ARTICLES

EXERCISES IN LEGAL ACROBATICS: THE BREXIT TRANSITIONAL ARRANGEMENTS

ADAM ŁAZOWSKI*

ABSTRACT: With the imminent closure of the first part of Brexit negotiations, the EU and the UK are shifting the centre of gravity from discussions about the termination of membership to the future arrangements. Anyone *au courant* with EU affairs is aware that what is left of the two-year period laid down in Art. 50 TEU will not be enough to negotiate, to sign and to ratify a future trade agreement. This is one of the reasons why both sides have recently engaged in discussions about a transitional period. As this *Article* proves, this is idea has merits, yet it will be hard to accomplish a plausible solution. Arguably, it may be more beneficial, and less problematic, to extend the two-year period instead.

KEYWORDS: withdrawal from the EU – Brexit – transitional regime – Art. 50 TEU – withdrawal agreement – United Kingdom.

I. INTRODUCTION

A transitional period is a procedural aspect of the Brexit negotiations, which has recently gained the attention of political circles. This is not surprising by any stretch of the imagination. To begin with, shortly after the referendum it became clear that the British political elite and, worse, the United Kingdom (UK)'s government were patently unprepared for what

* Professor of European Union Law, Westminster Law School, University of Westminster, London, a.lazowski@westminster.ac.uk. The author is indebted to Dr. Eleni Frantziou, with whom he held several discussions on the subject matter. Some of the arguments presented in this *Article* draw from E. FRANTZIOU, A. ŁAZOWSKI, *Brexit Transitional Period: The solution is Article 50*, in *CEPS*, 9 September 2017, www.ceps.eu.

was to unravel.[1] Furthermore, the government largely mishandled the first year that followed the plebiscite and triggered Art. 50 TEU without a clear vision or plan for the Brexit negotiations.[2] Inevitably, they have stalled. The sequencing of talks imposed by the EU added to the complexities of the process at hand.[3] As legal and economic consequences of withdrawal were becoming clear, so was the need to extend the transition from EU membership to a post-Brexit arrangement. The two-year period laid down in Art. 50 TEU is obviously way too short to conduct and to complete negotiations of EU withdrawal as well as a new agreement to regulate future relations between the EU and its departed Member State. This was obvious from the start to those *au courant* with everyday EU business. In the fall of 2017, as the negotiators were running out of time, the need for a transitional arrangement of sorts became obvious on both sides of the negotiating table. Indeed, such temporary arrangements are, in very general fashion, envisaged in the EU negotiating principles for the Brexit negotiations. They have been further outlined in the European Council Guidelines of 15 December 2017.[4] Furthermore, an idea of implementation phase has been also suggested by the UK's government,[5] although the members of the public and, in equal measure, the EU negotiating team have been exposed to an unprecedented cacophony of ideas, which are politically appealing, yet legally very unclear and hard, if not impossible, to materialize. When it comes to the transitional regime, as this *Article* proves, it will be very hard to square the circle. The analysis that follows provides an insight into some of the

[1] See further on the referendum, *inter alia*, by H.D. CLARKE, M. GOODWIN, P. WHITELEY (eds), *Brexit: Why Britain Voted to Leave the European Union*, Cambridge: Cambridge University Press, 2017; K. ARMSTRONG, *Brexit Time: Leaving the EU – Why, How and When?*, Cambridge: Cambridge University Press, 2017; P. CRAIG, *Brexit: A Drama in Six Acts*, in *European Law Review*, 2016, p. 447.

[2] There is a plethora of policy papers published in course of 2017, however their quality leaves much to be desired. Many a times they contain unrealistic desiderata, which can hardly serve as negotiating positions. See, for instance, *Future customs arrangements – a future partnership paper*, 15 August 2017, www.gov.uk. For a commentary see J. PELKMANS, *The Brexit Customs Vision – Frictions and Fictions*, in *CEPS*, 22 August 2017, www.ceps.eu.

[3] According to Guidelines on Brexit negotiations of the European Council in the first phase of withdrawal talks the centre of gravity was on the rights of EU and UK citizens, the UK payments to the EU budget as well as issues related to Ireland and Northern Ireland. Only when sufficient progress was achieved, which was for the European Council to determine, the negotiations entered the next phase. See European Council Guidelines EUCO XT 20004/17 of 29 April 2017 following the United Kingdom's notification under Article 50 TEU, www.consilium.europa.eu, para. 4. See also Council Directives XT 21016/17 of 22 May 2017 for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, www.consilium.europa.eu, para. 19

[4] European Council Guidelines EUCO XT 20011/17 of 15 December 2017, paras 3-5.

[5] See Foreign & Commonwealth Office, Prime Minister's Office, 10 Downing Street, Department for Exiting the European Union, The Rt Hon Theresa May MP, *PM's Florence speech: a new era of cooperation and partnership between the UK and the EU*, 22 September 2017, www.gov.uk. For a commentary see, *inter alia*, M. EMERSON, *Stocktaking after Theresa May's Brexit speech in Florence: Key point – the transition, key omission – the future relationship*, in *CEPS*, 26 September 2017, www.ceps.eu.

available options and argues that the most sensible way forward, yet not necessarily agreeable to the UK, is an extension of two-year period laid down in Art. 50 TEU.[6] Any transitional arrangement will be a legal and political minefield, unnecessarily moving the centre of gravity away from what is the most important in the Brexit negotiations: closure of over forty years of the UK's membership in the EU and development of a long-term framework for a future EU-UK relationship.[7]

The analysis that follows is constructed in the following way. The sunset clause, that is Art. 50 TEU, is a starting point. The key questions that will be answered in section II are whether the provision in question is broad enough to accommodate such a transitional regime. Section III focuses on Art. 50 TEU as a transition. Finally, section IV is devoted to dossiers that should be covered in a transitional arrangement and proves that it may be very challenging for the UK and the EU to be on the same page.

II. Art. 50 TEU: does it provide for a transitional arrangement?

Art. 50 TEU is arguably the most well-known provision of the EU Founding Treaties.[8] Ever since the UK voters expressed a desire to leave the EU, it has constantly remained under political and legal microscopes.[9] It has proven to be a *lex imperfecta*: a badly drafted provision that was meant to discourage the Member States from activating it.[10] Some authors even argue that it was never meant to be used.[11] Just like Art. 49 TEU, which governs the

[6] See further E. Frantziou, A. Łazowski, *Brexit Transitional Period*, cit.

[7] For a historical account of UK's membership in the EU see, *inter alia*, A. Geddes, *Britain and the European Union*, Basingstoke: Palgrave, 2013.

[8] As P. Eeckhout and E. Frantziou put it: "Never before has a provision of EU law become so well known in such a short space of time as Article 50 TEU". See P. Eeckhout, E. Frantziou, *Brexit and Article 50 TEU: A Constitutionalist Reading*, in *Common Market Law Review*, 2017, p. 695.

[9] See, *inter alia*, F. Fabbrini (ed.), *The Law & Politics of Brexit*, Oxford: Oxford University Press, 2017; K. Armstrong, *Brexit Time*, cit.; J.A. Hillman, G. Horlick (eds), *Legal Aspects of Brexit: Implications of the United Kingdom's Decision to Withdraw from the European Union*, Washington: Institute of International Economic Law, 2017; M. Dougan (ed.), *The UK After Brexit: Legal and Policy Challenges*, Cambridge: Intersentia, 2017; M. Emerson (ed.), *Britain's Future in Europe. Reform, renegotiation, repatriation or secession?*, London: Roman & Littlefield International, 2016; S. Peers, D. Harvey, *Brexit: the Legal Dimension*, in C. Barnard, S. Peers (eds), *European Union Law*, Oxford: Oxford University Press, 2017, pp. 815-835; A.F. Tatham, *Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon*, in A. Biondi, P. Eeckhout, S. Ripley (eds), *EU Law after Lisbon*, Oxford: Oxford University Press, 2012, pp. 128-154; H. Hoffmeister, *Should I stay or Should I Go? A Critical Analysis of the Right to Withdraw from the EU*, in *European Law Journal*, 2010, p. 589; A. Łazowski, *Withdrawal from the European Union and Alternatives to Membership*, in *European Law Review*, 2012, p. 523; P. Nicolaides, *Withdrawal from the European Union: A Typology of Effects*, in *Maastricht Journal of European and Comparative Law*, 2013, p. 209; C.M. Rieder, *The Withdrawal Clause of the Lisbon Treaty in the Light of EU Citizenship: Between Disintegration and Integration*, in *Fordham International Law Journal*, 2013, p. 147.

[10] See C. Hillion, *Accession and Withdrawal in the Law of the European Union*, in A. Arnull, D. Chalmers (eds), *The Oxford Handbook of European Union Law*, Oxford: Oxford University Press, 2015, p. 142.

[11] See P. Eeckhout, E. Frantziou, *Brexit and Article 50 TEU*, cit., p. 703 and sources cited by the authors.

EU accession, it "is a sparse, framework provision [...] [i]t provides an outline of the basic process and procedural requirements".[12] Alas, it is the only legal framework for the Brexit negotiations and there is no way around it. Not surprisingly, the provision in question has been interpreted in several ways, both in the academic writing and in the political documents. A plethora of available academic analyses of Art. 50 TEU means that it deserves no general rehearsing in this contribution to the debate. However, since little attention has been paid to the possibility of providing a transitional arrangement, it is crucial to verify as a starting point if such a solution is permitted by the legal basis for EU withdrawal.

To begin with, the provision in question does not explicitly provide for any temporary solution. As per Art. 50, paras 2-3, TEU, a withdrawal agreement, regulating the terms of withdrawal and taking account of future relations, is negotiated between the EU and a departing country. If it does not enter into force within two years of notification of the intention to withdraw, a Member State departs the EU without any formal agreement.[13] In order to avoid such a cliff edge, the European Council has the option of extending the two-year deadline. As regulated in Art. 50, para. 3, TEU, for that to happen a unanimous decision of all Member States, including the departing country, is required. So, the question emerges whether the fact that Art. 50 TEU is silent on a possibility of transitional regime means that it is impossible. *Au contraire*, Art. 50 TEU, and a withdrawal agreement envisaged therein, are broad enough to accommodate for an interim solution.

Firstly, Art. 50 TEU does not operate in a legal vacuum, hence it deserves a reading in accordance with the generally established principles governing the interpretation of EU law.[14] Consequentially, it should be interpreted in the light of the principle of loyal cooperation laid down in Art. 4, para. 3, TEU. A brief reminder is fitting that this translates into an obligation imposed on the Member States to proceed with actions aimed at achievement of EU objectives. A flip side of that coin is the obligation to refrain from taking measures that could jeopardise the EU's aims and objectives. Both aspects of this fundamental principle of EU law apply to the parties negotiating a withdrawal agreement, including the exiting country, which formally remains a Member State until the actual date of exit.[15] Bearing this in mind, the underlying objective of the Brexit negotiations should be comprehensive regulation of the terms of departure and, at least, the foundations for future relationship. Arguably, this is envisaged by Art. 50 TEU, which provides explicitly that a withdrawal agreement should "take account of future relations" between

[12] D. Edward, N.N. Shuibhne, *"While Europe's eye is fix'd on mighty things": implications of the Brexit vote for Scotland*, in *European Law Review*, 2016, p. 482.

[13] See further on the unilateral withdrawal, *inter alia*, A. Łazowski, *Unilateral withdrawal from the EU: realistic scenario or a folly?*, in *Journal of European Public Policy*, 2016, pp. 1294-1301.

[14] See P. Eeckhout, E. Frantziou, *Brexit and Article 50 TEU*, cit.

[15] See, for instance, European Council Guidelines EUCO XT 20004/17, para. 25: "Until it leaves the Union, the United Kingdom remains a full Member of the European Union, subject to all rights and obligations set out in the Treaties and under EU law, including the principle of sincere cooperation".

the parties. This, if a need arises, encompasses also a transitional regime that would serve as a bridge between the past and the future.

Secondly, the EU opted for a narrow interpretation of Art. 50 TEU, as not permitting a comprehensive regulation in a single agreement not only of the terms of withdrawal but also of future relations. The opinions of commentators vary when it comes to interpretation of Art. 50 TEU in this respect. The present author belongs to the group which claims that Art. 50 TEU is broad enough to accommodate such a jumbo agreement.[16] However, in accordance with another school of thought, the withdrawal clause is designed only to regulate the terms of exit and, perhaps, some general framework for future relations, leaving the details of the future deal to a separate agreement negotiated in accordance with the standard procedure laid down in Art. 218 TFEU.[17] In its Guidelines on the Brexit negotiations the EU opted for the latter solution claiming that an agreement future relations can only be concluded when the UK departs the EU.[18] Furthermore, the EU also decided – against the will of the UK delegation – about the already mentioned sequencing of talks. While such an approach makes perfect sense in political terms, its credentials are questionable. One could even contemplate if such an approach were not in breach of the principle of loyal co-operation.[19] It should be noted that the opening of negotiations of future relations was conditional on "sufficient progress" being achieved in talks about the terms of withdrawal. This put key decisions in the hands of the EU and, as experience has proven, it is not a straight-forward affair. One of the consequences of sequencing, combined with slow progress in the negotiations of opening three dossiers, is the emerging need for the transitional regime. It is a common knowledge that the trade talks between the EU and third countries traditionally take years to accomplish. Thus, it is a sign of *naïveté* to believe that the two-year period laid down in Art. 50 TEU is long enough to accommodate the withdrawal negotiations and detailed arrangements for future relations (regulated in one or more agreements). To cut a story short, even if the withdrawal agreement is negotiated, approved and enters into force by the end of the

[16] See, *inter alia*, A. Łazowski, *Withdrawal from the European Union and Alternatives to Membership*, cit., p. 523-540.

[17] See, *inter alia*, J. Carmona Nunez, C.-C. Ciurlig, G. Sgueo, *UK Withdrawal from the European Union. Legal and Procedural Issues*, 27 March 2017, www.europarl.europa.eu.

[18] This conclusion is, *prima facie*, correct. However, it does not take into account that Art. 50 TEU itself looks into the future. While the term employed therein ("taking account of future relations") is not particularly fortunate, it does indicate that a withdrawal agreement can also regulate future relations. The key question is where to draw the line between "taking account of future relations" and regulating them comprehensively. To put it differently, which dossiers should be squeezed in into a withdrawal agreement and which would be regulated in a future agreement between the parties.

[19] As per Art. 4, para. 3, TEU: "[T]he Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".

two-year period, it would be almost impossible to conclude and ratify a comprehensive trade deal by 29 March 2019. In this scenario, Art. 50 TEU – read in the light of the principle of loyal co-operation – provides a general framework that may also cover a transitional regime. Without it, the bilateral relations between the EU and the UK would be reduced, until a fully-fledged future agreement is signed, to a mere WTO coverage. That would, in all likelihood, cause a political, legal and economic havoc of mass proportions.[20]

Thirdly, it is one thing to agree that a transitional regime is a legitimate way forward and has a legal basis. Quite a different kettle of fish is what it would entail. In this respect, the wording of Art. 50 TEU does not give any hints. Furthermore, there is no prior experience to rely on, hence it will have to be shaped by practice. When this *Article* was completed, the matter in question has just arrived on the table of the Brexit negotiations.[21] Yet, as mentioned above, it was quite present in the political discourse and in some of the official EU documents. In the first Guidelines of the European Council on Brexit negotiations a possibility of transitional arrangements was elaborated upon. According to the European Council, such a transitional arrangement must be clearly defined, limited in time and subject to effective enforcement mechanism.[22] This general idea was elaborated on further in the European Council Guidelines adopted on 15 December 2017 and expected to turn into a negotiating mandate for the European Commission.[23] At the same time, it was painfully visible that the UK's Government was desperately short of ideas, while the EU was waiting for Whitehall to end the internal negotiations within the Conservative Party and to come up with a credible plan for Brexit, including the transitional arrangements.[24] However, even those very patchy details, which emerged in the meantime, demonstrated rather two completely different visions of a transitional regime. For instance, the European Council, argues that it will demand acceptance of EU law post-withdrawal as well as jurisdiction of the Court of Justice.[25] The European Parliament also envisaged a similar transitional arrangement in its resolutions on Brexit negotiations, yet it was willing to accept it only for a maximum of three years.[26] At the same time, the UK's government offered a tautological explanation along the lines of the infamous "Brexit means Brexit" mantra and insisted on referring to

[20] As things stood when this *Article* was finalised, the withdrawal agreement will focus on several dossiers, including the UK's contributions to the EU budget, the rights of EU citizens residing in the UK and UK citizens residing in the EU as well as the status of the Northern Ireland post Brexit.

[21] The European Council decided on 15 December 2017 that enough progress was achieved in the negotiations to move to the next phase, including the negotiations of the transitional regime.

[22] European Council Guidelines EUCO XT 20004/17, para. II.6.

[23] *Ibidem*, paras 3-5.

[24] See, however, House of Lords, *Report: Brexit: deal or no deal*, 7 December 2017, www.parliament.uk.

[25] *Ibidem*.

[26] European Parliament resolution P8_TA-PROV (2017)0102 of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union, para. 28. See also European Parliament resolution P8_TA-PROV(2017)0490 of 13 December 2017 on the state of play of negotiations with the United Kingdom (2017/2964(RSP)), paras 12-15.

transitional arrangements as "implementation" phase.[27] However, even without clarification of what it meant, it was clear that continued application of EU law and the EU enforcement machinery would not be acceptable to the UK.

Fourthly, as argued by E. Frantziou and the present author in the previous contribution to the debate, Art. 50 TEU should be treated as a transition in itself.[28] This reading of the exit clause takes into account the mere fact that, as of the day of notification, a Member State is heading for the door, and – in consequence – it does not participate in all decisions of the European Council and the Council of the EU. Thus, implicitly, Art. 50 TEU is all about a transition and it could be argued that not only it provides a procedural path for an exit from the EU but also a legal basis for any transitional arrangements that may be necessary (and agreed by the parties).

Last but not least, one should also remember a controversial proposition to use the EEA as a transit zone. This is sometimes promoted in the political and academic circles, although it has been seemingly rejected by Whitehall.[29] The latter's decision should not be taken as set in stone, as the current UK's administration is quite well experienced in taking reverse ferrets. Nevertheless, the propagators of the EEA option do not seem to appreciate that, from the technical point of view, joining the EEA *ad interim* would be a complicated affair. Although the UK is currently a member of the EEA it remains so *qua* its EU membership. In order to remain in the EEA on a temporary basis it would, in all likelihood, have to leave the EU as well as the EEA on the day of Brexit. In order to become an EEA-European Free Trade Association (EFTA) State it would have to negotiate its membership of EFTA and then re-accession to the EEA. That would amount to continued coverage by EU law, participation in the decision-shaping as well as jurisdiction of the EFTA Court. But first and foremost, it would require approval of the three EFTA countries, which should not be taken for granted. Arguably, the complexities of such a transition from EU to EEA membership and the implications of the latter make this scenario merely an academic exercise.

This takes us back to Art. 50 TEU and what it permits for. The analysis presented above has proven that Art. 50 TEU is broad enough to accommodate a transitional regime. It may take two alternative forms: either an extension of the two-year deadline laid down therein or adoption of a tailor-made regime in the withdrawal agreement or a separate agreement.

[27] For instance during weekly questions to the Prime Minister at the House of Commons on 11 October 2017, the Prime Minister T. May said: "On the second point, I made very clear – perhaps I need just to explain it again to members of the Opposition – that when we leave the European Union in March 2019, we will cease to be full members of the single market and the customs union. That will happen because you cannot be full members of the single market and the customs union without accepting all four pillars – free movement; continued, in perpetuity, European Court of Justice jurisdiction. During the implementation period, we will be looking to get an agreement that we can operate on much the same basis as we operate at the moment – under the same rules and regulations – but that will not be the same as full membership of the customs union and the single market". See www.parliament.uk.

[28] E. Frantziou, A. Łazowski, *Brexit Transitional Period*, cit.

[29] As confirmed by the Prime Minister in September 2017. See *PM's Florence speech*, cit.

Both would require a fair degree of political will, while the second option would also necessitate employment of serious legal acrobatics. The first would mean, in a nutshell, that the UK would remain a Member State for a few more years, albeit operating in the withdrawal mode. This, as explained in section 3 of this *Article*, may be politically unacceptable for the hard-core Brexiteers and thus it would make it difficult for the UK to agree to. Furthermore, the complexities of negotiating a tailor-made transitional arrangement may ultimately mean that it would be impossible to agree on the deal before the expiry of the two-year period. To put it differently, one should not exclude a scenario that extension of deadline laid down in Art. 50 TEU would precede the entry into force of the withdrawal agreement and any transitional regime laid down therein.

III. Art. 50 TEU as a transition

Art. 50 TEU encapsulates rather well the peculiarities of withdrawal from the EU. It regulates the process whereby a Member State remains inside of the EU but, at the same time, it is progressing towards the exit door. As interpreted by the European Council in the Brexit Guidelines, the UK remains a fully-fledged member of the club, bound by the principle of loyal co-operation, until the date of exit.[30] Yet, at the same time, it is formally excluded from some meetings, or parts thereof, of the two EU councils. It is unquestionable that Art. 50 TEU serves as a bridge between the full membership and the future relations. Hence, the wording of its paragraph 2, determining that a withdrawal agreement extends to the terms of departure, taking account of the future relations. As already mentioned in the previous section of this *Article*, one may draw a conclusion that Art. 50 TEU is all about a transition, either from the membership to a future association – or any other form of close co-operation.[31] At the same time, should the option of non-regulated withdrawal be pursued, Art. 50 TEU may serve as a vehicle for transition from the membership to a legal vacuum.[32] Seen that way, Art. 50 TEU by itself offers a two-year long transitional period, which – as explained earlier – can be extended unanimously by the European Council acting in unison with the departing Member State. Of course, it is easier said than done.

To begin with, from the political point of view, the extension should not be perceived as *fait accompli*. Not only it may be tricky to reach a consensus between the remaining

[30] European Council Guidelines EUCO XT 20004/17, paras 25-27.

[31] When this *Article* was completed it was rather unclear what the objectives of the UK were. For instance, in May 2017 the UK Government claimed that: "we will seek an ambitious future relationship with the EU which works for all the people of the UK and which allows the UK to fulfil its aspirations for a truly global UK". The White Paper, where this statement was included, was full of ambitious, yet general objectives, which failed to clarify what kind of a future deal with the EU is being sought after. See Department for Exiting the European Union, The Rt Hon, *Policy paper: The United Kingdom's exit from, and new partnership with, the European Union*, 2 February 2017, www.gov.uk.

[32] As noted above, should the UK-EU negotiation end in a fiasco, the UK would leave the EU on unilateral basis without any formal agreement as to the past or future between the parties.

27 Member States but also the political shenanigans in Westminster could seriously undermine the feasibility of such a deal.[33] The thought of remaining in the EU for extra few years may be politically unacceptable, even if it were to the benefit to the UK's economy. Extension of the two-year period laid down in Art. 50 TEU would also bring a number of other political and legal questions to the fore. For instance, how many times and for how long the two-year deadline could be extended. Furthermore, would it be amenable to judicial review in accordance with Art. 263 TFEU?[34] Could it create a special status for the UK allowing it, for example, to negotiate (but not to conclude) agreements with third countries?[35] Overall, if this option were pursued, the UK would remain a Member State for two, or even more, years. It would fully participate in the EU institutions and policy-making. It would also remain bound by EU law and be subjected to the jurisdiction of the CJEU. The "business as usual" scenario would also require continued contributions to the EU budget. Bearing in mind that the EU's seven-year long financial cycle comes to an end in 2020, one could expect that the UK would be involved in negotiations of the next multi-annual budget. This could be a hard pill to swallow on both sides of the English Channel.

IV. Tailor-made transitional arrangement

IV.1. Introduction

The second option for a transitional regime is a tailor-made arrangement that would apply as of the date of withdrawal from the EU. As things stood when the present *Article* was published, this is where the Brexit negotiations were heading to. Following the meeting of the European Council on 19-20 October 2017, the EU has commenced internal preparations for the next phase of the withdrawal negotiations, which, among others, were to extend to a transitional regime.[36] As mentioned earlier in this *Article*, further details, though still rather sketchy, were approved by the European Council on 15 December 2017.[37] This opens up a plethora of legal issues that would have to be resolved either at the outset or later in course of the negotiations. The EU made its position clear, however it remained unknown what would be acceptable to the UK.

[33] As things stood when this *Article* was published, the PM T. May could not even count on unity on the Conservative benches at the House of Commons. See further: *Pro-EU rebels inflict Brexit defeat on May*, Financial Times, 14 December 2017.

[34] As per Art. 263 TFEU, decisions of the European Council, which produce effects *vis-à-vis* third parties may be subject to actions for annulment.

[35] As things stood when this *Article* was completed, the UK was not permitted under existing EU rules to negotiate or conclude trade agreements with third countries. See further, *inter alia*, A. Łazowski. R.A. Wessel, *The External Dimension of Withdrawal from the European Union*, in *Revue des Affaires européennes*, 2016, pp. 623-638.

[36] European Council Conclusions EUCO XT 20014/17 of 20 October 2017.

[37] European Council Guidelines EUCO XT 20011/17, paras 3-5.

Firstly, the question emerges whether provisions on the transition have to be included in the withdrawal agreement or, perhaps, they can find a home in separate bespoke deal. Secondly, what should be the institutional arrangements during the bridging phase. Should the UK remain fully involved in EU decision-making, or should it be kept at bay. Thirdly, how far should the de-integration go in terms of substance. To put it differently, which aspects of EU law would the UK remain to be bound by and in which policies would it participate in during the transition phase. All three dimensions of a transitional regime are analysed in turn.

IV.2. Where to regulate a transitional arrangement?

When the negotiations of a transitional arrangement start, the first dossier on the table should be finding a home for the interim framework. In theory, one could imagine at least two scenarios. Firstly, as currently planned by the EU, relevant provisions could be included in the withdrawal agreement itself. Secondly, one could envisage a separate agreement concluded between the EU and the UK. The latter option, however, would encounter serious procedural challenges of a choice of legal basis and actors involved. As is well-known, for any action of EU institutions one needs to find a substantive and procedural anchor in the Founding Treaties. While it is clear that Art. 50 TEU is a legal basis for conclusion of a withdrawal agreement, it is rather unclear if it is broad enough to cover also a separate treaty restricted to the transitional regime. Even more unclear is the possibility of using other provisions of TEU/TFEU as a legal basis (bases). Furthermore, one should take into account the practicalities of such an arrangement and the potential risks. If two agreements – that is the withdrawal agreement and the agreement on transitional arrangements – were to be signed in parallel, what would have happened if only the first were approved, but not the latter. One could argue, though, that such a solution would only work if both agreements were chained by a *guillotine* clause *a là* EU-Swiss Bilateral Package No 1.[38] To put it differently, only both could enter into force or none. However, the troubles with a legal basis and potential procedural shenanigans make this scenario rather impractical. This is probably one of the reasons why the European Council opts for inclusion of the transitional regime in the withdrawal agreement.[39] Hence, it will serve as a bridge between the past and the future. This, however, opens a political and legal minefield, which will be attended to during the Brexit negotiations, which are due to re-commence in early 2018.

[38] See Art. 1, para. 2, of Decision 2002/309/EC, Euratom of the Council and of the Commission of 4 April 2002 as regards the Agreement on Scientific and Technological Cooperation, on the conclusion of seven Agreements with the Swiss Confederation, p. 1. See further, on EU-Swiss relations, *inter alia*, L. Goetschel, *Switzerland and European Integration: Change Through Distance*, in *European Foreign Affairs Review*, 2003, p. 313; S. Breitenmoser, *Sectoral agreements between the EC and Switzerland: contents and context*, in *Common Market Law Review*, 2003, p. 1137; F. Emmert, *Switzerland and the EU: Partners, for Better or for Worse*, in *European Foreign Affairs Review*, 1998, p. 367.

[39] European Council Guidelines EUCO XT 20011/17, para. 4.

The first question is for how long the interim arrangement should apply and whether it would be fitting to envisage a possible extension of the transitional period, should the negotiations of a fully-fledged trade agreement experience delays.[40] When it comes to first, the European Council makes it clear that the transitional regime will have to be limited in time.[41] The European Parliament firmly talks about a three-year regime.[42] The UK seems to prefer a two-year transition. It should be noted that any extension of an agreed timeframe would be problematic. For instance, what kind of *modus operandi* would apply? Nevertheless, bearing in mind the complexities of a fully-fledged post-Brexit free trade agreement, it would be sensible to provide for a fixed term transitional period with a possibility of extension. It is rather likely that the future relations would be regulated in a mixed agreement requiring ratification of the EU, Euratom and all remaining Member States of the EU. Experience proves that a positive outcome should not be considered *fait accompli.* Furthermore, it would take months, if not years, for all procedures to be completed. Thus, common sense dictates creation of a mechanism allowing for extension of the transitional regime. Although it would be mainly an escape hatch, it could prove to be a too bitter a pill to swallow for the hard-core Brexiteers.

IV.3. Institutional and substantive aspects of a tailor-made transitional arrangement

a) *Institutional aspects of the transitional arrangement*

The negotiations of a transitional arrangement are likely to be a complicated affair. For the EU it is a matter of protecting its uniformity as well as maintaining the homogeneity of its legal order.[43] As put in a straight-forward fashion in the European Council Guidelines of 15 December 2017: "Such transitional arrangements, which will be part of the Withdrawal Agreement, must be in the interest of the Union, clearly defined and precisely limited in time".[44] To begin with, a decision will have to be made as to the formal status of the UK during the transition period and the extent to which it would be bound by the principle of loyal co-operation. The analysis of existing political statements and formal positions of the EU institutions as well as the UK's government seems to imply that the

[40] This is perfectly possible bearing in mind the idiosyncrasies of mixed agreements and most recent shenanigans with ratification of trade agreements with Canada and Ukraine. For an academic appraisal see, *inter alia*, G. Van der Loo, R.A. Wessel, *The Non-Ratification of Mixed Agreements: Legal Consequences and Options*, in *Common Market Law Review*, 2017, pp. 735–770.

[41] European Council Guidelines EUCO XT 20011/17, para. 4.

[42] European Parliament Resolution P8_TA-PROV (2017)0102 of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union, para. 28; European Parliament Resolution P8_TA-PROV(2017)0490 of 13 December 2017 on the state of play of negotiations with the United Kingdom, para. 12.

[43] See the principles governing the Brexit negotiations, which have been unequivocally defined in the European Council Guidelines EUCO XT 20004/17, para. I.

[44] European Council Guidelines EUCO XT 20011/17, para. 4.

transitional regime will apply as of the formal date of departure from the EU. This means that the UK would no longer be a Member State of the EU when the transitional regime commences. It is unclear, though, what exactly would be its status. This is a matter of constitutional importance, which will have to be addressed early in the negotiations. Furthermore, the status of the UK will be inextricably linked with the substance of transitional arrangement. This is up for the negotiations, however the European Council has made its position clear in its Guidelines of 15 December 2017. They provide as follows:

> "In order to ensure a level playing field based on the same rules applying throughout the Single Market, changes to the acquis adopted by EU institutions, bodies, offices and agencies will have to apply both in the United Kingdom and the EU. All existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures will also apply, including the competence of the Court of Justice of the European Union. As the United Kingdom will continue to participate in the Customs Union and the Single Market (with all four freedoms) during the transition, it will have to continue to comply with EU trade policy, to EU customs tariff and collect EU customs duties, and to ensure all EU checks are being performed on the border vis-à-vis other third countries".[45]

The key question is whether any of the above will be agreeable to the UK. Furthermore, to turn such a political statement into law may prove to be challenging. For instance, if the UK were to remain part of the Internal Market, it would be covered by all relevant principles. Thus, an essential question emerges whether post-Brexit the UK can be still bound by the EU Founding Treaties. In this respect at least two solutions seem imaginable. The first option is that the withdrawal agreement would provide a list of TEU/TFEU/Euratom provisions, which would apply to the UK once it departs from the EU. Such a solution would be problematic at many levels. Most importantly, since the UK will cease to be a Member State, could it be bound by provisions, which exclusively apply to members of the club? Furthermore, the question is whether such an extension of the scope of application *rationae personae* to a third country could be provided in the withdrawal agreement, which – in the hierarchy of sources of EU law – will be subordinate to the EU Treaties. This would be legally problematic, to say the least. Hence, as an alternative, one could envisage either inclusion in the withdrawal agreement of provisions replicating relevant sections of TEU/TFEU/Euratom or their list. The first would be along the lines of the Agreement on the EEA, which in many places mirrors what is now the TFEU.[46] This, however, is just the tip of the iceberg as the UK would also have to comply with

[45] European Council Guidelines EUCO XT 20011/17, para. 4.

[46] TFEU was the Treaty establishing the European Economic Community (EEC Treaty) at the time when the EEA Agreement was negotiated.

relevant EU secondary legislation, including the EU Customs Code.[47] Following the practice known from the EEA (and, to a degree also a handful of other international agreements between the EU and third parties) one can expect annexes with long lists of relevant EU *acquis*, that the UK would be expected to comply with.[48] This triggers a number of fundamental questions about the selection and enforcement of such legal acts, participation of the UK in EU decision-making, and the jurisdiction of the CJEU. A taste of what is expected by the EU is clearly visible in the quoted above European Council Guidelines of 15 December 2017.

Firstly, the negotiators would be asked to come up with lists of EU secondary legislation that the UK would remain bound by *après* Brexit. It does not require a broad imagination to picture bitter disputes between the two sides as to the exact scope of the UK's commitment. The formal position of the European Council indicates that the EU expects the UK to comply with EU *acquis,* currently applicable to it. This would include the highly contentious free movement of persons legislation. In this respect one can already detect a potential legal and political clash as the UK is planning to introduce new legislation replacing the current regime applicable *qua* EU law as of the day of Brexit.[49] However, the overall scope of the obligations resting on the shoulders of the UK would largely depend on its substantive involvement in EU matters during the transition period. Judging by the wording of the European Council Conclusions of 15 December 2017, the EU negotiating team will not have the flexibility of a yoga teacher.

Secondly, as is well known, the EU provides for a new legal order, which benefits from doctrines of primacy, direct and indirect effect as well as state liability. Many types of legal acts are directly enforceable in national courts and, in accordance with well-established case-law of the Court of Justice, they are a direct source of rights of individuals that the national courts have the obligation to protect.[50] From the day of the UK's accession to the

[47] Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, p. 1.

[48] See, *inter alia*, Association Agreement of 21 March 2014 between the European Union, the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, p. 3; Association Agreement of 30 August 2014 between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, p. 4; Association Agreement of 27 June 2014 between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, p. 4. For an academic appraisal see, *inter alia*, G. VAN DER LOO, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area. A New Legal Instrument for EU Integration Without Membership*, Leiden: Brill, 2016.

[49] See, for instance, Home Office, Prime Minister's Office, 10 Downing Street, UK Visas and Immigration, Department for Exiting the European Union, and Foreign & Commonwealth Office, *Policy paper: Safeguarding the position of EU citizens in the UK and UK nationals in the EU*, 26 June 2017, www.gov.uk.

[50] See, inter alia, B. DE WITTE, *Direct Effect, Primacy, and the Nature of the Legal Order*, in P. CRAIG, G. DE BÚRCA, *The Evolution of EU Law*, Oxford: Oxford University Press, 2011, pp. 323-362; D. LECZYKIEWICZ, *Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability*, in A. ARNULL, D. CHALMERS (eds), *The Oxford Handbook of European Union Law*, cit., pp. 212-248; A. CAPIK,

European Communities, EU law has been directly enforceable *qua* European Communities Act 1972.[51] The question is how would the EU legal acts covered by the transitional regime be applicable in the UK when it leaves the EU. On the one hand, it is clear that the EU will insist on maintenance of *status quo* and application of the tenets of EU law.[52] On the other hand, the EU (Withdrawal) Bill does not envisage a transitional period scenario; however, it is due to maintain some of the effects of EU secondary legislation in the legal orders of the UK as of the date of Brexit. It is likely that during the negotiations of the transitional arrangements, EU regulations and their direct applicability may be a source of intellectual headaches. As things stood when this *Article* was completed, EU regulations would cease to be directly applicable in the UK when the Bill turns into an Act of Parliament and, as planned, enters into force on the date of withdrawal. The question is how to reconcile that with what the European Council demands, including respect for *effet utile* of EU law, a principle that the Court of Justice is a forceful guardian of. At this stage of the withdrawal negotiations it is unclear whether a continued direct application of EU regulations would be agreeable to the UK or whether a commitment along the lines of Arts 6-7 of the EEA Agreement would be more fitting and acceptable.[53] To put it differently, the UK would be under an obligation to secure effective enforcement of relevant EU legislation but without the obligation to guarantee the direct applicability of regulations. The negotiations will not be limited to the latter but will cover, in more general terms, the application of the doctrines of primacy, direct and indirect effect as well as state liability post-Brexit. Arguably, these fundamental constitutional issues would have to be attended to early in the negotiations of the transitional regime.

Thirdly, UK's continued participation in the Customs Union, the Internal Market or any other policy of the EU would require institutional involvement of its representatives. This will, no doubt, be a very thorny issue in the negotiations. The European Council made it clear in its Guidelines of 15 December 2017 that the UK "as a third country, will no longer participate in or nominate or elect members of the EU institutions, nor participate in the decision-making of the Union bodies, offices and agencies".[54] On the one hand, the language employed by the European Council suggests a *fait accompli*. On the other hand, one can imagine at least two alternative arrangements. The first option is to maintain status quo, which in reality would be rather tricky to accommodate, bearing in mind that

Five Decades since Van Gend en Loos and Costa came to town: primacy, direct and indirect effect revisited, in A. ŁAZOWSKI, S. BLOCKMANS (eds), *Research Handbook on EU Institutional Law*, Cheltenham: Edward Elgar, 2016, pp. 379-420.

[51] For a comprehensive analysis see, *inter alia*, D. NICOL, *EC Membership and Judicialization of British Politics*, Oxford: Oxford University Press, 2001.

[52] European Council Guidelines EUCO XT 20011/17, para. 4.

[53] Further on reception of EU law in the EEA and its application see, *inter alia*, C. BAUDENBACHER (ed.): *The Handbook of EEA Law*, Cham-Heidelberg-New York-Dordrecht-London: Springer, 2015; *The Fundamental Principles of EEA Law*, Cham-Heidelberg-New York-Dordrecht-London: Springer, 2017.

[54] European Council Guidelines EUCO XT 20011/17, para. 3.

the UK is expected to leave the EU when the transitional phase commences. The second, and a more achievable option, is that the UK would have a status comparable to the EEA-EFTA countries and Switzerland.[55] It would be entitled to participation in so-called decision-shaping but not decision-making proper. This would have several advantages for the EU, mainly that the UK would be no longer fully involved in EU institutions. It would not have the right to have a member of the European Commission or elected members of the European Parliament. In that scenario, it would also lose the right to appoint the judges or advocates general at the Court of Justice. Yet, it would not be completely out of the loop. For the UK the advantages of such an option are limited, as its status would be downgraded from a fully-fledged law-maker to a law-taker, at the mercy of twenty-seven EU Member States. Still, however, it would be better than being completely cut-off from the EU decision-making as it would allow the UK diplomats to make attempts at shaping of EU legislation. The option outlined in the European Council Guidelines of 15 December 2017 would be the worst possible scenario for the UK.

Fourthly, the EU is insisting on continued jurisdiction of the Court of Justice *vis-à-vis* the UK.[56] As already noted, if the option of participation in the Internal Market or the Customs Union is chosen, it is inevitable that the UK would be required to apply EU legislation. Consequentially, as the European Council made it clear, the UK would be expected to remain subject to relevant enforcement procedures and scrutiny of compliance. It is questionable whether the infringement proceedings laid down in Arts 258-260 TFEU as well as the preliminary ruling procedure (Art. 267 TFEU) could apply to a former Member State, which would no longer be a party to the TFEU. In this respect, the options seem twofold. Firstly, the withdrawal agreement (or any other agreement regulating a transitional regime) could provide a cross-reference to relevant provisions of TFEU. In the alternative, similar tailor-made *modi operandi* could be developed in course of negotiations and relevant provisions inserted into the withdrawal agreement. Either way, the EU will be driven by the objective need to preserve the effectiveness and homogeneity of EU law. This is likely to translate into a rather non-flexible negotiation stance that would be hard to reconcile with the priorities of the UK's government.

b) *Substantive aspects of the transitional arrangement*

As already mentioned, one of the fundamental issues that will have to be resolved, as the both sides engage in negotiations of the transitional regime, is which substantive dossiers should the deal extend to. To put it differently, it will be essential to agree on the post-Brexit involvement of the UK in the Internal Market, the Customs Union as well as other internal and external policies pursued by the EU. On the EU side things seem to be clear.

[55] See further, *inter alia*, C. TOBLER, *One of Many Challenges After 'Brexit': Institutional Framework of an Alternative Agreement – Lessons from Switzerland and Elsewhere?*, in *Maastricht Journal of European and Comparative Law*, 2016, pp. 575-594.

[56] European Council Guidelines of 15 December 2017, EUCO XT 20011/17, para. 5.

Guidelines of the European Council of 15 December 2017 leave little doubt that the UK is expected to remain fully committed to Internal Market and Customs Union. Yet, with very limited information as to the current intentions of the UK's government it is hard to predict where the debate and the negotiations would go from here. According to the media reports, the business community is becoming ever more concerned with the uncertainties that lay ahead. Many business leaders urge the government to provide for a transitional regime resembling the pre-Brexit arrangement as much as possible. If that were the case, it would amount to participation in key policies requiring compliance with EU primary and secondary legislation. This, as explained above, would be rather problematic for the British negotiators. Furthermore, it would necessitate, as made it clear by the European Council, acceptance of the jurisdiction of the Court of Justice. As well known, ending of the latter, is one of the red lines of the UK's current government.

To give the above more substance it is worth exploring the consequences of maintaining the status quo regarding the Internal Market of the EU. It comprises the four freedoms which, as made clear in the European Council Guidelines for Brexit negotiations, are indivisible.[57] If the transitional regime were to extend the application of Internal Market principles to the UK post-Brexit, it would require acceptance of not only free movement of goods but also free movement of persons. As is well known, this is a highly contentious matter in the UK public discourse and allegedly one of the reasons behind the referendum success of the "Vote Leave" camp. More complexities would be added, if the transitional regime – as demanded by the European Council – were to cover the Customs Union. To what extent would the UK be involved in everyday functioning of the Customs Union? Would it be allowed to negotiate trade agreements with the outside World as long as they would not enter into force before the expiry of the inter-temporal regime? Would and should the UK be engaged in negotiation of trade agreements it may never be a party to, once it leaves the EU? The European Council Guidelines of 15 December 2017 make it clear that the UK would be expected to comply with EU's trade policy towards the outside World. Hence, this implies that the UK would not be permitted to negotiate and to sign trade agreements. It is not certain, though, whether – as a third country – it would remain bound by hundreds of international treaties applicable to EU and its Member States during the transitional period.

Another fitting example would the co-operation in police and criminal matters. Although the UK is covered by an opt-out, it remains bound by several pieces of EU *acquis* it has opted in over the years. This includes a highly contentious, yet useful, Framework Decision on the European Arrest Warrant.[58] Without a transitional regime covering the legal act in question, the UK would, on the date of EU withdrawal, cease to be part of this well-

[57] European Council Guidelines EUCO XT 20004/17, para. I-1.

[58] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. For an academic appraisal see, *inter alia*, N. KEIZER, E. VAN SLIEDREGT (eds), *The European Arrest Warrant in Practice*, The Hague: Asser Press, 2009.

established procedural framework for fast-track extradition. That would have serious legal and security implications, unless a transitional regime provided for continuous application of the European Arrest Warrant legislation, or even more of the mutual recognition instruments that the UK has opted in, was secured.[59] These examples are, of course, presented as part of the sampling exercise. Yet, they demonstrate rather well the challenges ahead.

V. Conclusions

This *Article* proves that a Brexit transitional arrangement is a tempting political proposition, which will be very difficult to turn into reality. The first option is extension of the two-year deadline laid down in Art. 50 TEU. This, however, may not be a straight-forward affair. On the one hand, Art. 50 TEU itself is transitional in nature. It envisages reduction of the involvement of a departing Member State in the everyday work of the EU and, as argued above, serves as a bridge between the EU membership and future relations in any shape or form. On the other hand, the internal UK politics of Brexit makes the extension of the two-year period laid down in Art. 50 TEU rather unlikely. For hard-core Brexiteers it is unimaginable that the UK could remain a member state for longer than necessary, that is beyond 29 March 2019. Furthermore, one should not take for granted that unanimity between the Member States, needed for the extension, would be a *fait accompli*. As things stood when this *Article* was completed, the negotiations of a tailor-made transitional regime to be included in the withdrawal agreement were to commence in early 2018. While both the EU and the UK seemed to have agreed that such a solution was desirable, their objectives were, at least *prima facie*, hard to reconcile. The European Council adopted its Guidelines on 15 December 2017. The wording employed by the EU seems to imply that very little can be negotiated and its stance on key principles governing the future transition is strong and stable. While the UK's position on the essential elements of implementation phase is weak and wobbly, it is – nevertheless – rather clear that it will be very difficult to square the circle. As demonstrated in this *Article*, negotiating a transitional arrangement is a legal minefield with a large number of fundamental issues requiring solutions acceptable to both sides. Any transitional arrangement for Brexit is politically appealing, but legally problematic. Arguably, the plethora of potentially contentious issues that would need to be solved during the negotiations of a transitional period makes one question very legitimate: are they worth the candle? Bearing this in mind it can be argued that negotiation of the transitional arrangement may prove to be as tricky as negotiation of terms and conditions of withdrawal. With a very tight framework for both one can even imagine the following sequence: first the extension of Art. 50 TEU, followed by entry into force of the withdrawal agreement and a transitional period laid

[59] See, House of Lords, European Union Committee, *Brexit: future UK-EU security and police cooperation*, 16 December 2016, www.parliament.uk.

down therein. It only proves that, as the present author argued in the earlier contributions to the debate, a withdrawal from the EU is possible but it will be a very complicated and resource-thirsty exercise.