



Brexit: Opportunities, Challenges and the Road Ahead

Britain in Europe Policy Report
Brunel University London
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About Britain in Europe

The Britain in Europe think tank brings together academics from a wide range of disciplines, legal practitioners, civil servants, business leaders and NGO members from across the UK and Europe.

Britain in Europe members produce original research and influence public policy, offering a platform for evidence-based evaluations of Britain's interactions with the EU and its institutions, and the role of the UK within Europe more generally.

The think tank was founded in October 2015, and is based at Brunel University London.

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FOREWORD

Before the people of Britain voted on 23 June many, myself included, questioned what good could possibly come of excluding our island from the top table in Europe.

How, we asked, could British businesses, many of which have thrived in the single market, continue to compete with their counterparts across the Channel? And how attractive would Britain be to foreign investment while subject to the economic uncertainty predicted of Brexit?

Would our universities, considered to be among the best in the world, fall short of this accolade if isolated from one of the sources of their strength? It wasn't too hard to imagine a future in which our most fruitful collaborations across the continent cease to exist, while staff and students from the EU seek opportunities closer to home.

Perhaps most worryingly, we thought our actions at the polling stations might send a message to our closest neighbours that the UK was no longer open to them - a societal perception alien to anyone born in the past 60 years.

Now that we can be considered post-referendum, yet no closer to being post-Brexit, we can truly address those questions from an academic perspective.

It is no longer good enough to simply bemoan or celebrate the decision the country made, but to use our collective knowledge and experience to predict our future. Most importantly, we must consider the challenges and opportunities on the horizon.

In this policy report, the Britain in Europe think tank has done just that, with a view to adding to a discussion on issues that affect every one of us. The group has assembled the best legal minds from across a spectrum of disciplines, each drawing upon their knowledge and experience to answer the biggest questions arising from Brexit.

Their arguments range from seeing Brexit as a catalyst for constitutional change to considering the likely loss of UK influence in environmental policy, and no stone is left unturned.

I would like to thank the founder of Britain in Europe, Dr Dimitrios Giannouloupoulos, and the many exceptional minds that make up membership of the think tank for contributing to this substantial report. I believe that the arguments within bring much-needed clarity to the subject and will drive discussions to come.

Prof Julia Buckingham
Vice Chancellor, Brunel University London



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Cris Daly is an associate in the Business Solutions, Governance, Restructuring & Bankruptcy Group at international law firm Proskauer. Cris has worked on a range of multi-jurisdictional insolvency matters and represented liquidators, administrators, fixed-charge receivers, creditors and creditors' committees, shareholders and directors in a variety of contentious and non-contentious situations including shareholder disputes, project finance initiatives, distressed asset and business sales (and related litigation), debt enforcement and asset tracing. He is currently a member of the INSOL Europe Technical Committee, and a frequent contributor to bi-monthly insolvency journal *International Corporate Rescue*.

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Prof Andrew George is Deputy Vice Chancellor (Education and International) and Professor of Immunology at Brunel University London. He has published widely in the field of immunology and the development of molecular therapies to treat disease. He contributes to research ethics and governance, and is Chair of the National Research Ethics Advisors' Panel. He got a BA from Cambridge, followed by a PhD from Southampton. After holding a Beit Memorial Fellowship he went on to work at the National Institutes of Health in the USA before returning to the Royal Postgraduate Medical School (Hammersmith Hospital), which became part of Imperial College London. He has been awarded a DSc from Imperial. At Brunel he is responsible for the education and international strategies of the University.

Dr Christian Heitsch

Dr Christian Heitsch is lecturer in law at Brunel University London, and has previously worked in private practice and higher education in Germany and the U.S. As part-time advisor with a German law firm, he recently prepared a submission to an international supervisory body – the Aarhus Convention Compliance Committee –, alleging that German environmental law is incompatible with the Aarhus Convention about public participation and access to justice in environmental matters. He teaches Public, European Union and Environmental Law, and his research focusses on Human Rights and Environmental Law.



Sir Geoffrey Nice QC

Sir Geoffrey Nice QC has practiced as a barrister since 1971 and is renowned for leading the prosecution of Slobodan Milošević, former President of Serbia. Much of his work since has been connected to cases before the permanent International Criminal Court or pro bono for victims groups whose cases cannot get to any international court.



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Senior Lecturer in Law, LLB (UCM) MA & Ph.D. (Geneva) LLM (Harvard), FHEA. Since joining Brunel Law School, Dr de la Rasilla del Moral has served as Visiting Fellow of the Lauterpacht Research Center of International Law in Cambridge, the Max Planck Institute for European Legal History in Frankfurt, the Max Planck Institute for Public International Law in Heidelberg, The Graduate Institute in Geneva and the Max Planck Institute for Procedural Law in Luxembourg. Before joining Brunel Law School in October 2012, Dr. De la Rasilla served as Post-Doctoral Max Weber Fellow in Law at the European University Institute.



Prof Arad Reisberg

Prof Reisberg is the Head of the Brunel Law School and Professor of Corporate Law and Finance. Previously, he was a Reader in Corporate and Financial Law at UCL Faculty of Laws (2009-2016), and a Lecturer in Law (2006-2009). Arad acted as Director, [UCL Centre for Commercial Law](#) (2007-2016), and between 2009-2012 as UCL Laws Vice Dean (Research).



Jonathan Rushworth

Jonathan Rushworth is a retired solicitor, whose legal career was at a major City of London law firm. He was a partner in the firm with a broad ranging company and finance practice. He was on a number of professional committees and wrote and lectured extensively on legal topics. In addition to pursuing charity and history interests since retiring from legal practice, he has worked with Dr Michael Schluter and others on the analysis and practical approach to put relationships and the interests of others at the heart of society rather than a focus on the rights and interests of the individual with a narrow materialistic approach.

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Dimitrios Giannouloupoulos

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Sir Geoffrey Nice QC - "Post Brexit lawyers will be operating in a new environment where the supremacy of international human rights norms can not be so easily taken for granted and if – in our country or elsewhere – it becomes acceptable to slip back from today's liberal norms – for economic, ethnic, cultural, demographic reasons – then lawyers may have to confront our state more directly than has been their responsibility to date."

EXECUTIVE SUMMARY

Brexit is not *just* about Britain

Arad Reisberg and Dimitrios Giannouloupoulos explain in this report that, for Brexit to be a success, it has to be as much about the EU and its future shape and state, as it is about Britain post-Brexit, and that the UK government must pause to listen to the EU developing narratives post the Brexit vote. Reisberg and Giannouloupoulos urge caution against the view that Brexit is a one-sided affair; Britain will have to rely on regional and global goodwill for the government to achieve the deal it wants with the EU.

Against the culture of exclusion

Sir Geoffrey Nice develops a passionate critique of the post-Brexit culture of exclusion, pointing out that the concept of being a good neighbour (in Europe) was not one shared by many in the land. He regrets that we will now have to live in a narrower family. He explains how lawyers will be working in an environment where exclusion from Europe, its laws and learning will be a norm and where full collaboration with European law will be barred. In this culture of exclusion and isolation, lawyers will have the international rule of law on their side; how successfully they deploy it will be a test as to whether developing the rule of law was worth the fight.

Brexit is a catalyst for constitutional change

Scott Crosby argues that the EU referendum was not conceived in the public interest but in the private interest of a few people and was so ill-prepared and has such profound consequences that it exposes the inadequacies of the UK constitution. The referendum should therefore be taken as the catalyst for constitutional change, and change must be in the form of a modern constitution providing for essential safeguards amenable to judicial control by a constitutional court. In particular, a modern constitution should adopt entrenched rules on referenda, especially where adherence to international treaties is at issue.

Brexit and higher education

Brexit will result in enormous changes to the UK Higher Education landscape, resulting in both threats and opportunities to UK universities. Leaving the EU is likely to result in a reduction in the EU students who come to the UK, the effect of which will be dependent on the institution and subject area. Exchange schemes such as Erasmus may also be at threat. Universities rely on the free exchange of ideas, knowledge and people. They need to hold fast to their international nature, and maintain strong links with other universities around the world, helping the UK remain an outward looking and globally engaged nation. They will continue to support the development of skills needed by the workforce. They also need to wrestle with the challenges inherent in much of the debate around the referendum, which suggest that they are seen as irrelevant by a large proportion of the electorate, and work out how to engage with the wider communities that they serve.

The financial implications of Brexit

NatWest managing director Tim Boag suggests that, following the Referendum, whilst still early to draw too many conclusions, we can observe that: (a) demand for finance exists especially in the SME market although the upper end is more fragile; (b) supply of finance from commercial banks should be healthy for the foreseeable future; (c) there are some question marks about longer term confidence and willingness of larger business to invest as well as the impact of any changes to Government policy. Tim gives the example of NatWest who are determined to assist their customers by staying close to them, understanding their business and making appropriate finance available when needed.

Business in transition

Ashley Braganza's analysis starts by offering a reminder that Capital is fickle. It flows to larger markets and better returns. This leads Braganza to argue that businesses that are adversely affected by regulations, tariffs, access to talent, will transition the locus of their operations to the EU, leaving the post-Brexit UK economy smaller and weaker. This leads to the conclusion that a softer Brexit is in the nation's longer term interests.

Brexit offers the opportunity of a new approach to business in the UK

Jonathan Rushworth takes as a starting point that UK law has been influenced and shaped for over 40 years by legislation inspired and developed by the EU. A review of this legislation as we leave the EU could, this paper suggests, be carried out in such a way as to lead the corporate world to recognise and value relationships with stakeholders who rely on companies for their livelihood and wellbeing and its responsibility to society more generally, rather than the current primarily financially driven shareholder focussed approach.

A hard Brexit will impact upon the current attractiveness of the UK as a primary destination for corporate and financial restructuring

Cris Daly and Mark Fennessy claim that the current attractiveness of the UK as a destination for corporate and financial restructurings reflects the maturity of the laws and the flexibility of the courts in the UK to facilitate restructuring. This world-leading position is already under threat as a number of European jurisdictions have amended or introduced legislation in recent years that in due course could provide a more popular environment for insolvency and restructuring. In addition the UK's advantage over other existing market hubs such as New York, or emerging jurisdictions such as Singapore, is likely to diminish if and when UK insolvency office-holders lose the right to automatic recognition across the EU. It is likely that in ten years' time the geographical spread of cross-border insolvency work will be much changed, with the UK losing its pre-eminent position especially if a "Hard Brexit" is pursued.

Retaining elements of the European Arrest Warrant (EAW) post-Brexit

Gerard Conway discusses the possibility of retaining elements of the current EAW arrangement post-Brexit. A post-Brexit extradition treaty between the EU and the UK could entail provisions similar to the

EAW, although there would be details to work out like the status of ECJ caselaw on the EAW in UK courts post-Brexit. Alternatively, the UK could just revert to the European Convention on Extradition of 1957, adopted under the auspices of the Council of Europe, which it operates with European countries not in the EU, and apply this again in its relations with EU Member States. The UK already had a special backing of warrants procedure with Ireland, so flexible extradition arrangements have always been possible in public international law.

Restoring faith in the ECHR as a response to the looming human rights deficit post Brexit

Dimitrios Giannouloupoulos undertakes a contextual study of Brexit's ramifications for fair trial rights, demonstrating that the UK government must abandon plans for a potential repeal of the Human Rights Act and withdrawal from the ECHR. The government must instead re-establish faith in the much maligned Convention, if we are to grapple with the looming threat of an unprecedented human rights legal deficit post-Brexit. Giannouloupoulos also argues that, with a departure from EU human rights law now a foregone conclusion, and with the ECHR teetering on the brink of a long awaited, politically calculated, decision by Theresa May's government on whether to push forward with the proposals for a UK Bill of Rights, the idea of a written constitution, combined with a national Bill of Rights (as advocated by the former Attorney General Dominic Grieve QC MP in a recent BiE event), carries a lot of force. Giannouloupoulos doubts however that there is any political willingness to move in this direction, and expresses concern that a UK Bill of Rights would most certainly be an ECHR minus. Giannouloupoulos finally predicts that, because of the increasing importance of 'mutual trust' in the EU, after Brexit it will be challenging for the UK to secure judicial cooperation – even if it is through bilateral agreements with EU Member States – as a result of no longer subscribing to the development of common procedural guarantees across Europe.¹⁵

Freedom to manoeuvre versus loss of leverage? The security policy implications of Brexit

Philip Davies finds that Brexit is largely irrelevant to both defence and intelligence because the UK's defence and foreign intelligence postures are primarily geared towards commitments and coalitions outside the EU, e.g. NATO and the Anglo-American '5 Eyes' intelligence 'special relationship'. Because of close cooperation with EU partners and institutions on law enforcement and counter-terrorism, however, domestic security is a more mixed set of trade-offs between cooperation and independence. The main medium to long term security threat to the UK would be reduced public funds for security in the event of sustained Brexit-driven economic contraction, and increased risk from exposure to aggressive conduct by major powers in the European/Eurasian and Asia-Pacific regions such as Russia and China. By contrast, a 'hard Brexit' will do more damage to the EU's defence, intelligence and internal security arrangements than to the UK. Given the 'balance of power' between the UK and the EU in this sphere, therefore, the UK government should use the security costs to the EU as important 'bargaining chips' in Brexit negotiations, actively making linkages between security and other issues such as trade.

Likely loss of UK influence and ambition in environmental policy

Christian Heitsch argues that any post-referendum scenario which involves the actual withdrawal of the UK from the EU will have a significant detrimental effect on the current degree of environmental protection

in the UK and on the UK's influence on shaping EU and international environmental policy. In the author's view, this is an additional argument which should encourage Parliament and the Government to study carefully whether departing from the EU is really in the country's best interest. An orderly way out of the quandary created by holding the EU referendum without any contingency plans is the establishment of a Royal Commission charged with investigating the true implications a departure of the UK from the EU would have in all affected policy areas and with developing a plan for an orderly departure.

The future of international law in the UK

Ignacio de la Rasilla draws a gloomy picture of the future of international law in the UK. He explains that at a time when international legal expertise is dramatically needed by the UK for establishing, developing and maintaining a fructiferous new legal relationship with the rest of the world, the UK legal academy maintains some of the features that made it attractive as a place to develop an academic career in international law before the outcome of the EU referendum. However, some of these features are already losing some of their former splendor. The global influence of what is often referred as the British liberal tradition of the international rule of law, whose weight partially rests at present on the shoulders of many non-British-born and many EU nationals who live, teach and publish about international law in this country, will not be better off for it in the years to come.

The status of EU citizens in the UK after Brexit

All EU citizens living in the UK must be offered reassurance that after Brexit they will continue to enjoy equal rights with UK citizens. The government must give the nearly three million EU citizens currently in the UK automatic residence rights (and must provide for an effective administrative system to support this inherently complex process). To continue to treat EU citizens as potential bargaining chips in the post-article 50 negotiations is unacceptable, legally, politically and ethically, and makes no sense from a pragmatic point of view; these citizens have acquired the right to reside in the UK in accordance, inter alia, with international human rights law.

INTRODUCTION



The British people have spoken and the Government is now committed to following through with Brexit, but where does this monumental decision leave us as a nation? No sector can be viewed in isolation, so we are putting this seminal question to thought leaders in their fields, asking them to explore the challenges and opportunities facing the UK at this historic crossroads for the country.

This policy report is looking for answers about the way forward, so that we, as a think tank, can address the fundamental dilemmas that the EU referendum has created for us, in relation to immigration, the free market, our constitutional system, businesses and the free movement of labour, our financial institutions, human rights, the internationalisation of higher education and research, judicial cooperation in Europe, security and national defence, culture and environmental protection; the list is endless.

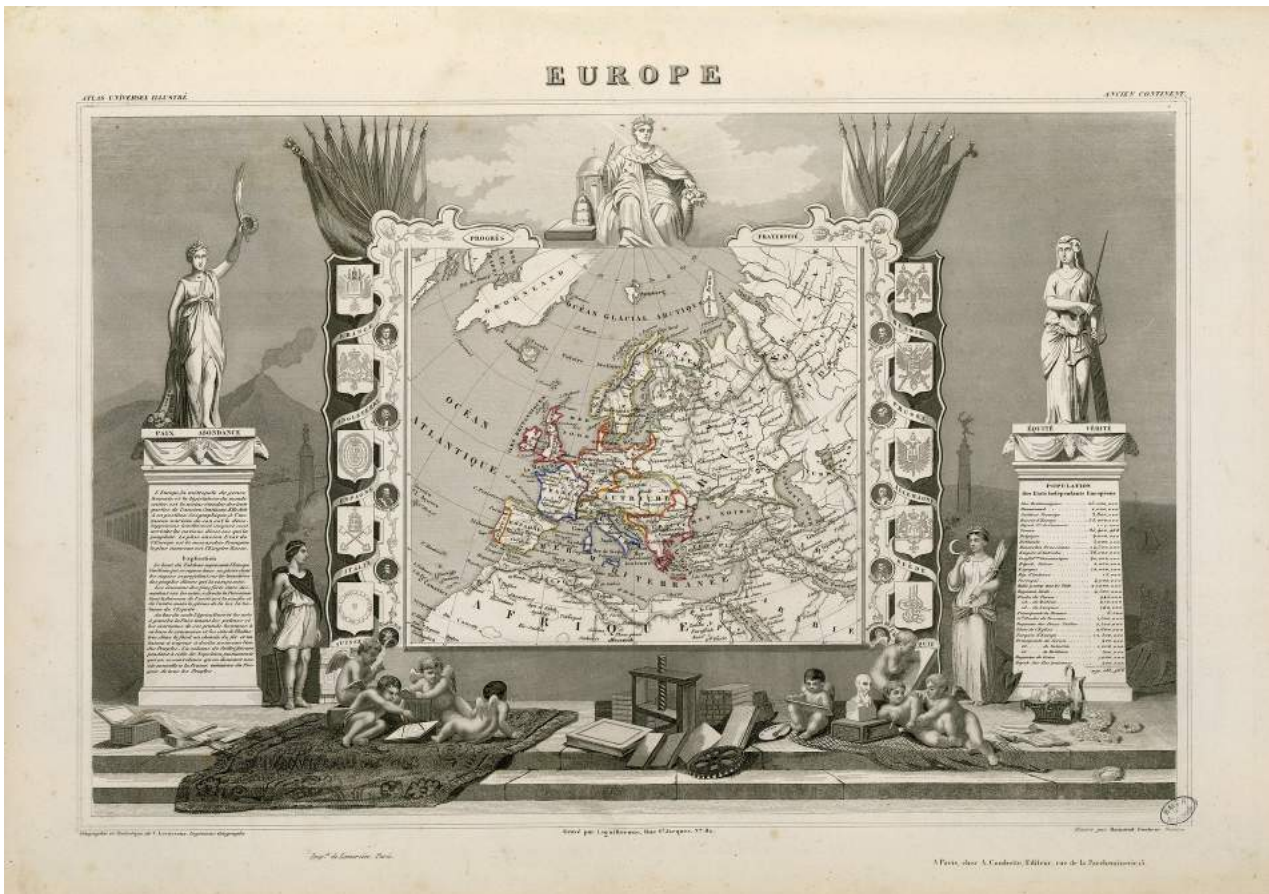
But Brexit is so much more than just seeking solutions to (the numerous) practical problems that disentangling ourselves from the EU will naturally create. It is also, much more importantly, about looking back again into the elements that make our society's fabric, and redefining the UK's role in Europe and the world.

I would like to thank all the contributors to this report. Here they provide expert, evidence-based, diagnosis of some of the flaws of (parts of) the UK legal, political and socio-economic frameworks that have come to the surface with Brexit (while at the same time pinpointing many of their inherent strengths), and insightfully prescribe remedies that will help transform challenges into opportunities as we navigate uncharted waters ahead.

Our appreciation as a think tank also goes to Brunel University and Brunel Law School for fully supporting this collaborative research effort.

Dr Dimitrios Giannouloupoulos
Director, Britain in Europe think tank

London, 18 October 2016



THE HIDDEN DIMENSION OF BREXIT: BREXITING EUROPE

Arad Reisberg and Dimitrios Giannouloupoulos¹

Introduction: Brexit is *not* just about Britain

Depressing news about the effect of the Brexit vote to date and the things to come post Brexit have become a matter of routine since the vote to leave on 23 June took place.² This is even before the terms of Brexit have been agreed, let alone negotiated. All signs are that it is going to be a long, complicated and hazardous road before the UK leaves the EU, if at all.³

Whatever the final format of negotiations is and regardless of what course of action is eventually followed by the UK political circle, one missing element in the discussion is that of the EU. Yes, the EU. Brexit itself seems to be a very 'British' affair, in terms of what has been debated on this side of the English Channel. The word 'Brexit' itself connotes an exit from the EU, yet the 'EU' is absent from it. That said, any exit, let alone a successful one, has to be about the EU as well. Questions like what has been the effect of the

vote on Brexit on EU countries, and more specifically on its people and the EU psyche are alarmingly absent from the discussion in the UK. However, understanding these questions and trying to reflect on them, it is argued, are a crucial factor in any future negotiation and whether, ultimately, Brexit is a success story as the Prime Minister is repeatedly arguing it will be.⁴ The discussion cannot solely be about the various options open to the UK, their merits and pitfalls, how the UK economy is going to be impacted and so on and so forth, unless the UK is still under the illusion that it can unilaterally decide these matters and simply expect the EU to meet the UK demands. This 'take back control', 'independence day', UK exceptionalism-rhetoric may have proved successful in (marginally) winning the hearts of the electorate in the referendum, but it is difficult to see how it can carry any force in the real world of international politics, if the UK is expecting to get anything of substance from the Brexit negotiations. That is all the more the case if one takes into account the inherently complex nature of the EU political arena, continuously shaped as it is by the often conflicting geopolitical and economic interests of its member states.

A thorough and meaningful analysis of the effect the vote has had across the EU, therefore, needs to be conducted and be brought onto the pre-negotiation table. Put another way: we need to talk about Europe. And we need to talk about it now.

Why do we need to talk about Europe?

The reason for this can be stated quite bluntly: the 23 June vote has not changed the simple fact that the UK and Europe are (still) highly intertwined. Perhaps in the minds of the Brexit electorate, and in the minds of those on the Brexit camp who shaped its expectations, 24 June would be a 'brave new world'; Britain would throw 'off the shackles of the EU' and thrive.⁵ Britain may very well 'thrive' – there is indeed some evidence that Brexit has, in some respects, benefited the economy in the immediate aftermath of the Referendum⁶ – but to disentangle itself from the Union, in pragmatic terms, it faces a very long road ahead.

We cannot even begin to enumerate the areas of activity in the UK affected by EU law, for instance. It is very hard to think of an area where EU law has not exercised at least some influence, and there are, of course, domains entirely regulated by EU law (the law of extradition within the EU is a characteristic example). But it is not just EU influences upon the UK that naturally complicate the process of extricating ourselves from the EU. From the economy, to law, to free movement and culture, Britain has itself contributed hugely to what Europe represents today. It is among the countries with the highest number of citizens living in another EU country (the government estimate is approximately 2 million people).⁷ The City of London is the economic centre of Europe.⁸ British corporate law rules and practice have influenced the shape of EU regulatory regimes for the protection of shareholders⁹ and the prevention of market abuse.¹⁰ Many protections for EU citizens as consumers have been modelled on British legislation.¹¹ Legal aid, fair trial guarantees and protections for defendants when they are arrested provide inspiration for EU legislation.¹² British intelligence agencies are highly relied upon in the common fight against terrorism and organised crime in Europe. British universities attract some of the best talent from Europe and produce a critically important volume of research, being among the largest recipients of research funding in the EU.¹³

In other words, the UK has been an integral part, and a major player, of the EU for nearly 40 years now.¹⁴ It has adopted European elements – of law, culture, the economy – as its very own, while seeing many of the elements that define its identity adopted by Europe. Even a political earthquake of the magnitude of the 23 June referendum cannot bring down this common history, legacy and existence, not immediately at least. But 23 June has changed the rules of the game and set in motion a chain of events that will change the shape of the UK relationship with Europe, and that may, in turn, change the EU itself.

Post June 23: What has changed and why does it matter?

First, words like ‘trauma’ and sentiments along the lines of ‘we are not to blame’ illustrate the depth and the level of shock the unexpected UK vote has caused in various EU countries.¹⁵ The result was ‘a watershed moment for the process of European unification, and one that I personally regret’, said Angela Merkel in a brief statement that she made in the early hours of 24 June.¹⁶ In Belgium, federalists saw Brexit as ‘a new window of opportunity for deeper and faster integration within Europe without the UK dragging its heels’.¹⁷ In Greece, members of the political mainstream, burdened with (and still incapable of) handling the euro-crisis, saw in Brexit an opportunity for a new vision for Europe, one in which Brussels and Berlin would empathise more with the suffering of the people in the traumatised South. Alarming, their rhetoric echoed that of the extreme right; a spokesperson for Greece’s right-wing fascist Golden Dawn party, congratulated the British people for saying no to the ‘German rulers of Europe’ and ‘Brussels’ scavengers’,¹⁸ and so did Marine Le Pen in France for that matter.¹⁹

But reactions have not been limited to the high political level. Brexit has affected all walks of life, and has stirred discussion across Europe and the world. If you live in Britain, and travelled to Europe this summer, there is a very good chance you have been asked about Brexit. People in Europe are concerned about the effect of Brexit, others are enthusiastic about its power to bring about change in Europe. Some have seen British common sense in it. Others feel the British have lost their path. Some have reacted violently to it. The FT reported that a 16-country poll by Ipsos Mori showed that almost half i.e. 48% of respondents from Sweden said they were dismayed by the UK’s decision, whereas in France only a quarter of respondents said they were sad about Brexit.²⁰ Interestingly, the survey also pointed out to divergent views on how to proceed with talks on a British exit: while 56% of Britons surveyed believe the UK should receive favourable exit terms, this was more than twice as many as in Germany, Belgium and France where the majority sought “unfavourable” terms for the UK to dissuade any other country from following the British out the door.²¹ Perhaps unsurprisingly, in a possible act of defiance, or perhaps of insult, British symbols are expected to be excluded from display post Brexit in certain European places.²² On the business side, while the ECB have warned before the UK vote on 23 June that the shock from Brexit to the Eurozone economy could be ‘significant’ and ‘difficult to anticipate’, it subsequently made a more gloomy forecast at their July meeting warning that Britain’s vote to leave the EU created what they coined ‘fresh headwinds’ for the Eurozone and could affect the world economy.²³ Clearly then, Whitehall needs to analyse these responses and, more important, understand what they mean for the negotiations ahead.

Secondly, like any negotiation, fundamentally, understanding what the other side wants to achieve, but crucially, how it is affected by the actual negotiation is as important as knowing one’s own position and bottom lines.²⁴ ‘Listen more than you talk’ is one prudent advice given by Chaffee who goes on to remind

us, what any beginner negotiator would have been advised to follow: ‘The best negotiators in my life had an innate talent of reading what was most important to the other side. Tactically, if you appreciate things from their perspective, you can decide whether to trade on big points early, or hold what you have identified as their hidden deal point. By holding, this hidden point becomes a lever to extract more at the end.’²⁵ Nothing that has happened so far suggests that this is occurring. If anything, anecdotal reports in the media suggest that the opposite is happening.²⁶ Likewise, one needs to appreciate that Brexit is not the only worry or uncertainty facing the EU at this point in time. For example, while the UK’s vote for Brexit has meant a new era of uncertainty for European banks, as a recent research note from Deutsche Bank highlights, it is far from the only problem the industry faces.²⁷

Thirdly, as was rightly pointed out recently, choosing the best trading relationship with the EU depends on how the rest of the world responds to the UK demands.²⁸ This response, however, will remain ‘unknowable until the UK formally launches the exit process by invoking Article 50 of the Lisbon Treaty. All that is certain is that if the UK is to make a success of Brexit, it will need to draw on vast reserves of global goodwill.’²⁹

Fourthly, it has been suggested that the mere possibility that the UK engages in fiscal and regulatory competition with the EU once it is out ‘is a powerful argument for the remaining EU member states to insist on either of two uncompromising outcomes following any triggering of Article 50: (a) the “Norwegian” one, i.e. membership of the EEA, which requires acceptance of the four EU freedoms and all EU rules without a say on their contents, or (b) no agreement at all.’³⁰ Clearly, this is not in Britain’s best interests.

Finally, there is a practical side to thinking about the EU now. If and/or when the UK leaves the EU, it will still have many interests in the EU, but would most likely lose its voice in making or influencing these rules and regulations.³¹ This means it would need to find new channels of influencing European policy and/or count on friends instead to represent its interests. But who might speak for it?³² According to analysis conducted by VoteWatch Europe of voting patterns in the EU institutions over the years, the Swedes, Danes and Dutch are the member states that have most steadfastly stood with the British in the Council of Europe.³³ More important, Sweden, the Netherlands and Denmark are also ‘the main promoters of decreasing the regulatory burden for EU businesses and for having stronger protection of copyrights. These pro-business member states will lose a key ally upon Brexit.’³⁴ This has a number of ramifications. First, there will be a shift in the power balance within the EU decision making framework with the vacuum left by the UK departure. Secondly, as illustrated by the latest VoteWatch Europe’s report on the future equilibrium of powers in the Council: ‘these three countries are not the strongest coalition builders in the Council, i.e. they find themselves in minority more often than other member states (especially the Netherlands). This means that, depending on the policy area considered, UK-reliant stakeholders will need to target also other countries in the Council in order to ensure a positive outcome for their advocacy activity.’³⁵ Finally, if these three countries are to be receptive to the claims and concerns of British interests then a lot of work needs to be done now to foster such a representative role. Friendships and alliances are built over years. They can be lost, however, rather quickly, in particular, if these EU members feel they have been betrayed by the British vote in losing a key ally.

More or less the same can be said about a potential post-Brexit alliance of the non-euro countries, where the UK might be able to capitalise on the non-euro countries' fear of Britain's departure from the EU, which will deprive them of a powerful ally and make them more vulnerable to potential pressures to adopt the euro, especially if further political and economic integration is seen as the best response to Brexit.³⁶

This leads to one final important point, that we can only briefly discuss here: we should not underestimate the extent to which the EU is divided about the way forward with Brexit (and the EU project), at this crucial juncture in modern European history. To quote the Guardian, 'the EU 27 do not share a vision of how to move forwards: some favour a tighter, more integrated EU, others a looser "variable geometry"; some want more investment to kickstart flagging economies, others greater competitiveness and tougher fiscal discipline'.³⁷ This means that 'what the UK decides it wants from Brexit may not be what it gets', as 'EU leaders have their own red lines and [their own] timetable'.³⁸ Similar levels of uncertainty exist within the UK government itself about the kind of relationship it wants from Europe. The lack of a pre-referendum master plan for Brexit, coupled with a Remain PM and a divided cabinet now handling this major operation, mean that despite the Referendum we are none the wiser about the future of Britain in Europe.

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Concluding thoughts

The irony of the foregoing discussion is, of course, that, as a result of the Brexit vote, the UK must now work more closely with Europe rather than on its own. That is if we take as a starting point that there is much to be gained from negotiating and establishing a good working relationship with Europe. One thing is clear: as much as the Brexit vote was a unilateral one, a one sided affair decided solely by the British people, making Brexit work is nothing but. For Brexit to be a success it has to be as much about the EU and its future shape and state, as it is about Britain post-Brexit. It is no longer a one-sided affair. Britain depends on regional and global goodwill. It is time the debate takes stock of this. It is time to listen to the EU developing narrative(s) post the Brexit vote.

Notes

- 1 This editorial was first published in International Corporate Rescue (see www.chasecambria.com), Volume 13, issue 5, 2016 and is reproduced with kind permission of Chase Cambria Company (Publishing) Limited.
- 2 The Institute of Fiscal Studies (IFS) has calculated that leaving the single market could cost Britain £70 billion a year. Not being a member, which is still a possible scenario, could see the UK lose out on an additional 4% of GDP by 2030, the IFS has said. That 4% is equivalent of two years' worth of growth, and equates to around £70 billion in today's money – or £2,900 for each household. The IFS added that the loss would outweigh the benefit of no longer paying in a net £9bn a year into the European Union budget. See, <http://www.independent.co.uk/news/business/news/brexit-economists-put-cost-of-uk-losing-european-union-single-market-membership-at-75bn-a7181376.html>, 9 August 2016; and the full report: <https://www.ifs.org.uk/publications/8411>, 10 August 2016. Similarly, it is reported that confidence among manufacturers has slumped since the UK's vote to leave the European Union. Manufacturers' average confidence score dropped to 5.24 after the referendum from 6.37 before the vote, the report from EEF <https://www.eef.org.uk/>, a manufacturing lobby group, and accountancy firm BDO indicated. The biggest fall in confidence was in London and the South East. See <http://www.bbc.co.uk/news/business-36912676> 29 July 2016.

- 3 D. Green, 'Brexit means Brexit – but in reality it's a long time away' *Evening Standard* <http://www.standard.co.uk/comment/comment/david-allen-green-brexit-means-brexit-but-in-reality-it-s-a-long-time-away-a3314616.html>, 9 August 2016 ('What's only just being realised is how deeply conjoined Britain is with the EU through laws in a host of areas' and 'Those wanting the UK to leave the European Union have won the referendum battle but it is still far from certain that they will win the Brexit war. The task before the UK is huge, and it may be that Article 50 is never invoked. If there is a Brexit, or a radical new basis for UK membership, this may have to be by an entirely new treaty.');
- J. Jones, 'Britain fails to understand the nature of globalisation at its peril', *The Conversation*, <http://theconversation.com/britain-fails-to-understand-the-nature-of-globalisation-at-its-peril-61392>, 5 August 2016 ('There remains great uncertainty in the aftermath of the UK vote to leave the European Union. Few seem to have a plan for what Brexit will look like and how the UK's relationship with the outside world will take shape.');
- J. Fittchen, 'Commercial disputes that cross borders will be a major headache after Brexit', *The Conversation*, <http://theconversation.com/commercial-disputes-that-cross-borders-will-be-a-major-headache-after-brexit-63623>, 8 August 2016;
- P. Ungphakorn, 'Nothing simple about UK regaining WTO status post-Brexit', <http://www.ictsd.org/opinion/nothing-simple-about-uk-regaining-wto-status-post-brexit> 27 June 2016. In the first Cabinet meeting after the summer break, Theresa May reassured the country, however, that there would be 'no attempts to stay in the EU by the back door'. See A. Asthana, 'Restricting immigration will be at heart of Brexit deal, Theresa May says', *The Guardian*, 31 August 2016, <http://www.theguardian.com/politics/2016/aug/31/restricting-immigration-will-be-at-heart-of-brexit-deal-theresa-may-says>. The mere fact that the PM needed to provide such reassurances reveals the level of division and uncertainty about the way forward and Brexit taking effect.
- 4 World News, Reuters, 'Britain's May tells ministers to work for Brexit success', <http://www.reuters.com/article/us-britain-eu-may-idUSKCN0ZY2RI> 20 July 2016.
- 5 P. Cruddas, 'Britain will thrive after it throws off the shackles of the EU', *The Telegraph*, 5 January 2016, <http://www.telegraph.co.uk/finance/economics/12083593/Peter-Cruddas-Britain-will-thrive-after-it-throws-off-the-shackles-of-the-EU.html>.
- 6 See, for example, S. Sjolín, 'What Brexit? UK recession cancelled after surprisingly strong data', <http://brexit.efinancialnews.com/what-brexit-uk-recession-cancelled-after-surprisingly-strong-data-d9ea177387b9#.f2nxw136b> 18 August 2016.
- 7 HM Government, 'The process for withdrawing from the European Union', February 2016, Cm 9216, at p. 17, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/503908/54538_EU_Series_No2_Accessible.pdf.
- 8 City of London, 'London: Europe and the world's financial centre', https://www.cityoflondon.gov.uk/business/eu-and-regulation/publications/Documents/london_europe_and_the_world's_financial_centre.pdf.
- 9 The EU Shareholders' Rights Directive <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0257+0+DOC+XML+V0//EN> appears to be similar, or as some argue even derived from, the UK Stewardship Code (introduced in the UK in July 2010) which is the first of its kind in the world. This shows the influence of the UK from 'within'. This Code seeks to encourage better dialogue between institutional shareholders and company boards. Given the UK market's role as a governance paragon, the code principles will be critical to practices of good stewardship taking root globally. See A. Reisberg, 'The UK stewardship code: On the road to nowhere?' (2015) 15(2) *Journal of Corporate Law Studies*, 217, and A. Reisberg, 'The notion of stewardship from a company law

perspective: Re-defined and re-assessed in light of the recent financial crisis?' (2011) 18(2) *Journal of Financial Crime* 126.

- 10 The Market abuse regime which has developed in the UK – and has longer history than in the EU – has influenced the shape, the form and substance of the new MAR which came into force on 3 July 2016. See, for example, <https://www.slaughterandmay.com/media/2535170/the-new-eu-market-abuse-regulation-an-overview-for-uk-issuers.pdf> January 2016 ('It bears many similarities to the UK's existing regime', hence suggesting the wide influence the UK had in shaping it).
- 11 D. Rosen, 'Europe in or out? A legal perspective', <http://www.brineurope.com/single-post/2016/06/02/Europe-In-or-Out-A-legal-perspective> 2 June 2016.
- 12 Britain in Europe, 'European human rights network urges EU institutions to continue to work towards legal aid directive', <http://www.brineurope.com/single-post/2016/05/06/European-human-rights-network-urges-EU-institutions-to-continue-to-work-towards-strong-legal-aid-directive> 6 May 2016.
- 13 The Royal Society, 'UK research and the European Union – The role of the EU in funding UK research', December 2015, <https://royalsociety.org/~media/policy/projects/eu-uk-funding/uk-membership-of-eu.pdf>.
- 14 See generally D. Giannouloupoulos, 'A powerful vision for Britain as a European leader – thank Gordon Brown for that', *The Conversation*, 14 June 2016, <https://theconversation.com/a-powerful-vision-of-britain-as-a-european-leader-thank-gordon-brown-for-that-61040>.
- 15 One Spanish newspaper, *XL Semanal*, put the following headline to an interview with Juncker and Schulz: 'Juncker and Schulz "Nosotros no somos culpables del "Brexit"'"', see <http://www.xlsemanal.com/actualidad/20160731/juncker-and-schulz-no-somos-culpables-del-brexit.html> 31 July 2016.
- 16 I. Hertner, 'Germany', in 'Brexit: global reaction to Britain's vote to leave the EU', *The Conversation*, 24 June 2016, <https://theconversation.com/brexit-global-reaction-to-britains-vote-to-leave-the-eu-61399>.
- 17 C. Jadot, 'Belgium', in 'Brexit: global reaction to Britain's vote to leave the EU', *ibid*.
- 18 D. Giannouloupoulos, 'Greece', in 'Brexit: global reaction to Britain's vote to leave the EU', *ibid*.
- 19 "Victoire", "leçon", "choc": les politiques français réagissent au "Brexit", *Le Monde*, 24 June 2016, http://www.lemonde.fr/referendum-sur-le-brexit/article/2016/06/24/victoire-lecon-choc-les-politiques-francais-reagissent-au-brexit_4957342_4872498.html#YmMmu00fhVd7bmaQ.99.
- 20 R Mertens, 'From gloomy to glad, Europeans respond to Brexit vote', *Financial Times*, 4 August 2016.
- 21 *ibid*. The Same survey found that non-EU countries are more lenient, with 39 per cent saying favourable conditions should be offered.
- 22 It was reported that the Palace of Westminster and a pub may be expelled from a Brussels theme park of miniature landmarks from every EU state. See, B. Goyder, 'Mini-Europe faces Mini-Brexit', <https://brexit.efinancialnews.com/mini-brexit-threatens-uks-position-in-mini-europe-fb37ab4f9a3b#.iwssk8y14> 22 August 2016.

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- 24 T. Chaffee, '5 Tips That Will Help You Negotiate on Just About Anything' *Fortune Insiders* http://fortune.com/2016/03/29/tips-help-negotiate/?xid=soc_socialflow_twitter_FORTUNE 29 March 2016.
- 25 *Ibid.*
- 26 See, for example, reports in the press that the new Department for International Trade, headed by Liam Fox, withdrew a press release after making some unexpected Brexit admission: <https://politicalscrapbook.net/2016/08/incompetent-liam-foxs-dept-deletes-press-release-after-making-big-brexit-eu-admission/> 13 August 2016.
- 27 T. Burke, 'European banks have more to worry about than just Brexit', <https://brexit.efinancialnews.com/european-banks-have-more-to-worry-about-than-just-brexit-89c20b749670#.u104clh3q> 22 August 2016. The brief note 'European banks: Recovery running out of steam?' is available at: https://www.dbresearch.de/PROD/DBR_INTERNET_DE-PROD/PROD000000000419199/European_banks%3A_Recovery_running_out_of_steam%3F.PDF 18 August 2016 ('The large European banks are increasingly struggling with an adverse external market environment and in their efforts to mitigate these negative effects. It is also becoming clear that weak results may not only be due to financial market turmoil at the beginning of the year or the Brexit referendum in the UK, but the outcome of other, more fundamental problems.').
- 28 S. Nixon, 'Brexit Success Hinges on Global Goodwill', *The Wall Street Journal*, <http://www.wsj.com/articles/brexit-success-hinges-on-global-goodwill-1470879250> 10 August 2016.
- 29 *Ibid.*
- 30 P. Eleftheriadis, J. Armour et al, Legal Aspects of Withdrawal from the EU: A Briefing Note (July 14, 2016). Oxford Legal Studies Research Paper No. 47/2016. Available at SSRN: <http://ssrn.com/abstract=2809285>. (This was triggered by a speculation that 'a likely outcome of Brexit is that, after withdrawing, the UK will lower corporate taxes and deregulate its economy to attract relocations from the Continent and elsewhere'.)
- 31 Unless the UK manages somehow to retain some influence over regulation of financial affairs, at least, after it left.
- 32 W. Hemmens, 'Once the Brits' seat at the EU is empty ...', <https://brexit.efinancialnews.com/once-the-brits-seat-at-the-eu-is-empty-9263dd11b39f#.i0gug7c21> 17 August 2016.
- 33 A. Goldis and D. Frantescu, 'After Brexit, Britain's empty seat at the decision-making table will be a blow to its interests', <http://blogs.lse.ac.uk/brexit/2016/08/16/after-brexit-britains-empty-seat-at-the-decision-making-table-will-deliver-a-significant-blow-to-british-interests/> 16 August 2016.
- 34 *Ibid.*
- 35 *Ibid.*
- 36 T. Barber, 'Europe's non-euro 8 fear consequences of Brexit vote', *Financial Times*, 21 July 2016.
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- 37 J. Henley, 'What the UK decides it wants from Brexit may not be what it gets', *The Guardian*, 31 August 2016. See also P. Papakonstantinou, 'Uncertainty on both sides of the Channel', *Kathimerini*, 28 August 2016 (in Greek).
- 38 *Ibid.* See also Reuters, 'UK must pay for Brexit or EU is in "deep trouble", says German minister', *The Guardian*, 29 August 2016, <http://www.theguardian.com/politics/2016/aug/29/uk-must-pay-for-brexit-or-eu-is-in-deep-trouble-says-german-minister>.
- 39 See e.g. A. Asthana, 'Theresa May calls Brexit meeting amid reports of single market split', *The Guardian*, 28 August 2016, <http://www.theguardian.com/politics/2016/aug/28/theresa-may-brexit-meeting-single-market>.





THE UK'S DEPARTURE FROM THE EU MAY BE A MATTER OF IMPRESSION

Sir Geoffrey Nice QC

The UK's departure from the EU may be a matter of impressions. The impressions left by proponents of one side or another of the so-called debate, not their arguments, which few could properly comprehend and that were often wildly overstated.

Impressions some have encouraged – however *sotto voce* – that a country of white native English speakers is a paradigm to which 'Brits' should incline, despite the multi-national, multi-cultural nature of our island being the product of our often abusive colonialism of the past and of well-intended EU treaties signed with consent of UK voters over the last 40 years.

Impressions – dangerous impressions – that the sometime indigenous population of this once white nation is better than the rest of Europe (perhaps the world) and entitled to protect that inherent good fortune by barriers against those born on the same planet less fortunate than they.

Impressions that as legislators we are superior to law makers of the treaty-based organisations we have joined and whose laws we have helped to form and interpret.

The impression that the Conservative Government needs no BREXIT plan to succeed and needs show no generosity of spirit to any other nation - unhappily these impressions may become cauchemars if our neighbouring continent bars us from its economic, security, and cultural harbours.

Impressions gaining clarity - even from Conservative ministers - that EU law, so reviled in the arguments advanced to persuade people to vote for BREXIT, should now be approached more sympathetically as on analysis there are few identified EU laws that require immediate destruction. And, yes, EU law *did* do much for workers' rights and the environment. But now that we are leaving the EU there is no need any longer to deny this, or falsely to vilify EU law quite so comprehensively. EU laws as bogie men are in retirement.

One final - for the present - but critical impression comes from those who voted Remain but who seem willing *now* to accept that Brexit will happen and that it would be wrong any longer to resist it, in the courts or elsewhere. Strange how weak or fair-minded they are in the face of a referendum result obtained in part by deception through an election process that could never attract any assessment of fairness if measured by pious international election monitors. The frank but effective lies by BREXIT campaigners would have monitors condemn the vote as unfair, just as they would if they found such effective lies in any former Iron Curtain country seeking respectability through the ballot box.

The Referendum result will always be vulnerable to well founded attack when analysed by future historians or politicians. They may well see this defining event as the very worst, or the very best, of times for whatever remains of the UK. But may they also be able to establish, as already suggested, that visible to voters behind even the best of Remain arguments was the indelible impression of a privileged class that needed a kicking and that referenda allow kickings to be delivered? May this explain why Remainers now feel guilty, if some do? And if that is so is it because the only arguments Remain dared voice loudly were those of palpable financial self interest, quite as important for the kickable class as for those kicking?

Might 'Remainers' have been more determined *now* to fight for what they actually want if the Remain argument had focused on the unvoiced proposition that it is good - better or even best - to share things with your neighbour unless there are good reasons not to, regardless of *precisely* how much is got out of the act of sharing and by whom?

I don't especially like or dislike the people of the village where I live; but I am glad to be part of their community and to know that they are part of mine.

I hold no strong affection or disaffection for the people in the nearby City; but it feels right to be part of their community and for them to be part of mine.

Likewise with the county, and the neighbouring county and with Scotland and Wales and Northern Ireland.

I really don't dislike the French or feel too passionately fond of them. There are plenty of things in France to like and few to dislike; just as here. But I am – or was – really thrilled to be part of their community and to have them feel they were part of mine.

And so on for Belgium, Netherlands, Germany, Greece.

I, like the many who had tears on their faces or in their hearts on 24th June, were not counting losses to come from a falling pound or the sadness of knowing they might soon hear only English in shops. No. They felt – and after 40 years of slowly getting closer to other Europeans can be excused for feeling – that they *had* been part of a family of neighbours; but were no more.

For them – us – privileged or liberal as many were and are, there was the shock realisation that the concept of being a good neighbour was not one shared by others in the land.

And now that the neighbourhood dream is behind them and us, we have to live in this narrower family, the one that may restore to our doors modern 'virtual' versions of signs that disfigured our national personality in the 1950s when people of colour or even of Irish descent could be barred from housing and jobs.¹

These and other impressions will shrink onto a narrative of changes to date and changes to come with which we must all live. It will be a narrative that will blame Europe if things turn out badly for the UK and that will allow the UK to condemn Europe if things turn out well. The collective national psyche will never accept blame or responsibility but will luxuriate in the arrogance of exclusion, especially if, improbably for now, the pound and personal wealth all rise. Having left a club all the other members of which wanted us to stay in we will surely not show the club generosity of spirit – or of cash – if we do better than they do. This is divorce on grounds of unreasonable behavior – but the unreasonable behavior is the UK's, and that in itself will shape the way we approach all others for a very long time to come.

What are the main challenges for law and lawyers of this narrative?

Setting aside the role of lawyers in arguing the rights of Parliament over Article 50 or over the final terms of our departure, once out of the EU there will be no EU law for us to discuss. There will be a UK replacement of those laws and maybe a UK Bill of Rights inevitably tracking the major international instruments defining human rights. Arguments by lawyers on individual cases will then turn to Europe for *guidance* at best, not direction, not much different from the way the ECHR has been turned to to date and in practice not that different from EU law where the limited number of direct conflicts between EU and UK law have led to resolution by compromise, however expressed.

But lawyers will be operating in a new environment where the supremacy of international human rights norms can not be so easily taken for granted and if – in our country or elsewhere – it becomes acceptable to slip back from today's liberal norms – for economic, ethnic, cultural, demographic reasons – then lawyers may have to confront our state more directly than has been their responsibility to date. And if the UK state were to need compliant lawyers to do its work that might by today's standards be thought

unworthy, it would have no trouble finding them. Look no further than the Nuremberg Laws or the Nazi's Final Solution to The Jewish Question to discover how biddable lawyers are never hard for a powerful state to find.² There may, of course, be a short term surge of cases involving rights of Europeans living and working here and of cases involving the rights of UK citizens living abroad in circumstances straightened by a falling pound and – perhaps – no access to free health care.

All of this will be good for lawyers and their incomes; and the work will be interesting. However, the real difference for lawyers in the mid- and long-term will be that they will be working in an environment where exclusion from Europe, its laws and learning will be a norm and where full collaboration with European law will be barred. Of course bodies of lawyers may continue fraternal association with European lawyers just as they do with lawyers in the US, Malaysia and even China. But that will not be collaboration of the kind brain surgeons may enjoy – to the benefit of their patients – if they share knowledge, experience or techniques with other brain surgeons from neighbouring countries. Sharing of thinking and judgment by European judges since WWII in both the ECtHR and then the EU Court of Justice is very similar to the sharing of knowledge and understanding by other professionals, and with the same likely benefits. Judges – like brain surgeons – need not be good people though it is better when they are; but they are people sharing a common objective and the objective was never to create a supranational dictatorial state but to work through legislation forged by a covenant on Human Rights (for the ECtHR) and by the EU's constituent members through the Commission and Parliament for the common good.

And if other countries – especially European countries – move to political positions that today's derided liberal elite will regard as illiberal and extreme there will be no external, but also no internal, brake on our country copying their exclusionary tendencies and moving in the same direction, to keep out more of those we apparently do not want because they do the jobs we are not willing or able to do ourselves. How easy will it be for lawyers – still on the 'light side' – to fight against illiberal changes in such a state is impossible to know. Derided though the liberal elite may now be, much though their intellectual and other arrogance may have been a partial cause of the BREXIT vote, their ideas may be right and what we should still have as part of a slowly forming rainbow of enlightenment.

In a public debate before the death of Jo Cox I was criticised for raising, however gently, the risk of violence the BREXIT debate was bringing. The subsequent death of that young MP can tell us much of what lawyers may have to face in the new, hard post-BREXIT – post 'hard BREXIT' – world. The parliamentary debate about her death *could* reasonably have assumed that extravagance of language in the public BREXIT debate was itself freeing hate – in people of all kinds and perhaps in her killer – and that those using strong BREXIT argumentative language might have been in part responsible for the death. There was, as I could hear, no acknowledgement of such responsibility. And immediately after – or was it immediately after the referendum result itself – Cameron was back joking and charming, with jolly jibes at his opponents, manifesting the brilliance our parliamentary system, 'oldest and best in the world' as we are foolish enough to boast. But our system, no different from others, does not save us from the the universal truth that societies move quickly to be where the power within society will want them to be. Jo Cox and Arkadiusz Jóźwik – slain in Harlow Essex – are arguably the first products – the first *impressions* – of the *stamp* of our new exclusive nation.

The Jo Cox debate showed how quickly culture can change and the culture of exclusion without responsibility will be upon us soon. It is in this culture that lawyers who do not choose the dark side will have to show that the rule of law was worth the fight.

Notes

1. Accurate recall of earlier times sometimes becomes controversial for calculated, 'instrumental' reasons. For example, it has recently been argued that there can have been no signs in the 1960s by landlords saying: 'No black, no Irish'. One way of discovering where we have come from and how we changed is by viewing old films that cannot really lie about things they take for granted – so see, for example, a Ted Willis scripted film starring John Mills called 'Flame of The Streets' made in 1961 that reveals how we were then as a nation confused about race if not actively prejudiced. The nearly optimistic conclusion of the film fits with how we have moved from that unacceptable position to where we were or are. But a reverse is simply all too easy to contemplate, sadly.
2. Two thirds of those sitting round the Wannsee Conference table in January 1942 when the 'Final Solution of the Jewish Question' was resolved were lawyers, many educated to the doctoral level.



BREXIT: SOMEONE HAD BLUNDER'D/ALL THE WORLD WONDER'D¹ OR HAILSHAM'S PROPHECY

Scott Crosby²

Forethought

The doctrine of parliamentary sovereignty is not regarded by all as sacrosanct. It has been described by the Scottish courts as a distinctively English doctrine with no equivalent in Scottish constitutional thinking or practice.³ It was also, as may be better known outside Scotland, openly questioned by Lord Hailsham, a former Lord Chancellor, who declared in the Dimbleby BBC lecture in 1976⁴ that he had

reached the conclusion that our constitution is wearing out. Its central defects are gradually coming to outweigh its merits, and its central defects consist in the absolute powers we confer on our sovereign body, and the concentration of those powers in an executive government formed out of one party which does not always fairly represent the popular will. I have come to think that (...) none of the reforms which I have examined (...) is adequate, by itself, to redress the balance. And I suppose I now owe it to you to give some indication of which might suffice, and how it might be achieved.

I envisage nothing less than a written constitution of the United Kingdom, and by that I mean one which limits the powers of Parliament and provides a means of enforcing these limitations both by political and by legal means.

Lord Hailsham foresaw the possibility that some event would occur which would effectively necessitate the change he called for. He had a hunch, as he put it, that circumstances in the not too distant future would “force our hand”.

The proposition addressed here is that Brexit is that event or is one such event.⁵

Preliminary

The current disorientation of the British Government as to how to leave the EU is due to two immediately identifiable factors: the negligence of the previous government and the inadequacies of the British Constitution.

It was negligent to hold the referendum without an exit plan.

The inadequacy resides in the fact that the constitution contains no rules on referenda, so that it was constitutionally unnecessary to have an exit plan before the vote. By like token it was not legally necessary to conduct a thorough and profound analysis of the implications of leaving the EU and to lay the results thereof before the electorate well in advance of polling day. In the result the analysis that should, even without legal necessity, have taken place before the result was known, is taking place after the event.

That said, the result is incomplete. The electorate has voted that the UK “should” leave the EU. It has not voted on the conditions appropriate to leaving. In current parlance the electorate has not chosen between hard and soft Brexit, because the question was not put to it.

There is then a third factor. It is that the Brexit referendum was not organised to promote the public interest of the United Kingdom, but to serve the private interest of the Conservative and Unionist Party in general and of the then Prime Minister in particular. The referendum was therefore based on a false pretext if not on a misuse of office.⁶

This contribution looks at but a few of the issues that should have been examined and debated before the referendum and, given the almost existential crisis caused by ignoring them, concludes that the British Constitution has been revealed as inadequate and must now be modernised.⁷

EFTA/EEA

The UK could ask to re-join the European Free Trade Association (EFTA) under Article 56 of the EFTA Convention. Admission would be at the discretion of the current members. They would have to weigh UK domination of the EFTA against the benefits that UK rejoining might bring and in particular an increase in the EFTA population from 13 to 77 million and the attendant increase in EFTA’s importance. But fear of domination could prevail, especially if the UK and Norway had different views on trade and British power were seen as a threat to Norway’s aspirations.⁸

Once, or if, back in, the UK would have the option of contenting itself with the free trade arrangements between the EFTA states, but having, like Switzerland, to negotiate bilateral deals with the EU and third countries on its own, without having any control over the outcome.

Otherwise the UK could then adhere to the EEA agreement. This would give it access to the internal market, but it would be subject to the jurisdiction of the EFTA Court and the UK would have to respect the rules, including free movement, without being able to vote on them. There would, therefore, be a loss of control and no discernible advantage.

In addition, the EEA was set up to enable its non-EU members to join the EU. That is still its aim and that aim may yet be met. So joining the EFTA/EEA is not a stable proposition, long term. It might even lead to the UK's applying to rejoin the EU.

WTO and Trade

In or out of EFTA or the EEA, the UK would be out of the Customs Union and would thus have to re-establish itself as an individual member of the WTO. In practice this would mean unbundling its membership from EU membership of the WTO. Re-establishing the UK's WTO status as an individual member would mean that the UK and the EU would have to negotiate with each other to establish a common front and the UK would then have to face the 163 other WTO members to settle their respective new membership terms. Each WTO member, including the EU, could delay agreement on these terms.

Adjusting the UK's terms of membership would be hard enough. Negotiating individual trade agreements with multifarious other members, who would prefer to be dealing with the EU, and may wish to exact concessions, would be a herculean task of uncertain duration and outcome.

Northern Ireland and Gibraltar

The frontier between Northern Ireland and the Republic of Ireland would become an external EU frontier on Brexit.

As a result the frontier would have to be controlled.

As regards the movement of persons, the UK has been saying that it wishes to retain the Common Travel Area. This would not be within its exclusive power. The operation of the external frontier is a matter for the EU.

As regards people there would have to be restrictions on persons entering Northern Ireland from Ireland, so that the UK could control immigration. Movement in the opposite direction would be governed by external frontier rules. They would presumably have to make a distinction between UK nationals and EU nationals, because to treat them all alike would contain an element of discrimination.

As regards goods, there could be no preferential treatment for goods entering Ireland from Northern Ireland.

Brexit would, in terms of goods, divide Ireland and place the internal Irish frontier under the jurisdiction of the EU. In terms of persons hard Brexit would lead to controls in both directions.⁹

The position of Gibraltar is somewhat different, because the common customs tariff has never applied to it. Consequently in terms of goods the Spanish-Gibraltar frontier is already an external EU frontier. The problem arises in respect of the free movement of people, vital for the Gibraltar economy. Hard Brexit would give rise to border controls in both directions in terms of persons.

The solution Spain offers is joint sovereignty, leaving Gibraltar in the EU, but ceding any sovereignty is not acceptable to the UK and not to the majority of Gibraltarians either.

There is no discernible advantage for the UK in any of these scenarios.

Scotland

Article 29 (2) (d) of the Scotland Act forbids the Scottish Parliament from enacting any legislation that infringes EU law. EU law thus constitutes a limit on the competences of the Scottish Parliament. UK withdrawal from the EU and the disapplication of EU law in the UK would thus alter these competences. The Sewel Convention provides that where Westminster intends to legislate on any devolved matter it must consult the Scottish Parliament and may not act without its consent. This mechanism is construed as extending to matters affecting the competences of the Scottish Parliament.¹⁰

In view of the doctrine of parliamentary sovereignty, which is given express, if otiose, expression in Article 28 (7) of the Scotland Act, a withholding of consent by Holyrood may be overridden by Westminster. Infringing the Sewel Convention would consequently not invalidate a Westminster act, nor conflict with Article 50 TEU, but would draw the teeth of the Convention. Disregarding the Sewel Convention in these circumstances would diminish Westminster's authority in Scotland.¹¹ A rough wooing is thus not likely to secure the unity of the UK, so overriding Scotland may contribute to reconstituting Scottish statehood.¹²

The Belfast or Good Friday agreement

Brexit has potentially more immediate consequences for Ireland, North and South.

Peace in Northern Ireland was sealed by an international agreement between the UK and Ireland, the Good Friday Agreement. The Preamble of the Agreement proclaims the wish to develop close cooperation between the two countries "(...) as partners in the European Union".

Clause 17 of Strand Two of the Agreement, on the North/South Ministerial Council, provides for cooperation on the EU dimension "of relevant matters". Clause 5 of Strand Three on the British/Irish Council provides for common "approaches to EU issues". In addition the assumption underlying and underpinning the whole agreement is that both states are members of the EU. This is particularly evident as regards human rights, where the right to freely choose one's place of residence is proclaimed, a right applying to both North and South and thus relying on the free movement principles of EU law.

The parties pledge in the Declaration of Support that they will "in good faith, work to ensure the success of each and every one of the arrangements (...) under this agreement".

Brexit would be a unilateral abrogation of that commitment. Brexit thus risks prejudicing the peace the UK pledged to protect and promote.

Article 50

Article 50 provides that once notice of the intention to withdraw has been given a withdrawal treaty has to be negotiated and finalised within two years. This period is extendible, but only with the unanimous consent of all remaining states.

The safer view is that once the process has started, exit, with or without agreed terms, is inevitable because withdrawal negotiations may not be aborted.¹³ So, “once the button is pushed there’s no runnin’ away”.¹⁴

What is not established is who may initiate the Article 50 process.

The government claims that it alone has this power, under what is termed the royal prerogative. There is no questioning the existence of this prerogative, but there is every need to test its use in matters of such monumental significance as leaving the EU.

After all if Parliament is, as it claims, sovereign, it cannot let the government make this sort of vital decision on its own, because if it did relinquish control at this point Parliament would remain a powerless by-stander for the rest of the Brexit process.¹⁵

There is therefore a dilemma. If, on the one hand the royal prerogative were used, Parliament would have no control over the momentous issues at stake. If on the other, the royal prerogative were declared inapplicable – the purpose of the pending legal challenge by Gina Miller and others – then the government would have to negotiate under the scrutiny of and subject to censure from a parliament, the majority of whose members are, apparently, against leaving the EU.

It cannot be entirely excluded then that Article 50 will not be invoked. That would alienate the 52%. Arguably that would be a lesser evil than Brexit and it would certainly avoid the problems Brexit would cause, but Parliament’s credibility and authority would be seriously damaged and its ability to control the country seriously impaired.

Constitutional questions

The Brexit issue thus starkly exposes the inadequacies of the British Constitution.

The only fundamental principle in the British Constitution is that of parliamentary sovereignty. Any other so-called constitutional rule, or indeed any rule whatsoever, may be repealed or altered at Parliament’s discretion.

As a consequence, the British Constitution recognises no other rights as fundamental – not even rights under the ECHR nor, indeed, rights exercised in good faith under the EU Treaties¹⁶ – and contains no rules on the holding of referenda, even referenda on significant constitutional changes, such as leaving the EU.

It is the very lack of constitutional rules that made it possible to hold the Brexit referendum without proper preparation and in particular without knowing in advance the answer to the “what if” question.

This could not have happened under a constitution providing for essential safeguards amenable to judicial control by a constitutional court.

Que faire?

To borrow the phrase of John Stuart Mill, it is time for the country to escape from its “own little mental orbit”¹⁷ and adopt a modern constitution including entrenched rules on referenda, especially where adherence to international treaties is at issue. This would salvage something progressive from the “train wreck”¹⁸ of Brexit.

In sum, whilst the Constitution works when there is strong and responsible government, Brexit proves it does not work when, as here, the opposite is the case. In stark terms the Constitution affords no protection against abuse. Brexit thus forces our hand.

Notes

1. Alfred Lord Tennyson, *The Charge of the Light Brigade*.
2. Solicitor, Scotland, Avocat, Brussels; my thanks go to all those who have commented on earlier drafts of this short paper.
3. For example, *MacCormick v Lord Advocate*, 1953 SC 396, per Lord Cooper; see also Walker, ‘The Union and the Law’, *Journal of the Law Society of Scotland*, 18 June 2007.
4. <http://www.crecib.fr/wp-content/uploads/2013/10/Dossier-Prunier.pdf>
5. Another being the threatened withdrawal of the UK from the ECHR, see Dominic Grieve QC, ‘It may be time to consider a written constitution’, *Solicitors’ Journal*, 4 March 2016; his full lecture, given to BiE on 21 March 2016 may be watched on <http://www.brineurope.com/single-post/2016/03/21/Former-Attorney-General-warns-of-ramifications-from-leaving-the-ECHR>.
6. A campaign has been started to prosecute dishonest politicians for misconduct in public office ; see James Blitz, ‘Brexit Briefing : Remain’s Day in Court’, *ft.com*, 19 July 2016.
7. The need for modernisation obtains whether or not Brexit actually takes place. The current crisis is a spur for reform – the crisis could and should have been avoided. In addition, the UK has never tried to identify itself by adopting a constitution.
8. One reason for Norway’s termination of the union with Sweden in 1905 was that the two countries had different trade policies and that Sweden was in charge of foreign policy to the frustration of Norway.
9. John Bruton concludes in his article ‘Peace and Prosperity in Ireland are Threatened by Brexit’ that “Brexit will (...) devastate trade flows, and human contact, within Ireland, with incalculable consequences, something which seems hardly to have entered the minds of most UK voters on June 23”, *ft.com* 15 September 2016.

10. See: www.gov.scot/About/Government/Sewel/KeyFacts.
11. Not least because the Sewel Convention was put on a legislative footing by Section 2 of the Scotland Act 2016.
12. Nor would a settlement whereby Wales and England left the EU but Scotland and Northern Ireland did not, the so-called "WEexit"; see The Scotsman, 24 August 2016, <http://www.scotsman.com/news/opinion/peter-sellar-and-john-bell-will-wales-and-england-go-for-weexit-1-4211929>
13. In formal legal terms this is debatable, although to retract a withdrawal notice mid-course might not be acceptable politically; see the opinions of Sir David Edward QC and Professor Derrick Wyatt QC in House of Lords European Union Committee, 11th Report of Session 2015-16, In agreement, Jean-Claude Piris, Article 50 is not forever and the UK could change its mind, FT, 1 September 2016; In disagreement, The Process of Withdrawing from the European Union, 4 May 2016; Constitution Unit, University College, London What Happens if we vote for Brexit? 19 January 2016; Also in disagreement, Professor Steve Peers, EU Analysis, Article 50: The uses and abuses of the process of withdrawing from the EU, 8 December 2014; Also in disagreement, European Parliament Briefing Note, February 2016, PE 577.971; In its 4th Report of Session 2016-17 the House of Lords Select Committee on the Constitution, 'The Invoking of Article 50' states as follows: "It is unclear whether a notification under Article 50, once made, could be unilaterally withdrawn by the UK without the consent of other EU member states. In the light of the uncertainty that exists on this point, and given that the uncertainty would only ever be resolved after Article 50 had already been triggered, we consider that it would be prudent for Parliament to work on the assumption that **the triggering of Article 50 is an action that the UK cannot unilaterally reverse.**"
14. Barry McGuire, The Eve of Destruction.
15. For corroboration see: Dr Andrew Blick & Richard Gordon QC, 'Using the Prerogative for Major Constitutional Change: The United Kingdom Constitution and Article 50 of the Treaty on European Union', Constitution Society Paper, 19 July 2016, www.consoc.org.uk
16. It is estimated that the acquired rights of 5.2m EU citizens would be abrogated on the UK's withdrawal from the EU, see Crosby, Brexit: 'The Human Dimension and Demos', NJECL Volume 7, Issue 3, 2016.
17. J. S. Mill, 'On Nationality as Connected with Representative Government', in 'On Liberty and Other Essays', OUP 1991, p. 431.
18. See Professor A.C. Grayling's open letter to Theresa May in The New European, n° 18, 9-15 September 2016.



BREXIT AND HIGHER EDUCATION

Andrew George

Higher Education is one of the success stories of the UK, with our university system attracting students from around the world, and carrying out world beating research. On nearly any international league table or metric the UK university system comes first or second to the USA. It is a valuable export in its own right, being worth around £10.7b in export earnings.¹ Overseas graduates of the UK, with their knowledge of, and sympathy for, the UK offer considerable ‘soft power’ for the UK when trading or collaborating with overseas markets. Furthermore, the research that is carried out in our universities, and the skilled graduates that they produce, is a necessity for the UK economy that has to be based on innovation and high value industry if it is to thrive in a post-Brexit world. Therefore consideration of the impact of Brexit on higher education is of the first importance, and we need to develop strategies both to mitigate the risks of leaving the European Union (EU) and also to take advantage of the opportunities that will be available to a UK that is no longer part of a single EU.

Undoubtedly leaving the EU will impact on the education we provide in universities. The debate is dominated by two things; student numbers and student mobility. However, other factors are also important; the high proportion of non-UK EU staff (nationally 10.7% of professors, 13.6% of senior lecturers²) in our university sector provides, together with staff from outside the EU (7.1% of professors

and 10.1% of senior lecturers), an important enriching element to our education. This contributes to the internationalisation of our education offering, ensuring that all our students are exposed to a global perspective. In addition our educational offering is inseparably intertwined with the research that we do, as our students are taught by staff who are involved in extending knowledge and applying it at the highest level (and students often contributing themselves to research). Therefore anything that impacts on our ability to carry out research will also impact on our education. In this paper I will concentrate on the impact of Brexit on student numbers and mobility, as well as wider issues around how the referendum exposes issues in our education provision that need further consideration by the sector.

In 2014/15 there was a total of 124 575 non-UK EU (for simplicity termed EU students henceforth) students studying in the UK,³ 78 350 on first degrees, 14 280 on research degrees and 31 945 on postgraduate taught degrees.⁴ This represents around 5.9% of total student body. EU students are estimated to be worth around £3.7b to the economy, resulting in 34 000 jobs.⁵ It is worth contrasting these figures to the 312 010 international students from outside the EU (89 540 from China alone).⁶

However, EU students are not spread evenly across the sector or disciplines. The percentage of EU students in different institutions varies from 0% to as high as 25%, with some of our more prestigious universities (Imperial College London, LSE, London Business School) having relatively high proportions of EU students.⁷ Interestingly, some of the arts based universities, such as the Royal College of Art and the Royal College of Music, also have a high proportion of EU students. If there is a reduction in students coming from the EU then different organisations will have different risks, based on their exposure to that market as well as the reputation of the institution.

This differential risk also applies to different subjects. There are some areas that have a lower proportion of students from the UK. Business and Administration attracts just 61.6% of its students from the UK, Engineering and Technology 66.9%, law 73.7%, mathematics 78.4% and computer science 79.6%.⁸ Within these broad bands there are more specialist areas that are very reliant on international students (both from within and outside the EU), because UK students do not wish to study these subjects. A loss of overseas students may risk our ability to deliver programmes in areas of strategic importance to UK industry.

It is of interest to contrast the number of students who come to the UK with the number of UK students who study abroad. Accurate figures are hard to come due to differences in definition, but a UNESCO report suggests that in 2014, 27 377 UK students studied abroad, with the USA being the most popular destination, followed by France, Ireland and Australia.⁹ Indications are that the number of UK students studying overseas is increasing, though from a very low base. This has to be welcomed as it increases the choice and opportunities for UK students to develop a global perspective.

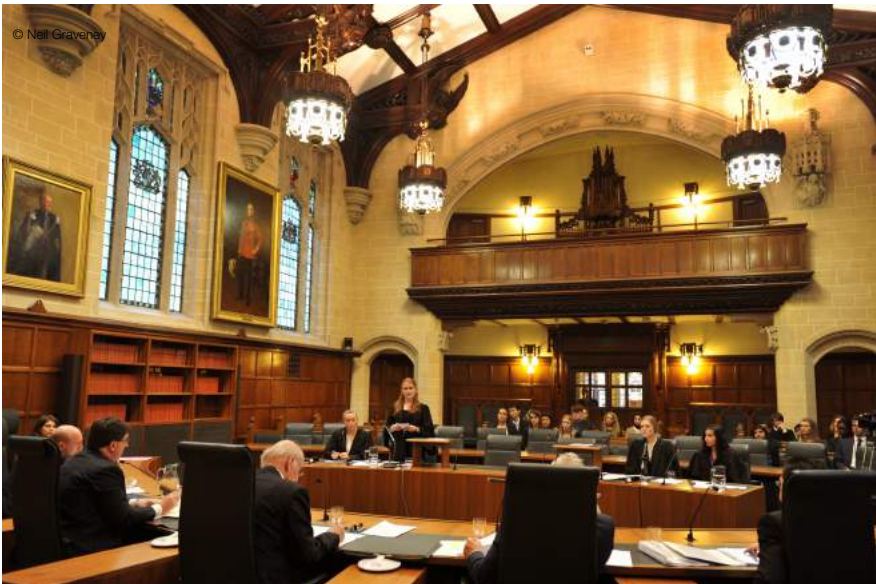
Student mobility is an important part of education. It allows students to spend some time abroad studying at another university or institution as part of their studies in their home university. This can be of particular importance for some disciplines (such as modern languages), but also exposes all students to new ways of thinking, working or studying. In the EU student mobility has been funded by the Erasmus Programme since the late 1980s. In 2014 this became part of Erasmus+. Historically, more students have come to the

UK on Erasmus programmes than have left the UK to study in Europe. Pleasingly, in recent years the number of students from the UK wanting to take part in the programme has increased, in 2013/14 15 610 students went from UK universities to participate in the Erasmus scheme, up 6.8% on the previous year.¹⁰ This compares to 27 410 who came to the UK. This is approximately ten times the number going the USA on similar short term programmes, indicating the importance of the funding and the networks provided through Erasmus.

What will the impact of Brexit be on student numbers and mobility? Until there is clarity about what a post Brexit world will be, it is not possible to predict with any certainty. At present EU students can study in UK universities at the same fee as home students, and can access student loans. The recent government announcement provides welcome short term certainty that this can continue for students who start their studies in 2017/18 academic year.¹¹ However, it is almost certain that these favourable terms will not persist after Brexit. Will this result in UK universities losing 100% of their EU students? That is unlikely, we attract good students from around the world so we will continue to attract some EU students. However, the numbers will fall, especially as most European universities charge considerably lower (or no) fees and are increasingly providing high quality courses delivered in English. The impact of a drop in EU students in the UK will depend on the subject and institution concerned.

In terms of Erasmus+, it is possible that the UK will continue to participate in this programme to encourage student mobility. There are 33 countries participating in Erasmus, including the non-EU states Turkey, Iceland, Norway, Liechtenstein and the former Yugoslav Republic of Macedonia. It is possible that the negotiations will allow the UK to remain part of this programme. However, the EU suspended Swiss participation in Erasmus after Switzerland's referendum introduced quotas for EU immigrants.¹² Therefore,

our participation will depend on the terms of Brexit.



Brunel Law School students - from the UK, the EU and beyond - in a mock trial at the UK Supreme Court (May 2015)

So far I have emphasised the practical issues around Brexit for the education that UK universities offer. However, perhaps of greater importance is the impact that it could have on our international and global outlook. Universities in Europe have their origin in being international; the first surviving European university at Bologna had its origins in mutual aid societies of scholars, called 'nations' (grouped in nationalities).¹³ They were

founded for protection of the students from collective punishments on foreigners for the crimes and debts of their countrymen. They hired scholars from the city of Bologna to teach them. After a time the nations started to associate together to form a universitas – which became the university. Thus internationalism and collaboration between countries is at the very heart of universities, and indeed is embedded in the very name!

This international outlook is essential for high quality university education (and research). Universities need to be open to the best ideas and knowledge wherever they come from. The ability to collaborate and communicate with people from around the world is an essential skill of any academic. There is a danger that Brexit could drive the UK to be inward looking and closed to the outside world. That would be to the detriment of our universities and the education we offer. We have to ensure that the universities help the UK to develop a different view, one that remains after Brexit to be open and engaged with any country in or outside the EU. The universities should be an important part of helping the UK, admitting students and staff from around the world based on their talents, skills and knowledge and unrestricted by geography. This means engaging with the government to demonstrate the advantages to the UK of bringing in skilled academics, and students who will benefit from a UK education.

We also need to continue to actively engage in the skills agenda. There is a strand in current government rhetoric which values self-reliance in training a skilled workforce, with a reduced dependency on talented immigrants. In some areas, such as medicine, universities will be able to expand their provision to train more UK students, as there is a demand for places on such programmes. However, in other areas there will need to be collaboration between universities, government, industry and schools to develop a pipeline of students who want to take those programmes.

Universities are good at forming research and education partnerships with institutions in other countries. In the next few years we will need to work harder to develop and maintain bilateral relationships with EU universities. We should take greater advantage of European university networks such as YERUN¹⁴ or LERU¹⁵, so that we continue to work closely with universities who will continue to be important and valued partners.

The final response is to examine some of the wider lessons of the referendum. One of themes of the debate both before and after the 23rd June was a rejection by a large group in the country of the values that are central to universities. These include a belief in the benefits of globalisation, collaboration across boundaries and the free exchange of ideas and skills. This is not to say that everyone who voted to leave rejected those values, but a large proportion did. Universities need to consider how they have become separated and irrelevant to so much of our country, and think of how to respond to this. They need to work out how to listen to the wider communities that they are members of, and fulfil their role in the wider education and enrichment of society.

In summary, universities face a range of practical challenges in education (and research) post Brexit. Some of these are acute (including how to support and recognise their EU staff), others are more long term. The magnitude of some challenges will not be clear until the direction that Brexit will take is known. However, universities need to make a success of whatever the outcome is, contributing both through research,

through producing skilled graduates and to ensuring that the UK remains a country that is confident and keen to engage with the rest of the globe.

Notes

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THE FINANCIAL IMPLICATIONS OF BREXIT

Tim Boag

Following the Referendum on 23rd June, the longer term impacts on finance in the UK remain uncertain, the terms of Brexit are not yet known however the general view is that there will be challenges and opportunities for the UK and we will need to adapt.

Just three months on, sterling has depreciated by 12% on a trade weighted basis, input cost inflation has increased by 6% which could feed through into profits impacting investment and demand for finance.

NatWest is the leading bank for many businesses across the UK, so it is important that we understand these factors and their impact on our customers. The effects of depreciation are that imported materials become more expensive for UK companies, increasing costs, while UK companies' goods and services become cheaper overseas. The combined effect on our customers will depend on the mix of import costs and sales overseas. By comparing import content with export content across business sectors, the beneficiaries are largely in the service sector with manufacturers likely to be the most adversely affected.

Demand for finance is influenced by confidence leading to investment. Larger companies have a big influence on investment which feeds through to the whole economy. A recent survey of the Chief Financial Officers (CFOs) of the largest UK companies undertaken by Deloitte indicates that CFOs are cautious in allocation of capital and taking on risk. CFOs expect investment to reduce over the next three years with

cost reduction and building up cash being key priorities. Two thirds of the respondents believe that Brexit will lead to a more challenging UK business environment.

However, some opportunities will emerge in the UK for overseas investment where the UK is seen as “good value” because UK assets have become cheaper to overseas buyers. This will attract investment as the UK has become more attractive for Mergers and Acquisitions.

NatWest's experience since the Referendum indicates that some large deals paused at the beginning of the Summer but a number have or are now moving forward to completion. Most small businesses cannot afford to wait too long for details of the outcome and are carrying on with running their day to day business, looking for opportunities, and the demand for finance in this segment has been sustained over the Summer. Moving into 2017, the effects are less clear with the IMF forecasting a downward movement in GDP for the UK.

The availability of finance remains healthy and there is little in Brexit that will significantly affect supply of credit per se. This is likely to continue, absent a dramatic fall in profitability and/or asset prices, because a sustained low interest rate environment reinforces the need for commercial banks to boost income earning assets, specifically loans and advances. Government policy can also have a major impact on borrowing through associated investment, as capital will flow to where demand exists. Bank borrowing and bonds remain the most attractive source of finance for CFOs which they view as being available and relatively inexpensive at present.

In the current political and economic environment, financial institutions like NatWest have a responsibility to guide their customers through a rapidly changing world and ensure they have access to the appropriate finance they need to meet their aspirations. Customers need to be confident finance will be available and banks should support them.

To do this effectively bankers need to invest time with their customers to truly understand the issues facing their businesses. NatWest, for example, have invested in their commercial banking relationship managers, through externally accredited training, to help them better identify business needs and provide solutions. In most cases NatWest can assist businesses in this way, and when it is not their role to do so, they will signpost customers to those who can help them.

In summary, the outcome of the referendum is still fresh but there is some evidence of the effects of the vote impacting. Demand for finance exists especially in the SME market although the upper end is more fragile. Supply of finance from commercial banks should be healthy for the foreseeable future. There are some big questions about longer term confidence and willingness of larger business to invest as well as the impact of any changes to Government policy. But NatWest, for example, are determined to assist their customers by staying close to them, understanding their businesses and making appropriate finance available when needed.



BUSINESS IN TRANSITION: THE BREXIT YEARS

Ashley Braganza

This section sets out the aftermath of the Brexit vote on UK businesses. It reviews key issues and examines three distinct transition periods to lay out the policy considerations for the longer term benefit of UK businesses.

In the months leading to the Brexit vote on June 23rd 2016, many leading figures predicted that the UK economy would be adversely affected in the event of the ‘No’ campaign winning. Based on an Institute of Fiscal Studies Report¹ George Osborne, the then Chancellor of the Exchequer, claimed that he would have to issue an emergency budget which would contain stringent budget cuts and tax increases. Christine Lagarde, Head of the IMF, said that leaving the EU would range from bad to very bad outcomes for the UK economy. Leading business people and academics wrote open letters to newspapers to make the point that a vote to leave would have negative consequences on the UK. Concurrently, those arguing to leave claimed that the UK’s prosperity would increase once the country was free from bureaucratic

constraints the EU placed on UK businesses. The leave campaigners claimed that the UK could increase trade with the rest of the world which would enable the economy to grow rather than shrink.

Which side was right? Neither, actually. Proponents of the Remain and Leave arguments seemed to ignore almost completely the temporal dimension. Businesses take time to build and develop supply chains and ecosystems. These also take time to dismantle and recreate, especially where this requires businesses to set up in different countries. Nissan, for instance, established its Sunderland operations in 1986 with 22 employees and produced about 5000 cars in its first year of operations. By the early 90s Nissan invested about £1 billion in the UK – at the time Nissan’s investment in the UK was the largest inward investment in Europe. It took the company six years to reach production levels of 500,000 and nine years to produce its one millionth car in Sunderland. To improve its supply chain, Nissan invested £4.5 million in its Parts Logistics Centre. In the thirty years since starting production, Nissan employs over 6500 people and has created over 27,000 jobs in the UK car component industry. Yet, Carlos Ghosn, Nissan’s CEO, has said that future investment in the UK could be diverted elsewhere should the Government’s Brexit policies adversely affect the company. Nissan is a prime example of the potential loss of confidence that the UK economy is likely to face because of the effects of Brexit. During the transition period, companies will take investment decisions that, over time, will direct capital away from the UK to other EU countries.

In the immediate aftermath of the vote, the confluence of the shock caused by the result, upheavals in the leadership of Conservative and Labour parties and reactions from around the globe led to share and currency markets falling dramatically. Trillions were wiped off global stock markets and the Footsie fell by 8% once the referendum results became clear. The value of the pound recorded the largest ever fall against the dollar. The markets appeared to be in freefall. Mark Carney, Governor of The Bank of England issued a statement to reassure the markets and restore confidence. He declared that the Bank would ensure that steps were taken to maintain liquidity by increasing levels of quantitative easing. Shares in companies in sectors such as property, travel and the banks fell significantly. It appeared that many of the dire predictions were coming to pass.

In the weeks that have followed there appears to be a greater sense of calm. The new Prime Minister, Theresa May, bought some time by resisting calls to invoke Article 50 immediately. She appointed a triumvirate of cabinet ministers to take responsibility for Brexit. The markets sensed that although Britain had voted to leave the EU, the process of leaving would not be overnight and in fact, could take several months if not longer to happen. The stock market has recovered and has made up the losses suffered on the day of the vote. The devaluation of the Pound makes UK exports competitive and inward investment for example in property has increased. The Bank of England cut interest rates and pumped liquidity into the market.

Transitions take time

Businesses are beginning to accept that the UK is in a period of transition. There are, broadly speaking, three phases to the transition. The first phase is from June 23rd 2016 to Article 50 being invoked. The second phase begins with Article 50 and spans the two to three years of negotiations until agreement is reached on the terms of the UK’s exit from Europe. The third phase is Brexit and beyond.

For businesses, the first phase can be characterised from two perspectives – one is a hard exit and the other is a soft exit. Those arguing for a hard exit claim that the UK government should invoke Article 50 as quickly as possible and enter the period of negotiations that take the UK out of the EU completely. This includes the UK ending the free movement of goods, capital and people, in effect, taking the UK out of the single market altogether.

The hard perspective makes a number of assumptions. One is that the EU will not raise tariffs or levy any form of export or import controls. Moreover, where the EU raises tariffs, the assumption is that there will be few, if any, adverse effects on UK businesses. The assumption is based on the premise that consumers in countries such as Germany and France would be worse off because the UK is a large importer of products that are then re-exported back to the EU. For instance, EU consumers will suffer if the tariffs are applied to cars made by Nissan, Honda, Mini plants located in the UK. Should tariffs be introduced, EU consumers will have to pay two tariffs – one at the time the car parts manufactured in the EU enter the UK and the second when the car is imported into the EU.

Another assumption is that trade agreements with other countries can be put in place in time for the UK's withdrawal from the EU. The premise is that terms of trade deals with other countries will be at least or more favourable to the UK. Several countries including Australia, Canada and India have indicated that they would like to enter into trade agreements although the details remain nebulous. The US has stated that reaching a trade agreement with the EU will take priority over an agreement with the UK. Countries that have already invested heavily in the UK and across the EU such as Japan have expressed concern about Brexit. These concerns relate to the preservation of free trade principles – freedom to move capital, people and goods across EU and UK boundaries. Japanese businesses have invested considerable amounts, for example, into supply chains that are reliant completely on barrier-free trade. The movement of personnel is particularly important as businesses need to be able to access the best talent and locate employees where they are needed most. Previous UK governments encouraged inward investment from multinational companies to establish head offices and operational plants and factories in the UK as a bridgehead into Europe and therefore, gain access to the about half a billion consumers. This made the UK the number one destination in Europe for foreign direct investment in 2015 in terms of the number of projects and net inflows.² A rapid withdrawal from Europe may not give these businesses sufficient time to adjust their operations, which adds pressure on their costs and, ultimately, leads to increased prices for consumers in the UK and EU.

A further assumption is that future EU governments will remain benign towards the UK. Since the Treaty of Rome, EU countries, especially the larger, more influential ones have had left and right leaning governments; nonetheless, most EU governments have remained, broadly speaking, in the centre ground of politics and policies. The 2016 regional elections in Germany and the position taken by countries such as Hungary and Slovakia over immigration indicate that future EU governments may become more nationalistic. EU countries will naturally prioritise key economic and business indicators such as increasing their own employment levels and inward investment. Whereas, within the single bloc the UK has comparative competitive advantage over EU countries, once the UK is outside the trading zone, EU countries can adopt policies that will make them relatively more attractive to companies that have to take

future investment decisions about the location of manufacturing plants, service centres and head offices. A recent IPSOS Mori poll suggests that citizens in EU countries feel that the UK should not be given favourable Brexit terms.³ A shift in the sentiment among European voters against the UK, as a consequence of Brexit, may encourage EU governments to negotiate tougher exit terms with the UK as evidenced by comments by the president of the European Council, Donald Tusk.⁴

The argument for a soft Brexit is premised on the importance of ensuring the UK retains access to the single market. The UK, within the EU, will be able to influence future regulations and tariffs which UK businesses will be subjected to whether or not Brexit goes ahead. The tricky trade-off that a soft Brexit poses is that the EU wants to ensure free movement of people. EU leaders have conjoined access to the single market to free movement of people. Restricting the movement of people is an EU 'red line' that cannot be crossed.

There is much speculation and uncertainty about when the UK Government will invoke Article 50. The only timeframe that is set is that Article 50 will not be triggered during 2016. Theresa May has ruled out a second referendum as well as a vote in Parliament on Article 50. Negotiations between the UK and EU can only begin once Article 50 is invoked. From that moment, UK and EU governments and officials have two years to negotiate the terms that will govern relationships and should they not reach consensus after two years the UK may get an extension provided all EU members agree unanimously. The speed, clarity and transparency with which the negotiations take place during this period will be critical to businesses. The extent to which businesses will be given time to adjust to changes, for instance, on rules related to the origin of goods will affect individual companies and possibly entire industries.

Transitions take time

It is critically important for policy makers to see through the short term froth and noise and to consider the longer term effects of Brexit on UK businesses. The immediate effects of Brexit saw a drop in the stock market, currency and investor sentiment. Although the stock market recovered as investors began to recognise that over the next one to three years businesses will, by and large, continue to operate as usual. UK consumer confidence remains resilient and the fall in sterling has boosted exports, tourism and some inward investment in property. These market fluctuations are said to indicate that the negative effects of Brexit were overblown and that the UK economy can thrive alone.

Policy makers need to take the long view; Coming out of EU requires a ten to fifteen year view. Policy decisions taken over the next two to three years will affect several future generations. It is important to recognise that, like countries, businesses don't have friends – they have only interests. Businesses take decisions that will further their interests.

Specific policy considerations

Position – Over the past 70 years the UK has evolved to create a strong global position as an open market with strong consumer demand, a highly educated and skilled workforce and as a gateway to

Europe. After Brexit, the UK needs to have new reasons for multinational businesses to want to stay and invest in the UK. The financial services sector is both important and vulnerable to Brexit. Changes to EU regulations that result in the UK no longer being aligned to EU requirements could raise the cost of being located in the UK. This may encourage businesses in key sectors such as banking, finance, cars and technology to move their operations to EU to avoid competitive disadvantages.

Rebuild trust – Although contracts and legalities of various forms can be put in place to govern business relationships, these are acted upon as a last resort. Businesses rely on trust. Successful businesses act in good faith to nurture and build longer-term relationships. Previous UK governments attracted companies to invest in the UK because of its position and influence in the EU. Many businesses will feel let down by the current government's tone and approach to leaving the EU. Businesses could take the view that future UK governments are not to be trusted and relied upon to keep their word.

Growth – Companies invest where they see the potential for growth. Future investment decisions will be based upon the anticipated growth in the UK economy. This doesn't look promising in the shorter term as many forecasts suggest that the UK economy will shrink as a consequence of the Brexit vote. The issue policy makers need to address is the level of growth businesses achieve when they invest in the UK.

Free trade – The introduction of tariffs on UK goods and services will have negative effects on UK and EU businesses. One way in which businesses can overcome any EU tariffs is by moving operations and supply chain activities from the UK to one or more EU countries. It is essential that imposition of tariffs is avoided.

People – Businesses are talent hungry. They want to be able to source expertise and specialist skills and deploy these where needed. Business will perceive impediments to the movement of people as a barrier to their competitive advantage. The UK government will need to ensure that businesses have the skills they need at every level of the economy – from the produce pickers in East Anglia to the board rooms in the City of London.

Innovation – The UK has created about a third of the world's tech unicorns – technology businesses with a value of \$1 billion or over. These include Spotify, Zoopla and Asos. The UK's reputation for developing new ideas based on world class research must be safeguarded. This requires policy makers to ensure the continuation of pan-European collaborations between academic institutions and businesses.

Beyond Brexit

Brexit has created uncertainty and businesses dislike uncertainty. Policy makers have to ensure that there is coherent framework for businesses after Brexit. This framework must preserve the business prosperity that has been developed since the UK entered the single market. It must also ensure that businesses are able, in the longer term, to operate in an environment that positions the UK to remain an attractive place for businesses to invest and grow.

Notes

1. Emmerson, C., Johnson, P., Mitchell, I., and Philips, David (2016) Brexit and the UK's public finances, Institute of Fiscal Studies, IFS Report 116
2. Inward Investment Report 2014/15 Published by UK Trade and Investment, Report no. UKTI/15/43 date June 2015
3. IPSOS Mori (2016) Reactions to Brexit across 16 countries. Published on 4 August 2016 <https://www.ipsos-mori.com/researchpublications/researcharchive/3766/Reactions-to-Brexit-across-16-countries.aspx>
4. Brunson, J. 'Hard Brexit' or no Brexit, Donald Tusk warns UK, Financial Times, <https://www.ft.com/content/df4885fa-9160-11e6-8df8-d3778b55a923>



A NEW APPROACH TO BUSINESS IN THE UK FOLLOWING BREXIT

Jonathan Rushworth

Brexit means Brexit may be a fine political slogan but it gives no help in discerning what our new relationship should be with our EU partners nor, as importantly, with the rest of the world. There is much debate as to whether we should negotiate to stay in the single market on acceptable terms, follow the Norwegian, Swiss or Canadian models or rely on membership of the EEA or EFTA or be part of the WTO, or a combination of these. Will the US really leave us at “the back of the queue”¹ in negotiating new tariffs and should we try to rejuvenate historic relationships with Commonwealth countries?

All these approaches focus on trading relationships which are vital but what about the way we are currently bound into the common approach to laws and regulations within the EU? How should we approach the breaking of these ties as we leave the EU? Brexit gives us an opportunity to review legislation which governs many aspects of our lives, to assess whether it makes the most of our

enterprise, talents and resources in the interests of our nation, in particular in areas where we have been obliged to follow a common EU approach for over 40 years in legislation and regulation.

This paper considers some of the ties which bind us to EU and cross-border legislation and practice and how we might approach a review of those which relate particularly to business practices. There is a mood in government, the business world and wider society for a change of emphasis in the purpose and impact of the corporate world, so that listed companies work in the interests of all stakeholders and society more widely and not primarily in the interests of shareholders.² Putting the interests of all stakeholders at the heart of company decision making and operations would lead to a more inclusive, responsible, constructive and successful form of capitalism.

Our acceptance of EU wide laws and regulations began with the passing of the Treaty of Accession of Denmark, Ireland and the United Kingdom in 1972. There are now at least 40,000 legal acts, and also 15,000 court verdicts and 62,000 international standards, binding on citizens and companies in the EU.³ Only a small number relate directly to business undertakings (114, of which 36 relate to company law) but many more will affect them in their operations, for instance those relating to employees, insolvency of employers, the environment, consumers and health protection and competition policy. EU Treaties are the basis or groundwork for all EU acts and secondary legislation is in the form of regulations, directives and decisions. There are also recommendations and opinions.

Regulations are binding legislative acts which apply in their entirety across the EU, for instance setting out common safeguards on goods imported from outside the EU. They are effective on member states without the necessity of adoption by regulation or order of each separate state. Directives, however, set out goals and all EU countries must take appropriate action to adopt their own law to achieve these goals for instance, under the consumer rights directive, consumers have an extended period under which they can withdraw from a sale contract. Major matters affecting companies are addressed by regulations and directives, such as directives on the content of annual financial statements and reports, the formation of public companies and maintenance and alteration of capital, mergers of PLCs and takeover bids. There are regulations on accounting standards but only non-binding recommendations on the quality of corporate governance reporting and on remuneration of directors of listed companies.

Decisions are binding and directly applicable on those to whom they are addressed, for instance an EU country or an individual company. Recommendations issued by the Commission, however, are not binding, for instance that EU countries' law authorities improve their use of videoconferencing to help judicial services work better across borders. Recommendations impose no legal obligation on those to whom they are addressed. Similarly, opinions are instruments which allow EU institutions to make statements in a non-binding fashion, and create no obligation on those to whom they are addressed.

There was much debate during the UK referendum campaign as to what proportion of UK law is influenced by EU law. This ranged from 13% to 65% depending on which side was putting the argument.⁴ It is separately reported that "there is no totally accurate, practical or useful way of calculating the percentage of national laws based on or influenced by the EU".⁵

The full range of law and regulation from Brussels as it applies to the UK will no doubt have to be reviewed to see if it can simply be left in place as it suits our needs, whether it falls away as it no longer applies or whether amendments are required to adapt it to our needs. There are a number of examples which may illustrate the possibilities. Restrictions on governments in EU countries giving financial or other support to ailing industries under state aid rules (as it is considered to be anti-competitive) will no longer apply to the UK. Further, once outside the EU/EEA, the UK will no longer be able to use these state aid rules to challenge subsidies by EU member states, but instead the WTO's anti-subsidy regime (including the possibility of countervailing duties) could be triggered by or against the UK.

The EU Insolvency Regulation which provides for cross-border co-operation between member states in insolvencies and reconstructions will presumably no longer apply as the UK will not be a member state.⁶ On the other hand, it may be likely that the requirement for the automatic transfer of employees on the transfer of a business will be retained in UK domestic legislation, as the business world has largely become accustomed to the transfer of employees on a business sale.⁷ The impact of Brexit on numerous complex aspects of UK business structures and operations will have to be addressed.⁸

The Accession Act of 1972 will no doubt have to be repealed which will formally remove the UK from the EU and from legislation binding on the UK made pursuant to the Act. It seems likely that, as a temporary measure, the UK will legislate to continue to be bound by relevant EU legislation, but a commission or review body will need to assess all EU imposed or inspired legislation directly or indirectly affecting the UK. This group will presumably work with all government departments as each will have knowledge of the legislation and regulations within its remit. A framework or matrix against which this exercise will be carried out will no doubt have to be agreed. Whether the various parts of the legislation can or should continue to apply in its current or an amended form will be one discussion. Another will be the suitability of the content of the legislation for a post-Brexit UK, reflecting the current political, economic and social views of the government and society and how to address the loss of any EU law or initiatives which the UK might find beneficial.

This paper recommends that the opportunity is taken to view company and business law, regulation and practice through a relational lens as part of the review exercise, with the effect that companies would be encouraged to put the interests of all stakeholders at the heart of company decision making and operations, reflecting a more inclusive form of capitalism. This would follow the increasingly expressed view, as explained in this paper, that company operations are too focussed on short-term and ever increasing financial return for shareholders, in the form of dividend payments and share price increase, at the expense of the interests of other stakeholders and society more generally.⁹ There should be a recognition of the value of relationships with all stakeholders, as part of a company's social and relational, and not just financial, capital. This change of focus might also help to overcome concerns that, as the UK will no longer be party to EU initiatives to render capitalism as more socially responsible, the UK corporate world would no longer be encouraged to move from what is seen in some respects as a short term shareholder focused and finance driven form of capitalism.

Too many examples of what is regarded as egregious corporate behaviour are regularly reported. Each year during the AGM season shareholders vote against what are seen as excessive remuneration

packages for senior executives.¹⁰ Pay differentials continue to increase with little if any pay increase for the lower paid, who work long hours and may be subject to unfair zero hours contracts, receive few incentives, and have little tangible appreciation of their value to the company.¹¹ Despite adoption by many companies of the Prompt Payment Code, suppliers frequently have long payment terms imposed on them and companies pay late which can have a devastating effect on cash flow.¹² Individual capital providers (those investors in listed companies through pension funds and personal investments) often have no say, and frequently no interest, in how the companies they invest in are run and how they treat employees, suppliers and other stakeholders, when their interests are held through several intermediaries.¹³

Shareholders tend to exert little or no control over the behaviour of directors, nor do they hold directors to account for their actions. Shares are regarded as a tradable commodity rather than a long-term investment in the underlying business with its impact on employees, suppliers, customers and wider society. Many large companies with international operations can structure their businesses to pay little or no tax in the country where profits are earned.¹⁴ It is not surprising that all these and other examples of unattractive corporate behaviour have led to a loss of trust and faith by society in large companies.¹⁵ And yet there are many companies which strive to maintain high standards of responsibility and dealings with stakeholders and pursue effective CSR and other social programmes.

The concern over aspects of corporate behaviour and a recognition that companies should have a greater focus on serving all stakeholders and a responsibility to society is increasingly publicised and there is a general mood towards encouraging a change in culture. With support from shareholders this can be achieved by directors within the scope of current company law, regulation and codes.¹⁶

The concerns over big business and the need for change were echoed in the Prime Minister's "manifesto" article published in July 2016 during the leadership election campaign when she talked of the need "to get tough on irresponsible behaviour in big business. That is why I want to see changes in the way that big business is governed".¹⁷ She referred to executive pay more than trebling over the past 18 years and "the unhealthy gap between what these companies pay their workers and what they pay their bosses". Consistent with the relational approach described above, she opined that "We don't just believe in markets but in communities. We don't just believe in individualism but in society."

Many others have spoken and written about the value and importance of stakeholder relations and the responsibility of companies to society. Andrew Haldane, Chief Economist at the Bank of England, recently spoke of encouraging longer-term investment in companies and long-term value creation and of reinforcing and broadening "the purpose of companies to better reflect their broader societal role, their role in serving stakeholders plural (employees, customer, clients) as well as shareholders... The evidence is that, so purposed, companies create extra value, not just for their staff and customers but for their shareholders too".¹⁸

A change of approach to meet these aims could be encouraged in a number of ways.¹⁹ Amendments to the Companies Act could be introduced to require a more pluralist approach by directors having responsibility to a broad range of stakeholders. It is argued that this is neither necessary nor appropriate, as it is for the private sector to change its practices without a legislative change of this magnitude. It is for

shareholders to exert influence on the directors through their ownership and voting interests to encourage change in the way the business of the company is conducted, its approach to engagement with stakeholders and its responsibility to society. A change in behaviour could be encouraged by the action of consumers choosing to buy goods and services from companies which adopt acceptable practices.

Another approach, which is proposed in this paper, is that the EU legislation review process would provide a platform to introduce additional disclosure requirements on companies in their annual financial statements and directors' reports to illustrate how they meet the relational and stakeholder engagement criteria. Detailed disclosures on various aspects of their operations would give the opportunity to compare companies in the same and different sectors as to the extent of the relational ethos they have adopted. The comparison should encourage through their disclosures improvement in their engagement with and responsibility to stakeholders. An agreed policy approach will be needed in this exercise so that there is consistency and transparency and to ensure that an acceptable political, financial, economic and legal standard is maintained.

There are many examples of disclosures which could be made, in addition to or expanding current requirements. The company could be required to disclose its policy towards stakeholder recognition and relationships, the directors' approach to measuring the quality of these relationships and how the legitimate interests of all stakeholders are met on the basis that this is in the best interests of the company and its shareholders.²⁰ Clarity of and justification for the remuneration packages of senior executives could be required and a summary of the process which led them to be recommended to shareholders. This would set the scene for their being put to shareholder vote. Disclosure could be required as to how the company engages with the interests of employees, for instance how much weekend and overtime work is required, confirmation that share purchase schemes for all employees funded by the company are provided, the minimum pay scales and disclosure in bands of remuneration for all employees and details of any discussion forum with different seniority levels of employees. With regard to suppliers, evidence of the building of close and understanding relationships, for instance with payment on time or sooner (with no more than a 30 day payment period), help with IT and no penalties or requirement for additional payments for displaying goods. Disclosure would be required of incentives to encourage long-term holdings of shares by investors and engagement with individual as well as institutional shareholders. Clarity would be needed of tax paid and rates in countries where the company's and group profits are earned, with full disclosure of any schemes or mitigating factors for lower taxes being paid.

The overall aim would be to show, with the above and other disclosures, how closely companies follow a practice of responsibility to all stakeholders and society more generally. The role of government as part of the consultation exercise in reviewing the legislation would be to encourage a discussion to take place with leaders in the business world, regulators, opinion formers and the wider public to agree how the disclosure exercise would help to set a new standard for acceptable business practice and to help to redefine the identity of the corporate world with values of fairness, inclusiveness and transparency. Through recognising the value of stakeholder relationships and assessing and reporting on their quality, and making this a focus of decision making rather than a largely financially driven approach, a more inclusive, competitive, successful and acceptable form of capitalism would be achieved. Instead of stakeholders fighting with the company and others to extract the most favourable financial terms, there

would be more of a partnership approach with stakeholders working with the company and each other as a community of interests to their mutual benefit and for the good of society.

Encouragement should be given to ways in which society, through legislative or regulatory means or as consumers and investors, can change corporate culture to meet the expectation of employees, investors, suppliers, customers, regulators in the context of the responsibility of the corporate world to the society in which it operates and from which it benefits. Companies which already adopt this approach will be recognised and encouraged and will lead others by example. The forthcoming discussion and debate on the future of EU inspired legislation provide an ideal opportunity to reframe and refocus UK corporate culture in a distinctive and exciting way in which all will benefit and the litany of criticism of the corporate world will start to evaporate as faith and confidence is restored. It should also meet the concerns of those who believe that Brexit could unleash irresponsible capitalism forces as the UK will no longer be part of EU initiatives to encourage a socially responsible form of capitalism.

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Notes

1. President Obama speaking at a press conference on 22nd April 2016 on a visit to the UK, reported by the BBC. He was apparently referring the US seeking to agree trade terms with the EU as a block before starting discussions with the UK separately.
2. See below and, for instance, Dominic Barton, Global Managing Director, McKinsey & Company: *The City and Capitalism for the Long Term* (The Tomorrow's Value Lecture Series, 2013), the speech given by Sir R. Lambert at The World Traders' Tacitus Lecture at the Guildhall in London on 28 February 2013, the comments on relationships with stakeholders by John Browne in Connect (WH Allen) and the work of *The International IR Framework* (The International Integrated Reporting Council, 2013).
3. The information in this and the following 2 paragraphs is taken from the EU Commission and the EU ABC websites. Details of all the regulations, directives and recommendations referred to can be found on these websites.
4. See statement by Professor Michael Dougan, Professor of European Law, Liverpool University Law School, on the University of Liverpool website posted on 1st July 2016.
5. Statement in House of Commons Library: Commons briefing paper RP10/62 by Vaughne Miller.
6. Other cross border co-operation arrangements will still apply. The UNCITRAL Model Law on Insolvency, implemented in 2006, provides for assistance to be given for the recognition of foreign proceedings in certain EU and other countries. S 426 Insolvency Act 1986 provides for a cross-border co-operation regime mainly between Commonwealth countries.
7. Introduced into UK law by The Transfer of Undertakings (Protection of Employment) Regulations 2006.

8. Matters such as the EU Merger Regulation (May 2004) concerning competition and Basel III Capital Adequacy Ratio Minimum Requirement and Liquidity coverage ratio for banks and other financial institutions (January 2013).
9. Dividends and share buy backs have increased from about 10% of profits and the 1970's to 60-70% of profit currently, thereby limiting the amount invested in the company.
10. Recent examples include Anglo American, Barclays, BP, Reckitt Benckiser, Shire, Smith & Nephew and WPP. See, for instance, Deloitte annual report on FTSE 100 directors' remuneration for further details.
11. The High Pay Centre reports that FTSE 100 executives are paid on average about 130 times more than their average employees. In 1988, by contrast, the average CEO was paid 47 times more than their employees.
12. Zurich reported on 18th January 2016 that late payments owed to British SME's amounted to more than £225bn.
13. About 10% of listed company shares are held directly by individuals, whereas in the 1960's the figure was about 50%.
14. Well publicised examples include Amazon, Apple, Facebook, Google and Starbucks. Apart from their responsibility to contribute to the society in which they operate, this puts them at a competitive advantage to local companies paying their taxes due.
15. Examples currently under scrutiny include BHS, Sports Direct and Volkswagen.
16. S172 Companies Act 2006 provides that a director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. In doing so, directors must have regard, among other matters, to the need to foster the company's business relationships with suppliers, customers and others and the impact of the company's operations on the community.
17. The Times 11th July 2016.
18. Speech by Andrew Haldane, New City Agenda Annual Dinner, 18th May 2016.
19. See the work of Relational Research in assessing the quality of relationships between a company and its stakeholders and a proposal for a ratings agency to measure the extent to which companies adopt a relational ethos: Transforming Capitalism from within by Jonathan Rushworth and Michael Schluter, and an article with the same title by Jonathan Rushworth and Dr Arad Reisberg, published in 3 parts in 2014 by Chase Cambria Company (Publishers) Limited. For a detailed analysis and understanding of stakeholder relationships, see The Relational Lens published by CUP (October 2016).
20. The King Report on Governance for South Africa 2009 published by the Institute of Directors in Southern Africa recognises a "stakeholder inclusive" model in which the legitimate interests and expectations of stakeholders are considered by the directors on the basis that this is in the best interests of the company. This contrasts with the "enlightened shareholder" approach in the UK Companies Act 2006.



THE POSSIBLE EFFECTS OF BREXIT ON CROSS-BORDER INSOLVENCY ISSUES

Crispin Daly and Mark Fennessy

Brexit impact on the recognition of insolvency officeholders

The key uncertainty from the perspective of cross-border insolvency is the applicability of Council Regulation (EC) 1346/2000 on insolvency proceedings and its successor, Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), which entered into force in principle on 25 June 2015, with the majority of its provisions applying from 26 June 2017 to UK insolvency procedures in the post-Brexit world.

The Regulation, which we will refer to in both its current and amended form, simply as the “**Insolvency Regulation**”, is directly effective in EU member states (with the exception of Denmark, which we will not include as a member state for the purposes of this article) and to a great degree represents an astonishing level of supra-national legal cooperation and reciprocity across the very different legal systems of the EU. Whilst not a harmonization of the insolvency law of the member states, the Insolvency Regulation

guarantees automatic recognition of most collective insolvency proceedings commenced in one EU state by the other states, without the necessity of opening proceedings in those other states.¹

The premise of the Insolvency Regulation is that main insolvency proceedings may only be opened in the state in which the debtor has its centre of main interests (“**COMI**”). The rebuttable presumption is that COMI will be located in the jurisdiction in which the debtor’s registered office is located, but should in any case be ascertainable to third parties as the place where the debtor administers his interests (for example the jurisdiction of the location to which creditors habitually send their invoices). Once a main proceeding has been opened in a state, there can be no alternative main proceedings.

Instead any related proceedings must be secondary to the main proceedings and are restricted to territorial or ancillary proceedings, which can be opened before or after main proceedings are opened. Such secondary proceedings can be opened in any member state in which the debtor has an establishment and the effects of the secondary proceedings are limited to assets located in the Member State where the secondary proceedings have been opened. The insolvency officeholder of the main proceedings can open the secondary proceedings in another EU member state to run in parallel with the main proceedings or apply to have such proceedings stayed. The Insolvency Regulation therefore adopts the principle of universality, but with concessions to protecting local interests.

Although there are controversies relating to the identification of a debtor’s COMI and concerns about debtors engaging “forum shopping” to select the most favourable jurisdiction in which to file (of which see more below), the Insolvency Regulation provides automatic recognition of a UK insolvency officeholder in main proceedings in any other EU member state and vice versa. Likewise an insolvency officeholder from any of the other EU member states will automatically be recognised by the UK courts. If and when, however, the Insolvency Regulation ceases to apply to the UK as a result of Brexit, there will be no automatic recognition and officeholders will have to make an application in each relevant jurisdiction under the local law, increasing time, cost and complexity. At a stroke, a UK insolvency officeholder will face a considerably harder task in identifying, securing and realizing a company’s assets outside of the UK. The obvious loser in this scenario is the creditors, who will ultimately carry the burden of the additional time and cost.

The ultimate effects of the Insolvency Regulation ceasing to apply in relation to the UK are multi-faceted and potentially far-reaching. The UK (and England and Wales in particular), is currently perceived as a jurisdiction in which creditors can more easily control or influence the course of an insolvency than in other, more debtor-friendly states within the EU. Procedures available in the UK such as out-of-court administration appointments and schemes of arrangement under the Companies Act 2006 (although strictly a corporate rather than an insolvency procedure) have historically provided both the debtor and creditors with more flexibility to deal with distressed situations without needing to enter a formal liquidation process. Partly as a result the UK has become an attractive primary contractual jurisdiction as well as a popular destination for “insolvency tourism” or forum shopping to take advantage of the UK’s mature and flexible insolvency regime, although this has been the subject of considerable criticism, particularly where a company “shifts” its COMI, in what can sometimes be regarded as an artificial manner, to the UK.

Not only might the UK become a less attractive jurisdiction in which to do business within Europe generally, but more niche issues could also arise. For example, purchasers of distressed debt may choose not to invest or demand a significant discount in instances where a portfolio of distressed debt contains UK assets as well as assets located in EU member states on the basis that any collective insolvency proceeding to which the UK assets are subject may not be recognised in other EU member states. With London being a well-established marketplace in debt trading, the trades are frequently subject to English law. This market position could be under serious threat in a post-Insolvency Regulation UK. Another example is the possibility that parties may seek to rely on the “change of law” provisions commonly present in loan agreements in an attempt to avoid exposure to any uncertainty regarding insolvency recognition issues with the UK.

Brexit impact on the recognition and enforcement of judgments

A second EU regulation that is of importance for the purposes of cross-border insolvency and restructuring is Regulation (EU) no 1215/2012 of the European Parliament of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (“**Brussels Recast**”).

Brussels Recast contains the “insolvency exception”, precluding the regime from application to “bankruptcy proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings”. Brussels Recast does however apply (at least in some circumstances) to the following procedures, which are important procedures in the UK restructuring sphere, however characterized:

- All forms of receivership including Law of Property Act and fixed charge receiverships (administrative receiverships have to a very large extent been replaced by administration, which is subject to the Insolvency Regulation);
- Members’ Voluntary Liquidations (a form of solvent voluntary liquidation initiated by special resolution of the company); and
- Schemes of arrangement of foreign companies in England and Wales under the Companies Act 2006 in circumstances where the company is not otherwise the subject of insolvency proceedings (see for example *Re Codere Finance (UK) Ltd*).²

Once Brussels Recast ceases to be directly effective in the UK, insolvency officeholders seeking to have judgments relating to such proceedings in the UK recognised or enforced in other EU member states will no longer be able to rely on the automatic recognition provided by Brussels Recast and will instead need to apply for such recognition and enforcement in each member state according to its domestic laws on recognition and enforcement of foreign judgments. As with recognition under the Insolvency Regulation, there is huge potential for a massive increase in process, time and cost.

Possible management of the impact of Brexit on UK insolvency law

One way to maintain the status quo post-Brexit, at least in theory, would be for the Insolvency Regulation to continue to apply to the UK, despite no longer being a member of the EU. In practice, it would be a mammoth task (if indeed possible) to achieve the required consensus between all the member states to agree and ratify such a step. There is likely to be little sympathy amongst the remaining EU member states to minimize the effect of Brexit on the UK's position as a leading destination for forum shopping and debt trading and indeed some states may see an opportunity to usurp the UK as a favoured insolvency destination.

Even if the UK were to seek to adopt the Insolvency Regulation on a reciprocal basis, one major factor would be a lack of control regarding future amendments to the Regulation. To date, the UK has been in a position to resist amendments to the Insolvency Regulation to which it takes exception, including as recent examples, attempts to include UK schemes of arrangement within the prescribed list of insolvency proceedings and to remove the UK out-of-court administration procedure from the list of insolvency proceedings. Once it is no longer a member of the EU club, the UK will be likely to have to accept the legislation as it is amended from time to time by the remaining members.

There is at least a more obvious path in relation to the recognition and enforcement of judgments for non-insolvency proceedings, including as discussed above, receiverships, members' voluntary liquidations and schemes of arrangement. Currently three of the four members of the European Free Trade Association (Iceland, Norway and Switzerland, but not Liechtenstein) are signatories to the 2007 Lugano Convention, which governs issues of jurisdiction and enforcement of judgments as between those EFTA states and the member states of the EU, providing a reciprocal regime materially the same as the 2001 Brussels Regulation (forerunner to Brussels Recast).

The Lugano Convention is already incorporated into law by the Civil Jurisdiction and Judgments Regulations 2009. The Convention could form an alternate framework for recognition and enforcement of judgments for the UK in place of Brussels Recast, provided that the UK became a signatory to it in its own right. Whilst consensus would again be required, not only from the remaining EU member states, but also Iceland, Norway and Switzerland, it does seem likely that the solution would be a positive outcome for all states concerned.

Alternative recognition regime - the Model Law

An alternative recognition framework to the Insolvency Regulation is that provided by the UNCITRAL Model Law on Cross-Border Insolvency (the "**Model Law**"). States that are signatories to the Model Law are subject to a standardized regime that provides a relatively straightforward procedure for recognition and assistance for foreign insolvency proceedings. Great Britain (both the jurisdiction of England and Wales and the jurisdiction of Scotland) has incorporated the Model Law under domestic legislation (the Cross Border Insolvency Regulations 2006 ("**CBIR**").³ Provided that a foreign insolvency officeholder can satisfy the basic requirements that the appointment is validly made in respect of foreign main proceedings, any foreign insolvency officeholder should be able to obtain recognition in Great Britain as well as assistance including:

- staying claims against the debtor's estate in Great Britain;
- entrusting the foreign officeholder with the administration of the debtor's assets in Great Britain;
- allowing the foreign officeholder to examine witnesses in Great Britain, to take evidence and force the delivery of information concerning the debtor's assets;
- giving the foreign officeholder access to British anti-avoidance provisions and antecedent claims/claims against directors; and
- permitting the foreign officeholder to apply his or her domestic insolvency law and procedures in Great Britain (to the extent that this is not incompatible with British law).

However, aside from the UK, of the current EU member states only Greece, Poland, Slovenia and Romania have implemented the Model Law. As it currently stands, therefore, the procedure would only be available to UK insolvency officeholders in those jurisdictions, rather than across the EU creating an obvious imbalance. There is no obvious sign that the other EU member states are likely to adopt the Model Law in the near future, either as individual states or by general application of a new insolvency regulation with the same effect as the Model Law regime and reaching the consensus that would be required is highly unlikely. The imbalance could be corrected if the UK, like Romania, were to make the CBIR reciprocal (whether positively or negatively), but it seems counter-intuitive that the UK would seek to make its recognition of insolvency proceedings less rather than more universal.⁴

The current availability of the Model Law to allow insolvency officeholders of remaining EU member states to seek recognition and assistance in the UK militates against the notion that the UK could negotiate a series of bilateral agreements with individual remaining members of the EU. After all what could those other states stand to gain more than is already available under the Model Law? UK insolvency officeholders will be at a disadvantage, but there is no obvious solution to the imbalance short of reversing the common-law principle of modified universalism, which holds that insolvency proceedings in relation to one debtor should apply worldwide.

Possible future effects of Brexit on UK insolvency

As it stands, the UK is a more open jurisdiction than most when it comes to recognizing and assisting foreign insolvency officeholders, whether they be from an EU member state or otherwise. Whilst there is obvious advantage in negotiating an arrangement with the remaining EU member states to continuing a regime identical or similar to that provided by the Insolvency Regulation, for the reasons discussed above, the bargaining positions are unequal and it is likely that the UK will have to accept whatever terms, if any, the remaining EU member states can agree to offer. Even in this context, the possibility of the Insolvency Regulation morphing into a different regime with the UK powerless to influence any changes, make the permanence of any agreement, or its fitness for purpose as far as the UK is concerned, questionable.

The current attractiveness of the UK as a destination for corporate and financial restructurings reflects the maturity of the laws and the flexibility of the courts in the UK to facilitate restructuring. This world-leading position is already under threat as a number of European jurisdictions have amended or introduced legislation in recent years that in due course could provide a more popular environment for insolvency and restructuring. In addition the UK's advantage over other existing market hubs such as New York, or emerging jurisdictions such as Singapore, is likely to diminish if and when UK insolvency office-holders lose the right to automatic recognition across the EU. It is likely that in ten years' time the geographical spread of cross-border insolvency work will be much changed, with the UK losing its pre-eminent position especially if a "Hard Brexit" is pursued.

Notes

1. Exceptions to the Insolvency Regulation include insolvency proceedings relating to insurance undertakings, collective investment undertakings and credit institutions.
2. 2015 EWHC 3778 (Ch).
3. The remaining jurisdiction of the United Kingdom, Northern Ireland has enacted the Model Law separately under the Cross Border Insolvency Regulations (Northern Ireland) 2007.
4. For more on the topic of reciprocity see "*Should reciprocity be a part of the UNCITRAL Model Cross-Border Insolvency Law?*" K.D.Yamauchi, University of Calgary, International Insolvency Review Vol 16, Issue 3, 29 Oct 2007.



MULTI-LEVEL COOPERATION IN CRIMINAL JUSTICE POST-BREXIT: THE CASE OF THE EUROPEAN ARREST WARRANT AND EXTRADITION

Gerard Conway

Introduction

The UK has been quite a reluctant participant in the criminal justice competence of the EU, since the EU developed competence in this sphere from the Treaty of Maastricht onwards in 1992. Today, following the Treaty of Lisbon, which came into effect in late 2009, the EU has the potential for considerable involvement in criminal procedure and the criminal justice systems of Member States. It has competence in both procedural (Article 82 TFEU) and substantive (Article 83 TFEU) criminal law (in – rather loosely – defined areas), along with the presence in Article 86 TFEU of the legal basis for a European Public Prosecutor (EPP). The EPP, which is currently the subject of a legislative proposal from the European

Commission,¹ is of huge potential significance, representing the direct involvement of the EU in the criminal enforcement and procedure of the Member States. The UK has opted out of much of the legal instruments adopted by the EU in criminal matters,² the possibility of opt-out having been provided for under the Treaty of Lisbon (in an interesting example of a reversal of integration).

The UK might legally operate something similar to the surrender scheme entailed in the European Arrest Warrant (EAW) when it is outside the EU. This could be achieved quite easily in terms of the legal form it would take, the UK would just need to sign an extradition treaty with the EU (as the US has done).³ The EAW has now become a familiar part within the UK of mutual legal assistance relations with EU Member States, although at a political level, a similar arrangement post-Brexit might have to be made part of the overall agreement the UK makes with the EU as it leaves (rather than being something that can be considered on a standalone basis). This contribution focuses on the possibility of retaining elements of the current EAW arrangement post-Brexit. Such a post-Brexit extradition treaty between the EU and the UK could entail provisions similar to the EAW, although there would be details to work out like the status of ECJ caselaw on the EAW in UK courts post-Brexit. Alternatively, the UK could just revert to the European Convention on Extradition of 1957,⁴ adopted under the auspices of the Council of Europe, which it operates with European countries not in the EU, and apply this again in its relations with EU Member States. The UK already had a special backing of warrants procedure with Ireland, so flexible extradition arrangements have always been possible in public international law (the EAW was sometimes slower than the warrant procedure the UK previously had with Ireland, although the EAW is quicker than the Council of Europe convention procedure).

The Council of Europe Convention on Extradition 1957

The Extradition Convention 1957 of the Council of Europe is the first major example of a comprehensive attempt to regulate extradition multilaterally. International law has for long recognised the possibility for States to hand over fugitives to another jurisdiction.⁵ Extradition has mostly operated at a bilateral level. Multilaterally, extradition rules have tended to be a small part of multilateral treaties on some other substantive matter. The European Convention on Extradition 1957 and the EAW are both important developments in extradition law understood as a part of international law. However, international law imposes relatively few limitations on the power of States to agree extradition rules amongst themselves. Rather, international customary and treaty law recognises certain standard practices, e.g. that States may refuse to extradite a person for political offences. One requirement that international extradition practice tends to impose is double criminality: to be extraditable, the offence must have existed in the criminal law of both the requesting and the requested State (reflecting the principle of legality - *nullem crimen sine lege* - or non-retroactivity) (there may be scope for debate, notwithstanding EU practice to the contrary, as to whether non-retroactivity is a general principle of international law and thus in principle not something from which States can agree to derogate).

The purpose and advantage of the Council of Europe Convention on Extradition of 1957 was to provide a standard framework in Europe for extradition between signatory States. It largely reflects existing extradition practices, including, for example, double criminality (Article 2(1), i.e. the offence must have existed in the criminal law of both States), the rule of speciality (Article 14, i.e. the extradition request is

only granted regarding a specified offence and another offence may not be prosecuted), the discretion of States to exclude offences from being extraditable (Article 2(3)), the exclusion of political offences (Article 3), double jeopardy or *ne bis in idem* (Article 9), and transmission through diplomatic (rather than judicial) channels (Article 12). The main innovation was its removal of the traditional requirement that the requesting State demonstrate a *prima facie* case (which is itself lower than States sometimes require, e.g. the US requires that probable cause be demonstrated). The UK removed the *prima facie* case requirement in s. 9 of the Extradition Act 1989 (this was later replaced by the Extradition Act 2003).

The European Arrest Warrant (EAW)

The EAW⁶ was adopted in the aftermath of the attacks on the United States in New York on September 9/11. It represents quite a radical innovation compared to pre-existing extradition practice, whether that operated bilaterally between countries or multilaterally.

Among its main features are:

- The arrest warrant applies to all offences punishable by a custodial sentence of over a year or when a person has been sentenced to a custodial or detention order exceeding four months (Article 2(1))
- There is no requirement to demonstrate a threshold of likelihood of the guilt of the accused (whether a *prima facie* case or probable cause)
- The double criminality requirement is removed for a wide-ranging list of 32 offences, one of the more problematic aspects of the EAW since it appears to undermine the principle of legality or non-retroactivity (Article 2(2))
- The decision on extradition or surrender (the EAW uses the latter term) is exclusively for courts, rather than the executive (Recital 8 and Article 1(1))

A key issue to address in adopting the Framework Decision on an EAW was the difference between common law and civil law legal traditions in criminal procedure. Perhaps of most significance here is the requirement that Ireland and the UK imposed in their implementing legislation that a decision on charging must have been made before the request for surrender, in order to prevent investigative detention (in Ireland in the European Arrest Warrant Act 2004, s. 11(3) and in the UK in s. 12A of the Extradition Act as amended) (generally prohibited in common law tradition, but accepted in civil law tradition). Whether these latter provisions would survive ultimately review by the Court of Justice of the EU is uncertain, but the Court has not been as activist or creative (although there are examples of activism in this area too) in criminal justice matters to date as it has in other areas of its caselaw.

The 'backing of warrants' procedure between the UK and Ireland

Ireland and the UK adopted a special, expedited form of extradition in response to the political and legal problems posed by the Northern Ireland conflict. In Ireland, this was implemented through an amendment

to the Extradition Act 1965, with a new Part III. In the UK, the new procedure was implemented by the Backing of Warrants (Republic of Ireland) Act 1965. The procedure is generally considered to have worked very well, especially for non-political offences (traditionally political offences are a ground for refusing extradition). The backing of warrants procedure involved mutual recognition of the validity of arrest warrants issued in the other jurisdiction so long as the arrest warrant was endorsed in the appropriate way by a magistrate. Where a suspect consented to extradition, the person could be transferred to the requesting jurisdiction within a day, and even where the suspect did not consent, extradition could be achieved in around 15 days. By comparison, the respective maximum periods under the EAW are 10 days (with consent) and 60 days (without consent) (Article 17).

The ability to agree this procedure reflected the similarity and mutual familiarity of the legal systems of Ireland and the UK. In the implementation by Ireland and the UK of the EAW, in its initial period, considerable delays could be caused in the requested Member States in efforts to ensure that a surrender to an unfamiliar legal system would not be compromised. As mutual familiarity between systems developed, concerns of this nature tended to drop away somewhat.

Concluding comment

A comparison of the EAW with 'traditional' extradition law is an instructive example of the multi-level character of legal cooperation and how flexibility and innovation can exist outside of an EU framework, while at the same time being open to learning about what positive elements exist within EU practice. While the EAW procedure undoubtedly has some advantages, chiefly in the standardisation of procedure and the relative expedition in the overall process relative to normal extradition (some consider the reduction of the role of the executive a desirable feature of the EAW also), an even more flexible procedure had previously been agreed by Ireland and the UK. This practice by Ireland and the UK (which has been superseded by the EAW) reflects the normal faculty of States under international law to mutually agree their sovereign preferences. Thus, the UK and the EU are free to adopt much of the context of the EAW post-Brexit, if they both agree. The partial removal of the double criminality requirement in the EAW is normatively questionable because it is in tension with the non-retroactivity principle, and thus the UK might seek to avoid this element of the EAW in any post-Brexit extradition treaty with the EU. Judicial enforcement and the role of the Court of Justice of the EU post-Brexit might be thought a problem, but in this context would not be any different to what normally happens in extradition internationally: each jurisdiction would be bound by its own court decisions on the matter and efforts to reconcile problematic caselaw could proceed by legislative and treaty amendment (the UK would follow the rulings of its Supreme Court and the EU would follow the rulings of the Court of Justice).

As a final comment, an alternative scenario is that the UK would enter into extradition agreements on a bilateral basis with individual EU Member States. Under the area of the EU Treaties in which criminal justice falls – the Area of Freedom, Security and Justice – the EU Member states retain their power to enter into external relations agreements (a power they have lost regarding internal market matters). Given that multilateral cooperation has been well developed in Europe (most European countries have signed the European Convention on Extradition of 1957⁷), however, this bilateral approach should not be necessary.

Notes

1. Proposal for a COUNCIL REGULATION on the establishment of the European Public Prosecutor's Office /* COM/2013/0534 final - 2013/0255 (APP).
2. Protocol 36 of the Treaty of Lisbon allowed the UK to opt out, by 31st May 2014, of approximately 130 police and criminal justice adopted by the EU. The UK decided to opt in to 35 of these measures, including the European Arrest Warrant.
3. Agreement on Extradition between the European Union and the United States of America, entered into force 1st February 2010, OJ L 181, 19.07.2003, p. 27.
4. ETS 024.
5. The practice of extradition has existed from antiquity, although the term itself only came into use in the late 18th century: see C. Blakesley, 4(1) *Boston College International and Comparative Law Review* 39-60 (1981).
6. OJ L 190, 18.07.2002, p. 1.
7. See < https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/024/signatures?p_auth=ztDhMhcR > (a total of 50 States have ratified it, including some outside of Europe).



Downloaded from [wikimedia.org](https://commons.wikimedia.org/wiki/File:Strasbourg_Cour_de_Droits_de_l'Homme.jpg)

FAIR TRIAL RIGHTS IN THE UK POST BREXIT: OUT WITH THE CHARTER AND EU LAW, IN WITH THE ECHR?

Dimitrios Giannouloupoulos

Following the historic June 23 decision of the UK people to exit the European Union, confusion abounds about the future of Britain in Europe. With a negotiation possibly still months away, both the UK and the 'remaining' 27 EU Member States have held their cards close to their chest, that is assuming they have a master plan for the labyrinthine negotiation that awaits them. A June 24 New York Times op-ed spoke of 'Britain's Brexit leap in the dark'.¹ Four months on this pessimistic analysis does not seem at all far from the truth,² with Theresa May going so far as to suggest in Parliament that the UK has not decided yet how to proceed with Brexit:

It is about developing our own British model. So we will not take decisions until we are ready. We will not reveal our hand prematurely. And we will not provide a running commentary.³

As we are moving forward in these uncharted waters, in an environment of disorientation and ‘political poker’, we find ourselves left with little more than an ability for speculation. On the common market, immigration, agriculture, business and education, to take a few stark illustrations, all is really to play for in deciding the UK’s future relationship with Europe. The outcome of the negotiations can theoretically range from the extreme of quasi-EU member status to burning bridges with Europe, even if it is intuitive to predict that the UK and the EU will in the end settle for the middle ground.

In the area of criminal justice and human rights, however, we already have a solid indication of ‘the day after’, as a result of having had glimpses of it in the recent past. This is because the Lisbon Treaty – in giving the UK the ability to opt in and out of EU criminal justice legislation – has in reality brought about a de facto Brexit. In relation to fair trial rights, more specifically, the UK has, for the most part, chosen to not opt in to key legislation introduced – in the form of EU Directives – in the aftermath of a 2009 [Roadmap](#) which set out a gradual approach towards establishing a full catalogue of procedural rights for suspects across the EU.⁴ The Roadmap Directives built on fair trial rights laid down in the Charter of Fundamental Rights of the European Union (the Charter). Now neither the Charter nor the Directives giving it effect will be relevant to the UK once it has formally exited the EU (with the exception of those Directives that will have already been transposed into national law, unless Parliament decides otherwise), and by definition the UK will no longer be part of this European integration process that has arguably triggered a fair trial rights ‘revolution’ in Europe.⁵

(Missing out on) the fair trial rights revolution in Europe?

Following on the Roadmap, the EU adopted far reaching Directives on the rights to [interpretation and translation](#) (2010), [information](#) (2012), and [access to a lawyer in criminal proceedings](#) (2013), taking a major first step in the direction of establishing common minimum standards for suspects and accused persons across the EU. These Directives, which signal ‘a fundamental shift in the focus of European criminal law, from a system privileging inter-state judicial and police cooperation to a system where the protection of the fundamental rights of the affected individuals should be fully ensured’,⁶ and which are already having a drastic effect in EU Member States, paved the way for a second generation of EU Directives on procedural rights. More specifically, on 15 December 2015 the Council and Parliament agreed a [Directive on procedural safeguards for children suspected or accused in criminal proceedings](#). On 9 March 2016 the Council adopted a [Directive that aims to strengthen certain aspects of the presumption of innocence](#), with an emphasis on the right to silence and the right against self-incrimination, and the right to be present at trial in criminal proceedings. Finally, days only after the June 23 referendum, the EU institutions took a major and final step forward in the Roadmap process, in agreeing the most controversial of the legal texts that were planned as part of this highly ambitious project: the [Directive on the right to legal aid](#), which aims to increase ‘mutual trust’ among EU states and ultimately enhance European cooperation in criminal cases.⁸

Taking much of their inspiration from – and running parallel to – European Court of Human Rights jurisprudence that has had a cataclysmic effect in EU Member States, particularly those that had long resisted the idea of lawyers ‘entering the police station’, the Roadmap Directives underpin a fair trial rights revolution in Europe and an unprecedented coming together of EU Member States around a group of core pre-trial procedural rights.⁹ But the UK has chosen to stay out of this process. It has transposed the first

two – less controversial – Directives on the right to translation and interpretation and the right to information, but has confirmed that it will not opt in to any of the Directives that followed.

The UK's decision to not opt in to the Directive on the right to access to a lawyer in particular was perhaps the biggest oxymoron in this process of post Lisbon emerging isolationism in criminal justice matters; the UK had long led the way in Europe in legislating custodial interrogation rights and ensuring their effective implementation in practice.¹⁰ Compared to the shock waves that the new emphasis on custodial interrogation rights sent down the spine of other EU Member States,¹¹ the UK would have easily absorbed possible vibrations, simply by making adjustments to long standing legislation and practice. Yet the UK decided it should not partake in this process, taking everyone by surprise and signalling the shape of things to come.

Brexit's damaging effect

Brexit can now exacerbate the increasingly ambiguous relationship with Europe on criminal justice matters. We must widen the angle of our vision to understand why. We must note, in particular, that while the UK has not transposed post Lisbon Directives recognising key procedural rights, it has, on the other hand, opted in to a significant number of EU Directives – and opted back into key third pillar measures – designed to enhance judicial and police cooperation and facilitate the fight against crime, most notably the European Arrest Warrant. However, as Mitsilegas has demonstrated, this 'varied landscape' with regards to UK participation in EU criminal law measures has been posing 'significant challenges for legal certainty, coherence and the protection of fundamental rights' even prior to Brexit, and will considerably reduce the scope for criminal justice cooperation with the EU in the post Brexit era.¹² This is because the Roadmap Directives aimed to improve the balance between judicial and police cooperation measures that facilitate prosecution and those that protect procedural rights of the individual,¹³ with the aim, ultimately, to enhance mutual trust as the cornerstone of judicial cooperation in the EU.¹⁴ After Brexit, it will therefore be challenging for the UK to secure the former – even if it is through bilateral agreements with EU Member States – without subscribing to the latter.¹⁵ These two key areas of EU legislation in criminal law matters are now highly intertwined, and, once outside the opt in/opt out compromises previously allowed by the Lisbon Treaty, the UK will arguably no longer be able to cherry pick the instruments it prefers. Brexit will thus put the UK at a disadvantage on judicial and police cooperation in Europe.

Equally importantly, it is suspected persons in this country that are likely to be worse off as a result of the UK no longer following the EU in this recent, but powerful, upward trajectory towards legislating suspects' rights. Of course, we should be under no illusion that fair trial standards in EU Member States have improved overnight, as a result of the coming into effect of EU Directives. Nothing could be further from the truth.¹⁶ In addition, the common law's strong grounding on the adversarial tradition provides sufficient reassurance that the UK will *not* be left behind in Europe in relation to protecting fair trial rights. But all this is not to say that the UK system is above reproach¹⁷ or that it does not stand corrected by external (European) oversight, or that it has not already benefited from the joined up work of the EU Member States and the institutions of the EU for that matter, not least in the context of the recent Roadmap Directives.

To take a few examples, the right to information Directive has led to the introduction in the UK of a revised 'Letter of Rights' and created a new obligation on police to provide sufficient information to the suspect

prior to the interview as well as documents essential for challenging the lawfulness of arrest or detention when the suspect is booked in at the police station, at reviews or on charge. In other words, it filled an important gap in existing legislation. Opting in to the Directive on the right of access to a lawyer would have similarly put pressure on Parliament to widen the scope of the right to legal assistance, by extending its application to investigative and evidence gathering acts other than the questioning of the suspect, thus providing more substantial protections to suspects.¹⁸ Following the same line of reasoning, the new Directive on the presumption of innocence would have most likely necessitated reopening the discussion about the courts' power to draw adverse inferences from silence,¹⁹ a taboo of UK criminal justice that one hardly comes across in other parts of the world – including in the common law world – but that has mysteriously been taken as something of a given in the English Law of Evidence and criminal procedure.²⁰ It also hardly needs emphasising that, in view of the controversial cuts imposed by UK governments on legal aid in recent years,²¹ the forthcoming Legal Aid Directive would have provided a useful external point of reference to the relevant debate.

It must be stressed that by opting out of legislation that concerns fair trial rights, the UK has not just turned its back on Europe, it has also turned its back on its own history of noteworthy advances in this area; advances that have had a marked influence in Europe. With Brexit looming, it is therefore now reasonable to predict that the UK's ability to positively affect the practice of other countries on suspects' rights will be diminished.²²

This emerging isolationist trend has overtones of critiques of modern conceptions of the role of the UK in Europe, which went to the heart of the EU referendum debate, especially as regards the distorting effect of narrowly portraying the UK as solely being on the receiving end of EU pressures for reform rather than a modern nation central to the Union, capable to lead in Europe, positively affecting the attitudes of fellow EU Member States in its various interactions with them.²³

The way forward: a renewed emphasis on the ECHR?

The imminent departure from the Charter of Fundamental Rights and relevant EU Directives represents a missed opportunity for enhancing the protection of suspects' rights in the UK, sharing with European partners UK expertise on how to effectively implement them in practice and reinforcing 'mutual trust' as a basis for cross-European cooperation on criminal justice matters. But, on the other hand, both the Charter and EU legislation on fair trial standards are still in their infancy, and the UK has generally fared well under the sheer influence of the ECHR as regards the protection of suspects' rights in the recent past. Placing a renewed emphasis on ECHR jurisprudence to fill in the gap might therefore go some way towards guaranteeing the protection of key procedural rights, even if does not provide the momentum for the accelerated and comprehensive reforms that one might otherwise be able to envisage under the EU Directives and even if it cannot secure enforcement through the more rigorous mechanisms that are available to EU law.²⁴

We should, in particular, note here that it was Strasbourg that breathed new life to the EU project on common fair trial rights, after this had come to a standstill as a result of resistance from a number of influential EU Member States,²⁵ and that Strasbourg jurisprudence has continued to evolve – at an impressive pace – long after the first Roadmap Directives came into effect, being the key driving force for

the substantial reforms of suspects' rights that we have in recent years witnessed in Europe. What is more, ECtHR jurisprudence on suspects' rights is now starting to directly take into account the Roadmap Directives.²⁶ This means that in subscribing to the Convention, the UK will at the same time be upholding guarantees that are part of the relevant EU Directives, in line with relevant interpretations adopted by the Court of Justice of the European Union (CJEU).

It can be argued therefore that the ECHR can, to some extent, provide an adequate substitute for the loss of the Charter, at least in relation to fair trials protections. The ECHR may also prove an easier pill for Eurosceptics in Britain to swallow. To their satisfaction, resistance to Strasbourg from the UK political and judicial establishment has risen to such levels in recent years²⁷ that they probably now consider the Convention an easy target, especially in comparison to the more interventionist role that the CJEU was posing (in their eyes), as a result of the far more rigorous enforcement mechanisms that the latter possesses in comparison with the ECtHR.

The ECHR under attack

Post Brexit Euroscepticism is, of course, anything but conducive to placing a renewed emphasis on the ECHR. The relationship of the UK with the ECtHR has become highly contentious in recent years, with Strasbourg decisions on prisoners' rights, whole life tariffs, deportation of foreign suspected terrorists and the action of UK military forces abroad among other things generating fierce criticism from the tabloid press and even from the (Conservative-minded part of the) broadsheet press.²⁸ In response to these concerns, and seeking to appease Conservative voters that might otherwise have been lured by UKIP's strong anti-European rhetoric, the Conservative party published in [October 2014 proposals](#) seeking to eradicate the effect of the Convention in the UK. The main ambition was to ensure that the ECtHR would 'no longer [be] binding over the UK Supreme Court' and would 'no longer [be] able to order a change in UK law', and that 'a proper balance between rights and responsibilities in UK law' would be restored.

In November 2015, a blueprint for the UK Bill of Rights was leaked to the Sunday Times, and it went so far as to suggest that 'under the new system, judges would not have to follow rulings of the ECtHR slavishly any longer', and that 'instead, they [would] be able to rely on the common law or rulings by courts in other Commonwealth countries, such as Australia or Canada, when making their judgments'. These proposals revealed 'grave misconceptions about the nature of the European Convention on Human Rights (ECHR) and its relationship with comparative law, if not a cynical attempt to trivialize the effects of putting in place a UK human rights system à la carte'.²⁹ It remains to be seen, when and if a consultation for a Bill of Rights is announced, whether the government is still subscribing to such a view of the Convention; concern has consistently been expressed that this is practically a plan for an ECHR-minus.³⁰

In the meantime, the UK continues to refuse to implement the judgment of the ECtHR in the case of *Hirst v the United Kingdom (No 2)* on the issue of prisoners' rights to vote, delivered in 2005, which risks 'undermin[ing] the standing of the UK' and would also 'give succour to those states in the Council of Europe who have a poor record of protecting human rights and who could regard the UK's action as setting a precedent for them to follow'.³¹ Irrespective of how controversial the topic has proved to be, this is another illustration of the UK backtracking on its international human rights commitments instead of leading in Europe.

In light of the above, it is perhaps more convincing to predict that leaving the EU Charter and EU law risks creating momentum for a simultaneous exit from the ECHR, rather than contemplate the opposite, more specifically that a newly discovered confidence in the ECHR would somehow counterbalance the loss of rights that would have been afforded with the EU Directives. Conor Gearty's acute warning – in the preface of his disturbingly timely [‘On Fantasy Island’ project](#) – captures this beautifully

‘Now that the larger European entanglement has been successfully seen off, the time has come for finishing the unfinished business of human rights destruction’, he notes,³² bringing the two main targets of British Euroscepticism – EU membership and the ECHR – alarmingly close to each other. Shami Chakrabarti echoes these concerns:

Debates about scrapping Britain's Human Rights Act and even our potential withdrawal from the European Convention on Human Rights ... are now back on the table. Once upon a time these may have been – at least in part – devices to enhance the credentials of reluctant remainers with their Eurosceptic political base. Now it seems these appetites have not been satisfied – and the wisdom of feeding the beast looks doubtful.³³

Now if these worrying predictions are correct, then the UK is heading straight to ‘a potential human rights legal deficit’, where – without the legal protections afforded by both EU law and the ECtHR, and in the absence of a written constitution – access to rights and remedies could be taken away without proper checks or safeguards.³⁴

A written constitution and the UK Bill of Rights

It was perhaps with the threat of such a legal deficit in mind that Dominic Grieve has recently suggested – at a recent ‘Britain in Europe’ event – that ‘Parliament should consider whether the time is right to draw up a formal written constitution for the United Kingdom’. The former Attorney General explained that ‘the government's position had become more nuanced of late, with its proposals not only directed at the

Strasbourg court but also against the “predatory activities of the European Court of Justice in Luxembourg”’. A written constitution, in combination with a Bill of Rights, ‘would allow the opportunity to define and protect rights constitutionally rather than via the ECHR’, so long as it were ‘compatible with our convention obligations’, he concluded. He emphasised, nonetheless, that the ECHR was ‘the single most important instrument for promoting human rights on the planet’ and a potential withdrawal of the UK would be ‘very damaging for the promotion



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of human rights elsewhere'.³⁵

With a departure from EU human rights law now a foregone conclusion, and with the ECHR teetering on the brink of a long awaited, politically calculated, decision by Theresa May's government on whether to push forward with the proposals for a UK Bill of Rights, the idea of a written constitution, combined with a national Bill of Rights, carries a lot of force. Whether there is any political willingness to move in this direction is another matter.

On the other hand, we must pause to observe that, for all its worth, this solution would still place the UK in the second league of human rights protections in Europe. Written constitutions and Bill of Rights are a common phenomenon there, and they normally enjoy a harmonious existence with international human rights law (they are supposed to complement each other). But such is the state of the debate on the UK's international human rights obligations at the moment that even an imperfect – ECHR-minus – system, based exclusively on national law, has a lot going for it.

Concluding thought

This contextual study of Brexit's ramifications for fair trial rights demonstrates that the UK Government must abandon plans for a potential withdrawal from the ECHR and/or the repeal of the Human Rights Act. It must instead re-establish faith in the much maligned Convention, if we are to grapple with the looming threat of an unprecedented human rights legal deficit.

Acknowledgement: Dr Giannouloupoulos is indebted to Prof Ed Cape, of Bristol Law School, for reading, and commenting upon, an early draft.

Notes

1. R Cohen, '[Britain's Brexit leap in the dark](#)', The New York Times, 24 June 2016.
2. P Papakonstantinou, 'Uncertainty on both sides of the Channel', Kathimerini, 28 August 2016 (in Greek).
3. J Henley and P Walker, '[Brexit weekly briefing: we're going to be kept in the dark](#)', The Guardian, 13 September 2016.
4. The Roadmap stemmed from the European Council's Stockholm Programme for 'an open and secure Europe', which placed special emphasis on the idea of 'a Europe built on fundamental rights' as one of its basic tenets. Council of Europe, [The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens](#), 2 December 2009, 17024/09.
5. See generally LEAP and Fair Trials, [Defence Rights in Europe: The Road Ahead](#) (2016).
6. V Mitsilegas, 'The Future of European Criminal Justice', paper prepared for the Commission Expert Group on EU Criminal Law Policy, 12 March 2014. See also T Konstantinides and N O'Meara, 'Fundamental Rights and Judicial Protection' in D Acosta Arcarazo and CC Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing, 2014).

7. See eg how the Directive on the right to access to a lawyer has been of paramount importance in leading the Dutch Supreme Court to recognise that, in addition to the right to consult a lawyer prior to interrogation, the suspect also has the fundamental right to have a lawyer present when interrogated by the police. D Giannouloupoulos and K Pitcher, [‘The Shifting Terrain for Suspects’ Rights in Europe – the Right to Legal Assistance Saga in the Netherlands](#)’, Fair Trials Blog, 23 May 2016.
8. European Council – Council of the European Union, [‘Legal aid in criminal proceedings: Council and Parliament reach an agreement’](#); Fair Trials – Legal Experts Advisory Panel, [Position paper on the proposed directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings](#), February 2015.
9. See generally D Giannouloupoulos, [‘Strasbourg Jurisprudence, Law Reform and Comparative Law: A Tale of the Right to Custodial Legal Assistance in Five Countries’](#) (2016) 16 *Human Rights Law Review* 103-129.
10. Giving evidence before the Select Committee on Extradition Law, Baroness Ludford said characteristically: ‘I am sorry the UK has not opted into the directive on the right to a lawyer, because I think we have the gold standard on that in the EU and it is a pity that we do not show leadership on that particular measure.’ Select Committee on Extradition Law, Second report, [Extradition: UK law and practice](#) (2015) para 343. John Spencer was critical of UK ‘reticence about further involvement’ in EU criminal law. Focusing on the Roadmap rights in particular, he argued that the ‘UK should be taking a leading role in [their] creation’, since this was ‘an area in which the UK currently holds the high moral ground’; ‘[t]here is much in the current laws and practices of the UK that the US is entitled to be proud of, and in respect of which it is in a position to give a lead to the rest of the EU – and in particular, to those Member States in which these things are at present less well done’. All this was before Brexit of course. J Spencer, ‘The UK and EU Criminal Law: Should we be Leading, Following or Abstaining?’ in V Mitsilegas, P Alldridge and L Cheliotis, *Globalisation, Criminal Law and Criminal Justice – Theoretical, Comparative and Transnational Perspectives* (Hart, 2015) 135, 147.
11. See eg the response of Scotland and France in D Giannouloupoulos, [‘“North of the Border and Across the Channel: Custodial Legal Assistance Reforms in Scotland and France”](#) [2013] Crim LR 369; D Giannouloupoulos, [‘Custodial Legal Assistance and Notification of the Right to Silence in France: Legal Cosmopolitanism and Local Resistance’](#) (2013) 24 *Criminal Law Forum* 291.
12. V Mitsilegas, ‘The Uneasy Relationship between the UK and European Criminal Law: From Opt-Outs to Brexit?’ [2016] Crim LR 517, 522. See also House of Lords, European Union Committee, [‘EU Police and Criminal Justice Measures: The UK’s 2014 Opt-Out Decision’](#), 13th Report of Session 2012-13, HL Paper 159.
13. Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, Recital 10.
14. *Ibid.*, Recital 7.
15. Mitsilegas (n 12) 534.
16. See eg Ed Cape and J Hodgson, ‘The Right to Access to a Lawyer at Police Stations – Making the European Union Directive Work in Practice’ (2014) 5 *New Journal of European Criminal Law* 450.
17. Empirical research on suspects’ rights has time again brought to light very significant gaps in UK legislation and practice in relation to the exercise of custodial interrogation rights. See eg V Kemp and J Hodgson, ‘England and Wales: Empirical Findings’ in Vanderhallen et al. (ed), *Interrogating*

Young Suspects: Procedural Safeguards from an Empirical Perspective II (Intersentia, 2016); P Pleasence, V Kemp and NJ Balmer, 'The justice lottery? Police station advice 25 years on from PACE' [2011] Crim LR 3.

18. Directive 2013/48/EU of 22 October 2013, L 294/1, Art 3.3(c).
19. Art 7(5) of the Directive states that 'the exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned'.
20. See, however, critiques of the power to draw adverse inferences, eg by Hannah Quirk, who has recently argued at the ['Criminal Law Reform Now'](#) conference that ss 34-38 of the Criminal Justice and Public Order Act 1994 should be repealed and the common law right of silence reinstated. See, in more detail, H Quirk, 'The Right of Silence in England and Wales: Sacred Cow, Sacrificial Lamb or Trojan Horse?' in J Jackson and S Summers, *Obstacles to Fairness in Criminal Proceedings* (Hart Publishing, forthcoming).
21. See generally T Smith and Ed Cape, 'The Rise and Decline of Criminal Legal Aid in England and Wales' in A Flynn and J Hodgson (eds), *Legal Aid and Access to Justice: Comparative Perspectives of Unmet Legal Need* (Hart Publishing, forthcoming).
22. Cape notes that 'until now the approach of England and Wales has been regarded as something of a model', then suggests that, as a result of EU opt outs and backtracking on existing legal aid safeguards in the UK, this will no longer be the case. Ed Cape, ['Criminal Defence: The Value and the Price'](#), Keynote speech to Law Society Criminal Law Conference, May 2013.
23. See generally D Giannouloupoulos, ['A Powerful Vision of Britain as a European Leader – Thank Gordon Brown for That'](#), The Conversation, 14 June 2016.
24. Concern over the failure of many Member States to observe the ECHR fair trial requirements with satisfactory consistency was one of the main reasons behind legislating the Roadmap Directives in the first place. See House of Lords, European Union Committee, [Procedural Rights in Criminal Proceedings](#) (2004-05) HL Paper 28, para 4.
25. The European Commission's 2004 proposal for a framework decision on certain procedural rights throughout the European Union had the ambition to move EU law in this direction, but it soon 'became clear there was no collective political will to agree the provisions and the proposal was reduced to little more than a letter of intent which held no compulsion or compellability'. See European Criminal Bar Association, [Procedural Safeguards](#). But Strasbourg jurisprudence, starting with *Salduz v Turkey* (2008) 49 EHRR 421, turned the tide in favour of wider EU integration in this area.
26. In *AT v Luxembourg* Application No 30460/13, Merits and Just Satisfaction, 9 April 2015, at para 87, the ECtHR drew on the Directive on the right of access to a lawyer to conclude that the lawyer's presence during questioning will not suffice for the right to fair trial to be respected, and that national legislation must also provide for private consultation with a lawyer prior to the beginning of the interrogation. In *Zachar and Čierny v Slovakia* Applications Nos 29376/12 and 29384/12, Merits and Just Satisfaction, 21 July 2015, the Court relied on the Directive on the right to access to a lawyer and the Directive on the right to information to decide that a waiver of the right to custodial legal assistance had not been effective.

27. See eg such as reflected in the cases of *Hirst v the United Kingdom (No 2)* [2005] ECHR 681 and *Al-Khawaja and Tahery v the United Kingdom* (2009) 49 EHRR 1 respectively.
28. See eg D Barrett, '[Calls grow to boycott "toxic" human rights court](#)', The Telegraph, 9 July 2013.
29. D Giannouloupoulos, '[The Bill of Rights leak shows draft plans are plainly flawed](#)', Solicitors Journal, 24 November 2015.
30. See generally Joint Committee on Human Rights, '[A Bill of Rights for the UK?](#)', 29th report (2007-8) HL paper 165/II, HC paper 150-II.
31. Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, First Report, [Executive summary](#), 16 December 2013.
32. C Gearty, [On Fantasy Island – Britain, Europe and Human Rights](#) (OUP, 2016).
33. S Chakrabarti, 'A second Brexit could be darker still', Prospect, October 2016, 14.
34. K Boyle, '[The legitimacy of the EU referendum requires that citizens are informed of the implications of their decision](#)'. Democratic Audit UK, 2 April 2016.
35. See '[Dominic Grieve QC: "It may be time to consider a written constitution"](#)', Solicitors Journal, 4 March 2016. The full lecture is available to watch from the BiE website: '[Former Attorney General warns of ramifications from leaving the ECHR](#)', 21 March 2016.



FREEDOM TO MANOEUVRE VERSUS LOSS OF LEVERAGE? THE SECURITY POLICY IMPLICATIONS OF BREXIT

Philip HJ Davies

Prelude

A UK exit from the European Union has played out, and will continue to play out, profoundly differently in the security sphere in Britain than in almost any other area prior to or since the June 23 referendum. While the early motivations for what would become the EU may have had a security aspect to them (defusing potential future conflict between Continental European states by increasing their economic integration), the EU did not evolve primarily as a security mechanism. Security, foreign policy and defence are, however, areas into which there has been a post-Maastricht Treaty progression. Whether seen as a natural outcome of the ‘spillover’¹ effects of economic and regulatory integration, as an incremental and questionable EU ‘mission creep’ or (at the most trenchant) part of a wider, ‘Euro-Federalist’ constitutional

'bait and switch' between European Economic Community and European *Union*, security has become a significant sphere of EU policy and activity, and hence has implications for so-called 'Brexit' and for British national security that require some scrutiny.

The degree to which British security policy and its practitioners have been as divided on the European question as the rest of the electorate and political classes is indicated by the fact that two former chiefs of the Secret Intelligence Service (SIS, aka MI6) entered the referendum debate – on opposite sides.² Similar divisions of opinion could as easily have been found amongst the armed Services or the police and elsewhere in the UK's defence, security and law enforcement worlds. UK defence and national security interests and plans do not, nor have they ever, aligned particularly naturally with any version of the European project. And yet, as a major politico-military power, the UK has been a major participant in the EU's endeavours in the defence and security spheres. The respective balance of power, as it were, between the UK and the EU is therefore profoundly different here than in other aspects of their relationship.

The notion of security is an enormously broad and highly contested one, but for the current purposes it will be discussed in terms of four principal areas: defence; intelligence; domestic security and the global geopolitical strategic environment. Some key implications of each of these will be examined in turn. For simplicity and brevity, the security implications are more readily articulated if one assumes (however artificially) a comparatively swift 'clean break' or 'hard' Brexit.

Defence

The first issue to appreciate with regard to defence is that the UK's defence capabilities, commitments, policies and investments are driven principally by our role in the North Atlantic Treaty Organization (NATO) and the UK's independent strategic role. That latter role is articulated in current British Defence Doctrine as collaborating as broadly as possible on a global basis to provide 'collective security', 'maintain the international order' and 'underpin a robust rules-based international system'. This strategic posture envisions leveraging the UK's sovereign political and military power-projection capabilities in a diverse array of international architectures including, *inter alia*, the Organization for Security and Cooperation in Europe; the Five Powers Defence Arrangement (FPDA) of the UK, Australia, New Zealand, Malaysia and Singapore; both the G8 and G20 frameworks; the African Union and the Gulf Cooperation Council.³

Brexit is, of course, irrelevant to NATO and UK participation therein, as it is to the wider global assortment of multilateral regimes in terms of which the UK pursues its defence policy. To be sure, there is the 2010 Anglo-French Lancaster House Treaty on defence cooperation, but this was pursued at the time by the coalition government of the day as a thinly veiled attempt to draw on French assets to fill UK capability gaps created by the corrosive defence cuts of the Strategic Defence and Security Review (SDSR) conducted that same year. In the event, the only palpable outcomes have been the deployment of British logistic and intelligence, surveillance, target-acquisition and reconnaissance (ISTAR) elements in support of French operations in Mali and the Central African Republic.

The main hazard for UK defence presented by Brexit is an indirect one. That is the risk of any significant and sustained post-Brexit contraction in the British economy which would limit or reduce the public funds available for defence expenditure, both in terms of immediate operational funds and long term investment and acquisition. This is a particularly serious consideration at a time when there are highly cost intensive defence systems due to come on stream, like the two *Queen Elizabeth* class aircraft carriers, or major investment programmes looming in the relatively near future (most notably the replacement programme for the Trident submarine-based nuclear deterrent⁴). Furthermore, the UK must address these programmes at a point when the recently retired Commander of Joint Force Command has warned that the UK's armed forces, still profoundly diminished in the wake of SDSR, are unable to meet the needs of the current fraught strategic environment. In this respect, whether or not the UK lives up to its 2006 NATO commitment to spending 2% of its GDP on defence (unlike the all but three of its European NATO partners⁵) is a red herring. The real question is whether that GDP will be big enough to sustain substantial and effective investment in national defence.

In the short term, however, the main defence cost of Brexit would be to the European Union. A truly clean break would mean withdrawal of UK capabilities and leadership from the EU Military Staff (EU MS) and the withdrawal of British assets, personnel and support to EU-led combined military (primarily maritime) operations. These include Operation ATALANTA against piracy off East Africa and Operation TRITON directed towards trans-Mediterranean migration. Such EU operations have, however, been chronically troubled affairs with ATALANTA in particular suffering from almost prohibitive discontinuities in leadership, operational policy, doctrine and intelligence support resulting from the regular rotation of command between the various EU states involved.

Intelligence

As in defence, the UK's foreign intelligence capabilities, commitments, investment, requirements and policies are almost entirely detached from the EU. Rather, Britain's national intelligence agencies and key elements of defence intelligence do their work in the context of the so-called '5 Eyes' intelligence special relationship with the United States, Canada, Australia and New Zealand.⁶ The 5 Eyes has its institutional roots in the so-called UKUSA network of signals intelligence cooperation agreements subsequently reinforced by other national agency-specific agreements (such as between the Secret Intelligence Service and the Central Intelligence Agency) and the 1957 Burns-Templer Agreements on military and defence information sharing. The 5 Eyes States collect on the basis of one another's requirements, share and manage much of the resulting information through common technological resources and infrastructure, cross-invest in one another's systems and operations, and work according to highly interoperable standards and procedures. The 5 Eyes architecture gives the UK access to global intelligence coverage, at levels of granularity, which cannot be matched by any individual or combination of EU states. Consequently, Brexit is also almost irrelevant to UK intelligence and foreign intelligence in particular.

The main implication of Brexit for intelligence (and law enforcement), from a government policy perspective, is that it would considerably simplify legislating on investigatory powers. One would no longer have to deal with interventions from, for example, the Court of Justice of the European Union on data retention. That intervention necessitated the hurried and poorly prepared 2014 Data Retention and

Investigatory Powers Act which has proven problematic even before the British High Court. While there may be a running and keenly felt debate over the issues surrounding intercept and surveillance powers,⁷ in purely practical policy terms the EU has often featured as a drag on the government's ability to manage its own affairs in this sphere. And it should also be borne in mind that any investigation, criminal or national security, depends on the ability and opportunity to interrogate as much relevant information as possible retrospectively after a crime, terrorist act or espionage penetration – sometimes (as in the case of Soviet penetration in the Cold War) reaching back decades rather than years.⁸ A departure from the EU would simplify such matters considerably for the UK government.

To be sure, the UK has been cultivating increasingly close intelligence sharing arrangements with a number of EU states, but this is chiefly at the level of top-level strategic intelligence assessment and not clandestine collection methods and their highly sensitive products. Those sharing arrangements, however, like the Lancaster House Treaty, are based on bilateral relationships outside the context of the EU.

Also like defence, the chief hazard to British intelligence would come from any significant or sustained post-Brexit economic malaise that would limit or reduce the public moneys available to fund the national agencies under the Single Intelligence Account or Defence Intelligence from the Ministry of Defence Central Account.

Here again the immediate cost of Brexit would be felt more acutely by the EU which would lose UK participation in, contribution to, and support of EU intelligence functions in the form of the EU MS Intelligence Directorate and the EU Intelligence Centre (EU INTCEN) within the European External Action Service. It is important to keep in mind Britain was formative to both intelligence components, in particular providing the operating model for INTCEN (based on the Joint Intelligence Organisation in the UK Cabinet Office) as well as its first Director. It is, moreover, generally accepted in the intelligence sphere that the UK is the most forthcoming of the major powers within the EU in terms of sharing intelligence information, technique and best practice.

Domestic security

Domestic security is itself a potentially vast sphere of activity, but for the present purposes it will be addressed in terms of counter-terrorism, counter-intelligence, law enforcement and protective security of facilities and infrastructure. These functions share substantial overlap in terms of targets, concerns, regulatory frameworks and the organisations involved. The domestic security picture is more nuanced than either defence or intelligence, and more a case of 'swings and roundabouts'.

In the event of a 'hard' Brexit, the UK would lose access to a range of security and law enforcement mechanisms of genuine value. This would include loss of access to the information sharing and operational coordination available through Europol, an agency which has proven relatively successful within the bounds possible within the EU. We would also lose access to the European Arrest Warrant, an all but indispensable legal instrument when terrorism, organised crime and cyber threats are almost uniformly transnational, cross-jurisdictional phenomena.

On the other hand, the UK would benefit from a reduced dependency on weak-link-in-the-chain states and ineffective EU collective security mechanisms. Weak link states are characterised by ineffective or intentionally non-compliant security and frontier control mechanisms. In a number of cases the problem is with states dogged by inadequate professionalism in the law enforcement and domestic security sector as well as under-investment in such agencies, often combined with endemic corruption or pervasive organised crime. Elsewhere the UK (and the rest of Europe) has had to deal with the consequences of certain states choosing not to comply with European collective security regimes. Typical here is Italy's conscious decision not to document incoming migrants crossing the Mediterranean, as required by the European Council on Refugees and Exiles Dublin Regulation, in order to avoid carrying the costs of monitoring and accommodation.⁹ An end to continued exposure to the consequences of such weak links that propagate via the Schengen Area across Continental Europe would almost certainly be a gain to effective UK domestic security.

In a slightly different class are states with highly professional and dedicated agencies that suffer from a chronic, even near-terminal, lack of investment or political support such as Belgium, the Baltic and the Black Sea states. In these cases, one is likely to see continued intensive UK engagement on capacity building and operational support on bilateral grounds or, where appropriate, via NATO.

The withdrawal of UK capabilities and competencies from collective EU internal security efforts will be no less keenly than the loss of British defence and intelligence cooperation. By the same token, the UK's policing and domestic security organisations will be just as vulnerable to any significant economic contraction as the armed Services and intelligence community.

Geopolitical and strategic environment

As we have seen from the discussion of Britain's defence posture, Brexit is essentially irrelevant to the UK's wider global commitments such as the FPDA in South East Asia, at least in the first instance. That being said, there may be longer term effects in this regard. There can be little doubt that the 'outward looking' UK on which Brexit advocates and the present government are staking their hopes will become increasingly concerned with trade in the Asia-Pacific region. One of the most likely consequences would be an increased dependence on trade with Asia-Pacific states within and through the so-called 'southern Silk Route' sea line of communication running from the Indian Ocean through the Straits of Malacca and the South China Sea. The UK would, as a result, become more exposed to the risks associated with China's increasingly aggressive and well-armed attempts to impose its authority and interests on the South China Sea region, and to expand those efforts into the Indian Ocean. In which case, it seems likely that the UK may have to confront and make far reaching decisions about its role in that potential conflict zone, either in terms of or outside FPDA. Britain will have to consider whether it is to be a passive beneficiary of attempts by others (chiefly the US) to maintain order and the security and freedom of sea lanes, or if we are to take on a role as one of the guarantors of that order – with all of the risks that seems likely to entail.

Within the more immediate Atlantic, European and Eurasian areas the principal challenge is that of an increasingly truculent and resurgent Federal Russia. Russian strategic discourse and doctrine do not

significantly differentiate between NATO¹⁰ and the EU. The two are typically perceived as functioning in lockstep as different facets of an integrated Western bloc dedicated to a continuation of the Cold War strategy of encircling Russia.¹¹ In this context, Britain's withdrawal from the EU is likely to be seen in Vladimir Vladimirovich Putin's government as a weakening of the resolve and robustness of that Western bloc. And any such sign of weakness is something that Russia will seek to exploit to the fullest possible potential at every opportunity.

That being said, it must be acknowledged from a geostrategic point of view that for many of its members, not just the UK, the EU and its post-Maastricht Treaty goal of a common foreign and security policy (CFSP) has proven far more a liability than an asset. From balkanised, fractious and divisive foreign policies of certain key EU members in the 1990s contributing to the bloody and tragic disintegration of the former Yugoslavia to the complete failure to achieve an effective and forceful corporate EU response to Russian aggression in the Crimea and eastern Ukraine, the CFSP has been little more than an increasingly expensive and counter-productive drag on European collective security even (as Lord Owen has suggested¹²) undermining the effectiveness of other arrangements such as NATO.

A withdrawal from the sometimes Byzantine workings of EU policy making could, therefore, unshackle Britain's ability to pursue the international order and 'rules-based international system' so central to its geostrategic self-perception. But this will only be the case if the UK is able to leverage its post-Brexit global international trade and economic position with sufficient effectiveness to ensure that it is prosperous enough to pay for the capabilities required to back up those aspirations. But this is a medium to long term concern. In the shorter term, however, the very real defence, intelligence and security costs that Brexit would incur *on the EU* should be seriously considered and clearly articulated as bargaining chips by the UK government in the coming Brexit negotiations.

Notes

1. To borrow Ernst Haas's concept; see Haas *The Uniting of Europe: Political, Social and Economic Forces 1950-1957* (Stanford CA: University of Stanford, 1968).
2. Sir Richard Dearlove entered the fray in favour of departure in his 'Brexit Would Not Damage UK Security' in *Prospect* April 2016, downloadable at <http://www.prospectmagazine.co.uk/opinions/brexit-would-not-damage-uk-security> 14 October 2016. His successor-but-one John Sawers sought to rebut Dearlove's case with 'I Am a Former MI6 Chief and I Am a Patriot. Here's Why I Am Voting Remain' *The Telegraph* 16 June 2016 <http://www.telegraph.co.uk/news/2016/06/16/why-this-lifelong-patriot-is-voting-remain/> (downloaded 14 October 2016).
3. Development, Concepts and Doctrine Centre (DCDC) *JDP 0-01: British Defence Doctrine* (Shrivenham, UK: DCDC, 2014) pp.5-6.
4. It is important to note that, given France's consistent commitment to their own independent nuclear *force de dissuasion*, the EU is also irrelevant to nuclear deterrence policy and strategy.

5. Those three are, surprisingly enough, Greece (as of figures for 2015), Estonia (who face an especially immediate threat to the East) and Poland (similarly placed). By comparison, the USA spends more than 3.5% of GDP. See Rob Page *Defence Expenditure – NATO 2% Target* House of Commons Briefing Paper CBP7343 21 October 2015 (London: House of Commons Library, 2015).
6. At the operational and tactical levels of military and defence intelligence there is also a central focus on NATO intelligence cooperation and sharing mechanisms, but this is essentially a special case of the issues discussed under ‘defence’.
7. For a highly detailed analysis of the issues and legislation, see Sir David Anderson *A Question of Trust: Report of the Investigatory Powers Review* (London: Williams Lea Group, 2015).
8. In the case of Soviet penetration, this entailed archived intercepted Soviet communications codenamed VENONA as much as thirty years old. For a British perspective on the US-led project see Nigel West *Venona: the greatest secret of the Cold War* (London: HarperCollins 2000).
9. Mark Micallef ‘Can Italy “Hurt” Europe?’ *Migrant Report* 14 June 2015; <http://migrantreport.org/if-eu-fails-to-move-on-migration-we-go-for-plan-b-italian-pm/> 13 October 2016.
10. NATO specifically has been cited in the 2014 Defence Doctrine of Russia as *the* principal external military threat to Russia due to expansion and ‘violation of the rules of international law’. See the English translation of V.V. Putin ‘The Defence Doctrine of Russia’ published by the Russian Embassy in London <http://rusemb.org.uk/press/2029> 14 October 2016.
11. See, e.g. Maria Lipman’s ‘Commentary: What Russia Thinks of Europe’ for the European Council on Foreign Relations http://www.ecfr.eu/article/commentary_what_russia_thinks_of_europe5084 14 October 2016.
12. Lord David Owen ‘The UK’s In-Out Referendum: Implications for EU Foreign and Defence Policy’ delivered at the Royal United Services Institute 25 April 2016; <https://rusi.org/event/David-Owen-EU-Referendum> 14 October 2016.



BREXIT SCENARIOS AND ENVIRONMENTAL POLICY: LIKELY LOSS OF UK INFLUENCE AND AMBITION

Christian Heitsch

Introduction

This paper considers the implications the various scenarios for the future development of the relations between the United Kingdom and the European Union may have for environmental policy. More specifically, given the advisory nature of the referendum about whether the UK should leave the EU, these scenarios include continued EU membership; the ‘Norway model’ of the UK becoming a party to the Agreement on the European Economic Area (‘EEA Agreement’); a negotiated bilateral agreement with the EU; and the applicability of WTO rules in the absence of any special agreement with the EU. The paper will conclude that any of these scenarios which involve the actual withdrawal of the UK from the EU will have a significant detrimental effect on the current degree of environmental protection in the UK and on the UK’s influence on shaping EU and international environmental policy. In the author’s view, this is an additional

argument which should encourage Parliament and the Government to study carefully whether departing from the EU is really in the country's best interest. An orderly way out of the unmitigated mess created by holding the EU referendum without any contingency plans is the establishment of a Royal Commission charged with investigating the true implications a departure of the UK from the EU would have in all affected policy areas and with developing a plan for an orderly departure.

Advisory character of the EU referendum

At the outset, it should be noted that as a matter of law the EU referendum vote is advisory and consultative rather than binding on Parliament and the UK Government. Effectively, the referendum is nothing more than a formal opinion poll. This is because the legislation authorizing the EU referendum¹ lacks any provision imposing a duty on the Government to implement the departure from the EU the majority favoured. In contrast, the legislation about the 2011 Alternative Vote referendum required the Secretary of State to make an order to introduce the alternative vote, should the majority of the ballots cast be for that change.² Ultimately, though, this did not happen, since there was an overwhelming majority in favour of retaining the traditional 'First Past the Post' voting system. Given the EU referendum's advisory and consultative character, Parliament and the Government would legally be free to decide not to withdraw the UK from the EU. Politically this would undoubtedly be extremely difficult,³ even though among sitting MPs there appears to be a large majority in favour of staying within the EU.

Impact of the UK on the development of EU environmental policy

The UK has had a significant influence on the development of the Union's environmental policy. In addition, the difficulty of changing EU measures has benefitted businesses by providing policy stability, increasing investor confidence and permitting long-term planning. As the House of Commons Environmental Audit Committee noted in a recent report.

This [i.e. the development of EU policy] is a two-way process in which the UK has significant influence through the Council of Ministers, its MEPs and stakeholders, such as NGOs and business representatives. Depending on how they have seen the national interest, the UK Government has led the way in developing key pieces of EU environmental legislation in some areas and have held back or amended measures in others. The Environment, Food and Rural Affairs Minister was clear that the UK Government's current approach was to press the EU to deliver a more ambitious better regulation agenda. As such, the UK has a reputation for taking a pragmatic approach to environmental law making. Many pieces of environmental legislation allow significant flexibility for member states to implement them in ways that reflect national circumstances.

Changing policy in a multi-national context is often more complex, timeconsuming and difficult than within a single nation-state. Whilst this has sometimes been a source of frustration for Government Ministers, it has had benefits, particularly for businesses, resulting in policy stability, boosting investor confidence and enabling a degree of long-term planning.⁴

Enhancement of the UK's environmental policy ambition through EU law

As has been noted on various occasions, EU environmental policy has significantly improved the state of the United Kingdom's environment, and in the absence of EU measures, the UK Government likely would have demonstrated a lower level of ambition in its environmental protection efforts. The House of Commons Environmental Audit Committee recently observed that

[t]he EU has a long history of developing environmental policy to promote the Single Market and to protect the environment. Legal authority to legislate in this area was eventually given to the EU by the member states in the recognition that there were significant benefits to solving some environmental problems multilaterally. The overwhelming majority of witnesses who gave evidence to our inquiry, and to the previous Government's Balance of Competencies Review, stated that these benefits remain. There are differences of opinion about precisely where the boundaries between national and EU level action should be drawn. The overwhelming majority of our witnesses also believed that the UK's membership of the EU has improved the UK's approach to environmental protection and ensured that the UK environment has been better protected. We noted that many witnesses implied that if the UK were free to set its own environmental standards, it would set them at a less stringent level than has been imposed by the EU.⁵

Similarly, DEFRA's submission to the European Commission's consultation about the effectiveness of the Habitats Directive noted the positive effects of the Directive on the development of the UK's conservation law, while at the same time expressing a concern about the resulting administrative burden and compliance costs:

[O]ne of the key added values in the EU Nature Directives is the ability to ensure that a coordinated approach to protecting species and habitats is achieved and maintained throughout the EU, noting in particular the needs of migratory and widely dispersed species and habitats and action to control invasive species. EU Directives provide a level playing field by requiring that MS all set a broadly similar level of ambition without compromising economic growth. Coordinated working through the recent introduction of biogeographic seminars and the development of a Natura 2000 communication platform are typical examples of invaluable joint working by Member States to achieve strategic objectives of the Directives. Having agreed standards set out in nature legislation across the EU has improved the development of conservation measures and raised the level of ambition (e.g. an understanding of what FCS [i.e. Favourable Conservation Status] means in practice). In some cases it has also helped influence the development of complimentary measures under other areas of EU legislation. For example, having Special Areas of Conservation adopted by all MS means that these MS are more receptive to the management of their fishing activities under the CFP. Conversely, the requirement of the Directive to set agreed standards (e.g. FCS) can drive action which does not always add value. For example, the Directives require MS in some cases to designate more of a particular habitat than may otherwise have been considered necessary at a MS level, in order to meet the Directives' aims (e.g. blanket bog in the UK). The need to meet the monitoring requirements of the Directives has added coherence and structure to biodiversity monitoring across the EU, although this comes at a cost and there is scope for streamlining in order to ensure that it represents good value for money. The implementation of the Directives has incentivised developers to improve the way in which they carry out major infrastructure projects, considering impacts and potential mitigation measures as a routine element of developing a project.⁶

DEFRA went on to note that

the application of FCS and the way in which monitoring has developed have been heavily driven by the Directives, and there may have been less incentive to protect widespread species such as bats and newts without the Directives.⁷

There is some documentary support for the view that in several areas the UK's environmental protection efforts would be less ambitious in the absence of mandatory EU standards. For instance, in 2012 the Coalition Government's 'RedTape Challenge' proposed that the UK should use the then-imminent review of the EU Air Quality Directives to seek:

[A]mendments to the Air Quality Directive which reduce the infringement risk faced by most MSs, especially in relation to nitrogen dioxide provisions; simplifications to the legal framework (e.g. through reducing requirements for MSs) to reduce costs and admin burdens to local authorities and businesses whilst maintaining or improving health and ecosystem protection; requirements that are strictly proportional to evidence on costs and benefits.⁸

Thus from the environmental protection perspective, there is much to be said in favour of Parliament and H.M. Government giving thorough considerations to the true implications of the UK's departure from the Union with a view to taking an independent decision on whether to withdraw.

Drawbacks of the Brexit scenarios

At present it is impossible to determine which shape the future relations of the UK with the Union will take. The Cameron Government earlier this year published a paper which presents and assesses various possible scenarios.⁹ This paper identifies three principal options – the 'Norway model' of membership in the EEA; a negotiated special agreement with the EU; and the application of WTO rules in the absence of a negotiated agreement. Building on the Government's study, the Institute for European Environmental Policy ('IEEP') prepared a paper on the implications these scenarios likely will have on environmental policy.¹⁰

Membership in the EEA

Compared to continued membership in the EU, the scenario of Britain joining the EEA has significant disadvantages in terms of the continued dominance of EU law and loss of UK influence on shaping this law. As the Government pointed out,

[t]he Norway model has considerable access to the Single Market but not in agriculture and fisheries. It does not give access to the EU's trade deals with countries outside the EU and still requires customs checks on goods crossing into the EU. It also involves making a significant contribution to EU spending, accepting free movement of people, and taking on EU rules without having a vote on them.¹¹

As regards EU environmental law, much of it would continue to apply, except the Bathing Waters, Birds and Habitats Directives.¹² The UK would lose its representation on EU institutions. EEA member countries which are not Member States of the EU are consulted on proposed EU legislation, but have no decision-making role in the legislative process.¹³ The compliance of the UK with the applicable EU / EEA legislation

would still be subject to supervision and enforcement by the EFTA Surveillance Authority and the EFTA Court.¹⁴

Bilateral agreement with the European Union

The scenario of Britain concluding a special negotiated agreement with the EU would also appear to have serious disadvantages over the current situation. As the Government study put it,

[existing] bilateral agreements vary, but none provide full access to services, which constitute almost 80 per cent of the UK economy. Higher levels of access to the Single Market involve implementing EU rules in domestic legislation, accepting free movement (as in the case of Switzerland), and in some cases making contributions to EU spending. The EU-Canada Trade Agreement provides reduced access to the Single Market for example in services and agriculture[.]

More specifically,

A bespoke UK-EU trade agreement would be complex to negotiate. The EU-Canada agreement, for example, has taken seven years to negotiate and is still not in force. A UK-EU agreement could require the agreement of all 27 of the remaining EU Member States. The European Parliament would also need to give its approval. No existing bilateral trade agreement would deliver the same level of access that the UK currently enjoys to the EU Single Market. In particular, none provide equivalent access for services, which accounts for almost 80 per cent of the UK economy. Access to the Single Market would be linked to the obligations which we would be prepared to accept. A trade agreement such as that between the EU and Canada would bring less access to the EU market than the UK currently enjoys in, for instance, financial services, but would not require the UK to accept the free movement of people or make significant contributions to EU spending. Switzerland has more access to the Single Market, but has had to accept these obligations in return. The UK would lose the benefit of EU Free Trade Agreements with other parts of the world: renegotiating these would take years. The UK would lose our voice and vote over EU rules.¹⁵

Under this scenario, EU environmental law would no longer be binding on the UK. Companies wishing to export into the EU single market would need to comply with EU environmental protection standards relating to products, though.¹⁶

Application of WTO rules in the absence of a negotiated agreement

Should the UK decide to withdraw from the EU without attempting to negotiate a bilateral agreement, or should the negotiations of such an agreement fail, WTO rules would apply between the UK and the EU. This scenario would also be disadvantageous for various reasons. The Government study concluded that

if [the UK] could not reach agreement with the EU on a new arrangement, [its] trading arrangements would revert to WTO rules. This would provide the most complete break with the EU. It does not entail accepting free movement, budgetary contributions or implementing EU rules. But it would cause a major economic shock to the UK. WTO rules mean that the EU, and all countries with which [the UK] currently [has] trade deals, would have no choice but to apply WTO tariffs on exports from the UK – putting our companies at a competitive disadvantage. Meanwhile, the UK would face a difficult choice between either raising tariffs on imports from the EU or lowering tariffs on imports from all countries. Raising tariffs would have knock-on effects on UK jobs and incomes, as well as on the attractiveness of the UK as a destination for international investment. Lowering tariffs would deny the UK revenue, and undermine our negotiating position in future trade deals.¹⁷

UK businesses wishing to trade with the Single Market would still need to comply with EU rules on environmental standards for products, without the UK having any decision-making role in the future development of these standards.¹⁸

Application of WTO rules in the absence of a negotiated agreement

All scenarios involving the UK's actual withdrawal from the EU likely have additional implications for environmental policy. The IEEP concluded that:

First, the UK ceases to participate as a decision maker in EU policies affecting the environment. This would be a substantial loss of influence.

Secondly, it ceases to influence the direction of travel of EU policy as expressed in important documents like the Seventh Environmental Action Programme and the Europe 2020 strategy for "smart, sustainable and inclusive growth", or in European Council decisions on medium term climate and energy targets.

Third, the UK would participate in international negotiations on the environment, such as the UN Framework Convention on Climate Change, as a separate party, rather than as a member of the EU. This would give it more independence, but little purchase on the overall EU position, which is arguably amongst the weightiest and most influential on the global scene because of its size, economic importance and environmental leadership in many areas.

Fourth, the CAP and CFP would no longer apply and alternatives would need to be introduced rapidly. These new arrangements would have legislative, trade and expenditure dimensions and may be significantly different for the constituent countries of the UK. There would be potentially far reaching implications for environmental management, both terrestrial and marine. For example, expenditure on agri-environment policy up to about £3 billion in the period 2013-2020 is one of the key means of incentivising more sustainable land management, but is about two thirds funded by the EU under the CAP.¹⁹

Conclusion

It derives from the above that any scenario which involves the UK actually leaving the EU will have significant disadvantages, compared to continued membership in the Union. These disadvantages are a likely lower standard of environmental protection and loss of influence over the development of European and international environmental policy. In this author's view, this is an additional argument which should encourage Parliament and the Government to study carefully whether departing from the EU is really in the country's best interest. To provide for the requisite investigation of the effects a departure of the UK from the EU would have on all affected policy areas and to develop the hitherto missing action plan for an orderly departure, the Government should as a matter of urgency establish a Royal Commission. Such a Commission, set up on the authority of the Royal Prerogative by Royal Warrant at the request of a Government Minister is the traditional UK device for thoroughly studying broader and long-term issues.²⁰

Notes

1. European Union Referendum Act 2015
2. S. 8 of the Parliamentary Voting System and Constituencies Act 2011
3. See, in a similar vein, S. Douglas-Scott, 'Brexit, the Referendum and the UK Parliament: Some Questions about Sovereignty', U.K. Const. L. Blog (28th Jun 2016) (available from <https://ukconstitutionallaw.org>, accessed 25/09/2016)
4. House of Commons Environmental Audit Committee, 'EU and UK Environmental Policy', Third Report of Session 2015-16, HC 537, at paras. 31 - 32 (available from <http://www.publications.parliament.uk/>, accessed 25/09/2016)
5. *Id.*, at para. 12
6. DEFRA, Response submitted to the evaluation study to support the fitness check of the Birds and Habitats Directives, 30/04/2015, p. 36 (available from http://ec.europa.eu/environment/nature/legislation/fitness_check/evidence_gathering/index_en.htm, accessed 25/06/2016)
7. *Id.*, p. 37
8. DEFRA, 'Red Tape Challenge – Environment Theme Implementation Plan', September 2012, p. 8 (available from <https://www.gov.uk/>, accessed 26/09/2016)
9. H.M. Government, 'Alternatives to membership: possible models for the United Kingdom outside the European Union', March 2016, available from <https://www.gov.uk/> (accessed 25/09/2016)
10. IEEP, 'Brexit – The Implications for UK Environmental Policy and Regulation: A special independent report commissioned by the all-party parliamentary environmental group', March 2016, (available at www.ieep.eu, accessed 25/09/2016).
11. H.M. Government (footnote 8), para. 1.3, for further elaboration, see *ibid.*, paras. 3.3 *et seq.*
12. EEA Agreement, Article 7 and Annex XX
13. IEEP (footnote 9), p. 7; EEA Agreement, Article 100
14. EEA Agreement, Articles 108 *et seq.*
15. H.M Government (footnote 8), para. 1.3 and Chapter 3, section B; for further explanation, see *ibid.*, paras. 3.26 *et seq.*
16. IEEP (footnote 10), p. 7
17. H.M. Government (footnote 9), para. 1.3; for further explanation, see *ibid.*, paras. 3.66 *et seq.*
18. IEEP (footnote 10), p. 7.
19. IEEP (footnote 10), p. 8 - 9
20. Ministry of Justice, 'The Governance of Britain: Review of the Executive Prerogative Powers, Final Report, 2009, para. 94 (available at <http://www.peeage.org/genealogy/royal-prerogative.pdf>



INTERNATIONAL LAW IN THE EARLY DAYS OF BREXIT'S PAST

Ignacio de la Rasilla del Moral

Echoing a widespread sense of almost existential malaise across the 'invisible college' of public international lawyers regarding 'Brexit', Judge James Crawford of the bench of the International Court of Justice (ICJ), and until very recently the Whewell Professor of International Law at the University of Cambridge, offered a *de minimis* definition of international law in times of crisis at the opening ceremony of the 12th Annual Conference of the European Society of International Law (ESIL) held in Riga on the 8th-10th of September 2016. International law, Judge Crawford said with a fine sense of irony in front of

circa 340 international lawyers representing up to 43 nationalities in the auditorium of the National Library of Latvia, is 'all that remains' when 'Brexit' happens, or when Donald Trump wins the U.S.' Presidential elections.

Internationalists by training and vocation, public international lawyers have not, for their greatest part, been too fond (to put it lightly) of the outcome of the Brexit referendum. But, is this gremial intellectual 'malaise' really justified from the perspective of the strictly professional academic interests of the UK academically-based 'invisible college' of international lawyers? After all, most international law scholars based in academic institutions across the UK received the news of the outcome of the EU referendum with, at least, a pinch of ironical relief at not having made European Union Law their life's profession. The awareness that the UK was to be in an even greater need of international legal expertise in the years to come added further reassurance. International law is, at the end of the day, 'all that remains' to replace the law of the European Union as legal vernacular for this country to lay new foundations of its global legal relationship with the rest of the world. But, can the UK truly count on some sense of academic loyalty on the part of non-British UK-based international lawyers, many of whom, moreover, feel particularly estranged as EU nationals in a country that will soon not be part of the EU family of nations?

This question is particularly relevant in view of the fact that a great many of the international law professors of international law, including some of the chair-holders of the most prestigious chairs of international law in this country, are non-British born nationals today. It is also pertinent because the professional human capital of international lawyers as experts in the most global of all legal disciplines, is comparatively higher than that of their domestic counter-parts in other legal disciplines in our increasingly globalized academic legal market. Answering the question, requires, firstly, to understand the reasons why, in spite of the multitude of inconveniences that émigré international legal scholars face, the UK was until the announcement of the outcome of the EU referendum, an attractive place to develop an academic career in international law.

These reasons can be classified for present purposes in five categories: the global influence of the English language as the main vernacular of international law; the prestige of the British tradition of international law; the hybrid intellectual position of the UK between the European and North-American approaches to international law; the liberalized and meritocratic British academic market and the relative low competition that the UK until recently faced from other countries regarding the recruitment of experts in 'the law', that as Mirabeau told us, 'one day will rule the world'. These five reasons will be briefly examined in turn.

The English language has, indeed, long replaced French as the modern lingua franca of diplomacy and international law. Moreover, the most prestigious academic publishers of books and scientific international journals in all the various areas of expertise in the large intellectual archipelago of international law are still located in the United Kingdom. The role of English as the dominant modern lingua franca for international law translates into the common perception among émigré-international-law-scholars-to-be that English was a professionally conducive choice in pursuing their academic careers. Brexit will not mean a dramatic decrease of the use of English as the main vehicular language of international law in the medium term and, therefore, at least, from this perspective, the UK still remains an attractive place for international law academics.

The prestige of the British tradition of international law before Brexit was another reason why the UK was an attractive place to develop an academic career in international law. As the just released 'British Influences on International Law, 1915-2015' published to commemorate the 100th anniversary of the foundation of the 'Grotius Society' in London, of which the British Institute of Comparative and International Law (est. 1958) is an offspring, shows, throughout the twentieth century, both British and émigré international law scholars have profoundly shaped the study of international law world-wide. This influence has been greatly facilitated by the historical position of the UK as a great power throughout the twentieth century and by the use of English as the lingua franca for international law. The international prestige of this liberal and cosmopolitan tradition rests nowadays, however, partly on the shoulders of the multitude of non-British born and non-British citizens who nurture it through their academic production, their legal advising and teaching roles in delivering manifold undergraduate and post-graduate courses of international law all over the country. Many of them came to work and, often, also to live permanently in the UK attracted by the fact that the British cultivation of international law has traditionally been intellectually positioned between the continental European and the North-American approaches and attitudes to international law. This intellectual cross-bred position, which is the third reason behind the traditional attractiveness of international law in the UK, may risk being affected if the UK, as the nationalistic overtones adopted by some politicians already anticipate, adopts an even more marked isolationist and a 'national interest first' approach in the managing of international legal affairs in the years to come. Whereas some British-born international lawyers may, out of a national sense of patriotism, go along with a neo-conservative 'Britain first' approach to international law, those with a more internationalist value-system understanding of the meaning of patriotism in the second decade of the 21st century, will critically distance themselves from such an approach. Non-British nationals based on the UK are, on the other hand, likely to be very reluctant to serve as the hand-maidens of a foreign power which shall soon not be part of the EU family of nations. Moreover, a disconnection of UK-based international lawyers from their geographically-closer EU-based international law colleagues, many of whom work at the interstices of EU law and international law, risks with creating both a sociological and epistemological gap in the relationship of the British invisible college of international lawyers with their EU-based counterparts in the years to come. Therefore, to the extent that the intermediate position between Europe and North-American approaches and attitudes to international law risks with being seriously affected by Brexit, this will decrease the former attractiveness of the UK as a place to develop an academic career in international law.

The fourth broad reason why the UK was an attractive place to develop an academic career in international law in the UK before the outcome of the EU referendum is its liberalized, meritocratic and comparatively well-funded academic market. However, the latter feature is, once again, bound to be affected by the decrease of EU academic research funding and, therefore, it now urgently requires the provision of UK tax-payers' funding to replace EU sources of funding for international law projects in this country. Maintaining a liberalized, meritocratic and well-funded academic market remains, now more than ever, a pre-condition for the UK to remain an attractive place for those wishing to develop an academic career in international law in the UK. This is even more so the case in the light of the fact that the relative closure, amidst a major international economic crisis, of other academic markets to both national and foreign academics, otherwise the fifth reason behind the attractiveness of the British academia for

international law scholars before Brexit, is turning into an enhanced international recruitment competition for the services of the professionally and sociologically cosmopolitan group of international law academics. Contrary to the craft of their most domestic oriented counterparts in law faculties across the country, the academic craft of international law scholars is perfectly transferable to other geographical locations. Indeed, exactly the same academic syllabus for an international law course can be taught in Melbourne, Shanghai, Hong Kong, Doha, Cairo, Cape Town, Berlin, Geneva, Oslo, Rio, Buenos Aires, Montreal, Boston or Los Angeles. In its search for the best and the brightest in international law, the UK is already facing a growing competition from universities, among other regions, from Asia, particularly from Singapore, Hong-Kong and, increasingly, mainland China as well as from many EU countries where international law is, often, taught in English. Moreover, it is not unlikely that EU legislators will devise policies to lure back to the EU many of the highly qualified EU nationals who are currently employed across UK law schools, including international law scholars. In the face of greater academic recruitment competition for international law academics, who are professionally well positioned in an ever increasingly global legal academic market, the attractiveness of the UK as place for international law scholars to develop their academic careers is already decreasing.

In conclusion, because of the influence of their particular international legal expertise, and their close relation to the circles of international power, international lawyers who are often polyglot and cosmopolitan professionals who through their career may perform the interchangeable roles of inter alia professors and scholars, legal advisors to states, international institutions, NGOs or corporations, and international judges, are strategic key-players in global legal policy-making processes. If it is true, as Antonio de Nebrija, the author of the first Spanish grammar published in 1492, knew well, that 'language has always been the companion of empire', in our time, the language of international law is, more than ever, the companion of global influence. Today, when international legal expertise is dramatically needed by the UK for establishing, developing and maintaining a fructiferous new legal relationship with the rest of the world, the UK legal academy maintains some of the features that made it attractive as a place to develop an academic career in international law before the outcome of the EU referendum. However, some of these features are already losing, for the reasons briefly touched upon, some of their former splendor. The global influence of what is often referred as the British liberal tradition of the international rule of law, whose weight partially rests at present on the shoulders of many non-British-born and many EU nationals who live, teach and publish about international law in this country, will not be better off for it in the years to come.



THE STATUS OF EU CITIZENS IN THE UK

Dimitrios Giannouloupoulos

In a [letter published in the Guardian](#) shortly after the referendum, 'Britain in Europe' called upon the government and all other political parties to offer the strongest possible reassurance to all EU citizens living in the UK that they will in no way be adversely affected by exit negotiations with the EU once article 50 has been triggered, and that they can continue to plan their future in this country exactly as before.

In the letter we strongly expressed the opinion that:

[t]he government has a moral duty to alleviate as rapidly as possible the feelings of uncertainty, fear and alienation that the referendum vote has inevitably brought about in EU citizens living in the UK, and to take positive action to demonstrate that they are an integral part of British society and their contributions are highly valued.

With equal urgency, the government must condemn the instances of extremist, racist and other criminal behaviour that we have witnessed since the referendum, and fully commit to a strategy that

will prevent discrimination against non UK-nationals both now and in the future. In the specific case of EU citizens living in the UK, the government must seek to safeguard all rights currently enjoyed by those citizens, rights that offer them exactly the same protections as British citizens.

Statements by the home secretary, Theresa May and the foreign secretary, Philip Hammond, to the effect that it would be “unwise” or “absurd” to unilaterally promise EU nationals that they can stay in the UK without first negotiating with the other 27 EU countries (Report, 6 July), will only exacerbate the anxieties of these EU citizens, and cause yet more anger, division and distrust.

The argument put forward by May and Hammond is that Britain’s negotiating position will be weakened if assurances are now offered to EU citizens. Quite apart from the fact that it is unacceptable to use EU citizens living in the UK as bargaining chips, this argument runs the serious risk of making it more likely that other EU countries may be prompted to adopt a similar approach to UK citizens residing there.

What May and Hammond are saying is tantamount to subjecting the three million EU citizens in the UK – nearly 5% of its population – to the threat of deportation, a situation unheard of in a western democratic regime for as long as we can remember.

Until today the UK Government insists on offering no reassurances to EU citizens in the UK, on the basis that their status is [one of the UK’s main cards in the Brexit negotiations and cannot be guaranteed](#). During her recent visit to Denmark, Theresa May [stated](#):

I expect to be able to guarantee the legal rights of EU nationals already in the UK so long as the British nationals living in Europe receive - in the countries who are member states of the EU - the same treatment.

Britain in Europe strongly reiterates that it is not acceptable for EU citizens living in the UK to be treated as bargaining chips in a negotiation that may last for months if not years, and this is also true of EU countries that may adopt a similar approach towards UK citizens currently living in the EU. The position of the UK government towards EU citizens can alienate a dynamic part of the UK population and give rise to racist, xenophobic, discriminatory and other criminal behaviour.

As reactions to the Conservative Party conference have amply demonstrated - including wide condemnation of Amber Rudd’s [‘British jobs for British workers’](#) and [‘foreign workers lists’](#) policies as impracticable and discriminatory if not racist - the Government is walking on very thin ice in resorting with worrying ease and frequency to a distinction between UK and non-UK citizens, forgetting that many EU citizens now facing the threat of being categorised as non-UK citizens have long enjoyed equal rights with UK citizens, to live, work and develop professionally in this country. In a recent BiE book launch for Conor Gearty’s [‘On Fantasy Island’](#), the eminent human rights scholar tackled the issue head on: these developments show that Brexit is bringing about ‘a move to explicit discrimination in the UK’, he stated with a great deal of concern.



Conor Gearty, at the BiE book launch of 'On Fantasy Island' © Neil Graveney

The news about the [Foreign Office's alleged banning of foreign academics from consultancy work on Brexit](#) policy issues, which happened in the same week as Rudd's speech at the Conservative Party conference, added salt to injury, eliciting a strong backlash from academics around the world.

We must add that the removal of EU citizens lawfully established in the UK would be in direct breach of article 8 of the European Convention on Human Rights. [Chapman v UK \(2001\)](#), and similar ECHR jurisprudence, would provide strong support for such a finding.

The logistical implications of proving residency rights for those EU citizens already in the country must also be addressed, as quickly and efficiently as possible. The existing residency rights process, for instance, has not been designed with EU nationals in mind and is proving to be a bureaucratic nightmare for those involved (see e.g. [here](#)).

In light of all this, we once again call upon the government to offer direct reassurance to all EU citizens living in the UK that they will continue to enjoy equal rights with UK citizens, and to provide a system that will be fit for purpose, giving the nearly three million EU citizens currently in the UK automatic residence rights.

To continue to treat EU citizens as potential bargaining chips in the negotiations process is unacceptable, legally, politically and ethically, and makes no sense from a pragmatic point of view; these citizens have acquired the right to reside in the UK in accordance, inter alia, with international human rights law.



Prof Andrew George: *Universities need to be open to the best ideas and knowledge wherever they come from.* © Neil Graveney



Tim Boag: *NatWest's experience since the Referendum indicates that some large deals paused at the beginning of the Summer but a number have or are now moving forward to completion.* © Neil Graveney

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BiE Policy Report

Brexit: Opportunities, Challenges and the Road Ahead

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