

## Brexit

Implications for Public Policy and  
Administration in Ireland - The Legal  
Dimension

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## Section 1 | Introduction

The implications of Brexit for public policy and administration in Ireland are, and will remain for many years, both profound and uncertain.

The profound nature of the implications of Brexit is palpable from the fact that jobs have been lost,<sup>1</sup> careers have been reshaped,<sup>2</sup> currencies have plunged<sup>3</sup> and soared,<sup>4</sup> markets have moved materially<sup>5</sup> while, ultimately, the future for many of those people and businesses affected by Brexit has become, at least, less clear and, potentially, less bright.

The uncertainty caused by the implications of Brexit is tangible. Almost every day, the media and the mood swing from a "Soft Brexit" to a "Hard Brexit" (and *vice versa*) in the blink of a tweet. The level of uncertainty – in a year of uncertainty – is clear from a short passage from the Brexit campaign diary of Sir Craig Oliver, who was David Cameron's Director of Politics and Communications, when he recalls what was happening inside No.10 Downing Street at around 8pm on the night of Referendum Day, 23 June 2016:

"I walk upstairs to discover the staterooms are taken up with a variety of people from across No.10.

I'm wearing a blue, *'I'm In...'* T-shirt. I've been wondering if it should have the words *'...it up to my neck'* on the back.

The doors sectioning off the Pillared Room, Terracotta Room and White Room have been opened up – and the wide No.10 family has come together. Civil servants, special advisers and politicians mingle. A long table has been set up, laden with moussaka and lasagne. Wine and elderflower cordial are served.

I chat with a few people. The mood is good.

Jim Messina, who ran Obama's successful second campaign and is trying to do the same for Hillary Clinton, comes over for a chat. Always an interesting mix of the cool and the geeky, he's looking confident – telling me his model says it'll be around...52-48 for Remain. Close, but I'll take that. His prediction has extra force, because he was one of the few who called the general election right.

The Conservative party chairman, Andrew Feldman, comes over and says a lot of hedge funds have been running models, too – they are also confident of a Remain victory. That's reflected in the markets with the pound buoyant.

As we chat, the PM comes over. He's looking relaxed in a casual, navy-blue shirt that isn't tucked in. Another poll comes through. It's 52-48 (on a sample of 5,000) to us.

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<sup>1</sup> Not least among members of the David Cameron Cabinet including the then Prime Minister, the Chancellor of the Exchequer and the Foreign Secretary.

<sup>2</sup> Not least among members of the Theresa May Cabinet including the Prime Minister, the Chancellor of the Exchequer and the three Brexit Ministers (i.e., the Foreign Secretary, the Secretary of State for International Trade and President of the Board of Trade as well as the Secretary of State for Exiting the European Union).

<sup>3</sup> E.g., Sterling has fallen against the euro by up to 18% since 23 June 2016.

<sup>4</sup> E.g., euro has risen against Sterling by up to 18% since 23 June 2016.

<sup>5</sup> E.g., the FTSE 100 has risen from 6337 to 7021 (i.e., 10.7%) from 23 June 2016 to 19 October 2016 (largely driven by the export-orientated nature of many of the constituent companies of the FTSE 100 while the FTSE 250 has risen from 17333 to 18040 (i.e., 3.9%) from 23 June 2016 to 19 October 2016 (largely driven by the more UK domestic focussed nature of many of the constituent companies of the FTSE 250).

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Samantha Cameron has some friends over. They want to know if I can get their children some Remain T-shirts.

There isn't a single indicator that suggests we should be worried."<sup>6</sup>

If No.10 Downing Street, with some of the UK's best brains, closest connections and most incisive information could not tell the outcome of the referendum *two hours* before the polls closed, how can the Irish public administration – or, indeed, any public administration - tell the outcome more than *two years* out from the scheduled resolution of the Brexit exit process? It is an impossible task.

It may be impossible to predict the outcome of the Brexit process but it is necessary to work towards it. The EU and the 27 Member States other than the UK did not choose to be in this unpredicted and unpredictable predicament. However, now no one has a choice but to deal with the situation. It is a mission for which Europe did not volunteer – it was conscripted by circumstances – but it is a mission which Europe must accomplish. All – including the UK – must work together to resolve it because there is too much riding not only on the *outcome* but even on the *way in which the process is handled*.

This short paper considers some of the legal aspects but one cannot separate the legal from the political, diplomatic, economic, commercial and other aspects of this extraordinary process known popularly (but incorrectly<sup>7</sup>) as "Brexit". This paper deliberately avoids analysing each and every area of life and law which could be affected by Brexit<sup>8</sup> – an impossible task which would be akin to painting a moving train – but instead takes a broader and a more high level view of the legal and related issues.

The EU, and indeed Brexit, is the perfect interface of the legal, political, diplomatic, economic, commercial and so on. If commentators called for a return to, and an espousal of, democracy and the democratic process by modern Western society then we got it is spades in the outcome of the Brexit referendum and now we have to deal with it.

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<sup>6</sup> Unleashing Demons: The Inside Story of Brexit (2016), pages 2-3.

<sup>7</sup> "Brexit" implies that only the UK was leaving, in fact, the whole of the UK (and Gibraltar) would be leaving so "UKexit" appears to be a more accurate term!

<sup>8</sup> E.g., the implications of Brexit for shipping (see Power, "Brexit and Shipping" (2016) 22 Journal of International Maritime Law 77). For a general discussion of the legal implications, see Power, Brexit: Selected Legal Aspects (reproduced at: <http://www.icel.ie/userfiles/file/conferences/Brexit%202016/ICEL%20ISEL%20Bar%20Council%20Brexit%20Conference%20-%20Vincent%20Power%20Paper.pdf>).

## Section 2 | Assume that Brexit will happen

Given the enormous task facing Irish public administration in having to deal with Brexit, it would be tempting to "wait and see" whether Brexit will really happen. Brexit may not happen. And even if steps are taken (including the infamous and overrated<sup>9</sup> triggering of Article 50 of the Treaty on European Union<sup>10</sup>), if the UK changes its mind then the EU might well treat the planned exit as never having happened much like Indonesia's announcement in 1965 that it was leaving the United Nations which was withdrawn a year later and the UN then treated Indonesia as never having left.

It is safer to assume, even if only for planning purposes, that Brexit will happen. The margin of 52% to 48% in favour of Brexit in the UK referendum on 23 June 2016 is eerily close to the margin of 53% to 47% in favour of Greenland leaving the then European Communities thirty years ago and Greenland has not returned since and there never was a second referendum. Equally, the margin in the UK referendum was not as tight as that of the Swiss referendum to decide on whether to join the European Economic Area: 50.3% of Swiss voters decided against joining the EEA and, again, they have not changed their mind and never had a second vote.

Indeed, the notion that the vote in the UK was tight is misconceived. The margin of 1,269,501 is equivalent to the combined entire populations of the cities of Manchester, Edinburgh, Cardiff, Belfast and Bristol. It is not narrow.

It is also important to *assume* that there will not be a second referendum. There can be a second referendum (and, in many ways, will be a second referendum) but it really has to be on a different question. The alternative question which could be put to the public could be whether the UK wants to accept the "final deal" because the electorate did not know on 23 June 2016 the terms on which the UK was leaving the EU (those terms are still not known). This second referendum could be a referendum in its own right (like the one on 23 June 2016) – but the UK has had very few referenda<sup>11</sup> and a Prime Minister would have to be, in the words of Sir Humphrey Appleby, a "brave Prime Minister" to hold one – or it could be a key issue in the next UK General Election if it was not part of a formal referendum. Votes can change – as we have seen in Denmark and Ireland on EU issues; indeed, in the UK to vote in 1975 for leaving the "Common Market", England and Wales were more inclined to remain (67.8% and 64.8% respectively) than Scotland and Northern Ireland (58.4% and 52.1%); a situation which was reversed in the 2016 Referendum. Today, sentiment changes even quicker!

It is safer to assume that Brexit will happen even if one wishes that it did not. For many, it is a case of hoping for the best but planning for the worst. Anything else would be to lose preparation time for what could well be a cataclysmic change.

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<sup>9</sup>Although it is an important and symbolic moment, it is overrated because it is only the initiation of a process which signals an "intention" rather than the culmination of the process and so much turns on the outcome of the process and not its initiation.

<sup>10</sup>Despite innumerable references to Art.50 being Art.50 of the Lisbon Treaty, it is actually Art.50 of the Treaty on European Union ("TEU") (and the provision was inserted into the TEU by the Lisbon Treaty hence the confusion).

<sup>11</sup>Only three full referenda have spanned the UK: the 1975 "Common Market" referendum; the 2011 "alternative vote referendum"; and the 2016 "Brexit" referendum. There have been ten major, but not UK-wide, referendums on other issues.

## Section 3 | Currently "Brexit Means Brexits" not just one Brexit

To resolve a problem, one needs to understand and delineate the problem. The difficulty is no one really knows what is meant by Brexit and what it entails. The new UK Prime Minister, the Right Honourable Theresa May MP, famously said on 11 July 2016: "Brexit means Brexit". Such a simple soundbite allows time for the UK's thinking on the subject to be formulated but it is neither accurate nor informative. It is not accurate because Brexit means different things to different people. Indeed, it seems to mean different things at different times even to the same person! Nor is it informative because it is a classical circular definition. For present purposes, one can simply define Brexit as meaning that the United Kingdom and Gibraltar would leave the EU and no longer be a member of the EU. The type of relationship which may or may not exist between the EU and the UK after the latter leaves is far from clear. From an Irish administration perspective, it is important to monitor very closely the meaning of "Brexit" because it changes and is being redefined constantly and continuously. It is also important, from an Irish perspective, to recall that while membership of the EU was (and is) a "step up in the world" for Ireland, membership for the UK (a victor of the Second World War, a Permanent Member of the United Nations Security Council and so on) of an organisation where it was an equal partner with some of the smallest States in the world was, at best, not a step up in the world and, at worst, a step down. So the psyche and perspective of UK membership must be understood.

## Section 4 | Why is Brexit so uncertain?

It might well be asked why there is so much uncertainty about Brexit. Over time, 28 States have either formed or acceded to the EU. There was always some degree of uncertainty but the uncertainty associated with becoming a member is trivial compared to the uncertainty of becoming a *former* member. There is a long tradition of marriage but divorce is a new found concept. When one joins the EU, there is a regime in place, a well-worn path given the fact that 22 States have acceded on seven occasions and one knows that one is committing to adopt an *acquis communautaire* which may be voluminous but it is ascertainable and definable. By contrast, triggering Article 50 of the Treaty on European Union (as inserted by the Treaty of Lisbon) is like jumping off the cliff at Acapulco: the only way to do it is to jump when there is no water down below, because that is the only way that there could be water there when you land.

At one level, it is remarkable that Article 50 is so bereft of detail. This makes it very difficult to know what will happen when a Member State serves the notice under Article 50 of its "intention" to leave. This absence of detail was probably deliberate because the EU does not want it to be too easy to leave the EU. (Indeed, the United Nations Charter has no exit clause at all and the EU did not have one until the Treaty of Lisbon entered into force on 1 December 2009.) The framers of the EU have made membership of it like a lobster-pot: it is much easier to enter than to leave.

Even if Article 50 was lacking in detail, one might think that there would be international precedent and jurisprudence to fill the void. In fact, there have been so few departures of any significance from international organisation of any significance – and none of this significance in modern times – it is certainly a novel area of first impression in this context.

There have been some withdrawals of course – some more notorious than others, such as Germany and Italy leaving the League of Nations – but the precedent is of little value in the present context (particularly, because as the Court of Justice of the European Union has said,<sup>12</sup> the EU constitutes a new legal order). Anticipate Black Swan events. The uncertainty will be matched by intensive instability throughout the process.

## Section 5 | Brexit is a process and not an event

Brexit will probably be a long process. However, Ireland needs to be ready to move quickly. Sometimes, crises can evolve and there is a need to move quickly. One need only think of the fact that the Stability Treaty took only a few months while, by contrast, some of the other EU treaties took years. The expectation is that it will be a long process (and many of the actors and actresses there at the start will not be there at the end) and this may not be a bad thing because tempers and temperatures may have tapered, cool heads may prevail and there might be some movement politically on all sides to enable an accommodation to occur. It would be interesting to speculate on whether the many scheduled (and the inevitable unscheduled elections) over the next few years might mean that there could be some accommodations offered to the UK (and to all Member States) to have, for example, quotas on migration and movement, so as to enable the UK to remain and the EU to reform. It is best to see the way that this will evolve as being long, involved and difficult.

## Section 6 | Brexit is complex and complicated

Brexit is both complex and complicated from many perspectives, but not least from the legal perspective. There have been over 100,000 legal instruments adopted by the EU which have, over the last four decades, been incorporated into UK law or become part of UK law. (Indeed, the UK has been one of the best Member States at implementation.) These legal instruments have become part of UK law and legal thinking. The UK courts have taken on board the novelty of EU law.<sup>13</sup> No one under 50 years of age can now remember the UK without it being part of, what is now, the EU. The incremental Europeanisation of UK law and the UK legal system has

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<sup>12</sup>In Case Case 6/64 Flaminio Costa v E.N.E.L. [1964] ECR 585, ECLI:EU:C:1964:51: "3. [b]y contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply.

By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the member states have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.

The integration into the laws of each member state of provisions which derive from the Community and more generally the terms and the spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The law stemming from the treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.

The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the treaty carries with it a permanent limitation of their sovereign rights."

<sup>13</sup>E.g., Regina v Secretary of State for Transport, ex parte Factortame (No 2); House of Lords 11 Oct 1990, [1991] 1 AC 603, [1990] UKHL 13, [1990] 3 CMLR 375, [1991] 1 All ER 70, (1991) 3 Admin LR 333, [1990] 3 WLR 818, [1991] 1 Lloyd's Rep 10 which challenged the sovereignty of Parliament.

been thorough and pervasive.<sup>14</sup> This means that the unravelling of the EU legal influence on the UK is extremely difficult.

Part of the difficulty associated with Brexit is that there is hardly an area of life or law in the UK which is unaffected by the UK's membership of the EU. There are legal issues in areas as diverse as agriculture, arrest, business, climate change, competition, consumer protection, customs, employment, energy, the environment, food safety, human rights, State aid, tax, trade and transport. As mentioned above, it is not proposed to discuss each and every aspect of EU law which could be affected by Brexit – that would be an impossible task given the enormity and dynamism of the topic – so it is proposed to consider the matter from a more general level.

## Section 7 | Brexit is more than the border

There is a tendency in some quarters of Ireland and Northern Ireland to assume that Brexit is about the Border. The 499-kilometre or 310-mile border between Ireland and the UK (i.e., Northern Ireland) is *the* important issue. That it is an important, indeed a *very* important, issue is not open to question. However, there is a risk that the debate in Ireland about Brexit will be Border-focussed. The Border between the Republic of Ireland and Northern Ireland would be, post-Brexit, the 38<sup>th</sup> external international border for the EU. The Border must be an important issue but part of a range of issues. There are solutions and quasi-precedents. The use of electronic documentation of goods helps. The movement of people raises some issues, but there may be some solutions there too: because there could be movement of persons, but workers and welfare recipients would be identified by the two jurisdictions separately, and any one moving from Northern Ireland to Great Britain would also be tracked separately (as is already the case under Project Gull<sup>15</sup>).<sup>16</sup>

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<sup>14</sup>See Snyder, *The Europeanisation of Law: The Legal Effects of European Integration* (2000).

<sup>15</sup>See the paper by Derek Wyatt QC, "The post-Brexit relationship between the UK and the EU, and the status of the north/south Irish border", presented at the Irish Centre for European Law Brexit Conference on 9 May 2016 (ironically Schuman Day), <http://www.icel.ie/userfiles/file/conferences/Brexit%202016/ICEL%20ISEL%20Bar%20Council%20Brexit%20Conference%20-%20Derrick%20Wyatt%20Paper.pdf>.

<sup>16</sup>It is also useful to recall Protocol No.20 to the TFEU which provides:

"PROTOCOL (No 20) ON THE APPLICATION OF CERTAIN ASPECTS OF ARTICLE 26 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION TO THE UNITED KINGDOM AND TO IRELAND

THE HIGH CONTRACTING PARTIES,

DESIRING to settle certain questions relating to the United Kingdom and Ireland,

HAVING REGARD to the existence for many years of special travel arrangements between the United Kingdom and Ireland,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union:

### Article 1

The United Kingdom shall be entitled, notwithstanding Articles 26 and 77 of the Treaty on the Functioning of the European Union, any other provision of that Treaty or of the Treaty on European Union, any measure adopted under those Treaties, or any international agreement concluded by the Union or by the Union and its Member States with one or more third States, to exercise at its frontiers with other Member States such controls on persons seeking to enter the United Kingdom as it may consider necessary for the purpose:

(a) of verifying the right to enter the United Kingdom of citizens of Member States and of their dependants exercising rights conferred by Union law, as well as citizens of other States on whom such rights have been conferred by an agreement by which the United Kingdom is bound; and



## Section 8 | Brexit would Alter the Relationship between Ireland & the UK

The EU is predicated on the unspoken notion that its Member States are closer to each other than to any other State worldwide. Indeed, there is meant to be an "Ever Closer Union" between the EU Member States. Every other State in the world is a "third State". The phrase relegates non-Member States to being below those of Member States. This will mean that, at a legal level and possibly on other levels as well, the relationship between Ireland and the UK has to be less close than the relationship between Ireland and the other remaining EU Member States. Of course, the relationship between the two States can be closer in other contexts but the EU is a factor to be included in the algebra of the intensity of that relationship. Ireland, and those involved in public administration in Ireland, will have to get used to the growing divergence and, if Brexit happens, the degree of separation.

There will be potential "flash points" which could emerge over time. Two examples illustrate the point. First, there *could* (no guarantees) even be a moment when Ireland could vote against the proposed Brexit Withdrawal/Relationship agreement because it might not be in the interests of Ireland. Secondly, the UK could decide to establish a new international organisation or arrangement (much like its involvement in the European Free Trade Agreement ("EFTA") when the UK did not participate in the European Communities). If Ireland had to choose between continuing to be a member of the EU or join the new UK-led organisation or arrangement, it is very likely that Ireland would remain with the EU rather than join an alternative arrangement. There is no certainty that there would be such tension but it cannot be ruled out.

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(b) of determining whether or not to grant other persons permission to enter the United Kingdom.

Nothing in Articles 26 and 77 of the Treaty on the Functioning of the European Union or in any other provision of that Treaty or of the Treaty on European Union or in any measure adopted under them shall prejudice the right of the United Kingdom to adopt or exercise any such controls. References to the United Kingdom in this Article shall include territories for whose external relations the United Kingdom is responsible.

### Article 2

The United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories ("the Common Travel Area"), while fully respecting the rights of persons referred to in Article 1, first paragraph, point (a) of this Protocol. Accordingly, as long as they maintain such arrangements, the provisions of Article 1 of this Protocol shall apply to Ireland under the same terms and conditions as for the United Kingdom. Nothing in Articles 26 and 77 of the Treaty on the Functioning of the European Union, in any other provision of that Treaty or of the Treaty on European Union or in any measure adopted under them, shall affect any such arrangements.

### Article 3

The other Member States shall be entitled to exercise at their frontiers or at any point of entry into their territory such controls on persons seeking to enter their territory from the United Kingdom or any territories whose external relations are under its responsibility for the same purposes stated in Article 1 of this Protocol, or from Ireland as long as the provisions of Article 1 of this Protocol apply to Ireland.

Nothing in Articles 26 and 77 of the Treaty on the Functioning of the European Union or in any other provision of that Treaty or of the Treaty on European Union or in any measure adopted under them shall prejudice the right of the other Member States to adopt or exercise any such controls."

## Section 9 | The crisis can be resolved

Given that it appears that Brexit is so complex, a reasonable question which can be asked is whether or not there will be a resolution of the Brexit issue.<sup>17</sup>

History demonstrates that the EU almost always resolves its issues - even if imperfectly. In the Summer of 2015, many commentators saw Grexit as inevitable. During the euro issue, some commentators forecasted the collapse of the euro, the Economic and Monetary Union - and even of the EU itself.

Rejections of the Constitution, the Lisbon Treaty, the Nice Treaty and the Maastricht Treaty were all hailed by some as signs of doom for the EU. However, even Mrs Thatcher's long-running Rebate Crisis was eventually resolved.

Brexit is not even the most serious issue to have faced the EU. That was probably the 'Empty Chair' crisis of the 1960s. In that situation, France walked out for seven months at a critical time for the development of the then nascent communities - more importantly, at a time when unanimity among all member states was needed.

The Empty Chair crisis was eventually resolved by the so-called 'Luxembourg Compromise'. We do not yet know the name of the compromise to resolve Brexit - but there will probably be such a compromise someday.

### So when will it be resolved?

This is the bad news. The EU institutions normally go to the 11th hour to resolve issues. Even routine fishery negotiations are only resolved at four in the morning on the last possible day.

EU crises tend to expand to fill the time available for their resolution. The problem with mentioning "two years" in Article 50 of the Treaty on European Union is that it will be tempting for many to exploit the full two years - and no one knows even when that time-frame starts.

Moreover, it is possible that the two-year time-frame could be extended by unanimous agreement. The giving of that agreement for an extension - or being seen to need an extension - could all be flashpoints.

And it may well be that the Brexit date - if it ever happens - could be delayed further under the final withdrawal agreement. 1 January 2020 is a possible date but even that raises the question of whether MEPs would be elected from the UK in the 2019 European Parliament election - in some ways, they should be unless the deal to leave is finalised and approved by all before then.

Resolution could well be delayed by national politics. There will be general elections in at least 18 of the 28 EU countries before the end of 2018 - including ones in France, Germany and The Netherlands as well as elections in Member States which have significant numbers of citizens in the UK (or seeking to go there). Many countries will be reluctant to give the UK a generous deal in case it fuels the exit movements in their own countries, particularly in the run-up to national elections.

Contagion is a key concern. It could, theoretically, be the case that matters will be resolved quickly - but it is more likely that matters will not be resolved until the key elections are out of the way, and that could be September 2017 when the German general election is scheduled to be over.

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<sup>17</sup> <http://www.independent.ie/business/brexit/brexit-will-be-resolved-but-it-wont-be-any-time-soon-and-it-wont-be-easy-34944255.html>

In such circumstances, the UK will have to decide when to show its negotiating hand. Show it too early and it could be bidding against itself but bid too late and it could be timed out. Already, the indications are that signalling and posturing a "Hard Brexit" has presented difficulties for the UK – before Prime Minister May spoke in Birmingham on 2 October 2016 at the Conservative Party Annual Conference, one pound bought US\$1.2972 but by the time she spoke on 12 October 2016 to the House of Commons to ease fears in some quarters, the pound had fallen to US\$1.2256.

### So how will Brexit be resolved?

Many commentators are mentioning the existing "models" as ways of resolving the issue. They refer knowingly to the Norwegian, Canadian, Turkish, Swiss and other models. But even the most advanced model - the Norwegian model (also known as the European Economic Area model) - lacks the Common Agricultural Policy, the Common Fisheries Policy, the Common Foreign and Security Policy and the EU Customs Union. The Canadian model lacks sufficient protection for services and may even be in some doubt if (at least) one regional parliament in Belgium has its ways – so fickle and delicate are these matters. Other models lack the internal market.

But the most fundamental flaw of all these models is that they have all been designed for states which were never EU member states. Therefore, a different model is needed for the UK given that it has been an EU member state for 43 years and has absorbed diligently (more than most others) over 100,000 EU legislative instruments. So, a bespoke model is needed to deal with the UK. It would be sold to Eurosceptics as a "Saville Row" suit – bespoke, expensive and very British! The UK may even require a new form of associate or mezzanine membership even though it might not be called that at all. The attraction of such an interim step is that it might give the UK much of what it wants - but it cannot be so attractive that others would follow suit.

The EU might also help to resolve matters by compromising on some aspects. Member states may have to be given the chance to have various levels of integration - Denmark and Sweden are, in reality, no less EU member states despite not having adopted the euro. The Faroe Islands has been accommodated within the Nordic Passport Region.

Resolution will require imagination and skill. But the negotiators will be relatively new to their jobs. The UK side of the negotiating table will be largely new and untested. The EU side of the table could also be changed during the Brexit process.

Moreover, the all-important European Council is relatively inexperienced: of its 27 members (leaving aside the UK), 19 have joined the Council since 2013, while only two of the 19 had previous stints on the Council. There will be changes during the negotiations too.

Resolution will also require consensus. All 27 remaining member states will have to work together. The mini-summit of the six founding members just two days after the UK vote was convenient - but was unnecessarily provocative to the 21 others who are still remaining.

All member states must seek to resolve Brexit and not exploit it for sectional interests, which are neither pertinent nor justified.

Resolution of Brexit is not just a matter for only the UK and the member states. The EU itself needs to refresh and re-orientate itself irrespective of Brexit. However, the EU should not try to do much on top of trying to resolve Brexit which is a tall order in its own right.

So, peering through the fog, one can see that the situation will be resolved - but it will probably not be soon and the solution itself is still out of sight.

## Section 10 | Irish Influence on the EU legislative process

Ireland has a strong record in terms of influencing the EU law which eventually emerges from the EU legislative process. One should not underestimate however the influence of the UK. There are many examples, not least in the financial services and company law areas, where European Commission proposals were stopped, or more often, modified, because of influence of lobbying by the UK and various institutions including, not least, institutions and interests in the City of London. Ireland benefited more often than not from that intervention. One should assume that if Brexit were to happen, particularly if a Hard Brexit were to occur, then that large wall of influence and defence epitomised by the UK would disappear. In some contexts, the outer dyke of the UK would disappear and this would mean that Ireland would have to take up more of the strain.

Apart from Scotland, the UK is a Common Law environment. Some EU proposals do not fit well with the Common Law environment. Again, if Brexit occurs (particularly, a Hard Brexit) then there is no additional barrier or obstacle to EU proposals which do not make sense from a Common Law perspective. This means that the Irish public administration will have to put in an extra effort (and be given the necessary resources and inputs) to address this issue.

Ireland is in a difficult position. It needs to remain close to its only contiguous neighbour. It also needs to remain close to the 26 Member States with whom it aims to maintain a Union. This is a difficult balancing act. It is like a divorcing spouse trying to maintain friendship with the spouse from whom it is divorcing and its new spouse, but also balancing the relationship with a wide circle of friends who have varying views on the new and old spouses!

## Section 11 | Ireland to reassure the world that Ireland is not leaving

At a distance, neighbouring countries can merge and blend to the point that they are seen as one. It is imperative for the sake of Ireland Inc. (or Ireland GmbH depending on one's perspective) for the word to go out that Ireland is not leaving the EU. It is able to make a decision independently of the UK. There are UK-based Eurosceptics and Europhobes who are seeking to propagate the message "Ireland is Next!" and this must be countered.

At present, Ireland remaining in the EU is an easy choice. Historically, however, Ireland could not have joined the European Communities without the UK also joining, but it is testament to the journey which Ireland has made that Ireland can now stay even without the UK.

In the future, the choice may not be so simple. First, in the initial phase, Ireland could end up vetoing the Withdrawal/Relationship Agreement with the UK if the deal does not suit Ireland – no one is suggesting that this is inevitable or even likely but it is possible. It follows that if Ireland is to be the most affected Member State by Brexit then it could be most concerned about the Brexit arrangements. Secondly, the UK could propose an alternative organisation or alliance of States and could invite Ireland to join. If Ireland refuses to join – preferring its membership of the EU – then that could be a significant moment. There is a delicate balance to be struck.

## Section 12 | The need to monitor the UK deals with the rest of the world

The Irish Public Administration will have to keep a very close eye on the deals which the UK reaches with others. No doubt, it will be difficult in some situations for the UK to complete such arrangements. However, Ireland needs to keep an eye on the arrangements which the UK concludes. For example, if the UK concludes a trade deal with a third State which would have an adverse impact on Ireland (e.g., by making exports of agricultural products from Northern Ireland more attractive than exports of agricultural products from the Republic) then Ireland would need to be concerned.

## Section 13 | Irish public administration to be enlarged to deal with Brexit

It is imperative that the size and range of the Irish public administration is enlarged to deal with Brexit issues. However, this is not, and should not be seen as, a temporary increase or temporary deployment of people. The need for a full and complete team of people is as great post-Brexit as pre-Brexit for the reasons outlined in this paper. Ireland will be effectively the sole Common Law and, if one may use the phrase, Anglo-Saxon country in the EU and it will need to advocate and articulate its position fully.

## Section 14 | Irish Independence may be a useful precedent

Paradoxically, there is some precedent in terms of various countries having been part of the British Empire becoming independent. In the case of Ireland, when it became independent in 1922, English law was the backbone of the Irish regime. An adaptation of statutes legislation had to be enacted and a system evolved whereby post-independence English case law was seen as “persuasive” but not “binding” (and this may be a model for UK courts dealing with EU case law post-Brexit in regard to UK legislation based on EU legislation (e.g., in the employment arena)). If the Birmingham Roadmap outlined by Prime Minister May on 2 October 2016 emerges (i.e., that EU law is captured and frozen into UK law on Brexit Day and then repealed, amended or retained as the UK desires thereafter) then the Irish Independence model might have much to commend itself to the UK, but it is clear that as new legal issues emerge – like unexploded mines left over from a war – 50, 60, 70, 80 years later (e.g., in cases on Crown Immunity) then the implications of Brexit will endure for some time!

## Section 15 | What will happen with Competition Law?

The UK’s competition rules are virtually the same as the EU rules (with some exceptions, notably on State aid). So, on the face of it, little would change. Except that there would be a doubling up of regulations, regimes and penalties. Currently, businesses are fined usually by either the EU or a Member State, but if the UK were to leave then there would be one more fining jurisdiction. There could also be a divergence in terms of rules between the EU and a Brexited UK (e.g., like the EU and the US at present) because of diverging jurisprudence and the probable absence of a preliminary reference procedure to the CJEU under Article 267 of the TFEU.

## Section 16 | What about Merger Control?

Post-Brexit, EU merger control will be less relevant to UK and other companies, including Irish companies - if the UK element of turnover is removed from the EU test then more deals will have to be dealt with at national levels without the advantage of EU one-stop shop (unless post-Brexit UK opts into the EU regime in some way). Otherwise the “one-stop shop” of the EU’s Merger Control Regulation disappears.

Businesses generally prefer the EU one-stop shop approach and actually lobbied the EU to extend the regime. Equally, there would be no reference back from the EU to the UK of transactions which matter locally in the UK.

Some Irish businesses whose deals have been filed under the one-stop-shop EU regime may find that, absent the UK turnover, then the deal would have to be notified in more jurisdictions because the EU test would not be satisfied without the UK turnover.

It is quite possible that a flashpoint may emerge – akin to the *General Electric/Honeywell* case – where the European Commission may block or prohibit a merger or acquisition involving two UK companies post-Brexit and the UK will not be as closely involved as it would once have been. One can anticipate the likely reaction in certain quarters.

## Section 17 | What about State Aid?

Unless there are special rules agreed, the UK would no longer be bound by the EU's State Aid rules. This could provide an advantage for UK business. However, the World Trade Organisation and the EU's "anti-dumping" regime would continue to exist but the EU's State Aid rules would no longer do so. This would lead to an "asymmetrical" situation to the advantage of UK business with UK businesses being able to complain to the European Commission about EU Member State aid to EU businesses, but EU businesses not being able to complain to the European Commission about UK State Aid to UK businesses. This should be a top priority for Ireland in the negotiations. In essence, the UK should not be able to give State aid which would affect trade between Member States without some legal constraints.

## Section 18 | What about Agriculture?

The changes here could be significant. The Common Agricultural Policy ("CAP") is still at the centre of EU policy. EU grants and subsidies to farmers would disappear and the price of agricultural land would fall accordingly – the Brexit campaign say that the grants would be replaced by UK funds. Complex arrangements would have to be negotiated to allow for the entry of EU food into the UK and vice versa (e.g., one need only think about how long it takes to negotiate for the export of EU food products to the rest of the world). The value of agricultural land is likely to fall if there is a Brexit and there is no substitution of EU grants by UK grants.

## Section 19 | What about Transport?

The EU operates an internal market for transport. EU operators fly, drive and sail freely around the EU as "EU operators". For example, "EU" controlled and majority-owned airlines fly from one Member State to another seamlessly on the basis of the "EU" passport. If the UK is outside the EU and sufficient replacement arrangements have not been negotiated then question marks exist over continued services by companies using "EU passporting". This is likely to be an interesting battleground. The situation is capable of resolution but there may well be extra costs and burdens imposed on business.

## Section 20 | What about Banking?

More foreign banks operate in the UK than in any other EU country. EU financial services legislation has been the backbone of so much UK financial services legislation. There are more questions than answers at this stage.

Among the questions are: do you retain the EU legislation but how would it be construed? The UK approach or the EU approach to construction? What about Passporting? Could there be obligations to set up subsidiaries in EU Member States and have costly capital requirements? Would businesses have to move from the UK to the EU? What would be the relevance of post-Brexit CJEU case law? Could the Markets in Financial Instruments Regulation (Reg.600/2014) and the Markets in Financial Instruments Directive II (Dir 2014/65) be implemented or adopted in modified form? Could CRD IV go to make London attractive to Banks? These are among the many questions to be resolved.

## Section 21 | What about Employment Law?

The EU has brought about enormous changes in employment law (e.g., pay equality, non-discrimination and TUPE). Theoretically, EU employment law rights and duties would disappear if Brexit occurred. But, in practice, many of these rights and duties are embodied in UK law and would the electorate agree to some or all of their rights being taken away? There is a risk that even if the UK leaves the EU and some of those rights remain on the “UK statute book”, that the way in which they are applied and construed would be “frozen in time” (e.g., future EU developments and jurisprudence might not be followed). Again, there are at this stage, more questions than answers. Key questions include: what about the Mutual Recognition of Qualifications? What about the Free Movement of Workers? To be competitive outside of the EU, the UK might well look at the area of employment law and make its employment regime more attractive to industry to establish or expand in the EU. This could cause an interesting debate between both sides of the employment relationship!

## Section 22 | What about Corporate/Company/Commercial Law?

In recent years, the EU has become very important in the area of corporate law. One only needs to think about the prospectus and mutual recognition regime, the EU Merger Control Regulation, the rules on agency arrangements, the TUPE/Transfer of Undertakings legislation, the Rome I Contract Regulation (Reg.593/2008) and so on. In reality, it is useful to contemplate how much one relies on EU law and then ask what happens if it were taken away but moreover, it is useful to ask what would be needed to be negotiated back into the post-Brexit UK relationship with the EU.

## Section 23 | What about Litigation?

The EU has streamlined and facilitated the litigation regime around the EU. It is now easier to have a judgment in one Member State recognised and enforced in another Member State. If the UK leaves the EU then it may be more difficult, unless new arrangements are put in place, for judgments in the UK or a remaining Member State to be recognised and enforced unless there are arrangements agreed to address the issue. There are opportunities, if that does not sound crass, for the Irish courts to be a forum of choice (much like the English courts are) if legislation is enacted and processes are adopted to facilitate this "export" business.

## Section 24 | Could Northern Ireland or Scotland join the EU on its own?

Under Article 49 of the TEU, an applicant must be a “State” so Northern Ireland or Scotland would have to become a State before it could apply to join the EU in its own right. Even if, for example, Scotland were to become independent, the process of accession takes time and is not without complication (e.g., currency issues).

## Section 25 | What should Government be advising business to do?

Businesses are looking to Government and those involved in public administration for some leadership at this difficult time. What should businesses do? Equally, it is useful for those involved in public administration to understand what businesses are asking themselves.

While each company and organisation has its own specific needs relating to Brexit, there are eleven key questions, from the legal perspective, which every CEO, General Counsel and executive should ask. These questions should be asked periodically throughout what is going to be a long Brexit process spanning not only

the negotiation of the exit arrangements, but also its implementation process which, in aggregate, could span a decade:

1. *What rights under EU Law is our business utilising?* For example, do we benefit, in regard to the UK, from the freedom of establishment (e.g., having a business in the UK which, because of EU law, may operate on equal terms with a UK business?), free movement of persons (e.g., do we rely on workers, consultants and their families being able to move freely around the EU including the UK?), do we benefit from the free movement of goods and services (e.g., with goods and services moving to, from or through the UK?) and do we benefit from the free movement of capital and payments (e.g., do we move money to, from or through the UK?). How then would our business be affected by the EU withdrawing those rights from the UK or the UK favouring UK businesses over EU ones?
2. *How are our employees affected by Brexit?* At its simplest level, the issue relating to employees arises where a national of one EU Member State works in another host Member State on the same basis as a national of the host State. Do we have workers who benefit from such rights? At a more complex level, do we have employees whose qualifications which are only recognised because of the EU law on mutual recognition of qualifications? At a more sophisticated level, businesses could also lose employees because the spouses or families of employees could not be able to remain in the UK by virtue of their nationality.
3. *How are our logistics affected by Brexit?* This is more straightforward to ask than to answer. If a business moves goods through the UK or sells/buys to/from the UK then any delay or restriction associated with travelling through the post-Brexit-UK could cause businesses to rethink their logistics and, in particular, the need to bypass the UK. It is too early to say that is the case and businesses who want to maintain traffic through the UK should seek to influence the debate so as to minimise disruption.
4. *How are our inputs and raw material sources affected by Brexit?* Inputs such as raw materials may be subject to higher duties and levies if they are being imported into the EU from the UK or into the UK from the EU. So, businesses need to lobby to ensure that their input costs are not affected adversely.
5. *How are our sales affected by Brexit?* Parallel trade is a priority for the EU: goods and services must be able to move freely around the EU. Consumers and customers in one Member State must generally be able to buy freely goods and services from other Member States. If the UK leaves the EU then parallel trade may not be possible involving the UK anymore but this all depends on the terms of the Brexit arrangements. In the meantime, many businesses in the EU are now adversely affected by parallel trade from the UK because the latter benefits from the weaker Sterling. Businesses need to plan with their competition lawyers how to address this issue.
6. *How do I get this company's concerns on the Brexit agenda to ensure Brexit has no adverse impact?* Mindful of their obligations under lobbying laws, businesses should seek to influence all governments (including the UK one) about what needs to be done.
7. *Do we need to move offices, people, head office, facilities and company seat?* Moving may be necessary so as to retain rights under EU law. Such moves need to be planned carefully and in a timely manner.
8. *How are any grants and research funds to the company affected by Brexit?* Many businesses, particularly in the pharma and technology sectors, are dependent (in part) on EU funding (e.g., in research and development agreements). Businesses should check how much funding is scheduled to be received over time and what would happen if the UK were to leave.
9. *Have we plans for the changes brought about by Brexit?* We all know that Sterling fell to a 31-year low against the US dollar in the aftermath of Brexit while Sterling has also become more competitive against the euro. But "never say never". If the euro area experienced a crisis and the euro fell in value



against Sterling then how would our UK business fare with too strong a currency and new reinstated barriers vis-a-vis the rest of the EU? There will be many bumps on the road to resolving Brexit and is our business nimble enough to cope and adapt?

10. *What steps do we need to take to plan for Brexit?* The steps which need to be taken by a business must be specific and tailor made. Those steps need to be amended as the likely post-Brexit regime emerges and evolves.
11. *How do we react as an industry to Brexit?* This is trickier to answer than first appears. There could well be discussions at trade associations and other groupings but it is imperative that competitors do not disclose competitively sensitive information or form any anti-competitive position otherwise businesses could face serious competition difficulties and sanctions.

Planning for Brexit is like taking medicine. It requires a full diagnosis, a tailor-made course of treatment and to have regular check ups because the situation is evolving but entering the realm of the unknown, so worth checking regularly after a thorough Brexit-initial examination has been undertaken.

## Section 26 | What about compliance costs for business?

If Brexit occurs and there is a new regime then this will cause compliance costs to rise for business including State ones. For example, multinationals will no longer have a one size-fits all compliance programme for the EU but will have a different regime for the UK. Moreover, if there is a hybrid arrangement (e.g., some UK rules, some old EU rules and the new UK-EU agreement rules) then the compliance costs will be higher.

## Section 27 | Conclusions

Without being flippant or banal, it is worth noting how Ireland has fared as the Eurovision Song Contest has evolved. There was a time when the Western European nations dominated in a Western European competition but their fate has changed radically over time. Ireland will have to adapt to an EU without the UK if Brexit occurs – but there has been some experience of this in the context of the euro and banking crises.

This is an unprecedented challenge not only for Irish public administration and public policy but for everyone. One has no doubt that those involved in Irish public administration and public policy will be up to the job but they must be given the resources, latitude and support to do the job. It is the 21<sup>st</sup> Century equivalent of John F Kennedy's task bestowed on NASA to put a person on the Moon by the end of the 1960s – the task now is to remove a critically important Member State from the delicate EU framework without disturbing the framework too much or, better still, at all! It is a delicate diplomatic and difficult task where the law will play its part in converting the political and pragmatic promises and positions into laws and legislation.

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