Did Brexit change EU law?

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Abstract

This paper investigates whether the withdrawal of the United Kingdom from the European Union changed EU law. Brexit necessarily animated the law related to and produced by Article 50 TEU. Did it also imprint on fundamental premises of EU law that will continue to shape relations between the Member States and the Union, and between the Union and the wider world? These questions are examined through the examples of the legal force of political decision-making and the legal nature of relationships with third States. At one level, it will be seen that Brexit restored the centrality of Union institutions and processes in the EU law-making that responds to exceptional situations. At the same time, however, it has distorted and/or displaced some of the vital checks and balances that would normally apply. A course correction exploiting a rounded understanding of the effectiveness of EU law and provoking coherent articulation of the legal coordinates of Union membership is urged in response.

Keywords: Brexit, orderly withdrawal, mutual trust, crisis, third state, membership, effectiveness

1. Introduction

In February 2016, the UK and EU27 governments agreed, among other measures, two significant reforms to EU legislation on the free movement of workers should the UK referendum produce a remain result: first, a 'safeguard mechanism' restricting 'in-work benefits' for newly arriving EU workers; second, for 'new claims made by EU workers', the option to index exported child benefits to the conditions of the Member State where the child resides.[1] The following explanation was provided:

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[1] Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union, OJ 2016 C691/1; proposing amendments to, respectively, Regulation 492/2011 on freedom of movement for workers within the Union, OJ 2011 L141/1 and Regulation 883/2004/EC on the coordination of social security systems, OJ 2004 L166/1.

> [T]he social security systems of the Member States, which Union law coordinates but does not harmonise, are diversely structured and this may in itself attract workers to certain Member States. It is legitimate to take this situation into account and to provide, both at Union and at national level, and without creating unjustified direct or indirect discrimination, for measures limiting flows of workers of such a scale that they have negative effects both for the Member States of origin and for the Member States of destination.[2]

The proposed amendments to EU free movement and equal treatment legislation agreed to politically suggested that even the fundamental building blocks of EU law were open to review because of concerns unleashed by the UK's referendum commitment.

However, in January 2019, the European Commissioner for Employment, Social Affairs, Skills and Labour Mobility issued the following remarks, using language more familiar to EU lawyers:

> Any reduction of family benefits solely because the children reside abroad, breaches the EU rules on social security as well as the principle of equal treatment of workers who are nationals of another Member State as regards social and fiscal advantages … Our single market is based on fairness and equal treatment. There are no second-class workers in the EU. When mobile workers contribute in the same way to a social security system as local workers, they should receive the same benefits, also when their children live abroad. There are no second-class children in the EU.[3]

This press release marked the commencement of infringement proceedings against Austria. Why? Because Austria had introduced into national law an 'adjustment mechanism' indexing family benefits and family tax reductions for EU nationals working in Austria whose children reside abroad. For the European Commission, '[b]y introducing the adjustment mechanism, Austria has therefore effectively established indirect discrimination against migrant workers. There is clearly no legitimate aim justifying that discrimination'.[4]

By pursuing the infringement, it might be argued that, for the Commission, the functioning of core principles of EU law is 'back to normal' following the extraordinary circumstances preceding and then produced by the UK's withdrawal from the European Union. But can EU law just go back – or did

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[2] 2016 Decision, Ibid. Section D.

[3] Marianne Thyssen, Commissioner for Employment, Social Affairs, Skills and Labour Mobility European Commission, press release IP/19/462, 24 January 2019; <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_463> accessed 3 May 2021.

[4] Case C-328/20 *Commission v Austria*, pending.

Brexit change some of its fundamental premises in ways that will continue to shape relations between the Member States and the Union or between the Union and the wider world? These are the questions that this paper investigates, examining through two Brexit-linked examples of the development and application of EU law the legal checks and balances that normally apply to the making of it. In one sense, the many ways in which Brexit inevitably changed EU law are too many to map and too soon to see. In another sense, whether or how Brexit changed EU law seem like modest questions considering the seismic consequences, on multiple levels, of the UK's withdrawal from the Union. But they are vital questions from the perspective of evaluating – and sustaining – the essential qualities, and quality, of EU law. In that light, this paper therefore focuses on interrogating the resilience of the outer legal parameters of EU law-making put in place by the Treaties and on the changing nature, in some respects, of how these are now interpreted by the Court of Justice.[5]

In Section 2, some of the ways in which Brexit expanded or 'grew' EU law – how Brexit changed EU law in a literal sense – will first be briefly outlined. Section 3 then presents two examples that suggest deeper changes to the EU legal framework. Section 3.A outlines an *internal* example by tracing how the objective of an 'orderly withdrawal' from the Union emerged and took harder legal shape over the course of the negotiations. Section 3.B considers an *external* example that demonstrates shifting perspectives on the legal relevance of mutual trust beyond the boundaries of EU membership. Section 4 brings together and reflects on these examples. It will be argued that Brexit did change EU law in some significant respects – not only by developing the substance of EU law but also, and perhaps more profoundly, in terms of how EU law is made. More specifically, Brexit changed aspects of how political decision-making acquires legal force and of the legal nature of relationships with third States. It is recognised that extraordinary challenges and exceptional events demand political imagination and agile regulatory responses. It is also appreciated that better reflection of complexities that the too blunt 'third state' idea does not properly capture is a welcome development. However, it will be argued that while Brexit restored the centrality of Union institutions and processes in the making of EU law, it has, at the same time, disrupted checks and balances that normally apply to evaluating it. In that light, how we frame and the extent to which we assess developments in an environment of recurring 'crisis' will be highlighted. At one level, changes to EU law produced by Brexit amplified what

[5] How Brexit as well as crisis events more generally evolve the practices and processes of the EU institutions from a wider perspective, as well as the balance of relations between them, is not the focus of this paper but see, from a rich seam of work, and mainly but not exclusively taking disciplinary perspectives beyond law, e.g. on Brexit specifically, B Laffan 'How the EU27 Came to Be' (2019) 57 *Journal of Common Market Studies* 13; and on crisis management by the Union more generally, B Laffan, *Europe's Union in Crisis: Tested and Contested* (Routledge, 2018), V Schmidt 'European Emergency Politics and the Question of Legitimacy' (2021) *Journal of European Public Policy*, doi: 10.1080/13501763.2021.191606, and LJ van Middelaar, 'The Lisbon Treaty in a Decade of Crises: The EU's New Political Executive' in A Södersten (ed.) *The Lisbon Treaty Ten Years On: Success or Failure?*, (Swedish Institute for European Policy Studies, 2019) 17.

had already materialised in Union responses to the Eurozone crisis. It is significant, though, that mechanisms and methods deployed for Brexit were steered more consciously towards the conventional register of EU law and EU institutions. Returning to the fold of EU law in acute situations of crisis management is a highly positive step – and a necessary contrast with what preceded it.

But crisis can accelerate dynamics that displace vital premises of EU law, and it can, at the same time, subdue the intensity of our scrutiny of them. Among highlighted points of concern in this paper are fixed outcomes determined by ostensibly non-binding measures; the closing down of pathways for judicial review through emphasising form over substance; and a still incoherent articulation of the legal coordinates of Union membership. These tendencies should be curbed because the context of crisis is, whether we like it or not, here to stay. Exploiting dimensions of EU legal principles more fully by merging qualities from the Union's internal and external domains, especially to progress the principle of effectiveness beyond an end-justifying-means tool, is suggested as a means of course correction.

2. Growing EU Law

As the first instance of a Member State withdrawing from the Union, Brexit necessarily expanded or 'grew' EU law in a literal sense and in various ways that can only be summarised briefly here. First, Brexit grew what Hillion calls 'a distinct *Union membership law*'[6] – adding substance to the terse blueprint for the withdrawal process in Article 50 of the Treaty on European Union (TEU) and complementing the inverse properties of membership law that concern Union accession, outlined in Article 49 TEU. For example, acknowledging that the answer is not evident from the wording of Article 50, the Court of Justice established in *Wightman* that a Member State's notification of its intention to withdraw from the Union is revocable for as long as a withdrawal agreement concluded between that Member State and the Union has not entered into force or, if no such agreement has been concluded, for as long as the two-year period in Article 50(3) TEU has not expired.[7]

Second, the concepts, procedures and complex governance and enforcement pathways created (and now in force) to support the Withdrawal[8] and Trade and Cooperation[9] Agreements have seeded multiple shoots of legal expansion with which we will all have to grapple in the months and

[6] C Hillion, 'Withdrawal under Article 50 TEU: An Integration-Friendly Process' (2018) 55 CML Rev 29, 30 (emphasis in original).
[7] Case C-621/18 *Wightman*, EU:C:2018:899.
[8] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ 2019 CI 384/01.
[9] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ 2020 L444/14.

years ahead. The full scale and features of 'Brexit law' extend well beyond what can be considered here but some specific examples – notably the transition period provided for in the Withdrawal Agreement (WA) and the arrangements for surrender pursuant to an arrest warrant provided for in the Trade and Cooperation Agreement (TCA) – are returned to in later parts of the paper.

Third, the shaping of Brexit negotiation strategies revived dimensions of EU law that had become somewhat dormant. For example, the significance of the autonomy of Union *decision-making* was underlined in the European Council's Guidelines on Article 50 TEU,[10] recalling pan-institutional conceptions of autonomy from earlier case law[11] and rebalancing to some extent the more recently prevailing dominance of the role of the Court of Justice in the autonomy context.[12] Reflecting the Guidelines, Article 7(1) WA now provides:

> [A]ll references to Member States and competent authorities of Member States in provisions of Union law made applicable by this Agreement shall be understood as including the United Kingdom and its competent authorities, *except as regards*: (a) the nomination, appointment or election of members of the institutions, bodies, offices and agencies of the Union, as well as the participation in the decision-making and the attendance in the meetings of the institutions; (b) the participation in the decision-making and governance of the bodies, offices and agencies of the Union … .

The consequences of a commitment to preserving the autonomy of Union decision-making are clear in this provision; even more when the exclusion of the UK from EU decision-making is considered in tandem with the corresponding *effects* of EU law there during the 11 months of the transition period (returned to in Sections 3.A and 4 below). The extent to which the approach honed through Brexit will

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[10] European Council (Art.50) guidelines for Brexit negotiations, 29 April 2017, para. 1: '[t]he Union will preserve its autonomy as regards its decision-making as well as the role of the Court of Justice of the European Union'. See later e.g. Article TBT.11(1) TCA.

[11] Opinion 1/76, EU:C:1977:63, para. 1; and Opinion 1/00, EU:C: 2002:231, para. 6.

[12] See in particular Opinion 2/13, EU:C:2014:2454; and, from a significant academic response, e.g. C Contartese 'The Autonomy of the EU Legal Order in the ECJ's External Relations Case Law: From the "Essential" to the "Specific Characteristics" of the Union and Back Again' (2017) 54 CML Rev 1628; D Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the European Convention on Human Rights' (2015) 16 *German Law Journal* 105; N Nic Shuibhne 'What is the Autonomy of EU Law, and Why Does That Matter?' (2019) 88 *Nordic Journal of International Law* 9; J Odermatt 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law', (2016/17) EUI (MWP) Working Papers, <cadmus.eui.eu/bitstream/ handle/1814/41046/mwp_2016_07.pdf?sequence=1> accessed 3 May 2021; E Spaventa 'A Very Fearful Court? The Protection of Fundamental Rights in the EU after Opinion 2/13' (2015) 22 *Maastricht Journal of European and Comparative Law* 35; and B de Witte, 'A Selfish Court? The Court of Justice and the Design of International Dispute Settlement beyond the European Union' in M Cremona and A Thies (eds.), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing, 2014) 33.

set negotiation benchmarks as relations with the UK evolve – as well as for relations beyond the UK – is now unfolding.[13]

Fourth, navigating Brexit has also grown ways to describe EU law, enriching the language through which the nature of the EU legal order can be articulated: perhaps most strikingly through the Commission's idea that 'Union policies and actions…form a *unique ecosystem* underpinned by instruments and structures that cannot be separated from each other'.[14] The ecosystem concept vividly communicates the constitutive interdependency of Union policies and the Union system. It reminds us that the enforcement mechanisms on which those policies depend are not about centralising regulatory, supervisory, or judicial power for its own sake; they are what make the Union's policies so powerfully functional. It intimates too the significance of being a part – and thus also of not being a part – of the system. The template comes from Opinion 2/13[15] but expressing these design features through 'ecosystem' imagery is highly evocative and therefore likely to stick. The concept of the 'indivisibility' of the EU single market provides another, more controversial example.[16] Law can disguise the extent of political choice at play in some respects,[17] but whether you consider that the language of single market indivisibility was conjured especially for Brexit or reflected a principle of EU law functioning before it arguably depends on whether you consider indivisibility as a binary state of being – the single market is either indivisible or it is not – or a legal principle that can, like other legal principles, be derogated from in proportionate ways for defensible public interest reasons.[18] What becomes critical, then, is the process of checks and balances – the framework for scrutiny of political choices – that law also provides. This point is developed in Section 4 below.

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[13] E.g. P Van Elsuwege, 'A New Legal Framework for EU-UK Relations: Some Reflections from the Perspective of EU External Relations Law' (2021) 6 *European Papers*, doi: 10.15166/2499-8249/461; C Tobler, 'One of Many Challenges After "Brexit": The Institutional Framework of an Alternative Agreement – Lessons from Switzerland and Elsewhere?' (2016) 23 *Maastricht Journal of European and Comparative Law* 575.

[14] Internal EU27 preparatory discussions on the framework for the future relationship: 'Regulatory issues', TF50 (2018) 32 – Commission to EU 27, 21 February 2018, <https://ec.europa.eu/info/sites/info/files/slides_regulatory_issues.pdf> accessed 3 May 2021, emphasis added.

[15] Opinion 2/13 (n 12), paras 153-200.

[16] European Council (Article 50) Guidelines (n 10), para. 1: 'the European Council welcomes the recognition by the British Government that the four freedoms of the Single Market are indivisible and that there can be no "cherry picking"'. See further, paras 19-20.

[17] See P Dermine, 'The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture' (2020) 47 *Legal Issues of Economic Integration* 337, 347; commenting that aspects of EU Covid-19 response measures 'expose the limits of the law's malleability towards politics, and the risks that interpretative stretching and legal acrobatics imply for the integrity of primary law, the power balance between Member States and the Union, and the EU rule of law'. These themes are returned to in Section 4.

[18] Compare e.g. Editorial Comments, 'Is the "Indivisibility" of the Four freedoms a Principle of EU Law?' (2019) 56 CML Rev 1189 and S Weatherill 'The Protocol on Ireland/Northern Ireland: Protecting the EU's Internal Market at the Expense of the UK's' (2020) 45 EL Rev 222.

However, there was less Brexit growth in some areas of EU law than was argued or hoped for, most acutely for citizens' rights and notwithstanding the 'fundamental' nature of Union citizenship affirmed repeatedly by the Court of Justice.[19] While Part Two WA makes extensive provision for EU nationals residing in the UK and British nationals residing in EU27 in many respects, the facts that, first, the negotiation of that settlement was hinged to reciprocity, on both the UK and EU sides, and second, the rights provided for aim primarily to secure continuity of residence and/or family circumstances established pre-Brexit attracted have sharp criticism.[20] For example, Union citizenship could have been engaged to rationalise post-membership protection of free movement rights for British nationals already residing in EU27, irrespective of what was to be agreed under the TCA framework. Brexit might thus have catalysed a deeper transformation of Union citizenship with more attention paid to connections between the citizen and the Union than to the conduit of Member State nationality.[21] The extent to which the EU legislator[22] and/or Court of Justice[23] might yet explore that potential remains to be seen, but the WA ultimately upheld the primacy of the connection between Member State nationality and Union citizenship. Conversely, the UK's new identity as a third state was underscored. However, as developed in Section 3.B below, not all third states – and not all third state nationals – are equal.

3. Changing EU Law?

In Section 2, it was seen that Brexit-induced changes to EU law are evident in multiple respects if change is understood as expansion or growth in a literal sense and that how these developments have changed EU law will emerge more clearly over time. However, the changes to EU law presented in this section are at once both more subtle and more systemic. In the first example used to illustrate this

[19] Beginning with Case C-184/99 *Grzelczyk*, EU:C:2001:458, para. 31: 'Union citizenship is destined to be the fundamental status of nationals of the Member States'.
[20] E.g. S Coutts 'Citizens of Elsewhere, Everywhere and... Nowhere? Rethinking Union Citizenship in light of Brexit' (2018) *Northern Ireland Legal Quarterly* 231; A Łazowski 'When *Cives Europae* Became Bargaining Chips: Free Movement of Persons in the Brexit Negotiations' (2018) 18 *ERA Forum* 469; C O'Brien, 'Between the Devil and the Deep Blue Sea: Vulnerable EU Citizens Cast Adrift in the UK Post-Brexit' (2021) 58 CML Rev 431; and E Spaventa 'Mice or Horses? British citizens in the EU 27 after Brexit as "Former EU Citizens"' (2019) 44 EL Rev 589.
[21] A development that could also have led to significant deepening of the rights of long-term resident third country nationals: see e.g. A Wiesbrock, 'Free Movement of Third-Country Nationals in the European Union: The Illusion of Inclusion' (2010) 35 EL Rev 455.
[22] E.g. by distinguishing British nationals as a special category of third country nationals for legislation on 'the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States' (Article 79(2)(b) TFEU).
[23] E.g. Case C-673/20 *Préfet du Gers and Institut National de la Statistique and des Études Économiques* and Case C-32/21 *Institut national de la statistique and des études économiques and Others*, pending. See also, Case T-252/20 *Silver v Council,* EU:T:2021:347 (rejected by Order on grounds of admissibility).

deeper quality of change, I trace the birth of a pivotal legal principle – the concept of 'orderly withdrawal' from the Union – and outline the consequences it produced (Section 3.A). The second example concerns the Union's relationships with third states and how the Court of Justice distinguishes these connections from Union membership through legal concepts: specifically for present purposes, through the principle of mutual trust (Section 3.B). The implications of both examples are then drawn out over Section 4, overlaid with the context of crisis management in which Brexit decisions and Brexit decision-making are typically located.

A. The Concept of 'Orderly Withdrawal'

On 24th June 2016 – one day after the UK referendum – Donald Tusk, then president of the European Council, issued a brief statement including the following remarks:

> I am fully aware of how serious, or even dramatic, this moment is politically. ... Today, on behalf of the [27] leaders I can say that we are determined to keep our unity as [27]. For all of us, the Union is the framework for our common future. I would also like *to reassure you that there will be no legal vacuum*. ... All the procedures for the withdrawal of the UK from the EU are clear and set out in the Treaties. … I will also propose to the leaders that we start a wider reflection on the future of our Union.[24]

Alongside understandable emotion, an appeal for a measured response, and humility as regards wider lessons for the Union, President Tusk set seeds that would shape the negotiations that followed in critical and defining ways. First, he underlined the unity of EU27 and that the Union remains the framework for their common future.[25] Second, of particular significance here, note how he characterised Brexit as a legal process: he emphasised that there would be no 'legal vacuum' and recalled that the procedures for withdrawal are, in his words, 'clear and set out in the Treaties'.

Four days later, the European Council – including then UK Prime Minister David Cameron – issued a very brief statement after its post-referendum meeting, referring to that discussion's focus on 'the political consequences of the UK referendum'.[26] With extraordinary understatement, the Conclusions devote just one line (at the end of eight pages) to Brexit, observing that '[t]he UK Prime

[24] Press statement by President Donald Tusk on the outcome of the UK referendum, 24 June 2016, emphasis added, <https://www.consilium.europa.eu/en/press/press-releases/2016/06/24/tusk-statement-uk-referendum/> accessed 3 May 2021.
[25] See more generally, Laffan (2019) (n 5).
[26] Main results – European Council, 28 June 2016, <https://www.consilium.europa.eu/en/meetings/european-council/2016/06/28-29/> accessed 3 May 2021.

Minister informed the European Council about the outcome of the referendum in the UK'.[27] Contrast this with the messaging after the first meeting of the EU27 configuration the next day, reflected in remarks from President Tusk:

> Leaders are absolutely determined to remain united and work closely together as 27. *We reconfirmed that Britain's withdrawal from the European Union must be orderly* and there will be no negotiations of any kind until the UK formally notifies its intention to withdraw. We hope to have the UK as a close partner in the future. It is up to the British government to notify the European Council of the UK's intention to withdraw from the EU. Leaders made it crystal clear today that access to the single market requires acceptance of all four freedoms, including the freedom of movement. There will be no single market 'à la carte'.[28]

Already here we see evidence of early political decisions with enduring – binding – effects over the negotiation process that followed: notably that Britain's withdrawal from the Union must be *orderly*. That determination also found expression in more formal language in the EU27 statement issued after the same meeting, which underlined that '[t]here is a need to organise the withdrawal of the UK from the EU in an orderly fashion' and that 'Article 50 TEU provides the legal basis for this process'.[29] Other important markers acknowledged various institutional roles in managing the Brexit process[30] and that '[a]ny agreement, *which will be concluded with the UK as a third country*, will have to be based on a balance of rights and obligations'.[31]

The significance of these ideas was sustained through to the European Council's pivotal Article 50 Guidelines, published nearly ten months later in April 2017 and framed as follows:

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[27] European Council meeting (28 June 2016) – Conclusions, EUCO 26/16, para. 23, <https://www.consilium.europa.eu/media/21645/28-euco-conclusions.pdf> accessed 3 May 2021.

[28] Remarks by President Donald Tusk after the informal meeting of 27 EU heads of state or government, 29 June 2016, <https://www.consilium.europa.eu/en/press/press-releases/2016/06/29/tusk-remarks-informal-meeting-27/> accessed 3 May 2021 (emphasis added). See similarly, already suggesting that focus for the EU27 meeting, Remarks by President Donald Tusk after the European Council meeting on 28 June 2016, <https://www.consilium.europa.eu/en/press/press-releases/2016/06/28/tusk-remarks-after-euco/> accessed 3 May 2021. The unity of EU27 was not taken for granted, noting an earlier meeting of the foreign ministers of the six founding Member States; see e.g. 'EU governments pile pressure on UK to leave as soon as possible', *The Guardian*, 25 June 2016, < https://www.theguardian.com/politics/2016/jun/25/eu-emergency-talks-brexit-berlin> accessed 7 July 2021.

[29] Informal meeting at 27 Brussels, 29 June 2016, Statement, para. 2, <https://www.consilium.europa.eu/media/20462/sn00060-en16.pdf> accessed 3 May 2021.

[30] 'Once the notification has been received, the European Council will adopt guidelines for the negotiations of an agreement with the UK. In the further process the European Commission and the European Parliament will play their full role in accordance with the Treaties', ibid. para. 3.

[31] Ibid. para. 4, emphasis added.

> The United Kingdom's decision to leave the Union creates significant uncertainties that have the potential to cause disruption…. Citizens who have built their lives on the basis of rights flowing from the British membership of the EU face the prospect of losing those rights. Businesses and other stakeholders will lose the predictability and certainty that come with EU law. ... With this in mind, we must proceed according to a phased approach *giving priority to an orderly withdrawal* … Throughout these negotiations the Union will maintain its unity and act as one … The European Council *will remain permanently seized of the matter, and will update these guidelines* in the course of the negotiations *as necessary*.[32]

Note that the European Council decided to remain 'permanently seized' of the negotiations and to update its Guidelines 'as necessary'. Further underlining its stewardship of the process, the European Council pronounced 'core principles' for the negotiations, based on the need to ensure an orderly withdrawal and connecting to systemic premises of EU law including the principle of autonomy.[33] The framing and functioning of the withdrawal process determined by the European Council were confirmed in the Council's negotiating directives, adopted one month later:

> The Agreement *will be negotiated in the light of* the European Council guidelines and in line with the negotiating directives. The negotiating directives *build on* the European Council guidelines by developing the Union's positions for the withdrawal negotiations *in full respect of the objectives, principles and positions that the guidelines set out*. The negotiating directives may be amended and supplemented as necessary throughout the negotiations, *in particular to reflect the European Council guidelines as they evolve*.[34]

The defining role played by – and accepted with respect to – the European Council is especially interesting when two further points are recalled: first, that the 'European Council' was necessarily configured as the political leaders of EU27 for Article 50 TEU purposes; and second, that a withdrawal agreement is concluded under that provision between the withdrawing state and 'the Union' – in contrast to accession agreements, which are, under Article 49 TEU, concluded between an applicant state and (each one of) the Member States.

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[32] European Council (Article 50) Guidelines (n 10), emphasis added.
[33] Ibid. para. 1.
[34] Council Negotiating Directives, 22 May 2017, XT 21016/17, para. 4, <https://www.consilium.europa.eu/media/21766/directives-for-the-negotiation-xt21016-ad01re02en17.pdf> accessed 3 May 2021, emphasis added.

The political 'guideline' of an orderly withdrawal was then legally hardened in two ways. First, it found its way into the reasoning of the Court in *Wightman* in December 2018, confirming that 'Article 50 TEU pursues two objectives, namely, first, enshrining the sovereign right of a Member State to withdraw from the European Union and, secondly, establishing a procedure to enable such a withdrawal to take place in an orderly fashion'.[35] Second, it was accepted as 'the objective' of the Withdrawal Agreement, according to the WA's preamble, and for the separate arrangements in place through WA protocols for Northern Ireland, Gibraltar, and the Sovereign Base Areas in Cyprus. Alongside the future-oriented framework agreed for Northern Ireland, the transition period in place for most of 2020 was a remarkable product of the orderly withdrawal principle. The European Council's Guidelines provided:

> 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 made. Any such transitional arrangements must be clearly defined, limited in time, and subject to effective enforcement mechanisms. Should a time-limited prolongation of Union *acquis* be considered, this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply.[36]

A 'time-limited prolongation of Union *acquis*' was deemed possible for the Council on the basis proposed by the Commission: an assertion that Article 50 TEU 'confers on the Union an *exceptional horizontal competence* to cover in this agreement *all matters necessary* to arrange the withdrawal'.[37] It was qualified that this 'exceptional competence is of a *one-off nature* and *strictly for* the purposes of arranging the withdrawal'.[38] Nevertheless, both the extent to which the UK – by then a third state – would be treated like a Member State and the exceptional Union competence discovered to realise it were plainly acknowledged. In Supplementary Council Directives in January 2018, it was envisaged that, 'the Union *acquis* should apply to and in the United Kingdom *as if it were a Member State*' and that 'Union law covered by these transitional arrangements should *deploy in the United Kingdom the*

[35] *Wightman* (n 7), para. 56.
[36] European Council (Article 50) Guidelines (n 10), para. 6, emphasis added.
[37] Council Negotiating Directives (n 34), para. 5, emphasis added.
[38] Ibid., emphasis added.

same legal effects as those which it deploys within the Member States of the Union. This means, in particular, that the direct effect and primacy of Union law should be preserved'.[39]

The significance of the transition period is evident across all parts of the Withdrawal Agreement[40] and the infringement proceedings launched against the UK in October 2020 in its final weeks[41] – responding to proposed provisions in the UK's Internal Market Bill enabling unilateral disapplication of the Protocol on Ireland/Northern Ireland (later withdrawn[42]) – epitomised the extent of membership/non-membership overlap. This blurring of status boundaries in turn provides a bridge to the second example: how the Union conceives of relationships with (some) third states and how the Court articulates them through legal concepts.

B. The reach of mutual trust

Wightman confirmed the legalisation of the orderly withdrawal concept, marking the culmination of a process through which a political benchmark was transformed into a principle of material legal content. The same ruling also provides a useful starting point for the mutual trust example, as the Court of Justice both affirmed and streamlined decades of constitutionally formative judgments to express the nature of the EU legal order:

> [The] autonomy of EU law with respect both to the law of the Member States and to international law is justified by *the essential characteristics of the European Union and its law*, relating in particular to the constitutional structure of the European Union and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, namely the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to *a structured network of*

[39] Council Supplementary Negotiating Directives, 29 January 2018, XT 21004/18, paras 13 and 14, <https://www.consilium.europa.eu/media/32504/xt21004-ad01re02en18.pdf> accessed 3 May 2021, emphasis added.

[40] See esp. Part Four WA (Articles 126-132 WA) and the statement in Article 127(1) that '[u]nless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period'. Article 128 provides further detail on the UK's exclusion from the Union's institutions, noted in Section 2 above with reference to Article 7 WA.

[41] European Commission press release of 1 October 2020, <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1798> accessed 3 May 2021.

[42] The amended legislation now in force was adopted in December 2020 as the United Kingdom Internal Market Act 2020.

> *principles, rules and mutually interdependent legal relations* binding the European Union and its Member States reciprocally as well as binding its Member States to each other.[43]

The idea of 'a structured network of principles, rules and mutually interdependent legal relations' aligns perfectly with conceiving the EU legal order as an 'ecosystem'. Additionally, 'EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded, as stated in Article 2 TEU'.[44] That in turn 'implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected'.[45] In *LM,* the significance of mutual trust for the Union's area of freedom, security and justice was re-emphasised, as was the principle's grounding of the European arrest warrant.[46] Additionally, in case law on the intersection of Union citizenship and extradition to third states, the Court ruled that Member States are obliged first to consider whether the European arrest warrant mechanism could be exploited so that where a Union citizen is facing criminal charges or detention following conviction, the situation might be managed within the territory of the Union, through surrender to that citizen's home State, before progressing extradition to a third state.[47]

Joining these threads together, the crucial implication is that participating in a legal order both based on and generating mutual trust, further underpinned by its own citizenship status, seemed neither feasible nor functional without the prerequisite of Union *membership*. And yet, in the extraordinary *RO* ruling in September 2018 – during the Brexit negotiation phase but before the UK withdrew from the Union; after *LM* but before *Wightman* – the Court seemed to abandon decades of its own case law, across several strands of reasoning, to find ways to overcome the referring Irish court's unease (or at least uncertainty) about surrendering a Union citizen to the UK under a European arrest warrant since the period of detention in the UK would outlast the UK's membership of the Union. First, the Court emphasised the UK's continuing membership of the ECHR as a reflection of shared EU/UK standards of fundamental rights protection since Article 3 ECHR 'corresponds to' Article 4 of the EU Charter of Fundamental Rights: indeed, the Court underlined that the UK's 'continuing participation in that convention is in no way linked to its being a member of the European Union' and its decision to withdraw from the Union cannot therefore 'justify the refusal to execute a European

[43] *Wightman* (n 7), para. 45, emphasis added; confirming Opinion 2/13 (n 12), para. 167.
[44] Case C-216/18 PPU *LM*, EU:C:2018:586, para. 35; confirming Opinion 2/13 (n 12), para. 168.
[45] *LM* (n 44), para. 35; confirming Opinion 2/13 (n 12), para. 168.
[46] *LM* (n 44), paras 36, 40 and 58. Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, 2002 OJ L190/1.
[47] Case C-182/15 *Petruhhin*, EU:C:2016:630; Case C-191/16 *Pisciotti*, EU:C:2018:222; Case C-247/17 *Raugevicius*, EU:C:2018:898.

arrest warrant on the ground that the person surrendered would run the risk of suffering inhuman or degrading treatment within the meaning of those provisions'.[48]

While Advocate General Szpunar acknowledged that 'the UK has decided to withdraw from the EU, not to abandon the rule of law or the protection of fundamental rights', he did ask to 'be forgiven for adding that…as recently as 2016, the then UK Home Secretary pleaded for the UK to leave the ECHR' – the 'then Home Secretary' being, by the time of *RO*, UK Prime Minister Theresa May.[49] But even leaving the fragility of the UK's political commitment to the ECHR to one side, the substitution of ECHR protection for EU/Charter protection jars with the Court of Justice's approach to the protection of fundamental rights more generally. In her Opinion for a subsequent case, Advocate General Kokott deduced from the *Petruhhin* case law, summarised above, that membership of the ECHR system is 'not enough' to assure protection of fundamental rights at the required level – though interestingly, she flagged the ruling in *RO* as possibly not conforming to this (usual) expectation.[50] More generally, while Article 52(3) of the Charter does establish that where rights provided for in the Charter 'correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention', it also establishes that '[t]his provision shall not prevent Union law providing more extensive protection'. The *LM* case provides a useful example: in distinction from the Advocate General, the Court of Justice did not adopt the European Court of Human Rights' 'real risk of a flagrant denial of justice in contravention of Article 6 [ECHR]' test to determine whether judicial independence concerns could displace a request for surrender within the framework of the European arrest warrant; instead, it focused on whether there had been a breach of 'of the essence of [the] fundamental right to a fair trial, a right guaranteed by the second paragraph of Article 47 of the Charter'.[51] How would this distinction in the applicable legal test(s) be managed in a post-Brexit case involving surrender to the UK, given that the UK is now bound by the ECHR but not by the Charter? The significance of shared Member State commitment to Article 2 TEU values for constituting mutual trust emphasised in Opinion 2/13 is also missing from the *RO* EU/ECHR fusion.

Second, the Court in *RO* extended extraordinary faith to guarantees in UK national law. It observed that the UK has ratified the European Convention on Extradition and transposed it into national law, meaning that the rights relied on by RO 'are, in essence, covered by the national legislation of the issuing Member State, irrespective of the withdrawal of that Member State from the European Union'.[52] However, subsequent changes to national law in a third state can be neither

[48] Case C-327/18 PPU *RO*, EU:C:2018:733, para. 52.
[49] AG Szpunar in Case C-327/18 PPU *RO*, EU:C:2018:644, para. 65 and fn54 of the Opinion respectively.
[50] AG Kokott in Case C-488/19 *JR*, EU:C:2020:738, para. 61 and fn29 of the Opinion, comparing paras 55-57 of *Petruhhin* (n 47) with para. 52 of *RO.*
[51] *LM* (n 44), para. 59. See differently, the Opinion of AG Tanchev (EU:C:2018:517).
[52] *RO* (n 48), para. 57.

predicted nor prevented by the Union or its legal order: after all, third states reside beyond the reach of the Union ecosystem's enforcement tools.

Third, the Court downplayed the absence of the preliminary reference mechanism in the functioning of any anticipated (at that time) surrender agreement between the Union and the UK, since recourse to that procedure 'has not always been available to the courts and tribunals responsible for the application of the European arrest warrant. [O]nly on 1 December 2014, that is, five years after the entry into force of the Treaty of Lisbon, did the Court obtain full jurisdiction' i.e. ten years after the implementation of the Framework Decision.[53] This throwback to the pre-Lisbon EU legal order is surprising enough on its own terms; but it sits in astonishing contrast to the parallel emphasis placed on preliminary references in case law on the European arrest warrant, mutual trust, and the protection of shared Union values – and especially in the Court's Article 19 TEU-based rule of law jurisprudence, which was intensifying at exactly the same time.[54]

On balance, *RO* is best understood – if not excused – as a ruling delivered at a time of acute political charge, where challenging the integrity of the UK's commitment to fundamental rights could have had serious implications for already fraught Brexit negotiations. The more established assumption was that mutual trust marks a material point of difference between being/not being a member of the Union. In the TEU, Article 3(5) indicates that the Union should 'uphold and promote *its* values' in its relations with the wider world while Article 21(1) recognises that third states might 'share' these values. Significantly, Article 8 commits the Union to developing a 'special relationship' – *founded on* Union values – with neighbouring countries. Nevertheless, the 'essential characteristics' of the EU legal order as well as the interdependency both enabled and reinforced through mutual trust seemed to have legal significance in the context of Union membership alone. In its Opinion on the EU-Canada Comprehensive Economic and Trade Agreement (CETA), delivered in April 2019, the Court confirmed that EU Member States 'are, in any area that is subject to EU law, required to have due regard to the principle of mutual trust' and that this principle 'obliges each of those States to consider, other than in exceptional circumstances, that all the other Member States comply with EU law, including…the right to an effective remedy before an independent tribunal laid down in Article 47 of the Charter'.[55] In contrast, 'mutual trust, with respect to, inter alia, compliance with the right to an effective remedy before an independent tribunal, is not applicable in relations between the Union and a non-Member State'.[56]

[53] Ibid. para. 60.
[54] See esp. Case C-64/18 *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, paras 30-38.
[55] Opinion 1/17, EU:C:2019:341, para. 128.
[56] Ibid. para. 129.

In that light, Advocate General Tanchev's remark in *IN* that 'the principle of mutual trust, as it has come to evolve in the European Union since the Lisbon Treaty of 2007, has no application in EEA law' was not surprising.[57] In the context of questions about whether the presumption in favour of utilising a European arrest warrant over extradition to a third State – developed to that point in the *Petruhhin* case law for Union citizens only – should be extended to Icelandic nationals in the light of the Agreement on surrender concluded between the EU, Iceland and Norway, he reasoned:

> Notwithstanding the *sui generis* nature of the EEA legal system, and the proximity of the relations between EFTA and EU Member States…and the provisions of the EEA Agreement [on] the privileged relationship of the EEA with the EU, the fact remains that mutual trust prior to the Lisbon Treaty was, in relative terms, in its infancy. As Norway notes…Article 3(2) TEU has no counterpart in the EEA Agreement.[58]

The very different response of the Court is remarkable. It harnessed the criteria of proximity, long-standing common values and European identity in the EEA Agreement's preamble to underline 'the special relationship between the European Union, its Member States and the EFTA States'.[59] For the 'special relationship' between Iceland and the Union specifically, which 'goes beyond economic and commercial cooperation', the Court again refers to Iceland as a party to the EEA Agreement but also to its application of the Schengen *acquis*, its participation in the common European asylum system, and the conclusion of the Agreement on surrender with the Union.[60] In that light, the position of an Icelandic national is 'objectively comparable with that of an EU citizen'.[61] Moreover, since 'the provisions of the Agreement on the surrender procedure are very similar to the corresponding provisions' of the Framework Decision on the European arrest warrant, relevant Union citizenship case law must be applied to Icelandic nationals 'by analogy'.[62] Advocate General Kokott subsequently observed that, through the surrender Agreement, 'the contracting parties expressed their mutual confidence in the structure and functioning of their legal systems and their ability to guarantee a fair trial' and, '[a]s a result, the European Union has expressed confidence in the Kingdom of Norway *which*

[57] AG Tanchev in Case C-897/19 PPU *IN*, EU:C:2020:128, para. 97 of the Opinion.
[58] Ibid. Article 3(2) TEU provides that '[t]he Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'. Agreement on the European Economic Area, OJ 1994 L1/3.
[59] Case C-897/19 PPU *IN*, EU:C:2020:262, para. 50.
[60] Ibid. para. 44. Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, OJ 2006 L292/2.
[61] *IN* (n 56), para. 58.
[62] Ibid. paras 74-75.

reaches to the mutual confidence between Member States'.[63] For EEA states in *IN* – and for the UK, for different reasons, in *RO* – the sharp Member State/third state (mutual trust) divide is dulled.

4. Changed EU Law: Implications of – and Beyond – Brexit

What implications can be drawn from these two examples of 'changed' EU law, which address distinctly yet also connect the internal and external dimensions of the EU's legal order? At one level, it remains to be seen whether 'core principles' articulated by the European Council in its Article 50 Guidelines will have legal life beyond Brexit; whether they will shape, helpfully or unhelpfully, the conduct of external relations more generally.[64] But while it is in many ways too soon to assess whether law made for the purposes of Brexit will endure beyond it (or can otherwise be unmade), and while some Brexit-induced effects were perhaps more about amplifying changes already evident, Brexit did change aspects of what Cremona describes as 'structural principles of EU law':[65] more specifically, Brexit changed aspects of the legal parameters around the making of EU law, especially concerning the role of the European Council;[66] and it catalysed a necessary but as yet unfinished decompressing of the third state concept in legal terms. But Brexit should, above all, provoke legal scholars to pay further attention to the kind of law that both enables and is enabled through management of 'crisis'.

In editorial comments in the *Common Market Law Review* in 2014, reflecting on extra-EU responses to the Eurozone crisis and the Court of Justice's light-touch scrutiny of them in *Pringle* in particular,[67] it was observed that '[w]e are now experiencing the development of a set of relations that deal with the objectives or the values of the Union, and yet seek to distance themselves from its common framework'.[68] The editorial argued that '[a] basic principle in the EU is that membership of the Union should always prevail over the reciprocal relations between the Member States';[69] and

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[63] AG Kokott in *JR* (n 47), para. 61 of the Opinion, emphasis added; see similarly, with reference to *IN*, para. 73. Arguing that 'mutual trust' and 'mutual confidence' are interchangeable concepts, see HH Fredriksen and C Hillion, 'The "Special Relationship" between the EU and the EEA EFTA States – Free Movement of EEA Citizens in an Extended Area of Freedom, Security and Justice: Case C-897/19 PPU, *Ruska Federacija v. I.N*.' (2021) 58 CML Rev 851, 864.

[64] See again the examples in (n 13).

[65] M Cremona (ed.), *Structural Principles in EU External Relations Law* (Hart Publishing, 2018).

[66] For reasons of space, the role of the European Parliament is not addressed in detail in this paper; but some brief comments are noted in Section 4.C below.

[67] Case C-370/12 *Pringle*, EU:C:2012:756.

[68] Editorial comments, 'Union Membership in Times of Crisis' (2014) 51 CML Rev 1, 1. See generally, A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (OUP, 2015) and K Tuori, *The Eurozone Crisis: A Constitutional Analysis* (CUP, 2014). Addressing EU/Member State dimensions specifically, see M Dawson, 'The Legal and Political Accountability Structure of "Post-Crisis" EU Economic Governance' (2015) 53 *Journal of Common Market Studies* 976 and S Peers 'Towards a New Form of EU Law? The Use of EU Institutions outside the EU Legal Framework' (2013) 9 *European Constitutional Law Review* 37.

[69] Editorial comments, ibid. 3.

cautioned that '[t]he decrease in trust and harmony, in a context of increased economic and political interdependence, may explain the development of both cooperation and disputes between Member States at the margins of the EU framework'.[70] Essentially, '[i]n the light of what came to be perceived as an existential threat to the European Union as a whole', both Member States and Union institutions 'resorted to "rescue" measures that were, in some instances, incompatible with the existing legal order, in other instances, outside the European legal order'.[71] For Peers, that approach produced a 'new form of EU law', related to but outside Treaty requirements for formalised differentiated integration.[72]

In contrast to how Eurozone responses shrunk back to the 'margins of the EU framework', what is striking about Brexit is a persistent recourse to both the fundamentals of EU law and the integrity of the Union's institutional system. However, while that shift is meaningful in several respects, it is illusory in others. It masks a still dangerous turn in EU law-making, evidenced most notably through the shutting down pathways for appropriate scrutiny. It also highlights a complexity of relations with third states that might be necessary and more realistic but is yet under-determined. These claims are first explained in more detail through the internal orderly withdrawal (4.A) and external mutual trust (4.B) examples. Bringing both examples together, it is then argued (4.C) that harnessing a richer understanding of principles of EU law operating internally and externally in the EU ecosystem would reorient changed EU law to constitutionally safer ground. Importantly, these steps would also recognise rather than gloss over the demands of law-making for exceptional challenges.

A. Threads from Orderly Withdrawal

Reflecting first on the internal example of orderly withdrawal, this paper is not challenging the importance of an orderly withdrawal – or in any way encouraging or preferring *disorderly* withdrawal. But agreeing with the logic and even the necessity of something is not enough to ensure its legality. It is important that we interrogate, first, how the orderly withdrawal objective was conceived; second, how it was rapidly and seamlessly absorbed as the guiding objective for the entire Article 50 process; and third, consequences justified through perfunctory recourse to it. The key point is that *what* an orderly withdrawal entailed and *why* it did so were rarely questioned, which enabled, in turn, the packaging of some extraordinary political choices through the sober yet expedient language of law.

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[70] Ibid. 6.
[71] C Joerges and C Kreuder-Sonnen, 'European Studies and the European Crisis: Legal and Political Science between Critique and Complacency' (2017) 23 *European Law Journal* 118, 120.
[72] Peers (n 67).

Hillion has suggested that the core principles expressed in the 2017 Guidelines 'arguably have significance beyond the context of withdrawal', observing that 'the European Council forcefully reaffirms and/or articulates what its members see as principles underpinning European integration'.[73] As a result, these principles 'are (becoming) key components of the EU constitutional identity'.[74] The language that he uses is striking, recognising instances of both affirmation *and* articulation: there is amplification of principles that already existed, but also the creation of new principles. This idea connects to a crucial question posed by Sowery: principally through analysis of EU responses to the Eurozone crisis, 'which institution', she asks, 'is responsible for identifying and upholding values that purportedly enjoy an elevated status?', highlighting what she describes as 'informal mechanisms of primary law change'.[75] This phrase captures something utterly significant: *informal* mechanisms producing *primary law change*? Brexit has underscored the need for us to confront such anomalies.

In 2017, Eeckhout and Frantziou appealed for a 'constitutionalist reading' of the Article 50 process to ensure compliance with EU constitutional law,[76] but I am not convinced that we sufficiently probed or challenged the limits of that provision as an 'exceptional' legal basis to ensure an orderly withdrawal.[77] For example, while the transition period lasted in the end for 11 months, it could have persisted for a further two years.[78] Some rationalisation of introducing a transition period under Article 50 TEU was undertaken. In particular, Dougan argued that a transition period 'based on the direct and wholesale (even if only temporary) extension of the Union legal order to the territory of a third country represents a highly expansive and truly exceptional conception of the competences conferred by Article 50 TEU', which is 'not only difficult to square with the explicit text of Article 50 TEU itself' but 'could also sit uneasily with myriad other provisions of EU law'.[79] Similarly, Łazowski questioned the constitutional propriety of applying EU law so extensively to/in a non-Member State.[80]

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[73] Hillion (n 6) 50.
[74] Ibid.
[75] K Sowery, 'The Nature and Scope of the Primary Law-Making Powers of the European Union: The Member States as the "Masters of the Treaties"?' (2018) 43 EL Rev 205, 215 and 218.
[76] P Eeckhout and E Frantziou, 'Brexit and Article 50 TEU: A Constitutionalist Reading' (2017) 54 CML Rev 69.
[77] Raising legal basis questions about the validity of the Ireland/Northern Ireland Protocol in light of its non-temporary character, see S Peers, 'The End – or a New Beginning? The EU/UK Withdrawal Agreement' (2020) 39 *Yearbook of European Law* 122, 127.
[78] See Article 132 WA.
[79] M Dougan 'An Airbag for the Crash Test Dummies? EU-UK Negotiations for a Post-Withdrawal "Status Quo" Transitional Regime under Article 50 TEU' (2018) 55 CML Rev 57, 91.
[80] A Łazowski, 'Exercises in Legal Acrobatics: The Brexit Transitional Arrangements' (2017) 2 *European Papers* 845, 856-859. After the WA's conclusion and entry into force, limits to the scope of Article 50 were considered in more detail: see e.g. T Lock, 'In the Twilight Zone: The Transition Period in the Withdrawal Agreement' in J Santos Vara, RA Wessel and PR Polak (eds.) *The Routledge Handbook on the International Dimension of Brexit* (Routledge, 2021) 30, 41, ruling out Article 50-based WA amendments not provided for in its text given that a condition explicitly expressed there – the UK being a Member State – would not be fulfilled. On amendments already provided for e.g. concerning the powers conferred by the WA on the Joint Committee, see Peers (n 77)

But neither the conception nor capacity of the orderly withdrawal principle, specifically, was expressly interrogated as the key to Article 50 TEU's formidable power. More typically, it was accepted that the principle justified the exceptional competence seen in Article 50 TEU by Union institutions.[81] Why did the orderly withdrawal principle not provoke deeper or more widespread reflection? The economic, political, and social reasons for ensuring a least-bad Brexit are obvious. But where does that leave legal scrutiny?

For some, the enhanced role of the European Council in articulating new premises of EU primary law might represent a welcome counterbalance to the dominance of judicial constitutional development, and Article 15 TEU establishes that the European Council should 'provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof'. But does the congealing of its 'guidelines' across the Brexit process – more or less unchallenged – transgress Article 15's requirement that the European Council 'shall not exercise legislative functions'? For EU27, the sense of purpose and relationships forged or renewed within the European Council through Brexit left a positive legacy of more meaningful solidarity, which has clearly underpinned the Union's response to the Covid-19 pandemic more recently. However, while 'the various crises the EU has gone through may justify a more prominent role for an institution that operates as the EU crisis-manager in chief, this evolution does not sit easily with the notion that, since the Treaty of Lisbon, the European Council has become a formal part of that institutional framework'.[82] In other words, the European Council must now be judged as an *ordinary* Union institution, 'bound by the principles that govern the latter's functioning, chiefly the principle of institutional balance, which ultimately guarantee respect for the rule of law and democratic accountability in the EU decision-making process'.[83]

Reflecting on Article 15 TEU, de Witte characterises the expected role of the European Council in this way:

127-128. Peers takes a different view on Article 50 as a valid legal basis for subsequent WA amendments agreed to by the parties (ibid. 128-129).

[81] E.g. Hillion (n 6), 42: 'the broad conception of Article 50 TEU, as an exceptional, horizontal, and indeed exclusive Union competence reflects the intention of the drafters of the EU exit clause to facilitate the conclusion of a withdrawal agreement … The broad EU empowerment is also key to an "orderly withdrawal", envisaged by the European Council as the ultimate purpose of the negotiations and which, in effect, emboldens the EU mandate under Article 50 TEU'.

[82] Editorial Comments, 'Compromising (on) the General Conditionality Mechanism and the Rule of Law' (2021) 58 CML Rev 267, 280. See also, B de Witte, 'The European Union's Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58 CML Rev 635, 668: 'although the Commission had couched its policy plans as proposals for legislation addressed either to the Council or to the Council and Parliament together, depending on the legal basis, the EU institution that took decisive action in the first instance was the European Council, an institution that was not mentioned in the Commission's proposals'.

[83] Editorial Comments (n 82) 280.

> [Its] priority-setting activity is very broad, and has no clear boundaries, but does not take the form of legally binding decisions. The European Council's Conclusions typically contain calls for action *by others*, whether the other EU institutions or the Member States. When doing this, the European Council is somehow acting outside the EU's institutional balance. It sets a political direction but the necessary legislative or executive action that follows from there must be taken by others, who are not bound by the European Council's Conclusions.[84]

De Witte acknowledges that Article 15 presents 'only a partial and therefore distorted picture of the real role played by the European Council',[85] but underlines that the European Council is not involved in the formal adoption of legislation as a critical point for Article 15 compliance. The Court has also ruled out 'the alleged effect of the "political" nature of the conclusions of the European Council' as grounds for annulment of a Council Decision, referring, inter alia, to the Commission's power of legislative initiative.[86] All of this suggests that Article 15 is complied with where the European Council does not participate in the ordinary legislative procedure, provoking two further reflections. First, (why) are we more comfortable with the European Council delivering 'informal mechanisms producing primary law change'?[87] Second, the story of Brexit demonstrates the harder nature of European Council 'guidelines' and how such mandates indeed constituted a step in adopting legislation. The Council effectively acknowledged this – that it was *bound* – in its Negotiating Directives,[88] and examples from the management of crisis events since then confirm the Brexit precedent.[89] What Dawson and de Witte critiqued about the European Council in the Eurozone crisis now seems unexceptional on the other side of Brexit: '[r]ather than set out strategic guidelines within which the Commission must act, the European Council has increasingly assumed the role of legislative initiator, both establishing detailed proposals, and securing and monitoring their implementation'.[90] The Brexit Guidelines went further than initiating or monitoring binding rules: they constituted dimensions of the rules' substance.

A critical question that merits further attention, then, is what the term 'legislative functions' means for the purposes of the constraint provided for in Article 15 TEU,[91] and just referring to the

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[84] De Witte (n 77) 670-671, emphasis in original.
[85] Ibid. 671.
[86] Case C-643/15 *Slovakia and Hungary v Council,* EU:C:2017:631, para. 145.
[87] Sowery (n 75) 218.
[88] See (n 34).
[89] See (n 93).
[90] M Dawson and F de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 *Modern Law Review* 817, 830.
[91] In its Order in *NF*, the General Court referred to the European Council's 'lack of legislative competence' in connection with Article 15 TEU but did not discuss this further (Case T-192/16 *NF*, EU:T:2017:128, para. 56). An appeal was rejected by Order of the Court of Justice (Joined Cases C-208/17 P to C-210/17 P, EU:C:2018:705);

Commission's power of legislative initiative without probing the actual effects of European Council Conclusions raises a first point of concern about privileging form over substance. Second, and evolving in new ways questions sparked by the Union's response to the Eurozone crisis, it is important also to examine the increasingly blurred lines between when it is the 'European Council' that acts; when the Member States act outside of that institutional configuration; and when elements of both (as seen through Brexit) seem to be present. We need to be much clearer about the criteria that determine these distinctions because there is otherwise a risk of selective institutional convening (or non-convening) with repercussions that we can now observe manifesting across many domains of EU crisis response: from 'statements' on EU immigration[92] to Covid-19 funding allocation[93] to appointments at the Court of Justice.[94] What these situations share is the merging of decision-making at the highest levels of Union infrastructure, on the one hand, with privileging the formation of the decision-making entity over the effects of or principles at stake in the substance of the measures produced, on the other. In proceedings before the General Court concerning the termination of her position at the Court of Justice following Brexit, Eleanor Sharpston invoked the ruling in *ERTA* to argue:

> [T]he contested decision is not simply the expression or recognition of a voluntary coordination on the part of the Member States, but was designed to lay down a course of action *binding on both the institutions and the Member States*, which is capable of derogating from the procedures laid down by the Statute of the Court of Justice of the European Union and having definite legal effects.[95]

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compare a previously more intensive analysis of effects in e.g. Case C-660/13 *Council v Commission*, EU:C:2016:616.

[92] See again *NF*, where the General Court (ibid.) found that the March 2016 agreement between the Union and Turkey ('EU-Turkey statement') setting out a joint action plan 'to strengthen their cooperation in terms of supporting Syrian nationals enjoying temporary international protection and managing migration' (ibid. para. 1) did not constitute a measure adopted by the European Council, '*independently of whether* it constitutes, as maintained by the European Council, the Council and the Commission, a political statement or, on the contrary, as the applicant submits, a measure capable of producing binding legal effects' (para. 71, emphasis added).

[93] See Editorial Comments (n 82) for critique of the disruption of institutional balance – notably through Hungary and Poland's '(successful) efforts to take a detour through the European Council to circumvent the normal EU decision-making process' – in the adoption of Council Regulation 2020/2093 laying down the multiannual financial framework for the years 2021 to 2027, OJ 2020 L433 I/11; Regulation 2021/241 establishing the Recovery and Resilience Facility, OJ 2021 L57/17; and Regulation (EU, 2020/2092 on a general regime of conditionality for the protection of the Union budget, OJ 2020 L433 I/1.

[94] See the Order of the Vice President in Case C-424/20 P(R) *Representatives of the Governments of the Member States v Sharpston*, EU:C:2020:705, returned to below.

[95] Case T-550/20 *Sharpston v Council and Representatives of the Governments of the Member States*, EU:T:2020:475, para. 28, emphasis added; appeals in these proceedings were subsequently dismissed (Case C-684/20 P, EU:C:2021:486 and Case C-685/20 P, EU:C:2021:485).

However, in an Order addressing interim relief, the Vice-President of the Court of Justice responded that 'the acts by which Judges and Advocates General…are nominated and which are adopted, in accordance with Article 253(1) TFEU, by common accord of the governments of the Member States' represent 'a decision taken not by an institution, body, office or agency of the Union but by the Representatives of the Governments of the Member States exercising the powers of those States, with the consequence that such act is not subject to the judicial review…on the basis of Article 263 TFEU'.[96]

Fundamentally, *ERTA* underlines two constitutional points. First, even when Member States act as Member States, they act as Member States *of the Union.* In particular, they remain bound by the principle of sincere cooperation in Article 4(3) TEU.[97] Importantly, this obligation persists even when Member States operate 'outside the framework of the [Union] institutions' where their actions produce 'obligations which might affect those rules or alter their scope'.[98] *ERTA* thus concretises the idea of Member States 'act[ing], and continu[ing] to act, in the interest and on behalf of the [Union]',[99] and prioritises the substance of the Union's constitutional principles over technical questions of institutional convening or formation. For present purposes, this point is not about the merits or otherwise of the decision to terminate Advocate General Sharpston's position at the Court of Justice following Brexit;[100] it is rather to highlight, through an *ERTA* lens, the formation-privileging reasoning through which her pathway to review was blocked. Relatedly, second, *ERTA* is fundamentally about the opening up of Union activities to scrutiny.[101] The same objective infuses *Les Verts*, where the Court observed that '[t]he European Parliament is not expressly mentioned among the institutions whose measures may be contested because, in its original version, the EEC Treaty merely granted it powers of consultation and political control rather than the power to adopt measures intended to have legal effects vis-à-vis third parties'.[102] Notwithstanding, the Court justified its review of acts intended to have such effects with reference to both the 'spirit' and the 'system' of the Treaty.[103]

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[96] *Sharpston* (n 94), para. 28.
[97] Case 22/70 *Commission v Council (ERTA)*, EU:C:1971:32, para. 21.
[98] Ibid. para. 22.
[99] Ibid. para. 90.
[100] For early criticism, see e.g. D Halberstam, 'Could there be a Rule of Law Problem at the EU Court of Justice? The Puzzling Plan to let U.K. Advocate General Sharpston Go After Brexit', *Verfassungsblog*, 23 February 2020, <https://verfassungsblog.de/could-there-be-a-rule-of-law-problem-at-the-eu-court-of-justice/> accessed 7 July 2021.
[101] *ERTA* (n 97) established that '[a]n action for annulment must…be available in the case of all measures adopted by the institutions, *whatever their nature or form*, which are intended to have legal effects' (para. 42, emphasis added).
[102] Case 294/83 *Les Verts v Parliament*, EU:C:1986:166, para. 24.
[103] Ibid. para. 25.

It is therefore difficult to square *ERTA* and *Les Verts*, as well as case law enabling judicial review of ostensibly non-binding acts,[104] with the constricted approach taken in *Sharpston*. The *ERTA* principles also make the dismissal of the EU-Turkey statement as a measure adopted by the European Council 'independently of whether it constitutes…a measure capable of producing binding effects'[105] in *NF* even more striking – and troubling. It is an essential tenet of the Court's functions 'to defend the conceptual and normative assumptions underpinning the EU legal order'.[106] At one level, through recurring citations across the developing expository narrative of the Union's ecosystem, the centrality of *ERTA* and *Les Verts* has been fortified – for example, the latter's characterisation of the Treaties as 'the basic constitutional charter of the European Union' was expressly affirmed in *Wightman*.[107] At the same time, though, a shift in perspective away from fundamental benchmarks established in that earlier case law enables an evasion of scrutiny that displaces long-established obligations to address the effects rather than form of decisions and/or the formation of the entities that make them.

That point also underlines the need to look beyond immediate impact as well as across different 'crisis' events to identify – and evaluate – their *cumulative* impact on EU law. Most work on defining both the nature of and responses to crisis in the context of Union governance has taken place to date outside of the discipline of law, even though vital legal questions connect to Union action. This paper in no way claims to provide such necessary, and necessarily extensive, legal analysis of the full range of crisis events to which the Union has responded; but it does identify examples from Brexit that have taken wider root and therefore deserve further examination. For example, we saw in Section 3.A that the exceptional competence drawn from Article 50 TEU was defended in part because of its '*one-off nature* [being] *strictly for* the purposes of arranging the withdrawal from the Union'.[108] More recently, to rationalise borrowing for Covid-19 purposes with the principle of budgetary balance in Article 310(1) TFEU, '[t]he Commission admits that "such way to proceed for large amounts diverges from the standard practice", but justifies this oddity as a one-off, an emergency solution to an unprecedented crisis'.[109] What happens when we stack these diffuse examples of 'exceptional and one-off' measures together? Adding to the problematic notion of 'informal mechanisms of primary law change' highlighted above, Dermine highlights another problem in crisis law-making: in the

[104] See esp. Case C-16/16 P *Belgium v Commission*, EU:C:2018:79; and see the Opinion of AG Bobek in Case C-911/19 *Fédération bancaire française* (FBF), EU:C: 2021:294, judgment pending at the time of writing.
[105] *NF* (n 91).
[106] L Azoulai, 'Structural Principles in EU Law: Internal and External' in Cremona (ed.) (n 65) 39.
[107] *Wightman* (n 7), para. 44.
[108] Council Negotiating Directives (n 34), para. 5, emphasis added.
[109] Dermine (n 17) 349; referring to European Commission, Q&A: Next Generation EU – Legal Construction (9 June 2020), <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1024> accessed 3 May 2021. The Commission states that: '[t]he borrowed funds are *exceptional and one-off* amounts coming in addition to the annual budget as external assigned revenue' (emphasis added).

management of Covid-19, he observes solutions that are 'formally sound from a legal perspective' yet about which he uses language such as 'thin ice', 'problematic artificiality' and 'somewhat contrived'.[110] Contrast de Witte's language assessing the same measures: 'creative legal engineering', 'craftsmanship by the legal services of the EU institutions', 'some stretching' :[111] for him, '[t]he entire plan was enacted within the bounds of the EU legal order, and thus, unlike what happened during the euro crisis, without recourse to intergovernmental agreements between the Member States'.[112]

These contrasting assessments demonstrate that while trappings of legality might be ticked, both the nature and the quality of measures adopted still require further probing. They also suggest that we need shared understanding of the necessary criteria of assessment. If 'EU crisis law' now exists and if it constructs a shield behind which review-proof Member State decisions are taken through the processes or exploiting the resources of the Union, on the one hand, or Union institutions are enabled to act beyond established institutional processes, on the other, then the makers of EU law participate in its own diminution. These words were written in 2012, reflecting at the time on the Eurozone crisis:

> The much-extended Preambles to the EU Treaties…have never been altered in one fundamental respect: it is the Member States that 'have decided' to establish the European Union, and to agree its terms and its remit. Certain Member States have not, in different ways and at different times, had the confidence or maturity to claim ownership of that intention and to commit openly to the sustainability of the Union; to meet the challenge of tackling its faults while still confirming its fundamental value. When Member States distance themselves from the Union, they may just be acting instrumentally for domestic political gain. But that is a dangerous strategy. It generates an existential hesitation that is then inevitably transmitted to their electorates, compounded by a degree of bias and inaccuracy in EU media reporting.[113]

Fundamentally, situations of crisis provoke Union existentialism, 'leav[ing] a perennial hint of insurgency in the air and a feeling that the whole precarious project is constantly vulnerable to implosion'.[114]

Events since the Eurozone crisis have compounded these challenges as well as the relentless conflation of crisis events and the Union's very existence. In a positive sense, as we saw throughout Brexit, regulatory imperatives provoked by urgency can stimulate unanticipated breakthroughs and

[110] Dermine, ibid.
[111] De Witte (n 82) 679.
[112] Ibid.
[113] N Nic Shuibhne, 'What is "Europe" and Who is it For?' (2012) 37 EL Rev 673, 674
[114] N Nic Shuibhne, 'Is it Time to Worry Yet?' (2009) 34 EL Rev 521, 522.

valuable innovation, overcoming instances of stuck-ness (that were often more about political choice than legal obstacle). I would suggest that three points are vital in connection with legal measures that respond to exceptional challenges. First, such challenges may well require extraordinary regulatory measures. For that reason, second, the regulatory response needs to be agile and flexible enough to manage challenges that might be very specific to the challenge in question even if exceptional challenges share features, such as daunting scale and rapid changes in circumstances, in many ways. But third, meeting the first two needs should not mean the negation of agreed parameters within which law is both made and assessed. With no sense of the crises still to come, it was argued in 2009 that 'where political and economic concerns seem increasingly disconnected from the framework and momentum of legal integration, it would be a mistake to see the situation as sustainable'.[115] Now, the legal position is arguably more nuanced. The *apparatus* of the EU legal framework is far more evident since Brexit; the trappings of EU law – of the legal parameters that the Treaty establishes around the institutions and their processes of law-making – are more evident, which goes some way to reversing the 'trend towards informalisation'[116] that characterised Eurozone crisis decision-making.

But the orderly withdrawal example demonstrates that Brexit has changed aspects of the EU legal order at a more fundamental level. Investigating the health of checks and balances on EU law-making will of course produce different assessments,[117] so how do we accommodate legitimately different perspectives while mitigating the risk of 'further normalisation, even legalisation, of discretionary politics'?[118] Dawson and de Witte rightly underline that we have recourse to law 'to hold institutional actors to long-term values that transcend day-to-day crises and emergencies'.[119] How we might 'do' EU crisis law better is returned to in Section 4.C below.

B. Threads from Mutual Trust

Second, from the external example of mutual trust, greater complexity is emerging in EU law, overcoming the blunt notion of a 'third state' and offering better recognition that relations with third states have produced an intricate matrix of legal concepts and legal consequences. Importantly, for third states closer to home, it was seen that the criteria of 'proximity, longstanding common values and European identity' framing the EEA agreement can have wider resonance. Brexit's reminder that not all neighbouring third states aspire to Union membership is stark; but it is also the reality.

[115] Ibid.
[116] Dawson and de Witte (n 90) 835.
[117] Compare e.g. Editorial Comments and de Witte (both n 82).
[118] Joerges and Kreuder-Sonnen (n 71) 122.
[119] Dawson and de Witte (n 90), 843.

However, post-Brexit, the extent to which relationships with neighbouring third states can differ as well as the lack of clarity about why or the extent to which they differ, from a legal perspective, produces some confusion. Most importantly, this complex web of relationships underlines that the legal coordinates of Union membership are not always clearly defined and not always, counterintuitively, preserved for Member States.

For example, on one view, the privilege conferred on Icelandic nationals in *IN* exacerbates a schism in EEA relations that also finds reflection in the EU-UK Withdrawal Agreement: between the degree of protection of individuals and the degree of representation of states in the framework of EU decision-making. In that light, Brexit apparently underlined that meaningful representation of states in the workings of the Union's ecosystem remains an exclusive (legal) privilege of Union membership.[120] Things are not straightforward, though: and not just through comparing different legal arrangements for different neighbouring states but also within specific arrangements. On the latter point, and notwithstanding the firm line drawn around institutional representation vis-à-vis the UK by the WA, Bekkedal has identified degrees of 'participation' by EEA EFTA States in the workings of EU agencies.[121] However, the changing position on exemptions for EEA EFTA States from an EU Covid-19 vaccine export ban profoundly challenged the impression of a 'special relationship' on a par with Union membership.[122] When are EEA EFTA States special, in a legal sense, and when are they not; what criteria are applied to determine this; and who gets to decide? To what extent does legal specialness derive from the overarching infrastructure of the relationship between these States and the Union, and/or to what extent does it depend on specific situations notwithstanding that architecture? More generally, how do the answers to those questions then work to distinguish, or not, EEA EFTA States from other neighbouring third states? It should be acknowledged that, at one level, the EU can articulate its own understanding of the legal premises of external relationships all it wants, but it matters ultimately how that is received across increasingly diverse patterns of connections with the wider – or for present purposes, the closer – world. Nevertheless, Leino and Leppävirta reached bleak conclusions on the potential for cooperation between states outside the framework of EU law. They argue, first, that 'if you wish to play with the EU States, you need to comply with EU rules,

[120] See e.g. Lock (n 80) 33; who also highlights respect for the equality of Member States under Article 4(2) TEU as another membership/non-membership distinction.
[121] T Bekkedal, 'Third State Participation in EU Agencies: Exploring the EEA Precedent' (2019) 56 CML Rev 381.
[122] The export ban was corrected by Commission Implementing Regulation 2021/734 of 5 May 2021, amending Implementing Regulation 2021/521 making specific arrangements to the mechanism making certain products subject to the production of an export authorisation, OJ 2021 L158/13.

irrespective of whether or not you are an EU Member yourself'; and second, that 'the chances of making your voice heard in EU negotiations are slim if you are not an EU Member State'.[123]

Will the pressure of notably looser arrangements for a *neighbouring* state such as those agreed between the EU and the UK through the TCA challenge the sustainability of the EU-centric way of doing things? In trying to work out if 'binding legal legacy effects'[124] could condition the relationship between the Union and a former Member State post-withdrawal, Brexit brought the variety compressed by the third state concept centre stage and drew greater attention to the range of legal arrangements that constitute 'special relationship[s] with neighbouring countries, which are *founded on* the values of the Union' (Article 8(1) TEU). In contrast, 'the Union shall uphold and promote *its values and interests*' in its 'relations with the wider world' (Article 3(5) TEU). These instructions illustrate 'sanctioned variation'[125] within the Treaties, aligning with the *Polydor* requirement to understand every agreement concluded by the Union in its own context.[126] That idea has influenced the Court's interpretation of quite different association agreements with neighbouring countries, for example, which range from (then) active[127] to frozen[128] accession processes; as well as arrangements that transcend accession as an objective.[129]

The EU-UK TCA joins the latter cluster of relations now; but what cohered different examples on the *Polydor* spectrum was a legally meaningful distinction between external agreements and Union membership. For example, in *Demirkan*, it was confirmed that 'the interpretation given to the provisions of European Union law, including Treaty provisions, concerning the internal market cannot be automatically applied by analogy to the interpretation of an agreement concluded by the European Union with a non-Member State, unless there are express provisions to that effect laid down by the agreement itself'.[130] More generally, Opinion 2/13 strongly resisted what we might term systemic sharing i.e. external extension of 'essential characteristics' of EU law. However, the WA extends both primacy and direct effect in the UK's post-membership relations with the EU;[131] and the judgments in

[123] P Leino and L Leppävirta, 'Does staying together mean playing together? The influence of EU law on co-operation between EU and non-EU states: the Nordic example' (2018) 43 EL Rev 295, 312. However, on the second point, compare Bekkedal (n 121).
[124] Editorial Comments, 'Polar Exploration: Brexit and the Emerging Frontiers of EU Law' (2018) 55 CML Rev 1, 15.
[125] S Weatherill 'The Several Internal Markets' (2017) 36 *Yearbook of European Law* 125, 176.
[126] Case 270/80 *Polydor*, EU:C:1982:43, paras 14-16.
[127] E.g. Case C-63/99 *Gloszczuk*, EU:C:2001:488, on the pre-accession Association Agreement with Poland.
[128] E.g. Case C-221/11 *Demirkan*, EU:C:2013:583, on the Association Agreement with Turkey.
[129] E.g. Case C-351/08 *Grimme*, EU:C:2009:697, on the sectoral Agreements with Switzerland.
[130] *Demirkan* (n 128), para. 44.
[131] See Article 4 WA, which provides that 'legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law; (Article 4(1)) and requires the UK to 'ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation' (Article 4(2)). Note also the statement in Article 4(1) that

both *RO* and *IN* now demonstrate that there are core components of EU primary law as 'essential' as mutual trust that might in fact be shared – *that are shareable* – with neighbouring third states. Most fundamentally, neither the circumstances in nor extent to which essential characteristics of the EU legal order can be shared beyond the parameters of Union membership has yet been systematically articulated, which also means that, once again, the wider reverberations of positions formed either for or in reaction to Brexit are not yet known. In their analysis of *IN*, Fredriksen and Hillion ventured to uncharted constitutional lands in suggesting that the Court may have created a new 'fundamental status' in EU law – not the 'fundamental status' of Union citizenship, which is inherently linked to Member State nationality;[132] but a fundamental status specifically conceived in the context of EEA relations, premised on extending the internal market 'in the most complete way possible'.[133] However, they also point out that it is not clear whether Schengen and/or the surrender Agreement were equally important components in the Court's reasoning.

If a commitment to shared values is what gels the whole Union ecosystem together, then a commitment to protecting and securing these values within the Union, in the first instance, matters profoundly. Article 2 TEU expresses the values on which the European Union is founded, and Article 3 commits the Union to their 'promotion'. The preamble to the Charter of Fundamental Rights adds that the Union contributes to the 'preservation and development' of these values[134] and, in *Wightman*, the Court referred to both Article 2 TEU and the Charter's preamble as sources of their status as part of the 'very foundations of the Union'.[135] In her Opinion on infringement proceedings against Poland, Hungary and the Czech Republic regarding commitments under the EU's relocation procedure, Advocate General Sharpston acknowledged that the rule of law 'has many important sub-components, such as respect for the proper balance of power between the different branches of government and ensuring the independence of the judiciary by protecting their tenure in office'.[136] However, '[a]t a deeper level, respect for the rule of law implies compliance with one's legal obligations' and '[d]isregarding those obligations because, in a particular instance, they are unwelcome or unpopular is a dangerous first step towards the breakdown of the orderly and structured society governed by the rule of law which, as citizens, we enjoy both for its comfort and its

'[t]he 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'.

[132] *Grzelczyk* (n19), para. 31.

[133] Fredriksen and Hillion (n 63).

[134] See further, D Kostakopoulou, 'Justice, Individual Empowerment and the Principle of Non-Regression in the European Union' (2021) 46 EL Rev 92, 99-100.

[135] *Wightman* (n 7), para. 62.

[136] AG Sharpston in Case C-715/17 *Commission v Poland*, Case C-718/17 *Commission v Hungary*, Case C-719/17 *Commission v Czech Republic*, EU:C: 2019:917, para. 241 of the Opinion.

safety'.[137] In her view, '[t]he bad example is particularly pernicious if it is set by a Member State',[138] an observation that connects to the discussion here by highlighting how mutual trust between Member States is corroding in some respects at the same time as it is being extended to non-Member States.

In the 1,449 pages of the EU-UK TCA, there is just one reference to mutual trust – not in the brutally arid preamble or in connection with the provisions on surrender, but a brief reference to building mutual trust through sharing information on technical barriers to trade and market surveillance. On one view, no direct comparisons could therefore be drawn between the surrender Agreement with Iceland and Norway and the TCA with the UK. Could other features of the EU-UK relationship act as surrogates for the criteria emphasised with respect to Iceland in *IN*? For example, could the legacy of the legal bond forged through *previous* Union membership suffice to enable legal specialness into the future, and if so, in what respects? For now, we simply do not know.

C. Joining the Threads: Correcting the Course of Legal Change Post-Brexit

Bringing the internal and external examples together, it should first be reiterated that the full scale and scope of changes to EU law produced by Brexit will only be determined through the extent to which they are replicated – or reversed – beyond the specific case of Brexit. In that way, and over time, the framing of Brexit on the EU side as a process of law will be tested. There is already evidence of a maturing of fundamental EU legal principles and of the ambitions of solidarity and common purpose, and not just the legal bonds, on which the Union is based. There are positive signs of wider institutional sharing in and ownership of expressing and progressing the Union 'ecosystem'. And there is greater alertness and openness to the complexity of EU law in both its internal and external senses.

Nevertheless, while Brexit returned activities of high strategic voltage to the processes and structures of EU law, it changed EU law in some respects, especially concerning the legal force of political decision-making and the legal coordinates of Union membership. Taking the second point first, greater clarity about the constituent elements of the Union's 'special relationships' with (some) third states is needed. This involves both spelling out the legal premises of 'special', in both infrastructure and context-appropriate ways. It also entails reflecting further, in consequence, on the legal distinctions between membership and non-membership. In both senses, we need to understand which essential characteristics of the EU legal order can – and which should not – be extended to (which) third states. On the first point, ensuring meaningful processes of scrutiny and review is vital.

[137] Ibid.
[138] Ibid.

The increasingly powerful, and increasingly binding, influence of the European Council as well as growing instances of privileging of form over substance raise points of concern. The rushed acceptance of the Withdrawal Agreement in the very final stages – and of the Trade and Cooperation Agreement even more so – did not project the EU institutional system (or national ratification processes) in a very positive light. For example, the speed at which the European Parliament was expected to assess and give consent for the TCA was disturbing,[139] compounding concerns about a side-lining of its 'representative influence' that can be traced, on either side of Brexit, to management of the Eurozone crisis[140] and of Covid-19.[141]

The legal changes both amplified and newly produced by Brexit thus underline that the Union is more than capable of setting good law-making examples and not immune from setting bad ones. In many respects, assessments of EU law-making that addresses exceptional challenges apply the expected criteria of assessment, engaging primary law parameters established in the Treaties such as the principles of conferral, institutional balance, sincere cooperation, and proportionality, as well as the Charter of Fundamental Rights (notably to date, Article 47 and the requirements of effective judicial protection). However, even if we already apply shared criteria of assessment to evaluate Union law-making, how we conceive and apply them could be further developed. Both internal and examples were drawn from in this paper to illustrate Brexit's contribution to EU legal change and it is argued that connecting how principles of EU law are conceived in both the internal and external domains of the Union's ecosystem offers a route to better EU (crisis) law-making.

The principle of effectiveness provides a strong illustration. According to Article 13 TEU, '[t]he Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions'. However, when we think about effectiveness in the context of events or challenges like Brexit, the emphasis tends to be narrow: a focus on effectiveness of outcome, and normally on the outcome for a particular crisis or challenge in isolation. But effectiveness – of rights, of EU law, of the EU legal order – has multiple dimensions and these include the capacity to indicate, and not just circumvent, systemic limits. Accetto and Zleptnig

[139] Two months later than intended, the European Parliament granted consent for the TCA on 28th April 2021.
[140] Dawson and de Witte (n 90) 817.
[141] See Editorial Comments (n 82) 280: 'one may regret that the European Parliament did not seize the opportunity to ask the ECJ to examine the content of the December deal. It could have provided an occasion for the Court to build on its limited case law regarding the European Council, and further articulate the legal framework within which, as an EU institution, it is to operate'. See similarly, on Article 122 TFEU as a legal basis for Covid-19 response measures, Dermine (n 17) 345: 'one cannot help sensing a certain malaise when observing that an emergency clause – whose decision-making procedure is dominated by the Council and only provides for the information of the European Parliament – is being used to raise close to one trillion euros, and to pass unprecedented, far-reaching institutional reforms, which have the potential to transform the founding structures and templates of European integration'.

ask a critical question in this respect: is effectiveness 'just a desired outcome, or also a tangible legal force within the [Union] legal order'?[142] They argue that effectiveness in fact provides 'a tool to measure the overall success of [EU] law'; that it is 'one of the fundamental governing principles of [Union] law with overarching implications not just for individuals…but above all for the coherence, integrity and proper functioning of the [Union] legal order'.[143] Reviewing case law on effective judicial protection, for example, they underline that effectiveness is about *quality* as much as equality.[144]

In this understanding, effectiveness works against systemic fragmentation – which, we have seen, is a significant risk when responding to exceptional challenges through legal measures. First, in an internal sense (the domain explored by Accetto and Zleptnig), effectiveness has served to advance the role of EU law in national systems and to protect in national courts the rights conferred by EU law on individuals. More broadly, Thies argues that 'the Court's focus, when referring to effectiveness in the internal EU legal order, has been on the enforcement of EU law *and the functioning of the EU legal order*'.[145] But the full potential of effectiveness is unleashed by also considering, second, its external functions. In that sense, Cremona suggests that '[t]he structural principles that we may call *systemic* characterise the type of international actor the EU is, and the norms it produces in its external policy-making'; they are 'concerned with *the operation of the system as a whole* as opposed to the interaction between its individual components, with building the EU's identity as a *coherent*, *effective* and *autonomous* actor in the world'.[146] Thies then demonstrates how the contributions of both the Union and its Member States to EU external relations, acting in mutually reinforcing ways and through a range of formations, have been recognised in the Court's case law. With resonance for themes seen across this paper in the context of crisis law-making, she underlines the Court's protection of unity and coherence, including where 'EU external action involves political decision-making' and emphasising the limits set by 'rules stemming from the EU constitutional legal order'.[147]

The internal and external domains of EU law have specific contexts that do not always enable direct translation between them.[148] But reflecting across them sparks, at the same time, more rounded understandings of the interests at stake: of how principles can have different dimensions and functions yet be linked through overarching objectives. While more familiar in EU external relations

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[142] M Accetto and S Zleptnig, 'The Principle of Effectiveness: Rethinking its Role in Community Law' (2005) 11 *European Public Law* 375, 376.
[143] Ibid.
[144] Ibid. 389.
[145] A Thies, 'The Search for Effectiveness and the Need for Loyalty in EU External Action' in Cremona (ed.) (n 65) 264, emphasis added.
[146] Cremona, 'Structural Principles and their Role in EU External Relations Law' in Cremona (ed.) (n 65) 27, emphasis in original.
[147] Thies (n 145) 264.
[148] As discussed in Azoulai (n 106) 31.

law, appeals to coherence and unity within the frame of the EU legal order do appear in case law on the internal system too: notably in *Melloni,* requiring that the 'primacy, unity and effectiveness of EU law are not…compromised' in the multi-layered system of EU fundamental rights protection.[149] As a facet of effectiveness, unity is not the same as uniformity or uniform application of EU law: it enables recognition of context. As a concept, it is more developed in EU external relations, but it has untapped potential for organising complexities in the Union's internal legal domain. Moreover, we have seen in EU crisis law that dynamics previously more characteristic of the external domain are increasingly evident in the internal domain. Azoulai draws from *Defrenne* to show that the Court 'made a fine distinction between the two distinct uses of the concept of "principles" in relation to the first part of the Treaty and to Article [207 TFEU] on commercial policy', with '[t]he former use of the concept of "principles" concern[ing], the Court stated, "the very foundations of the Community" whereas the latter concerns "the coherence of its external relations"'.[150] However, what Brexit and similar levels of challenge demonstrate is that, behind the objectivity projected through recourse to processes and measures of law, the coherence of EU *internal* relations has in some respects become vulnerable too.

Nothing about the crises faced by the Union supports overturning the fundamental boundary principles developed in *ERTA* and *Les Verts*. Reflecting on both internal and external examples for the purposes of Brexit inspires, instead, a way not to deny the regulatory agility that crisis events require but, instead, to anchor our assessment of it in EU constitutional law. Exploiting the deeper implications of principles like effectiveness in both internal and external EU legal domains to progress that work exemplifies the very idea of the ecosystem. It could provide significant means to correct problematic changes to EU law produced by Brexit but not, since then, confined to it.

5. Conclusion

In the 2016 Decision on a 'new settlement' between the EU and the UK, an expression of more limited political commitment to further European integration specific to the UK – qualifying the concept of ever closer union of the peoples of Europe – was not just acknowledged or conceded but intended to be reflected in a future revision of the Treaties.[151] I am not sure that such a concession would be (legally) possible now. Before Brexit, the Court of Justice engaged with 'ever closer union' in case law on access to documents, noting that the TEU preamble refers to 'decisions being taken as closely as possible to the citizen in accordance with the principle of subsidiarity'.[152] However, in *Wightman*,

[149] Case C-399/11 *Melloni*, EU:C:2013:107, para. 60.
[150] Azoulai (n 106) 34; referring to Case 43/75 *Defrenne v Sabena*, EU:C:1976:56, para 29.
[151] 2016 Decision (n 1), Section C ('Sovereignty').
[152] E.g. Case C-57/16 P *ClientEarth*, EU:C:2018:660, para. 73.

which I think we will come to know not as a 'Brexit case' but as a fundamental 'EU legal order' case, the Court expressly invoked the creation of an ever closer union of the peoples of Europe as the very purpose of the Treaties,[153] building on the more diffident idea in Opinion 1/91 that the objective of the Treaties is 'to make concrete progress towards European unity'.[154] This step produced a symmetry of constitutional exposition across the decades; but perhaps without the shrillness attributed to similar statements in Opinion 2/13 on accession to the ECHR, characterised in that context as rigidity, arrogance, selfishness, or indeed fearfulness.[155]

How the complexity of integration both internally and externally can be progressed while sustaining a unifying desire to progress it remains a critical Union challenge for the years ahead. At one level, perhaps Brexit crystalised that there must be a core commitment, and that compromises can be made – and differences not just tolerated but actively supported – only beyond it. What Brexit makes more complex is that this shared core connects to the idea of an ecosystem: not the Union's values or its structural principles or its policies in isolation; but some kind of stable yet evolving compound with elements of all of these; tied closely to where (in institutional terms) decisions are made and to how adhering to them is enforced. Puzzlingly, this knotty understanding of the integrity of the Union ecosystem acquired both density and elusiveness through Brexit. Bradley characterises Brexit as an 'existential moment for the Union, where it had to fall back on its values, *beyond the comforting principles and rules of the Treaties*'; in his view, the Union's 'reaction, as reflected notably in the European Council Guidelines of 29 April 2017, was balanced and defensive, not vindictive and aggressive, and relied on the unity and solidarity of the Member States'.[156]

This solidarity-rooted, European Council-led Brexit process marked a departure from the Union's management of preceding 'existential moments' and shaped a law-making model replicated to some extent for other high-stakes challenges, seen most recently in the adoption of the Covid-19 response package. But that then tempers the credibility of continuing to invoke an existential threat defence for extraordinary measures. Notwithstanding the Union's success in navigating the challenges and provocations produced by it, Brexit thus brings to the surface a vital systemic question: '[s]hould the consecutive constitutional crises be understood as challenges to the paradigms, orientations and expectations that have guided European studies for the past decades?'[157] This paper has argued that we relax the burden and responsibility of assessment at our peril; and that while complexity should be welcomed where it is meaningful and more reflective of reality, it must be underpinned by clear

[153] *Wightman* (n 7), para. 61.
[154] Opinion 1/91, EU:C:1991:490, para. 17.
[155] See again, the references in (n 12).
[156] K Bradley, 'Agreeing to Disagree: The European Union and the United Kingdom after Brexit' (2020) 16 *European Constitutional Law Review* 379, 416, emphasis added.
[157] Joerges and Kreuder-Sonnen (n 71) 118.

criteria that both constitute and delimit the Union's diverse legal relationships. It has emphasised the non-negotiability of appropriate scrutiny, which requires both the interrogating of fundamental legal premises, such as 'legislative' functions vis-à-vis the European Council, and the unblocking of pathways for review so that these questions can be asked in the first place. It has underlined the perhaps surprisingly under-determined legal sense of the constitutive elements of Union membership. It has also advocated a merged understanding of principles of EU law at play in both the internal and external spheres of the EU's ecosystem to provoke ways of thinking about constitutional parameters that are meaningfully but not futilely constraining of Union activity.

One final question: did Brexit leave other imprints on EU law that might prove more difficult to erase? In *Tarola*, the Court of Justice referred to 'one of the other objectives pursued by Directive 2004/38, namely the objective of striking a fair balance between safeguarding the free movement of workers, on the one hand, and ensuring that the social security systems of the host Member State are not placed under an unreasonable burden, on the other'.[158] This statement is about balancing freedom of movement for *workers* with ensuring that the social security systems of Member States are not placed under unreasonable burden – a test usually seen in case law concerning EU citizens who are *not* working or self-employed – and it came *after* Brexit. The pending infringement proceedings against Austria noted at the beginning of this paper are pivotal on this question.[159] To treat all EU workers equally and with respect, I hope that we will leave Brexit behind on this point at least.

[158] Case C-483/17 *Tarola,* EU:C:2019:309, para. 50.
[159] *Commission v Austria* (n 4).