McCann FitzGerald

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BREXIT TRACKER

Keeping you informed

McCann FitzGerald is committed to keeping our clients, both Irish and overseas, up to date in relation to the legal and related political/economic developments in respect of Brexit. As the only Irish law firm with working offices in Brussels, London and New York, we are also able to provide you with an informed insight of views at the heart of Europe, the City of London and New York.

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★★★★★
Winner

Commentary

Hard or Soft Brexit?

Which is it to be? To the surprise, perhaps, of many there has been some sense in recent weeks that the UK government will seek to "prioritise formal sovereignty", meaning that economic or trade arrangements with the EU will be shaped around that priority.

Based on comments of both the Prime Minister, Theresa May, and the Secretary of State for Exiting the EU, David Davis, some have suggested that the decision has, in practice, already been made for the UK to leave the EU customs union. Mr Davis then went a little further in suggesting that it was "very improbable" that Britain would stay in the single market given the desire to control migration. That would be a 'Hard Brexit'. Such an outcome would hit the UK financial services markets hard – certainly for a number of years. Although quite alarming in some ways for Ireland, it might give greater opportunities to Dublin as a location for some financial services activities and as a provider of solutions where passporting rights were lost. More generally, however, just how Ireland would react to Mr Davis' so-called "beacon for free trade across the world" with a "regulatory environment that helps rather than hinders businesses and workers" would be interesting and, potentially, very challenging.

However, it is by no means clear that a 'Soft Brexit' option has been abandoned. Many in the UK wish for and believe with some optimism that single market access can, after all, be combined with some restrictions on immigration from the rest of Europe. Mr Davis was subsequently rebuked by "a Downing Street spokesperson" who said that his comments were only "his opinion" (and, thus, not the views of the prime minister). Perhaps most importantly, the extraordinary publication by Japan's Ministry of Foreign Affairs of 'Japan's message to the United Kingdom and European Union' will likely have some effect as the UK government seeks to "build national consensus" around its negotiating position.

The position is made more difficult when, at present, there is a clear lack of certainty or agreement on the part of the UK government (and its members) in relation to trade: is the UK to pursue a completely open free trade policy or one that is, at least in some parts, protectionist and interventionist? Pending resolution of this policy issue, it will be difficult for the UK to enter negotiations for new trade deals with either the EU or other countries.

Whether it is to be a 'Hard' or 'Soft' Brexit, as a senior Irish official indicated earlier this summer, "the route ahead is uncharted and seems certain to be long and arduous".

Japan - a most surprising message

To the surprise of almost everyone, and to the particular discomfort of Theresa May, Japan posted on its Ministry of Foreign Affairs website a 'Message to the UK and EU'.

Almost half of Japanese direct investment intended for the EU in 2015 flowed to the UK, and Britain was one of the main destinations for Japan's 'investment stock' within the EU as of the end of last year.

"A considerable number of Japanese businesses operating in Europe are concentrated in the UK. We have been informed of a variety of requests that these businesses have in relation to BREXIT including:

- maintenance of trade in goods with no burdens of customs duties and procedures;
- unfettered investment; maintenance of an environment in which services and financial transactions across Europe can be provided and carried out smoothly;
- access to workforces with the necessary skills; and
- harmonised regulations and standards between the UK and the EU.

The Government of Japan trusts that the UK and the EU, by heeding such requests to the fullest extent and responding to them in a co-operative manner, will maintain the current business environment or alleviate the impacts of any radical changes, so as to remain an attractive destination for doing business."

The message also suggested the UK government had "invited" some Japanese companies to Britain on the basis that it was "seen to be a gateway to Europe" and that the government had a moral obligation to honour those promises. "We strongly request that the UK will consider this fact seriously and respond in a responsible manner to minimise any harmful effects on these businesses".

In diplomatic terms, for a Japanese government, this message is strong stuff indeed.

Changes to Transaction Documents - Take care

The Loan Market Association (LMA) has issued a note addressing a number of Brexit-related considerations for the syndicated loan market facility documentation.

Small changes only are suggested. However, the note focuses on certain possible controversial areas: governing law; jurisdiction provisions; references to the EU and EU legislation; lending restrictions; and Article 55, BRRD clauses.

The McCann FitzGerald view is that all English law contracts and agreements should be considered carefully - and not just for the areas mentioned by the LMA. It is also suggested that Brexit risk factor clauses might be appropriate in relevant circumstances.

Apple case - complications for Brexit?

Although not immediately obvious, there may be spill-over effects.

It's difficult to determine if and how the European Commission's decision (and the appeal against that decision) that Ireland provided unlawful state aid to Apple could impact Brexit, but here are some initial thoughts:

- Pending a full outcome of the case, Ireland might be held back (or constrained) in its ability to agree specific post-Brexit arrangements with the UK by the EU - both on the timing and the nature of the arrangements
- Post-Brexit, Ireland may be restricted in providing tax rulings for FDI where the UK would be free to do so
- If the EU's (long term) strategy is to change Ireland's 12.5% corporation tax rate, then our arrangements with the UK will be affected
- If the UK sought actively to attract Apple (and others) to the UK, then the nature of the EU/UK departure agreement could be affected
- If the EU decides against adopting the Transatlantic Trade and Investment Partnership (TTIP) (the proposed trade agreement between the EU and USA in respect of market access, regulatory co-operation and trade rules), then the time to negotiate the EU/UK departure agreement will be impacted and the nature of that agreement will be different

For analysis of the decision see our briefing '*The Apple Case*'.

UK new trade deals – how easy will it be?

Not as easy as Mr Davis and the Leave voters might suggest or hope.

In an interview, Frans Timmermans, the European Commission's first Vice President, demanded clarity from the UK. "The onus is on the country that decides to leave to tell us how they want to leave and I think that's the starting point of the discussion". He continued, in somewhat impatient terms, "Perhaps they should first get their act together and tell us what they really want out of this. Brexit is an existential issue, not just for the UK, but also for the rest of the EU." Mrs May says over and over again that "Brexit means Brexit" but doesn't specify what the UK wants in its new relationship(s) with the EU.

However, in more conciliatory tones, the European Commission's chief Brexit negotiator, Michel Barnier (the former French foreign minister and European commissioner), has said that he wants to "reach an agreement with the UK in any case" and that he was ready to begin talks as soon as Britain triggers its EU departure process. He also sought to debunk media speculation that he would drive a hard bargain with the UK because of his nationality and his reputation as a regulator who had been tough on the City of London.

What about agreements with non-EU countries? Well, again, not so straightforward while the UK is still a member of the EU – even with pro-British friendly states. Take Australia, Steven Ciobo, the Australian trade minister, has said it would be at least two-and-a-half years before formal Australia-UK talks could begin. His message was that Australia cannot agree a trade deal unless and until they know what the EU/UK departure agreement says.

And, finally, President Obama made clear at the G20 meeting in China that the US will not "fast track" a post-Brexit trade deal with the UK.

Don't forget the EU Budget - *That's going to be awkward*

The EU's spending is organised around a seven year period, known as the multi-annual financial framework (MFF). The MFF sets out the EU's spending priorities and sets spending limits for the seven years. The current MFF covers the period 2014-2020.

The MFF sets out the EU's spending priorities and sets spending limits for the seven years. The MFF isn't the annual budget itself: rather, it provides a framework through which annual budgets are negotiated. The European Commission, the Council and European Parliament negotiate the annual budgets based on the MFF spending limits.

Until its departure, the UK will continue to contribute to the EU budget - as is known, it is a net contributor. The UK contributes to the EU budget through 'own resources' in the same way as other member states. However, the UK receives a rebate on its net contribution. In 2015 the UK's total contribution, after the rebate, was an estimated £12.9 billion. In addition, the UK receives public sector receipts from the EU for programmes such as structural funding and common agricultural policy. In 2015 the UK received £4.4 billion of public sector receipts. The UK's public sector net contribution in 2015 – the difference between its contribution and receipts received – was an estimated £8.5 billion

In addition, some EU receipts bypass the public sector and go directly to private sector and other non-governmental organisations, such as universities. If these receipts are included, the UK's average net contribution to the EU budget was £7.1 billion between 2010 and 2014.

For further information see House of Commons Briefing paper 12 August 2016.

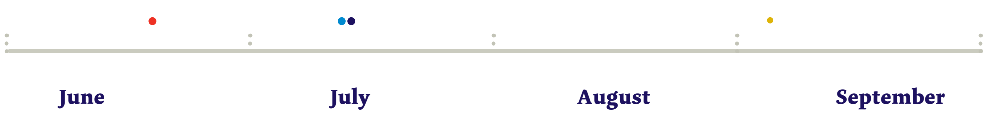
Britain's departure will mean a shortfall in the next MFF and the annual budgets based thereon. Ireland as a (new) net contributor may have to contribute to the shortfall.

A further point is that if the UK wishes to leave before 2020, this may require re-negotiation of the existing MFF, which would involve 27 other member states (none of which has an interest in a re-negotiation) as well as the EU institutions. This is not very likely to happen.

Thus, among all the consequences of Brexit, difficulties surrounding the EU budget promise to be amongst the most awkward and challenging.

What's Actually Happened to Date

23 June 2016	• Referendum - vote to leave
13 July 2016	• New UK prime minister, Theresa May, appointed
14 July 2016	• New UK Departments for Exiting the EU and International Trade established
4 September 2016	• Japan's 'Message to the UK and the EU' published
24 June - 13 September 2016	Sterling falls from GBP£1=USD$1.49 to GBP£=USD$1.32 GBP£1=EUR€1.31 to GBP£=EUR€1.18
	That's it.......



Brussels Insight

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EU's position is crystal clear: there will be no negotiations without notification

Listen-up UK. The view in Brussels is that the principle of "no negotiations without notification" is enshrined in the Treaties and is there to protect the interests of the remaining member states, not the UK. The EU will not give up on this principle according to Donald Tusk, President of the European Council. Thus, unless and until the UK gives notification of its "intention" (note: an important word which may become significant during the negotiation process) to withdraw under article 50 of the Treaty of Functioning of the EU, there will be no engagement or indications of what deal(s) may be on offer by EU officials. The expectation here in Brussels is that the UK will submit its notification early next year. For now (at least at the Bratislava meeting) the Heads of State will focus on the other problems confronting the EU: migration, terrorism and the growing fear of globalisation.

Timing of departure

The EU budget constraints (see *'Don't forget the EU Budget'* above) make any attempt to leave before 2020 pretty awkward as budget re-negotiation would delay any 'departure agreement'. Thus, as the FT has commented, in order to "save" time would require more time. This may explain why Philip Hammond, the UK Chancellor of the Exchequer, was prepared to guarantee domestic EU-related funding arrangements until 2020.

London Insight

Changes in City views?

The City of London has a fairly uniform set of views on its desired outcome: namely, access to the single market, with the maintenance of passport rights for capital and people. The British Bankers' Association has said that the industry wants a transition agreement to maintain access to the EU market until a replacement deal is in place that mirrors existing entitlements (a process that could take years).

However, we are hearing other views - and from those who voted to Remain - to the effect that, now a decision has been taken to leave the EU, it might actually be better to stay out of the single market. The argument is made that this would avoid a long and protracted negotiation for access to the single market with the inevitable condition of acceptance of free movement of labour.

A Second Referendum

Separately, the call for a second referendum or a new referendum on the new trade arrangements has given rise to different responses. Some four million+ people have signed a petition requesting such a second referendum (former head of the UK civil service, Gus O'Donnell, and many in the City among them) but the new prime minister Theresa May has indicated there will be no such thing. It looks as if the only 'second' vote will be - in respect of the departure arrangement with the EU and any new trade deals - in the UK Parliament.

New York Insight

Deep Concern

We believe that the UK's decision to leave the EU has caused deep concern in the United States about the future of the US/EU relationship. This view was confirmed by the EU ambassador to the United States, David O'Sullivan, in a recent speech. He indicated that the uncertainty surrounding Brexit was "our biggest enemy" and would have "a hugely chilling effect" on investment decisions, at least in the short term.

But Wait and See

Against that, a Wall Street Journal survey of leading economists reported forecasters making no major changes to their projections for economic growth for 2016 or 2017. Therefore, while there is concern and uncertainty in US minds, in general, we would say that US attitudes to Europe remain relatively benign with many taking a 'wait and see' approach.

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Events

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Date	Event
8 September 2016	**The Labour Market Implications of Brexit** CIPD, Ireland & sponsored in part by McCann FitzGerald. Location: Davenport Hotel, Dublin. Speakers included Terence McCrann, McCann FitzGerald
4 October 2016	**Brexit - Implications for Directors** Institute of Directors, Ireland. Panellist: John Cronin, McCann FitzGerald. Location: McCann FitzGerald Offices, Dublin
20 October 2016	**Financial Services Pre & Post Brexit: Formulating a Unified Response** by British Irish Chamber of Commerce/ McCann FitzGerald. Location: McCann FitzGerald Offices, Dublin
3 November 2016	**McCann FitzGerald: Preparing for Brexit, Trade seminar series.** No. 1 - Implications for Ireland's food and drink sector'. Location: McCann FitzGerald Offices, Dublin

McCann FitzGerald Brexit Group

We have established a cross-sector group that advises and represents Irish and international business clients on the legal, regulatory and tax implications of Brexit. A full list of the group can be found on our website. Some of the key contacts are listed below:

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