



BREXIT – issues and challenges we now face

Chair: Tim Ward QC

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BREXIT – issues and challenges

Article 50 exit negotiations: process and options

Philip Moser QC



Article 50 TFEU

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. 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 paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.



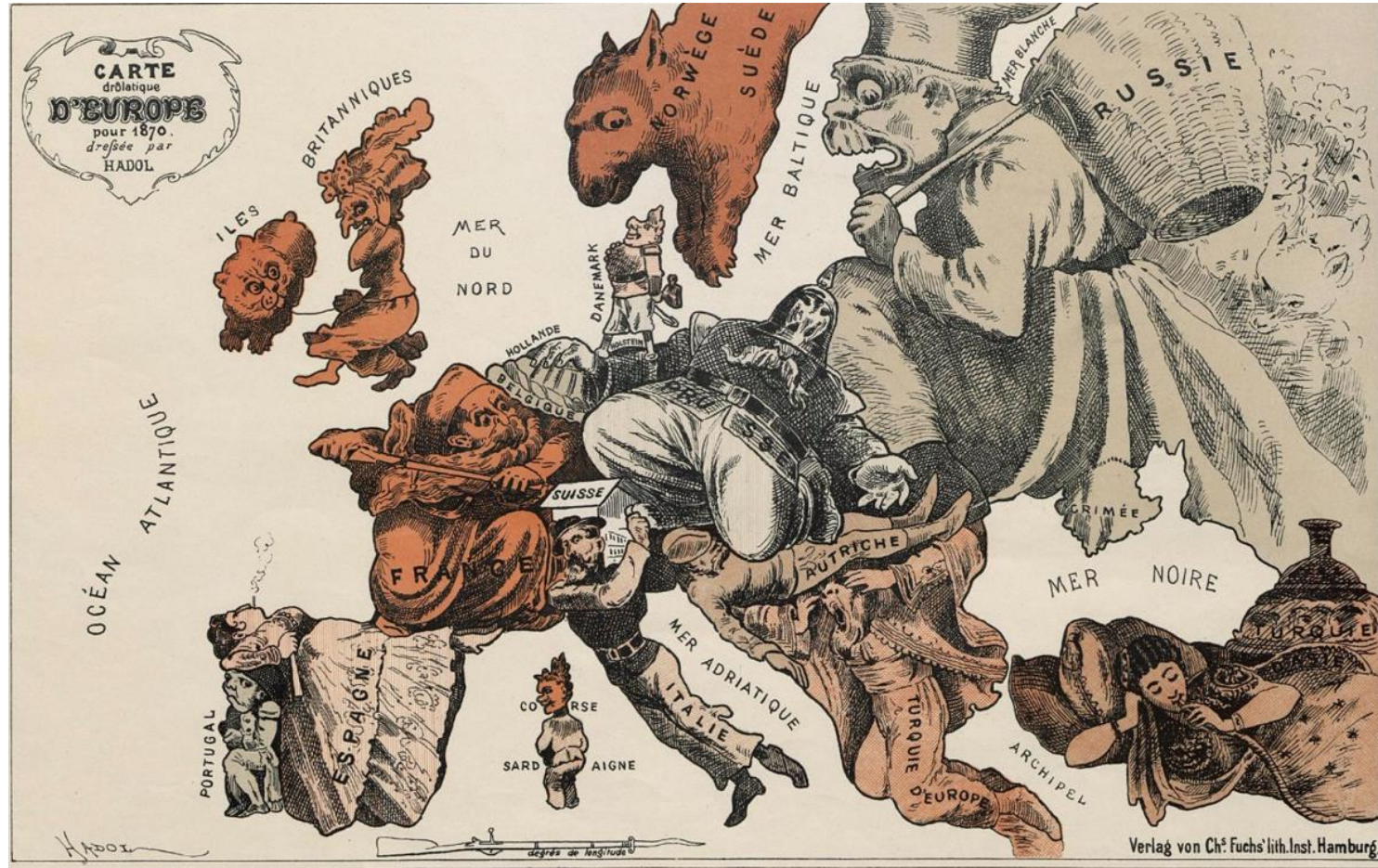
Article 50 Notice

- European Council spokesman : “It has to be done in an unequivocal manner with the explicit intent to trigger Article 50. It could either be a letter to the president of the European Council or an official statement at a meeting of the European Council duly noted in the official records of the meeting.” (Quoted in BBC News, <http://www.bbc.co.uk/news/world-europe-36632579>)
- “in accordance with its own constitutional arrangements”:
 - exercise of the royal prerogative by the Government
 - no formal requirement for Act of Parliament for Notice
 - resolution of House of Commons or both Houses of Parliament likely in practice
- Notice and negotiations as such require no UK Parliament involvement, but approval of withdrawal agreement very likely to do so; also any “framework for a future relationship”; ECA repeal, retaining EU-based legislation and new legislation on e.g. tariffs would require Acts of Parliament.
- No Member State ratification is required for a withdrawal agreement, although a simple majority of the European Parliament is required. However, any Treaty change *would* require ratification by all Member States (pursuant to Article 48 TEU), as would any new UK-EU framework or agreement.

Materials:

- *The process of withdrawing from the European Union, House of Lords EU Committee, 11th Report of Session 2015–16, HL Paper 138*
- *Article 50 TEU: Withdrawal of a Member State from the EU, European Parliament Briefing, February 2016*
- *P Nicolaidis, Withdrawal from the European Union: a typology of effects, Maastricht Journal Vol. 20, 2013, pp. 209-219*

“framework for a future relationship”





EEA

Option 1

- “Norway plus”
- EEA law
- EFTA Court
- Surveillance Authority
- Free movement
- Right of co-decision
- Could “draw in” Norway, Liechtenstein, Iceland and even Switzerland

Option 2

- “Norway minus”
- EEA law
- EFTA Court
- Surveillance Authority
- No free movement of people
- Why would EFTA countries agree?



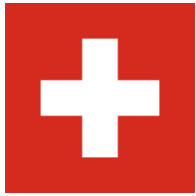
Association Agreement

Article 217 TFEU

The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.

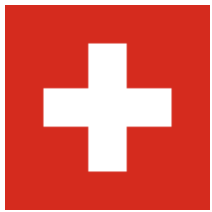
e.g.: **Turkey:** Association Agreement (1964) and
Customs Union (1995)

- Does not apply to agricultural goods, or services.



Bilateral agreements

- “Swiss model”
- Free movement applies (Swiss immigration cap controversy currently threatens Swiss model status)
- No full access for banking and financial services
- EU has announced unlikely to try Swiss model again



Swiss model, Part 2: EFTA

- *Status quo ante?*





Free Trade Agreement

- Comprehensive Economic and Trade Agreement (Ceta) EU/Canada (not yet in force)
- Access to single market without all the obligations for Norway and Switzerland
- Services only partially covered; not same access for financial services; no “passporting”
- Must comply with EU product and technical standards without say in legislation

- “Most favoured nation” tariffs with EU and associated countries?
- Complete free trade with all other 161 WTO countries?
- WTO Director General Roberto Azevêdo in an interview with the Financial Times: UK will have to renegotiate with all 161 other members, as though holding accession negotiations (<https://next.ft.com/content/745d0ea2-222d-11e6-9d4d-c11776a5124d>)
- N.B.: probably right, although possibly unilateral GATT/GATS renegotiation provisions could be used to avoid this if, for WTO legal purposes, the EU WTO schedules can be treated as 28 different WTO Schedules (one for each EU Member State)

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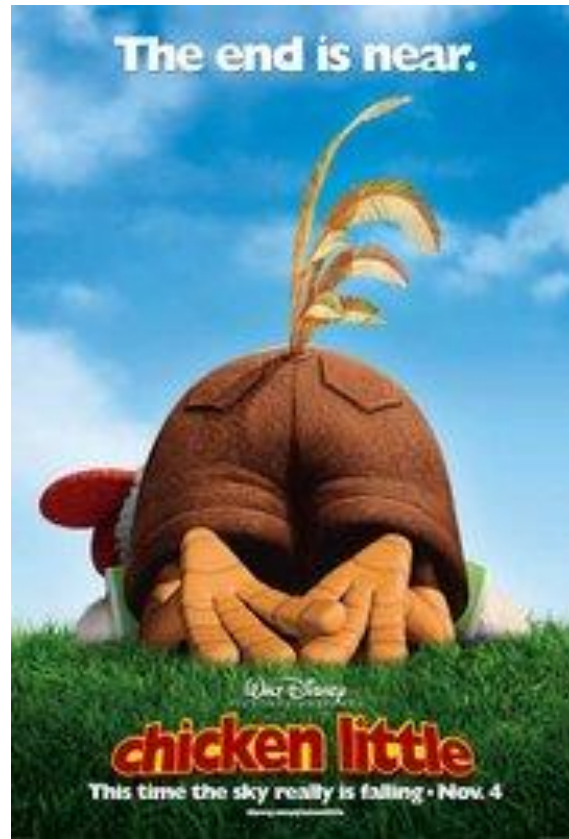


Impact of BREXIT on Competition Law



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The BREXIT vote



Plus ça change...

- Art 53 and 54 EEA mirror Arts 101/102 TFEU
- Equivalents to Reg 1, Reg 773/2004 and Commission notices incorporated in EEA Protocols
- Damages Directive undergoing consultation
- NCAs/ national courts apply Art 53 in full – including individual exemptions – no notification
- Duty of sincere cooperation in Art 3 EEA

Plus c'est la même chose...

Or is it?

- Key tenet: no transfer of legislative power
- No direct effect but Art 7 EEA provides Protocols are binding and apply as internal law once implemented – 2 year time delay
- Means Art 53/54 EEA will have to be implemented into domestic legislation
- No primacy but Art 35 Protocol provides EEA rules override conflicting law
- Different institutions : ESA and EFTA Court

Risk of divergence ?

(i) EU versus EFTA/EEA

- Key principles of homogeneity and reciprocity
- EEA rules should be interpreted consistently with EU rules and ensure equivalent protection for individuals
- Close cooperation between ESA and Commission in dawn raids and hearings
- EFTA Court closely follows CJEU rulings

Risk of divergence ?

(i) UK versus EFTA/EEA

- Repeal of s.2(1) ECA & s.60 CA98
- National courts still obliged to ensure effective protection (*Koch*) and have regard to EEA law when interpreting national law (*Karlsson*)
- ESA and EFTA members have right to intervene in preliminary references before CJEU (in fields) and direct appeals but not infringement cases
- Preliminary reference procedure to EFTA Court

Public Enforcement

- Commission investigations predominant
- ESA not that active and very few decisions
- Duplicate leniency applications
- Prior consultation and close coordination on dawn raids, exchange of information and attendance at hearings/Advisory Committee
- NB EFTA concept of privilege is broader than AKZO - judged on case by case basis (*Abelia*)

Private Enforcement

- EFTA case law recognises right to damages and effective relief and rights of indirect purchasers (*Schenker I and II*)
- Commission decisions will not necessarily be binding – may need adaptation to DD
- NCA decisions not binding
- DD will take additional 2 years for implementation and may have differences

SWOTs

- Fewer follow-on actions
- Stand-alone focus
- RBR not applicable – back to Lugano Convention or common law?
- *Forum conveniens* broader – not just domicile
- Rise of the “English rocket”?
- Preliminary references to EFTA much quicker
- EFTA Court : Faster, improved reasons & transparency and English working language



Thank You Any Questions



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BREXIT – issues and challenges

**UK votes out.
Procurement Law after Brexit?**

Michael Bowsher QC

BREXIT – issues and challenges

BREXIT and the future of Human Rights

Piers Gardner

1. What is changing:

- European Communities Act 1972, section 2(1):

2 General implementation of Treaties.

(1) All such **rights**, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such **remedies** and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression “enforceable EU right” and similar expressions shall be read as referring to one to which this subsection applies.

2. Amongst the ‘right’ and ‘restrictions’ created or arising under the Treaties are fundamental rights:

- a. Case C-29/69 Stauder v Stadt Ulm fundamental rights form part of the ‘general principles of law in force in Member States’: here whether beneficiaries of a subsidized scheme for consumers’ butter purchase should be named.

But note the Supreme Court’s assertion of ‘common law fundamental rights’, including Lord Sumption in *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6 at [26]:

‘The general principle of equality in EU law is that comparable situations are not to be treated differently or different situations comparably without objective justification. This is not a principle special to the jurisprudence of the European Union. It is fundamental to any rational system of law, and has been part of English public law since at least the end of the nineteenth century.’

- b. *Case C-11/70 Interhandel v Einfuhr- und Vorratsstelle fuer Getreide und Futtermittel* The system of deposit payments imposed by regulation 120/67 is contrary to the principles of economic liberty and proportionality: ‘the same result could be obtained by less radical means’.

The least interference ‘requirement’ has been a distinction between *Wednesbury* unreasonableness review, where it is not required, as opposed to the proportionality test, where it may be. Is that debate now over?

Keyu v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69, despite

R (Association of British Civilian Internees (Far East Region)) v Secretary of State for Defence [2003] EWCA Civ 473

3. The rights are articulated in the Charter of Fundamental Rights of the European Union:

- Case C-293/12 Digital Rights Ireland v Minister for Communications interpreting Articles 7 (private life) and 8 (data protection) and finding the ‘quality of the law’ represented by the insufficiently precise and delimited rules in the Directive 2006/24/EC concerning the obligation on the providers of publicly available electronic communications services or of public communications networks to retain certain data.
- A clear example of the CJEU adopting the same analysis of this issue of legislative control of communications as the European Court of Human Rights: the objective of regulation for national security and prevention of crime is fine, but the law is invalid because of its lack of precision and legal certainty in encroaching on fundamental rights.

4.

- In the field of mutual assistance in criminal matters EU law imposes the same requirement of precision and lawfulness: see Case C-241/15, Bob-Dogi judgment of the Court (Second Chamber) of 1 June 2016. The CJEU had to consider on a preliminary reference the validity of a European Arrest Warrant (EAW) which had been issued without an underlying national arrest warrant having been issued. The Framework Decision contains in Articles 3 and 4 the exhaustive circumstances in which a national court can refuse to execute an EAW; those circumstances do not include the question whether a national arrest warrant exists. The CJEU nevertheless held (ibid at 63-64) that the overriding principle of lawfulness implied that the existence of a national arrest warrant was a necessary requirement for the validity of an EAW.

5. Fundamental remedies for business: the protection of fair and timely civil proceedings and the provision and maintenance of legal certainty.

- Note that the recognition and enforcement of all European judgments in civil and commercial matters is subject to Regulation 1215/2012, the revised Brussels I Regulation and RSC Part 74
- On departure from the EU, the UK will seek to become a (direct) party to the (revised) Lugano Convention 2008 (OJ L 339/1), to which the current parties are the EU (except Dk) and the EEA States apart from Liechtenstein, but including Dk. Under Article 72, UK accession to Lugano 2008 will be subject to the unanimous consent of the existing parties to be provided normally within one year and to an accession notice period of three months.

6.

- Apart from the CJEU's scrutiny of mandatory rules restricting the recognition and enforcement of foreign judgments on public policy grounds (see Case C-7/98 Krombach v Bamberski) note the Eur Ct HR's recent interest in the fairness of the Brussels I Regulation regime in Avotins v Latvia (GC 23 May 2016 no 19502/07), concerning the compliance with the ECHR by Latvia in recognising and enforcing a judgment originating from Cyprus which the judgment debtor claimed to have already paid.

7.

- A ‘simple’ remedy: “Redd wie d’r de Schnawwel gewachse esch” in Case C-161/06 Skoma-Lux[20007] ECR I-10869 the CJEU held that a fine imposed under Regulation 2454/93, which was in force prior to Czech accession to the EU, but which had never been translated or officially published in the Official Journal in the Czech language, was unlawful and could have no application, even if the company affected could have been aware of the requirements through other means.
- Note that, from the date of UK’s departure from the EU, English will no longer be a (currently declared) official language of any Member State and so there will cease to be a requirement for EU ‘acts’ to be translated into English and Article 1 of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the EU (as amended) will be re-amended accordingly.

The last word? From Denning LJ in *Packer v Packer* [1954] P 15 at 22 and [1953] 3 WLR 33 at 36:

- “What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both.

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BREXIT: legal questions

Gerry Facenna QC

Status of EU law

EU law: Article 50(3) TFEU:

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 paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

Status of EU law

National law: European Communities Act 1972, ss. 2 and 3

“All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly... etc.”

Formal position

- EU law in all its forms continues to apply until withdrawal: this includes principles of direct effect, supremacy, *Marleasing*, *Francovich* damages etc.
- UK continues to be bound by new EU laws that come into effect before withdrawal (e.g. General Data protection Regulation; E-commerce package...)
- Prohibitive rules of EU law (State aid, procurement, technical standards etc.) continue to apply

In practice

- UK likely to have diminished role in / be excluded from negotiations on new legislation, especially internal market
- Commission may have reduced appetite for infraction proceedings: by the time it comes to Court the UK is likely no longer to be bound to implement
- National courts may be less inclined to make references where the answer won't come back until 2018 (although NB temporal effect – answer from CJEU may still be necessary)

Temporal effect

“According to settled case-law, the interpretation which the Court, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, gives to EU law clarifies and, where necessary, defines the meaning and scope of that law as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that, unless there are truly exceptional circumstances... EU law as thus interpreted must be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation...”

C-441/14 *Dansk Industri*, §40

New approaches

- Continue to rely on EU law arguments – even if the dispute arises on the last day of the UK’s EU membership
- Where possible rely on ECHR or common law (cf. *Kennedy v Information Commissioner* [2014] UKSC 20; *Pham v Home Secretary* [2015] UKSC 19)
- Where EU-based legislation persists, rely on need for continuing consistent interpretation (legislative intent)
- Plead alternative EEA provisions (which may rely on pre-1994 EU case law)

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