Article

MJ

Maastricht Journal of European and Comparative Law
2017, Vol. 24(3) 382–398

DOI: 10.1177/1023263X17722327
maastrichtjournal.sagepub.com
SAGE

Brexit and EU private international law: May the UK stay in?

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Abstract

Procedure of the British withdrawal from the European Union, officially launched on the 29th of March this year, opens not only questions of the general public-law governance but, first and foremost, gives rise to concern about its overall impact on the cross-border private-law transactions involving the UK and the rest-EU Member States. The article is focused on the regulatory risk within the framework of the Judicial Cooperation in Civil Matters (JCCM), encompassing the EU common private international law (PIL) provisions. Some misapprehensions about a possible continuity of the cooperation based on the existing PIL international treaties (e.g. the Lugano Conventions or the 1980 Rome Convention) on the one hand, and the deficiencies of the post-Amsterdam JCCM legislative mechanisms on the other hand, have been considered. The current European legislative policy dramatically lacks consistency even with regard to the EU countries which have not been vested with a special status comparable to the UK, Ireland, or Denmark. Thus the article suggests a possibility of restructuring the JCCM so as to encourage the UK to cooperate with the EU in the form of a 'Continental PIL Partnership.'

Keywords

private international law, European Union, Brexit, Article 50 TEU, EU Regulations, international conventions

> According to the teleological view of the past, the past extends itself towards the future as a linear time (. . .). As a matter of fact, however, history does not show such a linear development, but a dialectically converting unification in which development is construction, and becoming is action (. . .). History is

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not the content of contemplation (. . .) but, on the contrary, is based upon the dialectic of action by which even the evil can be converted into the good.

M. Ozaki, *Individuum, Society, Humankind* (Brill, 2001), p. 34-35

1. Introductory Remarks

We tend to view the history of the European integration as a purposeful process. In legal terms, this is indeed the case: in light of EU policies based on the logic of an 'ever closer' relationship between the Member States;[1] this allegedly infinite development should ultimately conclude with a true federal polity – not an easy objective to attain within a supranational organization of (still) 28 sovereign nations! On the 23 June 2016, the European thesis was dramatically confronted with its antithesis, in the form of the Brexit – the latter being formally launched on the 29 March 2017 by the British Prime Minister's Article 50 notification letter addressed to the President of the European Council.[2] What comes next as an inevitable synthesis of this dialectical process? It is not the author's task to give his predictions. The subject matter of this article is less ambitious: to add some remarks on the destiny of one of the EU's common policies, namely the Judicial Cooperation in Civil Matters (JCCM).

The latter mainly pertains to the discipline of law known as private international law (PIL). Depending on the adopted assumptions, its borders comprise the rules on the choice of law applicable to private law relationships (when construed narrowly), but they may also cover the courts' jurisdiction, and the recognition and enforcement of foreign judgments in civil and commercial matters (when construed widely). In terms of PIL in EU law, it is the latter which is indeed the case.[3]

It is exactly due to the complexity and technicality of the matter that PIL – from a political perspective – is present somewhere at the margin of the debate concerning the UK's future withdrawal from the European Union. For many lawyers in the UK, however, the perspective of 'Brexit' is much more serious in this regard. The City of London has become the true European centre for foreign investment[4] and the majority of local legal firms have built up their reputation on a simple, yet effective model of cooperation with their clients: agree to London as the arbitration venue or the prorogated forum – and we will do the rest.

1. Compare, the preamble and the second indent of Article 1 TEU ('*ever closer union among the peoples of Europe*'), the second indent of Article 24(2) TEU ('*ever-increasing* degree of convergence of Member States' actions in the field of CFSP') (emphasis added), and Recital 1 of the Preamble to TEU Protocol No. 14 on the Euro Group, [2008] OJ C 115/283 ('*ever-closer* coordination of economic policies within the euro area') (emphasis added).
2. See, European Council, 'Article 50 Notification letter from the United Kingdom', http://www.consilium.europa.eu/en/press/press-releases/2017/03/pdf/070329_UK_letter_Tusk_Art50_pdf/; European Council, 'Statement by the European Council (Art. 50) on the UK notification, http://www.consilium.europa.eu/en/press/press-releases/2017/03/29-euco-50-statement-uk-notification/.The procedure was undertaken upon the prior consent of the UK Parliament, see (UK) the European Union (Notification of Withdrawal) Act 2017.
3. P. Stone, *EU Private International Law* (Elgar, 2010), p. 3.
4. Recent analyses have shown that at the moment of the 'leave' referendum in June 2016, England absorbed the volume of more than £1 trillion of foreign direct investment, about half of which had been generated by the commerce with other EU Member States; financial services have the largest stock of inward FDI in the UK (45%) and constitute 8% of GDP and 12% of tax receipts. Compare, S. Dhingra et al., 'The Impact of Brexit on Foreign Investment in the UK', *CEP Brexit Analysis* No. 3 (2016), http://cep.lse.ac.uk/pubs/download/brexit03v2.pdf, p. 2, 6.

Another stimulant factor in the cross-border commerce between the UK and the rest of the EU has been the migrant workforce which have bound their private interests in the UK. Since the English legal profession has gained so much from the harmonized jurisdictional and conflict of law provisions,[5] a recurring question must now stick as a splinter in the minds of members of the London Bar: is it all now going to end?

Unfortunately, there are no easy answers. As commonly observed by most commentators on the procedure of Article 50 TEU,[6] two extreme post-Brexit scenarios stand before the United Kingdom:

- **soft 'Brexit'** (perceived in two variants: a 'Norwegian' or a 'Swiss' model) would mean either the accession of the UK to the European Economic Area (EEA), or at least entering into one or more bilateral agreements with the Union, making it possible for the UK to continue its participation in the Single Market;
- **hard 'Brexit'** – a total severing of the current legal links to the EU and relying only on the general mechanisms of the international legal and economic cooperation, like for instance that of the World Trade Organization (WTO).

Both of the above described scenarios refer to the fundamental freedoms of the Single Market, that is to the level of the primary law basically – and neither of them seem very realistic. They do not bring about an automatic answer to the UK's future participation in the JCCM. This issue will be elaborated below; as for now it is sufficient to say that the legal regime in which the UK could be operating post-Brexit seems to be unsatisfactory.[7] The UK's private international law is deeply Europeanized and though it is of course possible for the UK to abrogate the EU PIL regime, such a move would equate either to a revolution or a legal vacuum. Unfortunately, the current political solutions are not based on the rational grounds. Even although both Norway and Switzerland are parties to the Lugano Convention[8] – an instrument parallel to the Brussels I bis Regulation[9] – the scope of the former convention is limited to the jurisdiction, and the recognition and enforcement of judgments in most (but not all) civil matters. Moreover, the UK does not directly take part in it and it is not easy to answer whether it should accede thereto. And what about the rest of the EU's JCCM acquis? One way or another, the negative consequences for parties to the cross-border private law cases and the public interest seem to be practically inevitable.

5. J. Basedow, 'Brexit und das Privat- und Wirtschaftsrecht', 24 *Zeitschrift für Europäisches Privatrecht* (2016), p. 567 et seq., 572. Legal services directly contributed £26.8 billion to the UK economy in 2011, and this included almost £4 billion of exports – a substantial volume of which was generated through trade with other EU Member States; for a more detailed description compare, Law Society of England and Wales, 'Review of the Balance of Competences between the United Kingdom and the European Union: Civil Judicial Co-operation', https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279293/law-society-england-wales-evidence.pdf.
6. As to the impact of Article 50 TEU on PIL issues see Section 3 of the present article.
7. The UK becoming party to the EEA agreement does not seem practical, as it requires the sacrifice of British interests which the 'Brexiteers' are eager to avoid. Compare, J. Pisani-Ferry et al., 'Europe after Brexit: A proposal for a continental partnership', *Bruegel* (2016), http://bruegel.org/2016/08/europe-after-brexit-a-proposal-for-a-continental-partnership/, p. 3.
8. Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed in Lugano on 30 October 2007, [2007] OJ L 339/3 (the Lugano Convention).
9. Regulation No. 1215/2012/EU of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L 351/1 (the Brussels I bis Regulation).

Notwithstanding the fact that we still do not know what the outcome of the EU-British divorce will be, it is nevertheless worth considering whether – and, if appropriate, on what basis – the United Kingdom should continue its involvement in the EU's PIL acquis. The rest of this article will thus be divided into three parts. The following section (Section 2) will discuss the status quo *ante* of Brexit, taking the perspective of the British involvement in the EU's civil judicial cooperation regime. Following this, Section 3 will focus on the impact of Brexit on private international law in the UK. The final section (Section 4) will give concise remarks on the way out of the deadlock incurred by the 'leave' referendum, in the light of the overall situation in the EU at the time of writing.

2. Foundations of the EU Judicial Cooperation in Civil Matters

It would be fruitless for this article to recite the whole history of the EU's PIL acquis, which was symbolically launched by the adoption of ex Article 220 TEC:[10] within which the prominent Brussels Convention was adopted in 1968.[11] Nevertheless, it was only following the entry into force of the Maastricht Treaty that judicial cooperation in civil matters was proclaimed as a subject matter of common interest. To be sure, the latter has never been characterized as a politically important field. Several conventions prepared under the auspices of the Council did not enter into force at that point.[12]

The Amsterdam Treaty engendered a true turning point in the ambit of PIL, as it transferred the PIL competence of the EC from the so-called third pillar to the first pillar. This meant that the measures on this subject matter had to be adopted by the Council as an institution of the Community. This was definitely more than simply an improvement in the legislative procedure. As validly remarked by one leading German scholar,

> [t]he shift of legislation from national to European institutions breaks the linkage between substantive law and conflict-of-law rules. To use a metaphor, private international law rulers have been conceived by competing players in the field of substantive legislation, a field without a referee; since and to the extent that the Community is not a player in this field, it rather acts as a referee when legislating on PIL.[13]

With regard to the subject matter of the present article, it seems necessary to point out one serious flaw in the aforementioned pillar relocation: the provisions of Title IV TEC, still heavily influenced by the intergovernmental spirit of Article K.3 of the Maastricht Treaty, made a

10. Compare, Article 293 TEC (as renumbered by the Treaty of Amsterdam), finally derogated by the Lisbon Treaty (it had foreseen the Council's initiative in launching the negotiations of Member States with a view of simplifying the procedure of the mutual recognition and enforcement of judgments).
11. Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968, [1972] OJ L 299/32 (the Brussels Convention). For the consolidated text, see 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version), [1998] OJ C 27/1.
12. A. Borrás, 'Le droit international privé communautaire: réalités, problèmes et perspectives d'avenir', 317 *Recueil des Cours* (2005), p. 430; J.D. Gonzáles Campos, 'Diversification, spécialisation, flexibilisation et matérialisation des règles de droit international privé', 287 *Recueil des Cours* (2000), p. 123. These legal instruments were soon transformed into EC law measures, compare, W. Kennett, 'A Footnote on the Treaty of Amsterdam', 48 *International and Comparative Law Quarterly* (1999), p. 976 et seq., 977.
13. J. Basedow, 'The Communitarisation of Private International Law – Introduction', 73 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (2009), p. 455 et seq., 459.

universal reference to the matters of visas, asylum, immigration, as well as to some other aspects of the policies aimed at facilitating the free movement of persons, all of them politically sensitive issues. Thus private international law, being a set of rather technical rules serving the sound administration of justice, became a hostage of an ambitious political package, meaningfully called the 'Area of freedom, security and justice'.[14] Certainly, such a grouping together of policy areas was unfortunate[15] if not harmful to civil judicial cooperation.

The main consequence of introducing a new treaty provision turned out to be the need for several *inter partes* limitations to Title IV TEC. According to the 1997 Protocol No. 4 on the position of the United Kingdom and Ireland,[16] both Member States took no part in the adoption of measures pursuant to Title IV of the Treaty establishing the European Community, unless they specifically opted in to them in accordance with Article 3 of the Protocol. They were entitled to choose ex post, or even ex ante, to accede – so long as it was in writing – to individual measures on a case-by-case basis. The position of the UK in this respect has justly been described as 'Europe à la carte': as the UK was able to enjoy the benefits of EU membership when it so desired, but without any obligation to opt into any measures the UK Government did not like.[17] Such a flexible regime stood out favorably in comparison with another Protocol on the position of Denmark, which was left entirely outside the Justice and Home Affairs (JHA) regime.[18] To put it in other words, the UK's default 'opt out' could easily be transformed into an 'opt in'.

Generally speaking, the aforementioned Protocol at no rate meant a communitarization of PIL; contrariwise, its content – quite exceptional when compared to the position gained by other Member States within the JCCM framework – must be seen as a rather obvious expression of national sovereignty. As justly remarked by one British author, '(. . .) the United Kingdom has made strategic use of the Title IV EC Protocol, using the EU as an external vehicle through which to advance its own domestic policy objectives, which are at times (and increasingly) convergent with EU policy objectives'.[19]

Notwithstanding some minor reforms, the core provisions of the Protocols on the British (and Irish) opt-outs were transferred over to the Lisbon Treaty.[20] Their durability, however, turned out to be its curse. Quite a long time ago, it was identified that the particular rights of the United Kingdom were too high a price to be paid for the communitarization of the Judicial Cooperation in Civil Matters.[21] If we look at this pejorative evaluation from outside the perspective of European

14. See Article 61 TEC read in conjunction with Article 2(4) TEU, as amended by the Treaty of Amsterdam.
15. Compare, U. Drobnig, 'European Private International Law after the Treaty of Amsterdam: Perspectives for the Next Decade', 11 *King's Law Journal* (2000), p. 190 et seq., 193.
16. See the consolidated English version, as amended by the Treaty of Nice, [2006] OJ C 321E/187, 198-200.
17. T. Hartley, 'Balance of Competences in the European Union: Private International Law', *HM Government* (2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279275/professor-trevor-hartley-evidence.pdf.
18. P. Arnt Nielsen, 'Denmark and EU Civil Cooperation', 24 *Zeitschrift für Europäisches Privatrecht* (2016), p. 300 et seq., 305; S. Peers, *EU Justice and Home Affairs Law: EU Immigration and Asylum Law. Volume II: EU Criminal Law, Policing, and Civil Law* (4th edition, Oxford University Press, 2016), p. 357.
19. M. Fletcher, 'Schengen, the European Court of Justice and Flexibility Under the Lisbon Treaty: Balancing the United Kingdom's ''Ins' and 'Outs''', 5 *European Constitutional Law Review* (2009), p. 71 et seq., 82.
20. See, Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, [2012] OJ C 326/295; compare, S. Peers, *EU Justice and Home Affairs Law: EU Immigration and Asylum Law: Volume II: EU Criminal Law, Policing and Civil Law*, p. 41-44, 346.
21. A. Borrás, 317 *Recueil des Cours* (2005), p. 447; compare, D. Gonzáles Campos, 287 *Recueil des Cours* (2000), p. 130.

governance, the same facts may give rise to a more positive statement: why, namely, not to perceive the British Protocol as evidence that the mutual approach to the private international laws of the Member States was perhaps premature? Has the post-Amsterdam JHA really been as effective as we tend to think?

One can cast doubt over this evaluation. The civil judicial cooperation architecture has become overly complex and fragmented. Pursuant to Article 81(3) TFEU, within the ambit of international family law there is a deviation from the ordinary legislative procedure (normally applied under Article 81(2) TFEU), and the Council may only adopt measures unanimously, and after consulting the European Parliament. The so-called 'passerelle' clause foreseen in the second subparagraph of Article 81(3) TFEU has hitherto never been used, whereas several legislative proposals from the Commission pertaining to the crucial problems of cross-border family matters have failed to be adopted. In the case of conflict-of-law rules for divorce and separation, 14 Member States[22] have successfully launched the enhanced cooperation procedure,[23] and have been joined by other countries,[24] and the same phenomenon is taking place with regards to two proposals for a Council Regulation referring to the law applicable to marital property regimes and the property consequences of registered partnerships respectively.[25]

What we currently face in the field of the private international law, cannot simply be labelled as mere 'differentiated integration'[26] caused by the de facto stalemate in the development of the EU's

22. Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain.
23. See, Council Regulation No. 1259/2010/EU of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, [2010] OJ L 343/10. This decision has justly been criticized by one author noticing, *inter alia,* the general inappropriateness of a Treaty instrument aimed at guiding the Union towards any deeper integration. It is argued that this does not really suit the area of the conflict of laws; furthermore, such closer harmonization within the field of the jurisdiction, choice of law, and the recognition and enforcement of judgments harms legal certainty, creates a kind of regional level competition with the Hague Conference on Private International Law to which the EU is a member and, more generally, hampers the reconsideration of the PIL rules of the instruments too quickly adopted within the framework of the enhanced cooperation so as to pay due attention to the expectations of non-participating Member States and strengthen the effectiveness of the EU conflict of law rules; compare, J.J. Kuipers, 'The Law Applicable to Divorce as Test Ground for Enhanced Cooperation', 18 *European Law Journal* (2012), p. 201 et seq., 212-215 and 226-227.
24. The newcomers were: Lithuania (2012) and Greece (2014). The application of Estonia was accepted in 2016 and will come into force from 11 February 2018; see Commission Decision No. 2016/1366/EU of 10 August 2016 confirming the participation of Estonia in enhanced cooperation in the area of the law applicable to divorce and legal separation, [2016] OJ L 216/23.
25. See Proposal for a Council Decision authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, COM(2016) 108 final. This has resulted in the adoption of two instruments, namely Council Regulation No. 2016/1103/EU of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, [2016] OJ L 183/1, and Council Regulation No. 2016/1104/EU of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, [2016] OJ L 183/30. The participating Member States are: Austria, Belgium, Bulgaria, the Czech Republic, Croatia, Cyprus, Finland, Germany, Greece, France, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain and Sweden.
26. This is a term commonly used by the various authors, see for instance, A. Stubb, 'A Categorization of Differentiated Integration', 34 *Journal of Common Market Studies* (1996), p. 283 et seq.; R. Adler-Nissen, 'Behind the scenes of differentiated integration: circumventing national opt-outs in Justice and Home Affairs', 16 *Journal of European Public Policy* (2009), p. 62 et seq.

JCCM policy. This is well illustrated by the fate of the aforementioned legislative proposals, later transformed into draft regulations addressed only to the interested Member States. The first controversial Council decision on the acceptance of enhanced cooperation,[27] which finally resulted in the so-called 'Rome III Regulation',[28] triggered an avalanche of internal disintegration and it seems that the process cannot be turned back. The EU will not continue on any further with cooperation on the basis of Article 81(2) TFEU, while the Article 81(3) TFEU application will be blocked by the conspicuous manifestations of the interests of (at least some of) the Member States in preserving their (allegedly endangered) family law traditions. Thus, the structure of the JHA, and the Civil Justice Cooperation in particular, has long become completely unmanageable.

The question now is, what (if any) importance does the EU-British divorce have in light of these facts? Before any answer is given, one thing should be stressed from the outset: the JCCM's benefits, without the UK's participation, seem to be much smaller than expected, even when taking into account the UK's attenuated involvement. After all, as it has been proven by Rebecca Adler-Nissen,[29] the British élite's attitude towards JHA legislation has generally been more constructive than destructive. Even in questioning new proposals on the common PIL instruments, the UK officials in the EU Council tended to act for 'the best of Europe', rather than blindly placing their national interests against the common stance. Moreover, the same author convincingly argues (and provides evidence) that even in cases where the UK did not take part in the adoption and further application of a JHA instrument, the country's delegation was still able to influence the negotiations, which sometimes led to a compromise within the Council.[30] Generally speaking, the British position was judged to be commensurate with the pragmatic culture of this EU institution.[31]

The best illustration here may be the Rome II Regulation,[32] the preliminary draft of which was substantially amended mainly upon the UK's request,[33] so that the British government could make a decision to take part in the adoption and application of the measure,[34] notwithstanding initial signs of reluctance.[35] In the case of the 'twin' Rome I Regulation, the British resistance against the

27. See, Council Decision No. 2010/405/EU of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation, [2010] OJ L 189/12; compare also, Council Decision No. 2016/954/EU of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, [2016] OJ L 159/16.
28. See, Council Regulation No. 1259/2010/EU of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, [2010] OJ L 343/10.
29. Compare, R. Adler-Nissen, 16 *Journal of European Public Policy* (2009), p. 68, 71.
30. Ibid., p. 70.
31. For details see, ibid., p. 68 et seq.
32. Regulation No. 864/2007/EC of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L 199/40 (the Rome II Regulation).
33. The main point of dissent in the Council was the intention of the British negotiators to protect press freedom against an allegedly high level of protection of the personality rights, as enshrined in the draft Regulation. Such a step was critically assessed by one British MEP who then was the rapporteur of the Regulation; compare,. D. Wallis, 'Introduction: Rome II – A Parliamentary Tale', in J. Ahern and W. Binchy (eds.), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations* (Brill, 2009), p. 1, 4-5.
34. See Recital 39 of the Preamble to the Rome II Regulation; compare, A. Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (Oxford University Press, 2008), p. 51; for the political context of the UK's participation in the preparatory work compare, R. Adler-Nissen, 16 *Journal of European Public Policy* (2009), p. 70.
35. It was clearly shown by HM Government, in the letter of 2002 on the preliminary draft proposal of the Regulation, according to which '(. . .) [i]n the view of the United Kingdom there has not so far been demonstrated need for such an

perceived too liberal Article 9(3) – pertaining to the foreign overriding mandatory rules – was a true shift towards free international trade, which was generally a good compromise for the whole of Europe.[36]

This section of the article may be concluded as follows: by no means will 'Brexit' make integration within the field of the JHA – and in particular the JCCM – easier than it operates now; quite to the contrary, it may substantially weaken the EU Member States' readiness to push ahead with PIL harmonization. Such a conclusion may be driven from the fact that the very existence of a large common law jurisdiction within the European Union may have created a huge incentive to maintain intensive legal dialogue between Member States, in order to secure the smooth cooperation of their administration of justice systems. The UK lawyers have contributed much to its development because of their vital interest in this field.[37] We may question the way they dealt with it, but in any case, the UK Government was usually active and responsive, which is not necessarily the case for other EU Member States. This may be the strongest argument for linking the UK to the European JCCM as closely as practicable under the current circumstances, and not for making use of an opportunity to get rid of an inconvenient fellow passenger from the EU fast train.

3. Brexit: The Overall Impact on PIL Matters

What impact could the UK's withdrawal from the EU have on the field of the private international law? It is well known that the effects of the Member State's withdrawal from the Union, with regards to the founding Treaties, are expressly set out in Article 50(3) TEU: the primary law provisions shall cease to apply to the state in question from the date of the entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in Article 50(2) TEU, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period. Two years, as from the 29 March 2017, thus constitutes the default maximum period of time for the UK to negotiate its withdrawal,[38] after that date 'Brexit' will take effect as is expressly foreseen in Article 50(3) TEU. Until that date, however, the body of European Union law remains fully operational in the United Kingdom.[39] Yet, the interim stage is not so peaceful as might appear at first sight; the British referendum has shaken the legal foundations of

instrument which (. . .) must be ''necessary for the proper functioning of the internal market''''; for more details see A. Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*, p. 38; compare also, the stance of the House of Lords European Union Committee, 'European Union Committee, 8th Report of Session 2003-04: The Rome II Regulation. Report with Evidence', http://www.publications.parliament.uk/pa/ld200304/ldselect/ldeucom/66/66.pdf, p. 18.

36. Compare, P. Mankowski, 'Drittstaatliche Embargonormen, Außenpolitik im IPR, Berücksichtigung von Fakten statt Normen: Art. 9 Abs. 3 Rom I-VO im praktischen Fall', 36 *Praxis den Internationalen Privat- und Verfahrensrechts* (2016), p. 487 (pointing to the British position as to a strict formula of foreign overriding mandatory provisions in Article 9(3) of the Rome I Regulation as a factor lowering legal barriers to the free international trade).
37. Thanks to the EU Civil Justice Cooperation with the UK, lawyers in the Continent have become familiar with concepts such as e.g. 'anti-suit injunctions', 'freezing orders', 'debarment', or the 'scheme of arrangement'; B. Hess, 'Back to the Past: BREXIT und das europäische internationale Privat- und Verfahrensrecht', 36 *Praxis den Internationalen Privat- und Verfahrensrechts* (2016), p. 409 et seq., 418.
38. For the counting rules compare, Regulation (EEC, Euratom) No. 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits, [1971] OJ L 124/1.
39. J. Basedow, 24 *Zeitschrift für Europäisches Privatrecht* (2016), p. 568.

the international commerce between the UK and the rest of the EU and thus it directly impacts London as, inter alia, the *forum prorogatum* for financial services.[40]

As to the effects from 30 March 2019, formally speaking, Article 50(3) TEU is silent about the binding force of secondary law instruments created on the basis of the Treaties, like for example, regulations, directives, and the decisions of the EU institutions; though of course some conclusions in that respect may be driven from their very nature. On the one hand, the binding force and status of the national law implementing the directives will have to be assessed in line with the UK's constitutional requirements and in light of the proposed repealing of the European Communities Act 1972,[41] and it cannot be denied that their interpretative context will change fundamentally.[42] On the other hand, the directly effective EU legal instruments – first and foremost regulations – should not be held to remain in force without their legal basis in the primary law instruments after the day of withdrawal.[43]

Their exact treatment, however, largely depends on the way one addresses the problem. From the viewpoint of the state concerned, it is for the UK authorities to decide whether to maintain the European secondary law provisions for its internal legal needs or to repeal them. The specificity of the EU Regulations – a basic instrument of the EU harmonization's policy in the field of the JCCM – consists in its direct application in all the Member States (unless they are covered by the opt-out), which in turn gives rise to an assumption that once a Member State is outside the EU, the regulations will cease to apply. Professor Basedow rightly argues that it is for the British authorities to examine the situation carefully, because any kind of overall assessment would be misleading; he only suggests having due regard to the purpose of a given Regulation and to the nature of the legal relationships in question.[44]

Such a modest opinion may be justified by the fact that, generally, the UK does not apply EU Regulations without adopting implementing acts, which can be viewed as the facilitation of EU law into domestic law. For instance, the Rome I Regulation was implemented by the Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations 2009[45] and the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2009.[46] These acts simply mirror the longstanding dualist system identified by international law, which – one may argue – does not sit comfortably with the nature of European PIL

40. B. Hess, 36 *Praxis den Internationalen Privat- und Verfahrensrechts* (2016), p. 411.
41. The fundamental risk about laws transposing directives lies in the fact that they were usually enacted as secondary legislation under section 2(2) of the European Communities Act 1972; compare, Department for Exiting the European Union, 'Legislating for the United Kingdom's withdrawal from the European Union', https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604514/Great_repeal_bill_white_paper_print.pdf, p. 13.
42. The directives' objectives to be transposed in to national law are not binding on third States, and thus the British courts after Brexit may not be expected to interpret and apply the implementing national law in a way that is congruent to the EU Member States' courts. Moreover, individuals before the British courts will not be entitled to rely on the relevant directives' provisions, whose full application will not have been secured in UK laws by that time, and the obligations in that regard are addressed exclusively to the EU Member States, compare, Case C-62/00 *Marks & Spencer plc v. Commissioners of Customs & Excise,* EU:C:2002:435, para. 24, 27; for a detailed analysis see, S. Prechal, *Directives in EC Law* (2nd edition, Oxford University Press, 2005), p. 52-53, 131 et seq.
43. J. Basedow, 24 *Zeitschrift für Europäisches Privatrecht* (2016), p. 570.
44. Ibid.
45. The Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations 2009, SI 2009/3064.
46. The Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2009, SI 2009/3075.

Regulations, since pursuant to a literal reading of Article 288 TFEU, Regulations are to be 'directly applicable' in all Member States. On the other hand, however, the dualist doctrine could allow for the coherent co-existence of national and EU law, which would otherwise not be 'justiciable' according to established British constitutional practice.[47]

Generally speaking, authors discussing the impact of Brexit on the PIL regime, believe that all the Regulations on which the JCCM is based will lose their binding force in the UK post-Brexit.[48] This is the case for example with the Brussels I bis Regulation, the Brussels II bis Regulation,[49] the Maintenance Regulation,[50] and the choice-of-law Regulations Rome I[51] and Rome II. It is true, however, that we do not know at this moment what the exact post-Brexit scenario at the national level will be. Should the UK Government find it necessary to repeal all the acts implementing the PIL secondary law instruments, the effects would be immediate and detrimental to the interests of the British legal market. It seems, however, that the UK Government is planning to preserve the secondary legislation at the national level by simply transposing, through an Act of Parliament, the EU acquis into UK law. Any future decisions would thus be made by the UK Parliament itself.[52]

47. Compare, P. Eleftheriadis, 'Pluralism and Integrity', http://www3.law.ox.ac.uk/denning-archive/news/events_files/Eleftheriadis.pdf, p. 5-6. It is to be seen whether the same doctrine will make it easier for the UK courts to continue applying EU conflict of law rules post-Brexit.
48. B. Hess, 36 *Praxis den Internationalen Privat- und Verfahrensrechts* (2016), p. 410; for a similar standpoint compare, J. Fitchen, 'Brexit and EU private international law: cross-border judgments – unintended consequences', *Aberdeen Uni Law* (2016), https://aberdeenunilaw.wordpress.com/2016/07/07/brexit-and-eu-private-international-law-cross-border-judgments-unintended-consequences/.
49. Council Regulation No. 2201/2003/EC of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation No. 1347/2000/EC, [2004] OJ L328/1 (the 'Brussels II bis Regulation').
50. Council Regulation No. 4/2009/EC on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, [2009] OJ L 7/1 (the Maintenance Regulation), implemented with regard to the UK by Commission Decision No. 2009/451/EC of 8 June 2009 on the intention of the United Kingdom to accept Council Regulation No. 4/2009/EC on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (notified under document number C(2009) 4427), [2009] OJ L 149/73.
51. Regulation No. 593/2008/EC of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), [2008] OJ L 177/6 (the Rome I Regulation), implemented with regard to the UK by the Commission Decision No. 2009/26/EC of 22 December 2008 on the request from the United Kingdom to accept Regulation (EC) No 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) (notified under document number C(2008) 8554), [2009] OJ L 10/2.
52. According to the statement made on 2 October 2016 by the current Prime Minister Theresa May, the so-called 'Great Repeal Bill' will be submitted to Parliament, with the aim of repealing the European Communities Act 1972 from the statute book following the conclusion of Brexit negotiations. It would also incorporate current applicable EU law into an Act of Parliament and then allow the government to decide if/when to repeal, amend or retain individual measures in the future, following Brexit. One of the typical clauses of this statutory law instrument (as already planned in the past) may then be a provision stipulating that 'the secondary legislation made under that Act shall continue in force unless it is subsequently amended or repealed, and any such amendments or repeals may be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament'.; S. Douglas-Scott, 'The 'Great Repeal Bill': Constitutional Chaos and Constitutional Crisis?', *UK Constitutional Law Association* (2016), https://ukconstitutionallaw.org/2016/10/10/sionaidh-douglas-scott-the-great-repeal-bill-constitutional-chaos-and-constitutional-crisis/. There have been some more precise proposals by the Government included in the White Paper on Brexit, like for instance converting directly-applicable EU law (EU regulations) into UK law and assimilating the 'historic' CJEU case law to the decisions of the Supreme Court in terms of the source of authority. These formulae, however, still sound too imprecise; compare, Department for Exiting the European Union, 'Legislating for the United Kingdom's withdrawal from the European Union', p. 14.

In any case, even if the letter of the legal provisions is to remain the same for some time, the UK will become a third state with regard to the EU, which naturally changes its relationship with the European Union and its legal order applicable in all the (remaining) Member States. The current case law of the Court of Justice of the European Union (CJEU) will no longer be binding on the UK courts;[53] it will largely depend on their sovereign decision whether or not to treat the existing judgments on the EU acquis as authority for the interpretation of UK law. In order to limit the harmful effects to their interests, private parties will have to undertake various legal actions depending on the relationship in question, such as for example, changing the content of the prorogation agreement or moving the seat of an English company to the EU 'safe harbor'.[54] To be sure, parties' reasonable expectations have to be taken into consideration within the framework of intertemporal rules, yet this is only possible to a limited extent.[55] It is unlikely that such parties will have an opportunity to invoke Article 70(1)(b) of the Vienna Convention on Law of Treaties as the source of their 'acquired right'. This provision is clearly addressed exclusively to the Contracting States and offers no guarantees for private parties to contracts and court disputes post-Brexit.

To be sure, there are also ideas of limiting the scope of uncertainty on the basis of international agreements either concluded in the past or currently open for the UK's signature and ratification. One of the key international legal instruments in this context is the 2005 Hague Convention on the Choice of Court Agreements, which is particularly important for maintaining the exclusive prorogation clauses in favour of the English courts, in commercial cases.[56] This issue will be returned to in more detail.

The truth about Brexit is that virtually every EU Member State's position must be aggrieved by the unilateral decision taken by the UK. To be sure, the measures adopted pursuant to Article 81 TFEU remain in force with regard to the EU Member States covered by the subjective scope of the JCCM; moreover, the unified conflict of law provisions in both EU secondary law (in the form of the PIL Regulations) or international conventions entered into by the Union (for instance, the 2007 Hague Maintenance Protocol[57]) will still be applicable and capable of designating the law of

53. For the congruency of the UK law with its old EU pattern, it will not be enough just to make the historic CJEU case law binding on the UK courts. Everyone dealing with EU law knows how quickly the CJEU's acquis is growing. Therefore, the interpretative paths of both legal systems could fan out faster than might be expected. In order to prevent this, the Government announced in the White Paper that '(. . .) for as long as EU-derived law remains on the UK statute book, it is essential that there is a common understanding of what that law means. The Government believes that this is best achieved by providing for continuity in how that law is interpreted before and after exit day. To maximize certainty, therefore, the Bill will provide that any question as to the meaning of EU-derived law will be determined in the UK courts by reference to the CJEU's case law as it exists on the day we leave the EU'.; compare, Department for Exiting the European Union, 'Legislating for the United Kingdom's withdrawal from the European Union', p. 15. Nevertheless, identifying what the interpretation of the 'historic' and up-to-date EU legislation is, seems hardly realistic and such an obligation will surely make the judgments of the British courts less predictable.
54. B. Hess, 36 *Praxis den Internationalen Privat- und Verfahrensrechts* (2016), p. 411, 418.
55. Ibid., p. 411-413 who believes that some intertemporal rules valid for Brexit cases may be derived in a mirror-like manner from existing provisions, e.g. from Article 66 of the Brussels I bis Regulation.
56. M. Ahmed, 'Brexit and English Jurisdiction Agreements: The Post-Referendum Legal Landscape', 27 *European Business Law Review* (2016), p. 103 et seq.; see the Convention of 30 June 2005 on Choice of Court Agreements, [2009] OJ L 133/3. Much hope in this respect is also attached to an international convention being prepared, namely the Hague Convention on jurisdiction and enforcement of judgments in civil and commercial matters; see B. Hess, 36 *Praxis den Internationalen Privat- und Verfahrensrechts* (2016), p. 415-416.
57. Protocol on the Law Applicable to Maintenance Obligations, [2009] OJ L 331/19, concluded by the (then) European Community in the form of Council Decision No. 2009/941/EC of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations,

England or Scotland as applicable to a given case before the court seized in an EU Member State, notwithstanding the fact that this will soon be the law of a third country.

In any event, however, the legal cooperation between states (even taking a simple example of obtaining information on the content of the English or Scots law by the court in any EU Member State, which is now easier thanks to the European Judicial Network[58]) will no doubt be impeded. Brexit will rule out the application of several basic international procedural law instruments (pertaining to the service of documents,[59] taking evidence abroad,[60] and the recognition and enforcement of judgments and extra-judicial documents[61]) with respect to a former Member State which will nevertheless continue to be an important actor on the European scene.[62] Even if that state retains the provisions of the EU cross-border civil procedural law at the municipal law level, it will become a third state against which the current regulations will no longer be applicable. The case is becoming progressively worse as there is no general bilateral agreement pertaining to cross-border civil and commercial matters between certain EU Member States and the UK. Irrespective of the flexibility and the modernity of the civil procedural law, the need to rely on particular domestic regimes in cross-border litigation creates an additional risk factor, especially for the parties. Even if the UK, in searching for a substitute for the existing EU laws, had entered into several conventions prepared by the Hague Conference on PIL, the cooperation between courts would be hindered. Foreseeable difficulties, accompanied by existing migration, which simply cannot be turned back to the status quo *ante* before the UK's accession to the EEC, should induce the Member States and the UK to prepare a well-thought-out reaction beforehand.

Additional burden is created by British internal policy and legal problems. As already explained, the withdrawal procedure will be highly complex[63] and comprise several stages, the first of which will probably be the repealing of the European Communities Act 1972.[64] Further

[2009] OJ L 331/17. This Protocol is not applicable to the UK, see Recital 11 of the Preamble to Decision No. 2009/941/EC.

58. See, Europa, 'European Justice', https://e-justice.europa.eu/home.do?action=home&p.
59. See, Regulation No. 1393/2007/EC of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation No. 1348/2000/EC, [2007] OJ L 324/79.
60. See, Council Regulation No. 1206/2001/EC of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, [2001] OJ L 174/1.
61. Especially within the framework of the Brussels I Regulation.
62. There will even be technical impediments concerning cross-border civil litigation – to give one example, the Member State's courts will no longer have an opportunity easily to organize a videoconference with a witness in the UK, and vice versa. This is so because the national and international regimes in the field of the international judicial cooperation are still not based on the direct contacts between the organs of the interested States; compare, B. Hess, 36 *Praxis den Internationalen Privat- und Verfahrensrechts* (2016), p. 414; for a more detailed elaboration of international cooperation in collecting and taking evidence by electronic means see also, A. Kasper and E. Laurits, 'Challenges in Collecting Digital Evidence: A Legal Perspective', in T. Kerikmäe and A. Rull (eds.), *The Future of Law and eTechnologies* (Springer, 2016), p. 213.
63. First and foremost, they are connected to the mainly unwritten character of the British constitution and the lack of a clear division of competences between Parliament and Government; compare, P. Craig, 'Brexit: A Drama in Six Acts', 41 *European Law Review* (2016), p. 28 et seq. Some important questions pertaining to the Government's powers to launch the Brexit procedure (limited by the Parliament's sovereignty) have been set out by the High Court of Justice in *R (Miller) v. Secretary of State for Exiting the European Union*, [2016] EWHC 2768 (Admin), followed (on appeal) by the UK Supreme Court judgment and opinion in in the case of *R (on the application of Miller and another) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5.
64. The European Communities Act 1972 (c. 68).

steps with respect to the PIL will certainly have the effect of transforming all the EU Regulations, including those in the field of the JCCM, as for instance the Brussels I bis Regulation and some others listed above, into the internal law of the UK.

The same is generally expected vis-a-vis the international agreements to which the European Union, not the UK directly, is party.[65] It is, however, considered by some scholars as to whether Brexit will mean the 'revival' of the private international law applicable from the 31 December 1972 (the day preceding the UK's accession to the European Communities) or whether some of the older acquis communautaire measures will apply instead of the inapplicable EU Regulations.[66] The issue is particularly difficult to settle, especially for a non-UK lawyer, not so much accustomed to the common law perception of legal issues. From the general perspective, it is true that some of the instruments within the ambit of judicial civil cooperation are based on international law; as is the case for the 1968 Brussels, the 1980 Rome, and the 1988 Lugano Conventions.[67] While it is argued that the British adherence to these international conventions is conditional upon its membership of the EU,[68] the other PIL international agreements might automatically 'revive' at the moment of the withdrawal.[69]

Such an effect, however, with regard to the conventions formerly ratified by the UK as a Member State of the EU seems questionable, first and foremost due to their close relationship with EU law: the Protocols to both the Brussels and the Rome Conventions expressly attribute the jurisdiction of the CJEU for their interpretation in the preliminary proceedings, which quite obviously entails the application of Article 267 TFEU – the latter being inapplicable to the United Kingdom from the date of its withdrawal from the EU. Of course, one may say that the Conventions could be applied without the Protocols, yet an answer to such an argument is simple: both Conventions and their Protocols are now an integral and workable whole. One simply cannot adhere to them without accepting the jurisdiction of the CJEU.

Another argument against any further application of the PIL Conventions such as, for instance, the 1968 Brussels or the 1980 Rome ones to the UK consists in the analogy to Article 59 of the Vienna Convention on the Law of Treaties, from which one can deduce that the EU Regulations, such as for instance the Brussels I Regulation, effectively replaced the aforementioned conventions

65. A. Dickinson, 'Back to the future: the UK's EU exit and the conflict of laws', 12 *Journal of Private International Law* (2016), p. 195 et seq., 198-199.
66. A. Dickinson, 12 *Journal of Private International Law* (2016), p. 199 et seq.
67. The application of the latter generally is questionable due to a simple fact that it was replaced by its successor, the Convention of 2007 and then it is no longer in force.
68. E.g. Articles 60(a) and 64 of the 1988 Lugano Convention (assuming that it is still in force); A. Dickinson, 12 *Journal of Private International Law* (2016), p. 206. As to the new 2007 Lugano Convention that is, the Convention on jurisdiction and enforcement of judgments in civil and commercial matters, [2007] OJ L 339/3, there are speculations about the UK becoming a party to it in the future (now it is the Union as the whole, on behalf of its Member States, that is a party to this Convention). One potential avenue would be membership of the EEA (compare, Articles 70(1)(a) and 71 of the Lugano Convention 2007). The UK itself, however, is neither the party to the EEA Agreement nor has it shown any interest in acceding thereto. It would indeed be strange to get up from the EU table in order to sit at another – without a right of vote but with considerable burdens, contributions and obligations. The other opportunity of becoming a party to the new Convention is to submit the application to the Depositary (that is, the Swiss Government) for accession pursuant to Article 71(1)(c) of the 2007 Lugano Convention. Nevertheless, as it was justly remarked in the German legal literature, it would by no means be politically easy to obtain the necessary invitation, as it requires the consent of all the Contracting Parties, whereas any consent of the EU would no doubt largely depend on the political climate post-Brexit; B. Hess, 36 *Praxis den Internationalen Privat- und Verfahrensrechts* (2016), p. 414, 415.
69. A. Dickinson, 12 *Journal of Private International Law* (2016), p. 203-205.

as to the territories to which they found the application.[70] Moreover, both of the aforementioned conventions refer solely to the EU Member States and their obligations resulting from their accession thereto. Therefore, to argue that the simple abrogation of EU secondary law pertaining to PIL will lead to the restoration of the previous legal regime based on the international treaties, is a manifestly oversimplified theory. Therefore, it is hardly likely that the EU-British relationships relying on the existing treaty regime with regard to the JCCM will succeed.

4. Brexit and Beyond: With(out) the UK?

We still know very little, if anything, about the fate of the 'big British divorce'. It cannot be doubted that debate is necessary in order to protect ourselves from overly emotional and misleading judgements. May the UK continue its participation in the EU Judicial Cooperation in Civil Matters? Apparently not but since Article 50 TEU does not preclude the UK and the rest of the EU from setting up a legal framework on the future cooperation by terms of an agreement freely negotiated between them, there arguably are some instruments which can be used to keep the EU PIL 'alive' in the UK. Of course, the precondition for that is the will of both parties, that is, of the EU and the UK, and time will tell whether this will be the case. The following scenario largely depends on the outcome of the negotiations in the coming months. The more flexible the Union is, then the creation of platforms of intergovernmental cooperation will be more probable, one of them might be the creation of a Private International Law Partnership. A tough and firm common stance will in turn make it less probable.

The point of departure for the discussions could be a reminder that, in the light of the Protocol on the status of the UK and Ireland annexed to the Treaty of Lisbon, both interested Member States were given a special status within the field of inter alia the JCCM. Since those Member States have been so far free to pick and choose from contemplated new instruments, the Protocol's regime existing between, first and foremost, the UK and the rest of the EU are comparable to the typical unification of conflict rules with the help of the international treaties. Both have in common the underlying factor of the intention of a sovereign state to be bound by a given legal instrument, the adoption of which it freely assents thereto. It would thus come as no surprise to move away from the unusual mechanism of opt-outs and opt-ins attached to an allegedly 'common' EU policy, to the adoption of a clear and simple international treaty between the Union as a whole and the UK as its close partner in this field.

70. Compare, Article 68(1) of Council Regulation No. 44/2001/EC of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L 12/1 stipulating that the Regulation '*shall, as between the Member States, supersede the Brussels Convention*, except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 TEC' (emphasis added); for a similar provision in the Rome I Regulation, see Article 24 thereof. Of course, the word 'supersede' does not per se mean to 'repeal', nevertheless, having due regard to the context of Article 81 TFEU (ex. Article 65 TEC) as the legal basis for the JCCM as one of the common policies, it seems justified to perceive this word as the Member States' intention to keep the binding force of, for instance, the Brussels Convention only with respect to some particularly defined territories of the 'Member States' at the time of its entry into force as a new legal instrument. The Contracting Parties' intention (here: the will of the Member States in the EU Council) that the matter should be governed by the later treaty (here, respectively, the EU Regulation) instead of the earlier one, is the most important element of a situation governed by Article 59 VCLT; compare, M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill, 2009), p. 726.

There are several arguments which support this reasoning. Firstly, the British-Irish Protocol, as described above, has been perceived as a 'legal irritant' in the body of the EU common policies. Any kind of special rights attached exclusively to one of the members of the community provokes the other parties, who have not been so vested, to question the very sense of their default no-opt-out position. In order to understand the problem, it is enough to merely have a look at the second indent of Article 288 TFEU. According to the provision, a regulation 'shall be directly applicable in *all* Member States.' Its simple juxtaposition with Article 1 and 2 of the Protocol (No. 21) on the position of the UK and Ireland in respect of the Area of Freedom, Security and Justice, which in turn excludes the interested Member States from the adoption and application of any part of the AFSJ acquis (unless they opt in), casts doubt on the internal cohesion within the Treaty itself. Notwithstanding a full understanding and respect for the sovereign rights of the Member States as the 'masters of the Treaties' – according to a famous passage from the *Maastricht* judgment of the German Federal Constitutional Court[71] – such a special status for the UK (not to mention Ireland) would be devastating for EU primary law in the long run.

Secondly, supporting the aforementioned statement, is the current position of Denmark which – as already noted – has been subjected to an inflexible and complete opt-out from Title V Part Three of the TFEU. This status started to have serious consequences soon after the Amsterdam Treaty entered into force in 1999.[72] Hence the phenomenon of the agreements between that Member State and the rest of the EU (that is, the former European Community), only had a limited remit: according to the EC's position, namely, they were admissible in matters where cooperation already existed.[73] Until recently, there might have been an impression that the Danish position could change over time,[74] particularly because of the country's limited size and its close links to neighbouring Germany and other EU Member States. After the referendum held on 3 December 2015, however, it can be concluded that no change is on the horizon; on the contrary, the latest announcements by Kristian Thulesen Dahl, who leads the second biggest political party in Denmark, leaves room for the expectation that another Member State may soon be joining the UK on its way out of the EU.[75] This should make us think about the philosophy underpinning the entire EU PIL: as another similar withdrawal would mean a true end to the JCCM, if not the end of the EU as a whole.

71. Judgment of 12/10/1993, 2 BvR 2134, 2159/92, BVerfGE 89, 155, 190; for a more detailed analysis of the theory of the 'Treaty-masters' see especially, R. Barents, *The Autonomy of Community Law* (Kluwer Law International, 2004), p. 133 et seq.
72. P. Arnt Nielsen, 24 *Zeitschrift für Europäisches Privatrecht* (2016), p. 306.
73. Ibid., p. 307; compare, e.g. the following instruments: Council Decision No. 2005/794/EC of 20 September 2005 on the signing, on behalf of the Community, of the Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters, [2005] OJ L 300/53 and the Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters, [2005] OJ L 300/55; Council Decision No. 2006/325/EC of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2006] OJ L 120/22 and the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2005] OJ L 299/62.
74. P. Arnt Nielsen, 24 *Zeitschrift für Europäisches Privatrecht* (2016), p. 308-309.
75. See C. Kroet, 'Danish People's Party wants EU referendum too', *Politico* (2016), http://www.politico.eu/article/danish-peoples-party-wants-eu-referendum-too/.

Thirdly, as has clearly been proven above, the EU is actually not able to go on any further with the current mechanism of the JCCM. The unification in the field of general conflict of law instruments may be perceived as a (too) great success.[76] The EU is not in the position to even improve the imperfection stemming from their multitude.[77] On the other side of the coin, the repeated cases of enhanced cooperation between some Member States in the field of the international family law, accompanied by the 'vows of chastity' by some of the Member States, pretending to be the guards of their national traditions (allegedly endangered by the pan-European unity), do not augur well for the future of Article 81 TFEU at all. The intergovernmental cooperation, close to the Maastricht model mentioned in the Section 2 of this article, might be regarded as an emergency solution, if the current Area of Security, Freedom and Justice is to fail. Such a scenario may not sound optimistic, but it is certainly realistic.

Fourthly, assuming that Brexit takes place within the two-year period, it is still in the EU's best interest to keep the UK as close as possible to the rest of the EU. Moreover, it may soon be the UK, facing the increasing difficulties after launching the Brexit process pursuant to Article 50(2) TFEU, who will insist on some form of involvement in European matters. A remarkable study of a possible 'Continental Partnership' has shown an interesting perspective of the creation of an international cooperation structure.[78] According to the cited source, this could constitute a wider circle around the EU, without sharing the EU's supranational character, with the membership of all the EU Member States and the UK together with any other countries that wish to participate. For the UK, one might think that a cooperation mechanism in the field of private international law could be attractive, mainly because of its recent position as a cross-border litigation centre. The rest of the EU might also be interested, but of course, everything depends on the future political calculations at the negotiation table. Whatever the evolution in this respect could be, it is fair to raise an argument that without the UK as a partner, the EU loses much in terms of the cultural exchange between the common law and civil law legal traditions.[79] This is a value that we should endeavor to keep.

Establishing a European PIL Partnership with the UK would not be difficult for either party. It is, basically speaking, only a question of good will. In her letter to the President of the European Council, the British Prime Minister revealed her commitment to a kind of a 'a deep and special partnership between the UK and the EU'.[80] The proposed PIL cooperation would keep in line with those expectations and maybe stimulate other initiatives. Each party to the Partnership (the EU as the whole and the UK) could set out legislative proposals. Sitting together, the UK and the rest of the EU could then work on the improvement and development of new PIL instruments; the underlying philosophy could consist in a possibility of an easy transformation of the Regulations into international treaties to be adopted by the EU and the UK, and vice versa. The only difficulty

76. According to a description which seems particularly to fit the current situation, the 'centralization of European private international law in less than two decades after the Treaty of Amsterdam has been dramatic'.; R.A. Brand, 'Implementing the 2005 Hague Convention: The EU Magnet and the US Centrifuge', *Legal Studies Research Pa*per Se*ries: Working Paper* No. 2013-20 (2013), http://ssrn.com/abstract=2288708.
77. Opinions calling for more cohesion between various EU Regulations concerning the private international law are definitely unrealistic in the era of the sharp political crisis; see especially, R. Wagner, 'Do We Need a Rome 0 Regulation?', 61 *Netherlands International Law Review* (2014), p. 225 et seq.
78. J. Pisani-Ferry et al., 'Europe after Brexit: A proposal for a continental partnership', *Bruegel* (2016).
79. B. Hess, 36 *Praxis den Internationalen Privat- und Verfahrensrechts* (2016), p 418.
80. European Council, 'Article 50 Notification letter from the United Kingdom', p. 2.

about it would be the international jurisdiction of the CJEU, which seems to be unacceptable for the UK; in any case, it would not be necessary to force the other partner to accept the preliminary reference procedure, provided that the UK is ready to pay due regard to the interpretations attached to the common provisions by the courts of other Member States.[81]

The above discussed Partnership should not be perceived as a structure competing with the Hague Conference of PIL. From the perspective of international law it is not contrary to either the UK's or the EU's international obligations as members of the Conference, whose Statute, obviously, does not introduce any ban on the Member States and the participating Regional Organizations of Economic Integration as to their competence in the field of the PIL legislation.[82]

As a closing remark, there comes to mind one reflection: it is sometimes better to step back for a moment in order to move on quickly when the time is right. Before forging ahead with any kind of further integration, the EU has to somehow survive not only Brexit but, more generally, the eruption of nationalism within virtually every Member State.[83] Keeping in touch with the United Kingdom and a closer cooperation with that country in the area of the conflict of laws (of course assuming that this is what both parties desire) may help us to attain this objective.

81. It is notable that British legal specialists show a deep mistrust towards the CJEU, basically consisting in a very low assessment of the quality of its judgments and judges; compare, T. Hartley, 'Balance of Competences in the European Union: Private International Law', *HM Government* (2013).
82. Compare, Council Decision No. 2006/719/EC of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law, [2006] OJ L 297/1.
83. Brexit proves that there is a great deal of resentment against transnational law as such, and an unrealistic but vivid nostalgia of the Nation State with complete 'Westphalian' sovereignty; see R. Michaels, 'Does Brexit Spell the Death of Transnational Law?', 17 *German Law Journal* (2016), p. 51 et seq.