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Digital Markets

John Higgins CBE (John was Director General of the DigitalEurope trade association until the end of March 2017)

There have been criticisms of the Single European Market suggesting that it does not work as smoothly as might be wanted, for example the experience of blablacar (carpooling). Nevertheless a starting question for EU exit must be - 'What do you want from the proposed free trade deal'? In that context the role of industry is to explain what it would like the government to achieve.

Stepping back from that first question, the team of the EU's chief negotiator, Michel Barnier, is anxious to define what a *worst-case* scenario might look like. And that worst-case scenario might be that the UK exits the EU with no deal, having also failed to carry out the negotiations in order to become a WTO member in its own right. (NB: The WTO trade facilitation agreement only recently came into effect ['WTO's Trade Facilitation Agreement enters into force 22 February 2017', https://www.wto.org/english/news_e/news17_e/fac_31jan17_e.htm] .) If that were the case then the UK would not be in a position to benefit from the certainty of the WTO Agreement on Information Technology.

What then could be the situation of a British exporter of electronic goods to Europe - supposing that the product in question is a virtual reality headset designed for use in a theme park ?

1. Instead of duty-free entry to Germany a 12 to 15% tariff might apply;
2. Customs checks may be replicated in Germany;
3. Checks on the incorporation of third country parts may be carried out in Germany to see whether the UK content rules respect the [EU] rules on local content;
4. Regarding mobility of workers, a question may arise about whether personnel can be sent to provide training and on what basis they could get access to a blue card to work in Germany;
5. If the equipment uses data analytics there may be a question about data privacy (which can arise at the level of the German Länder as well as at the Federal level in Germany). Even if the UK says that it will respect data privacy rules - how soon will the EU be ready to issue a certificate of equivalence?
6. If development was being carried out within a Horizon 2020 project will there be any room for continuing involvement of the UK company in that process?
7. Will there be access to the European patent in order to protect the intellectual property rights throughout the EU - or not?
8. Concerning production, will the production be made according to the appropriate ETSI / CENELEC standards? Will certification to those standards be available in the UK? Will a separate UK standard be available or used so that, in practice, two versions of the same product have to be made?
9. Will procurement opportunities in Europe continue to exist or will companies from other European countries get preference in large procurements?
10. Regarding dispute resolution if there is a problem in Germany and there is no route to the Court of Justice of the European Union will the company therefore have to litigate in front of the German courts in the German language?
11. Who will get the benefit of the tariff payments that are collected in Germany?

University of Kent
The UK's European university

A New Bi-Lateralism?

« Prospectives » for future UK ~ EU relations

BSIS Brussels: 17 March 2017

Introduction: Professor Nicholas Grief

Kent Law School and Dean for Medway

At a colloquium held in the University of Kent Brussels School of International Studies (**BSIS**) *we asked: In light of the United Kingdom's decision to leave the European Union, how will these two different 'unions' continue to collaborate on major 2Ist century challenges?*

After an overarching keynote presentation, in which my colleague Professor Richard Whitman considered what a constructive UK-EU relationship might look like in the future, we focused on three sectors of crucial importance for 21st century economies: energy markets, digital markets and the framework for competition. With my thanks to all the participants, this newsletter presents some of the insights from that meeting. I hope that you will enjoy reading it.

Nicholas Grief

Brexit - the state of play

Professor Richard G Whitman, Director School of Politics and International Relations

The 23 June 2016 UK referendum took place pursuant to a commitment made in the Conservative government's election manifesto. On the basis of the referendum result the government is taking the view that there is a clear mandate to leave the European Union.

In result, following the request from the Scottish government for a new referendum on Scottish independence, the Prime Minister is now faced with a 'two union' problem. On the one hand the relationship with the EU and, on the other hand, the relationship with Scotland.

This begs the question of whether there can be new models for *differentiated relationships* between the Parliament in Westminster and the devolved assemblies. Finding a solution will call for creativity.

Article 50 was triggered by the letter sent by the Prime Minister, Mrs May, to the President of the EU Council of Ministers, Mr Tusk. It seems clear that the '*party political class*' in the United Kingdom have adjusted to Brexit: although it has taken them until now to do so.

On the one hand there will have to be the negotiations on withdrawal (which should take a two year period). The period of two years allowed for withdrawal will, seemingly, be reduced to about 350 days in practice.

> The current Scottish government was elected with a clear mandate that the Scottish parliament should have the right to hold an independence referendum if there was clear and sustained evidence that independence had become the preferred option of a majority of the Scottish people, or if there was a significant and material change in the circumstances that prevailed in 2014 - such as Scotland being taken out of the EU against its will.
> Source: consultscotland.gov.uk .

It also seems clear that there will need to be a multi-year period of transition permitting the adjusments that will be needed.

One thing is the terms for separation - another thing is the terms for the future relationship with the EU. We know that 'Brexit means Brexit' in a political sense.

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We also know that the relationship that the UK is looking for does not resemble any other existing relationship with the EU.

In practice the outlines of the group of minimum agreements that will be required will need to be defined by the end of this year.

Whether or not the current negotiating structures (which are very 'cabinet centric') are suboptimal is an open question.

Brexit - the state of play (continued from page1)

Although the exit legislation is destined to be included in legislation referred to as the Great Repeal Bill (which will in practice amount to a Great Continuity Bill) nevertheless the *destination of the negotiations needs to be set*.

For the moment it seems that the politics of 'Brexiting' will trump negotiation of the free trade agreement (**FTA**). The FTA will have to cover at least the following issues: common objectives, institutions and dispute resolution. Currently it seems the destination will be an arrangement somewhere between the arrangements previously concluded between the EU with Switzerland, Singapore and Canada.

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There will have to be an adjustment to what the UK thinks about the EU. Whereas the government's view has (hitherto) been generally supportive of the single market - it may become more ambivalent on the subject as the Brexit date approaches.

There is now to be a general election in the United Kingdom on 8 June 2017. That will be preceded by Presidential elections in France and followed by elections for the German Bundestag in September.

Even though the British government wants to be in a position to negotiate 'unencumbered', the role of the devolved parliaments must be taken into account. One important question in the article 50 process is whether the UK is properly prepared to deal with the European Parliament which, in the end, will have a crucial role to play.

The governments of the member states should have decided on the negotiating mandate of the European Commission by the end of April 2017.

In the end, it could be that what results in 2019 is a temporary arrangement with a transition period. However, such temporary arrangements have a habit of becoming permanent.

For example the arrangements with Turkey and Switzerland have de facto crystallized in this way.

Oil and Gas Markets

David Powell, Former British Ambassador to Norway,
Head of the Vice-Chancellor's office, University of Kent,

David Powell was previously involved in the negotiation of a North Sea agreement with Norway including on renewables. At the time carbon capture and storage was a significant part of that negotiation. (See now: Lowest Cost Decarbonisation for the UK: The Critical Role of CCS http://www.ccsassociation.org/news-and-events/reports-and-publications/)parliamentary-advisory-group-on-ccs-report/

The United Kingdom's negotiations will open domestic issues, including on energy and climate change policy, which are of significant importance.

However, energy and climate change policy may be given a lower priority than they deserve because they will be taken to be *easier* than the subjects of sovereignty and competences.

Account needs to be taken of the fact that the UK has gone from being a net exporter to a net importer of primary energy. Decommissioning of North Sea oil and gas facilities will be expensive and will require environmental legislation.

A review of the internal energy market and the balance of competences between the UK and the EU found that the EU competence had been exercised to the benefit of the UK.

Therefore there would appear to be an advantage to keeping within the internal energy market, of which e.g. Norway has been a member. But there is likely to be pressure for a sort of *pick-and-mix* agreement which would exclude, for example, EU rules on state aid.

The Climate Change Act 2008 sets out the UK's climate change priorities. It makes clear the duty of the Secretary of State to ensure that the net UK carbon account for all greenhouse gases is at least 80% lower than the 1990 baseline by the year 2050. The Act aims to enable the United Kingdom to become a low carbon economy and establishes an independent Committee on Climate Change.

Gas from the UK goes to Northern Ireland via the UK gas grid. The Republic of Ireland will want to continue to access the single energy market.

As regards unbundling the relationship with the EU a number of issues arise. These include whether, if state aid legislation can be dropped*, it will be possible to subsidise energy (prices) for certain industries.

(*NB: EU Free Trade Agreements normally incorporate state aid rules.)

An agreement with Norway concerning the very important Langeled gas interconnector from Norway will need to be concluded.

Membership of the EEA and membership of the Internal Energy Market are unlikely to be attractive. A possible approach would be to try to unbundle the existing points of intersection between the UK and the EU. An agreement on interconnectors is essential.

Power markets and renewables

Leonard W N Hawkes, DBB Brussels

A transition from large-scale centralized power generation, will require increasing volumes of decentralized & intermittent (variable) power generation from renewables to be incorporated in the UK's power system.

Transmission system operators (**TSOs**) have traditionally focused on forecasting system demand which varies according to a number of factors including the time of day and the season.

Variable renewable (**VRE**) generation (adds a new factor to be taken into account. It now makes sense for the TSOs to focus on ***Net system demand*** meaning : the electricity demand *minus* VRE generation. Meeting Net system demand (ie the demand that must be met by generation from conventional non-renewable sources) requires greater flexibility in both generation and the network itself.

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One important means of providing flexibility is 'market coupling' which enables cross-border trade in electricity across Europe.

'Interconnectors' are the physical links which support market-coupling and allow the transfer of electricity across borders. Interconnector revenues are dependent on the existence of price differentials between markets at either end of the interconnector.

Each coupled market implements a common set of rules and standardised wholesale trading arrangements that permit cross-border trading using the interconnectors. EU Regulations currently provide the framework for the establishment of cross-border EU electricity markets.

Both Great Britain and the island of Ireland intend to take advantage of new interconnectors - implying significant new investments.

For that investment to progress a number of issues will have to be solved in the EU exit negotiations:

• The island of Ireland has an integrated electricity market (**IEM**) separate from the island of GB. New (2018) IEM market arrangements are designed to *make optimal use of cross-border transmission assets*. • The energy sector is particularly capital intensive. Any increase in financing costs would have a significant impact on overall costs (and viability). • Current EU Regulations governing cross-border access and trade in electricity are subject to the jurisdiction of the European Court of Justice.

How competition law and regulation might work

Joanna Goyder, Senior Knowledge Lawyer, Freshfields Bruckhaus Derringer anti-trust, competition and trade group

Mergers : There is currently a one-stop shop for mergers which reach a certain turnover threshold. The EU Commission has exclusive jurisdiction over such mergers.

If the UK exits the EU mergers regime the Competition and Markets Authority (**CMA**) may have a duty to review certain mergers that it does not currently look into. One estimate is that the CMA would receive about 50% more merger notifications. An alternative would be to increase the relevant qualifying thresholds - so that fewer mergers would fall within its jurisdiction to review.

[In terms of transactional efficiency] it should be noted that the UK merger review timetable is long by comparison with other timetables. There is also some concern that the economic consumer welfare focus could be lost if a wider public interest test is adopted for merger review.

The City of London Law Society has recently adopted a paper in which it deals in particular with the question of transitional arrangements. One of the points to decide is at which point, a case which would in the past have been allocated to the EU Commission should be dealt with by the CMA.

Anti-trust : Unlike mergers, competition authorities have a discretion whether or not to make a review in anti-trust cases under competition law.

EU legal professional privilege protects written communications between lawyers and clients for the purpose of exercising rights of defence in the context of Commission competition investigations. The privilege applies only to communications with external lawyers, qualified to practice in a jurisdiction of the European Economic Area (EEA), as well as to documents prepared exclusively for the purpose of seeking their advice. See *Akzo Nobel Chemicals v Commission* (C-550/07 P).

There has been a great deal of convergence and cooperation between national Competition Authorities (**NCAs**) through the European Competition Network (**ECN**) which has led to a great deal of uniformity in the practice of competition law. Whereas the UK has had an influence on EU policies such as leniency in the past - and has been a balance to legal formalism - that may be lost in the future.

Equally, the EU's influence on UK competition law will diminish. The 1998 Competition Act voluntarily imports Articles 101 and 102 TFEU as the model for UK competition law. Moreover, article 60 of the 1998 Act provides that the UK courts will follow relevant decisions of the European Court of Justice and the EU Commission. It seems clear that article 60 will be unable to survive EU exit.

Policy choices will have to be made about the future implementation of the mergers regime. The anti-trust regime seems less likely to be affected by the change and there is a parallelism with the existing EU law.

There is also an important question about legal professional privilege. The EU does not admit that legal professional privilege will extend to practitioners from outside the EEA member states.