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Partnering for democracy: protecting the democratic order in post-Brexit Europe

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Index

Foreword	3
Executive summary	4
(1) Introduction: the case for a democratic partnership	6
(2) A democratic partnership	9
(3) Linkage.....	11
(4) The Copenhagen criteria: democratic conditionality for accession.....	14
(5) Democratic conditionality and other forms of leverage.....	18
(6) Functional cooperation and the European Neighbourhood Policy.....	21
(7) The rule-of-law mechanism	22
(8) Charter of Fundamental Rights of the EU	24
(9) Implementation	26
(10) Conclusions.....	31

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Foreword

In February 2017, while I was a Visiting Fellow at the Institute of Advanced Legal Studies of the University of London, I published with the Elcano Royal Institute a brief Expert Comment titled 'Towards a post-Brexit "partnership for democracy" between the EU and the UK'. In that Expert Comment, in a very succinct way, I analysed the impact of a potential British exit from the EU on the issue of democracy protection and promotion.

When I returned to my home institution, the University of Sheffield, the Faculty of Social Sciences considered that the ideas contained in the Comment were valuable and that it was worth exploring them in more detail. I received a grant for a Strategic Partnership at the Elcano Royal Institute, which kindly accepted hosting me as a Visiting Fellow, while the Institute of Public Goods and Policies of the Spanish National Council for Scientific Research contributed by providing office space and logistic support. The funding was granted by the Social Sciences Partnership, Impact and Knowledge Exchange Team (SSPIKE) of the University of Sheffield in the context of the Knowledge Exchange Impact and Opportunities (KEIO) Scheme, in turn funded by the ESRC IAA.

This Working Paper is the result of the work carried out during the Strategic Partnership. It develops in detail the ideas originally contained, in embryonic form, in the Expert Comment of February 2017 in order to provide a more solid analysis and more elaborate proposals. The main purpose of this Working Paper is to influence the Brexit debate by putting the focus on an aspect which is often forgotten but nonetheless of the utmost importance: the protection and promotion of democracy in Europe.

I am greatly indebted to the Faculty of Social Sciences and the School of Law of the University of Sheffield, as well as to the Elcano Royal Institute and the Institute of Public Goods and Policies, for providing the support necessary to prepare this Working Paper. I am particularly grateful to Carlos Closa and Ignacio Molina. Any mistakes and omissions are the sole responsibility of the author.

Executive summary

The EU has been a key actor in the democratisation of the European continent and in the protection of the culture of human rights in Europe. To do so, the EU has used strategies and tools such as linkage action vis-a-vis third countries, democratic conditionality for accession to the Union and other forms of leverage, functional cooperation with third countries, the creation of the rule-of-law mechanism and the enactment of the Charter of Fundamental Rights of the EU.

As shown in this Working Paper, a potential British exit from the EU might have detrimental effects on the capacity of both the EU and the UK to protect and promote democracy in the continent and beyond. To palliate these detrimental effects, institutionalised forms of cooperation between both parties to protect democracy are proposed, thus creating a 'democratic partnership' which could be open to other democratic European countries. Such forms of partnership are not unprecedented, with the EU-Canada Strategic Partnership Agreement providing an excellent example of this type of cooperation.

The EU-UK democratic partnership can have different levels of ambition. In a less ambitious approach it would consist of a series of soft-law agreements and declarations, together with modest budgetary commitments for activities of democracy promotion. In a more ambitious formulation, it would also count on institutions that facilitate cooperation between the parties. In the most ambitious approach it could be part of a more comprehensive political or economic partnership between the EU and the UK.

A British exit from the EU could translate into a loss of funding for the direct linkage activities of the latter. In parallel, the UK could lose international influence and indirect linkage capacity after Brexit. To prevent this, a budgetary commitment for linkage activities as well as indirect linkage cooperation is proposed in the frame of the democratic partnership.

Democratic conditionality for accession to the Union has been a particularly powerful tool for the democratisation of the European continent. After Brexit, the EU will remain an attractive organisation for third countries, and the prospect of accession will continue to function as a strong incentive for democratisation. However, Brexit might have marginal but negative effects on this incentive if the UK offers authoritarian states stable forms of cooperation. To avoid this, as part of the democratic partnership, both the UK and the EU should commit to uphold democratic and human-rights values in their relations with third countries, especially when they involve a supranational dimension of cooperation. Furthermore, a strong form of partnership with the EU, including institutionalised forms of foreign-policy coordination, could prevent a lenient attitude by the UK towards undemocratic states.

A British exit from the EU could also mean a loss of funding for leverage activities, as well as suboptimal leverage coordination between the EU and the UK. This might affect the efficiency of this form of democracy promotion. To minimise such problems, a funding commitment by the parties for leverage activities is proposed. It is also proposed that, as part of the partnership, the parties have a modicum of coordination of foreign policy, through institutionalised consultation mechanisms, to push a pro-democracy agenda

when possible. Finally, the prospect of membership of the democratic partnership, or of any other form of partnership between the parties, might become for third states an incentive to democratise, thus creating a new, powerful form of leverage.

Britain's exit from the EU should in principle have a less dramatic impact on activities of functional cooperation. Nonetheless, as part of the democratic partnership, the EU and the UK should be open to undertaking joint activities of functional cooperation with third states when joint action and complementary know-how can effectively help raise democratic standards in such countries.

Once out of the EU the UK will have no veto power in the context of the Rule of Law mechanism of Art.7TEU. However, it can effectively afford sanctioned states with diplomatic, political and economic cooperation, thus diminishing the effectiveness of EU action. To avoid this, there should be a commitment of cooperation between the EU and the UK for the preservation of democracy in Member States of the EU, using joint diplomatic action in which the British approach to these countries is complementary to EU sanctions. This cooperation could be institutionalised in bilateral or multilateral forums. Furthermore, a highly institutionalised democratic partnership should have its own rule-of-law mechanism.

After Brexit, British citizens might lose the human-rights protection afforded by the Charter of Fundamental Rights of the EU. However, as part of the democratic partnership, this Charter should continue to apply to action taken as a development of the clauses of the very partnership, as well as in any residual application of EU law in the UK. Furthermore, members of the democratic partnership should be allowed to opt-in the Charter and be bound by it also in their internal law.

The democratic partnership might become the seed of a powerful tool of democracy protection in Europe, thus contributing to the stability of the continent. Ideally, it should be agreed in parallel to the Art.50TEU negotiations about the British exit from the Union. Furthermore, any political or economic Brexit deal between the parties should be conditional to both agreeing to the democratic partnership. Modelled on the EU-Canada Strategic Partnership Agreement, the EU-UK trade and economic deals could include a termination clause in the case of gross violation by any of the parties of human rights or democratic standards.

(1) Introduction: the case for a democratic partnership

The EU is committed to the preservation and maximisation of political values that constitute the very core of modern conceptions of liberal democracy. Article 2 of the Treaty of the EU (TEU) states that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.² The EU has been indeed an extraordinary instrument for the achievement of some of these values on the European continent, making a decisive contribution to the preservation of peace, the promotion of democracy and human rights and the creation of cosmopolitan forms of citizenship

This Working Paper focuses on one of those political values, democracy, with a twofold objective. First, it aims to analyse the risks that a potential British exit from the EU might pose for the activities of democracy protection and promotion of the latter. Secondly, it intends to propose solutions that can minimise such risks by creating what I will call a 'democratic partnership' between the UK and the EU.

By 'democratic partnership' this Working Paper means the creation of institutionalised forms of cooperation between, at least, these two actors, aimed at protecting and promoting democracy and human rights in Europe and beyond. As will be shown in the following pages, the democratic partnership would involve cooperation in a wide range of activities, including *inter alia* direct and indirect linkage action, foreign policy coordination, functional cooperation and human rights. To do so, different options are proposed, ranging from less institutionalised forms of coordination such as soft-law agreements and modest budgetary commitments to more ambitious forms of cooperation, including institution-building.

The case for a democratic partnership between the UK and the EU is indeed solid from the perspective of international and EU law. In the case of the EU, Cardwell has masterfully explained how the treaties of this organisation oblige it to promote democracy even beyond its borders.³ In addition to the cited Art.2TEU, Art.21(1) TEU stipulates that the EU's international action 'shall be guided by the principles which have inspired its own creation'. According to Cardwell, these principles include democracy, the rule of law and human rights, which the Court of Justice has considered a distinctive part of general EU law.⁴ Furthermore, Art.21(2) calls for specific actions at the EU level to safeguard its values, consolidate democracy and to promote an international system based on stronger multilateral cooperation and good global governance. Cardwell considers that this provision, together with Art.3(5) TEU, constitutes the legal basis for the export of EU norms.⁵ Finally, Art.8(1) charges the EU with establishing 'an area of prosperity and good neighbourliness, founded on the values of the Union'. If these provisions contain a clear

² On the commitment to such values, see Peter Kotzian, Michèle Knodt & Sigita Urdze (2011), 'Instruments of the EU's External Democracy Promotion', *Journal of Common Market Studies*, vol. 49, nr 5, p. 995-997.

³ James Paul Cardwell (2017), 'Explaining the EU's Legal Obligation for Democracy Promotion: the Case of the EU-Turkey relationship', *European Papers*, vol. 2, nr 3, p. 864.

⁴ *Ibid*, p. 866.

⁵ *Ibid*, p. 866.

mandate for the Union to promote democracy as part of its external action and neighbouring policy, then their application to the relations with a former member state and new neighbour, such as the UK, are inescapable.

In the case of the UK, the legal case for a democratic partnership is more difficult to establish through its internal law, given the absence of an entrenched, codified constitution containing a mandate about democracy promotion to the British public authorities. However, such basis for the partnership could stem from the trends in international public law. The Charter of the United Nations establishes in its preamble the determination of the signatory states to promote 'social progress and better standards of life in larger freedom', and in its Art.1 the purpose of 'promoting respect for human rights and for fundamental freedoms'. The European Convention of Human Rights, to which the UK is a party, reaffirms in its Preamble the commitments of the UN Charter and reaffirms the belief of the signatory governments in that fundamental freedoms 'are best maintained one the one hand by an effective political democracy and on the other hand by a common understanding and observance of the Human Rights upon which they depend'. The legal commitment of the UK to values of democracy and human rights is thus clear in this legal framework, although the extent to which it should inform the UK's foreign policy and its relations with the EU is less obvious. International law, however, does contain important references to democracy promotion in other instruments. The Vienna Declaration and Programme of Action of 1993 asserts in paragraph 8 of Section 1 the idea that the 'the international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world'. According to Rich, although this is not a binding instrument, the Declaration clearly indicates the direction of international law opinion and the development of international law.⁶ The author also refers to Resolution 1999/57 –'Promotion of the Right to Democracy'– and Resolution 2000/47 – 'Promoting and Consolidating Democracy'– of the UN Commission on Human Rights,⁷ which constituted important milestones in the trend towards a right to democratic governance in international law. The former, in particular, urges 'the continuation and expansion of activities carried out by the United Nations system, other intergovernmental and non-governmental organisations and Member States to promote and consolidate democracy within the framework of international cooperation'. Unlike its primary law for the case of the EU, it would be forced to imply that public international law contains a clear duty for a state like the UK to promote democracy. But the international legal system at least provides for a normative background that makes such democracy-promotion activities desirable.

In any case, neither EU law nor international law establish that democracy promotion must be formalised through a strong, institutionalised form of cooperation like a democratic partnership. But this legal background is an excellent context for the creation of such a form of cooperation. Furthermore, at the political level, it seems that the understanding of the British and EU authorities is in line with the idea of EU-UK

⁶ Roland Rich (2001), 'Bringing democracy into International Law', *The Journal of Democracy*, vol. 12, nr 3, p. 20.

⁷ Rich (2001). *op. cit.*, p. 24.

(cont.)

cooperation for democracy after all. The British White Paper on Brexit insisted on the idea that the UK and the EU would continue to be partners and allies in the promotion of the values that they share, such as ‘respect for human rights and dignity, democracy and the rule of law both within Europe and across the wider world’.⁸ In her Florence speech, Prime Minister, Theresa May, recently emphasised the idea of a partnership with the EU and declared that the UK ‘has always –and will always– stand with its friends and allies’ in the defence of values such as ‘liberty, democracy, human rights and the rule of law’.⁹ This is somewhat mirrored by the position of the EU. Michel Barnier, the Chief EU Negotiator for Brexit, has acknowledged that Brexit negotiations should include the scoping of the future relationship between the UK and the EU, and that such a relationship ‘will go well beyond a trade relationship and will also involve an external, security and defence dimension’.¹⁰

Furthermore, partnerships with a specific view to strengthening democracy are not unknown to the EU. The EU has emphasised cooperation in matters of democracy, for instance, with regards to its Eastern¹¹ and Southern¹² Neighbourhood partnerships. However, unlike most Eastern and Southern partners, the UK is a mature, stable and advanced democracy. Because of that, a partnership with the UK ought not to be focused on promoting democracy in the partner state, but rather on cooperating with the partner state in order to promote democracy in the continent and beyond. Therefore, a democratic partnership between the EU and the UK would resemble more the Strategic Partnership Agreement between the EU and Canada, recently agreed as part of the CETA negotiations. This agreement establishes cooperation between the parties in a wide range of issues, from democracy and the rule of law to sustainable development and combating organised crime. The EU-Canada Strategic Partnership, which inspires many of the proposals of this Working Paper, shows clearly that partnerships with a democratic orientation are possible, feasible, and count on important precedents.

This Working Paper aims to outline what this democratic partnership might look like. To do so, it will analyse a range of democracy promotion and protection activities of the EU, assessing with the aid of academic literature the impact on them of Brexit. As will be shown, in many cases a British exit from the EU might have detrimental effects on the Union’s capacity to protect democracy in the continent and across the globe. The democratic partnership between the EU and the UK is thus simply a tool to palliate these negative effects, but also has the potential to become a complement to existing forms of

⁸ British Government (2017), ‘Policy Paper: The United Kingdom’s exit from and partnership with, the European Union’, 15/VI/2017, <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2>.

⁹ <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>, accessed 15/XI/2017.

¹⁰ http://europa.eu/rapid/press-release_SPEECH-17-3404_en.htm, accessed 15/XI/2017.

¹¹ See Joint Declaration of the Eastern Partnership Summit (Riga, 21-22/V/2015), https://eeas.europa.eu/sites/eeas/files/riga-declaration-220515-final_en.pdf, accessed 15/XI/2017.

¹² See Programming of the European Neighbourhood Instrument (ENI) 2014-2020, Regional South Strategy Paper (2014-2020) and Multiannual Indicative Programme (2014-2017), http://eeas.europa.eu/archives/docs/enp/pdf/financing-the-enp/regional_south_strategy_paper_2014_2020_and_multiannual_indicative_programme_2014_2017_en.pdf, accessed 16/XI/2017.

cooperation on the European continent. The premise is thus that EU-UK joint action is desirable as a means to increase the efficiency of democracy protection. The idea of a democratic partnership should be based on the reciprocal acknowledgement by the EU and the UK of the importance of each other for the maintenance of the democratic order in Europe.

The remainder of this Working Paper will be as follows. After this introduction, the idea and implications of a ‘democratic partnership’ will be explained in more detail. After that, the Working Paper analyses the risks for democracy protection and promotion posed by a potential Brexit and proposes solutions to palliate such risks. The analysis will be undertaken for a number of activities and strategies carried out by the EU: linkage activities, democratic conditionality for accession, other forms of leverage, functional cooperation, the rule-of-law mechanism of the EU and its Charter of Fundamental Rights. Next, the range of possible forms of institutionalisation and implementation of the partnership are discussed. The final section presents some conclusions.

(2) A democratic partnership

As noted above, and as I shall try to show throughout this paper, Brexit can have a detrimental effect on the capacity of both the EU and the UK to protect democracy and human rights in the continent. It is for this reason that measures have to be put in place in order to palliate the negative effects and to strengthen the democratic order in Europe and, when possible, its neighbourhood.

The EU-UK democratic partnership simply consists in the range of possible arrangements agreed by both actors to support their activities of democracy protection and promotion. In this regard, the democratic partnership might crystallise in a number of different settings, depending on the ambition of the parties, as shown in Figure 1. This section analyses such options, before moving in the following sections to the scrutiny of the specific aspects that UK-EU coordination could cover.

Figure 1. Options for a democratic partnership

	Option A: democracy-related non-comprehensive agreements	Option B: comprehensive democratic partnership	Option C: democratic partnership as part of more ambitious form of association
Parties	Bilateral	Bilateral or multilateral	Bilateral or multilateral
Degree of institutionalisation	Low	Medium	High
Aim	Alleviate some detrimental effects of Brexit on democracy protection	Alleviate effects of Brexit and institutionalise cooperation for democracy protection in Europe	Alleviate effects of Brexit and improve democracy protection, complement European Integration

Source: the author.

A minimalist formula for the EU-UK democratic partnership would consist in the inclusion of a number of democracy-related clauses in the agreement about future relations that the EU and the UK are to reach as a result of Brexit. In a very unambitious formulation this might consist of a series of non-comprehensive and unsystematic arrangements and agreements aimed at palliating the effects of Brexit on democracy protection in Europe, without much emphasis on institution-building and implementation mechanisms. It is likely that its effects on democracy protection on our continent would be insufficient, especially if the democratic commitments reached are mere rhetoric. However, such an approach would be better than a total absence of agreements, for three reasons. First, as it would entail a recognition of the duty of the parties to cooperate to protect democracy in the continent, sending a signal to other actors. Secondly, because it can nonetheless include some useful measures. And third, since it could become the seed for a more ambitious type of agreement in the future.

An intermediate approach would consist in the creation of a more complete, systematic bilateral agreement between the EU and the UK institutionalising forms of cooperation intended at protecting democracy after Brexit, creating bilateral institutions and organs and, in the best-case scenario, forms of implementation that could help develop the agreement and apply it more smoothly. The EU-Canada Strategic Partnership Agreement could provide an excellent template for this. This would be an ambitious solution with a real capacity to protect democracy in Europe. It would also set an important precedent in Europe, creating a framework that the parties could later replicate in their agreements with other advanced democracies willing to enter into similar commitments. Alternatively, this more institutionalised form of partnership could be open to accession by other European democracies.

The most ambitious form of the democratic partnership would consist in the creation of a political agreement between the UK and the EU involving forms of strong association, in which democratic aspects are central but not the only ones comprising the partnership. Such agreement could be open to other fully democratic States on the continent and be complementary to other initiatives of European integration such as the EU itself. A good example of this are the proposals by authors such as Pisani-Ferri *et al.* to create a Continental Partnership in Europe.¹³ Succinctly, the proposed Continental Partnership 'would consist in participating in goods, services, capital mobility and some temporary labour mobility as well as in a new system of inter-governmental decision making and enforcement of common rules... This results in a Europe with an inner circle, the EU, with deep and political integration, and an outer circle with less integration'.¹⁴ Ambitious forms of partnership such as the devised by Pisani-Ferri *et al.*, or any other form of intense political cooperation could be complemented by a democratic dimension, including aspects of democracy protection and promotion as part of the partnership. This could become an attractive institutional option for advanced democracies unwilling to accept the level of integration that characterises the EU but willing to establish forms of partnership with other European nations that include democratic concerns as a central aspect.

¹³ Jean Pisani-Ferry, Norbert Röttgen, André Sapir, Paul Tucker, Guntram B. Wolff (2016), 'Europe After Brexit: a proposal for a continental partnership'.

¹⁴ Pisani-Ferry *et al.* (2016), p. 1.

One additional question has to do with the potential overlap between a democratic partnership and the Council of Europe. Since there is already an institution for the protection of human rights and democracy in Europe, the question arises as to why not entrusting it with any democracy-related agreements between the UK and the EU. In fact, there is no reason to exclude the possibility, especially depending on the nature and ambition of the agreements reached. However, there are a number of reasons why entrusting all democracy-promotion functions of the partnership to the Council of Europe might prove difficult. The first is simply that the EU is not, at the moment, a party to that organisation or its instruments, even if its Member States are. Art.6(2) TEU foresees that the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. As argued by Jacqu e, the language of that provision and of Protocol No.8 to the treaty seem to suggest that accession is not just an option, but a mandate.¹⁵ However, accession has not so far taken place, given the rejection by the European Court of Justice of the negotiated accession agreement. Furthermore, the reluctance of important British political players to Council of Europe instruments is well known,¹⁶ which further complicates the feasibility of this option. The second reason is the extended membership of the Council of Europe, which goes beyond the 27 remaining states of the EU plus the UK, and which at the moment includes countries whose democratic credentials are questionable. A third, additional, reason has to do with the potential institutionalisation of the democratic partnership by endowing it with its own organs, or its coupling with other forms of political partnership between the EU and the UK, whose autonomous institutions would render resource to the Council of Europe redundant.

(3) Linkage

Linkage can be defined as the intensity of international interactions between the EU and third countries that take place at the social and economic levels in different areas, from the media and economic exchanges to civil society organisations.¹⁷ In principle, linkage can be deemed to facilitate democratisation through the exposure of the target country to the political and cultural traits of a democracy or, in the case of the EU, a democratic block. As this section shows, the EU and its civil society engage in a number of activities that can be considered forms of linkage with a potentially positive contribution to the democratisation of third countries.

Existing research suggests that the effectiveness of linkages depends on their diversity: the more types of linkage, the more likely they are to shape regime change.¹⁸ However,

¹⁵ Jean-Paul Jacqu e (2011), 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms', *Common Market Law Review*, nr 48, p. 995-1023.

¹⁶ The Independent (2016), 'Theresa May "will campaign to leave the European Convention on Human Rights in 2020 Election"', 29/XII/2016, <http://www.independent.co.uk/news/uk/politics/theresa-may-campaign-leave-european-convention-on-human-rights-2020-general-election-brexit-a7499951.html>, accessed 15/XI/2017.

¹⁷ Peter Burnell & Oliver Schlumberger (2010), 'Promoting democracy – promoting autocracy? International politics and national political regimes', *Contemporary Politics*, vol. 16, nr 1, p. 5.

¹⁸ Gwendolyn Sasse (2013), 'Linkages and the promotion of democracy: the EU's eastern neighbourhood', (cont.)

two main types of linkage can be distinguished: direct support and indirect democracy promotion.

- a) Direct support consists in the transfer of money or other resources to civil society organisations that are essential for democratisation in a country, and its effectiveness depends on the intensity of such support.¹⁹ A good example of direct support is the European Endowment for Democracy (EED). Launched in 2012, with the Briton Catherine Ashton as High Representative of the Union for Foreign Affairs and Security Policy, the EED provides support to local actors and grass-roots pro-democratic forces working in countries in the EU's neighbouring areas, especially Eastern Europe and the MENA region. The EED is funded by the EU and some of its Member States, including the UK. Another prominent example is the European Instrument for Democracy and Human Rights (EIDHR). Funded with €1,332,752,000 for 2014-2020, the EIDHR channels into non-EU civil society organisations direct funding aimed at supporting democratisation. It allows the EU to engage in 'positive, express democracy promotion in a third State without the permission of the host government'.²⁰
- b) Indirect democracy promotion has to do with fostering the socio-economic pre-requisites of democracy, such as economic development, education and contact with a democratic block such as the EU, on a long-term basis.²¹ Lavenex & Schimmelfennig provide examples of how such pre-requisites can be promoted: economic development can be fostered by increasing trade relations, investment and development aid; education can be promoted through a variety of strategies, such as the training of teachers, building and funding educational institutions, funding educational programmes, etc; and contact includes, *inter alia*, a range of activities, such as tourism, study-abroad programmes and media exposure.²² Levitsky & Way note that colonial legacies are often considered a form of linkage.²³ In this regard, it is worth underlining the strong linkage power of the UK vis-a-vis its former colonies, and also its capacity of leverage over the governments of such countries. Furthermore, interaction between civil society groups can be institutionalised, giving rise to hybrid form of linkage. For instance, the Africa-EU strategic partnership foresees in paragraphs 106-110 the facilitation of 'people-to-people contacts' and the promotion of 'twinning arrangements in relevant sectors' of civil society.

Given that direct linkage often materialises in the awarding of money or other economically measurable resources to democratic actors, the effects of Brexit will be in this regard relatively easy to measure. As the UK is a net contributor to the EU, Brexit

Democratization, vol. 20, nr 4, p. 580.

¹⁹ Sandra Lavenex & Frank Schimmelfennig (2011), 'EU democracy promotion in the neighbourhood: from leverage to governance?', *Democratization*, vol. 18, nr 4, p. 891.

²⁰ Cardwell (2017), *op. cit.*, p. 877.

²¹ Lavenex & Schimmelfennig (2011), *op. cit.*, p. 891.

²² *Ibid*, p. 891.

²³ Steven Levitsky & Lucan A. Way (2005), 'International Linkage and Democratization', *Journal of Democracy*, vol. 16, nr 3, p. 23.

might have a negative effect on the EU budget allocated to direct-linkage activities. For that reason, as a first proposal in this Working Paper, the democratic partnership should establish compensatory direct linkage funding, so that a potential British exit from the Union does not have a negative impact for the democratic forces currently supported by the latter. To do so, parties to the democratic partnership should commit to a certain share of their GDP devoted to direct-linkage activities. The contribution of the UK to this linkage fund should be at least the same as the proportion of its current contribution to the EU budget that is allocated to direct-linkage activities. In exchange, the UK could demand that the EU commits to maintaining or increasing its current contribution to linkage activities.

In order to manage the funding, the parties have at their disposal a wide range of options, depending on the extent to which they wish to institutionalise their cooperation. The parties could commit to a certain share of their GDP devoted to linkage activities, but follow their own preferences through autonomous and uncoordinated linkage strategies. Lack of coordination might, however, result in the loss of effectiveness of the linkage action. Alternatively, the funding could simply be channelled into existing organisations such as the European Endowment for Democracy, of which the EU, the UK and other Member States are already important funders. Another possibility would be to allow the UK, once outside the EU, to opt-in for certain policies and schemes of the EU in matters related to linkage activities and democracy promotion. A final option would be to let autonomous organs of the partnership manage and invest the funding in activities decided by the parties, further institutionalising the cooperation between the parties and endowing it with an autonomous budget.

Unlike those of direct linkage, the effects of indirect linkage are diffuse and difficult to detect and measure.²⁴ This renders particularly complex the assessment of the consequences of Brexit in this aspect, as well as the proposal of solutions. Brexit can be innocuous for some forms of linkage, but negative for others. Solutions to such negative effects will have to be designed on an ad-hoc basis and, given space constraints, this Working Paper can only make some preliminary proposals. It is unlikely that Brexit will interrupt any existing links between British civil society actors and their counterparts in authoritarian and semi-authoritarian regimes. However, such links may be slightly less attractive if British civil society actors –such as NGOs or associations– no longer have access to the supranational arena provided by the EU. Tourism and migration are important forms of linkage.²⁵ While it is unlikely that Brexit will strongly discontinue tourism to the UK, it is very likely that visa-free agreements between the EU and third countries will not apply to the UK, with detrimental effects on linkage. However, a close cooperation in the form of partnership between the UK and the EU could allow the former to opt-in to such visa-free agreements. The British government has recently also threatened with curbing the number of foreign students entering the country. However, the participation of the UK in the European Higher Education Area could be made conditional to participation in programmes that allow students from third countries to benefit from studying in European countries, including the UK. Finally, forms of

²⁴ Levitsky & Way (2005), *op. cit.*, p. 25.

²⁵ Sasse (2013), *op. cit.*, p. 555.

cooperation ought to be reached that allow the UK participate in programmes of the EU aimed at other forms of linkage, *inter alia* training of teachers or development aid.

(4) The Copenhagen criteria: democratic conditionality for accession

Democratic conditionality for accession to the EU has been defined as the most successful form of leverage undertaken by this supranational organisation.²⁶ In democracy promotion literature, leverage is defined as the 'top-down inducement of political elites towards democratic reforms through political conditionality',²⁷ a model that for the EU became dominant in the 1990s.²⁸ Similarly, political conditionality has been defined as the situation in which the EU 'sets the adoption of democratic rules and practices as conditions that the target countries have to fulfil in order to receive rewards such as financial assistance, some kind of institutional association or –ultimately– membership'.²⁹

Democratic conditionality for accession to the Union was formalised in the Copenhagen criteria in 1993. The Copenhagen criteria establish three conditions for membership of the EU of a political, legal and economic nature. The economic conditions are related to the existence of a functioning market economy, while the legal conditions consist in the acceptance of the *acquis communautaire*. The political conditions deal with the existence in the candidate state of a functional democracy, respectful of the rule of law and fundamental human rights, and protective of minorities. These political conditions are a strong form of democratic conditionality for accession. In fact, although such conditions were only formalised in the 1990s, they were implicit in the practice of the European Communities since their creation.³⁰

Literature suggests that the success of leverage strategies of democracy promotion by the EU has been tied basically to a membership prospect.³¹ More importantly, available empirical evidence suggests that this practice has been efficient in its objective of promoting democracy in Europe. In their panel study of 36 countries, Schimmelfennig & Scholtz show that when the EU offered a membership prospect in return for political reforms this had strong and robust effects on democratisation, even controlling for factors such as socioeconomic development or modernisation.³² Democratic conditionality has been effective in every enlargement in the past few decades, whether for Southern European or Eastern European countries. The 2004 enlargement provided a particularly

²⁶ Paul Cardwell (2011), 'Mapping out democracy promotion in the EU's external relations', *European Foreign Affairs Review*, vol. 16, p. 31.

²⁷ Lavenex & Schimmelfennig (2011), *op. cit.*, p. 885.

²⁸ *Ibid*, p. 886.

²⁹ Frank Schimmelfennig & Hanno Scholtz (2008), 'EU democracy promotion in the European neighborhood. Political conditionality, economic development and transnational exchange', *European Union Politics*, vol. 9, nr 2, p. 190.

³⁰ Carlos Closa Montero, Stefano Palestini Céspedes & Pablo Castillo Ortiz (2016), 'Regional organisations and mechanisms for democracy protection in Latin America, the Caribbean and the European Union', EU-LAC Foundation, Germany, p. 42.

³¹ Burnell & Schlumberger (2010), *op. cit.*, p. 6.

³² Schimmelfennig & Scholtz (2008), *op. cit.*

(cont.)

valuable example of the EU's capacity to foster democratisation in exchange for membership. According to Richard Youngs, 'The EU's 2004 enlargement represented a successful case of democracy support and also brought into the union Central and Eastern European states committed to enhancing the EU's role in democratization. Many analysts have examined the trajectory of EU policy in central and Eastern Europe during the 1990s and claim it as one of the most influential cases ever of democracy promotion'.³³

Schimmelfennig & Scholtz develop a rational choice model to explain the effectiveness of democratic conditionality.³⁴ In abiding with the conditions set by the EU, target governments will suffer a loss of autonomy, so the benefits and expected rewards to be provided by the EU must outweigh these and any other costs. Precisely for this reason, the effectiveness of democratic conditionality and its capacity to foster democratisation will increase with the size of incentives and with the credibility of the incentives. These two elements, size and credibility of incentives, might be affected by an eventual British exit from the EU.

- a) The size of the incentive part of the appeal of the EU relies on its role as the structuring organisation of the European order. For third countries this means that democratisation and respect for human rights are *sine qua non* requirements for the acquisition of an optimal diplomatic status on the European continent. These are also conditions for the enjoyment of a number of advantages that derive from the intense form of cooperation that the EU offers. For governments of European third countries, this has translated into a sizeable incentive to aim for accession, even if it is at the 'cost' of making decided steps towards democratisation. Brexit will have only marginal effects on the size of the incentive for third countries to join the EU, although these might be negative. The effects of Brexit will be marginal because after the UK eventually leaves the EU, the latter will still be an attractive organisation for other European states, whose appetite for accession is unlikely to disappear. At the same time, however, Brexit, and especially a post-Brexit UK that has a diplomatic approach uncommitted to human rights, can weaken the policy of democracy promotion of the EU by sending a wrong message to state actors. Some countries could regard the new situation as an opportunity to establish solid diplomatic, economic and political ties with an important power in Europe, the UK, without having to abide with ambitious standards of democracy, human rights and the rule of law. This, coupled with the existence of countries such as Russia, willing to promote such regimes, would pose a threat to the values that lie at the core of the process of European integration.
- b) For the incentive to be credible, there needs to be a real prospect of accession to the EU for the target state. Lacking such a prospect, the incentive for democratisation simply disappears. In this regard, it is worth noting that in the last

³³ Richard Youngs (2010), 'Introduction', in Richard Youngs (Ed.), *The European Union and Democracy Promotion: A Critical Global Assessment*, The Johns Hopkins University Press, p. 1.

³⁴ Schimmelfennig & Scholtz (2008), *op. cit.*, p. 190-191.

(cont.)

years actors at the European level seem to have lost the appetite for enlargement.³⁵ Brexit can still have an impact on this aspect. The UK had traditionally been an advocate for enlargement. This meant, for third countries willing to join the EU, that the incentive to democratise was more credible, as one of the most important powers in the EU would support membership. However, in the past few years the position of the UK had changed. From 2013, and in line with the general toughening of its approach to European integration, the British government has had a more sceptical attitude towards the possibility of further enlargement of the Union.³⁶ In case of a remain vote, this would have meant the potential transformation of the UK from a facilitator to a veto actor in any new accession process. With that background in mind, Brexit could have, in this particular regard, an unintended positive effect on democratisation: by removing from the block a serious veto point, the prospects for accession might again become more realistic for certain candidate countries, and therefore the incentives for democratisation might grow.

Figure 2 shows the scenarios to which the combined effects of Brexit in both dimensions –credibility and size of the incentive– can give rise.

Figure 2. Scenarios in relation to EU enlargement

	UK remains in the EU	UK leaves and does not cooperate with EU	UK leaves but cooperates with the EU
UK supports enlargement	1: facilitator	3: external competitor	4: partner
UK vetoes enlargement	2: veto point		

Source: the author.

As can be seen, Brexit would preclude scenario number 1, in which the UK remains in the EU supporting enlargement. This scenario would be the optimal one for democracy promotion, because it would maximise the size and the credibility of the incentive to democratise for candidate States. However, Brexit would also preclude scenario 2, in which the UK becomes a veto point for further enlargement, therefore minimising the credibility of the incentive to democratise. What remains in the event of Brexit are scenarios 3 and 4, in which the British position on enlargement becomes largely irrelevant because the country is a non-Member State, with no veto rights on accession of candidate countries. However, as such a non-Member State the UK would have more elbow room to pursue its own foreign-policy agenda. As explained above, by potentially establishing strong economic ties and even forms of partnership with authoritarian European countries the UK would likely hinder the efforts of the EU to preserve and promote the democratic order in the continent. What matters is therefore to find forms of

³⁵ Young, Richards (2010), op. cit., p. 2.

³⁶ Euractiv (2013), 'UK no longer advocates for EU enlargement', 21/XII/2013, <https://www.euractiv.com/section/enlargement/news/uk-no-longer-advocates-for-eu-enlargement/>, accessed 15/XI/2017.

cooperation between the UK and the EU that prevent this possibility from materialising. In other terms, in the event of Brexit, what matters is to avoid scenario number 3 (competitor) and materialise scenario number 4 (partner).

The precedent of the European Free Trade Association (EFTA) shows in a very graphic way the natural tendency of a power such as the UK to create its own network of alliances. However, given the current degree of consolidation of the EU and the number of European countries that are now Members of the organisation, the creation of regional alternatives to the EU seems scarcely viable. Still, a very pessimistic scenario would be one in which the UK opted for promoting forms of economic or political association distinct from the EU, especially if these do not include a clear commitment to democratic values and human rights. At the very least, the signing of Free Trade Agreements with scarcely democratic countries might be part of the post-Brexit foreign policy of the UK, in a context in which it will have less bargaining power to demand democratic reforms in exchange for fluid trade relationships.

A UK closely associated to the EU through special forms of partnership would minimise this risk. At the very least, the democratic partnership should comprise a commitment that democratic considerations will be part of the foreign policy agendas of the parties, which would coordinate for these purposes. A precedent can be found in the Strategic Partnership Agreement between the EU and Canada. In its preamble, the parties reaffirm their 'strong attachment to democratic principles and human rights as laid down in the Universal Declaration of Human Rights'. And in Art.2 of the Agreement, the parties affirm that respect for human rights and democracy underpins their national and international policies, that they shall endeavour to cooperate on such rights and principles in their own policies and encourage other states to adhere to human rights instruments. Such a commitment to the promotion of democracy can also be found in other strategic partnerships signed by the EU. For instance, the Africa-EU Strategic Partnership establishes in paragraph 27 the promotion of democratic governance and human rights as one of its central features; paragraph 1 of the EU-Brazil Strategic Partnership Joint Action Plan foresees the promotion of democracy and human rights, and a commitment to promoting those values at the international level; and section 2 of the EU-India Strategic Partnership Action Plan commits the parties to looking together for synergies to promote human rights and democracy.

These important precedents could be used as a basis for more concrete commitments in the case of the post-Brexit EU-UK relationship. With regards to the problem scrutinised in this section, the democratic partnership between the EU and the UK ought to include a commitment to democracy in foreign policy, which would comprise the supranational dimension. Of course, the parties will be able to pursue their own foreign policy and establish relations with authoritarian states, as is the case with all democratic countries. A good example of this are the ongoing discussions about the EU-China partnership. But the comment should specifically provide for a reciprocal assurance that no proposals for significant political or economic integration will be pushed forward with European third states that do not comply with sufficiently high democratic standards, in order to consolidate the continent as a space of democracy. This would create duties not only for the UK, but also the EU, that would be committed to preserving in the future its Copenhagen criteria by virtue of the democratic partnership. More generally, this

provision ought to include a general commitment that the parties will seek to promote democracy in their cooperation agreements with third countries, even beyond the European continent, especially when these are authoritarian (see the following section). In fact, a UK outside the EU but solidly linked to it in the economic and political arenas – through initiatives like a democratic partnership or more intense forms of partnership – would imply a smaller incentive to pursue the abandonment of democracy promotion as a guiding principle in its relations with third states.

A good model for the follow up and implementation of these commitments can be found, again, in the Strategic Partnership Agreement between the EU and Canada, especially in its Art.26 and Art.27. Art.26 commits the parties to political dialogue and consultation, while Art.27 specifies a range of consultation mechanisms including yearly summits at the leader level, meetings at the Foreign-Minister level, a Joint Ministerial Committee and a Joint Cooperation Committee. Similar arrangements exist in the context of other partnerships, such as the EU-Africa Strategic Partnership or the EU-South Africa Strategic Partnership Agreement. These consultation mechanisms –which, as will be shown, can also be useful to deal with other aspects of the democratic partnership– will be further explained below in section 9 on the implementation of the agreements.

(5) Democratic conditionality and other forms of leverage

Democratic conditionality for accession is the most important form of leverage exercised by the EU, but it is not the only one. In the literature on political science, leverage is deemed to comprise a wide range of activities, including ‘political conditionality and punitive sanctions, diplomatic pressure, and military intervention’.³⁷ The EU uses many of these forms of leverage, including democratic conditionality with third states in agreements that are unrelated to membership. Koch identifies the suspension of aid to Uganda in 1977 as an early example of conditionality in the practice of the European Communities.³⁸ However, there seems to be consensus that until the 1990s, with the end of the Cold War, the EU’s external policy had remained largely apolitical, and it is only with the Treaty of Maastricht that ‘the EU declared the development and consolidation of democracy as a goal of development cooperation (Art.130u) and its Common Foreign and Security Policy (Art.J.1), and the principle of democracy was introduced in all its external trade and aid agreements’.³⁹

There are many examples, often intertwined, of leverage strategies and democratic conditionality in the EU’s external action. According to the ‘suspension mechanism’, created in 1995 and integrated in agreements with third parties, respect for human rights and democratic principles form part of such agreements, the EU having made use of it on a number of occasions.⁴⁰ Another good example is that of the so-called ‘restrictive measures’, foreign policy sanctions imposed on certain States when democratic

³⁷ Levitsky & Way (2005), *op. cit.*, p. 21.

³⁸ Svea Koch (2015), ‘A typology of political conditionality beyond aid: conceptual horizons based on lessons from the European Union’, *World Development*, nr. 77, p. 100.

³⁹ Lavenex & Schimmelfennig (2011), *op. cit.*, p. 886; and Koch (2015), *op. cit.*, p. 100.

⁴⁰ Koch (2015), *op. cit.*, p. 100.

(cont.)

principles are violated.⁴¹ And a very prominent instance is that of the policy followed by the EU in trade agreements, in which ‘the violation of human rights standards leads to the withdrawal of trade preferences, whereas adherence and compliance leads to more beneficial trade conditions’.⁴²

EU budget support for third countries is in this regard particularly worth analysing, precisely because it combines leverage with other forms of democracy promotion. EU budget support provides funding to third countries aimed at development policies and reforms, addressing challenges such as the promotion of human rights and democracy, sector reform, state building or minimisation of aid dependency.⁴³ It totalled €1.59 billion in 2015,⁴⁴ the most recent figure available at the time of writing. Budget support has an important aspect of indirect linkage (see above) in that it aims to foster development, which is often seen as a positive factor in democratisation. It has an aspect that overlaps with functional cooperation (see below) in that it is aimed at sector reforms and very often addressed at countries that are part of European Neighbouring Policy Instruments (almost 30% of the total budget in 2015 was directed at these countries).⁴⁵ And finally, it has an element of leverage and democratic conditionality, in that ‘adherence by the beneficiary governments to the fundamental values of human rights, democracy and the rule of law is a major consideration in the Commission’s decision to grant budget support’.⁴⁶ Budget support can be considered a blend of democracy promotion strategies and shows an imaginative approach to democratic conditionality.

The literature has often been sceptical about the efficiency and success of leverage strategies outside accession candidacies.⁴⁷ However, as shown by the examples above, democratic conditionality continues to be solidly anchored in the policies of the EU, integrated in a number of practices and instruments, and Brexit can have an impact on them. In this regard, a British exit from the EU is a challenge in that it can endanger leverage strategies but it is also an opportunity in order to improve their effectiveness.

The success of leverage often depends on the capacity of democratic powers to override diverging interests in order to display a coordinated and coherent leverage strategy. As put by Levitsky & Way: ‘Leverage may be limited, and regimes less vulnerable to external democratizing pressure, in countries where Western governments have important economic or security interests at stake, as in much of the Middle East and East Asia. In these regions, Western powers are less likely to maintain a consensus behind demands for political reform, thereby limiting the effectiveness of those demands’.⁴⁸ A British exit from the EU might give rise to such a situation, unless coordinated strategies between

⁴¹ *Ibid*, p. 100.

⁴² *Ibid*, p. 100.

⁴³ https://ec.europa.eu/europeaid/eubudgetsupport_en, accessed 5/X/2017.

⁴⁴ *Ibid*.

⁴⁵ European Commission (2016), ‘Budget Support Annual Report 2016’, p. 4.

⁴⁶ https://ec.europa.eu/europeaid/eubudgetsupport_en, accessed 5/X/2017.

⁴⁷ Burnell & Schlumberger (2010), *op. cit.*, p. 6.

⁴⁸ Levitsky & Way (2005) *op. cit.*, p. 21.

(cont.)

the UK and the EU are implemented. After Brexit, the UK will have a greater incentive to reach trade and other agreements with third states but will simultaneously be in a weaker position to request from potential partners democratic reforms in exchange for the agreements.⁴⁹ In this same regard, the negotiating position of the EU will be weakened after Brexit, especially if the UK offers authoritarian countries agreements in the absence of demands for democratic reform. As suggested by the literature in the field, a lack of consistency in the approach of the democratic powers only weakens leverage strategies and benefits authoritarian regimes.

The UK and the EU can, however, seek strategies to palliate these problems. To start with, a very simple action would be the commitment to devote to leverage strategies an amount of resources similar or superior to those currently channelled through the EU. Similarly to the budget for linkage activities, the idea is to ensure that Brexit does not have a detrimental effect on the leverage strategies currently in place that involve the direct use of economic resources. And also, similarly to the budget for linkage activities, such resources could be managed separately by the parties, or jointly by the EU and the UK in the context of a more institutionalised democratic partnership or in the context of more ambitious forms of cooperation like political partnerships or other forms of association. In the latter cases, the budget devoted to linkage and leverage activities would become a way to endow the potential partnership with a modest but significant financial autonomy.

A second proposal has to do with issuing a formal commitment by both the EU and the UK that democracy promotion will continue to be a guiding principle in their external action, explained in the section above, that would display its effects also in this field. Again, such a commitment would follow the precedent of Art.2 of the EU-Canada Strategic Partnership Agreement. Strong forms of enforcement would be difficult to achieve, as they would involve a loss of autonomy and sovereignty difficult to accept by the parties. However, despite this, the commitment would still be significant in that it would send a clear signal to authoritarian states in the continent and beyond, and in that it would create a useful precedent for subsequent diplomatic relations between the UK and the EU. If the democratic partnership were to be further institutionalised, or in the event of the creation of a more ambitious form of political or economic partnership, the institutionalised consultation mechanism between the parties (following the model of Arts.26 and 27 of the EU-Canada Strategic Partnership Agreement) would be a natural forum for the implementation of cooperation in democracy promotion, including the possibility of democratic conditionality coordination in relations and agreements with third countries (see previous section and section 9).

Finally, paradoxically, the creation of a post-Brexit democratic partnership or a more ambitious form of partnership might constitute in itself a useful tool of leverage, against the background of criticisms about the alleged lack of effectiveness of leverage strategies outside the context of accession to the EU. Prospective membership of the democratic partnership or a more ambitious form of political association can be used as an incentive to democratise for third countries. This would be particularly useful for countries for which

⁴⁹ Pablo José Castillo Ortiz (2017), 'Towards a post-Brexit "partnership for democracy" between the EU and the UK', Elcano Royal Institute Expert Comment, nr 6/2017.

accession to the EU, for different reasons, does not seem to be a realistic possibility. Accession to the EU, and the correlated incentive to democratise, would of course still be on the agenda for many countries. But when that is not the case, given the existence of vetoes by EU Member States or insufficient fulfilment of other accession requirements, membership of a democratic partnership or other form of partnership that are subject to democratic conditionality can provide credible and significant incentives.

(6) Functional cooperation and the European Neighbourhood Policy

Functional cooperation can be considered as the newest strategy of democracy promotion of the EU, consisting in the implementation of new association policies below the threshold of membership, in which democratic governance norms are promoted through third-country approximation to EU sectoral policies.⁵⁰ The main instrument through which functional cooperation as a tool of democracy promotion is being operated by the EU is the European Neighbourhood Policy (ENP). Following Kelley, the ENP is a framework for cooperation between the EU and its Southern-Mediterranean and Eastern-European neighbours, whose goal is the promotion of political and security-related reforms through a 'privileged relationship' based on common values such as democracy and human rights.⁵¹ Barbé & Johansson-Nogués have suggested that the ENP represents the ambition of the EU to be a positive force in international relations, arguing that the policy is well balanced in its attention to interests and values and that it is soft in its coercion elements but generous in the offering of material assistance to partner countries.⁵²

Lavenex & Schimmelfennig put forward a number of hypothesis on the efficiency of functional cooperation and governance: (1) the more the democratic governance elements are legally specified in the EU acquis, the more likely it is that these norms will be effectively transferred to the third country; (2) the more the interactions between EU actors and sectoral counterparts are institutionalised in trans-governmental networks, the more likely it is that the democratic governance norms will be effectively transferred to the third country; (3) the more EU activities are supported by other international actors, the more likely it is that these norms will be effectively transferred to the third country; (4) the higher the expected adoption costs of the third country are and the less sectoral interdependence favours the EU, the less likely it is for the rule transfer to be successful; and (5) the effectiveness of democratic governance promotion increases with the accessibility and autonomy of the administration of the target country.⁵³

Brexit is not very likely to have a significant impact on any of these points, and therefore it is expected that the capacity of the EU to promote democratisation through functional cooperation will remain unchanged in the post-Brexit period. However, the foreign policy

⁵⁰ Lavenex & Schimmelfennig (2011), *op. cit.*, p. 887.

⁵¹ Judith Kelley (2006), 'New wine in old wineskins: promoting political reforms through the new European Neighbourhood Policy', *Journal of Common Market Studies*, vol. 44, nr 1, p. 30.

⁵² Esther Barbé & Elisabeth Johansson-Nogués (2008), 'The EU as a modest "force for good": the European Neighbourhood Policy', *International Affairs*, vol. 84, vol. 1, p. 81.

⁵³ Lavenex & Schimmelfennig (2011), *op. cit.*, p. 896-897.

(cont.)

of the UK might have a marginal effect on one of the points mentioned above: the support by other international actors for EU activities. This is even more relevant in light of the notion of interdependence, which in this context posits that the effectiveness of functional cooperation also depends on the conviction of the target party that 'sector-specific problems can be solved in collaboration with the EU rather than domestically or in collaboration with other external partners'.⁵⁴ Indeed, according to the idea of interdependence, 'the impact of [EU] democratic governance promotion is constrained when the target country is facing strong interdependence with another third country'.⁵⁵

The corollary of this refers to the need in the post-Brexit period to ensure that the UK has a supportive attitude vis-a-vis the activities of functional cooperation of the EU. This translates in both negative and positive dimensions. The negative dimension refers to the need that the UK abstains from offering alternative forms of functional cooperation that are less demanding from the viewpoint of democratic standards, and can be designed as a soft-law commitment. The positive dimension deals with the potential cooperation between the EU and the UK in functional cooperation activities with third countries as part of the democratic partnership, with the UK contributing with its sector-specific know-how and with leverage towards governments and countries with which it may have historical ties, good diplomatic relations or a particular interdependence.

(7) The rule-of-law mechanism

As noted above, the EU requires respect for the rule of law and democracy as a condition for accession. But this condition would be meaningless if, once inside the EU, a Member State can easily backslide into undemocratic practices or authoritarian rule. To prevent this, the treaties of the EU have foreseen the so called 'rule-of-law mechanism'. Included in Art.7 TEU, this mechanism allows the Union to identify practices in Member States as violations of the rule of law, and to impose sanctions to the state in question. The sanctions can consist in the suspension of the Member State of certain rights deriving from the application of the treaties, including voting rights in the Council.

The rule-of-law mechanism has been justified under many normative approaches, but the 'all affected principle' is probably that which better captures the nature of the mechanism and of the type of sanctions imposed. The 'all-affected principle' posits that the erosion of democratic governance in one Member State 'will affect the quality of EU decision-making in a normative sense: the state will participate in decision-making in EU institutions and, because of this, at least indirectly participate in governing the lives of *all* the citizens of Europe. On the other hand, it could project the effects of its decisions beyond its own borders'.⁵⁶ The suspension of membership rights, including voting rights in the Council, palliates the potential impact on citizens of other Member States of the democratic backsliding in the sanctioned country. So far, however, the rule-of-law

⁵⁴ Tina Freyburg, Sandra Lavenex, Frank Schimmelfennig, Tatiana Skripk & Anne Wetzel (2011), 'Democracy promotion through functional cooperation? The case of the European Neighborhood Policy', *Democratization*, vol. 18, nr 4, p. 1031.

⁵⁵ *Ibid*, p. 1032.

⁵⁶ Carlos Closa (2016), 'Reinforcing EU monitoring of the rule of law: normative arguments, institutional proposals and the procedural limitations', in Carlos Closa & Dmitry Kochenov (Eds.), *Reinforcing the Rule of Law Oversight in the European Union*, Cambridge University Press, p. 18.

mechanism has been of limited usefulness. The sanctioning mechanisms have never been fully effected, despite threats to different Member States for which it could have been used. Part of the reason might lie in the complexity of the mechanism and the abundance of veto points that it includes.

The impact of Brexit on the rule-of-law mechanism can be better captured by understanding its functioning and, in particular, the functioning of the different veto points at different moments of its application. Art.7 TEU (together with Art.354 TFEU) provides for a complex mechanism in different phases in order to apply sanctions against a state in breach of the rule of law. Each phase has different requirements in terms of voting thresholds in different institutions. The first phase is aimed at identifying a clear risk of a serious breach of the rule of law in a Member State and requires a reasoned proposal by one third of Member States, by the European Parliament or the European Commission that is approved by the Council by four fifths of its members with the consent of the European Parliament. The second phase is aimed at certifying an actual breach of the rule of law and requires unanimity in the European Council acting on a proposal of one third of Member States or the Commission, and after obtaining the consent of the European Parliament. The third phase is aimed at establishing sanctions once the actual breach has been confirmed in accordance with the procedure above and requires a qualified majority of votes in the Council.

Therefore, the impact of Brexit on the Art.7 mechanism depends on the interplay between the different voting thresholds and the position of British actors in each case. For instance, with regards to the current rule-of-law crises within the EU, Britain has been deemed to have a softer position than other large Member States, at least in the case of Poland,⁵⁷ with the British Conservative Party teaming up with Poland's ruling Law and Justice Party in the same group of the European Parliament.

Figure 3. Scenarios in relation to the rule-of-law mechanism

	Britain supports sanctions	Britain opposes sanctions
Britain remains in the EU	1: internal support, facilitator	2: veto actor
Britain leaves the EU	3: external support, partner	4: boycott actor

Figure 3 above shows all the different scenarios that result from considering the position of Britain about a Member State violating the rule of law and British membership in the EU. In scenario 1 Britain remains in the EU and supports sanctions under Art.7. This is a positive scenario for the application of the rule-of-law mechanism, because the UK not only does not veto the application of Art.7 but also potentially uses its diplomatic power to promote the sanctions. Conversely, scenario 2 is a very negative one for the use of Art.7, because given its diplomatic power and, especially, the requirement of unanimity to certify the breach of the rule of law, the UK has the capacity to block the use of the mechanism. In any case, with Brexit, scenarios 1 and 2 would no longer apply, so the analysis must focus on scenarios 3 and 4. In scenario 4, the UK cannot veto the

⁵⁷ <https://www.ft.com/content/a849303b-fc9e-3c81-9c0c-0a8b15117672>, accessed 15/XI/2017.

application of Art.7 because it is no longer a Member State. But the country could instead have a collaborative attitude towards the Member State which violates the rule of law, avoiding any type of diplomatic pressure or sanctions. In the worst-case scenario, if the UK had the intention of articulating a continental network of alliances as an alternative to the EU, it could offer the country violating the rule of law access to it, ignoring the lack of observation of the democratic standards by the country. This would undermine the EU's efforts. Conversely, scenario 3 is positive for democracy protection in Europe, because it facilitates coordinated action by the UK and the EU to protect the rule of law in the country in which it is endangered, with the UK taking complementary diplomatic action to that used by the EU of Art.7. In fact, there is a positive externality in this scenario. Out of the EU, the UK will be able to exercise political and diplomatic action autonomously. This can provide the UK with more agility when tackling the rule-of-law crisis in the country at stake, in contexts in which the constraints of Art.7 procedures (including the requirements of supermajorities or consensus) might render action by the EU slower, more difficult or impossible.

In the case of Brexit, therefore, the challenge is how to make sure that scenario 4 does not take place and instead move to scenario 3. In other terms, how to guarantee that the UK supports the EU in its protection of the rule of law in member States. There is a good precedent of this in comparative regional integration in the case of Mercosur. The Ushuaia Protocol, which regulates the democratic clause of this supranational organisation, was signed not only by member states but also by associate countries like Chile and Bolivia. In the case of the EU-UK relationship, a good starting point would be the issuing of a formal declaration committing the UK to diplomatically supporting the efforts of the EU to preserve the democratic order in Member States. Again, this would be in the best-case scenario a soft-law statement, but it would create a positive diplomatic background. In the case of further institutionalisation of the democratic partnership, these issues could be dealt with in organs of the partnership, thus creating a stable bilateral or multilateral forum of dialogue and cooperation to address rule of law crises in EU countries, following the model of the consultations mechanisms of the EU-Canada Strategic Partnership Agreement. Furthermore, such an agreement provides in Art.28.4 for a mechanism of urgent consultations at the request of either party in the case of a third country that violates the democratic and human rights principles listed in Art.2.1 of the Agreement. Such a mechanism of urgent consultations could be replicated with regards to Member States of the EU that are to be subject to the rule-of-law mechanism. Finally, if the democratic partnership had a high level of institutionalisation and a multilateral nature, it could have its own rule-of-law mechanism, overlapping that of the EU, allowing the establishment of sanctions to members of the partnership that do not respect democratic standards.

(8) Charter of Fundamental Rights of the EU

After being accused for years of an insufficient protection of human rights,⁵⁸ in 2000 the Presidents of the institutions of the EU proclaimed the Charter of Fundamental Rights of the EU (CFREU). Following its proclamation, the Charter was included as an integral

⁵⁸ Sionaidh Douglas-Scott (2011), 'The European Union and human rights after the Treaty of Lisbon', *Human Rights Law Review*, vol. 11, nr 4, p. 647.

part of the Treaty Establishing a Constitution for Europe, but failure in the ratification stage of the treaty prevented it from being binding at that time. It was finally the Treaty of Lisbon which gave the Charter the same legal status as the treaties of the EU. As acknowledged by the President of the Court of Justice of the EU, Koen Lenaerts, by virtue of the Lisbon Treaty the CFREU is primary EU law, with such a relevance that it marks 'a new stage in the process of European integration'.⁵⁹

The CFREU establishes a series of fundamental rights of EU citizens to be respected by both the EU and Member States when they act within the scope of EU law. The Charter is divided into six groups of rights: Human Dignity, Freedoms, Equality, Solidarity, Citizens' Rights and Justice. It combines more traditional civil and political rights with social and economic rights and with third-generation rights, in such a way that it 'presents in sharpest relief the indivisibility of fundamental rights'.⁶⁰

The impact of Brexit on the human-rights protection afforded by the CFREU deserves a specific explanation, given the complexities of its legal status in relation to the UK. The reason lies in Protocol No 30 of the Lisbon Treaty, which applies to this country and Poland. As is well known, according to Protocol No 30 of the Lisbon Treaty no court can find internal legislation of the UK and Poland to be inconsistent with the rights and principles of the Charter, and Title IV of the Charter –Solidarity Rights– does not create justiciable rights for the citizens of these countries unless national law provides for them. Additionally, Protocol No 30 states that to the extent that a provision of the Charter refers to national laws and practices, it shall only apply to those two countries when the rights or principles are recognised in their national laws and practices. These provisions, however, do not mean that the Charter does not have any effect at all in the life of British citizens of the EU. On the contrary, despite the opt-out of solidarity rights of the Charter, such rights are already recognised as general principles of EU law under Art.6(3)TEU, and therefore enforceable without invoking the Charter.⁶¹ Furthermore, AG Trstenjak in her Opinion in *N.S. and M.E and Others* held that Protocol No 30 could not be regarded as a general opt-out from the Charter.⁶²

All this means that after Brexit, in effect, British citizens will lose the fundamental rights protection afforded by the Charter. But it is also true that such fundamental rights protection was to apply only to areas covered by EU law, so the general rule will be that to the extent that EU law does no longer apply in the UK such a loss of Charter protection would be unavoidable. There are aspects, however, where an exception to this general rule should be justified. The Charter should continue to apply to UK citizens at least in two circumstances: in the event that aspects of EU law still apply to the UK as part of a Brexit agreement, either on a temporary or a permanent basis; and also in all aspects covered by any type of democratic partnership between the UK and the EU, or in action taken in the development of such a partnership. Additionally, there is nothing preventing states that are not Members of the EU from being bound by the Charter and the case

⁵⁹ Koen Lenaerts (2012), 'Exploring the limits of the EU Charter of Fundamental Rights', *European Constitutional Law Review*, nr. 8, p. 375.

⁶⁰ Douglas-Scott (2011), *op. cit.* p. 651.

⁶¹ *Ibid.*, p. 654.

⁶² *Ibid.*, p. 655

law of the Court of Justice of the EU. For this reason, opting-in the Charter could be a possibility, if not a requirement, for states willing to be part of a democratic partnership with the EU. Although the Charter was designed to be applied also in the sphere of competences of the EU, in the case of this opt-in it would work as an internal law catalogue of fundamental rights.

Finally, Brexit might only entail a minor positive externality for the Charter. Protocol 30, and the reluctance to be bound by the Charter on the part of the UK and Poland, was very significant in symbolic terms. In the case of the UK, the fact that one of the most important Member States of the EU was reticent to this instrument could be considered a minor but relevant setback for the Charter and for the idea that all EU citizens ought to be protected under the same standards of human-rights law. This will no longer be the case if the UK leaves the EU. In that case, the ideal of homogeneous application of the Charter across the Union will be almost achieved, with only Poland remaining a reluctant Member State.

(9) Implementation

This Working Paper has analysed the risks that Brexit entails for democratic protection and promotion in Europe and beyond, and has suggested a number of proposals aimed at palliating its most negative consequences. Figure 4 below summarises the analysis and proposals. As can be seen, a very modest approach to EU-UK cooperation for the protection of democracy in Europe would entail a mix of soft law agreements and a small budget for linkage, leverage and related activities of democratic promotion. A more ambitious approach would entail a modicum of institution-building in order to institutionalise cooperation, which could be complementary to rather than rivalling other initiatives of European integration such as the EU.

Figure 4. Summary of measures to be implemented as part of the partnership

	Negative consequences of Brexit	Solutions scenario 1: non-comprehensive agreement	Solutions scenario 2: comprehensive democratic partnership
Linkage	<ul style="list-style-type: none"> - Loss of funding for direct linkage - Loss of indirect linkage capacity 	<ul style="list-style-type: none"> - Funding commitment to be managed separately - Ad hoc commitments for indirect linkage 	<ul style="list-style-type: none"> - Funding commitment managed by partnership - Ad hoc commitments for indirect linkage
Democratic conditionality for accession	<ul style="list-style-type: none"> - Potential British cooperation and partnership with authoritarian countries in the continent 	<ul style="list-style-type: none"> - Commitment on democracy in foreign and supranational policy 	<ul style="list-style-type: none"> - Commitment on democracy in foreign and supranational policy - Partnership reduces the British incentive to support authoritarian governments
Other leverage	<ul style="list-style-type: none"> - Loss of funding - Lack of coordination, affecting effectiveness of leverage 	<ul style="list-style-type: none"> - Funding commitment to be managed separately - Commitment with democracy protection in foreign policy 	<ul style="list-style-type: none"> - Funding commitment managed by partnership - Commitment with democracy protection in foreign policy - institutionalised foreign policy meetings among the parties - Membership of partnership as incentive to democratise
Functional cooperation	<ul style="list-style-type: none"> - UK does not support EU activities and offers less democratically demanding functional cooperation 	<ul style="list-style-type: none"> - UK abstains from less democratically demanding forms of cooperation 	<ul style="list-style-type: none"> - UK abstains from less democratically demanding forms of cooperation - UK and EU undertake joint functional cooperation
Rule-of-law mechanism	<ul style="list-style-type: none"> - Potential British support for sanctioned countries 	<ul style="list-style-type: none"> - Soft-law declaration of cooperation with EU 	<ul style="list-style-type: none"> - Bilateral or multilateral forums for institutionalised cooperation - Own rule of law mechanism
CFREU	<ul style="list-style-type: none"> - British citizens lose protection of the Charter 	<ul style="list-style-type: none"> - Application of the Charter in residual application of EU law in UK - Application of the Charter in action taken as part of democratic partnership 	<ul style="list-style-type: none"> - Application of the Charter in residual application of EU law in UK - Application of the Charter in action taken as part of democratic partnership - Possibility or requirements to opt-in the Charter for members of partnership

Source: the author

One final element that deserves careful consideration has to do with the implementation of these proposals. Implementation here means both the issues related to the institutions tasked with managing the different aspects of the agreements and the timing for the agreement and entry into force of any forms of democratic partnership.

At the institutional level, we can think of a number of arrangements that can help materialise a democratic partnership between the UK, the EU, and potentially other countries. The range of these arrangements include: (a) bilateral and multilateral relations; (b) a consultation mechanism modelled on the EU-Canada Strategic Partnership Agreement; (c) a foundation or separate institution tasked with managing funds; (d) organs of a more general partnership modelled on the Continental Partnership proposed by Pisani-Ferri *et al.*; and (e) a judicial enforcer. These arrangements are not necessarily mutually exclusive, but some of them can be implemented in a complementary way.

- a) Bilateral or multilateral relations. The most basic way to manage the agreements and to partner for democracy would be through the usual bilateral (or multilateral, if other countries were to join) diplomacy between the parties. This would reinforce the soft-law nature of many of the commitments, and while it would provide for flexibility in their application, the solution would involve a loss of coordination. Given the flexible approach taken, enforcement of the agreements could only be operated through the threat of diplomatic retaliation. Budget for democracy promotion activities would be managed independently by the parties, but bilateral or multilateral dialogue would allow a modicum of coordination.
- b) A consultation mechanism modelled on the EU-Canada Strategic Partnership Agreement, especially in its Title VI. This would constitute a further step in the institutionalisation of the partnership and the relationships among the parties. In fact, this option has been used as the by default arrangement throughout this paper, because it provides for a useful template and shows its feasibility. As explained earlier, contained in Art.27 of the Agreement the consultation mechanism includes regular summits at the leader level and meetings and consultations at the ministerial level. It also includes a Joint Cooperation Committee that recommends priorities in relation to cooperation, monitors the development of the partnership, exchanges views on issues of common interest and ensures the efficiency and operation of the agreement, among other functions. And finally, it includes a Joint Ministerial Committee with decision-making capacity subject to the approval of the parties and with the capacity to make recommendations to the Joint Cooperation Committee. Similar consultation and coordination mechanism already exists in other strategic partnerships of the EU. For instance, the Africa-EU Strategic Partnership foresees the holding of regular Africa-EU summits and political interaction at different levels, and the EU-South Africa Partnership establishes high-level talks in a Troika format twice a year, as well as meetings at a lower level. The experience of all these mechanisms already in place will be of a vital importance to develop efficient cooperation mechanisms in the case of the relation between the UK and the EU.
- c) A foundation or a similar separate institution. In the absence of other institutions, budget contributions linked to activities of democracy promotion could be managed by a foundation or a similar organisation created by the parties. There exists a good precedent of this in the EU-LAC foundation, created by the EU and countries of Latin America and the Caribbean to institutionalise some of their relationships and to undertake joint initiatives such as research studies of bi-

regional interest. Alternatively, the funding could be channelled through an existing organisation, such as the European Endowment for Democracy.

- d) Organs of a more general partnership. A further level of ambition would be introduced if the partnership between the parties was not limited to democracy protection but had instead a wider reach. The organs of such a more ambitious partnership could also be tasked with roles in the development of the democracy-related aspects of the agreement. In this regard, the proposal by Pisani-Ferry *et al.* for a Continental Partnership is particularly interesting, in that it foresees ‘participation in a new CP system of inter-governmental decision making and enforcement’⁶³ as well as the creation of a CP Council⁶⁴ in which the UK would be able to provide a political –albeit not legally binding– input in certain areas of EU legislation. If this, or a similar form of partnership, were to be created, its organs could be bestowed with the capacity to make decisions in areas of application of the democratic partnership, including the use of the budget for democracy promotion as well as coordinated decisions vis-à-vis authoritarian countries or countries undergoing a democratic crisis.
- e) A judicial enforcer. In principle, the European Court of Justice (ECJ) would be a candidate to judicially enforce certain aspects of the agreement. An extended ECJ composition to comprise also the countries of the partnership, in line with the proposal of Pisani *et al.*,⁶⁵ could be an interesting option, as well as granting jurisdiction to other international courts. However, the idea of judicial enforcement of the agreements of the democratic partnership is problematic. And this, for two reasons. First, most of the agreements and clauses of the democratic partnership would have a very political character and an abstract phrasing, so judicial enforcement might not be the best option for their implementation. Secondly, it would be difficult to find a judicial organ for enforcement that could count on the consensus of the parties. In this regard, the UK has declared that one of the main drivers of its Brexit strategy is precisely ending the jurisdiction of the European Court of Justice.⁶⁶ There are, however, potential exceptions to this. First, if the agreement included more specific, technical and legalistic clauses, a judicial enforcer would become an optimal solution for such provisions. Secondly, if as suggested above the UK could still be bound by the Charter of Fundamental Rights of the EU, even if that were to be only in very limited aspects, the jurisdiction of the ECJ would be almost unavoidable for such aspects.

A second dimension of the implementation of the agreement has to do with the timing for the drafting of the agreements and their entry into force, especially with regards to the rest of potential Brexit agreements. There are three options for this:

1. A first possibility would be to reach agreements with regards to forms of partnering for democracy within the two-year period of Brexit negotiations

⁶³ Pisani-Ferry *et al.* (2016), p. 6.

⁶⁴ *Ibid*, p. 7.

⁶⁵ *Ibid*, p. 7.

⁶⁶ House of Lords European Union Committee, ‘Report 2016-17’, p. 14.

foreseen in Art.50(3) of the Treaty on the EU. This would allow the democratic partnership to be an integral part of the Brexit deal. Furthermore, this would allow a modicum of conditionality: the parties could consider that the partnership for democracy is an integral part of their future relationship and make the rest of Brexit agreements, including in the economic and market dimensions, conditional to agreements in aspects of democracy protection. For this reason, this is the ideal scenario for a democratic partnership between the UK and the EU. Furthermore, the UK-EU agreements could include a clause of termination of their economic or trade deals in the event of a grave violation of human rights or democratic principles by any of the parties. Again, this is not unprecedented. Suspension clauses for 'substantial violations' of democracy and human rights have been included in agreements of the EU with third countries at least since the 1990s.⁶⁷ In the EU-Canada Strategic Partnership Agreement we can find such a clause in Art.28.7, which establishes that 'a particularly serious and substantial violation of human rights or non-proliferation... could also serve as grounds for the termination of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) in accordance with Art.30.9 of that Agreement'.

2. A second option would consist in reaching an agreement for a democratic partnership in the transition phase after the two years of Brexit negotiations. Prime Minister Theresa May recently asked the EU for a two-year transitional period in which the UK would still be bound by EU rules.⁶⁸ As a second-best scenario, the democratic partnership agreements could be reached within this period, to be implemented by 2021 at the latest.
3. A final scenario would be one in which the EU and the UK do not reach a Brexit agreement, or do not agree on democratic commitments as a part of it. If this happened, it should not prevent the parties from negotiating and trying to reach in the future an agreement for the protection of democracy in Europe, when the conditions to do so are mature. This would, however, be the worst-case scenario, for at least two reasons. First, because the impetus provided by the Brexit negotiations would be lost, making a deal on a democratic partnership more difficult to reach. And secondly, because in the meanwhile important elements of coordination between the EU and the UK for democracy protection would have been missing, with detrimental effects for the preservation of the democratic order in Europe.

⁶⁷ Cardwell (2017), *op. cit.* p. 879.

⁶⁸ The Guardian (2017), 'Theresa May asks EU for two-year Brexit transition period', 22/IX/2017, <https://www.theguardian.com/politics/2017/sep/22/theresa-may-asks-eu-for-two-year-brexit-transition-period>, accessed 15/XI/2017.

(10) Conclusions

The idea of 'new partnership' seems to be everywhere in the Brexit negotiations. It was in the very title of the British White Paper on the 'United Kingdom's exit from, and new partnership with, the European Union'.⁶⁹ It has for a long time been in the discourse of Michel Barnier, who in his speech of August 2017 explicitly said that he refers to the future relationship between the EU and the UK 'as a new partnership'.⁷⁰ It was also in Theresa May's Florence speech, titled 'A new era of cooperation and partnership between the UK and the EU'. The idea that after a potential British exit from the EU both parties should engage in committed forms of cooperation and partnership to defend common interests and values seems to be already accepted by all actors involved in the debate.

This Working Paper has attempted to give further concretion to one of the aspects that should occupy a central role in such a partnership: the protection and promotion of democracy through necessary joint action by the EU and the UK. As shown throughout this Working Paper, a British exit from the EU is likely to have detrimental effects for the capacity of the EU and the UK to protect and promote democracy on the continent and beyond, and only marginal benefits in a very limited number of aspects. Certainly, the best solution to prevent such negative effects would be a 'no Brexit' outcome. But even in the event of Brexit there are still a number of measures that the parties can put in place to palliate the problems caused. In order to do so, the parties will need a modicum of political willingness, but the idea of cooperation and partnering for democracy is in fact not new. On the contrary, there are precedents in the practice of the EU of such partnerships, the Strategic Partnership Agreement with Canada constituting the most sophisticated example. Such an agreement offers an interesting template for the design of a future partnership between the EU and the UK, and it shows that committed forms of cooperation for the protection of democracy are a realistic option.

The EU has been a major factor for the geopolitical stabilisation of the European continent and for the consolidation of democracy in Europe and other parts of the world. Both the EU and the UK should appreciate this as an extremely valuable achievement and honour it by putting their differences aside and achieving strong forms of cooperation. What is at stake are the core values of the European societies, including Britain's: fundamental rights, political freedom and the rule of law. Such values are worth making an effort to find avenues for cooperation, which in exchange can become the seed of a fruitful future relationship between the EU and the UK.

⁶⁹ British Government Policy Paper (2017), 'The United Kingdom's exit from and partnership with, the European Union', 15/V/2017, <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2>, accessed 15/XI/2017.

⁷⁰ http://europa.eu/rapid/press-release_SPEECH-17-3043_en.htm, accessed 15/XI/2017.