# THE LEGAL IMPLICATIONS OF BREXIT

Proceedings of the conference
in the context of the 2018 General Assembly
of the UAE – European Lawyers' Union

LISBON, 30 NOVEMBER 2018

EDITED BY
**Pedro de Gouveia e Melo**

Union des Avocats Européens
European Lawyers' Union

# THE LEGAL IMPLICATIONS OF BREXIT

Proceedings of the conference
in the context of the 2018 General Assembly
of the UAE – European Lawyers' Union

LISBON, 30 NOVEMBER 2018

EDITED BY
**Pedro de Gouveia e Melo**

Union des Avocats Européens
European Lawyers' Union

# THE LEGAL IMPLICATIONS OF BREXIT

## Proceedings of the conference in the context of the 2018 General Assembly of the UAE – European Lawyers' Union

Lisbon, 30 November 2018


EDITED BY

**Pedro de Gouveia e Melo**

PREPARED AND DESIGNED BY

**Morais Leitão, Galvão Teles, Soares da Silva & Associados**


**Co-organisers:**

APDE

CÍRCULO DOS ADVOGADOS PORTUGUESES DO DIREITO DA CONCORRÊNCIA

**With the support of:**

ORDEM DOS ADVOGADOS

MORAIS LEITÃO
GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS

## FIRST PANEL – BREXIT: WITHDRAWAL AND TRANSITION



## SECOND PANEL – BREXIT AND THE LAW

**FIRST PANEL**

# BREXIT: WITHDRAWAL AND TRANSITION

## FIRST PANEL – BREXIT: WITHDRAWAL AND TRANSITION

# OPENING WORDS FROM THE MODERATOR

José Luís da Cruz Vilaça

Ladies and gentlemen,
Dear friends and colleagues,
Distinguished speakers,

It is a privilege and a great honour to moderate this panel of such distinguished speakers.

Please allow me to make some brief introductory remarks.

I think that since the beginning of the Brexit process, it should have been crystal clear for everybody that, regardless of the final outcome of the negotiations for withdrawal, this event would have huge and lasting implications for the life of millions of Europeans, including the British people.

This is the first time a Member State of the European Union (EU) decides, by the will of its own people, to leave the Union. Such move is, in itself, disruptive and traumatic to the normal course of the European integration.

Of course, the big enlargement of 2004-2007-2013 was expected to have huge consequences on the structures, the working and the culture of the whole block.

However, it was not supposed to fundamentally change the rules on which its functioning was based. The main implications, important though they might be, were those required by the need to promote a smooth adaptation of the new member countries, before the accession and during a transitional period, to the application of a vast set of rules known as the "*acquis communautaire*".

True, the big enlargement was probably politically inevitable. It must, however, be admitted that those who pushed into that direction might have underestimated the risks and the difficulties of the task. The recent political events in some Member States concerning the response to the refugees' crisis and the respect for the rule of law and the independence of the judiciary bear witness of such risks and difficulties.

The main difference now is that Brexit involves undoing what has been achieved all the way through more than 45 years, with regard to one of the biggest Member States!

That circumstance will have drastic and largely unpredictable consequences on the whole EU:

- Its institutional system;
- The internal market;
- The area of freedom, security and justice, including the free movement of persons and the immigration and asylum policies;
- The Monetary Union, the euro and the financial markets;

- The external dimension of the EU policies and the assertiveness of the whole Europe in the international arena;

- The relations between the UK and its EU neighbours (Ireland – hard or no hard border with Northern Ireland; Spain – Gibraltar);

- The European defence policy;

- All the other EU policies, including labour and social policy, competition, transport, environment, agriculture, education and training, regional policy and so on and so forth, and

- Principally, the rights that are an integral part of the statute of a citizen of the EU.

This time, the EU was not caught by surprise. I think this was shown during the negotiations. It became clear that the EU side was perfectly aware of the necessary implications of an exit from the Union and its mechanisms and did not underestimate the difficulties arising therefrom.

In the middle of all this, it is more than necessary to be ready for the next future. We now have a detailed agreement with almost 600 pages on the terms of the UK's withdrawal as well as a political agreement on the future relationship between both Parties.

Apparently, the European leaders are in the whole happy with the outcome of these negotiations and I think that is based on the reasonable assumption that they are intended to create a climate of confidence and to institute positive relations to the advantage of the two Parties, who had been members of the same Union for decades but one of which had decided to become a third country, however with a long lasting experience of cooperation within that Union.

Still, the British side is considerably divided over not only the result of the negotiations but also over the very decision to leave.

Much uncertainty is therefore still present in all those issues. Will the British Parliament uphold the agreement? Is a new referendum still possible? What could be its result? Is it possible to make a U-turn? Once the withdrawal agreement is in force, how difficult will be the negotiations for the detailed transition and future arrangements?

Meanwhile, the European Court of Justice has already been asked by a Scottish Court to rule on such crucial questions as whether, where a Member State has notified the European Council of its intention to withdraw from the European Union in accordance with Article 50 TEU, EU law permits that Member State unilaterally to revoke its notification before the end of the period of two years referred to in that article. If so, the referring court is uncertain as to the conditions governing such a revocation and its effects relative to that Member State remaining within the European Union.

The case is to be determined pursuant to the expedited procedure provided for in the Rules of Procedure and the public hearing was held last Monday. I must confess that I personally regret not to be there any longer to take part in the decision...

All this makes this Conference particularly timely and appropriate. I warmly congratulate the Union des Avocats Européens and its President, my friend Agustín Cruz, for holding it at the same time as its General Assembly in Lisbon, as well as the Portuguese Bar Association ("Ordem dos Advogados") for hosting it.

I would like to, in particular, congratulate my friends Carlos Botelho Moniz and Pedro Gouveia e Melo for the time and effort they devoted to the idea and the organisation of this important event.

The first Panel on "Brexit: Withdrawal and Transition" will give us the opportunity to discuss some of the issues I mentioned before. We very much look forward to hearing how our distinguished guests read the current situation and its prospects for the future of the relationship between the UK and the EU. I am sure they will set the tone for the next Panel on "Brexit and the Law".

I wish to sincerely thank our speakers for accepting to intervene in this Conference and, as the case may be, to come to Lisbon, which, I think, is not an unpleasant thing to do. Let me to very briefly introduce them:

- Joana Cruz Schilling is graduate in International Relations and holds a Master's degree in European Politics and Governance from London School of Economics and Political Science; she is currently a Political Officer at the European Commission Representation in Portugal after working at the European External Action Service and the European Commission Directorate for Development and Cooperation;

- Fergus Randolph is a Barrister at Brick Court Chambers in London. He is at the forefront of EU and competition law litigation at the English bar. He regularly appears before the ECJ and the GC as well as national courts and competition regulators. His recent caseload includes some of the leading cases going through the English and EU courts;

- Florence Loric is Partner with Arthur Cox in Dublin, in the firm's Competition and Regulated Markets group. Her practice extends across regulated network industries including in particular telecoms, energy, broadcasting, post and transport. She has extensive experience in advising on European law and public and administrative law, as well as on European and Irish competition law;

- Bernardo Ivo Cruz holds a PhD in Politics from the University of Bristol; he was Undersecretary of State for Foreign Affairs; he founded

the True Bridge Consultancy Group, based in London, and is the Editor of the London Brexit Monthly Digest.

It's a privilege to have such a wonderful panel to discuss Brexit with you.

It is now time to hear our speakers. I give the floor in the first place to Joana Cruz Schilling.

# OUTLINE OF THE BREXIT NEGOTIATIONS: PLAYERS, ROLES AND STATE OF PLAY

Joana Cruz-Schilling

Thank you very much, Dr. Vilaça, for your kind introduction, and clear introduction. On behalf of the head of the European Commission Office in Portugal, Sofia Colares Alves, who unfortunately couldn't be here today, I would like to thank the organizers for the excellent organization of this conference, and also for having in mind the gender balance of this session, which I think it's quite nice as well. So, as Dr. Vilaça has already said, I will try to be up to the task of explaining to you in fifteen minutes all the negotiations. My proposition is to do this in three steps, so the first step will be to focus on explaining to you who the key players are, all the three institutions, and what are their respective roles. Secondly, to tell you a little bit about what happened since "the clock started ticking", that is when Prime Minister May triggered article 50. And thirdly, I would like to just do a brief overview of where we are, today, since the extraordinary step that took place... last Sunday when the European Council endorsed the Withdrawal Agreement setting up the terms for the UK's orderly exit.

I'll try my best. So, I hope this will, in a way, give a contribution to the debate, and will set the scene as the organizers had planned in their heads.

So, starting off with my first point: who are the key players in these negotiations? Obviously, the first one that comes to mind is the European Council, the Heads of State and Government of the twenty-seven Member States, and the President of the European Council, Donald Tusk, who received the formal notification from Prime Minister May, and then prepared the essential guidelines, what he called the negotiating guidelines, to pursue during these negotiations. And this document became the reference document, the European Council guidelines of April 2017, because they had two essential things: the core principles that would guide negotiations, that is, the core principals of the Union – you all know it by heart, I'm sure – , those are the integrity of the single market, the role of the European Court of Justice, the autonomy of the EU's decision making, so these were the core principles set; and the guidelines also established what was called the "phased approach". What does this mean? The phased approach meant that in order to discuss all the transition issues, and all issues pertaining the future relationship with the United Kingdom, we would first have to settle, in the first phase, what was called the divorce issues. The divorce issues included priority areas for the institutions, for the Member States, clearly citizen's rights; the "divorce bill", that is, the financial settlement, and the very delicate issue of avoiding a hard border on the island of Ireland.

So, this was basically the role of the European Council, which was – and is – a very political role. Then the second institution is the Council, and when I mean Council I always refer to the General Affairs Council, so the ministers meeting in a General Affairs Council formation, and the Council mandated the European Commission, the other key institution, as the Union's negotiator, to negotiate on behalf of the twenty-seven. And it did so by authorizing the start of negotiations after the Council approved what was called very strict "negotiation directives". The Commission appointed, you all know, chief negotiator Michel Barnier. Michel Barnier is supported by a taskforce created to support all the coordination work, legal, financial, and all the strategic aspects of the negotiations. The

taskforce, just to explain to you, because I worked very closely with them on a regular basis, especially when I was posted in London, the taskforce's format was meant to be kept separate from the Union's business, so the regular European Union positive agenda. It was never working in splendid isolation, but supported and drawing its policy support from all the services of the European Commission, in all areas, while working very closely with the cabinet of the commissioners. So, it was separate, but very well integrated in the institutional setup.

Then, last but not least, the European Parliament, the institutional player with a fundamental role, not least because it will have to approve the withdrawal agreement, by a vote of a simple majority voting; the procedure is called Parliament's consent. The Parliament, as an institution, also organized its internal work to deal with Brexit through the creation of the Brexit Steering Group. The Brexit Steering Group, led by Guy Verhofstadt, the Liberal MEP, and this taskforce was basically the interface of everything that concerned Parliament (*e.g.*, it produced Parliament's resolution on Brexit), setting up the institution's red lines, which very much coincided with the EU's Member States, and also those of the European Commission.

Just one word on the Parliament and its organizational structure: Parliament was kept, from the very onset of the negotiations, very well informed of the process. President Tajani was always heard in the beginning of every European Council of heads of State and government, and also via the rotating presidencies of the Council, and through the team of Barnier, and Barnier himself. So this generated – just a personal comment as an observer – a very positive institutional relationship between all of them. So, there it goes for the first part.

Now, moving on to my second point, in a very condensed presentation, the second thing I would like to talk about is basically go back to that moment in time when Prime Minister May triggered article 50, and

notified the other EU Member States: on that dreadful day of 29th of March of 2017 the clock started ticking. Two years from there, that is less than six months' time, the UK will *de facto* leave the Union. But the official negotiations only started in June, 19th of June, if you remember, soon after the UK held its general election. And then from that period, June until December 2017, the negotiations focused essentially on the first (divorce) issues I told you about and achieving "sufficient progress" according to the European Council guidelines. And sufficient progress on all of the separation issues (citizen's rights, the financial settlement, and the hard border on Ireland) was made six months later, in December that same year: a joint UK-EU agreement was reached, which was basically translated later on into what was is today the draft withdrawal agreement – the Commission published it in February this year. So, ending of the phase one, we're ready to move on to phase two, of the negotiations. Phase two concentrated on the transition, and getting a political declaration on what the future relationship between the EU and the UK would be like. Always based on the premise that we want the UK to be a very close ally, and a very close partner and friend.

The draft withdrawal agreement published in February brings us to my final point, which is the point I want to concentrate a little bit more time on: the withdrawal agreement, and the political declaration. Seventeen months after the beginning of the negotiations, last Sunday's Extraordinary European Council, endorsed these two documents, the withdrawal agreement, which sets out the terms for an orderly exit of the UK from the Union, and the political declaration that outlines the future relationship with the UK.

On the withdrawal agreement, I would like to comment three aspects. One of them is the legal certainty that it brings. So, where Brexit creates uncertainty, a legal vacuum, the withdrawal agreement brings legal certainty for citizens, for businesses, for public administrations, and even for our international partners. It brings certainty. Then, the

second thing I would like to mention is the issues, so what is covered in the withdrawal agreement. First, and foremost, one of our priorities throughout the negotiations: citizen's rights, citizen's rights until the end of the transition period are safeguarded, and any UK citizen residing in the EU, or any EU citizen residing in the UK will be able to carry on living, working, studying, receiving benefits, as before. Then, the financial settlement. This is important, because all the financial commitments undertaken at twenty-eight will be honoured at twenty-eight. This is important to reassure all beneficiaries, all the regions which are recipients of the EU budget. And I can also mention other separation issues, which are protected, and I'd like just to mention one brief example (I don't have time to go through the one hundred and eighty-five articles, unfortunately). One of them is also important for Portugal, which is related to the protection of intellectual property rights; the close to three thousand geographical indications that protect, for example, our Port Wine, or your Welsh lamb, or Parma Ham. So, this is protected.

And then finally a point on the governance of the agreement. As in any international agreement, there are appropriate dispute settlement mechanisms, and this is important to protect what is laid out in those one hundred and eighty-five articles.

Then, let me just refer, still on the withdrawal agreement, what is said with regards to the transition. There is an agreement on the time frame, to keep matters as they are today for twenty-one months: from the 30th of March 2019, the time that *de facto*, at midnight, the UK will leave the Union, until the 31st of December 2020. And this time frame is important because it will allow citizens, businesses, enough time to prepare, and to adapt to what change will come, to the change that will happen after the end of the transition period. And only to adapt once. During this period, the UK will be treated as a Member State, with its rights and obligations, except that it cannot participate in institutions, so it's a little bit like "everything but institutions", no decision making power. It is possible to

extend this transition period, but only once, as it is set up in an article of the agreement which refers that a joint committee will jointly decide, if we want to extend this transition. That is also important to then speculate on what can happen, and what cannot happen. But then I leave that to the other fellow panellists.

One final word on this deal, as president Junker said after the Council, "this is the best deal", he even said "this is the only deal possible". But it is a balanced deal, and I think it's fair to say, and it also paves the way for a very close future relationship with the UK, through the political declaration, because the political declaration, if you had the time to look at it, does encompass a wide range of areas, from foreign policy, defence, security, law enforcement, cooperation on criminal matters, it's very dense, reflecting the ambition of the two parties to stay closely together. It is actually unprecedented, because if you look at any other international agreement the EU has, it doesn't have this depth of areas. But we are not there yet. So, this was just a note.

So, what next? Now, what next? Mr. Barnier at the European Parliament yesterday said that "we are at a major juncture, now". We are in ratification mode and now all efforts concentrated on ratifying the withdrawal agreement.

As for the role of the other institutions, the European Council has invited the Commission, the Parliament, the Council, to take all the necessary steps, so that the withdrawal agreement enters into force by 30th of March 2019. The Council, the General Affairs Council, will have to authorize signature of the withdrawal agreement before it goes to the European Parliament. The British Government already gave a date for the UK's ratification in House of Commons, which will be the 11th of December. Should this go ahead, and be approved, there is a chance that the General Affairs Council on the 18th of December takes this opportunity to sign the

authorization, then the EP votes by consent, and the Council concludes the negotiation.

On the future relations, both parties have also agreed to use their best endeavours to conclude an agreement on the future relations ASAP, as soon as possible, I know my colleagues in Brussels are working on this. So that, when it is ready, it enters into force when the transition comes to an end.

Before concluding, just a final word on a very important topic for everyone, which is on preparedness and contingency planning. While taking the necessary steps for ratification – and we're all very much engaged in this process – it is important that all actors, citizens, private parties, Member States, public administrations, all continue to prepare for all eventualities. The European Commission at the request also of the European Council has produced a series of notices, sectorial notices, seventeen… around seventeen notices that explain all the actions that need to be taken in all possible scenarios. At all levels. This is where we are at today. I think good progress has been made, and last Sunday's extraordinary Council was a good step forward, but we're obviously very mindful that the road ahead can still be very long, and can still be very difficult, and very bumpy.

# CAN BREXIT BE STOPPED? THE *MILLER* CASE

Fergus Randolph QC

Sorry, I don't want to be rude, but I've got so many papers, that it's happier and easier to have a lectern. Thank you. Monsieur le Juge, membres du UAE, Mesdames, Messieurs, je suis très content d'être ici, en tant qu' avocat britannique, d'avoir la possibilité de parler sur la perspective du Royaume-Uni sur Brexit. Quelle sujet! Well, I'm going to switch to English now. Because… I think that's probably going to be easier for you. Very interesting to hear my Spanish colleague, throw me what Americans would call a curve ball, about Gibraltar, I didn't think I'm going to mention that right now, except to say this: on Sunday the withdrawal agreement didn't actually have to be voted on by unanimity, it was a super qualified majority, so actually we could, have we wanted to, have said "thank you very much, Spain, but actually we are going to move on without you". But, of course, we don't want to do that, cause we're great friends with our Spanish colleagues, and I'm sure that we will organize something sensible about Gibraltar, to the benefit of both.

I'm going to talk, in the twenty minutes that are available to me, about the Miller case, which is really important, because it's about Parliament's role in dealing with the Brexit process, and in particular this, this is not the five hundred and eighty-five page document that Joana was talking about, this is something that's in force now, and it essentially looks at Brexit from a domestic position, and that's going to be my second topic, and then I'm going to very shortly look at Brexit and being stopped,

particularly by reference to the Article 50, primarily referenced from the Scottish Court. I'm not going to deal with the White Paper, which is otherwise known as the Chequers Agreement, because the minute that came out it was essentially dead, not least because the Brexit Secretary resigned the next day, as did our then Foreign Secretary Boris Johnson. That has been overtaken by events, as we have seen from Sunday. So, as I think was mentioned, the vote on that agreement will take place on the 11th, and I think Bernardo is going to be talking about, soft, hard, BRINO, and all sorts of other interesting acronyms, for what it's worth, I don't think it will pass first time, it may pass on a second vote, I think it's super unlikely that it will pass by the Council meeting on the 13th of December, but we'll see.

Just one point in terms of the political declaration, they say that they're looking forward, or both parties are looking forward to a meaningful and deep relationship, by way of a free trade agreement, that's fine. Actually, buried away is a very interesting description, they said that agreement can be by way of an association agreement. Now this is something that the European Parliament has been saying for about a year and a half. And it's something that I entirely agree with, the Ukraine-EU agreement is a very good example of that, but you can't actually slightly pick and choose, but that would be putting the UK negotiators in front of themselves, so to speak, so it's a watch this space.

So, Miller, why is that important? Gina Miller is quite an amazing woman, she came from an interesting background, she is half Guyanese, and her father was the attorney-general in Guyana, and he wanted to uphold the law very much, and for that he received death threats, now wind forward thirty years, and Gina Miller has been receiving death threats, both herself and her children, because of the stance she took over Brexit. Which shows how toxic the atmosphere is in the UK. Now the question she got to have asked and decided by the English Courts was whether the Article 50 notice, which hadn't been given at the time of her court

cases, could be given without prior parliamentary authorisation. Now, it was the Government's position, surprise, surprise!, that "yes, of course, you could give Article 50 notice" without such authorisation, in other words handing in the letter to the President of the European Council, or the Council of Ministers, not a problem, because that would be by use of prerogative powers, we call the royal prerogative. Now, the problem with that is that it is a well-known facet of English law, that prerogative powers can't be used to change domestic UK law. Now, somehow the Government suggested that by giving Article 50 notice, that somehow wouldn't change UK domestic law. Well, I'm not quite sure how that worked, and in fact it didn't work. At a divisional court level, the judges, two judges, very important judges, ruled against the Government, and the Government appealed to the Supreme Court, and they lost eight to three, saying that the Government had to give Parliament the opportunity to authorize the Article 50 notice. There are also devolution issues, important devolution issues, they added to the arguments that were being put by or on behalf of Mrs. Miller, effectively on the basis of something called the Sewel Convention, which is that the UK Parliament would not normally engage in exercising its power to legislate on devolved matters, and this would be a devolved matter, without their consent. Sadly for them, they lost on that, unanimously, but the overall battle was won. And accordingly… so that was in, I think, January of… yes, it was on the 24th of January of last year, so 2017, and so the UK Parliament had to pass an act of Parliament, and that's called the EU (Notification of Withdrawal) Act 2017, before the Article 50 notice could be given, it was very short, it was like two paragraphs.

Now, just a little something – the civil servants must have loved this. Why the 29th of March? Literally no idea, but if you look at what the first working day after the 29th of march is, you get to the 1st of April, so it's April Fools' Day, we will be in working mode as a third country, so I'm sure someone, somewhere in the civil service thought that was very amusing. Well, or maybe the Prime Minister did, but somehow I kind of doubt that.

So, we come to this, so we've given the notice, we had two years to go, we hadn't really got a plan, so maybe not a good idea, but we are where we are. This Act of Parliament actually is well drafted by the parliamentary draftsmen, it passed on the 26th of June 2018, it was subjected to a variety of amendments, and debates going on into the middle of the night. This, just in case, I'm sure you will have it, and you want to read it, if you haven't read it, by your bedside, you have to bear in mind what happens on Sunday, it has to be read in the light of that agreement assuming it is ratified, in respect of say the jurisdiction of the Court of Justice, which became a very toxic issue in the UK, and challenges to the validity of something called retained EU law, which is a brand new corpus of law, I'll come to that in a moment. That's all got to be read in the light of the EU-UK withdrawal agreement, because this Act essentially says that as of Brexit day, which is the 29th of March, or rather the 30th of March, one minute past midnight, European time, then the jurisdiction of the CJEU will disappear.

The key points in terms of this Act of Parliament, it repeals, obviously, the European Community Act, 1972, which is the way we entered into the membership of the European Union, it transforms the European *acquis*, which we heard about, into domestic law, as of the day of Brexit, or just before. Note, just in passing, the Brexit day is defined in section 20 of the act, as the 29th of March, 11 p.m., our time, but that can be amended. So, it will be quite interesting if there is an extension from our European colleagues of Brexit day, then that will obviously all could be amended.

After Brexit day, whenever that is, the UK courts won't be bound by decisions of the CJEU, and no preliminary references after Brexit day. However, UK courts can have regard to decisions of the CJEU, can have regard to the CJEU and all the Commission points on preliminary references, the UK-EU withdrawal agreement makes it absolutely clear that during the implementation period you'll be entitled to make references whenever you like, even if the Court doesn't come to a decision

on it until afterwards. So, anytime up to the 31st of December 2020, and that can be extended for two years, anytime up to the end of the transition period the Court of Justice will have jurisdiction. But of course that depends on the UK, or the EU-UK withdrawal agreement being ratified, and that is what Bernardo is going to be talking about, hard, soft, and BRINO.

Questions as to the validity and meaning of retained EU laws, that's all EU law, either in the form of adopted UK legislation based on EU directives, or indeed EU regulations, which have direct applicability in English law, they're all retained. If they are unmodified, at a Brexit day, that would be decided by the UK courts in accordance with retained case law, either domestic or EU, in accordance with the retained general principles of EU law. So that's all fine, but the Supreme Court is not bound by any retained EU law. So, it can say, "well, actually no, I don't really like what's being suggested", and say "we're not going to follow it". But it would have to be on the same basis as it would exercise when overturning its own case law. So, there has to be a very good reason for doing that. Ministers can use what they call Henry VIII powers, so they can amend EU retained law, where there is a perceived deficiency, now that is very vague, and we're quite worried that the EU *acquis* that's been brought into the UK law will somehow be affected.

Small point for Northern Ireland, that hasn't been pictured, apart from by Kenneth Clarke in 2017, I have found this amazing, it's section 10. 2. b), it's kind of sad that I know that, but it's the way it is, it says: no regulations may be made which, and I quote, "create or facilitate border arrangements between Northern Ireland and the Republic after exit day which feature physical infrastructure, including border posts or checks and controls which didn't exist before exit day, and aren't in accordance with any agreement between the UK and the EU". Now that, to me, gets over this whole idea of a hard border. So, I'm not quite sure why the Prime

Minister didn't go flagging section 10. 2. b) around, but doubtless, she had her own reasons for doing that.

I think I can skip through because of time. Interesting enough it's Schedule (1), it's actually really important. Normally you'd think, "oh, I got to the end of the twenty-five sections in here, that's it, and the schedules are very boring", no, they're not. There's going to be no right of action on or after Brexit day, based on a failure to comply with the general principles of EU law. There will be no court or tribunal or public authority having the ability to disapply or quash any enactment or other law, on the basis that it's unlawful, because it's incompatible with any general principles of the EU law. All these things you can do at the moment, and specifically, interesting enough, I mean, it's the first time in an UK Act of Parliament a EU judgment is actually mentioned by name, there is no right in domestic law, on or after Brexit day, in accordance with the rule, or to damages in accordance with the rule in Francovich, now we all know the Francovich Judgment, incredibly important, wonderful way of making sure that the Member States actually comply with EU law, and that's been taken away just like that.

So, that's this, obviously it has got to be read in the light of what Joana was talking about. Can Brexit be stopped? This is rather more Bernardo's area, in terms of BRINO, soft and hard, or anything else, for that matter, but this… it's obviously very political in terms of second referendum, and I'm not going to go into that. The point this goes to is a single point, and it's in relation to the Article 50 challenge, so a bit like Mrs. Miller, and I started with Mrs. Miller, talking about whether the Parliament has the power to authorise it, and the Government must wait for that authorization before giving the notice. This case called Wightman, and he was a… he is a Scottish MEP, and there were a whole bunch of people with him, he went to Scotland, or he is Scottish, and went to the Scottish courts, because he knew full well he'd get a better hearing in Scotland on this than he would in an English court, and I put a bet on that had he

gone to an English court, he probably wouldn't have got the reference, and the reference was this, the question: where, in accordance with Article 50 of the treaty, a Member State has notified the European Council of its intention to withdraw from the European Union, does EU law permit that notice to be revoked unilaterally by the notifying Member State? And if so, subject to what conditions. Obviously really important, because to the remainers, the non-Brexiteers, if… it could be… if the political situation was such that the Government were willing, somehow, a new Government probably, were willing to withdraw, then it could do so unilaterally, without having to have the agreement from the other twenty-seven Member States. Will still be a Member State, at this stage, it would have to be withdrawn prior to Brexit day.

The UK Government were so upset by the fact that a Scottish court had the temerity to refer this rather important question to the Court of Justice, that it sought permission to appeal. Now it put in hundreds of pages in its application for permission to appeal, rather charmingly, to the Supreme Court. Rather charmingly the Supreme Court spent six paragraphs, six short paragraphs, saying "No. You can't have permission", because of a very simple Scottish provision, which probably the UK Government didn't know about. But anyway, I can't possibly comment, but anyway, they didn't get that, so it goes ahead, unsurprisingly, the President of the European Court of Justice, Koen Lenaerts, ordered that there should be expedited procedure, and the oral hearing was held on Tuesday. I wasn't there, there wasn't, as far as I'm aware, livestream, but I saw some of the arguments, and unfortunately for Mr. Wightman and his colleagues, the European Council representative, who's interestingly called Hubert Legal, so that's very nice to him, lucky he didn't become a dustman, but anyway, he's a lawyer, so that's very good, he said "no, I'm sorry, you've got to have the agreement of the twenty-seven", he said, in terms there is no parallelism between the right to notify and the right to take back, national processes cannot suffice to pull the carpet on which everyone has been forced to stand. And the court set *en banc* with all the

judges, including the British judge, Judge Vajda, and the president of the court said it was a Madison moment – reference to a key US Supreme Court decision – something he said before, in the past, in public speeches. Actually, the commentary thereafter was interesting, because they said he should have said it more like a Van Gend en Loos moment, and I tend to agree with that, because without Van Gend en Loos none of us really would be here and the EU Treaty wouldn't have direct effect, it would just be a straight forward international treaty. The Advocates General's opinion will be handed down on the 4th of December, so very quickly, and presumably the Court will try to get this judgment out before the Christmas break on the 17th of December. And to wind up, if I were a betting man, I'd probably think that the question will be answered in the form of "no, it has to be by both parties", which will be disappointing, but I think we have to live with that, but we never know, and I'm sure President Lenaerts and his colleagues are thinking deeply about it as we speak.

Thank you very much indeed.

# BREXIT AND IRELAND

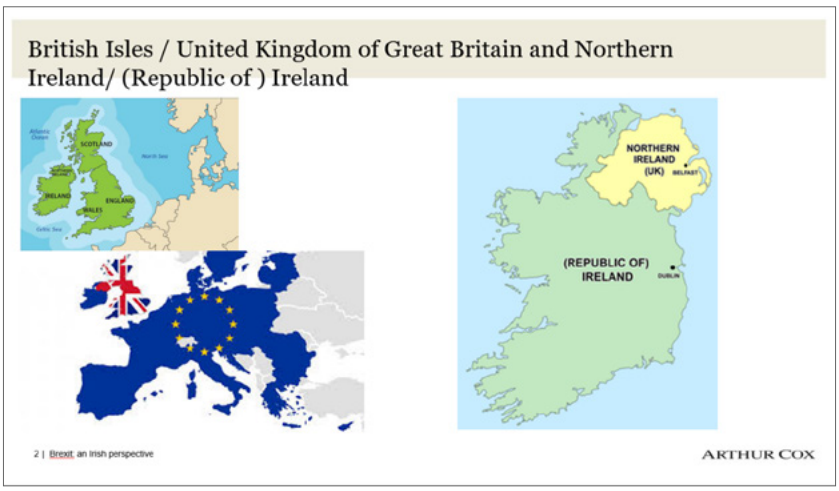
Florence Loric

Merci. Merci de m'avoir, merci à tous. As you probably can hear from my accent, I am French, and I was very honoured to be asked to present on the Irish perspective on Brexit. I have been living in Ireland for the past sixteen years, I'm married to an Irish man, it's the reason why I am living in Dublin. I have three children who are very Irish, so hopefully these are sufficient credentials to justify my talking about the Irish perspective on Brexit.

In many ways it's very easy to summarise the Irish perspective on Brexit: there is very little to gain, and so much to lose. Many people might have thought that Ireland had a lot to gain, and that Dublin would become a new London, but I do not believe that this is going to be the case, and I would like to spend the fifteen minutes that I have been allocated to explain why it is really close to a tragedy for Ireland that the UK is leaving the European Union. And that is the case from both an economic perspective, but maybe more importantly from a historical and political perspective. So, with the UK leaving, Ireland loses a strong ally in the EU, reflecting the fact that Ireland and the UK have a lot in common. Ireland and the UK have a common language, they have a common travel area, a common law-based legal system, which has been very important in the context of EU membership. And then a significant degree of commonality, from a cultural perspective, and in terms of consumer taste, which has a very significant impact on trade issues. Much of this commonality is a product of a very tumultuous past, which common belonging to the European Union has allowed to sometimes resolve, certainly appease,

dissensions between Ireland and the UK, by removing their grounds of expression. Brexit risks bringing this to an end, by reintroducing a hard border not only between Ireland and the UK but most importantly within the island of Ireland.

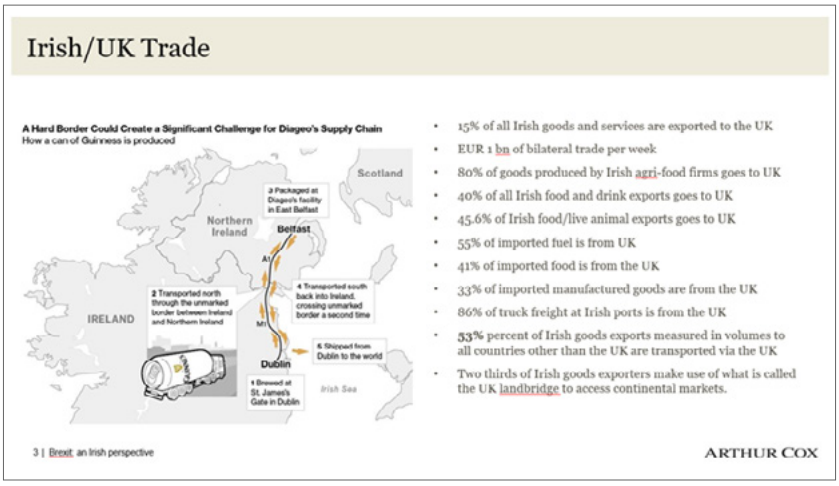
And it may be useful to clarify certain appellations here, and I have a slide with three maps, and I'm sorry if I am stating the obvious but my experience of when I travel to France, or to other European countries, is that people actually do not understand the difference between what is Ireland, what is UK, what is Northern Ireland, so it would be helpful to go through that. So forgive me if it's all very obvious.




So, the first slide, the first map shows the British Isles, which is a denomination that is geographic, rather than political. The British Isles hold two States, one of them is the Republic of Ireland, and the other one is the United Kingdom of Great Britain and Northern Ireland. This only goes back, actually, only to 1922, but we'll come back to that. The map below – with a pretty European flag and a Union Jack one – shows how much a periphery Ireland really is, and how Great Britain is really,

you know, a critical link between Ireland and the European Union, on a geographic basis, and this does have also an impact on discussions on the border. And then finally this map here to the right is a map that shows a political border between what is the Republic of Ireland, one of the twenty-eight Member States, and the United Kingdom of Great Britain and Northern Ireland, which includes Scotland, Wales and Northern Ireland.

So, the resurgence of a hard border on the island of Ireland is not the only concern of course. The existence of a border generally with the UK, including one which runs in the Irish Sea, has potentially dramatic commercial implications for Ireland. I think in the European Union, the European Commission, but in fact also most commentators, recognize that Ireland is uniquely affected among Member States in terms of the impact on this trade. And I think a few numbers may help assess the extent of the problem, and I have another slide there.




So, I have put some numbers here which can tell you about the importance of trade between Ireland and the UK. Fifteen percent of all

Irish goods and services are exported to the UK, and Ireland is equally dependent on the UK imports, which makes Ireland unique, again, in the EU. At the sectoral level is even more pronounced, in the agri-food sector, which is very important also, because it concerns rural Ireland as opposed to Dublin which is much more concerned with financial services and so on. So, in the agri-food sector, on average forty-seven percent of beef is produced to be exported for UK consumption, sixty percent of cheese (I should say cheddar). And ninety percent for mushrooms. So, it exposes local businesses very much to Brexit as well, which is a very political issue in Ireland.

And then finally, fifty-three percent of Irish goods' exports measured in all volumes, to all countries, not only the UK, are transported via the UK. And two thirds of Irish goods' exporters make use of what we call the UK landbridge. So, again, critical to the Irish perspective on Brexit is a fact that we are very much at the periphery of Europe, and the UK has been one of the means of access to the continent, for the Irish. And then… in many instances, in particular in the all-important agri-food businesses, trade relies on highly integrated food supply chains, and that is actually brought between the isle of Ireland and the UK, but also maybe more importantly, from a political perspective, through the island of Ireland.

The little map that shows how much, actually we can't really see quite clearly, but it basically shows all the traffic that there is between Dublin and Belfast, to produce cans of Guinness to be exported to all the Europeans, and across the world, and… not only the ingredients for a can of Guinness come from all over the island of Ireland, but there is actually a lot of transport in the process between Belfast and Dublin, so that thirteen thousand annual beer-related invisible border crossing takes place. Having a hard border between Ireland and Norther Ireland would add thirty to sixty minutes to the process, which would cost an additional hundred Euros per journey, and the annual cost would be one point three million Euros to the cost of production of one plant.

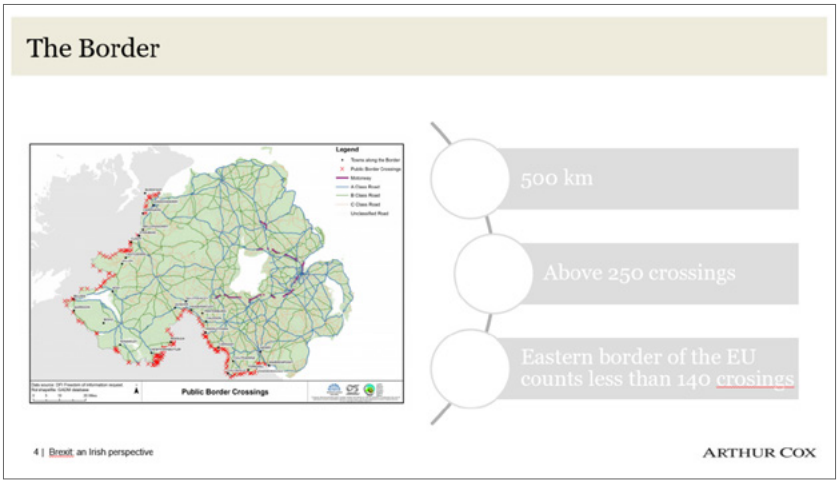
Of course, I'm only talking here about Guinness, so you can imagine how very significant the impact of Brexit and a hard border would be on the economy of Ireland.

So, this explains the importance not only of the discussion around the customs union, but also the regulatory alignment on the island of Ireland. And if I can actually mention something that Fergus said about section 10. 2. b), namely that the UK agreed not to set up hard physical border infrastructure, yes, that's great, but that's not the only problem, because unfortunately, with Brexit there will be now an external border of the European Union, which will run through the only land border of Ireland, and it is not so much what the UK wants to do, it's the fact that the European Union needs to protect its border, and that unfortunately… I cannot see how the European Union could be more relaxed because the UK said "oh, we are not going to do anything that you don't like", than it is in respect of the Eastern borders of the European Union. So, I don't think section 10. 2. b) is really the answer to that, regrettably.

And, so, where am I now…? So, I think that what it is critical to understand, is that in addition to the potential trade impact, and the likely economic disastrous impact of Brexit on Ireland, when it comes to Northern Ireland, trade is definitely not all, and politics plays a huge importance. Now, I'm French, so I don't have the natural diplomacy of my Irish colleagues, so I'm going to try to keep it as diplomatic as I can, but sometimes, I have to say, my blood boils when it comes to the Northern Irish issue, and of what is going on, and has been going on as a result of Brexit. So, in particular Brexit means reintroducing visible, meaningful border. And it calls into question a very fragile compromise that was put in place by the Good Friday agreement back on the 10th of April 1998. And the Good Friday agreement is an international agreement between Ireland and the United Kingdom, but it actually pretty much assumes that Ireland and the UK are members of the European Union, and really facilitates the peace process. To take away the membership of one of

the two countries is really fragilizing the Good Friday agreement, the arrangements, to a very significant extent.

But maybe in order to understand why there is a divided Ireland, and why is the Irish border such an issue, I think that it's impossible to understand that without going back to history. And I think I have another slide there.




Actually, let us talk first some more about the border itself – it is important to understand that the border is five hundred kilometres, so it's a very large border for such a small island. It is not… it isn't just the top of, you know, of Norther Ireland, it's really… it runs down, and then it goes East. It's five hundred kilometres, it's impossible to count the number of crossings. There's actually been a commission that has tried to do that, and they… I've read so many different numbers, the only thing that I know is that there is at least one hundred and eight public crossings, but that doesn't include all private roads, and actually all the crossings that have been counted yet. And by comparison, my understanding is that on the Eastern border of the European Union there are only hundred and forty-seven crossings. On a much, you know,

bigger scale. So, the Irish border is just, you know, a very big problem. All the little red crosses that you see are actually public crossings, there are means of acceding into the… from Northern Ireland to the Republic and vice versa. And… it actually goes… it winds in and out and so on. So, it is a very difficult border to manage.


Invaders came first to Celtic Ireland from the East with the Vikings in 795, and then the Norman French rulers in England, in the person of Strongbow in 1169. However, in both instances, the invaders assimilated very quickly with the Irish Gaels. By the end of the 15th century the English crown only ruled in Ireland a small area around Dublin, known as the Pale. So, invaders came first to Celtic Ireland from East, with the Viking, in 795, and then the Norman French rulers in England came to Ireland in fact at the invitation of an Irish king, to help solve a dispute with other Irish kings (there were a lot of disputes among the Irish kings at the time!). So, Strongbow (the second man there, second picture there) came. In both instances, both with the Vikings and the Normans, the invaders assimilated very quickly with the Irish Gaels – so much so that some historians say that one of the disasters, one of the reason for

the current situation is actually that Ireland was never fully conquered, especially at that time. England was busy, most of that time, dealing with trouble arising from its European neighbours, including France and Spain, and as a result Ireland was left on the side, the English sought control of Ireland sporadically but there was never complete control of Ireland. So much so that by the end of the 15th century the English only controlled a small area around Dublin known as the Pale.

This, however, was to change dramatically, and this is very important to understanding Brexit and the Northern Ireland question, I think, when the Tudors acceded to the throne, they came not only to control Dublin and the Pale but sought to control the entirety of Ireland. And in addition to that, when Ireland had been catholic for a few centuries already, the Tudors introduced, or tried to introduce the Reformation in Ireland. Introducing the Reform did not work, but the policy of extending the rule beyond the Pale met a lot of resistance from the Celtic or the Irish lords and the Normans, and especially, actually funny enough, from Ulster, from Northern Ireland. However, it was eventually successfully completed in 1601 with the Battle of Kinsale which saw the defeat of the Ulster lords and their Spanish allies. Over the years following Kinsale, all the leaders, the lords, more than 90 men, eventually left Ireland leaving Ulster leaderless. This "Flight of the Earls" was seized upon by the English crown to resolve once and for all the problem of Ireland's chief trouble spot, by a plantation. It's that, the red hand there.

The Ulster plantation is a confiscation of an enormous amount of land in Northern Ireland, and granting it to people on the condition that they would be planted by Protestants. The Ulster plantation was very, very successful, it was based on the principles that if the Irish would not become Protestant, then Protestants had to be brought to Ireland.

Scottish settlers and their descendants remained a people apart on the island of Ireland and today continue to live, many commentators say,

in a state of physical and mental siege, much attached to "the precious Union". And, you know, this is very concrete, this is what the DUP, which is the party of Arlene Foster, which gave Theresa May a majority in the United Kingdom Parliament, actually think, that they are under siege and they think that they need to defend themselves. To think that she and her party may hold the key to a withdrawal agreement does not make one hopeful.

At the end of the 19th century and early 20th century there were many attempts in Parliament to establish Home Rule within Ireland (as opposed to being ruled by Westminster), much however to the opposition of the Northern Irish protestants. The Irish border was originally intended as an internal border within the United Kingdom of Great Britain and Ireland with separate parliaments for Southern Ireland and Northern Ireland, in order to ensure that protestants in Northern Ireland would remain the majority and not become a minority in an otherwise overwhelmingly Catholic all-island Ireland.

This was never to pass – following the Easter Rising of 1916 in Dublin, a separatist Irish parliament was established in Dublin, and the Irish War of Independence ensued. The conclusion of the Irish War of Independence, and the subsequent signing of the Anglo-Irish Treaty, led to the creation of the Irish Free State on 6 December 1922, excluding six counties of Ulster with a Protestant majority. The Treaty led to a Civil War in Ireland between the pro- and anti-Treaty (who wanted an all island independent Ireland, not an Ireland without six counties of Ulster).

The Irish Free State was renamed Ireland (Éire in the Irish language) by the 1937 constitution, and became a republic in 1949. Meanwhile in Northern Ireland controls of all institutions by protestants unionists/loyalists manifested in discrimination against Catholics and what came to be known as "the Troubles". The Troubles were only resolved with the Good Friday Agreement of 10 April 1998, which brought

peace to the Ireland. With the Good Friday agreement, Ireland accepted to renounce its territorial claim over Northern Ireland, it was also agreed that there would be free movement of people between Northern Ireland and Ireland, Northern Irish citizen can choose to be both, United Kingdom citizen, as well as Irish citizen, and that a United Ireland could only come about by decision of the people through referendum.

As I was saying in the beginning, this was facilitated by the common membership of the European Union. To re-introduce a hard border means that there is a chance that all the troubles in the north will be reignited… This really is what informs the Irish perspective on Brexit. What the Irish I believe want to say to the United Kingdom is, "please don't go, and stay in the Union".

# SOFT, HARD OR NO DEAL BREXIT: THE EU AND THE ATLANTIC DIMENSION OF BREXIT

Bernardo Ivo Cruz

Let me start by thanking you for the invitation to be here with you today, and I here by "apologise" but I'm not a lawyer. Probably me and Joana are the only non-lawyers in the room and I'm going to use my non-lawyer capacity to try to look into the future of Brexit.

I would like to start by two disclaimers. Firstly, I've lived in the UK for many, many years, and two of my careers are very much connected to the UK, and to the British Government. When I did my PhD in Bristol I received a scholarship from the British Government and when I created a small company and decided to move it to the UK, I got all the support that I could imagine from the British Government. I'm very much involved and in debt with the British.

The second disclaimer that I'd like to do is that I was in the UK during the referendum, my company signed the two letters that were published in The Times against the referendum, and I got a really nice quote in The Sun, saying that I was one of the foreigners meddling where I shouldn't! But, as a friend of mine said, if you are mentioned in The Times and

insulted in The Sun, is better than being mentioned in The Sun, and insulted in The Times...

I'll try to avoid that these two disclaimers become apparent during my comments.

I'm going to pick up where Fergus didn't go, namely what we're looking at currently in the British debate on Brexit. There are three, possible four, scenarios that we could consider. The three scenarios are hard Brexit, soft Brexit or no Brexit at all. And I'm going to start with the no Brexit at all, because two weeks ago or a month ago, if anyone would say that we could have a second referendum on the possibility of a no Brexit, I would dismiss this as a dream. Not today. It's very difficult, it's very improbable, but it's not absolutely out of the card anymore. There was a massive demonstration in London a couple of weeks ago, seven hundred thousand people marching for a second referendum, there's growing consensus, growing support in Parliament, outside Parliament, for the possibility of a second referendum, so no Brexit at all becomes again a possible scenario, albeit a very distant and difficult one and that would require a new law entitling the referendum, a new referendum with questions that nobody knows exactly what they would be. Would be "yes to Mrs. May deal", "no to Mrs. May deal", "yes to stay in the Union", or "get out of the Union with another deal"? Whatsoever the questions, there are lots of question marks, but what I'd like to underline here is that no Brexit became a possibility all off the sudden in the last fortnight or something.

The second possibility is a hard Brexit, which is to get out of the European Union with no deal. The Conservative party has an internal rule that says that if fifteen percent of its members write an individual letter to the party, a challenge to the leadership starts automatically. For the all-time of the negotiations, the hard Brexitiers in the Tory Party were arguing that they commanded the magic number of fifteen percent that would support a challenge to Mrs. May. But when they asked for

the forty-eight letters, only twenty-four, or twenty-six showed up. nonetheless, the plan of the Hard Brexetiers is to generate enough trouble in the process to make to BREXIT day without an agreement.

We should also consider the third possibility, the soft Brexit, which is basically what Parliament wants. If you look at the arithmetic of Parliament, consider all the parties, and all the MP, and also the Lords, Parliament would support a soft Brexit. The way that the rules are made, it will depend on what the Speaker of the House of Commons will decide on January. On the 11th of December the withdrawal agreement and the political declaration will come to a vote, as Fergus mentioned probably will not pass, and then we have fifteen days to try to sort this out. One of the things that can happen is proposals to change the legislation and the discussion may be presented to Parliament by members of the House of Commons. The Speaker of the House, then, will have the very difficult task of choosing which amendments will actually be discussed. So, he will choose if we're going to discuss a no Brexit, a hard Brexit, a soft Brexit, whatever Brexit we will talk. At the moment, everybody who has anything to say about this are strategising to see which six amendments will be presented to the Speaker of the House, for debate after December 11th. That's where we are.

Now let's look, or try to look a bit into the future. Brexit has many features, one of them is it created an all new vocabulary. One new word is BRINO, which is Brexit In Name Only, another one is BREXODUS, which is the European Union citizens leaving the UK. Let's look at BRINO, and see where we are. The London School of Economics published a table that identifies different options, and different outcomes to Brexit. You have the WTO on one corner, and the EU membership on the other corner. And in the middle you have many variations on the subject under the heading of EFTA variations.

Bear in mind that everybody agrees in the UK that the result of the referendum is to take back control, as Mrs. May keeps saying, of laws, money and borders. So that's what the British electorate said to Parliament, "we want you to take back control of our laws, so no more European Court of Justice; of our borders, no more freedom of movement of citizens; and our money, no more sending payments to the European Union". But within that scope of taking back control of law, borders and money, if you look at the EFTA plus Lichtenstein, that was designed because Lichtenstein is very, very, very small, the decision was made in the European Economic Area Agreement that Lichtenstein could negotiate with the Commission and European Union to stop freedom of movement of people.

Therefore, if you look at EFTA plus Lichtenstein, you will have basically almost the three red lines of the British Government. You'll have free movement of goods, yes, everybody wants that, you'll have free movement of services, which you don't have in the original EFTA or the WTO, you will have control of immigration subjects to agreement with European Union, the only thing that you don't have in the three red lines is you have to contribute to the budget of the European Union.

Another possibility within EFTA is the Norway model that is it's almost identical to the EU membership. The only difference is, and something that is really relevant to the UK, if you are a Member State of the European Union, you cannot negotiate your own free trade deals across the world, and if you are a member of EFTA Norway you can negotiate those deals, and that is very important for the political discourse of Brexit in the UK. But everything else is exactly the same, with one big, enormous, difference, is that if you are a Member State, as Fergus mentioned, you have a say in negotiations, and you have a say in decision making, and if you're a member of ETA, you will have to take everything that the European Union decides, without having that role.

So, looking into the future, and taking advantage of being a political scientist and not a lawyer, I would say that we will probably end somewhere in EFTA. Now, which EFTA we're going to end up, your guess is as good as mine. No one, I think, would at the moment be able to say where we would end. But I would bet that Mrs. May will lose the vote on the 11th, and we will end up some point between EFTA only close to WTO, and EFTA Norway close to EU membership without voting.

Now, I'd like to look at another side of Brexit, very quickly, which is what happens after Brexit. After the UK leaves where are we going to be? I'm going to use Portugal as my case study, not only because I'm Portuguese, but because we're all her in Lisbon, I'm going to use Portugal as the case study for the point I'm trying to make.

When Portugal joined the European Union, in 1986, the sit of power of the European Union was somewhere between France, Germany and the United Kingdom, Northern Italy. With the first enlargement to the northern dimension of the European Union, and Austria, that didn't change. The only thing that changed, in fact, was there was more money available for poor countries, so everybody was very happy about that. When the 2004 enlargement came about, the need of the new Member States shifted the centre of politics and money and attention on the European Union from the border between France and Germany to somewhere eastwards, let's say within Germany. There was much more attention payed to the new Member States, and they needed that attention. At the time Portuguese Prime Minister, Mr. Guterres, who is now the Secretary-General of the UN, when asked by the Portuguese Parliament what will Portugal do about this new enlargement, where many more poor countries will come in, and the money will not grow exponentially. He said it would be shameful of us if after enjoying the benefits of membership for so many years, we would not extend the same benefits to the new Member States that came out of the Soviet Union

block. Thus the 2004 enlargement meant that the centre of power moved eastwards.

My argument is, without the UK, which is the key element in a western perspective of the European Union, the centre of power in the European Union will move again eastwards. If you want to keep the same metaphor, we will see the border going somewhere from the heart of Germany to the border between Germany and Poland. A study by the Open Democracy shows as much: without the UK, the concentration of power, decision making, budget and attention in the EU will move eastwards.

Taking Portugal as our case study, countries in the western side of the European Union, in particular Portugal, an Atlantic country, will find itself, if nothing is done, on the periphery of the European Union. Everything will move eastwards, and we will remain as an Atlantic country, on the borders of the European Union.

I'd like to argue, and using again Portugal as our case study, that we need – we here in Portugal, here in Lisbon – we need to reinforce the Atlantic dimension of the European Union and Portugal as a key element of that Atlantic dimension, needs to bring the Atlantic back into the European Union. If you take into consideration that today there's more money from the European Union to projects in the Black Sea than on the all Atlantic, you'll understand that already today there's an unbalanced policy approach to the Atlantic versus the continental side of the European Union. I would argue that Portugal could play a role in this new Atlantic dimension of the European Union, and I would point out nine dimensions that Portugal could play, being important in the Atlantic thus being important in the European Union, and being relevant in the European Union thus being important in the Atlantic:

1) There's the national dimension. I don't know if many of you know, but Portugal is going through the process of enlarging its continental

platform in the UN as we speak, and if that processes goes thought, Portugal will be responsible for half of the North Atlantic, due to the geographic position of The Azores. In fact, the area of sea that will fold under Portuguese control is roughly the same distance from Lisbon to Moscow;

2) There's the European Union dimension of the Atlantic, which includes, after Brexit Ireland, France, Spain and Portugal, the four countries that the European Union has identified as being the Atlantic side of the EU;

3) The bilateral relations between Portugal and the UK, and the Portuguese Foreign Minister has announced recently that after Brexit we will start immediately a negotiation, a bilateral treaty negotiation between Portugal and the UK, to reinforce our bilateral links;

4) The eastern dimension of the Atlantic, namely the initiative from China. The Chinese Government has launched, as I'm sure you all know, an enormous initiative to link China to Western Europe by road and by sea. At the moment by road is supposed to end in Madrid, and by sea in Greece; there's negotiations going on between Portugal and China to close both roads in Sines, a natural deep water port, in the south of Portugal. That would bring the land road and the sea road together into Sines, and open to the Atlantic;

5) There's the Portuguese speaking countries community, which are all of them maritime, most of them are Atlantic;

6) The Iberic-American communities of which Portugal and Spain are both members, and the key country in Latin America which is Brazil;

7) The defense dimension, with NATO and the Atlantic dimension;

8) The Portuguese community abroad (roughly one third of the Portuguese live abroad) and all over the world;

9) And finally, the economic and commercial dimension of the Atlantic.

Thank you so much for your attention.

## SECOND PANEL

# BREXIT AND THE LAW

## SECOND PANEL – BREXIT AND THE LAW

# OPENING REMARKS FROM THE MODERATOR

Pedro de Gouveia e Melo

Welcome back to the second session of this afternoon. Well, I'm not a family lawyer, but I am told that divorce proceedings are often complex, messy, protracted, and of uncertain result. So, if we would imagine a contentious divorce proceedings, involving a long marriage of forty-five years, sometimes with complicated moments, like all marriages, involving also a large family with twenty-eight members, all taking part in those proceedings, and many millions of both adult and little children, many of whom with a vocal participation in those proceedings as well. If we imagine also a multitude of immovable assets involved, and with one additional and very important complication: after the divorce the parties do not wish to go in their own separate lives, and restart their own separate ways, but wish to enter into a new relationship, that it's not called a marriage, which is looser, but still formal, that at the same time, as they now would announce, it's called close, ambitious and balanced. And also, the parties, well, none of the parties knows exactly how that relationship will turn out. This would probably be a very, very difficult court case. Well, fortunately this is only a product of my imagination, there's nothing to do with reality. Or maybe it does.

So, after this small simple example, let's turn to our second session that will be entitled Brexit and the Law. We will try to focus on a number of legal subjects that are of interest to Brexit. Because of the multitude

of the interesting subjects that we could treat we've chosen three. We've chosen first Brexit and justice, so the impact of Brexit in judicial corporation, both criminal and civil, and Rita Giannini will talk us about that. The second one will be Brexit and the practice of law, so the implications of Brexit for lawyers. That's very important for most of us, as we are lawyers, and that's going to be the talk of Nicole Hirst. And finally, maybe the key issue as we saw in the last session, involving free movement, the key issue for the UK, and for UK voters, free movements of people, that's going to be presented by Inês Quadros.

Just a brief presentation of the speakers. Rita Giannini works at the Joint Law Offices in Brussels. This office represents British solicitors who are members of law societies in England and Wales, Scotland and Northern Ireland. As the justice policy adviser her portfolio is quite varied covering all areas which are not related to commercial law, notably civil and criminal, procedure, family and succession, consumer, contract, etc. Before joining the Law Societies Office, Rita was a senior legal adviser at the European Parliament in Brussels. She holds a master's degree in jurisprudence from Florence University, and she is Italian, but she has lived in the UK for thirty years now, so a product of European integration, which, we hope, it will not disappear with Brexit.

Nicole is an English solicitor who practices in the city of London as a partner in Pini Franco LLP. She has accented experience in commercial litigation and dispute resolution, and in particular in intellectual property litigation matters. She maintains very close ties to Italy, where she grew up, and throughout her career has acted primarily for Italian and French speaking clients. She's also a trustee of charity organizations in the UK, and is a qualified fitness instructor, and therefore an example for many of us sedentary lawyers.

And Inês Quadros is a professor at the Católica Lisbon Law School here in Lisbon, and she has been a very good dear friend for many years. She

graduated, attained master's degree and a PhD at Católica. Her fields of research are mostly EU law, in particular internal market, citizenship in EU litigation, as well as public international law. Inês is currently a member of the board at the Católica Faculty of Law and also sits in the board of the Portuguese Association of European Law.

Presentations being made I would pass the word to Rita.

# THE IMPACT OF BREXIT ON JUDICIAL COOPERATION

Rita Giannini

I will use some slides, just as an aid memoire, because I could really probably talk for about three hours about all this, but I'll try to be as concise as possible. You can see under there a website address. That's the website of the Brussels Office of the Law Societies, where I work; we represent all British solicitors from the three jurisdictions, and you can find there, if you're interested, quite a lot of the things that I'll be talking about in terms of analysis and papers on these matters, because as solicitors, practitioners, what we look at and we are interested in are the practical consequences of Brexit. What Brexit, whatever Brexit is, means… we don't know yet, but whatever Brexit means, it will have consequences on the work of solicitors, on their clients, so therefore that's what we are looking at.

I'll concentrate on two specific areas, civil justice and criminal justice. And what I'm going to talk about is the political declaration. We have heard already about the withdrawal agreement; we don't know if it will happen or not, but what will happen for sure is a relationship between the UK and the EU, after the transition period or immediately on exit day. Nobody knows what the relationship will look like, but we have a political declaration, which is twenty-six pages, while the withdrawal agreement is over eighty-five; this declaration hints to the shape of the future relationship between the UK and the EU. It hints only, it doesn't say what this relationship will be, but at least gives an idea of what could be. It sets

out what will be included in the negotiations for this new relationship, and actually creates already a problem, as we will see in a minute, and indicates the future mechanisms of dispute resolution, including the role of the Court of Justice. So, even if it's only twenty-six pages, if it's very vague, but it already gives some idea of what is in the mind of these two groups of negotiators, UK and EU.

If we look at civil justice, we have for example family law. What is it going to happen in case there is no deal, or no further agreements after the transition period? Will the Hague Conventions be applicable? Which will be the national laws applicable? There might be the possibility of the application of bilateral treaties and conventions, which predate the EU membership of the UK, and there is also the possibility for the UK to have bilateral agreements with Member States, with the authorization of the Commission. There is a regulation of 2009, 664/2009, which allows Member States to conclude bilateral agreement, or even cluster agreement, with third countries in matters of parental responsibility and matrimonial matters, with the authorization of the Commission. So, therefore there is this possibility.

In the political declaration it says, at no. 58: "The parties will explore options for judicial cooperation in matrimonial, parental responsibility and other related matters". So, therefore there is already a provision that this is a matter which will be discussed and negotiated between the two parties. So that is a positive thing. But when we are talking about judicial cooperation on civil and commercial matters, it's a completely different question, because there is absolutely no mention of it in the political declaration. The EU seems to have linked the question of judicial cooperation in civil and commercial matters strictly and only on being a member of the single market. So, if you are not a member of the single market, you can forget about it. And this is really a big thing, because if Brussels I is not applicable anymore, recognition and enforcement of UK judgments in the EU will become more complicated and more expensive.

There is a possibility that if you have a choice of court agreement, the 2005 Hague Convention will still apply; the UK has already said that they want to accede the convention, they'll have to do a bit more work on it, but certainly it will be there. England and Wales, Scotland and Northern Ireland will go back to pre-existing common law rules for England and Wales – Scotland is a bit different – for recognition and enforcement of foreign judgements. And in the same way, EU and EEA States will go back to their own legislation, to their own law. And there are some countries in the EU which actually do not recognize foreign judgements at all, which means new proceedings in that country.

And what would happen is also that on this matter there can't be any bilateral agreements because it is EU competence, exclusive competence, and therefore there can't be separate agreements between the UK and one Member State. If there were previous agreements they might be resurrected, even if it's not that obvious, but there can't be any new one, and this creates a big problem.

The change of the relationship between the UK and EU will also affect many other fields of civil law. Let's take for example of the motor insurance directive, protection orders, the service of documents and taking of evidence. There are often Hague Conventions on these topics, so we can go down that road, but they are much less efficient than the EU instruments. So, it is a really a big problem. And we have been saying this for two years to the UK Government. I think they recognize the problem, but I think there is also a problem in the EU, that they see this only linked to the single market where we argue that this is not just the question of economics, it's a question of citizens' rights, it's a question of a small and medium enterprises, it's a question of consumer rights, which will be affected if there is no form of recognition and enforcement of judgements in the future.

The Lugano Convention is a possible solution to this conundrum; it is not as efficient as Brussels I, take the famous Italian torpedo which is still there, but certainly is a possibility, and again, the British Government has clearly said to us that they have the intension of joining Lugano. Unfortunately, they don't seem to have progressed enough, because the UK has to be invited to be a member of Lugano, and we haven't yet seen this invitation from any of the parties. We think – we hope – that the reason why Lugano is not mentioned at all in the political declaration, is that because it's an international instrument rather than an EU: but it's really a hope rather than a certainty. So, certainly it is a problem.

If we're talking about judicial cooperation in criminal matters, Joana, from the Commission office here, was making very positive noises about how much the political declaration contains on these matters. Unfortunately, I am not sure there is very much positive, in the sense that there is, as has been in the last two years, all the time, the indication that there is the will and the wish to have this relationship in terms of security and criminal justice, but not much more. The problem is that there are some quite big stumble blocks, and within the political declaration these stumble blocks are not actually solved in any way. So, let's say that there is no withdrawal agreement, therefore there is a hard Brexit. So, as far as the European Arrest Warrant, we go back to the 1957 Extradition Convention. And that really is a very big problem. It is an instrument which is old, which is based on diplomatic relationship rather than judicial cooperation: of course, nobody wants that, but no solution is envisaged. There is no access to Europol, to Eurojust, no passenger and name exchange, and no Prüm, no SIS, no ECRIS. And then, at that point, there would be a sort of painstaking process of trying to get back as a third country in Europol, possibly in Eurojust, and some access for data exchanges and so on.

Now, the political declaration does say that the parties should establish a broad comprehensive and balanced security partnership which should comprise law enforcement and judicial cooperation in criminal matters.

No. 82: "the future relationship will have to take into account the fact that the UK will be a non-Schengen third country that does not provide for the free movement of person". Access to SIS is gone. Even if the UK now has a limited access, because it's not Schengen member, for police purposes can access the SIS, the Schengen Information System. And no. 83 says: "the UK makes", and that is very, very important, "makes a commitment to respect the integrity of the Unions legal orders, such as with regard to alignments of rules and the mechanisms for disputes and enforcement including the role of the CJEU in the interpretation of the Union law". So, this might suggest that on these matters the UK is actually prepared to accept some form of respect of the judgements of the Court of Justice, or some form of access to the Court of Justice. Because when you say that the Court of Justice is the only interpreter of Union law, and if you are part of mechanisms which are derived from Union law, that means that you are in that system, and you have to respect the interpretation of the only interpreter of Union law, which is the Court of Justice.

The Political Declaration also says that regarding other mechanisms like the Passenger Name Record, Prüm and ECRIS, the arrangements might approximate those enabled by relevant Union mechanisms; so they are not the same, but they approximate, only so far as is technically and legally possible, and that is, again, something which makes me think that unless there is a broad recognition on the part of the United Kingdom of data protection, equivalence of the legislation data protection, and is not just GDPR, because the provision for exchange of data in the criminal field is a separate directive, so you have two different types of equivalence. And they don't have exactly the same parameters. For example, with this equivalence system, the Commission, the European Union can actually go into examining the law of the third country member, in this case the UK, to see if the law is compatible and respects all the parameters of human rights, defence, and the rights which are in the Charter.

There is some suggestion, again, if you read the political declaration, that maybe the UK remaining a party to the European Convention of Human Rights might be enough, even if they don't have the Charter, but it's not absolutely sure that it would work. For example, in the UK Investigatory Powers Act 2016, there is a so called Home Office exemption which removes a person›s rights as a data subject – their ability to access information or ask how it is being used – if satisfying them would prejudice «effective immigration control». So, the Home Office can refuse asylum, or can refuse residency, and the person doesn't have the right to have the data on which the Home Office based their decision. And that is certainly something that could be challenged on the basis of the Charter, and possibly even under basis of the Convention of Human Rights. Whatever the intention of UK and EU, legally the UK will not be able to have the same access to data, the same access to instruments in these fields as they have now, and they have to recognize that, and I am not absolutely sure that they have recognized it yet, but they will have to. It's the same with the Europol and Eurojust.

This is just to finish, free at last, who are we going to blame for our problems? Because that's the reality, I'm afraid. I do hope that it will not happen. I was on the march of the seven hundred thousand, I have my stickers "Bollocks to Brexit", so we'll see, but I'm still hopeful.

# BREXIT AND THE PRACTICE OF LAW

Nicole Hirst

Good afternoon. It's a real pleasure and honour to be speaking to you today in this beautiful city. Now, most of us in this room are practicing lawyers, and most of us – whether working for large firms, small firms, or whatever size – deal with an international, European or cross-border element. So, what's happening today with Brexit and the implications for our profession? I am going to give you a brief overview and introduction on where we are today, the principal EU directives, namely Directive 2005/36/EC regarding the recognition of professional qualifications in other Member States, and Directive 98/5/EC regarding the practice of the legal profession by EU lawyers in other Member States on a **permanent** basis. We talk a lot about free movement, which includes the free movement of services such as our profession. So, what is the position so far: the impact of the Withdrawal Agreement and, as we've heard, what if there is no deal?

From a UK perspective, legal services are one of the biggest British exports, worth almost 30 billion pounds a year. Therefore, very significant. There are approximately 700 Registered European Lawyers in England and Wales. Those Registered European Lawyers provide a full range of legal services on a **permanent** basis, including reserved legal services and the right to work as sole practitioners. So, what are the principal EU Directives: first, on a general front as to the mutual recognition of professions, there is Directive 2005/36/EC, regarding the recognition of

professional qualifications in other Member States. The spirit of those directives is obviously the right to pursue a profession, in a self-employed or employed capacity, in a Member State other than that in which one obtained or retained that profession qualification. Also, the Directive guarantees to individuals who acquired a professional qualification in another Member State, access to the same profession and to be able to pursue it in another Member State with the same rights as the other nationals. Ultimately, the objective is to facilitate the free provision of services.

Second, turning more specifically to lawyers and Directive 98/5/EC, which entitles a lawyer to practice on a permanent basis in an EU country other than that of qualification. What does the Directive do? It enables lawyers who qualify in one EU country to practice on a permanent basis in another Member State, with the same professional title. The Directive applies to all EU nationals authorised to practice, but the system also extends to nationals of EEA (European Economic Area) and Switzerland. So, what are the key points? The right to practice: those wishing to do so, must register with the competent authorities of the host EU country. As regards to the fields of activity, they may give advice on the law of both their home and host EU country, as well as on EU and international law.

With regard to legal proceedings – I myself am a litigation lawyer – if you are not qualified in the host country, you may be required to work in conjunction with a local lawyer. But the ultimate purpose is the **like treatment and equal standing of legal professionals**, and that is why lawyers from EU countries may also obtain the professional title in the host EU country on certain conditions. What are they? In essence, the lawyer must be active in effectively and regularly pursuing the activity in the law of the host Member State for a period of three years. After that, you are considered to have had sufficient practice in the law of the host country. For example, in my practice – we are very much an Anglo-Italian law firm, we have *avoccati* who have come from Italy and after three years

they can qualify as a solicitor, having had certain experience. Obviously, they must meet the requirements of having had sufficient experience, for example in administrative matters, compliance, Solicitors' Account Rules, litigation, conveyancing, professional conduct, so there is a whole range, but once they have done that and have the requisite experience in those areas, they are free to move, they are free to practice their profession.

The other aspect, as I mentioned, is professional conduct. Lawyers practising on a permanent basis in another EU country are, as you may know, still bound by its local professional conduct rules – for example, in the UK there is the SRA, the Solicitors' Code of Conduct – irrespective of the deontology of their home country. And similarly, as regards disciplinary procedures, lawyers practising under their home country professional title are also subject to the disciplinary procedures of the host EU country.

So those are the main Directives.

It's a really big freedom and firms working at an international level can operate in new jurisdictions through a branch of a UK firm. This is essential, as legal services have, as I mentioned earlier, an increasingly international and cross-border dimension. I worked for many years in a large international firm with offices all over the world, including in Milan, and I worked from there as a part of my normal practice, I'd go to Milan on a regular basis, the firm dealt with and had deals with a lot of Italian clients. The firm is called S*tudio Legale Associato*, but there were English qualified lawyers, solicitors, doing corporate work, M&As, etc., and you also had Italian *avvocati*, including those who did litigation, so a whole mix of work. Such scenario is a way of providing a legal professional service and meeting the clients' requirements. Linked to that is what I call the 'fly-in fly-out' service: as you know, law firms often have offices elsewhere, or they go and give advice to a client in another EU county, and that is permitted under Lawyers Services Directive 77/249/EEC. So, UK lawyers can serve the cross-border requirements of businesses and individuals

both from satellite offices in the EU, and on a 'fly-in fly-out' basis from their UK office. This is now part of the daily practice of many firms.

Finally, the UK lawyers' rights of audience across the EU courts, which so far we have: one important aspect of this is, for example, that legal profession privilege also applies to legal advice given by UK lawyers in European Commission investigations, and at the level of EUCJ. Another example is in the specific area of intellectual property, *e.g.*, in trade mark and design law, and trade mark and patent attorneys' rights of audience before the EU Intellectual Property Office – they have the right of representation and they represent their clients before the EUIPO. No problem, full rights of audience.

That is the position so far under these Directives, but what happens now with the Withdrawal Agreement? And there, I would make a slight observation that although it's called Withdrawal Agreement and the draft does contain some **post**-transition provisions, I think it is better termed as a "transition agreement", as it deals primarily with the **immediate** consequences of the UK's departure next March **during the transition period**. until the end of 2020 (or beyond that if an extension of that period is agreed), while the longer-term UK-EU relationship is negotiated. So, as I see it more as a transition agreement, this also applies to what's going to happen to the legal profession. What is the lawyer's position under the Withdrawal Agreement? Well, happily for the moment, the status quo is preserved throughout the transition period, in accordance with Articles 27 and 28 of the Withdrawal Agreement. So, for example, European lawyers who are already registered can keep on practising on a permanent basis. And Registered European Lawyers who apply during the transition period to became qualified solicitors, can still go on practising until a decision is made on their application. So, it's good news in that the status quo is being preserved. Again, even in my own firm, there are Italian a*vvocati,* who after practising for three years as Registered

European Lawyers, then qualify as solicitors. It is obviously a big relief to them, because they're 'home and dry' as it were.

Also, under Article 91 of the Withdrawal Agreement, UK lawyers will continue to have rights of audience in cases before the European Court commenced before the end of the transition period. Again, the status quo is also preserved as to rights of audience.

Now, the sixty-four-million-dollar question is what happens if there is **no deal**. That is the problem because in that case, the Directives regarding EEA lawyers will be revoked when the UK leaves, which as I mentioned is on 29th of March 2019, and so lawyers from other EU countries will only be able to practice in England and Wales under regulatory arrangements and under the rules that apply to lawyers for other third non-EU countries. Consequently, each other country will have their particular rules for admission as lawyers in their own country. For example, in the UK, having worked in the Anglo-Italian legal field for many years, I had colleagues who had come over from Italy and had been working in England for some years, who used to do the qualified lawyers transfer test, which is quite a burden and intense. However, since the Directives came into force, the preference of most people has been to avoid the QLTT exams, and they rather work in an English law firm and as long as they get the appropriate range of experience, such as compliance, conveyancing, and basic litigation, etc., they are fine. But who knows what is going to happen if there is no deal, because as regards the UK, the risk is that UK law firms would have 27 different regulatory systems to contend with, giving rise to additional burdens and cost for lawyers and their clients. That is why as a contingency plan, there has been a surge – more than 1,600 solicitors – who wanted to requalify automatically in the Republic of Ireland. They did so because if there is no deal, they have effectively taken matters in their own hand, as a safety net. Again, in a no deal scenario, UK lawyers may lose many rights of audience in the EU courts and in EU IP disputes.

Going back to my earlier point that we strive to give clients the best service on an international level, that is why the freedom to practice the profession is fundamental, but this could possibly be jeopardised, as we do not know what is going to happen after the transition period. For the time being, we have that breathing space, but who knows what the position will be in future? Also, because we work internationally, we want to attract talent from other jurisdictions which might be difficult in future, and I think even harder for small and medium sized firms. I see in my own firm: we are a small, niche firm that deals mainly with Italian clients, and attracting the right calibre of lawyers to service our clients' needs could potentially be quite difficult. We have to wait and see – as Rita was saying, we do not know effectively what is going to happen, but I think it would be a great shame if, due to more obstacles, we cannot continue to exercise our profession freely in the EU, and at international and cross-border level, as we do now in our daily professional lives. As I mentioned earlier, we go from one office to another, and in particular large firms have many offices elsewhere and there is absolutely no problem. I think we have been very fortunate that we have been able to benefit from that freedom in the way we practice our profession throughout the EU, so let's wait and see and be optimistic.

Thank you very much.

# FREE MOVEMENT AFTER BREXIT

Inês Quadros

First of all I would like to thank the organizers of the conference for the opportunity to take part in it. Although I have practiced law for some years, I am currently mostly an academic, and therefore I would highly appreciate your insight on the practical consequences of Brexit.

The subject that was proposed to me relates to free movement rights after Brexit. Although the subject lacks some stability now, because we don't know the results of the votes on the transition agreement yet, nor the effect or the result of the political declaration, I will base my presentation on what we have so far, and I have tried to systematize the topic by outlining three problems that I consider to underpin the future relationship between the UK and the EU on free movement.

The first topic relates to rights of free movement and residence within the transition period, and I've entitled this topic in the line of "You can't always get what you want". The second problem deals with the future relationship and economic freedoms, and I've entitled it "Same, same, but different". The third topic deals with the remedies available to individuals, and is entitled "You should have known better".

So, let's start by the first topic – "you can't always get what you want", and I would add "or at least when you want it to happen". The agreement for the transition period, to which by now you are probably acquainted,

accounts for the maintenance of several rights of EU citizens in the UK and rights of UK nationals in EU Member States. In Part II of the agreement, article 9 and the following guarantee that the rights of residence for citizens and rights of family members as stated in the directive of 2004 will be entirely applicable until the end of the transition period. Theresa May wanted it differently, to safeguard only the rights of EU citizens that entered the UK until March 2019, but she eventually accepted to extend those rights to all those arriving to live in the UK at any point until the end of 2020, or even later, if the transition period is extended. So, as we have heard earlier today, this is somehow puzzling for the UK since the subject goes to the heart of the argument in favour of Brexit. The United Kingdom wanted to take back control of the borders – that is to decide on rights of free movement of non-economic actors –, and it wanted to regain control on decision making, which basically meant that it didn't want to remain subject to the Court of Justice's creativity. Well, in both cases the UK didn't take back the control, since it had, first, to postpone the borders control, and, second, to continue to abide by the Court of Justice during the transition period.

As you know, rights of free movement have in the Treaty, and in the directives, only their point of departure. Their depth and significance were mostly the result of extensive case law of the Court of Justice that upgraded them to the nature of fundamental rights of EU citizens. Because they were considered fundamental rights, they were always broadly interpreted by the Court, and recognized as having a radiant effect towards all legal order. We can find multiple examples for that in an ever-expanding case law that, while reinforcing rights of free movement, actually challenged national laws on immigration (we can name several very known cases, like Carpenter,[1] Chen,[2] Metock,[3] all in which the Court

[1] C-60/00, judgment of 11.07.2002.

[2] C-200/02, judgment of 19.10.2004.

[3] C-127/08, judgment of 25.07.2008.

had to deal with national rules on immigration in order to guarantee rights of free movement to European citizens), on social benefits, as in Brey[4] (which was also a pretext for Brexit – you probably remember that the agreement achieved by Cameron with the EU prior to the referendum related mostly to rights conferred to family members of citizens that did not reside in the UK), and on, let's say, civil identification (like in García Avello[5] and Sayn-Wittgenstein,[6] for instance). By lifting residence rights and rights of free movement to the nature of fundamental rights, and hence by seeking their maximum protection, the Court brought to the scope of EU Law many areas which were not competence of the Union.

According to the transition agreement, the situation will not be altered when the UK leaves the EU next March, at least during that period (it may be different for the future relationship, of course). The agreement expressly reads in article 4 that "the provisions of the agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice handed down before the end of the transition period. The same article clarifies that "concepts and provisions of Union law shall be interpreted and applied in accordance with the methods and general principles of Union law".

The second problem, which I have entitled "Same, same, but different", deals with the future relationship between the UK and the EU, after the end of the transition period, when supposedly the EU provisions on rights of free movement and residence will cease to apply. Those rights will probably depend on mobility arrangements based on non-discrimination and full reciprocity, and not anymore on citizenship. So, time will then come for building a relationship much more to the like of the UK: an

4 C-140/12, judgment of 19.09.2013.

5 C-148/02, judgment of 2.10.2003.

6 C-208/09, judgment of 22.12.2010.

economic agreement without any trace of federalism, whichever form that takes. From that you can reasonably expect that economic rights and rights of movement and residence associated with the exercise of an economic activity will still be guaranteed. But I argue that even these rights will most probably be "same, same, but different" than what they are now. I mean, even if the final agreement on the future relationship grants to economic actors every right they have so far – free movement, residence, free exercise of an economic activity, that is the sum of all already existing rights connected to the exercise of the economic activity –, it will still make a difference that these rights no longer come in the package of citizenship.

I've selected two cases, that help me prove my point.

The first case is Ziebell,[7] and it concerned a Turkish national that was born in Germany and lived there ever since. Although he had an unlimited residence permit in Germany, he couldn't apply for the German nationality due to several infractions, mostly concerning drug possession, and several periods of imprisonment. Eventually in 2007 an order of expulsion was issued on the grounds that Mr. Ziebell's conduct considered a serious disturbance to social order, and there was a high risk that he would engage in serious re-offending. It happens that in previous years he had found work and was employed, had gotten married, had a child, and for those reasons he challenged the order of expulsion, arguing that the provisions providing for protection against expulsion laid down in article 28 of the directive of 2004 should be applied by analogy to a situation coming under the bilateral agreement between Turkey and the EU. The Court of Justice didn't agree. It argued that the different purposes of the EU treaties, and the EU-Turkey association agreement called for different solutions. In the view of the Court, the EEC-Turkey Association pursued a "solely economic purpose", whereas the 2004 directive, far from that, aims

[7] C-371/08, judgment of 8.12.2011.

to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by the Treaty, and it aims in particular to strengthen that right.

Of course you could always argue that the future UK-EU agreement cannot be compared to the EU-Turkey agreement, in view of the very different relations and history that EU has with Turkey and the UK. Relations with Turkey have not been, and still aren't, always easy, there have been many ups and downs in the process of accession to the EU. Further, you could argue that, should EU laws be applicable by analogy to EU-Turkey agreement, you could face the ghost of massive immigration coming from Turkey.

But it actually happens that similar considerations were made by the Court regarding a very recent case concerning the EU-Switzerland agreement. And of course, it's hard to believe that the Court is considering massive immigration to or from Switzerland, so we are forced to take this judicial trend seriously.

This second case is Picart[8] and was decided by the Court in March 2018. It deals with the agreement between the EU and Switzerland on the free movement of persons. It concerned a French national that had moved to Switzerland while maintaining substantial shares in several companies in France. To cut it short, some years later he wanted to challenge a French legal mechanism of exit taxation on unrealized capital gains that he had obtained. The Conseil d'Etat was unsure whether the right of establishment as a self-employed person within the meaning of the bilateral agreement had the same scope as the freedom of establishment, which article 49 of the TFEU Treaty guarantees to nationals of Member States. In its ruling, the Court recalled that, and I quote, "as the Swiss

[8] C-355/16, judgment of 15.03.2018.

Confederation has not joined the internal market of the European Union, the interpretation given to the provisions of EU law concerning that market cannot automatically be applied by analogy to the interpretations of the Swiss agreement unless there are express provisions to that effect laid down by that agreement itself". In practical terms, in this particular case it meant that Mr. Picard could not be considered a self-employed person, and thus rely on the right of establishment granted in the agreement, because while having changed its residence to Switzerland he maintained his economic activity in France. Therefore, he could not be considered either a frontier-worker (since he didn't return to his place of residence as a rule every day, or at least once a week), nor he pursued an activity in Switzerland.

This decision differs from the case law of the Court of Justice on the right of establishment within the European Union. There are several cases in which the exact same situations were considered in relation to Member States' nationals and the outcome was very different. In N case,[9] for instance, a situation very close to the Picard case was dealt by the Court in relation to a Netherlands national that transferred his residence to the UK while performing the economic activity in his home State. In this case, the Court had decided that the individual could rely on the right of establishment by simply recalling the well-established case law according to which national measures which are liable to hinder the exercise of fundamental freedoms or make them less attractive are contrary to the Treaty.

So, both of those cases – Ziebell and Picart – are of huge relevance to the future relationship between the UK and EU. Of course we cannot be sure that the rationale the Court applied to the interpretation of the bilateral agreements with Turkey and Switzerland will be applicable to the future agreement between the EU and the UK, because, of course,

[9] C-470/04, judgment of 7.09.2006.

again, the situations are very different: in the cases of bilateral agreements with Switzerland and Turkey, it was a matter of expanding the rights that individuals previously had, whereas in the case of the relationship between the UK and the EU, the case is of stepping back. That is why the political agreement actually takes this into account, when it states that "the period of the United Kingdom's membership of the Union has resulted in a high level of integration between the Union's and United Kingdom's economies, and an interwoven past and future of the Union's and United Kingdom's people and priorities. The future relationship will inevitably need to take account of these unique context".

But the problem is how to give practical effect to this wishful thinking. What we can affirm with a certain degree of certainty is that, without the citizenship package, economic rights tend to be differently understood. While EU citizens will no longer be considered as such by the UK, nor the other way around, there is the risk that free movement rights, whether connected to economic freedoms or not, will no longer be interpreted as fundamental rights, but probably merely as ancillary to an economic agreement between States.

And now to the final topic, that I've entitled "You should have known better", which relates to other intriguing issue – the available remedies in cases that affect rights of individuals.

As you know, free movement rights have been recognized thanks to the development of principles of direct effect and supremacy, which were crucial to the judicial protection of individuals. It's not clear how this protection will be guaranteed after the transition period, and in particular who will be responsible for the enforcement of rights. Further, the political declaration states that the UK ceases to be bound by the Charter of Fundamental Rights, and is now exclusively bound to the European Convention of Human Rights. Paragraph 7 of the political declaration states that "the future relationship should incorporate United Kingdom's

continued commitment to respect European Convention of Human Rights while the Union and its Member States will remain bound by the Charter of Fundamental Rights, which reaffirms the rights as they result in particular from the European Convention of Human Rights". So, it seems that the protection of individuals has a point of connection through the European Convention on Human Rights.

But two problems actually arise from here. One is the different remedies that the Charter and the European Convention provide in the UK. While the Charter as EU law is directly effective, European Convention of Human Rights is applicable through the Human Rights Act, and hence judges cannot not override legislation incompatible with the Convention. The other problem is that the Charter and the European Convention, while pursuing, of course, the same purpose, don't always produce the same outcome, as should be known by legal actors and political negotiators. The differences were brought to light in the Court's opinion on accession to European Convention on Human Rights, and further, throughout the years, several literature provides for examples in which the two Courts have decided differently, or at least according to different methodologies. For instance, the importance of the general principle of mutual trust in EU law, demanding for a cautious approach in the case of interstate litigation, and the way in which the Court of Justice interprets article 52 of the Charter, as not precluding the primacy of EU law, are amongst the most notable examples that show a different understanding of rights enshrined both in the Charter and in the European Convention on Human Rights. So, it may happen in the future that similar situations be treated differently by each part. That whereas a British citizen residing in a different Member State claiming that the latter did not fulfil obligations arising from the bilateral agreement can invoke both the Charter and the Convention, the same could not be possible for a EU citizen residing in the UK.

So, in short, I would say "it's a long and winding road". It's difficult to jump into conclusions so far, and to be anything else than problematic for now. On the other way around I'm an optimistic, and we are facing the opportunity of an unprecedent intellectual challenge. The complex net of relations in which the UK and the EU are gathered is surely a lot of food for thought for us, legal actors and academics.

# THE LEGAL IMPLICATIONS OF BREXIT

Proceedings of the conference
in the context of the 2018 General Assembly
of the UAE – European Lawyers' Union


Union des Avocats Européens
European Lawyers' Union