

Leaving the EU? The Legal Impact of “Brexit” on the United Kingdom

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Preface

This e-book reproduces the special issue on ‘Leaving the EU? The Legal Impact of “Brexit” on the United Kingdom’ published in March 2016 as a special issue of *European Public Law*.

Many events unfolded since then, most importantly the referendum on 23rd June 2016 where a majority voted for the UK leave the EU. As the final settlement with the EU remains unclear, the editors have realized that most of what was written in the contributions to the special issue remains fully relevant today, especially in light of the public debates at national and international level over the recent months, and in the context of the still very much unclear direction the negotiations between the UK and the EU under Article 50 TEU could be heading to. First research outputs after the referendum, focusing on various topics, such as the WTO legal status of the UK after Brexit, the implications of the Art 50 negotiations or the degree of protection of human rights in the UK, are being published. Given its increasing relevance, the three editors have decided to repackage the *European Public Law* special issue into a book and offer it to the interested reader.

Leaving the EU? The Legal Impact of ‘Brexit’ On the United Kingdom

Graham GEE, Luca RUBINI & Martin TRYBUS*

In 2013, the British Prime Minister David Cameron promised a 2017 ‘In or Out’ referendum on the United Kingdom (UK)’s European Union (EU) membership in the event that a Conservative government was elected to office in 2015. With the Conservatives returning to power with their first majority at Westminster since 1992, this referendum seems (at the time of writing in January 2016) likely to occur in 2016 or 2017 at the very latest. The outcome of such a vote would be uncertain as polls fluctuate between narrow yes or no majorities. What is clear is that there is a very real possibility that the UK could leave the EU within the next few years. This EU ‘Brexit’ poses many legal, economic and political questions regarding its likely impact on the United Kingdom. How would this ‘once again independent’ country interact with the EU? What would be the impact on the business community and its regulation? How would third country status change the lives of UK citizens? What would be the consequences for the Westminster political process or the common law? In 2016, after over forty years of full EU membership, these are timely questions. Answering these questions forces us to reconsider and evaluate the – financial, economic, political, strategic, cultural, or otherwise – benefits and costs of continued EU membership. This is particularly important because, as often happens, political debate seems to have been dominated by the short-term, even populist, dynamics of the UK electoral politics, rather than being based on a serious, fact-oriented evaluation of the benefits and costs of each option. It is against this background that this special issue specifically aims to contribute to a serious analysis of the reasons and especially the consequences of a possible Brexit.

On 25 June 2014, the Institute of European Law (IEL) and the Public Law and Human Rights Research Cluster at the University of Birmingham hosted a workshop to explore these questions. The workshop included a keynote address by Sir Stephen Wall, the esteemed former diplomat and historian, and four interrelated sessions with EU and constitutional lawyers and political scientists, scholars and public officials. For the IEL, this workshop was also part of its silver jubilee. The main goal of the organizers was to provide an understanding of the impact of a possible ‘Brexit’ on UK and English law, paying particular attention to its historical, political and economic contexts. At the same time, the workshop also encompassed an inquiry into the nature of the contemporary EU itself. Most of the papers presented at the workshop are included in this special edition of *European Public Law*. While clearly not all the implications of a ‘Brexit’ could be explored within the confines of a one-day workshop, or indeed a special edition of a journal such as this, the editors and authors aim to illuminate a number of key aspects. In particular, these include: (a) the history of UK accession to the EU, which is the necessary background for any discussion of its now proposed ‘Brexit’, (b) the discussion of one option which the UK might contemplate to then organize its relationship with the EU after such a move, (c) the analysis of its consequences for British business and British citizens, and (d) the assessment of its implications for certain aspects of the UK constitution and the common law.

The special issue begins with an illuminating historical essay written by Sir Stephen Wall. Few words of biography are necessary. Sir Stephen is a retired British diplomat, who worked closely with five Foreign Secretaries and acted as Foreign Policy Adviser to Prime Minister John Major and EU adviser to Prime Minister Tony Blair. He is also the official historian of Britain’s relations with her EU partners,¹ taking up this important venture where the late Alan Milward left.² In his account, he

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¹ See Stephen Wall, *Official History of the United Kingdom and the European Community Volume II, 1963–1975* (Routledge 2012). Sir Stephen is now writing the final volume of the Official History of

draws an interesting picture showing how the UK joined the EU, but did so reluctantly. And, it is fair to say, this attitude has ever since continued. As he perceptively notes in the incipit of his paper: ‘The United Kingdom, at heart, never wanted to join the European Community and, at heart, never stopped hankering after a world where it would be safe for it to leave.’ It is in this respect that Joseph Weiler recently highlighted that nothing short of exit from the EU would be able to appease this contrarian attitude.³ ‘No concession’ or ‘rule change’ would cure this rooted ‘identitarian’ issue.⁴

In their contribution, Ciarán Burke, professor at Schiller University in Jena, Ólafur Ísberg Hannesson and Kristin Bangsund, both of the EFTA Surveillance Authority, discuss one particular option open to the UK in the event of a Brexit. Assuming that the preservation of established markets represents a *desideratum* for both for the UK and its EU partners, they posit that such a goal could be achieved by the UK joining the European Free Trade Area (EFTA) and the European Economic Area (EEA). The authors argue that the EEA model would represent a best-case scenario for the UK, coupling the obvious benefits garnered from the participation in the Internal Market with a looser regulatory structure, allowing for greater freedom of action of the UK in a variety of fields. After analyzing the EFTA/EEA legislative and enforcement mechanisms, and comparing them with those of the EU, the EFTA/EEA model is favourably compared with the looser, but more complicated, bilateral arrangement governing Swiss-EU relations.

The next two articles discuss the possible impact of Brexit on respectively British citizens and British business. First, Marja-Liisa Öberg considers the possible effects of ‘Brexit’ on British nationals who would no longer be EU citizens. Following the *leit-motif* of the previous contribution, Öberg’s main argument is that any Member State withdrawing from the Union is unlikely to cut all ties to the Internal Market. It is almost inevitable that a departing State would need to set up a bilateral or multilateral arrangement for the purpose of continuing to participate in the Internal Market. She compares the legal status of the citizens of a withdrawing state vis-à-vis EU citizens and examines whether and under what conditions third country nationals are conferred rights and obligations in the EU Internal Market which are equal to those enjoyed by EU citizens. In this context, the possibility of using the *Polydor* doctrine to empower third country nationals to an extent comparable to EU nationals is explored. In his contribution, Adam Łazowski argues that withdrawal would not be beneficial for the British business community. On the one hand, neither a unilateral exit nor a consensual divorce would free the UK from EU law. Indeed, a time consuming and resource intensive exercise of cleansing the UK legal orders from EU law would be improbable. On the other hand, withdrawal would inevitably bring uncertainty as to future relations with the EU, which is destined to affect the UK business community and unlikely to deliver the desired efficiencies.

The two remaining articles adopt a UK constitutional law perspective, covering issues of sovereignty, common law and the role of EU law in UK law now and after ‘Brexit’. While the first contribution by Graham Gee and Alison L. Young focuses on the role and perspective of the UK Parliament, the second by Sophie Boyron concentrates on the judiciary. Gee and Young compare how the term ‘sovereignty’ was used in parliamentary debates on the European Communities Bill in 1971–1972 and the European Union Bill in 2011. In both cases, the language of sovereignty was often a placeholder for deeper concerns about the erosion of the political power exercisable by domestic political institutions. Comparing parliamentary debates separated by almost forty years reveals a shift from concerns primarily about the erosion of sovereignty in favour of the law-making powers of European political institutions towards concerns about its erosion to the advantage of the courts, and the domestic courts in particular. This shift prompts the authors to reflect whether a ‘Brexit’ would lead to ‘regaining’ sovereignty. The ‘Brexit’ debate is often analysed from the perspective of politicians, and in particular their views on and understandings of European law and politics. Sophie Boyron, by contrast, focuses on the views and understandings of the senior judiciary. By analysing five extra-judicial speeches made between October 2013 to February 2014, a period particularly fertile in cases in the UK’s top courts concerning the law of the EU or the European Convention of

Britain’s relations with the European Union, covering the period 1975–1991.

² See Alan D Milward, *The Rise and Fall of a National Strategy 1945-62* (Frank Cass 2002).

³ ‘It is the very idea of membership in a Union such as the EU which at the end of the day simply does not sit well’. See *Editorial*, *Eur. J. Intl. L.* 1 (2015).

⁴ *Ibid.*

Human Rights, she charts the senior judiciary's vision of Europe. More particularly, she highlights its strategies to limit the impact of both European treaties on the British constitution in what might she terms 'a search for judicial self-determination'. Boyron argues that a new extra-judicial process of constitutional change might be emerging, and evaluates it.

What emerges as an overarching answer to the question on the legal impact of 'Brexit' on the UK from the contributions in this special issue is that the country cannot have her cake and eat it. On the one hand, 'Brexit' is clearly intended to regain sovereignty, 'UK independence', and possibly to enhance democracy. On the other hand, there is the intention to continue being seriously involved in the Internal Market. Öberg (for British citizens) and Łazovski for (British business) argued convincingly that full participation in the Internal Market might be difficult after a 'Brexit'. The 2.2 million British citizens living permanently in other EU Member States and the millions more going on holidays there will of course continue to be welcome. However, they might face considerably more bureaucracy and less favourable treatment as tourists, residents, workers and service providers. The UK business community would of course continue to trade with the rest of the EU, arrangements would be made, through the EEA and EFTA, as shown by Burke, Ísberg Hannesson, and Bangsund, or otherwise, but Britain would be removed from most decision-making and see its political power reduced to persuasion and lobbying. Transitional and even permanent disruptions to trade are likely to occur, and will have consequences on profits and employment in Britain. Those in favour of 'Brexit' are probably accepting these clear disadvantages as the price to pay to gain 'independence', but whose independence? Gee and Young argue convincingly that there are limits to the prospects of increased parliamentary sovereignty outside the EU, as it is the European, and most importantly, the domestic case-law, rather than the law-making institutions in Brussels, that shape it. Completely cleansing English common law, Northern Irish and Scots law from the influence of the EU (and ECHR) will not only take decades, it is probably impossible. Boyron also highlights the role of the domestic judiciary in limiting the impact of these European legal frameworks on the British constitution. This raises the question if an increase in 'independence', 'sovereignty', 'self-determination' could not be achieved inside the EU, without the disadvantages of an exit.

In a recent lecture Sir Alan Dashwood provocatively asked whether the future of the UK's relationship with the EU could boil down to 'ending a bad marriage with a messy divorce'.⁵ It is difficult for the editors to conclusively state that this was a bad marriage, and not least as opinions differ amongst ourselves. History tells us that it was perhaps dictated more by convenience than sincere love. Be it as it may, there is no doubt, however, that what 'Brexit' entails is a divorce. There is no other way to classify the dramatic symbolic and practical impact on the UK-EU relationship of a positive vote to an 'in-out' referendum. To be sure, it is clear that only mature democracies, like the UK, can afford considering ultimate decisions such as divorcing from the European Union. Divorce may be advisable when the marital arrangement is no longer convenient to at least one of the partners. However, considering the continued and significant participation of the UK in the development of EU policies, as well as the 'opt-outs' and special arrangements already secured by the UK (think of Schengen or the Euro), one has to seriously ask whether there is sufficient evidence that EU membership is no longer convenient for the country.

Most divorces are messy, painful, and expensive, and it would take many years, resources and effort to complete this one. To be sure, alternative arrangements framing the relationship between the newly emerged 'independent' Britain and the EU can be introduced. These could be found in the already existing toolbox, such as EFTA/EEA, or, with some imagination, can take a new form. Weiler is right. No one can in principle exclude the creation of a 'special status for Britain, as associate member or something of the like'.⁶ But the main concern lies at the practical level. There would likely be difficulties in negotiating this 'special' (read: just for Britain) arrangement. The other EU members may even be irritated by having to deal with this matter. And even if a mutually suitable arrangement is eventually successfully concluded, there may be difficulties in implementing it, especially if this is to ensure a 'significant' UK influence beyond the normal EU governance framework. Against this background, what seem most certain are only the negatives of a divorce. As Weiler notes, one cannot

⁵ 2015 Durham European Law Institute Annual Lecture, delivered by Professor Sir Alan Dashwood QC in Durham on 27 Feb. 2015.

⁶ *Editorial*, Eur. J. Intl. L. 2 (2015).

overstate the damage that Britain's exit from the EU will cause to the EU but also Britain and the world at large.⁷ Without touching the difficulties related to the legal position of the UK with respect to the trade agreements entered into by the EU by virtue of its exclusive competence, one should think about the real traction that the UK would have – on its own – in twenty-first century geopolitics. Long gone are the times of the Empire and the days when the UK was re-defining the post-WW II economic order together with the United States. What would be the role of the UK in key economic fora like the WTO? Arguably, very limited. And if 'Brexit' happens before the pivotal Transatlantic Trade and Investment Partnership (TTIP) is concluded, would the US and the EU accept the UK as a third party to the negotiating process? Extremely unlikely. These are just a few of the key questions that one has to ask about the post-EU-exit role of the UK in the world. As Dashwood noted: 'while withdrawal from the EU would mean that the UK recovered its power to act autonomously as a subject of the international legal order, we might find our newly recovered freedom rather lonely, especially in international trade negotiations'.⁸

There are two further remarks to make that introduce additional doubts to the desirability of a breakaway. First, there is the shadow of the 'Scotland issue'. It does not take much to understand that the risk of secession and the risk of withdrawal are just two sides of the same coin, and that there is a delicate equilibrium – and an irony – in the two issues. Ten Downing Street has fought and won the battle to keep the union with Scotland. In the wake of a vote for EU withdrawal, it may then have to fight another battle to dissolve its union with its European counterparts. But – this is the irony – in so doing, it may risk losing Scotland once again. What would happen if the majority of the Scottish people voted in favour of staying within the EU? Could this significant political fact really be ignored in London? If there is a broad lesson to be learned, it is that long-standing constitutional settlements are difficult to disentangle without serious and unforeseen consequences. Second, if the vote is for withdrawal, will Britain be able to utter the words: 'independent at last?' The newly 'single' country might not be as 'independent' as it hoped to be. New arrangements with the former spouse will have to be made, assets divided and maintenance paid, and these arrangements may well be less favourable than the current ones, including what can be only access to, not 'joined custody' of the Internal Market. Most significantly, as the contributions to this special issue have shown, it may be very difficult, if not impossible, to dispose of the *acquis* of EU law which, along the decades has put its roots deeply within the domestic legal system, and often because of the action of domestic actors, such as the courts. Divorce is seldom straightforward. Finally, as already noted, a UK finally freed from its marriage bond with the EU may find itself free but lonely in the international community.

⁷ *Ibid.*

⁸ 2015 Durham European Law Institute Annual Lecture, delivered by Professor Sir Alan Dashwood QC in Durham on 27 Feb. 2015.

Leaving the EU?

Sir Stephen WALL*

This essay provides a detailed historical account of United Kingdom's accession and participation in the EU. Full awareness of the historical events and dynamics is crucial to understand the forces agitating the current debate. In particular, through an exploration of the key steps that led the United Kingdom to accede the EEC and the dynamics of its participation ever since, the main finding that emerges is that the United Kingdom joined the EEC reluctantly, and that this attitude has crucially continued ever since. It is thus fair to say that the United Kingdom, at heart, never wanted to join the European Communities and, at heart, never stopped hankering after a world where it would be safe for it to leave. This ambivalence does not prevent, however, from highlighting a few strong reasons that militate in favour of staying in.

1 HISTORY

The United Kingdom, at heart, never wanted to join the European Community and, at heart, has never stopped hankering after a world where it would be safe for it to leave. To understand today's paranoia about Europe, it is necessary to understand yesterday's schizophrenia on the subject.

We all know Britain's island story – of centuries of resisting continental encroachment from at least the English reformation onwards. The cry of 'no popery' was at least as much about freedom from continental control as it was about theological doctrine. The wars of the eighteenth and nineteenth century made Britain an imperial power. And then, in 1945, Britain, alone of the European nations, emerged with its political institutions vindicated. Those of other European powers had been disgraced or destroyed.

Britain had established a close wartime alliance with the United States, which prospered in peacetime through a nuclear and intelligence relationship. Britain was a founder member of the United Nations and of NATO. Her troops helped defend West Germany from the threat of Soviet attack. Her economic links and her trade were with the US and with the countries of the old Commonwealth: Canada, New Zealand and Australia and, potentially, with the newly emerging former colonies with whom she developed mutually beneficial trading arrangements.

So a fledgling European Coal and Steel Community, and then a European Economic Community, held few attractions for a nation which saw itself as having a global role and which prized its traditions of Parliamentary sovereignty.

Britain's humiliating intervention in Suez in 1956 made the British Government realize both its declining military and political power, as well as its dependence on US goodwill. But the obvious political lesson – that Britain could not compete on equal terms with the two superpowers of the US and the Soviet Union – was not immediately learned. Only in the British Treasury were there the beginnings of a realization that the fledgling European Economic Community might be an economic force to be reckoned with. Elsewhere in Government there was widespread scepticism about the durability of a project involving former enemies and countries which had been so recently humbled.

It was Prime Minister Harold Macmillan, more Europe-minded than most of his Conservative contemporaries, who persuaded his reluctant Cabinet in 1961 that Britain should apply to join the European Community, whose first four years had shown it to be a political and economic success story. European growth rates outstripped Britain's. The dominance of the two superpowers was ever more apparent. And the British Government had, after exhaustive homework, concluded that there was no alternative power grouping which would adequately represent British needs. The European Free Trade Association (EFTA) was not large enough to compete, and its own members were starting to consider EEC membership. A North Atlantic Free Trade Area (NAFTA) was mooted on both sides

of the Atlantic but was never favoured by the US Government. They did not want that degree of implied responsibility for the workings of the British economy. They saw Britain's role as being to join the EEC and, so they hoped, to dilute the hostility of France's President de Gaulle to what he saw as Anglo-Saxon transatlantic hegemony. Nor was a policy of going it alone (GITA) viable in the post-war world.

So the British Government's decision to apply for EEC membership was reluctant. There was hostility within both the Labour and Conservative Parties and in the country at large. The negotiations were detailed, scratchy and lengthy. In the late autumn of 1962, at the Chateau of Rambouillet, de Gaulle left Macmillan in no doubt that he did not want Britain to join. A tearful Macmillan remonstrated with de Gaulle in an attempt to persuade him of the larger vision of a Europe which, united, could be a force for good in a perilous world. Macmillan left empty-handed. The two men were never to meet in office again. Macmillan's one remaining hope was that the support of the other five EEC members for British membership would make it difficult for de Gaulle to follow his instincts. But when, in January 1963, de Gaulle gave a Press Conference at the Elysée Palace, effectively vetoing British accession, the dismay of the other EEC members was vocal but impotent. Chancellor Adenauer of West Germany was on the verge of concluding the treaty of friendship with France which was the culmination of his post-war career. He was to be the first of more than one German Chancellor whose half-hearted support for the British case was a source of anger and disappointment in London.

Macmillan resigned in October 1963 and the Conservatives narrowly lost the General Election a year later. The new Labour Government under Harold Wilson had condemned the terms which their Conservative predecessors had negotiated prior to de Gaulle's veto. Wilson wanted to build up EFTA. But the new Labour Government, faced with a dire economic inheritance, felt obliged to impose an illegal tariff on imports from other EFTA countries and the atmosphere within the Association turned sour. Within months, Wilson began to come round to the same view as Macmillan, and on the basis of the same evidence: there was no viable alternative to EEC membership, as much for political as for economic reasons.

And so, re-elected with a large majority in 1966, Wilson persuaded his Cabinet that they should try again. Wilson sought to flatter de Gaulle into agreement. De Gaulle was polite but resistant. In self-imposed internal exile in France, he had viewed with dismay the supra-national aspects of the Treaty of Rome. But, once back in power, he had found that the structure of the EEC suited French interests. He was the dominant figure. The bulk of the EEC budget was devoted to agricultural subsidies from which French farmers were the principal beneficiaries. Without Britain, which looked constantly across the Atlantic, de Gaulle could pursue his ambition of a Europe which would assert its independence of the United States economically, politically and militarily.

De Gaulle told a visitor that he wanted Britain 'naked' before he would contemplate her membership of the EEC. In 1967, he again formally vetoed British accession. Wilson, more prepared than Macmillan had been, immediately responded that he would not take no for an answer: Britain's bid would remain firmly on the table. And so, when de Gaulle fell from power in the spring of 1969, his successor, Georges Pompidou, was persuaded by the Federal German Chancellor, Willy Brandt, that the time had come to open the door to British membership. But Pompidou had a price: before negotiations could begin with Britain the definitive financing arrangements for the EEC must be agreed by the original six Member States. And, surprise, the accord they reached cemented the Common Agricultural Policy, especially favourable to France, as the cornerstone of the Community, taking 75% of the common budget. Britain would be the third poorest Member State in terms of per capita GDP but, along with Germany, the to the EEC budget, rather than making a net gain from it.

By the time negotiations for British entry began, Wilson's Labour Government had lost a General Election (in June 1970) and been replaced by the Conservatives who adopted unchanged the negotiating mandate that their Labour predecessors had prepared.

Edward Heath's Government swallowed hard and accepted the budget deal which had been cooked up by the Six as a *fait accompli*. They were somewhat comforted by a formal assurance from their future partners that if the budget arrangements turned out to be as disadvantageous as the British Government feared then they would have to be corrected.

Meanwhile, the Labour Party, bruised by their surprise election defeat and determined to rout

Heath at the earliest opportunity, turned their back on Europe and denounced the terms which Heath had accepted, even though they were terms which Wilson would almost certainly have agreed to had he still been in office. But Wilson did not want to close off the option of membership and hit on a device which rejected the terms Heath had negotiated and, at the same time, wrong-footed Heath. He promised that a Labour Government would renegotiate the terms of Britain's membership and put the result to the British people in either a fresh General Election or a referendum. This would be the full-hearted consent of the British people which Heath had promised but not delivered.

Against a background of a struggling economy and a disastrously mishandled coal miners' strike, Heath called a 'who governs Britain' election in February 1974. The result was a hung Parliament but the British people had made it clear that, whoever else might lead them, they did not want it to be Heath. Wilson, as leader of the largest Party, formed a minority Government, turning his slim overall minority into a slim overall majority in a further General Election in October 1974.

The ensuing renegotiation of the terms of Britain's membership was more smoke and mirrors than substance. But it gave Wilson just enough to carry the result through a divided Cabinet (though not the Labour Party as a whole, which voted against the terms) and to put the case to the people in a referendum, in June

1975. On a two-thirds turnout, two-thirds of the electorate, in every part of the United Kingdom except the Orkneys and Shetland, voted to stay in the European Community.

Today, one often meets people who say that they voted in favour of EEC membership in the 1975 referendum, in the belief that they were voting for a free trade area, not for an embryonic political union. It is certainly the case that the uniquely dynamic nature of the European institutional structure was not emphasized by the 'yes' camp, though the 'no' campaign majored in on it as an affront to the sovereignty of Parliament. These were, in any event, issues which had been well aired in Parliament when it debated and voted on the original legislation enacting UK accession. The truth is that Britain was living a paradox. In October 1972, on the eve of British accession, Edward Heath and the other leaders of the EEC countries met in Paris and committed themselves publicly to two very ambitious objectives: Political Union by 1980 and Economic and Monetary Union by the same deadline. Political Union remained studiously undefined. But economic and monetary union had already been the subject of a formal report by Luxembourg Prime Minister, Pierre Werner, and that report left no doubt that the goal was a common European currency.

So, there could be no doubt that the European Community project was always much more than a plan for a free trade area. That was why Britain had hesitated for so long. The Treaty of Rome does, after all, have as its principal objective 'ever closer union among the peoples of Europe'. If it meant nothing, why is David Cameron today intent on getting those words disappplied to the United Kingdom?

At the same time, it is also true that Heath, in common with Pompidou and Brandt, underestimated the dynamic nature of the EEC's institutional processes and believed that Governments, especially their Governments, would always be firmly in the driving seat and that their essential interests would never be thwarted. All British Governments also believed that invocation of the so-called Luxembourg Compromise of 1966 would constitute a veto on legislation which they opposed, even where, formally speaking, majority voting applied. In this, they were to be proved wrong but the belief was honestly held.

In an event, the referendum result did not for long resolve the issue in British political and public debate. The British had been right: the budget arrangements established by the Six before entry negotiations with the United Kingdom began, imposed on Britain a uniquely heavy financial burden. It is true that a compensation mechanism had been negotiated by the Labour Government as part of their renegotiation of the terms of membership. But, largely at German insistence, its conditions were so hedged about that it never, in practice, applied. So, when the UK's transitional arrangements as a new member came to an end in

1979, Britain became the largest net contributor, even outstripping Germany.

One of Jim Callaghan's last acts as Prime Minister was to warn his partners, in the spring of 1979, that this situation was intolerable and had to be addressed. Part of the necessary reform was seen as being to have more of the EEC budget spent in Britain. A large part of it must, the British argued, come from reform of the Common Agricultural Policy (CAP) whose guarantee of production

and export subsidies was creating massive and costly surpluses of milk, wheat and sugar. May 1979 was committed to a positive approach to EEC membership. Margaret Thatcher told each of her partners in turn that the Conservatives were the party of Europe and that their approach, unlike that of her Labour predecessors, would be cooperative, not confrontational. This approach lasted only a few weeks. The new Prime Minister was advised of the gravity of Britain's EEC budget problem and, against a background of soaring inflation at home and the need for drastic expenditure cuts, cutting the British EEC budget payments swiftly became a high priority; so much so that, by the end of the year, the new British Government were threatening to withhold their statutory contribution to the EEC budget unless they got satisfaction.

Thus began a battle which, apart from a temporary solution negotiated in 1980, endured until the lasting settlement reached at Fontainebleau in 1984. It was a battle fought with bitterness on both sides and it reinforced what had always been a feature of Britain's relations with her partners: to see engagement with the rest of the EEC as a confrontation with rivals, rather than a collaboration with colleagues.

Margaret Thatcher's attitude towards the European Community was never one of threatening to withdraw, or even of threatening to withdraw unless the terms of Britain's membership were changed. But her scepticism about the nature and effectiveness of the organization grew over the years and, in a speech in Bruges in September 1988, she famously accused the European Commission of seeking to impose at European level the very state, even a superstate, whose frontiers she had successfully rolled back at home. She also championed the cause of enlargement, reminding her audience that Prague, Budapest and Warsaw (then still imprisoned behind the iron curtain) were also great European cities.

The speech was popular at home but shocked the wider continental audience. Enlargement meant widening, not deepening, an end to integration. The attack on the notion of ever closer integration was seen as sacrilegious. It is hard today, when much of the speech would be common ground among the EU membership, to recall just how iconoclastic it was.

In parallel, renewed work had begun under the direction of Commission President, Jacques Delors, on the issue of economic and monetary union. When the iron curtain fell and Germany was reunited the impetus towards a single currency gathered pace. In Germany, Chancellor Helmut Kohl accepted the demise of the German currency as the price to pay for French acquiescence in German reunification. In France, President Mitterrand saw the single currency, and the political union that would go with it, as a way of clasping and containing France's closest, and yet most feared, neighbour which, it was widely believed, would rapidly become a superpower in economic terms. Margaret Thatcher set her face against the single currency. Her famous 'no, no, no' in the House of Commons, which precipitated the resignation of Sir Geoffrey Howe from her Government and triggered the leadership election which lost her her job, was, however, not directed at the single currency as such but at the political union which Jacques Delors saw as its essential accompaniment. In a speech to the European Parliament, Delors had proposed that the Commission should become the administration of the European Union, answerable to the European Parliament. Up with that, Margaret Thatcher would not put.

Margaret Thatcher's successor, John Major, was no enthusiast for the single currency. But he saw that it would be unwise for Britain to rule out joining altogether. He also accepted the legal advice that Margaret Thatcher had chosen to ignore: that if Britain blocked the draft treaty encompassing a single currency, the eleven other EU members could, and would, simply make a separate treaty on their own, outside the traditional EU legal framework. In negotiating an opt-out from the single currency, British negotiators were as preoccupied to ensure that Britain could be free to opt in at any time as they were to ensure that she could not be forced to do so should opt-out precedent was, moreover, firmly established for the future.

Out of office and power, an angry and distressed Margaret Thatcher set herself up on the back benches of the House of Lords as the open focus of Tory discontent with the Maastricht Treaty. Hostility to the European Union became synonymous with loyalty to the fallen leader. A generation of young Conservatives, among them David Cameron, sat both literally and metaphorically at her feet. Britain's forced exit from the Exchange Rate Mechanism in 1992, and the subsequent recovery of the British economy, lodged in the public mind the idea that European economic and monetary entanglements could be dangerous. Europe became for John Major a political stumbling block.

A change of Government in 1997 promised a change of attitude, including, it was believed, on the single currency. But the incoming Blair Administration was preoccupied above all in demonstrating economic competence at home and, as Gordon Brown, the new Chancellor of the Exchequer, cooled towards the project, and as the Murdoch Press held the Government's feet to the fire of their own euro scepticism, so the single currency became an issue for a second term, not for the first. And when the second term came, Gordon Brown's opposition had hardened along with his determination to displace Blair as leader. Blair was almost alone among the senior Labour team in making the positive public case for Europe. In the wake of the invasion of Iraq in 2003, Blair no longer had the strength to press the case for the single currency.

2 THE STATE OF THE UNION

And so the scene was set for today's political arguments in Britain about our EU membership. The context changes and some of the headline arguments change – from food prices in the 1970s, to the single currency in the late 1980s, to immigration now. But the fundamental issue remains our national unease at an organization which requires us to sacrifice national sovereignty for the sake of international influence and which makes us just one member, albeit one of the largest ones, of a twenty-eight nation body. Psychologically, our political leaders prefer to be the best friend of the United States than the partner of our European neighbours. The more inter-dependent we become, the more we fall back on the comfortable notion of the island fortress. We go to Europe. We are not, as we see it, in Europe.

If a referendum on Britain's membership of the European Union is held in 2017, the British Government's recommendation to the British people on how they should vote will be based on the outcome of the so-called renegotiation of the terms of membership which David Cameron has promised. But, it will be far more necessary for all of us to take stock of the real state of the European Union, as it has been, is and will be, and of where our national interests lie. In other words, the case for or against will be based, not so much on the terms of the renegotiation, but on the nature and achievements of the European Union.

From a purely British perspective, we have succeeded in changing the organization from within. The single market in goods and services is one of the prime objectives set out in the Treaty of Rome. Yet, until the mid-1980s, little was done to bring it about. Much of the pressure for that reform came from Margaret Thatcher. And she was largely successful. Reform of the Common Agricultural Policy has been slow and gradual. But Britain, working with the European Commission, has succeeded in shifting the focus of the CAP away from support for production (and over-production) and towards income support for farmers. The CAP still takes around 40% of the EU Budget, which is more than can be justified in terms of agriculture's relative economic importance, but that is a big improvement on the 75% share of the budget that was the case when Britain joined the EEC.

The feared federal superstate has not happened. The Union has exercised its competences within the legal limits established in the EU treaties, and when those competences have been extended, for example in environmental action, it has been with the consent of all the Member States. Now, as in 1957, the European Union has no competence to run a health service or primary, secondary or higher education, or a prison service, or a police force, or armed forces. Direct taxation remains the preserve of the nation state. Judicial cooperation, so far as the United Kingdom is concerned, is limited by how far we are prepared, or not prepared, to go. The conduct of foreign and security cooperation at European level is controlled by the Member States. If Russia were to march into one of the Baltic States it is their membership of NATO, not of the European Union, that might take us to war. The enlargement of the European Union to embrace, in the 1970s and 80s, Greece, Portugal and Spain as they emerged from dictatorship and, at the turn of this century, the countries of east and central Europe, newly freed from Soviet dictatorship, is the greatest achievement of our post-war world.

On the downside, the European Union still has a long way to go to achieve a coherent and effective common energy policy. The single market in services is incomplete. The political plus of national control over common policies in foreign affairs and defence carries the downside that action can only be taken at the lowest common denominator of agreement.

3 REASONS FOR STAYING IN

So much for the tally of achievement. Opponents argue that that was then and this is now: that in a global world, with emerging powers such as China and India, Brazil and Russia, the European Union has been passed by. I buy this argument only to the extent that I agree that the European Union is not a faith to which one adheres in good times and bad. It is a human construction and has to meet its objectives which remain, as always, to use the vehicle of economic cooperation to achieve prosperity and peace. In Britain, we held a referendum in 1975 to determine whether our national interest was met by staying in. We are promised another such referendum in 2017. If the British people vote to stay in, they will not be taking a decision for all time. But they will be taking a decision for the next few decades and all the evidence points to the advantage to Britain of being inside the EU during that period.

No one has yet invented a better means of managing the relations between twenty-eight competitive and nationalistic countries. The EU has a set of rules which constrain behaviour. They require all members to be democracies. They set common standards in human rights such that none of us executes our fellow citizens or can legitimately discriminate on grounds of gender, race or sexual orientation. If any Member State breaks the rules, we have an independent Commission to hold it to account before the independent European Court of Justice, which can impose penalties to bring the offender back into line.

The European Union constitutes the world's largest single market: the main destination for British exports and the main source of our investment, inward and outward. Our combined strength makes the EU a formidable force in international trade negotiations. We, the EU, are the world's largest donor of international development aid. We use our economic strength, and our shared values, and our role as a peacekeeper, to do well in the world.

Outside the European Union, Britain could still negotiate access to the single market but at the price of accepting and implementing rules determined without our participation and consent. The sovereignty we would take back would be more theoretical than real. Anyone who believes that Britain's former partners would allow us the benefits of the single market with none of the shared responsibility of reciprocity, including on the free movement of people, would, I am convinced, quickly be proved wrong.

We live in a dangerous world. If we looked around us we might feel, as every British leader since Macmillan, up to and including David Cameron has felt, that our economic and political security would be best safeguarded and advanced by being in the same organization as our closest neighbours, all of them democracies, all of them sharing our values, all of them committed to the same rule of law. We have that organization. It is thanks to us that more countries of Europe share those democratic values than at any other time in our collective history. To turn our back on it to go it alone would be, to say the least, reckless.

4 DIFFERENCES BETWEEN 1975 AND 2017

The past is a foreign country. Yet, as I have tried to show, much about today's debate is a repetition of an argument which goes back sixty years.

Of course, the context of a second referendum on British membership of the EU will be different from that of 1975. Then, we had never before held a national referendum. It was novel. Now we are more used to referendums in one form or another. We may adopt the habit of others by using the referendum to kick the Government of the day. Then, we were still living with the cold war threat of Soviet aggression and nuclear escalation. The need for solidarity was more acutely felt. Moreover, the other members of the European Community had a more obvious success story to tell than we did. The desire to share in their prosperity was marked. Although I believe that continued membership of the European Union is overwhelmingly in the British national interest, the relative position of the UK economy after some years of trouble in the euro zone, and the evolution of a global economy, make going it alone less instinctively to be feared than in the past.

In 1975, all of the British media, with the exception of the *Daily Express* and the Communist *Morning Star* were strongly in favour of continued British membership. The same cannot be said

today.

Party divisions were different: the leaders of all three main political parties were in favour of continued British membership and campaigned accordingly. There was no equivalent of UKIP. Today's divisions within the Conservative Party were, however, mirrored by the divisions that prevailed in the Labour Party in

1975. Harold Wilson's Cabinet were divided on the subject. A clear majority voted in favour of the outcome of the renegotiation but the price of unity was an almost unprecedented suspension of shared Cabinet responsibility for the duration of the campaign, so that opponents of membership were free to campaign against the policy of their own Government. The Labour Party too, at a special conference, voted against the terms which their own leaders had negotiated. It does not take a big stretch of the imagination to picture David Cameron being in a similar position in 2017.

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Life on the Edge: EFTA and the EEA as a Future for the UK in Europe

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The present article discusses the options open to the UK in the event that the proposed referendum on EU membership results in an ‘out’ vote. The case is presented that the preservation of established markets represents a desideratum, both for the UK, and for its EU partners, and that such a goal could be achieved – while removing the UK from many less popular areas of EU competence – by the UK immediately joining EFTA and the European Economic Area (EEA) upon its exit from the EU. The authors argue that the EEA model would represent a best-case scenario for the UK in the event of a ‘Brexit’, coupling the benefits garnered from the maintenance of the UK’s position within the Internal Market with a looser regulatory structure, while preserving established market relationships and economic stability, and allowing for greater freedom of action on the part of the UK government in areas not covered by the material scope of the EEA Agreement. The non-identical nature of EU law and EEA law is explained, with the absence of the twin doctrines of supremacy and direct effect presented as a means to restore the doctrine of parliamentary sovereignty in Britain. The EEA legislative and enforcement mechanisms are also discussed, while the EEA model is favourably compared with the looser – yet vastly more complicated – bilateral arrangement governing Swiss-EU relations.

1 INTRODUCTION

We have not successfully rolled back the frontiers of the state in Britain, only to see them re-imposed at a European level, with a European super state exercising a new dominance from Brussels...

The aim of a Europe open to enterprise is the moving force behind the creation of the Single European Market . . . By getting rid of barriers, by making it possible for companies to operate on a Europe-wide scale, we can best compete with the United States, Japan and the other new economic powers emerging in Asia and elsewhere.¹

The above extracts from Margaret Thatcher’s famous Bruges speech aptly describe the enduring ambivalence of the UK towards engagement with Europe. They are indicative of the willingness – even amongst arch-conservative elements of UK society – to participate in integration, while showing the limits to the European model with which they have been prepared to engage. Recent debates – and David Cameron’s promise of a forthcoming referendum on continuing EU membership² – raise the question as to whether these limits have been surpassed.

The legal, constitutional, economic, political and social questions raised by the possibility of a UK exit from the European Union are myriad. There is little doubt that, in the event of an ‘out’ vote in such a referendum, many tenets of British society will be profoundly impacted upon. However, the manner in which the UK will be affected is to a large extent within the government’s control. This

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¹ Speech delivered at the College of Europe, Bruges by The Rt. Hon. Mrs Margaret Thatcher, Prime Minister of the United Kingdom, on 20 Sep.1988.

² Speech delivered at Bloomberg by The Rt. Hon. Mr David Cameron, Prime Minister of the United Kingdom, on 23 Jan.2013. A full transcript of the speech is available on the UK Government website, at: <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg> (accessed 10 Jan. 2015).

paper argues that, taking into account the UK's particular needs, joining EFTA and the European Economic Area (EEA) would represent a best-case alternative for the country in the event of a 'Brexit',³ preserving access to the Internal Market, while restoring many prerogatives lost through EU membership, which have fueled the Eurosceptic lobby. The paper begins with an examination of the EU's effect upon the UK legal system and the likely impact thereupon from a decision to leave the Union. It then moves to a synopsis of the institutional particularities that would be involved in a subsequent or alternative decision to join EFTA and the EEA.⁴ The likely effects of EEA law upon the UK legal system are then assessed, with a further focus on the institutional framework and an enforcement machinery that supports this legal system, in an effort to chart the concrete implications of such a scenario for the UK should its citizens vote to exit the EU in 2017. In this context, there is also a discussion of the alternative, 'Swiss-style' model based upon a tapestry of tailored bilateral treaties and somewhat looser enforcement, and why the EFTA-EEA solution is preferable to it. The long-term implications of a 'Brexit' scenario in which all ties with the EU are severed will not be ventured into in detail, since such a scenario is necessarily deeply speculative, though the authors are of the opinion that the uncertainty and economic upheaval that would be engendered by such a move, and the lack of any institutional apparatus for the management of the UK's relationship with the EU, would likely render any such strategy damaging to the UK, and therefore, far from a best-case scenario.⁵ It should, finally, be noted that this paper does not purport to pass judgment on whether the UK should indeed exit the Union, rather merely treating the next phase of its relationship with the latter should it choose to do so.

2 UK DOMESTIC LAW

2.1 BEFORE THE REFERENDUM

The UK is the only EU Member State without a formal written constitution, rendering its legal system unique in Europe. Classic UK constitutional law dictates that, in the absence of a written constitutional text, there is no standard against which courts may review Acts of Parliament.⁶ However, this position came under severe pressure from the moment the UK entered the EEC (now EU). Section 2(2) of the 1972 European Communities Act enables government ministers to implement required changes to UK law via statutory instruments. The 1972 Act also stipulates that all UK legislation shall have effect 'subject to' directly applicable EU Law.⁷ This provided a direct challenge to parliamentary sovereignty as traditionally conceived.⁸

Even before the UK's entry into the EEC, a number of seminal cases had come before the European Court of Justice ('ECJ'), which had transformed the Rome Treaty from a simple trade

³ As opposed to severing all ties with the EU and thereby losing the access to the Internal Market, or a Swiss solution, which shall be addressed later in this article.

⁴ The terms 'subsequent' and 'alternative' are used here for the purposes of clarity, insofar as a decision to join EFTA and the EEA would, in all probability be taken only subsequent to a vote to leave the European Union. However, it is also possible that the EFTA/EEA route might be explicitly decided upon as the favoured *modus operandi* of regulating UK-EU relations prior to the moment that the UK leaves the Union. As shall be elaborated upon anon, due to the negotiations that would need to be undertaken subsequent to any UK decision to exit the EU, the modalities of the two scenarios are, to all intents and purposes, identical.

⁵ However, this will be briefly addressed in the Conclusion.

⁶ *Cheney v. Conn*, 1 All ER 779 (1968); *British Railways Board v. Pickin* AC 765 (1974).

⁷ Section 2(4). It is important to note that subsequent Acts of Parliament have also served to incorporate EU law into the UK legal order. However, these subsequent Acts have only been necessitated during moments of treaty revision, and have only constituted amending acts. Examples include the European Communities (Amendment) Act 1993, giving effect to the Maastricht Treaty (Treaty on European Union), and the European Union (Amendment) Act 2008, which gave effect to the terms of the Lisbon Treaty in UK law. It is worth noting that the acts do not actually ratify the treaties; they merely add the Maastricht and Lisbon Treaties to the treaties listed in s. 1(2) of the European Communities Act 1972.

⁸ With regard to parliamentary sovereignty, as noted by Nicol, *for some three hundred years the courts chose to adopt an essentially subordinate role vis-à-vis Parliament. They did so by adhering to the doctrine of parliamentary sovereignty as the constitution's dominant principle.* D. Nicol, *EC Membership and the Judicialization of British Politics* (OUP 2001) 1. Such a model, combined with the *lex posterior* principle, implies that the most recent act of parliament is effectively the supreme law of the land, and that parliament may effectively change any law, including 'constitutional' provisions, subject to some very limited exceptions based in custom (parliament may not bind successive parliaments *ad eternum*, for example, and there must always be a government and a Prime Minister).

agreement into something significantly more dynamic. In *Van Gend en Loos*⁹ and *Costa*, the ECJ asserted the two key doctrines of direct effect and supremacy, holding that Community law ‘could not be overridden by domestic legal provisions, however framed’.¹⁰ In *Internationale Handelsgesellschaft*, the Court made it clear that ‘domestic legal provisions’ included fundamental rights and constitutional law.¹¹ It was thus abundantly clear a new – sui generis – legal order had been created, with national courts and authorities obliged to accord primacy to the latter vis-à-vis all national law.¹²

The concrete effects of the ECJ’s dynamism were soon felt within the UK. In 1983, in *Garland*,¹³ the House of Lords, following the ECJ,¹⁴ conferred to itself the power to read domestic legislation ‘in harmony’ with Community rules. Then, in *Pickstone*, the House held that subsequent legislation should be read as giving effect to Community rules, even when not explicitly prescribed.¹⁵ In *Litster*, legislation implementing a directive was ‘assumed’ to fulfil the directive’s objectives, although the legislation in fact enumerated insufficient measures to do so.¹⁶ It was held that the UK ‘courts . . . are under a duty to follow the practice of the ECJ by giving a purposive construction [whenever necessary] . . .’ This interpretation contradicted the rules provided under the Interpretation Act 1978, heralding a move away from the regular role of the UK courts, which had theretofore always involved (unquestioningly) applying Acts of Parliament. In *Factortame (no.2)*, Lord Bridge stated that it was ‘the duty of a UK court . . . to override any rule of national law found to be in conflict with directly enforceable Community law’.¹⁷

It is clear from an EU perspective that even the most minor piece of Union legislation ranks above all UK law, reflecting the legal hierarchy present throughout the EU, though admittedly, two very recent decisions have suggested that there may be limits to the extent to which Union law may derogate from ‘fundamental principles’ of UK law in certain circumstances.¹⁸ In *Pham*, it was noted that ‘European law is part of United Kingdom law only to the extent that Parliament has legislated that it should be.’¹⁹ However, despite these observations, it remains the case that UK courts have a duty to give full force and effectiveness to EU law. Should there be any doubt regarding the implementation of European law, lower courts may make use of the preliminary reference procedure,

⁹ Case 26/62 *NV Algemene Transport – en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen*, ECR I (1963).

¹⁰ Case 6/64 *Flaminio Costa v. ENEL*, ECR 585 (1964).

¹¹ Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getriebe und Futtermittel*, ECR 1125 (1970).

¹² It is worth noting that the likely concrete effects of the doctrines of supremacy and direct effect, as well as the increasingly dynamic interpretation applied by the ECJ, were not appreciated at the moment of the UK’s accession to the EEC, with both parliamentary debates and academic opinion chiefly focusing on issues of sovereignty *stricto sensu*. Danny Nicol, *EC Membership and the Judicialization of British Politics* 23–107 (OUP 2001). It should however be noted that several other Member States also had issues with this approach at the time, see *inter alia* Morten Rasmussen, *Revolutionizing European Law: A History of the Van Gend en Loos Judgment*, 12(1) Intl. J. Constitutional L. 136–163 at 160–161 (2014).

¹³ *Garland v. British Rail Engineering* [1983] 2 AC 751. The above position had already been foreseen by a statement of Lord Denning in an earlier case, which further raised the possibility of giving outright priority to Community law in the event of a conflict with national rules. *MacCarthy’s Ltd. v. Smith* [1979] ALL ER 325. Denning stated (at 329) that ‘*in construing our statute, we are entitled to look to the treaty as an aid to its construction, and even more, not only as an aid, but as an overriding force...it is our bounden duty to give priority to community law*’.

¹⁴ Case 14/83 *Von Colson and Kamann v. Land Nordrhein-Westfalen*, ECR 1891 (1984).

¹⁵ *Pickstone v. Freemans Plc.*, AC 66 (1989).

¹⁶ *Litster v. Forth Dry Dock and Engineering Co. Ltd.*, 1AC 546 (1990).

¹⁷ *R. v. Secretary of State for Transport, ex parte Factortame (no.2)*, 1 AC 603,659 (1991).

¹⁸ See *HS2 Action Alliance Ltd v. Secretary of State for Transport* [2014] UKSC 3. Here, it was stated, at paragraph 207, that [i]t is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that ‘there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.’ This suggests two things. First, that there might be a hierarchy between individual constitutional measures and second, that it would be open to a UK court to refuse to apply EU law. The deciding factor here seems to be fundamentality – the more fundamental a constitutional measure, the more likely it is to be able to prevail over EU law. In this regard, see also Mark Elliott, *Constitutional Legislation, European Union Law and the Nature of the United Kingdom’s Contemporary Constitution*, 10 Eur. Constitutional L. Rev. 378–392 (2014).

¹⁹ *Pham v. Secretary of State for the Home Department* [2015] UKSC 19, at para. 76. It thus follows that European Union law is not part of UK law if it does not fall within the assimilation of EU law into UK law, for example if it is in conflict with a constitutional norm more fundamental than the ECA 1972.

while final instance courts *must* do so.²⁰ An increasing number of ‘bold decisions’,²¹ where supremacy and direct effect have been implemented by the UK courts – sometimes without reference to the ECJ – have been visible in recent years.²² This is deeply significant in the context of the present discussion, as will be explained.

2.2 THE EFFECTS OF A UK EXIT

The UK leaving the EU could have serious repercussions. The UK courts, previously limited in their activities by parliamentary sovereignty, employed the preliminary reference procedure as a novel means of controlling the legislator’s activities, introducing a degree of judicial review in the UK for the first time. It is to be noted that the number of annual referrals from the UK to the ECJ, though starting slowly, has hovered around the twenty-per-year mark since the late 1980s. In addition, lower courts have made the majority of such references. Such a figure reflects a real engagement with EU law throughout the legal system, comparing favourably to most Member States.²³

The UK judiciary have grown progressively more adept at reconciling the supremacy of EU law with parliamentary sovereignty over the past decades. The trouble is that this tactic has been employed to balance two interests. When one interest is removed, the balance achieved will necessarily be upset. The UK courts, when dealing with EU law, have, *inter alia*: (a) *applied special meanings* and *special interpretations* to certain domestic statutes, which would not otherwise apply, in order to ‘read them’ harmoniously with EU law;²⁴ (b) *directly applied* provisions of EU law in order to *confer rights on individuals*, even in the absence of implementing legislation;²⁵ and (c) *disapplied* properly enacted *domestic statutes* for failure to comply with EU law.²⁶ Repeal of the 1972 Act would thus entail that: (a) the special meanings and special interpretations would be called into question, since there would be no need to read such statutes harmoniously with EU law; (b) the rights conferred upon individuals would be lost;²⁷ and (c) the statutes in question – since they no longer contradict EU law – would apply in full.²⁸

Such a scenario would cause severe complications at a domestic level, and could have unfortunate repercussions elsewhere, for example, for UK citizens resident in other EU Member States, as shall be discussed anon. The UK courts have used their powers to derogate, disapply, and reinterpret legislation with ever-increasing zest. Instances where problems such as those described above occur will not be uncommon. The fact that special meanings required for conform interpretation of statutes in accordance with EU law will no longer be required, will essentially entail that certain Acts of Parliament will confer different rights from one day to the next, creating legal uncertainty, and potentially economic instability. The loss of individual rights – as well as the changing nature of the UK’s trade relationships, could place millions of people in an uncertain situation with regard to their future employment, and would likely engender economic instability due to the sudden lack of access to the EU Internal Market. A severance of ties with Europe would see all

²⁰ Cf. Art. 267(2) and (3) TFEU. See also case 283/81 CILFIT ECR 3415, para. 21 (1982).

²¹ Hilaire Barnett, *Constitutional and Administrative Law* 190 (9th edn., Routledge 2011).

²² See, for example, *Lawrence v. Regent Office Care Ltd.*, IRLR 608 (2000); *Armstrong v. Newcastle Upon Tyne NHS Hospital Trust*, EWCA Civ 1608 (2005).

²³ For statistics in this regard, see Court of Justice of the European Union, *Annual Report 2013*, Synopsis of the work of the Court of Justice, the General Court and the Civil Service Tribunal, Luxembourg (2014) 106–109.

²⁴ For example, in *Litster*, it was held that the UK ‘courts...are under a duty to follow the practice of the ECJ by giving a purposive construction [whenever necessary]...’ This interpretation contradicted the rules provided under the Interpretation Act 1978, and heralded a move away from the regular role of the UK courts – namely to (unquestioningly) apply Acts of Parliament. See *Litster v. Forth Dry Dock and Engineering Co. Ltd.* [1990] 1 AC 546.

²⁵ See *R v. Secretary of State for Transport, ex p. Equal Opportunities Commission* [1995] 1 AC 1.

²⁶ It should perhaps be acknowledged that criteria (a), (b) and (c) represent the transposition of indirect effect, direct effect, and supremacy doctrines to the UK legal system, and are thus common ground throughout European domestic jurisdictions.

²⁷ In this respect, it is worthwhile to underline that many basic rights enjoyed by individuals in the UK have found their genome in European Union law. See, for example, Case 152/84 *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority* (1986).

²⁸ It should be noted that the number of cases in which this third case would arise would be relatively few, since the European Commission has tended to pursue Member States via infringement proceedings in instances where domestic statutes – even when not actively applied – contradict EU law. States are encouraged to explicitly repeal or amend such statutes, and in many cases, the UK has done so.

EU nationals lose the framework underpinning their right to engage in economic activity in the UK, which could have severe and immediate consequences. In such a scenario, the 761,000 UK nationals in Spain, for example,²⁹ could find themselves subject to tit-for-tat discrimination. Finally, any statutes ‘reinvigorated’ by the demise of EU law would further contribute to the overall sense of chaos.

The pitfalls and possibilities are myriad. Countless acts will require redrafting, individuals risk losing a great many rights, and there is no telling how the (doubtless greatly overburdened) courts may choose to interpret certain statutes that have been entirely ‘re-cast’ by the repeal of the 1972 Act. In short, a chaotic legal situation would result from the ‘simple’ option of repealing the act.

Despite the above, if a prospective UK referendum indeed results in an ‘out’ vote, the 1972 Act will nonetheless need to be repealed. In light of the complications involved with this, it is useful to refine the modalities of how this might occur.

2.3 AFTER THE REFERENDUM

Subsequent to an outcome favouring a UK exit from the EU in a potential referendum in 2016 or 2017, the UK government would most likely seek to invoke Article 50 TEU, which provides that ‘[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements’. Article 50 provides a specific procedure, representing the only institutional means for EU Member States to leave the Union. It stipulates that a Member State which decides to withdraw should negotiate an agreement with the European Council, arranging its withdrawal and ‘taking account of the framework for its future relationship with the Union’.³⁰ EU law would cease to apply in the UK³¹ from the date of entry into force of the withdrawal agreement, or, from two years subsequent to notification of the UK’s intention to leave, unless the European Council, in agreement with the UK, were to unanimously decide to extend this period.³² The UK would thus have at least two years after the referendum to negotiate its post-EU position.

During negotiations, the UK would still be required to continue implementing EU law in full. Selective withdrawal from certain provisions as an interim ad hoc measure could destabilize previously established trade relationships and create an imbalanced market. A ‘jumping off point’, where EU law would cease to apply, could eventually occur, causing significant instability, both to UK and EU economic operators and the States themselves.³³ This is not to say that transitional provisions could not be devised. However, with the assent of the UK government, along with consensus amongst the remaining EU Member States, required to arrive at such an arrangement, there is no guarantee of an accommodation being reached that would be to the UK’s liking, or that would ensure an optimum outcome for its economy.

In order to avoid the legal and political uncertainty involved in a potential UK exit from the EU, the government must undertake negotiations with a view to *replacing* – rather than merely repealing – the 1972 Act. Two potential options present themselves in this regard. The first involves an *à la carte* bilateral relationship with Europe, with the Swiss model often used as a template in this regard.³⁴ However, this is unlikely to be a realistic option, as discussed in §5, below.

²⁹ Danny Sriskandarajah & Catherine Drew, *Brits Abroad: Mapping the Scale and Nature of British Emigration* (Institute for Public Policy Research 2006).

³⁰ The Council shall act by qualified majority, and shall obtain the consent of the European Parliament.

³¹ That is, from a European perspective. Domestic courts would cease to apply EU law from the moment at which the 1972 Act is repealed by an Act of Parliament. Further, certain provisions of EU law may have been replicated via national implementing legislation. Such provisions would also need to be individually – or more likely, collectively – repealed.

³² General principles of legal certainty, non-retroactivity and legitimate expectations would certainly play a role here as well, and will most likely contribute to the safeguarding of certain rights granted to legal and natural persons under EU law, at least during the transitional period. However, what would occur thereafter would necessarily be contingent upon the relationship that the government of the day wished to maintain with the EU.

³³ See, inter alia, Patrick Minford, *Balance of Competences Review: Setting Business Free: Into the Global Economy* (The Freedom Association, in association with the Hampden Trust 2013).

³⁴ House of Commons Select Committee on Foreign Affairs, Written evidence from Professor Clive H. Church, Dr Paolo Dardanelli & Sean Mueller, Centre for Swiss Politics, University of Kent, Session 2012–13, FEU 08, (2012) *The Future of the European Union: UK Government Policy*, <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmfaff/writev/futunion/feu08.htm> (accessed 8 Jan. 2015).

A second option would be to accept a different level of European integration. This could be achieved by replacing the 1972 Act with a 2019 Act implementing the EEA Agreement, with a view to the UK joining Iceland, Norway and Liechtenstein as EEA-EFTA States.³⁵ From a domestic legal perspective, little practical reform would be necessary, beyond the provisions of the 2019 Act. The UK would necessarily have had to remain compliant with *acquis communautaire* during exit negotiations. Since EEA law and EU law are substantively (if, perhaps, not procedurally) more similar than dissimilar, and since EEA law covers virtually no areas which EU law does not, the UK would already be fully compliant with its obligations under EEA law, rendering accession to the EFTA/EEA apparatus comparatively simple. It would also significantly diminish the number of areas of law that would be subject to radical change, thereby lessening the number of transitional arrangements that would need to be ironed out with the remaining EU Member States.

3 EUROPEAN AND INTERNATIONAL LEGAL ASPECTS

3.1 EFTA

Were the UK to wish to join EFTA, such a request would require the assent of the Icelandic, Norwegian, Swiss and Liechtenstein governments. There is little reason to believe they would oppose this. The UK is already basically compliant with the (primarily economic) criteria for joining EFTA, and the governments mentioned are likely to be happy about procuring a far-reaching free trade agreement with the UK, as well as the added influence which UK membership would garner for EFTA. Indeed, it should be noted that the UK would in fact be re-joining EFTA. The UK was a founding member of EFTA, having previously left the organization in 1973 to join the EEC. Joining EFTA would require the same basic procedures as the ratification of any international treaty.³⁶ EFTA is merely an international organization, with no legislative component whatsoever. An agreement by the UK government ratifying the Convention establishing the EFTA would be sufficient.³⁷

3.2 THE EEA AGREEMENT

Accession to the EEA Agreement as an EFTA State is likely to be more complicated, as it would require the consent not only of the other EFTA/EEA States, but also of the EU/EEA States. Nonetheless, there is good reason to suppose that EU States would be amenable to such a solution. The UK's membership of EFTA/EEA would entail that the UK would remain an EEA member – albeit under the EFTA pillar rather than the EU pillar – thus preserving many of the most valuable aspects of the UK-EU trade relationship, including access to the Internal Market and the application of the four economic freedoms, and excluding elements such as the Common Agricultural Policy and the Common Fisheries Policy, which will be examined in detail below.

The EEA Agreement contains rules on accession.³⁸ Article 128 EEA states that ‘any European State becoming a member of EFTA may apply to become a party to this Agreement. It shall address its application to the EEA Council’. This implies that the UK, after becoming an EFTA member,

³⁵ It does not follow from the EEA Agreement itself that the main part of the Agreement, i.e., the EEA equivalent to the text of the EU Treaty, containing the main provisions on four freedoms, etc., must be implemented in national law, as long as the result to be achieved therein is produced in the EEA-EFTA States' legal systems. However, such an implementing measure was considered necessary in Iceland and Norway in order to preserve the power of the Legislature to decide what rules shall apply. In Norway, s. 1 of the EEA Act of 27 Nov. 1992 No. 109 prescribes that ‘[t]he provisions of the main Agreement on the European Economic Area shall have the force of an Act of Parliament’. In Iceland, Art. 2 of Act No.2/1993 (EEA Act) provides inter alia that ‘[t]he main Agreement of the EEA Agreement shall have the force of law in this State’. See, for example, David Thór Björgvinsson, *EES-réttur og landsréttur* 78–79 (Reykjavík, Bókafélagið 2006).

³⁶ Specifically, parliamentary ratification via the Constitutional Reform and Governance Act 2010 (codifying the so-called (Ponsonby Rule’).

³⁷ The European Free Trade Association, *Convention establishing the European Free Trade Association*, done at Stockholm on 4 Jan.1960, amended at Vaduz on 21 Jun.2001.

³⁸ It should be noted that the Agreement also contains a withdrawal clause. According to the first paragraph of Art. 127 EEA, ‘each Contracting Party may withdraw from EEA Agreement provided it gives at least twelve months’ notice to the other parties’. Withdrawal from the EEA Agreement also leads to a withdrawal from the Surveillance and Court Agreement (cf. Art. 50(1) of that Agreement), the Standing Committee Agreement (cf. Art. 12(1) of the Agreement) and the Parliament Agreement (cf. Art.15 (1) of that Agreement).

disposes of the right to apply to become a member of the EEA.

From a European perspective, there would be a number of significant advantages to the UK joining the EEA. A committed partner, working on terms that are to her liking, providing access to British markets and investment via an institutional apparatus, would certainly be preferable to an isolated UK. It would, in fact, be in the interest of the EU/EEA States to back the UK's accession to the EEA Agreement. Moreover, it would also be easier to 'sell' an EEA-based solution to the public of the EU States, since the UK would not be procuring a bespoke, 'parachute' deal, but would rather be entering into a multilateral agreement on terms concomitant with those of other members, removing any suspicion of preferential treatment.

3.3 THE UK AS AN EFTA/EEA STATE

The EEA Agreement brings together the EU Member States and the three EEA-EFTA States – Iceland, Liechtenstein and Norway³⁹ – in a single Internal Market. It contains rules on the four freedoms and competition, which are further developed in secondary law.⁴⁰ In the UK context, this entails that many rights and obligations in domestic law, incumbent through the operation of EU law – transposed via legislation or otherwise – will continue to apply, solving the lion's share of the legal problems thrown up by any exit from the EU. It should further be noted that the EEA Agreement provides for the establishment of a separate and independent European Court – the EFTA Court – to rule on questions of EEA law for the EFTA States. The UK, in joining EFTA and the EEA, would become subject to its jurisdiction,⁴¹ so it is well to examine the likely effect of this on UK domestic law, given the extent of the impact of the ECJ's judgments and doctrines over the past decades.

3.4 THE EFFECT OF EEA LAW IN THE UK

3.4[a] *Legal Doctrines*

The EEA Agreement stipulates that it does not entail a transfer of legislative powers.⁴² Unlike EU law, under the EEA Agreement, even regulations must be transposed into the domestic legal order of dualist States (like the UK⁴³) in order to become applicable at the national level. UK courts would thus not be required to apply a rule of EEA law in the national legal order when that rule is not transposed, or is inadequately transposed, into domestic law.⁴⁴

However, with regard to the interpretation and enforcement of EEA law, it is germane to note that, while the EFTA Court may not avail itself of the doctrines of direct effect or supremacy, it has nonetheless employed alternative – albeit milder – doctrines, which may affect the UK legal order, namely conform interpretation, the provisions of Protocol 35 to the EEA Agreement, and the doctrine of State liability.

3.4[b] *Conform Interpretation*

Much like the CJEU, the EFTA Court has emphasized the doctrine of conform interpretation, stating that national courts 'must apply the interpretative methods recognized by national law as far as

³⁹ Referred to in the following as 'the EFTA States'.

⁴⁰ In addition to the four freedoms, the EFTA States also participate in the so-called flanking policies and in programmes of the EU in areas such as research, education and environment.

⁴¹ Once an EFTA State has acceded to the EEA Agreement, it has an obligation also to accede to the Surveillance and Court Agreement (cf. Art. 51 of the Agreement), the Agreement on a Committee of Members of Parliament of the EFTA State (cf. Art. 14 of that Agreement) and the Standing Committee Agreement (cf. Art. 13 of that Agreement). The Court of Justice of the European Union (CJEU, formerly ECJ) has no jurisdiction vis-à-vis the EFTA EEA States. See Case C-300/01 *Salzmann II*, ECR I-4899, paras 68–69 (2003).

⁴² The preamble to Protocol 35 explicitly proclaims that no legislative powers have been transferred to supranational institutions. See Leif Sevón, *Primacy and Direct Effect in the EEA. Some Reflections*, Festschrift til Ole Due. C.E.C. (Gads Forlag 1994) 339–354 at 350–351.

⁴³ See Lord Denning's statement in *Blackburn v. Attorney-General*, 2 All ER 1380, 1382 (1971). This position was confirmed by *Attorney General (McWhirter) v. Independent Broadcasting Authority*, 1 All ER 689 (1973).

⁴⁴ See Case E-1/07 *Criminal proceedings against A*, EFTA Court Report 245, paras 40–41 (2007). This holding was confirmed in Cases E-9/07 and E-10/07 *L'Oreal Norge*, EFTA Court Report 258 (2008). See also the ECJ's Opinion 1/91, ECR I-6084 (1991), later confirmed in Opinion 1/92, ECR I-2825 (1992).

possible in order to achieve the result sought by the relevant EEA rule'.⁴⁵ This method is frequently employed by national courts to give effect to international law within the domestic sphere.

3.4[c] Protocol 35

During the EEA negotiations, the question as to whether the principles of direct effect and primacy (supremacy) should be included in the EEA Agreement was raised. The Community negotiators believed that EEA law should have a comparable level effectiveness in the EFTA States to that which EU law has in the Member States. The EFTA negotiators, on the other hand, found the principles of direct effect and supremacy incompatible with the formal status of the Agreement, as well as with their national constitutions. The result was a compromise, which is now formulated in Protocol 35 to the Agreement.⁴⁶ The Sole Article of Protocol 35 provides that:

For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases.

As noted by Leif Sevón, Protocol 35 is 'closely related to the issue of primacy'. However, there are important differences. Sevón highlights two key expressions, which differentiate the principle in Protocol 35 from the principles of direct effect and supremacy. First, although the provision speaks of 'implemented EEA rules', it remains silent concerning the direct effect of non-implemented acts.⁴⁷ Second, the protocol only applies to conflict between EEA law and 'other statutory provisions'. As noted by Sevón:

[t]he word 'statutory' was used partly in order to avoid application of the Article to provisions in the Constitutions of the respective Contracting Parties. The reason for that was that a revision of the Constitution would have caused insurmountable political difficulties for several of EFTA States.⁴⁸

In its case law, the EFTA Court has, however, repeatedly emphasized the strong status of the Protocol, by applying it as a principle that entails that implemented EEA law must prevail over conflicting internal provisions, provided that they are unconditional and sufficiently precise.⁴⁹ One might thus presume that EEA provisions enjoy similar standing in the EFTA States and EU Member States if they have been transposed into national law.

In Norwegian domestic jurisprudence, Protocol 35 is understood as a principle of presumption, by which the legislator is presumed, absent express intent, not to have wished to legislate contrary to EEA law.⁵⁰ This interpretive device is identical to that employed in the UK, where it is assumed by national courts that Parliament does not seek to legislate contrary to EU law, representing the basis for according priority to EU law over subsequent contrary national rules.⁵¹ Parliament may therefore overrule implemented EEA law if it expressly enacts legislation to that end, though it is important to note that such an eventuality would render the EFTA State in question in violation of the EEA Agreement, potentially giving rise to state liability actions before national courts or infringement proceedings initiated by the EFTA Surveillance Authority.

⁴⁵ Case E-1/07 *Criminal proceedings against A*, EFTA Court Report para. 39 (2007). The Court has furthermore held that, 'when interpreting national law, national courts will consider any relevant element of EEA law, whether implemented or not.' Case E-12/13 *EFTA Surveillance Authority v. Iceland*, not yet reported, para.74 (2014).

⁴⁶ For information on the reasons that resulted in the formulation on Protocol 35, see F. Sejersted, 'Between Sovereignty and Supranationalism in the EEA Context – On the Legal Dynamics of the EEA-Agreement', *The European Economic Area – Norway's Basic Status in the Legal Construction of Europe*. (Berlin: BerlinVerlag Arno Spitz, 1997) p. 58 and L. Sevón, 'Primacy and Direct Effect in the EEA. Some Reflections', *Festskrift til Ole Due* 350–351 (Gads Forlag 1994).

⁴⁷ L. Sevón, *ibid.*, p.350.

⁴⁸ L. Sevón, *ibid.*, p.351.

⁴⁹ Case E-1/01 *Einarsson* [2002] EFTA Court Report I, para.50; Case E-2/12 – *HOB-vín* [2012] EFTA Ct. Rep 1092, paragraph 122; Cases E-11/12 *Koch and Others*, judgment of 13 Jun. 2013, not yet reported, para. 119; Case E-6/12 *EFTA Surveillance Authority v. Norway* [2013] EFTA Ct. Rep 618, paragraph 66; Case E-15/12 *Wahl* [2013] EFTA Ct. Rep. 534, para. 54 and Case E-12/13 *EFTA Surveillance Authority v. Iceland* [2014], not yet reported, para.73.

⁵⁰ See Fredrik Sejersted, *Between Sovereignty and Supranationalism in the EEA Context – On the Legal Dynamics of the EEA-Agreement, The European Economic Area – Norway's Basic Status in the Legal Construction of Europe* 60 (Berlin Verlag Arno Spitz 1997), and Henrik Bull, *The EEA Agreement and Norwegian Law*, *Eur. Bus. L. Rev.* 12, 291–296, 296 (1994).

⁵¹ W. Phelan, *Political Self-Control and European Constitution: The Assumption of National Political Loyalty to European Obligations as the Solution to the Lex Posterior Problem of EC Law in the National Legal Orders*, 16 *Eur. L. J.* 253–272, at 257–258 (2010).

4 STATE LIABILITY

EEA law, like EU law, contains the doctrine of State liability.⁵² If harmonious interpretation of domestic legislation with EEA law is not possible, an individual may thus be able to obtain compensation from the EEA Member State.⁵³

The scenario sketched out above would allow economic operators and individuals to preserve acquired rights concerning trade with Europe, permitting a smooth transition, including continued access to the Internal Market, to occur. It is useful in this context to have regard to the substantive provisions of EEA law, in order to garner a deeper understanding of its potential effect upon the UK legal system.

4.1 HOW THE UK AS AN EFTA STATE COULD CONTRIBUTE TO DECISION-SHAPING, CULMINATING IN NEW EEA LAW

The EEA was conceived to deepen and enhance cooperation between the EU and EFTA. It was clear that such cooperation would need to be based on reciprocal (or quasi-reciprocal) rights and obligations. It also required an assurance that the EFTA States would comply with such obligations. Against this background, the EEA institutional framework was developed. The result was several interacting independent bodies assembled in a ‘two-pillar’ structure.

The unique two-pillar institutional apparatus reconciles far-reaching economic integration with the rejection of supranationalism by the EEA-EFTA States. The structure of the EEA Agreement implies that decisions adopted by institutions on the EU side are not directly applicable in the EFTA pillar. The Agreement is administered, monitored and adjudicated in two independent pillars, with the EFTA States having their own court and surveillance authority, separate from the CJEU and the Commission.⁵⁴

One of the central features of the Agreement is the manner in which it is constantly updated in line with new EU legislation (albeit only in areas that are EEA-relevant).⁵⁵ This is accomplished by incorporating the relevant legislative acts, sometimes with textual adaptations appended thereto,⁵⁶ into the Agreement via the EEA Joint Committee, via so-called Joint Committee Decisions (JCD). The fact that EEA rules are continuously updated with addition of new EEA-relevant EU legislation has led David Cameron and others to discount the EEA option, as the UK would have no say over its rules.⁵⁷ However, such a position is misguided. In the event of a ‘Brexit,’ EFTA-EEA membership represents the only pre-existing institutional *modus operandi* for the UK to maintain a voice within the EU apparatus. Further, this model explicitly provides for a number of ways in which the UK may exercise influence over the rules that apply to it at European level.

Cameron’s disquiet is likely based upon the – not unimportant – fact that the EFTA States do not possess the right to vote in the decision-making process leading to the adoption of new *acquis* on the EU side. However, the EFTA States’ involvement in the EU’s decision-shaping process, in the phases that precede the adoption of new secondary legislation in the EU, is constant. As long as the subject falls within the scope of the Agreement,⁵⁸ they are entitled to participate in the EU decision-shaping

⁵² See Case E-9/97 *Sveinbjörnsdóttir v. Iceland*, EFTA Court Report 95 (1998). For a recent discussion on State liability in EEA law, see Skúli Magnússon & Ólafur Hannesson, *State Liability in EEA Law: Towards Parallelism or Homogeneity?*, 38(2) Eur. L. Rev. 167 (2013) and Halvard H. Fredriksen, *State Liability in EU and EEA Law: The Same or Different?*, 38(6) Eur.L.Rev.884–895 (2013).

⁵³ The three conditions for EEA State liability, which are identical to the conditions for state liability according to EU law, are as follows: (1) the EEA rule infringed must be intended to confer rights on individuals; (2) the breach must be sufficiently serious and (3) there must be a direct causal link between the breach of the obligation and the damage suffered by the injured parties.

⁵⁴ On the two-pillar structure, see Carl Baudenbacher & Henrik Bull, *European Integration Through Interaction of Legal Regimes* (Senter for Europarett, IUSEF, Universitetsforlaget, University of Oslo 2007).

⁵⁵ See Art.102 of the EEA Agreement.

⁵⁶ Such amendments adapt the content of the *acquis* to EFTA States’ requirements and specificities.

⁵⁷ Jóhanna Jónsdóttir, *It would be difficult for the UK to follow the ‘Swiss’ or ‘Norwegian’ models as an alternative to EU membership*, London School of Economics, European Politics and Policy Blog (28 Jan. 2013), <http://blogs.lse.ac.uk/europpblog/2013/01/28/uk-eu-euroscepticism-norway-model-swiss-modelelefta/> (accessed 5 Jan. 2015).

⁵⁸ Clearly, in instances where the legislation is not EEA-relevant, there is no interest for the EFTA States in participating.

process at all stages, disposing of a right to be heard and to be consulted on substantive matters.⁵⁹ In particular, during this process, relevant experts on the EFTA side shall, for example, be consulted by the European Commission, in the same manner in which it consults relevant EU experts, beginning from the stage at which new legislation is being drawn up by the European Commission.⁶⁰ The EFTA States can also, for example, request a preliminary exchange of views in the EEA Joint Committee on legislative proposals.⁶¹

In addition, the two-pillar structure of the Agreement implies that decisions adopted by institutions on the EU side are not applicable within the EFTA pillar, unless incorporated into the EFTA pillar via a separate and independent Joint Committee Decision (JCD).⁶² As a result, it is inaccurate to contend that the Agreement provides for the adoption of EU law without the EFTA States influencing its content. In this respect, it is worth noting that the EFTA States – and non-Governmental organizations representing EFTA State interest groups – including the Norwegian regional offices, have been successful in lobbying activities in Brussels.⁶³

Furthermore, it is not uncommon that the EFTA States have managed to negotiate with the EU side a (partial) derogation from, or adaptation to, the material scope of new EU legislation, which is officially agreed upon and written into the Joint Committee Decision in question.⁶⁴ This may occur, for example, in cases where the situation in an EFTA state differs substantially from that prevailing in any EU Member State and the EU act does not cater to these specific situations.⁶⁵ Furthermore, the possibility for stalling the implementation of EEA-relevant acts into the Agreement has been referred to, in a recent report produced by a committee appointed by the Norwegian Government, as a tool that

⁵⁹ See Ch.2 of Part VII of the Agreement, most notably Arts 5,99–100 thereof. Experts from the EFTA States shall be consulted during the preparatory phase, even prior to new legislative proposals being made, in the same way as experts from the EU States are consulted by the Commission, in accordance with Art. 99(1) of the Agreement. The EFTA States also have access to programme committees (Art. 81 EEA); and other committees in specific areas (Art. 101 EEA). Additionally, there are specific comitology committees established under the Agreement (Protocol 1 to the Agreement and Protocol 1 to the Surveillance and Court Agreement; see also Decisions No.3/2012/SC and 4/2012/SC of the Standing Committee of the EFTA States), which have decision-making powers concerning, inter alia, specific notifications, as well as applications for derogations and exemptions for the EFTA States vis-à-vis relevant secondary legislation.

⁶⁰ *Ibid.*

⁶¹ Article 99(2) EEA.

⁶² This principle is expressed both in the Agreement itself, as well as in paragraph 3 of Protocol 1 on Horizontal Adaptations.

⁶³ In this context, the Green Paper on a future Maritime Policy for the Union, which was influenced heavily by Norway and Iceland, is worth mentioning. See J. Borg, 'Listening to EFTA – the View from the EU, in *EFTA Bulletin on Decision Shaping in the European Economic Area* 10 (2009). Additionally the report of Europautredningen [Norwegian EEA Review Committee] *Utenfor og innenfor -Norges avtaler med EU* 193–194 (Norges Offentlige Utredninger, NOU 2012: 2) refers to a few of the instances in which the Norwegian Government has attempted to influence new EU rules at a preparatory stage. One example is the Norwegian Government's lobbying for the amendment of proposed rules on consumer protection. Whereas the report states that it is unknown whether the Norwegian involvement was the reason for the changes ultimately being made to the proposed Directive in question, the changes made were indeed in line with the Norwegian position. K.A. Eliassen & P. Peneva, *Norwegian Non-governmental Actors in Brussels 1980 – 2010, Interest Representation and Lobbying* (Europautredningen, rapport nr. 5, 2011). The report also provides a number of examples of Norwegian Non-governmental (including Norwegian regional offices) lobbying successes, including *inter alia*: (i) the launch of new energy research priorities and new major projects in this sector; (ii) a new strategy on blood alcohol levels, now below 0.5 in most Member States; (iii) lobbying related to the EU Carbon Capture and Storage Directive; (iv) the obtaining of a six months in-phasing period for low sulphur fuel ports due to expert advice provided to the Commission/Comitology Committee during last minute decision making; (v) the abandonment of anti-dumping measures against farmed trout and farmed Atlantic salmon from Norway; (vi) the adoption of the emissions trading scheme – and in particular, the recognition therein of how CO₂ impacts on power prices, and the risk of carbon leakage;(vii) significant Norwegian influence was visible in the Roaming regulation adopted in 2009 – the Norwegian organization's intervention was the basis for specific considerations by the Commission and the Parliament, which resulted in a positive outcome for the organization in question;(viii) elements of the working time directive and service directives.

⁶⁴ See Art.102(1) EEA. The Joint Committee consists of representatives of the EU on the one hand, and the EFTA States, speaking with one voice, on the other, cf. Art.93(2).

⁶⁵ For example, the derogations provided for Liechtenstein in the veterinary field and in the fields of free movement of persons and self-employed professionals. Other examples include the exemption from the feed ban in the TSE field, cf. point 2 of Annex IV to Regulation (EC) No. 999/2001, allowing Iceland, as the only EEA State, to continue to feed fishmeal to ruminants, pursuant to Joint Committee Decision No.133/2007; and the lack of a possibility to deliver detailed opinions, with all their legal implications, under Art. 9 of Directive 98/34 to the EFTA States, pursuant to Joint Committee Decision 16/2001, which substantially adapted the wording of that Article. Statistics reflecting the quantitative status of adaptation texts and derogations as of June 2011 were compiled by Christian Frommelt & Sieglinde Gstöhl, *Statistical Overview of Europautredningen's Report no. 18, in Liechtenstein and the EEA: The Europeanization of a (Very) Small State* Chapter 4.4.2, 45 (2011), demonstrating that out of a total of 2372 legal acts, 1119 derogations were granted to the EEA EFTA States. It is not possible to qualitatively assess the nature of these, but many of these are of course of a rather technical nature, owing to the 'small State' status of Liechtenstein, and similar EFTA specificities.

successive Norwegian governments have made use of on a ‘not infrequent basis’.⁶⁶ The possibilities for stalling and delaying incorporation of new acts into the Agreement are supplemented by a more formal possibility, foreseen by the Agreement, to notify constitutional requirements, i.e., a need for parliamentary approval in one or more EFTA States, thereby delaying the entry into force of the relevant Joint Committee Decision, and ultimately the secondary legislation in question, in the EFTA States.⁶⁷

Due to the EFTA States’ rights and prerogatives in both processes, which culminate in the entry into force of new European law in the EFTA States, it would hardly be correct to characterize the EFTA States’ Agreement with the EU as constituting a ‘fax democracy’ model.⁶⁸

4.2 SUBSTANTIVE PROVISIONS OF EEA LAW

Materially, the EEA is based upon primary EU law and treaties, in addition to secondary law, such as regulations and directives commonly referred to as *acquis communautaire*, extending the Internal Market of EU Member States to the three EFTA-EEA States. The Agreement also includes issues pertaining to several horizontal provisions relevant to the four freedoms.⁶⁹ The main part of the EEA Agreement has not been altered since it was signed 2 May 1992. It is therefore approximately based upon the EEC Treaty as it stood after the Single European Act, i.e., incorporating the Single Market. New policy areas, which were not present when the Agreement was drafted, can obviously not affect its scope or interpretation, even if they affect the functioning of the Internal Market.⁷⁰

In addition to the differences resulting from the lack of continual updating of the Agreement, the *objects and purposes* of EU law and EEA law are very different.⁷¹ The Agreement’s essential ambition, per Article 1(1), is to strengthen and intensify trade and economic relations between the Contracting parties by eliminating obstacles to trade and free movement. It thus lacks the overall goal, enshrined in the EU treaties, of an ever-closer union of peoples, and does not share the commitment to a new political community. The Agreement does not cover the Economic and Monetary Union (EMU), the Common Foreign and Security Policy (CFSP) or Justice and Home Affairs. Moreover, the Agreement is explicitly restricted to nationals of the EU and EFTA States. Therefore, secondary legislation concerning third-country nationals is not part of the Agreement.⁷²

Further, important sectors of the Internal Market are not included in the EEA Agreement. Contrary to the situation within the EU, the *harmonization* of tax and excise falls outside the material scope of EEA law.⁷³ Thus, none of the directives on direct and indirect tax legislation are part of EEA law. However, although the tax system of an EEA/EFTA State is not, as a general rule, covered by the EEA Agreement, the EFTA States must, nevertheless, exercise their taxation power consistently with

⁶⁶ Europautredningen, *Utenfor og innenfor -Norges avtaler med EU* (Norges Offentlige Utredninger, NOU 2012:2) 96.

⁶⁷ See Art. 103(1) of the Agreement.

⁶⁸ This notion, denoting the UK being bound by regulations which are ‘faxed’ from Brussels, to be ‘rubber stamped’ by the UK administration, has been employed by several voices in the UK public debate. See for example House of Commons Hansard Debates of 8 Jun. 2005, part 17: [http://www. publications.parliament.uk/pa/cm200506/cmhansrd/vo050608/debtext/50608-17.htm](http://www.publications.parliament.uk/pa/cm200506/cmhansrd/vo050608/debtext/50608-17.htm) (accessed 3 Jan. 2015).

⁶⁹ These include competition law and other common rules, such as those relating to State aid and public procurement, consumer protection and company law. The EFTA States also participate in so-called ‘flanking policies’ and in EU programmes in areas such as research, education, and the environment.

⁷⁰ See, for example, the Case E-1/01 *Einarsson*, EFTA Court Report 1, para. 45 (2002), where the EFTA Court refused to arguments based on provision of the EC Treaty introduced by the Treaty of Amsterdam.

⁷¹ Opinion 1/92, ECR, I-2821, para. 18 (1992). See also discussion in Skuli Magnússon, ‘Um hið sérstaka eðli samningsins um evrópska efnahagssvæðið’ in Ármann Snævarr et al. (eds), *Afmælisrit til heiðurs Gunnari G. Schram sjötugum* (Reykjavík, Almenna bókafélagið, 2002).

⁷² It could be mentioned here that in the EU, the ECJ has held that returning Union citizen could not derive a right of residence for a third-country national spouse in her home State on the basis of Directive 2004/38. Such rights can, however, be claimed on the basis of the citizenship articles (see case C 456/12O&BEU:C:2014:135, para. 37). While Directive 2004/38, which seeks to strengthen the right of Union citizens to move to and reside in any Member State, has been transposed into the EEA Agreement (Decision of the EEA Joint Committee No 158/2007 of 7 Dec. 2007), the EEA Agreement does not include the concept of EU Citizenship. Indeed, Decision 158/2007 of the Joint Committee and the declaration annexed thereto state that the concept of Union citizenship does not apply within the EEA legal order, and that the case law of the Court of Justice of the European Union (‘Court of Justice’) relating to this concept is of no relevance within the EEA. Thus, the rights of third-country nationals seem narrower in the EEA than within EU law.

⁷³ See, for example, Case E-1/01 *Einarsson*, EFTA Court Report 1, para. 17 (2002).

EEA law.⁷⁴ This means that taxation rules may not hinder persons from exercising the four freedoms.

In addition, and crucially, while the EU Treaty establishes a customs union that includes all Member States, the Agreement establishes a free trade area (and Internal Market).⁷⁵ The EEA States do not have common EEA rules on customs towards third countries. Obligations arising from harmonized EU legislation concerning customs, and customs tariffs towards third countries, would consequently be irrelevant for the UK as an EFTA-EEA State. It follows that the general provisions on the free movement of goods do not provide for rights for free circulation of non-originating products.⁷⁶

The Agreement contains no common trade policy towards third countries; consequently, the EFTA States remain free to conclude treaties and agreements with third countries in relation to foreign trade.⁷⁷ This would allow the UK a free hand in establishing free trade agreements with non-EU States, which is not presently the case.⁷⁸ Were the UK to become an EFTA/EEA State, it would only enjoy individual representation in the WTO, on the same basis as Iceland and Norway do at present. The EU would no longer act on behalf of the UK in such fora. Such a development could enable the UK to tailor its external trade policy toward the rest of the world, rather than accepting a ‘one-size-fits-all’ model agreed at EU level, as is presently the case. However, as a matter of actual political influence, it would also lose the strength it presently possesses as part of the world’s largest WTO trading bloc, thus becoming a significantly smaller player in multilateral negotiations. For example, it looks clear that a comprehensive transatlantic trade and investment negotiation, such as that currently pending between the US and the EU, would see the UK completely side-lined if they were to leave the EU, though the British government would still dispose of the possibility of negotiating a bespoke deal with the US, much as Iceland has done with China.⁷⁹

4.2[a] Fisheries

While the UK’s Exclusive Economic Zone (for fisheries) is amongst the largest in the EU, Britain receives only a fraction of the rights associated with the zone, with other EU Member States being allocated fishing quotas in accordance with their population, rather than their sovereign rights under international law. Moreover, ‘quota-hopping’ entails that even the allocated British share of fishing rights often ends up being consumed by foreign commercial operators who register a portion of their business in the UK.⁸⁰ The UK has been barred from legislating to prevent ‘quota-hopping’ by EU law.⁸¹ Both of these factors significantly reduce the potential for the UK to exploit its fisheries industry. The Common Fisheries Policy (CFP) has further been argued by commentators to have resulted in disastrous consequences for the environment, including the dumping of dead fish in order to comply with EU-imposed quotas.⁸²

⁷⁴ See Cases E-6/98 *Norway v. EFTA Surveillance Authority* [1999] EFTA Court Report 74, paragraph 34; E-1/01 *Einarsson* [2002] EFTA Court Report 1, paragraph 17; E-1/03 *EFTA Surveillance Authority v. Iceland* [2003] EFTA Court Report 143, para.26.

⁷⁵ See Case E-2-97 *Maglite*, EFTA Court Report 163, para.25 (1997).

⁷⁶ It is explicitly stated in Art. 8(2) EEA that Arts 10 to 15, 19, 20 and 25 to 27 shall apply only to originating products unless otherwise specified.

⁷⁷ See Case E-2-97 *Maglite* EFTA Court Report 163, para.27 (1997). It should be noted that the EFTA has concluded several Free Trade Agreements with third countries. For the full overview of these, see: <http://www.efta.int/free-trade/free-trade-agreements>.

⁷⁸ For EU States, the TFEU foresees that the negotiating mandate in areas covered by the common trade policy is with the Commission, which conducts negotiations with various trade partners and trade organizations on behalf of the EU, cf. Part Five, Titles I and II of the TFEU. However, the EU common trade policy and the European External Action Service are not part of the EEA Agreement.

⁷⁹ Iceland used the freedom afforded by its position as an EFTA/EEA State to become the first European country to conclude a Free Trade Agreement with China in 2013. See hyperlink on the Icelandic Ministry of Foreign Affairs’ website: <http://www.mfa.is/foreign-policy/trade/free-trade-agreement-between-iceland-and-china/>.

⁸⁰ See European Commission, *The Common Fisheries Policy – A User’s Guide* (2009) http://ec.europa.eu/fisheries/documentation/publications/pcp2008_en.pdf (accessed 11 Feb. 2014).

⁸¹ See *R.v.Secretary of State for Transport, ex parte Factortame* (no.2), 1 AC 603 (1991). This case concerned the 1988 Merchant Shipping Act, enacted in order to prohibit quota hopping (the practice of obtaining the right to catch a part of a country’s national quota for fish in European waters by buying licences from its fishermen). However, the ECJ ruled that the Act contravened the EU’s free movement and equal access rules, and the House of Lords was eventually forced to rule the legislation as incompatible with the 1972 Act.

⁸² Ruth H.Thurstan, Simon Brockington & Callum M. Roberts, *The Effects of 118 Years of Industrial Fishing on British Bottom Trawl Fisheries*, *Nature Commun.* 1, 1 (2010). It is worth noting that the EU has recently taken legislative action to counter the

The CFP is excluded from the EEA Agreement. Fisheries are regulated by the general rules of the EEA Agreement only to a limited degree. The main part of the Agreement does not apply to fish, which is regulated by specific arrangements.⁸³ In practice, bilateral agreements generally determine the EFTA States' rights regarding fisheries under the Agreement.⁸⁴ Norway, for example, has such an agreement with the EU States, which, *inter alia*, establishes the Contracting Parties' right to fish certain agreed upon quotas in each other's waters.⁸⁵ However, the UK would be under no legal obligation to pursue a similar course. The UK could content itself to exploiting its own EEZ, as regulated by the international law of maritime delimitation, to which it currently only receives a partial allotment via the CFP. This could enable the creation of new revenue streams and new jobs.

4.2[b] Agriculture

The main material provisions on the EEA four freedoms apply first and foremost to trade in industrial products, and only to a much more limited extent to trade in agricultural products and foodstuffs.⁸⁶ Wine is, for example, excluded, as are a variety of agricultural and fishery products.⁸⁷ Nevertheless, even if the main provisions of the EEA Agreement do not apply to such product categories, certain technical rules dealing with these subject areas have been incorporated into Annexes I and II to the EEA Agreement, as well as into Protocol 47 to the EEA Agreement, with a view, *inter alia*, to facilitating trade in these products within the EEA area (both between the EFTA States and between the EFTA States and the EU). Furthermore, as the EFTA States wished to protect domestic agriculture, the EU Common Agricultural Policy (CAP) was excluded from EEA law.

Not being part of the CAP or the CFP, UK agricultural and fisheries produce will no longer be subject to the EU's common external tariff regime. This would imply that the UK government can unilaterally establish price controls on imports and exports of such products.

4.3 ENFORCEMENT OF EEA LAW

The EFTA Surveillance Authority (the supervisory body for the EFTA-EEA States) possesses powers corresponding to those under Article 258 TFEU, which allow it to commence infringement proceedings against EFTA-EEA States for non-compliance with EEA law. However, it should be emphasized that the competences of the Surveillance Authority and the EFTA Court, insofar as they may be seen to affect the EFTA States' sovereign rights, are more restricted than those of their EU counterparts. In particular, the EFTA Court has no power to impose a financial penalty upon States in cases of non-implementation of its judgments.⁸⁸

Furthermore, unlike Article 267 TFEU, national judges are never obliged to refer cases for advisory opinions to the EFTA Court,⁸⁹ and EFTA States can limit courts' power to request an

practice of discarding dead fish, and that the New Common Fisheries Policy, in force since 1 Jan. 2014, bans this practice outright. See ENS Newswire, *EU Bans Fish Discards Under New Common Fisheries Policy* (10 Dec. 2013), <http://ens-newswire.com/2013/12/10/eu-bans-fish-discards-under-new-common-fisheries-policy/> (accessed 11 Feb. 2014).

⁸³ Prescribed, *inter alia*, in Art. 20 EEA and Protocol 9 to the EEA Agreement concerning trade in fish and other marine products. Fishery products, insofar as they do not fall under Chs 25 to 97 of the Harmonized Commodity Description and Coding System (HS) or are specified in Protocol 3, fall outside the general scope of application of the EEA Agreement.

⁸⁴ Foreseen in Art.2(3) second subparagraph of Protocol 9 to the Agreement.

⁸⁵ T. Foss, *Analyse av Norges avtaler og samarbeid med EU på fiskeriområdet* (Europautredningen, rapport nr. 4,2011) at 8 onwards.

⁸⁶ This follows from Art. 8(3) (a) and (b) of the Agreement, which clarifies that the provisions of the Agreement only apply to products falling within Chs 25–97 of the Harmonized Commodity Description and Coding System ('HS') and to products specified in Protocol 3 of the Agreement.

⁸⁷ See Case E-1/94 *Restamark*, REC 17, para.40 (1994–95); Case E-1/97 *Fridtjof Frank Gundersen v. Oslo kommune*, REC 110, para. 8 (1997); Case E-9/00 *ESA v. Kingdom of Norway*, REC 74, para. 30 (2002).

⁸⁸ Cf. Art. 260(2) and (3) TFEU. See, in this regard Case E-18/10, *ESA v. Norway*, EFTA Court Report 202 (2011). Concerning the issue of financial penalties, the Court made an explicit comparison between the two rules in terms of their legal effects, and stated that under Art.260(2) TFEU, the ECJ may impose a lump sum or penalty payment to be paid by the Member State, whereas '[t]he SCA does not provide for such a system of penalty payment as regards the non-compliance of the EFTA States with judgments by the EFTA Court'.

⁸⁹ See, for example, Morten Broberg & Niels Fenger, *Preliminary References to the European Court of Justice* 17 (Oxford 2010).

opinion.⁹⁰ The extent of the right of lower courts to ask for advisory opinions is exclusively a matter of domestic law.⁹¹ This could limit the scope for preliminary references to cases involving courts of final instance in the UK, potentially significantly reducing the number of such references on an annual basis.

The wording of Article 34 of the Surveillance and Court Agreement (SCA) also differs from that of Article 267TFEU, insofar as CJEU rulings are binding for the Member States, whereas the EFTA Court only has competence to dispense non-binding ‘advisory’ opinions.⁹² Thus, the EFTA Court ‘is not provided with exclusive rights to interpret the EEA Agreement in relation to the EFTA-States’,⁹³ rather, the Norwegian Supreme Court ‘regards itself both formally competent and substantially qualified to interpret provisions of [implemented] EEA law’.⁹⁴ This may be paralleled with the UK courts’ power to interpret and apply EU law that has been implemented into the domestic legal order. When we compare the number of references on an annual basis from 1995 to 2014 between the EU States and the EEA/EFTA States, we can see that the number of referrals involving the EFTA States is strikingly low.⁹⁵ The fact that the EFTA States’ courts have discretion regarding whether or not to make a reference is one factor explaining the paucity of cases referred. This stands in contradistinction to EU law, where any court at any level *may* refer, and where courts of final instance *must* refer where necessary.⁹⁶

The above considerations, in addition to the fact that not all EU law is EEA-relevant (e.g., as outlined above, the CAP and CFC are generally excluded), and that the law that is EEA-relevant is generally concerned with the Internal Market – something about which the UK population has historically been positive⁹⁷ – indicates that the UK could expect to enjoy a co-operative, productive relationship with the EFTA institutions.

4.4 FINANCIAL IMPLICATIONS OF EFTA/EEA MEMBERSHIP

The financial implications of the UK’s prospective membership of EFTA/EEA cannot be reduced to a

⁹⁰ Article 34(3) SCA permits the EFTA States to limit, in their internal legislation, the right to request an advisory opinion to courts and tribunals against whose decisions there is no judicial remedy under national law. Austria had imposed such a limitation before it moved into the EU.

⁹¹ See Case E-10/04 *Piazza*, EFTA Court Report 79, para.23 (2005).

⁹² It is clear that the Norwegian and Icelandic Supreme Courts do not consider the EFTA Court’s opinions as binding. Fredriksen notes that, in its STX case of 5 Mar. 2013 (HR-2013-00496), the Norwegian Supreme Court openly departed from the opinion it had requested from the EFTA Court, without basing itself on any recent supporting case law of the ECJ. See Halvard Haukeland Fredriksen, *Offentligrettslig erstatningsansvar ved brudd på EØS-avtalen 355* (Fagbokforlaget Vigmostad & Bjørke AS 2013). In cases where advisory opinions have been requested, the Icelandic courts have usually reiterated some form of the statement that although the opinions of the EFTA Court are not binding under Icelandic law, the Icelandic courts should take them into regard when interpreting the provisions of the EEA Agreement as long as there are no particularly compelling reasons that require exemption from them. See Þorgeir Örlygsson, *Iceland and the EFTA Court. Twelve years of Experience* in Mario Monti et al. (ed.), *Economic Law and Justice in Times of Globalisation*, Festschrift for Carl Baudenbacher 233–241 (Nomos-Verlag, Baden-Baden 2007).

⁹³ See Hans Petter Graver, *The Effects of EFTA Court Jurisprudence on the Legal Orders of the EFTA States*, *The EFTA Court Ten Years On 79–99* at 90 (Hart Publishing 2005).

⁹⁴ *Ibid.*

⁹⁵ 42 cases were referred from Norway, 27 from Iceland, 113 from Denmark, 114 from Sweden, 91 from Finland and 447 from Austria. It must be noted, however, that the statistics from the different EU States are not fully comparable to the number of EFTA States’ requests to the EFTA Court, since EU law is more comprehensive than the EEA Agreement. See Halvard Haukeland Fredriksen, *The Two EEA Courts - a Norwegian Perspective* EFTA Court (ed.) *Judicial Protection in the European Economic Area* 201 (German Law Publishers, Stuttgart 2012).

⁹⁶ In this regard, it is perhaps germane to note that the UK courts have consistently taken this obligation quite seriously. Vink et al. note that while Italy and Germany have clearly been the most frequent Member States to refer, the UK sits in a ‘middle’ tier, alongside Austria, Belgium, France, and the Netherlands, submitting about twenty such references per year between 1995 and 2006. See M. Vink, M. Claes & C. Arnold, *Explaining the Use of Preliminary References by Domestic Courts in EU Member States: A Mixed-Method Comparative Analysis*, Paper presented in Panel 6B ‘Judicial Politics in the EU and Beyond’, 11th Biennial Conference of the European Union Studies Association, Friday 24 Apr. 2009, Marina del Rey (2009) 5.

⁹⁷ This statement is borne out above all by the 1975 Referendum on continuing EEC Membership, where 67% of voters supported remaining within the Community. However, since then, things have clearly changed somewhat, with British Euroscepticism being predicated on ‘the steady creep of EU powers and regulations, into the justice system, the workplace and beyond... Many Britons feel they have ended up in a power hungry, supra-governmental and economically moribund arrangement, which they never voted to join, and would not have done.’ See Why Britain is so Eurosceptic, ‘The Economist’, 3 Mar. 2014. <http://www.economist.com/blogs/economist-explains/2014/03/economist-explains-1> (accessed 10 Mar. 2015).

single figure, or indeed a single set of figures, which are certain to be reliable. Most likely though, the maintenance of UK access to the Internal Market will be of great economic benefit to the UK, as will the increased freedom of action regarding potential Free Trade Agreements with non-European states. A number of further brief observations may be made.

In terms of overall net contributions to the maintenance of the EU budget, the UK pays an estimated GBP 9 billion a year.⁹⁸ By comparison, the EFTA States paid a total of CHF 22,369,000 (GBP 15.2 million) towards the upkeep of the EEA/EFTA structure in 2014.⁹⁹ The EEA/EFTA structure encompasses a substantially more limited number of fields than the EU structure, yet it currently only caters to the EFTA States, none of which are even close to as populous as the UK. The EEA/EFTA structure would therefore have to be enlarged, should the UK become an EEA-EFTA State, necessarily entailing an increased expenses base.

The EFTA States also contribute financially to the so-called EEA financial mechanism in order to *inter alia* 'reduce the economic and social disparities between their regions'.¹⁰⁰ These contributions have generally been negotiated for four years at a time, and have increased substantially since the mechanism's inception.¹⁰¹ For the period 2009–2014, Norway, Iceland and Liechtenstein jointly contributed to this arrangement via the so-called 'EEA Grants' with EUR 993.5 million in total; and Norway individually contributed an additional EUR 804.6 million via the so-called 'Norway Grants'.¹⁰² The Norwegian EEA Review Committee noted that Iceland has not reacted positively to the increased contributions to the financial mechanism over the course of time, and insinuated that Norway was too facilitating concerning proposed increases contribution suggested by the EU side during negotiations.¹⁰³ Iceland has gone so far as to question the legal basis for the financial mechanism contributions.¹⁰⁴ It is difficult to say what the outcome of such negotiations would be with the UK on the other side of the negotiation table, alongside the EEA-EFTA States. The precise scale of any potential contributions by the UK would have to be specifically negotiated with the EU once every four years.

The EFTA States also contribute financially to a number of other projects in which they participate. For example, Norway takes part in a certain number of EU programmes, and is represented in a number of agencies.¹⁰⁵

For illustrative purposes, an estimate of net costs related to Norway's agreements with the EU in 2010, based on the Norwegian EEA Review Committee's report, is as follows:¹⁰⁶ The net costs of the financial mechanism were NOK 2,792 million, the net cost of the program/agency cooperation was NOK 420 million, the net costs of the EFTA institutions were NOK 205 million, the net costs of national experts (in the European Commission and similar agencies) were NOK 26 million, and the net costs of Norway's Mission to the EU were NOK 23 million, in 2010. This amounts to a total approximately equal to GBP 270 million.

The UK, with a much larger population, could expect to contribute more than Norway, both to the EFTA Institutions, as well as to the financial mechanism – all of which would nevertheless have to be specifically negotiated. The EFTA apparatus would also have to be upgraded in order for it to cater to a State of the size of the UK. However, given the more limited scope of EEA law compared to

⁹⁸ Figures in this paragraph are taken from a review compiled by the UK governments in this regard. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220969/foi_eumembership_literaturereview.pdf.

⁹⁹ *Idem*. See also the EFTA figures on gross and net contributions. Available at: <http://www.efta.int/about-efta/efta-budget.aspx>.

¹⁰⁰ Articles 115–117 EEA; Protocol 38 to the Agreement.

¹⁰¹ Europautredningen [Norwegian EEA Review Committee] *Utenfor og innenfor -Norges avtaler med EU 761* (Norges Offentlige Utredninger, NOU 2012:2).

¹⁰² See the Norwegian Government's information page on the EEA grants: <https://www.regjeringen.no/nb/tema/europapolitikk/eos-midlere/mottagere-eos-midler/id685572/>. For the precise overview of the distribution of the funds in English, see: <http://eeagrants.org/Who-we-are>.

¹⁰³ Europautredningen [Norwegian EEA Review Committee] *Utenfor og innenfor -Norges avtaler med EU 762* (Norges Offentlige Utredninger, NOU 2012:2).

¹⁰⁴ *Ibid*. For the purposes of entirety it should also be noted that Switzerland pays a similar contribution, even if it is not an EEA EFTA State, which amounted to CHF 1 billion in addition to CHF 275 million over the five year period ending in 2012 and 2014, respectively.

¹⁰⁵ *Ibid*. 779, for example: CIP, Galileo.

¹⁰⁶ *Ibid*. 783.

EU law, with its correspondingly more limited needs in terms of institutional capacity, the EEA/EFTA structure would not require major readjustment, and merely a boost in capacity. The exact extent and cost of this enlargement would of course have to be specifically negotiated, and is thus rather difficult to estimate.

4.5 WHY THE EEA RATHER THAN A BILATERAL AGREEMENT IS OPTIMAL FOR THE UK IN THE EVENT OF A BREXIT: A COMPARATIVE ASSESSMENT OF THE SWISS FREE TRADE MODEL

In the event of a ‘Brexit’, as an alternative to the EFTA-EEA model proposed above, a further option for the UK is to negotiate a bilateral agreement with the EU. Indeed, Article 50 TEU’s wording effectively envisages such an outcome. There is no precedent in this regard, with the closest thing to a negotiated ‘exit plus bilateral’ outcome being Greenland in 1985, hardly a useful comparator. It seems reasonable to expect that the UK would wish to maintain good access to the Internal Market. The problem is what EU countries would find acceptable. Judging by the reactions at the highest political level to David Cameron’s speech of 23 January 2013,¹⁰⁷ EU Members will simply not allow the UK to ‘cherry-pick’ from the EU *acquis*, single market or other domains.¹⁰⁸ Any putative negotiations will therefore be far from easy. A bilateral outcome for the UK is likely to come at a high price. If the UK insists on complete regulatory autonomy, a bilateral arrangement would be preferable, yet the price will be significant differentiation and less smooth – or simply less – access to the EU market, in particular with the annual accrual of fresh *acquis*.¹⁰⁹

The CFI stated in *Ospelt* that:

one of the principal aims of the [EEA] Agreement is to provide for the fullest possible realization of the free movement of goods, persons, services and capital within the whole [EEA], so that the internal market established within the European Union is extended to the EFTA States.¹¹⁰

In the EEA, it is the very goal of establishing and operating a *shared internal market* with strong institutions, which led the CJEU, in September 2013, to define the Agreement as ‘a close association between the European Union and the EFTA States based on special, privileged links between the parties concerned’,¹¹¹ in comparison to other international agreements. The system of parallel enforcement and development of EEA law has allowed the EFTA States to maintain the shared Internal Market – and in this sense the Agreement differentiates itself both from standard international agreements and from EU law.

Other FTAs concluded by the EU do not share these features. The Swiss model, though favoured by some commentators,¹¹² raises questions concerning whether reciprocal enforcement of obligations is possible. In this respect, the *Polydor* case is instructive.¹¹³ The question was whether the (now-defunct) EU-Portugal FTA – which contained near-identical provisions on the elimination of restrictions on trade and quantitative restrictions to those in the EU – was applicable, and whether its provisions were to be interpreted in the same way as EU law. In deciding the case, the ECJ highlighted the institutional disparities between the EU’s Internal Market system on the one hand, and FTAs, on the other. It held that the FTA did not have the same objective as the EU, i.e., creating an

¹⁰⁷ A full transcript of the speech is available on the UK Government website, at: <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg> (accessed 10 Jan. 2015).

¹⁰⁸ Gavin Hewitt, *Britain-France Ties: How Cordial is the Entente?*, BBC News Europe (30 Jan. 2014), <http://www.bbc.co.uk/news/world-europe-25959465> (accessed 10 Jan. 2015).

¹⁰⁹ See also Jacques Pelkmans & Philipp Böhler, *The EEA Review and Liechtenstein’s Integration Strategy* 128 (Centre For European Policy Studies 2013).

¹¹⁰ Case C-452/01 *Ospelt and Schlössle Weissenberg*, ECR I-9743, para.29 (2003).

¹¹¹ Case C-431/11 *United Kingdom v. Council*, Judgment of the Court of 26 Sep.2013, nyr. para.49.

¹¹² See, *inter alia*, Hampden Trust, *The Freedom Association’s submission to the Balance of Competences Review: Freedom to Attract Trade and Investment* (The Freedom Association 2013).

¹¹³ Case 270/80, ECR 329 (1982); see also Case 104/78 *Kupferberg*, ECR 3641, para. 30 (1982); Case C-312/91 *Metalsa*, ECR I-3751, para.12 (1993).

Internal Market.¹¹⁴

The Court thus concluded that:

[i]t follows that in the context of the Agreement that restrictions on trade in goods may be considered to be justified on the ground of the protection of industrial and commercial property in a situation in which their justification would not be possible within the Community.¹¹⁵

Clearly, therefore, a lack of institutional structure is not without consequence. It is likely to cause legal fragmentation with respect to the FTA's application. This could produce vastly different levels of judicial protection for the same rights, depending on the jurisdiction in which they are claimed. The *Polydor* case raises the question of whether a similar distinction can be made vis-à-vis the EU-Switzerland agreements. The 2009 *Grimme* case certainly suggests that this would be the case.¹¹⁶ The foregoing jurisprudence led the President of the EFTA Court to note that '[c]ertain discriminations are ... possible under [the Swiss] agreement which would be unlawful under the TFEU and under the EEA Agreement'.¹¹⁷

Relations between the EFTA-EEA States and the EU are cordial.¹¹⁸ A common legal framework is thus helpful, though arguably not essential. However, 'a legal order is precious and valuable, precisely when interests are sensitive and/or once frictions become politicized (say, in domestic politics)'.¹¹⁹ This is likely to have significant implications for the UK. A bilateral system, without settled case law and an independent supervisory system, is significantly more vulnerable to collapse when fundamental interests collide. This has had serious consequences, notably for Switzerland.¹²⁰

It would certainly be in the best interest of UK businesses, economic operators and individuals, to adhere to the EEA Agreement and the equal access afforded to them thereunder, rather than the uncertainty linked to a Swiss-style arrangement.

Finally, if such a deal were to be reached, negotiating the particularities of such a relationship would take time, perhaps many years, and would require the assent of all 27 remaining EU Member States. Any favours accorded to the UK – seen to have 'abandoned' the EU – would be deeply unpopular in certain EU Member States, and a 'sweetheart deal' on the UK's terms could encourage other Member States to consider heading for the exit door. As a result, reaching such an accord would be fraught with difficulties, many of which are difficult to predict.

5 CONCLUSION

'Let me be quite clear. Britain does not dream of some cosy, isolated existence on the fringes of the European Community. Our destiny is in Europe....That is not to say that our future lies only

¹¹⁴ Case 270/80 *Polydor v. Harlequin Record Shops*, ECR 329,338 (1982).

¹¹⁵ *Ibid*, para.19.

¹¹⁶ Case C-351/08 *Grimme*, ECR I-10777 (2009). In this case, the CJEU referred to *Polydor*, holding that the interpretation given to EU Internal Market provisions cannot automatically be applied by analogy to the interpretation of the bilateral Agreement between the EU and Switzerland on the free movement of persons. See also cases C-541/08 *Fokus Invest AG*, ECR I-01025 (2010); C-70/09 *Hengartner and Gasser*, judgment of 15 Jul. 2010; Laura Melusine Baudenbacher, *Gas Personenfreizügigkeitsabkommen EU-Schweiz ist doch kein Integrationsvertrag*, European Law Reporter, 34ff. (2010); Laura Melusine Baudenbacher, *Gar lustig ist die jagerei — aber für Schweizer ist sie teurer als für andere*, European Law Reporter, 280 (2010).

¹¹⁷ Carl Baudenbacher, *Some Thoughts on the EFTA Court's Phases of Life*, in *Judicial Protection in the European Economic Area* 10–11 (EFTA Court (ed.) German Law Publishers, 2012).

¹¹⁸ Indeed, 'cordial' may well be an understatement. In truth, the relationship is one of substantial integration. A good number of former EFTA States have joined what is now the EU, including the UK in 1973. Indeed, even subsequent to – and within the framework of – the EEA Agreement, Austria, Finland and Sweden migrated from the EFTA pillar to the EU pillar on 1 Jan. 1995, desirous of a level of engagement with the EU beyond what the EEA Agreement was able to provide. Their accession was regulated by withdrawal from the EFTA Convention and accession to the EU Treaties, and was certainly facilitated by the substantial level of replication of obligations between the two legal systems. See, in this regard R.J. Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, Fordham Intl.L.J. 18:4 (1994) 1093–1189.

¹¹⁹ Pelkmans & Böhler, *supra*, at 125.

¹²⁰ A telling example of the enduring fragility of the EU-Swiss arrangement is provided by the debate in 2004 about the EU-Swiss Freedom of Movement agreement. The EU openly threatened to cancel all seven agreements (Bilateral I, see Annex 12) if Switzerland would not ratify the persons agreement. See J. Pelkmans & P. Böhler, *The EEA Review and Liechtenstein's Integration Strategy* (Centre For European Policy Studies 2013) 125. The EU-Swiss road transport agreement, was signed to solve a similar issue. This agreement entails automatic Swiss adoption of EU *acquis* in road transport, while non-compliance may result in the suspension of the entire bilateral trade agreement. Knowing the Swiss resistance concerning automatic incorporation of EU *acquis*, it becomes obvious just how much pressure was exerted upon Switzerland to agree to this solution.

*in Europe.*¹²¹

The UK's economy has become deeply reliant upon Europe in recent decades. In 1959, 9.9% of UK imports came from what would become the EFTA states; 14% from the EEC; and 76.1% from the rest of the world. Exports were similarly distributed: 10.4% EFTA; 14.7% EEC; and 74.9% from the rest of the world.¹²² However, this situation has changed radically. Recent statistics show that approximately half of UK imports and export trade is now conducted with the EU.¹²³ It would seem evident that any proposed model post-‘Brexit’ must necessarily include the preservation of UK access to the Internal Market, since an alternative arrangement could place half of the UK's international trade at risk.

Two models provide a potential route to such a result, namely a bilateral arrangement along the lines of the Swiss model, or EFTA and EEA membership. Given the uncertainties inherent in bilateralism, the fragility of such an arrangement, the fact that it would likely take a long time to finalize, and the position of the EU – having repeatedly avowed its lack of appetite for further bilateral arrangements based upon the ‘Swiss solution’ – such a model would seem an uncertain foundation upon which to build Britain's future. In light of the foregoing, the EFTA-EEA framework appears the optimal alternative.

In addition to Internal Market access, there are, of course, further advantages to the EFTA-EEA model. The lack of common agriculture and fisheries policies, the lack of a common external trade policy, as well as possibilities offered in an EFTA context in relation to FTAs, relations with non-EU States, and immigration policy, reads almost like a ‘laundry list’ of areas of EU influence that have come to represent bones of contention for some UK Eurosceptics.¹²⁴

Perhaps the day has indeed come when the EU's integrationist agenda – ‘an ever-closer union’ – has surpassed the limits of the British appetite. If the UK exits, it will be for this reason, and not through a wish to harm pre-established trade relationships and put British jobs at risk. It would seem that the EFTA-EEA solution would secure a perch for Britain post-Brexit where she has always seemed most comfortable, remaining within – albeit on the edge – of Europe.

¹²¹ Speech delivered at the College of Europe, Bruges by The Rt. Hon. Mrs Margaret Thatcher, Prime Minister of the United Kingdom, on 20 Sep. 1988.

¹²² OEEC Statistical Bulletin, Series A in RT Griffiths, EFTA – The Alternative in Kåre Bryn & Gudmundur Einarsson (ed.), *EFTA 1960-2010: Elements of 50 Years of European History* 43 at 54 (EFTA Publications and University of Iceland Press 2010).

¹²³ UK Office for National Statistics, *Statistical Bulletin*, 11 Sep. 2012, http://www.ons.gov.uk/ons/dcp1_71778_278439.pdf (accessed 8 Jan. 2015).

¹²⁴ The financial implications of the UK's prospective membership of EFTA-EEA are unpredictable and cannot be reduced to a single figure, or indeed a single set of figures, which are certain to be reliable. In this respect it should be noted that the EFTA States contribute financially to the so-called EEA Financial Mechanism in order to, *inter alia*, ‘reduce the economic and social disparities between their regions’. These contributions have generally been negotiated for four years at a time, and have increased substantially. The precise extent of these contributions – and where they would be distributed – would have to be specifically negotiated with the EU. The EFTA States also contribute financially to other European projects in which they participate, for example, Norway participates in a variety of EU programmes and agencies, including CIP, Galileo and Interreg., cf. *Europautredningen, Utenfor og innenfor - Norges avtaler med EU* (Norges Offentlige Utredninger, NOU 2012:2) 779.

From EU Citizens to Third Country Nationals: The Legacy of Polydor

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This article considers the possible effects of 'Brexit' on British nationals who would no longer be EU citizens. Any Member State withdrawing from the Union is unlikely to cut all ties to the Internal Market. It is almost inevitable that a departing State would need to set up a bilateral or multilateral arrangement for the purpose of continuing to participate in the Internal Market. The analysis compares the legal status of the citizens of a withdrawing state vis-à-vis EU citizens and examines whether and under what conditions third country nationals are conferred rights and obligations in the EU Internal Market which are equal to those enjoyed by EU citizens. In this context, the possibility of using the Polydor doctrine to empower third country nationals to an extent comparable to EU nationals is explored.

1 INTRODUCTION

Since its foundation, the EU has been the main driving force behind economic integration in Europe. The economic impact of the EU's Internal Market – the core of the European cooperation project – is significant.¹ It affects not only the Member States but all countries in the EU's neighbourhood. The large majority of the neighbouring countries pursue economic cooperation with the Union, often entailing regulatory cooperation. The instruments of the EU's cooperation with third countries vary in depth and breadth, yet have a general tendency of deepening the participation of third countries in the internal market. The prospect of the UK, an EU Member State possibly wishing to withdraw from the Union raises a myriad of legal questions.² One of the most important among them concerns the future relationship between the EU and the UK. Throughout its membership in the EU, the UK has been reluctant to join a number of EU policies which has resulted in a significant number of opt-outs. Many of the Area of Freedom, Security and Justice, do not concern the Internal Market specifically. Others, such as the opt-out from the Charter on Fundamental Rights affect equally the application of Internal Market *acquis* within the UK.³ Yet even if Britain decides to go as far as bid farewell to its membership in the Union, the country is unlikely to wish to cut all ties to the Internal Market.

Ideally, leaving the EU and renegotiating a new instrument of cooperation with the Union would allow the UK to restrict future integration to an *à la carte* selection of preferred fields only. By discarding less favoured domains while adopting – or continuing to adopt – chosen parts of the EU *acquis* Britain could, in theory, maintain access to chosen areas of the internal market.

There are a number of examples of third countries participating in the EU's Internal Market by means of international agreements. The prime example of such deep cooperation is the 1994 Agreement establishing the European Economic Area (EEA) concluded between the European Community and its Member States and three states of the European Free Trade Area (EFTA) –

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¹ Gráinne De Búrca, *Differentiation within the Core: The Case of the Common Market, in Constitutional Change in the EU: From Uniformity to Flexibility?* 133–171 at 133 (Gráinne De Búrca & Joanne Scott eds, Hart Publishing 2000).

² Until now, the closest example is the withdrawal of Greenland in 1985.

³ The actual effect of Protocol 7 of the Lisbon Treaty on the application of the Charter of Fundamental Rights of the EU to Poland and to the United Kingdom falls short of that of a true opt-out: Catherine Barnard, *The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?*, in *The Lisbon Treaty* 257–283 at 281 (Stefan Griller & Jacques Ziller eds, Springer 2008).

Iceland, Liechtenstein and Norway.⁴ Other such agreements exporting EU Internal Market *acquis* to third countries include the series of bilateral agreements concluded between the EU and Switzerland and the 1963 association agreement concluded between the European Economic Community (EEC) and Turkey (hereinafter ‘EEC-Turkey Agreement’). Despite the different scope of the EU’s cooperation with the EFTA States and Turkey, all of the agreements provide a stake for non-Member States in the Internal Market.

Joining the EEA or concluding an agreement or set of agreements similar to those concluded by the EU with Switzerland and Turkey, respectively, is one alternative for a Member State leaving the Union. Questions of political feasibility aside, on the one hand, the state may wish to continue to participate in the Internal Market but only adopt *acquis* which it deems desirable. On the other hand, however, cherry-picking may lead to unfavourable outcomes with respect to the areas which the withdrawing state does not wish to deviate from. The weaker the link between the objectives and content of the *acquis* in the Internal Market and in the international agreement exporting *acquis* to a third country, the weaker the guarantee that similarly or identically worded *acquis* will be given uniform interpretation in- and outside the EU. Uniform interpretation, implementation, application and enforcement of common rules. In order for individuals and economic operators across the expanded EU Internal Market to enjoy the same rights the international agreement must extend to third countries all relevant *acquis* as well as ensure uniform interpretation and effective implementation and enforcement of the *acquis*. It is thus not a given that the adoption of Internal Market *acquis* by a third country equals full membership in the Internal Market. Some of these reasons for this are substantive, others procedural and institutional in nature. The current analysis is specifically restricted to the former category and the question of guarantees to identical interpretation of provisions identical in substance in an expanded Internal Market.

2 DEFINING ‘EUROPEAN INDIVIDUALS’

The proclaimed aim of the EU internal market is to ‘unite national markets into a single market having the characteristics of a domestic market’.⁵ This objective is achieved by granting free movement of persons, goods, services and capital, the freedom of establishment and equal conditions for competition. The scope of the free movement rights is specified by the Treaties and secondary EU law, and interpreted by the EU and Member State judiciaries in the light of the objectives of the Treaties and general principles of EU law. As a result, individuals within the EU enjoy, regardless of their country of origin, the same set of free movement rights across the Union.

The European Communities specifically intended to join together not only the contracting states but also their nationals. The ‘ever closer union between the peoples of Europe’ as articulated in the Preamble to the EEC Treaty has proven crucial to the development of EU law.⁶ The ‘peoples of Europe’ have progressively become the European individuals who are specifically empowered by the Treaties, often so directly without Member State legislation.⁷ The distinction between the actors – the states and the peoples – which has assumed great importance in the narrative of the EU plays an equally important role in determining whether identical *acquis* functions in the same manner within the EU and beyond. Arguably, the expansion of the internal market entails the creation of ‘European individuals’ outside the EU.⁸ EU challenges the common assumption that the ‘European individual’ is, if not an EU citizen, then at least someone physically present in the EU. EU citizenship itself does not define ‘European individuals’ in the Internal Market context. Introduced by the Maastricht Treaty in 1992, the concept of EU citizenship has granted the right to move and reside freely within the EU to all EU citizens⁹ but has not altered the substantive content of the free movement rights within the

⁴ Discussed in detail in the article by Burke and Hannesson in this e-book.

⁵ Case 270/80 *Polydor v. Harlequin* [1982] ECR 329, para. 16. Also Case 15/81 *Schul* [1982] ECR 1409, para. 33.

⁶ Recital 1, Preamble of the Treaty Establishing the European Economic Community (Rome Treaty).

⁷ Case 26/62 *Van Gend en Loos* [1963] ECR 1.

⁸ On ‘European individuals’ in the context of EU citizenship, see Loïc Azoulay, *Transfiguring European Citizenship: From Member State Territory to Union Territory*, in *EU Citizenship and Federalism: The Role of Rights* (Dimitry Kochenov ed., Cambridge University Press 2015).

⁹ Article 21 TFEU, subject to limits and conditions elaborated by the Treaties and implementing measures.

Internal Market. In addition to European citizens who derive rights and obligations directly from the EU Treaties there is an increasing number of persons who have been granted a comparable set of free movement rights in the Internal Market by virtue of international agreements. In situations where an international agreement confers on third country nationals a similar set of rights as to EU nationals those third country individuals, too, can be considered European individuals – not by virtue of their country’s membership in the EU but due to Internal Market *acquis* applying to them. Inversely, insofar as the internal market is extended to third country nationals EU citizens, too, enjoy corresponding rights vis-à-vis third countries. The situation is comparable to that of expanding the Union through accession yet in this case integration is merely limited to the Internal Market or to parts thereof.

3 EXPORTING INTERNAL MARKET *ACQUIS*: ‘SO CLOSE, YET SO FAR AWAY’

Uniform rights, however, do not only depend on the similarity of the provisions but also on their uniform interpretation. Uniform interpretation of rules underpins the concepts of unity of the EU legal order and effectiveness of EU law. Institutional considerations aside, the issue comes down to whether different courts – the judiciary of the EU, of the Member States and the third countries – give the same effect to *acquis* which is identical in substance on the EU and Member State levels. In an internal market expanded to third countries the interpretation of identical *acquis* is, on the one hand, provided by the EU judiciary and Member States’ courts. On the other hand, the provisions are applied and interpreted by the non-EU judiciaries – third country national courts or judicial bodies set up by the international agreements. In the EEA these two dimensions are referred to as the ‘EU pillar’ and the ‘EFTA pillar’. For example, the outcome of the application of a provision of free movement depends largely on whether the national court follows the interpretation of the Court of Justice or whether the Court itself interprets the *acquis* contained in international agreements in the same vein as the underlying EU *acquis*. The present analysis is restrained to the EU-side of the coin and the conditions under which the Court of Justice is willing to regard third country citizens as ‘EU individuals’ on the basis of *acquis* that is identical in substance.

Interpretation methods are adopted by the interpreting bodies themselves. With the ultimate aim of securing the effectiveness of EU law, the Court of Justice often uses teleological interpretation to construe the meaning of the provisions of EU law.¹⁰ Does this mean that the Court is inclined to extend the effectiveness-driven method of EU interpretation also to the *acquis* exported to third countries by international agreements? The answer to the question lies primarily in the landmark decision of the Court of Justice in *Polydor*¹¹ and a determination of whether the *Polydor* doctrine applies to the international agreements exporting Internal Market *acquis* to third countries.

3.1 THE POLYDOR DOCTRINE

The *Polydor* case demonstrated that identical wording of provisions contained in the EU Treaties and in international agreements does not entail automatic uniformity of interpretation. The case concerned the interpretation of a provision of a free trade agreement concluded between the EEC and Portugal in 1972, before the latter joined the EEC. Two British companies were selling in the UK records which they had imported from a Portuguese producer. The records did not comply with UK copyright laws and, subsequently, a copyright infringement action was brought against the companies. The defendants relied on the provision in the EEC-Portugal FTA, equivalent to similar provisions in the EEC Treaty, on the abolition of restrictions to trade in goods which have been lawfully placed on the market in Portugal. The Court refused to interpret the provision of the EEC-Portugal FTA in a manner identical to the corresponding provisions of the EEC Treaty.

¹⁰ Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20 Fordham Intl. L. J. 656, 664 (1996).

Teleological interpretation is, of course, not the only method which the Court uses. See Koen Lenaerts & José A. Gutiérrez-Fons ‘To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice’, 9 EU Working Paper (2013), http://cadmus.eui.eu/bitstream/handle/1814/28339/AEL_2013_09_DL.pdf?sequence=1 (accessed 9 Feb. 2015).

¹¹ *Supra* n. 5.

The Court maintained that the interpretation of the EEC Treaty follows from the objectives and purpose of the EEC Treaty.¹² The provisions of the EEC-Portugal FTA must be given their own interpretation in the light of the specific objectives of that Agreement. A comparison between the objectives of the EEC Treaty and the EEC-Portugal FTA revealed the narrower scope of the latter.¹³ Subsequently, a mere similarity between the provisions of the EEC-Portugal FTA and the EEC Treaty does not justify an extension of the interpretation given in the context of the EEC Treaty to the provisions of the FTA.¹⁴ UK undertakings could not, therefore, exercise their right of free movement of goods between Portugal and the UK quite to the same extent as they would have been able to within the EEC. The *Polydor* doctrine is moreover fully in line with Article 31 of the Vienna Convention on the Law of Treaties according to which the provisions of an international agreement must be interpreted in the light of objectives of that agreement.

The *Polydor* doctrine has had a crucial impact on all attempts to construct ‘European individuals’ beyond the EU by means of exporting internal market *acquis*. In order for third country nationals to enjoy the same rights as conferred on EU citizens by the Treaties, the international agreements exporting the *acquis* must contain similarly worded provisions as well as demonstrate an equivalence of objectives pertaining to the Internal Market. A mere free trade agreement does not entail such similarity of objectives nor does it provide a guarantee for identical interpretation.

3.2 THE APPLICATION OF THE POLYDOR DOCTRINE

The Court has elaborated on the principle that evolved in *Polydor* in a number of subsequent cases, seeking to establish whether similar provisions should be given the same interpretation by assessing the aims pursued by each provision in their particular context and a comparison between the objectives and context of an international agreement and the EU Treaties. In some instances, the Court considered that provisions of free trade agreements and association agreements satisfied the above criteria and were thus interpreted in a manner identical to the provisions of the EU Treaties,¹⁵ in others it did not.¹⁶ The determination is always made with reference to each provision separately and does not extend to any international agreement in its entirety.

In *Pabst & Richarz*, for example, the Court contended that a provision of the EEC-Greece Association Agreement, which was similar in wording to Article 95 of the EEC Treaty on the prohibition of fiscal barriers to trade, ‘fulfils, within the framework of the Association between the Community and Greece the same function as that of Article 95’ due to its purpose of preparing the entry of Greece into the EEC.¹⁷ Consequently, the Court ruled that the ‘objective and nature’ of the EEC-Greece Association Agreement and the wording of the specific provision required that within the Community spirits originating from Greece must be treated equally *vis-à-vis* spirits originating from the Member States.¹⁸

In some instances, the institutional context of the international agreement, too, plays a role in establishing the comparability of the legal contexts of the EU Treaties and an international agreement. In *A*, the Court claimed that the same interpretation of the provisions on the free movement of capital within the Community cannot be extended to capital movements between the Community and third countries insofar as the mutual assistance between competent authorities does not extend to the third

¹² *Ibid.*, para. 16.

¹³ *Ibid.*, paras 16–18.

¹⁴ *Ibid.*, paras 15, 18.

¹⁵ For example, Case C-207/91 *Eurim-Pharm* [1993] ECR I- 3723 concerning the EEC-Austria Free Trade Agreement; Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049 concerning the EC-Poland Association Agreement; Case C-438/00 *Deutscher Handballbund* [2003] ECR I-4135 concerning the EC-Slovakia Association Agreement; Case C-171/01 *Wählergruppe Gemeinsam* [2003] ECR I-4301 concerning the EEC-Turkey Association Agreement; and Case C-265/03 *Simutenkov* [2005] ECR I-2579 concerning the EC-Russia Partnership Agreement.

¹⁶ For example, Case C-312/91 *Metalsa* [1993] ECR I-3751 concerning the EEC-Austria Free Trade Agreement; Case C-63/99 *Gloszczuk* [2001] ECR I-6369 concerning the EC-Poland Association Agreement; Cases C-235/99 *Kondova* [2001] ECR I-6427 and C-101/10 *Pavlov and Famira* [2011] ECR I-5951 concerning the EC-Bulgaria Association Agreement; and Case C-257/99 *Barkoci and Malik* [2001] ECR I-6557 concerning the EC-Czech Association Agreement.

¹⁷ Case 17/81 *Pabst & Richarz KG v. Hauptzollamt Oldenburg* [1982] ECR 1331, para. 26.

¹⁸ *Ibid.*, para. 27.

countries in question.¹⁹ The Court maintained this requirement even with respect to the EEA Agreement.²⁰

4 TURKISH, SWISS AND EEA NATIONALS: ‘EUROPEAN INDIVIDUALS’?

There is abundant case law of the Court of Justice on the interpretation of provisions of international agreements including those which replicate EU *acquis*. The Court’s interpretation of three (sets of) agreements – the EEC-Turkey Association Agreement, the bilateral agreements concluded between the EU and Switzerland and the EEA Agreement – illustrate this point. Each of these agreements has a different scope and aim at a different level of integration. The following analysis focuses specifically on the possibility of considering Turkish, Swiss and EEA EFTA nationals ‘European individuals’ in the light of the *Polydor* doctrine.

4.1 THE EEC-TURKEY AGREEMENT

The EEC-Turkey Agreement was concluded with the aim of promoting trade and economic relations between Turkey and the EU and, ultimately, creating a customs union.²¹ The specific *acquis* which Turkey is obliged to adopt under the Agreement is specified in the decisions of the Association Council. Together with the Agreement the latter form the ‘law of association’.²² The specific means of approximation include the adoption of legislation ‘equivalent’ to the EU *acquis* as well as accession to multilateral conventions on intellectual, industrial and commercial property rights.²³ Although the ‘law of association’ contains extensive parts of the legislation in force within the Union it falls short of all four free movement rights. A case in point is the free movement of workers between the EU and Turkey which has not been realized to this date²⁴ in spite of the programmatic declaration on the progressive achievement of this right in Article 12 of the Association Agreement.²⁵

The *Polydor* doctrine established that in order for the Court of Justice to interpret similarly worded provisions in international agreements in line with the interpretation of EU law, the substantive content of the respective provisions, the objective of the agreement and the institutional and procedural context must be comparable. On several occasions, the Court had ruled that the free movement of Turkish workers in the EU is limited and does not comprise a general freedom of movement which is granted to EU citizens.²⁶ The Court’s judgment in *Demirkan* is a good example in delimiting the scope of the free movement provisions in the EEC-Turkey Agreement.²⁷

Demirkan concerned a standstill clause in the Additional Protocol to the EEC-Turkey Agreement which restricted the contracting parties to adopt new barriers to the freedom to provide services after the conclusion of the agreement. The standstill clause became binding on Germany in 1973 but, nevertheless, in 1980 Germany introduced a visa requirement for Turkish nationals travelling to Germany. In *Soysal*, the Court found that the visa requirement infringed the standstill clause by erecting new barriers to the freedom of Turkish nationals to provide services in the EU.²⁸ *Demirkan*, a Turkish national, applied for a German visa to visit a relative in Germany but her application was

¹⁹ Case C-101/05 A [2007] ECR I-11531, paras 60–63.

²⁰ Case C-72/09 *E’tablisements Rimbaud* [2010] ECR I-10659, para. 40; Judgment of the Court of Justice in Case C-48/11 *Veronsaajien oikeudenvälvontayksikkö v. A Oy* of 19 Jul. 2012, nyr, para. 34. In the former, the conditions for administrative assistance were not satisfied, in the latter they were.

²¹ Articles 2 and 5 EEC-Turkey Agreement.

²² Edgar Lenski, Turkey (including Northern Cyprus), in *The European Union and Its Neighbours: A Legal Appraisal of the EU’s Policies of Stabilisation, Partnership and Integration* 283–313 at 289 (Steven Blockmans & Adam Łazowski eds, T.M.C. Asser Press 2006).

²³ Articles 2–3 of Annex 8 to the Decision 1/95 of the EC-Turkey Association Council.

²⁴ *Supra* n. 22, at 294–296.

²⁵ Case 12/86 *Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719, para. 23.

²⁶ For example, Case C-171/95 *Tetik* [1997] ECR I-329, para. 29; Case C-37/98 *Savas* [2000] ECR I-2927, para. 59; Case C-171/01 *Wählergruppe Gemeinsam*, *supra* n. 15, para. 89; Case C-325/05 *Derin* [2007] ECR I-6495, para. 66.

²⁷ Judgment of the Court of Justice in Case C-221/11 *Demirkan* of 24 Sep. 2013, nyr.

²⁸ Case C-228/06 *Soysal and Savatli* [2009] ECR I-1031, paras 57–58.

rejected by the German authorities. The applicant challenged the rejection in a German court arguing that because the visa requirement restricted her freedom to receive services in Germany it also violated the standstill clause. The Court rejected the argument.

Previously, in *Luisi and Carbone* the Court had interpreted the ‘freedom to provide services’ as entailing a passive dimension – the freedom of movement for the purpose of receiving rather than providing services.²⁹ In *Demirkan*, the Court decided not to extend the interpretation given in *Luigi and Carbone* to the EEC-Turkey Agreement. Resorting to the *Polydor* doctrine, the Court found that the ‘purely economic purpose’ of the EEC-Turkey Agreement fell short of the purpose of the EU Treaties to ‘bring ... about freedom of movement for persons of a general nature’.³⁰ Pursuant to the Court, the protection of passive freedom to provide services is part of the specific internal market objective – one which distinguishes the EU Treaties from the EEC-Turkey Agreement.³¹ *Demirkan* clearly demonstrates that it is not a given that a fundamental freedom retains the same scope as within the EU when extended to non-EU nationals.

4.2 EU-SWITZERLAND BILATERAL AGREEMENTS

Following a negative referendum in 1992 Switzerland was the only EFTA state to remain outside the EEA. Instead, Switzerland has concluded with the EU over 100 bilateral agreements which cover almost the entire field of the EU internal market. The objective of the EU-Swiss relationship based on bilateral agreements is not straightforward. From the perspective of exporting the *acquis*, the most significant of the bilateral agreements are the packages ‘Bilateral I’ signed in 1999 and ‘Bilateral II’ signed in 2004. On the one hand, Switzerland has agreed to adopt all EU *acquis* in the fields covered by the bilateral agreements thus resulting in very deep cooperation. On the other hand, although more far-reaching than the EEC-Turkey Agreement, the depth of integration of the bilateral agreements is smaller than that of the comprehensive EEA Agreement. The bilateral agreements notably exclude, in addition to some policy fields, to a smaller or greater extent the free movement of capital and services, and the freedom of establishment.

There are two possibilities for analysing the application of the *Polydor* doctrine to the EU-Switzerland bilateral agreements. On the one hand, each of the bilateral agreements is separate and has its own objectives. On the other hand, however, each bilateral agreement contributes to the comprehensive management of EU-Switzerland relations and must, thus, be seen in the overall context of the set of agreements.³² In *Grimme*, the Court adopted the latter, comprehensive way of analysis.³³ The Court found that the objectives of the EU-Swiss bilateral agreements as regards the internal market were not comparable to those of the EEA Agreement. The Court noted that Switzerland, by rejecting the EEA Agreement and refraining from implementing the free movement of services and establishment, did not ‘join the internal market of the Community’ which is an ‘area of total freedom of movement analogous to that provided by a national market’.³⁴ Therefore, the provisions of the EU-Switzerland bilateral agreements cannot automatically be interpreted in line with the corresponding provisions of EU Treaties unless the agreement in question provides so explicitly.³⁵ AG Mazák in *Bergström* referred to *Grimme* to conclude that there is no automatic equivalence of interpretation between the EU internal market provisions and the provisions of the EC-Switzerland bilateral agreements but that the latter instead need to be interpreted in the light of the objectives of the bilateral agreements.³⁶ Surely, this does not preclude the possibility of identical interpretation

²⁹ Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, para. 16.

³⁰ Case C-221/11 *Demirkan*, supra n. 27, paras 44, 51, 53.

³¹ *Ibid.*, para. 56.

³² This applies in particular to the ‘Bilateral I’ set of seven agreements which are bound together by a so-called ‘guillotine clause’. All of the agreements entered into force together and none of them can be terminated individually.

³³ Case C-351/08 *Grimme* [2009] ECR I-10777.

³⁴ *Ibid.*, para. 27.

³⁵ *Ibid.*, para. 29; Case C-541/08 *Fokus Invest* [2010] ECR I-1025, para. 28; Case C-70/09 *Hengartner and Gasser* [2010] ECR I-7233, para. 42.

³⁶ Opinion of AG Mazák in Case C-257/10 *Bergström* [2011] ECR I-13227, para. 45.

provided that in the relevant fields the objectives of the Treaties and of the bilateral agreements are comparable.

In his Opinion in *Ettwein*,³⁷ AG Jääskinen reiterated the Court's reasoning in *Grimme*. The AG found that as regards the internal market and the four freedoms the aims of the EEA Agreement are identical to those of the EU Treaties; identically worded provisions of the EEA Agreement should, therefore, be given the same interpretation as the underlying EU rules.³⁸ By rejecting the EEA Agreement in 1992, Switzerland also discarded the 'project of creating an integrated economic whole with a single market based on common rules between its members'.³⁹ Instead, the EC-Switzerland agreement on the free movement of persons, which was the subject of the Opinion, merely aims at the strengthening of relations 'without any prospect of extending the application of the fundamental freedoms *in toto* to the Swiss Confederation', thus excluding identical interpretation from taking place automatically.⁴⁰ The Court of Justice in *Ettwein* interpreted the relevant provisions of the EC-Switzerland agreement in the light of the agreement itself without comparing the objectives of the agreement with those of the EU Treaties or the EEA Agreement.⁴¹ In spite of the lack of automaticity, the Court deemed the objectives in the particular case comparable and interpreted the relevant provisions of the EC-Switzerland agreement in light of its previous judgments given in the EU context.

4.3 THE EEA AGREEMENT

The EEA Agreement comes closest to the level of integration in the EU internal market. The objective of the EEA Agreement is to promote trade and economic relations between the contracting parties by setting up a 'dynamic and homogeneous' EEA based on the free movement of goods, persons, services and capital and equal conditions for competition.⁴² To realize the EEA, the EEA Agreement is continuously updated to reflect the developments in the internal market *acquis*. The EEA Agreement covers almost the entire internal market with the exception of the common customs tariff, common commercial policy and common agricultural and fisheries policies. Homogeneous interpretation of EEA *acquis* with EU *acquis* is moreover pursued by Article 6 EEA Agreement which provides that provisions of the EEA Agreement which are identical in substance to EU *acquis* must be interpreted in conformity with the pre-1994 case law of the Court.

Already before the conclusion of the EEA Agreement, its objectives were subject to scrutiny by the Court of Justice. In Opinion 1/91 the Court, implicitly referring to the *Polydor* doctrine, found that the identical wording of the provisions of the EC Treaty and the EEA Agreement does not necessarily lead to their identical interpretation unless the objectives of both treaties justify such analogous interpretation.⁴³ Even though the internal market objectives of the EU and the EEA are roughly identical the Court found that the free trade and competition rules in the EEC Treaty 'far from being an end in themselves' serve the purpose within the Community of 'making concrete progress towards European unity'.⁴⁴ Provisions 'identical in their content or wording' in themselves do not guarantee homogeneity between the EEC Treaty and the EEA Agreement.⁴⁵

The Court's conclusions in Opinion 1/91 regarding homogeneity were, however, not fully endorsed. In *Opel Austria*, the Court of First Instance (CFI, now General Court) rejected the Council's argument on the existence of major differences between the EU Treaties and the EEA Agreement that would preclude an identical interpretation of Article 10 EEA Agreement and the corresponding

³⁷ Opinion of AG Jääskinen in Case C-425/11 *Katja Ettwein v. Finanzamt Konstanz* of 18 Oct. 2012, nyr.

³⁸ *Ibid.*, para. 39.

³⁹ *Ibid.*, para. 36.

⁴⁰ *Ibid.*, paras 36–37, 65.

⁴¹ Judgment of the Court of Justice in Case C-425/11 *Katja Ettwein v. Finanzamt Konstanz* of 28 Feb. 2013, nyr.

⁴² Article 1 and Recital 4 of the Preamble of the EEA Agreement.

⁴³ Opinion 1/91 EEA I [1991] ECR I-6079, para. 14.

⁴⁴ *Ibid.*, paras 15–18.

⁴⁵ *Ibid.*, para. 22.

provision in the EC Treaty.⁴⁶ The CFI recognized the difference between the aims and context of the EEA Agreement and Community law yet did not perceive them as standing in the way of achieving homogeneity in the EEA. Instead, the CFI deemed the integration objectives of the EEA Agreement to ‘exceed those of a mere free trade agreement’, thus justifying the inapplicability of the *Polydor* doctrine.⁴⁷ The CFI argued that the conclusions of Opinion 1/91 referred to the envisaged judicial system of the EEA and its effect on the autonomy of the EU legal order rather than the identical interpretation of similar provisions.⁴⁸ The EEA Agreement contains certain safeguard clauses that allow the Joint Committee to refuse the entry of post-1994 *acquis* into the EEA legal order, thus leading to derogations from substantive uniformity between the EU and the EEA legal order. The CFI, however, regarded the possibility of derogations not to be of importance for the purpose of interpreting Article 10 EEA Agreement.⁴⁹ Certain substantive derogations in the composition of the *acquis* should not render the objectives of the EEA Agreement incomparable to EU law.

The arguments of the CFI in *Opel Austria* were refuted by AG Cosmas in *Andersson*.⁵⁰ The case concerned the interpretation of Article 6 EEA Agreement with a view to determining whether secondary EU law and principles established in the case law of the Court of Justice – in this case the *Francovich* doctrine – can be applied in the EEA legal order. Noting the ‘fundamental differences’ between the EU and the EEA legal systems the AG contended that the contexts are too different to transfer to the EEA the fundamental principles of primacy, direct effect and state liability.⁵¹ The analysis of AG Cosmas can be considered correct but must be regarded in the specific context of the applicability of fundamental principles in the EEA Agreement. Undoubtedly an important aspect in the process of constructing ‘European individuals’ outside the EU, it pertains the effect of the *acquis* outside the Union rather than the identical set of rights and obligations which is the focus of the present article. As concerns the comparability of the objectives of the EEA Agreement and the EU Treaties for the purpose of interpreting Article 10 EEA Agreement, AG Cosmas fully endorsed the CFI’s conclusions in *Opel Austria*.⁵²

The ‘notorious’ differences in character between the EU and the EEA Treaties once noted by AG Fennelly⁵³ have not been upheld in subsequent case law. In *Ospelt*, both AG Geelhoed and the Court of Justice agreed that the objective of ‘the fullest possible realization of the free movement of goods, persons, services and capital within the whole European Economic Area’ adds up to an extension of the EU internal market to the EEA EFTA States.⁵⁴ To the extent that the EU Treaties and the EEA Agreement feature similar provisions on the free movement of capital as well as similar objectives and context, the provision itself and permissible restrictions must ‘as far as possible’ be given identical interpretation.⁵⁵

Commentators, too, agree that the *Polydor* doctrine does not apply to the EEA Agreement to the effect of precluding identical interpretation of provisions which are identical in substance.⁵⁶ On the one hand, compared to the EEC-Portugal FTA, the EEA Agreement envisages much deeper cooperation. On the other hand, Article 6 EEA Agreement precludes conflicting interpretations, at least with regard to pre-signature case law. Moreover, although the EEA Agreement does not include a reference to the peoples of the EU and the EEA EFTA States as did the original EEC Treaty, the

⁴⁶ Case T-115/94 *Opel Austria v. Council* [1997] ECR II-39, paras 105–106.

⁴⁷ *Ibid.*, paras 106–107.

⁴⁸ *Ibid.*, para. 109.

⁴⁹ *Ibid.*, para. 110.

⁵⁰ Opinion of AG Cosmas in Case C-321/97 *Andersson and Wåkerås-Andersson* [1999] ECR I-3551.

⁵¹ *Ibid.*, para. 49.

⁵² *Ibid.*, at note 44.

⁵³ Opinion of AG Fennelly in Case C-110/95 *Yamanouchi* [1997] ECR I-3251, para. 30.

⁵⁴ Opinion of AG Geelhoed in Case C-452/01 *Ospelt* [2003] ECR I-9743, para. 69; Case C-452/01 *Ospelt* [2003] ECR I-9743, para. 29.

⁵⁵ Opinion of AG Geelhoed in Case C-452/01 *Ospelt*, *supra* n. 54, paras 69–71.

⁵⁶ Sven Norberg, *The European Economic Area*, in *Oliver on Free Movement of Goods in the European Union* 487–506 at 493 (Peter Oliver ed., Hart Publishing 2010); Carl Baudenbacher, *The EFTA Court and Court of Justice of the European Union: Coming in Parts But Winning Together*, in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* 183–203 at 191 (T.M.C. Asser Press 2013).

preamble of the EEA Agreement does speak of ‘the important role that individuals will play in the EEA through the exercise of the rights conferred on them by this Agreement and through the judicial defence of these rights’.⁵⁷ Importantly, Recital 8 was only added to the preamble of the draft EEA Agreement after the Court had given its Opinion 1/91.⁵⁸ Compared to both the EEC-Turkey Agreement and the EU-Switzerland bilateral agreements, therefore, objectives of the EEA Agreement do, indeed, to the extent of the internal market constitute a pre-determined guarantee for identical interpretation of *acquis* which is identical in wording. The type of the agreement plays hereby no particular role as all of the agreements discussed above have been concluded as association agreements.⁵⁹

4.4 THREE ROUNDS OF UNITED KINGDOM VERSUS COUNCIL: THE EEA, SWITZERLAND AND TURKEY AGREEMENTS COMPARED

The three recent judgments in cases *United Kingdom v. Council* provided a unique occasion to compare the objectives of the EEA Agreement,⁶⁰ the EC-Switzerland Agreement on the Free Movement of Persons,⁶¹ and the EEC-Turkey Association Agreement.⁶² Although the judgments do not concern the interpretation of identical provisions they illustrate the considerations of the objective and context of the international agreements which can and certainly will be taken into account should a question of identical interpretation arise at a different point in time.

Each of the cases concerns an annulment action brought by the UK government against a Council decision on the position to be taken on behalf of the EU in accordance with Article 218(9) TFEU by the bodies who amend the three international agreements. The amendments in question concerned the adoption into the EEA Agreement, the EC-Switzerland Agreement and the EEC-Turkey Agreement Regulation No. 883/2004 on the coordination of social security systems which replaced Regulation No. 1408/71. The UK government claimed that the decisions were adopted on a wrong legal basis. Instead of the Internal Market legal basis of Article 48 TFEU, the UK argued that the contested Council decisions should have been adopted on the basis of Article 79(2) TFEU regulating EU immigration policy. From the latter the UK may opt-out.

In all cases, the Court firmly overruled the UK’s arguments regarding the amendments as immigration policy measures. The first judgment delivered in Case C-431/11 concerned the EEA Agreement. The Court, firstly, cited its earlier judgment in *Ospelt* on the objectives of the EEA agreement to extend the internal market to EEA EFTA States and found that the contested Regulation served precisely the purpose of providing to EEA citizens the same social conditions for the exercise of their free movement rights as those enjoyed by EU citizens.⁶³ In the case of the EC-Switzerland agreement, the Court did not use the language of extending the internal market to Switzerland, probably due to the Swiss refusal to become party to the EEA Agreement. Instead, the Court referred to the objective of the agreement to ‘bring about between [the EC and Switzerland] the free movement of persons on the basis of the rules applying in the Community’.⁶⁴

Both the EEA and the EC-Switzerland agreements already contained EU *acquis* on the approximation of social security systems with a view to ensure the effectiveness of the free movement provisions. An update in EU *acquis* was necessary to incorporate changes introduced by the Lisbon Treaty. In order to ensure the balance of rights between EU citizens and the citizens of Iceland, Liechtenstein, Norway and Switzerland and ‘with the result that nationals of the EEA States concerned benefit from the free movement of persons under the same social conditions as EU

⁵⁷ Recital 8, Preamble of the EEA Agreement.

⁵⁸ Halvard Haukeland Fredriksen, *The EFTA Court 15 Years on*, 59 *Intl. & Comparative L. Q.* 731, 750 (2010).

⁵⁹ Among the bilateral agreements concluded with Switzerland, agreements belonging to ‘Bilateral I’ are association agreements but not those of the ‘Bilateral II’ package. The Agreement on the Free Movement of Persons is part of ‘Bilateral I’.

⁶⁰ Judgment of the Court of Justice in Case C-431/11 *UK v. Council* of 26 Sep. 2013, nyr.

⁶¹ Judgment of the Court of Justice in Case C-656/11 *UK v. Council* of 27 Feb. 2014, nyr.

⁶² Judgment of the Court of Justice in Case C-81/13 *UK v. Council* of 18 Dec. 2014, nyr.

⁶³ Case C-431/11 *UK v. Council*, *supra* n. 60, paras 50 and 58.

⁶⁴ Case C-656/11 *UK v. Council*, *supra* n. 61, para. 55.

citizens' required a due update in the EEA and EU-Swiss *acquis* on the free movement of persons but the scope of the amendment in itself was not significant.⁶⁵

The same does not hold true for the EEC-Turkey Agreement. The objective of the EEC-Turkey Agreement is narrower than the fullest possible realization of the free movement of persons, stating merely the wish of the contracting parties to secure between them the freedom of movement for workers in progressive stages, one of the stages being the incorporation of the contested Regulation into the Agreement.⁶⁶ As set out in *Demirkan* and other case law, there is no general freedom of movement between the EU and Turkey, nor have the parties completed the progressive introduction of the free movement of workers provided in Article 12 of the Agreement. In the judgment, the Court referred extensively to the previous judgments in the cases concerning the EEA Agreement and the EC-Switzerland Agreement. The comparison of the three agreements led to a conclusion that regarding the free movement of persons the objective of the EEC-Turkey Agreement was neither comparable to that of the EEA Agreement nor the EC-Switzerland Agreement.⁶⁷

The Court contended that the EEA EFTA States and Switzerland can be 'Equated with a Member State for the purposes of the application of those regulations' whereas Turkey cannot.⁶⁸ Even the fact that Regulation No 1408/71 had been incorporated into the EEC-Turkey Agreement and the Additional Protocol similarly as to the EEA and the EC-Swiss agreements, it did not have the same effect of extending to Turkey the rules on the coordination of social security systems.⁶⁹ As a result, Turkey was not covered by the extension of the internal market in the way of the EEA EFTA States and Switzerland. In the case at hand this meant that the Council decision in question could not be adopted solely on the internal market legal basis of Article 48 TFEU but in conjunction with Article 217 TFEU which is the legal basis for association agreements.⁷⁰ The additional legal basis was meant to emphasize the distinction between the EEC-Turkey Agreement and the EEA and EC-Switzerland agreements yet is somewhat puzzling as all of the agreements are association agreements. The Court highlighted that the legal basis of Article 48 TFEU may only be used on its own for adopting Internal Market measures within the EU or in external action vis-à-vis non-EU Member States that 'can be placed on the same footing' as EU Member States.⁷¹ The difference between the decisions does not lie within actual divergences in the application of Regulation 883/2004 in the third countries concerned but rather in the perceived differences in the level of integration of the third countries into the Internal Market. In this case, individuals of Iceland, Liechtenstein, Norway and Switzerland were, indeed, placed on an equal footing with EU citizens thus justifying their position as 'European individuals' outside the EU. In the case of Switzerland, this generalization cannot automatically be carried on to all of the bilateral agreements because the EU-Swiss cooperation lacks uniformity in the crucial elements of the Internal Market – the four freedoms.

In Opinion 1/91, the Court contended that the fundamental freedoms were only one of several possible means to achieve the Internal Market and economic and monetary union and, eventually, greater European unity.⁷² A reading of Opinion 1/91 in combination with the judgments in the above cases *United Kingdom v. Council*, however, reveals that the Court is not likely to restrict the application of EU *acquis* in countries covered by agreements which envisage deep regulatory integration. By 2014, the Court's careful approach towards the EEA Agreement has been replaced by recognition of the possibility of truly extending the Internal Market beyond the EU also in the light of the *Polydor* principle. The facts of the cases above did not require the Court to comment on the interpretation of EU *acquis* in the respective agreements yet the Court's affirmation of an extended Internal Market encourages one to assume that it is unlikely for the Court to impede the functioning of the expanded Internal Market by refusing to interpret EEA or even EU-Swiss *acquis* which is identical in substance to the underlying EU *acquis* differently from the latter.

⁶⁵ *Ibid.*, para. 58.

⁶⁶ Case C-81/13 *UK v. Council*, *supra* n. 62, paras 43, 45.

⁶⁷ *Ibid.*, para. 57.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, para. 58

⁷⁰ *Ibid.*, paras 59–66.

⁷¹ *Ibid.*, para. 59.

⁷² Opinion 1/91 EEA I, *supra* n. 43, para. 19.

5 CONCLUSION

The EU is becoming an ever closer union among the peoples of Europe and is likewise expanding the Internal Market integration to non-Member States. In the meantime, the fundamental freedoms – the cornerstone of the Internal Market – do not exist independently of the nuances provided by the Court of Justice. In order for an exported set of Internal Market *acquis* to function as a true extension of the Internal Market it must be ensured that national courts and especially the Court of Justice are willing to extend to the exported *acquis* the same interpretation that it gives to provisions of EU law. The Court's ruling in *Polydor* has long raised doubts as to the viability of the practice of exporting EU *acquis* from the perspective of thereby achieving a homogeneous legal space which includes both identical rules as well as identical interpretation of those rules.

Recent case law, however, has shown that early concerns have largely been unfounded. A comparison between three rather different agreements which export EU *acquis* to third countries reveals that it is possible to pass the 'objectives and context' test of *Polydor*. The question which remains is whether the equivalence of the objectives and context of an international agreement to the EU Treaties can be pre-determined such as appears to be the case with the EEA Agreement or whether the objectives and context have to be compared separately in each new case. Due to the incomplete application of the fundamental freedoms in the EU-Swiss relationship, for example, the provisions of each of the bilateral agreements must be analysed in the light of their own objectives. In those areas where integration is more advanced, such as the free movement of persons and goods, the Court is more likely to interpret provisions of the bilateral agreements in line with EU *acquis* than in areas such as the free movement of services. The EEC-Turkey Agreement generally lags behind the EEA and EU-Swiss agreements in terms of the depth of integration envisaged. Each provision of the EEC-Turkey Agreement must be fully proven in accordance with the *Polydor* doctrine without, of course, precluding an outcome of identical interpretation. It applies equally to all international agreements exporting the *acquis* that the interpretation of different provisions within the same agreement may vary. In some fields, non-EU individuals may be in a comparable situation to EU individuals whereas in other cases an identical interpretation is precluded by the purpose served by the particular provision in the EU and in the international agreement, respectively.

The possible application of the *Polydor* doctrine must also be considered by Member States wishing to leave the EU yet retain a stake in the Internal Market, perhaps even full membership. The option of switching from an 'opt-out' scenario to a full 'opt-in' scenario may seem tempting at first but may have serious consequences for the areas from which one does not wish to deviate. Identical interpretation of EU *acquis* which means identical scope of rights and obligations for the market participants is only automatically guaranteed in an EEA-type agreement pursuing deepest possible integration. Each divergence from the *acquis* that is reflected in the objectives and context of the instrument chosen will reduce the possibility to foresee the actual scope of the exported *acquis* following an interpretation by the Court.

From the perspective of the EU and the Court of Justice it is possible to construct 'European individuals' outside the EU legal order yet the required level of integration of the overall framework with the EU is deep. An opt-out from one policy area of the EU Treaties does not affect the scope of the rest of the *acquis* and the Member State who thus opts out does not lose the 'same footing' with other Member States. Has a Member State, however, decided to leave the Union and reject cooperation in certain fields, especially one of the four fundamental freedoms such as in the case of Switzerland, its 'equal footing' will be challenged to the extent of the individuals concerned losing their equal position vis-à-vis EU nationals. Cherry-picking outside the Union is, therefore, much trickier than inside.

EU Withdrawal: Good Business for British Business?

Adam LAZOWSKI*

In this article Adam Lazowski argues that withdrawal of the UK from the EU is not good business for British business. It analyses two available modalities of EU withdrawal: a unilateral exit and a consensual divorce. Arguably neither of the two will free the UK from EU law. For that to happen, the British authorities would have to engage in the time consuming and resource thirsty exercise of clearing the UK legal orders from EU law. This, combined with uncertainty as to future relations with the EU, is destined to affect the UK business community and unlikely to bring desired efficiencies.

1 INTRODUCTION

Withdrawal from the EU, however tempting for some political circles, will have profound economic and legal consequences for EU citizens and the business community inside and outside of the Union.¹ First and foremost, however, it will affect nationals and companies of the withdrawing country. Current public discourse in the UK demonstrates that many will welcome the exit with a sigh of relief, allegedly allowing removal of regulatory burden stemming from EU law or, as the Eurosceptics put it colloquially, removal of Brussels red tape. This article argues that the only way to achieve that aim would be to leave the EU unilaterally and to remove *en bloque* all EU-based legislation from the UK legal orders. Although it may be a tempting proposition it would not be economically or legally viable, hence such hopes are rather ill-based and do not reflect reality. The simple truth is that the other EU Member States remain one of the main trading partners of the United Kingdom therefore, should the EU exit come to fruition, it is in the interest of the British business community to proceed with a properly negotiated withdrawal guaranteeing a continued access to the internal market. This would require a good deal of regulatory convergence, whereby Britain would have to accept parts of the EU *acquis* without participation in EU decision-making. An area where the negative consequences would be particularly visible, but not covered in the withdrawal negotiations, are trade relations with third countries. The EU is a party to countless trade agreements with the rest of the World, and this includes a plethora of free trade agreements. By leaving the EU, the UK will no longer be a party to any of these. One should not be blinded by a mirage that they can be re-negotiated with ease. Quite to the contrary, it will take years to accomplish, not to mention that the *status quo* of the existing regimes would not be guaranteed. Bearing the above in mind, the key question, therefore, emerges: is EU withdrawal good business for British business?

The starting point of this article is a brief analysis of modalities for EU withdrawal (section 2). The impact of EU exit on the business community will largely depend on the post-divorce settlement, therefore it is crucial to unlock some of the myths surrounding exit from the EU (section 3). The impact of withdrawal on trade with third countries is discussed in section 4. It will be argued that the EU exit will bring years of uncertainty, while the legal detachment from the EU is neither going to be an easy nor a straight-forward exercise.

2 LEGAL MODALITIES OF EU WITHDRAWAL

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¹ For academic appraisal of the legal effects of EU withdrawal see A. Łazowski, *Withdrawal from the European Union. A Legal Appraisal* (Edward Elgar Publishing 2016). See also A.F. Tatham, *Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon*, in *EU Law after Lisbon* 128 (A. Biondi, P. Eeckhout & S. Ripley, eds, Oxford 2012); H. Hofmeister, *Should I Stay or Should I Go? - A Critical Analysis of the Right to Withdraw from the EU*, 16 *Eur. L.J.* 589 (2010); A. Łazowski, *Withdrawal from the European Union and Alternatives to Membership*, 37 *Eur. L. Rev.* 523 (2012); P. Nicolaidis, *Withdrawal from the European Union: A Typology of Effects*, 20 *MJ* 209 (2013); C.M. Rieder, *The Withdrawal Clause of the Lisbon Treaty in the Light of EU Citizenship: Between Disintegration and Integration*, 37 *Fordham Intl. L.J.* 147 (2013).

Since the Treaty of Lisbon Article 50 TEU provides for an exit clause.² Its wording is rather general, regulating only some basic legal parameters of EU withdrawal. In a nutshell, they are as follows. A Member State may express a desire to leave the EU and for that purpose it should inform the other Member States of its intentions. For the EU this triggers an obligation to commence negotiations of a withdrawal agreement, which will be conducted and concluded by the EU and the withdrawing country. If such an agreement is not negotiated within two years, the EU Founding Treaties will cease to apply to the withdrawing country, unless the European Council takes a decision to extend this transitional period. In terms of substance of such negotiations, Article 50 TEU is rather cryptic. It provides that an agreement should regulate the terms of withdrawal, ‘taking account future relations’ between the parties. Last but not least, Article 50(5) TEU makes it clear that any country that leaves the EU and then decides to re-join the club would have to go through the entire accession procedure.³

There is no doubt that these general rules will need to be supplemented by practice that will fill numerous lacunas left by the Treaty creators. How and when this will happen is, for the time being, a question without answer. Yet, it is perfectly reasonable to make some assumptions and suggestions how such rules should look like. For that purpose a teleological interpretation of Article 50 TEU will be pursued. Furthermore, an attempt will be made to draw experience from the accession process as some elements of the well-established *modus operandi* for EU enlargements may apply *mutatis mutandis* to EU exit.⁴

The first important question that needs to be answered is whether Article 50 TEU allows for a unilateral exit from the EU. In this respect, two schools of thought have emerged. Numerous scholars argue that the wording of Article 50 TEU leaves no doubts that a withdrawal may be a one-sided affair.⁵ If one pursues a literal interpretation of the provision, such an argument has merits. This author has, however, offered in another publication on the topic, a different way of reading Article 50 TEU. It takes into account the economic and legal environment of the E U, which arguably precludes a literal interpretation of the exit clause.⁶ The EU is much more than a political alliance of twenty-eight Member States. It is the biggest trade block in the World founded on a unique legal order.⁷ Bearing this in mind it seems fitting to argue for a teleological interpretation of Article 50 TEU. As soon as that is taken on board, the possibility of a unilateral withdrawal becomes a mere theoretical proposition, which is highly unlikely to turn into reality. From the business point of view it would amount to cutting all direct economic ties between the UK and the EU, undermining those businesses that benefit from trade across the English Channel.⁸ As will be explored further in the next section of this article, it will not detach those companies, at least, *ab initio* from EU law. Such interpretation triggers a question about the nature of the two-year deadline laid down in Article 50 TEU. Arguably,

² Prior to the Treaty of Lisbon neither TEU nor EC Treaty contained rules on withdrawal from the EU. This, however, did not mean that EU exit was not theoretically possible as standard rules of public international law applied. See, *inter alia*, H. de Waele, *The European Union on the Road to a New Legal Order - the Changing Legality of Member State Withdrawal*, 12 Tilburg For. L. Rev. 169 (2004–2005); J.A. Hill, *The European Economic Community: The Right of Member State Withdrawal*, 12 Ga. J. Intl. & Comparative L. 335 (1982); J.H.H. Weiler, *Alternatives to Withdrawal from an International Organisation: the Case of the European Economic Community*, 2 Isr. L. Rev. 282 (1985).

³ This, as the pre-accession rules stood at the time of writing (an unlikely to change in the foreseeable future), covers EU law in its entirety. It includes compulsory, yet phased-in participation in, the Schengen *acquis* as well as Economic and Monetary Union. If the United Kingdom were to leave the European Union and then re-apply for membership it would no longer be entitled to the plethora of opt-outs it has been benefiting from ever since the Treaty of Maastricht entered into force.

⁴ For the most recent experience see A. Łazowski, *EU Do Not Worry, Croatia is Behind You: A Commentary on the Seventh Accession Treaty*, 8 Croatian Y.B. Eur. L. & Policy 1 (2012).

⁵ See, for instance, Tatham, *supra* n. 1 at 152.

⁶ Łazowski, *Withdrawal from the European Union. A Legal Appraisal*, *supra* n. 1.

⁷ As proclaimed by the Court of Justice in the seminal case *Van Gend en Loos* (see Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration ECLI:EU:C:1963:1). For a commentary see, *inter alia*, P Pescatore, *Van Gend en Loos, 3 February 1963 - A View from Within*, in *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty 3* (M P Maduro & L Azoulai eds, Hart Publishing 2010); B de Witte, *The Continuous Significance of Van Gend en Loos*, in *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty 9* (M P Maduro & L Azoulai eds, Hart Publishing 2010).

⁸ For other consequences of unilateral withdrawal see further, *inter alia*, Łazowski, *Withdrawal from the European Union. A Legal Appraisal*, *supra* n. 1.

it is an instruction to negotiators of a withdrawal agreement, a warning against unnecessary procrastination during the withdrawal negotiations. A disorderly divorce is in the interest of neither the withdrawing country nor the EU. Therefore, it is reasonable to assume that failure to negotiate a withdrawal agreement within two years is most likely going to result in a decision of the European Council extending the deadline. A teleological interpretation of Article 50 TEU suggests that it is based on a presumption that if any withdrawal actually takes place it will have to be based on properly negotiated terms of exit and on regulating future relations. If there is anything that the business community particularly dislikes, it is uncertainty. While the EU exit is a big gamble in lots of respects, a Treaty-based withdrawal should provide a solid legal basis for the divorce and post-divorce relations. This will never be the case with a unilateral withdrawal.

Following on the assumption that the best way forward, should the withdrawal option be chosen, is a Treaty-based exit, it is worth delving into the legal character of such an agreement as well as its potential contents. As far as the first is concerned, Article 50 TEU leaves no doubts that a withdrawal agreement will formally be an international treaty concluded between the EU and the withdrawing country. Bearing in mind its potentially rich substance, it is likely to be a mixed agreement. Therefore, it will require not only approval of the EU and the UK but also ratification by all other Member States.⁹ This will be neither easy nor fast. Being an international treaty concluded as per Articles 50 TEU and 218(3) TFEU, it will fall within the jurisdiction of the ECJ as per Article 218(11) TFEU and the standard action for annulment (Article 263 TFEU). This may translate into lengthy litigation, which will not provide for the certainty the business community desires.

One additional point needs to be made at this stage of the analysis. As well-established in the jurisprudence of the ECJ, provisions of international agreements to which the EU is a party can be invoked in national courts in accordance with the doctrine of direct effect.¹⁰ It should be noted, however, that in the case of some trade agreements recently concluded by the EU, particularly the Association Agreements with Ukraine,¹¹ Georgia¹² and Moldova,¹³ the Council decisions on signing of these agreements contain provisions going against the case-law of the Court by precluding their direct effect.¹⁴ These caveats appear in unilateral EU decisions, therefore they are not subject to negotiations with third countries. One can imagine the temptation on the EU side to have such a clause inserted into a decision on signing of the withdrawal agreement. Should that happen, British companies and citizens would be deprived of the possibility of invoking their rights based on the withdrawal agreement directly in the courts of EU Member States.

As already mentioned, in a very general fashion Article 50 TEU gives an indication that it should regulate the terms of withdrawal, taking account of future relations between the ‘divorcee’ and the EU. Here again, one may consider at least two alternative interpretations of this provision. The first is to treat the term ‘taking account of future relations’ as an instruction to include in the withdrawal agreement only basic parameters of a ‘post-divorce arrangement’. This, however, would create considerable uncertainty as to the details of future relations, which cannot be welcome to the business

⁹ See further on mixed agreements, *inter alia*, C. Hillion & P. Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010).

¹⁰ See, for instance, Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.*, ECLI:EU:C:1982:362; Case C-192/89, *S. Z. Sevince v. Staatssecretaris van Justitie*, ECLI:EU:C:1990:322; Case C-63/99, *The Queen v. Secretary of State for the Home Department, ex parte Wieslaw Gloszczuk and Elzbieta Gloszczuk*, ECLI:EU:C:2001:488; Case C-265/03, *Igor Simutenkov v. Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, ECLI:EU:C:2005:213.

¹¹ Association Agreement between the European Union, the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, OJ L 161/2014, p. 3.

¹² Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ L 261/2014, p. 4.

¹³ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, OJ L 260/2014, p. 4.

¹⁴ Council Decision 2014/295/EU of 17 Mar. 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Art. 1, and Titles I, II and VII thereof, OJ L 161/2014, p. 1; Council Decision 2014/494/EU of 16 Jun. 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ L 261/2014, p. 1; Council Decision of 16 Jun. 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, OJ L 260/2014, p. 1.

community. Thus, the second interpretation of Article 50 TEU may be preferable assuming a withdrawal agreement covering in a complex fashion the terms of withdrawal and the aftermath of EU exit. This would not be the case in a scenario where the UK becomes an EEA-EFTA Member State. If this option were pursued, the withdrawal agreement would only cover terms of exit, while the EEA Treaty would regulate future relations between the UK and the EU. It is notable, however, that for this to materialize at least two additional treaties would be required – one on accession to EFTA (*a conditio sine qua non* for the EEA eligibility) and another on accession to the EEA. Since this scenario is very unlikely, it will not be discussed any further for the purposes of this article, yet the experience of the EEA and also of the Swiss model will serve as a point of reference for the analysis that follows.

Arguably, ‘post-divorce’ relations will create most problems during the negotiations of the withdrawal agreement. Experience with a variety of agreements concluded with EU neighbouring countries demonstrates a rule of thumb.¹⁵ The closer the economic integration the more comprehensive the obligation to approximate national law with the EU *acquis*, which – in some cases – has evolved into an obligation to apply EU law. Bearing this in mind one has to assume that if the UK wishes to benefit from the Internal Market *in toto* or parts thereof, it will have to comply with selected pieces of EU legislation. As well-known from the experience of the EEA and EU-Swiss relations, a major bone of contention will be the *modus operandi* for securing homogeneity of the legal space thus created between the withdrawing country and the EU. While the EEA system is dynamic, the Switzerland model is, with a few exceptions, static. To put it differently, the EEA-EFTA countries are under a general obligation to follow developments in EU law while the Swiss authorities may proceed according to their wishes on a case-by-case basis. One thing, however, both systems have in common. Neither the EEA-EFTA countries nor Switzerland have the right to participate in EU decision-making as such. Their involvement is limited to the level of working groups and therefore is referred to as decision-shaping.¹⁶ The key question that will have to be answered during the withdrawal negotiations is which of the two models would be acceptable to both sides and to what extent a former EU Member State should be allowed to participate in EU decision-making. This will largely be determined by the intensity of post-divorce relations between the two sides. The rule of thumb is: the weaker the links, the weaker the involvement; the stronger the links, the more extensive the involvement. The decision on the future relations will also very heavily affect the business community. Until the basic determinants are agreed on, it is very difficult, if not impossible to evaluate the exact impact the withdrawal will have on British companies. Irrespective of that, however, it is clear that exit from the EU will not free British companies from the curbs of EU law. Those who believe otherwise are in for a nasty surprise. This is further elaborated in the next section of this article.

3 FAREWELL EU LAW?

The EU legal order is not perfect. A *cliché* it may be, but most of the legislation, be it domestic, international or EU, cannot be categorized in simplistic way as good or bad. An ultimate assessment depends on a variety of factors and, first and foremost, on the perspective of a person making a judgment. If one takes as an example EU consumer protection or competition legislation, the assessment will vary depending on whether the evaluation exercise is conducted by consumer associations or businesses. The first is more likely to praise the legislation or to criticize it for not sufficiently covering or protecting consumer rights. The latter will probably have a rather contrasting take on such EU *acquis*: anything from a nuisance to a straightjacket for business. Such contrasting views are inevitable but the reason why this is mentioned at this stage of the analysis is of utmost importance. Withdrawal from the EU, whether unilateral or consensual, will not per se detach the UK

¹⁵ Of particular importance will be experience gained in the negotiations with EFTA countries of the European Economic Area Agreement. See further, inter alia, M. Robinson & J. Findlater (eds), *Creating a European Economic Space: Legal Aspects of EC-EFTA Relations* (Irish Centre for European Law 1990); S. Norberg et al., *EEA Law. A Commentary on the EEA Agreement* (Fritzes Wolters Kluwer Sweden 1993).

¹⁶ For comparative analysis see, inter alia, A. Łazowski, *Enhanced Multilateralism and Enhanced Bilateralism: Integration without Membership in the European Union*, 45 Com. Mkt. L. Rev. 1433 (2008).

from EU law. Quite the contrary, in order to ‘de-EU’ the UK legal orders one would have to engage in a very complex and time-consuming exercise of sifting through the EU and domestic legislation with the view of selecting legal acts that would be repealed, amended or kept in force in the wake of a withdrawal. This should be conducted robustly, taking all advantages and disadvantages of EU legislation into account. A simplistic approach that all EU law is bad or good should be avoided at all costs. The basic parameters of this exercise will be determined by the model of withdrawal opted for and, if a consensual exit is chosen, on the terms of the post-divorce relations. As explained above, the deeper the involvement in the Internal Market, the more legal convergence will be required. This in itself will not allow the UK to proceed with a complete detachment from EU law. Even a unilateral withdrawal will not, per se, guarantee the severance of legal ties with the Union.

In the first instance the withdrawal from the EU would merely mean that the EU Founding Treaties would cease to apply to the UK and the jurisdiction of the ECJ would come to an end. In this respect, the choice between unilateral or consensual exit makes no difference. The real question is, though, what would happen to hundreds of legal acts that form the EU *acquis*. In this respect, a number of scenarios can be developed. To begin with, one would expect that the UK would repeal the European Communities Act 1972 to sever the links and to cut off the UK legal orders from the influence of EU law.¹⁷ This, though, would only block direct application of the Treaties as well as EU regulations and decisions. It would also preclude reliance on the direct effect of EU directives as well as international treaties concluded by the EU. Furthermore, EU framework decisions would cease to apply in the UK.¹⁸ However, many associated measures would have to be taken. National rules giving effect or supplementing regulations or transposing directives/framework decisions will remain in force, and frequently their EU origin would remain unnoticed, until identified, declared undesirable and repealed accordingly. From this perspective, an inordinate unilateral withdrawal or badly planned consensual divorce may have considerable implications for the business community, as it would create a legal cacophony of considerable proportions. This is explored further below.

Starting with EU regulations, contrary to the common perception their direct applicability, based on Article 288 TFEU, does not make them self-contained legal regimes not requiring action of domestic legislators. While EU Member States are not allowed to copy regulations into their national laws,¹⁹ they frequently remain under an obligation to provide a domestic legal framework to facilitate the direct application of EU regulations.²⁰ Hence, the final outcome is frequently a patchwork of EU regulations and supplementing domestic measures.²¹ In preparation for EU withdrawal, much can be learned from the accession process. During the period preceding the membership of the EU future Member States have to approximate their national legal orders with the EU *acquis*, including regulations.²² For that purpose EU regulations are largely copied into national laws, however,

¹⁷ See further G. Howe, *The European Communities Act 1972*, 49 *Intl. Aff.* 1 (1973).

¹⁸ Following the exercise of the grand JHA opt-out in December 2014 the United Kingdom is still bound by several pre-Lisbon Treaty framework decisions. This includes, for instance, Framework Decision 2002/584/JHA of 13 Jun. 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18 Jul. 2002, p. 1. For a full list of pre-Lisbon measures still applicable to the United Kingdom see: Council Decision 2014/857/EU of 1 Dec. 2014 concerning the notification of the United Kingdom of Great Britain and Northern Ireland of its wish to take part in some of the provisions of the Schengen *acquis* which are contained in acts of the Union in the field of police cooperation and judicial cooperation in criminal matters and amending Decisions 2000/365/EC and 2004/926/EC, OJ L 345/2014, p. 1; 2014/858/EU: Commission Decision of 1 Dec. 2014 on the notification by the United Kingdom of Great Britain and Northern Ireland of its wish to participate in acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon and which are not part of the Schengen *acquis*, OJ L 345/2014, p. 6.

¹⁹ See for instance Case 93/71, *Orsolina Leonesio v. Ministero dell'agricoltura e foreste*, ECLI:EU:C:1972:39, Case 34/73, *Fratelli Variola S.p.A. v. Amministrazione italiana delle Finanze*, ECLI:EU:C:1973:101; Case 18/72, *NV Granaria Graaninkoopmaatschappij v. Produktschap voor Veevoeder*, ECLI:EU:C:1972:108; Case 50/76, *Amsterdam Bulb BV v. Produktschap voor Siergewassen*, ECLI:EU:C:1977:13; Case 94/77, *Fratelli Zerbone Snc v. Amministrazione delle finanze dello Stato*, ECLI:EU:C:1978:17.

²⁰ See, for instance, Case 39/72 *Commission of the European Communities v. Italian Republic*, ECLI:EU:C:1973:13.

²¹ *Societas Europaea* is a very good example in this respect. The legal regime is composed of Council Regulation (EC) No. 2157/2001 of 8 Oct. 2001 on the Statute for a European company (SE) (OJ L 294/2001, p. 1), Council Directive 2001/86/EC of 8 Oct. 2001 supplementing the Statute for a European company with regard to the involvement of employees (OJ L 294/2001, p. 22) as well as domestic laws implementing the Directive and filling the gaps left by the EU legislator in the Regulation.

²² For in-depth analysis of pre-accession approximation conducted in the current candidate and potential candidate countries of the Western Balkan region see, inter alia, A. Łazowski & S. Blockmans, *Between Dream and Reality: Challenges to the Legal*

subsequently and taking effect on the day of accession, such domestic rules, which mirror self-executing provisions laid down in regulations, are repealed. In the case of withdrawal from the EU the situation would be just the reverse. It is imperative that the automatic repeal of EU regulations on the day of withdrawal should coincide with the removal of all domestic provisions filling gaps left by the EU legislator. Otherwise such national provisions would frequently make little sense and be largely devoid of purpose. Furthermore, EU regulations have largely replaced national rules in several areas, including, *inter alia*, financial services, transport, food production or agriculture. Thus, in order to secure legal certainty at the time of withdrawal the UK authorities would have to engage, well ahead of the EU exit, in a proper screening of the UK legal orders with the view of having a ‘complete inventory’ of applicable EU regulations. This should be combined with a detailed action plan for their replacement by statutory instruments or acts of parliament. For the rest, a list of domestic measures complementing EU regulations that are destined for repeal should be provided. This complex exercise would have to be conducted in an orderly fashion, subject to a robust and consistent methodology. Such a scenario would apply chiefly in case of unilateral withdrawal from the EU. Bearing in mind the already argued preference of a Treaty-based exit, it is necessary to add one more crucial element to this jigsaw puzzle. Looking at the examples of the EEA or the Swiss model, one can assume that the withdrawal agreement will require the UK to comply with a list of EU regulations as a *conditio sine qua non* for access to the EU internal market. If that were to happen, it would have to be taken into account for purposes of the legal detachment exercise. To put it differently, while making an inventory of EU regulations and their domestic implementing measures, the UK authorities would also have to list those EU regulations and the relevant national provisions that would remain in force *after* the divorce.

The situation would be different with EU directives or framework decisions, which always require transposition into national laws. Although, as per jurisprudence of the ECJ, directives may produce direct effect, this does not amount to their direct applicability.²³ Withdrawal from the EU would mean that the UK implementing measures will be detached from their original source but, unlike in the case of regulations, there would be no immediate threat to legal certainty. Domestic implementing measures will turn into mere legal transplants,²⁴ some of which will lose their *raison d’être* and will become obsolete. A good example would be sections of the Extradition Act giving effect to the Framework Decision 2002/584/JHA on the European Arrest Warrant, which is inextricably linked with EU membership.²⁵ The same would apply to some directives which are devoid of purpose in a non-membership legal environment. It is notable that from the day of withdrawal, the UK would cease to be bound by the principle of loyal cooperation laid down in Article 4(3) TEU and thus would be free to repeal national provisions transposing the undesired EU directives, framework decisions or parts thereof. Just like in case of the EU regulations, full detachment from the EU *acquis* would go well beyond a mere repeal of the European Communities Act 1972. For that exercise the UK would again benefit, at least as far as methodology is concerned, from the lessons of the accession process. Prior to approximation with the EU *acquis*, accession countries are advised, in the first place, to screen their national legal orders as to compliance with EU law with the view of identifying legislative gaps. Subsequent approximation then aims at filling those gaps.²⁶ In case of withdrawal, a similar exercise would have to be conducted. The aim would be first to identify which domestic provisions actually originate in EU directives or a few framework

Rapprochement of the Western Balkans, in The Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space? 108–133 (R. Petrov, P. Van Elsuwege eds, Routledge 2014).

²³ For the past forty years this has been a hotly debated topic in the academic literature. See, for instance, A. Dashwood, *From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?*, 9 Cambridge Y.B. Eur. Leg. Stud. 81 (2006–2007); P. Craig, *The Legal Effect of Directives: Policy, Rules and Exceptions*, 34 Eur. L. Rev. 349 (2009).

²⁴ H. Xhantaki, *Legal Transplants in Legislation: Defusing the Trap*, 57 Intl. & Comparative L. Q. 659 (2008).

²⁵ Council Framework Decision 2002/584/JHA of 13 Jun. 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L 190/1. The only exception would be if the withdrawal agreement provided for application of the European Arrest Warrant to the United Kingdom after the EU exit. This, *ab initio*, should not be excluded bearing in mind unquestionable (though controversial) security credentials of the EAW.

²⁶ One should note that, at least as far as the current candidate and potential candidates of the Western Balkans are concerned, approximation is frequently part of state creation exercise. To put it differently, while approximating their national legal orders with EU *acquis* are involved in an exercise that goes well beyond filling in the existing gaps but amounts to the creation of entire areas of law from scratch.

decisions still applicable to the UK. It may well turn out that many national laws criticized by the business community as allegedly originating from the EU are, in fact, home-made nuisances or straightjackets. One should not forget that over the past years the EU has been engaged in a de-regulation exercise of considerable proportions and numerous pieces of EU legislation have been repealed as a result. Hence, not all red tape is necessarily coming from the other side of the Channel. Preparation of such an inventory of EU directives and their national implementing measures would be the starting point. What would follow should not be, however, a straight-forward ‘repeal or keep’ exercise. A detailed analysis would be necessary which of those national measures would need to stay, as a matter of principle, however subject of some fine-tuning. Consumer protection, employment, insurance or environmental protection are ideal examples to demonstrate this point. All are inherent parts of the legal landscape in economically and politically developed countries. Hence, it is impossible to imagine the UK legal orders without a comprehensive legal regime covering these well-established areas of law. Furthermore, as already mentioned in relation to EU regulations, the legal detachment exercise would also be influenced by the exact content of the withdrawal agreement. Since the latter is likely to require the UK to either apply or to approximate its national legislation with the EU *acquis* post-divorce, the domestic measures giving effect to EU directives listed in the withdrawal agreement would need to be maintained in the UK legal orders.²⁷

As this analysis demonstrates, bidding farewell to EU law will not be a straight-forward exercise. It will be a time-consuming and resource-intensive process irrespective of whether an EU exit takes the shape of unilateral withdrawal or a consensual divorce based on a proper legal framework. Although the latter would guarantee more legal certainty in the long-term, it would, inevitably, be preceded by a considerable degree of uncertainty as to the future arrangement applicable on the date of withdrawal. Judging by the experience gained from the complex negotiations with the EFTA countries before the creation of the EEA²⁸ or talks with Switzerland leading up to conclusion of the Bilateral I and Bilateral II packages,²⁹ the negotiations will be lengthy and will centre around two main areas. First, the share of the Internal Market that would be offered to the withdrawing country. Second, the scope of regulatory engagement required post-exit is likely to be a bone of contention. In this regard, one would expect the toughest negotiations to cover rules securing the homogeneity of the legal regime. The question is to what extent the UK, after its withdrawal from the EU, should be bound by EU law, its future developments and the jurisprudence of the ECJ. As for the first, the withdrawal agreement is likely to contain lists of EU secondary legislation the UK would still be bound by, irrespective of whether a law application or a law approximation model is opted for. As already mentioned, the determination of whether the model should be dynamic or static will definitely be the most difficult issue to address. The question is whether the UK should have the obligation to follow all new EU *acquis* covered by the withdrawal agreement (dynamic model) or if it would have the right to opt-in according to its preferences (static model). Either way it would probably require participation in decision-shaping at the EU level, short of fully fledged contribution to decision-making. This is the case in the EEA model and partly in the EU-Swiss framework, to the extent that the latter imposed on Switzerland an obligation to apply the EU *acquis*.³⁰ In the withdrawal negotiations the dynamic model would probably be preferred by the EU, the static by the U.K. To reconcile such opposing positions would be very hard, indeed. Another, though related, issue that the

²⁷ The obligation to apply EU law is well known in the European Economic Area, the Swiss model or the Energy Community, whereby the EU and third countries created joint European Legal Spaces. This obligation should be distinguished from the obligation to approximate domestic rules with EU *acquis*, that is, to create domestic legal transplants sans a European Legal Space. It should be also noted that three Association Agreements concluded recently between the European Union and Ukraine, Georgia and Moldova fall short of imposing a requirement to apply EU law. However, they condition access to parts of the EU Internal Market on comprehensive approximation of national laws with EU *acquis*. For that purpose, these Agreements contain a plethora of annexes listing EU *acquis* that domestic legal orders have to be approximated with and provide detailed deadlines for that purpose. See further, *inter alia*, Łazowski, *supra* n. 16.

²⁸ See S. Norberg et al., *supra* n. 15.

²⁹ See further on the Swiss model, *inter alia*, L. Goetschel, *Switzerland and European Integration: Change Through Distance*, 8 Eur. For. Aff. Rev. 313 (2003); S. Breitenmoser, *Sectoral Agreements between the EC and Switzerland: Contents and Context*, 40 Com. Mkt. L. Rev. 1137 (2003); F. Emmert, *Switzerland and the EU: Partners, for Better or for Worse*, 3 Eur. For. Aff. Rev. 367 (1998).

³⁰ See further A. Łazowski, *supra* n. 16.

negotiators would have to address is the extent to which the UK courts would be bound by the interpretation of relevant legal acts by the ECJ. One of the weaknesses of the existing arrangement with Switzerland is the lack of judicial means of securing the homogeneity of interpretation of EU law. Unlike in the EEA, where this task is attributed to the EFTA Court,³¹ the EU-Swiss model provides neither for joint judicial authority nor access of Swiss courts to the ECJ or the EFTA Court. This proves to be not sustainable. Therefore, it is rather likely that the negotiators of the withdrawal agreement will have to address that issue, too.

4 THE EXTERNAL DIMENSION OF AN EU EXIT

EU withdrawal would also have an external dimension, with an impact on the British business community. The EU is a party to hundreds of international treaties, including agreements covering trade matters, be it liberalization of trade or creation of free trade areas and in case of Turkey, of a customs union. These agreements with third countries are either concluded by the EU itself or by the EU and its Member States. Here the impact of EU exit will not be addressed during the withdrawal negotiations as these matters would require the involvement of all the third countries the EU has concluded agreements with. Hence, as a matter of principle, they will cease to apply to the United Kingdom as of the date of withdrawal, irrespective of *modus operandi* chosen for that purpose. For a withdrawing country this triggers a fundamental question on how to proceed.³² One option would be to commence negotiations with the third countries of future trade agreements, before the EU withdrawal. In purely theoretical terms this is a sound proposition, yet it does not reflect a myriad of issues that will make this a problematic exercise. To begin with, third countries may approach such requests for negotiations with trepidation, taking into account the simple fact that the United Kingdom would remain a Member State until the date of EU exit and this may be marred with uncertainty. Indeed, one has to take into account the possibility of reversal of plans during the withdrawal negotiations and a decision on continued EU membership. The negotiations of new agreements with third countries would then be conducted in vain. The second option would be to commence trade negotiations with third countries as soon as the EU exit materializes. This, however, would leave a major legal vacuum as the old EU agreements would cease to apply and the future ones would be subject to negotiations. During that period the British businesses would likely be losing free or preferential access to the markets of these third countries with which the EU has trade agreements. Furthermore, to assume that, if such negotiations commenced, the United Kingdom would be as successful as the EU had been in the past may prove an illusion. The persuasive force of a medium-sized country is very much different to that of the biggest trade block in the World. Thus, at the end of the day the United Kingdom is likely to be worse off.

This example again demonstrates that EU withdrawal would not be as straight-forward as some may think. It is likely to take years to negotiate satisfactory solutions in negotiations of trade agreements with the third countries, which, in turn, will require a major effort on the part of the United Kingdom public administration. Needless to say that it will be a resource-intensive exercise that may not be ideal when pursuing austerity policies. It will also contribute to uncertainty underpinning the withdrawal process, as the results of the negotiations would be impossible to determine in advance. Hence businesses exporting goods or services to third countries will be in suspense for considerable periods, not to mention that the outcomes of these negotiations may not be satisfactory.

5 CONCLUSIONS

EU withdrawal is likely to have a considerable impact on the British business community. Exact economic implications will not be known before ‘Brexit’ actually taking place; therefore any analysis

³¹ See *The EEA and the EFTA Court, Decentred Integration* (Hart Publishing 2015).

³² It is notable that the European Union will also have to engage in negotiations with these third countries with which it has the agreements. Similarly to the accession process it will be necessary to agree on tailor-made protocols reflecting the departure of the United Kingdom.

in this respect carries a fair degree of speculation. Most recent studies indicate, however, that departure from the EU will not bring the businesses desired efficiencies but, *au contraire*, it is very likely to be detrimental.³³ The legal implications of an EU exit are, in comparison, easier to determine as they are based on a number of objective factors. As this analysis demonstrates, the exact legal parameters of EU withdrawal hinge upon the model that will be chosen for future relations between the United Kingdom and the EU. This will remain unknown until negotiations are completed. The fact that there is no prior experience in this respect means that both sides will step into the unknown. Furthermore, a clear lack of compelling alternative to EU membership brings a lot of uncertainty into equation. As argued in this article, a unilateral withdrawal should be taken off the cards *ab initio*. It is a tempting intellectual exercise but not a realistic proposition. Even if opted for, it would not guarantee the legal detachment from the EU that some circles are dreaming of. Consensual divorce based on a withdrawal agreement would not guarantee that, either. As Lord Denning famously argued, EU law is an incoming tide that cannot be held back.³⁴ To reverse it would be an exercise of massive proportions. If not conducted in a meticulous and sober fashion, the British business community will have to face a long period of trade in an environment characterized by uncertainty, including the possibility of considerable and long-lasting disruptions of trade with the EU and many third countries. Furthermore, the benefits of the internal market will only be guaranteed if the post-divorce solution provides for a degree of regulatory convergence, along the lines ‘more for more’, which are so well-known from the recent negotiations of Association Agreements with Ukraine, Moldova and Georgia. A complete detachment from EU law seems to be neither realistic nor possible.

However, one has to address the argument made earlier that EU law, just like domestic legal orders, has as many advantages as it has flaws. From the perspective of the British businesses it may be more effective to address those flaws from the inside; that is, by retaining EU membership and engaging in reforms. Arguably, the energy and resources used for the EU exit may better be used in pursuing genuine reforms of the internal market and the surrounding regulatory framework. The balance of competences review conducted by the Foreign and Commonwealth Office is, for that purpose, a very good starting point.³⁵ Equally plausible are efforts undertaken by the European Commission to clear the EU legal order of obsolete and undesired legislation (REFIT Programme) and the policy of the new Commission to table fewer proposals.³⁶ In the same vein the European Commission should be expected to refrain from presenting proposals for legislation, which have no serious chance of turning into laws. The case of a proposal for a Regulation on the right to strike has quickly turned into a textbook example of dubious practice that serves little purpose.³⁷

Irrespective of whether the option of EU withdrawal is chosen or a preference is given to continued membership, subject to de-regulation and reforms, one thing is certain. The United Kingdom government needs to develop a solid policy, which is bullet-proof to political shenanigans but based on substantive and sober assessment of the balance sheet. What is required before any steps towards a withdrawal from the EU are taken, including a referendum, is an honest and merit-based answer to a fundamental question: is EU exit good business for business? This article argues that it is not. It is a perfect recipe for years of uncertainty and, most likely, an arrangement for future relations with the European Union, which will make the UK and its businesses worse off for years to come.

³³ See, for instance, Centre for European Reform, The economic consequences of leaving the EU. The final report of the CER commission on the UK and the EU single market, available at: http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2014/report_smc_final_report_june2014-9013.pdf.

³⁴ ‘But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back.’ Lord Denning MR in *H.P. Bulmer Ltd. and Another v. J. Bollinger S.A. and Others* [1974] Ch. 401, 418.

³⁵ For a detailed assessment of this exercise see M. Emerson (ed.), *Britain’s Future in Europe. Reform, Renegotiation, Repatriation or Secession?* (CEPS 2015).

³⁶ See Annex to the Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2015 A New Start, COM(2014) 910 final.

³⁷ Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM (2012) 130 final.

Regaining Sovereignty? Brexit, the UK Parliament and the Common Law

Graham GEE & Alison L. YOUNG*

In this paper, we compare how the term ‘sovereignty’ was used by MPs in parliamentary debates on the European Communities Bill in 1971–1972 and the European Union Bill in 2011. In both cases, the language of sovereignty was often a placeholder for deeper concerns about the erosion of the political power exercisable by domestic political institutions. Comparing parliamentary debates separated by almost forty years reveals a shift from concerns primarily about the erosion of sovereignty by the law-making powers of European political institutions towards concerns about its erosion by the courts, and the domestic courts at that. We reflect on these concerns to evaluate whether a possible UK withdrawal from the EU would lead to a ‘regaining’ of sovereignty.

1 INTRODUCTION

That the United Kingdom is experiencing a period of constitutional upheaval seems almost trivially true.¹ There are rival views on the extent, significance and appeal of this upheaval, but few would dispute that over the last forty or so years many of the broad contours of the United Kingdom’s constitution have been redrawn. Indeed, it is little exaggeration to suggest that the United Kingdom no longer has a ‘settled constitution’ – i.e., one characterized by slow evolution, where parliamentary sovereignty was the unimpeachable rule in a highly centralized state. Rather, it has an increasingly ‘unsettled constitution’ – i.e., one characterized by substantial and seemingly far-reaching change, with reforms in one decade triggering spill-over effects in subsequent years, and all of which occurs against the backdrop of increasing doubts about the relevance of parliamentary sovereignty in a multi-polar state.² Amongst the factors contributing to the ‘unsettling’ of the constitution are questions about the United Kingdom’s continued membership of the EU, which not only generate political and legal uncertainty in their own right, but also have very real implications for other aspects of the United Kingdom’s constitutional unsettlement, most obviously the politics of Scottish independence.

A web of factors accounts for the resurfacing of ‘the European question’ at the forefront of constitutional debates in the United Kingdom. One such factor is the changing and complicated views of political elites. That the majority of political leaders believe that the United Kingdom should remain an EU Member State, and that none of the mainstream parties has advocated withdrawal since 1983, belies a deep-seated ambivalence in significant swathes of the political class,³ with a strong streak of scepticism as a long-standing current in political discourse about the EU.⁴ Political opinions have also been very fluid over forty years, with the two main parties at Westminster flipping their positions. Today’s Conservative Party bears little resemblance to ‘the party of Europe’ under Heath that shepherded the country into the then EEC, while the pro-Europeanism of most of the Labour Party is in contrast with sceptical attitudes in the 1970s, when a majority of Labour MPs voted against entry in 1972 and ‘no’ three years later in the referendum.⁵ The shifting attitudes amongst political

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¹ It might be more accurate to talk of numerous different constitutional transitions within the various UK constituent polities. See C. Bell, *Constitutional Transitions: The Peculiarities of the British Constitution and the Politics of Comparison*, *Public Law* 446 (2014).

² N. Walker, *Our Constitutional Unsettling*, *Public Law* 529 (2014).

³ A. Gamble, *Better Off Out? Britain and Europe*, 83 *Political Q.* 468, 472 (2012).

⁴ O. Daddow, *Margaret Thatcher, Tony Blair and the Eurosceptic Tradition in Britain*, *Brit. J. Pol. & Intl. Relations* 210 (2013). It is perhaps important to note the geographical dimensions to a Euro-scepticism that seems, for example, more pronounced in England than Scotland.

⁵ See generally N. Crowson, *Britain and Europe: A Political History since 1918* (Routledge, 2010).

elites on the United Kingdom's relationship with the EU are no doubt driven in large part by electoral and ideological considerations. But, as we see it, they also shape and are shaped by deeper anxieties about the British constitution, with many of these anxieties dressed up in the language of 'sovereignty'.

In this article, we focus on the political anxieties that find expression in parliamentary debates on sovereignty. The legal literature has been enriched by analyses of whether ours is a 'post-sovereignty'⁶ age, with suggestions that talking in terms of sovereignty is no longer a good fit for our times,⁷ or at the very least that a revised understanding is required to reflect the dispersal of legal and political authority within many polities to the sub-national and supranational levels.⁸ Irrespective of whether such analyses are correct, it is very clear that the traditional language of 'sovereignty' exercises a firm grip on the political imagination. Our goal in this article is to reflect on some of the concerns that underlie the language of sovereignty in parliamentary debates. We begin by comparing how MPs used this term during the 1971–1972 and 2010–2011 parliamentary sessions, paying special attention to the debates in the House of Commons on section 2 of the European Communities Act 1972 and section 18 of the European Union Act 2011. The former is the gateway provision by which directly effective provisions of EU law apply in domestic law, with all legislation to be 'construed and have effect' subject to EU law. The latter is known as 'the sovereignty clause', and provides that directly effective EU law is part of domestic law by virtue of the will of Parliament, and the 1972 Act in particular. Comparing parliamentary debates separated by almost forty years reveals a shift from anxieties primarily about the erosion of sovereignty by the law-making powers of the EU institutions towards anxiety about its erosion by the courts, and the domestic courts at that. We examine each of these anxieties in turn to evaluate whether a possible exit from the EU would lead to a 'regaining' of sovereignty. We conclude by reflecting on what the shifting anxieties suggest about the United Kingdom's unsettled constitution.

2 THE POLITICS OF SOVEREIGNTY 2.1 EUROPEAN COMMUNITIES ACT 1972

The European Communities Act was the subject of over 180 hours of parliamentary debate.⁹ There were recurrent references to 'sovereignty'. Many of these references involved claims that membership of the EEC would lead to the 'loss', 'surrender', 'transfer', 'abrogation' or 'erosion' of United Kingdom sovereignty (by many of those opposed to accession) or its 'enlargement', 'sharing' or 'pooling' (by some of those in favour). It is, of course, in keeping with the nature of parliamentary debate that there was little attempt to define exactly what sovereignty meant – and, indeed, several MPs noted that sovereignty was a 'weasel word' with the potential to obscure as much as to clarify.¹⁰ Several MPs also suggested that understandings of sovereignty might be changing,¹¹ but many clung to a vision of sovereignty as an indivisible quality that the United Kingdom or its Parliament possessed in full or not at all.¹² Typical of much of the debate were references to sovereignty by Geoffrey Rippon, the Conservative minister who had been primarily responsible for negotiating

⁶ See N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford University Press 1999); and H. Kalmo & Q. Skinner (eds), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge University Press 2010).

⁷ P. Eleftheriadis, *Law and Sovereignty*, 29 L. & Phil. 535 (2010).

⁸ See N. Walker (ed.), *Sovereignty in Transition* (Hart Publishing 2003).

⁹ J. Seaton & B. Winetrobe, *The Passage of Constitutional Bills in Parliament*, 4 J. Legis. Stud. 33, 45 (1998). See generally P. Norton, *Divided Loyalties: The European Communities Act 1972*, 30 Parliamentary Hist. 53 (2011).

¹⁰ Raphael Tuck, HC Deb 17 Feb. 1972 vol 831, cols 721–2. See also Kenneth Baker, HC Deb 17 Feb. 1972 vol 831, col 688 ('the word has been used frequently and I have reflected upon how it would be defined by various Members. I suspect that there would be about 630 different answers'); and Fred Peart, HC Deb 16 Feb. 1972 vol 831, cols 541–542 (the word sovereignty 'clouds' the issues at hand).

¹¹ See, e.g., J. Selwyn Gummer, HC Deb 14 Jun. 1972 vol 838, col 1576 ('the next step in national sovereignty is to exercise it in conjunction with our friends and neighbours').

¹² See, e.g., Harold Lever, HC Deb 14 Jun. 1972 vol 838, col 1551 ('There are those on both sides who believe that this groping by mankind to some better method of achieving the expression of national sovereignty is itself the abandonment of all national sovereignty').

Britain's entry into the EEC. He referred to both 'essential' and 'ultimate' sovereignty,¹³ but without elaborating on what exactly he meant by the two terms, or whether they denote distinct if related phenomena.¹⁴

These terms could be taken to reflect the fact that sovereignty has simultaneously both *internal* and *external* dimensions.¹⁵ 'Essential' sovereignty, on this reading, has more of an external orientation, and can be taken to refer to the totality of a state's capacity to enter into both domestic and international legal commitments. Hence, the question of whether membership reduces essential sovereignty would depend in part upon the extent to which the United Kingdom had transferred policy-making powers to the EEC. Inevitably, views differed on this question. Speaking for the Government, Rippon suggested that entry into the EEC entailed no diminution of Britain's essential national sovereignty.¹⁶ Opponents of membership roundly rejected this claim, arguing that it was not possible for the Government on the one hand to support the transfer of decision-making over large areas of public policy and on the other hand to maintain that there would be no reduction in essential sovereignty.¹⁷ A common concern amongst opponents was that, even if the initial impact of membership on the United Kingdom's essential sovereignty turned out to be relatively limited, it would expand over time as European integration accelerated and more and more policy competences were transferred to Community institutions. As Enoch Powell put it: 'this is intended to be only a start...so, although the surrender [of sovereignty] begins as minimal, it is intended to become maximal'.¹⁸ By contrast, some advocates of entry 'cheerfully accepted a loss of sovereignty...arguing that [the United Kingdom] gained more by membership in terms of influence'.¹⁹

'Ultimate' sovereignty can be taken to have more of an internal orientation, which in the United Kingdom is traditionally equated with parliamentary sovereignty. Thus, the question of whether membership would reduce ultimate sovereignty would depend on the extent to which Parliament can legislate contrary to directly effective provisions of EC law. On several occasions Rippon had argued that the European Communities Bill did not 'abridge the ultimate sovereignty of Parliament'.²⁰ At the same time, he also conceded that 'Community law would override national law'²¹ to the extent of an inconsistency, but suggested that nothing in the Bill 'precluded successor Parliaments from changing the law'.²² This can either be understood as an assertion of the ability of Parliament to legislate contrary to directly effective EC law or its ability to withdraw from the EEC, or both. Much of the parliamentary debate – and, indeed, the Government's defence of its claim that ultimate sovereignty would not be diminished – slipped back and forth between these interpretations of ultimate sovereignty. For the most part, ministers and MPs agreed that the United Kingdom Parliament retained the ability to legislate to withdraw from the EEC but were much less certain that it could legislate contrary to Community law. Typical was the then Solicitor General Sir Geoffrey Howe's tentative suggestion that most people agreed that a statute which, in clear and express terms, sought to legislate contrary to a particular provision of European law would be effective in domestic law 'as the matter now stands'.²³ As Danny Nicol notes, Howe's statement was 'masterly in its ambiguity', and in many ways captures 'the confusion as to what exactly Parliament would retain by way of ultimate sovereignty'.²⁴

For all the imprecision, and despite all of the uncertainty surrounding the possible impact of

¹³ Rippon, HC Deb 15 Feb.1972 vol 831 col 278–9.

¹⁴ Rippon's language drew on the Government's White Paper which suggested that there was 'no question of any erosion of essential national sovereignty; what is proposed is a sharing and an enlargement of individual national sovereignties in the general interest': *The United Kingdom and the European Communities* (1971) Cmnd 4715 at para.29.

¹⁵ N.Walker, *Sovereignty Frames and Sovereignty Clams in Sovereignty and the Law: Domestic, European and International Perspectives* 18,20 (Rawlings, P.Leyland & A.L.Young, eds, Oxford University Press 2013).

¹⁶ Rippon, HC Deb 15 Feb.1972 vol 831 col 279.

¹⁷ See, e.g., M Foot, HC Deb 17 Feb.1972 vol 831, col 738.

¹⁸ See, e.g., Enoch Powell, HC Deb 17 Feb.1972, vol 831, col 701.

¹⁹ D.Nicol, *EC Membership and the Judicialization of British Politics* 90 (OU 2001).

²⁰ See, e.g., Rippon, HC Deb 15 Feb.1972 vol 831 col 278–9.

²¹ Rippon, HC Deb 15 Feb.1972 vol 831 col 278–9.

²² Rippon, HC Deb 15 Feb.1972 vol 831 col 278–9.

²³ Howe, HC Deb 13 Jun.1972, vol 838, col 1320.

²⁴ D.Nicol, *EC Membership and the Judicialization of British Politics* 93–94 (Oxford University Press 2001).

membership on ultimate and essential sovereignty, a distinctly political conception of sovereignty shines through much of the parliamentary debate. The conception is ‘political’ in the sense of being concerned with power. As the Labour MP and professor of politics John P. Mackintosh remarked: sovereignty must not be regarded ‘purely in the legalistic sense’ since it is, at the end of the day, ‘a matter of power to make decisions and to achieve purposes’.²⁵ More specifically, the conception of sovereignty at the forefront of the parliamentary debates was concerned with the power of *political institutions* – and in particular, on the extent to which Parliament would find its ability to enact the legislation it wishes impeded by membership of the EEC. Those in favour of membership focused on how the powers to be transferred were small in comparison to the scope of policy-making power that remained with the United Kingdom, arguing in addition that membership would in fact increase the United Kingdom’s overall power by giving it the ability to influence decisions at the European level and to play a larger role on the international stage as a member of the EEC.²⁶ Opponents focused on how the powers transferred were greater than that portrayed by the Government and likely to increase over time, leading to a loss of scrutiny over policy by Parliament, with power being transferred away from a national democratic legislature to the unelected and unaccountable European Commission.²⁷ This stress on the power of political institutions was a feature of the discussion on both essential and ultimate sovereignty.

What bears emphasis is that the debates in 1972 – and the political conception that, it is submitted, underpinned and informed them – focused predominantly on the impact of EEC membership on the policy-making power of the United Kingdom. It is noteworthy that there was comparatively little mention of the likelihood that joining the Community would lead to an increased judicial role, which in turn might erode traditional understandings of parliamentary sovereignty. Where judicial influence was mentioned, the main focus was on the role of the European Court of Justice, which was criticized for its creative approach to interpreting EC law.²⁸ Danny Nicol has criticized the ministers and MPs of the time for their ‘inability to see things in legal terms’. The result of thinking ‘in political rather than legal terms’ was a failure to grasp ‘how parliamentary sovereignty would be affected’ as a result of a changed ‘institutional balance within the British constitution in favour of the courts’.²⁹ Taking into account the legal and political arrangements in the early 1970s, and in particular the still limited role for domestic courts under judicial review, this was unsurprising (and Nicol’s criticism somewhat ungenerous). As Nicol concedes, ‘the world view of British parliamentarians was based on an autonomous political sphere in which legal considerations played little part’.³⁰ This changed over the next forty years, as illustrated by the parliamentary debates on the European Union Act.

2.2 EUROPEAN UNION ACT 2011

In the forty or so years since the enactment of the European Communities Act 1972, legal considerations have moved centre-stage in parliamentary debates on sovereignty and, more generally, the United Kingdom’s relationship with the EU.³¹ There is now a distinctively legal hue to these debates, with the actual or potential role of the courts casting a long shadow on how MPs discuss sovereignty. Many parliamentarians – especially but not exclusively on the Conservative benches – are acutely aware of and concerned by the growth of judicial power. Such concerns have bubbled up in parliamentary debates on the Human Rights Act, the European Court of Human Rights and domestic judicial review. They also featured prominently in parliamentary debates on section 18 of the European Union Act 2011, a provision commonly called ‘the sovereignty clause’ even though it

²⁵ HC Deb 16 Feb.1972 vol 831,col 531.

²⁶ See,e.g., Dodds-Parker HC Deb 15 Feb.1972 vol 831,col 304;Knox HC Deb 16 Feb.1972 vol 831 col 478;Hopkins HC Deb 16 Feb.1972 vol 831 col 513;Johnston HC Deb 16 Feb.1972 vol 831 cols 573–4; Lever HC Deb 13 Jun. 1972 vol 838, cols 1551–1555 and Selwyn Gummer HC Deb 13 Jun. 1972 vol 838 col 1576–1578.

²⁷ See, e.g., Peter Shore,HC Deb 14 Jun.1972 vol 838,col 1547.

²⁸ See, e.g., Enoch Powell HC Deb 17 Feb.1972 vol 831 col 700 and Charles Fletcher Cooke HC Deb 17 Feb.1972 vol 831 cols 335–341.

²⁹ D.Nicol, *EC Membership and the Judicialization of British Politics* 52 (Oxford University Press 2001).

³⁰ *Ibid*, 254.

³¹ See, e.g., R. Rawlings, *Legal Politics: The United Kingdom and the Ratification of the Treaty on European Union: Part 1*, Public Law 254 (1994).

avoids any explicit reference to sovereignty.

This section provides that directly applicable or directly effective EU law ‘falls to be recognized and available’ in domestic law in the United Kingdom only by virtue of the 1972 Act.³² It sought to address concerns that parliamentary sovereignty may be eroded by future judicial decisions. By providing that EU law only takes effect in the domestic legal order by virtue of the will of Parliament, section 18 sought to provide authority to counter any arguments in any future litigation that EU law constitutes a new higher autonomous legal order that has become an integral part of the domestic legal system independent of statute.³³ Section 18 did not purport to alter the existing relationship between United Kingdom law and EU law or the primacy of EU law.³⁴ Domestic judges have tried to reconcile parliamentary supremacy on the one hand and the primacy of EU law on the other hand by tracing the applicability and effectiveness of EU law to an especially powerful expression of parliamentary will in the 1972 Act. Section 18 underscores this. On a strict legal level, then, section 18 is a statement of ‘the blindingly obvious’.³⁵ But, on a political level, it is intended to counter a perceived intrusion on parliamentary sovereignty by domestic courts.³⁶ It responds to suggestions by some judges (and, in particular, Lords Steyn and Hope in *Jackson*³⁷ and again from Lord Hope in *AXA*³⁸) and academics (including oral evidence from Professor T.R.S. Allan to the Commons’ European Scrutiny Committee³⁹) that the United Kingdom constitution is founded upon the rule of law, which in turn is superior to and capable of generating judicially enforceable limits on parliamentary sovereignty. As Michael Gordon and Michael Dougan note, section 18 has ‘only an incidental impact on the relationship between domestic and European law, in so far as it might establish which constitutional agent, the courts or Parliament, is entitled to determine the extent to which these two legal orders can coexist’.⁴⁰

For present purposes, what is of interest is the predominance of a ‘legal’ conception of sovereignty in the debates on section 18. When lawyers discuss sovereignty, their focus is often on the account of sovereignty expounded by Dicey. Lawyers assess the extent to which Parliament has unlimited law-making power and whether institutions other than Parliament can question a statute enacted in Parliament (and, particularly with regard to the impact of EU membership, whether Parliament can bind its successors). This translates into an emphasis on the role of courts since it inevitably falls on judges to resolve legal disputes arising from potential conflicts between United Kingdom legislation and EU law. As noted above, MPs in 1972 were not unaware of these issues when debating the European Communities Bill, but their emphasis was on power, and in particular on the ability of Parliament and the Government to pursue policy agendas unimpeded by EU law. By 2011, however, many MPs were appealing to a highly legalized language of sovereignty in order to express underlying anxieties about the expansion of judicial power, especially, the risk that an increasing numbers of domestic judges might suggest that in the domestic constitution the rule of law has come to eclipse parliamentary sovereignty.⁴¹ Though recognizing that it was only declaratory, several MPs regarded section 18 as sending a ‘positive and powerful signal’,⁴² in the words of Ian Paisley, to domestic courts that ‘reasserts the sovereignty of Parliament’, in particular by underscoring

³² The provision in full reads as follows: ‘Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act’.

³³ *Explanatory Notes to the European Union Act 2011*, para.120.

³⁴ See P. Craig, *The European Union Act 2011: Locks, Limits and Legality*, 48 C.M.L.R. 1925, 1937–1938 (2011).

³⁵ P. Birkinshaw, *Like Canute—Pushing Back the Waters of the Incoming Tides. The Prospects for Re-Inventing UK Constitutionalism* in *The EU and National Constitutional Law* 183, 194 (P.M. Huber ed., Boorberg 2012).

³⁶ See, e.g., Bill Cash HC Deb 11 Jan.2011 vol 521, col 172.

³⁷ *Jackson v. Attorney General* [2005] UKHL 56.

³⁸ *AXA General Insurance Ltd v. Lord Advocate* [2011] UKSC 46.

³⁹ House of Commons European Scrutiny Committee, *The EU Bill and Parliamentary Sovereignty*, 10th Report of Session 2010–2011 HC 633-1, 6 Dec.2010.

⁴⁰ M. Gordon and M. Dougan, *The United Kingdom’s European Union Act 2011: ‘Who Won the Bloody War Anyway?’*, Eur.L.Rev.3,5 (2012).

⁴¹ See e.g. Bill Cash HC Deb 11 Jan.2011 vol 521, col 182; Charlie Elphicke HC Deb 11 Jan.2011 vol 521, col 191; and Wayne David, HC Deb 11 Jan.2011 vol 521, col 182–193.

⁴² Ian Paisley HC Deb 11 Jan.2011 vol 521, col 217.

that Parliament ‘remains sovereign in all circumstances’, to quote John Redwood, one of the leading Conservative Euro-sceptic backbenchers.⁴³

The provision was, above all, a symbolic concession to Conservative Euro-sceptic MPs who seek ‘a fundamental change in the United Kingdom’s relationship with the EU’.⁴⁴ It is striking, however, that the anxieties of many MPs about this relationship are now intimately entangled with, and in part prompted by, concerns about how membership of the EU has contributed to the larger trend of ascendant judicial power. That this differs from forty years earlier is illustrated by contrasting section 18 with the proposal in 1972 by the Labour Opposition that a ‘Declaration of the Ultimate Sovereignty of Parliament’ be included in the European Communities Bill. The effect of the Declaration would have been to underline Parliament’s ability to repeal the European Communities Act and exit the Community.⁴⁵ The Conservative Government opposed this amendment to the Bill and it was rejected by 278 votes to 265. The debate on the Declaration did not betray much concern at the prospect of judicial power, and if anything was viewed as a tool that domestic courts could in fact employ to give expression to parliamentary sovereignty by giving legal effect to a statute that sought to withdraw the United Kingdom from the Community. By contrast, section 18 of the 2011 Act is spurred by anxieties about how membership of the EU has now accelerated the growth of judicial power to such an extent that there is the prospect of domestic judges holding that the common law is a source of enforceable limits on Parliament’s ability to make law. In this, section 18 is a useful illustration of how membership of the EU has produced a profound change in how politicians as well as judges and lawyers envisage sovereignty.

3 POLITICAL POWER AND SOVEREIGNTY REGAINED?

The question ‘what would be regained if the United Kingdom withdrew from the EU?’ is difficult to answer in terms of and by reference to political power. Faced with the knotty question of how to deal with the several thousand pieces of EU legislation that currently form part of United Kingdom law, domestic politicians will likely find that their room for manoeuvre is relatively constrained. It is not safe to assume that the domestic political institutions would be able to remove all of the European law that had applied immediately before withdrawal given that much of it is now blended within domestic law. Their room for manoeuvre might be further constrained by vested rights enjoyed both by EU citizens in the United Kingdom and British citizens in the EU.⁴⁶ The range of domestic policy options available might also be circumscribed in practice by existing externalities, such as EU legislation on market regulation that will shape how United Kingdom businesses sell their products in the EU.⁴⁷ It might also be the case that Britain’s international influence is reduced following an exit from the EU. Putting these sorts of objections to a United Kingdom withdrawal from the EU to one side, it might be suggested that withdrawal would at least address the anxieties articulated by MPs opposed to entry in 1972 about the shift of power from domestic to EU political institutions. This of course presupposes that these anxieties have proven prescient.

Arguably, the European project has not only affected political power by limiting the policy remit of national parliaments, but also by affecting a further shift in power away from those parliaments to national governments. It might even be suggested that this internal power shift has done more to marginalize national parliaments than the shift of decision-making power from the national to the European level. This is broadly in line with the ‘deparliamentarization thesis’ which posits that national parliaments have been constitutionally and politically weakened as a result of European integration.⁴⁸ Constitutionally, a significant transfer of legislative competences from the national to

⁴³ John Redwood HC Deb 11 Jan.2011 vol 521, col 180.

⁴⁴ Charlie Elphicke HC Deb 11 Jan.2011 vol 521, col 188.

⁴⁵ HC Deb 5 Jul.1972 vol 840, cols 556–647.

⁴⁶ See M. Öberg, *From EU Citizens to Third Country Nationals: The Legacy of Polydor*, 22 Eur. Pub. L. (forthcoming).

⁴⁷ See generally A. Lazowski, *EU Withdrawal: Good Business for British Businesses?*, 22 Eur. Pub. L. (forthcoming).

⁴⁸ See T. Raunio & S. Hix, *Backbenchers Learn to Fight Back: European Integration and Parliamentary Government*, 23W.Eur.Pol.142, 144–147 (2000).

the European level has led to a loss of control and influence for national parliaments.⁴⁹ The primacy of EU law creates judicially enforceable limits on the capacity of national parliaments to legislate, which not only reduces their legislative remit, but also requires parliaments to take into account EU law when exercising their remaining competences. The emphasis placed on realizing the Internal Market in practice further limits the range of legislative options available to parliaments even within those fields that remain subject to domestic influence. Politically, European integration has led to further gains in power for national executives at the expense of domestic parliaments flowing from the fact that national ministers and officials dominate decision-making on EU matters to an even greater extent than domestic matters. The role of ministers and civil servants in EU negotiations also leads to information asymmetries between national executives and national parliaments. Increased reliance on qualified majority voting in the Council has also made it difficult for national parliamentarians to force government ministers into making detailed ex ante policy commitments.⁵⁰

More recently, some have argued that this standard deparliamentarization thesis needs to be qualified. It is true that the power of national executives has grown as a result of the high levels of influence that ministers and officials enjoy over agenda-setting, policy design and policy implementation, but national parliaments have also increased their scrutiny of EU matters. Across Member States, national parliaments have established specialized committees to coordinate parliamentary scrutiny of the government in EU matters. Many MPs now pay greater attention to European affairs, although inevitably there are limits on how much time it is rational for MPs to devote to European issues given that domestic issues typically have more electoral salience.⁵¹ Finally, the Lisbon Treaty has introduced initiatives, e.g., an Early Warning Mechanism for subsidiarity monitoring, that confer on national parliaments formal if still relatively limited powers within the EU's political system, although some have questioned whether parliaments have the capacity to use these effectively.⁵² Even taking these initiatives into account, national parliaments are far from central actors in European policy-making and, to this extent, the deparliamentarization thesis remains relevant. Their primary role is to secure the accountability of ministers rather than influencing policy-making, albeit this role is one that they perform more effectively than twenty-five years ago.

The critical point to emphasize is that although in 1972 MPs were chiefly concerned about the shift of political power to European institutions, the real shift has arguably been domestic: that is, in terms of the United Kingdom Parliament's power, influence and control on European matters relative to that of the Government. Whitehall's empowerment at the expense of Westminster is of course a larger and longer standing pattern, and so its occurrence in the European context must be viewed as one part of a larger and more complicated picture. The long tradition of strong government, party discipline and the further strengthening of the power of party leaders have all contributed to the growing power of Whitehall relative to Westminster. Withdrawal from the EU will do nothing to reverse this – and, indeed, to the extent that it is the Government that will be at the forefront of deciding questions such as which parts of domestic law deriving from EU law should be repealed and which parts retained, withdrawal might lead, at least in the short term, to the further concentration of power in the hands of ministers and civil servants.

4 JUDICIAL POWER AND SOVEREIGNTY REGAINED?

The question 'what would be regained if the United Kingdom withdrew from the EU?' is rather difficult to answer in terms of and by reference to judicial power as well, not least because answers to it are contingent on judicial attitudes to parliamentary sovereignty and the rule of law. When closing the debate on section 18 of the European Union Act, David Lidington, the Conservative Minister for

⁴⁹ See P. Norton (ed.), *National Parliaments and the European Union* (Frank Cass 1996).

⁵⁰ T. Raunio, *National Parliaments and European Integration: What We Know and Agenda for Future Research*, 15 *J.Legis.Stud.*317 (2009).

⁵¹ T. Saalfeld *Deliberate Delegation or Abdication? Government Backbenchers, Ministers and European Union Legislation*, 11 *J.Legis.Stud.*343 (2005).

⁵² See, e.g., A. Cygan, *The Parliamentarisation of EU Decision-Making? The Impact of the Treaty of Lisbon on National Parliaments*, *Eur. L. Rev.* 480 (2011); and R. Bellamy & Kröger, *Domesticating the Democratic Deficit? The Role of National Parliaments and Parties in the EU's System of Governance*, *Parliamentary Affairs* 437 (2014).

Europe, noted that the provision ‘addressed the concern that the principle of parliamentary sovereignty, as it relates to EU law, might in future be eroded by decisions of ... domestic courts’.⁵³ As explained above, this erosion might occur if the courts were to regard EU law as entrenched in the domestic legal system as part of the common law, rather than deriving its authority from statute. For Lidington, there were three reasons to suspect that judicial erosion of parliamentary sovereignty might be on the cards: (i) the judgment of Mr J. Laws (as he then was) in the ‘Metric Martyrs’ case;⁵⁴ (ii) obiter from Lord Steyn in *Jackson*;⁵⁵ and (iii) the risk of future challenges in domestic courts to the currently received view that EU law gains direct effect in the United Kingdom through the operation of a United Kingdom statute.⁵⁶ For Bill Cash, these fears were not limited to the EU context, but applied more widely to the relative importance of parliamentary sovereignty and the rule of law as understood by domestic judges. At the root of these concerns is some domestic judges’ characterization of parliamentary sovereignty as a principle of the common law. When asserting that parliamentary sovereignty is a common law principle, domestic judges are claiming authority over the content of parliamentary sovereignty itself, empowering themselves to revise its content, including conceivably by claiming that domestic courts are able to strike down legislation that is contrary to the rule of law.⁵⁷

Two concerns arise from characterizing parliamentary sovereignty as a common law principle. The first concern is whether membership of the EU has changed the definition of valid law in the United Kingdom by requiring that all domestic legislation must be compatible with directly effective EU law. The starting point, here, is to recognize that if EU law derives its authority in the domestic legal system from *statute* (i.e., the 1972 Act), there is a greater possibility that Parliament can legislate contrary to EU law. This might be possible, for example, where a statute specifically repealed section 2 of the 1972 Act, perhaps by stating that its provisions were to take effect notwithstanding the provisions of EU law or by repealing the 1972 Act. However, if directly effective EU law derives its effect from the *common law*, then the possibility arises that even a statute enacted to specifically repeal the 1972 Act would not enable Parliament to legislate contrary to directly effective EU law, unless and until the UK left the EU. Domestic courts might simply refuse to recognize such a statute as valid legislation. The common law could modify parliamentary sovereignty so as to recognize that, as a Member State of the EU, the UK must adhere to its commitments under the EU Treaties if the rule of law is to be maintained. If the rule of law is superior to and limits parliamentary sovereignty, then any legislation contradicting directly effective EU law would not be recognized as valid legislation. The United Kingdom’s exit from the EU would modify this obligation, depending upon the terms of the United Kingdom’s exit and its remaining commitments.

The second concern is more fundamental, inasmuch as it concerns the very nature of parliamentary sovereignty itself. It engages with a foundational question for the United Kingdom’s constitution: is parliamentary sovereignty derived from legislation, or the common law, or does it have a different and distinct nature all of its own? If a principle of the common law, domestic courts can modify parliamentary sovereignty in broadly similar fashion to how they are able to modify other common law principles. This would presumably include modifying the common law by claiming that Parliament had only a limited as opposed to unlimited law-making power, with it ultimately being for the judges themselves to determine the scope of these limits on Parliament’s legislative competence. The main source for the suggestion that parliamentary sovereignty is a common law principle is *Thoburn*, which concerned a potential conflict between United Kingdom law and EU law. In this case, Sir John Laws asserted that the ‘scope and nature of Parliamentary sovereignty are ultimately confided’ in the courts.⁵⁸ As such, courts had created exceptions to the doctrine of implied repeal, also a creature of the common law. According to Laws, constitutional statutes – including the European Communities Act 1972 – cannot be impliedly repealed. Rather, a constitutional statute can only be repealed when it can be demonstrated that this was ‘the legislature’s *actual* – not imputed,

⁵³ HC Deb 11 Jan.2011 col 243–4.

⁵⁴ *Thoburn v. Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151.

⁵⁵ *Jackson v. Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

⁵⁶ HC Deb 11 Jan.2011 col 244.

⁵⁷ HC Deb 11 Jan.2011 col 248.

⁵⁸ *Thoburn v. Sunderland City Council* [2002] EWHC 195 (Admin), [60].

constructive or presumed – intention’, either by express words or words that are so specific that it is ‘irresistible’ to conclude anything other than an intention to overturn the provisions of a constitutional statute.⁵⁹

It is important to stress that the supremacy of EU law was only a partial catalyst for Sir John Laws and others to characterize parliamentary sovereignty as a principle of the common law. After all, directly effective EU law had been given effect in United Kingdom law prior to *Thoburn* in the *Factortame* series of cases, where domestic judges had claimed that the authority for the enforcement of directly effective provisions of EU law stemmed from the United Kingdom Parliament when it enacted the 1972 Act. In *Factortame I*, Lord Bridge stated that the 1972 Act required domestic courts to read into every Act of Parliament the requirement that its provisions took effect subject to directly effective provisions of EU law.⁶⁰ In *Factortame II*, Lord Bridge asserted that any modification of sovereignty had been entirely voluntary and had been effected by the Westminster Parliament when it enacted the 1972 Act.⁶¹ There was no suggestion of the modification of the doctrine of sovereignty by the common law in these cases, and this is so even though the House of Lords in *Factortame II* broke new constitutional ground by suspending the application of the Merchant Shipping Act 1988.

In other words: the Law Lords felt no need to assert that parliamentary sovereignty was a common law principle in order to accommodate the primacy of directly effective EU law. Echoes of the Law Lords’s approach in *Factortame II* can be seen in the recent HS2 decisions, where the Supreme Court made clear that the extent to which directly effective EU law was recognized in domestic law was itself subject to constitutional statutes, constitutional measures and constitutional principles. There are two points to take from all of this. First, the United Kingdom’s membership of the EU is at best only a partial explanation for the characterization of parliamentary sovereignty as a creature of the common law. That the Law Lords successfully accommodated the primacy of EU law without having to recast parliamentary sovereignty as a common law creation suggests that there must be some other factor or factors compelling some domestic judges to classify parliamentary sovereignty as a principle of the common law. Second, insofar as this analysis suggests that the United Kingdom’s membership of the EU does not by itself explain why some judges now choose to characterize parliamentary sovereignty as a principle of the common law, and given that some MPs seem chiefly concerned about this characterization, then withdrawal from the EU would not regain the sovereignty that those MPs today feel that Parliament has lost to the courts.

If membership of the EU was only a partial explanation of Sir John Law’s statement in *Thoburn*, what other factors might lead some to characterize parliamentary sovereignty as a common law principle? The most obvious contender is the rise of the theory of common law constitutionalism.⁶² In very rudimentary terms, this theory posits that the rule of law is a reservoir of fundamental values against which the legality of political decisions can be tested, including the legality of primary legislation. According to some versions of this theory, courts have a crucial role in ensuring that statutes respect these values, and in extreme cases are empowered to invalidate statutes at odds with the rule of law. This theory has long had proponents within academic circles, and it had also attracted support from a small handful of judges in their extra-judicial writing. Until recently, however, no judge had endorsed it in a judicial capacity. This changed in *Jackson*, where Lord Steyn accepted that parliamentary sovereignty is a principle of the common law that the courts are permitted to modify, including by finding in the rule of law justiciable legal limits on Parliament’s ability to legislate. For Steyn, in ‘exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the... Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament... cannot abolish’.⁶³ Similar statements were made by Lord Hope in both *Jackson* and in *AXA*, where he asserted that the ‘rule of law, enforced by the courts, is the ultimate controlling factor on which our constitution is based’.⁶⁴ Lords Steyn and Hope

⁵⁹ *Thoburn v. Sunderland City Council* [2002] EWHC 195 (Admin), [63].

⁶⁰ *Factortame I* [1990] 2AC 85,[140].

⁶¹ *Factortame (No 2)* [1991] 1AC 603,658–659.

⁶² See generally T. Poole, *Back to the Future? Unearthing the Theory of Common Law Constitutionalism*, 23 Oxford J.Leg.Stud.435 (2003).

⁶³ *Jackson v. Attorney General* [2005] UKHL 56 [102].

⁶⁴ *AXA General Insurance v. Lord Advocate* [2011] UKSC 46, [51]. See also *R v. Secretary of State for the Home Department ex*

conceived of the possibility that domestic courts might be authorized to invalidate legislation that those courts deem inconsistent with the rule of law. If Lords Steyn and Hope are correct, then a United Kingdom exit from the EU would make little difference to the perceived rise of the power of the courts. The common law will continue to exist, and the courts will continue to be charged to enforce the rule of law. Moreover, there is the risk that, deprived of one way of protecting human rights by applying EU law human rights protections within the sphere of EU law, the courts may instead develop the common law further to provide stronger rights protections, and in this way further eroding parliamentary sovereignty.

It is important to keep in proper perspective the threat to parliamentary sovereignty posed by common law constitutionalism. Within judicial circles, the position of Lords Steyn and Hope remains a minority one, although one that is gathering momentum.⁶⁵ Even within academic circles, not all of those who favour common law constitutionalism claim that the rule of law empowers courts to override legislation.⁶⁶ Even some who are often taken to make this sort of claim are in fact better understood as arguing for a much more subtle theory. Take the theory of common law constitutionalism favoured by T.R.S. Allan, which was frequently cited in parliamentary debates on section 18 of the European Union Act 2011. Allan argues that the rule of law applies both to Parliament and the courts. If legislation is enacted that does not comply with the rule of law, then this legislation would not generate the conditions under which individuals would have a general prima facie obligation to obey the law. It does not necessarily follow from this that the courts would refuse to recognize the legislation as valid law. Contrary to common readings of his work, Allan's theory has no general principle as to what would happen were Parliament to enact legislation that breached the rule of law. Any case where such a conflict arose would instead be decided on its own specific facts and circumstances. As recognized by the courts, such facts would need to be exceptional for the courts to overturn legislation and would only occur when the courts were unable to read the legislation in a manner that did comply with the particular requirements of the rule of law. All of this is to say that not only might withdrawal from the EU make no difference to the perceived threat of common law constitutionalism, the 'threat' may actually be far smaller than politicians perceive it to be.

There is an alternative reading of the case law commonly cited to evidence the rise of common law constitutionalism which posits that, far from removing the judicial threat to parliamentary sovereignty, withdrawal from the EU may exacerbate further erosion of parliamentary sovereignty. For both Lord Steyn and Lord Hope, the removal of judicial review constitutes an exceptional circumstance in which the rule of law would require courts to insist that legislation having such an effect would not be recognized as law.⁶⁷ This choice of example was likely no accident, and may instead have been influenced by the attempt around the time of the decision in *Jackson* to introduce legislation which would have removed the possibility of judicial review from immigration decisions.⁶⁸ Understood in its context, the obiter dicta from Steyn and Hope illustrate the tension between the legislature and the courts in an unwritten constitution. Courts can employ both the principle of legality and the Human Rights Act to overturn executive acts, or to reinterpret legislation, but it is also possible for Parliament to react to such measures by re-enacting legislation to counteract judicial decisions, even retrospectively.⁶⁹ Each institution can assert its sovereign will to an extent. Parliament asserts its sovereignty to make legislation. Judges determine whether legislation is valid or invalid, applying the common law that they can create, develop and enforce. If parliamentary statements such as those found in debates over section 18 of the European Union Act 2011 and judicial statements such as the dicta in *Thoburn* and *Jackson* are read as assertions of relative sovereignty, the United

parte Simms [2000] 2AC 115, [107].

⁶⁵ See, e.g., the dicta of Lord Hodge in *Moohan v. Lord Advocate* [2014] UKSC 67, [35] that 'I do not exclude the possibility that in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law, informed by principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful'.

⁶⁶ See, e.g., PP Craig, *The Common Law, Shared Power and Judicial Review*, 24 Oxford J. Leg. Stud. 237 (2004) and *Political Constitutionalism and the Judicial Role: A Response*, 9 Intl. J. Constitutional L. 112 (2011).

⁶⁷ *Jackson v. Attorney General* [2005] UKHL 56 [52].

⁶⁸ See generally R. Rawlings, *Review, Revenge and Retreat*, 68 Modern L.Rev.378 (2005).

⁶⁹ See, e.g., *Ahmed v. UK Treasury* [2010] UKSC 2 and the Terrorist Asset Freezing (Temporary Provisions) Act 2010.

Kingdom's exit from the EU may actually reduce, rather than increase, Parliament's sovereignty vis-à-vis the courts, at least insofar as withdrawal from the EU might prompt courts to make stronger assertions about their ability to determine the content of parliamentary sovereignty.

5 CONCLUSION

We began by noting how the United Kingdom now has an unsettled constitution, and it is therefore unsurprising that predictions about the constitutional implications of a British withdrawal from the EU are so difficult to make. Parliamentary debates show how many MPs' view of sovereignty has evolved: shifting from more political to more legal conceptions of sovereignty, with concerns about the loss of law-making power superseded by new concerns about the relative power of domestic courts. The chief concern of many of the most fervent Euro-sceptic MPs seems to be the status of parliamentary sovereignty in the unsettled constitution, and the threat posed to it by judicial pronouncements about the rule of law. Membership of the EU might have been a catalyst for some of these judicial pronouncements, but it is today very clear that debates about whether parliamentary sovereignty is subject to legally enforceable limits found in the rule of law have a life of their own outside of the EU context. Against this background, many of the attempts to regain Parliament's sovereignty over domestic courts by leaving the EU seems a case of (much) too little, (much) too late. Perhaps above all, it is important for all of us – MPs included – to realize that the United Kingdom's constitution is distinguished by its evolutionary and changing nature. Rather than harking back to regaining what may well have only been a temporary certainty, it might be better for Parliament to embrace the unsettled constitution, using this as an opportunity for constructive collaboration where, at the European level, the United Kingdom can protect its interests through a combination of negotiation and attrition. It is perhaps a paradox that it is only by embracing the unsettled constitution, including the potential erosion of the traditional conceptions of parliamentary sovereignty, that Parliament will be best able to protect its law-making power.

The Judiciary's Self-Determination, the Common Law and Constitutional Change

Sophie BOYRON*

The Brexit debate is often analysed from the perspective of politicians, and in particular their views on and understandings of European law and politics. In contrast, this article concentrates on identifying the views of the senior judiciary. To do so, it analyses five extra-judicial speeches made between October 2013 to February 2014, a period particularly fertile in cases in the UK's top courts concerning the law of the European Union or the European Convention of Human Rights. In doing so the article charts the senior judiciary's vision of Europe. More particularly, it highlights the judiciary's strategies to limit the impact of both European treaties on the British constitution in what might be termed 'a search for judicial self-determination'. In addition, the article argues that a new extra-judicial process of constitutional change might be emerging. Finally, it concludes on the advantages and drawbacks of such a process of change.

1 INTRODUCTION

In this article, I plan to analyse five extra-judicial speeches¹ to investigate an aspect of the Brexit debate that has yet to be explored. When discussing a possible Brexit, commentators tend to concentrate on the possible economic effects and on the position taken in this debate by individual politicians and political parties. So far, little attention has been given to the views of the senior judiciary. Normally, one would not look to judges as they would be unlikely to share their personal feelings about the matter for fear of compromising their neutrality. However, five senior judges – namely, Lords Reed, Sumption, Mance and Neuberger as well as Lord Justice Laws² – made extra-judicial speeches over a four months period all purporting to map the UK's constitutional relationship with both or either the European Union and the European Convention of Human Rights (thereafter ECHR).³ While no judge pronounced on the matter either way, the speeches – in terms of content, timing and context – were so unusual as to warrant analysis as part of wider debate about Brexit. Not only is five extra-judicial speeches in such a short time all on a European theme a record, but in the same period the Supreme Court decided three key cases touching upon the relationship of the UK constitution with the ECHR or the European Union: namely *Osborn*,⁴ *Chester*⁵ and *HS2*.⁶ As I show

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¹ The sake of clarity, in this Art. I will use the term speech to mean extra-judicial speech and I will use the term judgment to indicate a separate judgment in a judicial decision.

² All of the judges are Justices of the UK Supreme Court, with the exception of Lord Justice Laws, who is a judge of the Court of Appeal of England and Wales.

³ The five speeches in question are: Lord Reed 'The Common Law and the ECHR' – 11 Nov. 2013 – Inner Temple; Lord Sumption 'The Limits of the Law' – 20 November 2013 – 27th Sultan Shah Lecture – Kuala Lumpur; Lord Justice Laws 'Lecture III – The Common Law and Europe' – 27 Nov. 2013 – Hamlyn Lectures 2013; Lord Mance 'Destruction or metamorphosis of the legal order?' – 14 Dec. 2013 – World Policy Conference, Monaco; and Lord Neuberger 'The British and Europe' – 12 Feb. 2014 – Freshfields Annual Law Lecture 2014 (University of Cambridge).

⁴ *Osborn v. The Parole Board* [2013] UKSC 61. The judgment was given on 9 Oct. 2013. Osborn was a determinate sentence prisoner who having been released on licence was recalled to custody. However, in doing so, the Parole Board did not give him an oral hearing. The Supreme Court found that the Parole Board had breached the common law standard of procedural fairness. For an analysis of this case see, Phillip Murray, *Procedural Fairness, Human Rights and the Parole Board*, 73 Cambridge L.J 5 (2014).

⁵ *R (on the application of Chester) v. Sec. of State for Justice* [2013] UKSC 63. The judgment was given on 16 Oct. 2013. Chester and McGeoch were serving a life sentence for murder: they argued that their disenfranchisement was a violation of their rights under the ECHR (Article 3 Protocol 1). As the ECtHR had found in *Hirst* n.2 and *Scoppola* n.3 that the UK's blanket disenfranchisement breached the Convention, the Supreme Court ruled that the Representation of the People Act continued to be in violation of protocol 1 but refused to issue an additional declaration of incompatibility.

⁶ *R (on the application of HS2 Action Alliance Ltd) v. Sec. of State for Transport* [2014] UKSC 3. The judgment was heard on 15–

in this article, the speeches cast a new light on the Brexit debate. Finally, it could be thought more than a coincidence that all five judges chose to make speeches on either or both European treaties at a time when political discussions on the membership of each was raging.

At this stage, it is necessary to give a warning: while the first two speeches concentrated on the ECHR (Lord Reed and Lord Sumption), the remaining three examined both European treaties together (Lord Justice Laws, Lord Mance and Lord Neuberger). Rather than excluding the first two speeches and trying to limit the analysis to statements concerned exclusively with the European Union in the remaining three speeches, I examine the statements made in relation to both European treaties in all five speeches. Not only is it difficult to separate those comments concerned exclusively with the European Union but, it will be argued that the resulting picture of ‘Europe’ projected by the speeches is a choice. Consequently, an analysis of all five speeches is necessary if the messages of the senior judiciary, or at least some of its members, are to be understood. This examination will be performed in two stages: first, the various pronouncements regarding Europe will be analysed to establish the vision of Europe that they convey; once this is done, it will be possible, in a second part, to concentrate on the aims that were pursued by the senior judiciary when making the speeches.

2 THE UK AND EUROPE: A NEW JUDICIAL VISION?

Between November 2013 and February 2014, five members of the senior judiciary made speeches that each aimed to chart the relationship that the UK constitution has with Europe, be that the European Union or the ECHR. This flurry of extra-judicial activity may not be a coincidence: the possibility of a Brexit has been debated for a while, and particularly since May 2013 when Tory rebels attempted to inscribe in the Queen’s speech of that year the promise made by the Prime Minister, David Cameron, to hold a referendum in 2017 should the Conservative Party win the 2015 general election. Indeed, the debate continued well into early 2014 with an ill-fated European Union (Referendum) Bill sponsored by James Wharton MP.⁷ Lord Justice Laws, Lord Mance and Lord Neuberger acknowledged openly the Brexit debates that were taking place around them (with two stating that they would not and could not take any position on these).⁸ Consequently, the speeches should be read against the danger of withdrawal from the European Union and the more diffuse threat to repeal the Human Rights Act.

Each speech will be presented briefly and in chronological order, taking particular care to highlight the content or messages that relate to ‘Europe’ or to the European debate. Once this is completed, the various statements on Europe will be analysed in two ways: first, the comparative methodology deployed to arrive at them will be examined and secondly, the judicial vision of ‘Europe’⁹ will be depicted.

3 THE EUROPEAN MESSAGES OF SOME SENIOR JUDGES

3.1 LORD REED: THE COMMON LAW AND THE ECHR

16 Oct. and was given on 22 Jan. 2014. In *HS2*, the Supreme Court reviewed the legality of a project for a high-speed rail link between London and the north of England. Two main grounds were put forward by the appellants: first, the Government had failed to undertake a strategic environmental assessment as required by the EU directive 2001/42/EC and secondly, the hybrid bill procedure chosen by the Government to adopt the project did not comply with the EU directive 1011/92/EU as it requires effective public participation in the decision-making process of projects that are likely to affect the environment significantly. The appellants claimed that the procedure would not ensure appropriate public participation as the parliamentary process is in effect controlled by the Government. While rejecting both claims, the Supreme Court made some key statements regarding the constitutional foundations for the supremacy of EU law, the content of the UK constitution and the cooperation with the CJEU. For further analyses of this case, see Paul Craig, *Constitutionalising Constitutional Law: HS2*, Public Law 373 (2014) and Stephen Dimelow & Alison Young, *High Speed Rail, Europe and the Constitution*, 73 Cambridge L.J. 234 (2014).

⁷ The Bill’s progress was halted in the House of Lords in January 2014, as the Lords refused to schedule any more days to debate the bill. Since, Robert Neil MP introduced another European Union (Referendum) Bill that also failed to progress further than the second reading in the House of Commons.

⁸ See Lord Justice Laws’ speech at p. 3, Lord Mance’s speech at p. 4 and Lord Neuberger’s speech at p. 2. Neither Lord Sumption nor Lord Reed made any reference to those debates.

⁹ Or to use the expression of Lord Mance, of the ‘European project,’ see Lord Mance’s speech at p. 1. He explains that European project rests on the twin foundations of the European Convention of Human Rights and on the European Union’.

Lord Reed explores the relationship between the common law and the ECHR. After recounting the differences in working practices that he observed during a two-weeks posting with the criminal chamber of the French *Cour de cassation*¹⁰ and a visit of the Supreme Court justices to the German federal constitutional court,¹¹ he draws two comparative conclusions: first, other contracting states do not rely on the ECHR and the rulings of the European Court of Human Rights (thereafter ECtHR) for their domestic system of rights protection;¹² and, second, the ECHR can be given effect in different ways depending on the contracting states. As a result, Lord Reed suggests that the present approach to the authority of the ECtHR's decisions should be changed. By reviewing a few cases, Lord Reed demonstrates that relying on the ECHR is often unnecessary. He concludes that one should look first to statutes and the common law for rights protection in the UK before relying on Convention rights.

3.2 LORD SUMPTION: THE LIMITS OF LAW

Lord Sumption is interested in identifying the tasks that can be assigned to judges. As he sees it, this question is particularly pressing in the United Kingdom because of the law-making power recognized to judges and of the growing demand for courts to intervene in controversial social issues. To decide on these tasks, one could resort to the distinction between law and policy, with legal issues to be decided by judges only. However, according to Lord Sumption, courts everywhere tend to transform policy issues into legal questions. Indeed, this phenomenon of 'conversion' is particularly prevalent in the context of the ECHR. The depth and degree to which this is happening when interpreting the Convention is problematic: it is not consistent with the standard method of statutory interpretation, it raises issues of democratic legitimacy and leads the ECtHR to make pronouncements in law that were never foreseen, let alone approved by Parliament. Lord Sumption suggests that courts should only tackle 'cases of real oppression' and restrict themselves to protecting 'truly fundamental' rights.¹³

3.3 LORD JUSTICE LAWS: THE COMMON LAW AND EUROPE

Lord Justice Laws explores the threat that both European treaties appear to pose to the common law, and more particularly to the common law's two main virtues:¹⁴ catholicity and restraint. By catholicity, Lord Justice Laws means the ability of the common law to rely on foreign sources for inspiration. While some people may believe that the integrity of the common law is being undermined by the imports or influences from the ECHR or EU law, the common law has in fact always been inspired by foreign principles.¹⁵ These principles are brought into English law to respond to a need, not to pursue a pro-European policy. Once incorporated into the common law, the UK courts control their content and evolution entirely. Still, Lord Justice Laws is concerned that deep political tensions on the subject of Europe may undermine the faith that people have in the common law. Therefore, he suggests first that one should remember that the supremacy of EU Law is entirely dependent on its recognition by the UK Parliament; and secondly, that UK courts reconsider the *Ullah* principle¹⁶ and change the way they give effect to the ECHR. Instead, UK courts should turn to the common law to develop a protection of fundamental rights.

¹⁰ This French Supreme court deals with private, criminal and labour law.

¹¹ Lord Hope led a delegation of justices for a three-day visit to the German federal constitutional court in 2012, see also, Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* 222 (Hart 2013).

¹² Lord Reed notes that by contrast, it is commonplace in the UK for decisions of the European Court of Human Rights to be analysed in detail before the courts.

¹³ See Lord Sumption's speech at p. 10.

¹⁴ In the first Hamlyn lecture, Lord Justice Laws explained that the constitutional balance between law and government and judicial and political power is rooted in the Common Law. He went on to explain that presently the Common Law faced two threats: extremism (the subject of the second Hamlyn lecture) and Europe (the subject of the third Hamlyn lecture).

¹⁵ There he cites: the principles of legitimate expectations, legal certainty and proportionality.

¹⁶ [2004] 2 AC 323. This decision established the principle that ECtHR cases should be regarded as authoritative in English law and should be applied in a manner akin to precedents.

3.4 LORD MANCE: DESTRUCTION OR METAMORPHOSIS OF THE LEGAL ORDER?

In this lecture, Lord Mance highlights the tensions that arise in a world where supra-national systems flourish. After listing key achievements for each European treaty, Lord Mance analyses the issues that national courts face when cooperating with their supra-national counterparts. For instance, he notes that concerns about democratic deficit, judicial activism and the invasion of national law by supra-national rules are heard in the UK as elsewhere. UK courts may not be able to rely on the constitution in the same way that other European courts rely on theirs, i.e., to force a dialogue with their supra-national counterparts. Still, UK courts have been able to attract the attention of both the Court of Justice of the European Union (thereafter CJEU) and the ECtHR in the past. For Lord Mance, mutual cooperation is essential to the good functioning of the treaties and the future of the ‘European project’.

3.5 LORD NEUBERGER: THE BRITISH AND EUROPE

In his Freshfields Annual Lecture, the President of the Supreme Court aims to put the UK membership to both the European treaties in their political and cultural context and to dispel the idea that the common law is adversely affected by civil law notions imported from either the ECHR or EU law. For Lord Neuberger, the reason why British people do not support wholeheartedly the institutions created by either European treaties lies in the specific geography, religion and history of the country. Furthermore, the UK’s legal culture varies greatly from the legal culture found in many European countries. For instance, the UK’s uncodified constitution explains why UK courts are not in the habit of reviewing Acts of Parliament and why the ECHR has had since its incorporation a greater impact in the UK than in other European jurisdictions. Still, for centuries, the common law has been ready to incorporate ideas from other legal systems.

These short presentations reveal that all five judges have clear messages with regard to either or both European treaties. While the content and aim of these messages will be analysed further on in the article, it is the comparative methodology used to arrive at them that will be examined now.

4 AN EXERCISE IN COMPARATIVE RE-POSITIONING

The five speeches have one trait in common: many of the messages about either or both of the European treaties are arrived at by resorting to comparative methodology or by citing comparative material. At times, judges find it desirable to rely upon comparative material in judicial decisions.¹⁷ In the main, this material is used as inspiration by judges to address a perceived need in the law. This is sometimes seen as establishing a judicial dialogue across legal orders.¹⁸ Therefore, it is not surprising that this type of reasoning should also find its way in extra-judicial speeches that explore the relationship between national constitutions and supra-national legal orders. However, the nature of the comparative methodology employed in the speeches does not really serve the function identified above. Although the discourse is phrased in the language of comparative law, this is not about learning from the experiences of other jurisdictions, but about re-positioning the UK courts.

4.1 COMPARATIVE METHODOLOGY: SOME ISSUES

In itself, the comparative methodology relied upon in the speeches is revealing: there are sweeping statements of little comparative value and some notable inaccuracies. Examples of the former include Lord Neuberger’s assertions that ‘Mainland European countries, like almost all other countries across the world, are used to judges overruling legislation enacted by Parliament’.¹⁹ Similarly Lord Sumption

¹⁷ See for instance, Martin Gelter & Mathias Siems, *Citations to Foreign Courts – Illegitimate and Superfluous, or Unavoidable? Evidence from Europe*, 62 Am. J. Comparative L. 35 (2014).

¹⁸ These are the functions often ascribed to the use of foreign material in judicial decisions, see for instance, Anne-Marie Slaughter, *A Global Community of Courts*, *Harvard International Law Journal* 191 (2003).

¹⁹ See Lord Neuberger’s speech at p. 16.

suggests that almost ‘all written constitutions’ entrench a limited number of rights,²⁰ a statement later echoed by Lord Mance: ‘Written constitutions, containing fundamental rights chapters, exist in most countries.’²¹ Because of their generality, these statements tend to be uninformative and somewhat inaccurate. The value of comparative law resides in the careful exploration of similarities and differences between legal systems. For instance, the statement by Lord Neuberger about constitutional review in Europe is concerning: not all judges of mainland Europe are used to or able to overrule legislation enacted by Parliament. For instance, there is no constitutional review in the Netherlands – such a review is prohibited by the Dutch Constitution.²² In fact, the Dutch experience of rights protection would be particularly relevant to the UK as the protection of the fundamental rights listed in Chapter 1 of the Dutch constitution is largely achieved through compliance with the ECHR. Similarly, the difficult transformation that some Nordic countries, in particular Finland²³ and Denmark,²⁴ have experienced with their recent acceptance of constitutional review belies the representation of a uniform and consensual practice of constitutional review in Europe.²⁵

In addition, there are some inaccuracies. For instance, Lord Sumption explained that the judiciary is not given law-making power in all legal cultures and cites Article 5 of the French Civil Code by way of illustration. Unfortunately, Lord Sumption’s translation of this provision is incorrect. The provision does not prohibit judges from deciding cases by ‘way of statement of general principle or statutory construction’; instead, the provision states: ‘Judges are not allowed to decide cases before them by way of general and regulatory provisions.’ Furthermore, the evolution of the judiciary’s role in France has transformed the meaning of this provision. In reality, ‘la jurisprudence’²⁶ has a strong authority and French top courts commonly decide on ‘*arrêt de principe*’²⁷ that other courts follow.²⁸ This example is revealing of a superficial comparative methodology.

On the basis of this methodology, it appears doubtful that the authors wished to engage in a rigorous comparative exercise. Instead, these comparative pronouncements were used to portray the UK legal system in a specific manner.

4.2 THE DIVERGENCE DISCOURSE²⁹

On reading the speeches, one is struck by the language of divergence that is found therein. Many of the comparative statements highlight the differences between the UK and ‘mainland’ Europe or even the rest of the world. These differences can be grouped in three (albeit overlapping) categories: the differences between civil and common law jurisdictions; the differences in judicial decision-making cultures; and the differences between codified and uncoded constitutions.

Although Lord Neuberger refers emphatically to the distinction between common and civil law

²⁰ See Lord Sumption’s speech at p. 10.

²¹ See Lord Mance’s speech at p. 3. Before this, Lord Mance explains that: ‘In fact, the British common law system has been almost alone in the world in operating on a pure principle of Parliamentary sovereignty, unconstrained by any written constitution’.

²² Article 120 of the Constitution of the kingdom of the Netherlands 2008: ‘The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts’, this is despite the fact that Ch. 1 of the Constitution list fundamental rights, see Maartje de Visser, *Constitutional Review in Europe* 79 (Hart Publishing 2014).

²³ See Juha Lavapuro, Tuomas Ojanen & Martin Sheinin, *Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review*, 9 *Intl. J. Constitutional L.* 505 (2011).

²⁴ See Jens Elo Rytter & Marlene Wind, *In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms*, 9 *Intl. J. Constitutional L.* 470 (2011).

²⁵ Finnish courts were given the power of constitutional review in 2000 (see Art. 106 of the Constitution of Finland). Still, constitutional review in Denmark and Finland continue to rely markedly on the ex-ante scrutiny of the parliamentary Constitutional law committee.

²⁶ This can be translated by ‘case law.’

²⁷ This can be translated as ‘decision of principle’; it is the equivalent of a leading case.

²⁸ Furthermore, the rule contained in Art. 5 has always been construed by reference to Art. 4 that states: ‘A judge that refuses to decide a case because of the silence, obfuscation or inadequacy of an Act of Parliament will be prosecuted for denial of justice’.

²⁹ The question of divergence or convergence of legal orders has been hotly debated, see Roger Cotterell, *Is It So Bad to Be Different? Comparative Law and the Appreciation of Diversity*, in *Comparative Law: A Handbook* 133 (E. Oruc & D. Nelken eds, Hart Publishing 2007).

systems,³⁰ this basic difference is implied or touched upon in many of the speeches. For instance, Lord Sumption noted the differences between civil and common law jurisdictions with regard to the doctrine of precedent. Similarly, Lord Reed resorted to his observation of judicial decision-making in France, the UK and Germany to highlight the fundamental differences in the way the cases are handled.

Lord Mance and Lord Neuberger underline the unique position of the UK with its uncodified constitution and its reliance on parliamentary sovereignty. Both explain the difficulties created by these constitutional characteristics:³¹ Lord Neuberger asserts that constitutional review is not a tradition in the UK by contrast to what happens in other European countries. This unique constitutional landscape explains the role played by the ECHR and the inability of the UK courts to emulate the German constitutional court. Lord Mance gives the same analysis of the interactions between the German constitutional court and the CJEU.³² In addition, Lord Neuberger accentuated this message of divergence by explaining the dissimilarity in legal and rights cultures by reference to a separate history, geography, religion, etc. This point is also touched upon in Lord Mance's speech.³³

The comparative analysis deployed in the speeches emphasizes the uniqueness of the UK's legal system. In doing so, the speeches perform a comparative re-positioning by contrasting the UK's key characteristics with those of civil law jurisdictions. Still, one needs to be aware of the difficulties that a divergence discourse may engender: for a nuanced and useful comparative analysis, it is necessary to find the appropriate balance between convergence and divergence, between similarity and difference. To disregard all similarities undermines the comparative analysis and compromises any benefit that could be drawn from it.

Lastly, despite a relative consensus of all judges on the uniqueness of the UK Legal order, Lord Justice Laws and Lord Neuberger take care to explain that legal 'implants'³⁴ or influences from civilian systems do not have any adverse effect. Neither the constitution nor the common law is being harmed by the influx of civil law principles. They both argue that such implants have been taking place for a long time and that the common law has the necessary flexibility to benefit from them.³⁵ Furthermore, Lord Justice Laws stresses that these implants fill a need and are soon 'naturalized', by becoming an integral part of the UK constitution. By the positive spin given to this phenomenon, they may hope to dispel the more negative 'isolationist' aspects of the divergence discourse. Still, the re-positioning of the UK's legal system and constitution conjured up by the use of comparative law is disquieting. This impression is strengthened by the vision of 'Europe' that emerges from these speeches.

5 A CERTAIN VISION OF EUROPE

All five judges refer to 'Europe' to mean either the ECHR or the European Union or both. The use of the term is rather symptomatic of the tone and content of the speeches: Lord Neuberger may investigate the reasons as to why the English are at odds with their European neighbours, but 'Europe' is presented as a single geographical, cultural and legal entity; all of Europe has had a rather unstable history, all countries have a written constitution with a bill of rights and most of these legal systems pertain to the same civilian tradition. There is no cultural, social or geographical differentiation and this is translated into a solid and quite forbidding legal unit. There is no recognition that there are vast differences between the European constitutional orders or any mention of the fact that the label of legal family is a contested one and that in any event the civil law family was never homogeneous.³⁶

³⁰ See Lord Neuberger's speech pp. 19–20.

³¹ See Lord Mance's speech p. 9 and Lord Neuberger's speech at pp. 15–16.

³² See notably the reaction to C-617/10 *Aklagaren v. Hans Akerberg Fransson*.

³³ See Lord Mance's speech at pp. 2–3.

³⁴ These are more commonly called 'transplants' in the comparative law literature. The appropriateness of legal transplants has been hotly debated in comparative law circles for a long while now, see Alan Watson, *Legal Transplants* (Scottish Academic Press 1974) and Pierre Legrand, *What Legal Transplants?*, in *Adapting Legal Cultures*, 35 (D. Nelken & J. Feest eds, Hart Publishing 2001).

³⁵ See Lord Neuberger's speech at pp. 26–28.

³⁶ For such a classification see René David, *Les grands systèmes de droit contemporains* (Daloz 1964). It is worth pointing out

Furthermore, the speeches tend to highlight aspects of the European treaties that do nothing to correct this rather ominous impression. All judges deal with some real or apparent negative consequences of the UK's membership of one or the other European treaty. For Lord Reed, the ECHR has been given a central place in the UK constitution as a result of the way it is relied upon by lawyers. According to Lord Sumption, the ECtHR interprets the Convention in a way that allows the court to make law that should be left to other political institutions. Both Lord Neuberger and Lord Justice Laws acknowledged but combat the view that both European treaties are perceived as the source of destabilizing civilian influences. Even Lord Mance mentions the tensions arising from supra-national organization.³⁷ In fact, there are very few positive statements, let alone praise of the European treaties in the speeches, with Lord Mance's speech a notable exception.³⁸

In addition, the solutions to the problems uncovered above do not come from the relevant European systems or treaties.³⁹ The common law holds the key to solving the issues generated by the treaties. Both European systems appear to be lacking mechanisms of self-correction or intrinsic limitations that one normally finds in a legal order. Only Lord Mance stresses that judicial dialogue and the continued engagement of common lawyers in Europe would bring a more fruitful and influential relationship with either supra-national court.⁴⁰

Finally, the acknowledgment by three of the five judges of the political debates concerning a possible Brexit and/or repeal of the Human Rights Act darkens further this European portrait.⁴¹ Overall, these speeches offer a rather negative image of Europe.

Still, the use of comparative law to emphasize the uniqueness of the UK and the rather negative depiction of Europe were not fortuitous. Both serve as justifications for the aims pursued by these extra-judicial speeches: the search for judicial self-determination and the exploration of constitutional change. Only then, will the legal specificity of the UK be protected.

6 THE AIMS: FROM JUDICIAL SELF-DETERMINATION TO CONSTITUTIONAL CHANGE

If one looks to the language and images that judges use in the five speeches, they resemble closely the ideas and concepts that are called upon in public international law when tackling the question of self-determination of a 'people'. To be clear, I should not be taken to suggest that the five judges are putting forward a case for the self-determination of the United Kingdom in the public international law meaning of this term; it is only suggested that the language and image of self-determination⁴² is used in the speeches as a metaphor, consciously or otherwise.

7 THE NEED FOR SELF-DETERMINATION: A METAPHOR

First, the meaning of 'self-determination' needs to be clarified to understand the metaphor and the functions it fulfils in the speeches. The right to self-determination is found in Article 1 § 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights: '*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*'

This provision leaves many unanswered questions, and commentators warn that the content of

that this classification is strongly contested nowadays, see for a recent discussion Mariana Pargendler, *The Rise and Decline of Legal Families*, 60 Am. J. Comparative L. 1043 (2012).

³⁷ See Lord Mance's speech at p. 1.

³⁸ See Lord Mance's speech at pp. 2, 4, 5 & 12.

³⁹ The speech by Lord Sumption may be an exception to this.

⁴⁰ See Lord Mance's speech on the negotiation of the Brighton Declaration, p. 13.

⁴¹ See Lord Justice Laws' speech at pp. 3 & 7, Lord Neuberger's speech at p. 2, Lord Mance's speech at pp. 4, 5 & 6.

⁴² In fact, Lord Mance mentioned: 'concerns about identity and self-determination' with regard to the ECHR, see his speech at p. 4.

this right is notoriously difficult to identify in international law.⁴³ While it is beyond the scope of this research to determine the precise steps that will lead to a successful outcome for an international claim of self-determination, it is necessary to elucidate the meaning of this concept further. According to David Raic, the justification and main purpose of the concept of self-determination is:

*the protection, preservation, strengthening and development of the cultural, ethnic and/or historical identity of individuality (the 'self') of a collectivity, that is of a 'people', and this guaranteeing a people's freedom and existence.*⁴⁴

So, a distinct group of people which claims a right to self-determination seeks to preserve the existence of its separate identity based on ethnicity, culture, language or history. If one peruses carefully the five speeches and isolates the elements that may support a call for self-determination, it is possible to find references to the need for protection of both the 'people' (practicing common lawyers and judges) and the legal culture. With regard to the people, Lord Mance may assert that '(...) we, its common lawyers, judges and courts, are [not] about to be over-whelmed or lose our identity in the face of any outside threat',⁴⁵ but Lord Neuberger tempers this optimism by explaining that in Europe common lawyers are 'heavily outnumbered'⁴⁶ and that '(...) the Luxembourg and Strasbourg courts are manned by judges whose knowledge and experience are almost exclusively civilian law rather than the common law'.⁴⁷ This feels only one step away from claiming minority status, a common enough reason for claiming a right to self-determination.

Beyond the claims by Lord Mance and Lord Neuberger that the UK has a different history, religion and geography, all judges point to specific differences of the UK's constitutional order by comparison to those of mainland Europe, be it the lack of constitutional review, the common law tradition, or other aspects that make this system distinct. This follows the comparative re-positioning that emphasized the uniqueness of the UK's legal order. In addition, Lord Justice Laws,⁴⁸ Lord Mance⁴⁹ and Lord Neuberger⁵⁰ clearly identified a separate legal culture for the UK. Lord Neuberger isolated the distinctive traits of this culture: a pragmatic approach, judge-made legal principles and a distinct forensic attitude.⁵¹ Furthermore, one discerns a sense of unease with regard to the preservation of this culture: the speeches of Lord Sumption, Lord Justice Laws, Lord Mance and Lord Neuberger contained references to 'concerns about supranational invasion' (Lord Mance),⁵² to the issue of 'undesirable . . . civilian law influences' (Lord Neuberger),⁵³ and 'the threat to the common law' (Lord Justice Laws),⁵⁴ with the most apocalyptic warning to be found in Lord Sumption's conclusion.⁵⁵ In addition, Lord Neuberger highlighted the risk of this 'minority' culture being misunderstood.⁵⁶ Finally, both Lord Justice Laws and Lord Neuberger reproduce in full Lord Denning's famous quote of the 'flowing tide of Community law' with its clear image of invasion and devastation.⁵⁷ It may be over-stating the case to say that this legal culture is depicted as under attack,

⁴³ See J. Klabbers, *The Right to Be Taken Seriously: Self-Determination in International Law*, 28 Hum. Rights Q. 186 (2006): 'The right to self-determination easily qualifies as one of the more controversial norms of international law'.

⁴⁴ See David Raic, *Statehood and the Law of Self-Determination* 223 (BRILL 2002).

⁴⁵ See Lord Mance's speech at p. 13, where he also states: 'Common lawyers are eminently adaptable. Their contribution in cooperation with European supra-national courts and other European national courts has I believe been very fruitful and significant in the past.'

⁴⁶ See Lord Neuberger's speech at p. 20.

⁴⁷ See Lord Neuberger's speech at p. 20.

⁴⁸ See Lord Justice Laws' speech at pp. 3-4.

⁴⁹ See Lord Mance's speech at p. 13.

⁵⁰ See Lord Neuberger's speech at p. 19: 'A second cultural factor which distinguishes the UK from almost all other countries in Europe, is a common law system, whereas they have a civilian law system'.

⁵¹ See Lord Neuberger's speech at pp. 19-20.

⁵² See Lord Mance's speech at pp. 5 & 6.

⁵³ See Lord Neuberger's speech at p. 3.

⁵⁴ See Lord Justice Laws' speech at p. 4.

⁵⁵ See Lord Sumption's speech at p. 15.

⁵⁶ See Lord Neuberger's speech at p. 19: 'This leads to the risk of an approach to our forensic procedures, indeed sometimes to our whole forensic attitude, which, at least from an English lawyer's perspective, misunderstands our work'.

⁵⁷ This metaphor can be found in the judgment of Lord Denning in *Bulmer v. Bollinger* [1974] Ch. 401.

but all judges either express some concerns themselves or attempt to address fears commonly expressed by others on this subject.

In view of the possible threat to the legal and constitutional system that the metaphor seems to reflect, the senior judiciary would have been justified in devising ways of protecting the specificities of this system. I will attempt to show below that the speeches are part of a complex process of constitutional change that served to secure a degree of judicial self-determination.

8 BEYOND THE METAPHOR: A PROCESS OF CONSTITUTIONAL CHANGE?

The metaphor identified above, points to a need, if not a call for judicial self-determination. In this, it provides the impulse for the proposals canvassed in the extra-judicial speeches and for a sophisticated process of constitutional change. To study this process of change, the extra-judicial speeches will be analysed together with the Supreme Court decisions that were at the heart of this dynamic. It will be suggested that the speeches and the decisions combined to form a dynamic that led to a formidable and swift process of constitutional change.

8.1 SUPREME COURT DECISIONS AND EXTRA-JUDICIAL SPEECHES: DIALOGUES AND OUTCOMES

Having analysed the extra-judicial speeches individually at the outset, it is now necessary to analyse them in light of the three decisions of the Supreme Court that led to this flurry of extra-judicial activity. After all, October 2013 was an unusually ‘European’ month for the Supreme Court as it gave judgment on both *Osborn* and *Chester* and heard HS2. The confrontation of the extra-judicial writings with the output of the Supreme Court will shed light on an unusual creative dynamic.⁵⁸ While the speeches aimed to explain or comment on *Osborn* and *Chester*, two also mapped the path to a solution in HS2. For the purpose of this demonstration, close attention will be given to the authors of the speeches, the creative dialogue that took place via the speeches and finally, the constitutional solutions that emerged from them.

8.1[a] *Engaging in Multiple Dialogues*

To understand the creative dialogues that the speeches seem to have promoted, it is necessary to begin by identifying the authors of the speeches as they are the main participants to these dialogues. Of the five extra-judicial speeches, only one – the third Hamlyn lecture of Lord Justice Laws – was not delivered by a member of the Supreme Court, but instead by a member of the Court of Appeal who famously advocated the recognition of constitutional statutes.⁵⁹ Among the justices of the Supreme Court that delivered a speech, one finds: Lord Reed, author of the first speech, who delivered the sole judgment in *Osborn* and one of the lead judgments in HS2; Lord Sumption, author of the second speech, who delivered an additional judgment in *Chester* and a concurring judgment in HS2; Lord Mance, author of the fourth speech,⁶⁰ who delivered the lead judgment in *Chester* and a joint concurring judgment⁶¹ with Lord Neuberger in HS2; Lord Neuberger, author of the fifth speech⁶² and president of the Supreme Court, who delivered a joint concurring judgment with Lord Mance in HS2. On seeing the authors, their involvement in the cases and the time-line, neither these speeches

⁵⁸ I am grateful for the work of Harry Annison, *Interpreting the Politics of the Judiciary: The British Senior Judicial Tradition and the Pre-emptive Turn in Criminal Justice*, J.L. & Socy. 339 (2014). While it was not possible to make full use of the careful research methodology applied in the work, it framed my thought process and comforted me in the belief that the extra-judicial speeches needed also to be read as a whole with the three Supreme Court decisions.

⁵⁹ See *Thoburn v. Sunderland City Council* [1990] QB 151.

⁶⁰ This was the last extra-judicial speech before HS2.

⁶¹ All five other justices agreed with this joint concurring judgment.

⁶² This was produced after HS2 was handed down.

nor their timing seem altogether random. On close analysis, the five speeches appear to establish different types of judicial dialogue.⁶³

As is usual for these speeches, they were clearly aimed at the specific audiences they were addressing and beyond that at the wider public. For instance, when Lord Reed gave his speech to the Inner Temple, he explained the wider context for the important change of judicial policy contained in *Osborn*. To this effect, he referred to elements that would not have found their way in his judgment, such as his personal experience of judicial decision-making in other European legal systems. In doing so, he provided a more accessible analysis of the case. While the speech was mostly explanatory, it participated in a wider dialogue with the legal professions.

Still, another type of dialogue seems to take place alongside: the speeches provided a form of internal dialogue for the members of the senior judiciary closely involved with one or more of the three Supreme Court decisions. For example, not only did Lord Justice Laws analyse both *Osborn* and *Chester* quoting Lord Reed, Lord Mance and Lord Sumption, but he endorsed also the ruling in *Osborn*.⁶⁴ In addition, he noted and agreed with Lord Reed's extra-judicial speech.⁶⁵ This continued with Lord Mance's speech. Not only did Lord Mance endorse Lord Justice Laws' dicta in *Thoburn*,⁶⁶ but he also quotes directly from his Hamlyn lecture⁶⁷ and from Lord Sumption's speech.⁶⁸ These cross-references seem to indicate an intra-judicial dialogue prior to judicial policy choices being made. In fact, Lord Mance's speech was mostly exploratory; he was canvassing possible solutions prior to a judgment in *HS2*.

In addition, an attentive perusal of the speeches reveals a probable engagement with the wider judicial community. For instance, when Lord Justice Laws commented on *Ullah* he stated: 'I have in common with others come to think that this approach represents an important wrong turning in our law';⁶⁹ for his part, Lord Mance speaks of 'the expression of concern from some judicial colleagues' regarding the more controversial EU legislation or case of the CJEU or ECtHR.⁷⁰ It is suggestive of other discussions happening in the background.

Finally, the speeches have also been attempts at a dialogue with the ECtHR and the CJEU. Each speech contained clear messages for one or both courts. According to Alan Paterson, one objective of the Supreme Court has been to establish appropriate dialogue with the courts in Europe.⁷¹ He adds that while exchanges with the ECtHR are common and take various forms (including extra-judicial speeches), the situation is different with the CJEU.⁷² Consequently, the relevant speeches and *HS2* should be analysed together as an attempt to establish a dialogue with the Luxembourg court.

8.1[b] *Finding Constitutional Solutions*

The speeches did more than simply allow senior members of the judiciary to exchange ideas. It gave them a forum to identify and sketch possible answers to the issues in *HS2*. In fact, it is possible to see in the speeches, the burgeoning of solutions later used in the judgments.

As a result of the substantive grounds argued by the appellants, the Supreme Court was faced with significant constitutional issues. For this reason, *HS2* contained three key pronouncements on the constitutional foundations for the supremacy of EU law, the cooperation with the CJEU and the recognition of constitutional instruments and principles. As their roots can be traced to the speeches, it may help an understanding of *HS2* to explain the origins of these judicial pronouncements.

⁶³ Here the definition of 'dialogue' is taken from the Oxford dictionary: 'discussion between two or more people, especially one directed towards exploration of a particular subject or resolution of a problem.' It is used in a similar way as in the work of Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* 9 (Hart 2013).

⁶⁴ See Lord Justice Laws' speech at p. 10.

⁶⁵ See Lord Justice Laws' speech at p. 8.

⁶⁶ See Lord Mance's speech at p. 10.

⁶⁷ See Lord Mance's speech at p. 3.

⁶⁸ See Lord Mance's speech at p. 3.

⁶⁹ See Lord Justice Laws' speech at p. 9.

⁷⁰ See Lord Mance's speech at p. 3.

⁷¹ Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* 221 (Hart 2013).

⁷² *Ibid.*, 223–224.

First, the decision in *HS2* aimed to clarify the constitutional foundations for the relationship between UK and EU law and therefore for the supremacy of EU law in the United Kingdom. These points were canvassed in the extra-judicial speeches of both Lord Justice Laws and Lord Mance. Lord Justice Laws noted that the supremacy and reach of EU law in the UK rested entirely on the European Communities Act 1972 and was ‘ultimately a function of Parliament’s will’. He also quoted the doubts that he had expressed in *Thoburn*⁷³ that the ECA 1972 may not be sufficient to allow the incorporation of an EU provision in direct conflict with a UK constitutional or fundamental right. He added in his lecture that Parliament should not be assumed to have given ‘carte blanche’ to the European legislature.⁷⁴

As for Lord Mance, he began by noting that the German federal constitutional court (thereafter Bundesverfassungsgericht) has had a leading role in defining the legal relationship between European and national legal systems: while the Bundesverfassungsgericht had been careful to give effect to the decisions of the CJEU, it had fought to ensure that the CJEU remained within the limits of its powers.⁷⁵ Interestingly, Lord Mance referred also to the more recent skirmish between the two courts: in a judgment of April 2013,⁷⁶ the Bundesverfassungsgericht reacted to the CJEU’s claim made two months earlier that the Charter of fundamental rights applied whenever a Member State acts within the scope of EU law.⁷⁷ Even though Lord Mance underlined the difficulties of using the German example as a model for the UK constitution,⁷⁸ it may have served as inspiration⁷⁹ for the pronouncements in *HS2* on supremacy and reach of EU law by Lord Reed on the one hand and Lord Neuberger and Lord Mance on the other. In fact, Lord Mance indicated in his extra-judicial speech that both constitutional statutes and fundamental common law rights would impose a limit to the supremacy of EU law.⁸⁰ This is barely a step away from the pronouncements in *HS2* that any conflict between EU laws and a UK constitutional principle, statute or fundamental right, were to be resolved by reference to the UK constitution⁸¹ and that the relationship between the United Kingdom and the European Union was determined by reference to UK constitutional law. Similarly, both Lord Justice Laws and Lord Mance touched upon the content of the UK constitution in their speeches when tackling the issue of the relationship of the UK with the EU. Lord Justice Laws had been the first in *Thoburn* to suggest that there existed a category of constitutional statutes⁸² that could not be impliedly repealed. He returned to this analysis in the Hamlyn lecture. Similarly, Lord Mance having searched to limit the supremacy of EU law cites constitutional statutes and fundamental common law rights but admits that these are not as efficient as a written constitution.⁸³ On comparing the two extra-judicial speeches with the analysis in Lord Neuberger’s and Lord Mance’s concurring judgment on the content of the UK constitution, it appears that on this point, the content of the judgment is close to the

⁷³ *Thoburn v. Sunderland City Council* [2003] QB 151.

⁷⁴ See Lord Justice Laws’ speech at p. 7. Previously, he had suggested a different approach by equating EU legislation to secondary legislation as secondary legislation cannot ‘abrogate a fundamental or constitutional right’ in the absence of express authorization.

⁷⁵ See the decision of the Bundesverfassungsgericht in *Solange I (Internationale Handelsgesellschaft)* [1974] CMLR 540) and *Solange II (Re Wuensche Handelsgesellschaft)* [1987] 3 CMLR 225) that aimed to protect the effectiveness of the German constitution and its protection of fundamental rights.

⁷⁶ Judgment of 24 Apr. 2013 1 BvR 1215/07. Interestingly, this decision of the Bundesverfassungsgericht was referred to by Lord Neuberger and Lord Mance in their concurring judgment to support the idea of a cooperative relationship between the CJEU and national constitutional or supreme courts.

⁷⁷ See Case 617/10 *Aklagaren v. Hans Akeberg Fransson*.

⁷⁸ See Lord Mance’s speech at p. 10. He concludes that the situation is very different in the UK as the ECA removed any constitutional obstacles to the supremacy of EU law, and to the point that the ECA as a constitutional statute is itself protected. He notes that presently there are ‘few limits to the dominance of EU law.’

⁷⁹ In fact, there may be a precedent for that: the Bundesverfassungsgericht may have served in the past as inspiration to establish a better dialogue between the Supreme Court and the ECtHR, see Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* 233 (Hart 2013). Finally, the reference to the Bundesverfassungsgericht’s decision of April 2013 in Lord Neuberger’s and Lord Mance’s concurring judgment shows reliance on the decisions of the Bundesverfassungsgericht.

⁸⁰ See Lord Mance’s speech at p. 10.

⁸¹ See Lord Reed at p. 29 [§ 79]: ‘if there is a conflict between a constitutional principle, such as embodied in Art. 9 of the Bill of Rights, and EU law, that conflict has to be resolved by our courts as an issue arising under the constitutional law of the United Kingdom’ and see the more thorough analysis by Lord Neuberger and Lord Mance at p. 72 [§ 206–208].

⁸² The ECA 1972 was identified as one of the constitutional statute.

⁸³ See Lord Mance’s speech at p. 10.

proposals found in the extra-judicial speeches.

Finally, Lord Neuberger and Lord Mance drafted their joint concurring judgment to contest the interpretation by the CJEU of the relevant directives. Although the substantive analysis could not have been predicted,⁸⁴ an attempt at dialogue ought to have been expected. Not only did the subject of dialogue arise obliquely in Lord Justice Laws' lecture⁸⁵ but Lord Mance praised judicial dialogue as a way for national courts to influence the case law of the CJEU in his extra-judicial speech.⁸⁶ What is interesting however, is the reference in the judgment to the risks that these 'creative' interpretations of the CJEU may lead to: a lack of legal certainty, a loss of confidence in EU legislation, the compromise of judicial cooperation, the negative impact on subsequent legislative processes. The concerns expressed by both justices reflect for a large part those expressed by the members of the senior judiciary in their extra-judicial speeches: the legitimacy of the EU and its activity (whether legislative or judicial) was considered a challenge by Lord Mance and Lord Justice Laws.

This analysis tries to show that the extra-judicial speeches should be regarded in this context at least, an integral part of this judicial decision-making process and unusual process of constitutional change.

8.2 EXTRA-JUDICIAL SPEECHES AND CONSTITUTIONAL CHANGE: GRAND DESIGN AND JUDICIAL SELF-DETERMINATION

Beyond the pronouncements explained above, I will argue that the decision in *HS2* may have been part of a 'grand design': a Programme of constitution building that was used to secure judicial self-determination.⁸⁷ Indeed, on reading *Osborn*, *Chester* and *HS2* together with the five extra-judicial speeches, one wonders whether the court may have mapped a two-phase Programme. With *Osborn*, the Supreme Court may have aimed to 'repatriate' fundamental rights by encouraging lawyers (and presumably judges) to look for rights and freedoms in the common law first. Reading the sole judgment delivered by Lord Reed⁸⁸ together with his extra-judicial speech⁸⁹ gives credence to this interpretation. Not only would this recognition avoid too great a reliance on the ECHR but it would also increase the substantive content of the constitution. In effect, this would really 'bring home' to the United Kingdom the protection of fundamental rights.

When presented in this light the policy pursued in *Osborn* fits well with the pronouncements made five months later in *HS2*, the second phase of this possible Programme of constitution building. There, the Supreme Court elaborated further on the content of the UK constitution: not only did it recognize the category of constitutional statutes that was first discussed in *Thoburn* but it added fundamental rights and constitutional principles arising from the common law. Although the decision contained few details as to the practicality of this recognition, the court took steps to protect these newly discovered constitutional statutes, principles and fundamental rights. By proclaiming the superiority of the UK constitution over EU law in the event of a conflict, the Supreme Court in effect created a constitutional hierarchy of norms. This should bring some emancipation from EU law and its doctrine of Supremacy.⁹⁰

Should this Programme of constitution building be put into full effect, the Supreme Court would certainly regain a degree of constitutional autonomy from both the ECHR and the European Union. In addition, the Supreme Court would recover some control over the evolution of the UK's process of legal and constitutional development and a chance to shape the UK constitution for the future. Indeed,

⁸⁴ The relevant directives were not even mentioned in any of the speeches.

⁸⁵ See Lord Justice Laws' speech at p. 9 where he quotes Lord Neuberger who warned against systematic acquiescence to the Court of Justice's rulings for fear of destroying the ability to engage in a constructive dialogue with the Court.

⁸⁶ See Lord Mance's speech at pp. 12 & 13.

⁸⁷ Of course, there would have been a degree of serendipity with regard to the extra-judicial speeches.

⁸⁸ See Lord Reed at pp. 22–25 [§54–63]. It is notable that the judgment was agreed to by all four other justices and that the panel included both the President and the Deputy President of the Supreme Court.

⁸⁹ See the entirety of Lord Reed's speech.

⁹⁰ In doing so, the Supreme Court approved the ruling in *Factortame* except in the event of a conflict between EU law and UK constitutional law, or more precisely when the UK's 'constitutional identity is or may be engaged', see Lord Mance in *Pham v. Sec. of State for the Home Department* [2015] UKSC 19.

the 'grand design' has the potential to deliver the judicial self-determination that the senior judiciary feel they need to combat the negative aspects of the present supra-national era.

9 CONCLUSION

In view of the potential transformation that was achieved, this process of constitutional change has some notable advantages: this was concluded swiftly and with minimum risk as the speeches allowed ideas and solutions to be canvassed ahead of their adoption. Furthermore, the process itself was more transparent and seemingly more inclusive than simply departing from existing precedent. Finally, it allowed the senior judiciary to show that they were aware of the political debates around them and to adopt a coherent but flexible policy by way of response. Only the future will tell whether this unusual process will be used again and whether it has engineered lasting change. One may wonder what impact, if any, these Supreme Court's innovations are likely to have on the Brexit debate. Still, they may help address the concerns and frustration that are palpable from reading the speeches and that are seemingly shared by the senior judiciary and probably by the larger judicial community.