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The Brexit Roadmap: Mapping the Choices and Consequences during the EU/UK withdrawal and Future Relationship Negotiations

Mitchel van der Wel and Ramses A. Wessel



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CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**THE BREXIT ROADMAP: MAPPING THE CHOICES AND
CONSEQUENCES DURING THE EU/UK WITHDRAWAL
AND FUTURE RELATIONSHIP NEGOTIATIONS**

MITCHEL VAN DER WEL AND RAMSES A. WESSEL

CLEER PAPERS 2017/5

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ABSTRACT

The UK is the first EU Member State to have invoked Article 50 TEU. This study provides a comprehensive overview of the process that leads to the withdrawal of the UK and the construction of a new relationship between the EU and the UK. A distinction has been made between three agreements that will possibly be concluded. The first agreement consists of the terms of the withdrawal including the financial settlement, the reciprocal rights of EU and UK citizens and the border between Ireland and Northern Ireland. The second agreement will arrange the future relationship and lays out the trade rules and cooperation in other areas such as security. The third possible agreement consists of transition arrangements to cover the gap between the day of withdrawal and the entering into force of the future relationship agreement. The study gives an in-depth analysis of how these agreements will be realised, including the decision-making actors, potential complications and the legal, political and financial consequences that derive from it. The result is a process scheme that shows the subsequent steps for realizing the withdrawal and the new relationship, an overview of the possible forms the future relationship and how these compare to EU membership. Furthermore, the study shows that there are many uncertainties surrounding the withdrawal and that the desires of Scotland, Northern Ireland and Gibraltar to remain in the EU are unrealistic.

Keywords: Brexit, Article 50 TEU, Withdrawal Agreement, Transition Agreement, Future Relationship Agreement, Withdrawal from the EU

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1. INTRODUCTION

On 23 June 2016, the United Kingdom (UK) voted in favour of leaving the European Union (EU). After a series of internal events including a change of leadership, court cases about who is entitled to trigger Article 50 of the Treaty on European Union (TEU) and the passing of the Brexit bill, the notification of the intention to leave the EU was sent to the European Council on 29 March 2017. This notification has started the procedure of dismantling the intertwined system between the EU and the UK, involving governments, businesses, and citizens from multiple countries. Besides dismantling the current system, there is also the shared wish to set up a post-Brexit system.

This is the first comprehensive study mapping the entire Brexit process, from the withdrawal of the UK to the construction of a new relationship. It assesses all the procedural steps that have to be taken during this process and the legal, political and financial consequences that derive from the different choices that can be made throughout the process. It will also analyse the legal, political and financial consequences of the various options during the Brexit negotiations between the European Union and the United Kingdom ('if...then...'). Not all options are realistic from a political or even a legal point of view. Yet, our aim is to provide a comprehensive overview of all decision-making choices the parties are or will be confronted with. Furthermore, we have chosen a structured approach, leading to concrete decision-making options (presented in bullet-points) during each stage of the process.

The study begins with an introductory section (2), providing an overview of the Article 50 TEU procedure to withdraw from the EU, outlining the options for the final agreements. This will be followed by an in-depth analysis of the three agreements: the withdrawal agreement (3), the transition agreement (4), and the future relationship agreement (5). The focus here lies primarily on the procedures of the EU and the different steps that include a decision that has to be taken by one or more actors. Next, the study provides an overview of the possible templates for the future relationship agreement based on existing relationships between the EU and third countries (6). Finally, we will elaborate on the possibilities for Scotland, Northern Ireland, and Gibraltar since they voted in favour of remaining in the EU (7). We will conclude by providing a schematic overview of the options and their consequences and our assessment of the options (8).

2. ARTICLE 50 TEU AND THE FINAL AGREEMENTS

The first section serves as an introduction and will elaborate on Article 50 TEU and the final agreements. Given the many existing recent publications on Article 50, we will limit our analysis to the main issues that are relevant for the different steps during the negotiation process.

2.1. Ways to Withdraw from the EU

In 2009, the Treaty of Lisbon introduced Article 50 TEU, the right of a Member State to withdraw from the EU. Although the UK has been the first to trigger Article 50 TEU, in the past, three territories have left the EU or its predecessor the European Economic Community (EEC).¹ First, Algeria, as an integral part of the French Republic, was part of the EEC since 1957 and in 1962, it became independent from France and left the EEC. Second, Greenland as part of the Kingdom of Denmark joined the EEC along with Denmark in 1973. After home rule was introduced in 1979, the Greenlandic government called for a referendum on EEC membership. The referendum took place in 1982 and the majority of the people voted against EEC membership. Upon request by the Greenlandic government, the Treaties were amended, and Greenland was granted the status of overseas country and territory.² Third, in 2007 the islands of Saint-Martin and Saint-Barthélemy seceded from Guadeloupe, an overseas department of France, and an outermost region of the EU, and became overseas collectivities of France, and at first remained outermost regions of the EU. However, Saint-Barthélemy requested its EU status to be changed into an overseas country and territory. The change of status happened in 2012. Thus, while in the history of the EEC and the EU the application of European law has changed with respect to some territories, the UK will be the first sovereign country to leave the EU.

For the UK, the Article 50 TEU procedure is the road to withdrawal from the EU. However, British Eurosceptics would have preferred to take an alternative route since the process of Article 50 TEU strengthens the position of the EU by putting the UK under time pressure while the final agreement depends on the EU, which means in some cases that the approval of all 27 remaining Member States, parliaments and publics, and the European Parliament is needed.³

Several alternative routes have been mentioned by multiple sources.⁴ The alternative route that has been mentioned the most is probably the option of

¹ While it goes beyond the scope of the present paper, it is important to note that some analyses have shown that the Union was founded with a Eurafrikan Union in mind. From that perspective, the territory of the Union has thus shrunk dramatically. See in particular Hansen, P. and Jonsson, S. (2014) *Eurafrika: The Untold History of European Integration and Colonialism*, London: Bloomsbury.

² See more in detail Kochenov, D. (2018, forthcoming). 'European Union Territory from a Legal Perspective: A Commentary on Articles 52 TEU, 355, 349, and 198-204 TFEU', in Kellerbauer, M., Klamert, M. and Tomkin, J. (eds), *The EU Treaties and the Charter of Fundamental Rights – A Commentary*. Oxford: Oxford University Press; University of Groningen Faculty of Law Research Paper 2017-05; available at SSRN: <https://ssrn.com/abstract=2956011>; as well as A. Biondi and S. Ripley, *EU Law After Lisbon*, Oxford: Oxford University Press, 2012.

³ Oliver, T. (2016). *Brexit: What Happens Next? LSE IDEAS Strategic Update 16.2*.

⁴ See Vibert, F., & Beck, G. (2016, June 15). *The seven days of Brexit: how a Leave government could bypass Article 50*. Retrieved February 5, 2017, from LSE: <http://blogs.lse.ac.uk/brexit/2016/06/15/the-seven-days-of-brexit-how-a-leave-government-could-bypass-article-50/>; and Besselink, L. F. (2016, June 30). *'Beyond Notification: How to Leave the Union without Using Article 50 TEU'*. Retrieved February 5, 2017, from UK Constitutional Law Association: <https://ukconstitutionallaw.org/2016/06/30/leonard-besselink-beyond-notification-how-to-leave-the-european-union-without-using-article-50-teu/>. See also T. Skoutaris, 'From Britain and Ireland to

simply repealing the European Communities Act 1972.⁵ However, when doing this the UK would breach treaty obligations under international law and it would decrease the chance of striking a trade agreement with the EU. This study assumes that the Article 50 TEU procedure is the only realistic option for the UK to leave the EU, and other options will not be further analysed. This assumption is strengthened by most literature on Brexit,⁶ which sees the Article 50 TEU procedure as the only right procedure for the UK to withdraw from the EU. And above all, the UK has already triggered Article 50 TEU, and thus the procedure has started.⁷

2.2. The Article 50 TEU Procedure

The procedure of how an EU Member State might voluntarily leave the EU is set out in Article 50 TEU. Therefore, Article 50 TEU will be fully quoted since this is relevant to the following parts of the study:

Article 50 TEU:

1. *Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*
2. *A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.*
3. *The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*

Cyprus: Accommodating “Divided Islands” in the EU Political and Legal Order’, *EUI Working Papers*, AEL 2016/02 Academy of European Law’; https://ueaeprints.uea.ac.uk/60474/1/Skourtaris_AEL_2016_02.pdf.

⁵ Peers, S. (2016a, July 20). *How the EU works: leaving the EU*. Retrieved February 5, 2017, from Full Fact: <https://fullfact.org/europe/how-eu-works-leaving-eu/>; as well as Ruparel, R. (2015, February 22). *The mechanics of leaving the EU – explaining Article 50*. Retrieved February 5, 2017, from Open Europe: <http://openeurope.org.uk/today/blog/the-mechanics-of-leaving-the-eu-explaining-article-50/>.

⁶ Chalmers, D., & Menon, A. (2016). *Getting Out Quick and Playing the Long Game*. Berlin: Open Europe; Oliver, *op.cit.*; as well as Piris, J.-C. (2016). *If the UK votes to leave: The seven alternatives to EU membership*. London: Centre for European Reform.

⁷ May, T. (2017, March 29). *Prime Minister’s letter to Donald Tusk triggering Article 50*. Retrieved April 12, 2017, from Gov.uk: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf.

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

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

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

2.2.1. Euratom and the EEA

Article 50(1) TEU reads: ‘Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.’ The first paragraph clearly states that any Member State can decide to withdraw from the EU. On the contrary, it does not say anything about withdrawal from the European Atomic Energy Community (Euratom) and the European Economic Area (EEA). Since, besides being a member of the EU, the UK is also a member of member of Euratom and the EEA this is a relevant aspect. Commentators appear to have different views on this issue.

In the case of Euratom, Article 106a of the Euratom Treaty mentions that Article 50 TEU applies to the Euratom Treaty. This can be interpreted as meaning that a Member State can voluntarily decide to leave the EU and stay in Euratom or vice versa.⁸ However, Article 106a of the Euratom Treaty also states that ten other Articles from the TEU and 85 Articles from the TFEU apply to the Euratom Treaty. Some of these Articles, i.e. Article 14 and 15 TEU, set out the general rules for the European Parliament and the European Council. Thus, if a Member State would withdraw from the EU but not from Euratom it would still have Members of the European Parliament (MEPs) and a role in the European Council. It is very unlikely that this is what the drafters of the Treaties would have wanted and it does not seem to be in line with the goal of a withdrawing Member State.⁹ Noteworthy is also the fact that accession to the EU goes hand in hand with joining Euratom. Based on this one can argue that the same principle would apply to withdrawal; thus withdrawal of the EU goes hand in hand with withdrawal of Euratom. Furthermore, within the official letter written by Prime Minister May, sent to notify the EU about the withdrawal, it was explicitly mentioned that the UK also withdraws from Euratom.¹⁰ In our opinion, it would not be possible for the UK to stay in Euratom since this would create an unworkable situation. Euratom is governed by the EU institutions and this would thus mean that the UK is not able to exert any influence due to its exclusion from the EU institutions, or that the UK only participates in meetings of EU institutions on matters related to Euratom.

⁸ Brown, A. (2016). Energy Brexit: initial thoughts. *International Energy Law Review* 5, 209-221.

⁹ Peers, S. (2017, January 30). *The UK Brexits Euratom: Legal Framework and Future Developments*. Retrieved March 1, 2017, from EU Law Analysis: <http://eulawanalysis.blogspot.se/2017/01/the-uk-brexits-euratom-legal-framework.html>.

¹⁰ See *supra*.

Instead of pointing to Article 50 TEU, the EEA Agreement does have its own withdrawal procedure. Article 127 of the EEA Agreement states that: *'Each Contracting Party may withdraw from this Agreement provided it gives at least twelve months' notice in writing to the other Contracting Parties. Immediately after the notification of the intended withdrawal, the other Contracting Parties shall convene a diplomatic conference in order to envisage the necessary modifications to bring to the Agreement.'* However, it does not seem likely that the UK can stay a member of the EEA since only members of the EU and the European Free Trade Association (EFTA) can be a member of the EEA,¹¹ and staying in the EEA is not in line with the goals of the UK government.¹² We find it hard to believe that the UK can stay in the EEA after it has withdrawn from the EU. All members of the EEA are either EU or EFTA members, once the UK withdraws it is neither of those and therefore it cannot be in the EEA. On the other hand, the situation might be different if the UK decides to join the EFTA immediately or shortly after the withdrawal from the EU.¹³

At the moment of writing these matters are unclear, if they become relevant ultimately the Court of Justice of the European Union (CJEU) should provide answers.

2.2.2. The Notification

Article 50(2) TEU reads: *'A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.'* A Member State that wishes to withdraw from the EU has to notify the European Council. Prime Minister May notified the European Council on 29 March 2017.¹⁴ Article 50 TEU(2) and Article 50 TEU in their entirety do not clarify whether it is possible to revoke the notification. This question is of significant importance since it can offer the UK a way out if it becomes clear that the outcome of Brexit will be dramatic or in the case of a changing situation such as a new government, and finally it would offer the UK the possibility to buy another two years of negotiation time by revoking the notification and send-

¹¹ Cf. Wessel, R.A. (2017). De procedure om de Europese Unie te verlaten – een interpretatie van artikel 50 VEU. *SEW* 1, 2-10.

¹² Miller, Lang, & Simson-Caird, *op.cit.*

¹³ This paper does not allow us to go into detail as to all options under the EEA agreement. See for instance Hillion, C. (2018), 'Brexit means Br(EEA)xit: The UK withdrawal from the EU and its implications for the EEA', *CML Rev.*, 2018 (forthcoming)

¹⁴ May, T. (2017, March 29). *Prime Minister's letter to Donald Tusk triggering Article 50*. Retrieved April 12, 2017, from Gov.uk: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf.

ing out a new notification of withdrawal. One could imply the specific mentioning of when the Treaties cease to apply and how a withdrawn Member State can rejoin to mean that a notification cannot be revoked.¹⁵ During the *R (Miller) v Secretary of State for Exiting the European Union* case, it was taken for granted that the notification is irrevocable but no arguments supporting this were given. Several experts think the contrary but also point to the politics of the question.¹⁶ Professor Derrick Wyatt has stated: '*Analysis of the text suggests that you are entitled to change your mind, but the politics of it would be completely different.*' Furthermore, Sir David Edward, former judge of the CJEU has stated: '*Absolutely clear that you cannot be forced to go through with it if you do not want to: for example, if there is a change of Government.*' He also stressed the politics of the situation and thought that other Member States would only allow it if the UK were to let go of its opt-outs.¹⁷ More recently, the European Parliament has stated in its resolution: '*Whereas a revocation of notification needs to be subject to conditions set by all EU-27 so it cannot be used as a procedural device or abused in an attempt to improve the current terms of the United Kingdom's membership.*'¹⁸ Thus, according to the European Parliament, the notification can be revoked if it fits the conditions set by the EU-27. However, this is not a legally binding statement. In our view it is indeed difficult to revoke the notification unilaterally and against the wishes of the EU and the 27 Member States. A whole process has been set in motion and much time and energy has already been spent on the negotiations. Yet, if the EU and the EU-28 could agree on a possibility to reverse the process, a political solution would most probably be found.

2.2.3. The Procedural Steps

On 29 March 2017 the European Council received the notification from the UK of its intention to withdraw from the EU. This was followed up with the process of drafting the guidelines for the negotiations between the EU and the UK.¹⁹ The UK is excluded from European Council meetings related to Brexit. The guidelines will function as a framework for the negotiations and set out the overall positions and principles that the EU will pursue throughout the negotiations.²⁰ As stated

¹⁵ Miller, Lang, & Simson-Caird, *op.cit.*

¹⁶ *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

¹⁷ See the House of Lords (2016, March 8). *Revised transcript of evidence taken before The Select Committee on the European Union Inquiry on THE PROCESS OF LEAVING THE EUROPEAN UNION*. Retrieved March 1, 2017, from UK Parliament: <http://data.parliament.uk/written-evidence/committeeevidence.svc/evidencedocument/european-union-committee/the-process-of-leaving-the-eu/oral/30396.html>.

¹⁸ European Parliament's Committee on Legal Affairs. (2017). *Report on the Consequences of Brexit*. Brussels: European Parliament's Committee on Legal Affairs.

¹⁹ European Council. (2017). *GUIDELINES FOLLOWING THE UNITED KINGDOM'S NOTIFICATION UNDER ARTICLE 50 TEU*. Brussels: European Council.

²⁰ General Secretariat of the Council. (2016, June 23). *EU and the UK after the referendum on 23 June 2016*. Retrieved March 1, 2017, from Consilium Europa: <http://www.consilium.europa.eu/en/policies/eu-uk-after-referendum/>.

in Article 15(4) TEU, decisions within the European Council are taken by consensus, meaning that the guidelines will be concluded when there are no objections from any Member State within the European Council. It should be noted that the European Council is allowed to amend or clarify the guidelines during the course of the negotiations.²¹

The negotiations shall be done in accordance with Article 218(3) TFEU. This Article mentions that the European Commission (Commission) shall submit recommendations to the Council of the EU (Council), which shall adopt a decision authorising the opening of the negotiations and nominate the EU negotiator or the head of the EU's negotiating team. A more detailed description of this process was given during an informal meeting of the Heads of State or Government of 27 Member States, as well as of the Presidents of the European Council and the Commission. In accordance with the guidelines, after a recommendation by the Commission, the European Council will invite the Council, or more specifically the General Affairs Council, to take the decision authorising the opening of the negotiations. The General Affairs Council will then deal with the subsequent steps of adopting or amending the negotiating directives in substance (always, it is understood, based on the recommendations of the Commission) as well as adopting detailed arrangements governing the relationship between, on one side, the Council and its preparatory bodies, and, on the other side, the Commission. These negotiating directives can be amended during the course of the negotiations, to be in line with the amendments to the guidelines by the European Council (General Secretariat of the Council, 2016a). Finally, the General Affairs Council decides by strong qualified majority voting (SQMV) to authorise the opening of the negotiations. Article 238(2) TFEU defines SQMV as at least 72% of the members of the Council, representing Member States comprising at least 65% of the population of the EU. In the case of Brexit, the UK is excluded. Although Article 218(3) TFEU mentions that the Council nominates '*the Union negotiator or the head of the Union's negotiating team*', a statement released in December 2016 made clear that the Council will appoint the Commission as the negotiator.²²

On the EU side, the Article 50 Task Force of the Commission led by Michel Barnier is in charge of the negotiations. They work in close cooperation with the Council Working Group led by Didier Seeuws. The Council Working Group provides guidance to the Article 50 Task Force. Furthermore, Guy Verhofstadt acts as the chief negotiator on behalf of the European Parliament.²³ The European Parliament does not have a formal role in the negotiation process, other than the right to receive regular information on its progress. However, the Eu-

²¹ General Secretariat of the Council. (2016, December 15). Statement after the informal meeting of the 27 heads of state or government, 15 December 2016. Retrieved March 1, 2017, from Consilium Europa: <http://www.consilium.europa.eu/en/press/press-releases/2016/12/15-statement-informal-meeting-27/>.

²² Ibid.

²³ European Parliament's Committee on Legal Affairs. (2017). Report on the Consequences of Brexit. Brussels: European Parliament's Committee on Legal Affairs.

European Parliament has to give its consent on the withdrawal agreement and on the new international treaty that is to govern issues such as UK-EU trade.²⁴

The UK Brexit Taskforce is led by Secretary of State for Foreign and Commonwealth Affairs Boris Johnson, Secretary of State for Exiting the EU David Davis and Secretary of State for International Trade Liam Fox.²⁵

Article 50 TEU only refers to Article 218(3) TFEU which sets out rules related to the opening of the negotiations. However, Wyrozumska states that it is likely that not only the rules in Article 218(3) TFEU apply but that all the general rules laid down in Article 218 TFEU do too.²⁶ In this case, prior to concluding the agreement, there will be a Council decision to authorise the signing of the agreement and if necessary its provisional application. The provisional application, however, would only be relevant in the case of a mixed agreement. While the future arrangement between the UK and the EU may (have to) take the form of a mixed agreement, the first step in the withdrawal agreement and for this agreement (including, we would argue, the transitional arrangement) Article 50 seems to hint at an EU-only agreement (see further below).

Indeed, regarding the concluding of the agreement, paragraph 2 states: *'It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.'* Thus, the Council concludes the agreement but can only do this once it has received the consent of the European Parliament. According to Article 231 TFEU, the default decision-making mechanism for the European Parliament is a simple majority vote. Furthermore, it states that the Rules of Procedure shall determine the quorum. Rule 168(2) of the Rules of Procedure reads: *'A quorum shall exist when one third of the component Members of Parliament are present in the Chamber.'* Thus, consent in the European Parliament will be reached if at least one third of the total 751 MEPs turn up to vote, and the majority votes in favour of the agreement. It should be noted that the UK MEPs are allowed to vote since the Treaty only excludes the UK from participating in the Council and European Council on matters related to Brexit.²⁷ This can be seen as controversial since one can argue that their right to vote is attached to the nation state they represent and the nation-state has already decided to leave the EU. Finally, after obtaining the consent, the General Affairs Council can conclude the agreement by SQMV. Before the UK government can ratify the agreement, it has to be laid

²⁴ Ibid.

²⁵ UK Parliament. (2016). Brexit negotiations. Retrieved March 1, 2017, from UK Parliament: <https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee/inquiries/parliament-2017/scrutiny-of-brexit-negotiations/brexit-negotiations/>.

²⁶ Wyrozumska, A. (2013). Article 50 [Voluntary Withdrawal from the Union]. In H.-J. Blanke, & S. Mangiameli, *The Treaty on European Union (TEU)* (pp. 1385-1418). Berlin: Springer.

²⁷ Peers, S. (2016b, July 14). *What Role for the European Parliament under Article 50 TEU?*. Retrieved March 1, 2017, from EU Law Analysis: <http://eulawanalysis.blogspot.se/2016/07/what-role-for-european-parliament-under.html>.

down before both the House of Lords and the House of Commons.²⁸ In the case of a mixed agreement, the EU-27 also have to ratify the agreement.²⁹

Article 50(3) TEU reads: '*The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*' Once the UK has notified the European Council about its intention to leave, the clock starts ticking. Paragraph 3 mentions that the Treaties cease to apply to the withdrawing State from the day the withdrawal agreement enters into force. However, if the EU and the withdrawing Member State fail to agree on a withdrawal agreement within two years, the Treaties cease to apply without a withdrawal agreement. This situation can be avoided if the European Council and the withdrawing Member State unanimously decide to extend the two-year time limit. Technically, the extension can last forever since paragraph 3 does not specify a maximum duration.³⁰

Article 50(4) TEU reads: '*For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.*' Discussions and decisions within the European Council and the Council regarding the withdrawal of the Member State are done without that particular Member State. Between the moment of notification and the moment of withdrawal, the UK remains a member of the EU as before. This means that on all matters besides Brexit, the UK is entitled to vote and conduct business on the same level as all other Member States. The only significant change affecting the UK's power that took place was the replacement of the UK's planned EU-Presidency for the second half of 2017 by Estonia.³¹

Article 50(5) TEU reads: '*If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.*' It is possible for a Member State to rejoin the EU. Contrary to withdrawal, Article 49 TEU mentions that in order to be allowed to join the EU all Member States have to agree unanimously on this. If the UK wants to rejoin the EU, politics will most likely play a significant role in the acceptance of the UK by the other Member States.³²

²⁸ Independent. (2017, January 17). *Theresa May's Brexit speech in full: Prime Minister outlines her 12 objectives for negotiations*. Retrieved March 1, 2017, from Independent: <http://www.independent.co.uk/news/uk/home-news/full-text-theresa-may-brexit-speech-global-britain-eu-european-union-latest-a7531361.html>.

²⁹ House of Commons Exiting the European Union Committee. (2017). *The process for exiting the European Union and the Government's negotiating objectives*. London: House of Commons.

³⁰ Cf. Wessel, R. A. (2017). De procedure om de Europese Unie te verlaten – een interpretatie van artikel 50 VEU. SEW 1, 2-10.

³¹ Ibid.

³² House of Lords. (2016, March 8). *Revised transcript of evidence taken before The Select Committee on the European Union Inquiry on THE PROCESS OF LEAVING THE EUROPEAN UNION*. Retrieved March 1, 2017, from UK Parliament: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/the-process-of-leaving-the-eu/oral/30396.html>.

2.3. The Final Agreements

The negotiations will deal with provisions related to the withdrawal, the future relationship and possibly the transition period. The essence of the Article 50 TEU procedure is mainly to negotiate and conclude an agreement on the terms of withdrawal. However, Article 50 TEU states that there also should be negotiations about an agreement: *'setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.'* Thus, it also mentions the framework for the future relationship. This raises the question whether the withdrawal agreement should include provisions about the future relationship or whether this will be laid down in a separate agreement. Within the literature, most commentators agree that there will be an agreement containing the withdrawal provisions, namely the withdrawal agreement, and a separate agreement related to the future relationship between the EU and the UK, namely the future relationship agreement.³³ This view is in line with the UK government as they have stated within their report *'The process for withdrawing from the European Union'* that: *'Any sort of detailed relationship would have to be put in a separate agreement that would have to be negotiated alongside the withdrawal agreement using the detailed processes set out in the EU Treaties.'*³⁴ By doing this the withdrawal agreement can be solely concluded by the EU and the UK without the need of ratification by the EU-27. The agreement relating to the future relationship would most likely address competences within the preserve of Member States. This would make the agreement a mixed agreement. In the case of a mixed agreement, ratification by all Member States would be needed.

Furthermore, representatives from both the EU³⁵ and the UK³⁶ have mentioned the possibility of agreeing on transition provisions. Therefore, it is likely that transition arrangements will be laid down in either the withdrawal agreement or in a separate agreement.

Thus, the negotiations will address a withdrawal agreement, a future relationship agreement and possibly a transition agreement. This is stipulated within the plan of the Article 50 Task Force of the Commission as multiple sources have stated that Barnier has secured agreement with the EU-27 for a three-stage Brexit divorce plan existing of separate agreements for the terms withdrawal, the transition arrangements and the future relationship.³⁷

³³ Adviesraad Internationale Vraagstukken. (2017). *'Brexit means Brexit' Op weg naar een nieuwe relatie met het VK*. Adviesraad Internationale Vraagstukken; Flavier, H., & Platon, S. (2016, August 30). *Brexit: A Tale of Two Agreements?* Retrieved April 1, 2017, from European Law Blog: <http://europeanlawblog.eu/2016/08/30/brexit-a-tale-of-two-agreements/>.

³⁴ HM Government. (2016). *The process for withdrawing from the European Union*. London: HM Government.

³⁵ European Council. (2017). *GUIDELINES FOLLOWING THE UNITED KINGDOM'S NOTIFICATION UNDER ARTICLE 50 TEU*. Brussels: European Council.

³⁶ HM Government. (2017). *The United Kingdom's exit from and new partnership with the European Union*. London: HM Government.

³⁷ Mctague, T. (2016, December 15). *Europe's three-stage Brexit divorce plan*. Retrieved March 1, 2017, from Politico: <http://www.politico.eu/article/europes-three-stage-brexit-divorce-plan-europe-theresa-may/>.

Related to this is the issue of sequence, which comes down to the question whether the negotiations about the future relationship can take place parallel to the negotiations on the withdrawal agreement. The wording of Article 50 TEU that the withdrawal agreement will be concluded in a manner *'taking account'* of the future relationship implies that the content of that future relationship should be known not only after the withdrawal agreement has been signed but, ideally, from the start of the negotiations.³⁸ The UK government and even Prime Minister May have stated several times that they are in favour of parallel negotiations,³⁹ while within the EU there seemed to be different stances. Barnier has opposed parallel negotiations several times⁴⁰ while Verhofstadt has appeared to be in favour of parallel negotiations.⁴¹ More recently, it has been confirmed within the Brexit guidelines of the European Council and in the Brexit resolution of the European Parliament that first there will be negotiations about the withdrawal agreement and once enough progress has been made there can be talks about the future relationship agreement, but this agreement cannot be concluded before the UK has withdrawn from the EU.⁴² This is still vague as it is unclear what is meant by enough progress. Furthermore, it has not been clarified when the negotiations about the transition agreement will take place.

2.3.1. *The Withdrawal Agreement*

The first agreement that will be negotiated is the withdrawal agreement. Within Article 50 TEU it is referred to as *'the arrangements for withdrawal'*. This does not clarify the precise content of the withdrawal agreement. As Zalan has stated: *'The scope of the withdrawal negotiations can be as narrow or as wide as the negotiators choose, because Article 50 TEU does not specify how far-reaching a withdrawal agreement should be.'*⁴³ Within the House of Commons Briefing Paper: *'Brexit, how does the Article 50 procedure work?'* by Miller, Lang,

³⁸ Tell Cremades, M., & Novak, P. (2017). *Brexit and the European Union: General Institutional and Legal Considerations*. Brussels: European Parliament's Committee on Constitutional Affairs.

³⁹ HM Government. (2016). *The process for withdrawing from the European Union*. London: HM Government.

⁴⁰ Boffey, D., & Rankin, J. (2017, March 22). *EU's chief negotiator challenges Theresa May directly over Brexit talks*. Retrieved March 23, 2017, from The Guardian: https://www.theguardian.com/politics/2017/mar/22/eus-chief-negotiator-sets-three-conditions-for-brexit-trade-talks-to-start?CMP=Share_AndroidApp_BaconReader.

⁴¹ Bayliss, C. (2017, January 31). *EU 'DIVIDED' as Guy Verhofstadt hints UK 'may negotiate EU deal while STILL IN the bloc'*. Retrieved March 1, 2017, from Express: <http://www.express.co.uk/news/uk/760979/uk-brexit-eu-trade-deal-negotiate-brussels-bloc-guy-verhofstadt-theresa-may-michel-barnier>.

⁴² European Council. (2017). *GUIDELINES FOLLOWING THE UNITED KINGDOM'S NOTIFICATION UNDER ARTICLE 50 TEU*. Brussels: European Council; European Parliament's Committee on Legal Affairs. (2017). *Report on the Consequences of Brexit*. Brussels: European Parliament's Committee on Legal Affairs.

⁴³ Zalan, E. (2016, February 24). *EU's Article 50: the rules for Brexit*. Retrieved February 5, 2017, from EUobserver: <https://euobserver.com/institutional/132415>.

and Simson-Caird,⁴⁴ multiple scholars have elaborated on the question of what will be covered within the withdrawal agreement. One of them, Christophe Hillion argued that the withdrawal agreement would most likely cover the technicalities for withdrawal within the areas where the EU has exclusive powers such as trade. Furthermore, he stated that there will be an aim to cover *'the movement and treatment of citizens from the withdrawing state, and of citizens from other Member States resident in that state'* within the withdrawal agreement. Other commentators, such as Chalmers and Menon,⁴⁵ have stressed that the withdrawal agreement will cover the fate of EU institutions within the UK, UK staff in EU institutions, budgetary programmes and more related issues, while Edmondson, Morris, Saluja and Campbell have mentioned budget contributions, financial matters and other loose ends.⁴⁶ Another House of Commons Briefing Paper titled *'Brexit: impact across policy areas'* by Miller,⁴⁷ has stated which policy areas will need to be discussed during the withdrawal negotiations. In short, the paper mentions issues related to almost all policy areas including trade relations, agriculture, social security, immigration, and the environment.

Overall both within the literature, but also on the basis of the European Council's negotiating framework, there seems to be a high level of consensus about the issues that have to be settled within the withdrawal agreement.⁴⁸ The most mentioned issues are the following:

- the financial settlement. These include the disengagement of the UK from the EU budget, agreeing on existing liabilities, deciding about unallocated funds for projects or actors in the UK and the EU and the phasing out of EU spending programmes in the UK;
- the reciprocal rights of EU and UK citizens;
- the border between Ireland and Northern Ireland;
- the disentanglement of the UK from international treaties signed by the EU;
- phasing out the UK's involvement in CSDP missions and JHA matters. This includes the involvement within Europol and the engagement within Frontex;
- the withdrawal of UK civil servants working in the EU institutions. This includes the unpicking of the European External Action Service (EEAS) and the exit

⁴⁴ Miller, V., Lang, A., & Simson-Caird, J. (2017). *Brexit: how does the Article 50 process work?* London: House of Commons.

⁴⁵ Chalmers, D., & Menon, A. (2016). *Getting Out Quick and Playing the Long Game*. Berlin: Open Europe.

⁴⁶ Edmondson, P., Morris, S., Saluja, A., & Campbell, A. (2016, May). *The Brexit process: how the UK would withdraw*. Retrieved February 5, 2017, from CMS Law-Now: <http://www.cms-lawnow.com/~/media/Files/RegZone/Reports/Smart%20PDF/RegZone%20report%20Brexit%20Withdrawing%20from%20the%20EU.pdf>.

⁴⁷ Miller, V. (2016). *Briefing Paper 07213: Brexit: impact across policy areas*. London: House of Commons.

⁴⁸ Duff, A. (2016, July 4). *Everything you need to know about Article 50 (but were afraid to ask)*. Retrieved March 20, 2017, from Verfassungsblog: <http://verfassungsblog.de/brexit-article-50-duff/>; House of Commons Exiting the European Union Committee. (2017). *The process for exiting the European Union and the Government's negotiating objectives*. London: House of Commons; Tell Cremades, M., & Novak, P. (2017). *Brexit and the European Union: General Institutional and Legal Considerations*. Brussels: European Parliament's Committee on Constitutional Affairs.

of UK MEPs, the CJEU, the Committee of the Regions and the Economic and Social Committee;

- relocating the EU agencies that are currently located in the UK. Noteworthy are the European Banking Authority and the European Medicines Agency; and
- the situation regarding the sovereign territory of Gibraltar and the Sovereign Base Areas of Akrotiri and Dhekelia. This includes setting up new forms of frontier control.

Both the EU⁴⁹ and the UK⁵⁰ have released documents which contain statements regarding the content of the withdrawal agreement. In most cases, the issues mentioned within these statements differ from and are less detailed than the issues mentioned above. Nonetheless, the statements by the European Council within the Brexit guidelines and the statements by the UK government within the White Paper on Brexit will be compared with each other based on the literature. The following table provides an overview of the issues as mentioned in the literature and by the EU and the UK.

Issues (Duff, 2016; House of Commons Exiting the European Union Committee, 2017; Tell Cremades & Novak, 2017)	European Council Brexit guidelines (European Council, 2017)	UK government White Paper (HM Government, 2017)
The financial settlement		
The reciprocal rights of EU and UK citizens		
The border between Ireland and Northern Ireland		
The disentanglement of the UK from international treaties signed by the EU		
Phasing out the UK's involvement in CSDP missions and JHA matters		
The withdrawal of UK civil servants working in the EU institutions		
Relocating the EU agencies located in the UK		
The situation regarding the sovereign territory of Gibraltar and the Sovereign Base Areas of Akrotiri and Dhekelia		

Legend	
Fully mentioned	
Partially mentioned	
Not mentioned	

Table 1: Issues to be included within the withdrawal agreement

The table shows that there are significant differences between the issues mentioned in the literature and the issues mentioned by the EU and the UK and also between the EU and the UK. As mentioned before, the statements from both

⁴⁹ See the European Council Guideline, *supra*.

⁵⁰ HM Government. (2017). *The United Kingdom's exit from and new partnership with the European Union*. London: HM Government.

the EU and the UK are not very detailed and some of the issues are not even mentioned at all. For instance, both the EU and the UK have not mentioned the managing of the withdrawal of UK civil servants from EU institutions. However, it is clear that this is an unavoidable issue that has to be dealt with. Therefore, it is likely that all these issues will be included within the withdrawal agreement.

2.3.2. *The Future Relationship Agreement*

The second agreement would cover the relationship between the EU and the UK after the UK has withdrawn from the EU. Within the literature, the existing relations between the EU and other countries have frequently been mentioned as templates for the new relationship between the EU and the UK.⁵¹ These include the Norway model, the Swiss model, the Turkey model, the Canada model and the Ukraine model. In addition to these models, a newly devised model recently got attention as it was proposed shortly after Brexit. This model is called Continental Partnership and was devised with the support of academic think tank Bruegel after the Brexit referendum.⁵² Furthermore, the default option, if no agreement is reached, is the WTO option.⁵³ The choice for a certain model will depend on the perspectives of both the EU and the UK.

The position of the UK will be analysed based on a speech by Prime Minister May in January 2017,⁵⁴ the White Paper on Brexit released in February 2017⁵⁵ as well as the Prime Minister's speech in Florence in September 2017.⁵⁶ It should be taken into account that after the elections on 8 June 2017, the position of the UK can change since the Conservative government has lost its parliamentary majority. However, when this study was finalised new plans were not yet released and Secretary of State Davis mentioned shortly after the elec-

⁵¹ Carmona, J., Cîrlig, C.-C., & Sgueo, G. (2017). *UK withdrawal from the Europe*. Brussels: European Parliamentary Research Service; Munro, R., & White, H. (2016, July 6). *Brexit Brief: Options for the UK's future trade relationship with the EU*. Retrieved April 1, 2017, from Institute for Government: <https://www.instituteforgovernment.org.uk/publications/brexit-brief-options-uk-future-trade-relationship-eu>; Tell Cremades, M., & Novak, P. (2017). *Brexit and the European Union: General Institutional and Legal Considerations*. Brussels: European Parliament's Committee on Constitutional Affairs; Piris, J.-C. (2016). *If the UK votes to leave: The seven alternatives to EU membership*. London: Centre for European Reform.

⁵² Pisani-Ferry, J., Röttgen, N., Sapir, A., Tucker, P., & Wolff, G. B. (2016). *Europe after Brexit: A proposal for a continental partnership*.

⁵³ Piris, J.-C. (2016). *If the UK votes to leave: The seven alternatives to EU membership*. London: Centre for European Reform.

⁵⁴ Independent. (2017, January 17). *Theresa May's Brexit speech in full: Prime Minister outlines her 12 objectives for negotiations*. Retrieved March 1, 2017, from Independent: <http://www.independent.co.uk/news/uk/home-news/full-text-theresa-may-brexit-speech-global-britain-eu-european-union-latest-a7531361.html>.

⁵⁵ HM Government. (2017). *The United Kingdom's exit from and new partnership with the European Union*. London: HM Government.

⁵⁶ 'A new era of cooperation and partnership between the UK and the EU', speech delivered by Theresa May, Florence, 22 September 2017; <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>.

tion that the Brexit plans would not change.⁵⁷ The view of the EU will be based on the mentioned Brexit guidelines released by the European Council and to a lesser extent on the Brexit resolution released by the European Parliament. Although the European Parliament does not have a seat at the negotiation table, it has a veto over the final deal and therefore can influence the negotiations. First, within the White Paper it has been stated that the UK aims for: *'the freest and most frictionless trade possible in goods and services between the UK and the EU'*. However, membership of the Single Market is ruled out since the UK does not want to comply with the EU Rules and Regulations relating to the free movement of people and does not want to be bound by the jurisdiction of the CJEU. Furthermore, they have made clear that being in the Single Market but out of the EU means complying with the *acquis* without having a vote on it, which is not in line with what they want. Therefore, they pursue *'a bold and ambitious Free Trade Agreement with the European Union'* which can give them the *'greatest possible access'* to the Single Market. May has also stated that the UK wants to have a customs union with the EU but she has stressed that the UK does not want to be part of the Common Commercial Policy (CCP) and that the UK does not want to be bound by the Common External Tariff. In addition, it has been mentioned that the UK wants to be able to strike its own trade agreements with third countries. Overall, as stated by May in her Florence speech, the UK aims at a *'special partnership'*, and does not seek to copy any of the existing arrangements with third states: *'One way of approaching this question is to put forward a stark and unimaginative choice between two models: either something based on European Economic Area membership; or a traditional Free Trade Agreement, such as that the EU has recently negotiated with Canada. I don't believe either of these options would be best for the UK or best for the European Union.'*⁵⁸

Another related issue is the EU budget, the UK does not want to contribute *'huge sums to the EU budget'*. Instead, they only want to contribute to specific European programmes in which they want to participate. Finally, PM May has said that the UK wishes to continue to cooperate with the EU in such areas as crime, terrorism and foreign affairs.

On the EU side, it has been mentioned multiple times by Barnier and Verhofstadt that the four freedoms of the Single Market are indivisible and that cherry picking is out of the question.⁵⁹ Within the Brexit guidelines, it has been stated that the EU wants to have the UK as a close partner in the future but rules out any *'sectoral'* deals. The wish of the UK to pursue an ambitious free trade agreement (FTA) with the EU is welcomed by the EU. Furthermore, it has

⁵⁷ The Guardian (2017), *Conservative bickering is height of self-indulgence, says David Davis*, 12 June 2017.

⁵⁸ 'A new era of cooperation and partnership between the UK and the EU', speech delivered by Theresa May, *supra*.

⁵⁹ Barnier, M. (2016, December 6). *Introductory comments by Michel Barnier*. Retrieved March 1, 2017, from European Commission: https://ec.europa.eu/info/news/introductory-comments-michel-barnier_en; Khan, S. (2017b, January 17). *EU Brexit negotiator Guy Verhofstadt says Theresa May can't 'cherry pick' benefits of the European Union*. Retrieved March 1, 2017, from Independent: <http://www.independent.co.uk/news/world/europe/chief-eu-brexite-negotiator-guy-verhofstadt-theresa-may-cherry-pick-illusionspeech-benefits-european-a7531971.html>.

been explicitly mentioned that the new relationship should encompass more than just trade. The guidelines have mentioned establishing a partnership *'in other areas, in particular the fight against terrorism and international crime as well as security and defence'*. Thus, it seems that the EU and the UK have several common objectives since both parties have stated to aim for an FTA and a partnership in areas related to crime and terrorism. The real struggle will be more on the smaller details, for instance the role of the CJEU and the financial settlement.

In order to discover the suitability of each model, they will be analysed in depth in Section 5. The following criteria will be taken into account since both the EU and the UK have elaborated on them in, respectively, their officially released Brexit guidelines, resolution, White Paper and speeches:

- Free movement of goods;
- Free movement of services;
- Free movement of capital;
- Free movement of people;
- Financial contribution to the EU;
- Subject to EU legislation;
- Influence on EU decision-making;
- Ability to strike trade deals with non-EU markets;
- Cooperation in the area of Justice and Home Affairs (JHA); and
- Cooperation in the area of the Common Security and Defence Policy (CSDP).

2.3.3. *The Transition Agreement*

The third possible agreement will ensure a smooth transition by bridging the gap between the day of withdrawal from the EU and the entering into force of the future relationship agreement.⁶⁰ Transition agreements are not at all uncommon in EU law but are usually related to accession. In the case of the accession of the UK, for some areas a transitional period lasted ten years. The scope of the present paper does not allow us to go into detail, but lessons can be learned from those transitions as well as from the case law dealing with transitional problems.⁶¹

While a transition agreement is not mentioned by Article 50, the European Council has mentioned this option in its guidelines: *'To the extent necessary and legally possible, the negotiations may also seek to determine transitional arrangements which are in the interest of the Union and, as appropriate, to provide for bridges towards the foreseeable framework for the future relationship. Any such transitional arrangements must be clearly defined, limited in time, and subject to effective enforcement mechanisms. Should a time-limited prolongation of Union acquis be considered, this would require existing Union regulatory, budgetary, supervisory and enforcement instruments and structures*

⁶⁰ Miller, Lang, & Simson-Caird, *op.cit.*

⁶¹ Cf. W. Sadurski, J. Ziller and K. Zurek (eds.), *Après Enlargement: Legal and Political Responses in Central and Eastern Europe*, Florence: European University Institute, 2006.

to apply.⁶² The transition arrangements are in the interests of the EU since they will allow it to maintain trade flows and other relations with the UK until the future relationship agreement comes into force. Furthermore, the European Council stated that there must be a limitation in time. The European Parliament has acknowledged this time limitation and has even specified this to be a maximum of three years.⁶³ Although it is clear that the EU sees transition arrangements as an option, there are still many aspects which have not been clarified. This includes the legal basis and the decision-making mechanism for concluding the transition agreement.

The need for a transition period was also mentioned by Theresa May in her Florence speech: *'It is also the case that people and businesses – both in the UK and in the EU – would benefit from a period to adjust to the new arrangements in a smooth and orderly way. As I said in my speech at Lancaster House a period of implementation would be in our mutual interest. That is why I am proposing that there should be such a period after the UK leaves the EU.'*⁶⁴

Within the literature, two main views can be discovered. First, the transition arrangements will be included within the withdrawal agreement.⁶⁵ Second, a separate transition agreement will be negotiated and concluded.⁶⁶ Furthermore, different commentators have proposed alternative ideas such as extending EU membership, temporary membership of the EEA and a parallel sources agreement.⁶⁷ These options will be analysed in Section 3.

2.4. Sub-conclusion

The first part of this Section has given an overview of the Article 50 TEU procedure and has made a distinction between the three different agreements: the withdrawal agreement, the transition agreement, and the future relationship agreement.

Based on the information presented in the first chapter the following broad scenarios can be distinguished:

- The UK leaves the EU with a withdrawal agreement and future relationship agreement in place;

⁶² European Council Guidelines, *op.cit*

⁶³ European Parliament. (2017). *European Parliament resolution on negotiations with the United Kingdom following its*. Brussels: European Parliament.

⁶⁴ See 'A new era of cooperation and partnership between the UK and the EU', speech deliver by Theresa May, Florence, 22 September 2017, *op.cit*.

⁶⁵ Bowers, P., Lang, A., Vaughne, M., Smith, B., & Webb, D. (2016). *Brexit: some legal and constitutional issues and alternatives to EU membership*. London: House of Commons Library; Renwick, A. (2017). *The Process of Brexit: What Comes Next?* London: UCL.

⁶⁶ Eleftheriadis, P. (2017, February 15). *How to Make a Transitional Brexit Arrangement*. Retrieved April 1, 2017, from University of Oxford Faculty of Law: <https://www.law.ox.ac.uk/business-law-blog/blog/2017/02/how-make-transitional-brexit-arrangement>; Chalmers & Menon, 2016, *op.cit.*; Oliver, 2016, *op.cit.*; Renwick, 2017, *op.cit*.

⁶⁷ Whitman, R. G. (2016, June 27). *The EEA: A Safe Harbour in the Brexit Storm*. Retrieved May 1, 2017, from Chatham House: <https://www.chathamhouse.org/expert/comment/eea-safe-harbour-brexit-storm#>; Eleftheriadis, 2017, *op.cit.*; Oliver, 2016, *op.cit*.

- The UK leaves the EU with a withdrawal agreement that also covers the transition arrangements, while the future relationship agreement will be negotiated during the transition period;
- The UK leaves the EU with a withdrawal agreement and a transition agreement, while the future relationship agreement will be negotiated during the transition period;
- The UK automatically leaves the EU on 30 March 2019 without any agreement; or
- The UK revokes the notification and remains in the EU (in case this would be legally possible).

The process leading up to one of these outcomes involves negotiations between the EU and the UK and multiple actors that have the power to approve, delay, steer or block the process. All these different actions have different legal, political and financial consequences. To our knowledge, there is no complete overview of the entire Brexit procedure including the negotiations and the different steps that have to be taken. The remaining part of this paper will do exactly that by assessing the steps that have to be taken for the realization of the various agreements and by analysing the options for the parts of the UK that voted to remain in the EU.

3. THE WITHDRAWAL AGREEMENT

This third Section will focus on the process of the realization of the withdrawal agreement. The previous Section revealed that the Article 50 TEU procedure involves multiple actors that have a decisive vote within in the procedure. Furthermore, it has become clear that there are tough issues to negotiate, including the financial settlement and the reciprocal rights of EU and UK citizens. Therefore, the outcome of the withdrawal negotiations is not fixed, different routes can be taken. The following sections will elaborate on all the different steps in the process that have to be taken and that can influence the outcome. The steps range from reaching consensus within the European Council about the guidelines to approval by the UK Parliament and from the crucial issues during the negotiations to the optional decision of extending the negotiations.

3.1. Step 1: The European Council Drafts the Guidelines

After receiving the notification from the UK about the intention to withdraw from the EU, the European Council, without the UK, has to take the first step. This step is the drafting of the guidelines for the negotiations and agreeing on them. As stated in Article 15(4) TEU decisions of the European Council shall be taken by consensus. This means that agreement is reached once there is no objection to the proposal. The consequence of this decision-making mechanism is that the discussions must continue until everyone agrees, and thus consensus has been reached. This gives every Member State a veto over the withdrawal ne-

gotiations since without consensus there will be no negotiation guidelines and the process cannot continue.

Although it might seem logical that there is a common interest among the EU-27 to quickly reach consensus and move on, it is certainly possible that certain Member States will try to put their national interests on the agenda. An example which has become reality within the European Council guidelines is Spain and its interests in Gibraltar. Therefore, the level of detail of the guidelines plays an important role. If the European Council drafts highly detailed guidelines it is more likely that a Member State will object than when the guidelines are broad and vaguer.⁶⁸ After all, the Commission will draft, based on the guidelines, the more detailed and technical mandate. Nevertheless, it should be clear that the clock is ticking and that each more day the European Council needs to reach consensus is a day less of the two-year time limit in which the withdrawal agreement has to be concluded.

On 29 April 2017, the European Council adopted the guidelines for the Brexit negotiations.⁶⁹ According to the General Secretariat of the Council⁷⁰ and the introductory remarks within the guidelines, the European Council has the right to amend the guidelines in the course of the negotiations. From the wording of Article 50(2) TEU, it is unclear whether the European Council holds the right to unilateral amend the guidelines when it wishes to do so. One could interpret the wording *'in light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement'* to allow for amendments throughout the entire process. However, this does not clarify whether the European Council is allowed to amend the guidelines unilaterally or that they can only do this upon request of the Commission. During the EU-Canada Comprehensive and Economic Trade Agreement (CETA), the guidelines adopted in 2009 were amended in 2011 after a recommendation by the Commission. Thus, it remains questionable whether the European Council has the right to unilaterally amend the guidelines during the course of the negotiations.⁷¹

Finally, the process can go the following ways:

- European Council drafts and adopts the Brexit negotiation guidelines by consensus. The process continues (see Section 3.2.);
- European Council cannot reach consensus within the two-year time limit. However, the time limit will be extended (see Section 3.9.), and the European Council can continue to try to reach consensus; or
- European Council cannot reach consensus within the two-year time limit. The UK leaves the EU without a withdrawal agreement.

⁶⁸ Harvey, D. (2017, April 4). *'IN LIGHT OF THE GUIDELINES': BREXIT AND THE EUROPEAN COUNCIL REVISITED*. Retrieved April 4, 2017, from European Law Blog: <http://europeanlawblog.eu/2017/04/04/in-light-of-the-guidelines-brexite-and-the-european-council-revisited/>.

⁶⁹ See reference *supra*.

⁷⁰ General Secretariat of the Council. (2016b, December 15). *Statement after the informal meeting of the 27 heads of state or government, 15 December 2016*. Retrieved March 1, 2017, from Consilium Europa: <http://www.consilium.europa.eu/en/press/press-releases/2016/12/15-statement-informal-meeting-27/>.

⁷¹ Harvey, 2017, *op.cit.*

3.2. Step 2: The Council Authorizes the Opening of the Negotiations

After the European Council has drafted and adopted the guidelines, the Commission will submit its recommendations in the form of a draft mandate to the General Affairs Council. The draft mandate will be a more detailed version of the guidelines since the Commission has the expertise to fill in the more legal and technical aspects. Furthermore, each area of negotiation will be provided with firm recommendations.⁷² The draft mandate will then be discussed and finally must be agreed upon by SQMV in the General Affairs Council, without the UK. The requirements for SQMV are 72% of the remaining Member States, representing 65% of the EU-27 population. It may take several meetings of the General Affairs Council to agree on the final mandate. Contrary to the first decision in the European Council some countries can object without the immediate consequence of restraining the opening of the negotiations. Nonetheless, it should be taken into account that in theory countries can form political blocs to stop the opening of the negotiations but this does not seem very likely since the General Affairs Council consists of the Foreign Ministers who have strong ties with their heads of government who earlier adopted the guidelines in the European Council. Furthermore, any delay would take up valuable time of the two-year time limit and does not seem to be in the interest of the EU-27.

On 22 May 2017, the Council authorized the opening of the negotiations.⁷³

According to the Council's General Secretariat, just like the European Council, the General Affairs Council has the right to amend the negotiation directives during the course of the negotiations.⁷⁴ Then again, the question arises whether the General Affairs Council has the right to unilaterally amend the negotiation directives during the course of the negotiations. This is unclear at the moment of writing.

Finally, the process can go the following ways:

- The Council authorizes the opening of the negotiations by SQMV. The process continues (see Section 3.3.);
- The Council does not agree on the authorization of the opening of the negotiations. However, the time limit will be extended (see Section 3.9.) and the Council can continue to seek agreement on the authorization of the opening of the negotiations; or
- The Council does not agree on the authorization of the opening of the negotiations within the two-year time limit. The UK leaves the EU without a withdrawal agreement.

⁷² Macdonald, C. (2017). *The Article 50 negotiations*. Retrieved April 1, 2017, from The UK in a Changing Europe: <http://ukandeu.ac.uk/explainers/the-article-50-negotiations/>.

⁷³ General Secretariat of the Council. (2017a, May 22). *Council (Art 50) authorises the start of Brexit talks and adopts negotiating directives*. Retrieved May 30, 2017, from Consilium Europa: <http://www.consilium.europa.eu/en/press/press-releases/2017/05/22-brexit-negotiating-directives/>.

⁷⁴ General Secretariat of the Council. (2016b, December 15). *Statement after the informal meeting of the 27 heads of state or government, 15 December 2016*. Retrieved March 1, 2017, from Consilium Europa: <http://www.consilium.europa.eu/en/press/press-releases/2016/12/15-statement-informal-meeting-27/>.

3.3. Step 3: The Negotiations

The negotiations start after the General Affairs Council has adopted the mandate and agreed on opening the negotiations. Within the Brexit guidelines of the European Council the goals for the first phase have been stated:

- Settle the disentanglement of the United Kingdom from the Union and from all the rights and obligations the United Kingdom derives from commitments undertaken as Member State; and
- Provide as much clarity and legal certainty as possible to citizens, businesses, stakeholders and international partners on the immediate effects of the United Kingdom's withdrawal from the Union.⁷⁵

The following sections will discuss the most controversial issues that have to be settled within the withdrawal agreement. The issues that will be discussed are: the financial settlement, the reciprocal rights of EU and UK citizens, the border between Ireland and Northern Ireland, the disentanglement of the UK from international treaties signed by the EU, the phasing out of the UK's involvement in CSDP missions and JHA matters, and some other smaller issues. Finally, the process that takes place after the two parties have reached an agreement will be described.

3.3.1. *The Financial Settlement*

The biggest obstacle that has to be discussed during the withdrawal negotiations is probably the financial settlement. Often mentioned by the media is the number of €60 billion which has led to much controversy in the UK.⁷⁶ However, at the time of writing there have not been any official statements from the EU about the height of the financial settlement.

Within the European Council guidelines, it has been stated that there should be a single financial settlement before the day of withdrawal but an exact number has not been given. The statement reads: *'A single financial settlement should ensure that the Union and the United Kingdom both respect the obligations undertaken before the date of withdrawal. The settlement should cover all legal and budgetary commitments as well as liabilities, including contingent liabilities.'* Furthermore, the European Parliament has stated in its 2017 resolution: *'the United Kingdom must honour all its legal, financial and budgetary obligations, including commitments under the current multiannual financial framework, falling due up to and after the date of its withdrawal.'*

Barker has produced a report on the owed budget contributions that the EU would charge the UK.⁷⁷ The height of the financial settlement has been calcu-

⁷⁵ European Council Guidelines, *op.cit.*

⁷⁶ Barker, A., & Robinson, D. (2016, November 15). *UK faces Brexit bill of up to €60bn as Brussels toughens stance*. Retrieved March 1, 2017, from Financial Times: <https://www.ft.com/content/480b4ae0-aa9e-11e6-9cb3-bb8207902122>.

⁷⁷ Barker, A. (2017). *The €60 billion Brexit bill How to disentangle Britain from the EU budget*. London: Centre for European Reform.

lated by valuing the EU's assets and liabilities at the moment of the UK's withdrawal and dividing the net liability by the UK's share of the EU budget. The report lists three categories of which the financial settlement is made up, and which derive from the legal obligation implied by EU membership.

The first category consists of the unpaid commitments: the *reste à liquider* and the outstanding spending allocations. The largest part of EU spending goes to projects that are approved and paid for over a period of multiple years. Most of these projects are related to the development of the economically weaker regions within the EU. The *reste à liquider* are unpaid expenditure commitments made in annual budget rounds prior to 2019. This derives from the situation that the EU approves a higher amount of spending for projects than the Member States are willing to pay for in a year. Furthermore, the report states that the Commission will hold the UK accountable for outstanding spending allocations. That is jointly approved investment spending which is legally binding on the EU but will only be paid once the UK has withdrawn from the EU. The legal argument for holding the UK accountable for these payments comes from Article 76 of Regulation 1303/2013 which states: '*The decision of the Commission adopting a programme shall constitute a financing decision within the meaning of Article 84 of the Financial Regulation and once notified to the Member State concerned, a legal commitment within the meaning of that Regulation.*'

The second category is the pensions of EU officials. According to Article 83(1) of the Staff Regulations, all EU Member States are responsible for the payment of retirement benefits for EU officials. Article 83(1) of the Staff Regulations reads: '*Benefits paid under this pension scheme shall be charged to the budget of the Communities. Member States shall jointly guarantee payment of such benefits in accordance with the scale laid down for financing such expenditure.*' To be clear, this means that the UK is responsible not only for British EU officials but for all EU officials.

The third category consists of multiple legal obligations that derive from multi-annual allocations or from signed contracts. This includes payments for the European Fund for Strategic Investments, the Connecting Europe Facility and the Copernicus and Galileo programmes, loans from the European Investment Bank to non-EU countries and money allocated to multiple research projects under Horizon 2020 and other initiatives.

Finally, the UK will be compensated by its share of EU assets, which is made up of the value of EU property. In the end, Barker shows an upper estimate of €72.8 billion and a lower estimate of €24.5 billion.

Although the exact number is unclear it seems inevitable that there will be a significant difference in what the EU wants to receive and what the UK wants to pay. During the Brexit referendum, the EU budget contributions were an important issue for the pro-Brexit campaigners and the electorate,⁷⁸ and Prime Minister May has already announced that they do not want to pay huge sums

⁷⁸ Foster, A. (2016, September 29). *Brexit: When will Britain STOP paying billions into the EU budget at long last?* Retrieved April 1, 2017, from Express: <http://www.express.co.uk/news/politics/715849/Brexit-when-Britain-stop-paying-billions-EU-budget-financial-contributions-UK-payments>.

to the EU budget and that they will only pay for specific programmes they want to participate in.⁷⁹

Therefore, it is interesting to look at the legal and political arguments of the situation. According to The European Union Committee, appointed by the House of Lords, strictly legally speaking the UK does not have to pay anything since according to Article 50 TEU the withdrawing Member State is automatically out of the EU if no agreement has been reached within the two-year time limit.⁸⁰ This means that if the EU and the UK do not agree on a withdrawal agreement the *acquis* including the provisions related to on-going financial contributions ceases to apply. Redwood adds that once the UK leaves the EU, it is not bound by the judicial authority of the EU anymore, and therefore such a payment cannot be enforced. Indeed, unless specific arrangements are agreed upon, the Court of Justice of the EU will no longer be in a position to enforce the issues agreed upon by the two parties.⁸¹ If the UK decides not to pay, and in the absence of other arrangements, there is a possibility that the EU would go to the International Court of Justice.⁸² In this case, Article 70 of the Vienna Convention on the Law of Treaties would be relevant.

Article 70 of the Vienna Convention on the Law of Treaties:

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(a) Releases the parties from any obligation further to perform the treaty;

(b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

At that point, it is the question whether clause (a) removes any financial obligation the UK has or whether clause (b) confirms the financial obligation of the UK.

If the UK decides not to pay it is clear that the EU-27 would take a tough stance in further negotiations since they have to contribute extra to cover up for the missing money of the UK. Thus, in the case of no payment, the negotiations about the future relationship will certainly be much more difficult, or they will not take place at all. Furthermore, the UK not paying its obligations might send out a wrong signal to other countries as potential future trade partners. Finally, it has already been confirmed that the EU will only negotiate a future relationship

⁷⁹ Independent, 2017, *op.cit.*

⁸⁰ The European Union Committee. (2017). *Brexit and the EU budget*. London: House of Lords.

⁸¹ Redwood, J. (2017, January 29). *There is no legal basis for making any extra payments to the EU*. Retrieved April 1, 2017, from John Redwood: <http://johnredwoodsdiary.com/2017/01/29/there-is-no-legal-basis-for-making-any-extra-payments-to-the-eu/>.

⁸² Rayner, G. (2017, March 21). *EU to threaten Britain with court action if Theresa May refuses to pay £50bn Brexit 'divorce' bill*. Retrieved April 1, 2017, from The Telegraph: <http://www.telegraph.co.uk/news/2017/03/21/remain-voters-warming-idea-brexit-poll-shows/>.

agreement if an agreement has been reached about the financial settlement.⁸³ Thus, it seems highly likely that the UK will end up paying but the exact amount of the financial settlement is unclear.

Finally, the following options are possible:

- The EU and the UK agree on the financial settlement; or
- The UK decides not to pay. This will most likely affect the further negotiations about the future relationship agreement.

3.3.2. *The Reciprocal Rights of EU and UK Citizens*

Another controversial issue is the rights of the 3 million EU citizens residing in the UK and the 1.2 million UK citizens residing in the EU.⁸⁴ The rights acquired through EU citizenship according to the TFEU are:

- The right to non-discrimination;
- The right to move and reside freely within the EU;
- The right to vote for and stand as a candidate in European Parliament and municipal elections;
- The right to be protected by the diplomatic and consular authorities of any other EU country;
- The right to petition the European Parliament and complain to the European Ombudsman;
- The right to contact and receive a response from any EU institution in one of the EU's official languages; and
- The right to access European Parliament, Commission and Council documents under certain conditions.⁸⁵

Both the European Council and the European Parliament have stated that arranging citizens' rights is a priority during the negotiations. The guidelines of the European Council read: *'The right for every EU citizen, and of his or her family members, to live, to work or to study in any EU Member State is a fundamental aspect of the European Union. Along with other rights provided under EU law, it has shaped the lives and choices of millions of people. Agreeing reciprocal guarantees to settle the status and situations at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom's withdrawal from the Union will be a matter of priority for the negotiations. Such guarantees must be enforceable and non-discriminatory.'* And the resolution of

⁸³ The Economist. (2017, February 11). *From Brussels with love: The multi-billion-euro exit charge that could sink Brexit talks*. Retrieved April 1, 2017, from The Economist: <http://www.economist.com/news/britain/21716629-bitter-argument-over-money-looms-multi-billion-euro-exit-charge-could-sink-brexit>.

⁸⁴ European Citizen Action Service. (2017). *5 Takeaways on Brexit: Outlining Possible Scenarios for a New UK-EU Relationship and their Impact on Citizens*. Brussels: European Citizen Action Service.

⁸⁵ European Commission. (2016b). *EU citizenship*. Retrieved April 1, 2017, from European Commission: <http://ec.europa.eu/justice/citizen/>.

the European Parliament (2017) reads: *'Requires the fair treatment of EU-27 citizens living or having lived in the United Kingdom and the United Kingdom citizens living or having lived in the EU-27 and is of the opinion that their respective interests must be given full priority in the negotiations; demands, therefore that the status and rights of European Union citizens residing in the United Kingdom and United Kingdom citizens residing in the European Union, be subject to the principles of reciprocity, equity, symmetry, non-discrimination, and demands moreover the protection of the integrity of Union law, including the Charter of Fundamental Rights, and its enforcement framework; stresses that any degradation of the rights linked to freedom of movement, including discrimination between EU citizens in their access to residency rights, before the date of withdrawal from the European Union by the United Kingdom would be contrary to Union law.'*⁸⁶

Although the UK government has also stated that sorting out the rights of citizens is a priority,⁸⁷ the Brexit bill passed without any provision on the rights of EU citizens residing in the UK⁸⁸ and Secretary of State for International Trade Fox sees EU citizens as some sort of bargaining chip as he has stated that the uncertain status of EU citizens living in the UK is *'one of our main cards'* in the Brexit negotiations.⁸⁹

Nothing in Article 50 TEU points to any guarantees of the status or rights of EU citizens in the withdrawing Member State and vice versa. However, this does not mean that the EU and the UK are completely unconstrained in their actions during the negotiations and beyond. The EU institutions and its Member States, including the UK until the day of withdrawal, remain bound by the EU Treaties and the case law of the CJEU. Several objectives related to the citizens' rights are laid down in the EU Treaties. Among these are: Article 3(5) TEU: *'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens.'* And Article 3(1) TEU: *'The Union's aim is to promote peace, its values and the well-being of its peoples.'*

According to Eeckhout and Frantziou, the case law of the CJEU from its early years was often supported by provisions related to human rights as laid down in the European Convention on Human Rights (ECHR).⁹⁰ Hence, from the stance of the EU, any action breaching the rights as set out in the ECHR would be problematic. In addition, the EU Treaties and the Charter of Fundamental Rights of the EU must be respected. The protection of citizens' rights

⁸⁶ European Parliament, 2017, *op.cit.*

⁸⁷ Forsyth, J. (2017, March 20). *How quickly can a reciprocal rights deal be done for UK and EU citizens?* Retrieved April 1, 2017, from The Spectator: <https://blogs.spectator.co.uk/2017/03/quickly-can-reciprocal-rights-deal-done-uk-eu-citizens/#>.

⁸⁸ BBC. (2017, March 13). *Brexit bill: Lords back down over issue of residents' rights.* Retrieved April 1, 2017, from BBC: <http://www.bbc.com/news/uk-politics-39249721>.

⁸⁹ Elgot, J. (2016, October 4). *Liam Fox: EU nationals in UK one of 'main cards' in Brexit negotiations.* Retrieved April 1, 2017, from The Guardian: <https://www.theguardian.com/politics/2016/oct/04/liam-fox-refuses-to-guarantee-right-of-eu-citizens-to-remain-in-uk>.

⁹⁰ Eeckhout, P., & Frantziou, E. (2016). *Brexit and Article 50 TEU: A Constitutionalist Reading.* London: UCL European Institute.

under EU law goes beyond the standards of the ECHR and includes a strong right to family reunification.

After the UK has left the EU, the UK remains bound by the ECHR, assuming they do not withdraw from it. This means that the rights derived from Article 8 ECHR still apply to EU citizens residing in the UK. Although the protection is less extensive than under EU law there are still some safeguards. For example, the UK cannot simply expel EU citizens from its territory since Article 8 ECHR provides the right to remain where the citizen has developed personal or family ties in the host state. Furthermore, Article 8 ECHR also provides a limited right to enter a host state to be reunited with family members.⁹¹

Mantouvalou has pointed out that the current situation, thus even before the withdrawal of the UK, raises questions with respect to the computability of the ECHR.⁹² The Brexit referendum and the threats of Fox about using citizens as bargaining chips to get a better position at the negotiation table cause severe uncertainty and instability for EU citizens residing in the UK and vice versa. Therefore, she states that this might be in violation of the right to private and family life of EU citizens under Article 8 ECHR along with Article 14 ECHR.

Moreover, there is the discussion whether UK citizens could keep their rights attached to EU citizenship after the UK has withdrawn from the EU. Within the Treaties, there is nothing that points to the situation that UK nationals could keep their rights attached to EU citizenship after the UK has withdrawn and no agreement has been reached. Piriš notes that it would lead to '*absurd consequences*' since this would include the right to move and reside freely within the EU and the right to vote for and stand as a candidate in the European Parliament.⁹³ The matter is less clear for Eeckhout and Frantziou as they have stated that '*the loss of any form of citizenship – certainly one that has been enjoyed consistently, in its current form, for almost twenty-five years – merits a measured response by the parties to the negotiations and, ultimately, oversight by domestic courts and the Court of Justice alike, so as to meet existing safeguards of the EU constitutional order.*'⁹⁴

Finally, it should be mentioned that the European Parliament has stated that any Brexit deal will be vetoed if it does not protect citizens' rights (Khan, 2017a). Besides the threat of the European Parliament, it is in the interest of both the EU and the UK to protect citizens' rights, since they both have millions of citizens residing on each other's territory. Therefore, it is most likely that there will be safeguards for the rights of the EU citizens and the UK citizens in the withdrawal agreement. It remains an open question, however, which court will be able to rule on the provisions if no specific arrangements are agreed upon.

Finally, either of the following options are possible:

⁹¹ Joint Committee on Human Rights. (2016). *The human rights implications of Brexit*. London: House of Commons & House of Lords.

⁹² Mantouvalou, V. (2016, July 14). *Virginia Mantouvalou: EU Citizens as Bargaining Chips*. Retrieved April 1, 2017, from UK Constitutional Law Association: <https://ukconstitutionallaw.org/2016/07/14/virginia-mantouvalou-eu-citizens-as-bargaining-chips/>.

⁹³ Piriš, 2015, *op.cit.*

⁹⁴ Eeckhout & Frantziou, *op.cit.*

- The EU and the UK agree on safeguards for citizens' rights within the withdrawal agreement; or
- The EU and the UK do not agree on safeguards for citizens' rights within the withdrawal agreement. This will most likely affect the further negotiations and increase the chance that the European Parliament will veto the withdrawal agreement.

3.3.3. *The Border Between Ireland and Northern Ireland*

Brexit will create a land border on the island of Ireland between the EU and the UK. This has the potential to disrupt two economies and to threaten the fragile peace between the Unionist and Nationalist extremists. The currently enjoyed open border owes much to the peace process and the Good Friday Agreement, full EU membership of Ireland and the UK including the Single Market and the customs union, and the Common Travel Area (CTA).⁹⁵

The CTA came into force in 1952 and is an arrangement that allows free travel and other benefits between the UK, Ireland, the Channel Islands and the Isle of Man. Furthermore, it allows UK and Irish citizens to be treated almost identically within both states. However, the CTA is a peculiar arrangement which cannot be classified as an international treaty or concrete agreement.⁹⁶ The CTA is not directly provided for in legislation in either Ireland or the UK but exists as a collection of legal provisions in each of the relevant jurisdictions. The most important legal reference can be found in the protocol attached to the Treaty of Amsterdam.⁹⁷

Brexit means that the CTA now requires negotiation, and that much will depend on the future relationship between the EU and the UK. Although both the EU⁹⁸ and the UK⁹⁹ have stated that they want to avoid a hard border between Ireland and Northern Ireland, and the UK has even mentioned that they want to keep the CTA, it is virtually impossible to maintain the border as it currently is. This is especially the case if the UK leaves the Single Market and the customs union. As we have seen above, the EU is not unfamiliar with complex territorial issues, as exemplified by the situation of Greenland, Cyprus or the overseas territories.

Keeping the CTA would probably also not be in line with UK's desire to control migration. It would imply that EU nationals can travel to Ireland and travel across the UK border, and vice versa. This has the potential to create illegal

⁹⁵ The Centre for Cross Border Studies. (2016). *Brexit and UK-Irish Relations*. Armagh: The Centre for Cross Border Studies.

⁹⁶ de Mars, S., Murray, C. R., O'Donoghue, A., & Warwick, B. T. (2017). *The Common Travel Area: Prospects After Brexit*. Constitutional Conundrums: Northern Ireland, the EU, and Human Rights.

⁹⁷ Horan, B., & Gilmore, A. (2016). *What would happen to the Northern Irish border in the event of Brexit?* Dublin: The Institute of International and European Affairs.

⁹⁸ European Council Guidelines, op.cit.; and European Parliament, 2017, op.cit.

⁹⁹ HM Government. (2017). *The United Kingdom's exit from and new partnership with the European Union*. London: HM Government.

migration.¹⁰⁰ Recently the proposal of a seamless border with the example of the border between Sweden and Norway has gained positive attention.¹⁰¹ However, it should be noted that Norway is a member of the Single Market and of the Schengen Agreement and that the UK government does not have the desire to participate in any of these agreements.

Therefore, it is most likely that the current situation at the border will change. Although this does not have to be a *physical* border, an *administrative* border existing of some form of control seems inevitable.

Finally, the following options are possible:

- The EU and the UK agree on the issue of the border between the UK and Northern Ireland; or
- The EU and the UK do not agree on the issue of the border between the UK and Northern Ireland. However, even if they do not agree, the current open border cannot remain.

3.3.4. *The Disentanglement of the UK From International Treaties*

At the moment of writing the EU has concluded 1191 bilateral and multilateral agreements with countries outside the EU, ranging from topics such as trade and development to energy and fisheries.¹⁰² It seems clear that on the day of withdrawal the UK will cease to be a contracting party to those agreements. It will be impossible for the UK to swiftly replace those agreements, not only due to the number of negotiators available and the fact that the UK is not allowed to negotiate and conclude trade agreements before the day of withdrawal, but also because of the situation that other countries might not want to conclude agreements without knowing whether and under what conditions goods from the UK can enter the Single Market. A distinction should be made between agreements solely concluded by the EU (the so-called EU-only agreements), and the agreements that are concluded by the EU and its Member States (the mixed agreements).¹⁰³

In the case of EU-only agreements, it is clear that on the day of withdrawal these agreements cease to apply to the UK. A legal argument can be found within Article 216(2) TFEU which reads: '*Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.*' Thus, after withdrawal from the EU, the UK is not bound by these agreements any-

¹⁰⁰ de Mars et al., 2017, *op.cit.*

¹⁰¹ RTE. (2017, March 15). *UK rules out border posts between NI and Republic post-Brexit*. Retrieved May 1, 2017, from RTE: <https://www.rte.ie/news/2017/0315/859990-brexit-border-republic/>.

¹⁰² *Treaties Office Database*. Retrieved April 12, 2017, from European Union External Action: <http://ec.europa.eu/world/agreements/SimpleSearch.do>.

¹⁰³ See R.A. Wessel, 'The Consequences of Brexit for International Agreements Concluded by the European Union and its Member States', *CMLRev.*, 2018 (forthcoming); as well as A. Łazowski and R.A. Wessel, 'The External Dimension of Withdrawal from the European Union', *Revue des Affaires Européennes*, 2016/4, 2017, pp. 623-638.

more.¹⁰⁴ Furthermore, Van der Loo and Blockmans state that within most international agreements concluded by the EU a ‘*territorial application*’ clause is included.¹⁰⁵ This means that the agreement only applies to the territories in which the Treaties apply. After Brexit, this would not be the case for the UK and its territories anymore. In order to replace these agreements, it has been suggested that the UK can simply duplicate the agreements of the EU. Complications arise from the fact that the other contracting parties have to agree with this. It should not be taken for granted that the other parties will accept this since it offers them an opportunity to unravel specific aspects of the agreement and strike a better deal.¹⁰⁶ Furthermore, in some cases, agreements require the approximation of domestic law with EU legislation or include provisions that may only apply once the EU is a contracting party. In these cases, the agreements have to be changed since this would be useless for the UK and the other contracting party.¹⁰⁷

The situation for mixed agreements is different. The EU-only elements in the agreement would cease to apply to the UK on the same legal basis as with EU-only agreements. Nevertheless, it has been argued that the UK could decide to remain bound by the mixed elements of the agreement since they were signed and ratified by the UK. There might be good reasons for the UK to do this since it would be a near impossible task to swiftly replace all those agreements. However, Van der Loo and Blockmans (2016) argue that this would probably have to be arranged through a legal instrument that would have to be ratified by the EU, the EU-27, the third party and the UK. Further complications arise from the fact that most mixed agreements are concluded without a clear division between the EU-only elements and the mixed elements and that so-called ‘*Declarations of competences*’ are often too vague or outdated to fully rely on.¹⁰⁸ With respect to the larger multilateral mixed agreements to which the EU and the Member States are usually individual parties in their own right, it may be easier for the UK to stay on as a party, albeit that in those cases it will become responsible also for the parts falling under the EU’s competences.¹⁰⁹

Overall it seems that there is not one magic formula that the UK can apply to replace all the EU’s international agreements. Furthermore, it also has implications for third parties that have concluded agreements with the EU since Brexit will remove 64 million consumers that were previously covered by the agreement. Therefore, the EU will have to notify the third parties about the

¹⁰⁴ Ibid. See also Article 34 of the 1969 Vienna Convention on the Law of Treaties provides: ‘A treaty does not create either obligations or rights for a third State without its consent’. Art. 34 VCLT is considered a principle of customary international law and is as such also binding on the Union (Judgment in *Brita v Hauptzollamt Hamburg Hafen*, C-386/08, EU:C:2010:91, paras 40–45).

¹⁰⁵ Van der Loo, G., & Blockmans, S. (2016, July 15). *The Impact of Brexit on the EU’s International Agreements*. Retrieved April 12, 2017, from CEPS: https://www.ceps.eu/publications/impact-brexit-eu%E2%80%99s-international-agreements#_ftn3.

¹⁰⁶ Koutrakos, P. (2016, July 6). *What does Brexit mean for international trade agreements?* Retrieved April 12, 2017, from Monckton Chambers: <https://www.monckton.com/brexit-mean-international-trade-agreements/>.

¹⁰⁷ Łazowski and Wessel, *op.cit.*

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

change of situation. This can also mean that third parties do want to renegotiate the agreements or several parts of the agreements since the market will have significantly shrunk.

Finally, the following options are possible:

- The EU and the UK include several provisions and arrangements in the withdrawal agreement that provides an orderly disentanglement of the UK from EU agreements; or
- The EU and the UK do not include provisions and arrangements in the withdrawal agreement related to the disentanglement of the UK from EU agreements.

3.3.5. *Phasing out the UK's Involvement in CSDP Missions and JHA Matters*

As an EU Member State, the UK currently participates in Common Security and Defence Policy (CSDP) missions, as well as in some Justice and Home Affairs (JHA) matters and agencies. After the withdrawal of the UK, it is unclear whether the UK fully stops the cooperation in these areas or whether they to a certain extent keep cooperating with the EU.

At the moment of writing the EU has 15 ongoing military or civil missions across the world.¹¹⁰ Notable missions in which the UK is a major contributor are EUNAVFOR MED, or Operation Sophia, and EU NAVFOR Somalia, or Operation Atlanta. Operation Sophia aims to neutralise migrant smuggling routes in the Mediterranean. The UK has contributed by deploying staff and material. According to Earl Howe, UK Minister of State for Defence, approximately a third of all rescued migrants were picked up by UK ships.¹¹¹ Operation Atlanta is a counter-piracy military operation off the coast of Somalia. The UK has provided personnel and several ships. Furthermore, the UK has participated in several initiatives under the CSDP framework such as the European Defence Agency and EU Battlegroups. Although Michael Fallon, the former Secretary of State for Defence, did not want to speculate about UK involvement in CSDP missions after the withdrawal, he has argued that there is no reason that Brexit '*should inhibit future cooperation with missions that are in our direct interest*'.¹¹² Being outside the EU does not mean that you cannot participate in the CSDP. Several countries outside the EU including the US, Brazil, Canada, and Turkey, have participated in CSDP missions. Furthermore, non-EU countries have been invited to participate in the European Defence Agency and EU Battlegroups, these include Norway, Switzerland, and Ukraine.¹¹³

¹¹⁰ Strategic Communications. (2016, May 3). *Military and civilian missions and operations*. Retrieved May 1, 2017, from European Union External Action: https://eeas.europa.eu/topics/common-security-and-defence-policy-csdp/430/military-and-civilian-missions-and-operations_en.

¹¹¹ Howe, Earl. (2016, May 9). *Mediterranean Sea: Human Trafficking: Written question – HL7998*. Retrieved May 1, 2017, from Parliament.uk: <http://www.parliament.uk/written-questions-answers-statements/written-question/lords/2016-04-26/HL7998>.

¹¹² Newson, N. (2016). *Leaving the European Union: Foreign and Security Policy*. London: House of Lords.

¹¹³ Ibid.

The same principles account for JHA matters. Currently, the UK participates in the European Arrest Warrant (EAW), Europol and the Schengen Information System II. Further cooperation was planned by taking part in security measures such as Passenger Name Records and the Prüm Decisions. Davis, Secretary of State for Exiting the EU, has stated that: *'the whole justice and home affairs stream is being assessed even as we speak, and the aim is to preserve the relationship with the European Union on security matters as best we can'*.¹¹⁴ However, James Brokenshire, the then Minister for Security and Immigration has also pointed to initiatives that lay outside EU law such as the Five Eyes community and the Counter Terrorism Group.¹¹⁵ In case the UK wants to cooperate with the EU after the withdrawal there are several options since Europol and Frontex have agreements with countries outside the EU such as the US, Russia, and Nigeria.¹¹⁶

Thus, it seems that the UK wants to keep the cooperation in several areas of the CSDP and JHA. The EU shares the desire to keep cooperating and fight crime and terrorism together in a coordinated way.¹¹⁷ Therefore, it is most likely that after the withdrawal, the EU and the UK will seek to keep cooperating in CSDP missions and JHA matters. However, the details about the extent of the cooperation are unclear and will depend on the agreements.

Finally, the following options are possible:

- The EU and the UK stop all cooperation in CSDP and JHA matters; or
- The EU and the UK keep to a certain extent cooperating in CSDP and JHA matters.

3.3.6. Other Issues

The rules on the nationality of staff members are unclear. While nationality of an EU Member State may be a requirement for appointment at any of the EU's institutions, this is less clear for staff that have already been appointed. Informal talks with the Council's legal service have taught us that the Institutions will not make a concrete effort to replace their colleagues from the UK. Yet, it may be assumed that a number of UK nationals will have to leave their offices. This includes the unpicking of the EEAS and the exit of UK MEPs, the CJEU, the Committee of the Regions and the Economic and Social Committee. It has been pointed out that this may lead to difficulties related to replacing the UK civil servants at, for instance, the EEAS.¹¹⁸ Approximately 5.7% of the total staff in

¹¹⁴ House of Commons Hansard. (2016, September 5). *Exiting the European Union*. Retrieved May 1, 2017, from House of Commons Hansard: <https://hansard.parliament.uk/Commons/2016-09-05/debates/1609055000001/ExitingTheEuropeanUnion#contribution-1609055000141>.

¹¹⁵ See Newson, *op.cit.*

¹¹⁶ Europol. (2017). *Partners & Agreements*. Retrieved April 12, 2017, from Europol: <https://www.europol.europa.eu/partners-agreements>; Frontex. (2017). *Third Countries*. Retrieved April 12, 2017, from Frontex: <http://frontex.europa.eu/partners/third-countries/>.

¹¹⁷ See the European Council Guidelines, *op.cit.*

¹¹⁸ Lazowski and Wessel, *op.cit.*

the EEAS has UK nationality. Replacing all these civil servants on the day of withdrawal seem to be a near impossible task. Gradually replacing UK civil servants with other nationalities during the two-year negotiation period does not seem like a waterproof solution either given the possibility that the UK will revoke the notification. Furthermore, the UK remains a full EU Member State until the day of withdrawal, and thus expelling UK civil servants before the day of withdrawal would be in violation of the EU Treaties. Therefore, the negotiators may have to consider the possibility of laying down a phasing out strategy within the withdrawal agreement.¹¹⁹ Thus, the withdrawal of the UK civil servants working within the EU institutions seems to be a complicated issue which will possibly be included within the withdrawal agreement.

The European Medicines Agency (EMA) and the European Banking Authority (EBA) are EU agencies that are based in the UK. After the UK has withdrawn from the EU a new destination within the territory of the EU should be found for these institutions. Long before the day of withdrawal, other EU Member States have already started to express their interest in hosting these institutions in one of their cities¹²⁰ and this has already led to, for instance, the decision to relocate the EMA to Amsterdam and the EBA to Paris.¹²¹

Lastly, there are the issues related to Gibraltar and the Sovereign Base Areas of Akrotiri and Dhekelia located in Cyprus. These issues fall outside the scope of the withdrawal agreement and have to be settled by bilateral agreements between the UK and Cyprus and the UK and Spain, respectively, as the European Council has made clear in its Brexit guidelines.

3.3.7. *Legal Scrubbing, Initialising and Translating*

Once the two parties have generally agreed on the text of the agreement, the process of legal scrubbing starts, to make sure the text is legally coherent. During this process, minor changes can occur to the agreement.¹²² After the process of legal scrubbing there is no room for any changes to the text of the agreement, therefore there is the risk that the process will be stalled at this stage. This happened during the negotiations on the EU-Canada Comprehensive Economic and Trade Agreement (CETA), where negotiations were formally completed but the process was stalled and later reopened to change

¹¹⁹ Ibid.

¹²⁰ Parker, G., & Robinson, D. (2017, April 16). *London battles to keep hold of two main EU agencies*. Retrieved May 1, 2017, from Financial Times: <https://www.ft.com/content/72ead180-229a-11e7-8691-d5f7e0cd0a16>.

¹²¹ See <https://www.theguardian.com/politics/2017/nov/20/london-loses-european-medicines-agency-amsterdam-brexit-relocation>. In the European Parliament a plan had originated to move the European Medicines Agency to Strasbourg, and in exchange get rid of the Parliament's plenary seat in Strasbourg. See Paun, C. (2017, May 11). *Strasbourg swap plan: Take EU drug agency, lose Parliament*. Retrieved May 11, 2017, from Politico: <http://www.politico.eu/article/strasbourg-swap-european-parliament-medicines-agency-ema/>.

¹²² ClientEarth. (2016). *Briefing on the life cycle of EU trade agreements*. Brussels: Client Earth.

provisions related to the dispute settlement mechanism.¹²³ Once the legal scrubbing has been done, the Commission and the other party will initialise the agreement and, from then on, the negotiations are closed. At this point, the Council and the European Parliament will be informed and provided with the text. Next, the text will be translated into all official EU languages. This can take several months.¹²⁴

Finally, the process can go the following ways:

- The EU and the UK reach an agreement. The process continues (see Section 3.4.);
- The EU and the UK do not reach an agreement within the two-year time limit. However, the time limit will be extended (see Section 3.9.) and the negotiations can continue; or
- The EU and the UK do not reach an agreement within the two-year time limit. The UK leaves the EU without a withdrawal agreement.

3.4. Step 4: The Council Authorizes the Signing of the Agreement and Provisional Application

Normally, after the negotiation of international agreements, the Commission sends a proposal for the authorization of the signing of the agreement to the Council. The Council shall then adopt a decision based on Article 218(5) TFEU. Currently, it is unclear whether this step will be a part of the Article 50 TEU procedure since it only refers to Article 218(3) TFEU. Most commentators do not include it. However, Wyrozumska has stated that it is likely that there will be a Council decision on the signing of the agreement. Although normally this will be decided upon by either qualified majority voting (QMV) or unanimity, in the Article 50 TEU procedure Council decisions are taken by SQMV. Therefore, it is likely that the decision will be taken by SQMV.¹²⁵

In general, there is no room for any changes related to the content of the agreement at this stage within the process. However, the Council can decide to amend the legal basis of the proposed agreement. For instance, this can happen when the Commission proposes an EU-only agreement on the basis of Article 207 TFEU and the Council disagrees. As EU-only agreements do not require ratification by the Member States, the Council can decide to change the legal basis to lead to a mixed agreement, thus allowing involvement of the Member States. Changes to the legal basis of the agreement require unanimity voting (Puccio, 2016). However, for the Article 50 TEU procedure, it is unclear whether this has to be done by SQMV or unanimity.

¹²³ Patterson, B. (2015, December 10). *European Commission asks Canada to renegotiate key provision of CETA*. Retrieved May 1, 2017, from The Council of Canadians: <https://canadians.org/blog/european-commission-asks-canada-renegotiate-key-provision-ceta>.

¹²⁴ Puccio, L. (2016). *A guide to EU procedures for the conclusion of international trade agreements*. Brussels: European Parliamentary Research Service.

¹²⁵ Wyrozumska, *op.cit.*

Furthermore, the Council – on the basis of Article 218(5) TFEU – decides, if necessary, to provisionally apply the agreement. In case of mixed agreements, this would bypass the long ratification procedure. However, only the provisions falling exclusively under the competences of the EU can be provisionally applied. Problems arise here from the fact that the division of competences cannot always be clearly defined. Therefore, it is often unclear which competences fall under the EU and which belong to the Member States (van der Loo & Wessel, 2017).¹²⁶

Finally, the process can go the following ways:

- The Council authorizes the signing of the agreement. The process continues (see Section 3.5.);
- The Council authorizes the signing of the agreement and provisionally applies the agreement. The process continues (see Section 3.5.);
- The Council does not authorize the signing of the agreement within the two-year time limit. However, the time limit will be extended (see Section 3.9.) and the negotiations can be reopened; or
- The Council does not authorize the signing of the agreement within the two-year time limit. The UK leaves the EU without a withdrawal agreement.

3.5. Step 5: The European Parliament Gives Consent

Once an agreement has been reached, the European Parliament has to give its consent before the Council can conclude it. The decision-making mechanism for the European Parliament is a simple majority vote, at least one third of the total number of 751 MEPs must have cast a vote. If the European Parliament does not give its consent, the process cannot continue. The European Parliament has published a resolution concerning the Brexit negotiations which is in line with the guidelines of the European Council. The European Parliament may veto any deal if they are against certain aspects of it. Sources have reported that this will happen in case of non-abidance by the EU environmental regulations¹²⁷ and in case the rights of citizens are not protected.¹²⁸

It should be noted that the MEPs of the UK are allowed to vote since Article 50 does not explicitly exclude them. This allows the Scottish and Irish MEPs to seek and form alliances with other MEPs to withhold the consent of the European Parliament. Although this is speculative, the role of the European Parliament should not be underestimated not least because the MEPs are less

¹²⁶ Van der Loo, G., & Wessel, R. A. (2017). The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions. *Common Market Law Review*, pp. 735–770.

¹²⁷ Boffey, D. (2017, January 31). *MEPs in bid to force UK to meet environmental regulations after Brexit*. Retrieved March 1, 2017, from The Guardian: https://www.theguardian.com/politics/2017/jan/31/european-parliament-force-uk-meet-environmental-regulations-after-brexite?CMP=share_btn_tw.

¹²⁸ Khan, S. (2017, April 20). *Brexit deal will be vetoed if citizens' rights are not protected, President of European Parliament says*. Retrieved May 1, 2017, from Independent: <http://www.independent.co.uk/news/uk/politics/brexit-veto-eu-citizens-rights-not-protected-antonio-tajani-says-a7694036.html>.

restricted by their national governments than their colleagues in the European Council and the Council.¹²⁹

The Treaties do not state what happens if the European Parliament does not give its consent but it is clear that the agreement cannot be concluded without the consent of the European Parliament.¹³⁰ In practice, several agreements have failed because the European Parliament refused to give its consent. However, in some cases, the refusal of giving consent has led to the reopening of the negotiations whereby the amended agreement was granted the consent of the European Parliament.¹³¹ In the case of the Article 50 TEU procedure, the timing would be crucial. In case the European Parliament votes against the deal shortly before the two-year time limit has elapsed, there would not be much time left to go back to the negotiation table and change the deal to the demands of the European Parliament. An extension of the negotiation period is then necessary.

Finally, the process can go the following ways:

- The European Parliament gives its consent. The process continues (see Section 3.6.).
- The European Parliament does not give its consent within the two-year time limit. However, the time limit will be extended (see Section 2.9.) and the negotiations can be reopened; or
- The European Parliament does not give its consent within the two-year time limit. The UK leaves the EU without a withdrawal agreement.

3.6. Optional Step: EU-27 Ratify the Agreement

As indicated above Article 50 suggests that the withdrawal agreement is to be concluded as an EU-only agreement. Yet, if for some reason the withdrawal agreement would address, besides exclusive EU competences as trade and certain shared competences, also competences within the preserve of Member States, the withdrawal agreement would have to be classified as a mixed agreement. The question is whether this would be legally possible at all, in case a mixed agreement is adopted after all, the national parliaments of the EU-27 also play a decisive role since they would usually have to approve the ratification of the withdrawal agreement.¹³²

All Member States, with the exception of Malta, have one or more federal chambers that have to give their approval to the agreement. Furthermore, in the exceptional case of Belgium, parliaments at the regional level (the Flemish

¹²⁹ Peers, S. (2016b, July 14). *What Role for the European Parliament under Article 50 TEU?* . Retrieved March 1, 2017, from EU Law Analysis: <http://eulawanalysis.blogspot.se/2016/07/what-role-for-european-parliament-under.html>.

¹³⁰ Hartley, T. C. (2014). *The Foundations of European Union Law*. Oxford: Oxford University Press.

¹³¹ European Parliament. (2010, February 11). *SWIFT: European Parliament votes down agreement with the US*. Retrieved May 1, 2017, from European Parliament: <http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20100209IPR68674>.

¹³² House of Commons Exiting the European Union Committee, 2017, *op.cit*.

EU Member State	National / Federal level		Regional Level	Possibility for a
	Approval	Chambers	Approval	Referendum
Austria	✓	2/2	X	✓
Belgium	✓	2/2	✓	X
Bulgaria	✓	1/1	X	✓
Croatia	✓	1/1	X	✓
Cyprus	✓	1/1	X	X
Czech Republic	✓	2/2	X	X
Denmark	✓	1/1	X	✓
Estonia	✓	1/1	X	X
Finland	✓	1/1	X	X
France	✓	2/2	X	✓
Germany	✓	2/2	X	X
Greece	✓	1/1	X	✓
Hungary	✓	1/1	X	X
Ireland	✓	1/2	X	✓
Italy	✓	2/2	X	X
Latvia	✓	1/1	X	X
Lithuania	✓	1/1	X	✓
Luxembourg	✓	1/1	X	X
Malta	X	0/1	X	X
The Netherlands	✓	2/2	X	✓
Poland	✓	2/2	X	✓
Portugal	✓	1/1	X	X
Romania	✓	2/2	X	✓
Slovakia	✓	1/1	X	✓
Slovenia	✓	1/2	X	X
Spain	✓	2/2	X	X
Sweden	✓	1/1	X	X
Total	26/27	36/39	1/27	13/27

Table 2: Ratification procedures of the EU-27

Sources: Directorate-General for the Presidency. (2016). *Procedures of Ratification of Mixed Agreements*. Brussels: European Parliament; and Eschbach, A. (2015). *The Ratification Process in EU Member States*. Cologne: University of Cologne.

Parliament, the Brussels-Capital Parliament, and the Parliament of Wallonia) and parliaments at the community level (the French-Community, the German-speaking Community, the French Community Commission and the Common Community Commission) are involved since the withdrawal agreement has to be approved by them.¹³³ The recent experience with the ratification of CETA has shown that one regional parliament can significantly delay the process. At first, Belgium could not ratify the CETA agreement due to the refusal of Wallonia to approve the CETA agreement.¹³⁴ This caused delay and insecurity for the

¹³³ EPRS. (2016). *Ratification of international agreements by EU Member States*. Brussels: European Parliament.

¹³⁴ Mezgolits, N. (2016, November 21). *CETA and the role of Wallonis*. Retrieved May 1, 2017, from Bridging Europe: <http://www.bridgingeurope.net/ceta-and-the-role-of-wallonia.html>.

continuation of the CETA agreement. For the withdrawal agreement, this can cause much more harm since it is bound by a two-year time limit.

Furthermore, some Member States have the possibility to hold a referendum prior to ratification of the agreement. The advisory referendum in the Netherlands addressing the ratification of the EU-Ukraine Association Agreement (AA) has shown that referenda can cause delay and uncertainty in the process. This can be harmful since the UK would be automatically out of the EU after the two-year time limit has elapsed.

Table 2 gives an overview of the hurdles for ratification within the Member States.

Finally, the process can go the following ways:

- The EU-27 ratify the withdrawal agreement. The process continues (see Section 3.7.);
- The EU-27 do not ratify the withdrawal agreement within the two-year time limit. However, the time limit will be extended (see Section 3.9.) and the EU-27 can continue to ratify the withdrawal agreement; or
- The EU-27 do not ratify the withdrawal agreement within the two-year time limit. The UK leaves the EU without a withdrawal agreement.

3.7. Step 6: The UK Approves and Ratifies the Agreement

Prime Minister May has said in her speech about Brexit that both the House of Lords and the House of Commons get to vote on the final deal that is agreed between the EU and the UK.¹³⁵ Former Minister of State for Exiting the EU David Jones confirmed the statement of the government as he said that the government: *'made a commitment to a vote at the end of the procedure.'*¹³⁶ Although the precise details about the vote are lacking, it is clear that the vote will take the form of a motion before both the House of Commons and the House of Lords and that the vote that will cover both the withdrawal agreement and the future relationship agreement. Furthermore, Jones confirmed that the vote would be a take it or leave it vote and that the vote will take place before the vote of the European Parliament.¹³⁷ This raises confusion since under EU law the European Parliament will vote separately on the withdrawal agreement and the future relationship agreement.

Furthermore, according to the law in the UK on the approval of international treaties as set out in the Constitutional Reform and Governance Act 2010 (CRAG), international treaties must be laid down before the House of Commons and the House of Lords. Once the treaty has been laid down for Parliament the government may not ratify the treaty for 21 sitting days. A sitting day is a day

¹³⁵ Independent, 2017, *op.cit.*

¹³⁶ House of Commons Hansard, 2017, *op.cit.*

¹³⁷ Ibid; and Mason, R., & Asthana, A. (2017, February 7). *May to put Brexit deal to MPs' vote before it goes to European parliament.* Retrieved March 1, 2017, from The Guardian: <https://www.theguardian.com/politics/2017/feb/07/theresa-may-agrees-to-let-mps-vote-on-brexit-deal-head-off-tory-revolt>.

on which both the House of Commons and the House of Lords sit. If during these 21 days both the House of Commons and the House of Lords do not raise objections to the treaty, the government may continue and ratify the treaty. If the House of Lords raises objections but the House of Commons does not, the Government can still continue and ratify the treaty by laying a statement with the reasons for ratification in front of the House of Lords. However, if the House of Commons raises objections, the government cannot continue to ratify it. The government can then choose to lay a statement with the reasons for ratification before both Houses. This statement will trigger another 21 sitting days. If the House of Commons during these 21 days again raises objections, the process will be repeated. This process can be repeated indefinitely. Technically the House of Commons can block agreements from ratification. In the case of the withdrawal agreement, they can block it until the two-year time limit has elapsed. However, in practice treaties are often not debated and voted on since CRAG does not oblige the government to allocate time for debate and a vote. Therefore, it is up to the opposition to allocate time to this, if it controls any parliamentary time in the 21 days' period.¹³⁸ Finally, it should be noted that since 2010, when CRAG entered into force, neither house has raised objections against the ratification of treaties.¹³⁹

Thus, in addition to the normal scrutiny procedures, an additional vote covering both the withdrawal agreement and the future relationship agreement will take place. This raises the possibility for the House of Commons to block the withdrawal agreement at two different moments. In case this happens, it is unclear whether the UK government could return to the negotiating table. This will depend on if there is time left and whether the EU is willing to reopen the negotiations.¹⁴⁰ In the case of a late no vote within the process, the negotiation time should be extended and this is dependent on the willingness of the EU Member States, as explained in Section 2.7. A more radical option for the UK government, to gain more support, is to dissolve Parliament and call a snap general election as they did shortly after the triggering of Article 50 TEU.¹⁴¹ However, the UK government has stated that in the case of a no vote, the UK would leave the EU without an agreement.¹⁴²

Finally, the process can go the following ways:

¹³⁸ Institute for Government. (2017c). *Parliament and the Brexit deal*. Retrieved May 1, 2017, from Institute for Government: <https://www.instituteforgovernment.org.uk/brexit-explained/parliament-and-brexit-deal>.

¹³⁹ Lang, A. (2017). *Parliament's role in ratifying treaties*. London: House of Commons Library.

¹⁴⁰ Iltott, O. (2017, March 8). *How meaningful could a meaningful Brexit vote be?* Retrieved May 1, 2017, from Institute for Government: <https://www.instituteforgovernment.org.uk/blog/how-meaningful-could-meaningful-brexit-vote-be>.

¹⁴¹ Evans, J., & Glatté, S. (2017, January 18). *How will Parliament's Brexit vote work?* Retrieved March 1, 2017, from BBC: <http://www.bbc.com/news/uk-politics-38669524>.

¹⁴² Mason, R., & Asthana, A. (2017, February 7). *May to put Brexit deal to MPs' vote before it goes to European parliament*. Retrieved March 1, 2017, from The Guardian: <https://www.theguardian.com/politics/2017/feb/07/theresa-may-agrees-to-let-mps-vote-on-brexit-deal-head-off-tory-revolt>.

- The UK Parliament approves the withdrawal agreement and the UK government ratifies the withdrawal agreement. It should be taken into account that there can be two moments of approval. Namely, the normal procedure as laid down in CRAG and the vote promised by the UK government which entails both the withdrawal agreement and the future relationship agreement. The process continues (see Section 3.8.);
- The UK Parliament does not approve the withdrawal agreement. However, the time limit will be extended (see Section 3.9.). Then, the UK government can lay a statement before the UK Parliament with the reasons for ratification which means that the process of giving approval starts again. This can be repeated indefinitely. Other options are going back to the negotiating table or calling a snap election in order to gain more support in parliament; or
- The UK Parliament does not approve the withdrawal agreement within the two-year time limit. The UK leaves the EU without a withdrawal agreement.

3.8. Step 7: The Council Concludes the Agreement

Finally, after obtaining the consent of the European Parliament, the withdrawal agreement can be concluded by the General Affairs Council. The voting will be done by SQMV. Since the Council extensively participated in the negotiations, and there is not a single country with veto power it is likely that the final agreement will be concluded within several meetings. Nonetheless, it should be taken into account that in theory countries can form political blocs to stop the conclusion of the final agreement but this does not seem very likely.

Finally, the process can go the following ways:

- The Council concludes the withdrawal agreement by SQMV. The UK leaves the EU with a withdrawal agreement in place;
- The Council does not agree on concluding the withdrawal agreement within the two-year time limit. However, the time limit will be extended (see Section 3.7.) and the Council can continue to seek agreement on concluding the withdrawal agreement; or
- The Council does not agree on concluding the withdrawal agreement within the two-year time limit. The UK leaves the EU without a withdrawal agreement.

3.9. Optional Step: Extending the Negotiation Period

Once the UK has notified the European Council about its intention to leave the clock starts ticking. Article 50(3) TEU states: '*The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*' Thus, if the EU and the UK fail to agree on a withdrawal agreement within two years after the notification the UK will be out of the EU without a withdrawal agreement. However, the period can

be extended if the European Council and the leaving Member State, the UK in this case, unanimously decide to do this. Article 50 TEU does not mention a maximum duration of the extension. This means that theoretically, the duration of the extension could last forever. However, this does not seem very likely since economically speaking and also for their citizens it would be important for both the EU and the UK to provide clarity about their relationship with each other.¹⁴³

If there is the need for extending the period, each Member State has the power to veto the withdrawal agreement. This can lead to the situation whereby Member States demand certain privileges for not using their veto against extending the time period. For instance, Greece could demand debt relief or Hungary could demand an exemption for taking in migrants.

Finally, the process can go the following ways:

- The European Council, including the UK, agrees unanimously on extending the time limit. The process continues at the point where it left off; or
- The European Council, including the UK, does not agree unanimously on extending the time limit. The parties are still bound by the two-year time limit.

3.10. Optional Step: A Role for the CJEU

The withdrawal agreement that will be concluded between the EU and the UK is an international agreement, which implies that it can be brought before the CJEU for judicial review. There are several ways how this could be done, although some are contested.

The first way is challenging the legality of the Council decision to conclude the withdrawal agreement (Paragraph 3.5.) through an action for annulment based on Article 263 TFEU.

The second, but contested, way is that based on Article 218(11) TFEU, whereby a Member State, the Council, the Commission or the Parliament could request the CJEU to give an opinion on whether the withdrawal agreement and all its provisions are compatible with the Treaties.¹⁴⁴ This option is contested by some experts as Article 50 TEU only refers to Article 218(3) TFEU and not to the other paragraphs.¹⁴⁵ Therefore, it is unclear at the moment of writing whether the general rules laid down in Article 218 TFEU apply in their entirety.

In case the CJEU rules against the legality of the Council decision to conclude the withdrawal agreement or rules that the withdrawal agreement (or several parts) are not compatible with the Treaties, the withdrawal agreement or certain parts will not be able to enter into force.

Finally, the process can go the following ways:

¹⁴³ Wessel, 2017, *op.cit.*

¹⁴⁴ Poptcheva, E.-M. (2016). *Article 50 TEU: Withdrawal of a Member State from the EU*. Brussels: European Parliamentary Research Service; Tell Cremades & Novak, 2017, *op.cit.*

¹⁴⁵ Rieder, C. M. (2013). The Withdrawal Clause of the Lisbon Treaty in the Light of EU Citizenship (Between Disintegration and Integration). *Fordham International Law Journal*, 147-174.

- The Council decision to conclude the withdrawal agreement (see Section 3.8.) is annulled due to an action before the Court; or
- According to the CJEU, the withdrawal agreement in its entirety is, or certain provisions are, incompatible with the Treaties. The withdrawal agreement cannot enter into force in its current form.

3.11. Optional Step: The UK Revokes the Notification

From a legal perspective it remains unclear whether the UK can revoke the Article 50 TEU notification and thus remain in the EU.¹⁴⁶ As described in Section 1, it is generally held that the UK can revoke the notification. However, most commentators also point to the politics of the question and conclude that the UK will be at the mercy of the EU-27 and that this can lead to the loss of the several opt-outs the UK has.¹⁴⁷ Furthermore, the European Parliament has stated in its Brexit Resolution that a revocation will be subject to the conditions set by the EU-27.¹⁴⁸

Revoking the notification would give the UK an extra option to escape from Brexit, or simply buy more time by revoking and sending out a new notification. However, in case a revocation is subject to conditions set by the EU-27 it is most likely that they will not allow the UK to buy more time by revoking and sending a new notification. Furthermore, they can demand that the UK drops its current opt-outs in some EU policies, as a condition for being allowed to remain in the EU.

Finally, the process can go the following way:

- The UK revokes the Article 50 TEU notification and remains in the EU.

3.12. Sub-conclusion

Concluding the withdrawal agreement is the first step in the Brexit procedure. The EU and the UK have until 29 March 2019, 23:00 GMT¹⁴⁹ to do this, otherwise, the UK will automatically leave the EU without a withdrawal agreement. However, the day of withdrawal can be postponed by a unanimous decision in the European Council with the UK included. Reaching an agreement within the two-year time limit will be a cumbersome task due to the tough negotiations and due to the many procedural steps that have to be taken.

¹⁴⁶ Renwick, 2017, *op.cit.*

¹⁴⁷ House of Lords. (2016, March 8). *Revised transcript of evidence taken before The Select Committee on the European Union Inquiry on THE PROCESS OF LEAVING THE EUROPEAN UNION*. Retrieved March 1, 2017, from UK Parliament: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/the-process-of-leaving-the-eu/oral/30396.html>.

¹⁴⁸ European Parliament, 2017, *op.cit.*

¹⁴⁹ UK Prime Minister Theresa May said the EU Withdrawal Bill would be amended to formally commit to Brexit at 23:00 GMT on Friday 29 March 2019; <http://www.bbc.com/news/uk-politics-41936428>.

The negotiations between the EU and the UK will include sensitive issues about which both parties have different visions. One of these issues is the financial settlement. The EU wants the UK to pay for its obligations that derive from EU membership, while the UK seems unwilling to pay. Other issues which both parties want to settle are the reciprocal rights of EU and UK citizens and the border between Ireland and Northern Ireland. Settling these issues will determine the next steps in the process since the EU has mentioned that it will only start the negotiations on the future relationship if enough progress has been made on the terms of withdrawal, and the UK has stated that no deal is better than a bad deal.¹⁵⁰

The procedural steps include at least the drafting of the guidelines by the European Council, a Council decision on the authorization of the opening of the negotiations, the European Parliament giving its consent, approval by the UK Parliament, and a Council decision on the concluding of the agreement. An additional step of ratification by the EU-27 will be required in case the withdrawal agreement gets classified as a mixed agreement. Although ratification is not likely to be required it should be noted that if the agreement needs ratification, it is almost certain that the withdrawal agreement cannot be concluded within the two-year time limit since the ratification procedures in some Member States involve multiple governmental levels and referenda. Furthermore, the CJEU plays an important role since it can at least annul the Council decision on the concluding of the agreement.

At the moment of writing, there are several uncertainties that can complicate the process even more. The most important are: the revocability of the notification and the applicability of Article 218 TFEU. First, it is unclear whether the UK can revoke the Article 50 TEU notification and thus remain in the EU. Second, Article 50 TEU only refers to Article 218(3) TFEU; however it seems logical that the general rules in Article 218 TFEU would apply. If this is the case there would be an extra procedural step in the form of a Council decision about the authorization of the signing of the agreement, and the CJEU would get a bigger role as it can declare the agreements or parts of it incompatible with the EU Treaties.

The current state of affairs is that the European Council has adopted the Brexit guidelines on 29 April 2017, the Council has authorized the opening of the negotiations on 22 May 2017 and the negotiations started on 19 June 2017, 11 days after the general election in the UK.

An overview of the procedure is shown in the process scheme below:

¹⁵⁰ Chu, B. (2017, May 28). *Theresa May's 'no deal is better than a bad deal' Brexit logic could end up destroying the British economy*. Retrieved June 1, 2017, from Independent: <http://www.independent.co.uk/voices/brexit-theresa-may-tories-no-deal-better-bad-deal-brussels-destroy-british-economy-a7760026.html>.

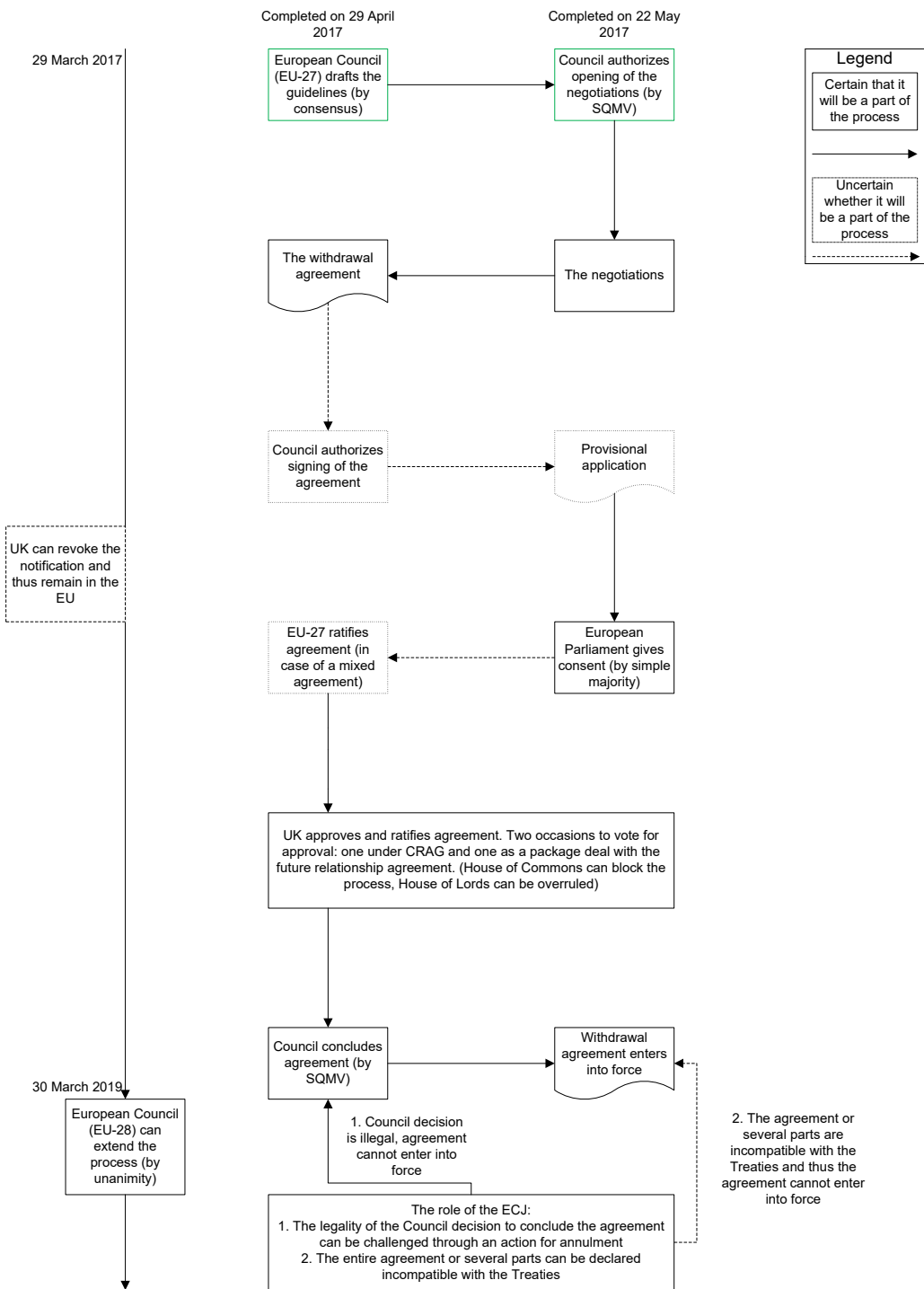


Figure 1: The process for the realization of the withdrawal agreement

4. THE TRANSITION AGREEMENT

The majority of the Brexit literature, news articles and blogs report mainly on the withdrawal agreement and the future relationship agreement.¹⁵¹ It should not be forgotten that there will most probably be a third phase, namely the period between the day of withdrawal and the entering into force of the future relationship agreement. In order to support a smooth withdrawal and prevent a cliff-edge Brexit, transition arrangements about a wide range of areas including continued Single Market access and citizens' rights may have to be made. To buy more time, the UK will most probably have to accept that it will continue to be bound by certain EU rules. At the same time, it may enjoy certain benefits during a transition phase.

Although transition arrangements have been mentioned by the European Council in its Brexit guidelines, by the European Parliament in its 2017 resolution and by the UK government in its 2017 White Paper,¹⁵² the procedure for concluding such an agreement is not as clearly defined as the procedures for the withdrawal agreement and the future relationship agreement. Among Brexit researchers and authors numerous unanswered questions circulate,¹⁵³ and even among MEPs the notion of transition arrangements is far from clear as parliamentary questions have been sent to the Commission.¹⁵⁴

This Section will therefore, to the extent possible, analyse the different options that are technically possible for the transition agreement or arrangements. The first part will discuss the legal basis for such arrangements. This will be followed by an assessment of the different options for agreeing on transition arrangements.

4.1. The Legal Basis

Transition arrangements are not mentioned in Article 50 TEU but have been mentioned by both the EU and the UK. The European Council has mentioned the possibility to determine transition arrangements within its Brexit guidelines: *'To the extent necessary and legally possible, the negotiations may also seek to determine transitional arrangements which are in the interest of the Union and, as appropriate, to provide for bridges towards the foreseeable framework*

¹⁵¹ Begg, I. (2016). Brexit: Why, What Next and How? *CESifo* 17(2), 30-36; Palmeri, T. (2016, July 5). Brexit roadmap: A guide to what happens next. Retrieved May 31, 2017, from Politico: <http://www.politico.eu/article/brexit-roadmap-a-guide-to-what-happens-next-eu-uk-negotiations/>; Morillas, P. (2016). *The Brexit Scenarios: Towards a new UK-EU relationship*. Barcelona: CIDOB.; *Brexit Essentials: Alternatives to EU membership*. London: Slaughter and May.

¹⁵² For references, see *supra*.

¹⁵³ Peers, S. (2017, April 4). *Guide to the Brexit Negotiations*. Retrieved May 1, 2017, from EU Law Analysis: <http://eulawanalysis.blogspot.se/2017/04/guide-to-brexit-negotiations.html>; Eleftheriadis, P. (2017), February 15). *How to Make a Transitional Brexit Arrangement*. Retrieved April 1, 2017, from University of Oxford Faculty of Law: <https://www.law.ox.ac.uk/business-law-blog/blog/2017/02/how-make-transitional-brexit-arrangement>.

¹⁵⁴ Luděk, N. (2017, April 12). *Legal basis of a post-Brexit transitional agreement with the United Kingdom*. Retrieved May 1, 2017, from European Parliament: <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=P-2017-002715&format=XML&language=EN>.

for the future relationship in the light of the progress made. Any such transitional arrangements must be clearly defined, limited in time, and subject to effective enforcement mechanisms. Should a time-limited prolongation of Union acquis be considered, this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply.' Furthermore, the European Parliament, in its resolution on Brexit (2017), has specified that the transition arrangements cannot exceed a time limit of three years. Moreover, Parliament added that it must give its consent before any transition arrangements can be concluded. Representatives of the UK have mentioned '*interim arrangements*' in their 2017 Brexit White Paper and stated that they do not seek some form of infinite transition status.

The statement of the European Council does not clarify the legal basis for the transition arrangements. The wording '*To the extent necessary and legally possible*' even seems to suggest that there is uncertainty about what is legally possible.¹⁵⁵ Therefore, it is unclear whether the procedure for negotiating and concluding the transition arrangements will be done based on Article 50 TEU or based on the normal procedures for negotiating and concluding international agreements as will be described in chapter 4. This also means that it is not known which decision-making mechanism, whether SQMV, QMV or unanimity, is needed and whether ratification by the 27 Member States is required.

4.2. The Options

In general, two different views can be discovered within the literature. First, the transition arrangements will be included within the withdrawal agreement. Second, a separate transition agreement will be concluded and negotiated. These two options will be analysed in the following Sections. Furthermore, multiple other options including extending EU membership, EEA membership and a parallel sources agreement have been proposed within the literature. Although the feasibility of these options is doubtful, they will be analysed in order to give a complete overview of the available options. Finally, the option of no transition arrangements will be described.

4.2.1. Transition Arrangements Within the Withdrawal Agreement

One of the views within the literature is that the withdrawal agreement would contain transition arrangements.¹⁵⁶ This would mean that one agreement containing the terms of withdrawal and the transition arrangements would be negotiated and concluded under Article 50 TEU. By doing this, a cliff-edge Brexit would be prevented since the withdrawal agreement, including the transition

¹⁵⁵ Peers, S. (2017, April 4). *Guide to the Brexit Negotiations*. Retrieved May 1, 2017, from EU Law Analysis: <http://eulawanalysis.blogspot.se/2017/04/guide-to-brexit-negotiations.html>.

¹⁵⁶ Bowers, P., Lang, A., Vaughne, M., Smith, B., & Webb, D. (2016). *Brexit: some legal and constitutional issues and alternatives to EU membership*. London: House of Commons Library; Miller, at al. *op.cit.*; Renwick, *op.cit.*

arrangements, would enter into force on the day the UK withdraws from the EU. This would buy more time for negotiating and concluding the future relationship agreement without disturbing the economy and the lives of citizens.

A major disadvantage of this option is that a withdrawal agreement including transition arrangements would most likely be classified under EU law as a mixed agreement.¹⁵⁷ Obviously, this process will take up a significant amount of time and can most likely not be completed within the two-year time limit.

Furthermore, Article 50 TEU does not mention anything about transition arrangements. Therefore, it is unclear whether it is legally possible to include transition arrangements within the withdrawal agreement. According to the European Parliament's Committee on Legal Affairs, it would not be possible to include transition arrangements in the withdrawal agreement under Article 50 TEU.¹⁵⁸ They state that Article 50 TEU only mentions the withdrawal agreement and indirectly the agreement on the future relationship. In their view, including transition arrangements would lead to the situation that the definitive effect as mentioned in Article 50(3) TEU – '*The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement*' – would not take place. Finally, they warn that this might lead to the situation whereby the EU and the UK '*might find themselves bogged down in an area of legal uncertainty*'.

Thus, while this option seems to provide for a smooth transition between the withdrawal from the EU and the entering into force of the future relationship agreement, the withdrawal agreement will most likely be a mixed agreement which requires ratification by the EU-27 and it is unclear whether this is legally possible.

4.2.2. A Separate Transition Agreement

The second possibility is that a separate transition agreement will be negotiated and concluded.¹⁵⁹ This would mean that an entirely new international agreement has to be negotiated and concluded.

The problem with such an agreement is that it would be treated as an international agreement with all the required formal steps regarding its negotiation and conclusion.¹⁶⁰ The regular EU procedure for negotiating and concluding international agreements between the EU and third countries as will be described in Section 5 would then apply. However, these procedures are for agreements between the EU and third countries. The UK is an EU member until the day of withdrawal. For a smooth transition, the transition agreement has to enter into force on the same day the UK withdraws. However, the agreement can only be concluded once the UK is a third country, therefore the timing would be difficult.

¹⁵⁷ Duff, *op.cit.*

¹⁵⁸ European Parliament's Committee on Legal Affairs. (2017). *Report on the Consequences of Brexit*. Brussels: European Parliament's Committee on Legal Affairs.

¹⁵⁹ Chalmers & Menon, 2016, *op.cit.* Eleftheriadis, 2017, *op.cit.*; Oliver, 2016, *op.cit.*; Renwick, 2017, *op.cit.*

¹⁶⁰ Eleftheriadis, 2017, *op.cit.*

In addition, it is unlikely that a transition agreement can be negotiated and concluded before the end of the Article 50 TEU procedure. According to the European Parliament's Committee on Legal Affairs, such an agreement is subject to unanimity voting within the Council, ratification by the EU-27 and has to be examined by the CJEU.¹⁶¹

4.2.3. Other Options

Several other options have been proposed and include extended EU membership, EEA membership, and a parallel sources agreement.

Multiple authors including Chalmers, Menon and Eleftheriadis have mentioned the possibility of extending the EU membership of the UK.¹⁶² This does not mean EU membership in its normal form but '*second tier membership*' as it is termed by Eleftheriadis.¹⁶³ This kind of membership would remove some of the elements that come with EU membership. These elements would have to be the issues that became clear after the Brexit referendum and thus include supervision of the CJEU and the free movement of people.¹⁶⁴ Problems for creating a second-tier membership arise from the fact that there is most likely no political will and that there are major legal challenges. Representatives from the EU have stated several times that EU membership goes hand in hand with the four freedoms of the Single Market, therefore it is not likely that the EU supports second tier membership. Even if there is the political will to do this, it would still require the amendment of the Treaties since the four freedoms are enshrined in the Treaties. Amending the Treaties can most likely not be achieved before the UK withdraws from the EU. Therefore, the feasibility of creating a second-tier EU membership as a transition solution is low.

Another frequently mentioned option is the UK temporary joining the EEA.¹⁶⁵ As an EEA member, the UK still has access to the Single Market including the four freedoms. Therefore, it prevents disrupting the economy and the lives of EU and UK citizens. During this transition period of EEA membership, the EU and the UK could work out the future relationship agreement. First, this solution would oppose the key messages that have emerged from the referendum since EEA members have nearly the same obligations as EU members. Second, the procedure for joining the EEA requires not only an agreement between the EU and the UK but also between all the other EEA members. The entire process of negotiating, signing and ratifying can most likely not be done within two years.¹⁶⁶

Finally, Eleftheriadis has proposed the option of a parallel sources agreement. This would mean that the transition arrangements would be organised on the basis of two parallel legal grounds, one for the legal order of the EU and one

¹⁶¹ See the Report on Consequences of Brexit, *op.cit.*

¹⁶² Chalmers and Menon, *op.cit.*, and Eleftheriadis, *op.cit.*

¹⁶³ *Ibid.*

¹⁶⁴ Chalmers and Menon, *op.cit.*

¹⁶⁵ See for instance Oliver, 2016, *op.cit.*; Whitman, 2016, *op.cit.*

¹⁶⁶ Eleftheriadis, *op.cit.*

for the legal order of the UK. For the UK, transition arrangements would be included in an Act of Parliament, while the EU Member States would be bound by an EU regulation. The regulation would be created under the normal procedures for creating EU secondary legislation. The drawback of this solution is that it does not provide for full reciprocity or the safeguards that exist under EU law with the CJEU as overarching dispute resolution mechanism that applies equally to all.¹⁶⁷

4.2.4. *No Transition Agreement*

At the end of this section, it should be noted that there is the voluntary or forced (in case the two-year time limit has elapsed or the EU and the UK cannot reach an agreement) option for the EU and the UK to proceed without any transition agreement or transition arrangements in place. This would mean that from the day of withdrawal the UK loses its access to the Single Market and the related free movement of goods, services, capital, and people. From that moment trade will be done based on the WTO rules until the moment a new agreement will be agreed upon and enters into force.

4.3. **Sub-conclusion**

Although the EU and the UK have both mentioned the possibility to agree on transition arrangements, at this moment there are too many uncertainties to set out the whole procedure for realizing such agreement. It is unclear whether transition arrangements will be concluded based on Article 50 TEU or on the regular EU procedures for concluding international agreements.

It has been suggested that the transition arrangements should be included within the withdrawal agreement. This will prevent a cliff-edge Brexit since the withdrawal agreement would enter into force on the day of withdrawal and the included transition arrangements would function as a safety net to keep Brexit from disrupting the economy and the lives of EU and UK citizens. However, it is uncertain whether this is legally possible since Article 50 TEU does not make any reference to transition measures. Furthermore, including transition arrangements within the withdrawal agreement would most likely mean that ratification by the Member States is necessary since it would be classified as a mixed agreement.

Another option that has been suggested is to lay down the transition arrangements in a separate agreement. Although this is legally speaking a safer option, it also raises several problems. The regular EU procedures are for concluding international agreements with third countries, and until the day of withdrawal the UK is still an EU Member State and not a third country. Furthermore, realizing such agreement is a cumbersome process and it possibly needs ratification by the EU-27. Therefore, it is highly unlikely that such an agreement can be concluded before the UK withdraws from the EU.

¹⁶⁷ Ibid.

Other options that have been suggested are creating a second-tier EU membership, temporary EEA membership, and a parallel sources agreement. These options are theoretically possible but in practice they are not likely to happen since there is neither the political will nor time for such cumbersome constructions.

5. THE FUTURE RELATIONSHIP AGREEMENT

This fifth Section will focus on the process of the realization of the future relationship agreement. This process differs slightly from the process of realizing the withdrawal agreement analysed in Section 3. Although Article 50 TEU has been the red line throughout the earlier chapters, the relevant Articles for negotiating and concluding the future relationship agreement are Article 207 TFEU and Article 218 TFEU which can be found in Appendix 1.

First, the legal basis of the future relationship agreement will be analysed. Second, the EU procedure for negotiating and concluding international agreements with third countries will be described. This includes all the different steps that have to be taken.

5.1. The Legal Basis

Article 50 TEU only mentions that an agreement setting out the arrangements for withdrawal should be negotiated which '*takes account of the framework for its future relationship with the Union*'. It does not set out any rules for the negotiations and the concluding of the final agreement. Therefore, the regular procedures for negotiating and concluding international agreements with third countries as set out in the Treaties have to be followed.

The EU manages its trade relations with third countries through its trade policy. Trade policy is an exclusive competence of the EU as Article 3 TFEU states that the CCP is an exclusive EU competence. The scope of the CCP is set out in Article 207 TFEU and stipulates that the CCP is not only limited to trade in goods but also encompasses trade in services, trade-related aspects of intellectual property and foreign direct investment. If the future relationship agreement would only address trade relations and thus falls within the scope of the CCP, the legal basis for the agreement would be Article 207 TFEU. However, if the agreement entails more than just trade relations, other provisions will have to be added. Article 218 TFEU sets out the rules for the negotiation and conclusion of international agreements by the EU. The recent FTA's between the EU and Canada and the EU and Singapore were also negotiated on the basis of Article 218 TFEU and because of their broad scope refer to several specific legal bases. Art. 3(2) TFEU allows the Union to agreements in situations of so-called indirect exclusivity. In its recent Opinion 2/15 on the EU-Singapore Free Trade Agreement (FTA), the CJEU clarified the scope of the CCP as well as the scope of Article 3(2) TFEU in relation to concrete policy areas. In a nutshell, the Opinion shows the broad scope of the Common Commercial Policy,

but also the limits to what the EU can do without the Member States. Thus, agreements including provisions on direct investments and/or investor-state dispute settlement need to be co-signed and ratified by the Member States. In general, the EU may act in the following four cases: *'where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the EU's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.'* This provides the following possibilities for the post-Brexit agreement: an agreement based on Article 207 TEU (and possibly other provisions), an Association Agreement (AA) based on Article 217 TFEU or a special relationship based on the neighbourhood competence under Article 8 TEU.¹⁶⁸

5.2. The Procedure

The following sections will describe the entire process for the realization of the future relationship agreement. This includes all the steps that have to be taken before the agreement can enter into force. There is overlap between some of the steps in the process of realizing the withdrawal agreement and the process of realizing the future relationship agreement, therefore only the main points will be described of the steps that were already mentioned in Section 3. In general, the procedure to conclude agreements is nothing new and can be found in any text book on EU external relations law. We nevertheless include the main steps with a view to our aim of providing a comprehensive overview of all decision-making choices with regard to Brexit.

5.2.1. Step 1: The Commission Submits Recommendations to Council

The process starts with the Commission making recommendations to the Council based on Article 207(3) TFEU and Article 218(3) TFEU. In order to be able to formulate its recommendations, the Commission holds a public consultation and conducts an assessment of the impact of an eventual agreement on the EU and the other country. Furthermore, the Commission carries out a so-called scoping exercise that exists of informal dialogue with the other country to establish the feasibility of the desired agreement. The duration of the scoping exercise varies from a few months to several years.¹⁶⁹ If the Commission finds it appropriate to open the negotiations, it submits its recommendations to the Council and requests formal authorization from the Council to open the negotiations. It should be noted that the Commission could recommend all it wants but that the Council is the actor deciding if any further action will be undertaken. The request of the Commission is also shared with the European Parliament.¹⁷⁰

¹⁶⁸ Kreiling, V., Becker, S., & Wolfstädter, L. M. (2017). *Brexit Negotiation Phases and Scenarios of a Drama in Three Acts*. Berlin: Jacques Delors Institut.

¹⁶⁹ Puccio, 2016, *op.cit.*

¹⁷⁰ Cf. DG Trade. (2013). *Trade negotiations step by step*. Brussels: European Commission.

In the case of Brexit, there is significant overlap between the withdrawal agreement and the future relationship agreement. Therefore, it is likely that the scoping-exercise for the future relationship agreement has already started since there have been several meetings between the Commission and the UK, including the much-discussed meeting between the President of the Commission Juncker and Prime Minister May.¹⁷¹

Finally, the process can go the following ways:

- The Commission submits its recommendations to the Council. The process continues (see 5.2.2.)

5.2.2. Step 2: The Council Authorizes the Opening of the Negotiations

It is then up to the Council to authorize the opening of the negotiations on the basis of Article 207(3) TFEU and Article 218(2) TFEU. In general, the Council discusses the recommendations, adopts negotiating directives and authorises the Commission to open the negotiations (DG Trade, 2013). According to Article 218(8) TFEU and Article 207(4) TFEU, the decision-making mechanism for concluding international agreements is QMV. The rules for QMV are at least 55% of the Member States, representing at least 65% of the total EU population, voting in favour. However, in some cases, unanimity is required. Article 218(8) TFEU states that in the following cases unanimity is the required decision-making mechanism:

- Fields for which unanimity is required for the adoption of a Union act. This means that any measure which requires unanimity for internal matters, also requires unanimity under Article 218 TFEU;
- Association agreements;
- Agreements with states that are candidates for accession as referred to in Article 212 TFEU; and
- Accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Furthermore, Article 207(4) TFEU states that for the negotiation and conclusion of agreements in trade in services, the commercial aspects of intellectual property, and foreign direct investment, the Council has to vote unanimously if the measures within the agreement concern matters for which unanimity voting in the Council would be required if it had to decide on these matters internally. This includes provisions related to tax harmonisation (Article 113 TFEU), restrictions on capital movements (Article 64(2) TFEU), the approximation of laws (Article 115 TFEU) and for regulations establishing language arrangements for Euro-

¹⁷¹ Revesz, R. (2017, May 1). *Theresa May's disastrous Brexit meeting with European Commission President Jean-Claude Juncker laid bare*. Retrieved May 1, 2017, from Independent: <http://www.independent.co.uk/news/world/europe/theresa-may-jean-claude-juncker-angela-merkel-meeting-brexit-negotiations-speech-eu-summit-a7711206.html>.

pean intellectual property rights (Article 118 TFEU). This also accounts for the following measures:

- Trade in cultural and audiovisual services, where the agreement risks prejudicing the Union's cultural and linguistic diversity; and
- Trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

In case the agreement includes any elements that require unanimity, the Council will have to use unanimity as the decision-making mechanism for the entire agreement.¹⁷²

Thus, the decision-making mechanism depends on the scope of the agreement. However, it is likely that a detailed and complex agreement such as the future relationship agreement between the EU and the UK will require unanimity.

Finally, the process can go the following ways:

- The Council adopts negotiating directives and authorizes the opening of the negotiations by QMV. The process continues (see 5.2.3.);
- The Council adopts negotiating directives and authorized the opening of the negotiations by unanimity. This means that unanimity will be used as the decision-making mechanism in the Council for the entire agreement. The process continues (see 5.2.3.); or
- The Council does not authorize the opening of the negotiations. The process ends.

5.2.3. Step 3: The Negotiations

Next, the Commission starts the negotiations and has to negotiate the agreement within the framework of the earlier adopted negotiating directives. During the negotiations, the Commission must work closely together with a Trade Policy Committee, which is appointed by the Council. According to the Commission, the average duration of negotiating an agreement is two to three years.¹⁷³

The role of the European Parliament is still limited at this stage of the procedure. They do not have any formal role but they have the right to be kept fully informed during all stages of the procedure. Furthermore, the European Parliament can publish recommendations in the form of a resolution, which has to be taken into account before an agreement has been reached.¹⁷⁴

Once there is an agreement, the process of legal scrubbing starts followed by the initialising and translating. The agreement can have different forms including an FTA and an AA. Section 6 will elaborate on the different possibilities for the post-Brexit relationship between the EU and the UK.

¹⁷² Puccio, 2016, *op.cit.*

¹⁷³ *Ibid.*

¹⁷⁴ See ClientEarth, 2016, *op.cit.*

Finally, the process can go the following ways:

- An agreement has been reached. The Process continues (see 5.2.4.); or
- An agreement has not been reached. The process ends.

5.2.4. *Step 4: The Council Authorizes the Signing of the Agreement and Provisional Application*

This step is similar to the step explained in Section 3.4, therefore this Section will only describe the points that are relevant in the current context.

After the proposal of the Commission to authorize the signing of the agreement, the Council shall adopt a decision based on Article 218(5) TFEU. The same decision-making mechanism as used in Step 1 will be used, thus either QMV or unanimity.

The Council can decide to amend the legal basis of the proposed agreement. This means changing an EU-only agreement into a mixed agreement. This can only be done by unanimity.

Furthermore, on the basis of Article 218(5), the Council can decide, if necessary, to provisionally apply the agreement before its entry into force. Provisional application is usually decided simultaneously with the decision on the authorization of the signing of the agreement. This means that it is done either by QMV or unanimity. Provisional application is not a straight forward process since it is often unclear which provisions fall under the competences of the EU and which under the Member States.¹⁷⁵

Finally, the process can go the following ways:

- The Council authorizes the signing of the agreement. The process continues (see 5.2.5.);
- The Council authorizes the signing of the agreement and provisionally applies the agreement. The process continues (see 5.2.5.); or
- The Council does not authorize the signing of the agreement. The negotiations can be reopened or the process ends.

5.2.5. *Step 5: The European Parliament Gives Consent*

According to Article 218(6) TFEU, the European Parliament has to give its consent in the following cases:

- Association agreements;
- Agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- Agreements establishing a specific institutional framework by organising cooperation procedures;
- Agreements with important budgetary implications for the Union; and

¹⁷⁵ Van der Loo & Wessel, 2017, *op.cit.*

- Agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

In practice, this means that for the future relationship agreement the consent of the European Parliament is required.

The decision-making mechanism in the European Parliament is simple majority voting. Thus, consent is achieved once at least one third of the MEPs cast a vote of which a majority is in favour of the agreement. The vote is either yes or no, and changes cannot be made at this stage of the process.

The Treaties do not state what happens if the European Parliament does not give it consent but it is clear that the agreement cannot be concluded without the consent of the European Parliament. In practice, several agreements have failed because the European Parliament refused to give its consent. However, in some cases, the refusal of giving consent has led to the reopening of the negotiations whereby the amended agreement was granted the consent of the European Parliament.¹⁷⁶

Finally, the process can go the following ways:

- The European Parliament gives its consent. The process continues (see Section 5.2.6.); or
- The European Parliament does not give its consent. The negotiations can be reopened or the process ends.

5.2.6. *Optional Step: The EU-27 Ratify the Agreement*

This step is similar to the step explained in Section 3.6, therefore this Section will only describe the main points.

In the case of a mixed agreement ratification by the 27 EU Member States is required. This seems likely for an extensive agreement as the future relationship agreement between the EU and the UK. This means that 34 national and regional parliaments have to ratify the agreement. Table 2 shows the national procedures for ratification. As indicated above, earlier experiences with the CETA agreement and the EU-Ukraine AA have shown that this can significantly delay the process.

Finally, the process can go the following ways:

- The EU-27 ratify the withdrawal agreement. The process continues (see Section 5.2.7.); or
- The EU-27 do not ratify the withdrawal agreement. A solution can be found, as happened after the Netherlands refused to ratify the EU-Ukraine AA, or the process ends and the agreement cannot enter into force.

¹⁷⁶ European Parliament. (2010, February 11). *SWIFT: European Parliament votes down agreement with the US*. Retrieved May 1, 2017, from European Parliament: <http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20100209IPR68674>.

5.2.7. *Step 6: UK Approves and Ratifies Agreement*

This step is similar to the step explained in Section 3.7. Therefore this Section will only describe specific points.

There are two moments of approval for the UK Parliament. First, according to the normal procedures as set out in CRAG, international treaties must be laid down before the UK Parliament. This offers an opportunity for the House of Commons to block the ratification of the agreement. The House of Lords cannot do this since they can be overruled by the government. Second, the UK government has promised that there will be a vote in the form of a motion before the UK Parliament concerning both the withdrawal agreement and the future relationship agreement. Thus, the House of Commons has two moments to raise objections against the agreement.

Finally, the process can go the following ways:

- The UK Parliament approves the withdrawal agreement and the UK government ratifies the withdrawal agreement. It should be taken into account that there can be two moments of approval. Namely, the normal procedure as laid down in CRAG and the vote promised by the UK government which entails both the withdrawal agreement and the future relationship agreement. The process continues (see Section 5.2.8.);
- The UK Parliament does not approve the withdrawal agreement. Then, the UK government can lay a statement before the UK Parliament with the reasons for ratification which means the process of giving approval starts again. This can be repeated indefinitely. Since one vote entails both the withdrawal agreement and the future relationship agreement it should be taken into account that the UK government can also decide to go back to the negotiation table or call a snap election in order to gain more support in parliament; or
- The UK Parliament does not approve the withdrawal agreement. The process ends.

5.2.8. *Step 7: The Council Concludes the Agreement*

Finally, after obtaining the consent of the European Parliament, and in the case of a mixed agreement after ratification by the EU-27, the Council will conclude the agreement based on a proposal by the Commission as stated in Article 218(6) TFEU. The decision-making mechanism for concluding the agreement is QMV but in case the earlier decisions were taken by unanimity, this decision also has to be taken by unanimity.

Finally, the process can go the following ways:

- The Council concludes the agreement. The future relationship agreement enters into force; or
- The Council does not conclude the agreement. The negotiations can be reopened or the process ends.

5.2.9. *Optional Step: Role of the CJEU*

This step is similar to the step explained in Section 3.10, therefore this Section will only describe the specific points.

There are several ways to allow the CJEU to interfere in the process of concluding the future relationship agreement. The first way is via challenging the legality of the Council decision to conclude the foreseen withdrawal agreement (Section 5.2.8.) through an action for annulment based on Article 263 TFEU. The second way is that, based on Article 218(11) TFEU, a Member State, the Council, the Commission or the Parliament requests the CJEU to give an opinion on whether the finished withdrawal agreement and all its provisions are compatible with the EU Treaties.

Finally, the process can go the following ways:

- The Council decision to conclude the withdrawal agreement (see Section 3.8.) is annulled;
- According to the CJEU, the withdrawal agreement in its entirety is or certain provisions of which are incompatible with the Treaties. The withdrawal agreement cannot enter into force.

5.3. **Accession to the EFTA and EEA**

The UK can also seek to join the EFTA or both the EFTA and the EEA. These options, the so-called Swiss and Norway models, respectively, are frequently mentioned as templates for the future relationship between the EU and the UK. These models will be described in Section 6, but first the procedures for accession to the EFTA and EEA will be described since they differ from the process described in the previous Sections.

5.3.1. *EFTA Accession*

The procedure for joining the EFTA is set out in Article 56 of the EFTA Convention. The Article will be fully quoted for the understanding of the rest of the Section.

Article 56 of the EFTA Convention:

1. Any State may accede to this Convention, provided that the Council decides to approve its accession, on such terms and conditions as may be set out in that decision. The instrument of accession shall be deposited with the Depositary, which shall notify all other Member States. This Convention shall enter into force in relation to an acceding State on the date indicated in that decision.

2. The Council may negotiate an agreement between the Member States and any other State, union of States or international organisation, creating an association embodying such reciprocal rights and obligations, common actions and special procedures as may be appropriate. Such an agreement shall be submitted to the Member States for acceptance and shall enter into force provided that it is accepted by

all Member States. Instruments of acceptance shall be deposited with the Depositary, which shall notify all other Member States.

3. Any State acceding to this Convention shall apply to become a party to the free trade agreements between the Member States on the one hand and third states, unions of states or international organisations on the other.

The text of Article 56 of the EFTA Convention does not specify a fixed procedure for accession. Furthermore, only two specific criteria can be distinguished. First, the joining party has to be a state. Second, the joining party has to apply to become part of the FTAs the EFTA has concluded. Recently it has been questioned whether this also accounts for the EEA Agreement, as this can also be seen as an FTA.¹⁷⁷ Besides the fact that Switzerland is an EFTA Member State but not part of the EEA Agreement, the wording of Article 128(1) of the EEA Agreement makes it a choice rather than an obligation for EFTA Member States to join the EEA Agreement. Thus, in practice, this would mean that any acceding state has to apply to be a part of 27 FTAs covering 38 countries.¹⁷⁸ From the wording of Article 56(3) of the EEA Convention, it appears that an acceding state only has to 'apply' to become a party, it does not mention anything about the outcome being a condition for accession (Gstohl, 2016).

Therefore, it seems that accession to the EFTA largely depends on the conditions and terms set by the EFTA Member States. Even if the UK were to submit an application and fulfil all the conditions and terms it is questionable whether they would be accepted since the EFTA does not pursue an active enlargement policy and unanimity is required in case of enlargement. This means that Norway, Switzerland, Iceland, and Liechtenstein can veto accession. So far, the comments from the EFTA Member States on the potential accession of the UK have been mixed in tone. The Icelandic Foreign Minister has said that Iceland would welcome the UK into the EFTA (Warnes, 2016), while the Swiss President has stated that Switzerland is open to discussing the issue (Bradley, 2016). Several Norwegian ministers have stated that the accession of the UK is not in their interest since it will shift the balance in the organisation as the UK has 65 million citizens while the entire EFTA only has 14 million citizens (Wintour, 2016).

5.3.2. EEA Membership Through the EFTA

Once the UK leaves the EU it is most likely automatically out of the EEA since only EU and EFTA Member States can be part of the EEA (Wessel, 2017). If the withdrawal of the UK coincides with its accession to the EFTA it is unclear whether the UK can keep its EEA membership or whether it has to re-join.¹⁷⁹

¹⁷⁷ Wright, E., Brasted, C., Buxton, P., & Bright, S. (2017). *The UK and the EEA after Brexit*. London: Hogan Lovells.

¹⁷⁸ Cf. Hillion, *op.cit.*

¹⁷⁹ The European Union Committee. (2016). *Brexit: the options for trade*. London: House of Lords.

In case it seeks to re-join the EEA as an EFTA member it is subject to Article 128 of the EEA Agreement.

Article 128 of the EEA Agreement:

1. Any European State becoming a member of the Community shall, and the Swiss Confederation or 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.

2. The terms and conditions for such participation shall be the subject of an agreement between the Contracting Parties and the applicant State. That agreement shall be submitted for ratification or approval by all Contracting Parties in accordance with their own procedures.

According to Article 128(2) of the EEA Agreement to become a part of the EEA Agreement the contracting parties and the applicant state must conclude an agreement with the terms and conditions for participation. This means that the EU, its Member States, and the EFTA Member States have to give their approval. Furthermore, it states that the ratification or approval should be in accordance with the own procedures of the parties. For the EU Members this means that national and regional parliaments have to approve the deal and that referenda can take place. Moreover, the approval of the EU most likely requires the consent of the European Parliament.¹⁸⁰

5.4. Sub-conclusion

This Section has described all the procedural steps for the realization of the future relationship agreement. Although some of the steps are similar to the process described in Section 3, there are slight differences and the future relationship agreement is not subject to a time limit as is the case with the withdrawal agreement.

While Article 218 and 207 TFEU will most like provide the general legal base of the future relationship agreement, other provisions may be needed to cover different policy areas. The procedure starts by the Commission submitting its recommendations to the Council. Next, the Council authorizes the opening of the negotiations, either by QMV or unanimity. For an extensive agreement such as the post-Brexit future relationship it seems likely that unanimity is the required decision-making mechanism. Then the Commission negotiates on behalf of the EU, and once the two parties reach an agreement the Council decides on the authorization of the signing of the agreement and eventual provisional application. It is then up to the European Parliament to give its consent. It seems inevitable that the agreement will be a mixed agreement (unless it stays within

¹⁸⁰ Booth, S. (2016, August 4). *As the UK searches for a post-Brexit plan, is the EEA a viable option?* Retrieved May 1, 2017, from Open Europe: <http://openeurope.org.uk/intelligence/britain-and-the-eu/as-the-uk-searches-for-a-post-brexit-plan-is-the-eea-a-viable-option/>.

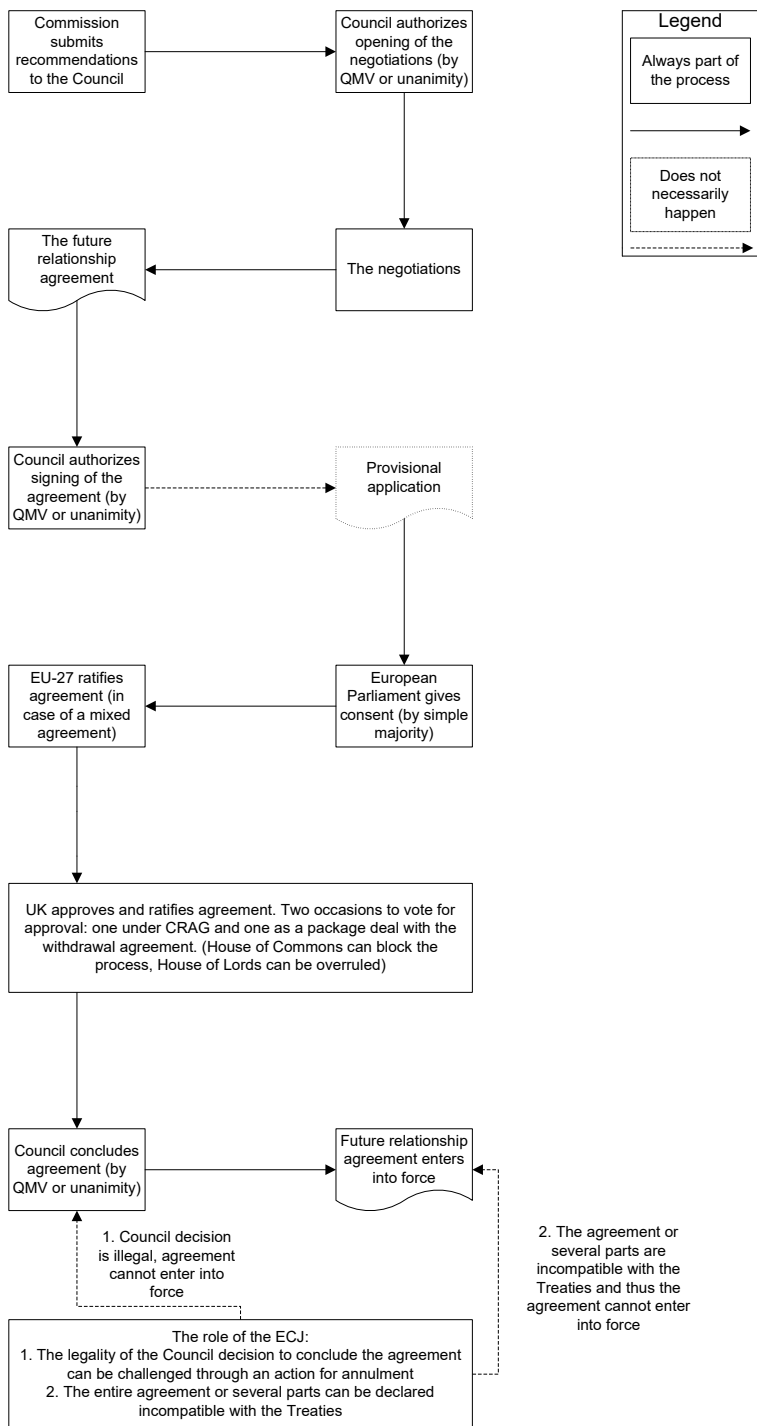


Figure 2: The process for the realization of the future relationship agreement

the limits defined by recent Opinion 2/15 of the Court), this means that the agreement requires ratification by the EU and the 27 Member States. Furthermore, the UK Parliament has to approve the deal, followed by ratification by the UK government. Finally, the Council can conclude the agreement and the agreement enters into force. An overview of all the steps is shown the process scheme in Figure 2.

In addition, the EFTA and the EEA have their own procedures related to the accession of new member states. The process for joining the EFTA depends largely on the conditions and terms set by the member states since the EFTA Convention does not specify a fixed procedure. Therefore, the UK will be subject to the demands of the EFTA member states.

In case the UK manages to join the EFTA and wants to become a part of the EEA Agreement it has to reach an agreement on the conditions for participation with all the contracting parties. In practice, this means that the EU-27 and the EFTA Member States have to give their approval and ratify the agreement.

6. TEMPLATES FOR THE FUTURE RELATIONSHIP AGREEMENT

Section 5 has described the entire process for negotiating and concluding the future relationship agreement. This Section will focus on the possible forms the agreement can have. In the past, the EU has negotiated three main types of agreement:

- Customs Unions;
- Association Agreements, Stabilisation Agreements, (Deep and Comprehensive) Free Trade Agreements and Economic Partnership Agreements; and
- Partnership and Cooperation Agreements.¹⁸¹

This Section will examine these different agreements the EU has concluded with third countries by looking at a specific country that has such an agreement with the EU. These include the Norway model, Turkey model, Swiss model and Ukraine model. Furthermore, a newly devised model called continental partnership will be described. The suitability of these models for the new relationship between the EU and the UK will be determined by analysing the criteria mentioned in Section 1.3.2. The following criteria are included:

- Free movement of goods;
- Free movement of services;
- Free movement of capital;
- Free movement of people;
- Financial contribution to the EU;
- Subject to EU legislation;
- Influence on EU decision-making;
- Ability to strike trade deals with non-EU markets;

¹⁸¹ Cf. also European Commission. (2017, March 31). *Agreements*. Retrieved May 1, 2017, from European Commission: <http://ec.europa.eu/trade/policy/countries-and-regions/agreements/>.

- Cooperation in the area of JHA; and
- Cooperation in the area of CSDP.

6.1. EFTA + EEA Membership / The Norway Model

The EFTA was established in 1960 with the goal of accommodating a framework for the liberalisation of trade in goods among its seven Member States. This framework has widened over the years and now includes trade in services, capital and government procurement. Over time several countries have joined the EFTA or have left the EFTA and joined the EU. Today, the EFTA has four Member States: Iceland, Liechtenstein, Norway, and Switzerland. Three of the four members are part of the EEA Agreement. The EEA was founded in 1992 and provides Single Market access for the three EFTA Member States.¹⁸² Being part of the EEA Agreement also comes with obligations such as incorporating EU legislation and contributing to the EU budget. EFTA Member States are not obliged to take part in the EEA but only EFTA and EU members can be part of the EEA. Norway takes part in the EEA as a member of the EFTA, the remainder of the Section will analyse the case of Norway.

Norway has almost complete access to the Single Market and its four freedoms of the free movement of goods, services, capital, and people. However, the agreement does not cover agriculture and fishery, this means that the access to the Single Market in these areas is limited. This is a disadvantage for the UK since it exports 64% of its fish and 73% of its vegetables to the EU.¹⁸³ Furthermore, the EEA Agreement does not establish a customs union between Norway and EU. Therefore, all trade in goods between Norway and the EU is subject to customs checks and procedures, and to rules of origin. The EU applies a common external tariff so for goods entering from outside the EU, this tariff has to be paid and then the goods can move freely within the EU. Due to the fact that the EFTA countries do not apply the same common external tariff as the EU, this arrangement is different under the EEA Agreement. Although most goods may be traded without tariffs in the EEA, in order to obtain this preferential treatment, the goods must originate in the EEA. Therefore, within the EEA Agreement rules of origin are laid down, these rules determine to what extent goods must be produced in the EEA to qualify as a product of EEA origin. For the UK, this option would mean custom checks at the border between Ireland and Northern Ireland. Furthermore, Norway is bound by the principle of free movement of people, and therefore this model would not offer a solution to the migration concerns of the UK.

As a contracting party to the EEA Agreement Norway has to apply the relevant EU legislation, adopt changes to the legislation and comply with the rules related to areas as competition, state aid, and intellectual property. Approximate-

¹⁸² Cf. also EFTA. (2016). *The European Free Trade Association*. Retrieved June 1, 2017, from EFTA: <http://www.efta.int/about-efta/european-free-trade-association>.

¹⁸³ HM Government. (2016a). *Alternatives to membership: possible models for the United Kingdom outside the European Union*. London: HM Government.

ly 11,500 EU acts have been integrated into the EEA agreement.¹⁸⁴ A study has shown that around 75% of EU legislation has been incorporated into the domestic legislation of Norway.¹⁸⁵ This does not only include legislation that is directly related to the Single Market but also in such areas as social policy, consumer protection, and environmental standards. Contrary to the situation within the EU, the financial services legislation does not automatically apply in the EEA. Instead, it must be incorporated, and this is a lengthy process. The work of the European Supervisory Authorities is currently not covered by the EEA Agreement. This is a major drawback for the UK and its booming financial services sector since this may leave the financial services sector isolated.¹⁸⁶

EFTA Member States that are part of the EEA have to accept the powers of the EFTA Surveillance Authority, which monitors compliance with the EEA agreement, as well as the jurisdiction of the EFTA Court, which deals with violations of the EEA agreement. Although the EFTA Court is a different court than the CJEU, in practice it often follows the principles of the CJEU rulings.¹⁸⁷

Furthermore, the EFTA Member States that take part in the EEA have to comply with a significant amount of EU legislation but only have limited influence on the EU decision-making process. There is no representation of the EFTA states within the European Council, the Council, the Commission, the European Parliament or the CJEU. However, Norway has some rights related to the consultation over new EU laws and it has some members within several Council working groups.¹⁸⁸ Finally, some input can be given during the preparatory phase when the Commission is drawing up proposals for new legislation that is to be integrated into the EEA Agreement.¹⁸⁹

Although the influence on the decision-making process is limited, EEA members still have to contribute to the EU budget. According to a House of Commons report, Norway pays only 17% less than the UK does.¹⁹⁰ EEA members contribute to the EU regional policy, which uses the money for the development of economically weaker regions within the EU, and to the EU programmes they participate in such as Erasmus, Copernicus, and Galileo.¹⁹¹

The EFTA Member States have the right to solely negotiate trade agreements with third countries. However, in most cases, they negotiate as a group. Under the EFTA framework 27 trade agreements have been concluded.¹⁹²

¹⁸⁴ Tell Cremades & Novak, 2017, *op.cit.*

¹⁸⁵ EEA Review Committee. (2012). *Outside and Inside Norway's agreements with the European Union*. Oslo: Norwegian Government.

¹⁸⁶ Slaughter & May, 2016, *op.cit.*

¹⁸⁷ Piris, 2016, *op.cit.*

¹⁸⁸ See the UK report *Alternatives to membership: possible models for the United Kingdom outside the European Union*, *op.cit.*

¹⁸⁹ Ministry of Foreign Affairs Norway. (2017, February 13). *Norway and the EU single market*. Retrieved April 20, 2017, from Government.no: <https://www.regjeringen.no/en/aktuelt/single-market/id2507626/>.

¹⁹⁰ Thompson, G., & Harari, D. (2013). *The economic impact of EU membership on the UK*. London: House of Commons Library.

¹⁹¹ Tell Cremades & Novak, 2017, *op.cit.*

¹⁹² See EFTA. (2017). *Free Trade Agreements*. Retrieved May 1, 2017, from EFTA: <http://www.efta.int/free-trade/free-trade-agreements>.

The EEA Agreement does not entail cooperation in JHA and the CSDP. However, EFTA Member States are part of the Schengen area. Further cooperation can be reached through separate agreements. Norway has agreements with the EU about engagement within Europol and Eurojust. Furthermore, there are agreements about the participation in several parts of the Prüm Decisions to share police data, and about the membership of the Lugano Convention on civil law.¹⁹³ Furthermore, Norway has signed a Framework Participation Agreement and participates regularly in CSDP missions.¹⁹⁴

6.2. EFTA + Bilateral Agreements / The Swiss Model

A variation on the Norway model is the Swiss model. Switzerland is a member of the EFTA but rejected accession to the EEA in 1992 by a referendum. As a consequence, Switzerland originally did not have access to the Single Market. In 1972, the first FTA came into force, removing quantitative restrictions and measures on several goods. Over time more than 100 bilateral agreements in different sectors were concluded.¹⁹⁵

Switzerland has limited access to the Single Market. It has access to a significant degree of the trade in goods but agriculture is not covered by the agreements. Therefore, some agricultural products are subject to tariffs. Furthermore, Switzerland is outside the EU's Customs Union; this means that the trade in goods is subject to customs checks and procedures, and the rules of origin.¹⁹⁶ The access to the trade in services is limited since the agreements only cover a few sectors including some types of insurance and public procurement. For some services including accountancy, legal services and auditing relevant individuals including self-employed professionals are only allowed to export services to the EU for 90 days a year. Furthermore, the financial services sector is not included in any of the agreements and Switzerland is not part of the passporting system. Therefore, Swiss banks that want to operate in EU countries have to open a subsidiary in an EU or EEA country, in order to get the required financial services passporting rights.¹⁹⁷ This would be a disadvantage for the UK. Switzerland is subject to the free movement of people but in 2014 the Swiss electorate voted in favour of imposing migration quotas. As a result, the Swiss federal council was not allowed to sign an earlier negotiated free movement accord with Croatia. This led to a conflict between Switzerland and the Commission. As a response, the EU decided to cut the funding of several research and educational programmes and suspended negotiations about further access

¹⁹³ See the UK report *Alternatives to membership: possible models for the United Kingdom outside the European Union*, *op.cit.*

¹⁹⁴ Tardy, T. (2014). *CSDP: getting third states on board*. Paris: European Union Institute for Security Studies.

¹⁹⁵ European Commission. (2017b, February 22). *Countries and regions: Switzerland*. Retrieved April 20, 2017, from European Commission: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/switzerland/>.

¹⁹⁶ Bowers et al., 2016, *op.cit.*

¹⁹⁷ See the UK report *Alternatives to membership: possible models for the United Kingdom outside the European Union*, *op.cit.*

to the Single Market.¹⁹⁸ The conflict was settled after the treaty to extend the free movement of people to Croatia was signed in 2016. However, the EU has warned Switzerland several times of the consequences of losing access to the Single Market when the principle of free movement of people is to be restricted.¹⁹⁹ Recently, Switzerland decided to limit the number of immigrant workers from Romania and Bulgaria.²⁰⁰ Although this is allowed under the terms of the Swiss-EU bilateral agreement, it does not do any good to the relation between Switzerland and the EU.

Contrary to Norway, Switzerland does not have the obligation to make sure that domestic law complies with any relevant EU legislation. However, in practice, Switzerland mostly chooses to comply with EU legislation since the EU can punish Switzerland for non-compliance by blocking their access to the relevant parts of the Single Market. Therefore, Switzerland has incorporated several EU rules including rules on competition, state aid, and environmental regulations. In some areas such as civil aviation Switzerland is bound by the rulings of the CJEU, while in others it is not. However, the EU wants to change this situation and wants to negotiate a new institutional agreement that would make Switzerland subject to CJEU jurisdiction in all the relevant areas.²⁰¹

Switzerland has a very limited influence on the EU decision-making process since it has no representation in the EU institutions and it does not have the right to consultation on laws drafted by the Commission.²⁰²

Switzerland contributes to the EU budget. First, they contribute to the EU regional policy and second, to the programmes they participate in, these include satellite navigation, research and education. If the UK were to adopt the Swiss model it would contribute 59% less than it did as an EU member.²⁰³

Switzerland has the right to conclude its own trade deals with third countries. However, in practice they often conclude trade agreements under the EFTA framework.²⁰⁴

Cooperation in JHA and the CSDP is managed via separate agreements. Switzerland has arrangements with the EU on border and police cooperation. Furthermore, it is part of Schengen and takes part in the arrangement related to asylum seekers under the Dublin Regulation. Switzerland does not take part in the European Arrest Warrant (EAW) but engages with Europol. In the past Switzerland has participated in several civilian and military missions under the

¹⁹⁸ Ibid.

¹⁹⁹ Tell Cremades & Novak, 2017, *op.cit.*

²⁰⁰ Swissinfo. (2017, May 10). *Swiss limit immigration from Bulgaria/Romania*. Retrieved May 12, 2017, from Swissinfo: https://www.swissinfo.ch/eng/quota-control_swiss-limit-immigration-from-bulgaria-romania/43171632.

²⁰¹ UK report *Alternatives to membership: possible models for the United Kingdom outside the European Union*, *op.cit.*

²⁰² Ibid.

²⁰³ Thompson & Harari, 2013, *op.cit.*

²⁰⁴ EFTA. (2017). *Free Trade Agreements*. Retrieved May 1, 2017, from EFTA: <http://www.efta.int/free-trade/free-trade-agreements>.

CSDP. Furthermore, Switzerland sets its own foreign policy but often sides with the position of the EU.²⁰⁵

Finally, it should be noted that the EU is dissatisfied with its current relationship with Switzerland. According to the Commission, Switzerland does not transpose EU legislation in time, which causes problems.²⁰⁶ Piris even stated that *'the current Swiss model is broken and will never be accepted again by the EU.'*²⁰⁷ Finally, the Brexit guidelines of the European Council explicitly rule out the possibility of concluding sectoral agreements.²⁰⁸ Therefore, it is not likely that the UK can adopt the Swiss model in its current form.

6.3. Customs Union / The Turkey Model

Turkey has been a candidate for EU membership since 1999. In 1963, far before the candidacy, an AA based on trade and economic cooperation was concluded. Over time further cooperation was desired, and this led to the establishment of the customs union between Turkey and the EU in 1995 (HM Government, 2016a). As recently shown by Ott, EU-Turkey bilateral relations are characterised as *'a three-layered structure'*: the association relationship based on a customs union, the accession process (partly frozen since December 2006), and new compartmentalised cooperation in areas such as migration, aviation and energy cooperation.²⁰⁹ Nowadays the customs agreement is considered to be outdated and Turkey has pushed several times for an upgrade. However, due to recent events that have taken place in Turkey, and as a consequence, due to the tense relationship between the EU and Turkey, this does not seem likely to happen in the short term.

The agreement gives Turkey partial access to the Single Market. Industrial goods and processed agricultural goods are included but raw agricultural goods are excluded. Goods covered by the agreement are not subject to customs checks.²¹⁰ This would be an advantage for the UK since it would avoid customs checks between Ireland and Northern Ireland. The free movement of services and capital are not included in the agreement, and this would be a significant disadvantage for the UK. Furthermore, the free movement of people is restricted to limited migration rights for Turkish nationals to reside in the EU.²¹¹ Turkey aligns with the EU's common external tariff, this means that Turkish exporters are not subject to the rules of origin and the related administrative burden.²¹²

²⁰⁵ Cf. the UK report *Alternatives to membership: possible models for the United Kingdom outside the European Union*, *op.cit.*

²⁰⁶ Cited by Piris, *op.cit.*

²⁰⁷ *Ibid.*

²⁰⁸ See the European Council Guidelines, *op.cit.*

²⁰⁹ A. Ott, 'EU-Turkey Cooperation in Migration Matters: A Game Changer in a Multi-layered Relationship?', *CLEER Paper*, 2017/4.

²¹⁰ Tell Cremades & Novak, 2017, *op.cit.*

²¹¹ See the UK report *Alternatives to membership: possible models for the United Kingdom outside the European Union*, *op.cit.*

²¹² Tell Cremades & Novak, 2017, *op.cit.*

Turkey has to enforce certain EU rules, and this includes rules related to technical regulation of products, environment, competition, intellectual property law and state aid. This also means that Turkey has to comply with decisions of the CJEU in these areas.²¹³

Turkey does not have any representation within the EU and does not contribute to the EU budget.²¹⁴

Turkey can conclude trade agreements with third countries but its external tariffs must be aligned with the tariffs of the EU. This limits Turkey in its ability to conclude trade deals. Furthermore, Turkey does not benefit from trade agreements concluded between the EU and third countries but has to open its market for the countries that have agreements with the EU. Recently Turkey sought participation in the negotiations between the EU and the US over the Transatlantic Trade and Investment Partnership; however, this was denied.²¹⁵

The cooperation between Turkey and the EU in the area of JHA is very limited. It does not fully participate in schemes such as Europol. However, liaison agreements give Turkey the benefit of a network of liaison offices and access to European expertise.²¹⁶ Turkey may participate in CSDP missions if it chooses to do so. In the past, Turkey has sent personnel to EU military and civilian missions.²¹⁷

6.4. FTA / The Canada Model

Some of the newer FTAs, which are being negotiated or were recently concluded, aim for increased market access and regulatory convergence. One of these comprehensive trade agreements is CETA, an FTA between the EU and Canada, which took seven years to negotiate.

CETA has opened up access to the Single Market for goods and services and to a lesser extent for people and capital. The agreement phases out the tariffs on 98% of all goods and addresses several other discriminatory measures such as subsidies and quotas.²¹⁸ However, on some sensitive agricultural and fishery products tariffs and quotas will remain. Furthermore, the agreement removes only for a minority of the products the differences in standards and regulations. An example is the trade in cars: Canadian cars which comply with Canadian standards may not be sold in the EU.²¹⁹ Therefore, technical barriers still hinder the trade of many goods. The access to the trade in services is limited to a few sectors, the audio-visual sector and the majority of air-transport are not included. Furthermore, the financial services sector is not included in

²¹³ See the UK report *Alternatives to membership: possible models for the United Kingdom outside the European Union*, *op.cit.*

²¹⁴ *Ibid.*

²¹⁵ Emerson, M. (2016). *Which model for Brexit?* Brussels: Centre for European Policy Studies.

²¹⁶ Shepherd and Wedderburn LLP. (2016). *Brexit The Turkish Model*. London: Shepherd and Wedderburn LLP.

²¹⁷ *Ibid.*

²¹⁸ Tell Cremades & Novak, 2017, *op.cit.*

²¹⁹ Piris, 2016.

the agreement. This means that Canadian companies have to establish a subsidiary in the EU in order to be able to sell their financial services (HM Government, 2016a). Moreover, all goods are subject to the rules of origin. Within the CETA Agreement provisions related to the free movement of people are very limited and are mainly focussed on businesspeople. These include the temporary movement of skilled professionals and a framework for the recognition of qualifications.²²⁰ Furthermore, some provisions on the equal treatment of investors and on investment protection have been laid down in CETA.²²¹

Besides compliance with EU rules and standards when exporting goods to the EU, Canada does not have to incorporate any EU legislation within its domestic legislation and is not bound by the jurisdiction of the CJEU. In most FTAs, dispute settlement mechanisms have been set up. Under CETA, the EU and Canada have set up an Investment Court System that decides on investments disputes.²²²

Canada does not have any representation within the EU,²²³ it does not contribute to the EU budget and it can conclude its own trade deals.²²⁴

FTAs do not usually extend beyond economic cooperation. Judicial and police cooperation can be managed within separate agreements. The cooperation between Canada and the EU within these areas is growing. This includes cooperation within Europol.²²⁵ The same can be said for the engagement in CSDP. Canada is free to negotiate about participation. Canada is a regular contributor to CSDP missions such as EU Police Missions in Afghanistan (EUPOL Afghanistan) and in the Palestinian Territories (EUPOL COPPS).

6.5. AA / The Ukraine Model

The new AAs that entered into force in 2016 with Moldova, Georgia, and Ukraine go beyond economic cooperation and are also focused on political cooperation. At the core of these AAs is a Deep and Comprehensive Free Trade Agreement (DCFTA) that covers a significant amount of major EU policies and compe-

²²⁰ Kassam, A. (2016, August 15). *Canada's trade deal with EU a model for Brexit? Not quite, insiders say*. Retrieved April 20, 2017, from The Guardian: <https://www.theguardian.com/world/2016/aug/15/brexit-canada-trade-deal-eu-model-next-steps>; as well as the UK report *Alternatives to membership: possible models for the United Kingdom outside the European Union*, op.cit.

²²¹ Wyatt, D. (2016, July 26). *Can the UK retain access to the single market without allowing free movement of workers? Let's rephrase the question*. Retrieved April 20, 2017, from Brexit Law: <https://brexit.law/2016/07/26/can-the-uk-retain-access-to-the-single-market-without-allowing-free-movement-of-workers-lets-rephrase-the-question/>.

²²² European Commission. (2016a, December 13). *A future multilateral investment court*. Retrieved April 20, 2017, from European Commission: http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm.

²²³ Cf. the UK report *Alternatives to membership: possible models for the United Kingdom outside the European Union*, op.cit.

²²⁴ The European Union Committee. (2016). *Brexit: the options for trade*. London: House of Lords.

²²⁵ Government of Canada. (2013, October 3). *Justice & Home Affairs*. Retrieved April 20, 2017, from Government of Canada: <http://www.canadainternational.gc.ca/eu-ue/policies-politiques/justice.aspx?lang=eng>.

tences. Besides trade, this agreement offers opportunities for cooperation in several areas, including foreign and security policy and combating international organized crime. The example of Ukraine will be discussed below.

The agreement with Ukraine offers a high degree of access to the Single Market. The free movement of goods, services, and capital is partly included but the free movement of people is excluded. Furthermore, arrangements about custom checks and zero tariffs have been made within the agreement. Although Ukraine does not have access to the entire Single Market, if Ukraine complies with the relevant EU regulations its access to numerous sectors including the financial services sector (including passporting) will be increased. For the UK it would be relatively easy to gain access to these sectors since the UK already complies with the EU regulations.²²⁶

The agreement provides for provisions on technical standards, product regulations, competition, intellectual property, environment, social policy, consumer protection and state aid but does not require the application of EU law or compliance with the case law of the CJEU.²²⁷ A dispute settlement mechanism consisting of three judges has been established and acts in case obligations under the agreement would not be fulfilled.²²⁸

Ukraine does not have any representation within the EU. In the agreement, there is an obligation for Ukraine to contribute to the EU budget if it wants to participate in certain programmes such as Horizon 2020 but this is very limited.²²⁹ Ukraine may conclude trade agreements with countries outside the EU.²³⁰

The agreement provides for cooperation on combatting crime and terrorism migration, asylum and border management. As a result, Ukraine has signed a strategic cooperation agreement with Europol. There are also provisions related to the cooperation on foreign and security policy. Thus, there are possibilities for Ukraine to participate in CSDP missions.²³¹

6.6. Continental Partnership

A new model that has never been used in practice is the Continental Partnership model, which has been proposed by Pisani-Ferry et al. with the support of academic think tank Bruegel.²³² This model divides the EU into two circles: an outer circle that only cooperates for the economic reason of the Single Market, and an inner circle that also wants political cooperation.

The model would keep the economic integration including the free movement of goods, services, and capital, however, the free movement of people would be restricted to the temporary movement for reasons of labour. Furthermore,

²²⁶ The European Union Committee, 2016, *op.cit.*

²²⁷ Emerson, 2016, *op.cit.*

²²⁸ The European Union Committee, 2016, *op.cit.*

²²⁹ *Ibid.*

²³⁰ Pöttsch, U., & van Roosebeke, B. (2017). *'Ukraine Plus' as a model for Brexit*. Freiburg: Centre for European Policy.

²³¹ *Ibid.*

²³² Pisani-Ferry, J., Röttgen, N., Sapir, A., Tucker, P., & Wolff, G. B. (2016). *Europe after Brexit: A proposal for a continental partnership*.

the political integration objectives would be separated from economic integration. The main characteristics of the model are:

- Participation in a series of selected common policies consistent with access to the Single Market;
- Participation in a new Continental Partnership system of inter-governmental decision-making and enforcement;
- Contribution to the EU budget; and
- Close cooperation on foreign policy, security and, possibly, defence matters.

The EU would then consist of an inner and outer circle. The outer circle, which consists of all EU Member States, would not be subject to the goals of political integration and the supranational character of the EU, except where common enforcement mechanisms are needed to protect the Single Market. The inner circle would consist of countries that want to pursue political integration objectives with the supranational characteristics of the EU including its institutions.²³³

Multiple experts have questioned the feasibility of this model. According to Maganza, the practicability of EU law-making and enforcement under this model is limited.²³⁴ In our opinion that is not the only problem. We think that this model will not see its use in the near future since it shakes up the foundation of the EU and creates an almost entirely new system. The political will to realise this is not there, and certainly does not exist to please the UK by creating a new system which better suits their needs.

6.7. WTO

After withdrawal from the EU with no transition and/or future relationship agreement in place, the UK would hit the cold hard floor that is the WTO option. The WTO started in 1995 and deals with the rules of trade between the contracting parties. This includes rules related to tariffs, negotiating trade agreements and dispute resolution. Currently, the WTO has 164 members, which are responsible for 95% of all world trade.²³⁵

In the case of the WTO option, all trade in goods between the EU and the UK would be subject to the tariffs they apply. Due to the principle of non-discrimination within the WTO, these tariffs must be the same for all WTO members, except when there are preferential FTAs in place. Although for most products the tariffs the EU applies continue to decline, for some products the tariffs are still as high as 30%.²³⁶ This is a significant difference compared to the zero

²³³ Ibid.

²³⁴ Maganza, G. (2016, September 29). Comments on Europe after Brexit: A proposal for a continental partnership. *The constitutional relationship of the United Kingdom with the European Union: the consequences of the results of the referendum of 23 June 2016*. Brussels: Committee on Constitutional Affairs.

²³⁵ Cf. Institute for Government. (2017). *Article 218*. Retrieved May 1, 2017, from Institute for Government: <https://www.instituteforgovernment.org.uk/brexit-explained/brexit-explained-article-218>.

²³⁶ WTO. (2016). *World Tariff Profiles 2016*. Geneva: WTO.

tariffs that the UK currently enjoys under its EU membership. Furthermore, the WTO option would significantly limit the UK's access to the services market. WTO's General Agreement on Trade in Services contains several reservations that limit market access. These reservations are partly set at the EU level and partly by the Member States.²³⁷

Difficulties arise from the situation that the UK's commitments under the WTO are linked to its EU membership and not to its own individual WTO membership. The commitments related to tariffs, quotas, and subsidies are laid down in schedules. Although the UK does not have to reapply for WTO membership, it must detach itself from the EU schedules.²³⁸ In practice, this means that the UK must set out its own schedules, with the agreement of all WTO members. Some commentators argue that the UK can duplicate the EU's tariffs.²³⁹ Even if duplication were possible, this would not work for quotas and subsidies. In these cases, the UK has to negotiate with the EU on what part of the EU shares it can take.²⁴⁰ It is not that easy to split-up the respective competences of the EU and the UK under the main underlying WTO agreements, such as GATT and in particular GATS.

Yet, once the UK has its own schedules, it will want to formally approve them by the so-called process of certification. This requires unanimous approval by all WTO members, and it therefore seems that 137 WTO members (the UK and the EU-27 excluded) may veto the certification of the UK's schedules over political motives. Examples are Argentina vetoing over the Falkland Islands or Spain over Gibraltar. This vision was strengthened by statements of the Director-General of the WTO Roberto Azevêdo.²⁴¹ Azevêdo stated that it would be extremely difficult and complex for the UK to negotiate the schedules and that some WTO members would not want to negotiate with the UK since they will have their own priorities. Six months later he softened his tone by stating that he would personally work intensely to guarantee that the '*transition is fast and smooth*'.²⁴² The question remains as to what another WTO member can do to block the UK's schedules since the objecting WTO member must have a particular reason, backed with evidence that is directly linked to a trade issue. Furthermore, even if the new schedules of the UK do not get certified, the UK can still trade based on these schedules. The EU has several uncertified schedules but still trades based on the commitments laid down in these schedules.²⁴³

²³⁷ Tell Cremades & Novak, 2017, *op.cit.*

²³⁸ Carmona, Cirlig, & Sgueo, 2017, *op.cit.*

²³⁹ Miller, 2016, *op.cit.*

²⁴⁰ Institute for Government. (2017, March 16). *10 things to know about the World Trade Organization (WTO)*. Retrieved May 1, 2017, from Institute for Government: <https://www.institute.forgovernment.org.uk/explainers/10-things-know-about-world-trade-organization-wto>









²⁴¹ Cited in Green, D. A. (2017, February 28). *Brexit and the issue of the WTO schedules*. Retrieved May 1, 2017, from Financial Times: <http://blogs.ft.com/david-allen-green/2017/02/28/brexit-and-the-issue-of-the-wto-schedules/>.

²⁴² Conway, E. (2016, 26 October). *Brexit will not cause UK trade 'disruption' – WTO boss*. Retrieved May 1, 2017, from Sky News: <http://news.sky.com/story/brexit-will-not-cause-uk-trade-disruption-wto-boss-10632803>.

²⁴³ Institute for Government. (2017, March 16), *op.cit.*

6.8. Sub-conclusion

This Section has given an overview of the possible forms the future relationship between the EU and the UK can have. Several existing relations between the EU and third parties have been described as well as a newly devised model and the WTO option. The descriptions have been based on several criteria including access to the Single Market and cooperation in JHA matters and CSDP missions. An overview of all the models is shown in the following table:

Option	Example	Single Market				Obligations		Other		Cooperation	
		Goods	Services	Capital	People	Financial contribution	EU legislation	Influence over EU	Non EU markets	JHA	CSDP
Membership of the EU		Full	Full	Full	Full	Full	Full	Full	Full	Full	Full
	UK (current option) 	Full	Full	Full	Full	Partial	Full	Full	Full	Partial	Full
EFTA + EEA Membership	Norway 	Partial	Full	Full	Full	Full	Full	Partial	Partial	Full	Partial
EFTA + Bilateral agreements	Switzerland 	Partial	Full	Full	Full	Full	Full	Partial	Partial	Full	Partial
FTA	Canada (CETA) 	Partial	Full	Full	Full	Full	Full	Partial	Partial	Full	Partial
Customs Union	Turkey 	Partial	Partial	Partial	Full	Full	Full	Partial	Partial	Full	Partial
AA	Ukraine 	Partial	Full	Full	Full	Full	Full	Partial	Partial	Full	Full
Continental Partnership	-	Full	Full	Full	Full	Full	Full	Full	Full	Full	Full
WTO		Partial	Partial	Partial	Full	Full	Full	Partial	Partial	Full	Partial

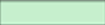


Legend	
Full integration	
Partial integration	
No integration	

Table 3: Overview of the possible templates for the future relationship

None of the described models, with the exception of Continental Partnership, comes close to EU membership, its full access to the Single Market and the influence in the EU decision-making process. Although Continental Partnership is in theory possible, in practice it will not happen in the near future since it creates an almost entirely new system.

The Norway model has the most similarities with EU membership but lacks the power of influencing EU decisions while having to incorporate a significant amount of EU legislation. This also accounts for the Swiss model which has even less access to the Single Market than the Norway model. Furthermore, the Swiss model can be ruled out since the EU is not pleased by this model in its current form.

The other described models differ significantly from EU membership. Although the free movement of goods is often partly included in these models, the free movement of services, which is of significant importance for the UK, is not always included. Even in the most sophisticated FTA so far, CETA, the free movement of services is very limited and the financial services sector is excluded. Nonetheless, the FTA option is one of the most interesting ones since the arrangements can go as far as both parties want. A 'Comprehensive *Cross-Channel* Economic and Trade Agreement' (CC-CETA), an amended CETA, has been mentioned as the most probable outcome of the process.²⁴⁴ The AA option is another interesting option since Single Market access is extensive and dependent on compliance with EU regulations; the UK already complies with all applicable EU regulations and thus would have almost complete access to the Single Market.

In case no agreement is concluded the EU and the UK will automatically fall back on the WTO option. This will mean that there will be tariffs on the imports and exports which could be up to 30%. Furthermore, a challenge awaits the UK in detaching itself from the WTO commitments of the EU and laying down its own commitments.

7. THE OPTIONS FOR THE REMAINERS

The result of the Brexit referendum has not only divided the EU but also the UK itself since several regions voted in favour of remaining in the EU. This has led to calls for an independent Scotland, a reunited Ireland and a special arrangement for Gibraltar. This Section will explore the options for the parts that voted to remain, besides the status quo of following the UK and thus most likely leaving the EU. First, the parts that voted to remain and their stances will be explained. Second, the different possibilities for staying in the EU will be elaborated on.

7.1. The Remainers

The UK consists of four constituent countries and 14 overseas territories. Furthermore, there are three crown dependencies which are officially not a part of the UK but which the UK is responsible for. An overview is shown in Figure 4:

From the constituent countries, Scotland and Northern Ireland voted in favour of remaining in the EU. The same accounts for Gibraltar which voted overwhelmingly against Brexit (BBC, 2017c). The other 13 overseas territories did not have the possibility to participate in the referendum. This is remarkable since some of the overseas territories have strong ties with the EU in the form of economic and environmental cooperation (Clegg, 2016). Furthermore, the territorial dispute over the Falkland Islands can rise up again since it is questionable whether the EU would guarantee the solidarity over the islands after the withdrawal of the

²⁴⁴ N. Neuwahl (2017), 'CETA as a potential model for (Post-Brexit) UK-EU relations', *European Foreign Affairs Review*, Issue 3, pp. 279–301.

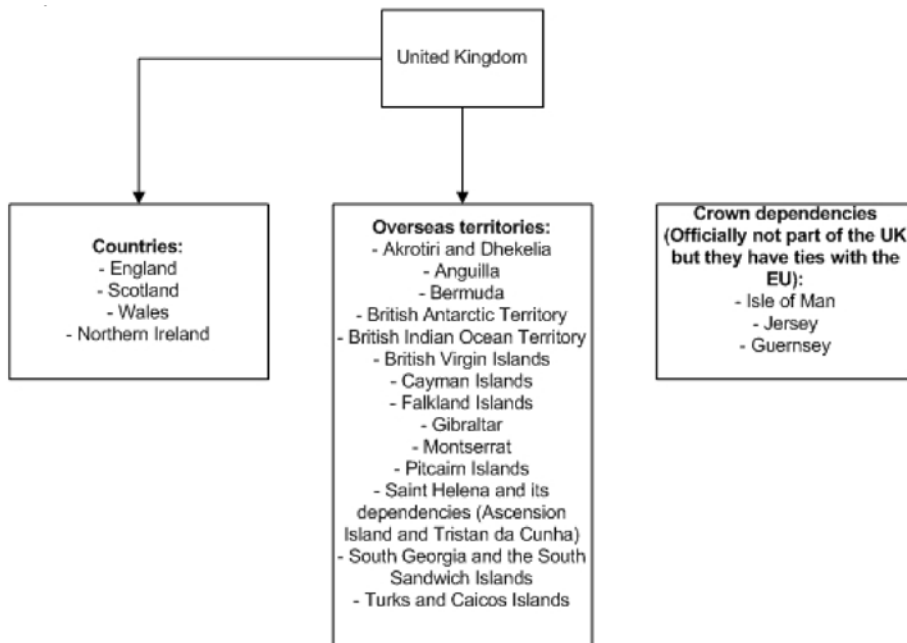


Figure 4: Structure of the UK

UK.²⁴⁵ Finally, the crown dependencies did not participate in the referendum. Although they are not officially part of the UK, they have ties with the EU since they are part of the EU Customs Union.

The next sections will focus on Scotland, Northern Ireland, and Gibraltar since they voted in favour of remaining in the EU.

7.1.1. Scotland

The Scottish electorate voted 62% against 38% to remain in the EU.²⁴⁶ After the result became clear Prime Minister Nicola Sturgeon stated that she intends to *‘take all possible steps and explore all options to give effect to how people in Scotland voted – in other words, to secure our continuing place in the EU and in the single market in particular.’*²⁴⁷ Later the Scottish Government published a policy paper in which it stated that the aim is to find a solution that would protect Scotland’s place in the Single Market as a member of the UK. However,

²⁴⁵ Benwell, M. C., & Pinkerton, A. (2016). Brexit and the British Overseas Territories. *The RUSI Journal* 161(4), 8-14.

²⁴⁶ BBC. (2017c). *EU Referendum Results*. Retrieved February 2, 2017, from BBC: http://www.bbc.com/news/politics/eu_referendum/results.

²⁴⁷ STV. (2016, June 24). *Nicola Sturgeon speech in full after EU referendum result*. Retrieved May 1, 2017, from STV: <https://stv.tv/news/politics/1358534-nicola-sturgeon-speech-in-full-after-eu-referendum-result/>.

in the same policy paper, Sturgeon also stated that in her view the best solution for Scotland is to become a full member of the EU as an independent country.²⁴⁸

On 28 March 2017, the Scottish Parliament voted in favour of holding a referendum on the independency of Scotland.²⁴⁹ However, the referendum cannot take place without the approval of the UK government and parliament. Sturgeon has requested permission for the powers to call for a referendum by a so-called Section 30 order. UK representatives have made clear that: *'now is not the time for an independence referendum, and we will not be entering into negotiations on the Scottish Government's proposal'*. Furthermore, UK representatives have made clear that the referendum should take place after the Brexit negotiations and thus when more information on the future relationship between the EU and the UK is clear.²⁵⁰ Therefore, it does not seem likely that the Scottish independence referendum will take place before the UK has withdrawn from the EU.

The latest Scottish independence referendum took place in 2014 whereby 55.3% voted against an independent Scotland.²⁵¹ Even if a new referendum were to take place it is far from likely that the Scottish electorate would vote in favour of independency since the polls show a significant lead for the side that is against an independent Scotland.²⁵²

7.1.2. Northern Ireland

In Northern Ireland, 55.8% of the electorate voted in favour of remaining in the EU.²⁵³ The possible withdrawal of the UK poses several challenges to Northern Ireland due to the following:²⁵⁴

- Northern Ireland and Ireland share a land border, in the case of a withdrawal, this will be a border between the EU and the UK. The open border significantly contributed to the economic wellbeing of both sides. Furthermore,

²⁴⁸ The Scottish Government. (2016). *Scotland's Place in Europe*. Edinburgh: The Scottish Government.

²⁴⁹ Clark, N. (2017, March 28). *NEVER-ENDUM Scottish Parliament BACKS second independence referendum as Nicola Sturgeon refuses to give in to Theresa May – but No10 immediately slaps down request for vote*. Retrieved May 1, 2017, from The Sun: <https://www.thesun.co.uk/news/3200007/scottish-parliament-back-nicola-sturgeons-call-for-a-second-referendum-on-independence-as-first-minister-vows-to-fight-theresa-may/>.

²⁵⁰ Weybridge, E. (2017, March 31). *JOCKS AWAY? Will there be a second Scottish Independence referendum and what has Nicola Sturgeon said about IndyRef2?* Retrieved May 1, 2017, from The Sun: <https://www.thesun.co.uk/news/2974347/second-scottish-independence-referendum-nicola-sturgeon-indyref2-date/>.

²⁵¹ BBC. (2014, September 19). *Scottish referendum: Scotland votes 'No' to independence*. Retrieved May 23, 2017, from BBC: <http://www.bbc.com/news/uk-scotland-29270441>.

²⁵² What Scotland Thinks. (2017, May 18). *How would you vote in a Scottish independence referendum if held now? (asked after the EU referendum)*. Retrieved May 23, 2017, from What Scotland Thinks: <http://whatscotlandthinks.org/questions/how-would-you-vote-in-the-in-a-scottish-independence-referendum-if-held-now-ask#line>.

²⁵³ BBC. (2017c). *EU Referendum Results*. Retrieved February 2, 2017, from BBC: http://www.bbc.com/news/politics/eu_referendum/results.

²⁵⁴ Renwick, 2017, *op.cit.*

the open border is an important aspect of the peace process. Changes to the border can disrupt this and avoiding a hard border has become part of the negotiation process;

- The EU Membership of both the UK and Ireland is an important aspect of the peace process. The Good Friday Agreement refers to both the UK and Ireland as partners in the EU. Furthermore, the EU has contributed significantly to the peace process through its PEACE programme; and
- The Brexit referendum has divided the community: the Unionists who are mostly Protestants generally voted in favour of leaving the EU while the Nationalists who are mainly Catholics voted to remain. The same division has caused decades of violence in the past.

On 22 January 2016 Sinn Féin leader Gerry Adams stated that: *'Brexit is a hostile action – the British government's decision to drag the North out of the EU against the wishes of the electorate is a hostile action. This and the indifference of the Tory Government in London toward Ireland, North and South, will destroy the Good Friday Agreement.'*²⁵⁵

The calls for a referendum on Irish unity became stronger and were even more fuelled by the statement of the European Council that confirmed that Northern Ireland can automatically join the EU in a post-Brexit reunification with Ireland.²⁵⁶ More recently Sein Finn has demanded a referendum on Irish unity which has to take place within the next five years.²⁵⁷

As set out in Section 1 of the Northern Ireland Act 1998, Northern Ireland has the right to withdraw from the UK to join a United Ireland if the majority of the electorate votes in favour of this.²⁵⁸ However, there are still political barriers for such a referendum to happen since Schedule 1 of the Northern Ireland Act 1998 states that a referendum for the reunification of Ireland can only be organised if *'it appears likely to [the UK Secretary of State] that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.'* For now, a referendum on Irish unity does not seem likely since UK representatives have ruled this out given that, in their view, it is not the right time.²⁵⁹

²⁵⁵ Adams, G. (2017, January 22). *Brexit risks destroying the Good Friday Agreement – Adams*. Retrieved May 23, 2017, from Sinn Fein: <http://www.sinnfein.ie/contents/43147>.

²⁵⁶ O'Leary, N. (2017, April 28). *European Council will nod to prospect of united Ireland*. Retrieved May 23, 2017, from Politico: <http://www.politico.eu/article/european-council-will-nod-to-prospect-of-united-ireland/>.

²⁵⁷ Express. (2017, May 22). *Sinn Fein demands Irish Unity Referendum within five years after Brexit vote*. Retrieved May 23, 2017, from Express: <http://www.express.co.uk/news/politics/807752/Sinn-Fein-demands-Irish-Unity-Referendum-within-five-years-Brexit>.

²⁵⁸ Skoutaris, N. (2016). *From Britain and Ireland to Cyprus: Accommodating 'Divided Islands' in the EU Political and Legal Order*. Trier: Academy of European Law.

²⁵⁹ Belfast Telegraph. (2017, March 15). *Theresa May rules out border poll on Irish unity*. Retrieved May 23, 2017, from Belfast Telegraph: <http://www.belfasttelegraph.co.uk/news/northern-ireland/theresa-may-rules-out-border-poll-on-irish-unity-35531715.html>.

7.1.3. Gibraltar

In Gibraltar, an overwhelming 95.9% of the electorate voted in favour of remaining in the EU.²⁶⁰ Brexit has far-reaching implications for Gibraltar. First, losing access to the Single Market could be disastrous for the economy since 45% of Gibraltar's trade is with the EU. This is in particular the case in relation to flourishing financial and online gaming industries. Furthermore, due to the free movement of people, thousands of people commute every day from South Spain to work in Gibraltar or as tourists. Restricting the free mobility would affect the viability of the Gibraltarian economy.²⁶¹

Other complications arise from the fact that Gibraltar is still subject to a territorial claim by Spain. In the past, the Commission has warned Spain not to interrupt freedom of movement after Spain had imposed border controls and threatened to impose a fee.²⁶² After the Brexit referendum, several Spanish representatives made clear that they see new opportunities for Spanish control of Gibraltar once the UK has withdrawn from the EU.²⁶³

Gibraltar's Chief Minister Fabian Picardo has stated that he wants to keep Gibraltar in the EU and keep the access to the Single Market.²⁶⁴ However, this could be difficult since, according to the European Council's Brexit guidelines, that any post-Brexit agreement between the EU and the UK would not apply to Gibraltar without an agreement between the UK and Spain.²⁶⁵

7.2. The Options

There are two different pathways that should be considered. The first is to stay in both the EU and the UK, while the second option means seceding from the UK and joining the EU. The first option seems to have the least economic consequences since the UK is the most important trading partner for Scotland, Northern Ireland and Gibraltar. Seceding from the UK would most likely put certain restrictions on trade with the UK. Particularly for Gibraltar, the first option seems the most feasible since seceding from the UK would pave the way for Spain to actively pursue its claims over Gibraltar. The second option is interesting for Scotland and Northern Ireland since they legally have the possibility to become independent of the UK via referenda.

²⁶⁰ BBC. (2017c). *EU Referendum Results*. Retrieved February 2, 2017, from BBC: http://www.bbc.com/news/politics/eu_referendum/results.

²⁶¹ Benwell & Pinkerton, *op.cit.*

²⁶² *Ibid.*

²⁶³ Badcock, J. (2016, June 24). *Spain says 'closer to' controlling Gibraltar after Brexit vote*. Retrieved May 23, 2017, from The Telegraph: <http://www.telegraph.co.uk/news/2016/06/24/spain-proposes-shared-sovereignty-over-gibraltar-after-brexit-vot/>.

²⁶⁴ Gatehouse, G. (2016, June 27). *Brexit: Gibraltar in talks with Scotland to stay in EU*. Retrieved May 23, 2017, from BBC: <http://www.bbc.com/news/uk-politics-eu-referendum-36639770>.

²⁶⁵ European Council Guidelines, *op.cit.*

7.2.1. *Staying in the UK and the EU*

The first pathway would be to stay in both the UK and the EU. This would mean that Scotland, Northern Ireland and Gibraltar are in the EU while at the same time they are part of the UK and that England, Wales and the rest of the UK are not in the EU. The advantages of this option are that it would avoid the whole procedure of seceding from the UK and that there will be no restrictions on trade with both the UK and the EU.

Currently, there are several cases of which certain parts of a Member State have a different relationship with the EU, for historical, geographical or political reasons. First, France, Portugal, and Spain have several parts which, due to their geographical remoteness, have the special status of outermost region within the EU. Although the *acquis* is in general fully applicable within outermost regions, due to the geographical location and the related difficulties its application can differ from the mainland. Second, Gibraltar currently enjoys a special arrangement with the EU and is excluded from the Customs Union, VAT Area and Common Agricultural Policy. Other cases are the Crown dependencies, the Åland Islands, and the Faeroe Islands. Finally, there are several regions, including the Spanish enclaves of Ceuta and Melilla, the Italian enclaves of Campione d'Italia and Livigno and the German island of Heligoland, which are all excluded from the Customs Union and VAT Area.²⁶⁶ These examples cannot be compared to Scotland and Northern Ireland due to the differences in size, location, and history. Furthermore, in all these cases the Metropolitan State is a full EU member. However, it certainly shows that the EU is flexible in terms of the application of the *acquis* in different regions.

The case of Greenland withdrawing from the EEC in 1985 is often seen as the best practical example for Scotland, Northern Ireland and Gibraltar.²⁶⁷ The so-called reverse Greenland model would mean that the UK would stay in the EU, but only partly. This would be done by amending the Treaties so that they would fully apply to the remainers but not to England and Wales. Legally speaking this might be possible if the UK and the EU Member States agree on this, but it should not be forgotten that Greenland is an island and does not share a land border with the EU. Given the case of Scotland, this would mean that there is a land border between the EU and England, which would be outside of the EU.

An interesting example is Cyprus which is an EU Member State, although its northern part is effectively controlled by Turkey. Therefore, the *acquis* does

²⁶⁶ The scope of the paper does not allow us to address these interesting issues in more detail. See much more extensively Skoutaris, *op.cit.*, Kochenov, *op.cit.*; and the various contributions to D. Kochenov (ed), *EU Law of the Overseas*, The Hague: Kluwer Law International, 2011; as well as D. Kochenov, 'The Application of EU Law in the EU's Overseas Regions, Countries, and Territories After the Entry into Force of The Treaty of Lisbon', *Michigan State International Law Review*, 2012, p. 669.

²⁶⁷ Lock, T. (2016, June 26). *A European Future for Scotland?* Retrieved May 23, 2017, from Verfassungsblog: <http://verfassungsblog.de/a-european-future-for-scotland/>; Pram Gad, U. (2016, July 7). *Could a 'reverse Greenland' arrangement keep Scotland and Northern Ireland in the EU?* Retrieved May 23, 2017, from LSE: <http://blogs.lse.ac.uk/europpblog/2016/07/07/reverse-greenland-arrangement/>.

not apply to this part, and there is a physical border between these two parts. This is governed by the Green Line Regulation that regulates the free movement of goods and people between the part where the *acquis* applies and which is in the Customs Union, and the part where the *acquis* does not apply and that is outside the Customs Union.²⁶⁸ In case the UK follows this approach, it would mean that the *acquis* does not apply to England and Wales but does apply to Scotland, Northern Ireland, and Gibraltar. This also means that the same problems as in the case of Cyprus have to be resolved related to the free movement of goods and people. This implies the creation of a physical border in order to check the crossing of goods and people.

In theory, it is possible for Scotland, Northern Ireland and Gibraltar to stay in both the UK and the EU by following the reverse Greenland model or the Cyprus model. However, in our opinion, this is not a realistic scenario. Both the UK and the EU-27 would have to agree on this which seems very unlikely, and even with the political will there are many practical problems which would have to be solved. These include the creation of physical border controls, since Scotland has a territorial border with England, and the UK's preservation of right over some important competences such as foreign policy. This would lead to the absurd situation that the EU votes about a foreign policy initiative with Scotland, Northern Ireland and Gibraltar participating in the vote, but that the UK overrules their votes since foreign policy is decided upon by the UK. Therefore, these models can only work if the UK devolves the decision-making power related to these competences back to the remainers, which does not seem likely to happen.

7.2.2. Seceding From the UK and Joining the EU

The second pathway would be to secede from the UK and join the EU. Seceding from the UK would happen via referenda on independency as explained earlier in this chapter. Although it is not likely that this will happen, for the sake of this Section it is assumed that Scotland, Northern Ireland and Gibraltar are independent from the UK.

In the case of Northern Ireland, it is a straight forward scenario. In their case independence goes hand in hand with the reunification of Ireland. Thus, Northern Ireland does not become an independent state but joins Ireland. An example from the past is the reunification of Germany whereby the *acquis* was extended to East Germany without an amendment of the EU Treaties.²⁶⁹ For Northern Ireland, it would be much easier than it was for East Germany since the *acquis* did not apply in East Germany while in Northern Ireland it already

²⁶⁸ Fletcher, M., & Zahn, R. (2017). 'What Options are Available to Scotland to Remain within the EU Given the "Brexit" Referendum Result?' *Edinburgh Law Review*, 21(1), 98-103.

²⁶⁹ Jacqu e, J.-P. (1990). German Unification and the European Community. *Revue g n rale du droit international public*.

applies.²⁷⁰ Finally, it should be noted that the EU has already stated that Northern Ireland automatically joins the EU in case of reunification.²⁷¹

The situation for Scotland and Gibraltar is different and far more complicated. The legal base would be either Article 49 TEU or Article 48 TEU; this is a debatable point. The normal procedure for acceding countries is laid down in Article 49 TEU. However, during the 2014 Scottish independence referendum, the Scottish government argued that Article 48 TEU would suffice.²⁷²

In case the normal procedure of Article 49 TEU applies it would mean that the Council must decide unanimously to open the negotiations and that the European Parliament must give its consent. Once the candidate state complies with all the conditions, the Accession Treaty can be drafted. The Treaty needs to be signed by the candidate Member State and all the EU Member States. Furthermore, all Member States have to ratify the Treaty. This process can take a long time and thus would imply that Gibraltar and Scotland for a certain period are both outside the UK and outside the EU. Besides the whole procedure, it is likely that new candidates have to wait in queue behind the other countries applying for EU Membership. Furthermore, there will not be any EU enlargement during the current European Parliament, new elections will take place in 2019. Finally, if Scotland and Gibraltar decide to go down this road it would also mean that they have to apply the whole *acquis*. This includes adopting the euro and joining Schengen.²⁷³

Thus, Article 49 TEU is a long and cumbersome procedure. Therefore, the Scottish government has argued that the territorial scope as laid down in Article 52 TEU can be amended via Article 48 TEU. An argument against this is that this process would take nearly as long as the Article 49 TEU procedure since the amendment of Treaties can only be done with the unanimous agreement of all Member States. In the case of Brexit, it can be argued that the Treaties have to be amended anyway and it would therefore be a simple step to replace the United Kingdom with Scotland and Gibraltar. Disadvantages of this route are that there is not a negotiation process as would be the case with the Article 49 TEU procedure and that it is not likely that the Treaties can be amended while the UK is still in the EU.²⁷⁴ Finally, it should be noted that representatives of the Commission have stated that an independent Scotland would have to apply for EU membership.²⁷⁵ Therefore Article 49 TEU seems to be the only right procedure.

²⁷⁰ Skoutaris, 2016, *op.cit.*

²⁷¹ O'leary, 2017, *op.cit.*

²⁷² The Scottish Government. (2013). *Scotland in the European Union*. Edinburgh: The Scottish Government.

²⁷³ Lock, 2016, *op.cit.*

²⁷⁴ *Ibid.*

²⁷⁵ Carrell, S. (2017, February 10). *Independent Scotland 'would have to apply for EU membership'*. Retrieved May 23, 2017, from The Guardian: <https://www.theguardian.com/politics/2017/feb/10/independent-scotland-would-have-to-apply-for-eu-membership>.

7.3. Sub-conclusion

Scotland, Northern Ireland and Gibraltar voted in favour of remaining in the EU. This Section has analysed two pathways for remaining in the EU, namely staying in the UK and at the same time in the EU, and seceding from the UK and joining the EU.

Within the EU there are certain parts of a Member State, which have a different relationship with the EU than the mainland has. This is either for historical, geographical or political reasons. An example is the reverse Greenland model. This would mean that the parts of the UK that voted in favour of remaining stay in the EU, while the other parts leave the EU. Difficulties arise from the fact that Greenland is an island and that adopting this model for the UK would create an internal land border between Scotland and England and thus between the part of the UK that is outside the EU and the part that is in the EU.

The case of Cyprus is a comparative case since the *acquis* only applies to the southern part. The free movement of goods and people between the northern and southern parts is regulated by the Green Line Regulation, and therefore it should be possible to find a construction that would work for the UK. However, in the case of the UK other problems arise due to the devolved powers. The UK preserves the right over some competences as foreign policy. Therefore, it would lead to an unworkable situation in which the UK can overrule EU policy which normally would apply in Scotland, Northern Ireland and Gibraltar. Thus, although it is legally possible, there are multiple practical problems and it is not likely that there is the political will within the UK and the EU to realize this.

The second pathway entails Scotland, Northern Ireland and Gibraltar seceding from the UK and joining the EU. Seceding from the UK would be done via referenda. However, referenda are not easy to realize since the UK has to give its approval. Once seceded from the UK it is questionable whether they can join the EU based on Article 48 TEU or Article 49 TEU. In the case of Northern Ireland independency would follow unification with Ireland, and thus its accession to the EU, but for Scotland and Gibraltar Article 49 TEU, the normal more cumbersome procedure, would apply.

8. CONCLUSION

On 29 March 2017, the UK started the procedure for withdrawal from the EU and constructing a new relationship with the EU. This study aimed to find out what the legal, political and financial consequences of the various options during the Brexit negotiations between the EU and the UK are.

The UK will withdraw from the EU via the Article 50 TEU procedure and withdrawal from the EU implies withdrawal from Euratom and the EEA. This procedure prescribes the steps that have to be taken for the concluding of an agreement concerning the terms of withdrawal. The first step was the drafting of the Brexit guidelines by the European Council, a step that was completed on 29 April 2017. Next, was the Council authorizing the opening of the negotiations on 22 May 2017. As easy as these first two steps went, the negotiations – which

started on 19 June 2017 – are likely to be much more complicated as they entail sensitive topics including the financial settlement, the reciprocal rights of EU and UK citizens, the border between Ireland and Northern Ireland, the disentanglement of the UK from international treaties signed by the EU and the phasing out of the UK's involvement in CSDP missions and JHA matters. The outcome of these negotiations will significantly influence the post-Brexit relation between the EU and the UK since a bad outcome for the EU, i.e. the UK not paying its financial obligations or guaranteeing the rights of EU citizens residing in the UK, would toughen the stance of the EU in the future relationship negotiations, while UK representatives have threatened to walk away from further negotiations in case of a bad deal since '*no deal is better than a bad deal*'.²⁷⁶ Once the two parties reach an agreement the Council will conclude the agreement, but it can only do this after having obtained the consent of the European Parliament, allowing the European Parliament to have a veto over the withdrawal agreement. Furthermore, the UK parliament gets the chance to raise objections, and technically, by repeatedly raising objections, the House of Commons could also block the withdrawal agreement from entering into force. It is unlikely that the withdrawal agreement will be a mixed agreement since the terms of withdrawal are EU-only matters and Article 50 hints at the idea that withdrawal is an issue between the EU and the withdrawing state. In case the agreement nevertheless turns out to be a mixed agreement, ratification by the EU-27 is obviously required, resulting in a time-consuming process that cannot be completed before the UK automatically withdraws from the EU on 30 March 2019. This deadline can be postponed, but only in case the EU-28 unanimously agree on this.

Once enough progress has been reached on the withdrawal agreement, the negotiations on the future relationship agreement, which is not bound by the two-year time limit, can start. The future relationship agreement would entail not only the post-Brexit trade relation but also cooperation in fighting crime and terrorism. The position of the UK government before the elections of 8 June 2017 was that the UK would leave the Single Market, should be able to control the migrant influx, does not want to be subject to the jurisdiction of the CJEU and does not want to pay huge sums to the EU budget. Their goals were to conclude an FTA with the EU and keep cooperating on security matters.²⁷⁷ Due to the elections, the Conservatives have lost their majority²⁷⁸ and together with more recent discussions on, *inter alia*, the border with Ireland, this may change the position of the UK to a softer tone regarding its connection to the Single Market. In order to be able to conclude an agreement on the future relationship with the EU, the whole procedure laid out in Article 218 TFEU must be completed. This procedure starts with the Commission submitting recommendations to the Council, followed by the Council authorizing the opening of the negotia-

²⁷⁶ Chu, 2017, *op.cit.*

²⁷⁷ HM Government. (2017). *The United Kingdom's exit from and new partnership with the European Union*. London: HM Government.

²⁷⁸ BBC. (2017b, June 11). *Election 2017*. Retrieved June 11, 2017, from BBC: <http://www.bbc.com/news/election/2017/results>.

tions. After the negotiations have been completed, the Council has to authorize the signing of the agreement and the European Parliament has to give its consent. Ratification by the EU-27 will be required due to the extensive scope of the agreement. Finally, if no objections are raised by the UK parliament, the UK government may then ratify the agreement, and this will be followed by the final step of the Council concluding the agreement.

An overview of this process is shown in the Figure 5 below. It should be noted that it is currently unclear whether the UK can revoke the Article 50 TEU notification and thus remain in the EU and whether Article 218 TFEU is fully applicable to the withdrawal agreement.

The process scheme does not show the transition agreement, which should bridge the gap between the day of withdrawal and the entering into force of the future relationship agreement. The transition agreement is surrounded by uncertainty due to the lack of clarity about the legal basis and the decision-making mechanism. Currently, there are two views: first, transition arrangements will be included in the withdrawal agreement, and second, a separate transition agreement will be concluded. If it is even legally possible to include transition arrangements in the withdrawal agreement, it will be a mixed agreement that requires ratification by the EU-27, a process that cannot be completed within the two-year time limit. A separate agreement would risk the same problem of becoming a mixed agreement and would be subject to the same cumbersome procedure as concluding the future relationship agreement. Therefore, currently, the transition agreement is the most uncertain part of the three different agreements related to Brexit.

This study also assessed the different forms the future relationship between the EU and the UK can take, by analysing existing relationships between the EU and third countries and theoretical models. Based on the criteria including access to the Single Market, influence on EU decision-making and cooperation in JHA matters and CSDP missions it has become clear that Continental Partnership, the Norway model, and the Swiss model have the most similarities with full EU membership. However, these models are not likely to be used due to the practical problems or because either UK or the EU has already ruled them out. The most suitable options which can comply with both the needs of the EU and of the UK are the FTA and the AA. An FTA can be as comprehensive as both parties want, offering possibilities for intensive trade cooperation and cooperation on security matters. In addition, the AA model also offers political cooperation and can grant the UK extensive access to the Single Market due to its compliance with the *acquis*. Partly due to the image of AAs as 'unequal' agreements, a comprehensive FTA along the lines used in CETA seems to be the most probable outcome at the moment.

As part of the UK, Scotland, Northern Ireland and Gibraltar would also automatically leave the EU. However, their electorates have voted to remain in the EU and government officials have stated that they will look at alternatives.²⁷⁹ In this regard, the present study has looked at two pathways: first, staying in the

²⁷⁹ Gatehouse, G. (2016, June 27). *Brexit: Gibraltar in talks with Scotland to stay in EU*. Retrieved May 23, 2017, from BBC: <http://www.bbc.com/news/uk-politics-eu-referendum-36639770>.

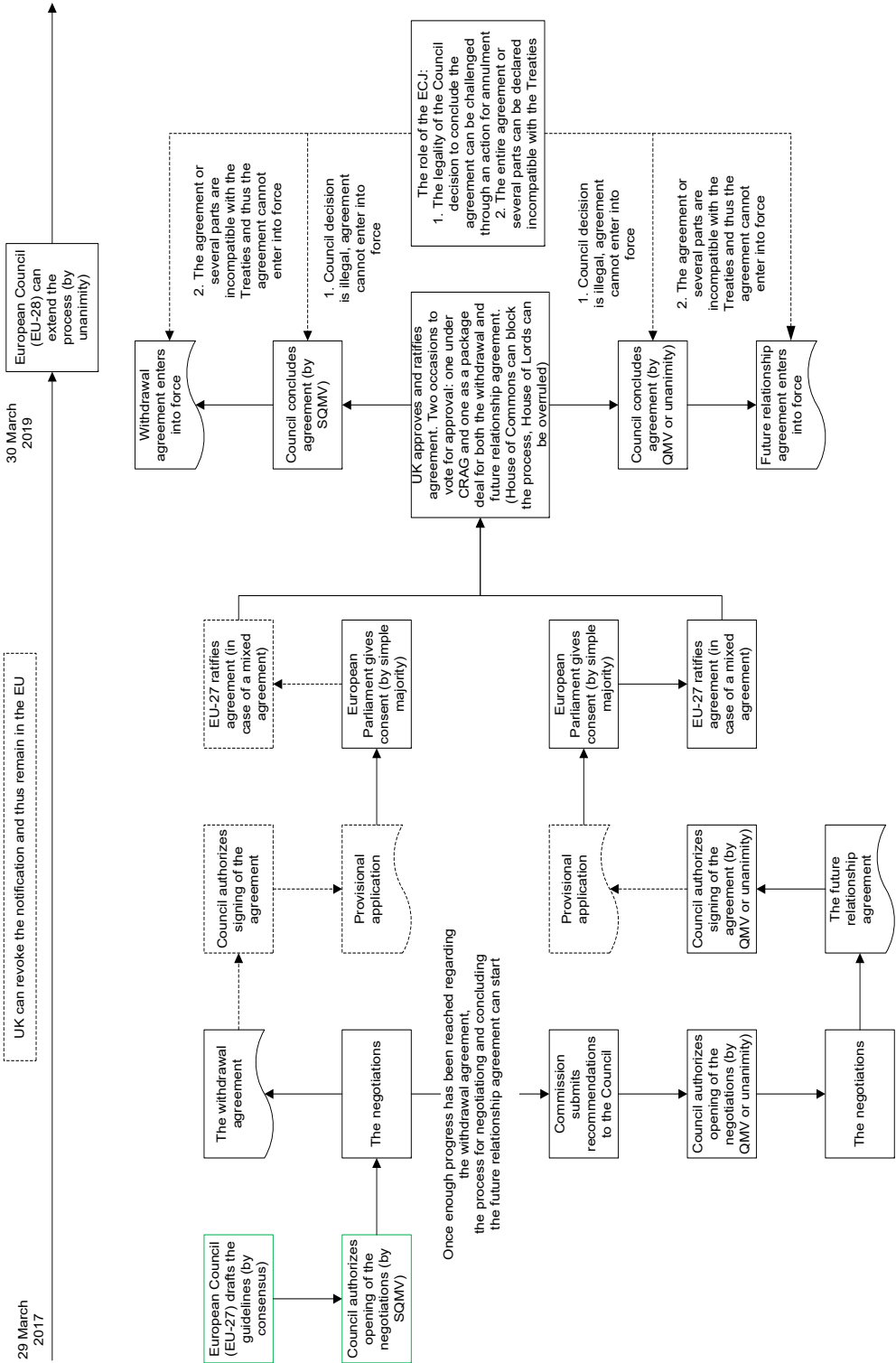


Figure 5: The Brexit process

EU as a part of the UK (the UK will only partly withdraw from the EU), and second, seceding from the UK and joining the EU. Although in theory these are possibilities which seem legally feasible, they are surrounded by complications such as the creation of a physical border between parts of the UK that are in the EU and parts that are out of the EU, and the fact that the UK preserves the right of maintaining some important competences which would significantly complicate EU policy-making. The second pathway of seceding from the UK and joining the EU is unrealistic due to the economic dependency on the UK, and in the case of Gibraltar also due to the security that the UK provides against the Spanish claims. Seceding from the UK would be done via referenda. While technically speaking Scotland and Northern Ireland can organise these referenda, the UK has a crucial say over this. Independency of Northern Ireland could go hand in hand with a discussion on the reunification of Ireland, in which case it would automatically become part of the EU. For Scotland and Gibraltar, this would not be the case, they would have to join the EU via the normal cumbersome Article 49 TEU procedure.

This study has given a comprehensive overview of the entire Brexit process by analysing legal, academic and political documents and shining a light on the different steps that have to be taken and the different outcomes. However, it should be noted that due to the extent and the actuality of the topic certain aspects have not been taken into account or have not been analysed. This includes the individual stances of the EU Member States, the manifestos of the different political parties in the UK and the precise legal, political and financial consequences of a certain template for the future relationship agreement.

Our analysis of all the procedural and substantive complexities leads to the conclusion that it is possible for the EU and the UK to succeed, albeit not within the two-year time limit. In this respect, three issues in particular are of concern. First, it will be hard to reach an agreement on the issues regarding the financial settlement and the citizens' rights before the two-year time limit has elapsed. Both parties have strong opinions regarding the payments to be made and the involvement of the CJEU, and cannot loosen their stance without risking a loss of face. Second, after the latest general election in the UK, Prime Minister May has lost her majority in the House of Commons and has come under a lot of pressure. This makes it less certain that she can push her Brexit plans through the UK Parliament, and it should even be considered that she might step down during the Brexit negotiations. Thus, in our view, the UK is far from a reliable negotiating partner at the moment of writing. Third, for the UK it would only make sense to conclude a withdrawal agreement if this were to be followed by an agreement on the future relationship. As the future relationship agreement will most probably need to be ratified by the EU-27 (despite the wide scope of the Union's competences as identified by the CJEU in Opinion 2/15), this cannot be completed within the two-year time limit. This leads to the situation that a transition agreement is inevitable, but the legal basis of such an agreement is unclear and it is likely that Member State ratification is also required for such an agreement, preventing its completion before the UK automatically withdraws from the EU.

This leads us to conclude that an extension of the negotiation time may be inevitable, allowing for enough time to at least agree on the withdrawal agreement and a transition agreement. With the transition agreement in place, the EU and the UK can negotiate the agreement regarding the future relationship, which in our view should be a (comprehensive) FTA.

An extension of the negotiation time, will keep the UK in the EU for longer, and will also make the financial settlement easier, since most of the outstanding debts will be paid by the UK as an EU Member State. Regarding the UK's budget contributions for the extra years in the EU, new arrangements should be made. Finally, one should not completely rule out the option of the UK revoking the Article 50 TEU notification and remaining in the EU. Despite the legal uncertainties surrounding this option, a solution will be found when the political will is there; both on the side of the UK and of the EU and its Member States.

Appendix 1

Article 207
(ex Article 133 TEC)

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article.

The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.

4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority.

For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct invest-

ment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.

The Council shall also act unanimously for the negotiation and conclusion of agreements:

(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;

(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.

6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.

Article 218

(ex Article 300 TEC)

1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.

2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.

3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

4. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.

5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.

6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

(a) after obtaining the consent of the European Parliament in the following cases:

(i) association agreements;

(ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(iii) agreements establishing a specific institutional framework by organising cooperation procedures;

(iv) agreements with important budgetary implications for the Union;

(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

7. When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation.

8. The Council shall act by a qualified majority throughout the procedure.

However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

9. The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.

10. The European Parliament shall be immediately and fully informed at all stages of the procedure.

11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

