

Brexit: Legal and Policy Lessons learned for the European Union, the Withdrawal Process and European Union Law

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This paper examines some of the lessons learned so far from the Brexit process. It analyses those lessons under three main headings: the European Union itself; the withdrawal process (including Article 50 of the Treaty on the European Union); and European Union law. The lessons learned include the following: a realisation about the fragility of the EU project if such a politically stable and long-standing EU Member State as the United Kingdom (which is traditionally one of the most compliant Member States in terms of implementing EU law) could decide that it was not worthwhile remaining in the EU; the consequential need for the EU to validate itself even more with all of its citizenry; the complexity of EU law; the difficulties involved in withdrawing from the EU; the pervasive nature of EU law; the mistakes made in the Brexit process; and the continued significance of sovereignty not only as far as the Brexiteers are concerned but also as the Court of Justice of the European Union demonstrated in the Wightman litigation. Mistakes were made by both the UK and the EU in letting the situation come to a point where a majority in the UK voted in favour of Brexit – that was a mistake by both the EU and the UK. Mistakes have also been made by the UK in the Brexit process. The Brexit process clearly demonstrates the centrality of law as the force which unites and underpins the EU project. The Brexit process also shows the close interrelationship between law and politics in the EU so this paper combines issues of both legal and political science in its attempt to discern and discuss some of the lessons of Brexit so far.

Introduction

While Brexit¹ is an evolving process, it is important to take time to reflect on some of the lessons learned so far. It is however challenging to identify and articulate those lessons. Indeed, given the pace of news stories and the lack of clarity on the topic, reflecting on Brexit is like a drunk trying to paint a moving train. It is therefore better to look at the milestones rather than the millimetres of the process. As Brexit is incomplete and unfinished, no one knows all the lessons. Moreover the process will not even be complete if, as is contemplated but not certain, the United Kingdom ('UK') and Gibraltar leave the European Union ('EU') on 29 March 2019.² Therefore we cannot know all the lessons from Brexit at this stage but we should still discern and distil some of the lessons so far in order to help understand what

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¹ On Brexit law, see John Armour and Horst Eidenmüller, *Negotiating Brexit* (CH Beck, 2017); Kenneth Armstrong, *Brexit Time: Leaving the EU – Why, How and When?* (Cambridge University Press, 2017); Michael Dougan (ed), *The UK after Brexit: Legal and Policy Challenges* (Intersentia, 2017); Federico Fabbrini (ed), *The Law & Politics of Brexit* (Oxford University Press, 2017); as well as Jennifer Hillman and Gary Horlick (eds), *Legal Aspects of Brexit* (Georgetown Law, 2016). On the political aspects, see Harold Clarke, Matthew Goodwin and Paul Whiteley, *Brexit: Why Britain Voted to Leave the European Union* (Cambridge University Press, 2017). On the British political dimension, see Tim Shipman, *All Out War* (Collins, 2016). On the wider geo-political dimension, see Anthony Barnett, *The Lure of Greatness* (Unbound, 2017). On the dynamics, see Diarmuid Phelan, 'Brexit and British Empire, Fexit and Ireland – Complexity and the nature of law, democracy and the division of powers, and the rule of law', Europa Institut, *New Dynamics in the European Integration Process – Europe Post Brexit*, 25-28 June 2017.

² The UK will be the first EU Member State to leave what is now the EU. The significance of the departure is clear from the fourth recital of the Draft Withdrawal Agreement (as agreed at negotiators' level on 14 November 2018 and available at <https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf>) (the 'DWA') which states that 'the law of the Union and of Euratom in its entirety ceases to apply to the United Kingdom from the date of entry into force of this Agreement' (emphasis added) which was, when drafted, expected to be the end of 29 March 2019 (i.e., midnight Brussels time on the end of 29 March 2019). The notion that the entirety of EU and Euratom law would no longer apply in the UK brings the issue into sharp relief.

is involved and what could happen on the long road ahead. And it is a long road ahead – the current phase is only the withdrawal agreement stage and this would be just the first of many agreements with most of them being much more complicated and complex. It is worth recalling that the EU and the UK will continue to have to conclude agreements on all manner of issues for as long as both the EU and the UK exist – that has been the experience of Norway and Switzerland (the former which did not join the EU but did join the European Economic Area ('EEA') while the latter country did not join either the EU or the EEA but needs to have a close relationship with the EU in certain respects). So too, the UK and the EU will need to get on (to a greater or lesser extent) and therefore will need to conclude agreements between each other. This is therefore just the beginning of the beginning and certainly not the beginning of the end of negotiations.

Not only is Brexit evolving, it is also an enormous topic as has been demonstrated cogently by the complexity of the process to date.³ This paper therefore analyses the lessons under three headings: the European Union itself; the withdrawal process (including Article 50 of the Treaty on the European Union ('TEU')); and European Union law. The lessons are set out under three headings and may appear somewhat disconnected but it is, at this stage, impossible to thread a golden thread through the apparently random chaos of much of the Brexit process.

In discerning the lessons of Brexit, it is clear that law and politics are so closely intertwined in the EU. While the strands of law and politics are intertwined in every jurisdiction worldwide (including international law⁴), the two strands are more exposed and much closer to the surface in a legal system as nascent as the EU where the system is no older than many grandparents alive today. The EU legal system is underdeveloped as compared to many legal systems because the EU has many laws which are first generational rules and therefore do not have a long lineage and instead their political dimension is more exposed to the naked eye. EU Brexit law itself is no more than three years old! In the EU, we can see, in real time, bureaucrats propose, politicians agree and legislation adopted – the journey from political agreement to legal enactment is shorter and more visible in the EU context than in most other legal systems – and this is nowhere more obvious than in regard to Brexit where we can see political agreements and law being adopted.

³ The breadth and range of preparedness notices by the EU (see <https://ec.europa.eu/info/brexit/brexit-preparedness_en> accessed 20 December 2018) and the UK (see <<https://www.gov.uk/government/collections/how-to-prepare-if-the-uk-leaves-the-eu-with-no-deal>> accessed 20 December 2018) demonstrate the pervasive nature of EU law in the UK (and in all the Member States). It took the UK 12 years to negotiate its way into a much simpler European Communities (see Hugo Young, *This Blessed Plot* (Macmillan, 1998)), it is no wonder that it is so difficult for the UK to find its way out of the much more complex EU in a mere two years.

⁴ See Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press, 2001).

European Union

Introduction

It is useful to begin examining the lessons of Brexit from the perspective of the EU itself before moving on to the two other aspects of the topic.

The EU was shaken by the Brexit Referendum but it has been a Tremor and not an Earthquake

The enormity of Brexit⁵ means that the EU itself has been shaken by the process. No Member State has ever left what is now the EU in its sixty or so years of existence.⁶ And if the UK leaves in the EU then it would be one of the ‘big’ Member States which would be leaving which magnifies the significance of Brexit even further. The first few days after the UK’s Brexit Referendum in June 2016 witnessed the original six founding Member States⁷ retrenching and having a foreign ministers meeting among themselves in Berlin – this was a mistake because it excluded 21 other Member States that were not leaving but had acceded to, and were now standing by, the EU. Thankfully, from the EU’s perspective, that mistake was not made again and the 27 remaining Member States have worked together. One of the lessons which the EU has learned is that it needs to keep the 27 together. Remarkably, the Brexit process has seen great unity among the 27 Member States but considerable disharmony within one Member State – it is counterintuitive that so many could keep together while one would find it so difficult to decide its own position.

While the EU has been shaken by the Brexit result, somewhat remarkably, the EU has not been as shaken as many Brexiteers imagined and hoped but it is nonetheless destabilising for the EU⁸ to have any Member State leave. Perhaps the EU has not been as shaken by the UK’s departure because the UK’s discomfort and unease with the EU was trailed for many years. The UK has been semi-detached or entirely detached⁹ for so long from the EU that it is not such a radical notion that the UK would leave. There is even an argument that the UK has been such a brake on the EU wheel for so long¹⁰ that its departure could liberate the EU from such a constraint and thereby enable the EU to achieve more. It is probably the case that the EU’s emotion (if international organisations can have emotions) is now one of *regret* that the UK is leaving rather than *fear* for the EU without the UK. However, in the context of emotions, the EU has yet to have any widespread sense of remorse that, in part, the EU let this situation occur.

⁵ The enormity of Brexit is clear on so many levels whether, for example, the political, economic, social, cultural or, indeed, legal dimensions of the issue. In terms of the legal dimension, one need only recall that the UK will become a ‘third state’ in the words of the eleventh recital of the DWA.

⁶ Indeed, prior to the adoption of Art 50 of the TEU, there was no explicit provision about withdrawal from the EU. This is common in the case of many international organisations including, for example, the United Nations which does not have a withdrawal clause in its Charter (nor has it ever had a Member State leave even though Indonesia threatened to leave but did not do so). In so far as states have left international organisations, they have often returned (eg, France returned to the North Atlantic Treaty Organisation and the United States of America returned to the International Labour Organisation).

⁷ Ie, Belgium, France, Germany, Italy, Luxembourg and The Netherlands.

⁸ Eg, see the various tweets by Donald Tusk as President of the European Council over time.

⁹ Eg, the UK’s non-participation in the EU’s Economic and Monetary Union (‘EMU’) project.

¹⁰ Eg, during the Maastricht Treaty negotiations.

Fragile Nature of the EU Project: The EU, and hence EU Law, Cannot be Taken for Granted

If a Member State with the history of institutional stability, low levels of political risk and high levels of political discourse as the UK can believe that there is no value in remaining in the EU then the EU project could be more fragile than many had suspected.

At least 17,410,742 people in the UK - which had been a Member State for 43 years at that stage – did not see a value in remaining in the EU and therefore voted for Brexit in the 2016 Referendum. The UK's departure must be a wake-up call to some extent. If the UK can be tempted to leave then efforts need to redouble with other Member States. The need may be even greater with Member States other than the UK. It is clear that the UK has suffered from austerity but it has not suffered as badly as some other Member States. The UK's compliance record for implementing EU law has always been generally strong.¹¹ The country has been in the EU for 45 years – longer than 19 other Member States who joined later. It was, *from a distance*, part of the EU furniture. The UK has not spent the last ten, twenty or thirty years adjusting from dictatorship¹² or communism.¹³ It has not faced a migration crisis like that faced by Italy or Greece. More than half of all Europeans have never known a time when the UK was outside the EU. That is even greater in Ireland's case where the median age on 1 January 2017 was 36.9 years and the UK had already been a Member State for 43 years. Indeed, the decision at the European Council on 25 November 2018 to agree to the UK's Draft Withdrawal Agreement (the 'DWA') was made by 27 leaders but several of them were not even born when the UK joined the now EU - members such as Irish Taoiseach Varadkar, Austrian Chancellor Kurz, Belgian Prime Minister Michel, Greek Prime Minister Tsipras and French President Macron. If a stable state such as the UK could be tempted to leave the EU then is any state really a secure EU Member State?

The lesson is that the European Project cannot be taken for granted. Few imagined in 1989 that the USSR would not exist three years later. It is wrong to suggest that the EU is also on the brink of collapse but its survival is neither inevitable nor guaranteed. Great care needs to be taken by the EU to ensure that the project is bolstered and buttressed. It is worth recalling that the EU will not last forever – that is not a hope (far from it) but a realistic statement of fact. The Treaty of Rome falls into a long pattern of important European treaties such as the Treaty of Westphalia, the Treaty of Versailles and so on. Just as those older treaties have fallen away (apart perhaps from some of their effects), so too, in time, the Treaty of Rome (and all its amendments) will fall away. We must plan now for the future and for the post-EU world. We cannot, if the UK is leaving, take this European Project for granted. As lawyers, we have witness how law has helped the EU achieve its aims and purposes – law has achieved more than military power ever did and for longer - but law must be used dynamically and effectively to sustain the EU.

The EU needs to explain the EU Project to the EU Citizenry but, moreover, have the EU Citizenry Embrace the EU Project

One of the many failures of the Remain Campaign in the 2016 Referendum was not to explain to voters the rationale for the EU or, moreover, make the electorate *want* to embrace the EU. People often vote in referendums and elections not on the basis of what they are told but how they are made feel. 'Project Fear' was perhaps a reason to vote for Remain but it was a negative reason and it clearly was not

¹¹ See European Commission reports on compliance by Member States with EU law: <https://ec.europa.eu/info/publications/2017-commission-report-and-factsheets-monitoring-application-eu-law_en> accessed 20 December 2018.

¹² As in the case of, for example, Greece, Portugal and Spain.

¹³ As in the case of, for example, Bulgaria, Hungary, Poland, Romania, Slovakia and Slovenia.

enough. The Brexit campaign had more apparently 'positive' messages. Ironically, the messages of Brexit (eg, take back control, make your own laws and stop sending money to a foreign capital) were more akin to the messages which the British Empire's colonies espoused in their struggles against the UK rather than a message one would have expected to hear from a British electorate.

The EU's original rationale is not easily explicable to a contemporary audience who have no understanding or recollection of the Second World War. It is indisputable and incontrovertible that the EU has had a critical role in securing peace in Europe – as exemplified by the EU winning the Nobel Peace Prize in 2012. A contemporary audience has no understanding of the scale of Second World War so it needs to be explained. While no one knows the death toll in the Second World War and few today have any conception of the horrors of that terrible war, a simple but admittedly crude analogy would give a palpable sense of the what is to be avoided: based on the median estimate of the loss of life in the Second World War and the known loss of life on 9/11, there was effectively a 9/11 every 45 minutes every day and every night for six years from 1939 to 1945. That is what the EU has helped avoid being repeated. If the EU is to be effective in achieving its purposes then then the EU project needs to be not only revitalised but also explained to its citizenry.

The EU Needs to Inform and Connect with its Citizenry even more

Apart from explaining itself, the EU needs to inform and connect with its citizenry even more. It certainly attempts to reach out to its citizenry (particularly, the young¹⁴) but it clearly did not do enough in the UK to get young people there to support actively the EU project by voting in sufficient numbers. If the EU had tried to reach out to UK voters during the 2016 Referendum then that could have been politically unwise or naive but it was, in any event, too late. Intervening in the few weeks of a referendum campaign is usually too little too late – particularly, as there had been a sustained build-up of anti-EU sentiment in the UK over time – UKIP had won 3,881,099 vote in the 2015 General Election despite Cameron's Conservatives offering an In-Out Referendum if his party had won an overall majority – the UKIP vote was a 9.5% increase in votes since the previous general election and the scale of the increase is evident from the fact that the party with the second highest increase in votes (the Scottish Nationalist Party) in the 2015 General Election had only increased its vote by 3.1%.

The EU needs to take away some lessons from the Brexit process. First, its work with the young helps to generate enthusiasm for the EU but the 2016 Referendum was characterised by Euroscepticism or, at least, Eurocynicism among the older half of the population¹⁵ and typically, it is the older half who tend to vote. Secondly, the EU needs to explain the benefits of membership much more widely across all population groups. The EU needs to reach out to all age cohorts. Thirdly, the EU needs to correct fallacies and falsehoods about itself in the media and otherwise. There is little doubt that many went to the polls in the UK believing as true some of the myths about the EU. Fourthly, the EU needs to ensure that it has personalities and role models from all the Member States in positions of power within the EU who can act as champions for the EU cause in the Member States. It is notable that the UK did not have one of its citizens hold a senior EU political position for many years and some of those that did hold senior office were little known and did not do a great deal to champion the EU cause in the UK. The EU cannot take itself or support for it by citizens for granted.

The EU needs to be Careful about its Future Members

¹⁴ Eg, through the Erasmus Programme.

¹⁵ Eg, the Erasmus programme.

While the UK has been a long standing Member State, it is clear that it was not comfortable with much of what the EU was about. It wanted to opt-out from parts of some policies and even avoid participating altogether in other policies,¹⁶ stand apart, pay less¹⁷ and limit progress in certain areas. It was almost as if the UK did not want to be part of the European Project. While the Brexit crisis is very largely (though not entirely) the result of in-fighting in one political party in one Member State, it is clear that there is not the support within Corbyn's Labour Party that one might have had in Blair's or Wilson's Labour Party. While the UK, if it wanted to be, would be an admirable EU Member State, it is clear that many citizens in the UK (and, indeed, a majority of those who voted in the 2016 Referendum) do not want to be members of the EU. And as the CJEU said so crisply in para.65 of *Wightman*: 'given that a State cannot be forced to accede to the European Union against its will, neither can it be forced to withdraw from the European Union against its will'¹⁸ – membership is a choice and not necessarily a choice for life. Perhaps in an effort to minimise issues, to some extent, the EU should insist that a referendum is held in an applicant state to demonstrate popular support for EU membership before that state is allowed to join. It is notable that unlike Denmark and Ireland, the UK did not have a referendum *before*¹⁹ it acceded to the then European Communities in 1973 and many would argue that the UK never quite 'bought into' the European project.

How little is Really Understood about the EU

The ignorance in the UK about the EU has been somewhat staggering. This ignorance is in part the fault of the political classes in the UK and, also importantly, the EU. While there is no doubt that many in the media in the UK attacked the EU with venom, many in the political classes in the UK also held back defending the EU so as to avoid being targeted by the same media and thereby potentially losing political office. Indeed, many of those UK politicians who negotiated Brexit issues with the EU had very little experience of negotiating with the EU – a negotiator such as Michel Barnier had been a government minister negotiating with the EU as long ago as 1993²⁰ and someone like Jean Claude Juncker had been a minister negotiating with the EU as long ago as 1984.²¹ While youth has its virtues, experience has its value: when Juncker was starting out his career of EU negotiations in 1984, the incumbent (at the time of writing) UK Brexit Secretary was 12 years old and the leading Brexiteer Boris Johnson was in first year at university. The UK ministers had either little or no experience of dealing with the EU and far less than their counterparts.

It is clear now that the EU should go out of its way to prove its value and explain itself to the population of all Member States including the UK after it leaves. This is important because support for, and knowledge of, the EU should not be taken for granted. Conversely, those in Member States need to understand the EU regime and its peculiar 'language' and 'signalling' even more because history will recall that the UK missed many of the signals sent by the EU over time. Indeed, history will probably say that Cameron sought too little and got less in early 2016 from the EU and then promptly ignored the deal which he did get in the 2016 Referendum which followed.

¹⁶ Eg, EMU.

¹⁷ Eg, the battles over the UK's contribution to the EU budget during many years of Margaret Thatcher's premiership in the UK.

¹⁸ Case C-621/18 *Wightman and Others v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:999.

¹⁹ The UK had a referendum in 1975 when a majority voted to remain. The geographical spread of support/opposition was largely the inversion of the outcome in 2016 with the result in 1975 showing that the southern half of the UK tended to be more in favour of remaining while the northern half was tending more towards leaving (see Robert Saunders, *Yes to Europe!* (Cambridge University Press, 2018)).

²⁰ <https://ec.europa.eu/info/persons/director-head-service-michel-barnier_en> accessed 20 December 2018.

²¹ <https://ec.europa.eu/commission/commissioners/2014-2019/president_en> accessed 20 December 2018.

History Can Go Backwards

History can go backwards. First, an obvious lesson of Brexit is that states may leave the EU as well as join it: the EU can contract as well as expand. Apart from the withdrawal of three territories, namely, Algeria (1962), Greenland (1985) and Saint Barthélemy (2012) from what is now the EU, this is the first possible withdrawal from the EU by a Member State. Secondly, there is a notable swing against the liberalisation or opening up of trade in many parts of the world with a swing back towards protectionism. Thirdly, the laws which opened up the market and liberalised trade were seen as not worth retaining by the current UK Conservative Government - which is somewhat ironic as many of those rules were proposed in the 1992 Single Market Programme which was championed by Lord Cockfield, a Conservative Party politician and businessman, who was nominated to the European Commission by the Thatcher Government. The ultimate lesson is that forward momentum in every organisation is not inevitable.

Watch out for the Danger Signs

The EU should pay more attention to any warning sign that a member of the EU is wavering. Perhaps it would have been too much to have reacted when United Kingdom Independence Party ('UKIP') was founded by Alan Sked in 1991 but perhaps the EU should have taken more notice of the canary in the coal mine moments which followed. There are several Member States which have significant minorities who not only do not support the EU, they positively oppose it and the EU must not let the same thing happen again. History demonstrates that the UK can break away, in a reformation-type moment, from Rome (and perhaps the Treaty of Rome) and those schisms can last for a long time whatever level of ecumenical spirit can be expressed by both sides.

Brexit has paradoxically been good for the EU in Some Ways

We commemorate the 'Founders Fathers' and the early leaders of the EU with their names on railway stations, squares, buildings and professorships. One need only think of the Monnets, the Schumans, the Borchettes and so on. But one person who did a huge amount to unite Western Europe was Josef Stalin of the Union of Soviet Socialist Republics. Paradoxically, Stalin's 'opposite' force helped to strengthen the support for the then fledgling European Communities because people in the founding Member States espoused the *western* European alliance to save themselves from the *eastern* European forces of communism. Stalin unwittingly thereby helped foster western European Integration. It is possible that some of the leading Brexiteers have unintentionally brought the remaining EU Member States closer together. It is also paradoxical that Brexit (and the shambolic nature of the process from time to time) probably curbed some of the enthusiasm for the Exiteers in France and The Netherlands as demonstrated by the performance of Exiteers in those countries in elections which followed the 2016 Referendum in the UK and the commencement of the Brexit process.

Sovereignty has been strengthened by the Brexit Process

Brexiteers have often argued that the EU actually controls and subjugates Member States. They say that the Member States have surrendered their sovereignty to the EU. Ironically, the Brexit process has proved that to be a lie. Member State's sovereignty always continues beneath the surface of membership. Article 50 of the TEU encapsulates the notion that membership of the EU (which does involve some diminution and transfer of sovereignty while one is a member) is not forever because Member States may, at their discretion, withdraw from EU membership and even withdraw their withdrawal notice. The Draft Withdrawal Agreement referred in the very first recital to the UK's

'sovereign decision to leave'. The CJEU's *Wightman* ruling emphasised that not only could a Member State announce its intention to withdraw but it could change its mind and withdraw the withdrawal notice.

The Complex and Complicated Nature of the EU

The Brexiteers were probably more correct than they thought in arguing that the EU pervades so much of life in the EU for individuals, businesses and governments. But even the staunchest Brexiteer did not know how difficult it is to extricate a Member State from membership and to start an independent existence in an interconnected world. There had been little discussion during the 2016 referendum about, for example, Ireland,²² the European Atomic Energy Community,²³ the complexities of leaving the EU or what type of Brexit would be sought by the UK. It is a simple lesson – a trite but true one – that the EU is more complex and complicated than many ever understood.

The Interconnectivity of the EU

There can now be no doubt about the interconnectivity of all the Member States of the current EU. The vote in the UK and Gibraltar has implications for Ireland (eg, the 'Border' issue), Cyprus (eg, where two UK sovereign base areas on the island of Cyprus will also leave the EU), Gibraltar,²⁴ the Channel Islands,²⁵ the Isle of Man,²⁶ but also further afield in places as diverse as Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, the Falkland Islands and Pitcairn.²⁷ Equally, the EU's Member States are often interconnected with other parts of the world because of international agreements to which the EU is a party²⁸ and the Brexit process demonstrates how difficult it is to disconnect from those EU-sponsored agreements.

The Exclusive Competence of the EU and the International Dimension of the EU both came more into focus

While it is trite EU law that the EU has exclusive competence over certain matters and that the EU has an international dimension, the significance of both features of the EU came sharply into relief during the Brexit process because it became clear that the UK could not simply 'go out and make trade deals' with the rest of the world while it was still in the EU club. The Draft Withdrawal Agreement recognises that fact but it does cut some slack for the UK by stating that the UK may 'take steps to prepare and establish new international arrangements of its own, including in areas of Union exclusive competence, provided such agreements do not enter into force or apply during that period, unless so authorised by the Union.'²⁹

²² The Irish Government sensibly decided to stay out of the internal referendum campaign in the UK but history will judge whether it should have done more to 'inform' rather than 'advocate' the UK electorate on the issue but such information, however well-intentioned, could well have back-fired among many voters in the UK (a simple test of that would be to consider how UK 'information campaigns' in Ireland during an Irish referendum would be received by certain sectors of the Irish electorate).

²³ This is despite the fact that the UK was also announcing its intention to leave the European Atomic Energy Community ('EAEC') as well by virtue of serving the Art 50 TEU letter which applied to the EAEC by virtue of Art106a of the Treaty establishing the EAEC.

²⁴ DWA, recital 13 and the Protocol on Gibraltar (at page 496 of the DWA).

²⁵ DWA, art 3(1)(c).

²⁶ DWA, art 3(1)(c).

²⁷ DWA, art 3(1)(e).

²⁸ DWA, Art,2(a)(iv).

²⁹ DWA, ninth recital.

Could Brexit have been any more complicated?

A clear lesson is that the Brexit process is complicated and difficult. However, in some (but not many) ways, the departure of the UK is not as difficult a departure as would be the departure of the likes of France or Germany. If the UK had joined the EMU then it would be now a much more difficult process because it could mean a profound EMU/euro crisis. The UK was semi-detached from so much in the EU for so long that its departure might not be so difficult as if it had been a more central player. While an Irish readership is acutely aware of the UK's land border with Ireland, the exit of a landlocked EU/EMU Member State such as Austria (surrounded by six Member States and one non-Member State) or Luxembourg (surrounded entirely by three Member States) could be much more difficult in certain respects.

Preparations should be made now for the UK to return

The EU should not see the withdrawal of the UK as the end of the process. The bigger failure will not be that the UK does not return but rather that the EU and all of its Member States did not do enough to lay the groundwork for its possible return. States do change their mind. Indonesia said it was leaving the United Nations when Malaysia was being elected to the Security Council but changed its mind. France left NATO but returned. The USA left the ILO but returned. In 1975, the UK voted to remain and in 2016, it voted to leave. Like Bobby Ewing coming out of the shower, anything is possible and we may need to move quickly without resentment but not be taken for fools either – it is a difficult balance. It is not inevitable that the UK would want to return or that all Member States would agree to its re-admission but it is important to facilitate its re-admission.

Withdrawal Process

Introduction

The second area of lessons to be learned is in respect of the withdrawal process itself. It is well-known that Article 50 of the TEU regulates this issue but what is less clear is how incomplete an article it is in many respects. Article 50 provides:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

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

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

Article 50(1) provides that any Member State may decide to withdraw from the EU in accordance with its own constitutional requirements. The first lesson from the Brexit process is that, as demonstrated amply by the *Miller* litigation,³⁰ there is genuine doubt about the relevant constitutional requirements in Member States. This is not surprising because states so rarely decide to leave international organisations. In that regard, the default two-year time period in Article 50(3) could be too short to accommodate a Member State trying to grapple with the constitutional requirements. (A parlour game would be whether Ireland needs to hold a referendum to leave.) The second lesson is that the reference to the Member State's constitutional requirements is understandable given the need to have regard to sovereignty. However, it is open to question whether there ought to be an additional element where the departing Member State would have to honour EU law as well. The latter lesson – relating to the EU legal requirements - has not been an issue (to date) in regard to Brexit but it could arise in the case of other departures.

Article 50(2) has proved central to the *Wightman* litigation. Under this paragraph, a Member State which decides to withdraw shall notify the European Council of its 'intention' to leave – the word 'intention' has proven critical because, as the CJEU said in paragraph 49 of its ruling: '[a]n intention is, by its nature, neither definitive nor irrevocable.' In the light of the guidelines provided by the European Council, the EU shall then negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the EU. Those guidelines proved critical because the EU had clear guidelines, the UK did not – instead, the UK changed tack from Lancaster House to Florence to the Mansion House speeches³¹ and has changed direction again since. The agreement is to be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. Ultimately, the agreement must be concluded on behalf of the EU by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament – a stage which has not been reached at the time of writing so no significant lessons can yet be learned in that regard.

Article 50(3) embodies the so-called default position relating to the two-year period for the withdrawal negotiations. One of the lessons of Brexit is that the two-year Article 50 window probably needs to be longer. In the case of Brexit, it will be almost three years from the date of the Brexit Referendum (ie, 23 June 2016) until the planned withdrawal date (ie, 29 March 2019) and that timeframe has proven too short. There is merit in extending in the TEU the prescribed timeline. If the process of a particular

³⁰ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5. See Mark Elliott, Jack Williams, Alison L Young, *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing, 2018).

³¹ For the UK Prime Minister's speeches, see:

<https://www.gov.uk/government/announcements?keywords=&announcement_type_option=speeches&topics%5B%5D=all&departments%5B%5D=prime-ministers-office-10-downing-street>.

Member State withdrawing is achieved more quickly than the extended timetable then that is a very good result for all concerned. But the reality is that a Member State might well find it very difficult (eg, for domestic political reasons) to ask for an extension³² so it would be better to extend the negotiation window so as to enable negotiations to proceed in a less febrile or frenzied environment. The various stages associated with the withdrawal from the EU seem akin to the various stages of the human grieving process (or, at least it has been in the Brexit process) so as much time as possible should be allocated to achieving a successful outcome.

Article 50(4) provides that the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. This is a practical and correct rule. Anything else could be counter-productive. However, it is clear that by having the UK leave summits early and so on, the UK is already a nearly-departed Member State.

Understand the nature of referendums

The UK has had very few referendums.³³ Ireland has had more experience of referendums but it has still had some difficulties with them. It is worth reflecting on the nature of a referendum. It is possibly best to explain it by analogy. A referendum is a process whereby you ask people would they like tea or coffee? They want to give many answers and for all sorts of reasons but the stricture of the question confines it usually to a binary choice. So typically, you ask someone in a referendum, 'would you like tea or coffee?' They answer 'I would like a Rolls Royce.' You explain that a Rolls Royce is not on offer. Eventually you yield and you give them the keys of a new Rolls Royce and they ask 'yes but where's my skinny latte?' Referendums often involve binary choices and hard consequences. They are an imperfect method of discovering public opinion but they are as good a method as anyone can devise.

Two lessons can be learned from the Brexit Referendum. First, it was defective in that its question was not accompanied by an adequate information campaign as to what were the consequences of either choice and the nature of the notion of leaving. Secondly, the Brexit Referendum made a choice between people and goods with the voters choosing goods (ie, free trade) over persons (ie, fellow EU citizens who might want to go to the UK or UK citizens who might want to go to the EU Member States). It was a choice which will be studied by historians and sociologists for many years to come.

The EU is a Lobster Pot

While there have been seven waves of accessions to what is now the EU between 1973 and 2013, they were all relatively easy compared to the complex and complicated withdrawal by the UK. In many ways, the EU is like a lobster pot: relatively easy to enter but very difficult to leave. That may not be a bad thing.

³² The granting of an extension to a withdrawing Member State has also become somewhat more difficult because that Member State may now clearly withdraw its notification so some Member States may be unwilling to grant an extension and instead leave it to the withdrawing Member State to withdraw its notice where there are fundamental issues and obstacles to an agreement.

³³ See <<https://www.parliament.uk/get-involved/elections/referendums-held-in-the-uk/>> accessed 20 December 2018.

The Draft Withdrawal Agreement states its 'objective' to be 'to ensure an orderly withdrawal of the United Kingdom from the Union and Euratom'.³⁴ Leaving comes at a high price because the UK had to make a 'financial settlement' with the EU.³⁵

It is difficult to leave the 'clutches' of the EU. The DWA still contemplates some role for the CJEU. The DWA even contemplates in Article 4(1) that:

The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.

Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.

Indeed, the UK must ensure full compliance under Article 4(2):

The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.'

Moreover, Article 4(3)-(5) go on to provide:

3. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.

4. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period.

5. In the interpretation and application of this Agreement, the United Kingdom's judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period.

This is not leaving in the pure Brexit sense. Indeed, when one considers Article 158(1) of the Draft Withdrawal Agreement, one can see a 'tail' of eight years from the end of the transition period for the UK courts³⁶ and the financial settlement has an even longer tail out for perhaps another five decades or so.

³⁴ DWA, fifth recital.

³⁵ DWA, tenth recital.

³⁶ Art 158(1) states

[w]here, in a case which commenced at first instance within 8 years from the end of the transition period before a court or tribunal in the United Kingdom, a question is raised concerning the interpretation of Part Two of this Agreement, and where that court or tribunal considers that a decision on that question is necessary to enable it to give judgment in that case, that court or tribunal may request the Court of Justice of the European Union to give a preliminary ruling on that question.

But Withdrawing from the EU is Possible

Article 50 of the TEU put beyond doubt the question of whether a Member State may leave the EU. Public international law and international political reality would have meant that a Member State could probably have left even in the absence of Article 50. Nonetheless, we have, through the Brexit process, learned a great deal more about Article 50 than the somewhat succinct article suggests.

Withdrawal of the Withdrawal Notice is Possible

Not only is withdrawal possible but withdrawal of the withdrawal notice is possible. The CJEU decided in *Wightman* on 10 December 2018³⁷ that a Member State which serves a withdrawal notice under Article 50 of the TEU may then withdraw that notice provided it acts in good faith. The CJEU was succinct in its ruling:

75. In view of all the foregoing, the answer to the question referred is that Article 50 TEU must be interpreted as meaning that, where a Member State has notified the European Council, in accordance with that article, of its intention to withdraw from the European Union, that article allows that Member State — for as long as a withdrawal agreement concluded between that Member State and the European Union has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in Article 50(3) TEU, possibly extended in accordance with that paragraph, has not expired — to revoke that notification unilaterally, in an unequivocal and unconditional manner, by a notice addressed to the European Council in writing, after the Member State concerned has taken the revocation decision in accordance with its constitutional requirements. The purpose of that revocation is to confirm the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State, and that revocation brings the withdrawal procedure to an end.

The CJEU agreed with the views of Advocate General Campos Sánchez-Bordona only six days earlier.³⁸ The lesson to be drawn is not only that a Member State may announce its intention to leave and then withdraw that notice of intention but also that the CJEU may move very quickly, when it needs to do so – this is demonstrated by the fact that the request for the preliminary ruling was only received by the CJEU from the Scottish Court of Session, Inner House on 3 October 2018 but the CJEU had a written procedure, held a hearing on 27 November 2018, heard the Advocate General on 4 December 2018, was able to deliver its ruling on 10 December 2018. This preliminary ruling took 69 days from ‘question to answer’ while the average was 16.3 months for all judgments delivered by the CJEU in 2017. It was a remarkably swift process where the CJEU delivered a ruling which was convincing on the law, clearly free of political interference and yet pragmatic and practical.

Experience pays off

One of the lessons of the Brexit process is that experience pays off. The EU and, in particular, the European Commission have vast experience of negotiating on EU law matters. The EU adopted a clear strategy and clever tactics in the case of Brexit. It chose the European Commission, rather than the Council or European Council, to be the lead negotiator thereby tapping into the European Commission's

³⁷ Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union*, ECLI:EU:C:2018:999.

³⁸ Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union*, Opinion of Advocate General Campos Sánchez-Bordona, ECLI:EU:C:2018:978.

experience in negotiating internally and externally while leaving the Council and the European Councils as political courts of appeal. The EU chose one person who was vastly experienced in EU and Member State politics to lead the negotiations (Michel Barnier) but he was not the most senior person (they were Jean-Claude Juncker and Donald Tusk) which left leeway to 'bring in the boss' for the more delicate issues. The European Council gave clear and specific guidelines to the European Commission³⁹ from which the latter rarely, if ever, departed. By contrast, the UK could not get a consistent line on what it wanted (and did not want) from the negotiations. It appointed ministers who had little or no experience at ministerial level let alone at international or EU negotiations. As mentioned, Juncker was a minister negotiating at the EU table while some of them were still students or had not yet entered politics. The UK Prime Minister took centre stage way too early and the UK therefore had no fall-back position – a requirement which is self-evident to anyone who has observed EU diplomacy and even negotiations generally. Even the UK Prime Minister, as energetic, dedicated and committed as she has been, lacked any real experience at EU negotiations given that her background was as Home Secretary which did not involve many Brussels-based negotiations and even less because of the UK's semi-detached position on Justice and Home Affairs issues in the EU. The experience of the EU side made it a home game and on their rules. The EU has its own language, rhythm and approach – it was clear that many of the UK's political negotiators did not grasp much of it (eg, making important submissions to 'Brussels' in August is much like writing to Santa in February – was it too early or too late?). The lack of success on the UK side was a surprise to some but a reality for all to see.

Brexit is an iterative Process

As no Member State ever left the EU, it was not clear as to how the process would unfold. It could have been a 'big bang' approach with all the changes being implemented simultaneously. It is now clear that it is an iterative process. During the negotiations, the EU designed a two-phase approach with three issues to be dealt with first and then the rest – that two-stage structure is not in Article 50 of the TEU or anywhere else – and largely insisted on it (the Irish issue was let slip, in part, into the second phase); the UK went along with the process. The Draft Withdrawal Agreement provides that while there would be 'various separation provisions aiming to prevent disruption and to provide legal certainty to citizens and economic operators as well as to judicial authorities in the Union and in the United Kingdom', these would not exclude 'the possibility of relevant separation provisions being superseded by the agreement(s) on the future relationship'.⁴⁰ This iterative process will last for many years to come.

Language matters

Like many international diplomatic processes, language and nomenclature became very significant in the Brexit process. During the campaign, Polish workers moving to Britain were 'migrants' but Britons moving to Spain were 'expats'. During the negotiations, the first period after the UK leaves became known as the 'transition' period for the EU but the 'implementation' period for the Brexiteers.⁴¹ One of the clear lessons is that language matters.

Trust is needed but perhaps lacking in the Brexit Withdrawal Process

Articles 5 and 8 of the Draft Withdrawal Agreement are very telling. Article 5 (entitled 'Good faith') provides:

³⁹ See the guidelines of 29 April 2017, 15 December 2017 and 23 March 2018.

⁴⁰ DWA, seventh recital.

⁴¹ The DWA uses both terms occasionally (eg, the eighth recital) but not consistently (eg, recital 9, art 2(e) in which case it opts only for the EU preferred term 'transition period').

The Union and the United Kingdom shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement.

They shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement.

This Article is without prejudice to the application of Union law pursuant to this Agreement, in particular the principle of sincere cooperation.

Article 8 (entitled 'Access to networks, information systems and databases' but is, more colloquially, the 'anti-hacking provision') then provides:

Unless otherwise provided in this Agreement, at the end of the transition period the United Kingdom shall cease to be entitled to access any network, any information system and any database established on the basis of Union law. *The United Kingdom shall take appropriate measures to ensure that it does not access a network, information system or database which it is no longer entitled to access.* (Emphasis added)

The fact that these two provisions had to be included is indicative of there is not a high level of trust between the parties. One of the lessons is that trust is in short supply in this type of process despite the appearances.

UK Attitudes towards the EU will probably harden not ease

Unless and until the UK re-joins the EU, the relationship between the EU and the UK will be hard and will grow more coarse. The UK Foreign Secretary's comparison of the EU to the former Soviet Union could, in time, seem mild and quaint.⁴² If the UK finally leaves and the UK suffers because of Brexit then it is quite possible that some in the UK will not blame Brexit itself but instead blame the EU because of the supposedly harsh terms imposed on the UK by the EU as part of the withdrawal process and any subsequent agreement. Equally, if the UK prospers post-Brexit then it is quite possible that many in the UK will have resentment towards the EU and the harsh regime that was imposed upon the UK by its EU membership for four decades or more. Either way, it is unlikely to be a harmonious relationship unless the EU and the UK work hard to avoid such an atmosphere emerging.

There will be other non-Brexit Issues in the UK which will emerge which will be serious

Brexit is all consuming for many UK politicians. It is a fair question to ask whether there are issues in the UK which have been neglected because of the Brexit withdrawal process. It should be a lesson to any Member State that withdrawal could be a very difficult process for any Member State to manage – particularly for smaller Member States with smaller civil services.

Withdrawal is a very long – and almost never-ending – Process

⁴² See <<https://www.irishtimes.com/news/world/uk/brexit-jeremy-hunt-compares-eu-to-prison-and-soviet-union-1.3646873>> accessed 20 December 2018 and <<https://www.theguardian.com/politics/2018/oct/01/jeremy-hunt-draws-eu-ire-over-soviet-prison-comparison>> accessed 20 December 2018.

The simplistic and naïve view of many Brexiteers was that the Brexit process would be short. Liam Fox, the UK Trade Secretary, said the Brexit deal will be the ‘easiest thing in human history’.⁴³ Gerard Batten of UKIP said that the deal could be negotiated in an afternoon.⁴⁴ If the Brexit process was short, it would be, to borrow from Hobbes, ‘solitary, poor, nasty, brutish, and short’.⁴⁵ The record demonstrates that the Article 50 preparation process (from 24 June 2016 to 29 March 2017) was difficult and the Article 50 negotiation process (still underway at the time of writing) was verging on hellish for the UK. And yet, the Draft Withdrawal Agreement is only the first of a suite of several agreements which would be needed. The Draft Withdrawal Agreement creates a form of limbo law for the UK in that although its membership of all EU institutions and organs ends on 29 March 2019,⁴⁶ as ‘it is in the interest of both the Union and the United Kingdom to determine a transition of implementation period during which...Union law, including international agreements, should be applicable to and in the United Kingdom, and, as a general rule, with the same effect as regards the Member States, in order to avoid disruption in the period during which the agreement(s) on the future relationship will be negotiated’.⁴⁷ The DWA contemplates ‘the formal negotiation of one or several agreements’.⁴⁸ Whatever Brexit means, it does not mean an immediate Brexit.

The Lessons of Brexit relating to European Union Law

Introduction

This is the shortest of the three topics being examined. Brevity makes analysis and exposition of the issues more manageable. If one was to examine the impact of Brexit on each area of EU law then one would have several books.⁴⁹ So, it is useful to consider the issue at a high level and to pick a number of examples from competition law as an example of the issues which could arise.

Complexity of EU Law

The Brexit process demonstrates the complexity of EU law. Anyone who believes that withdrawing from the EU would be simple has had a rude awakening. Indeed, one interesting lesson is how EU Member States stop doing things for themselves so that if they have to start doing things again, it is more difficult; one need only think of the fact that the UK has not negotiated many types of international agreement (particularly international trade agreements) for many decades meaning that it has to relearn those skills. So not only is EU law complex but Member States have become dependent on the EU for producing many of their laws.

How Withdrawal leaves holes in national legal Regimes

The UK benefits from a tapestry of international legal agreements by virtue of its membership of the EU. In the absence of some arrangements whereby the UK may continue to be part of the EU regime,

⁴³ Mark Steel ‘Liam Fox says the Brexit deal will be the “easiest thing in human history”. That’s a relief, isn’t it?’ *The Independent* (20 July 2017) <<https://www.independent.co.uk/voices/brexit-deal-eu-liam-fox-boris-johnson-a7851656.html>> .

⁴⁴ Ajay Nair ‘UKIP MEP rips into two-year Brexit negotiations raging “you could do in an afternoon!”’ *The Express* (27 March 2017) <<https://www.express.co.uk/news/uk/784466/Ukip-Gerard-Batten-UK-Brexit-deal-in-an-afternoon-bbc-two-daily-politics-alison-mcgovern>> accessed 20 December 2018.

⁴⁵ *Leviathan* (1651), XIII.9.

⁴⁶ DWA, fourth recital.

⁴⁷ DWA, eighth recital.

⁴⁸ DWA, recital 16.

⁴⁹ Eg, Dougan (n 1) *passim*.

there will be certain gaps in the UK legal regime. There are several examples which demonstrate this point. For example, the EU has agreements relating to competition law with the likes of the USA (1995 and 1998), Japan (2003), South Korea (2009), Brazil (2009), Canada (1999), China (2004, 2012 and 2017), India (2013), Japan (2003) and Mexico (2018). Equally, the EU has air transport agreements with various countries worldwide including the USA. The UK will have to replicate or replace those agreements with its own bespoke agreements. It has been estimated that there are at least 750 agreements which need replication or replacing. There is no doubt that the UK might find that challenging to do in an acceptable timeline.

Integrated Nature of EU Law

It is interesting to see how the EU reacted when the UK sought to 'pick and choose' elements of EU law. The UK wanted to have free movement of goods but not free movement of persons. However, the EU responded by saying that the four freedoms are an integrated whole and it is not possible to pick and choose. This is interesting because the *political* reaction in 2017 and 2018 matched the *legal* response of the CJEU in many cases over time that the four freedoms are integrated and indivisible.

Ireland will have to vindicate and articulate its Position in terms of EU Law even more in a Post-Brexit UK

When the European Commission proposed legislation or laws were discussed at the EU level generally, there was often an immediate reaction in Whitehall, Westminster, the City of London or UK industry to many of the proposed laws. Those UK institutions and groupings often prepared detailed submissions and they lobbied the EU and Member States intensively. The UK's analysis was often directly relevant to, and helpful for, the Irish position because of the common approach to so many issues and the shared Common Law background between the two Member States. If the UK leaves the EU then that 'British Breakwater' which shielded Ireland in some ways will disappear. It is therefore imperative that Ireland (both in the public and private sector) increases its resources and efforts to vindicate its position in a post-Brexit EU. This is not to suggest that Ireland needs to resist or object to whatever is being proposed and debated at the EU, it may simply be that the EU's proposal needs to be tinkered with to accommodate the needs of the Anglo-Irish/Anglo-Saxon situation and, specifically, the Irish situation. Ironically, the Brexit process has helped Ireland and its diplomatic service to hone further their impressive influencing skills within the EU which will be needed even more in the future.

Impact on EU free market measures and policies following the UK's Withdrawal

The UK has been a champion of the free market within the EU. Many EU measures which have liberalised markets in the EU owe their origin to the UK. This has been the case across industries as diverse as air transport, financial services, retail, shipping and telecommunications so it is very likely that the UK's withdrawal will mean that the pendulum within the EU might move away from the free liberal market towards a more protectionist outlook.

Question Mark over Human Rights in the UK Post-Brexit

The UK has traditionally seen itself as a beacon in the area of human rights protection. Reference is often made by UK politicians to the Magna Carta and the Bill of Rights. The UK was central to the establishment of the Council of Europe and the adoption of the European Convention on Human Rights. That espousal by the UK of human rights has not always been perfect but it has certainly been diminished in recent years. Withdrawal from the EU will deprive UK citizens of a plethora of rights under EU law as well as human rights under both EU law and the Charter of Fundamental Rights. It will be

interesting to see the impact of Brexit on the protection of human rights in the UK. It would be very unfortunate if the UK, having left the EU, were to also renounce the European Convention on Human Rights and leave the Council of Europe. There have been several cases where the UK has been found in breach of the European Convention on Human Rights and for UK citizens to lose the protections under both EU and Council of Europe human rights law would be seriously problematical. Advocates of human rights should work to avoid that occurring if they fear the consequences.

There will be no Hard Brexit and there will be no Soft Brexit; there will be a Spectrum Brexit

What type of law and legal issues will emerge post-Brexit? The media and many commentators have reduced the debate to one of whether there will be a Hard Brexit or a Soft Brexit. There is an assumption that there is a simple choice. There will be no Hard Brexit or no Soft Brexit but there will be a Spectrum Brexit. It is not a simple binary choice. Some sectors, some countries, some regions will do better than others and some will do worse than others. That was the experience of accession in almost every Member State and Brexit is the inverse of accession. So it will be a Spectrum Brexit.

There will be Mergers and Acquisitions which the EU will block which relate primarily to the UK

In 2001, the European Commission blocked the proposed *General Electric/Honeywell* merger.⁵⁰ President George W Bush had telephoned the President of the European Commission to encourage the EU to change its mind given that it was a deal between US companies and the US antitrust authorities had cleared the deal but the EU did not budge. The EU was making a decision for itself within the EU. Roll the clock forward to a post-Brexit world. Two UK multinationals are merging. The UK has approved the transaction. But the proposed concentration triggers the EU Merger Control Regulation thresholds and the European Commission prohibits the deal. Imagine the outrage in the UK. There would be cries of: 'Have we not left? How come they can still block the deal?' and so on. The truth is, and the lesson will eventually be learned by all, you can enter, but you cannot leave the EU's orbit, irrespective of whether or not one was ever a Member State of the EU.

There will be fewer EU Merger Control Regulation Deals relating to Ireland

While there have not been many Irish-sourced concentrations which have been notified to the European Commission under the EU's merger control regime,⁵¹ most transactions which were notified had only been notified to the EU because the EU thresholds were triggered due to the merging parties' combined Irish and UK turnover. However, if the UK turnover no longer counts as EU turnover then the EU merger control regime may simply be inapplicable and transactions would not automatically go to the European Commission.

There could be Trade Wars between the UK and the remaining EU

It may seem fantastical to speculate about this but it is possible that if the UK became a true third state and there are differences between the EU and the UK over trade then trade wars, or at least, trade disputes between the two are not out of the question. Trade law could be an important area of activity for all concerned.

⁵⁰ *General Electric/Honeywell* Case No COMP/M.2220.

⁵¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1 or, historically, Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L 395/1.

There will be greater and wider divergence between the laws of the EU and the UK as well as between the laws of the UK and Ireland

While the UK has said that it will adopt many of the EU laws as its own and may even amend its own laws to take into account changes in EU law, this apparent symmetry is illusionary. It is like those states which are not Member States of EMU adopting the euro as their currency, they may be in a parallel universe but they are not part of the EU. Moreover, even if the same rule is adopted in the UK and in the EU, it is quite likely that the rules will be construed differently given the absence (for the most part) of the Court of Justice of the European Union from the UK regime. One can anticipate that even EU measures copied into UK law will be construed in the more traditional common law way and that Brexit will not just mean Brexit but Brexit will mean differences too.

Conclusions

The lessons of Brexit are many but there is no complete set yet of all the lessons. There is almost no end to the lessons which could be learned. Some of those lessons include sociological, psychological, economic, political, and constitutional lessons. It is clear however that law and politics are so clearly intertwined and interconnected in the EU. The Brexit process shows the interaction of law and politics in plain view. If there are fundamental lessons to be learned from the process then they are that law is so significant to the EU project and that withdrawal is difficult because the EU law and Member State life are so intertwined. The law and legal systems will change in the UK if Brexit is to mean anything. Perhaps one key lesson is deduced when one contrasts the accession of Ireland and the accession and planned withdrawal of the UK: for Ireland, accession was a step *up* in the world, for the UK, it was a step *down*. Ireland was, on paper at least, able to veto the views of the likes of France, Germany and the UK in a community built around unanimity. But for the UK, it meant that Member States like Denmark, Luxembourg and Ireland could say 'ingen', 'with' or 'níl' respectively. Ireland had only been a member of the UN since 1955 – 18 years before acceding to the Communities. Ireland had only been an independent state for barely 50 years. It was taking its place among nations. In the European Communities at the time where so much was decided by unanimity, it had a real voice even if it were a somewhat impoverished and muted one. By contrast, for the UK, once a global super power, it joined communities where it had equal voting power, on matters requiring unanimity, as Denmark, Ireland and Luxembourg. Perhaps, it is no wonder that it felt uncomfortable and has never felt comfortable since. Indeed, in 1973, Ireland could not have entered without the UK but now Ireland, enhanced and richer, can stay even if the UK leaves.