

Friedemann Kainer/René Repasi (eds.)

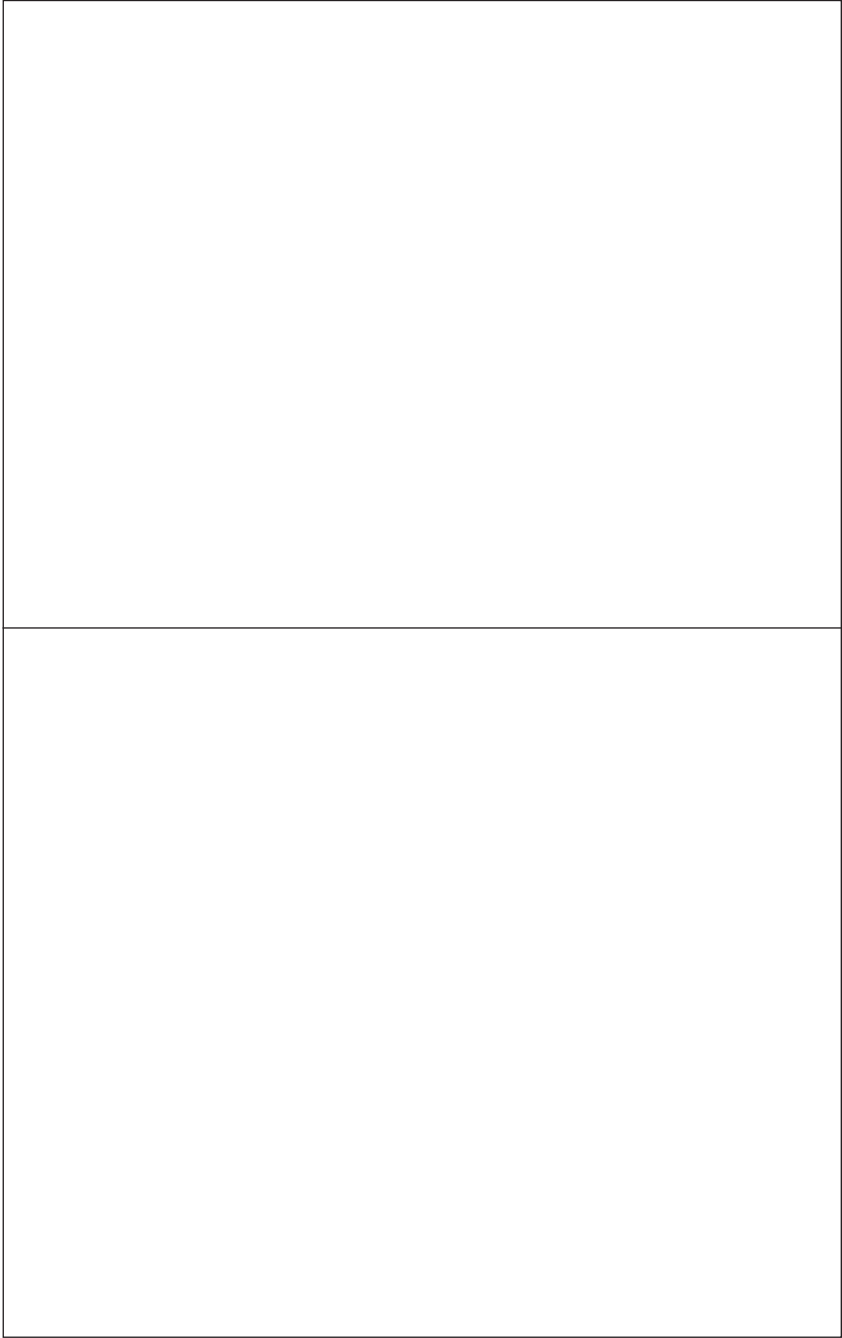
Trade Relations after Brexit



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Trade Relations after Brexit: An Introduction

Friedemann Kainer & René Repasi

The trade relations between the EU and the UK are intense. The economies of both are deeply interwoven. In 2017 the EU accounted for 44% of the UK exports and 53% of the imports.¹ The UK had in 2017 an overall trade deficit with the EU of around 78 billion Euro. Whilst the number dropped in the last decades in relation to exports from 54.6% in 1999 to 44% in 2017, the number in relation to imports remained stable with 56% in 1999. These numbers make clear that any changes to the legal framework defining the trade relations between the EU and the UK will have a significant impact on trade relations that are meaningful for the UK.

As it stands today, trade relations between the EU and the UK will have to be completely rearranged. This is the result of the referendum of 23 June 2016, which was initiated at the suggestion of then Prime Minister David Cameron and paved the way for the UK's withdrawal from the EU with a 51.9% 'leave' result. Although the referendum was only advisory in nature and does not bind Parliament, Theresa May, who took the office of Prime Minister soon after the resignation of David Cameron, was determined to deliver 'Brexit' and to fulfil the will of the people as expressed by the majority in the referendum vote. Following the vote, there was no debate about the promises made by withdrawal campaign, which was by no means completely committed to the truth. This is astonishing because key elements of the leave campaign were declared untrue already days after the referendum took place. Nor were the nations of the United Kingdom given a say. The latter particularly affects the Good Friday Agreement, which has constitutional status in Britain and ensures peace in Northern Ireland.

Even if the result of the referendum has not been and is not questioned, it only gives an indication of the direction of the political path that the UK has to take: it has to leave the European Union. Important questions as to what kind of 'Brexit' should take place were not addressed by the referendum. The will of the people voiced therefore that the UK should leave the

1 These and the following numbers are taken from *House of Commons*, Statistics on EU-UK trade, Briefing Paper, No. 7851, 11 January 2019.

EU, but the future shape of political and economic cooperation remained completely unclear and is still extremely controversial today. Key issues, such as the consequences of a withdrawal for the fragile balance of communities in Northern Ireland, were scarcely touched on in the referendum campaigns and even less publicly discussed.

The actual design of the UK's withdrawal lay with politicians framed by the two-stage withdrawal procedure under Article 50 of the EU-Treaty. The withdrawal clause was by no means an integral part of the original Treaty of Rome, which was concluded for an indefinite period of time. It originated textually from the 'Convention on the Preparation of a Constitution for the European Union' and was put into force unchanged by the Lisbon Treaty in 2009. The provision allows each Member State to initiate a withdrawal procedure by means of a unilateral declaration. The withdrawal procedure consists essentially of two periods. The first step is to negotiate a withdrawal treaty within a period of two years, which sets out the details of the withdrawal by taking into account the framework for the future relationship between the withdrawing Member State and the EU. While the withdrawal treaty therefore essentially contains transitional provisions and rules dealing with enduring legacy issues stemming from the period of membership, the withdrawing State and the EU only negotiate their future relationship after the withdrawal has come into force – on the basis of a policy document negotiated and agreed upon in the first stage, which sets out the prospective framework of the future relationship.

In the particular case of the withdrawal of the UK from the EU, the issue of a future external border between the EU and the UK on the Irish island became particularly pertinent. In order to prevent any revival of the Northern Irish conflict, a hard border on the Irish island with physical border controls had to be avoided by all means. Hence, the UK had to accept a so-called 'backstop' solution that was designed to prevent a controlled customs border in Northern Ireland. This highly controversial 'backstop' led to the withdrawal agreement failing in the House of Commons in three votes. At the time of writing and shortly after the announcement of Theresa May's resignation as Prime Minister, it is unlikely that the withdrawal agreement will find a majority in Parliament.

Irrespective of whether or not it is still possible to ratify and to subsequently implement a withdrawal agreement and irrespective of whether there will be a 'hard Brexit' or a variation of the withdrawal agreement, it remains a permanent task for both the EU and the UK to provide a stable and lasting basis for trade and future political relations between them. It can be considered certain that, in the event the current version of the withdrawal agreement will be ratified, the envisaged transition period of 21

months (as planned until 31 December 2020) will not suffice for the negotiation and ratification of an agreement covering the future relationship between the EU and the UK; on the contrary, the negotiations are unlikely to last any shorter than in the case of CETA, for example. This is supported by the UK's antagonistic claim to largely regain sovereignty on the one hand and to continue frictionless trade on the other, despite the current approximation of laws between the EU and the UK in a 45-year history of joint integration.

This book discusses the negotiation process for a future agreement between the EU and the UK. It deals with specific reference questions in order to present solutions and arguments for the negotiations. What could be the basis for a free trade agreement? What international precedents could the agreement be based on? What concrete problems will arise and how could they be tackled? What solutions are available to combine the conflicting ends of free trade and sovereignty?

Against the backdrop of these overarching questions, the book is divided into three parts, dealing with, first, the current state of affairs, second, the principle foundations, on which any legal framework of the future relationship will be based, and, third, specific trade-related issues that will have to be addressed by a future trade agreement between the EU and the UK.

The first part gives attention to the current state of affairs. Here *Elmar Brok*, being a member of the European Parliament's Brexit Steering Group, and *Anne Liekenbrock* develop the basic lines of the EU 27's negotiating position, drawing on the (pre)history of the European Union, the goals of the British Brexit movement, the negotiating goals of the UK Government and the EU's response and strategy. In particular, it outlines the course of negotiations to date within the framework of the withdrawal agreement. *Patrick Minford* as a member of the 'Brexit' supporting group 'Economists for Free Trade' contrasts this with the view of the 'Leave' campaign. To this end, he sets out a very different story of the European integration from the perspective of the UK, an organisation that is transforming itself from an economic community into a political union and taking over more and more power and control. In the editors' opinion, the understanding of this position is essential for a successful negotiation strategy. Unless a moderate political camp prevails in Westminster, this narrative and the *Minford* idea of untying economic chains will stand in the way of closer ties between the UK and the EU. The economic promises of a 'Brexit' as hard as possible may be highly exaggerated, but they are part of the 'Brexit' movement. *Jürgen Matthes* counters this economic minority position with a series of arguments that put the idea of a 'Global Britain' into perspective and draws a

rather gloomy overall economic picture of Britain as a result of its withdrawal from the EU. *Matthes* also discusses the – relatively manageable – economic consequences of Brexit for Germany and the EU. This perspective is of great importance for the negotiation process because it allocates the negotiating powers in accordance with the economic interests that are at stake. Depending on which economic view prevails on the part of the British negotiation team, a harder or softer negotiating line may be expected. Recent economic estimates by the British Government itself point in the second direction.

The second part of the book turns to the foundations for the future trade relationship between the EU and the UK. *Christoph Herrmann* looks at the WTO. Trading under the conditions defined by WTO law is the absolute fallback framework for the trade relations between the EU and the UK since both are fully-fledged members of the WTO. In this context he refers to the issue of schedules of concessions and tariff rate quotas that are currently held by the EU for both. ‘Brexit’, so *Herrmann*, will require a renewal or revision of these schedules and their notification to the WTO, which will trigger lengthy and cumbersome negotiations with the other WTO members as changes to the EU schedules due to ‘Brexit’ must be considered as changes to the value of concessions. Due to the generally pragmatic approach pursued in the WTO and by its members issues that have to be addressed at the level of WTO law will most likely be solved after ‘Brexit’ so that the WTO will form a minimum framework within which the EU and the UK will be able to trade with each other. Any further step towards more integrated markets between the UK and the EU will require a tailor-made free trade agreement. *René Repasi* doubts, however, that any free trade agreement between the EU and the UK can uphold the level of market integration as it currently stands under the conditions of EU membership. He explains that the instrument of a traditional international law agreement does not allow for far-reaching mutual recognition obligations as such agreements cannot provide for the necessary mechanisms to avoid a run to the bottom in terms of standards. This inability is due to the fact that only autonomous institutions with own decision-making powers that are sufficiently democratically legitimatised can provide for such mechanisms. The mere *ex ante* ratification and possible *ex post* approval of decisions taken by Treaty bodies is not sufficient to legitimise such far-reaching decision-making powers. He therefore concludes that any agreement between the EU and the UK will fall short of EU membership and therefore leads to less market integration than currently under the conditions of the EU internal market. Nevertheless, it is the objective of both sides to make the future economic objectives as ambitious as possible,

in particular, in order to ensure the free movement of goods and services and, in particular, not to jeopardise the supply chains necessary for the economy based on the division of labour.

On this basis, *Friedemann Kainer* examines the need for a far-reaching alignment of standards between the EU and the UK. He develops the thesis that ambitious market access rights, as provided for in the EU by the fundamental freedoms, are only compatible with the EU competition principle if both parties guarantee a level playing field and thus avoid competition distorting regulatory cost difference. In his view, the scope of this regulatory alignment must go beyond the directly affected product standards and also include general standards in areas such as the environment, social affairs and labour, etc. *Kainer* proposes to make sector-specific market access dependent on a sufficient alignment of standards in future and takes the EEA as a model in this respect. A newly created international authority is to be responsible for the necessary administration. He also shows that such an approach is consistent with the more general objective of avoiding incentives ("cherry-picking") to leave the European Union.

The third part of the book looks at specific issues that a future trade agreement between the EU and the UK has to address given the UK's current fully-fledged integration in the EU's internal market. *Armin Cuyvers* speaks about free movement of goods post-Brexit and looks at the triangle of conflicting objectives in the shape of 'sovereignty, 'trade' and the 'Northern-Irish peace'. He makes clear that all proposals that are currently discussed fall short of realising all three objectives. Finding an optimal solution that keeps the Irish border open for goods in terms of customs and regulatory alignment, that takes sovereignty seriously and avoids the divisibility of the four freedoms requires both the UK and the EU to reconsider their fundamental policy objectives. If not, he predicts that any solution that is found will harm the free movement of goods. *Gavin Barrett* turns thereafter to the freedom of services. He places the freedom of services in its political context in the sense that providing cross-border services requires cross-border free movement of natural persons, who provide services – something that the UK excludes. Furthermore, leniency on the part of the EU with regard to the future regime on free movement of services would set incentives for future disintegration of the EU as it could show to other EU-sceptic countries that they can get the benefits of the internal market without the institutions that protect it. After having analysed the various policy documents and proposals for a future trade arrangement on services he concludes that everything currently proposed falls short of what a fully-fledged EU membership can offer. That is especially true in the area of services where a deeper liberalisation is much more difficult to achieve

than in the area of tariffs and when you are within a bloc of countries than outside of it. The special case of financial services, which is discussed by *Wolf-Georg Ringe*, constitutes a showcase in this regard. This is the only economic area, in which the UK has a trade surplus with the EU. Having an open access to the internal market is therefore in the interest of both the UK and the EU. Yet, having the recent financial crisis in mind, the dangers linked to low protection standards and supervision are deeply enrooted in the minds of policymakers. The common interest of both the UK and the EU in an open market access will, however, prevail according to *Ringe* so that he expects a legally robust solution for the free movement of financial services that protects vital economic interests of business located on both sides of the Channel.

After having discussed the product freedoms, *Menelaos Markakis* looks at the free movement rights of persons. Since the rights of Union citizens in the UK and of UK citizens in the EU are one of the core issues related to the withdrawal of the UK from the EU, his contribution deals with both the draft withdrawal agreement and a future mobility framework. Whilst the withdrawal agreement deals with the legacy issues by a continuation of the existing EU legal regime transposed into articles of the withdrawal agreement, the situation looks more complicated with regard to a future framework of mobility. Outlines for such framework reflects the promise made by 'Brexit' to put an end to the free movement of persons. The policy documents are rather vague and seem to be open for a strictly work-related free movement. His contribution concludes with an outlook on the legal situation of persons in the event of a 'no-deal Brexit' that contains only one certainty, which is an unbearable uncertainty for the persons concerned.

Florian Wagner-von Papp's contribution deals with the question of how cooperation in competition policy between the EU and the UK can be organised in the future. Naturally, the main question here is whether it will be more likely to be characterised by approximation or whether the UK could go its own way in the areas of antitrust law, merger control or state aid control. Based on the economic expediency of the greatest possible level playing field, *Wagner-von Papp* examines the changes currently planned in the UK. The greater freedom resulting from the withdrawal from the EU could lead to deviations, in particular in the field of supervision of state aid. The author shows how important standards especially in the area of state aid are by taking a closer look at the provisions foreseen by the so-called 'backstop' in the Protocol on Ireland and Northern Ireland of the draft Withdrawal Agreement. From a procedural perspective, *Wagner-von Papp* discusses future cooperation between the EU and UK competition au-

thorities. He considers further membership of the Competition and Markets Authority (CMA) in the ECN unlikely. The contribution finds further implications of Brexit in the context of private enforcement (in particular by being no longer bound by decisions of EU competition authorities) as well as in the necessity of transitional rules for ongoing proceedings, which are addressed in the Withdrawal Agreement, but which would be missing in the case of a no-deal Brexit.

Another field of particular importance for the future trade relations between the UK and the EU is public procurement. *Albert Sanchez-Graells* presents some thoughts on the EU-UK procurement-based trade relations after ‘Brexit’. In his view, public procurement is a major tool to dismantle non-tariff barriers to trade in public markets, to foster administrative cooperation as a trade-facilitation strategy, and to boost the enforceability of a rules-based system. A future trade agreement between the EU and the UK should accordingly include rules on public procurement that aim at realising precisely these objectives. In achieving this effort *Sanchez-Graells* identifies two obstacles: the adjustment of current commitments under the WTO agreement on government procurement (GPA) and the current position of the UK to reject the CJEU’s jurisdiction on the interpretation of EU law. Once these issues are solved in a satisfying manner, a public procurement chapter in a free trade agreement between the EU and the UK can be successful.

In his concluding contribution, *Peter-Christian Müller-Graff* discusses possible scenarios in the future relations between the EU and the UK with regard to the legal protection of trade-related rights. As the experience of over 60 years of the Treaty of Rome has shown, it is precisely the subjective legal character of the fundamental freedoms and their legal enforcement by the Member States’ courts and – above all – the European Court of Justice that has made internal market law effective. The author deals with possible scenarios (no agreement, common rules for trade relations, scenario for establishing rules for judicial protection) and elaborates on models for the most effective protection of market-constituting interests. These can range from autonomous legal protection by courts of both sides to the attribution of legal protection to the courts of one side (the ECJ). There are also clear limits indicated, as can be seen, for example, with regard to the case of a ‘Common Dispute Resolution Model’, from the most recent Singapore opinion and the ‘Achmea’ ruling of the ECJ. The contribution concludes with three recommendations for the ongoing negotiations with the EU: to immunise the values and objectives of the Union against any relativising interests of the UK; to prevent a proliferation of bilateral treaties

that might contribute to a weakening of legal protection; and to keep the possibility for a potential return of the UK to the EU in the future open.

This edited volume emerged from a conference that was jointly organised by the Mannheim Centre for Competition and Innovation (MaCCI) and the European Research Centre for Economic and Financial Governance (EURO-CEFG) of the Universities of Leiden, Delft and Rotterdam, which took place on 25 and 26 January 2018 in Mannheim. The conference was entitled ‘Trade Relations after Brexit: Impetus for the Negotiation Process’ and was financially generously supported by both centres. The contributions to the volume were for the most part presentations held at this conference. The contributions for this edited volume were all submitted before the expiry of the original negotiation period for a withdrawal agreement, which was 29 March 2019. They therefore reflect the state of the negotiations between the EU and the UK and within the UK of before this date. Still more than two and a half years after the referendum vote on the withdrawal of the UK from the EU it is unclear, in which direction the relationship between the EU and the UK will head. Even remaining a member of the EU is not yet off the table. Provided some sort of ‘Brexit’ will happen, the legal arrangement of this withdrawal remains a mammoth task for a whole generation of lawyers. Howsoever a ‘Brexit’ may look like or take place, it is clear that both the EU and the UK being geographically so closely located will have to find a legally sustainable way to frame their future trade relationship. This edited volume wants to present its contribution to perform this task.

Part 1 State of Affairs

Brexit – The Negotiation Position of the EU 27

Elmar Brok & Anne Liekenbrock

The European Union (EU) has always stood for political integration through economic integration and has ensured peace and prosperity on the European Continent. Of course, taking this for granted seems rather foolish as history would suggest something different. The Napoleonic wars had just ended in 1815, just 4 years before Queen Victoria was born. Queen Victoria and her ambitious husband Albert shared the same ideas and ideals and wanted to create alliances across Europe that would bring peace to the divided continent.

Political alliances of the time were as much borne out by blood as by institutions and treaties. Queen Victoria and her husband married off their children into other royal and noble families across Europe. Very successfully too, she ended up with 40 grandchildren and 88 great-grandchildren, who were widely spread throughout the major and minor monarchies of Europe – earning her the moniker of “the grandmother of Europe”.

Striving towards peace in Europe had little to do with general broad-mindedness, but rather to stabilise Great Britain’s claim to power and to build a dynasty that would stretch across Europe. Britain’s imperial century saw its territories and peoples expand to cover almost a quarter of the world’s population. Building the greatest empire the world has ever seen, was neither completed in a day, nor was it won without the use of weapons or violence. To the contrary, securing the British Empire turned out to be a bloody business.

Sadly, Queen Victoria’s dream of a peaceful Europe was shattered by human nature. The catastrophic wars of the 20th century could not be stopped – despite the existing family bonds. In the era of imperialism, countries such as France, Austria and Germany engaged in political, economic and territorial power games that proved both irresistible and fatal. When in 1914 Kaiser Wilhelm II of Germany’s, King George V of England’s and Tsar Nicholas II of Russia’s countries were on the verge of entering World War I, the family bond (they were cousins), childhood memories and a previously close relationship could not stop the start of the war. The famous ‘Willy–Nicky’ correspondence between Wilhelm and Nicholas (both grandsons of Queen Victoria) just before the outbreak of the First

World War trace the sentiments of the time quite well. The early telegrams were very friendly, leaning heavily on the family bond: “[...] to try and avoid such a calamity as a European war I beg you in the name of our old friendship to do what you can to stop your allies from going too far. Nicky”,¹ Inevitably, however, they become harsher and more distant over time, as the prospect of war grows ever closer: “Immediate affirmative clear and unmistakable answer from your government is the only way to avoid endless misery. Until I have received this answer alas, I am unable to discuss the subject of your telegram. As a matter of fact I must request you to immediately order your troops on no account to commit the slightest act of trespassing over our frontiers. Willy.”² The same day this telegram was sent, Germany declared war on Russia.

Through the lens of European history, we can safely say that the European Union is a success story. It has brought not only peace, welfare and prosperity to the continent and has made all nations draw closer together in partnership – not only economically but also culturally. From the model of single, small and medium-sized States to a union that is not only economically strong but has also managed to reinforce itself politically in a globally more and more intertwined world.

Every country that is part of the European Union brings its own bit of culture and history to the table, but ultimately, we all share the same basic values: human dignity, freedom, democracy, equality, rule of law and human rights. These values constitute the basis of the European way of life. “If Europe were once united in the sharing of its common inheritance there would be no limit to the happiness, prosperity and glory [...]”³ Winston Churchill’s quote is as apt today as the day it was uttered. Not only have we managed to keep peace, but we have steadily built a common European identity. This does not mean that we have to give up our national identities, that we cannot be proud of them too. It is an addition to what we already have. It enriches us and broadens our view and possibilities. There is no need to be either German or European, either English or European. We can be both! We can listen to Italian opera and British pop music, like French wine and British ale. We should be proud of this achievement.

1 Neiberg, *The World War I Reader* (2007), “Telegram One: Tsar to Kaiser, July 29, 1914”, page: 46.

2 Neiberg, *The World War I Reader* (2007), “Telegram Ten: Kaiser to Tsar, August 1, 1914”, page: 49.

3 Winston Churchill, Speech delivered at the University of Zurich, 19 September 1946. <https://rm.coe.int/16806981f3>.

Make the UK great again?

In her (in)famous *Mansion House* speech in March 2018, Theresa May presented her vision for the UK's relationship with the EU after Brexit. The Prime Minister made a stand on what kind of a country the UK wants to be once it leaves the EU: “[...] a modern, open, outward-looking, tolerant, European democracy. A nation of pioneers, innovators, explorers and creators. A country that celebrates our history and diversity, confident of our place in the world [...]”⁴ Where is the dividing line from the EU itself? There are many who would happily substitute this as the vision for our continent as a whole. So why did the UK and its citizens decide to leave? Was it to become more modern, more open and more outward-looking than the EU? Arguably three themes stood out during the campaign: sovereignty, migration and money.

The UK's loss of sovereignty

First, there was the question about the loss of sovereignty of the UK under the EU's umbrella. Boris Johnson complained about “a slow and invisible process of legal colonisation, as the EU infiltrates just about every area of public policy”⁵ and made this the central tenet why he wanted to leave the EU. There may be good reason why this line of argument was so enticing. Robert Armstrong, the chief leader writer of the Financial Times (FT), made a convincing (and very funny) argument in August that distaste for being told what to do is the true essence of the British character.⁶

But here, we will repeat the challenge of Poland's former Foreign Minister – Radek Sikorski to British “leavers”, who asked what is the first thing you wish the UK Government to do that the EU is preventing you from doing? Nobody has yet been able to answer this challenge. Either, it can be done under existing EU laws, or has nothing to do with the EU.

There is no denying that the EU today is a different beast to the one that was brought to life as the European Economic Community (EEC) in 1958.

4 Theresa May, speech at the Mansion House <https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union>, all sources last accessed on 07.12.2018.

5 B. Johnson, ‘Does the EU impact on UK sovereignty?’, BBC, <https://www.bbc.com/news/uk-politics-eu-referendum-35630757> (23.02.2016).

6 Armstrong, ‘Why Stubbornness is the Secret to Britishness’, Financial Times, <https://www.ft.com/content/0c454858-9408-11e8-b67b-b8205561c3fe> (01.08.2018).

While the EEC focused on intertwining European countries on an economical level in order to avoid yet another war on the continent, the EU has been given new responsibilities by Member States for many different areas of policy reaching from human rights to climate action and trade⁷. However, there are also limitations to the EU's influence on its Member States. It has never tried to change the constitutional structure of its Member States or align languages, cultures and traditions.

Klaus Welle, Secretary General of the European Parliament, stated in a speech in 2016 that “[...] *Political minorities, religious minorities, ethnic minorities. We are an assembly of minorities.*”⁸ The EU's model of sovereignty reflects its general notion of pluralism. With the distribution of power between the European Commission (EC), the European Council (Council) and the European Parliament (EP) the EU's countries are represented by their governments but additionally via the bridge function via the direct election of the EP every five years. This adds a vertical power to the horizontal power the EU carries via the EC.

The merits of the EU's involvement in the myriad of different realms that come under its command may be debatable. However, one thing that should not be denied is the careful justification the EU applies to getting involved in any of these areas. One of the most common turns of phrase in EU-speak is “subsidiarity” – the notion, in essence, that if it can be done by the Member States it should be and the EU should keep its nose out of whatever it might be.

We should also not forget that the UK is part of the EU, not a disinterested observer. Since the UK joined the EU in 1973, it has been shaping and creating the EU we live in today. The UK was part of every decision to extend the EU's competences and every legislation process. For those in the Brussels bubble, the efficiency and influence of the UK's civil servants in ‘UKRep’ have long been the envy of other countries. Michael Gove's *idea* “[...] *our membership of the EU prevents us being able to change huge swathes of law and stops us being able to choose who makes critical decisions which*

7 https://europa.eu/european-union/topics_en.

8 Welle, ‘Europe and Sovereignty: Realities, Limits and Projects’, Egmont Royal Institute for International Relations, <http://www.europarl.europa.eu/the-secretary-general/en/%E2%80%9Ceuropa-and-sovereignty-realities-limits-and-projects%E2%80%9D>.

*affect all our lives*⁹ gives a false impression of reality. The UK has on an average voted 95% with the rest of the European Council.¹⁰

“TAKE control” was one of the slogans of the pro-Brexiters – it almost felt as if they were not part of the EU’s club but merely the victim of the EU’s dastardly plans. The discussion about sovereignty feels nostalgic, dowdy. Like the parallel pitch for sovereignty in today’s United States, it feels like a movement looking for inspiration in the past, not the future. Not make the UK great but make the UK great *again*. Whereas all other EU member States have understood that they cannot survive in a globalised world, with new economic and geopolitical challenges, the UK wants to go back to a model of nation States that seems obsolete. As the Danish Finance Minister, Kristian Jepsen, puts it: “*There are two kinds of European nations. There are small nations and there are countries that have not yet realized they are small nations*”.¹¹

Unsurprisingly, some people wonder if the UK is still hanging on to former times, when the UK was an imperialistic global power. A time when the narrow strip of water separating the UK from the rest of the continent took on an outsized importance and the UK’s view was seen to be determinedly out to the rest of the world, rather than towards its immediate neighbours. The machinations of Victoria and Albert indicate that the reality was rather less simplistic but the tried and trusted narrative claims that geographic isolation gave the UK the possibility to keep its distance from European politics – a luxury the rest of the continental countries were unable to afford. Whatever the true nuances of the UK’s former geopolitics, there’s likely to be more than a grain of truth in the idea that the UK traditionally had more space to make its own decisions, rather than having to listen to others and to compromise. This is of course more difficult as a member of the EU. The EU’s *raison d’être* is based on consensus, political and economic collaboration and the shared idea to strive in a globalised world with many new challenges, which states on their own will hardly be able to deal with.

9 Gove, ‘EU referendum: Michael Gove explains why Britain should leave the EU’, Telegraph, <https://www.telegraph.co.uk/news/newstopics/eureferendum/12166345/European-referendum-Michael-Gove-explains-why-Britain-should-leave-the-EU.html> (20.02.2016).

10 UK in a Changing Europe Fellows and Full Fact team, ‘EU facts behind the claims: UK influence’, Fullfact, <https://fullfact.org/europe/eu-facts-behind-claims-uk-influence/> (25.04.2016).

11 Jepsen, conference ‘Road to Brexit’, Politico, <https://www.politico.eu/article/kristian-jepsen-brits-angry-at-danes-small-nation-jibe/> (13.06.2017).

So what does “TAKE control” mean? When Europhobic populists call for ‘sovereignty’, they mean ‘supreme authority’. Hence, nothing higher than their own national authority, freedom to do what they want. This, rather simplistic, idea of sovereignty would postulate, that the actions of countries are not influenced by the actions and ideas of other countries. An idea that we can discard rather quickly in the 21st century, where the interdependencies between States in all kinds of areas are undeniable. The UK has in the past decades decided to block the idea of a common EU defence policy. The UK’s “NATO first” attitude came in the way of the EU’s proposed defence cooperation. For example, the idea of an EU operational headquarter independent from that of the NATO. Despite this, the EU Member States cooperation in many areas connected to the EU’s defence policy has continuously increased in the past decades. In 2009 the EU passed a directive requiring member States to publish defence tenders and contracts the same way as other public procurement projects recarried out in the EU. The only country that really opened up its procurement to suppliers from other EU member States was the UK. Also, the UK has continuously driven the Commission’s efforts to improve the EU’s defence market and make it more competitive, as the EU’s national defence budgets are often spent inefficiently.

The protection of the territory in today’s world depends more and more on cooperation. This is the same for a number of other issues such as global warming, terrorism or the safeguarding of our energy supply. In addition, economic issues do not stop at the frontiers of our States. Spillover effects such as the financial crisis in 2009 are not a national matter but are better dealt with together.

Another question that arises when talking about the UK’s sovereignty is the UK’s memberships in NATO, the European Convention on Human Rights and the UN, among others. Here the UK is obliged to defend their allies in case of war, to uphold fundamental rights of its citizens and cooperate on economic, social, cultural and humanitarian issues. So, is the answer to leave such organisations, conventions and treaties? Or are those in favour of such ‘sovereignty’ comfortable with such inconsistencies?

The Brexiteers “TAKE control” slogan gave the illusion that supreme authority is still possible in the 21st century. The fact that so many people seem to have agreed with this idea perhaps shows that the UK never fully managed to arrive in the EU in the first place, having failed to understand what they were signing up for.

Migration

One of the lowest moments during the Brexit campaign was when the words *"Breaking Point – The EU has failed us all"* were placed on a poster featuring refugees crossing the border between Croatia and Slovenia – most likely fleeing from war. Nigel Farage, the leader of the right-wing populist UK Independence Party (UKIP), wanted to make a bold statement and show his voters how endangered their homeland was by the invasion of the masses of refugees from the European mainland – sad for him, that he ran out of refugees at the UK's own borders.

Secondly, the refugee crisis was a simple peg for those in favour of the UK leaving the EU to hang their hats on. Change in society is always cause for concern as it comes with uncertainties. So sadly, the campaign by Vote Leave, based on wrong facts and designed to scare the people was and still is successful. Michael Gove, Justice Secretary, "warned" the public in an article, published by *The Times* in April 2016: *"Because we cannot control our borders – and because our deal sadly does nothing to change this fact – public services such as the NHS will face an unquantifiable strain as millions more become EU citizens,"* he wrote. *"There is a direct and serious threat to our public services, standard of living and ability to maintain social solidarity if we accept continued EU membership,"* he added.

The reality is that the UK has largely been a bystander as the masses of people that had to flee their countries in 2015 knocked on Europe's doors. Once more, it fell back on that thin strip of water. As a non-Schengen country, it was easy for them to control their borders and select whom they would let into the UK and, more importantly, whom not. While Germany accepted 712 235 refugees in 2016 and Italy 128 850, the UK only accepted 34 780.¹²

12 Eurostat, 'Asylum and first time asylum applicants by citizenship, age and sex Annual aggregated data,' [23](http://appsso.eurostat.ec.europa.eu/nui/show.do?query=BOOKMARK_DS057066_QID_5C5B0FBF_UID_3F171EB0&layout=TIME,C,X,0;GEO,L,Y,0;CITIZEN,L,Z,0;SEX,L,Z,1;AGE,L,Z,2;ASYL_APP,L,Z,3;UNIT,L,Z,4;INDICATORS,C,Z,5;&zSelection=DS057066CITIZEN,EXT_EU28;DS057066UNIT,PER;DS057066ASYL_APP,NASY_APP;DS057066INDICATORS,OBS_FLAG;DS057066SEX,T;DS057066AGE,Y_LT18;&rankName1=UNIT_1_2_1_2&rankName2=AGE_1_2_1_2&rankName3=CITIZEN_1_2_1_2&rankName4=INDICATORS_1_2_1_2&rankName5=ASYLAPP_1_2_1_2&rankName6=SEX_1_2_1_2&rankName7=TIME_1_0_0_0&rankName8=GEO_1_2_0_1&sortC=ASC_1_FIRST&rStp=&cStp=&rDCh=&cD-</p>
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When in March 2016 the EU and Turkey reached an agreement in order to stop the flow of irregular migration via Turkey to Europe it helped control an unprecedented migration crisis in Europe. The number of refugees from Syria reduced significantly in only one year, from 1 322 845 in 2015 to only 712 235 in 2017. To put those numbers into perspective, in 2015 Turkey received approximately 1.2 million and in 2017 almost 3.6 million refugees only from Syria. However successful this deal was for the EU, it has been criticised by human rights groups as well as European politicians. Until today, it has not provided the wanted improvement for the refugees itself – and that despite high payments of the EU to Turkey.

When Mr. Gove claims that the UK will face a future migration ‘free-for-all’ unless it leaves the European Union, one has to wonder where he thinks all of those people will come from. The “Vote Leave” campaign claimed that the UK population could increase by 5.2 million by 2030¹³. They base this on the assumption that Turkey, Albania, Montenegro, Serbia and Macedonia would join the EU by 2020 and that their citizens receive the automatic right to live in the UK.¹⁴ The possibility that any of these countries will enter the EU in the next years is practically zero. It’s not just a case of the accession criteria but also politics. It is safe to say that Mr. Gove’s warning was “*much ado about nothing*”¹⁵.

Sadly, it has become tough-sell politically in recent years to make the case in favour of immigration. Wild claims that the “*migrant crisis will cost £20 BN*” or “*migrant mothers cost NHS £103 BN*” published by the *Daily Express* tabloid predict a dark economic future for the UK if more migrants are allowed in. Academic studies that look at the actual impact migration has on the labour market, economic growth and the overall costs for the government associated with net migration tend to take a less pessimistic view.

In Europe, labour markets have strongly benefited from migrants, who accounted for 70% of the increase in the workforce in Europe over the past

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- 13 Gove, ‘Soviet-style control freaks are a threat to our independence’, *The Times*, <https://www.thetimes.co.uk/article/soviet-style-control-freaks-will-worsen-migration-free-for-all-m3rfb6vmb> (25.04.2016).
- 14 Gove, ‘Gove: EU immigrant influx will make NHS unsustainable by 2030’, *The Guardian*, <https://www.theguardian.com/politics/2016/may/20/eu-immigrant-influx-michael-gove-nhs-unsustainable>.
- 15 William Shakespeare, *Much ado about nothing* (1600).

ten years. Looking at the UK in 2017, nearly one in two recent migrants was in the highest educational category compared to only one in three UK born. Migrants arrive with skills that contribute to our labour market. After the recession in 2008, employment growth has been impressive across the UK and as well the UK as the EU citizens have benefitted. Of course, this is an easy equation to make. The more people there are, the more goods and services are required overall. This translates directly into jobs as those goods and services need to be produced or offered. EU migrants to the UK are often younger than the average UK worker, better educated and enjoy the same or even higher employment rates than natives, hence contributing to the UK's GDP. The claim migrants weigh heavily on our welfare systems does not hold true either. A survey from 2018 shows that there were 1.07 million unemployed UK born people, but only 266 000 unemployed non-UK born people. As a group, immigrants contribute more in taxes and social contributions than they receive in benefits.¹⁶

Far from the truth, the slogans offering scapegoats for societal shortcomings were well received by the population and deepened the fear many people had grown once the migration crisis had started. There was a degree of exceptionalism in the UK's media coverage of migration, which often did not coincide with the truth but impacted public opinion on migration and border control. Cardiff University published a study on press coverage across Europe and stated “[...] *the right-wing press in the United Kingdom expressed a hostility towards refugees and migrants which was unique.*”¹⁷ In 2015, the UK received approximately 60 asylum applications per 100 000 UK citizens. The EU-wide average is 260 applications per 100 000 citizens¹⁸.

It is sad to say but the country that claims to be a ‘modern, open, outward-looking, tolerant, European democracy’ has decided to leave the EU partly due to the promise to reduce immigration to the UK, backed up by false, or at the very least misleading, data and promises.

16 Secretary General of the OECD, ‘Is migration good for the economy?’, Migration policy Debate, <https://www.oecd.org/migration/OECD%20Migration%20Policy%20Debates%20Numero%202.pdf>.

17 Berry/Garcia-Blanco/Moore, ‘Press Coverage of the Refugee and Migrant Crisis in the EU: A Content Analysis of Five European Countries’, Cardiff School of Journalism, Media and Cultural Studies, <http://www.unhcr.org/56bb369c9.html>.

18 Eurostat, ‘Asylum quarterly report’, https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report (20.09.2018).

EU, the Bottomless Money Pit

Being part of a club means that you have to pay a membership fee. In exchange, you are entitled to receive the benefits. However, the UK's contribution to the EU's budget has been a thorn in the Brexiteer's side for many years and they were not shy to distort reality to make their point. Right-leaning newspapers such as the *The Sun*, *Daily Mail*, *Telegraph* and *Daily Express* repeatedly featured that being part of the EU means, "giving £20 billion a year or £350 million a week to Brussels"¹⁹.

These sums are not difficult to unpick. The same forces that idolised the UK's rebate as the symbol of Thatcher's European legacy conveniently forgot about it when it came to determining the UK's bill. "I want my money back" became "what money"?²⁰ The exact calculation of the 'correction' for the UK's relatively large net contributions is complex and varies by year but as a rule of thumb it reduces the UK's contribution by a quarter. Taking this into account the UK made an estimated gross contribution of £13.0 billion in 2017. In addition, Vote Leave ignored the money that the EU redistributes to the UK (public sector receipts) for different areas such as agricultural, social, economic development and competitiveness programmes. In 2017, for example, the UK received £4.1 billion of public sector funding from the EU. Taking all those factors into account, the UK's net contribution and receipts to the EU in 2017 was an estimated £8.9 billion. This number is not fixed, as gross contributions as well as receipts vary every year. However, between 2011 and 2015, the years just before the referendum, the average net contribution of the UK was £8.5 billion, not even half of what Vote Leave claimed.

Studies by the CBI have shown "for every £1 we put in the EU, we get £10 from the EU back"²¹. What the EU provides is a focus for local authorities, businesses, and the central authorities to fund needed projects that otherwise would not have been done.

19 M. Elliott on behalf of Vote Leave, 'Cost of the EU – Let's spend our money on our priorities,' http://www.voteleavetakecontrol.org/briefing_cost.html (01.10.2018).

20 Margaret Thatcher, Speech to European Parliament, Debates of the European Parliament No.2-346, session pp 41-68, 1986/87.

21 CBI, 'CBI Literature review of the impact of EU membership on the UK economy' <http://www.cbi.org.uk/business-issues/brexit-and-eu-negotiations/eu-business-facts/cbi-literature-review-of-the-impact-of-eu-membership-on-the-uk-economy-pdf/>.

Yes, it is still a big number. Nevertheless, when dealing with big numbers it is useful to provide some context. While the EU funds a number of important programmes, budget is not the first tool that springs to mind when one considers the EU's powers. It does not control the big powerhouses of public sector spending, such as health, education, social security and defence. Mapping the amount the UK Government spends on the EU to the total public sector spend helps provide some much-needed perspective. The UK's own Office for National Statistics calculates the EU as a little over 1% of the total government budget. Moreover, if you jump from the big picture to the cost for individual citizens, the bill is roughly £140 a year.²² For some the net spend of the UK might be the killer blow but – at the risk of seeming out of touch – others are scratching their heads as to why this had such a central role in the debate.

Undeterred by the criticism of the figures during and after the campaign, Boris Johnson has doubled-down. In an interview in the *Guardian* in January 2018, he stated “*there was an error on the side of the bus. We grossly underestimated the sum over which we would be able to take back control*”. It's difficult to be any more generous than to view this as straight out of the ‘alternative facts’ playbook.

Beyond the budget discussion, the other side of the economic argument presents the EU as a millstone around the UK economy's neck – holding it back from its natural status as a paragon of dynamic growth and innovation. Lacking any further explanation, in 2016 Johnson stated that the “*EU is a graveyard of low growth*”. Again, looking at numbers the picture looks very different and shows that the UK has profited strongly from being part of the EU. Since the UK joined the EU in 1973, the per capita GDP of the UK economy grew by 103%, higher than Germany's 99% and comfortably outpacing France's 74%.²³ The reverse argument could be made that the fact the UK has grown so well – and is outpacing its neighbors – demonstrates the ‘drag’ effect rather than the UK's successful exploitation of the growth conditions afforded by the EU. That the UK is the smart pupil in the class, if you will, being held back by a learning environment focused on her less-gifted classmates. But if that was the case, one would expect that the UK would be outperformed by other developed nations not fettered by the EU's constraints. With 97% growth, however, the US was also

22 Office for National Statistics, ‘The UK contribution to EU budget’, <https://www.ons.gov.uk/economy/governmentpublicsectorandtaxes/publicsectorfinance/articles/theukcontributiontotheeubudget/2017-10-31> (31.10.2017).

23 Hendry/Farmer/Roser, ‘How did the UK economy do since joining the EU?’, letter to ‘The Times’, <https://www.inet.ox.ac.uk/news/Brexit> (06.06.2016).

outperformed by the UK over the same period. Or maybe a better comparison is with itself. Harking back to the ‘glory days’ of the Empire once more, however, sees a rather sluggish growth rate of 0.9% per capita from 1872 – 1914, as opposed to the rather brisk 2.1% since EU membership. In addition to strong economic growth, the Institute for New Economic Thinking shows that the fruits of this growth have been fairly evenly spread, at least in comparison to the US. The median income in the UK has grown by 79% since 1974, in contrast to 16% in the US.²⁴

The reasons why the UK voted in favor of Brexit – or at least the arguments positioned by the Vote Leave campaign – are perplexing for many in the corridors of the EU. At face value, the claims seem almost too easy to debunk. Why were the UK’s populace taken in? When the practicalities of organizing Brexit subside – along with some of the emotions – perhaps there will be time to reflect and learn lessons. It might not be the specific claims of the campaign that are important but a deeper and more rudimentary sense that the Brexiteers tapped into. A lack of trust in an establishment that gave us the global financial crisis and subsequent great recession; an unease in how culture is evolving or a common identity and community that is neither as strong or deep as was believed. Nevertheless, it is sad to think that pride in 60 years of peace and prosperity took second billing to squabbles over who decides what, closing the door on outsiders and transactional costs.

The UK’s Take in the Negotiation and the EU’s Dilemma

Even now, more than two years after Theresa May triggered Article 50 of the Lisbon Treaty, the UK is still heavily divided on the question of leaving the EU. Although the EU Council agreed to extend the negotiation period, the clock is still ticking ominously and relentlessly and a decision will have to be made inevitably.

The Prime Minister said in June 2016 “*Brexit means Brexit*”²⁵. Even at that early stage, the phrase seemed to indicate that the energies were as likely to be expended on herding cats in Westminster as on negotiating with EU partners. It attempted to placate those on the right-wing of her party –

24 Hendry/Farmer/Roser, ‘How did the UK economy do since joining the EU?’, letter to ‘The Times’, <https://www.inet.ox.ac.uk/news/Brexit> (06.06.2016).

25 Theresa May, speech in front of the Houses of Parliament <https://www.independent.co.uk/news/uk/politics/theresa-may-brexit-means-brexit-conservative-leadership-no-attempt-remain-inside-eu-leave-europe-a7130596.html> (11.07.2016).

and perhaps in the media – by hinting that the vote would be respected and was not to be rerun under any circumstances and that the UK's exit would not be on paper only – that there would be differences in substance in the UK's institutional relationship with the EU. At the same time, in order not to immediately expose the factions in her government, the phrase was delightfully non-committal. In academic terms, it is a tautology – it adds nothing to the common ground.²⁶ Unsurprisingly, perhaps, the EU had to wait a long time before it received an answer as to what the UK wanted once it had left the EU.

The UK's Red Lines

The UK was quicker, however, to let the EU know what it *didn't* want rather than providing a coherent strategy that would allow for structured negotiations. They laid out their **red lines** right after the decision of exiting the EU. All in all that is a bit light on detail as a negotiation strategy and, as it turned out, proved inconsistent as they had to loosen them the longer negotiations went on.

*“We will take back control of our laws and bring an end to the jurisdiction of the European Court of Justice (CJEU),”*²⁷ May said. It seemed clear, that the CJEU's jurisdiction for the UK would end the day the UK had exited the EU. UK courts would have supremacy and the UK would regain the sovereignty it had dreamed of. The UK was also very clear about leaving the single market and the customs union of the EU. The UK wanted to be able to do its own trade deals and negotiate tariffs with third countries rather than being tied to those the EU had negotiated. Of course, negotiating trade deals take several years and officially – as still being a member of the EU – the UK is not allowed to start negotiations until it has left the EU. A big political song and dance was made of the money, of course, as May stated that the payments to the EU would be over after Brexit. Boris Johnson, who is never short of one-liners, said that the EU could “*go whistle*” over its “*extortionate demands*”²⁸.

26 Neutral Footing, ‘Brexit means Brexit’ <https://neutralfooting.wordpress.com/brexit-means-brexit/> (03.10.2018).

27 Theresa May, speech to the Lancaster House, <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> (17.01.2017).

28 Boris Johnson to the House of Commons, <https://www.bbc.com/news/uk-politics-40571123> (11.07.2018).

But while the EU has made the negotiations a priority, mainly also to protect its citizens living in the UK, it almost seemed as if the Brits were so shattered by their own decision to leave the EU, that they did not quite know how to move forward.

Of course, it is debatable if it is wise to have a referendum making a decision on such a scale as the future of a nation. Especially since the information provided to people were left to mainly populist politicians, rather than having neutral information from a reliable source. However, there were no impact assessments made before the referendum, as well as no plans for the future in case it would come to this decision. It caught the UK as red-handed as the rest of the EU when the people voted to leave.

The EU had made it clear that negotiations could only start once Article 50 of the Treaty of the European Union (TEU) was triggered, setting into motion the two years deadline for negotiation. However, rushing into it was a political statement and had little to do with the UK Government's preparedness.²⁹ When Theresa May over hastily triggered Article 50 barely nine months after the referendum in March 2017, the dimension of what was going to come was not yet entirely clear.

The time pressure was on, but valuable time was wasted for the lack of a negotiating position of the UK. Long delays and waste in resources -with it the dwindling chance of reaching an agreement before the deadline.

Then May's decision for a snap election in June 2017, suspending Parliament for weeks to allow for campaigning. Believing to leave her with more negotiating power, Prime Minister May campaigned explicitly on a Brexit platform. It left her with little success. The result removed the narrow Tory majority in the House of Commons from the 2015 election. As a result, the Tories needed to enter a confidence and supply arrangement with the Democratic Unionist Party (DUP) from Northern Ireland, which was not always going to be without its hitches. May promised the DUP to ensure the same deal for Northern Ireland as for the rest of the UK.

Since 2016 May has regularly been declared dead in the water but is struggling on – often with little trust or sympathy of her own political party. It is certainly an impossible task to please everyone as positions of Brexit are so divided in the UK. At this point in time it is much easier for Brexiteer Tory MPs to distance themselves from the Brexit negotiations and the possible deal that might be agreed, than to be tainted by the compromise

29 C. Cooper, 'UK screwed in Brexit negotiations, says EU ambassador', Politico, <https://www.politico.eu/article/ivan-rogers-brexiteer-uk-screwed-in-brexiteer-negotiations-says-ex-ambassador/> (25.10.2017).