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The Legal Implications of Brexit

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The New Settlement, the impact of Brexit in key policy areas & the perception of the debate in Brussels

Evanna Fruithof[1]

I am delighted and honoured to have been invited to take part in this debate.

I have represented the Bar of England and Wales as a consultant in Brussels for the past 17-odd years, having been called to the Bar in London in 1985. Quite apart from being privy to the build up to this referendum debate over recent years through my general work, about which I will say more later, I have had the benefit of being directly involved over the past several months, in the work of the Bar Council of England and Wales' EU Law Committee, on the legal implications of BREXIT. The Bar is putting out a set of papers on the subject later this month, which we hope will be seen as a useful contribution to the debate. In addition, like many of you, I have enjoyed taking part in debates and reading many helpful analyses and commentaries on the topic, including one by Professor Sir Alan Dashwood QC, which is carried in the May issue of the English Bar's Counsel magazine, along with a piece that I produced, setting the scene for the BREXIT decision. What I have to say today, draws on all of this material, and as well as on my own knowledge and impressions. If I speak of the Bar, or "we", therefore, I mean the Bar of E & W. But, for the sake of clarity, I emphasise that the Bar does not take a position itself on the "in or out" question. You will not be surprised to know that I do. Since I am here in my personal capacity, the comments I make in favour of the UK remaining are my views, and not to be seen as stated on behalf of the Bar Council.

[1] Evanna Fruithof was called to the Bar of England and Wales in 1985 and practised at the Bar in London until 1990. She then spent two years with the European Commission. She worked in the Competition department at Freshfields and as Deputy Director of an EU political think-tank. She established the Bar Council's Brussels Representation in 1999 and has served as its Consultant Director ever since. She is a bencher of the Middle Temple.

I The New Settlement

I will start with a look at the European Council Decision and supporting annexes, contained in the Summit Conclusions of 18 & 19 February 2016, concerning "A New Settlement for the United Kingdom within the European Union".

In pure legal terms, as a Council Decision, concluded between the Heads of State and government, this is in effect a treaty in simplified form, binding in international law upon the Member States. You'll recall this same device being used in June 2009 to address Irish concerns regarding the Treaty of Lisbon.

As then, the New Settlement Decision contains only provisions that explain or complement, but are compatible with, the existing treaties. There are two main legal techniques used in various ways to give effect to specific elements of the settlement:

- The establishment of principles of interpretation of the EU treaties.
- Agreements binding the Member States as to how they will behave in certain circumstances, when acting in their capacity as members of the Council = Council conduct agreements.

The Bar has looked at each of the four so-called baskets of reforms in the UK's negotiated settlement with the EU, being Economic Governance, Competitiveness, Sovereignty and Social Benefits and Free Movement.

Economic governance

The economic governance basket aims to bring order to the relationship between economic and monetary union (EMU) and the other core EU policies, notably the internal market, and hence between members and non-members of the Eurozone.

The Bar considers that calls for *Treaty change* to secure the UK's non-Eurozone position were not in fact necessary. The desired protections for non-Eurozone countries were essentially already in place in the Treaties, as further confirmed through the jurisprudence of the Court of Justice of the EU ("CJEU"). The New Settlement does however, provide for additional safeguards, including the emergency brake mechanisms, which the Bar considers would be enforceable in the context of decision-making by the Council of the EU, were the UK to remain a member.

Competitiveness

The competitiveness basket is concerned essentially with reinvigorating EU policies of particular interest to the UK, namely strengthening the internal market, improving legislation, reducing regulatory burdens on business and promoting an active trade policy. But let's face it. These are not just of UK interest, but of interest to all Member States. It is in effect a restatement and endorsement of the trend of existing EU policy, e.g. under its Competitiveness agenda, Better Regulation Agenda; REFIT (the Regulatory Fitness and Performance Programme); the Commission's pared down work programmes for 2015 and 2016, as also foreseen for 2017; and

the Single Market and Digital Single Market Strategies, to name but a few. It can be argued that that just means that this element of the deal is meaningless. It can equally be said to show that the UK and the EU's ambitions in these important areas are in fact in line with each other.

Sovereignty

We have looked at the many shades of grey that this term signifies, even in the mouths of lawyers, but certainly in those of politicians, and the fact that the issue is made more complex by the particular constitutional arrangements in the UK. We examined the evolution of the term 'ever closer union' in the treaties, noting that it was always intended to refer to a union among the peoples of Europe. It has never been regarded as having the status of a legal rule creating rights or obligations on Member States or their citizens. We noted too the European Council conclusions of 27 June 2014, reaffirming that position, and making it clear that all the other Member States accepted and respected the UK's position that no Member State should be bound against its will to move towards closer political union, even if other Member States might choose to do so.

Nonetheless, given the totemic nature of the issue, it is to be welcomed that the European Council agreed on this occasion to a clear declaration of the principle that "it is recognised that the United Kingdom, in the light of the specific situation it has under the Treaties, is not committed to further political integration into the European Union", and that such position will be included in the next Treaty change.

As regards the position of national Parliaments, many bodies and informed stakeholders have made suggestions which the Bar Council has endorsed. At present there are "yellow card" and "orange card" mechanisms enabling objections to Commission proposals from, respectively, 10 and 15 of the 28 national Parliaments. The House of Lords in 2014[2] called for the addition of both a blocking red card system, and a green card system, by which the Commission could be asked to table a proposal if meeting with enough national approval. Both of these ideas have received support from other Member States, and the Green Card has already been used.

Thus, we have already seen a gradual trend to including national Parliaments as partners in the EU legislative process, responding to a long-held view in many quarters that EU decision-making suffers from a "democratic deficit" in which the executive branch of national governments, and a centralized bureaucracy in Brussels, have undue dominance.

Against that background, the New Settlement's creation of a "red card" mechanism, where 55% of Member State National Parliaments can force a special discussion in Council on pending legislative proposals, is a natural progression in this trend. Though the 55% threshold is high, the mechanism provides a further incentive to national governments (or more specifically the organs of government responsible for the conduct of European affairs) to take account of the likely views of their own national legislatures before promoting – or indeed resisting – potentially

[2] See: http://bit.ly/1cIrK6o

controversial measures at EU level. This would surely be a welcome development for all Member States.

Social benefits and free movement

In many ways, the biggest political hot potato, though hardly the most legally significant element of the whole debate, the Council Decision offers robust interpretations of the possibilities that already exist under current EU rules for limiting access by migrant workers to social benefits, in the light of recent developments in the case law of the CJEU. These are reinforced by a Commission declaration on issues related to the abuse of free movement rights.
The first of the rule changes entails amending Regulation 883/2004 on the coordination of social security systems, to give Member States the option of indexing child benefits exported to another Member State. This will initially apply only to new claims, but from 2020 also to existing ones.

The second rule change involves the amendment of Regulation 492/2011 on freedom of movement for workers within the EU, to introduce a so-called 'emergency brake' limiting access by newly arrived workers to in-work benefits for up to four years. A declaration by the Commission expresses its understanding that the type of exceptional situation the mechanism is intended to cover already exists in the UK.

Implementation of this vital aspect of the reform package depends on the actual adoption of the necessary amending legislation. The Commission and the Member States through the Council can be relied on to play their respective parts in the legislative process. No one I have spoken to doubts that the European Parliament too, will play its part. In the event of a vote to remain by the UK, there would be nothing to be gained politically from putting the new constitutional settlement in jeopardy. Nor is there any informed expectation that the proposed rule changes risk being struck down by the CJEU.

Conclusions on the New Settlement
While we have some doubts about the legal necessity of some of its contents, overall we consider that the New Settlement, if it is upheld by a remain vote, and proves to be enforceable in most if not all particulars, would bring useful clarification and effectiveness to the UK's relationship with the EU, and indeed to the EU as a whole. Even were the UK to exit the EU, it is the view of many that I have spoken to that elements of the New Settlement will find their way into the EU order going forward.

II. The impact of BREXIT in some key legal policy areas

The medium to long-term repercussions in both economic and legal terms, of a UK exit from the EU depend in large measure on the arrangements that the UK manages to secure thereafter, both as regards its ongoing relationship with the EU and its trading agreements with non-EU countries. A further important factor will be the length of time that it takes to secure those relationships, and thus just how long the inevitable period of uncertainty, is likely to last. Beyond the negotiating periods at EU and international level though, there will also be years of examining, unravelling, selecting, and rewriting UK national law to deal with the new arrangements.

In almost all areas of exclusive or shared EU competence, the Bar's analysis indicates that the UK will either need to continue to apply EU rules (in particular in the areas of the internal market and free movement; consumer protection, employment law and non-discrimination, if it wants to have access to the Single Market for Goods and especially, Services); or at least to adopt national legislation that mirrors EU rules (say, in financial services, competition law, data protection).

I'll just pick out a few specific legal topics, beyond the financial services and single markets aspects that have been so thoroughly explored elsewhere, to examine more closely the potential impact of a BREXIT:

Legal services

Within the EU, lawyers are covered by a separate system of directives governing the free movement of legal practitioners. This regime is widely seen to be an internal market success story, allowing practitioners to offer their services in other Member States on an occasional or long-term basis, based on mutual recognition.

The global legal services market has seen significant growth over the past decade and more as a result of increasing international trade and growth in developing economies. This has led to an increase in demand for legal services and the UK has done well out of this. A substantial contribution to this is made by the continued demand by parties (from the EU and beyond) for the use of London as a venue for litigation and arbitration. One of the imponderables in all this is the possible impact, say, of the loss of the Brussels I regulation to the UK, meaning that UK judgments would no longer enjoy automatic recognition and enforcement across the EU.

Were the UK to leave the EU, it is clear that the UK would still wish to retain access to the Internal Market. If access meant having to comply with the relevant EU rules without our having had any say in their content, then it is easy to envisage a context in which the UK's legal professionals

could rapidly be placed at a disadvantage. Of course, there are those in this room who may be rubbing their hands in glee at the thought.

Looked at from the other perspective, I also note that the UK legal profession has been a driving force in opening up the rest of the legal profession in Europe to new ways of operating in the market, including through alternative business structures and the like. That ship may already have sailed too far to be easily turned around, but it could be interesting.

In the event of a BREXIT, it seems likely that there would be a short-term increase in EU-law related work: lawyers would be required to advise on the structuring of the withdrawal, to negotiate new arrangements and to review, amend and advise upon domestic legislation. However, that would be a finite 'bulge' of work, focused largely on specialist EU and regulatory lawyers. Long term there is a clear risk to the contribution to the UK economy made by the legal sector as a whole.

Judicial cooperation in civil and criminal matters

Figures vary, but it is generally agreed that at least 2 million UK nationals live in other EU Member States. The ending of the UK's involvement in EU law that defines rights and obligations in the civil and criminal justice fields would therefore be of significant and practical concern. But this body of EU law also brings benefits to UK citizens resident in the UK, whose lives are nonetheless touched by membership of the EU in ways of which they themselves may not be conscious.

There is EU-wide legislation regarding jurisdiction, recognition and enforcement of judgments, choice of law in contract and in non-contractual obligations and insolvency. There are also pan-European instruments dealing with family law and personal status and with civil procedure and judicial co-operation. Together, these measures provide a framework, of slightly varying application, for the great majority of cross-border civil disputes. They provide a largely level playing field for citizens and businesses across the EU and are considered by the Bar Council to represent an extremely valuable part of the body of EU law.

In the event of a vote for withdrawal, transitional and ultimately alternative arrangements would need to be effected in respect of these matters. Given that for most Member States, the existence of an EU measure in a particular area, e.g. choice of law for contractual disputes (the Rome I regulation) or the European Arrest warrant for use in cross-border criminal cases, means that their pre-existing private international law or other arrangements have been rescinded, the UK would need to negotiate new rules, potentially on a bi-lateral basis, to replace these. The lack of an obvious fall-back position is likely to generate uncertainty and concern for affected individuals and businesses alike.

Many other EU civil justice instruments have a complementary procedural, usually automatic recognition and enforcement function. Here, I refer to the European Enforcement Order, the European Order for Payment, the European Small Claims Procedure and the more recent European Protection Order. Of the rest, most are concerned with procedural issues, e.g. the service of documents, taking of evidence; provision of legal aid and measures enhancing the availability of alternative dispute resolution, including the Mediation directive and the more recent measures on ADR and ODR. The Bar Council has long endorsed the adoption of such measures. We believe that in practical terms, these measures ease the dealings of individuals and businesses (including SMEs) who visit, work or trade across European boundaries. In the event of withdrawal from the EU it would probably be regarded as sensible to negotiate new arrangements to continue or replicate most of these measures, again especially if access to the Single Market is central to the new relationship.

In relation to the criminal justice field, the Bar's general view is that cross-border co-operation, whether through mutual assistance or mutual recognition, is in the UK interest. We consider that if the UK were to leave the EU, it would be important that provision be negotiated for this co-operation to continue so far as possible. If we were to revert to non- EU-led cooperation in the fight against crime, we would be relying on intergovernmental conventions that need to be ratified. There is significant evidence from the past that this is not an effective approach, and would be even less so in the face of the growth of technology-enabled crime.

It is far from clear how cross-border crime could be controlled if the UK withdrew from the EU. One of the frequently given reasons to withdraw is to have greater control at the borders, and to end the right of free movement from the other EU countries and vice-versa. This BREXIT issue is of even greater immediate interest and concern here in Ireland (and Gibraltar) than it is for most other Member State neighbouring the UK. But cross-border crime includes activities that have little to do with physical movement of individuals across national borders; for example, internet-based fraud, crimes relating to cross-border payments, and customs and tax offences concerning import and export of goods. The view at the Bar is that these challenges have been met with increasing effectiveness by the development of EU level bodies such as Eurojust, Europol and the European Judicial network. If the UK votes to withdraw from the EU, the UK government will no doubt wish to negotiate new arrangements enabling the UK to benefit from these agencies, or to replicate their effect with other mechanisms.

Defence and victims' safeguards

I hope that present company will not mind me claiming that the English and Welsh criminal justice system is widely seen as one of the most developed and sophisticated in the EU, if not more widely. I've seen this with my own eyes over the past decade, as the EU has attempted to fill the gaping lacuna it had as regards the rights of the defence and of victims. On both, the law and practice in England & Wales has been regularly cited in Brussels and in other Member States as a benchmark. If the UK chooses to withdraw from the EU, it will fall to Ireland alone to uphold the Common Law banner in these most sensitive of areas.

The Bar has long maintained that any actual or foreseeable EU legislative proposals imposing minimum rules in these fields are unlikely to increase the legal or administrative burden in England & Wales, and when they do, we would likely welcome that change. Their effect on English law is, based on the current Treaty competences, likely to be minimal and/or beneficial for both the victims and suspects they seek to provide procedural safeguards for.

With little cost to our domestic system therefore, the message of engagement and support for the underlying principles that a UK opt-in to such measures gives to other EU Member States is invaluable. An additional advantage of proactively engaging in this way is that it enables the export of certain procedures and expectations that are accepted norms for us, to other EU partners where they may not be, often to the benefit of the rule of law throughout the EU, and of UK citizens living, working in or visiting other jurisdictions.

In the specific area of extradition, the operation of the European Arrest Warrant (EAW) means that criminals who flee back to other EU countries can be brought back to the UK to face justice, and vice versa, without bureaucracy. It is widely recognized that this power has been misused by some Member States, and there is a need to reform its operation, as well as to rapidly implement and use complementary measures such as the more recent European Investigation Order. Overall however, the EAW is seen as a success story. A single common approach in this area must be preferable to its likely replacement in the event of UK withdrawal, by a network of bilateral arrangements between the various States, even assuming that that could be readily agreed.

Conclusions

This is just a snapshot of impacts in a couple of areas of law, but it reflects what will happen across the board. BREXIT, if it happens, will unleash years of trade and legal negotiations, costly law reforms, economic and legal uncertainty. Assuming that the UK secures access to the Internal Market, the likely conditions attached to that will mean that a large percentage of the new or re-created national laws will have to mirror or replicate EU law, albeit that the UK will no longer be able to influence the content of the latter.

III. Perception of the debate in Brussels – a personal perspective

To understand how this entire debate is being perceived in Brussels and in other EU capitals, in my view it is helpful to see it in a historical context, going back a decade and more, though obviously the history of UK discomfort with the EU goes back much further than that.

I have selected a few particular highlights, necessarily influenced by the work that I do in the justice field. A trade or financial services specialist might see other factors at play.

THE "5TH EU ENLARGEMENT"

The 2004 enlargement of the European Union was its largest ever single expansion, in terms of territory, number of states - 10, and population. It occurred on 1 May 2004.
The simultaneous accessions concerned the following countries, Cyprus, the Czech public, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia. Bulgaria and Romania then joined in 2007, and Croatia in 2013, bringing us up to the current 28 members.

UK support

The reason I mention this today, is that the UK's support for Eastern enlargement of the EU is well remembered in Brussels. The general desire to secure the loyalty and future economic and political stability of the former Communist states and create a buffer zone, under EU control, to the East, were of course common to all existing members of the EU (and NATO!). But it was also recognised that the UK was expecting to benefit from a shift in the EU power base eastwards; an increase in the number of EU citizens whose second language would be English, making that the de facto working language of the bloc, and a certain loyalty to the UK and the Common Law, especially in countries like Poland, dating back to earlier historical events, but also to more recent investments and efforts to introduce common law based rule of law principles, following the collapse of the Soviet Union. That the UK has not been able to capitalise on some of these expected advantages (other, arguably, than the rise of the English language) is seen mostly as its own fault.

Chief among the current difficulties is the public perception about intra-EU immigration, especially from those "new" Member States, and the impact on public services, employment prospects etc., that we have seen played out in the British press over recent years, and as reflected in the New Settlement. It is of course now exacerbated by the wider immigration crisis, and few bother to make the distinction.

No transitional arrangements applied by UK

That the UK should resent the influx of EU migrants, despite clear evidence of the economic benefits that it has brought, is seen as all the more ironic, given that the terms of the 5th

enlargement allowed existing Member States to apply transitional restrictions on freedom of movement from the new Member States, up to 1 May 2011. It is interesting to note that the UK, unlike several other Western European countries, chose not to apply any quotas, or work permit requirements, but merely applied some welfare restrictions.

UK HAVING ITS CAKE AND EATING IT TOO - A FEW EXAMPLES

The UK enjoys several concessions that differentiate its EU membership from that of other Member States (apart of course, from Ireland in some respects, and Denmark), including its rebate on payments to the EU budget; opt-outs from the Euro and the Schengen border-free area; and, of particular interest to the Bar and its clients, its right to choose which justice and home affairs arrangements it joins.

I'd like to take a quick look at that last one – the use by the UK of the Protocol 21 opt-out over recent years, both in civil, but especially in the criminal law field.

Civil law

With one or two notable exceptions, the UK opt-in in the civil justice field has by and large been well exercised. That said, it is important to be aware that it is, and is seen elsewhere as, a political tool and as such is subject to the political vagaries in place at any one time. The Bar has observed several factors at play on this issue in recent years:

- Other Member States may resent the option that the UK (and Ireland) secured for itself, in choosing to take part or not in justice measures on a case-by-case basis;
- This resentment is likely to be inflamed if the UK chooses not to opt-in to a measure at the time of its initial adoption by the Commission, but then seeks to play a very active role in the Council negotiations;
- Ditto if the measure is effectively modeled on UK domestic law, but the UK then rejects it at EU level – as happened with the European Account Preservation Order 2014.

Criminal law

In recent years, the British government seems to have pursued a policy of not opting into criminal justice measures. Some of these we would hope a future government may yet choose to take part in, if the UK remains part of the EU. Examples:

- Directive (adopted 2013) on the right of access to a lawyer and on the right to communicate upon arrest (which guarantees the right of access in both the issuing and executing state in EAW cases);
- Directive (adopted 2014) on the freezing and confiscation of proceeds of crime;
- Regulation (adopted 2015) on Europol and the European Police College (CEPOL);
- Directive (adopted 2016) to strengthen the presumption of innocence and the right to be present at trial in criminal proceedings;
- Directive (adopted 2016) on special safeguards for children suspected or accused of a crime;

- Draft Directive on the right to provisional legal aid for citizens suspected or accused of a crime and for those subject to a European Arrest Warrant;
- Draft Directive on the fight against fraud to the Union's financial interests by means of criminal law;

The other side of the opt-in coin is of course, the flexibility to not take part in measures which the UK and Ireland genuinely feel are incompatible with our law or practice or in some other way not in the national interest.

In practice, at least so far, the Bar considers that very few of the EU's proposals in the criminal justice field could be so described, or at least, if they were at the outset, they were susceptible to the necessary improvements during the legislative process. One of the few exceptions to that is the current proposed regulation creating the European Public Prosecutor's Office (EPPO).

PROTOCOL 36 OPT-OUT

In the summer of 2013, the Government formally announced (confirming the PM's position blurted out inadvertently some months earlier) that it would exercise the block-opt-out provided for in Protocol 36 to the Lisbon Treaty, from the more than 130 EU criminal justice measures that were adopted prior to the entry into force of the Lisbon Treaty (and which were due to become enforceable before the CJEU at the end of the five-year transition period i.e. on 1 December 2014). These would cease to apply to the UK on 1 December 2014, unless it chose to opt-back into them.

For the best part of a year therefore, HMG was negotiating its opt-back-in wish-list with the Commission and – for the Schengen measures – with the Council, culminating in Council and Commission decisions confirming the respective UK participations in about 35 of the measures, including the infamous European Arrest Warrant, adopted officially on 1 December 2014.

In that time, the House of Lords carried out extensive inquiries into the topic, to which the Bar gave evidence, and a lot of Parliamentary time was taken up, as well of course, as that of UK and EU officials involved in the negotiations. That many of the measures that were not opted-back into were obsolete or otherwise no longer necessary was not lost on Brussels.
That exercise alone was very costly in terms of man hours and good will, and in the end, what really was gained?

Indeed, the REMAIN campaign can point to the 35+ measures that survived in UK law as a measure of the importance of EU criminal judicial cooperation measures in the fight against crime.

MISSED OPPORTUNITIES

The 2012-2014 Government Balance of Competences Review

Time prevents me from going into this in any detail, but for present purposes, suffice it to note that the wealth of valuable data gathered during the Government's 2-year long, Balance of Competences Review, including the 9 papers that we as a Bar submitted, are hardly referred to in this debate. Moreover, an early approach by London to share that extensive but useful exercise with one or two other EU capitals could have transformed it into a truly positive examination of EU competences, rather than the UK-centric one that it became.

SO, THAT'S THE BACKGROUND – WHAT IS THE VIEW FROM BRUSSELS?

It must be, and is acknowledged, that some of the UK's dissatisfaction with how the EU works, is entirely legitimate, and indeed, shared to a greater or lesser extent by others. No doubt that explains in part why the EU institutions and the other Member States were willing to engage with the HMG's list of reforms, culminating in the New Settlement described earlier. That the present Commission was already doing less and doing it better, in the justice and competiveness field for example, I have noted above, but there is clearly plenty of scope still for improvement across the board.

If the UK does remain an EU member, various legal and political hoops will have to be gone through to implement the New Settlement and debate rages as to whether it will all prove workable and enforceable in practice. But there can be no doubt that its existence, as prompted by the UK, could and should bring about some lasting positive changes in the EU, that could even lead to further reforms in the future, especially were the UK to remain and other Member States to join in that push.

If the UK chooses to leave however, whilst the spirit of parts of the New Settlement may survive, it must surely be the case that the remaining Member States will focus on their own interests and those of the EU first and foremost.

The UK being seen as having been recalcitrant over the years is unlikely to enhance its position. This is important:

- Article 50 TEU does not give the UK a voice in the negotiations for its withdrawal from the EU – the other Member States in Council will determine that.
- The UK will need to negotiate favourable terms for access to the Internal Market. It needs trade with the EU more than the other way around.
- It will also need to negotiate trade agreements with third countries.

Other factors that will influence the mood of these negotiations:

Risk of nationalistic contagion? – look at e.g. recent election results in Poland and Austria, and looming political changes in France and Germany.

Member States with an axe to grind could put that on the table too - e.g. Spain and Gibraltar

THE REAL CHALLENGES FACING THE EU AT THIS TIME

Many in Brussels would rather focus time and energy on the other challenges that are looming – ongoing Greek economic and financial crisis; immigration crisis; instability in the Middle East; potential unravelling of the TTIP trade negotiations with USA to name but a few. And all that, quite apart from its own ambitious internal work programmes to try to bring consistent economic prosperity back to the bloc, including banking union, the Digital Single Market and so much else.

Conclusions

It is my hope that the UK will remain a member of the EU and regain much of its positive influence. However, in the event of a vote to leave, in my view the UK should be steeling itself for a potentially bumpy ride. That does not mean that the other countries will punish it as such. But it is arguable that the scenario as described gives cause for some discontent, and the need for the UK to secure a good EU withdrawal, protection for acquired rights and maximum unfettered access to the Single Market, all ideally within a 2-year period, puts it at something of a disadvantage.

Ireland might well stand to gain some of what the UK would lose, in the long term (alternative forum for common law litigation; pick up some of the slack on financial or legal services etc.), but it would be difficult to dodge the storm of the next decade or so.

Thank you.
9 May 2016