Introduction

Precisely one year after the UK' referendum on remaining or leaving the EU, which is the basis of Brexit, the European Constitutional Law Network (ECLN) met at the Faculty of Law of the University of Lisbon on 23 and 24 June 2017 to discuss 'Brexit – Challenge or End of EU Constitutional Law?'.

The formal inclusion of a withdrawal clause – Article 50 of the Treaty on the European Union (TEU)[1]– into the TEU through the Treaty of Lisbon opened a Pandora's box with consequences that no one could predict either before the entry into force of that Treaty or after the referendum in the UK; and even today it is difficult to fully assess the impact of the clause and, in particular, of making use of it. As the negotiations of Brexit,[2] the draft Withdrawal Agreement that ensued,[3] the successive rejections by the House of Commons,[4] and the successive decisions of the EU 27 leaders, in agreement with the UK, on the extension of the negotiations' period, first-

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1 According to Article 50 TEU, any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. The Member State, which decides to leave the Union, shall notify the intention of withdrawal to the European Council. The Union shall negotiate and conclude an agreement with that Member State, which shall be concluded on behalf of the Union by the Council, by a qualified majority with the consent of the European Parliament.
The Treaties shall cease to apply to the State in question from the date of entry into force of the Withdrawal Agreement or, failing that, two years after the notification above referred, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
If a State, which has withdrawn from the Union, asks to rejoin, its request shall be subject to the accession procedure.

2 The documents related to the negotiations of Brexit are available at the website https://europa.eu/newsroom/highlights/special-coverage/brexit_en (accessed 26 June 2019).

3 Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018, available at https://ec.europa.eu/commission/files/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-agreed-negotiators-level-14-november-2018_en (accessed 26 June 2019).

4 The Draft Withdrawal Agreement was rejected on 15 January, 12 March and 29 March 2019.

ly, until 22 May 2019 and later on until 31 October 2019, under certain conditions,[5] have shown, the complexity of an exit process exceeds what anyone could expect, and it seems to be a challenge to overcome the political and practical obstacles that came out of that open box. Yet, in the perspective ex post, given the level and strength of the ties uniting the EU and its Member States not only economically and legally, but also politically, including social, financial and monetary matters, etc, no one should be surprised that even after three years the process is far from coming to a satisfying end.

This experience of applying Article 50 TEU in practice is perhaps the main reason why we are, currently, in a deadlock. Nobody knows what will happen in the near future. Can the UK expect a re-opening of the negotiation on the Withdrawal Agreement? After the European elections, will the UK decide for – or fall into – a "hard Brexit"; or will the government call for new elections opening new perspectives, or call for a second referendum? How many further months (or years?), if any, will the deadline of Article 50 TEU (have to) be extended? Will the EU and the UK conclude another type of agreement? If so, which one? Will the UK Parliament accept this potential new agreement? Is it still possible and feasible for the UK to remain in the EU, and if so, under what conditions? All these scenarios are for now conceivable, but, looking back to the Brexit process, some of them are more realistic than others.

As to the EU, after a rather short period, still under the impact of the referendum's shock – in which even some institutions of the EU had sustained that the Brexit should be rapid and under hard conditions in order to give an example to other Member States – since the beginning of the negotiations with the UK, its position has been characterised by serenity, precision and clarity. First, the EU accepted the decision of the UK to withdraw without making of it a drama. Second, under the political leadership of President Donald Tusk, the EU-27 has rejected the negotiation strategy by Theresa May, who demanded parallel discussions on the withdrawal and on trade. The President of the European Council insisted that the negotiations should be informed by the following principles: minimization of disruption caused by UK withdrawal; securing agreement on the rights of EU citizens living in the UK; ensuring that the UK honors its financial

5 The UK is bound to hold European Parliament elections as it is still a member of the EU, between 23 and 26 May 2019. If the UK fails to hold the elections, it will leave the EU on 1 June 2019. See European Council Decision, 11 April 2019, XT 20013/19, available at: https://www.consilium.europa.eu/media/39043/10-euco-art50-decision-en.pdf (accessed 26 June 2019).

commitments; and avoiding a hard border between Northern Ireland and Ireland. Donald Tusk stated firmly: 'These four issues are all part of the first phase of the negotiations. Once, and only once, we have achieved sufficient progress on the withdrawal, can we discuss the framework for our future relationship. Starting parallel talks on all issues at the same time, as suggested by some in the UK, will not happen'.[6] Third, contrary to one of the major fears after the UK referendum, a potential domino effect leading to the disintegration of the Union, the remaining Member States united around the strategy of the EU. In fact, the EU's 27 leaders unanimously adopted the phased strategy at the European Council meeting on 29 April 2017. Fourth, even with many obstacles, the EU has achieved to conclude a draft agreement with the UK on its withdrawal. Fifth, the EU has always left an open door for the UK to revoke the withdrawal notification and to remain in the EU. The Court of Justice of the European Union, in the case *Wightman and Others*, has confirmed that a revocation of a notice under Article 50 TEU is lawful, since its 'purpose (…) is to confirm the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State, and that revocation brings the withdrawal procedure to an end'.[7]

Conversely, as to the UK, one has been witnessing a permanent lack of coherence and a constant dance of advances and retreats, leaving the impression that the UK was singing the music of Beatles Should I stay or should I go?, culminating in a plurality of decisions of the UK Parliament and in the Prime Minister Theresa May's request to delay Brexit twice. Even with the new Prime Minister, Boris Johnson, and his determination to go for a hard Brexit in case the EU is unwilling to reopen the negotiations on the Withdrawal Agreement – what it seems to be – it is questionalbe whether he will find support for this in Parliament. The membership of the UK to the EU, and similarly, the Brexit process were rightly qualified, by the UK Supreme Court in the *Miller* case,[8] as having constitutional implications for the UK (like for the EU), and this may explain why it attracts more public attention and binds more workforce both sides for a

6 Remarks by President Donald Tusk of 32.3.2017 on the next steps following the UK notification, available at https://www.consilium.europa.eu/en/press/press-releases/2017/03/31/tusk-remarks-meeting-muscat-malta/ (accessed 26 June 2019).

7 CJEU, judgment of 10 December 2018, Wightman and Others, C-621/18, ECLI:EU:C:2018:999, para. 75.

8 Judgment (2017) UKSC of 24 January 2017, *Miller*, paras 60, 62, 67, 68, 78, 80–82, 90, 92, 96, 100, at: https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf (accessed 21 August 2017).

longer time as ever expected. But the process with its adverse effects on the capacities of all to tackle important other political issues cannot last without limits.

Taking into account the uncertainties and implications caused by the Brexit referendum, as well as the lasting openness of the outcome, one may ask why publishing a book on Brexit right now. The main intend of the present book is to reflect upon the Brexit process and analyse some particular issues from a constitutional perspective, with the aim to contribute to the discussion and the finding of solutions to some of the many problems raised.

From a European and constitutional law perspective, Brexit raises so many issues, however, that the contributions to this volume cannot cover all of them, and particularly cannot predict the future. Focussing on some key general questions and particularly relevant policies, the eleven substantive chapters of the book divided into three parts may give the reader a hint of how the Brexit process and its implications are seen from European constitutional law scholars outside the UK and stimulate the discussion across the channel on the future relationship between the UK and the EU.

I. As the key narrative of the UK before and after the Brexit referendum was based on the rhetoric of State sovereignty and democracy, Part I of the book is devoted to *Constitutional Issues – Basic Concepts Revisited*.

The insistence of the UK in "taking back control" over laws, borders, democracy, and money, means anything but "taking back control" over the most significant issues of UK State sovereignty and its constitutional system. Putting this decision in the hands of the people through the referendum apparently legitimates Brexit within the purest standards of democracy and protection of fundamental rights. Part I of this book will deconstruct this rhetoric.

Tom Eijsbouts, following the discourse of President Macron of 26 September 2017 at Sorbonne, proposes the development of a new notion of State sovereignty, which not only agrees with the facts of European integration instead of opposing them, but which also allows for an original conceptual development of sovereignty in the EU, concerning both the Member States and the Union itself. Analysing the way how the Euro summit came into being and got itself a permanent president, the Author concludes that this institutional development shall be faced as an exercise of European sovereignty. For Tom Eijsbouts, the European Union needs to build up an open and dynamic concept of European sovereignty, which instead of challenging national sovereignties builds upon, adds to and so strengthens the Member States' sovereignty, if it would like to prevent events such as Brexit.

Commenting Tom Eijsbouts' contribution, *Ana Maria Guerra Martins*, first, underlines how fascinating the said proposal is, but second, warns of its dangers. Above all, the introduction of the idea of sovereignty in the EU context may arise more fears and suspicion, which might well pave the way to populism, nationalism and general pessimism. Secondly, the definition of such a sovereignty would be rather difficult. Thirdly, she argues that the way how the Euro summit came into being and got itself a permanent president must be integrated in the broader context of EMU governance and, fourthly, the recent case law of the CJEU on Article 50 TEU, accepting the lawfulness of the revocation of the withdrawal notice is much more an expression of a State's sovereignty – the one of the UK – than an expression of EU sovereignty. Finally, the author does not envisage how helpful could be such an idea after the exit of the UK.

Giacinto della Cananea looks at this from another perspective: He distinguishes two main visions of the European Union, first, in order to explain and critically assess, in a second step, the options for a future relationship of the UK with the EU as a question of differentiated integration. One of these visions is close to the traditional concept of State sovereignty, the EU being 'a broad community of nation-states', the other that of an 'ever closer union' of peoples as provided in the preamble of the Union Treaties. A critical assessment of these two opposed positions leads to an analysis of the existing mechanisms of flexibility in EU law, both within the EU (e.g. the EMU, enhanced cooperation, the fiscal compact and two speed integration) and beyond the EU such as the European Economic Area, a set of bilateral agreements like in the case of Switzerland and what is called the "Schengen's mixed membership". Considering the implications for Brexit the author finds that, given the need to take account of the twin criteria of clarity and coherence a solution different from the one that exists in the context of the EEA could not be meaningfully envisaged.

Jirí Zemánek analyses the future of the protection of fundamental rights after Brexit, seeking to demonstrate that the withdrawal of the UK from a "community of destiny", which comprises three levels of protection of fundamental rights – national constitutions, European Convention on Human Rights and the EU Charter of Fundamental Rights – where the UK has, to some extent, a reserved position, would represent more than a mere withdrawal from its rights and obligations. His focus is the question to what extend the effective protection of fundamental rights of the individual is affected. As the UK plays an important role in the EU-wide dialogue on fundamental rights and their protection under the Charter of Fundamental Rights, he also points to the loss Brexit would cause in this regard.

Ingolf Pernice is looking at the different stages of the Brexit process from the perspective of democracy. Is it a challenge to, or an exercise of democracy? While the strategy to put the future membership of the UK to an advisory referendum is qualified as an exercise of democracy, and both, the procedure of Article 50 TEU and the increase of democratic awareness throughout the EU can in no way be understood as a challenge to democracy, incidences related to the preparation of the referendum as well as the interpretation of its result in the subsequent political action are found to bring about serious challenges to democracy. The author discusses the impact of open lies and targeted disinformation on democratic processes on the one side, and the way the UK Parliament has renounced to the constitutional principle of sovereignty of Parliament and brought itself into an irresponsible situation of incapability to take a positive decision, on the other side. Yet, the emergence of a new citizens' engagement, triggered by the Brexit process throughout the Member States, movements of citizens taking ownership of the EU, acting for 'remain' and calling for further developing the EU, are taken as a positive outcome of the still open Brexit process.

II. As Brexit will definitively impact on *The Future of the Internal Market and its Social Dimension*, Part II of this book addresses the effects of Brexit in the internal market, in the EU citizens' social rights and in immigration control and the future of the 'Green Border' in Ireland.

Paula Vaz Freire analyses the economic effects of Brexit in the UK and in the EU, drawing attention to the fact that the UK specialization in services, namely financial services, as well as the foreign direct investment in the UK has evolved and turned into a successful model due the UK's EU membership. The withdrawal from the EU would diminish the UK's attractiveness insofar. For the EU, as a whole, the economic effects of Brexit may be less significant, but taking into account the strategic and political importance of the UK and the contribution of the UK to the EU budget, the Brexit will also have a considerable impact on the remaining EU-27. However, from the perspective of the EU, free trade and free movement must be definitively linked, as the internal market is a global reality.

Rui Lanceiro develops a broad critical analysis of the recent CJEU case law on EU citizen's social rights, sustaining that, from *Grzelczyk* case to *Dano*, *Alimanovic* and *Garcia-Nieto* judgments, the Court has initiated a significant change in its earlier jurisprudence on non-national EU citizens' access to social benefits in host Member State, and did not change this in more recent cases, such as *Gusa*, *Prefeta* and *Tarola*. This restrictive trend has also extended to the social dimension of EU citizenship in the *Commission v. United Kingdom* (UK child benefit or child tax credit) case. It is sug-

gested that this judgment probably aimed at influencing the outcome of UK Remain/Leave referendum, which failed. The consequence is understood to be that the notion of EU citizenship as a fundamental and political status with no link with the economic market is being dismantled and the free movement of citizens and workers in the EU remains incomplete.

Daniel Thym and *Mattias Wendel* discuss one of the most topic issues throughout the Brexit debate – immigration after Brexit. They are stressing the uncertainty of the moment and conclude that, while Brexit may facilitate legal control over the entry and stay of EU citizens, from a legal perspective it might, ironically, render control of immigration of non-Europeans, including asylum seekers, more difficult.

III. Apart from the internal market and its social dimension Brexit will influence other *EU Policies – Perspectives of Cooperation with the UK*, as it is discussed in Part III of the present book.

Jean-Victor Louis gives a legal standpoint of the presumed effects of Brexit on the Monetary Policy, as well as on financial regulation and supervision. After recalling some essential features of the Brexit negotiations up to the present no deal and the new delay, the author draws attention to the internal institutional consequences of Brexit in monetary and financial matters, as well as to the situation of the UK, the EU and other national authorities in the international financial institutions and the future cooperation. In spite of admitting negative consequences either for the UK or for the EU, the author concludes with a word of hope, asserting that once the UK becomes a third country after Brexit, this is perhaps an opportunity for the EU progressing towards a sui generis federation.

In his comments on Jean-Victor Louis's contribution, *Stefan Griller* states that he agrees with the identification of the most salient issues as well as the respective observation, therefore he opts to work on the hypothesis of no deal and after 31 October 2019 the UK would find itself as a third country. The author advocates that the dynamics of EMU-participation may change once the UK will have left, because the non-EMU Member States will lose a powerful ally. Secondly, after Brexit, the EMU-deepening and reform, including the building of a Banking Union, may become easier, once the UK has always been a brake to this kind of initiatives. Thirdly, the impact of a no deal Brexit on the freedom of establishment and, particularly, with regard to financial services located in the UK is considered to be huge. In spite of a rather optimistic scenario for the EU in this context, the author envisages also some negative effects.

Maria José Rangel de Mesquita, finally, analyses the possible modes of participation and cooperation of the UK in the EU external action both, CFSP and CSDP, with particular regard to the possible future status of the UK

either as a mere third State or a special status as an 'ex-EU third State'. The analysis is based upon an assessment of the developments in the EU external action, particularly the 2016 Global Strategy for the European Union's Foreign and Security Policy and the adoption of 'three main categories of initiatives – political, institutional and financial – in some of which the UK may participate during and after the transition period'. In his very detailed and deep description of the EU and the UK perspectives on the recent developments as well as of the terms found in the Withdrawal Agreement and the Political Declaration the author concludes in shaping a (possible) differentiated third State status of the UK in the field of European Foreign and Security Policy, including Defence, based upon autonomy both sides but also on common values and shared interests both, known and to be identified though structured consultation and thematic dialogues. It could go as far as to agree on an observer status of the UK with some rights of participation in EU institutions, bodies and structures 'with financial EU counterparty ("value for money")'.

In the present introduction it is not possible to give a sufficiently precise idea of the richness and of all the challenging thoughts expressed during the conference, as updated and completed in the present volume by some reflections regarding the evolution of Brexit process since June 2017. Therefore, we invite the readers to go through the following chapters and develop your own views on the EU constitutional impact of Brexit.

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Ana Maria Guerra Martins/Ingolf Pernice
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