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

Chapter 11
Legal Status of the United Kingdom as a Third State: Strange *Déjá Vu*

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Contents

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

Keywords Brexit · withdrawal · citizenship · free movement of goods · Court of 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 cooperation[3] 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

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

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

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

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

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

[6] On 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.

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

[8] Court 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.

[9] Court 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.

and the principles of EU law, such as sincere cooperation, uniform interpretation and application of EU law, as well as primacy and direct effect; consequently, they apply EU law to individuals, especially in respect of free movement of (2) citizens and (3) goods; and participate in (4) the EU judicial system[10] and (5) EU institutions, bodies, offices or agencies.

Although, in principle, these elements characterise the position of EU member states, they may concern, to a certain extent, some third states, too. Through the conclusion of international agreements with the EU, third states may engage in "integration without membership".[11] It is the case, for example, of the European Economic Area (EEA),[12] composed of the European Union and three members of the European Free Trade Area (EFTA), i.e. Iceland, Liechtenstein, and Norway (hereafter, EFTA states).[13] EFTA states ensure, to a large extent, free movement of persons, apply EU internal market law[14] and are subject to the jurisdiction of the EFTA Court, which interprets the EEA Agreement in light of EU principles and the case law of the Court of Justice.[15]

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

[10] Court of Justice, *Popławski 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").

[11] Łazowski 2008; see also Ott 2015 and Maresceau 2013.

[12] EEA Agreement, above n. 10.

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

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

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

[16] Cf. 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.

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

After the transition period, the status of the UK changes considerably in terms of the application of EU law. This section discusses the application of EU constitutional principles to and in the UK, by virtue of the Withdrawal Agreement. The following sections focus on the application of EU rules in respect of free movement of persons, free movement of goods, the jurisdiction of the Court of Justice and the UK's participation in EU organs.

EU law is characterised by several constitutional principles, some of which are particularly relevant.[23] The list of core EU principles obviously includes *direct effect* and *primacy*, which are connected to *sincere cooperation.*[24] *Uniform interpretation* and application of EU law arguably constitutes another core constitutional principle of EU law[25] and ensures "its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties".[26] The uniformity of interpretation of the Treaties is the primary mission of the Court of Justice, which fosters it, in particular, through the preliminary reference procedure.[27]

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

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

[22] Ibid., article 129(3), which enables the UK to conclude international agreements with third countries 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.

[23] Cf. Constantinesco 2001.

[24] See *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.

[25] On 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.

[26] Opinion 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.

[27] See, *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.

[28] The 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.

such but its Article 3 mirrors to a certain extent Article 4(3) TEU, by stipulating that the Contracting Parties must take appropriate measures to ensure fulfilment of the obligations arising out of the Agreement and abstain from any measure which could jeopardize the attainment of its objectives. The obligation of sincere cooperation enshrined in Article 3 of the EEA Agreement has been used by the EFTA Court as a legal foundation for the introduction, in the EEA legal order, of principles linked to sincere cooperation, such as state liability[29] and consistent interpretation.[30]

The Withdrawal Agreement may seem different from the EEA Agreement: Article 5 WA stipulates that the parties "shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement". Being titled "Good faith" and referring to "good faith", this provision might suggest that the international principle of good faith, and not the more expansive EU law principle of sincere cooperation, should apply in this ambit.[31] However, Article 5(3) WA clarifies that "This Article is without prejudice to the application of Union law pursuant to this Agreement, in particular the *principle of sincere cooperation.*"[32] Moreover, Article 5(1) and (2) WA are almost identical to Article 4(3) TEU[33]; the WA is even closer to the wording of the TEU than the EEA Agreement. This suggests that the WA, and the EU rules it refers to, should be applied in the UK consistently with the principle of sincere cooperation. Moreover, UK judges, like the EFTA Court, should arguably "import" in their legal order principles linked to sincere cooperation, such as state liability and consistent interpretation. The British judiciary should apply also the *ERTA* case law (which is based on the duty of sincere cooperation)[34] in respect of the EU's rules applied in the UK by virtue of the Withdrawal Agreement. For instance, after the end of the transition period, the UK should not assume international obligations which might affect or alter the scope of the internal market rules applicable to Northern Ireland (see below, Sect. 11.4).

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

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[29] EFTA 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.

[30] EFTA 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.

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

[32] Emphasis added.

[33] Differently 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.

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

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

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

The Withdrawal Agreement is more straightforward. According to Article 4(1) WA, "legal or natural persons shall in particular be able to *rely directly* on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law."[39] Moreover, the UK must ensure compliance with the duty to give EU provisions the same effect that they have in the EU legal order, "including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation" (Article 4(2) WA). As in the case of the EEA's *ersatz* primacy, the UK must adopt "primary legislation" to enable domestic judicial and administrative authorities to disapply any national legislation inconsistent with the WA (and the EU rules it refers to). Unlike the EEA's *ersatz* primacy, though, the WA's primacy arguably applies, not only to EU norms implemented in the UK legal order, but to all the "provisions of Union law" made applicable by the WA.[40]

Thirdly, the Withdrawal Agreement, like the EEA Agreement, introduces extensive obligations in respect of the *uniform interpretation and application of EU law.*[41] Although the EEA Agreement creates an autonomous legal order, it aims at creating "a homogeneous European Economic Area" by ensuring "uniform interpretation and application" of EEA norms and those provisions of EU legislation which are substantially reproduced in EEA Agreement.[42] For the sake of a homogeneous application of the law, the EEA Joint Committee takes decisions incorporating (with adaptations) new pieces of EU secondary law in annexes of the EEA Agreement, thereby making

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

[37] Hreinsson 2016, pp. 384–385.

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

[39] Emphasis added.

[40] UK 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.

[41] Cf. 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.

[42] EEA 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.

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

Like the EEA Agreement, the Withdrawal Agreement fosters uniformity in the application of EU law. To be sure, the EEA Agreement and the Withdrawal Agreement have different objectives: while the former promotes integration (a homogeneous EEA), the latter is intended to facilitate disintegration (the UK withdrawal). Nonetheless, both agreements make applicable EU rules to one or more third states, either by referring to EU sources or by restating their content.[49] Uniform interpretation and application of such rules is essential, not only for the EEA, but also for the UK. The WA promotes the "orderly withdrawal" of the UK, to "prevent disruption and to provide legal certainty" to citizens, economic operators, and judicial and administrative authorities in the Union and in the UK.[50] To attain this goal, a uniform and, therefore, predictable application of the law is arguably indispensable. The WA itself implicitly calls for uniform interpretation and application of EU rules: under Article 4(3), WA provisions "referring to Union law or to concepts or provisions thereof" must be interpreted and applied in accordance with the methods and general principles of Union law.[51]

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

[44] EEA 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, *Fonnship A/S*, Judgment, 8 July 2014, Case C-83/13, EU:C:2014:2053, para 41.

[45] Agreement 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).

[46] Baudenbacher 2016, p. 181.

[47] EFTA 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.

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

[49] For 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).

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

[51] To 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).

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

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

11.3 Free Movement of EU Citizens in the UK

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

[52] An 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.

[53] The NI Protocol makes exception to the "due regard" rule, see below, Sect. 11.5.

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

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

[56] See 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.

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

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

In other words, the Withdrawal Agreement creates two categories of EU citizens: protected EU citizens, who moved to the UK before the end of the transition period (and who can enjoy free movement rights in the UK for the duration of their lives) and other EU citizens (who do not enjoy free movement in the UK after the transition period). Protected EU citizens may enjoy several rights after the end of the transition period, including[60]: (*i*) The right to *enter* and *exit* the UK with a valid passport "or national identity card"[61]; The UK cannot impose on protected EU citizens "exit visa, entry visa or equivalent formality" (Article 14(1) and (2) WA).[62] (*ii*) The right to *reside* in the UK, under conditions similar to those imposed by EU law for the exercise of the right to residence in EU member states (Article 13 WA).[63] (*iii*) The right to *permanent residence*, under the conditions set out in EU law for permanent residence in EU member states (Article 15 WA).[64] The UK may not impose any additional limitations or conditions for obtaining, retaining or losing residence rights

[57] For 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.

[58] See, 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.

[59] Under 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.

[60] This 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.

[61] Cf. 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).

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

[63] UK WA, above n. 17, article 13.

[64] See, however, n. 59.

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

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

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

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[65] The 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.

[66] Court 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.

[67] UK WA, above n. 17, article 20(2).

[68] See also Piernas López 2019, p. 284.

[69] The 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.

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

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

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

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

11.4 Free Movement of Goods to and from the UK

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

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

[71] Ibid., article 18(1).

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

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

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

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

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

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

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

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

[76] Decision 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.

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

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

[79] Ibid., pp. 108–111, 116–122.

[80] See above, n. 21.

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

[82] The 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.

[83] The 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).

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

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

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

The NI Protocol goes even beyond any association agreement, by enabling EU "institutions, bodies, offices, and agencies" to exercise their powers regarding the implementation of the key norms applicable to Northern Ireland, notably with regard to free movement of goods[89] (Article 12(4) NI Protocol). The Court of Justice has the competence provided for in the Treaties in this respect and may receive preliminary references from British courts regarding the application of EU rules made applicable by the NI Protocol in respect of Northern Ireland (see further below, Sect. 11.5). In addition, Union organs may supervise British authorities. Union representatives have a right to be present during any activities of UK authorities relating to the implementation of provisions of Union law made applicable by the NI Protocol (e.g. the Customs Code); they also have a right to receive "all relevant information" relating to such activities. Union representatives may even request British authorities to perform control measures in individual cases (e.g. on a certain good imported in Northern Ireland) and the latter must comply with the request (Article 12(2) NI Protocol).

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

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[84] Ibid., Annex 5 to the NI Protocol.

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

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

[87] Ibid., article 66.

[88] See, 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.

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

Secondly, the NI Protocol apparently enables some restrictions to the trade in goods between Northern Ireland and the EU. Article 5(5) of the Protocol stipulates that Article 30 TFEU (prohibition of customs duties and charges having equivalent effect) and Article 110 TFEU (prohibition of discriminatory taxation) apply in respect of Northern Ireland. Then, it affirms that "quantitative restrictions on exports and imports" are prohibited but mentions neither "measures having equivalent effect" nor Article 34 TFEU (prohibiting both quantitative restrictions and measures having equivalent effect). This formulation of the NI Protocol seems the product of a deliberate choice of the parties: the Draft Protocol on Ireland prepared by the European Commission in early 2018 mentioned both quantitative restrictions and "measures having equivalent effect", but the latter were excluded from the NI Protocol.[92] The NI Protocol implicitly refers to equivalent measures only in Article 7(1), by stipulating that "the lawfulness of placing goods on the market in Northern Ireland shall be governed by the law of the United Kingdom as well as, as regards goods imported from the Union, by Articles 34 and 36 TFEU". This arguably means that only *certain* measures having equivalent effect are prohibited (those regarding the placing of goods on the market), while others, such as inspections at the frontier[93] or "buy national" campaigns,[94] seem compatible with the NI Protocol.[95]

[90] UK WA, above n. 17, article 166(3).

[91] As 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).

[92] European 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).

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

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

[95] It 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,

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

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

The UK is treated *de facto* as a member state throughout the transition period but, after that, it becomes truly a third country, capable of defining its internal regulatory standards and its external trade policy. Nonetheless, the exit from the Union brings 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.

[96] Emphasis added.

[97] The 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.

[98] O'Carroll 2019.

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

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

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

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

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

[100] Cf. 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 Juízes 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.

[104] UK Government 2017b, paras 2.2–2.3.

[105] Moreover, 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.

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

Moreover, the Court of Justice has time-bound jurisdiction on preliminary references regarding free movement of citizens. Any court or tribunal in the UK may, in a case which "commenced at first instance within 8 years from the end of the transition period", request the Court of Justice to give a preliminary ruling concerning the interpretation of Part Two of the Withdrawal Agreement, which concerns citizens' rights (Article 158 WA).[106] The judgments of the Court of Justice have the same effects as preliminary rulings under Article 267 TFEU. The Court's time-bound jurisdiction in this field probably is aimed at ensuring the correct application of EU citizenship law in respect of the issuance of residence documents. As noted above (Sect. 11.3), the EU citizens that do not obtain residence documents after the transition period risk losing their free movement rights in the UK forever. The Court may thus provide UK judges with guidance about crucial questions such as the definition of "EU citizen" or "residence in the host state",[107] or the prohibition for UK authorities to exercise "discretion in applying the limitations" to residence rights.[108] This solution is satisfactory in principle, but there is the risk that British judges might fail to formulate preliminary questions, especially because they (including last instance judges) "may", but are not required to, do so.

In other areas, the powers of the Court of Justice have indefinite duration. This is the case of the Protocol relating to the Sovereign Base Areas in Cyprus[109] and the infringement proceedings and preliminary references relating to certain UK financial obligations to the Union (e.g. the contribution to Union programmes committed under the Multiannual Financial Framework 2014–2020).[110]

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

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

[107] Ibid., articles 108(1)(a) and (f).

[108] Ibid., article 13(4).

[109] See 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).

[110] UK WA, above n. 17, article 160.

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

Finally, the Court's jurisdiction has indefinite duration in respect of *sui generis* preliminary references regarding the settlement of disputes between the Contracting Parties. Both the UK and EU soon agreed that the WA requires some form of dispute settlement, which may be problematic under EU law.[111] Given the numerous references to EU law in the Withdrawal Agreement, it is likely that a dispute may raise a question of interpretation of a concept of Union law. Under the case law of the Court of Justice, dispute settlement procedures cannot bind the Union to a particular interpretation of EU rules[112]; probably, international tribunals and arbitrators cannot even have jurisdiction to "interpret" rules of EU law.[113] Some association agreements bypass this problem, by stipulating that arbitration panels established under those agreements "shall not give an interpretation of the *acquis communautaire*".[114] The Association Agreements with Ukraine, Moldova and Georgia go a step further, by affirming that, if a dispute raises a question of interpretation of one of the several provisions of EU law made applicable by the agreements, the arbitration panel shall not decide the question, but "request the Court of Justice of the European Union to give a ruling on the question."[115] The ruling is binding on the panel.[116] The Withdrawal Agreement followed the example set by these Association Agreements. In

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

[112] Cf. 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.

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

[114] E.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.

[115] E.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.

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

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

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

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

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

[117] See 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)).

[118] Cf. 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.

[119] German 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.

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

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

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

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

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

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[122] One 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.

[123] Schermers and Blokker 2011, para 173ff.

[124] Opinion 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.

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

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

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

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

[129] Baur 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.

[130] UK 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.

Furthermore, the WA prevents the UK from participating in EU organs since the day of its withdrawal from the Union, including the transition period. In its guidelines on the Brexit negotiations (December 2017), the European Council stated that "the United Kingdom, as a third country, will no longer participate in or nominate or elect members of the EU institutions".[131] The UK government had similar priorities, since it sought to extricate itself from the EU machinery even *before* the transition: the UK did not take up the rotating presidency of the Council in 2017 and refused to propose a British member of the European Commission in 2019.[132] The WA reflects the intention to separate the UK from the EU as soon as withdrawal takes place, by stipulating, e.g., that the UK loses the ability to introduce legislative proposals and its parliament may not be considered as a parliament of a member state for the purpose of subsidiarity control during the transition period.[133]

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

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

In fact, the WA does not regulate the UK's involvement in EU organs after the transition period; this issue is touched upon in the Political Declaration and will presumably be addressed by the Future Relationship agreement or other UK-EU agreements. The Political Declaration expresses the intention of the parties to establish, after the transition, a dialogue or cooperation on various subjects, such as emerging technologies, nuclear safety,[136] healthcare, and police.[137] The expectation of cooperation seems particularly high in respect of foreign policy, security and defence. Among others, the Declaration mentions, the adoption of "agreed statements, demarches and

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

[132] See EC Europa 2019.

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

[134] Ibid., article 128(2).

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

[136] Political Declaration, paras 40 and 66.

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

shared positions", "exchange of information on listings" for sanctions, and "early consultation" in the area of defence to facilitate the UK's participation in CSDP missions.[138] It cannot be excluded that, in the long run, the UK's integration in the EU's organs might be strongest in the area—CFSP—where European integration is weakest.

11.7 Conclusion

The UK government apparently envisaged a clean break from the Union: "Leaving the European Union will mean that our laws will be made in Westminster, Edinburgh, Cardiff and Belfast. And those laws will be interpreted by judges not in Luxembourg but in courts across this country".[139] After the conclusion of the Withdrawal Agreement the legal position of the UK seems more complicated.

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

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

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

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

[138] Ibid., para 93.

[139] UK Government 2017a.

[140] See above, n. 16.

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

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

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[141] Poinsignon 2018, pp. 580–583.

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