

# BREXIT TRACKER

Keeping you informed

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**McCann FitzGerald Brexit Group**

McCann FitzGerald is committed to keeping our clients up-to-date in relation to the legal and related political/economic developments in respect of Brexit. As the only Irish law firm with working offices in Brussels, London and New York, we are also able to provide you with an informed insight of views at the heart of Europe, the City of London and New York.

*Commentary*

**Clean Brexit = “a new and equal partnership” with the EU?**

In her speech on 17 January 2017 (see [here](#)), the UK prime minister, Theresa May, provided some detail on what she and the UK government wish to achieve in their Brexit negotiations with EU. She indicated that the UK:

- will leave, but wants the "greatest possible access" to, the EU single market through a new free trade deal. However, it is not prepared to pay "huge sums" for that access
- wants a bespoke customs agreement with the EU and has “an open mind on how we do it” but does not want to be part of the common commercial policy and part of the common external tariff. The UK may seek to become an "associate member" of the customs union. The UK wants "frictionless" trade without customs barriers between nations - "It is not the means that matter but the ends"
- is prepared to default to the WTO rules if necessary – “no deal for Britain is better than a bad deal for Britain”
- believes that interim arrangements are likely to be a "matter for negotiation" with

the EU but the UK "will seek to avoid a disruptive cliff edge". There should be a "phased period of implementation" while institutions prepare for transition. "That will be in our [i.e. the UK and the EU's] mutual interests"

- wants a "smooth and orderly" departure but that should not be an unlimited "political purgatory". Instead, Britain wants to have reached an agreement by the time the Article 50 negotiations are completed [i.e. by the end of the two year period]
- will not say at this time what its position is in relation to immigration. The resistance of a number of EU members state governments to providing a quid pro quo guarantee for UK citizens living in their countries means an immediate deal has not yet been possible
- wants “a truly Global Britain” who is “the best friend and neighbour to our European partners” as well as continuing to be “reliable partners, willing allies and close friends” as the UK establishes “a new and equal partnership” with the EU member states.

*Commentary continues* →

Mrs May did not spell out all of her/the UK's intentions – she indicated that she could only provide the business world with as much certainty as possible at the moment. Her speech echoed many of the recommendations of a paper published just two days earlier titled “Clean Brexit” and written by Liam Halligan and Gerard Lyons - read in full [here](#). In that paper the UK government was urged to carry out and make clear “immediately” a number of things:

- explicitly rule out remaining in the EU's single market - whose economic benefits are, in their view, exaggerated and which does little to help the UK's service sector, which accounts for four-fifths of the UK economy
- rule out remaining in the EU Customs Union also
- offer the other 27 EU member states a deal to carry on trading under existing tariff-free arrangements, but make clear the UK is also happy with World Trade Organisation (WTO) rules, operating under “most favoured nation” status
- make clear that if the EU imposes WTO tariffs on the UK, the UK will reciprocate
- insist that the UK will negotiate free trade agreements with the rest of the world, even while the UK remains in the EU
- make clear to the British public and the EU27, that while non-EU trade deals are attractive, they do not need to be agreed within the Article 50 window
- explain that a “Clean Brexit” is not only best for Britain, but also for the EU
- explain that the UK does not want a tumultuous and potentially explosive “Messy Brexit” negotiation with the EU over “freedom of movement” and single market “access”
- put the “Great Repeal Bill” before the UK Parliament
- ahead of March 2019, it is vital that Whitehall, Westminster and the country (the UK) prepares to leave the EU
- during the two-year negotiation, using the prospect of WTO rules as a strong platform, work to achieve sector-specific trade deals with the EU.

Many of these recommendations were adopted by Mrs May in her speech. The writers also echoed Mrs May's words when they added that “Brexit need not shatter UK-EU relations - and we certainly hope it does not”.

However, the real question is how the EU will react and negotiate in response to Mrs May? And will her/its negotiation stance constitute the beginning of a true “new and equal partnership” between the EU member states and the UK?

## Commentary

### Transition - safety first?

Has Mrs May's speech of 17 January 2017 changed the likelihood of a gradual and managed transition under an EU-UK agreement as opposed to a more disruptive, abrupt process with only the WTO rules and certain national measures to cushion exit? Probably, yes.

It seems clear that a 'co-ordinated, orderly transition' would permit and facilitate both the EU (including Ireland) and the UK adjust to the new order and arrangements. Philip Hammond, the UK Chancellor, agrees. He has said that "thoughtful politicians" are convinced of the need for a long transition. And, indeed, it is worth recalling that when Ireland, the UK and Denmark entered the European Community in 1973 there was a seven year transition. Lord Hague has also recently backed a post-Brexit transitional arrangement to minimise disruption for the City of London, saying it should be a priority.

And yet David Davis, the UK Secretary of State for Exiting the EU, has said that he is "not really interested" in the discussion around transitional arrangements. He does not foresee any benefits and feels that such arrangements could be perceived as a delay to the process - something the UK government could not abide. However, he did say that if the EU, rather than UK stakeholders, wanted to have transitional arrangements he would be "more in favour" and, somewhat provocatively, he added "I will be kind".

Mrs May said a little bit more in her 17 January 2017 speech noting that while interim arrangements are likely to be a "matter for negotiation" with the EU, the UK "will seek to avoid a disruptive cliff edge". She added that she wanted a "smooth and orderly" departure but that should not be an unlimited "political purgatory". Instead, she wants Britain to have reached an agreement by the time that Article 50 negotiations are completed. Then she hopes there would be a "phased period

of implementation" while institutions prepare for transition. "That will be in our mutual interests," she said. That might apply to customs, criminal justice, migration and the regulatory framework for financial services. And the time needed to phase-in new arrangements might differ in each case.

In early January 2017 some City of London leaders had called for a three-year delay to Brexit to enable companies adjust to new trading arrangements between the UK and EU and to avoid the risk of systemic crisis in the multitrillion-dollar derivatives market. The CityUK organisation have also sought a transitional arrangement to cover two separate periods:

- a bridging period to cover the time between the date the UK exits the EU and the date the new partnership agreement is ratified and becomes unconditional; and
- an adaptation period starting on the date the bridging period ends or, if there is no bridging period, on the date of exit.

In January 2017, the Irish ambassador to London, Dan Mulhall, said Ireland is probably the EU country that will be most seriously affected by the UK's exit from the EU. This is because no other EU country has quite the same range of interests as we have in our relations with the UK. He added that a "good outcome will require flexibility all round and the will to find common ground".

In our view such an outcome must include a transitional period (or periods) and arrangements so that business and trade are not jeopardised or compromised. A disruptive, abrupt process would not be in the interests of the EU member states or the UK. So we welcome Mrs May's move towards a safety transition period or periods.

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## Ireland's Advantages as a Financial Services Location

*In response to queries from both Irish and overseas clients, we have in recent months been asked on many occasions to summarise Ireland's advantages as a financial services location. We are pleased to set these out below.*

Our advantages include that Ireland:

- is a long-standing, deeply committed EU member state;
- is a member of the Eurozone;
- is a common-law, English-speaking country, with one of the most stable systems of government in the EU;
- has a well-educated, flexible and diverse work force and is ranked as a top business destination;
- has a well-established financial services sector, comprising some 450 internationally and Irish-owned cross-border financial services businesses. The sector has a truly international focus, derived from, and reflected in, the fact that it has long acted as a mid-point linking the US and European financial services markets;
- is home to an array of professional services firms with in-depth financial services experience, including audit and legal firms;
- has a regulator of the financial services sector, the Central Bank of Ireland (CBI), a tried and tested regulator, which is deeply embedded in the EU's supervisory and regulatory system. This is reflected in its rules-based, cautious, prudent and predictable approach to regulation. Given the level of cross-border activity originating from Ireland, the CBI also has considerable experience in cross-border regulation and supervision and is among the most experienced regulators in Europe in this regard. This experience is likely to be of vital significance for any firm looking for a home from which to exercise passporting rights;
- has made its business migration system from EEA countries more 'business friendly' in recent years; and
- has significant amounts of commercial office space coming on stream over the coming months, capable of accommodating in excess of 20,000 persons.



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## Leaving The European Union: Ireland and the UK

*On November 17 2016 the House of Lords published a briefing providing background to two key areas identified as being potentially affected by Brexit.*

The first area is peace and security, which encompasses the peace process, border controls and the Common Travel Area. The second area is trade, particularly the bilateral trade relationship between UK and Ireland. The briefing examines the current peace and security and trade situations, and discusses the potential implications of the UK leaving the EU, drawing upon commentary from UK and Irish heads of governments, political parties, think tanks and organisations.

According to the HM Revenues and Customs Trade Statistics Unit, in 2015, the value of

trade in exports to Ireland from the UK was £15.1 billion, whilst the value of trade in imports from Ireland to the UK was £11.2 billion.

In terms of trading in both goods and services between the two countries, the UK Office for National Statistics reported that 5% of the UK's exports in 2014 went to Ireland, worth £28 billion, whilst 3% of the UK's imports came from Ireland, worth £17 billion.

The full briefing may be read [here](#).

Scotland's Place in Europe

## Scotland's Place in Europe

*Following its promise “in good faith and a spirit of compromise” to seek to identify a solution that might enable Scotland's voice to be heard, and mitigate the risks that Brexit poses to Scottish interests within the UK, on 20 December 2016, the Scottish Government published its Brexit proposals.*

At the heart of its proposals is a determination “to maintain Scotland's current position in the European Single Market” from within the UK. The proposals fall short of what they consider to be best for Scotland and the UK: namely, full membership of the EU. The Scottish people did not vote for Brexit, and a hard Brexit would severely damage Scotland's economic, social and cultural interests. It will hit jobs and living standards - deeply and permanently. “That is why we are so determined to avoid it” - Nicola Sturgeon MSP, First Minister.

Thus, it is proposed that:

- firstly, the UK as a whole should remain within the European Single Market - through the European Economic Area - and within the EU Customs Union; and

- secondly, Scotland should remain a member of the European Single Market and retain some key benefits of EU membership even if the rest of the UK decides to leave; and
- thirdly, a ‘repatriation’ of certain powers to the Scottish Parliament.

It is recognised by the Scottish government that significant practical challenges would be involved in implementing such proposals. Others, however, were less kind calling them “politically savvy, but all-but-impossible”.

To read the full set of proposals [here](#).

## EU External Agreements – More Trouble?

*An interesting question arises in respect of international treaties when the UK exits the EU.*

Where the EU has concluded an external agreement in an area in which it has exclusive competence, the UK will not have ratified that agreement separately. Brexit will mean, therefore, that the UK is no longer bound by that agreement.

The Europa Treaties database lists 890 bilateral and 259 multilateral international treaties and agreements which the EU or the EU and the member states have signed and/or ratified. Most have been concluded and signed by the EU and have not needed national ratification. But many are so-called “mixed agreements”, which both the EU and the individual member states have ratified because they contain some policy provisions which are within the EU's exclusive competence and others which are within the competence of the member states.

Opinions differ on the effects of Brexit on external agreements. On balance, most lawyers believe that both exclusive and mixed agreements will fall on Brexit, and will have to be renegotiated after Brexit, or possibly in parallel with negotiations on the withdrawal agreement (could this be achieved within the two-year negotiating period?). There is a view, however, that where the UK has ratified a mixed agreement in its own right, aspects of the mixed agreement will remain in force.

The question is considered in some detail in a paper published in January 2017 by the UK Government, [read here](#).

## Equivalence – What is it?

*In certain cases the EU may recognise that a foreign legal, regulatory and/or supervisory regime is equivalent to the corresponding EU framework.*

That recognition, in turn, makes it possible for authorities in the EU to rely on supervised entities' compliance with the equivalent foreign framework. That approach brings benefits to both the EU and third-country financial markets:

- it reduces or even eliminates overlaps in compliance for the EU and/or third-country entities concerned;
- it leads to considering certain services / products / activities of third countries' firms as acceptable for the various regulatory purposes in the EU; and
- it permits the application of a less burdensome prudential regime in relation to EU financial institutions' exposures to an equivalent third country.

Recognition and reliance possibilities are set out in third-country equivalence provisions which have been included in most of the EU's recent financial services legislation. Equivalence provisions, which are tailored to the needs of each specific legislation, set out in which cases, based on what criteria and to what extent the EU may take into account the regulatory and supervisory framework of a third country when regulating and supervising EU financial markets in situations involving a third-country element. Typically, equivalence provisions require verifying in an assessment that a third-country framework demonstrates equivalence with the EU regime when it comes to: having legally binding requirements, having effective supervision by authorities, and achieving the same results as the EU corresponding provisions and supervision (outcome-based analysis).

Requiring "equivalent" laws is not the same as requiring "identical" laws.

Technical assessments of equivalence are performed by European Commission

services (DG FISMA), usually on the basis of technical advice from European authorities such as EBA, ESMA or EIOPA. Only following completion of the technical assessment and where all technical criteria are satisfied, may an equivalence decision be formally made by the European Commission.

A decision on equivalence may take the form of an implementing or delegated act, in accordance with what is envisaged in the corresponding equivalence provision. The latter may stipulate whether such decision can be granted in full or partially, for an indefinite period or with a time limit. Sometimes, equivalence decisions may apply to the entire framework of a third country or to some of its authorities only. Some of the equivalence decisions may be subject to specific conditions being satisfied.

For the UK, if no direct access to the single market is sought – i.e. a 'hard Brexit', an alternative course of action would be to seek an "equivalence-based relationship" with the EU in financial services. This would not import the EU "four freedoms". It would permit full cross-border access to EU counterparties and customers in the relevant sector of the market. As the UK's current regulatory regime is based on EU rules and EU laws may generally be grandfathered upon Brexit, there may be few obstacles to equivalence determinations immediately upon Brexit. However, subsequently, if changes are made to (former) EU laws, then the UK would be required to show that the relevant tests and key outcomes were still achieved.

For further information see:

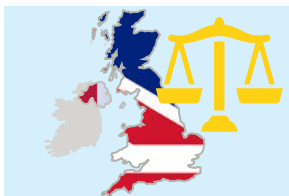
The European Commission's policy document [Equivalence with EU rules and supervision](#) and [Blueprint for Brexit](#) produced by Poletia.



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## English Law, Jurisdiction of English Courts & Enforcement of English Law

*Are there risks if English law is used in contracts post Brexit? English lawyers argue strongly that no such risks will arise. A typical view is that English law will continue to present a comparatively secure, stable and certain choice of law for commercial contracts.*



This is probably true. However, it is clear that there is some nervousness in London. The recent CityUK paper (see 'London Insight' section below) is quite explicit on the point when stating “There is a crucial and broader need to deliver a regime for recognising and enforcing judgments from UK jurisdictions in the EU and vice versa to ensure legal continuity. This is in the interests of parties to contracts in the UK, the EU and globally, and to the ongoing primacy of English law and dispute settlement.”

The fact is that, although not immediately obvious, Brexit could impact dispute resolution. Increasingly, commercial disputes have cross-border dimensions. A significant achievement of the EU has been the introduction of harmonised rules regarding key aspects of cross-border litigation proceedings. Unless bilateral UK-EU agreements are negotiated for the post-Brexit era, some of this may now be undone. (See further our [Brexit - A legal perspective - Issue III](#))

In brief, Brexit might mean:

- no longer a ‘passporting’ right to automatic enforcement of judgments

- as between Ireland and UK: may have to rely on common law rules for enforcement
- inconsistency between the powers of Irish and English courts
- potential for disputes regarding jurisdiction and enforceability
- parallel litigation
- balance of risk in commercial contracts could change in unintended ways
- taking of evidence could be impacted
- potential upset to cross-border enforcement and claims
- loss of criminal mutual assistance measures
- changes to contractual provisions
- English courts no longer taking account of ECJ decisions on laws in force and of an EU origin.



## Central Bank – Steadying the Ship

*The Central Bank of Ireland (CBI) has responded strongly and effectively to criticisms made of it in Autumn 2016 regarding its role in respect of Brexit and opportunities for Ireland in the financial services area in a series of speeches.*

While the CBI does not have a promotional role, it recognises the importance that it is open, transparent, predictable and consistent in its engagement with financial services institutions considering seeking authorisation in Ireland, or those institutions that are already authorised here and are considering expanding their activities. The promotional mandate that it had pre-crisis, which was seen by the CBI to have contributed materially to the development of the crisis conditions, has been expressly removed from its mandate. The Bank's planning and thinking has now progressed from examining the immediate impacts of the leave vote, to considering some of the structural, political and policy repercussions.

The first speech was that of Governor Philip Lane titled 'Macro-Financial Perspectives on the Irish Economy' made on 2 August 2016 where he said that the Bank was committed to providing a clear, consistent, open and transparent authorisation process, while ensuring a rigorous assessment of the applicable regulatory standards.

Then Gerry Cross, Director of Policy and Risk, said on 3 October 2016 that when it came to applications for licenses in Ireland, the CBI stood ready to meet the challenges that might arise. "We will do so on the basis of an active, open stance, ready to engage, but in line with our duty to protect consumers, and in keeping with EU rules, international standards, and our published processes."

Later, Ed Sibley, Director of Credit Institutions Supervision, on 7 October 2016 summarised the Bank's immediate priorities, consideration of potential impacts and thoughts on the regulatory framework and its approach regarding firms considering migrating operations from the UK to Ireland, including the approach to authorisations and on-going supervisory expectations.

Next, Deputy Governor, Cyril Roux, on 1 December 2016, indicated that Brexit had led to a material increase in the number of authorisation queries from UK authorised

firms. He said that when authorising a firm, the CBI will expect to see a substantive presence in Ireland. "Applicants can expect a rigorous process" where the CBI will expect to see risks managed and mitigated. He added that "it is important to note the collective commitment of supervisors in the EU to safeguard the integrity and the homogeneity of rules and our determination to avoid regulatory arbitrage."

Subsequently, on 23 December 2016, in a speech titled "Responding to the post-Brexit environment", Gerry Cross spoke further about the CBI's role in providing "high quality and credible financial regulation and supervision designed to promote financial stability, protect consumers and support effectively functioning financial markets". He stressed that a key component of a successful and attractive jurisdiction for the location of financial services activities is a "strong and independent regulator, with international credibility". Delivering that is, in his view, "by far the most valuable contribution" that CBI can make to the attractiveness of Ireland as a location for financial services firms.

On 17 January 2017, Gerry Cross again made an interesting speech and said that "proper business models, with convincing risk identification and management, suitable products, sound finances, and strong boards and executives, can be expected to be approved, whether or not such business models already exist in Ireland". He re-emphasised the point that "businesses that are authorised here must be run from here".

The CBI approach is embedded in the European context, whether as part of the SSM or the European System of Financial Supervisors. This is significant, as Gerry Cross said, because it means that "regulatory differences should not be a driver of where firms, considering restructuring, might choose to locate new entities or business activities".

The speeches can be read [here](#).



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### Irexit? No.

*On 24 June 2016, the day following the UK referendum vote for Brexit, the Irish Minister for Foreign Affairs and Trade, Charlie Flanagan, said “Ireland will of course remain in the EU and in the Eurozone”. And, notwithstanding a few newspaper articles to the opposite effect since then, new research published on 30 December 2016 has found that, despite the UK voting to leave the EU, Ireland remains one of most pro-European countries in Europe.*

When asked how they would vote if there was a referendum on membership of the EU, 80% of Irish citizens suggest they would vote to remain in the EU, slightly higher than recorded in 2015. See <http://www.redcresearch.ie/brexit-little-impact-positive-support-eu-ireland/>

This finding also reflects the Taoiseach, Enda Kenny’s view that “after more than 40 years of membership, we have built up strong bonds of partnership with all the other member states, and with the European institutions, that will continue to serve us well”.

The government’s position was confirmed recently on 10 January 2017 in a speech by the Irish ambassador to London, Dan Mulhall, when he said:

“Ireland will remain a member of the EU. There is political consensus behind this and strong public support evidenced in recent opinion polls. Our Foreign Minister, Charlie Flanagan, has described the idea of Ireland exiting the EU as ‘fanciful’ and with good reason.

Look at how Ireland has benefited from EU membership. In 1973, our wealth per capita was just two-thirds of the then EU average; now it is comfortably above the average. Membership has enabled our economy and our ties with our European neighbours to develop and diversify impressively. Membership has given us an opportunity to bring significant quantities of foreign direct investment into Ireland, attracted by our status as an English-speaking country within the EU.”

See speech text [here](#).



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### IP Developments Related to Brexit

#### *UK and Germany to ratify UPC agreement - new patent system gets green lights*

Previously in **Brexit Tracker II** we noted that the proposed introduction of a Unitary Patent (“UP”), which would make it possible to obtain patent protection valid in all participating states (currently all EU member states except Spain, Poland and Croatia), and an associated Unified Patent Court (“UPC”) had been in severe doubt given the Brexit referendum result. The relevant international treaty had not yet come into effect as Germany and the UK (whose ratifications are required under the agreement) had not yet ratified it. However, since our last update there have been two very significant developments.

First, in a move that caused genuine surprise (even shock) in the UK and also across Europe, the UK Government indicated at the end of November that, despite the Brexit result, it intended to ratify the UPC agreement.

Secondly, and just before Christmas, the

German government restarted the relevant legislative process to enable Germany to ratify the same agreement.

The practical and legal implications of a departing EU member state signing up to this agreement are yet to be worked out, but it now seems quite likely that the UP and the UPC will come into effect where a few months ago that seemed a far off, or even unlikely, prospect.

As a result, affected clients and others should begin to restart (or begin) their preparations for the new system. Perhaps most importantly, if your organisation holds European patents, it is now well worth reconsidering whether you would like to “opt” any or all of those current European patents out of the new court system, as otherwise such patents will be subject to invalidity attacks in the central UPC system and not on an individual country-by-country basis (as currently).



## Procedural Arrangements for Article 50 Negotiations

*On 15 December 2016, the EU Council published a statement following an informal meeting between the heads of state of government of 27 member states, as well as the Presidents of the European Council and the European Commission.*

“Determined to see the Union succeed, [we] stand ready to start negotiations with the UK as soon as the UK has notified under Article 50. We welcome the intention of the UK to do so before the end of March 2017, so that we can begin to tackle the uncertainties arising from the prospect of the UK's withdrawal. We reiterate that any agreement will have to be based on a balance of rights and obligations, and that access to the single market requires acceptance of all four freedoms. We intend to conduct the withdrawal negotiations in a spirit of trust and unity among us.”

The procedure and consequences of a withdrawal from the EU are governed by EU law and no recourse to international law is possible. They are as follows:

- the formal withdrawal process will be initiated by a notification from the UK to the European Council declaring its intention to withdraw
- the European Council (without UK participation) will then provide guidelines that will define the framework for negotiations and set out the overall positions and principles that the EU will pursue throughout the negotiations. The European Council will remain permanently seized of the matter, and will update these guidelines in the course of the negotiations as necessary
- the European Council will invite the General Affairs Council (a configuration of the Council mainly made up of the European affairs ministers from all EU member states) to proceed swiftly with the adoption of the decision authorising the opening of the negotiations, following a recommendation by the European Commission
- the EU Council will also adopt negotiating directives on substance as well as on the detailed arrangements governing the relationship between the EU Council and its preparatory bodies on the one hand and the EU negotiator on the other
- the EU Council will be invited to nominate the European Commission as the Union negotiator. The European Commission has already nominated Michel Barnier as its chief negotiator. He will systematically report to the EU Council and its preparatory bodies and will also keep the European Parliament closely and regularly informed throughout the negotiations
- the EU and the UK have a time-frame of two years to agree on the withdrawal arrangements. After that, membership ends automatically, unless the EU Council and the UK decide jointly to extend this period
- before concluding the agreement, the EU Council will need to obtain the European Parliament's consent
- the EU Council will conclude the agreement with a 'super qualified majority' (without the participation of the UK). The qualified majority is defined in this case as at least 72% of the members of the EU Council, comprising at least 65% of the population of the member states (without the UK)
- unlike the accession of new member states to the EU, the withdrawal of a member state does not require ratification by the remaining member states
- however, any treaty changes or international agreements (such as a free trade agreement) that might be necessary as a consequence of the withdrawal agreement will need to be ratified by the remaining member states

## Procedural Arrangements for Article 50 Negotiations

(continued)

- the withdrawal agreement will not be primary EU law. It will be an international agreement and therefore subject to judicial review by the ECOJ. The Council decision to conclude the agreement could, for instance, be challenged before the ECOJ through an action for annulment
- the domestic courts of the remaining member states (including Ireland) will be able to refer questions regarding the withdrawal agreement for preliminary ruling to the ECOJ
- the legal consequence of a withdrawal from the EU will be the end of the application of the EU treaties (and the protocols thereto) in the UK from the time of exit. EU law will cease to apply in the UK, although any UK legislation adopted in implementation or transposition of EU law would remain valid until the UK introduces its so-called “Great Repeal Act” to amend or repeal them. At present, the plan is for the UK Parliament to pass such repeal legislation in advance but not to bring it into force until the date of exit.

See [statement](#).

Finally, it is not clear whether the UK’s future relationship with the EU will be covered by the withdrawal agreement or negotiated as a separate agreement alongside the withdrawal agreement. The UK could ask to re-join the European Free Trade Association (EFTA) and the European Economic Area (EEA). Membership of these organisations would not be automatic but subject to the unanimous approval of existing member states. The UK government says that is not looking at existing models for its future relationship with the UK, but at a “bespoke agreement” with the EU.

**Acquired Rights:** An important issue in the negotiations is likely to be ‘acquired rights’ (also referred to as vested or executed rights). There is nothing in the EU treaties stating that rights acquired during the currency of the EU treaties will automatically continue after leaving the EU. Unlike many international treaties, there is no survival clause in the EU treaties with rules on protecting the acquired rights of citizens and businesses or on the possible survival of claims based on EU law. It might be expected that the withdrawal agreement will address this issue but, again, it is not yet clear what that agreement will cover.

On 17 January 2017, the House of Commons library published its own Briefing Paper on “*Brexit: how does the Article 50 process work?*” view [here](#). It includes a final short section titled ‘Could the UK later re-join the UK?’ which concludes “yes” but states that “it is unlikely that if in the future the UK re-applied to be a member of the EU, it would gain membership with its current concessions, opt-outs and opt-in arrangements intact”. That sounds correct.

## **Northern Ireland - Highly dependent on EU markets, but mainly on Ireland**

An interesting analysis by Bruegel, the Brussels-based independent European think tank that specialises in economics, on the impact of Brexit on Northern Ireland was published on 22 December 2016.

In relation to trade it notes that the UK as a whole relies on the EU for trade as much as it relies on the rest of the world. However, out of the constituent countries, this pattern is only true for England and Wales. Northern Ireland trades mostly with the EU, and in particular with the Republic of Ireland. Two thirds of exports from the EU and about half of imports to the EU are traded with the Republic of Ireland. The economic integration with the Republic of Ireland has risen substantially since the Good Friday Agreement. Since then, there has been a significant increase in cross-border trade, which was mainly driven by the increase in exports from Northern Ireland to the Republic. This improved the Northern Ireland trade balance. Ultimately, political stability and cross-border cooperation paid a significant economic “dividend”.

In light of this higher reliance on the Irish market, Northern Ireland is more exposed to the impact of any trade barriers that might emerge as a consequence of Brexit.

See the article on Northern Ireland [here](#).

## **Stealing London’s financial crown would bring both benefits and responsibilities**

Bruegel also has an interesting piece about the cities that are looking to take over London's financial activity.

The potential benefits are numerous: high-quality jobs in financial services, expansion of ancillary services such as legal support and consultancy, better access to finance for corporates, higher tax revenues for the government, and prestige for the city and country.

However, hosting a major financial centre also comes with significant risks and responsibilities. Most importantly, the country’s authorities are responsible for the supervision and stability of the incoming financial players and markets. In this regard, it commends Irish Central Bank governor, Philip Lane, as having “rightly warned against a regulatory race to the bottom” – see also 'Central Bank - Steadying the Ship' section above.

They advocate a tightly integrated EU27 financial architecture, so that financial institutions can relocate to various cities without that being a problem, and propose three institutional changes to support such an integrated financial architecture:

- first, the banking rule-making body, the European Banking Authority (EBA), should be relocated from London to a capital in the EU27
- second, the Banking Union needs to be completed to ensure effective prudential supervision and crisis management (including the fiscal backstop) at the euro-area level
- finally, the Capital Markets Union should be upgraded with a central role for ESMA to ensure effective conduct supervision.

An interesting example is the United States with an integrated regulatory structure and financial sector, while financial market activities take place in New York and Chicago.

See the related Bruegel article [here](#).



## London Insight

### The City view

The CityUK, the influential organisation which champions UK-based financial and related professional services and lobbies on the industry's behalf, published its priorities for the UK's negotiations in a paper titled "Brexit and UK-Based financial and related professional services" published on 12 January 2017.

It says that the UK and the EU should conclude a bespoke agreement that delivers mutual market access, transitional arrangements to allow for enough time to implement the new relationship and access to talent. The paper sets out key considerations on each of these areas. It also asserts that there will be opportunities arising from Brexit, including from new networks of trade and investment agreements, the creation of Sharia-compliant central bank liquidity facilities and FinTech.

On market access, it argues that it is in the economic interests of the UK and EU to continue to provide and have access to the widest possible range of financial and related professional products and services without the need to establish a commercial presence in both markets.

See the CityUK report on Financial and Related Professional Services [here](#).

### Work permit for EU workers?

Elsewhere, Lord Hague, formerly William Hague M.P. and the UK Foreign Secretary, said in an interview that the UK should make the EU a "fair offer on migration" in exchange for a "sensible, fair system of trade", limiting any damage to British business. Under his suggestion any EU citizen with an offer of a job in the UK would qualify for a work permit. There would be little or no welfare support but the freedom to work in Britain would be retained. Such a scheme, he argues, would be simple to operate and would allow Mrs May to say, in his words: "We're proposing something one step short of free movement so we're seeking something one step short of the single market". "We're not expecting to be in the single market without freedom of movement but we would expect on this basis tariff free trade across all sectors."



## New York Insight

### Bank capital

A concern regarding the interplay of bank capital requirements, CRD V and London as a place to locate business is the latest issue that US advisors have identified may arise from Brexit.

The concern is that, if adopted, a new requirement to establish an EU intermediate holding company where two or more banking institutions established in the EU have the same ultimate parent in a third country, may make it more efficient from a capital perspective for an international bank to establish its main banking presence in the EU and then run the UK business through a UK-authorized branch of that EU institution rather than use EU branches of a UK bank to run a European business. Thus, some UK-based credit institutions and investment firms wanting to continue to operate in the EU might have to establish a large separate pool of capital in the EU after Brexit.

### Anti-trust

Separately, the anti-trust implications for US companies continue to raise concerns and especially how Brexit might affect US companies doing deals in the UK and the EU. One issue is that post-Brexit companies involved in cross border cartels extending from the UK to the EU may face the risk of parallel investigations. Dual filing of immunity or leniency applications would be necessary. Perhaps of greater concern though is the perhaps inevitable but gradual divergence between UK and EU law, regulation and practice. Also, EU block exemptions would no longer be part of UK law but would continue to apply to the conduct of trade within the EU. Would the UK enact new and separate domestic block exemptions?



# MCCANN FITZGERALD

## Upcoming Events

Date	Event
16 March 2017	<b>British Irish Chamber of Commerce Annual Conference</b> , DoubleTree by Hilton, Dublin.  <b>Session: "Blueprint for Financial Services"</b> Chair: John Cronin, McCann FitzGerald.

## McCann FitzGerald Brexit Group

We have established a cross-sector group that advises and represents Irish and international business clients on the legal, regulatory and tax implications of Brexit. A full list of the group can be found on our [website](#). Some of the key contacts are listed below:

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