

EDITORIAL

Brexit and shipping

Introduction

On 23 June 2016, voters in the UK and Gibraltar will vote on whether the UK should leave the EU. Almost no-one living in the UK today under the age of 50 has any real sense of what it would be like for the UK to operate outside the EU. For 43 years, EU provisions, policy and philosophy have been grafted onto, or embedded into, UK law. The closest analogy is a colony gaining independence and deciding what it wants to do, or not to do, with the law and institutions of the departing power.

While a great deal of the focus of the debate to date has been on what will happen on the day of the vote – and whether the proposition will be carried or defeated – in reality, the focus needs to be on what would happen after 23 June 2016 if there were to be a vote to leave. The consequences of Brexit would be enormous, but what would they be for shipping?

Significance of shipping in the UK and the EU

Shipping is extremely important to the EU. In 2014, more than 51.5 per cent of EU external freight trade by value was transported by sea. More than 400 million people are transported by sea from EU ports annually. The EU's 22 coastal Member States have more than 1200 seaports offering direct employment to around 110,000 people and providing indirect support to around 3 million more. Almost 90 per cent of the EU's external trade by volume is facilitated by seaports, as are 40 per cent of freight exchanges between Member States. The EU's seaports are the gateway for two-thirds of all the goods that are imported by more than 60,000 cargo ships from non-EU countries. Over 3.8 billion tonnes of cargo are handled in these ports annually.

Shipping is also extremely important to the UK. The sector contributes around €12 billion annually to the UK economy. Around 240,000 people are employed in the sector in the UK. The UK is one of the top 10 shipowning nations according to UNCTAD, with about 3 per cent of the world's tonnage.

Bringing the two strands together – the importance of shipping to the EU and to the UK – leads to some important conclusions. The rest of the EU is the UK's biggest trading partner. Just over half of the UK's imports are from the rest of the EU (53 per cent) and almost half of the UK's exports are to the rest of the EU (45 per cent). It is believed that several million jobs in the UK are linked to trade with the rest of the EU and the most common estimate is that there around 3 million people employed in this context.

No-one can realistically suggest that trade between the UK and the EU would stop if the UK left the EU but the trading terms would change and become more difficult – the degree of difficulty depends on what a 'Brexit' UK and the EU could agree upon after a Brexit vote.

EU law and shipping

Since the early 1970s – but more particularly since the mid-1980s – the EU has become increasingly involved in the shipping sector. During this period an enormous volume of law has been adopted, including regulations, directives and decisions, in addition to case law. If the UK were to leave the EU then the logical question would be to ask what would happen to that law vis-à-vis the UK. Answering that question is not simple, given that it is not yet known whether the UK will vote to leave and, if it does, what arrangements would be put in place to replace the current ones. It is

possible that some of the legislation will remain in place (for example, because it is already part of UK law (such as where a directive has been implemented) or it may simply disappear from the UK legislative environment. Indeed, if EU legislation is retained by the UK, it may be somewhat ‘frozen’ in time if amendments or interpretations by the courts are not also taken into consideration. There is little doubt that EU shipping law and UK shipping law would diverge in a post-Brexit environment, although it is not yet clear (and would not be for some time) just what the extent of that divergence would be.

Why is Brexit such a big deal?

Brexit would raise novel and profound legal issues. Those issues are indeed novel because no Member State has ever left what is now called the EU in its 60-year history. The issues are profound because the EU is – and all sides agree on this point – a key influence on UK law to such an extent that, after 43 years of membership, EU and UK law are intermingled in a way that untangling the two sources of law would be very difficult.

It is often said – and probably all too often – that a particular event would be ‘novel’ or ‘unprecedented’. However, for a Member State to withdraw from the phenomenon that is now called the EU is truly novel. No Member State has ever left. Algeria left the then European Economic Community (EEC) in 1962 but it was not a Member State and was, at that time, part of France. Greenland left the EEC in 1985 but, again, it was not a Member State but instead part of Denmark. Saint-Barthélemy left in 2012; however, not only was it small but it was also not a Member State. By contrast, for the UK to leave would be hugely significant because it is a full and very long-established Member State (joining in 1973 in the second wave and prior to the arrival of another 19 Member States afterwards), a global power and the fifth largest economy in the world. It is quite possible that, were the UK to vote to leave, then some other Member States could well be tempted to leave or, at least, threaten to do so in order to improve their lot within the EU. There is no doubt that Member States intent on staying are very mindful of this fact and it is entirely possible that the EU and its key Member States will take whatever action they legally can prior to the UK referendum to encourage the UK to remain, with a view to preventing a haemorrhage of further EU Member States promising referenda after a Brexit.

Legal framework for withdrawal

The UK was not a founding Member State of the EU. Instead, it took the ‘road less travelled’¹ for many years but ultimately joined the EU² on 1 January 1973 (along with Denmark and Ireland), having signed a Treaty of Accession in 1972. The UK’s membership is therefore founded on treaty law. As the UK took on its international law obligations by way of a treaty, then it would also be entitled to renounce those treaty obligations by virtue of the general rules of public international law,³ even if there was no explicit provision of EU law allowing for withdrawal of membership.

It was not until the Treaty of Lisbon entered into force on 1 December 2009 that EU law dealt explicitly with the possibility of a Member State withdrawing from the EU and provided a mechanism to address the issue. However, the right to withdraw from the organisation almost inevitably existed anyway because accession to the EU is not an irrevocable act. The Treaty of Lisbon introduced Article 50 of the Treaty on the European Union (TEU), which sets out a regime (albeit an incomplete one) for a Member State to withdraw. Article 50(1) of the TEU provides that any Member State may decide to withdraw from the EU ‘in accordance with its own constitutional requirements’. Member States may go beyond what is required constitutionally; it may not have been necessary at all for the UK to have a referendum to leave (after all, it did not have a referendum to join).

¹ The UK was part of the European Free Trade Association (EFTA).

² More accurately, the European Economic Community, the European Coal and Steel Community and the European Atomic Energy Community.

³ See the Vienna Convention on the Law of Treaties 1961 generally in so far as it is reflective of customary international law and EU Member States are party to it.

Under Article 50(2), a Member State that decides to withdraw from the EU must notify the European Council of the Member State's intention to leave the EU. In the light of the guidelines to be provided⁴ by the European Council, the EU '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'. The agreement must be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union (TFEU).⁵ The withdrawal agreement must be concluded on behalf of the EU by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

The European Parliament could be something of a wild card in the process and will potentially be very powerful.⁶ Indeed, if the agreement involves areas within the confines of the Member States'

⁴ These guidelines are not yet in existence and would have to be drafted after a particular withdrawal notification.

⁵ TFEU art 218 provides:

1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.
2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.
3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.
4. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.
5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.
6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

(a) after obtaining the consent of the European Parliament in the following cases:

- (i) association agreements;
- (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- (iii) agreements establishing a specific institutional framework by organising cooperation procedures;
- (iv) agreements with important budgetary implications for the Union;
- (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

7. When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation.
8. The Council shall act by a qualified majority throughout the procedure. However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.
9. The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.
10. The European Parliament shall be immediately and fully informed at all stages of the procedure.
11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

⁶ All the members of the European Parliament (including those elected from UK constituencies) appear, according to the TEU and the TFEU, to be entitled to vote but the UK (or any exiting Member State) would not be entitled, according to the TEU, to vote in the Council.

purview (eg in certain contexts, areas of services, investment protection and transport), then it is possible that any particular agreement or free trade agreement might (as a mixed agreement) also require approval by all the Member State parliaments, which would be an additional hurdle.⁷ The EU treaties would have to be amended to address the departure of the UK, which would also be an elaborate process. Equally, the EU agencies based in the UK (eg the European Medicines Agency and the European Police College) would have to relocate. The EU might be rather like a lobster pot: easier to enter than to leave!

Article 50(3) of the TEU provides that: ‘. . . 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 [Article 50(2)], unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period’. The popular debate on Brexit often refers to this ‘two year period’ as if it were set in stone but the period is not fixed – it can be changed by agreement between the withdrawing Member State and the other Member States⁸ – and it is very clear that it could be extremely difficult to negotiate a withdrawal. It took several years for the UK to negotiate its entry to a much slimmer and nimble EC, so one would have thought that it would take quite some time to negotiate an exit from the current EU, particularly given the length and depth of the relationship over four decades.

There is a risk that this ‘Brexit uncertainty’ could continue if there is a vote in June 2016 to leave but the next UK General Election or another referendum might be fought on the basis of whether the UK should accept the ‘withdrawal treaty’ or stay in the EU! Indeed, the EU has many issues on its plate⁹ and the UK’s withdrawal negotiations will not be top priority at all times so the process could be a difficult and fraught one. To buy some time, one could contemplate the UK making the notification a little later than simply the following day but that is a political, rather than a legal issue and would almost inevitably be unacceptable politically. It is also notable that the European Council must formulate some ‘guidelines’ on how the negotiations should be conducted and an agreement concluded, so it is not inevitable that the negotiations will commence right away. During the negotiation, EU law would continue to apply in the UK.¹⁰

For the purposes of Article 50(2) and (3) of the TEU, the member of the European Council¹¹ or of the Council¹² representing the withdrawing Member State must not participate in the discussions of the European Council or Council or in decisions concerning it.¹³ A qualified majority is defined in accordance with Article 238(3)(b) of the TFEU.¹⁴

⁷ For example the recent EU–Peru and EU–Colombia agreements and the vote in The Netherlands over the EU–Ukraine agreement.

⁸ The UK might be keen to leave if it has voted to leave but it would appear that two years is the minimum period of time for the negotiation of the withdrawal. It is also likely that at least some other Member States might be unwilling to grant an extension of the two-year window unless it was in their interests to do so. Withdrawing may not be all that easy in practice, and however difficult joining the EU can be, leaving could be much more difficult!

⁹ Current issues include the migration crisis, the banking crisis and the need to revive the EU economy. It is a matter of speculation as to how much patience would be shown towards the UK by some of the remaining Member States.

¹⁰ It is open to speculation as to how vigilant a Member State would be about complying with EU law as the Member State prepares to leave but it is hoped and anticipated that a Member State would comply during the phase-out period because the duty to comply would be no less than at any other time (although one could envisage a Member State not necessarily implementing EU legislation where the date for implementation postdated its planned withdrawal).

¹¹ Being the ministers of the Member States along with the President of France.

¹² Being the ministers of the Member States (eg the ministers for agriculture).

¹³ TEU art 50(4). Whilst the drafting is not perfect, one presumes that the UK (or the withdrawing Member State) could still continue to participate in, and vote on, matters not relating to that Member State’s withdrawal, as art 50(4) qualifies the exclusion by saying that it ‘concern[s] it’ and presumably the ‘it’ relates to the Member State’s withdrawal. Any Member State would be well advised to participate earnestly in the work of the EU other than that relating to the withdrawal because the Member State might ultimately not withdraw at all but be stuck with the law enacted during that time!

¹⁴ TEU art 50(4).

Article 50(5) provides that if a Member State that has withdrawn from the EU later asks to rejoin, its request will be subject to the procedure referred to in Article 49 of the TEU.¹⁵ This clever provision means that there cannot be a 'revolving door' or any easy path to re-enter the EU. Indeed, it is very likely that many of the remaining Member States would be extremely reluctant to allow the UK back in too easily, which would mean that the UK would not find it easy to rejoin.

What could happen if the UK were to leave the EU?

Article 50 of the TEU does not prescribe what the relationship would be between the EU and any leaving Member State. Unless otherwise agreed, the departing Member State would become a 'third state' – that is, it is no different in the eyes of the EU than any other non-Member State and, indeed, in the absence of special arrangements between the EU and the UK, the latter would be even less connected with the EU than states such as Canada and the USA (which have their own special arrangements).

It is useful to consider very briefly the various options that have been mentioned in the Brexit debate to date. It is very likely, it is submitted, that a special arrangement would be negotiated, as the main arrangements the EU has with the rest of the world (eg Norway) are with states that never joined the EU, rather than with one that had been a Member State for over four decades.

Becoming a member of the European Economic Area (EEA) (ie the so-called Norwegian model), the European Free Trade Agreement (EFTA) or concluding a UK/EU Free Trade Agreement would almost inevitably mean (based on the Norwegian precedent, at least) that the UK would have to accept much of the EU substantive regime relating to the 'freedoms' (eg free movement of persons) and competition law, as well as parts of the EU institutional regime. However, it would be counter-intuitive to leave the EU (including abandoning the vetoes and influence that EU membership provides) to replace it with a 'half-way house' with many of the features and burdens that have been so opposed by those keen to leave the EU. Clearly, the negotiation of any withdrawal agreement would be problematical.

A looser option, such as a customs union similar to the EU/Turkish model, might be an option because it would avoid tariffs on goods traded with the EU. The advantage of such an arrangement would be that it would provide some protection for trade but would also avoid the more extensive institutional and substantive involvement of the EU and its institutions. This would not, however, address the issue of the free movement of people, including UK subjects living in the EU and EU citizens who want to live in the UK.

A post-Brexit UK might seek to have a Swiss-like relationship with the EU. This would involve having a series of bilateral agreements between the UK and the EU. This is complex: there are more than 100 treaties between the EU and Switzerland negotiated over four decades. It would also mean that there would have to be free movement of people if the Swiss model were to be followed. Furthermore, it would mean that UK law would have to be closely harmonised with EU law anyway so as to avoid UK businesses having to cope with two differing regimes, so Brexit would not necessarily achieve any material difference were this model to be followed.

There are many other possible models (eg the South Korean, Canadian and Albanian models) but they would all require complex negotiation that could take several years to achieve. The debate to date has been on the UK negotiating agreements with the EU but it must also be noted that the UK

¹⁵ TEU art 49 provides: Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.

The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

would have to conclude arrangements with all the other states with which the EU currently has agreements as well. It is not simply a matter of ‘copying and pasting’ those arrangements, because the UK’s bargaining position and needs are different from the EU’s, as the latter is the world’s largest trading bloc.

There is no doubt that the future after a Brexit vote would be uncertain and it would also be complex, with no clear pattern or result for several years. It is clear that trade between the UK and the EU would continue but what would differ would be the terms on which that trade occurred. Today, the UK is part of the ‘internal market’ and there are, for the very most part, no barriers to trade amongst the 28 Member States (whether those barriers are, for example, physical, technical or fiscal) and there is a common external customs tariff vis-à-vis the rest of the world. It is meant to be as convenient to trade between Liverpool and Lisbon as it would be to trade between Liverpool and Leeds. If the UK leaves the EU then trade will become more difficult, and the degree of difficulty depends on the arrangements concluded between the UK and the EU post-Brexit.

The campaigners for Brexit are probably correct in saying that there will be trade agreements between the EU and a Brexited UK but the difficulties involved and the time such arrangements would take to adopt should not be underestimated. The EU–India Bilateral Trade and Investment Agreement negotiations commenced in 2007 (nine years ago) and have stalled since March 2015. The Economic and Trade Agreement (CETA) agreement between Canada and the EU is a mammoth exercise. Work on it commenced in October 2008. The launch of negotiations was announced in 2009. An agreement in principle was signed in 2013. The negotiations were concluded in 2014. The 1634 page document has to be translated into 24 EU languages and ratification has been an ongoing process. With regard to the EU–US Transatlantic Trade and Investment Partnership (TTIP), the negotiations are currently in their 13th round! The chairman of Lloyd’s of London, John Nelson, is reported as saying that it would be ‘fantasy’ to think that bilateral negotiations on trade agreements would be simple or that it would not take ‘many, many years’ to negotiate and implement them.

Clearly, there would be trade agreements to be negotiated – not only between the UK and the EU – but between the UK and all those other states worldwide with which the EU has a plethora of arrangements. Thus, it is not simply a matter of negotiating a single trade agreement; rather, it would be a matter of negotiating a range of agreements. Not only would many trade agreements have to be concluded but there would also be uncertainty arising from Brexit itself, which would also impact on trade. Examples of that uncertainty would be currency volatility, which has already commenced and may continue further.

There is also no guarantee that the remaining Member States would not seek either to strengthen their own position in the event of a Brexit or even punish the UK so as to deter others from leaving. Guy Platten, the chief executive of the UK’s Chamber of Shipping has said: ‘no-one has left the European Union before, and the EU may seek to “punish” the UK for leaving, in order to discourage others from leaving too. The Brexit negotiations are unlikely to be quick or easy’.

If the UK were to exit the EU, then trade will not stop and people will not stop travelling between the UK and the EU. However, there is little doubt that both the movement of people and goods would be harder and, if the economists are correct, there would be fewer people travelling and fewer goods being traded, which would undoubtedly have a negative impact on the shipping sector.

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