

# Legal Consequences of ‘Brexit’ for the Role of the EU and the UK in Global Affairs

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## 1. Introduction

Departure from the European Union has political, economic and legal consequences. Almost a year after the Brexit vote in the United Kingdom it is absolutely clear that, first heading for the door, then departing from the European Union and (at the same time or thereafter) providing for a post-divorce framework will be neither easy nor smooth.<sup>1</sup> This paper has no desire to serve as a comprehensive guide to what has been unravelling ever since PM Theresa May filed her notification as per Article 50 TEU.<sup>2</sup> *Au contraire*, it focuses on one, yet very crucial, aspect of Brexit: its external dimension.<sup>3</sup> Even with the subject area narrowed down the readers will find in the analysis that follows that departure from the EU raises a myriad of political and legal issues that need to be attended to. In the simplified Brexiters’ world everything is easy: from the moment of withdrawal the United Kingdom will no longer be bound by EU external policies, including Common Commercial Policy and all existing EU agreements with third countries will cease to apply. In the meantime, the United Kingdom will flourish and become a trade power by means of trade agreements it desires to negotiate with countries around the World. This would be done swiftly with no tears or sweat. Alas, such a view, although appealing to some, does not take into account that many a times the truth is stranger than fiction. In this paper, we aim to address some of the pertinent political and legal issues that the European Union and the United Kingdom must attend to as divorce negotiations will be pending. It should be emphasised that the latter’s centre of gravity will not be on external dimension, though – as argued in the next section – withdrawal process has two faces. From the point of view of the European Union it is, in itself, a hybrid between an internal EU affair and an external relations exercise. This will make matters even more complicated than *prima facie* they are.

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<sup>1</sup> See, *inter alia*, A.F. Tatham, *Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon*, in: A. Biondi, P. Eeckhout, S. Ripley (eds), *EU Law after Lisbon*, Oxford 2012, p. 128; H. Hofmeister, *Should I stay or Should I Go? - A Critical Analysis of the Right to Withdraw from the EU*, 16 ELJ (2010) p. 589; A. Łazowski, *Withdrawal from the European Union and Alternatives to Membership*, 37 ELRev. (2012) p. 523; P. Nicolaides, *Withdrawal from the European Union: A Typology of Effects*, 20 MJ (2013) p. 209; C. M. Rieder, *The Withdrawal Clause of the Lisbon Treaty in the Light of EU Citizenship: Between Disintegration and Integration*, 37 FILJ (2013) p. 147; A. Łazowski, *EU Withdrawal: Good Business for British Business?*, 22 EPL (2016) p. 115.

<sup>2</sup> See the letter of 29 March 2017; <https://www.theguardian.com/politics/blog/live/2017/mar/29/brexit-theresa-may-triggers-article-50-politics-live?page=with:block-58dba1bae4b0a411e9ab99cf#block-58dba1bae4b0a411e9ab99cf>.

<sup>3</sup> On external dimension of Brexit see I. Bosse-Platière and C. Flaesch-Mougin, *Brexit et action extérieure de l'Union européenne*, Revue trimestrielle de droit européen (2016) p. 759.

For the purposes of this paper we grouped a plethora of external aspects of Brexit into four different areas to study the external dimension of withdrawal from the European Union. Firstly, a fundamental question is what is the formal status of the United Kingdom now that it has triggered Article 50 TEU. It goes without saying that being a departing country the United Kingdom will remain a member state until the formal date of departure.<sup>4</sup> To this end it will be bound by the principle of loyal co-operation laid down in Article 4(3) TEU. But, the conundrum that the European Union is facing now, is whether to pretend that it is business as usual and therefore allow the UK to be involved in the negotiation and, perhaps even, ratification of new international agreements between the European Union with third countries. A flip side of the same coin is even more interesting and challenging. Perhaps, the United Kingdom should be put into the exit mode and, by the same token, it should be allowed to kick start setting-up its own external relations regime straight away. Secondly, how and when the United Kingdom will be severed from the external policies of the European Union and the external relations legal framework. This, *inter alia*, triggers a question of application of EU's unilateral instruments (for instance the Common Customs Tariff) and hundreds of treaties that bind the European Union with countries in the EU's neighbourhood and around the globe. Apart from the international agreements, the UK has been part of the adoption and implementation of all decisions and policies in the area of external relations. The latter have evolved through the years and have gained in importance. There is hardly a policy area left in which the EU and its Member States have not engaged in relations with third states or other international institutions. Thirdly, the question is how and when the UK should be phased out from institutional diplomatic networks related to the European External Action Service, including the European Union Delegations around the World. More generally, there is the heritage of the UK having been part of the EU's external activities for decades, not to mention that it is one of two EU Member States that hold a permanent seat at the UN's Security Council. Fourthly, there is the post-divorce reality that needs to be taken into account. A quick scan of different "off-the-shelf" models proves that, with exception of general clauses, they hardly ever include provisions on external relations or involvement of third countries (even candidates for membership) in EU's external activities.

In the following sections we deal with these questions in order to allow for a conclusion on, what we believe to be, the key external dimensions of Brexit. Our aim is not engage in unnecessary scaremongering but rather to prove the point that while Brexit is perfectly possible from the political and legal points of view, it will be a very complex and resource thirsty exercise. This will be particularly the case for the United Kingdom, although the effects will be also felt on the EU side.

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<sup>4</sup> Either entry into force of the withdrawal agreement or fall down the cliff of dover in an act of unilateral withdrawal. Both options are extensively analysed in A. Łazowski, *Withdrawal from the European Union. A Legal Appraisal*, forthcoming in 2017.

## 2. Position of the UK in EU External Affairs before Withdrawal

### 2.1 EU's External Relations Regime

One of the political and legal issues that have emerged following the Brexit referendum is whether the United Kingdom can negotiate trade agreements with third countries before it formally leaves the European Union. This is linked to a more general question of UK's status in the European Union following its notification of intention to withdraw, but before that wish becomes a reality. As already alluded to, a legal orthodoxy is that until the divorce materialises the United Kingdom remains a fully-fledged Member State bound by both the division of competences and the principle of loyal co-operation (as enshrined in Article 4(3) TEU). However, the situation can be more nuanced than it *prima facie* looks. Yet, before this is studied in detail, it is essential to briefly revisit the foundations of EU external relations. Needless to say, they form an important part of the EU's activities and over the years it has become an important actor in international relations.<sup>5</sup> This did not happen overnight but rather it has evolved steadily through decades. The starting point has been the Common Commercial Policy with its legal foundations and procedural *modus operandi* laid down in the original EEC Treaty. As well known the big leap forward was the Treaty of Maastricht which provided a legal basis for what is now the Common Foreign and Security Policy.<sup>6</sup> The subsequent treaty revisions, that is the Treaty of Amsterdam<sup>7</sup>, the Treaty of Nice<sup>8</sup> and the Treaty of Lisbon<sup>9</sup> strengthened the legal parameters of EU's external action even further.<sup>10</sup>

It is crucial to make the distinction between the political and legal aspects of EU's external action. As far as the first is concerned, the European Union has very extensive competences stemming from the Treaty on European Union. The legal side of external relations, including

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<sup>5</sup> See, *inter alia*, K.E. Jorgensen, K.A. Aarstad, E. Drieskens, K. Laatikainen and B. Tonra (eds.), *The SAGE Handbook of European Foreign Policy*, London 2015.

<sup>6</sup> Treaty on European Union, OJ C 191/1992, p. 1. See further, *inter alia*, D. O'Keefe, P. Twomey, (eds.), *Legal Issues of the Treaty of Maastricht*, London-New York-Chichester-Brisbane-Toronto-Singapore, Wiley Chancery Law 1994.

<sup>7</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ 1997 C 340/1. See further, *inter alia*, D. O'Keefe, P. Twomey, (eds.), *Legal Issues of the Amsterdam Treaty*, Oxford-Portland, Oregon 1999.

<sup>8</sup> Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ 2001 C 80/1. See further, *inter alia*, M. Andenas, J. Usher (eds.), *The Treaty of Nice and Beyond Enlargement and Constitutional Reform*, Oxford and Portland-Oregon 2003.

<sup>9</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306/2007, p. 1. See further, *inter alia*, M. Trybus, L. Rubini (eds.), *The Treaty of Lisbon and the Future of European Law and Policy*, Cheltenham-Northampton 2012; J-C. Piris, *The Lisbon Treaty. A Legal and Political Analysis*, Cambridge 2010; P. Craig, *The Lisbon Treaty. Law, Politics, and Treaty Reform*, Oxford 2010; A. Biondi, P. Eeckhout, S. Ripley (eds.), *EU Law after Lisbon*, Oxford 2012.

<sup>10</sup> See, *inter alia*, P. J. Cardwell (ed), *EU External Relations Law and Policy in the Post-Lisbon Era*, The Hague 2011, P. Eeckhout, *EU External Relations Law*, 2<sup>nd</sup> ed., Oxford 2011, P. Koutrakos, *EU International Relations Law*, Oxford and Portland-Oregon 2015; B. Van Vooren and R.A. Wessel, *EU External Relations Law: Text, Cases and Materials*, Cambridge 2014; S. Keukeleire, T. Delreux, *The Foreign Policy of the European Union*, 2<sup>nd</sup> ed., Basingstoke 2014; I. Govaere, E. Lannon, P. van Elsuwege and S. Adam, *The European Union in the World Essays in Honour of Marc Mareceau*, Brussels 2013; P. Koutrakos (ed.), *European Foreign Policy. Legal and Political Perspectives*, Cheltenham 2011.

the ability of the EU to conclude international treaties with third countries is of essence for the main thread in this paper. Anyone *au courant* with EU law is fully aware that part and parcel of the EU's legal regime is the division of competences between the European Union and its Member States.<sup>11</sup> It has both, an internal and an external dimension.<sup>12</sup> To put it differently, the EU Member States have agreed to not only transfer some internal competences to legislate in certain areas which can be better regulated at the EU level, but they have equally tasked the EU to handle a plethora of issues in relations with third countries.<sup>13</sup> The logic of the internal-external connection is well-known: once the Member States have transferred competences to the EU in their internal relations, they have become far less interesting partners at the international level since they are simply no longer in the position to negotiate and conclude international agreements on issues legislated internally at EU level. It is true that the exclusive competences (competences on the basis of which the EU can conclude international agreements without the Member States themselves being the parties) are not universal, but it is equally true that there are not so many areas left in which the EU members can engage in international commitments while completely bypassing the EU.<sup>14</sup> In case of many dossiers the competences are shared and thus agreements are concluded by the European Union and its Member States, on the one side, and third countries, on the other side.

As already alluded to earlier, the EU has become a global actor and has become active in most of key global issues, ranging from trade and investment to development and environment. International agreements concluded by the European Union cover many areas either grouped under more general association or co-operation agreements or are provided for in sectoral

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<sup>11</sup> More on the attributed powers and division of competences see, *inter alia*, G. Davies, *The post-Laeken division of competences*, 28 ELRev (2003) pp. 686-698; M. Dougan, *The Convention's draft Constitutional Treaty: bringing Europe closer to its lawyers?*, 28 ELRev (2003) pp. 763-793; P. Craig, *Competence: clarity, conferral, containment and consideration*, 29 ELRev (2004) pp. 323-344; T. Tridimas, *Competence after Lisbon. The elusive search for bright lines*, in D. Ashiagbor, N. Countouris, I. Lianos (eds), *The European Union after the Treaty of Lisbon*, Cambridge 2012, pp. 50-51, M. Dougan, *The Treaty of Lisbon 2007: Winning Minds not Hearts*, 45 CMLRev. (2008) pp. 617-703; M. Claes, B. de Witte, *Competences: Codification and Contestation*, in: A. Łazowski, S. Blockmans (eds), *Research Handbook on EU Institutional Law*, Cheltenham 2016, pp. 46-87.

<sup>12</sup> See for a very good recent overview: F. Erlbacher, 'Recent Case Law on External Competences of the European Union: How Member States Can Embrace their Own Treaty', *CLEER Papers*, 2017/2; <http://www.asser.nl/cleer/publications/cleer-papers/cleer-paper-20172-erlbacher/>; and, more extensively: B. Van Vooren and R.A. Wessel, *EU External Relations Law: Text, Cases and Materials*, Cambridge: Cambridge University Press, 2014, Chapters 3-5.

<sup>13</sup> It is notable that the Court of Justice already in the 1970s defined the inextricable link between domestic and external competences in ground-breaking judgment in case 22/70 *Commission of the European Communities v. Council of the European Communities (ERTA)*, ECLI:EU:C:1971:32. For a commentary, also in relation to subsequent jurisprudence, see P. Mengozzi, *The EX External Competences: from the ERTA Case to the Opinion in Lugano Convention*, in M. Maduro, L. Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50<sup>th</sup> Anniversary of the Rome Treaty*, Oxford and Portland-Oregon 2010, pp. 213-217; P. Eeckhout, *Bold Constitutionalism and Beyond*, in M. Maduro, L. Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50<sup>th</sup> Anniversary of the Rome Treaty*, Oxford and Portland-Oregon 2010, pp. 218-223; Ch. Hillion, *ERTA, ECHR and Open Skies: Laying the Grounds of the EU System of External Relations*, in M. Maduro, L. Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50<sup>th</sup> Anniversary of the Rome Treaty*, Oxford and Portland-Oregon 2010, pp. 224-233; R. Post, *Constructing the European Polity: ERTA and the Open Skies Judgments*, in M. Maduro, L. Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50<sup>th</sup> Anniversary of the Rome Treaty*, Oxford and Portland-Oregon 2010, pp. 234-247.

<sup>14</sup> For an overview of the areas where the EU remains active, see, *inter alia*, S. Keukeleire, T. Delreux, *The Foreign Policy of the European Union*, 2nd ed., Basingstoke 2014.

treaties with third countries.<sup>15</sup> In early 2017 the EU's treaty database listed over 1100 international agreements concluded by the EU and/or Euratom with countries around the World. This has many consequences. One of them is that to a large extent the Member States rely on the EU and the expertise of the European Commission to negotiate and conclude international agreements. This is particularly the case in 'exclusive' policy areas such as trade or fisheries, in which the role of the Member States has been marginalised. Thus, while individual EU members are still full members of the WTO, most of the actual work is done by the European Commission. A side effect of this shift is that over the years the EU members have lost considerable expertise in international trade law and have not concluded any trade agreements in their own right. This is the reality that the United Kingdom has woken up to in the aftermath of the Brexit referendum. Not only the civil servants have to deal with gargantuan tasks that the withdrawal has brought but also there are shortages of expertise forcing the Whitehall to hire additional personnel and, perhaps, to outsource some of the tasks.

## 2.2 'You Can Go Your Own Way'?

In implementation of Article 50 TEU the United Kingdom notified in March 2017 its intention to withdraw from the European Union. This set things in motion, at least in a formal sense. In fact, a lot of preparatory work has been done on both sides of the English Channel since the referendum in June 2016. While Article 50 TEU governs the *modus operandi* for withdrawal, no attention is being given to the external effects of the exit from the EU. Accordingly, it will largely remain on the margins of Brexit negotiations. But, as mentioned in the opening section of this paper, the key question is to what extent the UK can already anticipate its future role as a non-EU country.<sup>16</sup>

Internally, the position after the notification is clear. The UK remains an EU Member, even though on many occasions it may be a little awkward, to say the least. Bearing this prospect in mind the United Kingdom rescinded its presidency in the European Union which was scheduled for 2017. One thing is certain, though. At least during the Brexit negotiations the United Kingdom is at the other side of the table. Article 50(4) TEU provides that a withdrawing country does not participate in discussions in the European Council or Council or in decisions concerning it. By the same token, the voting rules are accordingly adapted. The Commission,

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<sup>15</sup> In many cases a general framework treaty is supplemented by sectoral agreements of sorts. For instance, EU-Georgia relations are covered by the Association Agreement (Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ L 261/2014, p. 4). Furthermore, a list of sectoral agreements concluded between the parties includes, *inter alia*, Agreement between the European Union and Georgia establishing a framework for the participation of Georgia in European Union crisis management operations, OJ L 14/2014, p. 2; Agreement between the European Union and Georgia on protection of geographical indications of agricultural products and foodstuff, OJ L 93/2012, p. 3; Common Aviation Area Agreement between the European Union and its Member States and Georgia, OJ L 321/2012, p. 3; Agreement between the European Union and Georgia on the readmission of persons residing without authorization, OJ L 52/2011, p. 47; Agreement between the European Union and Georgia on the facilitation of the issuance of visas, OJ L 52/2011, p. 34.

<sup>16</sup> See also R.A. Wessel, *You Can Check Out Any Time You Like, But Can You Really Leave? On 'Brexit' and Leaving International Organizations*, 13 IOLR (2016) pp. 197-209. Parts of the present contribution are based on that short Editorial. Many thanks to Christophe Hillion for the valuable discussions we had with him on the points in this section. The usual disclaimer applies.

the European Parliament, the Court or other EU institutions are not mentioned, apart from the fact that the European Parliament (including the UK members) will be asked to approve the withdrawal agreement and the Commission is involved in the negotiations (formally not without the commissioner from the UK, Sir Julian King and his cabinet, but informally he will most probably not participate in the deliberations).

Externally, the situation is indeed largely left open. The British international trade secretary, Liam Fox, is reported to have said that the UK is “discussing the possible shape of new agreements” with at least 12 countries, adding that dozens more were prepared to expand their UK trading links.<sup>17</sup> Given the fact that the UK will remain empty-handed when it does not replace the trade relations it has with third states on the basis of its EU membership with new agreements, the question has indeed come up whether the UK can already start negotiating, and perhaps concluding agreements, with other states prior to exit day. Such a proposition is problematic in several ways that are explored further below.

First, there is Article 50(3) TEU, which is seemingly quite clear (although phrased *a contrario*) on the fact that the Treaties remain in force for a withdrawing country until the day of actual exit from the European Union. The provision in question does not, however, take into account that a member state will be leaving the European Union at least in two stages. One needs to distinguish the period from the notification to signature of the withdrawal agreement and the final phase of its approval/ratification. Should the withdrawal agreement take the shape of mixed agreement the latter phase would not be short by any stretch of imagination. Bearing in mind the breadth of withdrawal process one of the present authors argued in an earlier publication that the European Union should develop a special status of a withdrawing country waiving some of the obligations linked to membership to allow it to prepare for the inevitable legal consequences of exit.<sup>18</sup> Setting the legal parameters aside, it would make perfect sense to allow the United Kingdom to proceed with negotiations of trade agreements with third countries from the date of notification, providing that none of the deals would enter into force before actual Brexit. This, of course, is easier said than done and it would create numerous conundrums that would have to be solved well in advance. For instance, if the United Kingdom were to proceed in such exit mode would it be involved in pending negotiations and ratification of agreements with third countries? Would it keep its veto rights? However, unless any special deal is arranged with the United Kingdom the situation – at least from the legal point of view – looks as follows.

To begin with, nothing changes in the division of competences between the United Kingdom and the European Union. The latter holds exclusive competences in number of areas falling under the external relations. It is worth referring here to Article 2(1) TFEU, which provides that “When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.” This provision

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<sup>17</sup> ‘Pursuing trade pacts outside EU “could mean worse Brexit deal for UK”’, *The Guardian*, 25 January 2017; <https://cdn.ampproject.org/c/s/amp.theguardian.com/politics/2017/jan/25/brexit-deal-uk-eu-trade-pacts>

<sup>18</sup> A. Łazowski, *Withdrawal from the European Union and Alternatives to Membership*, 37 ELRev. (2012) p. 523.

continues to apply and implies that the UK will have to respect the division of competences and is refrained from adopting legally binding acts in area of EU exclusive competence. Bearing in mind the external dimension of Brexit it seems that the most crucial is the fact that broadly defined Common Commercial Policy is one of the policy areas where EU competences are exclusive.<sup>19</sup> The same goes for the Customs Union. The result of all of this is that the UK simply does not have the competence to conclude international agreements in the area of Common Commercial Policy, or indeed in any other area of exclusive EU competence, until it formally leaves the European Union. The international agreements that have so far been concluded by the EU remain binding on the UK until the divorce will do the parties apart. More generally, apart from exclusivity on the basis of the Treaties (so-called ‘a priori exclusivity’ or ‘policy area exclusivity’), exclusivity may flow from the adoption of internal Union measures and the UK would be excluded from adopting rules which affect those measures (‘conditional exclusivity’ or ‘pre-emption’). Finally, exclusive competences can occur when absolutely indispensable to achieve EU Treaty objectives, without there being internal EU measures (‘exclusivity through necessity’).<sup>20</sup> All these situations would continue to deprive the UK from having a competence to conclude international agreements.

Furthermore, also in areas of shared competences the UK continues to be limited by the rules and principles guiding the division of competences. Again, it is helpful to make a distinction between different types of competences. In the case of so-called pre-emptive competences, the Member State action is only excluded if the competence is exercised by the Union. In the case of non-pre-emptive competences the EU can fully deploy a policy, but exercising its competence does not exclude Member State action in the same field. In the realm of external relations good examples include development cooperation and humanitarian aid. A special shared (or in fact ‘parallel’) competence exist in relation to the Common Foreign and Security Policy (CFSP).

During the period leading up to the withdrawal the United Kingdom remains bound by two key principles underpinning the EU legal order, that is the principle of loyal co-operation and the principle of primacy. It is important to underline that even in cases in which Member States do have some room for external manoeuvre, the principle of sincere cooperation will have to guide their behaviour. On the basis of this principle “the Union and the member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. [...] The Member States shall [...] refrain from any measure which could jeopardise the attainment of the Union’s objectives.” (Article 4(3) TEU). The effects of this principle are well documented in the academic literature and it may become particularly relevant in cases in which we are not

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<sup>19</sup> In accordance with Article 207 TFEU this policy extends to conclusion of tariff and trade agreements relating to trade in goods and services, commercial aspects of intellectual property rights, foreign direct investment, achievement of uniformity in measures of liberalisation, export policy and measures to protect trade. See further, *inter alia*, P. Eeckhout, *EU External Relations Law*, 2<sup>nd</sup> ed., Oxford 2011 pp. 439-466.

<sup>20</sup> B. Van Vooren and R.A. Wessel, *EU External Relations Law: Text, Cases and Materials*, Cambridge 2014, pp. 100-102.

dealing with the pre-emption.<sup>21</sup> The case-law of the Court is quite clear on, for instance, the scope of the principle of sincere cooperation<sup>22</sup> but one should remember that this principle works both ways. On the one hand, it can be relied on by the European Union to stop the United Kingdom from engaging into negotiations of trade agreements with third countries. On the other hand, the same principle may be invoked by the UK arguing that since it is leaving the Union, there should be a fair degree of leverage and cooperation granted by the European Union, allowing it to prepare for a new future. We were confronted with a somewhat similar situation in case C-45/07 *Commission v. Greece (IMO)*.<sup>23</sup> Whereas Greece had violated its duty of abstention stemming from the pre-emption doctrine, that Member State argued that the Commission had itself failed in its duty to cooperate loyally with the Member States by not allowing discussion of Greece's proposal in the so-called Marsec committee, a preparatory body within the Union. It thus invoked the failure of the Commission to fulfil its legal obligation with regard to the scope of Union law, as defence against its own failure with regard to Union competence. The Court's reply was by no means surprising.<sup>24</sup> The judges at Kirchberg held that a breach by the Commission of the duty of cooperation does not entitle a Member State to undertake actions which affect rules adopted at Union level. Nonetheless, the Court did take the opportunity to emphasize the reciprocal nature of the duty of cooperation. When the Union has an exclusive power, it too, has to cooperate loyally with its Member States.

In Opinion 1/03 the Court of Justice already stated the following rationale for pre-empting Member State action: “[...] it is essential to ensure a uniform and consistent application of the Community rules and the proper functioning of the system which they establish in order to preserve the full effectiveness of Community law”.<sup>25</sup> The purpose of excluding Member States from acting solely has thus been to ensure effective application of EU rule through uniformity where the EU has exercised its shared powers conferred upon it, or where it possesses an *a priori* exclusive power.<sup>26</sup> Indeed, the duty of cooperation and the principle of pre-emption are connected: pre-emption *ensures* application of EU rules through *uniformity*, whereas the duty

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<sup>21</sup> See for instance E. Neframi, *The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations*, 47 CMLRev. (2010), pp. 323-359. B. Van Vooren and R.A. Wessel, *EU External Relations Law: Text, Cases and Materials*, Cambridge 2014, Chapter 6.

<sup>22</sup> One of the leading judgments was rendered in case C-246/07, *European Commission v Kingdom of Sweden*, ECLI:EU:C:2010:203. For an academic appraisal see, *inter alia*, M. Cremona, *Case C-246/07, Commission v. Sweden (PFOS), Judgment of the Court of Justice (Grand Chamber) of 20 April 2010*, 48 CMLRev. (2011) pp.1639-1665; J. Van Zeben, *The Principle of Unity under Article 10 EC and the International Representation of the Union and its Member States - Case C-246/07, Commission v. Sweden*, 1 European Journal of Risk Regulation (2010) pp.301-305. More on the (im)possibilities of Member States to be active externally in areas covered by EU law see, *inter alia*, A. Delgado Casteleiro and J. Larik, *The Duty to Remain Silent: Limitless Loyalty in EU External Relations?*, 4 ELRev. (2011) pp. 524-541.

<sup>23</sup> Case C-45/07 *Commission of the European Communities v Hellenic Republic*, ECLI:EU:C:2009:81.

<sup>24</sup> Par. 26.

<sup>25</sup> Opinion 1/03 of the Court (Full Court) of 7 February 2006. Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, ECLI:EU:C:2006:81. For an academic appraisal see, *inter alia*, N. Lavranos, *Opinion 1/03, Lugano Convention*, 43 (2006) CMLRev. pp. 1087-1100; Th. Kruger, *Opinion 1/03. Competence of the Community to Conclude the New Lugano Convention on the Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, 13 CJEL (2006) pp.189-199.

<sup>26</sup> Case C-433/03, *Commission v. Germany*, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2005:462; Case C-266/03 *Commission of the European Communities v Grand Duchy of Luxembourg*, ECLI:EU:C:2005:341.

of cooperation seeks to *facilitate* effectively attaining EU tasks and *coherent* EU international action. Phrased otherwise: when EU competences could be affected, the Member States are excluded from acting at all. Yet, when the EU treaty objectives are at stake and there is some room for manoeuvre, this triggers an obligation of the Member States and the Union institutions to cooperate loyally.<sup>27</sup> Translated to the obligations of the UK in the period between the notification and exit day, one could argue that there would be some room for the EU and the UK to jointly seek for possibilities to allow the UK to explore options for future trade deals with third countries as long as EU competences would not be affected. At the same time, it is clear, that, firstly, the division of competences, and secondly, the duty of sincere cooperation would entail that any unilateral uncoordinated actions on the side of the UK run the risk of being in violation of EU law.

The second doctrine that the United Kingdom will remain to be bound by until the date of departure from the European Union is the primacy. It is well established in the jurisprudence of the Court of Justice<sup>28</sup> and it was recently confirmed quite expressly by the UK's Supreme Court in the *Miller* case.<sup>29</sup> It held that “Following the coming into force of the 1972 Act [European Communities Act] the normal rule is that the domestic legislation must be consistent with EU law. In such cases, EU law has primacy as a matter of domestic law [...]”.<sup>30</sup> This primacy has traditionally not been different for internal or external activities. So, even after the notification, the UK will have to act upon the agreed rules and principles of EU external relations law. This will seriously hamper the UK in preparing itself for the post-Brexit period as we would be dealing with negotiations on topics that are already covered by existing EU agreements that fall, moreover, largely under the EU's exclusive competences. Hence, in most cases the UK will simply be pre-empted to negotiate (let alone to conclude) an international agreement and it will not be able to win any time by already starting the negotiations during the 24 (or mostly likely 18<sup>31</sup>) months of negotiations with the EU. Indeed, checking out does not imply that the UK is immediately free to go its own way.<sup>32</sup>

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<sup>27</sup> See more extensively: B. Van Vooren and R.A. Wessel, *EU External Relations Law: Text, Cases and Materials*, Cambridge 2014, Chapter 5; as well as E. Neframi, *The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations*, 47 CMLRev. (2010), pp. 323-359.

<sup>28</sup> See further M. Claes, *The Primacy of EU Law in European and National Law*, in A. Arnulf, D. Chalmers (eds), *The Oxford Handbook of European Union Law*, Oxford 2015, pp. 178-211; B. de Witte, *Direct Effect, Primacy, and the Nature of the Legal Order*, in P. Craig, G. de Búrca, *The Evolution of EU Law*, 2<sup>nd</sup> ed., Oxford 2011, pp. 323-362; A. Capik, *Five Decades since Van Gend en Loos and Costa came to town: primacy, direct and indirect effect revisited*, in A. Łazowski, S. Blockmans (eds), *Research Handbook on EU Institutional Law*, Cheltenham 2016, pp. 379-420.

<sup>29</sup> *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

<sup>30</sup> Para. 67. See <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>. See also Oliver Garner, “‘So Long (As) and Farewell?’ The United Kingdom Supreme Court in *Miller*”, European Law Blog, 26 January 2017; <http://europeanlawblog.eu/2017/01/26/so-long-as-and-farewell-the-united-kingdom-supreme-court-in-miller/#more-3529>

<sup>31</sup> As indicated by EU-negotiator Barnier; ‘UK will have less than 18 months to reach deal, says EU Brexit broker’, *The Guardian*, 6 December 2016; <https://www.theguardian.com/politics/2016/dec/06/uk-will-have-under-18-months-to-negotiate-deal-says-eus-brexiteer>

<sup>32</sup> Cf. the remarks by HR Federica Mogherini during her visit to the USA: “[...] 8 months after the referendum in the UK we have not even been notified about the beginning of negotiations, so UK will stay a Member State of the European Union for another two years at least. This also implies that it will not be able to negotiate any trade agreement bilaterally with any third country which is the case of all the Member States, not because we limit our Member States but because this is the guarantee for all Europeans that we are stronger in trade negotiations, being

Could this help us in answering the question of whether informal talks between the UK and one or more third states would be allowed prior to the entry into force of the withdrawal agreement? As we have seen, most cases can easily be settled on the basis of the division of competences and the primacy of EU law. Yet, are informal talks on possible new agreements to be seen as an exercise of an external competence by the UK? Brexit Minister Davis even argued that there is a difference between the negotiations (which would be allowed) and the actual signing of an agreement (for which a competence could not exist).<sup>33</sup> But is it so? The answer depends on the meaning of the term “negotiations” and for solutions one can search in EU law as well as in public international law.

In law of the treaties, negotiations are defined as the first phase of a treaty-making process.<sup>34</sup> Negotiations are generally carried out, or at least initiated, by the executive (that is to say, the Head of State or a minister for foreign affairs). As recently argued by de Oliveira Mazzuoli: “Negotiations of a treaty start when the representatives of States meet at a specific place and at arranged time, for the purpose of studying the possibilities to reach an agreement in connection with the conclusion of a specific international instrument in a joint manner.”<sup>35</sup> The term ‘negotiations’ can be seen to include “every action prior to an agreement of any nature, the time of discussion and the concurrence of wills which will or will not be transformed into a legal act”.<sup>36</sup> This implies that any action by the executive which is aimed to investigate the possibilities to reach an international agreement could already be regarded as falling under the umbrella term ‘negotiations’. Admittedly, the descriptions do seem to include a certain formalised procedure, which would exclude fully informal talks preceding actual negotiations, but it is equally clear that formal talks between governmental representatives of the UK and third states with the aim of discussing the terms of a new agreement would easily amount to a ‘negotiations’.

When it comes to EU law one has to note that the Court of Justice was occasionally confronted with similar questions. In case C-433/03 *Commission v. Germany (Inland Waterway)*, the Court stated that the adoption of a decision authorising the Commission to negotiate a multilateral agreement marks the start of a concerted action triggering the duty of cooperation.<sup>37</sup> In case C-246/07 *European Commission v Kingdom of Sweden (PFOS)*, the judges at Kirchberg held that the duty of cooperation was triggered at an earlier stage.<sup>38</sup> However, as mentioned before,

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the second economy in the world, and because this guarantee is that the benefit of any trade agreement goes equally to all Europeans without any internal competition so it is a form of guarantee for all Europeans and it is not a limitation.”, Washington, 9 February 2017; [https://eeas.europa.eu/headquarters/headquarters-homepage/20408/remarks-high-representative-mogherini-press-roundtable-during-visit-united-states-america\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/20408/remarks-high-representative-mogherini-press-roundtable-during-visit-united-states-america_en)

<sup>33</sup> Speech by David Davies, 2 February 2016; <http://parliamentlive.tv/event/index/bfe52708-fed8-4028-b2b8-aa8831d173cd?in=12:37:34>

<sup>34</sup> Cf. V. de Oliveira Mazzuoli, *The Law of Treaties: A Comprehensive Study of the 1969 Vienna Convention and Beyond*, Rio de Janeiro: Forense, 2016, at 89.

<sup>35</sup> *Ibid.*, at 89.

<sup>36</sup> *Ibid.*, at 89.

<sup>37</sup> Case C-433/03 *Commission of the European Communities v Federal Republic of Germany*, ECLI:EU:C:2005:462.

<sup>38</sup> Case C-246/07 *European Commission v Kingdom of Sweden*, ECLI:EU:C:2010:203.

in the case of Brexit the question of whether the European Commission has already utilised its competence is less relevant as in most cases we are dealing with existing EU agreements with third countries. Thus, unless a special status is given to it, the UK would simply not have the competence to negotiate new agreements with third countries.

From a more practical perspective the question emerges what would happen if the UK were to violate EU external relations law before it formally departs from the European Union. This would have obviously had legal and political implications. As far as the first are concerned the European Commission could have recourse to its usual armoury of infringement proceedings based on Articles 258 and 260 TFEU. The Court, in turn, could use the fast track procedure in order to render a judgment before the Brexit actually takes place. In purely political terms any violation of EU law during the negotiations would amount to political vandalism and, most likely would backfire and not help the UK's position. Consequentially, it could be potentially detrimental to the result it aims to achieve. No doubt, that would bring a reputational damage to the United Kingdom.

This brings us back to the point made earlier in this section of the chapter. The extraordinary predicament that the European Union and the United Kingdom find themselves in may call for extraordinary measures. One of the options is to consider granting a special status to the United Kingdom now that it has filed its application for withdrawal. A related question is to what extent third countries are already willing to open negotiations on future relationships with the UK. In case a special EU arrangement for the UK after the notification is not on the table, from a treaty law perspective third states could indeed question the competence of the UK to conclude certain international agreements. At the same time they also may wish to open, for instance, new tariff negotiations to secure or renew access to the UK market.

### **3. Phasing-Out from EU External Relations *Acquis* and Policies**

#### *3.1 Introduction*

EU external relations regime comprises many sources, which in general terms, may be divided into autonomous EU instruments and bilateral/multilateral treaties with third countries and international organisations. Withdrawal from the European Union will have profound consequences in relation to both categories of legal acts. Furthermore, the European Union operates in external relations in accordance with several policies, some of which have legal foundations in the Treaties<sup>39</sup> and some were designed in practice of the EU Institutions.<sup>40</sup> All are analysed in turn.

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<sup>39</sup> For instance the already discussed Common Commercial Policy.

<sup>40</sup> European Neighbourhood Policy is a prime example.

### 3.2. *Brexit and Autonomous EU instruments*

The catalogue of EU autonomous instruments is extensive and comprises many directly applicable regulations. This includes, *inter alia*, Regulation 952/2013 on Union Customs Code<sup>41</sup>, Regulation 978/2012 on generalised tariff preferences<sup>42</sup> or Regulation 2016/1036 on antidumping procedure.<sup>43</sup> They all fall under the chapeau of EU Customs Law.<sup>44</sup> In relation to those legal acts Brexit will have consequences for both the European Union and the United Kingdom. In the European Union they will cease to apply to the UK as of the date of departure. One should not exclude, however, some technical adjustments to existing secondary legislation (just like in the case of subsequent EU enlargements). After all, as things stood when this paper was written, the United Kingdom was on course to leave the customs union altogether. Furthermore, an intertemporal provision delimiting the scope of application of relevant legal acts to the United Kingdom should be included in the withdrawal agreement. With no practice in this respect one may rely *mutatis mutandis* on similar clauses traditionally included in accession treaties.<sup>45</sup> Obviously, such a clause would have general application, that is it won't be tailor-made only for external relations *acquis*.

Changes brought by Brexit in this domain will be way more demanding for the United Kingdom and its state apparatus. EU law is applicable in the United Kingdom legal orders *qua* European Communities Act 1972.<sup>46</sup> In the wake of the Brexit referendum the British Government has already announced that it will be repealed and the fate of EU *acquis* applicable in the UK will be decided accordingly. As phrased by Brexit-Minister David Davis:<sup>47</sup>

“It’s very simple. At the moment we leave, Britain must be back in control. And that means EU law must cease to apply. [...] To ensure continuity, we will take a simple approach. EU law will be transposed into domestic law, wherever practical, on exit day.”

As confirmed by the White Paper on EU Withdrawal published in February 2017, a new act will thus transfer ‘useful’ EU law to UK law.<sup>48</sup> What is simple for the Brexit-Minister will not be simple for those who will be implementing decisions taken by the political top. To de-EU the UK legal orders will be a gargantuan exercise that cannot be done with supersonic speed.<sup>49</sup>

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<sup>41</sup> Regulation 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, OJ L 269/2013, p.1.

<sup>42</sup> Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences, OJ L 303/2012, p. 1.

<sup>43</sup> Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, OJ L 176/2016, p. 21.

<sup>44</sup> See, *inter alia*, M. Fabio, *Customs Law of the European Union*, 4<sup>th</sup> ed., Dordrecht 2012.

<sup>45</sup> S. Kaleda, *Intertemporal Legal Issues in the European Union Case Law Relating to the 2004 and 2007 Accessions*, in A. Łazowski (ed), *The Application of EU Law in the New Member States*, The Hague 2010, pp. 99-125.

<sup>46</sup> For an excellent analysis of its genesis see D. Nicol, *EC Membership and the Judicialization of British Politics*, Oxford 2001, pp. 76-116.

<sup>47</sup> ‘Government announces end of European Communities Act’, 2 October 2016; <https://www.gov.uk/government/news/government-announces-end-of-european-communities-act>

<sup>48</sup> The United Kingdom’s exit from and new partnership with the European Union, London 2017.

<sup>49</sup> See A. Łazowski, *EU Withdrawal: Good Business for British Business?*, 22 EPL (2016) p. 115.

*Au contraire*, this exercise will be resource thirsty and will require a lot of diligence. Alas, it may be in short supply bearing in mind the galloping pace of Brexit requested by the British Prime Minister. The complexity of the task is particularly visible in the realm of external relations. The United Kingdom will have to in a very short period of time adopt its own customs code, develop a customs tariff and adopt trade protection legislation. In order to turn the new legislation into reality it will have to create new authorities, boost considerably the human resources as its customs authorities and prepare for this its business community that is very much used to free trade with the rest of Europe.

### 3.3. *From Member State to Third Country: (re)negotiation of New Agreements*

Leaving the EU implies that the international legal position of the UK will have to be reset and certain dimensions of its statehood will have to be reactivated. It will no longer be able to rely on the EU's expertise in international trade (including the WTO) and it will have to seriously upgrade its own delegations in international organisations, in which it was mainly active as an EU member.<sup>50</sup> In other words, in many situations it will have to face the reality of a major shift, that is the transition from an EU to non-EU Member State. This, *inter alia*, entails that the UK may have to negotiate a large number of international agreements to replace the dozens, which – because of the division of competences – were so called 'EU only' agreements to which the Member States were not a party in their own right. As these agreements usually apply to the territories in which the Treaty on European Union is applied. Hence, unless some kind of transitional regime discussed later in this paper is agreed to, the UK will no longer be covered. Article 216(2) of the TFEU makes it clear, however, that international agreements concluded by the EU are (arguably only) "binding upon the institutions of the Union and its Member States". In the EU context, it is internal matter as the Member States are bound by such agreements by means of EU law. However, with Brexit it is likely become an international law issue as the UK will no longer fall under the EU internal arrangements.

One could perhaps argue that the EU merely concluded the agreements 'on behalf of' its Member States and that the UK would thus remain bound once the competences are returned to it. Yet, there are some serious flaws in this argument. Firstly, the text of the agreements does not indicate the UK (or any other Member States) as a contracting party. In many cases we are dealing with bilateral agreements and it would be difficult to simply read 'the European Union' as 'the United Kingdom' in those cases. Secondly, given the EU's separate international legal status and its autonomous position as a global actor, it is difficult to hold on to the idea that the EU acted on behalf of its Member States. The Treaty on European Union clearly presents the EU as a separate international actor and over the years it has been accepted as such (and alongside its Member States) by almost all countries in the world. In other words, the UK will have to start from scratch, although it may in some cases aim to what could largely be a copy of the agreements that were concluded by the EU. This, of course, assumes that the other contracting parties would agree to such a solution. In fact, this should not be taken as *fait*

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<sup>50</sup> See Ch. Kaddous (Ed.), *The European Union in International Organisations and Global Governance: Recent Developments*, Oxford 2015. See also I. Bosse-Platière and C. Flaesch-Mougin, *Brexit et action extérieure de l'Union européenne*, *Revue trimestrielle de droit européen* (2016) p. 759.

*accompli*. One thing is to negotiate a trade agreement with the biggest trade block in the World, quite another to negotiate it with a medium size country on the fringes of Europe. To put it differently, the third countries that the European Union has free trade agreements with may not be as accommodating to the wishes of the United Kingdom as the latter's political circles may assume or hope for. Furthermore, in some cases copy-pasting existing agreements to make them adjusted just for the United Kingdom would make little sense, especially if such treaties require approximation of domestic law with EU *acquis* or have provisions that may only apply if one side is the EU (alone or together with its Member States).<sup>51</sup>

In the case of so-called 'mixed agreements' (concluded by both the EU and its Member States and one or more third States or international organizations) the situation could be easier as the UK is bound by them as a Member State directly under public international law.<sup>52</sup> Yet, it will not be easy to simply remove the UK from the list of contracting parties, because such international agreements - as an 'integral part of EU law' in the words of the EU Court - are closely connected with other EU legislation and policies. Moreover, many mixed agreements are concluded without a strict indication of what falls under EU competences and what is still in the hands of the Member States<sup>53</sup>, although the Council Decision may provide some hints by listing issues that can already be applied provisionally, that is, awaiting Member State ratifications.<sup>54</sup> In any case, if the UK wishes to maintain the same legal rights and obligations it would have to take it as a starting point for negotiations with respective third countries.

Needless to say that these negotiations will be time consuming, not only for the UK but also for all third parties. This, as already mentioned, will materialize provided that they will accept requests for negotiations in each and every case. In the case of EU-only agreements not so much needs to be changed after Brexit. Most likely the third countries will need to be notified of the fact that their respective agreements will no longer apply to a former part of the 'EU's territory'. Indeed, the 'territorial scope' of international agreements concluded by the EU is not without meaning. In the case of trade or investment agreements, for instance, a shrinking territory may be particularly worrisome for a third party (if only because in the case of Brexit it loses 64 million consumers). In addition, with regard to multilateral agreements in particular, other aspects, including budgetary reallocations, could become part of the deal.<sup>55</sup>

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<sup>51</sup> See, for instance, Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161/2014, p. 3. For an academic appraisal see, *inter alia*, G. Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area. A New Legal Instrument for EU Integration Without Membership*, Brussels 2016, M. Emerson and V. Movchan (eds), *Deepening EU-Ukrainian Relations: What, why and how?*, Brussels 2016.

<sup>52</sup> See, *inter alia*, Ch. Hillion, P. Koutrakos (eds), *Mixed Agreements Revisited. The EU and its Member States in the World*, Oxford and Portland-Oregon, 2010.

<sup>53</sup> See pending case 2/15 regarding the allocation of competences in Free Trade Agreement between the European Union and Singapore. Opinion of Advocate General Sharpston, ECLI:EU:C:2016:992.

<sup>54</sup> See, for instance, Council Decision (EU) 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11/2017, p. 1080.

<sup>55</sup> In the reverse situation, when a new state joins the EU, the effects for third countries are determined in the accession treaties. See, for instance, Article 6 of the Accession Treaty with Croatia (Treaty between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic,

With regard to mixed agreements, different considerations apply to *bilateral* and *multilateral* agreements.<sup>56</sup> In the case of bilateral agreements (between the EU/Member States and a third party), the UK would cease to be a party, which could be given effect to by way of a notification to third parties. In the case of multilateral agreements, the UK could perhaps remain a party, although a notification regarding the changed situation would be required and an adjustment of some of the commitments would be necessary. Indeed, it should not be excluded that the UK's continued participation may in some cases become subject to negotiations between the EU, its Member States and third countries (including the UK in a new special position). This may result in solutions on the basis of, for instance, additional Protocols or by replacing the UK's participation in a multilateral mixed agreement by a 'UK only' agreement. For this reason, the withdrawal agreement may perhaps include some provisions on how to proceed in these situations, including the need for notifications and other arrangements. As elaborated on in section 4 of this paper, a transition period, allowing the UK to remain covered by certain international agreements for a certain period after Brexit, could also be envisaged.

### 3.2 *Phasing-Out of the External Relations Institutional and Policy Frameworks*

As of the day of withdrawal, the UK will no longer be an EU Member State and will no longer have a seat in any of the EU institutions and other bodies. As a third state it will most probably open a diplomatic mission in Brussels and send the letters of credence of a Heads of Mission to the President of the European Council and the President of the European Commission.<sup>57</sup> For all practical purposes it may of course choose to turn the current UK Permanent Representation to the EU into a revamped diplomatic mission.

While, indeed, on exit day all persons that have been representatives of the UK will have to leave their offices, this may be less easy than it sounds. Limiting ourselves to the external relations framework, the European External Action Service and the European Union Delegations around the world deserve attention.<sup>58</sup> Apart from advisors, the EEAS staff does not include third country nationals. This implies that all UK personnel will have to be replaced. It is difficult to see that happening in one day. It has been held that the importance of ensuring

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the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union, OJ L112/2012, p. 10. See further, *inter alia*, A. Łazowski, *EU do not worry, Croatia is behind you: A Commentary on the Seventh Accession Treaty*, 8 CYELP (2012) pp. 1-30, at pp. 32-33.

<sup>56</sup> See more extensively G. Van der Loo and R.A. Wessel, *The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions*, 54 CMLRev. (2017) (forthcoming).

<sup>57</sup> See Vade-mecum for the use of the Diplomatic Corps accredited to the European Union and to the European Atomic Energy Community, [http://ec.europa.eu/dgs/secretariat\\_general/corps/index.cfm?go=vademecum.vademecum](http://ec.europa.eu/dgs/secretariat_general/corps/index.cfm?go=vademecum.vademecum).

<sup>58</sup> See on the EEAS for instance J. Bátorá and D. Spence (Eds.), *The European External Action Service: European Diplomacy Post-Westphalia*, Basingstoke: Palgrave MacMillan, 2015; as well as M. Gatti, *European External Action Service: Promoting Coherence through Autonomy and Coordination*, Leiden/Boston: Brill | Nijhoff, 2016.

British representation in the EEAS has been a key priority for the UK government. Over the years, however, the numbers dropped.<sup>59</sup> Overall, the 2015 EEAS Report reveals that, of all staff (officials, temporary agents, contract agents, seconded national experts) around 5.7 % has a UK nationality. Only Germany, Spain, Italy, France and Belgium (13.7 %) have a higher percentage.<sup>60</sup> One could argue that this is exactly what the two-year negotiation period is for, but probably no one would like to anticipate the outcome of the negotiations by already replacing UK officials with staff with other nationalities. Furthermore, this would run counter to our earlier claim that the UK will have to live up to all EU law commitments until exit day. Hence, a phasing out strategy may have to be part of the withdrawal agreement, allowing for UK nationals to more gradually leave the EEAS. At the same time, this may be problematic as the question is whether, post-exit, UK staff will not have possibilities to stay. After all, Article 27(3) TEU provides that the EEAS “shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States.” A similar phrase can be found in Art. 6(2) of the Decision creating EEAS. It reads: “The EEAS shall comprise officials and other servants of the European Union, including personnel from the diplomatic services of the Member States appointed as temporary agents.”<sup>61</sup> This seems to be a limitative list, which does not include ‘staff from third countries’.

The same holds true for the 139 European Union Delegations worldwide. While the Delegations have so far not replaced the missions of the individual Member States,<sup>62</sup> they do represent the Union in all areas of foreign policy. Apart from the replacement of UK staff, the UK Embassies around the world will have to take over all areas and contacts the EU Delegations have invested in in the implementation of EU (both exclusive and shared) policy areas.

### 3.3 *Phasing-Out of Substantive External Relations Law, Policies and Case Law?*

Apart from freeing itself from the institutional entanglement, the UK will also have to find ways to deal with the fact that large parts of its external relations were defined on the basis of EU rules, policies and case law. Obviously, the UK will no longer be bound to any of this, but at the same time a clear cut may be difficult. The remark by Brexit Minister Davis that “EU law will be transposed into domestic law, wherever practical, on exit day” (see *supra*), may work for some of the internal rules, but is more difficult to envisage in the area of external relations law and policy. In a substantive manner, the UK’s external policies are to a large extent part

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<sup>59</sup> D. Fiott, “Our Man in Brussels”. The UK and the EEAS: Ambivalence and Influence’, in R. Balfour, C. Carta and K. Raik (Eds.), *The European External Action Service and National Ministries: Convergence or Divergence?*, London/New York: Routledge, 2015.

<sup>60</sup> EEAS.DG BA HR.1 - HR Policy and Coordination, May 2016, at 68; [https://eeas.europa.eu/sites/eeas/files/eeas\\_human\\_resources\\_report\\_2015.pdf](https://eeas.europa.eu/sites/eeas/files/eeas_human_resources_report_2015.pdf)

<sup>61</sup> Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service (2010/427/EU), OJ L 201/30, 3.8.2010. The preamble also refers to the EU Member States in provisions like “The staff of the EEAS should comprise a meaningful presence of nationals from all the Member States” or “all officials and other servants of the European Union should be able to apply for vacant posts in the EEAS.”

<sup>62</sup> Cf. R.A. Wessel, ‘Can the European Union Replace its Member States in International Affairs? An International Law Perspective’, in I. Govaere, E. Lannon, P. Van Elsuwege, S. Adam (Eds.), *The European Union in the World: Essays in Honour of Marc Maresceau*, Leiden/Boston: Martinus Nijhoff Publishers, 2013, pp. 129-147.

and parcel of the many hard as well as soft law instruments<sup>63</sup> that have been used in areas such as development policy, environmental and energy policy, the external dimension of freedom, security and justice, the Common Foreign, Security and Defence Policy or the European Neighbourhood Policy. It goes beyond the scope of the present contribution to address this in detail, but two general questions emerge. Firstly, what are the effects on the coherence of the EU external policies; and secondly, in which ways will the UK be able or allowed to continue to be aligned to EU external policies.

Obviously, the demands for consistency and coherence will no longer apply to the UK after exit day. At the same time, a complete change of policies that would lead to a contradiction of everything the EU (including the UK) developed over the past years, could certainly affect EU policies and could even be confusing for third parties. As the UK referendum was mainly about the effects of EU law on internal UK policies and preferences, drastic changes in foreign policy are perhaps not on the immediate agenda.

A final question concerns the effects of EU external relations case-law on the UK after Brexit. Again, the answer seems to be quite straightforward as the UK will simply no longer be bound by it. At the same time, the UK has been part of the EU's external relations structure for decades and the case-law has largely defined its policy options. Yet, it is difficult to find examples of a possible on-going influence of EU case-law on the UK post Brexit. Indeed, in most of the rules and Opinions of the Court in the external relations field concern the division of competences and this will be quite clear for the UK. Key notions as 'pre-emption' or 'sincere cooperation' which have extensively featured in external relations case law will no longer be a concern for the UK, although one may expect the UK to need some time to realise this and take the necessary initiatives without initiatives from the Commission of the High Representative.

In conclusion, phasing-out will be difficult as the UK will remain bound until exit day and anticipating new arrangements seems to be excluded. Post Brexit, however, there will be possibilities for the UK to stay close to EU external policies and this could even be institutionalised – leading perhaps to a post Brexit phasing-out. All of this could become part of the future arrangements, which we will address in the next section.

#### **4. UK's role in EU's external relations *après* Brexit**

##### *4.1. Introduction*

When this paper was finalised it was rather unclear what exactly the Brexit negotiations would cover. Even a fundamental question, whether withdrawal and future relations should be regulated in one agreement or two (negotiated together or in sequence) was impossible to answer. Quite stunningly an option of unregulated unilateral withdrawal seemed to be on the

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<sup>63</sup> See B. Van Vooren, *A Case Study of "Soft Law" in EU External Relations: The European Neighbourhood Policy*, 34 ELRev. (2009), p. 705.

table. With such basic legal parameters of Brexit unclear the analysis that follows is merely an attempt to sketch what lays ahead and the actual *finalité* may be very much different from what we envisaged.

#### 4.2. *Unilateral Brexit*

The easiest yet most radical scenario is UK's departure from the European Union after two years of unsuccessful negotiations and a failed attempt at extension of this time framework for exit negotiations by the European Council. This would cut the United Kingdom almost completely off the European Union with an immediate effect. The UK-EU dimension of such a radical move goes beyond the scope of this paper, however the external dimension of it needs to be taken on board. Should such an extreme version of Brexit materialise, the United Kingdom would immediately cease to be a party to all agreements between the EU and third countries in force on the cut-off date. Yet, at the same time, it would be formally permitted to enter into fully fledged negotiations of its own external relations regime and, accordingly, proceed with conclusion of international agreements with the outside World. From the institutional point of view, the United Kingdom would automatically cease to contribute and benefit from the EEAS and dozens of EU embassies around the globe. It would no longer be covered by EU external relations policies, including Common Commercial Policy or the European Neighbourhood Policy. Furthermore, its status as a WTO member would have to be attended to. Setting the political parameters of such version of Brexit aside it is rather clear that trade and economic consequences would be immense and would considerably undermine the performance of the UK's economy. The effects would also be felt on the EU side. However, irrespective of all that, nothing would formally stop the United Kingdom from associating itself with EU's Common Foreign and Security Policy. In general, it is not uncommon for third states to join EU statement, policies and even international agreements. A particularly relevant example is the alignment of third states with EU sanctions, something that happens quite often and obviously strengthens the sanction regime.<sup>64</sup> But alignment is also possible in other areas of EU foreign and security policy. Thus, Declarations by the EU can be joined by third states, and international agreements can be concluded on for instance the participation in EU military mission.<sup>65</sup> Dashwood even suggested that "with some legal tweaking (or perhaps by establishing a new 'European Foreign, Security and Defence Community'), the UK should be able to retain a place at the Council table" in the area of CFSP.<sup>66</sup>

#### 4.2. *Regulated Brexit*

A perhaps more realistic scenario is that the United Kingdom will depart the European Union on the basis of a properly negotiated withdrawal agreement. As already alluded to, the

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<sup>64</sup> See for instance E. Hellquist, *Either with us or against us? Third-country alignment with EU sanctions against Russia/Ukraine*, 29 CRIA (2016), pp. 997-1021.

<sup>65</sup> The participation of third states in EU military missions is usually done on the basis of a special agreement to that end. See, for instance, the Framework Agreement between the United States of America and the European Union on the participation of the United States of America in European Union crisis management operations, OJ L 143/2011, p. 1.

<sup>66</sup> A. Dashwood, *After the Deluge*, 41 ELRev. (2016) pp. 469-470.

parameters of the latter were largely unknown when this paper was finalised. Bearing this in mind we found it necessary to draw the main alternative scenarios and their implications for the future participation of the United Kingdom in EU's external activities. Although legally possible, the option of a single agreement governing the withdrawal and future relations has been rejected by the political circles. Therefore, the most realistic way in which Brexit will unfold are two separate treaties regulating, respectively, the terms of divorce and the afterlife. What remained up in the air in early 2017 was whether this duo of agreements would be negotiated in parallel or in sequence. From the point of view of legal certainty the latter option would be preferred, yet it was not clearly on the cards of the European Union. Either way the negotiated framework could potentially provide for a transitional period during which the effects of existing agreements with third countries would be preserved until further notice. This option, although *prima facie* rather plausible, has certain flaws as it proceeds on the assumption that there will be a consensus for such an arrangement between the EU and the UK. Furthermore, it does not consider the will of third countries, which are also parties to hundreds of agreements with the European Union. Even if one were to assume that such a scenario would turn into reality one has to acknowledge the complexity associated with some international agreements that the European Union is a party to. For instance, a decision would have to be made as to participation of the United Kingdom in regular updates to Association Agreements with Ukraine, Georgia and Moldova.<sup>67</sup> Even more so, a *modus operandi* would have to be developed for participation of the United Kingdom in regular updates of the European Economic Area.<sup>68</sup> That is, of course, if the United Kingdom were to remain an EEA member after Brexit. As noted earlier in this paper, this is far from certain as of the day of withdrawal the United Kingdom would no longer meet the EEA eligibility criteria. Procedural and legal complexities would go to even a higher level if agreements existing at the time of Brexit were to be replaced by new treaty arrangements negotiated at that point in time or thereafter. The question is to what extent the United Kingdom would be permitted to participate in such negotiations and in what capacity. Most importantly, it is unclear whether it would be equipped with veto rights or the power to challenge the legality of taken decisions as a privileged applicant as per Article 263 TFEU. If one adds the political shenanigans connected with negotiations of such temporary arrangements and their implementation in practice it becomes clear that this scenario may not be as plausible as it seems at first sight.

A more likely option is that all international treaties applicable to the European Union would cease to apply to the United Kingdom on the day of withdrawal. This would mean that the United Kingdom could proceed with negotiation of its own agreements with countries around the World, while the European Union would have to – in some cases – negotiate tailor-made protocols with existing contracting parties to reflect the fact that a state has left the Union (a reverse of what it regularly engages in when countries join the EU). The question is to what

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<sup>67</sup> Association Agreement between the European Union, the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, OJ L 161/2014, p. 3; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ L 261/2014, p. 4; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, OJ L 260/2014, p. 4.

<sup>68</sup> Agreement on the European Economic Area, OJ 1994 L 1/1.

extent the agreement between the EU and the UK regulating relations *après divorce* can regulate participation of the United Kingdom in the EU's external activities. In this case, much will depend on the will of both sides, however the existing practice can be very instructive. For instance, the European Economic Area, which is based on an association agreement, does not include provisions on the external dimension. To put it differently, its scope is limited to EU-EFTA countries relations. The same applies to dozens of EU-Swiss Agreements regulating the bilateral relations. The situation is different, however, with other agreements concluded with EU's immediate neighbours. To begin with, the Stabilisation and Association Agreements with the Western Balkans provide for co-operation between the associated states and the European Union in the fields covered by the Common Foreign and Security Policy. This, however, is not a very comprehensive legal framework as the matters in question fall under a more general umbrella of Political dialogue.<sup>69</sup> A similar model has been followed in Association Agreements with the Mediterranean countries.<sup>70</sup> In this respect the newly adopted Association Agreements with Ukraine, Georgia and Moldova can be very instructive as all three comprise more comprehensive measures regulating alignment of these countries with EU's foreign and security policy activities. It remains to be seen if provisions of that kind could find their way into the legal framework governing the post-Brexit relations between the European Union and the United Kingdom. This will depend on the political will on both sides of the negotiation table, in particular the question is whether the United Kingdom will wish to align itself with activities of the EU on the international arena. Whatever solution is opted for there will be inherent limits to the co-operation in this regard. One has to remember that with its departure from the EU, the United Kingdom will no longer be a leading actor of EU's external relations regime but one of its objects, together with other neighbours of the European Union.

## 5. Conclusion

Given that the EU is engaged in a legal and political relationships with almost all the states in the world, it would be unthinkable that ties with, let's say, Vanuatu,<sup>71</sup> would be stronger than with the UK. Indeed, while negotiating Britain's exit, the future of the EU-UK relationship needs to be on the table. Or as phrased by Article 50 TEU, and the exit agreement should set out the arrangements for the Member State's withdrawal, "taking account of the framework for

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<sup>69</sup> See Article 7 of Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part, OJ L 84/2004, p. 13; Article 8 of Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, OJ L 107/2009, p. 166; Article 10 of Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part, OJ L 278/2013, p. 14; Article 10 of Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, OJ L146/2015, p. 2; Article 11 of Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo \*, of the other part, OJ L 71/2016, p. 3.

<sup>70</sup> See, for instance, Article 3 of Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part, OJ L 304/2004, p. 39.

<sup>71</sup> See the recent 4th Enhanced Political Dialogue between the European Union and Vanuatu, 26 January 2017; [https://eeas.europa.eu/headquarters/headquarters-homepage/19333/4th-enhanced-political-dialogue-between-european-union-and-vanuatu\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/19333/4th-enhanced-political-dialogue-between-european-union-and-vanuatu_en)

its future relationship with the Union”. As Article 50 leaves form and substance of the future framework open, various options have already been discussed in literature (and in fact some of these have already been taken off the table by Prime Minister May in her speech of [...] January 2017. Often, references have made to existing agreements with other non-EU states (e.g. the ‘Turkey’ option, the ‘Norway’ option, the ‘Swiss’ option or the ‘Canada’ option).<sup>72</sup>

In the contribution we focussed on the external dimension of Brexit. Our main point was that the UK will have to start from scratch in re-developing its international relations as large parts of it were regulated on the basis of EU external relations law. The existing division of competences as well as the principles of sincere cooperation and primacy also make it difficult for the UK to fully prepare future relations with third states prior to exit day. We suggested to think about a special transition arrangement for the UK during the 2 years of exit negotiations.

This is not to say that the UK’s external relations regimes will by definition be very different than what it has now. In a substantive manner it will be possible to copy-paste many of the arrangements that are currently in EU-only agreements. At the same, there will be possibilities for the UK to align itself to the EU’s foreign and security policy. Both in economic and political terms, it will be beneficial for the UK as well as the EU when new UK policies (including tariffs) would stay close to the current situation.

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<sup>72</sup> See for instance C. Tobler, *One of Many Challenges after ‘Brexit’: The Institutional Framework of an Alternative Agreement – Lessons from Switzerland and Elsewhere?*, 4 *MJECL* (2016), pp. 275-294.