

## Brexit (1): Planning for Brexit - key points

The purpose of this report is to summarise the key points from various RegZone publications. You can access the more detailed analysis via the [Brexit page](#) on the RegZone website.

### Planning for Brexit – financial institutions

#### [\*The challenge of Brexit: how CMS is helping financial institutions across Europe and beyond\*](#)

Our brochure covers information, intelligence and analysis; assessing the impact of Brexit and your potential response; lobbying and responding to consultations; and implementing your Brexit response.

### Understanding the Brexit process and assessing its impact

#### [\*Report 2 - The referendum vote – the start of the process\*](#)

##### Key points –

- The referendum result is advisory only and not legally binding but the UK government has committed itself to Brexit implementation (although this does not bind Parliament or future governments) and has established 2 new departments of state (for EU exit and international trade).
- The government believes it is entitled to give notice under Article 50 as a matter of prerogative power, without parliamentary approval or legislation.
- Parliament will have a heavy workload with detailed legislation to prepare the UK legal system for the removal of its EU legal foundations at the date when Brexit eventually takes effect.
- At least one legal challenge seeks to assert that prior parliamentary approval is required before Article 50 can be triggered. The government, however, appears committed to proceeding without a substantive vote in the House of Commons or Lords which might frustrate their plans to trigger Article 50 or their negotiation of the withdrawal and the new UK/EU relationship.

#### [\*Report 3 - The period of UK 'purgatory' – from referendum to exit\*](#)

##### Key points –

- Legally the UK remains part of the EU until the day the UK ceases to be a member of the EU and at many levels it is 'business as usual'.
- EU law and EU derived obligations are still fully applicable in relation to the UK. UK regulators have emphasised to firms the need to continue with implementation of new EU legislation such as MiFID II.
- At other levels, however, the referendum result has fundamentally changed the UK's political position within the EU resulting in a major loss of influence, now that it is 'on the way out'.
- During this period, there are likely to be considerable tensions arising from these conflicting legal and political realities.

#### [\*Report 4 – The Article 50 process - a legal analysis looking at 10 key questions\*](#)

##### Key points –

- The UK will need to make use of the Article 50 process to bring about Brexit.
- The process would be easy for an exiting state that does not require an extensive new relationship with the EU, but there are serious difficulties and uncertainties for the UK (which is looking for a new relationship).

- There is considerable uncertainty about key aspects of the Article 50 process (both for the exiting state and for the remaining bloc) including the scope of any withdrawal agreement and the simplified process for its adoption (which is based on a qualified majority, rather than unanimity, in the European Council/amongst the 27 states). Interpretation is ultimately a matter for the CJEU.
- Once the UK gives notice, it has no express right under Article 50 to control unilaterally the date when exit from the EU takes effect (BID) or to make exit conditional, for example on concluding a withdrawal agreement. BID can be controlled by agreement with Member States via a withdrawal agreement or using the delay mechanism.
- The UK and Member States/the EU institutions have not found common ground on whether and how a smooth transition from EU membership to the new relationship can be agreed and implemented.

#### ***Report 5 - Negotiating Brexit and the danger of a bad transition***

##### **Key points –**

- Financial services firms may need to make major structural/regulatory changes in order to continue to trade after the date when the UK leaves the EU (BID). These changes have long lead times. Business needs sufficient notice of the legal regime that will be in effect at BID (the BID regime) and how it is to comply with it.
- UK firms face 'catch 22' – they will need to have completed lengthy processes for local branch authorisation at BID but cannot start that process until BID.
- Whilst the UK advocates parallel negotiation of the withdrawal and the new trade agreement, but the EU does not. This issue may come before the CJEU
- Even with parallel negotiation, UK would cease to be an EU member at the Brexit implementation date (BID) but the new UK/EU relationship would be likely still to face years of uncertain member state ratification after the negotiations are completed.
- The UK has not proposed any legal process that, even with EU agreement, would avoid a damaging void in the UK/EU trading relationship arising at BID. Indeed there is a risk that political pressures for an early Brexit/BID might aggravate procedural difficulties to prevent a satisfactory transition.
- There is a risk that this 'void' scenario may also impact UK relations with non-EU countries and even the establishment of a full WTO relationship faces certain difficulties.
- The UK government intends to build a national consensus on the new relationship it will seek from the EU. It should also establish how, in legal process terms, a satisfactory transition is to be achieved. This should cover grandfathering rights for firms, as for individuals, a transitional regime and the mechanics to avoid or cover any potential void between Brexit and the new arrangements taking effect.
- There are to be preparatory talks between the UK and the EU/member states to prepare for the Brexit negotiations. A legal route map for the Brexit process and the negotiations should then be agreed before Article 50 is triggered. This should include not only the principle of parallel negotiation but also the legal mechanics and timetable for a good transition without a 'void'.

#### ***Report 6 - The key issues for financial services and the City of London***

#### ***Report 7 - The EEA – not the UK's preferred solution but a possible stepping stone? 10 things for the UK to learn***

#### ***Report 8 – Bilateral and bespoke – a UK/EU deal?***

#### ***Report 9 – 8 things the UK can learn from the Swiss experience – a perspective from CMS Switzerland***

#### ***Report 10 - The UK as a 'third country' under EU rules***

## **Report 11 - International trade with non-EU countries – the UK as a WTO member in its own right**

### **Key points –**

- The WTO is a rules-based system of trade, which is based on consensus and requires the agreement of all 164 members for any amendment to existing rules or new rules.
- WTO rules are based on the principle of trading without discrimination. This is a much more limited concept than the free movement principles of the EU single market and customs union. The WTO regime is particularly limited in relation to the services sector.
- The EU currently represents the UK at the WTO and the UK does not have its own schedule of commitments and concessions setting out how it would treat foreign products and service providers. These would have to be negotiated with the consensus of all WTO members. Such negotiations have been likened to (typically long and complex) accession negotiations by the Director-General of the WTO and the UK will have to ensure it has the resources and expertise for such talks
- There are legal difficulties with the UK being able to negotiate these concessions prior to its exit of the EU and this would require goodwill on the EU's part. The UK should provide for this possibility in preparatory talks with the EU ahead of triggering Article 50.
- The UK must ensure that after giving notice and whilst negotiating Brexit, the UK can conduct 'parallel negotiations' of its post-Brexit WTO status and schedule (as well as PTAs) and bring this into effect at the Brexit implementation date (BID).

## **Report 12 - The WTO and Financial Services**

### **Report 13 -The Scottish Dimension – a perspective from CMS Edinburgh**

### **Key points –**

- The UK Government has said there will be full consultation with the Scottish Government before the UK triggers Article 50, but appears to be proceeding on the basis that the entire UK (including Scotland) will exit the EU.
- There is considerable resistance to this idea from the Scottish Government/Parliament, given the clear majority in Scotland which voted to remain in the EU.
- Work is under way in Scotland to look in detail at the ways in which Scotland might remain in the EU or re-establish EU membership. These range from a second referendum on Scottish independence, the Greenland option whereby the rest of the UK exits but Scotland remains, to an argument that the Scottish Parliament can veto any UK exit.
- It remains to be seen how the UK government's proposals for a new relationship with the EU (whatever they may be) will be viewed in Scotland.

## **Report 14 - Removing the EU foundations in the UK legal system**

## Contact



**Paul Edmondson**  
Partner (UK)  
+44 (0)20 7367 2877  
paul.edmondson@cms-cmck.com



**Ash Saluja**  
Partner (UK)  
+44 (0)20 7367 2734  
ash.saluja@cms-cmck.com



**Simon Morris**  
Partner (UK)  
+44 (0)20 7367 2702  
simon.morris@cms-cmck.com



**Aidan Campbell**  
Partner (UK)  
+44 (0) 141 304 6112  
aidan.campbell@cms-cmck.com



**Caroline Hobson**  
Partner (UK)  
+44 (0)20 7367 2056  
caroline.hobson@cms-cmck.com



**Jacqueline Vallat**  
Associate (UK)  
+44 (0)20 7367 2819  
jacqueline.vallat@cms-cmck.com



**Kaspar Landolt**  
Partner (Switzerland)  
+41 44 285 11 11  
kaspar.landolt@cms-vep.com

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