

Article

## A Knot not to be Cut? The Legacy of Brexit over the CJEU

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**Abstract:** What was the role of the Court of Justice of the European Union (CJEU) in the Brexit saga? And what will the impact of Brexit be over the future structure and activity of the CJEU? This article deals with this twofold question and accordingly deals with three different issues. Firstly, we offer a reflection on the questions and the risks raised by the *Wightman* case, where the CJEU ruled on the unilateral revocation of the UK notification of its intention to withdraw from the European Union (EU) under Art. 50 TEU. Secondly, we shall deal with the impact of Brexit on the composition of the CJEU and, particularly, the risks for the independence of the Court raised by the advanced termination of the mandate of the British Advocate General. Thirdly, we will provide some insights on the scope of the jurisdiction of the CJEU in the post-Brexit Union, emphasizing how the Withdrawal Agreement maintained its jurisdiction during and even beyond the transition period.

**Keywords** Court of Justice of the European Union, Brexit, Interpretation, Post-Brexit EU, Advocate General, EU Law

### Issue

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## 1. Introduction

In a famous decision given by the House of Lords, Lord Denning, one of the most influent lawyers in the history of the United Kingdom (UK), described the impact of Community law over the British legal system by using the image of the “incoming tide” which “flows into the estuaries and up the rivers. It cannot be held back” (*Bulmer (HP) Ltd v J Bollinger SA* [1974] Ch 401, paras 418–19). The irony in this is that Brexit can be defined as an effort to push the tide of EU law back to recover the original meaning of British sovereignty, understood as parliamentary supremacy (Dicey 1885) in a context characterised by a partly written constitution. This is legal system characterised by a “process of gradually converting an uncoded constitution into a codified one” (Bogdanor, Khaitan, Vogenauer 2010), so that fundamental aspects of the British constitution are not governed by statutes (Bogdanor 2019). From the EU perspective, the Brexit saga was a shocking turning point, the moment of rupture with its traditional “awkward partner” (George 1990). In this saga, the Court of Justice (CJEU) played a relevant role and contributed to disclosing the tensions between the respect for national sovereignty and the independence of supranational institutions.

45 The purpose of this article is twofold: to investigate the role of the Court of Justice of the European  
46 Union during the Brexit process and the possible impact of the British withdrawal of the EU  
47 membership on the composition and jurisdiction of the Court. The centrality of the CJEU as  
48 acknowledged by the wording of the Withdrawal Agreement (see Council Decision 2020/135/EU of  
49 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of  
50 Great Britain and Northern Ireland from the European Union and the European Atomic Energy  
51 Community; hereafter WA) derived from the existence of a legal “knot”; that is, the web of norms  
52 created by years of membership of the UK within the EU. As evidence of this, consider that EU law  
53 has over the years contributed to creating new rights that have partly been retained by the domestic  
54 norms governing the repeal of EU law in the UK (see European Union (Withdrawal) Act 2018).  
55 Another example of the complex context triggered by the Europeanisation of the British system is the  
56 *Miller I* case, firstly heard before the High Court (*R (Miller) v Secretary of State for Exiting the*  
57 *European Union* [2016] EWHC 2768) and then before the UK Supreme Court (*R (Miller) v Secretary*  
58 *of State for Exiting the European Union* [2017] UKSC 5), which emphasised the importance of the EU  
59 integration for the genesis of a new category of rights. In addition, a series of recent cases concerning  
60 the validity of the Council Decision 2020/135/EU as regards the breach of EU citizenship rights also  
61 shows how difficult it is to cut legal ties without breaking fundamental rights that became part of the  
62 British constitution (see T-198/20, *Shindler and Others v Council* pending; T-231/20, *Price v Council*  
63 pending; T-252/20, *JU and Others v Council* pending). All this means that the EU membership has  
64 created constitutional ties in the UK that will not be cancelled: it is a legal knot that cannot easily be  
65 cut.

66 Alongside the several economic and political issues that needed to be settled, the legal ties connecting  
67 the Member States in the EU legal order and governing such economic and political relationships,  
68 indeed emerged as a critical knot in the Brexit process. By triggering the withdrawal process, the UK  
69 has not only mobilised political actors and their negotiations, but it has also shaken the existing legal  
70 interdependences, which remained relevant for all the time that the UK continued to be a Member  
71 State and will still affect to some extent the post-Brexit Union. The CJEU as the guardian of the  
72 Treaties has thus become a key player to disentangle such a knot and to unleash conflicts in the  
73 withdrawal process.

74 This article focuses on the role of the CJEU in Brexit, with the aim of disclosing the main legacies of  
75 Brexit from the perspective of this key institution. The analysis is thus divided into three parts, each  
76 highlighting the main issues of the two research questions recalled above. The first part (sections 2 and  
77 3) examines how the CJEU contributed to interpreting Art. 50 of the Treaty of the European Union  
78 (TEU), which guided the Brexit process. The analysis is thus centred on the *Wightman* case, which set  
79 a milestone in the governance of the withdrawal process. The subsequent parts focus on how Brexit  
80 will likely influence the role of the CJEU in the post-Brexit Union. They are thus devoted to the  
81 analysis of the independence of the Court (section 4) and the scope of its jurisdiction (section 5) in the  
82 post-Brexit Union. The final remarks highlight the importance of Brexit for the future case law of the  
83 CJEU.

84

## 85 **2. Brexit and national sovereignty in the EU legal order**

86 During the Brexit process, the CJEU was called to interpret Art. 50 TEU under preliminary ruling  
87 proceedings (see C-621/18, *Wightman and others v Secretary of State for Exiting the European Union*  
88 ECLI:EU:C:2018:999). The preliminary ruling has worked as a powerful bridge connecting national  
89 judges and the CJEU. According to Art. 267 TFEU governing the procedure, national judges may or  
90 shall raise preliminary questions to the CJEU concerning either the validity or the interpretation of EU

91 law if these questions are necessary to solve a national case. In the *Wightman* case, the Scottish Inner  
92 Court of Session asked the CJEU to clarify whether the British decision of withdrawal could be  
93 revoked unilaterally. The national court raised the question because Art. 50 TEU did not expressly  
94 regulate the right to revocation of the notification to withdraw. In its capacity of exclusive interpreter  
95 of the Treaties, the CJEU had to rule on whether such revocation was admissible, and if so, whether it  
96 could be unilateral or should be subject to specific conditions.

97 When deciding on a number of crucial aspects governing the departure of a Member State from the  
98 EU, the CJEU contributed not only to clarifying the viable options concerning Brexit, but also offering  
99 several insights on the nature of the EU legal order itself (Martinico and Simoncini 2020). It  
100 particularly emphasised the precedence of national sovereignty in the decision to withdraw the  
101 membership and reverse such a decision, over any other considerations of supranational autonomy and  
102 the legitimate expectations of the remaining Member States.

103 Both Advocate General (AG) Campos Sánchez-Bordona and the Grand Chamber of the Court  
104 recognised that Art. 50 TEU does not expressly prohibit nor authorise any form of revocation of the  
105 withdrawal notification, but they identified behind the legal minimalism of Art. 50 TEU the existence  
106 of a sovereign right of the Member State to reverse the withdrawal process. When filling the lacuna in  
107 the black letter of the law, their respective interpretations however differed in the conceptualisation of  
108 such right and the conditions for its exercise.

109 AG Campos Sánchez-Bordona relied on international law and held Art. 50 TEU as “lex specialis, in  
110 respect of the general rules of international law on withdrawal from treaties, but not a self-contained  
111 provision which exhaustively governs each and every detail of the withdrawal process” (Opinion of  
112 the AG Campos Sánchez-Bordona, Case C-621/18, *Wightman and others v Secretary of State for  
113 Exiting the European Union*, ECLI:EU:C:2018:978, para 85). The CJEU, instead, refused to treat the  
114 withdrawal and its reversal as an international law issue related to the participation of States in a Treaty  
115 and reaffirmed the difference between the EU legal order and “ordinary international treaties”  
116 (*Wightman*, para 44), considering its findings “only corroborated by the provisions of the Vienna  
117 Convention on the Law of the Treaties” (Ibid., para 70). The Court started its reasoning from the idea  
118 that the EU is an autonomous legal order with its own institutions and independent sources of law. It  
119 thus justified its interpretation on the grounds of the “structured network of principles, rules and  
120 mutually interdependent legal relations binding the EU and its Member States reciprocally as well as  
121 binding its Member States to each other” (Ibid., para 45).

122 The Court stressed the autonomy of EU law and marked the distinctiveness of EU law and dualism in  
123 the application of international law. The EU legal order shall be protected against the external  
124 interference of international law, including in the foundational moment of withdrawal. *Wightman*  
125 reiterated the consistency of the case law since the *Van Gend and Loos* case (26-62,  
126 ECLI:EU:C:1963:1), which “expressly cut the umbilical cord with classic international law” (Schütze  
127 2015, p. 79). The autonomy of EU law thus brings about the assessment of the relevant question in  
128 light of the Treaties, as the Court has emphasised both in the *Kadi* case (C-402/05 P and C-415/05 P,  
129 *Kadi and Al Barakaat International Foundation/Council and Commission* ECLI:EU:C:2008:461)  
130 when assessing the validity of restrictions on suspected terrorists (Simoncini 2009; Avbelj, Fontanelli  
131 and Martinico 2014) and in Opinion 2/13 on the draft agreement providing for the accession of the  
132 European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms  
133 (ECLI:EU:C:2014:2454) when evaluating the EU accession to the ECHR (Eeckout 2015) – both  
134 referred to in *Wightman*.

135 The CJEU reconnected the right of withdrawal to the right of the State “to retain its status as a Member  
136 State of the European Union, a status which is not suspended or altered by that notification”  
137 (*Wightman*, para 59). The Court focused on the Member States’ commitment to the common values of

138 integration and the goals of the EU project and emphasized that no Member State can be forced to  
139 leave against its own will (Ibid., para 66). As Eeckhout and Frantziou (2017, pp. 699-700 and 702-703)  
140 underlined, such interdependence means that a complex system of rights is at stake in the withdrawal  
141 process and this requires a specific constitutional reading of Art. 50 TEU.

142 This characterisation of the sovereign right of the Member State to commit to and withdraw from the  
143 EU legal system persuaded the Court not to impose any condition on the exercise of this right. To  
144 avoid the risk of undue interferences with the right, the Court only required the revocation to be  
145 “unequivocal and unconditional, that is to say that purpose of that revocation is to confirm the EU  
146 membership of the Member State concerned under the terms that are unchanged as regards its status  
147 as a Member State, and that revocation brings the withdrawal procedure to an end” (*Wightman*, para  
148 74).

149 The CJEU thus ruled against the Council and the Commission, who asked for the revocation to be  
150 subject to mutual consent through the unanimous approval of the European Council, and it also  
151 deviated from the Opinion of the Advocate General, who considered that the unilateral exercise of the  
152 right should be reasonably tempered to prevent procedural abuses. In his interpretation, revocation  
153 should be exercised by ensuring mutual trust between the departing State and the EU and required  
154 reasonable justifications to ensure that collateral legal tactics do not drain negotiations and do not turn  
155 a right into a privilege.

156 The absence of procedural requirements, however, weakens the capability of the CJEU to control the  
157 authenticity of the reversal decision. When rejecting any conditions of mutuality, in fact, the Court  
158 implicitly required all the other Member States to trust the declaration of the State to reverse its  
159 withdrawal intentions unequivocally and unconditionally. The CJEU relied on the good faith of the  
160 decision of the departing State to genuinely reverse the withdrawal, and thus bound the remaining  
161 Member States to that decision. This means that the principle of mutual trust still applies in the relations  
162 between both un-departing Member States and the other Member States, because they are all  
163 committed to the same values. As the CJEU suggested, among others, in Opinion 2/13, mutual trust is  
164 a pillar of EU law, which operates as a presumption in the relations among Member States and as cases  
165 in asylum law show, can only be challenged under very specific circumstances (see Canor 2013).

166

### 167 **3. Systemic risks of the *Wightman* ruling**

168 In *Wightman*, for the first time, the CJEU offered an interpretation of Art. 50 TEU, by reading this  
169 provision in combination with other norms of the Treaties and in light of some historical decisions. On  
170 the one hand, the Court recalled cases like *Les Verts*, *Kadi* and Opinion 2/13 to confirm the *sui generis*  
171 (and constitutional) nature of the EU (*Wightman*, para 44). On the other hand, the CJEU read Art. 50  
172 TEU from the perspective of the values that characterise the supranational integration process  
173 (Sarmiento 2018):

174

175 As regards the context of Article 50 TEU, reference must be made to the 13<sup>th</sup> recital in the preamble to the TEU, the first  
176 recital in the preamble to the TFEU and Article 1 TEU, which indicate that those treaties have as their purpose the creation  
177 of an ever closer union among the peoples of Europe, and to the second recital in the preamble to the TFEU, from which  
178 it follows that the European Union aims to eliminate the barriers which divide Europe. It is also appropriate to underline  
179 the importance of the values of liberty and democracy, referred to in the second and fourth recitals of the preamble to the  
180 TEU, which are among the common values referred to in Article 2 of that Treaty and in the preamble to the Charter of  
181 Fundamental Rights of the European Union, and which thus form part of the very foundations of the European Union legal  
182 order (see, to that effect, judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and*  
183 *Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraphs 303 and 304) (par. 61-62).

185 However, the reading proposed by the CJEU presents some risks. The language of the sovereign rights  
 186 can expose the EU and the remaining States to abuses in the unilateral revocation of Art. 50 TEU. For  
 187 instance, States could use the threat of exit to renegotiate better (from their point of view) conditions.  
 188 To avoid this scenario, we think that “a sustainable reading of Art. 50 TEU” (Martinico and Simoncini  
 189 2020) is necessary to escape any instrumental (ab-)uses of this norm. The frequent mention made by  
 190 the CJEU of the concept of sovereignty is a ground of criticism in this respect, as it risks exposing Art.  
 191 50 TEU to perilous unilateral readings. The word “sovereign” was repeated six times in the English  
 192 version of the *Wightman*, becoming its keyword. Such an emphasis on this concept remains unbalanced  
 193 in so far as the CJEU did not refer to the principle of sincere cooperation. It seems to us that the  
 194 Luxembourg Court excessively focused on an approach aimed at guaranteeing the sovereign choice at  
 195 the costs of the plurilateral design of Art. 50 TEU. This creates a systemic risk, which may trigger  
 196 serious instability in the withdrawal process. This risk is only mitigated by the fact that Art. 50 TEU  
 197 cannot be read as if it were detached from the broader constellation of values preserved by the EU  
 198 Treaties.

199

#### 200 **4. The independence of the CJEU in the post-Brexit Union**

201 In accordance with Art. 50 (3) TEU, the Treaties cease to apply to the withdrawing Member State from  
 202 the date of entry into force of the WA. As a consequence, as stated in the Declaration of 29 January  
 203 2020 by the conference of the representatives of the Governments of the Member States on the  
 204 consequences of the withdrawal of the United Kingdom from the European Union for the Advocates  
 205 General of the Court of Justice of the European Union (XT 21018/20), the ongoing mandates of  
 206 members of EU institutions, bodies, offices and agencies nominated, appointed or elected in relation  
 207 to the UK's membership of the Union end on the date of withdrawal.

208 This affected the same composition of the Court of Justice of the European Union. The British judges  
 209 and the British Advocate General, Eleonor Sharpston, were called to leave their mandates. If the  
 210 departure of British judges stems from the black letter of Art. 19 (2) TEU, for the Advocate General  
 211 there is no specific legal basis that imposes such a choice. As under Art. 19 (2) TEU, in fact, both the  
 212 General Court and the CJEU are composed of judges from each Member State, British judges had to  
 213 terminate their mandate in advance.

214 It was the Declaration of 29 January 2020 that applied the same destiny to the Advocate General  
 215 permanently nominated by the UK, but not legally constrained by nationality clauses. On the one hand,  
 216 the system of appointment of the AG provided that bigger Member States -that is Germany, France,  
 217 Italy, Spain, the UK and Poland- should permanently appoint six AGs, while the others -currently five-  
 218 will rotate among the smaller States (see Declaration 38 on Art. 252 of the Treaty on the Functioning  
 219 of the European Union regarding the number of Advocates General in the Court of Justice, annexed to  
 220 the final act of the intergovernmental conference which adopted the Treaty of Lisbon). On the other  
 221 hand, Protocol No 3 on the Statute of the Court of Justice of the European Union, annexed to the  
 222 TFEU, did not envisage any nationality requirement for the exercise of the AG's functions and its Art.  
 223 8 indicates as the only reasons for dismissal normal replacement, death, resignation (Art. 5 of the  
 224 Statute) and deprivation of office “only if, in the unanimous opinion of the Judges and Advocates  
 225 General of the Court of Justice, he no longer fulfils the requisite conditions or meets the obligations  
 226 arising from his office” (Art. 6 of the Statute).

227 There is no apparent legal basis for dismantling the guarantees that frame the functions of the British  
 228 Advocate General. Unlike for judges, no Treaty provision subordinates the functions of the Advocates  
 229 General as members of the Court of Justice to nationality clauses; in addition, the Statute of the Court,

230 which has the same force of the Treaties as primary law, does not provide any exclusion clause linked  
231 to national representation. This persuaded British AG Sharpston to act for the annulment of the  
232 decisions concerning her removal in two actions that were kept confidential. She asked for the  
233 annulment of the Declaration of 29 January 2020, insofar as it integrated her post in the rotation system  
234 among the Member States. She also challenged the letter of 31 January 2020 that the President of the  
235 CJEU, Koen Lenaerts, addressed to the President of the Council of the European Union and of the  
236 Conference of the Representatives of the Governments of the Member States, Andrej Plenković, which  
237 confirmed the vacancy, while allowing her to keep the position until her own replacement.

238 More recently, Sharpston also acted for the annulment of Decision 2020/1251/EU of 2 September 2020  
239 of the Representatives of the Governments of the Member States insofar as it appointed a new  
240 Advocate General and she also asked for interim relief. Two orders of the Vice-President of the CJEU  
241 (C-423/20 P(R) and C-424/20 P(R), *Council v Sharpston* ECLI:EU:C:2020:700) set aside the previous  
242 order of the Judge of the General Court granting as an interim measure the suspension of the Decision  
243 of the Representatives of the Governments of the Member State regarding the appointment of a new  
244 Advocate General (T-550/20 R, *Eleanor Sharpston v Council of the European Union and*  
245 *Representatives of the Governments of the Member States* ECLI:EU:T:2020:416). The CJEU  
246 particularly found that the General Court erred in law when granting interim measures, because the  
247 Decision 2020/1251/EU was not an act of the Member States acting in the Conference of the  
248 Representatives of the Governments “collectively exercising the competences of the Member States”  
249 and not of the Council, so that their act could not be subject to judicial review by the EU courts (C-  
250 423/20 P(R), para 26). When adjudicating the substance of the case, the General Court thus relied on  
251 this interpretation of the Vice-President of the CJEU and consequently dismissed the action for  
252 annulment on the grounds that there was no act adopted by an EU institution at stake that could be  
253 subject to the judicial review of the Court (T-550/20, *Eleanor Sharpston v Council of the European*  
254 *Union and Representatives of the Governments of the Member States*, ECLI:EU:T:2020:475, para 38).

255 This intensive litigation clearly shows the existing concerns about the risk for the lack of independence  
256 of the EU judicial branch and transparency since the AG Sharpston was dismissed and replaced after  
257 a series of decisions, which allegedly breached the relevant norms governing the procedure to be  
258 followed (Kochenov and Butler, 2020a; Kochenov and Butler, 2020b; Kochenov and Butler, 2020c).  
259 The case discloses the tension between the political opportunity of keeping an Advocate General  
260 appointed by the UK and the legal guarantees concerning the independence of such a role. The case is  
261 peculiar because the need to cut the political ties with the exiting Member State directly clashes with  
262 the principle of independence of courts that frames the rule of law in the EU and its Member States.  
263 The tensions between the principle of national sovereignty and the independence of EU institutions  
264 were brought within the organisation of the Court, showing the legal difficulties to cut the existing  
265 interdependences between national sovereignty and supranational autonomy. In other words, the case  
266 shows the latent conflict between the principle of intergovernmentalism, which relates to the principle  
267 of national sovereignty in the composition of EU institutions and the principle of independence of the  
268 judiciary, which lies at the roots of the rule of law and preserves the supranational function of the Court  
269 and its Advocates General.

270 Although the CJEU contributed to the implementation of the European project, its contribution was  
271 based on the judicial neutrality to the interests of the parties in the trial. Even more so, this applies to  
272 an organ like the AG, which performs serving functions aimed at the uniform interpretation and  
273 application of EU law by a Court composed of national judges. The independence of other institutions  
274 and, particularly, of the Commission, instead, is a means to pursue political goals. It is not neutrality  
275 to the interests at stake, but the discretionary capability to choose among the interests at stake and  
276 define how to best pursue supranational interests in a wider accountability framework.

277 Legal scholarship has effectively pointed out that the Declaration of 29 January 2020 has a clear  
278 political value, but it cannot reverse legal provisions of the Statute of the Court regulating AGs’  
279 appointment and removal, which have the force of primary law of the Treaties (Halberstam 2020;  
280 Kochenov 2020; Pech 2020). Unlike protocols, declarations attached to the Treaties are non-binding  
281 statements. Declaration 38 thus cannot affect Art. 19 (2) TEU, under which AGs “shall be appointed  
282 by common accord of the governments of the Member States for six years” and can be reappointed. In  
283 addition, Halberstam (2020) considers that the recitals to the Brexit WA emphasising the end of the  
284 mandates of all members of institutions have no binding force and that the inclusion of AGs among  
285 the cohort of sacked officials does not necessarily flow from Art. 101 WA, which refers to continuing  
286 privileges and immunities of the members of institutions. He also questions whether the continuity of  
287 Sharpston’s office until the appointment of the new AG might be an implicit admission of the  
288 legitimacy of her service. As Pech (2020) effectively held, “there cannot be an application à la carte  
289 of the CJEU Statute: Either AG Sharpston is covered by it or she isn’t. She cannot be the Court’s  
290 *Schrödinger’s* AG”, trapped in the sort of paradoxical situation proposed by the Nobel Prize physicist  
291 in his thought experiment of the cat both alive and dead at the same time.

292 To protect the independence of the Court and the rule of law, Sharpston should leave her position only  
293 at the expiration of her six-year mandate. Otherwise, there would be a breach of primary EU law  
294 “triggered by a political declaration combined with one of her nationalities”, the British one (Kochenov  
295 2020). In Kochenov’s words, the breach would create the conditions for “humiliating our own Court  
296 through undermining both its independence and its attempts to take the Rule of Law seriously in the  
297 current difficult circumstances”. Only the Court - according to its own Statute - should “exclusively  
298 decide on the legal effects of Brexit (if any) on the mandate of AG Sharpston. It is not for political  
299 actors to decide this matter, in particular via an entity which is not even mentioned once in either the  
300 TEU or the TFEU” (Pech 2020.)

301 The rule of law should thus confer precedence on the independent status of the Court, preserving its  
302 usual functioning despite the occurrence of an exceptional situation as Brexit is. Political changes shall  
303 not compromise the correct functioning of independent institutions, showing that the legal knot would  
304 not be cut where the law of the Treaties prevails over political will. The first findings on the  
305 Sharpston’s case show that so far, the CJEU and the General Court have not entered the merit of this  
306 issue. Yet, it remains to be seen if and how the CJEU will reconcile its own independence with the  
307 dismissal of the AG in its next expected rulings.

308

## 309 **5. The jurisdiction of the CJEU in the post-Brexit Union**

310 Recently, the Commission decided to trigger the procedure to bring the UK before the CJEU for  
311 violation of the WA. In particular, according to the Commission some parts of the British Internal  
312 Market Bill would breach the obligation of good faith enshrined in Art. 5 of the WA and it would also  
313 conflict with the Protocol on Ireland and Northern Ireland. It has been argued that the “Internal Market  
314 Bill thus sets the scene for a perfect constitutional storm: a confrontation with the EU, a stand-off with  
315 the courts, a fundamental attack on the rule of law, and a diminution of the UK’s commitment to the  
316 rules-based international order” (Elliott 2020). In particular, clauses 44, 45 and 47 are the main sources  
317 of such a conflict. In a nutshell, they provide ministers with the “power to disapply or modify export  
318 declarations and other exit procedures”, including “any exit procedure that is applicable by virtue of  
319 the Northern Ireland Protocol” (clause 44). They also give ministers the power to disapply or modify  
320 the “effect of Article 10 of the Northern Ireland Protocol (State aid)” (clause 45). Finally, clause 47  
321 states that “regulations under section 44(1) or 45(1) are not to be regarded as unlawful on the grounds  
322 of any incompatibility or inconsistency with relevant international or domestic law”. Clause 47, in  
323 particular, openly clashes with the principle of direct effect and with other norms of international law,

324 as recognised by Northern Ireland Secretary Brandon Lewis, who spoke of a violation of international  
325 law “in a specific and limited way” at the House of Commons on 8 September 2020. On this basis the  
326 Commission activated the procedure. This episode is very telling of the central role that the CJEU can  
327 still play, especially in the transition period. This is confirmed by many provisions, among others, by  
328 Art. 131 of the WA, a clause functioning “as the juridical means to ensure the transition period  
329 maintains a ‘simulacrum’ of the supranational constitutional order in relation to the UK immediately  
330 following withdrawal” (Garner 2020).

331 This provision reads that:

332

333 “During the transition period, the institutions, bodies, offices and agencies of the Union shall have the powers conferred  
334 upon them by Union law in relation to the United Kingdom and to natural and legal persons residing or established in the  
335 United Kingdom. In particular, the Court of Justice of the European Union shall have jurisdiction as provided for in the  
336 Treaties.  
337 The first paragraph shall also apply during the transition period as regards the interpretation and application of this  
338 Agreement.”

339

340 Not by coincidence, this provision, among others, has created concerns and criticism among  
341 Brexiteers, as it seems to confirm “the ‘after-life’ of Article 258 TFEU before the end of the transitions  
342 period” (Garner 2020). Art. 258 TFEU is about the so-called infringement procedure, i.e. the  
343 mechanism according to which the Commission may bring a State which does not comply with EU  
344 before the Luxembourg Court. This procedure is characterised by a pre-judicial phase in which the  
345 Commission asks (by means of a formal notice) the State to present its views regarding an alleged  
346 breach of EU law. In light of the information brought by the State the Commission may decide to send  
347 a formal request to comply with EU law and, eventually, to bring the case to the CJEU. Stepping back  
348 to the breach of the WA, in accordance with the terms of the agreement, the CJEU is to continue to  
349 have jurisdiction in any proceedings brought by or against the UK before the end of the transition  
350 period, which is set as 31 December 2020. It is also to continue to have jurisdiction to give preliminary  
351 rulings on requests from British courts and tribunals made before the end of the transition period. The  
352 WA also makes a distinction between pending cases (Art. 86) and new cases before the CJEU (Art.  
353 87). Art. 87 WA is particularly intriguing as it reads:

354 “1. If the European Commission considers that the United Kingdom has failed to fulfil an obligation under the Treaties  
355 or under Part Four of this Agreement before the end of the transition period, the European Commission may, **within 4**  
356 **years after the end of the transition period**, bring the matter before the Court of Justice of the European Union in  
357 accordance with the requirements laid down in Article 258 TFEU or the second subparagraph of Article 108(2) TFEU, as  
358 the case may be. The Court of Justice of the European Union shall have jurisdiction over such cases.

359 2. If the United Kingdom does not comply with a decision referred to in Article 95(1) of this Agreement, or fails to give  
360 legal effect in the United Kingdom's legal order to a decision, as referred to in that provision, that was addressed to a natural  
361 or legal person residing or established in the United Kingdom, the European Commission may, **within 4 years from the**  
362 **date of the decision concerned**, bring the matter to the Court of Justice of the European Union in accordance with the  
363 requirements laid down in Article 258 TFEU or the second subparagraph of Article 108(2) TFEU, as the case may be. The  
364 Court of Justice of the European Union shall have jurisdiction over such cases.

365 3. In deciding to bring matters under this Article, the European Commission shall apply the same principles in respect of  
366 the United Kingdom as in respect of any Member State.”



367 This was one of the most contested provisions by the UK, since it extends the jurisdiction of the Court  
368 even after the end of the transition period. For the sake of clarity, Art. 89 WA confirms the binding  
369 nature of these kinds of judgements “in their entirety on and in the United Kingdom”. Another  
370 contested provision of the WA is Art. 158, according to which the CJEU has jurisdiction to give  
371 preliminary rulings on requests concerning cases “commenced at first instance within 8 years from the  
372 end of the transition period before a court or tribunal in the United Kingdom”, where “a question is  
373 raised concerning the interpretation of Part Two of this Agreement, and where that court or tribunal  
374 considers that a decision on that question is necessary to enable it to give judgment in that case”.

375 A similar scheme is applied to cases concerning Art. 18 (Issuance of residence documents) and 19  
376 (Issuance of residence documents during the transition period) of the Agreement. Finally, another  
377 confirmation of the persistence of the relevance of the case law of the Luxembourg Court can be found  
378 in Art. 174, which reads:

379 “where a dispute submitted to arbitration in accordance with this Title raises a question of interpretation of a concept of  
380 Union law, a question of interpretation of a provision of Union law referred to in this Agreement or a question of whether  
381 the United Kingdom has complied with its obligations under Article 89(2), the arbitration panel shall not decide on any  
382 such question. In such case, it shall request the Court of Justice of the European Union to give a ruling on the question.  
383 The Court of Justice of the European Union shall have jurisdiction to give such a ruling which shall be binding on the  
384 arbitration panel. The arbitration panel shall make the request referred to in the first subparagraph after having heard the  
385 parties”.

386 There are then other provisions that seem to confirm the persistent relevance of the CJEU’s case law.  
387 Even at national level Art. 26 of the EU (Withdrawal Agreement) Act 2020 about “retained EU law  
388 and relevant separation agreement law” confirms the significance of the case law of the CJEU. If, on  
389 the one hand, it is clear that judges are no longer bound by the case law of the CJEU on the  
390 interpretation of retained EU law, on the other hand, this does not exclude that they may take it into  
391 account. This was also explicitly suggested by Art. 6 of the EU (Withdrawal) Act 2018, which reads  
392 that “a court or tribunal may have regard to anything done on or after exit day by the European Court,  
393 another EU entity or the EU so far as it is relevant to any matter before the court or tribunal”.

394 This is understandable after all, since retained EU law has been shaped by the interpretation of the  
395 Luxembourg Court over the years. Moreover, one should not forget that the UK is a common law  
396 system based on the stare decisis principle, which inevitably tend to be conservative. This could  
397 represent another reason why the activity of the CJEU could be relevant even in the future, within the  
398 British borders.

399

## 400 6. Final remarks

401 Brexit was a landmark in the characterisation of the relationship between the EU and its Member  
402 States. The “incoming tide” described by Lord Denning showed all its force in the moment of  
403 maximum friction; that is, the withdrawal of EU membership. However, even after Brexit, the  
404 inextricable knot that the membership created will not vanish magically in one blow. As this article  
405 demonstrated, Brexit set a milestone for EU law and the CJEU has been one of its main interpreters.  
406 In a nutshell, the CJEU has shed some light on the structure of the EU and the relationship between  
407 the EU and its Member States, confirming its key role in the interpretation of the Treaties and in the  
408 preservation of the smooth functioning of the EU legal order. From this standpoint, the legacy of Brexit  
409 is destined to last beyond the individual case of the UK and to affect the future of the EU legal order.

410 The main legacy is the *Wightman* case, where the Grand Chamber of the CJEU delivered a landmark  
411 interpretation of Art. 50 TEU. This was the first time that the CJEU engaged with the interpretation of

412 this provision and aimed to clarify the functioning of the withdrawal process. *Wightman* disclosed the  
413 tensions between national sovereignty and EU membership and opened some potential issues in the  
414 exercise of national right to revocation of the withdrawal decision. As this article pointed out, the  
415 CJEU affirmed the existence of an unconditional right to repent and reverse the withdrawal process,  
416 which might bring about some systemic issues in the functioning of the negotiations for the  
417 withdrawal. Even though this was not the case for Brexit, the absence of any guarantees for the  
418 remaining Member States in the unilateral revocation of the withdrawal decision creates a precarious  
419 equilibrium in the application of Art. 50 TEU.

420 In addition, Brexit re-shaped to some extent the independence and the jurisdiction of the CJEU. As  
421 analysed, the tensions between the national composition of EU institutions and their supranational  
422 character reflected upon the composition of the EU judiciary and, controversially, upon the mandate  
423 of its Advocates General before the CJEU. The pending actions brought by British AG Sharpston are  
424 going to clarify how independent the EU judiciary is. The settlement of this case will provide further  
425 insights that will impact on general understanding of the role of the judiciary. As a second legacy,  
426 Brexit has thus forced the EU and the CJEU to reflect on the independence of its supranational  
427 institutions and the prevalence of the rule of law over political agreements.

428 The UK accession to the European Communities in 1972 had an impact over the style of the CJEU's  
429 decisions and on its legal reasoning (Pierdominici 2020, 317) and on this basis more recently it has  
430 been argued that changes in the composition of the CJEU shall impact on the use of precedents in the  
431 case law of the CJEU (Fjelstul 2018). Although possible, it is also true that the CJEU does not consider  
432 itself as bound to the *stare decisis* principle (Jacob 2014). It is also likely that Brexit might produce  
433 some changes in the legal reasoning and style of decisions of the CJEU as had happened after the UK  
434 accession (Nicola 2017), but these are speculations that can only be tested in the long run.

435 The third legacy of Brexit concerns the jurisdiction of the CJEU. As seen, if Brexit was supposed to  
436 cut the UK's relationship with the CJEU, the WA maintained its jurisdiction, which in practice  
437 extended beyond the transition period. The CJEU will maintain a crucial role and even at national level  
438 judges could take its case law into account as provided by the EU (Withdrawal) Act 2018. All this  
439 means that the legal knot cannot be definitely cut, it needs to be reassembled in the post-Brexit  
440 scenario, so that existing legal ties can live with the framework of the changed UK-EU relationships.

441

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448 The authors declare no conflict of interests.

449

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