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Negotiating the Future of EU and UK Citizens after Brexit

Reaching an Agreement to grant an Acceptable Future to Citizens
Residing in the UK and EU after Brexit

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Riassunto

Il 23 giugno 2016 il Regno Unito ha deciso con un referendum di lasciare l'Unione Europea. La decisione, accolta con stupore sia in UE che nel mondo, diede inizio ai primi negoziati per l'uscita di uno Stato membro nella storia dell'UE fino ad oggi. In quanto primo nel suo genere, diversi erano gli obiettivi dell'UE che voleva fare di questi negoziati l'esempio di cosa comporta lasciare l'UE, così da disincentivare ogni altro Stato membro con correnti euroscettiche al suo interno. Allo stesso tempo però, l'UE non poteva punire aspramente la decisione della Gran Bretagna, rischiando di minare i rapporti futuri e, nel lungo periodo, la pace nel continente europeo.

Brexit, quindi, è un negoziato estremamente importante sotto molti punti di vista, dato che potrebbe disintegrare o rafforzare l'UE a seconda di come verranno trattati i negoziati. Va infatti sottolineato che l'uscita del Regno Unito rappresenta, come verrà analizzato nel primo capitolo, la conseguenza di molti anni di dissensi e scetticismi in UK verso la classe politica europea. Brexit ha dimostrato inoltre quanto poco sanno i cittadini europei di quello che l'UE effettivamente rappresenta nella vita di tutti i giorni, dalla libertà di circolazione delle merci a quella delle persone. Pertanto, Brexit ha mostrato ai vertici UE il bisogno di informare i cittadini, tramite l'esempio della Gran Bretagna post-Brexit, sui benefici che l'UE porta nella vita di tutti i giorni.

I negoziati di Brexit hanno mostrato un'unità senza precedenti nelle classi politiche dei rimanenti Stati membri, che hanno mantenuto fronte comune durante tutte le negoziazioni, escludendo la possibilità per la UK di raggiungere accordi bilaterali con i singoli Stati membri, portando quindi la Gran Bretagna a negoziare solo ed esclusivamente con un'Unione Europea unita, impedendo all'UK di influenzare i negoziati.

I negoziati di Brexit sono estremamente ampi e complessi, a causa dell'ampio numero di argomenti che i negoziatori devono affrontare. Tuttavia, la tesi si concentra in particolar modo sui diritti dei cittadini britannici ed europei che risiedono in UK o EU analizzando ogni round dei negoziati tra il Regno Unito e l'UE. Questo argomento, di vitale importanza e forse il più scottante per l'opinione pubblica, dato che cambierà completamente il modo di viaggiare tra UK e EU, verrà analizzato secondo la teoria della hard positional bargaining di Ury e Fisher e della two-level game theory di Putnam. In particolare, la tesi vuole dimostrare quanto importante sia stato per i negoziatori il ruolo dei cittadini e le loro convinzioni, portando i negoziatori ad una trattativa estremamente dura dove nessuna delle due parti poteva fare concessioni per non rischiare di perdere la loro reputazione a livello nazionale.

L'argomento di analisi, ovvero i diritti dei cittadini post Brexit, rappresenta un chiaro esempio in cui gli interessi dei negoziatori coincidono, dato che entrambi speravano di garantire il maggior numero di diritti possibile ai loro cittadini che risiedono nello Stato dell'altra parte coinvolta così da permettere una transizione il più facile possibile e con burocrazia facile per i cittadini che risiedono in UE o UK. Nonostante gli interessi coincidessero, tuttavia, i negoziatori hanno dovuto prendere posizioni estreme, come verrà analizzato, per mantenere la loro reputazione agli occhi del mondo e, soprattutto, dei loro stessi cittadini. Infatti, l'UE doveva mostrare ai cittadini e agli altri Stati membri le conseguenze di lasciare l'Unione, portando inevitabilmente i negoziatori ad assumere uno schema mentale in cui l'UE è il lato più forte e la Gran Bretagna deve fare concessioni per poter negoziare. Al contrario, la Gran Bretagna doveva dimostrare di poter rispettare, o almeno di provarci, le promesse fatte durante la campagna del referendum, promesse estremamente cariche di risentimento nei confronti dell'UE, che hanno costretto i negoziatori a mostrarsi forti e non propensi a fare concessioni.

I primi round dei negoziati hanno mostrato che entrambe le parti puntavano ad apparire forti agli occhi dei loro cittadini, ostacolando quindi la possibilità di affrontare i loro veri interessi senza soffermarsi sulle posizioni prese. Il secondo capitolo analizza i primi sei round dei negoziati, soffermandosi sugli ostacoli, le strategie e le dichiarazioni stampa fino a raggiungere quello che l'UE ha definito "progressi sufficienti" per affrontare i negoziati sulle relazioni future.

Va infatti sottolineato che l'UE è riuscita fin dal principio a influenzare l'intero processo dei negoziati imponendo alla Gran Bretagna la sua visione su come dovrebbe essere affrontata la negoziazione, ovvero attraverso un approccio separato in distinte fasi in cui la stesura dell'accordo può avvenire solo dopo aver raggiunto progressi sufficienti sui temi centrali per l'UE, ovvero i diritti dei cittadini, i contributi finanziari e il confine tra l'Irlanda e l'Irlanda del Nord.

Il terzo capitolo analizza la prima bozza del cosiddetto accordo di ritiro dell'UK dall'UE, focalizzandosi in particolar modo sul ruolo del Parlamento Europeo durante le negoziazioni come garante dei diritti dei cittadini. Infatti, va specificato che il Parlamento Europeo, malgrado l'Articolo 50 TFEU preveda che il Parlamento Europeo si limiti ad approvare l'accordo una volta che i negoziatori lo raggiungono, si è trasformato in un attore fondamentale durante tutto il processo di negoziazione, difendendo in particolar modo i diritti dei cittadini con la pubblicazione di linee guida e proposte per i negoziatori.

Durante tutto il processo di negoziati tra l'UE e il Regno Unito i cittadini hanno chiesto più volte chiarezza su come saranno le relazioni tra le due parti una volta conclusasi Brexit. Pertanto, una parte

del terzo capitolo è dedicata alle possibili alternative che l'UK prevede analizzando le relazioni che l'UE ha con altri partner quali il Canada, la Svizzera e altri Stati.

Il quarto e ultimo capitolo analizza ogni bozza dell'accordo di ritiro, evidenziando ogni cambiamento fatto tra una bozza e l'altra durante i negoziati. Va menzionato che in questa fase finale il governo britannico era particolarmente diviso, portando alle dimissioni di Theresa May e altri politici del partito conservatore, tra cui David Davis, capo negoziatore fino a questo momento.

Nel quarto capitolo la teoria di Putnam del two-level game tornerà ad essere analizzata, dato che i negoziatori in questa fase di stesura delle bozze cercheranno ogni modo per raggiungere un accordo non solo al livello internazionale, ma anche a livello nazionale, cercando di convincere cittadini e governi della validità dell'accordo per poterlo ratificare.

Una volta raggiunto l'accordo di ritiro finale, verranno analizzati gli articoli inerenti ai diritti dei cittadini, evidenziandone i cambiamenti e le concessioni fatte in questi anni di negoziati. Il processo di ratificazione e le conseguenze dell'accordo sulle due parti verranno poi analizzati, dimostrando che, per quanto riguarda la sezione sui diritti dei cittadini, affinché i diritti dei cittadini vengano armonizzati tra le due parti è necessario che le corti di giustizia competenti creino giurisprudenza analoga sia in UE che in UK per poter salvaguardare i diritti dei cittadini con le stesse modalità.

Brexit ha completamente cambiato il Regno Unito, portandolo a un ruolo più indipendente, anche se isolato, all'interno del continente europeo. Il Regno Unito, infatti, a partire dal giorno della Brexit, ha raggiunto con l'UE solo un accordo di recesso, mentre le due parti hanno come periodo di transizione solo pochi mesi del 2020 per raggiungere un accordo sulle relazioni future.

Brexit ha irrimediabilmente dimostrato al mondo intero, e in particolar modo agli Stati Membri euroscettici, che lasciare l'UE porta profonde conseguenze per i cittadini e per i governi. Lasciando l'UE, infatti, il Regno Unito ha lasciato, tra le altre cose, il mercato unico europeo, perdendo molti vantaggi economici e commerciali, oltre alla libertà di circolazione dei cittadini. I negoziati dimostrano che il Regno Unito, a differenza dell'Unione Europea, non era disposto a concedere libertà di movimento ai cittadini europei, così da fermare il flusso di immigrazione verso l'UK. Tuttavia, l'UK pretendeva che i cittadini britannici continuassero a godere dei benefici della libertà di circolazione sul territorio europeo, essendo nati con tale diritto.

Le negoziazioni per Brexit hanno rappresentato una nuova sfida per l'UE, che non aveva mai preso parte ad un negoziato di tale importanza. Questi negoziati sono infatti noti per la loro complessità e la mancanza di volontà da entrambe le parti di scendere a compromessi, sia per non perdere la

reputazione a livello nazionale che internazionale, sia per un sentimento di risentimento reciproco che ha caratterizzato i negoziati e anche, come dimostrato nel primo capitolo, gli ultimi anni di relazioni tra l'UE e UK.

L'accordo di recesso è entrato in vigore il 1° febbraio 2020, evitando ufficialmente lo scenario di un no-deal. L'accordo ha previsto un periodo di transizione per consentire al Regno Unito di adattarsi alla nuova situazione, oltre a garantire ai cittadini dell'UE che risiedono nel Regno Unito e ai cittadini britannici che risiedono in uno Stato membro una transizione relativamente agevole.

I negoziati hanno irrimediabilmente dimostrato la forza dell'UE rispetto a quella del Regno Unito, lasciando l'UE in condizioni relativamente migliori rispetto a quelle del Regno Unito, con una nuova unità tra gli UE-27 mai vista prima. Sebbene le conseguenze della Brexit sui cittadini siano ancora vaghe, poiché la CGUE e i tribunali britannici devono ancora creare una giurisprudenza in materia, vale la pena notare che le rassicurazioni e le concessioni reciproche concordate nell'Accordo di recesso consentono ai cittadini di risiedere nell'UE o nel Regno Unito con la compilazione di alcune pratiche burocratiche.

I negoziati per la Brexit sono stati particolari per molte ragioni, in quanto si è trattato del primo recesso dall'UE nella storia. Un'analisi approfondita di questi negoziati, con un focus particolare sul tema dei diritti dei cittadini, dimostra che il senso di risentimento e il desiderio di mostrarsi potenti agli occhi dei propri cittadini può alterare anche negoziazioni dove gli interessi coincidono. Infatti, le due parti hanno assunto posizioni estremamente diverse dall'inizio dei negoziati. Pertanto, malgrado i negoziati sui diritti dei cittadini potessero essere un tema relativamente di facile negoziazione, poiché le due parti avevano gli stessi interessi nascosti, ovvero garantire ai cittadini di continuare la loro vita nell'UE o nel Regno Unito nel modo più sereno possibile, il ruolo dei cittadini e di altri attori a livello nazionale ha ostacolato la buona riuscita dei negoziati e, con ogni probabilità, un accordo che potesse essere più soddisfacente per entrambe le parti.

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Introduction

The 23rd of June 2016 represents a milestone day in contemporary history. On this day, the United Kingdom, through a referendum, decided to leave the European Union. The decision was so unexpected that Prime Minister David Cameron and his government had not made any plan for this scenario. Thus, the UK fell into a spiral of uncertainty and doubt (McGowan, 2018).

Since the Treaty of Rome in 1957, the European continent has completely reshaped its identity and now it is an area of incomparable cooperation that no other continent has ever witnessed in human history. The EU also marked the longest period of peace and cooperation on the continent since the Roman Empire. Throughout the years, several governments voluntarily decided to take part in the EU. However, for the first time in the history of the EU, a Member State decided to leave the Union. In 2017, Theresa May formally triggered Article 50 of Lisbon's Treaty; thus, the negotiations between the UK and the EU for Brexit could officially start. Article 50 is the one that provides the mechanisms for the voluntary and unilateral withdrawal of a country from the EU.

As Article 50 of Lisbon's Treaty has never been triggered before, the Brexit negotiations are an epochal change in the history of the EU, that has the power to reinforce or disrupt the European Union as known today. In fact, as will be discussed in this thesis, the position of the EU was particularly endangered by the possibility that other Member States might choose to follow the path of the UK; thus, the EU needed to show that Brexit was a mistake. On the other side, however, the EU cannot punish the UK for its sovereign decision to leave the Union, as punitive or non-cooperative behaviour might endanger the relations between the two parties and even endanger peace within the continent. As such, it is extremely important to analyse the Brexit negotiations, as the future of the European continent relies on these negotiations.

'Brexit means Brexit', stated Prime Minister Theresa May on several occasions, alluding to the fact that there will be no other Referendum on the matter because the voters have already chosen (Martill and Staiger, 2021). In saying so, Theresa May wanted to express the fact that the electorate will now have a more active role in British politics and that the Parliament will always behave as the citizens command. However, a vast majority of Brexiteers thought that the negotiation processes between the UK and the EU would have been straightforward, as it will be considered in the next sections.

The UK had two essential reasons why it voted for Brexit: migration and sovereignty over the borders. In particular, the UK electorate proved to desire to leave the EU, so as not to have any other EU

immigrant and to regain sovereignty over its borders. Thus, this thesis will focus on the negotiations for the new status of EU citizens or EU immigrants as called by the UK. To better understand the role of immigration in the negotiation processes that the EU and the UK went through in the last years, it is of crucial importance to analyse the electorate's ideas and needs. Through the two-level game, this thesis will explore the biggest problem of the Brexit negotiates regarding the status of EU citizens living in the UK, namely the public opinion and the spoilers (Ott and Ghauri, 2019).

This thesis, divided into four chapters, aims at analysing the difficulties and implications of the Brexit negotiations for UK citizens living in the EU and EU citizens living in the UK, as their lives might completely change after the results of the referendum.

The first chapter of the thesis intends to evaluate the reasons why the British electorate chose to leave the EU. After an analysis of the historical background, the results and reasons for the referendum will be investigated outlining the main expectations the British electorate had with Brexit. Particular stress will be given to the matter of immigration, as it was one of the two fundamental topics of the Brexit campaign alongside sovereignty. The first chapter introduces one of the most problematic topics of the Brexit negotiations between the EU and the UK: granting rights to citizens while withdrawing from the EU body of law.

Starting from the second chapter, the Brexit negotiations take place. The second chapter starts with the first phase of the Brexit negotiations, which analyses all the rounds of the negotiations until sufficient progress has been reached on the three fundamental topics: citizens' rights, financial settlement and the Irish question. After providing the first six rounds of the negotiation, the chapter considers the progress made, to highlight the positions of the EU and the UK regarding citizens' rights.

The third chapter focuses on the role and positions of the European Parliament as it represented the main protector of citizens' rights. The chapter will then focus on the result of the six rounds of the negotiations analysed in the previous chapter: the Joint Report. Finally, the chapter analyses the possible outcomes of Brexit, as sufficient progress has been made and the spoilers on both sides of the negotiations were increasingly worried regarding the future between the two parties.

The term win-set is of particular importance for the analysis of the outcomes, as it refers to all the possible agreements that level 2, namely the national level in the two-level game theory, would accept. The win-set varies depending on the preferences and coalitions of level 2; in fact, there can be homogeneity or heterogeneity within level 2. In the first case, the constituents have a clear view

of what they want to obtain. Heterogeneity, on the contrary, means that the needs are more diverse and there is not a clear view of what the constituents want.

Finally, the fourth and last chapter analyses the various drafts of the Withdrawal Agreement and its final version, in order to discuss the latest agreements regarding citizens' rights. The chapter will then move on to the ratification process and the consequences of the agreement in the UK and the EU.

This thesis provides an analysis of the negotiation process and its consequences regarding citizens' rights from the early stages to the ratification of the Withdrawal Agreement. The main objective of this work is to consider the importance the two parties addressed to the matter of citizens' rights, starting from the referendum campaign to the day of the ratification of the Withdrawal Agreement.

The Brexit negotiations are still a recent process; thus, gathering data and information proved to be difficult, especially in a small, although crucial, branch of the negotiations as the one regarding citizens' rights. Nonetheless, the information gathered analysed through the hard bargaining theory (Fisher and Ury, 1991) and the two level-game theory (Putnam, 1988) showed that influencing public opinion has been of fundamental importance for both sides to justify the withdrawal of the UK from the EU.

This thesis provides an analysis of the strategies used by both sides, comparing them and highlighting the differences between the two sides in dealing with the rights of the citizens when moving or residing between the two countries. This paper differs from previous research, as it conveys an analysis step by step of the negotiations on citizens' rights, taking into account every round and meeting the negotiators had until reaching the Withdrawal Agreement, as well as considering their strategies and the role of the actors and spoilers involved in the negotiations.

It is defined as hard bargaining a negotiation process in which the actors involved take a sequence of positions to overcome the status quo to reach a compromise; however, unlike the soft bargaining strategy, in the hard one the actors take extreme positions and are not willing to make any concessions leading to deadlocks. In the positional hard bargaining the actors identify their positions with their ego and do not talk openly about the interests, but only about the positions, which transforms the negotiation into a matter of pride that the parties have to win to not lose the face both at home in front of the constituents and at the international level (Fisher and Ury, 1991).

The two-level game theory by Putnam is the main theory used in this thesis to explain the negotiations between the EU and the UK, as the national level and the constituents had a crucial role in this specific topic of the Brexit negotiations. The two-level game theory consists of the assumption that the role

of the negotiator is not only to negotiate at the international level with the counterpart but also at the national level with the constituents and potential spoilers, so as to develop a better strategy at the international level. As such, the negotiator also negotiates at the national level to grant the ratification of the agreement reached at the international level (Putnam, 1988).

The two-level game theory is implemented to observe the behaviour of the negotiators and the strategies and tactics used during the whole process. It will be argued that both the negotiators of the EU and the UK were extremely cautious in making concessions exactly because of the constituents and public opinion. The Brexit negotiations represented the first withdrawal from the EU in the history of the Union; thus, its peculiarity lies in the fact that the negotiators had to demonstrate to the British public opinion the reasons of the withdrawal, and to the European public opinion the reasons for a hard, and sometimes punitive, behaviour.

The use of the two-level game theory will highlight two different behaviours in manipulating public opinion: the EU through transparency showed to the other Member States the complexity of the interconnectedness between the Union and a Member State, highlighting the disadvantages of leaving the Union, while the UK had to show to its constituents that the EU will not allow the Brexit promised during the Referendum campaign, while at the same time using a hard-bargaining approach to show to its constituents that the UK is a strong country.

The Brexit negotiations regarding citizens' rights are an example of how the national level can alter and sometimes prevent an agreement at the international level, even when the underlying interests of the two counterparts do not diverge. In fact, the analysis of the many rounds of negotiations will highlight the deadlocks and every divergence, but it will also disclose the fact that both parties wanted the same thing: the desire to grant their citizens as many rights as possible to allow them to keep residing in the EU or the UK without excessive bureaucratic procedures. Nonetheless, the hard bargaining strategy implemented by the two counterparts and imposed by the public opinion at the national level forced the negotiators to focus on their positions, which were extremely different, as it will be analysed, and not on their interests, hindering the chances to make concessions.

Chapter I

Behind the Brexit Agreement: The Implications of Migration and Sovereignty in the Negotiations between the European Union and the United Kingdom

1.1 Introduction

This following chapter introduces the Brexit negotiations, setting out the extremely complex relations between the European Union and the United Kingdom in the past 46 years. The chapter focuses on the historical background and on the reasons of the Brexit Referendum held in the UK on June 2016. The focus of the discussion, after analysing the vote and the main ideas behind Brexit, will then be on the negotiating principles and the red lines imposed by the two parties involved in the negotiations, so as to introduce the main topics that will be discussed in the next chapters. Special attention will be given not only to the consequences the vote had in the UK, but also in the EU, as this arguably impacted the stances the two parties had throughout the whole negotiation period.

The chapter will then move to the main argument of the thesis, namely the issue of the European immigration in the UK. Although the chapter only analyses the migration with an historical perspective, it will give insights of the main issues related to immigration that will be analysed during the Brexit negotiations. The chapter ends with an analysis of the European greatest accomplishment, the Single Market. After an analysis of the Single Market, the Four Freedoms will be introduced, focusing in particular on the position of the UK towards the freedoms. Special attention, however, will be dedicated to the most relevant freedom for the thesis, the Freedom of Movement of Persons.

The main reason for this first chapter is to introduce the historical perspective of the relations between the UK and the EU to demonstrate the strict interdependency that the two actors have, so as to highlight that the two actors need to negotiate to find a compromise which might be better than the current status quo. Starting from this basic assumption, it is implied that the No-deal option is nothing more than a strategy used by the UK to overcome deadlocks or to assure that the EU will make some more concessions to the UK. This threat has been also used to show to British citizens that the UK has some sort of decisional power to terminate the negotiations at any time. As such, the British negotiators were trying to convince the British constituents that the UK is stronger than the EU.

The chapter also aims at presenting the actors involved in the negotiations analysing the relations they had in the past decades. As the two actors are collective actors, the role of constituents and public

opinion will be analysed, as it represented an extremely important issue, especially on the British side, as many issues were at stake. The role of the constituents will also explain why the two actors engaged in a hard bargaining strategy where no concessions were made.

1.2 The UK leaves the EU

On 23 June 2016, the UK unilaterally decided through a close-call referendum to leave the EU. Despite almost every UK party advocating to remain in the EU, the citizens chose to leave the Union, with an incredibly significant minority complaining about the results of the referendum. This minority, which stands as 48 percent of the voters, is endangering the possibility of a clear path towards the Brexit negotiations, as the British negotiators have such divided positions at the constituents level. Although the referendum had not a legally binding status, the UK government decided to follow the decision of its citizens (Somai and Biedermann, 2016).

Following this decision, the European continent was filled with insecurity and fear for the future of the relations between the UK and the EU and, more specifically, of the future of the EU itself. In fact, many observed, especially in the UK, that the EU is destined to fail without the UK as a Member State. Particularly convinced of this statement was Nigel Farage, leader of the UK Independence Party (UKIP), party founded in 1993 following the Maastricht Treaty. On the 8th of January 2018 Farage and Michel Barnier, the Brexit chief negotiator of the EU, met in a private meeting and the former said, 'after Brexit, the EU will no longer exist' (Barnier and Mackay, 2021: p. 141). Brexit created instability and turbulence not only in the political sphere, but also at the economic level, as the world financial markets were instable after the referendum (Arnorsson and Zoega, 2018).

Moreover, the referendum created instability also within the country, as the electorate was split in half (McGowan, 2018). The day after the referendum, the British pound fell to its lowest price in 31 years and British Prime Minister David Cameron, convinced that the UK would vote to remain in the EU, resigned. The following table analyses in details the results of the Brexit referendum focusing on the differences within the regions of the UK. The UK voted to leave the EU with 51,9% of the voters, which highlights how difficult was the decision for the UK, as almost half of the electorate was willing to remain in the EU (*EU referendum poll of polls - Financial Times*, 2018).

Region	Leave	Remain	Region	Leave	Remain
England outside London			South Yorkshire	61.56	38.44
Bedfordshire and Hertfordshire	51.93	48.07	Surrey, East and West Sussex	49.29	50.71
Berkshire, Buckinghamshire and Oxfordshire	46.84	53.16	Tees Valley and Durham	60.89	39.11
Cheshire	51.67	48.33	West Midlands	58.64	41.36
Cornwall and Isles of Scilly	56.46	43.54	West Yorkshire	54.78	45.22
Cumbria	56.43	43.57	Average	56.29	43.71
Derbyshire and Nottinghamshire	58.53	41.47	London		
Devon	55.34	44.66	Inner London	28.09	71.91
Dorset and Somerset	56.20	43.80	Outer London	43.97	56.03
East Anglia	55.45	44.55	Average	36.03	63.97
East Yorkshire and Northern Lincolnshire	64.75	35.25	Northern Ireland	44.24	55.76
Essex	62.34	37.66	Scotland		
Gloucestershire, Wiltshire and Bristol/Bath area	49.12	50.88	Eastern Scotland	36.82	63.18
Greater Manchester	53.46	46.54	South Western Scotland	36.78	63.22
Hampshire and Isle of Wight	54.58	45.42	Highlands and Islands	43.96	56.04
Herefordshire, Worcestershire and Warwickshire	56.56	43.44	Average	39.19	60.81
Kent	59.25	40.75	Wales		
Lancashire	59.03	40.97	West Wales and The Valleys	53.89	46.11
Leicestershire, Rutland and Northamptonshire	59.03	40.97	East Wales	50.25	49.75
Lincolnshire	65.16	34.84	Average	52.07	47.93
Merseyside	48.82	51.18			
North Yorkshire	51.89	48.11			
Northumberland and Tyne and Wear	55.71	44.29			
Shropshire and Staffordshire	62.53	37.47			

Table 1.1 illustrating Brexit poll tracker (Arnorsson and Zoega, 2018: p. 302)

The leaders of the ‘leave’ propaganda were shocked as well, as they admitted they were not prepared for how Brexit will actually look like. The other Member States urged the UK from the very beginning to invoke Article 50 of the EU’s Lisbon Treaty, as negotiations could start only after the formal invocation of the Withdrawal Clause, which is Article 50. The article provides the legal mechanism to leave the European Union voluntarily and unilaterally:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. 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 referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
5. If a State which has withdrawn from the

Union asks to re-join, its request shall be subject to the procedure referred to in Article 49 (European Union, 2012a).

The article provides, thus, the duty not only to negotiate to conclude an agreement on the withdrawal, but it also takes into account the future relations, urging to already set the basis for the relations of the Member State that left the Union. However, after the referendum nine months passed before on the 29th of March 2017 Prime Minister Theresa May officially triggered Article 50 of the EU. As no country before has ever left the EU, it was not clear whether or not Article 50 can be reversed. The then European Council President Donald Tusk believed that the Withdrawal Clause can actually be reversed; nonetheless, Theresa May argued that there will be no turning back, as the British population clearly voted to leave the EU.

As the Article 50 was triggered, the UK and the EU have two years, as it appears in Paragraph 3 of the Article, to sign an agreement; otherwise, the UK will officially leave the EU, after the two-year-period, without any agreement (BBC News, 2017). The reason behind the nine long months between the referendum results and the triggering of Article 50 was, based on Theresa May's statements, to define the UK objectives that must be pursued in the negotiation process. Those objectives were outlined in a letter to Tusk sent right after the triggering of Article 50 called the UK's seven negotiating principles.

Constructive and respectful engagement in spirit of sincere cooperation; put citizens first; aim for a comprehensive agreement; minimise disruption and give certainty if possible; pay attention to UK's 'unique' relationship with Ireland and importance of Northern Ireland peace process; begin technical talks soon and prioritise biggest challenges and work towards protecting shared European values (Miller, 2017: p. 7).

The letter, thus, revealed the impellent need to avoid a no-deal scenario, which will damage both parts. However, this letter already emphasised one fundamental difference between the priorities of the EU and the UK: the UK wanted to negotiate the withdrawal and the future relationships alongside each other, while the EU wanted to solve the withdrawal in the first place, and discuss about the future relations in a second phase, only when the withdrawal agreement has been found. The EU explained that it would be useless to agree on future relations if no withdrawal agreement has been found. However, the UK wanted specifically to negotiate on both topics alongside to develop an issue-linkage strategy, which allows to find side-deals to buy cooperation. This strategy was deemed as particularly useful by the British negotiators to avoid possible deadlocks on one of the two topics negotiated (Miller, 2017).

In February 2017, the British Shadow Brexit Team, which is composed of politicians of the opponent party chosen by the opposition to face the Brexit Team in the Government (UK Parliament, 2022), outlined objectives, or better called red lines, which were presented to the Brexit Team and Theresa May but they were deemed too optimistic. Despite these red lines were refused, one principle must be analysed, as it shows how the British underestimated the EU and its benefits. The UK Shadow Brexit Team asked to remain inside the Single Market of the EU, keeping only the freedom of movement of goods, while refusing the other three freedoms: namely, persons, capital and services (Carberry and Bailey, 2017). However, the EU was clear regarding this topic, as it stated that by leaving the Union, the UK will enjoy no freedom reserved to the Member States.

On the 17th of January 2017, Theresa May made a speech at Lancaster House which roughly set the agenda for the negotiations (Prime Minister's Office and UK Government, 2017).

I want this United Kingdom to emerge from this period of change stronger, fairer, more united and more outward-looking than ever before. [...] Not partial membership of the European Union, associate membership of the European Union, or anything that leaves us half-in, half-out. We do not seek to adopt a model already enjoyed by other countries. We do not seek to hold on to bits of membership as we leave (Independent.ie, 2017).

Theresa May used strong words in her speech, affirming the idea of a 'Global Britain.' May also expressed the British willingness to take back control of its own sovereignty, without the EU:

[...] so we will take back control of our laws and bring an end to the jurisdiction of the European Court of Justice in Britain. Leaving the European Union will mean that our laws will be made in Westminster, Edinburgh, Cardiff and Belfast. And those laws will be interpreted by judges not in Luxembourg but in courts across this country (Prime Minister's Office and UK Government, 2017).

Michel Barnier, the head negotiator for Brexit in the EU, expressed in his diary of the Brexit negotiations his scepticism towards the phrase 'Global Britain,' as the UK is isolating itself. Barnier also expressed his astonishment 'by the sheer number of doors she is closing' (Barnier and Mackay, 2021: p. 65). In fact, he stresses the fact that May is excluding all the models of cooperation the EU has managed to construct through the years, even with non-EU Members such as Norway and Turkey (Barnier and Mackay, 2021: p. 65-66). Thus, reiterates Barnier, the UK is seeking a trade agreement, the kind of agreement that the EU has with distant countries such as Canada and South Korea.

1.3 The relationship EU-UK through the decades

It must be noted that the relationship between the European Union and the United Kingdom has never been easy since the beginning, as the French President Charles de Gaulle vetoed both in 1961 and 1967 the UK's proposal to join the European Economic Community (EEC), which became the European Union in 1992 with the Maastricht Treaty. Finally the EEC accepted the third proposal made by the UK as a Member State in 1973 (Stockemer, 2018). The main reason of such commitment from the British side to enter the EEC was purely economic; in fact, if the UK's GDP was 30 percent higher than Germany and France in 1950s, in 1973 the British GDP was 10 percent lower than any of the EEC Member State. The countries of the EEC, on the contrary, experienced in the same period the so-called Golden Age of European economic growth, in which the reconstructions post-war and the industrialisation process were almost completed (Campos and Coricelli, 2015).

As at the end of the 1940s the UK was economically stronger than any country in the continent, it refused in 1950 to enter the European Coal and Steel Community. From the Marshall Conference in 1947 it was in fact clear that the UK and the EU6 had extremely different opinions: France wanted a custom union, while the UK pushed only for a free trade area, as a custom union requires a huge political step. The US supported the French in favouring a custom union; thus, the UK refused any partnership. Things changed when in 1960 the EEC inaugurated the European Free Trade Area (EFTA) in the Stockholm Treaty; hence, the UK started to be interested in joining the EEC (Atiken, 1973). Despite its membership in 1973, many struggles between the UK and the other Member States aroused already in 1975, when the Labour Party asked for a Referendum to leave the EEC because the contributions the UK owed to the EEC were too expensive. However, in this case, 67.5 percent of the population voted to remain in the community.

Many other financial struggles happened between the UK and the Members, such as the successful attempt led by Margaret Thatcher to reduce the annual contribution to the EEC in 1985 (Wall, 2011). The European affairs have always been a problematic issue within British politics. The contradictory nature of this relationship became more evident in the 1990s, when the UK signed the European Exchange Rate Mechanism and then it withdrew from it only two years later. Moreover, in 1986 Thatcher signed the Single European Act, in which every Member States expressed their willingness to introduce a single currency and the single European Market (European Union, 2011) while giving speeches anti-EU some months later (Kirkup, 2013). This dualism in the UK behaviour towards the EU shows how ambivalent not only the political class but also the public opinion is towards the EU.

In 1985, the Schengen Treaty was signed, but the UK did not sign it. The Schengen Acquis refers to the body of law aimed at the removal of internal border checks between countries which have agreed to comply with the treaty. Thus, the Schengen Area guarantees free movement to the European citizens and also to non-EU nationals living in one Member State. The Schengen provisions are also aimed at providing a common set of rules for controls at the external borders by fostering cross-border and judicial cooperation, as stated in Article 17 of the Agreement:

[...] they shall endeavour first to harmonise, where necessary, the laws, regulations and administrative provisions concerning the prohibitions and restrictions on which the checks are based and to take complementary measures to safeguard internal security and prevent illegal immigration by nationals of States that are not members of the European Communities (European Union, 2000).

Lastly, the Schengen Area also established a common information sharing system, the Schengen Information System (SIS), which preserves internal security through a system alert that enables border guards and migration authorities to check every third-country nationals entering the Schengen Area for the purpose of refusing entrance to criminals (European Commission, 2022).

The Schengen agreement, originally signed by 5 Member States, namely France, Germany, Luxemburg, Belgium and the Netherlands in the city of Schengen, gradually expanded in the following years until it was officially included in the Treaty of Amsterdam in 1999 (Behr, 2016). In doing so, the agreement entered into the legal framework of the EU, binding every Member State of abolishing checks at the borders between the EU Countries.

The UK, however, negotiated a special protocol in the Treaty of Amsterdam to not fully join the Schengen system, while it fully joined the SIS and coordinated efforts to prevent the entrance of criminals in the Schengen Area. Article 2 of the Protocol on the position of the United Kingdom and Ireland attached to the Treaty of Amsterdam allows the UK, and also Ireland, to not fully participate in the Schengen provisions, as provided in the following Article:

[...] no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland ; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of those States; and no such provision, measure or decision shall in any way affect the *acquis Communautaire* nor form part of Community law as they apply to the United Kingdom or Ireland (European Parliament, 1997: p. 99).

As in the EU legal framework, any European citizen and his or her family members, unless they are criminals, can enter any other EU country, member of the Schengen area agreement, without a visa. The UK before Brexit, as already noted in the Protocol of the Amsterdam Treaty, still could check

people coming from the rest of the EU and, in particular, it still controlled its borders with regards to non-EU citizens (Peers, 2015). Robin Cook, the Secretary of State for Foreign and Commonwealth Affairs from 1997 to 2001 argued that:

[...] because Britain is an island, it is sensible for us to retain controls at the point of entry, and that, because of our long historical and cultural ties with other parts of the world, it is important to retain control of our own immigration policy (UK Parliament, 1997).

Already in 1999, thus, the British stance towards a European free movement of persons was rather sceptical. In fact, despite the image of a borderless continent as a major achievement for the European countries, the UK has always been in favour of a more protectionist approach towards borders. One main reason for this choice regards the geographical position of the UK as, since it is an island, immigration control in the UK is limited to certain main ports of entry, while the Schengen countries are more interdependent because of their geographical positions (Wiener, 2000). It must also be stressed that Schengen impacts the core components that define sovereignty, namely borders, security and citizenship, and the UK has never wanted to lose these competences in favour of the European integration.

The precarious economic situation of the EU in the 2000s, and in particular the 2008 crisis, created a huge wave of dissatisfaction among the British. Euroscepticism started to grow in the country, especially within the Conservative Party. Britain, already isolated in Europe for not joining the Euro and the Schengen Agreement, in 2011 became even more isolated, when Prime Minister David Cameron vetoed the EU budget. In doing so, the populist forces from the left and the right expressed their discontent towards the ever-closer union and the four freedoms of movement of the EU: namely goods, people, capital and services. The populist discontent became so popular among the citizens, in particular regarding the free movement of persons, that Prime Minister David Cameron had to guarantee that in case he would win the general elections in 2015 he would have proposed a Referendum whether UK should leave or remain the EU.

1.4 Sovereignty and the EU-UK relations

As it appears through the history of the relations between the EU and the UK, topics such as sovereignty, economics and politics are of fundamental importance. The UK after World War II was one of the few winners of the war in the continent and thus it perceived itself as a global player, on a higher level than the other European countries. Moreover, as already noted, the UK has always been

reluctant in the process of integration performed by the other Member States; in fact, from 1975 to 2015 many called for another referendum regarding the British membership in the EU, especially the press, but the political leaders always tried to prevent this. David Cameron himself opted for the referendum confident that the UK would have decided to remain in the EU, taking this opportunity to defeat the opposition and also to reinforce his party (European Council, 2017c). However, as it is widely known, Cameron underestimated the past 40 years of resentment towards the EU and on 23rd of June 2016 52 percent of the population voted to leave the EU. Cameron resigned right after the referendum results were clear, leaving the UK in one of the most instable conditions it had ever faced.

The referendum caused a leadership struggle, especially in the Labour Party, while the First Minister of Scotland announced the willingness to hold a referendum for independence of Scotland, in order to enter again the EU. Moreover, many multinationals has opted for moving their headquarters from London to other cities in the EU, so as to maintain the economic advantages the EU gives. The pound, following the results of the referendum, collapsed to its lowest (Gietel-Basten, 2016).

Some months before the referendum, on the 18th and 19th February 2016, David Cameron's cabinet had intensive negotiations in Brussels with the leaders of the other Member States to change the status of the UK's membership in the EU, changes that will be applied only if the UK voted to remain in the EU (Meluš, 2016: p. 617). These changes were aimed at convincing more electors to vote for remain. The changes agreed would have profoundly changed the status of the UK within the EU, as many concessions were made. The EU had agreed on granting to the UK relative independence in many crucial aspects regarding the Eurozone, Migration and Free movement.

1.4.1 Eurozone

In particular, Britain was agreed to keep the pound, despite the Maastricht Treaty explicitly stresses that all the countries that meet the criteria have to adopt the Euro, as the main aim was to have more economic integration and cooperation through a common currency (European Central Bank, 2017). These provisions were agreed by all the Member States, except for Denmark that expressed already in the Treaty negotiations its reluctance to adopt the euro. Article 121 Paragraph 1 of the Maastricht Treaty (European Union, 2006), signed by the UK, established the convergence criteria, which sets out the principles for introducing the common currency. The four convergence criteria are price stability, government finances, exchange rates and long-term interest rates.

The first criterion, price stability, refers to the inflation rate of a Member State, which must be close to that of the three best-performing Member States (Polasek and Amplatz, 2003). In fact, Article 1 of the Protocol on the convergence criteria referred to in Article 109j of the Treaty establishing the European Community declares:

The criterion on price stability referred to in the first indent of Article 109j of this Treaty shall mean that a Member State has a price performance that is sustainable and an average rate of inflation, observed over a period of one year before the examination, that does not exceed by more than 1 ½ percentage points that of, at most, the three best performing Member States in terms of price stability. Inflation shall be measured by means of the consumer price index on a comparable basis, taking into account differences in national definitions (European Union, 1992: p. 85).

Concerning government finances, the Commission examines compliance of the budgetary discipline based on the annual government deficit and the government debt. The Member State must not exceed 3% of the deficit compared to its Gross Domestic Product (GDP) and the ratio of gross government debt over GDP must not exceed 60%. Preceding the examination of the fulfilment of the criteria, the Member State must have participated in the exchange rate mechanism of the European monetary system without any break (European Union, 2006). Lastly, the long-term interest rate must not exceed by more than two percentage points that of the three best-performing Member States.

The protocol on the transition to the third stage of Economic and Monetary Union declares:

[...] the irreversible character of the Community's movement to the third stage of Economic and Monetary Union by signing the new Treaty provisions on Economic and Monetary Union. Therefore all Member States shall, whether they fulfil the necessary conditions for the adoption of a single currency or not, respect the will for the Community to enter swiftly into the third stage, and therefore no Member State shall prevent the entering into the third stage (European Union, 1992: p. 87).

Thus, this protocol obliges the Member States to go through the third stage, which is the adoption of the euro as currency, automatically if the four convergence criteria are fulfilled. However, the British government never wanted to give up the sovereignty in controlling interest rates. As a consequence, the Maastricht Treaty has a protocol on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland which recognises:

[...] that the United Kingdom shall not be obliged or committed to move to the third stage of Economic and Monetary Union without a separate decision to do so by its government and Parliament. [...] The United Kingdom shall not be included among the majority of Member States which fulfil the necessary conditions referred to in the second indent of Article 109j(2) and the first indent of Article 109j(3) of

this Treaty. The United Kingdom shall retain its powers in the field of monetary policy according to national law (European Union, 1992: p. 88).

The agreement reached between the EU and the UK would thus close the last remote possibility that the UK would ever join the Eurozone. As already mentioned, though, the agreement would have been entered into force only if the UK had voted to remain inside the EU. This agreement provided the UK with further benefits. In fact, the UK was granted to keep its own currency and deepen their business trade without any sort of discrimination for the pound (Meluš, 2016: p. 617).

1.4.2 Migration

For what concerns migration, the agreement reached by the Cameron cabinet and the EU allowed the UK to unilaterally decide to limit in-work benefits for EU migrants for the first 4 years in the UK. The EU law does not require the Member states to grant unrestricted access to any EU citizen to services and benefits, but it does grant access to fundamental services to any EU citizen in another EU Member State.

To join all the same rights as a citizen, the EU law expresses that the EU citizen who moves to another country must be economically active or self-sufficient to enjoy all the benefits (UK Parliament and Mackley, 2019). The agreement reached, but never implemented, allowed, thus, the UK to not comply anymore with this particular case and to have more sovereignty over its own immigration policies.

1.4.3 Free movement

The agreement also included some limitations to free movement, as it allowed the UK to deny unconditional entry to nationals of a country outside the EU married to an EU national (Meluš, 2016). However, as we witnessed with the referendum vote, this agreement between Cameron and the EU was not enough to suppress Euroscepticism.

David Cameron after the agreement reached with the European Council claimed victory and in his Office in 10 Downing Street stated:

We will be in the parts of Europe that works for us, influencing the decisions that affect us in the driving seat of the world's biggest market and with the ability to take action to keep people safe. And we will be out of the parts of Europe that do not work for us. Out of the open borders. Out of the bailouts. Out of the euro (Prime Minister's Office, 2016).

1.5 The referendum campaign

Despite this agreement, the UK left the EU. As already noted, David Cameron and all major parties of the Parliament were in favour of remaining in the EU; thus, they were confident about the results of the referendum. During the referendum campaign two figures became particularly important: David Cameron and Boris Johnson, the former mayor of London. David Cameron became the most prominent campaigner to vote for In, with the support of many foreign leaders, international organisations and businessmen, while Boris Johnson was the most prominent Out campaigner (Hobolt, 2016). The Loughborough University carried out a research in 2016 regarding media coverage of the campaign which observed that Cameron was the most prominent figure, as he was mentioned in 25 per cent of news items, while Johnson in 19 per cent (Loughborough University, 2016).

From the very beginning of the campaign, it became clear that the topics were essentially two: economy and immigration. Brexit represented a leap in the dark for the Remainers, as it was a huge economic risk, while the Leave advocated the necessity to take back control of British borders and the British law-making. The rhetoric used by both sides was mainly focused on inducing fear, with the Remain side assessing Brexit as possible economic disaster and the Out campaigning for the negative effects of the European immigration policies and advocating this referendum as the only chance to disrupt the status quo and regain sovereignty.

Throughout the whole campaign, these two issues dominated both the political and media agenda, while other fundamental issues, such as security, democracy and sovereignty, became more marginal (The Week UK, 2022). Table 1.2, taken from the research carried out by the Loughborough University (Loughborough University, 2016), shows the prominence of the two fundamental topics in the news from the 6th of May until the 22nd of June 2016.

The seven weeks analysed by Table 1.2 highlight how intense the debate was. In the first three weeks, the fear for economic disaster appeared much more important than immigration; however, starting from the fourth week, immigration gained much more importance, which benefitted the Leave campaign. At the seventh week, the two topics were almost equally important, which depicts how close the results of the referendum would have been (Hobolt, 2016).

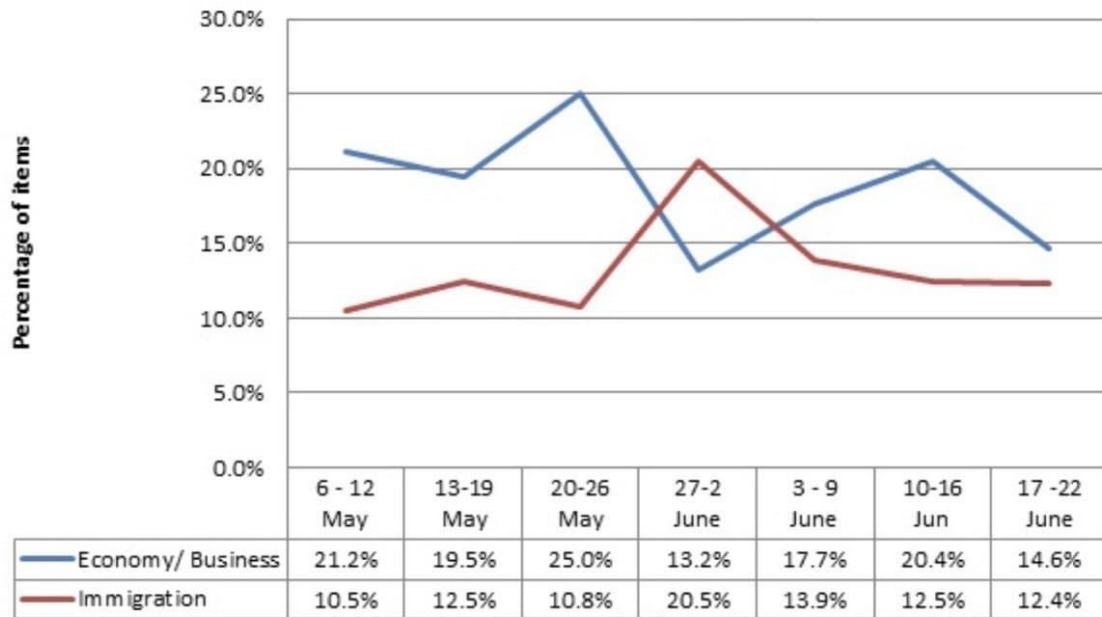


Table 1.2 illustrating the seven weeks prior to the Brexit referendum (Loughborough University, 2016)

Another important research conducted by YouGov analysed the topics after the referendum campaign. Again, economy and immigration appeared as the two fundamental topics. This dichotomy was further proved interviewing some voters, as it appeared clear that the British interviewed never took into consideration that the two topics could actually coexist. One possible explanation of this dichotomy lies behind the fact that both sides of the campaign focused on fostering fear and on the fact that economy and immigration are incompatible topics, as if limiting immigration and fostering economic growth could not exist at the same time (YouGov, 2017).

The vast majority of Brexiteers simply advocated immigration as the main cause of reduction of wages and rising unemployment. However, some of the Brexiteers stated that the UK can have a better immigration policy if it leaves the EU. In fact, as it will be further analysed later, the EU law requires every EU Member to accept all EU citizens regardless of their skills. It was also advocated that the UK should admit only migrants that might bring positive valuable skills to the society (Vox, 2016).

It must be noted that the referendum campaign was filled with illusions, expectations and resentment towards the ever-closer union the EU is creating (Niedermeier and Ridder, 2017). Many Brexiteers promised that, for example, without the payments the UK had to pay to the EU, the UK will gain

£350 million a week, as the UK does not have to pay anymore the EU policies. However, the reality showed that the UK because of Brexit is facing costs of around £800 million a week (SNP, 2022).

The main problem with Brexit was, however, the fact that both parties wanted to show to the world and, more importantly, to their citizens that they can end the negotiations being stronger than the counterpart. The main reasons Britons decided to leave the EU was, as promised during the Referendum Campaign in an overly simplistic way, to gain sovereignty and to be able to use its budgets freely without any imposition from Brussels; thus, the main aim of the negotiations is to show the power of the UK as it can stand alone and that the EU is weaker. A successful Brexit is highly likely to show the world the strength of the UK, but it can also allow a spill over effect in the EU, as other countries might want to leave the EU to enjoy the same benefits as the UK. For this reason, the Brexit negotiations are very unlikely to be articulated over a win-win solution, but rather over the willingness to end the negotiations stronger than the other side. Of course, both parts know that they depend on each other and, luckily, throughout the history of the EU Members and the UK, a strong relationship of mutual trust has been established. Nonetheless, as the negotiations will show, hard and soft Brexit or the No-Deal were threats often used by the UK to reach a better agreement (Guerra and McLaren, 2016).

1.6 The impact of the Brexit Referendum on the EU

The call for the referendum in the UK created many concerns not only related to the possible loss of a Member State in the Union, but also that other countries will be more likely to follow the path of Britain. Many international relations scholars predicted that also other countries in which Euroscepticism is prominent, such as Denmark, Austria and Sweden, might hold referenda to leave the EU leading to EU's disintegration (Malik, 2018). The EU, thus, through the Brexit negotiations, has to be united against the threat to leave the UK worse off compared to the Union, so as to make another EU exit less attractive (Guerra and McLaren, 2016).

However, Brexit has actually led to the opposite direction, as support for the EU starting from 2016 continued to rise. Studies revealed in fact that not in a single Member State the majority of the population would support exiting the EU (Collins, 2017). Brexit served as a glimpse into the future for every Eurosceptic within the Union if their country would choose a path outside the EU. Many British were convinced that the EU would have ceased to exist after Brexit; however, the huge economic impact and the long and often dissatisfactory negotiations increased European integration

among the members. Brexit had actually proved to both the population and the European political class that the benefits of the EU have not been acknowledged (Czech and Krakowiak-Drzewiecka, 2019). As such, Brexit forced the EU to reshape its campaigns on how to promote awareness regarding the benefits of the EU's integration and, as a consequence, Brussel pushed for a more positive presence in the everyday life of the European citizens. In fact, it must be noted that Brexit highlighted a growing disbelief in the European institutions, as many citizens did not feel represented by the European institutions. In 2017, the former President of the European Commission Juncker expressed his intention to have a more pro-active approach to future EU social policy (Oliver *et al.*, 2018).

Moreover, over the years, the UK has gained in Brussels the reputation of delaying Council decisions, as the UK was often in conflict with the other Member States. As the predictions to unravel the EU proved to be unfounded, the UK found itself in struggling to cope with the myriad challenges of the withdrawal, with almost half of the population, who voted to remain in the EU, against many of the proposals of the British political class. On the other hand, the EU reached unanimity on how to negotiate with the UK; thus, proving that the EU will be likely to control the negotiations (Oliver *et al.*, 2018).

The EU negotiators, with Michel Barnier as head negotiator, understood the pivotal importance of finding consensus among the Member States and the European citizens on how to negotiate with the British. Barnier reiterated many times before and during the negotiations the lack of realism by the British counterpart (Barnier and Mackay, 2021: p. 76). Barnier and his team of negotiators, thus, visited each of the EU27 governments in order to prepare the agenda and set the priorities for the EU as a unified actor. In doing this, the negotiators assured more participation through the sense of being represented by every Member State.

On 29 April 2017, the European Council set the core principles for the Brexit negotiations. The core principles set out the positions and the aims the Members of the Union pursue during the negotiations (European Council, 2017a). The first core principle, and the fundamental one, stresses the willingness of the Union to have the UK as close partner in its future relations, stating, however, that the Single Market remains indivisible, which means that no sector-by-sector approach will be granted. The Union also unanimously decided that non-member States of the Union cannot enjoy the same rights and benefits as the Member States (Łazowski, 2018).

Of fundamental importance was also the need to grant transparency in every step of the negotiation and the EU countries also decided to not engage with the UK separately, but rather to negotiate

exclusively through the Union so as to grant unified positions. The Union as core principles also set out that the negotiation must lead to agreements for reciprocal guarantees to safeguard the rights of EU and UK citizens that were affected by Brexit. Another critical issue addressed by the European Council regards the commitments and debts contracted by the UK when it was a member of the Union. In this respect, the EU expects the UK to pay the British shares that it agreed as member (European Council, 2017a). The text was drafted by the Tusk's cabinet and the task force of the European Council and on 29 April 2017 it was unanimously agreed on. These core principles, thus, set out the three key issues of the withdrawal: citizens, budgets and borders. Thanks to the consensus reached in voting the core principles, the position the EU showed to its British counterpart was of great unity and clarity. On the contrary, the UK, in the White Paper sent to the EU in February 2017, lacked a proper position on two crucial topics: the future relations and EU citizens' rights.

1.7 Migration and the UK

As already mentioned, migration represented the most crucial topic for leaving the EU during the referendum campaign. The EU-citizenship has always been the most delicate argument of the negotiations, as the EU wanted to grant as many rights as possible to its many citizens living in the UK, while the UK citizens voted to leave the EU exactly to avoid immigration from the EU. As such, the positions of the two parts on this topic are the pivotal matter to analyse the Brexit negotiations. During the referendum campaign, migration was held by Brexiteers as responsible to drain the resources of the country (Gietel-Basten, 2016). The British population deemed responsible for the increasing immigration rates the EU's enlargements to eastern Europe. In 2015 the then Home Secretary Theresa May stated:

[...] When immigration is too high, when the pace of change is too fast, it is impossible to build a cohesive society. It is difficult for schools and hospitals and core infrastructure like housing and transport to cope. And we know that for people in low-paid jobs, wages are forced down even further while some people are forced out of work altogether (Gietel-Basten, 2016).

All the migration narratives from the governments underlined the fact that there was no positive side of immigration and even during the referendum campaign the Remain side stressed that migration is a price to pay to avoid economic destruction. Particularly significant were the most recent enlargements of the European Union, which drastically enhanced the British immigration rates. The Vote Leave campaign addressed:

The EU is expanding to include: Albania, Macedonia, Montenegro, Serbia and Turkey. When we joined, there were just nine member states. Now there are twenty-eight, the most recent being Romania, Bulgaria and Croatia. Five more countries are in the queue to join totalling eighty-nine million people. When they join they will have the same rights as other member states (Gietel-Basten, 2016).

However, the UK has always been an ardent supporter for the enlargements of the EU, as it supported the entry of Bulgaria and Romania in 2007, as well as Croatia in 2013. At the same time, the UK firmly believed in the necessity to allow Turkey to enter in the EU, as well as encouraging countries of the Western Balkans to join the Union (Ker-Lindsay, 2017). In doing so, the UK hoped to avoid that the Union championed the idea of the ever-closer union in matters that might have further affected sovereignty. The election of a Conservative-led government in 2010 changed the British position inside the EU, and an outwardly hostility to the EU rose. While the British Foreign Office kept on stressing that Britain was still in favour of enlargements, the political sphere ceased to champion expansion of the EU and a hostile debate over EU immigration rose within the country.

Since joining the EU, the UK, thus, has been extremely interested in the expansion of the Union and it even became the most important champion of the bloc to assess expansion. The UK feared from the very beginning what France and Germany called an ever-closer union and to prevent this issue it has always tried to enlarge the Union as antidote to this process (Ker-Lindsay, 2017). After the enlargement in 2004, which added ten countries to the EU, the UK experienced a large-scale arrival of workers from those countries. Thus, the UK in the next enlargements still favoured and welcomed the new countries, but promoting at the same time, along with other EU Countries, transitional restrictions over freedom of movement. However, these measures did not prevent the increase of the immigration wave and in 2015 net migration from the EU reached a peak of 184,000 immigrants (BBC Radio, 2016).

With the 2004 enlargement, all EU countries, except for the UK, Ireland and Sweden, temporarily restricted labour market access to the new Member States. However, the UK, being favourable to EU enlargements, allowed flows from these ten new members and it experienced unprecedented flows of immigration, which caused further Euroscepticism (Vargas-Silva, 2014). Although hostility to immigration has always been present within the country, the Eastern European migration following the EU enlargement has reshaped the debate on migration in the UK, generating much more hostility. Furthermore, the 2008 crisis sharpened UK unemployment rates, which pushed the British to address immigration as a cause of less jobs and reduction in salaries.

The UK since the 1990s has always been popular among southern European countries such as Italy, Greece, Spain and Portugal. However, after the 2008 crisis, migration from these four countries increased by over 50% (D'Angelo and Kofman, 2017: p. 179). In 2013, as the Table 1.3 shows, immigration from these four southern European countries counted 41,000 Spanish, 38,500 Italians and 24,000 Portuguese, while the registrations from the EU countries overall rose by 50% compared to 2010. In the same year, a Conservative-led Coalition was elected and it pledged to reduce net immigration from non-EU countries, as the UK, as Member of the EU, could not limit access to EU nationals. British politicians and national media started addressing the fact that EU migration could not be controlled by the UK, as sovereignty on this matter belonged to the EU and not anymore to the UK. Ring-wing newspapers highlighted that the UK is powerless and populist politicians noticed that Britain is threatened by EU immigration. From 2010 to 2015, the hostility towards migration focused exactly on EU migration, leading many Brexiteers parties such as UKIP to gain importance in the political sphere.

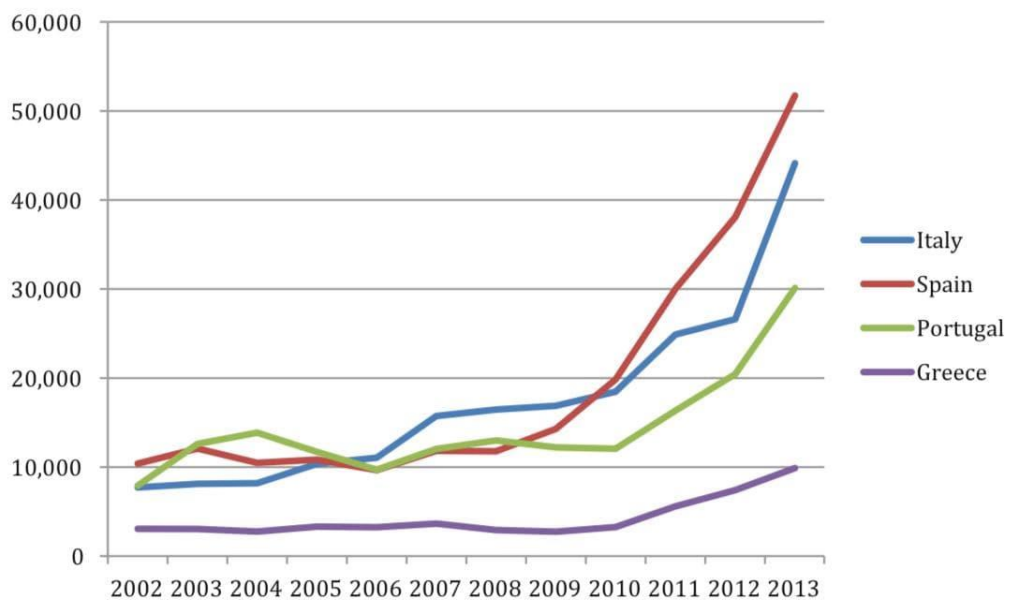


Table 1.3 illustrating migratory flows from Southern Europe to the UK (D'Angelo and Kofman, 2017: p. 181)

1.8 The EU Single Market and the Four Freedoms

As already stressed, migration during the campaign represented one pivotal argument for the British along with the economic problems. Thus, EU immigration in the UK also represented a fundamental topic in the Brexit negotiations. Before discussing the negotiations, however, it is fundamental to briefly analyse the Single Market of the EU with particular attention to the four freedoms.

The UK was mostly interested in leaving the EU to stop the immigration wave from the EU countries, in particular after the enlargements of the EU to eastern countries. However, the freedom of movement of persons is one of the four pillars of the EU, along with freedom of movement of goods, capital and services and they represent the basis of the European Union that cannot be partitioned (EU3doms, 2017). This brief analysis of the four fundamental freedoms in the EU framework is of vital importance to understand the main topics and the reasons discussed by the UK both during the referendum campaign and the Brexit negotiations.

The European single market is one of the EU's greatest successes. The agreement includes all the 27 EU Member States and four non-EU countries: namely Iceland, Liechtenstein, Norway and Switzerland. Thanks to it, the EU experienced economic growth and created a new path towards further cooperation among the Member States. One of the main problems of the creation of a single market was, however, the different domestic regulations in every Member State. For this reason, the EU implemented a policy of harmonisation, especially implemented by the European Court of Justice (ECJ), which fostered an integrated economy through judicial activism (Egan, 2016: p. 258). The single market is divided in four cornerstones, which are the so-called "four freedoms" – the free movement of goods, services, capital and people.

Economic prosperity has always been one of the primary drivers for Nation-States, which opted for an economic integration in the European area to protect their own sovereignty (Milward, 1992). The integration of a supranational European entity that would protect the existence of Nation-States and the creation of a single market to grant economic integration have been two major objectives after World War II. Already in 1968, the six members of the EEC, Germany, Italy, France, Belgium, Luxemburg and the Netherlands, abolished customs barriers and created a common tariff for goods from non-EEC countries. The EU agreed in 1986 to adopt the Single European Act which introduced the first provisions towards a complete single market. The 1992 Maastricht Treaty represented a big step forward and laid the basis of the actual single market, to which the UK has always agreed. In 1994, the Agreement on the European Economic Area (EEA) was signed and included thirty-one countries. However, the 2008 crisis highlighted that the single market still had flaws; thus, in 2011

the European Commission introduced the Single Market Act I which identified ways to improve the Single Market (Bublitz, 2018). The European Commission through this Act addressed the shortcomings of the Single Market and advocated for more cooperation.

To remedy these shortcomings we must give the single market the opportunity to develop its full potential. [...] This means putting an end to market fragmentation and eliminating barriers and obstacles to the movement of services, innovation and creativity. It means strengthening citizens' confidence in their internal market and ensuring that its benefits are passed on to consumers. A better integrated market which fully plays its role as a platform on which to build European competitiveness for its peoples, businesses and regions, including the remotest and least developed (European Commission, 2011).

The Single Market increased the power of the economic weight of the Union in the world and gave the European Union a strong voice in trade agreement negotiations. The Single Market comprises of five hundred million European citizens and twenty-four million companies. The Single Market has in fact benefitted the European Union, which has now a GDP similar in size to the GDP of the US (Bublitz, 2018).

1.8.1 The free movement of goods

The free movement of goods is the first of the four fundamental freedoms. It eliminated the custom duties and quantitative restrictions between the Member States. When the internal market was established, goods were more than 70% of the European economy. Thus, goods represented the first and most important step towards integration (Ugirashebuja *et al.*, 2017: p. 326-344). Originally, the right to free movement of goods was aimed at fostering connections in the economies of the Member States lowering custom duties and tariffs, but later it was aimed at creating the internal market, an area in which goods can move as freely as in a national market. As a consequence, since the 1970s the Member States coordinated efforts to harmonise national legislation so as to allow a good produced in another EU country to be easily introduced in all the other EU countries without facing national provisions. Harmonisation is however limited to essential requirements.

The goods to which the freedom of goods is applicable are all the goods that are legally produced in one Member State or legally imported in one Member State. As such, they are legally produced or imported based on the laws of the Member State and, thanks to the harmonisation, they can thus move freely in every other EU country. The European Parliament has a fundamental importance in this specific area, as it has always produced strong legislative contributions to harmonise the national

laws. In particular, the Parliament was active in proposing new regulations on consumer product safety, which contributes to increase enterprises competitiveness and environmental protection (Maciejewski, 2008).

Moreover, Also the European Court of Justice has through the years strongly shaped the nature of harmonisation. Of particular importance is the Dassonville case of 1974 in which the Court defined illegal even measures that are capable of potentially and indirectly hinder trade. These measures of equivalent effect represented a turning point in the freedom of goods, as it basically prohibits any actual or potential obstacle in the intra-Community trade (Ugirashebuja *et al.*, 2017: p. 326-344). The UK was particularly interested, as it will be analysed in the next chapter, of maintaining this particular freedom. On the contrary, the British public opinion deemed immigration of EU citizens, thus freedom of movement of person and freedom of services, as extremely awful for the economy, as discussed later on.

1.8.2 The free movement of capital

Free movement of capital is the most recent freedoms in the EU single market, as it was introduced in 1992 with the Maastricht Treaty (European Commission, 2016). This freedom abolished all the restrictions regarding the flow of capital between the Member States, allowing private citizens to open bank accounts abroad and to invest in other EU countries. This freedom was for many decades seen as less important and thus it was limited to abolish the restrictions necessary to allow a proper functioning of the market. Article 67 Paragraph 1 of the Treaty of Rome, for example, states:

During the transitional period and to the extent necessary to ensure the proper functioning of the common market, Member States shall progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or the place of residence of the parties or on the place where such capital is invested (European Union, 2015).

However, Maastricht completely changed the approach the EU has always had on freedom of capital. The freedom in fact from being the least developed became the most far reaching one (Ugirashebuja *et al.*, 2017: p. 410-432). In fact, nowadays freedom of capital is the only one that also applies to and from third countries, even though there are much more restrictions. It is exactly because of this reason that this specific freedom never represented a problem in the Brexit negotiations, as flows of capital will still be granted between the EU and the UK.

1.8.3 Freedom to establish and provide services

The freedom of establishment and to provide services provides the European citizens the possibility to give services and work within the EU. Any kind of professionals are thus allowed to perform an economic activity in another Member State and offer their services to citizens living in another Member State (European Parliament *et al.*, 2021). The freedom of goods, as already noted, was the most fundamental freedom for the European integrationists, while freedom to provide services was a residual freedom. However, nowadays this view has changed completely, as services now are 70% of the European economy. The Article 56 of the Treaty on the Functioning of the European Union (TFEU) states:

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended (European Union, 1992b).

The TFEU provides only a general outline of the freedom to provide services. Thus, it was the role of the ECJ to provide jurisprudence on the matter. A service is defined in the TFEU as all the economic activities that are normally provided for remuneration and that are not covered by the other freedoms (Ugirashebuja *et al.*, 2017: p. 376-391). Thus, a service is an activity with remuneration, which might be extraordinarily little or even paid by third party, as the state for example. An activity is also regarded as a service, based on Article 57 TFEU (European Union, 2012a), when it is not covered by the other freedoms.

However, if the right to provide services was considered essential and fundamental, the right to establish, which is intended to be more permanent than provide services, is still today unclear and many EU countries, and also the UK before Brexit, do not fully agree with the decisions taken by the ECJ among the years. Freedom of establishment is still controversial for many countries, especially the UK before Brexit, which condemned this freedom during the referendum, as it directly deals with immigration and permanent stay of EU citizens in Great Britain.

1.8.4 The free movement of people

The 1992 Maastricht treaty legally recognised the so-called European Citizenship; however, its origins lay in the early days of the European integration. In fact, the 1952 Treaty of Paris of the European Coal and Steel Community already provided some provisions regarding free movement.

This first and limited approach was soon followed by the 1957 Treaty of Rome, which expanded the freedom of movement and granted the European Commission the responsibility to create measures to foster freedom of movement of workers. Freedom of movement was, however, only limited to workers, and not to every citizen on the European continent (Maas, 2014). The freedom of movement of persons was one of the first pillars that was deemed fundamental to create the concept of European citizenship. The aim was to create a supranational community where citizens share common values. In 1948, Winston Churchill called for the creation of a new common citizenship,

We hope to reach again a Europe . . . [in which] men will be proud to say ‘I am a European.’ We hope to see a Europe where men of every country will think as much of being a European as of belonging to their native land. . . . [And] wherever they go in this wide domain . . . they will truly feel ‘Here I am at home (Churchill, 1948).’

Churchill was not the only leading figure calling for a common citizenship, as Belgium proposed in the Hague Conference of that same year the creation of a European passport to create the title ‘European’ when travelling to other continents. The idea of an “ever closer union” in the Preamble of the Treaty of Rome (European Union, 2015) was widely accepted for many decades. However, starting from the 2010s, the idea of an EU that continually expands its scope became controversial. In particular, the Dutch government expressed in 2013 its discontent with the expanding scopes of the EU. In the same year, British Prime Minister David Cameron proposed removing the idea of “ever closer union” from all the European treaties (Maas, 2014). As a consequence, freedom of movement of citizens has become more ambivalent in the last decade, especially being related with the immigration and international integration.

The free movement of persons inside the EU, thus, creates a link between immigration and European movement, as it allows citizens from one Member State to enter the labour markets of other Member States. In the last decade, immigration rates from Eastern European countries like Poland, to the West consistently increased, leading many European citizens to scepticism towards this freedom of movement. When Poland joined the EU in 2004, for example, emigration rates from Poland to other EU countries, especially the UK and Germany, increased dramatically. In fact, in this occasion the UK and other countries granted immediate right to work after the Polish accession in the EU (Dautova, 2018). After the Polish case, however, the EU Member States had a more conservative approach towards other EU enlargements, in particular limiting the access to the Schengen Acquis and the Right of free movement. This case highlights that there is an ambivalent attitude towards freedom of movement both in the EU and in the UK. In fact, the citizens deem freedom of movement as extremely important for them, as it allows them to travel with no restrictions. At the same time,

they appear more sceptical when it comes to grant this freedom of movement to new Members of the EU or third-country citizens entering in a Member State (Toshkov and Kortenska, 2015).

The role of free movement is, hence, important in analysing the support and opposition towards the European integration and, eventually, the European Union itself. Increasing immigration from Eastern Europe has demonstrated that immigration undermines the support for integration in the EU (Toshkov and Kortenska, 2015). Immigrant receiving countries are, thus, much more susceptible to Euroscepticism and its four freedoms.

On the other hand, it has been widely proved that freedom of movement lies in the citizens' minds as the most important accomplishment made by the EU. This ambivalence of the freedom of movement is one of the main causes of discontent among the Member States, which are facing the rising of many populist and Eurosceptic forces within their political spheres (Lutz, 2020). European citizens have proved to not distinguish between EU and non-EU immigrants, but rather between European wealthy countries and the rest of the world.

As a result, richer European countries are often against freedom of movement for other European citizens, while they bear their own freedom of movement within the continent as essential. A particular example of the debate of the effects of the freedom of movement is the so-called "welfare tourism," which suggests that citizens of European Eastern Countries migrate to Western European Countries because of the better social security benefits and the higher quality of public services (Fóti, 2015). Thus, the main problem related to the freedom of movement seems to be the reciprocity of this freedom. Its ambivalence lays in the perception of the citizens; in fact, when free movement is perceived from the citizens' own mobility, the citizens usually have a more cheerful outlook, since it expands their freedom. On the contrary, the citizens have a more negative attitude when it is perceived as the right of others to enter their own country (Nic Shuibhne, 2002).

Despite the consolidated European citizenship, citizens still identify themselves first with their nation states. In fact, the EU citizenship was not created to replace the national one, as no one can be a European citizen without being a citizen of one of the Member States, but rather to add a set of rights to it (EU3doms, 2017). Despite these European rights, citizens coming from other Member States are still likely to be treated as immigrants and not as fellow citizens. This feeling was particularly strong in the UK before Brexit, where immigration from other Member States was deemed as an essential problem that must be solved. In fact, as already stressed, the free movement of persons was one of the most important topics regarding the campaign for leaving the EU.

1.9 Conclusion

This first chapter introduced the historical background, particularly focusing on the relations between the UK and the EU in the last decades. As analysed, it never was an easy or always peaceful relation, as the UK never fully agreed with the “ever-closing Union” that the other Member States wanted to reach. As such, it is worth asking whether or not the ever-closing Union might be achieved in the future of the EU without the sceptical UK as member.

The chapter also outlined the two most important topics the Leave Campaign of the Referendum used to win the Referendum to leave the EU, namely sovereignty and immigration. The British electorate desperately wanted through Brexit to regain control over the British borders and limit immigration, as the immigration from the other Member States was increasing, especially after the Eastern enlargements of the EU.

After introducing the historical background and the main reasons behind Brexit, the chapter moved on to the impact that the referendum had on the EU and its citizens, especially those citizens residing in the UK. Many Eurosceptics believed that the EU following Brexit might have been disrupted, as the UK would have been better off outside the EU rather than within the Union. However, the EU proved once again, as already noted, to prefer unity over isolation; in fact, the EU from the beginning showed an extremely strong unity in dealing with Brexit. The chapter highlighted that there is a contrasting vision of Brexit within the UK, as it intends to withdraw from all the rights and obligations of the EU while keep those rights regulating the life of UK citizens within the EU.

In addition, the chapter provided a short analysis of the European Single Market and its four freedoms, so as to highlight the importance of the EU in the everyday life of citizens. In doing so, the chapter introduced the main challenge that the Brexit negotiators will face during the negotiations: granting as many rights as possible to their citizens, while revoking every single agreement the UK has reached with the EU in the last 46 years.

Negotiations often differ from one-shot game negotiations, in which the two actors meet to reach a compromise without the perspective of any other future meetings, to repeated negotiations, in which the two actors meet on a regular basis to create mutual trust. In this case, however, none of the two concepts suits this kind of negotiation, as it is the first time there is a negotiation for a withdrawal from the EU. In this case, the two actors will not have such close relations once the process is over; however, mutual trust has been created over the past decades, which will trigger specific behaviours. On the other side, the so-called “shadow of the future,” which refers to the fact that negotiators will act in a different way considering that they will negotiate again in the future, is not entirely applicable,

as the two actors know that the negotiations refer to the withdrawal from the EU; nonetheless, they both admit that the two actors will still be in touch in the future since they are deeply intertwined.

The UK as an EU Member had contact with the EU on a daily basis; as such, the negotiators involved knew each other also on a personal level. Moreover, as this chapter demonstrated, the two actors share a strict historical relationship, which means that they share the same cultural values. Sharing the same culture, as well as the relationship between the negotiators, has an important impact on the behaviours of the negotiators, although in this case, both parties will endure a strong and tiring negotiation process without conceding any important concession.

Chapter II

The First Phase of the Brexit Negotiations: An Analysis of the Main Strategies Involved and the Sufficient Progress in the Negotiations Regarding Citizens' Rights

2.1 Introduction

As Chapter I introduced, the Brexit Agreement mainly focused on two problems: how to end the membership of the United Kingdom in the European Union, and how to negotiate future bilateral relations between the UK and the EU. As a consequence, this chapter focuses on the first part of the Brexit Agreement; namely, how to end the status of the UK as a Member State of the EU. Chapter I already emphasised how crucial the status of the European citizens in the UK was for both sides during the Referendum campaign. However, this chapter focuses on the first rounds of the negotiations regarding the rights of European and British citizens. Citizens' rights is a particular topic within the Brexit negotiations, both because of the number of citizens who will be affected by the decisions and because of the desire from both sides to grant as many rights as possible to allow to the many Europeans living in the UK and British living in the EU to continue their lives even after Brexit.

After a short analysis of the main strategies involved, the chapter will then focus on the discussion regarding the first negotiation within the Brexit discussion: the setting of the agenda. As already noted, the setting of the agenda was already controversial, as the two sides could not reach an agreement on how to negotiate Brexit.

This second chapter will then move on to the analysis of the first six rounds of the negotiations, which took place during phase one, which is the phase regarding the withdrawal from the EU, until reaching sufficient progress the EU is asking the UK to proceed with the other phases of the negotiations. However, it is worth stressing that the thesis aims at analysing the rights of the citizens of the European Union entering, residing or working in the UK. Thus, even though agreements and positions regarding the financial settlements and the Irish question will be mentioned, the main focus will be given to the particular matter of citizens' rights.

The chapter analyses the six rounds of the negotiations of the so-called phase one of the Brexit negotiations. During these rounds, special attention will be given, as already mentioned, to citizens' rights. Each round of the negotiations will be analysed, focusing on the main topics discussed and on the deadlocks. Special attention will also be given to the press conferences and in particular, the

speeches made by the two head negotiators, Michel Barnier and David Davis, to analyse the different positions of the two counterparts (Ott and Ghauri, 2019).

The chapter aims at highlighting the strategies of the two parties and the behaviours of the negotiators both during the rounds of the negotiations and in front of the media. The analysis will consider that, although the negotiators share the same cultural values and even a relatively close relationship as they used to meet in the institutions of the EU, the sense of resentment from the EU and the necessity to prove that the UK is stronger outside the EU affected the concession-making process, often leading the two parties to deadlocks because of their positions.

2.2 How to negotiate Brexit: the main strategies

The main reason behind every kind of negotiation is to overcome the current situation the actors involved are facing; namely, they aim at overcoming the status quo. International negotiations are opposite to wars, as the actors are involved in peaceful ways to solve the issue, without resuming to violence. Negotiations mean that the parties will discuss to find a compromise, a solution that might not be optimal, but it is more favourable than the status quo. The actors negotiate to adjust their interdependence, usually, especially within the EU, trying to deepen it (Burchill, 1999). The Brexit negotiations, however, differ from this matter, as the negotiations aim at reducing the interdependence between the two actors.

Negotiations are not limited to individuals but they more often take place between groups or organisations. It has been widely agreed that negotiations between groups that share the same culture are much more likely to be successful, rather than negotiations between two different cultures. However, culture is only one factor among the numerous and complex factors that are involved in negotiations (Ott and Ghauri, 2019). It can be stated that, after more than 40 years of UK membership in the Union, the UK and the EU share the same culture and many common values, such as democracy and human rights. However, despite this common ground, the Brexit negotiation has been known for its unprecedented complexity among the negotiations conducted by the EU.

From the very beginning of the negotiations, both actors presented their positions and tried to not make any concessions. The two actors used the strategy of positional bargaining (Fisher and Ury, 1991) trying to reach an agreement, especially in the first part of the negotiations, where the constituents of both parties were eager to see how the negotiations will proceed. Because of the constituents, the two parties had to have a strong stance, so as to not lose the face at the national level.

Positional bargaining means that the actors involved negotiate over positions and not interests, because the negotiators are committed to the positions, becoming linked to their egos. However, this strategy often leads to deadlocks, as the parties are too focused on each other's positions and not on their interests. Positional bargaining is divided into soft and hard bargaining.

In a soft bargaining approach, the actor tends to make concessions to avoid conflicts, which might ruin the relations with the other party. However, this kind of approach cannot be deemed optimal, as the actor will make too many concessions, feeling exploited and dissatisfied with the outcome. On the contrary, in hard bargaining the actor does not make any concession, taking extreme positions to be able to ask more of what they actually want.

Both parties saw the negotiations as a context of will for different reasons; the UK needed to show its power to the world in order to maintain its reputation and, more importantly, to its constituents. The EU, on the other hand, wanted to terminate the membership of the UK in the single market and its four freedoms. Nonetheless, the interests of the two actors, although the UK had a confusing stance, especially in the first rounds, were not incompatible, as they wanted to grant as many rights as possible to their citizens to allow them to continue their lives in the EU or the UK.

2.2.1 The strategies of the EU

As already emphasised, the EU is far from being a monolithic bloc. As such, its approach is usually very rigid, as there are many political stakes, both at the national and European level. However, the negotiators of the European Commission have often used this sort of two-level game during the negotiations to gain some leverage. In fact, the EU is famous for its rigid, inflexible and legalistic approach (Patel, 2018). The EU clearly exploits its powerful position in the concession-making process, as it is often the strongest party involved. The EU, in fact, has always been using a strong and uncompromising approach (González García, 2018). Also in the Brexit negotiations, the EU can count on a stronger economy. Moreover, The EU relies much less on the UK than the UK does on the economy of the EU. Thus, the EU at the beginning of the Brexit negotiation had a relatively stronger position than the UK.

From the very beginning, the EU imposed its stronger position to force the UK to make multiple concessions, as it implemented strategies such as the use of transparency, the manipulation of the setting of the agenda, the restrictions regarding the role of the actors involved, and the unity of the EU27 (Patel, 2018: p. 5).

Regarding the first strategy, the EU has kept transparency throughout the whole negotiations, posting several position papers, guidelines and reports summarising all the topics of discussion after every round of the negotiations, highlighting the areas in which agreement has been found and the ones in which the two parties' positions still diverge. This particular strategy has enabled the EU to shape a specific narrative of how the Brexit negotiations were going, influencing the public opinion of the whole world and gaining much more authority compared to the confusing stance of the UK. Moreover, the EU leaders also urged several times the UK to be more specific in its position papers, showing to the world another peculiar story: the UK does not have a clear view of how Brexit should be, while the EU is prepared, as it outlined very early its guidelines. Finally, this strategy obliged the UK Government to abandon the initial idea of secrecy to sedate possible public protests, which meant that the UK had to negotiate with the EU and with the divided public opinion within the UK at the same time, raising however the likelihood of a ratification by the UK Parliament once an agreement will be found (Ilott, 2017).

It must be noted that the phased approach was not a legal necessity, as no part of Article 50 states that the negotiations for the withdrawal of a Member State must be divided into phases. However, the EU opted for a phased approach to avoid the possibility that the UK might have some leverage on certain central areas, such as security, as well as obliging the UK to make concessions to proceed to the next phase of the negotiations (Oliver, 2018). This was done in order to increase the likelihood of concessions from the British counterpart. As this chapter will analyse, the UK spent six rounds of the negotiations proving to the EU that sufficient progress has been made, so as to move to the second phase of the negotiations. However, the term sufficient progress has always been vague, as the EU never referred specifically to how sufficient this progress might be. In doing this, the EU successfully gained the role of the leader throughout the negotiations, as the UK had to prove to the EU to be ready to move to the next phase.

The third strategy implemented by the EU was the restriction of the role of the actors. The EU Member States were not allowed to bilaterally negotiate with the UK, so as to maintain a unified and stronger position. In doing so, the EU avoided possible secret bilateral negotiations between the UK and one EU Member, which would have caused a severe disruption within the Union. The UK repeatedly tried to break through the EU unity by talking to single Member States, but it never succeeded (Patel, 2018).

Finally, the unity of the EU left many countries around the world, the UK in the first place, surprised. In fact, during the negotiations with the US regarding the Transatlantic Trade and Investment

Partnership between 2010 and 2014, the EU showed a very divisive approach, as the Member States could not find an agreement. However, during this negotiation, the EU successfully engaged in a unified approach (Durrant, Stojanovic and Lloyd, 2018). In fact, as already mentioned, the Member States never bilaterally talked with the UK regarding the Brexit negotiations, so as to give full power to the EU.

2.2.2 The strategies of the UK

The approach of the UK during the negotiations has often been a hard bargaining one, as the British Government could not appear weak in front of the citizens. In fact, the majority of the citizens who voted for Brexit wanted the UK to have a strong and strict position during the negotiations. To do so, the UK implemented several strategies to portray the EU as a weaker actor than the UK. In fact, the UK has always described the Brexit negotiations as extremely confrontational, particularly after the June 2017 general election, as Theresa May stated that the EU was interfering with domestic affairs (Hastings, 2020). In addition, the UK Government defined the EU Negotiators as intransigent and threatening. Consequently, the UK wanted to describe a different story than the one narrated by the EU, so as to convince both its own constituents and the whole world that the EU was punishing or threatening the UK (Martill, 2021).

The British counterpart has stated from the beginning that it would not have accepted any compromise over the red lines May presented, as described in the previous chapter. Thus, the UK aimed at keeping a hard position over its own guidelines, without any willingness to soften key positions or interests, often threatening a no-deal scenario. From day one, thus, the UK presented its red lines as unnegotiable. However, as it will be later discussed, the UK after a strong start did indeed compromise over some of its red lines, especially the role of the CJEU, the budgetary contributions and free movement (Martill, 2018). However, the UK strongly presented these compromises as the result of duress. While the EU, despite being the least dependent on the UK than the opposite, never threatened a no-deal scenario. On the contrary, the political class of the UK often stated how a no-deal would have been better than a bad deal, as the former would have allowed the UK to reshape the British economic model and completely abandon the EU's sphere of influence (May, 2017b).

Scholars have also noted that the narrative from the UK perspective has always been the one of a zero-sum game in which losses of one side are advantages for the other. In fact, the UK often limited itself to solely state its own positions, rather than persuade the EU of the validity of its proposal. Lastly, the UK's initial idea was to keep relative secrecy over the Brexit negotiations, as the

constituents and the media would have endangered the chances of a better deal with the EU (Martill, 2018).

2.3 The predominance of the two-level game

The two-level game is a theory by Putnam used to understand how diplomacy and domestic politics interact. Putnam stated that it is often assumed that during negotiations the parts involved are unitary actors. However, that is often not the case, especially in international negotiations, as even within a country there might be disagreements that lead to confusion at the international level (Putnam, 1988).

The two-level game is composed, as the name suggests, of two levels that interact with each other, the national level and the international one. The model suggests that the negotiator must not only focus on level one, which is the international level, but also on the national level. The role of public opinion in international negotiations is extremely important. Within level two, in fact, there are many actors, with different preferences and coalitions. Thus, to grant the ratification of the agreement reached at the international level, the negotiator must be aware of the consensus and the main arguments within level two (Putnam, 1988: p. 430-435).

As pointed out, communication with those who are not at the negotiation table is as important as communication with those who are present. For this reason, international negotiations are usually long and delicate, as governments, citizens, stakeholders and spoilers are involved to assure the agreement reached during the negotiations will be implemented at home.

In the case of the Brexit negotiations, however, there is an enormous quantity of actors who do not sit at the table of the negotiations. In fact, even if the parties involved are essentially two, the UK and the EU, we must not forget that the EU is composed of 27 sovereign nations, 448 million citizens (Eurostat, 2020) and industry groups. With such an extremely elevated number of actors involved, the role of the European Commission is not only the mere negotiation with the UK, but also assuring consensus among the Member States and their own actors. It must be stressed, that the UK during the Brexit negotiations has experienced a period of extreme division within its borders. As such, also on the British side, there were spoilers and stakeholders with extremely diverse interests.

The Chief Negotiator for the EU Michel Barnier stressed several times that transparency is a key element for a strong and unified position from the European side. Barnier diligently uploaded the Commission, the EU Parliament, Member Countries and European Ambassadors. However, from the

British side transparency proved to be too hard to handle, since industry groups were often kept in the dark (Fisher, 2020). In fact, in June 2018 the then-foreign secretary Boris Johnson in response to British industry groups concerned over a no-deal Brexit stated “F*** business (BBC News, 2018a).” The biggest stakeholder of the UK, the citizens, were often left in the dark. The UK government more than once avoided informing the public about some complicated issues, as it would have led to further divisions among the public and, thus, endangered the position of the UK in the concession-making.

Moreover, as already noted, the UK did not want a phased approach, as it would have blocked any chance of finding side deals on other topics and of exchanging consensus on conflicting matters. The UK also favoured relative secrecy during the negotiations, as the general public was often left in the dark. However, the strategy of secrecy was aimed at creating back-channel negotiations (Wanis-St. John, 2006), both with the EU and, most importantly, with the single Member States. However, the EU prevented this possibility, by granting transparency on its side and prohibiting single States to negotiate with the UK over Brexit, as the EU is much stronger together than separate. In fact, each Member State was convinced that the agreement that could be reached as EU would have been much stronger than the agreement each Member State would have reached with the UK.

Because of the complexity of the two levels, the international one and the national one, during these negotiations, the two-level game theory helps to understand the reason why the negotiations have been so complex, as both parties needed to discuss any step or concession they made at their national levels. What is interesting in this case is, however, that although the EU is composed of 27 Member States with 27 parliaments the negotiators had to discuss with, while the UK negotiators had to discuss only with the British Parliament, it was extremely difficult for the British counterpart, as the Parliament, the citizens and the constituents could not reach an agreement on how to negotiate at the international level with the EU, as there was no clear view of how Brexit should be. On the contrary, the European counterpart, as already mentioned, revealed to be as unified as ever.

The two-level game theory also explains why Barnier and his team of negotiators had to systematically meet the politicians of Member States and visit the countries to discuss with the various parliaments. In fact, it must be considered that any final deal negotiated must reach a qualified majority of Member States according to Article 218 TFEU (European Union, 2008). However, the qualified majority is applicable only on deals regarding trade, while in this case, it is extremely likely that the deal does not only encompass trade, but also immigration, security and many other aspects. As a consequence, mixed agreements require the approval and ratification of every EU Member State, which means that all 27 Member States detain veto power (Malhotra, 2016). From a negotiation point

of view, this does not only mean that the EU negotiators must have the support of every EU Member, but it also means that the possible agreements are narrower and that the UK must make significant concessions to reach a deal. In fact, considering the percentage of total exports for each party, the UK has a significant interest in reaching a valuable deal with the EU, as the exports of the UK to the EU represent 44% of total UK exports. On the other hand, the EU exports to the UK are only 10% of the total exports (Ward, 2021).

As noticed in the previous chapter, the EU needs to show to the world, and to its Member States, that leaving the EU has consequences, in order to avoid any other possible exit from the Union. As such, nationalistic parties all over the EU are extremely interested in analysing the negotiations and the deal reached. Thus, the EU must grant to the Members and to its own existence the fact that the UK has a worse deal than it had when it was a member. Consequently, many agreements that could have been reached if the EU was a monolithic actor are not possible, as the deterrence of future exits represents one of the most important goals of the EU, which makes the likelihood of a no-deal higher (Malhotra, 2016).

On the other side, the UK still represents an important financial power that the EU cannot risk antagonising. In fact, a punitive deal would threaten cooperation on other topics such as security. As such, also the UK has some sort of leverage in the negotiations. However, a fundamental issue to take into consideration is the fake promises made by Brexiteers during the referendum campaign. In fact, the Leave campaigners promised much more than the UK can possibly reach in leaving the EU. As such, British citizens play a pivotal role in the negotiations, as the number of spoilers can easily grow. During the referendum campaign, many facts and data were overstated, such as the money the UK gives to the EU and the European immigration rates. Thus, the British government must find a way to inform the citizens that almost every promise made is not plausible (Marshall and Drieschova, 2018).

2.4 The setting of the agenda: EU versus UK

As already mentioned in the last chapter, the EU did have an important victory in the first phase of the negotiation, as it successfully managed to set the agenda, dividing it into two main topics. In fact, as previously mentioned, the UK wanted to talk about the two main topics, leaving the EU and future relations, at the same time, so as to allow a concession-making game from one topic to the other (Miller, 2017). However, the EU pushed for negotiating first only on leaving the Union and only after

reaching an agreement on this matter the two parties can discuss the future relations (Fisher, 2020). In doing so, the EU gained an important victory even before the negotiation started. As a result, the Union demonstrated at the international level to be indeed an “ever-closer union” showing unity and cooperation. The EU also decided to play as a united actor in the negotiations, with the lead of the European Commission, while talks between the UK and single Member States were avoided. In doing so, the Union assured a much stronger negotiating power for all of its members.

The UK was firstly against the idea of separating the two topics; however, it soon realised that within the country constituents were not yet unified at all over the status the UK should have in the future. Thus, it agreed on discussing the two topics separately, as the British Government needed time to decide the role of the UK in the future. In fact, the debate within the UK was extremely divided, as Remainers asked to remain at the very least in the Internal Market, as the case of Norway. Moreover, also within Brexiteers there were extremely different positions regarding the future status of the UK in the European continent and in the world. Moderate Brexiteers invoked a similar agreement as the one between the EU and Canada, while extremists asked for a unilateral withdrawal with a no-deal (De Ruyt, 2017). This internal debate has been extremely detrimental to the UK Government and it particularly affected the negotiating strategies, often leading the UK side to confusion and uncertainties. In fact, as it will be analysed, the first rounds of the negotiations were marked by a confusing position of the UK, which often endangered the possibility to reach an agreement within the two years provided by Article 50 TEU.

2.5 The three pillars of phase one of the Brexit negotiations

The EU strongly pushed for negotiating first on how to end the relationship in three main issues: namely, the Northern Irish question, the rights of EU citizens in the UK and British citizens in the EU and the UK’s financial liabilities (Fisher, 2020). The EU affirmed that before talking about the future relations, sufficient progress must be made on these three particular sectors to push the UK, extremely interested in starting the talks for the future relations, in making concessions to allow the second phase of the negotiations to start (De Ruyt, 2017).

The first topic regards citizens’ rights and it is deemed by the EU as the most concerning issue, as citizens that in the last forty years have experienced the freedom of movement will not be allowed to enjoy this freedom anymore. The EU before the negotiations started stressed that citizens should continue to enjoy the same rights as before. However, as already noted in the last chapter, the UK

aimed at limiting European immigration. Thus, the UK supported the idea of limited access for EU citizens in the UK, while condemning any direct role of the CJEU within British matters.

The financial settlement is the second pillar of phase one of the negotiations. From the perspective of the EU, the UK should pay all its commitments, while the UK assumed that there was no legal obligation for a Member State to pay the contributions it agreed on as a Member of the EU.

The third topic of phase one regards the border between Ireland and Northern Ireland. Both sides agreed from the beginning on avoiding a border, which might cause problems on the island. However, the two sides had different opinions on how to solve this particular issue. The UK used this topic to ask for remaining within the Freedom of movement of goods, while the EU asked for leaving only Northern Ireland within the Single Market (De Ruyt, 2017).

Despite the EU not being a monolithic bloc, it must be noted that, in the first phase of the negotiations; namely, to end the British membership in the Union, every EU country had the same interests. On the contrary, interests were jeopardised when it came to discussing the future relations (Durrant, Stojanovic and Lloyd, 2018). In fact, all countries shared the same interests in protecting the rights of their citizens residing and working in the UK.

Article 50 of the Lisbon Treaty provides a period of two years to reach an orderly withdrawal from the EU and also to find a deal regarding future relations. As such, the UK and the EU, after agreeing on the European condition to negotiate over the two topics separately, agreed on a deadline, which is October 2018, to complete the first part of the negotiations (European Union Committee and House of Commons, 2017: p. 15).

2.6 The rounds of the Brexit negotiations

This second chapter analyses the first rounds of the first phase of the Brexit negotiations, which aims at reaching a Withdrawal Agreement. The six rounds of phase one, thus, will be presented and discussed, so as to analyse the progress made after each round. As stated, particular attention will be given to citizens' rights, as it represents the fundamental topic throughout the whole negotiation process.

2.6.1 The first round

After formally triggering Article 50 to leave the EU, the EU and the UK prepared their guidelines, as already noticed in the previous chapter, so as to be ready for the first round of negotiations, which took place on the 19th of June 2017. In this one-day event in Brussels, the EU Chief Negotiator Michel Barnier and the Secretary of State for Exiting the European Union David Davis met to discuss four main topics: citizens' rights, the financial settlement, the Northern Irish border and other separation issues (Council of the European Union, 2021). Alongside Barnier, representatives of the European Commission and of the President of the European Council were present. These representatives were present only during this first round, while for the next rounds the EU Negotiator is responsible for reporting to the European Council and its bodies the progress made after each session. Following the first round, Barnier made a formal speech in which he addressed what was discussed during the meeting.

This first session was useful to start off on the right foot. And it was useful for me to sit down with my counterpart, David Davis. I look forward to working closely with you during this negotiation. Today, we agreed on dates. We agreed on organisation. We agreed on priorities for the negotiation. [...] We also agreed on the importance of timing for this first phase (Barnier, 2017d).

Barnier, thus, in this speech highlights the fact that during this first session the priority was to find agreements on how to work in the next sessions. During this session, it was agreed to have one week of negotiations every month, so as to allow to work on the proposals in the meantime. In the first round, the three main issues of the first phase of the negotiations; namely the withdrawal, were agreed upon: citizens' rights, the single financial settlement and other separation issues (Barnier and Mackay, 2021). These three separate issues will be analysed by three different groups, which will focus on the specific issue, always informing their respective principals.

The Northern Irish border, as depicted in Barnier's speech after the first session, soon became part of the so-called other separation issues, as the UK was firmly convinced that the topic belongs to the future relations. However, the EU counterpart was able to convince the British side that the closest collaborators of Davis and Barnier will establish a dialogue over the Irish border (Barnier, 2017d).

The speech made by Barnier also highlights the fact that the EU had an important victory in the setting of the agenda. In fact, not only the UK agreed on discussing the withdrawal and the future relations in two separate phases, but it also granted the fact that it is the European Council the only responsible institution for allowing the negotiations to move to the second phase. Thus, the UK has no power in deciding whether the negotiations can move on to the second phase, which is the most pressing phase

for the British counterpart. The EU assured itself, in other words, the possibility to push the UK to find and accept an agreement on the orderly withdrawal with the EU as soon as possible, so as to move on to the second phase (Sparrow, 2017).

During the press conference right after the first session, Barnier was asked how likely concessions from the EU are to be made and the EU Chief Negotiator replied using a strong stance, showing unity within the European bloc:

I am not in a frame of mind to make concessions, or ask for concessions. It's not about punishment, it is not about revenge. [...] The United Kingdom has decided to leave the European Union, it is not the other way around. The United Kingdom is going to leave the European Union, single market and the customs union, not the other way around. So, we each have to assume our responsibility and the consequences of our decisions. And the consequences are substantial (Barnier, 2017g).

In conclusion, the first round of the negotiation of phase one was indeed necessary to set the agenda and to organise the next sessions, but it also showed a stronger position of the EU rather than the position of the UK, as the latter still faced confusion and uncertainties at the domestic level and, furthermore, within the British Government itself.

2.6.2 The second round

The second round of the negotiations took place in Brussels from 17 July 2017 to 20 July 2017. The main aim of this second session was to expose the respective positions of the two parties involved. During this second session, the predominant topic was citizens' rights. At the end of the four-day session, the working group produced a summary of the positions discussed and it also analysed whether there is convergence, divergence or a need for further discussions. In doing so, the working group aimed at addressing the issues that must be prioritised for the next rounds (European Commission, 2017c).

This round was largely used to understand common and different positions that the two parties have; however, Barnier openly asked for clarification for the next round of talks in August. On the other side, Davis in the press conference seemed much more idealistic than his European counterpart, as he stated:

All in all, the second round of negotiations has given us a lot to be positive about. And they have also highlighted the need for both sides to demonstrate a dynamic and flexible approach in the way we approach these challenges. We have conducted this round constructively and at pace, and I hope this

is a model we can continue going forward (Davis, 2017d).

The summary produced by the working group included 44 specific points for discussion on citizens' rights, in the majority of which the UK and the EU seemed to have reached a point of convergence. However, in some of the most important matters, such as how to enforce rights and family members, the two parties had strong different positions (European Commission, 2017c). Barnier once again reiterated that before the third round the UK needs to clarify its position towards European citizens. The joint paper identified six main topics: personal scope, the nature of the agreement, residence, social security coordination, professional qualifications and other economic rights.

Personal scope refers to all the provisions of a Treaty that involve free movement (Weatherill, 2017). Both parties agree that the Withdrawal Agreement should protect EU and UK citizens and their family members; however, the UK does not agree on the idea that the EU law rights of the Member States' citizens in the UK continue after Brexit. The UK and the EU also disagree on the rights of workers sent to the UK on a temporary basis. The UK stated that EU law rights will not be preserved (Lang, McGuinness and Miller, 2017: p. 13). The summary also shows that further clarification is needed by the British side regarding the date that determines when citizens of the EU can lawfully reside in the UK, as the EU proposed as a date the date of the UK's withdrawal, while the UK has not a clear position whether it should be the day Article 50 was triggered or the effective date of exit (European Commission, 2017c).

Regarding the nature of the agreement, both parties aim at creating reciprocal binding obligations in international law. However, the parties disagree on how these rights should be enforced. In fact, while the EU desires a role of the domestic courts of the EU27 and of the Court of Justice of the European Union (CJEU), as well as the British domestic court, the UK strongly opposes considering that rights on British soil must be enforceable only through the British judicial system. As a result, not only the domestic courts of the EU27, but also the CJEU will not have any jurisdiction over EU citizens' rights in the UK (Lang, McGuinness and Miller, 2017: p. 14).

The topic regarding the residence status, according to the joint summary, appeared to be the most divergent matter. In fact, as already stressed in the previous chapter, one of the main factors leading to Brexit was the excessive immigration rates from the EU to the UK (European Commission, 2017c). As a result, the UK supports that from the moment the UK leaves the EU, all EU citizens in the country, regardless of when the EU citizen lives in the UK, need to apply for changing their status, so as to enjoy rights under the UK law. The UK also asks for systematic criminal checks on applicants, so as to limit European immigration after the agreement is reached. The UK also asks that all British

citizens, residing in the UK or in the EU, will be granted the right of freedom of movement, whereas the EU strongly opposes to any possibility of a single market “à la carte,” as former President of the European Council Donald Tusk stated (Tusk, 2016). Thus, the EU clearly stated that only British citizens residents in a Member State at the time of the UK’s exit from the EU will enjoy the freedom of movement, while future British citizens moving to any Member State will be treated as any other citizen of third countries (Lang, McGuinness and Miller, 2017: p. 14-15).

During this second round of negotiation, many issues regarding social security coordination, recognition of professional qualifications and other economic rights were merely mentioned so as to prioritise the divergence for the next rounds. As a consequence, the topics remained to be discussed (Lang, McGuinness and Miller, 2017: p. 15).

Despite the citizens’ rights being the most discussed topic of this second session, it must be stressed that the main aim of the second round was to bring to the table all the topics that must be discussed. However, the uncertain stance the UK had during the negotiations mined this proposition. As a consequence, many topics, such as, for instance, the Irish question and Gibraltar, were not discussed during this session. Barnier, in his speech for the press conference on 20 July, urged the UK for more clarity regarding the Irish border:

On Ireland, we had a first discussion on the impact of Brexit on two key subjects: the Good Friday Agreement and the Common Travel Area. We agree that the important issue of the Good Friday Agreement, in all its dimensions, requires more detailed discussions. In particular, more work needs to be done to protect North-South cooperation between Ireland and Northern Ireland. Today, that cooperation is embedded in the common framework of EU law and EU policies. We need to better understand how the UK intends on ensuring the continuation of this cooperation after Brexit (Barnier, 2017c).

The Irish Government soon after the confusing position of the UK during the second session pushed for prioritising the border between Ireland and Northern Ireland also in this phase of the negotiation (O’Shea, 2017). Although this second session was aimed at identifying the main objectives and prioritising the discussion of the divergences, no British negotiator mentioned the issue of Gibraltar, while the UK protested after the EU granted the veto power to Spain regarding the Gibraltar matter (Valero, 2017).

To conclude, this second round clearly showed that the UK, despite its confused stance towards many of the issues raised (Valero, 2017), refuses any EU law on the British soil. Recalling Theresa May’s words in July 2016 “Brexit means Brexit (Mardell, 2016),” the second session showed that divisions

within the constituents in the UK are still present. However, the UK has made it clear that no EU law will be valid in the UK; thus, the UK during the second session followed what the general public calls a “Hard Brexit” position (Chelotti, 2017).

2.6.3 The third round

At the end of August 2017, from the 28th to the 31st, the EU and the UK met in the third round of the Brexit negotiations. Before the third round, after the urge from the EU side for more clarity, the UK published many position papers in which it expressed its position regarding citizens’ rights, the Northern Ireland issue and the desire to be a member of the Customs Union. However, despite the British effort, these position papers were deemed confusing and even unrealistic by the EU, as it declared that no real solution has been suggested in any of the position papers. The EU, following the analysis of the position papers, asked for postponing the fourth round of the negotiations in September (De Ruyt and Stannard, 2017). The EU also refused to consider parts of the position papers as they discussed future relations and not the withdrawal from the EU. During this third round, little progress was made regarding the withdrawal agreement, especially in the issue of the financial settlement. However, some advances were indeed made in citizens’ rights (Miller, Lang, Curtis, *et al.*, 2017).

In particular, the UK and the EU discussed the topics not yet covered in the previous sessions, which were professional qualifications and economic rights. Both parties agreed that it is indeed fundamental to grant reciprocal rights for EU and UK citizens in some areas, specifically healthcare and social security. The topic of discrimination was also discussed, so as to grant protection from discrimination in the working environment. Finally, the topic of health insurance was addressed as well; in fact, the UK agreed that the EU health insurance card (EHIC) would be valid for all those British citizens living in the EU and EU citizens living in the UK on Brexit day. However, after this date, the position is not clear and the EU asks for including an agreement on this matter within the future relations agreement (Miller *et al.*, 2017: p. 9).

The joint paper published after the second session was analysed and further discussed, reaching convergence in five areas: frontier workers, aspects of social security coordination and healthcare. However, the two parties disagreed on over 20 areas, including the EHIC, as already noted, the cut-off date, future family reunion and rights of residence to onward movement within the EU (Miller *et al.*, 2017: p. 10-11).

As during the previous session, the UK during the third session did not have a clear view regarding

the cut-off date. However, the EU side stresses that this date should be the effective day of Brexit, which is 29 March 2019. On the other side, the UK also considers the date in which Article 50 was triggered, 29 March 2017, so as to avoid granting rights provided by the EU freedom of movement to EU citizens moving to the UK during the negotiation period.

Regarding future family reunions, the UK considers that EU citizens will be given the same rights as non-EU nationals joining UK citizens. On the other hand, the EU asks that the Free Movement Directive on bringing current and future family members to the UK remains valid after the cut-off date. The UK, though, also suggests that post-exit immigration arrangements for EU citizens can be found during the next phase of the negotiations (European Commission, 2017d).

Also discussing the right of holders of residence to onward movement within the EU, the UK shows that it wants to keep rights for freedom of movement to its own citizens, but it does not want to grant those same rights to EU citizens. In this particular topic, the position of the UK supports that UK citizens residing in the UK or one of the EU27 can still move within the EU27 after the cut-off date. On the other hand, the EU firmly opposes this position, granting protected rights to UK nationals only in the State of residence on Brexit day (Miller, Lang, Curtis, *et al.*, 2017). Once again, the EU opposes any chance to join the Single Market *à la carte*.

The main problematic issue in this session was the role of the CJEU after Brexit. In fact, the EU regards the jurisdiction of the CJEU as extremely important, as it represents the only judicial organ able to ensure the total application of EU rights to citizens. On the other hand, the UK stresses the fact that the direct jurisdiction of the CJEU for the resolution of disputes has always been limited to the Member States, and there are no precedents for this kind of jurisdiction in the non-EU Member States. The UK, as a consequence, asks for full jurisdiction of citizens living within the UK borders to British courts (Miller *et al.*, 2017: p. 30).

After this third session, the Secretary of State for Exiting the European Union David Davis seemed to be particularly optimistic towards citizens' rights, as he stated:

[...] we agreed: to protect the rights of frontier workers; to cover future social security contributions for those citizens covered by the withdrawal agreement; to maintain the rights of British citizens in the EU27 to set up and manage a business within their member state of residence, and vice versa; and that we should protect existing healthcare rights and arrangements for EU27 citizens in the UK and UK nationals in the EU. These are the European health insurance or "EHIC" arrangements. These areas of agreement are good news (Davis, 2017c).

On the other hand, the EU Chief Negotiator Barnier did not have such an optimistic view:

This week, we made some useful clarifications on a lot of points, for example, the status of frontier workers, the aggregation of social security rights, and pending legal proceedings before the Court of Justice, to name but three. But we made no decisive progress on the main subjects. [...] At the current speed, we are far from being able to recommend to the European Council that there has been sufficient progress in order to start discussions on the future relationship, while we are finalising the withdrawal agreement throughout 2018 (Barnier, 2017e).

2.6.4 The fourth round

The fourth session of the Brexit withdrawal negotiation took place from 25 to 28 September 2017. Barnier defined this round as constructive but stressed that it is still too early to state that sufficient progress has been made, which would allow to start the negotiations for the future relationship. On the other hand, the British counterpart, through Davis' speech, believed that decisive steps forward have been made (Miller, Lang, McGuinness, *et al.*, 2017: p. 4).

Before the beginning of the fourth round, UK Prime Minister Theresa May made on the 22nd of September 2017 a speech in Florence reiterating the common need for finding agreement on citizens' rights:

I want to repeat to the 600,000 Italians in the UK – and indeed to all EU citizens who have made their lives in our country – that we want you to stay; we value you; and we thank you for your contribution to our national life – and it has been, and remains, one of my first goals in this negotiation to ensure that you can carry on living your lives as before. I am clear that the guarantee I am giving on your rights is real. [...] I know there are concerns that over time the rights of EU citizens in the UK and UK citizens overseas will diverge. I want to incorporate our agreement fully into UK law and make sure the UK courts can refer directly to it (May, 2017a).

The speech, although not formally part of the Brexit negotiations, was seen by the EU, and particularly by the European Council President Donald Tusk, as a significant contribution to explaining the position of the UK.

Some progress has been made in citizens' rights, especially since the UK has agreed to give direct effect to citizens' rights in the withdrawal agreement. This means, from the EU point of view, that EU citizens will be able to legally invoke their rights before the UK courts (Miller, Lang, McGuinness, *et al.*, 2017). The EU-UK Joint technical note on the comparison of the EU-UK position on citizens' rights published right after the end of the fourth round updated the previous one published after the third round (European Commission, 2017b). This note shows convergence in some more areas, while

it highlights seven more issues in which further discussion is still needed: personal scope, interpretation of EU law concepts, the nature of the agreement, residence, social security coordination, professional qualifications and other economic rights (Miller, Lang, McGuinness, *et al.*, 2017: p. 14). The two parties also agreed on the fact that frontier workers will fall within the scope of the Withdrawal Agreement retaining the rights they are enjoying. Most social security issues have been agreed; however, social security benefits still remain a point of divergence between the two parties.

Disagreements are however still present, especially regarding the status of the EU citizens in the UK following the withdrawal. In fact, the UK was considering, at the moment of the fourth round, as the scope of the agreement only the qualified citizens that are residents before the cut-off date. Barnier indicated that the EU requires much more details than that, especially regarding how administrative procedures for EU citizens seeking to stay in the UK would be created. Moreover, family reunification still remains a very delicate topic, as no agreement was reached. The EU pushes for EU citizens to continue to enjoy the rights they currently have; however, the UK is firmly convinced that the rules applied to non-EU citizens re-joining British citizens must be applied also to EU citizens without any distinction (Miller, Lang, McGuinness, *et al.*, 2017: p. 16).

During this round of negotiation, the topic regarding the European Health Insurance Card for all UK citizens, regardless of the country in which the UK citizens are – if in the UK or in the EU – was mutually agreed to be postponed until the second phase of the negotiations. However, the jurisdiction of the CJEU still represents a very controversial matter, the UK agreed on applying the EU law concepts present in the withdrawal agreement, but it still refuses any jurisdiction of the CJEU on British matters (European Commission, 2017b).

Following the fourth round of the negotiations, Michel Barnier in his press statement acknowledged the existence of some important steps forward, noting however the big gaps between the two parties over extremely important matters, such as the jurisdiction of the CJEU:

On citizens' rights, our priority, the UK has agreed to give direct effect to the Withdrawal Agreement. This is very important. It will give the assurance to our citizens that they will be able to invoke their rights, as defined by the Withdrawal Agreement, before UK courts. [...] But we failed to agree that the European Court of Justice must play an indispensable role in ensuring this consistency. This is a stumbling block for the EU (Barnier, 2017b).

2.6.5 The fifth round

The fifth round of the Brexit negotiations took place from 9 to 12 October 2017. During this round, despite Barnier calling for a deadlock in the discussion regarding the financial settlement, further progress regarding citizens' rights was made (Miller, Lang, McGuinness, *et al.*, 2017). Before the round began, the European Parliament (EP) met in a plenary session on the 3rd of October to discuss whether tangible progress was indeed made to start the second phase of the negotiations or if it is still necessary to focus on the first phase (European Parliament, 2017b).

During the session, the EP decided that there has been no sufficient progress yet to start the negotiations for the future relationship between the UK and the EU. The leaders of the EU 27 decided to postpone their next meeting regarding Brexit on 20 October, so that the fifth round can be analysed as well (European Parliament, 2017b).

This session was, however, according to Barnier, without great accomplishments, as the issues regarding citizens' rights remain the same. In particular, there is still a deadlock in the areas concerning the future role of the CJEU within the UK. In fact, Barnier in the press conference following the fifth round clarified the position of the EU:

We worked constructively this week. We clarified certain points. But without making any great steps forward. [...] I am not able to recommend to the European Council next week to open discussions on the future relationship. I will say before you again that trust is needed between us if this future relationship is to be solid, ambitious and long-lasting (Barnier, 2017a).

Furthermore, the same issues of the previous session, the family reunion and social security benefits, still remain unsolved. However, the EU stressed that the UK promised to grant a simplified procedure for EU citizens to enjoy their rights in the UK. However, during this session, the UK did not give any practical detail on how to implement this promise (Miller, Lang, McGuinness, *et al.*, 2017: p. 9).

As it appeared also during the previous rounds, the British counterpart has engaged in a more optimistic view. Davis spoke on 17 October to the House of Commons, stressing the noteworthy progress the two parties have made so far:

Last week, we explored the ways in which we will make sure that the rights we agree now will be enforced in a fair and equivalent way. We also explored ways in which we can fully implement the Withdrawal Treaty into UK law. That will give confidence to European citizens living in the UK that they will be able to directly enforce their rights - as set out in the Agreement - in UK courts. The two sides also discussed ways of ensuring consistent interpretation of our Agreement (Davis, 2017b).

To conclude, despite this four-day session, no important steps forward have been made. On the contrary, it is worth noting that during the October session the threat of a no-deal Brexit appeared on the agenda, as UK negotiators threatened to refuse to further negotiate, especially because of the topic regarding the financial settlement (Miller, Lang, McGuinness, *et al.*, 2017: p. 23).

2.6.6 The sixth round

On 20 October 2017, the European Council met with all the EU 27 heads of State to decide whether the past five rounds were sufficient or not to start the second phase of the negotiations: the negotiations on future relations. During the discussion, the European Council urged for more progress in three particular topics: namely, citizens' rights, the Irish question and the financial settlement (Council of the European Union, 2021).

The European Council during the session analysed the three topics above mentioned, noticing that signs of progress were indeed made; however, they are not sufficient to open the second phase. Nevertheless, the EU proclaimed after the meeting that it will prepare the guidelines and red lines for the second phase of the negotiation. Thus, the second phase is likely to start before the end of 2017, if the negotiations keep this path. The Council invited the negotiator of the EU, Michel Barnier, to further discuss citizens' rights and to be able to provide the necessary legal certainties to all concerned citizens and their family members. The Council also pushed for the necessity of the EU to protect their own citizens and their family members residing in the UK through the role of the CJEU. Moreover, the EU also highlighted that the UK must provide smooth and simple administrative procedures to all EU citizens residing in the UK (European Council, 2017b: p. 2).

The European Council will reassess the progress of the negotiations during the next session in December. In the meantime, as already noted, the European Council urged to start the internal preparations regarding the second phase of the negotiations (European Council, 2017b: p. 3).

The sixth round of the negotiations took place on 9 and 10 November 2017. Considering the scarce progress made especially during the fifth round and the meeting of the European Council on 20 October, both sides agreed on the urge to further discuss the three crucial topics: citizens' rights, the Irish question and the financial settlement (Miller, Curtis, Gower, *et al.*, 2017).

Right before the beginning of the sixth round, the UK Government provided a document with further details regarding the application process that EU citizens will have to do after the UK leaves the EU. The document also suggested that negotiations regarding citizens' rights have almost come to an end,

as the majority of topics have been discussed. The UK through this document requires all EU citizens to have the status for lawful residence in the UK to enjoy public services. The document also provides measures towards those EU citizens who do not apply for the status of residence (UK Government, 2017). On the other hand, the European Parliament (EP) in a press release stated that reports suggesting that the topic regarding citizens' rights is almost finalised is unacceptable and completely wrong. Furthermore, the EP voices further concerns regarding the report issued by the UK, as the EP considers that giving status to EU citizens residing in the UK should be done automatically, without all the bureaucracy of the application proposed by the UK (European Parliament, 2017a).

The EU negotiator Barnier in the press conference right after the sixth round stated that some progress was being made, especially highlighting the need for further discussion on the detailed proposals of the UK regarding the process of application for EU citizens. Despite this small progress, Barnier also stated that many topics are still to be discussed. The EU negotiator also noticed that the same topics of the fifth round have been unsuccessfully discussed, as no convergent areas have been found. In particular, family reunification, social security benefits and the role of the CJEU seem to have reached a deadlock stage, as no concessions have been made (Miller, Curtis, Gower, *et al.*, 2017). Barnier during the press conference analysed the main aspects discussed during this sixth session. However, Barnier opened with a strong stance, affirming that concessions are not possible during this phase of the negotiations, as this phase is merely limited to granting a withdrawal according to Art 50 of the Lisbon Treaty:

I would like to repeat that in this extraordinary negotiation, which is extraordinarily complex, that we are not demanding concessions from the United Kingdom, and we do not intend on issuing concessions either. We work on the basis of fact, and law, and on precise, reciprocal commitments. [...] On citizens' rights, we are making some progress, although we need to work further on a number of points. The UK wants to put in place administrative procedures through which EU citizens can obtain "settled status". The EU needed reassurances on how such a system would work: it should be simple to use, and low cost. We also needed reassurance on how people, when rejected, can appeal effectively (Barnier, 2017f).

On the British side, David Davis stressed that in the topic regarding citizens' rights both sides reached an agreement on many spheres, isolating the remaining issues (Miller, Curtis, Gower, *et al.*, 2017: p. 13). However, Davis in his speech also clarified the importance of the deadlock regarding the role of the CJEU, as neither the UK nor the EU made concessions towards the counterpart:

[T]his week we have sought to give further clarity on our commitment to incorporate the agreement on Citizen's Rights into UK law. This will ensure that EU citizens in the UK can directly enforce their

rights in UK courts – providing certainty and clarity in the long term. We have made clear that, over time, our courts can take account of the rulings of the European Court of Justice in this area, to help ensure consistent interpretation. But let me be clear, while we share the same aims, it remains a key priority for the United Kingdom, as we leave the European Union, to preserve the sovereignty of its courts (Davis, 2017a).

2.7 The ‘sufficient progress’ and the end of phase one

On 17 November 2017, Donald Tusk, president of the European Council met UK Prime Minister Theresa May in Gothenburg. During the press conference, Tusk said that the EU started already in October the preparations for the second phase of the negotiations and that the EU27 are likely to be ready in December to start the discussions, but only if phase one reaches sufficient progress (Council of the European Union, 2021). On 8 December 2017, the EU and the UK published a joint report of phase one, which analyses the progress made. As the negotiations during phase one, also the joint report focused on three different topics: citizens’ rights, Northern Ireland and the financial settlement (European Union and Government of the United Kingdom, 2017).

Regarding citizens’ rights, the main aim, as specified in the joint report, is to provide reciprocal protection for citizens and their rights (European Union and Government of the United Kingdom, 2017). The report also includes the role of the CJEU in relevant decisions after Brexit. In fact, the UK courts or tribunals have jurisdiction; however, if relevant cases exist within the CJEU, the British court has to ask the CJEU about the interpretation of those rights put into question. Moreover, a new channel of dialogue between the CJEU and the UK courts will be established to grant protection of citizens’ rights (Markakis, 2019).

The joint report, however, is not an agreement; thus, there may be some changes to it. The joint report only represents proof of the progress made, it is not a treaty. Nevertheless, the joint report highlights the common areas and the hard negotiations that the two counterparts have been involved in since June. The report states that UK citizens residing in one EU27 and EU citizens residing in the UK will be able to maintain their status and reside in the country even after Brexit. EU citizens moving to the UK, however, will need to apply for settled status, as well as family members re-joining UK citizens (O’Neill and Livingstone, 2018).

The resolution issued by the European Parliament on 13 December 2017 on the state of negotiations analysed the main progress made on citizens’ rights. The EP states that sufficient progress has been

indeed made, focusing on the concessions the UK has made throughout the negotiations (European Parliament, 2017c).

The UK, as the Resolution issued by the European Parliament on 13th December 2017 states, made the following concessions regarding citizens' rights:

- accepted that all EU citizens legally residing in the UK and UK nationals legally residing in an EU-27 Member State, and their respective family members at the time of withdrawal, will enjoy the full set of rights as established in EU law and interpreted by the Court of Justice of the European Union (CJEU), based on protections which will be set out in the Withdrawal Agreement,
- accepted, in addition, that citizens' core family members and persons in a durable relationship with them currently residing outside the host state will be protected by the Withdrawal Agreement and that this will also be the case for children born in the future and outside the host state; accepted that the continuation of citizens' rights will be guaranteed for a lifetime through a proportionate procedure, which will be subject to proper safeguards, in accordance with EU law concepts. This procedure and these safeguards will be set out in the Withdrawal Agreement,
- accepted that administrative procedures will be transparent, smooth and streamlined, that forms will be short, simple and user-friendly, and that applications made by members of a family at the same time will be considered together,
- accepted that all relevant rights based on EU law will be safeguarded and will be set out in detail in the Withdrawal Agreement,
- accepted that all social security rights under EU law will be maintained. This includes the export of all exportable benefits,
- accepted that the citizens' rights' provisions of the Withdrawal Agreement will be incorporated into a specific UK legal act so that these rights will have direct effect (European Parliament, 2017c);

Following this Resolution by the EP, on 15 December 2017, the European Council decided that sufficient progress has been made; thus formally allowing the negotiations to move to the second phase (Curtis *et al.*, 2017), while the European Commission and the United Kingdom can begin a draft of the Withdrawal Agreement based on Article 50 (European Commission, 2017a). After these past six rounds, the UK agreed that the CJEU will have an indirect influence within the UK courts for the first eight years. In particular, the UK courts can, if needed, ask the CJEU for advice on some cases. Regarding social security rights, the two counterparts agreed that citizens residing and covered by the social security system before the cut-off date will be able to enjoy those same rights even after Brexit (Curtis *et al.*, 2017).

The joint report particularly stressed that both parties must implement a smooth and transparent procedure to allow citizens to apply for settled status. Overall, the parties reached a common understanding of how to provide protection to the citizens of the other party (Jones, 2019).

Although the two parties reached a joint report, the negotiations, as analysed, were not easy at all. In particular, the British side faced several problems, as the UK Government had no clear view of the future relationship between the UK and the EU. The Cabinet was extremely divided on how the future economic relationship with the EU should be. It must also be stressed that, while the EU adopted a transparent approach in which every EU27 and its citizens were constantly informed of the status of the negotiations, the UK adopted a much more secretive approach, as the Prime Minister urged the negotiating team to not reveal delicate information. Another important issue within the UK side was the mistrust towards the UK's official negotiators, as many politicians in the UK criticised the work of the negotiators. The UK negotiators, in fact, were deemed responsible for the many concessions the UK made to the EU, putting the UK in a weaker position compared to the EU (Durrant *et al.*, 2019).

On 19 March 2018, the EU and the UK drafted the first Withdrawal Agreement, which translates the December joint report into legal terms, formally creating a binding agreement. However, this first withdrawal agreement highlighted areas on which the two actors still do not agree. The document is in fact divided into areas in which the two parts agreed on and the parts in which progress has still to be made.

The Withdrawal Agreement, which will be analysed in the next chapters, consists of six different parts: the common provisions; citizens' rights; separation provisions; transition; financial provisions; and institutional and final provisions (Markakis, 2019). It should also be stressed that the Withdrawal Agreement does not issue any right regarding the freedom of movement of UK nationals residing in the EU either. Thus, the main concern of UK citizens living in the EU is that they will be landlocked in their State of residence without the possibility to freely move within the Schengen Area.

2.8 Conclusion

The first phase of the Brexit negotiations set out the three most important topics from the EU point of view: citizens' rights, financial settlement and the Irish question. During phase one, the EU, thus, demonstrated a unified approach towards these three pillars, which the EU pushed to prioritise during the negotiations. The UK, on the other hand, presented several difficulties in following the path of its

own constituents, both because of the promises the political sphere made during the referendum campaign, and also because of the incapability of the British Government to find a unified approach, as the Cabinet, as already noted, never fully agreed on the work the British negotiators were doing with the EU. Because of this lack of a unified approach, the UK often had an unclear stance. In fact, the EU several times urged its counterpart to be clearer and less idealistic during the negotiations.

The EU, thus, during phase one has always had a very unified approach at the national level, which extremely helped during the negotiations, allowing the EU negotiators to have an organised strategy and approach at level one, which refers to the international level according to the two-level game strategy set out by Putnam. However, it must be noted that the topics discussed during this first phase were equally important for every Member State. On the contrary, as it will be discussed in the next chapter, the second phase of the negotiations dealt with far more specific topics, which were not always unanimously acclaimed within the EU (Patel, 2018: p. 11).

As depicted throughout the chapter, the two counterparts did not always share the same view of the negotiations. In fact, if the EU was more sceptical towards the progress made and the agreements reached, the UK tried to promote a different story, in which the negotiations were satisfactory and many topics were already solved. The reason behind that, as already noted, is the fact that the UK needed to show confidence not only to convince the EU that progress has been indeed made but also to reassure its citizens and all the constituents and stakeholders that Brexit was heading in the right direction.

As analysed in these first rounds of the negotiations, the two actors engaged in a positional bargaining strategy which was mainly a hard one as neither the UK nor the EU were willing to give in and make concessions (Fisher and Ury, 1991). The two actors, as analysed, started the negotiations with stubborn and, for the British side, unrealistic positions. While the EU stressed that by leaving the EU the UK will also leave the benefits, not only the burdens, the UK wanted to remain in the single market. The EU assumed a hard bargaining strategy, as it is the stronger actor involved; however, as analysed, during the press conferences Barnier had a more problem-solving stance, although it was not the strategy used in the rounds with the UK. On the contrary, the UK also in press statements had a positional bargaining stance, trying to appear stronger than the EU in front of its constituents to sedate possible spoilers.

The EU did not make any major concessions during these first six rounds, showing that its hard bargaining was more efficient than the British one. As such, the first phase of the Brexit negotiations was marked by a contest of will, and the stronger party was the EU.

Chapter III

The beginning of the Second Phase of the Brexit Negotiations: Forging an Acceptable Future for EU Citizens living in the UK and UK Citizens living in the EU

3.1 Introduction

As sufficient progress has been reached after the sixth round of the negotiations, the EU declared that the negotiations could proceed to the second phase, which started in February 2018 until reaching a Withdrawal Agreement in November 2018. The second is, however, a much more complex phase than the previous one, as the negotiations are approaching an agreement regarding the withdrawal of the UK from the EU and, at the same time, discussing the possible frameworks for the future relationship.

The chapter will briefly focus on the role of the European Parliament during this second phase of the Brexit negotiations, as it has been extremely important in defending the rights of the citizens of the EU. The European Parliament, in fact, has managed to be constantly informed during every single step of the negotiations, although its only role was to ratify the agreement once agreed by the two parties involved.

This chapter will also focus on the first part of the second phase of the negotiations; namely the first Withdrawal Agreement (WA) (European Union, 2019a). Thus, the following sections aim at analysing the next rounds of the negotiations regarding the Withdrawal Agreement, specifically focusing on citizens' rights. In order to analyse the Withdrawal Agreement, an analysis of the final Joint Report reached after the rounds of the negotiation and published on 8 December 2017 is necessary to set out the main objectives agreed upon by both parties.

Every draft of the Withdrawal Agreement will be analysed, bearing in mind that the negotiators after every round need to convince the Parliaments of the Member States, the UK and the public opinion to accept the agreement. As such, the already analysed theory of the two-level game will still have relevance, as in this second phase more than ever the constituents have a crucial role in the ratification.

As the second phase of the negotiations approached, the citizens of the UK became increasingly doubtful regarding the degree of the future interconnectedness between the UK and the EU. Thus, British public opinion started analysing all the partnerships the EU has with other countries. As such, the chapter will focus on the so-called "models" of how the relationship between the UK and the EU

should be after the negotiations. In doing so, the chapter will discuss the different rights citizens enjoy regarding the possibility to move from one country to the other in every model analysed.

3.2 The European Parliament: an ever-expanding role within the second phase of the Brexit negotiations

The European Parliament, although it had no formal role during the negotiations, managed to influence and shape the Brexit negotiations, becoming the most important actor defending citizens' rights. In fact, the European Parliament made a resolution at the end of phase one of the negotiations, on 14 March 2018, taking into account the efforts and the sufficient progress reached during phase one. The EP, however, stated that the framework regarding the future relationship can only be accepted if the following principles will be respected:

1. a third country must not have the same rights and benefits as a Member State of the European Union, or a member of the European Free Trade Association (EFTA) or EEA, 2. protection of the integrity and correct functioning of the internal market, the customs union and the four freedoms, without allowing for a sector-by-sector approach, 3. preservation of the autonomy of the EU's decision-making, 4. safeguarding of the EU legal order and the role of the Court of Justice of the European Union (CJEU) in this respect, 5. continued adherence to democratic principles, human rights and fundamental freedoms, as defined in particular in the UN Universal Declaration of Human Rights, the European Convention on Human Rights and Fundamental Freedoms and its Protocols, the European Social Charter, the Rome Statute on the International Criminal Court and other international human rights treaties of the United Nations and the Council of Europe, as well as respect for the principle of the rule of law, 6. a level playing field, in particular in relation to the United Kingdom's continued adherence to the standards laid down by international obligations and the Union's legislation and policies in the fields of fair and rules-based competition, including state aid, social and workers' rights, and especially equivalent levels of social protection and safeguards against social dumping, the environment, climate change, consumer protection, public health, sanitary and phytosanitary measures, animal health and welfare, taxation, including the fight against tax evasion and avoidance, money laundering, and data protection and privacy, together with a clear enforcement mechanism to ensure compliance, 7. safeguarding EU agreements with third countries and international organisations, including the EEA Agreement, and maintaining the overall balance of these relationships, 8. safeguarding the financial stability of the EU and compliance with its regulatory and supervisory regime and standards and their application, 9. a right balance of rights and obligations, including, where appropriate, commensurate financial contributions (European Parliament, 2018).

The European Parliament, as it appeared through the already mentioned principles, soon became one of the most important European organs addressing the negotiations over citizens' rights. In fact, since from the beginning of the negotiations, the EP pushed for the jurisdiction of the CJEU over the UK during the transition period to protect the European citizens under EU law during the transition (Stoll, 2017).

The European Parliament is an important EU institution within the EU's framework. The EP is a primary source of democratic legitimation and it detains legislative power. The EP and the Council share the role of legislative powers and they both exercise budgetary functions based on the Lisbon Treaty (Craig, 2008). The role of the European Parliament is divided into the approval or rejection of laws, which must also be transmitted to the Council, the supervision of EU institutions and budgets and the establishment of EU budgets along with the Council of the EU.

After the Lisbon Treaty in 2009, the EP gained the role to give or withdraw consent from international negotiations. From that moment, the EP had, thus, the capability to alter the negotiations, as it became the organ responsible for the ratification of the agreements. Since 2009, the EP has given to European citizens a voice in international negotiations. Already in 2010, the EP exercised its new power to reject the ratification of the SWIFT Agreement between the US and the EU to protect the data protection rights of EU citizens (Eckes, 2014). The EP from the Lisbon Treaty became the main actor in reflecting the concerns of Europe's citizens, as the President of the EP between 2009 and 2012 Jerzy Buzek affirmed. As of today, the EP is the main European organ that has been able to represent and give a voice to European citizens in external negotiations (Eckes, 2014).

The role of the parliament is indeed fundamental during the Brexit negotiations, as it is the body responsible for the ratification of the EU-UK agreement (European Union, 2012a), while the European Council was responsible for the endorsement the agreement (European Council, 2022). As such, early involvement is crucial to facilitate the ratification (Stoll, 2017). The European Parliament, however, does not hold any formal role regarding the negotiation process. Nevertheless, Article 50 (2) of the TEU states that the Council needs the Parliament's consent to conclude a withdrawal agreement with the UK. The EP, thus, used its power of consent to force the Council to keep the Parliament constantly informed on every matter at each round of the negotiations (Bressanelli, Chelotti and Lehmann, 2021).

As such, it is indeed relevant to analyse the leverage the EP has regarding citizens' rights within the Brexit negotiations (Verhofstadt and The Brexit Steering Group, 2021). The permanent residence status, free movement rights, and expulsion rights were highlighted by the EP in its resolution of

March 14th, 2018, as the primary issues on which it will exert pressure to secure concessions during the second phase of negotiations:

[The European Parliament] [w]elcomes the general approach taken on citizens' rights in Part Two of the Commission's draft Withdrawal Agreement, but reiterates that addressing all outstanding issues with regard to citizens' rights and making sure that the rights of EU citizens legally residing in the UK and of UK citizens legally residing in EU-27 are not affected by Brexit will be one of the key issues for Parliament's consent; supports the inclusion of the reference to future spouses; takes note of the provisions on the administrative procedures to acquire permanent resident status and insists on the need to enable families to initiate the procedure by means of a single form that is declaratory in nature and places the burden of proof on the UK authorities; underlines that the European Parliament will scrutinise that these procedures are effectively implemented and are simple, clear and free of charge; insists that future free movement rights across the whole EU for UK citizens currently resident in an EU-27 Member State are guaranteed, as well as voting rights in local elections for all citizens covered by the Withdrawal Agreement; calls also for the lifelong right for EU citizens covered by the Withdrawal Agreement to return to the UK, protection against the expulsion of disabled citizens and their carers, as well as the protection of procedural rights related to expulsion as referred to in Directive 2004/38/EC and of the rights of third-country nationals as established in EU law (European Parliament, 2018).

Moreover, the EP pushes the UK for greater clarity regarding the possibility for citizens to move freely between the EU and the UK. The EP and Barnier consider that the agreement needs to be ready by October 2018, to be ratified by all the EU27 and the EP by 29th March 2019 (Perez-Solorzano, 2017).

3.2.1 The leverage of the European Parliament during the Brexit negotiations

The role of the EP in the Brexit negotiations provided by Article 50 TEU is formally limited to the consent vote, which happens at the very end of the negotiation process. As such, the EP was responsible only for accepting or not an agreement already written. However, as already noted, to allow the agreement to be successfully ratified by the EP, a more active role of the latter is needed during the Brexit negotiation. The EP has been able to upgrade its position throughout the negotiation and also to influence the agenda and content of the negotiation. In particular, the EP has been able throughout the whole process to gain power in three specific areas (Bressanelli, Chelotti and Lehmann, 2021: p. 7).

First of all, the EP has been informed by the Council and Barnier during every step of the negotiation, as they have been extremely transparent. The Council also kept close contact with the Parliament at every step, so as to assure that the EP would vote in favour of the agreement once it will be reached. Moreover, the EP became a quasi-negotiator as it participated in the negotiations of the guidelines with the European Council. The EP was also allowed to be present in the decision-making rooms of the Council during the crucial moments of the negotiations. However, these first two aspects do not automatically lead the EP to have a real impact on the negotiations. The third aspect, unlike the already mentioned first two, led the EP to use its leverage during the negotiations. In fact, the EP has many instruments to influence the mandate, such as resolutions, committee's opinions and hearings. In order to become an active actor rather than just a passive one, the EP used red lines to influence the Brexit talks (Bressanelli, Chelotti and Lehmann, 2021).

During the second phase of the negotiations, the EP continued to represent the EU citizens' advocate. The Parliament, in particular, pushed for maintaining the role of the CJEU even after Brexit, as the jurisdiction of the CJEU would have granted harmonisation in the way the EU and the UK maintained citizens' rights in the future. Moreover, the EP also asked for citizens to be able to enjoy the same rights they did before Brexit even after the transition period. However, as already discussed in the previous chapter, the UK was not willing to give any concession on these two topics (Bressanelli, Chelotti and Lehmann, 2021).

Despite the vague provisions of Article 50 TEU regarding the role of the EP, the Parliament was able to use its consent as a useful tool to expand its influence. In particular, the EP was constantly informed and it even participated in the key decisions during the negotiations (Closa, 2019).

The EP, moreover, successfully created the Brexit Steering Group (BSG) with Guy Verhofstadt as chair. The BSG had the role to be sure that the EP would have accepted and ratified the Withdrawal Agreement. The group was composed of five different parliamentary groups which allied despite their differences to promote a unified and focused position towards the negotiations. The BSG was extremely useful as it constantly cooperated both with Barnier and with the Council, especially regarding the creation of strategies (Bressanelli, Chelotti and Lehmann, 2021).

3.2.2 The role of the European Parliament before and after Brexit day

The EP, as already mentioned, was the main organ dealing with citizens' rights. In fact, while the Council and the Commission focused mainly on the financial settlement and the Irish border, the

Parliament attributed much more importance to individuals. The EP, in particular, pushed for topics such as the applications for permanent residency and work permits to be discussed during the second phase of the negotiations, as the first phase was limited to reaching a common understanding. As such, the role of the European Parliament was much more prevalent during this second phase, where it used its powers to alter the agenda and prioritise citizens' rights. The EP, in addition, also supported many activists trying to reverse Brexit (Bressanelli, Chelotti and Lehmann, 2021).

The EP during the second phase of the negotiations was extremely active in prioritising citizens' rights. On the contrary, after Brexit day on 31 January 2020, the EP had a less significant role in negotiating the future relations with the UK, which led to a loss of influence in the negotiations of a trade agreement, as the topic regarding citizens' rights was no longer at stake. Nonetheless, the EP successfully influenced the agenda and the negotiations with the UK during the two phases before Brexit day (La Moncloa, 2020).

It must be stressed that the Parliament already from the beginning championed citizens' rights as a crucial matter, while the Commission and the Council were deemed responsible for the financial settlement and trade agreement (Bressanelli, Chelotti and Lehmann, 2021). As a consequence, the EP during the second phase of the negotiations had a much stronger position as a quasi-negotiator rather than during the first phase or during the trade negotiations after Brexit (Brusenbauch Meislova, 2019).

3.3 The Joint Report

On 6 February 2018, the two parties met for the seventh round of the negotiations in which they started the discussions for the transitional arrangements. The parties further discussed the Joint Report published in December and also the arrangements for the creation of the draft of the Withdrawal Agreement (WA) began (Clay, 2018).

As already discussed in the previous chapter, the Joint Report is the record of the progress made after each round of the negotiations. The report collects, thus, the discussions made over the three main topics: citizens' rights, Northern Ireland and the financial settlement. The Joint Report contains the commitments taken by both parties which are to be included in the Withdrawal Agreement. The clauses in the Withdrawal Agreement, however, can differ from the ones in the report, as the report is not a treaty and, thus, does not represent a binding document, it can thus be subject to adaptation (Markakis, 2019):

Under the caveat that nothing is agreed until everything is agreed, the joint commitments set out below in this joint report shall be reflected in the Withdrawal Agreement in full detail. This does not prejudice any adaptations that might be appropriate in case transitional arrangements were to be agreed upon in the second phase of the negotiations and is without prejudice to discussions on the framework of the future relationship (European Union and Government of the United Kingdom, 2017).

This particular paragraph is extremely important, as it functions as a promise that if the next stages of the negotiations do not provide the desired results the UK can stop the negotiations and, thus, reach a no-deal Brexit. Moreover, the EU in paragraph 5 highlights the leverage that it has on the UK, expressing at the same time that the EU would prefer a no-deal than give too many concessions (de Mars *et al.*, 2017). It is worth noting, however, that as the Joint Report has been published as a result of all the previous and intense rounds of the negotiation, walking away from the negotiations would eventually lead to a loss of international reputation and lose the face when it comes to reach trade agreements with the rest of the world. As such, neither the UK nor the EU would deny what has been agreed upon so far in the Joint Report (de Mars *et al.*, 2017).

3.3.1. The first section of the Joint Report: citizens' rights

The first and longest section of the report is dedicated to citizens' rights, which states the objectives reached by the two parties during the first phase. The section begins with Paragraph 6 expressing the urge to grant these rights to protect citizens after Brexit:

The overall objective of the Withdrawal Agreement concerning citizens' rights is to provide reciprocal protection for Union and UK citizens, to enable the effective exercise of rights derived from Union law and based on past life choices, where those citizens have exercised free movement rights by the specified date (European Commission, 2017e).

Paragraphs 10-16 specifically refer to the citizens who fall within the scope of the Joint Report and of the Withdrawal Agreement (Murray, O'Donoghue and Warwick, 2018). All the Union citizens that before Brexit legally resided in the UK and all the British citizens who legally reside in the EU as well as their family members are within the scope of the agreement and will enjoy full rights without any discrimination. These rights, as specified in paragraph 12, refer also to family members in a relationship before the specified date and children born or adopted after the specified date of Brexit if one parent falls within the scope of the agreement (European Commission, 2017e). However, family members that are in a stable relationship after the Brexit date do not fall within the scope of the agreement and will thus be subject to national law.

Of particular importance is paragraph 17 which refers to the process of registration for EU citizens in the UK:

Administrative procedures for applications for status will be transparent, smooth and streamlined, in particular:

a. The Withdrawal Agreement will specify that the host State cannot require anything more than is strictly necessary and proportionate to determine whether the criteria have been met. The Withdrawal Agreement will contain provisions that follow a similar approach to the provisions on evidential requirements in Directive 2004/38; b. The host State will avoid any unnecessary administrative burdens; c. Application forms will be short, simple, user friendly and adjusted to the context of the Withdrawal Agreement. The host State will collaborate with the applicants to help them prove their eligibility under the Withdrawal Agreement and to avoid any errors or omissions that may impact on the application decision. Competent authorities will allow applicants to furnish supplementary evidence or remedy any deficiencies where a simple omission has taken place. A principle of evidential flexibility will apply, enabling competent authorities to exercise discretion in favour of the applicant where appropriate; d. A proportionate approach will be taken to those who miss the deadline for application where there is a good reason. Applications made by families at the same time will be considered together; and e. Where an application is required to obtain status, adequate time of at least two years will be allowed to persons within the scope of the Withdrawal Agreement to submit their applications. During this period, they will enjoy the rights conferred by the Withdrawal Agreement. Residence documents under the Withdrawal Agreement will be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents (European Commission, 2017e).

This paragraph is extremely detailed, as it represents one of the most important and debated topics of the negotiations, as analysed in the previous chapter. The right to obtain the permits to legally reside in the UK or in the EU, in fact, is of fundamental importance for every citizen and it was one of the main causes of chaos and fear across the Union and the UK right after the results of the Brexit referendum were official. This part is of particular importance for Northern Ireland as well, as it provides to all citizens with EU passports, as well as any other Union citizen residing in the UK, to apply for a quick and not costly process of registration in the UK, to enjoy the right to legally stay in the UK (de Mars *et al.*, 2017).

Paragraph 17 is also important because it highlights a deep concern regarding the treatment that EU citizens might face in the UK after Brexit. For this reason, in 17a it is explicitly expressed that the host State will not be able to require any additional procedure to the ones provided by the Agreement. The paragraph also asks the competent authorities to be understanding and allow the applicants to

avoid any unnecessary procedure. The authorities are also urged to be discrete and flexible towards possible deficiencies or omissions by the applicants (Markakis, 2019).

The following paragraphs, in particular 19-22, further state that the procedures to obtain the resident permits as expressed in paragraph 17 must be fair and that no other requirements beyond the ones already set out in paragraph 17 can be introduced. However, paragraph 22 allows and even encourages the UK and EU27 to facilitate the procedures and the requirements (de Mars *et al.*, 2017).

Paragraph 25 provides the regulation for EU nationals residing in the UK to leave the UK for a period of a maximum of 5 consecutive years without losing their right to reside in the UK. This is however not to be applied to Irish nationals, who, accordingly to the Ireland Act of 1949, possess unlimited rights to reside in the UK, including Northern Ireland (de Mars *et al.*, 2017). As such, Irish citizens or the holders of an Irish passport will be able to enjoy more free movement, as they will be able to travel in Schengen and in the UK without restrictions.

Paragraphs 28-32 of the Joint Report provide the rights that will still be valid for all EU nationals and UK nationals after the Brexit date. Paragraph 28, in particular, provides social security rights, granting the existence of the EHIC health insurance cards after Brexit, as long as the citizen remains resident in the country. In addition, equal treatment rights are provided by the report and will be in the Withdrawal Agreement, as it will be analysed in the next section of the chapter (de Mars *et al.*, 2017).

Paragraph 36 is considered the most important part of the whole Joint Report, and as analysed in the previous chapter, one of the most negotiated parts. The paragraph refers to the implementation of the provisions written in the report as binding laws:

The UK Government will bring forward a Bill, the Withdrawal Agreement & Implementation Bill, specifically to implement the Agreement. This Bill will make express reference to the Agreement and will fully incorporate the citizens' rights Part into UK law. Once this Bill has been adopted, the provisions of the citizens' rights Part will affect primary legislation and will prevail over inconsistent or incompatible legislation, unless Parliament expressly repeals this Act in future. The Withdrawal Agreement will be binding upon the institutions of the Union and on its Member States from its entry into force pursuant to Article 216(2) TFEU (European Commission, 2017e).

For its part, the EU, as well as the Member States, considers the Withdrawal Agreement that will be negotiated as a legally and thus binding document. As such, all the provisions in it will be binding. On the other hand, the UK Government, as negotiated during the previous rounds and included in paragraph 36, accepts to prepare a Bill, called the Withdrawal Agreement and Implementation Bill, which will bind the UK to fully integrate the citizens' rights into the UK law (Markakis, 2019). In

doing so, these provisions will be primary legislation and, thus, will be able to prevail over incompatible legislation. This also includes any Act subsequently approved by the British Parliament.

The Joint Report also provides a chapter regarding the interpretation of citizens' rights, which comprises paragraphs 37-41, urging the UK courts to take due regard to the relevant decisions made by the CJEU after Brexit. Many concessions were made regarding these paragraphs. The EU imposed the role of the CJEU to the UK regarding citizens' rights, despite this topic remaining a deadlock for several rounds of the negotiations, as analysed in the previous chapter (de Mars *et al.*, 2017). The report, thus, managed to create a hierarchical relation between the CJEU and the British courts. The report also establishes a temporary mechanism in which a British court before making a judgement regarding the interpretation of the citizens' rights provided by the agreement has to consider if any similar case has been previously judged by the CJEU. This mechanism will be valid for 8 years after the Brexit date, to allow British courts to align to the judgements made by the CJEU (Markakis, 2019).

Moreover, this section also provides a further role and involvement of the EU in British matters. The European Commission, according to paragraph 39 of the report, is allowed to intervene in all UK cases regarding citizens' rights. It must be noted that this involvement, together with the role of the CJEU, is completely against one of the red lines proposed by the UK before the negotiations, as the UK wanted to be completely independent of the EU law after Brexit (de Mars *et al.*, 2017).

Finally, the last paragraph regarding citizens' rights summarises the main objective of the future Withdrawal Agreement:

The approach agreed upon in the context of the citizens' rights Part of the Withdrawal Agreement reflects both Parties' desire to give those citizens certainty. It in no way prejudices discussions on other elements of the Withdrawal Agreement, including governance, other separation issues or any possible transitional arrangements, nor discussions on the future relationship (European Commission, 2017e).

As already mentioned, Brexit caused many uncertainties for many UK citizens residing in the EU and EU citizens residing in the UK, as well as their family members. With this final paragraph, both sides assure that they will implement clear and quick procedures for citizens to apply for resident permits.

The Joint Report, however, does exclude other issues related to citizens' rights, according to a report made by the EU Rights Clinic on 25 January 2018 (Valcke, 2018), such as the interpretation of the term "lawful residence" and other assurances that the UK should pursue. The lawful residence, in particular, should be further specified, according to Valcke, as the current term can lead to a restrictive application, which consequently might lead to refusal to grant rights of residence to EU citizens in

the UK or British citizens in the EU. Many studies by EU institutions (European Parliament, 2017d) analysed that the UK has a much more restrictive interpretation of the term rather than the EU (European Parliament, 2014), such as the more restrictive use of the term “worker” which does not comply with EU law, as in the UK the status of a worker is granted to a person earning £157 per week (Valcke, 2018). As such, the term might lead many EU citizens who should be granted as lawfully resident in the UK as they comply with EU law to be unlawfully resident by the UK law.

According to Valcke, during the negotiations for the draft Withdrawal Agreement, the European Commission should explicitly urge the UK to ensure that it will not impose any requirement on EU citizens to demonstrate a “genuine and effective work” regarding the already discussed threshold under national law (Valcke, 2018). The negotiations for the WA should also cover inactive EU citizens and their family members, as the UK post-Brexit might ask them to demonstrate health insurance to obtain rights of residence under UK law.

As Valcke claims, if these topics will not be covered by the scope of the WA, there is the risk that after Brexit these EU citizens will not be protected by the agreement and, thus, be subject to deportation (Valcke, 2018). As many topics failed to be addressed in the first phase of the negotiations, it is unlikely that the two parties will meet a compromise in the first draft of the Withdrawal Agreement.

3.4 The beginning of the negotiations for the Withdrawal Agreement: Barnier’s strategy

After the publication of the final Joint Report, which is the first version of the Withdrawal Agreement, the EU negotiators headed by Michel Barnier had constant meetings with the Member States to discuss the position of the EU during the second phase. On 15 March 2018, in particular, Barnier met the twenty-seven Ambassadors to discuss the current situation within the UK, as the Labour Party were forcing Prime Minister Theresa May to obtain results on the matter. The industrial sector of the United Kingdom was planning to relocate its headquarters within the EU. As a consequence, as discussed during this meeting, the UK might be more willing to get closer to the position of the EU to reach an agreement (Barnier and Mackay, 2021: p. 165).

The UK side wanted to ensure a smooth transition period, to avoid any loss in the industrial sector. Thus, the EU decided to not isolate the topic of the transition, but rather to discuss it together with the other separation matters, to oblige the UK counterpart to make more concessions to reach an agreement (Barnier and Mackay, 2021: p. 166).

On 19 March 2018, David Davis returned to Brussels after more than 3 months. The two negotiators met for a preparatory meeting. The two discussed the 168 Articles of the first draft of the Withdrawal Agreement. Barnier insisted that 75% of the agreement has been agreed upon by both sides, while there is still much work to do to agree on every article. Davis, on the other side, did not question any of the points of the agreement (Barnier and Mackay, 2021: p. 169).

As the Joint Report marks the end of phase one of the Brexit negotiations, the second phase was dedicated to the future trade relations between the UK and the EU and the drafting of the WA has started. Nevertheless, the scope of this thesis, as already mentioned, is limited to the negotiations regarding citizens' rights. As such, it will be analysed only one of the two aspects of phase two, namely the drafting of a Withdrawal Agreement, while the future commercial relationship between the UK and the EU will only be mentioned. However, as the first phase of the negotiations came to an end, British citizens became increasingly curious about what kind of agreement the two parties will reach. As such, it is worth analysing the main agreements the EU has with other non-Member States to understand how freely will the citizens circulate between the EU and the UK after Brexit.

3.5 Possible outcomes

It must be stressed that there were many possibilities regarding how the future relationship between the UK and the EU would have looked after the termination of the negotiations. The possibilities were mainly based on the already existing agreements the EU has with other non-Member States or countries which do not have a full EU membership status, even though they have close relationships. These relationships, with countries such as Norway, Ukraine, Canada and Switzerland, represent models for Brexit. However, also the No-Deal option is a possibility, as Article 50 of the European Union Lisbon Treaty (European Union, 2007) provides a period of up to two years after officially triggering Article 50.

The possible outcomes are an analysis of the win-sets of the two parties involved. The win-set varies depending on the preferences and coalitions of level 2; in fact, if there is homogeneity within level 2, the constituents have a clear view of what they want to obtain with the negotiations. However, in this case, the win-set is not so wide, as the constituents have a clear idea of what they want. On the contrary, if there is heterogeneity within level 2 the needs are more difficult to be understood, as there is not a clear view of what the constituents want with the negotiations, as in the UK in this case.

However, heterogeneity also means that the win-set is wider, as the constituents are divided and have different ideas of optimal agreement (Putnam, 1988).

When the win-set is small, which means that there is homogeneity within the constituents, as in the case of the EU, the negotiators can use the power of weakness, which is a strategy where the negotiator states that it cannot accept or change its position as the negotiators are under the influence of domestic pressure and cannot make any concession. The negotiators of the EU had many reasons to use this strategy. As already noted, the UK decided to leave the EU and the EU needed to show to the world and its Member States that leaving the Union means leaving all the benefits of the Single Market and its four freedoms.

It must also be noted that the EU has three main types of agreements so far, namely Customs Union, Association Agreements and Partnership and Cooperation Agreements. The former, Customs Union, is aimed at eliminating all customs duties such as tariffs in bilateral trade and establishing joint tariffs on imports (Lipsey, 1957). The Association Agreements remove or reduce duties on bilateral trade, but do not provide joint tariffs on foreign trade. Finally, Partnership and Cooperation Agreements are limited to providing a general framework for bilateral relations; however, tariffs and customs duties still exist. A brief analysis of these three models is necessary to understand the position of the UK not merely regarding trade, but also the freedom of movement of persons and their rights (Ott and Ghauri, 2019).

The British Conservative Party during this second phase of the negotiations deeply analysed all of the possibilities that the UK faced in dealing with the EU. The EU has mainly two types of external trade agreements and it is highly unlikely that the EU negotiates a new agreement different from the models it already has (Szyszczak, 2017).

The first kind of agreement is usually based on geographical proximity to the EU and it involves an extension of the EU laws to the area which do not formally belong to the EU. This framework has been used for countries such as Norway and Switzerland, as it will be further discussed in this chapter (Szyszczak, 2017).

The second framework is applied to countries far away such as Canada, South Korea and the ongoing negotiations with Japan. In this case, the EU is not dominating the agenda, unlike the previous set of agreements. The arrangements in this case usually refer to international standards, not to European ones. However, in many cases, these standards have been indeed heavily influenced by the EU (Szyszczak, 2017).

In the following section, the main trade models of the EU will be analysed, to highlight how the negotiations of this second phase will take shape. These models, although limited to trade in goods, do not only provide frameworks for goods, but also some matters regarding the free movement of people and cooperation for immigration issues. It must be however stressed, that the UK frequently proposed these models and switched from one to the other many times, provoking quite a loss of credibility in its negotiation skills (Jones, 2019).

United Kingdom's objectives	Norway model	Switzerland model	Canada model	Ukraine plus model
No application of EU law (Objective 2)	-	(√)	√	√
No free movement (Objective 5)	-	-	√	√
Access to the internal market (Objective 8)	√	(√)	(√)	(√)
Own trade agreements with third countries (Objective 9)	√	√	√	√
Collaboration on security and defense policy (Objective 11)	-	-	-	(√)

- Does not align with UK objectives.
(√) Partially aligns with UK objectives, but needs special agreements.
√ Fully aligns with UK objectives.

Table 3.1 comparing how suitable these different models are regarding the objectives of the UK (Pötsch and Van Roosebeke, 2017: p. 5).

3.5.1 The Norway Model

The first alternative was to follow the path of Norway. Norway is not part of the EU; however, it has strong connections with the EU. The Norwegian Model became to be discussed as a valid alternative, especially by Nick Boles from May's Conservative Party and a Labour lawmaker called Stephen Kinnock (Stearns and Wishart, 2018).

Norway has access to the European Free Trade Association (EFTA) and the Single Market. As such, Norway has accepted the four freedoms of the EU and all the EU laws, although it does not have formal say in the decision-making process. Moreover, Norway makes substantial contributions to the European Union, so as to participate in the Single Market without being an EU Member (Morris, 2018).

On 8 May 2018, the UK's House of Lords proposed through an amendment to the House of Commons to vote on the possibility to adopt the Norway Model, which meant remaining in the European Economic Area (EEA). The model, however, highlights that Norway, although not a formal EU

Member, has very few autonomies in rule-making decisions. As such, the model would deeply affect the first and most important reason why the UK voted to leave the EU: sovereignty. The model does not allow an independent trade policy (Fossum and Graver, 2018).

Moreover, this model is far more complex than the EEA, as it also provides many other arrangements not regulated within the EEA framework. Norway is also part of the Schengen agreement and the Dublin Treaty regarding asylum and police cooperation (Fossum and Graver, 2018).

Norway, to maintain the so-called Nordic Passport which grants free movement within Scandinavian countries, had to accept the Schengen Agreement. Thus, the Norway model would also affect the second and foremost reason why the British decided to leave the EU: Freedom of movement. Norway, in fact, fully applies the common framework of the Schengen rules with the right to speak at all levels of the EU Council; however, it does not detain the right to vote (Fossum and Graver, 2018). It must be noted that Norway, as of today, has the closest relationship to the EU as a non-Member State (Carswell, 2019).

Norway, moreover, also cooperates with the EU on citizens' and non-citizens' rights. In fact, as well as granting freedom of movement to Schengen citizens, it also seeks cooperation regarding refugees and immigrants. In particular, Norway participates in the European Migration Network, which contributes to the creation of policies on asylum, the EUROPOL and fully accepts the Dublin Treaty, which is responsible for the criteria and mechanisms for asylum seekers and the responsibility to examine the applications of asylum (Norwegian Ministry of Foreign Affairs, 2017).

Because of the already-mentioned characteristics of the Norway Model, Theresa May stated that no deal would be better than a bad deal (Fossum and Graver, 2018). In fact, the Norway Model does not satisfy the citizens' requests when they voted to leave the EU. As such, although the model would represent the best possible scenario on the economic side, it would also involve a loss of sovereignty, as the UK would have to accept all the EU laws without the possibility to vote in favour or against them, as it is not a Member of the EU anymore. Lastly, the UK would also be obliged to follow the EU laws regarding immigration and freedom of movement. As such, the UK would not be able to take back control of its borders (Carswell, 2019).

In conclusion, although the Norway Model represented a valid idea on the economic side, it was not an acceptable model, as many of the most important red lines published by the UK at the beginning of the negotiations would not be respected.

3.5.2 The Switzerland Model

Among the many countries that had already negotiated trade agreements with the European Union, there is Switzerland. Switzerland is not a member of the EEA, but it is part of the EFTA and Schengen. There are about 100 bilateral agreements between the EU and Switzerland; however, none of them refers to the financial sector (Ott and Ghauri, 2019). Compared to the Norway Model, Switzerland has less access to the Single Market, but it has much more decisional power in the application of EU laws.

In the 1980s, the European Community and EFTA started negotiations for a new trade bloc. However, Switzerland in 1992 voted against it, leaving the country outside the Single Market. As such, Switzerland was never part of the Single Market, unlike Norway, and thus had to negotiate with the EU over 100 bilateral agreements regarding specific sectors. The main aim of many of these agreements is the reduction of barriers and tariffs. On the other side, Switzerland has rather limited access to services, as Swiss citizens can export their services to the EU for a maximum of 90 days every year, which significantly hinders the possibility to export these sectors (UK Government, 2016).

Unlike Norway, Switzerland is not obliged to directly comply with EU legislation. However, it does have to reflect certain EU rules in its domestic legislation, otherwise, it cannot access some specific sectors of the Single Market. As such, Switzerland usually decides to automatically align with EU laws, as Norway, to prevent being excluded from some areas of the Single Market (UK Government, 2016).

Switzerland, thus, has obligations to comply with EU laws, without the possibility to vote or to fully access the Single Market. As such, a Switzerland Model would not fit the expectations Britons have for the future of the UK outside the EU, as they ask for a country fully sovereign and outside the EU regulations.

On the other side, Switzerland, unlike Norway, has the possibility to negotiate its own trade agreements with other countries, as it is not part of the Customs Union (UK Government, 2016). This aspect is, as already mentioned, of particular importance to the British electorate, which aims at the possibility to regain sovereignty over this and other matters.

Regarding borders and immigration, Switzerland has similar agreements as Norway. Switzerland is part of Schengen and other arrangements regarding asylum seekers under the Dublin Regulation (UK

Government, 2016). It must be stressed that the EU integration forced Switzerland to open its migration policy (Jenni, 2016).

Switzerland has always been rather sceptical about liberalising migration. In 2014, Swiss citizens proposed a popular initiative to limit freedom of movement by imposing a quota on inward migration (Shepherd Wedderburn, 2016), which was contrary to the EU principles. The EU, on the other hand, has stated that it will not renegotiate the terms of the agreement. The EU cannot formally sanction Switzerland; however, since 2014, the EU started to assume uncooperative behaviour in negotiations (Jenni, 2016). As such, it is highly unlikely that the EU would accept a similar model as the Swiss Model for the UK.

In 2020, Switzerland rejected the 2014 popular initiative, granting support to the freedom of movement, as a limitation of this freedom would have led to the loss of direct access to many sectors of the EU market. In rejecting the initiative, the relations between Switzerland and the EU returned to normality and the negotiations over broader access to the EU market started again. It must be stressed that the EU had a very important role in this narrative, as it used its power and influence to push the Swiss Government to reject the 2014 initiative (Schweizerische Eidgenossenschaft, 2022). This case represents the power the EU holds within the Swiss legislation process, which is a power that the UK is not willing to allow. As such, the Swiss model, although it might appear a better solution than the Norway model, can lead to an important EU presence within British internal matters, especially regarding immigration policy.

Due to the complexity of this Model, as it does not provide a single agreement but rather over 100 agreements on specific sectors, it is highly unlikely that the EU allows the UK to follow a Swiss Model. EU-Swiss relations are extremely complex and even after more than two decades of negotiations many problems still arise. The EU, for example, asks Switzerland since 2008 to reach an agreement regarding a common framework for the dynamic updating of the agreements and dispute resolution. As such, the Swiss Model is still an ongoing and complex process (Oesch, 2019: p. 46).

In conclusion, the so-called Swiss Model cannot be a valid solution either for the UK or the EU, as this model has been created through decades of negotiations and regards specific sectors as a patchwork. The model also highlights that, in order to participate in the European economic integration, a non-Member State has to accept the supremacy of EU law and it has to harmonise its legislation with it (Jenni, 2016).

3.5.3 The Canada Model

During the referendum campaign, many Brexiters analysed the relations between the EU and Canada as optimal for the future relationship between the UK and the EU. In 2016, British campaigners such as David Davis addressed Canada-EU relations as a better alternative than the ones the EU has with Norway and Switzerland (Whitman, 2016). Canada and the EU reached in 2014 the Comprehensive Economic and Trade Agreement (CETA), which is the most inclusive agreement the EU has ever signed with a third country.

The CETA provides almost free trade with 98% of EU goods exported to Canada duty-free (Whitman, 2016). The CETA, thus, allows Canada to enter the single market without being part of the legal system as the other Member States. In fact, CETA provides that EU standards and regulations must be fulfilled only when exporting to the EU's single market.

However, it must be stressed that Canada has only a trading partnership with the EU, while the UK is much more integrated into the EU's net. While Canada exports nearly 10% of its external trade to the EU, the UK counts 44,6% of exports to the EU (Whitman, 2016). As such, this leads the UK to a very much more complex and dependent relationship with the EU, which could eventually lead to a situation much more similar to the one Switzerland has with the EU.

The CETA provides the elimination of almost all tariffs on goods traded. The agreement also provides higher quotas on goods traded. However, both tariffs and quotas still exist between the two parties. Moreover, the CETA does not include trade in services or financial services, which is a fundamental aspect for the UK, as the UK exports services and financial services to the EU. In addition, the agreement reached between the EU and Canada includes tariffs and quotas, but it does not include border checks. As such, between Canada and the EU there are border checks, as the goods must be analysed at ports to certify that they fulfil the EU regulatory requirements (Reality Check, 2020b).

Between Canada and the EU, there is visa-free travel, meaning that Canadians can stay in the Schengen Area for 90 days without a visa (ETIAS, 2022). However, Canada does not enjoy the right of free movement within the EU (Ott and Ghauri, 2019). As such, the UK with this model would be able to gain control of its own borders, limiting immigration from EU countries.

This model was deemed as optimal both by Johnson and May (Smith, 2016); however, the implementation of the agreement between the EU and Canada took many years to be negotiated and implemented and, as already noticed, the model regards only trade in goods, not services.

Despite the great consensus towards a Canada Model in 2016, British diplomats noticed that relations between Post-Brexit UK and EU are affected by the decision to leave the Union, while the relations between the EU and Canada have always been positive. Moreover, Canada's trade with the EU, as already mentioned, is much less prominent than the one between the UK and the EU. The UK is far more dependent on the EU than Canada and long negotiations might paralyse the British economy (Smith, 2016).

The Canada Model, unlike the Swiss and Norway models, allows Canada to trade freely, although there are still tariffs and quotas, with the EU without applying EU laws and participating in the free movement (Ott and Ghauri, 2019). The UK, as already stressed, aimed at leaving the EU in order to regain its sovereignty over immigration and its own legislation. Thus, this model would in theory suit the main ideas of British citizens. However, it is worth stressing once again that Canada is a country geographically far from Europe and its trading relations with the EU are limited. On the contrary, the UK is much more dependent on the EU markets, both in terms of goods and services.

To conclude, this model mainly focuses on trade in goods, without specific reference to many other aspects that are present in the EU-UK relations, such as cooperation in immigration, defence policies and trade in services and financial services. For this reason, the Canada Model could be a starting point for the trade in goods. However, a deeper and broader agreement is necessary to cover the several other aspects that the Canada Model does not include (Ott and Ghauri, 2019).

3.5.4 The Ukraine Plus Model

The EU-Ukraine Association Agreement is an innovative type of integration without membership in the EU. Its aim is the integration of Ukraine into the internal market (Szyszczak, 2017). The EU granted an unprecedented level of integration to Ukraine; however, Ukraine has to align its domestic law to the EU one. Ukraine is asked to apply a minimum of 80% of the *Acquis Communautaire* to freely trade with the EU (Oppenheim, 2018).

The agreement aims at eliminating 99% of Ukrainian tariffs and 98% of EU tariffs (Oppenheim, 2018). Unlike the Canada Model, this framework includes services provisions to allow also trade in services. The UK, in fact, is particularly worried about the possibility of not trading services freely with the EU. Thus, this model could meet the concerns of many British politicians (Oppenheim, 2018).

On 17 January 2017, Prime Minister Theresa May addressed the possibility of whether the Ukrainian Model could match the needs of the UK after Brexit, as she stated:

[...] A model for this special type of partnership could be provided by the Association and Free Trade Agreement which the EU has concluded with Ukraine. This has been in effect since 1 January 2016, although some of it only provisionally because ratification by the Netherlands is still outstanding. Firstly, the "Ukraine Model" corresponds to the British objectives in that it contains substantial market access but does not require the application of EU law or compliance with the case law of the ECJ, nor does it provide for free movement but it does allow free trade agreements with third countries. Thus the United Kingdom's four key requirements are met (Pötsch and Van Roosebeke, 2017).

The UK, though, would need deeper access to the single market than the access Ukraine has. The agreement contains several limitations especially related to services (Pötsch and Van Roosebeke, 2017). For this reason, it has been often discussed in the UK the so-called Ukraine Plus Model. The model, as already noted, provides the UK with tariff-free access to some EU markets without requiring freedom of movement. It must be stressed, however, that usually freedom of movement is not comprised within these agreements because the EU is not ready to grant the possibility for the citizens of the counterpart to move freely within the EU, not vice versa (Reece and Boswell, 2018).

Migration from Ukraine is limited, as there is no freedom of movement. However, there is visa-free travel between Ukraine and most EU members, allowing Ukraine citizens to travel to the EU for a maximum of 90 days for tourism or work (Ghauri, 2018).

Despite the almost frictionless trade, however, the model does indeed ask the counterpart to comply with EU standards and regulations, as well as allow the jurisdiction of the CJEU. As such, the model still does not fully comply with all the red lines expressed by the UK at the beginning of the Brexit negotiations (Reece and Boswell, 2018). Moreover, the EU-Ukraine agreement provides a strict monitoring procedure to assure that Ukraine follows the rules of the *acquis* and gives competencies to the CJEU to monitor its compliance. Although the British laws are already aligned with the *acquis*, the main problem lies in giving jurisdiction to the CJEU, as the UK aims at gaining full sovereignty both on immigration and rule-making matters (Szyszczak, 2017).

Within the EU-Ukraine agreement, the EU has a stronger power than its counterpart; in fact, the EU can unilaterally withdraw from the agreement if the integrity and stability of the financial system are threatened (Oppenheim, 2018). This solution has been made to protect the EU financial markets, as the Ukrainian market is still very fragile compared to the European one and, according to the Centre

for European Policy Studies, it will still take a considerable number of years for Ukraine to reach full internal market access (Emerson and Movchan, 2016).

3.5.5 The No Deal scenario

The UK Government published in December 2018 a position paper called “Citizens’ Rights – EU citizens in the UK and UK nationals in the EU” in which the UK reiterated its willingness to implement the priorities set during the first phase of the negotiations with the EU. However, the position paper affirmed that the UK must be ready also in the case of a no-deal scenario. As such, it is worth also an analysis of this possible outcome of the Brexit negotiations (Department for Exiting the European Union, 2020). The UK, in particular, stresses that:

We have always been clear that we highly value the contributions EU citizens make to the social, economic and cultural fabric of the UK and that we want them to stay in the UK. To remove any ambiguity, the UK Government guarantees that EU citizens resident in the UK by exit day will be able to stay and we will take the necessary steps to protect their rights even in an unlikely 'no deal scenario (Department for Exiting the European Union, 2020).

The UK, thus, stated that even in case of a no-deal scenario the EU citizens will follow the same procedures to obtain residence status in the UK. However, as paragraph 11 highlights the no-deal scenario would mean that there will be no implementation period. As such, this guarantee will be valid only for those EU citizens living in the UK before the exit day. Moreover, deportation would also be implemented after the exit day for those EU citizens who committed a crime. The national identity card would also not be valid to travel to the UK.

Starting with paragraph 17, the UK analysed the situation of UK nationals living in the EU in a no-deal scenario. In this case, the UK stated that it cannot act unilaterally in granting any rights if the EU is not willing to apply them. The UK, thus, asked with this position paper that the EU should respect the commitments that were made during the first phase of the negotiations even in a no-deal scenario (Department for Exiting the European Union, 2020).

The UK further stressed the need for reciprocity with the EU, even in the unlikely case of a no-deal scenario. In particular, the UK within the position paper stated that it will develop strategies to protect past arrangements in a no-deal scenario to protect EU citizens. One example of it is the Healthcare Bill that will implement reciprocal healthcare schemes after the exit day (Department for Exiting the European Union, 2020).

The UK has also declared that no visa will be required for EU citizens for short stays regarding business or tourism. On the other hand, the European Commission proposed visa-free travel for British citizens in every EU Country only if the UK treats all EU citizens equally in granting visa-free travel. The Commission asked to all the EU27 to cooperate and have a unified position in this matter, to ensure visa-free access to all EU citizens regardless of their country of origin (Wolff, 2019).

British citizens, in case of a no-deal Brexit, will be unable to work in the EU without work permits (Tenberg and Happel, 2020). As already analysed, the UK intended to implement a similar provision regarding EU citizens working in the UK, as only EU nationals earning a certain threshold can continue to live in the UK without being deported to the EU (Silkin, 2019).

In the long term of a no-deal scenario, the decisions of the CJEU and the British Supreme Court could differ, as the Supreme Court will no longer be bounded to the decisions the CJEU makes. In this case, the UK will not be obliged to follow any EU directive (Silkin, 2019).

It is also worth stressing that the most severe consequences in a no-deal scenario would be related to trade. In fact, in case of a no-deal, the trade relations between the UK and the EU would fall under the WTO terms, which only rules on the basic terms of trade. Without any free trade agreement, in fact, borders between the EU and the UK would be established, as well as tariffs and quotas (Dr2 Consultants, 2019). As such, the European countries already in 2019 prepared some recovery plans in case of a no-deal Brexit, as much more employees would be needed to introduce the necessary custom controls between the UK and the EU (Wright, 2019).

To conclude, the no-deal scenario could lead not only to the disruption of the bilateral relations between the EU and the UK, as full quotas and tariffs will be applied in case of a no-deal scenario, but it will also lead to many side effects in every aspect of the actual EU-UK relation. In fact, despite Brexit, the EU and the UK are willing to cooperate, especially in security matters. However, a no-deal scenario would lead both sides to negative attitudes towards the other party (Reality Check, 2020a). Many sectors, such as the British car industry, for example, perceive a no-deal case as the dissolution of many companies, as they mainly export to the EU (Wesel, 2020).

3.6 Conclusion

This third chapter analysed the joint report the two parties involved in the Brexit negotiations, namely the EU and the UK, have reached after almost one year of negotiations. As already highlighted, the

joint report represents only a draft version of the Withdrawal Agreement in which only 75% of the provisions included are agreed upon. Thus, the next chapter aims to analyse the next months of the negotiations until the publication of the final version of the Withdrawal Agreement.

The chapter also focused on essential topics that must not be forgotten when analysing the intense and delicate negotiations between the EU and the UK, namely the role of the European Parliament and, last but not least, the possible futures a UK post-Brexit might face.

As the second phase of the negotiations approached, the EU negotiators had to be sure that the EU would have ratified an agreement. As such, the negotiators became increasingly interested in gaining consensus at home, meaning that they ensured that the EP and the constituents were happy with the negotiations that were happening at the international level with the UK. The two-level game theory has, thus, a stronger role in this second phase of the negotiations, as the negotiators are reaching the Withdrawal Agreement. Despite the negotiations getting closer to an agreement, the two actors still engaged in a positional bargaining situation, lacking a problem-solving approach.

Although in this second phase both actors behaved in a more problem-solving approach on the surface, especially during press conferences, the two parties still negotiated focusing on their respective positions and red lines and not on their interests. An example of this is the already mentioned role of the CJEU, which still represents a deadlock. Both countries aimed at granting as many rights as possible to their citizens residing in the UK or the EU and both actors wanted those rights to be harmonised and protected in the same way. However, the UK perceived the role of the CJEU as an intrusion into its internal affairs, stating that no other non-Member State has the intrusion of the CJEU within its affairs. On the contrary, the EU assumed that the role of the CJEU is fundamental to grant harmonisation for those EU citizens residing in the UK. Their positions diverged; nonetheless, their main interest was similar, namely protecting citizens' rights in the same way both in the UK and in the EU.

The European Parliament, as already stated, was the organ responsible for the ratification of the Withdrawal Agreement. As such, Barnier recognised from the beginning the role that it must have also during the negotiations. The involvement of the European Parliament as a quasi-negotiator made the ratification of the Withdrawal Agreement much more likely. Moreover, the Parliament promoted the protection of citizens' rights throughout the whole Brexit process.

Finally, the chapter focused on the possible outcomes of the Brexit negotiations, without, however, a clear view from the British perspective, as public opinion and the political sphere were extremely divided regarding which model the UK should follow. Every model, as noticed, had its pros and cons,

showing that the UK is unlikely to reach a satisfactory result if the parties would want to follow the schemes of the other models.

Chapter IV

Reaching a Withdrawal Agreement:

The Drafts and the Ratifications of the Withdrawal Agreement

4.1 Introduction

The fourth and final chapter analyses the final phase of the Withdrawal Agreement between the UK and the EU, namely the various drafts the two parties produced to negotiate the final issues regarding the Agreement. The drafts will, thus, be introduced, to highlight the differences between every draft. The negotiations of the drafts were extremely intense, especially for the UK, as the British Government was extremely divided, causing an important switch of ideology from Theresa May to Boris Johnson. Moreover, the situation in the UK political sphere was also severely compromised during these negotiations, as many politicians of the conservative party such as the Chief negotiator David Davis resigned.

It is in this final phase that the two-level game theory is applied the most, as negotiators from both sides tried to ensure that the agreement reached will be accepted by their parliaments and constituents. As the deadline was approaching, the negotiators were involved in a more flexible bargaining strategy, making concessions, especially the UK, and using promises rather than threats.

The chapter will then focus on the final version of the Withdrawal Agreement, especially providing an analysis of the part dedicated to citizens' rights. The focus will be on the provisions related to citizens' rights, namely general provisions, rights and obligations and social security.

A deep analysis of the citizens' rights covered by the Withdrawal Agreement will then be made, so as to highlight the results of these months of negotiations. Moreover, also some limits and blurred areas of the Withdrawal Agreement will be mentioned, to highlight that, despite the agreement has been reached, the two parties involved still have to deepen their positions on citizens' rights and create jurisprudence to assure that no citizens' rights will be violated in the future.

Finally, the chapter will turn to the ratifications of the Withdrawal Agreement, analysing the process behind it and the modalities and conditions under which the ratifications must unfold. After providing information regarding the modalities of the ratification process, the focus will be on the consequences that the agreement represents for the EU and the UK.

4.2 The negotiations of the Withdrawal Agreement

The Joint Report analysed in the previous chapter was subsequently translated into a legal text by the Experts of the European Union. The main aim of the translation was to be as clear as possible and to provide all the possible matters which fall into the scope of the agreement. Moreover, as already noted, the Joint Report was not fully agreed upon; thus, the EU had to write into the first draft of the Withdrawal Agreement and also some parts where no consensus has been reached yet.

As a consequence, the negotiations now moved to a strenuous analysis of the drafts of the Withdrawal Agreement to reach a final version. Unlike the previous rounds of the negotiations, where the negotiators were formal meetings and discussions, these negotiations were much more focused on the analysis of what the European experts have written in the drafts of the Withdrawal Agreement until reaching a consensus on each article. As such, this section analyses the drafts of the Withdrawal Agreement highlighting the differences between the various drafts.

According to the EU, during the transition period, which has already been negotiated in the first phase of the negotiations and agreed upon on 31st December 2020 as the end of this period, the EU acquis shall still be applied to the UK as if it still was a member state. Thus, any change in the acquis would consequently be applied also to the UK. As well as the EU acquis, also the jurisdiction of the European Court of Justice (CJEU) and all the existent EU regulatory instruments are still valid during the transition period. On the other hand, the EU27 pushed for no British participation in the decision-making process on EU matters also during the transition period (European Council, 2018a).

As a result, although being bounded by the obligations of the EU agreements, the UK, as it already is a third country, will no longer participate in the decision-making of the EU. Thus, the UK is not allowed anymore to attend meetings of the committees, but it could however be invited to attend one of these meetings if the other Member States agree to that. Nonetheless, the UK even during these meetings will not enjoy voting rights (European Council, 2018a).

The European Union stressed the fact that any kind of progress during this second phase might be possible only with respect to what has been already agreed upon during the first phase, as nothing is agreed until everything is agreed, as stated by Barnier on many occasions during the previous rounds of the Brexit negotiations. (Council of the European Union, 2018).

4.3 The first draft of the Withdrawal Agreement

As already mentioned, phase two of the Brexit negotiations focused on identifying the priorities regarding the future EU-UK commercial relations and on the ratification of a Withdrawal Agreement. On this second topic, the European Commission Brexit Task Force already at the end of February 2018 published a draft withdrawal agreement which marked the beginning of intense talks between the EU and the UK (Barnard and Leinarte, 2020).

On 28 February 2018, the EU published the first draft of the Withdrawal Agreement, which is exactly the Joint Report reached during the first six rounds of the negotiations put in legal terms (European Commission, 2018). This first draft was created as the UK and the EU reached sufficient progress during the first phase of the negotiations. However, this first draft of the Withdrawal Agreement still has many blurred areas in which further negotiations are still needed, as discussed in the previous chapter (European Council, 2022).

4.4 The second draft of the Withdrawal Agreement

After the publication of the first draft of the withdrawal agreement, on 19 March 2018, the second draft was published, after intense negotiations. This draft is composed of 168 articles which were divided into six parts regarding common provisions, citizens' rights, separation provisions, transition period, financial provisions and, finally, structural provisions (Cîrlig, Tilindyte and Mazur, 2018).

On March 2018, the UK agreed to approximately 75 per cent of the draft withdrawal agreement published by the EU in February. In particular, the UK agreed on sections regarding citizens' rights, financial settlement and the transition period, matters on which the two parties negotiated during the previous month. The EU has agreed that the UK can be part of the Single Market for a period after the withdrawal, to allow the UK to reach trade agreements in that period. However, the role of the CJEU imposed by the EU still represents an important deadlock (Barnard and Leinarte, 2020).

It is important to stress that, unlike all the other sections, the second part regarding citizens' rights has been fully agreed upon during the talks before this second draft. Compared to the first draft, however, this second draft has considerable changes (Cîrlig, Tilindyte and Mazur, 2018).

First of all, in Article 4 it has been included a good faith clause which commits both sides to respect each other. Article 31 has been changed to assure the UK the right to implement a review mechanism regarding changes in EU law on the payment of benefits to EU nationals. On the contrary, the former

Article 32, which precluded free movement for UK citizens, was removed from this second draft. In this case, it is very likely that the EU and the UK will negotiate in the further drafts of this particular topic, as the EU has always been clear regarding the unity and indivisibility of the four freedoms (Ares *et al.*, 2018).

The most important change in this second draft is, however, related to international agreements. In fact, Article 124(4) now allows the UK to sign and ratify international agreements, which they must enter into force after the transition period unless the EU authorises them. Article 152 also adds that the UK 'Authority' has the same powers as the Commission in supervising citizens' rights provisions. Finally, Article 168 states that the Withdrawal Agreement may not enter into force unless every EU Member State ratifies it. In introducing this final provision, the EU assured once again its stronger leverage on the UK, as the UK now has to be more cooperative to enhance the likeliness that every Member State ratifies the Withdrawal Agreement without raising any issue (Ares *et al.*, 2018).

4.5 The third draft of the Withdrawal Agreement

On 19 June 2018, the two parties announced in a joint statement to have reached progress on other areas of the drafts of the Withdrawal Agreement. After the draft of the Withdrawal Agreement of March, the negotiators analysed the draft and tried to agree on every aspect of it, so as to respect the deadline the European Commission proposed. The Commission took into consideration that all the Member States have to accept the Agreement, as well as the European Parliament; thus, many months are needed to allow the ratification (Wesel, 2018).

As already mentioned, the role of the European Parliament was fundamental, especially in the citizens' rights area. The active role of the European Parliament was extremely important, as it enhanced the possibilities of quick ratification of the Withdrawal Agreement. During the months between March and October 2018, the EP pushed for the inclusion of more articles in the Withdrawal Agreement and expressed on many occasions its support for the Commission's proposals (Cîrlig, Tilindyte and Mazur, 2018).

Although further progress has been announced in June 2018, many disagreements still persist. Nonetheless, the two parties agreed on some of the Articles in the draft Withdrawal Agreement, but none of them is related to the citizens' rights area or, a much more debated topic, to the role of the CJEU. The negotiations reached an agreement on intellectual property, providing certificates for supplementary protection as in Article 56, on judicial cooperation in civil and commercial matters as

in Article 63 and the rules applicable to ongoing processes as in Article 72 (European Union and United Kingdom Government, 2018).

The negotiators in the joint report stressed that they reached sufficient progress to finalise the Withdrawal Agreement by October 2018 (Cîrlig, Tilindyte and Mazur, 2018). However, many blurred areas persist in important areas, such as the governance of the treaty including the future role of the CJEU.

The European Council met on 28 and 29 June 2018 to analyse the latest negotiations; however, the Council expressed its concern that no substantial progress has been made and that the negotiators will not be able to provide a Withdrawal Agreement by October 2018 (Cîrlig, Tilindyte and Mazur, 2018):

The European Council expresses its concern that no substantial progress has yet been achieved in agreeing on a backstop solution for Ireland/Northern Ireland. It recalls the commitments undertaken by the UK in this respect in December 2017 and March 2018 and insists on the need for intensified efforts so that the Withdrawal Agreement, including its provisions on transition, can be concluded as soon as possible to come into effect on the date of withdrawal. It recalls that negotiations can only progress as long as all commitments undertaken so far are respected in full (European Council, 2018c).

The European Council, lastly, called all the EU Member States, Institutions of the European Union and all the stakeholders involved to be prepared for every possible outcome, stressing once again that the possibility of a no-deal Brexit is still at stake (European Council, 2018c).

4.6 The fourth draft of the Withdrawal Agreement

In July 2018, Prime Minister Theresa May held a meeting to finally unify its cabinet over future relations with the EU. In fact, during the previous months, and especially from February to June, the negotiations regarding the future relations were going extremely slowly, as the UK did not have a clear vision of what kind of Brexit it wanted (Jones, 2019). The European Union asked several times the UK negotiators to be clearer and to bring realistic and possible proposals to work on.

During the meeting, Prime Minister Theresa May reached a unitary position, which gave shape to the so-called White Paper. The White Paper finally provided the EU with a clear view of the future relations between the UK and the EU. The paper provided a vision of future relations based on the idea of a free trade area for goods, with a set of common rules and provisions to enable the free trade area (UK Government, 2018).

The White Paper highlighted that there will be no freedom of movement and, thus, EU immigration will be limited (UK Government, 2018). The Cabinet collectively signed the White Paper; however, the Chief Negotiator David Davis resigned followed by Boris Johnson and eight other ministers. Davis stated that:

[...] I am afraid that I think the current trend of policy and tactics is making that look less and less likely. At each stage, I have accepted collective responsibility because it is part of my task to find workable compromises, and because I considered it was still possible to deliver on the mandate of the referendum, and on our manifesto commitment to leave the Customs Union and the Single Market. [...] As I said at Cabinet, the "common rule book" policy hands control of large swathes of our economy to the EU and is certainly not returning control of our laws in any real sense. I am also unpersuaded that our negotiating approach will not just lead to further demands for concessions (BBC News, 2018b).

Prime Minister Theresa May replied to the allegations made by David Davis in his resignation letter regarding the future sovereignty of the UK after Brexit, after appointing Dominic Raab as the new Brexit secretary (Cooper, 2018). In her reply, Theresa May stressed that the Negotiator left only eight months before Brexit day, leaving the negotiation sphere in a confused position:

[...] I do not agree with your characterisation of the policy we agreed on at Cabinet on Friday. Parliament will decide whether or not to back the deal the government negotiates, but that deal will undoubtedly mean the returning of powers from Brussels to the United Kingdom. The direct effect of EU law will end when we leave the EU. Where the UK chooses to apply a common rulebook, each rule will have to be agreed upon by Parliament. Choosing not to sign up to certain rules would lead to consequences for market access, security cooperation or the frictionless border, but that decision will rest with our sovereign Parliament, which will have a lock on whether to incorporate those rules into the UK legal order (Stewart, 2018).

The White Paper published by the Cabinet of Prime Minister Theresa May was hardly criticised by the Conservative Party, which suggested that the White Paper still ceded too much sovereignty to the EU in very important areas. Moreover, also the UK Labour Party expressed its concern and appeared sceptical, arguing that the White Paper did not solve the problems of the Northern Irish border (Jones, 2019).

It must be stressed that after the resignation of David Davis, UK Prime Minister Theresa May herself attempted to negotiate with the EU. In fact, during the informal meeting of EU leaders in Salzburg, Austria, in September 2018, Prime Minister May expressed the UK's proposals as agreed in the White

Paper. However, May stressed that the White Paper is the only possible way to reach an agreement for Brexit (Jones, 2019).

On the other hand, European Council President Donald Tusk declared that, although many positive steps have been made, the proposals of the White Paper will not work, as it could damage the cohesiveness of the Single Market (Tusk, 2018).

Finally, Donald Tusk in his speech in reply to Theresa May at the informal meeting in Salzburg showed once again that the EU in this negotiation process undeniably has the upper hand, as shown in the stance of the speech:

[...] Everybody shared the view that while there are positive elements in the Chequers proposal, the suggested framework for economic cooperation will not work. Not least because it risks undermining the Single Market. [...] The moment of truth for Brexit negotiations will be the October European Council. In October we expect maximum progress and results in the Brexit talks. Then we will decide whether the conditions are there to call an extraordinary summit in November to finalise and formalise the deal (Tusk, 2018).

Following the Salzburg meeting, UK Prime Minister Theresa May made a speech in which she strongly criticised the behaviour of the EU at this stage of the negotiations:

[...] Anything which fails to respect the referendum or which effectively divides our country in two would be a bad deal and I have always said no deal is better than a bad deal. But I have also been clear that the best outcome is for the UK to leave with a deal. That is why, following months of intensive work and detailed discussions, we proposed a third option for our future economic relationship, based on the frictionless trade in goods. That is the best way to protect jobs here and in the EU and to avoid a hard border between Ireland and Northern Ireland while respecting the referendum result and the integrity of the United Kingdom. Yesterday Donald Tusk said our proposals would undermine the single market. He didn't explain how in any detail or make any counterproposal. So we are at an impasse (May, 2018).

The EU Summit on October 18 and 19 2018 is the final deadline the EU imposed on the negotiators to find an agreement on the final draft of the Withdrawal Agreement, to allow all the parties involved to ratify it in due time (Wesel, 2018). The EU27 leaders declared that not enough progress has been achieved, and the Withdrawal Agreement must be accepted before the end of the year (European Council, 2018b), obliging the two parties to negotiate over the final matters.

Finally, the EU on 13 November declared that decisive progress has been made and the negotiators can now finalise the Withdrawal Agreement. The following day, the European Commission and the

UK Government published the final draft of the Withdrawal Agreement, which now has to be analysed by the EU leaders within the European Council (Seely, Mills, *et al.*, 2019).

4.7 The Withdrawal Agreement

Despite the deadlocks and the tough negotiations, the EU and the UK agreed on 14 November 2018 on the Withdrawal Agreement, which is an agreement composed of 585 pages. The EU and the UK also agreed on a Political Declaration of 26 pages in which the future relations between the EU and the UK are set out (Jones, 2019). The Withdrawal Agreement provides the parameters of the UK's orderly exit from the European Union, as well as guidelines for an implementation period.

The legal document governing the UK's exit from the EU is the Withdrawal Agreement. The exit agreement is a binding contract, in contrast to the political declaration which outlines the foundation for the future UK-EU partnership. The Withdrawal Agreement, thus, primarily addresses issues related to the UK and the EU's separation rather than their future commercial partnership. Nonetheless, in many cases, the conditions of separation outlined in the Withdrawal Agreement have significant effects on how the EU and the UK will trade and collaborate in the future. The agreement addresses the three key issues that the EU outlined at the outset of the negotiations: preventing a hard border between Northern Ireland and the Republic of Ireland, defending the rights of UK and EU citizens, and determining the amount of money the UK will be required to pay when it leaves the EU. The 21-month transition period and certain other aspects of withdrawal also fall within the scope of the agreement (Morris and Kibasi, 2018: p. 4).

The Withdrawal Agreement, however, cannot be addressed as the so-called "soft Brexit" that both sides were aiming for. Even if rules of origin inspections and tariffs are not required, the bare-bones customs union will not result in frictionless commerce since nontariff barriers, such as sanitary and phytosanitary and product regulatory checks, will be implemented. Moreover, it is worth stressing that the level playing field regulations are robust when it comes to controlling state aid, but they are noticeably weaker when it comes to protecting the environment and the labour market (Morris and Kibasi, 2018).

Despite the strenuous negotiations, the text of the Withdrawal Agreement shows that ambiguity will continue to exist. The Brexit process will probably continue throughout this decade, as trading arrangements are still to be made, both with the EU and the rest of the world after the end of the transition period.

The Withdrawal Agreement is divided into six parts with three additional Protocols at the end regarding the Irish border, Cyprus and Gibraltar. The "Common Provisions" of the withdrawal agreement are outlined in Part One (Articles 1 through 8, covered in Section IV), and they cover topics such as definitions and geographical scope (Craig, 2020). The legal position of EU residents residing in the UK and UK citizens residing in the EU before the end of the transition period as specified in the agreement is covered in Part Two (Articles 9 to 39, detailed in Section VI). The majority of the agreement, Part Three, contains "separation clauses" (Articles 40–125, covered in Section VII), which specify how EU law will be gradually substituted by British law after the transition period (Peers, 2021).

The next part, part Four, outlines the rules regarding the transition period (Articles 126-132). It must be noted that during the aforementioned transition period the UK continues to be subject to substantive EU law. The financial settlement is then covered in Part Five (Articles 133–157, detailed in Section VIII), which includes further information about payments made by the UK to the EU during its membership (plus the transition period). Finally, "Institutional and Final Provisions" are outlined in Part Six (Articles 158–185, covered in Section IX). These cover the rules governing the decision-making body established by the agreement (the "Joint Committee"), some aspects of the Court of Justice of the EU's (CJEU) jurisdiction over the agreement, rules for resolving disputes, and rules for the agreement's entry into force and dates of application (Peers, 2021).

4.7.1 How the Withdrawal Agreement protects citizens' rights

One of the pillars of the European Union is the freedom of movement. When the UK was a member state of the EU, it enjoyed the freedom of movement. As such, many EU citizens and UK nationals travelled overseas to live, work, or study. From the start of the negotiations, thus, protecting people who relocated abroad has been the top concern. The Withdrawal Agreement ensures that these individuals and their families will continue to enjoy the same basic freedoms between the UK and the EU, including the ability to live, study, work, and travel. Moreover, during the transition period, the same rules apply to any EU national who migrates to the UK and to a British national who moves to an EU Member State (European Commission, 2021).

The Withdrawal Agreement safeguards both UK nationals and EU citizens who are legally residing in one of the 27 EU Member States or in the UK, in the case of EU citizens, at the conclusion of the transition period. It also safeguards the relatives who have been given rights under EU law to join their family members in the future, which includes registered partners, parents, grandparents,

children, grandchildren, and a committed relationship (European Commission, 2021). Children will be protected by the Withdrawal Agreement, wherever they are born, whether they are born inside or outside the host state where the EU citizen or the UK national resides, or whether they are born before or after the United Kingdom's withdrawal from the EU. However, within the protection of children, the only exemption is in the case of children born after the United Kingdom's withdrawal and for whom the applicable family law grants sole custody to a parent who is not covered by the Withdrawal Agreement (European Commission, 2021).

The agreement protects rights such as the right to social security benefits, the right to employment, and the right to equitable treatment. Additionally, it defends the legal rights of EU citizens' families. To ensure that the procedures are not overly burdensome on citizens, the agreement specifies rules for the process of producing residency paperwork to confirm the claim of rights. However, there are some restrictions. For example, the agreement does not guarantee onward movement rights (the right to freely relocate to other EU member states) for UK nationals currently residing in other countries of the EU (Morris and Kibasi, 2018: p. 6).

The Withdrawal Agreement, however, may be in contrast with some parts of the TFEU. The Withdrawal Agreement is a binding treaty which allows the UK to leave the EU. As such, the Agreement revokes British citizens of parts of their European citizenship, while aiming at preserving some 'acquired rights' of EU citizenship. However, every person who possesses the nationality of a Member State is a citizen of the Union, according to Article 20(1) TFEU. Union citizenship, thus, shall be in addition to and not in substitution for national citizenship. The reasoning is straightforward at first glance: only citizens of Member States are entitled to Union citizenship, and since the United Kingdom ceased to be a Member State, its citizens are no longer entitled to Union citizenship. There is no mention of non-EU citizens possessing citizenship, nor is there any authority for the EU or individual Member States to grant non-EU citizens EU citizenship, even though the word "only" does not explicitly occur (Peers, 2021).

This part of the Withdrawal Agreement is of crucial importance, as it has an immediate impact on millions of individuals. During the transition period, the UK is still part of the Freedom of Movement; thus, these provisions will largely apply after the transition period. After this period, references in Part Two sent from UK courts are subject to specific regulations regarding CJEU jurisdiction. This second part of the agreement has four titles (European Union, 2019a):

Title I comprises Articles 9-12 and refers to the general provisions, which deal with non-discrimination, personal scope, continuity of residency, and definitions. Title II refers to Rights and

Obligations (Articles 13-27) and it is divided into three chapters. Chapter 1 on Residence Rights and Documents (Articles 13-23), which addresses Entry and Exit Rights, Residence Rights, Status, the Application Process, Safeguards and Appeal Rights, Related Rights, and Equal Treatment; Chapter 2 on the Rights of Workers and Self-Employed Persons (Articles 24-26) and Chapter 3 on Professional Qualifications (Articles 27-29). Title III comprises Articles 30-36 and refers to Social Security; and, finally, Title IV on Other Rights (Articles 37-39) (Peers, 2021).

It is important to note that many of the references made in Part Two of the agreement refer to EU law, whose interpretation must follow the case law of the CJEU. Thus, it implies that the UK Courts will still indirectly follow the case law of the CJEU when dealing with citizens' rights (Peers, 2021).

4.7.2 Title I: General provisions

Article 9 provides the definitions of the subjects that fall within the scope of the Withdrawal Agreement. In particular, family members might both be core family members of EU or UK citizens, as already defined in the EU Citizens' Directive, or individuals not part of the core family but whose presence is required to retain the right of residence. The article also focuses on the definition of frontier worker, which is based on the regulations of the EU Treaty regarding employees and independent contractors. The term host State is then analysed to clarify the rights of the citizens, if a person used their right under EU law to live in the UK or the EU before the conclusion of the transition period and continued to do so subsequently, they are considered to be residents of the UK, in case of EU citizens, or of an EU Member State for UK citizens (Peers, 2021).

Article 10 sets out every individual who is protected by this agreement, in accordance with EU law. In case citizens were exercising their right to reside in the country before the transition period, they are entitled to continue to live in the country. Also, frontier workers that exercised their rights before the transition period are allowed to continue it. As already mentioned in Article 9, also family members of these citizens fall within the scope of the agreement, given that they fulfil specific conditions, such as residence in the host State, direct relationship with the person referred to in paragraphs A or B of Article 10, or if they were born to or adopted by the person referred to in the previous paragraphs (European Union, 2019a).

However, regarding the personal reach of the citizen's rights clauses, there are several difficulties. First of all, the requirement to adhere to CJEU case law implies that its precedent on dual citizens of two Member States is applicable, which obliges the UK Courts to refer to the jurisprudence produced

by the CJEU. Moreover, the agreement, as the two Articles show, does not appear to apply to citizens of the UK or a Member State who have relocated to the EU or the UK and then returned to their home country. This category of citizens, thus, will not enjoy the right to freely move from the UK to the EU or vice versa (Peers, 2021).

4.7.3 Title II: Rights and obligations

Article 13 outlines the criteria under which EU and UK residents and their family members are allowed to remain in the country where they now reside. The article refers to the provisions of the TFEU and of Directive 2004/38 (European Union, 2004) adding that the UK and the EU cannot impose other conditions or limitations on the rights outlined in the TFEU.

Within this second title, the parties agreed on a limited version of free movement for EU citizens living in the UK and UK citizens living in one member State of the EU. As Article 14 stresses, with a valid passport, identity card or passport card, the family members of the EU and UK individuals covered by the agreement can leave the host state and enter it, for non-EU and non-UK citizens (European Union, 2019a). However, the host State could stop accepting identity cards for this purpose five years after the transition period ends; thus, by the end of 2025. Where the EU or UK citizen or a family member is in possession of a document issued in accordance with the agreement, no visas may be imposed (Peers, 2021). After the end of the transition period of five years, the host State is obliged to provide all the means necessary to concede visas to allow people to enjoy their rights of a family reunion as outlined in Article 14.

The agreement describes then one of the most controversial parts of the citizens' rights section of the Withdrawal Agreement: the acquisition and the retention of permanent residence status (Craig, 2020: p. 9). The right to reside permanently under the terms of EU free movement law is granted to EU and UK citizens, as well as members of their families, after five years of residence under EU law. Nonetheless, there can be a shorter period than five years in case the law permits it. The possibility exists also for those who do not qualify for permanent residence at the time of Brexit day. In fact, they can do so later on the basis of the same requirements, as Article 15 applies to periods of residence or employment both before and after the conclusion of the transition period. Once the citizen has the right to reside in the host country, it can be lost only in case of an absence for more than five years, which is more than the two years outlined in the citizens' Directive 2004/38 (European Union, 2004). However, based on the Directive, citizens can always enjoy free movement. On the contrary, based

on the Withdrawal Agreement, after the transition period, citizens will not be able anymore to freely circulate between the EU and the UK.

However, Article 15 fails to protect those EU citizens working in the UK with an unstable or insecure working contract, which should be regarded as the most vulnerable workers. In addition, there is another source of inequality when it comes to EU citizens acquiring the pre-settled status, as secondary legislation has outlined that these citizens cannot enjoy the same rights as British nationals (Giovannone, 2021).

To avoid any possible misunderstanding, the agreement clearly states that EU or UK nationals, or members of their families, do not lose rights in case they change their status, such as from student to worker. This also includes family members who were reliant on EU or UK nationals before the transition period ended. Nonetheless, family members of EU and UK citizens who are legally residing in the host country are not allowed to become primary rights holders according to the Withdrawal Agreement.

The most complex provision of Part II is Article 18 on the issuance of residence documents (European Union, 2019a):

The host State may require Union citizens or United Kingdom nationals, their respective family members and other persons, who reside in its territory in accordance with the conditions set out in this Title, to apply for a new residence status which confers the rights under this Title and a document evidencing such status which may be in a digital form (European Union, 2019a).

A variety of requirements regarding the application for the new status are outlined in Article 18. First, if the applicant satisfies the requirements, the applicant must be awarded the status and the related document; there is no residual discretion in the determination of the status. The application date must be at least six months after the transition period ends.

Where the host State encounters technical difficulties registering the application or issuing the certificate indicating that it has been made, this period must be extended by a year. If the applicant misses the application date, they must be permitted to reapply within a later "reasonable further amount of time (European Union, 2019a)" if there are good reasons for the delay. All rights in Part Two must be presumed to be applicable to all UK or EU citizens and their family members prior to the deadline, including any extension thereof, with the possibility for those who enter the country for the first time after the end of the transition period to momentarily benefit from this presumption. Equally, Part Two is assumed to be applicable to applicants while their application is pending or while

waiting for the outcome of any legal action the applicant may take in response to a refusal (Peers, 2021).

The host State is, moreover, obliged by the Withdrawal Agreement to grant a smooth, transparent and simple procedure to give applicants the residence permit. The permit must also be issued for free or at the same price as for citizens to avoid any discrimination against EU or UK citizens. In case the residency status is denied, the agreement provides the possibility for the applicant to ask for an examination of the legality of the refusal (European Union, 2019a). The post-transition status as referred to in Article 18 can also begin during the transition period if the host State is willing to do so, as stated in Article 19 (European Union, 2019a).

Articles 20 and 21 specify the cases in which EU and UK citizens can be removed from their rights in case of abuses or incorrect conduct. In particular, a distinction between the transition period and after the transition period has finished. In fact, during the transition period expulsion from the host State follows the rules outlined in the already mentioned Directive 2004/38 (European Union, 2004). On the contrary, after the end of the transition period national law is applied. The agreement also states that those citizens who submitted fraudulent applications can be removed from the host State and brought to their native country before the final judgement of the competent authorities (Peers, 2021).

The agreement then turns to Chapters 2 and 3 of Title II regarding the rights of specific categories of people. Particular attention is given to workers, either employed or self-employed, who must enjoy equal treatment to that of the citizens of the host State. However, it is interesting to point out that the Withdrawal Agreement lacks procedures to recognise professional qualifications for those citizens who move after the end of the transition period (Peers, 2021).

4.7.4 Title III: Social security

The provisions regarding social security have a slightly different personal scope than the provisions outlined in Title I and Title II. These Articles protect EU and UK citizens in need of protection when falling under those circumstances defined by the EU social security law after the end of the transition period (Peers, 2021). The main aim of these provisions is to grant protection to UK citizens, EU citizens, their family members and some third-country nationals, by coordinating the social security provisions within British and EU law once the transition period is concluded. The provisions also

refer to those who worked or lived in a cross-border scenario before the end of the transition period (UK Government, 2021).

On the European side, the coordination of these provisions will fall under the already existing EU social security law and the CJEU will have jurisdiction on the matters. On the British side, the UK is granted observer status in the EU bodies to harmonise its Courts to the EU laws on the matter. The UK, in addition, can also have access to the EU database (Peers, 2021).

The remaining clauses of Part Two confirm the lifetime application of this Part as long as people meet the necessary requirements, as well as the duty to spread awareness of the rights and responsibilities of those who fall under these provisions. Article 38(2) takes into consideration the Common Travel Area issued between the UK and Ireland, to avoid a hard border on the Irish island (European Union, 2019a). In particular, the Withdrawal Agreement mentions the “more favourable treatment,” a very important and discussed topic. The CJEU deliberated following the Joined Cases C-424/10 and C-425/10 (European Union, 2012b) that, concerning the citizens' Directive's equivalent provisions, a Member State's choice to apply more benevolent norms did not bring the person in question under the purview of the system established by the Directive.

In conclusion, the measures pertaining to citizens' rights represent a further compromise between the EU and the exit agreement's status under international law. Not all rights are preserved by reference to EU law rules: UK nationals may have lost EU citizenship as such, and if so, even those who are in the EU may have lost their right to free movement between Member States. As of the end of the transition phase, both EU and UK nationals living in each other's territory will lose some of their rights to vote, gather their families, be shielded from deportation, and return home. Moreover, after eight years, the protection promised to EU citizens in the UK in the form of CJEU jurisdiction will be no more valid, and the Monitoring Authority's function may also be terminated (Peers, 2021).

4.8 The Ratifications of the Withdrawal Agreement

On 14 November 2018, the UK and the EU reached an agreement on the Withdrawal Agreement, leaving the floor to the period dedicated to the ratification of all the parties involved.

In these months, the UK translated the Withdrawal Agreement into the EU Withdrawal Agreement Bill, to formally have the Agreement within the UK body of law. However, to respect the deadline imposed by the EU on the 31st of January 2020, the UK ratification process must be completed by

that day (Cowie, 2019). Finally, the Bill was approved by the UK Parliament on 22 January 2020 and received the Royal Assent the following day.

On 29 January 2020, the European Parliament ratified the Withdrawal Agreement. The main problem in the ratification process was the timing. In fact, the EP clearly stated that it would grant its approval only once the ratification process in the UK has been completed. The consent vote was made by a simple majority of the Members of the European Parliament voting. Moreover, the UK Members of the EP were also allowed to vote (Fella, 2020).

After the approval of the EP, the Council of the EU, composed of the ministerial representatives of every EU Member State, has to grant its final approval with an enhanced qualified majority. Unlike the standard qualified majority, which calls for the consent of at least 55% of the Member States, or at least 65% of the EU's total population, a reinforced qualified majority necessitates the participation of 72% of Member States or at least 65% of the total population. This means that the WA needed to be approved by representatives of at least 20 of the remaining 27 Member States. In this case, the withdrawing Member State is exempt from voting on its withdrawal under Article 50. The UK will therefore abstain from the Council's vote on the WA (Fella, 2020).

Both the EU and the UK must notify the depositary of the Agreement before the Agreement can take effect, according to Article 185 of the WA. In this case, the Secretary-General of the Council is the depositary of the Agreement. This notification must attest to the completion of all required internal processes for ratification by the UK and the EU (Fella, 2020).

4.8.1 The consequences of the ratification and implementation of the Withdrawal Agreement within the UK law

Although the Withdrawal Agreement's finalisation between the UK and the EU had major political implications, it had no legal standing under UK law. Due to the dualist nature of the UK legal system, the statutory incorporation of treaties is a prerequisite for their application under UK law. The UK executive, whose powers derive from royal authority, is the responsible body for the negotiations and the ratification of international agreements. The House of Commons is responsible for ratifying the treaties; however, because of the above-mentioned dualist nature of the British legal system, mere ratification is not enough to validate a treaty. For a treaty to be valid in the UK, it has to be transformed or adopted into national law through a separate Act of Parliament (Craig, 2020).

Prime Minister Theresa May attempted three times to reach the majority of votes in the House of Commons for the implementation of the Withdrawal Agreement into the UK legal system. However, she failed and resigned on 7 June 2019 (Seely, Ferguson, *et al.*, 2019). On 25 July 2019, Boris Johnson took office as the next Prime Minister. Johnson stated that there would be no further delays regarding Brexit and he also stated that a renegotiation of the Withdrawal Agreement was needed, otherwise the UK would have left the EU without a deal.

The Johnson Government proposed to the EU that Northern Ireland would not be part of the Single Market, as this would have mined the UK customs territory. However, the EU refused to make this concession, as the borders between Ireland and Northern Ireland have to be left open (Seely, Ferguson, *et al.*, 2019). As such, the EU opposed a renegotiation of the agreement, as there would be no time left for the ratifications.

Johnson failed the first attempt to gain the approval of the House of Commons. However, Johnson called for a general election, which gave him a majority of 80 seats in the House of Commons (Craig, 2020). Thanks to this result, he had the votes necessary to ratify the agreement. The Withdrawal Agreement was finally ratified and embodied within the UK legal system through the so-called European Union (Withdrawal Agreement) Act 2020, which is divided into 5 parts: implementation period; general provisions; citizens' rights; separation, finance, Northern Ireland; and the final provisions.

Each part is limited to implementing the relative parts in the Withdrawal Agreement; thus, no changes have been made. However, as mentioned, the Bill will give formal obligations to the UK side to implement every article of the Withdrawal Agreement. Regarding citizens' rights, in particular, the UK has now the obligation to introduce a new authority to monitor that the part regarding citizens' rights of the Withdrawal Agreement is respected and to protect EU citizens living in the UK (Craig, 2020: p. 9).

Since the UK joined the EU in 1973, EU legislation has governed many aspects of daily life. Many directives of EU law have been automatically incorporated into UK law through the years. Many aspects of EU law, including regulations, were, before Brexit, directly applicable and took effect in domestic law automatically when it was adopted by the EU, negating the need for additional national legislation. The direct applicability of EU law to the law of Member States is based on Articles 289-291 of the TFEU (Craig, 2020).

Moreover, to achieve a seamless and orderly transition to a sovereign domestic legal order, it is vital to ensure that EU law continues to be in force in some capacity after Brexit. In fact, leaving the EU

also means leaving the *acquis* of the EU, which is the current body of law in existence in the UK, as it was an EU member for decades (Tatham, 2018).

As such, to avoid a vacuum before the creation of new rules, the laws in existence are likely to be kept within the UK statute (Tatham, 2018). The European Union Withdrawal Agreement Bill 2020 incorporates the category “retained EU law” which refers to the EU laws which will be kept by the UK government until they will be amended or repealed. The EU laws that will be retained are the ones as stated in the Withdrawal Act:

(a) EU-derived domestic legislation: mostly EU directives under art. 288 TFEU previously harmonised by the UK into domestic law; (b) EU direct legislation: mainly EU regulations and EU decisions under art. 288 TFEU as well as EU tertiary legislation under arts. 290 and 291 TFEU; (c) Retained case law: comprising both (a) retained domestic case law being any principles and decisions of a UK court or tribunal that had applied EU law before Brexit; and (b) retained European case law being any principles and decisions of the CJEU as they have effect in EU law before Brexit; (d) Retained general principles of EU law: covering all such principles as they have effect in EU law before Brexit. However, there will be no post-Brexit right of action in domestic law based on a failure to comply with these general principles; and after Brexit, no court or tribunal (or other public authority) may disapply or annul any legal rule, or annul any conduct or otherwise decide that it is unlawful, because of its incompatibility with such general principles (Tatham, 2018).

However, From Brexit day on the dualist approach of the UK government will be applied; as such, there will be no automatic application of future EU *acquis* in UK law. The Parliament will decide in two stages if the new EU measures which will be introduced within the EU can be transformed into UK law or if these rules will not be implemented (Craig, 2020: p. 11).

4.8.2 The consequences of the ratification and implementation of the Withdrawal Agreement within the EU law

The ratification process of the EU is set out in Article 50 paragraph 2 of the TEU:

A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament (European Union, 2012a).

From the EU side, there was no discussion on the legal complexity, as there was no need to transform the Withdrawal Agreement into EU law. However, many EU laws, as well as delegated and implementing acts, needed amendments. Many institutional changes were needed, such as the reassignment of the UK's MEPs. In addition, the relocation of EU organisations that were previously based in the UK was subject to significant legal challenges. This was equally true for legal concerns relating to topics such as data sharing and cooperation with the police. Finally, in the future, there will be complicated legal difficulties, including customs and regimes of equivalency (Craig, 2020).

In addition, another factor contributed to Brexit's considerable legal repercussions for the EU. All the complicated legal documents issued during the negotiation process were mostly drafted by the EU legal services. The terms agreed upon by the political actors must be translated into legal language. Since the law governing the agreements was the European one, the EU legal services were responsible for the translation of the agreement reached by the political spheres into a legal text. For instance, the Withdrawal Agreement, as already analysed, is an extremely difficult text to produce, as the text had to express the need for certainty and clarity between the two parties involved, in particular regarding the section on citizens' rights (Craig, 2020).

The Withdrawal Agreement consists of overlapping dispute settlement processes, granting jurisdiction to the CJEU and UK Courts regarding citizens' rights in specific areas. The CJEU has been granted jurisdiction in some areas during the transition period and even beyond, as the agreement grants the CJEU as the responsible court to refer to whether there are disagreements between the EU and the UK regarding the interpretation of the Citizens' Rights section of the Withdrawal Agreement (Mars, 2020). In doing so, the EU has granted to those EU citizens residing in the UK that the CJEU will create jurisprudence in the following years, which will then be followed by the British courts, so as to harmonise the judgements and grant common provisions to citizens both in the EU and the UK.

The main effect of Brexit on the EU is uncertainty, which largely depends on the future EU-UK relationship. Although a Withdrawal Agreement has been reached and the talks for future trade relations are still going on, the EU policies will be affected by the adjustment of behaviour both by the European institutions and the citizens. Many EU actors such as firms, for example, had begun already after the results of the referendum in 2016 to relocate from the UK to the EU, as well as many EU citizens who returned to the EU (de Ville and Siles-Brügge, 2019).

4.9 Conclusion

The Withdrawal Agreement was signed on January 24, 2020, by Charles Michel, President of the European Council, and Ursula von der Leyen, President of the Commission. On January 29, 2020, the UK declared that the exit process was complete. The approval of the European Parliament followed the approval of the UK Parliament on the same day (Craig, 2020). The formal decision was then properly taken by the Council on January 30, 2020, under the last clause of Article 50(2) TEU, and the UK officially left the EU on January 31, 2020, subject to the transitional period, which expires on December 31, 2020, unless extended.

The Withdrawal Agreement entered into force on February 1, 2020, officially avoiding the scenario of a no-deal. The agreement provided a transitional period for the UK to adapt to the new situation, as well as provided EU citizens residing in the UK and UK citizens residing in a Member State to grant a smooth transition without burdens or uncertainty (Larik, 2020).

It is in this final chapter that the two-level game theory became crucial, as the negotiators reached an agreement and needed to obtain the approval of their parliaments. The two-level game theory has been extremely important to analyse the Brexit negotiations, especially on the European side, as the EU negotiators were conscious that during the negotiations the number of constituents and spoilers within the EU27 had many different opinions regarding Brexit; thus, finding a consensus at the level 2 has always been extremely important to deal with the UK with a strong stance.

On the contrary, the UK, although had fewer constituents than its counterpart, faced many problems exactly because it tried to exclude British citizens from the negotiations. In fact, as analysed, the negotiators and the British Government were aware that the promises made during the Referendum Campaign were unlikely to be reached. The UK, thus, engaged in a hard bargaining strategy to show to its constituents that the UK is a strong country at the international level, even though in the end the EU was stronger. It is highly unlikely that the UK would have reached what was mentioned during the Referendum campaign; thus, the strategy of the UK has been to show to its citizens that the Government engaged in a hard bargaining strategy to force the EU to make concessions, but the EU revealed to have a stronger stance.

It must be stressed that the transition period agreed upon represents the opposite of "taking back control" that the UK desperately wanted. As analysed, the UK will still be bound to the EU legal system throughout the period without any right to vote. On the contrary, after the transition period, the CJEU will lose direct jurisdiction in most of the cases, while it will still be valid in its

jurisprudence, which is likely to be followed by the UK courts, at least in the near future, to avoid contradictions regarding EU citizens living in the UK, as already stressed (Larik, 2020).

After the ratification of the Withdrawal Agreement, the two sides involved issued a Political Declaration, in which they reiterated the importance of this historical event and the need to pursue a partnership even after Brexit:

The period of the United Kingdom's membership in the Union has resulted in a high level of integration between the Union's and the United Kingdom's economies, and an interwoven past and future of the Union's and the United Kingdom's people and priorities. The future relationship will inevitably need to take account of this unique context. While it cannot amount to the rights or obligations of membership, the Parties are agreed that the future relationship should be approached with high ambition concerning its scope and depth, and recognise that this might evolve over time. Above all, it should be a relationship that will work in the interests of citizens of the Union and the United Kingdom, now and in the future (European Union, 2019b).

The final phase of drafting of the Withdrawal Agreement was, as analysed in this chapter, deeply intertwined with the matter regarding citizens' rights, as it represented one of the fundamental parts of the Withdrawal Agreement. The ratification and entry into force of the Withdrawal Agreement represents an essential step in the protection of EU citizens residing in the UK and vice versa. However, the Brexit process, although formally concluded at the end of the transition period, is, as analysed, extremely likely to continue and adjust itself following the jurisprudence the UK courts of justice and the CJEU will collect in the next years.

Conclusion

On the 1st of February 2020, the UK officially left the European Union, leading to an unusually short transition period until 31 December 2020 in which the UK has to reshape its trade relationship with the EU and with the world (Rawlingson, Topping and Murphy, 2020). Brexit has completely reshaped the UK, as it led the country to a more independent, despite isolated, role within the European continent. The UK, in fact, as of Brexit day, did only reach with the EU a Withdrawal Agreement, while the two parties have the rest of 2020 to reach an agreement on Future Relations.

The EU successfully proved to the world, and in particular to other sceptical EU countries, that leaving the EU has severe consequences, as there will not be a Single Market for those countries who will decide to leave the EU. Moreover, as already noted, the EU proved to be as united as ever before when negotiating with the UK, giving the EU much more power and a stronger stance against the UK, while the UK failed to have a unified position within its constituents.

The thesis analysed the concessions and deadlocks between the two parties during the negotiation of the Withdrawal Agreement. After the referendum, EU and UK citizens saw the possibility to lose all their rights at once when residing or moving to the EU or UK. As such, the two parties decided to prioritise the topic of citizens' rights in the agenda of the negotiations. However, as stressed several times, the UK saw immigration from EU countries as a threat that must be stopped or at least reduced.

Citizens' rights have always been a top priority for both sides. However, there was a fundamental difference in how the two parties managed to grant rights to their citizens. The EU was relatively willing to grant mutual rights while stressing that leaving the EU means leaving the four fundamental freedoms at once. The UK, on the other hand, pushed for granting freedom of movement to British citizens without the willingness to grant it to Europeans entering the UK. The stance of the UK was, thus, confusing, as its citizens desired Brexit to “take back control” of immigration policy and sovereignty, but the citizens were not willing to lose their own rights regarding freedom of movement. The EU, on the other hand, was not willing to grant freedom of movement to a country that decided to leave the EU, as there will not be a European Union “à la carte.”

The negotiations regarding the Withdrawal Agreement were far from being smooth, as the two parties wanted to grant as many rights as possible to citizens while having clear that a country leaving the EU cannot hold the same privileges as a Member State. Moreover, both parties also had an underlying sense of resentment. On the one side, the UK wanted to prove to be better off outside the European

Union, as the country wanted to gain independence from the Union. On the other side, the EU needed to show to the other euro sceptical Member States that leaving the EU has consequences for the economy of the country.

Reaching a Withdrawal Agreement has been extremely complicated for both sides, as already analysed. The long and tiring process has left the EU better off, as the unprecedented unity of the EU27 led the EU to have a strong stance against the UK, avoiding any possible loss of international reputation. Although the consequences of Brexit on citizens are still vague, as the CJEU and British Courts still have to create jurisprudence on the matter, it is worth noting that the mutual reassurances and concessions agreed in the Withdrawal Agreement allow citizens to reside in the EU or the UK undertaking only some easy and smooth procedures.

The two-level game theory implemented to analyse these negotiations was extremely important, as it showed two different approaches used by the two parties involved. The EU negotiators kept the governments and the Union informed, so as to grant their consensus in every step of the negotiations. The UK, on the other hand, engaged with the constituents in a very peculiar way: as the EU pushed for transparency, the UK decided to engage in a positional bargaining strategy to convince its citizens of the credibility of the Government. In this matter, the national level, or level 2 as theorised by Putnam, was indeed deemed as the most important, and sometimes even dangerous, spoilers during the Brexit negotiations and both the EU and the UK tried to sedate those spoilers with two different strategies.

While the EU informed its constituents trying to obtain their consensus, the UK attempted to demonstrate to their citizens that those promises made during the Referendum campaign will not be accepted by the EU, although the British Government is trying to negotiate to obtain those concessions. In doing this, the British government, which was extremely divided on how to deal with Brexit, had to pursue a hard bargaining strategy, otherwise, this narrative would not have worked. The EU had its reasons as well to use a hard bargaining strategy, namely the necessity to show to the other Member States that leaving the Union has severe consequences both on the political, economic and social aspects. As such, the two-level game theory by Putnam paved the way in showing the main reasons behind the hard bargaining that characterised the Brexit negotiations regarding citizens' rights.

The Brexit negotiations were peculiar for many reasons, as they were the first withdrawal from the EU in history. A deep analysis of these negotiations, with a particular focus on the citizens' rights topic, which was a topic characterised by the same interests, namely granting citizens to continue

their lives in the EU or the UK as smoothly as possible, with extremely different positions, proving that constituents and their resentment can endanger and bring to deadlocks and hard bargaining even in a negotiation process where the two parties share the same hidden interests.

And we have been able, finally, to reach a balanced agreement, which, in view of the difficult circumstances and the complexity of Brexit, is the only and the best agreement possible. This agreement respects our principles, whilst taking account of the United Kingdom's red lines. It opens the way to an ambitious future relationship, unprecedented in its range of areas of cooperation between us. [...] The withdrawal agreement provides legal certainty for everyone who is worried about the consequences of the British decision to leave the European Union (Barnier, 2018).

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