

Keeping up with Brexit—preparations will intensify in 2018

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Public Law analysis: Professor Derrick Wyatt, QC at Brick Court Chambers, offers analysis of the UK's Brexit preparation and challenges ahead for the UK Parliament, central government, devolved administrations and businesses, as negotiations on the Withdrawal Agreement gather pace and negotiations on transitional arrangements and the framework of a future UK-EU trade relationship move up the agenda in 2018.

Original news

Committee Stage of the EU (Withdrawal) Bill concludes, [LNB News 21/12/2017 144](#)

Day 8 of the Committee of the whole House concluded the Committee Stage of the European Union (Withdrawal) Bill, approving amendments to provide that the definition of 'exit day' is fixed at 29 March 2019 at 11.00pm for all purposes, subject to a further amendment granting ministers a power to amend the definition if the day or time of Brexit is different from that specified. The next stage is for the Bill to be considered at Report and Third Reading, which is scheduled for 16–17 January 2018.

What are the key UK legislative projects under way in preparation for Brexit? How is the legislation progressing?

Most important by a long way are the European Union (Withdrawal) Bill, which has concluded Committee Stage in the House of Commons in a Committee of the whole House, and the Trade Bill, which has so far received first reading, and already been under scrutiny in the House of Commons International Trade Committee.

The Withdrawal Bill provides for the transformation of EU law in force at the time of Brexit into UK law, and for any changes to that law necessary for it to take effect in a workable way once UK links with the EU have been broken. The Bill has been criticised for excessive delegation of legislative powers to the government, by means of so-called 'Henry VIII clauses'. These are statutory instruments (SIs), subject to the negative procedure, which can be used to amend primary and secondary legislation. The government has agreed to the creation of a new 'sifting committee', which will identify those SIs which should be require affirmative rather than negative parliamentary votes.

The government suffered its first defeat in Committee on 13 December 2017, when the House voted to insert in the Bill a requirement that the final terms of the Withdrawal Agreement between the UK and the EU must be approved by an Act of Parliament. This is likely to lead to the House of Commons seeking more scrutiny of, and more influence over the negotiations. In my view, this is essential and would strengthen the government's arm in negotiations, rather than weaken it.

The Trade Bill is under scrutiny by the House of Commons International Trade Committee. The Bill provides for a Trade Remedies Authority, which after Brexit will protect UK industry from damage caused by dumped or subsidised imports—protection currently provided by the European Commission. The Bill is also concerned with giving effect in the UK law to those EU trade agreements with non-EU countries which are in force at the time of Brexit, and which the UK manages to renegotiate and renew with the third countries concerned.

Implementation would be by SIs (negative procedure) adopted by the government or devolved assemblies. Significant re-negotiation of some agreements might take place, either at once, or after Brexit. At the moment, there is no provision for anything like adequate parliamentary oversight of either re-negotiation or implementation of these agreements. I was called to give evidence on the Bill by the International Trade Committee, and argued that significant re-negotiation of existing trade agreements should be subject to parliamentary scrutiny and that Parliament should have the chance to influence the content of the agreements before re-negotiations were concluded.

What are the key Brexit priorities for government departments and the devolved administrations?

There are numerous competing priorities all requiring political guidance and technical support. The early priority for the Department for Exiting the European Union (DExEU) will be working with the Commission to turn the UK-EU joint report on progress on citizens' rights, financial arrangements, and the Northern Ireland (NI) border into a legal text to be included in the Withdrawal Agreement. Of the three issues referred to, clarifying the position on the Northern Ireland border may present the biggest challenge, and this has major implications for the devolved administrations and the UK as a whole.

Northern Ireland

Cross-border movement of persons has proved the least problematic. The UK confirms that the Common Travel Area can continue to operate without affecting Ireland's obligations under EU law, in particular with respect to free movement for EU citizens. The assumption underlying this is that EU and UK citizens will enjoy at least visa-free short-stay access to the UK and the EU respectively, so that passport or ID checks at the border will not be needed. The movement of goods is not so straightforward. UK commitments in the UK-EU joint report lack detail and are ambiguous. The border issue will be addressed through the overall UK-EU relationship, or through specific proposals to address the unique problem of the border. This is 'Plan A', and pretty vague it is too.

If Plan A fails, there is a 'Plan B'. The UK commits to 'full alignment' with those rules of the internal market and the customs union which support north-south co-operation, the Good Friday Agreement, and the all-island economy. But the UK also commits itself (and this sounds like a commitment to the Democratic Unionist Party rather than the EU) to ensuring that no new regulatory barriers will arise between NI and the rest of the UK, unless the Northern Ireland Executive agree on distinct solutions for NI. In another pledge more of internal constitutional significance than concern to the EU, the UK promises that 'in all circumstances', it will continue to ensure the same unfettered access for NI's businesses to the whole of the UK internal market. How these commitments are supposed to work out in practice is one of the known unknowns of the Brexit process.

Turning the 'Plan A' commitments for the north-south border into binding provisions in the Withdrawal Agreement will likely involve further negotiations, as well as more detailed legal drafting. Will there be an indication of the sort of solutions for the border which the UK has in mind for the future trade agreement, even if that simply involves cross-referencing the framework of the future trade agreement? And how will 'Plan B' be expressed in the Withdrawal Agreement? It looks like a Norway model arrangement, for the whole of the UK, at least for the single market and customs union legislation which underpins the Good Friday Agreement and north-south co-operation and the all-island economy. It is true that Norway is not in the customs union, but it applies EU third country measures on veterinary checks, animal health etc, and that is probably what is meant by the reference to customs union as well as single market legislation. But which EU legislation actually falls within the category of underpinning the Good Friday agreement etc, is open to debate. Will the Withdrawal Agreement list the EU legislation in question? And how would this fit into a future trade agreement inspired by the EU-Canada model, which is what the Secretary of State for Exiting the European Union, David Davis, has said on more than one occasion will be the model for the UK agreement with the EU (as to which, see below)?

An awkward question even a lawyer is entitled to ask is whether the wording in the joint report might be designed to nudge the Northern Ireland Executive and Assembly towards accepting a border in the Irish Sea, if all else is shown to fail. This would leave NI in the customs union and the single market, but not the rest of the UK, with customs checks at airports and ferry ports between NI and the rest of the UK. Yet if this happened, the Scottish government would be likely to say that if NI can remain in the single market and the customs union, so can Scotland.

I am very ready to change my mind on this, but right at the moment, the north-south border looks like occupying DExEU for some time to come, and there are implications which could affect the future unity of the UK. Parliamentary committees and the devolved administrations would be wise to seek early sight of the draft text of the Withdrawal Agreement, with a view to making their voices heard, before the government announces that negotiations are too far advanced to change anything. I note below that the International Trade Committee has just opened a distinct inquiry into the impact of the arrangements for the border on future UK trade policy.

Transition

DExEU has plenty of other priorities, the first being the negotiations on a transitional period, which are due to start in January 2018. The EU will not agree to any transition that does not come very close to continued UK membership of the EU, minus UK participation in the various EU institutions and bodies, and the Commission has proposed to the Council that the transitional period end no later than 31 December 2020. This would be a shorter transition than sections of the business community are hoping for. But the end of 2020 date may change when the Council considers the proposal, or later in negotiations.

One exception to UK continued virtual membership of the EU that the UK will want to secure will be the right for the UK to begin negotiating trade agreements with non-EU countries immediately after Brexit. There is no objective reason why the EU should try and obstruct this UK aspiration, and the UK is likely to press ahead with trade talks with third countries one way or another. This will be the responsibility of the Department for International Trade (DIT).

DIT won't yet have completed its work on the adaptation, renegotiation and renewal of all the trade agreements with third countries which the UK currently benefits from as a result of its EU membership, including, most recently, that with Canada. At the very least, the renewal of these agreements as freestanding agreements for the UK will involve technical

adaptation of texts. Sharing tariff-free quotas for third countries under these agreements between the EU and the UK will involve more than technical adaptation and may in some cases be as problematic as it has been for quotas covered by World Trade Organisation (WTO) rules. In this latter context a share-out by the UK and the EU on the basis of actual take-up over the last three years has provoked objections from some countries, including Australia and the US. And then there is a long list of countries with which Secretary of State for International Trade Dr Liam Fox would like new trade deals to be negotiated, including the US, Australia, China and Japan. Quick fixes seem unlikely, and good outcomes will require spadework for some years to come.

Negotiations on the framework of a future trade relationship, which are due to start in March or April 2018, will engage both DExEU and DIT. The framework of the future trade relationship is, under [Article 50](#) TEU, part of the agenda of the Withdrawal Agreement (DExEU), but the future trade agreement will involve the UK as a third country after Brexit (DIT).

Yet the two cannot really be disentangled. And the Foreign and Commonwealth Office (FCO) retains responsibility for bilateral relations with all the countries concerned. This gives the FCO some stake in the negotiations on a future agreement, not least because it is likely to be a mixed agreement. Investment protection, and portfolio investment, and any dispute settlement mechanisms relating thereto, remain within national, rather than EU competence. Direct investment (ie investment with a view to participation in the management of an enterprise), by way of contrast, is within EU competence, as is all or virtually all the rest of the subject matter of a likely free trade agreement. Other departments, such as the Department for Business, Enterprise and Industrial Strategy (BEIS), and the Department for Environment, Food and Rural Affairs (Defra) will also be providing input into negotiations.

For the UK devolved administrations, priorities will include ensuring that repatriation from the EU of devolved powers hitherto subject to EU law will not lead to the UK bargaining them straight back to the EU in negotiations over a future trade relationship. As the Prime Minister has said, some of these developments will be very 'exciting' indeed.

What are the major Brexit Select Committee inquiries ongoing, and which reports are pending in 2018?

The House of Lords European Union Committee and the House of Commons Exiting the European Union Committee are conducting inquiries into the government's negotiating objectives. Both can be expected to report from time to time in 2018. Currently David Davis reports back on the state of negotiations after the event, rather than disclosing the government's objectives in advance. Whatever the merits of this to date, pressure from Parliament on the government to give a clearer indication in advance of the intended direction of travel of the future trade negotiation is likely to increase, and rightly so, in my view.

The House of Commons International Trade Committee has been looking into the renewal and renegotiation of trade agreements to which the EU is party, referred to above. It has in particular expressed interest in the degree of Parliamentary scrutiny of domestic UK implementation of renegotiated EU-third country agreements, and indeed scrutiny of the making of such agreements, and trade agreements generally.

I gave evidence to this Committee on 29 November and argued that trade agreements can affect the rights and interests of individuals and businesses as much as statutes, and that accordingly Parliament should be able to influence the content of such agreements before they are finalised. I also argued that such participation by Parliament would strengthen the government's arm in negotiations, rather than weaken it, pointing to the participation of the European Parliament in EU trade negotiations as evidence of this. (For a summary of my evidence see [Brick Court Chambers' Brexit Blog](#).)

The International Trade Committee also has two inquiries pending into the UK's trade relationship with the Commonwealth, the first dealing with Australia and New Zealand, and the second with developing countries. There are also inquiries into trade with the US, and the implications of the NI border arrangements for wider UK trade policy.

Do you anticipate further UK consultation as the government's preparations intensify, including devolved administrations, and businesses?

Yes. There has been considerable consultation so far, but it will only step up as negotiations on transition and the future trade agreement get into gear. What the government will want to achieve, and certainly should want to achieve, is a future trade agreement which will work in practice for businesses, in both the manufacturing and services sectors, and including farmers, and the fishing industry.

As negotiations evolve, so will consultation. It will certainly continue for the UK devolved administrations, for the same reasons. If, for example, some Member States want to see fishing rights on the table in the future trade negotiations, the fishing industry, and the devolved administrations will want to be consulted about that in a big way, as will the Secretary of State for Environment, Food and Rural Affairs.

What are the key dates/milestones and potential hazards to look out for in 2018?

On 18 December 2017 the Cabinet started discussing the sort of future relationship the government would like to see between the UK and the EU after Brexit. These discussions will spill over into January 2018, when the Prime Minister will give a major speech on the government's vision of the UK's post-Brexit relationship with the EU. Mr Davis has already said he wants a Canada 'plus plus plus' deal.

A Canada model agreement will certainly need some pluses to suit the UK's needs, because the Canada model does not cover aviation services, and is thin on financial services. On the other hand, for services in general, a Canada model might work quite well if due credit were given by the EU for the high degree of alignment between the UK and the EU on, for example, professional qualifications. The same might be said for financial services.

Yet it is politics that will dictate the direction of the negotiations, rather than simply the degree of current alignment and what is technically possible. Politics on the EU side has so far called for 'no cherry-picking' (repeated in the European Commission's proposed negotiating mandate), and for strict adherence to a Norway model or a Canada model, with nothing in between. But these are starting positions, and even if the EU's narrative remains unchanged, its implications can evolve in the negotiations.

A recent boost for the case (from the UK's point of view) for a Canada model over a Norway model came in a [report](#) from the Rand Corporation think-tank saying that the Norway model would offer little economic advantage to the UK over a Canada model (0.2% GDP over ten years). While economic forecasts have to be treated with some caution, if the Rand Corporation is only nearly right, this is unexpectedly (for most of us) strong support for a Canada plus model. Starting from a Canada model would create no expectations that the free movement of persons would find its way onto the negotiating table.

I have already referred to key dates in January 2018, when negotiations will begin on the transitional period, and in March or April 2018, when negotiations start on the framework of the future trade relationship between the UK and the EU.

Another key date will be in October 2018. EU chief negotiator Michel Barnier has indicated that all the negotiations on the Withdrawal Agreement must have been completed by then. This would give the Council, the European Parliament and the UK Parliament five months to ratify the deal. An unlikely potential hazard is that the European Parliament would refuse to accept the text agreed by the EU and UK negotiators. This is unlikely because it participates closely in the negotiating process and is unlikely to be taken by surprise.

Any other potential hazards in 2018? One is that a deal won't be done by October. Once the UK signs up to the Withdrawal Agreement, and begins to make its financial payments during the transitional period, the UK will be in a progressively weaker bargaining position vis-à-vis outstanding details around the future trade agreement than it was before. And there will be some commitments regarding the future trade agreement that the UK will feel it needs to tie down in one form or another with the EU before it commits itself to the terms of the Withdrawal Agreement.

The EU may in turn try and use the October deadline to force the UK to accept its 'last offer'. This is where talk about no deal being better than a bad deal makes some sort of sense. No deal (for the time being) could be better than accepting a bad deal under pressure and being stuck with it. October might turn out not to be a deadline after all, and talks could continue, threatening the [Article 50](#) TEU deadline of 29 March 2019.

If needs be, the UK should be ready to seek an extension to the two-year period under [Article 50](#) TEU. And as a very last resort, the UK should be prepared to trade with the EU on WTO terms for a period while finalising the withdrawal agreement, if it proved impossible to reach a satisfactory agreement in good time for the Article 50 deadline, and there had been no agreement on extending the Article 50 period.

But I don't believe that this extreme scenario is likely to unfold, and I don't want to finish this interview talking only about hazards, and falling off cliffs. The UK and the EU have a strong mutual interest in concluding a Withdrawal Agreement capable of paving the way for a strong future economic and security partnership. That relationship will not be the same as EU membership, and so it will provide different opportunities on both sides.

The case, on both sides, for a smooth transition, and for a strong economic and political relationship thereafter, is so overwhelming, that the smart money must be on a positive outcome at the end of the day.

LexisNexis

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