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## Deficiencies and Omissions in the Brexit Agreement

The European Union's Shared Responsibility at the Failure of the UK Withdrawal Negotiations <sup>1</sup>

With the election of Boris Johnson as Chairman of the British Conservatives and his appointment as Prime Minister of the United Kingdom, a narrative has emerged in the German media that discredits his person and thus severely strains future relations. They call him a "swindler", "monster" and "political seducer" who came to power through anti-European positions and populism. The message behind it tells us that he has nothing serious to offer the European Union, so further negotiations on the Brexit Treaty would be out of the question. The disreputation of political personalities, however, is a rhetorical stylistic device and not an objective analysis of the interests at stake in the background. Could it be that not only British, but also "pro-European" forces benefit from the Brexit? Anyone who pursues this question will quickly find what they are looking for. Their motives and goals should be disclosed and discussed, because only such transparency creates room for a withdrawal agreement that satisfies both sides. Those who oppose this expose the EU member states to conflicts that cannot only escalate violently in Northern Ireland. Europe has had more than enough of this in its recent history.

A "hard Brexit" is today understood as a "No-Deal Brexit", i.e. an EU withdrawal of the United Kingdom (UK) without a treaty. This was not the case at the beginning of the negotiations. When the then head of government Theresa May applied for her country's withdrawal from the European Union (EU) on 29 March 2017, she made it clear that her country would leave both the EU Single Market and the EU Customs Union. In doing so, she wanted to regain complete control over national borders and laws. This scenario was then called "hard Brexit", while "soft Brexit" means that the UK only partially terminates the EU treaty and remains in the EU customs union, for example.

So it was clear from the beginning that London wants to cancel EU membership and conclude a new free trade agreement instead. To this day, EU negotiator Michel Barnier has rejected this position as a "cherry picking". He only agreed to a withdrawal treaty and shifted the reshaping of mutual relations into an uncertain future. Since mid-2018 there has been a threat of an unregulated withdrawal if London does not accept this proce-

dure. Since then, this scenario has been called "hard Brexit" (SZ, 23.8.2018). This new interpretation gives the impression that this is above all a strategy of the British negotiating side.

### The British have visions and concepts...

Since Boris Johnson's appointment as the new prime minister, the fictional history of British refusal has continued. It is said that he has appointed [hardliners](#) to his cabinet and is now working "at full speed" on a [hard Brexit](#). It is only occasionally mentioned that it is actually Brussels that has moved into a [position of refusal](#) (Die Welt, 28.7.2019). While Theresa May long sought a majority for the negotiated withdrawal agreement, Johnson now makes a U-turn. His government rejects an EU treaty that leaves mutual relations unregulated. This makes him a hardliner from the EU's point of view.

May and her Brexit Minister Dominic Raab represented exactly this position until shortly before the conclusion of the withdrawal agreement (14.11.2018). They insisted on Article 50 (2) of

<sup>1</sup> This is a translation [S.R.]: Konzeptionelle Defizite des Brexit-Vertrags. Die Mitverantwortung der Europäischen Union am Scheitern der Verhandlungen, [Forschungshorizonte Politik & Kultur](#), FPK, Vol. 3, No. 6 (2019 Aug 12), 8 Seiten.

the EU Treaty, according to which the agreement must define the EU withdrawal together with the "framework for future relations" (cf. Fig. 1). Michel Barnier, on the other hand, interpreted this article differently and transferred all controversial questions from the first [draft agreement of 19 March 2018](#) to another treaty to be concluded later. In order to force London into this two-stage procedure, it has since threatened to use an unregulated Brexit (cf. Fig. 4 and 5).

Because British Prime Minister May finally gave in to Brussels' pressure, her Brexit Minister Dominic Raab resigned. In his opinion, "the UK should be ready to risk a no-deal Brexit in the face of EU 'blackmail'". (BBC, 15.11.2018) In his few months in office, he had to learn that the EU rejected all constructive proposals. These include the [Chequers Agreement of 17.7.2018](#), with which May wanted above all to resolve the dispute over the Irish-British border controls. She envisioned a new free trade agreement with common standards for trade goods and EU rules on consumer and environmental protection. May and Raab assured that their proposal "respects the constitutional and economic integrity of the UK and the autonomy of the EU" (cf. [Future relationship, 17.7.2018](#), item 5.1; Riedel 2019, p. 7f.).

The EU also rejected this British proposal and instead tightened the thumbscrews. Only two days after the Chequers Agreement was presented, the Commission reacted with emergency plans for a "No-Deal Brexit". It says: "Contingency planning for the worst possible outcome is not a

sign of mistrust in the negotiations. The Commission is devoting very significant resources and committing great efforts to achieve an agreement. This remains our goal. However, the outcome of negotiations cannot be predicted." ([Preparing for the withdrawal, 19.7.2018](#), 2.b) As a result, Brexit Minister Dominic Raab was forced to develop contingency plans, too, so that British economy could also prepare itself in good time for an unregulated EU withdrawal ([Speech on no deal planning, 23.8.2018](#), cf. Fig. 4).

Raab was appointed new foreign minister in the cabinet reshuffle under Boris Johnson, while his successor as Brexit minister, Stephen Barclay, remains in office. With this personnel decision, the new prime minister is thus focusing on continuity and not on "radical overhaul" ([BBC, 24.7.2019](#)). Changes concern not so much the existing concept as their strategic approach. From now on London will emphatically demand a new trade agreement and for the first time use a "No-Deal Brexit" as leverage. EU negotiator Michel Barnier recently confirmed that May had abstained from such a threat. "He also insisted Mrs May and her ministers 'never' told him during Brexit talks she might opt for no deal." (BBC, 18.7.2019).

### ... And the EU Commission defends its two-stage Brexit model

Against the advice of her Brexit Minister, Theresa May was prepared to make further compromises with the EU. In mid-November 2018, she had accepted the required two-stage Brexit model (cf. Fig. 4). But the EU Commission let May down at the decisive moment when she asked for additional guarantees. Nevertheless, May was sure that Brussels would offer a new free trade agreement after the EU withdrawal. But the majority of the House of Commons remained sceptical, above all because this [promise from Brussels](#) did not come in the expected form (14.1.2019). They only received a vague [Political Declaration](#) (19.2.2019).

Furthermore, in his [legal advice of 5.12.2018](#), the British Attorney General Geoffrey Cox confirmed deficits in the withdrawal agreement. The sticking point is the Backstop rule: accordingly, the United Kingdom (UK) is leaving the EU Single Market and the EU Customs Union without [Northern Ireland](#). This autonomous region within the UK is "caught" by the EU (= backstop) so that it remains under the control of the EU Commission and the ECJ. As a result, customs controls are avoided at the border between Northern Ireland and the Republic of Ireland. Instead, controls take

Figure 1:

#### Article 50 2. of the EU Treaty

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

Source: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M050> [13.8.2019]; Blue highlighting: S.R.

place between Northern Ireland, which is still a member of the EU Single Market, and Great Britain, and thus within the UK (see Fig. 3). After all, this transition phase can only be ended by a new treaty between the EU and the UK. According to Cox, Northern Ireland's special status could prevent a future agreement and thus extend the transition phase indefinitely (cf. Fig. 2).

May lost many supporters not least because this confidential legal advice was published only after a corresponding [parliamentary decision](#). To date, it is impossible to explain why the EU Commission did not support Theresa May in this delicate situation. They had to expect that their behaviour would polarise and make the circle of Brexit proponents even larger. The results of the elections to the European Parliament (23.5.2019) show who ultimately stands out: [Nigel Farage's Brexit Party](#) represents 30.5 percent of British voters in the European Parliament today. The only party in the UK that has clearly opposed leaving the EU and received 19.6 per cent in return is the [Liberal Democrats](#). These figures suggest that in a second Brexit referendum significantly less than the 48.1 percent in the vote on 23 June 2016 would vote for remaining in the EU.

Figure 2:

**Geoffrey Cox: Legal Effect of the Protocol on Ireland/Northern Ireland**

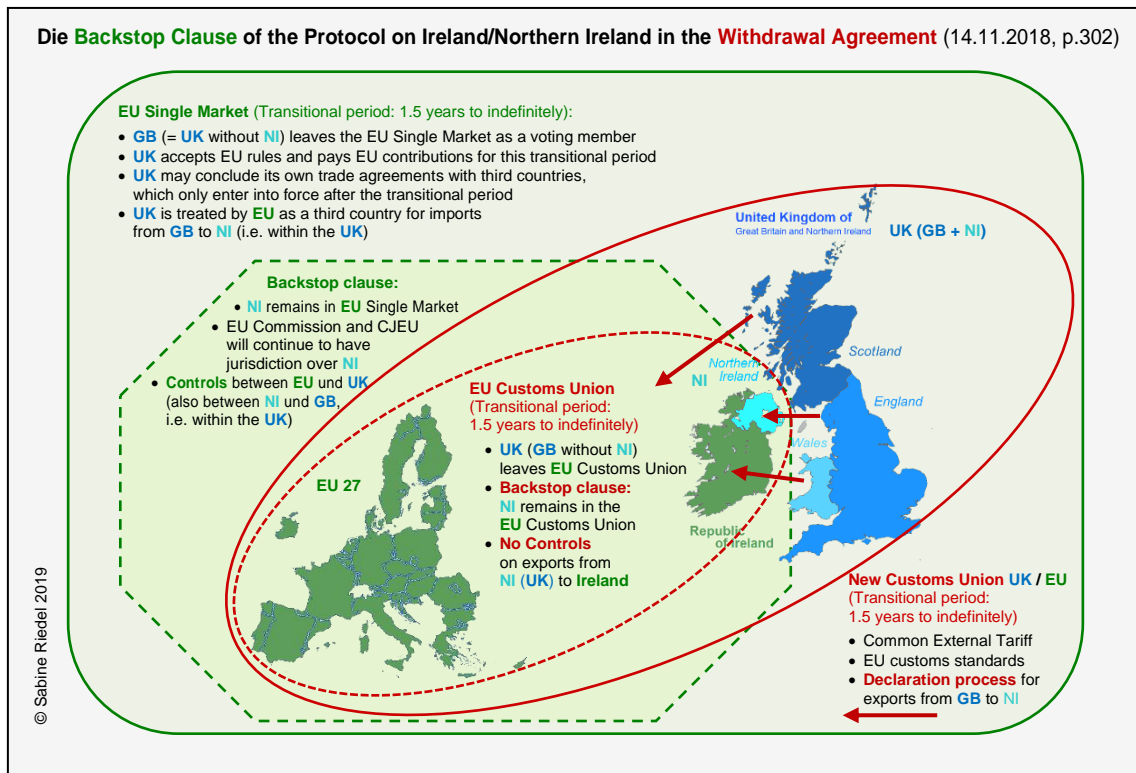
„7. Pursuant to Article 6.1. *the UK as a whole (i.e. GB [Great Britain] and NI [Northern Ireland]) will form a single customs territory with the EU. [...]. NI remains in the EU's Customs Union, and will apply the whole of the EU's customs acquis, and the Commission and CJEU will continue to have jurisdiction over its compliance with those rules, which means goods can pass from NI to Ireland without any fiscal checks. [= Backstop..., S.R.]*

8. Pursuant to Article 6.2, *Northern Ireland will remain in the EU's Single Market for Goods and the EU's customs regime [= Backstop...]. The Commission and CJEU will continue to have jurisdiction over NI's fulfilment of its obligations under these rules. [...]*

16. It is difficult to conclude otherwise than that the Protocol is intended to subsist even when negotiations have clearly broken down. [...] **Therefore, despite statements in the Protocol that it is not intended to be permanent, and the clear intention of the parties that it should be replaced by alternative, permanent arrangements, in international law the Protocol would endure indefinitely until a superseding agreement took its place, in whole or in part, as set out therein. [...]**

Source: *Attorney General's legal advice to Cabinet on the Withdrawal Agreement and the Protocol on Ireland/Northern Ireland*, 5.12.2018.

Figure 3:



Source: Own compilation [S.R.]

However, neither the polarisation of the British electorate in favour of leaving the EU nor the hard disputes among the British Conservatives has prompted the EU Commission to rethink and give in. On the contrary, preparations for a withdrawal without a treaty are becoming more and more concrete. A new communication from the [European Commission](#) on the “State of play of preparations of [contingency measures for the withdrawal](#) of the United Kingdom from the European Union” (12.6.2019) confirms that an “orderly withdrawal” on the basis of the negotiated agreement of 14.11.2019 “is the best outcome” (see 1. Introduction). It takes no position on the deficiencies of the treaty, which came to light during the debates in the British House of Commons. Even the fact that the Backstop rule affects the sovereignty and integrity of the UK does not make them think.

For Michel Barnier, the integrity or inviolability of the European Single Market takes precedence over the integrity of sovereign states: “The interest of Europeans is to preserve the [integrity of the common market](#).” (The Guardian, 2.9.2018) Following this principle, he redefined [the first draft agreement \(19.3.2018\)](#), which still mentions three options. Since mid-2018, Barnier has only been talking about the two-stage Brexit model (cf. Fig. 5). After that, [Northern Ireland is to remain in the EU Customs Union and the EU Single Market](#) for

Figure 5:

**Michel Barnier warned the Withdrawal Agreement is the UK’s only option**

Speaking to the [New York Review of Books](#), Michel Barnier said the UK has the option to leave without a deal but the only way it will leave with a deal is to accept the one currently on the table. [...]

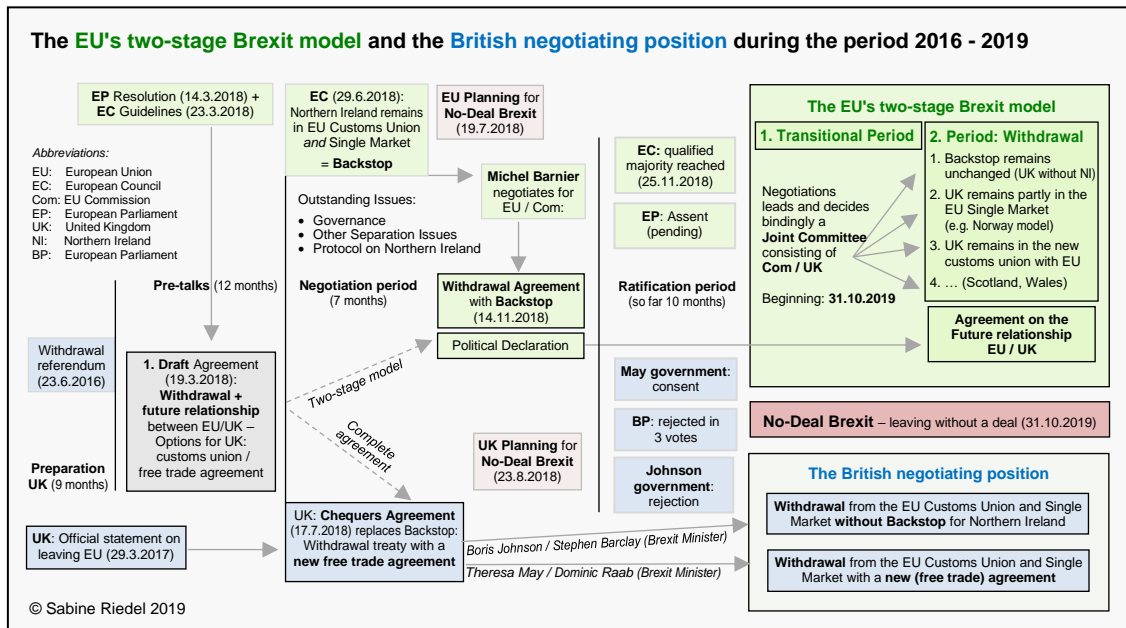
But Barnier said: “If the choice is to leave without a deal — fine. If the choice is to stay in the EU — also fine. But if the choice is still to leave the EU in an orderly manner, this treaty is the only option. This is all that our legal constraints allow.”

He added that the EU is prepare to consider “alternative arrangements” to the backstop plan which could keep the UK in the customs union indefinitely to avoid a hard border on the island of Ireland.

Source: [The EU’s Chief Brexit Negotiator has warned the Withdrawal Agreement is the UK’s only option for an “orderly exit” from the EU](#), in: Euronews, last updated: 30.5.2019 [14.8.2019].

a transitional period and continue to be subject to the EU Commission in terms of trade policy and the CJEU in legal terms (cf. Fig. 4, Withdrawal Agreement, p. 304, Riedel 2019). At the same time, the United Kingdom and the EU will form a new customs union. This would avoid controls between Northern Ireland and the Republic of Ire-

Figure 4:



Source: Own compilation [S.R.] of: [Communication from the Commission, Brussels, 19.7.2018](#), [European Council, Brexit Timeline \[14.8.2019\]](#).

land, but would require controls between Northern Ireland and Great Britain, i.e. within the United Kingdom. This is tantamount to an infringement of the national territory and is therefore clearly contrary to international law.

So it is not surprising that the new British Prime Minister is proposing to the EU as a compromise to remove the Backstop clause (Businessinsider, 27.7.2019). Even if this does not resolve all points of contention, it would be quite easy to implement from a formal point of view. This rule was later added to [Protocol of the Agreement on Ireland/Northern Ireland](#), i.e. between March and November 2018 (cf. Brexit Agreement, p. 304). It is true that Michel Barnier also rejected this latest proposal as "unacceptable". Nevertheless, in the coming months it could become the nucleus of a mutual agreement.

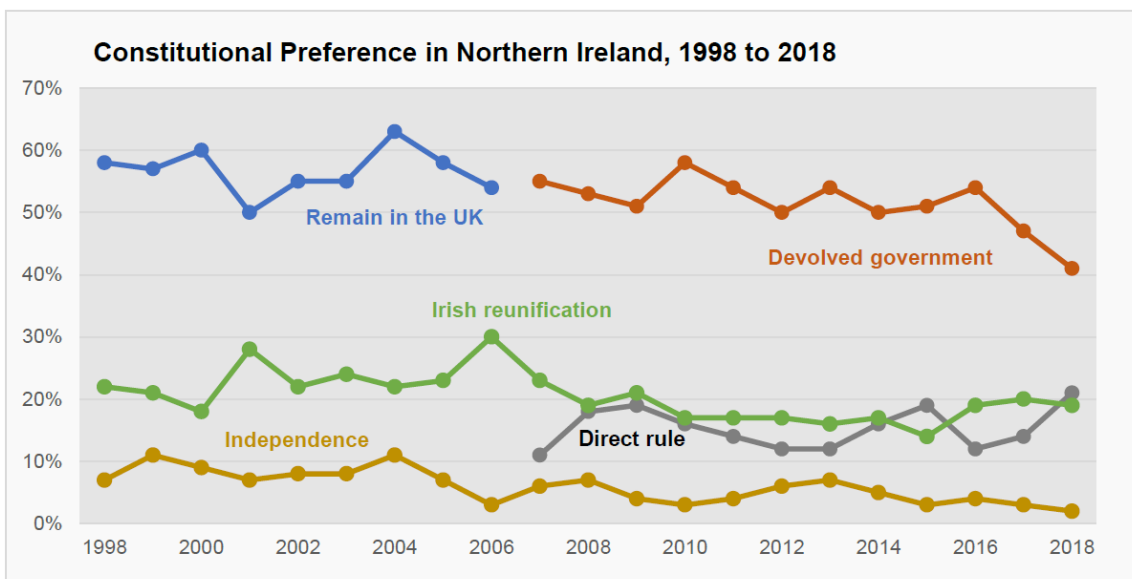
### Profiteers of the No-deal Threat

The Backstop in the withdrawal agreement was originally initiated by [Irish Prime Minister Leo Varadkar \(Statement, 13.12.2017\)](#). Ireland does not want to accept that in the future it will have to pay customs duties at the border to the United Kingdom. This is because the main routes of Irish foreign trade have so far been duty-free via British ports and the border with the British region of Northern Ireland. The [pharmaceutical industry](#), which mainly produces for the European and the US markets, will be particularly affected by an increase in transport costs ([GTAI, 27.04.2018](#)).

Dublin, on the other hand, is increasingly concerned about the danger of an unregulated Brexit, as it is one of the losers of the British withdrawal from the EU anyway. At the beginning of 2019, the Irish Finance Minister Paschal Donohoe predicted a [deficit in the national budget](#) for this case as early as next year (gov.ie, 29.1.2019). But instead of mediating and persuading Barnier to negotiate with London, which has already signalled a [concession in the customs dispute](#) (Spiegel, 13.3.2019), the Irish government prefers to hope for financial compensation from Brussels. Germany and France have already expressed their ["full solidarity" with Ireland](#), but without knowing how expensive this could become for the EU (FAZ, 8.1.2019). The Spanish take a more critical view and ask whether the EU should not first demand more solidarity from Ireland in tax matters. Because it foments [tax dumping in Europe](#) with low tax rates (El País, 8. 2.2019).

Despite all solidarity, Europeans should also take a critical look at Irish foreign policy. Head of government Varadkar is currently claiming that "The question of the [unification of Ireland and British-ruled Northern Ireland](#) will inevitably arise if Britain leaves the European Union without a divorce deal on Oct. 31." (Reuters, 27.7.2019). In truth, all the major parties in the Republic of Ireland have been singing nationalist tones since the Brexit referendum three years ago. They only argue about the right strategy. While Sinn Féin is demanding a referendum in Ireland and Northern

Figure 6:



Source: [Constitutional Preference in Northern Ireland, 1998 to 2018](#), updated: 18.6.2019, [13.8.2019].

Ireland under the [Belfast Agreement / Good Friday Agreements \(10.4.1998\)](#), the others are warning against a negative result. For only around 20 percent of Northern Irish are prepared to give up the autonomous status of their region in the United Kingdom for an Irish central state ([Irish reunification, 18.6.2019](#), cf. Fig. 6). There is no use in the fact that 60 per cent in the Republic of Ireland are in favour of a [reunification of the Irish island](#) (Independent, 30.7.2019).

Thus the Brexit offers a suitable opportunity to advance the project of a reunification of the Irish island. Its supporters argue rhetorically with national interests and accuse the political opponent of a nationalist policy. What is the difference? National interests are covered by international law because they belong to the sovereignty rights of an internationally recognized state. Nationalist positions, on the other hand, call into question the sovereignty rights of other states. This accusation must be made against today's Irish foreign policy because it wants to enlarge its territory at the expense of its neighbour without a legal basis. The United Kingdom, on the other hand, is defending its state integrity and wants the Brexit to restore its external sovereignty it has lost through EU membership. Thus the Backstop for Northern Ireland could be transformed from an intra-European dispute into an international conflict.

The Irish are not the only ones who might accept a disintegration of the United Kingdom. The Scottish Government also sees the Brexit as a springboard to the hoped-for independence. With the agreement of the British central government, it were already able to hold a [legal vote on independence \(18.9.2014\)](#), but 55.3 percent were opposed. Edinburgh kept its promise to respect even a negative result for only 20 months. The Brexit referendum (23.3.2016) would have changed everything because a [majority of Scots voted against leaving the EU](#) (Riedel 2016, p.4). Since then, Scottish Prime Minister Nicola Sturgeon has launched a second independence referendum. She also calls for a backstop clause for Scotland (8.10.2018), following the example of Northern Ireland. It should also remain in the EU Single Market and the EU Customs Union.

While Sturgeon raises the bar for the Brexit negotiations even higher than it already is, she warns Boris Johnson against an unregulated EU withdrawal. As if that weren't enough, she claims that he was actually aiming for a [No-Deal Brexit](#) (Die Zeit, 30.7.2019). Why does she not also ask Michel Barnier to resign his blocking stance when she consulted him in Brussels? He used the meeting to confirm that "[the Brexit deal and back-](#)

[stop will not be altered](#)" (The Herald, 12.6.2019). Could Sturgeon have already negotiated a Scottish backstop according to their plans?

### **The Backstop clause could trigger currency competition in Europe**

The threatening gestures of the Scottish head of government towards her own central government are contradictory only at first glance. As recently published papers show, she has learned from the weaknesses of the last independence referendum. At the time, Sturgeon's predecessor Alex Salmond followed the advice of an international commission of experts to retain the British pound as the currency in the event of Scotland's independence. This issue proved to be a crucial issue in the referendum because the then British Finance Minister George Osborne made it clear that with their statehood the Scots would also lose their codecision rights in British monetary policy. This obviously caused many voters concern, so that the majority of them voted against leaving the United Kingdom.

Today, the ruling Scottish National Party (SNP) assesses this question completely differently. A Sustainable Growth Commission (SGC) announced by Nicola Sturgeon published a report in May 2018, in which it "set out a road map to an independent currency, using the pound for a transitional period, with a series of [tests for future currency decisions](#)" (SNP, 25.5.2018 and [SGC, Summery, May 2018](#), p. 47f.) This immediately raises the question of whether an independent Scottish currency is a realistic target. After all, an independent Scotland wants to remain or become a member of the EU. Under the EU Treaty it would then be obliged to adopt the euro. In addition, the SGC's final report speaks of a transitional period. For entry into the euro zone?

The SNP's treasurer, Ian Blackford, denied that. He argues that the transition from the British pound to a Scottish currency will take ten years alone. Moreover, the introduction of the euro would require participation in the so-called European Exchange Rate Mechanism (ERM). During these two years, the stability criteria for joining the euro zone will be tested. Finally, Blackford claims: "[Joining the Exchange Rate Mechanism \[of the euro zone\] is entirely voluntary](#)" (channel4, 20.3.2019). In doing so, he refers to a similar statement by the current [President of the EU Commission, Jean-Claude Juncker \(15.9.2017\)](#). But in the same statement Juncker emphasises that the euro should continue to be the currency of the entire EU (cf. Fig. 6).

The negotiated withdrawal agreement and its Backstop clause therefore not only calls into question state borders, but also the borders of existing currency areas. Until today there are different national currencies within the EU: In addition to the United Kingdom, also Sweden, Denmark, Poland, the Czech Republic, Hungary, Croatia, Romania and Bulgaria have their own monetary systems. If the Brexit continues to be so controversial, this currency competition will gradually develop into a currency competition that could eventually end in conflict and move the goal of a single currency into the distant future.

Northern Ireland and Scotland are the first harbingers that monetary policy will be misused within the EU as an instrument for achieving political goals. If the EU Commission should even allow itself to be carried away into opening up the euro zone to separatist forces, this will have negative repercussions. The Backstop would gradually free Northern Ireland from the British economic and monetary area and make it dependent in the long term on aid from the EU. What risks would this pose for the Republic of Ireland, which had difficulty recovering from the financial and banking crisis in 2010? In this context, economist Dan O'Brien of the Irish European Institute IIEA warns: "A hard Brexit and a transatlantic trade war would once again [destroy the hard-won recovery](#) (DLF, 17.8.2018).

Similarly, problematic would be a backstop for Scotland. Like Northern Ireland, it would be caught between two economic and monetary areas. It therefore remains questionable whether the Scots will actually achieve more independence in this way. For the scope for a monetary

Policy of one's own is extremely limited. Rather, in the event of political tensions with the British central government, there is a growing danger that Scotland will also become permanently dependent on aid from the euro zone. Conversely, such an import of instability is not good for the euro zone, not to mention the fact that the independence issue will place a heavy burden on bilateral relations between the EU and the UK.

### The Brexit agreement violates the EU Treaty and democratic values

The EU's two-stage model not only outsources all open questions on EU withdrawal and future relations to a second phase of negotiations after the Brexit, which clearly contradicts Article 50 of the EU Treaty. Moreover, the governments of the Member States and their national parliaments, as well as the European Parliament, will then have nothing more to say. They will no longer have a say if critical issues such as the future of the Backstop are negotiated during the transitional period. A Joint Committee composed of representatives of the European Commission and the United Kingdom Government will be solely responsible for the interpretation and application of the [Withdrawal Agreement](#): "The [decisions adopted by the Joint Committee shall be binding](#) on the Union and the United Kingdom [...]. They shall have the same legal effect as this Agreement ([Article 166, point 2, p. 279](#)).

Apparently the EU Commission and its negotiator Michel Barnier are currently in a hurry to push through the Withdrawal Agreement in its present form, even before the Member States and above all the newly elected European Parliament recognise in it the formal disempowerment of the elected and democratically legitimised bodies after the Brexit. The discrediting of the new Prime Minister Boris Johnson is therefore nothing less than a diversionary strategy. On the one hand, it should remain hidden that some key European politicians want to centralise the political system of the EU in favour of the EU Commission. On the other hand, it serves to identify a guilty party even now if the United Kingdom actually leaves the EU without a treaty. As this analysis makes clear, the EU has so far shown little cooperation and has been threatening for a year with the No-Brexit scenario, which it is now blaming on its opponent.

This statement is not intended to relieve the British side of its co-responsibility. Theresa May signed the Brexit Treaty at the last minute, accepting the EU's two-stage model and thus abandoning her own negotiating position. This had to trigger a government crisis. After all, when she

Figure 6:

#### EU Member States are required to join the euro once they fulfil all conditions

„If we want the euro to unite rather than divide our continent, then it should be more than the currency of a select group of countries. The euro is meant to be the single currency of the European Union as a whole. [...]

All but two of our Member States are required and entitled to join the euro once they fulfil all conditions. Member States that want to join the euro must be able to do so. This is why I am proposing to create a Euro-accession Instrument, offering technical and even financial assistance.“

Source: Juncker: "I don't intend to force countries to join the euro if they are not willing or not able to do so", Brussels, 15.9.2017 [14.8.2019].

took office, she had announced that she would hold the United Kingdom together and lead it out of the EU. This promise is broken by the Backstop clause.

Even if the circumstances of May's resignation seem chaotic, British democracy will not disintegrate (Die Welt, 18.6.2019). Not only the British House of Lords has opposed the Withdrawal Agreement (SZ, 15.1.2019, cf. Fig. 7). The House of Commons also won more transparency and a say in the Brexit negotiations. After intensive debates, it stopped government plans that could harm the country's unity. This is why parliamentary majorities are also becoming a test for Boris Johnson. Brussels and its negotiator Michel Barnier do not have to face such a challenge. Perhaps this undemocratic distribution of power is the reason why the withdrawal of one of the 28 EU members could become such a fundamental issue for the Union.

Figure 7:

**Letter Lord David Owen sent to all EU Heads of Government (2.4.2019)**

„Dear Federal Chancellor [Angela Merkel],  
I am writing to you as Head of Government at this late stage in the consideration of the UK's exit from the EU. I wish to urge that you carefully consider a possible basic contradiction within the EU-UK Withdrawal Treaty which has so far prevented a majority of British MP's approving it in its present form. Namely, that an Article 50 procedure to allow a Member State, in this case the UK, to leave the EU, has created a Withdrawal Treaty that according to the UK Attorney General could prevent the UK from ever leaving the Irish backstop. [i.e. Northern Ireland remains in the EU Single Market and in the EU Customs Union ...].

Unless this potential basic legal contradiction is grappled with at the highest political level it is hard to see the Withdrawal Treaty being agreed. I hope you will consider asking the ECJ to consider this issue as a matter of urgency. If they do agree with the UK Attorney General perhaps they could be asked to suggest legal wording for the Political Declaration to re-interpret the 'Irish Backstop'.

If the ECJ does not agree then their judgement could help overcome British MPs' concern about the wording of the Withdrawal Treaty. [...]"

Source: [Letter Lord Owen sent to all EU Heads of Government, London, 2.4.2019](#) [14.8.2019].

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