

# **Can a Soft Brexit Last? The Politics and Political Economy of Limiting Differentiation with the EU**

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### ABSTRACT

This paper uses insights from comparative federalism to examine the safeguards that sustained the UK-EU relationship during the UK's time as a member state, before comparing them with how these same safeguards might operate under the scenario of a soft Brexit (modelled on the assumption that the UK survives territorially intact). As in a federal arrangement, these institutional, judicial, and partisan/socio-cultural safeguards help maintain a balance between autonomy and common obligations. What the comparison shows is that a soft Brexit comes without a stronger mechanism for sustaining regulatory alignment than that which operated, ultimately unsuccessfully, during the UK's membership of the EU. In fact, the system of safeguards is notably weaker. Additionally, the analysis looks at how the nascent debate over pursuing a new economic settlement might intersect with the mechanisms needed to sustain a soft Brexit arrangement over time. The two rival models for transforming the UK economy after EU withdrawal, a de-regulatory vision aping Singapore and the opposing state intervention approach, will put even more pressure on judicial and partisan/socio-cultural safeguards. In such circumstances, it will take tremendous political skill to avoid divergence over the long term, thereby putting a soft Brexit in peril.

## INTRODUCTION

The UK government, having decided to trigger Article 50 of the Lisbon Treaty in March 2017, immediately faced a thorny negotiation problem: how exactly to disassociate from the EU when no concrete alternative to membership was put to the British electorate in the 2016 EU membership referendum? A spectrum of options are available for life outside the EU, ranging from a hard or soft exit: the latter scenario relates to retaining membership of the single market and/or joining a Customs Union with the EU; reliance on WTO trading rules and no actual FTA with the EU is, conversely, the hardest of exits. The 2016 referendum did not provide an explicit mandate to leave the EU customs union or the single market, the two key institutional arrangements that would constitute a soft exit were the UK to remain in one or both. On the surface, a 'soft' Brexit appears the natural end goal of the UK's ongoing divorce from the EU because British public opinion appears to support minimizing the extent of divergence from Europe. A June 2018 poll showed a modified EEA arrangement was the most popular option, preferred by 57% of respondents (Opinium 2018). Moreover, the very principle of remaining closely aligned with the EU was accepted by the UK government in Phase I of the Brexit negotiations (concluded by a joint report published in December 2017). Originally, this objective took the form of alignment to cover Northern Ireland only – to prevent the re-emergence of a politically divisive border – but, by the time the Withdrawal Agreement was finalized, the aim was for the UK and EU to form a single customs territory.

Yet the political process of finding an alternative relationship with the EU and then of accepting its constraints – to say nothing of how the strictures of EU membership proved too much for UK voters – gives reason to doubt the very sustainability of a soft Brexit. What looks good in theory is quite different from what can withstand the furious jousting of post-referendum British politics. The British Prime Minister Theresa May invoked a future 'deep and special relationship' to avoid replicating the hard and soft antinomy she associated with people that 'have still not accepted the result of the referendum' (May 2016). However, after she failed to win a personal mandate to execute Brexit on her terms in the 2017 election she herself called, her political survival, became premised on finding a way to reconcile opposing preferences in her cabinet and party over precisely how far to diverge with the EU.

The preliminary component for softening the nature of the UK's withdrawal was intended to be a time-limited transition period after the original official date of EU exit on 30 March 2019. The length of this hiatus, designed to buy time for concluding a final settlement can be concluded, will be affected by the withdrawal extension granted by the European Council just prior to the planned Brexit date. However, the severe difficulties encountered by the UK government when seeking to adopt such standstill arrangements – extending EU membership, followed by a transition involving full UK alignment with EU law – reveal the pressure on the UK side that militates against close regulatory alignment. The prelude to the March 2018 agreement in principle for a transition period was a set of wide-ranging British demands to cushion the initial

economic impact of Brexit and render this halfway house politically more palatable by limiting restrictions on British sovereignty. The UK sought to treat incoming EU citizens differently from those that arrived while it was still a member state, the ability to influence new laws adopted during transition, and flexibility to negotiate free trade agreements (FTAs) with other countries at the same time as wishing to remain bound by existing EU FTAs. Similarly, the Brexit extension request came on the back of endless UK attempts to renegotiate or remove the “backstop” arrangement for Northern Ireland as part of the Withdrawal Agreement.

Hence this paper sets out to explore the potential durability of a “soft Brexit” arrangement (whether immediately after a transition period or not), which in conceptual terms is taken to be a debate concerning how to establish differentiation outside the scope of formal EU membership (Schimmelfennig et al. 2015). That is, a negotiated outcome over the degree of interdependence that requires common rules and institutions (ibid.), underpinned by an acceptance of the legitimacy of the EU legal-political order (Glencross 2018). Whereas a hard Brexit involves disintegration and the delegitimation of EU rules, a soft form of EU withdrawal requires the joint management of areas of regulatory alignment, especially the resolution of disputes over where common obligations begin and end. Such an endpoint – a relationship undoubtedly requiring an international treaty and featuring a certain degree of institutionalization – also needs to be understood as a process. This is because EU integration is not static; regulations affecting the scope and depth of market-making and market-correcting practices evolve, not to speak of changes in jurisprudence or foreign affairs, with consequences for the states with which the EU has close economic and security ties.

In the event of a soft Brexit, the formal outcome of negotiations over a future EU-UK relationship would be only one part of a broader story regarding the ability to sustain this relationship as an ongoing process where both sides will continue to have opposing interests at times and be subject to different internal political headwinds. Norway, for instance, is the emblematic case of quasi EU membership – via the European Economic Area (EEA) – entailing “dynamic homogeneity” (Fossum and Graver 2018) maintained by institutional cooperation and domestic political adaptation. Thus the analysis used here works on the premise that the durability of a soft Brexit is best modelled by drawing on literature that explains political accommodation between different levels of government that share common principles or institutional structures i.e. comparative federalism. After all, EEA membership, or partial membership of the single market via the ‘Jersey option’ (full customs union and regulatory alignment in goods, social and environmental rules), involves significant constraints on state sovereignty (Legrain 2018). Just as federalism entails a ‘change in the political status of every member of the federation ... it establishes a new *status* for every member’ (Schmitt 1992, 29), so does shadowing EU rules through a legal arrangement that binds the exercise of authority over large swathes of economic life. The same logic applies to the most tangible UK proposal during Article 50 negotiations [at the time of writing] for a UK-wide customs arrangement with the EU and the concomitant adoption of certain EU rules on state aid, environmental standards and the like.

In fact, the UK and EU, in the event of a soft Brexit, will be engaged in a ‘holding together’ political arrangement that can be compared with institutionalized legal and political processes found in federations that seek to devolve power back to constituent units (Stepan 1999). They will also do so in the absence of a direct external security threat, which William Riker considered the most effective and persuasive stimulus behind federation (Riker 1964). This is why the work of Daniel Kelemen scrutinizing the safeguards necessary for federalism to endure (Kelemen 2007) is of particular relevance for analysing the ability of the UK and EU to make a soft Brexit work effectively over time. His identification of four types of federal safeguard on which a stable political order that constrains unit autonomy can be productively applied to the scenario of a soft Brexit. These factors include: structural safeguards (institutions that provide cross-unit political dialogue); partisan safeguards (how far parties are committed to supporting federal arrangements); judicial safeguards (legal mechanisms to prevent cheating on obligations or *ultra vires* federal actions); socio-cultural safeguards (the extent of shared identity and political culture). The paper explores the existence and solidity of each type of safeguard in turn – albeit by treating partisan and socio-cultural factors as one and the same – while giving special prominence to considerations of how these intersect with underlying issues surrounding contestation of the UK’s political economy. This is because the 2016 referendum, for the first time in more than a generation, engendered meaningful discussion over the future of the UK political economy (Bickerton 2018), a subject that looms large in discussion of the relations with the EU after Brexit as set out in the following section. The analysis proceeds on the assumption that the UK will stay territorially intact in the event of Brexit, which is nevertheless a contestable claim given the stress the politics of EU withdrawal have placed on the British Union (Keating 2018).

## **1. The Internal Politics of UK Differentiation with the EU**

A common assumption of much UK referendum analysis is that it was a clash of cultures pitting the winners and losers of globalization against each other (Hobolt 2016). Certainly there was a struggle, part inter-generational and part reflection of divides in educational achievement, between economic interests favouring EU membership and the emotional appeal of regaining sovereignty by leaving. The latter is closely linked to feelings of “Englishness”, identification with which correlates strongly with a vote against EU membership (Goodwin 2018) and constitutes a destabilizing force in UK politics given the divergence of EU-related preferences in Scotland and Northern Ireland. However, this overarching narrative tends to overlook the way in which for a generation prior to the vote British economic interests were “constructed in opposition to European integration” (Gifford 2016: 779).

Opting out of the Euro encouraged differentiation between the UK’s increasingly financialized political economy and the rest of the EU. Tony Blair’s decision not to use transitional restrictions on migration from the Central and Eastern European countries that joined the EU in 2004 also made the UK unique among big member states. This divergent growth model, dependent on financial services and high net immigration,

became politically increasingly costly when coupled with austerity politics and the UK's position as 'employer of last resort' during the Eurozone crisis (Thompson 2017). These developments explain why, since triggering Article 50, Theresa May's travails in finding a common Cabinet negotiating position are much more than a reflexion of her problematic leadership or limited understanding of how the EU operates. Rather, they point to the legacies of how domestic politics in the UK has approached the issue of differentiation with the EU, especially with regards to economic costs and benefits.

A soft Brexit, as in an EEA-like arrangement, would entail – just as in the case of Norway – swift and enduring adaptation to EU rules in important economic policy areas at relatively low political cost. Yet during its time as a member state, the UK frequently challenged, and was in turned challenged by, adaptation to evolutions in the EU order. Internal differentiation in the EU was pioneered by the UK, which became known as an 'awkward partner' (George 1998) for unilaterally challenging the European consensus on important constitutive changes. Successive British governments explicitly sought to recalibrate the advantages and disadvantages of European integration in the UK's favour, beginning with the Labour Party, which won the General Election of February 1974 with a manifesto that included a pledge to renegotiate the terms of EEC membership.

As was the case four decades later, the 1974-75 renegotiation was a two-level game in which the UK's ambitions for how to recalibrate the relationship with Europe produced serious internal tensions within the ruling party (Wall 2008). The dispute within Labour, as with David Cameron's Conservatives in 2015-16, revolved around how far to challenge the legitimacy of the existing rule-based system and seek UK-specific exemptions to it. To some degree, even though the UK obtained over time a budget rebate and opt-outs from EMU and Schengen, as well as the ability to opt in to justice and home affairs legislation, UK differentiation was a self-limiting exercise in what to negotiate and what to avoid asking for (Glencross 2018). That is, a succession of UK governments during the years of EU membership were torn over how far to push for EU-wide reform as opposed to unilateral guarantees for British interests.

This explains why, before making his keynote speech in 2013 announcing his intention to hold a referendum, Cameron met with his key advisors to prepare what other EU leaders would understand as a 'sincere and credible contribution to the European debate' (Seldon and Snowdon 2015, 261). As the former Prime Minister himself put it in a newspaper article shortly afterwards, 'if there is no appetite for a new treaty for us all then of course Britain should be ready to address the changes we need in a negotiation with our European partners', while noting that a successful renegotiation 'will have transformed the European Union and Britain's relationship with it' (Cameron 2014). What Cameron faced domestically was a pincer movement of anti-EU forces. The Conservatives' membership base had become increasingly Eurosceptic (Fontana and Parsons 2015) at the same time as a parliamentary group where the divide between Europhobes and Europhiles had morphed into one between hard and soft Eurosceptics in the two decades after the 1992 Maastricht Treaty (Dorey 2017). In 1992, Prime Minister John Major was only able to get parliamentary support for ratifying Maastricht by making the treaty the subject of a vote of confidence.

The preferences of hard Eurosceptics among Tory backbenchers can be judged from the contents of a 2013 letter to the Prime Minister, signed by 95 Conservative MPs representing the Fresh Start movement, asking for the introduction of a unilateral parliamentary veto (incompatible with European law) over EU legislation. Another demand incompatible with basic EU principles made by the Fresh Start group was a quantitative restriction on EU migration, accompanied by vaguer claims for a repatriation of certain policy competences. This same tension between minimalist and maximalist demands dogged Cameron's attempts at a formal renegotiation of the UK's status within the EU. Instead of rolling back the principle of free movement of EU citizens or EU legal supremacy, the UK government settled on technical tweaks of welfare provisions for migrants and some emollient pledges for how the EU would be run in the future. The only UK-specific measure contained in the European Council's February conclusions was a promise to change the wording of the EU treaties at an unspecified point in the future to 'make it clear that the [treaty] references to ever closer union do not apply to the UK' (European Council 2016, 16).

Balancing the homogeneity of EU rules with a preference for a certain degree of differentiation was thus the recurring theme during the UK's time as an EU/EEC member state. This predicament, however, became more vexing for UK governments following the global financial crisis and its Eurozone ramifications, which as Helen Thompson notes, 'pushed British interests further away from other member-states' (Thompson 2017, 440). Whereas regulating finance and harmonizing Eurozone economic policies were one and the same for the EU core, the UK was caught between supporting integration to prop up the single currency and defending the City of London's autonomy beyond merely opting out from EMU. The absence of a common economic vision was most obvious when in 2011 the UK refused to back a new EU treaty stabilizing the Eurozone unless it obtained concessions on financial regulation (Beach 2013). Long before the delicate diplomatic talks on leaving the EU began, therefore, the UK government had adopted a fundamentally defensive posture on European policy, especially economic regulation and immigration rules, which continues to shape post-referendum politics.

This trend is now evident beyond the confines of the Conservative Party. Under the leadership of Jeremy Corbyn, the Labour Party has returned to debating the merits and demerits of the single market. Divisions over how far pooling sovereignty compromises the ability to deliver socialist policies in the UK were a central feature of Labour politics in the 1970s, culminating in the Cabinet split during the 1975 referendum (Saunders 2018). The party elite was only won over to European integration by the end of the 1980s, when Commission President Jacques Delors helped cast European rules on labour rights as a shield against Thatcherite neoliberalism. Tony Blair reinforced this consensus and adapted it while in government by pursuing a strategy of depoliticizing EU matters, pre-empting a potentially destabilizing internal debate over the Euro and the Constitutional Treaty by promising to hold referendums on both (Oppermann 2013). Hence Jeremy Corbyn's convictions – deemed mistaken by most experts (Tarrant and Biondi 2017) – that re-nationalizing public utilities and supporting a bold industrial strategy are incompatible with Brussels' competition agenda marks a return to an older strand of Labour thinking.

That EU membership should create such internal tensions within the UK party system is no surprise when EU integration itself is considered from the perspective of comparative federalism. Debates over the appropriate scope and depth of EU competences challenge the left-right cleavage of the UK (and other countries') party landscape. Moreover, understood as an instance of "joint federalism" whereby the EU and national governments share and coordinate capacities rather than possess autonomous spheres of governance (Scharpf 1995), such a system requires constant discussion at the member state level of how exactly to work together. This is particularly true given the constitutional principle that all the powers of the EU must voluntarily be conferred by the member states (Article 5 TEU) which corresponds with the possibility of exit (Article 50 TEU). In this context, if the UK's obligations post-Brexit are similar to those of a member state, as would be the case in a soft Brexit scenario involving aligning with single market and customs rules, it is fundamental to explore the factors that could stabilize this particular arrangement.

## **2. Analyzing the Safeguards Needed to Support a Soft Brexit**

The comparative study of federal systems indicates there are two major dilemmas facing such political systems: centralization, or encroachments on unit autonomy; fragmentation, whereby the units shirk responsibilities or in other ways assert themselves at the cost of common obligations or goals (Bednar et al. 2001). When considering the case of a soft Brexit involving tight coordination over certain economic policy competences the problem of sustainability is one of avoiding centrifugal forces. To explore the factors that will affect the longevity of such an arrangement involves examining institutional mechanisms that reinforce or not the ability of either party to avoid withholding cooperation or unilaterally breaking their commitments. These factors are endogenous to the institutional system rather than a reflection of exogenous circumstances or shocks (Greif and Laitin 2004). Building on Kelemen (2007), three types of safeguard relevant to UK-EU relations can be identified and compared in terms of how far these existed prior to Brexit and how, thereafter, they might apply to a scenario of a soft Brexit.

### *Structural safeguards*

The idea of creating a structure of decision-making that could balance out centripetal and centrifugal tensions within an institutional arrangement joining together units with potentially different interests was a central concern of *Publius* when defending the proposed US Constitution in *The Federalist*. James Madison wrote that 'we have seen, in all the examples of ancient and modern confederacies, the strongest tendency continually betraying itself in the members, to despoil the general government of its authorities, with a very ineffectual capacity in the latter to defend itself against the encroachments' (Hamilton et al. 2003: 235). In the American case, the solution was to create a 'compound republic' that mixed different forms of political representation as both the states and the union had a claim to represent citizens; in addition, the bicameral legislature of the federal government combined both representation of the states and of the aggregate people. That is why Madison claimed in Federalist 39 that 'the proposed constitution therefore is in strictness neither a national nor a federal constitution; but a composition of both' (Hamilton et al. 2003, 187).

As an EU member state, the UK was able to participate in the many ways that the EU system similarly seeks to balance national interests and EU ones in various decision-making arenas. In the EU compound polity (Fabbrini 2007; Glencross 2009), the UK had a seat in the Council and the European Council, thereby providing opportunities to build legislative coalitions or block decisions deemed unsuitable. There was also the possibility to use a veto in areas where qualified majority voting is not used (e.g. taxation or foreign policy), while also threatening to block treaty change if UK interests were not accommodated (as Cameron did in 2011). Following the ratification of the Lisbon Treaty the option of exiting the EU also provided extra leverage to member states willing to consider this option, as demonstrated by the UK's attempt to renegotiate membership terms prior to the 2016 In/Out referendum.

More discreetly, UK interests could be promoted via participation in the preparatory legislative work of COREPER, full membership and voting rights within various regulatory agencies such as the European Medicines Agency or European Defence Agency (EDA). For six years in a row (2011-16), for example, the UK vetoed an increase in the EDA budget in order to limit any increase in EU contributions. The existence of a British Commissioner, CJEU judge and personnel at various high levels of the EU bureaucracy also offered a conduit for a two-way exchange of information between the EU and UK. Hence member states of the EU benefit from strong structural safeguards that shield their interests, especially so in the case of large countries with significant voting weights in the Council (Häge 2013).

In the event of a soft Brexit, the capacity for mutual dialogue, exchange of information, and accommodation of divergent interests would be greatly reduced. Even the most institutionalized form of non-membership, the EEA, contains weak structural safeguards for its signatory countries. Those countries have no formal representation within EU decision-making institutions and their participation in EU regulatory agencies comes devoid of voting rights. Norway relies at times on its close relationship with Sweden for accessing information and getting its voice heard in internal EU negotiations (Fossum and Graver 2018)

Formal political interaction between the two sides occurs via the Joint Parliamentary Committee and the more important EEA Joint Committee, made up of ambassadors from the EEA states and a delegation from the EU's External Action Service. When legislation in EEA-relevant areas is proposed by the Commission, under Article 99 EEA non-EU countries can ask for an exchange of views in the Joint Committee. The Commission also solicits informal advice from EEA country experts prior to initiating legislation (in practice this means receiving comments on green papers). But EEA states have no say in deciding on EU secondary legislation that they need to mirror. The process of mirroring requires a decision of the Joint Committee, meaning EEA countries in theory have the right to reject the incorporation of new EU law. However, since 1994 Norway has exercised this right once, in 2011, in a decision that was reversed two years later. The extent of 'decision shaping' under the EEA system is thus a far weaker mechanism for protecting member state interests than that available to EU member states.

### *Judicial safeguards*



Judicial institutions have a crucial role to play in ensuring that common obligations are observed by different parties that could otherwise benefit from unequal compliance with rules governing trade or other economic interactions (and beyond). Within the EU system, member states benefit from access to the very powerful CJEU for redress against potential competence encroachment or non-compliance by other countries. There is also a highly integrated system of de-centralized enforcement whereby EU law is applied via national courts. In this sense, the EU offers robust safeguards against federal over-reach and state shirking, although the mechanism is more skewed towards the latter (Kelemen 2007). Nevertheless, the UK was able to use the CJEU to protect the interests of the City of London by bringing a case against the ECB's attempt – supported by France and Germany – to 'relocate' the clearing of euro-denominated derivatives to inside the eurozone (Howarth and Quaglia 2013, 115). The CJEU found in the UK's favour that this was a distortion of single market rules, demonstrating the value of accessing this form of judicial redress.

Overall, the EU judicial system is an extremely strong mechanism for creating an integrated legal space. The major study comparing legal resistance to central authority between US federalism and European integration shows US states proved more obstreperous in their defiance of federal legal authority than the six founding EEC states did in relation to the CJEU (Goldstein 2001). This willingness to defer to EU legal authority can be explained in part by the strength of political safeguards to protect member state interests (Glencross 2009). Equally, member states are conscious of the benefits of delegating to the Commission the job of investigating non-compliance by member states, while also granting the CJEU the overriding power to arbitrate if such evidence is found. Delegation of non-compliance investigation and sanctioning to independent bodies minimizes the kind of brinkmanship or miscalculation possible when states seek to judge and enforce compliance with international law unilaterally (Phelan 2012).

The EEA mechanism is designed to replicate the strengths of the EU legal order. It does so through the creation of the EFTA Surveillance Authority, which like the Commission oversees compliance with EU legislation incorporated via the EEA mechanism. Issues of non-compliance are adjudicated by the independent EFTA Court, which follows CJEU jurisprudence to ensure a uniform legal interpretation across the entire (EU and non-EU) internal market. A soft Brexit could in this scenario result in strong judicial safeguards with regards to maintaining a level playing field across all states with common obligations. However, as a legal mechanism for adjudicating conflicts between the EU and non-EU states this arrangement does not provide a backdoor institutional remedy to contest EU decision-making *ex post*.

The EFTA Court is competent to hear cases where surveillance procedures or competition decisions are contested and in instances of disputes between two or more EFTA states. The task of resolving a conflict between an EFTA state and the EU when the latter's rule-making is considered vexatious lies elsewhere. Article 102 specifies an institutional mechanism for remedying disagreements over the incorporation of the EU *acquis* using the EEA Joint Committee, as well as a procedure for suspending part of the agreement in a case where no solution can be found. There is also the possibility for the Joint Committee, under Article 111, to trigger adjudication by the CJEU, but

only if both sides agree. Proponents of an EEA-style soft Brexit further point to Article 112 providing a legal framework for a contracting party to take unilateral measures suspending the application of a particular aspect of single market regulation in cases where 'economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising'. Iceland did this in 2008 in order to introduce capital controls for the sake of managing the repercussions of the global financial crisis. Lichtenstein, which has a foreign-born population of more than 50%, is the only EEA country to have used emergency measures to restrict immigration.

Hence Article 112 appeals as an indicator of greater legal flexibility that, in a post-Brexit context, could allow the UK to pursue certain restrictions on free movement of labour or on state aid if and when the government decided to trigger this provision. Yet according to the EEA treaty the measures taken by a member under Article 112 have to be restricted in scope and duration. In addition, the measures are supposed to be agreed upon jointly via consultation with the EEA Joint Committee. This same body would review emergency measures every three months and countermeasures could be applied by the EU should there be no consensus on the validity of restrictions on single market rules.

The EEA system thus creates a legal mechanism for institutionalized dialogue between both parties in the case of serious disagreement over the incorporation of EU legislation. In practice, Article 102 has never been used to trigger a suspension of the EEA agreement, although there are notable delays in EFTA states' domestic implementation of EU rules that have caused consternation in Brussels (European Commission 2012). This can be explained by the absence of direct confrontation within the EEA framework, which itself is a reflection of the asymmetry of economic power enabling the EU to absorb the costs from any suspension far more easily than the smaller EFTA states. From this perspective, joining the EEA would not enable the UK to access judicial remedies to protect UK interests – especially concerns relating to financial services or other sensitive areas of the economy – to make up for the inability to participate in EU rule-making. Rather, the judicial safeguards of the EEA are designed to prevent state shirking across the internal market, with a view to facilitating incorporation of the EU *acquis* under a different legal framework.

Within the remit of the Article 50 negotiations, the EU has considered the need to create similar judicial safeguards for preserving the homogeneity of the internal market in the event of a soft Brexit that nevertheless falls short of EEA membership. So-called level-playing-field clauses were first formally mentioned in the Draft Withdrawal Agreement produced by the Commission in March 2018. This document spelled out explicitly that

given the UK's geographic proximity and economic interdependence with the EU27, the future relationship will only deliver in a mutually satisfactory way if it includes robust guarantees which ensure a level playing field. The aim should be to prevent unfair competitive advantage that the UK could enjoy through undercutting of current levels of protection *with respect to competition and state aid, tax, social, environment and regulatory measures and practices*. This will

require a combination of substantive rules aligned with EU and international standards, adequate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement mechanisms in the agreement as well as Union autonomous remedies, that are all commensurate with the depth and breadth of the EU-UK economic connectedness [emphasis added]. (European Council 2018: 5)

Judicial safeguards reflect the Commission's awareness of the evolving debate and changing preference structure in the UK over the direction of economic regulation. Any soft Brexit scenario would thus be the result of a legal contract that would leave the UK at the mercy of potential EU countermeasures should Westminster seek to change unilaterally the terms of trade in a manner the EU considers unfair. There is a precedent here in the EU-Swiss relationship, which is a bilateral arrangement outside the EEA system. After the Swiss voted in a 2014 referendum to restrict EU migration, the European Commission swiftly retaliated by excluding Switzerland from participation in the Erasmus university exchange and the €80 billion research funding programme Horizon 2020, which the Swiss help finance via the money they commit in order to access the single market. Hence the significance of judicial safeguards is directly related to the nature of partisan politics as they pertain to a legal contract surrounding joint obligations between different governments. These political dynamics are intimately connected to socio-cultural factors, which explains why partisanship is treated here as part and parcel of the same type of safeguard.

#### *Partisan and socio-cultural safeguards*

These safeguards can be understood as those arising from party dynamics that in turn reflect the extent to which a common, complementary identity and culture exists between different political units (Kelemen 2007; Stepan 1999). Partisanship can thus draw on commonalities or their absence to politicize, respectively, the need to comply with joint obligations or ask for separate treatment. Hence the presence of this fellow-feeling constitutes a glue that helps make commitments binding, especially in times of great stress.

Already during UK membership of the EU such safeguards could be considered moderate at best. The British debate over the benefits of EU membership was itself exceptionalist in that it treated integration as a pragmatic and utilitarian foreign policy stripped of a normative commitment to a European ideal of ever closer union (Wall 2008). The failure to perceive sufficient benefits from pooling sovereignty is why in the 1950s the UK remained aloof from the original Franco-German project for European unity. Two subsequent referendums on whether to remain a member state on the basis of negotiations to improve the UK's terms of membership further point to an anomalous political culture – no other EU member has held an In/Out referendum.

British political elites' criticism of the balance between the costs and benefits of integration relates not just to recent developments such as the politicization of intra-EU migration in the past decade (Gifford 2014). Rather, there is a significant continuity in the Euroscepticism found in contemporary British politics in that complaints about

the detrimental impact of the EU often relate to core first principles of European integration and not just recent moves towards greater political union (Glencross 2016). This exceptionalist stance translated institutionally into opt-outs from the Euro and the Schengen open-border arrangement as well as other special treatment (e.g. the budget rebate obtained by Thatcher or the double majority voting system of the European Banking Authority).

In the realm of party politics, British exceptionalism manifested itself in various ways during the period of EU membership. The EU's nascent party system, i.e. the party groupings in the European Parliament, was only of moderate importance to UK attempts to defend British interests or manage the balance of competences between Brussels and the member states. David Cameron withdrew his Conservative MEPs from the powerful centre-right EPP group, before fighting a losing battle against the adoption of the *Spitzenkandidaten* process for selecting the Commission President in 2014. In both instances the moves served only to isolate the UK from potential allies for legislative coalitions while Conservative MEPs joined an explicitly anti-EU group.

The tendency to view the EU from an exceptionalist vantage point even at the risk of isolation was present in both main political parties over the four decades of UK membership. Labour won the General Election of February 1974 with a manifesto that included a pledge to renegotiate the terms of EEC membership prior to holding a referendum. Its 1983 policy was to advocate EEC withdrawal, while supporting the withholding of financial contributions during the budget rebate standoff (Wall 2008). New Labour was reconciled with European integration, supporting the social dimension of the EU and helping pioneer a breakthrough in foreign policy cooperation. However, this was accompanied by a strategy of depoliticization for issues of greatest UK concern, namely EMU and the Constitutional Treaty. The promise to hold a referendum on the latter took other leaders by surprise and resulted in a chain reaction that eventually spelled the end of the constitution-making experiment after Jacques Chirac felt compelled to offer French voters the same right to have their say.

In other words, the degree of political support and willingness to politicize integration (positively or negatively) oscillated within the UK party system before David Cameron sought to use the promise of a membership referendum to shore up his party's electoral prospects in the face of the anti-immigrant UKIP. The rise of this challenger party – aided by the Liberal Democrats' tarnished position as a controversial coalition partner helping pursue austerity – points to the significance EU immigration played in UK politics after the 2004 enlargement (Ford and Goodwin 2014). What was not tried in this period was a redistributive strategy for helping regions adapt to inflows of EU workers or the adoption of a registration system to minimize potential abuse of welfare. Instead, Cameron's renegotiation was intended to reduce the pull factor behind EU immigration to the UK by phasing in access to in-work tax credits, index-linking child benefit remitted abroad to local levels, and creating an emergency break to limit total numbers of migrants under certain conditions (Glencross 2016).

The politicization of the EU in UK politics increased in the wake of the 2016 referendum result. Much of this extra scrutiny of European integration and how the EU works has been negative, taking its cue from the government's negotiation stance in Article 50

talks. Theresa May's approach has been to make repeated pleas for a new relationship whereby the EU shows flexibility towards its own legal principles. This includes advocating the idea of a 'frictionless' border in Ireland made possible by advanced technology, mooting reneging on financial liabilities incurred whilst the UK was a member state, or avoiding the jurisdiction of the CJEU even while seeking to participate in certain aspects of the single market. Similarly, even opponents of a hard Brexit put forward suggestions involving further unilateral concessions to the UK, such as Tony Blair's idea that the UK could be granted an exemption from free movement in order to remain a member state.

What the referendum also revealed was the entrenched nature of distrust and downright hostility towards EU integration within the British electorate. As demonstrated by Clarke et al. (2017), the rejection of EU membership was supported by a broad swathe of the public, including a third of BME voters as well as one in two female voters. In fact, the ongoing Brexit negotiations appear to have solidified attitudes towards the EU. Support for leaving increased by 22 points between 2015 and 2017 among those who think membership has undermined Britain's sense of identity, while there was an opposite swing in favour by 7% in favour of remaining among those who saw no clash between both identities (Philips et al. 2018).

Thus partisan safeguards for buttressing a soft Brexit appear weaker than those present to support UK membership of the EU from 1973-2016. Increased hostility to integration, alongside extra polarization of EU-UK relations, is not a very stable platform for pursuing ongoing close regulatory alignment. This can be seen from studies of external differentiation along the lines of the EEA agreement, which have demonstrated the importance of low political salience to managing successfully this kind of outsider relationship with the EU (Schimmelfennig et al. 2015). In other words, successful adaptation to EU rule-making from outside the club requires managing the politicization of issues surrounding integration such as immigration or sovereignty. The problem of maintaining a soft Brexit based on regulatory alignment but with weaker safeguards is likely to be compounded by the effect of emerging debates surrounding a new economic settlement for the UK.

### **3. Can a Soft Brexit Survive a New UK Economic Settlement?**

The previous section analysed the federal-style safeguards needed to provide a stable legal and political system of common obligations between the EU and UK, comparing scenarios of EU membership and that of a potential soft Brexit (EEA or a Chequers-like deal). What this showed was that leaving the EU will weaken the range of institutional, judicial and partisan/socio-cultural safeguards on which a stable form of alignment is premised. These results are captured in the following table.

TABLE ONE

*Federal-style safeguards and the EU-UK relationship: comparing EU membership with a soft Brexit*

TYPE OF SAFEGUARD	PURPOSE	METHOD OF OPERATION	STRENGTH DURING TIME OF UK MEMBERSHIP	STRENGTH IN A SOFT BREXIT SCENARIO
<b>INSTITUTIONAL</b>	Represent and protect national interests	Dialogue and decision-making in EU institutions (inc. agencies)	Very strong	Weak
<b>JUDICIAL</b>	Provide remedy to protect interests	CJEU and Commission enforcement oversight	Very strong	Strong/Moderate
<b>PARTISAN/SOCIO-CULTURAL</b>	Generate support for binding commitments	National party system/public debate	Moderate	Weak

What also needs to be explored, in light of the economic debates arising during and since the referendum, is how the politicization of EU adaptation intersects with different visions of forging a new direction for the UK political economy. David Cameron's government, driven by the Treasury and building on the strategy used in the 2014 Scottish independence referendum (Shipman 2016), attempted to win the referendum by invoking the benefits of monolithic economic growth using technocratic discourse (Siles-Brügge 2018). The failure of this argument opened up new space for challenging received thinking on how to run the economy. This contestation essentially gravitates around two competing two strategies for replacing the UK growth model built in the past decades around financialization and "competitiveness" to take full advantage of the single market to attract foreign investment and labour (Bickerton 2018).

The first option involves strengthening the scope and depth of government intervention in the economy. In part, this relates to the pursuit of standard leftist redistributive policies, which are back in favour politically as survey data indicate voter dissatisfaction with a decade of public austerity (Philips et al. 2018). More radically, and potentially against the grain of various single market rules covering state aid or other areas of competition policy, there are proposals for using state authority to reconfigure ownership and control of large swathes of the economy (Bickerton 2018; Guinan and Hanna 2017; Guinan and O'Neill 2018). As advocated by Labour's Shadow Chancellor, John McDonnell, the government should be promoting cooperatives, workplace democracy, and shared ownership of the means of production. In addition to public ownership of utilities or the railways, the Labour Party is now discussing industrial strategy and the rules for public procurement to foster alternative forms of capital ownership and economic growth.

Talk of a novel era of government intervention in the economy after Brexit is not the preserve of Labour. A centrepiece of Theresa May's premiership is the so-called Modern Industrial Strategy aimed at promoting investment in science and research

with a view to supporting businesses and infrastructures in areas outside London. However, this state-centric vision of the UK political economy is challenged by one that advocates greater competitiveness by undercutting previous EU standards in areas such as product regulation, labour relations, or service provision. This “disaster capitalism” approach, as the economic historian Adam Tooze has dubbed it (Tooze 2017), is particularly associated with non-banking financial services. This sector prefers to align with US or Asian soft-touch regulation – to maximize the potential for regulatory arbitrage – rather than European standards (Lavery et al. 2018). The presence of this option in UK political debate has also been wielded as a threat during the Article 50 negotiations. For instance, Chancellor Philip Hammond warned about the structural pressure to follow such a course in the event of having no satisfactory trade agreement after Brexit: ‘in this case, we could be forced to change our economic model and we will have to change our model to regain competitiveness. And you can be sure we will do whatever we have to do’ (BBC News 2017).

Significantly, it is not just the deregulated version of a new economic settlement that is constructed in opposition to the EU model. What can be broadly labelled the industrial strategy option is hostile to liberalization and thus to the European Commission’s market-making powers as well as the CJEU’s authority to privilege EU fundamental freedoms above collectivist principles such as trade union law (Guinan and Hanna 2017). There is equally a desire to restrict free movement of people to reduce labour competition and also allow the UK government to focus on training Britons (Bickerton 2018). Given there was not enough popular support for the economic status quo and trust in the policy experts used to defend it (Siles-Brügge 2018) during the 2016 referendum, this overarching debate over political economy can be expected to continue. Since the nature of a soft Brexit is to keep the UK aligned with the EU economic model – rejected by voters in 2016 – it is vital to question how such a framework would be affected by attempts to shift the British economic model in a bold direction.

Implementing a new economic settlement would not create problems for the institutional safeguards surrounding a soft Brexit. Formal and informal channels for dialoguing with the EU, including exchanging information with the Commission and participation as an observer in agencies would be unaffected. However, things would be different regarding the operation of judicial safeguards. The creation of a dispute resolution system – for instance a new court mirroring CJEU jurisprudence as with the EFTA court – is designed to protect the interests of both parties. That is, both the UK and EU need to access remedies in the event that the other side does not meet its commitments. The latter, as with the EEA, consist of a vast swathe of single market rules, or could consist of sectorally specific rules (e.g. for goods, as proposed by the Chequers plan) accompanied by level playing field clauses extending to other areas of rule-making. UK alignment in either fashion would come under stress in the face of a domestic agenda for de-regulation or industrial policy.

The more the UK seeks to depart from EU standards or seeks to bypass rules on fair competition, the greater the need to resort to arbitration to prevent shirking obligations. Moreover, the results of such dispute resolution are liable to greater contestation in such circumstances as they would either vindicate or invalidate UK policy-making. This

zero-sum logic points to the increased politicization EU-UK relations would undergo as a consequence of any radical shift in UK political economy, de-regulatory or more interventionary. Partisan safeguards, already only of moderate strength during UK membership of the EU, would be sorely tested if the legal framework ensuring a soft Brexit frustrated the implementation of economic policies. This political dynamic would work in both directions as the absence of a British presence in the EU’s decision-making bodies is predicted to lead to a more protectionist trade and regulatory policy (Hix et al. 2016). With the UK already on the EU margins for labour and product market regulation, the EU27 consensus position for new regulatory standards is liable to depart from UK norms. Hence the impact of a new economic settlement in the EU would be destabilizing regardless of whether this comes from the left or right of the political spectrum, as shown in Table 2.

TABLE TWO

Effect of new UK economic settlement on safeguards needed to maintain soft Brexit

<i>Type of safeguard</i>	<i>Purpose</i>	<i>Method of operation in soft Brexit</i>	<i>Effect of deregulation as new UK economic settlement</i>	<i>Effect of “Industrial policy” as new UK economic settlement</i>
<i>Institutional</i>	Represent and protect national interests	Dialogue with EU, observer status in agencies	Neutral	Neutral
<i>Judicial</i>	Provide remedy to protect interests	Dispute settlement body	Increased contention over LPF measures and arbitration results	Increased contention over LPF measures and arbitration results
<i>Partisan/socio-cultural</i>	Generate support for binding commitments	National party system/public debate	Increased politicization of EU-UK relations	Increased politicization of EU-UK relations

## Conclusions

This paper drew on the comparative federal literature to examine the safeguards that sustained the UK-EU relationship during the UK’s time as a member state before comparing them with how these same safeguards might operate under the scenario of a soft Brexit. As in a federal arrangement, these institutional, judicial, and partisan/socio-cultural safeguards combine to maintain a balance between autonomy and common obligations. What the comparison showed was that a soft Brexit comes without a stronger mechanism for sustaining regulatory alignment than that which operated, ultimately unsuccessfully, during the UK’s membership of the EU. In fact, the system of safeguards is weaker – *pace* proponents of EEA membership as a preferable destination for UK-EU relations. A known unknown, however, is what value



a successful confirmatory referendum on a soft Brexit arrangement would have i.e. the extent to which it could operate as a partisan safeguard or socio-cultural safeguard limiting the UK's willingness to challenge regulatory alignment with the EU.

Moreover, the analysis looked at how the nascent debate over pursuing a new economic settlement might intersect with the mechanisms needed to sustain a soft Brexit arrangement over time. Here the two rival models for transforming the UK economy after EU withdrawal were shown to put even more pressure on judicial and partisan/socio-cultural safeguards. Although not explored in this paper, such pressures could easily be compounded by frictions within the UK constitutional settlement as the component parts of the UK respond differently to the politicization of EU differentiation. In these circumstances, it will take tremendous political skill to avoid divergence over the long term, thereby putting a soft Brexit in peril as a stable and permanent solution to the UK's relationship with the EU.

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