

## WHAT WE THINK AND WHAT WE KNOW: FUTURE OF THE FUTURE UNITED KINGDOM AFTER BREXIT

### Abstract

*The present paper deals with the recent debates on the possibilities of the UK leaving the EU and its consequences. The procedure within the Lisbon Treaty for withdrawal calls for specific attention regarding withdrawal as regards the nature and obligations on the UK and the EU to negotiate a withdrawal agreement. The fate of the UK after such withdrawal would also be of significant importance, both in its relation with the EU and the rest of the world.*

*This paper is structured in four sections. The first section deals with a general introduction and overview on the various aspects of UK's withdrawal from the EU and its consequences. The second section deals with general procedures of withdrawal from the EU under Article 50 of the Lisbon Treaty. It focuses mainly on two issues: first, the possibility for the UK to negotiate an agreement on future trade relations with the EU and to agree on an alternative to the EU model; second, the possibility for the UK to withdraw from the EU without any agreement. It concludes that Article 50 of the Lisbon Treaty may be interpreted as requiring both parties to negotiate in good faith as well as obliging the EU to conclude a withdrawal agreement. The third section focuses on the impact of the withdrawal on existing UK-EU relations as well as the possible relations of the UK with the rest of the world, especially with its accession to the WTO. As the UK is party to various agreements entered into by the EU, the status of the UK in these agreements after withdrawal is of utmost importance. The third section further concludes that the UK's EU-exit would have major implications for its WTO membership. Upon its withdrawal from the EU, the UK's WTO membership will not automatically remain in place. In order to preserve its WTO membership, the UK will have to submit its individual schedules of commitments under several WTO agreements, unless it enters into a CU with the EU. Finally, this section concluded that the UK's EU exit may generate both advantages and disadvantages for the UK's position vis-à-vis the world's regional trade networks. This problematic results from the fact that not only the UK but also all other non-EU parties to the WTO may deviate from the MFN treatment obligation under the WTO's regional trade exception. Consequently, the nature and extent of trade advantages granted to the UK will depend on negotiation.*



## **1. INTRODUCTION**

The UK has been a member of the European Economic Community since 1973 and was one of the founding members of the EU in 1992. The EU membership of the UK is unique in some respects since the UK is not part of the Schengen area. In the wake of the exit of the UK's withdrawal from the EU, the procedure for such withdrawal and the implications thereof must be carefully examined. In this paper, I attempt to analyse the hurdles that the UK may face when withdrawing from the EU, as well as the scenarios that the UK may face in relation to the EU and the rest of the world after withdrawal.

The second chapter of this paper will examine the procedures of withdrawal from the EU under Article 50 of the Lisbon Treaty. Upon withdrawal, the negotiations between the UK and the EU will be shaped by the requirements of sincere cooperation and good faith. Article 50 of the Lisbon Treaty does not specify what kind of agreement the EU is obliged to reach with the UK. However, if the latter upon withdrawal delivers a proposal for future relationship, the EU would have to take serious efforts to negotiate it with the UK. At the same time, this obligation to conclude an exit agreement may not be absolute. Therefore, the two-year period under Article 50 of the Lisbon Treaty can enable either party to escape the conclusion of a withdrawal agreement if the other party considerably breaches its good faith obligation.

After a discussion on the EU exit procedures for the UK, I will turn our attention to the possible models that may be adopted by the UK within Europe. These include the EEA Model, the Swiss Model, the Customs Union Model, the FTA Model and an exit without any agreement. These models differ in their level of integration into the EU, in terms of adopting the internal and external EU policies and financial contribution to the EU. I will attempt to compare these models, with its advantages and disadvantages with the EU membership, for the UK. Needless to say that it is essential for the UK to carefully examine the implications of each of these models before entering into an exit arrangement with the EU.

In the third chapter of this paper, I analyse the implications of UK's withdrawal on its relations with third countries. The EU has entered into various agreements with third countries for international cooperation. While some of these agreements have been solely entered into by the EU (exclusive agreements), there are other agreements where each Member State of the EU is a

party along with the EU (mixed agreements). Upon withdrawal, the fate of these mixed agreements conferring rights and obligations on the UK, the EU and the third countries need to be examined.

Finally, I will demonstrate that the UK's EU exit would generate both advantages and disadvantages for the UK's position vis-à-vis the world's regional trade networks. This stems from the fact that not only the UK but also all other non-EU parties to the WTO may deviate from the MFN treatment obligation under the WTO's regional trade exception. In this regard, it will also be shown that the UK's withdrawal from the EU may have major implications on the UK's key industry sectors and other shareholders.

## **2. UK WITHDRAWAL AND ITS IMPACT ON UK-EU RELATIONS**

### **2.1 EXPECTATIONS FOR THE UK FROM THE WITHDRAWAL PROCESS**

#### ***2.1.1 Upon withdrawal, the UK will have the possibility to agree on future relations with the EU***

The UK has the right to exit from the EU pursuant to Article 50 of the Lisbon Treaty. This right was established for the first time in the Lisbon Treaty. Prior to 2009, it was debatable whether or not and on what conditions a Member State was allowed to withdraw from the EU.<sup>1</sup> Article 50 of the Lisbon Treaty does not leave any further doubts and establishes the inherent right for any Member State to leave the EU.

Therefore, in case the UK decides to withdraw from the EU, it may do so at any time by notifying the European Council about this intention. Article 50(2) of the Lisbon Treaty then obliges the Council to start negotiations and carry them out in accordance with the recommendations

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<sup>1</sup> Different opinions were mainly based on the idea whether EU law was qualified as part of public international law or whether it should be determined as an autonomous legal order. The prevailing view was that the EU was established for an unlimited period and consequently, Member State could not withdraw. However, EU Member States insisted on the necessity to recognize an inherent right of withdrawal for any Member State. See for example: P. Athanassiou. *Withdrawal and expulsion from the EU and EMU: some reflections* (Legal working paper series, Legal Counsel, European Central Bank, December, 2009), 8-22 <<https://www.ecb.europa.eu/pub/pdf/scplps/ecblwp10.pdf>>.

submitted by the Commission<sup>2</sup> as well as in light of the guidelines provided by the European Council.

Article 50(3) of the Lisbon Treaty establishes a two-year period for the parties to reach an agreement that would set out the arrangements for withdrawal, which may include provisions on future EU-UK relations.<sup>3</sup>

Two questions arise from the wording of Article 50 of the Lisbon Treaty:

- 1) Would the EU be obliged to negotiate with the UK on future trade relations and agree on an alternative to the EU model?
- 2) Does Article 50 of the Lisbon Treaty allow the UK or/and the EU to withdraw without any agreement?

***2.1.2 Withdrawal may necessitate the parties to negotiate in good faith and to make serious good efforts to reach an agreement on future trade relations***

Article 50(2) of the Lisbon Treaty provides that “the Union shall negotiate and conclude an agreement with [the separating] State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union”.<sup>4</sup>

This means that the EU shall be obliged not only to *negotiate* but also to *conclude* an agreement with the UK. This agreement would cover arrangements concerning the past relationship between the EU and the UK. Also, it may go further and include an arrangement concerning their future relationship. However, this provision remains silent on the content of a possible future agreement and does not give any answer to the question as to whether the EU will be obliged to agree on

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<sup>2</sup> Art. 218(3) of the Lisbon Treaty provides as follows: “The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorizing the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or head of the Union’s negotiating team”.

<sup>3</sup> This agreement shall be concluded by the Council, based on a qualified majority vote. In accordance with the Treaty, the new qualified majority corresponds to at least 55 per cent of the members of the Council, comprising at least 15 of them and representing at least 65 per cent of the European population.

<sup>4</sup> Lisbon Treaty (2009), Art. 50(2).

any alternative trade relationship, for example, an agreement such as those followed by Norway, Switzerland or Turkey. Besides, this provision obliges only the EU and remains silent on whether the UK itself will have any obligation to negotiate any arrangements concerning its withdrawal.

Similarly, other provisions of the Lisbon Treaty do not expressly provide further explanations on the extent of the obligations of the EU and the UK during the withdrawal process.<sup>5</sup> However, further clarification to Article 50 is provided in the relevant provisions of the Lisbon Treaty on foreign policy in trade relations, as well as the provisions on general standards that govern the behavior of parties negotiating international agreements, i.e. sincere cooperation and good faith, present in EU and international law.

*i) Upon withdrawal, the behaviour of the UK and the EU would have to be in accordance with the requirements of sincere co-operation and good faith*

The relations between the EU and the UK are governed by the principle of sincere cooperation, which is established in Article 4(3) of the Lisbon Treaty.<sup>6</sup> According to the principle of good faith, the Member States must take all appropriate measures to fulfil their obligations arising out of the Lisbon Treaty and may do nothing detrimental to the proper functioning of the EU.<sup>7</sup>

Generally, this principle contains both positive and negative obligations for the UK as a Member State, namely (i) the obligation to take all appropriate measures to ensure the fulfilment of the obligations arising out of the Lisbon Treaty; (ii) the obligation to facilitate the achievements of

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<sup>5</sup> The difficulties that may arise when interpreting the ambiguous clauses of Article 50 of the Lisbon Treaty have recently been discussed in a number of articles and surveys. In most of them it is argued that the full impact of a UK withdrawal is impossible to predict. Therefore, it is only possible to identify difficulties which may arise and to roughly estimate some of the impacts of withdrawal. See for example: A. Łazowski, *Withdrawal from the European Union and Alternatives to Membership*, (European Law Review, Vol. 37, 2012), 523-540; J. Herbst, *Observations on the Right to Withdraw from the European Union: Who are the 'Masters of the Treaties'?* (German Law Journal (6:2005), 1755 – 1760.

<sup>6</sup> Lisbon Treaty (2009), Art. 4(3) states that “according to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives”.

<sup>7</sup> H. Schermers, Denis F. Waelbroeck, *Judicial Protection in the European Union: Sixth Edition* (Kluwer Law International, 2001), 113.

the EU tasks; and (iii) the “obligation to abstain from any measures which could jeopardise the attainment of the objectives of the Treaty”.<sup>8</sup>

The Court of Justice of the European Union (CJEU) by its practice extended the duty of cooperation to *reciprocal duties* of cooperation between the EU and its Member States.<sup>9</sup> In the Lisbon Treaty, the mutual nature of this principle has been established explicitly under Article 4. Consequently, the principle of sincere cooperation governs the actions of the EU and the UK *in all areas* relating to the objectives of the Lisbon Treaty and “does not depend either on whether the EU competence concerned is exclusive or on any right of the UK to enter into obligations towards non-member countries”.<sup>10</sup>

The practice of the CJEU extends the duty of sincere cooperation to all possible areas of the EU’s relationship with its Member States. Therefore, at the stage of withdrawal, the UK and the EU will be bound by this duty necessitating the negotiations to fulfil the requirements of sincere cooperation and good faith. This conclusion finds further support in international law. For instance, good faith, as a customary international law principle, is established in Article 26 (as a guide for contractual behaviour)<sup>11</sup> as well as in Article 31 (as a guide for interpretation of treaties)<sup>12</sup> of the Vienna Convention on the Law of Treaties between States (VCLT). It implies that good faith

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<sup>8</sup> See Kapteyn and V. Themaat. *The Law of the European Union and the European Communities* (Publisher Alphen aan den Rijn : Kluwer Law International, 2008), 147 – 157.

<sup>9</sup> See, for example: Case C-230/81 *Luxembourg v European Parliament* [1983] ECR 255, para 37, Case C-65/93 *European Parliament v Council* [1995] ECR I-643, para. 23.

<sup>10</sup> C. Hillon. *Mixity and coherence in EU external relations: the significance of the duty of cooperation* / available at: <[http://www.asser.nl/upload/documents/9212009\\_14629clee09-2full.pdf](http://www.asser.nl/upload/documents/9212009_14629clee09-2full.pdf)>,22 accessed 26 October 2013; see also: Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, para. 58; Case C-433/03 *Commission v Germany* [2005] ECR I-6985, para. 64.

<sup>11</sup> Vienna Convention on the Law of Treaties (VCLT) (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art. 26 says that “treaty in force is binding upon the parties to it and must be performed by them in good faith (*pacta sunt servanda*)”.

<sup>12</sup> VCLT (n 12), Art. 31 indicates that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

must be observed in performing obligations under agreements as well as in negotiating either at a pre-agreement stage or at withdrawal procedures.<sup>13</sup>

The practice of international tribunals recognises that negotiations in good faith include the following duties: (1) negotiations shall be meaningful; (2) meaningful negotiations cannot be conducted if “either party insists upon its own position without contemplating any modification of it”.<sup>14</sup> This means that the parties are obliged to take into consideration both their own interests and the interests of the other party; (3) the parties must not unjustifiably delay negotiations<sup>15</sup>; (4) the parties are under an obligation to act in such a way as “to achieve a satisfactory and equitable result”.<sup>16</sup>

In the context of the Lisbon Treaty, these standards of conduct imply that the UK and the EU will be obliged to consider the interests and reasonable expectations of each other in addition to their own interests during withdrawal negotiations. Besides, ensuring meaningful negotiations would require the EU and the UK to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage of the other party.

Further, as mentioned above, Article 50 of the Lisbon Treaty obliges the EU not only to *negotiate* but also to *conclude* an agreement with the UK. In this context, the good faith standard would imply the EU not only to negotiate the withdrawal agreement in good faith but also to make serious efforts aiming at the conclusion of such an agreement. Consequently, if the UK provides a proposal on future UK-EU relations at the time of notifying the EU, the latter will be obliged to consider the UK’s proposal seriously and in good faith.

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<sup>13</sup> See for more information: A. D. Mitchell. *Good faith in WTO dispute settlement*, 345, <<http://www.worldtradelaw.net/articles/mitchellgoodfaith.pdf>>.

<sup>14</sup> *North Sea Continental Shelf Case (Federal Republic of Germany/Netherlands)*, [1969] ICJ Rep 3, 46-47.

<sup>15</sup> *Case concerning the Government of the State of Kuwait/The American Independent Oil Company (AMINOIL)*, March 24, 1982, *International Legal Materials*, 1982, vol. 21, 1014.

<sup>16</sup> *North Sea Continental Shelf case* (n 14). In this case, the Court also stated that “the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.”.

ii) *Upon withdrawal, the EU would have to make serious good efforts to reach an agreement on future trade relations*

The Lisbon Treaty does not expressly give explanations on the possible content of a withdrawal agreement and does not provide any express obligation for the EU to agree with the UK on future trade relations.

However, it was mentioned above that upon withdrawal, the UK and the EU will be obliged to consider the interests and reasonable expectations of each other in addition to their own interests during withdrawal negotiations. The standard of good faith in negotiations may thus be understood as obliging the EU to seriously consider any proposal that the UK provides with regards to the future EU-UK trade relationship, e.g. for an CU or an FTA.

This conclusion finds further support in the provisions of the Lisbon Treaty, which governs the principles underlying the EU's foreign policy in Articles 3(5) and 8 of the Lisbon Treaty. For example, Article 3(5) of the Lisbon Treaty states that in its relations with third parties, the Union “*shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to [...] the sustainable development of [...] free and fair trade [...], as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter*”.<sup>17</sup> Besides, Article 8 of the Lisbon Treaty states that “*the Union shall develop a special relationship with neighboring countries, aiming to establish an area of prosperity and good neighborliness founded on the values of the Union and characterized by close and peaceful relations based on co-operation. [...] For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly*”.<sup>18</sup>

In short, Article 50 of the Lisbon Treaty does not specify what kind of agreement the EU is obliged to reach with the UK. In case the UK provides a proposal on future trade relations upon

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<sup>17</sup> Lisbon Treaty (2009), Art. 3(5)

<sup>18</sup> Lisbon Treaty (2009), Art. 8, Emphasis added.

its withdrawal, the EU would hence be obliged to take this proposal seriously and negotiate it with the UK.

### ***2.1.3 Obligation of the EU to conclude withdrawal agreement is not absolute in light of the two-year period under the Lisbon Treaty***

Article 50(3) of the Lisbon Treaty provides that “the Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, *two years* after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.”<sup>19</sup>

Against the background of the analysis so far, this provision seems puzzling. A literal analysis suggests (i) that the UK and the EU would have to negotiate for a period of two years, after which the mutual obligations on good faith and sincere cooperation will expire; and (ii) that if no agreement is reached after this period, the UK may withdraw without any agreement. This reading, however, would undermine the obligation to conclude an agreement laid down in Article 50(2) of the Lisbon Treaty. This raises the issue of the meaning of the Article 50(3) of the Lisbon Treaty and its impacts on the obligation of the EU to conclude a withdrawal agreement.

On the one hand, the two-year period established in the Lisbon Treaty may be understood as obliging the parties to maintain a certain discipline and not allowing the parties to waive the obligation to conclude a withdrawal agreement. On the other hand, the EU’s obligation to conclude a withdrawal agreement is not absolute. This provision may therefore be understood as an ‘escape clause’ for any party.

In contractual relations, whether international or not, the requirement of good faith at the negotiation stage is generally considered as an obligation of conduct, and not as one of result. Consequently, the parties may not be forced to reach a definite agreement during their negotiations. The only requirement with regards to the negotiation procedure is to *make serious good efforts to reach an agreement*.<sup>20</sup> For example, the CJEU’s practice concerning mutual

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<sup>19</sup> Lisbon Treaty (2009), Art. 50(3). Emphasis added.

<sup>20</sup> *Case concerning the Railway traffic between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys)*, advisory opinion of 15 October 1931, *P.C.I.J. Series A/B*, no. 42, 116; *North Sea Continental Shelf* case (n 14), 48.

obligations in external contractual relations with third parties<sup>21</sup> shows that parties are in general only bound by the obligation “*to use their best endeavours to reach a common position with the Community*”.<sup>22</sup>

However, in certain circumstances, it is argued that *the duty of cooperation may amount to an obligation of result* in seeking the uniform implementation of provisions of a mixed agreement, even if these do not relate to EU law.<sup>23</sup> Accordingly, the requirement for the EU to negotiate or conclude an agreement with the UK is not common. Nevertheless, this requirement might still apply to the situation of the UK’s withdrawal, which becomes particularly clear when taking into account the EU goals of continuity and overall integration.

Article 50 of the Lisbon Treaty hence directly obliges only the EU, but not the UK, to negotiate and conclude a withdrawal agreement. At the same time, the EU is not directly obliged to reach an agreement over future EU-UK trade relations. Therefore, the two-year negotiation period set out in the Lisbon Treaty in combination with the requirement to conclude a withdrawal agreement allows the following interpretation: (1) the UK may not be forced to stay within the EU at any price, even if no agreement is reached; (2) the EU obligation to conclude agreement may not be absolute.

Further, even though the obligation to conclude an agreement is not absolute, the good faith requirement still implies that the two-year period established in the Lisbon Treaty does not waive the parties from the obligation to conclude a withdrawal agreement. On the one hand, it may be interpreted as obliging the parties to keep a certain discipline during the withdrawal process. On the other hand, the two-year period may be understood as an ‘escape clause’ for the parties if either party breaches good faith in terms of insufficient efforts in negotiations or unreasonable conditions for withdrawal.

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<sup>21</sup> See C. Hillon (n 11).

<sup>22</sup> Opinion of AG Tesauro in Case C-53/96 *Hermès* [1998] ECR I-3603, para 21.

<sup>23</sup> C. Hillon (n 11); see for example: joined Cases C-300/98 *Christian Dior* and C-392/98 *Assco Gerüste* [2000] ECR I-11307.

In short, the two-year period under the Lisbon Treaty indicates that the obligation to conclude an agreement may not be absolute. However, it does not allow the parties to waive their obligation to conclude a withdrawal agreement. Therefore, it can enable either party to escape the conclusion of a withdrawal agreement if the other party breaches its good faith obligation.

### **2.3. EU-UK RELATIONS AFTER WITHDRAWAL**

#### ***2.3.1 Upon withdrawal from the EU, the UK can opt for one of five “models” to cooperate with the EU economically***

Upon its withdrawal from the EU, the UK would need to consider the alternatives available to it in order to ensure the continuance of smooth trading relations in Europe. It would be difficult for countries in Europe, within or outside the EU, to operate in isolation. Therefore, the UK may consider entering into an arrangement within Europe which is mutually beneficial. Towards this end, the UK can negotiate an arrangement with the EU at the time of withdrawal for preferential treatment or negotiate the accession to another trading bloc within Europe. The UK, in this regard, can mainly consider five models: (1) the EEA model; (2) the Swiss model; (3) the customs union model; (4). Free Trade Agreement (FTA) model; or (5) an exit without any agreement for future EU-UK relations. In this section, the models will be discussed in the order of their decreasing level of integration into the EU framework.

<b>Model</b>	<b>Advantages</b>	<b>Disadvantages</b>
EU Membership	<ol style="list-style-type: none"> <li>1. Access to the EU Single market</li> <li>2. One of the highest share in voting over the formation of EU laws (29 votes)</li> <li>3. Bargaining power of the EU as a bloc in negotiating agreements</li> <li>4. UK has a strong voice to influence EU relations with rest of the world</li> </ol>	<ol style="list-style-type: none"> <li>1. Reduced flexibility for internal laws to ensure conformity with EU laws</li> <li>2. Reduced flexibility in external policies</li> <li>3. High budget contribution to the EU</li> <li>4. Regulatory costs imposed by EU</li> </ol>
Norway Model (EEA)	<ol style="list-style-type: none"> <li>1. Access to the EU single market without adopting the wider EU regional policies</li> <li>2. Freedom to determine its own</li> </ol>	<ol style="list-style-type: none"> <li>1. EFTA members may veto the entry of the UK into EFTA, and thereby the EEA</li> <li>2. EEA Members have to adopt certain EU laws on single market</li> </ol>

	<p>external policies</p> <ol style="list-style-type: none"> <li>3. No common external tariff set by the EU</li> <li>4. Lower financial contribution to the EU</li> </ol>	<ol style="list-style-type: none"> <li>3. Financial contribution to the EU without any formal influence on the formation of EU laws</li> <li>4. Application of complicated EU rules of origin for goods travelling to the EU (depending on negotiations)</li> <li>5. Lack of bargaining power with third countries which EU would have as a bloc</li> </ol>
Swiss Model (bilateral agreements)	<ol style="list-style-type: none"> <li>1. Access to the EU single market without adopting the wider EU regional policies</li> <li>2. Freedom to determine its own external policies</li> <li>3. No common external tariff set by the EU</li> <li>4. Lower financial contribution to the EU</li> <li>5. UK may have a higher bargaining power in concluding bilateral agreements with the EU</li> </ol>	<ol style="list-style-type: none"> <li>1. EU might not have the same attitude to the UK as it had to Switzerland for adopting this model</li> <li>2. Application of complicated EU rules of origin for goods travelling to the EU (depending on negotiations)</li> <li>3. Static nature of this model, as opposed to evolving EU laws may become tedious</li> <li>4. No effective dispute settlement mechanism under this model (unless specifically negotiated)</li> <li>5. Conformity with EU laws to be ensured in areas covered by bilateral agreements, while having no formal influence on the formation of these laws</li> <li>6. Indirect financial contribution to EU policies and European infrastructure</li> <li>7. Lack of bargaining power with third countries which EU would have as a bloc</li> </ol>
Turkish Model (CU)	<ol style="list-style-type: none"> <li>1. Access to the EU single market on negotiated goods</li> <li>2. Freedom to determine its own internal laws</li> <li>3. No requirement to ensure conformity with EU laws</li> <li>4. No financial contribution to the EU</li> </ol>	<ol style="list-style-type: none"> <li>1. Application of common external tariff and product regulations decided by the EU</li> <li>2. Lesser flexibility in determining external trade policy</li> <li>3. FTAs concluded by the EU would lead to goods from those third countries entering the UK freely while this benefit will not be granted to the UK goods unless UK separately concludes an FTA with other countries</li> </ol>

		<ul style="list-style-type: none"> <li>4. Lack of bargaining power with third countries which EU would have as a bloc</li> <li>5. Application of complicated EU rules of origin for goods travelling to the EU (depending on negotiations)</li> </ul>
Korean Model (FTA)	<ul style="list-style-type: none"> <li>1. Access to EU single market on negotiated goods</li> <li>2. Freedom to determine its own internal and external policies</li> <li>3. No financial contribution to the EU</li> <li>4. Possibility to negotiate an effective dispute settlement system</li> </ul>	<ul style="list-style-type: none"> <li>1. FTA may not guarantee free movement of capital and labour to the EU</li> <li>2. Negotiations to conclude the agreement may consume a longer time period</li> <li>3. Application of complicated EU rules of origin for goods travelling to the EU (depending on negotiations)</li> <li>4. Lack of bargaining power with third countries which EU would have as a bloc</li> </ul>
US Model (no agreement)	<ul style="list-style-type: none"> <li>1. Complete freedom over internal and external policies</li> <li>2. No financial contribution to the EU</li> <li>3. Protection under the WTO regime</li> </ul>	<ul style="list-style-type: none"> <li>1. UK would be faced with new tariffs</li> <li>2. UK will have to negotiate the terms of its accession to WTO with all other WTO members</li> <li>3. Application of complicated EU rules of origin for goods travelling to the EU (depending on negotiations)</li> <li>4. Lack of bargaining power with third countries which EU would have as a bloc</li> </ul>

### **3. IMPACT OF WITHDRAWAL ON UK RELATIONS WITH EU AND NON-EU COUNTRIES.**

#### **3.1 FATE OF EXISTING FTAs.**

After withdrawing from the EU, the question remains as to the status of the existing free trade agreements concluded by the EU with other countries. The provisions of these agreements indicate that they would be automatically terminated for the UK upon its withdrawal from the EU. In any case, the third countries with whom the agreements are concluded have the right to terminate the agreement with the UK.

Under the scheme of the EU, certain areas such as customs union, common commercial policy, competition rules, etc. fall within the exclusive competence of the Union.<sup>24</sup> In these areas, the Union is allowed to enter into agreements on its own and they would be binding on all Member States, which would not have to specifically ratify them. Certain other areas such as internal market, social policy, environment, transport, energy, etc. fall within the shared competence of the Union and its Member States.<sup>25</sup> When entering into agreements covering these areas, the Member States are a party along with the EU in relation to the third country. These agreements, commonly known as mixed agreements, relate to the areas under the EU law over which the Member States also have the competence to legislate.<sup>26</sup> Mixed agreements include bilateral agreements between various third countries as well as multilateral conventions on various matters of international importance.<sup>27</sup> All the FTAs entered into by the EU are mixed agreements. As the UK has entered into these mixed agreements in its own capacity along with the EU, the effect of the withdrawal of the UK on these agreements need to be examined.

### ***3.1.1 Automatic Termination of Exclusive and Mixed Agreements***

Upon withdrawal from the EU, the UK would no longer have any rights or obligations under the agreements entered into by the EU under its exclusive competence. The UK is bound by these agreements only by virtue of its membership in the EU. These agreements are solely entered into by the EU with the third country. The rights and obligations therein on the UK arise only due to its EU membership. Once the UK withdraws from the EU, these rights and obligations cease to exist on the UK, as the termination of EU membership terminates the requirement to take up any further action under these agreements entered into by the EU.<sup>28</sup> To further support this point, Article 216(2) of the Treaty of the Functioning of the European Union states that *agreements*

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<sup>24</sup> Art. 3, Treaty of the Functioning of the European Union (TFEU), <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>>.

<sup>25</sup> TFEU (n 92), Art. 4.

<sup>26</sup> See Annexure A containing a list of all the mixed agreements entered into by the EU.

<sup>27</sup> J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Kluwer Law International, 2001).

<sup>28</sup> VCLT (n 12), Art. 70.

*concluded by the Union are binding upon the institutions of the Union and on its Member States.* Consequently, if the UK ceases to be a *Member State* of the EU, these agreements would no longer be applicable to the UK. For example, the Air Services Agreement between EU and Sri Lanka is an exclusive agreement entered into by EU on the one hand and Sri Lanka on the other hand.<sup>29</sup> The UK has not specifically been named as a party to this Agreement. Therefore, it would automatically cease to exist in relation to the UK upon its withdrawal from the EU.

As regards the mixed agreements, the question arises whether the UK would still be a party to these agreements as they were entered into by the UK, along with the EU. An examination of the provisions and intent of these agreements indicates that these agreements would be automatically terminated with regards to the UK upon its withdrawal from the EU.

Every mixed agreement defines the term ‘parties’ of the agreement. To quote an example, the EU has concluded a free trade agreement with Korea in 2010.<sup>30</sup> Article 1.2 of this agreement defines ‘parties’ as *the European Union or the Member States or the European Union and the Member States on the one hand and Korea on the other.* While this does attribute rights as well as individual responsibility to each Member State to perform the obligations under the agreement, it cannot be extended to apply to the UK once it terminates its status as a ‘Member State’ of the EU. To clarify this point, the preamble to the Agreement recognizes the UK as the Contracting Parties to the Treaty on European Union and the Treaty on the Functioning of the European Union. The parties of this agreement are these ‘Member States’ of the European Union. On withdrawal from the EU, the UK would cease to be a party to the Treaty on European Union and the Treaty on the Functioning of the European Union, which automatically disqualifies it from being a ‘party’ to the free trade agreement with Korea.

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<sup>29</sup> Agreement between the European Union and the Government of the Democratic Socialist Republic of Sri Lanka on certain aspects of air services (February, 2013), <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:049:0002:0009:EN:PDF>>.

<sup>30</sup> Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (September, 2010) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:127:0006:1343:EN:PDF>>.

To take another example, Article 352 of the EU Association Agreement with Central American States<sup>31</sup> defines parties as *the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, referred to as the “Republics of the CA Party” on the one hand, and the European Union or its Member States or the European Union and its Member States, within their respective areas of competence, referred to as the “EU Party” on the other*. While the Central American States are named separately, such separate identity of the EU Member States is not recognised. This indicates the intention of the parties to grant the benefits to EU as a whole. The only rationale for the UK to have signed the agreement separately is due to the division of competences within the EU system, whereby the sovereignty of the individual Member States require them to give specific consent to the Agreements. However, this consent is not an indication that the EU Member State individually entered into an agreement with the third country. As regards the third country party, it is entering into an agreement with only the EU Member States. The status of an EU Member State, therefore, is essential for the UK to continue with these agreements. Similar definition of parties can also be seen in the EU agreement with the CARIFORUM States.<sup>32</sup>

### **3.2. TRADE RELATIONS UNDER THE WTO REGIME**

#### ***3.2.1 The UK’s EU-exit would have major implications for its WTO membership***

Upon its withdrawal from the EU, the UK would not automatically remain an independent WTO member in its own rights. Instead, certain preconditions for continued WTO membership would apply to the UK.

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<sup>31</sup> Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other (December, 2012), <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:346:0003:2621:EN:PDF>>.

<sup>32</sup> Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part (October, 2008), <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:289:0003:1955:EN:PDF>>.

Currently, both the EU and its Member States are adherents to the WTO under joint membership.<sup>33</sup> Upon its EU exit, the UK would not become an independent WTO Member without any transition as certain pre-requirements apply to WTO membership.

The accession procedure as laid down in Article XII of the WTO Agreement<sup>34</sup> is supplemented by preconditions to WTO membership. According to Article XI of the Agreement Establishing the WTO, “[t]he contracting parties to GATT 1947 as of the date of entry into force of this Agreement [...], which accept this Agreement and the Multilateral Trade Agreements and *for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS* shall become original Members of the WTO.”<sup>35</sup>

Hence, WTO membership is dependent on the submission of schedules of concessions and commitments.

Assuming the UK does not enter into a CU with the EU after its withdrawal, it would no longer be part of the common schedules. In this scenario, the UK must submit its own new schedules after the conclusion of an exit agreement with the EU if it is to remain a WTO member. These schedules need to be accepted by all other WTO members in consensus<sup>36</sup> and certified following certain procedures<sup>37</sup>, which might create difficulties.

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<sup>33</sup> See for further information: E. Steinberger, “The WTO Treaty as a Mixed Agreement: Problems with the EC’s and the EC Member States’ Membership of the WTO” [2006] 17 (4) EIJL 837.

<sup>34</sup> “Any state or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to [the WTO] [...]” (Article XII: 1 of the Agreement establishing the World Trade Organization 1995 [*WTO Agreement*]).

<sup>35</sup> WTO Agreement (n 107), Art. XI:1

<sup>36</sup> WTO Agreement (n 107), Art. IX:1.

<sup>37</sup> Procedures for Modification and Rectification of Schedules of Tariff Concessions, Decision of 26 March 1980, L/4962, BISD 27S/25.

### **3.3 AS A WTO MEMBER, THE STANDARD WTO RIGHTS AND OBLIGATIONS WILL APPLY TO THE UK.**

The following section will be based on the assumption that consensus, thereby preserving the UK's WTO membership, certifies the UK's new schedules. It will shed light on the standard rights and obligations under WTO law which would apply to the trade relations between the UK and the non-EU members to the WTO, except where the UK has concluded an FTA which provides otherwise with one or more of these third countries.<sup>38</sup>

#### ***3.3.1 MFN treatment remains guaranteed under GATT and GATS***

The tariffs applied by any WTO member towards the UK are bound to the so-called MFN level as a guaranteed maximum, which applies on a country and product specific basis. Like every WTO member, the UK can rely on the WTO's MFN principle, according to which every WTO member must receive the same treatment (i.e. trade advantages) granted to the most favoured nation. The MFN principle applies to goods<sup>39</sup> as well as services and service suppliers.<sup>40</sup>

In practice, this would for example mean that if the EU as one WTO member grants a certain customs rate on cars to Japan, it must grant the same rate to cars imported from any other WTO member, including the UK. However, it should be noted that this principle applies only to the UK's trade relations with non-EU members to the WTO except where an FTA has been concluded that provides otherwise. This exception will be further explained in the following section.

#### ***3.3.2 The standard WTO rules on non-tariff barriers continue to apply***

Likewise, the UK's withdrawal from the EU would not imply any changes to the standard WTO rules on non-tariff barriers. The UK's trade relations with non-EU members to the WTO would still be subject to the ordinary WTO rules on non-tariff barriers, such as the general prohibition

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<sup>38</sup> This scenario will be discussed in the following section on the UK's regional trade relations.

<sup>39</sup> GATT 1994 (n 113), Art. I:1.

<sup>40</sup> GATS (n 115), Art. II:1. This aspect has been recognized in recent studies on the UK's potential EU-exit, inter alia in: *Our Global Future. A Business vision for a Reformed EU* (n 91) 134, 135 and *Leaving the EU* (n 6) 27.

on quantitative restrictions under Article XI: 1 of the GATT 1994<sup>41</sup> and the relevant disciplines laid down in other WTO Agreements, e.g. the Agreement on Sanitary and Phytosanitary Measures or the Agreement on Technical Barriers to Trade.<sup>42</sup>

The UK could hence have recourse to the WTO dispute settlement system when disputing over tariff and non-tariff barriers applied by the EU. One example for this scenario is the current WTO dispute over fisheries measures between the EU and the Faroe Islands since the latter are covered by Denmark's WTO membership but do not fall within the territorial scope of the EU.<sup>43</sup> However, these rules will only apply to the UK's trade relations with non-EU members to the WTO unless there is no FTA that provides otherwise. This exception will be further explained in the following section.

#### **4. CONCLUSIONS**

The possibility of an exit for the UK from the EU is closer to reality as Article 50 of the Lisbon Treaty establishes the inherent right for the UK to withdraw from the EU. However, the practical implications of such exit must be carefully analysed. The exit of the UK from the EU, therefore, would require enormous focus on negotiating a beneficial exit arrangement.

Article 50 of the Lisbon Treaty may be interpreted as implying both parties to negotiate in good faith as well as obliging the EU to conclude a withdrawal agreement. Under the scheme of this provision, the EU would be obliged to make serious good effort to reach an agreement on future trading relations with the UK. Nevertheless, this may be contingent upon the UK submitting a proposal to this effect. While this obligation may not be absolute, the two-year period established in the Lisbon Treaty does not allow the parties to waive from their obligation to conclude a withdrawal agreement. Therefore, it may be an 'escape clause' for the EU or the UK in the event

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<sup>41</sup> GATT 1994 (n 113), Art. XI:1.

<sup>42</sup> This aspect has been stressed in *Leaving the EU* (n 6), 25. However, it has not been included in the discussion in *Our Global Future. A Business vision for a Reformed EU* (n 91), 135.

<sup>43</sup> *European Union - Measures on Atlanto-Scandian Herring*, Request for consultations by Denmark in respect of the Faroe Islands, WT/DS469/1, dated 04 November 2013.

of a breach of good faith by the other party in terms of lack of sufficient efforts in negotiations or setting unreasonable conditions for withdrawal.

Further, the Lisbon Treaty does not directly include any provisions on possible protection of acquired rights of/against individuals and entities of the UK and of survival of disputes based on EU law. The general requirements of legitimacy of EU law presupposes that, upon withdrawal, the UK and the EU may be required to agree on protection of acquired rights and legitimate expectations of/against individuals and entities of the UK. At the same time, the claims of/against the individuals and entities of the UK would survive in the failure of the UK and the EU to conclude such agreement. In a case based on EU law and pending before the CJEU or the domestic court of a Member State, the claimant may raise the principle of legal certainty and its different aspects such as protection of legitimate expectations, non-retroactivity and acquired (vested) rights. The particular effect of those principles in these cases would then depend on individual circumstances. The UK courts will not be obliged to apply the rules of EU law on legal certainty after the Lisbon Treaty is terminated. However, they may still be obliged to follow the minimum standards of international law requiring protection of acquired rights.

In the event that the UK manages to negotiate an exit agreement with the EU, it may opt for one of the five models discussed, for its future trading relations with the EU. Each of these models represents different levels of integration into the EU framework. The EEA model, while ensuring increased access and trading benefits with the EU, results in a high level of integration to the EU in terms of internal laws and external policies. The Swiss model, coupled with the UK's bargaining power, gives some opportunity to negotiate a tailor-made set of agreements with the EU. However, the outcome of this model entirely depends on the negotiations to be held with the EU. The Customs Union model leads to a different level of EU integration in terms of external policies, while keeping internal sovereignty intact. However, this model does not ensure reciprocal benefits with respect to third countries that enter into FTAs with the EU. The FTA model represents a far lower level of integration into the EU as compared to the other models, leaving more scope for internal and external sovereignty. However, this would also mean that the benefits that UK may receive from this model in terms of access to the EU single market would be far less than in other models. Finally, the UK can decide to exit the EU without any agreement, in which case the UK-EU relation would be governed by WTO laws. While this

would grant complete internal and external freedom to the UK, it will lose all types of trading concessions from a huge trading bloc i.e. the EU. Therefore, the advantages and disadvantages of each of these models must be carefully analysed in comparison with the UK's current EU membership prior to entering into any exit negotiations with the EU.

The UK's withdrawal from the EU would also have an impact on the agreements concluded by the EU while the UK was an EU Member. As regards the exclusive EU agreements, they would cease to apply to the UK upon withdrawal, unless the UK negotiates an arrangement for their continued application. As regards mixed agreements, the provisions of these agreements indicate to the legal likelihood that they would be automatically terminated upon UK's withdrawal. The parties to this agreement can only be either the Member States of the EU or the third country. Further, the territorial application of these agreements is limited to those territories governed by the EU treaties or that of the third country. Upon withdrawal, neither would the UK be a Member State of the EU nor would the territory of the UK governed by the EU treaties. This sufficiently points to the legal outcome of the automatic termination of these mixed agreements in relation to the UK after its withdrawal from the EU. Alternatively, these agreements have a termination clause and the third countries have the possibility to terminate the agreement in relation to the UK. At the same time, these agreements also contain the provisions for amendments which can be used to make appropriate changes to these agreements, after negotiations, to allow the UK to continue as a party to these agreements. Therefore, the fate of these agreements entirely depends on the negotiations between the UK, EU and the third country after withdrawal.

With regards to the UK's trade relations under the WTO regime, the UK's withdrawal from the EU may have major implications for its WTO membership as the latter is conditioned upon the submission of new UK schedules of commitments under the GATT and the GATS. These procedures can involve major difficulties since the new UK schedules will be subject to approval by consensus of all other WTO members. Further, the certification of the UK's new schedules is not a process that can be taken for granted. During these negotiations, other WTO members might exert pressure, conditioning their consent to certain benefits. Similarly, other WTO members might wish to withdraw or modify their schedules in response to the UK's new schedules. Consequently, the design and negotiation of the new UK schedules require political sensitivity. The same applies to the negotiations for the UK's membership to the GPA, which is

based on its EU membership and therefore needs to be preserved after its withdrawal. In this regard, the UK must submit schedules to specify the coverage of the GPA, which might involve difficulties similar to those under the procedures for the submission of schedules under other WTO agreements, since other members might wish to withdraw or modify their schedules in response to the UK's new schedules.

Additionally, once the UK's WTO membership is approved, the UK's trade relations with non-EU parties to the WTO would continue to be governed by the same WTO rules that currently govern this relationship, being subject to any changes set out in the UK's WTO schedules and any continuing or new FTA relations between the UK and non-EU parties to the WTO. Moreover, the UK's EU exit would imply both advantages and disadvantages for the UK's position vis-à-vis the world's regional trade networks. This has been explained by the fact that not only the UK but also all other non-EU parties to the WTO may deviate from the MFN treatment obligation under the WTO's regional trade exception. In this regard, the UK's withdrawal from the EU would have major implications on the UK's key industry sectors and other policy areas.

Thus, the implications of the UK's withdrawal from the EU may have far-reaching consequences. These consequences can be positive or negative, depending on the negotiations with the EU at the time of withdrawal. This paper has attempted to shed light on some of these scenarios and implications providing key information for the future of the UK in Europe.