

Implications of Brexit for Innovation in Private Law

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Horst Eidenmueller, *Collateral Damage: Brexit's Negative Effects on Regulatory Competition and Legal Innovation in Private Law* (May 7, 2018), available at [SSRN](#).

The dark side of Brexit is that it illustrates dramatically the contrast between a political context which operates largely on the basis of slogans and a business and economic context where details matter. When Airbus warned of the risks to businesses if the UK crashes out of the EU without a deal, Jeremy Hunt, the Health Minister, described the intervention as [inappropriate](#). Mark Carney, the Governor of the Bank of England, has similarly [been criticised](#) for pointing out some of the economic disadvantages associated with Brexit.

The bright side of Brexit is that it is producing some excellent scholarship in a range of disciplines as scholars try to understand its causes and potential effects. In this working paper [Horst Eidenmueller](#) argues, convincingly, that Brexit will interfere with desirable innovation in private law in Europe, both in the EU and in the UK. This is one of many examples of potential harm from Brexit to the UK and to the remaining Member States of the EU.

English lawyers like to think that English law is particularly well-adapted to dealing with new commercial problems (for example see [this recent speech by Sir Geoffrey Vos, Chancellor of the High Court](#)). English law is flexible, and English judges have tended to be pragmatic. And when English judges created uncertainties for the financial markets, as in the [local authority swaps cases](#), other institutions have focused on promoting legal certainty. The Bank of England encouraged the formation of the Financial Law Panel to address issues of uncertainty. The current Financial Markets Law Committee continues the work the Financial Law Panel began, although [it stresses its independence from the Bank of England](#). The creation of a [Financial List as a specialist court in the UK](#) to deal with cases involving the financial markets and with a new test case procedure "to facilitate the resolution of market issues on which there is no previous authoritative English precedent" is a recent development in this process of ensuring that English law works well for financial transactions, including international transactions.

Horst Eidenmueller argues that Brexit is likely both to reduce incentives for EU Member States to improve their own laws, and to reduce incentives for the UK to innovate. In addition, the loss of the UK's involvement in EU law-making processes will reduce the impetus for development of EU private law. Thus, Brexit will likely "reduce the level of efficiency-enhancing legal innovation in Member States' and European private law."

The article supports these arguments with examples from the evolution of company law, insolvency law, and contract law and dispute resolution. Eidenmueller's examples show in particular how competition from English law has provoked efficiency-enhancing developments in Germany. But he also notes that Germany and France have decided to enter the competition to attract business disputes to their courts, including providing for proceedings in English.

The topic of the influence of the UK on the development of EU (rather than Member State) private law is a large one, and in this article Eidenmueller focuses on some illustrative examples of the UK's efforts to influence the development of EU law. Here the results are somewhat mixed, but in some cases (such as the Alternative Investment Fund Managers Directive) he argues that the UK did have a significant impact on the final version of EU rules (even if critics based in the UK are not entirely satisfied with the result).

The article then needs to address the significant uncertainties about the rules that will apply after Brexit. Nevertheless, Eidenmueller argues that London will be less attractive as a litigation venue, and that English law will therefore be less attractive as a governing law. And he foresees harm to the UK market for international restructurings. It is not a pretty story for the UK. But the EU stands to lose out also. If only there had been a way for David Cameron to have the opportunity to read scholarship like this before committing to the referendum decision.

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