



July 2016

## **Brexit: Progress Report One Month In**

This alert provides a status report on progress toward Brexit over the month that has elapsed since the "Leave" vote in the UK's referendum of 23 June 2016. It is one of a series of *GTM Alerts* designed to assist businesses in identifying the legal issues to consider and address in response to UK's withdrawal from the EU.

The UK has not left the EU. It will remain an EU Member State until it formally leaves the EU in accordance with the exit procedure set out in Article 50 of the Treaty on European Union. Until then, UK businesses will be bound by existing EU laws and by new EU laws that come into force before the date of exit.

### **Political Developments: A New UK Prime Minister and a Dedicated Government Department**

The Article 50 exit procedure is triggered when the UK makes a formal decision to leave the EU and notifies this decision to the European Council. The day after the referendum vote, the then prime minister, David Cameron, expressed his intention to resign as prime minister and stated that these steps would be taken by a new prime minister.

The ruling Conservative party elected a new prime minister more quickly than expected, and Theresa May took over from David Cameron on 13 July 2016, calming commentators' concerns regarding prolonged lack of leadership in the UK. One of Mrs. May's first actions as prime minister was to restructure a number of government departments and create a new Department for Exiting the European Union, headed by David Davis as Secretary of State. Davis, who has dubbed his new department Department X, is one of three prominent Leave campaigners to be appointed to Brexit-related jobs. Boris Johnson takes over as Foreign Secretary and Liam Fox as Secretary of State for International Trade, with responsibility for negotiating new trade arrangements between the UK and other countries or trading blocs, including the EU.

In the meantime, the leadership abilities and Parliamentary credibility of the current leader of the UK's main opposition party, Labour, are under challenge, distracting Labour from effective participation in the Brexit debate.

### **"Brexit means Brexit" – No Turning Back**

The new government's express intention is to carry out the wishes of the 52 percent majority of the UK electorate that voted to leave the EU. Theresa May made this clear in her inaugural speech, stating "Brexit means Brexit." This makes a second Brexit referendum unlikely, despite calls from one of the Labour leadership contenders and a Petition to Parliament signed by just over 4 million individuals. Mrs. May's decision to give up the UK's right to take over presidency of the EU for six months in the second half of 2017 underlines the government's stance.

### **Triggering Brexit – Article 50 Notification After Year-End**

The outcome of the June 23 referendum prompted calls from various EU officials and Member States for the UK to trigger the Article 50 exit procedure without delay, by notifying the UK's intention to exit the EU to the European Council immediately. There is also pressure from within the UK Conservative party to notify as soon as possible. Upon taking up her appointment as prime minister, however, Theresa May stated that there should be no rush to serve the Article 50 notification, and she and David Davis have both indicated that notification should not take place before the end of the year. Following their recent discussions with Mrs. May, German Chancellor Angela Merkel and French President François Hollande have both accepted that the UK needs time to prepare for exit negotiations, although they have also stressed that the UK's Article 50 notification should not be unduly delayed as this would not be in the interests of the EU or UK economies.

While the situation remains fluid, it is expected that the next few months will see the UK establishing its preferred negotiating position on the terms of its exit from the EU and its preferred model for its future relationship with the EU, with notification occurring in early 2017.

### **Challenge to Notification without Parliamentary Approval**

Article 50 recognises that an EU Member State's decision to leave the EU must be made in accordance with that state's own constitutional requirements. The UK is almost unique in not having a written constitution, and several sets of legal proceedings to the Article 50 process have been brought in the English High Court, challenging government statements that notification of the UK's Brexit decision can be served on the European Council without Parliamentary approval.

The proceedings will be combined and heard in a single, two day hearing before the Lord Chief Justice, Lord Thomas, in mid-October this year. In a preliminary hearing on 19 July, the president of the English Queen's Bench, Sir Brian Leveson, indicated that the case was of such constitutional importance that any appeal against the Lord Chief Justice's decision would go straight to the Supreme Court. It is likely that the appeal would be heard quickly, allowing notification to be served in early 2017.

If the outcome of the proceedings is that a Parliamentary vote is in fact required before the UK can notify under Article 50, this may present a conflict for those UK Members of Parliament – a majority of all MPs – who believe the UK should remain in the EU, but whose constituents voted to leave. On the other hand, for MPs who voted to leave the EU on the basis that exit would restore full Parliamentary sovereignty, it would be somewhat ironic if the outcome were to be that no Parliamentary approval is required for the notification.

## **Article 50 Timetable**

When the notification is served on the European Council, it will trigger an initial two-year period of negotiation with the EU on the UK's terms of exit only.

Assuming notification in early 2017, it is possible that exit terms could be agreed before the deadline in early 2019. While there is pressure from the EU and inside the UK to agree on terms as soon as possible, many commentators think that the volume of issues to be resolved means that negotiations would need to take considerably longer than two years. If so, the deadline can be extended only if the UK and the other 27 Member States unanimously agree. Whether or not an extension is agreed, if the UK and EU are unable to agree on terms before the relevant deadline, there is a possibility that the UK could exit the EU without any terms. Although this is a possibility that cannot be discounted, it is generally believed to be against the interests of both the EU and the UK, and likely that both parties would make all efforts to avoid it.

## **Exit Terms**

While the UK spends the next few months considering its negotiating stance on exit terms, the European Council will be drawing up guidelines for its negotiators to use in exit negotiations with the UK. The final exit agreement is likely to cover a wide range of issues. The final amount of the UK's contributions to the EU budget will have to be settled. Arrangements will need to be made for treatment of UK citizens currently resident in other EU Member States and of other EU Member States' citizens currently resident in the UK, including residence, pension, health, and social security rights. EU funding for UK projects may need to be apportioned if completion of those projects will occur after Brexit. EU bodies located in the UK, for example, the European Medicines Agency, will need to relocate to another EU Member State, and arrangements will need to be made for UK civil servants, lawyers, translators, and politicians to leave Brussels, Strasbourg and Luxembourg. The UK's role in protecting security in the EU will need to be reconsidered. These are just some of the issues that UK and EU negotiators will need to discuss and resolve.

It might be expected that these issues could start to be addressed in informal discussions prior to the UK formally serving its Article 50 notification. However, the EU has so far said that there will be no negotiation without notification. It remains to be seen whether this stance changes as the agenda for the negotiations is developed.

## **Model for the UK's Post-Brexit Relationship with the EU**

The arrangements the UK wants to put in place with the EU for the future remain unclear, and the next few months will also see the UK developing its preferred model. Indications are that this will be announced by early 2017.

Speaking to journalists at the G20 meeting of finance ministers and central bank governors in China at the weekend, the new UK Chancellor, Philip Hammond, acknowledged that prolonged uncertainty regarding the UK's future arrangements with the EU is impacting adversely on business confidence and that confidence would be restored only when these arrangements had been agreed. He expressed the hope that when the UK sets out the arrangements it envisages, these will be accepted positively by the EU. Although the EU Trade Commissioner, Cecilia Malmstrom, has previously said that the UK must have exited the EU before any negotiations regarding the future UK/EU relationship can start, Article 50 expressly requires the UK's exit terms to take account of the framework for this relationship, so it is likely that some discussions on this subject will have to take place during the Article 50 negotiations.

Key to the arrangements will be access for UK businesses to the EU Single Market, for example, for UK-established financial services and insurance businesses that rely on authorisation in their home state as a "passport" to providing services in other EU states. Foreign Secretary Boris Johnson stated during a visit to New York on 22 July 2016 that he expected these "passporting" rights would be retained, given the interdependence of the UK and EU. However, negotiation of access will not be straightforward. The EU and the heads of state of a number of EU Member States, including Angela Merkel and François Hollande, have indicated that if the UK is to have access to the Single Market, it must also respect all of the four freedoms that underpin the Single Market, including the freedom of movement of EU nationals to and from the UK. Yet immigration was a major factor in the vote to leave the EU, and Theresa May has flagged that more control over immigration is also a key issue for the UK. Consequently, some form of compromise will be needed before a deal can be done, although it will likely be influenced by the upcoming French presidential and German parliamentary elections in 2017 and by the EU's concern to discourage other Member States from considering exit by ensuring that the UK is not seen to be able to "cherry-pick" those aspects of the EU Single Market it likes while withdrawing from those it does not.

### **The UK's Post-Brexit Relationships with Non-EU States**

The EU has exclusive competency to negotiate and conclude international treaties on behalf of all EU Member States in certain areas, including international trade. Free trade treaties lay down the terms applied to trade between the signatories to the treaty, a recent example being the Comprehensive Economic and Trade Agreement with Canada (CETA), which awaits ratification. The UK will no longer benefit from these treaties when it leaves the EU and will need to negotiate its own arrangements, and although it is prevented by EU law from signing up to these while it is an EU member, it is debatable whether it would be prevented from discussing them.

International Trade Secretary Liam Fox has indicated that his department has started work on the terms of free trade arrangements with countries outside the EU, with a view to having these signed once the UK exits the EU, and Chancellor Philip Hammond confirmed recently that the UK has begun discussions with China.

### **Scotland, Wales and Northern Ireland**

62 percent of the Scottish electorate voted to remain in the EU, prompting Scotland's First Minister, Nicola Sturgeon, to state publicly just after the referendum vote that she would seek to ensure that Scotland's wishes were respected, mentioning a second referendum on Scottish independence as "highly likely" but stating that she would explore other options too, and holding meetings with EU officials to discuss Scotland's position.

One of the first meetings Theresa May had after taking office was a meeting with Nicola Sturgeon in Edinburgh on 15 July, at which Mrs. May stated that she would not trigger Article 50 until a UK-wide approach to negotiations with the EU had been agreed. In particular, she said that she wanted the Scottish government to be fully engaged in discussions and that she was willing to consider any options the Scottish government put forward for the new UK/EU relationship. While this has not led Ms. Sturgeon to abandon the prospect of a second independence referendum, it has led her to acknowledge that the interests of the 1 million Scots that voted to leave the UK also need to be taken into account, and to look at the interests of Scotland in a post-Brexit UK. In a speech to the Institute for Public Policy Research in Scotland on 25 July, she set out five specific interests - democratic, human, economic, social, and solidarity – that the Scottish government intends to ensure are protected post-Brexit.

Mrs. May has given the same message to the governments of Wales and Northern Ireland, stressing that she would like them to be involved and engaged in Brexit negotiations. In her visit to Belfast on 25 July, Theresa May addressed one of

the main concerns in Northern Ireland that, upon Brexit, controls would have to be reintroduced at its border with the Republic of Ireland, which will stay in the EU. The concern is that this will upset the Ireland peace process. Mrs. May has agreed to engage with the Northern Ireland government on this as well as other Brexit issues.

### **UK Negotiating and Legal Resources**

The UK will require substantial resources to negotiate the UK's exit agreement with the EU, its new relationship with the EU and free trade agreements with non-EU states. Press reports indicate that negotiation of CETA involved up to 300 Canadian trade negotiators, and the EU itself is reported to have around 600 negotiators. Because the EU has for decades conducted most international negotiations on the UK's behalf, the UK civil service has very few experienced negotiators, a gap that government is looking to fill with secondees.

In addition, because EU law forms an integral part of UK law, significant resources will be required to disentangle it from UK laws where needed, identifying which EU laws should be preserved and which should be replaced. This is likely to take years: when the Republic of Ireland gained independence from the UK in 1922, it was agreed that the 1800 Act of Union between Ireland and the UK would remain in place until such time as UK laws were replaced by Irish laws. This process took over 60 years, with the Act of Union eventually repealed in 1983.

### **How Business is Preparing**

Press reporting and individual company statements indicate that, in the main, businesses are preparing for Brexit by identifying risk areas and monitoring developments, but are waiting for greater certainty regarding the UK's future relationship with the EU before taking active measures. However, a number have cited Brexit as a reason for looking to relocate or open branches in other EU countries. In the meantime, lobbying initiatives have started up in a number of areas – for example, a Financial Services EU Taskforce has been set up to coordinate contacts between UK financial services businesses and government in relation to the impact of Brexit on the UK financial services sector.

Further information on issues relating to Brexit can be found [here](#).

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