

## client alert

EU | BREXIT | LEGAL UPDATE

3 FEBRUARY 2017

### BREXIT LEGISLATION PASSES ITS FIRST VOTE AND THE UK GOVERNMENT WHITE PAPER

#### THE VOTE

On Wednesday 1st February, the House of Commons voted in favour of the European Union (Notification of Withdrawal) Bill (the Bill) by a majority of 498 to 114. Conservative MPs voted in favour, with one exception: Kenneth Clarke, former Chancellor of the Exchequer, Home Secretary, Lord Chancellor and Justice Secretary under three Conservative Prime Ministers. The leader of the Labour party, Jeremy Corbyn, had ordered a three line whip requiring all Labour MPs to vote in favour of the bill; in the event 43 Labour MPs (including some shadow ministers) defied the whip and voted against the bill. All the Liberal Democrat and Scottish National Party MPs voted against the bill. Next week there will be three days of debate of the numerous amendments that have been proposed before a second vote. After that the Bill will go to the House of Lords where it will be subject to a similar process of votes and debate, expected to begin on 20 February. The Prime Minister would appear to be on track to keep her promise to trigger Article 50 by the end of March. Indeed there is some speculation that she will do so well before that deadline, on 8 March, just ahead of the EU Council meeting scheduled for 9 March.

#### THE WHITE PAPER

Yesterday the Government issued a White Paper on Brexit, entitled *'The United Kingdom's exit from and new partnership with the European Union'*. White Papers are policy documents produced by the Government that set out their proposals for future legislation and provide a basis for further consultation and discussion with interested or affected groups before legislative steps are taken. The Government had previously resisted demands for a White Paper on Brexit, claiming that it would be self-defeating to reveal the UK's negotiating position in advance of the commencement of the talks. After Mrs May's speech at Lancaster House on 17 January (the Lancaster House speech), the Government continued to resist calls for a White Paper, on the grounds that the speech provided as much information as Parliament needed. Finally, in his response to the Supreme Court judgement on the Miller Case on 24 January, the Secretary of State for Exiting the EU, David Davis, committed the Government to producing a White Paper, which it has now done, although the fact that the first round of voting on the Bill had taken place before its publication is unusual and has attracted a great deal of criticism. In fact there is very little new in the White Paper, which is best seen as an expansion of the 12 objectives first set out in Lancaster House speech. The most significant of these are discussed below.

## PROVIDING CERTAINTY AND CLARITY

The Government is proposing to introduce the Great Repeal Bill to remove the European Communities Act 1972 from the statute book and convert the '*acquis*' (the body of existing EU law) into domestic law, and are promising another White Paper on that Bill. The Government specifically states that it 'believes the preserved law should continue to be interpreted in the same way as it is at the moment'. That approach raises the somewhat alarming prospect of English law continuing to hold as binding judgements and rulings on EU legislation which are subsequently overruled or refined after Brexit. It remains to be seen whether that is an unintended consequence or the actual proposal.

The White Paper repeats the Government's assertion that it '*will need to keep its positions closely held and at times to be careful about the commentary we make public*'. It promises that '*We will, however ensure that the UK Parliament receives at least as much information as that received by members of the European Parliament*'. That undertaking is not likely to offer much consolation to UK Parliamentarians incensed about the Government's failure to consult or disclose its position; it may in fact be somewhat inflammatory.

## TAKING CONTROL OF OUR OWN LAWS

The Government is particularly keen to bring an end to the jurisdiction in the UK of the Court of Justice of the European Union. We now know that '*the UK will seek to agree a new approach to interpretation and dispute resolution with the EU*'. Although the White Paper set out a number of examples of how other international agreements approach interpretation and dispute resolution, it also specifically states that '*the actual form of dispute resolution in a future relationship with the EU will be a matter for negotiations between the UK and the EU, and we should not be constrained by precedent*'.

## CONTROLLING IMMIGRATION

The White Paper commits the Government to designing an immigration system that will ensure that the UK is able to control the numbers of people who come to the UK from the EU. The Free Movement Directive will be disapplied after Brexit and the migration of EU nationals will be subject to UK law. The White Paper does not address the issue of how the current skill shortages in the UK are to be met if EU migration is reduced, nor does it commit to a reduced level of immigration.

Notably the Government suggests that the new immigration arrangement will favour highly-skilled individuals: '*We will create an immigration system that allows us to control numbers and encourage the brightest and the best to come to this country, as part of a stable and prosperous future with the EU and our European partners*'.

## SECURING RIGHTS FOR EU NATIONALS IN THE UK, AND UK NATIONALS IN THE EU

Around 2.8 million EU nationals are estimated to be resident in the UK, and around 1 million UK nationals are resident in other EU countries. Securing the status of these individuals is stated to be one of the Government's early priorities for the negotiations; indeed the Government says it would have liked to resolve the issue ahead of the formal negotiations, but '*this has not proven possible*'. That is because of the Government's insistence on reciprocity; there has been widespread condemnation of the Government's failure to act unilaterally and

guarantee the rights of EU nationals in the UK. The Government claims in the White Paper that it wishes to *“reach a reciprocal deal with our European partners at the earliest opportunity”*, although the Government's insistence on leaving this issue to be resolved along with many others through negotiation suggests we may yet be some way away from its resolution.

## PROTECTING WORKERS' RIGHTS

The White Paper notes, rightly, that UK employment law already goes further than many of the standards set out in EU legislation. It has launched an independent review of employment practices in the modern economy, examining phenomena such as the growth in self-employment, the shift from hiring to contracting, the rising use of no-standard contract forms and the use of on-demand platforms.

## ENSURING FREE TRADE WITH EUROPEAN MARKETS

As clarified in the Lancaster House speech, the UK is not seeking membership of the Single Market, but instead is looking for a new strategic partnership with the EU, including an *‘ambitious and comprehensive’* Free Trade Agreement and a new customs agreement. The Free Trade Agreement *‘may take in elements of current Single Market arrangements in certain areas’*. The paper notes that the EU is the UK's largest export market and the UK is the largest goods export market of the EU27 taken as a whole. Whether it is wise to take the EU27 as a whole is debatable, given that unanimity will be required for some agreements, and there are some member countries who stand to lose very little export activity to the UK.

The paper notes the significance of financial services to the UK economy, and the importance of the passporting arrangements that allow 5,000 UK firms to provide financial services across the rest of the EU and around 8,000 European firms to provide services into the UK. The Government is relying on *‘a legitimate interest in mutual cooperation arrangements that recognise the interconnectedness of markets’* to ensure that there will be a good deal for the UK on financial services. TheCityUK, a lobbying group that promotes the City's interests, recently published a paper in which it suggested that if no deal on financial services is reached, the UK *‘should offer arrangements to keep EU businesses here, similar to those available to non-EU businesses, thus maintaining London as the principal location for Europe's financial sector’*, i.e. that London could preserve its position by continuing to allow access to EU companies even if UK companies had no reciprocal access to the EU.

In order for the UK to negotiate its own trade agreements with other countries, it cannot stay part of the Customs Union. Beyond stating that the UK wants cross-border trade with the UK to be as frictionless and seamless as possible, the White Paper does not indicate what the terms of any customs agreement with the EU would be.

## SECURING NEW TRADE AGREEMENTS WITH OTHER COUNTRIES

The White Paper confirms that the UK is looking *‘to increase significantly UK trade with the fastest growing and most dynamic export markets in the world’* noting that whilst the EU is an important trading partner for the UK, *‘the importance of other markets outside the EU has been increasing in relative terms. The share of UK exports to the EU has declined from 54 per cent in 2000 down to 44 per cent in 2015’*. The significance of the United States as a trading partner of the UK is mentioned twice in this section of the White Paper, which notes that the US is the UK's single biggest export market on a country-by-country basis, and that the *‘new United States Administration has said that they are interested in an early trade agreement with the*

UK. 'President Trump did indeed give such an indication, but it is unclear how that relates to his stated intention to strongly encourage Americans to *'buy American'*.

The White Paper confirms that work is already underway to develop the UK's independent membership of the World Trade Organisation. The intention is to *'replicate as far as possible [the UK's] current position as an EU Member State, thus creating a mutually beneficial, simple and inclusive outcome'*.

## COOPERATING IN THE FIGHT AGAINST CRIME AND TERRORISM

The White Paper commits the UK to continuing to work with the EU to preserve UK and European security and to fight terrorism and uphold justice across Europe. It is clear from the paper that the UK Government considers its security and intelligence expertise to be important factors in its favour in the balance of power between it and the rest of the EU.

## DELIVERING A SMOOTH, ORDERLY EXIT FROM THE EU

As it has previously stated, the Government wants *'to avoid a disruptive cliff-edge'* and is hoping for a phased process of implementation after the two year Article 50 process has concluded. Immigration controls, customs systems, criminal and civil justice, and the legal and regulatory framework for business are mentioned as areas where a phased in approach might be preferable. Nevertheless the mantra that *'no deal for the UK is better than a bad deal for the UK'* from the Lancaster House speech is repeated. The Government has specifically ruled out a second referendum but has promised that Parliament will have a vote on the final negotiated deal, after it has been approved by the European Parliament. Should that vote not be achieved, the UK would be out of the EU by operation of the Treaty, with *'no deal'*. It is difficult to imagine more of a cliff edge than that.



Check out our dedicated **Gide / Brexit** LinkedIn page to learn more about the consequences and legal implications of Brexit.

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