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Brexit (1): Divorces are never easy. Mind the gap.

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The divorce agreement and future gaps in UK law

Divorces are never easy. What will happen after the Brexit? Nobody knows yet. From a legal perspective, article 50 of the Treaty on European Union (TEU) is of main importance now. That article paves the way for the UK to withdraw from the EU by means of a divorce agreement. Its functioning has been discussed in the past several weeks, but the article itself has never been applied. The concrete application of art. 50 TEU is uncertain and the status of UK law after the withdrawal from the EU is unclear. Gaps in UK law could arise.

Article 50 TEU: how does it work?

The first question is: who needs to initiate the invocation of article 50 TEU? The UK parliament, the UK government or one or more other institutions? Art. 50 TEU only states that (UK) 'constitutional requirements' are decisive. In a case^[1] now pending before the UK High Court, the claimants plead that under UK constitutional law the UK Prime Minister could not trigger article 50 by making use of the prerogative powers of the UK Government. Notification could only take place on the basis of authorization by an Act of *Parliament*. This would require a parliamentary majority consenting with such a law. The number of successful challenges of these state actions is very limited. It is likely that this case in the end will be subject to judgment of the U.K. Supreme Court, but this will only happen

after a hearing on October 15, 2016.[2]

After initiating the 50 TEU procedure and the UK notifying the European Council, the next step would be to initiate, negotiate and conclude an agreement that sets the conditions for withdrawal, otherwise known as the divorce agreement. The European Commission has appointed the French politician Michel Barnier to lead and represent the EU standpoint in talks on this agreement.[3] The UK will cease to be an EU Member State when the divorce agreement has been signed, or after two years have passed since the notification was made to the European Council (unless the European Council decides to extend this period). This whole process of officially withdrawing has been criticized, for instance by Anatole Kaletsky[4] who calls the EU to prevent the invocation of article 50 TEU by allowing the British electorate instead to decide under which conditions it would like to remain part of the EU. The EU does not seem to be pursuing this route: since the Brexit vote, the Member States and Commissioner Juncker have in fact been pushing the UK to accelerate the withdrawal process.[5] The question is whether this vengeful attitude of the EU is in its own best interest. Maybe the UK would agree to a “light” version of EU membership.

What will EU law in the UK be like after withdrawal from the Union?

After withdrawal, the UK will no longer be part of the EU. This bears certain immediate consequences in the field of law. First of all, how will the rights of UK citizens, and companies’ rights outside the UK be affected in the EU? Some scholars argue that, under international law, the termination of a treaty may not infringe upon rights that have already been executed and have obtained effect before the termination.[6] However, imagine that the UK and the EU agree on terminating at one moment the rights of all UK citizens and companies, including those already acquired before withdrawal from the EU. European case law[7] then seems to exclude the possibility of international law overruling European law. Does this mean that EU jurisprudence neglects this notion of international law and that rights of citizens and companies already acquired under the Treaty can simply be suspended? And does the fact that the UK becomes a third country after withdrawal from the EU alter this?

Another issue is the status of UK domestic law that is the outcome of transposition of Directives and Regulations into national law. EU law will immediately cease to apply to the UK and its citizens. These laws have an EU origin, but will not immediately cease to apply in the UK since they are provisions of national law. EU

Directives have been transposed into UK law, and EU Regulations may also have been. If EU Regulations have not been transposed, this too poses a problem in that, suddenly, certain areas will no longer be covered by law.[8] The UK must, for instance, write and approve new UK customs regulations, since the EU regulations will no longer be applicable. It will be a busy period for the UK legislator, and temporary gaps in law will certainly arise.

All this shows that, although there is a procedure to leave the EU (article 50 TEU), there are many unforeseen consequences of a Brexit. The status of UK citizens' and companies' rights after withdrawal from the EU remains uncertain. Additionally, UK law itself needs to change in order to recover from the consequences of the Brexit, and gaps in UK law may arise. So, UK legislators: we know that divorces are never easy, but mind the gap!

[1] CO/3281/2016 - Santos v. Chancellor for the Duchy Lancaster (High Court of Justice, Queen's Bench Division, Administrative Court) 19 July 2016.

[2] Patrick Gower, 'Quick Take Q&A; Brexit Gets First Challenge in U.K. Court Case' *Bloomberg* (London, 19 July 2016) <<http://www.bloomberg.com/news/articles/2016-07-18/quicktake-q-a-brexit-gets-first-challenge-in-u-k-court-case>> accessed 8 August 2016.

[3] Jon Henley and Patrick Wintour, 'Juncker puts veteran French politician in charge of Brexit talks' *The Guardian* (London, 27 July 2016) <<http://www.theguardian.com/politics/2016/jul/27/jean-claude-juncker-puts-michel-barnier-in-charge-brexit-talks>> accessed on 28 July 2016

[4] Anatole Kaletsky, 'Can the EU persuade the UK to change its mind on Brexit?' *The Guardian* (London, 26 July 2016) <<https://www.theguardian.com/business/2016/jul/27/brexit-can-the-eu-persuade-the-uk-to-change-its-mind>> accessed on 27 July 2016

[5] Jennifer Rankin, Jon Henley, Philip Oltermann and Helena Smith, 'EU leaders call for UK to leave as soon as possible' *The Guardian* (London, 24 June 2016) <<http://www.theguardian.com/politics/2016/jun/24/europe-plunged-crisis-britain-votes-leave-eu-european-union>> accessed on 28 July 2016

[6] Vaughen Miller (ed.) (House of Commons Library), Tax after the EU referendum (Research Paper 13/42 1 July 2013) p. 15-16

<<http://researchbriefings.files.parliament.uk/documents/RP13-42/RP13-42.pdf>>
accessed 6 July 2016.

[7] C-402/05 P - *Kadi and Al Barakaat International Foundation v Council and Commission*,
Para. 316
<<http://curia.europa.eu/juris/document/document.jsf?text=&docid=67611&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=142502>> accessed
25 July 2016.

[8] Swati Dhingra and Thomas Sampson, 'Life after BREXIT: What are the UK's options outside the European Union?' [2016] Centre of Economic Performance (The London School of Economics and Political Science) PaperBrexit01, p. 3
<<http://cep.lse.ac.uk/pubs/download/brexit01.pdf>> accessed 6 July 2016.