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# The impact of Brexit on shipping and ports law

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## Introduction

This article considers selected implications of Brexit for EU shipping and ports law.

'Brexit' is the term used to describe the withdrawal or secession of the United Kingdom of Great Britain and Northern Ireland (UK) as well as Gibraltar from the European Union (EU) and the European Atomic Energy Community (EAEC).

It is widely anticipated that the UK will leave the EU on 29 March 2019 (ie Brexit) but it is not inevitable.<sup>1</sup> However, it is assumed that the UK will leave the EU on that date and at 23:00 hours (UK time). It is worth noting that all the arrangements relating to Brexit have not been agreed at the time of writing. It is even possible that all arrangements for the UK's withdrawal and the post-Brexit arrangement will not be concluded before the UK actually leaves the EU.<sup>2</sup>

Brexit would affect the maritime sector more immediately and more obviously than many other economic sectors. If there is more or less trade because of Brexit then the maritime sector will be an obvious indicator by virtue of the levels of trade which would be carried by ships and transported through ports. If there is a diversion in trade patterns (eg more or less trade is moving through the UK<sup>3</sup> or, alternatively, by-passing the UK and instead going between EU ports only<sup>4</sup>) then shipping and ports will be barometers of the changes attributable to Brexit. Equally, if there are more or fewer passengers moving because of Brexit, then that could also be evident in the shipping and ports sector. Therefore, the shipping and ports sector is a bellwether or early warning system for the impact (be it positive or negative) of Brexit on the economy generally, or parts of the economy.

The essence of the change is that UK shipping and port interests will no longer have the rights and privileges of EU membership because the UK would become, after leaving the EU, a 'third country' or 'third state' under EU law (ie it would no longer be an EU Member State). Those in favour of Brexit would argue that UK shipping and port interests would be rid of the bureaucracy and burden of EU law. However, many of the rules (eg those EU environmental and safety rules relating to vessels (of whatever flag) entering EU ports would still apply, as would EU competition law where trade in the EU was affected). Moreover, the UK would not be part of the EU's decision-making process with

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<sup>1</sup> The notion that the UK would remain in the EU (Britstay) or return to the EU (Britreturn) are not entirely theoretical but the odds are, at the time of writing, against either occurring. It would require various events to occur such as the EU reforming itself, the EU being keener on the UK remaining, a change of mind on the part of the UK's population and perhaps a downturn in the fortunes of the UK owing to Brexit, which could be undone by the UK not leaving or returning to the EU. See D MacShane *Brexit, No Exit: Why (in the End) Britain Won't Leave Europe* (IB Tauris & Co Ltd 2017).

<sup>2</sup> In many ways, that is not too surprising as EU law has always been a living dynamic body of law. Indeed, on 25 March 1957 when the Treaty of Rome (to establish the EEC) was signed, not all of its terms had been agreed.

<sup>3</sup> For example, because of an increase or a decrease in trade involving the UK because the country is no longer in the EU.

<sup>4</sup> For example, goods avoiding the UK (ie the so-called Landbridge route between Ireland and Continental Europe) and, instead, those goods are going directly from Ireland to France (or vice versa), thereby avoiding the UK so as to remain in the EU.

regard to any of the rules that the EU might adopt or amend after the UK leaves the EU but which would still impact on the UK and its interests (eg shipping companies). It is unclear in this context and, indeed, generally, whether the UK would simply be a 'third state' or whether there will be a special and deeper relationship with the EU than most other third states. This will depend on the terms of the arrangements which the EU and the UK agree.

It is very difficult to contemplate how all that has been done over the last five decades<sup>5</sup> to integrate the UK into the EU could be undone – and replaced – in two years (ie the time between issuing the so-called Article 50 notice under the Treaty on European Union (TEU) on 29 March 2017 and the UK leaving the EU on 29 March 2019). It took the UK 12 years and two attempts to join the much simpler European Communities in 1973 so a total reversal now, after all the EU law that has been grafted onto the UK system, seems very difficult to imagine in a very short period of time. However, those who supported Brexit, claiming that the EU was inefficient and incapable of making effective decisions, now believe that the EU and the UK could agree a 'Withdrawal Agreement' and a 'Relationship Agreement' in 23 months.

There will certainly be – and, indeed, there already are – commercial implications because of Brexit. As a backdrop, it is likely that there will be some reduction in trade volumes owing to the uncertainty leading businesses and consumers to invest and consume less during the uncertainty. The vote in favour of Brexit has had a negative effect on business and consumer sentiment generally (but not universally), leading to a reduction in trade. Therefore, it is likely that there will be commercial consequences. While UK exporters have benefited in the short term from being able to sell exports from the UK more competitively because of the fall in the value of the pound, this is not likely to be sustained in the long run because the cost of imports (particularly imported raw materials) is rising (because of the fall in the value of sterling) and hedging arrangements will come to an end. It is also unclear how the UK economy would fare if tariffs (even at World Trade Organization (WTO) levels) were imposed on exports from the UK.<sup>6</sup> While Brexiteers would say that there has not been the dramatic impact on the UK economy that some Remainers foresaw, it is probably more accurate to say that it is still too early to see the full impact of Brexit on the UK economy. After all, the UK is still a Member State of the EU, the country is still part of the Internal Market/Customs Union, no post-Brexit arrangements between the EU and the UK have yet been finalised and the consequences of these decisions take time to become clear.

As well as commercial implications, there could also be operational implications for Brexit with, for example, new shipping routes being opened to bypass the UK and any customs posts which it might have. For example, all other things being equal, it would make sense to open or expand more shipping routes between Ireland and the Continent of Europe than to have goods delayed at UK, Irish and Continental European ports owing to customs operations, which would otherwise slow down the movement of goods. Delays to a container may occur because a single package in the container raises suspicions.

As mentioned at the outset, the purpose of this article is to consider the legal implications of Brexit on shipping and ports. Obviously, a great deal of this analysis is purely speculative and preliminary in nature, given the fact that the post-Brexit legal and political landscapes have not yet been negotiated, let alone agreed. The article is also naturally selective, given that it is impossible to identify each and every implication of Brexit for the shipping and ports sector. There are dire warnings on both sides of the Remain and Brexit debate. Ultimately, it would be as wrong to see the UK as being a wilderness outside the EU<sup>7</sup> as to see the EU as an entity on the brink of collapse simply because the UK could be leaving because, in reality, the situation is more nuanced and sophisticated than either of those extreme views. The EU will be weaker because of a departure by the UK but the UK's departure will not cause the EU's demise; indeed, some would argue that the EU would prosper

<sup>5</sup> While the UK joined the European Community in 1973, some preparation had been undertaken in the run-up to the UK's accession.

<sup>6</sup> Moreover, the WTO regime does not cover all goods and services.

<sup>7</sup> See D Hannan *What Next: How to Get the Best from Brexit?* (Head of Zeus Ltd 2016).

without the ‘slowest wheel on the wagon’.<sup>8</sup> It is also clear that the UK would be weaker by virtue of leaving the EU (eg leaving the world’s largest internal market) but it is unlikely to become an economic wilderness simply because of Brexit.

### Freedom of establishment and registration of vessels

The EU is built around the four ‘fundamental freedoms’, meaning that people, goods, capital/ payments and services may move freely around the EU. One of these freedoms, the freedom of establishment, means that a company or individual who is a national of one Member State may, subject to very few exceptions, establish a business in another Member State on the same basis as a national of another Member State. Before Brexit, therefore, a UK national may establish a business elsewhere in the EU on the same basis as a national of the host Member State, although that right is likely to disappear post-Brexit. So, for example, a post-Brexit UK company may or may not be able to establish a business in Germany, Greece, Italy or the Netherlands on the same basis as a locally-based company; while nothing has been finalised yet, it is widely anticipated that there would be no automatic right for UK nationals to be treated the same as the host’s own entities and UK nationals could, therefore, all things being equal, be discriminated against. This also means that the current regime allowing for the easier transfer of vessels between registers of EU Member States would no longer be available to UK nationals. It may well be that host states are still willing to allow UK nationals to establish businesses in their states but the right to do so is no longer enshrined in EU law.

### Free movement of services in the maritime sector

A fundamental feature of the EU is the Internal Market, which includes the notion of free movement of services. The EU adopted measures in 1986 and 1992 to ensure that there would be free movement of services in the maritime sector. The first measure, Regulation 4055/86,<sup>9</sup> was designed to ensure that *international* maritime services (where the EU was involved) would be possible while the second measure, Regulation 3577/92,<sup>10</sup> was designed to ensure that *domestic* maritime services within Member States would be possible. Only nationals of EU Member States may avail themselves of the rights afforded under the two regulations. Presumably, unless there is agreement to the contrary, UK nationals will no longer be eligible for such rights. Indeed, the EU has already anticipated this outcome by warning stakeholders that, unless something is agreed to the contrary, the freedom to provide services will no longer be available to UK nationals. On 27 February 2018, the European Commission’s Directorate-General for Mobility and Transport issued a notice to stakeholders entitled ‘Withdrawal of the United Kingdom and EU Rules in the Field of Maritime Transport’.<sup>11</sup>

There are features of the notice that are irrelevant for present purposes, but its key provisions include:

[S]ubject to any transitional arrangement that may be contained in a possible withdrawal agreement, as of the withdrawal date, the EU rules in the field of maritime transport no longer apply to the United Kingdom. This has in particular the following consequences in the different areas of Union law in the field of maritime transport:<sup>12</sup>

<sup>8</sup> This is a reference to the fact that the UK has often been the Member State which is the slowest to agree to changes in the EU and the most sceptical of the Member States.

<sup>9</sup> Council Regulation (EEC) No 4055/86 (1) of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries [1986] OJ L378/1 of 31 December 1986.

<sup>10</sup> [1992] OJ L364/7 of 12 December 1992.

<sup>11</sup> <https://ec.europa.eu/transport/sites/transport/files/legislation/brexit-notice-to-stakeholders-maritime-transport.pdf>.

<sup>12</sup> This notice does not address marine equipment (which is addressed in the notice to stakeholders entitled ‘Withdrawal of the United Kingdom and EU Rules in the Field of Industrial Products’ [https://ec.europa.eu/growth/single-market/goods\\_en](https://ec.europa.eu/growth/single-market/goods_en)) nor seafarer qualifications (which is addressed in the notice to stakeholders entitled ‘Withdrawal of the United Kingdom and EU Rules on the Minimum Level of Training of Seafarers and the Mutual Recognition of Seafarers’ Certificates’ [https://ec.europa.eu/transport/transport-modes/news/2017-12-11-brexit-notice-stakeholders\\_en](https://ec.europa.eu/transport/transport-modes/news/2017-12-11-brexit-notice-stakeholders_en)).

### Market Access

- Intra-Union shipping services and third-country traffic: Regulation (EEC) No 4055/86<sup>13</sup> stipulates the freedom to provide maritime transport services between Member States, as well as between Member States and third countries, in respect of:
  - nationals of Member States who are established in a Member State other than that of the person for whom the services are intended;<sup>14</sup> and
  - nationals of the Member States established outside the EU, or shipping companies established outside the EU and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation.

Persons or companies who, as of the withdrawal date, do not meet those criteria will no longer benefit from this Regulation, notably in terms of non-discriminatory treatment as regards international maritime transport connections.

- Cabotage: According to Article 1(1) of Regulation (EEC) No 3577/92,<sup>15</sup> the provision of maritime transport services within EU Member States (maritime cabotage) is restricted to Community<sup>16</sup> shipowners (as defined in Article 2(2) of that Regulation). As of the withdrawal date it will no longer be possible to provide maritime transport services in accordance with this Regulation if the conditions for constituting a Community shipowner are no longer fulfilled, unless national legislation allows access to cabotage to vessels flying the flag of a third country.<sup>17</sup>

Brexit would appear to have little or no impact on the ability of UK interests to pursue international shipping activities and services outside the EU. However, there are some features of the EU's international agreements (eg the agreement between the EU and Canada known as Comprehensive Economic and Trade Agreement (CETA)<sup>18</sup>), which the UK would no longer be able to enjoy, with the result that the UK would have to negotiate its own arrangements with regions, associations or countries with which the EU has already reached agreement. (More generally, the EU believes that the UK might have to agree up to 750 agreements with parties around the world if it wishes to replicate the treaty network which the UK already enjoys by virtue of its EU membership.)

### Discrimination on the basis of nationality

At present, Member States may not discriminate against UK nationals (eg individuals or companies) in matters falling within the scope of EU law. For example, Article 18 of the Treaty on the Functioning of the European Union (TFEU) provides:

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

This can have practical implications. For example, an Italian port may not, as a general rule, impose different dues or charges on a British vessel, as opposed to an Italian vessel but, post-Brexit and unless there is an agreement to the contrary, there could be discrimination in EU ports against UK vessels and even UK seafarers (eg pilotage exemption certificates) in certain circumstances. This means, for example, that a UK national may not now be discriminated against by, say, a Belgian, French, German or Italian authority. However, post-Brexit, unless something is agreed to the contrary, it will be possible as a general rule, as a matter of EU law, to discriminate against UK nationals.

<sup>13</sup> Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries [1986] OJ L378/1 of 31 December 1986.

<sup>14</sup> *ibid* art 1(1).

<sup>15</sup> Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) [1992] OJ L364/7 of 12 December 1992.

<sup>16</sup> In this case, EU shipowners.

<sup>17</sup> <https://ec.europa.eu/transport/sites/transport/files/legislation/brexit-notice-to-stakeholders-maritime-transport.pdf>.

<sup>18</sup> See eg [http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc\\_156062.pdf](http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156062.pdf) and <http://www.ecsa.eu/news/ceta-will-greatly-benefit-maritime-transport>.

## Maritime safety law

The EU has become deeply involved in, and concerned with, maritime safety matters. These safety issues have covered issues such as the safety of passengers and crew members, as well as the protection of the environment. Many of these measures have emerged from particular maritime incidents. It is open to question as to whether a post-Brexit UK will be inclined, or moreover, will be able to adopt its own position on such issues. In practice, it is thought that the leeway for the UK to adopt its own rules would be very limited, to the point of being negligible. Many of the EU rules are not dependent on the flag flown by the vessel – they are often flag-blind rules – so if UK vessels want to continue to visit EU ports or even sail EU waters then those vessels will probably opt for the EU rules in preference to any contradictory UK rules (unless, for example, the UK rules were providing greater protection but adoption of the UK rules was not incompatible with adherence to those of the EU).

On 27 February 2018, the European Commission issued a notice to stakeholders entitled 'Withdrawal of the United Kingdom and EU Rules in the Field of Maritime Transport'.<sup>19</sup> There are features of the notice which are irrelevant to the issue of safety, but its key provisions include:

[S]ubject to any transitional arrangement that may be contained in a possible withdrawal agreement, as of the withdrawal date, the EU rules in the field of maritime transport no longer apply to the United Kingdom. This has in particular the following consequences in the different areas of Union law in the field of maritime transport:<sup>20</sup>

### Maritime Safety

- Recognition of organisations: The withdrawal of the United Kingdom does not as such affect the recognitions by the Commission in accordance with Article 4 of Regulation (EC) No 391/2009<sup>21</sup> of organisations referred to in Article 2(c) of that Regulation. However, according to Article 8 of Regulation (EC) No 391/2009 Recognised Organisations are to be assessed on a regular basis (at least every two years) by the Commission, together with the Member State that initially submitted the request for recognition for the organisation in question. This also applies to the organisations which had initially been recognised by the relevant Member State and which now enjoy recognition pursuant to Article 15 of Regulation (EC) No 391/2009. As of the withdrawal date, the United Kingdom will no longer be in a position to participate in the assessments carried out in accordance with Article 8 of Regulation (EC) No 391/2009 of organisations initially recognised by it. With respect to this procedural requirement, the Commission is considering the necessary and appropriate steps to allow for the assessment in accordance with the terms of the Regulation.
- Port State Control: Directive 2009/16/EC<sup>22</sup> sets out the EU Port State Control system. The Directive requires Member States to inspect foreign ships in ports by Port State Control officers for the purpose of verifying that the condition of a ship and its equipment comply with the requirements of international conventions, and that the vessel is manned and operated in compliance with applicable international law. Directive 2009/16/EC also requires verification of compliance with a number of other EU-law based requirements,<sup>23</sup> including insurance certificates under Directive 2009/20/EC.<sup>24</sup> While EU-27 Member States will continue to verify United Kingdom ships calling to EU ports, as of the withdrawal date, the Port State Control inspection system set out in Directive

<sup>19</sup> <https://ec.europa.eu/transport/sites/transport/files/legislation/brexit-notice-to-stakeholders-maritime-transport.pdf>.

<sup>20</sup> This notice does not address marine equipment (which is addressed in the notice to stakeholders entitled 'Withdrawal of the United Kingdom and EU Rules in the Field of Industrial Products' [https://ec.europa.eu/growth/single-market/goods\\_en](https://ec.europa.eu/growth/single-market/goods_en)) nor seafarer qualifications (which is addressed in the notice to stakeholders entitled 'Withdrawal of the United Kingdom and EU Rules on the Minimum Level of Training of Seafarers and the Mutual Recognition of Seafarers' Certificates' [https://ec.europa.eu/transport/transport-modes/news/2017-12-11-brexit-notice-stakeholders\\_en](https://ec.europa.eu/transport/transport-modes/news/2017-12-11-brexit-notice-stakeholders_en)).

<sup>21</sup> Regulation (EC) No 391/2009 of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations [2009] OJ L31 of 28 May 2009.

<sup>22</sup> Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port state control [2009] OJ L31/57 of 28 May 2009.

<sup>23</sup> *ibid* art 13 and Annex IV.

<sup>24</sup> *ibid* Annex IV point 41 and art 4(1) of Directive 2009/20/EC of the European Parliament and of the Council of 23 April 2009 on the insurance of shipowners for maritime claims [2009] OJ L31/128 of 28 May 2009.

2009/16/EC no longer applies in the United Kingdom.<sup>25</sup> Relations between the United Kingdom and the EU in respect of Port State Control will be governed by the Paris Memorandum of Understanding on Port State Control.<sup>26</sup>

- Operations of passenger ships: According to Articles 4, 5 and 6 of Council Directive 1999/35/EC,<sup>27</sup> host States, as defined in that Directive, are to carry out mandatory inspections to provide for assurance of safe operation of regular ro-ro ferry and high-speed passenger craft services to or from ports of the EU. While these ships will continue to be subject to such inspections in the EU-27 Member States to or from which they operate, as of the withdrawal date, the United Kingdom will no longer have to carry out such inspections in accordance with Directive 1999/35/EC ... .

The Commission services stand ready to provide further clarifications to interested stakeholders. The website of the Commission on maritime transport ([https://ec.europa.eu/transport/modes/maritime\\_en](https://ec.europa.eu/transport/modes/maritime_en)) provide for general information.

These pages will be updated with further information, where necessary. Further information on other maritime safety related questions is available on European Maritime Safety Agency's website at the following link: <https://www.emsa.europa.eu/>.<sup>28</sup>

## Employment and seafarer qualifications

The EU has adopted several measures in the area of employment. A great deal of UK employment law is thus based on EU employment law. It is assumed by many commentators that there will be some arrangements concluded between the EU and the UK on continuity of rights for those non-UK EU nationals based in the UK, as well as the UK nationals based in the EU. However, it is not clear how these rules will apply to new arrivals in both locations. Brexit will impact on employment law in the UK.<sup>29</sup> The main rules governing employment on board vessels is the International Labour Organization's Maritime Labour Convention 2006. The UK government ratified the ILO Convention on 7 August 2013. The UK would probably abide by the ILO Convention. The UK may nonetheless dilute some of the rights which have been conferred on employees by virtue of EU law. The UK may have a great degree of flexibility in regard to employment law as it would not be bound by the EU employment law regime but employees (principally, seafarers) could suffer by virtue of having fewer rights and lower levels of protection.

With regard to seafarer qualifications, the European Commission's Directorate-General for Mobility and Transport issued a notice to stakeholders on 19 January 2018.<sup>30</sup> It is entitled 'Withdrawal of the United Kingdom and EU Rules on the Minimum Level of Training of Seafarers and the Mutual Recognition of Seafarers' Certificates'.<sup>31</sup> After reciting that the UK had served notice under Article 50 of the TEU and would therefore become a 'third country' if it leaves the EU, the notice continues:

In view of the considerable uncertainties, in particular concerning the content of a possible withdrawal agreement, all seafarers subject to Directive 2008/106/EC on the minimum level of training of seafarers<sup>32</sup> and Directive 2005/45/EC on the mutual recognition of seafarers' certificates issued by the

<sup>25</sup> Note that, as of the withdrawal date, UK flagged ships will no longer be required to carry the inventory of hazardous materials that complies with art 5(2) of Regulation 1257/2013 on ship recycling. However, this obligation becomes applicable again to ships flying the flag of a third country as of 31 December 2020 (arts 12 and 32(2)(b) of Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling [2013] OJ L330/1 of 10 December 2013). The certificate will be verified in accordance with point 49 of Annex IV to Directive 2009/16/EC (n 22).

<sup>26</sup> All EU Member States with sea ports, including the UK, are members of the Paris Memorandum of Understanding.

<sup>27</sup> Council Directive 1999/35 of 29 April 1999 on a system of mandatory surveys for the safe operation of regular ro-ro ferry and high-speed passenger craft services [1999] OJ L138/1 of 1 June 1999. Note that this directive is being repealed and replaced by Directive (EU) 2017/2110 that entered into force on 20 December 2017 and will have as a deadline for transposition 21 December 2019 (after the withdrawal date).

<sup>28</sup> <https://ec.europa.eu/transport/sites/transport/files/legislation/brexit-notice-to-stakeholders-maritime-transport.pdf>.

<sup>29</sup> On this issue see eg C Barnard 'Brexit and employment law' in M Dougan *The UK after Brexit: Legal and Policy Challenges* (Intersentia 2017).

<sup>30</sup> [https://ec.europa.eu/transport/transport-modes/news/2017-12-11-brexit-notice-stakeholders\\_en](https://ec.europa.eu/transport/transport-modes/news/2017-12-11-brexit-notice-stakeholders_en).

<sup>31</sup> [https://ec.europa.eu/transport/transport-modes/news/2017-12-11-brexit-notice-stakeholders\\_en](https://ec.europa.eu/transport/transport-modes/news/2017-12-11-brexit-notice-stakeholders_en).

<sup>32</sup> Directive 2008/106/EC of the European Parliament and of the Council of 19 November 2008 on the minimum level of training of seafarers [2008] OJ L323/33 of 3 December 2008.

Member States<sup>33</sup> are reminded of legal repercussions, which need to be considered when the United Kingdom becomes a third country.

Subject to any transitional arrangement that may be contained in a possible withdrawal agreement, as of the withdrawal date, the EU rules in the field of minimum level and mutual recognition of seafarers' certificates no longer apply to the United Kingdom. This has in particular the following consequences for the validity of certificates:

- According to Article 3 of Directive 2008/106/EC, seafarers serving on board a vessel flying the flag of an EU Member State have to hold the requisite certificate of competency or certificate of proficiency (hereafter 'certificates') issued by that Member State, by another EU Member State or by one of the third countries recognised under Article 19 of Directive 2008/106/EC. The Member State of the vessel recognises the certificates issued to seafarers by the other Member States or the recognised third countries, for such certificates to be valid in that Member State. There are two distinct recognition procedures.
- Article 3 of Directive 2005/45/EC provides that every Member State shall recognise the certificates issued to seafarers by the other Member States: the recognition of these certificates (by the Member State of the vessel) must be accompanied by an 'endorsement attesting such recognition'.
- Article 19(4) of Directive 2008/106/EC provides that a Member State may decide to endorse the certificates issued by the recognised third countries.
- As of the withdrawal date, the certificates issued to seafarers by the United Kingdom can no longer be presented for an 'endorsement attesting recognition' by an EU-27 Member State under Directive 2005/45/EC.

The 'endorsement[s] attesting recognition' issued prior to the withdrawal date by EU-27 Member States under Directive 2005/45/EC of certificates issued to seafarers by the United Kingdom will continue to be valid until their expiry. A master or an officer holding an 'endorsement attesting recognition' issued by a Member State will be able to continue working on board vessels flying the flag of that Member State. However, they will not be able to change and work on board a vessel flying the flag of another Member State on the basis of their existing UK-issued certificates, given that the basis for the recognition of their certificates by that Member State (Directive 2005/45/EC) would no longer be applicable.

- As of the withdrawal date, recognition by an EU-27 Member State of certificates issued to seafarers by the United Kingdom will be subject to the conditions set out in Article 19 of Directive 2008/106/EC,<sup>34</sup> in line with the new status of the United Kingdom as a third country.

Preparing for the withdrawal is not just a matter for Union and national authorities, but also for private parties.

The website of the Commission on maritime transport ([https://ec.europa.eu/transport/modes/maritime/seafarers\\_en](https://ec.europa.eu/transport/modes/maritime/seafarers_en)) provides general information. These pages will be updated with further information, where necessary ...<sup>35</sup>

## Marine equipment

The EU has sophisticated rules with regard to marine equipment. Brexit would have an impact in this context as well. On 22 January 2018, the European Commission issued a notice to stakeholders entitled 'Withdrawal of the United Kingdom and EU Rules in the Field of Industrial Products',<sup>36</sup> which touches on marine equipment as well. The notice states:

<sup>33</sup> Directive 2005/45/EC of the European Parliament and of the Council of 7 September 2005 on the mutual recognition of seafarers' certificates issued by the Member States and amending Directive 2001/25/EC, [2005] OJ L255/160 of 30 September 2005.

<sup>34</sup> The list of third countries recognised at EU level was published in [2015] OJ C26125 of 8 August 2015. Following the publication of this list, Montenegro was recognised by the Commission Implementing Decision published in [2017] OJ L107/31 of 25 April 2017, Ethiopia was recognised by the Commission Implementing Decision published in [2017] OJ L177/43 of 8 July 2017 and Fiji was recognised by the Commission Implementing Decision published in [2017] OJ L202/6 of 3 August 2017.

<sup>35</sup> [https://ec.europa.eu/transport/transport-modes/news/2017-12-11-brexit-notice-stakeholders\\_en](https://ec.europa.eu/transport/transport-modes/news/2017-12-11-brexit-notice-stakeholders_en).

<sup>36</sup> [https://ec.europa.eu/growth/single-market/goods\\_en](https://ec.europa.eu/growth/single-market/goods_en).

Currently, Union product legislation does not generally oblige the manufacturer to designate an authorised representative.<sup>37</sup> However, if the manufacturer chooses to do so, the applicable legislation requires the authorised representative to be established in the Union. In addition, specific Union legislation does provide for the obligation to have an authorised representative (e.g., [...] marine equipment<sup>38</sup>) or a responsible person (cosmetic products ...) established in the Union.

Authorised representatives or responsible persons established in the United Kingdom will not, as from the withdrawal date, be recognised as authorised representatives or responsible persons for the purposes of the applicable Union product legislation. Therefore, manufacturers are advised to take the necessary steps to ensure that, as from the withdrawal date, their designated authorised representatives or responsible persons are established in the EU-27.<sup>39</sup>

## Ship recycling

On 28 March 2018, the European Commission's Directorate General for Environment issued a notice to stakeholders entitled 'Withdrawal of the United Kingdom and the EU Ship Recycling Regulation'.<sup>40</sup> The notice recalled that the UK submitted on 29 March 2017 the notification of its intention to withdraw from the Union pursuant to Article 50 of the TEU and the Notice continued, this 'means that, unless a ratified withdrawal agreement<sup>41</sup> establishes another date, all Union primary and secondary law will cease to apply to the UK from 30 March 2019, 00:00h (CET) (withdrawal date).<sup>42</sup> The UK will then become a 'third country'.<sup>43,44</sup> Turning to the specifics of recycling, the notice states:

Subject to any transitional arrangement that may be contained in a possible withdrawal agreement, as of the withdrawal date, the EU rules on ship recycling, and in particular Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling<sup>45</sup> no longer apply to the United Kingdom.

This has in particular the following consequences:<sup>46</sup>

According to Article 6(2)(a) of Regulation (EU) No 1257/2013, owners of ships flying the flag of a Member State<sup>47</sup> shall ensure that ships destined to be recycled are only recycled at ship recycling facilities that are included in the European List of ship recycling facilities ('the European List'). As of the withdrawal date, the entries in the European List<sup>48</sup> of ship recycling facilities for facilities located in the United Kingdom will become void. As a consequence, ships flying the flag of a Member State of the Union may no longer be recycled at these ship recycling facilities.

The above is without prejudice to the possibility for the Commission to list facilities located in third countries in the European List in accordance with Article 16 of Regulation (EU) No 1257/2013.

<sup>37</sup> Commission proposal for a Regulation of the European Parliament and of the Council laying down rules and procedures for compliance with and enforcement of Union harmonisation legislation on products COM(2017) 795 final of 19 December 2017 <https://ec.europa.eu/docsroom/documents/26976>.

<sup>38</sup> Article 13 of Directive 2014/90/EU of the European Parliament and of the Council on marine equipment [2014] OJ L257/146 of 28 August 2014.

<sup>39</sup> <https://ec.europa.eu/docsroom/documents/27401/attachments/1/translations/en/renditions/native>.

<sup>40</sup> [https://ec.europa.eu/info/sites/info/files/notice\\_to\\_stakeholders\\_brexit\\_ship\\_recycling\\_final.pdf](https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_brexit_ship_recycling_final.pdf).

<sup>41</sup> Negotiations are ongoing with the UK with a view to reaching a withdrawal agreement.

<sup>42</sup> Furthermore, in accordance with art 50(3) of the TEU, the European Council, in agreement with the UK, may unanimously decide that the treaties cease to apply at a later date.

<sup>43</sup> A third country is a country not a member of the EU.

<sup>44</sup> [https://ec.europa.eu/info/sites/info/files/notice\\_to\\_stakeholders\\_brexit\\_ship\\_recycling\\_final.pdf](https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_brexit_ship_recycling_final.pdf).

<sup>45</sup> See OJ L330/1 (n 25).

<sup>46</sup> This notice does not address EU rules on maritime transport. On these aspects, including controls in the framework of the EU port state control inspection system see the notice to stakeholders entitled 'Withdrawal of the United Kingdom and EU Rules in the Field of Maritime Transport' ([https://ec.europa.eu/info/brexit/brexit-preparedness\\_en?page=1](https://ec.europa.eu/info/brexit/brexit-preparedness_en?page=1)).

<sup>47</sup> Regulation (EU) No 1257/2013 art 2(1).

<sup>48</sup> Commission Implementing Decision (EU) 2016/2323 of 19 December 2016 establishing the European List of ship recycling facilities pursuant to Regulation (EU) No 1257/2013 of the European Parliament and of the Council on ship recycling [2016] OJ L345/119 of 20 December 2016.



The website of the Commission on the European Union's ship recycling policy (<http://ec.europa.eu/environment/waste/ships/index.htm>) provides general information concerning shipments of waste and the recycling of specific waste streams. These pages will be updated with further information, where necessary.

## Competition law generally

EU competition law could still apply to anti-competitive arrangements and practices in the UK, notwithstanding that the UK would have left the EU. This is because EU competition law applies whenever there is an effect on trade in the EU and it is irrelevant that the parties involved are not EU nationals or that any arrangements or practices were decided on outside the EU. This means that, by virtue of Article 101 of the TFEU, an anti-competitive arrangement (ie an agreement between undertakings, a decision by an association of undertakings or a concerted practice involving undertakings) which has the object or effect of preventing, restricting or distorting competition in the EU's internal market (or any part of it) would be prohibited and void (unless it could be exempted according to the criteria set out in Article 101(3) of the TFEU), notwithstanding that the parties to the arrangement are all from the UK and/or the arrangement was concluded in the UK. Equally, by virtue of Article 102 of the TFEU, an abuse of dominance by any undertaking having a dominant position in the internal market (or a substantial part of it) would be prohibited absolutely, notwithstanding that the undertaking abusing the dominance was from the UK and/or the decision to abuse the dominance was taken in the UK. This means that, notwithstanding that the UK would leave the EU, the rules of EU competition law could still be applicable to UK undertakings and arrangements/practices which were, for example, decided upon in the UK or by UK nationals.

## Merger control in the maritime sector

EU competition law could still apply to mergers, acquisitions and concentrative joint ventures (ie concentrations) in the UK, notwithstanding that the UK would have left the EU. This would occur where the undertakings involved in a proposed concentration had the requisite turnover in the EU (as well as worldwide) and the proposed transaction fell within the scope of the EU's Merger Control Regulation (Regulation 139/2004<sup>49</sup>), notwithstanding that the parties involved were non-EU nationals (eg UK nationals). So, it is quite possible that, post-Brexit, the European Commission could block a proposed transaction involving one or more UK interests and/or involving one or more UK assets, notwithstanding the fact that the UK would have left the EU at that time. This type of phenomenon has occurred in the past when the EU prohibited a proposed concentration involving US corporations, notwithstanding that the US authorities had approved it.<sup>50</sup> Such a decision could be controversial but would be entirely foreseeable; thus, the notion that Brexit would 'take back control' is not entirely accurate.

## State aid

The EU's state aid regime is a very significant constraint on the ability of EU Member States in terms of their ability to aid or assist, in a discriminatory manner, certain businesses or industries. The potency of the state aid rules is clear in that Member States could not assist their banks during the Financial Crisis commencing in 2007 without the EU (specifically, the European Commission) first approving the aid. It would therefore be unfortunate for the EU if the UK were able to provide harmful state aid to its chosen undertakings or sectors to the prejudice of EU undertakings and sectors. While the EU and its interests could resort, for example, to EU anti-dumping law, it would be better to be able to invoke EU state aid law. If the EU and the UK do not agree on a special state aid regime post-Brexit, then the UK would appear to be immune from the EU state aid law post-Brexit. A practical example from the maritime sector would be the tonnage tax regime. The UK's

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<sup>49</sup> [2004] OJ L24/1 of 29 January 2004.

<sup>50</sup> Case No COMP/M.2220—*General Electric/Honeywell* [http://ec.europa.eu/competition/mergers/cases/decisions/m2220\\_en.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m2220_en.pdf).

tonnage tax regime currently has to comply with EU state aid law. It is possible that the UK could liberalise its tonnage tax regime because it would no longer have to comply with the EU State Aid Guidelines – for example, the requirement to be flagged under EU flags could disappear, a wider range of vessels could be covered and the regime generally loosened. Equally, if the UK was not constrained by state aid rules, then it would be possible that the UK could give assistance to certain shipping companies and ports to cover costs (eg by way of direct grants, subsidised loans and tax breaks). Shipping companies and port companies in the UK could obtain state aid from the UK which their EU counterparts could not obtain from their Member State governments, unless there is an agreement reached between the EU and the UK in the longer term. It would be important, from the perspective of the EU and maritime interests in the EU, that the EU insists that, as part of the Brexit negotiations, post-Brexit UK is subject to some controls on its ability to grant uncontrolled state aid.

## Litigation

The EU has had a significant impact on litigation generally, including in the area of maritime matters.<sup>51</sup> For example, the Rome Convention sets out many key rules on contracts<sup>52</sup> and the Brussels Recast Regulation deals with many issues of jurisdiction, as well as the recognition and enforcement of judgments.<sup>53</sup> Equally, while the UK is a Member State, questions of EU law may be referred by UK courts and certain other tribunals to the Court of Justice of the European Union (CJEU) by way of the preliminary reference procedure under Article 267 of the TFEU, which means that the UK courts are deciding cases in a manner which is influenced by, and more likely to be consistent with, the jurisprudence of the EU and the CJEU. It is not clear how such matters will be addressed post-Brexit given the absence of an agreement but it is likely that there will be a divergence of approach and therefore a divergence in outcome.

There is no doubt that London will continue to be a major centre for maritime litigation and arbitration. This is all the more so in matters which are unconnected with the EU and EU law. The history, concentration of talent and experience, as well as its infrastructure and the nexus to London incorporated into shipping contracts by lawyers based in London will all help to ensure that London will remain a world capital in the area. Nonetheless, it would be wrong for those involved to deny the fact that other locations which are remaining in the EU will strive to improve their claim to a role in the arena and the simple fact that the UK will have left the EU and that, for UK law, EU law is like a ‘stopped watch’.

On 21 November 2017, the European Commission’s Directorate-General Justice and Consumers issued a notice to stakeholders entitled ‘Withdrawal of the United Kingdom and EU Rules in the Field of Civil Justice and Private International Law’.<sup>54</sup> The operative parts are:

In view of the considerable uncertainties, in particular concerning the content of a possible withdrawal agreement, members of the legal professions as well as other stakeholders are reminded of legal repercussions, which need to be considered when the United Kingdom becomes a third country.<sup>55</sup>

Subject to any transitional arrangement that may be contained in a possible withdrawal agreement, as of the withdrawal date, the EU rules in the field of civil justice and private international law no longer apply to the United Kingdom. This has in particular the following consequences in the different areas of civil justice:

<sup>51</sup> On this issue see eg T Horsley ‘Brexit and UK courts: awaiting fresh instructions’ in M Dougan *The UK after Brexit: Legal and Policy Challenges* (Intersentia 2017).

<sup>52</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A133109>.

<sup>53</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1 of 20 December 2012.

<sup>54</sup> [http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc\\_id=48468](http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=48468).

<sup>55</sup> For procedures and proceedings pending on the withdrawal date, the EU is trying to agree solutions for some of the situations that might arise. The relevant essential principles of the EU position in the field of judicial cooperation in civil and commercial matters have been published at [https://ec.europa.eu/commission/publications/position-paper-judicial-cooperation-civil-and-commercial-matters\\_en](https://ec.europa.eu/commission/publications/position-paper-judicial-cooperation-civil-and-commercial-matters_en).

- International jurisdiction: the rules on international jurisdiction in EU instruments in the area of civil and commercial law as well as family law no longer apply to judicial proceedings in the United Kingdom and under certain circumstances (in civil and commercial cases where the defendant is domiciled in the United Kingdom) to judicial proceedings in the EU. International jurisdiction will be governed by the national rules of the State in which a court has been seized.
- Recognition and enforcement: judgments issued in the United Kingdom are no longer recognised and enforced in EU Member States under the rules of the EU instruments in the area of civil and commercial law as well as family law, and vice versa. Recognition and enforcement of judgments between the United Kingdom and an EU Member State will be governed by the national law of the State in which recognition and enforcement is sought or by international Conventions where both the EU (or EU Member States) and the United Kingdom are contracting parties.
- Judicial cooperation procedures: EU instruments facilitating judicial cooperation (e.g. in relation to the service of documents, taking of evidence or within the context of the European Judicial Network in Civil and Commercial Matters) no longer apply between EU Member States and the United Kingdom.
- Specific EU procedures: EU instruments making available specific procedures, in particular the European Payment Order Procedure or the European Procedure for Small Claims, will no longer be available in courts of the United Kingdom and will not be available in the courts of EU Member States where one or more parties are domiciled in the United Kingdom.

The website of the Commission on civil justice [https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/civil-justice\\_en](https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/civil-justice_en) as well as the dedicated webpage of the European Judicial Network in civil and commercial matters [https://ejustice.europa.eu/content\\_ejn\\_in\\_civil\\_and\\_commercial\\_matters-21-en.do](https://ejustice.europa.eu/content_ejn_in_civil_and_commercial_matters-21-en.do) provides general information concerning the field of civil justice. These pages will be updated with further information, where necessary.<sup>56</sup>

## Divergence between EU and UK law

The UK has made much of the notion that, because the UK will adopt various elements of EU law as UK law on the day in which the country leaves the EU, then the risk of divergence is minimised. This notion that there would be convergence or even identical laws is grossly inaccurate. First, the laws of the EU and the UK will not be the same at the moment when the UK leaves because the way in which these laws will be interpreted by the UK courts would differ from the ways in which the CJEU would interpret them and, in any event, some of the general principles of EU law are not easily incorporated into UK law. Secondly, the way in which the EU law and the ‘EU laws dressed as UK laws’ would be applied and implemented would differ (not least because of the divergent objectives of the EU (eg internal market and EU interests) and the UK (eg a more national-centred approach). Thirdly, the EU adopts laws on an ongoing basis – several hundred measures are adopted each year by the EU. Fourthly, if Brexit is to be in anyway meaningful, then it makes sense that the UK will choose different rules. Ultimately, it is to be assumed that there will be greater divergence between the EU and the UK legal regimes, both substantively and procedurally.

## Sanctions regime

The EU has a developing international sanctions regime to impose sanctions on countries, companies or persons connected with regimes of which the EU does not approve (eg because of a violation of international law). To date, the EU and the UK have been aligned but differences between the EU and the UK (which are more likely post-Brexit) could complicate matters considerably. An example of the complications would be when the EU and the US sanctions regimes with regard to Cuba diverged. It is possible that there could be a divergence between the sanctions regimes espoused by the EU and the UK post-Brexit. This means further complication and complexity for those in the shipping sector because of, for example, the EU, UK, USA and United Nations sanction regimes.

<sup>56</sup> [http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc\\_id=48468](http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=48468).

## Ship finance

The ship finance market is generally very resilient. This market is likely to continue to adapt to changes, including Brexit. However, if a ship finance bank is based in the UK (typically, London) with a view to servicing the EU through the EU passport regime, then it is likely, based on current expectations, that the current 'passporting' regime whereby a UK-based bank (even if owned by non-EU interests) may serve the whole of the EU and the EEA from its UK base would disappear. As a result, such financiers may move some or all operations from the UK to the EU. While many of the incumbents could well decide to stay, Brexit is more likely to have an impact on future establishment and expansion decisions in terms of whether to enter into, or expand in, the UK or in the EU.

## Environmental law

The implications of Brexit on environmental law are still unclear but are likely to be significant.<sup>57</sup> There have been some on the Brexit side of the referendum who have argued that EU environmental laws have been excessive and intrusive. If the UK leaves the EU, then it will certainly have more freedom of action subject to international legal obligations but also the willingness of UK citizens to accept that its country might decide to adopt lower standards of protection for its citizens than their neighbours enjoy. In reality, many of the EU's measures on environmental law will apply, irrespective of whether Brexit occurs or not; for example, a British vessel entering an EU port must comply with the EU regime in so far as it applies to port users, irrespective of the flag of the vessel. Brexiteers would argue that they can choose their own environmental laws in the future and not be concerned with the agenda of the European Commission or decision-making by the CJEU.

## Implications of Brexit on contracts

Brexit may well impact on contracts in several ways. There is the issue of the geographical scope of contracts. Contracts which have a geographical application clause (eg 'this contract shall apply to the European Union') should be reviewed to ensure whether the parties are content with such an expression of intent on application. In the past, the geographical reach of such a contract that included such a clause was extended to include other Member States as the EU's membership expanded. Now, however, it would be logical that the geographical reach should be narrowed because the EU would contract. If the parties want the contract to apply to the EU and the UK, then that should be specified explicitly. Indeed, given the possibility of changes in the UK's composition, the contract could well specify territories such as England, Wales, Scotland and Northern Ireland specifically. Contracts should also identify Gibraltar explicitly, if that is what the parties want after Gibraltar leaves the EU. Contracts which are in existence now may well be affected by Brexit, so it is prudent to monitor the implications of Brexit for such contracts including, in particular, the negotiations.

## Passenger rights

Passengers enjoy various legal rights under EU law, both as consumers and as passengers. They could lose some of those rights, depending on what is agreed under Brexit. On 27 February 2018, the European Commission's Directorate-General Justice and Consumers as well as Directorate-General for Mobility and Transport published a notice to stakeholders entitled 'Withdrawal of the United Kingdom and EU Rules on Consumer Protection and Passenger Rights'.<sup>58</sup> Given its importance, it is useful to set out the pertinent provisions:

Subject to any transitional arrangement that may be contained in a possible withdrawal agreement, as of the withdrawal date, the general EU rules in the field of consumer law (such as the Unfair

<sup>57</sup> On this issue see eg V Heyvaert and A Cavoski 'UK environmental law post-Brexit' in M Dougan *The UK after Brexit: Legal and Policy Challenges* (Intersentia 2017).

<sup>58</sup> <https://ec.europa.eu/transport/sites/transport/files/legislation/brexit-notice-to-stakeholders-consumer-protection-passenger-rights.pdf>.

Commercial Practices Directive,<sup>59</sup> the Consumer Rights Directive,<sup>60</sup> the Unfair Contract Terms Directive,<sup>61</sup> the Consumer Sales and Guarantees Directive,<sup>62</sup> the Package Travel Directive<sup>63</sup> – see sections 1 and 2 below) and the EU passenger rights legislation (see section 3 below) no longer apply to the United Kingdom.<sup>64</sup>

This has in particular the following consequences:

1 Purchase by consumers in the EU of products or services from traders established in the United Kingdom<sup>65</sup>

On or after the withdrawal date, consumers in the EU might purchase products or services from traders established in the United Kingdom.

According to EU law, where a consumer concludes a contract with a professional in another country who, by any means, directs his commercial activities to the consumer's country of residence, the contract is generally governed by the law of the country where the consumer has his or her habitual residence. It is possible to choose another law but that choice cannot deprive the consumer of the protection afforded by the law of the habitual residence which cannot be derogated from by agreement under that law.<sup>66</sup> On that basis EU courts will continue to apply the EU rules on consumer protection even though the trader is in the United Kingdom. This includes in particular the rules set out in:

- the Unfair Commercial Practices Directive;<sup>67</sup>
- the Consumer Rights Directive;<sup>68</sup>
- the Unfair Contract Terms Directive;<sup>69</sup>
- the Consumer Sales and Guarantees Directive;<sup>70</sup>
- the Price Indication Directive;<sup>71</sup> and
- the Package Travel Directive.<sup>72</sup>

If a EU-27 consumer were to bring an individual legal action<sup>73</sup> before a court of the EU-27 against a trader domiciled in the United Kingdom, the withdrawal has no implications for establishing international jurisdiction where the trader has directed his activities to the Member State of the consumer's domicile;<sup>74</sup> in these cases the EU jurisdictional rules which allow the consumer to sue the trader in the EU-27 Member State where the consumer is domiciled apply, irrespective of whether the

<sup>59</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') [2005] OJ L149/22 of 11 June 2005.

<sup>60</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64 of 22 November 2011.

<sup>61</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 of 21 April 1993.

<sup>62</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12 of 7 July 1999.

<sup>63</sup> Directive (EU) No 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements [2015] OJ L326/1 of 11 December 2015.

<sup>64</sup> This notice does not address the specific EU rules on e-commerce and, in particular, the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L178/1 of 17 July 2000.

<sup>65</sup> This notice does not address other practical aspects of cross-border purchase in third countries, such as EU rules related to value added tax, customs, and limitation and restrictions of importation.

<sup>66</sup> Article 6(1) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6 of 4 July 2008. For exceptions to this general rule see art 6(2)–(4).

<sup>67</sup> Directive 2005/29/EC (n 59).

<sup>68</sup> Directive 2011/83/EU (n 60).

<sup>69</sup> Council Directive 93/13/EEC (n 61).

<sup>70</sup> Directive 1999/44/EC (n 62).

<sup>71</sup> Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of prices of products offered to consumers [1998] OJ L80/27 of 18 March 1998.

<sup>72</sup> Directive (EU) 2015/2302 (n 63).

<sup>73</sup> While cross-border litigation by consumers is relatively rare, this aspect is addressed here to provide a complete overview.

<sup>74</sup> Consumer contracts covered in art 17(1)(a)–(c) of Regulation (EU) No 1215/2012 (n 53).

trader is domiciled in the EU or in a third country.<sup>75</sup> However, the recognition and enforcement of an EU judgement in the United Kingdom and vice versa will be governed, as of the withdrawal date by national rules in the EU-27 and in the United Kingdom.<sup>76</sup>

As of the withdrawal date, EU law ensuring the availability of out-of-court dispute resolution<sup>77</sup> and facilitating access to alternative dispute resolution<sup>78</sup> no longer applies to the United Kingdom and the EU online dispute resolution platform is no longer available in relation to traders established in the United Kingdom.

Concerning public enforcement (e.g. to achieve the cessation of a commercial practice) the Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation)<sup>79</sup> no longer applies to the United Kingdom. This means that, as from the withdrawal date, United Kingdom authorities will not be obliged under EU law to cooperate in the case of cross-border claims.

In addition, as of the withdrawal date, EU law giving to certain 'qualified entities', designated by EU Member States, legal standing for bringing injunction actions in another Member State no longer applies to the United Kingdom.<sup>80</sup>

## 2 Insolvency protection of travellers (Package Travel)

- According to EU law, package travel organisers established in the EU are obliged to provide securities for the refund and for the traveller's repatriation in case of the organiser's insolvency.<sup>81</sup> Organisers not established in the EU which sell or offer travel packages to consumers in the EU, or which by any means direct such activities to the EU, also must provide such insolvency protection in each of the Member States they are selling to.<sup>82</sup> However, where an organiser established in a third country does not offer travel packages to consumers in the EU and does not direct its selling activities to the EU (passive sales), EU law providing mandatory insolvency protection does not apply. This means that in such cases insolvency protection granted by EU law will not apply to insolvencies of organisers established in the United Kingdom occurring as of the withdrawal date.
- As of the withdrawal date, EU law providing for the mutual recognition of insolvency protection taken out in accordance with the requirements of the home country of an organiser no longer applies with regard to insolvency protection taken out in accordance with requirements applicable in the United Kingdom.<sup>83</sup> This means that, as of the withdrawal date, insolvency protection taken out in the United Kingdom no longer serves to comply with the requirements for insolvency protection of package travel organisers in accordance with Article 17 of Directive (EU) 2015/2302.

## 3 EU passenger rights

...

- Ship passengers: EU law on ship passenger rights<sup>84</sup> continues to apply on and after the withdrawal date to passengers where the port of embarkation is in the EU-27<sup>85</sup> or in the United Kingdom, provided that the port of disembarkation is in the EU-27 and the service is operated by a carrier

<sup>75</sup> Regulation (EU) No 1215/2012 (n 53) art 18(1).

<sup>76</sup> For procedures and proceedings pending on the withdrawal date, the EU is trying to agree solutions for some of the situations that might arise. The relevant essential principles of the EU position in the field of judicial cooperation in civil and commercial matters have been published here: [https://ec.europa.eu/commission/publications/position-paper-judicial-cooperation-civil-and-commercial-matters\\_en](https://ec.europa.eu/commission/publications/position-paper-judicial-cooperation-civil-and-commercial-matters_en).

<sup>77</sup> Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes (Directive on consumer ADR) [2013] OJ L165/63 of 18 June 2013.

<sup>78</sup> Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes (Regulation on consumer ODR) [2013] OJ L165/1 of 18 June 2013.

<sup>79</sup> [2004] OJ L364/1 of 9 December 2004.

<sup>80</sup> Article 4 of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests [2009] OJ L110/30 of 1 May 2009.

<sup>81</sup> Directive (EU) 2015/2302 (n 63) art 17(1).

<sup>82</sup> *ibid.*

<sup>83</sup> *ibid* art 18(1).

<sup>84</sup> Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway [2010] OJ L334/1 of 17 December 2010.

<sup>85</sup> *ibid* art 2(1)(a).

established within the territory of a Member State or offering passenger transport services to or from a Member State ('Union carrier').<sup>86</sup>

...

The websites of the Commission on consumer protection (<https://europa.eu/youreurope/citizens/consumers/>) and passenger rights ([https://europa.eu/youreurope/citizens/travel/passenger-rights/index\\_en.htm](https://europa.eu/youreurope/citizens/travel/passenger-rights/index_en.htm)) provide general information. These pages will be updated with further information, where necessary ...

It is also possible that there could be increased bureaucracy associated with the movement of people between the UK and the EU, with the need for passports and work visas delaying the movement of people and causing delays and difficulties at ports.

## Carriage of live animals

On 27 February 2018, the European Commission's Directorate-General for Health and Food Safety issued a notice to stakeholders entitled 'Withdrawal of the United Kingdom and EU Rules on Animal Health and Welfare and Public Health related to the Movement of Live Animals'.<sup>87</sup> The purpose of the general<sup>88</sup> notice is to remind economic operators involved in trade in live animals<sup>89</sup> of some of the legal repercussions that will need to be considered if and when the UK becomes a third country.<sup>90</sup> Given the detail involved, it is useful to set out the key elements of the notice in full:

Subject to any transitional arrangement that may be contained in a possible withdrawal agreement, as of the withdrawal date, the EU public and animal health rules in the field of intra-Union trade in live animals,<sup>91 92 93 94 95</sup> the placing on the market of aquaculture animals,<sup>96</sup> the controls carried out on such movements<sup>97</sup> and EU law on animal transport<sup>98</sup> no longer apply to the United Kingdom.

This notice is also relevant for the movement of live animals and hatching eggs from and to the Channel Islands and the Isle of Man.<sup>99</sup>

<sup>86</sup> *ibid* art 2(1)(b) and 3(e). Specific rules apply to cruise passengers: see *ibid* art 2(1)(c).

<sup>87</sup> [https://ec.europa.eu/food/sites/food/files/animals/docs/notice\\_brexit\\_animal\\_health\\_welfare\\_movement\\_live\\_animals.pdf](https://ec.europa.eu/food/sites/food/files/animals/docs/notice_brexit_animal_health_welfare_movement_live_animals.pdf).

<sup>88</sup> Since the EU veterinary *acquis* is very detailed, the notice can only set out the essential rules. The website of the Commission on imports of live animals ([https://ec.europa.eu/food/animals/live\\_animals\\_en](https://ec.europa.eu/food/animals/live_animals_en)) provides general information concerning EU animal health legislation for imported live animals.

<sup>89</sup> The notice does not address non-commercial movements of pet animals (Regulation 576/2013 of the European Parliament and of the Council of 12 June 2013 on the non-commercial movement of pet animals [2013] OJ L178/1 of 28 June 2013).

<sup>90</sup> For live animals the movement of which is ongoing on the withdrawal date, the EU is trying to agree solutions with the UK in the withdrawal agreement. For the essential principles of the EU's position on goods placed on the market, including live animals the movement of which has started before the withdrawal date see [https://ec.europa.eu/commission/publications/position-paper-goods-placed-market-under-union-law-withdrawal-date\\_en](https://ec.europa.eu/commission/publications/position-paper-goods-placed-market-under-union-law-withdrawal-date_en).

<sup>91</sup> Council Directive 64/432/EEC of 26 June 1964 on animal health problems affecting intra-Community trade in bovine animals and swine [1964] OJ L21/64 of 29 July 1964.

<sup>92</sup> Council Directive 91/68/EEC of 28 January 1991 on animal health conditions governing intra-Community trade in ovine and caprine animals [1991] OJ L46/19 of 19 February 1991.

<sup>93</sup> Council Directive 2009/156/EC of 30 November 2009 on animal health conditions governing the movement and importation from third countries of equidae [2010] OJ L192/1 of 23 July 2010.

<sup>94</sup> Council Directive 2009/158/EC of 30 November 2009 on animal health conditions governing intra-Community trade in, and imports from third countries of, poultry and hatching eggs [2009] OJ L343/74 of 22 December 2009.

<sup>95</sup> Council Directive 92/65/EEC of 13 July 1992 laying down animal health requirements governing trade in and imports into the Community of animals, semen, ova and embryos not subject to animal health requirements laid down in specific Community rules referred to in Annex A(I) to Directive 90/425/EEC [1992] OJ L268/54 of 14 September 1992.

<sup>96</sup> Council Directive 2006/88/EC of 24 October 2006 on animal health requirements for aquaculture animals and products thereof, and on the prevention and control of certain diseases in aquatic animals OJ L328, 24 November 2006, p. 14).

<sup>97</sup> Council Directive 90/425/EEC (n 95).

<sup>98</sup> Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations [2005] OJ L3/1 of 5 January 2005.

<sup>99</sup> Regulation (EEC) No 706/73 of the Council of 12 March 1973 concerning the Community arrangements applicable to the Channel Islands and the Isle of Man for trade in agricultural products [1973] OJ L68/1 of 15 March 1973.

## 1 Entry of live animals into the EU

## Public and animal health:

As of the withdrawal date, the entry of live animals<sup>100 101</sup> from the United Kingdom into the EU-27<sup>102</sup> is prohibited for public and animal health reasons, unless:

- The United Kingdom is 'listed' as a third country by the Commission for animal health<sup>103</sup> purposes. For the 'listing', Directive 2004/68/EC as well as specific legislation applies;
- The specific animal health requirements and veterinary certification conditions set out with the 'listing' for the species or categories of animals from the United Kingdom are fulfilled;
- The United Kingdom is 'listed' by the Commission as a third country having a residue control plan approved in accordance with Directive 96/23/EC<sup>104</sup> for the animals and animal products specified therein. For the 'listing' Chapter VI of Directive 96/23/EC applies.

The 'Tripartite Agreement' concluded in accordance with Article 6 of Directive 2009/156/EC between France, Ireland and the United Kingdom no longer applies to the United Kingdom as of the withdrawal date.

As of the withdrawal date, these substantial requirements are controlled upon entry into the EU-27 by applying mandatory border checks, including veterinary checks, at the first point of entry into the Union territory:

- Live animals can only enter the EU-27 through 'border inspection posts'<sup>105</sup> approved for the species and categories of animals concerned;
- Each consignment has to be accompanied by a duly completed health certificate in compliance with EU animal health import legislation;<sup>106</sup>
- Each consignment undergoes documentary, identity and physical checks;<sup>107</sup>
- Live animals are only allowed to enter the EU-27 with the official document (Common Veterinary Entry Document) attesting that the border checks were satisfactorily carried out in compliance with the applicable animal and, public health rules.

These conditions also apply to the entry into the EU-27, as of the withdrawal date, of live animals from the United Kingdom for the purpose of transit from the United Kingdom to another third country or to another part of the United Kingdom.<sup>108</sup> In addition, the consignment has to pass through border inspection posts both at entry into and exit from the Union, including the respective notifications in the EU Trade Control and Expert System (TRACES).<sup>109 110</sup>

In case of transit from the EU-27 through the United Kingdom to the EU-27, live animals have to be accompanied by an intra-Union trade certificate and pass through a border inspection post at entry into the EU-27, including the respective notifications in TRACES.<sup>111 112</sup>

<sup>100</sup> Cattle, pigs, sheep and goats, equidae, poultry and hatching eggs, aquaculture animals, bees and bumble bees, other 'ungulates' listed in Directive 2004/68/EC. Dogs, cats and ferrets in commercial movements.

<sup>101</sup> For other animals than those listed in n 101, including certain animals consigned to and from bodies, institutes or centres approved in accordance with Annex C to Directive 92/65/EEC, national animal health conditions may apply to the entry from third countries of animals (Directive 92/65/EEC art 18(2)). However, the EU rules on border checks apply.

<sup>102</sup> In this case, the remaining EU Member States.

<sup>103</sup> Council Directive 2004/68/EC of 26 April 2004 laying down animal health rules for the importation into and transit through the Community of certain live ungulate animals [2004] OJ L139/321 of 30 April 2004. For equidae, poultry, aquaculture animals and other animals see footnotes above.

<sup>104</sup> Council Directive 96/23/EC of 29 April 1996 on measures to monitor certain substances and residues thereof in live animals and animal products [1996] OJ L125/10 of 23 May 1996.

<sup>105</sup> Commission Decision 2009/821/EC of 28 September 2009 drawing up a list of approved border inspection posts, laying down certain rules on the inspections carried out by Commission veterinary experts and laying down the veterinary units in Traces [2009] OJ L296/1 of 12 November 2009.

<sup>106</sup> Article 4 of Council Directive 91/496/EEC of 15 July 1991 laying down the principles governing the organisation of veterinary checks on animals entering the Community from third countries [1991] OJ L268/56 of 24 September 1991.

<sup>107</sup> *ibid.*

<sup>108</sup> For equidae, specific transit rules are laid down in Commission Decision 2010/57/EU of 3 February 2010 laying down health guarantees for the transit of equidae being transported through the territories listed in Annex 1 to Council Directive 97/78/EC [2010] OJ L32/9 of 4 February 2010.

<sup>109</sup> Commission Decision 2003/623/EC of 19 August 2003 concerning the development of an integrated computerised veterinary system known as Traces [2003] OJ L216/58 of 28 August 2003.

<sup>110</sup> Council Directive 91/496/EEC (n 106) art 9.

<sup>111</sup> In addition, for the transit of certain ungulates, art 12 of Commission Regulation (EC) No 206/2010 applies.

<sup>112</sup> In addition, the rules on exit of live animals apply see section 2 of the notice.



**Animal welfare:**

Live animals permitted to enter the EU-27 will have to be transported according to all the animal welfare rules laid down in Council Regulation (EC) No 1/2005,<sup>113</sup> and will be submitted to checks at border inspection posts by the competent authorities as laid down in Article 21 of that Regulation.<sup>114</sup>

**2 Exit of live animals from the EU****Public and animal health:**

As of the withdrawal date, the exit of live animals<sup>115</sup> from a Member State to the United Kingdom through the territory of another Member State is subject to the following conditions:

- The transport operation must ensure that in accordance with Decision 93/444/EEC<sup>116</sup> the consignment remains under customs supervision up to the point of exit<sup>117</sup> from Union territory;
- Each consignment of animals is accompanied by veterinary documents or veterinary certificates meeting relevant veterinary requirements of the United Kingdom and health certificates for intra-Union trade, which contain, where necessary and applicable, the additional guarantees provided for by Union legislation for animals intended for slaughter;
- A message must be addressed in TRACES to the place of destination, which is the border inspection post of exit or the local authority of the place in which the point of exit is situated, and to the central authorities of the place of destination and of the Member State(s) of transit.

**Animal welfare:**

The transport of live animals exiting the EU to the United Kingdom will have to comply with Council Regulation (EC) No 1/2005 up to the final place of destination and will be submitted to checks at the exit point by the competent authorities as laid down in Article 21 of that Regulation.

Private parties are advised that the specific conditions regarding the movement and importation of live animals are regularly updated. The website of the Commission on imports of live animals ([https://ec.europa.eu/food/animals/live\\_animals\\_en](https://ec.europa.eu/food/animals/live_animals_en)) provides for general information concerning EU animal health legislation for imported live animals. These pages will be updated with further information, where necessary.

**Customs**

On 30 January 2018, the European Commission's Directorate-General Taxation and Customs Union and Directorate-General for Trade issued a notice to stakeholders entitled 'Withdrawal of the United Kingdom and EU Rules in the Field of Customs and Indirect Taxation'. The key elements of the text include:

In view of the considerable uncertainties, in particular concerning the content of a possible withdrawal agreement, economic operators are reminded of legal repercussions, which need to be considered when the United Kingdom becomes a third country.<sup>118</sup>

Subject to any transitional arrangement that may be contained in a possible withdrawal agreement, as of the withdrawal date, the EU rules in the field of customs (see below, 1) and indirect taxation (VAT and excise duties – see below, 2) no longer apply to the United Kingdom.<sup>119</sup>

<sup>113</sup> Council Regulation (EC) No 1/2005 (n 98).

<sup>114</sup> See also the Commission notice to stakeholders entitled 'Withdrawal of the United Kingdom and EU rules for authorisations and certificates for transporters of live animals, drivers and attendants' ([https://ec.europa.eu/food/animals/welfare/practice/transport\\_en](https://ec.europa.eu/food/animals/welfare/practice/transport_en)).

<sup>115</sup> Cattle, pigs, sheep, goats, equidae, poultry and hatching eggs, dogs, cats and ferrets, bees and bumble bees and aquaculture animals.

<sup>116</sup> Commission Decision 93/444/EEC of 2 July 1993 on detailed rules governing intra-Community trade in certain live animals and products intended for exportation to third countries [1993] OJ L208/34 of 19 August 1993. For the exit of live animals to a third country without passing through another Member State, no specific EU rules apply.

<sup>117</sup> *ibid.* In accordance with art 1(2)(a), 'exit point' means any place situated in close proximity to the external frontier of one of the territories listed in Annex I to Council Directive 90/675/EEC offering customs supervision facilities.

<sup>118</sup> For a movement of goods that has started before and ends on or after the withdrawal date, the EU undertakes to agree solutions with the UK in the withdrawal agreement on the basis of the EU's position on Customs related matters needed for an orderly withdrawal of the UK from the Union [https://ec.europa.eu/commission/publications/position-paper-customs-related-matters-needed-orderly-withdrawal-uk-union\\_en](https://ec.europa.eu/commission/publications/position-paper-customs-related-matters-needed-orderly-withdrawal-uk-union_en). The position paper also addresses administrative cooperation procedures on or after the withdrawal date between the EU-27 and the United Kingdom related to facts that have occurred prior to the withdrawal date (for example, mutual assistance related to the verification of proofs of origin).

<sup>119</sup> This note does not address the general customs and tax-free allowances applicable to goods in the personal luggage of travellers entering the EU.

This has in particular the following consequences as of the withdrawal date:<sup>120</sup>

#### 1 Customs

- Goods which are brought into the customs territory of the EU from the United Kingdom or are to be taken out of that territory for transport to the United Kingdom, are subject to customs supervision and may be subject to customs controls in accordance with Regulation (EU) No 952/2013 of 9 October 2013 laying down the Union Customs Code.<sup>121</sup> This implies inter alia that customs formalities apply, declarations have to be lodged and customs authorities may require guarantees for potential or existing customs debts.
- Goods which are brought into the customs territory of the EU from the United Kingdom are subject to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff.<sup>122</sup> This implies the application of the relevant customs duties.
- Certain goods which enter the EU from the United Kingdom or are leaving the EU to the United Kingdom are subject to prohibitions or restrictions on grounds of public policy or public security, the protection of health and life of humans, animals or plants, or the protection of national treasures.<sup>123</sup>
- Authorisations granting the status of Authorised Economic Operator (AEO) and other authorisations for customs simplifications, issued by the customs authorities of the United Kingdom will no longer be valid in the customs territory of the Union.
- Goods originating in the United Kingdom that are incorporated in goods exported from the EU to third countries will no longer qualify as 'EU content' for the purpose of the EU's Common Commercial Policy. This affects the ability of EU exporters to cumulate with goods originating in the United Kingdom and may affect the applicability of preferential tariffs agreed by the Union with third countries.

#### 2 Indirect taxation (VAT and excise duties)

- Goods which enter the VAT territory of the EU from the United Kingdom or are dispatched or transported from the VAT territory of the EU to the United Kingdom will respectively be treated as importation or exportation of goods in accordance with Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the 'VAT Directive').<sup>124</sup> This implies charging VAT at importation, while exports are exempt from VAT.
- Taxable persons wishing to use one of the special schemes of Chapter 6 of Title XII of the VAT Directive (the so-called Mini One-Stop Shop or MOSS), who supply telecommunications services, broadcasting services or electronic services to non-taxable persons in the EU, will have to be registered for the MOSS in a Member State of the EU.
- Taxable persons established in the United Kingdom purchasing goods and services or importing goods subject to VAT in a Member State of the EU who wish to claim a refund of that VAT may no longer file electronically in accordance with Council Directive 2008/9/EC<sup>125</sup> but have to claim in accordance with Council Directive 86/560/EEC.<sup>126</sup> Member States may make refunds under the latter Directive subject to reciprocity.
- A company established in the United Kingdom carrying out taxable transactions in a Member State of the EU may be required by that Member State to designate a tax representative as the person liable for payment of the VAT in accordance with the VAT Directive.
- The movement of goods which enter the excise territory of the EU from the United Kingdom or are dispatched or transported from the excise territory of the EU to the United Kingdom will

<sup>120</sup> The listing illustrates some important consequences in the field of customs and indirect taxation of the withdrawal of the UK from the Union but is not meant to be exhaustive.

<sup>121</sup> [2013] OJ L269/1 of 10 October 2013.

<sup>122</sup> [1987] OJ L256/1 of 7 September 1987.

<sup>123</sup> A list with such prohibitions and restrictions is published on the website of DG TAXUD [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/prohibition\\_restriction\\_list\\_customs\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/prohibition_restriction_list_customs_en.pdf).

<sup>124</sup> [2006] OJ L347/ of 11 December 2006.

<sup>125</sup> Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State [2008] OJ L44/23 of 20 February 2008.

<sup>126</sup> Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonisation of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in Community territory [1986] OJ L326/40 of 21 November 1986.

respectively be treated as importation or exportation of excise goods in accordance with Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty.<sup>127</sup> This implies, *inter alia*, that the Excise Movement and Control System (EMCS) on its own will no longer be applicable to excise duty suspended movements of excise goods from the EU into the United Kingdom, but those movements will be treated as exports, where excise supervision ends at the place of exit from the EU. Movements of excise goods to the United Kingdom will therefore require an export declaration as well as an electronic administrative document (e-AD). Movements of excise goods from the United Kingdom to the EU will have to be released from customs formalities before a movement under EMCS can begin.

The websites of the Commission on taxation and customs union ([https://ec.europa.eu/taxation\\_customs/index\\_en](https://ec.europa.eu/taxation_customs/index_en)) and external trade (<http://ec.europa.eu/trade/import-and-export-rules/>) provides for general information on the rules as they apply currently to the importation and exportation of goods. The relevant pages will be updated with further information, whenever available ...

## Other issues

Brexiters and Remainers would agree that the EU has either, depending on their perspective, interfered with or involved itself with many areas of law and life. Identifying and addressing all of those issues is a mammoth task. This article must, by definition, only touch on some of the various issues involved. Before concluding, having considered many of the main issues, it is useful to identify some of the remaining issues.

If borders, burdens and bureaucracy are reintroduced in terms of trade between the UK and the remaining EU Member States, then trade will become slower and more cumbersome. There is no doubt that trade has speeded up enormously since the creation of the EU's completion of the Internal Market by virtue of the so-called 1992 Programme. If there is extra bureaucracy and checks then trade will become slower, with greater costs for operators of vessels and ports and with implications for business generally (eg in the context of so-called just in time (JIT) contracts and delivery). Shippers, carriers, ports and customers would all be well-advised to check their contracts and terms because there could well be disputes and debates as to who is liable and what they would be liable for in a post-Brexit environment with delays, and so on.

Some ferry operators on the English Channel could be concerned that there would be special rules or special deals for the Eurotunnel/Channel Tunnel services, which would not apply to the ferry operators leading to discrimination.

A recurring theme in the Brexit negotiations has been the relationship between the UK and Ireland, as well as, in particular, the impact of Brexit on the border between the two countries. While no agreement has been reached on these 'Irish'-related aspects of Brexit, it seems that it could be difficult to reach agreement on this issue without some or all of the parties compromising. It is quite possible that this will be a point of division for some time to come unless the matter can be agreed upon. It could impact on issues such as migration controls at ferry ports and delays in the handling of cargo.

## Conclusions

The imprecision of Brexit has meant that commentators and politicians have resorted to clichés and stock phrases. In the context of shipping and ports, phrases such as 'unchartered waters', 'choppy waters' and so on prevail. However, when one removes these clichés, the position is only a little clearer. It is impossible to say what will be the long-term consequences because the terms of the post-Brexit arrangements between the UK and the EU have not yet been agreed. There is still no rulebook. There are, however, some key messages. There is uncertainty about the regime and the rules. Trade will be impacted negatively for as long as there is uncertainty. Issues relating to people (and, in particular, their free movement) will be of concern to the UK and so there is little guarantee

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<sup>127</sup> [2009] OJ L9/12 of 14 January 2009.

that the free movement of people post-Brexit will be as free as it is today.<sup>128</sup> There has been a great deal of ‘talking up’ the economy generally and the sector in particular by various parties, although this may not be enough to overcome the challenges that lie ahead.

If the UK and Gibraltar leave the EU, which is very likely (but not inevitable), then the implications for the UK and Gibraltar will be profound but as yet unclear. In an increasingly globalised and integrated world, it is difficult to conceive that a country with such a proud history of operating on a grand world-scale would seek to ‘go it alone’. While it may well have the fifth largest economy in the world, one is struck by the fact that it is *leaving* the world’s largest trading bloc (ie the EU) with members which include the fourth, sixth and eighth biggest economies in the world (ie Germany, France and Italy, respectively). Moreover, the UK represents only about 3 per cent of the world’s trade. It is also seeking to establish ‘free trade’ agreements with various states in the world at a very time when some of those states are either ambiguous about or even hostile towards free trade.

Whatever may be agreed between the EU and the UK by March 2019, there will still be a great deal more to discuss and possibly agree after that date. It is likely therefore that the negotiations and discussions between the UK and the EU will have to continue long after 2019 – indeed, or long as the UK and EU exist and seek to trade with each other.

The presence of the UK in the EU has generally been seen as a force for liberal economics and open market philosophy. This has been particularly so in regard to shipping and ports. The UK has, for example, opposed cabotage restrictions and what it perceives as bureaucracy in ports. It has influenced EU law in a very constructive and intelligent manner. The UK’s well-established interest groups and institutions have considered, in a thoughtful manner, various proposals which have been made by the Commission. Entities as diverse as the House of Lords and the UK Chamber of Shipping, as well as London-centred groups such as the European Maritime Law Organisation have all taken time to reflect on, and comment on, EU proposals. There is little doubt that the UK has shaped and influenced EU shipping law. Indeed, there are some commentators who trace the early evolution of EU shipping law in the early 1970s to the very accession of the UK (and, to a much lesser extent, Denmark and Ireland) because of the arrival in the (then) European Community family of an island as well as a maritime nation.

If the UK leaves the EU, then it is unlikely that the UK will have no interest in EU shipping matters; on the contrary, it will need to remain interested and should have a greater incentive to comment because it will not be part of the EU’s deliberations. However, it is quite likely that there would be some reduction in terms of the intensity of the scrutiny and the level of analysis by UK maritime interest in the affairs of a club which it has left. If that were so, then it would be a great pity because the rules which the EU adopts will continue to apply, and even affect, UK shipping interests without meaningful formal input from the UK.

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<sup>128</sup> Perhaps there could be relatively easy free movement of people between Ireland and the UK because of the so-called Common Travel Area, but this is not certain.