

The Institutional Consequences of a 'Hard Brexit'



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IN-DEPTH ANALYSIS

Abstract

This in-depth analysis, commissioned by the European Parliament at the request of the Committee of Constitutional Affairs, considers the institutional, budgetary and policy implications that a so-called 'hard Brexit' would pose on the EU. It analyses from a legal perspective how a withdrawal of the UK from the EU without a withdrawal treaty, transition deal and framework on future relations would affect each specific EU Institution, the EU budget for the remaining years of the current MFF, and EU policies in the crucial fields of trade, security and justice. While the study does not endorse a 'hard Brexit' it provides guidelines for the EU to be prepared in case such scenario were to materialise.

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LIST OF ABBREVIATIONS

AFSJ	Area of freedom, security and justice
ALDE	Group of the Alliance of Liberals and Democrats for Europe
DSB	Dispute Settlement Body
EAW	European Arrest Warrant
ECRIS	European Criminal record information system
EIO	European Investigation Order
EEA	European Economic Area
ECB	European Central Bank
ECJ	European Court of Justice
ECR	European Conservative and Reformists group
EPP	European Peoples' Party
EU	European Union
ESCB	European System of Central Banks
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
MFF	Multi-annual Financial Framework
MFN	Most Favoured Nation
S&D	Socialists & Democrats
UK	United Kingdom
WTO	World Trade Organisation

EXECUTIVE SUMMARY

Background

Since the notification of the United Kingdom (UK) decision to withdraw from the European Union (EU) on 29 March 2017, the EU and the UK have made progress on the terms of an orderly withdrawal of the UK from the EU. Nevertheless, negotiations are stalled on a number of important issues and therefore, it cannot be excluded that on 29 March 2019 the UK may leave the EU without a withdrawal agreement, a transition deal and the framework for future EU-UK relations ('hard Brexit').

Aim

This in-depth analysis examines from a legal point of view what would be the institutional, budgetary and policy implications for the EU in the case of a hard Brexit.

KEY FINDINGS

- The institutional implications of a hard Brexit will not be different than those inevitably following the withdrawal of the UK from the EU. However, the implications of Brexit differ from one EU institution to another.
- The withdrawal of the UK produces immediate effects on the European Council, the Council of the European Union and the European Commission – with UK representatives no longer sitting in the European Council and the Council and the British European Commissioner ceasing his function on the day of Brexit.
- The withdrawal of the UK produces diluted effects on the European Parliament and the European Court of Justice – as the principles of representative democracy and good administration of justice require that MEPs elected in the UK should be allowed to conclude their mandate until the next European Parliament elections, and that British-appointed judges and advocate generals at the ECJ should remain in their judicial posts until the end of their terms.
- The withdrawal of the UK produces hardly any effect on the European Central Bank as the UK is not part of the Eurosystem.
- The budgetary implications of a hard Brexit would be highly disruptive. If the UK were to leave the EU without a withdrawal agreement, this would pose major challenges to the discharge of the EU budget for the two remaining years of the current MFF 2014-2020.
- The EU however will have a stronger legal case against the UK in asking it to honor its financial commitments. Since at the conclusion of the first phase of the Brexit negotiations the UK government has eventually acknowledged its duty to continue to contribute to payments jointly undertaken in the framework of the current MFF, a subsequent about-face by the UK would constitute a breach of good faith, which could be sanctioned under international law.
- The policy implications of a hard Brexit would be important – particularly for trade and for security and justice cooperation.

- If the UK were to leave the EU without an agreement that maintains it closely connected with the EU single market and customs union, commerce between the EU and the UK would be governed by WTO rules. Free movement of goods, services, people and capital would come to a halt and customs controls would need to be set up at the border between the EU and the UK to levy tariffs and verify rules of origins and standards of imported and exported goods.
- If the UK were to leave the EU without an agreement that maintains it closely connected to the EU AFSJ, criminal justice and law enforcement cooperation would bounce back to classical instruments of international law. Mechanisms of police and judicial mutual assistance like the European Arrest Warrant and the sharing of information would be immediately suspended, and much more cumbersome instruments like extradition requests and so-called 'letters rogatory' would have to be used to secure cooperation in the field of security.
- A hard Brexit would pose vital challenges particularly for the Republic of Ireland, and the EU should identify in advance legal tools to address this contingency.
- On the side of trade, the EU could invoke the frontier traffic exception under Article XXIV(3) GATT to declare the whole territory of Northern Ireland as a border region to the EU customs union, thus excluding the need for a customs border. But this solution raises problems and could lead to abuses.
- On the side of justice and security, the EU could try to replicate vis-à-vis the UK some of the cooperation agreements it has put in place with other non-EU countries. But this solution faces limits, notably connected to compliance by third countries with EU human rights law, and the jurisdiction of the ECJ.
- A framework of future relations would represent a better scenario than a hard Brexit for EU-UK cooperation on commerce and trade, as well as security and justice.

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1. INTRODUCTION

On 29 March 2019, the United Kingdom (UK) – absent a unanimous decision of the European Council – will leave the European Union (EU) pursuant to Article 50 TEU and become a third country vis-à-vis the EU. The purpose of this report is to analyse what would be the institutional, budgetary and policy implications of the UK withdrawal from the EU in the scenario in which the two parties do not reach agreement on an orderly withdrawal and the framework of their future relations (so-called 'hard Brexit').

At the time of writing (April 2018) this scenario does not appear likely but cannot be excluded. On 8 December 2017 the EU and UK negotiators agreed on a joint report that outlines the conditions for an orderly exit.² On that basis, the European Council has given its blessing to the opening of the second phase of the Brexit negotiations, on the terms of the future EU-UK relations, provided the EU and the UK fully settle into a legally binding withdrawal treaty all that has been agreed in the first phase of the negotiations.³ On 28 February 2018 the European Commission published the text of a draft withdrawal agreement⁴ – the substance of which was in large part accepted by the UK government on 19 March 2018.⁵ Nevertheless, the Commission draft withdrawal agreement also includes provisions – notably a Protocol on Northern Ireland, designed to prevent the return to a hard land border with the Republic of Ireland by maintaining the North within the EU single market and customs union – which remain contentious for the UK, and a clear norm of the negotiations is that “nothing is agreed until everything is agreed.”⁶ As such, the possibility that negotiations will break down and that a hard Brexit will occur cannot be ruled out.

This in-depth analysis clearly does not endorse such a scenario – but seeks to examine what would be the implications for the EU if this were to occur. As will be pointed out, some of the institutional consequences of a hard Brexit would apply equally also in the case that the EU and the UK were able to agree on an orderly withdrawal and a new framework for their future bilateral relations. As such, this report endeavors to provide guidelines for the EU as it prepares to function as a Union of 27 Member States.

The in-depth analysis is structured as follows: Chapter 2 examines the implications for each of the main EU institutions – European Parliament, European Council, Council of the European Union, European Commission, European Court of Justice and European Central Bank – after the withdrawal of the UK. Chapter 3 considers the budgetary implications for the EU of a hard Brexit. Chapter 4, finally, explores what will be the implications for a number of relevant EU policies – especially trade and security – if the UK were to leave the EU on World Trade Organization (WTO) terms, without remaining connected somehow to the EU single market and customs union, the EU area of freedom security and justice and other EU sectors-specific regulations.

² Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, 8 December 2017, TF50 (2017) 19.

³ European Council (Art. 50) meeting – Guidelines, 15 December 2017, EUCO XT 20011/17, §1.

⁴ European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, TF50 (2018) 33.

⁵ European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community highlighting the progress made in the negotiation round with the UK of 16-19 March 2018, 19 March, TF50 (2018) 35.

⁶ European Council (Art. 50) meeting – Guidelines, 23 March 2018, EUCO XT 20001/18, §1.

2. INSTITUTIONAL IMPLICATIONS

This Chapter examines what will be the implications for the EU institutions in the case of a hard Brexit by considering separately the European Council, the Council, the European Parliament, the European Commission, the European Court of Justice and the European Central Bank. As the Chapter explains, Brexit has immediate institutional effects on the European Council, the Council and the Commission. Instead, countervailing concerns – including the principles of representative democracy and good administration of justice – require to dilute over time the effects of the UK withdrawal on the European Parliament and the European Court of Justice. Finally, Brexit has essentially no effect on the European Central Bank, as the UK currently enjoys an opt-out from the single currency and therefore is not involved in the Eurosystem.

2.1. European Council

As a result of the UK withdrawal from the EU, the composition of the European Council will change in a straightforward manner. Pursuant to Article 15(2) TEU the “European Council shall consist of the Head of State or Government of the Member States, together with its President and the President of the Commission” and according to Article 10(2), second paragraph “Member States are represented in the European Council by their Head of State or Government.” After Brexit, the UK will no longer be a Member State of the EU, and, as a result, the UK Prime Minister will no longer sit in the European Council. This effect will be immediate from the day of exit and will apply regardless of whether the EU and the UK reach an agreement on the withdrawal and the framework of their future relations or not.

In fact, as is well known, Article 50 TEU has already anticipated this state of affairs. Pursuant to Article 50(4) TEU “the member of the European Council [...] representing the withdrawing Member State shall not participate in the discussions of the European Council [...] or in decisions concerning it” and since the notification of withdrawal on 29 March 2017 the UK Prime Minister has not been part of Brexit-related European Council meetings.⁷ By the time of withdrawal on 29 March 2019, therefore, the European Council will have had over two years of experience in working in a smaller composition, with 27 Heads of State or Government only.

From an institutional point of view, the withdrawal of the UK will have an impact on the internal functioning of the European Council. While, as indicated in Article 15(4) TEU, in general “decisions of the European Council shall be taken by consensus”, on occasions the European Council votes. For example, on 27 June 2014, the European Council voted by majority to appoint Jean Claude Juncker as President of the European Commission, with the opposition of the British Prime Minister and the Hungarian Prime Minister.⁸ According to Article 235 TFEU, when the European Council votes, its President and the President of the European Commission shall not take part in the vote, and a qualified majority shall be calculated in a manner analogous to the vote tally that applies for the Council (see *infra*). Following the withdrawal of the UK, therefore, the calculations of a qualified majority will change, with implications for the ability of a minority of states to block majority decisions in the European Council.

⁷ But see already the statement of the Informal meeting of the Heads of State or Government of 27 Member States as well as the Presidents of the European Council and the European Commission, Brussels, 15 December 2016.

⁸ President of the European Council Herman van Rompuy, remarks following the European Council, 27 June 2014, EUCO 138/14.

2.2. Council of the European Union

Just like for the European Council, also the composition of the Council will immediately change after the withdrawal of the UK from the EU, regardless of the conclusion of an agreement between the UK and the EU. Pursuant to Article 10 TEU "Member States are represented [...] in the Council by their governments", and according to Article 16(2) TEU the "Council shall consist of representatives of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote". Therefore, from 30 March 2019, following Brexit, the UK as a third country will no longer send representatives to the Council – in each of the 10 compositions which are currently in place.⁹ Moreover, the UK will no longer be represented in the Committee of Permanent Representatives (COREPER) established by Article 240 TFEU as well as in the various committees set up by the Council.

Similarly to the European Council above, pursuant to Article 50 TEU the Council has also been meeting since the notification of withdrawal in a composition without the UK government to debate and decide any Brexit-related matters. Moreover, Brexit has already had implications for the presidency of the Council, which according to Article 16(9) TEU rotates among all Member States every six months on the basis of a pre-agreed schedule. In fact, following the results of the Brexit referendum on 23 June 2016, the UK renounced its turn in presiding over the Council in the second semester of 2017, with the consequence that the Estonian presidency was brought forward from 2018 to 2017 to fill the gap.¹⁰

The most significant institutional implications of Brexit for the Council will be on voting rules. Whereas the European Council by default decides by consensus, Article 16(3) TEU formally rules that the "Council shall act by a qualified majority except where the Treaties provide otherwise". While scholars have repeatedly emphasized how the Council de facto tends to avoid voting,¹¹ decision-making in the Council today operates under the shadow of the vote – rather than the shadow of the veto.¹² As is well known, the Lisbon Treaty introduced transitional rules on how to calculate qualified majority voting in the Council, but according to Article 16(4) TEU "as from 1st November 2014 a qualified majority shall be defined as at least 55% of the members of the Council, comprising at least 15 of them, and representing Member States comprising at least 65% of the population of the Union".

Decision-making in the Council follows therefore the principle of the dual majority: a Council decision is deemed to be approved if supported by 55% of the states (comprising at least 15 of them), representing 65% of the population. Because the UK is currently the third most populous Member State of the EU,¹³ its withdrawal significantly alters vote tallying within the Council. In particular, each of the three largest remaining EU Member States (Germany, France and Italy) will increase its ability to form a blocking minority against a Council decision. On the other hand, small and medium-sized EU Member States decrease their ability to form a sufficient coalition to outvote the largest Member States. From a political point of view, therefore, it seems clear the logic of bargaining within the Council will change as a result of the UK withdrawal from the EU.

2.3. European Parliament

While the institutional implications of Brexit on the European Council and the Council are immediate – producing their effects on the internal composition of these institutions as of 30 March 2019 – there is

⁹ Council Decision (EU) 2009/937 of 1 December 2009 adopting the Council's Rules of Procedure, OJ 2009 L 325/35.

¹⁰ Council Decision (EU) 2016/1316 of 26 July 2016 amending Decision (EU) 2009/908 laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, OJ 2016 L 208/42.

¹¹ Uwe Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (OUP 2014).

¹² Joseph H.H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2423.

¹³ See Eurostat, Population as a percentage of EU28 population (accessed 27 April 2018), <http://ec.europa.eu/eurostat/web/products-datasets/-/tps00005>

a need to distinguish between the effects of the UK withdrawal from the EU on the current term of the European Parliament (2014—2019) and the next one (2019—2024). On 20 March 2018, the Council decided to consult the European Parliament in fixing 23—26 May 2019 as dates for the ninth European Parliament elections.¹⁴ This means that the next European Parliament elections will take place circa 8 weeks after the UK will have left the EU and become a third country on 30 March 2019.

There is no doubt that as a third country, the UK will not participate in the elections of the European Parliament in 2019. In fact, the European Parliament has approved a proposal for a reallocation of seats among the EU Member States following Brexit (see *infra*). Nevertheless, there are legal arguments to claim that the members of the European Parliament elected in the UK should maintain their seats for the short period of time that extends beyond Brexit and before the elections of the new European Parliament. Contrary to the old text of Article 189 TEC, which stated that the European Parliament represented “the peoples of the States brought together in the Community”, Article 14(2) TEU proclaims that the “European Parliament shall be composed of representatives of Union citizens,” and Article 14(3) states that “members of the European Parliament shall be elected for a term of five years.” As a result, the European Parliament today is an institution which represents European citizens, and not citizens of the EU Member States. This is evidenced by the fact that current members of the European Parliament elected in the UK have been voted into office also by non-British EU citizens resident in the UK who exercised their voting rights for European Parliament elections in accordance with Article 22(2) TFEU, Article 39 EU Charter of Fundamental Rights, and Directive 93/109/EC.¹⁵ In fact, contrary to what happened in the European Council and the Council since the notification of withdrawal, MEPs elected in the UK have not been excluded from Brexit-related deliberations and decisions within the European Parliament. In light of the above, it seems possible to claim that the principle of representative democracy codified in Article 10(2) TEU, according to which “citizens are directly represented at Union level in the European Parliament,” allows MEPs elected in the UK to serve in their role until the end of the current European Parliament’s term, particularly considering that this will be only 8 weeks after the formal withdrawal of the UK, and therefore at a time when parliamentary activities will be at a minimum.

Instead, after March 2019, the UK as a third country will not take part in elections for the ninth European Parliament. Since European Parliament seats are allocated among Member States on the basis of population – following the principle of degressive proportionality enshrined in Article 14 TEU, according to which no Member State shall be allocated more than 96 seats, and no Member States shall be allocated less than six – the withdrawal of the UK has a sizable impact on seats allocation within the European Parliament.¹⁶ The UK is indeed the third most populous Member State of the EU, and there are currently 76 MEPs elected in the UK. In its resolution of 7 February 2018, the European Parliament has proposed to re-allocate among the remaining Member States some of the seats currently assigned to the UK, while reducing the overall number of MEPs from 751 to 705.¹⁷ The European Parliament proposal must be now followed-up by the European Council pursuant to Article 14 TEU in time for the next European elections.

From an institutional point of view, the implications of Brexit on the functioning of the European Parliament will emerge most prominently in voting rules. According to Article 231 TFEU, the European Parliament decides by majority, which will obviously have to be recalculated in light of the overall reduction of MEPs’ number.

¹⁴ Council (General Affairs), Outcome of Council meeting, 20 March 2018, Doc. 7326/18.

¹⁵ Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals OJ 1993 L 329/34.

¹⁶ Federico Fabbrini, ‘Brexit and the Future of Europe’, DCU Brexit Institute Working Paper No. 2/2017.

¹⁷ European Parliament resolution of 7 February 2018 on the composition of the European Parliament, P8_TA-PROV(2018)0029.

From a political point of view, however, the implications of Brexit on the internal structure of the European Parliament will potentially be of an even greater magnitude.¹⁸ While it is not possible to make predictions on electoral trends in the next European Parliament elections in 2019, it is clear that Brexit will alter the equilibrium between political groups within the European Parliament. Currently, no MEP elected in the UK is part of the European Peoples' Party (EPP) group – following the decision of former UK Prime Minister David Cameron to take the UK Tory Party out of the EPP and move it into the European Conservative and Reformists (ECR) group. As a result, *ceteris paribus*, Brexit will numerically weaken the ECR group, the Socialists & Democrats (S&D), and to a very limited extent the Alliance of Liberals and Democrats (ALDE) within the European Parliament, without instead affecting the EPP, which will see its proportional strength increase.

2.4. European Commission

The European Commission finds itself in a position closer to the European Council than to the European Parliament and it is submitted here that on 30 March 2018 the Commissioner with British nationality will immediately cease from his function. (This in-depth analysis focuses on the Commission intended as the college and does not consider instead the effect of Brexit on the legal status of EU officials and other servants of British nationality working in the Commission intended as the administrative apparatus, on which see a specific prior report.¹⁹) According to Article 17(3) TEU the "members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt." In fact, the Lisbon Treaty planned to progressively reduce the overall size of the Commission to a number of members corresponding to two thirds of the number of Member States. Nevertheless, following the first unsuccessful referendum on the ratification of the Lisbon Treaty in Ireland, the European Council decided in December 2008 "that the Commission shall continue to include one national of each Member State."²⁰ Hence, although members of the Commission do not represent their Member States, and are expected to be independent, there is clearly a connection between Commissioners and Member States. This connection is compounded by the increasingly political – as opposed to technical – nature that the Commission has acquired during the last years.²¹ As a result, the withdrawal of a Member State requires that the Commissioner appointed from that Member State ceases from his function.

In fact, constitutional practice seems to have validated this interpretation of the Treaties. Following the Brexit referendum results on 23 June 2016, Commissioner Jonathan Hill, a British national appointed as a member of the Commission by President Juncker in agreement with the UK government, and with the consent of the European Parliament, resigned from his post.²² Although this was not formally necessary – since Commissioner Hill served in a personal capacity, and in full independence from the government of the UK – his action confirmed that his British nationality critically affected his role within the Commission. The resignation of Commissioner Hill prompted President Juncker to appoint a new Commissioner from the UK – Julian King who was nominated in consultation with the UK government, and confirmed in his post with the approval of the European Parliament.²³ In fact, after the Brexit referendum the UK remained a Member State of the EU and was therefore entitled to have one of its nationals as a member of the College of Commissioners. However, following withdrawal, on 30 March 2019, the UK will no longer be a Member State of the EU: as a consequence the above-mentioned requirement set by the European Council will become moot with regard to the UK.

¹⁸ Uwe Puetter, 'Brexit and Institutional Balance' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (OUP 2017) 247.

¹⁹ Herwig Hoffmann, 'The impact of Brexit on the legal status of European Union officials and other servants of British nationality', study commissioned by the European Parliament Committee on Legal Affairs, December 2017.

²⁰ European Council Presidency Conclusions, 11-12 December 2008, Doc. 17271/1/08, §2.

²¹ See President of the European Commission Jean-Claude Juncker, State of the Union Address, 9 September 2015.

²² European Commission statement on the Decision of Commissioner Lord Hill to Resign from the Commission and on the Transfer of the Financial Service Portfolio to Vice-President Dombrovskis, 25 June 2016, Doc. 16/2332.

²³ Council of the EU, press release, 'Julian King appointed new commissioner for security union', 19 September 2016.

Certainly, the EU is bound by the principle of good administration, which is codified in Article 41 of the EU Charter of Fundamental Rights. Nevertheless, this principle does not seem to justify the extension of the mandate of the Commissioner of British nationality in his post beyond Brexit: the date of UK withdrawal is well known, and the Commission can be anticipated it by putting in place internal administrative arrangements (including reshuffling of personnel and portfolios) capable of ensuring the continuity of its services at a time when one of the EU Member States will have left the EU.

The institutional implications of the reduction of the overall number of Commissioners from 28 to 27 will not be major. As is well known, calls have been recurrently made to reduce the Commission's size: hence, Brexit could possibly even improve the functioning of the institution. Needless to say, the composition of the new college of Commissioners – following the next European Parliament elections in May 2019 (see *supra*) – will reflect the fact that the Union will be composed at that time by only 27 Member States.

2.5. European Court of Justice

The withdrawal of the UK from the EU will have institutional implications for the European Court of Justice (ECJ) – intended here to include also the General Court of the EU. According to Article 19(2) TEU, the ECJ “shall consist of one judge from each Member State,” and the General Court “shall include at least one judge per Member State”. Moreover, by practice, the UK has always appointed one of the currently 11 Advocate Generals of the ECJ. When the UK will no longer be a Member State of the EU, it shall therefore no longer be entitled to appoint a judge to the ECJ, judges in the General Court nor an Advocate General.

Nevertheless, principles of fairness and the smooth administration of justice require that the cessation of the mandate of ECJ judges and advocate generals appointed by the UK does not occur immediately but is rather phased-out over time. In fact, a comparative analysis of the rules of international courts like the European Court of Human Rights²⁴ and the Appellate Body of the WTO²⁵ reveal that judges are allowed to remain in their function even after the end of their mandate to conclude pending cases. Therefore British-appointed members of the ECJ should at minimum be entitled to bring to conclusion the cases on which they are rapporteurs, or on which they are part of the adjudicating panel, even after 30 March 2019.

Yet, it is suggested here that the prorogation of the terms of British appointed members of the ECJ should continue even beyond the minimum strictly necessary simply to discharge pending and ongoing cases. The ECJ, in fact, is a unique institution.²⁶ Members of the ECJ are appointed by common accord by the governments of the Member States and constitute a corps which enjoys strong autonomy from politics. According to Article 253 TFEU, members of the ECJ “shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence.” And since the entry into force of the Lisbon Treaty a special judicial committee established by Article 255 TFEU is designed to give an opinion on the qualifications of judges, further reducing possible political interference by the appointing authority.

²⁴ Article 23(3) European Convention on Human Rights (stating that “judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.”)

²⁵ Point 15 of the “Working procedures for appellate review”, [WT/AB/WP/6](#) (stating that: “A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body.”)

²⁶ Federico Fabbrini & Miguel Maduro, ‘Supranational Constitutional Courts’ in *Max Planck Encyclopedia of Comparative Constitutional Law* (OUP 2017) ad vocem.

Moreover, nationality does not play any role within the internal organization of the ECJ. In fact, contrary to what is typical in international courts, the ECJ as a supranational court does not require judges nominated by one of the Member States to sit in cases which concern that state. On the contrary, as indicated in the last paragraph of Article 18 of Protocol No. 3 on the Statute of the ECJ, “[a] party may not apply for a change in the composition of the Court or of one of its chambers on the grounds of either the nationality of a Judge or the absence from the Court or from the chamber of a Judge of the nationality of that party.” This confirms that judges of the ECJ act as EU judges and not in any form as Member States’ judges.

In light of these peculiar features it cannot be conceived that the UK withdrawal from the EU may result in a termination of the function of the judges and advocate generals appointed by the UK and currently sitting within the ECJ. Rather, for the purpose of preserving the integrity of the ECJ as a fully supranational institution the current judges and advocate generals appointed by the UK should continue to serve in their mandate until the expiry of their terms, which pursuant to Article 19 TEU is six years. While this solution would extend the participation of British-appointed judges and advocate generals to the ECJ well beyond March 2019, this is more consistent with the preservation of the constitutional integrity of the ECJ as an institution which has not been tainted by national interests.

Although members of the ECJ appointed by the UK should be entitled to remain on the bench even beyond withdrawal, a hard Brexit will have important effect on judicial proceedings and the possibility for UK courts to send preliminary references to the ECJ. Following the withdrawal of the UK from the EU and in the absence of a transition deal or the adoption of specific provisions within the framework for the future EU-UK relations, the ECJ would no longer have jurisdiction to hear infringement proceedings brought against the UK by the Commission or another EU Member State under Articles 257 and 258 TFEU. Nor would the ECJ be able to answer preliminary references involving the interpretation or the validity of EU law in the UK under Article 267 TFEU. Moreover, the ECJ would no longer enjoy exclusive jurisdiction in disputes between the UK and other EU Member States since the UK would no longer be bound by Article 344 TFEU.

In the interest of the smooth administration of justice and consistent with the principle of good administration enshrined in Article 41 EU Charter of Fundamental Rights, however, all cases pending in front of the ECJ at the time of withdrawal and which relate to the UK should be allowed to continue to their natural conclusions with a final judgment. A ruling of the ECJ with regard to the UK delivered after a hard Brexit will be no longer binding on the UK under the rules of EU law (which include the principles of supremacy and direct effect). The judgment but will nonetheless certainly remain binding under international law because the UK had accepted *ratione temporis* that the ECJ exercised supranational oversight over its actions. Under the principle of good faith, therefore, the UK will be expected to comply with a judgment of the ECJ even if delivered after the day of Brexit.

2.6. European Central Bank

Contrary to the implications of the UK withdrawal from the EU on the other EU institutions, Brexit will have a negligible institutional impact on the European Central Bank (ECB). As is well known, pursuant to Protocol No. 15, the UK enjoys an exemption from the adoption of the euro as its currency and is therefore not a member of the monetary union of which the ECB is the central institution. According to Article 1 of Protocol No. 4 on the Statute of the ECB, the Bank of England, which is the monetary policy authority of the UK, is a member of the European System of Central Banks (ESCB). It is not however a member of the Eurosystem – which comprises the central banks of Member States which adopt the euro as their currency, together with the ECB. On the day of Brexit, the Bank of England will cease to be part of the ESCB. At the same time, because the Bank of England had contributed to the paid-in capital of the ECB pursuant to Protocol No. 4, the ECB will need to arrange for the

reimbursement of the paid in capital of the Bank of England after Brexit. While this in-depth analysis is not in the position to assess the economic impact of this reimbursement, it is submitted that the ECB-related political and institutional challenges of withdrawal of a Member State which is outside the Eurozone are manageable – and confirm *a contrario* the irreversible nature of the euro.

3. BUDGETARY IMPLICATIONS

This Chapter briefly examines what will be the budgetary implications for the EU in the case of a hard Brexit. As indicated in the introduction, at the end of the first phase of the Brexit negotiations, the UK government has accepted the view consistently made by the European Commission that the UK is liable to pay its share of the future EU budgetary commitments jointly undertaken within the 2014—2020 multi-annual financial framework (MFF) and has agreed to pay a financial settlement as part of its withdrawal.²⁷ The draft withdrawal agreement published by the Commission on 28 February 2018 includes a detailed Part V on Financial Provisions which has been accepted in full by the UK government on 19 March 2018.²⁸ Under the terms of the agreed provisions, the UK will contribute to, and participate in, the implementation of the EU budgets for the years 2019 and 2020, and will be liable to the EU for the outstanding budgetary commitments and liabilities of the 2014—2020 MFF even beyond 2020 (*restes à liquider*). Moreover, the UK will cover its share of the contingent financial liabilities related to loans for financial assistance and the European Fund for Strategic Investments, it will remain a party to the European Development Fund until the closure of the current cycle, and will continue to honor its ongoing commitments for ad hoc spending projects, including Trust Funds, the Facility for Refugees in Turkey, the European Defense Fund and operations under the EU Common Foreign and Security Policy.

While the UK will not be part of the new MFF 2021—2027 – the negotiations of which are about to begin²⁹ – the recognition by the UK government that it is indeed legally obliged to settle budgetary costs as a condition of withdrawal bears relevance in the scenario of a hard Brexit. While it still remains possible that withdrawal negotiations may break down, the fact that the UK has already accepted its budgetary responsibilities as a condition of withdrawal implies that the EU will have a strong legal case against the UK for budgetary contributions even in a hard Brexit scenario. Should the UK leave the EU on 30 March 2019 without a withdrawal agreement, transition deal and a new framework for future EU-UK relations, therefore, the EU institutions could invoke the good faith of the UK and request it to honor the deal on the financial settlement which had been agreed in the context of the withdrawal negotiations.

If the UK were to breach its commitments, this would pose a challenge to the discharge of the EU budgets in the remaining years of the current 2014—2020 MFF. The EU would need to adopt measures either to increase revenues or to decrease spending (including by temporarily suspending all grant programs which would apply in the UK) while seeking compensation from the UK through judicial remedies. Clearly, in such a scenario, the EU institution could not sue the UK in front of the ECJ – but would rather need to settle a possible dispute under rules of international law. Yet, it must be acknowledged that no international adjudicatory body would have original jurisdiction to hear a dispute between the EU and the UK,³⁰ and any international award would suffer from the classic problem of lack of effective international enforcement. However, despite these political challenges, it seems possible to conclude that from a legal viewpoint, because the UK has already accepted its financial obligations towards the EU, an international tribunal would likely rule in favor of the EU. Hence, it is expected that this scenario will not come into being and that even in the hypothesis of a hard Brexit the two parties will still settle budget matters, guaranteeing the smooth conclusion of the current 2014—2020 MFF, and the possibility for UK-based natural and legal persons (e.g. universities, farmers, industries) to continue to benefit from the contributions coming from the EU budget.

²⁷ The obligation of the UK to pay a settlement as part of the withdrawal had initially been questioned. See report of the House of Lords European Union Committee, 'Brexit and the EU Budget', 4 March 2017 HL 125.

²⁸ See note 4.

²⁹ See European Commission Communication 'A Modern Budget for a Union that Protects, Empowers and Defends: The Multiannual Financial Framework for 2021-2027', 2 May 2018, COM(2018)321 final.

³⁰ The International Court of Justice, for example, would not be able to hear the case as the EU is not a state.

4. POLICY IMPLICATIONS

This Chapter briefly examines the policy implications for the EU in the case of a hard Brexit, by focusing specifically on cooperation in the relevant fields of commerce and trade, as well as of security and justice. The in-depth analysis examines here the legal consequences that would arise if the EU and the UK do not successfully conclude a withdrawal agreement, a transition deal and a framework for their future relations. As the Chapter points out, a hard Brexit would significantly hamper the ability of the EU and the UK to preserve unhindered trade with each other, and would bring to a halt cooperation in the field of criminal justice and internal security, with potential negative consequences for both the UK and the EU. While WTO rules would provide the background for commercial relations between the EU and the UK, and 'old' instruments of international law could be revived to maintain basic EU-UK cooperation in the field of security and justice, such a scenario would pose particularly acute problems in Ireland, notably in connection with the return of a hard border between the Republic of Ireland and Northern Ireland.

4.1. Commerce & Trade

The ability of the EU and the UK to maintain close economic ties would be significantly affected in the case of a hard Brexit. Currently the UK is part of the EU internal market and customs union, which means that goods, services, people and capital can move freely between the UK and any other Member State of the EU, while the UK and the EU act as a single trade bloc vis-à-vis the rest of the world. At the conclusion of the first phase of the withdrawal negotiations the Commission and the UK government have agreed that after its withdrawal the UK will remain part of the EU single market and customs union for a transition period of 21 months, until 30 December 2020.³¹ The transition period has been codified as Part IV of the draft withdrawal agreement. Nevertheless, the draft withdrawal agreement is not a legally binding text yet since negotiators still need to find an accord on other provisions of the draft treaty. Moreover, the treaty as a whole will need to be ratified by the European Parliament and the UK Parliament. It therefore remains possible that the withdrawal agreement will not enter into force, resulting in a hard Brexit. In addition, even if the withdrawal agreement is concluded and successfully ratified, there remains the possibility that no deal is reached between the EU and the UK for a new framework of future relations post-transition, with the result that a hard Brexit may occur after 2020. In this context it is necessary to consider what would be the policy implications of this scenario on the EU with respect to commerce and trade.

If the UK were to leave the EU without a deal – including an agreement that would maintain the UK connected to the EU customs union and single market for example through membership of the European Economic Area (EEA) – commercial relations between the EU and the UK would switch to WTO rules. There is consensus that the UK, as a founding member of the General Agreement on Tariffs and Trade (GATT) 1947, is a member of the WTO on its own right on the side of the EU and that after withdrawal it will remain an independent member of the WTO, entitled to set its own schedule of concessions and commitments vis-à-vis the other members of the organization.³² In the case of a hard Brexit, the UK and the EU would automatically apply towards each other their own schedule of commitments, subject to the most favored nations (MFN) principle enshrined in Article I GATT, which requires that “any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.” This would have major implications for the free movement of goods, services, capital and people.

³¹ See note 3.

³² See Lorand Bartels, 'Understanding the UK's Position in the WTO After Brexit', ICTSD Opinion, 26 September 2016.

With regard to goods, a hard Brexit would mean that goods entering the UK market from the EU and vice versa would be subject to customs controls and to the relevant customs duties in place for each category of goods (ad valorem tariffs and weight-based tariffs). As it has been thoroughly explained in the economic literature, the EU and the UK apply on average very low customs tariffs, but these vary significantly from sector to sector with a range that goes from 0% to over 50%.³³ As a result, the implications of the application of WTO terms on the reciprocal flow of trade between the UK and the EU will diversely impact specific products and specific countries – and depending on price elasticity, “trade in some specific sectors, such as food and textiles would be close to wiped out while others would be almost unaffected.”³⁴

With regard to services, because the WTO General Agreement on Trade in Services (GATS) only offers very limited liberalisation of trade in services, a hard Brexit would likely mean an almost complete suspension of free movement of services and the freedom of establishment from the UK towards the EU and vice versa. Regulators in the UK and the EU would be able to mitigate on a temporary basis the difficulties created by this cliff edge scenario by granting to operators based in the other jurisdiction an adequacy decision, allowing them to continue their performance on the basis of regulatory equivalence. Such a decision however would be at the discretion of the relevant authorities and could be unilaterally revoked at the first sign of regulatory divergence.

With regard to people, finally, because the WTO does not cover free movement of workers – except the presence or movement of natural persons for the time necessary to provide a service under Mode 4 of Article II GATS – a hard Brexit would terminate free movement of citizen and workers from the UK to the EU and vice versa. Nevertheless, the special arrangements currently in place between the UK and Ireland under the Common Travel Area (CTA),³⁵ which allows people to move freely between the two jurisdictions without border controls, would remain unaffected.

Under a hard Brexit scenario with bilateral relations working under WTO terms the flow of trade between the UK and the EU would be significantly affected. While Article V GATT guarantees freedom of transit, which would allow goods to move from one EU Member State to another *via the UK* without obstacles, freedom of movement of goods, services, capital and people between the EU and the UK as it is now would come to an end. While the CTA would preserve free movement of people between the UK and Ireland only, the impact of a future EU-UK relationship under WTO terms would be particularly severe precisely for Ireland. The Republic of Ireland shares a 500+ km land border with Northern Ireland, which is part of the UK. (Smaller land borders between UK territories and the EU exist also between Gibraltar and Spain and in Cyprus with the British Sovereign Base Areas).

If the UK were to leave the customs union and internal market, this border would become a customs border for both the UK and the EU – i.e. a post where British and European customs officials would check goods entering the market and levy customs duties. In fact, even if tariff-free trade could be secured, so that neither the EU nor the UK levies customs duties on goods imported from each other, a border post would still need to be established in order to check the origins of goods – ensuring that goods come from the EU and the UK (and not from other third countries)³⁶ – and their conformity – verifying that goods comply with the standards and regulations of the importing country in case no agreement on mutual recognition is reached. The purported desire of the UK to strike free trade agreements with other countries around the world makes the imposition of a hard board imperative also for the UK: free trade deals constitute facilitation and deepening of trade between the contracting

³³ See Martina Lawless and Edgar Mogenroth, 'The Product and Sector Level Impact of a Hard Brexit across the EU', ESRI Working Paper No. 550/2016.

³⁴ Ibid 26

³⁵ Article 2, Protocol No. 20 OJ 2010 C 83/293.

³⁶ See Paola Conconi et al, 'From Final Goods to Inputs: the Protectionist Effects of Rules of Origin' (2018 forthcoming) *American Economic Review*.

parties compared to standard WTO rules, and therefore third countries with which the UK will potentially conclude free trade deals will demand that their goods are treated 'better' than other goods entering the UK market from other countries which do not benefit from a free trade agreement with the UK.

As previous reports have pointed out, the creation of a physical border between Ireland and Northern Ireland poses a major challenge for the protection of the peace process in Northern Ireland, and for the preservation of the achievements of the Belfast Good Friday Agreement of 1998.³⁷ In fact, another study commissioned by the European Parliament has indicated that while technological solutions can minimise hurdles they cannot avoid the introduction of a border on the island of Ireland for customs controls.³⁸

In the event of a hard Brexit, therefore, contingency plans would need to be put in place from the EU side to deal with the sudden emergence of a customs border between Ireland and Northern Ireland. In this context, it has been suggested that an option that the EU could consider to avoid a return to a hard border of the past would be to trigger Article XXIV(3) GATT, which introduces the so-called "frontier traffic exception" from the MFN principle.³⁹ Under this never-used clause of the GATT, ordinary WTO custom rules "shall not be construed to prevent: a) advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic." Pursuant to this reading, the EU could declare the entire territory of Northern Ireland to be a frontier zone to the EU customs union; thereby removing the need for customs controls (at least on the EU side) but not the need for SPS checks. Clearly this solution would not be problem-free, as it would create a loophole in the impermeability of the EU external customs border, which could be exploited for illegal purposes. Nevertheless, it should remain in the armory of the EU to deal with a thorny issue in case the UK leaves the EU without having given its positive contribution in solving the Irish / Northern Irish border problem.

From a governance and adjudication perspective, if in the case of a hard Brexit the EU and the UK were to switch their trade relations to WTO terms, they would be subject to the governance and dispute settlement mechanism rules provided under the WTO. While the WTO remains an international rather than supranational legal order, it is still endowed with an established dispute settlement system – based on two levels of jurisdictions.⁴⁰ Members of the WTO that complain against actions by another member allegedly in breach of its obligations and commitments under the WTO may request consultations with that member before the Dispute Settlement Body (DSB). Should the consultations fail, they may ask for the establishment of a Panel. Rulings of a Panel can be appealed in front of the WTO Appellate Body, and while rulings and recommendations do not have direct effect in the EU (and UK) legal order,⁴¹ they are final and binding after their adoption by the DSB. WTO members must comply with these rulings and recommendations within a reasonable period of time. In case of non-compliance, WTO members can be authorized by the WTO Appellate Body to take counter-measures.

³⁷ See David Phinnemore and Katy Hayward, 'UK Withdrawal (Brexit) and the Good Friday Agreement', study commissioned by the European Parliament Committee on Constitutional Affairs, November 2017; and John Temple Lang, 'Brexit and Ireland – Legal, Political and Economic Considerations', study commissioned by the European Parliament Committee on Constitutional Affairs, November 2017.

³⁸ Lars Karlsson 'Smart Border 2.0 – Avoiding a hard border on the island of Ireland for Customs control and the free movement of persons', study commissioned by the European Parliament Committee on Constitutional Affairs, November 2017.

³⁹ Giorgio Sacerdoti, 'The Prospects: the UK Trade Regime with the EU and the World' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (OUP 2017) 71.

⁴⁰ Ulrich Petersmann, 'How to Promote the International Rule of Law, Contributions by the World Trade Organization Appellate Body Review System' (1998) 1 *Journal of International Economic Law* 25.

⁴¹ See Case C-120/06 P, *FIAMM and Others v Council and Commission* [2008].

4.2. Security & Justice

The ability of the EU and the UK to maintain close cooperation in the field of security and justice would be significantly affected in the case of a hard Brexit. Currently the UK is part – although with opt-outs, including from Schengen – of the EU area of freedom, security and justice (AFSJ). The UK participates together with all the EU other Member States in, among others, policies on judicial cooperation in criminal matters and police cooperation, subject to the jurisdiction of the ECJ and in accordance with common principles on the protection of fundamental rights, enshrined in the EU Charter of Fundamental Rights, as well as in sector-specific legislation (like in the field of data protection).

The draft withdrawal agreement published by the Commission on 19 February 2018 includes specific provisions in Title V of Part III for ongoing police and judicial cooperation in criminal matters. This part of the agreement has not yet been accepted by the UK. Nonetheless, the British Prime Minister Theresa May indicated in her speech in Munich on 17 February 2018 her intention to maintain close security ties between the UK and the EU⁴² – a position welcomed also by the President of the European Council.⁴³ Yet, the current EU AFSJ is grounded on the principle of mutual trust between Member States, which depends on the fact that they are subject to the same human rights standards and centralized oversight by the ECJ.⁴⁴ In addition, there is a strong complementarity between the different EU instruments, such as for instance between those facilitating cross-border judicial cooperation and those approximating procedural guarantees. Therefore, it cannot be excluded that the EU and the UK will not be able to reach an agreement to prolong in the future the arrangements currently in place in the AFSJ.

If the UK were to leave the EU without a deal that maintains the current level of integration in the field of security and justice, criminal justice and law enforcement cooperation would be significantly affected. Legal instruments currently available in the AFSJ – including the European Arrest Warrant (EAW),⁴⁵ the European Investigation Order (EIO),⁴⁶ confiscation orders⁴⁷ and financial penalties⁴⁸ – would cease to operate between the UK and the EU. In fact, it is plausible to maintain that in the absence of a deal, all pending and ongoing requests for the execution of judgments or EAWs would have to be immediately suspended on 30 March 2019 – and a case has already been referred to the ECJ by the Supreme Court of Ireland in this regard.⁴⁹ Moreover, absent an agreement premised on the UK acceptance of the jurisdiction of the ECJ and compliance with EU data protection law, the UK as a third country would no longer be automatically part of EUROPOL and EUROJUST.⁵⁰ Furthermore, it would lose access from the exchanges of information, including the European Criminal Record information system (ECRIS)⁵¹ and SIS II.⁵²

In a hard Brexit scenario, security and justice cooperation between the EU and the UK would bounce back to traditional international law instruments, including treaties on extradition and mutual legal

⁴² Prime Minister Theresa May, speech at Munich Security Conference, 17 February 2018.

⁴³ President of the European Council Donald Tusk, statement, 7 March 2018.

⁴⁴ See Joined Cases C-411/10 & C-493/11, *N.S.* [2011].

⁴⁵ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States OJ 2002 L 190/1.

⁴⁶ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters OJ 2014 L 130/1.

⁴⁷ Council Framework Decision 2006/783/JHA of 7 October 2006 on the application of the principle of mutual recognition to confiscation orders OJ 2006 L 328/59.

⁴⁸ Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties OJ 2005 L 76/16.

⁴⁹ See *Minister for Justice and Equality v. O'Connor* [2018] IESC 19

⁵⁰ Chloé Brière, 'Cooperation of Europol and Eurojust with external partners in the fight against crime' DCU Brexit Institute Working Paper No. 1/2018.

⁵¹ Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS).

⁵² Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II) OJ 2007 L 205/63.

assistance. In particular, the UK is a party to the Council of Europe Convention on Extradition of 1957 and additional protocols, which allows for the extradition between contracting states of persons wanted for criminal proceedings or for the carrying out of a sentence. Moreover, the UK is a party to the European Convention on Mutual Legal Assistance of 1959, which allows courts in contracting states to send 'letters rogatory' to judicial authorities in other contracting states to obtain information relevant to an ongoing criminal proceeding. These conventional instruments, however, are much less effective than the EAW, or the EIO, and hence will most likely slow down the surrender of suspected or convicted persons between the UK and the EU and vice versa, or the sharing of information for the purpose of fighting crime and securing the execution of justice.

The EU could try to develop new forms of cooperation with the UK on a bilateral basis. Specifically, in the field of extradition, the EU Council has concluded in 2006 an agreement with Norway and Iceland on the surrender between these two EEA states and the EU Member States, which reproduces some of the features of the EAW⁵³ – and this could be replicated with regard to the UK. Moreover, with regard to participation to EU law enforcement agencies, it has been suggested that the EU has already shown flexibility in accommodating the idiosyncratic positions of certain EU Member States and this could offer a template to develop more advanced forms of cooperation also with the UK.⁵⁴ For example, since Denmark voted not to join EUROPOL, the EU Council added Denmark to the list of third states with which EUROPOL can conclude cooperation agreement, thereby allowing Denmark to remain associated to EUROPOL with the status of a third country⁵⁵ – and this model could possibly be explored to preserve connections with the UK post-Brexit. Nevertheless, Denmark is a Member State of the EU, is subject to the jurisdiction of the ECJ and fully abides by EU human rights and data protection standards.

Hence, there would be significant legal limits to what could be agreed between the EU and UK if the latter would not remain subject to ECJ oversight and comply with the EU Charter of Fundamental Rights and data protection law. Potential ad hoc EU-UK agreements in the field of security and justice designed to minimise the impact of a hard Brexit would therefore have to be based on a careful balance of rights and obligations. Mutual trust and the possibility for the UK to access instruments analogous to those of the AFSJ would in fact depend on the level of commitments that the UK were ready to accept in terms of compliance with EU human rights law (including data protection) and the jurisdiction of the ECJ: the lower the level of acceptance of EU principles by the UK, the lighter would be the depth of the cooperation the EU could offer in the field of security and justice.

In fact, the governance and adjudication of these agreements would raise particular issues from an EU perspective. Contrary to what happens in the field of trade, where a multilateral system is in place via the WTO, cooperation in the field of justice and security tends to be based on intergovernmental arrangements concluded bilaterally between countries under international law. It seems unlikely however that the ECJ would accept as compatible with EU law any legal agreement with the UK providing forms of automaticity – for instance in the surrender of persons, or the exchange of data among agencies – unless it maintained jurisdiction to verify continuing ongoing compliance with EU human rights law also by the UK as a third country.⁵⁶ In the unwillingness or inability to accept this requirement, it is to be expected that EU-UK cooperation in the field of security and justice will return somehow to the level in place at the early stage of the development of the AFSJ in the 1970s.

⁵³ Council Decision 2006/697/EC of 27 June 2006 on the signing of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway OJ 2006 L 292/1.

⁵⁴ Deirdre Curtin, 'Brexit and the EU Area of Freedom, Security and Justice' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (OUP 2017) 183.

⁵⁵ See Council Implementing Decision 2017/290 of 17 February 2017 amending Decision 2009/935/JHA as regards the list of third States and organisations with which Europol shall conclude agreements, OJ 2017 L 42/17; and Agreement on Operational and Strategic Cooperation between the Kingdom of Denmark and the European Police Office, 30 April 2017.

⁵⁶ See Case C-182/15 *Petruhhin* [2016]; Opinion 1/15 EU-Canada PNR Agreement [2017].

5. CONCLUSION

This report examined the consequences that a 'hard Brexit' would pose to the EU. Since the notification of the UK decision to secede from the EU on 29 March 2017, the EU and UK negotiations have made progress toward the objective of reaching an orderly withdrawal, and on the basis of these successes preliminary talks have already started to define the framework of the future EU-UK relations. As such, the possibility of a hard Brexit may not appear likely at this stage (April 2018). Nevertheless, the scenario cannot be ruled out. In fact, the EU and the UK still are at odds on important issues connected to the withdrawal – notably the resolution of the thorny issue of the Northern Irish border – and it cannot be excluded that negotiations will break down, with the UK leaving the EU on 29 March 2019 without a withdrawal agreement, a transition period and a deal on its future relations with the EU. This study clearly neither welcomes nor endorses such scenario but has endeavored to analyze from a legal point of view what would be the institutional, budgetary and policy implications for the EU in case a hard Brexit were to come into being.

As the in-depth analysis has pointed out, the institutional implications of a hard Brexit will not be different than those inevitably following the withdrawal of the UK from the EU. As a result of the withdrawal of the UK, the composition of the EU institutions will change, with effects on their internal decision-making dynamics. Nevertheless, it was suggested that the implications of Brexit differ from one Institution to another. In particular, the withdrawal of the UK produces immediate effects on the European Council, the Council, and the Commission – with UK representatives no longer sitting in the European Council and the Council and the British Commissioner ceasing his function on the day of Brexit. On the contrary, the withdrawal of the UK produces diluted effects on the European Parliament and the ECJ – as the principles of representative democracy and good administration of justice require that MEPs elected in the UK should be allowed to conclude their mandate until the next European Parliament elections (scheduled in May 2019, circa 8 weeks after Brexit), and that British-appointed judges and advocate generals at the ECJ should remain in their judicial posts until the end of their terms. The withdrawal of the UK, finally, produces hardly any effect on the ECB since the UK enjoyed an exemption from the single currency and was therefore not part of the Eurosystem.

As the in-depth analysis pointed out, the budgetary implications of a hard Brexit would be highly disruptive. If the UK were to leave the EU without a withdrawal agreement, this would pose major challenges to the discharge of the EU budget for the two remaining years of the current MFF 2014-2020. The shortfall resulting from the Brexit funding gap would compel the EU either to reduce spending or to raise new revenues. Nevertheless, the study has underlined how in legal terms the obligation by the UK to honor its budgetary commitments now rests on solid juridical grounds. Since at the conclusion of the first phase of the Brexit negotiations the UK government has eventually acknowledged its duty to continue to contribute to payments jointly undertaken in the framework of the current MFF, a subsequent about-face would constitute a breach of good faith. And while it may not be politically easy for the EU to enforce the UK to honor its commitments, given the weakness of enforcement in international law, it is clear that the EU would have a strong cause of action against the UK in front of an international adjudicator.

As the in-depth analysis pointed out, finally, the policy implications of a hard Brexit would be important – particularly for EU-UK trade and for security and justice cooperation. If the UK were to leave the EU without an agreement that maintains it closely connected with the EU single market and customs union, commerce between the EU and the UK would be governed by WTO rules. Free movement of goods, services, people and capital would come to a halt and custom controls would need to be set up at the border between the EU and the UK to levy tariffs and verify rules of origins of imported and exported goods. At the same time, if the UK were to leave the EU without an agreement that maintains it closely connected to the EU AFSJ, criminal justice and law enforcement cooperation would bounce

back to classical instruments of international law. Mechanisms of police and judicial mutual assistance like the EAW, the EIO and the sharing of information under ECIRS and SISII would be immediately suspended, and much more cumbersome instruments like extradition requests and so called 'letters rogatory' would have to be used to secure cooperation in the field of security.

A hard Brexit would negatively affect trade from the UK to the EU, and vice versa, and decrease cooperation in the fight against transnational crime. This would pose vital challenges particularly for the Republic of Ireland, given its 500+ km border with the UK in Northern Ireland: A hard border with customs control and the absence of cross-border police cooperation would in fact call into question the achievements of the peace process. To address these challenges this report suggested that the EU could consider taking a number of contingency measures. On the side of trade, the EU could invoke the frontier traffic exception under Article XXIV(3) GATT to declare the whole territory of Northern Ireland as a border region to the EU customs union, thus excluding the need for a customs border (at least on the EU side). On the side of justice and security, the EU could instead try to replicate vis-à-vis the UK some of the cooperation agreements it has put in place with other non-EU countries. Nevertheless, the frontier traffic exception is not without problems – and there are clear limits to what the EU can agree in AFSJ with third countries which do not abide by the same EU human rights and data protection standards, and are not subject to the ECJ jurisdiction. In the end, from a policy perspective it is to be hoped that Brexit negotiations will successfully result in an orderly withdrawal process, with an agreement on the future relations that addresses the abovementioned challenges.

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This in-depth analysis, commissioned by the European Parliament at the request of the Committee of Constitutional Affairs, considers the institutional, budgetary and policy implications that a so-called 'hard Brexit' would pose on the EU. It analyses from a legal perspective how a withdrawal of the UK from the EU without a withdrawal treaty, transition deal and framework on future relations would affect each specific EU Institution, the EU budget for the remaining years of the current MFF, and EU policies in the crucial fields of trade, security and justice. While the study does not endorse a 'hard Brexit' it provides guidelines for the EU to be prepared in case such scenario were to materialise.

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