BREXIT – SELECTED LEGAL ASPECTS

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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[1] has ever left what is now called the EU in its sixty 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 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[2] 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).

The 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-Barthélmey left in 2012 but it was not only small, it was also not a Member State. By contrast,

[1] In this paper, the phrase "Member State" refers to those States which are members of the EU.
[2] The question being asked of the voters is: "Should the United Kingdom remain a member of the European Union or leave the European Union?"

for the UK to leave would be significant as it 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 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 European Communities. Instead, it took the "road less travelled"[3] for many years but ultimately joined the EC[4] 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 the general rules of public international law[5] 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 Article 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 Article 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[6] 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 Article 218(3) of the Treaty on the Functioning of the European Union ("TFEU").[7] The withdrawal agreement shall

[3] The UK was part of the European Free Trade Association ("EFTA").
[4] More accurately, the European Economic Community, the European Coal and Steel Community and the European Atomic Energy Community.
[5] 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.
[6] These guidelines do not exist already and would have to be drafted after a particular withdrawal notification.
[7] Article 218 of the Treaty on the Functioning of the European Union 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

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.[8] 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.[9] 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 [Article 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[10] – 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 European Communities 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[11] and

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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.

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."

[8] 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.

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

[10] 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!

[11] Current issues would 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 by some of the remaining Member States.

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.[12]

For the purposes of Article 50(2) and (3) of the TFU, the member of the European Council[13] or of the Council[14] representing the withdrawing Member State must not participate in the discussions of the European Council or Council or in decisions concerning it.[15] A qualified majority shall be defined in accordance with Article 238(3)(b) of the TFEU.[16]

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 Article 49 of the TEU.[17] 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 EU than any other non-

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[12] It is open to speculation as to how vigilant a Member State would be about complying with EU 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.

[13] I.e., the Ministers of the Member States along with the President of France.

[14] I.e., the Ministers of the Member States (e.g., the Ministers for Agriculture).

[15] TEU, Art.50(4). 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 "concerns 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!

[16] TEU, Art.50(4).

[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.
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> 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."

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[18] 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 as well if the Swiss model were to be followed. It would also mean that UK law would have to be closely harmonised to 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.

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.

[18] E.g., along the lines of the EU/Swiss model.

Selected Legal Issues arising from Brexit

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 freedom 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, the criminal law, transport, consumer protection, competition, taxation, defence/security, professional qualifications, justice, asylum, banking, litigation, tax, 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 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[19] which will also involve a change to the UK's constitutional regime.[20] 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 sixty year history. These are all part of EU law. At first glance,[21] 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 Treaty on European Union and the Treaty on the Functioning of the European Union) would certainly be no longer relevant in the UK courts or UK law.

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[19] In this context, it is worth recalling the vigorous debate in the UK over Case C-48/93 *R v Secretary of State, ex parte Factortame Limited* [1996] ECR I-1029 as contrasted with the muted response in Ireland over *Pesca Valentia* [1985] IR 193.

[20] 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.

[21] 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).

The EU's regulations are directly applicable automatically. They do not need implementation into UK (or any Member State)[22] 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 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 the "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.

General principles of law of EU law have been a very significant and growing feature of the common law world in both England & 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 then 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.[23] Concepts and general principles such as "proportionality", "non-discrimination" and so on have entered the UK's legal

[22] 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 (the "EUMR") would be otiose if the UK did not apply the EUMR as part of a post-Brexit regime).

[23] One need only think of the perceptive *dictum* of Lord Denning MR 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.

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 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 Article 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 by 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.

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[24] – 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

[24] This is often known as "passporting".

occur.[25] (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.[26] 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-à-vis the European Union Merger Control Regulation (the "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.[27] So too, post-Brexit, the EU could prohibit a transaction involving UK undertakings and the UK would lack the internal influence in the debate and, moreover, the UK would lack the ability to seek a referral back under Article 9 of Regulation 139/2004. 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.

State Aid

In regard to State aid, if Brexit occurred then UK businesses and others could complain about Member States (such as Ireland) providing State aid to their businesses. Conversely, if the post-Brexit UK were to provide comparable assistance to their businesses then EU interests (such as an Irish business) could not argue against such assistance on the basis of EU State aid law (because it would simply not apply to the UK any more) but would have to invoke the international trade law or

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[25] 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 the *Benkharbouche v Embassy of Sudan* [2015] EWCA Civ 33.
[26] Non-Member States may well impose penalties alongside the EU's penalties but Member States do not.
[27] See Commission Decision of 3 July 2001 in Case M.2220.

EU dumping regimes which are more cumbersome and difficult to operate. This would put EU businesses at a disadvantage as compared to the UK businesses which would benefit from such assistance. If there was to be a Brexit then this is an issue which Ireland should take into account in its negotiating checklist.

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 section 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.[28] There is no doubt that the same issues arise for the insurance sector too.

Research & Funding Agreements

[28] At present, the EU contributes about €3.8b 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.

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.

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.

Litigation

The impact would not be substantive but also procedural. One need only consider how much easier the recognition and enforcement of judgments and arbitral awards have become since the EU adopted its various measures in this area. The regime could become easier with the adoption of measures dealing with, for example, competition and consumer law issues. The impact on litigation should not be underestimated.

Compliance Costs

What about compliance costs for business? If the vote is against Brexit 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 and, if anything, would lead to a reduction in charges. However, a vote for Brexit and 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.

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 it ensures that no other Member State ever contemplates such a move. Whatever will be the outcome of the vote – and it 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!