

THE SHAPE OF BREXIT

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Overview

- Introduction – where are we now?
- Options
- Withdrawal Agreement and Political Declaration
- Legal & Practical Issues
- Brexit and Contracts
- After Brexit
- Brexit Planning
- Conclusion

Introduction

- EU Referendum – 23rd June 2016
- Gina Miller
- The White Paper and exit strategy – 17th January 2017 – ‘Red Lines’
- European Union (Notification of Withdrawal) Act
- Article 50 – 29th March 2017
- General Election – 8th June 2017
- Negotiations on Withdrawal Agreement with EU commence – June 19th 2017

Introduction

- The Joint Report – 8th December 2017
- PM's Brexit speech – 2nd March 2018
- European Council's ('EC') response – 7th March 2018
- Draft Withdrawal Agreement – 19th March 2018
- Withdrawal Agreement & Political Declaration – 25th November 2018
- Parliament rejects deal – ('meaningful vote' or 'MV') – 15th January 2019
- Joint Instrument (Strasbourg) – 11th March 2019

Introduction

- Parliament rejects MV2 – 12th March 2019 (AG advice)
- Vote on extension to Article 50 – 14th March 2019
- EC meeting – 21st and 22nd March 2019 – short extension agreed
- 12th April 2019 (unconditional) and 22nd May 2019 (conditional)
- First round of indicative votes - 27.3.19
- No-deal & leave 12th April – (no thanks) – (160/400)
- Common Market 2.0 (single market and customs union) – (188/283)

Introduction

- Single Market (EEA but no customs union) – (65/377)
- Customs Union (no independent trade deals) – (264/272)
- Revoke Article 50 (if there is no deal 2 days before Brexit day) – (184/293)
- Second Referendum (Any deal requires confirmatory vote) – (268/295)
- Managed No-deal (2-year standstill) – (39/422)
- Labour's plan (single market and customs union 'Lite') – (237/307)

Introduction

- Parliament rejects MV3 (Withdrawal Agreement only) – 29th March 2019
- Progress?
- Second round of indicative votes – 1st April 2019
- Customs Union - (273/276)
- Common market - (261/282)
- Confirmatory public vote - (280/292)
- Revocation of Article 50 - (191/292)

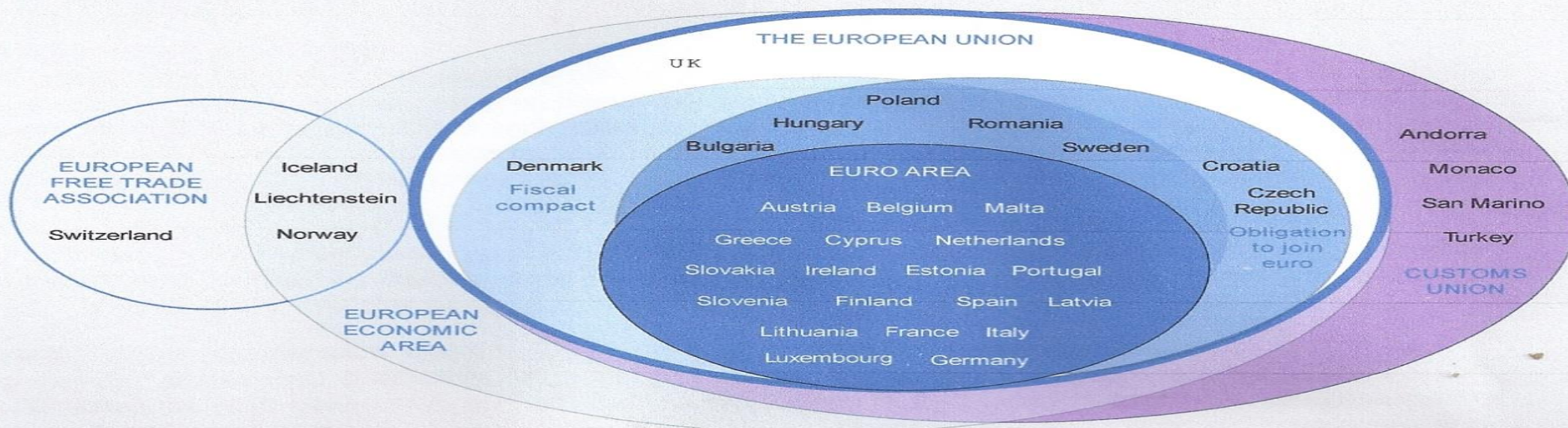
Introduction

- EC meeting – 10th April 2019 (to consider request of 30th June 2019)
- New extension agreed to 11pm on 31st October 2019 – ‘flexible extension’ (with option for UK to leave earlier if Parliament approves Withdrawal Agreement)
- European elections – 23rd May 2019 (MEP’s to take seats by 2nd July 2019) – compulsory otherwise leave on 1st June 2019 if no – Deal
- EC review – 20th June 2019
- Next meaningful vote (MV4) – After 23rd April but before 23rd May 2019?
- ‘*Substantial changes*’ test satisfied?

Options

EU and related membership groupings

The diagram below shows which countries are members of the various groupings associated with the EU. As set out above, all EU Member States are in the EU Customs Union. A number of additional countries also have a customs union arrangement with the EU, such as Turkey.



Source – HM Government

Options

Option 1

- Leave with No Deal (31.10.19) – still in play – no appetite?
- No transition period
- End to free movement
- Revert to WTO rules – Article 24
- Formally Article XXIV of the WTO's General Agreement on Tariffs and Trade (GATT)
- Interim free trade agreement (up to 10 years) (goods only) but...
- Needs to be agreed before UK leaves the EU
- Does not address regulatory issues (non – tariff barriers)

Options

Option 2

- Leave with PM's Deal
- The backstop problem
- This Deal (Withdrawal Agreement) or varied by agreement (Indicative votes) - *'preferred options'*
- Talks with Labour over future trading relationship with EU (Political Declaration)
- Variations (on a theme):
 - PM's Deal with Customs Union
 - PM's Deal with Customs Union and Single Market (Norway Plus)

Options

- Softer Brexit – ‘Brexit in name only’ (BINO)
- What model?
- Keep UK close to EU
- Limits potential for Brexit – related job losses
- Meet with DUP approval – regulatory divergence and threat to Union?
- Breaches one (or more) of PM’s red lines
- Question of semantics – a customs union or arrangement v the customs union – *‘when different language is used’*
- Must retain independent trade policy objective (red line)
- Better chance of success than no-deal Brexit?

Options

Option 3

- Extension of Article 50
- Second extension to 31st October 2019
- Still a full member of EU
- Longer – 2 years or more?
- ‘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))

Options

- Option 4
- No Brexit – Staying in EU
- Respecting the Referendum result in 2016?
- Second confirmatory vote as part of any deal with Labour
- Term demanded by EU for further extension?
- *'Remain in EU'* on voting slip
- General Election in 2019?
- Revoke Article 50 (EU's and remainers' wish)

The Withdrawal Agreement

- Agreement negotiated under Article 50 of the Treaty of the European Union (TEU)
- The Negotiations
- The Key Elements
- Orderly withdrawal

The Withdrawal Agreement

- Transition Period or ‘Implementation Period’ – 2 years
- 30.3.2019 – 31.12.2020 (Extended by 6 months?)
- Could be extended until as late as December 2022 – should both sides agree
- Standstill would be in place where current trading arrangements between the EU and UK would continue
- UK agrees to continue to abide by the EU’s rules and to be subject to the rulings of EU courts
- UK will have no say around the EU table

The Political Declaration

UK and EU's ('the Parties') commitment to preserving:

- Financial stability;
- Market integrity;
- Investor and consumer protection;
- Fair competition;
- Respects regulatory autonomy; and
- Ability to take equivalence decisions in their own interest

The Political Declaration

Parties will have equivalence frameworks in place

- Begin assessments as soon as possible following UK's exit from EU
- Aim to conclude any assessments before the end of June 2020
- Parties agree that close and structured cooperation on regulatory and supervisory matters in their mutual interests; and
- Cooperation should be grounded in the '*economic partnership and based on the principles of regulatory autonomy, transparency and stability*'

Vienna Convention

- Attorney General amend his advice?
- to include the argument that Article 62 might allow the UK to unilaterally terminate the backstop after 2021 because of a “*fundamental change of circumstances*”.
- Other issue is, under Article 62, the change of circumstances has to be unforeseeable.
- As we are talking about this ‘*change of circumstances*’ now, it cannot be unforeseeable.”
- How can backstop be unforeseen?

Legal & Practical Issues

European Union (Withdrawal) Act 2018

Purpose?

1. To remove the applicability of EU law in the UK by repealing the European Communities Act 1972;
2. To *transpose* all 'EU law' into UK domestic law at the date of Brexit; 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 & Practical Issues

EU (Withdrawal Agreement) Bill 2019 – Not Yet Published

- Section 13 of the European Union (Withdrawal) Act 2018:
- Specific requirements for the ratification of the withdrawal agreement that has been agreed between the UK and EU under article 50 (2) of the TEU
- 13 (d) an Act of Parliament has been passed which contains provision for the implementation of the withdrawal agreement

Brexit and Contracts

- Legal issues for business
- Will contracts operate as before?
- Can contracts be performed after a no-deal Brexit?
- Can you physically deliver goods from UK to another EU country?
- Resulting liability for non-performance?
- Carry out contract audit

Brexit and Contracts

Jurisdictions and Applicable Law

- Can international contracts be enforced after Brexit?
- Is Brexit a 'frustrating event' – *Canary Wharf v European Medicines Agency (2019)*
- *EU agency argued its 25 lease on premises in London – worth £500 million – was frustrated by Brexit.*
- *In English law a contract is 'frustrated' if an event occurs which the parties could not have foreseen when contemplating the contract:*
- *Radically alters performance of contract and unjust to continue*
- *Court said contract not frustrated and EU agency liable to pay rent for remainder of lease.*

Brexit and Contracts

- Force majeure (beyond reasonable control) clauses – contracts capable of being performed?
- Termination rights – withdrawal from potentially loss-making contract?
- Use of '*materially adverse event*' clause
- Choice of law clauses
- Jurisdiction clauses
- Enforcing Judgments in EU after Brexit
- Hague Convention (exclusive jurisdiction clauses)
- Arbitration

After Brexit

(1) Trade with EU

- Can UK achieve an FTA with European Union which protects UK business and on similar terms to EU membership?
- If so, how and at what cost?
- Will have to pay 'divorce bill' before EU will agree to enter talks

After Brexit

- After transition period ends or no-deal scenario
- Uncertainty
- Customs and tariffs – How will these work in practice?
- Government publishes proposed tariff rates on imports
- Not apply to Northern Ireland
- Increase in costs for business – import duty
- UK face potential tariffs on 90% of our EU goods export by value

After Brexit

- Delays in imports to UK
- Business risk being contractually liable for failing to supply goods on time
- Increased administration costs
- Impact on sterling
- Supply chain risks
- Help British economy '*enormously*' making imports cheaper from non – EU countries (ERG)

After Brexit

- CBI estimate trading on WTO most favoured nation terms would equate to an average tariff of 4%
- 4% equates to £4.5 billion to £6 billion-worth of increased costs per year to our exports
- Disruption at ports and airports – reams of paperwork
- Port of Dover – 600 lorries per day delivering fresh food
- Extra two-minute delay leading to 17 miles of tailback

After Brexit

- (2) Trade with rest of world
- Can UK replicate the 40 or so FTA's that EU has with other non-EU countries by 20.12.20 or some later date?
- UK presently party to these FTA's through EU membership
- Deals done to date?
- Trump factor

Brexit Planning

- Business continuity plans
- Risk assessments – effect of potential disruption
- Who will take responsibility?
- Governance for rapid decision making

- Proactive engagement
- Suppliers, customers, clients and other key organisations
- Expectations of all parties
- Build and update business continuity plans

Brexit Planning

- Communication
 - Keep personnel regularly updated
 - Preparations
 - Reassurance and advice to those most affected
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- Prepare supply chain
 - Forward plan – beyond 31st October 2019
 - Don't rest on laurels

Brexit Planning

- Review working capital exposure
- Risk of delayed payments
- Invoice promptly
- Options to extend your own payment days
- Don't assume flexibility in overdraft facilities
- Ensure trade finance providers are in place
- Check cash flow and banking requirements
- Dependency on borrowing and other financial products

Brexit Planning

- Business travel after 31st October 2019
- Any likely developments before 31st October 2019?
 - Passports
 - Visas
 - Driving licences

Brexit Planning

Financial and professional services

- Passporting
- Key attraction to non-EU institutions
- Approximately 5,500 UK firms hold one or more outbound passports
- Otherwise – set up authorised subsidiary within EU and conduct business from that subsidiary
- Replacing passporting – Equivalence?
- Temporary permissions regime (TPR)

Conclusion

The Shape of Brexit...

- PM's Deal (MV4)?
- Softer Brexit
- No Deal (less probable)
- No Brexit? (Revoke Article 50)
- Further extension of Article 50 beyond 31.10.19?
- Second Referendum
- General Election

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