

# BREXIT: THE KNOWN AND UNKNOWN

JOHN WALMSLEY – JKW LAW  
PRESENTATION TO CIMA, CHILTERN BRANCH  
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# Overview

- Where Are We Now?
- Withdrawal Agreement
- Post-Brexit models
- Challenges or Opportunities?

# Overview (2)

- European Union (Withdrawal) Bill
- Legal challenges
- Brexit Plan
- Conclusion

# Where Are We Now?

- EU Referendum – 23rd June 2016
- The White Paper and exit strategy – 17th January 2017
- European Union (Notification of Withdrawal) Bill
- Receives Royal Assent on 16th March 2017
- Article 50 triggered on 29th March 2017
- General Election on 8th June 2017
- Negotiations on withdrawal agreement with EU commence – June 19th 2017 – (11 months left)

# Where Are We Now?

- The Joint Report on 8th December 2017
- PM's Brexit speech – 2nd March 2018
- EU Council's response - 7th March 2018
- Draft Withdrawal Agreement (75% agreed) – 19th March 2018
- European Council meeting on 22-23rd March 2018
- Further negotiations to commence shortly ahead of next EU council meeting in June 2018
- UK leaves European Union on 29th March 2019

# The Withdrawal Agreement

- Overview
- The challenges revealed
- The Joint Report on 8th December 2017
- Focused on three key areas:
  - Financial Settlement
  - EU Citizens' rights
  - Ireland and Northern Ireland

# The Withdrawal Agreement

PM's speech (*'let's get on with it'*) – 2.3.18

Future economic partnership

1. Reciprocal binding commitments to ensure fair and open competition
2. Arbitration mechanism that is completely independent
3. Close consultation on regulation
4. Data protection arrangement
5. Maintain links between 'our people'

# The Withdrawal Agreement

- What is PM's objective?
- Leaving the Single Market and the Customs Union
- No tariffs or quotas on goods
- Frictionless trade
- Comprehensive system of mutual recognition to ensure goods meet regulatory standard
- UK law may not be identical to EU law but it should '*achieve the same outcomes*'
- Parliament pass identical laws to EU?
- Associate membership of EU agencies

# The Withdrawal Agreement

- Services – Don't want the EU to discriminate against UK service providers
- Limit the number of barriers
- FTA should also cover financial services
- *'Deep and comprehensive partnership'*
- Give up passporting rights (apparently)
- Ireland and Northern Ireland
- Frictionless border and not a hard border
- Brexit *'not an end in itself'*

# The Withdrawal Agreement

- EU Council Response – 7.3.18
- The UK Government and EU's position is that '*nothing is agreed until everything is agreed*' is reflected in the joint report concerning the financial settlement
- EU position that any agreement with the UK '*will have to be based on the balance of rights and obligations*' and
- '*to ensure a level playing field*'
- '*Non – member cannot have the same rights and enjoy the same benefits as a member*'

# The Withdrawal Agreement

- EU 'recalls' that:
- Four freedoms of the Single Market are indivisible and there can be no 'cherry picking'
- No sector by sector approach permitted
- Protection of the integrity and proper functioning of the Single Market
- Role of the Court of Justice of the European Union must be fully respected

# The Withdrawal Agreement

- European Council confirms its readiness to initiate work towards a free trade agreement (FTA)
- This agreement to be finalised and concluded once the UK is no longer a Member State
- Agreement to cover:
  - Trade in goods and cover all sectors which would be subject to zero tariffs
  - No quantitative restrictions
  - Appropriate accompanying rules of origin

# The Withdrawal Agreement

- Reciprocal access to fishing waters and resources should be maintained
- Appropriate customs cooperation
- Must preserve regulatory and jurisdictional autonomy of parties and integrity of EU Customs Union
- Trade in services to allow market access – to an extent consistent with the fact that UK will become a third country
- Ambitious provisions on movement of natural persons
- Access to public procurement markets, investments and IP rights

# The Withdrawal Agreement

## **Financial**

- The two sides have agreed a methodology
  - a list of components, a set of principles for calculating the value of the financial settlement and proposed modalities
- It also includes arrangements for continued UK participation in the current Multiannual Financial Framework (MFF) programmes until their closure

# The Withdrawal Agreement

## Financial (2)

- In addition, financial and related arrangements for the European Investment Bank
- European Central Bank, EU trust funds, the Facility for Refugees in Turkey, Council Agencies and the European Development Fund
- The UK has also agreed to be responsible for the EU's unpaid bills known as *reste a liquider (RAL)*

# The Withdrawal Agreement

## The divorce bill?

- Government estimate - £35 billion - £39 billion
- Office of Budget Responsibility (OBR) - £37 billion
- £16 billion to cover 2019 and 2020 liabilities
- £18 billion for RAL's
- £3 billion – other liabilities (pensions)
- £50-£60 billion more realistic?

# The Withdrawal Agreement

## Citizens Rights

### Withdrawal agreement –

- applies to EU citizens legally resident in the UK; and
- UK nationals legally resident in an EU 27 Member State
- On the withdrawal date (29.3.19) and during transition period
- Will prohibit discrimination on grounds of nationality
- Government previously announced ‘settled status’ concept

# The Withdrawal Agreement

## Citizens Rights (2)

- Switching from existing permanent residency to settled status
- Family members not resident in UK on withdrawal date entitled to come to UK
- Applies to their children even if children born after withdrawal date
- Future spouses not protected under agreement
- Administrative procedures must be '*transparent, smooth and streamlined*'

# The Withdrawal Agreement

## Citizens Rights (3)

- Will be a mechanism to allow UK courts to refer questions of interpretation of EU rights for ruling to CJEU
- Where necessary and for a period of up to 8 years after withdrawal agreement
- Further details including practical arrangements and mechanisms for ensuring consistent interpretation and protection of citizens' rights  
tbc

# The Withdrawal Agreement

Ireland and Northern Ireland

Brexit creates a *'significant and unique challenge'*

(horrendously complicated, fraught with centuries of political history and sensitivities, bloodshed and a subsequent peace settlement not to mention the small matter of the UK Government's current *'support and confidence'* arrangement with the DUP)

# The Withdrawal Agreement

## Ireland and Northern Ireland (2)

- No hard border
- Full co-operation across political, economic security, societal and agriculture
- Continued operation of North – South implementation bodies
- Full alignment with the rules of the EU single market and customs union (present and future)
- Regulatory alignment

# The Withdrawal Agreement

## Ireland and Northern Ireland (3)

- Protection of the Good Friday or Belfast Agreement (effective – 2.12.99)
- Next phase will be to negotiate the detailed arrangements required to give effect to the agreed principles
- Potential deadlock ahead?
- ‘Backstop’ solution of Northern Ireland remaining in the customs union and single market
- Technological Solution to hard border by UK – *‘fantasy island unicorn model’*

# The Withdrawal Agreement

Devolution and the consent question

Devolution

- Scottish Parliament and Welsh Assembly

Consent

Is it required?

# The Withdrawal Agreement

- Transition Period – 2 years
- 30.3.2019 – 31.12.2020
- UK can negotiate with other countries during transition period
- Previously –
- EU publishes Transitional Arrangements in the Withdrawal Agreement – 7.2.18
- *‘During the transition period, the United Kingdom may not become bound by international agreements entered into in its own capacity in the areas of exclusive competence of the Union, unless authorised to do so by the Union’* (paragraph 4)

# Transition Period

- Type of Transition
- 2-year period
- Government prefer a transition period to extending Article 50 period (subject to unanimous approval by EU 27)
- EU Position – ‘No deal (Withdrawal Agreement), no transition period’
- December 2020 – end of EU budgetary year
- What are we transitioning to?
- Do we know the terms of entire deal?
- General in nature and subject to interpretation?

# Withdrawal Agreement

- Second phase of negotiations – scoping a trade deal
- Previously in Joint Report - EU position is that detailed negotiations on trade agreement will not start until UK leaves
- So, preliminary and preparatory discussions with the aim of identifying an overall understanding of the framework for the future relationship
- Try to conclude by end of 2018

# Withdrawal Agreement

- Withdrawal Agreement – legally binding international treaty
- Emphasis on "*deeper relations*" between UK and EU
- Political, strategic and economic considerations (expediency)
- There has to be a deal or a deal in principle to allow transition (or implementation) period to begin
- Prevent cliff-edge scenario on 28th March 2019
- Legislative approval
- Ratification of deal by UK Parliament
- Ratification by EU Parliament

# Post - Brexit Models

What will Brexit look like?

- Transitional Brexit
- Cliff-edge Brexit or Chaotic Brexit?
- Bespoke Free Trade Agreement (FTA)
- Canada Plus, Plus, Plus ?
- Norway or Norway minus
- Swiss Model
- No deal – WTO default
- No Brexit (Second Referendum on deal?)?

# Post – Brexit Models

## Harder Brexit

- Making independent trade deals
- Losing full access to the single market and customs union
- Full control over immigration from the EU
- Applying new rules within the UK's own territory
- Reverting to World Trade Organisation (WTO) rules and tariffs

# Post – Brexit Models

## Softer 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)?

# Post – Brexit Models

- Global Future Report – April 2018
- Based on Government estimates – long term the Brexit scenarios below cut amount of money available for spending on public services
- EEA model - £260 million per week
- FTA model - £875 million per week
- WTO model £1.25 billion per week
- Government preferred bespoke model - £615 million per week

# Challenges Or Opportunities?

## (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?
- Regulatory alignment
- Regulatory equivalence
- Mutual divergence

# Challenges or Opportunities

- The customs union
- A customs union
- Customs partnership – UK mirroring EU tariffs and customs rules for foreign imports destined for the European market
- Customs arrangement – relies on tracking technology and pre – clearance of ‘trusted’ and smaller operators

# Challenges Or Opportunities

- (2) Trade with rest of world
- Can UK replicate the 40 or so FTA's that EU has with other non-EU countries by 29.3.19 or some later date?
- UK presently party to these FTA's through EU membership

# Challenges Or Opportunities?

- CBI calls for a fundamental change in approach from Government to achieve '*a good Brexit*'
- Transition deal first to protect status quo
- Unambiguous heads of terms of FTA by end of October 2018
- Neither Canada nor Norway models represent best solution for UK
- Economics before politics
- Revisit red lines

# Challenges Or Opportunities?

- Customs and tariffs – How will these work in practice?
- Increase in costs for business
- UK face potential tariffs on 90% of our EU goods export by value
- 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

# Challenges Or Opportunities?

- What replaces passporting?
- 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?
- Otherwise – set up authorised subsidiary within EU and conduct business from that subsidiary
- Equivalence

# Challenges Or Opportunities?

- Potential for confusion over everything from contracts to chemical regulation
- No reciprocal recognition
- Automotive industry – Vehicle Certification Agency to allow selling of vehicles across the EU
- Significant chaos around cross border-services
- UK economy comprises 80% services and there is no WTO fallback
- Serious implications for UK's most successful exporting industries and services

# Challenges Or Opportunities?

- Financial and professional services
- £63.7 billion exports
- 1.1 million employees
- 5,500 UK firms providing financial services to clients within EU and EEA
- Divergence model
- Detailed FTA which includes financial services within 3 years (Sam Woods – Deputy Governor BoE – 17.1.18)
- Existing benefit of completely aligned rules and strongly aligned supervision

# Challenges Or Opportunities?

- No white paper for financial services

FCA statement:

- Legislating to allow EEA firms and funds to obtain 'temporary permission' to continue operating in the UK for a limited time
- Legislating to ensure the other contractual arrangements not covered by the 'temporary permissions' (insurance contracts) can still operate
- In the absence of EU authorities, ensuring UK authorities (BoE) will be able to provide regulation and supervision
- Avoiding disruption in financial sector

# Challenges Or Opportunities?

More generally...

- 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 to be relocated from UK – European Banking Authority
- City fights back?
- EU visas for specialised employees
- Sector-based approach to employment
- Low tax regime – an opportunity?

# European Union (Withdrawal) Bill

- European Union (Withdrawal) Bill
- Introduced in Queen's Speech
- Recently passed by Commons and now goes to Lords
- One amendment passed – Dominic Grieve MP – (December 2017)
- Amendment 7 to clause 11 of the Bill insisting that Parliament have a '*meaningful vote*' and vote on the withdrawal agreement rather than allow the Government to simply be able to implement it.

# European Union (Withdrawal Bill)

- Further challenges for Government
- The constitution committee was told the vote would take place “as soon as possible” after an expected autumn agreement in Brussels, and that it should be supported “in the national interest”
- If parliament backs that motion, it will be followed by a Withdrawal Agreement and Implementation Bill (Waib) to put the agreement into legal effect

# European Union (Withdrawal) Bill

## 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')

# European Union (Withdrawal) Bill

- Great challenge - importing 12,000 EU Regulations into UK law
- Statutory powers (800 – 1,000) 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 – By 29th March 2019!

# European Union (Withdrawal) Bill

- Primary legislation (freestanding) – not affected.
- Secondary legislation – (legal effect under section 2 (1) ECA 1972)
- Customs Bill or its official name the Taxation (Cross-border Trade) Bill
- Enable the government to create a functioning customs, VAT and excise regime
- Put in place a UK trade remedies system – investigations into allegations of dumping and subsidy and to propose remedies
- Allow the UK to put in place its own system of trade preferences for developing countries

# European Union (Withdrawal) Bill

## The Trade Bill

- The Trade Secretary has repeatedly emphasised that the Trade Bill is about transitioning existing EU deals and not about future ones
- Create the necessary powers for the UK to transition trade agreements that currently exist between the EU and other countries (and which we are party to through our EU membership)
- Enable the UK to have continued access to £1.3 trillion worth of government contract and procurement opportunities
- Allow UK to implement the Agreement on Government Procurement as an independent member
- Establish the Trade Remedies Authority to defend UK businesses

# Legal Challenges

- The Miller case –
  - the Supreme Court established - the referendum result was not a constitutionally binding decision to leave the EU
  - Only an Act of Parliament could give effect to that decision
  - PM could not exercise royal prerogative re triggering Article 50
  - Consent and Sewel Convention

# Legal Challenges

- Devolved Powers case -
- Scottish Parliament and Welsh Assembly recently passed their own alternatives to the key Brexit legislation and rejected EU Withdrawal Bill
- Aims to replicate EU law into UK law in time for its departure from EU
- Branded the Bill a "power grab" by Westminster
- Fear that law-making powers being returned from the European Union after Brexit will be held in London and not passed on to their administrations

# Legal Challenges

- UK Government will now challenge the legality of the Scottish and Welsh administration's Brexit legislation
- Ask the Supreme Court ruling on whether - it is constitutional and within the powers of Edinburgh and Cardiff
- Scottish government has made clear - cannot recommend the Scottish Parliament consent to the Withdrawal Bill in its current form
- Opposition from Welsh Assembly

# Brexit Plan

Planning:

- Monitor Brexit developments
- Develop a contingency plan
- Possible withdrawal of passporting rights
- Review of existing contracts

# Brexit Plan

## Contracts – Brexit audit

- 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

# Brexit Plan

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

# Brexit Plan

- Can I enforce an international contract after Brexit?
- Rome I and Rome II
- Contracts and choice of law clauses
- Force Majeure provisions – capable of being performed?
- Termination rights – withdrawal from potentially loss-making contract?
- Use of materially adverse event (financial) clause
- Jurisdiction

# Conclusion

- Withdrawal Agreement - further negotiations
- UK to leave EU on 29.3.19
- Transition period – 2 years (or longer?)
- After transition period ends?
- Detailed negotiations on future trade relationship start shortly
- A bespoke or ‘off the shelf’ deal?
- Similar to Norway or EEA ?
- Pay for ‘access’ to single market?

# Conclusion (2)

- EU will not permit dismantling of the single market
- EU will protect at all costs:
  - "preconditions", which include:
    - freedom of movement across the EU;
    - budget contributions; and
    - the jurisdiction of the European Court of Justice

# Conclusion (3)

- UK knows that EU does not want to ‘unplug’ UK’s financial services from rest of Europe
- UK knows it will not be allowed to ‘cherry-pick’ the single market
- Frictionless trade is achieved at a price
- UK and EU connected for trade in goods, but allowing divergence for the services sector.
- UK and EU connected for trade in goods, but allowing divergence for the services sector?
- General status quo for financial services maintained at a price?
- Clock is ticking...

# 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