A&L Goodbody

Brexit:

The Legal Dimension

A Selection of Articles on Brexit published by A&L Goodbody in 2016

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Introduction

Starting before the Referendum, A&L Goodbody's EU & Competition Group published various articles on the likely implications of a possible Brexit.

The following articles are a selection of those posted by the Group on its website during 2016. They tell the story of how the Brexit saga unfolded during 2016.

The key messages are:

- the Brexit crisis will be resolved but it will be neither soon nor easy;
- there may well be a second referendum or a quasi-referendum (e.g., a general election) when the terms of the Brexit deal become known;
- the implications of Brexit are enormous because of the 100,000+ legislative instruments as well as the Treaty provisions which have become embedded in UK law over the last four decades;
- the "models" which were discussed widely during the campaign (e.g., the Norwegian, Swiss, Canadian and other models) will fall away because they are not suitable to the UK/EU relationship and will be replaced by a specific UK/EU model;
- a special EU/UK regime will thus have to be created;
- there is little chance, based on current facts, that Ireland will leave the EU; and
- a U-turn on Brexit is possible but currently unlikely.

Introduction

Ireland's nine European Union-related referenda might provide some insight on how the UK's 'Brexit' or 'Britremain' referendum could turn out on 23 June 2016.

There is little UK precedent to help predict the outcome of the June referendum on whether the UK should remain a member of the EU. There has been just one UK-referendum on EU issues in almost 50 years. That was the 1975 referendum on whether the UK should remain a member of the then three European Communities: the European Economic Community (the 'EEC'); the European Coal and Steel Community (the 'ECSC'); and the European Atomic Energy Community (the 'EAEC'). The vote was 67% in favour of remaining with 33% voting to leave - with the strongest support for continued membership being in the southern half of the UK with the support diminishing in Scotland and Northern Ireland. Mathematicians say that one cannot plot a pattern from just one point so one UK referendum 41 years ago is not necessarily a reliable guide as to what might happen today.

One possible source of inspiration - and it is nothing more than limited inspiration - is to see what has happened in the nine referenda on EU matters in Ireland. The lessons are helpful because Ireland - the only contiguous Member State to the UK - has had nine referenda on EU matters, has been a member of the EU for exactly the same length of time as the UK, has comparable political traditions and perspectives, a similar legal regime (for the most part) and very strong links across several dimensions. Indeed, some citizens of the Republic of Ireland will be eligible to vote in the June referendum and some UK subjects living in the Republic of Ireland will also be eligible to vote so the lessons which can be learned from the Irish referenda could be quite revealing.

Legal background

Before considering the lessons from Ireland, it is worth asking why have there been so many Irish referenda.

The short answer is that acceding to the EEC, ECSC and EAEC and adopting some new EU treaties have meant that amendments to Ireland's written constitution (the *Bunreacht na hÉireann*) were needed. If any law is enacted by the Irish parliament (the Oireachtas) or action taken by Ireland or its Government which is incompatible with the Constitution then that law or action is invalid in so far as it breaches the Constitution so, on occasion, the Constitution had to be amended to ensure that the EU regime would not be incompatible with the Constitution.

There are two features of the Constitution which deserve mention. First, it provides that the law-making power of the Irish State is vested exclusively in the Oireachtas. Secondly, the Constitution also provides that the highest court is the Irish Supreme Court. Both provisions are incompatible with membership of the EU because, for example, the EU's Council, Parliament and Commission may make laws which would be superior to, and even incompatible with, the laws enacted by the Oireachtas. Equally, the Court of Justice of the European Union would be superior, albeit only in EU law matters, to the Irish Supreme Court thereby undermining the notion in the Constitution that the latter court is supreme.

A mechanism was needed therefore to immunize EU law from a challenge in the Irish courts that the laws adopted by the EU institutions or actions taken by Ireland in pursuance of EU membership would be invalid under the Irish Constitution.

The simplest mechanism was to provide in the Constitution that nothing in the document would invalidate any law or action adopted by the EU in so far as the law was incompatible with the Constitution. This required the Constitution to be amended. The Constitution may now be only amended by way of a referendum of the people; hence any amendment of the Constitution to absorb EU changes requires a referendum. Therefore, for example, Ireland had a referendum in January 1972 on whether Ireland should join the European Communities (the 'Accession Referendum') and, since then, whether Ireland should ratify EU-related treaties which could

involve Ireland ceding some element of sovereignty. The Irish people voted in the Accession Referendum that nothing in the Constitution should, in practical terms, strike down or annul anything necessitated by Ireland's membership of the EU.

Given the passage of the Accession Referendum, one might be forgiven for thinking that no further referendum was needed in Ireland as the Accession Referendum had apparently immunized further developments at the EU level from challenge by virtue of the Irish Constitution. That was mistaken thinking according to the Irish Supreme Court in Crotty v An Taoiseach. The Supreme Court held in that seminal case that any EU treaty (including new ones) which would bind Ireland to concede part of its sovereignty would require prior authorisation under the Constitution. Since then, referenda on some EU matters have become more common in Ireland. If a new EU treaty does not involve ceding sovereignty then, at a simple level, there is no need for a referendum but, if there is a ceding of sovereignty then a referendum in Ireland is needed. So, what lessons can be learned from these referenda in Ireland?

Lessons:

Do Not See the 23 June 2016 as the Finishing Line

It is tempting for commentators to see the 23 June 2016 as the finishing line. It is unlikely to be so. Some propositions which were put to the Irish people in EU referenda and rejected were put to the people a second time, and the second vote produced a different result. Whatever way the vote goes in June, there could be calls for a second vote (especially if the vote is narrow). Equally, if the vote is to leave, some of the remaining Member States could seek to retain the UK by putting a new package on the table to keep the UK in the EU. This is altogether separate from the post-membership negotiations under Article 50 of the Treaty on the European Union, which would flow from a vote to leave. This notion that there could well be a second vote can give some comfort to voters intending to leave the EU (in the case of the June Referendum) or reject a proposal (in the case of the Irish referenda) because they sense that there could always be the 'safety net' of a second vote. So do not assume that the 23 June 2016 referendum would be the end of the process.

Turnout Matters

The level of turnout has been critical to the outcome of the Irish EU-related referenda. Post-referendum survey evidence showed that low turnout in some of the Irish EU-related referenda meant that the proposition was defeated. For example, in the 2001 referendum on possible accession to the Treaty of Nice, it was clear that abstention, rather than a swing from 'yes' to 'no', was the key feature of the behaviour of the electorate in the referendum. Ironically, those who do not vote can have as much influence as those who do vote. It is also the case that if voters are largely indifferent about the outcome or believe the outcome is inevitable, then the more 'committed' voters are more likely to turnout and vote. Recent survey evidence in the UK shows that the younger voters are more likely to want to remain in the EU while older voters are more likely to want to leave, but older voters are more likely to vote than their younger counterparts. So the level of turnout could well be critical to the outcome (Ireland tends to have votes on Fridays which tends to facilitate students to vote as they return to their own constituencies.)

Do Not Assume that Voters are voting on the Issue in Front of Them: EU Polls can Generate Diverse Issues which are not Obviously Connected with the Issue in Hand

Voters in general elections are usually voting, to some extent, on the simple issue of who they want to elect to govern the country. By-elections are often more complex because voters can, for example, express disenchantment with the government of the day. Irish experience shows that referenda can have more in common with by-elections than general elections. Therefore extraneous issues can influence voting patterns in referenda. To borrow the terminology of political scientists, 'second order' considerations can be relevant and it is not just 'first order' considerations which matter in deciding voting intentions

A survey of the Irish EU referenda shows that among the issues which have been prominent in Ireland's EU referenda: abortion; conscription; corporation tax; military neutrality; and workers' rights have been included. It

is possible that some groups can have their overall long-term ambitions (positive or negative) for the EU distorted by virtue of seeking to take short-term advantage on a vote. These second order issues are, to a greater or lesser extent, not obvious EU issues but they can still be relevant to EU referenda because a link to the EU (however weak or strong) can be found. So anyone seeking to influence the outcome of the June referendum needs to contemplate that 'second order' issues can be as relevant as 'first order' EU issues. These second order issues can be generated by, for example, pressure groups who see the referendum as a platform to ventilate their issues or by events which bring the issue into focus.

National, rather than EU, Issues can be Material

Staying with the theme of extraneous issues being relevant, it is clear that some of the Irish EU-related referenda have involved voters taking into account national, rather than EU, issues. Some of these issues have involved Irish-centred issues which had some connection with the EU but the connection was not a strong one. Both sides of a campaign need to anticipate that some tangential issues or events (particularly, events close to voting day) could become centre stage and they have to deal with all issues rather than ignoring them because they are not obviously pertinent to the vote in hand.

Campaigns Matter

The Irish EU-related referenda demonstrate that if either side of a campaign is not working at full tilt then it is possible that the other side can gain an advantage. Campaigns matter in terms of informing voters about the issues at hand. In some referenda (e.g., the 2001 referendum on whether Ireland should ratify the Treaty of Nice), post-referendum surveys showed that late voters tended to vote 'no' (i.e., against the proposition) because of a lack of understanding of the issues. Paradoxically, 'yes' voters can be more uncertain about their decisions but sufficient knowledge helps voters to vote in favour of a change, while a lack of knowledge (e.g., about the matter in hand or its consequences) can lead voters to vote against change.

Parties Matter

Some voters in Irish referenda on EU matters have taken their lead from the political parties which they follow. Opposition parties have tended to be less enthusiastic about supporting the Government's approach on referenda because a victory for the Government is seen as unhelpful to the progress of the opposition parties. Nonetheless the approach of political parties can influence the outcome.

Mood and Feelings Matter

It is an old political cliché that people often vote not only on the basis of what you tell them but how you make them feel. So the mood of the electorate has been important in the Irish EU referenda. Giving voters detailed information can help them to understand the issues more closely. However, those seeking to influence voters may be better rewarded with seeking to influence the voters' mood as well as their knowledge.

Do not assume that Voters know a Great Deal about the EU

Some post-referendum surveys in Ireland have shown surprisingly low levels of hard knowledge about the EU among the electorate despite long membership and frequent discussion of EU issues in the media. So, any campaign needs to include some element of information and education about the EU so as to ensure that voters are informed fully. A survey after the 2001 Treaty of Nice referendum showed that 35% of those surveyed said they 'did not know what the Treaty was about at all' and only 8% said they had a 'good understanding' of what the Treaty was about. Indeed, some famous politicians around Europe have expressed their views on EU treaties, only to later admit that they had never read the treaties in full despite being involved in the negotiation of the treaties. So it may just be too much to expect voters to sit down and read EU laws in their spare time! Voters found that different sources of information had diverse levels of utility: television and radio programmes as well as newspapers were found useful by just over 40% of voters (and these were the most useful sources of information) but some other sources (e.g., posters and government publications) were found less useful.

Court Cases and Legal Issues have been Common

There have been several cases before the Irish courts in the context of the EU referenda. These have turned on issues such as compatibility with the Irish Constitution but have also turned on specific issues during campaigns (e.g., government spending and statements). There has also been considerable debate, including some abstract debate, about the status in law of reassurances provided by the EU on issues relevant to Irish debates (e.g., after the electorate refused to ratify the Lisbon Treaty, the European Council issued various reassurances, which would later become binding as treaty commitments with the Croatian Accession Treaty but which in the interim, when the Irish people voted, were not treaty provisions).

There are Differences between the UK and Ireland

It is interesting to speculate as to what lessons can be learned from EU-related referenda in Ireland but there are limitations on extrapolating too much from Ireland to the UK. First, there has been no anti-EU party (along the lines of the UK Independence Party ('UKIP')) in the Irish Oireachtas or any political party or movement dedicated to the anti-EU cause which has attracted support on the same scale as UKIP. Instead, the anti-EU platform in Ireland has involved the formation of coalitions of diverse groups, individual politicians or smaller mainstream political parties which align themselves to the anti-EU coalition. Secondly, apart from the 1972 Accession Referendum, Ireland has never had an 'In or Out' referendum. This is different from the UK's 1975 Referendum or the referendum in June. Instead, the Irish EU referenda since 1972 have been about whether the EU project would move forward. This means that the voters in the Irish electorate have had a somewhat less onerous burden than their UK counterparts — since 1972, Irish voters have only had to consider whether the EU project should go forward or not but the UK voter will have to decide whether their country should leave the EU altogether. Indeed, the referendum should be called the 'UKEXIT' referendum rather than the narrower 'BREXIT' because it would not be just Britain, but the whole UK which would leave the EU. The Irish experience will be interesting to those trying to anticipate what will happen in this critically important vote and, in due course, it will be interesting to compare and contrast the experiences in both jurisdictions. While the vote on 23 June is for the voters of only the UK and Gibraltar, the outcome will have an impact on the people of the entire EU but particularly its nearest and closest neighbour who joined what is now the EU at the same time as the UK.

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What is Brexit?

Brexit is the voluntary withdrawal by the United Kingdom from the European Union ('EU').

Voters in the UK and Gibraltar will decide by way of a popular referendum on Thursday, 23 June 2016 whether or not to leave.

The withdrawal would be in accordance with Article 50 of the Treaty on the European Union ('TEU') (which has only existed since 1 December 2009).

Brexit would be a unique event — no Member State has ever left the EU. Algeria left in 1962 to become independent of France, Greenland left in 1985 to become 'self-governing' of Denmark and Saint Barthelemy left in 2012, However, none of them was a Member State but merely a part of the relevant Member States. So this would be a unique event with profound consequences. It would be as significant as New York leaving the United States of America.

What will be the Question on the Ballot Paper?

The UK's European Union Referendum Act 2015 (17 December 2015) prescribed the question as: 'Should the United Kingdom remain a member of the European Union or leave the European Union?'

The alternative answers are: (a) 'Remain a member of the European Union' or (b) 'Leave the European Union'. It is neither an 'in'/'out' nor a 'yes'/'no' referendum.

Will the UK Leave 2 Years after the Vote to Brexit?

There is a popular view that the UK would leave exactly two years after the referendum date if there is a vote for Brexit. This is not necessarily so.

Article 50(3) of the TEU provides that the "Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in [Article 50(2)], unless the European Council, in agreement with the Member State concerned unanimously decides to extend this period."

It took several years to negotiate the UK's accession to a slimmer and lighter European Communities, so two years is a very optimistic time frame to negotiate and legislate for the un-doing of 43+ years of law. It could happen in two years but it would be more likely to be a transition-type arrangement.

Is Withdrawal Inevitable if there is a Brexit Vote on 23 June 2016?

Not necessarily. If there is a tight majority in favour of Brexit, then the other Member States might offer an alternative enhanced package thereby triggering a possible second referendum (as in the case of Denmark and Ireland in some previous referenda).

Whatever the outcome on 23 June 2016, the 'Withdrawal Treaty' might still be put to the UK electorate when it is agreed (either by way of a referendum or as part of the UK General Election which is scheduled for 7 May 2020 or; more likely, following a confidence vote or debate on the Withdrawal Treaty) so 23 June 2016 may not be the end of it- there might be Brexit 2!

Could the UK Re-join the EU?

Yes but it would be a slow process.

Article 50(5) provides that if a Member State which has withdrawn from the EU asks to re-join, then its request shall be subject to the procedure referred to in Article 49 of the TEU. This clever provision means that there cannot be a 'revolving door' or any easy path to re-enter the EU. Indeed one could see that many of the remaining Member States would be generally reluctant to let the UK back in too easily. So, it would mean that the UK would not find it so easy to re-join.

Remember that the other Member States are worried about the 'floodgates'. This is not just about what the departing Member State wants or does not want, as the remaining Member States could be quite reluctant to agree to new arrangements. They could even exploit the opportunities which a withdrawal could present for their own interests.

Hasn't the UK Been Here Before?

Mass referenda are rare in the UK. There have really only been 12 ever and then only 2 of them covered the whole of the UK. The more relevant one for present purposes was the one on continued UK membership of the then European Communities on 5 June 1975. There was a 65% turnout (in the Scottish Independence Referendum on 18 September 2014, there was a 84.59% turnout which was the highest turnout ever in a UK referendum). 67% voted in favour of remaining in the European Communities. In Northern Ireland there was a 47% turnout and 52% voted in favour. Curiously, the southern half of the UK was more in favour of membership with the northern half (particularly parts of the west of Scotland) less in favour of membership — on 23 June 2016, the voting patterns (North/South) could well be reversed.

So do we know what would Happen Post-Brexit?

No, and this is key to understand. Businesses are being advised to 'prepare for Brexit' which is fine but the question is 'prepare for what?' No one has a clear vision of what will happen post-Brexit vote, so one needs to speculate somewhat about the various possibilities. It is also worth remembering that some remaining Member States may, despite the Brexited UK's wishes, seek to capitalise on the UK's planned withdrawal and not concede some of the current privileges so as to further their own interests. The negotiation of the 'withdrawal' and 'retained connections' would probably be more fraught than the Brexit campaign which is largely centred in one Member State but the withdrawal debate cuts across the interests of all other Member States and will be coupled with a desire by some Member States to ensure that a post-Brexit UK does not obtain such a good deal that others would be tempted to follow.

What will happen Post-Brexit to EU Law in the UK?

It depends on the post-Brexit agreement between the EU and the UK. If there was a complete 'Clean Break' then EU Law disappears completely. In reality, EU law is embodied in so much of UK law already (e.g., statutes and statutory instruments) that it is not so simple to untangle or unpick the EU law elements. The impact of EU law on UK law would depend on the post-Brexit agreement (e.g., 'Norway' or 'Switzerland').

Paradoxically, there is some precedent in terms of various countries having been part of the British Empire becoming independent. In the case of Ireland, when it became independent in 1922, English law was the backbone of the Irish regime so adaptation of statutes legislation had to be enacted and a system evolved whereby post-independence English case law was seen as 'persuasive' but not 'binding' (and this may be a model for UK courts dealing with EU case law post-Brexit in regard to UK legislation based on EU legislation (e.g., in the employment arena)).

What will happen with Competition Law?

The UK's competition rules are virtually the same as the EU rules (with some exceptions, notably on State aid). So, on the face of it little would change. Except that there would be a doubling up of regulations, regimes and penalties. Currently, businesses are fined usually by either the EU or a Member State but if the UK were to leave then there would be one more fining jurisdiction. There could also be a divergence in terms of rules between the EU and a Brexited UK (e.g., like the EU and the US at present).

What about Merger Control?

Post-Brexit, EU merger control will be less relevant to the UK and other companies, including Irish companies - if the UK element of turnover is removed from the EU test then more deals will have to be dealt with at national levels without the advantage of EU one-stop shop (unless post-Brexit UK opts into the EU regime in some way). Otherwise the 'one-stop shop' of the EU's Merger Control Regulation disappears. Businesses generally prefer the EU one-stop shop approach and actually lobbied the EU to extend the regime. Equally, there would be no reference back from the EU to the UK of transactions which matter locally in the UK. Some Irish businesses whose deals have been filed under the one-stop-shop EU regime may find that, absent the UK turnover, the deal would have to be notified in more jurisdictions because the EU test would not be satisfied without the UK turnover.

What about State Aid?

Unless there are special rules agreed, the UK would no longer be bound by the EU's State Aid rules. This could provide an advantage for UK business. However, the World Trade Organisation and the EU's 'anti-dumping' regime would continue to exist. This would lead to an 'asymmetrical' situation to the advantage of UK business with UK businesses being able to complain to the European Commission about EU Member State aid to EU businesses, but EU businesses not being able to complain to the European Commission about UK State Aid to UK businesses.

What about Agriculture?

The changes here would be significant. The Common Agricultural Policy ('CAP') is still at the centre of EU policy. EU grants and subsidies to farmers would disappear — the Brexit campaign say that they would be replaced by UK funds. Complex arrangements would have to be negotiated to allow for the entry of EU food into the UK and vice versa (e.g., one need only think about how long it takes to negotiate for the export of EU food products to the rest of the world). The value of agricultural land is likely to fall if there is a Brexit and there is no substitution of EU grants by UK grants. On the other hand, the UK will no longer have to deal with the CAP and its labyrinthine regulatory regime and food might be cheaper.

What about Transport?

The EU operates an internal market for transport. EU operators fly, drive and sail freely around the EU. For example, EU controlled and majority-owned airlines fly from one Member State to another seamlessly on the basis of the EU passport. If the UK is outside the EU and sufficient replacement arrangements have not been negotiated then question marks exist over continued services by companies using 'EU passporting'.

What about Banking?

More foreign banks operate in the UK than in any other EU country. EU financial services legislation has been the backbone of so much UK financial services legislation. There are more questions than answers at this stage. Among the questions are: do you retain the EU legislation but how would it be construed? The UK approach or the EU approach to construction? What about Passporting? Leave or Passport but no Influence? Could there be obligations to set up subsidiaries in EU Member States and have costly capital requirements? Would businesses have to move from the UK to the EU? What would be the relevance of post-Brexit CJEU case law? Could the Markets in Financial Instruments Regulation (Reg.600/2014) and the Markets in Financial

Instruments Directive II (Dir 2014/65) be implemented or adopted in modified form? Could CRD IV go to make London attractive to Banks?

What about Employment Law?

The EU has brought about enormous changes in employment law (e.g., pay equality, non-discrimination and TUPE). Theoretically, EU employment law rights and duties would disappear if Brexit occurred. But, in practice, many of these rights and duties are embodied in UK law and would the electorate agree to some or all of them being taken away? There is a risk that even if the UK leaves the EU and some of those rights remain on the 'UK statute book', the way in which they are applied and construed would be 'frozen in time' (e.g., future EU developments and jurisprudence might not be followed).

Again, there are at this stage, more questions than answers. Key questions include: what about the Mutual Recognition of Qualifications? What about the Free Movement of Workers? To be competitive outside of the EU, the UK might well look at the area of employment law and make its employment regime more attractive to industry to establish or expand in the EU. This could cause an interesting debate between both sides of the employment relationship.

What about Corporate/Company/Commercial Law?

In recent years, the EU has become very important in the area of corporate law. One only needs to think about the prospectus and mutual recognition regime, the EU Merger Control Regulation, the rules on agency arrangements, the TUPE/Transfer of Undertakings legislation, the Rome I Contract Regulation (Reg.593/2008) and so on. In reality, it is useful to contemplate how much one relies on EU law and then ask what happens if it were taken away but moreover; it is useful to ask what would be needed to be negotiated back into the post-Brexit UK relationship with the EU.

What about Litigation?

The EU has streamlined and facilitated the litigation regime around the EU. It is now easier to have a judgment in one Member State recognised and enforced in another Member State. If the UK leaves the EU then it may be more difficult for judgments in the UK or a remaining Member State to be recognised and enforced, unless there are arrangements agreed to address the issue.

Does so Much Turn on the Post-Brexit Arrangements?

Yes. If the UK votes to leave the EU then so much turns on the post-referendum arrangements. The more sophisticated and extensive those arrangements then the less disruption there will be. However, it is worth bearing in mind that some remaining Member States may simply not be in a mood to do an overly-generous deal with the UK because it might encourage other Member States to leave and could have a negative reaction among their domestic voters and business interests who might object to having a post-Brexit UK getting rights without all the duties.

Would the Republic of Ireland also Leave the EU if the UK did?

It is highly improbable that the Republic of Ireland would leave even if there is Brexit. Ironically, the Republic could not have joined without the UK in 1W3 but now the Republic can choose to stay.

The impact on the Republic is difficult to quantify at this stage because so much depends on the post-Brexit arrangements. One can see impacts on areas such as trade, migration, business uncertainty, exports/imports, currency, energy and general competitiveness. There is no doubt that there is a slowdown in economic activity generally in various markets. A part of this slowdown may be due to the Brexit uncertainty and there is no guarantee that this uncertainty will disappear post-23 June 2016.

Would there be a fixed traditional 'border' between Northern Ireland and the Republic? The answer to this question depends on what is agreed between the Brexited UK and the remaining Member States. Sweden/Norway does not have food borders (as Norway is in the European Economic Area) but it is possible that there could be a fixed border if comparable arrangements are not concluded.

A key point for the Republic would be the loss of an ally in the EU process. The Member State to which Ireland is closest to across a variety of parameters is the UK, and there is no doubt that the absence of the UK could be very significant in the future EU for Ireland.

Could Northern Ireland or Scotland join the EU on its Own even if there was a Brexit?

Under Article 49 of the TEU, an applicant must be a 'State' so Northern Ireland or Scotland would have to become a Stale before it could apply to join. Even if, for example, Scotland were to become independent, the process of accession takes time.

What if there is a Vote to Remain?

Then the February 2016 deal concluded between the UK and the EU applies. It covers the areas of economic independence, competitiveness, sovereignty and immigration. However, a great deal of uncertainty could still remain in the UK and beyond — the debate may not be quite over on 23 June 2016 even if the Brexit proposal is defeated.

What about Compliance Costs for Business?

If the outcome is Britremain then compliance costs for business in, or dealing with, the UK would remain largely the same. The arrangements negotiated in February by the UK involve relatively minimal changes for business and, if anything, would lead to a reduction in charges. If it is Brexit, then the creation of a new regime will cause compliance costs to rise for business. For example, multinationals will no longer have a one size-fits all compliance programme for the EU but will have a different regime for the UK. Moreover, if there is a hybrid arrangement (e.g., some UK rules, some old EU rules and the new UK-EU agreement rules) then the compliance costs will be higher. However, Brexit could get rid of 'EU Red Tape' and help reduce compliance costs! In some ways, this question epitomises the debate.

What should Businesses Do Now?

- Expect the uncertainty that is there already to intensify in the run up to Thursday 23 June
- Expect the market instability to intensify on Friday, 24 June
- Expect some uncertainty to continue post- Referendum Day because there could be political fallout and debate about what happens next
- Some businesses may continue to be cautious about investments and deals
- The traditional Summer break could then kick in prolonging the stagnation or 'Brexation'
- If there is a Brexit vote then expect the fall out to involve prolonged and intensive debate on what the post-Brexit relationship should look like. There would be intensive negotiations between the UK and the EU with some Member Stairs being unwilling to compromise easily
- Trade agreements are notoriously long to negotiate, draft, and implement so expect some uncertainty
- In the short term, look at markets which are not so reliant on the UK still being a member until the 'fog of uncertainty' lifts
- In the meantime, businesses should review their businesses model and activities to see how they are dependent on the UK being a member of the EU (e.g., trade, free movement of personnel, EU

grants and EU passport rights for businesses and people) and how they would cope if that 'UK membership' element was removed

What will be Outcome of the Vote on 23 June?

That is for the voters of the UK and Gibraltar to decide. Whatever way they vote, the vote will be significant for everyone in the EU.

Date published: 29 April 2016

"Brexit" is the notion that the United Kingdom would leave the European Union. What would be the impact of Brexit on the shipping sector?

Introduction

On 23 June 2016, voters in the UK and Gibraltar will vote on whether the UK should leave the EU. Almost no one living in the UK today under the age of 50 years has any real sense of what it is like for the UK to operate outside the EU. Over 43 years of EU provisions, policy and philosophy have been grafted onto, or embedded into, UK law. The closest analogy is a colony gaining independence and deciding what it wants to do, or not do, with the law and institutions of the departing power.

While a great deal of the focus of the debate to date has been on what will happen on voting day – on whether the proposition will be carried or defeated – in reality, the focus needs to be on what would happen after 23 June 2016 if there was a vote to leave.

Significance of shipping in the UK and the EU

Shipping is extremely important to the EU. In 2014, more than 51.5% of EU external freight trade by value was transported by sea. More than 400 million people are transported by sea from EU ports annually. The EU's 22 coastal Member States have more than 1,200 seaports offering direct employment to around 110,000 people and providing indirect support to around three million more. Almost 90 per cent of the EU's external trade by volume is facilitated by seaports, as are 40 per cent of freight exchanges between member states. The EU's seaports are the gateway for two-thirds of all goods which are imported by more than 60,000 cargo ships from non- EU countries. Over 3.8 billion tonnes of cargo are handled in these ports annually.

Shipping is also extremely important to the UK. The sector contributes around €12 billion annually to the UK economy. Around 240,000 people are employed in the sector in the UK. The UK is one of the top 10 ship owning nations according to UNCTAD with about 3% of the world tonnage.

Bringing the two strands together – the importance of shipping to the EU and to the UK – leads to some important conclusions. The rest of the EU is the UK's biggest trading partner. Almost half of the UK's imports are from the rest of the EU (53%) and almost half of the UK's exports are to the rest of the EU (45%). It is believed that several million jobs in the UK are linked to trade with the rest of the EU and the most common estimate is that there are around three million people employed in this context.

No-one can suggest realistically that trade between the UK and the EU would stop if the UK left the EU, but the terms of the trade would change.

EU Law and Shipping

Since the early 1970s – but particularly since the mid-1980s – the EU has become involved in the shipping sector. Over time, an enormous volume of law has been adopted – regulations, directives and decisions as well as case law. If the UK were to leave the EU then the logical question would be as to what would happen to that law vis-à-vis the UK. Answering that question is not simple given that it is not yet known whether the UK will vote to leave and, if it does vote to leave, what arrangements would be put in place to replace the current ones. It is possible that some of the legislation will remain in place (for example, because it is already part of UK law (such as where a directive has been implemented) or because the UK has opted into that piece of legislation) or it may simply disappear from the UK legislative environment. Indeed, if the EU legislation is retained by the UK, it may be somewhat "frozen" in time if amendments or interpretations by the courts are not also taken on board. There is little doubt that EU shipping law and UK shipping law would diverge in a post-Brexit environment, but it is not yet clear (and would not be for some time) as to the extent of that divergence.

So what could happen if the UK were to leave the EU?

It is clear that trade between the UK and the EU would continue but what would differ would be the terms on which that trade would occur. Today, the UK is part of the "internal market" and there are, for the very most part, no barriers to trade among the 28 Member States (whether those barriers are, for example, physical, technical or fiscal) and there is a common external customs tariff vis-à-vis the rest of the world. It is meant to be as convenient to trade between Liverpool and Lisbon as it would be to trade between Liverpool and Leeds. If the UK leaves the EU then trade will become more difficult – the degree of difficulty depends on the arrangements concluded between the UK and the EU post-Brexit. The campaigners for Brexit are probably correct in saying that there will be trade agreements between the EU and a Brexited UK but the difficulties involved and the time such arrangements would take to adopt should not be underestimated. The EU-India Bilateral Trade and Investment Agreement negotiations commenced in 2007 (nine years ago) and are stalled since March 2015. The Economic and Trade Agreement (CETA) agreement between Canada and the EU is a mammoth exercise. Work on it commenced in October 2008. The launch of negotiations was announced in 2009. An agreement in principle was signed in 2013. The negotiations were concluded in 2014. The 1,634 page agreement has to be translated into 24 EU languages and ratification has been an on-going process. In regard to the EU-US "Transatlantic Trade and Investment Partnership" ("TTIP"), the negotiations are currently in their 13th round! The Chairman of Lloyd's of London, John Nelson, is reported as saying that it would be "fantasy" to think that bilateral negotiations on trade agreements would be simple and he also said that it would take "many, many years" to negotiate such arrangements.

Clearly, there would be trade agreements to be negotiated – not only between the UK and the EU but between the UK and all the States with which the EU has a plethora of arrangements with various countries worldwide. So, it is not just a matter of negotiating a single trade agreement, it would be a matter of negotiating a range of agreements.

Not only would many trade agreements have to be concluded but there would also be uncertainty arising from Brexit itself, which would impact on trade. Examples of that uncertainty would be currency volatility which has already commenced and may continue further.

There is also no guarantee that the Member States which remain would not seek to either strengthen their own position in the event of a Brexit or even punish the UK so as to deter others from leaving. Guy Platten, the Chief Executive of the UK's Chamber of Shipping has said: "no one has left the European Union before, and the EU may seek to 'punish' the UK for leaving, in order to discourage others from leaving too. The Brexit negotiations are unlikely to be quick or easy".

Examples of Legal Issues which would arise if Brexit were to Occur

It is impossible to enumerate every legal issue. So a sample of the issues illustrates the point. If a contract was predicated upon continued membership of the EU or was dependent on the exercise of EU freedoms (e.g., the operation of Cabotage services) then the contract may become frustrated by Brexit occurring. There could also be challenges to the successful operation of contracts caused by volatile currency movements. EU competition law would continue to apply to UK shipping undertakings (i.e., businesses) whenever their activities had an effect on trade between EU Member States (an easy threshold to meet in practice). Therefore, UK businesses would not be able to escape from the application of EU competition law. Indeed, many of the UK's own substantive competition law rules are the same as the EU's own substantive rules so it is quite likely that the competition law environment might not change too much in that respect. However, compliance costs could rise for business because it might not be possible to avail of the EU's Merger Control Regulation regime. Equally, businesses could be fined not only at the UK but also the EU level rather than, as is more common now, being fined only at only one level. Conversely, the EU's State aid rules may well not apply to the UK in the event of a Brexit so there could be greater freedom for the UK to provide assistance to UK shipping interests but that would be subject to international trade law and the EU's so-called dumping laws which apply to non-Member States providing assistance which damage EU interests. Ultimately, there is little doubt that competition law

regime in a Brexited UK and an EU without the UK would become more complex and complicated leading, to higher compliance costs and greater uncertainty for those in the shipping sector.

The rules on freedom to provide services/Cabotage may well not apply to UK entities if the UK were to leave the EU unless there was some special agreement concluded which may well prove difficult.

A Brexited UK could impose different sanctions on third States than the EU would impose. This may mean some inconsistency and divergence in terms of making compliance more complicated.

In regard to employment law, it is very likely that the employment rights of seafarers would be best protected by remaining part of the EU (and that view has been advocated by the trade union Nautilus International) but supporters of Brexit would say that reduced compliance costs would help make UK shipping more competitive.

EU environmental law would probably still remain, in practiced terms, because the EU would simply apply their rules to vessels plying in EU waters irrespective of their flag or ownership.

An area of considerable uncertainty would be in the area of litigation where many judgments and arbitral awards within the EU are easily recognised and enforced within the EU because of the EU's rules governing such matters (e.g., the so-called "Brussels Regulation"). There is no doubt that UK businesses would find it more difficult to have judgments and awards in their favour recognised and enforced within the EU were the UK to be outside (unless special arrangements could be negotiated which would prove very difficult).

More Uncertainty?

There is already considerable uncertainty in the run up to the referendum on 23 June 2016. If the UK votes to leave the EU then there would be, under Article 50 of the Treaty on the European Union, a prolonged period of negotiation on the terms of its departure. Not only would there be that period of uncertainty but there could even be a second referendum on whether or not the UK should accept the terms of the "Withdrawal Treaty". One could see the "Britremain" supporters arguing that the precise terms of the withdrawal – which were not known on 23 June 2016 – should be put to the electorate. All of this means that the uncertainty which currently exists could well be prolonged in the event of a Brexit vote and there could even be two Brexit referend!

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Introduction

The possible withdrawal of the United Kingdom from the European Union—so-called "Brexit"—would raise novel and profound legal issues. Those issues are novel because no Member State has ever left what is now called the EU in its 60-year history. The issues are profound because the EU is—and all sides agree on this point—a key influence on UK law to such an extent that, after 43 years of membership, EU and UK law are intermingled in a way that untangling the two sources of law will be very difficult. Indeed, no one under the age of 50 years of age has any real sense of what the UK is like without EU law.

This short paper considers some of the legal aspects of Brexit. The observations and conclusions are somewhat tenuous and tentative in nature because not only is it unclear whether the voters in the UK and Gibraltar on 23 June 2016 will vote in favour of leaving the EU[1] but, perhaps more importantly, it is entirely unclear as to what arrangements, if any, would be put in place between the UK and the EU were Brexit to become a reality. In this respect, it is worth highlighting that the issues are more complex and complicated after a vote to leave than even the issues are currently in the run-up to the vote itself. This latter fact also means that the referendum in June 2016 could well not be the last one because any withdrawal terms (e.g. embodied in a "withdrawal treaty") could also end up being put to the electorate in a second referendum.

This paper is divided into five parts: an explanation as to why Brexit would be a novel event; a description of the EU legal framework for Brexit; the possible post-Brexit relationship between the UK and the EU; a selection of the legal issues arising from Brexit; and some conclusions.

Novelty of Brexit

It is often said—and probably too often said—that a particular event would be "novel" or "unprecedented". However, for a Member State to withdraw from the phenomenon that is now called the EU is truly novel. No Member State has ever left. Algeria left the then European Communities ("EC") in 1962 but it was not a Member State and was, at that time, part of France. Greenland left the EC in 1985 but, again, it was not a Member State but rather part of Denmark. Saint-Barthelmey left in 2012 but it was not only small, it was also not a Member State. By contrast, for the UK to leave would be significant as it is a full Member State, a very long-established Member State (joining in 1973 in the second wave and before 19 other Member States did so), a global power and the fifth largest economy in the world. It is quite possible that were the UK to leave then some other Member States could well be tempted to leave or, at least, threaten to do so in order to improve their lot within the EU. There is no doubt that Member States intent on staying are very mindful of this fact and were there to be a vote in the UK to exit then one could contemplate that actions would be taken by the EU and key Member States to encourage the UK to remain in the EU so as to deter a haemorrhage.

Legal Framework for Withdrawal

The UK was not a founding Member State of the EC. Instead, it took the "road less travelled"[2] for many years but ultimately joined the EC[3] on 1 January 1973 (along with Denmark and Ireland) having signed a Treaty of Accession in 1972. The UK's membership is therefore founded on treaty law. As the UK took on its international law obligations by way of a treaty, then it would also be entitled to renounce those treaty obligations by virtue of

[1] *The question being asked of the voters is: "Should the United Kingdom remain a member of the European Union or leave the European Union?"*
[2] *The UK was part of the European Free Trade Association ("EFTA").*
[3] *More accurately, the European Economic Community, the European Coal and Steel Community and the European Atomic Energy Community.*

the general rules of public international law,[4] even if there was no explicit provision of EU law allowing for withdrawal of membership.

It was not until the Treaty of Lisbon entered into force on 1 December 2009 that EU law dealt explicitly with the possibility of a Member State withdrawing from the EU and provided a mechanism to address the issue. As just mentioned, the right to withdraw from the organisation almost inevitably existed anyway because accession to the EU is not an irrevocable act. The Treaty of Lisbon introduced art.50 of the Treaty on the European Union ("TEU") which sets out a regime (albeit an incomplete one) for a Member State to withdraw.

Article 50(1) of the TEU provides that any Member State may decide to withdraw from the EU "in accordance with its own constitutional requirements". Member States may go beyond what is required constitutionally; it may not have been necessary at all for the UK to have a referendum to leave (after all, it did not have a referendum to join).

Under art.50(2), a Member State which decides to withdraw from the EU must notify the European Council of the Member State's intention to leave the EU. In the light of the guidelines to be provided[5] by the European Council, the EU "shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union". The agreement must be negotiated in accordance with art.218(3) of the Treaty on the Functioning of the European Union ("TFEU").[6] The

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[4] *See the Vienna Convention on the Law of Treaties 1961 generally in so far as it is reflective of customary international law and EU Member States are party to it.*

[5] *These guidelines do not exist already and would have to be drafted after a particular withdrawal notification.*

[6] *Article 218 of the TFEU provides:*

"1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.

2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.

3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

4. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.

5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.

6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.
Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:
(a) after obtaining the consent of the European Parliament in the following cases:
(i) association agreements;
(ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;
(iii) agreements establishing a specific institutional framework by organising cooperation procedures;
(iv) agreements with important budgetary implications for the Union;
(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.
The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.
(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

7. When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation.

8. The Council shall act by a qualified majority throughout the procedure.
However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

9. The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.

10. The European Parliament shall be immediately and fully informed at all stages of the procedure.

withdrawal agreement shall be concluded on behalf of the EU by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament. The European Parliament could be somewhat of a wild card in the process and will be potentially very powerful.[7] Indeed, if the agreement involves areas within the confines of the Member States' purview (e.g. in certain contexts, areas of services, investment protection and transport), then it is possible that any particular agreement or free trade agreement might (as a mixed agreement) also require approval by all the Member State parliaments which would be an additional hurdle.[8] The EU treaties would have to be amended to address the departure of the UK which would be quite an elaborate process. Equally, the EU agencies based in the UK (e.g. the European Medicines Agency and the European Police College) would have to relocate. The EU might be somewhat like a lobster pot, easier to enter than leave!

Article 50(3) of the TEU provides that the "Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in [art.50(2)], unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period." The popular debate on Brexit often refers to this "two year period" as if it were set in stone but the period is not fixed—it can be different by way of agreement between the withdrawing Member State and the other Member States[9] —and it is very clear that it could be quite difficult to negotiate a withdrawal. It took several years for the UK to negotiate its entry to a much slimmer and lighter EC so one would have thought that it would take some time to negotiate the exit from the current EU, particularly given the length and depth of the relationship over four decades. There is a risk that this "Brexit uncertainty" could continue if there was a vote in June 2016 to leave but the next UK General Election or another referendum was fought on the basis of whether the UK should accept the "withdrawal treaty" or stay in the EU! Indeed, the EU has many issues on its plate[10] and the UK's withdrawal negotiations will not be top priority at all times so the process could be a difficult and fraught one. To buy some time, one could contemplate the UK making the notification a little later than simply the following day but that is a political, rather than legal, issue and would almost inevitably be unacceptable politically. It is also notable that the European Council must formulate some "guidelines" on how the negotiations should be conducted and an agreement concluded so it is not inevitable that the negotiations will commence right away. During the negotiation, EU law would continue to apply in the UK.[11]

For the purposes of art.50(2) and (3) of the TEU, the member of the European Council[12] or of the Council[13] representing the withdrawing Member State must not participate in the discussions of the European Council or Council or in decisions concerning it.[14] A qualified majority shall be defined in accordance with art.238(3)(b) of

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11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised."

[7] All the members of the European Parliament (including those elected from UK constituencies) appear, according to the TEU and the TFEU, entitled to vote but the UK (or any exiting Member State) would not be entitled, according to the TEU, to vote in the Council.

[8] E.g. the recent EU-Peru and EU-Colombia agreements and the vote in the Netherlands over the EU-Ukraine agreement.

[9] The UK might be keen to leave if it has voted to leave but it would appear that two years is the minimum period of time for the negotiation of the withdrawal. It is also likely that at least some other Member States could be unwilling to grant an extension of the two-year window unless it was in their interest to do so. Withdrawing may not be all that easy in practice. However difficult joining the EU can be, leaving could be much more difficult!

[10] Current issues include the migration crisis, the banking crisis and the need to revive the EU economy. It is a matter of speculation as to how much patience would be shown towards the UK by some of the remaining Member States.

[11] It is open to speculation as to how vigilant a Member State would be about complying with EU law as the Member State prepares to leave but it is hoped and anticipated that a Member State would comply during the phase-out period because the duty to comply would be no less than at any other time. (One can see a Member State not necessarily implementing EU legislation where the date for implementation post-dated its planned withdrawal.)

[12] i.e. the Ministers of the Member States along with the President of France.

[13] i.e. the Ministers of the Member States (e.g. the Ministers for Agriculture).

[14] Article 50(4) of the TEU. While the drafting is not perfect, one presumes that the UK (or the withdrawing Member State) could still continue to participate in, and vote on, matters not relating to that Member State's withdrawal, as art.50(4) qualifies the exclusion by saying that it "concern[s] it" and presumably the "it" relates to the Member State's withdrawal. Any Member State would be well advised to participate earnestly in the work of the EU other than that relating to the withdrawal because the Member State might ultimately not withdraw at all but be stuck with the law enacted during that time!

the TFEU.[15] Article 50(5) provides that if a Member State which has withdrawn from the EU asks to re-join, its request shall be subject to the procedure referred to in art.49 of the TEU.[16] This clever provision means that there cannot be a "revolving door" or any easy path to re-enter the EU. Indeed, one could see that many of the remaining Member States would be generally reluctant to let the UK back in too easily. So, it would mean that the UK would not find it so easy to re-join.

Post-Brexit Relationship between the UK and the EU

Article 50 of the TEU does not prescribe what would be the relationship between the EU and any Member State which leaves. Unless something is agreed otherwise, the Member State which leaves becomes a "third State"—that is to say, it is no different in the eyes of the EU than any other non-Member State and, indeed, in the absence of special arrangements between the EU and the UK, the latter would be less connected with the EU than States such as Canada and the USA which have special arrangements.

It is useful to consider very briefly the various options which have been mentioned in the Brexit debate to date. It is very likely, it is submitted, that a special arrangement would be negotiated as the main arrangements which the EU has with the rest of the world (e.g. Norway) are with States which never joined the EU rather than with one which had been a Member State for over four decades.

Becoming a member of the European Economic Area ("EEA") (i.e. the so-called "Norwegian Model"), the European Free Trade Agreement ("EFTA") or concluding a UK/EU Free Trade Agreement[17] would almost inevitably involve (based on the Norwegian precedent at least) that the UK would have to accept much of the EU substantive regime relating to the "freedoms" (e.g. free movement of persons) and competition law, as well as parts of the EU institutional regime. However, it would be counterintuitive to leave the EU (including abandoning the vetoes and influence which membership provides) to replace it with a "half-way house" which has many of the features and burdens which have been so opposed by those keen to leave the EU, so the negotiation of the withdrawal agreement will be problematical.

A looser option such as a customs union—similar to the EU/Turkish model—might be an option because it would avoid tariffs on goods traded with the EU. The advantage of such arrangements would be that it would give some protection in regard to trade but avoid the more extensive institutional and substantive involvement of the EU and its institutions. This would not, however, address the issue of the people (e.g. the UK subjects living in the EU and the EU citizens who want to live in the UK).

A post-Brexit UK might seek to have a Swiss-like relationship with the EU. This would involve having a series of bilateral agreements between the UK and the EU. This is complex—there are over 100 treaties between the EU and Switzerland negotiated over four decades. It would also mean that there would have to be free movement of persons if the Swiss model were to be followed. Furthermore, it would mean that UK law would have to be closely harmonised with EU law anyway so as to avoid UK businesses having to cope with two differing regimes, so Brexit would not necessarily achieve a material difference.

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[15] *Article 50(4) of the TEU.*

[16] *17 Article 49 of the TEU provides:*

"Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.

The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements."

[17] *E.g. along the lines of the EU/Swiss model.*

There are many other models which are possible (e.g. the "South Korean", "Canadian" and "Albanian" models) but they all require negotiations which are often involved and span out over several years. The debate to date has been on the UK negotiating agreements with the EU but one must also recall that the UK would have to conclude arrangements with all the other States with which the EU currently has agreements and it is not simply a matter of "copying and pasting" those arrangements because the UK's bargaining position and negotiating needs are different from the EU's, as the latter is the world's largest trading bloc.

There is no doubt that the future after a Brexit vote would be uncertain and it would also be complex, with no clear pattern or result for several years.

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Introduction

It is impossible in a short paper to enumerate or elaborate on all of the legal issues arising from Brexit occurring. The reason for this is that one would have to write a book addressing all the issues of EU law which are relevant, including such diverse topics as the four freedoms (i.e. the free movement of goods, free movement of persons, freedom to provide services/establishment and free movement of capital/payments around the EU), competition, State aid, procurement, employment, agriculture, social welfare, migration, family law, criminal law, transport, consumer protection, taxation, defence/ security, professional qualifications, justice, asylum, banking, litigation, intellectual property, regulation and so on. Indeed, there would hardly be any sector of the economy which would not be affected by the event of Brexit. One can see the impact when one considers that so much of what has been added to UK law over the last 40 years has a significant EU dimension.

Brexit would involve a return of some element of sovereignty from the EU to the UK[18] which will also involve a change to the UK's constitutional regime.[19] For example, there would no longer be any notion that EU law would be superior to UK law in the areas where EU law applies.

Sources of EU Law

There have been over 100,000 legislative instruments adopted by the EU in its 60-year history. These are all part of EU law. At first glance,[20] in the absence of special arrangements, they should all disappear in the event of a Brexit. However, much like Ireland in 1922 and the question of whether English law would continue, much depends on the arrangements agreed between the EU and the UK as well as whatever choices the UK makes internally as a matter of UK law on how to deal with EU law post-Brexit.

The EU's treaties would cease to apply if the UK were to leave the EU. An alternative arrangement may well be put in place (i.e. a withdrawal treaty) but the EU's treaties (e.g. the TEU and the TFEU) would certainly be no longer relevant in the UK courts or UK law.

The EU's regulations are directly applicable automatically. They do not need implementation into UK (or any Member State)[21] law so, ironically, they are easier to deal with in the context of Brexit than directives.

When it comes to Brexit, directives are the most difficult of the sources of EU law. Directives can be potent. Most importantly, they need to be implemented into Member State law. So, Member State law has to be amended to cope with the changes brought about by the directives. This means that unlike treaties or, for the most part, regulations which might simply (in very broad terms) be ignored after the UK has left the EU, the reality is that UK law will have been amended to implement directives. So, if the UK wanted to "unwind" some of the EU's directives, then it would have to unwind its own national laws as well as simply ignore EU directives. This is a more difficult task than appears at first because the UK (and its citizens (both corporate and personal)) may wish to retain some (but not all) of them, hence there would have to be a selective approach to the task. If the UK decided to keep some elements of its national law which had been adopted to implement the directive

[18] *In this context, it is worth recalling the vigorous debate in the UK over R. v Secretary of State, Ex p. Factortame Ltd (C-48/93) [1996] E.C.R. I-1029 as contrasted with the muted response in Ireland over Pesca Valentia Ltd v Minister for Fisheries [1985] I.R. 193.*

[19] *In reality, Member States transfer much less sovereignty to the EU than Eurosceptics or Europhobes believe. Member States retain the overall right not only to leave the EU but even to "kill off" the EU itself.*

[20] *It is worth noting that many provisions of EU law are implemented into UK law and are therefore part of UK law (e.g. the primary and secondary UK law relating to employment which embodies the EU employment directives).*

[21] *It is fair to say that some national laws in the UK have been amended to deal with the entry into force of regulations but that would be relatively rare and, in so far as it happened, the UK law would simply be otiose (e.g. the UK legislation which has been amended to address the operation of the EU Merger Control Regulation ("EUMR") would be otiose if the UK did not apply the EUMR as part of a post-Brexit regime).*

then should, post-Brexit, that national law be construed in the light of, for example, the jurisprudence of the Court of Justice of the European Union ("CJEU") post-Brexit? To do so would be counterintuitive because the UK had, after all, left the EU by that time and could have no involvement in the debate before the CJEU. Conversely, not to have regard to jurisprudence which helpfully interpreted the directive would seem somewhat pointless. The UK faces the question of whether to "stop the clock" in terms of EU jurisprudence on the day it leaves the EU; one might see a scenario evolving of CJEU jurisprudence being "persuasive" but not "binding", as in the scenario of post-1922 Ireland.

Decisions would remain binding on those to whom they are addressed (e.g. undertakings in the case of competition decisions) but it is not entirely clear as to whether or how they would be enforced in UK law post-Brexit.

Recommendations and opinions are not legally binding anyway so there is no legal issue arising with these.

General principles of EU law have been a very significant and growing feature of the common law world in both England and Wales as well as Ireland. Those principles would not be part of the Brexited UK law and may not be addressed in any withdrawal treaty so it would be interesting to see how they would be addressed in the UK's post-Brexit law—it may well be that they will continue to be applied but would be seen as part of the general principles of the common law. There is little doubt that the UK courts have been influenced by concepts of EU law such as proportionality, non-discrimination and so on. If the UK were to leave the EU, the attention has focussed to date on how the UK would repeal UK legislation based on EU law. However, there is a need for a deeper analysis. UK law has been influenced, at least in part, by the EU approach to EU law.[22] Concepts and general principles such as "proportionality", "non-discrimination" and so on have entered the UK's legal toolkit. The process of unpicking and untangling EU law from the UK legal environment should not be underestimated.

General Issues

Indeed, that raises the prospect that if the UK were to leave then there would only be two Member States (Ireland and, to a large extent, Cyprus) with a common law tradition which could have an impact on the way in which EU law evolves.

It may well be the case that there would be a "waterbed effect", with the EU laws not applying in the UK but the latter still having to adopt laws of its own on the very same topics, which means that there would be no real net reduction in the volume of laws except that there would be a change in their origin/source of the law (i.e. national rather than supranational) and a heavier burden on the UK's four parliaments and many law-makers to adopt them.

Presumably, in the case of Brexit, there would be no preliminary reference regime under art.267 of the TFEU so the UK courts would be "on their own" in the case of difficulties arising on the construction of measures which were part of UK law but owe their origin to EU law.

It is also worth noting that Ireland benefits enormously from the detailed scrutiny which the much larger UK administration can give to EU proposals and it is clear that Ireland would lose out from this level of pre-enactment scrutiny by the UK.

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[22] *One need only think of the perceptive dictum of Lord Denning M.R. in HP Bulmer Ltd v J Bollinger SA [1974] Ch. 401 at 418 that, what is now, EU law "flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute." His dictum was correct but it is also true to say that EU law could even be superior to a statute (as was demonstrated in the later Factortame litigation). Equally, cases such as Preddy v Bull [2013] UKSC 73 have demonstrated how EU law can influence UK law even though EU law is not at issue.*

Specific Issues

It is proposed to consider a few issues as a representative sample. As mentioned above, this survey and analysis have to be cursory in nature.

Rights for businesses and employees

EU law creates rights for businesses, employees and individuals. For example, businesses established in the EU have the right, under EU law, to establish a business or provide services in almost any economic sector anywhere across the EU[23]—businesses established in the UK would lose such a right were Brexit to occur and the EU was unable or unwilling to negotiate an agreement to address the deficit. Equally, employees often have the right to work, provide services and have their qualifications recognised without the need for further examinations. Individuals such as students and retirees also have rights under EU law which would be at least diminished, if not extinguished, in the event of a Brexit depending on what transpires as part of a post-Brexit arrangement. It would probably no longer be possible to invoke the EU's Charter of Fundamental Rights were Brexit to occur.[24] (It is also possible that if there was a Brexit then there could also be a move to leave the European Convention on Human Rights regime—which was a UK-centred initiative in many ways.)

Competition law

In regard to general competition laws, EU competition law applies in the UK. The UK also has its own substantive competition law regime. The latter regime ordinarily operates alongside the EU one. The EU one sometimes takes precedence. For example, in an EU-wide cartel, the European Commission is normally the one to impose the fines and Member States do not impose penalties.[25] This would change in the event of a Brexit. For example, a company could be fined twice over—by the EU and the UK. It is also interesting to speculate on how the UK courts would, post-Brexit, construe UK competition law which has been drafted on the basis of EU competition law. Would the UK courts follow the EU jurisprudence? Perhaps the approach of the post-independent Irish courts might well be the best approach and therefore the UK courts would treat the EU jurisprudence as persuasive but not binding.

Merger control

In regard to merger control, if Brexit were to occur then there could be a very interesting result vis-a-vis the European Union Merger Control Regulation ("EUMR"). The EUMR applies to "concentrations" which have a "Union dimension". This latter element is calculated by examining the worldwide, EU-wide and Member State turnovers of the undertakings concerned. The EUMR is blind to the nationality or domicile of the undertakings involved. So, for example, the EU prohibited—much to the annoyance of the USA—the acquisition of Honeywell by General Electric even though both undertakings were from the USA.[26] So too, post-Brexit, the EU could prohibit a transaction involving UK undertakings and the UK would lack the internal influence in the debate. Moreover, the UK would lack the ability to seek a referral back under art.9 of the EUMR. This could be particularly relevant for Irish companies which have been able to benefit from the EUMR because of turnover in Ireland and the UK thereby benefitting from the "one-stop shop" dimension of the EUMR.

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[23] *This is often known as "passporting".*

[24] *See, e.g. the interesting interplay in the UK courts between the Charter and public international law (in the context of the UK's State Immunity Act 1978) in Benkharbouche v Embassy of Sudan [2015] EWCA Civ 33.*

[25] *Non-Member States may well impose penalties alongside the EU's penalties but Member States do not.*

[26] *See Commission Decision of 3 July 2001 in Case M.2220.*

Standards in trade

In regard to trade, if exporters in the post-Brexit UK wanted to access the EU's internal market then the goods and services would have to meet the EU's standards. Ironically, therefore, the UK might well end up retaining many of the EU's standards and the concurrent legislation setting those standards. The review of all of the UK's legislation (primarily, in this context, statutory instruments enacted under s.2(2) of the UK's European Communities Act 1972) would be an exhaustive and enormous task which might well leave a great deal of the UK's legislative instruments in this area in place anyway.

Contracts

In regard to contracts, there has been some debate as to whether Brexit might constitute a frustrating event; that would seem unlikely in the vast majority of situations. Nonetheless, it is possible that in some contracts, the presence of a party in the EU may be required so as to perform the contract (e.g. to provide services around the EU). If there is a vote to leave the EU then businesses would be well advised to review their contracts to see if there is any clause dependent on EU membership.

Banking and insurance

The EU has an enormous impact on the banking laws of the Member States (whether or not those Member States are also participating in the Economic and Monetary Union). Brexit would mean that the EU banking rules would, unless retained by way of an agreement, fall away in the context of the UK. Equally, the EU banking regulatory regime would fall away. There could be very serious implications for "passporting" between Member States. There could even be implications for the value of security taken by banks—for example, it is believed by many that the value of agricultural land would fall if Brexit were to occur because of the absence of EU grants and subsidies to farmers?[27] There is no doubt that the same issues arise for the insurance sector too.

Research and funding agreements

Many businesses, particularly in the pharmaceutical and technical spheres, have research agreements with universities and other institutions. These educational counterparties to the companies are bringing to the agreement not only their educational expertise but also, in many cases, EU funding. Both sides need to legislate in any agreement between now and voting day for the possibility of that funding disappearing.

Environment

The EU has influenced enormously the law relating to the environment (including planning) in the EU Member States. There is no doubt that Brexit would lead, in all likelihood, to a lowering of the higher EU environmental standards. The lower UK standards of environmental law could be the result of a desire by the UK to achieve some form of competitive advantage over the EU by attracting industry which wants to locate or operate in Europe without being subject to the higher EU standards. As environmental law is a devolved topic within the UK, this may lead to divergent standards within the UK.

[27] *At present, the EU contributes about €3.8 billion to the UK via the Common Agricultural Policy ("CAP") and it is believed that EU subsidies contribute about 55% of farm income in the UK. The Brexit supporters are saying that a withdrawal from the EU and the consequential reduction in the amount of funding which the UK has to provide to the EU would mean that the UK could use that extra money to replace the CAP funding to UK farmers.*

Pensions

EU law has influenced the evolution of pensions law over time, particularly in the area of equality. It is generally assumed that Brexit would have little initial impact on pensions law but there would be an impact over time (e.g. new standards and protections would not flow into the UK from the EU legislation). However, there would be significant changes in time. Pension trustees already have to face the consequences of the volatility and uncertainty caused by the possibility of Brexit.

Conclusions

It might well be the case that the UK will vote to remain in the EU and Brexit could appear to be this decade's Y2K. However, the EU will still never be the same. The EU would have come close to losing a Member State and it is easier that others could go where the UK did not. The EU will have to implement the deal agreed with the UK in February 2016. However, more than that, the EU will have to ensure that no other Member State ever contemplates such a move. Whatever will be the outcome of the vote—and it is for the voters to decide—a decision to leave would have enormous consequences for everyone around the EU and the EU itself. However, a vote to leave may not be the end of the matter given the EU's history of pulling back from the brink (from the "Empty Chair Crisis" in the 1960s to the "Grexit Crisis" of the 2010s) and the June referendum might not be the last time this debate will be conducted. Indeed, students of history might recall that we are now where we were in 1975 when the UK also had a vote on whether to leave or remain!

Will the Brexit Crisis be resolved?

The good news is that ultimately the current crisis will be resolved to a greater or lesser extent.

History demonstrates that the EU always resolves its crises even if imperfectly. This time last year, many commentators saw Brexit as inevitable. During the euro crisis, some commentators forecasted the collapse of the euro, the Economic and Monetary Union and even the EU itself. Rejections of the Constitution, the Lisbon Treaty, the Nice Treaty and the Maastricht Treaty were all hailed by some as signs of doom for the EU. Even Mrs Thatcher's long running Rebate Crisis was eventually resolved.

And Brexit is not even the most serious crisis to have faced the EU. That was probably the Empty Chair Crisis in the 1960s. In that crisis, France walked out for seven months at a critical time for the development of the then nascent Communities and, importantly, when unanimity among all Member States was needed. The Empty Chair Crisis was eventually resolved by the so-called *"Luxembourg Compromise".* We do not yet know the name of the "Compromise" to resolve the Brexit Crisis. There will probably be such a compromise someday but hardly as early as the planned Bratislava summit in September – it would be too early to hope for a resolution.

So when will it be resolved?

This is the bad news. The EU institutions normally go to the 11th hour to resolve crises. Even routine fishery negotiations are only resolved at four in the morning on the last possible day. Deals at four in the morning are valued more highly in the EU than resolutions at four in the afternoon. EU crises tend to expand to fill the time available for their resolution. The problem with mentioning *"two years"* in Article 50 of the Treaty on European Union is that it will be tempting for many to exploit the full two years – and no one knows even when that timeframe starts. Moreover, it is possible that the two year timeframe could be extended by unanimous agreement. And it may well be that the Brexit date – if it ever happens - could be delayed further under the Final Withdrawal agreement.

Resolution could well be delayed by national politics. There will be general elections in around 18 of the remaining 27 countries before the end of 2018 – including the all-important France and Germany. Many countries will be reluctant to give the UK a generous deal in case it fuels the exit movements in their own countries particularly in the run up to national elections. Contagion is a key concern. It could theoretically be the case that matters will be resolved quickly but it is more likely that matters will not be resolved until the key elections are out of the way and that could be September 2017 when the German general election is over. In such circumstances, the UK will have to decide when to show its negotiating hand – show it too early and it could be bidding against itself but bid too late and it could be timed out.

How will the Brexit Crisis be resolved?

Many commentators are mentioning the existing *"models"* as ways of resolving the issue. They refer knowingly to the Norwegian, Canadian, Turkish, Swiss and other models. But even the most advanced model - the Norwegian model (also known as the European Economic Area model) – lacks the Common Agricultural Policy, the Common Fisheries Policy, the Common Foreign and Security Policy and the EU Customs Union. The Canadian model lacks sufficient protection for services. Other models lack the Internal Market. But the most fundamental flaw of all these models is that they have all been designed for States which were never EU Member States. Therefore a different model is needed for the UK given that it has been an EU Member State for 43 years and has absorbed diligently – more than most others - over 100,000 EU legislative instruments. So, a bespoke model is needed to deal with the UK. The UK may require a new form of associate or mezzanine membership. The attraction of such an interim step is that it might give the UK much of what it wants but it cannot be so attractive that others would follow suit. The EU might also help to resolve matters by compromising on some aspects. Member States may have to be given the chance to have various levels of

integration – Denmark and Sweden are, in reality, no less EU Member States despite not having adopted the euro.

Resolution will require imagination and skill. But the negotiators will be relatively new to their jobs. The UK side of the negotiating table will be largely new and untested. The UK Prime Minister will be attending her first European Council meeting as Prime Minister. The EU side of the table could also potentially change if Commission President Juncker does not remain in office as some commentators are speculating. Moreover, the all-important European Council is relatively inexperienced: of its 27 members (leaving aside the UK), 19 have joined the Council since 2013. While 2 of the 19 had previous stints on the Council, it is a relatively inexperienced European Council.

Resolution will also require consensus. All 27 remaining Member States will have to work together. The mini-summit of the six Founding Members on the Saturday morning after the UK vote was convenient but was unnecessarily provocative to the 21 others who are still remaining. More generally,all Member States must seek to resolve the Brexit Crisis jointly and not exploit it for sectionalist interests which are neither pertinent nor justified.

Resolution of Brexit is not just a matter for the UK and the Member States. The EU itself needs to refresh and re-orientate itself irrespective of Brexit. However, the EU should not try to do much on top of trying to resolve the Brexit Crisis which is a tall order in its own right.

So, peering through the fog, one can see that the crisis will be resolved but it will probably not be soon, and the solution itself is still out of sight.

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A Key Practical Tip on the Brexit Reality for Business Executives

On Brexit, it is now time for business executives to move from the politics to the practicalities.

Assuming that Brexit is happening and there will be negotiations between the UK and the rest of the EU, executives need to identify what their company and their sector require to emerge from those negotiations.

Executives need to compile a shopping list of what needs to remain or change in the post-Brexit environment.

The question to ask is: "what do we need to ensure that this business continues with minimal interruption?" Answering that question involves identifying the ways in which EU law and practice currently help the company or sector to trade more easily. Put another way, what would be the legal obstacles that would have to be overcome post-Brexit?

The shopping list of elements in any final deal could comprise of, for example, provisions on licensing, authorisation, passporting, movement of people, mutual recognition of qualifications or standards as well as tariffs/fee-free arrangements. One wants to avoid tariffs or charges but also any obstacle to the business actually trading. Some businesses may even need State aid or restructuring aid to deal with the seismic changes.

Businesses and sectors could then brief governments on their shopping lists to try to ensure that those lists are part of the negotiating agenda.

Briefing one's own government is critical but briefing other governments is also important because they may also see the benefit for their own industry too. And a critical mass needs to be built up because the negotiations will be complex: there are 27 remaining EU Member States, 3 European Economic Area States, a host of EU institutions, national parliaments and a plethora of lobbying groups.

Briefing the UK government is also critical because there is an obvious tactical value in any negotiation, where one is not present, to create a situation where both sides of the table are calling for the same result. The UK has the advantage of not wanting to damage industry either (provided UK industry is not affected) so it may be a powerful ally.

It would also be important to brief the European Commission and members of the European Council and Parliament because it needs to know what will help a business that is remaining within the EU.

Keeping EU law in mind is critical in the compilation of the shopping list and the negotiation of the deal. EU law constrains what the EU and the remaining Member States may do in the negotiations. For example, there cannot easily be special bilateral deals, discrimination or breaches of existing EU law. Equally, there are ways in crafting and presenting arguments which are compatible with EU law and are more likely to succeed. There is no point in compiling a wonderful wish list which cannot be delivered under EU law. It needs to be EU law proofed.

Any lobbying needs to comply with EU and national lobbying rules. Equally, such lobbying needs to comply with competition law - for example, competitors must not exchange competitively sensitive information.

As we move from the politics to the practicalities, it is time to move from the shock to the shopping list to protect businesses and the jobs in those businesses.

Date published: 27 June 2016

Everyone is still analysing the consequences of the vote by the electorate in the UK and Gibraltar on 23 June 2016 to leave the European Union (**EU**). It is premature to be definitive on all the consequences of Brexit or even to predict whether the UK will ultimately leave the EU. Nonetheless, it is important to try to anticipate some of the implications, even in narrow and specific areas. The purpose of this short paper is to consider some of the implications for competition law.[28]

Short-Term Implications

In the short term, until the UK leaves the EU, the EU competition law rules continue to apply in respect of: (a) the UK itself (e.g. the EU's State aid rules[29]); and (b) "undertakings"[30] (of whatever nationality) whose activities have an impact on trade in the EU and the UK. Put simply, it is "business as usual" in that the competition rules remain in place and compliance should be maintained. In the long run, UK undertakings whose activities affect trade in the EU will remain subject to EU competition law so the Brexit dream of ridding UK business from the effects of EU law (and EU competition law) is illusory in this context at least.

In reality, there will be a change in the mindset of many of those involved in competition law and policy even before the UK leaves. One could see some executives (particularly those of a Brexit mindset) being less inclined to comply with EU competition law even if the rules remain, as a matter of law, binding on their undertakings. Moreover, as we get closer to the "exit date", there is a possibility that the UK Government and the devolved UK Governments will become more ambitious about devising schemes[31] which would not be compatible with EU State aid law if the UK post-Brexit were still bound by EU State aid rules. Equally, plaintiffs could be less inclined to institute long-running competition litigation (e.g. damages actions) before the UK courts if there is doubt about whether EU competition law (and, in particular, European Commission decisions) will continue to have direct effect in UK law.

In the short term and over the medium term, the UK will be considering its "shopping list" for the negotiations with the EU and the remaining EU Member States. If the UK maintains its desire to have access to the EU's internal market then it will almost inevitably have to accept some form of competition law regime because it would be paradoxical to allow the UK to have access to the internal market but be able to frustrate the operation of such a market by having private arrangements or practices (e.g. cartels and abuse of dominance) or public practices (e.g. State aid) which would undermine the aims and operation of the internal market but have no mechanism to control such anti-competitive behaviour.[32] So, one should assume that the UK would remain subject to some form of EU competition law regime post-Brexit. But it is useful to consider how matters might evolve if it was not subject to EU competition law in one form or another.

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[28] *See Whish, "Brexit and EU Competition Policy" (2016)7 Journal of European Competition & Practice 297.*

[29] *See arts 107-109 of the Treaty on the Functioning of the European Union (**TFEU**). See also art 106 of the TFEU in respect of State authorities and any privilege granted by a Member State.*

[30] *The term "undertaking" is the term used in EU competition law to describe those entities subject to competition law. See arts 101-102 of the TFEU.*

[31] *E.g. corporation tax and grant regimes.*

[32] *The Court of Justice of the European Union (**CJEU**) has long recognised that the EU rules on competition are essential for the accomplishment of the tasks entrusted to the EU and, in particular, for the functioning of an internal market. (See Eco Swiss China Time Ltd v Benetton International NV (C-126/97) [1999] E.C.R. I-3055. Para.36; Courage Ltd v Crehan (C-453/99) [2001] E.C.R. I-6297, para.20; Manfred v Lloyd Adriatico Assiourazion SpA (C-295/04 to C-298/04) [2006] E.C.R. I-6619, para. 31; T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit (C-8/08) [2009] E.C.R. I-4529, para. 49).*

Longer Term Implications

The longer-term implications will only become clearer once the exact terms of any post-Brexit arrangement between the UK and the EU have been finalised.[33] However, it is useful to consider some implications.

If the EU State aid rules were to no longer apply to the UK then the UK authorities would be free, as a matter of EU law, to provide State aid without breaching EU law. This would be problematical for all remaining EU Member States (including the likes of Ireland) because EU State aid law currently limits the provision of anti-competitive State aid by Member States.[34] Conversely, if State aid law continues to apply to the UK as part of the post-exit settlement (e.g. as part of the UK joining a European Economic Area (**EEA**) arrangement) then this will be a disappointment for those who voted for Brexit if they anticipated that the UK could be more supportive of UK domestic businesses and have greater freedom dealing with all businesses.

The biggest changes would probably be in the area of merger control. At present, the UK benefits from the "one stop shop" regime embodied in the EU's Merger Control Regulation (**MCR**)[35] - a "concentration" with a "Union dimension" is typically notified only to the European Commission and does not have to be notified to, and cleared by, all of the individual national competition agencies in the EU. This "one stop shop" approach is seen as very desirable by the business sector and reduces compliance costs and complication. If the UK left the EU entirely then the turnover in the UK would not count towards the Union dimension and the UK would probably retain its own national merger control regime, which would mean that businesses would have to notify many deals twice (i.e. once to the EU and once to the UK), with the inevitability of higher costs and the possibility of having divergent results.[36] Indeed, the fact that the UK would be outside the MCR regime would mean that the European Commission could block a transaction affecting the UK without the UK having any ability to have the transaction referred back to the UK under art.9 of the MCR (because transactions can only be referred back to a Member State).[37] One could anticipate a scenario arising whereby a deal involving UK companies would be prohibited by the European Commission as being very controversial.[38] If the UK wants to retain the MCR regime, at least in some measure, then the UK would have to be part of an EEA-type model or some comparable arrangement. It is very likely that many in the UK business community would overwhelmingly support such an outcome.

Anti-competitive arrangements or abuse of dominance involving UK undertakings would still be subject to investigation by the EU where there was an effect on trade in the EU despite the UK leaving the EU. In this respect, the UK would be no different than any other "third State" and would be subject to EU competition law (e.g. investigations by the EU of cases involving US technology companies). Presumably, the UK would not voluntarily yield jurisdiction to the EU so the UK authorities would also investigate the allegations. For the undertakings involved, this would lead to duplication of costs and penalties, as well as potentially divergent outcomes. Indeed, even where there was no divergence (e.g. where there was a finding of a breach of EU and UK competition law) then the undertakings could be punished on the double (i.e. at the EU and the UK levels).

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[33] *See art. 50 of the Treaty on European Union.*

[34] *Such practices might be challenged, in certain circumstances, under the rules of the World Trade Organisation but that is not as easy as it would be under the EU's State aid rules.*

[35] *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0139:EN:NOT [last accessed 6 July 2016].*

[36] *It is even possible in the context of some deals that the removal of the UK turnover would remove the deal entirely from the scope of the MCR thereby forcing the parties to notify in several jurisdictions.*

[37] *This would also mean that the MCR's arts 4 and 22 case reallocation provisions would also disappear vis-à-vis the UK.*

[38] *An analogous situation arose where the European Commission prohibited the proposed acquisition by General Electric of Honeywell (both US corporations) even though the US approved the transaction. For the EU decision, see Case No COMP/M.220 – General Electric/Honeywell, 3 July 2001, available at ec.europa.eu/competition/mergers/cases/decisions/m2220_en.pdf [last accessed 6 July 2016]. In a scenario where the UK left the EU in its entirety then the UK companies would be in the same scenario as the US ones in the General Electric/Honeywell transaction.*

UK domestic competition law (principally, the UK's Competition Act 1998 (**the 1998 Act**)[39]) would presumably continue in force and, indeed, would be all the more necessary. However, there would probably be inevitable amendments to domestic UK competition law. For example, s.60 of the 1998 Act provides, in effect, that to ensure consistency between the EU and the UK regimes, the UK courts must avoid such inconsistency and, essentially, follow the EU precedent—that could hardly survive a true Brexit. Equally, there would have to be some amendments to the 1998 Act to address the fact that the EU's block exemption regulations would no longer apply (if there was a complete so-called "hard exit").

If there is any divergence, however small, between EU and UK competition law then not only could there be unfortunate consequences (e.g. a transaction not proceeding at all because it is prohibited by just one regime) but there would also be inconsistency in philosophy and approach between the EU and the UK regimes. Over time, such divergences and inconsistencies would be likely to grow rather than reduce and cause concern and difficulty for all involved.

Consequences in an Irish Context

What would be the relevance for Irish business and Irish competition law? It is useful to consider some of the implications.

At an institutional level, the possible absence of the UK and its Competition and Markets Authority from the EU's European Competition Network could be quite significant. There will be a greater burden on Ireland, the Department of Jobs, Enterprise and Innovation, as well as the Competition and Consumer Protection Commission, to advocate the common law/Anglo-Saxon corner in the EU. Over time, if the UK is outside the EU or even somewhat semi-detached, there will be a growing divergence between Ireland (as part of the EU) and the UK on various competition law issues. One could see a greater move towards the civil law approach to these issues.

There would be consequences at a business level too. Many Irish businesses are able to benefit from the MCR because of their turnover in the UK and, as matters stand, the "UK turnover" counts towards "EU turnover", thereby triggering the application of the MCR. However, if the EU turnover of Irish businesses no longer includes UK turnover then it is quite possible that the MCR would no longer apply because the EU threshold would not be met. This means higher compliance costs for some Irish businesses because they would no longer be able to notify the European Commission but would have to notify several different competition agencies (all with different tests, procedures and policies). More generally, there would be higher compliance costs because of the divergence in approach.

Lawyers giving advice on EU competition law need to be not only external lawyers[40] but must also be called to a bar or roll of a Member State if their advice is to benefit from legal professional privilege. Lawyers who are called in the UK only would not be able to give such privileged advice as a matter of EU law. The same would arise in the context of advice rendered during competition investigations (i.e. so-called "dawn raids"). And, equally, non-EU lawyers are not able to sign pleadings before the CJEU. Hence, there is already a surge in the number of UK lawyers seeking to requalify, even if only as a formality, elsewhere in the EU, including Ireland.

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[39] *1998 c. 41. See http://www.legislation.gov.uk/ukpga/1998/41 [last accessed 6 July 2016].*

[40] *See AM & S Europe Ltd v Commission (Case 155/79) [1982] E.C.R. 1575, available at: http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=155/79&td=ALL# [last accessed 6 July 2016]. See Power, "In-House Lawyers and the European Court: The Akzo v Commission Judgment" (2010) 45 Ir. Jur. (n.s.) 198.*

Conclusions

It is too early yet to decipher all of the consequences of the Brexit vote. With regard to competition law, it is almost inevitable that if the UK does succeed in retaining access to the internal market, the competition rules will remain largely intact but the divergences and differences which are likely to emerge are such that they will lead to higher costs for businesses, greater uncertainty for all and a poorer regime. From an Irish perspective, it would be important to ensure that the UK remains bound by EU competition law (particularly EU State aid law) so as to ensure that competition is not adversely distorted vis-à-vis Ireland (e.g. in the context of tax or grant regimes). Whatever happens, the outlook is uncertain but it will be interesting to observe.

Date published: 18 July 2016

European Commission Appoints Michel Barnier as its Chief Negotiator

The cast of Brexit negotiators is taking shape. The UK side has got its key negotiators in place with a new Prime Minister and three key ministers. The European Commission has now appointed its Chief Negotiator.

On 27 July 2016, European Commission President Jean-Claude Juncker appointed Michel Barnier as the European Commission's Chief Negotiator in charge of the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 of the Treaty on European Union.

M. Barnier, an experienced negotiator, is a former Vice-President of the European Commission and has been a French Government Minister with portfolios as diverse as Foreign Affairs, Environment, European Affairs and Agriculture as well as being a former MEP. So, he has had experience in the Commission, the Council of Ministers and the European Parliament which should help prepare him for engaging with all three institutions in this process. He is well known to the financial services community and the UK for his work as Commissioner for the Internal Market and Services.

He will report directly to the Commission President who said: "he will report directly to me, and I will invite him to brief regularly the College [of Commissioners] to keep my team abreast of the negotiations." He will have the rank of a Director-General rather than that of a Commissioner. It is interesting that it is not one of the College of Commissioners who has the role which puts the matter at a distance from the College. He will be advised, in turn, by a group of Commission Directors-General dealing with the specific issues relevant to the negotiations.

M. Barnier will take up the position on 1 October 2016 – not immediately – and as the European Commission said in a press release on his appointment: "in line with the principle of 'no negotiation without notification', the task of the Chief Negotiator in the coming months will be to prepare the ground internally for the work ahead. Once the Article 50 process is triggered, he will take the necessary contacts with the UK authorities and all other EU and Member State interlocutors." So, a signal that publicly at least, negotiations will not be starting as soon as some would like.

Incidentally, M. Barnier – a well-known marathon runner - uttered words in a speech in Washington DC in 2012 which could well be applicable to the upcoming Brexit talks: "this is not a sprint. It is a marathon. If you run too fast, you may well trip over. And you may never reach the finishing line." It is interesting to speculate whether that will be the EU's style in these negotiations.

Date published: 29 July 2016

Brexit and EU law: How does the European Union (EU) enter into trading agreements with third countries? It's mainly about competence

Brexit is now bringing into sharper focus the way in which nations and economic blocs seek to negotiate international trade agreements. Ireland's role in those negotiations is defined by reference to and subject to its obligations of membership of the EU. The future of the UK's post-Brexit trading relationship in particular with the EU (but also with many other countries) remains uncertain. Depending on what that future arrangement finally looks like, the UK's post-Brexit trading relationship with the EU might be, for example, membership of the European Economic Area, based on a series of bilateral agreements with the EU (as with Switzerland in the context of its membership of the European Free Trade Agreement), a customs union with the EU (as with Turkey), membership of the World Trade Organisation (**WTO**) or a specific free trade agreement (such as the Comprehensive Economic and Trade Agreement between the EU and Canada). This note assesses some of the legal aspects of the EU's trade policy in the context of Brexit.

EU trade policy has been developing since the creation of the common market in 1958. When Ireland became a member of the European Economic Community (**EEC**) in 1973, it joined the customs union of the EEC. Since then, Irish trade policy has been governed by EU trade policy. However, the precise parameters of the EU's competence to agree trade policy for its Member States has evolved over a number of years into:

- Exclusive competence: areas in which the EU alone is able to legislate and adopt binding acts – Member States are able to do so themselves only if empowered by the EU to implement these acts;
- Shared competence with the Member States: where the EU and Member States are able to legislate and adopt legally binding acts – Member States exercise their own competence where the EU does not exercise, or has decided not to exercise, its own competence; and
- Supporting competence: where the EU can only intervene to support, coordinate or complement the action of Member States.

This somewhat complex construct may become an important factor in the way in which the UK's post-Brexit relationship is negotiated and eventually agreed with the EU and its Member States.

Since 1957, the EEC, which later evolved into the EU, has had competence over international trade in goods and has exercised this exclusive competence through its international trade policy, the Common Commercial Policy (**CCP**). The CCP has expanded beyond goods to cover international trade and investment. A customs union, a common customs tariff and common import and export regimes for goods were central to the scope of this EU competence, but the precise scope of the EU's exclusive competence in trade matters was disputed from time-to-time by Member States. In a series of judgments dating back to the 1970s, the (now) Court of Justice (**COJ**) was instrumental in defining the scope of the CCP. There were important developments in this regard in the 1990s (and which coincided with the creation of the WTO and its expansion beyond an international trading system based on goods to areas such as services and intellectual property (**IP**) rights). The extent of the EU's exclusive competence was then developed by the Treaty of Amsterdam (1997), the Treaty of Nice (2001) and most recently by the Treaty of Lisbon (2009).

The Treaty of Lisbon (as reflected in Article 207 of the Treaty on the Functioning of the European Union (**TFEU**)) sets out the institutional processes for agreement in the relevant trade areas (e.g. as between the Council of the EU, the European Commission and the European Parliament) and sets out the current state of EU competence in the areas of trade and investment. It has expanded the scope of competence in some areas of trade and investment and clarified it in others. The EU is exclusively competent for all services (apart from transport which is an area of shared competence) and trade-related aspects of IP. However there may still be some argument as to the precise meaning and scope of "services" and "IP".

One significant extension of the CCP is through the inclusion of foreign direct investment under Article 207 TFEU, though there remain potential issues as to its precise delimitation.

Article 207 TFEU also sets out the limits of EU competence. For example, the exercise by the EU of its competence should not harmonise legislative or regulatory provisions of Member States where the TFEU prohibits this (e.g. immigration, health, and education and vocational training).

The EU exercises its competence through the CCP by way of agreements (i.e., bilateral and multilateral) between the EU and third countries as well as by way of internal EU legislation. However, agreement on competence between the EU and Member States in areas such as investment (e.g. the delimitation of exclusive and shared competence) and the maritime sector (e.g. issues of shared competence) may be the subject of future debate.

In summary, the Lisbon Treaty clarified the balance of competences (particularly in trade and investment) as well as the exercise of such competences in these areas. There remain areas of clarification and delimitation which may yet have an impact on the negotiation of the EU's eventual trade relationship with the UK post-Brexit. These and other EU trade issues will be explored in a later article on this topic.

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Brexit and trade agreements: What is the legal basis for the negotiations by the EU with the UK?

When the EU and UK diplomats eventually begin talks on the post-Brexit trading relationship, the structure and possibly outcome of those talks will, at least in part, be affected by the legal basis on which the EU negotiates trade agreements with third countries. While Ireland will seek to actively engage with the EU institutions to outline issues directly affecting Ireland (such as the impact of Brexit on Ireland/Northern Ireland issues), the EU will take control of the negotiations on the post-Brexit trading relationship with the UK.

What is the Legal Basis for the EU to Negotiate Trade Agreements?

The EU organises trade relations with countries outside the EU through its trade policy. Trade policy is an exclusive power of the EU. Article 3(1)(e) of the Treaty on the Functioning of the European Union (**TFEU**) provides that the EU has exclusive competence in relation to the common commercial policy. The scope of this exclusive competence (developed over time since 1957 by a series of revisions to the EU Treaties and by way of case-law from the Court of Justice (**COJ**)), is mainly set out in Article 207 TFEU. This exclusive competence is not limited to trade in goods, but also includes trade in services, trade-related aspects of intellectual property and foreign direct investment. Article 207 TFEU provides that:

> *"1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.*
>
> *2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.*
>
> *3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article. The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.*
>
> *The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations."*

For the negotiation and conclusion of these trade agreements, the Council of the EU (**Council** (and which represents the Member States' governments)) acts by a qualified majority.

From 1 November 2014 a new procedure for qualified majority voting began to apply in the Council. Under this procedure, when the Council votes on a proposal by the Commission, a qualified majority is reached if: (i) 55% of Member States vote in favour (essentially 16 out of 28); and (ii) the proposal is supported by Member States representing at least 65% of the total EU population. This procedure is also known as the 'double majority' rule.

For the negotiation and conclusion of agreements in trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council acts unanimously where such agreements include provisions for which unanimity is required for the adoption of internal EU rules. The Council also acts unanimously for the negotiation and conclusion of agreements:

a) In the field of trade in cultural and audio-visual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity; and

b) In the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

The sole exception to the EU's exclusive competence over trade in services is in the field of transport, which is an area of shared competence. The negotiation and conclusion of international agreements in the field of transport is therefore subject to separate rules under the TFEU (see Title VI and Article 218 TFEU).

The exercise of the competences conferred by Article 207 regarding the CCP does not affect the delimitation of competences between the EU and the Member States, and does not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.

In this regard, Article 216 of the TFEU provides that the EU may conclude an agreement with a third country where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the EU's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

Agreements concluded by the EU are binding upon the institutions of the Union and on its Member States.

Therefore, it is the EU, and not individual Member States (such as Ireland), that negotiates international trade agreements. The Commission negotiates with a third party trading partner on behalf of the whole EU in cooperation with the Council and the European Parliament. Ultimately the Council and the European Parliament approve any trade agreement.

Currently the EU: (i) has a Customs Union (with Turkey, Andorra, Monaco and San Marino); (ii) is party to the European Economic Area (with Norway, Liechtenstein and Iceland); and (iii) has a number of trade agreements with countries such as Switzerland and South Korea. The EU is currently seeking to negotiate a trade agreement with the US (though there are a number of political hurdles in relation to this proposed agreement), and has an agreement waiting for final ratification with Canada (i.e. the Comprehensive Economic and Trade Agreement).

What Are The Formal Procedures for Such Negotiations?

Under Article 218 TFEU (and without prejudice to the specific provisions set-out under Article 207 TFEU above), agreements between the EU and third countries (or international organisations) are negotiated and concluded in accordance with the following general procedures:

- The Council authorises the opening of negotiations, adopts negotiating directives, authorises the signing of agreements and concludes them;
- The Commission (or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement relates mainly to the common foreign and security policy), submits recommendations to the Council, which adopts a decision authorising the start of negotiations and, depending on the subject of the agreement envisaged, nominates the Union negotiator or the head of the Union's negotiating team;
- The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted; and

- The Council, on a proposal by the negotiator, adopts a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.

Then, the Council adopts the decision concluding the agreement (except with regard to the Common Foreign and Security Policy (**CFSP**)) after obtaining the consent of the European Parliament for: (i) association agreements; (ii) agreement on EU accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms; (iii) agreements establishing a specific institutional framework by organising cooperation procedures; (iv) agreements with important budgetary implications for the EU; and (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required. The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

The Council also adopts the decision concluding the agreement (except with regard to the CFSP) in other cases after consulting the European Parliament. The European Parliament delivers its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may then act.

The Council acts by a qualified majority throughout the procedure. However, it acts unanimously when the agreement covers a field for which unanimity is required for the adoption of an EU act as well as for association agreements (for more details see Part 1 of this series of articles). The European Parliament is informed at all stages of the procedure. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the COJ as to whether an agreement envisaged is compatible with the EU Treaties. Where the opinion of the COJ is adverse, the agreement envisaged cannot enter into force unless it is amended or the EU Treaties are revised.

How does the EU prepare for negotiations?

The Commission, the Council and the European Parliament are in contact about trade policy including any plans to negotiate a trade deal with a certain country or region. In early stages of a discussion about launching trade negotiations, the Commission holds a public consultation on the content and options for any free trade agreement and conducts an assessment of the impact of any such deal on the EU and on the other country.

The Commission may begin an informal dialogue with the third party concerned on the content of a future negotiation (i.e. a scoping exercise). This can cover the range and depth of topics that will be negotiated and assesses if the parties have similar interests to reach a successful conclusion to the discussions.

The Commission requests formal authorisation from the Council to begin negotiations. These are known the "negotiating directives" referred to above under Article 218 TFEU and they outline the general objectives to be achieved. The Commission request is shared with the European Parliament. The Council adopts the negotiating directives and then authorises the Commission to negotiate on behalf of the EU.

Relevance of the World Trade Organisation (WTO) framework

Free trade agreements grant certain privileged access to the markets of the countries concerned and they are an exemption to the first principle in the WTO of granting equal treatment to all trade partners. Therefore, the rules for free trade agreements are set out in the WTO, specifically in Article XXIV of the General Agreement on Tariffs and Trade and Article V of the General Agreement on Trade in Services. This is relevant for the content of the tariff aspect of the negotiations, for example, as the rules state that "substantially all trade" must be liberalised. Free trade agreements are also required to be notified to the WTO.

Process

The negotiating teams are led by a Chief Negotiator and include experts covering the topics under negotiation. The Commission (i.e. DG Trade) leads the negotiations and draws on expertise from across the Commission. A negotiation round may cover all the topics under negotiation or it focus on a limited number of them.

The Chief Negotiators set up different negotiation rounds, normally alternating between the EU and in other party's country. The duration of negotiations depends on the pace of negotiations and the Commission has stated that it can range from 2-3 years to much longer. The Chief Negotiators are in regular contact and may meet outside formal negotiation rounds. At key moments in the negotiations, the Trade Minister of the country concerned and the EU Trade Commissioner will meet.

Types of Agreements

The titles of the free trade agreements vary according to the partners' preferences (e.g. CETA for Canada). Some trade agreements are part of broader political cooperation agreements, where trade is one of several topics covered: e.g., the Association Agreement with Central America. If the EU already has an overall agreement framework for political cooperation with the country concerned, it is more likely that the free trade agreement will be a stand-alone agreement. Typically, a free trade agreement contains chapters on each topic and has a number of annexes. These include the schedule of tariff liberalisation tariff-line by tariff-line, sectoral agreements and Protocols.

Sharing Information within the EU

After each negotiation round and at other key points in the negotiations the Council and the European Parliament are informed about the state of play. Discussion takes place regularly with Council and with the European Parliament at working level, but it may also be raised periodically at Ministers' level or in plenary debates. The draft texts of the negotiations are not made public during the negotiations. Even when certain chapters (or topics) are "closed", the negotiation is not over until everything is agreed. When negotiations reach the stage of technical finalisation, the European Parliament and the Council are informed. Finalised texts are sent to the Member States and to the European Parliament. At this stage the legal input into the texts begins in earnest and is where lawyers review the negotiated texts. The Commission has said that this exercise can take from 3 to 9 months.

Conclusion of Negotiations

(i) Initialling

When negotiations are technically concluded and the legal input (or "scrubbing") is complete, the chief negotiators of both parties initial the English text of the proposed agreement. The Council and the European Parliament are informed once the agreement is initialled and they are provided with the text. After initialling, the Commission can decide to publish the text with a disclaimer that it is not yet binding as a matter of international law. The agreement is translated into all official languages of the EU. The other party also ensures translation into their national language, for example if the text was negotiated in English.

(ii) Signature

The Council decides on the signature and conclusion of the agreement following a proposal of the Commission.

The Council also has the texts legally reviewed and following internal debate, gives the authorisation to sign the agreement. Sometimes agreements are accompanied by legislative proposals needed to help implement the agreements, which must also be adopted by the Council and the European Parliament. The agreement is formally signed by the two parties. The Presidency designates a person to sign (often the European Commissioner for trade) on behalf of the EU. Where the agreement covers topics that are the responsibility of the Member States (and not shared at EU level), all Member States need to sign as well.

(iii) Approval and ratification

After signature by both sides, the Council transmits the agreement together with the draft decision to conclude to the European Parliament for consent. Once it receives the texts, the European Parliament gives its consent after the necessary preparation at committee level. Once the European Parliament completes its internal review (e.g. involving the Committee for International Trade), the European Parliament votes in plenary session to consent. Where the agreement contains provisions that fall under Member State responsibility (i.e. a "mixed agreement"), individual Member States must ratify the agreement as well as the EU according to their national ratification procedures. After consent of the European Parliament and ratification by Member States, the Council adopts the final Decision to conclude the agreement and the agreement is published in the Official Journal.

Date published: 10 September 2016

Irish Foreign Minister Gives Views on Brexit

The prospect of Brexit is exercising the minds of many people including the diplomatic service. On 29 August 2016, most of Ireland's diplomatic corps met in Dublin to discuss various issues including Brexit. The Department of Foreign Affairs & Trade's Departmental Conference at Dublin Castle was attended by eighty Irish Ambassadors and Consuls General and other senior diplomats. The meeting was addressed by the Minister for Foreign Affairs & Trade, Mr Charles Flanagan TD. The Minister's remarks on Brexit are worth noting:

> "In a very real sense, the UK referendum result brings us all into unchartered waters. It is an immensely significant development…
>
> As a young country we are used to dealing with major shifts in the institutional framework that determines our international engagement. It happened in 1955 when Ireland joined the United Nations and in 1973 when we joined the European Economic Community. The Good Friday Agreement provided a fundamentally new framework for managing the three strands of relationships on these islands.
>
> We are facing now into a challenge of a similar order – one that will reshape the institutional framework in which we as a member of the EU engages with a United Kingdom outside that Union. The particular challenge we face now is to protect the institutional gains of recent decades, most particularly those of the Good Friday Agreement.
>
> As we prepare to chart a new course for the future, I want to set out some considerations which I believe must inform our approach.
>
> First, our approach must be firmly anchored in our position as committed member of the EU and to the success of a project that can and should be made more effective and more responsive to the needs of its citizens but has nevertheless been transformative for the better in Ireland. In mitigating the risks arising from Brexit, we have to be conscious that we face one risk even greater – a diminishing of the EU project itself. The UK referendum result is one of several major challenges to European cohesion – the challenge of economic recovery and job creation; of public questioning of the EU and its relevance to their concerns; of insecurity within our borders and in our neighbourhood; of developments globally and in our own neighbourhood that challenge our values and test our determination to uphold them. Addressing these challenges is the business of every member state. We should play our role to the full.
>
> Second, optimising this role must engage the network of bilateral relations with our European partners. It has often been said that when times were good, governments scaled back their investment in EU business, reducing their presence at the table for issues seen as non-essential. That has not been the case under Enda Kenny's stewardship as Taoiseach – his Ministers are under clear instruction to, at all times, play an active and constructive role in European affairs. In this context, I recognise that equally important for the future, perhaps, is our investment in the bilateral relationships that support the understanding and collaboration that allow us to tackle the biggest issues. The relocation of EU experience to this department from the Department of the Taoiseach will greatly assist this work. So too will the breadth of our embassy network in Europe which we must use to the full in support of this. The Taoiseach's recent meetings in Ireland with President Hollande and in Berlin with Chancellor Merkel, the visit last month by Italian FM Gentiloni and tomorrow by the Dutch FM Bert Koenders and the conversations I have had with all of my EU colleagues have to be seen not as a phase of engagement but as a normal and necessary mode of operating; not alone as an opportunity to communicate our concerns but also to listen attentively to our partners. Our meeting with Foreign Minister Bert Koenders on Wednesday will be an opportunity to do this.
>
> It goes without saying that a successful negotiation requires a keen understanding of the factors at play on the other side of the table. But it equally requires a keen and empathetic understanding of the

concerns on your own side too. That is an insight as old as the 6th century BC when the Chinese philosopher Sun Tzu wrote his treatise on strategy. But it is easily forgotten.

The third element relates less to Brexit than to the global context in which we operate. Notwithstanding the multiple challenges of managing a British departure from the EU, we should be alert also to the risk that this preoccupation might lower our gaze or reduce our horizons.

We have always seen our foreign policy reach as a long one, our voice carrying far, our weight greater than our size. Our stature at the UN is as high as it has ever been over our 60 years of membership. Irish Aid has maintained and in some respects enhanced its status as one of the most effective programmes in the world. We are acknowledged as a world leader in efforts to tackle hunger and malnutrition. We will not allow the mobilisation that will be needed to respond to this Brexit challenge to diminish, however inadvertently, our role as a constructive global player.

This is not solely a matter of promoting our values, though we should never shirk from that. It is a matter of promoting and protecting our fundamental interests. The UK referendum has highlighted the importance of enhancing our market diversification. Of course we will aim to protect our UK market, while protecting our competitive advantage over the UK…."

Date published: 5 September 2016

Brexit: UK to get a "Saville Row" Solution?

Since the UK voted on 23 June to leave the UK – by a margin equivalent to more than the combined entire populations of Manchester, Edinburgh, Cardiff, Belfast and Bristol – there has been much discussion about the "model" which could be used for the UK's continued relationship with the EU.

There has been mention of "models" as diverse as the ones by which the EU has a relationship with Norway, Canada, Switzerland, Turkey, the World Trade Organisation and even Albania.

Such discussion is interesting but will be largely unproductive.

Those models are all used for States which have never been in the EU.

Some of those models are even designed to entice or encourage membership of the EU.

These models have involved *installing* and not *removing* the tapestry of rules which have been introduced into the UK regime for over four decades. Dismantling four decades of rules – 100,000+ laws – is difficult and different than starting afresh.

While no one knows how (or when) Brexit will be resolved, it is submitted that if the UK is to have a new relationship with the EU then it will probably not be an off the shelf model.

It is best to see it as a bespoke model – much like a Saville Row suit. And just like a bespoke suit, it could be expensive and take a long time to make.

However, this could be the best approach because it is tailor made for the needs of the UK and the EU.

Designing and agreeing this new model will be difficult. The favourite model – the "Norway" one which is also the European Economic Area model - has several attractions because it is already in place and the UK is already party to it as the UK is party to the EEA. The downside however for some in the UK is that it would involve free movement of persons and that may be a bridge too far in some quarters. The Canadian and WTO models do not afford the necessary protections from the services perspective for vital UK sectors such as financial services. Other models make the UK a mere rule-taker rather than a rule-maker.

Hence, the takeaway is that we are moving towards a new bespoke model of relationship. It may even be easier to "sell" a Saville Row suit than an "off the peg" one!

Date published: 6 September 2016

Top Eleven Key Questions for CEOs, General Counsel and Executives on Brexit Evaluation and Planning for Businesses

While each company and organisation has its own specific needs relating to Brexit, there are eleven key questions, from the legal perspective, which every CEO, General Counsel and executive should ask. These questions should be asked periodically throughout what is going to be a long Brexit process spanning not only the negotiation of the exit arrangements but also its implementation process which, in aggregate, could span a decade.

1. **What rights under EU Law is our business utilising?** For example, do we benefit, in regard to the UK, from the freedom of establishment (e.g., having a business in the UK which, because of EU law, may operate on equal terms with a UK business?), free movement of persons (e.g., do we rely on workers, consultants and their families being able to move freely around the EU including the UK?), do we benefit from the free movement of goods and services (e.g., with goods and services moving to, from or through the UK?) and do we benefit from the free movement of capital and payments (e.g., do we move money to, from or through the UK?). How then would our business be affected by the EU withdrawing those rights from the UK, or the UK favouring UK businesses over EU ones?

2. **How are our employees affected by Brexit?** At its simplest level, the issue relating to employees arises where a national of one EU Member State works in another host Member State on the same basis as a national of the host State. Do we have workers who benefit from such rights? At a more complex level, do we have employees whose qualifications which are only recognised because of the EU law on mutual recognition of qualifications? At a more sophisticated level, businesses could also lose employees because the spouses or families of employees could not be able to remain in the UK by virtue of their nationality.

3. **How are our logistics affected by Brexit?** This is more straightforward to ask than to answer. If a business moves goods through the UK or sells/buys to/from the UK then any delay or restrictions associated with travelling through the post-Brexit-UK could cause businesses to rethink their logistics and, in particular, the need to bypass the UK. It is too early to say that is the case and businesses who want to maintain traffic through the UK should seek to influence the debate so as to minimise disruption.

4. **How are our inputs and raw material sources affected by Brexit?** Inputs such as raw materials may be subject to higher duties and levies if they are being imported into the EU from the UK or into the UK from the EU. So, businesses need to lobby to ensure that their input costs are not affected adversely.

5. **How are our sales affected by Brexit?** Parallel trade is a priority for the EU: goods and services must be able to move freely around the EU. Consumers and customers in one Member State must generally be able to buy freely goods and services from other Member States. If the UK leaves the EU then parallel trade may not be possible involving the UK anymore, but this all depends on the terms of the Brexit arrangements. In the meantime, many businesses in the EU are now adversely affected by parallel trade from the UK because the latter benefits from the weaker Sterling. Businesses need to plan with their competition lawyers how to address this issue.

6. **How do I get this company's concerns on the Brexit agenda to ensure Brexit has no adverse impact?** Mindful of their obligations under lobbying laws, businesses should seek to influence all governments (including the UK one) about what needs to be done.

7. **Do we need to move offices, people, head office, facilities and company seat?** Moving may be necessary so as to retain rights under EU law. Such moves need to be planned carefully and in a timely manner.

8. **How are any grants and research funds to the company affected by Brexit?** Many businesses, particularly in the pharma and technology sectors, are dependent (in part) on EU funding (e.g. in research and development agreements). Businesses should check how much funding is scheduled to be received over time and what would happen if the UK were to leave.

9. **Have we plans for the changes brought about by Brexit?** We all know that Sterling fell to a 31-year low against the US dollar in the aftermath of Brexit, while Sterling has also become more competitive against the euro. But "never say never". If the euro area experienced a crisis and the euro fell in value against Sterling then how would our UK business fare with too strong a currency and new reinstated barriers vis-a-vis the rest of the EU? There will be many bumps on the road to resolving Brexit and is our business nimble enough to cope and adapt?

10. **What steps do we need to take to plan for Brexit?** The steps which need to be taken by a business must be specific and tailor made. Those steps need to be amended as the likely post-Brexit regime emerges and evolves.

11. **How do we react as an industry to Brexit?** This is trickier to answer than first appears. There could well be discussions at trade associations and other groupings but it is imperative that competitors do not disclose competitively sensitive information or form any anti-competitive position. Otherwise businesses could face serious competition difficulties and sanctions.

Planning for Brexit is like taking medicine. It requires a full diagnosis, a tailor-made course of treatment and regular check-ups; because the situation is evolving but entering the realm of the unknown. It is therefore worth checking back with your doctor regularly, after a thorough Brexit-initial examination has been undertaken.

Date published: 13 September 2016

Irish Prime Minister gives Brexit assessment to business community

Irish Prime Minister, Enda Kenny TD, gave an overview of Brexit to the Annual President's Dinner of the Irish Business and Employers' Confederation (**IBEC**) which is the Irish member of BUSINESS EUROPE. The key points from his speech, from a Brexit perspective, were:

1. "With Brexit and rising international economic and political uncertainty now is not the time for risks" so the upcoming Irish Budget will be cautious in that respect.

2. "The event that will have the most profound impact on Ireland is undoubtedly the result of the Brexit referendum."

3. "Of course, while we in Ireland were disappointed with the referendum outcome, the democratic decision of the UK to leave the European Union is one that we accept."

4. "But we cannot deny the range and extent of the challenges it presents to everyone on these islands, in Europe, and beyond."

5. "The challenges involved are as complicated as they are unprecedented."

6. "The Irish Government has clearly set out its priorities in the context of the upcoming negotiations. First and foremost, Ireland remains completely committed to our membership of the European Union and the Eurozone. Our priorities for the negotiations relate to the economy and trade, to Northern Ireland and the peace process, to the common travel area and to the future of the EU itself."

7. "I will travel to Bratislava for tomorrow's first ever Summit of 27 EU leaders. What I pointed out as a possibility in Belfast in the run-up to the referendum has now come to pass – I will be the only leader from these islands at the table."

8. "[N]o one should underestimate the commitment of the 27 EU member states to maintaining the European Union. The EU is the answer to so many historic questions for Europe. That is why nobody should think that the negotiations ahead will be easy, or that they can be viewed through a purely economic lens. For the remaining EU members, there are matters of historic and fundamental importance at stake. It will be a hard bargain to strike."

9. "I also want to provide a message of reassurance regarding our corporation tax regime of which there has been much debate about in recent weeks. I cannot be more categorical in stating that our statute based 12.5% corporation tax rate remains a cornerstone of Irish industrial policy and will not change. Our right to set our own tax rate is enshrined in European Treaties."

Date published: 19 September 2016

European Parliament appoints its Brexit Representative: A Tough Pro-EU Former Belgian Prime Minister

The forces for the Brexit negotiations are being slowly lined up on the negotiating chess board.

The UK has appointed its Brexit Trio of Boris Johnson, Liam Fox and David Davis. The European Commission has appointed Michel Barnier as its Chief Negotiator in charge of the Preparation and Conduct of the Negotiations with the UK under Article 50 of the Treaty on European Union. And now, the European Parliament has appointed Guy Verhofstadt MEP as its representative on Brexit.

The European Parliament will be critical in the negotiations. It will need to approve any agreement reached by the EU and its Member States with the UK on the latter's future relationship with the EU. Ironically, while the UK will not participate in the voting of the Council on the matter, the UK's 73 Members of the European Parliament (**MEP**s) will be present and voting until the UK leaves – the next European Parliamentary election is scheduled for 2019 – and the UK MEPs will be able to vote (including the United Kingdom Independence Party's 24 MEPs).

Throughout the negotiations, Mr Verhofstadt will have to keep the European Parliament informed fully of developments and help prepare the European Parliament's position in the negotiations, in close consultation with the Parliament's Conference of Presidents.

Mr Verhofstadt is a former prime minister of Belgium and the current leader of the Alliance for Liberals and Democrats for Europe Group in the European Parliament so is well versed in the type of negotiations involved.

What will his appointment mean for Brexit and the UK? Like Michel Barnier, he will be a tough and determined adversary for the UK. On 13 September 2016, he tweeted:

> "If UK wants access to #SingleMarket, it must also accept the free movement of citizens. Our four freedoms are inseparable." On the same day, he also tweeted, "#Brexit should be delivered before 2019, when EU politics enters into new cycle & the @Europarl_EN starts new mandate."

So, he hopes to have the Brexit arrangements concluded before the next European Parliamentary election which is scheduled for 2019. Bottom line: he wants a quick negotiation with the UK. The other lesson is that the EU institutions are not going softly, they are picking tough pro-EU negotiators and representatives – people who are certainly not on the Christmas Card list of the Brexiteers!

Date published 19 September 2016

They think it's all over: but Brexiting UK could still pull a u-turn on Article 50

Article 50 is fast-becoming the most quoted but least read legal provision in the contemporary world. It is also one of the most controversial but least understood provisions. It is being cited by many but read by few. Triggering it is seen as a day of hope or a day of doom depending on one's perspective.

There is an enormous focus on when it will be "triggered" as if that alone will solve or cause problems. In fact, its triggering will simply be one moment (and, even then, a potentially anti-climactic moment) in a potentially long process.

Article 50 permits withdrawal by a Member State from the EU. There was no explicit withdrawal provision until this article was inserted into EU law by the Treaty of Lisbon on December 1, 2009.

The provision is ambiguous, incomplete and awkward to apply - it is not meant to be invoked or applied easily. But how will this provision operate?

International law generally has limited precedent of significant states withdrawing from major international organisations. The UK's withdrawal from the EU would be the most significant ever given the scale of the UK and the EU.

Even the United Nations Charter has no explicit provision to allow withdrawal. Despite Indonesia purporting in 1965 to withdraw and communicated its intention to do. When the country changed its mind, the UN and Indonesia moved on, almost pretending that the incident never occurred.

A critical issue now is whether serving Article 50 is irreversible. It is significant not least because it could take years for its effects to materialise and there could be, during that timeframe, circumstances which would trigger a rethink.

Many assume that once Article 50 is triggered, it's a trip to Mars, not to the Moon - it would be long, you don't return and you could even be burned up on arrival. Their arguments are straightforward. The provision does not provide for the notice to be withdrawn. It is too serious a matter for flip-flopping. The provision is solemn and should not be used as a bargaining tactic to get a better deal.

However, could the UK withdraw the Article 50 notice? It is submitted that it is legally possible. Politically, it would probably require another referendum in the UK but, legally, there are reasons why it is reversible.

Often in the EU, the law follows the politics: if Member States want to keep the UK in, and the latter withdraws the Article 50 notice, then in all probability the law will be interpreted or, if needed, rewritten to accommodate that outcome.

Triggering Article 50 is a unilateral act by the relevant state and is not dependent on agreement by other states other than to agree the withdrawal agreement. If the putative withdrawing state triggers Article 50 then the other states have to accept it provided the notice is served validly and in accordance with the state's internal constitutional requirements. Other states may not veto either its serving or its withdrawal.

Importantly, Article 50 refers to the Member State announcing its "intention" to leave - this is not a binding irrevocable commitment. Sovereignty theory supports withdrawal. States which have joined the EU may decide to remain or leave. It is a sovereign unilateral decision and the only exception is where the expulsion provision applies, which is not an issue here. There is national case law in Germany and the Czech Republic for the right of unilateral withdrawal.

Practice in comparable areas supports withdrawal. There is ample precedent that States have signed up to positions in the EU and then reversed those positions. Norway, for example, signed the Treaty of Accession in 1972 to join the EEC along with Denmark, Ireland and the UK but changed its mind after a referendum; no one

could force Norway to join and the EU even entertained a subsequent application by Norway to join later which again did not proceed.

If a state had triggered the notice, but maintaining it was no longer in accordance with the state's "constitutional requirements" then presumably the triggering is no longer valid.

Ireland and Denmark have voted to reject ratification of some EU treaties only to later change their mind in referenda. No one insisted, like a quiz master, "we are sorry, we have to accept your first answer".

More importantly, Article 50 does not trigger withdrawal in its own right. Article 50 is just a procedural enabling provision and it only has effect if no agreement is reached within the time limits specified in the article. There has to be a Withdrawal Agreement which is what really matters and that would require agreement and even ratification.

There is no guarantee that the UK notice will be withdrawn and no preference is being expressed here as to whether it should be withdrawn but it is clear that, as a matter of law, the balance of the argument favours the argument that an Article 50 notice may be withdrawn.

So there is a need for politicians, business executives and all concerned not to freeze everything during the Article 50 process (life must go on) and also not to assume that there can be only one outcome (Brexit). It is best to plan for Brexit but contemplate the possibility of an alternative. Given the timeline involved - three years or more - anything can happen.

But don't pin too many hopes on a reversal without realising that to reverse the decision on June 23, there would have to be difficult dark days (such as a recession, a crisis or a fundamental shift of views by all or many of the parties) but stranger things have happened.

The world is slowly learning it is much easier to say "Brexit means Brexit" than to win the prize for completing, in ten words or less, the slogan: "Brexit means....." But it is also reasonably clear that one can now say with some degree of confidence that "Brexit does not have to be forever".

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London High Court Judgment on Brexit: Minister may not Trigger Article 50

In a unanimous judgment on 3 November 2016, the High Court in London ruled that Brexit may not be triggered by the UK's Secretary of State for Exiting the European Union (David Davis). In effect, the judgment says such a move requires a decision by Parliament.

The 32-page, 111-paragraph judgment was delivered by the Lord Chief Justice of England and Wales, the Master of the Rolls and Lord Justice Sales. It will now be appealed by the UK Government to the UK Supreme Court which is expected to hear the appeal on 7-8 December.

The judgment does not stop Brexit or overturn the referendum result. Instead, it means that – if to-day's judgment is upheld by the Supreme Court – the decision to serve notice under Article 50 of the Treaty on European Union ("**TEU**") must be made by the UK's Parliament rather than by the Government or a Minister. The judgment reiterates the sovereignty, role and centrality of Parliament in such matters.

The Court stated in paragraph 4 that the *"sole question in this case is whether, as a matter of the constitutional law of the United Kingdom, the Crown – acting through the government of the day – is entitled to use its prerogative powers to give notice under Article 50 for the United Kingdom to cease to be a member of the European Union."*

The Court answered that question 107 paragraphs later as: *"we hold the Secretary of State does not have power under the Crown's prerogative to give notice pursuant to Article 50 of the TEU for the United Kingdom to withdraw from the European Union"*.

The judgment was careful to say that the *"court does not question the importance of the referendum as a political event"* but confines its comments to *"a pure legal point about the effect in law of the referendum"*.

The legal issues in the case now go to the Supreme Court but the political issues move to the centre stage of the political arena.

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UK Government's Supreme Court Appeal of High Court Judgment on Brexit

On 3 November 2016, the London High Court ruled that Brexit may not be triggered by the UK's Secretary of State for Exiting the European Union and that any such a move would require a decision by Parliament.

The UK Government subsequently appealed the High Court ruling to the UK Supreme Court. The Government's appeal began on 5 December 2016, and involved four days of hearings. It was the first time that all 11 justices sat to hear a case.

The substance of the UK Government's appeal was that it has power to trigger Brexit under the "royal prerogative". This is a collection of powers, derived from medieval times, that allows ministers to act without seeking approval from Parliament.

Among other things, the UK Government argued that ministers negotiated the treaty that led to the UK joining the EEC in 1972 using prerogative powers, and so ministers have the power to withdraw from that treaty (i.e. trigger Brexit). This is seen as controversial because it would effectively be using executive powers the override legislation (the European Communities Act 1972) passed by Parliament. A fundamental principle of Parliamentary sovereignty is that only legislation can override legislation.

As was highlighted in a previous story, the High Court judgment did not have the effect of stopping Brexit or overturning the referendum result. The effect of the High Court judgment was to rule that the decision to serve notice under Article 50 of the Treaty on European Union must be made by the UK's Parliament rather than by the Government or a minister.

This point was reiterated by the President of the Supreme Court, Lord Neuberger, at the conclusion of the appeal hearing. He stated that: "It bears repeating that we are not being asked to overturn the result of the EU referendum. The ultimate question in this case concerns the process by which that result can lawfully be brought into effect."

The Court also heard submissions on behalf of the Welsh and Scottish governments, as well as interested parties from Northern Ireland. Arguments on behalf of children (who could lose rights due to EU withdrawal) and ex-pats living in EU countries were also heard.

The decision of the 11 Supreme Court justices on whether to the High Court's judgement should be upheld is expected in early 2017.

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