



BREXIT TRACKER

Keeping you informed

McCann FitzGerald is committed to keeping our clients 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.

IN THIS ISSUE:

Commentary

“A change is going to come”

If these words remind you of Sam Cooke’s civil rights anthem song from 1965 or, perhaps, the 2009 song “*I feel a change comin’ on*” from the newest Nobel laureate for literature, Bob Dylan, then you are mistaken. They are, in fact, the words of the UK prime minister, Theresa May, spoken last month. The Brexit vote was “a call for a change in the way the UK works and the people for whom it works – forever” she said. “Knock on almost any door in almost any part of the country, and you will find the roots of the revolution laid bare.”

But what change and what revolution? Does the UK expect or wish to stay in the single market and/or in the customs union? We simply don’t know because they don’t know. In Dublin last week, a UK trade minister asked his audience of business leaders “what would a good deal with the EU look like for the UK?” He continued “we are asking industry and you to tell us”. In other words, the failure by Mr Cameron to put alternative legal or treaty/constitutional arrangements to UK citizens in the referendum has resulted in no-one knowing what outcome is desired by the British people.

Mrs May said in October that she “will seek the best deal possible as we negotiate a new agreement with the EU. I want it to involve free trade, in goods and services. I want it to give British companies the maximum freedom to trade with and operate in the single market – and let European businesses do the same here. But let me be clear. We are not leaving the EU only to give up control of immigration again. And we are not leaving only to return to the jurisdiction of the ECOJ”. Previously, in July, she had talked of protection for ‘national champions’. Her statements are simply incompatible.

In the courts, the UK attorney general cannot even muster a clear argument in favour of the government giving notice to leave under Article 50 without a vote of parliament.

For pure laughs, of course, we always go to the Foreign Secretary, Boris Johnson, who declared last week that “Brexit will be a titanic success”. Sorry, he explained, he meant to say a “colossal success”. Previously, he had quipped that “Our policy is having our cake and eating it. We are pro-secco but by no means anti-pasto”. It’s the way he tells’em! A trade minister reading carefully from a prepared script in Dublin says “We are not leaving Europe, we are re-joining the rest of the world”. The Chancellor of the Exchequer, Philip Hammond, with marvellous but typical understatement, indicates that he expects “turbulence” for the next five years.

As the Financial Times put it “Britain is now apparently a country where, when the government is defeated, the pound gets stronger; when parliamentary sovereignty is upheld, some parliamentarians are unhappy, and when judges listen to legal arguments in a courtroom, they are ‘enemies of the people’.”

In September The Economist newspaper referred to Brexit as “Britain’s most calamitous decision in a generation”. On 7 November, the Taoiseach said that “It is arguably the greatest economic and social challenge for this island in 50 years.”

We concur with both statements.

INSIGHT:

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TIMELINE:

CONTACTS:



Financial services in Ireland – a unified response

On 20 October 2016 McCann FitzGerald co-hosted an event, with the British Irish Chamber of Commerce (BICC), entitled “Financial Services: Pre and Post Brexit – Formulating a Unified Response”.

The event took the form of three separate panel discussions: the first, was an overview of Brexit and financial services generally, the second addressed the insurance industry (somewhat forgotten in many of the discussions to date) and, the third, sought the views of market participants in the banking and funds sectors. The key objective was to consider how Ireland should formulate a unified response to Brexit, which was broadly agreed to be a defining event

for Ireland, presenting both clear risks and clear opportunities.

Overall, it was agreed that it is vital that Ireland identifies and seizes the opportunities for financial services and does so employing a coherent and co-ordinated message (facilitated by government). Following the event, we prepared an ‘outcome’ note - request a copy of the note [here](#).

Participants

MODERATOR	PANEL ONE	PANEL TWO	PANEL THREE (pictured)
John Cronin McCann FitzGerald	Denis Curran IDA Ireland	Michael Culligan Milliman	Eddie Cullen Ulster Bank Ireland
	Valerie Daunt Deloitte	Patrick Manley Zurich	Brian Daly KPMG
	John FitzGerald Trinity College Dublin	Darragh Murphy McCann FitzGerald	Joe Duffy BNY Mellon
	Deirdre Somers Irish Stock Exchange	Brendan Roche Marsh	Susan Dargan State Street



Significant increase in disclosure of Brexit risk factors

Since 24 June 2016, almost 400 public companies registered with the U.S. Securities and Exchange Commission (SEC) have disclosed ‘Brexit-related’ risk factors in their quarterly reports.

Separately, 35+ companies have disclosed ‘Brexit-related’ risk factors in registration statements filed with the SEC (excluding disclosures included in confidential registration statements submitted to the SEC).

The risks disclosed include economic and political uncertainty, exchange rate volatility, regulatory and legal uncertainties. The SEC itself appears to be assisting or providing guidance to companies on what risks to their business or business environment they might disclose and how they might disclose such risks.

In our ‘Brexit – A legal perspective, issue Three’ we have advised Irish corporates and businesses to review their business models and arrangements (including supply chains) in order to identify legal and business risks and opportunities, and steps that should or ought to be taken in the context of the Brexit vote. We recommend the establishment of a review team to prepare a plan with its primary aim to identify the principal aspects of the company’s business that will be affected most by Brexit. This may, in turn, lead to a need to make disclosures in public documents or to banks and other lenders in certain circumstances.



Article 50 – English High Court judgment

The Court held that the UK government does not have the power under the Crown’s (i.e. the UK government of the day) prerogative to serve a notice pursuant to Article 50 of the UK’s intention to leave the EU.

The effect of the decision is that the UK parliament’s approval is required before any notice can be given under Article 50.

The court found, indeed the UK government itself accepted, that the legislation under which the referendum was run – the EU Referendum Act 2015 – was flawed as it failed to “confer statutory authority to give notice under Article 50”. Thus, a simple provision in the legislation would have saved the government’s embarrassment!

The Court did not accept the “central contention” put forward by the government that parliament must have intended, when it enacted the European Communities Act 1972 (the **ECA**), that (i) the government would “retain its prerogative power” to effect a withdrawal from the EU, and thereby (ii) that the government should have the power to choose whether EU law should continue to have effect in UK domestic law.

The government accepted that a notice under article 50 “cannot be withdrawn once it has been given” and that the giving of notice will have the effect in due course of changing UK domestic law. Both matters would not be accepted unreservedly by all lawyers.

However, the court took the government’s acceptances, underlined the “most fundamental rule” of the UK constitution – namely, that parliament is sovereign and can make and unmake any law it chooses – and found the government’s argument to be contrary to both that fundamental rule and the language of the ECA – “there is nothing in the text to support it”.

Does this judgment matter? It’s pretty awkward for the prime minister. However, the Supreme Court (the old House of Lords) has already set aside time to hear an appeal (by-passing the Court of Appeal) starting on 5 December so, assuming a quick decision thereafter in the government’s favour, Mrs May can still meet her undertaking of giving notice by end of March 2017. After the decision, her spokesman said “we have no intention of letting this derail our timetable”.

From an EU perspective, it looks like the UK government is, again, less than sure-footed in its approach to Brexit and its engagement with the remaining EU Member States.

(R (Miller) and others v Secretary of State for Exiting the European Union – judgment 3 November 2016.

Northern Ireland - Two judicial review challenges

In two challenges to the way the UK government intends to invoke Article 50, it was argued that Brexit could not be imposed on Northern Ireland and the Good Friday Agreement meant the province had some control over constitutional changes.

It was argued that sovereignty over constitutional affairs has been ceded by the UK. “The people of Northern Ireland have control over constitutional change, it cannot be imposed upon them.” It was further argued that Northern Ireland could exercise a veto over withdrawal and “that

is what Britain signed-up to when it signed the Good Friday Agreement”.

The court rejected the arguments made. An appeal is possible at some stage.

See cases [summary](#).

Irish regulator stands ready to do its job

On 3 October 2016, the Central Bank of Ireland (CBI) gave welcome reassurance regarding its role on Brexit and applications regarding the establishment of operations in Ireland.

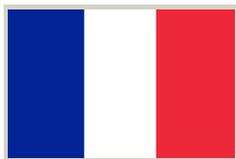
In a statement, the Director of Policy and Risk, Gerry Cross, said that the Central Bank stands “ready to do our job, we are open for engagement”. He indicated that CBI is committed to staff and deploy resources in line with the flow of applications from overseas entities.

In relation to how applications would be treated, he said that “in assessing any application we are guided as always by our mandate to safeguard stability and protect consumers”. CBI is “committed to transparency and clarity in its authorisation processes and performance standards”.

He added that “where we are asked to consider the authorisation of a firm in Ireland, we will want to be satisfied that we are authorising a business or line of business that will be run from Ireland and which we will be effectively supervising. We will expect there to be substantive presence”.

In summary, CBI “stands ready to meet the challenges that may arise. We will do so on the basis of an active, open stance, ready to engage, but in line with our duty to protect consumers, and in keeping with EU rules, international standards, and our published processes”.

See [Statement](#).



Regulatory arbitrage?

France changes its application process.

In an article in the Financial Times “*Come to Paris, we speak English*”, the newspaper claimed that “in a blatant attempt to lure companies across the Channel” the Autorité de contrôle prudentiel et de résolution (ACPR), an independent administrative authority attached to Banque de France responsible for supervising the banking and insurance sectors in France, and the Autorité des marchés financiers (AMF), the securities regulator, were simplifying the “often laborious process” of registering financial companies in the context of the Brexit vote.

What they actually said was:

“As all players in the Paris financial market are gearing up for the challenges posed by Brexit, the ACPR and the AMF are getting ready to welcome British-based institutions that wish to locate their business in France.

The UK’s decision to leave the EU may have consequences for institutions based in the UK which use the passport mechanism to carry out all or part of their activities in other EU countries under the freedom to provide services or under the right of establishment.

Against this background, some institutions operating under the passport mechanism may decide to establish an insurance company, investment firm, payment institution or an electronic money institution, licensed and supervised by ACPR to carry out activities that are currently conducted in France through branches or directly from the institution’s home country.

For existing activities already supervised by the competent authority in the home country, the licensing procedure may be simplified and speeded-up. This will be done by using documents already available in English.

An English-speaking contact point will be appointed to guide applicant firms through the procedure starting with the pre-authorisation period and will provide all necessary information to ensure the smooth processing of the application.” See guide [here](#).

Regulatory arbitrage? Hardly. But it should keep all regulators in “competing” Member States on their toes.....



Brexit upsets proposed changes for patents and in the life sciences sector

The proposed introduction of a Unitary Patent (UP), which would make it possible to obtain patent protection valid in all participating states (currently all EU Member States except Spain, Poland and Croatia), and an associated Unified Patent Court (UPC), remains in doubt.

Brexit has had, and continues to have, serious consequences for these proposals given that UK participation was important to the project itself as well as to its legal agreement.

The relevant international treaty has yet to come into effect as Germany and the UK (whose ratifications are mandatory under the current agreement) have not yet ratified it. And it is now generally acknowledged that there will be, at the very least, further significant delay as the parties seek a way forward. However, it has been confirmed by the UK intellectual property office that it will continue to participate in UPC meetings and that there will be no immediate changes.

Amendments to the agreement to take account of Brexit, which would be required to allow the UP/UPC system to come into effect whether the UK's involvement continues in any form or not (e.g. because London is one of the Court's centres for the central division in pharmaceutical and life sciences UP disputes and because it is currently only open to EU Member States), will necessitate further delay in any case, so that a 2017 start date for the system seems no longer possible.

Transfer of the European Medicines Agency (EMA) to Dublin?

Also arising from Brexit is the possible transfer of the headquarters of the EMA from London. The EMA fulfils an important role in the protection and promotion of public health through the scientific evaluation, supervision and safety monitoring of medicines for human and veterinary use in the EU. At the end of October, the Irish Minister for Health, Simon Harris TD, confirmed that Ireland will formally bid to host the EMA post-Brexit. The Irish Government noted the advantages of a transfer to Ireland as an English-speaking country with particular expertise in the relevant fields. He has set-up an inter-departmental group to work towards making this potential transfer to Dublin a reality.

Capital Markets Union - possibility of UK exiting the single market makes the case for CMU stronger and more urgent

Vice-President Valdis Dombrovskis, the European commissioner in charge of financial services policy, moved to end speculation that Brexit might spell the end of ambitious plans outlined in 2014 to build a capital markets union.

He said that his “focus will be to give predictability and continuity to the EU's financial sector. To continue building a capital markets union. To complete a reliable framework for Europe's banking sector. And to stick to evidenced based rulemaking by following through on the call for evidence.

The arguments for creating a single market for capital in Europe are strong. Europe needs deeper capital markets to increase financing in the wider economy. Our businesses need a broader range of funding options to grow and create jobs. And deeper capital markets are crucial if we're to support long term investment and remain globally competitive. The possibility of Britain exiting the single market just makes the case for CMU stronger and more urgent.”

He promised to continue to drive forward the CMU Action Plan. “We moved fast with the first wave of measures. We've proposed an overhaul to the Prospectus regime. A balanced proposal to restart securitization markets by defining simple, transparent and standardised securitisation is on the table. We've published proposals to strengthen Europe's venture capital markets and support socially minded investment. The

onus is now on the co-legislators. Let's get these agreed. Let's get these done by the end of the year.”

He spoke of being ready for the second wave of CMU actions - “ambitious measures which will take longer to deliver but on which we need to accelerate progress”.

The first area he highlighted was the “different approaches to insolvency in the EU” which he sees as a barrier to integrated capital markets. “Inefficient procedures also hamper the restructuring of debt of viable borrowers. They reduce the capacity of creditors to retrieve non-performing loans.” To this end, the Commission will present a proposal to encourage more effective arrangements for the restructuring of “viable business debt” in all Member States.

He also specified his intention to “drive forward work to improve the distribution of investment funds”. He wishes to increase competition and choice, and reduce costs for investors. And then to take action to “remove remaining barriers in the asset management sector, through legislative changes if necessary”.

See [Press Release](#).



Brexit is the ‘Word of the Year’

After an “unprecedented surge” and an “unheard of” increase in use, Collins, the dictionary publisher, named Brexit named as the word of the year. “Brexit’ is arguably politics’ most important contribution to the English language in over 40 years” said Helen Newstead, Collins’s head of language content.

Brussels Insight

The UK's recent "support and assurances" to Japanese car manufacturer, Nissan, in relation to the risks that it faces in a Brexit have caught the eye of the European Commission under its State aid powers. For so long as the UK remains a part of the EU, it is subject to the EU's State aid law, and the exclusive jurisdiction of the European Commission to determine whether a State aid may be paid by a Member State. The Commission has said that nothing has been submitted to it for review.

Nissan has said that despite the UK's plans to leave the EU, the "support and assurances of the UK government" enabled it to decide that two new models will be manufactured at its plant in Sunderland. The assurances came in the form of a letter from Theresa May to the company, which the UK has refused to make public. And it may have good reason not to make it public - amid speculation the UK might be favouring Nissan above other manufacturers, the Commission has sought information from the UK on the exact nature of these assurances.

To those familiar with State aid law, it will come as no surprise that the "support and assurances" have raised eyebrows in Brussels. For a State aid to arise there must be transfer of State resources. But, the transfer can take many forms: a direct grant, a guarantee, a loan, an investment, a benefit in kind, a waiving of revenue due to the State can all qualify. Indeed the Commission's most recent summary of State aid law states "a firm and concrete commitment to make State resources available at a later point in time is also considered a transfer of State resources". Presumably, this is what the Commission will be probing - along with the issue of whether the UK government is selectively favouring Nissan in providing these assurances.

This all goes to confirm the view held by many in Brussels that the issue of State subsidies will be a hot topic during the exit and future relations negotiations. At least in the short term, the UK must abide by the EU's rules.



London Insight

The chief executive of the British Bankers' Association, Anthony Browne, has warned that the UK's £20bn trade in financial services is at risk and the public and political debate is taking the UK in the wrong direction.

At the banking industry's annual conference in London last month, Mr Browne stated that there was "a consensus that the EU's integrated financial market is one of its great success stories" but it is now at risk. He noted that banking is probably more affected by Brexit than any other sector of the UK economy, both in the degree of impact and the scale of the implications. It is also the UK's biggest export industry by far and is more internationally mobile than most.

In a somewhat despairing voice he said: "Banker colleagues in other EU countries all agree that disrupting the free trade in financial services would be self-inflicted damage. The top regulators in the UK and EU also agree that we must retain the integrated financial market. If we left it all to the regulators, we would have a relatively quick and rational economic solution. But politics trumps economics and it will be the politicians who decide." He said that London will survive as a global financial centre. "Finance is inventive and will find a way through. But putting-up barriers to the trade in financial services across the Channel will make us all worse off, not just in the UK but in mainland Europe."

However, not all City folk share his views. There are some leaders of the UK financial services industry who welcome the opportunities which Brexit will bring. They argue that "Britain's extrication from the single market" is "important and timely".

A research paper published on 3 November 2016 by Politeia, a think tank, argues that "whether home-grown or of overseas origin, all in the sector benefit from the security which Britain's stable legal framework brings and the democratic and reliable political system under which the laws of the UK are made. Brexit could bring further stability by removing the UK from potential uncertainties, political or economic, of the eurozone; by encouraging greater legal certainty in place of what can be a tension in accommodating EU law to Britain's statute and common law tradition; and by further facilitating the competitive market system on which Britain's success and prosperity has evolved". As they see it: "The new world that will emerge [post Brexit] is not to be feared".



The US government continues to monitor closely the 'Brexit effect' and is clearly concerned regarding the level of uncertainty surrounding the process, the nature of the engagement between the UK and the EU and the possible outcomes.

In a statement issued after the UK High Court's decision on 3 November 2016, a spokesman for the White House said: "We are and will continue to work closely with officials in London, Brussels and our international partners around the world to ensure continued economic stability, security and prosperity in Europe and beyond." He added "We urge both the United Kingdom and the European Union in their negotiations ... to continue to

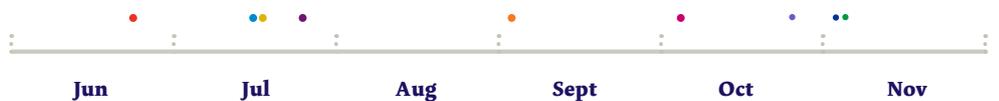
be flexible, and work this out in a process that is smooth, pragmatic, transparent and productive".

US law firms report that they expect little, if any, progress in relation to the many questions which arise in relation to the legal and regulatory implementation of Brexit (or what model for withdrawal may be adopted), and the implications of how those questions are resolved in certain areas of English law (in particular in the area of financial services).



What's Happened to Date

23 Jun 2016	<ul style="list-style-type: none"> Referendum - vote to leave
13 Jul 2016	<ul style="list-style-type: none"> New UK prime minister, Theresa May, appointed
14 Jul 2016	<ul style="list-style-type: none"> New UK Departments for Exiting the EU and International Trade established
27 Jul 2016	<ul style="list-style-type: none"> Michel Barnier appointed Chief Negotiator for the preparation and conduct of negotiations with UK under Article 50, reporting to European Commission President Juncker
4 Sept 2016	<ul style="list-style-type: none"> Japan's 'Message to the UK and the EU' published
Summer and Autumn 2016	Changes made to structures and size of UK civil service, Irish civil service & EU civil service
2 Oct 2016	<ul style="list-style-type: none"> Mrs May announces that UK will "invoke" Article 50 "no later than the end of March 2017"
28 Oct 2016	<ul style="list-style-type: none"> Northern Ireland High Court rejects applications for judicial review
3 Nov 2016	<ul style="list-style-type: none"> English High Court holds that Article 50 notice may not be given without the approval of the UK Parliament
8 Nov 2016	<ul style="list-style-type: none"> Donald Trump elected next President of the United States
24 Jun - 14 Nov 2016	<ul style="list-style-type: none">  Sterling falls from GBP£1=USD\$1.49 to GBP£1=USD\$1.32 GBP£1=EUR€1.31 to GBP£1=EUR€1.16



MCCANN FITZGERALD

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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