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BREXIT: A LEGAL PERSPECTIVE WITH PARTICULAR REFERENCE TO NEW ZEALAND

Jürgen Basedow*

This is the edited text of a lecture given at the Faculty of Law, Victoria University of Wellington on 13 February 2018 as part of a workshop on Cross-Border Issues in Australasian Courts with the support of the New Zealand Law Foundation.

I INTRODUCTION

In February 1930, Winston Churchill published an article on "The United States of Europe" in the United States magazine *The Saturday Evening Post*. It culminated in the following assessment of the position of the United Kingdom:[1]

> We are with Europe but not of it. We are linked but not combined; we are interested and associated, but not absorbed. … We belong to no single continent, but to all.

These words, inspired by the British Empire, again come to mind after the surprising outcome of the Brexit referendum in June 2016. They give evidence of an *historical* perception and of a *political* perspective. Their author could not have anticipated the significance of *legal* ties that have become characteristic of European integration.

For more than six decades, the European Community, now the European Union (EU), has grown by virtue of an enormous body of legislation affecting all sectors of the economy and all parts of society. Thousands of legislative instruments, some of them with hundreds of provisions, have been enacted. The first President of the European Commission, Walter Hallstein, who had started his career as a scholar of international business law at what is now the Max Planck Institute for Comparative and International Private Law, designated the European Economic Community as a

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1 Winston Churchill "The United States of Europe" *The Saturday Evening Post* (United States, 15 February 1930) at C147.

"*Rechtsgemeinschaft*" – a community based on the rule of law.[2] Leaving such a union today has nothing in common with the conduct of international relations familiar to Churchill, but is rather a kind of vivisection – an experiment on a living body, if you will – with far-reaching consequences. There will be consequences for both sides, but in particular the United Kingdom and, to a certain extent, for countries outside the EU like New Zealand which, for the last 40 years or so, have made use of London as a gateway to Europe.

My remarks begin with a short survey of the procedure that is conducive to Brexit, followed by the options available for negotiations about the future relations between the EU and the United Kingdom. I will then take a glance at the attempts to maintain EU law in the United Kingdom for the sake of legal certainty, and focus on the legal consequences entailed by Brexit for the operation of various parts of EU law, in particular primary law, market regulation, cooperation mechanisms, and unitary intellectual property rights. A final section will deal with the future of international treaties after Brexit. Particular attention will be given to possible implications for New Zealand.

II THE BREXIT PROCEDURE

Article 50 of the Treaty on European Union (TEU) provides for the exit of a Member State from the EU in two phases.[3] The first ends with the notification, by the exiting Member State's government to the EU, of the country's intention to leave the EU. This first phase is not a matter of EU law, but is governed by the constitutional law of the Member State in question. In the United Kingdom, a special act was adopted that provided for a referendum without dealing with its consequences.[4] The referendum has often been characterised as advisory. The British Government nevertheless felt compelled to send the exit notification to the EU. But the Supreme Court of the United Kingdom held that the notification under art 50 of the TEU did not fall under the government's prerogative for foreign policy; the notification had to be approved by Parliament.[5] After Parliament had given this approval, Prime Minister Theresa May notified the European Council on 29 March 2017 of the United Kingdom's intention to leave the EU, thereby triggering the second phase of the exit: negotiations with the EU.[6] According to art 50, these negotiations have to be finalised within two years unless a unanimous decision of the European Council approves an

2 The term "*Rechtsgemeinschaft*" ("legal community") was coined by Hallstein in a speech delivered at Padova in 1962: Walter Hallstein "Die EWG – eine Rechtsgemeinschaft" in Thomas Oppermann (ed) *Europäische Reden* (Deutsche Verlags-Anstalt, Stuttgart, 1979) 341 at 343. See also Walter Hallstein "The European Economic Community" (1963) 78 Political Science Quarterly 161 at 170: "all the Community's actions are subject to the rule of law, as embodied in the founding Treaty and in the basic principles of Western jurisprudence."

3 Consolidated Version of the Treaty on European Union [2016] OJ C202/13 [TEU].

4 European Union Referendum Act 2015 (UK), s 36.

5 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

6 European Union (Notification of Withdrawal) Act 2017 (UK), s 9.

extension. If the deadline elapses, Britain must leave the EU regardless of whether an agreement has been struck with the EU.

Article 50 unambiguously requires an exit agreement to set out the arrangements for the country's withdrawal. The compulsory content relates to the winding-up of *past* commonalities. But the language of art 50(2) concerning the *future* is rather vague: the parties shall negotiate and conclude the exit agreement "taking account of the framework for its future relationship with the Union." This sounds as if such a framework is already in existence; there is, at any rate, no obligation to build or change that framework. On that basis, the EU refused to talk about the future relations without a prior agreement on essential issues raised by the United Kingdom's withdrawal. Thus, the negotiation phase was split into two sub-phases. In the first sub-phase, three issues had to be resolved:[7]

(1) the rights of citizens of continental EU Member States in Britain and of British citizens on the continent;
(2) the border between Ireland and Northern Ireland; and
(3) the financial settlement.

It was, in particular, the Irish question that gave trouble. Since the border between the Republic of Ireland and Northern Ireland will become an external border of the EU after Brexit, customs controls would appear to be indispensable. But such controls might be perceived as aggravating the partition of Ireland and threaten the Good Friday Agreement of 1998 that finally put an end to the unrest in Northern Ireland 20 years ago.[8] In December 2017, a political compromise that is legally not binding was finally achieved and the European Council opened the negotiations of the second sub-phase on the future relationship between the United Kingdom and the EU.[9] It is, however, doubtful whether this compromise on the Irish issue is sustainable. The United Kingdom pledges to avoid a hard border and to maintain "full alignment" with those rules of the internal market and the customs union that support North-South cooperation and the all-island economy.[10] But in light of the ongoing development of EU legislation, it is difficult to see how this commitment can be reconciled with the very idea of Brexit, namely, to restore legislative sovereignty to the United Kingdom.

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7 European Commission "Communication from the Commission to the European Council (Article 50) on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union" COM(2017) 784 final (8 December 2017) at 3 [Communication].

8 Northern Ireland Peace Agreement (The Good Friday Agreement), Ireland–United Kingdom (signed 10 April 1998, entered into force 2 December 1999).

9 European Commission "Guidelines – 15 December 2017" EUCO XT 20011/17.

10 Communication, above n 7, at 9.

Finally, it should be mentioned that the December 2017 Communication refers to "transitional arrangements" for a period of limited duration after Brexit. This period will start on 29 March 2019 and likely end in December 2020. During this transition period, which is the third phase of the exit, EU law will fully apply in the United Kingdom, but the United Kingdom will not take part in decisions made by EU institutions.[11]

III OPTIONS FOR THE FUTURE

The objectives pursued by the United Kingdom in the negotiations with the EU were summarised by Prime Minister Theresa May in a speech at a conference of the Conservative Party in October 2016: the United Kingdom wants to regain control of immigration from EU countries; maintain free trade in goods and services with the EU and preserve the maximum freedom for British companies to operate in the European Single Market; regain regulatory powers; ensure cooperation in law enforcement; and get rid of the jurisdiction of the Court of Justice of the European Union (CJEU).[12]

The mix of these objectives gives evidence of a certain misunderstanding of the structure of the European Single Market. The definition in art 26(2) of the Treaty on the Functioning of the European Union (TFEU) is as follows:[13]

> … the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

These freedoms are directly applicable, that is, they bestow individual rights on the citizens of the EU. With regard to the free movement of persons, the TFEU distinguishes the freedom of movement of workers and the freedom of establishment of self-employed persons (arts 45 and 49). The United Kingdom's objective of regaining control of immigration comes down to a restriction of the free movement of persons. Granting this freedom is the *quid pro quo* for the free movement of goods and services. Services are essentially produced by human labour. Where a country allows for free importation of services, the demand for local services may be reduced which, in turn, may negatively affect the employment rate of its own workforce. The free movement of persons compensates for the resulting increased unemployment at home. Moreover, it may help to reap the benefits of an international division of labour. A sound economic policy does not permit one to cherry-pick among the basic freedoms.

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11 At 15; and "Konstruktives beim Lunch – Brexit-Gespräche nehmen Konturen an" *Frankfurter Allgemeine Zeitung* (Frankfurt, 6 February 2018) at 2.

12 The speech was reprinted in *The Independent* and is reproduced on the website of that newspaper: "Theresa May's keynote speech at Tory Conference in full" *The Independent* (online ed, United Kingdom, 5 October 2016).

13 Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 [TFEU].

Another inconsistency concerns the relationship between the basic freedoms, on the one hand, and the recovery of national regulatory sovereignty, on the other. The approximation of national legislation in the EU is not the result of an egalitarian philosophy of the Brussels bureaucracy, but of a disappointing experience in the early years of European integration. Prior to 1985, common regulation required unanimity in the European Council, which could rarely be secured. Consequently, Member States refused to import goods and services produced on the basis of divergent regulations. A resolved return to national regulation would certainly build new barriers for the importation of British goods and services to EU Member States and vice versa. This is the inherent logic of free trade as evidenced by numerous free trade agreements and the current tendency to supplement such agreements with regulatory cooperation; trying to alter this logic is an attempt to square the circle.

The British reluctance to accept judgments of the CJEU will have to take a back seat when it comes to the interpretation and legal review of the exit treaty itself. It is settled case law that international treaties, by the Council decision on their conclusion, become an integral part of EU law; as such their interpretation and legal review is entrusted to the CJEU, which may act upon the initiative of any Member State or of any court or tribunal of a Member State.[14] Thus, the exit treaty itself may be indirectly subjected to legal review, which would not reduce its binding nature under public international law, but would give rise to uncertainty and the need to renegotiate. Having this in mind, the EU delegation will avoid violations of primary EU law, such as the founding treaties and the EU Charter of Fundamental Rights. While the United Kingdom may acquit itself of the binding force of judgments of the CJEU, it cannot avoid indirect effects that arise where the CJEU, upon the submission by a court of a Member State, deals with measures adopted for bilateral relations or with parallel intra-EU measures.

Apart from these inconsistencies, one has to highlight the complexity of the EU legal system which, contrary to the times of Winston Churchill, cannot be reduced to a few key issues. This will become clear as we analyse more specific areas of EU law. The complexity is such that negotiations will not end within the two-year period laid down in art 50 of the TEU unless some ready-made solutions are approved.

One such solution would be the "Norway model": the United Kingdom could remain a party to the European Economic Area (EEA), which is based upon the European Economic Area Agreement, concluded in 1992.[15] At present, it governs the relations between the EU and its Member States, on the one side, and Iceland, Norway and Liechtenstein, on the other. The United Kingdom, which ratified that agreement on the EU side, would remain a contracting party unless it withdraws from it

14 This has repeatedly been confirmed by the Court of Justice of the European Union: see for example Case C-344/04 (*The Queen (ex parte IATA) v Department of Transport*) [2006] ECR I-403 at [36].

15 Agreement on the European Economic Area, entered into force on 1 January 1994 [1994] OJ L1/3.

in accordance with art 127. The EEA agreement provides for the free movement of goods, services and capital, but also ensures the free movement of persons, which the United Kingdom rejects. Moreover, the non-EU Member States of the EEA must adopt EU legislation related to the internal market without having much influence on its content.[16] Further, for the authoritative interpretation of EEA law, the opinions of the CJEU would still be of decisive significance (arts 105 and 111, and in particular art 111(3)). Prime Minister May has rejected the "Norway model" and also the "Swiss model".[17] The Swiss model, by virtue of numerous specific bilateral agreements, equally comes down to an assumption of much EU law by Switzerland which, in turn, gets access to the internal market in the respective areas.

More recently, the former Brexit Secretary, David Davis, suggested taking the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU as a starting point for the negotiations.[18] The free trade scheme of CETA would be supplemented by arrangements on services, in particular, aviation and financial services.[19] Taking an existing treaty as a model appears to be a reasonable step. CETA occupies more than one thousand pages in the Official Journal of the European Union, which conveys an idea of the very complex and lengthy negotiations that led to it. The proposal, nevertheless, is questionable: CETA is clearly drafted as a programme for *approximation.* The chapter on regulatory cooperation makes clear that the parties have "a view to enhancing convergence and compatibility between [their] regulatory measures."[20] Quite to the contrary, the United Kingdom is pursuing the objective of greater regulatory independence, which will undoubtedly be conducive to greater regulatory *distance* over time. Moreover, CETA enables private investors to sue Canada, the EU or a Member State in a newly established international tribunal, the decisions of which are enforceable in the territories of the contracting parties.[21] Would the United Kingdom really reject the jurisdiction of the CJEU and accept, at the same time, the creation of a new international tribunal?

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16 Articles 99 and following.

17 See "Theresa May's keynote speech at Tory Conference in full", above n 12.

18 Comprehensive Economic and Trade Agreement, Canada–European Union and its Member States (signed on 13 October 2016, not yet fully in force) [2017] OJ L11/23 [CETA].

19 See David Davis "Britain should sign a 'Canada plus plus plus' trade deal with the EU after Brexit" *The Telegraph* (online ed, United Kingdom, 10 December 2017). The financial services, in particular, are highlighted in an article published by Philip Hammond, Chancellor of the Exchequer, and Brexit Secretary David Davis in a German newspaper: Philip Hammond and David Davis "Phantasievoll und erfinderisch in eine gute Zukunft" *Frankfurter Allgemeine Zeitung* (Frankfurt, 10 January 2018) at 8.

20 CETA, above n 18, art 21.5.

21 Articles 8.18 and following, and in particular arts 8.27 and 8.41.

IV THE FUTURE OF EU LAW IN BRITAIN

Article 50(3) of the TEU indicates that "the Treaties shall cease to apply to the State in question" from the date of exit onwards. The provision does not refer to secondary EU law, in particular the huge body of regulations, directives and decisions that shape the lives of Europeans. From art 50, we simply can infer that the non-application of secondary EU law by the United Kingdom after the date of Brexit will no longer constitute an infringement of the EU treaties. In this sense, secondary EU law will no longer be binding for the United Kingdom. But will secondary EU law become ineffective? That would cause untenable uncertainty.

Secondary EU law has been enacted in the form of directives over many years, but increasingly in the form of regulations. Under art 288 of the TFEU, directives are not applicable as such, but have to be implemented in the various Member States. Thus, courts apply the national provisions which implement those directives; in the United Kingdom, these are statutory instruments: they do not lose effect on the simple ground that their basis in EU law is no longer binding on the United Kingdom. This is different in the case of regulations which are directly applicable in all Member States in accordance with art 288 of the TFEU. Where regulations no longer apply, there will often be no national law to replace them, since the Member States have not enacted any national provisions in the respective field. Take, for example, the General Data Protection Regulation,[22] the Regulation on securities prospectuses,[23] or the Regulation on medical devices.[24] These comprehensive instruments cover whole areas of modern law which are often not dealt with by national enactments in Member States.

The United Kingdom government has decided to avoid the legal uncertainty resulting from Brexit and proposed a European Union (Withdrawal) Bill that is meant to repeal the European Communities Act 1972 and, at the same time, retain EU law existing on the day of Brexit, as a matter of United Kingdom law.[25] This move will enable the British legislature to review and amend EU law piece by piece at a later stage. This approach invites two comments. First, as will be shown below, the conversion of EU law into United Kingdom law is not sufficient to preserve the legal

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22 Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119.

23 Regulation 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC [2017] OJ L168/12.

24 Regulation 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 and repealing Council Directives 90/383/EEC and 93/42/EEC [2017] OJ L117/1.

25 European Union (Withdrawal) Bill (HL Bill 102) 2017 (UK). See in particular cls 2–3. Meanwhile the Bill has been signed into law: see now European Union (Withdrawal) Act 2018.

status quo in many instances. Secondly, it is an open question whether the United Kingdom will have much leeway for later amendments given its commitment in the December 2017 compromise to ensure "full alignment" with future internal market legislation. The December compromise and the Withdrawal Bill give evidence of divergent orientations in British politics.

V THE EFFECT OF BREXIT ON PRIMARY EU LAW

Except for the free movement of capital, which applies to financial relations both within the EU and with third States (art 63 of the TFEU), the basic freedoms laid down in the TFEU are exclusively applicable to internal cross-border situations in the EU. Thus, the free movement of goods is ensured "between Member States".[26] The free movement of workers is secured "within the Union" and entails the abolition of discrimination based on nationality "between workers of the Member States".[27] In a similar vein, the freedom of establishment is ensured to "nationals of a Member State in the territory of another Member State", and the freedom to provide services is accorded to "nationals of Member States who are established in a Member State other than that of the person for whom the services are intended".[28] These provisions will lose their effect with regard to the United Kingdom, not only pursuant to art 50(3) of the TEU, but also because EU–United Kingdom relations will no longer fall within their scope.

Brexit will also have some effect on the free movement of persons for New Zealanders. While the free movement of workers within the EU does not apply to New Zealanders, they are entitled to residence in the EU if they are a spouse or a close relative of a citizen of a Member State. This right does not flow from art 45 of the TFEU directly, but has been clearly established by secondary legislation.[29] Where a New Zealander is married to a British citizen, Brexit will deprive both of them of the right of free movement within the EU. It will depend on the exit treaty or, if it is silent on the matter, on the immigration law of the host Member State, whether they will be entitled to reside and work in that country in the future.

Another consequence relates to companies founded by New Zealand investors and incorporated in the United Kingdom. At present, they benefit from the freedom of establishment under art 54 of the TFEU because of their incorporation under British law. Thus, they may establish subsidiaries or branches in other Member States. In accordance with the more recent case law of the CJEU, they may also relocate their central administration or principal place of business to another Member

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26 Compare arts 28, 34 and 35 of TFEU, above n 13.

27 Article 45.

28 Articles 49 and 56.

29 See Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77, arts 2(2), 4 and 5; and Winfried Brechmann in Christian Calliess and Matthias Ruffert (eds) *EUV/AEUV – Kommentar* (5th ed, Beck, München, 2016) Art 45 AEUV at Rn 25 and following.

State.[30] The freedom of establishment may conflict with the private international law of several Member States in the field of companies. According to Belgian[31] and Polish[32] legislation, as well as German case law,[33] companies are governed by the law of the country of their central administration, the so-called "real seat theory". After Brexit, the relocation of the central administration from London to, for instance, Hamburg would entail, under German private international law, a change of the applicable law. Since the company has been incorporated under British law and not under German law, it would be considered as non-incorporated with unexpected and perhaps unpleasant consequences. As long as the United Kingdom is a Member State of the EU, these consequences are superseded by the freedom of establishment, which is directly applicable and takes precedence over national law. Once the United Kingdom leaves the EU, German private international law rules relating to companies incorporated in non-EU States will apply without any restrictions imposed by EU law. There are other provisions in primary EU law that may affect the rights and obligations of private actors not dealt with here. The following discussion turns to the implications of Brexit for the large body of secondary law in the EU.

VI CONSEQUENCES OF BREXIT FOR MARKET REGULATION

EU legislation has profoundly affected all areas of the law that have some economic significance: competition law, company law, public procurement, the regulation of various services markets, intellectual property, consumer law and labour relations. EU acts have approximated competitive conditions within the EU and, in some cases, even created entirely uniform legal standards.[34] As pointed out before, the Withdrawal Act is intended to maintain that situation. It is unlikely that the United Kingdom will repeal many of these provisions at a later stage; the objective

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30 The line of cases starts with Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-01459. See also Case C-208/00 *Überseering BV v Nordic Construction Company Bau Management GmbH* [2002] ECR I-09919; and, most recently, Case C-106/16 *Polbud* [2017] OJ C437.

31 See arts 110 and 111 of the Law of 16 July 2004 containing the Code of private international law, the English translation for which can be found in Jürgen Basedow and others (eds) *Encyclopaedia of Private International Law* (Edward Elgar Publishing, Cheltenham, 2017) vol 4 at 2967.

32 See arts 17 and 19 of the Polish Act on Private International Law of 4 February 2011, English translation in Basedow and others, above n 31, at 3621.

33 The German Federal Court (Bundesgerichtshof (BGH)) still applies the real seat theory with regard to companies incorporated in countries outside the EU: compare Bundesgerichtshof, II ZR 290/07, 27 October 2008; for annotations, see Marc-Philippe Weller "Die Rechtsquellendogmatik des Gesellschaftskollisionsrechts" [2009] IPRax 202. In this case, the court treated a Swiss corporation, which was not recognised as such, as a partnership endowed with legal capacity. See also Marc-Philippe Weller and Chris Thomale "Companies" in Jürgen Basedow and others (eds) *Encyclopaedia of Private International Law* (Edward Elgar Publishing, Cheltenham, 2017) vol 1 404. Concerning companies incorporated in other Member States, the BGH now applies the law of the country of incorporation.

34 General Data Protection Regulation, above n 22.

of legal certainty will probably prevail even where the United Kingdom originally objected to the adoption of the respective EU Act.

However, the conversion of these rules into British law will not solve all problems. Difficulties will arise where provisions in a directive or regulation explicitly refer to facts that occurred or are connected with a Member State or to relations between different Member States. Since the United Kingdom will no longer be a Member State after Brexit, such provisions will become inapplicable in the United Kingdom. Thus, where a regulation is meant to ensure that "users of public mobile communications networks, when travelling within the Union, do not pay excessive prices for Union-wide roaming services in comparison with competitive national prices", the reference to Union-wide services will no longer include the United Kingdom after Brexit.[35] A similar observation applies to the general directive on services in the internal market which, inter alia, lays down the country-of-origin principle.[36] Its scope is confined to service providers "established in a Member State" (art 2). It follows from the legislative context with primary law that the directive is confined to intra-EU relations.[37] Brexit will, therefore, deprive United Kingdom service providers, such as architects, builders or consultants, of the right to offer their services to clients in the remaining Member States. Equally, service providers from continental Member States will no longer be entitled, by that directive, to offer their services in the United Kingdom. Brexit will also deprive customers of the right to invoke the directive in their relations with service providers from the other side of the English Channel.

What may be worse for the United Kingdom is that its undertakings will be classified as third State undertakings for the purposes of those EU acts that contain specific and often adverse provisions for such non-EU companies. This is the case in the field of financial services. It is well known that the financial services industry is particularly important for the United Kingdom, with more than one million jobs and contributing about seven per cent to its gross domestic product, one third of which is from exports to other Member States of the EU.[38] The pertinent EU instruments lay down a specific regime for service providers established outside the EU offering their services to

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35 Regulation 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming in public mobile communications networks within the Union (recast) [2012] OJ L172/10, art 1(1).

36 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36.

37 Articles 53(2) and 62 of the TFEU, above n 13, formerly numbered as arts 47(2) and 55, are the legislative basis of the directive.

38 See generally Niamh Moloney "Financial Services, the EU, and Brexit: An uncertain future for the city?" (2016) 17 German Law Journal 75. A briefing paper for the House of Commons of 25 April 2018 indicates a contribution of the financial services industry of £119 bn or 6.5 per cent to the United Kingdom gross domestic product in 2017, as compared with 4–5 per cent in most EU Member States: see Chris Rodes, "Financial Services: Contribution to the UK Economy" (Briefing Paper no 6193) <researchbriefings.parliament.uk>.

EU clients. With regard to such service providers, the principle of a single authorisation or "single passport" cannot be maintained since that authorisation is not necessarily based on the same provisions as those that are in force in the EU. Consequently, the MIFID II Directive allows every Member State to require that a third State firm establish a branch in its territory, thereby imposing costs on it and subjecting it to EU regulations and supervision.[39] In relation to insurance, the admission of a third State company to the market is at the discretion of each Member State and the conditions are more restrictive than for other financial services.[40] The adverse regulation of non-EU providers of financial services was intended to keep competitors from New York, Hong Kong or Singapore at a distance. Unless the exit treaty adjusts the regulatory framework for British providers, they will be subject to the same adverse regulations after Brexit.

VII CONSEQUENCES OF BREXIT FOR COOPERATION BETWEEN STATES

A further group of provisions that has not been dealt with by the Withdrawal Act relates to administrative and judicial cooperation between Member States. A huge body of rules provides for cooperation between national authorities, for example in the European Competition Network[41] and in the enforcement of capital market regulations[42] or consumer protection laws.[43] Numerous acts provide for the exchange of relevant information, whilst some also provide for referrals to an authority of another Member State if it appears to be better placed to deal with a specific case. It is unlikely that the need for such rules will disappear after Brexit. Cross-Channel economic relations are far too extensive to return to the situation that prevailed in the 1960s when only diplomatic channels were available. However, the rules cited above clearly refer to cooperation between the authorities of Member States and will no longer apply to Britain after Brexit. It is obvious that the cooperation required cannot be implemented by unilateral measures such as the Withdrawal Bill. It would have to be preserved by appropriate agreement within the Brexit treaty. But does it make

39 See Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (recast) [2014] OJ L173/349 [MIFID II], arts 39 and following.

40 See Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II) (recast) [2009] OJ L335/1, arts 162 and following.

41 See Council Regulation 1/2003 of 16 December 2003 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty [2003] OJ L1/1. See also the Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C101/43, arts 11 and following.

42 See MIFID II Directive, above n 39, arts 79 and following. For insurance, see for example the Solvency II Directive, above n 40, arts 33, 52 and 71.

43 Regulation 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the regulation on consumer protection cooperation) [2004] OJ L364/1.

sense for the United Kingdom and the EU to agree on such far-reaching obligations if no authoritative interpretation by the CJEU can be ensured?

Judicial cooperation in civil matters is a further area where the EU has become the vanguard of the development of the law. The Brussels Convention of 1968[44] and the Rome Convention of 1980[45] paved the way towards the uniform regulation of jurisdiction, choice of law for contracts, and the recognition and enforcement of judgments in civil and commercial matters many years ago. They were, in fact, the first multilateral conventions in these fields. After the transfer of additional competences to the EU in 1997, they have been the model for a number of EU regulations dealing with private international law at large. These instruments have inspired national legislation worldwide. No reasonable legislature would repeal them. However, only some of the rules are fit for conversion into national law by a statute such as the Withdrawal Act. Thus, the Rome I Regulation on the law applicable to contracts,[46] and the Rome II Regulation on the law governing extra-contractual liability,[47] will continue to apply without major changes, both vis-à-vis EU Member States and other States outside the EU.

However, the Brussels I Recast Regulation is different.[48] Its provisions on jurisdiction often refer to the location of certain connecting factors such as the defendant's domicile in a Member State. Where that connecting factor is located in the United Kingdom, absent amendment, the Recast Regulation can no longer be applied. And the rules of the same regulation on the recognition and enforcement of foreign judgments relate only to decisions originating in other Member States. While the United Kingdom is of course free to continue enforcing judgments from continental Member States after Brexit, judgments of United Kingdom courts will no longer be considered as originating in a Member State and will, therefore, not be enforced in continental Member States unless the Brexit treaty somehow perpetuates the current situation.

The unenforceability of judgments of United Kingdom courts in the EU is a serious threat to the large law firms of the city of London. According to their business model espoused many years ago,

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44 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (opened for signature 27 September 1968, entered into force 1 February 1978) [1972] OJ L299/32; English translation in [1978] OJ L304/36.

45 Convention on the law applicable to contractual obligations (opened for signature 19 June 1980, entered into force 1 April 1991) [1980] OJ L266/1.

46 Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

47 Regulation 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

48 See Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcements of judgments in civil and commercial matters [2012] OJ L351/1.

they propose the choice of English courts and English law to their clients from all over the world, promising that the resulting judgments will be enforceable all over Europe. After Brexit, this promise no longer holds true unless some other basis for the enforcement of judgments in the EU can be found. While some Member States have concluded bilateral enforcement treaties long ago or give effect to foreign judgments through their national provisions, other Member States such as Sweden reject the enforcement of foreign judicial decisions in the absence of treaties altogether.[49] The resulting uncertainty may induce parties from overseas countries such as New Zealand to think about new solutions such as the choice of Singapore as an exclusive forum. Since both Singapore and the EU have ratified the 2005 Hague Convention on Choice of Court Agreements,[50] the enforcement of the resulting judgments in the EU would be ensured. That said, EU parties might be reluctant to accept such a forum as long as New Zealand has not ratified the 2005 Hague Convention. By virtue of the EU's ratification, Britain is currently bound by the 2005 Hague Convention, but it will lose this status on the day of Brexit. Given the exclusive competence of the EU for the negotiation of treaties on judicial cooperation,[51] an eventual accession of the United Kingdom to the 2005 Hague Convention is possible only after Brexit and will take effect three months later.[52] Thus, parties should be aware of a time gap.

There are numerous other instruments dealing with issues of judicial cooperation. If the British government takes the Prime Minister's pledge for European cooperation in law enforcement seriously, it will have to make great efforts in order to avoid a regression to the pre-Brussels state of the law.

VIII CONSEQUENCES FOR UNITARY INTELLECTUAL PROPERTY RIGHTS

Ever since the 1980s, the EU has created unitary legal instruments, which owe their existence, not to the harmonisation of pre-existing national laws, but to EU regulations. This has mainly occurred in the fields of intellectual property and company law. A particularly successful instrument of this kind is the Regulation on the Community trade mark,[53] which has recently been redesignated

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49 For Sweden, see Michael Bogdan "Sweden" in Bea Verschraegen (ed) *International Encyclopaedia of Laws: Private International Law* (Kluwer Law International, Alphen aan den Rijn, 2012) at [312]; and Michael Hellner "Sweden" in Jürgen Basedow and others (eds) *Encyclopaedia of Private International Law* (Edward Elgar Publishing, Cheltenham, 2017) vol 3, 2535 at 2546.

50 Convention on Choice of Court Agreements (opened for signature June 2005, entered into force 1 October 2015) [Hague Convention], available at the website of the Hague Conference on Private International Law <www.hcch.net>.

51 Opinion 1/03 *Lugano Convention* [2006] ECR I-01145.

52 Hague Convention, above n 50, art 31.

53 Regulation 207/2009 on the Community trade mark [2009] OJ L78/1.

as an EU trade mark.[54] I shall confine my remarks to this latter instrument, which is very popular; in fact, more than 2,800 such EU trade marks have been registered upon applications from New Zealand alone.[55]

The EU trade mark "shall have a unitary character" and "equal effect throughout the Union."[56] Under the principle of national treatment that is generally acknowledged in intellectual property law, the EU trade mark can be owned and registered upon application by any natural or legal person, no particular link with the EU being required.[57] Consequently, British citizens will be able to continue to register EU trade marks in the future.

However, by virtue of Brexit, the territorial scope of protection will shrink to the remaining EU Member States. If owners, whether originating in New Zealand or any other country, require continuous protection of their trade marks in Britain, they should register marks under British law. This will have a very similar effect, although limited to the United Kingdom territory, due to the approximation of national trade mark laws by the EU. Where owners fail to register, they should not expect much help from the Withdrawal Act. Since the scope of protection of the EU trademark has been limited to the territory of the EU, a non-EU State such as Britain does not appear to be in a position to extend this scope to its own territory.

IX INTERNATIONAL TREATIES

The EU is the result of international treaties concluded by its Member States, but it is also endowed with legal personality (see art 47 of the TEU) and charged with the pursuit of policies in the international arena by concluding treaties of various kinds.[58] It is a contracting party to a large number of international agreements. In some cases, such as the 2005 Hague Convention on choice of court agreements, the EU even has exclusive competence to deal with the matter in international relations – Member States must refrain from negotiating on their own and are bound by the instrument once the EU has ratified or acceded to it.

Other treaties deal with subjects that partly fall into the competence of the EU and partly into that of the Member States. For example, the Free Trade Agreement between the EU and the Republic of Singapore was held to be such a mixed convention: the main body of rules on free trade in goods and services is covered by the exclusive competence of the EU under art 3(1)(e) of the

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54 Regulation 2017/1001 on the European Union trade mark (codification) [2017] OJ L154/1.

55 The European Union Intellectual Property Office "SSC – Statistics of Community Designs" <www.euipo.europa.eu>. The number of such marks registered for New Zealanders amounts to 0.6 per cent of all EU trade marks registered on behalf of non-EU owners.

56 Regulation 2017/1001 on the European Union trade mark (codification), above n 54, art 1(2).

57 Article 5.

58 See TEU, above n 3, art 8. See also TFEU, above n 13, arts 47, 198, 205 and 216.

TFEU on common commercial policy. In comparison, the rules on investment protection and on investor-state dispute settlement were considered to be more than just ancillary to free trade and to fall into the shared competence of the EU and the Member States.[59] Such mixed treaties are concluded by both the EU and the Member States.

The effect of Brexit on the two types of EU conventions differs. Where the EU has exclusive competence, the United Kingdom can become a contracting State to that convention only after Brexit. There will not be an automatic succession. The 1978 Vienna Convention on the Succession of States in Respect of Treaties does not apply since the EU is not a state for the purposes of this instrument.[60] Where the EU and the Member States share the competence for the conclusion of the treaty, a Member State's ratification of that instrument, which was originally needed only for certain provisions, arguably acquires additional effects and becomes a full-fledged approval of the whole treaty.

It follows that many agreements concluded by the EU with third States will become ineffective with regards to the United Kingdom after Brexit. In the area of free trade alone, 47 agreements were in operation at the end of 2016,[61] and important agreements with Canada and Japan have been concluded thereafter. The United Kingdom will probably aim to ensure that these agreements continue to apply and some countries may be willing to agree at least on their provisional application for a transition period. But these countries have negotiated with the EU in view of access to a market of 500 million people; some would not have made the same concessions for access to a much smaller market. They will likely insist on renegotiations, which will require time and manpower given the growing complexity of modern trade agreements.[62]

Brexit will restore the United Kingdom's right to conclude agreements in all areas in accordance with its own political preferences. If the transition period starting on 29 March 2019 is agreed, the United Kingdom will, for a limited period, be part of the internal market and the customs union, and be entitled to conclude treaties on related subjects with third States. This will be perceived as an advantage in the United Kingdom and in third countries, which have not so far been able to

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59 Opinion 2/15 *Free Trade Agreement between the EU and Singapore* (CJEU 16 May 2017).

60 Vienna Convention on Succession of States in respect of Treaties 1946 UNTS 3 (opened for signature 23 August 1978, entered into force 6 November 1996).

61 European Commission "Report from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions on implementation of free trade agreements 1 January 2016-31 December 2016" COM(2017) 654 final (9 November 2017) Annex 2 at 38.

62 As pointed out earlier, CETA, above n 18, the agreement with Canada occupies more than 1000 pages in the Official Journal, and the agreement concluded with Ukraine on 21 March 2014 more than 2100 pages: see Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L161/3 (signed 21 March 2014, entered into forcem1 September 2017).

negotiate a trade agreement with the EU. Maybe New Zealand and other countries of the Commonwealth aspire to recover the trade preferences from which they benefitted before the United Kingdom's accession to the EU. While this does not seem unrealistic, the United Kingdom will have to set priorities. It is doubtful whether it will start its negotiations with New Zealand prior to the European Commission, which has recently recommended that negotiations for a free trade agreement with New Zealand be opened.[63]

X CONCLUSION

Brexit will affect the legal framework of business in a perceptible way. In Europe, the delivery chains that lead to the final product now often have a multinational character. It has, for instance, been reported that certain car parts cross the English Channel several times before the final product is sold. Thus, the crankshaft used for the Mini is cast in France, further treated in a British plant, Hams Hall, and integrated into the engine in another BMW plant in Munich, before it is integrated into the car at the assembly plant operated by BMW in Oxford. When an Italian customer finally buys the car, the crank has moved across the Channel four times.[64] Is the ultimate product a British car? Or is it German or European? The origin is relevant for the imposition of customs duties: it is a key element of trade law, but it has become an increasingly arbitrary concept with international delivery and production chains.

The problem of customs duties and country of origin exemplifies the many difficulties that arise after more than 40 years of the United Kingdom's integration into the European Single Market. The expectation that such problems can be solved within a couple of months – that the exit treaty can be drafted by October 2018 in order to allow for the approval by the relevant institutions of the United Kingdom, the EU and the Member States by Spring 2019 – is simply illusory. It will take years until the relations between the United Kingdom and the EU will be settled on a new basis and until the United Kingdom will have established, for its own markets, a new legal framework that satisfies both the expectations of national sovereignty and the promise of eventual full alignment with the EU.

According to the present state of negotiations, there will be a limited transition period beginning on the day of Brexit. During this period, businesses will retain the right of access to the markets of other Member States, "on the basis of existing rules, provisions and institutions of the EU".[65] Consequently, businesses will have to adjust to new conditions only once: when the future EU–

63 European Commission "Recommendation for a Council decision authorising the opening of negotiations for a Free Trade Agreement with New Zealand" COM(2017) 469 final (13 September 2017).

64 This story is told in "Briten spielen auf Zeit – Regierung in London schlägt eine 'vorübergehende Zollunion' mit der EU vor/Kommission zurückhaltend" *Frankfurter Allgemeine Zeitung* (Frankfurt, 16 August 2017) at 17.

65 See Hammond and Davis, above n 19 (author's translation).

United Kingdom relations have been settled. This is the first sign of realism. More of it, as well as political skill and leadership is needed – virtues that do not strike the eye when we look at the current British government.

XI POSTSCRIPT

This paper was drafted in early 2018. The expectation that the exit treaty would be concluded, or that at least its main lines would be visible within a couple of months, have not been fulfilled. While the United Kingdom has enacted the Withdrawal Act, the negotiations with the EU are still ongoing. The Irish issue is still unresolved. At present, in early November 2018, it is unclear whether both sides will strike an agreement in time that would get the transition period going. Even if that happens, the parliamentary approval in the Member States and especially in the United Kingdom is not secured. In the absence of an agreement, the consequences of Brexit outlined above will happen from 29 March 2019 onwards.