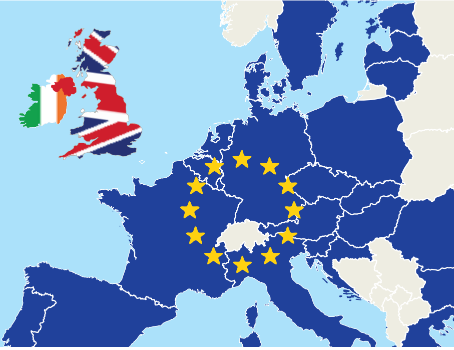
McCann FitzGerald



ISSUE FOUR: 23 FEBRUARY 2017

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: "Calm, clear-eyed and strategic" - is Ireland going to seek a EU state aid holiday?

Commentary: Common Travel Area – no room for complacency

Recognising what a Customs Union actually is, and what the EU Customs Union actually involves - Borders

Financial Services

- **Welcome to Spain**
- **Germany: BaFin informs foreign banks**
- **Maintaining the EU's Financial services agenda - the challenges**

UK Government White Paper - some matters for reflection

Data Protection

It's the Budget, stupid...

Brexit negotiations: what role for the EU Parliament?

LMA - limiting the impact of Brexit on the syndicated loan markets

Environment and Climate Change - is the UK alive to the risks?

Northern Ireland - devolved external affairs

Tax - Brexit means what?

INSIGHT

- **Brussels**
- **New York**
- **London**

UPCOMING EVENTS

CONTACTS

McCann FitzGerald Brexit Group

Commentary

"Calm, clear-eyed and strategic" - is Ireland going to seek a EU state aid holiday?

The Taoiseach, Enda Kenny, T.D., gave a detailed speech recently to the Institute of International and European Affairs (IIEA) on "Ireland at the heart of a changing European Union" which was reported widely but was not the subject of much technical commentary.

There was a welcome and strong endorsement of our EU membership. "To succeed as an open economy and a welcoming society, we must remain at the heart of Europe. The foundation of Ireland's prosperity and the bedrock of our modern society is our membership of the EU. That will not change. Our membership of the EU has brought us enormous benefits, and the Irish people have consistently endorsed that membership. It has been central to the success of our open, competitive economy. Ireland's membership of the single market and the customs union are absolutely fundamental to our economic strategy."

But Brexit, he said, poses "unprecedented political, economic and diplomatic challenges for Ireland". We face the "most important negotiations in our history as an independent state". He outlined the Government's plan for Brexit combining three essential elements (being, he said, the "essential lessons of our history"):

- We must remain at the heart of Europe and open to the world
- We must protect the hard-won peace on our island, and
- We must pursue thoughtful, prudent but ambitious economic policies.

He confirmed that Brexit is a "serious, direct threat to Ireland's economic prosperity". The potential impacts are profound, right across the economy. Key sectors, such as agri-food and fishing, face particular risks and challenges. The challenges for Ireland "require a hard-headed, radical and innovative response. We need to negotiate hard for the best possible economic outcome from the Brexit negotiations" and "we need to be calm, clear-eyed and strategic". He outlined the "essential actions" and "measures" taken and to be taken by government to give Ireland the capacity to absorb and respond to any economic shocks, including Brexit.

Commentary continues →

Towards the end of the speech he then said

"We will also make a strong case at EU level that Ireland will require support that recognises where Brexit represents a serious disturbance to the Irish economy".

Article 107(3)(b) of the Treaty on the Functioning of the European Union (TFEU) permits aid "compatible" with the internal market where given to "promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a member state". Earlier this year, IBEC had called for this provision to be invoked in respect of the food and drink business as Brexit was already causing a "deep and unique impact" to the sector. See publication here.

Is the statement at the end of the Taoiseach's speech a signal of intent to seek European Commission approved derogation from EU state aid rules on a regional, sector or, even, national basis? It could certainly be regarded as such.

Commentary

Common Travel Area – no room for complacency

The Common Travel Area ("**CTA**") is an open borders travel area between the UK (including Isle of Man and Channel Islands) and Ireland and has existed since the foundation of the State in the 1920's, but it has never been legislated for and is not legally binding; it relies on co-operation between the Irish and British authorities.

Although the CTA does not have a legislative origin, it is mentioned in certain provisions of both Irish and UK domestic legislation. The Irish and British governments signed a joint statement in December 2011 renewing their commitment to the CTA and acknowledging it as a "legitimate and fundamental public policy" for both countries. The joint statement further states that the freedom of movement for persons travelling between Ireland and Northern Ireland is "of immense importance to the economic, social and cultural wellbeing of both jurisdictions".

It is worth noting, however, that CTA arrangements have for the most part been put in place on an administrative basis and many of its details have not been made public.

The operation of the CTA is reflected in three Protocols annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union. Protocol 19 provides that Ireland and the UK may opt out from the application of the Schengen acquis and Protocol 21 provides that Ireland and the UK may opt out of certain other immigration or asylum legislation. Protocol 20 refers expressly to the CTA, stating that Ireland and the UK are free to "continue to make arrangements between themselves relating to the movement of persons between their territories".

As part of CTA, Ireland and the UK co-operate on immigration matters and citizens of CTA countries may enter the CTA without a passport check. For non-CTA citizens, immigration checks for travel within the CTA are minimal but individuals must still hold immigration permission for the CTA country they desire to enter. At present EU and EEA citizens have the right to enter and reside in Ireland and the UK under EU free movement of people but as Ireland and the UK are not party to the Schengen Agreement, EU and EEA citizens may be subject to passport checks when travelling to or between CTA countries.

Two visa programmes have been launched which rely on Ireland-UK co-operation on immigration matters:

- the Irish Short Stay Visa Waiver programme, allowing short-term visitors from certain non-EEA countries who already have permission to visit or live in the UK to visit Ireland from the UK without the requirement of a separate visa; and

Commentary continues →

- the “British Irish Visa Scheme” which permits visitors from China and India to travel to and around the CTA on the basis of a single visa.

As regards the Irish-Northern Irish border, under the CTA this is a ‘soft’ border, with Irish and Northern Irish citizens crossing freely without being subject to routine immigration controls. Commerce also takes place across the border without duties or customs checks.

The impact which Brexit will have on the CTA is uncertain. CTA pre-dates Ireland and the UK’s membership of the EU and as such it does not depend on either state’s continued membership of the EU for its existence. However, following Brexit the border between Ireland and the UK will also constitute the border between the UK and the EU. Given that the CTA arrangements are not legally binding on Ireland it may be difficult to argue that they should take precedence over Ireland’s obligations to its fellow EU member states. For this reason it is possible that all EU member states may have to consent to any agreement reached as to the CTA’s status post-Brexit.

The above is a very short and simplified note of just some of the matters relating to the CTA. Notwithstanding that both the Irish and UK governments have stated that maintenance of the CTA is a “priority”, Brexit will give rise to a number of challenges, including: if and how the Protocols annexed to the TFEU will operate; what and how passport controls for Irish, Northern Irish, UK, EU and EEA citizens will operate; if and how the visa programmes will continue and operate; what consents of other remaining member states may be required for new or revised arrangements; and what border arrangements might come into play?

There is a lot to be done and no room for complacency.

Recognising what a Customs Union actually is, and what the EU Customs Union actually involves - Borders

The OECD provides that customs unions are arrangements among countries in which the parties do two things: (1) agree to allow free trade on products within the customs union, and (2) agree to a common external tariff (CET) with respect to imports from the rest of the world.

In the EU trade among the member states flows tariff free, and regardless of which country in the EU imports a product, the same tariff is paid. The CET is what distinguishes a customs union from a free trade area. In a free trade area, trade among the member states flows tariff free, but the member states maintain their own distinct external tariff with respect to imports from the rest of the world. NAFTA, the North American Free Trade Agreement, is the best known example of a free trade agreement. Canada, the United States and Mexico do not share a common external tariff, despite allowing free trade on products traded among the three countries.

EU member states are not permitted to introduce charges that have an effect equivalent to that of customs duties on goods; nor are they permitted to impose quantitative restrictions or quotas. This means member states are obliged to allow goods that are legally produced and marketed in other member states to be circulated and placed on their domestic markets.

The EU's customs union has a CET which is imposed on all goods imported from third countries. Uniform implementation of the CET by customs authorities across the EU's external borders is ensured through the customs union code. Goods imported into the EU need to comply with Single Market legislation. In support of this, the EU has legislated to harmonise regulations (such as product standards and safety requirements) and to enforce the principle of mutual recognition (which requires member states to accept each other's certification and conformity practices). To expedite this process for third countries, the EU has concluded a number of mutual recognition agreements, recognising compliance procedures which demonstrate that goods meet the required EU standards.

Goods imported into the EU need to follow 'rules of origin', which determine where a product and its components were produced in order to ensure that the correct customs duty is levied. If goods consist of materials from more than one country, special rules apply to determine which country will be judged to be the country of origin. This is based on the origins of the materials, the value added in the process, and where the final substantial production phase took place. Such formalities are not necessary for goods manufactured inside the customs union.

The customs union was part of the foundation of the EU, enshrined in the Treaty of Rome, to such an extent that it can be said that it is "not a separate entity to which member states all happen to be a member". The UK will probably leave the EU customs union although it might seek to have a new customs union with the EU customs union – in some ways similar to Turkey's arrangements with the EU, but note that such arrangements are "incomplete" in that there is not complete tariff-free trade on all goods between the EU and Turkey (e.g. tariffs are applied on agricultural goods).

Outside of a customs union, and outside of the EU customs union, there are borders. What type, how they are operated, monitored or policed is determined on

a case-by-case basis. A recent article by Professor Kevin O'Rourke made the point very explicitly that Ireland cannot avoid a border or frontier with Northern Ireland if and when the UK leaves the EU – wishful thinking, he says, will not do away with this fact of life. See article here.

Professor O'Rourke's words echo a statement in a UK House of Lords report which said "*We are concerned that the UK Government appears not yet to have given sufficient consideration to the implications of leaving the EU's customs union. While there may be opportunities to use digital technologies to streamline customs procedures, we are troubled that the Government presently has no estimate of the cost to businesses of administrative delays, compliance with customs checks, and the rules of origin if the UK left the customs union, and that it was unable to confirm whether or not such information would be available before triggering Article 50. Our concerns are made more acute by the implications of leaving the customs union for the UK's land border with the Republic of Ireland.*"

We would recommend that both Professor O'Rourke's words of warning and the report's statement should be given further consideration as a matter of some priority.

Financial Services

Welcome to Spain

In an already crowded marketplace, the Spanish securities regulator, the Comision Nacional del Mercado de Valores (the CNMV), has published a detailed handbook (a "Welcome Programme") for investment and management firms currently based in the UK that may be interested in Spain as a possible jurisdiction to which to relocate their business post-Brexit.

In Autumn 2016, the Spanish government put together a task force comprising members of the Bank of Spain, CNMV and the economy ministry to highlight the attractiveness of Spain as a possible location for international financial services activities – and especially to businesses forced to leave the UK because of the loss of passporting rights. In December 2016, the regulator announced that it was "determined to contribute to making Spain the most appealing option for investment firms considering a move from the UK to another EU country". Now comes its Welcome Programme.

The CNMV is taking what is terms "a flexible approach" to implementing various measures with the aim of making the authorisation process in Spain as easy as possible. In this context, a single contact point will be created for applicants, who will be able to submit all documentation in English.

The CNMV is also developing a straight-forward authorisation process for those entities currently being supervised by the UK FCA. It will create standardised application forms to be submitted electronically, and pre-existing documents will be accepted (when possible). Firms will be informed whether they have obtained authorisation within two weeks of application, so will be able to start organising their move to Spain once formal authorisation is given, within two months from the application.

Somewhat controversially, the CNMV is permitting delegation of certain functions or activities to third parties, to facilitate partial relocation at the earliest opportunity. It "undertakes to adopt the most flexible approach provided that the relevant Spanish entity is not a totally empty shell and the outsourcing scheme complies with the MiFID requirements:

- the outsourcing firm must retain the ultimate responsibility;
- it must establish reasonable controls over outsourced functions; and
- all the information should be accessible to the CNMV as a supervisor.

As the UK will, in any event, remain a member of International Organization of Securities Commissions (IOSCO) and signatory of its multilateral memorandum of understanding, the CNMV does not foresee any difficulties in this regard".

There are two main elements of controversy here: first, the establishment of a task force comprised of the regulator and the state government and bodies and, secondly, the seemingly deliberate regulatory arbitrage - the latter comes within days of the Chair of the European Securities and Markets Authority (ESMA), Steven Maijoor, advocating that "the risk of regulatory competition" should be reduced.

See Welcome Programme here.

Germany: BaFin informs foreign banks

At the initiative of its President, Felix Hufeld, the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin) invited about 50 representatives of foreign banks to a supervisory workshop in Frankfurt on 30 January 2017 to discuss specialist issues related to Brexit.

In the weeks leading up to the workshop, many institutions had already contacted BaFin to find out about regulatory and supervisory issues in Germany. Brexit will cause a fundamental change in the legal framework for the banks.

The event focused on, for example, questions of risk management, compliance requirements under the German Securities Trading Act (Wertpapierhandelsgesetz – WpHG), requirements for internal models, rules governing large exposures, provisions on recovery planning and various aspects of the authorisation procedure pursuant to the German Banking Act (Kreditwesengesetz – KWG) and the Markets in Financial Instruments Directive (MiFID).

Deputy Chief Executive Director of Banking Supervision, Dr Peter Lutz, said after the meeting: "As committed Europeans, we do not see Brexit as a reason to celebrate. But now we need to take a pragmatic approach and offer institutions the necessary supervisory clarity for their strategic decisions." BaFin was doing this to give institutions wishing to move their business to Germany a reliable basis for their activities, but also to avoid any risks arising for the German financial sector, Lutz added. In this respect, he saw a special role for BaFin as the integrated German financial supervisor, since it monitors the whole of the financial market.

Read full article here.

Maintaining the EU's Financial Services agenda - the challenges

Over the past years, the EU has adopted more than 40 measures creating new rules for the EU's financial system. The European Commission is currently working on measures designed to improve access to non-bank financing in the EU. By and large each of these measures has been prompted by the financial crisis. They are largely aimed at establishing a safe, responsible and growth-enhancing EU financial sector.

Brexit will change things for EU financial services. However, we do not know in what way or to what effect. It could provide a positive stimulus to certain elements of the EU's financial services agenda. Alternatively, it could lead to some disruption and regulatory splintering.

Capital Markets Union (CMU)

Brexit makes the case for CMU stronger and more urgent. EU businesses need a broader range of funding options to grow and create jobs, and deeper capital markets are crucial for long term investment.

The Chair of the European Securities and Markets Authority (ESMA), Steven Maijoor, spoke on 8 February 2017 at the ALDE Party Seminar on the **"Review of the European Supervisory Authorities : Opportunities to ensure a safe and sound financial system"** at the European Parliament in Brussels. He said that "the future of European financial markets is directly linked to the CMU project. The need for a CMU has only increased and we cannot afford to have a CMU which would not deliver on full integration of EU financial markets, financial stability or investor protection". See review here.

A possible option would be to establish a single common regulator for CMU responsible for overseeing the development of capital markets and ensuring the application of harmonised regulation across the EU.

Third Country Access

Brexit is likely to lead to changes in the EU's access regime for non-EU financial service providers. Currently that regime is a patchwork of different measures. One implication of Brexit for the CMU project is that it raises questions on the future financial ties between the UK and the EU. Can UK-based financial firms maintain their access to the Single Market and, if not, how does this impact different capital market segments?

Brexit may incentivise the EU to reach an agreement on a more streamlined "single point of access" arrangement.

The Single Rulebook

The Single Rulebook is the 'backbone of financial sector regulation' in the EU and the EU's banking union. However, the Rulebook contains a number of national discretions and these create the potential for regulatory or supervisory arbitrage. This is becoming a concern as member states compete for post-Brexit business: delegation and outsourcing are two specific instances.

Brexit may provide the impetus for a reduction in those discretions and, as a result, increased harmonisation of EU financial services. Alternatively it may lead to greater lack of harmony and regulatory arbitrage.

Steven Maijoor also addressed this issue:

"The decision of the UK to leave the EU results in increased risks to consistent supervision. Let me explain this briefly. As UK-headquartered market participants are considering their options across the EU-27, it is essential that national regulators do not compete on regulatory or supervisory treatment. Some practical examples where this may be a risk include such issues as the possibilities to delegate and outsource to a UK entity, while being registered and supervised by one of the EU-27 financial markets regulators." He continued *"we need to strengthen the instruments available to ensure supervisory consistency across the EU. Some of these instruments will be generic, while some will be specific for individual pieces of legislation."*

Financial Supervision

Brexit will impact the European Supervisory Authorities in diverse ways. Most obviously, it will provide momentum to the proposals to fund the ESAs from industry levies, as Brexit will cut the EU's budget. Brexit may also lead to an increase in the ESAs' roles and powers, leading to stronger supervisory convergence. The UK has traditionally argued against conferring the ESAs with direct supervisory authority but Brexit will deplete the ranks of the member states seeking to limit the ESAs' powers in this respect.

Conclusion

According to Vlasdis Dombrovskis, the European Commissioner in charge of financial services policy, the EU's ambitious plans for the EU's financial sector will not be set aside by Brexit. Commissioner Dombrovskis has re-affirmed the focus to continue building the CMU, to complete a reliable framework for Europe's banking sector, and to stick to evidence based rule making. While, Brexit will be a real challenge the hope is that it will provide a stimulus to realise such plans and such focus. However, it will require considerable endeavour and goodwill to bring this about.

UK Government White Paper - some matters for reflection

The reaction to the UK government's white paper published on 2 February 2017 – "The United Kingdom's exit from and new partnership with the European Union" - has been quite muted. Most thought that it contained little more than that set out by Theresa May in her speech made on 17 January 2017 when she identified the 12 principles which will guide her government "in fulfilling the democratic will of the people of the UK".

However, in our view there are some matters which it raised and are worth further reflection. These include:

- The exceptional difference of the UK's trade balance with Ireland compared with other member states emphasises just how exposed Irish trade and business is to the UK and how important it is that Irish government gets a good hearing from its fellow 26 remaining member states.
- The supply chain statistics are interesting. In Ireland almost 17% of the foreign value added to Irish exports comes through UK – after Malta, that is the highest share of all member states. This means that any introduction of tariffs could seriously damage our export industries.
- One area of exposure for the UK is the services market (excluding financial services). The EU single market for services is not complete. However, with service inputs of 37% of the total UK exported manufactured goods, the UK really needs the EU to help it in this important area.
- The tone used in the white paper on financial services is very interesting, in some places almost placatory. It talks about "a legitimate interest in mutual EU/UK co-operation arrangements that recognise the interconnectedness of markets". It praises the EU for having "taken a number of steps to strengthen collective oversight of the sector". In addition, it suggests "strong co-operative oversight arrangements with the EU" to support and implement international standards to continue to safely serve the UK, European and global economy.
- The UK has recognised dispute resolution mechanisms will be required in respect of the withdrawal agreement and the free trade agreement(s) with the EU. It also recognises that different mechanisms have been tried elsewhere (e.g. CETA and NAFTA). However, somewhat ominously, the UK says that it will seek to agree a "new approach to interpretation and dispute resolution" with the EU. That might take some doing and some time.

The White Paper fails to discuss the UK's likely liabilities and costs on exit or provide detail on the regulatory authorities that will be needed to replace EU bodies upon the UK leaving the EU.

Some UK commentators believe that there are increasing grounds for concern that the plan as constituted cannot be credibly delivered. *"As such, multinational corporates may decide that the uncertainty in the UK's policy regime is best avoided, and may choose to vote with their feet rather than waiting to see the negotiated outturn"* - JP Morgan economist, Malcolm Barr.

Data Protection

What are the data protection law issues to be considered by UK based financial services businesses which are contemplating establishing operations in Ireland or expanding existing operations in Ireland, particularly with regard to UK-EU flows of 'personal data'?

Currently UK and Irish data protection laws and practice are very similar (but not identical). With effect on 25 May 2018 current UK and Irish data protection laws will be replaced by a new regime, which will consist primarily of the General Data Protection Regulation (the "**GDPR**"). For the period between 25 May 2018 and the date on which the UK leaves the EU, which is not expected to occur any earlier than March 2019 (the "**Exit Date**"), data protection law and practice in Ireland and the UK are likely to be even more similar than they are currently.

It is widely expected that with effect from the Exit Date, the UK will have national data protection laws in place that closely resemble the GDPR (which will no longer be applicable in the UK).

Under EU data protection law transfers of personal data to third parties based anywhere outside the European Economic Area which is not deemed by the European Commission to have an 'adequate' data protection regime are generally prohibited, subject to limited exceptions. With effect from the Exit Date, unless and until steps are taken to ensure that the UK is deemed by the European Commission to have an 'adequate' data protection regime, or an alternative mechanism with the same legal effect is agreed between the EU and the UK, transfers of personal data from EU member states into the UK will be prohibited unless the transferring entity takes appropriate steps to ensure it can rely on one of the exceptions.

If the UK's data protection laws after the Exit Date include similar restrictions regarding transfers of personal data from the UK to jurisdictions outside the UK which have not been deemed adequate by the UK, then transfers of personal data from the UK to EU member states will also require an 'adequacy' decision by the UK in respect of the EU's data protection regime or alternatively need to be based on equivalent exceptions.

The UK government has stated publicly that its Brexit goals include ensuring that, with effect from the Exit Date, cross-border flows of personal data between the UK and the EU could continue on the same basis as they were carried out before the Exit Date (the "**Ideal Position**"). In principle, the Ideal Position is achievable, however, the UK will require the co-operation and approval of the European Commission or another EU institution with the ability to agree an alternative legally binding mechanism to provide for this. It is likely that the Ideal Position will be achievable in the longer term, but remains to be seen whether, as a result of the Brexit negotiations, it will be in place with immediate effect from the Exit Date.

It would be prudent for any business likely to be engaging in transfers of personal data between the UK and other member states post Brexit to consider contingency plans so that if the Ideal Position is not achieved by the Exit Date it could, if necessary, continue engaging in such transfers in a way that would comply with EU law and UK law requirements for the period between the Exit Date and whenever the Ideal Position is achieved, however long that may be.

If you like a detailed analysis of the position, please contact Adam Finlay, Partner.

It's the Budget, stupid...

In our first Brexit Tracker published in September 2016 we said that "difficulties surrounding the EU budget promise to be amongst the most awkward and challenging" (see "Don't forget the EU Budget - That's going to be awkward").

Recognition of this fact has been slow to come in the UK. Now, however, as notice of withdrawal under article 50 is imminent, the point is becoming more understood. In a paper published by the Centre for European Reform with the challenging title **"The €60 billion Brexit bill: How to disentangle Britain from the EU budget"**, its author, Alex Barker, says "Britain's EU exit bill is possibly the single biggest obstacle to a smooth Brexit". See policy brief here.

The paper argues that the issues are surmountable. *"In pure economic terms, even that €60 billion estimate is relatively insignificant, especially when paid over many years. But disputes over EU money are almost always highly-charged and occasionally nasty. A mismanaged negotiation of the bill could easily poison Brexit divorce talks and future UK-EU trade relations."* Quite so.

The Economist newspaper – 7 February 2017 edition - identified the "three main elements" of the bill faced by the UK. *"All, in Brussels' view, derive from the legal obligations implied by Britain's EU membership. The first, and largest, covers the gap between payments made in the EU's annual budget and the larger "commitments" made under its seven-year budgetary framework, approved by Britain and the 27 other EU governments. This overhang has been growing steadily. Britain's share of what eurocrats call the reste à liquider (or amount yet to be paid) would be around €29.2bn."*

The second element covers investment commitments to be executed after Britain leaves the EU in 2019. Most of this is "cohesion" funding for poorer countries (e.g. motorways in Poland). Mr Barker reckons the UK's share could amount to €17.4bn. The UK government will struggle to explain why voters should be on the hook for payments made after Brexit. But the European Commission will argue that the UK's approval of the current budget, which runs until 2020, obliges it to pay.

Pensions make-up the third component. The liabilities for the EU's unfunded scheme stand at over €60bn. The UK may be prepared to cover UK nationals. But European officials insist that all liabilities are a joint responsibility, as eurocrats work for the EU, not their national governments. "This may be the fiercest row of all."

It would seem that the matter will, ultimately, have to be decided by the EU and UK negotiators on some political basis. Otherwise, the Court of Justice of the EU might have to interpret the legal positions of both sides. Mrs May has said that the UK will "bring an end to the jurisdiction of the CJEU in the UK" but in the absence of agreement on the size of budget bill she might have go back to the court for one last, and potentially, troublesome time.

Brexit negotiations: what role for the EU Parliament?

Whilst it has no formal role within the Brexit negotiation process, other than the right to receive regular information on its progress, the EU Council needs to obtain the European Parliament's consent, voting by a simple majority of the votes cast, before it can conclude the withdrawal agreement and any subsequent trade agreement.

In its own view, the right to withhold consent to the final agreement offers the EU Parliament "political leverage to influence the agreement and effectively makes it a veto player". MEPs have in the past used their veto in international negotiations when the European Commission and the member states have not involved them "properly" in the negotiation process.

Thus, the European Parliament has appointed Guy Verhofstadt MEP as its lead representative on Brexit matters. European leaders have agreed to brief the European Parliament before and after Council meetings at which ministers will discuss the negotiating mandate of the EU-27. Mr Verhofstadt, will also participate in the preparatory meetings of the European Council. But member states have refused to allow him to join the EU's negotiating team. Mr Verhofstadt has threatened that MEPs could vote down the final withdrawal agreement if EU leaders do not change their minds.

If the European Parliament vetoed the exit deal, the UK would leave the EU without an agreement on migrants' rights, customs arrangements or budget liabilities. This may be as risky for the EU as it is for the UK.

The UK based Centre for European Reform has noted that "threatening to vote down the final withdrawal deal just to make a point about inter-institutional co-operation could undermine the European Parliament's public standing. EU citizens expect MEPs to focus on addressing their problems rather than on playing power games." – see Centre for European Reform article.

However, the new leader of the SPD in Germany who will challenge Angela Merkel for chancellorship in September this year and the immediate past president of the European Parliament, Martin Shultz, indicated in a letter to EU President, Donald Tusk, in December 2016 that the "secondary role" of the Parliament in the Brexit negotiations would not be acceptable to MEPs. "If we are not adequately involved, we may not be able to give our consent. And in this situation, the UK would face the hardest Brexit possible" he said.

Although very early days, the election by the European Parliament of Antonio Tajani, an Italian MEP from the European People's Party (EPP), as its new president at end January 2017 is not expected to lead to any change of view regarding the Parliament's role, approach or positioning in the Brexit negotiations.

To a large degree, the wrangling between the EU institutions will likely play itself out during the next few years but the EU Council and EU Commission and the UK government have been warned that MEPs want to play as central a role as possible.

LMA - limiting the impact of Brexit on the syndicated loan markets

February 2017: The UK-based Loan Market Association (LMA), which works to improve liquidity, efficiency and transparency in the primary and secondary syndicated loan markets in Europe, the Middle East and Africa, has responded to the UK Treasury Committee's call for evidence on EU exit and transitional arrangements, in preparation for the start of official negotiations upon the triggering of article 50.

The call for evidence was regarded as particularly important as the UK government forms its strategy on exiting the EU and the priorities it must consider when negotiating with the 27 other EU member states.

The LMA response sets out the need for, and importance of, transitional arrangements for the loan market following Brexit, and is based on an on-going dialogue with its members, and the UK and EU governments, to ensure that the UK's exit has as little adverse impact as possible on the syndicated loan market and those participating in it.

The LMA points out that the loss of the CRD passport – which covers lending – will have a major impact on some lending and loan market activities conducted by banks in and through the UK, unless mitigating measures are agreed, including a transitional period following exit from the EU. The LMA provides a number of statistics quantifying the current extent of cross-border lending activity to illustrate the mutual benefit of a continued relationship with respect to the loan product. In addition, the LMA notes a number of complications that a complete severing of ties would have for both UK-based and EU-based lending institutions which the UK Government should consider when negotiating its exit and potential transitional arrangements.

Commenting on the Call for Evidence on EU Exit and Transitional Arrangements, Nicholas Voisey, LMA Managing Director, said:

"A sudden withdrawal of passporting rights could affect both the enforceability of existing loan agreements and the ability and willingness by lenders based in the UK and the EU-27 to enter into future agreements. Transitional arrangements are required to avoid these damaging effects. In the absence of such a commitment, lenders based in the UK and the EU-27 may start withdrawing lending activity, as well as existing agreements being affected, prior to the EU exit.

The transitional arrangement should be as broad as possible to ensure that the fullest range of rights and obligations remain available for discussion as part of the future UK-EU agreement. This should include the continuing right for UK banks and non-banks to make and own loans to EU-27 entities. Loans originated or acquired by passported firms at a time when those firms were validly authorised should also not be affected by the termination of the rights of those firms."

Environment and Climate Change - is the UK alive to the risks?

Membership of the EU has had a fundamental impact on environmental legislation in the UK and throughout the other EU member states, and Brexit will affect nearly every aspect of the UK's environmental policy. In recent years, UK climate change policy has also become increasingly enmeshed in EU policy.

The recent report of the EU Energy and Environment Sub-Committee of UK House of Lords European Union Committee suggests that there is a keen sense of the environmental risks for the UK that will arise from the UK's withdrawal. The report highlights key actions that will be needed to be taken by the UK to ensure environmental protections are not eroded as a result of Brexit.

The EU is the source of the majority of environmental legislation in the UK, and the UK's work to combat climate change is mostly conducted as part of the EU programmes in this regard. As a result, the UK's withdrawal from the EU will have a significant impact on environment and climate change policies in the UK and the means by which they are enacted. Furthermore, the UK's environment will remain inextricably linked to that of Europe after Brexit, so the UK and the EU will continue to be affected by one another's climate and environment policies.

Key findings: The Committee concluded that one of the key challenges will be that of effectively maintaining environmental protection through the UK Great Repeal Bill, given the complex and extensive nature of environmental legislation. It also identified a risk of a vacuum once the European Commission and Court of Justice of the European Union no longer have a role in the oversight and enforcement of environment legislation, given the significant impact those institutions have had on the UK's compliance in the past. The Committee noted that the UK may wish to co-ordinate environmental standards with the EU in the future, to both enable trade and ensure the effective protection of the natural environment. Interestingly and encouragingly, the Committee also concluded that the UK should explore diplomatic avenues to maintain its influence in climate negotiations post-Brexit.

Key areas considered in the report include:

- The Great Repeal Bill and its implications for environment legislation
- How environment law will be enforced after Brexit
- The extent to which the UK's trading relationship with the EU will affect its environmental standards
- The need to align and co-ordinate policy to manage the shared European environment effectively
- The resources that will be required to maintain environment protection after Brexit

View report here.

For Ireland, Brexit may prompt or lead to divergences between the legal and regulatory environmental regimes in the UK and Ireland/the EU, any of which could impact the investment decisions of both State and private businesses. Further, a requirement to comply with two different regulatory regimes (which could diverge significantly over time) would lead to an increase in compliance costs for all parties. The scale of the impact will largely depend on the terms of the UK-EU withdrawal agreement and the measures the UK puts in place to manage the transition from an EU legislative and regulatory regime to a new UK regime. This report may assist those who wish to limit divergence in the regimes.

Northern Ireland - devolved external affairs?

A paper published by Chatham House highlights that Brexit will have significant political and institutional implications for the external affairs of the devolved administration of Northern Ireland.

The paper, which makes an interesting contribution to the current debate within and regarding Northern Ireland, examines devolution and repatriation, arrangements for joint decision-making and makes certain recommendations for Northern Ireland (Scotland and Wales).

On devolution and repatriation, it notes that:

- The division between domestic and foreign policy has become increasingly blurred, for both the UK and the devolved administrations. Policy areas with both domestic and external elements include agriculture, fisheries, the environment and trade.
- While foreign policy remains reserved for the UK government, some policy areas with external dimensions have been devolved to Northern Ireland (subject to EU law). These include agriculture, energy, fisheries and the environment.
- Under current legislative arrangements, after the UK leaves the EU some of these powers are expected to return directly to the devolved administrations, which will then have more autonomy in these policy areas.

In respect of arrangements for joint decision-making, it states that:

- The institutional arrangement for decision-making between the UK and devolved governments - the Joint Ministerial Committee (JMC) – is not suited to developing a joint position on leaving the EU.
- The devolved governments do not feel that they are being included as partners around the decision-making table, due to the weak agenda-setting powers, frequency and duration of the JMC meetings.
- The devolved administrations have different priorities for the Brexit negotiations, and have different resources available to address these concerns. Therefore, creating a forum for developing a joint position between the devolved administrations and the UK government will be of critical importance for a successful Brexit settlement.

It notes that, to varying degrees, the devolved administrations are seeking to develop an international profile distinct from that of the UK. As we know, that is certainly true of Northern Ireland.

Northern Ireland has two major obstacles to direct interaction with the EU: it has limited resources to approach the major task of creating a diplomatic presence, and the divided nature of its government poses particular challenges to developing a coherent external image.

The paper recommends:

- Alongside invoking article 50, the UK government should undertake a review of which EU competences are to be returned to the devolved administrations under current constitutional arrangements.
- The JMC mechanism for inter-governmental decision-making should be revised for the challenge of negotiating Brexit. The revised forum should have an agreed timetable of meetings, enough time to address complex issues, and opportunities for 'parity of esteem' between the UK government and devolved administrations.
- The devolved administrations should develop further their positions and infrastructure for representing their interests directly to the EU and member states after Brexit.

View paper here.

Tax - Brexit means what?

To date the main focus of commentary on tax has been on the likelihood that customs duties may be levied on goods or that customs formalities may be introduced between the UK and the EU following Brexit. As tax is largely a member state competence, it is unsurprising that the UK's departure from the EU should not significantly impact on direct tax. While the EU does have a role in the context of indirect tax, especially in relation to VAT, as most countries within the EU including the UK have adopted their own laws which are compatible with the EU directives on VAT, the UK's departure from the EU should not have an immediate impact on the application of UK VAT.

Following Brexit, goods and services provided by EU based suppliers to customers in the UK will be regarded as being provided outside of the EU for VAT purposes and this is likely to change the current VAT position of certain suppliers especially where the services they provide are exempt financial services.

Following its departure from the EU, the UK will be at liberty to change its tax policy without having regard to the EU rules such as state aid and the directives on VAT. However, the expectation is that it is unlikely that the UK will seek to alter to any great extent the current VAT regime that applies within the UK given that VAT currently accounts for approximately 17% of all UK government receipts. The UK will be at liberty to alter the rates of VAT or extend out the range of reliefs provided for in relation to VAT but to date there has been no indication that it will seek to do so.

In relation to direct tax, while the rate of tax and specific tax rules applied is a member state competency, there are a number of EU instruments related to administrative co-operation, exchange of information and measures to tackle tax evasion. It is expected that the EU and the UK will seek to maintain some bilateral agreements on these provisions given that many of these measures were introduced as part of a global approach to tackling international tax avoidance and general tax compliance.

The EU has also adopted a number of directives designed to facilitate companies with operations in different member states. Particular directives address tax issues related to interest and royalties, mergers and dividend flows between companies. Following Brexit, residents of the UK will cease to benefit from the provisions of these directives. It is likely that some of the matters addressed by the directives will be covered by existing tax treaties that the UK has with individual members of the EU but companies will have to consider to what extent they are facing additional tax burdens because UK based companies will no longer be able to rely on the provisions of such directives.

Following its departure, the UK will have freedom to pursue particular tax policies without regard to EU rules. Following the referendum, the then Chancellor of the Exchequer, George Osborne, indicated that he would consider cutting the corporate tax rate in the UK to 17% by 2020. Mr Osborne's successor, Philip Hammond, has indicated that he is not necessarily going to pursue this strategy but there have been comments by the UK Prime Minister, Mrs May, that in certain circumstances the UK might look to change the basis of "Britain's economic model" and noting that it would have freedom to set competitive tax rates and embrace policies that would "attract the world's best companies and biggest investors to Britain". It remains to be seen whether any agreement arrived at between the UK and the EU in the context of Brexit will include provisions preventing the UK using what could be considered state aid by means of its tax policies to enhance its attractiveness as a place to do business in the future.

See House of Commons Library Briefing Paper CBP7630 of the 6th February 2017 here.

Brussels Insight

Unity remains the number one priority for the 27 member states who will be remaining in the EU post Brexit. With the article 50 notice of withdrawal imminent and negotiations to commence soon thereafter, so far at least, the EU-27 are sticking together and getting prepared for life without the UK.

According to EU Council President Donald Tusk, it is not just Brexit that compels the EU-27 to stick together for there are other, even more pressing, issues that need to be addressed by the group acting as a whole. In his view the EU faces three clear threats:

- geopolitical challenges from China, Russia, and the US;
- the rise of anti-EU, xenophobic and nationalistic sentiment within the EU; and
- the threat emanating from the "state of mind of the pro-European elites", with a decline of faith in political integration and doubt in the fundamental values of liberal democracy.

The EU Council leaders will meet on 25 March in Rome to celebrate the 60th anniversary of the Treaty of Rome. It is suggested that fundamental questions will be asked at that gathering about what Brexit means for the EU's future approach to issues such international trade, investment, technological changes and social protection standards, all of which impact on companies and businesses operating and the general business environment in the EU.

New York Insight

New York – and not the European cities of Frankfurt, Paris, Dublin, Amsterdam, Madrid, Warsaw or Luxembourg - may be the winner from any exodus of financial services from London unless Brexit negotiators on both EU and UK sides are sensible and pragmatic. The experience and expertise in NYC is reckoned to be so far ahead of most of the EU cities that, without early clarity on the future relationship between the UK and the EU, banks and other financial firms may set-up subsidiaries and transfer workers to New York.

This view has it that only NYC has the depth of expertise and capital flows to compete with London, as well as the necessary operational and regulatory infrastructure to assume London's huge volume of financial transactions. The derivatives market is one market in particular that stands out – without London, NYC is the only other city capable of clearing trading in all major currencies.

One source notes that banks in the UK are currently proceeding with two-year tactical plans to maintain continuity of service. However, these plans are likely to be sub-optimal for clients and market effectiveness, and will be dependent on reaching agreement about an interim business model that is acceptable to their new EU-27 regulators and can be put in place before the UK leaves the EU. This may lead to the conclusion that a switch to NYC represents the best way to ensure real continuity of service.

London Insight

An interesting group was established in the UK after the referendum last year, namely, '*The Legatum Institute Special Trade Commission*', which aims to present a roadmap for the many trade negotiations which the UK will need to undertake and to re-focus discussion in the UK on Brexit to a "positive conversation on opportunities, rather than challenges".

The group has just published its report *"Brexit, Movement of Goods and the Supply Chain"*

In its view, the optimal outcome of the negotiation process pursuant to Article 50 in respect of tariffs on trade between the UK and the EU would be a full free trade agreement. This would deal not only with tariffs and quotas but with all trade, services and investment matters, including customs cooperation and trade facilitation.

If this cannot be agreed, either due to differences between the parties or because of the expiry of the two-year negotiation period before terms can be concluded, the UK should offer an agreement that tariffs and quotas will not be applied by either side, as part of the framework for the future relationship, on an interim basis for a limited period with a view to a free trade agreement.

If the EU will not agree to this, it is still possible for the UK to remain competitive and lower the overall cost of manufacturing here by reducing tariffs on imports and benefiting from the depreciation in the value of sterling, for as long as the current exchange rate persists. The shape of such tariff reductions needs careful consideration, as unilateral tariff reductions must be extended to all WTO members under the WTO's MFN rule.

The group believes that the component parts of a successful Brexit include:

- a 'Prosperity Zone' consisting of a group of like-minded countries which agree to a massive reduction of trade barriers, behind the border barriers and economic distortions. Members might include US, Canada, Singapore, Australia, New Zealand, Mexico and Switzerland
- bilateral Agreements between the UK and a series of major trading partners such as India and China
- economic partnership agreements with developing countries (primarily in Africa, Caribbean and the Pacific region, so-called ACP countries) that are true economic partnerships involving access for their agricultural products, an end to tariff escalation and reduction of tariffs to advanced manufacturing as well as regulatory reform in these countries, which such countries often need to undertake but are prevented from doing because of powerful vested interest groups
- a productivity and consumer welfare agenda in the UK that leads to a reduction of distortions at home and policies that use free trade and free markets to lower key costs such as food and energy.

McCann FitzGerald

Upcoming Events

Date	Event
16 March 2017	**British Irish Chamber of Commerce Annual Conference**, DoubleTree by Hilton, Dublin. **Session: "Blueprint for Financial Services"** Chair: John Cronin, 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:

DUBLIN

John Cronin
Partner, Finance,
Head of Brexit Group
DDI +353-1-607 1284
EMAIL john.cronin@mccannfitzgerald.com

LONDON

Hugh Beattie
Partner, Investment Management Group
DDI +44-20-7621 1000
EMAIL hugh.beattie@mccannfitzgerald.com

BRUSSELS

Philip Andrews
Partner, Head of Competition, Regulated Markets, EU & Trade Law
DDI: +353-1-611 9143
EMAIL: philip.andrews@mccannfitzgerald.com

Laura Treacy
Senior Associate, Competition, Regulated Markets, EU & Trade Law
DDI +32-2-740 03 70
EMAIL laura.treacy@mccannfitzgerald.com

NEW YORK

Gary McSharry
Partner, Head of US Office
DDI +1-917-921 5077
EMAIL gary.mcsharry@mccannfitzgerald.com

THE LAWYER European Awards 2016 — *Law firm of the year - Republic of Ireland* ★★★★★ Winner

FT Top 50 INNOVATIVE LAWYERS 2016

Principal Office Riverside One, Sir John Rogerson's Quay, Dublin 2, D02 X576
Tel: +353-1-829 0000

London Tower 42, Level 38C, 25 Old Broad Street, London EC2N 1HQ
Tel: +44-20-7621 1000

New York Tower 45, 120 West 45th Street, 19th Floor, New York, NY 10036
Tel: +1-646-952 6001

Brussels 40 Square de Meeûs, 1000 Brussels
Tel: +32-2-740 0370

Email inquiries@mccannfitzgerald.com **www.mccannfitzgerald.com**

© McCann FitzGerald, February 2017