Message from the Europe Committee

The Europe Committee is happy to present this Brexit special edition of our Europe Committee newsletter. The co-chairs would like to thank the many committee members who have contributed articles to this special edition newsletter and we hope that you enjoy reading this special edition as much as we have.

We welcome all Europe Committee members who are interested in acting as guest editors to volunteer to organize a future special edition newsletter on a hot topic important to the Europe Committee.

Next week the Section will be organizing the Leadership Retreat at the Ritz Carlton Half Moon Bay Resort from August 3-5, 2016. We encourage all leadership members and those aspiring to a committee leadership position or Section leadership position to attend.

The Europe Committee’s Year-in-Review publication (YIR 2016 volume 50) is now available on the Sections website at:
http://www.americanbar.org/content/dam/aba/uncategorized/international_law/_yir640.authcheckdam.pdf This YIR edition discusses select developments in European Law during 2015. Congratulations to Tom Stanton all of the other editors for a YIR in review well done! Finally, don’t forget to join us on our monthly calls, the times and dates of which are distributed through the committee listserv.

Nancy Matos, Mattia Colonnelli and Jörg Rehder, Europe Committee Co-Chairs

A Note from the Editor

This hot topic issue of EUROPE UPDATE provides contemporaneous perspectives on the Brexit result from various Committee members around Europe. Beginning with an article that preceded the vote, and captured much of the suspense of the unknown, the issue continues with impassioned voices following the win by the “Leave” campaign. I have also, with special permission from De Brauw Blackstone Westbroek London B.V., reproduced their dispatch sent in the early hours following the final results. I anticipate this issue will continue the discussion of this historic event.

We welcome our Europe Committee members who wish to step forward as guest editors to organize further issues such as this one and others posted on the Europe Committee website.

Michael L. Balistreri (michael.balistreri@rhi.com), Editor in Chief

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EUROPE UPDATE

About the Europe Committee

The Europe Committee seeks to engage lawyers conducting practices that touch Europe, including the various European countries, the European Union, and the institutions of the Council of Europe. It nurtures a community of lawyers sophisticated in cross-border matters, comparative law, and the continuously emerging transnational law of Europe, public and private. The Europe Committee’s activities include the sponsorship of programs at the Section of International Law’s seasonal meetings, hot topics teleconferences and newsletter presentations by experts on emerging developments of European law, exploration of legal policy and law reform topics, contribution to the Year in Review issue of The International Lawyer, and co-sponsorship of Section of International Law standalone and other programming.

The Europe Committee’s membership is its most important asset. We encourage all Committee members to be involved in Committee activities and to communicate freely suggestions and ideas.

Upcoming Events

The following are highlights of some of the upcoming Section events:

Section of International Law 2016 Retreat
08/03/2016-08/05/16
Ritz-Carlton Half Moon Bay, California
This year’s leadership retreat will be at the spectacular Ritz Carlton Half Moon Bay Resort. The event will include a welcome reception and dinner, as well as networking with Section Leadership & Strategic Planning, as well as the committee awards presentation and luncheon.

Section Dinner at Tank18
08/05/2016
Tank18, San Francisco, California
Following the Section’s Leadership Retreat, we invite Section leaders and international bar leaders to a dinner at Tank18. Wine. Food. Fun. These three simple words are the driving force of everything they do at Tank18. The Tank18 Tasting Room is located at the winery in San Francisco’s SOMA district, bringing the country to The City.

2016 ABA San Francisco Annual Meeting
08/24/2016-08/25/2016
Marriott Marquis, San Francisco, California.
At this year’s ABA Annual Meeting, hosted in San Francisco, California, you can network with thousands of attorneys and make connections with new colleagues; attend (9) captivating, informative and spectacular CLE Showcase Programs; participate in engaging seminars; build and expand your legal career / practice; experience the presentation of the ABA Medal; enjoy and be entertained at the exciting ABA President’s Reception; and experience ABA EXPO & Reception.

11th Annual Homeland Security Law Institute
08/24/2016-08/25/2016
Walter E Washington Convention Center, Washington, D.C.
Please join us for this annual look at the state of security from infrastructure to exports, immigration to chemical safety and the roles of the Department of Homeland Security, Law Enforcement, the Military, FEMA, the National Protection and Programs Directorate, the NSA, the FBI, the CIA and the legal profession in keeping the country secure. Featuring more than 100 panelists.

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Pre-Brexit – A View from London
by Fabrio Marazzi & Domenic Pini

Overview

A referendum will be held on the 23rd of June 2016 where the British public will be asked to vote on the following proposition:

“Should the United Kingdom remain a member of the European Union or leave the European Union?”

The “Brexit” referendum, as it is better known, was born out of perceived political necessity for the Conservative Party in the United Kingdom. Prime Minister David Cameron, who leads this party, felt he needed to unify them over their stance on Europe before the general election of 2015 and prevent the drift of Euroskeptic voters to the anti-EU and populist portion of the voting population, represented through the United Kingdom Independence Party (UKIP). This was in keeping with his promise from 2013 of a referendum on membership of the EU and pledged to re-negotiate the terms of the UK’s membership of the EU.

The debate to leave or remain in the European Union (EU) is taking place after 8 years of austerity politics, in the midst of a migration crisis, and during the recent fallout of the Grexit Euro crisis, all of which have had an impact on several EU members. This has contributed to the UK’s public opinion on the EU, which is equally divided between leaving and remaining in the EU.

What the statistics show

Interestingly, the UK is dividing along demographic and geographic lines on the issue of the looming Brexit. In several recent surveys, the geographic areas most likely to vote to remain are London, Scotland, Wales and Northern Ireland, where 60/40 are for staying in the EU. This contrasts with provincial England outside London where the divide is 53/47 for leaving.

The age divide from that survey also indicates that under 30’s divide is 73/27 in favor of remaining while the over 60’s are 63/37 in favour of leaving. This may present a problem for the remain campaign as the under 30’s are less likely to vote in the referendum.

The statistics are equally interesting when examining them in terms of workforce. The managerial and professional segment of society, the social class A/B are 62/38 in favor of remaining, while skilled and semi-skilled are 63/37 in favor of leaving.

The divisive issues

The main issues dividing the public are centered on immigration, the cost of Brussels, sovereignty, and trade.

Immigration

Immigration is divided between the EU and non-EU immigration. The “leave” campaign has tried to connect the free movement of people in the EU to security risk in the UK, even though the UK is not a member of Schengen Area. The Brussels terrorist attack on the 22nd of March 2016 and the possible accession of Albania, Serbia, and Turkey to the EU, have added fuel to the fire on this issue.

Further, the EU migration, where 3 million EU residents have taken advantage of the ability for them to reside in the UK, has also raised issues of the pressure on schools, hospitals, and social security benefits, particularly to children who remain in their home countries. This has been described as “benefit tourism”. There is evidence that many of these fears are more perception than reality as a study by University College London has found that European Economic Area immigration in the decade up to 2011 contributed 34% more in taxes than they received in benefits.

The Cost of Brussels

Another major issue absorbing the attention of the public is the cost of Brussels. According to British Government figures, the UK net contribution was £8.8 billion in 2015, which was less that the UK received in benefits from the EU. The “leave” campaign point out this vast sum could be better used to support public services and infrastructure projects. However, the Confederation of British Industry (CBI) estimated that the UK benefits by between £62 and £78 billion a year from being a member of the EU.

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Sovereignty versus Economic Necessity

Ideas around trade and sovereignty have also spawned concern about the potential Brexit. The EU is currently the UK’s biggest trading partner, accounting for 44.6% of UK goods and services exports, which has a value of £226.7 billion. However, there is a large trade deficit with EU imports exceeding UK exports to the EU by about £77 billion. Despite this deficit, about a third of FTSE 100 CEOs support remaining in the EU, according to the Hundred Group.

The main thrust of the “Leave” campaign is that EU rules and regulations suffocate entrepreneurs and leaving would allow the UK to negotiate free trade agreements with high-growth parts of the world such as India and China.

This argument within the “Leave” supporters is highlighted by opposition to the EU from Sir James Dyson of Dyson Vacuum Cleaners, who believes that the EU is opposed to new technologies and is protectionist. However, there is no certainty on what the outcome of these negotiations will be. In addition, concerns exist that if the UK left the EU it would cease to be the top destination for Foreign Direct Investment which in 2014 accounted for $72 billion.

In the City of London, opinion seems divided between the large corporates for remaining because of the Single Market and the smaller firms arguing that London would thrive if it no longer had to comply with EU regulations and become more like Singapore or Hong Kong. On the issue of sovereignty, an argument has been made that the EU makes the UK less democratic because the UK parliament has to accept legislation from the European Commission’s decisions Brussels. Recently, the former Prime Minister, John Major said that the only truly sovereign country in the world is North Korea, his argument being that all countries have to compromise on decision making, just as the UK does with other organizations such as NATO, and the United Nations, and through treaties and conventions such as the European Convention on Human Rights.

Conclusion

The current geopolitical issues branded as, “immigration”, “terrorism”, “economic austerity”, and “Euro instability” have created a divided UK on the issue of its continued membership to the EU. Some public sentiment suggests that it would be best to go it alone and pull up the drawbridge between Britain and the rest of the EU. However, this is balanced against the uncertainty of the UK economic future if it left the EU without any idea of where it would end up. It may find itself on leaving the EU between a rock and hard place with no safe harbor.
The Brexit Vote of June 23, 2016
by Guest Editor Anna Engelhard-Barfield

Germans respond to the Brexit vote in one of three ways. They either respect the results of the British vote as "living democracy" (gelebte Demokratie), condemn the leave vote as a terrible mistake and a consequence of fear-mongering, or speak of hope for Europeans and the EU.

The U.K. always had special EU membership status, since it did not adopt the euro, and did not participate in the Schengen Agreement which provided for visa-free travel. This created the impression that the U.K. had been asking for, and getting, preferential treatment ("getting an extra sausage" as Germans like to say). This view is supported by David Cameron’s recent negotiation with the EU that was considered cherry-picking for favorable EU membership terms. Thus, many Germans say: let them go.

The U.K. exit came as a surprise, following late betting odds in favor of the, “Remain” camp. When Ms. Jo Cox, a British MP and Remain supporter, was stabbed and shot to death only one week prior to the vote, various conspiracy suspicions arose and betting odds for Remain improved to 62%.

The widely read "Neue Zürcher Zeitung" forewarned on June 28, 2016, "The Brexit is only the tip of the iceberg", suggesting that Brexit represents a challenge, and test, for the UK and all of Europe because of unhindered debt burdens and weak productivity rates. The Bank for International Settlements (BIS), Basel, was cited as concluding that the, "current financial cycles alternating between large expansion periods and violent crisis have permanently damaged the world-wide economic system". Also, the BIS found that, central banks, with their, "ultra-loose monetary policies are unable to attack the real reasons of weak growth," and that, "if the expectations of the public in the stabilizing effects of monetary and economic policies are disappointed over a long period of time, the reputation of political decision makers suffers."

The "Frankfurter Allgemeine Zeitung" wrote on June 25, 2016 that the EU would not fall apart because of Brexit, but would no longer be the same. "EU elites will hold Sunday talks dedicated to promising change, even though there is no consensus whether the EU should be reformed and if so, how it should be reformed, whether towards greater subsidiarity or greater centralism". A common thread points to the EU’s failure to manage the migration crisis, including the hundreds of thousands of immigrants coming to the U.K. each year, most from EU countries such as Poland and Romania, breaches of Masstricht and Schengen treaties, loss of jobs due to globalization and digitalization, inciting many Danish, Swedes, Dutch, French and Germans to ask for a referendum to vote on whether to leave the EU.

European Commission President Juncker and European Parliament President Schulz (wishing for a "true European government") initially called for accelerated European integration. German politicians have responded cautiously. Chancellor Merkel said within a few days of the vote that, "she saw no chance the U.K. could ignore the outcome of the referendum." But before negotiations, leaders of the remaining 27 states, "need to ask ourselves what our interests are," and that "the remaining EU states' interests would take priority in the talks." Ms. Merkel spoke out against "cherry-picking", making it clear that privileges do not continue to exist, if, "all obligations become obsolete." Mr. Cameron has acknowledged that it would be impossible for the U.K. to have all the benefits of EU membership without the costs.

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On June 27, 2016 German Chancellor Merkel met with Francois Hollande, Matteo Renzi and Donald Tusk, the EU Council President in Berlin. Bild-Deutschland reported on June 28, 2016 that the three big member states intend to form a "commando" to "give the EU new impulses", but "to avoid big gestures which would not be supported by the majority of citizens."

After the vote, European bank stocks lost considerable (25%) value. European Banks' problems stem from the existence of too many banks, weak profits, minimal capitalization, and a high percentage of bad loans. Deutsche Bank and Santander failed the 2016 US bank stress test. Italy is considering using state funds to recapitalize its banking system, giving investors more reason to be cautious in the wake of Britain's vote to leave the European Union. Greece continues in bankrupt mode, with very high levels of nonperforming loans and an inability to get off the EU dole.

There have been discussions about making London more attractive as an offshore haven. "This could lead to London becoming even more like the Cayman Islands and other British territories, skirting around regulations, in a race to the bottom for the financial sector," said Adam S. Posen, a former member of the rate-setting committee at the Bank of England and now president of the Peterson Institute for International Economics in Washington. He further opined: "This potentially could leave pretty big holes in the financial safety net." (http://nyti.ms/28XMcnr, "Brexit" in America: A Warning Shot Against Globalization)

The top Europen Banking Supervisory Board (EBA), currently located in London, will have to move to another EU location. EBA is responsible for EU banks, including banks in non-euro countries. Frankfurt and Paris are jockeying for top consideration in the search for the new location of EBA.

The planned fusion of the Frankfurt Stock Exchange (FWB), operated by Deutsche Börse, and the London Stock Exchange (LSE), is also now in question. Felix Hufeld, the President of Bafin (German federal financial supervisory authority) voiced what many think, "It is difficult to imagine that the most important stock exchange in the euro zone would be located outside of EU territory." Even before Brexit, there were concerns about locating the euro stock exchange outside the euro zone.

According to an article in the Frankfurter Allgemeine Zeitung (FAZ) of July 5, 2016, Germany and France may be forced to reduce their taxation of business entities, if the U.K. follows through on George Osborne's suggestions to considerably reduce business taxation to less than 15% (currently at 20%). Ireland imposes the lowest taxes (12.5%), the Netherlands are at 24%, Germany is listed at 29.83%, and France at 38%. Goldman-Sachs predicts a U.K. recession. National debt is 1.6 trillion GBP/83% of GPD. Concerns about capital flight from the U.K. have arisen.

It is interesting and sad that Mr. Cameron has been credited by many Europeans with having a clear vision for the EU and Europe, advocating principles which are on the wish list of many Europeans: a slimmer and less bureaucratic union, more flexibility and consideration for the diversity of member states, greater consideration of the subsidiarity principle, and democratic legitimacy for national parliaments. It is not expected that the top EU bureaucrats really want to reform the EU in this direction. But there is hope for meaningful discussion - and further national referenda as options for the future.
Brexit, International Law & the UK Constitution  
by Matthew Soper

On June 23, 2016, the “shot heard round the world” was the British people voting to exit the European Union (EU), or simply “Brexit”. The United Kingdom’s (UK) EU Referendum, in which a record 72.2% of the electorate voted, resulted in 48.1% choosing to “remain” and a surprising 51.9% opting to “leave”. Immediately after the referendum’s unexpected outcome, a snowball reaction began that affected the UK’s political landscape and international financial markets.

The political casualties and financial impacts of the Brexit vote have been monumental and historic to say the least. As financial markets opened on Friday, June 24, 2016, the Pound Sterling had its worst trading day since the 1967 devaluation, losing 8% by 18:00 BST. The FTSE 250 index took a 7.2% hit, the worst since the October 1987 crash. The Stoxx Europe 600 index fell by 7%, the steepest one day drop since the Financial Crisis of 2008. British banks also took major hits, as Barclays PLC lost 30% at one point on the 24th and the Royal Bank of Scotland Group closed the trading day down 18%.

The UK Prime Minister, David Cameron, who campaigned to remain in the EU, became the first casualty of the EU Referendum when he announced he would stand-down at the Conservative Party’s meeting in October 2016. The presumptive replacement, the former Mayor of London, Boris Johnson, a Member of Parliament (MP), became the second casualty when fellow Brexit leader, William Gove MP, withdrew his support of Mr. Johnson before launching his own campaign to become the Party’s leader and Mr. Cameron’s replacement. Two weeks after the Brexit vote, a runoff leadership ballot was cast on July 8, 2016, in which Mr. Gove was eliminated. Andrea Leadsom MP, a finalist, pulled-out of the Conservative Party leadership battle on July 11, 2016, leaving a clear path for Home Secretary Theresa May to become Britain’s Prime Minister two-days later.

Amongst the political and financial roller-coaster that ensued, the legal aspects of withdrawing the UK’s membership from the EU are an unchartered and complicated legal web. For starters, the EU Referendum was only advisory to Parliament and not binding on the Government. The UK Constitutional and Public International law legal battles, which are currently underway, are of great interest to lawyers and scholars since they have never been applied in practice.

Under the foundational pillar of the British Constitutional system, the doctrine of “parliamentary sovereignty” implies that the Parliament of Westminster is the supreme legal authority of the United Kingdom of Great Britain and Northern Ireland. Contrast this principle with the United States’ system of government, where a codified constitution is the highest law and the Supreme Court has the power to judicially review acts of Congress and the executive. In the UK, courts cannot generally overrule legislation and no parliament can pass laws binding a future parliament.

Amongst the political and financial roller-coaster that ensued, the legal aspects of withdrawing the UK’s membership from the EU are an unchartered and complicated legal web. Some refer to the British Constitution as “unwritten,” though this is not entirely accurate. Parliament has passed laws which, politically speaking, limit the scope of the doctrine of parliamentary sovereignty. These laws include: the European Community Act 1972, the Acts creating the Scottish Parliament and Welsh Assembly, the Human Rights Act 1998, and the Constitutional Reform Act 2005 that established the UK Supreme Court (on October 1, 2009), separate from the House of Lords, to serve as the nation’s highest appellate court. Other acts have received higher standing in the British constitutional hierarchy too. Fundamentally, the principle of parliamentary sovereignty remains in place as, at least theoretically, a future parliament could repeal any of these acts.

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Perhaps the most significant British constitutional development has been the UK’s participation as a Member State of the European Community (now European Union) since January 1, 1973. The effect of joining the EU was that the UK had its “Constitution” subjected, for the first time, to the exercise of powers by and processes of an entirely non-domestic set of institutions.

EU law, the body of law developed by the EU and its institutions, is superior to laws of the whole of Great Britain and Northern Ireland until the UK officially withdraws. When the UK joined the European Community, some scholars and pundits claimed that the UK Parliament had given away aspects of its own sovereignty in exchange for access to the Common Market – a constitutional question that has remained contentious ever since is whether the United Kingdom can withdraw from the EU.

The legal authority for the referendum came from legislation passed by Parliament in December 2015.

University of Cambridge Law Professor Mark Elliott commented that:

“The legislation that provided for a referendum to be held said nothing whatsoever about the effect of the outcome of the referendum, and the result does not place the Government under any legal obligation to secure Brexit.”

While the Government is not legally obligated to trigger an exit from the EU, the political reality is that the electorate is expecting the Cabinet to respect the will of the populace and perform according to the outcome of the referendum.

Prior to the vote, Dr. Alan Renwick of University College London’s (UCL) Constitutional Unit wrote:

“In purely legal terms, a referendum vote to leave places no obligation on the Prime Minister to invoke Article 50 [TEU]. Indeed, it places no obligation on him to do anything: the referendum is, formally, advisory only. In practice, of course, he

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will have to respect the result. But does that mean invoking Article 50?”

The legal point that is currently being debated is whether the Prime Minister has the prerogative to act on the vote’s result without Parliament taking any prior action. University of Glasgow’s Regius Professor of Law, James Chalmers, has expressed the view that this was a matter of dispute:

“There may be litigation seeking a declaration that an Act of Parliament is required. My expectation is that there will be an Act of Parliament, because there is no clear gain in proceeding without one.”

Further, British diplomat David Riley, during a June 29, 2016 Brookings Institution event stated that:

“While the legislation is not binding on the Government, nor does the legislation say Parliament has a role in the making of Article 50 [TEU]. It is for the Prime Minister to decide when to invoke Article 50 and the extent to which he or she wishes to involve Parliament.”

On June 29, 2016, an Informal meeting of the 27 heads of state or government (UK excluded) of the EU Member States indicated the European Council is expecting Article 50 TEU (Treaty of Lisbon) to be the legal basis for withdrawal and that official notice to withdraw must come from the UK Government. Since the Prime Minister is the head of the UK Government, it will be for Mr. Cameron’s replacement to send an Article 50 notice to the EC in Brussels.

Under the Treaty of Lisbon 2007 (which consolidated and amended the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)), which came into force December 2009, there are two possible routes for a Member State to leave the EU. The logical route is to proceed under Article 50 TEU, as it is the treaty provision which governs what happens when a Member State decides to withdraw from the Union; the alternative, unlikely method is under Article 48 TEU, which governs the process for amending of the treaties of the EU.
Article 48 TEU, governs the rules for its revision and amendment. Implementing Brexit via Article 48 TEU would be to revise the Union’s membership list to exclude the United Kingdom as a Member State from the EU treaties. In theory, this option sounds easy, but would be challenging from both a procedural and political aspect, as two layers of veto powers are involved. Under Article 48 TEU, there must first be unanimous agreement among all Member States to trigger it. Thus, each Member State would have a veto power. The second layer of veto power occurs when each national government must ratify, according to the Member State’s method for amending its own national constitution, the revisions to the TEU.

Under Article 50 TEU, once an EU Member State has decided to withdraw from the EU, the Member State “shall notify,” in other words, legally communicate that intent to the European Council, thus triggering a two-year negotiations period. The negotiation period exists to ensure the conclusion of a withdrawal agreement concerning trade provisions, EU treaty arrangements, etc. The EU Council is granted the authority to conclude such withdrawal agreement on behalf of the Union by a qualified majority of Member States (after obtaining consent from the EU Parliament). The UK exit date would be either the date of the withdrawal agreement or two years from the date of “notification of decision”.

If after two years no agreement is reached, the UK, under Article 50(3) TEU, would simply cease to be an EU Member State without any transitional provisions or trade deals. A negotiated withdrawal is adventitious for achieving transitional and post-exit trade, tax, and citizenship arrangements. The prospect of negotiating an agreement is one of the UK’s, the EU’s, and individual Member States’ strongest bargaining chips in the Article 50 process. However, an automatic withdrawal, two years after commencement of Article 50, does not necessarily mean non-use of the power to negotiate a withdrawal agreement is a horrible outcome.

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The UK and EU would be free to make treaties post-withdrawal in the same way that the EU can make treaties with other non-Member States.

A “decision,” for the purposes of Article 50(1) TEU, must be in accordance with the given Member State’s own constitutional requirements. This means a “decision” is made either by the exercise of the prerogative powers (i.e. Prime Minister acting on behalf of the Crown) or through a piece of primary legislation (i.e. Parliament acting in its sovereign role). The EU Referendum vote was merely advisory, and to comply with the “constitutional” element in Article 50, either the prerogative power or the parliamentary powers, depending on the point of view, must be used to formally “notify” the European Council in order to trigger Article 50(3) TEU’s two year clock.

Assuming a “decision,” for Article 50 TEU purposes is to be made by Parliament, a few scenarios might playout:

(a) Scottish National Party (SNP), Labour, and a few Conservatives could lead a revolt and refuse to take action; or

(b) The same could vote down any measure upholding the results of the EU Referendum.

In Addition, Parliament might also pass a bill which would restrict the exercise of the prerogative power by the Prime Minister, thus preventing him or her from acting on the results of the EU Referendum. If the next Prime Minister, who will take office in October 2016, decides that both the ‘decision to withdraw’ and ‘notice to the European Council of the decision’ are prerogative powers, then there may occur a scenario in which ‘statute beats prerogative’.

Alternatively, UK Constitutional Law Association fellows Nick Barber, Tom Hickman, and Jeff King argue any prerogative power that would otherwise be available to the Government in order to make an Article 50 TEU withdrawal decision is displaced by the **European Communities Act of 1972**. The argument is based on the...
holding in the Fire Brigades Union case, in which Lord Browne-Wilkinson said, “It would be most surprising if prerogative powers could be validly exercised by the Executive so as to frustrate the will of Parliament expressed in the statute.” The difficulty of challenging the prerogative in this way is that the EC Act of 1972 does not confer any particular rights on anyone. The Act does, however, show Parliament’s will to give effect to the UK’s obligations under EU treaty law within the country. Since foreign relations are usually perceived as a part of the prerogative powers, triggering Article 50 TEU may be both the exercise of a common prerogative authority through the usage of a treaty provision and going against the implied will of Parliament through nullifying its 1972 Act. This question will further be debated as the Michcon de Reya law firm seeks a definitive answer.

On July 3, 2016, solicitors at Michcon de Reya, acting on behalf of an anonymous group of clients, contacted government lawyers to seek assurances that Article 50 will not be triggered without an act of Parliament. The solicitors at the law firm, who are not advocates, retained the services of renowned constitutional advocates who were bestowed the distinguished title of Queen’s Counsel (QC), The Lord David Pannick QC of Blackstone Chambers and Rhodri Thompson QC of Matrix Chambers, as barristers who have standing to appear in court for Michcon de Reya’s clients. The Lord Pannick QC sits on the Constitution Committee in the UK House of Lords.

After the Brexit vote, the Petitions Committee, which is made up of 11 backbench Members of Parliament, received an e-petition with over 4 million signatures asking the Government for a 2nd EU Referendum. Under a convention of Parliament, any e-petition with over 100,000 signatures will be debated in the House of Commons. This petition is scheduled for debate on September 5, 2016. However, the Government responded by saying:

“The Prime Minister and Government have been

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clear that this was a once in a generation vote and, as the Prime Minister has said, the decision must be respected. We must now prepare for the process to exit the EU and the Government is committed to ensuring the best possible outcome for the British people in the negotiations.”

Even though the majority of the British electorate may have voted in favor of exiting from the EU, the UK will continue to remain a Member State until key constitutional questions are resolved in order to begin the withdrawal process. The first order of business is deciding if a decision has been made which meets the UK’s Constitutional process. The New Government has intimated it will honor the outcome of the Referendum and withdraw from the Union using Article 50 TEU. The New Prime Minister, Ms. May, has indicated how the withdrawal process should take place, but this is only one opinion, and more importantly, just the beginning of the process.

The legal issues of how national constitutional law interacts with international treaty law will test unprecedented waters. The legal debate on how to leave, and then, how to unravel a union that has

It is quite clear, that even if the New Government were to not follow the advice of the electorate, the financial and political damage is already irrecoverable. The world has already reacted to Brexit, as though the vote’s outcome were contractually binding. The snowball effect in terms of political shifting and financial and business turbulence will continue for the next several years. The legal issues of how national constitutional law interacts with international treaty law will test unprecedented waters. The legal debate on how to leave, and then, how to unravel a union that has existed since 1973, will be a daunting challenge to say the least. It is speculated Brexit will prompt changes in formal rules and conventions within the EU and will serve as a case study to other nations contemplating what would happen if they were to follow the UK. The legal path of leaving the EU is a watershed moment in the history of UK Constitutional and Public International law.
Brexit:
A Problem for the UK or for the EU (or Both?)
by Holger Bielesz & Isabel Haider

The stock markets went crazy on this 23 June 2016, when the United Kingdom authorities announced the official result of the EU referendum stating that 52% of the population had opted for the exit of the UK out of the EU – the "Brexit". Enormous drops in share prices were the imminent verdict made by the international financial markets. What the financial markets expect is that the Brexit will lead to a shift of economic activity out of the UK and thus trigger recession and unemployment. Is it going to happen?

At least, this is what those who supported the UK's stay in the EU were saying. It was their key selling argument. Yet, these threatening illustrations of a world without the UK being EU member state did not entail the desired effect. Some say that, quite the contrary; they merely aided Nigel Farage and Boris Johnson in their campaigns for the "Brexit".

To phrase it differently, the "Bremain" supporters failed to address the UK population's concerns, they failed to convey the benefits of European integration, the benefits of being part of a sizeable global player rather than pursuing individual interests as Europe's national states used to do for centuries.

Probably, these deficiencies weighed more heavily than some "inaccuracies" of the "pro-Brexit" campaign, which came to light shortly after the referendum. In contrast to one of the key messages conveyed during the "Brexit" campaign, Nigel Farage soon admitted that he did not actually believe that following a "Brexit" there would be an additional GBP 350 million per week available to fund the UK's national health system.

The EU always struggled to convey the benefits of European integration to its citizens. There are commentators who fear that EU bureaucracy is prone to even more of an increase after the UK has left the EU decision-making bodies; the UK traditionally pushing back on overly centralistic EU legislation projects. Moreover, national politicians repeatedly preferred to attribute unpopular policies to the EU bureaucracy and to present the more popular projects as the result of smart ideas originating in the member states. While such a political "sales strategy" might not be uncommon in national states with federal structures, the major difference lies in the possibility to leave the EU, creating a real exit option, which is, of course, not available within national states. It was this, or similar, reporting about the EU's role by media and national politicians that slowly, but constantly, damaged the reputation of the EU and its institutions in the eyes of the citizens.

Against this backdrop, the "Brexit" campaign obviously had its impact on the UK citizens. It was supported by known arguments regularly used by populist parties in a number of member states; money paid to the EU could be better used in the nationalistic social systems; the EU costs more money than it gains; and foreigners will overrun and steal the jobs of the national population.

The UK "Brexit" protagonists will now have the chance to keep their promises. Interestingly enough, neither Farage nor Johnson will do so, as they each have left their leadership positions only days after the referendum (Although UK's new prime minister Theresa May recently appointed Mr. Johnson foreign secretary, it will be David Davis, who will lead the negotiations with the EU as new UK secretary of state for leaving the EU.).

Their sudden disappearance seems to confirm what populist movements all over Europe have in common. It is their speciality to denounce deficiencies and faults, rather than propose any solutions.

However, despite the significance of political messages on public opinion, it may be too simplistic to identify these as the only driving forces of the recent vote for "Brexit". The UK was having a difficult relationship with the EU for a long time. What was the EU's initial purpose and did it
change over time? When the UK joined the European Communities (EC) in 1973, the EC had only consisted of its six founding member states. It will be remembered that the EU had been founded as a loose association to consolidate peace and foster economic growth between its member states through abolition of trade tariffs. When awarding the Nobel Peace Prize to the EU in 2012, the Norwegian Nobel Committee said its decision was based on the stabilizing role the EU has played in transforming most of Europe from a continent of war to a continent of peace.

Later on, the member states developed into steady and wealthy democracies playing a major role on the international markets. It is not an overstatement to say that the EC contributed to Europe's economic development. However, as time went by, and the challenges of a more and more globalized world grew and changed, even more fields of policy were shifted to the European agenda. At the same time, increasing unemployment, a globalized economy, lack of innovation, and an aging society presented challenges for Europe, which remain to be adequately addressed. As many other institutions in the world struggled with them, so too did the EU, with the answer often closer integration. The UK was one of the member states looking at this development with a lot of skepticism. An interesting theory proposed for the UK's aversion to the EU is that the UK had never been interested in anything beyond a loose economic association from the beginning. Accordingly, some say that the UK's population was misinformed ever since with regard to the EU's true aim towards stronger political cohesion.

Was the "Brexit" the only solution to remedy this mismatch of concepts? Which example does the "Brexit" referendum set for the rest of the EU? It puts a spotlight on one way to solve problems, which might at first sight seem easier than lengthy discussions and tough negotiations. While the economic effects caused by the Brexit referendum are still impossible to foresee, one effect is obvious already; Brexit means giving up; giving up on the opportunity to help form the EU as one of the world's most ambitious political, legal, and economic association models; and giving up on the EU aiming at playing a "front-runner" role in the fight for global peace, prosperity, and preservation of the environment. While of course its member states main interests may not be purely unselfish, it would be short-sighted of them to only pursue their own interests. Peace and economic welfare are not maintained through the bare pursuit and defense of nationalistic interests. Peace has been, and is served, if all European member states see self-interest in the welfare of every single member state among them.

What comes next after "Brexit"?

The answer to this question will most probably entail much greater long term effects than the recent turmoil on the stock markets. Will the UK be able to agree with the EU on a concept of economic co-operation more suitable to its desire? Will the EU grant the UK its benefits, in the first place free movement of goods and services, and nonetheless allow the UK to impose limitations on the free movement of persons? And if it does, what will be the effect on other EU member states, where at least certain political parties have already started to debate a "Nexit" (Netherlands) or "Oexit" (Austria) for their country as well? It might generate a domino effect, putting at risk the European project in its entirety. A lot will depend on how the EU will handle its relations with the UK going forward and, last but not least, on how it will address its flaws, which facilitated the upcoming departure of Europe's second largest national economy out of the EU.

A lot will depend on how the EU will handle its relations with the UK going forward...

Footnotes:
1 http://europa.eu/about-eu/basic-information/eu-nobel/index_en.htm
3 Pelinka, Europa ist nicht Europa ist nicht Europa, Beitrag für TRANSIT Nr. 28
Brexit Referendum Result – A Triumph of Jingoism and Mendacity!
by Robert M. C. Webster

Doubtless, the advocates of Brexit are congratulating themselves on securing a historic victory! Doubtless, they are rejoicing as the pound sinks to its lowest value for over thirty years and economic uncertainty appears to beckon! Doubtless, too, they must be exulting in the political chaos that has enfeebled the nation and left the good ship United Kingdom rudderless and directionless! It is, of course, highly doubtful that the anarchic Brexiteers are sufficiently cognizant of the realities of today’s world that they are troubled by the calamitous consequences of their destructive campaign. After all, it was a campaign characterized by mendacity and duplicity. The amount of misinformation (I use the word delicately) disseminated about immigration figures, contributions to the E.U. coffers and how much would be saved by British withdrawal from this awkward monolith that has apparently been stifling the spirit of freedom-loving Brits, deserves a lifetime of penance.

The decision to leave the European Union is, frankly, nothing short of an international melodrama complete with a cast of thoroughly dubious characters who bear a very considerable degree of responsibility for this fiasco.

The dramatis personae of this tragedy feature the unwelcome spectre of Margaret Thatcher, Tony Blair, departing Prime Minister Cameron, Jeremy Corbyn [this fellow masquerades as the Leader of Her Majesty’s Loyal Opposition – The Labour Party] – and – the collective leadership of the European Union.

Thatcher, once she was deposed, encouraged hostility to Europe, even to the extent of undermining the authority of her successor, John Major. Indeed, so successful was the “retired” Thatcher at fomenting Euroscepticism in the Conservative Party that it became firmly rooted within its ranks, gaining a strong and lasting foothold.

David Cameron, understandably weary of his colleagues “banging on about Europe”, as he put it, and weakened by the subversion of his Eurosceptic colleagues, ultimately (regrettably and recklessly), committed his administration to holding a referendum. Using a plebiscite as a tool of party management that risked jeopardizing the nation’s welfare was at best questionable, at worst, contemptible. Now, Brexit will be indelibly engraved on his political tombstone – an ignominious end to what might have been a career blessed with some distinction.

The Labour Party adopted the official position that Britain should indeed remain within the European Union. This may come as something of a surprise to many, as Corbyn was nowhere to be seen on the campaign trail. His shameful absence may well have been partly responsible for the lack of working class support for the Remain side. In any event, it is an appalling reflection on Corbyn’s “leadership” that he was effectively AWOL from the national debate on a matter of monumental importance.

Perhaps the most singularly contentious issue in this ill-fated referendum was immigration, which is why Tony Blair warrants a mention in this unattractive parade of miscreants. Blair presided over a period of unprecedented immigration, both from within and without the E.U. History records that officials failed to predict this influx, and equally failed to develop a transparent and practical policy to deal with it. Notwithstanding Blair’s inexpertitude in respect to this problem, it would ultimately be the European Union that would be blamed for this “invasion”, and thereby earn the unforgiving wrath of many a Brit, their ire translating into votes to leave in the referendum.

It would be indescribably remiss to overlook the role of the European Union itself in this tawdry tale. The E.U.’s imperious insensitivity to the feelings, needs, and concerns of what are so coyly described as, “ordinary folk” defies description. The E.U. “bullet train” is not seen stopping at stations used by the hoi polloi in regions up and down the land where people have not experienced the fruits of prosperity. On the contrary, they see themselves as victims, jobless, without prospects, living in communities they no longer recognize, and, above all, voiceless. Increasingly, they turn to those outside conventional politics to champion their cause. They latch on the often mendacious claims of the National Front in France or UKIP in the U.K. They readily believe that the European Union governs their

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beloved nation and that their government no longer has control over its own borders. They are angry, and they voted with anger on the 23rd of June. It should also be remembered that they feel abandoned by their regular political representatives who often give the appearance of caring more about their careers than their constituents. (A parliamentary career today seems to lack that all-important vocational element of service.) Brexiteers believe in a return to a Golden Era when Britannia will once again rule the waves. But rule the waves in what sort of seas? When Prime Minister Harold MacMillan was asked by a journalist what represented his biggest worry, he replied: “Events, dear boy, events.”

The vast majority of those who voted to leave would opine that the collective lackluster leadership of Europe is incapable of dealing with events, let alone solving them. Britain is experiencing one of its most severe and testing challenges since World War II. What of the future?

The result of the referendum is not binding. Parliament is sovereign and Members of Parliament must be given a vote in order to enact legislation that would trigger Article 50 of the Lisbon Treaty, setting in motion the mechanics of withdrawal from the European Union. This view is at odds with the opinion expressed by the Government Minister put in charge of “Brexit”, Oliver Letwin. He has recently opined that Article 50 could simply be activated by the exercise of the Royal Prerogative, a power exercised by the Prime Minister, denying MP’s a say in the matter.

However, the proper approach, it is submitted, would be for MP’s to repeal the European Communities Act of 1972, which brought us into Europe, in order to trigger Article 50.

The sovereignty of Parliament was a major talking-point during the campaign. Who governs Britain? It would be offensively ironic were Parliament not allowed to participate in a decision of such magnitude. Brexiteers have had their day. Let the denouement of this story be played out according to parliamentary rules and let MP’s vote, unless of course the xenophobes are worried about the exercise of democratic principles.

Would Parliament ignore the will of the people expressed in the Referendum and refuse to repeal the European Communities Act? It has been said that such a development is unthinkable, that it could never happen. After all, the people have spoken. But “never” is a word that simply does not belong in the lexicon of a politician.

At the time of writing, Theresa May has just been effectively anointed as the next Prime Minister. She might well embark...
EUROPE UPDATE

Brexit’s Impact on the Irish Energy Sector
by Eoin Cassidy & Peter McLay

At an instinctive level, Brexit will inevitably have an enormous effect upon Ireland’s affairs, due (among other things) to Ireland’s geographical position as the only EU Member State sharing a significant land border with the UK, and the fact that Ireland is separated by the UK from the remainder of the EU.

However, we choose to focus here on the potential impacts of Brexit upon Ireland’s energy sector. When we do this, we find that the consequences, at least in the short term, may not be as dramatic as might be expected.

To set the scene (at least in relation to electricity), there is around 13GW of electricity generating capacity installed on the “island of Ireland” (which includes both the Republic of Ireland and Northern Ireland – the latter being part of the UK). Around 3.5GW of that total is made up of onshore windfarms that have been installed since the establishment of the Single Electricity Market – which is the wholesale electricity market through which the electricity generated and consumed on the island is required to be traded. It is often remarked (and particularly at fraught stages during the development of complex industry projects) that the demand served by the “all-island” electricity sector is (only) around that of a large regional UK city.

Ireland’s energy infrastructure is certainly capable of being affected by Brexit, in particular because:

• the electricity generated and consumed in Ireland and Northern Ireland (part of the UK) currently passes through a common wholesale electricity market, the Single Electricity Market;

• a 500MW sub-sea electricity interconnector has been built between Ireland and Wales (part of the UK);

• EirGrid, the transmission system operator on the island of Ireland, is planning to build a 400MW cross-border transmission line across the border between Ireland and Northern Ireland, to supplement the small number of lower-voltage power lines that already cross the border; and

• much of Ireland’s natural gas is imported through two sub-sea pipelines running from Scotland (part of the UK), and a “South-North pipeline” runs from Gormanston, Co. Meath, to Belfast (Northern Ireland).

From this perspective, one might expect energy to be one of the areas in which Brexit has the potential to affect Ireland most significantly.

However, the ownership and operation of these assets is governed by a web of inter-governmental (Ireland-UK) treaties, respective domestic legislation and contracts. These arrangements do not generally depend upon continued EU membership, and therefore Brexit may not, of itself, have an immediate impact upon the continued smooth operation of these energy markets and assets. Nor is Brexit likely to disturb the extent to which the Irish (as opposed to UK) elements of these arrangements continue to facilitate Ireland’s compliance with its European legal obligations.

Under the I-SEM project, the Single Electricity Market is currently being modified for the primary purpose of aligning it more closely with the “target model” that is favoured by the European Union – which might make its viability appear to be threatened by Brexit. However, this project will also align the Irish wholesale market more closely with that of Great Britain, and will facilitate enhanced electricity exports between the two markets. The I-SEM project will therefore continue to have merit, even if Northern Ireland is no longer obliged to pursue it for reasons of compliance with European law. At this time, therefore, there is nothing to suggest (and we do not expect) that the I-SEM project will be a casualty of any Brexit.

One area in which Brexit may expose Ireland relates to the security of the continued supply of Ireland’s natural gas, in view of Ireland’s significant dependence upon the natural gas interconnectors running from Scotland. At present the Irish and UK governments are party to arrangements, which apply in the event of emergency disruptions to the supply of natural gas, and which arise from the requirements of EU law. Post-Brexit, and in the absence of any compulsion upon the UK driven by continued EU obligations, it is not clear whether such emergency arrangements will continue to apply. This exposure may well spur the development of infrastructural assets – such as LNG reception terminals – which will be capable of providing backup sources of natural gas to Ireland.

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Brexit Will Lead to Greater European Unity, Not Disintegration

by C. Scott Maravilla

The ‘70’s era British punk band, The Clash, have a song “Should I Stay or Should I Go?” On June 23, 2016, by a vote of 52 to 48 percent, the British public answered with, “Go.” Despite the vote, and all of the backlash following, the British Parliament has yet to invoke Article 50 of the Lisbon Treaty, which outlines the procedures for a member state to leave the European Union. Even then, Article 50(2) establishes a two year window (which may be extended) to attempt to work out all of the complications associated with establishing a new relationship between Britain and the EU. In the end, the UK may end up remaining in the EU, and, coupled with the debt crises of some of the member states, result in a greater unity. Between the two, the Eurozone countries have incentive to drive toward stronger ties.

After an initial drop, the FTSE rebounded assuaging some of the initial fears that the British economy faced certain recession1. The exchange rate has still been hard on the British pound sterling, which, as of this writing, is trading at $1.322. This represents a 30-year low. London has also witnessed a large protest from those opposed to the Brexit result3.

The European Union Referendum Act 2015 is advisory and non-binding. The law simply posed the following question to the British public: “Should the United Kingdom remain a member of the European Union or leave the European Union?” In order to implement the result, the UK Parliament must exercise Article 50 of the Lisbon Treaty. Article 50 states, in relevant part:

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.

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.

Between the unpopularity of the measure, and the resignation of Prime Minister David Cameron5, the current Parliament is not likely to take such a vote.

A more palpable scenario involves calling a snap election under the Fixed-term Parliaments Act 2011, which provides, in relevant part:

An early parliamentary general election is to take place if—

the House of Commons passes a motion in the form set out in subsection (2), and

(b) if the motion is passed on a division, the number of members who vote in favour of the motion is a number equal to or greater than two thirds of the number of seats in the House (including vacant seats).

If the UK elects to have an election to determine whether to follow the Brexit outcome, and trigger Article 50, a Government with a popular mandate will make that decision. If the decision is to stay, then that will strengthen the EU.

The European debt crisis is also pressuring the EU for greater unification. Since 2010, Greece has received financial support from the EU and the International Monetary Fund6. Prior to the Brexit vote, the EU issued a statement on Greece further supporting the bailout of

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that country. On June 16, 2016, the parties signed a Supplemental Memorandum of Understanding outlining the measures Greece needs to enact to continue to receive support. There are also other EU member states with debt problems, including Italy and Portugal.

Given the need for these countries to enact domestic legislation to insure growth and austerity, it is possible that the EU may seek centralized policies on some of these issues, like taxation, procurement, and budget deficits. The Brexit vote may also incentivize the EU to revisit the Lisbon Treaty, to make it more difficult for member states to exit the EU. The overarching trend of the EU is moving toward unity, not dissolution. Brexit may end up as merely a bump in the road.

Footnotes:

2. Xe.com (viewed on July 4, 2016).
3. theresa-may-prime-minister-conservative-leadership-brexit-vote

EDITOR’S NOTE AS TO THE PAGES THAT FOLLOW

As mentioned earlier in, “A Note From the Editor” appearing at the bottom of page one of this edition, the next two pages have been reproduced with permission from the De Brauw Blackstone Westbroek London B.V. Entitled, “Q&A on Brexit”, this was released to interested parties by the firm in the hours following the final vote tally.

The editor would like to extend a special thank you to Thijs Elseman and the “Brexit team” at De Brauw for their permission in allowing this to be included in our edition.

As with all other articles in the Edition, the contents represent the opinions of the authors.
Q&A on Brexit

The outcome of the UK referendum on Thursday, 23 June 2016 is that the UK will in time leave the EU. The consequences for businesses and financial markets in the UK, the EU and even globally could be significant. The impact of a “leave” vote will depend on the form that the exit takes. This Q&A addresses some of the questions and uncertainties about a Brexit.

If you have any questions in relation to Brexit, please contact our Brexit team at brexit@debrauw.com or your usual De Brauw contact.

What will happen when the UK leaves the EU?

The referendum is advisory rather than mandatory. This means that from a legal perspective, nothing changes for the time being. The UK remains a member of the EU and continues to be bound by EU law.

What might a Brexit look like?

An obvious Brexit model does not exist and the UK’s relationship with the EU and its member states will only become clear after an intensive period of negotiations. However, commonly cited Brexit models include (in decreasing order of integration with the EU):

1. Norwegian model
   - Membership of the European Economic Area (EEA) and European Free Trade Association (EFTA)
   - Retain access to the single market
   - Contribution to the EU budget
   - Subject to EU standards and regulation
   - Accept authority of the EFTA Court

2. Swiss model
   - Join the EFTA and negotiate bilateral agreements governing UK access to the single market on a sector-by-sector basis
   - Contribute to the EU budget
   - Otherwise negotiate free trade agreements (FTAs)

3. Turkish model
   - Customs union with the EU
   - Limited to trade in industrial and agricultural products
   - Customs union would not apply to services
   - Comply with significant portions of the EU trade policy

4. Free Trade Agreements
   - Covers treatment of both goods and services
   - Differs from Swiss approach – one FTA covers several topics
   - It is unprecedented for such FTA to be negotiated in two years’ time

5. World Trade Organisation
   - UK would rely on WTO membership as basis for trade relationship with the EU
   - Complete exit
   - No new agreements with EU or any EU member states

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What will Brexit mean for our clients?

Brexit may trigger several potential restrictions for our clients and furthermore may potentially affect the markets on which our clients are active. The scope of these potential effects will depend heavily on the Brexit model and differ from business to business. We list a few of the areas and predicted issues that may arise after Brexit.

Internal Market

- Restricted free movement of goods: Restrictions on imports and exports such as licenses, price controls, obligations to appoint a representative in the importing state, type approval, and national price controls.
- Restricted free movement of workers: Less flexibility in human resource if immigration controls are introduced, so that UK nationals could less easily work in the EU or vice versa.

Financial Services

- Territorial effect of regulatory passporting rights could be limited: UK banks, insurers, regulated family offices, investment firms, and other AIFMs and non-bank mortgage lenders would most likely lose access to the EU under MiFID, EMIR, and other related EU regulation (and vice versa).
- Restricted ability to invest in alternative investment funds (AIFs): UK alternative investment fund managers (AIFMs) would likely qualify as Non-EU AIFMs under current regulation. This would mean that the UK AIFMs could only market AIFs to EU investors under national private placement regimes (and vice versa).

Contracts

- Triggers in MSA, finance and commercial contracts: Although generally unlikely, parties may wish to consider whether in their specific circumstances the economic consequences of the "leave" vote may trigger material adverse change, event of default and/or force majeure clauses in their contracts.
- Repeal: amendment of EU employee and consumer protection laws: Employment and consumer protection laws, which may be incorporated by reference in a number of contracts, would likely be repealed or amended. However, any changes will likely not take place immediately but over time.

Dispute resolution

- Restrictions on enforceability of judgments: Extensive EU regulation is in place on enforcement of judgments in member states. After Brexit, the UK will need to replace these regulations, otherwise the UK courts will face the prospect of its courts judgments becoming less effective in Europe (and vice versa).

Competition law

- Effect on competition law: EU companies also doing business in the UK may find themselves subject to parallel UK and EU investigations. Competition law is effect based, and therefore applies to the location where the business is conducted. Mergers, acquisitions and joint ventures that need to be notified to the EU may also need to be notified in the UK. EU filing would not cover the UK. Also, parallel cartel investigations between the EU Commission and the UK authorities would occur.

IP and data protection

- Impact on data transfers: the free flow of data between the EU and the UK will not immediately be affected, as the UK will formally remain a member of the EU during the exit negotiations. After the Brexit formally takes effect, the UK is expected to take measures to avoid running the risk of becoming a "third country without an adequate level of data protection" in the eyes of the EU. If the UK would not succeed in this, companies would need to arrange for alternative data transfer mechanisms to lawfully transfer personal data to the UK. Such mechanisms include Binding Corporate Rules or EU model contract clauses.
- Impact on the new Unitary Patent & Unitary Patent Court system: the UK is expected not to ratify the Unitary Patent Court Agreement which UK ratification is – as long as the UK is formally an EU Member State – still needed for the current agreement to take effect. Moreover, it is unlikely that London will remain a seat of the Central Division in the UPC system. It is envisaged that the UPC agreement will be renegotiated.
- EU trademarks and design would most likely cease to apply in the UK. Pan-European remedies such as cross-border injunctions could be held to no longer cover the UK.

Export Controls and Trade Sanctions

- Export Controls: Under EU export controls, dual-use items may not leave the EU customs territory without an export authorization. After the Brexit formally takes effect, exports of dual-use items to the UK will likely require a form of export authorization.
- Trade Sanctions: European companies having a UK nexus will likely find themselves subject to parallel EU and UK sanctions once the Brexit formally takes effect. This will require companies to adjust their compliance program to address this increasingly complicated set of sanctions measures.
The Europe Committee continuously seeks qualified professionals prepared to contribute their time and talents to continue developing a more active Committee. This is a prime opportunity to become involved with a community of lawyers that share an interest in Europe and European law, who are fellow American Bar Association members. The Europe Committee welcomes any suggestions, ideas or contributions to enhance this occasional publication.

If you are interested in participating actively with the Committee, please contact any member of the Committee Leadership.

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