



University of  
Zurich <sup>UZH</sup>

Institute of Law

# Principles of Common Law European Dimension of UK Law and Brexit

Principles of Common Law

08 December 2020

Lecture 13

Prof. Dr. Kern Alexander



University of  
Zurich<sup>UZH</sup>

## Main points

---

- Timelines, political issues and legal basis
- EU Treaty (Art 50) & UK Withdrawal Act
- Withdrawal Agreement
- Future EU-UK relationship



## European Law and the United Kingdom

---

“But when we come to matters with a European element, the (EU) Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute.”

Lord Denning M.R. in *H.P. Bulmer Ltd. Bollinger SA* [1974] Ch. 401, at 418.



University of  
Zurich <sup>UZH</sup>

## European Convention on Human Rights (signed in 1950 and in force

---

- Human Rights Act 1998 (in force 2<sup>nd</sup> October 2000)
- Declaration of incompatibility
- Parliament is expected to enact legislation to cure defect in UK law under Human Rights Act.



## EU (EEC) Law

- UK became part of European Communities (Jan 1, 1973) – based on European Communities Act 1972 (ECSC 1951, Euratom (1958), and EEC (1958, Treaty of Rome)
- Single European Act 1986 (EC); Maastricht Treaty (Nov 1993) Treaty on European Union; Treaty of Amsterdam (1997); Treaty of Nice (accession countries – 2004 and later Croatia 2013 etc)
- Constitutional Treaty 2004(rejected by voters in France and Ireland)
- Treaty of Lisbon (TFEU) (2009) (created office of President of the European Council and High Representative of Foreign Affairs)
- Council of Ministers (weighted voting), European Council (Heads of State), The Commission (28 states provide commissioners) – oath of independence, European Parliament. Co-legislative power to approve Commission draft legislation – approve budget and commissioners (censure the Commission).
- European Court of Justice – advisory role (General Court), and appellate review if not resolved. Preliminary ruling procedure. Art 234 (TFEU), often by request of national courts.
- European Court of Auditors - accounts
- Secondary legislation: Directives (*objective or policy to be achieved in certain time*) *vertical but not horizontal effect*; and Regulations (*vertical direct effect and horizontal direct effect*)
- Decisions – taken by Commission officials and other EU institutions
- Free Movement – people, goods, capital, and services (and companies)
  - Note: broader context of rising nationalism and fragmentation (US, France, Poland, Catalonia)
- Competition
- Employment protections for workers (ie., minimum holidays, rights against dismissal)



## Article 50 Treaty on European Union

---

- 1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
- 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, **the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.** That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.



## Article 50 TEU

- 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, **in agreement with the Member State concerned, unanimously decides to extend this period.**
- 4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
- 5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.



## Issues - political

---

- Devolution within UK: Wales, Northern Ireland, Scotland
- The Irish border and border controls
- Rights of UK citizens in the EU – rights of EU citizens in the UK
- Further free movement of people in the future
- Loss of EU citizenship and linked equal treatment rights
- UK membership in the Single Market
- Free movement of goods (tariffs?), services, capital
- Freedom of establishment of businesses
- UK's exit bill to pay
- ECJ jurisdiction
- Further: agriculture, nuclear, salaries of UK-EU representatives



## Issues – constitutional/legal

- August 2019 – PM proposes to Queen that she prorogue (suspend) Parliament from 12 Sept to Oct 15 2019
- 3 legal challenges to the lawfulness of the Govt's decision to prorogue Parliament (England/Wales, Scotland, N. Ireland)
- English court rejected the challenge deciding that prime minister's decision to prorogue was "inherently political in nature", and that there are "no legal standards" against which to judge its legitimacy.
- Scottish Inner House of the Court of Session ruled that the prorogation was unlawful, because the prime minister had acted for the improper purpose of stymying or quashing scrutiny in Parliament of Brexit debate.
- UK Supreme Court heard the joint appeal on 17 Sept and gave decision on Sept 24
- Ruled that the courts did have "jurisdiction to decide upon the extent and limits of a prerogative power". It found that the power to prorogue "is limited by the constitutional principles with which it would otherwise conflict" – ***those two principles being parliamentary sovereignty and parliamentary accountability.***



## European Union (Notification of Withdrawal) Act 2017 + Notification

- Long title: *To Confer power on the Prime Minister to notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU*
- Two sections: just to allow the **notification**
- **≠ Brexit Act ≠ Brexit UK-EU Deal**
- Came into effect after Royal Assent has been given to it on 16 March 2017
- Formal notification of withdrawal on 29 March 2017: Theresa May wrote to European Council President Donald Tusk to notify him of the UK's intention to leave the EU, delivered by Sir Tim Barrow, the UK's Permanent Representative to the European Union



### European Union (Notification of Withdrawal) Act 2017

2017 CHAPTER 9

An Act to confer power on the Prime Minister to notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU. [16th March 2017]

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

**1 Power to notify withdrawal from the EU**

- (1) The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU.
- (2) This section has effect despite any provision made by or under the European Communities Act 1972 or any other enactment.

**2 Short title**

This Act may be cited as the European Union (Notification of Withdrawal) Act 2017.



## The Withdrawal Agreement

- UK adopted revised Withdrawal Agreement (WA) on Oct 19 2019
- UK-EU customs border runs down the Irish sea
  - Leave EU on 31 January 2020, but transition period for EU rules to stay in effect until 31 December 2020 (parties hope to conclude trade deal by 1 Jan 2021)
  - Rejects original Withdrawal Agreement's Custom Union for UK-EU indefinitely while new trade deal negotiated
  - Not contesting other elements of the WA (including 'divorce bill' €39 billion payment to EU & mutual recognition of citizen's rights)
  - WA Joint Committee can agree to a 1-2 year extension (A132), but politically complex to do so
- Johnson government committed to exit based on the revised Withdrawal Agreement
- But election on 12 Dec 2019 – in which Labour party campaigns to negotiate a new WA in which UK remains in Customs Union until new trade agreement and then WA would be put to a referendum.
- Lib Dems and SNP want to revoke Article 50 process and hold new referendum
- Conservatives win parliamentary election on 12 Dec 2019 and Parliament enacts Withdrawal Act 2019 that implements the Withdrawal Agreement (treaty with EU to



- 2019 Conservative Manifesto
- “We must move on. No more renegotiations. No more referendums. Every week is costing us.” (Conservative Manifesto 2019, p. 5, available at [https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba\\_Conservative%202019%20Manifesto.pdf](https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf))
- The Conservatives promise to:
  - Put the renegotiated Withdrawal Agreement through Parliament before Christmas
  - Leave the European Union by January 2020



Source: Shutterstock



## Northern Ireland's status (WA)

- N. Ireland stays in UK customs union legally but de facto all N.Irish exporters/importers to/from UK must complete customs declarations and monitor products destined for EU.
- EU and UK to use 'best endeavours' to conclude an agreement which supersedes the WA by 31 Dec 2020
- Until the future relationship becomes applicable, no tariffs/quotas/rules of origin checks between N.Ireland/S.Ireland
- N Ireland stays in regulatory alignment with EU
- Between UK-EU until 31 Dec 2020, level playing field rules: customs rules, some state aid rules, some competition law, tax principles – good governance; environmental & social principles (non-regression) dispute resolution in Joint Committee. UK will not depart from EU rules until after 31 Dec 2020 – or alternative extension date to be negotiated as part of new trade deal



## Financial Services After Brexit

---

- EU (Withdrawal) Act 2018/2019
  - Repeals EU Communities Act 1972
  - However, UK will implement some EU legislation, including financial services legislation, through “onshoring”
- EU-UK Withdrawal Agreement (Treaty)
  - Not specifically mentioned in original and revised agreement
  - Political Declaration holds that UK and EU will have equivalent frameworks in place.
  - Assessment of equivalence should be concluded by end of June 2020.
- Financial Services (Implementation of Legislation) Bill
  - Provides UK government with power to implement and amend pieces of EU legislation that are not yet in force (in-flight files).



## The future relationship

- EU-UK Withdrawal Agreement, Art 184: “The Union and the United Kingdom shall use their best endeavours, in good faith and in full respect of their respective legal orders, to take the necessary steps to ***negotiate expeditiously the agreements governing their future relationship*** referred to in the Political Declaration of 25 November 2018 and to conduct the relevant procedures for the ratification or conclusion of those agreements, with a view to ensuring that those agreements apply, to the extent possible, as from the end of the transition period.”



## Future relationship: Hard vs Soft Brexit

- Refers to the kind and extent of relationship between the UK and the EU after Brexit
- **Hard Brexit:** UK give up full access to the single market and to the customs union – full control over borders and immigration → initially fall into WTO rules for trade with EU
- Hope to make UK a full independent trading nation, not half-Brexit
- **Soft Brexit:** UK's relation with EU as close as possible to the existing arrangements – unfettered access to single market, free movement of goods and services without tariffs, maintaining passporting rights for companies (see below)
- National models of this deal include: Norway, Iceland and Liechtenstein - not members of the EU but have access to the single market by being part of the European Economic Area.
- Customs Union – goods and agriculture but not services – Turkey and Ukraine in customs union
- Switzerland has a different model: EFTA membership: bilateral agreements and equivalence



## Issues – New UK/EU trading arrangement

- Referendum driver: “take back control” – regulatory autonomy and independence from EU structures
- Problem with UK access to EU economy market and vice versa without regulatory norm clash or double-imposition of EU and UK laws
- Options:
  - EEA membership (benefit from passporting, but has to obey EU law and no role in adoption of new rules)
  - Free Trade Agreement, maybe within European Free Trade Association: equivalence or substitute compliance or comparable compliance
  - Last resort: default WTO/GATS rules
- All have potential but also challenges and complexities



# Current negotiations for future EU-UK Trade Agreement

- Deadlocked negotiations (10 December 2020)
- EU Fishing Rights
- Economic regulation – level playing field, and EU ability to retaliate if UK does not fulfill obligations - sanctions
- Future Governance of the EU-UK relationship

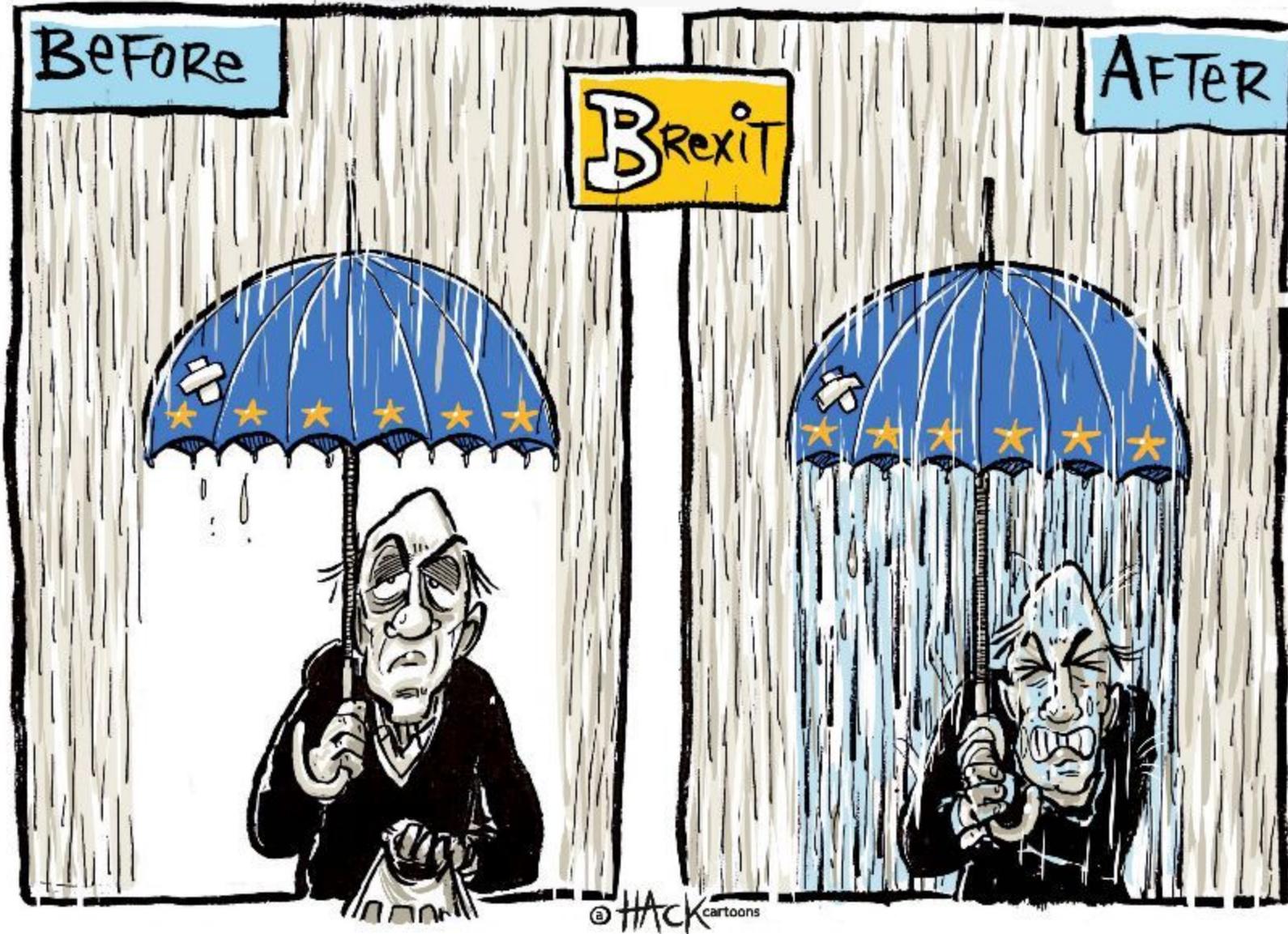




## No trade agreement - Brexit and contracts

- Terminating event
  - Brexit changes - regulatory requirements, tariffs, other barriers to trade, prices, exchange rates – all of which may change the nature of the original contract
  - Force majeure: for example, as a result of the loss of passporting rights for investment services? (depends on clause, but narrow application)
  - Common law frustration (outside event making it physically or commercially impossible to perform/ or performance radically different from entry BUT narrow scope)
  - Need for Brexit continuity clause to protect existing contracts?
- Disrupting event
  - For example, banks losing permissions to operate and the need to novate contracts to new entities with necessary regulatory permissions?







## BREXIT AND FINANCIAL SERVICES

LAW AND POLICY

*Kern Alexander,  
Catherine Barnard,  
Eilís Ferran, Andrew Lang  
and Niamh Moloney*

This timely book examines the legal and regulatory implications of Brexit for financial services. The UK's withdrawal from the EU is likely to have significant market, political, and policy consequences for the UK financial system, for the single market and the euro area, and for the international financial system. As the UK disentangles its financial system from the EU, law will matter to a profound extent. Treaties, legislation, and regulation, at UK, EU, and international levels, and the many dynamics and interests which drive them, will frame and shape the ultimate settlement between the UK and the EU, as well as how the EU financial system develops post-Brexit and how the international financial system responds.

Written by leading authorities in the field, this book addresses and contextualises the legal, regulatory, and policy issues across five dimensions, which correspond to the major legal spheres engaged: financial regulation implications and market access consequences for the UK financial system; labour law and free movement consequences for the UK financial system; the implications internally for EU financial governance and the euro area; the implications and relevance of the EEA/EFTA financial services market; and the trade law and World Trade Organization law implications.

### THE AUTHORS

**Kern Alexander** is Professor of Banking and Financial Market Regulation and Chair in Law and Finance at the University of Zurich.

**Catherine Barnard** is Professor of EU Law and Employment Law and Fellow of Trinity College, University of Cambridge.

**Eilís Ferran** is Professor of Company and Securities Law at the University of Cambridge and Pro-Vice-Chancellor for Institutional and International Relations.

**Andrew Lang** is Professor of Law and Chair in Public International Law and Global Governance at Edinburgh Law School.

**Niamh Moloney** is Professor of Financial Markets Law at the London School of Economics and Political Science.

### CONTENTS

1. Regulatory Parity in Post-Brexit UK–EU Financial Regulation: EU Norms, International Financial Standards or a Hybrid Model? (*Eilís Ferran*)
2. The UK Financial Market: Free Movement of Persons (*Catherine Barnard*)
3. EU Financial Governance after Brexit: The Rise of Technocracy and the Absorption of the UK's Withdrawal (*Niamh Moloney*)
4. The UK's Third-Country Status Following Brexit: Post-Brexit Models, Third-Country Equivalence and Switzerland (*Kern Alexander*)
5. The 'Default Option'? The WTO and Cross-Border Financial Services Trade after Brexit (*Andrew Lang*)

January 2018

240pp Hbk 9781509915804 RSP £60

**20% Discount Price: £48 (+ postage)**

*20% discount  
with this flyer!*

TO ORDER  
THIS TITLE  
go to  
[www.hartpub.co.uk](http://www.hartpub.co.uk)

To receive your 20%  
discount use the  
discount code **CV7**  
at the checkout

FOLLOW US  
ON TWITTER!  
For news about  
Hart Publishing  
@HartPublishing

KEEP UP TO DATE WITH  
HART PUBLICATIONS AND  
RECEIVE 10% DISCOUNT  
BY JOINING OUR EMAIL  
MAILING LIST!

Visit [www.hartpub.co.uk](http://www.hartpub.co.uk)  
for details

HART  
PUBLISHING

Good Books  
for Lawyers

