‘The day after’

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'The day after': Exit-induced legal lacuna

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Abstract
The purpose of the two-year rule in Article 50 TEU is to prevent the remaining Member States from delaying the exit of the withdrawing Member State through stalling tactics. This article argues that the two-year period is a double-edge sword. It affords very little time to the withdrawing Member State to adjust its domestic legislation, regulatory system and administrative structure to be able to function effectively on the day after exit from the EU. The UK's Great Repeal Bill proposes a 'copy and paste' approach. However, this approach is only a partial solution to the problem of the 'exit-induced' legal lacuna. With the use of two case studies, the article demonstrates that the UK will have to establish new regulatory procedures and redefine EU concepts inserted in national law. The UK will 'regain control' but will have to follow EU practice. At some point in the future it will also encounter the dilemma of diverging from EU practice and creating two sets of compliance standards for its companies.

Keywords
Brexit, Article 50 TEU, Great Repeal Bill

1. Introduction

Since the UK's referendum on EU membership in 2016, whereby the British public voted to leave the European Union, the ensuing commentary and academic literature has focused, for the most part, on the post-exit relationship between the UK and the EU and the impact on the EU.[1] There is a

1. See, for example, C. Tobler, 'One of Many Challenges after Brexit: The Institutional Framework of an Alternative Agreement', 23 *Maastricht Journal of European and Comparative Law* (2016), p. 575; and the special issue on Brexit of the *German Law Journal*, (17 *German Law Journal* (2016)).

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thriving cottage industry on the possible forms that that relationship may take, as well as on each sides' options and the interests that will be pursued during the negotiating phase. Some of that literature is merely speculative, whereas some of it is better informed

Much less attention has been paid as to what happens the day after exit. How will the UK function, immediately after it leaves the EU? This article argues that withdrawal from the EU will cause uncertainty. This is a consequence of exit that we are only now beginning to comprehend. This is a different kind of uncertainty than the hitherto unknown choices that the UK will have to make with respect to trade and its relations with the EU and the rest of the world respectively.

The EU acquis has been estimated to constitute around 2,000 directives and 10,000 regulations. Certainly, there is not enough time for the UK, from the moment Article 50 TEU is triggered to the moment of exit, and within two years, to review and decide what to keep and amend out of that huge body of law. There is a real prospect of what may be called an exit-induced legal lacuna.

The UK government is aware of this problem. The White Paper on *The United Kingdom's exit from and new partnership with the European Union*, that was published in early February 2017 offers some answers.[2] In the White Paper, the UK government outlines, among other things, how it intends to prevent a legal lacuna arising from the moment it withdraws from the EU. The answer is what is referred to as the 'Great Repeal Bill'.

This Bill has three primary objectives. First, it will repeal the European Communities Act 1972 which has facilitated the direct application of EU law, such as regulations. Second, it will

> preserve EU law where it stands at the moment before [the UK] leaves the EU. Parliament (and, where appropriate, the devolved legislatures) will then be able to decide which elements of that law to keep, amend or repeal once [the UK] has left the EU. The UK courts will then apply those decisions of Parliament and the devolved legislatures.[3]

And thirdly, the Bill will enable changes to be made, by secondary legislation, to the laws that would 'otherwise not function sensibly once [the UK] has left the EU'.[4]

The Great Repeal Bill offers a solution that does not, in fact, match the extent of the problem. Although the Bill aims to 'provide legal certainty' so that 'wherever practical and appropriate, the same rules and laws will apply on the day after'[5] the UK's exit from the EU, this article will argue that it is very unlikely that the UK government, in the midst of negotiations, will have sufficient time to consider the whole of the EU acquis in order to determine the appropriate rules that will apply on the day after exit. This article argues that the UK cannot solve the problem through a 'copy and paste' exercise. In fact, as will be shown in the case studies later on, if certain EU law is just copied it will create confusion while some other aspects of EU law cannot be simply copied on to the domestic statute books. For example, in some policy fields it will be necessary for the UK to establish new procedures.

A recent report by the London-based Institute for Government makes a similar warning.[6] The report argues that, not only will the required legislative work exceed Parliament's capacity, but it

2. HM Government, 'The United Kingdom's exit from and new partnership with the European Union',
3. White Paper, p. 10.
4. Ibid.
5. Ibid., p. 9.
6. Institute for Government, 'Legislating Brexit: The Great Repeal Bill and the Wider Legislative Challenge', *Institute for Government* (2017), https://www.instituteforgovernment.org.uk/sites/default/files/publications/IFGJ5347-Legislating-Brexit-IFG-Analysis-032017-WEB.pdf.

will also prevent Parliament from exercising the same degree of scrutiny. And the report merely refers to 10-15 additional bills and not to the mass of EU-related legislation that will have to be reviewed.

With the help of two case studies, this article will show that policy, regulatory and institutional reform will have to be undertaken before the UK leaves the EU. Some adjustment of UK laws and policies will necessarily have to take place prior to the date of exit. Unless the UK takes action in the next two years, a legal lacuna will emerge in some policy areas at the very moment that EU Treaties and secondary legislation cease to apply.

Despite the fact that one of the objectives of the White Paper is to 'provide legal certainty' and deliver a 'smooth' and 'orderly' exit from the EU, the legal lacuna identified in this article will heighten both policy and market uncertainty, and will make the UK's exit anything but orderly.

In essence, the lesson to be drawn from this article is that exit from the EU necessarily leads to a period of prolonged uncertainty in the withdrawing country. Unlike entry into the EU, where the final destination is known – that is, the full assumption of the obligations emanating from EU law – and for which there is enough time for preparation and adjustment through transitional periods, the final destination of exit, by way of contrast, is largely unknown, and the process cannot be prepared in advance. There is only the two-year period allowed by Article 50 TEU. And two years are unlikely to be sufficient. The drafters of the Treaty imposed a two-year limit to the withdrawal negotiations in order to obviate foot-dragging and stalling tactics. They wanted to give Member States the option to be able to leave the EU. However, it is becoming increasingly obvious that the very instrument of unshackling the withdrawing Member State from the EU will inflict a heavy price in terms of uncertainty on that country.

The article focuses on the challenges facing the withdrawing Member State. Naturally, uncertainty can spill-over into the rest of the EU, especially given the fact that the UK is a large country which accounts for 18% of the EU's economy. Indeed, the EU will be affected too. Consider, for example, the possible losses from trade restrictions, if the EU and the UK fail to agree on a post-exit free trade arrangement, the impact on the EU budget and the waning influence of the EU on the global stage. However, the effect of Brexit on the EU will very much depend on the terms of the future relationship between the UK and the EU. At this stage, trying to assess that effect will be rather speculative. By contrast, how Brexit will affect the application of EU law in the UK is more tangible because it depends, to a far greater extent, on the decisions made by the UK itself. And, if the UK does not tackle the challenges identified in this article, a legal lacuna will emerge with near certainty.

The article is structured as follows. The next section outlines the extent of the challenge facing the UK (Section 2). Section 3 briefly reviews the relevant points of the White Paper and draws a number of tentative conclusions which are relevant to the argument that is made here. Section 4 considers the situation that may arise the day after exit in the long-established field of competition, if the UK does nothing in the interregnum. Section 5, carries out the same analysis in the newer field of banking supervision and banking resolution. Section 6 then summarizes the main points of the article.

The case-study approach chosen by this article is necessitated by the fact that the very large and diverse body of EU law makes it virtually impossible for any single contribution or author to tackle it either comprehensively and authoritatively. The two case studies in this article examine competition policy and banking resolution respectively. Competition policy is one of the oldest and most centralized policies of the EU; while banking resolution is one of the newer policies, where the UK enjoys an opt-out from the rules that apply to the single

currency. Nonetheless, we will see that regardless of the age of the policy field or the extent of the legislation that is binding on the UK, the same fundamental questions arise. They cannot be left unanswered until after the UK leaves the EU. This is because rule-making in the EU has always involved the division of tasks between the EU and Member States and procedural and enforcement cooperation between EU and national institutions. The EU is based on cooperation between multi-level authorities. In all policy areas, there is interaction, to a varying extent, between EU institutions, EU agencies, national ministries and national agencies. This very structure of the EU, with its division of competences and sharing of tasks, creates fundamental institutional and administrative challenges for any Member State that decides to leave the EU. The exiting Member State will have to decide whether and how to replace the cooperation that will cease after it withdraws from the EU. Not making that decision will naturally leave administrative gaps and create legal uncertainty.

2. A framework of analysis: there is no such thing as a placid exit from common policies

Imagine that two adjacent countries, A and B, decide to work together to solve a problem that affects both of them. The areas on either side of their shared border are heavily populated. Assume that they have decided to adopt common rules on the management of traffic in order to reduce air pollution which affects both sides of the border. For this purpose, they have banned heavy goods vehicles (lorries and/or trucks) above a certain age and have obliged the owners of all other lorries to install special devices on their vehicles that can reduce their speed when it is deemed necessary by a central traffic management authority (this is because higher speeds generate more pollution). The devices can be controlled through radio signals from that central authority. The devices are 'intelligent' because they adjust speed according to the age of the lorry, the condition of its engine and the amount of pollutants it emits. This system incentivizes transport companies to upgrade their fleets so that they can be allowed to operate at higher speeds and therefore deliver goods faster.

The common rules define common technical standards and have led to the creation of a network of pollution sensors on either side of the border. The sensors are managed by municipalities. When a sensor close to the border detects high levels of pollution, it alerts the central authority which is co-managed by the two countries. When it receives a signal from a sensor, this central authority has to assess it and depending on the number of signals and the severity of the pollution, it will reduce the maximum allowable speed in the affected area that may extend to the other side of the border. The system of common rules is periodically revised by mutual agreement.

Now, assume that country A has given notice to country B that it wishes to withdraw from the system of common rules, because it wants to determine its pollution policy independently. Those in favour of exiting this system argue that country A can regain its policy independence overnight without having to do anything besides declare that it will not be bound by the obligation to set rules in agreement with country B. They claim that country A can continue to apply the current policy but at the same time it will also have the freedom, at any point in the future, to decide to change it. Proponents of withdrawal from the common system call it the 'placid' exit (that is similar to the objective of the White Paper to deliver 'smooth and orderly' exit from the EU). Country A, it is claimed, will regain control without causing ripples in its economy or regulatory system. Indeed, country A can opt to continue applying the same rules or it can choose to change them. However,

what is not true is that it can exit the system of common rules without having to do anything else or without causing ripples in its economy.

In this regard, country A has at least three options. First of all, it may decide to abandon the system of traffic management altogether. But this does not mean that there will be no consequences. Pollution will not go away simply because country A decides to abolish its policy. Moreover, abolishing the system does not necessarily mean that everything will be allowed. For example, country A may still want to keep older lorries off its roads. If this ban is not explicitly re-affirmed, it will not be clear after the date of exit from the system what is permitted and what is prohibited.

Second, if country A decides to maintain that policy, it will have to determine who will assume the role of the central authority. The policy is based on the collection of pollution measurements from a network of sensors and management of traffic. Country A will have to establish a new institution so that the municipalities which operate the sensors will know whom to send information to. Withdrawal from the common system necessitates domestic institutional changes, and any gains from policy independence will come at a cost.

Third, if country A withdraws from the common system, but still maintains the policy of pollution monitoring and traffic management, presumably it will not receive information from the other side of the border and will not be able to change maximum traffic speeds on the other side in country B. Therefore, it will have to decide whether to keep the same criteria for traffic management, which take into account the impact of pollution on the other side. Regardless of how it adjusts those criteria, country A regains control over its policy at the expense of losing access to the information provided by its neighbour. This loss is not the same as the loss of control over the common policy. That was loss from not having a say in the definition of common rules. This loss is about being cut-off from useful information.

Despite its simplicity, this stylized example reveals that withdrawal from common policies, which are based on common institutional structures and cooperation networks, creates potentially four policy dilemmas for the withdrawing country.

First, the option of doing nothing does not mean that nothing will change in reality or that withdrawal has no consequences. The autonomous decisions of market operators, in this case, lorry operators, will affect the environment and the decisions of any successor authority will be less effective as it will not have access to all necessary information from across the border. Second, doing nothing does not necessarily mean that everything that was previously prohibited would or should be automatically allowed. The ban on older lorries may have to be maintained. Third, the withdrawing country will have to domestically reconstruct an institutional structure that mirrors, at least partly, that of the central authority. Fourth, pursuit of independent policies requires rethinking of the principles on which the former common policies were based.

The case studies will demonstrate that these four dilemmas are present in both the competition policy and in the policy on banking resolution, despite the fact that the UK is not bound by the single resolution mechanism that has been established within the banking union that extends to the Eurozone.

3. The relevant points of the White Paper

The White Paper is divided in twelve chapters, each dealing with a separate issue or problem. The headings and main points of the chapters which are relevant for the purposes of this article will be set out in the following sections.

A. Chapter 1: 'providing certainty and clarity'

The government assures businesses that it will provide information on its negotiating objectives so as to minimize uncertainty. It is in this chapter that the government pledges to introduce the so-called 'Great Repeal Bill'. Parliament will then legislate as necessary:

> The Government's general approach to preserving EU law is to ensure that all EU laws which are directly applicable in the UK (such as EU regulations) and all laws which have been made in the UK [such as the laws that have transposed directives], in order to implement our obligations as a member of the EU, remain part of domestic law on the day we leave the EU. In general the Government also believes that the *preserved law* should continue to be interpreted in the same way as it is at the moment. This approach is in order to ensure a coherent approach which provides continuity. It will be open to Parliament in the future to keep or change these laws.[7]

Furthermore, 'There will also be a programme of secondary legislation under the Great Repeal Bill to address deficiencies in the preserved law, which will be subject to parliamentary oversight'.[8] In the same chapter, the government pledges to honour all funding commitments to projects which are co-financed by the EU budget.

1. Comments. Naturally, before the UK leaves the EU, it can adjust its rules unilaterally only to the extent that such adjustments are compatible with EU law. This, of course, does not prevent it from preparing the necessary adjustments. However, it is unlikely that either the preparation or the actual legal revision will be completed soon after the UK's exit from the EU. To the extent that legal review and revision will require a multi-year programme, uncertainty concerning the rules that apply to businesses will persist for a much longer period than the withdrawal negotiations. It would not be an exaggeration to say that the UK has, perhaps, entered a decade of uncertainty.

The White Paper states that the 'preserved law' will continue to be interpreted in the 'same way'. The uncertainty mentioned above will be compounded the moment EU courts apply a different interpretation to an existing law, especially if the interpretation runs contrary to express UK policy preferences. Then the relevant UK regulatory authorities or courts will have to make a conscious decision on whether to follow the new interpretation or deviate therefrom. If they deviate, they will also have to decide how far to deviate. Regulatory authorities will have to take into account the costs on UK business from having to comply with two apparently contradictory sets of rules.

B. Chapter 2: 'taking control of our own laws'

This chapter refers to parliamentary sovereignty and restates the government's wish to bring an end to the jurisdiction of the Court of Justice of the European Union (CJEU) in the UK. At the same time, it 'recognize[s] that ensuring a fair and equitable implementation of our future relationship with the EU requires provision for dispute resolution'.[9] In order to achieve this purpose, it outlines possible dispute resolution arrangements. An Annex to the White Paper provides more examples and details of how various arrangements work in practice and how compliance by the contracting parties is assured.

7. White Paper, p. 10 (emphasis added).
8. Ibid., p. 11.
9. Ibid., p. 14.

1. Comments. Some of the examples cited in Chapter 2 and in the Annex stand out, in the sense that they limit the sovereignty of contracting parties to interpret the law that applies to them. Any future agreement with the EU, like any rule-bound relationship, will necessarily constrain the UK's policy-making discretion. Despite the wish of the UK to escape from the jurisdiction of the CJEU, the White Paper acknowledges that the UK will have to accept limitations to its policy-making autonomy.

C. Chapter 3: 'strengthening the union'

At first sight, this chapter appears out of place. Why should relations among the four nations of the UK be considered in a policy paper that ostensibly addresses the future partnership of the whole of the UK with the rest of the EU? The reason given, in the very first line of the chapter, is that a united UK will be stronger to face the future together. Also, the government wants to signal its intention to adhere fully to the Belfast Agreement that brought peace in Northern Ireland. The Agreement commits the UK and Irish governments to maintain open borders, which consequently poses a challenge to the UK as to how it can maintain free cross-border movement with Ireland after exiting from the EU.

However, the main issue here is not just that the UK's negotiating position has to be agreed with the devolved administrations, but rather that withdrawal from the EU presents an opportunity for further devolution within the UK.[10] This is because powers repatriated from the EU may be shared among the four constituent nations of the UK. But, as always, when it comes to sharing, disagreements may arise. The White Paper indeed recognizes that 'as the powers to make these rules are repatriated to the UK from the EU, we have an opportunity to determine the level best placed to make new laws and policies on these issues, ensuring power sits closer to the people of the UK than ever before'.[11]

1. Comments. Regardless of how repatriated powers are shared, in some policy fields, such as state aid control, the issue at hand will not be sharing competences, but rather agreeing on who will be the single authority that will decide on complex matters such as the compatibility of state aid.

D. Chapter 8: 'ensuring free trade with European markets'

This chapter sets out the well-rehearsed position of the government that it is in the interests of both the EU and the UK to maintain a close trading relationship. What is perhaps a more novel idea, is the intention of the government to seek a 'new customs agreement' with the EU. But precisely because the UK wants to enter into its own trade agreements with third countries, it is also expressly stated in this chapter that it does not want to be bound by the EU's common external tariff.

This chapter also has separate sections on goods, technical standards, agriculture and food, professional services, financial services, and energy, transport and communications networks. These sections highlight the important trade-facilitating role of mutual recognition, harmonization,

10. Although in its recent judgment in *Miller v. Secretary of State*, [2017] UKSC 5, the UK Supreme Court ruled that triggering the Article 50 procedure did not require the approval of the devolved administrations, the outcome of negotiations with the EU will have to be agreed with those administrations as far as it affects powers they currently exercise.
11. White Paper, p. 18.

common standardization procedures, common regulatory procedures and common dispute-resolution procedures. For example, it 'recognize[s] that an effective system of civil judicial cooperation will provide certainty and protection for citizens and businesses'.[12] Also,

> in highly integrated sectors such as financial services there will be a legitimate interest in mutual cooperation arrangements that recognise the interconnectedness of markets, as so clearly demonstrated by the financial crisis. Since that time, the EU has taken a number of steps to strengthen collective oversight of the sector. As the UK leaves the EU, we will seek to establish strong cooperative oversight arrangements with the EU.[13]

Moreover, 'with respect to energy, EU legislation underpins the coordinated trading of gas and electricity through existing interconnectors with Member States (. . .) These coordinated energy trading arrangements help to ensure lower prices and improved security of supply for both the UK and EU Member States'.[14]

1. Comments. The White Paper does not explain how the UK can be part of a customs agreement with the EU, without being bound by the EU's common external tariff. Perhaps the envisaged customs agreement will only cover customs clearing procedures rather than the application of a common schedule of tariffs. This different meaning, however, is not explicitly mentioned. At any rate, even if the UK's intention is only to cooperate with the EU on customs clearing, it will also be necessary to agree on rules of origin to ensure that products from third countries do not enter one of the parties in order to bypass the tariffs or rules of the other party.[15]

The avowed political position of the UK government is that it will not seek access to the EU's internal market because it does not want to make concessions on the free movement of persons. However, truly free trade and investment require agreement on mutual recognition or harmonization of non-tariff rules. Regulatory cooperation is unavoidable and regulatory cooperation necessarily limits policy autonomy.

For the sake of consistency, the headings of the other chapters are as follows: Protecting our strong and historic ties with Ireland and maintaining the Common Travel Area; controlling immigration; securing rights for EU nationals in the UK, and UK nationals in the EU; protecting workers' rights; securing new trade agreements with other countries; ensuring the UK remains the best place for science and innovation; cooperating in the fight against crime and terrorism and delivering a smooth, orderly exit from the EU.

E. An assessment of the White Paper's appreciation of the problem of 'the day after': the 'known known' and the 'known unknown'

Certainly, the White Paper has made the challenges and dilemmas facing a country that wants to leave the EU more salient. Not only will the UK have to negotiate the terms of its withdrawal and its post-exit relationship, it will also have to decide on the nature of the relationship that it wants to

12. Ibid., p. 42.
13. Ibid.
14. Ibid., p. 43.
15. See, A. Winters, J. Rollo and P. Holmes, 'Leaving the EU Customs Union: What Is the Issue', *UK Trade Policy Observatory* (2016), https://blogs.sussex.ac.uk/uktpo/2016/07/29/leaving-the-eu-customs-union-what-is-the-issue/.

have with the rest of the world and to decide what to do with the EU law that is already incorporated in its statue books.

The White Paper has also highlighted the following paradox. With the exception of escaping from the jurisdiction of the CJEU, limiting immigration and pursuing an independent trade policy, in all other policy areas the White Paper recognizes the usefulness of maintaining close relations and cooperation with the EU. Even in social policy, where the UK has maintained a less interventionist position than other Member States, the White Paper declares the government's intention to strengthen workers' rights. Regardless of whether the overall benefits from trade independence and immigration controls will outweigh the overall costs of reduced access to the internal market and of loss of influence in decision-making in Brussels, it will be in the UK's interest to maintain some form of post-exit cooperation with the EU, and the same applies to the EU. Membership of the EU changes a country. It is rather unlikely that a withdrawing country will want to transform itself, reject everything that was decided in Brussels and go back to how things were before entry into the EU. Choices will have to be made.

Naturally, a country may object to some parts of EU law (for example, the regulation of social policy), but it may be in favour of other parts (for example, free provision of services). When a country ceases to be a member of the EU, it will have the option to revise or annul those parts it does not like. Hence, the decision on what to do with 'preserved law', as the task is termed in the White Paper, is unlikely to be a simple choice of keep or delete. As already argued above, the process of reviewing and revising preserved law is likely to take several years.

However, the challenge for the exiting country is not just how to make a wise choice. The challenge will be to construct the administrative machinery that was provided by the EU and to redefine EU principles at national level. As the case studies will reveal, the country that leaves the EU in reality will not have the luxury of reviewing preserved law at a leisurely pace. Some decisions will have to be made right from the moment of exit from the EU. The case studies will also reveal that regardless of the extent of preparations and prior planning, when the time comes, that country will be confronted with new choices. Those will be the choices that will be necessitated by new and unexpected directions in EU law.

Although, the intention of the UK government is to continue with the current interpretation of EU law, every time the EU courts make an unpredictable pronouncement, UK authorities will have to decide whether to follow that ruling or deviate from it. The eventual decision will depend on the extent of deviation and the magnitude of the impact on UK businesses in case of deviation. In the words of the former US Secretary of Defence Donald Rumsfeld, it is a 'known known' that such decisions will have to be made. But the timing and magnitude of those decisions is a 'known unknown'.

The academic literature does not appear to have tackled, as yet, the issue of the exit-induced legal lacuna. Indeed, some of the problems that are identified in the case studies are just beginning to surface in the political debate in the UK. On 12 March 2017, the House of Commons Foreign Affairs Committee published a report on 'Article 50 Negotiations: Implications of No Deal'.[16] The report contains a short chapter (just 2.5 pages) entitled 'regulatory gap and the limitations of the Great Repeal Bill'. It makes the following observations:

16. House of Commons Foreign Affairs Committee, 'Article 50 Negotiations: Implications of "No Deal"', https://www.publications.parliament.uk/pa/cm201617/cmselect/cmfaff/1077/1077.pdf. (the House of Commons Foreign Affairs Committee report).

> The great repeal Bill is supposed to leave all this EU legislation behind in the UK, but that legislation only works if you have people who can administer it and civil servants who can co-operate with one another. For industry, when things go wrong (...) what is the mechanism for resolving the dispute outside the structures of co-operation that have grown up over the years? (...)[17]

> What we are then going to have to work out, (...), is what happens to all those national authorisations that are currently in place and which benefit automatically as a matter of EU law from mutual recognition, (...) I do not think that is something the great repeal Bill itself can touch (...)[18]

> There are currently some 33 EU regulatory and other bodies covering sectors as varied as aviation, fisheries, food safety, medicines, law enforcement and financial services. Before withdrawing from the EU, the UK will need to be prepared to expand the capacity of UK regulatory bodies in these fields and to establish new UK-only regulatory bodies in some cases.[19]

The report concludes the short chapter on regulatory gaps with the statement that the UK will have to close gaps in the legal or regulatory frameworks in many sectors. The two case studies that follow reveal the nature and extent of such regulatory as well as institutional gaps. In conclusion, the White Paper appears to underestimate both the magnitude and urgency of the problem of what will happen on the day after exit.

4. Case study 1: competition policy

According to Article 3 TFEU, the definition of the rules of competition which are necessary for the functioning of the internal market, falls within the exclusive competence of the EU. The enforcement of the rules is shared between the European Commission and national authorities, including national courts. Until 2004, the Commission enjoyed the exclusive right to grant exemption to agreements between undertakings. At present, the Commission exercises exclusive rights only in two areas: (a) the assessment of mergers with an EU dimension; and (b) the assessment of the compatibility of state aid with the internal market. Under Article 106(3) TFEU, the Commission also has the prerogative to issue directives or decisions to Member States without having to ascertain the prior approval of the Council and/or Parliament.

In its capacity as the enforcer of competition rules, the Commission has issued a number of block exemption regulations with respect to the application of both antitrust and state aid rules: that is, Article 101(3) TFEU, Article 93 TFEU, Article 106(2) TFEU and Article 107(2) and (3) TFEU. It has also adopted 'guidelines' in order to be more transparent with regards to how it intends to enforce the rules and therefore to facilitate compliance by undertakings and Member States.[20]

All Member States have competition laws that copy EU concepts. This is required by Regulation 1/2003.[21] If they exit the EU, they can naturally continue enforcing their own competition

17. Ibid., p. 21.
18. Ibid., p. 22.
19. Ibid.
20. The various block exemption regulations and guidelines can be found on the website of DG Competition.
    The anti-trust legislation can be accessed at, DG Competition, 'Antitrust Legislation', http://ec.europa.eu/competition/antitrust/legislation/legislation.html. The state aid legislation can be accessed at, DG Competition, 'State Aid Legislation', http://ec.europa.eu/competition/state_aid/legislation/legislation.html.
21. Council Regulation No. 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1.

laws, but apart from the general problem that any exiting country would encounter about whether to retain the EU competition concepts and rules, the system of shared enforcement poses additional problems. Some of these problems have recently been identified by the so-called 'Brexit Competition Law Working Group' which was established in the UK in 2016.[22] Its purpose is to study the consequences of withdrawal from the EU and make appropriate recommendations to the UK government. One of its first tasks was to publish a position paper[23] and organize roundtable discussions. The main points of relevance of the position paper and of the dozen or so other papers that were presented at the roundtable discussions will be summarized in the following paragraphs.[24]

First, with respect to the vetting of mergers, it is likely that the Commission will also investigate mergers which, in the future, will be assessed by the UK's Competition and Markets Authority (CMA). That will immediately create two problems: (a) increased compliance costs for merging companies; and (b) risk of conflicting assessments, especially with respect to any remedies that the CMA and the Commission may require from the merging parties, especially given the fact that the Commission will no longer be concerned about the impact of mergers on UK markets. These are as much problems for the EU as they are for the UK.

Second, the CMA will also have to decide whether to establish criteria other than turnover in order to prioritize the cases which are currently assessed exclusively by the Commission and which will fall within the scope of its jurisdiction after exit. Or, it will have to increase its staff in order to cope with the extra workload.

Third, with respect to anti-trust rules, the Great Repeal Bill will not only have to repeal unwanted EU laws, but it will also have to incorporate Commission block exemption regulations in to UK law.

Fourth, since EU law will not apply to the UK, companies in the UK will lose the benefits of leniency in 28 countries, unless some special arrangement is agreed before exit. They will have to apply to both the Commission and the CMA.

Fifth, when the Commission currently opens an antitrust investigation, any on-going investigations by national authorities are suspended. Again, UK companies will lose the benefit from being investigated by a single authority, unless some special arrangement is arranged before exit.

Sixth, the risk of conflicting assessment will also arise in the case of commitments offered by undertakings, especially given that the Commission will not necessarily take in to account the state of competition in UK markets and, therefore, it will not aim to address concerns arising from specific UK problems.

Seventh, with respect to both mergers and antitrust, exit from the EU will mean that the UK will be free to define its own substantive competition rules and the extent to which a finding of anti-competitive behaviour will have to be supported by solid economic evidence, moving further away from restriction by 'object' to restriction by 'effect'. This will raise questions concerning consistency with the evolving EU case law. It will also raise questions of how the UK will determine concepts such as public security, media plurality, financial stability and whether it will want to

22. Its composition and activities are indicated on http://www.bclwg.org.
23. It can be accessed at, Brexit Competition Law Working Group, 'BCLWG Issues Paper', *BCLWG* (2016), http://www.bclwg.org/activity/bclwg-issues-paper.
24. The various papers that were presented at the roundtables can be accessed Brexit Competition Law Working Group, 'Activity', http://www.bclwg.org/activity.

allow the consideration of non-competition concerns such as broader public interest or narrower industrial policy objectives.

Eighth, with respect to state aid, UK law contains no prohibition of state aid similar to that contained in Article 107(1) TFEU, as Article 107(1) TFEU applies directly. After exit, the UK will have to decide whether to explicitly prohibit the granting of state aid. Adopting state aid rules of its own may become necessary for the UK because apparently, with the exception of Switzerland, all other free trade agreements concluded by the EU contain provisions on state aid. It will probably be in the interest of the UK to bind the EU and prevent EU subsidies from favouring the competitors of UK-based firms.

Ninth, the UK may also find it necessary to adopt state aid rules in order to prevent subsidy competition between the devolved administrations after exiting the EU. That will require the establishment of a body to control state aid within the UK. The CMA would be the natural candidate as it is independent and more likely to be accepted as impartial by the devolved administrations.

Tenth, in the field of state aid too, there are questions about whether to follow the interpretation of the EU courts after exit or to deviate from EU case law and develop UK specific concepts. Unlike cartels and abuse of dominance, the promotion of national interest may be a more forceful argument for the granting of subsidies that can promote UK companies at the expense of their EU competitors.

Indeed, the emergence of a legal lacuna is more probable in the case of state aid for the simple reason that aid is both defined and controlled at EU level. In the next two years, the UK will have to provide answers to the following three questions.

First, will it define its own state aid rules? If the answer is negative, will the UK allow, for example, operating aid which is normally prohibited by EU rules? Or, will it grant regional investment aid to companies which will have closed operations in other parts of the EU or the UK (this kind of aid is also not normally allowed). Or, how will the numerous public authorities that can potentially grant aid know how much aid they should grant and how will the many more recipients know how much to request?

If the answer is in the affirmative, then the UK, at the very least, will have to copy into UK law or adopt similar rules such as those of the prohibition contained in Article 107(1) TFEU and the exceptions contained in Articles 107(2) and (3) TFEU, 106(2) TFEU and 93 TFEU. In addition, it will have to copy or adopt similar provisions such as the block exemption regulations (for example, Regulation 651/2014[25] and the de minimis regulations, for example Regulation 1407/2013[26]) to enable public authorities, as grantors of aid, and undertakings, as recipients of aid, to know more precisely what kind of aid may be legally granted and received respectively.

One must also recall that the White Paper has pledged to maintain the same support for Research and Development, the Common Agricultural Policy and structural fund operations. This support will inevitably constitute state aid and the terms on which it will be granted will have to be made clear both to grantors and recipients.

25. Commission Regulation No. 651/2014/EU of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, [2014] OJ L 187/1.
26. Commission Regulation No. 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, [2013] OJ L 352/1.

Second, will it establish its own state aid control system that is based on the principle of prior notification? In theory, once the UK adopts the legal principle that state aid is prohibited unless explicitly exempted by a block exemption regulation, then for its enforcement it can rely on action before courts by competitors of aid recipients. In the EU, national courts also play an important role in protecting the rights of individuals. However, experience suggests that this is not enough. It is impossible to define, a priori, all variations of state aid that may be exempted on the grounds that they are likely to generate more positive than negative effects. Hence, it becomes necessary to have a central body to make the assessment of whether, on balance, aid is beneficial. That central body can also answer questions and clarify the interpretation of the block exemption regulations. The Commission's lengthy document on Frequently Asked Questions on the General Block Exemption Regulation is a case in point.[27]

Third, will it redefine the concept of 'common interest'? The legal basis of over 90% of the state aid that is granted in the EU is Article 107(3)(c) TFEU.[28] This Article declares aid to be compatible with the internal market when it 'does not adversely affect trading conditions to an extent contrary to the common interest'. The UK will have to define for itself what that common interest may be. It is clear that it will not be the common European interest, but it is far from obvious what the UK interest may be and whether, for example, it may hinge on considerations of international competitiveness. Unlike Article 101(3) TFEU, Article 107(3) TFEU, with the exception of the reference to common interest, does not provide the criteria for determining the compatibility of aid.

In fact, the dilemma for the UK is broader than that posed by Article 107(3) TFEU. The prohibition of state aid in Article 107(1) TFEU is not absolute. Article 107(1) TFEU declares state aid to be 'incompatible with the internal market', unless it is 'otherwise provided in the Treaties'. The words 'otherwise provided' refer to categories of aid that is or may be compatible with the internal market. This means that not only will the UK have to re-think the criteria of exemption, but also the categories of aid that may be exempted from the general prohibition of aid.

There is little doubt that exit from the EU will leave large gaps in the field of competition law. It is far from certain how these gaps may or should be filled. The White Paper suggests that the Great Repeal Bill will just 'copy and paste' EU law. For sure, block exemption regulations can be easily copied into UK law. But that will not be enough and will create confusion as no one will know with a sufficient degree of certainty, for example, the extent of restriction by 'object', in the case of antitrust rules, or what the UK interest may be or to whom to notify aid measures in the case of state aid. These considerations cannot be left solely to Parliament, as indicated by the White Paper, to determine, at some undefined point in the future, the meaning of the vague concepts of common interest or the balancing of positive and negative effects. The UK will have to make a number of tough decisions pretty soon.

At the same time, one may argue that withdrawal from the EU provides an opportunity for the UK to establish new rules that fit it much better than the EU rules. However, the overall conclusion of the papers, contributed by BCLWG, is that after 44 years of being subject to EU law, withdrawal from the EU and the prospect of companies having to comply with 'two sets of standards could

27. This document can be accessed at, European Commission, 'General Block Exemptions Regulation (GBER) Frequently Asked Questions', http://ec.europa.eu/competition/state_aid/legislation/practical_guide_gber_en.pdf.
28. The latest scoreboard of the European Commission indicates that aid for environmental protection, green energy generation, R&D, regional development, SMEs, and agriculture accounts for close to 90% of the all aid. See the latest scoreboard at, DG Competition, 'State Aid Scoreboard 2016', http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html.

result in cost, uncertainty and inefficiency'.[29] The counterintuitive conclusion is that compliance with one, but imperfect, set of rules may be preferable to compliance with two sets of rules.

5. Case study 2: banking resolution

The nascent EU banking union is based on three pillars: the single supervisory mechanism (SSM),[30] the single resolution mechanism (SRM)[31] and the common deposit insurance. So far, no progress has been achieved on a common deposit insurance.

The SSM (Regulation 1024/2013) has created a crisis-prevention mechanism. One of the lessons of the financial crisis that broke out in September 2008 was that banking regulation was fragmented along national lines, national regulators ignored the situation outside their jurisdiction and that when they acted they failed to coordinate effectively with their counter-parts in other jurisdictions.[32] The SSM has sought to redress all three regulatory failures with the European Central Bank (ECB) assuming the role of the single supervisor.

The SRM (Regulation 806/2014) has a created a crisis-management mechanism to (a) ensure the orderly restructuring or winding-up of banks; and (b) to sever the link between banking debt and government debt by limiting the occasions and reducing the amount of state aid that may be granted to banks. Aid is allowed when it is granted to insolvent rather than failing banks. Resolution procedures are implemented by a newly established independent Single Resolution Board.

Both the SSM and SRM apply to the 19 Eurozone countries, but any other Member State is free to join. The UK has declined to join either the SSM or the SRM. Therefore, on banking supervision, the EU law that applies to the UK is that contained in the 'single rule book'[33] elaborated by the European Banking Authority while, on banking resolution, the applicable law is the Banking Recovery and Resolution Directive 2014/59.[34] The counterpart for the Eurozone countries is the SRM. This case study reviews only the Directive. The single rule book is in fact a collection of many different regulations and guidelines. Assessing that body of law is beyond the scope of this article.

For the purposes of this article, the relevant provisions of Directive 2014/59 'establishing a framework for the recovery and resolution of credit institutions and investment firms', as it is formally known, are the following:

29. J. Vickers, 'Consequences of Brexit for Competition Law and Policy', *Paper for the British Academy Conference on the Economic Consequences of Brexit* (2016), http://www.bclwg.org/wp-content/uploads/2016/12/Vickers-British-Academy-7-Dec-16.pdf, p. 8.
30. Council Regulation No. 1024/2013/EU of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, [2013] OJ L 287/63.
31. Regulation No. 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and Single Resolution Fund and amending Regulation No. 1093/2010/EU, [2014] OJ L 225/1.
32. See Recitals 4-6 of the SSM Regulation.
33. See Recital 4 of Regulation No. 1022/2013 of the European Parliament and Council amending Regulation 1093/2010 establishing a European Supervisory Authority (European Banking Authority).
34. Directive 2014/59 of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions, and investment firms and amending Council Directive82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations No. 1093/2010/EU and No. 648/2012, of the European Parliament and of the Council, [2014] OJ L 173/190.

(1) Articles 1 to 3 define the scope of the Directive, provide definitions of the various concepts used in the Directive and request Member States to designate a resolution authority.
(2) Articles 4 to 14 lay down procedures for recovery and resolution planning, require resolution authorities and financial institutions to cooperate in drawing up resolution plans and instruct the EBA (European Banking Authority) to issue guidelines for that purpose.
(3) Articles 31 to 34 define the objectives, conditions and general principles for resolution action and require compliance with EU state aid rules.
(4) Articles 39 to 58 identify the resolutions tools that can be used (for example, sale of business, asset separation, bail-in) and how they may be used; set rules on the treatment of shareholders, the sequencing of writing-down of assets and conversion of capital and debt, the restructuring and re-organisation of business and the granting of government support. They also require compliance with EU state aid rules.
(5) Articles 63 to 72 require Member States to endow resolution authorities with sufficient powers, define those powers and ensure that they comply with state aid rules.
(6) Articles 81 to 86 lay down procedural requirements concerning cooperation between financial institutions and national authorities, cooperation between national authorities and European authorities (for example, the Commission, ECB, EBA, European Systemic Risk Board, European Securities and Markets Authority, European Insurance and Occupational Pensions Authority) and rights of appeal.
(7) Articles 87 to 92 deal with the cross-border resolution of groups involving more than one Member State, define cooperation procedures and set up multi-country 'resolution colleges'.
(8) Articles 93 to 98 address issues of cooperation with third countries and recognition or refusal to recognize resolution decisions taken by authorities outside the EU.
(9) Articles 99 to 109 require the establishment of resolution funds and impose rights and obligations for borrowing between resolution funds.
(10) Articles 110 to 132 deal with administrative penalties, amendment of other directives and regulations, impose the obligation for cooperation with the EBA and contain the typical final provisions.

In summary, the Directive essentially performs four tasks:

(1) It defines concepts which are relevant to the resolution of banks;

(2) It lays down the obligation for the winding up of insolvent financial institutions. Only institutions that can return to viability can be restructured and only institutions with systemic significance can be recovered;

(3) It stipulates the sequence of bail-in of shareholders and creditors and imposes limits and conditions on the use of public money and

(4) It obliges Member States and national authorities to cooperate with each other and with European authorities and to comply with EU state aid rules.

In the UK the Directive was transposed through the Bank Recovery and Resolution Order 2014.[35] HM Treasury has prepared a note that indicates the correspondence between the sections of the Order and the articles of the Directive.[36]

35. The Bank Recovery and Resolution Order 2014, SI 2014/3329. The text of the Order can be accessed at, http://www.legislation.gov.uk/uksi/2014/3329/made.
36. The note can be accessed at HM Treasury, 'Draft Transposition Note', http://www.legislation.gov.uk/ukdsi/2014/9780111123782/pdfs/ukdsitn_9780111123782_en.pdf. An explanatory note on the transposed legislation can be

Since the Directive has already been transposed in UK law, at the moment of withdrawal from the EU, the UK can continue to enforce its own law. However, the Directive also establishes extensive cooperation procedures on exchange of information, joint assessment and cross-border action, authorizations (for example, state aid compatibility), further elaboration of the current rules and the drafting of interpretive guidelines. It is indicative of the extent of the cross-border and multi-level cooperation arrangements that the Directive refers to the EBA 100 times, to the Commission 91 times, and to Article 107 TFEU and state aid 34 times.

After exit, UK authorities will be free to ignore those cooperation requirements, but the closely-knit structure of financial markets, the cross-border linkages of multinational financial institutions and the web of inter-connected financial networks and corporate alliances will not disappear overnight. Financial markets will continue to remain highly integrated. Hence, the UK will need to decide how to address the restructuring or resolution of banking conglomerates with extensive holdings in other Member States. Not only will some form of cooperation be in its interests, it will also be necessary.

For certain aspects of the Directive, it will not be enough for the UK just to continue with the enforcement of its current laws. For example, the Directive requires Member States and national resolution authorities to obtain prior approval from the Commission before any public money or any money controlled by public authorities is committed.[37] The obligation to notify resolution measures to the Commission will have to be deleted or the role of the Commission will have to be assigned to a UK authority. This example also demonstrates that it will also not be enough for the UK to simply declare that EU state aid rules will not be enforced after withdrawal from the EU. It will need to specify in many diverse legal instruments, which apply in different policy fields, whether the assessment performed by the Commission will lapse or be undertaken by another authority. It will also have to consider how any such authority will cooperate, if at all, with the Commission.

Lastly, as in the field of competition law, the Directive defines legal concepts that may be expressed differently or interpreted differently. For example, the UK may decide to change the sequence of bail-in or raise or lower the threshold on the amount of public money that can be used to support restructuring or recovery. Such changes do not have to be decided before exit. However, if it deviates from EU rules and practice there will be consequences for multi-country banking groups which will fall within UK and EU jurisdictions. Any advantage that can be created from changes in the rules that are enforced in the UK may be neutralized by extra compliance costs and increased uncertainty as to how the two sets of rules can interact.

6. Implications and conclusions

Article 50 TEU stipulates that a Member State that wants to leave the EU has two years to negotiate the arrangements of its withdrawal. During those two years, the EU and the withdrawing Member State may also agree on the terms of their future relationship. In reality, a withdrawing Member State will have many more issues to consider. It will also have to decide what kind of relationships it will want to have with the rest of the world. At least in the case of the UK, this is a top priority.

accessed at, HM Treasury, 'Explanatory Memorandum to the Bank Recovery and Resolution Order 2014', http://www.legislation.gov.uk/uksi/2014/3329/pdfs/uksiem_20143329_en.pdf.

37. This is required by several provisions of the Directive. See, for example, Article 32 on conditions for resolution and Article 34 on general principles governing resolution.

Since the UK referendum of 23 June 2016, most commentary and academic articles have focused on the interpretation of Article 50 TEU, the possible negotiating objectives and tactics of each side and the likely or desired nature of the post-exit relationship between the UK and the EU. Much less attention has been given to what the UK needs to do domestically in order to be able to function smoothly after it formally leaves the EU. Exit will not be placid despite the intention of the White paper to deliver a 'smooth and orderly' exit from the EU.

The two-year limit of Article 50 TEU is intended to protect the withdrawing Member State by preventing the remaining Member States from obstructing its exit with stalling tactics. This paper has shown that the two-year limit is a double-edge sword. It leaves little time for the withdrawing Member State to make the legal, regulatory and institutional adjustments that are necessary in order to enable it to continue functioning smoothly the date after exit.

The withdrawing Member State will have to determine the laws it wants to keep, establish the necessary enforcement institutions and procedures and redefine concepts that are currently applied at EU level. In addition, it will have to agree with the EU on how to cooperate in the enforcement of the rules it decides to keep. This kind of cooperation can fall within the scope of the future relationship between the withdrawing Member State and the EU.

This article argued that the multi-level structure of the EU, with its shared tasks and cooperation in policy implementation and enforcement, will create a lacuna in the legal system of the UK post-exit. With the help of two case studies, one on competition and the other on banking resolution, this article illustrated that, unless the UK takes remedial action in the next two years, exiting the EU will leave a gap where at present EU law provides for notification to or cooperation with EU institutions and other Member States. There will also be uncertainty on the interpretation of concepts relating to the common interest, which are embedded in EU law.

The forthcoming Great Repeal Bill will attempt to 'copy and paste' EU law into UK law. It will then be left to Parliament to revise the law as deemed necessary after exit. However, as shown by the case studies, the UK will need to find solutions before it exits the EU, otherwise there will be legal uncertainty as to who should assume the role of EU institutions and how fundamental EU concepts will be interpreted.

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