

2018 Legislative Drafting
Conference:
Charting Legislative Courses
in a Complex World

Brexit

History – EEC/EC/EU

- The entry of the UK into the EEC (and the other two Communities), on January 1, 1973, came after many hard-fought political battles.
- First application in 1961 – rejected by France (under President de Gaulle) in 1963.
- Second application in 1967 (together with Denmark and Ireland) – vetoed again by France.
- President de Gaulle resigned in 1969.
- After that the EEC Members decided to open accession negotiations.

History: EFTA

- European Free Trade Association (EFTA), established by Convention signed in Stockholm (1960), known as the “Stockholm Convention”.
- Original EFTA membership (1960): Austria, Denmark, Norway, Portugal, Sweden, Switzerland and United Kingdom.
- Current EFTA membership: Iceland, Liechtenstein, Norway and Switzerland.
- The EFTA countries (minus Switzerland) and the EU countries together are Parties to the European Economic Area Agreement (EEA, in force January 1, 1994).

Referendum

- Set of arrangements between the UK and other EU Member States, agreed in the European Council, February 18/19, 2016:
<http://data.consilium.europa.eu/doc/document/ST-1-2016-INIT/en/pdf>
- Referendum held on June 23, 2016.
- Participation rate of eligible voters: 72.21%

UK Referendum Question 2016

- “Should the United Kingdom remain a member of the European Union or leave the European Union?”
- Options to cross off:
 - (1) “Remain a member of the European Union” (48.11%).
 - (2) “Leave the European Union” (51.89 %).

Subsequent events in the UK

- Prime Minister David Cameron resigned.
- Theresa May became Prime Minister on July 13, 2016.
- General elections June 8, 2017: turnout 68.7%
- Results (total 650 seats):
 - (1) Conservatives: 318 (-13);
 - (2) Labour: 262 (+30);
 - (3) Democratic Union Party: 10 (+2).

EU withdrawal process

- Article 50 of the Treaty on European Union (TEU) – included through the Treaty of Lisbon (in force since December 1, 2009).
- Without TEU Article 50, it was unclear what the withdrawal process for a Member State would be like.
- Letter from UK Prime Minister to the European Council, delivered on March 29, 2017:
<https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50>
- Unless otherwise agreed, UK will stop being a Member of the European Union at the end of March 29, 2019.

Article 50 TEU (cont'd)

- Question whether the UK could unilaterally revoke the withdrawal letter anytime before March 29, 2019, or whether a reversal would require the consent of the EU 27.

Article 50 TEU

- Period of two years from withdrawal letter to negotiate withdrawal agreement.
- Conclusion by Council by qualified majority (here 72% of EU Member States and 65% of the population of the Member States – normal qualified majority is 55/65) after consent by the European Parliament.

Draft text of EU-UK Agreement - made public March 19, 2018

- https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf
- Although certain parts are indicated as agreed, the agreement in its totality must be agreed to by negotiators (and after that by the Government of the UK and the Parliament in London, as well as by the Council of Ministers of the EU and the European Parliament).

Split between “divorce agreement” and future trade agreement

- In December 2017 the UK and EU agreed to a transition period (sometimes referred to as “implementation period”) from March 30, 2019 through December 31, 2020.
- The plan is that the UK will end its membership in the EU at the end of March 29, 2019.
- The EU’s departure will be governed by the withdrawal agreement, which is currently being negotiated but will not contained the rules for the future trade relationship.

Transition period

- During the transition period EU law will continue to apply to the UK for EU citizens' rights to reside in the UK.
- Also, the transition period will be used to negotiate the new trade relationship between the UK and the EU, on the basis of a framework that will presumably accompany the withdrawal agreement.

Agreed areas of the withdrawal agreement

- White Paper on Legislating for the Withdrawal Agreement (July 2018), after the Chequers Cabinet meeting and the resignation of David Davis and Boris Johnson.
- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728757/6.4737_Cm9674_Legislating_for_the_withdrawal_agreement_FINAL_230718_v3a_WEB_PM.pdf

Agreed areas (cont'd)

- The White Paper confirms that the following parts of the March text of the withdrawal agreement are agreed:
 - citizens' rights (chapter 2),
 - implementation period (chapter 3) and
 - negotiated financial settlement (chapter 4).
- The White Paper also includes a discussion of the procedures for Parliament's approval of the terms of withdrawal, including the vote on the final deal (chapter 5).

EU citizens' rights

- The agreement will cover all EU citizens legally resident in the UK before the end of the transition period of March 30, 2019 – December 31, 2020.
- Around 3.5m EU (excluding Irish) nationals were estimated to be resident in the UK from January 2017 to December 2017.
- Around 0.8m UK citizens were resident in other EU Member States (excluding the Republic of Ireland) on 1 January 2017.

EU citizens' rights during the transition period

- On exit day (29 March 2019) the EU (Withdrawal) Act 2018 will repeal the European Communities Act 1972 (ECA).
- The rights of EU citizens to reside in the UK (and related rights) will continue to apply in the UK (subject to limited exceptions) during the implementation period, by virtue of a transitional provision, in which the EU (Withdrawal Agreement) Bill will amend the EU (Withdrawal) Act 2018 (so that the effect of the ECA is saved for the time-limited implementation period).
- The EU (Withdrawal Agreement) Bill will end this effect of the ECA on 31 December 2020.

EU citizens' rights during the transition period (cont'd)

- The position of the CJEU will be preserved during the transition period and will be the final interpreter of the EU rules that will continue to apply in the UK during that period.

EU citizens' rights after the transition period

- For the eight years after December 31, 2020, UK courts will be able to make references to the CJEU in relation to Part Two of the Withdrawal Agreement (on citizens' rights). This is similar to the mechanism of Article 267 of the Treaty on the Functioning of the European Union (TFEU).
- This will apply only where UK courts consider that a CJEU ruling on a question is necessary for the UK court or tribunal to be able to give judgment in a case.

EU-UK financial settlement

- The UK will contribute to the EU budget in 2019 and 2020 as if it were still an EU Member State for these full two years.
- It will be responsible for its share in EU liabilities and contingent liabilities as of December 31, 2020.
- UK Government stated (in January 2018) its estimate of the settlement to be in the range of £35-39 billion.

The sequence of action by UK Parliament outlined in the White Paper

- First: approval of the final deal as negotiated under the Article 50 TEU process.
- Second: Government to introduce **EU (Withdrawal Agreement) Bill** to implement the Withdrawal Agreement in UK law.
- Third: before ratification of Withdrawal Agreement takes place, there will be a final scrutiny process – deposit before Parliament for 21 days. Adverse resolution could stop ratification.
- See section 13 of **EU (Withdrawal) Act 2018**.

The future UK-EU trade relationship

- Other White Paper: The future relationship between the United Kingdom and the European Union, with emphasis on trade (also of July 2018).
- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf

Customs checks between Northern Ireland and the Irish Republic

- Brexit means that the UK will be outside of the EU single market.
- Will border checks will be re-established between Northern Ireland and the Irish Republic?
- UK proposed new free trade area of EU and UK with common rules for goods (under a “Facilitated Customs Arrangement”).

UK-EU single market for goods?

- The UK has proposed an elaborate scheme that would in effect allow it to continue, at least for trade in goods, as if it were still an EU Member State.
- The EU has already indicated that the UK scheme is not acceptable.

What remains to be negotiated?

- Far too much is still no agreed in the Withdrawal Agreement.
- A Free Trade Agreement remains to be negotiated during the transition period.
- Although the trade relationship will not be set out in the Withdrawal Agreement, it must be clear what the governing rules are as of March 30, 2019.

The default trade rules

- In the absence of specific rules agreed between the UK and the EU, the default rules on March 30, 2019 will be those of the WTO.
- Some of those WTO rules will be clear but others will not .(because the UK is currently covered in the goods area (GATT 1994) by the common external tariff of the EU and in the services area by the EU's schedules to the General Agreement on Trade in Services (GATS).
- In the absence of specific transitional rules, there will be border checks and probably much confusion.
- It is therefore in the interest of both sides to negotiate clear transitional rules for the trade relationship during the transition period.

UK legislation

The Queen's Speech at the beginning of the 2017-19 Session of the UK Parliament announced Bills on:

- Immigration
- Customs
- Fisheries
- Repeal of the European Communities Act
- Nuclear energy

The European Union Referendum Act 2015

An Act to make provision for the holding of a referendum in the United Kingdom and Gibraltar on whether the United Kingdom should remain a member of the European Union

The *Miller* litigation

- *R (on the application of Miller and others) v Secretary of State for Exiting the European Union* [2017] UKSC 2WLR 583
- Was the UK Government able, in exercise of the Royal Prerogative, to give notice of intention to withdraw from the EU under Article 50 TEU?

European Union (Notification of Withdrawal) Act 2017

An Act to confer power on the Prime Minister to notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU.

European Union (Withdrawal) Act 2018

An Act to repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU.

European Union (Withdrawal) Act 2018

The European Union (Withdrawal) Act

- Repeals the European Communities Act
- Preserves all EU legislation in UK law as it stands at “exit day”
- Confers wide powers to amend legislation to rectify “deficiencies” that arise once the UK leaves the EU
- Enables UK Ministers to legislate for the devolved administrations

Taxation (Cross-Border Trade) Bill

A Bill to impose and regulate a duty of Customs by reference to the importation of goods into the United Kingdom; to confer a power to impose and regulate a duty of customs by reference to the export of goods from the United Kingdom; to make other provision in relation to any duty of customs in connection with the withdrawal of the United Kingdom from the EU; to amend the law relating to value added tax, and the law relating to any excise duty on goods, in connection with that withdrawal; and for connected purposes.

Trade Bill

A Bill to make provision about the ratification and implementation of international trade agreements; to make provision establishing the Trade Remedies Authority and conferring functions on it; and to make provision about the collection and disclosure of information relating to trade.