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Legal Status of the United Kingdom as a Third State: Strange Déjà Vu

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Chapter 11

Legal Status of the United Kingdom as a Third State: Strange *Déjà Vu*

M. Gatti

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1 **Abstract** The UK government envisaged a clean break from the Union but, under
2 the Withdrawal Agreement, the UK’s legal position as a “third state” is ambiguous.
3 Throughout the transition period, the UK is in many respects hardly distinguishable
4 from an EU member state. After the transition period, the UK remains outside Union
5 institutions, but applies core EU rules in respect of specific persons (EU citizens
6 settled in the UK) or areas (Northern Ireland). Furthermore, UK authorities must
7 apply these EU rules in light of EU principles and are, by and large, subject to
8 the control of EU institutions, particularly the Court of Justice. Several aspects of
9 the new legal status of the UK are a *déjà vu*, since the Withdrawal Agreement is
10 relatively similar to “integration-oriented agreements”, such as Association Agree-
11 ments. To be sure, this similitude is imperfect, as the degree of integration of the
12 United Kingdom varies considerably, depending on the subject matter, the persons
13 and regions concerned, and/or the moment when the law is applied. The UK’s legal
14 position, therefore, remains complex and contradictory: as it was the least integrated
15 member of the Union, it is now a very integrated third state.

16 **Keywords** Brexit • withdrawal • citizenship • free movement of goods • Court of
17 Justice • EU institutions

11.1 Introduction

After its withdrawal from the Union, the legal status of the UK shifted from “member state” to “third state”. But what does it really mean, to be a “third state”?¹

The legal status of a “member state” or “third state” corresponds to the legal position of that country in the legal order of the Union, i.e. the sum of its rights and obligations in the EU legal system.² EU Treaties distinguish clearly member states from third states, at least from a formal perspective. Member states are subject to a set of rights and obligations under EU primary law, while third states are described by the Treaties as objects of cooperation³ or entities the EU may interact with.⁴ From a substantive viewpoint, however, the distinction is not that straightforward, since the scope of rights and obligations of member states and third states may vary.⁵ For instance, Switzerland (a third state) is in the Schengen area, unlike some EU member states, such as Ireland.

Some elements, linked to the nature of the European Union, arguably characterise the position of EU member states, and set them apart from third states, at least in principle. According to the case law of the Court of Justice,⁶ EU Treaties established a new legal order, characterised by the “establishment of *institutions* endowed with sovereign rights”.⁷ EU law is defined by “its *primacy* over the laws of the Member States and by the *direct effect* of a whole series of provisions which are *applicable to their nationals*” and to the member states themselves.⁸ To ensure that those specific characteristics are preserved, “the Treaties have established a *judicial system* intended to ensure consistency and uniformity in the interpretation of EU law.”⁹

The status of member state may thus be linked to at least five essential elements that arguably define their position. The member states (1) are bound by EU Treaties

¹On the meaning of the expression “third state”, see Bosse Platière and Rapoport 2014, pp. 17–18.

²On the notion of legal status, see *inter alia* Trisciuglio 2019, p. 11.

³See e.g. Consolidated Version of the Treaty on the European Union, 2012, OJ C326 (TEU) articles 21(1) and 43(1).

⁴See e.g. Consolidated Version of the Treaty on the Functioning of the European Union, 2012, OJ C 326 (TFEU) articles 216 and 218.

⁵See, in this sense Abderamane 2018, p. 217.

⁶On the relationship between the status of EU member states and the principles enucleated in the case law of the Court of justice, see Potvin-Solis 2018, pp. 17–18.

⁷Court of Justice, *Van Gend en Loos*, Judgment, 5 February 1963, Case 26-62, EU:C:1963:1, p. 12, emphasis added.

⁸Court of Justice, *Wightman*, Judgment, 10 December 2018, Case C-621/18, EU:C:2018:999, paras 44–45; Court of Justice, *Achmea*, Judgment of 6 March 2018, Case C-284/16, EU:C:2018:158, para 33; Court of Justice, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion 2/13 of 18 December 2014, EU:C:2014:2454, paras 165–166.

⁹Court of Justice, *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA)*, Opinion of the Court of 30 April 2019, Opinion 1/17, ECLI:EU:C:2019:341, paras 110–111; Court of Justice, *Les Verts*, Judgment, 23 April 1986, Case 294/83, EU:C:1986:166, para 23; *Van Gend en Loos*, above n. 7, p. 12.

42 and the principles of EU law, such as sincere cooperation, uniform interpretation and
 43 application of EU law, as well as primacy and direct effect; consequently, they apply
 44 EU law to individuals, especially in respect of free movement of (2) citizens and (3)
 45 goods; and participate in (4) the EU judicial system¹⁰ and (5) EU institutions, bodies,
 46 offices or agencies.

47 Although, in principle, these elements characterise the position of EU member
 48 states, they may concern, to a certain extent, some third states, too. Through the
 49 conclusion of international agreements with the EU, third states may engage in “inte-
 50 gration without membership”.¹¹ It is the case, for example, of the European Economic
 51 Area (EEA),¹² composed of the European Union and three members of the European
 52 Free Trade Area (EFTA), i.e. Iceland, Liechtenstein, and Norway (hereafter, EFTA
 53 states).¹³ EFTA states ensure, to a large extent, free movement of persons, apply EU
 54 internal market law¹⁴ and are subject to the jurisdiction of the EFTA Court, which
 55 interprets the EEA Agreement in light of EU principles and the case law of the Court
 56 of Justice.¹⁵

57 This chapter investigates the status of the UK as a third state by referring to the five
 58 aforementioned elements that characterise the legal position of EU member states.
 59 To elucidate the specificities of the UK’s status, the analysis compares the position of
 60 the UK to the status of other third states that have a close relationship with the Union.
 61 It is submitted that, after Brexit, the UK has an unprecedentedly complex status. In
 62 some areas, the UK’s position is analogous to the status of Associated countries,
 63 particularly EFTA states. Although the Withdrawal Agreement is a “disintegration-
 64 oriented” instrument, it is relatively similar to “integration-oriented agreements”,
 65 such as the EEA Agreement or other Association Agreements.¹⁶ In any event, this
 66 similitude is imperfect, as the degree of integration of the United Kingdom varies
 67 considerably: *certain* EU rules concerning *certain* topics apply in *certain* regions of
 68 the UK, to *certain* persons, and/or for a *certain* period. If one wanted to represent

¹⁰Court of Justice, *Poplawski II*, Judgment, 24 June 2019, Case C-573/17, EU:C:2019:530, para 52; *Achmea*, above n. 8, para 35; Opinion 2/13 (*Accession to the ECHR*), above n. 8, para 174; There are, of course, other elements that might possibly characterise EU member states, such as common values, see Article 2 TEU; Court of Justice, *Commission v. Poland*, Judgment, 24 June 2019, Case C-619/18, EU:C:2019:531, paras 42, 43, and 58; Opinion 2/13 (*Accession to the ECHR*), above n. 8, paras 168 and 173. The EU purportedly shares “values” with several third countries, too, see e.g. Agreement on the European Economic Area, opened for signature 02 May 1992, OJ L 1/3–522, (entered into force 1 January 1994) (EEA Agreement), preamble (referring to “common values”); Cooperation Agreement between the European Community and the Socialist Republic of Vietnam, opened for signature 17 July 1995, OJ L329/8 (entered into force 1 June 1996) preamble (referring to “shared values”).

¹¹Lazowski 2008; see also Ott 2015 and Maresceau 2013.

¹²EEA Agreement, above n. 10.

¹³Cf. EEA Agreement, above n. 10, article 2(b).

¹⁴Baur et al. 2018, p. 64; Van Elsuwege and Chamon 2019, p. 28.

¹⁵See below, Sects. 11.2, 11.3, 11.4 and 11.5.

¹⁶Cf. Rapoport 2017, p. 104; see also Ott 2015, p. 10; Maresceau 2012, p. 319; Maresceau 2013, p. 153.

third countries on a sliding scale of “closeness” to EU membership, the UK would be contemporarily “very close” in some respects and quite “far” in others.

It is worth noting that, at the time of writing, the EU and the UK have concluded a Withdrawal Agreement (hereinafter: WA), including a Protocol on Ireland/Northern Ireland (hereinafter: NI Protocol) and a Protocol relating to the Sovereign Base Areas in Cyprus, and a Protocol on Gibraltar,¹⁷ and have adopted a (nonbinding) Political Declaration.¹⁸ The UK and the EU are currently negotiating a “Future Relationship” agreement, regarding cooperation on issues not covered by the Withdrawal Agreement, which might modify the status of the UK.¹⁹ This contribution focuses on the aspects of the UK’s status that are already discernible on the basis of the WA. The analysis does not intend to address all the details connected to the UK position, such as the treatment of British citizens in the EU, the treatment of goods exported from the UK to the EU, or the external relations of the UK after Brexit.

Section 11.2 investigates the application to the UK of core constitutional principles of the Union. Then, the attention turns to the application of EU law to individuals in the UK, concerning the movement of citizens (Sect. 11.3) and goods (Sect. 11.4). Section 11.5 focuses on the participation of the UK in the EU judicial system and Sect. 11.6 discusses the UK’s participation in the EU’s institutional structure. The conclusion suggests that certain elements of the UK’s status are modelled on previous experiences, but they are combined in a novel and uniquely intricate manner (Sect. 11.7).

11.2 Application of EU Constitutional Principles to and in the UK

EU Treaties, by definition, bind EU member states but are *res inter alios acta* from the perspective of third states. Nonetheless, rules and principles of EU primary law (as well as secondary rules based on primary law) may be applicable to third states, albeit indirectly, by virtue of international agreements concluded with the Union.

This is the case, in particular, of the UK during the “transition period”, which started with the UK’s withdrawal and is expected to last until the end of 2020, and may be extended once up to two years (December 2022).²⁰ During this period,

¹⁷ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, opened for signature 24 January 2020, OJ C 384I (entered into force 1 February 2020) (UK WA).

¹⁸ European Commission 2019.

¹⁹ Council Decision (EU, Euratom) 2020/266 of 25 February 2020 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement, OJ 2020 L58/53.

²⁰ UK WA, above n. 17, articles 126 and 132.

99 “Union law” as such is “applicable to and in the United Kingdom”,²¹ though there
 100 are exceptions relating, for instance, to participation in EU institutions (see Sect. 11.6
 101 below).²²

102 After the transition period, the status of the UK changes considerably in terms
 103 of the application of EU law. This section discusses the application of EU consti-
 104 tutional principles to and in the UK, by virtue of the Withdrawal Agreement. The
 105 following sections focus on the application of EU rules in respect of free movement
 106 of persons, free movement of goods, the jurisdiction of the Court of Justice and the
 107 UK’s participation in EU organs.

108 EU law is characterised by several constitutional principles, some of which are
 109 particularly relevant.²³ The list of core EU principles obviously includes *direct effect*
 110 and *primacy*, which are connected to *sincere cooperation*.²⁴ *Uniform interpretation*
 111 and application of EU law arguably constitutes another core constitutional principle
 112 of EU law²⁵ and ensures “its consistency, its full effect and its autonomy as well
 113 as, ultimately, the particular nature of the law established by the Treaties”.²⁶ The
 114 uniformity of interpretation of the Treaties is the primary mission of the Court of
 115 Justice, which fosters it, in particular, through the preliminary reference procedure.²⁷

116 EU constitutional principles generally apply to EU member states, but interna-
 117 tional agreements may lead to the application of EU constitutional principles—or
 118 the application of principles modelled on EU law—to and in third states. The EEA
 119 Agreement constitutes a useful term of comparison for the Withdrawal Agreement
 120 in this respect.²⁸ In the first place, both Agreements refer, explicitly or implicitly, to
 121 *sincere cooperation*. The EEA Agreement does not mention sincere cooperation as

²¹Ibid., article 127; see also articles 7, 128 and 129.

²²Ibid., article 129(3), which enables the UK to conclude international agreements with third coun-tries in areas subject to the EU’s exclusive competence, such as trade, provided such agreements do not apply during the transition period. See further Neframi 2019, pp. 220–221.

²³Cf. Constantinesco 2001.

²⁴See *Achmea*, above n. 8, para 34. See also Court of Justice, *Costa v Enel*, Judgment, 15 July 1964, Case 6/64, EU:C:1964:66: “the executive force of community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the treaty set out in article 5(2)” (providing for the obligation of sincere cooperation). See further Casolari 2019b, pp. 50–51.

²⁵On the characterisation of uniform interpretation and application of EU law as a principle, see *inter alia* Court of Justice, *Océ van der Grinten*, Judgment, 25 September 2003, Case C-58/01, EU:C:2003:495, para 53; Court of Justice, *Soledad Duarte Hueros*, Opinion of Advocate General Kokott of 28 February 2013, Case C-32/12, EU:C:2013:128, para 20; Constantinesco 2001; Burchardt 2019.

²⁶Opinion 2/13 (*Accession to the ECHR*), above n. 8, para 174; see also Court of Justice, *Draft Agreement on the Creation of a Unified Patent Litigation System*, Opinion of 8 March 2011, Opinion 1/09, ECLI:EU:C:2011:123, paras 67 and 83.

²⁷See, *inter alia*, Opinion 1/17 (*CETA*), above n.9, paras 110–111; Court of Justice, *Rosneft*, Judgment, 28 March 2017, Case C-71/15, EU:C:2017:236, para 80.

²⁸The EEA Agreement does not extend the legal order of the Union to EFTA countries, because it pursues specific objectives in a specific context (Neframi and Lacchi 2018, p. 240) but makes applicable principles modelled on EU law, as shown below.

122 such but its Article 3 mirrors to a certain extent Article 4(3) TEU, by stipulating that
 123 the Contracting Parties must take appropriate measures to ensure fulfilment of the
 124 obligations arising out of the Agreement and abstain from any measure which could
 125 jeopardize the attainment of its objectives. The obligation of sincere cooperation
 126 enshrined in Article 3 of the EEA Agreement has been used by the EFTA Court as
 127 a legal foundation for the introduction, in the EEA legal order, of principles linked
 128 to sincere cooperation, such as state liability²⁹ and consistent interpretation.³⁰

129 The Withdrawal Agreement may seem different from the EEA Agreement: Article
 130 5 WA stipulates that the parties “shall, in full mutual respect and good faith, assist
 131 each other in carrying out tasks which flow from this Agreement”. Being titled “Good
 132 faith” and referring to “good faith”, this provision might suggest that the international
 133 principle of good faith, and not the more expansive EU law principle of sincere coop-
 134 eration, should apply in this ambit.³¹ However, Article 5(3) WA clarifies that “This
 135 Article is without prejudice to the application of Union law pursuant to this Agree-
 136 ment, in particular the *principle of sincere cooperation*.”³² Moreover, Article 5(1)
 137 and (2) WA are almost identical to Article 4(3) TEU³³; the WA is even closer to the
 138 wording of the TEU than the EEA Agreement. This suggests that the WA, and the
 139 EU rules it refers to, should be applied in the UK consistently with the principle of
 140 sincere cooperation. Moreover, UK judges, like the EFTA Court, should arguably
 141 “import” in their legal order principles linked to sincere cooperation, such as state
 142 liability and consistent interpretation. The British judiciary should apply also the
 143 *ERTA* case law (which is based on the duty of sincere cooperation)³⁴ in respect of the
 144 EU’s rules applied in the UK by virtue of the Withdrawal Agreement. For instance,
 145 after the end of the transition period, the UK should not assume international obli-
 146 gations which might affect or alter the scope of the internal market rules applica-
 147 ble to Northern Ireland (see below, Sect. 11.4).

148 Secondly, the Withdrawal Agreement and the EEA Agreement ensure application,
 149 to a certain extent, of *direct effect* and *primacy*. To preserve the dualistic approach
 150 of some EFTA states, EEA law was not expressly given direct effect and primacy.³⁵

²⁹EFTA Court, *Sveinbjörnsdóttir*, Advisory Opinion of 10 December 1998, E-9/97, E1997J0009 para 6; EFTA Court, *Kolbeinsson*, Judgment, 10 December 2010, E-2/10, para 85. On the relationship between state liability and sincere cooperation, see Neframi 2018, p. 355.

³⁰EFTA Court, *Criminal proceedings against A*, Judgment of 3 October 2007, E-1/07, para 39; EFTA Court, *L’Oréal*, Judgment, 8 July 2008, Joined Cases E-9/07 and E-10/07, para 22. See further Hreinsson 2016, pp. 357–359; Lourenço 2019, p. 541; Neframi and Lacchi 2018, pp. 245–246. On the link between consistent interpretation and sincere cooperation, see Court of Justice, *Von Colson*, Judgment, 10 April 1984, Case 14/83, EU:C:1984:153, para 26.

³¹On the difference between good faith and sincere cooperation, see Constantinesco 1987 and Klamert 2014, pp. 42–46.

³²Emphasis added.

³³Differently from TEU, above n. 3, article 4(3), Article 5 WA, above n. 17, stipulates that the parties assist in each other “in good faith” and does not require them to facilitate the achievement of the Union’s tasks. See further Casolari 2019a, pp. 1027–1028; Casolari 2019b, pp. 72–73.

³⁴Court of Justice, *European Agreement on Road Transport*, Judgment, 31 March 1971, Case 22-70, EU:C:1971:32, paras 21–22.

³⁵See Protocol 35 (On the Implementation of EEA Rules) to the EEA Agreement.

151 The EFTA Court has rejected arguments for making the principles of direct effect
 152 and primacy part of the EEA legal order.³⁶ To partially compensate for the absence
 153 of direct effect, Article 7 of the EEA Agreement affirms that the acts referred to in
 154 decisions of the EEA Joint Committee (typically, EU secondary legislation) must “be,
 155 or be made” part of the internal legal order of the parties.³⁷ Furthermore, Protocol 35
 156 to the EEA Agreement introduces a so-called “*ersatz primacy*”, by stipulating that
 157 “for cases of possible conflicts between implemented EEA rules and other statutory
 158 provisions, the EFTA States undertake to introduce, if necessary, a statutory provision
 159 to the effect that EEA rules prevail in these cases.” This “*ersatz primacy*”, however,
 160 applies only to EEA norms implemented in national legal orders.³⁸

161 The Withdrawal Agreement is more straightforward. According to Article 4(1)
 162 WA, “legal or natural persons shall in particular be able to *rely directly* on the provi-
 163 sions contained or referred to in this Agreement which meet the conditions for direct
 164 effect under Union law.”³⁹ Moreover, the UK must ensure compliance with the duty
 165 to give EU provisions the same effect that they have in the EU legal order, “including
 166 as regards the required powers of its judicial and administrative authorities to disapply
 167 inconsistent or incompatible domestic provisions, through domestic primary legis-
 168 lation” (Article 4(2) WA). As in the case of the EEA’s *ersatz primacy*, the UK must
 169 adopt “primary legislation” to enable domestic judicial and administrative authori-
 170 ties to disapply any national legislation inconsistent with the WA (and the EU rules
 171 it refers to). Unlike the EEA’s *ersatz primacy*, though, the WA’s primacy arguably
 172 applies, not only to EU norms implemented in the UK legal order, but to all the
 173 “provisions of Union law” made applicable by the WA.⁴⁰

174 Thirdly, the Withdrawal Agreement, like the EEA Agreement, introduces exten-
 175 sive obligations in respect of the *uniform interpretation and application of EU law*.⁴¹
 176 Although the EEA Agreement creates an autonomous legal order, it aims at creating
 177 “a homogeneous European Economic Area” by ensuring “uniform interpretation and
 178 application” of EEA norms and those provisions of EU legislation which are substan-
 179 tially reproduced in EEA Agreement.⁴² For the sake of a homogeneous application of
 180 the law, the EEA Joint Committee takes decisions incorporating (with adaptations)
 181 new pieces of EU secondary law in annexes of the EEA Agreement, thereby making

³⁶EFTA Court, *Karlsson*, Judgment, 30 May 2002, E-4/01, para 28; *Criminal Proceedings against A*, above n. 30, para 40.

³⁷Hreinsson 2016, pp. 384–385.

³⁸See further Hreinsson 2016, pp. 384–386.

³⁹Emphasis added.

⁴⁰UK WA, above n. 17, articles 4(1) and (2). There may, in any event, be some issues with the application of the WA’s primacy under UK law, see UK’s European Union (Withdrawal Agreement) Act 2020, section 38; Dougan 2020, p. 21.

⁴¹Cf. Court of Justice, *Ruska Federacija*, Judgment, 2 April 2020, Case C-897/19 PPU, EU:C:2020:262, para 50; For a broader comparison of homogeneity clauses in integration-oriented agreements, see Ott 2015, pp. 18–23.

⁴²EEA Agreement, above n. 10, Recitals 4, 6 and 15 and article 1(1); EFTA Court, *L’Oréal*, above n. 30, para 27; see further Neframi and Lacchi 2018, pp. 240–241; Hreinsson 2016, pp. 350.

182 them binding on EFTA states.⁴³ Moreover, the provisions of the EEA agreement,
 183 when identical in substance to corresponding rules of EU law, must be interpreted
 184 “in conformity with” the relevant rulings of the Court of Justice handed down *prior*
 185 to the date of signature of the EEA Agreement.⁴⁴ By contrast, the EFTA Court must
 186 “pay due account to” the principles laid down by the rulings by the Court of Justice
 187 *after* the date of signature of the EEA Agreement.⁴⁵ “Paying due account to” presum-
 188 ably means less than “in conformity with”. The EFTA Court is at least obliged to
 189 examine the case-law of the Court of justice and make this clear in its reasoning.⁴⁶ In
 190 practice, the EFTA Court tends to follow the case law of the Court of Justice, unless
 191 there are “compelling grounds for divergent interpretations”,⁴⁷ linked to the specific
 192 context and objectives of the EEA Agreement.⁴⁸

193 Like the EEA Agreement, the Withdrawal Agreement fosters uniformity in the
 194 application of EU law. To be sure, the EEA Agreement and the Withdrawal Agree-
 195 ment have different objectives: while the former promotes integration (a homoge-
 196 neous EEA), the latter is intended to facilitate disintegration (the UK withdrawal).
 197 Nonetheless, both agreements make applicable EU rules to one or more third states,
 198 either by referring to EU sources or by restating their content.⁴⁹ Uniform interpre-
 199 tation and application of such rules is essential, not only for the EEA, but also for
 200 the UK. The WA promotes the “orderly withdrawal” of the UK, to “prevent disrup-
 201 tion and to provide legal certainty” to citizens, economic operators, and judicial and
 202 administrative authorities in the Union and in the UK.⁵⁰ To attain this goal, a uniform
 203 and, therefore, predictable application of the law is arguably indispensable. The WA
 204 itself implicitly calls for uniform interpretation and application of EU rules: under
 205 Article 4(3), WA provisions “referring to Union law or to concepts or provisions
 206 thereof” must be interpreted and applied in accordance with the methods and general
 207 principles of Union law.⁵¹

⁴³EEA Agreement, above n. 10, article 102; see further Sif Tynes 2018, pp. 25–26.

⁴⁴EEA Agreement, above n. 10, articles 6 and 119; see further Court of First Instance, *Opel Austria*, Judgment, 22 January 1997, Case T-115/94, EU:T:1997:3, para 110; Court of Justice, *A*, Judgment, 19 July 2012, Case C-48/11, EU:C:2012:485, para 22; Court of Justice, *Fonship A/S*, Judgment, 8 July 2014, Case C-83/13, EU:C:2014:2053, para 41.

⁴⁵Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, opened for signature 02 May 1992, OJ L 344 (entered into force 1 January 1993), article 3(2).

⁴⁶Baudenbacher 2016, p. 181.

⁴⁷EFTA Court, *L'Oréal*, above n. 30, paras 31, 37; see also Baur et al. 2018, pp. 76–77; Baudenbacher 2016, p. 183; Tatham 2016, p. 115–116.

⁴⁸Cf. Neframi and Lacchi 2018, pp. 242–243.

⁴⁹For instance, Article 5(5) NI Protocol stipulates that (i) “Articles 30 and 110 TFEU” apply to and in the UK in respect of Northern Ireland and (ii) “quantitative restrictions on exports and imports” are prohibited. See Protocol on Ireland and Northern Ireland to the UK WA (NI Protocol).

⁵⁰UK WA, above n. 17, preamble, recitals 5 and 7.

⁵¹To be sure, in the case of the UK WA, this interpretation is performed by national (UK) courts, not by an international tribunal (such as the EFTA Court).

208 Differently from the EEA agreement, the WA does not include a general expect-
 209 tation of automatic adaptation to new EU legislation: references to Union law are
 210 understood as references to Union law “as applicable on the last day of the transition
 211 period” (Article 6(1) WA).⁵² Nonetheless, the interpretation of the EU law provi-
 212 sions referred to in the WA follows the same rules set in the EEA Agreement. EU
 213 law provisions made applicable by the WA must be interpreted “in conformity” with
 214 the case law of the Court of Justice handed down *before* the end of the transition
 215 period (Article 4(4) WA). UK judicial and administrative authorities are generally
 216 required to have only “due regard” to relevant case law handed down *after* the end of
 217 the transition period (para 5).⁵³ Presumably, the concept of “due regard” is equivalent
 218 to “due account” under the EEA Agreement (see above). Since the concern for the
 219 “uniform interpretation and application” of EU law underlies the WA, as much as
 220 the EEA Agreement, British judges should, in principle, follow the example of the
 221 EFTA Court and respect the case law of the Court of Justice in its entirety—unless
 222 there are “compelling grounds” for divergent interpretations.

223 The Withdrawal Agreement fosters uniformity in the interpretation of EU law,
 224 not only by requesting British courts to take into account the case law of the Court of
 225 justice, but by extending the competence of the Court. This issue is discussed below,
 226 in Sect. 11.5. Before addressing that topic, the analysis focuses on the main rules
 227 whose uniformity of interpretation should be ensured, regarding free movement of
 228 citizens (Sect. 11.3) and goods (Sect. 11.4).

229 11.3 Free Movement of EU Citizens in the UK

230 By virtue of their sovereignty, states generally are entitled to control the entry of aliens
 231 into their territories and their residence there.⁵⁴ EU member states, having transferred
 232 part of their sovereign powers to the EU, should generally grant all EU citizens the
 233 right to move and reside freely within their territories.⁵⁵ Some third states have
 234 undertaken similar obligations via the conclusion of international agreements with
 235 the EU. The EEA Agreement, in particular, grants all EEA citizens free movement
 236 rights similar (though not identical) to those protected by EU law.⁵⁶

⁵²An exception concerns the coordination of social security systems; see UK WA, above n. 17, article 36; another exception is provided in NI Protocol, above n. 49, article 13(3); see further below, Sect. 11.4.

⁵³The NI Protocol makes exception to the “due regard” rule, see below, Sect. 11.5.

⁵⁴European Court of Human Rights, *Üner v. the Netherlands*, Judgment, 18 October 2006, App. 46410/99, para 54; see also Mariani 2019, p. 669.

⁵⁵See in particular TFEU, above n. 4, article 20; Charter of Fundamental Rights of the EU, 2002, OJ C364/1, article 45.

⁵⁶See EEA Agreement, above n. 10, articles 28–39; See also Decision of the EEA Joint Committee No 158/2007 of 7 December 2007, OJ 2008 L 124/20; EFTA Court, *Jabbi*, Judgment of the Court of 26 July 2016, E-28/15, para 71; see further Björgvinsson 2016, pp. 473–500.

237 Such an arrangement was unacceptable for UK authorities and, probably, public
 238 opinion. Restraining freedom of movement of persons has been a leitmotiv of the
 239 Brexit campaign, epitomised by the xenophobic rhetoric of Nigel Farage.⁵⁷

240 However, the Withdrawal Agreement does not eliminate freedom of movement
 241 completely. During the transition period, EU citizens fully benefit from freedom of
 242 movement in the UK, as Union law is applicable to and in the UK during this period
 243 (see above, Sect. 11.2). After the end of the transition period, EU citizens generally
 244 do not benefit from freedom of movement in the UK, with an important exception:
 245 Union citizens who exercised their right to reside in the United Kingdom or their
 246 right as frontier workers in the UK “before the end of the transition period” (hereafter,
 247 Protected EU citizens), as well as their family members, enjoy rights that are, to large
 248 extent, similar to the freedom of movement rights guaranteed by EU primary and
 249 secondary law (notably, Directive 2004/38/EC).⁵⁸ Protected EU citizens enjoy these
 250 rights “for their lifetime” (Article 39 WA), assuming they continue to reside in the
 251 UK.⁵⁹

252 In other words, the Withdrawal Agreement creates two categories of EU citizens:
 253 protected EU citizens, who moved to the UK before the end of the transition period
 254 (and who can enjoy free movement rights in the UK for the duration of their lives)
 255 and other EU citizens (who do not enjoy free movement in the UK after the transition
 256 period). Protected EU citizens may enjoy several rights after the end of the transition
 257 period, including⁶⁰: (i) The right to *enter* and *exit* the UK with a valid passport
 258 “or national identity card”⁶¹; The UK cannot impose on protected EU citizens “exit
 259 visa, entry visa or equivalent formality” (Article 14(1) and (2) WA).⁶² (ii) The right
 260 to *reside* in the UK, under conditions similar to those imposed by EU law for the
 261 exercise of the right to residence in EU member states (Article 13 WA).⁶³ (iii) The
 262 right to *permanent residence*, under the conditions set out in EU law for permanent
 263 residence in EU member states (Article 15 WA).⁶⁴ The UK may not impose any
 264 additional limitations or conditions for obtaining, retaining or losing residence rights

⁵⁷For instance, Farage’s campaign included a poster showing “a queue of migrants, mostly men and brown-skinned”, with the slogan “Breaking Point: the EU has failed us all”, *Evolvi* 2018, p. 4; see also Pitcher 2019, pp. 2491–2492.

⁵⁸See, in particular, UK WA, above n. 17, articles 10(1)(a), (c) and (e). On the notion of EU citizens and their family members, see Article 2 of Directive 2004/38, OJ 2004 L 158/77.

⁵⁹Under the UK WA, the right of permanent residence is lost only through absence from the host State for a period exceeding 5 consecutive years (whereas under EU law the period is 2 years), see UK WA, above n. 17, article 15(3); see further Dougan 2020, pp. 32–33.

⁶⁰This list of rights of EU citizens in the UK after Brexit is non-exhaustive; see, for instance, the right to equal treatment in the UK WA, above n. 17, article 23; see further Mariani 2019, p. 664; Piernas López 2019, pp. 287–289; Dougan 2020, pp. 30–31.

⁶¹Cf. Article 4 and 5 of Directive 2004/38/EC, cit. It is worth noting that the UK may decide no longer to accept identity cards five years after the end of the transition period, but only if they do not include a chip complying with the applicable International Civil Aviation Organisation standards, see UK WA, above n. 17, article 14(1).

⁶²Cf. Article 4(2) and 5(1) of Directive 2004/38/EC, cit.

⁶³UK WA, above n. 17, article 13.

⁶⁴See, however, n. 59.

265 other than those provided for in the Withdrawal Agreement and “there shall be no
266 discretion in applying the limitations and conditions provided for in the Agreement,
267 other than in favour of the person concerned” (Article 13(4) WA).

268 The Withdrawal Agreement introduces two main limitations to the freedom of
269 movement of protected EU citizens.⁶⁵ In the first place, the Withdrawal Agreement
270 widens the scope of the public policy exception to freedom of movement. Under
271 EU Law, an EU citizen who exercised his/her right to freedom of movement may
272 be regarded as posing a threat to public policy only if his/her individual conduct
273 represents a “genuine, present and sufficiently serious threat affecting one of the
274 fundamental interests of the society of the Member State concerned”.⁶⁶ Under the
275 WA, the UK may exercise wider discretion: the conduct of protected EU citizens
276 occurred after the end of the transition period may constitute grounds for restricting
277 their right of entry (for frontier workers) and residence (for other EU citizens) “in
278 accordance with national legislation”.⁶⁷ UK parliament and courts may, therefore,
279 adopt a broader understanding of “public security” than the EU legislature and judi-
280 ciary, and consequently introduce greater restrictions to the right to entry, exit, and
281 residence.⁶⁸

282 Secondly, and most importantly, the Withdrawal Agreement introduces new
283 procedural obligations for EU citizens. Union citizens do not require a permit to
284 exercise their rights to freedom of movement in the Union but EU citizens residing
285 in the UK may be required to apply for a new residence status which “confers the
286 rights” to freedom of movement (Article 18(1) WA). The UK has indeed introduced
287 the obligation to apply for a residence permit (“EU Settlement Scheme”). In principle,
288 this procedural obligation should not constitute an unassailable obstacle. The With-
289 drawal Agreement expressly stipulates that EU citizens have “a right to be granted the
290 residence status” if they comply with the conditions set in the Agreement—in partic-
291 ular, if they moved to the UK before the end of the transition period (Article 18(1)(a)
292 WA).⁶⁹ Applications must be “smooth, transparent and simple” and the document
293 evidencing the residence status must be issued free of charge (or for a charge not
294 exceeding that imposed on UK citizens for the issuing of similar documents) (Article

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⁶⁵The list of limitations is not exhaustive. For instance, the range of family members entitled to rights by association with a protected EU citizen is reduced, see Dougan 2020, p. 33. Moreover, procedural safeguards in case of removal seem reduced, see UK WA, above n. 17, article 20(4) and Peers 2019.

⁶⁶Court of Justice, *G.S. and V.G.*, Judgment, 12 December 2019, Joined Cases C-381/18 and C-382/18, EU:C:2019:1072, para 53; Court of Justice, *Orfanopoulos and Oliveri*, Judgments, 29 April 2004, Joined cases C-482/01 and C-493/01, EU:C:2004:262, paras 66 and 67; Court of Justice, *Coman and Others*, Judgement, 05 June 2018C-673/16, EU:C:2018:385, para 44; See also Article 27(2) of Directive 2004/38/EC, cit.

⁶⁷UK WA, above n. 17, article 20(2).

⁶⁸See also Piernas López 2019, p. 284.

⁶⁹The UK might also require EU citizens to comply with the conditions for enjoying the right to residence under EU law, e.g. being workers or having sufficient resources and sickness insurance, see Article 7(1)(a) and (b) of directive 2004/38; See further Smismans 2019, p. 448; Dougan 2020, p. 31.

295 18(1)(e), and (g) WA).⁷⁰ The deadline for submitting the application is not too strict,
 296 as it must not be less than 6 months from the end of the transition period (Article
 297 18(1)(b) WA).⁷¹

298 However, some commentators expressed concerns about the application of the EU
 299 Settlement Scheme in practice: for instance, EU citizens may allegedly face problems
 300 with evidence required for the Settlement Scheme application, since they may lack
 301 the means to prove their stay in the UK or may not be properly informed about the
 302 need to apply for a residence document.⁷² The potential misapplication of the WA in
 303 this area is very problematic: if an EU citizen failed to obtain the residence status in
 304 the immediate aftermath of the transition period, he/she probably would be unable to
 305 secure his/her rights afterwards.⁷³ The “hostile environment” for migration created
 306 by the UK Home Office does not ease the concerns regarding the application of the
 307 Withdrawal Agreement.⁷⁴

308 To avert the risk of misapplication of EU law during the transition period, the WA
 309 introduces two institutional solutions. On the one hand, the creation of an “authority”,
 310 which may receive complaints from EU citizens in the UK and has the right to
 311 bring legal action before an UK court (Article 159 WA).⁷⁵ On the other hand, the
 312 extension of the Court of Justice’s jurisdiction to give preliminary rulings concerning
 313 EU citizens’ rights, which is discussed below, in Sect. 11.5.

314 The rules on the free movement of EU citizens in the Withdrawal Agreement
 315 suggest that, with respect to EU citizens entering the UK *after* the transitional period,
 316 the UK’s position has indeed changed. But the UK’s obligations vis-à-vis EU citizens
 317 exercising their movement rights *before* the end of the transitional period are to a large
 318 extent unmodified. And these rights must be interpreted and applied consistently with
 319 the principles of EU law, such as direct effect and primacy (see above, Sect. 11.2). The
 320 Withdrawal Agreement thus injects in the UK legal order parts of EU citizenship law.
 321 A similar injection occurs with respect to other EU rules applicable to individuals,
 322 concerning freedom of movement of goods.

323 11.4 Free Movement of Goods to and from the UK

324 Internal market arguably constitutes, together with citizenship law, the main body
 325 of EU norms applicable to individuals and, as such, characterises EU membership.
 326 Freedom of movement of goods and the customs union may be seen as the core
 327 of the internal market. Some third states apply EU rules (or rules modelled on EU

⁷⁰See also, in particular, UK WA, above n. 17, articles 18(1)(f), (j), (k) and (l).

⁷¹Ibid., article 18(1).

⁷²Smismans 2018, p. 449; Benson et al. 2019.

⁷³See however UK WA, above n. 17, article 18(1).

⁷⁴Smismans 2018, pp. 444–445, 450; Benson et al. 2019; Dougan 2020, pp. 29–30.

⁷⁵The Joint Committee may abolish the authority eight years after the end of the transition period, see UK WA, above n. 17, article 159.

328 law): for instance, EFTA states apply EU internal market law, while the EU-Turkey
 329 Association Agreement ensures freedom of movement of goods and establishes a
 330 customs union.⁷⁶

331 Neither the EEA nor the Turkey model were acceptable for the UK, which sought
 332 to restore its regulatory autonomy and conduct its own policy on international trade.
 333 At the same time, the UK's exit from the EU's customs union could not be complete, as
 334 it might have determined the re-establishment of border checks between the Republic
 335 of Ireland (i.e. the EU) and Northern Ireland (the UK).⁷⁷ To solve this conundrum, the
 336 May government and the Union negotiated a complex solution, known as "backstop"
 337 and contained principally in a Protocol on Ireland/Northern Ireland.⁷⁸ During the
 338 transition period, EU law would have applied in the UK. Had the UK and the EU
 339 failed to conclude a Future Relationship agreement before the end of the transition
 340 period, the entire UK would have aligned with the EU customs union; furthermore,
 341 the UK would have committed to respect EU-equivalent standards in several areas,
 342 such as labour or environmental law (the so-called "Level Playing Field").⁷⁹

343 The Johnson government re-negotiated the NI Protocol. The new NI Protocol,
 344 which was approved by both Parties as part of the Withdrawal Agreement, confirms
 345 the applicability of substantive EU law provisions in the UK during the transition
 346 period.⁸⁰ After the transition period the UK ceases to be part of the EU's single
 347 market for goods and customs union.⁸¹ The UK can also define its own regulatory
 348 standards, as the new NI Protocol no longer refers to the Level Playing Field.⁸²

349 However, Northern Ireland is subject to special rules. It becomes "part of the
 350 customs territory of the United Kingdom" (Article 4(1) of the NI Protocol)⁸³ but
 351 remains closely aligned with EU law regarding the movement of goods. By virtue
 352 of the NI Protocol, most primary and secondary EU law rules on the movement of
 353 goods are applied in Northern Ireland after the end of the transition period. This is the
 354 case, for instance, of the prohibition of customs duties, discriminatory taxation, and
 355 quantitative restrictions in respect of trade between the Union and Northern Ireland
 356 (Article 5(5) NI Protocol). The NI Protocol also requires the application in Northern
 357 Ireland of the numerous EU acts regarding the customs union, including the Customs
 358 Code (Article 5(4) NI Protocol and Annex II to the Protocol). EU State aid law also

⁷⁶Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union, OJ 1996 L35/1.

⁷⁷See further Harvey and Kramer 2018, pp. 68–69.

⁷⁸See further on the "backstop" Ares et al. 2019, pp. 105–114.

⁷⁹Ibid., pp. 108–111, 116–122.

⁸⁰See above, n. 21.

⁸¹See NI Protocol, above n. 49, articles 4 and 5.

⁸²The only reference to this concept is found in the Political Declaration, which is a political commitment that does not significantly affect the UK's legal position, see Political Declaration, cit., para 77.

⁸³The UK, therefore, can include Northern Ireland in the territorial scope of trade agreements with other countries (provided that those agreements do not prejudice the application of the NI Protocol); see NI Protocol, above n. 49, articles 4(2)(3) and (4).

359 applies to the entire UK in respect of measures that affect trade between Northern
 360 Ireland and the EU (Article 10(1) NI Protocol).⁸⁴

361 Whereas EU law provisions referred to in the WA are generally intended as the
 362 provisions applicable “on the last day of the transition period”,⁸⁵ the references
 363 contained in the NI Protocol refer to the act “as amended or replaced” (Article 13(3)
 364 NI Protocol). Moreover, while UK judges should generally have “due regard” to the
 365 case law of the Court Justice handed down after the end of the transition period,⁸⁶
 366 they should always rule “in conformity” with the case law of the Court relating to
 367 provisions referred to in the NI Protocol, including post-transition case law (Article
 368 13(2) NI Protocol).

369 Northern Ireland seems more integrated in the Union than EFTA states, since
 370 the EFTA Court is bound only by the pre-EEA case law of the Court of Justice, at
 371 least in principle (see above, Sect. 11.2). The position of Northern Ireland comes
 372 close to that of Turkey: EU rules on freedom of movement of goods and the customs
 373 union applicable to Turkey must be interpreted “in conformity with the relevant
 374 decisions of the Court of Justice”,⁸⁷ including decisions issued after the signature of
 375 the EU-Turkey Association Agreement.⁸⁸

376 The NI Protocol goes even beyond any association agreement, by enabling EU
 377 “institutions, bodies, offices, and agencies” to exercise their powers regarding the
 378 implementation of the key norms applicable to Northern Ireland, notably with regard
 379 to free movement of goods⁸⁹ (Article 12(4) NI Protocol). The Court of Justice has the
 380 competence provided for in the Treaties in this respect and may receive preliminary
 381 references from British courts regarding the application of EU rules made applicable
 382 by the NI Protocol in respect of Northern Ireland (see further below, Sect. 11.5).
 383 In addition, Union organs may supervise British authorities. Union representatives
 384 have a right to be present during any activities of UK authorities relating to the
 385 implementation of provisions of Union law made applicable by the NI Protocol
 386 (e.g. the Customs Code); they also have a right to receive “all relevant information”
 387 relating to such activities. Union representatives may even request British authorities
 388 to perform control measures in individual cases (e.g. on a certain good imported in
 389 Northern Ireland) and the latter must comply with the request (Article 12(2) NI
 390 Protocol).

391 In other words, while Great Britain exits the EU’s customs union and single market
 392 for goods both *de jure* and *de facto*, Northern Ireland remains, to a large extent, within
 393 them—even more so than other third countries. There are, at any rate, three major
 394 differences between Northern Ireland and EU member states from the perspective of
 395 free movement of goods.

⁸⁴Ibid., Annex 5 to the NI Protocol.

⁸⁵UK WA, above n. 17, article 6(1), see above, Sect. 11.2.

⁸⁶Ibid., article 4(5); see above, Sect. 11.2.

⁸⁷Ibid., article 66.

⁸⁸See, to this effect, Ott 2015, p. 22.

⁸⁹*Rectius*, EU organs exercise their powers in respect of article 5, articles 7–10 and article 12(2)(2) NI Protocol.

396 In the first place, the UK applies in Northern Ireland only certain provisions of
 397 EU primary law, as well as the pieces of secondary law listed in Annex II to the
 398 NI Protocol, as amended or replaced. If the EU adopts a new piece of law, the UK-
 399 EU Joint Committee can either add it to an Annex to the Protocol or “examine all
 400 further possibilities” to ensure the functioning of the Protocol (Article 13(4) NI).
 401 This procedure is reminiscent of the adaptation of EEA law to EU law (see above,
 402 Sect. 11.2). As the Joint Committee decides by mutual consent of the UK and the
 403 EU,⁹⁰ it might not manage to adopt a decision “within a reasonable time”; in that
 404 case, the EU can adopt “appropriate remedial measures” (Article 14(4) NI Protocol).
 405 The vagueness of these rules might foster disputes between the parties. For instance,
 406 the Protocol does not specify to what extent amending (or replacing) EU acts may
 407 contain new elements compared to the amended (or replaced) act. Should the Union
 408 include “new” provisions in an amending act, the UK may bring the issue to the
 409 arbitration panel, which would have to decide whether an EU provision “amends” a
 410 previous EU act or is indeed “new”.⁹¹

411 Secondly, the NI Protocol apparently enables some restrictions to the trade in
 412 goods between Northern Ireland and the EU. Article 5(5) of the Protocol stipulates
 413 that Article 30 TFEU (prohibition of customs duties and charges having equivalent
 414 effect) and Article 110 TFEU (prohibition of discriminatory taxation) apply in
 415 respect of Northern Ireland. Then, it affirms that “quantitative restrictions on exports
 416 and imports” are prohibited but mentions neither “measures having equivalent effect”
 417 nor Article 34 TFEU (prohibiting both quantitative restrictions and measures having
 418 equivalent effect). This formulation of the NI Protocol seems the product of a delib-
 419 erate choice of the parties: the Draft Protocol on Ireland prepared by the European
 420 Commission in early 2018 mentioned both quantitative restrictions and “measures
 421 having equivalent effect”, but the latter were excluded from the NI Protocol.⁹² The
 422 NI Protocol implicitly refers to equivalent measures only in Article 7(1), by stip-
 423 ulating that “the lawfulness of placing goods on the market in Northern Ireland
 424 shall be governed by the law of the United Kingdom as well as, as regards goods
 425 imported from the Union, by Articles 34 and 36 TFEU”. This arguably means that
 426 only *certain* measures having equivalent effect are prohibited (those regarding the
 427 placing of goods on the market), while others, such as inspections at the frontier⁹³
 428 or “buy national” campaigns,⁹⁴ seem compatible with the NI Protocol.⁹⁵

⁹⁰UK WA, above n. 17, article 166(3).

⁹¹As this question deals with the interpretation of EU law, it should be settled after a preliminary reference to the Court of Justice (see below, Sect. 11.5).

⁹²European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, TF50 (2018) 33, article 4(4).

⁹³See e.g. Court of Justice, *Rewe-Zentralfinanz eGmbH*, Judgment, 8 July 1975, Case 4-75, EU:C:1975:98.

⁹⁴See e.g. Court of Justice, *Commission v Ireland*, Judgment, 24 November 1982, Case 249/81, EU:C:1982:402.

⁹⁵It cannot be excluded that the UK intended to be set free, in particular, from the (wavering) case law of the CJEU on selling arrangements, see e.g. *Keck*, Judgment, 24 November 1993, Case C-267/91,

429 Thirdly, Northern Ireland is in two markets at the same time—the UK market *de*
 430 *jure* and the EU market *de facto*—and this may create frictions between the Parties.
 431 As the EU and UK markets are likely to have different rules, in terms of custom
 432 duties and standards for products, there must be some restrictions to trade, either
 433 between the EU and Northern Ireland, or between this region and the rest of the
 434 UK. It may seem, at first sight, that trade between Northern Ireland and the rest
 435 of the UK should generally be free, with restrictions being an exception. Article
 436 5(1) NI Protocol indeed stipulates that “no customs duties shall be payable for a
 437 good brought into Northern Ireland from another part of the United Kingdom by
 438 direct transport [...] *unless* that good is at risk of subsequently being moved into the
 439 Union”.⁹⁶ However, restrictions to intra-UK trade are likely to be the rule. Article
 440 5(2) NI Protocol affirms that any good brought into Northern Ireland from outside the
 441 EU is “at risk of subsequently being moved into the Union”, unless it is established
 442 that it will not be subject to commercial processing in Northern Ireland and it fulfils
 443 additional criteria established by the Joint Committee). This suggests that custom
 444 duties are likely to apply to several goods exported from Great Britain to Northern
 445 Ireland.⁹⁷ Moreover, exports from Great Britain to Northern Ireland may be subject
 446 to custom and regulatory checks (e.g. sanitary checks on live animals). Such checks
 447 will be performed by British authorities, but EU authorities will supervise them (see
 448 above). These intricate arrangements are likely to create conflicts between EU and
 449 British authorities: for instance, the UK government already claims that checks on
 450 trade between Great Britain and Northern Ireland are not necessary.⁹⁸

451 The norms regulating free movement of goods may be integrated or modified by
 452 the Future Relationship agreement and subsequent decisions of the Joint Committee.
 453 The Future Relationship agreement is expected to define, in particular, the legal
 454 regime applicable to trade between the EU and Great Britain (i.e. UK minus Northern
 455 Ireland).⁹⁹ Moreover, starting four years after the end of the transition period, the
 456 Northern Ireland Assembly will be given the possibility to decide whether to continue
 457 the application of the EU rules of freedom of movement of goods contained in the NI
 458 Protocol (Article 18 NI Protocol). In any event, the NI Protocol arguably provides for
 459 a sufficiently stable legal framework, which enables some preliminary conclusions
 460 regarding the UK’s legal status in terms of free movement of goods.

461 The UK is treated *de facto* as a member state throughout the transition period but,
 462 after that, it becomes truly a third country, capable of defining its internal regulatory
 463 standards and its external trade policy. Nonetheless, the exit from the Union brings
 464 about two shortcomings, from the UK viewpoint. On the one hand, the so-called “Irish

EU:C:1993:905; *Commission v. Italy*, Judgment, 10 February 2009, Case C-110/05, EU:C:2009:66; *Scotch Whisky Association*, Judgment, 23 December 2015, Case C-333/14, EU:C:2015:845. I thank Giacomo Di Federico for pointing this out.

⁹⁶Emphasis added.

⁹⁷The Joint Committee and the UK government may, to a certain extent, ease the burden for exporters, see NI Protocol, above n. 49, articles 5(6) and 10, as well as Annex 5.

⁹⁸O’Carroll 2019.

⁹⁹See further Neframi 2019, pp. 226–227.

465 sea border” between Great Britain and Northern Ireland. It is curious that, whereas
 466 the Union is bound to respect the “territorial integrity” of its member states (Article
 467 4(2) TEU), the first withdrawal from the Union should lead to the creation of a *de*
 468 *facto* customs border within the withdrawing state. On the other hand, the persisting
 469 application of parts of EU law—past, present, and future—in the UK. Whereas the
 470 UK has little to no influence on the activity of EU institutions (see below, Sect. 11.6),
 471 EU organs can adopt, implement and enforce legislation applying in the UK, albeit
 472 only in respect of EU trade with Northern Ireland.¹⁰⁰ The persisting jurisdiction of
 473 the Court of Justice, discussed further below, is the most striking example in this
 474 sense.

475 11.5 Jurisdiction of the Court of Justice on Acts Applicable 476 to and in the UK

477 Being part of the EU’s judicial system and being subject to the jurisdiction of the
 478 Court of Justice is a key element of the membership of the Union. As repeatedly
 479 affirmed by the Court of Justice, EU Treaties have established a judicial system
 480 intended to ensure consistency and uniformity in the interpretation of EU law.¹⁰¹ It
 481 is for the “national courts and tribunals *and the Court of Justice*” to ensure the full
 482 application of EU law in all member states.¹⁰² The preliminary ruling procedure,
 483 which sets up a dialogue between the Court of Justice and the courts and tribunals
 484 of the Member States, constitutes the keystone of this judicial system.¹⁰³

485 In the Brexit debate, the Court of Justice was often presented as a pro-integration
 486 court, prone to overstep its mandate, and whose jurisdiction in the UK had to be
 487 terminated. The government of Theresa May embraced this approach, by affirming
 488 that “We will bring an end to the jurisdiction of the [Court of Justice] in the UK”.¹⁰⁴
 489 This result was achieved through the WA, though not completely. The Court of
 490 Justice maintains its jurisdiction virtually untouched throughout the transition period.
 491 For example, the Commission can bring infringement proceedings against the UK
 492 and British judges can issue preliminary references until the end of the transition
 493 period.¹⁰⁵

¹⁰⁰Cf. UK House of Lords, EU Committee 2020, para 168.

¹⁰¹*Achmea*, above n. 8, para 35; Opinion 2/13 (*Accession to the ECHR*), above n. 8, para 174; see also TEU, above n. 3, article 19.

¹⁰²*Achmea*, above n. 8, para 36, emphasis added; Opinion 1/09 (*Patent Court*), above n. 26, paras 68–69; Court of Justice, *Associação Sindical dos Juizes Portugueses*, Judgment, 27 February 2018, Case C-64/16, EU:C:2018:117, para 33.

¹⁰³*Achmea*, above n. 8, para 37; see also, *inter alia*, Opinion 2/13 (*Accession to the ECHR*), above n. 8, para 176.

¹⁰⁴UK Government 2017b, paras 2.2–2.3.

¹⁰⁵Moreover, the Court will maintain its jurisdiction, after the transition period, on proceedings brought by or against the United Kingdom and requests from UK tribunals made before the end of the transition period, see UK WA, above n. 17, article 86.

494 After the transition, the Court of Justice will play a role in several areas. In
 495 some fields, the Court’s post-transition powers are limited in time. The Court has
 496 jurisdiction on infringement and state aid proceedings brought by the Commission
 497 against the UK “within 4 years” after the end of the transition period, provided that
 498 the UK has failed to fulfil one of its obligations under EU Treaties or under Part
 499 Four of the Withdrawal Agreement (relating to the transition) before the end of the
 500 transition period (Article 87 WA).

501 Moreover, the Court of Justice has time-bound jurisdiction on preliminary refer-
 502 ences regarding free movement of citizens. Any court or tribunal in the UK may, in a
 503 case which “commenced at first instance within 8 years from the end of the transition
 504 period”, request the Court of Justice to give a preliminary ruling concerning the inter-
 505 pretation of Part Two of the Withdrawal Agreement, which concerns citizens’ rights
 506 (Article 158 WA).¹⁰⁶ The judgments of the Court of Justice have the same effects as
 507 preliminary rulings under Article 267 TFEU. The Court’s time-bound jurisdiction in
 508 this field probably is aimed at ensuring the correct application of EU citizenship law
 509 in respect of the issuance of residence documents. As noted above (Sect. 11.3), the
 510 EU citizens that do not obtain residence documents after the transition period risk
 511 losing their free movement rights in the UK forever. The Court may thus provide UK
 512 judges with guidance about crucial questions such as the definition of “EU citizen”
 513 or “residence in the host state”,¹⁰⁷ or the prohibition for UK authorities to exer-
 514 cise “discretion in applying the limitations” to residence rights.¹⁰⁸ This solution is
 515 satisfactory in principle, but there is the risk that British judges might fail to formu-
 516 late preliminary questions, especially because they (including last instance judges)
 517 “may”, but are not required to, do so.

518 In other areas, the powers of the Court of Justice have indefinite duration. This is
 519 the case of the Protocol relating to the Sovereign Base Areas in Cyprus¹⁰⁹ and the
 520 infringement proceedings and preliminary references relating to certain UK financial
 521 obligations to the Union (e.g. the contribution to Union programmes committed under
 522 the Multiannual Financial Framework 2014–2020).¹¹⁰

523 The jurisdiction of the Court has indefinite duration also in respect of the imple-
 524 mentation of the NI Protocol. As noted above (Sect. 11.4), the NI Protocol enables
 525 EU “institutions, bodies, offices, and agencies” to exercise their powers concerning
 526 the application of EU rules (mostly, on free movement of goods and the customs
 527 union) in relation to the UK and persons resident or established in the UK. The
 528 Court of Justice, in particular, has “the jurisdiction provided for in the Treaties in
 529 this respect. The second and third paragraphs of Article 267 TFEU shall apply to
 530 and in the United Kingdom in this respect” (Article 12(4) NI Protocol). Like the acts

¹⁰⁶Ibid., article 158(2), which provides for a partial exception to this rule in case of residence applications made during the transition period.

¹⁰⁷Ibid., articles 108(1)(a) and (f).

¹⁰⁸Ibid., article 13(4).

¹⁰⁹See Protocol No 3 on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus of 23 September 2003, OJ L236, article 12(1).

¹¹⁰UK WA, above n. 17, article 160.

531 of other “institutions, bodies, offices, and agencies”, the judgments of the Court of
 532 Justice produce with regard to and in the United Kingdom the same legal effects as
 533 those which they produce within the Union and its Member States (Article 12(5) NI
 534 Protocol). By affirming that the Court of Justice has “the jurisdiction provided for in
 535 the Treaties” in respect of the application of certain EU rules, the NI Protocol arguably
 536 suggests that all judicial procedures may be applicable in this area. For instance, the
 537 Commission may bring infringement proceedings against the UK. Preliminary refer-
 538 ences, at any rate, are likely to be more common. By referring to the “second and
 539 third paragraphs of Article 267 TFEU”, the NI Protocol makes applicable the general
 540 preliminary reference procedure to freedom of movement of goods and customs union
 541 in Northern Ireland. Therefore, a UK judge “may” request the Court of Justice to
 542 give a ruling (second subparagraph of Article 267 TFEU) and judges of last instance
 543 “shall bring the matter before the Court” (third subparagraph).

544 Finally, the Court’s jurisdiction has indefinite duration in respect of *sui generis*
 545 preliminary references regarding the settlement of disputes between the Contracting
 546 Parties. Both the UK and EU soon agreed that the WA requires some form of dispute
 547 settlement, which may be problematic under EU law.¹¹¹ Given the numerous refer-
 548 ences to EU law in the Withdrawal Agreement, it is likely that a dispute may raise
 549 a question of interpretation of a concept of Union law. Under the case law of the
 550 Court of Justice, dispute settlement procedures cannot bind the Union to a particular
 551 interpretation of EU rules¹¹²; probably, international tribunals and arbitrators cannot
 552 even have jurisdiction to “interpret” rules of EU law.¹¹³ Some association agreements
 553 bypass this problem, by stipulating that arbitration panels established under those
 554 agreements “shall not give an interpretation of the *acquis communautaire*”.¹¹⁴ The
 555 Association Agreements with Ukraine, Moldova and Georgia go a step further, by
 556 affirming that, if a dispute raises a question of interpretation of one of the several
 557 provisions of EU law made applicable by the agreements, the arbitration panel shall
 558 not decide the question, but “request the Court of Justice of the European Union to
 559 give a ruling on the question.”¹¹⁵ The ruling is binding on the panel.¹¹⁶ The With-
 560 drawal Agreement followed the example set by these Association Agreements. In

¹¹¹To be sure, the starting positions of the Contracting parties diverged considerably on a number of key points, see Odermatt 2018, p. 300.

¹¹²Cf. Court of Justice, *Draft Agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area (ECAA)*, Opinion of 18 April 2002, Opinion 1/00, ECLI:EU:C:2002:231, para 13; Opinion 2/13 (*Accession to the ECHR*), above n. 8, para 184.

¹¹³Opinion 1/17 (*CETA*), above n. 9, para 120; *Achmea*, above n. 8, para 39.

¹¹⁴E.g. Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, opened for signature 16 June 2008, OJ L164/2 (entered into force 1 June 2015), Protocol 7, article 13.

¹¹⁵E.g. Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, opened for signature 21 March 2014, OJ L 161/3–2137 (entered into force 1 September 2017) (EU-Ukraine AA), article 322; see further Van Elsuwege and Chamon 2019, p. 46. The EEA Agreement contains a comparable, but not identical, mechanism, see EEA Agreement, above n. 10, article 111(3); see further Baur et al. 2018, pp. 168–169.

¹¹⁶See further Van der Loo 2016, pp. 296–300.

561 case of a dispute regarding the interpretation and application of the provisions of the
 562 WA and its Protocols, the UK and the EU may enter in consultation and, eventually,
 563 each of the parties may demand the establishment of an arbitration panel, whose
 564 ruling is binding (Article 170 and 175 WA).¹¹⁷ If a dispute raises a question of inter-
 565 pretation of EU law, the panel must request the Court of Justice to give a ruling to
 566 the question, which is binding on the panel (Article 174 WA).¹¹⁸

567 The *sui generis* preliminary ruling procedure in the dispute settlement mechanism,
 568 the Court's preliminary jurisdiction regarding citizens' rights (for a limited time)
 569 and free movement of goods (concerning a limited area), combined with the British
 570 court's duty to take into account the case law of the Court of justice (see above, in
 571 Sect. 11.2), should contribute to foster a consistent application of EU law in and to
 572 the UK. The effectiveness of most of these mechanisms, however, depends on the
 573 cooperation of British courts, which should conduct a dialogue with the Court of
 574 Justice as if they were courts of a member state—despite being the courts of a third
 575 state. At a time when even the Constitutional Court of a member state disregards a
 576 judgment of the Court of Justice, labelling it as “simply not comprehensible”,¹¹⁹ the
 577 cooperation of the courts of a third countries can hardly be taken for granted.

578 11.6 Participation in EU Institutions, Bodies, Offices, 579 or Agencies

580 EU member states participate, not only in the judicial system of the Union, but
 581 also in its institutional machinery. The “establishment of institutions endowed with
 582 sovereign rights, the exercise of which affects Member States and also their citi-
 583 zens” has always been a defining feature of the European Union.¹²⁰ The member
 584 states participate directly in these institutions (e.g. the Council) or contribute to their
 585 nomination or election (e.g. the Commission).¹²¹ The right to participate in EU insti-
 586 tutions, bodies, offices or agencies (hereafter, collectively, EU organs) may be seen
 587 as complementary to the obligation to apply Union law, discussed in the previous
 588 sections. Under the WA, however, the UK's participation in the work of EU organs
 589 is not symmetrical to its obligations to apply EU law.

¹¹⁷See also UK WA, above n. 17, article 182. One may note that, since the arbitrators cannot be “members, officials or other servants of the Union institutions”, the members of the Court of Justice cannot be part of the panel (article 171(2)).

¹¹⁸Cf. Court of Justice, *Draft Agreement relating to the creation of the European Economic Area*, Opinion of 14 December 1991, Opinion 1/91, ECLI:EU:C:1991:490, para 61.

¹¹⁹German Constitutional Court, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, para 118.

¹²⁰*Van Gend en Loos*, above n. 7; see also *Costa v Enel*, above n. 24. More generally, participation in the institutional structure of international organisations is one of the constant elements of the status of member states, see Pustorino 2012, p. 176.

¹²¹See further Dony 2018, pp. 299–313.

590 Third states are generally excluded from the activity of EU organs.¹²² The Union
 591 is, in this respect, different from most other international organisations, that grant
 592 some form of observer status to non-member states.¹²³ The exclusion of third states
 593 from EU organs is arguably a corollary of the EU’s autonomy, which requires that
 594 “the essential character of the powers of the [Union] and its institutions as conceived
 595 in the Treaty remain unaltered”.¹²⁴ The autonomy of EU law indeed presupposes
 596 “the capacity of the Union to operate autonomously within its unique constitutional
 597 framework.”¹²⁵

598 Nonetheless, certain third states have some relationships with EU organs. EFTA
 599 states, in particular, have a right to be consulted by the Commission regarding the
 600 proposal of new legislation in a EEA-related field—but their views are not binding;
 601 similarly, the experts of EFTA states participate in comitology committees—but they
 602 do not have the right to vote.¹²⁶ More generally, third states may participate in some
 603 EU agencies but do not have voting rights.¹²⁷

604 Third states may also set up joint organs under international agreements together
 605 with EU institutions but this should not result in an alteration of the “essential char-
 606 acter” of the powers of EU organs, which should remain clearly separate “from an
 607 institutional point of view”.¹²⁸ Several agreements create international bodies where
 608 the Union is represented separately from third States. For instance, the EEA Joint
 609 Committee (composed of representatives of the Union and EFTA states) facilitates
 610 exchange of information, adopts decisions (especially in respect of the incorporation
 611 of EU acts in the EEA agreement) and may settle disputes between the Union and
 612 EFTA states.¹²⁹

613 In institutional terms, the status of the UK does not differ significantly from the
 614 position of other third states. The Withdrawal agreement sets up a Joint UK-EU
 615 Committee that supervises the implementation of the agreement and is similar to the
 616 EEA Joint Committee.¹³⁰

¹²²One may note that non-EU EEA member states are consulted during the EU decision-making process relating to acts relevant for the EEA, but their opinion is not binding on the Union, Lourenço 2019, p. 535.

¹²³Schermers and Blokker 2011, para 173ff.

¹²⁴Opinion 1/00 (*ECAA*), above n. 112, para 12; see also Opinion 1/91 (*EEA*), above n. 118, paras 61–65; Court of Justice, *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area*, Opinion of 10 April 1992, Opinion 1/92, ECLI:EU:C:1992:189 paras 32 and 41. See also Guillard 2014, p. 458.

¹²⁵Opinion 1/17 (*CETA*), above n. 9, para 150.

¹²⁶EEA Agreement, above n. 10, articles 99(1) and 100. See further Baur et al. 2018, pp. 119–124; Lourenço 2019, p. 535.

¹²⁷Tovo 2016, pp. 72–83; Chamon 2019, pp. 1517 and 1522; Bekkedal 2019.

¹²⁸Opinion 1/00 (*ECAA*), above n. 112, paras 6–22.

¹²⁹Baur et al. 2018, pp. 94–95; See also, e.g., the Association Council established by the EU-Ukraine AA, above n. 115, articles 460–463.

¹³⁰UK WA, above n. 17, articles 164–166. See, to that effect, EU Law Analysis 2019, para 127. See also the Specialised Committee overseeing the implementation of the Protocol on Northern Ireland, Protocol on NI, above n. 49, article 14.

617 Furthermore, the WA prevents the UK from participating in EU organs since the
 618 day of its withdrawal from the Union, including the transition period. In its guidelines
 619 on the Brexit negotiations (December 2017), the European Council stated that “the
 620 United Kingdom, as a third country, will no longer participate in or nominate or elect
 621 members of the EU institutions”.¹³¹ The UK government had similar priorities, since
 622 it sought to extricate itself from the EU machinery even *before* the transition: the
 623 UK did not take up the rotating presidency of the Council in 2017 and refused to
 624 propose a British member of the European Commission in 2019.¹³² The WA reflects
 625 the intention to separate the UK from the EU as soon as withdrawal takes place,
 626 by stipulating, e.g., that the UK loses the ability to introduce legislative proposals
 627 and its parliament may not be considered as a parliament of a member state for the
 628 purpose of subsidiarity control during the transition period.¹³³

629 The WA introduces only minor limitations to the UK’s exclusion from EU organs
 630 during the transition period. Although the British Parliament does not have the right
 631 to exercise any subsidiarity control under Protocol 1, it has the right to receive the
 632 legislative proposals introduced by the Commission.¹³⁴ Moreover, British represen-
 633 tatives *may* be invited by EU institutions to take part in comitology meetings and
 634 international bodies where the EU is represented.¹³⁵ The UK’s involvement in EU
 635 organs during the transition period is even weaker than that of non-EU EEA member
 636 states, which at least have a *right* to be consulted at the stages of initiative and
 637 implementation, concerning EEA-related areas (see above).

638 The almost complete exclusion of the UK from EU organs during the transition
 639 period, albeit consistent with the established approach of the EU vis-à-vis third states,
 640 is remarkable, as the position of the UK during this period is unusually similar to that
 641 of a member state (see above, in Sect. 11.2). In other words, the UK’s integration in
 642 the EU’s institutional structure seems to be at its lowest during the transition period
 643 (when the UK is subject to almost all the obligations applicable to EU member
 644 states) but, paradoxically, might possibly grow *after* the transition period (when EU
 645 obligations for the UK are likely to be fewer).

646 In fact, the WA does not regulate the UK’s involvement in EU organs after the tran-
 647 sition period; this issue is touched upon in the Political Declaration and will presum-
 648 ably be addressed by the Future Relationship agreement or other UK-EU agreements.
 649 The Political Declaration expresses the intention of the parties to establish, after the
 650 transition, a dialogue or cooperation on various subjects, such as emerging technolo-
 651 gies, nuclear safety,¹³⁶ healthcare, and police.¹³⁷ The expectation of cooperation
 652 seems particularly high in respect of foreign policy, security and defence. Among
 653 others, the Declaration mentions, the adoption of “agreed statements, demarches and

¹³¹European Council (Article 50) Meeting, 15 December 2017, Guidelines, EUCO XT 20011/17.

¹³²See EC Europa 2019.

¹³³UK WA, above n. 17, articles 128(2) and (3); see also articles 128 (4) and 129(7).

¹³⁴Ibid., article 128(2).

¹³⁵Ibid., article 128(2)(b) and 129(2); see also article 129(5).

¹³⁶Political Declaration, paras 40 and 66.

¹³⁷Ibid., paras 23, 40, and 66. See also paras 45, 49, 63, 65, 83, 86, 88.

654 shared positions”, “exchange of information on listings” for sanctions, and “early
 655 consultation” in the area of defence to facilitate the UK’s participation in CSDP
 656 missions.¹³⁸ It cannot be excluded that, in the long run, the UK’s integration in the
 657 EU’s organs might be strongest in the area—CFSP—where European integration is
 658 weakest.

659 11.7 Conclusion

660 The UK government apparently envisaged a clean break from the Union: “Leaving the
 661 European Union will mean that our laws will be made in Westminster, Edinburgh,
 662 Cardiff and Belfast. And those laws will be interpreted by judges not in Luxem-
 663 bourg but in courts across this country”.¹³⁹ After the conclusion of the Withdrawal
 664 Agreement the legal position of the UK seems more complicated.

665 Throughout the transition period, the UK is in many respects indistinguishable from
 666 a member state—though it does not participate in EU institutions and organs. After
 667 the transition period, the UK remains outside the EU institutional framework but must
 668 apply core EU rules and principles in respect of specific persons or areas. Northern
 669 Ireland, in particular, remains *de facto* in the EU’s customs union. And some EU
 670 citizens—who settled in the UK before the end of the transition period—can exercise
 671 their free movement rights in the UK.

672 These rules are likely to be applied to and in the UK for a long time: for the
 673 duration of protected EU citizens’ lives and even indefinitely, in the case of free
 674 movement of goods in Northern Ireland. Not only is the UK bound by EU rules but
 675 must apply and interpret them in light of EU principles, including those defining
 676 the Union and distinguishing it from other international organisations, such as direct
 677 effect and primacy. The UK also remains, in several respects, subject to the control
 678 of EU institutions, particularly the Court of Justice. In a way, EU citizens and goods
 679 entering the UK may bring with them into the British system parts of the EU’s legal
 680 order, including rules, principles, and judicial procedures.

681 Therefore, the status of the UK under the Withdrawal Agreement is ambiguous.
 682 Several aspects of the UK’s position are a *déjà vu*, as they echo agreements between
 683 the Union and other third countries. For instance, the EEA Agreement inspires the
 684 WA rules on the relationship with the case law of the Court of Justice, while the
 685 *sui generis* preliminary references in the context of dispute settlement are probably
 686 modelled on recent Association Agreements (see Sects. 11.2 and 11.6). It is perhaps
 687 ironic that the Withdrawal Agreement, a “disintegration-oriented” instrument, should
 688 be similar to “integration-oriented agreements” such as Association Agreements.¹⁴⁰

689 The similitudes with past experiences are accompanied by elements of novelty,
 690 which complicate the framework: under the WA, *certain* EU rules concerning *certain*

¹³⁸Ibid., para 93.

¹³⁹UK Government 2017a.

¹⁴⁰See above, n. 16.

691 topics apply in *certain* regions of the UK, to *certain* persons, and/or for a *certain*
 692 period. These apparently strange arrangements of the WA constitute a compromise
 693 between the UK's government intention to showcase a "clean break" from the Union
 694 and the practical necessity to protect the interests of citizens and economic actors, as
 695 well as the stability of Northern Ireland. Combining established solutions in original
 696 ways prevented a "hard" Brexit but gave the UK a uniquely multifaceted status as
 697 a "third country". The Future Relationship Agreement might possibly simplify the
 698 legal framework, but such a simplification cannot be taken for granted.

699 By withdrawing from the Union, the UK may have changed its status, but its legal
 700 position remains complex: as it was the least integrated member of the Union,¹⁴¹ it
 701 is now a very integrated third state.

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¹⁴¹Poinsignon 2018, pp. 580–583.

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Author Queries

Chapter 11

Query Refs.	Details Required	Author's response
AQ1	Kindly note that the reference 'Abderamane (2016)' has been changed to 'Abderamane (2018)' so that this citation matches the list.	
AQ2	Kindly note that the reference 'Smismans (2019)' is cited in the text but not provided in the reference list. Please provide the respective reference in the list or delete this citation.	