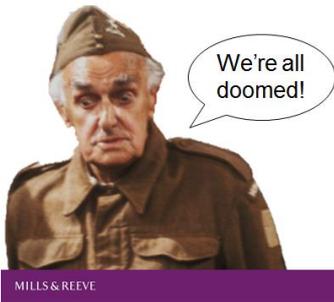


## BREXIT - WHAT ARE THE LEGAL IMPLICATIONS OF LEAVING THE EU?

- In the next 25 minutes I am going to cover only the legal implications of the UK leaving the EU, I will leave political and economic comment to others. What I say will:-
  - deal with distinctions between UK and EU laws and Regulations and why they are important to you; and
  - leave you with 5 clear recommendations that I think you should consider before embarking on any significant changes to your business, to ensure it survives the undoubted turmoil that Brexit will bring
- I can't completely ignore the recent Supreme Court decision and the European Union (Notification of Withdrawal) Bill, which is now required to permit the government to give notice under Article 50. But I am assuming that Parliament won't stop the notice being given and that the court decision will turn out to have been more important constitutionally than in practice.
- The lesson I would draw from the case is that Governments of all colours often fail to understand the law, with the result that their enactments are flawed. Presumably it would have been simple to add a clause to the Referendum Act to deal with the next stage, and give the government the authority that they need. With the legislative changes to come, we must expect other omissions and unintended consequences.
- Unfortunately I am not going to have all the answers. No one does. There are plenty of educated people out there telling us that we face catastrophe on a biblical scale and an equal number telling us that we can look forward to a Utopian future. I suspect that neither is correct, but remember that nothing will change immediately. Until we leave the EU we will still be governed by the same rules and regulations that we have now.
- For you lawyers in the audience, I am not going to go into great detail on the legal framework and there will be virtually no detail on the actual regulations and directives. This will possibly be a disappointment to the lawyers, but a great relief to the rest of you.
- What I will do is look at the legal implications of Brexit with the help of some familiar TV characters.....

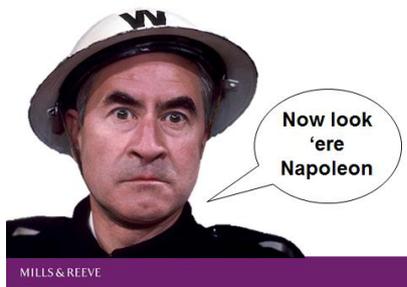


- I'll begin with a short history lesson.
- Dad's Army was of course set in another time when our relationship with mainland Europe was put to the test .
  - Control of our borders was a significant issue.
  - We had a Prime Minister who had been appointed rather than elected at a General Election.
  - The pound fell sharply against the dollar.
  - Sounds familiar?
- The first episode of Dad's Army was set in 1940, a year or so after the beginning of the Second World War and, at least in this country, a time of considerable change for agriculture. Before the start of the Second World War, Britain imported 55 million tons of food a year. By the end of 1939, this had dropped to 12 million.
- (Today the UK is of course again a net-importer of agricultural products, and imports of these from the rest of the EU well out-weigh the amount exported.)
- After the War concerns over food security led to the introduction of the Agriculture Act 1947, in an attempt to reduce the risk of a hostile foreign power being able to starve the UK into submission. The Act guaranteed prices, markets and tenure, in an attempt to assure farmers that their land would not be taken away and that whatever they grew would be sold at a known price.
- But as with the present day, Governments were unwilling to let go of what had come their way and all sorts of farmland taken for the duration of the war was never to be released back to the original landowners.
- Some of you will know that much of Dad's Army was filmed on what is now known as the Stanford Training Area, not far away from here, just outside Thetford. Villagers who were forced out of their homes to make way for the base in 1942 were promised that they would be able to return at the end of the War, but it never happened. So it's not just Brussels that has it in for you.
- Other UK legislation followed, often largely relating to the security of tenure of tenants, but of course in 1972 it wasn't just agriculture that was effected when the European Communities Act set out the terms upon which the United Kingdom became part of the European Economic Community, now the European Union.
- In order to put into effect the decision of the referendum last June, and extract us from Europe, it is now proposed that the 1972 Act will be repealed by something that is currently being referred to as the "Great Repeal Bill".
- This might sound like good news but unfortunately it can't be as straightforward as just repealing the 1972 Act. The Act is now accompanied by over 40 years' worth of EU rules and regulations, and to just remove all of these .overnight would leave huge gaps in our legislation.
- Is this going to be a problem?



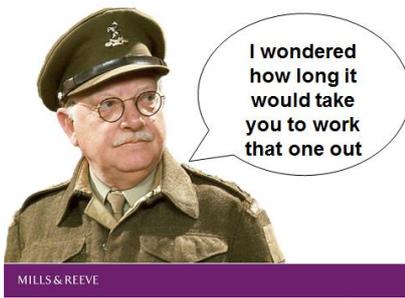
- Is Private Fraser at last correct, are we all doomed?
- The effect of the 1972 European Communities Act was to put EU law above UK law as part of the UK legal system, so that it can be relied on in court and takes priority over UK law in the event of any conflict. The Great Repeal Bill will switch off this system, but Theresa May confirmed in her Lancaster House speech last month that it will probably also do exactly the opposite to what its name suggests; by re-enacting as UK law many of the EU laws that it has just repealed.
- As I have already said, this is of course necessary as otherwise we would have huge gaps in our legislation. Not only would we lose those famous rules regulating bendy bananas, over-powered vacuum cleaners and the amount of fruit in jam, but also a whole raft of provisions relating to agriculture, not least the CAP and Countryside Stewardship Schemes.
- But not all the EU rules and regulations would otherwise automatically disappear with the 1972 Act. Basically it depends upon whether or not they are “directly applicable”. Towards the end of last month, there was a Commons Library briefing which said that there are at present about 20,000 EU legislative acts in force and of these some 5000 are directly applicable.
- UK law is acquired from the EU via two main sources; Regulations and Directives.
- Generally, EU Directives are binding as to the result to be achieved but the method of achieving the result is left up to the member state. They become part of UK law by being embodied in an Act of Parliament. They will remain part of UK law despite the repeal of the 1972 Act.
- BY contrast, due to the way that the 1972 Act operates, EU Regulations become part of UK law automatically, on a set date, without any Act of Parliament. They will cease to have effect when the 1972 Act is repealed.
- Here are a couple of practical examples. What we know as the TUPE rules, protecting employees’ rights on the transfer of ownership of businesses, were implemented following the European Acquired Rights Directive, and will automatically remain in force; as will the rules regulating the imposition of VAT. However the Basic Payment Scheme and the Countryside Stewardship Scheme were introduced following EU Regulations and will therefore disappear. The rules relating to food labelling have been introduced via directive and regulation, so some will automatically remain in force and others will disappear. The issue will be to work out which ones.
- This is important to understand as it will be necessary for the government to sift through all inherited EU law to decide whether it should be retained, amended, or repealed. This task is complicated by the fact that it isn’t practical simply to cut and paste EU legislation into new UK legislation, word for word, as some EU law will only make sense whilst the UK is a member of the EU. For example many EU laws make references to EU agencies and institutions which will no longer be relevant.

- We should also bear in mind that without the EU “kitemark” to show that our products, not least our food, comply with certain standards, it may well be more difficult to sell them in the EU and elsewhere. Whilst the Great Repeal Bill may incorporate existing rules and regulations into UK law, such rules and regulations are dynamic as they continuously change. Going forward, we will somehow have to make sure that we are not left behind by post-Brexit legislation.
- So are we all doomed? Well not totally doomed in the way that Private Fraser would relish. But we will be doomed to a flood of new legislation and the chances of it all being well thought through and skilfully drafted are not spectacularly great. So expect some nasty surprises and some opportunities to arise, and look out for things that have been missed.
- A lot of our clients are looking at the rules and regulations that exist and are lobbying the government in order to try to influence the shape of the new legislation. This is something that you should think about if you aren’t already.



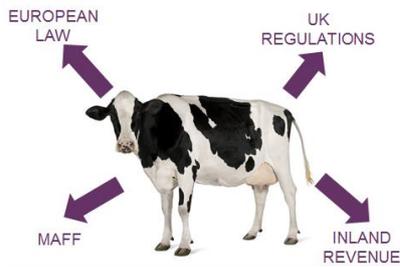
- Some of you will remember that when Chief ARP Warden Hodges said this he was actually addressing Captain Mainwairing rather than the enemy. In future it might be more appropriate to say “Now look ‘ere Jean-Claude Juncker” when we have to remind our European neighbours of our independence.
- Even when we have left the EU there will still be areas where our European neighbours will continue to rule over us, when matters are governed by treaties rather than the EU. Not everything that we think of as being Euro tinted or Euro tainted will change.
- You may have heard that withdrawing from the EU does not necessarily mean that we are withdrawing from the European Convention on Human Rights. This is because the European Convention on Human Rights is an international treaty protecting human rights and fundamental freedoms, although it is often confused with the EU Charter of Fundamental Rights. The EU Charter is of narrower effect and applies to public bodies making decisions within the scope of EU law.
- Before the referendum last June, David Cameron said that he intended to repeal the Human Rights Act, which incorporated the rights set out in the European Convention, and replace it with a distinct and more limited British bill of rights. Theresa May appeared to be in favour of this, but at the end of last year it was widely reported that the government has had to accept that for the time being Brexit may have given them more than enough to deal with. The suggestion now is that, after Brexit, the Conservative party may fight the 2020 election on a pledge of taking Britain out of the European Convention.
- So where does this leave us in practice? Could this affect your employees? One question is whether coming out of the European Union will lead to the infringement of any rights enshrined in the European Convention, such as those protecting family life? For example, if the current residence rights of EU nationals are not continued, could this infringe their rights under the European Convention, where they are married to British citizens or have a child here?

- Although we are south of the border some of you will be aware of the long running case of *Salveson V Riddell* dealing with the Agricultural Holdings (Scotland) Act 2003. Here the UK Supreme Court decided that a provision in this Scottish Act violated Mr Salveson's right to the protection of his property under the European Convention of Human Rights, by preventing him terminating a tenancy. However, the effect of the decision was suspended for 12 months in order to give the Scottish Parliament time to change the law to remedy the human rights breach. This is an example of a decision which would have been the same even if our exit from the EU had been completed.
- So however hard Brexit is to be, we will all still be affected by a surprising amount of European based law.



- As avid watchers of *Dad's Army* will know, Captain Mainwaring used that phrase whenever he had made an mistake and was pretending that it was deliberate. In the future it may be appropriate as even though it is intended that EU laws will be introduced into UK law word for word, that doesn't mean that the legal consequences will be the same, as there will be different regimes of statutory interpretation.
- When interpreting legislation the European Court uses the "purposive approach", as do most continental European countries. This is where, when interpreting a law, the court considers what was intended to achieve, and tries to achieve that objective, rather than fussing about the exact words. Since we joined the EU our own courts have been obliged to adopt this approach when deciding EU matters, and so have become accustomed to using it and more likely to use it to interpret domestic law.
- A good example is the legislation from Europe introducing Single Farm Payment. Many schemes set up with a view to circumventing the capping of payments did not go ahead because of fears that the purpose of the legislation would override the strict interpretation.
- By contrast, traditionally, our own courts use a variety of rules of interpretation, but predominantly the literal rule, which quite simply interprets what is actually written.
- This can throw up unexpected results such as in a case following a new Income Tax Act, which required tax returns to be submitted by everyone who had tax to pay, with a penalty of £20 plus treble the tax payable for those who failed to do so. In this case an unfortunate tax payer, whose income was all subject to deduction of tax at source, technically owed no tax but had failed to submit a return. However the Inland Revenue brought the case before the court and the court favoured the literal interpretation of the law; whether the tax had been paid or not. The result was that the poor tax payer who had already paid his tax, had to pay it again, three times over, plus the penalty.
- When milk quota was introduced through the EU and farmers started to want to trade their quotas, we soon found that we effectively had to deal with four different interpretations of the regulations.

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- European law said milk quota did not exist as a tradeable asset. UK regulations suggested that it might. The practice of MAFF was to say that it was probably okay so long as you didn't do anything too provocative, and the Inland Revenue said milk quota did exist, had a value, and they wanted their share.
- There is bound to be a period of considerable uncertainty while civil servants sift through the vast amount of legislation which has to be re-enacted and until the relevance of past cases is established. Probably not a lot will change immediately but be careful of assuming that what looks the same as before actually is the same. Think about how legislation affecting your business may be interpreted in the future.



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- “Do you really think that's wise”, Sergeant Wilson said when he thought that Captain Mainwairing was making a ridiculous decision. Who knows whether the referendum result was wise or not. It's far too early to say. Our Brexit barometer suggested that across our client base people were generally quite optimistic about the outcome, but what is clear is that our sector will need to be on its toes to make the best of whatever cards are dealt.
- The press has suggested that many farmers voted in favour of Brexit – was this a ridiculous decision?
- After talking to quite a few farmers, it's clear that for many the decision was finely balanced. But one thing that is certain is that a subsidy system for the UK will be very different to what we have now, without the influence of the French farming lobby in what is a predominantly urban population.
- Remember the shambles after the introduction of SFP? There was uncertainty, resulting in transactions being fouled up, and contracts and tenancies were impossible to draft. This uncertainty led to the making of short term rather than long term decisions and the land market effectively stalled for a year or so.
- There are bound to be unintended consequences – perhaps rewards falling to those who happen to be farming at the right time, effects on rents, or problems arising from any inability of Defra to cope with the quantity of new rules and regulations which will be required.
- How will it affect the landlord and tenant system?
- What will be the effect on the property market?

- In fact, is the inevitable uncertainty that will be created by Brexit likely to be any different to the chaos farmers have sometimes seen when we were in Europe?



- No, Private Pike, this time it really isn't your fault
- But what will a further bout of Brexit related change do for young people like him who are hoping to get on the farming ladder and build a career?
- Getting on to the farming ladder has never been easy. When FBT's were introduced the Government thought that they would be the solution, but tenancies granted to new entrants remain rare.
- There has now been suggestion that in future farmers under 30 will get more subsidy, but will this actually be enough to make any difference when money is in short supply? Your guess is as good as mine, but perhaps it's unlikely.
- All the uncertainty is bound to be bad news, it creates risks to making any change.
- What a young farmer might want is a long term tenancy or contract. That is not going to be helped by the coming uncertainty.
- Greater volatility is to be expected. Currency fluctuations have already been seen with inflationary consequences for inputs. In uncertain times who does a landowner appoint, a newcomer or a long established contractor with experience of difficult times and deep pockets? I think you can all guess the answer to that question.
- What will tighter immigration controls do? Are we 100% confident that any new scheme for agricultural workers that there may be will get it right for the industry?
- Will any shortage of foreign seasonal labour provide any entry points into farming or will the opportunities just be purely seasonal.
- So no Private Pike, it's really not your fault, but I am afraid that Brexit is unlikely to give you much help getting on to the farming ladder.



- If it all goes wrong then, like Private Godfrey, we might all feel that we would like to be excused. But for most of us, that won't be an option. Farmers are owners of significant capital assets which must be protected.
- What should we be doing in case it all works out badly? What are the foreseeable consequences?
- One consequence may be a Corbyn government. Stranger things have happened when voters are disaffected.
- So where does this leave us?
- Whatever government we may have, we should remember that the UK has a largely urban population, with MPs to match, and agriculture will be much further down the political agenda than it has been while we have been part of the EU.
- Will money be available to help farmers when it is also needed by the NHS, education and infrastructure projects?
- I said at the beginning that I would leave you with 5 points to take away with you. These are based on our understanding of how the legislative environment will change and also some of the actions that we are seeing our clients take.
- I would suggest that if you have tax planning to do in the next 4 or 5 years then you might want to think about doing it sooner rather than later, for example, by making gifts, or changes within a partnership or corporate structure, perhaps a family investment company.
- We must expect some chaos on the legal front, so if there are things that really need doing and you can do them now, then you should probably get on with it.
- Be careful about long term agreements which will remain in place after Brexit. Expect the unexpected which it may not be possible to cover in legal documents. Try to build flexibility into your arrangements so that you are able to react to change.
- You may also need to revisit existing agreements, particularly where they are cross-border.
- We are now drafting Brexit clauses for agreements, although there is as yet no consensus on the wording. With these it is important to be clear about what you are trying to achieve, and remember that an agreement to agree is just unenforceable. Think about it from a commercial perspective; is what you want is likely to be acceptable to the other party?
- If you are a landowner wanting someone else to farm your land then contracting agreements are likely to be safer than tenancies, as these maximise flexibility and you remain the one in control.

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- But above all, remain confident that somehow we will get through it and don't be pushed into taking steps that don't make sense for your business.
- You can be sure there will be no shortage of clever wheezes and "must do" measures for you to consider.
- But let's finish with the excellent advice given by Corporal Jones – DON'T PANIC



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Michael Aubrey  
Partner  
for Mills & Reeve LLP  
+44(0)1223 222397  
michael.aubrey@mills-reeve.com

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[www.mills-reeve.com](http://www.mills-reeve.com) T +44(0)344 880 2666

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