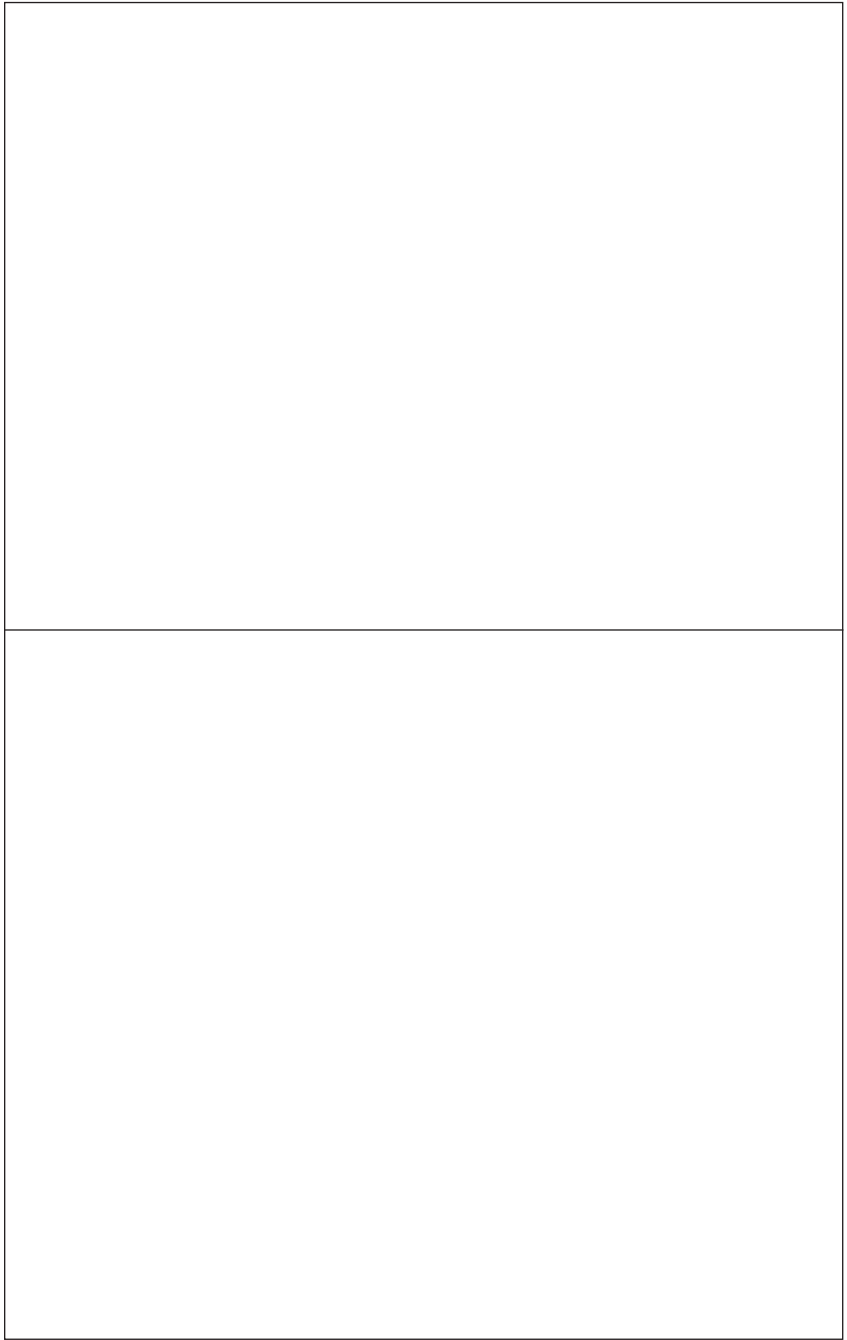


Hannes Hofmeister (ed.)

The End of the Ever Closer Union



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HART
PUBLISHING



Nomos

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

ISBN: HB (Nomos) 978-3-8487-4202-8
ePDF (Nomos) 978-3-8452-8471-2

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN: HB (Hart) 978-1-5099-2424-0

Library of Congress Cataloging-in-Publication Data

Hofmeister, Hannes
The End of the Ever Closer Union
Hannes Hofmeister (ed.)
204 p.

ISBN 978-1-5099-2424-0 (hardcover Hart)

1st Edition 2018

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Chapter I

Preface

The European integration project has been one of the success stories of the last century. The predominant *Zeitgeist* during this period was to advance this project by deepening mutual cooperation, encapsulated in the famous formula of an ‘*ever closer Union*’. Yet the European Union¹ has changed profoundly since its beginnings in the post war period. It no longer consists of the original six Member States, but has expanded to 28 states with diverse social and economic characteristics and – most notably - with diverging interests. Some therefore began to question the concept of an ‘*ever closer Union*’ – most notably the former British Prime Minister David Cameron. He started a debate about the ‘repatriation of rights’ which ultimately culminated in his promise to hold a referendum on withdrawal from the EU altogether. The result of this risky gamble is well-known: On 29 March 2017 his successor – Prime Minister Theresa May – officially notified the European Council of the UK’s intention to leave the EU. Yet the ‘disintegration debate’ is not confined to the UK, whose relationship with the EU has always been difficult. Other states – or least certain political actors in a number of EU Member States² - also contemplate the option of withdrawal or at least a re-transfer of competences. And it is not only Eurosceptic populists harbouring such thoughts. Even Europhile politicians, such as the former French President Valéry Giscard D’Estaing, no longer categorically exclude a withdrawal of Greece from the Eurozone. In nuclear-free Austria there is an ongoing debate about withdrawal from Euratom. Yet disintegration does not necessarily have to be voluntary: For example, not so long ago, Jean Asselborn, the Luxembourgian foreign minister, demanded the expulsion of Hungary from the European Union.³ So are we - *horribile dictu* - about to witness the beginning of the

1 Or EEC as it was called back then.

2 For the statement by the President of the Hungarian Parliament Kövér, see ‘Hungary to withdraw from EU in case of interference in internal affairs’, Itar Tass Online, 28 October 2014, available online at www.itar-tass.com/en/world/756971.

3 M.Weaver/ P.Kingsley, ‘Expel Hungary from EU for hostility to refugees, says Luxembourg’, The Guardian, 13 September 2016, available online at www.theguardian.com/world/2016/sep/13/expel-hungary-from-eu-for-hostility-to-refugees-says-luxembourg

end of the EU? In order to answer this complex question, this volume will analyse a number of important aspects of the looming ‘-xits’ - be it Brexit, Grexit or Plexit. It will then try to develop a set of solutions to these problems, such as the realignment and delimitation of the EU’s competences, a new normative framework for an orderly withdrawal from the Eurozone and a greater focus on the role of the regions in Europe to mention but a few.

Chapter II

“BREXIT I” – Law and Brexit

*Catherine Barnard*¹

I. Introduction

The Brexit vote came as a tremendous shock on the 24 June 2016 – even to the strongest supporters of a vote to leave. Many people have been affected both personally and professionally, especially migrant EU citizens. EU (academic) lawyers, not a group which necessarily commands public support, have had their worlds turned upside down. Years of acquiring profound knowledge of the rules of EU law, its system, its *modus operandi* – have gone up in smoke. And yet, I would argue that there is still a need for a knowledge and understanding of the EU more generally and EU law in particular. The Brexit process – the divorce, the transition and the future deal - is governed by EU law. While it may be politics that determines the content of the three deals, it is law that governs the process and provides the context for the skirmishes. In this chapter, I will demonstrate the extent to which EU law provides the framework for the negotiations. I will also argue that the death of EU law as a subject in the United Kingdom is greatly exaggerated.

II. The state of play

So Article 50 TEU has been triggered. This marks the beginning of the process of the UK leaving the EU. It has been difficult for the UK government so far: the fight over whether the executive or Parliament could trigger Article 50 TEU, involving trips to the High Court and Supreme Court;² the logistical problems of setting up and staffing two new government departments (Department for Exiting the EU (DExEU) and the Department for International Trade (DIT)); guiding the European Union (No-

1 Professor of EU Law, Trinity College, University of Cambridge.

2 R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) [2017] UKSC 5.

tification of Withdrawal) Bill through Parliament; and still the ongoing threat to the unity of the United Kingdom, from a new referendum on Scottish independence. However, with hindsight, this period may look like the calm before the storm. The next stage will be far more challenging.

Let's start with the negotiations themselves: what to negotiate and when. The European Council laid down the negotiation guidelines on 29 April 2017.³ The European Council provided that the negotiations should take place in three phases. Broadly speaking they involve phase one which covers the divorce agreement and specifically the three most contentious issues: the position of EU citizens living and working in the UK and UK citizens living and working in the EU; the border between Northern Ireland and the Republic of Ireland; and the so-called 'Brexit bill'. Only if 'sufficient progress' is made on these issues will the negotiations move on to considering phase two (transition) and phase three (the future deal). As we shall see, this phasing has become something of a straightjacket and has limited both sides in reaching a solution.

Given the sequencing of the negotiations and the short time for such a major negotiation to occur, it might be thought that speed was of the essence. In fact, no serious negotiations happened until after the French elections in May 2017. They were further delayed by the fact that the Prime Minister called a snap election for 8 June 2017 where she did not get the result she hoped for. This has led to months of infighting within the Conservative party and attempts to unseat her as Prime Minister. Then there were talks about managing the talks. At domestic level the European Union (Withdrawal) Bill was introduced (originally labelled the Great Repeal Bill). The Bill will repeal the European Communities Act 1972, the Act that took the UK into the EU, and convert the existing *acquis*, mainly EU Regulations, into UK law. Its aim is to ensure a functioning statute book on Brexit day while also ensuring consistency between the pre-Brexit and post-Brexit position. This detail of the Bill is considered further below.

3 European Council, Press release, European Council (Art. 50) guidelines for Brexit negotiations, 29 April 2017, available online at <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/>.

By August 2017 the UK government had produced some position papers on key issues like citizens’ rights⁴ and enforcement and dispute resolution.⁵ So the negotiation process only started in earnest in September, six months after the triggering of Article 50 TEU, when the Conservative government was tearing itself apart with infighting and yet further rearrangement of the team doing the Brexit negotiations. The weakness of the Prime Minister - and the uncertainty over her future (and that of her chosen negotiators) – has made it more difficult for the EU side to have confidence that she will be able to deliver on her commitments. In recognition of this – and the sluggish pace of the negotiations – Theresa May tried to reset the agenda with a speech in Florence on 22 September 2017. In contrast to her Lancaster House speech of January 2017,⁶ where she set out her twelve guiding objectives, the tone of the Florence speech was more conciliatory. It also recognised the role of the law and how the law plays a direct influence on the shape of the negotiations, a point I will return to below.

Apart from the most ardent Brexiteers, nobody is expecting the process of Brexit to be smooth or easy. Theresa May is right to dislike the language of divorce. Divorce involves separating from one spouse; Brexit involves separating from 27, all with their own conflicting interests and political agendas. This is a multi-dimensional, multi-faceted process conducted in the most febrile atmosphere against complex legal rules which both lay down the rules of the game as well as tying the hands of the negotiators. We turn now to consider these rules.

4 UK Government Policy paper, Safeguarding the position of EU citizens in the UK and UK nationals in the EU, 26 June 2017, available online at <https://www.gov.uk/government/publications/safeguarding-the-position-of-eu-citizens-in-the-uk-and-uk-nationals-in-the-eu>.

5 UK Government Policy Paper, Enforcement and dispute resolution - a future partnership, 23 August 2017, available online at <https://www.gov.uk/government/publications/enforcement-and-dispute-resolution-a-future-partnership-paper>.

6 Prime Minister Theresa May's Lancaster House speech: ‘The government's negotiating objectives for exiting the EU’, 17 January 2017, available online at <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>.

III. The legal rules shaping the Brexit process

1. Article 50 TEU

Much attention has already been given to Article 50 TEU, the skeletal provision which prescribes the process for leaving the EU. Paragraph 1 allows any Member State to withdraw from the EU in accordance with its own constitutional requirements. What those constitutional requirements are in the UK was articulated by the Supreme Court in the *Miller* case.

Article 50(2) TEU requires the Member State to notify the European Council of its intention to withdraw from the EU, which the UK did on 29 March 2017. In accordance with the guidelines provided by the European Council – which were handed down on 29 April 2017 - ‘the Union shall negotiate and conclude’ a divorce agreement with that State. The agreement is to be concluded by qualified majority voting in Council and requires the consent of the European Parliament. Crucially, Article 50(2) TEU provides that the divorce agreement will set out the arrangements for the UK’s withdrawal, ‘taking account of the framework for [the UK’s] future relationship with the Union’. This already anticipates that there will be a future deal, albeit that future deal will need to be concluded under different legal bases (see below). However, it is the language of ‘taking account of the framework’ of the future deal, that persuades many that Article 50 TEU implicitly provides the legal basis for transitional arrangements, provided they are time limited (so as not to circumvent the procedures laid down under the specific legal bases for trade deals.) Others argue that Article 49 TEU on accession makes no reference to transition, but transition arrangements are standard practice in that realm. As the QC Derrick Wyatt puts: transition arrangements of between three and five years applied to smooth the UK’s entry to the EU, so they should also apply to smooth the exit. The Prime Minister took this line in her Florence speech: ‘The framework for this strictly time-limited period [for transition – or implementation as she prefers to call it], which can be agreed under Article 50, would be the existing structure of EU rules and regulations’.⁷

7 Prime Minister Theresa May's Florence speech: ‘A new era of cooperation and partnership between the UK and the EU’, 22 September 2017, available online at <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>.

Article 50(3) TEU is the ticking time bomb: from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification, the Treaties shall cease to apply to the UK. That two-year period can be extended, but only by unanimous agreement of the 27 remaining Member States. Paragraph 3 shows how the power is now in the hands of the EU. If no agreement is reached by 29 March 2019 there will be a chaotic Brexit. The implications of this will be very serious indeed.⁸ While the UK government is now doing planning for a no deal scenario - and a certain amount of legal certainty will be provided by the EU (Withdrawal) Bill, with its aim to ensure continuity - the consequences of no agreement will be financially, economically and socially damaging. For this reason there is now some discussion as to whether it might be better to seek an extension of the two year period.⁹ Most people think that would be politically unacceptable. Theresa May has staked her premiership on delivering Brexit on 29 March 2019. For her it is important to be able to say that the UK has left the EU even if, during transition, much of EU law will continue to apply in the same way but without the UK’s input.

Another related question is whether the Article 50 notification can be withdrawn in the event that the negotiations are going badly, that there is a change of government and a change of heart. The balance of views is that the Article 50 notification can be withdrawn up until the point of departure. Lord Kerr, who was involved in drafting Article 50 TEU, thinks so, as does Jean-Claude Piris, former director general of the Council of the EU’s legal service as well as Martin Selmayr, a lawyer and head of cabinet to the President of the European Commission. Jessica Simor QC puts it this way:

As a lawyer, I agree with them. Article 50 provides for the notification – not of withdrawal but of an “intention” to withdraw. In law, an “intention” is not a binding commitment; it can be changed or withdrawn. Article 50(5) is, moreover, clear that it is only after a Member State has left that it has to reapply to join. Had the drafters intended that once a notification had taken place, a Member State would have to request readmission (or seek the consent of the other Member States to stay), then Article 50(5) would have referred not just

8 <http://ukandeu.ac.uk/research-papers/cost-of-no-deal/>.

9 J. Lis, Article 127: the obscure clause that could deliver a soft Brexit, *The Guardian* (21 September 2017), available online at <https://www.theguardian.com/commentisfree/2017/sep/21/mps-soft-brexite-article-127-cea>.

to the position following withdrawal, but also following notification. Such an interpretation is in line with the object and purpose of Article 50.¹⁰

What remains unclear is whether the EU would need to accept the UK's decision to withdraw the notification or whether it unilaterally rests in the hands of the UK. Only the Court of Justice can give an authoritative ruling on the legal questions raised here. At a political level, a change of mind by the UK raises serious implications for the UK's future relationship with the EU. For example, will the EU ever get a budget agreed with an intransigent UK sitting at the Council table? What would be the implications in the UK were there to be such a dramatic change of mind.

2. *The future deal*

a. Introduction

The divorce and probably the transition arrangements can probably be done under Article 50 TEU. However, transition – or implementation – suggests there is an endpoint. What might that be? At the moment the government seems to be negotiating with itself as to what sort of Brexit it wants: the views range from leaving the customs union and the single market combined with a narrow trade deal on tariffs to a much deeper arrangement with favourable access to the single market and some sort of customs arrangement. What we know is that the Prime Minister would like 'a new, deep and special partnership with the European Union. And this should span both a new economic relationship and a new relationship on security'.¹¹ She has, however, ruled out both joining the European Economic Area and having an agreement like the Canadian CETA – one is too deep, the other too shallow. Theresa May would like an agreement which is just right – but the precise content of this remains deeply uncertain. And this is already problematic for the UK: it argues that none of the three 'big

10 J. Simor, Why it's not too late to step back from the Brexit brink, *The Guardian* (7 October 2017), available online at <https://www.theguardian.com/commentisfree/2017/oct/07/why-its-not-too-late-to-step-back-from-brex-it>.

11 Prime Minister Theresa May's Florence speech: 'A new era of cooperation and partnership between the UK and the EU', 22 September 2017, available online at <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>.

ticket’ issues which must be resolved at phase one can be resolved until it has an idea as to what the final deal will look like. However, this is a phase three issue which the Commission’s negotiator, Michel Barnier, has no powers to discuss. One of the aims of the Florence speech was to ask the EU to allow the Commission to move on to negotiating at least the transition phase:

It is clear that what would be most helpful to people and businesses on both sides, who want this process to be smooth and orderly, is for us to agree the detailed arrangements for this implementation period as early as possible. Although we recognise that the EU institutions will need to adopt a formal position.¹²

But all of this presupposes that there is some sort of endpoint. And this means that there should be a trade agreement. This trade agreement (or agreements for there may be more than one) must be adopted under different legal bases – not Article 50 TEU. One possibility is Article 207 TFEU, another is Article 217 TFEU. In both cases the process in Article 218 TFEU applies.

b. The future trade agreement

Article 207: Free Trade Agreements

Article 207 TFEU concerns free trade agreements between a third country (i.e. a non-Member State which is what the UK will be post Brexit) and the EU, acting in the framework of its common commercial policy:

The common commercial policy shall be based on ... the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.¹³

12 Prime Minister Theresa May's Florence speech: ‘A new era of cooperation and partnership between the UK and the EU’, 22 September 2017, available online at <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>.

13 Article 207(1) TFEU.

The titles of agreements concluded under Article 207 TFEU can vary depending on what the partner wants. They may simply be called Free Trade Agreements (FTAs), such as the EU-Singapore FTA or the EU-South Korea FTA. Alternatively, they may be called Comprehensive Economic Trade Agreements (CETAs) or Economic Partnership Agreements. The recent free trade agreement with Canada was a CETA.

Article 217 Association Agreements

Article 217 TFEU also concerns agreements with third countries, but usually in the context of deeper and closer arrangements. These are called Association Agreements (AAs). Article 217 TFEU provides:

The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.

Association Agreements were signed with Ukraine, Georgia and Moldova in 2014 on the basis of Article 217 TFEU. According to the Commission, these three AAs represent the most extensive form of co-operation offered by the EU to its non-candidate neighbours to date. They foresee far reaching political and economic integration with the EU by significantly deepening political and economic ties. The political and cooperation provisions of the Association Agreement (AA) with Ukraine have been provisionally applied since November 2014. The AA also contains a Deep and Comprehensive Free Trade Agreement (DCFTA) which the EU and Ukraine have provisionally applied since 1 January 2016. Such agreements often involve the partner country accepting most of the EU's *acquis communautaire*, i.e. most rules concerning the single market and other parts of the EU legal order.

It will ultimately be a political decision whether the future deal the UK wishes to adopt will be under Article 207 TFEU as a free trade deal (which as the Canadian CETA shows can be broad in scope) or as an Association Agreement (deeper but suggests ever closer cooperation with the EU) or possibly both. It may be that Article 217 TFEU will be the favoured option given the depth of the partnership called for by the Prime Minister. However, the divide between Article 207 and 217 TFEU is less clear than might be thought.