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THE ROAD TO BREXIT: TEN UK PROCEDURES TOWARDS LEAVING THE EU

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I.- THE DECISION TO WITHDRAW AND THE MILLER CASE - II. THE EUROPEAN UNION (WITHDRAWAL) ACT 2018. III.- THE REVOCATION OF THE NOTIFICATION OF WITHDRAWAL: WIGHTMAN. IV.- THE UK-EU 2018 DRAFT WITHDRAWAL AGREEMENT. V.- THE 2019 EUROPEAN PARLIAMENT ELECTIONS. V.- THE PROROGATION OF PARLIAMENT AND THE CHERRY CASE. VII.- THE “UPDATED” WITHDRAWAL AGREEMENT. VIII.- THE WITHDRAWAL AGREEMENT BILL (WAB). IX.- THE DECEMBER UK ELECTIONS. X.- THE EUROPEAN UNION (WITHDRAWAL) ACT 2020

ABSTRACT: This paper offers a concise explanation of each of the ten most relevant legal and procedural issues, in their political context and in chronological order, that have arisen in the United Kingdom since the British voted to activate the EU’s new and hitherto unused Article 50 TEU withdrawal clause.

KEY WORDS: Brexit; Withdrawal from the European Unión; Article 50 TEU; United Kingdom, Negotiations.

EL CAMINO HACIA EL BREXIT: DIEZ PROCEDIMIENTOS BRITÁNICOS PARA ABANDONAR LA UNIÓN EUROPEA

RESUMEN: En este trabajo se ofrece una explicación concisa de cada una de las diez cuestiones jurídicas y procedimentales más importantes, en su contexto político y en orden cronológico, que han surgido en el Reino Unido desde que los británicos votaron activar la nueva y hasta ahora no utilizada cláusula de retirada del artículo 50 del Tratado de la Unión Europea.

PALABRAS CLAVE: Brexit; retirada de la Unión Europea; Artículo 50 TUE; Reino Unido; negociaciones.

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I. THE DECISION TO WITHDRAW AND THE MILLER CASE

As everyone knows, on 23 June 2016 a referendum was held in the United Kingdom (UK) on whether this Member State should remain in or leave the European Union (EU). A majority of 51.9% of those voting on a 72% turn out voted to leave. Legally, the result was not binding as the *European Union Referendum Act 2012*² provided no detail on the consequences of the referendum result,³ but the Government pledged to honour the result and it has since been treated as politically and democratically binding. Immediately after the referendum, Mr David Cameron resigned as Prime Minister (PM) as he had campaigned to remain on the new terms for UK membership he had negotiated with Brussels.⁴ Mrs Theresa May, who had been Home Secretary, was chosen as leader of the Conservative party and took his place. Her first public utterance on becoming Prime Minister was “Brexit means Brexit” which, widely criticised as a meaningless tautology, was in fact a very serious indication that the UK was on the verge of the unprecedented invocation of Article 50 of the Treaty on European Union (TEU).⁵

The machinery for leaving the European Union is contained in Article 50 TEU. Its first paragraph is clear that, if a Member State decides to trigger its withdrawal from the Union, the conditions are a matter for that Member States’ law in accord with its “own constitutional requirements”.⁶ Once a Member State has decided to withdraw, it must notify the European Council of its intention. What is not so clear in the case of the United Kingdom is what those constitutional requirements to decide to leave the Union and notify that

² UK European Union Referendum Act 2015 c.36.

³ CHALMERS, D., “Gina Miller and the last Gasp of Parliamentary Sovereignty?”, *Maastricht Journal of European and Comparative Law*, vol. 24, no. 1 (2017), p. 4.

⁴ Conclusions of the European Council of 18-19 February 2016, *A New Settlement for the United Kingdom within the European Union*, EUCO 1/16.

⁵ A concise look at the back story of the 2016 referendum can be found in WALLACE, H., “Heading for the Exit: the United Kingdom’s Troubled Relationship with the European Union”, *Journal of Contemporary European Research*, vol. 12, no. 4 (2016), pp. 809-815; whilst a running commentary on UK progress towards Brexit is offered in the Editorials of *European Public Law*, vol. 22, no. 3 (2016) to vol. 24, no. 4 (2018). Finally, for an interesting analysis on the suitability of using a referendum to resolve the “British question” read GOSALBO BONO, R., “Brexit o Bremain”, *Revista General de Derecho Europeo*, vol. 39 (2016), pp. 1-23.

⁶ CRAIG, P., “Brexit: A Drama in Six Acts”, *European Law Review*, vol. 41, no. 4 (2016), p. 29.

intention are. This is due to the peculiar constitutional arrangements of this country which, unlike most others, “does not have a constitution in the sense of a single coherent code of fundamental law which prevails over all other sources of law” but, instead, has an unwritten constitution composed of “a combination of statutes, events, conventions, academic writings and judicial decisions.”⁷ In virtually all other Member States there are written constitutional norms for treaty termination and generally they also provide for specific rules for the special case of withdrawal from the EU.⁸ If, for example, it were Spain wishing to withdraw from the European Union, its own constitutional requirements are neatly set out in its Law of Treaties and other International Agreements.⁹ Article 37(3) of said norm makes a remission to the Spanish Constitution and together they require previous authorization of the Spanish Parliament before the Council of Ministers can terminate certain treaties, among which we can find those that confer on an international organisation the exercise of powers derived from the Constitution,¹⁰ i.e. the EU Treaties.¹¹ In Britain, on the other hand, the lack of any specific constitutional statute relating to its withdrawal from the European Union became a very serious (and highly mediated) issue after the referendum. So much so that

⁷ Judgment of 24 January 2017, R (*on the application of Miller and other*) v *Secretary of State for Exiting the European Union*, UKSC 5, paragraph 40.

⁸ Examples of national constitutions that refer specifically to the case of withdrawal from the European Union are, among others: Articles 23 of the German Grundgesetz, Articles 88-1 to 88-7 of the Constitution française, and Article 117 of the Costituzione della Repubblica Italiana.

⁹ Ley 25/2014 de Tratados y otros Acuerdos Internacionales.

¹⁰ Article 37(3) Ley 25/2004: “No obstante, lo dispuesto en los apartados anteriores, los tratados internacionales comprendidos en los artículos 93 y 94.1 de la Constitución Española solo podrán ser denunciados previa autorización de las Cortes Generales, de conformidad con lo dispuesto en el artículo 96.2 de la Constitución Española.” And it is Article 93 of the Constitution that refers to the EU Treaties: “Mediante ley orgánica se podrá autorizar la celebración de tratados por los que se atribuya a una organización o institución internacional el ejercicio de competencias derivadas de la Constitución. Corresponde a las Cortes Generales o al Gobierno, según los casos, la garantía del cumplimiento de estos tratados y de las resoluciones emanadas de los organismos internacionales o supranacionales titulares de la cesión.”

¹¹ For more on the termination of Treaties in the case of Spain, see: GONZÁLEZ VEGA, J. “Artículo 37. Denuncia y suspensión”, in Andrés Sáenz de Santa María, P., Diez-Hochleitner, J. & Pérez de Nanclares, J. (eds), *Comentarios a la Ley de Tratados y otros Acuerdos Internacionales*, Thomson Reuters (2015), pp. 763-788.

it resulted in an extraordinary academic debate¹² and in the most important judgment of the UK Supreme Court (UKSC) since its creation in 2009¹³ and maybe even the most important British judgment since the XVII Century:¹⁴ The *Miller* case.¹⁵

This case arose because the new Prime Minister had announced her intention to give notice under Article 50 TEU before the end of March 2017 and, more importantly, had argued that it was the executive's power (known as the "royal prerogative") to do so without the need for Parliamentary authorisation.¹⁶ Business owner Gina Miller and others judicially challenged this

¹² The first academic debate on the royal prerogative, the role of Parliament and the triggering of Article 50 in the Brexit context can be found in BARBER, N., HICKMAN, T. & KING, J., "Pulling the Article 50 'Trigger': Parliament's indispensable role", *UK Constitutional Law Blog*, June 2016, written on the Monday following the referendum. See also: DOUGLAS-SCOTT, S., "Brexit, Article 50 and the Contested British Constitution", *The Modern Law Review*, vol. 79, no. 6 (2016), pp. 1019-1040 and the doctrine there cited.

¹³ In 2005 Parliament passed the Constitutional Reform Act which, for the first time in British history, provided for the separation of the Appellate Committee (Supreme Court) from the legislature (Parliament) and the executive (Government). The last hearings and judgments in the House of Lords took place on 30 July and the new Supreme Court opened on 1 October 2009. The *Miller* case was the first ever to be heard *en banc* by the full court (eleven justices, there being one vacancy).

¹⁴ BELL, J., "La Cour supreme du Royaume-Uni et le Brexit", *Revue française de droit administrative* (2017), p. 220.

¹⁵ Judgment of 24 January 2017, *R (on the application of Miller and another) v Secretary of State for Exiting the European Union*, UKSC 5. In this sense, Eeckhout remarks "The litigation was conducted under conditions of unprecedented public attention, ranging far beyond the traditional echo chambers of lawyers and legal academics. For months the mainstream media focused on Gina Miller – now a celebrity – and her daring challenge to the government's plans. Concepts such as 'the royal prerogative' and the 'Sewel Convention', and cases like *De Keyser Royal Hotel*, normally the preserve of sophisticated constitutional lawyers, became items of popular debate. In academia there was a veritable blogfest on what the litigation was about, and how it should be resolved. This was the case of the century, and possibly of the last one too. The hearings before the Supreme Court were live-streamed in an unprecedented reality show, populated by star-studded barristers and a fearsomely erudite panel of Justices." (ECKHOUT, P., "The Emperor has no clothes. Brexit and the UK constitution", in Martill, B. & Staiger, U. (eds), *Brexit and Beyond: Rethinking the Futures of Europe*, UCL Press (2018), p. 165).

¹⁶ "Theresa May will trigger Brexit negotiations without Commons vote", 27 August 2016, recovered from <<https://www.telegraph.co.uk/news/2016/08/26/theresa-may-will-trigger-brexit-negotiations-without-commons-vot/>>.

power of the executive to trigger the UK's withdrawal process without the authority of an Act of Parliament. The two main arguments were the following: The Government relied on the principle that, as a matter of law, the conduct of the UK's foreign relations falls within the prerogative power of the Crown, advised by its Ministers, and this included the power to negotiate, amend and withdraw from international treaties. What is more, there was no need to make any exception regarding the EU Treaties. The claimants, however, argued that although the Crown can undoubtedly enter into and withdraw from treaties through the exercise of prerogative powers of its Ministers, it cannot, by doing so, alter domestic law. Given that a notification under Article 50 would result in the Treaties ceasing to have effect in domestic law, it would in fact alter this law and destroy statutory rights, and this could not lawfully be done without a new Act of Parliament. The UK Supreme Court agreed with the latter approach and recognised that the unusual nature of the EU Treaties due to the fact that EU law was an independent and overriding source of domestic law made irreconcilable that such a fundamental legal change as withdrawal from those Treaties be carried out by Ministers without authorisation of Parliament.¹⁷ Indeed, the decision to leave the EU was so far-reaching that it simply could not be left to the executive.¹⁸

Parliament then responded by passing the *European Union (Notification of Withdrawal) Act 2017* which received royal assent on 16th March 2017 and authorised the Prime Minister to give the notification.¹⁹ Theresa May did so by sending a letter to the President of the European Council, Donald Tusk, on 29th March 2017²⁰, turning the 29th March 2019 into the official *Brexit* day by effect of Article 50 paragraph 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* [...]" (emphasis added).

¹⁷ Judgment of 24 January 2017, R (*on the application of Miller and other*), paragraphs 65-101.

¹⁸ ECKHOUT, P., *op. cit.*, p. 168. For a detailed explanation of the case and the decision of the court see: MACKIE, S., "Brexit and the Trouble with an Uncodified Constitution: R (Miller) V. Secretary of State for Exiting the European Union", *Vermont Law Review*, vol. 42 (2017), pp. 297-343.

¹⁹ European Union (Notification of Withdrawal) Act 2017 ch.9.

²⁰ UK Prime Minister's letter to Donald Tusk triggering Article 50, 29 March 2017.

II. THE EUROPEAN UNION (WITHDRAWAL) ACT 2018

Swayed by recent polls that placed the Conservatives 21 points ahead of Labour and hoping that a decisive election victory would strengthen the government's hand in the Brexit negotiations, the PM managed to have Parliament dissolved and call a snap general election which was held on 8 June 2017. The result was that May's Government in fact lost its overall majority in the House of Commons and was only able to form a new government through a "confidence and supply" agreement with the Democratic Unionist Party of Northern Ireland (DUP). At this time, negotiations for a UK Withdrawal Agreement (WA) were proceeding with the European Commission and the new Parliament took the legislative steps needed to prepare UK law for leaving the Union. The *European Union (Withdrawal) Act 2018* received Royal Assent on 26 June 2018. It defined the initial "exit day" as 29 March 2019 and stipulated that, from that day, the European Communities Act 1972 which had provided for the UK's entry into what became the European Union would be repealed, although much of the existing EU law would be preserved as the law of the United Kingdom, with provision for exceptions and modifications to be made by delegated legislation (the so-called Henry VIII powers).²¹ The Act also established that Parliamentary approval was required of any Withdrawal Agreement reached by the Government and, if no agreement was reached or did not obtain approval by the legislative, the Government would have to state how it proposed to proceed and also bring that proposal before the Houses of Parliament.²² On 14 November 2018 the negotiations between the UK and the EU concluded with a Draft Withdrawal

²¹ "What is the EU Withdrawal Act 2018?", *Institute for Government*, recovered from <<https://www.instituteforgovernment.org.uk/explainers/eu-withdrawal-act>> (last accessed 18 November 2019).

²² European Union (Withdrawal) Act 2018 c.16. In summary, it provided that a Withdrawal Agreement may only be ratified if (a) a Minister of the Crown has laid before Parliament a statement that political agreement has been reached, a copy of the negotiated withdrawal agreement and a copy of the framework for the future relationship; (b) the House of Commons has approved the withdrawal agreement and future framework; (c) the House of Lords has, in effect, taken note of them both; and (d) an Act of Parliament has been passed which contains provision for the implementation of the withdrawal agreement.

Agreement setting out terms for an orderly exit from the European Union²³ and a non-binding Political Declaration (PD) establishing a framework for the future EU-UK relationship to be negotiated by the end of 2020.²⁴ The first thus laid out the terms of the divorce in order to secure an orderly withdrawal, essentially dealing with three key substantive issues: citizens' rights, a financial settlement and a solution to avoiding a border between Ireland and Northern Ireland.²⁵ The PD, on the other hand, was a non-binding document taking account of the framework for a future relationship between the ex-Member State and the Union to be fleshed out during trade negotiations once the latter's withdrawal became effective, i.e. once the WA entered into force. Given the new legal requirements of Parliamentary approval of the WA for its ratification as an international treaty, several members of the UK, EU and Scottish parliaments had sought a ruling from the European Court of Justice on the possibility of a departing country to unilaterally revoke its Article 50 notification, a matter on which said provision was silent. In other words, they wanted to know whether there was a legally valid third option for MPs voting on the Withdrawal Agreement between approving it or causing the UK to leave without a deal by legal default of Article 50(3) —that of revoking the notification and stopping the Article 50 process with the UK remaining in the European Union—.

²³ European Commission Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level, 14 November 2018, TF50 (2018) 55.

²⁴ European Commission Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, 22 November 2018, XT 21095/18.

²⁵ It also included other separation provisions concerning ongoing procedures, goods on the market, etc as well as set up a transition period needed to avoid a gap in the legal relations between the EU and the UK once the latter became a third country with the entry into force of its WA but had not yet finalised agreement on its future relationship with the Union. Until December 2020, unless extended by the parties, most EU law would continue to apply to and in the UK.

III. THE REVOCATION OF THE NOTIFICATION OF WITHDRAWAL: WIGHTMAN

Although the claimants were initially unsuccessful,²⁶ on 21 September 2018, the Court of Session, Inner House, First Division (Scotland, United Kingdom), granted the request for a preliminary ruling to the European Court of Justice.²⁷ The European Court received the request on 3 October 2018 and agreed to the expedited procedure in light of the urgency of the case, since Brexit was due on 29 March 2019 and the vote on the Withdrawal Agreement would have to occur well in advance. Spanish Advocate General (AG) Manuel Campos Sánchez-Bordona delivered his Opinion on 4 December 2018, and the Full Court gave its ruling on the 10 December 2018²⁸ in the now landmark case *Wightman*.²⁹ The latter followed the former's reasoning and decided that Article 50 TEU must be interpreted as meaning that, where a Member State has notified the European Council of its intention to withdraw from the European Union, that Member State—for as long as a withdrawal agreement has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in Article 50(3) TEU, possibly extended in accordance with that paragraph, had not expired—may revoke that notification unilaterally with the purpose of confirming its EU membership and bringing the withdrawal procedure to an end. One of the main arguments was that a Member State could not be forced to withdraw from the European Union against its will, which could have been the inevitable result if it was not allowed to unilaterally reverse its decision to withdraw and stop the Article 50 process.³⁰

²⁶ For more on the initial refusals and appeals of the petition see: TAYLOR, R. & WILSON, A., “Brexit, the Revocation of Article 50, and the Path not Taken: Wightman and Others for Judicial Review against the Secretary of State for Exiting the European Union”, *Edinburgh Law Review*, vol. 22, no. 3 (2018), pp. 417-422; ARMSTRONG, K., “The Right To Revoke an EU Withdrawal Notification: Putting the Bullet Back in the Article 50 Chamber?”, *The Cambridge Law Journal*, vol. 78, no. 1 (2019), pp. 24-38.

²⁷ Reclaiming Motion of 21 September 2018 by Andy Wightman and Others against Secretary Of State For Exiting The European Union, ScotCS CSIH_62.

²⁸ Advocate General Manuel Campos Opinion of 4 December 2018 to the *Wightman* case, EU:C:2018:978.

²⁹ Judgment of 10 December 2018, *Wightman*, C-621/18, EU:C:2018:999.

³⁰ For a longer analysis of the *Wightman* case see: GEORGOPOULOS, A. “Revoking Article 50 TEU (C-621/18 Wightman and others): ‘Iphigenia Must Reach the Altar’”, *UK Constitutional*

IV. THE UK-EU DRAFT WITHDRAWAL AGREEMENT

Theresa May's 2018 Withdrawal Agreement was first rejected by the House of Commons on the 15 January 2019 by 432 to 202 votes. With an opposition majority of 230 votes, it was the largest defeat on a government motion in the era of universal suffrage. Apart from "remainer" MPs voting against the deal as the CJEU's *Wightman* ruling had removed the threat of crashing out without a deal, the main reason that drove May to this disastrous result was the (in)famous "Irish backstop", an anathema to both hard-line "brexeters" and the DUP on whose approval her Withdrawal Agreement really depended.³¹ The backstop included in the WA planned to keep the UK in a customs arrangement with the EU as long as no future deal on trade was reached with an alternative solution to avoiding a border on the Isle of Ireland. This raised, to some leaver MPs, the unacceptable situation of the UK being trapped inside the customs union indefinitely, with no legal right of withdrawal without EU consent. The DUP, on the other hand, were opposed to the backstop on the grounds that it would require Northern Ireland to be subject to closer regulatory alignment with the EU than the rest of the UK.³² After this first defeat, the Prime Minister then held a final round of negotiations with the EU and secured a package of interpretations and clarifications on the Withdrawal Agreement and a sequence of new votes took place. On 12 March 2019 a second meaningful vote on the "new package" was held and May's deal was again rejected in the House of Commons by 391 to 242 votes.³³ On 13 March, MPs voted to reject a "no deal" Brexit and, on 14 March, they approved 412 to 202 to seek to agree with the European Union an extension of the negotiating period beyond the initial 29 March 2019 date with a view to finalising the ratification of the Withdrawal Agreement which had so far failed in Parliament.³⁴ On 21 March 2019, the European Council agreed

Law Blog, December 2018.

³¹ O'LEARY, Brendan "How Theresa May's Brexit Deal Collapsed. The Return of the Irish Question", *Foreign Affairs*, vol. 98, no. 2 (2019).

³² GOODLAD, G., "The Slow-Motion Downfall of Theresa May", *Political Insight*, vol. 10, no. 3 (2019).

³³ House of Commons, *The UK's EU Withdrawal Agreement*, Briefing Paper 08453, 11 April 2019.

³⁴ House of Commons, *Extending Article 50: could Brexit be delayed?*, Briefing Paper 8496, 21 March 2019.

to an extension until 22 May 2019, but only provided the Withdrawal Agreement was approved by the House of Commons in the following week.³⁵

The weekend before the third and final vote on May's Withdrawal Agreement, it was estimated that a crowd of over one million people marched through central London to demand that MPs grant them a fresh referendum on Brexit.³⁶ However, a new people's vote was not introduced in the Brexit policies of any of the main political parties. On 29 of March 2019, the day Britain was due to leave, a third and final vote once again defeated the Prime Minister's deal by 344 to 286 votes.³⁷ This meant the UK had missed the EU deadline to delay Brexit to 22 May and leave with a deal. For such a case, the European Council had already agreed in the same Decision abovementioned to a longer extension.³⁸ If the UK was still to be a Member State on 23-26 May 2019, it would be under the obligation to hold elections to the European Parliament (EP) in accordance with Union law. Therefore, it was expected the UK indicate a way forward before 12 April 2019 and, among other things, whether it would be holding such elections. On the 8th April and a few days before that deadline, the *European Union (Withdrawal) Act 2019* was passed.³⁹ This required a Minister of the Crown to move a motion that the House of Commons agree to the Prime Minister seeking another extension. Pursuant to that Act, Prime Minister Theresa May sought a second extension, which on 10th April 2019 was granted until 31 October 2019.⁴⁰ On the same day, the Government made the Order enabling the holding of European Parliament elections still with the idea that if the UK reached agreement to leave the EU

³⁵ European Council Decision taken in agreement with the United Kingdom, extending the period under Article 50(3)TEU, 22 March 2019, EUCO XT 20006/19.

³⁶ "One million join march against Brexit as Tories plan to oust May", 23 March 2019, recovered from <<https://www.theguardian.com/politics/2019/mar/23/one-million-march-against-brexit-tories-plan-oust-may>> (last accessed 18 November 2019).

³⁷ "Brexit: MPs reject May's EU withdrawal agreement", 30 March 2019, recovered from <<https://www.bbc.co.uk/news/uk-politics-47752017>> (last accessed 18 November 2019).

³⁸ Supra 35.

³⁹ European Union (Withdrawal) Act 2019, c.16.

⁴⁰ European Council Decision taken in agreement with the United Kingdom extending the period under Article 50(3)TEU, 11 April 2019, EUCO XT 20013/19. The regulation changing the "exit day" was made the next day by amending the *European Union (Withdrawal) Act 2018*.

before 23 May then the legislation allowing EP elections to happen would be repealed and UK participation would be cancelled.⁴¹

V. 2019 EUROPEAN PARLIAMENT ELECTIONS

The UK initially triggered Article 50 TEU long before it was prepared for the immensity of its deeply complex EU withdrawal negotiations.⁴² One key consideration for this premature decision was a desire to avoid participation in the European Parliament elections.⁴³ Many also opined later that, for the same reason, the talks could not be extended beyond the initial two year period because it would create the bizarre situation of those same citizens that had refused EU membership in the Brexit referendum now voting in EU elections.⁴⁴ Nonetheless, on 7 May 2019 Theresa May's government conceded that there was not enough time left to get her Withdrawal Agreement through Parliament and therefore the UK would have to take part in the European plebiscite.⁴⁵

Three years after Britain voted to leave the EU, the new 2019 EU Parliament would again be composed of 751 members, including 73 British MEPs.⁴⁶ The European Parliament elections held in the UK on 23 May 2019 had the second highest turn-out in any European election in this country at 37%.⁴⁷ As campaigning centred entirely on the issue of withdrawal, votes

⁴¹ House of Commons, *Brexit delayed again: until 31 October 2019?*, Briefing Paper 8549, 17 April 2019.

⁴² ROGERS, I., *9 Lessons in Brexit*, Short Books (2019), pp. 32-44.

⁴³ House of Commons, *European Parliament Elections 2019: results and analysis*, Briefing Paper 8600, 26 June 2019.

⁴⁴ "EU has no choice but to approve Brexit extension", 20 March 2019, recovered from <<https://www.politico.eu/article/eu-has-no-choice-but-to-approve-brexit-extension/>> (last accessed 18 November 2019).

⁴⁵ "Brexit: UK will take part in European elections, says David Lidington", 7 May 2019, recovered from <<https://www.bbc.co.uk/news/uk-politics-48188951>> (last accessed 18 November 2019).

⁴⁶ On the 29 June 2018 the European Council adopted a decision reducing and redistributing European Parliament seats following the decision by the United Kingdom to exit the European Union to become effective once Brexit was final (European Council Decision establishing the composition of the European Parliament, EUCO 7/1/18).

⁴⁷ The first being the 2014 EP elections at 38% turn-out.

shifted from the two main Conservative and Labour parties advocating a withdrawal agreement to smaller parties which favoured the extremes of either a no-deal Brexit or no Brexit at all. In this sense and respectively, ex UKIP leader Nigel Farage's newly formed Brexit Party came first with 29 seats while the Lib Dems also soared from 1 seat in the 2014-2019 EP to 16. Corbyn and May, on the other hand, lost half or more of their MEPs, winning only 10 and 4 seats.⁴⁸ Although the results were not announced until 26 May after all EU countries had voted, polling had already revealed that the Tories were set for a historic defeat. Thus, after having lost her majority in the snap elections, having also been defeated three times on the "meaningful vote" on her deal and then having enraged Conservative Brexit supporters with an offer to Labour MPs of a vote on whether to hold a second referendum if her Withdrawal Agreement was passed⁴⁹; on 24 May the Prime Minister officially announced her resignation.⁵⁰ This triggered another contest for a new Conservative leader which was won by Boris Johnson. He effectively took over as Prime Minister of the United Kingdom on 24 July 2019.

VI. THE PROROGATION OF PARLIAMENT AND THE CHERRY CASE

The new Prime Minister's stated mission was to deliver Brexit by the 31 October extended deadline either through the negotiation of a new Withdrawal Agreement with the EU that would succeed in Parliament or by leaving without any deal in place. He would not, however, be seeking another extension. This was the first promise he would breach. The second was his pledge to remove the Protocol on Ireland/Northern Ireland from the With-

⁴⁸ "European Election 2019: UK results in maps and charts", 27 May 2019, <<https://www.bbc.co.uk/news/uk-politics-48403131>> and see also <<https://election-results.eu/national-results/united-kingdom/2019-2024/>> (last accessed 18 November 2019). For a comparison with the 2014-2019 EP: CRACKNELL, R., "European Parliament elections: How has the UK voted in the past?", *House of Commons Library* (2019). For an analysis of the 2019 European Parliament elections focussing on both the UK and EU-wide results, see: *House of Commons, European Parliament Elections 2019: results and analysis*, Briefing Paper 8600, 26 June 2019.

⁴⁹ "Theresa May offers vote on second Brexit referendum", 21 May 2019, recovered from <<https://www.ft.com/content/6ef8bcec-7bc4-11e9-81d2-f785092ab560>> (last accessed 18 November 2019).

⁵⁰ "Theresa May resigns over Brexit: What happened?", 24 May 2019, recovered from <<https://www.bbc.co.uk/news/uk-politics-48379730>> (last accessed 18 November 2019).

drawal Agreement.⁵¹ EU leaders insisted the backstop could not be abolished and that they would not be threatened by the prospect of a no deal scenario.⁵² This firmness was due to their belief in the likelihood of the British parliament blocking once again any such hard Brexit.⁵³ Mr Johnson then rose severe concerns regarding the Government's respect for the legislative power during such a tumultuous time as the UK's withdrawal from the EU. At the end of August, he announced the Queen had approved his request to suspend Parliament between 9 and 12 September until 14 October 2019.⁵⁴ The decision was mostly seen as a strategy to avoid proper Parliamentary scrutiny of the Government's Brexit plans and especially as a way of strengthening its negotiating hand vis-à-vis the EU by giving credibility to the threat of no-deal. However, just one day before so-called prorogation was put into effect, the Houses of Parliament managed—in spite of fierce opposition and very little time—⁵⁵ to approve the *Benn Act*. This Act provided a statutory obligation for the government to prevent a no deal Brexit on 31 October 2019 by requiring the Prime Minister to ask for another extension of Article 50 TEU unless the House of Commons approved a Withdrawal Agreement agreed with the European Union by 19 October 2019.⁵⁶ This effectively rendered his prorogation aims futile. Nonetheless, Boris Johnson and his government continued to tell EU leaders that the UK would leave with or without a deal by legal default of Article 50 TEU. Indeed, according to Number 10, the European Union would be making a historic mistake if it thought the *Benn Act* would stop Brexit from happening on 31 October, as the Government abso-

⁵¹ Boris Johnson, "Priorities for Government", *House of Commons Hansard*, 25 July 2019.

⁵² "Simon Coveney conveys 'disappointment' with Boris Johnson's four-page letter on Brexit. Donald Tusk has re-iterated the EU's commitment to the backstop", *The Journal.ie*, 20 August 2019.

⁵³ "Boris Johnson's three-way Brexit standoff", 29 July 2019, recovered from <<https://www.politico.eu/article/uk-prime-minister-boris-johnson-three-way-brexit-standoff-no-deal-withdrawal-agreement/>> (last accessed 18 November 2019).

⁵⁴ "Parliament suspension: Queen approves PM's plan", 28 August 2019, recovered from <<https://www.bbc.com/news/uk-politics-49493632>>.

⁵⁵ TOLHURST, A., "Tory peers launch bid to block no-deal bill with filibuster in House of Lords", *Politics Home*, 4th September 2019 [Online].

⁵⁶ European Union (Withdrawal) (No. 2) Act 2019, c. 26.

lutely refused to seek another extension of negotiations.⁵⁷ The *Benn Act* also cost the Conservatives its slim majority by one MP defecting⁵⁸ and another 21 MPs rebelling and voting with the opposition to stop a no deal Brexit. They then had their whip removed and were expelled from the party.⁵⁹

By this time, the prorogation of Parliament had also been judicially challenged and the UK Supreme Court had ruled that the Government's decision to prorogue Parliament was unlawful. Indeed, the UKSC again convened a panel of eleven Justices, the maximum number who were permitted to sit and, on the 24 September 2019, gave another ruling of grave constitutional importance.⁶⁰ In the *Cherry* case, the Court considered that Mr Johnson had on many occasions made it clear that he believed that the European Council would only agree to changes in the Withdrawal Agreement if they thought that there was a genuine risk that the United Kingdom would leave without any such agreement. Yet it was also clear that a majority of the House of Commons would not support withdrawal without an agreement. The Court then decided the Prime Minister's advice to the Crown to prorogue Parliament for five weeks had the effect of frustrating the constitutional role of Parliament in holding the Government to account and unlawfully prevented it from having a voice in the run-up to exit day. It therefore ruled that the Parliament's session had not been brought to an end and if Parliament so wished, parliamentary scrutiny of government activity could continue.⁶¹ Parliament reopened the very next day. Boris Johnson's deeply worrying response

⁵⁷ SCHOFIELD, K., "Boris Johnson warns EU that Benn Act will not stop the UK from leaving on 31 October", *Politics Home*, 6 October 2019 [Online].

⁵⁸ "Boris Johnson loses majority as MPs seek to stop no-deal Brexit", 3 September 2019, recovered from <<https://www.politico.eu/article/tories-lose-commons-majority-as-phillip-lee-defects/>> (last accessed 18 November 2019).

⁵⁹ Ten of the twenty-one subsequently had the whip restored on the 29th October, recovered from <<https://www.theguardian.com/politics/2019/oct/29/tories-restore-party-whip-to-10-mps-who-sought-to-block-no-deal-brexit>> (last accessed 18 November 2019).

⁶⁰ Judgment of 24 September 2019, *Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)*, UKSC 41.

⁶¹ ELLIOTT, M., "The Supreme Court's Judgment in Cherry/Miller (No 2)", *Public Law for Everyone* [Online], (2019).

was to say that he thought “The Court was wrong to pronounce on what is essentially a political question, at a time of great national controversy.”⁶²

VII. THE “UPDATED” WITHDRAWAL AGREEMENT

While the abovementioned constitutional turmoil was going on, talks with the EU had reopened and the rough shape of a new Boris Johnson Brexit Deal was emerging.⁶³ On the 17 October it was announced that an updated Withdrawal Agreement and Political Declaration had been agreed. This was understood by some as an apparent vindication of the new UK Prime Minister’s strategy to ramp up the threat of a “no deal” departure and force concessions from Brussels.⁶⁴ However, the “new” Withdrawal Agreement⁶⁵ remained unchanged in substance as per the agreement reached on 14 November 2018 except for a revised Protocol on Ireland/Northern Ireland which was basically a return to an even earlier proposal made by the EU in February 2017 setting out special arrangements for Northern Ireland.⁶⁶ This proposal had already been rejected by both Theresa May⁶⁷ and Boris John-

⁶² See Prime Minister’s Update of 25 September 2019, vol. 664, available here: <<https://hansard.parliament.uk/Commons/2019-09-25/debates/AD2A07E5-9741-4EBA-997A-97776F80AA38/PrimeMinisterSUpdate>> (last accessed 18 November 2019). Also, KONSTADINIDES, T., O’MEARA, N. & SALLUSTIO, R., “The UK Supreme Court’s Judgment in Miller/Cherry: Reflections on Its Context and Implications”, *UK Constitutional Law Blog*, October 2019.

⁶³ GRANT, C., “Deal Or No Deal? Five Questions on Boris Johnson’s Brexit Talks”, *CER Insights*, 20 September 2019.

⁶⁴ USHERWOOD, S., “Boris Johnson’s Brexit deal: what’s in it and how is it different to Theresa May’s version?”, *UK in a Changing Europe Blog*, 17 October 2019.

⁶⁵ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L 29/7.

⁶⁶ European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, TF50 (2018) 33.

⁶⁷ ‘No UK PM could ever agree with EU draft’, BBC video of 28 February 2018, available at <<https://www.bbc.com/news/av/uk-politics-43228485/theresa-may-no-uk-pm-could-ever-agree-with-eu-draft#>> (last accessed 28 March 2020).

son⁶⁸ due of course to its possible impact on the principle of territorial integrity of the UK. The significant difference between the deal May secured in November and this “new” deal was that her November backstop maintained a much more complete and encompassing set of relations on trade in goods between the EU and the UK through an envisaged UK-EU customs territory and alignment with EU law and standards, therefore potentially restricting the UK’s ability to diverge from EU regulation and pursue an independent trade policy. Under the new scenario, only Northern Ireland would remain aligned to a limited set of rules related to the EU’s single market in order to avoid a hard border with the Republic of Ireland and thus the UK could have its own trade agreements with other countries. In other words, the EU-UK single customs territory seeking to avoid both a border on the Island but also between Northern Ireland and Britain was replaced with a new way to achieve the goal of avoiding the first border but not the second: in legal terms, Northern Ireland will remain part of the UK customs territory and be included in UK free trade agreements. In practice, however, EU customs and single market legislation will apply to Northern Ireland, that is, to all goods entering its territory if they risk entering the EU single market. In conclusion, there will effectively be a customs and regulatory border between Great Britain and Northern Ireland down the Irish Sea. Finally, the revised proposal is no longer a backstop in case nothing else is agreed and thus subject to EU consent for its removal, but a set of permanent arrangements under a new mechanism of consent which gives the Members of the Northern Ireland Assembly a vote every four years (or every eight years if continuity of the WA had been endorsed on a cross-community basis).⁶⁹ If the Protocol was ever rejected by the Assembly, the provisions specific to Northern Ireland would cease to apply after two years.⁷⁰

Regarding the new Political Declaration in which the parties set out their vision for the yet to be negotiated future relationship, Theresa May had hoped

⁶⁸ ‘Boris Johnson’s letter to Donald Tusk calling for Brexit backstop to be replaced’, *Politics Home*, 19 August 2019.

⁶⁹ Cross-community voting is a form of voting used in the Northern Ireland Assembly according to the Good Friday Agreement which requires the support of both main communities in Northern Ireland, in other words, a majority of unionists and a majority of nationalist members of the Assembly (*The Belfast Agreement*, 10 April 1998).

⁷⁰ House of Commons, *The October 2019 EU-UK Withdrawal Agreement*, Briefing Paper CBP 8713.

for a much closer future relationship with the EU than Mr Johnson. Hers included higher alignment in the regulatory and customs sphere to ensure less trade friction and the UK signing up to so-called level playing field provisions. By contrast, Johnson's Government seeks a Canada-style free trade agreement that will not bind the UK to level playing field commitments but which envisages zero tariffs and zero quotas.⁷¹

Of course, the first major obstacle for the new PM was the same as for the previous one: getting the new deal through the UK Parliament. This would have to be done, firstly, without a Conservative majority or the support of the DUP⁷² and, secondly, in time to avoid the *Benn Act* effect and fulfil Johnson's recurrent promise to leave the EU by October 31. The intention was therefore to present a motion of approval and have a clean yes or no vote on the Withdrawal Agreement on the same day the deadline for seeking an extension, i.e. the 19 October, ran out. Thus, the UK Parliament sat on a Saturday for the first time in 37 years.⁷³ However, a very important and "cunningly crafted"⁷⁴ change was again proposed by an MP to the Prime Minister's deal: the Letwin amendment. It passed by 322 votes to 306. The idea behind it was that the Government's motion passing on the 19th would have devoided the *Benn Act* of effect. Many MPs feared that in such a case the UK could still end up leaving the EU without a deal on 31 October if the extension period ran out before legislation to make Brexit a reality had been approved. The Letwin amendment held off on giving final approval for the UK-EU Withdrawal Agreement until after a detailed Bill implementing and making other provision in connection with it —the Withdrawal Agreement

⁷¹ European Commission Revised text of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom as agreed at negotiators' level on 17 October 2019, to replace the one published in OJ C 66I of 19.2.2019, TF50 (2019) 65.

⁷² "Brexit: EU and UK reach deal but DUP refuses support", 17 October 2019, recovered from <<https://www.bbc.co.uk/news/uk-politics-50079385>> (last accessed 18 November 2019).

⁷³ This rare Saturday sitting also happened at the outbreak of World War II, during the Suez crisis and during the Falklands conflict, recovered from <<https://www.parliament.uk/business/news/2019/october/parliament-sits-on-a-saturday-to-debate-the-prime-ministers-proposed-brexit-deal/>> (last accessed 18 November 2019).

⁷⁴ "Brexit delay voted through by MPs: What has just happened?", 19 October 2019, available at <<https://www.bbc.co.uk/news/world-europe-50110214>> (last accessed 18 November 2019).

Bill (WAB)⁷⁵— was passed. This ultimately meant that the 19 October deadline had not been met, the *Benn Act* was effectively brought into play and the Prime Minister was required by law to write to the European Commission and request a new extension until January 31. Loud cheers among demonstrators were heard that day outside Westminster where a multitudinous crowd had once again gathered after another London march asking for a final referendum on the withdrawal agreement.⁷⁶ Late that evening, Mr Johnson sent the letter to the EU making clear that he was required by law to seek a delay but personally believed that it was a mistake.⁷⁷ The EU27 accepted the third UK request for an extension and the new position under Article 50 was that the United Kingdom would leave the Union on 31 January 2020 with or without a Brexit deal.⁷⁸

VIII. THE WITHDRAWAL AGREEMENT BILL (WAB)

Boris Johnson still wished to meet his promised Brexit deadline. His new plan was thus to effectively incorporate his Withdrawal Agreement into UK law through the Withdrawal Agreement Bill (WAB) and to do so before the 31 October. The WAB was not only an extremely complex amendment statute of 110 pages overlaid onto *The European Union (Withdrawal) Act* which gave direct effect and supremacy to the WA, but also an enormously important piece of legislation that effectively and finally implemented Brexit. The Government nonetheless intended it be given only 3 days of Parliamentary scrutiny: from Monday the 21 October when it was first published until Thursday 24. The great stumbling block in this case would therefore be the fast-tracking of the Brexit process because not only the WAB but its timetable had to be approved by MPs. The PM, aware that his Bill might gain sufficient votes but not be approved in time to fulfil his 31 October promise, used one final

⁷⁵ Withdrawal Agreement Bill 58/1.

⁷⁶ “People’s Vote march: Jubilant scenes at ‘final say’ Brexit protest”, 19 October 2019, recovered from <<https://www.bbc.co.uk/news/uk-50108531>> (last accessed 18 November 2019).

⁷⁷ Prime Minister’s letter to President Donald Tusk 19 October 2019, available here: <<https://www.gov.uk/government/publications/prime-ministers-letter-to-president-donald-tusk-19-october-2019>> (last accessed 18 November 2019).

⁷⁸ European Council Decision taken in agreement with the United Kingdom extending the period under Article 50(3) TEU, 28 October 2019, EUCO XT 20024/2/19.

threat. Unless his 3-day schedule was accepted, he would pull the WAB and press for a general election. As anticipated, the first reading in the House of Commons on Johnson's Bill passed by 329 (every Conservative MP, 25 independents and 19 Labour) to 299 on Tuesday 22 October but he failed to get approval for the timetable by 308 (every Conservative MP, 18 independent and 5 Labour) to 322.⁷⁹ The PM then went on to blame the “dysfunctional” Parliament for not reaching his 31 October target and pressed ahead with his plan to trigger a snap election. This final plan would take him another three thwarted attempts in Parliament because of the need to secure the support of two-thirds of MPs —434 in total— for a snap election to be approved through the Fixed-Term Parliaments Act 2011. Finally, true to form, he would circumvent this legal requirement by proposing a short, one-off piece of legislation to trigger an election on 12 December with the advantage of it only requiring a simple majority.⁸⁰ Lawmakers finally agreed to hold a general election on this day and which would notably be unlike any other, not only because it was the first UK winter poll since 1923⁸¹ but because it revolved entirely around Brexit.

IX. THE DECEMBER UK ELECTIONS

The December 2019 election was called on the Conservative slogan “Get Brexit done” and the Prime Minister's rhetoric was that parliamentary obstructionism had to be defeated by a new public vote in order to gain a Tory majority that would approve his deal. Labour, on the other hand, finally added a new referendum to its Brexit policy: if it won the election it promised to renegotiate the Withdrawal Agreement with the EU and put it to another

⁷⁹ “Brexit deal: How did my MP vote on the Withdrawal Agreement Bill?”, 22 October 2019, recovered from <<https://www.bbc.co.uk/news/uk-politics-50145265>> (last accessed 18 November 2019).

⁸⁰ “Boris Johnson loses election vote — unveils plan B”, 28 October 2019, recovered from <<https://www.politico.eu/article/uk-mps-reject-snap-election-on-december-12/>> (last accessed 18 November 2019).

⁸¹ “How to Navigate the 2019 General Election: Views from UCL”, 22 November 2019, recovered from <<https://ucl-brexit.blog/2019/11/22/how-to-navigate-the-2019-general-election-views-from-ucl/>>.

public vote.⁸² The Liberal Democrats continued to campaign in favour of revoking the Article 50 TEU notification of withdrawal with the UK remaining a member of the EU.⁸³ Finally, the SNP supported another referendum on EU membership or the revocation of Article 50 if either option was the only alternative to a no-deal Brexit.⁸⁴ The general election result was a resounding victory for Prime Minister Boris Johnson's Conservatives⁸⁵ who won 47 new MPs with a total of 365 seats and an 80 seat majority.⁸⁶ This stunning outcome immediately led to a generalised acceptance/resignation that Brexit was finally set to happen on 31 January 2020.⁸⁷

X. THE EUROPEAN UNION (WITHDRAWAL) ACT 2020

The UK, in distinction to the monist approach adopted by most other countries, is a dualist country where an international treaty is not part of British law unless and until there is domestic legislation to give it effect. The main purpose of the new European Union Withdrawal Act (EUWA) introduced to the newly elected House of Commons on 19 December 2019 is to implement the revised EU-UK Withdrawal Agreement in the UK. The Government's sweeping majority effectively changed the political dynamics driving the Brexit process and the EUWA passed every legislative stage with overwhelming support. Final backing in the House of Commons was gran-

⁸² "Labour's Plan for Brexit", recovered from <<https://labour.org.uk/page/labour-brexit-plan/>> (last accessed 18 November 2019).

⁸³ "2019 Liberal Democrat Manifesto", recovered from <<https://www.libdems.org.uk/plan>> (last accessed 18 November 2019).

⁸⁴ "General election 2019: SNP's Brexit position backed by EU vote", 27 November 2019, recovered from <<https://www.bbc.com/news/av/uk-scotland-50574653/general-election-2019-snp-s-brexit-position-backed-by-eu-vote>> (last accessed 18 November 2019).

⁸⁵ For further analysis of the British General Election results and what led to them, see: DONNELLY, B., "Brexit: The End of the Beginning", *The Federal Trust Blog*, 17 December 2019.

⁸⁶ The results have given rise to serious criticism regarding the first-past-the-post voting system used in the UK and its failure to translate public sentiment into reasonably representative outcomes: SACHS, J., "The UK's Electoral System Failed", *Project Syndicate*, 16 December 2019.

⁸⁷ ORTEGA, A., "From Brexit to Great Singapore in Europe", *Elcano Blog*, 17 December 2019; POLAK, P., "The 2019 UK Elections and the Latest Brexit Deadline", *Yuste Foundation Newsletter*, vol. 1 (2020).

ted on 9 January 2020 with 330 to 231 in favour.⁸⁸ The House of Lords allowed the Bill to pass on 22 January 2020.⁸⁹ The next day, it received Royal Assent. On the 24 January, Boris Johnson, in representation of the UK, and Ursula von der Leyen and Charles Michel (new Presidents of the European Commission and the European Council, respectively), on behalf of the EU, signed the Withdrawal Agreement.⁹⁰ There is no equivalent to the EUWA passed by the EU. Following the rules of Article 50 TEU, the WA, an EU Treaty, was approved by the European Parliament on 29 January⁹¹ and concluded by the Council of the EU the day after.⁹² By effect of its entry into force, the withdrawal process came to an end and the UK became a third country on 1 February 2020.

* * * * *

Now the UK is no longer a Member State it can enter into new negotiations with the Union towards establishing their future trade relations that will replace its abandoned membership. In the meantime, the UK is existing in a transition period during which nearly all EU rules continue to apply, although it cannot take part in EU decision-making as it is no longer represented in the EU institutions and has lost its voting rights.⁹³ According to Article 126 of the Withdrawal Agreement, the transition period will last until the end of December 2020 unless extended pursuant to Article 132, that is, by a decision

⁸⁸ “Brexit: MPs give final backing to Withdrawal Agreement Bill”, 9 January 2020, recovered from <<https://www.bbc.com/news/uk-politics-51051178>> (last accessed 25 March 2020).

⁸⁹ “Brexit: EU withdrawal bill clears final parliamentary hurdle”, 22 January 2020, recovered from <<https://www.bbc.com/news/uk-politics-51210602>> (last accessed 25 March 2020).

⁹⁰ EUROPEAN COMMISSION, “The EU-UK Withdrawal Agreement”, recovered from <https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/eu-uk-withdrawal-agreement_en> (last accessed 25 March 2020).

⁹¹ Approval was given following an emotional debate in which MEPs sang “Auld Lang Syne” to bid farewell to 40 years of UK membership: “European Parliament gives final approval to Brexit deal, bids farewell with ‘Auld Lang Syne’”, 29 January 2019, recovered from <<https://www.france24.com/en/20200129-european-parliament-gives-final-approval-to-brexit-deal>> (last accessed 25 March 2020).

⁹² Council Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

⁹³ FELLA, S., “Brexit next steps: The transition period”, *House of Commons Insight* (2020).

adopted before 1 July 2020. Curiously, when the new Conservative Government tabled the EUWA, it was a slightly amended version of the October WAB as it no longer found it necessary to include concessions designed to gain cross-party support.⁹⁴ One such amendment was a new clause to rule out any extension to the transition period, meaning unless new legislation reamends the clause in the near future, the EU and the UK only have eleven months to negotiate their new relationship and put an agreement in place.⁹⁵ This has been deemed a highly unrealistic timetable given how EU trade agreements generally take four to seven years to conclude.⁹⁶ In effect, all that has been discussed thus far regarding the future relationship is contained in the revised Political Declaration, a mere non-binding framework to serve for the forthcoming trade negotiations. According to the PD, the future partnership will encompass “a Free Trade Agreement (FTA), as well as wider sectoral cooperation” and will be “underpinned by provisions ensuring a level playing field for open and fair competition.”⁹⁷ The scale of these generic commitments of course depends on the scale of the future relationship, which at the time of writing remains to be seen.

⁹⁴ Another clause inserted by Johnson’s Government into the amended withdrawal bill reserved the right to lower courts and not only the Supreme Court to reinterpret and overturn EU case law (“Brexit: Lower British courts to overrule EU law”, 18 December 2019, recovered from <<https://www.thetimes.co.uk/edition/news/lower-courts-to-overrule-eu-law-rw28swlrg>>). Likewise, the new EUWA scraps or waters down a number of key protections compared with the October WAB. In this sense, it removes an entire schedule that previously promised to protect workers’ rights, with the government suggesting this will now be dealt with in separate legislation. Ministers are also no longer bound by the legislation to provide updates on the future trading relationship or to make sure the parliament approves the government’s negotiating objectives. And thirdly, it waters down a commitment to taking unaccompanied refugee children from Europe, known as the Dubs amendment (*European Union (Withdrawal Agreement) Bill 2019-20*).

⁹⁵ There also exists the possibility of amending the WA and eliminating the need to agree on an extension by the 1 July 2020 as pointed out by LOCKE, T., “In the twilight zone: the transition period in the Withdrawal Agreement”, in Santos Vara, J., Wessel, R. & Polak, P. (eds), *Research Handbook on the International Dimension of Brexit* (forthcoming Routledge 2020).

⁹⁶ “EU brushes off Boris Johnson’s deadline for post-Brexit trade deal”, 17 December 2019, recovered from <<https://www.thetimes.co.uk/article/election-2019-boris-johnson-takes-tough-new-line-on-brexit-trade-talks-03blg97jz?region=global>> (last accessed 25 March 2020).

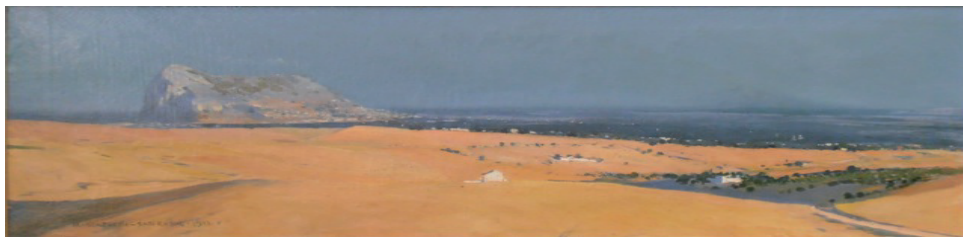
⁹⁷ Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, OJ [2020] C34/12.

Experience has shown that it took the UK three and a half agonising years of uncertainty since the Brexit referendum to negotiate just three basic pillars for its divorce: citizens' rights, a financial settlement and the issue of the Irish border. The main difficulty was the hung Parliament that resulted from Theresa May's snap election in June 2017, leaving her with a minority Government that never offered the simple majority needed in the House of Commons to approve her deal with Brussels. There was no such problem in the EU. The European institutions had tactically ensured a united front by limiting the divorce negotiations to matters in which it was easy for the EU27 to have perfectly aligned interests. All of them of course wanted the UK to pay the Brexit bill, to retain rights for their citizens living in the UK and to let Ireland shape the negotiations over the Irish border.⁹⁸ On the contrary, they could have different interests over international trade, finance and migration, issues that were deliberately left for the future but now have to be faced.⁹⁹ Thus, the tables might have turned. Whereas the Johnson Government has a thumping majority to quickly approve his future agreement at home, ratification by the EU could prove cumbersome. Especially if its content goes beyond EU exclusive competences and becomes a mixed treaty, i.e. one requiring Member State ratification by national—and in some cases regional—parliaments. Furthermore, whereas the European Commission strategically exploited its united position to gain leverage in the withdrawal negotiations and extract concessions from the UK,¹⁰⁰ the latter might suddenly find it can now capitalise on divergent national interests in the EU during these more sensitive trade talks. As with everything Brexit, only time will tell.

⁹⁸ SPRINGFORD, J., LOWE, S. & OPPENHEIM, B., "Will the unity of the 27 crack?" *Centre for European Reform Policy Brief* (2018).

⁹⁹ In effect, Article 50 does not include a selection of material issues that must be agreed in a withdrawal agreement but refers merely to "the arrangements for withdrawal" which the European institutions have freely interpreted.

¹⁰⁰ PATEL, O., "The EU and the Brexit Negotiations: Institutions, Strategies and Objectives" *UCL Brexit Insight* (2018).



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