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## EU Law With the UK, EU Law Without the UK

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## INTRODUCTION

### EU LAW WITH THE UK – EU LAW WITHOUT THE UK

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On Monday, February 27, 2017, Fordham’s International Law Journal and Center on European Union Law jointly held the symposium “EU Law with the UK – EU Law without the UK.”

The UK electorate voted to leave the European Union on June 23, 2016. Since then, legal scholars and practitioners have primarily addressed the institutional and constitutional consequences of “Brexit,” especially the operation of art. 50 of the Treaty on European Union, on the one hand, and the impact of the United Kingdom’s impending departure on specific areas of law on the other. The *symposium* deliberately took a different perspective, starting from the assumption that it was no accident that it was the United Kingdom – and not another Member State – that voted to trigger art. 50.

Much has been made of the United Kingdom’s insular location, its political trajectory during the past years, and not the least debates about the effects of immigration. Arguably, the “leave” campaign was based on a very limited understanding of EU law and the impact of Brexit on the United Kingdom, and the vote may ultimately represent just another example of populist outrage that seems to have gripped many Western democracies.<sup>1</sup> However, observers both on the Continent and in the United Kingdom, as well as on the other side of the

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1. See, e.g., Michael Dougan, *Editor’s Introduction*, in *THE UK AFTER BREXIT. LEGAL AND POLICY CHALLENGES* 1, 1, 6-11 (Michael Dougan ed. 2017) (suggesting that the “leave” campaigners exhibited only a limited comprehension of the implications of Brexit, and providing a personal account of outrage directed against EU law researchers in the UK).

Atlantic, often have the impression – justified or not – that the United Kingdom is in some ways an uneasy fit for its Continental partners. At the very least, one could argue that its population and political elites were more skeptical about whether a stronger or more centralized Europe was desirable. The most prominent cases in point are the UK's opt-outs from the Euro currency and the Schengen zone. This difference in attitude may imply that the vote was also influenced by the UK's distinct culture, which also has a sizeable impact on the prevalent attitudes toward business law and economic regulation that are both of interest for legal scholars and relevant for the practice of law. These differences and their consequences have been studied by social scientists. Economists have found that whether a country adheres to the common law or civil law tradition correlates with specific substantive legal rules and regulations in many areas, which obviously have considerable economic and social impact.<sup>2</sup> In a different line of research, the United Kingdom is classified as a “liberal market economy” in the “varieties of capitalism” literature along with other English-speaking countries, whereas Continental European countries are classified as “coordinated market economies.”<sup>3</sup> Political economists have identified a “market-making” and a “market-shaping” coalition within the European Union, with the United Kingdom as a centerpiece of the former.<sup>4</sup> On the annual World Values Survey, Great Britain shows up in a group along with the United States, Australia, New Zealand, Canada, and Ireland, whereas Protestant (Continental) European and traditionally Catholic European countries populate different clusters.<sup>5</sup>

One would probably go too far by saying that these differences make the United Kingdom truly unique within Europe. Maybe similar points can be made for other Member States along different dimensions. However, scholars studying EU legal policies and business

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2. See generally Rafeal La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008).

3. Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, in VARIETIES OF CAPITALISM 1, 20 (Peter A. Hall & David Soskice eds. 2001).

4. Lucia Quaglia, *The 'Old' and 'New' Politics of Financial Services Regulation in the EU*, 17 NEW POL. ECON. 515, 519-520 (2015).

5. See *Findings and Insights*, WORLD VALUES SURVEY (last visited July 14, 2017), <http://www.worldvaluessurvey.org/WVSContents.jsp?CMSID=Findings>.

regulations often see the United Kingdom as bringing a particular perspective to the table that would otherwise be missing in Europe. Arguably, these perspectives gave the United Kingdom an outsize influence. According to the conventional wisdom about the operation of the European Union, the United Kingdom often clashed with its Continental partners when voting in many areas of legal and economic policy, possibly for reasons linked to the above divergences. As a large Member State, the UK's vote in the Council had a considerable impact, and in varying coalitions, in some cases the British voice in negotiations on EU law may have driven EU policy away from paths that it might have otherwise taken. In other areas, it may have prevented European harmonization that might otherwise have been achieved, or directed it into a different direction. In yet other areas, Britain was the driving force behind EU law policies and has created the impetus for EU action that otherwise would not have happened. The *symposium* organizers thus asked the participants to explore, in their areas of expertise, not Brexit as such, but the influence of the United Kingdom on key regulatory policies. The contributors thus assessed whether and how, in their chosen fields, the United Kingdom has influenced EU policies, and speculated about what EU law might have been without the UK's membership. Given the experience of the past, the authors further discussed the likely consequences Brexit is to have for EU Law. Unlike other conferences, the *symposium* focused less on the implications of Brexit for the United Kingdom, but rather explored the importance of the UK's membership for the development of EU law in the past, and why the British voice might be sorely missed in the future. We therefore hope that the articles in this issue will thus contribute to a better understanding of European harmonization efforts in practically relevant areas of law.

In her contribution, *Niamh Moloney* highlights the important role of **financial regulation**, given the size of the London financial market, which has made the United Kingdom a big player in debates about the European regulatory architecture. She describes how the United Kingdom has been a member (with the Nordic countries and the Netherlands) of the liberal, market-orientation coalition that generally opposed a prescriptive, one-size-fits-all approach advocated by other Member States such as France, Spain and Italy, whereas Germany wavered between both positions. After the financial crisis, the liberal policies lost some ground. The United Kingdom has remained vigilant, however, in policing the limits of EU powers in financial

regulation by challenging potential overreach in court. After Brexit, UK financial regulation may bend more toward uniformity and become less liberal, but radical changes are unlikely. The EU's influence on international financial regulation is also unlikely to be affected.

*Susan Block-Lieb* investigates the case of the **European Insolvency Regulation** (EIR), which is important for the resolution of cross-border insolvencies. During the 1990s, the United Kingdom failed to sign the draft Convention on Insolvency Proceedings, which consequently did not enter into force. The European Union then enacted the original EIR in 2000 with the assent of the UK government, but the EIR suffered from similar problems, such as an unclear criterion (the "center of main interests") to determine jurisdiction, and a focus mainly on liquidation as opposed to reorganization. British courts pragmatically interpreted the EIR and thus made it more suitable to corporate reorganization. The revised EIR of 2015 contemplates also a debtor-in-possession and reflects British practice in the insolvency of cross-border groups. Brexit may mean that the United Kingdom will lose these benefits.

*Martin Gelter* and *Alexandra Reif* explore four areas of **company law**. In the first two — board structures and legal capital, which were "traditional" projects of company law harmonization even before the United Kingdom became a member — German law was historically influential, while the United Kingdom typically put brakes on harmonization, which resulted in the derailment of some projects and compromises in others that completely changed the original plans. During the 1990s and 2000s, when EU company law harmonization became more focused on capital markets, UK law became the model, whereas Continental European jurisdictions tended to object. Gelter and Reif illustrate this phenomenon with the examples of takeover law and accounting. However, the paper argues that Brexit will be irrelevant for these areas because the general trajectory and needs of capital markets will remain the same, with or without UK membership.

*Giorgio Monti's* contribution to the *symposium* studies **competition law**, maybe one of the areas where the European Union has had the greatest impact in general. Looking both at the activities of individual officials and the larger policy, he suggests that, somewhat in line with the varieties of capitalism thesis, the United Kingdom was instrumental in aligning antitrust more strongly with economic ideas.

This means that the consideration of efficiency effects has gained weight relative to the preservation of competitive market structures as such. This can be seen in the “more economic approach” of the 2004 EU Merger Regulation. Similarly, British influence led to increased challenges to the state’s role with respect to utilities.

*Susanne Augenhöfer* surveys European **consumer law**. In most respects, the United Kingdom was a recipient of European consumer legislation, and some changes can be expected after Brexit. In some areas, the departure of the United Kingdom may lead to a “rejuvenation” of consumer law harmonization projects that it previously resisted. After Brexit, the United Kingdom might also innovate in certain areas of consumer law, since will no longer be constrained by existing EU harmonization and better positioned to experiment with new approaches. However, even if the United Kingdom decides to loosen consumer protection requirements, British industry can be expected to largely conform to European requirements (e.g., in general contract terms), given that otherwise British firms will likely be penalized by market forces.

*Fernanda Nicola* argues that the UK common law influence had a significant impact on the **judicial style** of the Court of Justice of the European Union and was a source of preoccupation for the Commission since the early 1960s. While the court in Luxembourg was initially heavily influenced by the French *Conseil d’Etat*, it began to use common law techniques such as *stare decisis* and careful analysis of its own precedents after the UK accession in 1973. The combination of civil and common law style still resulted in minimalist *per curiam decisions* that allowed the court to make policy while giving relatively few justifications. At the same time, English statutory interpretation was influenced by Luxembourg, as UK judges became more inclined to espouse purposive over purely literal interpretation, and at times depart from relying solely on the tradition of parliamentary sovereignty through the mechanism of preliminary references. Even if preliminary references will no longer be possible after Brexit, the common law influence on the Luxembourg judicial style will persist whereas the UK judiciary will continue to closely monitor the jurisprudence of the Court of Justice.

*Julie Suk*’s essay investigates **equality law** through the lens of litigation. She suggests that the United Kingdom played an important role as a litigant before the Court of Justice and through its Advocates General, both of which pulled equality law into the direction of the

US model. Often this perspective was at odds with Continental European visions of equality legislation in a democratic society, which were to some extent more prescriptive. In recent years, the Court has increasingly moved toward the Continental model, largely because of the work of Continental European Advocates General. Brexit may accelerate this trend.

*Kurt Wimmer* and *Joseph Jones* describe both European and UK **privacy law** as strict but largely consistent, and explain that the principles of the new General Data Protection Directive will likely be implemented in 2018 in the United Kingdom alongside the European Union. After Brexit, data transfer from the European Union to the United Kingdom will be permissible only if the United Kingdom meets a standard similar to that of European data protection law. Most likely, the United Kingdom will find it in its own interest to comply, in order to benefit domestic industries relying on data flows. In some areas, such as the “right to be forgotten,” UK jurisprudence may eventually diverge from the European Union.

Overall, the contributions show that that UK influence on EU policies has been considerable. The pathways through which British ideas had an influence differ among sources of law – legislation, domestic judicial interpretation of EU instruments, commissioners and advocates general, and, maybe most subtly, the outlook of judges as reflected in judicial style. In many areas close to business, such as financial regulation, insolvency law, some areas of company law and antitrust, the United Kingdom has taken the lead or UK ideas have predominated over time. In some fields, such as consumer protection or some areas of company law, the United Kingdom often put the brakes on the harmonization train. While in most areas UK law’s influence has increased over time, equality law provides an interesting counterpoint, as the CJEU has increasingly moved away from the UK model.

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