

EDITORIAL COMMENTS

Polar exploration: Brexit and the emerging frontiers of EU law

On 8 December 2017, the EU and UK Government negotiators published their joint report on progress achieved during phase 1 of the Article 50 TEU withdrawal process.¹ At its summit on 14–15 December 2017, the European Council “welcomed” that progress, decided that “sufficient progress” had indeed been made in phase 1 to enable the negotiations to proceed to discussions on transition in January 2018 in accordance with its published guidelines, and indicated that guidelines for negotiations on the framework for future trade relations will be adopted at its summit in March 2018.² The joint report outlines “agreement in principle” (para 1) on the three areas under consideration in phase 1 i.e. protecting the rights of EU citizens in the UK and British nationals in the EU, a framework for “addressing the unique circumstances in Northern Ireland” (para 2), and a “methodology” (para 57) for the financial settlement.

In one sense, these events produced a sense of achievement, and indeed relief. At the same time, however, the scale of the task ahead seems not diminished but ever more complex. For example, in the interests of the UK’s commitment to “protecting and supporting” (para 48) both North-South (Ireland-Northern Ireland) and East-West (Ireland-UK) cooperation, there is a three-tiered framework for avoiding a hard border between Ireland and Northern Ireland, potentially premised on the UK maintaining “full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 [Good Friday] Agreement” (para 49). That proposal conjures up systems necessitating spectacular degrees of coordination, ingenuity, tenacity, and trust.

1. Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union, 8 Dec. 2017, TF50(2017)19. See also, published on the same date, Communication from the Commission to the European Council (Article 50) on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union, COM(2017)784 final.

2. European Council (Art. 50) meeting (15 Dec. 2017) – Guidelines, 15 Dec. 2017, paras. 1 and 9.

The parts of the agreement on citizens' rights and Northern Ireland will also need to be more consciously joined up. In particular, "who" are Irish and British nationals, in their various constellations of single and dual nationality, in Ireland and in the UK after Brexit – thinking especially of single national Irish citizens in Northern Ireland? Will they be "only" European for the purposes of the rights conferred by the Withdrawal Agreement, and/or Irish and/or British for the purposes of the "arrangements" (Protocol 20) of the Common Travel Area (excavation of the substantive rights actually protected by which has barely begun³), or will they be something exceptional that is yet to be worked out? This point is made more pressing by contrasting the UK's declaration that "Irish citizens residing in the UK will not need to apply for settled status to protect their entitlements"⁴ with the joint report's statement that "[w]here the host State requires persons concerned to apply for a status, no status is obtained if no successful application is made" (para 16). Are "persons concerned" here all EU citizens, from the Commission's perspective, or can a Member State differentiate between different EU State nationalities along the lines of the UK's position? This uncertainty is possibly amplified by the statement in the Commission's Communication that "the 'special status' that the United Kingdom will set up will be the sole procedure for EU citizens to avail themselves of the rights provided for in the Withdrawal Agreement",⁵ and may therefore test the extent to which the commitment to non-discrimination on grounds of nationality can be made subject to any "special provisions" (para 11)⁶ that the Withdrawal Agreement may contain in its final version.

The shift from phase 1 to phase 2 also seemed to do little to quell political game-playing, noting the almost immediate deflating of the nature of the agreement by David Davis, the UK Brexit Minister,⁷ which led to a personal

3. See Dougan, "The 'Brexit' threat to the Northern Irish border: Clarifying the constitutional framework" in Dougan (Ed.), *The UK after Brexit: Legal and Policy Challenges* (Intersentia, 2016), p. 53 at 60–68; see further, "Brexit and Irish citizens in the UK: how to safeguard the rights of Irish citizens in an uncertain future", The Traveller Movement, Dec. 2017, at <travellermovement.org.uk/wp-content/uploads/TTM-Brexit_and_Irish_citizens_in_the_UK_web.pdf>.

4. "The United Kingdom's exit from the European Union: safeguarding the position of EU citizens living in the UK and UK nationals living in the EU", 26 June 2017, at <www.gov.uk/government/publications/safeguarding-the-position-of-eu-citizens-in-the-uk-and-uk-nationals-in-the-eu>.

5. COM(2017)784 final, p. 6.

6. See also, Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 22 May 2017, para 14 (hereafter "EU negotiating directives").

7. "David Davis scrambles to salvage EU relations after 'damaging trust'", *The Guardian*, 12 Dec. 2017.

admonition by the European Parliament.⁸ For its part, the European Council underlined that “negotiations in the second phase can only progress as long as all commitments undertaken during the first phase are respected in full and translated faithfully into legal terms as quickly as possible”.⁹

But what do the positions agreed in December 2017 reveal, in a more general sense, about the character and reach of EU law in the novel context of post Union membership? The roots of the EU legal order are both deep and wide: deep in the sense that defining features of EU law can be traced back to the ECJ judgments in *Van Gend en Loos* and *Costa v. Enel*,¹⁰ wide in the sense that the reach of EU law tends to be expansively conceived.¹¹ The frontiers of EU law therefore concern not only how far the EU legal order extends, but also, what degrees of flexibility or variation it can tolerate.¹²

The EU/UK negotiations create distinct questions at the poles of the EU legal order – at the outermost edges of EU law. More specifically, what is the role of EU law post EU membership? Does membership leave a legal imprint, one that can influence, or even condition, the content and constraints of the Withdrawal Agreement as well as its effects into the future? Or does being outside the EU post membership necessarily mean being beyond the reach of EU law entirely?

A not so new legal order

The Court of Justice’s conception of the EU legal order is, by now, familiar, articulated in a series of judgments from *Van Gend en Loos* and *Costa v. Enel*, through *Les Verts* and *Kadi*.¹³ In Opinion 2/13, *ECHR Accession*, the Court drew the main elements of the system together by speaking about “the specific characteristics arising from the very nature of EU law”; i.e. “EU law is characterized by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States ... and by the

8. European Parliament resolution of 13 Dec. 2017 on the state of play of negotiations with the United Kingdom, 2017/2964(RSP), recital P.

9. European Council Guidelines (15 Dec. 2017), para 1.

10. Case 26/62, *Van Gend en Loos*, EU:C:1962:42; Case 6/64. *Costa v. ENEL*, EU:C:1964:51.

11. See e.g. Scott “The new EU ‘extraterritoriality’”, 51 CML Rev. (2014), 1343.

12. On the latter point, see e.g. Opinion 1/91, *EEA Agreement I*, EU:C:1991:490; Opinion 2/13, *Accession to the ECHR*, EU:C:2014:2454; and Opinion 2/15, *FTA Singapore*, EU:C:2017:376.

13. Case 294/83, *Les Verts v. Parliament*, EU:C:1986:166; Joined Cases C-402 & 415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission*, EU:C:2008:46.

direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves”.¹⁴

The origins of this system are rooted in the fact that “the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights and the subjects of which comprise not only those States but also their nationals”.¹⁵ This latter feature of the EU legal order, in particular, adds an exceptional set of concerns to the negotiation of a Member State’s withdrawal from the EU.¹⁶ The Court also emphasizes that these characteristics are “peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation”.¹⁷ Thus, as Article 2 TEU now affirms, the EU is, and has always been, a community founded on the rule of law.

Two consequences of the Court’s constitutional understanding of the EU legal order were further emphasized in Opinion 2/13. First, significant weight was placed on “[t]he autonomy enjoyed by EU law in relation to the laws of the Member States *and* in relation to international law”, which “requires that the interpretation of [EU] fundamental rights be ensured within the framework of the structure and objectives of the EU”.¹⁸ Indeed, the substance of the autonomous EU legal order takes more concrete form precisely when it collides with national and/or international law. Second, the EU’s “legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognized and, therefore, *that the law of the EU that implements them will be respected*”.¹⁹

This depiction of the EU legal order would seem to make membership of it essential. In other words, a unique legal bond is created by the very fact of EU membership so that, conversely, being, and remaining, in this “peculiar” legal construct is simply not comparable to being outside it. Moreover, a conscious withdrawal from the EU could reasonably be read as a signal that the departing Member State no longer shares, at least in part, the “set of common values on which the EU is founded”, linked inherently to the EU’s “legal structure” by

14. Opinion 2/13, *ECHR*, para 166

15. *Ibid.*, para 157.

16. See further, Eeckhout and Frantziou “Brexit and Article 50 TEU: A constitutionalist reading”, 54 *CML Rev.* (2017), 695 at 698–703.

17. Opinion 2/13, *ECHR*, para 158.

18. *Ibid.*, para 170 (emphasis added).

19. *Ibid.*, para 168 (emphasis added).

the Court of Justice in Opinion 2/13. However, the UK has been careful to underline that this is not the case. For example, in the speech that she delivered in Florence on 22 September 2017, UK Prime Minister Theresa May made explicit reference to shared EU/UK values more than ten times.²⁰ Indeed, in the same speech, she envisaged the future relationship between the UK and the EU as a continuing “partnership of values”.

Is there, even, a continuing role for “the law of the EU that implements” such still-shared values post EU membership?²¹ The UK will become a “third country” after it leaves the EU. But does the very fact of having been a member of that legal order have distinct implications, in that it is simply not (legally) comparable to any other third country with which the EU engages?

Negotiating anomalies

As the Brexit negotiations unfold, we necessarily learn more about the legal consequences of the fact that the right to leave the EU was absorbed into the EU legal order by the Lisbon Treaty. In other words, “the Article 50 competence [is] the basis for elaborating the EU constitutional law of withdrawal”.²² At the same time, however, traces of confusion, or at least inconclusiveness, about the reach of EU law and of EU legal concepts post membership can be seen across different aspects of the negotiating positions developed over recent months. This gives rise to paradoxes, or at least asymmetries, in the sometimes-competing visions set out by the EU and by the UK.

One example of this is how the loss of binding effect for Charter rights within the UK’s legal systems provoked considerable concern at national level.²³ At one level, while apprehension about the quality of rights protection in the UK after Brexit is entirely understandable, the Charter is not a self-standing source of fundamental rights; it requires a preliminary EU material “hook” before its impact can be kindled. The EU negotiating directives that guide the Commission do not mention the Charter when noting that “Union law (including all primary law, in particular the Treaty on

20. “A new era of cooperation and partnership between the UK and the EU”, at <www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>.

21. Noting too that Arts. 3(5), 8 and 21 TEU suggest that the relevance of such values is not exclusively “internal” to the Union.

22. Hillion “Article 50 TEU – A legal basis for an integration-friendly withdrawal?”, 55 CML Rev. (forthcoming).

23. See e.g. “Government backs down over EU human rights to avoid risk of defeat”, *The Guardian*, 21 Nov. 2017.

European Union, the Treaty on the Functioning of the European Union, the Accession Treaties and the Treaty establishing the European Atomic Energy Community, as well as the secondary law and international agreements) ceases to apply to the United Kingdom on the date of entry into force of the Withdrawal Agreement”.²⁴

However, as the Charter is the instrument communicating the autonomous EU fundamental rights highlighted in Opinion 2/13, the standards it protects must infuse all actions undertaken by the EU – self-evidently, the other contracting party to the Withdrawal Agreement provided for in Article 50 TEU. Thus, while Article 50 makes it clear that the Treaties will “cease to apply” to the UK either “from the date of entry into force of the Withdrawal Agreement or, failing that, two years after” its notification to the European Council of its intention to withdraw from the Union, the role of EU law in the process of *negotiating* the Withdrawal Agreement is retained. The EU will also have continuing responsibilities for the agreement’s *implementation*.

But “who” is the UK for the purposes of, first, negotiating and, second, implementing the Withdrawal Agreement? For negotiation purposes, it is an EU Member State, albeit one separated in some respects from the other 27 by a glass procedural wall. It becomes a third State at the moment at which the Treaties cease to apply to it, whether by agreement or because of non-agreement. Up to that point, as the European Council’s Article 50 guidelines affirm, “[u]ntil it leaves the Union, the United Kingdom remains *a full Member* of the European Union, subject to all rights and obligations set out in the Treaties and under EU law, including the principle of sincere cooperation”.²⁵ The Withdrawal Agreement is therefore unlike any other agreement concluded with “already” third countries²⁶ – and this includes the future partnership agreement, the substantive negotiation and conclusion of which can only take place after the date of formal withdrawal. Moreover, while the protection of citizens’ rights into the future and the determination of the EU/UK financial settlement are driven by past-facing – i.e. membership-specific – commitments, the realization of these rights and procedures will continue well into the UK’s post EU membership future.

24. Directives for the negotiation of an agreement with the United Kingdom, para 6. See further, Recommendation for a Council Decision supplementing the Council Decision of 22 May 2017 authorizing the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union, COM(2017)830 final, p. 2.

25. European Council (Art. 50) guidelines following the United Kingdom’s notification under Article 50 TEU, 29 April 2017, para 25 (emphasis added).

26. It is also different from agreements between the EU and *continuing* Member States; see e.g. Council Decision 2006/325/EC concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. 2006, L 120/22.

Efforts to work out the rights of EU citizens in the UK and of British nationals in the EU after Brexit provide several further examples of somewhat anomalous negotiating positions. Holding Member State nationality is the principal condition of access to the status of Union citizenship, in accordance with Article 20(1) TFEU. The judgment in *Rottmann* compels national authorities to take decisions withdrawing Member State nationality with due regard to the principle of proportionality, in light of the consequential loss of EU citizenship that such decisions may entail.²⁷ But it would be difficult to argue that the withdrawal of EU citizenship from those who will no longer be Member State nationals once their State of nationality withdraws from the Union could be disproportionate, as long as the condition that such decision is taken in accordance with that State's constitutional requirements (Art. 50(1) TEU) is met. Indeed, Article 50 itself makes no provision nor indicates any particular priority, or fate, for EU citizens caught in the withdrawal crossfire. In other words, EU citizens are created, not ordained. EU citizenship can be lost, and it can be lost through decisions that are fully compatible with and provided for within the EU Treaty framework itself.

Nevertheless, the special position of EU citizens was marked from the outset by their prioritization – alongside agreement on a financial settlement and questions concerning Northern Ireland – as one of the three central issues to be resolved in phase 1 of the Brexit negotiations. For its part, the EU emphasized security of rights for EU nationals living, working or studying in the UK and British nationals living, working or studying elsewhere in the EU, in line with a principle of reciprocity – as December's joint report puts it, “to enable the effective exercise of rights derived from Union law and based on past life choices” (para 6). By emphasizing that guarantees should be “effective, enforceable, non-discriminatory and comprehensive”,²⁸ the EU position reflected an EU legal starting point for the future protection of citizens' rights. The EU negotiating directives therefore stipulated that the protection conferred by the Withdrawal Agreement “should apply for the life time of the citizens who are concerned”,²⁹ which was agreed to by the UK.³⁰

However, disagreement about the protection of family members of Union citizens was a “red” point of EU/UK disagreement until the very final days of the phase 1 negotiations. For the Commission, “[t]his is an issue of *preserving rights under EU law* and not an issue of equal treatment. Family members as defined in Directive 2004/38 who accompany or join the EU citizen after the

27. Case C-135/08, *Rottmann*, EU:C:2010:104.

28. European Council (Art. 50) guidelines (29 April 2017), para 8.

29. Directives for the negotiation of an agreement with the United Kingdom, para 20.

30. See Joint Technical Note on the comparison of EU-UK positions on citizen's rights, 19 July 2017, at <www.gov.uk/government/uploads/system/uploads/attachment_data/file/631038/Joint_technical_note_on_the_comparison_of_EU-UK_positions_on_citizens__rights.pdf>.

date of withdrawal may continue to benefit from rights of residence under same provisions as current family members. Children born after UK's withdrawal would be able to join their parents as a family member".³¹ However, for the UK, the position of family members after Brexit required "[e]qual treatment as between EU and British citizens as regards applicable rules". On that premise, "[f]uture family members will be subject to the same rules that apply to non-EU nationals joining British citizens, or alternatively to the post-exit immigration arrangements for the EU citizens who arrive after the specified date" and "[c]hildren born to an EU citizen parent with settled status in the UK after the date of withdrawal will be eligible to immediately acquire settled status or British citizenship if born in UK as an independent right holder".³²

For the UK, then, post EU membership rights were conceived as folding into the "normal" national framework of immigration rules, in terms of both the substance of rights and their enforcement, (see further below). This can also be seen in the UK's insistence that "[e]xpulsion for post-exit activity [should be] assessed under UK immigration rules" in contrast to the Commission's preference for continued application of the expulsion system laid down in Directive 2004/38.³³ It also goes to the heart of the UK's initial insistence that even EU citizens with rights to permanent residence in the UK should have to apply for a new "settled" status that would be enshrined as a concept of national law.³⁴

The joint report published in December 2017 shows that concessions were made on both sides. For example, it is made clear that only family members (as defined by Art. 2 of Directive 2004/38) already "related" to an EU citizen or British national before withdrawal can have rights under the agreement to join EU/British national right-holders in the future, ruling out a right for future spouses and thus reflecting the compromise of lifelong protection but only for "past" choices (with special protection for children born or legally adopted in the future; see para 12). However, reflecting a concession on the part of the EU, "[a]ny restrictions on grounds of public policy or public security related to

31. See Joint Technical Note on the comparison of EU-UK positions on citizen's rights, 28 Sept. 2017, at <www.gov.uk/government/uploads/system/uploads/attachment_data/file/648148/September_-_Joint_technical_note_on_the_comparison_of_EU-UK_positions_on_citizens_rights.pdf> (emphasis added). Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. 2004, L 158/77.

32. Joint Technical Note, *ibid*.

33. *Ibid*.

34. In the December 2017 joint report, it was eventually agreed that "those already holding a permanent residence document issued under Union law at the specified date will have that document converted into the new document free of charge, subject only to verification of identity, a criminality and security check and confirmation of ongoing residence" (para 23).

conduct *after* the specified date will be in accordance with *national law*” (para 27, emphasis added).

But then, how can the fact that the UK sought to achieve the absorption of EU citizens’ rights into national regulatory competence so quickly be reconciled with its argument about the movement of its own citizens in other EU Member States in the future? On this question, reflecting the principles of reciprocity and security of rights, the Commission reasoned that “UK nationals [with]in [the] scope of [the] Withdrawal Agreement only have protected rights in the state(s) in which they have residence rights on exit day, without prejudice to Social Security rights”. But the UK argued that “UK nationals [within the scope of the Withdrawal Agreement] *who move within EU27 after the specified date* should keep all existing rights; also for cross-border activity *begun after the specified date*”.³⁵

The UK seeks, in effect, the retention, post EU membership, of free movement rights throughout the Union for its own citizens already residing in another EU Member State.³⁶ The Joint Technical Note published in December 2017 concluded that “the continuing protection of rights for UK nationals covered by the Withdrawal Agreement who move after the specified date to take up residence in another Member State” was “raised by the UK, but [is] outside the scope of the EU mandate for the first phase of the negotiations” (point 58). However, in its Resolution of 13 December 2017, the European Parliament characterized this as one of the “outstanding issues with respect to providing for an orderly withdrawal of the UK from the EU, which must be resolved before the Withdrawal Agreement can be finalized” (para 3), opening a door to further discussion, at least, of this question before the Withdrawal Agreement is finalized.

Obligations of EU membership after EU membership?

It is worth stating again that Article 50 TEU neither makes special provision for nor even refers to the EU citizens who are, inevitably, affected most profoundly by the decision of any Member State to withdraw from the Union. Moreover, by providing explicitly for the infamous “cliff edge” of withdrawal

35. Joint Technical Note, Sept. 2017 (emphasis added).

36. Similarly, the UK had aimed “to protect in the Withdrawal Agreement existing rights of UK/EU citizens to vote and/or stand in local elections in their host state”. However, the Commission detached the fact that “Member States are free to give voting rights to third country nationals regardless of the Withdrawal Agreement” from the status of EU citizenship, with no reference to the idea of “preserving rights under EU law” on this point (Joint Technical Note, Sept. 2017).

without an agreement after two years, Article 50 itself devises an outcome that entails no guarantees of protection for (current) EU citizens into the post EU membership future at all. This outcome would, also, arguably fit with the argument that since the Court has pushed the idea of the uniqueness of EU law as far as it has, EU law can have no relevance in a post EU membership situation in any event.

Disagreement about the role of the Court of Justice in connection with the oversight and enforcement of rights conferred by the Withdrawal Agreement further exemplifies uncertainties about the extent to which EU law should or should not retain a role post EU membership. On the particular question of citizens' rights, the EU position was summed up by Michel Barnier in a speech delivered in Florence in May 2017: "the EU requires crystal-clear guarantees that rights will be effectively enforced. For UK citizens in the EU, the European Court of Justice will play its role to ensure the application of the Withdrawal Agreement. Similarly in the UK, the rights in the Withdrawal Agreement will need to be directly enforceable and the jurisdiction of the European Court of Justice maintained".³⁷ That position is in line with the overarching principle of reciprocity, avoiding a situation whereby British nationals residing in other Member States would have recourse to the Court of Justice through the Article 267 TFEU preliminary reference mechanism, whereas EU nationals residing in the UK would not.

Reflecting the fundamental premises of Opinion 1/91 as expanded upon in Opinion 2/13, the European Council specified in the very first paragraph ("Core Principles") of its Article 50 Guidelines that "[t]he Union will preserve its autonomy as regards its decision-making as well as the role of the Court of Justice of the European Union".³⁸ This statement is further fleshed out in the EU Negotiating Directives, reinforcing the need for "dispute settlement mechanisms that fully respect the autonomy of the Union and of its legal order, including the role of the Court of Justice of the European Union".³⁹ More specifically, for disputes in relation to "continued application of Union law; citizens' rights; [and] application and interpretation of the other provisions of the Agreement, such as the financial settlement or measures adopted by the institutional structure to deal with unforeseen situations", it is again clearly stated that "the jurisdiction of the Court of Justice of the

37. "Protecting citizens' rights in the negotiations with the UK", Speech by Michel Barnier at the 7th State of the Union Conference, European University Institute, Florence, 5 May 2017, at <europa.eu/rapid/press-release_SPEECH-17-1236_en.htm>.

38. European Council (Art. 50) guidelines, para 1. This point is reinforced in paras. 17 (again on the Withdrawal Agreement) and 23 (referring here to the future partnership).

39. Directives for the negotiation of an agreement with the United Kingdom, para 17; see further, para 39.

European Union (and the supervisory role of the Commission) should be maintained”.⁴⁰

The December 2017 joint report indicates that “the Withdrawal Agreement should provide for the legal effects of the citizens’ rights Part both in the UK and in the Union” (para 34). The principle of direct effect is not mentioned, but the report outlines that the relevant provision in the Withdrawal Agreement “should enable citizens to rely directly on their rights” (para 35). Interestingly, this contrasts with the recent tendency to exclude direct effect in other external agreements, signalling that the Withdrawal Agreement is indeed something distinctive. Nor is the principle of primacy mentioned, but the joint report does outline that “inconsistent or incompatible rules and provisions will be disapplied” (para 35).

Paragraph 38 of the joint report addresses the role of the Court of Justice. It confirms that the Court “is the ultimate arbiter of the interpretation of Union law”; that the UK courts “shall therefore have *due regard* to relevant decisions of the [Court] *after* the specified date” (emphasis added); and that the Withdrawal Agreement should establish “a mechanism enabling UK courts or tribunals to decide, having had due regard to whether relevant case-law exists, to ask the [Court of Justice] questions of interpretation of those rights where they consider that a [Court of Justice] ruling on the question is necessary for the UK court or tribunal to be able to give judgment in a case before it”. However, the latter possibility is limited to “litigation brought within 8 years” and the text is silent as to the legal effect of the Court of Justice’s judgments. Are these arrangements legitimate in light of existing case law on enforcement of EU rights and the role of the Court of Justice?

As expressed by Advocate General Sharpston in Opinion 2/15, “where the European Union has competence as regards the substantive provisions of an international agreement, it also enjoys competence as regards the dispute settlement mechanisms, which aim to ensure that those provisions are effectively enforced”.⁴¹ In Opinion 1/91, the Court acknowledged that “[t]he [Union’s] competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court *which is created by such an agreement* as regards the interpretation and application of its provisions”.⁴² The Court also found, however, that “an international agreement may affect [the Court’s] own powers only if the indispensable conditions for safeguarding the essential

40. Directives for the negotiation of an agreement with the United Kingdom, paras. 41 and 42.

41. A.G. Sharpston Opinion in Opinion 2/15, *FTA Singapore*, EU:C:2016:992, para 525.

42. Opinion 1/91, *EEA I*, para 40 (emphasis added). See further, Opinion 2/13, *ECHR*, paras. 181–182.

character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order”.⁴³

In Opinion 1/91, the Court ruled that the interpretation mechanism originally provided for in the draft EEA agreement, which stipulated that the rules of the agreement were required be interpreted in conformity with its case law, would “not enable the desired legal homogeneity to be achieved” since that mechanism only concerned rulings of the Court of Justice “given prior to the date of signature of the agreement. Since the case law will evolve, it will be difficult to distinguish the new case law from the old and hence the past from the future”.⁴⁴ The language of the joint report emphasizes “consistent interpretation” rather than “legal homogeneity”. Does the requirement that UK courts and tribunals must have “due regard” to future Court of Justice rulings for the purposes of enforcing rights conferred by the Withdrawal Agreement go far enough to meet that threshold? Or, on the contrary, and noting especially the 8-year limit on access to the Court of Justice, is it instead an accepted, and acceptable, understanding that interpretations, and applications, of the rights conferred by the Withdrawal Agreement developed by the Court of Justice, on the one hand, and by UK courts and tribunals, on the other, will naturally, and legitimately, diverge over time?

An analogy between the EEA Agreement and the Withdrawal Agreement can be drawn in the sense that both “necessarily [cover] the interpretation both of the provisions of the agreement and of the corresponding provisions of the [Union] legal order”.⁴⁵ Here, again, the Court of Justice has placed particular emphasis on the requirement that its future case law had to be worked into the relevant judicial interpretation mechanism, something that is captured by the joint report. But the Court has also expressly ruled out the relegating of its potential input to advisory status.⁴⁶ This suggests that, while the text of the joint report does not say so explicitly, rulings of the Court of Justice obtained through the *de facto* preliminary reference mechanism envisioned will have to be binding on UK courts and tribunals if that part of the agreement is to be compliant with EU law. But it also suggests that the 8-year cut-off point may, once again, prove more problematic.⁴⁷

A potentially distinguishing factor between the EEA Agreement and the Withdrawal Agreement might be the *extent* to which EU law and matters

43. Opinion 2/13, *ECHR*, para 183.

44. Opinion 1/91, *EEA I*, para 26.

45. *Ibid.*, para 43.

46. *Ibid.*, para 61; confirmed in Opinion 1/92, *EEA II*, EU:C:1992:189.

47. See further, para 41 of the joint report. Cf. Art. 322 of the Association Agreement between the EU and its Member States, of the one part, and Ukraine, of the other part, O.J. 2014, L 161/3.

covered by the Withdrawal Agreement would correspond.⁴⁸ Thus, in a post EU membership context, it would seem legally defensible that the joint report indicates only that “a mechanism will be established to decide jointly on the incorporation of future amendments” to EU social security legislation (leaving aside the more practical headaches that non-incorporation of rule changes would engender).

More troubling, though, is the recognition of UK parliamentary sovereignty explicitly built into para 36 of the joint report. Here, it is stated that the UK Government will “fully incorporate the citizens’ rights Part into UK law”, giving these provisions effect in primary legislation” that “will prevail over inconsistent or incompatible legislation” – “*unless Parliament expressly repeals this Act in future*”. That is quite some sting in the tail of enforcement of rights. How can it be reconciled with the constitutional understanding of the EU legal order that will continue to bind the EU as a party to the Withdrawal Agreement? How can it ensure long-term security of rights for the citizens affected by Brexit? The rights conferred by the Withdrawal Agreement may not be EU free movement law; but they will be EU law.

What needs to be determined, therefore, is the baseline of EU constitutional requirements, that must be applied to all agreements; but also whether other, novel, EU constitutional requirements might exceed that baseline with respect to the Withdrawal Agreement, derived from the very fact of EU membership.

Three levels of EU membership legacy

The conflict between the EU Treaties’ dependence on the ECJ in the interpretation of all EU law and the UK’s “red line” with respect to the jurisdiction of that Court beyond an agreed transition phase is well known; as is the particular character of parliamentary sovereignty, which places congenital constraints on the capacity of the UK system to integrate into a legal order that accepts legal, and especially judicial, limits on parliamentary action. The latter factor thus recasts what might be perceived as institutional stubbornness on the part of the EU into a more defensible concern for the underlying baseline of effective protection of rights in light of the limitations on judicial enforcement in the UK’s legal systems.

48. Cf. Opinion 1/91, paras. 41 (“the agreement at issue takes over an essential part of the rules – including the rules of secondary legislation – which govern economic and trading relations within the Community and which constitute, for the most part, fundamental provisions of the Community legal order”) and 42 (“the agreement has the effect of introducing into the Community legal order a large body of legal rules which is juxtaposed to a corpus of identically-worded Community rules”).

With beautiful understatement, the Commission has offered the opinion that “[w]ith regard to the general governance of the Withdrawal Agreement, the Commission is of the view that more work is needed”.⁴⁹ It has also indicated that the UK “has made clear its opposition to according a central role for the Court of Justice ... while the Commission has stressed the need to protect the autonomy of the Union and of its legal order, including the role of the Court of Justice, as underlined in the European Council guidelines of 29 April 2017”. These are battles not won, then, but postponed. But is the dilemma a purely political one, or does the EU legal order imprint binding principles on the scope and oversight of rights that will be exercised post EU membership, which both the EU *and* the UK must observe?

A first, and most basic, understanding of EU membership legacy is a moral one, and it surely drives both the negotiation and implementation of the Withdrawal Agreement. The concept of moral legacy can inspire the political negotiations, the outcomes of which can then be captured by law. Michel Barnier recognized guarantees for citizens in precisely these terms, noting that “[p]rotecting these rights is our moral duty”.⁵⁰ In the same speech, he acknowledged that [i]t is also a political necessity: we will not discuss our future relationship with the UK until the 27 Member States are reassured that all citizens will be treated properly and humanely”.

A second understanding of legacy could be framed around the principles to which the UK had committed – and indeed, to the shaping of which it has contributed – as a member of the EU, which goes further, in a legal sense, than a continuing commitment to mutually “shared values” as discussed earlier. This is a form of legacy connected to the wider *culture* of the EU legal order, expressed through the reminder in the European Council guidelines that the UK remains “subject to all rights and obligations set out in the Treaties and under EU law, including the principle of sincere cooperation” until it formally leaves the EU. It also underlines the EU’s continuing emphasis on legal certainty.

The positions taken by the EU in Brexit negotiations are often portrayed as an expression of “demands”. But such characterization overlooks the implications, and responsibilities, of the EU as an entity grounded in the rule of law. Therefore, in the terms of the European Council’s Article 50 guidelines, legal culture legacy would require that the general principles of EU law should apply to the conclusion of the Withdrawal Agreement, but it would not necessarily leave a legal imprint beyond this. In other words, legal culture legacy arguably ceases to have binding effects from the moment of withdrawal.

49. COM(2017)784 final, p. 14.

50. Speech cited *supra* note 37.

Is a third form of legal legacy conceivable – one that has the capacity to set material conditions more than just wider mood, with effects that endure beyond the moment of withdrawal? Rights into the future for the family members of EU citizens – “*preserving*” EU citizenship rights – could fall into this category, as could recognition that longer-term jurisdiction for the Court of Justice specifically, and not just an effective enforcement framework generally, is not only desired but required by the conception of the EU legal order presented in Opinion 2/13. Debate about whether an extended conception of acquired rights would explain these dynamics arguably does not go far enough, in the sense that it re-roots the rights and obligations of the Withdrawal Agreement in the shaping forces of national and international law only. Similarly, the conferring of rights on EU citizens in the Withdrawal Agreement is utterly different from, for example, the free movement rights conferred as part of the EEA Agreement, since the latter are adopted and exercised precisely without commitment to the status of EU citizenship.⁵¹ In this sense, the Brexit story has perhaps raised quite acutely the question of whether the Court of Justice was right, or not, to have placed such emphasis on the autonomy of EU law in Opinion 2/13 in the first place. For present purposes, however, the fact remains that the choice actually made will have implications. The irony that the Withdrawal Agreement may involve an EU legal order health-check by the Court of Justice itself at some stage too, under Article 218(11) TFEU, should also be acknowledged.

It may seem incongruent that the binding effects of EU law as well as the jurisdiction of EU institutions could outlive a State’s membership of the Union. It may be felt that international and national legal frameworks must necessarily take over at this point. Nevertheless, binding legal legacy effects⁵² could be conceived as a particular manifestation of the very specialness of EU law, and the corollary specialness of having been, once, a committed part of the EU’s distinctive legal structure. Legal legacy effects would be limited in material scope. The Withdrawal Agreement prioritizes the rights of EU citizens, for example, before turning to the also overwhelming implications for businesses, professionals and consumers in their own terms, which, under Article 50 TEU, can be accommodated within the EU legal framework for a period of transition at most. The governance of the agreement, especially in

51. Yet even here, the expansive reach of EU law has arguably “blurred” the relevant dividing lines; see further, Haukeland Fredriksen and Franklin, “Of pragmatism and principles: The EEA Agreement 20 years on”, 52 CML Rev., 629; on the “lack of an EEA parallel to the concept of EU Citizenship”, see esp. section 2.2.

52. Not to mention legacy effects of quite a different nature; see “Editorial Comments: EU law as a way of life”, 54 CML Rev., 357.

relation to the provisions on citizens' rights and the role of the Court of Justice,⁵³ provides another example.

There have been many analogies drawn between Brexit and divorce; but perhaps the converse analogy is just as relevant: that some legal obligations extend beyond the date at which the divorce takes effect because of the nature of the *marriage* that preceded it.

At the edges of the EU legal order, it becomes harder, but not always impossible, to decouple what constitutes a legal obligation and what is instead a choice made for political expediency and/or economic security. It will be important to do so because UK withdrawal from the EU will set precedents. Law offers some potential to cut through questions clotted with economic, political and social complexity – not always providing the “right” answer, but providing “an” answer nevertheless. When still unresolved Withdrawal Agreement questions, with resonance that is distinct from transition and/or future partnership negotiations, are finally resolved through the conclusion of the Article 50 phase of EU/UK negotiations, we will know what form of legacy outlasts EU membership. We will in turn know more about the poles of the EU legal order, about where the coordinates of its most remote frontiers are located. Here indeed is *Terra Nova*.

53. Also emphasized in the Commission's position paper on Governance, TF50 (2017) 4, 12 July 2017.