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Brexit – Nevermind The Whys And Wherefores? Fog In The Channel, Continent Cut Off!

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ARTICLE

BREXIT – NEVERMIND THE WHYS AND WHEREFORES? FOG IN THE CHANNEL, CONTINENT CUT OFF!

*Laurence W. Gormley**

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INTRODUCTION

The United Kingdom’s relationship with the European Union has always been somewhat half-hearted. This goes back to the very early days, when negotiations started first on what became the European Coal and Steel Community, and history repeated itself in the negotiations leading up to what became the European Communities. That the preference for intergovernmental, rather than supranational, cooperation was a second-rate choice only gradually

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dawned on the British establishment, and by the time the potential suitor was ready to tie the knot, the bride was playing hard to get – or at least General de Gaulle, like a parent who disapproves of a potential marriage, made it clear that the time was not yet ripe.¹ A second attempt in 1967 under the Labour Prime Minister Harold Wilson also left bride and suitor far from the altar. Only after de Gaulle's departure from power did France change its mind. The Conservative government in the United Kingdom under Prime Minister Edward Heath (who had led the British negotiating team first time round) brought negotiations to a successful conclusion, resulting in the accession of the United Kingdom to the European Communities on January 1, 1973. Ireland and Denmark also acceded on that date.

Accession was accomplished, from the UK's viewpoint, perfectly orthodoxly in accordance with its dualist approach to international legal obligations. Domestic legal effect of European Community law was ensured through an Act of Parliament, the European Communities Act 1972. That Act functioned as the horse on which European law rode into the United Kingdom, and, once there, dismounted and went about its business without further recourse to the horse. That is not to say that the horse was of no further value. It had many qualities: it ensured that the direct applicability and the direct effect² of various types of Community (now EU) law could be fitted into the United Kingdom's various legal systems;³ it also instructed the UK judiciary to take judicial notice of judgments and expressions of opinion by the European Court of Justice ("ECJ") and to have regard to the principles laid down by and any decision of the ECJ, and to treat questions of (now) EU law as questions of law, not as questions of fact⁴ (which is how questions of

1. See, generally, MIRIAM CAMPS, *BRITAIN AND THE EUROPEAN COMMUNITY 1955—1963* (1964); RICHARD MAYNE, *THE RECOVERY OF EUROPE* (1970). For a useful brief summary of the process leading to the accession of the United Kingdom to the European Communities, see PAUL J. G. KAPTEYN & PIETER VERLOREN VAN THEMAAT, *INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES* 17-21 (Laurence W. Gormley ed., 3rd ed.1998).

2. The concept of direct applicability means that no further action at European or national level is necessary for a particular provision of EU law to be operational; the concept of direct effect relates to whether a person can rely on a particular provision of EU law in judicial or administrative proceedings. While these concepts were confusingly initially used interchangeably, this is no longer generally done, even in Leiden. See Kapteyn & Van Themaat, *supra* note 1, at 526.

3. For key provisions, see European Communities Act 1972, c. 68, § 2(1), (2), (4).

4. See *id.* § 3(1), (2).

foreign law are treated in the UK). But those initial instructions having been given, the rights and obligations under European law were applied in accordance with European law itself.

The marriage between the UK and the Communities got into a rocky period politically, with the election of a Labour government in February 1974 and its re-election in October of that year. A renegotiation of certain (mainly financial) aspects followed, and a referendum was held in June 1975, in which just over two thirds of those who voted were in favor of remaining in the Communities.⁵ Financial considerations were also the background to Margaret Thatcher's negotiation of a budgetary rebate for the UK in 1980, on the well-known legal basis of wanting a large part of her money back.⁶

While the love of money is the root of all evil,⁷ there was more to the disquiet than merely money. On the right wing of the Conservative party, shrill voices protested about loss of sovereignty and being run by Brussels; the UK Parliament only rather grudgingly accepted the idea of direct elections to the European Parliament.⁸ The Labour Party for many years in the 1980s was also not exactly pro-European; only in the 1990s did it change its stance, and embrace support for European integration. Margaret Thatcher's Bruges Speech, delivered on December 20, 1988 at the College of

5. See Ronald Irving, *The United Kingdom Referendum, June 1975*, 1 EUR. L. REV. 3 (1976). See also Vaughne Miller, *The 1974–75 U.K. Renegotiation of EEC Membership and Referendum*, HOUSE OF COMMONS BRIEFING PAPER No. 7253, <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7253>.

6. See Michael Jenkin, *Britain and the Community Budget: The end of a chapter*, 17 C.M.L. REV. 493 (1980).

7. 1 *Timothy* 6:10 (King James).

8. See European Assembly Elections Act 1978, § 6, which provided that no new treaty providing for an increase in the power of the Assembly should be ratified unless approved by an Act of Parliament. This provision was then re-enacted as section 12 of the European Parliamentary Elections Act 2002. The Assembly was the old name for the European Parliament, which decided to start using the latter name on 30 March 1962. See the Resolutions of 20 March 1958, 1958 J.O. 6/58; Resolutions of 30 March 1962, 1962 J.O. 1045/62. Article 3(1) of the Single European Act brought the name 'European Parliament' into the Treaties officially, although that name had long been used in official documents. See, e.g., Decision of the Governments of the Member States concerning the Provisional Location of Certain Institutions and Departments of the Communities, 1967 J.O. P 152/18; see, e.g., Council Decision 76/787, 1976 O.J. 278/1, corr. 1976 O.J. L 326/32, and its annexed Act concerning the election of representatives to the European Parliament. As to the European Parliament, see RICHARD CORBETT, FRANCIS JACOBS & DARREN NEVILLE, *THE EUROPEAN PARLIAMENT* (9th. ed., 2016).

Europe in Bruges,⁹ inspired the formalization of thought on the right of the political spectrum, first in the Bruges Group and later in the development of the United Kingdom Independence Party (“UKIP”). This latter group was originally established by historian Alan Sked, and was initially little more than a fringe, one-issue group; it became a populist party in later years, achieving “major party” status in 2014.

Increasingly Europhobe sentiments in Conservative selection committees led to significant intakes of Eurosceptic Members of Parliament into the House of Commons—not a majority of Conservatives, by any means, but enough to cause difficulties. This meant that in times of small majorities, they had to be taken into account by the sitting government. Step by step the distrust of the European Union became more evident, and the European Union (Amendment) Act 2008 required the approval by Act of Parliament before ratification by the United Kingdom of any alteration of the competences of the European Union, or its decision-making processes or institutions, in such a way as to dilute the influence of individual Member States.¹⁰ This pattern was taken a step further in the European Union Act 2011.¹¹ In July 2012 the UK government launched a review of the balance of competences, an audit of what the European Union was doing and how it affected the United Kingdom. Like many government initiatives, it was launched with much trumpeting, but when the results of the wide-ranging consultation came in, the overall conclusion was that the balance was actually just

9. See Margaret Thatcher, Prime Minister, Speech to the College of Europe: The “Bruges Speech” (Sep. 20, 1988) (transcript available at <http://www.margaretthatcher.org/document/107332>).

10. See European Union (Amendment) Act 2008, c. 7, §§ 5, 6 (requiring ministers not to vote in favor of any decision under certain articles of the Treaty on European Union (“TEU”) and of the Treaty on the Functioning of the European Union (“TFEU”) without prior parliamentary approval). As to the latest consolidated version of the Treaty on European Union, see Consolidated Version of the Treaty on European Union, 2016 O.J. C 202/1 [hereinafter TEU post-Lisbon]. As to the latest consolidated version of the Treaty on the Functioning of the European Union, see Consolidated Version of the Treaty on the Functioning of the European Union, 2016 O.J. C 202/13 [hereinafter TFEU].

11. The European Union Act 2011 imposed various restrictions on the ratification by ministers of amendments to or replacement of the TEU and the TFEU, and on the approval of certain decisions under the simplified revision procedure, as well as various restrictions of agreement to other types of measures without prior parliamentary approval. See European Union Act 2011, c. 12, §§ 2-12. Moreover, section 18 of that Act provided that directly applicable or directly effective EU law fell to be recognized and available in law in the United Kingdom only by virtue of the European Communities Act 1972 or where it was required to be recognized and available in law by virtue of any other Act of Parliament. See European Union Act 2011, c. 12, § 18.

about right; such an unwelcome conclusion led to all mention of the results being quietly dropped.¹²

On January 23, 2013, UK Prime Minister David Cameron announced in his “Bloomberg Speech”¹³ that he would be seeking a new treaty, or at least a renegotiation, to meet British concerns. It took a long time for the British government to specify in detail changes it wanted to see; indeed, it was not until a letter of November 10, 2015 that the issues of concern were formally raised.¹⁴ In the Conservative party’s 2015 general election manifesto, Cameron committed his government to holding a referendum, should the Conservatives be elected.¹⁵ In this case that manifesto commitment was honored in what became the European Union Referendum Act 2015. That Act did not provide for any threshold either concerning turnout or the majority. The referendum was held after negotiations had taken place on the issues raised in Cameron’s letter of the previous November. Those negotiations resulted in “A New Settlement for the United Kingdom within the European Union.”¹⁶ As seems to be customary when the people are consulted on issues that have been the subject of international negotiations, scant regard was paid to this new settlement in the referendum campaign: the referendum was about “in or out” rather than what had been agreed, although a vote to remain would have triggered a notification to the Secretary General of the Council of the European Union that the United Kingdom would remain a member of the European Union. The original referendum question proposed was, “Should the United Kingdom remain a member of the European Union?” The options would have been to vote “Yes” or “No.” However, the UK Electoral

12. FOREIGN & COMMONWEALTH OFFICE, REVIEW OF THE BALANCE OF COMPETENCES AND EUROPEAN UNION LAWS AND REGULATION, <https://www.gov.uk/guidance/review-of-the-balance-of-competences> (guidance on contributions); Tony Brown, *The Curious Incident of the UK Competences Review*, THE INSTITUTE OF INTERNATIONAL AND EUROPEAN AFFAIRS BLOG (Mar. 14, 2016), <http://www.iea.com/blogosphere/the-curious-incident-of-the-uk-competences-review> (discussion of how the results were effectively sidelined).

13. See David Cameron, Prime Minister, United Kingdom, EU Speech at Bloomberg (Jan. 23, 2013), <https://www.gov.U.K./government/speeches/eu-speech-at-bloomberg>.

14. Letter from David Cameron, Prime Minister, United Kingdom, to Donald Tusk, President, European Council (Nov. 10, 2015) (writing about a new settlement for the United Kingdom in a Reformed European Union), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf.

15. See The Conservative Party Manifesto 2015, 72-73, <https://www.conservatives.com/manifesto> pp 72-73.

16. Eur. Council Notice (New Settlement), 2016 O.J. C 69I/1.

Commission, when consulted by political parties, decided that this should be redrafted to read, “Should the United Kingdom remain a member of the European Union or leave the European Union?” The options became to vote “Remain a member of the European Union” or “Leave the European Union.” Paul Craig has rightly and eloquently described Brexit, as it is now known, as “a drama in six acts,” and peppered his views with apposite quotations from Shakespeare.¹⁷

On June 23, 2016, the referendum took place. After a campaign in which regard for factual accuracy was sacrificed on the altar of almost visceral hatred of the European Union in Eurosceptic circles, 72.2 percent of those entitled to vote exercised their right to do so. 51.9 percent of those who voted opted to support the leave campaign, and 48.1 percent opted to support the remain campaign. While a majority supported the leave campaign numerically, it is clear that less than half of the entire population that was entitled to vote did so. It is no exaggeration to say that the campaign was characterized by blatant lies, whipping up fears, and populist rhetoric.¹⁸ Given that the popular press, and some sections of the allegedly “quality” press, had for years been none too careful about objective reporting about the European Union, the charms of little England and the superficial populist attractions of UKIP resonated rather like the sirens of the Lorelei, luring voters onto the rocks. Cameron duly resigned, having effectively sacrificed the UK’s membership of the European Union to feed the baying hounds of the right wing in his own party and the yelping of UKIP. After a drama within the Conservative party resembling a Shakespearean tragedy, Theresa May succeeded him as Prime Minister, determined to follow the referendum result. While the referendum result was not legally binding, in political terms it was fiendishly difficult to ignore.

17. Paul Craig, *Brexit: A Drama in Six Acts* 40 *EUR. L. REV.* 447 (2016).

18. David Davis, a prominent ‘leave’ campaigner who is presently the Secretary of State for exiting the European Union, has been reported as finding the untruths in the campaign unimportant. Jon Stone, *Brexit Secretary David Davis says EU referendum campaign untruths ‘not important’*, *INDEPENDENT* (Oct. 4, 2016, 2:45 PM), <http://www.independent.co.uk/news/uk/politics/david-davis-brexit-secretary-eu-referendum-campaign-lies-a7344611.html> (last visited May 9, 2017). Richard Corbett MEP hosts a useful list of ‘Brexit Lies’: see Richard Corbett, *Brexit Lies*, <http://www.richardcorbett.org.U.K./long-list-leave-lies/> (last visited May 9, 2017); see also *Brexit Lies*, <http://brexitlies.com> (last visited May 9, 2017).

I. THE LEAVING MECHANISM

Leaving the European Union has always been possible, but it is only since the changes to the Treaty on European Union (“TEU”), made by the Treaty of Lisbon, that a special procedure has been established. This is set out in Article 50 of the TEU and is itself perfectly orthodox, proclaiming in Article 50(1) that, “[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.” The mechanics of leaving are then set out in Article 50(2): the Member State concerned will notify the European Council of its intention to withdraw from the European Union. The European Council (without the member representing the withdrawing Member State)¹⁹ then provides guidelines for the negotiation and conclusion of an agreement with the withdrawing Member State, “setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.” The negotiations are to be carried out in accordance with Article 218(3) of the Treaty on the Functioning of the European Union (“TFEU”). The European Commission, accordingly, will submit recommendations to the Council, which will confer upon the Commission a negotiating mandate and nominate the European Union’s negotiator or head of the European Union’s negotiating team. The Commission, when the referendum result became clear, designated Michel Barnier, a former member of the Commission, to act as Chief Negotiator of its Task Force for the Preparation and Conduct of the Negotiations. The Council has the power to choose, as it invariably does, to address directives to the negotiator (done in the negotiating mandate) and to establish a special committee in consultation with which the negotiations must be conducted. In due course the negotiator will make a proposal to the Council as to the signature and conclusion of the agreement.²⁰ The Council will then conclude the agreement on behalf of the European Union, acting by qualified majority vote,²¹ after obtaining the consent of the European Parliament.

19. TEU post-Lisbon, *supra* note 10, art. 50(4) ¶ 1.

20. TFEU, *supra* note 10, art. 218 ¶¶ 3-6.

21. TEU post-Lisbon, *supra* note 10, art. 50(4) ¶ 2 provides that a qualified majority is to be determined in accordance with Article 238(3)(b) TFEU, i.e. at least 72% of the members of the Council representing the (here) 27 participating Member States, comprising at least 65% of the population of those 27 States, must be in favor.

A number of points stand out here. First, the agreement is an agreement concluded by the Council with the United Kingdom; it is not a mixed agreement concluded by the Council and the twenty-seven remaining States on the one hand, with the United Kingdom on the other. Secondly, the normal special committee procedure may prove somewhat cumbersome, given the political involvement of the European Council, although the Council would not even contemplate leaving the Commission to conduct the negotiations without some form of a special committee hovering behind the latter's back in some form or other. Third, the fact that the Council will act by a qualified majority will limit the blackmail possibilities for individual Member States seeking to "punish" the United Kingdom. Fourth, it would appear that the withdrawal agreement will embrace the future relationship of the United Kingdom with the European Union, but it might be that a "hard Brexit" would result in a simple withdrawal treaty, or, as will be apparent from what follows below, even no treaty; the question of a future relationship would have to be subsequently worked out. Fifth, it would be possible for the European Parliament to refuse its consent. If this happened, then the two-year curtain (or the curtain at the end of an agreed extended period) would simply fall, as the proposed agreement would not have entered into force. This prospect makes it less likely that the European Parliament would withhold its consent, unless it felt that the European Union would be better off with no deal at all than with an agreement that the European Parliament regarded as unsatisfactory. Finally, while there is no mention of a Member State withdrawing its notification of intention to leave, it is inconceivable that this could not be done if the political landscape changed or if the conclusion was reached that it would be in the United Kingdom's best interests not to press ahead with withdrawal. While the likelihood of either of these occurring in the present political climate in the United Kingdom may be slight to downright zero, it is certainly not obvious that the notification under Article 50(2) of the TEU is a one-way street.²²

22. Both the Divisional Court and the U.K. Supreme Court treated Article 50(2) as being irreversible, given that the parties to the litigation in *The Queen on the application of Miller et al v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) & *The Queen on the application of Miller et al v Secretary of State for Exiting the European Union* [2017] U.K.S.C 5 were of the view that this was the case, so the courts did not bother to rule on the issue. The question whether Article 50(2) is reversible is a question of EU law itself, so if the U.K. courts had not taken the view they did, they would have had little option but to refer the question for a preliminary ruling from the ECJ under Article 267 TFEU. That

By virtue of Article 50(3) of the TEU, the TEU and TFEU will cease to apply to the United Kingdom from the date of entry into force of the withdrawal agreement; if no agreement has been reached within two years of the notification of the United Kingdom's intention to withdraw, the TEU and TFEU will cease to apply to the United Kingdom as from the expiry of that two-year period, unless the European Council, acting unanimously, and in agreement with the United Kingdom, decides to extend that period.

In a communiqué after the informal meeting of the Heads of State or Government of twenty-seven Member States, as well as the Presidents of the European Council and the Commission in Brussels on December 15, 2016,²³ the procedures that will be followed were set out. After the notification by the United Kingdom under Article 50 of the TFEU, the European Council will adopt guidelines defining the framework for negotiations, and setting out the overall positions and principles that the European Union will pursue during those negotiations; these guidelines will be updated during the negotiations as necessary. The European Council will then invite the Council (meeting in the composition for general affairs) to adopt quickly a decision authorizing the opening of negotiations following a recommendation by the Commission and dealing with subsequent steps in the process. The negotiating directives will also be adopted by the Council; these will deal with substance and with the relationship between the Council and its preparatory bodies on the one hand and the union negotiator on the other. The negotiating directives may be amended and supplemented as appropriate during the negotiations to reflect the guidelines from the European Council as they evolve. Appropriately, the Council will be invited to nominate the Commission as EU negotiator, which effectively confirms that Barnier will, as expected, lead the negotiations. The significant development lies in how the links between the negotiator and the Council, and the European Council will be ensured; here, transparency and trust-building have been central considerations. Barnier's team will integrate a representative of the rotating

would have involved considerable delay, even if the ECJ would have been willing to expedite the case; given the political climate in the U.K. such delay would have been distinctly unfortunate to put it mildly. Sometimes neglecting the elephant in the room may be the better option.

23. Press Release from the President of the European Council, 782/16 (available at http://www.consilium.europa.eu/press-releases-pdf/2016/12/47244652443_en.pdf). The following discussion briefly sets out the proposed approach.

Presidency of the Council; representatives of the President of the European Council will be present and participate, in a supporting role, in all the negotiation sessions alongside the representatives of the Commission. As might be expected, the EU negotiator is to report systematically to the European Council, the Council, and its preparatory bodies. Between meetings of the European Council, the Council, and Coreper,²⁴ assisted by a dedicated working party with a permanent chair, are to ensure that the negotiations are conducted in line with the European Council guidelines and the Council negotiating directives, and provide guidance to the EU negotiator. In accordance with Article 50(4) of the TEU, the representatives of the United Kingdom in the European Council, the Council, and its preparatory bodies will not participate in the discussions or decisions concerning it. The representatives of the twenty-seven Heads of State and Government will be involved in the preparation of the European Council as necessary, and representatives of the European Parliament will be invited to attend preparatory meetings. The EU negotiator will be requested to keep the European Parliament closely and regularly informed throughout the negotiations, and the Presidency of the Council will be willing to inform and exchange views with the European Parliament before and after each meeting of the Council (again in the composition for general affairs). Finally, the President of the European Council will be invited to be heard at the beginning of the meetings of the European Council. This last point is nothing new, as it is standard practice anyway.

From the United Kingdom's point of view, withdrawal, like accession, would be internationally effected by exercise of the Royal Prerogative, by the government acting in the name of the Crown; ratification of the withdrawal agreement reached would be subject to the negative resolution procedure envisaged in section 20 of the Constitutional Reform and Governance Act 2010. If Parliament attempted to restrain ratification, the prospect of the curtain of Article 50(3) of TFEU falling would still loom. If no agreement had been reached and the curtain of Article 50(3) of the TEU fell, Parliament's role, as there would be no treaty to be ratified, would simply be confined to the domestic sphere. Domestically, the European

24. *Coreper* is the acronym (from the French name *comité des représentants permanents*) for the Committee of Permanent Representatives of the governments of the Member States (i.e. their ambassadors to the EU). See TFEU *supra* note 10, art. 240(1), (2016) O.J. C 202/154.

Communities Act 1972 and related legislation would need to be repealed, and that repeal would need to be coordinated with the actual date of withdrawal. This could be achieved by the not unusual procedure of making the coming into force of the repeal legislation effective through an Order in Council or a statutory instrument specifying the appropriate date. But before that stage was in sight, a discussion emerged about whether the government could “pull the Article 50 trigger” without first obtaining the agreement of the UK Parliament.

II. CONSULTING THE UNITED KINGDOM PARLIAMENT?

The rights conferred by European law, carried in by the horse of the European Communities Act 1972, enure to the benefit of European citizens and market participants, according to the content of the rights concerned. Although they rode on that proverbial horse, they are conferred by EU law itself. While, as observed above,²⁵ section 18 of the European Union Act 2011 attempted to make UK legislation itself the basis of these rights and indeed duties, they are in reality founded firmly in EU law itself. The UK Parliament, when enacting the European Communities Act 1972, assented to those rights and duties having effect within the United Kingdom, but did not thereby make that act the source of those rights and duties; the act is a vehicle (a horse) rather than the source. Given that Parliament had clearly intended EU law to have effect within the United Kingdom, should not Parliament have to decide on whether the British government should take steps that could lead to those rights and duties becoming effective?

The UK government’s intention to trigger the Article 50 of the TFEU mechanism without seeking the prior authority of Parliament was challenged in *The Queen on the application of Miller et al. v. Secretary of State for Exiting the European Union*.²⁶ The case came before a particularly strong Divisional Court of the Queen’s Bench Division of the High Court.²⁷ The Divisional Court, as seen above, avoided the issue of deciding whether a notification under Article 50 of the TFEU was reversible. That is itself a question of EU law, and

25. See European Union Act 2011, *supra* note 11.

26. In the Divisional Court [2016] EWHC 2768 (Admin), upheld on appeal [2017] U.K.S.C 5 (hereinafter *Miller*).

27. *Id.* Consisting of the Lord Chief Justice of England and Wales (Lord Thomas of Cwmgiedd); the Master of the Rolls (Sir Terence Etherton) and Lord Justice Sales.

had the court felt it necessary to decide that point in order to give judgment, it would have had little choice but to make a reference for a preliminary ruling under Article 267 of the TFEU to the ECJ, as there is no existing authority on the question. This would have caused considerable delay in deciding the case, which would have been particularly politically sensitive in view of the rabble rousing in the press baying for Brexit rather yesterday than tomorrow.

The Divisional Court was at pains to emphasize that it was dealing with the question of law, and that nothing it said had concerned the question of the merits of withdrawal from the European Union, nor because government policy is not law did the court's decision have any bearing on government policy.²⁸ Even though the European Communities Act 1972 gave effect to the supremacy of EU law, and that measure remained the only instance of Parliament recognizing a superior form of law than primary legislation, the doctrine that Parliament is sovereign and could always repeal primary legislation, including the European Communities Act 1972 remained unabated.²⁹ The Royal Prerogative covered only the prerogative powers recognized by common law and their exercise produced legal effects only within those boundaries; thus, while it did embrace the making of treaties, it did not extend to altering or conferring rights upon individuals or depriving individuals of rights which they enjoyed in domestic law without the intervention of Parliament.³⁰

The Divisional Court recognized that the European Communities Act 1972 was a constitutional statute, approving in particular the approach adopted by Lord Justice Laws in *Thoburn v. Sunderland City Council*.³¹ The Act was not subject to the usual wide principle of implied repeal by subsequent legislation; its importance was such that could only be repealed or amended by express language and subsequent statute or by necessary implication from the provisions of such a statute.³²

The key to the discussion in the Divisional Court lies in the rights arising under EU law which would be affected by withdrawal from the European Union, although that court rightly recognized that

28. *Id.* at ¶ 5 of the Divisional Court's judgment in *Miller*.

29. *Id.* at ¶ 20—21.

30. *J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry* [1990] 2 AC 418 (HL) 500 (*per* Lord Oliver of Aylmerton).

31. [2003] QB 151 (DC) [¶ 62].

32. Divisional Court's judgment in *Miller*, *supra* note 26, at ¶ 44.

there were many other a substantial areas of EU law which took effect as part of the law of the United Kingdom as directly applicable regulations. These rights were analyzed in three categories:

- *Rights which could be replicated in United Kingdom law.*

These rights could be maintained in whole or in part after the withdrawal through re-enactment; this could be done either on an individual basis (such as in the area of employee rights) or as part of an overall maintenance of existing rights through means of a proposed Great Repeal Bill. However, there would be no possibility of making a reference to the ECJ about these rights after withdrawal. The Divisional Court held that even if such rights were to be preserved under new primary legislation within the United Kingdom after withdrawal, withdrawal would have deprived the domestic law rights created by the European Communities Act 1972 of their effect. Moreover, the removal of the ability to seek a preliminary ruling from the ECJ under Article 267 of the TFEU relating to the scope and interpretation of those rights would itself amount to a material change in the domestic laws of the United Kingdom.³³

- *Rights which British citizens and companies enjoyed in other Member States of the European Union.* These are rights of residence and the freedoms to pursue economic activities (as workers, self-employed, service providers (or recipients), or as retirees or students or persons of independent means, and rights of companies to establish branches and agencies in other Member States). Besides being enforceable in the domestic courts of other Member States, these rights could also be invoked by such citizens and companies against impedimenta imposed by the United Kingdom; again, the enforcement and interpretation of those rights could benefit from the procedure of Article 267 of the TFEU. The Divisional Court had little difficulty in concluding that these rights would be affected by withdrawal, and that they were rights which Parliament intended to bring into effect through the European Communities Act 1972.³⁴

- *Rights that could not be replicated in United Kingdom law.*

These rights embraced citizens' rights, such as the right to vote in and stand for elections to the European Parliament, as well as broader rights, such as the right to request a court to make a reference under Article 267 of the TFEU or to benefit from the

33. *Id.* at ¶ 64.

34. *Id.* at ¶ 66.

possibility of persuading the European Commission to take action in relation to the enforcement and application of EU law within the United Kingdom (for example in relation to infringement of competition law or environmental protection legislation within the United Kingdom), and to seek appropriate remedies. Given that these rights were acknowledged by the Secretary of State to be at least in part the product of the European Communities Act 1972 the Divisional Court did not deal with them further.

The Divisional Court then proceeded to give the Secretary of State a lesson in statutory interpretation of constitutional statutes. In situations in which the constitutional principles are strong, the courts find that there is a presumption that Parliament intended to legislate in conformity with them, and not to undermine them. The text of the statute must be read in the light of constitutional principle: could it be inferred in the particular context of the primary legislation being interpreted that a Parliament, aware of that constitutional principle and respectful of it, still intended to produce effects at variance with that principle? Although many presumptions could be overridden by Parliament if it chose to do so, the stronger the constitutional principle, the stronger the presumption that Parliament did not intend to override it, and the stronger the requirement of express language or clear necessary implication for the inference can be properly drawn that Parliament did intend to override it. Likewise, the stronger the constitutional principle, the stronger the argument that Parliament's language was intended to reflect that principle. The Secretary of State had studiously ignored the constitutional principle that the Crown could not vary the law of the land by the exercise of its prerogative powers without the authority of Parliament.³⁵ In view of the important and far-reaching step that Parliament had taken in switching on the direct effect of EU law in the UK legal systems by enacting the European Communities Act 1972, the Divisional Court felt it not plausible to suppose that Parliament intended that the Crown should be able to switch off direct effect again simply by unilateral action using prerogative powers. Furthermore, the status of the European Communities Act 1972, as a constitutional statute, was such that Parliament is taken to have indicated that it should be exempt from the operational usual doctrine of implied repeal by subsequent inconsistent legislation; it was all the more unlikely that Parliament

35. *Id.* at ¶¶ 82–85.

intended that the rights thereby conferred could be revoked by the unilateral use of prerogative powers.³⁶

The Divisional Court concluded that in the light of the above it was clear that Parliament intended to legislate by the European Communities Act 1972 to introduce EU law into domestic law and to create the rights in the second category, which could not be undone by the exercise of Crown prerogative powers. Rights from the first and third categories, as well as the wider rights in the second category, also depended on the continued existence of the European Communities Act 1972, which had brought them into domestic law.³⁷

The press reaction to this judgment essentially called a lynch mob against the distinguished judges involved, and regrettably, several politicians were lukewarm (to say the least) in their support for the independence of the judiciary—a phenomenon also currently evident in the United States. Unsurprisingly, the Secretary of State appealed to the UK Supreme Court. Prior to the hearing, there were clear attempts to intimidate some of the Justices into recusing themselves, but the Supreme Court very wisely took the view that such a step was unnecessary – the activities did not affect their judicial independence – and decided to hear the case *en banc*. Again, the Justices rightly stressed that their judgment had nothing to do with the political wisdom of Brexit.

The majority of the Supreme Court, formed by eight out of the eleven Justices,³⁸ took the view that although the European Communities Act 1972 gave effect to EU law, it was not the originating source of that law.³⁹ The majority spoke of that Act as a conduit,⁴⁰ which is a slightly different metaphor than that of the horse invoked above, although nothing turns on the distinction, and the

36. *Id.* at ¶¶ 86–88.

37. *Id.* at ¶ 92. The Divisional Court then summarized the background to its conclusion in paragraphs 93–94 of its judgment. It then turned to deal with the applicants' arguments, concluding that in reality the Secretary of State was proposing to take away the rights of citizens given effect by Parliament through the use of prerogative powers. The final parts of the judgment discussed other issues that did not affect the conclusion.

38. Lord Neuberger (President); Lady Hale (Vice President); Lord Mance; Lord Kerr; Lord Clarke; Lord Wilson; Lord Sumption, and Lord Hodge.

39. *The Queen on the application of Miller et al v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [62]–[65].

40. *Id.* at ¶ 65 (echoing the metaphor used by John Finnis in his Sir Thomas Moore Lecture in 2016; accessible at <http://www.lincolnsinn.org.U.K./images/word/education/Sir%20Thomas%20More%20Lecture%20-%20Professor%20John%20Finnis%20FBA.pdf> (delivered after the judgment of the Divisional Court discussed above).

horse could not be said to be in any way unruly. The majority examined the categories of rights identified by the Divisional Court and concluded that given that it was clear that some of the rights in first category would be lost on the United Kingdom withdrawing from the European Union, it was unnecessary to consider whether the applicants could rely on the loss of rights in the second and third categories. The majority took the view that if they could not succeed in their argument based on loss of rights in the first category, then invoking loss of rights in the other categories would not help, and if they could succeed on the basis of loss of rights in the first category, they would not need to invoke loss of rights in the other categories.⁴¹ The majority took the view that the loss of the source of law which would result from withdrawal was a fundamental legal change which justified the conclusion that prerogative powers could not be invoked to withdraw from the EU Treaties. The majority also upheld the Divisional Court's view that the changes in domestic rights acquired through EU law was another, albeit related, ground for justifying that conclusion. The consequences of withdrawal went further than affecting the rights acquired pursuant to Section 2 of the European Communities Act 1972. That Act envisaged domestic law, and therefore rights of UK citizens, changing as EU law varies, but it did not envisage those rights changing as a result of ministers unilaterally deciding that the United Kingdom should withdraw from the EU Treaties.⁴² The effect of the European Communities Act 1972 was that ministers required the authority of Parliament before giving notice of the United Kingdom's intention to withdraw,⁴³ a conclusion that was unaffected by subsequent legislation or by the referendum of 2016; in any event, deciding on whether to act on the result of the referendum was a matter for Parliament.⁴⁴

41. *The Queen on the application of Miller et al v. Secretary of State for Exiting the European Union* [2017] UKSC 5 at ¶ 73.

42. *Id.* at ¶ 83.

43. *Id.* at ¶ 101.

44. *See id.* at ¶ 116—25. The remaining part of the majority judgment dealt with issues relating to Northern Ireland, and devolution: the majority in the Supreme Court concluded that the Scottish Parliament and the Welsh Assembly did not have a legal veto over withdrawal from the European Union, nor did the Northern Ireland Assembly. *Id.* at ¶¶ 135, 150. The “Sewell Convention” that the United Kingdom Parliament would not normally legislate with regard to devolved matters without the consent of the devolved Parliaments was considered to be a political convention, rather than a rule that was justiciable. *Id.* at ¶¶ 136—51. The three dissenting judgments can be briefly summarized. Lord Reed, whose minority judgment was the most extensively reasoned, felt that the effect that Parliament had given to

This sensible approach recognizes that EU law itself is a dynamic body of law, which is constantly developing. The Treaties are the skeletons on which flesh is constructed by the acts of the Union institutions, and the skeletons are extended by the Member States through Treaty amendments. The rights and obligations brought into being by EU law were never intended to be static, and they have developed through the years as the ECJ looks at the present state of Union law at the snapshot moment of a judgment.

It was clear that the UK government had to go back to Parliament. It did so, and after an initial rebellion in the House of Lords, the notably brief European Union (Notification of Withdrawal) Act 2017 received the Royal Assent on March 16, 2017. Parliament thus granted permission to ministers to trigger the Article 50 of the TFEU mechanism.

III. THE PROCESS STARTS

On March 29, 2016, Theresa May wrote to Donald Tusk, the President of the European Council notifying body in accordance with Article 50(2) of the TEU of the United Kingdom's intention to withdraw from the European Union and, on the same basis, as applied by Article 106a of the Euratom Treaty,⁴⁵ from the European Atomic Energy Community.⁴⁶ Certain points expressed in this letter are of particular (largely political) interest: the expression about the deep

EU law in U.K. domestic law by virtue of the European Communities Act 1972 was inherently conditional on the application of the EU treaties to the U.K. and thus on the latter's membership of the Union. He argued that that Act did not affect the Crown's exercise of prerogative powers in respect of membership. Since, in his view, no alteration in the fundamental rule governing the recognition of sources of law had resulted from membership of the EU, or would result from notification under Article 50 TFEU, Ministers were entitled to give notification under Article 50 in the exercise of prerogative powers, without requiring authorization by a further Act of Parliament. Lord Carnwath, agreeing with Lord Reed, felt that the Divisional Court took too narrow a view of the constitutional principles involved; he argued that although the Article 50 TFEU process involved a partnership between Parliament and executive, that did not mean that legislation was required simply to initiate it, although legislation would be required to implement withdrawal. That process, including the form and timing of any legislation could and should be determined by Parliament not by the courts. Lord Hughes delivered a brief judgment, agreeing with Lord Reed.

45. See Consolidated version of the Treaty establishing the European Atomic Energy Community, 2016 O.J. C 203/01 [hereinafter Euratom Treaty].

46. Letter from Theresa May, Prime Minister, United Kingdom, to Donald Tusk, President, European Council (Mar. 29, 2017), https://www.gov.U.K./government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf.

and special partnership the United Kingdom hopes to enjoy – as the European Union’s closest friend and neighbor – with the European Union after leaving it; the proposal for constructive and respectful engagement in a spirit of sincere cooperation; the importance of striking early agreement about the rights of citizens of the other twenty-seven Member States living in the United Kingdom and of the UK citizens living in the other twenty-seven Member States; the importance of economic and security co-operation; the importance of working together to minimize disruption and give as much certainty as possible; the importance of special attention to the United Kingdom’s unique relationship with Ireland and the importance of the peace process in Northern Ireland; the suggestion that the technical talks on detailed policy areas should begin soon as possible with the biggest challenges prioritized; and an intention to continue to work together to advance and protect European values. One particular element that attracted attention in relation to the deep and special partnership was that it would take in both economic and security of cooperation. In some circles this was interpreted as a thinly veiled threat that if there were no agreement on economic matters, there would be none on security cooperation, although this impression was fortunately quickly dispelled.⁴⁷

The immediate reaction of Donald Tusk⁴⁸ in part reflected these issues, but also made it clear that the European Union had other concerns as well. Tusk stressed, first, the European Union’s duty to minimise the uncertainty and disruption caused by the United Kingdom’s decision to withdraw from the European Union for EU citizens, businesses, and Member States. This would essentially be about damage control. Putting people first, he emphasized the need to settle the status and situations of EU citizens in the United Kingdom after the withdrawal with reciprocal, enforceable, and non-discriminatory guarantees. It would also be important to address the legal vacuum for companies arising from the fact that after Brexit the EU laws would no longer apply to the United Kingdom. The third point he made was that the European Union would also need to make sure that the United Kingdom honoured all financial commitments

47. See Joe Watts, *Brexit: Theresa May forced into embarrassing climbdown over Article 50 negotiations security ‘threat’*, INDEPENDENT (Mar., 31, 2017), <http://www.independent.co.uk/news/U.K./politics/brexit-theresa-may-article-50-negotiations-security-threat-latest-leave-eu-european-union-a7659466.html>.

48. See *Letter from Theresa May to Donald Tusk*, *supra* note 46.

and liabilities it had made and taken as a Member State. The logic behind this point lies in the multiannual commitments made in respect of policies such as research, agriculture, and regional, economic, and social cohesion, where all twenty-eight Member States made financial commitments. Tusk emphasized that the European Union, on its part, would honour all its commitments. The fourth point was the commitment to seek flexible and creative solutions aiming at avoiding a hard border between Northern Ireland and Ireland; supporting the peace process in Northern Ireland was crucial. Tusk observed that these four issues formed part of the first phase of the negotiations, and only once sufficient progress on the withdrawal had been achieved could the framework for the future relationship between the European Union and the United Kingdom commence. Tusk rejected, therefore, the idea of starting parallel talks on all issues at the same time. This is actually scarcely surprising, as accession negotiations proceed on a chapter-by-chapter basis, and not all chapter negotiations take place at the same time. The wording of Article 50(2) leaves this point somewhat up in the air: “the Union shall negotiate and conclude an agreement with [the withdrawing] State setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.” While the choice for a single phase or two-phase set of negotiations is essentially political, it is tidier, and reflects the view that the withdrawal treaty should be a separate document from any treaty on the future relationship between the European Union and the withdrawing State; otherwise, the resulting document would be messy in the extreme.

The Council’s Task Force established under leadership of Didier Seeuws was well prepared, and the draft European Council guidelines under Article 50(2) were made public on March 31, 2017.⁴⁹ These draft guidelines unsurprisingly dovetail with very many of the observations already made by President Tusk. Those draft guidelines, with only minor changes, were approved at the Special Meeting of the European Council on April 29, 2017.⁵⁰ On May 3, 2017, the

49. GENERAL SECRETARIAT OF THE COUNCIL OF THE EUROPEAN UNION, *Council Document 21001/17, Bxt 5*, (Mar. 31 2017), <http://g8fip1kplyr33r3krz5b97d1.wpengine.netdna-cdn.com/wp-content/uploads/2017/03/FullText.pdf>.

50. Eur. Council Document EUCO XT 20004/17, <http://data.consilium.europa.eu/doc/document/XT-20004-2017-INIT/en/pdf>.

Commission presented its recommendation for a Council Decision authorizing it to open negotiations relating to U.K. withdrawal.⁵¹

The guidelines emphasise the European Council's wish to have the United Kingdom as a close partner in future, and they make it plain that any agreement with the United Kingdom must be based on the balance of rights and obligations and ensure a level playing field. In this, the integrity of the single market assumes major importance: participation based on a sector-by-sector approach is rejected, so there will be no cherry picking. In line with this approach, the negotiations will be conducted as a single package on the principle that nothing is agreed until everything is agreed (a principle that the European Union applies in all its negotiations, even though individual chapters in the negotiations are closed once *de facto* agreement on them has been reached), so individual items will not be settled separately. From the European Union's point of view, the negotiations will be conducted with unified positions, with no separate negotiations between the Member States and the United Kingdom on matters pertaining to its withdrawal from the European Union; this is clearly designed to stop Member States being open to being "bought." While the European Union intends to be constructive throughout and find an agreement that is fair and equitable for all Member States and in the interests of the Union's citizens, which is in the best interest of both sides, the guidelines make it clear that the European Union will also take steps to be able to cope if the negotiations were to fail.

The phased approach emphasized by Tusk is also reflected in point 4 of the guidelines, as is the view that the United Kingdom must first become a third country before the arrangements on a future relationship with the European Union can be concluded. Given the wording of Article 50 of the TEU, an overall understanding on the framework for future relationship could be identified during the second phase of the negotiations under Article 50, so the European Union will be ready to engage in preliminary and preparatory discussions on that in the context of the negotiations under Article 50 once the European Council decides that sufficient progress has been made in the first stage towards reaching a satisfactory agreement on the arrangements for an orderly withdrawal.

Point 6 of the guidelines leaves open the possibility of negotiating transitional arrangements, provided that they are in the

51. Commission Document COM (2017) 218 final.

interest of the European Union, and, that they form appropriate bridges towards the foreseeable framework for the future relationship. As with transitional arrangements negotiated in relation to accession agreements, such arrangements would have to be clearly defined, limited in time, and with effective enforcement mechanisms. If a time-limited prolongation of the EU *acquis*⁵² were to be considered, existing EU regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures would have to apply during that prolongation.

In addition to the common points already highlighted in the letter from May and Tusk's reaction (citizens' rights, companies, and EU-funded programs and financial issues), the guidelines stress the need for a single financial settlement covering all legal and budgetary commitments, as well as liabilities, including contingent liabilities. The guidelines also note the importance of supporting the peace process in Northern Ireland and, moreover, the aim of avoiding a hard border on the island of Ireland, while respecting the integrity of the European Union's legal order. They envisage that existing bilateral agreements and arrangements between the United Kingdom and Ireland that are compatible with EU law should also be recognized. The remaining points deal with arrangements as regards the sovereign base areas of the United Kingdom on Cyprus: the consequences of international commitments which the United Kingdom has contracted in the context of its EU membership, with a possible common approach towards third country partners and international organizations, and arrangements for the facilitation of transfer of seats of EU agencies and facilities located in the United Kingdom (although this is actually a matter for the twenty-seven Member States rather than for the European Union itself).

Of major interest to lawyers are points 16 and 17 of the guidelines. Point 16 considers questions relating to ensuring legal certainty and equal treatment for all court procedures pending before the Court of Justice of the European Union ("CJEU," i.e., the ECJ itself or the General Court) on the date of withdrawal that involve the United Kingdom or natural or legal persons there. The guidelines envisage that institution remaining competent to adjudicate in those procedures. Arrangements should also be agreed for administrative

52. *I.e.* a continuation of the status quo. Whether that would mean application of developments in the period of the transitional arrangements (as EU law is dynamic) would be the subject of negotiation, although it is difficult to envisage from the U.K.'s viewpoint.

procedures pending before the Commission and the EU agencies at the date of withdrawal, involving the United Kingdom or natural or legal persons there, as well as for the possibility of administrative or court proceedings initiated after withdrawal in respect of facts that occurred before the withdrawal date. Point 17 addresses the need for appropriate dispute settlement mechanisms regarding the application and interpretation of the withdrawal agreement, as well as duly circumscribed institutional arrangements allowing for the adoption of measures necessary to deal with situations not foreseen in the withdrawal agreement. The European Union's interest in effectively protecting its autonomy and its legal order, including the role of the Court of Justice, will have to be borne in mind.

The remainder of the guidelines set out a number of essentially political and economic points the brevity of which is almost in inverse proportion to their political importance. Understandably, the European Council welcomes and shares the United Kingdom's desire to establish close partnership between the European Union and the United Kingdom after its departure; though this will not offer the same benefits as EU membership, strong constructive ties are regarded as remaining in both sides' interests and should involve more than just trade. Given that the British government had indicated that it would not wish to remain in the single market but would like to pursue an ambitious free-trade agreement with the European Union, the European Council stated that it was ready to initiate work for such an agreement, to be finalized and concluded once the United Kingdom is no longer a Member State. Any free trade agreement would have to be balanced, ambitious, and wide-ranging, but it could not amount to participation in the single market or parts thereof, as that would undermine its integrity and proper functioning. Any agreement would have to ensure a level playing field in terms of competition and state aid, and would have to encompass safeguards against unfair competitive advantages through *inter alia* tax, social, environmental and regulatory measures and practices. Beyond trade, the European Union was ready to consider establishing partnership in other areas, in particular the fight against terrorism and international crime as well as security, defense and foreign policy. The future partnership would have to include appropriate enforcement and dispute settlement mechanisms that did not affect the European Union's autonomy, in particular its decision-making procedures. Finally, the guidelines make clear that after the United Kingdom

leaves the European Union, no agreement between the European Union and the United Kingdom could apply to Gibraltar without agreement between Spain and the United Kingdom. This last point already caused something of a furor in certain circles in early April 2017 in the United Kingdom and in Spain, with some UK politicians making rather unwise statements in a high and loud, even jingoistic tone.⁵³

On May 22, 2017, the Council adopted a decision setting out the negotiating mandate,⁵⁴ the terms of which address the first aspect of the negotiations, the terms of withdrawal; a further negotiating mandate will in due course address the issue of the future relationship between the European Union and the United Kingdom. The negotiating mandate follows closely the guidelines set out above. Negotiations finally commenced on June 19, 2017.

IV. HOW TO WRIGGLE OUT, AND HENRY VIII POWERS

The UK government has now finally published its White Paper on legislating for the United Kingdom's withdrawal from the European Union.⁵⁵ The White Paper heralds the introduction in due course of a so-called Great Repeal Bill that is designed to ensure that generally the same rules and laws will apply after the United Kingdom leaves the European Union as before. The Great Repeal Bill will repeal the European Community 1972 and convert EU law as it stands at the moment of withdrawal from the European Union into UK law before the United Kingdom actually leaves the European Union; this is designed to ensure there is no overnight change in rights and obligations for individuals and businesses. It is also designed to ensure that the UK Parliament and, where appropriate, the devolved legislatures in Scotland, Wales, and Northern Ireland can make such changes as they feel appropriate at any time after the United Kingdom has left the European Union. The Great Repeal Bill will convert directly applicable EU law into UK law, thus ensuring

53. BRITISH BROADCASTING CORPORATION, *Brexit and Gibraltar: May laughs off Spain 'war' talk* (Apr. 3 2017), <http://www.bbc.com/news/uk-politics-39475127>.

54. The Council Decision and Annex (which contains the details) have surprisingly not yet been published in the O.J., see <http://www.consilium.europa.eu/en/press/press-releases/2017/05/22-brexit-negotiating-directives/andCouncilDocuments21009/17BXT16and21009/17BXT16ADD1REV2>.

55. SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION, *Legislating for the United Kingdom's Withdrawal from the European Union*, 2017, CM 9446 (UK).

that there is no void resulting from present EU regulations no longer being applicable in the United Kingdom. Those laws that have been made in the United Kingdom in order to implement obligations imposed by measures such as EU directives (which have to be transposed into national law) will be preserved. Usually such implementation was on the basis of Section 2(2) of the European Communities Act 1972, which empowered ministers, including those in devolved administrations in Scotland, Wales, and Northern Ireland, to adopt secondary legislation to implement EU obligations. On the repeal of that Act, legislation adopted by virtue of that Act would cease to apply, unless preserved (in this instance) by the Great Repeal Act.

The White Paper goes on to make it clear that the EU Treaties as they exist at the moment the United Kingdom will leave the European Union may well assist in the interpretation of the EU laws which the United Kingdom intends to preserve. It is intended that directly effective Treaty rights for individuals will be incorporated into UK law. While the CJEU itself will no longer have jurisdiction affecting the United Kingdom, and the existing obligation on the judiciary to follow its case law will disappear, the White Paper intends to ensure continuity in how European Union law is interpreted before and after withdrawal day. The Great Repeal Bill will provide that any question as to the meaning of EU-derived UK law is to be determined in the UK courts by reference to the CJEU's case law as it exists on the day that the United Kingdom withdraws from the European Union. CJEU case law on any aspect of EU law that is not be converted into UK law would not need to be applied by the UK courts. The value of such CJEU case law as a binding precedent will be the same as that of decisions of the UK Supreme Court.⁵⁶ The British government states that it would expect the Supreme Court to take a similar approach to departing from CJEU case law to that which it takes when departing from its own, and is examining whether it might be desirable for any

56. *UK Supreme Court Practice Statement 3* <https://www.supremecourt.uk/docs/practice-direction-03.pdf> (last visited May 9, 2017) states: "The Supreme Court has not re-issued the House of Lords' Practice Statement of 26 July 1966 (Practice Statement (Judicial Precedent) [1966] 1 WLR 1234) which stated that the House of Lords would treat former decisions of the House as normally binding but that it would depart from a previous decision when it appeared right to do so. The Practice Statement is "part of the established jurisprudence relating to the conduct of appeals" and "has as much effect in [the Supreme] Court as it did before the Appellate Committee in the House of Lords": *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28, [24]—[25].

additional steps to take to give further clarity about the circumstances in which such departure might occur. Parliament would in any event be free to change the law and overturn case law if it felt fit.

The White Paper also proposes that where a conflict arises between EU-derived UK law and primary legislation passed by Parliament after UK withdrawal from the European Union, the new legislation will take precedence over the EU-derived UK law that has been preserved by the Great Repeal Bill. This is the logical result of the supremacy of EU law in the event of a conflict with national law no longer applying in the United Kingdom. In relation to the European Union's Charter of Fundamental Rights,⁵⁷ the British government's intention is that removal of the Charter from UK law will not affect the substantive rights which individuals already benefit from in the United Kingdom. Article 51 of the Charter states that it "does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties." Many of those rights exists elsewhere in the body of EU law which will be converted into UK law, and others already exist in UK law or in international agreements to which the United Kingdom is a party. Given that EU law would be converted into UK law by the Great Repeal Bill, it will continue to be interpreted by UK courts consistently with the underlying rights which will be preserved. If pre-withdrawal case law has been decided by reference to such underlying rights, that case law will continue to be relevant as explained above; but is insofar as case-law refers to the Charter, those references will be considered as referring only to the underlying rights, rather than the Charter.

Chapter 3 of the White Paper contains the most controversial aspect of the British government's proposal, referring to delegated powers. These powers are often referred to as Henry VIII powers,⁵⁸ after the Statute of Proclamations 1539. Section 2(2) of the European Communities Act 1972 is itself a Henry VIII clause, giving ministers the power to implement non-directly applicable EU law. But as it relates to implementing EU legislation which has already passed

57. 2016 O.J. C 20/ 389.

58. Joelle Grogan, *Rights for the chop: how a Henry VIII clause in the Great Repeal Bill will undermine democracy*, LSE BREXIT'S BLOG, <http://blogs.lse.ac.uk/brexit/2016/11/30/rights-for-the-chop-how-a-henry-viii-clause-in-the-great-repeal-bill-will-undermine-democracy/> (for a useful and clear discussion.).

democratic scrutiny at EU level and, at least in more recent years will also have been open to national parliamentary level scrutiny at the proposal stage, it is inherently less far-reaching than the proposals in the Great Repeal Bill. The problem identified by the British government is that there will be where some areas where converted law will be unable to operate because the United Kingdom is no longer a member of the European Union; there will also be cases where EU law will cease to operate as intended or will be redundant after withdrawal. Where EU rights are based on reciprocal arrangements, it may no longer be practical or in the United Kingdom's interests to maintain them unilaterally, if no reciprocal continuity can be established as part of the new relationship between the European Union and the United Kingdom.

The White Paper recognizes the need for justification of the choice to use secondary rather than primary legislation, and suggests that justifications include: matters which cannot be known or may be liable to change at the point when the primary legislation is being passed because the government needs to allow for the progress of negotiations; adjustments to policy that are directly consequential on the withdrawal from the EU; and to provide a level of detail not sort appropriate for primary legislation. The White Paper also recognizes the need for some limitations on the powers of ministers, not least because it intends to use these powers in relation to primary as well as secondary legislation which implements current EU obligations as well as directly applicable EU law that will be converted into domestic law on withdrawal. The government also intends to include the power to transfer to UK bodies or ministers those powers that are contained in EU-derived UK law and which are currently exercised by EU bodies, although the White Paper argues that this does not mean that the power will be wide in terms of legislation to which it can be used to make changes. The White Paper envisages that the power will not be available where the government wishes to make a policy change which is not designed to deal with deficiencies in preserved EU-derived UK law arising out of withdrawal from the EU. Moreover, the government states that it will consider the constraints placed on the delegated power in section 2 of the European Communities Act 1972 to assess whether similar constraints may be suitable for the new power (for example, preventing it from being used to make retrospective provision or impose taxation). The White Paper argues that if the power is too narrowly drafted, then too many

of the changes will have to be enacted through primary legislation before withdrawal, which would lead to an enormous crowding of Parliamentary time. The government proposes to use existing types of statutory procedure, which allow Parliament to see all statutory instruments under various levels of security. The most commonly used procedures are the negative procedure (the measure is agreed if no objection requiring a debate and possibly even a vote is lodged by a member of either House of Parliament within a set period) and the affirmative procedure, which requires debate and approval by both Houses of Parliament before either measure can enter into force. Moreover, Parliamentary committees scrutinize statutory instruments for technical and policy content.

Mindful of the furor that the use of Henry VIII powers would create, the government sees the White Paper as the beginning of discussion between government and Parliament as to the most pragmatic and effective approach to take in this area. The government envisages that the corrections made by the statutory instruments will have to be in place before the United Kingdom leaves the European Union, and thus proposes that the power in the Great Repeal Bill will come into force as soon as the Royal Assent is granted, so that the process of correcting the statute book can begin immediately. Finally, as most of the corrections can and will need to be made before the United Kingdom leaves the European Union, the powers proposed in the Great Repeal Bill will be time-limited to enact the necessary changes. The White Paper also holds out the carrot of more powers being devolved to Scotland, Wales, and Northern Ireland in accordance with the (unstated) principle of subsidiarity, so as to ensure that power sits closer to the people. Devolved ministers would be granted similar Henry VIII powers to amend devolved legislation in order to correct a law that would no longer operate appropriately after withdrawal from the European Union. Last, but not least, the White Paper makes it plain that the UK government will take appropriate steps to engage with the Crown Dependencies and Overseas Territories in so far as necessary.

It remains to be seen to what extent the UK Parliament will accept such a far-reaching use of delegated powers, but first reactions have been understandably very negative. Those on the Eurosceptic right who have long clamored that there is not enough national parliamentary scrutiny of EU legislation are hardly going to be

impressed by attempts to restrict parliamentary scrutiny of legislative action by UK ministers.

V. CRYSTAL BALL SCENARIOS?

The key problems are likely to center around the extent, if any, to which the United Kingdom will retain access to the internal market of the European Union. One obvious way to do this would have been to change the United Kingdom's participation in the European Economic Area Agreement⁵⁹ ("EEA Agreement") from a Member State party to a non-member state party, assuming that the other signatories would agree to such a course.⁶⁰ This approach foundered on the political obstacle that access to the internal market under the EEA Agreement comes with a price, which unlike ancient Gaul, is in two parts. The first element is that the United Kingdom would have to continually adjust its legislation to reflect changes in the European Union's internal market legislation (to ensure continued homogeneity), without having a vote at the table in the decision-making process regarding that legislation. The second element is that the United Kingdom would be called upon to make a financial contribution to the EU budget just as the other non-member state signatories of the EEA Agreement have agreed to do. The UK government has evidently ruled out such an approach.

The chosen scenario is that the United Kingdom could seek to have a comprehensive free trade agreement with the European Union. Free trade agreements can come in varying forms, but they have tended at least to deal with the free movement of goods and services, and may even embrace other internal market freedoms. One of the problems with free trade agreements is that they do not seek to achieve the same degree of integration as the original EEC Treaty, or now the TFEU does, and that the case law applicable to identically worded provisions of the EEC Treaty, now of the TFEU, cannot be imported into the meaning of the free-trade agreement.⁶¹ Since then,

59. 1994 O.J. L 1/3.

60. See Dóra Sif Tynes & Elisabeth Lian Haugsdal, *In, Out or in-between? The U.K. as a contracting party to the Agreement on the European Economic Area*, 40 EUR. L. REV. 753, 764 (2016) (explaining that this would involve amending the EEA Treaty (or withdrawing and re-acceding) and the United Kingdom rejoining the European Free Trade Association, which it had left on accession to the European Union).

61. See e.g. *Polydor Ltd. et al. v. Harlequin Record Shops et al.*, Case C-270/80, [1982] E.C.R. I-339, ¶¶ 16-18 (concerning the interpretation of the EEC Treaty).

however, the ECJ has been able to achieve a similar result by interpreting a free trade agreement in the light of its purpose, at least where it was obvious that the Member State concerned already had all the relevant information on the pharmaceutical product being reimported.⁶² When the EEA Agreement was concluded, the scope of EU legislation dealing, for example, with free movement of workers, was expressly extended to cover nationals of the non-member state EEA countries. This was done so that the ECJ could not use the different integration argument to deny direct effect to the rights created. A similar approach could be taken in the context of a comprehensive free trade agreement with the United Kingdom.

Given that paranoia about immigration was a major factor in the referendum campaign, it may be thought that any agreement on the free movement of workers in particular would be a matter of some controversy on the right wing of the Conservative party and in UKIP circles. However, the sort of arrangements envisaged in the ill-fated Settlement with the United Kingdom might provide some inspiration as part of a mutually satisfactory solution in this area. A particular variety of free trade has been achieved between the European Union and Switzerland, which have concluded a series of agreements relating to different aspects of the classic internal market: goods, services, workers, establishment, capital, and payments, as well as agreements on transport and other issues. With Switzerland, a poison pill clause in the more recent series of agreements provides that the consequence of failing to ratify the latest in the series of agreements would be the collapse of rights granted under the previous agreements. This is an incentive to vote for them in referendums, which are commonplace in Switzerland. A similar clause could be included in agreements with the United Kingdom if it were to follow this route. However, it is now unlikely that this route will be followed, given that both the United Kingdom and the European Union appear to favor a single comprehensive and far-reaching solution.

The United Kingdom has ruled out trying to remain part of the customs union aspects of the European Union, but, as seen above in the discussion of the United Kingdom's notification of withdrawal and the reaction by Donald Tusk and in the draft guidelines from the

62. See e.g. *Eurim-Pharm GmbH v. Bundesgesundheitsamt*, Case C-207/91, [1993] E.C.R. I-3723, ¶¶ 15–26.

European Council, this gives rise to the Irish problem.⁶³ Ireland will remain a Member State of the European Union, and thus of the customs union; this would imply that there would have to be controls on goods at the land border between Northern Ireland and Ireland, as well as controls between Great Britain and Ireland. The land border is nothing new: it has always existed, as have the unauthorized roads, but even at the height of the Troubles, there were no systematic passport checks on people moving from one side and borders of the other. When Ireland became independent, it was agreed that a common travel area would exist between it and the United Kingdom, a state of affairs that still exists independently of the rights created by membership of the European Union.

If the United Kingdom is no longer a Member State of the European Union, there will need to be controls on the movement of goods between the two States, a scenario to which no one looks forward. When one builds fences, or strengthens borders, one stimulates smuggling, tunneling, and more.⁶⁴ Given that neither Ireland nor the United Kingdom is in the Schengen Area, no problem arises on that score. However, the common travel area does pose problems, as nationals of other Member States can come into Ireland freely, but would have no right to reside in the United Kingdom, unless that were to be negotiated reciprocally as part of the Brexit deal or later. The idea of British immigration officers checking passengers arriving in Ireland, alongside Irish officials, is not necessarily assured of a welcome reception in Dublin. There are though ready precedents: French authorities check travelers using the Eurostar service from London to the Continent, and British officials do the same at the Paris and Brussels terminals. A customs union with the European Union might have been able to solve many issues on trade in goods, but there would still be questions of rules of origin to deal with, as well as dumping, and the problems as to persons would still be there. The customs union with Turkey has been fraught with difficulties for many years, and at WTO level it effectively means that

63. See Brian Doherty, John Temple Lang, Christopher McCrudden, Lee McGowan, David Phinnemore & Dagmar Shiek, *Northern Ireland and Brexit: the European Economic Area Option*, (Apr. 7, 2017), http://www.epc.eu/documents/uploads/pub_7576_northernirelandandbrexit.pdf (addressing the prospects for Northern Ireland to become part of the EEA).

64. See *e.g.* Pigs & Bacon Commission v. McCarren & Co. Ltd., Case C-177/78, [1979] E.C.R. 2161.

the Turks have relatively little to say about trade policy, concessions, hanging to a considerable extent on the coattails of the European Union, much to the dissatisfaction of the Turks. While the United Kingdom could have chosen simply continue to apply by incorporation the European Union's customs legislation as part of the conversion program envisaged under the Great Repeal Bill, and align itself entirely with the European Union in these matters, the Queen's Speech at the State Opening of Parliament on June 21, 2017 made it clear that a separate Customs Bill would form part of a package of measures designed to achieve Brexit, and the term "Great Repeal Bill" made way for the simpler term "Repeal Bill", with a series of specialist satellite Bills.⁶⁵

A solution, under which Northern Ireland would leave the United Kingdom and become independent, or even part of Ireland on a federal or confederal basis with religious toleration and freedom ensured, seems as yet unachievable (no matter how economically desirable either course might be). Yet old prejudices, when examined closely, sometimes do not stand up to scrutiny, and political desirability can triumph apparent religious interests. At the Battle of the Boyne, King William, the Protestant King, carried Papal support into battle. Success for James III would have meant *agrandissement* of his supporter, Louis XIV, with whom the Pope was having a classic row about control of the Catholic Church in France; the Pope therefore supported the Protestant King against the Catholic King. Given that neither the Northern Irish nor the Irish politicians want a serious land border to return, as it might threaten the peace process, the stimulus to think out of the box is enormous. The importance of this aspect has been rightly highlighted in Theresa May's letter notifying the European Union of the United Kingdom's intention to withdraw from the European Union, and in the European Union's reactions discussed above.

Finally, Brexit could well lead to the break-up of the United Kingdom, if Scotland and/or Northern Ireland were to leave it after a referendum and a settlement. Either or both would most likely seek to accede to the European Union. That brings its own complications, as Spain has hitherto not been seeking to reward secession, for fear of

65. See THE QUEEN'S SPEECH AND ASSOCIATED BACKGROUND BRIEFING, ON THE OCCASION OF THE OPENING OF PARLIAMENT ON WEDNESDAY 21 JUNE 2017 (2017), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/620838/Queens_speech_2017_background_notes.pdf, at 17, *et seq.*

encouraging would-be separatists in Spain, although some flexibility might develop. In any event, there is no guarantee that Scotland and/or Northern Ireland would be at the head of the queue to accede. Another, perhaps less welcome, aspect is that a proliferation of very small new Member States is likely to lead to Balkanization, with all the problems that that would entail. Decision-making with a huge number of Member States would need to be seriously reformed along federal lines, and simplified. At the moment, this may well be politically difficult, given the attractions of those who want the power of decision to be nearer the people affected by it. However, many things are simply more effectively considered and effected at a higher level than the Nation State. Putting Ruritania first may not always be a recipe for success in the long term.

The final obvious course of action, if a deal cannot be agreed for preferential access for UK goods and services to the European internal market, and preferential or reciprocal access for EU goods and services to the UK market, is the fallback position of WTO rights. These will be on the basis of the most favored nation principle and are widely regarded as the least satisfactory outcome. This would be a hard Brexit on the most disadvantageous terms for all parties; it would be a triumph for those of little faith and even less understanding of world trade. The United Kingdom is currently trying to investigate the possibilities of concluding bilateral trade deals with important partners, such as Commonwealth countries. Until it actually leaves the European Union, the United Kingdom has no competence to conclude bilateral trade agreements with third countries, and it is not entirely clear that third countries will be lining up to conclude such arrangements, despite visits from Theresa May or even Boris Johnson. There is also the issue of whether the United Kingdom would have to apply for separate membership of the WTO or whether it could substitute itself out of the EU membership; this would be a reverse of what happened under the old General Agreement on Tariffs and Trade 1947 when the European Communities substituted themselves for the individual Member States.

CONCLUDING OBSERVATIONS

From the above remarks, it is apparent that most conclusions on the consequences of Brexit must necessarily be tentative. However, some points can be made with certainty. The European Communities Act 1972 would be repealed. National legislation implementing prior

EU law would remain in force unless expressly repealed as part of the withdrawal process or afterwards, and directly applicable EU law will be re-enacted as UK law under what is now simply called the Repeal Bill. As has been seen, UK judges would no longer be obliged to interpret UK law in accordance with the case law and principles behind the case law of the ECJ in respect of post-withdrawal developments in that case law, although the Repeal Bill will take the sensible approach to require them look at its case law prior to Brexit as a means of interpreting law which had originally been enacted in order to implement EU obligations, whether or not that law had been re-enacted. It goes without saying that the UK courts will no longer be able to be able or obliged to make a reference for a preliminary ruling to the ECJ under Article 267 of the TFEU. EU law will also once more be treated as foreign law in UK courts, and would have to be proved by evidence.

Financial aspects will also play a role, as the European Union expects the United Kingdom to continue to pay its anticipated share of European multiannual programs, at least for the coming few years. The contributions to the EU pension scheme will also need to continue to be funded, and those former European officials who have retired and are in the United Kingdom should be entitled to receive their pensions still subject to taxation for the benefit of the European Union rather than UK taxation, just as those former EU officials of British nationality who are residing in the remaining Member States should continue to benefit from existing conditions. Under Article 28(a) of the EU Staff Regulations, it is possible for the EU institutions to take individual decisions to appoint people who are not nationals of an EU Member State as officials or temporary agents.⁶⁶ On the same basis, EU officials of UK nationality could be individually continued in their existing positions: they work for the European Union and are not there as representatives of the United Kingdom, and the Commission has made it clear that it will do its best for them.⁶⁷

The situation of UK nationals who are resident in the remaining Member States and of the nationals of the remaining Member States who are resident in the United Kingdom will need to be dealt with in

66. See STAFF REGULATIONS OF OFFICIALS OF THE EUROPEAN COMMUNITIES (2004), http://ec.europa.eu/civil_service/docs/toc100_en.pdf.

67. See Tara Palmeri & Carmen Paun, *EU leaders to UK staff: we will try to protect you after Brexit*, PU leaco (Jun. 24, 2016), <http://www.politico.eu/article/eu-leaders-to-staff-well-try-to-protect-you-after-brexit-eu-referendum-consequences-uk-leave-europe/>.

an honest and reciprocal manner.⁶⁸ It would be most appropriate for all States concerned at least to agree to honor existing rights. Possible continuing rights of employment, establishment and service provision, as well as possible rights for the economically inactive and for students will all form important parts of any deal.

The debate in the United Kingdom has become no less shrill following Theresa May's decision to call a General Election for June 8, 2017. This was designed to take account of perceived current disarray in the Labour Party and to seek a larger Conservative Party majority in the House of Commons, which would leave Mrs. May less open to the baying of the right-wing Eurosceptic wing of her party. The result was certainly not what she expected, and she has been able to cling on to power only through a rather shabby deal with the Democratic Unionist Party from Northern Ireland; this is pork-barrel politics at its lowest. What effect (if any) the election outcome will have on the negotiations will become apparent in due course, although it is already being stated that Mrs. May's negotiating red lines do not seem to be facilitating sensible negotiations.⁶⁹

The Repeal Bill, formally the European Union (Withdrawal) Bill, was published on July 13, 2017.⁷⁰ It unsurprisingly follows the approach already announced in the White Paper, discussed above. Equally unsurprisingly, it promptly ran into a barrage of criticism, not least because of the Henry VIII powers it envisages. Scotland and Wales also made their opposition plain.⁷¹ If the Scottish Parliament and the Welsh Assembly do indeed withhold legislative assent in due course, a major domestic constitutional crisis will loom.

In short, everything is up in the air at the moment, not least concerning the role of the CJEU after Brexit, given the diametrically opposed views expressed so far by the EU and British negotiators,⁷²

68. See however, THE UNITED KINGDOM'S EXIT FROM THE EUROPEAN UNION (June 2017), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/621848/60093_Cm9464_NSS_SDR_Web.pdf, the poverty of which is embarrassing.

69. See *Theresa May has 'hamstrung' David Davis in Brexit talks*, BBC (June 30, 2017), <http://www.bbc.com/news/uk-politics-40461496>.

70. European Union (Withdrawal) Bill (HC Bill 5), available at https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/cbill_2017-20190005_en_1.htm.

71. *Brexit: The UK's key repeal bill facing challenges*, BBC (July 13, 2017) <http://www.bbc.com/news/uk-politics-40589510>.

72. See Christopher McCrudden, *An early deal-breaker? EU citizens' rights in the UK after Brexit, and the future role of the European Court of Justice*, UK Constitutional Law Association, <https://ukconstitutionallaw.org/2017/06/27/christopher-mccrudden-an-early-deal->

and the feeling of *saute qui peut* is still prevalent. The first round has gone to the European Union, however, as the EU's approach of first negotiating the terms of withdrawal and only then proceeding, once sufficient progress has been made, to negotiate the terms of the future relationship, has been accepted by the British negotiating team.⁷³

The hotheaded rhetoric prevalent in certain sectors of the UK press, and the populism of politicians plodding the path to re-election on the back of misinformation, fear and prejudice, does not help create a positive climate for the coming negotiations. The result of the General Election in the United Kingdom is hardly a ringing endorsement of Mrs. May's strategy, but it is very clear that Jeremy Corbyn, the leader of the Labour Party, after a wholly unconvincing lukewarm endorsement of the "remain" option during the referendum campaign, is totally unwilling to call for a reversal of the lemming-like Brexit rush, missing thereby a major political opportunity to offer a real alternative to the myopic policy of the British Government. Reliance on the expertise of civil servants will be necessary, and a return to quiet diplomacy and negotiation would benefit all concerned. The impression at the moment is that those most concerned realize the importance of this. But the outcome of the Brexit negotiations, and the viability of Mrs. May's administration, are distinctly shrouded in haze. We will simply, like Asquith, have to "wait and see."⁷⁴

breaker-eu-citizens-rights-in-the-uk-after-brexite-and-the-future-role-of-the-european-court-of-justice/.

73. See Rob Merrick, *Brexit talks: UK caves in to EU's demand that divorce terms are established before future trade deals*, INDEPENDENT (June 19, 2017), <http://www.independent.co.uk/news/uk/politics/brexit-talks-negotiations-latest-uk-eu-divorce-deal-government-agrees-caves-in-before-trade-deal-a7798076.html>.

74. The phrase was used by Asquith often in 1910. See ROY JENKINS, ASQUITH, ch.14, (Harper Collins, 1964).

