

Your Starter For Ten: BREXIT means ... ?

The Panel

It is genuinely difficult to know where to begin with the topic of BREXIT, a point borne out by the confusion which appears to reign across Whitehall on this very subject (unless of course, it is all a fiendishly cunning negotiating ploy).

There are of course many difficult subject matter questions about what we want from Europe which arise across many different fields of law and policy. A great deal of time could be spent by specialists in examining these topics (work which will now need to be accelerated). No doubt, trade-offs will be required in many areas, with discussions relying upon political goodwill – which may currently be in short supply on the continent and closer to home. However, the substance is also bound up with important questions of process – both external and internal to the UK. The analysis of these points is complex and challenging as a result. Attempting to create a framework in which to consider them is therefore of great importance.

A Potential Framework using Two Perspectives: Bottom Up and Top Down

One way of thinking about things, although there are overlaps, is what we might call ‘Bottom Up’ and ‘Top Down’ perspectives. The former looks at how the UK decides how to implement an external regime domestically, whilst the latter looks at the demands of the EU system (including its view of the peremptory nature of EU law) in relation to the UK.

‘Bottom Up’

- Parliament can incorporate what it likes into domestic law. A specific example would be the ECHR via the HRA 1998. The misleadingly titled ‘Great Repeal Act’ is proposed to do this for the body of EU law, entering into force on actual Brexit (i.e. a Top Down release), with repeal/amendments/improvements on a case by case basis. E.g. if desired, the Government can choose to preserve the EU citizenship rights of EU nationals in the UK.
- In principle, this is the straightforward bit – although examining the wide-ranging substantive law issues will take a very long time. The Bill and the process presents an opportunity for Parliamentary scrutiny, but potentially too late, as well as concerns about Henry VIII clauses.
- Ideally decide on a rule of interpretation for the Courts vis a vis the CJEU (both pre and post Brexit). But what about EU law that has no express implementing legislation/SI? And what about new EU law post-Brexit? A divergence problem that grows over time.

A Cross-Over Issue

- Art 50 trigger (Parliament or Prerogative?) is a cross-over issue between the perspectives. High Court case and NI High Court case focusing on devolution issues are ongoing and will end in UKSC – a question of how much ‘Bottom Up’ input into a ‘Top Down’ release?

‘Top Down’

- What comes after is a question of reciprocity. Questions about rights and obligations, e.g. whether UK citizens abroad in Germany have their status protected, depend on doing deals.
- A potential problem if in the external negotiations, concessions are demanded which would require ‘Bottom Up’ results – e.g. please repeal certain financial regulations – how to scrutinise this?

- Question of ordering/how to prioritise at least the following deals¹:
 1. Leaving EU (including division of EU liabilities)
 2. FTA/other form of Agreement with EU27
 3. Interim Deal between leaving and FTA/other form of Agreement in force (e.g. an extension to the 2 year window/EEA as a waiting room on the way to Brexit to avoid a 'cliff edge' scenario?)
 4. WTO arrangements (both adjusting/dividing existing EU Schedules with EU and negotiating with other countries)
 5. FTAs with countries where EU already has FTAs
 6. FTAs with countries where the EU does not have FTAs
- The UK-EU27 FTA will likely be a mixed agreement and therefore require ratification by the EU and each remaining Member State, including approval by national and regional parliaments and possibly referenda – i.e. political calculations, not just economic ones.
- What if the 'cliff edge' scenario happens, i.e. no replacement or interim deal with the EU? Do UK treaties revive to bind member States (e.g. Brussels Convention 1968 on Jurisdiction and Judgments)? Can the UK succeed to the EU's current FTAs (if it wanted to)? Which tariff and non-tariff barriers might apply to UK business abroad?

The Substance

A messy question (not least because it is affected by systemic issues like 'Customs Union' vs 'no Customs Union' – which impact 5 and 6 and whether Liam Fox keeps a job). Lots of people are likely to be disappointed. As a negotiating strategy, asking for the world makes sense, but when concessions are made, there will be a public trust problem. Being more realistic may be a worse negotiating strategy, but may create greater trust. A difficult choice. Further, lots of special interests will be in play. Including those of the Bar...

Some Further Reading

Paper by Andrew Tyrie MP (Chair of the Treasury Select Committee): <http://openeurope.org.uk/intelligence/britain-and-the-eu/giving-brexit-meaning/>

Paper by Nick Clegg MP & Others: <http://www.cer.org.uk/events/roundtable-brexit-challenge-future-international-trading-relationships-uk-nick-clegg-and>

Paper by Legatum Institute (perhaps reflective of Government thinking so far): <https://lif.blob.core.windows.net/lif/docs/default-source/publications/uk-government-recommendations-on-brexit-and-international-trade-negotiations-july-2016-pdf.pdf?sfvrsn=2>

Prof Mark Elliott (generally): www.publiclawforeveryone.com

The Bar Council's analysis at Sections (3) and (4) of Paper I (p. 30ff): <http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2016/june/barristers-publish-non-partisan,-fact-based-report-on-european-union-membership/>.

¹ Perhaps: Framework of 2 (incl with regard to 4), then 1 and 3, then 2 proper, then 5 and 6. Query whether 5 and 6 can be done as 'in principle' deals, because third countries might want to see what the UK-EU relationship looks like to assess what is on the table in negotiations.