

## Introduction

On June 23, 2016, a referendum was held in the United Kingdom (UK) on whether or not the UK should remain in the European Union (EU<sup>1</sup>). A narrow majority of 51.9 per cent voted to leave the EU, setting in motion a process known as Brexit.<sup>2</sup> Following domestic discussions on the path to pursue to become a non-Member State,<sup>3</sup> then British Prime Minister Theresa May submitted the official notification of withdrawal under Art. 50 *Treaty on European Union*<sup>4</sup> (TEU) to Brussels on March 29, 2017.<sup>5</sup> Pursuant to Art. 50(3) TEU, the notification kicked off a two-year phase of withdrawal negotiations, which, however, ended on March 29, 2019, without the UK having left. With the British parliament having rejected the draft of a UK-EU withdrawal agreement, the UK had requested – and been granted – an extension of the negotiation period under Art. 50(3) TEU.<sup>6</sup>

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- 1 Throughout this study, the term ‘EU’ is used to refer to the current European Union but also its predecessors. In some instances, for example in case of quotations or where it is relevant for the historical background, reference is made to the exact name of a predecessor organisation of the current EU.
  - 2 For the results of the referendum in detail, see UK Electoral Commission, ‘Results and Turnout at the EU Referendum’ (08.02.2023) <<https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/eu-referendum/results-and-turnout-eu-referendum>>.
  - 3 For an initial UK government report on the process of withdrawal, see UK Government, ‘The Process for Withdrawing from the European Union’ (February 2016) Cm 9216. The domestic process was delayed, *inter alia*, by court proceedings. In UK Supreme Court *R (on the Application of Miller and Another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, for example, the Court held that the UK government required an Act of Parliament before officially notifying the EU of its withdrawal pursuant to Art. 50 TEU.
  - 4 Consolidated Version of the Treaty on European Union (26 October 2012) OJ C326/13 [TEU].
  - 5 UK Government, ‘Prime Minister’s Letter to Donald Tusk Triggering Article 50’ (29.03.2017) <<https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50>>.
  - 6 For a full timeline of the Brexit negotiations, including links to the relevant documents, see European Council, ‘Timeline – The EU-UK Withdrawal Agreement’ <<https://www.consilium.europa.eu/en/policies/eu-relations-with-the-united-kingdom/the-eu-uk-withdrawal-agreement/timeline-eu-uk-withdrawal-agreement/>>.

Following changes of government in the UK and further intense negotiations, both necessitating additional deadline extensions, the *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*<sup>7</sup> (UK-EU WA) was finally signed on January 24, 2020. Following the agreement's subsequent ratification by the EU and the UK, the UK ceased to be a Member State of the EU on January 31, 2020. Its final 'goodbye', however, would not take place until the end of that year. During this agreed-upon transition period, the UK continued to be treated like an EU Member State, albeit without enjoying full Member State status, until December 31, 2020.<sup>8</sup> Thus, the foremost goal of the transition period – to gain time for the negotiations on future relations – was only just achieved with the signing of the *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*<sup>9</sup> (EU-UK TCA) on December 30, 2020, and its provisional application on January 1, 2021. Following completion of the EU and the UK's internal procedure, the EU-UK TCA entered into force on May 1, 2021.

Regardless of the exact shape and depth of their future relationship, the UK's exit from the EU resulted in a profound process of disintegration between the UK, on the one hand, and the EU and its Member States, on the other. The relationship between the UK and many continental European states, 27 at the time of its exit, had for nearly 5 decades rested on common participation in a 'new legal order'<sup>10</sup>, the level of integration of which – regardless of how its nature is perceived<sup>11</sup> – is unprecedented and unique. In the future, however, this relationship will again rest solely upon

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7 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (12 November 2019) OJ C384 I/1 [UK-EU WA].

8 Cp Art. 126 UK-EU WA.

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 (30 April 2021) OJ L149/10 [EU-UK TCA].

10 A notion repeatedly employed by the European Court of Justice (ECJ), see rather recently in ECJ, Opinion 2/13 *Accession to the ECHR* [2014] ECLI:EU:C:2014:2454, [157].

11 On the nature of the EU and its legal order, see below Part I § 2 section I.

and be shaped by ‘ordinary’<sup>12</sup> international law and agreements. Brexit, however, not only means a return to international law in the relations between the UK, EU, and EU Member States, it is also necessary to turn one’s gaze to international law to fully grasp the withdrawal’s consequences. Brexit was not only an ‘earthquake’ in EU–UK relations, the ‘rubble [of which] will take years to clear’<sup>13</sup> – its seismic waves also reverberated beyond these entities and into the international legal order, shaking a main pillar of the EU and UK international relations: international agreements.

According to Art. 216 *Treaty on the Functioning of the European Union*<sup>14</sup> (TFEU), the EU ‘may conclude [...] agreement[s] with one or more third countries or international organisations’ (paragraph 1), which are ‘binding upon the institutions of the Union and on its Member States’ (paragraph 2). As simple as this provision may sound at first, the network of international agreements that has evolved over the years is widespread and complex. The EU maintains international agreements with most states in the world and many international organisations, with its Member States participating in some of these agreements as contracting parties alongside the EU. Moreover, internally – among Member States – international agreements serve as an additional layer of cooperation, often in the interest of deeper integration. What *all* these agreements have in common, however, is that the UK once participated in them – either by way of Art. 216(2) TFEU or itself as a treaty party. What *most* of these agreements have in common is, moreover, that the UK did so *because* it was an EU Member State. Since March 29, 2017, the question has therefore also arisen as to what effect withdrawal from the EU has on this network of international agreements. Can a former EU Member State continue to participate in international agreements of the EU? Can it remain a party to international agreements it concluded in the context of its EU membership?

As with many issues in the context of EU withdrawal, the question of the effect of a Member State leaving the EU on international agreements was asked for the first time in the wake of Brexit. But while the UK’s

12 In ECJ, *ECHR Accession* (n 10) [157], the ECJ had separated the EU Treaties from other international agreements, stating that ‘the founding treaties of the EU, unlike *ordinary international treaties*, established a new legal order’ (emphasis added).

13 R Behr, ‘Brexit earthquake has happened, and the rubble will take years to clear’ (*The Guardian*, 24.06.2016) <<https://www.theguardian.com/politics/2016/jun/24/brexit-earthquake-has-happened-the-rubble-will-take-years-to-clear>>.

14 Consolidated Version of the Treaty on the Functioning of the European Union (26 October 2012) OJ C326/47 [TFEU].

exit provided the opportunity, the question has so far still been only insufficiently answered. The reason is two-fold: firstly, most scholarly contributions aiming to provide answers were written following the UK's referendum but before Brexit took place, and therefore many of them could not consider the actual practice. In hindsight, the actual practice of Brexit contradicts many of the answers given in these earlier contributions. Secondly, most of these works also took only one particular perspective on the EU and withdrawal therefrom as a starting point for their analysis: namely that the EU is an international organisation the consequences of withdrawal from which must be considered in light of international institutional and treaty law. However, against the backdrop of Brexit practice, this approach has proven to be inadequate. The possibility of applying alternative legal frameworks to the situation of a state leaving the EU, on the other hand, is vastly underexplored.

The aim of this study is, therefore, not simply to show the deficiencies of earlier scholarship, but, following a deconstruction of previous arguments, it offers an alternative approach. Given the nature of the relationship between the EU and its Member States and the corresponding nature of the international agreements they conclude, this study argues that the framework of the law of state succession is better suited to address the challenges of such a disintegration for international agreements. While a direct application of the rules on *state* succession fails due to the EU's lack of statehood, this study makes the first attempt to comprehensively investigate the possibility of an analogical application. Based on a comparison between the EU and so-called 'unions of states', applying the framework of state succession by analogy is justifiable and the results of such an application arguably correspond better with the actual practice witnessed in the case of Brexit.

The argument is divided into three. The first chapter sets the scene: following a brief overview of the EU and its Member States' treaty practice in general, it looks at their specific practice in the context of Brexit and demonstrates the divergence between this practice and previous scholarship on the issue (§ 1). The following chapters form two parts. *Part I* engages with the traditional international institutional and treaty law approach to EU withdrawal and international agreements (§§ 2–4). *Part II* introduces and argues in favour of the alternative path of taking recourse to the framework of state succession (§§ 5–7). The study closes with a summary and outlook.