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ARTICLE

BREXIT and business law

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Abstract The surprising outcome of the referendum on the future membership of the United Kingdom (UK) in the European Union (EU) has given rise to a large number of political speculations and claims. They will have to be realized within the framework of EU law and British constitutional law. This paper is meant to outline that framework and, in particular, the procedure that might lead to BREXIT, infra 1, as well as the options available for the negotiations about the future relations between the EU and the UK, infra 2. Its main thrust will be the legal consequences of BREXIT for the operation of primary and secondary EU law, infra 3–5. A final section will deal with the fate of international treaties concluded by the EU for Britain after BREXIT, infra 5. Particular attention will be given to possible implications for China.

Keywords European Union · BREXIT · Trade Law · Private International Law · Public International Law

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1 The BREXIT procedure

1.1 Two phases

Article 50[1] of the Treaty on European Union (TEU)[2] provides for the exit of a Member State from the European Union in two phases. The first phase is shaped by the constitutional law of the Member State in question and not affected by EU law. In the case of the UK, the national government pledged to act in accordance with the result of a plebiscite labeled as advisory in the enabling legislation. It is an issue of British constitutional law whether the government is entitled to do so without the consent of Parliament or whether the latter's approval is required and might be given under certain conditions.

The first phase ends with the notification, by the UK government to the EU, of the country's intention to leave the EU. This notification triggers the second phase which is a phase of negotiations between the UK and the EU. For these negotiations, Article 50 TEU prescribes a maximum duration of two years which may, however, be prolonged by unanimous decision of the EU Council and the exiting Member State. It is unclear whether the notification may be withdrawn unilaterally; but it is unlikely that a withdrawal decision of the Member State in question will be challenged. In the absence of a withdrawal or prolongation the Treaties, i.e. the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU),[3] will become ineffective with regard to the UK 2 years after the notification by the simple lapse of time.

Parties to the negotiations on the exit treaty in the second phase are the UK and the EU, not the individual Member States.[4] The reference in Article 50 TEU to Article 218 TFEU indicates that the provisions of the Treaties governing the external relations of the Union apply. Consequently the negotiations will be conducted by the Commission acting upon a decision of the Council which establishes guidelines; the Council decision is in turn based upon a recommendation by the Commission. Commission President *Junker* has announced that the former French Commissioner *Barnier* will act as chief negotiator.

In accordance with Article 50 TEU the BREXIT treaty will be concluded by the Council, acting by qualified majority, after having obtained the consent of the European Parliament. Thus the BREXIT treaty may be adopted against the vote of a substantial minority of Member States.[5] Given the expected complex nature of the exit treaty, the stark and divergent interests of Member States on the matter and the

[1] On the BREXIT procedure see in particular Skouris 2016, 806–811.

[2] Treaty on European Union, consolidated version in Official Journal of the European Union (OJ) 2016 C 202/13.

[3] Treaty on the Functioning of the European Union, consolidated version in OJ 2016 C 202/47.

[4] See also Skouris, above fn. 1, EuZW 2016, 809.

[5] According to Article 16(4) TEU a qualified majority comprises 55% or more of the Council members, at least 15 (out of 27) Member States representing 65% or more of the EU population; four Member States are required for a blocking minority.

emotional character of the BREXIT discussions, the future BREXIT treaty will likely be disputed both in the European Parliament and the Council.

1.2 Objectives of the parties

What are the objectives that both parties will pursue in the negotiations? For the UK the major goals were stated in the Prime Minister's speech at the conference of the conservative party[6]: the UK wants to regain control of immigration from EU countries; it wants to shape its future relations with the EU so as to maintain free trade in goods and services; it aims at cooperation in law enforcement; it wants to preserve the maximum freedom for British companies to operate in the European Single Market; and it wants to get rid of the jurisdiction of the Court of Justice of the European Union (CJEU). It is noteworthy that among these five objectives three could best be attained by the UK remaining a Member State of the EU; and the opposition to the Court of Justice cannot be that strong since the UK government announced several months after the BREXIT referendum that the UK would ratify—despite BREXIT—the Agreement on a Unified Patent Court which provides for referrals to the Court of Justice.[7] It is just the national control of immigration from EU countries that does not square with the principles of the Union.

The objectives of the EU have not been enunciated so far. As usual they will result from a lengthy process of coordination of national interests. The EU will certainly urge the UK to guarantee the right of EU citizens living in Great Britain on the day of BREXIT to permanent residency in the country, but this will hardly be disputed.[8] Many other national interests diverge: for example, Germany will certainly aim at unrestricted exports of cars and machinery to the UK; 14% of cars produced in Germany are currently exported to the UK.[9] Countries in Eastern Europe value the export of labour; at present about 800,000 Polish citizens live in Britain, and about 5% of the total work force of Lithuania and Latvia are working in the UK sending remittances to their home countries.[10] For Spain, it is essential that the 300,000 British citizens living mainly along the Mediterranean coast stay in the country lest the Spanish real property market be stricken by another crisis.[11] In the financial services sector of several EU countries efforts are being made to attract

[6] The speech is reprinted in The Independent of 5 October 2016 and is reproduced on the website of that newspaper under the heading "Theresa May's keynote speech at Tory conference in full" at http://www.independent.co.uk.

[7] See "UK to ratify EU patent system despite Brexit", Daily Telegraph 28 November 2016; Article 38 of Annex I to the Agreement on a Unified Patent Court, done at Brussels on 19 February 2013, OJ 2013 C 175/1 explicitly provides for referrals by the patent courts to the CJEU.

[8] An initiative of UK politicians including some leading "Brexiteers" has already suggested a unilateral guarantee of this kind to be given by the British government prior to any negotiations, see "Mit guten Beispiel voran – EU-Bürger sollen Garantie für Aufenthalt in Britannien erhalten", Frankfurter Allgemeine Zeitung 2016, p. 5.

[9] See "Wie wichtig der Handel mit Großbritannien ist", Frankfurter Allgemeine Zeitung 2016, p. 18.

[10] See "Brexit trifft Osteuropa mehrfach", Frankfurter Allgemeine Zeitung 2016, p. 21.

[11] See "Brits abroad: how many people from the UK live in other EU countries?" on the website https://fullfact.org → immigration.

business from London; accordingly, these states would appear to favor restrictions imposed upon British providers in the case of BREXIT.

It is not possible to predict the outcome of the internal discussions in the EU about the significance of these goals at present. The traditional inclination of EU politics in favor of the preservation of the *acquis* will no longer necessarily help. What can be predicted, however, are two crucial points: first, the EU is an entity favoring trade; it will not obstruct cross-channel trade. Second, the dependency of the UK on trade with continental Member States is much higher than vice versa. While the UK's exports to the EU are 12% of its gross domestic product (GDP), the share of exports of EU Member States to the UK is for no Member State higher than 3% of the national (GDP).[12] Accordingly, the pressure on the UK to lead negotiations to a satisfactory result is much stronger than the pressure on the EU.

1.3 Limitations under EU law

In light of the divergent interests of Member States it may be tempting for the Commission and the majority of the EU Council to take the decision on the conclusion of the exit treaty by qualified majority and to outvote a minority of Member States. This raises the question of whether the outvoted minority States or anybody else can challenge the Council decision in the Court of Justice of the EU. Two types of legal proceedings are particularly relevant in this context, one operating *ex ante*, the other *ex post*, after the decision on the conclusion of the exit treaty has been taken.

Article 218 (11) TFEU specifically provides for the possibility of Member States to apply *in advance* for an opinion on the compatibility of an international agreement with the primary law of the Union, and there are numerous examples of such opinions in practice. This instrument would also be available in the case of the exit agreement,[13] thereby reducing the incentive for the Council to adopt it by qualified majority against the vote of some Member States, since the risk of court proceedings would at least cause delay and might even further block the exit procedure. Once the decision on the conclusion of the exit treaty is taken, the courts of the Member States are entitled or, in the case of courts of final instance, under an obligation to submit preliminary questions concerning the validity or interpretation of the decision when such questions arise in national proceedings and are deemed relevant for the outcome of the pending case.[14] It is settled case law that international treaties, by the Council decision on their conclusion, become an integral part of EU law for the purposes of Article 267 TFEU.[15] Thus, the exit treaty itself may be indirectly subjected to legal review which would not reduce its binding nature under public international law but would give rise to uncertainty and the need

[12] See "Wie wichtig der Handel mit Großbritannien ist", Frankfurter Allgemeine Zeitung 2016, p. 18.

[13] Skouris, above at fn. 1, EuZW 2016, 808.

[14] See Article 267 TFEU; on the availability with regard to the Council decision on the conclusion of an international treaty see *Till Müller-Ibold* in Lenz and Borchardt 2010, Art. 218 paras 22–24, 26.

[15] CJEU 10 January 2006, case C-344/04 (*The Queen (Ex parte IATA) v. Department of Transport*), ECLI:EU:C:2006:10, para. 36.

to renegotiate. While the referral procedure cannot be initiated by private actors whose rights might be curtailed by the exit treaty, national courts are likely to protect those rights by referrals to the Court of Justice where the exit treaty appears to infringe those rights.

As part of the secondary law of the Union, the Council decision on the conclusion of a treaty and the treaty itself have to comply with primary EU law, in particular with the basic Treaties and the Charter of Fundamental Rights.[16] This principle is meant to ensure the internal lawfulness of a treaty under EU law, not under treaty law. It may be subject to some exceptions in the case of an exit treaty, since the very purpose of the exit is to deprive the EU Treaties of their effect with regards to the exiting Member State. But to the extent that relations between remaining Member States are concerned the exit treaty must be in line with primary law. The possibility that the exit treaty allows the UK to discriminate, with regards to immigration, between citizens of different Member States would thus appear to be excluded. It is further submitted that the internal market, which is defined in Article 26 TFEU by the implementation of five basic freedoms, cannot be distorted by the exit treaty if it were to comprise only some of these freedoms and exclude the free movement of workers.

2 Future relations between the EU and the UK

2.1 The content of the exit treaty

The exit treaty will by necessity tackle some rather technical problems which arise from the present and continuous involvement of Britain in the EU. Decisions must e.g. be taken on the relocation of EU agencies established in the UK such as the European Medicines Agency or the European Banking Authority. Further compulsory elements of an exit treaty concern transition issues such as the British contribution to the EU budget, aid granted by EU funds for a period extending beyond the day of BREXIT, the future employment and pensions of EU officials of British nationality, etc.

Under Article 50 TEU the treaty with the exiting Member State may take "account of the framework for its future relationship with the Union." It can be predicted that this will be the core of the negotiations with controversial positions at the outset. The legal question is whether the founding Treaties allow the EU to agree on an exit treaty that "softens" fundamental rules of EU law, selecting some of them for continuous application in EU–UK relations in the future while declaring others inapplicable. Would it, in particular, be in accordance with the EU Treaties to grant the UK continuous access to the internal market for goods and services while excluding the free movement of workers?

It is submitted that the answer has to take account of the fact that the exit treaty can be concluded by a qualified majority of the EU Council and without the consent of the single Member States. The threshold of approval in the case of exit is thus

[16] See *Jörg Philipp Terhechte* in Schwarze 2012, Art. 218 AEUV, para. 33.

much lower than in the converse situation of an accession which must be approved by all Member States under Article 49(2) TEU. It is inconceivable that an accession treaty allowing the acceding State a kind of cherry-picking, i.e. to select among the basic freedoms and to grant some of them while rejecting others would receive the approval required under Article 49 TEU. The basic freedoms can only be accepted as a package. The situation cannot be different for an exiting Member State. Otherwise a Member State which, at the time of its accession, valued the free movement of persons very highly and, in order to secure that free movement to its own nationals, opened its market in goods and services as a *quid pro quo* at the time of accession would be deprived, by BREXIT, of the main benefit it expected from its own accession to the EU. Thus, as a matter of law, the exit treaty cannot allow the UK to cherry-pick from the basic freedoms.

This does not exclude selective solutions agreed upon in a separate treaty that takes effect after BREXIT. That treaty would be negotiated by the EU with a third state, i.e. the UK, and might take the form of a free trade agreement similar to many such agreements concluded by the EU with other countries. Free access of goods and services originating in the UK could, however, hardly be promised unless the UK agrees to keep its regulatory standards in line with EU provisions. Given the sheer number of such provisions, this means opening Pandora's box. Results are unlikely to be agreed upon within the period of two years laid down in Article 50 TEU unless some ready-made solutions are approved.

2.2 Ready-made solutions

One such ready-made solution would be the "Norway model": the UK could in fact remain a party of the European Economic Area which is based upon the Agreement of Oporto concluded in 1992.[17] At present it governs the relations between the EU and its Member States on the one side and Iceland, Norway and Liechtenstein on the other. The UK, which ratified that Agreement on the EU side, would remain a Contracting Party unless it withdraws from it in accordance with Article 127.

The EEA Agreement provides for the free movement of goods, services and capital which would satisfy the UK aspirations (see Article 2). But the same provision also ensures the free movement of persons which Britain rejects. Moreover, the UK would have to adopt EU legislation related to the internal market without continuing to have much influence on its content in the legislative procedures of the Union, see Article 99 ff. And for the authoritative interpretation of EEA law, the opinions of the Court of Justice would still be of decisive significance (see Articles 105 and 111, in particular para. 3). It is understandable that Prime Minister May for these reasons has rejected the "Norway model" for the time being.[18]

She has also rejected the "Swiss model".[19] After the negative outcome of the Swiss referendum on the EEA Agreement, Switzerland concluded a number of

[17] Agreement on the European Economic Area, done at Oporto on 2 May 1992, OJ 1994 L 1/3.

[18] See the speech cited above in fn. 6.

[19] Ibid.

bilateral agreements with the EU which ensure free trade, free movement of persons, participation in the EU transport area etc. Under these agreements, Switzerland is committed to assume EU law in those respective fields and to adjust continuously to new EU law. This approach requires substantial resources in the field of legislation. EU institutions want to replace this static model by a more dynamic one and would probably be unwilling to extend it to another country, namely, the UK.

There are no other suitable ready-made solutions. If the UK does not accept the Norway model at least as a starting point, the negotiations will have to tackle the single legislative acts of the EU and inquire as to whether they are necessary for the future relationship and how they could or should be amended. Considering that the respective lists of enactments in the EEA Agreement fill about 600 pages of the Official Journal and even more than 2000 pages in the case of the EU-Ukraine Association Agreement,[20] it is safe to predict that an agreement on such details will not be achieved in two years' time.

3 The fate of secondary EU law

Article 50 TEU does not relate to the effect of the exit of a Member State on the secondary law of the Union, i.e. on regulations, directives and decisions. Article 50(3) indicates, however, that "the Treaties shall cease to apply to the State in question" from the date of exit onwards. Thus, the non-application of secondary EU law by the UK after that date would no longer constitute an infringement of the Treaties. It could therefore be concluded that secondary EU law is no longer binding for the UK.

But this does not resolve the question whether it is still binding in the UK as a matter of British law. Directives are implemented in the Member States by national legal provisions, and regulations might even be classified, because of their direct effect, as part of the national law. From this perspective, neither EU regulations nor the UK instruments implementing EU directives would become ineffective by BREXIT.

Prime Minister May has announced a "Great Repeal Bill" which would repeal the *European Communities Act 1972* but, at the same time, transform all secondary EU law into British law.[21] This mega-law, which is more of a consolidation than a repeal of the existing EU law, is intended to grant legal certainty and, at the same time, to allow the rule-makers in the UK, both government and Parliament, to review EU law piece by piece, to abrogate some provisions and to amend others.

While the mega-law might provide clarity in many instances, it will not help where EU instruments define their scope by a personal or territorial connection between the fact situation covered and the Member States or the internal market.

[20] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, done at Brussels on 21 March 2014, OJ 2014 L 161/3.

[21] See the speech, above at fn. 6.

BREXIT will turn the UK from a Member State into a "third" State with the effect that such instruments will no longer apply.

4 The UK as a "third" state: the effect on primary EU law

4.1 The basic freedoms

Except for the free movement of capital which applies to international relations whether within the EU or with third states (Article 63 TFEU), the basic freedoms laid down in the Treaty are applicable to internal cross-border situations of the EU only. Thus, the free movement of goods is ensured and customs, quantitative restrictions and all measures having equivalent effect are prohibited "between Member States", cf. Articles 28, 34, 35 TFEU. The free movement of workers is secured "within the Union" and entails the abolition of discrimination based on nationality "between workers of the Member States" (Article 45). In a similar vein, the freedom to provide services is accorded to "nationals of Member States who are established in a Member State other than that of the person for whom the services are intended" (Article 56 TFEU). These provisions lose their effect with regards to the UK, not only pursuant to Article 50(3) TEU, but also because EU–UK relations will no longer be covered by their scope.

The same is true for the freedom of establishment which is ensured to "nationals of a Member State in the territory of another Member State" (cf. Article 49 TFEU). In respect of the freedom of establishment of companies, Article 54 TFEU requires formation "in accordance with the law of a Member State" and the location of "the registered office, central administration or principal place of business within the Union"; after BREXIT companies established in the UK will no longer comply with these requirements.

As a consequence, the Court of Justice's jurisprudence on international company law will lose its effect with regards to the UK. Ever since the landmark cases of *CENTROS*[22] and *Überseering*[23] the Court of Justice has held that companies set up in one Member State have all rights in other Member States even if they neither have their "real seat" nor perform any activity in the Member State of incorporation. This case law is based on Article 54 TFEU and is particularly relevant for the UK where investors from continental Member States, but also from third countries such as China, have established thousands of companies for business purposes pursued not in the UK, but at home or in other Member States of the EU. Many of them may no longer be recognized as corporate entities in the rest of the EU once Britain loses the status of Member State. Where the Member State of the company's principal place of business holds that the law of the "real seat" governs

[22] CJEU 9 March 1999, case C-212/97 (*CENTROS Ltd. v. Erhvervs- og Selskabsstyrelsen*), ECLI:EU:C:1999:126.

[23] CJEU 5 November 2002, case C-208/00 (*Überseering BV v. Nordic Construction Company Baumanagement GmbH)*, ECLI:EU:C:2002:632.

the company in question, as for instance in Belgium[24] or Poland,[25] courts will consider that the company is established under the wrong law which cannot grant the privilege of limitation of liability to the founding shareholders. It is unclear whether this view would also apply retroactively to companies set up in the UK before BREXIT. But there is an apparent need for clarification in the context of the exit treaty.

4.2 Competition law

For the prohibition of both cartels by Article 101 TFEU and the abuse of a dominant position by Article 102 TFEU the Treaty requires that the conduct in question "may affect trade between Member States". This requirement has traditionally been interpreted in a wide manner[26]; e.g. a cartel confined to a single Member State has been held to affect (potential) trade with other Member States.[27] BREXIT is unlikely to change this wide interpretation in EU–UK relations. An exclusion or restriction of competition confined to the UK market, although outside the future EU, is not unlikely to have an impact on the flow of goods and services from the UK to the EU or vice versa and also indirectly affect trade between the remaining Member States.

In addition, both provisions cited above refer to adverse effects on competition "in the internal market". According to the Court of Justice, such adverse effects may result from the "implementation" of anti-competitive conduct carried on outside the EU.[28] The exit of the UK from the EU therefore does not reduce the scope of application of Articles 101 and 102 TFEU, as long as conduct in the UK restricting competition is implemented in the EU. On the other hand the relevant market that has to be determined for assessing adverse effects on competition will be reduced, through BREXIT, to the territory of the remaining Member States.

The Treaty provisions on state aid apply only to aid "granted by a Member State", see Article 107 TFEU. They will cease to apply to aid granted by the UK after BREXIT. Since state aid tends to distort competition, it is, however, likely that any future free trade agreement between the EU and the UK will lay down obligations for the contracting parties to review and reduce state aid.

[24] See Articles 110 and 111 of the Belgian Code on Private International Law of 16 July 2004, English translation in RabelsZ 70 (2006) 358.

[25] See Article 17 of the Polish Law of 2011 on Private International Law, English translation in YB PIL 13 (2011) 641; cf. also Article 19.

[26] CJEU 14 July 1981, case 172/80 (*Züchner v. Bayerische Vereinsbank*), ECLI:EU:C:1981:178, para. 18.

[27] CJEU 28 January 1986, case 161/84 (*Pronuptia de Paris*), ECLI:EU:C:1986:41, para. 26; CJEU 28 February 1991, case C-234/89 (*Delimitis v. Henninger Bräu*), ECLI:EU:C:1991:91, paras. 18 ff.

[28] CJEU 27 September 1988, joined cases 89/85 (*Åhlström Osakeyhtiö* et al. *v. Commission* – Wood Pulp), ECLI:EU:C:1988:447, paras. 16 ff.

5 The UK as a "third" state: the effect on secondary EU law

5.1 Protection of competition: mergers and anti-dumping

Competition is also protected by a number of enactments of secondary EU law. Where the structure of competition is threatened by a concentration, the Merger Regulation provides for a review by the Commission provided that the merger has a "Community dimension"; it is defined by turnover thresholds which relate to the aggregate turnover of the undertakings involved in the whole Community or in groups of at least three Member States.[29] It is irrelevant where the companies involved have their registered offices, principal places of business or production plants, whether in the EU or outside.[30]

BREXIT will affect merger control in at least two essential ways. It will repeal the one-stop-shop principle underlying the Regulation; mergers affecting both the EU and the UK market will be subject to double review proceedings in the future. Moreover, for the purposes of the EU Merger Regulation, BREXIT will also change the basis of calculation of the turnover. However, the Merger Regulation will still apply to mergers of UK companies or to a take-over of a UK undertaking by a Chinese company where the turnover of the companies involved within the remaining Member States exceeds the thresholds.

Competition in the internal market has been repeatedly distorted by subsidies and dumping practices, in third States, of goods imported into the EU. The EU has enacted a number of countervailing measures which have only recently been codified in the Anti-Subsidy Regulation[31] and the Anti-Dumping Regulation.[32] Both texts, which have been applied to Chinese products on several occasions in the past, refer to products released for free circulation "in the Union". Thus, after BREXIT, an export of Chinese steel to the UK will no longer be covered. But the UK may adopt similar anti-dumping measures which would have to be specifically designed. The Great Repeal Bill announced by Prime Minister May will not suffice for this purpose.

5.2 Services

The freedom to provide services ensured by primary law has been further developed by several directives. Of general significance is Directive 2006/123 on services in the internal market which *inter alia* lays down the country-of-origin principle.[33] Its

[29] See Article 1(2) and (3) of Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ 2004 L 24/1.

[30] General Court 25 March 1999, case T-102/96 (*Gencor Ltd. v. Commission*), ECLI:EU:T:1999:65, para. 79.

[31] Regulation (EU) of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (codification), OJ 2016 L 176/55.

[32] Regulation (EU) of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (codification), OJ 2016 L 176/21.

[33] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006 L 376/36.

scope is confined to service providers "established in a Member State" (see Article 2). While it does not specify the link of the recipient of services with the EU, it follows from the legislative basis—Articles 53(2) and 62 TFEU (formerly: 47(2) and 55)—that the Directive is confined to intra-EU relations. BREXIT will therefore deprive UK service providers, such as architects, builders, or consultants, of the right to offer their services to clients in the remaining Member States and vice versa. It will also deprive customers of the right to invoke the Directive in their relations with service providers from the other side.

Among the various instruments dealing with specific services, those addressing financial services deserve special attention. Financial services are particularly important for the UK, contributing about 7% to its gross domestic product, one-third of which is by exports to other Member States of the EU.[34] The scope of the pertinent EU instruments is not confined to intra-EU services; but they lay down a specific regime for service providers established in third states offering their services to EU clients. With regard to such service providers, the principle of a single authorization ("single passport") cannot be maintained, since the country of the main establishment is not bound to apply EU provisions to the authorization in question.

Thus the MIFID II Directive allows Member States to require that a third state firm desirous of offering services to retail clients in the EU establishes a branch in its territory, thereby subjecting that firm to EU regulations and supervision.[35] For services provided to professional clients in the EU no such requirement exists, but they must ensure that disputes arising from their business relations can be litigated in courts of EU Member States[36]; thus, the enforcement of binding EU regulations can be secured, either as part of the law governing the contractual relation or as an overriding mandatory provision. In insurance, the regulations for third state providers are even stricter. The admission to the market by the authorization required is discretionary for the Member States, and the conditions are more restrictive than in other financial services.[37] British providers of financial services will be subject, in the future, to a legal regime which they had thought would apply only to their competitors from New York, Hong Kong or Singapore.

A further sector that may witness noticeable consequences of BREXIT is transport. On the basis of Article 90 ff. TFEU, the Union has established a common transport policy. In the common transport market business models of transport companies, which no longer take the home Member State of the firm as the point of departure and destination of all transport operations, have proven successful. An

[34] Moloney 2016.

[35] See Article 39 ff. of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast), OJ 2014 L 173/349.

[36] See Article 46(6) of Regulation (EU) no. 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) no. 648/2012, OJ 2014 L 173/84.

[37] See Article 162 ff. of the Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II) (recast), OJ 2009 L 335/1.

example is provided by the British company, *Easyjet*, which has established bases in various continental airports where it serves other continental airports non-stop. It avails itself of the rights flowing from Regulation 2408/92 which grants access to air routes within the EU to all carriers with an operating license granted by a Member State.[38] Such license can be issued only by the Member State of the principal place of business and, if any, of the registered office of the carrier.[39] Unless *Easyjet* relocates to a continental country or some other solution will be agreed upon in the exit treaty, the company will no longer be able to pursue its successful business model.

5.3 Unitary legal institutes

Ever since the 1980 s, the EU has created unitary legal tools which owe their existence not to the harmonization of pre-existing national laws, but to the creation of EU regulations. This has mainly occurred in the fields of intellectual property and company law. Two particularly successful instruments of this kind are the Regulation on a Community trade mark[40] and the Regulation on a European Company (*Societas Europaea*).[41]

As a corporate arrangement, the *Societas Europaea* is available where the founders are affiliated with at least two different Member States.[42] After BREXIT, UK firms will therefore not be able to set up an SE unless that connection to different Member States is established through other founders of the SE. Existing SEs having a registered office in the UK will benefit from the Great Repeal Bill provided that it will transform the SE Regulation into UK law. The law governing British SEs will continue to be the SE Regulation in that case. Doubts might arise, however, as to the split regime: is it conceivable that a unitary corporate entity is governed by a European regulation in the courts of Member States and by an—identical—national UK statute in Britain?

The Community trade mark that "shall have equal effect throughout the Community"[43] can be owned and registered upon application by any natural or legal person, no relation with the Union being required.[44] This is due to the principle of national treatment recognized in intellectual property law; thus, a right protecting intellectual property of citizens of the Union in the EU has to be accorded to citizens of third States as well. Consequently British subjects will be able to continue to register Community trade marks in the future. However, the territorial scope of

[38] See Articles 2(b) and 3 of Regulation (EEC) no. 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, OJ 1992 L 240/8.

[39] See Article 4(1)(a) of Council Regulation (EEC) no. 2407/92 of 23 July 1992 on licensing of air carriers, OJ 1992 L 240/1.

[40] Council Regulation (EC) no. 207/2009 on the Community trade mark, OJ 2009 L 78/1.

[41] Council Regulation (EC) no. 2157/2001 of 8 October 2001 on the statute for a European company (SE), OJ 2001 L 294/1.

[42] See Article 2 of Regulation 2157/2001, previous fn.

[43] See Article 1(2) of Regulation 207/2009, above at fn. 40.

[44] See Article 5 of Regulation 207/2009, above at fn. 40.

protection will shrink, by BREXIT, to the remaining EU Member States. If the owner aims at continuous protection of the trade mark in Britain it should register an—almost identical—trade mark under British law. The Great Repeal Bill is, however, of doubtful effect. Since the scope of protection of the Community trade mark has been limited by its creator, the European Union, to the territory of the EU, a third State does not appear to be in a position to extend this scope to its own territory. All it can do is to create a separate trade mark that is parallel to the Community trade mark.

5.4 Administrative cooperation

In various fields, EU instruments have established duties of cooperation between the administrative authorities of the Member States, endowed with the task of implementing legal provisions and supervising private actors and their activities. Such duties encompass the notification of proceedings, information and consultation, sometimes an obligation to abstain from pursuing proceedings in favor of other authorities, or even a duty to refer proceedings to authorities in other Member States or to the Commission. BREXIT will terminate British participation in such networks unless the exit treaty or other international agreements provide for continuous cooperation.

Numerous examples could be given from all areas of EU law. Articles 11 ff. of the basic implementing Regulation in the area of competition have imposed a duty of close cooperation upon the national competition authorities in their dealings with each other and with the Commission in the enforcement of Articles 101 and 102 TFEU[45]; thereby bringing the so-called European Competition Network into being. In the field of merger control the one-stop-shop principle requires similar cooperation: the Commission may refer a case to a national competition authority and vice versa; the Commission may also invite a national authority to refer a case to it.[46] In the financial services sector the supervisory authorities of the Member States are put under an obligation to cooperate by Articles 79 ff. of the MIFID II Directive.[47] And even in consumer law, a special regulation provides for duties of cooperation between national authorities.[48] All this will come to an end on the day of BREXIT.

5.5 Judicial cooperation in civil matters

On the basis of what is now Article 81 TFEU, the Union has enacted several regulations that deal with the jurisdiction of the courts of the Member States, with

[45] See Articles 11 ff. of Council Regulation (EC) no. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.

[46] See Articles 9 and 22 of Regulation 139/2004, see above at fn. 29.

[47] See above at fn. 35.

[48] Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), OJ 2004 L 364/1.

the law they apply and with the recognition and enforcement of their judgments. Ever since the Treaty of Amsterdam, the UK has had the privilege of being able to select the pertinent acts it wanted to adopt while rejecting others.[49] The UK has essentially opted for those acts which deal with commercial relations, in particular, for the Brussels I Regulation on jurisdiction and the enforcement of judgments in civil and commercial matters.[50] In this exemplary context, BREXIT raises several questions.

If the Great Repeal Bill announced by Prime Minister May is enacted, the provisions on jurisdiction of Brussels I will remain in force as rules of national law. Would this entail the return of the UK courts to traditional notions of jurisdiction, in particular, its discretionary character and the possibility of dismissing a claim on the basis of the doctrine of *forum non conveniens* which the Court of Justice declared to be incompatible with the Brussels regime?[51] The answer to this question is also of essential significance for negotiations between the UK and the EU about the future judicial cooperation outside the Brussels I regime.

The Great Repeal Bill would also require some other amendments to the British version of Brussels I. Several provisions explicitly confer jurisdiction on courts in Member States: Article 5(1) declares courts in other Member States as competent where the defendant is domiciled in a Member State; neither this provision nor Sections 2 to 7 to which it refers concern the relationship between a court in a Member State competent under Article 4 and the courts in a non-Member State such as the UK in the future. Various other grounds of jurisdiction, by their very wording, would not apply to UK courts after BREXIT; see e.g. Article 7(1)(b), 2nd indent relating to the place of performance of services "in a Member State", Article 11 and 13 on actions against insurers and liability insurers, Article 14 for actions brought by an insurer against a policyholder. Choice-of-forum agreements are only covered by Article 25 where they designate the court(s) of a Member State, not of the UK after BREXIT. Consequently, a simple transformation of Brussels I into UK law by the Great Repeal Bill would be insufficient.

The situation will also change with regard to *lis pendens* (Article 29 ff.) and the recognition and enforcement of judgments (Article 36 ff.). The pertinent rules apply exclusively to proceedings conducted and decisions made in other Member States. While the UK may decide in the Great Repeal Bill that it will continue after BREXIT to apply the said provisions to proceedings and judgments from other EU Member States, decisions of UK courts and prior proceedings will definitely not be considered as proceedings in, and judgments given by, courts of another Member State after that date. It will rather be a matter for the national law of the Member States to decide on the recognition and enforcement of UK judgments. In some

[49] See Protocol no. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, OJ 2016 C 202/295.

[50] The current version is the Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012 L 351/1; on the effect of BREXIT see already Lein (2015/2016), pp. 33–47.

[51] CJEU 1 March 2005, case C-281/02 (*Owusu v. Jackson*), ECLI:EU:C:2005:120, paras. 37 ff.

cases bilateral treaties may help,[52] in others the national law is basically hostile to the recognition and enforcement of foreign judgments in the absence of international conventions.[53]

This is a serious threat to the large law firms of the City of London. According to the business model espoused many years ago, they convince their clients from all over the world to agree on the choice of English courts and English law with the promise that resulting judgments will be enforceable in the whole of Europe. After BREXIT, this promise no longer holds true unless some other basis for the enforcement of judgments in the EU can be found. Due to the resulting uncertainty, parties from overseas might change to other venues which are closer to their home countries, e.g. in Asia, to Singapore or Hong Kong.

As a solution, the revival of the old Brussels Convention of 1968 as amended by later accession conventions has been discussed[54]; allegedly it was only superseded by the Brussels I Regulation but was not terminated. But the Brussels Convention made express reference in the preamble to the intention of the Contracting States to "strengthen in the Community the legal protection of persons therein established." This does not include persons domiciled in third States such as the UK; the preamble and some further references to EU institutions contained in the final provisions clearly indicate that the Brussels Convention was a corollary of the European Communities. All references to a Contracting State in the provisions of the Convention have to be understood in light of the identity of Contracting State and Member State. Accordingly, it cannot be revitalized with regards to a non-Member State.

A more realistic solution could be the accession of the UK to the Lugano Convention[55] which closely follows a previous version of the Brussels I Regulation. Contracting Parties are the EU and the EFTA countries Iceland, Liechtenstein, Norway and Switzerland. The EU Member States are bound by the Convention but are not Contracting States since the exclusive competence for the conclusion of the Lugano Convention was vested in the EU.[56] An accession of the UK would be possible in accordance with Article 70(1)(c), but would be subject to the unanimous approval of the Contracting Parties to the Lugano Convention (see Article 72(3)). The EU might postpone its consent until other issues arising from BREXIT are resolved. Moreover, the Lugano Convention might not be that attractive for the UK,

[52] See e.g. the Convention between the Federal Republic of Germany and the United Kingdom of Great Britain and Northern Ireland for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, done at Bonn on 14 July 1960, Bundesgesetzblatt 1961 II, p. 302; the convention does not apply to judgments of the courts of first instance.

[53] This is e.g. the case in Sweden as far as judgments in commercial matters are concerned, see *Michael Bogdan*, Sweden, in Verschraegen 2012, para. 312; no bilateral convention appears to exist.

[54] See the last consolidated version in OJ 1998 C 27/1. For a revival of this instrument see Dickinson 2016, 195 ff.; *Lein*, above at fn. 50, p. 36–38.

[55] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, done at Lugano on 30 October 2007, OJ 2007 L 393/3.

[56] CJEU 7 February 2006, case A-1/03 (Lugano Convention), ECLI:EU:C:2006:81.

since its courts would once again be bound to respect the decisions of the Court of Justice.[57]

Certain help might come from the Hague Choice of Court Convention of 2005. This instrument deals with jurisdiction resulting from exclusive choice of court agreements and the recognition of the judgment of the selected court by other Contracting Parties. Its significance is thus limited to a certain part of disputes arising from commercial contracts.[58] The situation of the UK is similar to the one under the Lugano Convention: it is currently bound by the Convention, but not as a Contracting State, since the exclusive competence is vested in the EU and prevents the UK from accession until the day of BREXIT. Accession by the UK will be possible thereafter, no consent of other Contracting Parties being required (see Article 27). However, a transition period of uncertainty is likely, since the Convention will take effect for the acceding State only three months after the deposit of the accession instrument.

If the UK government takes the Prime Minister's pledge for European cooperation in law enforcement seriously, it will have to make great efforts in order to avoid a regression to the pre-Brussels state of affairs.

6 The fate of international treaties concluded by the EU

The European Union is not only the result of international treaties concluded by its Member States, it is also an entity endowed with legal personality (see Article 47 TEU) and charged with the task of pursuing policies in the international arena by concluding treaties of various kinds.[59] And the Union has in fact concluded a large number of treaties in many policy areas: international trade, transport policy, judicial cooperation in civil and commercial matters, and intellectual property are some of them. Depending on the internal distribution of competencies between the EU and the Member States, these treaties, or at least some of their provisions, are binding on the Member States. Where the EU holds exclusive competence, a treaty it concluded will bind the Member States. Where the EU and the Member States share the treaty-making powers for a field of law covered by a treaty, there may be two ratifications, one by the EU, the other by the Member State, or only a single ratification by the EU. In all such cases, BREXIT raises the question to what extent the UK will be bound by those treaties in the future.

The answer does not flow from the 1978 Vienna Convention on the succession of States in respect of treaties.[60] Regardless of whether this Convention has actually taken effect for the parties involved, the Union is not a State for the purposes of this

[57] See Protocol 2 on the uniform interpretation and on the Standing Committee, OJ 2007 L 393/27.

[58] Convention on Choice of Court Agreements, Concluded at The Hague on 30 June 2005, see the website of Hague Conference: www.hcch.net. The Convention is currently in force for the EU Member States, Mexico and Singapore.

[59] See Article 8 TEU as well as Articles 198 ff., 205 ff., 216 ff. TFEU.

[60] Vienna Convention on the succession of States in respect of treaties, concluded at Vienna on 23 August 1978, 1946 UNTS 4.

instrument. However, the situation resulting from BREXIT is similar to State succession since the UK takes over from the EU the responsibility for its territory with regards to certain treaties or treaty provisions.

The fate of EU treaties for the UK after BREXIT will have to be determined case by case which will require a lengthy and strenuous appraisal of international agreements concluded by the EU over the last few decades. Where both the EU and the UK are already Contracting Parties as e.g. in the case of the WTO Convention,[61] BREXIT will bring together the obligations arising from the treaty. While some obligations are to date incumbent only on the EU, they will revert to the UK which will thereby become the only subject bound by the treaty.

This is different where a treaty has been concluded by the EU pursuant to its exclusive competence. Examples are numerous free trade agreements (FTAs)[62] or the Hague Choice of Court Convention mentioned above.[63] BREXIT will release the UK from the treaty obligations and will return the treaty-making power in this field to the UK. Provided that it wants to continue to be bound, a unilateral declaration by the UK providing for the continuous application of the Convention would not be sufficient as such, as can be inferred from Articles 9 and 15 of the Vienna Treaty Succession Convention for the corresponding situation of State succession. A formal accession subject to the conditions laid down in the respective convention, if any, would be required. Those conditions are not an obstacle in the case of the Hague Choice of Court Convention. But the FTAs relate to goods originating in the territory of the other partner, not of a third State, and have been negotiated by the partner countries of the EU in view of gaining access to a market of 500 million people; the concessions they made would not have been the same had they only expected access to a market of 50 million persons. It follows that the foreign partners will most likely not approve an accession of the UK to the EU trade agreements and that they will therefore have to be renegotiated by the UK.

7 Conclusion

It follows from this analysis that BREXIT will have far-reaching consequences across the board in business law. Some of them can be dealt with by the private parties involved, others by the Great Repeal Law announced by Prime Minister May. This law should not be confined to a mere transformation of EU law into British law; it should deal with other issues raised by the fact that many provisions of EU law depend upon some relation between the regulated fact situation and the EU, the existence of which will cease to exist once BREXIT becomes effective.

To assess the consequences and to negotiate appropriate solutions will most likely take much more than the two years allowed by Article 50 TEU. The

[61] Marrakesh Agreement establishing the World Trade Organization, concluded at Marrakesh on 15 April 1994, 1867 UNTS 3.

[62] The EU has concluded 36 trade agreements with 77 partners in the whole world, including countries such as Korea, Turkey, Peru, Tunisia and South Africa, cf. "Der Protektionismus pirscht sich an", Frankfurter Allgemeine Zeitung 5 November 2016, p. 24.

[63] See above at fn. 58.

negotiations on the accession of new Member States to the EU usually take about 10 years; it is realistic to assume that the exit treaty will require a similar period of time unless the UK agrees to build upon some existing model providing ready-made solutions. The negotiations entail a kind of new deal in international competition. Business interests from all sectors and many countries are engaged, and it will be difficult to accommodate them in a short period of time.

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