

AFTER EU MEMBERSHIP: THE UNITED KINGDOM IN TRANSITION

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One of the fundamental risks of a 'No Deal' Brexit would be the loss of a transition period between the United Kingdom's (UK) departure from the European Union (EU) and the entry into force of subsequent agreements establishing the future relationship between the UK and the EU. The idea of a transitional period of legal and economic continuity and certainty was suggested by the UK Government at the outset of the Article 50 TEU negotiations and accepted (with qualifications) by the EU. However, the early consensus around creating a 'safety net' against the parties falling over the cliff-edge of a disorderly departure and a 'bridge' to a future relationship changed after the negotiations were concluded. For those opposed to the negotiated Withdrawal Agreement, the transition period – like the Irish 'backstop' – seemed more like a 'trap' or a 'trampoline' to maintain alignment with the EU post-Brexit. The first aim of this article is to analyse what the UK and the EU sought to achieve in the negotiations by agreeing a transition period. The second aim is to consider whether – in combination with other factors – the outcome of the negotiations on a transition period contributed to the failure of the UK to exit the EU as intended on 29 March 2019. The article concludes that the Article 50 negotiation process underestimates the way in which the momentous nature of a decision to leave the EU unleashes political forces that inhibit a smooth and orderly exit and transition.

Keywords: Brexit, Article 50, transition, No Deal, Irish backstop

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I. INTRODUCTION

The United Kingdom (UK) was scheduled to end its membership of the European Union (EU) on the 29th March 2019. Had things gone to plan, the EU and the UK would subsequently have entered into a 'transition period' operational immediately upon the UK's exit from the Union. Recognising that a future relationship between the Union and the UK would only be negotiated and agreed once the UK had formally left the Union,¹ the intention behind the transition period was to offer certainty and stability to the legal relations between the parties, and between the economic and social actors located in their respective territories. The EU rules and norms applicable during the transition period – and the legal discipline they exert – would produce a form of 'shadow membership' substituting for the past legal discipline of EU membership and for alternative default rules, including the discipline of the World Trade Organisation (WTO) agreements.²

The UK's departure from the Union – and the commencement of the transition period – did not proceed as intended. The UK Government failed to secure parliamentary approval for the texts of the Withdrawal Agreement and Political Declaration negotiated and agreed between the Union and the UK, despite two formal approval votes, and one vote simply on the text of the

¹ See Sacerdoti and Mariani in this issue.

² Kenneth A Armstrong, 'Regulatory Alignment and Divergence After Brexit' (2018) 25 *Journal of European Public Policy* 1099.

Withdrawal Agreement.³ This led the UK Prime Minister to write on two occasions to the President of the European Council, Donald Tusk to request an extension to the period provided for in Article 50 TEU, and to delay 'Brexit' till 31 October 2019.⁴ It also resulted in the resignation of Theresa May as leader of her party and as Prime Minister, throwing more political uncertainty into the divisive politics of Brexit.⁵ On 24 July 2019, Boris Johnson became the new British Prime Minister, vowing that the UK would leave the European Union by 31 October 2019, 'no ifs no buts'.⁶ Failure to secure a revised agreement with the EU by this deadline would see the UK leaving the Union without a deal and without a transition period.

This article pursues two central aims. The first is to comprehend how the EU and the UK understood the role to be played by a transition period in the wider withdrawal process. Through an analysis of the negotiations and the text of what became the provisions on transition within the Withdrawal Agreement, the article pinpoints key ambiguities about the purposes of transition and the management of the Brexit process. Metaphorically, a transition period could be understood as a kind of 'safety net' to prevent the UK simply falling over the 'cliff-edge' once the treaties ceased to apply to the UK as a Member State of the Union. But it could also act as a 'bridge' to a future relationship with the EU, thereby offering a high level of continuity in

³ The term 'formal approval vote' is used here to indicate a vote in terms of Section 13 of the European Union (Withdrawal) Act 2018 which requires Parliament to approve the texts of the Withdrawal Agreement and the Political Declaration prior to its ratification and entry into force. The votes were held on 15 January 2019 and 12 March 2019. The texts of the Withdrawal Agreement and Political Declaration are published at [2019] OJ C66 I. For further discussion see Jones in this issue.

⁴ See further below and in more detail in Fabbrini and Schmidt in this issue.

⁵ For a preliminary analyse of the impact of Brexit on the 'Westminster model' of decision-making see: Gianfranco Baldini, Edoardo Bressanelli and Emanuele Massetti, 'Who Is in Control? Brexit and The Westminster Model' (2018) 89 *The Political Quarterly* 537. For Brexit's wider political implications see: Andrew Gamble, 'Taking Back Control: The Political Implications of Brexit' (2018) 25 *Journal of European Public Policy* 1215.

⁶ 'Boris Johnson's first speech as Prime Minister' (GOV.UK, 24 July 2019) <<https://www.gov.uk/government/speeches/boris-johnsons-first-speech-as-prime-minister-24-july-2019>> accessed 11 October 2019.

legal and economic relations between the parties as a precursor to the negotiation and conclusion of a long-term relationship. As against these benign depictions, the concept of a transition period could also be viewed with suspicion. The creation of a short-term 'shadow membership' might be considered as less of a safety net and more as a 'trap' by keeping the UK closely aligned to EU rules and regulations notwithstanding the UK's departure from the Union. When taken together with the provisions relating to the so-called Irish 'backstop', the safety net of a transition period might also act as a 'trampoline' bouncing the UK into a future relationship with the Union based on regulatory alignment with the EU.

The second aim of this article is to follow the common thread which runs through all the contributions to this special issue, namely to understand the interaction of law and politics throughout the Article 50 withdrawal negotiations. More specifically in the context of this article, the intention is to reflect upon whether the pursuit of a transition period contributed to the failure of the negotiations to produce an agreement that could obtain the domestic approval of the UK House of Commons. Although much of the political attention understandably has focused on the contentious nature of the Irish 'backstop', arguably some of the same anxieties about regulatory alignment and democratic control were present in discussions about a transition period.

The article expands on these research aims beginning in Section 2 with an unpacking of the different purposes that transition might serve. Given the problems experienced in delivering Brexit, it is clear that one of the central purposes of transition – to ensure stability and certainty to allow affected interests to plan for a time after EU membership – has effectively been lost. Rather than being able to organise on the basis of the rules and norms applicable during a transition period, 'No Deal' contingencies have had to be put in place including the hasty promulgation of more than five hundred statutory instruments.⁷ Under the premiership of Boris Johnson, No Deal contingency planning intensified. Without it being clear which set of rules and norms would apply – the body of EU law applicable during a defined transition period or a body of amended 'retained EU law' applicable for an

⁷ See 'EU Withdrawal Act 2018 statutory instruments' <<https://www.gov.uk/eu-withdrawal-act-2018-statutory-instruments>> accessed 11 October 2019.

unknown period of time – economic undertakings have made contingency plans based on worst case scenarios.⁸

Section 3 focuses on the outcome of the Article 50 negotiations in respect of the scope and legal effect of a 'standstill' transition period created by the Withdrawal Agreement. While the analysis is focused on giving continuing effect to 'internal' Union law during a period of transition, the analysis also draws attention to the 'external' dimension of Union law, including implications for the European Economic Area Agreement. The evident intention of the parties was to maximise legal certainty through continuity in legal relations between the UK and the EU (and beyond). Yet this aspiration for legal certainty can be seen to be in tension with a domestic politics fearful of being trapped in regulatory alignment with the EU without democratic representation in the institutions of the EU.

Section 4 examines the different terminology deployed by the EU and the UK during the negotiations to describe an interim legal framework following withdrawal. It discloses contrasting assumptions about the phasing of the negotiations and the function of transition. Paradoxically, the UK's failure to build a domestic consensus on where negotiations on a future relationship might lead both made the need for a transition period more urgent but also contributed to the failure to attain approval for a Withdrawal Agreement which would create such a transitional legal framework.

The competence to create a transition period, and the legal and political considerations which shaped the construction of that period are analysed in Section 5. In particular, the temporal limitations on transition illustrate the way in which time shapes Brexit.⁹ Significantly, the need for transition to be time-limited heightens the politics surrounding the so-called Irish 'backstop' that would come into effect at the end of a transition period if neither alternative arrangements nor a subsequent trade and cooperation agreement

⁸ 'Retained EU law' refers to domesticated EU law applicable as of 'exit day' in terms of the European Union (Withdrawal) Act 2018. In a 'No Deal' scenario this body of law comes into legal effect with any consequential amendments made by statutory instruments to correct any 'deficiencies' (section 8 of the Act).

⁹ Kenneth A Armstrong, *Brexit Time - Leaving The EU: Why, How and When?* (Cambridge University Press 2017).

between the EU and the UK was in force. The controversy around the backstop contributes to the problems in bringing transition into effect.

Sections 6 and 7 continue the temporal theme analysing, respectively, the intended duration of the transition period and the implications of extending the Article 50 period in curtailing the duration of transition. As will become clear, the more the UK's membership of the EU is extended, the more doubtful it becomes that transition can serve a useful purpose.

The article concludes that it is entirely possible that if the UK leaves the EU on 31 October as promised by the new UK Prime Minister, it will do so without a transition period coming into effect and with no Withdrawal Agreement in force. While the negotiators of the Withdrawal Agreement may have thought that they were creating a vehicle for economic stability and legal certainty in a post-membership period, they underestimated just how much domestic politics – and the UK itself – is in transition following the 2016 referendum.

II. THE PURPOSES OF TRANSITION

In her letter notifying the President of the European Council of the United Kingdom's intention to withdraw from the Union, Prime Minister May set out a key purpose of transition:¹⁰

Investors, businesses and citizens in both the UK and across the remaining 27 member states – and those from third countries around the world – want to be able to plan. In order to avoid any cliff-edge as we move from our current relationship to our future partnership, people and businesses in both the UK and the EU would benefit from implementation periods to adjust in a smooth and orderly way to new arrangements.

In evidence before the House of Commons Select Committee on Exiting the EU on 25th October 2017, the then Secretary of State for Exiting the EU

¹⁰ 'Prime Minister's letter to Donald Tusk triggering Article 50' (GOV.UK, 29 March 2017) <<https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50>> accessed 11 October 2019.

David Davis identified three main reasons for seeking an 'implementation period':¹¹

- To give business clarity about what they might need to do to prepare for the UK's withdrawal rather than simply having to prepare for a worst-case scenario;
- To give the UK government more time to put in place arrangements for life outside the EU; and
- To give other EU states time to make any consequential adjustments.

The first rationale clearly chimes with the sentiment behind the Prime Minister's Article 50 notification. At its simplest it is the idea that the UK should not fall off a 'cliff-edge' after the expiry of the two-year period laid down in Article 50 TEU for the negotiation of a withdrawal agreement, with a negotiated transition period acting as a kind of 'safety net'. There is, however, an important variant of this rationale which also considers the number of adjustments that businesses, people and states should make as the UK leaves the Union. The purpose of transition could also be to act as a 'bridge' to the future, giving economic, social and political actors a predictable adjustment path along different vectors depending on what the EU and the UK were to agree. The creation of a legal 'standstill' transition based on the continuing application of EU law to the UK for a defined period of time (as explained in Section 3 below) is certainly intended to serve the purpose of affording legal certainty and predictability in the period between withdrawal and the entry into force of any subsequent agreement on the future relationship.

Brexit represents a significant shock to the UK administrative system. The second rationale for transition recognises that after decades of shared administrative capacity with the EU and with other EU states, Brexit requires the expansion of UK domestic administrative and regulatory capacity as responsibilities are 'on-shored' – e.g. state aid control – while in other fields capacity might be reduced as regulatory responsibilities move away from successful UK regulators – e.g. the Medicines and Healthcare

¹¹ House of Commons Exiting the European Union Select Committee, 'The progress of the UK's negotiations on EU withdrawal', (2017-19), second report, HC 372.

products Regulatory Agency ('MHRA') – to the regulatory authorities of EU Member States. A transition period would facilitate this process of adjustment.

However, it is not just the United Kingdom that is in transition. Brexit produces externalities for other EU states – 'Brexternalities'.¹² For example, the national authorities of the EU27 need to put in place and have administrative capacity to manage registrations from UK citizens seeking to reside in their territories after Brexit.¹³ These Brexternalities are different from unintended consequences because they are foreseeable and predicable. Certain Brexternalities are highly visible and political – the creation of an EU external frontier on the island of Ireland and its effects on North-South relations – while others are opaque and relatively depoliticised – the transfer of registrations of licences and authorisations from UK competent authorities in areas like pharmaceuticals and financial services to the regulators of the EU27. Therefore, a third rationale for a transition period is to smooth this process of adjustment for other countries as part of an Article 50 process intended to manage the externalities of a Member State's withdrawal.

Omitted from Davis' list are three other purposes for a transition period. Most obviously, one of the central functions of a transition period is to give the Union and the UK time to negotiate a new future relationship. True, the UK could negotiate a trade arrangement with the Union without a transition period and for some, politically, it would be preferable to do so rather than spending time in a transition period during which the UK would continue to be bound by EU rules. Indeed, this seems to be the philosophy and strategy of the Johnson Government. Nonetheless, opening up trade negotiations following a disorderly departure from the Union is also highly problematic.

A further purpose of transition is to allow the UK to manage its external relationships beyond the EU in ways that mirror the purposes of transition

¹² Kenneth A Armstrong, "'Brexternalities', Article 50 and The UK's Grossly Irresponsible Attempt to Export Its Own Problems' *Prospect Magazine* (28 June 2019) <<https://www.prospectmagazine.co.uk/world/brexternalities-article-50-and-the-uks-grossly-irresponsible-attempt-to-export-its-own-problems>> accessed 11 October 2019.

¹³ See Barnard in this issue.

between the UK and the EU, namely to maintain on an interim basis certain legal relationships on existing terms and to facilitate the negotiation of new international agreements. With the consent of those countries, a transition period facilitates the continuity of legal obligations and enhances legal certainty rather than a disorderly and complex disentangling of them at the moment of withdrawal from the Union.

The final function of a transition period is to avoid customs and regulatory checks on the border between Ireland and Northern Ireland at the moment that the treaties cease to apply to the UK.¹⁴ The transition period would create a default set of rules post-membership to govern economic relations between the Union and the UK to meet the commitments made by the UK and the EU to avoid a hard border on the island of Ireland. However, having created this interim framework, the issue would always be what would happen once the transition period expired. In terms of the Joint Report agreed between the EU and the UK negotiators in December 2017,¹⁵ in the absence of agreed alternative arrangements to avoid a hard border on the island of Ireland, post-transition, the UK would commit to maintaining full alignment with the rules of the customs union and the internal market for the purposes of maintaining North-South cooperation, the all-Ireland economy and the protection of the 1998 Belfast 'Good Friday' Agreement (the so-called 'backstop').¹⁶ The precise extent of that alignment was later agreed in a Protocol on Ireland/Northern Ireland attached to the Withdrawal Agreement (the 'Irish Protocol'). However, a major stumbling block in gaining parliamentary approval for the negotiated Withdrawal Agreement was a fear that a transition period and the backstop were devices to trap the UK in continuing regulatory alignment with the EU rather than temporary adjustment mechanisms. Looking longer term, both the transition period

¹⁴ See further Connolly and Doyle in this issue.

¹⁵ 'Joint Report from the Negotiators of the European Union and the United Kingdom Government on progress during phase one of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union – TF50' (GOV.UK, 2017) 19 <<https://www.gov.uk/government/publications/joint-report-on-progress-during-phase-1-of-negotiations-under-article-50-teu-on-the-uks-orderly-withdrawal-from-the-eu>> accessed 11 October 2019.

¹⁶ *Ibid.* paras 49-50. For detailed analysis of the backstop see Connolly and Doyle in this issue.

and the backstop could also be understood as serving the purpose of bouncing the UK into a future relationship of close regulatory alignment with the EU.

By unpacking these different understandings of the purposes of transition it becomes evident that the different metaphors of 'safety net', 'bridge', 'trap' and 'trampoline' highlight a deep tension between the uncertain and contested politics of Brexit, and the aspiration for legal certainty and continuity of economic and social relations post-membership.

III. THE SCOPE AND LEGAL EFFECTS OF A TRANSITION PERIOD

In this section the analysis focuses on how the concept of a transition period was turned into legal text during the negotiations. In the December 2017 Joint Report on the progress of the negotiations, the UK signalled its desire that there be 'an agreement as early as possible in 2018 on transitional arrangements'.¹⁷ A developed version of the transition period was already in place in the February 2018 draft text of the Withdrawal Agreement.¹⁸ This was further refined during the negotiations to produce the text contained in the Withdrawal Agreement (WA) but the principle of a 'standstill' transition based on the continuing application of Union law to the UK for a defined period post-membership remained unchanged from the February draft.

The scope of application of the transition period is established in Article 127 WA. According to this provision, 'Union law' shall remain applicable to the UK during the transition period. 'Union law' is defined in Article 2 WA as:

- the Treaty on European Union ('TEU'), the Treaty on the Functioning of the European Union ('TFEU') and the Treaty establishing the European Atomic Energy Community ('Euratom Treaty'), as amended or supplemented, as well as the Treaties of Accession and the Charter of Fundamental Rights of the European Union, together referred to as 'the Treaties';
- the general principles of the Union's law;

¹⁷ Above n 15, para 96.

¹⁸ European Commission, Draft Withdrawal Agreement – TF (2018) 33 (28 February 2018) <https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf> accessed 11 October 2019.

- the acts adopted by the institutions, bodies, offices or agencies of the Union;
- the international agreements to which the Union is party and the international agreements concluded by the Member States acting on behalf of the Union;
- the agreements between Member States entered into in their capacity as Member States of the Union;
- acts of the Representatives of the Governments of the Member States meeting within the European Council or the Council of the European Union ('Council').

The following analysis is divided into two sub-sections. The first sub-section deals with the scope of application and effects of 'internal' primary and secondary Union law adopted before and after the UK's withdrawal from the Union. The second sub-section focuses on 'external' Union law in the form of international agreements, with specific attention being given to the continuing application of the European Economic Area Agreement during the transition period.

1. Creating a Legal 'Stand-Still' – the Continuing Application of Union Internal Law

With the exception of provisions of Union law that were not binding on the UK during its membership – e.g. relevant provisions on Schengen and the area of freedom, security and justice; enhanced cooperation measures such as the law applicable on divorce – or which would be inappropriate post-membership – the provisions of the Charter of Fundamental Rights on 'Citizenship of the Union' – primary and secondary EU law would continue to apply to the UK during the transition period as if the UK were a Member State. As made clear in Article 6 WA, the definition of 'Union law' includes, unless otherwise provided by the Agreement, Union law – including as amended or replaced – 'as applicable on the last day of the transition period'. Therefore, instruments adopted after withdrawal would also be applicable to the United Kingdom.

The significance of Article 6 WA becomes clearer when read in conjunction with Article 7 WA. While the UK would remain a Member State for the

purposes of the continued application of Union law, under Article 7 WA it loses its representation in the institutions, bodies, offices and agencies of the Union. Article 128 WA makes clear that Article 7 WA applies to the transition period. In other words, the UK could not participate in the decision-making structures that would promulgate new rules during the transition period. In terms of the administration and implementation of Union law, although Article 7 WA excludes the UK from participating in the work of expert committees following its withdrawal, Article 128(5) WA derogates from Article 7 WA during the transition period, by allowing its participation at the invitation of the Union where the discussions of expert groups and committees concerns acts addressed to natural or legal persons residing or established in the UK or where the presence of the UK is necessary and in the interests of the Union for the effective implementation of Union law. However, and of some significance, UK regulatory authorities like the MHRA will not be able to act as a 'leading authority' carrying out risk assessments whether on behalf of the European Medicines Agency for the purposes of the centralised authorisation of medicines, or at the level of the Member States for the purposes of decentralised authorisation of medicines (see Article 128(6) WA). This is a crucial and significant departure from the 'standstill' approach with the effect that the MHRA loses an important part of its regulatory business and the fee income associated with it.

The body of law applicable to the UK during transition is not, however, reducible to the instruments that make up the Union *acquis*. These instruments are embedded within a legal order that not only claims its autonomy from national law but also imposes its own demands in terms of the effects which this body of law can produce within the domestic legal order. In their interactions with this legal order, the legal systems of the Member States, including the United Kingdom, have accepted and mediated the legal discipline deriving from EU law in different ways.¹⁹ Nonetheless, it is a feature of the primacy principle that it derives from EU law as an 'independent source of law', while the capacity of this body of law to be domestically enforced in national courts through 'direct effect' applies

¹⁹ Bruno De Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in Paul Craig and Grainne De Búrca (ed), *The Evolution of EU Law* (Oxford University Press 2011).

'independently of the legislation of the Member States'.²⁰ The Withdrawal Agreement seeks to ensure that whatever the UK does in domestic legal terms, the qualities of primacy and direct effect – as they apply to the Agreement and the law it makes applicable to the UK – continue to derive from EU law.

In specifying the 'methods and principles' relating to the effect, implementation and application of the Agreement, Article 4(1) WA states a general proposition:

The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.

The reference to 'provisions of Union law made applicable by this Agreement' would clearly apply to Union law during the transition period and indeed Article 127 WA makes this absolutely explicit. Importantly, Article 4 WA goes on to state in express terms that natural or legal persons may rely on the direct effect of provisions of the Agreement itself as well as those referred to in the Agreement, provided those provisions meet the normal justiciability requirements for direct effect. Article 4(2) requires the UK to ensure compliance with Article 4(1) WA through domestic primary legislation to allow judicial and administrative institutions 'to disapply inconsistent or incompatible domestic provisions'. In this way, the legal – indeed 'constitutional' – discipline produced by primacy and direct effect are to be extended during the transition period to the Union's relationship with a post-membership United Kingdom.

Nonetheless, in a dualist system like the UK there still needs to be a mechanism in national law to allow the Withdrawal Agreement and the law made applicable by it to be deployed domestically.²¹ During its membership, the function of the European Communities Act 1972 was to recognise and give effect to EU law as a source of law available within the domestic legal order. It would have been an option for the UK to retain the 1972 Act and add

²⁰ Respectively *Costa v. ENEL*, Case 6/64, EU:C:1964:66 and *Van Gend en Loos*, Case 26/62, EU:C:1963:1.

²¹ Paul Craig, 'Constitutional Principle, The Rule of Law and Political Reality: The European Union (Withdrawal) Act 2018' (2019) 82 *The Modern Law Review* 319.

the Withdrawal Agreement to the list of instruments to which it gave effect. That would have given continuity post-Brexit not just to the instruments of the Union *acquis* during transition, but also afforded confidence to the Union in terms of the domestic application and enforcement of this body of law. Politically, however, the repeal of the 1972 Act would be a clear signal that the UK was withdrawing from the Union. Therefore, the European Union (Withdrawal) Act 2018 repeals the 1972 Act when its relevant provisions are commenced. It would be the function of a European Union (Withdrawal Agreement) Bill to ensure that the demands of Article 4 WA and Article 127 WA could be met in domestic law. Yet, the failure by Parliament to approve the text of the Withdrawal Agreement meant that the Bill remained unpublished let alone enacted by the time that Theresa May stood down as Prime Minister.

2. International Agreements and the European Economic Area Agreement

The Withdrawal Agreement states that international agreements shall continue to apply during transition as if the UK were still a Member State and still bound by these agreements. This reflects the UK's own wish to avoid disruption in its, and the Union's legal relationships with third countries.²² However, the consent of third countries is required in order to maintain the desired legal effects and in a footnote to Article 129 WA, the Union indicates that it will notify the other parties to international agreements that the UK is to be treated as a Member State for the purposes of the agreements during the transition period. The Union will also notify them if there is an extension to the transition period pursuant to Article 132.

However, the issue for third countries and for the UK itself is whether temporary continuity during transition should simply rollover and produce agreements replicating the terms of existing agreements once transition ends or whether the transition period offers time and the opportunity to negotiate new and different terms.²³ After all, pursuit of 'an independent trade policy' was identified by the UK Government in its 'Chequer's Plan' as delivering on

²² HM Government, 'Technical Note: International Agreements During the Implementation Period' (February 2018).

²³ House of Commons Library, 'UK replacement of the EU's external agreements after Brexit', Briefing Paper No. 8370 (23 May 2019).

the result of the 2016 referendum.²⁴ It also resonated with an aspiration to forge a post-Brexit identity for the UK as 'Global Britain', intended to project an image of the UK as a confident outward-looking actor on the world stage.²⁵ Be that as it may, the uncertainty over whether the UK would approve a Withdrawal Agreement or leave the EU without a deal prompted the UK to announce a set of temporary tariffs and tariff-free access to UK markets without demands for reciprocity.²⁶ This undermined negotiations on rolling over the EU-negotiated trade deals like the Canada-EU Trade Agreement given that on the basis of the 'No Deal' arrangements, Canadian exporters would benefit from tariff-free access in many areas and yet Canada could impose tariffs on UK imports on products.²⁷ This unilateral step by the UK frustrated the intention behind the transitional framework of providing a smooth adjustment path that could – if the UK and its international partners were so minded – produce reciprocal trade liberalisation agreements in a post-transition period. At its simplest, the lack of clarity as to whether there would or would not be a transition period, and whether there would or would not be temporary No Deal rules, meant that non-EU partners like Canada found themselves unable to agree terms to rollover the trade agreements they had concluded with the EU.

In respect of the UK's ability to negotiate new agreements with non-Member States during the transition period, Article 129 WA states:

... during the transition period, the United Kingdom may negotiate, sign and ratify international agreements entered into in its own capacity in the areas

²⁴ HM Government, 'The Future Relationship between the United Kingdom and the European Union', Cm 9593.

²⁵ As a House of Commons Foreign Affairs Select Committee Report notes, the term 'Global Britain' has been deployed frequently as a means of articulating the UK's external identity post-EU membership but without specificity as to what this entails: Foreign Affairs Committee, 'Global Britain', 6th Report (2017-19), HC 780.

²⁶ Department for International Trade, 'MFN and tariff-rate quotas of customs duty on imports if the UK leaves the EU with no deal' (GOV.UK, 29 March 2019) <<https://www.gov.uk/government/publications/temporary-rates-of-customs-duty-on-imports-after-eu-exit/mfn-and-tariff-quota-rates-of-customs-duty-on-imports-if-the-uk-leaves-the-eu-with-no-deal>> accessed 11 October 2019.

²⁷ 'Canadian businesses need more than optimism from Boris Johnson' (CBC News, 24 July 2019) <<https://www.cbc.ca/news/politics/canada-uk-trade-boris-wednesday-1.5221984>> accessed 11 October 2019.

of exclusive competence of the Union, provided those agreements do not enter into force or apply during the transition period, unless so authorised by the Union.

The problem this might create is that third countries may be keen to establish a new economic relationship with the UK during the transition period but the Union may be reluctant to see those new trading terms applied before the UK finalises its future economic relationship with the EU. In this way – and particularly if the UK and EU extend transition because a new trade and economic partnership between the Union and UK is not finalised – the UK and third countries could find their scope to develop new international trade deals to be constrained during the transition period.

It is also worth briefly noting the particular approach which has been taken to the European Economic Area Agreement. While there has been debate over whether the UK should forge a future relationship with the EU based on EFTA membership and the EEA Agreement, some consideration has also been given to using the EEA vehicle as a form of interim or transitional framework for the UK post-Brexit, particularly as an alternative to the transition period established by the Withdrawal Agreement in the event of a No Deal Brexit.²⁸ Nonetheless, and on the assumption that a Withdrawal Agreement would enter into force, the United Kingdom negotiated an agreement with Norway, Liechtenstein and Iceland to shadow the terms of the Withdrawal Agreement.²⁹ This parallel agreement would have particular relevance for the protection of the rights of EEA nationals.³⁰ It would also

²⁸ 'Norway for Now – or Never?' *The Economist* (3 November 2018) <<https://www.economist.com/britain/2018/11/03/norway-for-now-or-never>> accessed 11 October 2019.

²⁹ Draft Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom's membership of the European Union: <https://www.efta.int/sites/default/files/documents/eea/eea/legal-texts/2018_12_20_UK-EEA-EFTA_separation_agreement.pdf> accessed 11 October 2019.

³⁰ Indeed, because of fears of a No Deal Brexit, the UK and participating EFTA states also agreed a separate legal text covering citizens' rights: Draft Agreement on arrangements regarding citizens' rights between Iceland, the Principality of

secure the continuing application of the EEA Agreement and Union acts incorporated into the EEA Agreement during the transition period. Reflecting that the EEA Agreement does not give rise to direct effect and primacy in the same way as Union law,³¹ the parallel provision to Article 4 WA accepts that the obligations created will be given effect within the domestic law of the contracting parties with their judicial and administrative institutions having 'due regard' to the Agreement.³²

All of this leaves open the question of the kind of relationship between the UK and the EFTA states to which transition might lead. The draft agreement anticipates a new future relationship but there is no equivalent of the Political Declaration to guide and so the preamble to the draft agreement simply considers that the parties will:

... take all necessary steps to begin as soon as possible the formal negotiations of one or several agreements governing their future relationship with a view to ensuring that, to the extent possible, those agreements apply from the end of the transition period.

In this way, transition under the draft agreement between the EFTA states and the UK is primarily about creating a safety net rather than a bridge.

IV. A 'TRANSITION' OR 'IMPLEMENTATION' PERIOD

A potent symbol of the politics of Brexit – and the way in which law interacts with that politics – can be found in the different legal terminologies deployed by the EU and the UK throughout the negotiations to refer to the interim period following membership and before a new relationship could begin. While the European Council's Guidelines on the Article 50 negotiations anticipated 'transitional arrangements' and the Union consistently referred

Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union and the EEA Agreement: <https://www.efta.int/sites/default/files/documents/eea/eea/legal-texts/EEA_EFTA-UK_no_deal_CR_agreement.pdf> accessed 11 October 2019.

³¹ Halvard H. Fredriksen and Christian N.K. Franklin, 'Of Pragmatism and Principles: The EEA Agreement 20 Years On' (2015) 52 *Common Market Law Review* 629.

³² Above n 29, Article 4.

to a 'transition period', the UK preferred the terminology of an 'implementation period'. This was not a mere linguistic preference but instead revealed a very different understanding of how the UK would end its membership and start a new post-membership relationship with the EU.

For the EU, negotiations have to follow a sequential path with the phases of negotiations governed by distinct legal provisions in the treaties. The Article 50 negotiations cover the settlement of the terms of withdrawal – including provisions on citizens' rights, the financial settlement, Northern Ireland – and provisions on transition, whereas any agreement on a future relationship is governed by alternative legal bases in the treaty depending on what sort of relationship the parties agreed to pursue. The UK, however, wanted to have parallel tracks to the negotiations in the hope that a future relationship could be settled during the Article 50 negotiations and then 'implemented' once the UK had left the EU.

The EU's approach to the negotiations prevailed. The 'phased approach to negotiations' was made clear in the Guidelines given by the European Council for the conduct of the Article 50 negotiations on behalf of the Union.³³ The legal text of the Withdrawal Agreement refers throughout to a transition period – Part Four of the Agreement is entitled 'Transition' and Article 126 has the heading 'Transition Period' – but as a concession to the UK, the substance of the text of Article 126 states that '[T]here shall be a transition or implementation period ...'; the only other reference to an 'implementation period' being found in the Preamble.

However, the politics that gives rise to a Member State's withdrawal is the same politics that has to determine the shape of the future relationship. A sequenced approach to negotiations and the facility of a transition period as a bridge to a future relationship only really works if a political consensus on the future relationship is either clear at the point of the decision to withdraw or emerges early on in the withdrawal process. In the case of Brexit, its politics has proved to be highly contested. Days before the UK's scheduled departure from the EU on 29 March 2019, the UK Government and MPs were still at loggerheads over what kind of post-membership relationship the

³³ European Council (Art.50) guidelines following the United Kingdom's notification under Article 50 TEU (29 April 2017).

UK really wanted. A series of 'indicative votes' in the House of Commons failed to find a majority for any alternative to the Government's direction of travel as agreed with the EU and set out in the Political Declaration.

That the debate about the future relationship took place late on in the Article 50 process, that it did not produce a consensus, and that the framework for the future relationship would be contained in a 'political' declaration rather than a legally binding instrument did nothing to produce the political circumstances in which it would have been possible for the UK to leave the EU on 29 March 2019 and enter into a transition or implementation phase as intended.

V. THE LAW AND LEGALITY OF A TRANSITION PERIOD

The European Council guidelines on the negotiations cautiously accepted the legal possibility of the negotiation of a transition period under certain conditions:

To the extent necessary and legally possible, the negotiations may also seek to determine transitional arrangements which are in the interest of the Union and, as appropriate, to provide for bridges towards the foreseeable framework for the future relationship in the light of the progress. Any such transitional arrangements must be clearly defined, limited in time, and subject to effective enforcement mechanisms.

The text of Article 50 TEU is silent on what kind of transition is or is not 'legally possible'. From the perspective of the attributed competence of the Union, Article 50 TEU has been considered by the Council as conferring on the Union a particularly broad legal power to manage the terms of withdrawal. The Article 50 'negotiating directives' agreed by the Council state that:³⁴

...Article 50 of the Treaty on European Union confers on the Union an exceptional horizontal competence to cover in this agreement all matters necessary to arrange the withdrawal. This exceptional competence is of a

³⁴ Council Decision of 22 May 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union (XT 21016/17).

one-off nature and strictly for the purposes of arranging the withdrawal from the Union.

Framed in this way, the Council sought to draw a distinction between a unique and broad Union competence to manage all aspects of withdrawal, and the specificities and limits on Union competence under legal bases of the treaties which could be used to negotiate a future relationship between the Union and the UK. The difficulty is that a transition period is intended to bridge the past and the future. The legal limit, therefore, is that a transition cannot be a permanent arrangement without being incompatible with the use of Article 50 as a legal basis. Therefore, and notwithstanding the breadth of the competence under Article 50, the transition period had to have a temporal limitation in order to be lawful.

This temporal limit had one obvious and profound implication for the negotiations, and that concerned the 'backstop'. Had it been possible for the EU and the UK to negotiate a parallel track agreement on their future relationship, and provided that agreement was consistent with the commitments made in the Joint Report, there would be little need for a transition period or a 'backstop'. But with negotiations being phased, it became clear that the backstop could come into effect following the expiry of a time-limited transition period if alternative and subsequent arrangement on a future relationship had not entered into force by the expiry of the transition period.

With the backstop proving to be a fundamental political problem for the UK in obtaining approval for the Withdrawal Agreement, one means of avoiding the backstop being deployed would be to keep all of the UK in transition for longer to facilitate the negotiation of alternative arrangements. A more 'open' transition – with the legal discipline it produced being substituted as new agreements entered into force – would have had an obvious appeal were it not politically difficult – the spectre of 'Brexit in Name Only' – and legally problematic inasmuch as the end of transition would depend on an uncertain future event rather than a specific date.³⁵

³⁵ Kenneth A Armstrong, 'Transition Time: 3 Options For Extending The Transition Period' (2018) University of Cambridge Faculty of Law Research Paper No. 61/2018 <<https://ssrn.com/abstract=3272851>> accessed 11 October 2019.

Nonetheless, it is worth noting that while a clear end-point was generally accepted as a precondition for the lawfulness of a transition period based on Article 50, rather different considerations seem to have been applied to the duration of the backstop which also has its legal basis in Article 50. It was stated by the then UK Prime Minister that 'the treaty is clear the backstop can only ever be temporary',³⁶ and in its unilateral Declaration on the Irish Protocol, the Government expressed its view that the Withdrawal Agreement to which the Protocol is attached 'is based on Article 50 TEU [and] does not aim at establishing a permanent future relationship between the Union and the United Kingdom'.³⁷ Despite political pressure to have an end-point or exit clause written into the backstop, the counter-argument that a backstop ceases to fulfil its purpose if it can be exited prevailed. All of which might suggest that *mutatis mutandis* a more open-ended transition period – with the application of EU law ceasing to have effect once new subsequent agreements came into force – could have been considered as being capable of being lawfully based on Article 50 TEU.

Of course, keeping the whole of the UK in transition for longer, and subject to the EU *acquis* as a means of avoiding triggering the backstop, incurs its own political costs. Nonetheless, the more one presses precise temporality as a precondition for the lawfulness of transition based on Article 50, the more one has to question why the same considerations did not apparently apply to the backstop.³⁸ And as we will consider below, the shorter the duration of transition, the more likely it would be that the backstop would be deployed.

³⁶ 'Prime Minister's Statement on the European Council' (GOV.UK, 17 December 2018) <<https://www.gov.uk/government/speeches/pm-statement-on-european-council-17-december-2018>> accessed 11 October 2019.

³⁷ 'Declaration by Her Majesty's Government of the United Kingdom of Great Britain and Northern Ireland concerning the Northern Ireland Protocol' (GOV.UK, 11 March 2019) <<https://www.gov.uk/government/publications/11-march-withdrawal-agreement-and-political-declaration-laid-before-parliament-following-political-agreement>> accessed 11 October 2019.

³⁸ A similar point is made in a 'View from Brussels' briefing by Herbert Smith Freehills: 'Using EU law to improve the Brexit deal along the lines requested by the UK Parliament' (4 February 2019). Similarly the legal advice offered by the Attorney General on the Irish Protocol underscores that the EU had insisted that Article 50 could only serve as a legal basis for arrangements that were a 'bridge to a

Although the limits on Union competence are a primary aspect of legality from an EU perspective, other normative considerations might also condition the legality – and duration – of transition. A more open-ended transition during which time the UK would continue to be bound by EU rules and norms – including new rules adopted during the transition period – but without political representation in the Union, could be considered to be incompatible not only with the Union's own commitments to respect the principle of democracy (Articles 2 and 10 TEU), but also the principle of representative democracy enshrined in Article 3, Protocol 1 attached to the European Convention on Human Rights. As Peretz argues, it is the temporary nature of the transition period which is intended to immunize this aspect of the Withdrawal Agreement from legal criticism.³⁹

VI. THE DURATION OF TRANSITION

Operating within the temporal requirements for the lawful use of Article 50 TEU, it would, nonetheless, be possible to specify the duration of transition in different ways depending upon the purpose that transition served (see Section 2 above). If, for example, the purpose was to facilitate regulatory capacity-building in the UK, this could take a rather different amount of time from that which might be required, for example, to negotiate a future trade agreement with the EU or with non-EU states. If transition also served the ends of avoiding triggering the 'backstop', that would suggest a transition period at least of the duration of negotiations on alternative arrangements.

more permanent arrangement': Attorney-General, 'Legal effect of the Protocol on Ireland/Northern Ireland' (13 November 2018). It is unclear why strict temporality is a condition of the legality of a transition period but not of the backstop which also has its legal basis in Article 50 TEU.

³⁹ See George Peretz QC, 'The Brexit Withdrawal Agreement May Violate The European Convention on Human Rights', *Prospect Magazine* (11 October 2018) <<https://www.prospectmagazine.co.uk/politics/the-brexit-withdrawal-agreement-may-violate-the-european-convention-on-human-rights>> accessed 11 October 2019. Peretz notes that this line of argument is augmented in an EU context by the judgment of the European Court of Human Rights in *Matthews v United Kingdom*, Application No. 24833/94 (1999) 28 EHRR 361 which was concerned with the denial of a right to vote in elections to the European Parliament.

The UK wanted a flexible and functional transition period of 'around 2 years' with the duration determined 'simply by how long it will take to prepare and implement the new processes and new systems that will underpin the future partnership'.⁴⁰ However, in its position paper, the Union negotiating team defined the duration of transition in precise terms: it would begin on the date of entry into force of the Withdrawal Agreement and end on 31 December 2020.⁴¹ This was in line with the revised negotiating directives proposed by the Commission and agreed by the Council.⁴² It is the deadline that is contained in Article 126 of the Withdrawal Agreement.

The political reasons for having a deadline for the end of the transition period are apparent on both sides. For the UK, an agreement that kept the UK subject to EU rules and contributing to the EU budget without any of the benefits of participation in EU decision-making could only ever be a short-term measure. While the UK originally wanted some flexibility, a more fixed endpoint for the transition should have helped the UK Prime Minister to sell the negotiated agreement to those who might otherwise be anxious that a more open transition would keep the UK in a 'zombie' quasi-EU membership. On the other hand, and as explained, it dramatized the potential for the Irish backstop to be triggered if no new arrangements were in place at the end of a short transition. For the EU side, a time-limited transition was consistent with the Union's position on the temporary nature of a transition based on Article 50 TEU and was in line with the European Council's guidelines. More directly, a transition period ending in 2020 neatly coincides with the end of the current Multiannual Financial Framework that

⁴⁰ HM Government, 'Draft Text for Discussion: Implementation Period' (21 February 2018): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/682894/Draft_Text_for_Discussion__Implementation_Period__1_.pdf> accessed 11 October 2019.

⁴¹ Position Paper, 'Transitional Arrangements in the Withdrawal Agreement' TF50 (2018) 30 (7 February 2018) <<https://ec.europa.eu/commission/sites/beta-political/files/transition.pdf>> accessed 11 October 2019.

⁴² Council Decision supplementing the Council Decision of 22 May 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union (XT 21004/18).

guides the EU budget and so avoids having to include the UK in budgetary planning over the next financial period.

Nonetheless, during the course of the Brexit negotiations, it became apparent that the duration of the transition period might need to be revisited. Firstly, if a practical purpose of the transition period was to create time to negotiate subsequent agreements including on the future relationship, then the deadline set in the Withdrawal Agreement seemed unrealistic. Expecting negotiations to be conducted and finalised between the UK's formal withdrawal from the EU and the end of 2020 seemed improbable, and given how long it had taken to negotiate the Withdrawal Agreement itself, highly questionable. The ambitious scope of the intended negotiations and the need for new agreements to obtain domestic approval and ratification prior to their entry into force before the expiry of the transition period demands a longer transition.

Secondly, the lack of realism about what might be achieved in the limited time available was exacerbated by domestic political conflict over the terms and nature of a future relationship with the EU. Although the EU insisted that formal negotiations on a future relationship could not begin until the UK had left the EU, had the UK Government forged a domestic consensus on what it wanted by way of a future relationship, the Union and the UK would have been able to start formal negotiations with a sense of momentum and clarity of purpose. By contrast, the UK Prime Minister's attempt to get MPs to back the Withdrawal Agreement without approval of the text of the Political Declaration suggested that the Government was even prepared to countenance a relatively 'blind' Brexit, none of which would facilitate expedited post-withdrawal negotiations on the future relationship.

The third driving force was the continuing difficulty in agreeing the 'backstop'. If there was a risk that the transition period could end in 2020 without a new future relationship in place, then the assurances that the UK Government gave about the backstop as an 'insurance policy' that need never be deployed would simply lack credibility. With domestic political attention focusing on whether it would be possible for the UK unilaterally to exit the backstop and with the EU unified around a position that the backstop was not up for renegotiation, extending the transition period to give more time

for negotiations on agreements that would avoid the backstop being deployed appeared to be a useful way of helping the UK to sell its Brexit deal.

Despite good reasons to revisit the 31 December 2020 deadline, any attempt to change or extend the transition period still had to confront the political and legal limits described previously. Implausibly, the UK Prime Minister initially intimated that the UK might seek a facility to extend the transition period by only a matter of months. In the end, a new provision was added to the draft Withdrawal Agreement to allow the transition period to be extended by one or two years. Accordingly, Article 132(1) provides for the Joint Committee established under the Agreement to make a 'single decision' before 1 July 2020 on whether to extend the transition period for one or two years. This capacity to extend in annual increments also requires a corresponding budgetary contribution to be made by the UK.

The thought that transition could extend to 2022, with the UK still bound by EU rules and still making contributions to the EU budget more than six years after the referendum on EU membership, is no doubt an unhappy one for many politicians and voters. The idea that this could be as a result of a decision of a 'Joint Committee' may also cause some alarm and it is unclear what sort of parliamentary scrutiny would accompany any decision to extend transition. Yet, before the transition period can be extended it has to come into being upon the entry into force of the Withdrawal Agreement. With the UK House of Commons unable to give statutory approval for the texts of the Agreement and the Political Declaration, attention has focused instead on a different type of extension, namely extension of the UK's membership of the Union. It is to this extension that attention turns because it has profound implications not just for the duration of transition, but whether any transition period takes place at all.

VII. EXTENDING EU MEMBERSHIP AND ITS IMPLICATIONS FOR TRANSITION

Article 50(3) TEU permits the Union, following notification of an intention to withdraw and in agreement with the withdrawing state, to extend the two-year period after which the treaties would otherwise cease to apply to the

withdrawing state.⁴³ The effect of such a decision – to be taken by the European Council with the unanimous agreement of the Member States – is to extend the withdrawing Member State's membership of the Union.

Following failed attempts to gain parliamentary approval for the texts of the Withdrawal Agreement and Political Declaration, on 20 March 2019 the then UK Prime Minister formally requested an extension till the end of June 2019.⁴⁴ The Union, however, was only prepared to offer an extension till 22 May on the condition of approval by MPs of the deal negotiated with the Union before 29 March or, in the absence of such approval till 12 April.⁴⁵ Despite severing the text of the Political Declaration and only seeking approval of the Withdrawal Agreement,⁴⁶ MPs once again failed to approve the Agreement leaving the Prime Minister to once again seek an extension.⁴⁷ Her request for an extension again to the end of June – but with a hope that it might end sooner and so avoid the need to hold elections in the UK to the European Parliament on 23 May – was countered by the EU who – despite clear reservations from France about the shadow that Brexit would cast over the EP elections – would only agree a longer extension to the end of October 2019.⁴⁸

Extending the Article 50 withdrawal process has very significant implications for a transition period. First, if an extension of the Article 50 process results

⁴³ See Fabbrini and Schmidt in this issue.

⁴⁴ 'Prime Minister's Letter to President of the European Council' (GOV.UK, 20 March 2019) <<https://www.gov.uk/government/publications/prime-ministers-letter-to-president-tusk-20-march-2019>> accessed 11 October 2019.

⁴⁵ European Council Decision (EU) 2019/476 taken in agreement with the United Kingdom of 22 March 2019 extending the period under Article 50(3) TEU: [2019] OJ L80I/1.

⁴⁶ This tactic was compatible with EU law in that Article 50 TEU is fundamentally concerned with the negotiation of a withdrawal agreement, but would not have constituted a formal statutory approval in terms of section 13 of the European Union (Withdrawal) Act 2018 which demands that both texts be approved.

⁴⁷ 'Prime Minister's Letter to Donald Tusk' (GOV.UK, 5 April 2019) <<https://www.gov.uk/government/publications/prime-ministers-letter-to-president-tusk-5-april-2019>> accessed 11 October 2019.

⁴⁸ European Council Decision (EU) 2019/584 taken in agreement with the United Kingdom of 22 March 2019 extending the period under Article 50(3) TEU: [2019] OJ L101/1.

in a Withdrawal Agreement entering into force, the period of such an extension also reduces the duration of a transition period as the end point of the transition period is fixed in the Withdrawal Agreement. In other words, the longer the extension the less time is available for negotiations on a future relationship. The extension to 31 October 2019 reduced the transition period by seven months, making the likelihood of the Joint Committee extending transition a near certainty.

Second, while a transition period following a short extension is manageable, the longer the extension, the more that the purpose of any transition would come into question. Instead it might be better simply to continue to extend the UK's EU membership and focus on negotiating the new future relationship between the Union and the UK. Quite obviously, such an approach would run counter to everything the EU had said about not undertaking negotiations on the future until the UK left the Union. It would undermine the strategy of the phased and sequential negotiations before and after withdrawal. And it would conflict with the new UK Prime Minister's stated intention for the UK to leave the EU by 31 October 2019. But at a pragmatic level – and perhaps also as a way of avoiding having to trigger the backstop at the expiry of a shortened transition – it might be less disruptive to seek to negotiate a package of agreements concerning not just withdrawal from the Union but also the future relationship.

Thirdly, the failure to leave the Union and the grant of a further extension played into domestic politics in a profound way. Instead of using the period of the extension to conduct another 'meaningful vote' on the Brexit deal, Theresa May changed tack and announced her intention to bring forward the European Union (Withdrawal Agreement) Bill – which would give domestic legal effect to a Withdrawal Agreement – complete with new safeguards to try to appeal to MPs. However, the strength of opposition she encountered led to her resignation. Confronting the choice between seeking a further extension to membership to negotiate an orderly departure or winning back voters who had deserted the Conservatives for the Brexit Party, Prime Minister Boris Johnson's political mantra has been to 'Get Brexit Done' and to secure that the UK leaves the EU by 31 October 2019, with or without a Withdrawal Agreement.

VIII. CONCLUSIONS

Looking back at the negotiations that led to the Withdrawal Agreement, the need for a transition period was a logical consequence of the phasing of negotiations in terms of the management of the UK's exit from the Union and the agreement of the terms of a new relationship. In this way, the purpose behind a transition period was to give the parties a safety net against a cliff-edge departure and a bridge to a future relationship. Legal certainty and the continuity of economic and social relationships would be preserved through a 'stand-still' transition.

However, this aspiration for legal certainty and continuity has been undermined by the contested politics of Brexit which has inhibited the intended entry into force of a Withdrawal Agreement and the commencement of the transition period. For some, the anxiety relates to the absence of a consensus as to the ultimate endpoint of Brexit in the sense of a lack of clarity as to the terms of a future relationship that is not expressed in a legally binding Withdrawal Agreement but instead a framework Political Declaration. Yet while some have concerns about a 'Blind Brexit' a more fundamental concern, particularly within the ruling Conservative Party, is that transition is neither a safety net nor a bridge but a legal trap that keeps the UK too closely aligned to the EU ('Brexit in name only'). If a No Deal Brexit is to be avoided, these concerns will need to be overcome.

On reflection, the smooth and orderly exit of a Member State as anticipated by the legal language of Article 50 simply fails to comprehend that the sort of politics that initiates a withdrawal from the EU will also struggle to handle it. In a country like the UK with a political constitution, a political crisis is also a potential constitutional crisis, further exacerbating its capacities for political will-formation either to end the Brexit process or to continue towards post-membership with or without a Brexit deal. The decision by Prime Minister Johnson to suspend Parliament in the run up to 'Exit Day' – a decision successfully challenged in litigation in the courts of Scotland, Northern Ireland and England – dramatises the strained relationship between the Executive and Parliament and between law and politics that Brexit has produced.

One way or another, the UK will be in transition.