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"Brexit: some legal uncertainties on economic partnership"

RELATORE

CH.MO PROF. Laurence Klesta

LAUREANDA Sadocco Rita

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Abstract

Brexit: alcune incertezze giuridiche sulla partnership economica

Il presente elaborato tratta delle procedure legali che hanno segnato il recesso del Regno Unito dall'Unione Europea. A partire dall'Articolo 50 TEU, usato per la prima volta dal suo inserimento nel 2007, vengono descritte le negoziazioni che hanno portato all'accettazione dell'Accordo di Recesso ed il suo contenuto, accompagnato dalla vaga Dichiarazione politica. Chiarito il concetto di Periodo di Transizione, nel secondo capitolo, sono descritti dei possibili scenari per la futura relazione tra Gran Bretagna ed Europa, citando in primo luogo gli articoli 216/218 TFEU, che regolamentano la creazione di Free Trade Agreement tra l'EU e Terze Parti, poi presentando tre esistenti FTAs che potrebbero servire come modello per la relazione con l'Inghilterra, con i loro limiti e svantaggi rispetto al Mercato Unico. Infine, nel terzo ed ultimo capitolo, si tratta della Libera Prestazione di Servizi e della Libertà di Stabilimento, garantite all'interno degli Stati Membri, delle incertezze dovute all'estrema generalità delle dichiarazioni finora rilasciate ed infine di alcuni esempi di regolamenti del Diritto Societario che non avranno la stessa validità dopo il Periodo di Transizione.

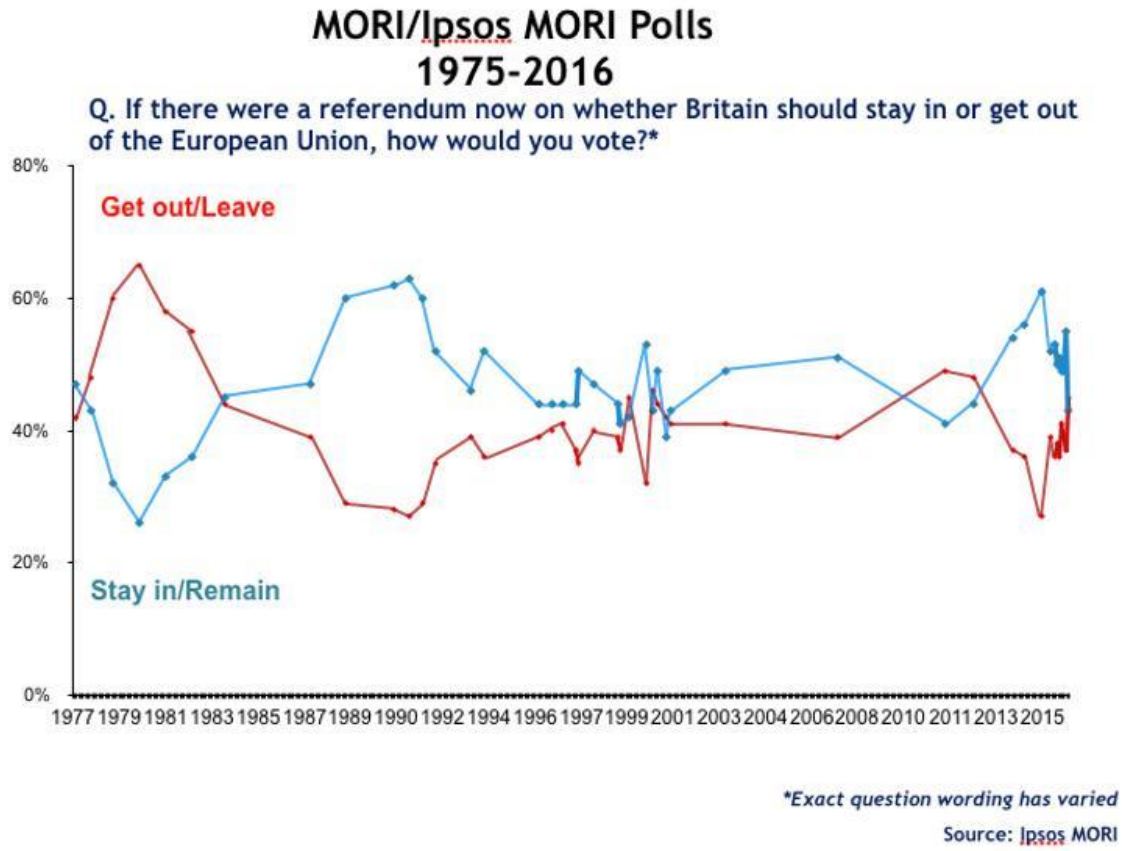
Introduction

On 23 June 2016 was held the consultative referendum about the permanence of the United Kingdom in the European Union, and the British government had committed itself to abide by its outcome. Despite the expectations of a "Bremain", the British citizens have chosen to leave the Union. Received permission from the British Parliament, Prime Minister Theresa May on 29 March 2017 invoked Article 50 of the Treaty on the European Union, with a letter to the President of the European Council Donald Tusk. This Article, introduced in 2007 for the first time, provides for the possibility for each member country to interrupt their stay within the European Union. The Withdrawal was scheduled for the end of March 2019, but with the approval of the PM May and the European institutions, it was postponed: first for a few months, and then until 31 January 2020.

The United Kingdom has always been linked to Europe in historical and cultural terms, but above all for deep economic integration with the other European countries. However, it should be considered that the UK has always kept a certain distance from the European Union, firstly by not participating in the Schengen Area, which abolishes border controls for the countries that are part of it, and secondly by not joining, through the so-called opting-out clause, the Economic and Monetary Union, which provided for the introduction of the single currency.

We should also remember the United Kingdom is not one of the founders of the European Union: it joined in 1973 after founding the European Free Trade Agreement and participating in the Single Market of the European Economic Area. Criticism has not been lacking since then, and it has led to a first referendum on staying in the Community in 1975. At the time the ‘Remain’ won, and, except for the decade of James Callaghan's and then Margaret Thatcher's period as prime ministers, the public consensus for the Single Market and the Union seemed consolidated.

Below is a graph with statistics carried out by IPSOS MORI, global market and opinion research specialist, showing that until 2016 the most quoted choice seemed to be to stay in the Union.



As one can see in the graph and as one may recall by the news, the result of the elections was uncertain until the very last moment and surprised the experts: the impression was that the Remain option would win, and this has destabilised not little the expectations of the market.

The reasons that led the British to vote Leave are different and have their basis in various spheres of life in the UK. On the one hand, there is growing nationalism, which claims to free the United Kingdom from the burdens of EU membership and to regain national sovereignty. On the other hand, the economic rationale of specific trade sectors, such as fisheries. We can also identify a current that wants to close the borders with Europe in order to limit immigration (increased after the EU expansion in 2004) and to safeguard security in the face of recent cases of terrorism. What is certain is that a part of the population wanted

to express discontent about the economic and working situation, which, especially in the North, has not recovered after the Great Recession 2007/2013.

Regardless of these reasons, the separation is now in place, and the consequences of Brexit in both the UK and EU will not be evident until negotiations are concluded and will manifest themselves over a more extended period.

The topicality and novelty of this matter have made it difficult to consult school and specialist textbooks on the subject. However, the whole negotiation process was conducted in a very transparent manner: the European Commission published a number of documents on which we have relied in order to give this matter a legal rather than a political slant.

The primary starting point for writing this thesis is a document published by the Directorate-General for Internal Policies of the European Parliament, entitled "The Consequences of Brexit on Services and Establishment: Different Scenarios for Exit and Future Cooperation", written by Dr Friedemann Kainer from the University of Mannheim, Germany.

In the first chapter, we go to examine Article 50 of the Treaty on the Functioning of the European Union, which allowed the start of the separation process, and about what the Withdrawal agreements consist of. In the second chapter, we will analyse possible scenarios for the future, comparing different types of Trade Agreements, starting with the legal procedure described in Articles 207, 216-219 of the TFEU.
Finally, in the third chapter, we will discuss the freedoms of establishment and freedom to provide services, and what will change for companies and workers in the service sector.

1 From the withdrawal to a possible agreement

"We will work closely together to find solutions to common challenges.
But one thing has to be absolutely clear: whatever the future holds, the bond and the friendship between our people are unbreakable."

- President von der Leyen, European Parliament, Strasbourg, 27 November 2019

With the Lisbon Treaty of 2007, the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) entered into force. Article 50 of the TEU introduced the right for each Member State to withdraw from the Union.

When the Lisbon Treaty was ratified, the EU was experiencing a period of territorial expansion and economic growth. The debt crisis of the coming years was not yet evident, and Bulgaria and Romania were completing the accession process. Article 50, which outlined the provisions under which a country could voluntarily leave the EU, did not receive much public attention. While the Greece bankrupt in 2010 and austerity measures failed to slow its decline, EU leaders began to consider the possibility of a "Grexit" ('Greek exit') from the euro area and the EU. However, Article 50 concerned the voluntary separation of a country from the EU and the mechanisms under which a member could be expelled were not clear. It is the first time since its creation that Article 50 is triggered.

It was thought to be of little significance at the time of drafting, and during the adoption of the Treaty of Lisbon; now it has possibly become the most popular article in the Treaty for the general public.

1.1 Article 50 - Treaty on the European Union

Article 50 states that "Any Member State may decide to withdraw from the Union in accordance with its constitutional requirements". It was left deliberately vague, given the complexity of the process and its individuality for each Member State, given the differing needs and prerogatives of different withdrawals.

Article 50 defines the requirements for separation, all procedural in nature: it broadly defines the practice to be followed, as we have seen it in the recent news. First of all, it sets out the necessity of notification of the intention to withdraw from the receding State's Prime Minister to the European Council. Consequently, it contemplates the negotiation of an agreement between the Union and that State, having as its primary objective the creation of a framework for future relations, post-separation. The agreement should then be concluded, with the consent of the European Parliament, from a qualified majority of the Council.

On the 3rd paragraph, it defines two years after the notification of withdrawal, in case an agreement cannot be reached before, that can be extended in agreement with the Member State concerned and the European Council, unanimously.
Finally, it regulates the possibility for the withdrawing State to ask to rejoin the Union, following the rules of Article 49 TEU, without a favourable treatment compared to a Non-Member Country applying for Union membership for the first time.

Another unique aspect and which made the negotiations more complicated is that the Article had not been referred to the Court of Justice of the European Union (CJEU) in time to be interpreted judicially: in particular there was a debate about the reversibility of the 'triggering' of the Article. On the 10th December 2018, the CJEU (C- 621/18 - Press Release No 191/18) stated that the receding State is free to revoke unilaterally the notification of its intention to withdraw from the EU. The press release states also: "That possibility exists for as long as a withdrawal agreement concluded between the EU and that Member State has not entered into force or, if no such agreement has been concluded, for as long as the two year period from the date of the notification of the intention to withdraw from the EU, and any possible extension has not expired."

Withdrawal must be decided at the end of a democratic process, following national constitutional rules. Again, this must be communicated in a letter to the European Council, unequivocally and unconditionally.
In this case, the State would regain the title of Member State, a status that is neither suspended nor changed compared to if it had never started the process of separation.

1.2 Withdrawal Agreements

After the definitive exit from the EU, the United Kingdom needs a new regulatory system. It means that all economic and commercial transactions will have to be based on laws and regulations external to those within the EU: it is necessary to identify as soon as possible new rules for International Trade, and this can happen only after the approval of a general Withdrawal Agreement setting out the key principles of the future EU-UK relationship. It provides legal certainty once the Treaties and EU law cease to apply to the United Kingdom.

Several agreements have been rejected: the first, on 15 January 2019; on 12 March, then on19th March, when the vote was cancelled for a convention of the Parliament that refuses the possibility of multiple votes on an area in which regards the House of Commons has already expressed its opinion. The same happened on 29 March, followed shortly after by Theresa May's resignation as a PM and finally on 19 October, creating an unprecedented stalemate that is calling into question the office of Boris Johnson. The rejection of the withdrawal agreement of 19 October 2019, in fact, comes from the vote to the Letwin amendment, which passed with a majority of only 16 people.

With this amendment, the Parliament refused to approve the agreement given also the provisions of the Withdrawal (No.2) Act, known as the 'Benn Act', voted on 9 September, which forced the government to act to stop a no-deal Brexit on 31 October, if no consent was found by 19 October 2019.

The Prime Minister was therefore obliged to request a further postponement of Brexit until 31 January 2020. PM Boris Johnson was forced to apply to the EU for an extension of the final date for Brexit, but in protest refused to sign the letter. This led to the early elections on 12 December 2020, which unequivocally established the consensus of the population for

the Tories and Boris Johnson. With a majority in government, the PM's deal was finally approved in three different sessions by the House of Commons. It was then given Royal absent on 23 January 2020, only nine days before the UK left the Union.

The Withdrawal Agreement is generic, and is no guarantee that the final Trade Agreement will be comprehensive and satisfactory to both parties, nor that it will be reached in time. however, representatives of both parties have repeatedly stated that the intention is for a close partnership, touching a wide range of topics.

Firstly, it protects the rights of citizens, 3 million Europeans in the UK and over 1 million British in the EU countries, by safeguarding their right of residence and ensuring that they can continue to contribute to their communities. For example, it establishes an independent supervisory authority (EPI) to which EU citizens in the UK can lodge complaints about the way the government treats them.
It sets out exactly how the UK will make payments from the "divorce account" to the EU for the coming years, and defines the areas where the European Court of Justice still plays a role in the UK and makes the withdrawal agreement in some respects 'supreme' compared to other areas of UK law. (Morris, BBC News, 23/01/2020)
It contains the new Protocol on Ireland, which establishes a customs and regulatory border between Northern Ireland and Great Britain.

1.3 The Political Declaration

The withdrawal agreement is accompanied by the Political Declaration, agreed at negotiators' level on 17 October 2019. It sets the parameters for an ambitious, broad and flexible partnership through trade and economic cooperation with a comprehensive free trade agreement, law enforcement, foreign, security and defence policy. The Declaration also states that safeguards on a level playing field should ensure a future relationship based on open and fair competition. (European Commission: Q&A on the UK withdrawal 24/01/2020)
The precise nature of the commitments will be commensurate with the ambition of future relations and will take into account the economic link and geographical proximity of the United Kingdom. We will refer to the Political Statement in more detail in the Services and Establishment chapter.

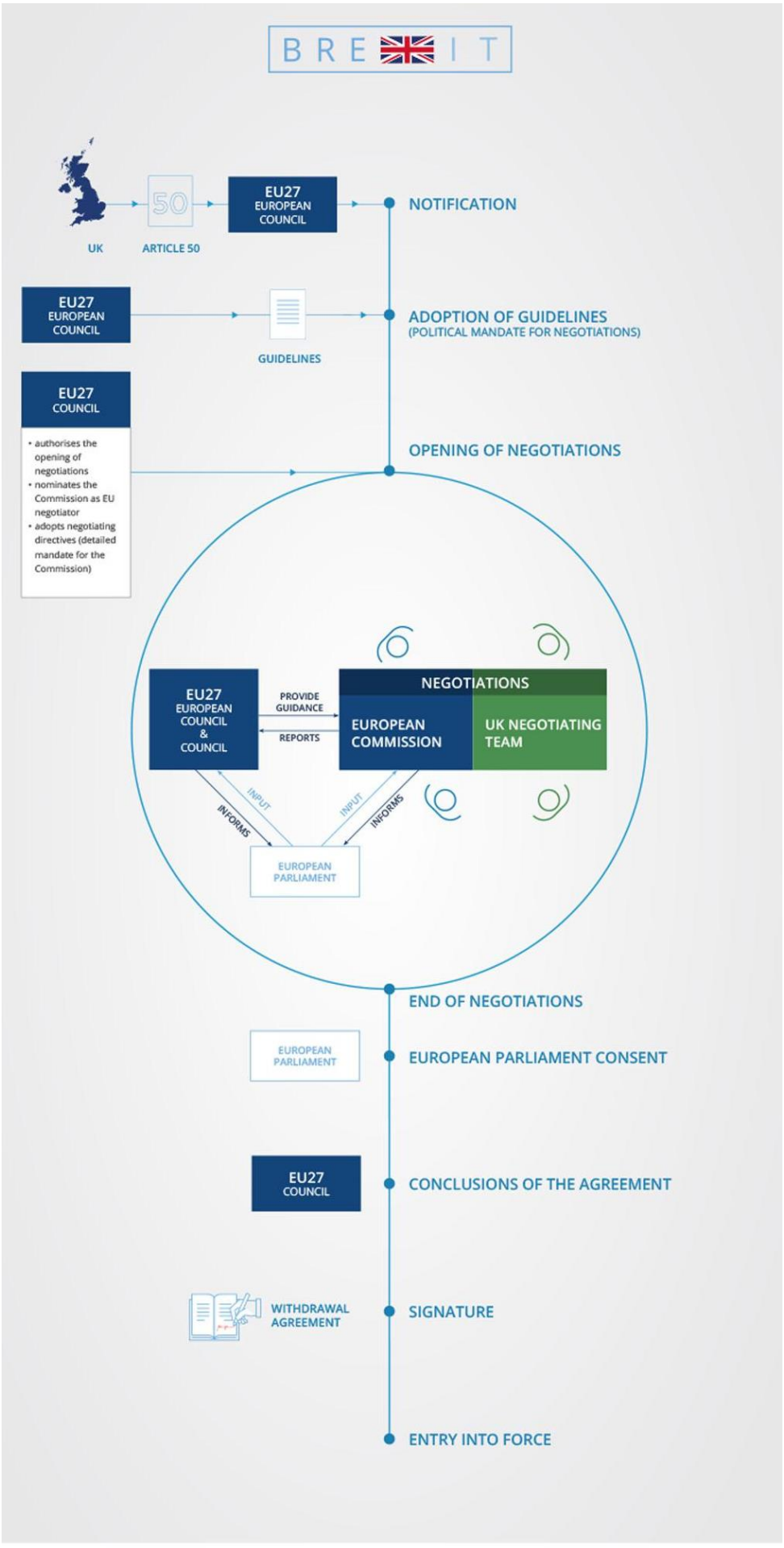
1.4 Transitional Period

A transition period has been granted, which will follow the formal exit date, 31 January 2020. This implementation period is supposed to extend until 31 December 2020 and is necessary to try and finalise the negotiation process.

During this period, the UK will remain in both the EU Customs Union and the Single Market. This means that, until the end of the transition, most things will remain the same. It includes travel between the EU and the UK, the right to live and work in the EU and vice versa and trade, which will continue without any additional cost or control. While the United Kingdom will no longer have the right to vote, it should comply with European law, with certain restrictions. The European Court of Justice will also continue to have the final say on any legal disputes. The UK will have to participate in the Union Budget.
The UK has to respect the international agreements signed by the EU. New agreements with third parties can be concluded in this period, but they cannot be applied.

This time allows the Parties to create a more comprehensive and wide-ranging Free Trade Agreement. In this time, the English Parliament will take back full powers in its territory and will copy the European legislation in the English one to ensure continuity in the UK's legal framework. (Humphreys & Wells-Greco, 2018).

This period can be extended through a mutual UK EU agreement before 1 July 2020. This extension can only be decided once, for a period of 1 or 2 years. (European Commission: Q&A on the UK withdrawal, 24 January 2020)



2 The Possible Scenarios

"We will have to rebuild a partnership with the United Kingdom, which will remain a great country that is a friend, ally and neighbour"

- Michel Barnier, Stockholm, 9 January 2020

The European Commission's Task Force for Relations with the United Kingdom (UKTF) coordinates work on strategic, operational, legal and financial issues relating to the UK withdrawal and its future relations with the European Union. Michel Barnier is the head of this Task Force. UKTF is under the direct authority of the President of the European Commission, Ursula von der Leyen. (European Commission website: The EU and the UK - forging a new partnership)

It is not clear yet what the final arrangement will be like, but it is plausible that it will be based on existing Free Travel Agreements between the EU and other Third Parties.
All existing International Trade Agreements between the EU and third countries are well below the level of European integration. There is usually no global scope, or they do not address the crucial point of the common standards' creation and, although they include rules on market access and national treatment, these rules are often not directly applicable.
Therefore, existing trade agreements will not adequately serve as a model for future EU-United Kingdom relations.

2.1 Articles 216-217-218 TFEU

The possibility of concluding agreements with nations or international organisations is provided for by the TFEU in Article 216. It is limited to cases where one of the objectives of the Treaties is to be achieved within the framework of the Union's policies and may affect common rules or change their scope. (Bungenberg, Griebel, Hindelang, p 12/14)

The agreements will be legally binding on Member States or organisations as well as on the EU, and as Article 217 states, they can even establish an association "involving reciprocal rights and obligations, common action and special procedure".

Finally, Article 218 specifies the procedure to be followed or conducting negotiations with Third Parties. Composed of 11 paragraphs, it focuses on trade and investment, but may also apply to other areas, such as negotiations on economic cooperation and development and participation in programmes such as research and education.

This Article specifies Article 207 TFEU, which sets out the procedure to be followed for the conclusion of common commercial policy agreements between the EU and a third country. These agreements should be based on uniform principles, and they should aim to obtain "changes in tariff rates, the conclusion of trade agreements relating to trade in goods and services and the commercial aspects of intellectual property, foreign direct investment, the standardisation of liberalisation measures, export policy and trade protection measures, such as those to be taken in the event of dumping or subsidies". It then identifies in the European Parliament and the Council, the main actors that operate following ordinary legislation, to create the framework of the Common Commercial Policy.

Thus, in paragraph 3 of Article 207, Article 218 is mentioned precisely in the matter of the negotiation and conclusion of international agreements. In particular, in paragraph 3, it states: "The Commission, [...] shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team." It maintains a markedly intergovernmental approach, with as main actors the Council of the Union and the European Parliament. The Commission has only a marginal role, of submitting its recommendations to the Council; in case the agreement relates only, or principally, to the standard foreign and security policy, it is the High Representative of the Union for Foreign Affairs and Security Policy who has to submit recommendations to the Council.

The EP does not have a formal role during the negotiations but has the right to be informed, having the right to veto the possible outcome of the negotiations.
The Belgian MEP Guy Verhofstadt was appointed as the EP's representative.

The possibility of setting up a select committee for consultation is envisaged in paragraph 4; it will be the main instrument for dialogue in the process for the Council. The Council then adopts a decision, but it needs to dialogue with the EP beforehand. In cases of association agreements, agreements on human rights and fundamental freedoms, decisions on institutional cooperation and those with a high economic impact on the EU budget, Parliament must have given its consent; in other cases, it shall just "deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter". Therefore, even if its role is not decision-making, the EP should always be informed, in all stages of the negotiation.

About the consent required for approval, the Council shall generally act by a qualified majority, but in fields referred to in Article 212, in regards to Human Rights and for accession in the EU, it should act unanimously.

Paragraph 11 provides that any of the above institutions, including Member States, may at any time request the opinion of the Court of Justice about the nature and compatibility of the agreement with the fundamental Treaties. Any refusal by the CJEU is binding and requires an amendment of the agreement or treaties before the opening of the negotiations.

It's important to notice as well how the entire process is exclusively governed by Union law, and it is not possible to recourse to international law.

2.2 Integration Strategies

The degree of integration facilitated by a bilateral agreement is assessed based on which integration strategies it contains and provides for. These were indicated in a study commissioned by the European Parliament's Committee on Internal Market and Consumer Protection, published in May 2017. Written by Prof. Dr Friedemann Kainer, we will refer to it often in this next chapter.

A first identified step consists in removing laws and discrimination that hinder trade, as well as specific internal rules that aim at consumer or environmental protection: this is called 'negative integration'.
There are then the bases for mutual recognition, i.e. a reciprocal acknowledgement from the States of the requirements necessary for free trade, such as the value of diplomas and professional licenses: this is called 'positive integration'. It comes in the shape of common standards, to approximate national laws and instaurates passport.
In third place, we must consider the scope of an agreement in trade. While in the Single Market services' laws are applicable almost without restrictions, International Trades Agreements have a restricted scope typically.
The restrictions may be listed singularly, with a positive list method, or more broadly, citing only the sectors excluded from liberalisation, with a negative list method.
A fourth point is the enforceability of the directives of International Trade Agreements: applicable rules with a direct effect over the market players' rights, together with an effective judicial review, allow a widespread usage of the law and thus create a uniform legal framework that facilitates integration.

Let us now look in particular at some of the possible scenarios for the future and their implications for trade, especially concerning services.

2.3 WTO framework - Is a 'No-Deal Brexit' possible?

The most worrying and uncertain case is that of a definitive exit (on 31 December 2020, or later if so is decided by July 2020) without agreements, the so-called 'No-Deal Brexit': the status of the United Kingdom, in this case, is not clear.

Some political forces, together with part of the public opinion claim that a 'clean Brexit' could benefit the UK marking a sharp cut with the European Community. However, it is now clear that the priority for the House of Commons is to build a balanced agreement that satisfies all parties involved, as stated in the Withdrawal agreement approved on 23 January.

Trade should initially be under the conditions laid down by the World Trade Organisation (WTO), of which both the UK and the Union are part. In that case, import taxes will apply to goods traded by British companies to the EU, with a significant loss of competitivity for English companies. Trade under WTO conditions would also mean border controls for goods, which could cause bottlenecks in port traffic, such as Dover. UK services industry would no longer have access to the EU's single market.

As the UK will remain within the WTO system, it will also, in any case, remain to be a GATS member. The General Agreements on Trade in Services entered in force in 1995. It was inspired by its counterpart related to Tariffs and Trade, to create a credible and reliable system of international trade rules, with the principle of non-discrimination between its participants and the aim of a progressive liberalisation. The UK should sign new commitments, as the current commitments are signed by the EU and therefore valid only within the territory of the Union.

In Keiner analysis (2017, p14), it is enlighted how a positive harmonisation is totally missing in the GATS, with “no approach to ease mutual recognition”. The principle of most-favoured-nation can be triggered, opening mutual reconnaissance between several parties, but given the lack of universal standard requirements, there is no basis for operating in this way.

Even the purpose is rather narrow, (unlike the CETA of which we will discuss later) as there is a positive list that is changeable and decided unilaterally by each state, making the system less automatic and less stable.

Furthermore, with regard to the quality of law, we could say that these are not laws but ‘international principles’, which have no direct effect. The process of integration into national courts is rather long and subjective for any state that becomes hard for an individual to have rights recognised.

Of course, passporting is not allowed, and many aspects of the trade are not dealt with precisely and therefore leave many uncertainties. On the other hand, establishment is contemplated, but only when the company itself provides the services. (Kainer, 2017, p 14)

The EU follows the WTO framework in trade with 58 countries, including Australia, which has been called into question in recent speeches by Boris Johnson. This has raised some concerns: UE does not have any special agreement with Australia yet, but the two share a

vision in trade and investments policies. There is not preferential or facilitated access for Australian businesses in the Single Market, even if a new wide agreement is being negotiated at the moment (Balls, 2020). We will talk about this subject again in the conclusions.

2.4 European Free Trade Association (EFTA) and Economic European Area (EEA)

In future EU-UK relationships, Kainer (2017) has presented as the best possible solution for the market the remaining of the United Kingdom in the European Economic Area. To be able to stay inside the EEA, as stated in the two-pillar structure of the EEA Agreement and from

Article 126, the UK will have to rejoin EFTA. Let us now explain what these institutions consist of.

The European Free Trade Association (EFTA) was created in 1960 under the leadership of the UK when the UK decided not to join the European Community. The aim was to promote free trade and economic integration between its member states. EFTA does not provide for political integration and does not establish a customs union. (Chalmers, Davies, Monti 2014, p 31)
It originally consisted of Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom itself. As we may notice, for many of these countries, this was a prelude to joining the Union: the United Kingdom joined the then European Economic Community on 1 January 1973, together with Denmark and Ireland. Iceland and Liechtenstein joined the Association later, but they are the only states, together with Norway and Switzerland, that have remained part of the EFTA.

It was then established in 1994 the European Economic Area, to extend the EU's internal market to the participating EFTA States by creating a homogeneous European Economic Area based on common rules and equal conditions of competition, with appropriate means of enforcement in the Courts. Iceland, Liechtenstein and Norway are part of this EEA, together with the EU Member States, while Switzerland stayed out: relations between Switzerland and the EU are regulated autonomously, with a complex system of bilateral agreements. Croatia has submitted a request to participate.

Each EFTA State negotiated bilateral free trade agreements (FTAs) with the EEC. Currently, the EFTA States have 29 FTAs in force or pending ratification for 40 partner countries worldwide (outside Europe).

The EEA Agreement ensures equal rights and obligations in the internal market for individuals and economic operators in the EEA.
The details of the EEA Trade Agreement include the free movement of goods, persons, services and money between countries. Besides, the EEA Agreement covers other areas such as social policy, consumer protection, environment, company law, statistics, tourism and culture. It also provides for participation in Community programmes such as research and education.

The EEA EFTA States' financial contributions to the EU related to the EEA Agreement are twofold. Firstly, the EEA EFTA States contribute to reducing economic and social disparities within the EEA through EEA subsidies. The Beneficiary States currently include Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, the Czech Republic and Hungary. Secondly, the EEA EFTA States contribute to the EU programmes and agencies in which they participate under the EEA Agreement. These contributions are in addition to the EU budget by increasing the overall financial envelopes of programmes and agencies concerned. For the current multiannual budget period of the EU 2014-2020, the total EEA-EFTA contribution to EU programmes and agencies is approximately EUR 460 million per year. (EFTA website, Frequently asked questions)

Could it work as a Brexit model?

The UK Government has made it clear that it does not intend to apply for EFTA membership. However, if the United Kingdom tries to rejoin EFTA, the EFTA Member States will carefully examine the application. An application for EFTA membership would be examined by the EFTA Council, where decisions are taken unanimously. It is not automatic in this case either that the UK remains within the EEA: this is, in fact, decided by each state autonomously. According to Article 128 of the EEA Agreement, “any European State becoming a member of the Community shall, and the Swiss Confederation or any European State becoming a member of EFTA may apply to become a party to this Agreement. It shall address its application to the EEA Council.”
UK could also seek to remain in the EU Customs Union, unlike other EFTA states that are not part of it. Accession to EFTA does not preclude the possibility of concluding a Customs Union with the EU; the current EFTA countries regulate their relations with the EU through various means.

In any case, as we anticipated, it seems that this would be the most doable solution, as not much regarding service market and establishment would change. The fundamental freedoms would be preserved, as they are identical and stated in Article 1 (2) of the EEA Agreement. As we said, the ‘Acquis communautaire' regarding the Single Market would be adopted

almost totally. Kainer (2017) in fact underlines how the scope of the EEA agreement is extensive, with similar 'quality of the law': even if the EEA laws do not have a direct effect, they are transposed into national law immediately and are revised by the authority of the EFTA Court.

What seems unconvincing about the UK joining EFTA, with the exception of the comprehensive market integration, is that the English Parliament should, as if nothing has changed, adapt the laws of the Single Market to its own market, including the ones about the economic contributions to the Union that we mentioned earlier.
The situation would, therefore, be almost unchanged compared to staying in the EU. The main difference for the population would be that British citizens would not have the right to vote in the Council, nor could they send representatives to the European Parliament.

2.5 Comprehensive Economic and Trade Agreement

The Comprehensive Economic and Trade Agreement (CETA), negotiated between the European Union and Canada, entered into force on 21 September 2017. It is the most ambitious Trade Agreement ever entered into by the European Union with a Third State, and it took about seven years to negotiate it.
Its impact on European and Canadian businesses has been significant, to the point of abolishing customs duties at 98%, saving EU businesses up to €590 millions of euros a year in terms of tariffs alone. (European Commission: Guide to the CETA, 2017)

The Service Markets and Establishment under CETA could work as a model for EU-UK trade relations in the future. With rules like national treatment and about market access, it is based on a broad approach concerning negative integration. The CETA also requires that internal regulation of rules affecting services, creating a fair treatment system.
There are also rules on the temporary entry of staff and natural persons for employment purposes, even if this remains subject to conditions. Based again on Kainer's writing, this framework of negative integration is inferior to the rules of Community law but, compared to other trade agreements, is rather progressive. However, there is no legal basis for common standards, while an attempt at positive integration, is made up of a framework to facilitate

the mutual recognition of diplomas and licences and market admissions. It also offers more protection of intellectual property rights.
Even the scope of the agreement is sufficiently broad, as it is described in a negative list, presented at the article 9,2 of Chapter IX. It only excludes “services supplied in the exercise of governmental authority; for the European Union, audio-visual services; for Canada, cultural industries;” some transportation services, CRS services, and government subsidies to support cross-border trade in services. There is no direct effect of the law, but an individual can access directly to arbitration in case of breach of the obligations established by CETA.

Could it work as a Brexit model?

As said, this Agreement between Canada and the EU would represent an acceptable level of integration of the market of Services. However, there are still national laws that force the parties, there is no establishment of standard requirements, little mutual recognition, and therefore there is no possibility of passporting (Kainer, 2017, p13).

Furthermore, there is a difference in the value of goods and services traded. Only 10% of Canada's external trade goes to the EU, with total trade worth about C$85bn (£50bn). About 43% of UK external trade is with the EU, with total trade between the two worth about £318bn. (BBC News: Reality Check 27 February 2018).
In general, an agreement of this kind would be a downgrade compared to the current trade relationship between UK and EU, with the introduction of barriers of regulatory and trade nature.

However, there are recent statements by Barnier suggesting that the EU will not accept such an agreement. According to the Head of the Negotiations Task Force, this would give almost total tariff-free access to the Single Market, without UK compliance with certain conditions that were accepted six months ago as on state aid and social and environmental policies. (Boffey, 2020)

“We have proposed a trade agreement with a country that has a very particular and unique close geographical proximity not like Canada, not like South Korea and not like Japan” Barnier said on 18 February 2020, talking to the MEPs. “Very particular. We are ready to

propose and work very quickly with Britain on the basis of the political declaration, which was agreed with Boris Johnson. We stand ready to propose this agreement, if the UK wants it."

2.6 Other Trade Agreements and Comparison

Relating again to Kainer's analysis (p12-14), other existing agreements cover the topics of Services and Establishment, but they fall back behind the EU's level of integration.

The Deep and Comprehensive Free Trade Area (DCFTA) with Ukraine, which aims to align the economy of this state with that of Europe, would be "a disengagement rather than a rapprochement". The EU-Turkey customs union, which abolishes tariffs for trade, would not be incisive in the UK-EU relation. Finally, FTA EU-Korea is quite similar to CETA, has no direct effect and, following a positive list, is not very attractive.

	European Union	CETA	FTA EU-S.Korea	GATS
Negative Integration	Art. 56, 49 TFEU Market access National treatment	Art. 9.6, 9.3: limited market access, national treatment Art. 8.1 ff.: limited market access for investment	Art. 7.5 f., 7.9 f: limited market access, national treatment	Art. XVI, XVII: limited market access, national treatment
Mutual Recognition	Art. 56, 49 TFEU, Principle of origin	framework to develop Mutual Recognition Agreements (Art. 11)	mechanism on negotiation of Mutual Recognition Agreements	framework for further negotiation
Common Standards	Art. 114, Art. 62, 53 TFEU	(-)	(-)	(-)
Scope	not restricted	Negative list	Positive list	Positive list, unilateral
Direct Effect	yes	no	no	no
Judicial Review	CFEU	arbitration, restricted	restricted	restricted

The Consequences of Brexit on Services and Establishment, European Parliament, 2017, p15

All the trade agreements mentioned include market access rights and a non-discrimination rule, and the effects of these rights are very different in substance and application. However, most attention should be paid to the relationship between the common rules and market access. In principle, market access and full and self-executing mutual recognition should be guaranteed. Market access and mutual recognition could be suspended when the EU or the UK unilaterally change standards - until standards are back on track. The problem is to find a way to align these standards.

3 The Fundamental Freedoms

"It is stupid to say that freedom of movement is a fundamental right. It's something that has been acquired by a series of decisions by the courts. [..]
And everyone now has in his head that every human being has a fundamental, God-given right to go and move wherever he wants. But it is not. [..]
It was never a founding principle of the European Union. It's a complete myth."

- Boris Johnson, former UK Foreign Secretary,
now UK Prime Minister, 15 November 2016

The principle of free movement of goods, capitals and people is essential to the EU Single Market. It is the most tangible manifestation for the European citizen of what it means to be part of this Union, and it is one of its greatest achievements.
It has been enshrined in Community law since the 1957 Treaty of Rome and was defined as "the elimination of obstacles to the free movement of persons, services and capital among member states" (Article 3, a-c).

Underlying the implementation of the Single Market are, in fact, four pillars that guarantee a level of integration that is unique in the world among supranational organisations:

- **free movement of goods**, which guarantees tariff-free access to the single market and the harmonisation of national regulations which could obstacle trade;
- **free movement of capital**, which permits cross-border investments and allowing the moving of funds between member states;
- **free movement of people**, in particular, workers, their family members and those seeking work;
- **freedom of establishment and freedom to provide services** that means that once a company is established in a Member State, it can sell services into other Member States, without needing to establish a subsidiary or a branch there. This is also called 'passporting'.

We will look in detail at this last point and analyse how it may change with Brexit, particularly during the Transition Period and making assumptions about the future of the UK-EU relationship.

3.1 Free Provision of Services

The service sector generates almost 70% of GNP and jobs in Europe. (Humphreys & Wells-Greco, 2018) Services are treated as tradable goods in the internal market, and the regulations for services are similar to those on the free movement of material goods. Services are generally provided for remuneration, as stated in Article 57 TFEU. This article also gives a shortlist of what we can call a service: activities of an industrial character; activities of a commercial character; activities of artisans; activities of the professions.

Through the judgments of the Court of Justice, the definition has widened to include tourism, medical treatment, financial services, business and education, telecommunications, lotteries, insurance and prostitution.

The principle underlying the rules on services, workers and establishment is non-discrimination on the grounds of nationality, described in Article 56.

The regulations are also very much linked to the rules on people. There are, in fact, situations where provisions on services and rules on people intersect, and they relate to:

- professionals established in a member state, occasionally operating in other states, like lawyers and other self-employed persons;
- undertakings and persons permanently operating in more than one state;
- undertakings established in one Member State which send their workers to another Member State to provide services.

A key aspect of service regulation is the temporary nature of the cross-border economic activity. If the worker or company were to operate permanently in a State different from their original one, they would settle or move to the new State. In this case, the law on establishment rather than the one on services applies. The temporary nature does not only concern "the duration of the provision of the service but also of its regularity, periodicity or continuity". (Case C-55/94 Gebhard 1995)

3.2 Freedom of Establishment

Freedom of establishment is defined by Article 49 TFEU as the faculty to move permanently to another Member State and to pursue an economic activity there.

With the establishment, the natural or legal person is permanently integrated into a national economy, or at least “without foreseeable limit to his duration” (Case C-147/11 Secretary of State for Work and Pensions v Lucja Czop, 2012), with the right to equal treatment with nationals of the host Member State.

Necessary for the establishment of workers or self-employed in a new State is the recognition of academic and professional qualifications. Through numerous directives specific to the different professions, since the 1960s, the European Commission has laid down a framework of minimum standards to allow this. The Professional Qualifications’ Directive (2005/366) has equated university degrees and training courses, on the grounds of 'Mutual trust' and 'Mutual recognition' between the Member States. Directive 2018/958 introduces the rule of a proportionality test before the adoption of additional regulations for professions.

As stated in Article 54 TFEU, the right of establishment includes not only workers and self-employed but also companies or firms, as legal persons, and any profit-making undertakings (Humphreys & Wells-Greco, 2018, p 403).
In addition to excluding non-profit organisations, there are other criteria for companies wishing to take advantage of the freedom of establishment:

- the company must be incorporated in accordance with the law of a member state;
- the company must have its registered office, central administration and principal place of business within the EU.

Restrictions on freedom of establishment are allowed only based on public policy, public security and public health (Directive 2004/38, Art. 27-33).

There are two ways to move a company:
- by moving the principal business place or head office to another Member State, but retaining the legal personality of the country of origin. We have therefore a secondary establishment of a registered office, agency, branch or subsidiary under the conditions laid down by the law of the new country for its own nationals.
- through reincorporation, by changing the company core legal nature. In this second case, the company ceases to exist in the first Member State, "in effect, recreating itself" (Chalmers, Dawes, Monti, 2014, p884). This is also the case with company conversion, i.e. when a business ceases to exist, a new one is formed, but it is recorded that the former was the predecessor of the latter, passing on debts to it.

There are two difficulties in enforcing this right:

- one of legal nature: since in order to benefit from the right of establishment, a company must be incorporated in a Member State, and if in the transition from one state to another the company loses its legal personality under national law, it would, therefore, lose a fundamental requirement for the application of Article 49.
- one in the policy context: assets are transferred to benefit from reduced tax obligations, or lower requirements for companies (e.g. on the minimum capital requirement). States themselves use these 'fiscal shells' to attract companies and their taxes, which would otherwise go to the states where they do most businesses.

In both these cases, we are not in the presence of abuse of freedom of establishment.

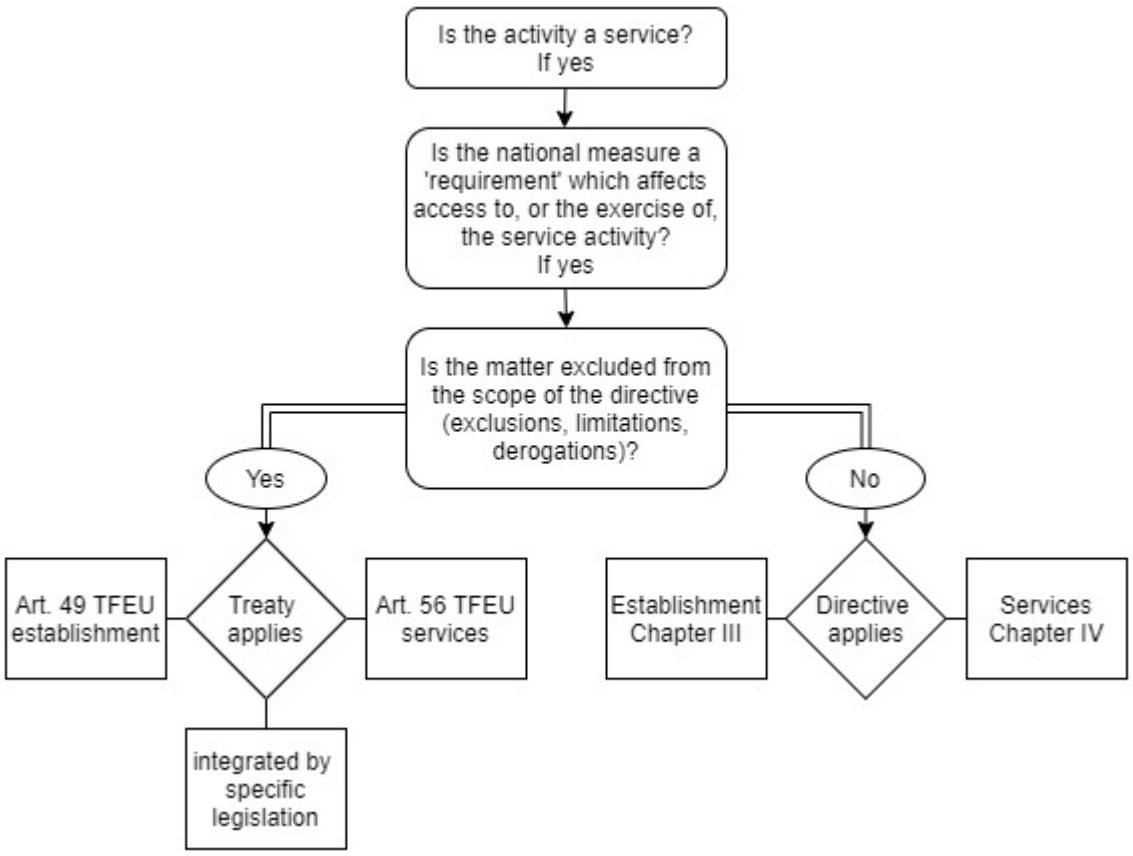
However, while the right of establishment is recognised in all Member States, there is no standard rule governing incorporation in the first place. There are, therefore, two systems, which are followed by different states independently of European regulations.

- 'Incorporation theory': the personality of the company depends on its mere constitution since the law governing the company must be considered that of the State of incorporation. In this case, the transfer of the registered office to another State would be possible without problems, since it does not lead to the loss of legal subjectivity. (Benyon, 2016, p 224)
- 'Real Seat theory': personality depends on the location of the company's seat since the law governing the company is that of the place where its centre of interest is located, i.e. its administration. In this case, the transfer would not be possible

because, by changing the State of the seat, the company would lose its legal subjectivity. (Benyon, 2016, p 225)

The right of establishment shares many common features with the provisions regarding services. Through Directive 2006/123, the European Commission provided a general framework for establishing the applicability of the rules on Services and Establishment. It promotes the harmonisation of Member States' legislation in areas such as consumer protection, professional insurance and dispute settlement.

The directive is divided into three parts: the first which deals with the two freedoms in administrative and bureaucratic terms, the second which elaborates the scope of the rights, the third which contains provisions of a coordinating nature for the Member States, in order to guarantee the factual applicability of the rights (Chalmers, Dawes, Monti, 2014, p842).



Adapted from Barnard, 2016, p430

3.3 Legal Uncertainties for the Future

Let us now turn to the changes that will take place with Brexit. In the transition period, everything remains the same, but companies and professionals will have to prepare for the transition. The problem is that until a Free Trade Agreement is signed, it will not be possible to define with certainty what changes will take place.

According to a document published by the European Commission, “Question and Answers on the United Kingdom’s withdrawal from the European Union on 31 January 2020” published the 24 January 2020, economic activity can be pursued with the same rules applicable to nationals, and the rights of workers and self-employed persons are preserved. Personal qualifications that have already been recognised remain so. Those that are in the process of being recognised during the transition period will be assessed according to EU law.

In the Political Declaration of the 17 October 2019, there is a section related to Services and Investment. It is divided into three areas:

1. Objectives and principles: the agreement on trade in services should be "ambitious, comprehensive and balanced [...], respecting each Party’s right to regulate". It is here stated that a WTO level of integration would be too limited, and aims for more, averting the risk of a No Deal Brexit. A list is then drawn up of the sectors that should be included: professional and business, telecommunications, courier and postal, distribution, environmental, financial and transport.
2. Market Access and Non-Discrimination: services providers "are treated in a non-discriminatory manner, including with regards to establishment", and "temporary entry and stay of natural persons for business purposes" should be allowed.
3. Regulatory aspects: regulations should be "transparent, efficient, compatible to the extent possible" and aiming to remove unnecessary obstacles and requirements. The Parties should also "establish a framework for voluntary regulatory cooperation in areas of mutual interest" and arrange a system for the recognition of professional qualifications necessary for the economic activities requiring them.

It is evident that these guidelines are vague: they do not give any certainty on how to prepare for the end of the transition period.

3.4 Company Law

British business has always relied on the rights conferred by European Union law: there is no guarantee that they will maintain free access to the market.
After Brexit, the freedom of establishment of Article 54 will no longer be guaranteed to companies incorporated in the United Kingdom. And Services Directive 2006/366 will not apply anymore.
Companies would maintain the acknowledgement of their personality only in the Member States who follow the ‘Incorporate theory’. Courts of a ‘Real Seat’s states’ might refuse to recognize a company which has the headquarters and the incorporation in different states (Davies, 2019, p6).

When a company has no legal status in a country, shareholders may be liable with their personal assets for the debts of the company. Branches of UK incorporated companies, located in a Member State, will be considered as third-country companies, and national rules on third-country companies will apply (European Commission, Notice to Stakeholders, 11/07/2019, p2). Directive 2017/1132 will not be applicable anymore.

Therefore stakeholders, including employees, creditors and investors dealing with UK companies, cannot rely on EU rules regarding incorporation, capital maintenance and alteration. Among the significant consequences, we note that English companies will no longer be obliged to communicate certain company information to the commercial register, such as information on company deeds of incorporation, the appointment and termination of company representatives, liquidation and change of seat. The rules on cross-border mergers and the provisions on directors' remuneration and the independence of board members will also no longer apply. (European Commission, Notice to Stakeholders, 11/07/2019, p3-4).

British legal doctrine follows the "theory of incorporation". This means that the company law applicable to a legal person is that of the country in which it is incorporated, irrespective of where the company has its effective seat. For this reason, some British economists, such as Peter Davies (2019, p7), claim that "UK based entrepreneurs have not needed Treaty-based freedom of establishment", and the immediate cost of the loss of Establishment Rights will fall off the non-UK entrepreneurs working in the UK.

EU legal entities, such as Societas Europea (SE), European Cooperative Society (SCE) and European Economic Interest Groupings (EEIGs) must have their headquarters in a Member State (Kainer, 2017, p 18). The status of such companies established in the UK will expire and with it the benefits due to it. (European Commission, Notice to Stakeholders, 11/07/2019, p 6).

In any case, also in a No-Deal Scenario, Davies again (2019) clams that it is unlikely that UK companies will be excluded from all economic activities in the EU if only to avoid to avoid a tightening of relations between the EU and the UK.

4 Conclusions

The only conclusions we can draw at the end of this work, coinciding with this deadlock between 31 January 2020 and the start of negotiations for the future Trade Agreement, is that Brexit will not end on 31 December 2020. Boris Johnson has said he does not intend to extend the transition period, but nine months is not enough time to negotiate a comprehensive and broad trade agreement. It is unlikely that any decision about services is going to happen before the end of this year.
The end of the transitional period is the real changing point, and the UK government itself could not be ready to face it: they need to rewrite a tremendous amount of law, regarding the borders, the economy, not to talk about the policy areas as immigration, agriculture and internal security. There are 30,000 civil servants expected to be working on Brexit by March (Owen, Jack, Wright, et alii, 2020).

In any case, even if a deal is reached before December 2020, there would not be to implement it, and UK businesses will not be able to be operationally ready for the changes: what documents are required, what fees will apply (if any) and what standards will be considered mandatory.

A No Deal exit is still a risk, but with the Withdrawal Agreement still in force, both parties would be bound by their civil rights commitments and financial agreements. Concerning trade in both goods and services, however, an exit without agreements would be a significant disruption.

With this paper we have analysed some of the legal issues, focusing on people and services, but there are strong uncertainties on other fronts, like political and legal.
On the European side, there are some critical issues that may arise:
-- political contagion and Eurosceptic visions could emerge;
-- EU budget must be revised;
-- finally of particular importance will be agreements concerning European workers and students in the UK.

Among the latest statements of the British Government, a worrying immigration system that aims to limit the incoming 'low skilled workers' stands out. This system, along the lines of the Australian system in place since 1989, aims to attract skilled workers and direct them to areas where they are needed. Unlike the Australian system, however, applicants for a Visa must already have a job offer. Anyway, as we said, an Australian model does not exist yet. The current agreements are only those of the WTO.

President von der Leyen said to the EU Parliament "..honestly, I was a little bit surprised to hear the Prime Minister of the United Kingdom speak about the Australian model. [..] The European Union does not have a trade agreement with Australia. We are currently trading on WTO terms. Furthermore, if this is the British choice, we are fine with that – without any question. Nevertheless, in fact, we are just in the moment where we agree with Australia that we must end this situation, and we work on a trade deal with them. Of course, the UK can decide to settle for less. Nevertheless, I personally believe that we should be way more ambitious."

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