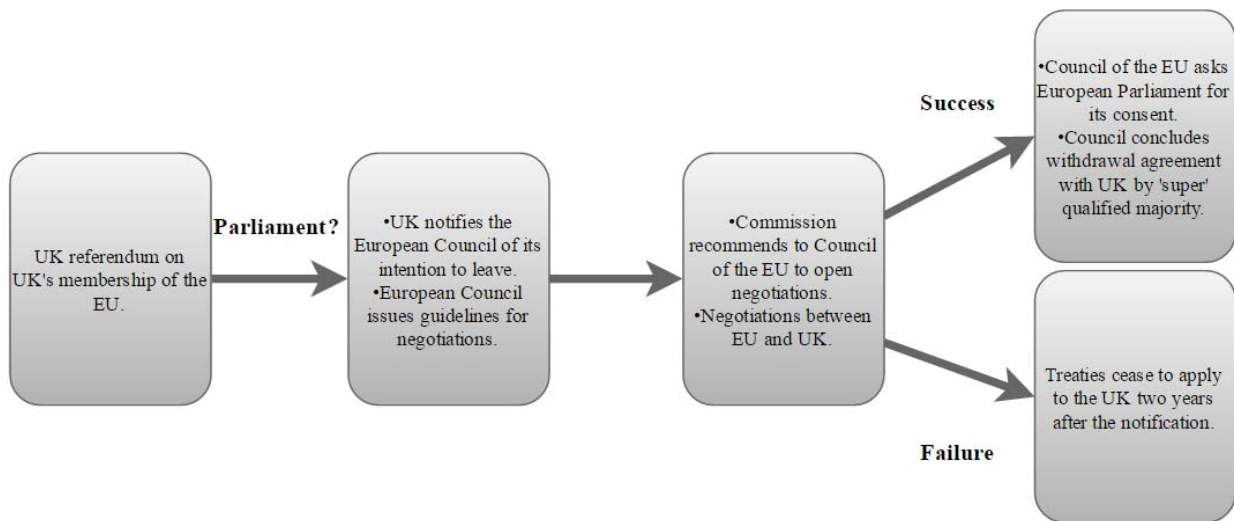
⁴³ *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin); [2016] A.C.D. 134, [10]-[11]. Critical on this approach Daniel Sarmiento, 'Miller, Brexit and the (maybe not to so evil) Court of Justice', *VerfBlog*, 2016/11/08, <http://verfassungsblog.de/miller-brexit-and-the-maybe-not-to-so-evil-court-of-justice/>, DOI: <http://dx.doi.org/10.17176/20161108-171128> accessed 5 January 2017.

⁴⁴ Paul Craig, 'Miller: Winning Battles and Losing Wars' (OxHRH Blog, 4 November 2016) <<http://ohrh.law.ox.ac.uk/miller-winning-battles-and-losing-wars/>> accessed 12 December 2016.

⁴⁵ European Parliamentary Research Service, 'Article 50 TEU: Withdrawal of a Member State from the EU' (February 2016) <http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI%282016%29577971_EN.pdf> accessed 17 August 2016, 3.

population of the Member States.⁴⁶ As to the role of the exact role of the European Parliament in the Brexit procedure reference is presently made to chapter 2.3.

The steps to be followed pursuant to Article 50 TEU can be summarised as follows:⁴⁷



As has been observed in the previous chapters, Article 50(2) TEU requires a notification by the Member State concerned to the European Council. The question of exactly which constitutional organ is authorised under UK constitutional law to take a decision on the notification is, as pointed out by Cuyvers (2016) with reference to Hillion (2015) and Tatham (2012), also of importance from a European Union law perspective. Namely, does the European Council have the right or even an obligation to undertake a substantive review of whether the notification has indeed been done 'in accordance with ... the constitutional requirements' of the Member State concerned?⁴⁸

Leaving aside the decision-making procedure, Article 50 TEU provides little clues regarding the scope of the withdrawal agreement other than stating in paragraph 2 that it should set out the arrangements for the withdrawal, stating that these arrangements are 'taking account of the framework for its future relationship with the Union'. This reference to the 'framework for its future relationship' thus links the withdrawal agreement to the future framework and, by that, with the policy choices that the UK has to decide regarding its future relationship with the EU.

2.2. Defining the future relationship between the EU and the UK: the future arrangement

As becomes already clear from chapter 2.1., the legal framework defining the relationship between the EU and the UK is twofold. While the withdrawal agreement to be concluded in accordance with Article 50 TEU will have to deal with transitional measures, it cannot itself in its entirety define the future framework.⁴⁹ Instead, the latter will have to be dealt with in a stand-alone agreement, which can take numerous shapes.

⁴⁶ Article 238(3)(b) TFEU.

⁴⁷ The figure is taken from Markakis (n 40), 18.

⁴⁸ Cuyvers (n 42), 224. For the reference to Hillion (2015) and Tatham (2012) see footnote 21 of that contribution.

⁴⁹ In a similar vein 'Editorial comments: Withdrawing from the "ever closer union?" (2016) 53 *Common Market Law Review* 1491.

In this context Craig (2016) has argued that there could be a 'thin' withdrawal agreement 'that deals only with the core essentials of terminating the UK's current relationship with the EU, while leaving details concerning the future to be decided by a later treaty'; or a much 'thicker' agreement, setting out 'the detailed architecture to govern future interaction between the EU and the UK'.⁵⁰ Indeed, it appears rather unlikely that the UK would opt for a 'thicker' agreement considering the tight two-year deadline, the extension of which requires unanimity in the European Council. This thus makes a 'slim' withdrawal agreement that contains the necessary minimum for the withdrawal a likely scenario.

The drafters of Article 50(2) TEU have envisaged that the substance of the withdrawal agreement is to some extent determined by the character of the future relationship between the UK and the Union. Otherwise, the reference in the context of the withdrawal agreement to the framework relating to the future relationship between the UK and the EU would make little sense. Against this background, a position stating that there has to be a withdrawal agreement before any serious orientation concerning the future relationship can take place seems at least questionable. So, while the withdrawal agreement under Article 50 TEU cannot itself define the future relationship between the UK and the Union, as this would go beyond the meaning of 'taking account of', drawing a precise dividing line between these two agreements appears difficult *in abstracto* and can only be attempted once the UK has taken a policy decision on its (envisaged) future vis-à-vis the EU. De Witte argues in this context that the reference to the future agreement 'implies that the main outlines of that future relationship should be known by the time the withdrawal agreement is signed'. In fact, this author even suggests that for the negotiating parties it may be preferable not to sign a withdrawal agreement in case that a satisfactory 'deal for the future' cannot be reached.⁵¹

The meaning of 'taking account' does not become equally relevant in all withdrawal scenarios discussed in more detail in chapter 3. Under the EEA option, the framework of the future relationship will be defined by existing EEA law/EFTA law. Under the WTO 'fall-back scenario' option, no detailed rules on the future relationship between the UK and the Union within the WTO framework would necessarily be needed. Simply concluding a withdrawal agreement could in principle be a suitable solution, albeit the UK would have to negotiate its own WTO schedule relating to tariffs, quotas and subsidies (in particular concerning agricultural products), as will be further described in chapters 3.3 and 3.4. This means that the Treaty reference to 'taking account' becomes mainly relevant in a scenario involving tailor-made solutions. Here, the trade relations between the Union and the UK would have to be defined autonomously, requiring a comprehensive trade agreement such as CETA or TTIP, both of which are based on Article 207 TFEU (see further chapter 3.6.). In contrast to the withdrawal agreement under Article 50 TEU, which requires a qualified majority in the Council regardless of the contents of the agreement, the applicable decision making procedure in the case of a free trade agreement depend on the substance of the agreement (qualified majority or unanimity in the Council after obtaining the consent of the European Parliament).

In order to conclude such an agreement, first the Council will have to define a negotiation mandate upon recommendation of the Commission by qualified majority without any further involvement of the European Parliament (Article 207(3) and (4) TFEU), provided that this

⁵⁰ Craig (n 31), 465; Cuyvers (n 42), 227. On the withdrawal agreement, see further Alan Dashwood, 'After the Deluge' (2016) 41 *European Law Review* 469; Bruno De Witte, 'Near-Membership, Partial-Membership and the EU Constitution' (2016) 41 *European Law Review* 471; Pavlos Eleftheriadis, 'A New Referendum is a Constitutional Requirement' in Pavlos Eleftheriadis (ed) and others, 'Legal Aspects of Withdrawal from the EU: A Briefing Note' (14 July 2016) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2809285> accessed 3 August 2016, 25-28; House of Commons oral evidence for the 'UK's economic relationship with the EU inquiry' <<http://www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/inquiries1/parliament-2015/economic-relationship-with-eu-16-17/>> accessed 15 December 2016.

⁵¹ De Witte (n 50), 471.

agreement does not touch upon trade in services and the commercial aspects of intellectual property, as well as foreign direct investment. In those cases, the Council acts unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules (Article 207(4) TFEU). The Council also acts unanimously for the negotiation and conclusion of agreements in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity; and in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them (Article 207(4) TFEU). The negotiation and conclusion of international agreements in the field of transport is governed by the provisions of Title VI of Part Three and Article 218 TFEU (Article 207(5) TFEU).

Furthermore, it should be noted that, as the debate in legal scholarship stands today, comprehensive free trade agreements are considered to be mixed agreements. More clarity on this matter can be expected once the ECJ has issued its opinion 2/15 on the Free Trade Agreement with Singapore. AG Sharpston recently opined that this free trade agreement could be concluded only by the EU and the Member States acting jointly.⁵² Assuming, for the time being, that such comprehensive free trade agreements are mixed agreements, their conclusion requires ratification by all EU Member States, in accordance with their respective constitutional requirements.⁵³

It is furthermore argued in legal scholarship that the EU Treaties and protocols may also need to be amended by the remaining Member States to take stock of the post-Brexit reality.⁵⁴ For this the Treaty amendment procedure laid down in Article 48 TEU will have to be initiated.

This quick comparison of the decision-making procedures makes it clear that a tailor-made solution may not be achieved by means of concluding a withdrawal agreement alone, but requires a set of independent agreements, amongst which there would be a CETA/TTIP type of comprehensive free trade agreement. Ideally, because of the interdependence of the withdrawal agreement and the framework for the future relationship, both should be negotiated and possibly even concluded within the same two-year period defined in Article 50 TEU so to ensure coherence between the two agreements and to avoid legal lacunae. Yet, from a legal point of view it may be argued the competence of the EU to formally negotiate international agreements relates to constellations where the EU is negotiating with a third country and thus not with a Member State that has the intention to withdraw from the Union. More importantly in practical terms, considering past experience, the likelihood of the completion of the negotiations on a comprehensive free trade agreement within two years is rather remote.

It is questionable, whether in the likely situation that the withdrawal agreement is negotiated much quicker than the agreement on the future relationship, the entry into force of the withdrawal could be made conditional upon the entry into force of the agreement on the future relationship. The reason for this is that such a clause in the withdrawal agreements would have the effect of delaying the withdrawal of the UK beyond the two-year deadline foreseen in the third paragraph of Article 50 TEU. So in order to not circumvent Article 50 TEU, such a clause would arguably have to be approved by a unanimous vote in the European Council.

⁵² Opinion procedure 2/15, Opinion of AG Sharpston, ECLI:EU:C:2016:992.

⁵³ For the fate of existing mixed agreements after 'Brexit', see Panos Koutrakos, 'Negotiating International Trade Treaties after Brexit' (2016) 41 *European Law Review* 475.

⁵⁴ Adam Łazowski, 'Withdrawal from the European Union and Alternatives to Membership' (2012) 37 *European Law Review* 523, 529-30.

Finally, it should be recalled that in order to launch the negotiations for a future comprehensive trade agreement with the UK, the EU has to define its negotiation mandate before entering into negotiations with the UK. This mandate has to take into account the particularities of free trade agreements in contrast to the EU Treaties. EU law is a 'living instrument' as it provides for legal bases to adopt secondary legislation, which has to be implemented into national legal orders. Free trade agreements traditionally do not provide for such 'dynamisation' but for rules of some kind of mutual recognition (be it a mutual recognition of standards, be it a mutual recognition of conformity decisions). This inherent danger of 'fossilizing' legal standards is the main danger to any currently applicable secondary EU legal act, which sets minimum standards for goods and services in the internal market.

2.3. Article 50 TEU: the role of parliaments in the withdrawal agreement

2.3.1. European Parliament

As has been pointed out above, the Council needs to obtain the consent of the European Parliament. This requires a simple majority of at least one third of the total number of MEPs.⁵⁵ Despite this involvement of the EP, some commentators consider the European Council to be the most important institutional player, as it determines the political direction of the negotiations.⁵⁶

The role of the European Parliament is, at first sight, only a minor one. It has to give its consent by a majority of the votes cast (Article 50(2) TEU in conjunction with Rule 82 of the Rules of Procedure of the European Parliament). Rule 81 of the Rules of Procedure of the European Parliament specifies, by reference from Rule 82, the rights of the Parliament during the negotiation of the withdrawal agreement. According to this Rule, Parliament may decide, on a proposal from the committee responsible, a political group or at least 40 Members, to request the Commission and the Council to take part in a debate before negotiations with the State commence. Yet, when adopting the negotiation mandate, the European Parliament may neither amend nor veto a draft mandate. Article 50(2) TEU refers in this context to Article 218(3) TFEU, which empowers exclusively the Council to adopt the decision authorising the opening of negotiations. Throughout the negotiations, the Commission and the Council have to inform the committee responsible regularly and fully of the progress of the negotiations, if necessary on a confidential basis. At any stage of the negotiations Parliament may, on the basis of a report from the committee responsible, adopt recommendations and require these to be taken into account before the conclusion of a withdrawal agreement. When the negotiations are completed, but before any agreement is signed, the draft agreement must be submitted to Parliament.

There is academic debate as to whether British MEPs can still participate in the voting. This issue relates to a future ratification of the withdrawal agreement under Article 50(2) TEU, but also to the current Parliamentary work in the run up and during the withdrawal negotiations and any on-going legislative files.

Article 50(2) TEU itself is silent on this issue and only addresses the situation of the member of the European Council or of the Council representing the withdrawing State.⁵⁷ On one hand it has been observed by Łazowski (2012) that '[a]lthough art. 50 TEU is silent on this, it seems reasonable to expect that the same rule will apply to the elected members of the

⁵⁵ Article 231 TFEU; Rule 168(2) of the European Parliament's Rules of Procedure.

⁵⁶ Adrienne de Moor-van Vugt, 'Redactionele signalen', *SEW, Tijdschrift voor Europees en economisch recht* 2016, 291.

⁵⁷ Article 50(4) TEU specifies that the UK representative in the European Council and the Council is excluded from the deliberations and decision-making in the European Council and Council. See also Cuyvers (n 42), 226.

European Parliament from the departing country.⁵⁸ On the other hand it can be observed that Article 10(2) TEU considers MEP to be representatives of the Union citizens and thus, expects them to act in their interest. In contrast to the Council, which represents the interests of the European nations, MEPs are not representing their home countries. By that, there is no constitutional ground for depriving British MEPs of any right linked to the status of a Member of European Parliament.⁵⁹ Thus, it is for example argued by Rieder (2013) that their participation in voting would further 'allo[w] nationals from other EU Member States who are living on the territory of the withdrawing state to have at least some representation in the political process of withdrawal',⁶⁰ given that they have the right to vote in the European elections in their state of residence.⁶¹ This would 'alleviate', it is argued, 'the problem that they may be excluded from the national political process/discourse of withdrawal.'⁶²

The same reasoning can be applied to the involvement of British MEPs in on-going legislative files. Currently, the withdrawal of the UK from the EU is a legal *Nullum*. Until the withdrawal becomes effective, nothing changes in relation to the legal status of the UK in the EU. Even after the formal notification of 29 March 2017 to the European Council, British MEPs must arguably be still in a position to make use of their full rights as Members of the European Parliament.

2.3.2. National Parliaments

The withdrawal agreement does not require ratification by the national parliaments of the Member States.⁶³ Yet, in the light of a possible future free trade agreement and the likely need for a ratification thereof by national parliaments, it is advisable to engage the latter in the process leading up to the conclusion of a withdrawal agreement, such as through regular a regular exchange of information on the state of affairs of the negotiations.

Apart from the parliaments of the remaining Member States, the particular situation applying to the UK has to be noted and namely the rights of the UK Parliament pursuant to domestic constitutional requirements in relation to the formal notification and, thereafter, the withdrawal agreement concluded by the UK government.

As has been noted above, according to Article 50(1) TEU any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. This means that the domestic process leading to invocation of Article 50 TEU is subject to the constitutional legal requirements in the Member State concerned. As the exact scope of these domestic requirements was not clear in the UK, this had given rise to extensive legal debate. As a matter of principle, the conduct of international relations and the making and unmaking of treaties on behalf of the UK are regarded as matters for the Crown (acting through the Executive Government of the day) in the exercise of its prerogative powers.⁶⁴ It was nonetheless contested, whether the Executive could use the Crown's prerogative powers to give

⁵⁸ Łazowski (n 54), 528.

⁵⁹ See, e.g., Articles 10(2) and 14(2) TEU. See further Darren Harvey, 'What Role for the European Parliament under Article 50?' (EU Law Analysis Blog, 14 July 2016) <<http://eulawanalysis.blogspot.co.uk/2016/07/what-role-for-european-parliament-under.html>> accessed 3 August 2016; Markakis (n 40), 18-19. See also de Moor-van Vugt (n 56), 292, who seems to argue that EU law does not foresee the exclusion of British MEPs.

⁶⁰ Clemens M. Rieder, 'The Withdrawal Clause of the Lisbon Treaty in the Light of the EU Citizenship: Between Disintegration and Integration' (2013-2014) 37 *Fordham International Law Journal* 147 (2013), 159.

⁶¹ Article 20(2)(b) TFEU.

⁶² Rieder (n 60), 159.

⁶³ For a different view see Łazowski (n 7), 118. This does not exclude that national parliaments may demand from their own governments to be involved in the negotiations. See in this regard the report commissioned by the EU affairs committee of the Dutch second Chamber of Parliament: 'Nederland en de Brexit', Nr. 171 Verslag van de Rapporteurs, 21 March 2017.

⁶⁴ Craig (n 31), 462. On the royal prerogative, see e.g. Timothy Endicott, 'This Ancient, Secretive Royal Prerogative' (U.K. Const. L. Blog, 11 November 2016) <<https://ukconstitutionallaw.org/2016/11/11/timothy-endicott-this->

notice under Article 50 TEU for the United Kingdom to cease to be a member of the European Union or whether it should seek parliamentary authorisation prior to triggering Article 50 TEU.

In the literature, it has been observed that seeking some form of parliamentary approval could be regarded as a legal or a conventional constitutional obligation or perhaps justified 'in terms of political expediency'.⁶⁵ The prerogative power of the Crown could be said to be fettered by domestic legislation such as the European Communities Act 1972 (ECA 1972), which incorporates the EU Treaties into domestic law. The relevant literature and case law are listed in the bibliography chapter, and space precludes a detailed exegesis of the complex issues examined therein. Suffice it to say for present purposes that there was considerable ambiguity as to whether parliamentary approval would be required prior to triggering Article 50 and that this uncertainty is reflected in the relevant literature.

Barber, Hickman and King (2016) argue that 'it is not open to Government to turn a statute into what is in substance a dead letter by exercise of the prerogative powers; and that it is not open to the Government to act in a way which cuts across the object and purpose of an existing statute.'⁶⁶ In the opinion of these authors, triggering Article 50 through the prerogative would render the ECA 1972 'nugatory', in the sense that its provisions would be devoid of any substance and the EU rights introduced through it into UK law would fall away. As such, they argue that before an Article 50 declaration can be issued, UK Parliament must enact a statute empowering or requiring the UK Prime Minister to issue notice under Article 50 TEU, and empowering the Government to make such changes to statutes as are necessary to bring about UK's exit from the EU.

Craig (2016) argues that '[t]he invocation of art. 50(1) has no legal effect as such on the ECA 1972, nor does the 1972 Act say anything about the procedure for withdrawal from the EU Treaties'.⁶⁷ The ECA 1972 would need to be repealed through a statute enacted by Parliament.⁶⁸ There is, according to this opinion, no case that comes close to establishing the proposition advocated by Barber, Hickman, and King.⁶⁹ This should be regarded, however, as a critique of their position as articulated in their contribution, and not as an argument against review by Parliament.⁷⁰ Young (2016) further argues that the interpretation of Barber, Hickman, and King is not widely accepted; that unless and until a withdrawal agreement is reached between the UK and the EU, it is by no means clear that the invocation of Article 50 TEU means that all of the EU rights currently enjoyed by UK citizens will be removed; that it is difficult to regard that provision as a one-way street to exit from the EU; and that 'a prerogative power to enter into Treaties does not in and of itself create rights and obligations in UK law', as 'these rights and obligations need to be ratified – normally through legislation – into UK law'.⁷¹

ancient-secretive-royal-prerogative/> accessed 12 December 2016; Peter Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* (3rd edn, Hart Publishing 2016) 32, 87-90.

⁶⁵ Alison Young, 'Brexit, Article 50 and the "Joys" of a Flexible, Evolving, Un-codified Constitution' in Pavlos Eleftheriadis (ed) and others, 'Legal Aspects of Withdrawal from the EU: A Briefing Note' (14 July 2016) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2809285> accessed 3 August 2016, 20-24.

⁶⁶ Nick Barber, Tom Hickman and Jeff King, 'Pulling the Article 50 "Trigger": Parliament's Indispensable Role' (U.K. Const. L. Blog, 27 June 2016) <<https://ukconstitutionalaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/>> accessed 3 August 2016.

⁶⁷ Craig (n 31), 463.

⁶⁸ *ibid* 463.

⁶⁹ *ibid* 463.

⁷⁰ See further Paul Craig, 'Brexit: Foundational Constitutional and Interpretive Principles: I' (OxHRH Blog, 27 October 2016) <<http://ohrh.law.ox.ac.uk/brexit-foundational-constitutional-and-interpretive-principles-i/>> accessed 12 December 2016.

⁷¹ Young (n 65), 21.

It is further noted that it would nevertheless be possible to argue that the Executive's prerogative power is altered by constitutional convention, requiring the Government to seek parliamentary approval prior to making the Article 50 notice.⁷² Indeed, it needs to be recalled that constitutional conventions are 'maxims or practices which, though they regulate the ordinary conduct of the Crown, of ministers, and of other persons under the constitution, are not in strictness laws at all,' meaning that 'conventions, unlike laws, are not enforceable in the courts.'⁷³ It should be noted however that it is not clear whether such a convention exists with respect to 'Brexit', though 'that is not in and of itself conclusive – new conventions have to start somewhere'.⁷⁴ In any event, such a convention would not be enforceable in the courts. Consequently, a constitutional convention of parliamentary deliberation, even if it existed, could not be used to stop the Government from handing in the notification required by Article 50 TEU to set 'Brexit' in motion.

The House of Lords Select Committee on the Constitution notes that triggering Article 50 TEU through the use of primary legislation would entail benefits in terms of legal certainty and legitimacy.⁷⁵ Nonetheless, the Committee also observes that, although parliamentary approval by means of resolution 'would remove any uncertainty about Parliament's acceptance of the referendum result', it 'would not necessarily provide a water-tight legal authority for triggering Article 50 against challenges in either the domestic or European courts.'⁷⁶

The uncertainty in the academic debate has now been clarified by the High Court judgment in the case of *Miller*.⁷⁷ The High Court confirmed that, as a matter of UK constitutional law, 'the Crown cannot through the use of its prerogative powers increase or diminish or dispense with the rights of individuals or companies conferred by common law or statute or change domestic law in any way without the intervention of Parliament.'⁷⁸ EU law rights were treated by the Court as domestic law rights which were introduced into domestic law through the ECA 1972 or as rights which depend on the continued existence of the ECA 1972. The Court ruled that withdrawal from the EU would undo these categories of rights which were brought into effect by Parliament through the enactment of the ECA 1972.⁷⁹

More specifically, the High Court set out three categories of rights: EU law rights capable of replication in the law of the United Kingdom after 'Brexit' (category (i) rights); rights enjoyed by British citizens and companies in other EU Member States (category (ii) rights); and EU law rights that could not be replicated in UK law after 'Brexit' (category (iii) rights). Concerning the first category, it is observed that this includes 'the rights of workers under the Working Time Directive'.⁸⁰ Moreover, for present purposes, this can arguably be said to also include consumer rights. Concerning the second category, it is noted that these rights include 'the rights of free movement of persons and of capital and rights of freedom of establishment'.⁸¹ Moreover, it may be argued that the free movement of goods may fall under this heading, as well as the 'right' to import or export goods into or from an EU Member State without them being subject to tariffs or other charges having equivalent effect to customs duties. In

⁷² Craig (n 31), 462; Young (n 65), 21-23.

⁷³ Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1959) 24; Leyland (n 64), 32-42.

⁷⁴ Young (n 65), 21.

⁷⁵ Select Committee on the Constitution, *The Invoking of Article 50 (fourth report)* (2016-17, HL 44) 10.

⁷⁶ *ibid* 12.

⁷⁷ R. (on the application of Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin); [2016] A.C.D. 134.

⁷⁸ *ibid* [33].

⁷⁹ *ibid* [62]-[66].

⁸⁰ *ibid* [58].

⁸¹ *ibid* [60].

the third category, the right to stand for election to the European Parliament, the right to vote in such elections, the 'right' to seek a reference to the CJEU, and 'the right to seek to persuade the EU Commission to take regulatory action in relation to matters within the United Kingdom, such as to investigate a violation of EU competition law or of EU environmental protection legislation occurring within the United Kingdom and grant a remedy in relation to it' have been identified.⁸²

The High Court judgment in *Miller* has received a mixed reaction from legal scholars, the main controversy being whether EU law rights are indeed statutory rights enacted by Parliament.⁸³ The prevailing view seems to be that the outcome in the *Miller* case was correct. An appeal was lodged before the Supreme Court of the United Kingdom. In its judgment in *Miller* which was handed down on 24 January 2017, the UK Supreme Court ruled that the Government could not exercise its prerogative powers and trigger Article 50 TEU without prior authorisation by Parliament by means of statute.⁸⁴ It further ruled that the UK Government was not required to seek the consent of the Northern Ireland Assembly prior to giving notice under Article 50. The Scottish Parliament, Welsh Assembly and Northern Ireland Assembly did not have a legal veto, said the Court, on the UK's withdrawal from the European Union.

At the time of writing, the European Union (Notification of Withdrawal) Bill 2016-17 has completed its journey through the two Houses of the UK Parliament and Royal assent has been given. The Bill confers power on the Prime Minister to notify, under Article 50(2) of the TEU, the UK's intention to withdraw from the EU.⁸⁵

The UK will need to ratify a withdrawal agreement that is concluded between the EU and the UK pursuant to Article 50 TEU.⁸⁶ It is important to note for the purposes of this study that there is considerable ambiguity with respect to the UK rules governing the ratification of such

⁸² *ibid* [61].

⁸³ See among many others Nick Barber and Jeff King, 'Responding to Miller' (U.K. Const. L. Blog, 7 November 2016) <<https://ukconstitutionallaw.org/2016/11/07/nick-barber-and-jeff-king-responding-to-miller/>> accessed 12 December 2016; Eirik Bjorge, 'EU Rights as British Rights' (OxHRH Blog, 14 November 2016) <<http://ohrh.law.ox.ac.uk/eu-rights-as-british-rights/>> accessed 13 December 2016; Paul Craig, 'Miller: Alternative Syllogisms' (OxHRH Blog, 23 November 2016) <<http://ohrh.law.ox.ac.uk/miller-alternative-syllogisms/>> accessed 30 November 2016; Sionaidh Douglas-Scott, 'Miller: Why the Government Should Still Lose in the Supreme Court (Even with New Arguments)' (U.K. Const. L. Blog, 15 November 2016) <<https://ukconstitutionallaw.org/2016/11/15/sionaidh-douglas-scott-miller-why-the-government-should-still-lose-in-the-supreme-court-even-with-new-arguments/>> accessed 30 November 2016; Mark Elliott and Hayley Hooper, 'Critical Reflections on the High Court's judgment in R (Miller) v Secretary of State for Exiting the European Union' (U.K. Const. L. Blog, 7 November 2016) <<https://ukconstitutionallaw.org/2016/11/07/mark-elliott-and-hayley-hooper-critical-reflections-on-the-high-courts-judgment-in-r-miller-v-secretary-of-state-for-exiting-the-european-union/>> accessed 12 December 2016; David Feldman, 'Brexit, the Royal Prerogative, and Parliamentary Sovereignty' (U.K. Const. L. Blog, 8 November 2016) <<https://ukconstitutionallaw.org/2016/11/08/david-feldman-brexit-the-royal-prerogative-and-parliamentary-sovereignty/>> accessed 12 December 2016; John Finnis, 'Terminating Treaty-based UK Rights' (Policy Exchange, 26 October 2016) <<http://judicialpowerproject.org.uk/wp-content/uploads/2016/10/Finnis-2016-Terminating-Treaty-based-UK-Rights-v2.pdf>> accessed 12 December 2016; Jeff King and Nick Barber, 'In Defence of Miller' (U.K. Const. L. Blog, 22 November 2016) <<https://ukconstitutionallaw.org/2016/11/22/jeff-king-and-nick-barber-in-defence-of-miller/>> accessed 12 December 2016; Thomas Poole, 'Losing our Religion? Public Law and Brexit' (U.K. Const. L. Blog, 2 December 2016) <<https://ukconstitutionallaw.org/2016/12/02/thomas-poole-losing-our-religion-public-law-and-brexit/>> accessed 12 December 2016; Alison Young, 'R (Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin): Constitutional Adjudication – Reality over Legality?' (U.K. Const. L. Blog, 9 November 2016) <<https://ukconstitutionallaw.org/2016/11/09/alison-young-r-miller-v-the-secretary-of-state-for-exiting-the-european-union-2016-ewhc-2768-admin-constitutional-adjudication-reality-over-legality/>> accessed 12 December 2016.

⁸⁴ R. (on the application of Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5.

⁸⁵ 'European Union (Notification of Withdrawal) Bill 2016-17' <<http://services.parliament.uk/bills/2016-17/europeanunionnotificationofwithdrawal.html>> accessed 15 March 2017.

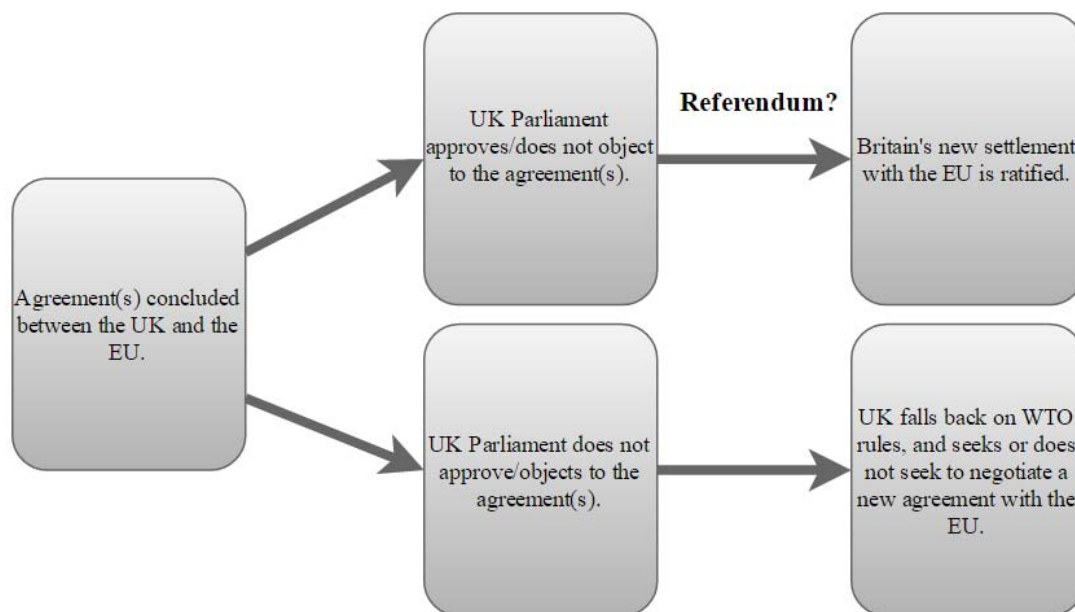
⁸⁶ As stated above, as far as the remaining EU Member States is concerned there is no need for ratification at the level of the Member States.

an agreement, an issue which the EU27 might have an interest to seek further clarification about prior to concluding a withdrawal agreement with the UK.

Turning to the UK rules governing ratification of international agreements, the Constitutional Reform and Governance Act 2010 provides that, subject to certain exceptions, the Executive should place the international agreement before Parliament for 21 days before it is ratified. These agreements would have to be submitted for review by Parliament, acting separately, under the negative resolution procedure. The House of Commons may resolve that the treaty should not be ratified, and it would then be unlawful to ratify the treaty concerned. The House of Lords, too, can resolve that the treaty should not be ratified, the difference being that its resolution can be overridden by the Minister.⁸⁷

There is considerable ambiguity as to the degree of parliamentary involvement that would be required for the ratification of a future withdrawal agreement between the UK and the EU. The regime under the 2010 Act may not be held to be applicable if some greater parliamentary involvement is required.⁸⁸ More specifically, the 2010 Act provides that the default rule does not apply to a treaty that is subject to a requirement imposed by Part 1 of the European Union Act 2011.⁸⁹ Chapter 2 of the latter Act provides that 'a treaty which amends or replaces TEU or TFEU' shall not be ratified unless it is approved by means of an Act of Parliament and a referendum.⁹⁰ It is not clear whether a withdrawal agreement would be 'replacing' or 'amending' the EU Treaties within the meaning of the European Union Act 2011.⁹¹ For his part, Eleftheriadis (2016) argues that a referendum would indeed be required for the withdrawal agreement, as well as for the future trade agreement to be concluded between the UK and the EU.⁹² Others argue that a withdrawal from the EU is not covered by the terms of the 2011 Act, as this Act does not address, in their opinion, this type of situation.

The following figure summarises the discussion above:⁹³



⁸⁷ Constitutional Reform and Governance Act 2010, s 20.

⁸⁸ Constitutional Reform and Governance Act 2010, Explanatory Memorandum, para. 144.

⁸⁹ Constitutional Reform and Governance Act 2010, s 23(1)(c).

⁹⁰ European Union Act 2011, s 2.

⁹¹ See, e.g. Craig (n 31), 466.

⁹² Eleftheriadis (n 50), 25-29.

⁹³ The figure is taken from Markakis (n 40), 23.

Craig (2016) highlights another feature of the law, which is that Parliament 'would be deprived of voice' if no withdrawal agreement was concluded within the two-year period.⁹⁴ The subsequent repeal of the ECA 1972 would be 'purely formal'.⁹⁵ He argues that:

...the executive should not legally be able to allow the two year period to run out, with the consequence that the treaties cease to be applicable to the UK henceforth, without a fully informed parliamentary debate concerning the state of the negotiations, in which views could be expressed as to whether to proceed with exit in this manner, to accept the best withdrawal deal that is on offer or to remain within the EU. This would be giving effect to the legal principle contained in the Constitutional Reform and Governance Act 2010 as it pertains to this situation, and it should be regarded as a cognisable legal constraint that could be actionable in the courts.⁹⁶

This is clearly important for the purposes of this study, as it would not be surprising if this type of situation gave rise to yet more litigation on 'Brexit' in the UK courts, thereby further postponing 'Brexit'.

2.4. The future EU-UK trade agreement: the role of parliaments

As explained above, the rules governing the negotiation and conclusion of the future EU-UK trade agreement are set out in Article 207 TFEU. Again, these rules should not be confused with those governing the negotiation and conclusion of the EU-UK withdrawal agreement, which are set out in Article 50 TEU.

2.4.1. European Parliament

This chapter discusses the role of the European Parliament with respect to the making of a future EU-UK agreement, the operation of the EU-UK agreement, and the prospects of inter-parliamentary cooperation.

As regards the future EU-UK trade agreement, it is explicitly provided in Article 207(3) TFEU that '[w]here agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article'. As regards the role of the European Parliament in this process, Article 207(3) TFEU merely provides that the Commission must report regularly to the European Parliament on the progress of the negotiations. It is Article 218 TFEU, which spells out the role of the European Parliament in the negotiation and conclusion of the future EU-UK agreement (if any).

As such, the default position is consultation by the Council with the European Parliament, unless the future EU-UK agreement is covered by Article 218(6)(a) TFEU. In such a case, the consent of the European Parliament would be required before the Council adopted the decision concluding the EU-UK agreement. At this stage of the political process, it is difficult to determine which set of rules precisely would be applicable to the process of negotiating and concluding of a future EU-UK agreement, as the shape that this agreement will take, as well as its substantive scope, are unknown for now.

Yet, it appears to be likely that a tailor-made solution would lead to the conclusion of a comprehensive free trade agreement such as CETA. As explained above, such comprehensive trade agreement between the EU and the UK would require the consent of the European

⁹⁴ Craig (n 31), 467.

⁹⁵ *ibid* 467.

⁹⁶ *ibid* 467.

Parliament in relation to those parts of the agreement that are covered by Union competences. The European Parliament will have to pass all the necessary legislation in the course of withdrawal. Furthermore, the European Parliament may obtain the opinion of the ECJ as to whether the EU-UK agreement envisaged is compatible with the EU Treaties. Where the opinion of the ECJ is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised (Article 218(11) TFEU).

As regards the operation of the future EU-UK agreement (if one was concluded), it is argued by Stoll (2017) that it is for the European Parliament to secure legitimacy and the rule of law in the process of its operation. This is all the more important since the future EU-UK agreement is likely to be a 'living agreement', which would further be developed by the treaty bodies. Such bodies might take decisions on amending its Annexes (or on its interpretation) which would take effect without the need for ratification. The role of the European Parliament in the operation of agreements, Stoll argues, is limited: the Parliament receives information and may issue declarations. This may raise concerns, he argues, from the standpoint of democracy and legitimacy. Consequently, he recommends that the role of the European Parliament in the operation of the future EU-UK agreement be strengthened by means of inter-institutional agreements and by establishing an interparliamentary body in the EU-UK agreements.⁹⁷

There are different models with respect to interparliamentary cooperation in the context of such international agreements. Interparliamentary activities could be informal, such as the interparliamentary dialogue in the context of CETA. Alternatively, interparliamentary activities could be embedded in a future EU-UK agreement, providing for joint parliamentary committees or setting out arrangements modelled after EEA, the EU-Turkey arrangements or the EU-Ukraine agreement. It is argued by Stoll that interparliamentary structures should become part of both agreements and that this would strengthen the role of the European Parliament in the operation of these agreements.⁹⁸

2.4.2. National Parliaments

While national parliaments of the remaining EU Member States do not have to ratify the withdrawal agreement, they will have to be involved in the ratification of the future relationship of the UK with the EU.

Most importantly, national Parliaments of the EU Member States will be involved when ratifying a tailor-made free trade agreement between the EU and the UK. This relates to the decision-making process outlined in Articles 207 and 218 TFEU. Comprehensive free trade agreements are, due to their wide scope, to be considered as mixed agreements such as CETA or the association agreement with Ukraine. Mixed agreements can only enter into force if the EU (in relation to policy areas covered by Union competences) and all the Member States (in relation to policy areas covered by national competences) have ratified the mixed agreement in accordance with their respective constitutional requirements. This glimpse at the ratification procedure of an agreement on the future relationship between the EU and the UK reveals that Parliaments will have quite a significant say in the forward-looking parts of the 'Brexit' procedures. The involvement of both national Parliaments and the European Parliament may give COSAC (Conférence des Organes Spécialisés dans les Affaires Communautaire), being the platform where national Parliaments and the European Parliament may coordinate their activities, a new and important role to play in relation to 'Brexit'.

⁹⁷ Peter-Tobias Stoll, 'The Role and Powers of the European Parliament in the Brexit Process' (Workshop on the consequences of Brexit, Brussels, 28 February 2017).

⁹⁸ *ibid.*

In case the UK opts for the EEA solution, Parliaments of the EFTA Member States will have to approve the accession of the UK to EFTA and the subsequent accession to the EEA. In case the UK opts for the 'WTO option', several decisions within the WTO require an involvement of national Parliaments approving these decisions.

3. THE FUTURE RELATIONSHIP BETWEEN THE EU AND THE UK: BREXIT SCENARIOS

Once a withdrawal of the United Kingdom from the EU becomes a reality, resulting either from the ratification of a withdrawal agreement or the expiry of the two-year period pursuant to Article 50(3) TEU, the future relationship between the UK and the EU has to be determined. In legal terms, this future relationship may take different legal forms, which depend on the policy choices that have yet to be made. These policy choices revolve around the following general questions:

1. How intense should the future trade cooperation between the UK and the EU be?
2. Will the future trade cooperation be limited to reducing/precluding trade barriers between the UK and the EU or will it allow for uniform standard-setting?
3. Will the cooperation cover all economic sectors?
4. Will the legal arrangement agreed upon by the UK and the EU cover individual rights whose interpretation and/or enforcement are guaranteed at the Treaty level?

The answers to these questions have implications for the substantive scope of a future agreement between the EU and the UK.

Hereafter, first of all, general parameters determining the Brexit scenarios will be identified and placed in an analytical grid. Thereafter the several Brexit scenarios will be identified and described against the background of this analytical grid.

3.1. Introduction: the various degrees of trade cooperation

The type of (trade) cooperation the UK and the EU will establish will be determined by a number of parameters, including:

- the intensity of trade cooperation (3.1.1);
- the legal means to implement the trade cooperation (3.1.2);
- the enforcement regime applicable to the trade cooperation (3.1.3);
- the scope of the envisaged trade cooperation (3.1.4).

The determination of these parameters will allow for the identification of the most suitable trade cooperation instrument for the policy choices made.

3.1.1. Intensity of trade cooperation

Trade cooperation aims primarily at reducing the costs for economic operators on the national markets that would like to enter into a cooperation. There are various ways to deal with these costs ranging from a minor reduction through information to their complete abolition.⁹⁹ The distinguishing factor is the intensity by which trade cooperation enters into the sphere of national law-making. Based on the level of intrusion into a country's autonomous law-making sphere, the following scenarios are conceivable:

⁹⁹ World Trade Organization (WTO), World Trade Report 2005, Exploring the links between trade, standards and the WTO, p. xxix.

- **Information exchange:** Trading partners inform each other concerning national regulation in place and agree to also inform each other on future modifications of national regulation. The trading partners remain free in setting their own standards.
- **Mutual recognition of conformity decisions:** Trading partners set and apply their own trading standards. Decisions confirming the compliance of products emanating from the one trading partner to be in conformity with standards of the other trading party are mutually recognised by the trading partners. This way trading partners delegate the conformity assessments to the other trading partners.
- **Equivalence:** A trading partner unilaterally recognizes trade standards set by the other trading partner. While the trading partners remain free in setting their own standards, they can autonomously and unilaterally decide under which conditions they consider the other trading partner's standards as equivalent and open the border for products from the other trading partner that are in line with these standards.
- **Mutual recognition of standards:** Trading partners accept each other's trading standards. Products originating from the other trading partner may freely enter the national market and compete against home products that must comply with domestic law. The trading partners remain free in setting their own standards, but competition and market reactions can create pressure on the legislator to adapt its own standards to lower standards.
- **Full harmonisation:** Trading partners commit to set uniform rules applicable in the territory of all partners based on objectives commonly defined.

3.1.2. Legal means to implement trade cooperation

Reducing costs for market operators in trade cooperation knows several legal ways of how to implement the intensity of trade cooperation as defined by the trading partners. Roughly these legal means can be distinguished between negative integration, which aims at reducing costs linked to trade barriers established by the trading partners for market operators, and positive integration, which requires positive legal action by the trading partners before costs for market operators can be reduced.

- **Negative integration:** Access to the markets of the trading partners may not be precluded through (1) discrimination and/or (2) non-discriminatory trade barriers, subject to case-by-case justifications for unilaterally defined policy goals.
- **Positive integration:** Access to markets ('passporting') depends on prior legislation to be adopted by the trading partner. Such legislation may include (1) mechanisms merely based on mutual recognition of unilaterally defined trading standards of the partners ('equivalence mechanisms') and/or (2) commonly set trading standards applicable within all trading partners.

The presence of positive integration may cut off the case-by-case justification of unilaterally defined trade barriers under the concept of negative integration. It follows that the two models are not mutually exclusive and that a combination of a positive integration approach with the tools of negative integration is conceivable.

3.1.3. Enforcement of trade cooperation

The effectiveness of the agreed intensity of trade and of the legal means to implement trade cooperation depend on the compliance of the trading partners. Compliance with the rules of the trade cooperation is defined by two parameters: the direct effect of Treaty rules and the

presence of a Treaty-based court system that ensure uniformity of the rules. The following models of enforcement can be distinguished:

- Traditional public international law approach: Treaty rules have **no direct effect**. In such a situation market operators may only request their home countries to consult with the non-compliant trading partner. Non-compliance cannot be sanctioned at the domestic level.
- Traditional public international law approach with a Treaty-based dispute resolution mechanism: Treaty rules have **no direct effect**, but the Treaty establishes **treaty-based dispute resolution mechanisms**. Market operators can either (1) request from their home countries to initiate proceedings in front of these dispute resolution mechanisms (comparable to the WTO panel) or (2) have direct access to them in order to enforce Treaty rights against non-compliant trading partners.
- Direct effect: Treaty rights have **direct effect**, meaning that market operators can invoke them directly in national courts against a non-compliant trading partner without the necessity to transform Treaty rules into domestic law. In such a constellation, national courts may be (1) free in interpreting Treaty rights or (2) subject to a Treaty-based court that is exclusively competent for interpreting Treaty rights in a legally binding manner.

3.1.4. Scope of trade cooperation

The trading partners have to define the scope of trade cooperation. As a first step, a distinction can be made between an unlimited and a limited cooperation. Trade cooperation with an unlimited scope means that, in principle, the intensity of trade, the legal means to implement trade cooperation and the enforcement mechanisms cover all economic sectors and trade barriers. Trading partners may narrow the scope by explicitly excluding certain economic sectors and/or trade barriers from the scope (so-called 'negative list approach'). In the alternative, trading partners may define the scope in relation to explicitly mentioned economic sectors and/or trade barriers (so-called 'positive list approach').

Furthermore, trading partners can also define a different scope in relation to one of the abovementioned elements. Against this background it is imaginable that trading partners opt for an unlimited scope for negative integration understood as the prohibition of discrimination, but limit the scope in which they intend to make use of full harmonisation. Moreover, trading partners may choose to distinguish between economic sectors.

3.1.5. Analytical grid

The abovementioned elements for trade cooperation identified above can be translated into the following analytical grid. This table allows to visualise the degree of trade cooperation that can be achieved by a certain 'Brexit' scenario.

The columns identify several parameters, including the intensity of cooperation (ranging from mere information obligations to full harmonisation), the legal means to implement trade cooperation (ranging from non-discrimination principles to setting common standards) and the compliance mechanisms (ranging from mere consultation obligations to direct effect with a centralised Treaty-based court).

The rows subdivide the various Brexit scenarios based on their substantive scope. Traditionally, trade cooperation distinguishes between trade in goods and trade in services. For the purposes of the present analysis, the analytical grid builds on this distinction for the scope of the various models of trade cooperation. Based on these two main categories a further subdivision is introduced, differentiating trade cooperation with an unlimited scope, covering all

kinds of trade barriers (e.g. most notably the fundamental freedoms in EU law) from cooperation with a limited scope, covering only a predefined set of trade barriers (e.g. EU directives defining their scope). This makes it possible to visualise the degree of trade cooperation envisaged in relation to trade in goods and in services. It should be noted in this context that trade cooperation that makes use of the so-called 'negative list approach' is considered as 'unlimited scope'.

Brexit Scenarios	Intensity of Cooperation					Means				Compliance				
	Information Exchange	Mutual Recognition of Conformity Decisions	Equivalence	Mutual Recognition of Standards	Full Harmonisation	Negative Integration (non-discrimination)	Negative Integration (non-discriminatory trade barriers)	Positive Integration (mutual recognition)	Positive Integration (common standards)	Consultation Obligations	Treaty-based Dispute Resolution for trading partners	Treaty-based Dispute Resolution for Individuals	Direct Effect (without Treaty-based Court)	Direct Effect (with Treaty-based Court)
[Trading Cooperation]														
Trade in Goods														
Unlimited scope														
Limited scope														
Trade in Services														
Unlimited scope														
Limited scope														

Hereafter, the various options for the UK and the EU to define their future relationship will be assessed against this analytical grid. Reference will be made to known examples of existing trade cooperation of the EU with third countries, most notably the EEA, CETA, DCFTA (with Ukraine) and the KOREU with South Korea. Placing them into the analytical grid and comparing them to the EU membership as the baseline scenario will reveal to which extent a given scenario will deviate from the current EU status.

Moreover, this will allow to analyse the role of EU secondary law in the respective scenario. If a trade cooperation only makes use of negative integration, EU secondary law turns into a non-tariff trade barrier of one of the trading partners which has to be justified for restricting trade. If trade cooperation, however, includes positive integration, EU secondary law might theoretically be extended as a common standard applicable to both trading partners.

3.2. Baseline: EU membership

The EU membership forms the baseline scenario. It defines the trade relationships of the UK with other 27 EU Member States. Under EU law, all economic sectors and trade barriers are covered by negative integration in the shape of the fundamental freedoms prohibiting not only discrimination based on the nationality or the origin of a product, but also non-discriminatory restrictions making cross-border trade less attractive. Some economic sectors and some of the trade barriers are, to the extent that there are Union competences and that the

Union legislator had made use of them, even covered by positive integration, where trade barriers are harmonised.¹⁰⁰ Custom tariffs are subject to full harmonisation in the EU.

Under the EU membership, the UK has full access to the internal market, all the legislation pertaining to free movement of goods and services, customs union and consumer protection is applicable and has, when harmonisation was achieved by means of directives, to be incorporated into UK domestic law. Furthermore, under the EU membership, there is secure access to justice, as well as the coherent interpretation and application of EU law by the Court of Justice of the European Union. In the context of the EU, all these elements are considered a *conditio sine qua non* for having full access to the internal market formed by the EU Member States.

It must be noted at this point that any deviation of another trade cooperation than the EU membership from the elements that define the internal market calls the right to a full access to the EU internal market into question and must, in economic terms, be considered less efficient in relation to the outcome of the envisaged trade cooperation.

3.3. Fall-back scenario: hard Brexit without any arrangements

The scenario that forms the antipode to the baseline of EU membership is the withdrawal of the UK from the EU without any kind of arrangements. This so-called 'hard Brexit' is the 'fall-back scenario' or 'worst case scenario'. Using this scenario as the benchmark for assessing the impact of Brexit on EU policies allows to measure what is arguably the worst possible outcome and allows, by that, the identification of the most important EU policy measures that should form part of a future EU-UK agreement.

Under this scenario, the trade cooperation between the EU and the UK would be defined by the WTO law. The WTO commitments are seen as basic terms for trade between two countries with very little integration.¹⁰¹ Currently, both the EU and the UK are members of the WTO in their own right. Amongst the most important WTO agreements, the following ones are ratified by the United Kingdom:

Legal act	Ratified by the UK	Year
General Agreement on Tariffs and Trade (GATT)	(+)	1948
General Agreement on Trade in Services (GATS)	(+)	1995
Agreement on Trade-Related Aspects of Intellectual Property (TRIPS)	(+)	1995
Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)	(+)	1995
Agreement on Technical Barriers to Trade (TBT)	(+)	1995
Agreement on Trade-Related Investment Measures (TRIM)	(+)	1995

¹⁰⁰ See e.g. Paul Craig and Gráinne De Búrca, *EU Law. Text, Cases and Materials*, 6th edition (OUP 2015), chapter 17 et seq.; Fabian Amtenbrink and Hans H.B. Vedder, *Recht van de Europese Unie*, 6th edition (BJu 2017), chapter VI-VII.

¹⁰¹ House of Commons Treasury Committee 'Oral Evidence: The UK's future economic relationship with the European Union' HC 483, 13 July 2016, pp.1-6

Agreement on Agriculture (AoA)	(+)	1995
Agreement on Government Procurement (GPA)	(-)	
Agreement on Trade in Civil Aircraft	(-)	
International Dairy Agreement	(-)	
International Bovine Meat Agreement	(-)	
Trade Facilitation Agreement (TFA)	(-)	

The core of all WTO agreements is the prohibition of discrimination. Most notably, this covers the most-favoured-nation clause (MFN) and national treatment.

Under the MFN, each WTO member is obliged to extend the same favourable treatment that it accords to any other country.¹⁰² What is thus prohibited is discrimination between trade partners. The MFN is, however, not applicable to favourable treatment accorded within agreements of 'economic integration' such as the EU.¹⁰³ By that, once the UK withdraws from the EU, based on the MFN principle, it cannot claim to get accorded the same favourable treatment as one EU Member State accords to another EU Member State on the basis of the EU Treaties.¹⁰⁴

Under the national treatment obligation, WTO members are obliged to treat products in the same manner as domestic products once they have entered the domestic market.¹⁰⁵ It should be noted that, under GATS, the MFN, the 'national treatment' and the market access rules do not apply to government procurement (Article XIII of GATS).

A 'hard Brexit' scenario without any arrangements between the EU and the UK would lead to de-facto closure of the access to the EU internal market. This is due to the fact that favourable treatment agreed between partners in free trade agreements that aim at achieving economic integration is excluded from the scope of the MFN clause, as a result of which the UK cannot claim the same favourable treatment from EU Member States on the basis of the MFN. Consequently, it was concluded:

*'Trading with the EU on the basis of concessions set at the WTO would provide the UK with a baseline of tariffs for trade in goods: the UK would have to apply those tariffs to imports from the EU. EU imports from the UK would, similarly, face EU tariffs. Trading under WTO rules would also provide limited commitments on services, as contained in the GATS [i.e. the General Agreement on Trade in Services]. It would not provide the UK with any preferential access (which might be possible under a Free Trade Agreement or EEA membership) to the Single Market.'*¹⁰⁶

There was concern expressed by expert witnesses before the House of Lords' EU Committee as to the tariffs facing UK exports to the single market under the WTO rules. There was also concern about '[a] host of other factors, including regulation, geographic indicators and

¹⁰² Article II of GATS, Article I of GATT 1947.

¹⁰³ Article V of GATS, Article XXIV of GATT 1947.

¹⁰⁴ Mary E. Footer and Carol George, *The General Agreement on Trade in Services*, in: Macrory, Appleton & Plummer, *The World Trade Organization*, Volume I, 2005, p. 799-954, at 833.

¹⁰⁵ Article XVII of GATS (but only in relation to conditions and qualifications set out in specific schedules), Article III of GATT 1947.

¹⁰⁶ European Union Committee, *Brexit: The Options for Trade (fifth report)* (2016-17, HL 72) 58 para 197.

standards', which were in their opinion 'largely untouched by WTO agreements'.¹⁰⁷ Under WTO rules, the UK would only have to comply, it is argued, with EU standards and regulations in those goods and services it traded with EU Member States.¹⁰⁸

Finally, market access rules under WTO law are subject to special schedules that are currently negotiated and held by the EU. In order to have its own schedules, the UK must first negotiate these schedules, which will require some sort of approval by the EU. These schedules and their relationship with EU schedules are examined more closely in the next chapter (3.4.). What will become clear is that even a 'hard Brexit' will require an arrangement of the UK with EU as regards the UK's position within the WTO.

3.4. Hard Brexit with arrangements concerning WTO

Whilst WTO law establishes general principles such as the 'most-favoured nations' clause, national treatment and market access rules, these rules are in many areas subject to schedules and commitments, which have to be negotiated between the WTO members (3.4.1). What is more, in some areas the WTO Agreements refer to the necessity to conclude special agreements, most notably in public procurement law. As these plurilateral trade agreements are not compulsory for WTO members, some of these agreements have been concluded by the EU (on behalf of the UK) and not by the UK in its own capacity. A 'hard Brexit' would consequently raise the question whether the UK would have to join these supplementary WTO agreements in its own right (3.4.2). In this context the Agreement on Government Procurement (GPA) deserves special attention.

3.4.1. WTO schedules and commitments

As explained above, the UK is a member of the WTO in its own right but does not have an individual schedule of concessions. Instead, it is part of the EU's combined schedules. The rights, commitments, and concessions of the UK under WTO rules are currently channelled through the EU. The European Commission speaks for all the EU Member States at almost all WTO meetings, and the Member States are bound by the EU schedules of commitments on goods and services.¹⁰⁹

Little is currently known about how to deal with these schedules and commitments. It is unprecedented for a WTO member to exit a supranational organisation, which bundles the external trade interests of its Member States at WTO level, while remaining inside the WTO. Yet, as a preliminary observation it can be noted that in the absence of a separate agreement between a withdrawing Member State and the EU, the former would have to negotiate its own new schedule on tariffs, quotas and subsidies independently of what the EU has achieved to receive also on behalf of it as a member of the EU. One possible way of dealing with the issue unilaterally would be that the withdrawing Member State replicates its EU commitments into its own membership. Such replication would require consensus among all other WTO members. This 'copying of schedules' will likely be more difficult for politically sensitive matters such as services and agricultural WTO commitments.¹¹⁰ Since, in relation to Brexit, the WTO would treat the UK as a member in its own right, its own schedule would have to be approved by all other 163 WTO members, including the EU for that matter.

¹⁰⁷ *ibid* 58-59 paras 198-202.

¹⁰⁸ *ibid* 61 para 213.

¹⁰⁹ WTO website, <https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm>.

¹¹⁰ Although see interview by Roberto Azevêdo, Director General of the WTO, who expressed the view that the UK would not be allowed to 'cut and paste' the EU's terms of membership: Financial Times, 'Brexit warns on tortuous Brexit trade talks', 25 May 2016.

In the alternative, some sort of agreement could be concluded between the EU and the withdrawing Member State, separating the WTO commitments of the EU and this country. Such a separation could concern tonnage of imports, as well as an individual country schedule in the area of services trade.¹¹¹ Even though an agreement between the EU and the withdrawing Member State would be more beneficial for this country's position in the WTO, it would, in the WTO context, go beyond the bilateral relations between the EU and the withdrawing Member State and touch upon the interests of all the other WTO members. This becomes clear when looking at areas such as tariff quotas and agriculture subsidies (e.g. farming subsidies). An agreement between the EU and the withdrawing Member State would therefore require the approval of the other WTO members. The negotiations between the withdrawing Member State and the EU, as well as the other WTO members, would hence most likely be particularly intense. In any event, in case there was no approval by the other WTO members, the withdrawing Member State, whilst remaining a WTO member, would legally speaking not be in a position to simply continue to apply the EU schedules in relation to third countries.

3.4.2. Joining WTO agreements

Besides negotiating own schedules and commitments under WTO law, the UK would have to consider whether it signs and ratifies special WTO agreements that are not compulsory for WTO members and that are currently ratified by the EU. This refers to the Agreement on Government Procurement (GPA) and to the Trade Facilitation Agreement (TFA), which entered into force on 22 February 2017. In this context, there is an opinion, according to which the UK might succeed to WTO Treaties that were only ratified by the EU in its own right.¹¹² Yet, this opinion refers to precedents in International law that dealt with the succession in case of a dissolution of a union or a federation but not to a withdrawal of state from an International Organisation that continues to exist. Hence, the majoritarian view on the matter is that the UK will have to adhere to these WTO agreements after a withdrawal took place.

3.5. Joining the European Economic Area Agreement

The Brexit scenario which comes the closest to the baseline scenario, EU membership, in terms of trade intensity is 'joining the European Economic Area Agreement'.¹¹³ The EEA includes negative integration in the shape of a prohibition of discrimination and non-discriminatory trade restrictions, positive integration in the shape of EU secondary law, which has to be implemented into the domestic law of the EEA countries, and a centralised Treaty-based Court, the EFTA Court, that ensures uniform interpretation. The key element that distinguishes the EEA from the EU internal market is the non-presence of direct effect. Individuals may only rely on EEA law after it has been incorporated into national law.

The European Free Trade Association (EFTA) was established in 1960 by Austria, Denmark, Norway, Portugal, Sweden, Switzerland, and the United Kingdom. The United Kingdom and Denmark left EFTA in 1973 to join the European Economic Community (as it then was). The Agreement on the European Economic Area, which entered into force in 1994, brings the EU Member States and three EEA EFTA States (Norway, Iceland, and Liechtenstein) together in

¹¹¹ House of Commons Treasury Committee 'Oral Evidence: The UK's future economic relationship with the European Union' HC 483, 13 July 2016, p.2.

¹¹² Lorand Bartels, 'The UK's Status in the WTO after Brexit', <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841747>, p. 18.

¹¹³ Joining commentators such as Łazowski (n 7), p. 119, it is presently submitted that the UK will not in its own right retain EEA membership. For an overview of arguments on this point see Ulrich G. Schroeyer and Heinrich Nemeček, 'The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area', (2016) *EBLR* 921-958. Generally, on the state of affairs of the EEA see Halvard Haukeland Fredriksen and Christian N.K. Franklin, 'Of Pragmatism and Principles: The EEA Agreement 20 Years On', (2015) 52 *Common Market Law Review* 629.

a single market. Portugal joined the EU in 1986, whereas Austria, Finland and Sweden became EU members in 1995. Switzerland has not signed up to the EEA Agreement and relies on a separate network of bilateral treaties with the EU.

It should be stressed that assuming that the UK would implicitly lose EEA membership if it left the EU,¹¹⁴ a return to EFTA would be necessary in order for the UK to be part of the EEA Agreement. More specifically, the territorial scope of the latter agreement only covers EU Member States and EFTA States.¹¹⁵ Upon its withdrawal from the EU, the UK would no longer be covered through its EU membership. Moreover, the UK is currently not a member of EFTA. The EEA Agreement provides that any European state becoming a member of EFTA may apply to become a party to the EEA Agreement.¹¹⁶ The terms and conditions for such participation are the subject of an agreement between the Contracting Parties to the EEA Agreement (Norway, Iceland, and Liechtenstein) and the applicant state (the UK). That agreement would have to be submitted for ratification or approval by all Contracting Parties in accordance with their own procedures.¹¹⁷ The EEA Agreement enables Norway, Iceland and Liechtenstein to participate fully in the internal market.

EU acts that are of relevance to the EEA are incorporated into the EEA Agreement, that is, into one of its annexes and protocols. These amendments to the EEA Agreement are made by means of a Joint Committee Decision (JCD). The JCD may adapt these acts before incorporating them into the EEA Agreement. Proposed EU legal acts with possible EEA relevance, adopted EU acts under consideration for incorporation into the EEA Agreement, and acts that have already been incorporated into the Agreement are available on EEA-Lex.

3.6. Other tailor-made arrangements

Between the antipodes of the baseline scenario 'EU membership' (and close to it, 'joining the EEA'), on the one hand, and of the fall-back scenario 'hard Brexit without any arrangements', on the other hand, there are 'other tailor-made arrangements', which differ with regard to the degree of trade cooperation they envisage.

As part of this general scenario, various types of bilateral agreements are conceivable, including (but not necessarily limited to) customs unions (to eliminate customs duties in bilateral trade and establish a common customs tariff with respect to third countries), association agreements, stabilisation agreements, free trade agreements, economic partnership agreements (to remove or reduce customs tariffs in bilateral trade), and partnership and cooperation agreements (to provide a general framework for bilateral economic relations without eliminating or reducing customs tariffs). As such, the arrangements with Switzerland, Turkey, Ukraine, Canada (although CETA is not yet fully ratified) and South Korea would fall under this heading. However, it must be stressed that the existing models clearly do not exhaust

¹¹⁴ See further Gavin Barrett, 'How Article 127 of the EEA Agreement Could Keep the UK in the Single Market' (EUROPP Blog, 4 January 2017) <<http://blogs.lse.ac.uk/europpblog/2017/01/04/how-article-127-eea-agreement-could-keep-the-uk-in-the-single-market/>> accessed 11 January 2017; Panos Koutrakos, 'Brexit, European Economic Area (EEA) Membership, and Article 127 EEA' (Mockton Chambers Blog, 2 December 2016) <<https://www.monckton.com/brexit-european-economic-area-eea-membership-article-127-eea/>> accessed 11 January 2017; Steve Peers, 'Could the UK Stay in the Single Market after Leaving the EU? The Planned Case on Article 127 EEA' (EU Law Analysis Blog, 30 November 2016) <<http://eulawanalysis.blogspot.co.uk/2016/11/could-uk-stay-in-single-market-after.html>> accessed 4 December 2016. A 'Brexit2' Article 127 EEA challenge is currently pending in the UK courts, with the applicants seeking a declaration from the Divisional Court on the requirement of approval from HM Treasury and an Act of Parliament to withdraw the UK from the EEA Agreement: <<https://www.no5.com/news-and-publications/news/1495-no5-barristers-instructed-in-brexit2-article-127-eea-challenge/>>.

¹¹⁵ Article 126 of the EEA Agreement.

¹¹⁶ Article 128(1) of the EEA Agreement.

¹¹⁷ Article 128(2) of the EEA Agreement.

the variety of tailor-made arrangements that could possibly inform the future EU-UK agreement.

Of these tailor-made arrangements, the UK Government appears to aim for a 'comprehensive' free trade agreement with the EU.¹¹⁸ At the inevitable risk of oversimplification, there are two basic models for comprehensive free trade agreements. Firstly, there is CETA with Canada. This is a purely 'international' agreement, i.e. with no EU acquis. Secondly, there is the Deep and Comprehensive Free Trade Area (DCFTA) that is part of the EU-Ukraine association agreement. This includes most single market acquis.¹¹⁹

It is noted by Gasiorek, Holmes and Rollo (2016) that the 'key differences' between these tailor-made arrangements and the EEA model are that 'an FTA arrangement comes with a lesser degree of sectoral coverage (notably in services) and does not give automatic access to the Single Market'.¹²⁰ 'These FTAs typically come with no obligations on free movement of people, budget contributions or legal oversight by the European Court of Justice.'¹²¹ 'Essentially each FTA has some elements of free trade in goods and different coverage of Single Market access.'¹²² In sharp contrast to the EEA model, the Free Trade Agreement (FTA) and customs union models do not in principle have rules of origin, therefore goods flow freely and do not have to be stopped at the border for that reason.

It should be further noted that association agreements seem to offer, in the opinion of the House of Lords' EU Committee, a way to disentangle the four freedoms from one another – notably, the free movement of labour from the other fundamental freedoms. In this regard, the House of Lords' EU Committee makes the point (albeit with considerable caution) that the EU association agreements with Ukraine (to be examined below) and Georgia provide a precedent whose existence the EU27 might find difficult to deny.¹²³ 'A FTA could also avoid the imposition of tariffs on goods traded between the UK and the EU, although rules of origin would apply.'¹²⁴ It is, however, argued by Gasiorek, Holmes and Rollo (2016) that 'both the UK and the EU could agree that in all industries where the UK keeps the same external tariffs as it has now, Rules of Origin would not be checked, and/or that where standards and enforcement was maintained as it had been within the EU, Mutual Recognition could be assumed at least temporarily.'¹²⁵

Hereafter, three types of recently concluded (but not in all instances ratified) free trade agreements of the EU are briefly presented, starting with the most intense, the DCFTA with Ukraine (3.6.1), followed by CETA with Canada (3.6.2), and KOREU with South Korea (3.6.3).

¹¹⁸ Department for Exiting the European Union and The Rt Hon Davis Davis MP, 'The United Kingdom's Exit from and New Partnership with the European Union White Paper' (2 February 2017) <<https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper>> accessed 17 March 2017.

¹¹⁹ Michael Emerson, 'Economic Impact of Brexit on the EU27' (Workshop on the consequences of Brexit, Brussels, 28 February 2017).

¹²⁰ Michael Gasiorek, Peter Holmes and Jim Rollo, 'UK-EU Trade Relations Post Brexit: Too Many Red Lines?' (2016) UK Trade Policy Observatory Briefing Paper No 5, 4.

¹²¹ *ibid* 4.

¹²² *ibid* 4.

¹²³ European Union Committee (n 106), 45-47 paras 145-152; 49 para 166. See further Michael Emerson, 'Which Model for Brexit?' (CEPS Special Report No 147, 14 October 2016): <<https://www.ceps.eu/system/files/SR147%20ME%20Which%20model%20for%20Brexit.pdf>> accessed 14 December 2016; Written evidence from Andrew Duff (ETG0014) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-external-affairs-subcommittee/brexit-future-trade-between-the-uk-and-the-eu/written/43513.html>> accessed 13 December 2016.

¹²⁴ European Union Committee (n 106), 49 para 166.

¹²⁵ Gasiorek, Holmes and Rollo (n 120), 5.

3.6.1. Comprehensive Single Market access: Ukraine Agreement

The EU-Ukraine Association Agreement was signed by the EU Heads of State or Government and the Ukrainian President on 27 June 2014. It was ratified by the Ukrainian and European Parliaments on 16 September 2014.¹²⁶ The provisional application of the DCFTA started on 1 January 2016. The Deep and Comprehensive Free Trade Area (DCFTA) establishes a free trade area for trade in goods over a transitional period of a maximum of 10 years (Article 25). Quantitative restrictions on imports and exports and measures having an equivalent effect on imports and exports are also prohibited, unless allowed by the relevant WTO rules (i.e. Art. XI GATT) (Article 35 of the Agreement).¹²⁷ 'The DCFTA tariff liberalisation is asymmetrical; the EU needs to abolish its customs duties faster than Ukraine. This should give Ukrainian exporters the time to prepare for competition from the EU and support the Ukrainian market.'¹²⁸ The EU-Ukraine Agreement also includes rules of origin, which are laid down in Protocol I of the Association Agreement. The DCFTA further 'includes rules on "trade defence" measures that the EU and Ukraine can take against imports from the other party that cause or threaten to cause injury to the domestic industry, notably anti-dumping, antisubsidy and safeguard measures. These DCFTA provisions essentially incorporate the relevant WTO rules' (see Chapter 2 of Title IV of the Agreement).¹²⁹

As noted above, the DCFTA provides that '[c]ustoms tariffs between the EU and Ukraine are set to disappear almost completely, so non-tariff barriers such as technical standards will become the main obstacle to trade. In order to tackle these barriers, Ukraine will adopt the relevant EU legislation, standards and procedures.'¹³⁰ Chapter 3 of Title IV of the Agreement applies to the preparation, adoption and application of technical regulations, standards and conformity assessment procedures. The Parties must strengthen their cooperation in the field of technical regulations, standards, metrology, market surveillance, accreditation and conformity assessment procedures with a view to increasing mutual understanding of their respective systems and facilitating access to their respective markets. To this end, they may establish regulatory dialogues at both horizontal and sectoral levels (Article 55(1)). 'The Agreement requires Ukraine to adopt the 'corpus' of European standards, which includes, in addition to the 5,000 harmonised standards, around 24,000 European standards (i.e. standards developed by CEN, CELELEC or ETSI)' (see Article 56 of the Agreement).¹³¹ 'Ukraine is also obliged to progressively fulfil the membership conditions for the European standardisation organisations (CEN, CENELEC and ETSI)' (Article 56(8) of the Agreement).¹³²

The Agreement also aims to conclude an Agreement on Conformity and Assessment and Acceptance of Industrial Products (ACAA) once the parties have agreed that the relevant Ukrainian legislation, institutions and standards have been fully aligned with those of the EU (Article 57(1)). 'ACAAs are a type of mutual recognition agreement envisaged by the EU for any country of the eastern or southern parts of the European Neighbourhood Policy and the Western Balkan countries. By concluding an ACAA, the parties agree that industrial products listed in the annexes of an ACAA and fulfilling the requirements for being lawfully placed on

¹²⁶ 'Association Agreement' <http://eeas.europa.eu/archives/delegations/ukraine/eu_ukraine/association_agreement/index_en.htm> accessed 15 March 2017.

¹²⁷ Michael Emerson and Veronika Movchan (eds), *Deepening EU-Ukrainian Relations: What, Why and How?* (Rowman & Littlefield International Ltd., 2016) 35.

¹²⁸ *ibid* 35.

¹²⁹ *ibid* 46.

¹³⁰ *ibid* 57.

¹³¹ *ibid* 61.

¹³² *ibid* 61.

the market of one party may be placed on the market of the other party, without additional testing and conformity assessment procedures.¹³³

Chapter 6 of Title IV concerns establishment, trade in services and electronic commerce. It is noted by Emerson and Movchan that 'the DCFTA provides for a comprehensive and extremely detailed liberalisation of establishment and trade in services, subject still to reservations - more by the EU than Ukraine. For several services sectors, the agreement envisages the integration of Ukraine into the EU Internal Market. However, this far-reaching integration is conditional upon Ukraine's approximation to the relevant EU legislation'.¹³⁴ To this effect, the various sub-chapters of the chapter (on postal and courier services, financial services and so on) typically include a provision on 'regulatory approximation' (see, e.g., Article 133 on regulatory approximation in financial services).

As regards public procurement, '[t]he DCFTA provides for the gradual and reciprocal liberalisation of the parties' public procurement markets under the strict condition that Ukraine implements the EU's key public procurement rules' (see Article 148 of the Agreement).¹³⁵

As regards compliance mechanisms, it is noted by Emerson and Movchan that '[t]he Agreement has two different dispute settlement mechanisms [...]; one that covers disputes related to the agreement in general but excluding the DCFTA; and another more detailed one that covers the DCFTA itself'.¹³⁶ The general dispute settlement mechanism is laid down in Articles 476-478 of the Agreement and is 'based on a traditional "diplomatic" approach, under which the Association Council has the key role'.¹³⁷ The latter body adopts decisions 'by agreement' (Article 465(3) of the Agreement), therefore both the EU and Ukraine would need to agree with the decision for it to be adopted. The separate dispute settlement mechanism for the DCFTA is laid down in Articles 302-323 of the Agreement and is, according to Emerson and Movchan, 'largely inspired by the WTO Dispute Settlement Understanding (DSU)'.¹³⁸ 'If there is a dispute regarding the interpretation and application of DCFTA provisions, the parties shall first seek to come to an agreement through consultations. If these consultations fail, the complaining party may request the establishment of an arbitration panel to rule on the dispute'.¹³⁹ 'Rulings of the arbitration panel shall be binding and each party must take the necessary measures to comply with them'.¹⁴⁰ It is noted, however, by Emerson and Movchan that 'in practice the EU very rarely relies on the [Dispute Settlement Mechanisms] in its FTAs to resolve a trade dispute. It prefers to use diplomatic means (e.g. by discussing this in bilateral meetings such as the Association Council or in unilateral statements) or, in some cases, the WTO DSU'.¹⁴¹

3.6.2. Comprehensive Free Trade Agreements with limited Single Market access: CETA

CETA establishes a free trade area between the EU and Canada (Article 1.4). Chapter Two of the Agreement concerns goods and includes provisions on customs duties on imports and exports. Chapter Three concerns trade remedies (e.g., anti-dumping and countervailing measures). Chapter Four concerns technical barriers to trade. More specifically, it provides for the incorporation of parts of the TBT Agreement into CETA (Article 4.2); cooperation in

¹³³ *ibid* 62-63.

¹³⁴ *ibid* 78.

¹³⁵ *ibid* 90.

¹³⁶ *ibid* 233.

¹³⁷ *ibid* 233.

¹³⁸ *ibid* 235.

¹³⁹ *ibid* 235.

¹⁴⁰ *ibid* 235.

¹⁴¹ *ibid* 235-236.

the areas of technical regulations, standards, conformity assessment procedures, market surveillance or monitoring and enforcement activities as set out in Chapter Twenty-One on Regulatory Cooperation (Article 4.3); a procedure for recognising technical regulations as equivalent to the ones of the other party (Article 4.4); mutual acceptance of the results of conformity assessments (Article 4.5); and transparency procedures regarding the development of technical regulations and conformity assessment procedures (Article 4.6). The agreement also includes chapters on customs and trade facilitation (Chapter Six), subsidies (Chapter Seven), and investment (Chapter Eight). Notably, Chapter F concerns the resolution of investment disputes between investors and states. Chapter Nine deals with cross-border trade in services, whereas Chapter Ten makes provisions for the temporal entry and stay of natural persons for business purposes. Chapter Eleven lays down rules for the mutual recognition of professional qualifications. There are also chapters on specific sectors (transport, electronic commerce and so on), as well as chapters on government procurement (Chapter Nineteen) and dispute settlement (Chapter Twenty-Nine).

3.6.3. Free Trade Agreements: South Korea

The EU-South Korea Free Trade Agreement took effect in July 2011.¹⁴² It addresses both customs duties and non-tariff barriers (NTB) on trade in goods (Chapter 2). There are also separate Annexes (Annexes 2-B to 2-E) on non-tariff barriers with respect to specific sectors (consumer electronics; motor vehicles; pharmaceutical products and medical devices; and chemicals). The Agreement sets up a Committee on Trade in Goods that must meet at the request of either party. This Committee can consider broadening the scope of NTB disciplines, speeding up liberalisation as well as tackling other issues related to trade in goods between South Korea and the EU.¹⁴³ The agreement also includes a chapter on trade remedies (Chapter 3). Chapter 4 concerns technical barriers to trade and is 'intended to reduce obstacles to trade between the EU and South Korea arising out of technical regulations, standards, conformity assessment procedures and similar requirements'.¹⁴⁴ The two parties 'undertake to cooperate on standards and regulatory issues, and where appropriate, to establish dialogues between regulators, with the intention of simplifying and avoiding unnecessary divergence in technical requirements applying to products'.¹⁴⁵ The agreement includes specific provisions on good regulatory practice, and a mechanism for co-ordination is set up between the EU and South Korea to keep these matters under consideration and to address any specific issues.¹⁴⁶

The Agreement also includes chapters on Trade in Services, Establishment and E-Commerce (Chapter 7), as well as on Government Procurement (Chapter 9), the latter seeking to expand the coverage of the GPA. Chapter 14 on Dispute Settlement is based on the WTO DSU model. Accordingly, the first step is consultation between the parties, and if the parties do not reach an agreement the dispute is referred to an arbitration panel. The FTA also contains a mediation mechanism for non-tariff measures (Annex 14-a). The mediation mechanism does not exclude the possibility to have recourse to dispute settlement, during or after the mediation procedure.

¹⁴² <<http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/>> accessed 15 March 2017.

¹⁴³ 'EU-South Korea Free Trade Agreement: A Quick Reading Guide' (October 2010) <http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145203.pdf> accessed 15 March 2017, 1-2.

¹⁴⁴ *ibid* 5.

¹⁴⁵ *ibid* 5.

¹⁴⁶ *ibid* 5.

3.7. Summary and preliminary conclusions in relation to Brexit

3.7.1. Summarising table

Applying the analytical grid developed in chapter 3.1. provides the following picture with regard to the degree of trade cooperation that can be achieved in different 'Brexit' scenarios.

Brexit Scenarios	Intensity of Cooperation					Means				Compliance				
	Information Exchange	Mutual Recognition of Conformity Decisions	Equivalence	Mutual Recognition of Standards	Full Harmonisation	Negative Integration (non-discrimination)	Negative Integration (non-discriminatory trade barriers)	Positive Integration (mutual recognition)	Positive Integration (common standards)	Consultation Obligations	Treaty-based Dispute Resolution for trading partners	Treaty-based Dispute Resolution for Individuals	Direct Effect (without Treaty-based Court)	Direct Effect (with Treaty-based Court)
EU Membership														
Trade in Goods														
Unlimited scope				■		■	■				■			■
Limited scope	■	■			■			■	■		■			■
Trade in Services														
Unlimited scope				■		■	■				■			■
Limited scope	■	■			■			■	■		■			■
EEA														
Trade in Goods														
Unlimited scope				■		■	■			■	■			
Limited scope	■	■			■			■	■	■	■			
Trade in Services														
Unlimited scope				■		■	■			■	■			
Limited scope	■	■			■			■	■	■	■			
DCFTA														
Trade in Goods														
Unlimited scope						■				■	■			
Limited scope		■		■	■				■	■	■			
Trade in Services														
Unlimited scope														
Limited scope		■		■	■	■			■	■	■			
CETA														
Trade in Goods														
Unlimited scope	■	■				■	■			■	■			

Limited scope												■		
Trade in Services														
Unlimited scope	■	■				■								
Limited scope							■		■	■	■			
KOREU														
Trade in Goods														
Unlimited scope						■	■			■	■			
Limited scope	■	■								■	■			
Trade in Services														
Unlimited scope														
Limited scope	■	■				■	■			■	■			
WTO														
Trade in Goods														
Unlimited scope						■	■			■	■			
Limited scope	■	■								■	■			
Trade in Services														
Unlimited scope														
Limited scope	■	■				■	■			■	■			

The table reveals the following characteristics, in which the various trade cooperation in which the EU is involved differ:

- The **EEA** differs from EU membership in terms of ‘compliance mechanisms’ as EEA law has no direct effect and the EFTA Court’s judgments are neither legally binding upon the EEA members nor are national courts under a legal obligation to request preliminary rulings on the interpretation of EEA law.
- The **DCFTA** is to be distinguished from EU membership in terms of ‘compliance mechanisms’ in a way that it neither has direct effect nor does it provide for a Treaty-based court but only for a panel, which can resolve disputes between the Contracting Parties. Furthermore, the DCFTA does not foresee a mechanism to adopt common standards, but includes a legal obligation on the part of Ukraine to implement parts of the existing *acquis communautaire* into domestic law. Besides, the DCFTA follows the principles WTO of free trade cooperation, which amounts to negative integration in terms of non-discrimination concerning goods and services, albeit the scope is limited to certain goods and services and to certain trade barriers.
- **CETA** and **KOREU** follow WTO principles of free trade cooperation, subjecting trade in goods and services to the prohibition of discrimination based on origin. Compliance is ensured by consultation obligations and a panel mechanism.
- **CETA** differs from **KOREU** and **WTO** in relation to its scope in that it applies the negative list approach not only to trade in goods but also to trade in services. Furthermore, it supplements the traditional international law mechanisms to ensure compliance with a Treaty-based court that is accessible for individuals claiming compensation for a breach of some Treaty rights in relation to goods and services (the so-called Investment Court System (ICS)).

- **KOREU** is modelled after the WTO principles of free trade. In relation to its scope this implies that it makes use of the negative list approach for trade in goods and of the positive list approach for trade in services. In order to ensure compliance it establishes consultation obligations and a panel mechanism. It differs from WTO only in relation to the number of services and trade barriers that are explicitly covered by the agreement. KOREU further includes mutual recognition of standards concerning motor vehicles production assuming that the domestic standards implement the UN-ECE standards.

3.7.2. Preliminary conclusions

Applying these distinctive characteristics to the different Brexit scenarios leads to the following (preliminary) conclusions:

1. The UK and the EU have to agree on the **intensity of their future trade cooperation**. Under the terms of the EU membership, the UK as a part of the EU makes use of the combined model of full harmonisation with a limited scope and of the mutual recognition of standards with an unlimited scope in order to define its trade relations to the other EU Member States. This intensity can only be upheld under the EEA membership. Partial full harmonisation and a partial mutual recognition of standards can also be achieved following the DCFTA model. It should, however, be seen that this model includes an obligation on the part of the trading partner to implement the *acquis communautaire* autonomously. All other free trade models reduce the intensity of trade cooperation to a mere recognition of conformity assessments, which would mean a significant step backwards from the current state of economic integration.
2. The UK and the EU have to decide which **means** they would like to make use of in order to achieve the intensity of trade cooperation they agreed on. Currently these means include positive integration and negative integration covering also non-discriminatory restrictions. These means are repeated by the EEA membership. The DCFTA also knows positive integration, but only in the shape that the trading partner has to implement uniform rules adopted by the EU. No current trade arrangement provides for own institutions adopting legally binding standards.

If the UK and the EU opt for a model limited to negative integration (such as DCFTA, CETA, KOREU and WTO) it must be realised that the existing and future *acquis communautaire* cannot be extended to the UK territory (this would require positive integration) and that the existing and future *acquis communautaire* is then considered to be a non-tariff (technical) barrier to free trade (subject to negative integration) for goods and services coming from the UK, provided that it cannot be justified by grounds of general interest.

3. The UK and the EU have to opt for a mechanism that ensure the **compliance** with the intensity of trade cooperation and the means used to implement it. Currently, under the terms of EU membership, EU law has direct effect and is secured by a Treaty-based Court which renders legally binding judgments. Standard FTAs such as KOREU and the general terms of WTO provide for mere consultation obligation and a panel mechanism excluding direct effect in the domestic legal order of the trading partners. Only CETA (and the free trade agreement with Singapore) include a Treaty-based court that protects individual rights of a part of trade in goods and services, which are investments, and which is accessible for investors.

The impact of Brexit on EU law increases the more the UK and the EU opt for a trade cooperation that resembles the WTO principles of free trade instead of the full harmonisation model including mutual recognition of standards under the terms of the EU membership. The

more the future relationship between the EU and the UK takes after trade cooperation such as KOREU the less existing and future *acquis communautaire* can be applied to goods and services from the UK. In such a situation, the focus must shift from questions revolving around how to extend the *acquis* and its further development to the UK to questions addressing the challenge how to protect the high standards set by the *acquis* against any weakening through free trade agreements. The *acquis* then turns into a trade barrier for UK goods and services, which are subject to the rules of negative integration. Depending on the scope of negative integration, the *acquis* would only be affected if it discriminates directly or indirectly against UK products or already if it creates unjustifiable restrictions. In this scenario, the EU must focus on broad possibilities to justify the current *acquis* and its further development.

3.7.3. State of affairs: Policy choices made so far concerning the future trade cooperation between the UK and the EU

The policy choices concerning the future trade cooperation made by the UK government and the EU27 so far appear still to be quite vague. They do not allow yet for a clear and precise definition of the trade cooperation that both seek to achieve.

3.7.3.1. The position of the UK government

As regards the UK government, in its notification to the EU of 29 March 2017, it indicated to establish with the EU27 'a deep and special partnership that takes in both economic and security cooperation', the terms of which should be agreed 'alongside those of our withdrawal from the EU'.¹⁴⁷ This partnership should be based on a 'bold and ambitious Free Trade Agreement between the United Kingdom and the European Union', which 'should be of greater scope and ambition than any such agreement before it so that it covers sectors crucial to our linked economies such as financial services and network industries'.¹⁴⁸ Starting from the ascertainment that both regulatory regimes are comparable at the moment of separation, both sides should focus on solving the question 'how we manage the evolution of our regulatory frameworks to maintain a fair and open trading environment, and how we resolve disputes'.¹⁴⁹ Transition from the EU membership to the deep and special partnership and uncertainties linked to it should be addressed by 'implementation periods to adjust in a smooth and orderly way to new arrangements'.¹⁵⁰ Based on these statements, it seems that the UK government intends to choose for a comprehensive free trade agreement without specifying the envisaged trade intensity, the means to achieve the envisaged trade intensity and the mechanisms to ensure compliance. The withdrawal notification does hence not allow for more detailed conclusions.

The white paper of the UK government, published on 2 February 2017, does not specify the three elements to define the kind of trade cooperation that is sought either. The 'new relationship should aim for the freest possible trade in goods and services between the UK and the EU. It should give UK companies the maximum freedom to trade with and operate within European markets and let European businesses do the same in the UK. This should include a new customs agreement with the EU, which will help to support our aim of trade with the EU that is as frictionless as possible. [...A new comprehensive, bold and ambitious free trade] agreement may take in elements of current Single Market arrangements in certain areas as it makes no sense to start again from scratch when the UK and the remaining Member States have adhered to the same rules for so many years. Such an arrangement would be on a fully

¹⁴⁷ May (n 1), p. 3.

¹⁴⁸ Ibid., p. 5.

¹⁴⁹ Ibid., p. 5.

¹⁵⁰ Ibid., p. 4.

reciprocal basis and in our mutual interests.¹⁵¹ Turning to policy areas, the white paper establishes the aim in relation to trade in goods that the 'new partnership should allow for tariff-free trade in goods that is as frictionless as possible between the UK and the EU Member States',¹⁵² in relation to trade in services that the 'new strategic partnership we will be aiming for the freest possible trade in services between the UK and EU Member States'¹⁵³ and in relation to customs that 'new customs arrangement with the EU [should enable] us to make the most of the opportunities from trade with others and for trade between the UK and the EU to continue to be as frictionless as possible. There are a number of options for any new customs arrangement, including a completely new agreement, or for the UK to remain a signatory to some of the elements of the existing arrangements. The precise form of this new agreement will be the subject of negotiation'.¹⁵⁴ The white paper does not include more detailed statements on specific policy areas.

Whilst it can be deduce from the quoted paragraphs of the white paper that the UK seems to strive for the most intense trade cooperation, it is nowhere specified whether this trade intensity is only to be guaranteed by negative integration or by some sort of mutual standard-setting. In relation to compliance mechanisms, the white paper 'recognise[s] that ensuring a fair and equitable implementation of our future relationship with the EU requires provision for dispute resolution'.¹⁵⁵ It refers in this context to several dispute resolution mechanisms that cannot adopt decisions that are binding upon the contracting parties. It leaves the question open whether the envisaged dispute resolution mechanism should be open for actions raised by individuals.

3.7.3.2. The position of the EU27

The EU27 shares the UK government's 'desire to establish a close partnership between the Union and the United Kingdom after its departure' clarifying that such a partnership 'between the Union and a non Member State cannot offer the same benefits as Union membership'.¹⁵⁶ In contrast to the UK government, the EU27 would like to negotiate an 'agreement on trade' 'once the United Kingdom is no longer a Member State', which 'must ensure a level playing field, notably in terms of competition and state aid, and in this regard encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices [... and] must include appropriate enforcement and dispute settlement mechanisms that do not affect the Union's autonomy, in particular its decision-making procedures'.¹⁵⁷ These paragraphs seem to suggest that the EU aims at a trade intensity that also covers minimum standards including a dispute settlement mechanisms without further specifying details about the envisaged dispute settlement mechanism.

Concerning the withdrawal agreement, the EU aims for '[n]egotiations [that] should seek to prevent a legal vacuum once the Treaties cease to apply to the United Kingdom and, to the extent possible, address uncertainties'. The withdrawal agreement 'should include appropriate dispute settlement mechanisms regarding the application and interpretation of the withdrawal agreement, as well as duly circumscribed institutional arrangements allowing for the

¹⁵¹ Department for Exiting the European Union and The Rt Hon Davis Davis MP (n 3), p. 35.

¹⁵² Ibid., p. 40.

¹⁵³ Ibid., p. 42.

¹⁵⁴ Ibid., p. 48.

¹⁵⁵ Ibid., p. 14.

¹⁵⁶ European Council (n 1), p. 8, para. 18.

¹⁵⁷ Ibid., p. 8.

adoption of measures necessary to deal with situations not foreseen in the withdrawal agreement.¹⁵⁸

3.7.3.3. Interim conclusion

The vote of UK people to leave the EU on 23 June 2016 has created as such has already created uncertainties not only in relation to the future relationship between the EU27 and the UK, but also in relation to the fate of rights lawfully acquired under EU law after UK law takes over in the aftermath of a withdrawal of the EU.

The policy documents published so far sketch the future relationship to be embodied in a free trade agreement that includes some sort of dispute settlement mechanism. Yet, neither the scope nor the intensity of trade is yet defined by the parties in these documents. Hence, at this point of time, uncertainties created by the Brexit vote are not addressed in a manner that would reduce them. Although at first sight it seems that uncertainties related to the broad variety of withdrawal scenarios might be diminished by the choice of a free trade agreement, applying the analytical framework developed in section 3.1 highlights how major choices that define, in substance, the future trade cooperation between the EU and the EU27 remain too vague to properly address the uncertainties.

The same holds true regarding the withdrawal and the fate of rights lawfully acquired under EU law. The policy documents of both the EU27 and the UK government reveal the intention to minimise uncertainty for citizens and economic operators as much as possible without providing, however, for precise indications as to how transitional rules following a withdrawal of the UK from the EU could look like.

Whilst the vagueness in relation to the future relationship as in relation to rights lawfully acquired in the past is not surprising at the current very early stage of negotiations, uncertainties linked to the unprecedented withdrawal of a Member State from the EU create a major problem for economic operators and citizens. The following chapter will address uncertainties linked to Brexit by establishing an analytical framework that allows to reveal those rules that are actually affected by Brexit and those that remain subject to EU law even if a withdrawal materialises. Agreeing on transitional rules at least with regard to the former rules constitutes hence an important step towards a reduction of uncertainties.

¹⁵⁸ Ibid., p. 5, para. 9.

4. FRAMEWORK FOR ANALYSING THE IMPACT OF BREXIT ON EU POLICY AREAS AND EU LAW

Once a 'Brexit scenario' materialises, it is crucial to analyse the impact of the scenario on EU law and the policy field linked thereto. Whilst an in-depth legal analysis can only be provided once the scenario becomes clearer, it is already possible at this stage of the process to develop an analytical framework *in abstracto*, which allows for the identification of the impact of different scenarios. This analytical framework is constructed on the basis of the assumption that a currently applicable legal regime (viz. EU law) is replaced at a given moment of time by a new legal regime (viz. UK law). Emphasis is thereby put on substantive rules affecting the legal relationships of individuals and undertakings, in contrast to procedural rules, which will be neglected for the purpose of analysing the impact of a Brexit scenario.

The first hypothesis on which the development of the analytical framework is based is that the change of a legal regime does not result automatically in a change of the applicable law. The second hypothesis is that a change of the applicable law does not automatically result in a loss of rights created under the previously applicable legal regime.

The object of the analysis is a legal relationship, which has some sort of connection with both the EU and the UK. The change of the legal regime affects this legal relationship in such a way that diverging rules of different origin could be applied to it. Applying the two hypotheses to this situation leads to the following two questions to be answered by the analytical framework:

1. Does the change of legal regime result in a change of the applicable law?
2. In case the applicable law changes, are rights lawfully acquired under the previous legal regime insulated from the change of the applicable law?

The first question has to be assessed based on the applicable rules determining the competent courts (international procedural law) and the applicable substantive law (conflict rules) (4.2). This follows from the fact that the applicable conflict rules (which decide whether there is a change of the applicable law) are those of the country in which the competent court is located. It is conceivable that although a given case involves the UK conflict rules designate EU law to be the applicable law in a given case. In such a situation, the impact of Brexit is insignificant. Brexit only becomes relevant where the applicable substantive law would be UK law. In those situations, the answer to the second question becomes pertinent.

In case the applicable law changes, the fact that a right was previously lawfully created under a different legal regime has to be taken into account. The answer to the second question is governed by the principles of intertemporal law (4.3). These principles define, which rules are to be applied to a legal relationship that was created under a different legal regime *ratione temporis*. Whereas, in general, the new law (viz. UK law) is applicable (4.3.1), there are exceptions to this general rule that lead to the application of the previous legal regime (viz. EU law) (4.2.2).

Applying the presently suggested two step approach in the analytical framework will reveal those policy areas that are affected by a changing legal landscape resulting from a withdrawal of the UK from the EU (chapter 5). To the extent that the facts and circumstances of a given case may take place on the UK territory, for such policy areas a future EU-UK agreement should create legal certainty. To the extent that the facts and circumstances of a given case may take place on the EU territory, the EU legislator can autonomously adopt own rules that deal with these cases.

It should be noted that the proposed analytical framework does not only apply to policy areas covered by the IMCO committee but to all EU policy areas.

4.1. Preliminary remarks

As a preliminary remark it should be noted that the issue of the continuous application of a legal regime although a new legal order is applicable *ratione temporis* is hardly addressed in relation to Brexit by academic writing or by documents produced by policymakers. Most notably, the European Union Committee of the UK House of Lords published a report on 'Brexit: acquired rights'¹⁵⁹ and the European Parliament published a study on the same matter.¹⁶⁰ Furthermore, the British Institute of international and Comparative Law,¹⁶¹ Douglas-Scott and Lowe in their written evidence for the EU Committee of the UK House of Lords,¹⁶² Bowers et al. in their briefing paper for the UK House of Commons,¹⁶³ Tell Cremades & Novak in their study on the legal framework of Brexit for the European Parliament¹⁶⁴ and Douglas-Scott in a blogpost¹⁶⁵ analysed the issue of vested rights in more detail. Other contributions such as the ones by Lehmann & Zetsche,¹⁶⁶ Weller, Thomale & Benz,¹⁶⁷ Gordon & Moffatt,¹⁶⁸ Rathke,¹⁶⁹ Mindus¹⁷⁰ and Piris¹⁷¹ mention that 'vested rights' or 'acquired rights' could protect rights that were created under EU law and whose further existence could be threatened by the change of the applicable law because of Brexit. Yet, these contributions do not discuss details of the scope and the nature of these rights. Against this background the following sections will develop the analytical framework on the basis of the general theory of inter-temporal law and of 'acquired rights' under international law with references, where necessary, to the just mentioned more detailed contributions.

4.2. Designation of the applicable law

The applicable law is designated by conflict rules. This designation is done by defining a connecting factor that allows to identify the legal order that has the closest links to a given legal relationship. In private law, the most prominent connecting factors are the nationality, which assigns the legal relationship of person to the legal order to which this person belongs because of his nationality, the habitual residence or, for contract law, the place where a

¹⁵⁹ European Union Committee, *Brexit: acquired rights* (2016-17, HL 82)

¹⁶⁰ Antonio Fernández Tomás and Diego López Garrido, The impact and consequences of Brexit on acquired rights of EU citizens living in the UK and British citizens living in the EU27, April 2017.

¹⁶¹ British Institute of international and Comparative Law, *BREXIT Transitional Arrangements and Public International Law*, p. 10-14.

¹⁶² Written Evidence AQR0001, AQR0002, AQR0003

¹⁶³ Paul Bowers et al., *Brexit : some legal and constitutional issues and alternatives to EU membership*, Briefing Paper No. 07214, 28 July 2016, pp. 19-25.

¹⁶⁴ Miguel Tell Cremades and Petr Novak, *Brexit and the European Union: General Institutional and Legal Considerations*, January 2017, pp. 21-23.

¹⁶⁵ Sionaidh Douglas-Scott, 'What Happens to 'Acquired Rights' in the Event of a Brexit?', U.K. Const. L. Blog (16 May 2016) (available at <https://ukconstitutionallaw.org/>).

¹⁶⁶ Matthias Lehmann and Dirk A. Zetsche, 'Brexit and the Consequences for Commercial and Financial Relations between the EU and the UK', *EBLR* 2016, p. 999 at 1013 et seq.

¹⁶⁷ Marc-Philippe Weller, Chris Thomale and Nina Benz, 'Englische Gesellschaften und Unternehmensinsolvenzen in der Post-Brexit-EU', *Neue Juristische Wochenschrift* 2016, p. 2378 at 2381.

¹⁶⁸ Richard Gordon and Rowena Moffatt, *Brexit: The Immediate Legal Consequences*, The Constitution Society 2016, p. 64 to 68.

¹⁶⁹ Hannes Rathke, 'Brexit und die Arbeitnehmerfreizügigkeit', in Malte Kramme, Christian Baldus and Martin Schmidt-Kessel (eds.), *Brexit und die juristischen Folgen*, 2016, pp. 211-229 at 214 to 216.

¹⁷⁰ Mindus, Patricia, *European Citizenship after Brexit*, 29 September 2016, available at SSRN: <https://ssrn.com/abstract=2842500>, p. 6.

¹⁷¹ Jean-Claude Piris, *If the UK votes to leave – The seven alternatives to EU membership*, January 2016, p. 12.

contract is concluded or performed. In public law, the most used connecting factor is territoriality, which assigns a legal relationship to the legal order, in which the legal relationship is located.

The conflict rules in private law are to a great extent EU rules such as the Rome I Regulation on the law applicable to contractual obligations¹⁷² and the Rome II Regulation on the law applicable to non-contractual obligations.¹⁷³ (Rome II). The conflict rules on public law are to a great extent still national law.

If there is now a cross-border legal situation in private law, which involves a legal order of a third country, or a cross-border legal situation in public, there is more than one conflict rule available. Before using a conflict rule in order to designate the applicable law, one has first to determine the applicable conflict rule. This is done by the principle of *lex fori*, which means that the conflict rule of the legal order of the competent court for solving such a case is the applicable one. Again, in private law, international procedural law is to a great extent EU law such as the Brussels Ibis Regulation.¹⁷⁴ In public law, international procedural law is national law.

Based on these considerations, in order to determine which law is applicable to a legal relationship with cross-border elements, first the competent court has to be identified. This then determines the applicable conflict rule that designates the applicable law.

If the application of rules of international procedural law leads to an applicable conflict rule that defines a connection factor that is located in the (remaining) EU territory, the impact of Brexit on the legal relationship subject to this conflict rule is insignificant. Thus, only where the applicable conflict rule provides for a connection factor that is located in the UK territory, the second step of the proposed analytical framework, the principles of intertemporal law, comes into play.

4.2.1. Designating the applicable law under the conditions of a 'hard Brexit'

Against the background of what has been observed above, the legal situation in relation to the international procedural rules and the applicable conflict rules after Brexit materialises has to be assessed. The basis for this assessment is the 'hard Brexit' scenario, in which no arrangements ordering the continuous application of EU rules have been provided for.

4.2.2. Legal situation in the UK after a withdrawal

Under this scenario, not much changes with regard to public law, since the procedural rules, as well as the conflict rules remain national law, whereby territoriality constitutes the connecting factor.¹⁷⁵ If a legal relationship is taking place within UK territory, it will be UK law that is applicable to this relationship.

¹⁷² Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6.

¹⁷³ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40.

¹⁷⁴ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1 repealing Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.

¹⁷⁵ Cf. Gerhard Kegel, 'The Role of Public Law in Private International Law: German Report', in: Frank Vischer, Frederic-Edouard Klein and Ludwigs Wildhaber (eds.), Basle Symposium on the Role of Public Law in Private International Law, Basel 1991, p. 29.

With regard to private law, the day after a 'hard Brexit' materialises, the EU law in shape of the Brussels Ibis- and the Rome-Regulations ceases to apply.¹⁷⁶ The same applies to the Lugano Convention of 2007¹⁷⁷ and to the Hague Choice of Court Convention,¹⁷⁸ which currently only bind the UK via the EU.¹⁷⁹ This raises the question by what rules the EU legal regime will be replaced. The answer to this question would in principle be domestic UK law, was it not for the fact that the UK has concluded international instruments that were superseded by EU law. The Brussels Convention of 1968¹⁸⁰ and the Rome Convention of 1980¹⁸¹ are international agreements that were ratified by the UK and given force of law by different means than the European Communities Act 1972.¹⁸² Both conventions were meant to regulate the international procedural law and private international law of the EEC Member States. Upon accession to the EEC, the UK also ratified both conventions.¹⁸³ Although there is some dispute in academia whether both conventions are still existing and could be applied to the UK after a withdrawal,¹⁸⁴ the more convincing arguments point in favour of a revival of these convention for the UK.

The Brussels Ibis-Regulation (Article 68(1): 'This Regulation shall, as between the Member States, supersede the 1968 Brussels Convention [...]') as well as the Rome I-Regulation (Article 24(1): 'This Regulation shall replace the Rome Convention in the Member States [...]') state both that 'replace' or 'supersede' the conventions, the conventions remain in force. This is due to the fact that they remain applicable to all those geographical parts of the Member States that are not covered by Article 299 TFEU and, more importantly, Denmark remains party to the 1980 Rome Convention.¹⁸⁵ Another argument put forward against the revival of both conventions for the UK is that these instruments were originally concluded to regulate the legal relationships of the EEC Member States. Hence, it may be argued that an unwritten rule states that third countries are excluded from their scope. Since the UK would leave the Union in case of a 'hard Brexit', it could be said to implicitly also withdraw from these conventions.¹⁸⁶ Yet, whilst it is true that both convention requires a membership in the EEC for the signature and the ratification of these conventions, it is not stated anywhere that continued membership is a requirement for remaining a Convention state.¹⁸⁷ Furthermore, the EU Treaties and the Convention are, from an international law perspective, two distinct instruments. The withdrawal from the one does not imply the termination of the other.¹⁸⁸

¹⁷⁶ Andrew Dickinson, 'Back to the future: The UK's EU exit and the conflict of laws', *Journal of Private International Law* 12 (2016), p. 195-201 at 197.

¹⁷⁷ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano, 31 October 2007), [2007] OJ L339/3.

¹⁷⁸ Hague Convention on choice of court agreements of 30 June 2005.

¹⁷⁹ With regard to a future application of the Hague Convention see Mukarrum Ahmed, 'BREXIT and English Jurisdiction Agreements: The Post-Referendum Legal Landscape', (2016) *EBLR* 989.

¹⁸⁰ Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L 299/32.

¹⁸¹ Convention on the law applicable to contractual obligations (Rome, 19 June 1980) [1980] OJ L266/1.

¹⁸² Dickinson (n 176), 199.

¹⁸³ Civil Jurisdiction and Judgments Act 1982 and the Contracts (Applicable Law) Act 1990.

¹⁸⁴ See for instance Burkhard Hess, 'Back to the Past: BREXIT und das europäische internationale Privat- und Verfahrensrecht', *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2016, 409-417; Giesela Rühl, 'Die Wahl englischen Rechts und englischer Gerichte nach dem Brexit', *JuristenZeitung* 2017, p. 72.

¹⁸⁵ Dickinson (n 176), 203 et seq.

¹⁸⁶ Hess (n 184), 417.

¹⁸⁷ Dickinson (n 176), 204 et seq.

¹⁸⁸ One may argue that there could be a termination of both Conventions because of 'Brexit' being a 'fundamental change of circumstances' in terms of Article 62(1) VCLT. Yet, it is more likely that the high threshold for a 'fundamental change of circumstances' that refers to situations such as war between Convention states is fulfilled in the case of 'Brexit'. It appears more convincing to say that in terms of legal certainty conventions such as the Brussels and the Rome convention remain applicable.

While it is presently thus argued that both Conventions revive after a 'hard Brexit' materialises, it should be noted that these instruments only cover 15 of the currently 28 Member States since countries that joined the EU after the entry into force of the Regulations had not to ratify the conventions anymore. This makes it recommendable that the UK should conclude an agreement with EU on the application of the Brussels- and Rome-Regulations on UK territory comparable to the one that Denmark concluded with the EU in 2005.¹⁸⁹

For the purpose of the application of the analytical framework, the present study will assume the applicability of the Brussels and Rome Convention.

4.2.3. The legal situation in the EU after a withdrawal of the UK

If a legal relationship involving the UK is to be assessed on the EU territory, little changes with regard to public law, since the procedural rules as well as the conflict rules remain national law using territoriality as connecting factor. If a legal relationship is therefore taking place within EU territory, it will be EU law that is applicable to this relationship.

As regards private law, the Rome-Regulations remain applicable vis-à-vis the UK.¹⁹⁰ Article 2 of the Rome I-Regulation and Article 3 of the Rome II-Regulation order a universal application of these regulation ('Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.'). Under the Brussels Ibis-Regulation, the regulation is applicable only to 'persons domiciled in a Member State shall, whatever their nationality, [...] sued in the courts of that Member State' (Article 4). This means that the Brussels Ibis-Regulation would not be applicable to people and undertakings being domiciled in the UK that are being sued in the EU. In such a situation, the abovementioned Brussels Convention would have to be applied, since this convention is also ratified by at least 14 EU Member States. It should furthermore be noted that the Brussels Ibis-Regulation includes exceptions to the abovementioned general rule in case consumers (Articles 17 et seq.) and workers (Articles 20 et seq.) are involved.

4.3. Principles of intertemporal law

Once it is established that the change of the legal regime entails a change of the applicable law to a given legal relationship, the question arises whether rights lawfully acquired under the previous legal regime are protected against the change of applicable law. This refers to the principles of intertemporal law. The foundations for intertemporal law in public international law were laid by Judge Huber in the judgment of the Permanent Court of Arbitration (PCA) in the case of 'Island of Palmas' of 1928:

"[A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled. [...] As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law."¹⁹¹

The principles of intertemporal law hence moderate the conflict between the *lex temporis actus* (the law applicable at the creation of a legal relationship) and the *lex praesens* (the

¹⁸⁹ Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2005] OJ L 299/62.

¹⁹⁰ Rühl (n 184), 76.

¹⁹¹ Max Huber in: PCA, *Island of Palmas* Case (Netherlands, United States), 2 Reports of Int'l Arb. Awards 831, 845.

law applicable in the present time). The guiding legal principles for shaping intertemporal law are the principles of non-retroactivity of a law and of legitimate expectations, which are in favour of limiting the effects of the new law, and the principles of legal certainty and of legislative alignment, which speak in favour of the application of new rules.

Based on these legal principles, the principles of intertemporal law can be summarised as follows:¹⁹²

1. New rules become fully and immediately applicable at the date of their entry into force ('effet immédiat de la loi');
2. The creation of a legal relationship in the past is to be assessed against the law applicable at the time of its creation;
3. Legal effects generated by a legal relationship in the past are to be assessed against the law applicable at the time of the generation of these legal effects;
4. Legal effects of a legal relationship that was created in the past but that will be generated in the present or in the future are to be assessed against the law applicable in the present.

4.3.1. Immediate application of new law in the moment of the change of the applicable law

Applying the principles of intertemporal law identified above to a situation, in which the change of the legal regime entails the change of the applicable law to a given legal relationship entails that the new law is to be applied to the legal relationship despite its creation in the past, where a different legal regime was applicable to it, from the moment of the change of the applicable law.¹⁹³

4.3.2. Application of previously applicable law to the creation of a legal relationship

The immediate application of the newly applicable law may, however, not result in a loss of a legal relationship that was created lawfully under the previous legal regime. The principle of non-retroactivity requires, as it was stated by Judge Huber in the 'Island of Palma' case, the application of the *lex temporis actus*. The creation of a legal relationship must be assessed against the rules that were applicable at the time of the creation.¹⁹⁴

Yet, the rule of the *lex temporis actus* does not lead to a situation in which the previously applicable law remains the same despite any changes in law. The so-called second branch of the statement of Judge Huber in the 'Island of Palmas' case is then to be taken into account: The further existence of a legal relationship requires the continued manifestation of this relationship under the conditions set by the evolution of law.

Whilst against this background it becomes clear that the creation of a legal relationship cannot be challenged by the new legal regime, its continuation may be rendered less attractive by the immediately applicable new law as compared to the conditions of the previously applicable law.

¹⁹² This summary draws on Paul Roubier, *Les conflits de lois dans le temps*, 2nd edition 1960.

¹⁹³ In this sense, see e.g. ECJ, Case 1/73, *Westzucker GmbH v Einfuhr- und Vorratsstelle für Zucker* [1973] ECR 723 para. 5.

¹⁹⁴ Burkhard Hess, *Intertemporales Privatrecht*, Tübingen 1998, p. 366.

4.3.3. Continuous application of previously applicable law due to 'acquired rights'

Against the immediate applicability after the change of the applicable law stands the theory of 'acquired rights', according to which rights lawfully acquired under previous law may not be undermined by the newly applicable law.

In order to understand the theory of 'acquired rights' one has to distinguish between the legal order that gave rise to a particular right, which might be deemed 'acquired', and the legal order that commands the 'survival' of an 'acquired right' over time. Both are, by definition, distinct from each other. The issue of 'acquired rights' only occurs, if the legal order that gave rise to it is not applicable any longer. Since this legal order is, in principle, not able to instruct judges anymore due to its inapplicability *ratione temporis*, another legal order that is still binding upon courts must command the survival of 'acquired rights'. Already for this reason the legal source for the continuous application of rights that were created by EU law cannot be found in EU law.

A different view¹⁹⁵ could be based on the CJEU's judgment in 'Van Gend en Loos', in which the EU legal order was considered to be 'a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage'.¹⁹⁶ This quality of being a new legal order of international law could call for different standards when defining the scope of rights requiring the continuous application of EU law *ratione temporis* than the ones established under the classical public international law. The reference to the 'legal heritage' could be understood as meaning that all rights EU law confers upon individuals could outlast the existence over time of the Treaties that created these rights. Yet, this view ignores the question of the identifying the norm that commands the continuous existence of a rights that outlasted its own legal source. Whilst an 'acquired right' can remain applicable although the legal source of its creation is not applicable anymore, the continuous application of an 'acquired right' must be ordered by a provision that is still applicable and binding. In the case of 'Brexit', after a withdrawal of the UK from EU, domestic judges in the UK are no longer subject to EU law and the case law of the CJEU, but instead only to national law and public international law. Hence one has to find the legal source for the continuous application of rights lawfully acquired under EU law in public international law. The latter and thus not EU law therefore defines, within the territory of the UK, the scope and the effects of the theory of 'acquired rights'.¹⁹⁷

In public international law, the theory of acquired rights is based on two arguments.

The first refers to Article 70(1)(b) of the Vienna Convention on the Law of the Treaties, according to which 'the termination of a treaty [...] does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination'. The main weakness of this argument is, however, that the notion of 'parties' refers to states and not to individuals since parties of a Treaty are under public international law states and not individuals.¹⁹⁸

¹⁹⁵ Cf. Jochen Herbst, 'Observations on the Right to Withdraw from the European Union: Who are the "Masters of the Treaties"?' German Law Journal 6 (2005), p. 1755 at 1756.

¹⁹⁶ Case 26/62, Van Gend & Loos [1963] ECR 1, p. 12.

¹⁹⁷ Cf. Bowers et al. (n 163), p. 20; Fernández Tomás and López Garrido (n 160), p. 38 et seq.; Tell Cremades and Novak (n 164), p. 22; Jean-Claude Piris, *Should the UK withdraw from the EU: Legal aspects and effects of possible options*, European Issue No 355, 4 May 2015, p. 10.

¹⁹⁸ Anthony Aust, *Modern Treaty Law and Practice*, 3rd ed., 2013, p. 266.

The second argument refers to the judgment of the Permanent Court of International Justice in the case 'Certain German Interests in Polish Upper Silesia' of 1926.¹⁹⁹ In this case the PCIJ ruled that the 'principle of respect for vested rights [...] forms part of generally accepted international law'.²⁰⁰ Yet, the scope of these vested rights is very narrow. It primarily covers property rights (including trademarks, copyright and patents).²⁰¹ These are absolute rights whose acquisition was legally finalised in the past and whose existence can be duly evidenced because of its publication in registers.²⁰²

Moreover, rights could qualify for 'acquired rights' if they can be considered comparable to property rights. O'Connell identified such comparable rights if they contain 'any legal interest, other than the personal freedom to pursue an avocation, which is reducible to monetary terms. Hence, real and personal estate of all kinds, including choses in action and equitable claims, are comprehended in the notion "acquired rights". Political advantages, such as rights to public office, and certain economic advantages such as industrial or commercial monopolies have not been treated as acquired rights. It is, of course, necessary that the right be properly vested under the municipal law of the predecessor State and sufficiently evidenced'.²⁰³ Hence next to property rights one can understand as 'acquired rights' contractual rights deriving from the State such as concessions or licences, and the recognition of foreign official certificates and documents (including judgments and arbitral awards).²⁰⁴ At the other end of the spectrum of rights that cannot be considered anymore as 'acquired rights' are simple commercial privileges without being capable of financial valuation and business opportunities. This understanding is supported by the PICJ's judgment in the 'Oscar Chinn' case, in which the Court held that the reduction of transport rates on the Congo River by the Belgian government resulting into a *de facto* monopoly of a Belgian company did not violate any rights of a British entrepreneur who lost his business opportunities because of this measure.²⁰⁵

Having defined the scope and the effect of the continuous application of rights lawfully acquired under a previous legal regime under public international law, the question might arise whether the scope has to be defined differently (broader) when 'acquired rights' were created by the EU legal order in the event of a withdrawal of a Member State because of the high level of integration of an EU Member State into the EU legal order before its withdrawal. Yet, public international law does not define an acquired right in relation to the legal order it stems from. In fact it sets its criteria irrespective of the 'quality' of the legal order that is no longer applicable. This derives already from the fact that public international law is built on the assumption of the equality of legal orders. Hence, from the perspective of public international law, the scope of acquired rights is not to be defined any differently only because the source of the right is the EU legal order.

4.3.4. Continuous application of previously applicable law based on the principle of legitimate expectations

Next to the protection of 'acquired rights' the principle of legitimate expectation may require the continuous application of previously applicable law to a legal relationship. The principle

¹⁹⁹ PCIJ Series A no 7, ICGJ 241 (PCIJ 1926), 25 May 1926.

²⁰⁰ PCIJ Series A no 7, ICGJ 241 (PCIJ 1926), 25 May 1926 at point 132.

²⁰¹ Pierre A Lalive, 'The Doctrine of Acquired Rights', in: Bender (ed.), Rights and duties of private investors abroad - International and comparative law center, New York, 1965, p. 145-200 at 183.

²⁰² Sionaidh Douglas-Scott, 'What Happens to 'Acquired Rights' in the Event of a Brexit?', U.K. Const. L. Blog (16th May 2016) (available at <https://ukconstitutionallaw.org/>).

²⁰³ Daniel Patrick O'Connell, *International Law*, 2nd edition 1970, p. 378.

²⁰⁴ Vaughan Lowe, Supplementary written evidence, AQR0003, p. 1; Lalive (n 201), p. 183; Robert Bindschedler, 'La Protection de la Propriété privée en droit international public', RdC 90 (1956) vol. II, p. 179 at 217.

²⁰⁵ PCIJ Series A/B no 63, ICGJ 313 (PCIJ 1932), 12 December 1934.

of legitimate expectations can be invoked by the addressee of the newly applicable law, if the latter could expect a legal situation as it stood before the change of applicable law to continue and, if the confidence of individuals in that expectation deserves to be protected.²⁰⁶ The confidence of the individual in the expectation that a legal situation continues can only be sanctioned, if public interests in the immediate application of the new law predominate.²⁰⁷

The first condition creates a presumption that an individual can, in principle, rely on the fact the currently applicable law continues to apply in the same manner. This presumption is, however, rebutted if there are explicit rules that prevent the creation of such expectations. In the context of 'Brexit', reference can be made to Article 50(3) TEU. With the formal notification of a Member State to withdraw from the Union, it may be argued that individuals cannot expect any longer that EU law continues to apply in the future since Article 50(3) TEU states that even if there is not withdrawal agreement, EU law ceases to apply two years after the notification.

The second condition, concerning the question whether the confidence of the individual in the expectation of continuous application of previously applicable law requires a weighing up of the interests of the individual in the continuous application of previously applicable law and of the public interests in changing the applicable law. This balancing test can only be done on a case-by-case basis. In the case of 'Brexit' it must be taken into account that the change of the applicable law results from a change of the legal regime as a consequence of a withdrawal from the EU requested by a popular vote in a referendum and supported by a Parliamentary vote in the UK. Arguably, this sets the threshold for the public interests against which individual rights in continuously applying EU law have to be weighed quite high.

4.3.5. Continuous application of previously applicable law due to solutions *de lege ferenda*

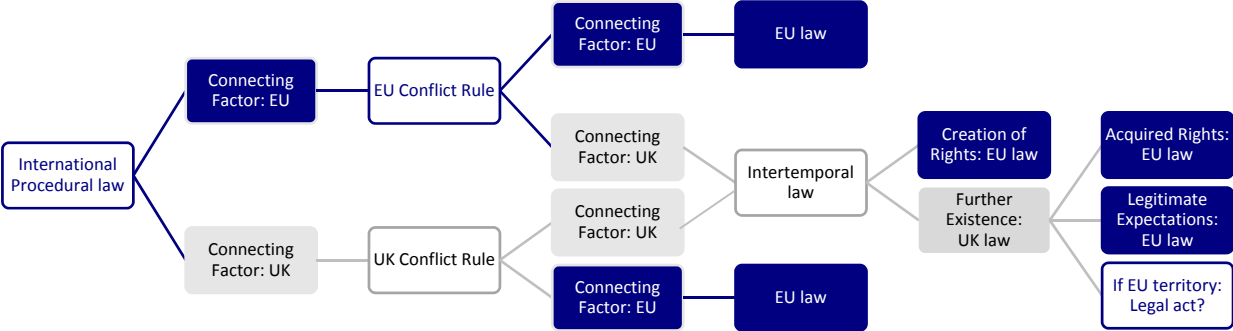
Legislators create legal certainty through the adoption of transitory laws with a view to cases in which it cannot be excluded that the previously applicable law remains applicable (at least for a certain period of time). Hence, a continuous application of previously applicable law can be ordered unilaterally by domestic law *de lege ferenda*.

4.4. Analytical framework

In sum, the abovementioned considerations lead to the following analytical framework for assessing (1) whether or not the change of a legal regime leads to a change of the applicable law and (2) whether in case the applicable law changes the previously applicable law continues to apply because of principles of intertemporal law.

²⁰⁶ In this sense, see e.g. ECJ, Case 1/73, Westzucker GmbH v Einfuhr- und Vorratsstelle für Zucker [1973] ECR 723 para. 6.

²⁰⁷ Opinion of AG Roemer, Case 1/73, Westzucker GmbH v Einfuhr- und Vorratsstelle für Zucker [1973] ECR 741.



This analytical framework allows to identify rules that may want to be included in an agreement on the future relationship between the EU and the UK in case they are supposed to be preserved to the extent that UK law would take over the regulation of matters falling within the scope of these rules. Identifying these rules allows the EU and UK to make conscious policy choices with regard to whether these rules should be included in a future agreement.

In chapter 5 this analytical grid is applied to the policy areas covered by the IMCO competence.

5. BREXIT SCENARIOS AND THE POLICY AREAS COVERED BY THE IMCO COMMITTEE

Assuming that the withdrawal agreement and the subsequent agreement (if any) would manage to secure the approval of the European Parliament, the impact of such agreements on areas of IMCO competence needs to be observed.

To this end, this chapter applies the analytical framework developed in chapter 4 in order to identify the rules, which would be affected the most by a 'Brexit'. The impact will be then assessed against the background of the 'fall-back scenario': a 'hard Brexit' without arrangements between the EU and the UK. This scenario is chosen because it is not dependent on any presumed policy choice, which have yet to materialise. It furthermore allows to draw conclusions on the worst possible impact of a withdrawal of the UK from the EU, as all other Brexit scenarios approximate the future relationship between the EU and the UK closer to the baseline scenario, which is the EU membership (see chapter 3). To the extent that already some interim conclusions have been drawn on the scenario of the UK joining the EEA (see chapter 3.5) or other tailor-made trade cooperation arrangements (see chapter 3.6.), these conclusions will briefly be outlined.

The object of this chapters is formed by policy areas and EU legislation falling within the ambit of the IMCO Committee, as well as other arrangements presently not part of the *acquis* which could feature in a future EU-UK agreement. This refers to legislative files that are currently pending. The assessment includes existing literature on the implications of Brexit for the policy areas forming the subject matter of this study as well as expert testimonies presented at a workshop organised by the Policy Department A: Economic and Scientific Policy of the European Parliament on the consequences of Brexit on 28 February 2017.²⁰⁸ The penultimate and final parts of this chapter offer an overview of the EU legislation and pending proposals likely to be affected by the Brexit options examined in this report.

5.1. Customs Union

5.1.1. Application of the analytical framework

Customs law is part of public law. The connecting factor for determining the applicable procedural law is therefore 'territoriality'. This means that, after a Brexit materialises, UK courts will apply UK law on customs duties due because of the entry into UK territory. Hence the change of the legal regime would result into a change of the applicable law.

The change of applicable law will result in some intertemporal issues. Article 50 TEU will preclude legitimate expectations for the continuation of no tariffs and quotas when entering UK territory. However, licenses and concessions issued under EU law that concern UK territory and whose duration of validity surpasses the date of a potential withdrawal of the UK from the EU are considered property rights and would therefore be considered acquired rights, which cannot be rendered invalid without compensation.

Against this background, the law of the Customs Union is one where the impact of a withdrawal of the UK from the EU will be highly significant. This calls for a more detailed analysis of the significance of a withdrawal under the different Brexit scenarios.

²⁰⁸ The workshop is documented in the 'Proceedings of the Workshop on the consequences of Brexit' published in March 2017.

5.1.2. Hard Brexit: WTO rules

According to this scenario, there would be no agreement governing the future relationship between the EU and the UK. The UK would cease to be a member of the EU's customs union. Its imports from and exports to the EU would be subject to tariffs (and vice versa). There would have to be a customs border. In this scenario, there would be no rules of origin. The HL EU Committee notes in this context in its most recent Brexit report on trade in goods that '[t]o [their] knowledge, no precedent exists for an agreement outside a customs union that entirely eliminates the need for customs checks and the additional burden of associated administration and costs'.²⁰⁹ The UK would moreover have to negotiate its own schedule of commitments in the WTO or to separate its commitments from those of the EU, as explained in chapter 3.4.1. While the UK is a member of the WTO in its own right, it does not have an individual schedule of concessions. Instead, it is part of the EU's combined schedules (see chapter 3.4.1).²¹⁰

In this context it is argued by the House of Lords' European Union Committee that '[b]efore presenting its schedules to WTO members, the UK will have to negotiate formally with the EU to separate out its TRQs [i.e. Tariff Rate Quotas] and levels of subsidies from those currently shared between the EU's 28 Member States'.²¹¹ It will be recalled that 'TRQs provide lower duties on limited quantities of goods imported into a country'.²¹² The process of dividing these quotas between the EU and the UK is expected by the HL EU Committee to be 'contentious'.²¹³ The EU and the UK would further need to 'divide those quotas that currently enable the EU to export to third countries on preferential terms'.²¹⁴ It is not clear whether the EU would keep these quotas, with the consequence that the UK would need to negotiate preferential access itself.²¹⁵ 'The UK and the EU would also have to agree on how to divide the entitlement to domestic subsidies (most commonly agricultural subsidies), known in the WTO as the aggregate measurement of support (AMS)'.²¹⁶ However, it is noted that the EU is currently 'well below its agreed limit', which gives some leeway for a deal to be struck.²¹⁷

It is further argued by the HL EU Committee that from the perspective of other WTO members it makes a 'massive difference' whether the UK remains part of the EU's customs union, concludes an FTA with the EU or trades under WTO rules only.²¹⁸ This is because other countries might seek from the UK Government lower tariff rates on imports so as to compensate for the fact that their products would no longer have free access to the single market.²¹⁹ This is more especially so with respect to the WTO option ('hard Brexit').

Scheller (2016) briefly outlines the consequences for tariffs of a 'hard Brexit'.²²⁰ Newly introduced tariffs in the cross-border trade relations plus additional administrative and procedural

²⁰⁹ European Union Committee, *Brexit: Trade in Goods (sixteenth report)* (2016-17, HL 129) 5.

²¹⁰ See further House of Commons Treasury Committee 'Oral Evidence: The UK's future economic relationship with the European Union' HC 483, 13 July 2016; European Union Committee (n 106).

²¹¹ European Union Committee (n 106), 53 para 177.

²¹² *ibid* 53 para 178.

²¹³ *ibid* 53-54 para 178.

²¹⁴ *ibid* 54 para 179.

²¹⁵ *ibid* 54 para 179.

²¹⁶ *ibid* 54 para 180.

²¹⁷ *ibid* 54 para 180.

²¹⁸ *ibid* 55 para 187.

²¹⁹ *ibid* 55 para 187.

²²⁰ Peter Scheller, 'Brexit und die Folgen für das Zollrecht und die indirekten Steuern', *Deutsches Steuerrecht (DStR)* 2016, 2196, 2197.

burdens would have a negative impact on cross-border trade.²²¹ Scheller therefore anticipates the conclusion of a most favoured nation agreement between the EU and the UK that would reduce tariff burdens as much as possible.

As to the process of modifying the EU and the UK's schedules, it is not clear whether a 'rectification' or a 'modification' would be needed, the latter being far more cumbersome a decision-making process.²²² It bears mentioning that the EU had to revise its commitments as more countries joined the EU. It is noted by Ungphakorn (2016) that the schedule for 1995 was not certified until 2010 – it took fifteen years to account for the addition of three Member States.²²³

At the time of writing, the most recent statement by the Rt Hon Greg Hands MP, Minister of State in the Department of International Trade, is that '[t]he UK goods and services schedules will be based on the most recent certified EU schedules, which is EU25 for goods, and EC12 for services. Since these schedules were certified the EU has entered into further WTO obligations, which we will also seek to replicate in our schedules.'²²⁴

There is no discussion in the existing literature on the Trade Facilitation Agreement (TFA), which entered into force on 22 February 2017. 'The TFA focuses on a different kind of NTB: It aims at reducing the costs that arise from administrative customs procedures, which are substantial. In short, the TFA aims at a simplification, harmonisation and modernisation of export and import procedures.'²²⁵ 'Estimates show that the full implementation of the TFA could reduce trade costs by an average of 14.3% and boost global trade by up to \$1 trillion per year'.²²⁶ The problem here lies in the fact that the agreement was signed by the EU on behalf of all its Member States, including the United Kingdom.²²⁷

5.1.3. European Economic Area Agreement

In this scenario UK goods covered by the EEA Agreement would have tariff-free access to the single market, and EU goods covered by the EEA Agreement would also have tariff-free access to the UK market. However, as explained above (chapter 3.5), rules of origin would apply. This is because there is no common customs tariff applicable to goods imported from third countries under the EEA Agreement. The EEA Agreement includes a prohibition of customs duties on imports and exports and of any charges having equivalent effect without prejudice to the arrangements set out in Protocol 5 with regard to customs duties of a fiscal nature. Yet, in contrast to the EU, the EEA may not define common customs tariffs duties. The EEA cannot therefore be considered a fully-fledged customs union. Moreover it has to be noted that there would be tariffs for farm produce and fish.²²⁸ EEA EFTA States can set their own tariffs on goods imported from outside the single market, but their own goods (except

²²¹ *ibid* 2197-8 with a lot of examples.

²²² European Union Committee (n 106), paras 188-190.

²²³ See further Peter Ungphakorn, 'The Hilton Beef Quota: A Taste of What Post-Brexit UK Faces in the WTO', (Trade β Blog, posted on 10 August 2016 and updated on 25 November 2016) <<https://tradebetablog.wordpress.com/2016/08/10/hilton-beef-quota/>> accessed 12 December 2016.

²²⁴ Written answer from Department of International Trade to written parliamentary question WPO67537 by Kirsty Blackman MP, 16 March 2017.

²²⁵ Christian Bluth, 'TFA: The Trillion Dollar Trade Deal That Just Came into Force ...And Which Hardly Anyone Noticed' (7 March 2017) <https://ged-project.de/topics/competitiveness/challenges_in_international_competitiveness/tfa-the-trillion-dollar-deal-nobody-noticed/> accessed 21 March 2017.

²²⁶ World Trade Organization, 'Trade Facilitation' <https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm> accessed 21 March 2017.

²²⁷ World Trade Organization, 'Members accepting the Protocol of Amendment to insert the WTO Trade Facilitation Agreement into Annex 1A of the WTO Agreement' <https://www.wto.org/english/tratop_e/tradfa_e/tradfa_agreeacc_e.htm> accessed 21 March 2017.

²²⁸ See further Catherine Barnard, 'The Customs Union' <<http://ukandeu.ac.uk/explainers/the-customs-union/>> accessed 11 January 2017.

for farm produce and fish) are imported tariff-free into the EU. This means that if the UK were to become part to the EEA Agreement, its exporters would have to show that their goods originated in the UK and would therefore be eligible for tariff-free entry to the EU countries. This would require the application of rules of origin.²²⁹

It is noted by the House of Lords EU Committee that the economic impact of rules of origin, if these were to be introduced, has not yet been precisely quantified.²³⁰ According to one study, applying rules of origin could cost the UK economy 'around 1-1.2% GDP'.²³¹ A CEPS report commissioned by the UK Government (2013) estimated that leaving the customs union could cost traders anything from 4–15% of the cost of goods sold.²³² The House of Lords EU Committee is also 'conscious of the practical challenges of introducing full customs controls within two years'.²³³ The EU27, too, would of course face similar practical challenges under this scenario.

The EEA Agreement includes a provision that waives the Common External Tariff on goods (except certain agricultural and fish products) exported from non-EU EEA States into the EU, insofar as the majority of their parts are produced in the EEA.²³⁴ It is explained by the House of Lords EU Committee that this could be 'problematic' for the UK, as 'on average 23% of the value of the UK's goods exports is derived from foreign components'.²³⁵ In this connection, the Financial Times report that around 60% of UK exports are intermediate goods, capital goods and raw materials –not final consumer goods–, with parts of the same product crossing the border multiple times before the latter is assembled.²³⁶ This provision in the EEA Agreement could further increase, argues the House of Lords EU Committee, red tape, transaction costs for businesses, and costs for consumers.²³⁷ What is more, it is difficult to determine the origin of products with a complex supply chain.²³⁸ As shown by a CBI study, the UK aerospace industry, for example, rests on complex supply chains.²³⁹

Another issue identified in the report of the HL EU Committee is that for those sectors falling outside the EEA Agreement which are not covered by other bilateral agreements between EEA EFTA States and the EU, the EU imposes tariffs on imported goods. In other words, outside the scope of the EEA Agreement, the 'fall-back option' applies, according to which the legal relationship between the UK and the EU is governed by WTO law (section 5.1.2). The EU can further apply safeguard measures, such as antidumping policies, which has happened in the past with respect to fish products. This could 'potentially pose difficulties for the

²²⁹ Catherine Barnard, 'The Customs Union' <<http://ukandeu.ac.uk/explainers/the-customs-union/>> accessed 11 January 2017.

²³⁰ European Union Committee (n 106), 31-32 paras 97-102.

²³¹ Raoul Ruparel, 'Post Brexit, Leaving the Customs Union is a No-Brainer' (Open Europe, 28 July 2016) <<http://openeurope.org.uk/today/blog/post-brex-it-leaving-customs-union-no-brainer/>> accessed 14 December 2016.

²³² Centre for Economic Policy Research, 'Trade and Investment: Balance of Competence Review' (November 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271784/bis-14-512-trade-and-investment-balance-of-competence-review-project-report.pdf> accessed 14 December 2016, 58.

²³³ European Union Committee (n 106), 35 para 116.

²³⁴ See further EEA Agreement Protocol No 4 on rules of origin.

²³⁵ European Union Committee (n 106), 24 para 71.

²³⁶ Financial Times, 'UK Faces Struggle to Redesign Trade Relationships, in Charts' (3 February 2017) <<https://www.ft.com/content/37aa67a0-e94e-11e6-893c-082c54a7f539>> accessed 12 May 2017, with data from the World Bank: <<http://wits.worldbank.org/CountryProfile/en/Country/WLD/Year/2014/TradeFlow/Export/Partner/all/Product/UNCTAD-SoP2>> accessed 12 May 2017.

²³⁷ European Union Committee (n 106), 24 para 72; 31 para 98.

²³⁸ *ibid* 24 para 72; 31 para 98.

²³⁹ CBI, 'Aerospace: An International Success Story' <http://www.cbi.org.uk/global-future/case_study02_aerospace.html> accessed 12 May 2017.

UK', it is argued, because 64% of the UK's fish and 73% of vegetable exports go to the EU.²⁴⁰ This arguably creates leverage for the EU in the 'Brexit' negotiations.

5.1.4. Tailor-made arrangements

Much depends on the choices which are yet to be made by the two negotiating parties, the EU and the UK. In principle, an FTA could reduce or eliminate tariff barriers to trade for goods covered by the agreement. As such, it could go further than WTO commitments made by the EU with respect to third countries.

Tariff-free mutual access presupposes a rich/deep FTA. It is argued by Pelkmans (2017) that the DCFTA is a good candidate, especially because the UK already fully 'owns' the EU *acquis*. However, the DCFTA is clearly based, Pelkmans argues, on 'entrenching the single market *acquis*', and the UK would not be a member of the customs union.²⁴¹

'A FTA could also avoid the imposition of tariffs on goods traded between the UK and the EU, although rules of origin would apply.'²⁴² It is, however, argued by Gasiorek, Holmes and Rollo (2016) that 'both the UK and the EU could agree that in all industries where the UK keeps the same external tariffs as it has now, Rules of Origin would not be checked, and/or that where standards and enforcement was maintained as it had been within the EU, Mutual Recognition could be assumed at least temporarily.'²⁴³ This proposal would, if implemented, minimise the impact of Brexit.

5.2. Internal Market in Goods

5.2.1. Application of the analytical framework

The internal market in goods covers the free movement of goods provisions in EU primary law (Articles 34 to 37 TFEU), as well as secondary law on standards that products on the internal market have to comply with. The latter refers in particular to product safety rules.

Understood in this way, the rules concerning the internal market in goods are part of public law. The connecting factor for determining the applicable procedural law is therefore 'territoriality'. This means that, after a Brexit materialises, UK courts will apply UK law to goods entering the UK market. Hence the change of the legal regime would result into a change of applicable law.

Furthermore, principles of intertemporal law will not lead to a continuous application of EU law to goods that seek entrance to the UK market. Article 50 TEU will preclude legitimate expectations for the expectation that goods that are in conformity with EU rules could enter the UK market without any further restrictions. Goods produced in compliance with EU product safety rules cannot be considered acquired rights, in particular since these goods can easily be sold within the remaining EU internal market.

Against this background, the law concerning the internal market in goods is one where the impact of Brexit could be significant. Yet, the actual significance will depend on how much UK domestic rules would deviate from the current EU standards. If the UK lowers the standards, EU products being compliant with higher standards will still be able to enter the UK market, whereas UK products could be prevented from entering the EU internal market. If

²⁴⁰ European Union Committee (n 106), 25 para 74.

²⁴¹ Jacques Pelkmans, 'Economic Impact of Brexit on EU27: Part 2, Sectorial Consequences' (Workshop on the consequences of Brexit, Brussels, 28 February 2017).

²⁴² European Union Committee (n 106), 49 para 166.

²⁴³ Gasiorek, Holmes and Rollo (n 120), 5.

the UK raises its standards, UK products will not meet any problems entering the EU internal market, whereas EU products would face difficulties to be sold on the UK market.

5.2.2. Hard Brexit: WTO rules

The basic rules of non-discrimination would still be applicable, and it is argued by Eeckhout (2017) that they are 'not *so* different'.²⁴⁴ There would be 'very limited' harmonisation, no mutual recognition, and no direct effect.²⁴⁵ Dispute settlement would be 'international', in the sense that it would be carried out by the panels and Appellate Body.²⁴⁶ Moreover, there would be the possibility of trade defence measures, and the UK would be free to decide its own external trade policy (subject to WTO commitments).²⁴⁷

The House of Lords' EU Committee in March 2017 has published its report on Brexit and trade in goods.²⁴⁸ It is argued in that report that the UK Prime Minister's approach may result in the introduction of both tariff and non-tariff barriers to trade in goods between the UK and the EU. The report examines the impact of WTO rules on six sectors: chemicals and pharmaceuticals; capital goods and machinery; food and beverages; oil and petroleum; automotive; and aerospace and defence. In the view of the HL EU Committee the significance of tariff barriers 'varies considerably between sectors: while tariffs are zero on civil aerospace parts (under WTO agreements), EU tariffs set at the WTO are 10% on cars and can be more than 200% on some agricultural products. Tariffs would be particularly damaging for sectors with a highly integrated EU supply chain, such as the automotive sector—tariffs could be levied multiple times in the production process.'²⁴⁹ In the view of the Committee it is thus of considerable importance that the UK Government seeks to eliminate tariff barriers in its planned 'ambitious and comprehensive free trade agreement' with the EU.²⁵⁰ Further, 'compliance with rules of origin requirements would introduce a significant additional administrative burden, with a particularly negative impact on sectors with a highly integrated EU supply chain. Companies in these sectors might be unable to comply with the local content requirements contained in the EU's preferential rules of origin'.²⁵¹

5.2.3. European Economic Area Agreement

Eeckhout (2017) describes this model as 'equivalent to full membership'.²⁵² It is equivalent in terms of harmonisation and mutual recognition, as the UK would keep incorporating rules that are of EEA relevance into domestic law. Yet, some products are excluded from the scope of the Agreement.²⁵³ As regards the legal effect of those commitments, there is no direct effect and primacy, but there is full implementation by the EEA EFTA States. There is a centralised Court mechanism (EFTA Court). Further, there is the possibility of trade defence measures, and the UK would be in charge of its own external trade policy.²⁵⁴

²⁴⁴ Piet Eeckhout, 'The Consequences of Brexit for the EU Customs Union and the Internal Market *Acquis*' (Workshop on the consequences of Brexit, Brussels, 28 February 2017).

²⁴⁵ *ibid.*

²⁴⁶ *ibid.*

²⁴⁷ *ibid.*

²⁴⁸ European Union Committee (n 209).

²⁴⁹ *ibid.* 4.

²⁵⁰ *ibid.* 4.

²⁵¹ *ibid.* 4.

²⁵² Eeckhout (n 244).

²⁵³ See Article 8(3) of the EEA Agreement; [Protocol 2 on products excluded from the scope of the Agreement in accordance with Article 8\(3\)\(a\)](#); [Protocol 3 concerning products referred to in Article 8\(3\)\(b\) of the Agreement](#).

²⁵⁴ Eeckhout (n 244).

5.2.4. Tailor-made arrangements

The implications here would of course depend on the precise type of FTA (or other agreement) that would be concluded between the EU and the UK. The DCFTA model, for example, includes basic rules akin to the WTO model. Harmonisation and mutual recognition are 'partial'.²⁵⁵ The legal effect of the commitments is, Eeckhout argues, 'uncertain'.²⁵⁶ Dispute settlement is 'international' in the sense outlined in chapter 3.6.1. There is also the possibility of trade defence measures, and the UK would be free to determine its external trade policy.²⁵⁷ CETA (discussed in chapter 3.6.2) diverges from the DCFTA model in that there is no harmonisation and mutual recognition, and its legal effect is 'international'.²⁵⁸

It is noted by Pelkmans (2017) that in this case Brexit would amount to possible deviations from or erosion of free movement of goods if new EU laws were not incorporated in the UK, the UK opted for amendments or new UK laws affecting derogations, and/or the UK did not accept relevant CJEU rulings.²⁵⁹ If, however, UK laws stayed in line with EU law, as suggested by the UK Government's White Paper,²⁶⁰ then the costs of Brexit in goods would 'at first be zero'.²⁶¹

Gasiorek, Holmes and Rollo (2016) note that an FTA could include rules on mutual recognition of testing and certification of standards for goods. These options may also give, they argue, the EU and the UK 'some flexibility in the sectoral coverage, and like Norway or Switzerland, [they] could try to exclude some sectors from free trade'.²⁶² Whether a tailor-made agreement would include rules on mutual recognition of standards and/or conformity assessment in certain sectors clearly depends on the choices to be made by the negotiating parties. In this connection, it is noted by the HL EU Committee in its March 2017 report on Brexit and trade in goods that an FTA 'would require a trade-off between the UK's desire to make domestic laws, and its wish to pursue close trade relations with the EU. It would be likely to entail a legal obligation to maintain a high level of harmonisation or mutual recognition of standards with the EU, and might also require the UK to agree an oversight or arbitration mechanism with the EU'.²⁶³

5.3. Internal Market in Services

5.3.1. Application of the analytical framework

The internal market in services covers the freedom to provide services provisions in EU primary law (Articles 56 to 62 TFEU) as well as secondary law on standards that services on the internal market have to be up to. It excludes all those rules that aim at protecting consumers and those that regulate public procurement, since both are addressed in separate chapters (see chapter 5.4 on consumer protection and chapter 5.5 on public procurement).

²⁵⁵ *ibid.*

²⁵⁶ *ibid.*

²⁵⁷ *ibid.*

²⁵⁸ *ibid.*

²⁵⁹ Pelkmans (n 241).

²⁶⁰ See further Department for Exiting the European Union and The Rt Hon Davis Davis MP, 'The United Kingdom's Exit from and New Partnership with the European Union White Paper' (2 February 2017) <<https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper>> accessed 17 March 2017.

²⁶¹ Pelkmans (n 241).

²⁶² Gasiorek, Holmes and Rollo (n 120), 4.

²⁶³ European Union Committee (n 209), 4-5.

Understood in this way, the rules concerning the internal market in services are part of public law. The connecting factor for determining the applicable procedural law is therefore 'territoriality'. This means that, after a Brexit materialises, UK courts will apply UK law to services that are provided on the UK market and to service suppliers located in the UK. Hence the change of the legal regime would result into a change of applicable law.

Furthermore, principles of intertemporal law will not lead to a continuous application of EU law to goods that seek to enter the UK market. Article 50 TEU will preclude, in principle, legitimate expectations for the expectation that services that are in conformity with EU rules could be provided on the UK market without any further restrictions. One issue may, however, raise intertemporal problems. Current EU primary law and secondary law provides for a certain degree of recognition of professional qualifications for the access to and/or the pursuit of regulated professions.²⁶⁴ Non-UK service providers that have been granted access to the UK market on the basis of these rules and that established a stable business relationship in the UK might rely on acquired rights. Precluding the further practice of e.g. lawyers that established themselves in the UK in accordance with EU rules and that provide legal services in the UK may not lose their access to the regulated profession of lawyers simply because of a change of the applicable law. The recognition of their professional qualifications under EU rules allowed them to build up their professional existence and the recognition of their diplomas as equivalent to the domestic ones is a public fact. Hence, this situation can be equated with property rights in terms of the acquired rights doctrine. These acquired rights can, however, not be extended to the acquisition of a professional qualification, which would be protected under the EU legal regime. EU law does not establish a free movement of professional qualifications but diminishes access restrictions to services and establishment insofar as they relate to non-domestic professional qualifications. Hence, the application of the 'acquired rights' doctrine in the context of professional qualifications requires the actual and stable provision of services based on these qualifications.

Against this background, the law concerning the internal market in services is one where the impact of Brexit could be significant. Yet, the actual significance will depend on how much UK domestic rules would deviate from the current EU standards. If the UK lowered the standards, EU services being compliant with higher standards would still be able to enter the UK market whereas UK services could be prevented from entering the EU internal market. If the UK raised standards, UK services would not meet any problems entering the EU internal market, whereas EU services would face difficulties to be provided on the UK market.

5.3.2. Hard Brexit: WTO rules

As regards the substance of WTO law, Kainer (2017) argues that the UK would remain a member of GATS (though the details are 'controversial').²⁶⁵ Trading under WTO rules would, in this case, 'provide limited commitments on services'. It would not provide the UK with any preferential access to the single market.²⁶⁶ More specifically, Articles XVI and XVII provide for limited market access and national treatment rules. As regards mutual recognition, there is a framework for further negotiation. There are no common standards akin to Articles 114 TFEU, 62 TFEU and 53 TFEU. In terms of its scope, there is a positive list, and commitments can be fixed unilaterally. Crucially for services, there would be no 'passporting'.²⁶⁷

²⁶⁴ Cf. Directive 2005/36/EC on the recognition of professional qualifications; Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services; Directive 98/5/EC to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

²⁶⁵ Friedemann Kainer, 'The Consequences of Brexit on Services and Establishment: Different Scenarios for Exit and Future Cooperation' (Workshop on the consequences of Brexit, Brussels, 28 February 2017).

²⁶⁶ European Union Committee (106), 58 para 197.

²⁶⁷ Kainer (n 265).

Kainer (2017) highlights the problems facing service providers and established persons from the UK in a 'hard Brexit' scenario. If (hard) Brexit became a reality, UK natural and legal persons would lose their rights under Articles 56 and 49 TFEU. They would further lose their rights under Article 15(2) of the EU Charter (establishment). For example, UK companies (Private Ltd.) having their main economic activities in Germany would fall outside the scope of Article 49 TFEU.

As regards the scope of WTO commitments, '[t]he extent of market access in services provided by WTO agreements varies sector by sector'.²⁶⁸ It is noted, for example, by the HL EU Committee that aviation 'is hardly touched upon by WTO commitments'.²⁶⁹ 'There [are] no commitments regarding the right to fly between WTO members, whereas in "huge contrast", in the Single Market "you have a full single market in aviation" where "any EU airline ... can perform freely any flights across the European internal market".'²⁷⁰

Further, as regards the EU's digital single market, it is noted by Harcourt (2016) that it is 'unique in providing extensive liberalisation in services markets'.²⁷¹ 'By contrast, few commitments have been made under telecommunications, broadcasting and digital services in bilateral treaty arrangements with third countries and on the World Trade Organisation (WTO) table.'²⁷²

5.3.3. European Economic Area Agreement

It is argued by Gasiorek, Holmes and Rollo (2016) that 'the EEA covers services in the same way as does the EU's single market'.²⁷³ As regards the substance of EEA law, Kainer (2017) notes that it is 'largely aligned to the EU single market law'.²⁷⁴ Negative integration is achieved through the application of the TFEU's fundamental freedoms. In terms of positive integration, the EEA Agreement incorporates EU single market law into EEA law. The scope of the agreement is, as noted above, 'comprehensive', and there are 'only few exceptions in the treaty'.²⁷⁵

Kainer further argues that joining the EEA would be 'the easiest solution', as the EEA Agreement provides for a 'comprehensive integration of service markets'. There is also a centralised court mechanism (EFTA Court) and 'passporting'.²⁷⁶

5.3.4. Tailor-made arrangements

The consequences of Brexit would very much depend in this case on the model to be followed by the negotiating parties. Under the EU-South Korea FTA, there is limited market access and national treatment rules (Articles 7.5f and 7.9f). There is a mechanism for the negotiation of mutual recognition agreements (MRA), no common standards, and a positive list in terms of scope. CETA provides for limited market access and national treatment (Articles 9.6 and 9.3). It further provides for limited market access for investment (Articles 8.1 et seq.). There is a framework to develop MRA (Article 11), no common standards, and a negative list in

²⁶⁸ European Union Committee (n 106), 59 para 204.

²⁶⁹ *ibid* 60 para 204.

²⁷⁰ *ibid* 60 para 204.

²⁷¹ Alison Harcourt, 'The EU's Digital Single Market' <<http://ukandeu.ac.uk/explainers/the-eus-digital-single-market/>> accessed 12 January 2017.

²⁷² *ibid*.

²⁷³ Gasiorek, Holmes and Rollo (n 120), 3.

²⁷⁴ Kainer (n 265).

²⁷⁵ *ibid*.

²⁷⁶ *ibid*.

terms of scope. For both agreements, there is no direct effect and judicial review is restricted. There is also investment arbitration in the case of CETA.²⁷⁷

The House of Lords' EU Committee argues that non-tariff barriers for services could create problems when trade consists of goods and services bundled together, even if tariff barriers for goods were eliminated.²⁷⁸ Some services might also be 'easier to include [in an FTA] than others', such as telecommunications and e-commerce.²⁷⁹ It is noted by Gasiorok, Holmes and Rollo (2016) that recent EU FTAs have included some services, especially the EU-Korea agreement (see also chapter 3.6.).²⁸⁰ However, as the House of Lords EU Committee itself admits, 'there is no precedent for third-country access to the Single Market in financial services and other services.'²⁸¹ Witnesses noted that the CETA model was 'far short ... of providing a passport and being able to provide a service from your home base in the UK.'²⁸²

5.4. Consumer Protection

5.4.1. Application of the analytical framework

The law on consumer protection is considered to be private law. The international procedural law is hence regulated by the Brussels Ibis Regulation and the conflict rules can be found in the Rome I-Regulation. According to Article 18 of the Brussels Ibis-Regulation, a consumer may bring proceedings against the other party of contract either in the courts of the Member State where this party is domiciled or where the consumer is domiciled. Proceedings against the consumer may be brought only in courts of the Member State where the consumer is domiciled. Except for when the consumer chooses differently, the competent court for consumer cases is the one located in the Member State where the consumer is domiciled. This means that in cases where the consumer is domiciled in the EU the Brussels Ibis-Regulation is applicable and the applicable conflict rule is the Rome I-Regulation. According to Article 6(1) of the Rome I-Regulation, 'a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b) by any means, directs such activities to that country or to several countries including that country.' In a situation in which an EU consumer purchases products on a UK website in Euro (which is sufficient to consider that an activity from the UK is directed to the EU) the law applicable to the EU consumer remains EU consumer protection law. The change of the legal regime does not result into a change of the applicable law.

If a UK professional then initiates proceedings against an EU consumer in a UK court, the latter would have to apply the 1968 Brussels Convention (see chapter 4.2.2) once the withdrawal has become a reality. Article 13, in essence, repeats Article 18 of the Brussels Ibis-Regulation so that a UK court would have to declare itself as not competent. Even if UK courts would consider themselves competent, they would have to apply the 1980 Rome Convention as the applicable conflict rule (see as well chapter 4.2.2). Article 5 of this Convention also

²⁷⁷ *ibid.*

²⁷⁸ European Union Committee (n 106), 32 para 103.

²⁷⁹ *ibid* 42 para 137.

²⁸⁰ Gasiorok, Holmes and Rollo (n 120), 4.

²⁸¹ European Union Committee (n 106), 43 para 138.

²⁸² *ibid* 43 para 138. See further Chapter 13 of CETA; John Armour, 'Brexit to the EEA: What Would It Mean?' in Pavlos Eleftheriadis (ed) and others, 'Legal Aspects of Withdrawal from the EU: A Briefing Note' (14 July 2016) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2809285> accessed 3 August 2016; John Armour, 'Brexit and Financial Services' (2017) 33 (suppl_1) Oxford Review of Economic Policy S54-S69.

designates the law of the country where the consumer has his habitual residence as applicable. Hence, even if the proceedings were initiated in the UK, the EU consumer would remain protected under the standards of EU consumer protection law.

Therefore, even after Brexit, the EU consumer protection law would have to be respected by UK professionals selling goods and services to EU consumers. In this situation the change of legal regime would not entail a change of the applicable law.²⁸³

It should, however, be noted that the Brussels Convention in Article 13 and the Rome Convention in Article 5 require for their application that the consumer contract 'was preceded by a specific invitation addressed to [the consumer] or by advertising'. The EU instruments refer to 'commercial or professional activities directed to' the Member State of residence of the consumer (Article 17(1)(c) of the Brussels I-Regulation and Article 6(1)(b) of the Rome I-Regulation). This means that consumer contracts concluded via websites that do not aim at commercial activities in the Member State of residence of the consumer (passive sales) will be covered by the general rules of designating the competent court and the applicable law, which could lead to the application of another law than the one of the habitual residence of the consumer.

Hence, in these situations as in case the professional is an EU resident contracting with a UK consumer, the legal situation is different. In the situation of a passive sale with a UK based professional the EU consumer and in the other cases the EU professional would have to comply with UK consumer protection rules. Here, the application of the principles of intertemporal law would not lead to a continuous application of EU consumer protection law to the EU-based professional. Legitimate expectations cannot arise because of Article 50 TEU from the moment of the notification of the UK government of 29 March 2017 and, furthermore, consumer protection law is not considered as comparable to property rights so that the 'acquired rights' doctrine could be applied.

In sum, the impact of Brexit on consumer protection law may be relatively limited, at least insofar as EU consumers are concerned.

5.4.2. Hard Brexit

In the 'hard Brexit' scenario, consumer protection law would be affected by the principles of non-discrimination under WTO law. Although consumer protection standards are considered as non-tariff barriers to free trade in goods and services under WTO law, they are in line with WTO law since they either do not discriminate directly or indirectly against foreign products or they can be justified as the realisation of aims in the general interest.

The most relevant impact will arise from the fact that UK and EU consumer protection laws will evolve in different directions after a Brexit. Yet, as explained above, this change of a legal regime does not imply a change of the applicable law in contractual relations in which an EU consumer is involved.

Examining the future evolution of consumer protection law in case of a withdrawal by the UK from the EU without any agreement on the Business-to-Consumer relationship linked to consumer law, Jeloschek (2016) differentiates between the future interpretation of existing consumer law in the UK and that of any future EU harmonisation measures.²⁸⁴ According to this author, no major changes are to be expected as far as the interpretation of existing British

²⁸³ See also Guillaume Croisant, 'Fog in the Channel – Continent Cut Off. Les conséquences juridiques du Brexit pour le droit international privé et l'arbitrage international' (2017) 2 *Journal des Tribunaux* 24-33.

²⁸⁴ Christoph Jeloschek, 'Brexit en consumentenrecht: much ado about nothing?', *Bb* 2016/72, 251.

consumer law, such as the Sales of Goods Act that is based on European Directives, is concerned. Concerning the question of a possible revision of such acts following a Brexit, the author speculates that this instrument may be modified in order to increase the UK's competitive position on the market by deviating from the high EU (product) standards, such as in the area of product liability or unfair commercial practices. Regarding future harmonisation measures, Jeloscsek argues that the deviations following a Brexit may be larger. The UK would then no longer be under any obligation to implement plans to a comprehensive approach to cross-border e-Commerce, nor would it be under an obligation to follow through new legislative initiatives, such as regarding certain aspects concerning contracts for the online and other distance sales of goods.²⁸⁵

Pelkmans (2017) concurs that there would be pressure to change consumer law in the UK after Brexit. He argues, however, that EU consumer law is unlikely to change due to Brexit alone.²⁸⁶ Kramme (2017), too, argues that in the long term, the UK and EU consumer protection legislation are likely to drift apart (due to changes of EU or UK law or due to different interpretations). Consequently, conflict of law rules and jurisdiction would gain importance.²⁸⁷

It is noted by the House of Commons Library in its briefing paper (2016) that '[i]t is impossible to calculate the impact of withdrawal in any meaningful way without knowing the basis on which the UK would continue to interact with the EU'.²⁸⁸ The briefing paper inquires: 'Clearly, the crucial question is whether the UK retains any sort of access to the European Single Market, and if so, how much and in return for what?'²⁸⁹ It is further noted in the briefing paper that the Consumer Rights Act 2015 (CRA 2015) 'will not be directly affected by Brexit'. 'However, an important question is whether a non-EU UK would keep all or some of the rules and procedures of EU consumer protection legislation. Existing consumer legislation could be unpicked and changed, but in practice this might be difficult to achieve.'²⁹⁰

As regards consumers of digital content, it is noted below that the UK Consumer Rights Act 2015 (CRA 2015) contains extensive rules on consumer protection in relation to contracts for the supply of digital content.²⁹¹ As also noted below, the CRA goes in part even beyond the proposed Digital Content Directive.²⁹² This text is, it should be noted, of EEA relevance as well. Mánko and Tereszkievicz (2016) draw a comparison between the CRA 2015 and the proposed Digital Content Directive.²⁹³ They argue that in some areas consumers would be better off under the proposed Directive (e.g., with regard to digital services), whereas in other areas the CRA 2015 is more favourable (e.g., with regard to the purchase of digital content on a tangible medium).

²⁸⁵ See proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, 2015/0287 (COD).

²⁸⁶ Pelkmans (n 241).

²⁸⁷ Malte Kramme, 'Consequences of Brexit in the Area of Consumer Protection' (Workshop on the consequences of Brexit, Brussels, 28 February 2017).

²⁸⁸ House of Commons Library, 'Brexit: Impact across policy areas', Briefing paper No 07213, 26 August 2016, 153.

²⁸⁹ *ibid* 153.

²⁹⁰ *ibid* 153.

²⁹¹ See also Annex II.

²⁹² See Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM/2015/0634 final - 2015/0287 (COD).

²⁹³ Piotr Tereszkievicz and Rafal Mánko, 'Digitale Inhalte nach britischem Consumer Rights Act 2015 unter dem Eindruck des Brexit', in Malte Kramme, Christian Baldus and Martin Schmidt-Kessel (eds.), *Brexit und die juristischen Folgen*, 2016, pp. 279-296.

5.4.3. European Economic Area Agreement

Kramme (2017) notes that consumer protection under the EEA Agreement is 'comparable' to the EU consumer protection level.²⁹⁴ Under the EEA Agreement, there is a mechanism for the dynamic adoption of new EU secondary law.²⁹⁵ As explained hereafter,²⁹⁶ the EEA Agreement covers almost the entire EU consumer protection *acquis* as well as transport and financial services. This point is not lost on the other side of the channel, and it is noted that 'in return for access to the internal market, EEA/EFTA states are required to adopt all EU consumer protection provisions without access to the EU's decision-making institutions'.²⁹⁷ However, Regulations in the field of judicial cooperation in civil matters are not covered (Brussels Ibis Regulation; Uncontested Claims Regulation No (EC) 805/2004; Order for Payment Procedure Regulation No (EC) 1896/2006/EU; Small Claims Regulation No (EC) 861/2007; Legal Aid for Cross-Border Disputes Directive (2003/8/EC); Rome I, Rome II). The Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is applicable, and it overrules Brussels Ibis for courts in EFTA and EU Member States if disputes concern EFTA Member States.²⁹⁸

Joining the EEA Agreement would also mean that the UK would remain participant in the Consumer Programme 2014-2020.²⁹⁹ The Programme funds actions across the EU28 and the EEA EFTA States. It aims to help consumers enjoy their rights and actively participate in the single market, thereby supporting growth, innovation and meeting the objectives of Europe 2020.³⁰⁰ The main challenges to be addressed by the Consumer Programme are safety; consumer information and education; consumer rights and effective redress; and strengthening enforcement cross-border.

5.4.4. Tailor-made Arrangements

The other models are not discussed in the relevant literature, and it is briefly noted that the level of consumer protection would depend on the outcome of the negotiations.³⁰¹ The principal default line is, however, again between purely 'international' agreements with no EU market *acquis* and those trade agreements which include the EU market *acquis*. A key aspect in both cases would be the coverage of the trade agreement (or of the EU *acquis* incorporated therein) in terms of consumer protection, as the EU and UK consumer protection rules on the issues not covered by the agreement could be different in the future. In which case, conflict of law rules would apply in cross-border situations, as explained above (section 5.4.1).

5.5. Public Procurement

5.5.1. Application of the analytical framework

Public procurement law is part of public law. The connecting factor for determining the applicable procedural law is therefore 'territoriality'. This means that, after a Brexit materialises, UK courts will apply UK law to public procurement procedures and decisions. Hence the change of the legal regime would result into a change of applicable law.

²⁹⁴ Kramme (n 287).

²⁹⁵ Article 98 of the EEA Agreement.

²⁹⁶ See Annex I and II.

²⁹⁷ House of Commons Library, 'Brexit: Impact across policy areas', Briefing paper No 07213, 26 August 2016, 153.

²⁹⁸ Kramme (n 287).

²⁹⁹ Regulation (EU) No 254/2014 of the European Parliament and of the Council of 26 February 2014 on a multiannual consumer programme for the years 2014-20 and repealing Decision No 1926/2006/EC [2014] OJ L84/42.

³⁰⁰ See European Commission, 'Europe 2020 Strategy' <https://ec.europa.eu/info/strategy/european-semester/framework/europe-2020-strategy_en> accessed 21 March 2017.

³⁰¹ Kramme (n 287).

Regarding intertemporal law, a distinction has to be drawn. Awards and concessions that were granted by UK contracting authorities in the past on the basis of EU public procurement rules cannot be put in question by the mere fact that the applicable law changes. These awards and concessions must be considered 'acquired rights'. This derives already from the principle of 'pacta sunt servanda'. This concerns all awards that were granted under the EU public procurement rules even after the formal notification of the UK government under Article 50 TEU of 29 March 2017. Concerning the contract performance, EU public procurement rules remain applicable to legal relationships that entered into effect under these rules. This concerns e.g. subcontracting but also modifications of public contracts during their term provided that modifications would otherwise require new procurement procedures. The acquired right in relation to the award also includes the protection of this award against subsequent modifications.

The situation with a view to intertemporal rules is different when procurement procedures will be initiated after the change of the applicable law. EU tenderers will then be subject to the newly applicable rules.

More difficult to assess is the situation for procurement procedures that are pending at the moment of the change of the applicable law. Without a formal award, there is no acquired right and tenderers will not be able to invoke legitimate expectations at least from the moment the notification of the UK under Article 50 TEU was sent to the European Council onwards. From a legal perspective, intertemporal law would not require the continuous application of EU public procurement law. Legal certainty would therefore speak in favour of transitory rules to be adopted by the EU and the UK in order to clarify the status of these procedures.

Against this background, the law concerning the public procurement is one where the impact of Brexit will be significant, although limited to cases of future awards. Past awards are protected as 'acquired rights'. The actual significance will depend on how much UK domestic rules would deviate from the current EU standards and whether the UK would shut down market access for EU tenderers. The latter depends on the framework rules for public procurement in the various Brexit scenarios.

5.5.2. Hard Brexit: WTO rules

In the event of a 'hard Brexit', the UK would potentially have to negotiate its entry into the Agreement on Government Procurement (GPA).³⁰² In contrast to the WTO itself and its most important agreements, the GPA was a facultative agreement that was signed and ratified by the EU on behalf of the UK (and all other Member States for that matter). The UK itself is not a Contracting Party of the GPA. The GPA covers 47 WTO members (counting all EU-28 as one member) and aims to open up the government procurement markets among its parties. The signatories to the agreement have opened up procurement activities estimated to be worth \$1.7 trillion.³⁰³ If the UK were to sign up to this agreement, its terms would govern access to procurement markets between the EU and the UK.

³⁰² For a different view (not endorsed by the author of the blog post) see Albert Sánchez-Graells, 'Additional Thoughts on Brexit and Public Procurement' (30 November 2016) <<http://www.howtocrackanut.com/blog/2016/11/30/brexit-and-public-procurement-some-thoughts-after-kcl-seminar>> accessed 30 November 2016: 'There was interesting discussion of the WTO GPA, UNCAC and UNCITRAL model law requirements and the possibilities they bring after Brexit, including a rather subtle argument why the UK may retain its condition of party to the WTO GPA on the basis of its final provisions in its Article XXII--which I either did not fully understand, or really do not see working out.'

³⁰³ European Union Committee (n 106), 60 para 206.

It is argued by Sánchez-Graells (2016) that the UK would indeed need to become party to the GPA after 'Brexit'.³⁰⁴ The GPA is a plurilateral agreement that was signed and ratified by the EU on behalf of the UK (and all other Member States for that matter) so that the UK itself is not a Contracting Party of the GPA. The GPA covers 47 WTO members (counting all EU-28 as one member) and aims to open up the government procurement markets among its parties. The signatories to the agreement have opened up procurement activities estimated to be worth \$1.7 trillion.³⁰⁵ If the UK were to sign up to this agreement, its terms would govern access to procurement markets between the EU and the UK.

Consequently, the impact of the 'fall-back option' ('hard Brexit') on public procurement is highly contingent upon the future decision of the UK about whether to ratify the GPA or not, as well as the approval of the other Contracting Parties and the subsequent negotiations by the UK regarding the coverage of the GPA.

Arrowsmith (2017) describes the WTO option (Government Procurement Agreement – GPA) as a 'very robust' agreement, with standards just as good as the EU.³⁰⁶ She, too, argues that the UK would 'probably' have to apply to be party to the GPA.³⁰⁷

The coverage of the GPA would be negotiated bilaterally between the EU and the UK and would not have to be extended to others. The EU and the UK could also maintain the current GPA coverage.³⁰⁸

Arrowsmith highlights the differences between the GPA and EU Directives on public procurement in terms of coverage. The GPA does not cover lower-value procurement. Moreover, it does not cover private utilities, as well as some utility sectors (postal services, gas and heat, oil and gas extraction, solid fuels extraction/exploration). One big sector which is not covered is water. Further, the GPA does not cover hard defence, and it does not cover some services (e.g. health and social services; legal services). It is not clear whether the GPA does not cover most concessions.³⁰⁹

As regards award procedures, Arrowsmith argues that switching from EU law to the GPA would have 'almost no impact'. The GPA has a similar structure to the (old) Utilities Directive. There is under the GPA a single set of procedures for all covered contracts. The GPA is, however, 'less explicit' on framework agreements.³¹⁰ As regards remedies, there would be 'not very significant' differences.³¹¹

5.5.3. European Economic Area Agreement

The EEA Agreement provides for the application of EU rules for all key elements of public procurement (prohibition of discrimination; transparent award procedures; and remedies for suppliers). In sharp contrast to the GPA model, it covers both major and lower-value contracts. Important related legislation also applies (e.g. on standardisation: Regulation

³⁰⁴ Sánchez-Graells (n 302): 'There was interesting discussion of the WTO GPA, UNCAC and UNCITRAL model law requirements and the possibilities they bring after Brexit, including a rather subtle argument why the UK may retain its condition of party to the WTO GPA on the basis of its final provisions in its Article XXII--which I either did not fully understand, or really do not see working out.'

³⁰⁵ European Union Committee (n 106), 60 para 206.

³⁰⁶ Sue Arrowsmith, 'The Consequences of Brexit for Public Procurement Legal Standards' (Workshop on the consequences of Brexit, Brussels, 28 February 2017).

³⁰⁷ *ibid.*

³⁰⁸ *ibid.*

³⁰⁹ *ibid.*

³¹⁰ *ibid.*

³¹¹ *ibid.*

1025/2012).³¹² Furthermore, a very useful practical point is that there is a system in the EEA for advertising contracts.³¹³

5.5.4. Tailor-made arrangements

Arrowsmith (2017) notes that most other trade agreements are modelled on the GPA and are concerned with how to expand GPA coverage. Some (non-accession) trade agreements aim at wider coverage and/or deeper standards than the GPA and are inspired by the EU Directives. For example, the DCFTA aims at a gradual assimilation to the internal market *acquis* in terms of award procedures. However, some provisions in these trade agreements are described by Arrowsmith as 'sub-GPA' standards (e.g., some entities under CETA).³¹⁴

Arrowsmith highlights three key transition issues which would need to be dealt with, in her opinion, in the withdrawal agreement: ongoing award procedures and arrangements already concluded under EU rules (modifications; call-offs under framework agreements and dynamic purchasing systems, qualification systems; remedies relating to procedures where the contract is concluded, including the ineffectiveness remedy; and invoicing); and whether the UK should retain access to the OJEU.³¹⁵ Further, as regards EU measures whose adoption is still pending, Arrowsmith draws attention to the proposed Regulation on access for third country goods and services, which could be applied to the UK where the coverage is less than the Directives; and the Accessibility Act (COM/2015/0615 final) and its accessibility obligations in public procurement specifications (see also the tables in the annex).³¹⁶

5.6. Summarising overview

On the basis of the analysis of the implication of the various 'Brexit' scenarios to the policy areas covered by the IMCO Committee, it is possible to establish a table showing the legislative files within the competence of the IMCO Committee that are affected by 'Brexit'. These tables can be found in the Annex. It should be noted that the impact of tailor-made solutions is, as explained in chapter 3, highly dependent on policy choices that are still to be made by the UK and the EU and their implementation during the negotiations.

³¹² Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council (Text with EEA relevance) [2012] OJ L316/12.

³¹³ Arrowsmith (n 306).

³¹⁴ *ibid.*

³¹⁵ *ibid.*

³¹⁶ *ibid.*

6. CONCLUSIONS

The present in-depth study confirms that the withdrawal of a Member State from the EU ventures into uncharted legal territory. Article 50 TEU serves thereby as a legal base for an agreement dealing with legacy issues and organising the transition from EU membership to the future relationship as it is to be defined by the future partners. These future arrangements can, however, not be based on Article 50 TEU. Whilst a 'hard Brexit' and EEA membership would not require, in theory, additional agreements between the EU and the UK,³¹⁷ tailor-made solutions would have to be based on the Article 207 TFEU empowering the EU to pursue an common commercial policy. Since a comprehensive free trade agreement is a mixed agreement, a close involvement of Parliaments (the European one as the national ones) in the entire negotiation procedure appears recommendable.

When it comes to a discussion of, from the perspective of the EU27, the more or less advantageous Brexit scenarios, one has to identify, first, the interests of the EU before turning, second to the scenarios. The EU's interests in the way of how the relationship with the UK should be shaped can be summarised as follows: Rights of Union citizens lawfully acquired under EU law before the entry into force of a withdrawal of the UK from the EU should be upheld on the territory of the UK. The free movement of goods, services, capital and persons between the EU27 and the UK should remain free from unnecessary barriers. UK imports should not undermine and ideally continue to comply with the existing and future protection standards under EU legislation. The more a withdrawal agreement (if any) and the future legal relationship contribute to the achievement of these interest, the more such a 'Brexit' scenario can be considered to be advantageous for the EU27.

6.1. Scenarios for a withdrawal of the UK from the EU

Article 50(3) TEU provides for two scenarios with regard to the withdrawal of a Member State from the EU: Either on the basis of a withdrawal agreement or without any agreement two years after the formal notification provided that there is no prolongation of the negotiation period.

6.1.1. No withdrawal agreement

Without any withdrawal agreement, the protection of rights lawfully acquired under EU law is to be ensured within UK territory by UK domestic law or international public law. This refers in particular to all those rights that might be covered by the 'theory of acquired rights' as explained in section 4.3.3. These rights include, within the ambit of the IMCO committee, concessions or licences issued under the customs union that are valid at the time of the withdrawal (section 5.1.1), foreign professional qualifications and practice recognised under EU law at the time of withdrawal that gave access to regulated professions and to the UK domestic market (section 5.3.1) and awards and concessions that were granted under the EU public procurement rules before the withdrawal (section 5.5.1). The main weaknesses of the 'theory of acquired rights' are the fact that their scope is far from settled and that their enforcement depends on the willingness of UK domestic judges to apply international law (including the ECHR). The lengthiness of potential judicial proceedings undermine already the effectiveness of the protection of acquired rights without any formal agreement. Although rights lawfully acquired under EU law are not rendered inexistent in the event of a withdrawal

³¹⁷ It should, however, be noted that also under a 'hard Brexit' scenario, the separation of schedules and commitments currently held by the EU on behalf of the UK could be achieved easier if an agreement between the EU and the UK could be found.

without agreement, defining their scope (which might go beyond what is discussed in international law) and their enforcement via an explicit withdrawal agreement is certainly more advantageous for the EU27 than relying on general international law and the application of the ECHR within the UK territory.

At least with regard to the territory of the Member States of the EU27, in order to create legal certainty on the continent, the Union could unilaterally adopt a secondary legal act dealing with acquired rights. This would, within the ambit of the IMCO Committee, concern in particular the following situations:

- The recognition of awards and concessions granted to UK tenderers by EU contracting authorities under the application of EU public procurement law;
- The continuous application of rules on contract performance under EU public procurement law for such awards and concessions so that modifications won't require new public procurement procedure;
- Rules on how to deal with procurement procedures pending at the time of the withdrawal of the UK from the EU (it is recommended to include a rule that such procedures shall be finished considering UK tenderers as being covered by EU public procurement law);
- The continuous recognition of UK professional qualifications for services providers that exercise at the time of the withdrawal of the UK from the EU a regulated profession in the EU;
- The recognition of the further existence of incorporations lawfully established under the law of the UK after the withdrawal of the UK from the EU.

6.1.2. Withdrawal agreement

Against this background, it appears preferable and more advantageous for the EU27 to conclude an explicit withdrawal agreement that should define the scope and the enforcement of rights lawfully acquired under EU law after a withdrawal. Within the ambit of the IMCO committee, this concerns in particular the following legal situations:

- The recognition of awards and concessions granted to EU tenderers by UK contracting authorities under the application of EU public procurement law and vice versa;
- The continuous application of rules on contract performance under EU public procurement law for such awards and concessions so that modifications won't require new public procurement procedure;
- Rules on how to deal with procurement procedures pending at the time of the withdrawal of the UK from the EU (it is recommended to include a rule that such procedures shall be finished under application of EU public procurement law);
- The continuous recognition of EU professional qualifications for service providers that exercise at the time of the withdrawal of the UK from the EU a regulated profession in the UK and vice versa;
- Rules on how to deal with consumer procedures under ADR and ODR pending at the moment of the withdrawal of the UK from the EU (it is recommended to include a rule that such procedures shall be finished under application of EU law);
- The recognition of the further existence of incorporations lawfully established under the law of the UK and/or the EU after the withdrawal of the UK from the EU.

Parliaments (the European one as the national ones) should be in some shape engaged in the process leading up to the conclusion of a withdrawal agreement, such as through a regular exchange of information on the state of affairs of the negotiations (see section 2.3).

6.2. Scenarios for the future relationship between the UK and the EU27

It was explained in chapter 3 that the future relationship between the UK and the EU27 may take different legal shapes depending on the policy choices by the EU and the UK in relation to the intensity of trade cooperation (ranging from mere information obligations to full harmonisation), the legal means to implement trade cooperation (ranging from non-discrimination principles to setting common standards) and compliance mechanisms (ranging from mere consultation obligations to direct effect with a centralised Treaty-based court). Moreover, it has to be decided whether these parameters are to be the same within the scope of the trade cooperation or vary for the different economic sectors. The following conclusions on advantages and disadvantages of selected scenarios build on the preliminary conclusions in section 3.7.2.

As explained above, the EU's interest can be described as upholding the free movement of goods, services, capital and persons without unnecessary barriers and ensuring the level of protection defined by EU secondary law as it stands at the time of the withdrawal and as it further evolves afterwards. In relation to the intensity of trade cooperation (section 3.1.1) this implies at least an information exchange, the mutual recognition of conformity decisions and mechanisms to recognise the equivalence of standards set by the UK with the EU standards. This minimum degree of trade intensity in relation to those economic sectors that fall within the ambit of the IMCO committee (trade in goods and services) can be found in all current free trade agreements involving the EU.³¹⁸ This minimum degree of trade intensity guarantees that EU standards will not be undermined by UK imports. At the same time free movement between both trading partners is more restrictive than under the conditions of the internal market. There is clearly a trade-off between lowering the barriers to future free trade between the UK and the EU27 and the ability to prevent the undermining of EU standards of future UK imports. From the perspective of protecting the EU standards, this minimum degree of trade cooperation appears to be the most advantageous choice regarding the intensity of trade cooperation.

Any arrangements that lower the barriers to free movement of goods and services approach an intensity of trade cooperation that is characterised by a mutual recognition of standards even if they are not equivalent to each other. The costs for this increase in free trade can be found in the possibility for UK imports that comply with lower domestic standards to compete against EU products which have to comply with higher and hence more costly standards. In order to avoid harmful competition arrangements lowering the barriers to the free movement of goods and services should be accompanied by the possibility to set common standards for the UK and the EU. Only then, from the perspective of protecting the EU standards, a lowering of trade barriers still appears advantageous. Comparable intensity of trade cooperation can be found in the EU itself, the EEA and to some extent in the DCFTA. The two latter provide for a legal obligation of the other trading partner to implement parts of the *acquis communautaire* into domestic law. Against this background a mutual recognition of standards including a legal obligation to implement the *acquis* into domestic law as in EEA/DCFTA appears to be the most advantageous scenario for the EU27 within the ambit of the IMCO committee regarding the intensity of the trade cooperation.

³¹⁸ It should be noted that the scope of the existing free trade arrangements is, however, limited when it comes to the free movement of persons.

Regarding the means, negative integration is to be used in order to achieve free movement of goods, services, capital and persons, whereas positive integration is the means to be employed in order to achieve high protection standards. The most advantageous scenario would make use of both negative and positive integration. Looking at previous free trade arrangements, in which the EU was involved, only EEA and DCFTA contain such a mix. This is not surprising seeing that both instruments intend to implement an intensity of trade cooperation that includes mutual recognition of standards. The abovementioned trade-off is also reflected by the means. A future trade cooperation between the UK and the EU that relies only upon negative integration appears to be a less advantageous solution for the EU as, under negative integration, the existing and future *acquis communautaire* is considered to be a non-tariff (technical) barrier to free trade for goods and services coming from the UK, provided that it cannot be justified by grounds of general interest. Hence, in case a possible agreement on the future relationship between the EU and the UK includes only elements of negative integration such an agreement should provide for clauses allowing to justify non-tariff barriers for grounds of public interest.

Finally, regarding the compliance mechanisms, the effectiveness of the future trade cooperation increases the more its provisions have direct effect and are secured by a Treaty-based Court which renders legally binding judgments. None of the current trade arrangements, in which the EU is involved, comprise provisions with direct effect. Standard FTAs such as KORREU and the general terms of WTO provide for mere consultation obligation and a panel mechanism excluding direct effect in the domestic legal order of the trading partners. Only CETA (and the free trade agreement with Singapore) include a Treaty-based court that protects individual rights of a part of trade in goods and services, which are investments, and which is accessible for investors. Yet, these Treaty-based courts only enforce compliance with provisions of negative integration since the trading partners cannot initiate proceedings in front of these courts to enforce protection standards against investors. Against this background it appears advantageous for the EU if the future trade cooperation includes direct effect of both provisions of negative and of positive integration. A Treaty-based court increases the effectiveness of the trade cooperation provided it enforces not only negative but also positive integration.³¹⁹ Yet, a national court system that follows the case of the CJEU autonomously (as it is done within the context of the EU-Swiss trade cooperation) could still be considered sufficient in order to deem such a trade cooperation advantageous for the EU.

In sum, a 'hard Brexit' without any arrangements is less advantageous than a formal trade cooperation, even from the perspective of the EU27. The more this trade cooperation approximates EU membership, the more this trade cooperation becomes advantageous for the EU27. This conclusion must be understood against the background of the scope of the present in-depth study, which examines the legal implications of 'Brexit' and thus not its economic or political implications. It can therefore not be excluded that when taking these additional factors into account the assessment of advantages and disadvantages may change.

³¹⁹ It should be noted that such a court may not undermine the exclusive powers of the CJEU under Article 19 TEU.

Annexes: Implications of ‘Brexit’ on IMCO legislative files

Annex I: Impact of Brexit on the existing *acquis communautaire*

The following table lists the currently existing *acquis communautaire* in the policy areas covered by the IMCO committee and shows the general impact of the EEA model, the tailor-made model(s) and the WTO model on the content of these acts. At this stage of the examination, the impact of tailor-made models is, as explained in chapter 3, highly dependent on policy choices that are still to be made by the UK and the EU and their implementation during the negotiations. Important questions covered by some of these acts are already highlighted in order to mark that these elements should be covered by a tailor-made solution.

This table is to be understood as a living instrument that can be more specified and adapted once policy choices are made and their implementation is settled. As it stands, the table can only address overarching and crosscutting issues such as the one of the ‘acquired rights’ that will affect EU legal acts irrespective of the actual policy choices. Where necessary, short remarks aim at issues embodied in the respective legal instrument that will become relevant in the upcoming negotiations.

The legal acts in the following table are, first, sorted according to policy areas, second, according to the year of its publication (provided that they are not closely linked to later/earlier published legal acts), third, according to the kind of measure (regulation, directive, decision) and, finally, according to the reference number in ascending order.

Explanation of the abbreviations and symbols used in this table:

EEA = The UK joins the European Economic Area

FTA = The UK negotiates a tailor-made free trade agreement with the EU;

WTO = Fall-back option, according to which in the absence of any kind of agreement the relationship between the UK and the EU is governed by WTO law

■ = Application of the legal act as if the UK remained an EU Member State

❖ = Content of the tailor-made free trade agreement is highly dependent on the policy choices to be made by the UK and the EU before the negotiation starts; a serious analysis of the impact of these policy choices on the existing EU legal framework is only possible after these choices were made.

□ = The relationship with the remaining EU Member States is governed by the prohibition of discriminations and the most-favoured-nation rule under WTO law

Legal act	EEA	FTA	WTO
Internal Market in Goods and Services			
Public Procurement			
Concessions Directive Directive 2014/23/EU	■	❖/ A ³²⁰	GPA ³²¹ / A ¹

³²⁰ The issue of ‘acquired rights’ occurs: Can those that acquired rights under the existing EU law rely on these rights after Brexit?

³²¹ Reference to ‘GPA’ means that the United Kingdom must first become a Contracting Party to this Agreement before its rules would apply to the UK. Upon ratification, the UK will have to negotiate its coverage under the GPA. After a Brexit will have taken place, the EU is under a legal obligation to notify to the GPA contracting parties that the UK won’t be part of the EU’s coverage schedules, which will enter into force 45 days after the notification if no party objects.

Public Procurement Directive Directive 2014/24/EU	■	❖/ A ¹	GPA ² /A ¹
Public Procurement Directive 'Utilities' Directive 2014/25/EU	■	<ul style="list-style-type: none"> • Award criteria • Award procedures 	GPA ² (limited coverage)
Directive on e-Invoicing in Public Procurement Directive 2014/55/EU	■	❖	GPA ²
Directive on defence and sensitive security procurement Directive 2009/81/EC	■	❖	GPA ² (limited coverage)
Directive on intra-EU transfers of defence related products Directive 2009/43/EC	■	❖	GPA ²
Improving the effectiveness of review procedures concerning the award of public contracts Directive 2007/66/EC	■	❖	GPA ²
Directive on Remedies for the utilities sector Directive 92/13/EEC	■	❖	GPA ² (limited coverage)
Directive on Remedies for the public sector Directive 89/665/EEC	■	❖	GPA ² (limited coverage)
Recognition of Professional Qualifications and Access to Service Markets			
Services Directive Directive 2006/123/EC	■	<ul style="list-style-type: none"> • Establishment of providers • Providing services without prior notification • eGovernment • administrative cooperation • rights of recipients ❖/A ¹	□/ A ¹
Recognition of Professional Qualifications Directive Directive 2005/36/EC	■	❖/A ¹	□/A ¹

¹ The issue of 'acquired rights' occurs: Can those that acquired rights under the existing EU law rely on these rights after Brexit?

² Reference to 'GPA' means that the United Kingdom must first become a Contracting Party to this Agreement before its rules would apply to the UK. Upon ratification, the UK will have to negotiate its coverage under the GPA. After a Brexit will have taken place, the EU is under a legal obligation to notify to the GPA contracting parties that the UK won't be part of the EU's coverage schedules, which will enter into force 45 days after the notification if no party objects.

Lawyers' Establishment Directive Directive 98/5/EC	■	❖/A ¹	□/A ¹
Lawyers' Services Directive Directive 77/249/EEC	■	❖/A ¹	□/A ¹
Trade in Goods			
Medical Devices Regulation (EU) No 2017/745	■	❖	□
Active implantable medical devices Directive Council Directive 90/385/EEC	■	❖	□
Medical devices Directive Council Directive 93/42/EEC	■	❖	□
In vitro diagnostic medical devices Directive 98/79/EC	■	❖	□
Appliances burning gaseous fuels and repealing Directive 2009/142/EC Regulation (EU) 2016/426	Adopted act under scrutiny by EEA EFTA	❖	□
Appliances burning gaseous fuels Directive 2009/142/EC	■	❖	□
Regulation on Personal Protective Equipment Regulation (EU) No 2016/425	■	❖	□
Cableway Installations Regulation Regulation (EU) No 2016/424	■	❖	□
eCall Regulation Regulation (EU) No 2015/758	■	❖	□
Decision on the deployment of the interoperable EU-wide eCall service Decision No 585/2014/EU	■	❖	(-)
Reducing the consumption of lightweight plastic carrier bags Directive (EU) 2015/720	Adopted act under scrutiny by EEA EFTA	❖	□
Pressure Equipment Directive Directive 2014/68/EU	■	❖	□
Radio Equipment Directive Directive 2014/53/EU	■	❖	□

¹ The issue of 'acquired rights' occurs: Can those that acquired rights under the existing EU law rely on these rights after Brexit?

Low Voltage Directive Directive 2014/35/EU	■	❖	□
Potential Explosive Atmosphere Directive Directive 2014/34/EU	■	❖	□
Lifts Directive Directive 2014/33/EU	■	❖	□
Measuring Instruments Directive Directive 2014/32/EU	■	❖	□
Non-Automatic Weighting Directive Directive 2014/31/EU	■	❖	□
Electromagnetic Compatibility Directive Directive 2014/30/EU	■	❖	□
Simple Pressure Vessels Directive Directive 2014/29/EU	■	❖	□
Explosives for Civil Uses Directive Directive 2014/28/EU	■	❖	□
Type-approval Regulation of two or three wheel vehicles and quadricycles Regulation (EU) No 168/2013	■	❖	□
Approval and market surveillance of agricultural and forestry vehicles Regulation (EU) No 167/2013	■	❖	□
Recreational Crafts Directive Directive 2013/53/EU	■	❖	□
Pyrotechnic Articles Directive Directive 2013/29/EU	■	❖	□
Textile fibre names and related labelling and marking of the fibre composition of textile products Regulation (EU) No 1007/2011	■	❖	□
Construction Products Regulation Regulation (EU) No 305/2011	■	❖	□
Directive on the restriction of the use of certain hazardous substances in electrical and electronic equipment Directive 2011/65/EU	■	❖	□

Regulation on cosmetic products Regulation (EC) No 1223/2009	■	❖	□
Common rules for access to the international road haulage market Regulation (EC) No 1072/2009	■	❖	□
Trade in seal products Regulation (EC) No 1007/2009	(-) ³	❖	□
Type-approval of motor vehicles, their trailers and systems, components and separate technical units intended therefor Regulation (EC) No 661/2009	■	❖	□
Type-approval of hydrogen-powered motor vehicles Regulation (EC) No 79/2009	■	❖	□
Toys Directive Directive 2009/48/EC	■	❖	□
Machinery for pesticide application Directive 2009/127/EC	■	❖	□
Mutual Recognition Regulation Regulation (EC) No 764/2008	■	❖	□
Accreditation and market surveillance relating to the marketing of products Regulation (EC) No 765/2008	■	❖	□
Common framework for the marketing of products Decision No 768/2008/EC	■	❖	□
Electro-medical equipment used in veterinary medicine Directive 2008/13/EC	■	❖	□
Cat and dog fur, and products containing such fur Regulation (EC) No 1523/2007	(-) ³	❖	□
Motor Vehicles Framework Directive Directive 2007/46/EC	■	❖	□

³ Adopted EU legal act considered by the EU and the EEA EFTA States not to be relevant for incorporation into the EEA Agreement.

Nominal quantities on prepacked products Directive 2007/45/EC	■	❖	□
Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) Regulation (EC) No 1907/2006	■	❖/ A ¹ insofar as authorisations are concerned	❖/ A ¹ insofar as authorisations are concerned
Electrical equipment designed for use within certain voltage limits Directive 2006/95/EC	■	❖	□
Machinery Directive Directive 2006/42/EC	■	❖	□
Fertilisers Regulation (EC) No 2003/2003	■	❖	□
Marketing of beet seed Council Directive 2002/54/EC	■	❖	Convention on Biological Diversity/ International Seed Treaty
Marketing of vegetable seeds Council Directive 2002/55/EC	■	❖	Convention on Biological Diversity/ International Seed Treaty
General Product Safety Directive Directive 2001/95/EC	■	❖	□ ⁴
Veterinary medicinal products Directive 2001/82/EC	■	❖	□
Regulation on the functioning of the internal market in relation to the free movement of goods Regulation (EC) No 2679/98	■	❖	□
Information Directive Directive 98/34/EC	■	❖	□
Intellectual Property			
Collective management of copyright and related rights and multi-territorial licensing of rights in	Draft JCD under consideration	❖	(-)

¹ The issue of 'acquired rights' occurs: Can those that acquired rights under the existing EU law rely on these rights after Brexit?

⁴ There is a possibility for the UK to apply as a third country for cooperation under the RAPEX alert system irrespective of any tailor-made solution.

musical works for online use in the internal market Directive 2014/26/EU			
Certain permitted uses of orphan works Directive 2012/28/EU	■	❖	TRIPS/ WIPO agreements
Regulation on the community trade mark Council Regulation (EC) No 207/2009	(-) ³	❖	TRIPS/ WIPO Agreements
Enforcement of intellectual property rights Directive 2004/48/EC	(-) ³	❖	TRIPS/ WIPO Agreements
Regulation on community designs Council Regulation (EC) No 6/2002	(-) ³	❖/A ¹	TRIPS/ WIPO Agreements
Medicinal products for human use Directive 2001/83/EC	■	❖	WHO law/ TRIPS
Harmonisation of certain aspects of copyright and related rights in the information society Directive 2001/29/EC	■	❖/A ¹	TRIPS/WIPO Agreements
Trade in Services			
Directive on the accessibility of public sector bodies' websites Directive (EU) 2016/2102	Adopted act under scrutiny by EEA EFTA	• Continuous use of existing EU standard	(-)
Directive on networks and information security (NIS) Directive (EU) 2016/1148	■	• Information obligation • Minimum set of security/ notification requirements	□
Open internet access Regulation (EU) 2015/2120	Entry into force of JCD pending	❖	□
Electronic identification and trust services for electronic transactions in the internal market Regulation (EU) No 910/2014	Adopted act under scrutiny by EEA EFTA	❖	(-)

¹ The issue of 'acquired rights' occurs: Can those that acquired rights under the existing EU law rely on these rights after Brexit?

³ Adopted EU legal act considered by the EU and the EEA EFTA States not to be relevant for incorporation into the EEA Agreement.

Roaming on public mobile communications networks within the Union Regulation (EU) 531/2012	■	❖	(-)
Single European railway area (recast) Directive 2012/34/EU	Draft JCD under consideration	❖	(-)
Multiannual radio spectrum policy programme Decision No 243/2012/EU	■	❖	(-)
Common rules for access to the international market for coach and bus services Regulation (EC) No 1073/2009	■	❖	□
Common rules for the operation of air services in the Community Regulation (EC) No 1008/2008	■	❖	□
Framework for the creation of the single European sky (the framework Regulation) Regulation (EC) No 549/2004	■	❖	□
Universal Services Directive Directive 2002/22/EC	■	• Interoperability requirements for consumer digital TV	□
Directive 2009/136/EC amending Directives 2002/22/EC, 2002/58/EC and Regulation (EC) No 2006/2004	Draft JCD under consideration	❖	□
Framework Directive Directive 2002/21/EC	■	❖	□
Authorisation Directive Directive 2002/20/EC	■	❖	□
Access Directive Directive 2002/19/EC	■	❖	□
E-commerce Directive Directive 2000/31/EC	■	• Freedom to provide e-commerce services • Mutual assistance obligations	□
Cableway installations designed to carry persons Directive 2000/9/EC	■	❖	□

Community framework for electronic signatures Directive 1999/93/EC	■	❖	□
Common rules for the development of Community postal services and the improvement of quality service European Parliament and Council Directive 97/67/EC	■	❖	□
Common rules applicable to the transport of goods or passengers by inland waterway between Member States with a view to establishing freedom to provide such transport services Council Regulation (EC) No 1356/96	■	❖	□
Applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) Council Regulation (EEC) No 3577/92	■	❖	□
Conditions under which nonresident carriers may transport goods or passengers by inland waterway within a Member State Council Regulation (EEC) No 3921/91	■	❖	□
Applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries Council Regulation (EEC) No 4055/86	■	❖	□
Cross-sector Subject-Matter			
European Standardisation Regulation Regulation (EU) No 1025/2012	■	❖	□
IMI Regulation Regulation (EU) No 1024/2012	■	❖	□
Combating late payment in commercial transactions (Recast) Directive 2011/7/EU	■	❖	□
Regulation establishing a new statistical classification of products by activity (CPA) Regulation (EC) No 451/2008	■	❖	□

Misleading and comparative advertising Directive 2006/114/EC	■	❖	□
Advertising and sponsorship of tobacco products Directive 2003/33/EC	■	❖	□
Units of measurement Directive 80/181/EEC	■	❖	□
Consumer Protection			
Directive on insurance distribution (recast) Directive (EU) 2016/97	Adopted act under scrutiny by EEA EFTA	❖	□
Interchange fees for card-based payment transactions Regulation (EU) 2015/751	Adopted act under scrutiny by EEA EFTA	❖	□
Package Travel Directive Directive 2015/2302/EU [full harmonisation]	■	❖	□
Payment services in the internal market Directive 2015/2366/EU	Adopted act under scrutiny by EEA EFTA	❖	□
Key information documents for packaged retail and insurance-based investment products (PRIIPs) Regulation (EU) No 1286/2014	Adopted act under scrutiny by EEA EFTA	❖	□
Consumer Programme 2014-2020 Regulation Regulation (EU) No 254/2014	■	❖	(-)
Credit agreements for consumers relating to residential immovable property Directive 2014/17/EU	Adopted act under scrutiny by EEA EFTA	❖	□
Comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features Directive 2014/92/EU	Adopted act under scrutiny by EEA EFTA	❖	□
Regulation on Consumer ODR Regulation (EU) No 524/2013	■	❖/P ⁵	□/P ⁵

⁵ The issue of pending procedures at the time of Brexit will have to be addressed.

Directive on Consumer ADR Directive 2013/11/EU	■	❖/P ⁵	□/P ⁵
Consumer Rights Directive (CRD) Directive 2011/83/EU [full harmonisation]	■	❖	□
Liability of carriers of passengers by sea in the event of accidents Regulation (EC) No 392/2009	■	❖	□
Cross-border payments in the Community Regulation (EC) No 924/2009	■	❖	□
Injunctions for the protection of consumers' interests Directive 2009/22/EC	■	❖	□
Timeshare Directive Directive 2008/122/EC	■	❖	□
Certain aspects of mediation in civil and commercial matters Directive 2008/52/EC	(-)	❖	□
Credit agreements for consumers Directive 2008/48/EC	■	❖	□
Rail passengers' rights and obligations Regulation (EC) No 1371/2007	■	❖	□
European Small Claims Procedure Regulation (EC) No 861/2007	(-)	❖/P ⁵	□/P ⁵
Order for Payment Procedure Regulation Regulation (EC) No 1896/2006	(-)	❖/P ⁵	□/P ⁵
Rights of disabled persons and persons with reduced mobility when travelling by air Regulation (EC) No 1107/2006	■	❖	□
Consumer Protection Cooperation (CPC) Regulation Regulation (EC) No 2006/2004	■	❖	□
Misleading and Comparative Advertisement Directive Directive 2006/114/EEC	■	❖	□

⁵ The issue of pending procedures at the time of Brexit will have to be addressed.

[full harmonisation]			
Unfair Commercial Practices Directive Directive 2005/29/EC [full harmonisation]	■	❖	□
Uncontested Claims Regulation Regulation (EC) No 805/2004	(-)	❖/p ⁵	□/p ⁵
Common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights Regulation (EC) No 261/2004	■	❖	□
Insurance mediation Directive 2002/92/EC	■	❖	□
Distance marketing of consumer financial services Directive 2002/65/EC	■	❖	□
Consumer Sales and Guarantees Directive Directive 1999/44/EC [minimum harmonisation]	■	❖	□
Price Indication Directive Directive 98/6/EC [minimum harmonisation]	■	• Use of kilogramme, litre and metre for the indication of unit prices	□
Air carrier liability in the event of accidents Council Regulation (EC) No 2027/97	■	❖	□
Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier Regulation (EC) No 2111/2005	■	❖	□
Distance Selling Directive <i>(for contracts concluded before 13 June 2014)</i> Directive 97/7/EC	■	❖	□
Unfair Contract Terms Directive Directive 93/13/EEC [minimum harmonisation]	■	❖	□

⁵ The issue of pending procedures at the time of Brexit will have to be addressed.

Doorstep Selling Directive <i>(for contracts concluded before 13 June 2014)</i> Council Directive 85/577/EEC	■	❖	□
Customs Union			
Union Customs Code: goods that have temporarily left the customs territory by sea or air Regulation (EU) 2016/2339	(-)	❖	WTO ⁶
Customs enforcement of intellectual property rights Regulation (EU) No 608/2013	(-)	❖	(-)
Forms provided for in Regulation (EU) No 608/2013 Commission Implementing Regulation (EU) No 1352/2013	(-)	❖	(-)
Union Customs Code Regulation (EU) No 952/2013	(-)	❖	WTO ⁶
CUSTOMS 2020 Programme Regulation Regulation (EU) No 1294/2013	(-)	(-)	(-)
Community system of reliefs from customs duty Council Regulation (EC) No 1186/2009	(-)	❖	(-)
Elimination of controls performed at the frontiers of Member States in the field of road and inland waterway transport Regulation (EC) No 1100/2008	(-)	❖	(-)

⁶ UK will have to negotiate new schedules under WTO.

Annex II: Impact of Brexit on other arrangements, currently not part of the EU *acquis*

The following table shows the legislative files that are currently pending. It outlines, where necessary, the main policy choices made in these legislative files, which could be taken into account when negotiating tailor-made solutions. This table does not list own-initiative report procedures, consultation procedures, and legislative proposals on which the IMCO Committee decided not to deliver an opinion. It is sorted in accordance with the year of the initiation of the legislative procedure.

Legislative file	Policy Remarks
Internal Market in Goods and Services	
Public procurement: access of third-country goods and services to the Union's internal market and procedures supporting negotiations on access of Union goods and services to the markets of third countries COM(2012)0124 - 2012/0060(COD)	
Simplifying the transfer of motor vehicles registered in another MS within the Single Market COM(2012)0164 - 2012/0082 (COD)	
Consumer product safety (Council Directive 87/357/EC and Directive 2001/95/EC) COM(2013)0078 - 2013/0049 (COD)	The proposal introduces an obligation to mark all consumer products with the country of origin.
Reduction of pollutant emissions from road vehicles COM(2014)0028 - 2014/0012(COD)	
Single-member private limited liability companies COM(2014)0212 - 2014/0120(COD)	
Prospectus to be published when securities are offered to the public or admitted to trading COM(2015)0583 - 2015/0268(COD)	
Control of the acquisition and possession of weapons (Firearms Directive) COM(2015)0750 - 2015/0269 (COD)	
European Accessibility Act COM(2015)0615 - 2015/0278 (COD)	
Approval and market surveillance of motor vehicles and their trailers COM(2016)0031 - 2016/0014(COD)	

<p>Posting of workers in the framework of the provision of services COM(2016)0128 - 2016/0070(COD)</p>	
<p>Making available on the Market of CE marked fertilising products and amending Regulations COM(2016)157 - 2016/0084(COD)</p>	<p>The proposal is drafted on the basis of the concept of optional harmonization: Manufacturers may opt out of the Regulation requirements by simply not making use of the CE-mark and keep trading on their respective national market only. Market access is then governed by the principle of mutual recognition.</p>
<p>Cross-border parcel delivery services COM(2016)0285 - 2016/0149(COD)</p>	
<p>Audiovisual media services: changing market realities COM(2016)0287 - 2016/0151(COD)</p>	
<p>Geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market COM(2016)0289 - 2016/0152(COD)</p>	<p>The proposal seeks to remove discrimination based, directly or indirectly, on the nationality, the place of residence or the place of establishment of customers in e-commerce (geo-blocking).</p>
<p>Union programme to support specific activities enhancing the involvement of consumers and other financial services end-users in Union policy making in the field of financial services (2017-2020) COM(2016)0388 - 2016/0182(COD)</p>	
<p>European venture capital funds and European social entrepreneurship funds COM(2016)0461 - 2016/0221(COD)</p>	
<p>Union certification system for aviation security screening equipment COM(2016)0491 - 2016/0236(COD)</p>	
<p>European statistical programme 2013-2017: extension to 2018-2020 COM(2016)0557 - 2016/0265(COD)</p>	
<p>Copyright in the digital single market COM(2016)0593 - 2016/0280(COD)</p>	
<p>Copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes COM(2016)0594 - 2016/0284(COD)</p>	

Body of European Regulators for Electronic Communications COM(2016)0591 - 2016/0286(COD)	
Promotion of Internet connectivity in local communities COM(2016)0589 - 2016/0287(COD)	
European Electronic Communications Code. Recast COM(2016)0590 - 2016/0288(COD)	
Consumer Protection	
Contracts for the supply of digital content COM(2015)0634- 2015/0287 (COD)	It should be noted that the UK Consumer Rights Act 2015 (CRA) contains extensive rules on consumer protection in relation to contracts for the supply of digital content. The CRA goes in part even beyond the COM proposal. ³³¹
Contracts for the online and other distance sales of goods COM(2015)0635 - 2015/0288 (COD)	The proposal is based on the principle of full harmonisation, which might require from some Member States to lower their level of consumer protection.
Cooperation between national authorities responsible for the enforcement of consumer protection laws COM(2016)0283 - 2016/0148(COD)	
Customs Union	
Union legal framework for customs infringements and sanctions 2013/0432(COD) - COM(2013)0884	It should be noted that the UK government is amongst those states that call the Commission to withdraw the proposal. ³³²

³³¹ See for details: Mánko/Tereszkiewicz, Digitale Inhalte nach britischem Consumer Rights Act 2015 unter dem Eindruck des Brexit, in: Kramme/Baldus/Schmidt-Kessel (eds.), Brexit und die juristischen Folgen, 2016, p. 279-296.

³³² Letter from Nicky Morgan MP to the Chairman, 12 May 2014, in: House of Lords, European Union Committee, Economic and Financial Affairs, correspondence from 1 December 2013 and 4 June 2014, p. 10.

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