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THE CHANNEL ISLANDS AND THE EU: A MID-BREXIT SNAPSHOT

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Introduction

It is a pleasure to be here today. Thank you for inviting me. For those of you that haven't come across us, the Channel Islands Brussels Office (CIBO) was set up in 2011 as the joint office of the Governments of Guernsey and Jersey with the strapline objective of promoting and protecting the Channel Islands interests in Europe.

Guernsey and Jersey are proudly independent, one from the other, and on a commercial level are fierce competitors with each other. So an important part of our work is to facilitate inter-islands coordination to agree what those "Channel Islands" interests are and how we can best promote and protect them in Brussels. On the big-ticket issues that I will be covering today, it actually works very well because the two islands' interests in relation to the EU agenda are normally closely aligned.

It is 16 months since the UK electorate voted to leave the EU and 17 months until that decision will be given effect – hence the title "mid-Brexit snapshot". I will first say something about the Brexit negotiations themselves. I will then explain how and why the Brexit process is impacting on our "business as usual" objectives. Finally, I will cover developments in two EU policy areas that I think will be of particular interest to you – tax, especially the planned EU blacklist, and beneficial ownership, especially regarding the treatment of trusts.

Brexit

Unless you have recently returned from the planet Zog, you know that, to put it mildly, Brexit is complicated, both politically and technically. Progress in the formal negotiations between the UK and the EU has been slow. The EU has not yet agreed that sufficient progress has been made on the main withdrawal issues (citizens' rights, the financial settlement, and Northern Ireland) to authorise the start of the negotiations on the future trade relationship between the UK and the EU post-Brexit.

Both the Labour and Conservative Parties are split on Brexit, and in the case of the Conservatives, those divisions are manifested around the Cabinet table. There is thus continued lack of clarity about the specifics of the desired end state of the trade negotiations, or about the nature and duration of the so-called transitional arrangements. The two are of course linked because it is hard to discuss a transition without knowing what it is you want to transition to.

It is also a statement of the obvious that the outcome of Brexit matters enormously for the Channel Islands. It impacts on just about every facet of our economies and our communities – fishing, farming, transport links, data flows, telecommunications, labour supply, tourism, the environment, law enforcement, judicial cooperation, financial services, tax and more. The Brexit process is therefore a huge challenge for both

Guernsey and Jersey. Although I am a public official and so you might say I am biased, I believe I can say reasonably dispassionately that both governments have so far risen admirably to that challenge.

Since the referendum, the Islands have established good consultative mechanisms with the UK government at both political and official level to ensure that our interests are properly understood and taken into account in the UK negotiating positions, and to ensure that we are kept fully abreast of the progress in the negotiations. The UK has explicitly confirmed that it is committed to doing this, most recently during the visit in August to the Islands by the Brexit Minister, Robin Walker. This is very welcome.

“The UK’s relationship with Jersey, Guernsey and the Isle of Man is a valued, historical and special one.

[...]

Understanding the key issues of the Bailiwick of Jersey, the Bailiwick of Guernsey and the Isle of Man is a crucial part of our work. As we continue our negotiations with the EU we will make sure the interests of the Crown Dependencies are understood and taken into account.”

(Robin Walker MP, 10 August 2017)

The Jersey and Guernsey governments are also engaging systematically and openly with domestic stakeholders – the respective States Assemblies, industry, the wider public – to ensure that the consultations with the UK are properly grounded in, and informed by, the necessary domestic consensus.

But there is no getting away from the fact that major uncertainties lie ahead. Brexit is uncharted waters for all concerned – the EU, the UK, the Channel Islands and the rest of the world. The outcome is unknown even at this mid-point. We need to remain flexible and nimble – traditional Guernsey and Jersey strengths - because the pace and direction of the negotiations is going to remain unpredictable. And we must at all times remain clear headed about our own objectives.

1. Brexit’s impact on business as usual

An important part of the current work of our office is assessing the impact of Brexit on our “business as usual” objectives. This is manifesting itself in three main ways.

Firstly, following the referendum, the influence of the UK around the table in Brussels where EU laws are negotiated has inevitably started to reduce. Although legally the UK remains a full Member State until the day it leaves, politically the reality is that other Member States are increasingly discounting UK views, especially on dossiers which may not be implemented until after the UK leaves, or where the UK once outside the EU is perceived to be a potential competitor.

For the Channel Islands this reduced UK influence matters, though arguably less than it once might have done. We are already outside the EU so on issues where we have direct interests at stake we need to ensure that

key Member States understand our position. We have worked hard in recent years to develop our direct relations with the EU institutions and with Member States other than just the UK.

The work of the Brussels office obviously plays a central part in that. But it is part of a multi-pronged approach. Guernsey and Jersey have active contacts with the London Embassies of EU Member States, in Jersey's case coordinated by our colleagues in the Jersey London Office. The key relationship with France is coordinated for both islands by our colleagues in the joint office in Caen. The Islands use the relationships established with EU counterparts through our involvement in multilateral bodies like the Global Forum and MONEYVAL. And it is underpinned by significant political commitment from both islands. By the end of this month, we will have had 5 ministerial visits to Brussels in the past 12 months.

All that said, it is an inescapable fact that of all the Member States, the UK is the one that is the best able and willing to listen to our concerns and to take them into account in its own position in negotiations on ongoing, "normal" EU business. So, the fact that the UK is less able to do this – partly because it needs to preserve most of its political capital for the Brexit negotiations themselves and partly because its voice carries less weight in the negotiations on ongoing EU business the nearer it gets to Brexit day – is something we need to factor into to our own engagement strategy on these individual EU dossiers of continuing importance to us.

The second way in which Brexit is impacting on business as usual is because in some policy areas the EU 27 are starting to think how a stance they may take with other third countries might have a read across to the Brexit negotiations.

The most obvious area is financial services. Guernsey and Jersey, as existing third countries, have obtained some limited market access through demonstrating regulatory equivalence, where the relevant EU regulation permits this. We were poised to get an important new slice of market access having been assessed twice by the relevant EU Regulator – the European Securities and Markets Authority (ESMA) - as meeting the technical requirements for being granted the third country passport under the Alternative Investment Fund Managers Directive (AIFMD). This would have built on the access we already enjoy through national private placement regimes (NPPRs). Unfortunately, the European Commission has put the passport on indefinite hold for all third countries pending a wider review of the future of "equivalence" in EU financial services legislation. And it is clear that this review is linked to the question of how to deal with financial services as part of the future UK/EU trade relationship.

The third way Brexit is impacting on us is the increasing tendency for the EU's future policies to be geared around the priorities of the EU 27 even though the UK still has a seat at the table. It is a bit like the oil tanker changing course: it's slow, but it's happening. The recent "big picture" speeches by President Macron and President Juncker made only the briefest of references to Brexit, and more in sorrow than in anger. Some of the policies now being pushed by Macron, such as greater harmonisation of corporate tax, are ones that he would certainly have felt less confident about pushing without Brexit.

We need to understand and assess this change of direction because EU policies in many different areas will continue to impact significantly on Guernsey's and Jersey's interests even though the UK has left.

2. Current EU policy developments of relevance to STEP members

There are numerous EU policy areas that are of relevance to you, as representatives of the business community – on aviation emissions trading, data protection, cyber security, FinTech, the digital single market, labour mobility and more - but there isn't time today. So, I want to concentrate on just two – tax and beneficial ownership.

Tax

Guernsey and Jersey have a strong record of cooperation on tax matters with EU Member States – something that has been publicly recognised by the EU Tax Commissioner, Pierre Moscovici, after he met the Chief Ministers in January 2016.

"I very much welcome the continued active engagement of Guernsey and Jersey in the key international initiatives for fighting tax evasion, fraud and abusive tax avoidance, in which they are important partners of the EU. Their implementation of the Common Reporting Standard on automatic exchange of information from the 1st January, and their support of the BEPS programme, alongside the EU Member States, are particularly noteworthy and reinforce their standing as cooperative jurisdictions."

(EU Tax Commissioner Pierre Moscovici, 13 January 2016)

That recognition is important but not of itself sufficient. Since the crisis, the public and political centre of gravity of what is "acceptable" tax practice has shifted markedly, and is continuing to evolve. A series of well publicised scandals have fuelled this, often arising from data leaks and data hacks. The political and public mood has also shifted following disclosures of the low level of tax paid by some multinational companies – a low level that is partly due, in the court of public opinion, to complex corporate structures which enable tax to be legally avoided.

This is the political backdrop to the EU's decision in November 2016 to establish by the end of 2017 a list of so called "non-cooperative jurisdictions" – in the popular lexicon, a blacklist. This list will be accompanied by so-called "defensive measures" or sanctions. The criteria for this list were agreed in November 2016 and in January the EU invited 92 jurisdictions, including Guernsey and Jersey, to be assessed or "screened" against these criteria.

The screening process is being carried out by the EU's Code of Conduct Group on Business Taxation. The 92 jurisdictions have been divided up between various panels of experts established by the Code Group. These panels have analysed responses received to questionnaires sent to jurisdictions that are being screened. The reports from the panels are being considered by the Code Group itself. The Code Group may notify jurisdictions and invite comments, though this is not certain. Finally, a recommendation is expected to be put to EU Finance Ministers (ECOFIN) at their meeting on 5 December.

Most of the criteria are of little concern to Guernsey or Jersey given our strong track record of cooperation – they concern tax transparency; the absence of preferential tax regimes; and a commitment to the OECD actions for tackling base erosion and profit shifting (BEPS). However, one of the criteria – criterion 2.2 - is potentially more problematic, because of the latitude it gives to subjective interpretation of what is meant by the requirement that offshore structures in the jurisdictions being screened have “real economic activity” or “substance”. This is not helped by the fact that currently there is no international standard on these matters, particularly in relation to investment holding companies, although work is continuing in the OECD on this issue.

▪ Criterion 2.2:

“The jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction.” (ECOFIN, 8 November 2016)

▪ Guidelines for 2.2:

“In the context of criterion 2.2, the Code of Conduct Group should evaluate the absence of a corporate tax system or applying a nominal corporate tax rate equal to zero or almost zero as a possible indicator.”

(ECOFIN, 8 November 2016)

We await the outcome. What I can say is that Guernsey and Jersey, and our office, have left no stone unturned either in the quality of the material that has been submitted to the Code of Conduct Group as part of the screening, or in our underpinning diplomatic engagement in Brussels and with national governments to ensure that our messages are understood. Indeed, only this week, the Chief Minister of Jersey, Senator Gorst, and the Deputy Chief Minister of Guernsey, Deputy Trott, were in Brussels to reiterate those messages.

Beneficial ownership

The second area I want to focus on is beneficial ownership. I know that you will be covering this in some depth during the conference so let me simply pick out one key point from the EU agenda.

As you know, the EU’s 4th Anti Money Laundering Directive (AMLD4) was adopted in June 2015 and applies from June 2017. In July 2016 the Commission tabled a proposal – dubbed AMLD5 – for amending the Directive. The driver for AMLD5 was the terrorist attacks in Paris in November 2015 and the need to improve the elements in AMLD 4 relating to the countering of terrorist financing (CFT).

However, the finalisation of the draft proposal coincided with the Panama Papers scandal. As a result, the Commission decided to revisit the provisions in AMLD4 on beneficial ownership. The European Parliament (EP) gratefully seized on this as a backdoor way of shaping EU tax policy, over which the EP has no formal powers. So, what should have been a quick amendment driven by CFT became bogged down on tax matters under the guise of beneficial ownership.

Negotiations between the Council (the Member States) and the EP on AMLD5 have been going on since March. It is possible but not certain that the negotiations will conclude by the end of the year. The main issue still holding up agreement concerns the treatment of trusts. It seems highly likely that there will be a requirement for Member States to establish a central register of beneficial ownership of trusts, mirroring the existing requirement under AMLD4 for such a central register for companies.

However crucial details have yet to be agreed including, importantly, the question of access to the register. The EP's position is that there should be full public access, with only very limited exemptions. The Council's position is that access should be only by competent authorities with anyone else only having access if they can meet a "legitimate interest" test, which would be for each Member State to define. Several Member States, including Germany, will not support public registers and have tough data protection laws which limit who can have access to personal information.

There is continued disagreement about whether a distinction can be made between a family trust and a so-called "commercial trust" (which no one can properly define). And there is disagreement about the basis for the inclusion of a trust in the register – is it where it is administered, where it is created, where it is operated (all terms that themselves need definitions) or something else? While it is accepted that trustees are the source of information on trusts, some Member States including France are concerned that if there is not a register of trustees and of the trusts they administer, then law enforcement and tax authorities will not be able to find the trustees from whom information is to be obtained.

Even though AMLD5 will not apply to third countries like Guernsey or Jersey, depending on how some of these definitions end up in the final text will determine whether any trusts administered in Guernsey or Jersey might be included in the registers of any of the Member States. It is also unknown the extent to which the EU may in the future include its new AML standards as part of an equivalence test for future market access.

AMLD5 is also a useful reminder of three other Brexit related points, which are a suitable way to bring this presentation round full circle.

The first is that EU membership has both acted as a framework for UK national policy and a driver of it. Paradoxically in AMLD4 the UK wanted to go further on company registers than other Member States wanting them to be fully public. The compromise agreed made public registers one of several options. It was therefore an example of EU law constraining UK national policy in a way which, most would agree, was helpful from a Channel Islands perspective. On trusts in AMLD5, that interlinkage may work the other way, to our disadvantage. It is worth noting that the UK of course now has a register of trusts, so if the requirement in AMLD 5 is for a non-public register, the UK is unlikely to resist this.

The second point is that this interlinkage between EU law and UK law will persist after Brexit but in a changed and reduced form and in ways we cannot properly assess until the nature of the final Brexit deal is known. Anti-money laundering is a cross cutting issue, like tax and data protection. We do not know how these cross cutting issues may feature in the final Brexit deal. But in general, the greater the degree of market access, the greater the likelihood that the UK will have to meet at least some EU standards in these cross cutting areas.

The third point is that we must of course not just watch what is happening in Brussels but also nearer to home, in London, where the political outlook remains fluid, to put it neutrally. The document on tax policy that formed part of the Labour Party manifesto is worth a glance as part of any forward planning. It has plenty to say about beneficial ownership, trusts and the Crown Dependencies.

“Strict minimum standards for Crown Dependencies and Overseas Territories [which] will include a public register of owners, directors, major shareholders and beneficial owners for all companies and trusts and requirement for companies and limited liability partnerships to publish accounts.”

(Labour Party “Tax Transparency & Enforcement Programme”, June 2017)

Conclusion

In my presentation I have assessed the state of the Brexit negotiations from a Channel Islands perspective. I have explained how the governments of Guernsey and Jersey are ensuring that we are on the front foot through engagement with the UK government to ensure that our interests are taken into account, though I did not seek to underplay the considerable uncertainties that lie ahead. I explained how Brexit is impacting on our business as usual objectives – through weakening UK influence, fear of setting Brexit precedents, and the changing priorities of an EU of 27. And I have given an overview of current developments in two areas I believe are likely to be of key interest to STEP members – on tax, in particular regarding the planned EU blacklist, and on beneficial ownership, in particular about the treatment of trusts under AMLD5.

In the time available, I have only been able to skim the surface, but I hope that I have helped set the scene for some of your discussions during today’s conference.

For CIBO, you – industry representatives – are among our most important stakeholders. You are part of “team Channel Islands”, whose interests we are trying to promote and protect. That is why it is so valuable to have the chance to meet with you on occasions like this. Thank you again for inviting me.