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Revival or Eternal Death? The Impact of Brexit on Early Bilateral Agreements in the Area of Aviation and Social Security Between the UK and EU Member States

RESEARCH ARTICLE

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ABSTRACT

The purpose of this article is to assess whether the withdrawal of the United Kingdom (UK) from the European Union (EU) may entail the revival of the early bilateral agreements between the UK and EU member states. The main claim is that the earlier bilateral agreements may be reinstated pursuant to international law, but the revival is substantially narrowed due to the limitations arising from EU law and the new EU – UK legal framework. This is based on the argument that the earlier bilateral agreements were not terminated or suspended in operation, and remain in force with limited application. After providing the outline of the new legal relations between the EU and the UK, the article analyses the framework provided for subsequent agreements in the Vienna Convention on the Law of Treaties and the case-law of international tribunals. The current analysis draws implications for a revival from EU Treaties and the case-law of the Court of Justice of the EU. Finally, general considerations are provided as applied to agreements in the two specific fields reviewed, namely aviation and coordination of social security.

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The views expressed in the Article are only those of the author and do not represent the official position of any institution.

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1 INTRODUCTION

Commonly described as *Brexit*, the United Kingdom's (UK) decision to leave the European Union (EU) led to the governance of their mutual relations by international law since the entry into force on 1 February, 2020 of the UK Withdrawal Agreement.[1] The Withdrawal Agreement enabled an orderly withdrawal of this former member state from the EU. Its main purpose was to ensure legal certainty for EU and UK citizens residing in the UK and the EU, respectively, as well as businesses operating across the Channel.[2] The agreement introduced a transition period during which the EU and the UK were provided a timeframe for the conclusion of agreements governing future relations.

The orderly withdrawal also meant postponement of the so-called *cliff-edge scenario* from 1 February, 2020 to 1 January, 2021 with possibly grave consequences for sectors such as aviation or coordination of social security. However, this was prevented by the provisional application of three new EU – UK agreements as of 1 January, 2021, namely the Nuclear Cooperation Agreement, the Agreement on Security Procedures for Exchanging and Protecting Classified Information, and the Trade and Cooperation Agreement. The conclusion of these documents represents the beginning of a new phase in EU – UK relations following the UK withdrawal from the system.[3]

The avoidance of a legal vacuum presents, undoubtedly, satisfactory results of the intense negotiations which prevented the fall-back into the World Trade Organization rules as to reciprocal trade relations.[4] On the other hand, the question arises whether the EU and the UK have transitioned in all areas governed previously by EU law. If this is not the case, the lack of a legal framework for certain sectors may entail the need for citizens and economic operators to look for alternative legal sources. One of them may be a bilateral agreement between an EU member state on one side and the UK on the other, concluded prior to the EU membership of one or both of them. Whether these can be revived post-Brexit is the principal question analysed in this article.

The topic of validity and applicability of bilateral agreements between EU member states has been a subject of judicial and academic debates for years.[5] The process of Brexit added another layer of complexity related to previous bilateral agreements of EU member states with the UK. The post-Brexit situation raises the question of whether the provision of such agreements, which were not applied during the UK membership time period could potentially be revived due to their withdrawal in areas not covered by the new EU–UK agreements.

From an international law perspective, the possibility of revival depends on the reasons for which these agreements ceased to be applied when the UK became a EU member (or rather the European Communities, as it was the case in 1973). In this respect, the first argument of this analysis is that if the provision of an earlier agreement was not applied because of termination based on Article 59 paragraph 1 of the Vienna Convention on the Law of Treaties[6] (Vienna Convention), then reinstating is not possible. On the other hand, if this was not the case, because of a suspension in operation based on Article 59 paragraph 2 or because of incompatibility based on Article 30 paragraph 3 of the Vienna Convention, then revival is possible.[7]

This assumption is based on the logic of elimination of the obstacle preventing the application of earlier agreements. However, the second argument holds that even when the revival is possible from the perspective of international law, it is impeded by constraints stemming from the new EU–UK legal framework, and in the case of EU member states, also from EU law. The obstacles for a reinstatement are not of such a nature that they make the revival legally impossible, but they substantially narrow its potential scope.

These arguments will be applied in the context of two specific sectors: aviation –with a focus on the UK bilateral agreements with Germany and the former Czechoslovakia– and coordination of social security –with a focus on UK bilateral agreements with Italy and Germany–. These two sectors were selected because of their crucial importance for citizens and businesses on both sides of the Channel. Both travel and work represent everyday activities of citizens impacted profoundly by the legal framework. Moreover, although fields such as judicial cooperation in criminal matters or investment protection[8] are important, but do not affect citizens' lives on an everyday basis.

The analysis of the British parliament demonstrates that the UK reflected on the idea of reviving the bilateral pre-accession agreements with EU member states.[9] The revival is advocated also by some scholars in areas like aviation, coordination of social security, or investment protection.[10] Whilst the member states adhered during the negotiations on withdrawal and the new legal framework to the joint EU position –and preferred collective rather than individual solutions–,[11] in case of the legal vacuum in EU-UK agreements, there may be initiatives to revive said early bilateral agreements.

The present article will not consider the bilateral agreements concluded between an EU member state and the UK during the EU membership of both of them.[12] Although discrepancies are not to be completely excluded, the assumption is that the member states entered into mutual obligations, which are in line with EU law, and hence have been unaffected by the UK's withdrawal. On the contrary, agreements concluded between the UK and a member state prior to the EU membership of one of them could not have always

anticipated the future accession of either of the two states to the EU. Therefore, possible overlaps and even conflict with EU law which would prevent application of parts of agreements during UK's membership will not be excluded from the current analysis.

The article uses a traditional legal-doctrinal methodology, focusing on the analysis of official documents and case-law. The academic literature is used as a supplementary source of information supporting the author's approach. However, due to the fact that the new EU–UK legal framework and the idea of reviving bilateral agreement are quite new concepts, the academic literature on this subject-matter is not abundant.

2 THE NEW LEGAL FRAMEWORK FOR EU – UK RELATIONS – TRADE AND COOPERATION AGREEMENT

The focus of part II of this article is to provide a short outline of the new EU–UK legal framework.[13] It will introduce how the new legal regime creates a downgrade from full EU membership and, consequently, the potential for a legal vacuum in the areas of aviation and social security. The new legal framework agreed to by the UK at the end of 2020 consists of three agreements –the Trade and Cooperation Agreement, the Nuclear Cooperation Agreement and the Agreement on Security Procedures for Exchanging and Protecting Classified Information–.[14] This article will focus only on the first one, given its major importance, comprehensive nature, and relevance for the areas covered in this article.

The Trade and Cooperation Agreement is unprecedented in its scope, encompassing areas such as trade, energy, climate, security, transportation, and fisheries. Its provisions, going beyond the scope of a classical Free Trade Agreement reflect the unique nature of the EU–UK relationship and the status of the UK as a former member state.[15] These are reasons why the Trade and Cooperation Agreement is so ambitious in its content.[16] On the other hand, even the most ambitious Free Trade Agreement cannot replicate the benefits arising from the membership in the EU internal market and the customs union. This is further aggravated by the lack of direct effect of the Trade and Cooperation Agreement.[17] In some areas like fisheries, regulatory cooperation and data protection envisage continuing negotiations or transitional regimes.[18] In other words, the new legal framework represents a downgrade from the status of EU membership,[19] thus creating potential for a legal vacuum in relations between the EU and the UK. Aviation and social security are two prominent examples which directly affect the lives of the citizens of the UK and the EU and will be analysed further in more detail.

2.1 AVIATION

In the field of aviation, the Trade and Cooperation Agreement provides to the EU and the UK the right to grant airlines of the other contracting party the possibility to operate the routes between points in their territory, intermediate points and points beyond. The key provision of this part is Article 419 which addresses the issue of traffic rights. This provision guarantees to air carriers of both contracting parties the first four air freedoms out of the existing nine.[20] In addition, paragraph 4 of this Article grants EU member states the right to negotiate bilateral agreements with the UK beyond the Trade and Cooperation Agreement, which would include the fifth freedom rights.[21] Whilst Article 419 paragraph 4 grants the UK and EU member states the right to negotiate bilateral agreements regarding the fifth freedom, this right may be operationalized by reviving the existing bilateral agreement on this subject-matter. The Trade and Cooperation Agreement does not cover the sixth to the ninth freedoms, which were previously applied to the UK due to its EU membership.

The conditions and the procedure for the negotiation and conclusion of the bilateral aviation agreements between the UK and EU member states are governed by Articles 6 and 8 of the decision on signature and provisional application of the Trade and Cooperation Agreement.[22] Whilst the principal aim of these provisions is to govern the conclusion of new agreements, they do not exclude the revival of the earlier ones. However, they explicitly exclude in Article 6 paragraph 3 letter a) of the decision any other issues from the scope of the new EU – UK bilateral agreements. In practice, this means that the member states are precluded from covering the sixth to ninth freedom bilaterally with the UK on the basis of the Trade and Cooperation Agreement.

2.2 COORDINATION OF SOCIAL SECURITY

The provisions of the Trade and Cooperation Agreement on the coordination of social security cover only legal residents of EU member states and in the UK, and strictly in situations between one or more member states and the UK. Given the end of free movement with respect to the UK, this means that personal scope of social security provisions of the Trade and Cooperation Agreement is much narrower than the previous EU legal framework. The details of social security coordination are enshrined in the Protocol on Social Security Coordination, which stipulates the material and personal scope of social benefits, basic principles such as non-discrimination between the EU Member States, equal treatment of benefit recipients with nationals, aggregation of insurance periods in different countries, among others. The Protocol has pursuant to its Article SSC.67 a special status, as natural and legal persons are entitled to invoke its provisions, either directly or through national law.

However, the protocol creates a downgrade for EU–UK relations compared to the previous legal regime. In its Article SSC.3 paragraph 4 the protocol explicitly excludes some benefits from its scope. This is the case e. g. for the family benefits, covered during the UK membership in the EU by Article 3 of Regulation 883/2004.[23]

Another specific feature of the Protocol is its limited application for a period of fifteen years after its entry into force, with any party having the right not later than twelve months before its expiry to initiate its renegotiation. This provision represents a sunset clause and creates a sectoral cliff-edge for the field of the coordination of social security. Both the limited material scope of the Protocol –when compared to the EU law– and the sunset clause create a space for reflections on the reviving of pre-accession bilateral agreements on the coordination of social security (i.e. UK agreements with Germany and Italy, analysed in more detail in part 5.4 of this article). In other words, the question arises as to whether these bilateral agreements covering participation of nationals of the other contracting party in the social security schemes may materially supplement, or in case of unsuccessful renegotiation after fifteen years even replace, the Protocol.

Similarly, as in the case of aviation, the Council decision on signature and provisional application of the Trade and Cooperation Agreement in its Article 7 provides the member states with the possibility to negotiate bilateral agreements with the UK on issues of social security. This is subject to several conditions, in particular the compatibility with the Trade and Cooperation Agreement, EU law, and the principle of non-discrimination. Whilst aiming primarily at the conclusion of new bilateral agreements, these provisions may further cover the reinstating of the old ones. The international commitment has the same legal force no matter whether it is newly negotiated or revived. The status of earlier agreements will be examined further in Part 3 from the perspective of international law.

3 THE VIENNA CONVENTION ON THE LAW OF TREATIES AND ITS APPLICATION TO THE BILATERAL AGREEMENTS BETWEEN THE MEMBER STATES

The purpose of part III is to outline the legal framework provided by the Vienna Convention for termination, suspension in operation, and parallel application of subsequent agreements. This part will further provide the views of international tribunals on how these concepts are applied in practise. Finally, the general concept of earlier bilateral agreements between member states is framed into the concrete provisions of the Vienna Convention.

3.1 TERMINATION, SUSPENSION IN OPERATION AND PARALLEL APPLICATION OF BILATERAL AGREEMENTS PURSUANT TO THE VIENNA CONVENTION

Article 30 paragraph 3 of the Vienna Convention enables the application of an earlier agreement to the extent that it is compatible with the provisions of a subsequent agreement. Article 59 provides for termination or suspension in operation of an earlier treaty by virtue of conclusion of a later treaty when several conditions are fulfilled. The first three cumulative conditions of Article 59 for the termination are: (1) conclusion of a new treaty, (2) identity of the contracting parties, and (3) the same subject-matter. The fourth cumulative condition is that there is either an established intention of the parties to govern the matter by a new treaty, or incompatibility of the provisions of the new treaty with those of the earlier one to the extent that the two treaties are not capable of being applied at the same time. For the suspension of the earlier treaty Article 59 paragraph 2 prescribes an established intention of the parties to this effect, whilst implicitly maintaining the first three conditions.

Article 30 paragraph 3 and Article 59 are closely related provisions, but at the same time, there is an important distinction between them, as specified in the commentary of the International Law Commission.[24] Whilst Article 30 paragraph 3 is intended for the parallel application of provisions of two subsequent treaties in force, Article 59 is tailored to situations where it has been established that the parties intended to fully terminate or suspend the earlier treaty.[25] In other words, Article 30 paragraph 3 and Article 59 of the Vienna Convention cannot apply to the same provisions of a treaty at the same time and Article 30 can only enter into play if Article 59 does not apply.

The Vienna Convention further prescribes procedural conditions for invalidity or a suspension of operation of an agreement. According to its Article 65, the contracting party invoking a ground for termination or a suspension in operation must notify the other party of this claim. Said notification triggers a period of three months, during which the other party may raise an objection, in case of which a solution should be explored in line with Article 33 of the Charter of the United Nations.

In assessing the revival for the provisions of the pre-accession agreements with the UK it is necessary to frame them either into the Article 30 paragraph 3 or the Article 59 scenario, and also to distinguish within Article 59 between both paragraphs providing for termination and suspension in operation. In this respect, the commentary of the International Law Commission refers to the separate opinion of Judge Anzilotti in the *Electricity*

Company of Sofia and Bulgaria case,[26] which served as an inspiration for the codification in Article 59.[27] The opinion established that the parties do not have to terminate the earlier agreement explicitly, but that said termination may be also an implicit consequence of incompatibility of the anterior agreement with the new one.

However, the notion of implicit termination does not mean an automatic termination resulting in invalidity.[28] This is to prevent a situation when the contracting parties have diverging views on whether the agreement has been terminated or not.[29] For this reason, the contracting party invoking ground for invalidity must initiate the procedure enshrined in Article 65 of the Vienna Convention and provide the other party with the possibility to raise objections.

3.2 ARTICLE 30 PARAGRAPH 3 OF THE VIENNA CONVENTION

As aforementioned, Article 30 paragraph 3 applies only when both the prior and subsequent agreement are valid and in operation. The earlier agreement is then applied only to the extent that its provisions are in accordance with the later one.[30] The validity of the earlier agreement remains unaffected by the subsequent agreement. What may be affected is the application of some parts of the earlier agreement.

Consequently, in the context of Brexit it is not necessary to contemplate the revival of the earlier agreement. Article 30 paragraph 3 enabled the application of earlier agreement already before the UK's withdrawal to the extent compatible with EU law, as will be demonstrated with reference to the case *Rönfeldt*[31] case (in part 4.2 below). In other words, there are cases of non-application that are not due to termination or suspension in operation by subsequent agreement as provided by Article 59, but due to the incompatibility between the earlier treaty as set out by Article 30 paragraph 3. For these cases, the crucial question is whether the end of application of EU law to the UK brings the revival of earlier agreements.

From the perspective of the Vienna Convention, the end of application of EU law to the UK means an end of the obstacle of a subsequent agreement preventing the application of earlier one within the meaning of Article 30 paragraph 3. In practice, the termination of EU Treaties in the relations between the UK and the remaining member states means that the superseding agreement ceases to be in force. Thereby, the revival of the earlier agreement, not applied because of the conflicting provisions with EU law, becomes possible –unless its application is prevented by the Trade and Cooperation Agreement–.

On the other hand, the revival based on Article 30 paragraph 3 is not possible when the bilateral agreement is terminated or suspended in operation in accordance with Article 59 of the Vienna Convention. These situations result in a complete legal vacuum, in which both earlier bilateral agreement and EU law are not in force anymore in the relations between the UK and member states in areas not covered by the Trade and Cooperation Agreement. As will be demonstrated in part V for the aviation and social security sectors, Article 30 paragraph 3 will play crucial role for the potential revival of earlier agreements in these fields.

3.3 THE VIEW OF INTERNATIONAL TRIBUNALS

From the point of view of various international tribunals, the EU Treaties are perceived as ordinary international agreements in the sense of the Vienna Convention. These tribunals are reticent to accept any primacy of EU law, which should terminate, suspend in operation, or disapply the earlier agreements between member states. Contrarily, they rigorously scrutinize the conditions related to invalidity. This may be evidenced by various rulings of international tribunals, such as investor-state dispute settlement panels, International Tribunal for the Law of the Sea, or the tribunal instituted within the Permanent Court of Arbitration.

One of the most important decisions related to subsequent agreements was the award of the arbitration tribunal established under the Netherlands-Slovakia BIT on jurisdiction and merits in the *Achmea* case.[32] Slovakia –as one of the parties in the dispute– raised the intra-EU objection claiming the termination and inapplicability of the bilateral agreement between former Czechoslovakia and the Netherlands because of the subsequent accession of the country to the EU. The tribunal considered the relevant provisions of the Vienna Convention and came to the conclusion that the Dutch-Czechoslovak Agreement was still valid and applicable. It relied on the lack of a notification to this effect, as required by Article 65 of the Vienna Convention and the lack of incompatibility with the EU law because of a different subject-matter.[33]

A similar conclusion has been reached in the *Marfin Investment Group v. Greece* dispute by an investment tribunal established under the Greek-Cypriot investment agreement of 30 March 1992.[34] According to the tribunal, the subject-matter of the agreement is different from the one of the EU Treaties, hence neither Article 30 paragraph 3 nor Article 59 was applicable to that case.[35] The position of international tribunals *vis-a-vis* the EU law can be illustrated by the following statement in *Rockhopper* proceedings:

> EU law is a system of obligations entered into as between EU Member States to regulate the manner (in many, but not all respects) by which they each govern their respective jurisdictions. In that sense, EU law is indeed public international law to that particular extent. However, EU law does not go further than that and constitutes, in the Tribunal's view, international law as a *lex specialis*, the application of which is restricted to those cases which fall into its particular scope.[36]

It follows from this statement, that international tribunals perceive EU law as a *lex specialis* being part of international law. From an international law perspective, EU law is not hierarchically superior to other treaty systems and does not automatically entail termination, suspension in operation, or non-application of bilateral agreements of EU member states just because of its specific features, including its primacy over conflicting international obligations.[37] Whilst this is usually the approach of the Court of Justice of the EU –which insists on the creation of special constitutional orders between member states–,[38] international tribunals base their conclusions on international law and the case law of the Court of Justice of the EU is not binding upon them.

EU law is treated, from their point of view, as a part of international law, and from the perspective of the International Tribunal for the Law of the Sea as international treaties with separate rights and obligations.[39] In case of a conflict of norms and resulting termination, suspension in operation, or non-application they, therefore, primarily rely on the Vienna Convention and not EU law. In the case of *Rhine Chlorides*[40] the tribunal did not even refer to EU law, despite dealing with issues covered by EU Treaties such as economic aspects of environmental protection, or the management of international rivers.[41] On the other hand, EU member states are not able to disapply EU law, as they would otherwise have to face infringement proceedings under Article 258 of the Treaty of the Functioning of the European Union (TFEU).

3.4 FRAMING THE EARLIER BILATERAL AGREEMENTS UNDER THE CONDITIONS OF ARTICLE 59 OF THE VIENNA CONVENTION

Article 59 lays down the conditions for termination (paragraph 1) or suspension of operation (paragraph 2) of an earlier treaty by the conclusion of later treaty. The first condition for termination is the conclusion of a later treaty. This condition focuses on the existence of a treaty as such and its temporal element of posteriority. When applying this provision to EU Treaties, these are, at the same time, integral parts of the EU legal order and international agreements within the Vienna Convention.[42] The same is true for EU secondary law, which, as Klabbers rightly points out, is an emanation from multiple EU Treaties and, without such basis, would be devoid of legal effect.[43] Primary and secondary EU law, thus, fall within the concept of later treaty.

As for the second condition of termination set out by Article 59 of the Vienna Convention (identity of the contracting parties), the UK and all other member states were contracting parties to EU Treaties and protocols. The UK was a contracting party even to the protocols related to the British opt-outs, which prevented application of certain parts of EU law (in particular the Schengen acquis, the common currency, and the area of freedom, security and justice) in its territory.[44] Consequently, the condition of identity of the contracting parties with respect to EU primary law is complied with.

On the other hand, this condition does not always hold with respect to all acts of the secondary law exactly due to the special treatment provided to the UK by various protocols attached to EU Treaties. The reason for this is that these protocols granted the UK the option of not participating in certain acts of secondary law on a case-by-case basis.[45] Consequently, whilst in most cases the condition of identity of contracting parties is fulfilled, for some acts of secondary law –particularly in the field of freedom, security and justice– this condition does not hold.

The third condition for termination, namely the same subject-matter, needs to be examined on a case-by-case basis.[46] As outlined in the previous paragraph, due to the special treatment provided to the UK by certain protocols related to opt-outs, specific acts of EU secondary law were not binding for the UK. In these cases, the condition of the same subject-matter did not hold. However, most of EU acquis was binding upon the UK, thus, creating prerequisites for overlaps with the subject-matter of earlier bilateral agreements. By way of example, the rights and obligations of airlines covered by Regulation 1008/2008 were previously to a large extent covered by bilateral agreements of the member states with the UK.[47] Another important example is the coordination of social security, currently governed by Regulation 883/2004, but previously by social security agreements involving the UK.[48] The specific pre-accession bilateral social security agreements concluded by the UK with Germany and Italy are analysed in part 5.4 of this article. To sum up, the identity of the subject-matter of bilateral agreements and EU law must be identified individually, but there are some areas, in particular aviation or social security, where this condition is fulfilled.

The most difficult condition of Article 59 first paragraph of the Vienna Convention in terms of requiring the most in-depth examination and exposed to subjective assessment is the last condition –namely the intention of the parties to replace the old treaty with the new one or a substantive incompatibility–. EU Treaties do not contain any explicit provision terminating earlier bilateral agreements between the member states.[49] It is also difficult to identify an implicit intention of the EU member states to terminate earlier bilateral agreements. Indeed, as De Witte points out, the founding EU treaties have not terminated any bilateral agreements between member states.[50] EU secondary law contains some provisions referring to the supersession or replacement of earlier bilateral agreements in the area of aviation and social security.[51] But these provisions do not state that the superseded or replaced bilateral agreements

are terminated. The fact that the earlier bilateral agreements are not terminated is evidenced by the fact that the superseding EU law provisions either refer only to restrictions arising from aviation bilateral agreements,[52] or even explicitly allow under specific circumstances the application of earlier social security bilateral agreements.[53] Similarly, the UK accession treaty from 1972 lists the provisions of social security agreements remaining applicable without terminating any agreement in this field.[54] Consequently, the EU primary or secondary law does not contain explicit or implicit intent for termination of an earlier bilateral agreement.

The alternative condition set out in Article 59 paragraph 1 of the Vienna Convention the intention of both parties to replace the earlier treaty with the new one is an incompatibility of the provisions to such an extent that both treaties (the old and the new one) are not capable of being applied at the same time. The risk of overlap of earlier agreements with EU law is likely, because prior to acceding to the European Economic Community (EEC)/ EU European states aimed at regulating mutual relations by bilateral treaties in areas where EU law applies today, e.g., in order to support mutual commerce, facilitate travelling of their citizens and harmonize technical norms. Usually, the purpose of the earlier agreements was to grant some benefits to citizens and economic operators of the other contracting party.[55] After the accession to the EU, provisions granting these benefits may have infringed EU rules encompassing all EU citizens and EU economic operators, in particular the non-discrimination principle. This will be demonstrated with reference to the judgment of the Court of Justice of the EU in *Matteucci* in Part 4.2 below.[56] However the incompatibility must be assessed individually for each case, hence, it is not possible to conclude that all earlier bilateral agreements are incompatible with EU law.

Furthermore, the above analysis is relevant for Article 59 paragraph 2 of the Vienna Convention. It has been demonstrated that the intention of the contracting parties of the earlier bilateral agreement to terminate them by EU law has not been established. The same is true for suspension in operation, which cannot be explicitly or implicitly identified in the respective provisions of EU law.

On one hand, some of the substantive criteria for termination or suspension in operation –such as existence of subsequent agreement and identity of contracting parties of earlier bilateral agreement between the member states– are fulfilled. On the other hand, it is not possible to identify the intention of member states to terminate or to suspend in operation the earlier agreements. The incompatibilities between earlier agreements and EU law exist, but the extent of the incompatibility (using the language of Article 59 paragraph 1 letter b) of the Vienna Convention "so far incompatible") does not result in their termination. Indeed, as explained above and further analysed in part 4.2, in some cases the provisions of EU law explicitly allow for application of earlier agreements under certain circumstances.[57] What is even more important, the contracting party invoking termination or suspension in operation must follow the procedure laid down in Article 65 of the Vienna Convention. To the authors' knowledge, with the exception of intra-EU bilateral investment agreements,[58] member states have not proceeded with the notifications pursuant to Article 65 with respect to other earlier bilateral agreements, in particular not in the areas of aviation and social security which are under examination in this article. This confirms the conclusion that earlier bilateral agreements between the member states are valid and have not been terminated or suspended in operation by the accession to the EU. The withdrawal of the UK, therefore, creates a potential for reviving them because EU law is not in force anymore between the member states on one side and the UK on the other.

From the perspective of citizens and economic operators, the question arises whether the revival of earlier international agreements is automatic or additional steps are necessary in order to revive the agreement. Given the continued validity of the agreements, the elimination of the obstacle of subsequent agreement entails automatic revival. Indeed, as Nazzini points out, a provision of international law does not become invalid and non-existent as a mere consequence of incompatibility with EU law, and after removing the incompatibility this provision can be applied again.[59] This means that from the perspective of international law, no additional steps are needed in order to apply the agreement. However, for the purpose of legal certainty, it is desirable to confirm the reapplication of revived provisions, e.g. by means of exchange of diplomatic notes.

Whilst the revival is automatic, its scope is narrowed on both sides, with stricter limitations on the side of the member states. Both member states and the UK must respect restrictions stemming from the Trade and Cooperation Agreement. In addition, member states are impaired by the provisions of EU law which prevent them from engaging in conflicting international obligations. This means that they are prevented not only from acquiring new obligations, but also from reviving the old ones. In this respect, Article 30 paragraph 3 of the Vienna Convention becomes the crucial provision of the Vienna Convention, as it enables partial revival of those provisions of earlier agreements which are compatible with the Trade and Cooperation Agreement. The member states must also consider their obligations stemming from EU law in the process of potential revival. The position of EU law and the approach of the Court of Justice of the EU regarding international obligations that are incompatible with EU law will be analysed in the Part 4 of this article.

4 EU LAW AND THE APPROACH OF THE COURT OF JUSTICE OF THE EU

The purpose of part IV is to assess the legal framework provided by EU law for earlier bilateral agreements of the member states. This part will outline the provisions of EU primary law, the case law of the Court of Justice of the EU, as well as the criterion of compatibility with EU law.

4.1 THE PROVISIONS OF EU TREATIES ON BILATERAL AGREEMENTS OF THE MEMBER STATES

Before Brexit, the UK did not enjoy any Treaty regime for its international agreements with other member states, such as the *Benelux* countries did.[60] It is, therefore, necessary to resort to general Treaty provisions. EU Treaties touch upon the question of bilateral agreements in general terms. Article 351 TFEU[61] covers only earlier agreements of the member states with third countries, leaving agreements between member states aside. The Court of Justice of the EU clarified in case *Burgoa* that Article 351 TFEU implies apart from obligations of the member states to the third countries also duties for EU institutions not to impede the implementation of the member states' obligations to the third countries.[62] The "generous" wording of this provision *vis-à-vis* earlier agreements with third states suggests according to Wouters et al and Klabbers that EU Treaties emphasize a balance between the uniform application of EU law and the respect for international law.[63] This balance cannot be ignored with respect to earlier bilateral agreements between the member states.

Another relevant provision is Article 4 paragraph 3, second subparagraph of the Treaty on the European Union (TEU), which obliges the member states to take any appropriate measures in order to fulfil their obligations arising out of the Treaties or acts of the EU institutions. The scope of this provision is wide and may affect also earlier bilateral agreements.[64] Part of it encompasses the 'principle of sincere cooperation' requiring mutual respect between the EU and member states in pursuing the tasks provided by the Treaties. The principle of sincere cooperation applies both in relations between member states and in their action *vis-à-vis* third countries.[65] However, Article 4 paragraph 3 does not terminate or suspend per se the operation of any bilateral agreement between member states. Indeed, as de Witte argues, EU Treaties respect the mutual international obligations of member states so that automatic termination or suspension in operation of bilateral agreements by virtue of EU Treaties did not happen.[66] According to this interpretation –correct in the authors' opinion–, EU law did not terminate bilateral agreements, but member states are under an obligation to undertake the steps necessary for aligning their international obligations with EU law. The case law of the Court of Justice of the EU provides some more guidance in this respect.

4.2 CASE LAW OF THE COURT OF JUSTICE OF THE EU ON BILATERAL AGREEMENTS – INCOMPATIBILITY, PRECEDENCE AND SUPERSESSION

The first important judgment having implications for bilateral agreements between the member states was the case 10/61 *Commission v Italy*.[67] Italy tried to justify the levying of customs duties for some products from other member states based on the General Agreement on Tariffs and Trade (GATT) agreements by referring to Article 234 of the Treaty establishing the European Economic Community (EEC Treaty nowadays Article 351 TFEU). The Court rejected this argument by explaining that the purpose of Article 234 EEC Treaty was to protect the rights of third countries and affirm the obligations of member states.[68] Moreover, the Court referred to general principles of international law pursuant to which a state gives up the exercise of the rights stemming from an earlier agreement by assuming a new obligation, which is incompatible with the former.[69] The Court affirmed this interpretation and set a crucial rule by emphasizing that, in matters governed by it, the EEC Treaty takes precedence over agreements concluded between member states before its entry into force.[70] This argument falls well in the rules of general international law, which were not yet enshrined in the Vienna Convention at the time of the judgment, being codified only a few years later. The EEC Treaty was a subsequent agreement, whilst the GATT agreements were concluded earlier, so the application of *lex posterior* rule was fully in accordance with international law.

These conclusions were further corroborated in the *Matteucci* ruling,[71] where the Court was seized with the question of whether the bilateral cultural agreement between Belgium and Germany providing for a possibility to grant scholarships for nationals of both contracting parties was compatible with EU law. The conclusion of the Court was unambiguous as it decided that the member states may not preclude the application of EU law because of a bilateral international agreement.[72] The Court further elaborated in extensive case law on the relationship between bilateral agreements of the member states and EU regulations in the area of coordination of the social security systems. The judgments in *Walder*[73] and *Rönfeldt*[74] confirmed the replacement of the provisions of bilateral agreements on social security coordination by EU secondary law. However, the Court did not go further in elaborating whether the term replacement should be interpreted as a termination in the meaning of Article 59 paragraph 1 of the Vienna Convention, a suspension of operation based on Article 59 paragraph 2, or the rule of parallel application based on Article 30 paragraph 3.

Some authors interpret the replaced term as meaning the abrogation of earlier bilateral agreements.[75]

Altogether, the judgement *Rönfeldt* provides arguments in favour of the Article 30 paragraph 3 scenario. Despite confirming the replacement of bilateral agreements by the Regulations 1408/71[76] and 883/2004,[77] the Court admitted the application of bilateral agreements on social security coordination under specific circumstances. These were the cases, where the replacement of earlier agreement results in a less advantageous status for the worker, and, thereby, a loss of benefits granted by bilateral agreements.[78] The Court apparently refused to declare the provisions of bilateral agreements terminated or suspended in operation not based on Vienna Convention rules, but by looking at the goals of EEC Treaty provisions on free movement of persons. The Court was inspired by the aim of not depriving the workers of any social advantage they might be entitled to based on earlier bilateral agreements.[79] In any case, as Strban correctly argues the judgement, *Rönfeldt* corroborates the conclusion that the old social security agreements may continue to apply, since the EU regulations never annulled them, only replaced.[80]

In *Bogiatzi*[81] the Court was confronted with the situation where a prior international agreement (The Warsaw Convention) was partially replaced in relations among EU member states with provisions of secondary law. It held that the provisions of EU secondary law do not preclude the application of those provisions of the Warsaw Convention, which do not overlap with EU rules.[82] In other words, the Court allowed for an application of those elements of prior mutual agreement, which are not governed by EU law, thereby not rendering the whole prior agreement inapplicable or void.

The most recent landmark ruling *Achmea* was a follow-up to arbitration awards analysed in Part 3.3. The Court of Justice of the EU was confronted with the compatibility of an investor-state dispute clause between Slovakia and a Dutch investor, as set out in a bilateral investment agreement (BIT) between former Czechoslovakia and the Netherlands.[83] The Court concluded that the agreement was incompatible with EU law, as it did not ensure resolution of disputes by the courts being part of the judicial architecture of the EU, and thereby posing a possible risk for autonomous application of EU law.[84] Nazzini perceives the *Achmea* judgment as preventing the application of agreements concluded between EU member states, hence enabling applicability of their provisions after the end of incompatibility –in case of Brexit, at the end of transition period–.[85] Despite claiming for a revival, the same scholar admits that arguments sustaining the contrary may also succeed.[86] The author does not point to the specific provision of the Vienna Convention serving as a legal basis for revival. In some authors' view, the only applicable provision is Article 30 paragraph 3 of the Vienna Convention.[87]

The examination of provisions of EU treaties and the case law of the Court of Justice of the EU has revealed that EU law precludes the application of some provisions of earlier bilateral agreements. At the same time, other authors provide that EU law does not terminate or suspend in operation these agreements pursuant to Article 59 of the Vienna Convention. Quite the contrary: the judiciary endorsement of continuous application of certain provisions of earlier provisions of bilateral agreements should be interpreted according to Article 30 paragraph 3 of the Vienna Convention. In other words, they have not been terminated or suspended in operation, but continue to apply to the extent they are compatible with EU law. The exact extent of their application will be the focus of the Part 5 in the sectors of aviation and coordination of social security.

5 REVIVAL OF BILATERAL AGREEMENTS IN THE SPECIFIC SECTORS

The examination of a general framework of international law and EU law has revealed that earlier international agreements between the member states and the UK have, in principle, not been terminated or suspended in application, in line with Article 59 of the Vienna Convention. These may, nonetheless, be applicable to the extent compatible with EU law and the Trade and Cooperation Agreement pursuant to Article 30 paragraph 3.[88] The remaining question is the scope for their revival.

Consequently, the following analysis will elaborate upon two specific sectors: first, aviation and secondly, coordination of social security in order to determine the scope for revival of specific earlier agreements. In aviation the focus will be on aviation agreements of the UK with Germany of 1955 and former Czechoslovakia of 1960, which are selected in order to give examples from both sides of the former Iron Curtain. The area of social security will touch upon the UK social security agreements with Italy in 1953 and Germany in 1960 because they are examples of social security agreements limiting their personal scope to the nationals of the contracting parties.

5.1 REVIVAL OF BILATERAL AGREEMENTS IN THE FIELD OF AVIATION

As stated above in the part 2.1, the first four air freedoms are covered by the Trade and Cooperation Agreement, thereby making any reflection of the revival of old provisions related to these air freedoms futile. However, a possible legal vacuum for economic operators is entailed by the lack of regulation of the fifth to the ninth freedom directly in the Trade and Cooperation Agreement, in Article 419 paragraph 4, which only authorizes member states to negotiate bilateral agreements covering the

fifth air freedom.[89] This is the only air freedom member states are entitled to cover by their bilateral agreements, as the decision on signature and provisional application of the Trade and Cooperation agreement explicitly excludes in its Article 6 paragraph 3 letter for other issues from the scope of bilateral agreements.

Some EU member states concluded their bilateral aviation agreements with the UK prior to the EU membership of one or both of them, in particular in the 1950s and 1960s. These may be potential candidates for a revival. As such, I will analyse two specific bilateral agreements of EU member states with the UK. The first one is the aviation agreement of the UK with the Federal Republic of Germany and the second one with the former Czechoslovakia.

5.2 UK AVIATION AGREEMENT WITH GERMANY

The UK concluded with the Federal Republic of Germany an aviation agreement in 1955.[90] According to the UK Treaty database this agreement entered into force on 7 February 1957 with no termination date indicated.[91] The agreement is published in the German *Bundesgesetzblatt*[92] and the German Ministry of Transportation lists it among the existing aviation agreements concluded by Germany.[93] These UK and German national sources indicate that the agreement is still in force and has not been terminated by EU law according to Article 59 of the Vienna Convention.

The issue of traffic rights is addressed in Article 2 of the UK–Germany agreement. According to Article 2 paragraph 1, the contracting parties grant to the designated airlines certain traffic rights as stipulated in a Route Schedule agreed in an exchange of diplomatic notes. Whilst unusual under today's terms, flight connections had to be specified in supporting documents. The scope of traffic rights is addressed in paragraph 2 of Article 2, which grants the airlines designated by the contracting party the right to fly without landing across the territory of the other Contracting Party: (1) to make stops in the said territory for non-traffic purposes, and (2) to make stops in the said territory at the points specified for that route for the purpose of putting down and taking on international traffic in passengers, mail or cargo.

The same provision explicitly excludes from the scope of the agreement the right of airlines of one contracting party to operate domestic routes on the territory of the other contracting party. When applying this provision, together with the Route Schedule to the nine air freedoms, it is clear that it covers the first five freedoms.[94] Although the last option above provides stops for commercial purposes and may indicate the sixth freedom, when interpreting this provision together with the Route Schedule provided in the Annex, it is apparent that this freedom is not covered. The schedule stipulated for the particular airlines designated by Germany as the departure, and by default arrival airport, always stayed within German borders. The same is true for the airlines designated by the UK with respect to the UK airport.[95] From the schedule, it seems as if the sixth freedom is not covered by the Agreement, because the designated airlines always have their final departure or arrival destination airport in their home country. The same is true for the seventh freedom, with the eighth and ninth being even explicitly excluded from the scope of the agreement.

Considering the possibility provided by the Trade and Cooperation Agreement to negotiate bilateral agreements covering the fifth freedom, the question arises whether the revival of the bilateral UK – German air services agreement from 1955 to this effect is legally possible. Whilst still in force according to the UK and German national sources, the agreement represents quite a challenge from the point of view of compatibility with the EU law. As mentioned above, the right to fly through the airspace of the other contracting party and to make certain types of stops are reserved to the airlines designated by each contracting parties. Article 6 of the agreement provides for a "fair and equal opportunity for the airlines of both Contracting Parties to operate the agreed services on the specified routes between their respective territories".[96] According to the same provision, the respective airlines must take into account the interests of the airlines of the other contracting party in order not to unduly affect the services provided by them.[97] Article 7 establishes a mechanism for the determination of tariffs based on cost of operation, reasonable profit, characteristics of service and the tariffs of other airlines.[98]

These provisions could not have been applied during the UK's membership in the EU. The EU acquis in the aviation sector is based on liberalized rules enshrined in regulation 1008/2008. The most prominent provision in this respect is Article 15 of the regulation, which in its paragraph 1 grants EU airlines the right to operate within the EU. The same Article precludes in its second paragraph any prior requirement by member states for operation of EU airlines on intra-EU routes. This liberal regime would have been violated during the UK membership, had the UK on one side or the other EU member state on the other side, decided to use the designation mechanism enshrined in a bilateral agreement, and thereby excluded some airlines from the right of flying predefined routes. This is, in case of application of this agreement during the UK's membership, non-designated airlines would not have been able to benefit from the agreement. These kind of restrictions are incompatible with Articles 49 and 54 TFEU, which prohibit any restrictions on the freedom of establishment for nationals and companies or firms from EU member states.

This is corroborated by the wording of Article 15 paragraph 4 of the regulation 1008/2008, which explicitly

declares any restrictions for operation of intra-EU services stemming from intra-EU bilateral agreements to be superseded. Provisions of the agreement on fair and equitable opportunity to operate the routes and tariff setting run beyond any doubts counter the EU competition rules, to which the regulation abundantly refers. Following these incompatibilities, it is clear, that the agreement could not be applied during the UK's membership in the EU, despite still in force from the point of view of international law. Because it was not terminated or suspended in operation in some authors' view, the only way EU law could have superseded it is by means of Article 30 paragraph 3 of the Vienna Convention.

However, the incompatibility of the agreement with EU law has not been removed even after the UK's withdrawal, and its implementation would face incompatibilities also when applied between a EU member state and a third country. Notably, the designation clause enshrined in Article 2 paragraph 4 of the Agreement enables the contracting parties to reject the designation of airlines or to withdraw an existing designation in cases, where it deems, that the substantial ownership and effective control is not vested in the contracting parties or its nationals. For the contracting party that is an EU member state, in this case Germany, this would exclude airlines which are not in the substantial ownership and effective control of Germany or its nationals. This treatment would exclude and discriminate airlines from other EU member states, which is a violation of Article 18 of the TFEU. Similarly, the tariff-setting as set out in Article 7 of the Agreement is problematic from the perspective of Article 101 TFEU and the Regulation 411/2004,[99] which extend the scope of EU competition rules enshrined in the Regulation 1/2003[100] to air traffic with the third countries.

Considering the incompatibilities mentioned above, it is possible to suggest that the revival of the UK–German aviation agreement would be highly problematic. Although providing some space for the reflection about revival with respect to the fifth freedom, the incompatibility of the designation clause with EU primary law prevents the revival of the complete application of the agreement.

On the other hand, in line with Article 30 paragraph 3 of the Vienna Convention, it is possible to consider a limited revival of the provisions related to the fifth freedom without the designation clause. This would mean that Germany, when applying this bilateral Agreement, would open its implementation to the airlines from the other EU member states. However, given the limited geographical scope of the allowed routes provided by the Route Schedule, this application would not be suitable to the airlines which operate today much wider range of flights then envisaged by the UK–German agreement of the 1950s. The negotiation of a new bilateral agreement providing for a fifth freedom between the UK and Germany as provided for by Article 419 of the Trade and Cooperation Agreement is, therefore, legally the safest way to ensure ambitious flight connections between the two countries.

5.3 UK AVIATION AGREEMENT WITH THE FORMER CZECHOSLOVAKIA

The second aviation agreement assessed in this article is the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czechoslovak Republic for Air Services between and beyond their respective Territories[101] from 1960. The Treaty database of the Foreign and Commonwealth Office of the UK lists it among the UK agreements concluded with former Czechoslovakia. According to the database, both the Czech Republic and Slovakia succeeded into the agreement as of 1 January, 1993 –the date they became sovereign states, respectively–. The UK database notes termination of the agreement on 20 March, 1998.[102] This could be explained by entry into force of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech Republic concerning Air Services on the very same day. On the other hand, no explicit termination of the original Czechoslovak agreement occurred with respect to Slovakia. Quite the opposite, the exchange of letters on 15 December, 1998 and 26 January, 1999 between the UK and Slovakia confirm the validity of the old agreement from 1960.[103]

Only on 25 March, 2003, more than one year before the Slovak accession to the EU, both states signed an Agreement concerning Air Services.[104] As the document of the Slovak government confirms, this agreement was meant to replace the 1960 agreement of relations between Slovakia and the UK.[105] However, this second agreement never entered into force due to Slovakia's accession to the EU. According to the analysis of the Slovak government, the rules of a single European market with the free provision of air services cannot be impeded by bilateral agreements providing for a separate licencing system, the setting price policies, or other elements running counter the liberalized rules.[106] Non-ratification of the agreement between Slovakia and the UK meant that the 1960 agreement has not been terminated. This is confirmed by the fact, that the agreement is still listed in the Slovak Gazette called Collection of Laws under the number 60/1960.[107] The UK Treaty database lists this agreement too, with the note that it has been terminated on 20 March, 1998.[108]

It has been already explained above that the termination occurred only with respect to the Czech Republic, and both the UK and Slovakia confirmed the validity of the 1960 agreement in exchange of

notes dated December 1998 and January 1999. When examining the intention of the contracting parties of the agreement dated from 1960, the intention of the UK and Slovakia is indicating that this agreement is still valid and has not been terminated or suspended in pursuant to Article 59 of the Vienna Convention although apparently it has not been applied during the UK membership in the EU.

The content of the UK–Czechoslovak agreement is, to a large extent, similar to the UK- German agreement on such issues as the traffic rights, designation of airlines entitled to operate the routes, fair and equal opportunities, and determination of tariffs, amongst other topics. Traffic rights are addressed in Article 3. This provision has similar wording as the Article 3 of the UK–German air agreement analysed above. It grants to UK and Czechoslovakian airlines the operation of the first five freedoms. However, the route schedule attached to the agreement provides only for the route London–Prague and vice versa.[109] In addition to its lack of relevance for Slovakia in geographical terms, this implies that the fifth freedom is (contrary to the UK-German agreement) not covered by this text. The first four freedoms are already covered by the EU–UK Trade and Cooperation Agreement, so the revival of this agreement in its 1960 wording is prevented by the new EU–UK legal framework.

The only way to revive the earlier UK-Czechoslovak Agreement is to amend the Route Schedule to contain the arrival and departure points in the Slovak territory and cover the fifth freedom also the points beyond. But even after this amendment of the text would involve the same EU law issues as the UK–German agreement regarding the designation clause and the EU competition rules. The potential for a revival of the UK–Czechoslovak agreement is, therefore, smaller than the UK–German agreement.

Consequently, the analysis of the two earlier agreements between the UK and EU member states shows that despite being formally in force and not terminated or suspended in operation pursuant to Article 59 of the Vienna Convention, their revival would be highly problematic. For aviation agreements covering only the first four freedoms, the revival is prevented by the EU–UK Trade and Cooperation Agreement. Even where the fifth freedom forms part of the earlier bilateral agreement, these texts represent a challenge for the compatibility of this agreement with EU law and the room for application of earlier bilateral aviation agreements pursuant to Article 30 paragraph 3 of the Vienna Convention is extremely limited. Under these conditions the negotiation of a new bilateral agreement as authorized by Article 419 paragraph 4 appears to be the legally safest way of completing a legal vacuum entailed by the UK withdrawal from the EU.

5.4 BILATERAL AGREEMENTS ON COORDINATION OF SOCIAL SECURITY

As explained above, the Protocol on social security coordination embedded in the EU–UK Trade and Cooperation Agreement diminishes the scope of benefits provided previously by EU law to both EU and UK citizens. At the same time, the Protocol creates an additional cliff-edge due to its sunset clause which limits its application to fifteen years.[110] In this respect, the question arises whether the member states may revive their earlier bilateral agreements with the UK with the view of extending the material scope of the social benefits and in order to prevent another cliff-edge after a potentially unsuccessful renegotiation of the Protocol in fifteen years.

It has been clarified in part 4.2 above that most of the provisions of the bilateral agreements on social security coordination have been replaced by the Regulations 1408/71 and 883/2004. However, pursuant to Article 8 paragraph 1 of the Regulation 883/2004:

> Certain provisions of social security conventions entered into by the Member States before the date of application of this Regulation shall continue to apply provided that they are more favourable to the beneficiaries or if they arise from specific historical circumstances and their effect is limited in time.

This exceptional application reflects the case law Rönfeldt described in part 4.2 above. These legislative provisions and judicial endorsement of continued application clearly show that the social security agreements have not been terminated or suspended in operation pursuant to Article 59 of the Vienna Convention but continue to apply to the extent compatible with EU law in line with Article 30 paragraph 3 of the Vienna Convention. Regardless of the provisions of the Trade and Cooperation Agreement, the scope of their application post-Brexit is restricted by two important limitations in case of additional cliff-edge envisaged by Article SSC.70 of the Protocol.

The first limitation preventing the application of the bilateral social security agreements between member states is the Withdrawal Agreement of the UK, which continues to apply even after the end of the transition period.[111] According to its Articles 30 and 31, EU citizens and UK nationals falling within the scope of Article 30 of the agreement shall be protected by the application of relevant EU social security legislation, including the Regulation 883/2004.[112] This protection is, however, granted subject to specific conditions related to the existence of acquired rights at the end of the transition period.[113] *A contrario,* individuals from the EU or the UK for whom the social relationship to the other contracting party arises only after the end of the transition period (e.g. EU nationals who start to work in the UK in 2021) are not covered by the Withdrawal Agreement. For these

individuals the revival of the bilateral social security agreements might be relevant.

The second limitation related to the revival of the social security agreements relates to the requirement of respect of EU law for member states. As in the case of aviation agreements, it is necessary to examine whether social security agreements do not discriminate individuals from EU member states other than the one which concluded the agreement with the UK. As the Court of Justice of the EU emphasized in the case *Gottardo*, when applying a social security agreement with a third state, a member state must provide to the nationals from the other member states the same benefits as granted to its own nationals, except where it can provide objective justification for not doing so.[114] In other words, the EU member state bound by the bilateral social security agreement with the UK post-Brexit must include, within entitled individuals on its side, all EU citizens who comply with the conditions provided therein.[115]

These conclusions may be applied to the specific earlier bilateral agreements, e.g. the Convention between the UK and Italy on Social Insurance of 1953.[116] This convention provides in Article 14 a mechanism for claiming a pension for British and Italian nationals, who were covered by the social security systems of both contracting parties. In line with the *Gottardo* judgment, the provision must be interpreted as granting the right to all EU citizens to claim a pension in case they were covered by the social security systems of both contracting parties. Similarly, the right to obtain a pension pursuant to Article 19 of the Social Security Convention between the UK and Germany of 1961[117] should be granted to any EU citizen complying with the conditions set out in this treaty.

However, the examination of texts of these two bilateral agreements has demonstrated that the revival brings only limited practical application also when applied in parallel with the Trade and Cooperation Agreement. The main restriction consists in limited material scope of branches of social security. The 1961 Social Security Convention between the UK and Germany covers in relation to Germany sickness insurance, pensions insurance for specific types of workers, accident insurance, children's allowances, specific family benefits in the Saar, and old age assistance for farmers.[118] This material scope does not cover maternity and equivalent paternity benefits, invalidity benefits, survivors' benefits encompassed in the scope of the Trade and Cooperation Agreement,[119] but also special non-contributory cash benefits, social and medical assistance, long term-care benefits and other branches explicitly excluded from its scope.[120] The second type of branches of social security excluded from the scope of the Trade and Cooperation Agreement are not covered also by the Convention between the UK and Italy on Social Insurance of 1953.[121] Moreover, as Strban points out, the bilateral social security agreements do not take into account the insurance period in non-contracting parties[122] This means that those individuals covered by the UK–Italy or the UK–Germany agreement cannot claim, on their basis, benefits acquired in different member states.

Consequently, member states may continue to apply to a limited extent the bilateral agreements on social security coordination pursuant to Article 30 paragraph 3 of the Vienna Convention. Beyond those conditions set out in the decision on signature and provisional application of the Trade and Cooperation Agreement, they need to respect two additional conditions. First, they must respect the exclusion from the scope of bilateral agreements of those individuals who are covered by the provisions of the UK Withdrawal Agreement. Secondly, the scope of entitled persons on the EU side must be interpreted in line with the *Gottardo* judgement in a way to cover all EU citizens, not only the nationals of the contracting party which is an EU member state.[123] The revival has a very limited effect during the application of the Protocol on social security as it already covers most of the benefits within the scope of bilateral agreements on social security coordination. On the other hand, these agreements may serve as a useful safety net in order to prevent another cliff-edge after potentially unsuccessful renegotiation of the Protocol on social security coordination in fifteen years after the entry into force of the Trade and Cooperation Agreement.

6 CONCLUSION

The EU–UK Trade and Cooperation Agreement created a new legal framework which was, by default, a downgrade to the previous UK full EU membership status. This downgrade is, to a large extent, the consequence of the impossibility to replicate the benefits stemming from a full EU membership. It entailed the creation of a legal vacuum and initiated considerations about the revival of earlier bilateral agreements between the UK and individual EU member states. The provisions of the Vienna Convention, EU Treaties, and case law of the Court of Justice of the EU and international tribunals provide for a complex picture on possible revival of earlier bilateral agreements.

The Vienna Convention gives the states the options to terminate earlier bilateral agreements, to suspend their operation, or to apply them to the extent they are compatible with the EU legal framework. The EU law has not terminated or suspended the operation of earlier bilateral agreements, which may continue to apply to the extent they are compatible with EU law pursuant to Article 30 paragraph 3 of the Vienna Convention. The absence of termination pursuant to Article 59 of the Vienna Convention has been confirmed by the case law of international tribunals and the Court of Justice of the EU.

The examination of specific areas of aviation and coordination of social security revealed that conditions for partial and exceptional automatic revival in these areas exist. However, as a part of this process, the EU member states must respect several conditions, in particular compatibility with EU law, prohibition of discrimination of citizens and businesses from another EU member states, and together with the UK respect of the overall EU–UK legal framework, in particular the Trade and Cooperation Agreement and the Withdrawal Agreement.

Despite automatic revival, after more than one year after the end of the transition period, there is no evidence that the businesses and citizens started to invoke the provisions of social security and aviation agreements, which were non-applied during the UK membership. There is neither an indication that member states started to apply these provisions. This is, undoubtedly, the consequence of the extensive use of framework provided by the Withdrawal Agreement and the Trade and Cooperation Agreement.

However, the fifteen years' cliff-edge provided by the Protocol on Social Security Coordination and the possibility for the member states to negotiate the agreements covering the fifth air freedom create the potential for confirmation of automatic revival of anterior bilateral agreements, e.g. by exchange of diplomatic notes and subsequent application. One may, therefore, not oversee that the following years may bring back into life the old bilateral agreements concluded in the middle of the twentieth century and non-applied during decades as explained above. However, for the purposes of legal certainty, the negotiation of new agreements in areas of aviation and coordination of social security is legally the safest way in order to ensure efficient social security coordination and ambitious flight connections between the EU member states and the UK.

NOTES

1 Kieran Bradley, 'On the Cusp: Brexit and Public International Law' in Inge Govaere and S. Garben, (eds), *The Interface Between EU and International Law* (Hart Publishing, 2019) 210.

2 For more on the UK Withdrawal Agreement see: Federico Fabbrini, *The Law & Politics of Brexit: The Withdrawal Agreement* (OUP 2020); and Robert Frau, *Das Brexit-Abkommen und Europarecht* (Nomos, 2020).

3 Simon Usherwood, 'Our European Friends and Partners'? Negotiating the Trade and Cooperation Agreement´ (2021) 59 Journal of Common Market Studies 121.

4 Giorgio Sacerdoti, 'The Prospects: The UK Trade Regime with the EU and the World' in Federico Fabbrini (ed.), *The Law and Politics of Brexit* (OUP 2017) 77.

5 On the international agreements between the EU member states see inter alia Jan Klabbers, *Treaty Conflict and the European Union* (CUP 2008). Bruno De Witte 'The Emergence of a European System of Public International Law: the EU and its Member states as Strange Subjects' in Jan Wouters, André Nollkaemper, Erika de Wetet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Members* (T.M.C. Asser Press 2008) 39-54; Bruno De Witte 'Chameleonic Member states: Differentiation by Means of Partial and Parallel International Agreements' in Bruno de Witte, Dominik Hanf and Ellen Voset (eds), *The Many Faces of Differentiation in EU Law* (Intersentia, 2001) 231-267.

6 The EU is not a contracting party to the Vienna Convention on the Law of Treaties and to the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, the latter not being in force. However, according to numerous case-law of the International Court of Justice of the EU the rules enshrined therein should be considered as the codification of customary law.

7 Oliver Dörr, Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 1084.

8 The investment protection is particularly relevant due to the fact that the UK was not state party to the agreement terminating the intra-EU bilateral investment treaties. For this reason, one may also discuss the revival of the specific eleven UK investment agreements mostly with the member states which acceded from 2004. See Laura Peters, Sebastian Wuschka ´Investment protection in EU-UK relations after Brexit´ (*Luther Blog*, 13 January 2021) <https://www.luther-lawfirm.com/en/newsroom/blog/detail/investment-protection-in-eu-uk-relations-after-brexit> accessed 12 February 2022. Similarly, the UK was reflecting about the revival of twenty-six road transport agreements. See the document of the UK Parliament *Road Transport Bilateral agreements overview* <https://www.parliament.uk/globalassets/documents/commons-committees/european-scrutiny/Correspondence-from-DfT-on-Overview-of-bilateral-agreements-for-Roads.pdf> accessed 12 February 2022. The topic of investment agreements and road transport goes beyond the scope of this article and may be subject of future research. In total, the approximate number of the UK bilateral agreements concerned in all sectors may amount to several hundred.

9 Vaughne Miller, 'Exiting the EU: impact in key UK policy areas' (House of Commons Library 12 Feburary 2016) <https://www.northants-chamber.co.uk/images/uploads/cbp-7213_(2).pdf> accessed 12 February 2022.

10 Grega Strban 'Britain's Social Security System: Alone after Brexit?' in Andrea Biondi, Patrick J. Birkinshaw and Maria Kendrick, (eds), *Brexit: The Legal Implications* (Wolters Kluwer 2019), 223; Jan Walulik, *Brexit and Aviation Law* (Routledge 2019), 43; Mavluda Sattorova 'UK Foreign Investment Protection Policy Post-Brexit' in Michael Dougan (ed.), *The UK after Brexit: Legal and Policy Challenges* (Intersentia 2017) 278.

11 Jacopo Barigazzi and Hans von der Burchard, 'UK offers Brexit mini deals to side-step Brussels' (*Politico,* 10 September 2019) <https://www.politico.eu/article/uk-offers-brexit-mini-deals-side-step-brussels/> accessed 12 February 2022.

12 Examples include: Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany concerning Air Services to and from Berlin, 9. October 1990; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany concerning Air Navigation Services in Berlin, 23. October 1990.

13 For more information see Federico Fabbrini (ed.), *The Law & Politics of Brexit: The Framework of New EU-UK Relations* (OUP 2021).

14 Federico Fabbrini, 'Introduction' in Federico Fabbrini (ed.) *The Law & Politics of Brexit: The Framework of New EU-UK Relations* (OUP 2021) 18.

15 Federico Fabbrini and Giovanni Zaccaroni 'The Future EU-UK Relationship: The EU Ambitions for a Comprehensive Partnership' (Brexit Institute Working Paper Series No 11/2020) 2, 13 <https://dcubrexitinstitute.eu/working-papers/> accessed 14 February 2022.

16 ibid 2.

17 Adam Lazowski, 'Mind the Fog, Stand Clear of the Cliff! From the Political Declaration to the Post-Brexit EU-UK Legal Framework – Part I', European Papers - A Journal on Law and Integration, (2020) 5 (3), 1123. <https://www.europeanpapers.eu/en/e-journal/mind-fog-stand-clear-cliff-political-declaration-post-brexit-legal-framework-part-i> accessed 12 February 2022.

18 Fabbrini (n 14) 25.

19 Paola Mariani and Giorgio Sacerdoti, 'Trade in Goods and Level Playing Field' in Federico Fabbrini (ed.) *The Law & Politics of Brexit: The Framework of New EU-UK Relations* (OUP 2021) 95.

20 The first four air freedoms are the following: *first freedom - the right to fly through the territory without landing, second freedom - the right to land in the territory for non-traffic purposes, third and four freedom - the right for air carriers of one contracting Party to land in the territory of the other contracting party to provide scheduled and non-scheduled air services between any point in the territory of one Contracting Party and any point in the territory of the other Contracting Party.* The fifth to ninth freedom are pursuant to the International Civil Aviation Organization website *expressis verbis* the following: *fifth freedom - the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down and to take on, in the territory of the first State, traffic coming from or destined to a third State, sixth freedom - the right or privilege, in respect of scheduled international air services, of transporting, via the home State of the carrier, traffic moving between two other States, seventh freedom - the right or privilege, in respect of scheduled international air services, granted by one State to another State, of transporting traffic between the territory of the granting State and any third State with no requirement to include on such operation any point in the territory of the recipient State, eight freedom - the right or privilege, in respect of scheduled international air services, of transporting cabotage traffic between two points in the territory of the granting State on a service which originates or terminates in the home country of the foreign carrier or outside the territory of the granting State, ninth freedom - the right or privilege of transporting cabotage traffic of the granting State on a service performed entirely within the territory of the granting State.*

21 The essence of the fifth freedom in the Trade and Cooperation Agreement is to perform cargo flights between points in the territory of both contracting parties with connecting flights to a point in the territory of a third party.

22 Council Decision (EU) 2020/2252 of 29 December 2020 on the signing, on behalf of the Union, and on provisional application of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information (2020) OJ L 444/2–10.

23 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (2004) OJ L 166/1.

24 International Law Commission, *Draft Articles on the Law of Treaties with commentaries* (1966) 253 <http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf> accessed 12 February 2022.

25 ibid.

26 *Belgium v Bulgaria* [1939] PCIJ Series A/B No 77(PCIJ 1939).

27 International Law Commission (n 24).

28 *Achmea BV v The Slovak Republic*, Award of 26 October 2010, Case no. 2008-13, para 235.

29 August Reinisch, 'Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the Eastern Sugar and Eureko Investment Arbitrations' (2012) Legal Issues of Economic Integration 39, 164.

30 Piet Eeckhout, *EU External Relations Law* (2nd edn, Oxford University Press 2011) 421.

31 Case 227/89 *Ludwig Rönfeldt v Bundesversicherungsanstalt für Angestellte* EU:C:1991:52.

32 *Achmea BV v The Slovak Republic* (n 28).

33 ibid paras 231–277.

34 *Marfin Investment Group v The Republic of Cyprus*, ICSID Case No. ARB/13/27, Award 26 July 2018.

35 ibid, paras 584-591.

36 *Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v Italian Republic*, ICSID Case No. ARB/17/14, Award 29 June 2019, para 174.

37 Annalisa Signorell, 'The Intra-EU investment dispute settlement after Achmea: towards an integrated model of justice' (*SSRN Papers* 26 May 2020) 37. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3609561> accessed 12 February 2022.

38 International Law Commission, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission*, (A/CN.4/L.682 13 April 2006) para 218 < https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> accessed 12 February 2022.

39 *The MOX Plant Case (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, *ITLOS Reports 2001*, para 50.

40 *Netherlands v France*, Award, ICGJ 374 (PCA), 12 March 2004.

41 Anne Thies, 'European Union Member States and State-State Arbitration: Whats Left' in Marise Cremona, Anne Thies and Ramses A. Wessel (eds), *The European Union and International Dispute Settlement* (Hart Publishing 2017) 152.

42 Bruno De Witte, Thibault Martinelli, 'Treaties between EU Member States as Quasi-Instruments of EU Law', in Marise Cremona, Claire Kilpatrick, (eds), *EU Legal Acts: Challenges and Transformations*, (OUP 2018) 157.

43 Klabbers (n 5) 195.

44 It is noteworthy that the UK was able to use the options provided by the protocols even with respect to the measures related to social security coordination for third-country nationals moving within the EU. The reason for their applicability was the legal basis from the Title V of the TFEU covering the area of freedom, security and justice. Using this possibility, the UK opted into the Council Regulation (EC) 859/2003 extending the social security regulations to nationals of third countries, who are not already covered due to their nationality, but opted out from Regulation (EU) 1231/2010 covering the same subject-matter as the former.

45 Rebecca Adler-Nissen, *Opting Out of the European Union: Diplomacy Sovereignty and European Integration* (CUP 2014) 126.

46 Jan Wouters, Cedric Ryngaert, Tom Ruys and Geert De Baere, *International Law:* A European Perspective (Hart Publishing 2018) 121.

47 Walulik (n 10) 52.

48 Strban (n 10) 223.

49 Article 351 TFEU covers only agreements with third countries.

50 De Witte (n 5) 45; Wouters et al (n 46) 96.

51 Regulation (EC) 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (2008) OJ L 293/3–20, Article 15 paragraph 4; Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (2004) OJ L 166/1, Article 8 paragraph 1.

52 Regulation (EC) 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (2008) OJ L 293/3–20, Article 15, paragraph 4.

'Any restrictions on the freedom of Community air carriers to operate intra-Community air services arising from bilateral agreements between Member States are hereby superseded.'

53 "This Regulation shall replace any social security convention applicable between Member States falling under its scope. Certain provisions of social security conventions entered into by the Member States before the date of application of this Regulation shall, however, continue to apply provided that they are more favourable to the beneficiaries or if they arise from specific historical circumstances and their effect is limited in time."

54 Act concerning the Conditions of Accession and the Adjustments to the Treaties (1972) L 73.

55 Bilateral agreements on coordination of social security granting social benefits or aviation agreements granted traffic rights are good examples to this effect. Other examples may include cultural cooperation agreements, such as assessed by the Court of Justice of the EU in Matteucci Case 235/87.

56 Case 235/87 *Matteucci* v *Communauté française de Belgique*, EU:C:1988:460.

57 E. g. Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (2004) OJ L 166/1–123, Article 8 paragraph 1.

58 Reinisch (n 29) 165.

59 Renato Nazzini, 'Brexit and Arbitration' in Andrea Biondi, Patrick J. Birkinshaw and Maria Kendrick (eds), *Brexit: The Legal Implications* (Wolters Kluwer 2019) 111.

60 Ramses A. Wessel, 'Consequences of Brexit for international agreements concluded by the EU and its Member States' (2018) 55 Common Market Law Review 128.

61 TFEU, Article 351

The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.
To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.
In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

62 Case 812/79 *Attorney General v Burgoa* ECLI:EU:C: 1980:231, para 9.

63 Wouters et al (n 46), 96; Klabbers (n 5) 118.

64 Manuel Kellerbauer, Marcus Klamert, Jonathan Tomkin, *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP 2019) 53.

65 Joris Larik, 'EU external relations law and Brexit: "When Pluto was a planet"' (2020) Europe and the World: A law review, 4.

66 De Witte (n 5).

67 Case 10/61 *Commission* v *Italy*, EU:C:1962:2.

68 ibid.

69 ibid.

70 ibid.

71 Case 235/87 *Matteucci* v *Communauté française de Belgique* EU:C:1988:460.

72 ibid, para 14.

73 Case 82/72 *Walder* v *Soziale Verzekeringsbank* EU:C:1973:62.

74 Case 227/89 *Ludwig Rönfeldt* v *Bundesversicherungsanstalt für Angestellte* EU:C:1991:52.

75 Jan Wouters, Frank Hoffmeister, Geert De Baere, and Thomas Ramopoulos, *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor* (OUP 2019) 1061.

76 Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (1971) OJ L 149.

77 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (2004) OJ L 166/1.

78 Case C-227/89 *Ludwig Rönfeldt* v *Bundesversicherungsanstalt für Angestellte* EU:C:1991:52, para 29.

79 Sean Van Raepenbusch, 'The role of the Court of Justice of the EU in the development of social security law of persons moving within the European Union' (50 years of Social Security Coordination May 2009) 34 <http://aei.pitt.edu/42168/1/social_security_coordination.pdf> accessed 12 February 2022.

80 Strban (n 10) 223.

81 Case C-301/08 *Irène Bogiatzi, married name Ventouras* v *Deutscher Luftpool and Others* EU:C:2009:649.

82 ibid, para 44.

83 Case C-284/16 *Slowakische Republik* v *Achmea BV* EU:C:2018:158.

84 ibid, para 58.

85 Nazzini (n. 59).

86 Ibid 112.

87 The substantive question of revival of bilateral investment agreements of the EU member states with the UK is beyond the scope of this paper. It focuses solely on aviation and social security agreements.

88 The exception being some bilateral investment agreements, see Reinisch (n 29).

89 '4. Notwithstanding paragraphs 1, 2 and 3 and without prejudice to paragraph 9, the Member States and the United Kingdom may, subject to the respective internal rules and procedures of the Parties, enter into bilateral arrangements by which, as a matter of this Agreement, they grant each other the following rights:

(a) for the United Kingdom, the right for its air carriers to make stops in the territory of the Member State concerned to provide scheduled and non-scheduled all-cargo air transport services, between points situated in the territory of that Member State and points situated in a third country as part of a service with origin or destination in the territory of the United Kingdom (fifth freedom traffic rights);
(b) for the Member State concerned, the right for Union air carriers to make stops in the territory of the United Kingdom to provide scheduled and non-scheduled all-cargo air transport services between points situated in the territory of the United Kingdom and points situated in a third country, as part of a service with origin or destination in the territory of that Member State (fifth freedom traffic rights).'

90 Agreement between the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany for Air Services between and beyond their respective Territories, Treaty Series No. 35 (1957) <http://foto.archivalware.co.uk/data/Library2/pdf/1957-TS0035.pdf> accessed 12 February 2022.

91 Foreign & Commonwealth Office, UK Treaties Online <https://treaties.fco.gov.uk/responsive/app/consolidatedSearch/#search/v=list,c=1,q=country_name%3D%5BGERMANY%5D%2Cfield3%3D%5BBI%5D%2Ctitle%3D%5Bair%5D%2CqueryType%3D%5B64%5D,sm=s,l=library2_lib,a=t> accessed 12 February 2022.

92 Gesetz zu dem Abkommen vom 22. Juli 1955 zwischen der Bundesrepublik Deutschland und dem Vereinigten Königreich von Großbritannien und Nordirland über den Luftverkehr zwischen ihren Gebieten und darüber hinaus.

93 Bundesministerium für Verkehr und digitale Infrastruktur, Bilaterale Luftverkehrsabkommen <https://www.bmvi.de/SharedDocs/DE/Artikel/LF/luftverkehrsabkommen-bilateral.html> accessed 12 February 2022.

94 For the substance of air freedoms see (n 20).

95 Route Schedule attached to the Agreement between the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany for Air Services between and beyond their respective Territories.

96 Article 6 of the Agreement between the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany for Air Services between and beyond their respective Territories.

97 ibid.

98 ibid, Article 7.

99 Council Regulation (EC) No 411/2004 of 26 February 2004 repealing Regulation (EEC) No 3975/87 and amending Regulations (EEC) No 3976/87 and (EC) No 1/2003, in connection with air transport between the Community and third countries (2004) OJ L 68/1–2.

100 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L 1/1–25.

101 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czechoslovak Republic for Air Services between and beyond their respective Territories Treaty Series No. 26 (1960) http://

foto.archivalware.co.uk/data/Library2/pdf/1960-TS0026.pdf accessed 12 February 2022.

102 Foreign & Commonwealth Office, UK Treaties Online, available at https://treaties.fco.gov.uk/responsive/app/consolidatedSearch/#search/v=list,c=1,q=country_name%3D%5B(SLOVAK%20REPUBLIC)%5D%2Ctitle%3D%5B(air%20services)%5D%2CqueryType%3D%5B64%5D,sm=s,l=library2_lib,a=t.

103 Communication of the Ministry of Foreign Affairs of the Slovak Republic No. 324/1999 Coll. https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1999/324/19991204 accessed 12 February 2022.

104 Ibid.

105 *Návrh na uzavretie Dohody medzi vládou Slovenskej republiky a vládou Spojeného kráľovstva Veľkej Británie a Severného Írska o leteckých dopravných službách [Proposal for a conclusion of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Slovak Republic concerning Air Services]* <https://rokovania.gov.sk/RVL/Material/16533/1> accessed 12 February 2022.

106 Explanatory document of the Slovak government justifying non-conclusion of the agreement concerning Air Services between Slovakia and the United Kingdom <https://rokovania.gov.sk/download.dat?id=67461DFB9BAB4D1F8F54F15809E93066_B1CF1B03D45F15FC1DC54B4BE8FD755B> accessed 12 February 2022.

107 Dohoda medzi vládou Československej republiky a vládou Spojeného kráľovstva Veľkej Británie a Severného Írska o leteckých dopravných službách medzi ich krajinami a cez ich územia [Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czechoslovak Republic for Air Services between and beyond their respective Territories], <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1960/60/19600608> accessed 12 February 2022

108 Foreign & Commonwealth Office, UK Treaties Online, https://treaties.fco.gov.uk/responsive/app/consolidatedSearch/#search/v=list,c=1,q=country_name%3D%5B(SLOVAK%20REPUBLIC)%5D%2Ctitle%3D%5B(air%20services)%5D%2CqueryType%3D%5B64%5D,sm=s,l=library2_lib,a=t accessed 12 February 2022.

109 Schedule attached to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czechoslovak Republic for Air Services between and beyond their respective Territories, <http://foto.archivalware.co.uk/data/Library2/pdf/1960-TS0026.pdf> accessed 12 February 2022.

110 Article SSC.68 of the Protocol on the Social Security Coordination.

111 For more on this topic see Herwig Verschueren, 'The complex social security provisions of the Brexit withdrawal agreement, to be implemented for decades' (2021) European Journal of Social Security 23.

112 Polly R. Polak, 'Who Had Their Cake and Ate It? Lessons from the UK's Withdrawal Process and its Impact on the Post-Brexit Trade Talks' (2021) German Law Journal 22, 992.

113 Catherine Barnard and Emilija Leinarte 'Citizens' Rights', in Federico Fabbrini (ed.), *The Law & Politics of Brexit: Volume II: The Withdrawal Agreement* (OUP 2020) 109.

114 Case C-55/00 *Gottardo* EU:C:2002:16, para 34.

115 Stephanie Reynolds 'May We Stay? Assessing the Security of Residence for EU Citizens Living in the the UK' in Michael Dougan (ed.), *The UK after Brexit: Legal and Policy Challenges* (Intersentia 2017) 198.

116 Foreign & Commonwealth Office, UK Treaties Online, <http://foto.archivalware.co.uk/data/Library2/pdf/1953-TS0041.pdf> accessed 12 February 2022.

117 Foreign & Commonwealth Office, UK Treaties Online, available at: <http://foto.archivalware.co.uk/data/Library2/pdf/1961-TS0018.pdf> accessed 12 February 2022.

118 Article 2 paragraph 1 letter b) of the Social Security Convention between the UK and Germany of 1961.

119 Article SSC.3 paragraph 1 of the Protocol on the Social Security Coordination.

120 Article SSC.3 paragraph 4 of the Protocol on the Social Security Coordination.

121 Article 2 of the Convention between the UK and Italy on Social Insurance of 1953.

122 Strban (n 10) 224.

123 The principle stemming from the Gottardo judgement of providing the same benefits to the nationals from other member states in the contractual arrangement with third country would probably apply also in the sector of aviation. In this respect it is noteworthy, that the Court of Justice of the EU referred to Gottardo judgement in aviation cases, e. g. C-475/98, para 137.

COMPETING INTERESTS

The author has no competing interests to declare.

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