THE DAY AFTER BREXIT?

How the world might look on June 24th

Webinar
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Today’s Topics

- What is Brexit?
- Leave or Remain?
- Negotiating Brexit
- How long will it take?

Leading to today’s focus:

- The rules of the game before and after Brexit
What is Brexit?

- **Referendum: UK** vote whether to remain in the **European Union**
  - compare to Grexit

- Why is the referendum being held?

- Is the result binding?
Leave or Remain?

- **Remain!**
- But today isn't about the pros and cons

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**New Report provides compelling evidence of substantial benefits of EU membership**

*Lawyers – In for Britain,* a group of British lawyers, has today issued a detailed Report setting out the benefits of, misconceptions about, and alternatives to, the UK’s membership of the EU. The core aim of the Report is to promote a more informed discussion of the issues by the electorate ahead of the referendum.

In this Report, *Lawyers – In for Britain* has gathered together what it considers to be the most reliable key evidence on which more than 250 signatories based their conclusions about the UK’s EU membership. The Report is unequivocal: the benefits of EU membership to the UK are substantial and often taken for granted and the UK’s interests are best served by remaining in the EU.

The Report details the numerous benefits that EU membership brings to the UK: from a safer and more secure society, easier and cheaper transport and travel, more affordable energy, a cleaner and healthier environment and guaranteed access to the single market on which so many of the UK’s jobs and business currently depend.
Negotiating Brexit

- Article 50 of the Treaty on the European Union (TEU)
- Serving notice to leave - but when to serve notice?
- Membership ends automatically two years after the notice
  - unless unanimity to extend
- Negotiating a Withdrawal Treaty: 27 versus 1
  - majority vote within the 27
  - European Parliament has to approve
Withdrawal from the EU: Article 50, TEU

A hypothetical timeline...

2016
- 23 June 2016: EU Referendum

2017
- April 2017: French Presidential Elections
- August 2017: German Federal Elections
- UK Presidency of Council of Ministers: July – Dec 2017
- Dec 2016: Suppose Article 50 notice served

2018
- Article 50 process:
  - Guidelines for negotiation (European Council, by consensus)
  - European Commission submits recommendation to Council
  - Council (excl. UK) authorises negotiations
  - Council appoints negotiator
  - EU Parliament consents to agreement (simple majority)
  - Council concludes withdrawal agreement (qualified majority)
- Dec 2018: Date of actual UK exit?

... but when would an Article 50 Notice actually be served?
The EU’s exit clause: Article 50, TEU

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. 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 and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. 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.

3. 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.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

5. ....
The Withdrawal Treaty

- Negotiating the terms of withdrawal, and …
- …the UK’s future relationship with the EU?
  - Norway, Switzerland, Turkey, Canada, USA – which model?
  - a new UK-only relationship? On what terms?
- Is there a formula that retains access to the Single Market, but without conceding free movement of people?
- What attitude to expect from the 27?
  - benign mutual interest?
  - hostility, pour encourager les autres?
What if negotiations fail?

- Membership expires regardless
  (unless unanimity to extend time)
- “Take it or leave it” terms offered by the 27?
- Was Article 50 “designed never to be used”?

- When to serve notice?
- Is an Article 50 Notice the only way forward?
- The “Leave” camp hope not …
Exit without Article 50 notice?

“It is only after informal negotiations with both other EU members and the Commission that issues such as whether and how to use Article 50 will be clear. It makes no sense to trigger Article 50 immediately after the 23 June vote and before extensive preliminary discussions… It will be possible to negotiate a new settlement with the EU, including a UK-EU free trade deal, by the next general election in 2020.”  (“Leave” framework, 15 June 2016)

May 2020: UK general election - assumed date for end of UK membership

Four years!

2016 | 2017 | 2018 | 2019 | 2020

23 June 2016: EU Referendum

“If they want to leave it is Article 50. There is no third way.”

“What would be refused is a political negotiation to leave without formal notification…we will not start any negotiation of any kind without a notification”.

(Financial Times, 16 June 2016)
EU law is still law

The European Communities Act 1972 (ECA) remains in force
  o Parliament enacted 1972 Act in order to incorporate EU law into UK domestic law

“Leave” campaign have suggested six Parliamentary bills for consideration
  o immediate European Law (Emergency Provisions) Bill limiting the ECA 1972
  o other Bills would apply “by the date of the next general election”, including repeal of the ECA 1972

Would repeal be synchronised with a Brexit withdrawal treaty?

Parliamentary majority?

Legality?

What would UK courts do?
While over in Brussels...

- The UK remains a full member of the EU
- UK roles in the Commission, Council and Parliament continue
- UK holds the rotating Presidency of the Council (from July to December 2017)
- British staff remain employed (but with what prospects?)
- Re-shuffle of Commissioner portfolios? – what role for Lord Hill?

EU bodies operate as usual?
Wishful thinking…
“It will be possible to negotiate a new settlement with the EU, including a UK-EU free trade deal.”

- Join the European Economic Area (Norwegian model)?
- Swiss model - negotiate a series of bilateral agreements with the EU?
- Bilateral free trade agreement with the EU?
- Customs union with the EU, like Turkey?
- Which formula preserves advantages, but prevents free movement of persons?
- New special UK-only terms? In or out of the Single Market?

Default to WTO rules if negotiations fail
UK relationship with ROW post-exit (if it is not a member of the EEA)

- UK would no longer be party to the trade agreements negotiated with some 60 non-EU countries
  - these cover about 35% of world trade and 60% of UK trade
- UK also excluded from current EU negotiations with the US, Japan and China
- Obama: UK will probably have to go “to the back of the queue” for trade deals
- UK has not negotiated any solo trade deals since at least 1972

What terms can UK secure when negotiating alone?

Can it be done in parallel with EU exit negotiations?

How long will it take?
The day after: short term impact

  *De facto* capital controls?

- General financial dislocation (in UK and EU generally)

- Reduction of investment confidence/transactions
Running your business in the interim

- Immediate triggers, defaults, termination or notice rights?
- What assumptions to make for what the post-Brexit rules will be?
- Can I afford to wait and see? For how long?
- How do I write my contracts now?
- **How long until we know the rules** for the post-Brexit future?

- What medium/long term strategy for (e.g.):
  - imports/exports of goods; and of services?
  - inward/outward investments
  - passporting
  - staff mobility?
Impact on documentation

- Submission to UK jurisdiction, and enforcement of UK judgments – Would UK sign the Lugano Convention 2007 and the Rome Regulations (I & II) in their own right? Would the UK sign mutual recognition treaties?

- Brexit “risk factor” in offering documents – does it need amplification regarding “material risks” on exit?

- Sanctions wording will likely need to be amended to refer to UK rather than EU sanctions.

- Add consensual restructuring provisions in financing and M&A documents. Permit new EU group-subsidiaries to be formed.

- Technical breaches in finance document unlikely, but consider any representations previously given. Be careful over new representations/ covenants.

- Certain EU authorisations may fall away; documents may have to be cleared up to avoid trips or falls once the dust has settled.
Post-Brexit world: impact on financial services sector (I)

- Day 1 regulatory impact likely to be muted.
- No “bonfire of red tape”.
- UK still a member of G20, Basel Committee, IOSCO. But key question is the access of UK based financial services to the EU.
- Key Issue – “Passporting”. Over 5,000 firms, including banks, investment firms and insurance companies, are currently able to provide their services in EU Member States and/or establish branches: including not only UK firms but very many from e.g. US, Switzerland, Japan etc.
- If UK leaves the EU, only EEA membership would preserve access to a “passport”.
- If no “passporting”, financial services firms would need “equivalent” UK authorisation consistent with minimum EU standards for cross-border operations. EU Commission likely to determine “equivalence” on a discretionary basis.
- Different models: “Norwegian”, “Swiss” or “Total Exit” – no real consensus on which model would be followed.
- Whichever model is followed will determine effect of Brexit on UK financial services industry.
Post-Brexit world: different models for post-Brexit financial services

Norway Model
- UK membership of EEA/EFTA, but no direct influence
- AIFMD, CRD IV, MiFID, MiFIR, Solvency II still apply post-Brexit
- Business generally goes on as usual

Swiss Model
- Possible EFTA membership
- Bilateral agreements (risk of delay in concluding)
- In practice, UK probably unable to adopt lighter regulatory burden
- UK has almost no influence on regulation – “take it or leave it”
- UK not bound by EU Court

Total Exit
- Trade based on WTO Principles
- UK with “third country” status
- Current (pre-Brexit) legislation based on EU regulation – repeal of ECA 1972 leaves many gaps
- Would Parliament simply re-enact EU-derived legislation?
- UK could design own fiscal regulation, but would be restrained by complying with other rules (i.e. Basel, FSB)
Post-Brexit world: impact on financial services sector (II)

- Strategic solutions - consider incorporation of EU subsidiary to benefit from a passport or risk approaching each local regulatory authority for separate consent. Some obvious “pros”, but also “cons”: (i) possible need to overcome two steps of regulatory hurdles to passport into EU; and (ii) exposure to EU-wide regulatory requirements, reporting and (possibly) taxation.

- Potential dual capital requirements for bankers if there is divergence post-Brexit (comparison to US insurance related dual-company issuances?)

- Restructuring and reorganisation of existing operations (especially if UK does not join/ continue in EEA – although that seems very unlikely, and “Brexiter”s not arguing for that).

- Restructuring *might* involve relocation of existing financial services activities. Is this risk over-stated – have we been here before (with the Financial Transactions Tax, UK Bank Levy)?

- Would London still be a good place to do business? Depends on terms that UK negotiates for access to EU single market. But:

  - UK financial services industry is too important to UK economy for “passporting” not to be protected; and

  - other locations (Paris, Frankfurt, Dublin) each have possible drawbacks.
Post-Brexit world: impact on financial restructuring transactions

- UK’s status as leading jurisdiction for insolvency procedures might be affected, but less materially (compared to financial services).
- The EU Insolvency Regulation might cease to apply to the UK, lessening attraction of relocating COMI to UK?
- Automatic mutual recognition of insolvency regimes given under the Insolvency Regulation may be at stake – difficult if reorganising or restructuring a company with pan-European operations.
- Key question: can debtors and creditors continue to rely heavily on EU jurisdictions recognising UK processes as an implementation mechanic? For example, will Germany or Luxembourg stop recognising UK administrations?
- However, UK Schemes of Arrangement (outside Insolvency Regulations) would be unaffected. And alternative recognition mechanics UNCITRAL Model Law on Cross-border Insolvencies would still apply (although few EU states are implemented the UNCITRAL Model Law).
Post-Brexit world: a new shape to the UK tax system?

- Brexit not likely to be a seismic impact.
- Gives the UK flexibility to amend VAT and duties – but very unlikely to be a VAT repeal in UK.
- UK financial institutions clearly outside scope of proposed financial transaction tax and the common consolidated corporate tax base (although latter is elective, anyway).
- An EEA arrangement post-Brexit would mean existing changes to UK tax by European Court judgments shall remain.
- Could the UK set out an attractive fiscal stall (as a “new Switzerland”)? Unlikely in the short term (politically unattractive to be seen, in post-BEPS world, to be encouraging tax competition/“tax avoidance”). But if macro-economic problems develop, UK might be able to offer attractive tax incentives for inward investment.
The free movement of persons lies at the heart of the EU together with the free movement of goods, services and capital.

Control of immigration policy has been a key theme of the Brexit campaign.

Leaving the EU could reduce the levels of EU migration into the UK, but this is ultimately dependent on what arrangements are negotiated between the EU and the UK post-Brexit:

- If the UK adopts the ‘Norwegian’ model and becomes a member of the EEA, little will change since free movement of persons applies to EEA members.

- Similarly, replicating the ‘Swiss’ model of a customised bilateral relationship is unlikely to yield much change since free movement of persons also applies to Switzerland.

- If no - or only limited - trade related agreements are negotiated, the situation would be similar to that between the EU and other key trading partners, e.g. the US. Migration would be reduced and those wishing to work in the UK would need to qualify for a visa.
Post-Brexit world: impact on immigration (II)

- Short-term impact of a ‘Leave’ vote on immigration into UK: minor, since possible Asylum and Immigration Control Bill would only come into force 2020.
- Long-term impact: Bill will introduce security checks for known criminals and a points-based immigration system.
- Ambiguity for **EU citizens living in UK**:
  - Grandfathering? cut-off date?
  - Determining who qualifies for permanent residency will be complex since UK does not maintain a population register, or record the movement of EU citizens.

- Impact on 1.3 million **UK citizens living in EU Member States**?
  - Status will depend on new relationship with the EU
  - Absence of free of movement of persons in future relationship could impact UK citizens:
    - Visa requirements may be imposed
    - Access to Member State-funded healthcare and social security?
    - Rights to own property could be curbed?
Post-Brexit world: impact on antitrust and merger control

- EU competition rules will continue to apply to UK businesses that are active in the EU, European Commission jurisdiction unaffected.
- UK Courts and Competition and Markets Authority would no longer defer when European Commission is investigating infringements and would need to run independent procedures.
- Mergers may need parallel filing in London and Brussels – no more “one-stop shop”.
- Substance of the law will start the same but possible divergence over time, especially once UK no longer exercises pro-market influence on policy-shaping; resurgence of Sarkozy tendency?
- State aid and public procurement obligations will cease to apply which will give UK government greater freedom/flexibility to favour British business (also in fiscal arrangements).

...All assuming the UK is unwilling to delegate its enforcement role to the European Commission
Breaking up is hard to do

A decision to leave is not the same thing as a decision not to join in the first place
Any Questions?
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Alec Burnside is the Managing Partner of Cadwalader's Brussels office. Alec has been continuously resident in Brussels since 1989, and as such is closely familiar with the workings of EU institutions. He concentrates on EU competition law and on EU single market legislation, and is frequently called on for comment in the media, in Brussels and internationally.

Among his recent prominent cases, Alec advised Aer Lingus on its merger with IAG which followed the successful nine-year defence of repeat hostile takeover bids by Ryanair; and he advises several international tech and media companies in relation to the Commission’s investigations into Google. Over the years he has advised on the mergers creating BAe Systems, BHP Billiton, Deutsche Post DHL, Glaxo SmithKline and many others.

Alec is described in Chambers Europe as “among the best lawyers in Brussels”. He is recognised for his “exceptional creativity, leadership style and wider understanding of the political issues” ... “a unique blend of creativity and persistence”.

Alec studied at Downing College, Cambridge; College of Law, London; and the Institut d'Etudes Européennes, Brussels. He is a Solicitor of the Senior Courts of England and Wales, a foreign member of the Brussels Bar and an Associate of the Chartered Institute of Linguists in London.

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Adam’s practice includes acting on restructurings in solvent and distressed debt situations, corporate reorganisations and reconstructions. He has a particular interest in the structuring and restructuring of regulated and unregulated investment funds and private equity financings and investments. He also provides advice on corporate acquisitions, demergers and joint ventures, both within the UK and internationally, and provides counsel on disputes with revenue authorities and has acted in domestic tax litigation, representing clients before the Appeal Courts.

Adam is described in Chambers UK by clients as “being very responsive and excellent at providing advice from both a commercial and tax law point of view.”

Adam graduated with first class honours from the University of Leeds and studied at The College of Law in York, joining Cadwalader as a partner in 2006. He is admitted to the roll of Solicitors in England and Wales and is a keen advocate of pro bono legal work, serving both as the London office's pro bono partner and an Honorary Legal Adviser at the Royal Courts of Justice Advice Bureau.