

BREXIT: BEYOND ARTICLE 50

JOHN WALMSLEY – JKW LAW
PRESENTATION TO CIMA, LONDON
29TH JUNE 2017

Overview

- Miller
- Article 50 and the 2-year period
- The White Paper and the exit strategy
- What will Brexit look like in reality?
- The process and negotiations
- Further legal challenges
- Legal consequences of Brexit?
- Regulatory landscape after Brexit
- What should business be doing now?

Entering The Rabbit Hole

- *“Apparently you follow the rabbit down the hole and emerge in a Wonderland where suddenly countries throughout the world are queuing up to give us trading advantages and access to their markets that previously we’ve never been able to achieve.*
- *Nice men like President Trump and President Erdogan are just impatient to abandon their normal protectionism and give us access . . . No doubt somewhere there’s a hatter holding a tea party with a dormouse!”*

Ken Clarke MP in the Commons debate on 31.1.17

Miller

- Supreme Court Judgment – 24th January 2017
- 8:3 in favour of upholding High Court's decision and dismissing Government's appeal
- *'[Withdrawal] will constitute as significant a constitutional change as that which occurred when EU law was first incorporated..by the 1972 Act...We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone;..the bullet will have left the gun before Parliament has accorded then necessary leave for the trigger to be pulled'*
Lord Neuberger

Article 50 and The 2-Year Period

- European Union (Notification of Withdrawal) Bill
- Two amendments proposed by Lords
- The Commons voted against guaranteeing EU nationals' rights and ensuring a "meaningful vote" on the outcome of the negotiations
- Bill passes Parliament on 14th March 2017
- Receives Royal Assent on 16th March 2017
- Article 50 triggered on 29th March 2017

Article 50

- Article 50 Lisbon Treaty (2009):

‘Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements’ -
Article 50 (1)

Article 50

- A Member State which decides to withdraw shall notify the European Council of its intention'
- 'In the light of the guidelines provided by the European Council, the Union shall negotiate an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union....' (Article 50 (2))

Article 50

- ‘That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the functioning of the European Union’
- ‘It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament’ Article 50 (2)

Article 50

- ‘The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period’ (Article 50 (3))

Article 50

- Is it revocable?
- Lord Kerr, who devised the clause, said the country "*might want to think again*" when Brexit terms become clearer.
- "*It is not irrevocable. You can change your mind while the process is going on*"
- Revoking Article 50 Notice - Plausible/Possible?
- Leaving and re-joining the EU in future (EU leaving the door open)?

The White Paper and The Exit Strategy

Post-Brexit models?

Five possibilities:

- EEA and EFTA
- Bilateral trade agreements and EFTA model
- Customs Union
- Free Trade Agreement (FTA)
- World Trade Organisation

The White Paper and The Exit Strategy

- Presented by the PM on 17th January 2017
- 12 principles which will guide the Government in fulfilling the democratic will of the people of the UK
- Providing certainty and clarity;
- Taking control of our laws;
- Strengthening the Union;
- Protecting our strong historic ties with Ireland and maintaining the Common Travel Area;

The White Paper and The Exit Strategy

- Securing rights for EU nationals in the UK and UK nationals in the EU;
- Protecting workers' rights;
- Ensuring free trade with European markets;
- Securing new trade agreements with other countries;
- Ensuring the UK remains the best place for science and innovation;
- Cooperating in the fight against crime and terrorism; and
- Delivering a smooth, orderly exit from the EU

What Will Brexit Look Like in Reality ?

- Features of a Hard Brexit:
- Losing full access to the single market
- Full control over immigration from the EU
- Applying new rules within the UK's own territory (not ECJ)
- Aiming for a Free Trade Agreement (FTA) with EU
- Reverting to World Trade Organisation (WTO) rules and tariffs if we do not achieve 'a good deal' with EU
- Making independent trade deals with rest of World (not part of customs union)

What Will Brexit Look Like in Reality ?

- As opposed to.....a Soft(er) or Open Brexit
- Remaining close to the existing arrangements with the EU –
- Access to single market;
- Not subjecting Britain's exports to border tariffs;
- Accepting "four freedoms": movement of goods, services, capital and people;
- Continued free access for EU nationals to live and work in the UK; and
- Membership of the European Economic Area (EEA) – ‘EU membership lite’ or associate membership
- Norway model

The Process and Negotiations



The Process and Negotiations

- EU response - draft guidelines on 31st March
- EU summit meeting on 29th April
- Council Decision (European Commission) on 3rd May authorising EU to open negotiations with UK
- Formal response from EU 27 – Essential Principles on Financial Settlement and Citizens’ Rights - 24th May (discussed by EU on 30th May and 1st June)
Contained main principles of EU’s position
- GE – 8th June
- Negotiations on withdrawal agreement with EU commence (21 months left) - June 19th
- Queen’s Speech – 21st June

The Process and Negotiations

Phased Approach to Negotiations

First phase of negotiations – Withdrawal Agreement

- EU's 'Essential Principles' (WP – 24.5.17)

(1) Financial Settlement

- The Union budget;
- The termination of the membership of the UK of all bodies and institutions established by the Treaties; and
- The participation of the UK in specific funds and facilities related to Union policies

The Process and Negotiations

- UK expected to honour the '*standing commitments*' it gave when the current seven-year EU budget was agreed by David Cameron in 2013
- A key element will be the cohesion fund which is used to pay for infrastructure projects in deprived parts of the EU
- UK should continue to benefit from all programmes '*as before the withdrawal*' until their closure under the condition that UK respects the applicable EU legal rules
- Accounts to be established in euro and all payments from the UK to the EU to be made in euro
- UK's obligations calculated at the date of withdrawal in accordance with methodology to be agreed in the first phase of negotiations

The Process and Negotiations

- EU deficit (£175bn) and pensions liability (£34bn-£52bn)
- Provisions – decommissioning Joint Research Centre nuclear sites
- Contingent liabilities disclosed in accounts
- The specific costs related to the withdrawal process
- Will UK will be responsible for its full share of the budget up until 2020?
- £50bn ‘divorce settlement’?
- When will this be paid?

The Process and Negotiations

- Schedule of payments to be agreed that should '*aim at mitigating the impact*' of the UK's withdrawal on the budget for the EU and on its Member States
- Negotiations with UK will be conducted as a single package – nothing is agreed until everything is agreed

The Process and Negotiations

(2) Citizens' rights

- Same level of protection as set out in Union law at date of withdrawal of EU27 citizens in the UK and UK nationals in EU27
- Right to acquire permanent residence after 5 years legal residence
- Equal treatment in the UK of EU27 citizens (reciprocal treatment) in accordance with Union law
- Equal treatment pursuant to the terms of the Withdrawal Agreement
- EU Citizens in UK should be considered legally resident at the date of entry into force of the Withdrawal Agreement (even if they do not hold a residence document)

The Process and Negotiations

- Family members who wish to join persons covered by the provisions of the Withdrawal Agreement should be allowed to join the holder of the right *'at any point in time after the date of entry into force of the Withdrawal Agreement'*
- Court of Justice of EU *'should have full jurisdiction corresponding to the duration of the protection of the citizen's rights in the Withdrawal Agreement'*

The Process and Negotiations

- White Paper on status of EU citizens in UK – 26th June
- All 3 million EU citizens resident in UK will have to apply for inclusion on a ‘settled status register’ if they want to continue living in Britain
- Give EU citizens indefinite leave to remain status after 5 years of continuous residency in UK
- Government proposes ‘a light touch’ online system to process applications
- ID card backed up by entry on database or register?
- What about 150,000 who have already applied for residency?

The Process and Negotiations

- Evidence of comprehensive sickness insurance?
- Rights in future to bring family members to UK?
- Exemption from minimum income test for EU nationals to remain?
- 2 years grace after Brexit for EU nationals – have to apply for residency (if they qualify) before 2 years expires
- Those who arrive before 30th March 2019 will be allowed to build up 5 continuous years residence after Brexit
- Application of UK law rather than EU law after Brexit
- *‘a horrible legal morass?’*

The Process and Negotiations

- Second phase of negotiations – Trade deal
- ‘The Union and its Member States stand ready to engage in preliminary and preparatory discussions to this end in the context of negotiations under Article 50 TEU, as soon as sufficient progress has been made in the first phase towards reaching a satisfactory agreement on the arrangement for an orderly withdrawal’
- *‘Sufficient progress’*

The Process and Negotiations

Third phase of negotiations - Final Deal

What is the future relationship?

Future trading relationship between UK and EU 'can only be concluded once the UK has withdrawn from the EU'

The Process and Negotiations

Timetable – Best case

- Late 2017/early 2018 – Agree heads of terms for withdrawal agreement with EU ?
- Early or mid - 2018 – Commence talks on FTA having made sufficient progress with terms of withdrawal agreement ?
- March 2019 – Parliamentary approval of FTA/terms of Brexit
FTA becomes effective?
- Phased implementation for financial services and other relevant sectors begins?

The Process and Negotiations

- Or:
- If FTA not agreed by 29th March 2019 –
- Implement a transition arrangement and continue negotiations and seek to finalise FTA
- 29th March 2021/2022 – End of 2 or 3 - year transition arrangement?
- Conclude other non-EU trade deals?
- Realistic?
- Hopelessly optimistic?
- Or seek to extend 2-year period under Article 50 (3).
- Avoid 'cliff edge'

Further Legal Challenges

(1) Article 127 of EEA Agreement

- *“Each Contracting Party may withdraw from this Agreement provided it gives at least twelve months' notice in writing to the other Contracting Parties,”*
- Does Britain automatically leave the EEA when it leaves the EU?

(2) Can Article 50 be revoked?

(3) Miller (2) – Did Parliament make a constitutional decision to leave the EU ? Withdrawal treaty – unlawful?

Legal Consequences of Brexit

- EU treaties, directives, regulations and rulings of the European Court would cease to apply unless their effect was specifically preserved by UK national law.
- Primary legislation (freestanding) – not affected.
- Secondary legislation – (legal effect under section 2 (1) ECA 1972)
- Regulations which are directly applicable in all member states (without need for national implementation)
- Directives which are binding as to result to be achieved – method of implementation left to member states

Legal Consequences of Brexit

- Great Repeal Bill
- Purpose?
 1. To remove the applicability of EU law in the UK by repealing the ECA 1972;
 2. To provide legal certainty and continuity by transferring EU laws and regulations onto the UK statute book; and
 3. Give Government delegated powers to amend laws ‘that would not otherwise function sensibly’ once the UK has left the EU (described as ‘inoperable’)

Legal Consequences of Brexit

- The legislative task ahead...
- Repeal of ECA 1972
- Provisions to 'save' secondary legislation made under ECA so that it continues to have effect once ECA repealed
- Provisions to transfer into UK law EU regulations which currently have direct effect in UK law, so they continue to have effect once the ECA has been repealed
- Provisions to clarify how transposed laws relying on or referring to EU institutions and mechanisms will operate

Legal Consequences of Brexit

- Statutory powers to enable ministers to make changes to primary and secondary legislation to ensure operability without the need for primary legislation (‘Henry VIII powers’) -
- New primary legislation to establish policies previously under EU control – must be set up and running at time of Brexit (the new Bills mentioned in Queen’s Speech)
- Timing of legislation will depend on the Article 50 negotiations

Legal Consequences of Brexit

- Secondary legislation to:
- Address deficiencies in transferred EU law and make EU law 'operable'
- What is Government's view on the status the courts should accord to previous and future rulings of the ECJ?
- What of the guidance used to interpret European law?
- Courts to adopt own approach to the issue?

Legal Consequences of Brexit

- Number of new Bills required in 2017 and 2018 sessions (2 year parliamentary session)?
- Customs Bill – UK to have ‘standalone’ regime on exiting the EU and EU customs union
- Trade Bill – legal framework for UK to operate its own independent trade policy
- Immigration Bill – UK to exercise control immigration from EU27 - EU Nationals will be subject to relevant UK law post – Brexit

Legal Consequences of Brexit

- Fisheries Bill – UK to control access to its waters and set own quotas
- Agriculture Bill – to provide ‘effective system’ and ‘stability for farmers’
- Nuclear Safeguards Bill – Increased powers for Office of Nuclear Regulation
- International Sanctions Bill – UK framework to implement international sanctions on multilateral and unilateral basis

Legal Consequences of Brexit

- Mechanisms for Parliamentary scrutiny
- White Papers ahead of future legislation?
- Introducing legislation in draft
- Timing issues
- Further challenges
- Conflicts as Government seeks widest mandate and flexibility

Regulatory Landscape after Brexit

- Capital Requirements Directive IV (CRD)
- Applied since 1st January 2014
- EU legislative package containing prudential rules for banks, building societies and investment firms
- Implements Basel III
- Quality and quantity of capital
- New liquidity and leverage requirements
- Also changes to corporate governance and remuneration
- Passporting rights

Regulatory Landscape after Brexit

- Key attraction to non-EU institutions
- 5,476 UK firms hold one or more outbound passports
- What happens?
- Can they be protected and if so at what cost?
- EEA?
- Swiss model?
- Otherwise – set up authorised subsidiary within EU and conduct business from that subsidiary
- ‘Bridging’

Regulatory Landscape after Brexit

- Equivalence
- When UK leaves EU – third party country
- Requirement for separate authorisation by EU regulator?
- Similarity of regulatory ecosystem
- Any change to EU regulations mirrored in UK legislation
- Attack on sovereignty?
- Does not apply to deposit-taking and lending – no third country regime
- Possible extension or limited application?

Regulatory Landscape after Brexit

- UK no longer able to participate in agencies such as European Supervisory Authorities in relation to financial services or European Data Protection Board
- EU agencies located in UK – European Banking Authority?
- City fights back?
- EU visas for specialised employees
- Sector based approach to employment
- Corporate Governance
- Directors remuneration
- Low tax regime - an opportunity?

What Should Business Be Doing Now?

- Planning:
 - Monitor Brexit developments
 - Develop a contingency plan for a 'Hard Brexit'
 - Possible withdrawal of passporting rights
 - Review of existing contracts

What Should Business Be Doing Now ?

- Contracts
- Mainly a commercial rather than legal effect
- Currency volatility with international contracts
- Existing contracts
- Appetite for new business and new contracts
- Concerns about exchange rate risk and potential for future barriers to trade

What Should Business Be Doing Now ?

- Can I enforce an international contract after Brexit?
- Rome I and Rome II
- Contracts and choice of law clauses
- Jurisdiction
- Hague Convention
- Enforcing Judgments in EU
- Arbitration

What Should Business Be Doing Now?

- Territory references to the EU
- Compliance with 'EU Laws'
- Intellectual property
- Product safety
- TUPE
- Data protection
- Consumer law
- Tax

What Should Business Be Doing Now?

- Investment strategies may require updating – will investments in UK still be permitted post-Brexit?
- Effect on other EU Member States' financial trading
- Force Majeure provisions – capable of being performed?
- Termination rights – withdrawal from potentially loss-making contract?
- Use of materially adverse event (financial) clause

What Should Business Be Doing Now ?

- How are businesses responding in this political vacuum?
- BoE written to UK's biggest financial firms:
- Plan for all eventualities
- Some financial firms needed to prepare in case of a 'more extreme' or 'adverse potential' outcomes
- To leave or not to leave
- City's role as 'Europe's investment banker'

Conclusion

- Negotiations of “unparalleled complexity”
- Is a hard Brexit more or less likely after GE?
- Article 50 and timetable
- Withdrawal agreement/transitional phase/final deal
- Extending the 2-year period to reach a FTA?
- WTO rules if no deal?
- Planning for Brexit – implement a strategy and review and update
- Role of the professional adviser
- Brexit means uncertainty but will it mean business?

Questions and Thank You



JKW Law
45 King William Street
London EC4R 9AN

Telephone:
0203 102 6865
++ 44 203 102 6865

Mobile:
07870 676582
++ 44 7870 676582

Email:
john@ikwlaw.com »

Skype:
john.k.walmsley

Disclaimer

- This Brexit presentation contains general advice and comments only and therefore specific legal advice should be taken before reliance is placed upon it in any particular circumstances