

## EU Challenges for UK Lawyers

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## The European Union – 28 Member States

Austria	France	Malta
Belgium	Germany	The Netherlands
Bulgaria	Greece	Poland
Croatia	Hungary	Portugal
Cyprus	Ireland	Romania
Czech Republic	Italy	Slovakia
Denmark	Latvia	Slovenia
Estonia	Lithuania	Spain
Finland	Luxembourg	Sweden



**United Kingdom**

## History

- Treaty of Rome (1957)
- UK joins (1972)
- Single European Act (1986)
- Maastricht Treaty (1992)
- Treaty of Nice (2001)
- Treaty of Lisbon (2009)
  - Treaty on the Functioning of the European Union (TFEU)
  - Treaty on European Union (TEU)
  - EU Charter of Fundamental Rights

## EU Institutions

- Commission
- Council
- Parliament
  - Regulations
  - Directives
- Court of Justice

## TEU Article 50

- 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.
- 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 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 If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

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## 23 June 2016 – and political developments thereafter

- Brexit Vote takes place
- 52% of the voters vote out
- David Cameron resigns
- Theresa May becomes Prime Minister
- New Ministry created dealing with Brexit – David Davis appointed Secretary of State for Exiting the European Union
- No Article 50 declaration expected before the end of 2016

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## How will the UK make the Article 50 Declaration?

- This will need to be made “in accordance with [the UK’s] own constitutional requirements”: but what are they?
  - Is making an Article 50 Declaration within the prerogative powers (ie, can it be exercised by the relevant minister)?
  - Is there delegated authority to the relevant minister in accordance with the ECA 1972 (as Article 50 is a treaty provision)?
  - Since the Article 50 Declaration will be (some argue) repealing the ECA 1972, does the Declaration require primary legislation?
    - This appears erroneous as transmitting the Article 50 Declaration will leave the ECA 1972 on the statute books and in full effect.
- There are joined cases currently going through the English High Court to decide the issue, with the possibility of an Order in Council providing for a “leapfrog” appeal to the Supreme Court which could be heard by the end of 2016.

## Consequences for UK law

- Repeal of the European Communities Act 1972
  - What consequences for acts done with authority granted by this act?
- Application of EU Regulations/Directives?
  - Will these continue to apply?
  - Will the UK simply re-enact?
- What role for the Court of Justice?
  - Will UK Courts still have to follow the Court of Justice’s rulings? Will they be able to refer questions still?
  - Will UK lawyers still have rights of audience? Will their communications with clients be privileged?
- What about EU-wide rights, like EUTMs and RCDs?

## What happens to actions done under ECA 1972?

- Constitutional principle:
  - Acts done with authority remain valid even when that authority is taken away
- Unless there is further legislation, secondary legislation (etc) made under the ECA 1972 will continue to have effect after the ECA 1972 is repealed.
- No further secondary legislation will be able to be made after a repeal.
- Directives will continue to have effect *insofar as* they have already been implemented with secondary legislation.
  - Interpretation of secondary legislation will no longer have to accord with *Marleasing* principle of EU law.
  - UK interpretation of a Directive may diverge from EU interpretation.

## What about Regulations?

- The effect of Regulations is generally only *within* the territory of the EU.
- Once the UK leaves, Regulations will no longer have Direct Effect in the UK.
- However, some Regulations have been extended by the EEA Agreement to the EEA Member States.
  - Interpreted for the EEA Member States by the EFTA Court, which has parallel jurisdiction to the EU Court of Justice, although the EFTA Court follows that Court of Justice's case law.
- The UK can choose to enact legislation to match EU Regulations to create equivalent effect.

## What role for the EU Court of Justice?

- Opinion 1/91, para 60 states:

*Neither can any objection on a point of principle be made to the freedom which the EFTA States are given to authorize or not to authorize their courts and tribunals to ask the Court of Justice questions...*

- This (unusual) provision of law was confirmed in Opinion 1/00 para 33.
- The UK, if it so wishes, can still authorize its courts to send a reference to the Court of Justice to determine a question of EU law.
  - The parties involved in a case where a reference is made must be bound by the response of the Court of Justice.
- More likely, judgments of the Court of Justice will be treated like the judgments of the ECtHR in Strasbourg – where they are relevant to an issue, they will be persuasive authority.

## Consequences for UK lawyers

- Largely depend on what the Brexit Agreement is:

	Appear before Court of Justice	Appear before the EUIPO	Appear before UPC	Attract EU-recognised privilege
EU-qualified	Yes	Yes	[-----]*	Yes**
EU-qualified and national	Yes	Yes	Yes	Yes**
EEA-qualified	Yes	Yes	[-----]*	Yes**
Non-EEA qualified	No	No***	No	No

\* If qualified in, and a national of, a Contracting Member State.

\*\* Not in-house lawyers

\*\*\* Unless a lawyer is entered onto the "List of Professional Representatives" which is kept by the EUIPO.

## What about EU-wide rights?

- European Union Trade Marks, Registered and Unregistered Community Designs, and Community Plant Variety Rights will (almost certainly) no longer offer protection in the UK.
- Rights holders will need to get the counterpart UK rights if UK- and EU-wide protection is wanted.
- Depending on the Brexit Agreement, the UK rights might be automatically granted, or a right holder will have to apply again.
  - This may cause problems for priority/validity of the new UK mark.
- Whilst national UK law relating to these rights has been harmonized across the EU, it is likely that, in time, the UK courts' interpretation of the statutes will deviate from the EU Court of Justice's interpretation and the interpretations of the courts from other Member States.

## What about pan-EU injunctions which have already been granted? (I)

- Enforcement of a court order is governed by:
  - The Brussels Regulation (within the territorial EU);
  - The Brussels Convention (for the EU, including some territories of Member States which are outside of the EU); and,
  - The Lugano Convention (for the EU Member States, Norway, Iceland, and Switzerland).
- Each of these provides for the enforcement of judgments from the courts of foreign states without a reassessment of the underlying judgment.


## What about pan-EU injunctions which have already been granted? (II)

- Under these Conventions/the Regulation, States are to give equivalent effect to an order as it would receive in the originating state.
- If a UK court has given a pan-EU injunction, will this continue to be enforced throughout the remaining 27 Member States?
  - If the UK is in Lugano, yes. If not, it is unclear.
- If a German Court has given a pan-EU injunction, will this injunction continue to have effect in the UK post-Brexit?
  - It will likely depend on:
    - (a) whether the UK remains in Lugano;
    - (b) whether the German Court has jurisdiction over the dispute; and,
    - (c) if it does have jurisdiction, whether the German court intended the UK to remain bound post-Brexit.

## Next Steps

- High Court/Supreme Court rules on whether Parliament needs to be consulted (before end of 2016)
- Article 50 notification (2017?)
- French election (April/May 2017)
- German election (August-October 2017)
- 2019? Two year Article 50 period ends
- UK election (7 May 2020)





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