

# **‘Brexit: its impact on the Bailiwick and financial services regulation’**

## **04 April 2019**

### **Where is the Bailiwick of Guernsey heading?**

**Deputy Gavin St Pier, President, Policy & Resources Committee**

I was asked a few months ago to speak today to a title, “Where has the Bailiwick landed?” but, at 11 am last Friday, 12 hours before Brexit was supposed to happen, we agreed it probably made more sense to change the title to “Where is the Bailiwick of Guernsey heading?”

But before I attempt to answer that question, I think I need to answer two different questions first, “How did we get here?” and “Where are we?”

#### **How did we get here?**

Guernsey did not participate in the 1975 referendum. We did not participate in the 2016 referendum. (As an aside, there are many ironies in this story, but one is that in a process apparently designed for the purpose of “taking back control”, we’ve had no control. As a small jurisdiction, surrounded by larger neighbours, this is not a particularly new experience. We have been used to being policy takers in a number of international initiatives. But – and Jacob, had he been here would not want to hear this - it is one the UK is going to have to get used to if and when the UK does leave the EU.

Whether it be in the field of data protection, anti-money laundering or tax transparency, the UK is still going to be a policy taker, working with the EU’s rules in the form of GDPR, AMLD5 and the Code Group on Business Taxation – except it will be doing so as a third country without any input, rather than as a member state.)

In never ceases to surprise me how, even in a representative democracy, so few people really determine policy direction for 65 million. Don’t kid yourselves, we are where we are today, not because 17.4 m people ‘took back control’ in June 2016 but because of the decisions of a much smaller number of politicians – not even all 650 MPs. James Goldsmith. Nigel Farage. Jacob Rees-Mogg. David Cameron and George Osborne for agreeing to pledge a referendum in their 2015 manifesto, for an election they had no real expectation of winning; Theresa May for calling an election in 2017 in which she had no real expectation of losing her majority; the key advisers around the prime minister who painted the red lines in the Lancaster House speech; the 10 DUP MPs; and so on. And whether or not Parliament digs itself out of its current impasse or whether in spite of last night’s vote, the EU allows a no deal exit a week tomorrow, will also be determined by just a handful of individuals – potentially, just two in the UK – Theresa May and Jeremy Corbyn – and 27 in the European Council. Welcome to “taking back control.”

In 1975, the British public were told the European Community was all about trade in a Common Market; the political objectives of the whole enterprise, driving to what is now termed in the Treaty of Lisbon as ‘ever closer union’ – which had their origins post World War 2 with the admirable objective of avoiding yet another conflict in Europe – were downplayed. In 2016, the British public were promised an extra £350m a week for their beloved NHS whilst preserving trading links, with no mention of red lines being established around the need to leave the customs union and the Single Market. By reducing the question to “yes or no” in 1975 and “leave or remain” in 2016, the arguments to support either response were shortened too. And in the 41 years between the two questions being put to the public, arguably there were only two openly Europhile prime ministers, Ted Heath and Tony Blair – with all others playing a variety of Eurosceptic tunes to a receptive news media. It can hardly be a surprise that although 67% voted to stay in 1975, Britain never fell truly in love with the European project and apparently warmed to the idea of “taking back control.”

The European project was divisive in Britain long before it formally joined in 1973 and has remained so ever since – and no doubt will remain so whether or not it now leaves. Many have noted that it has shortened the careers of every Conservative party leader since Margaret Thatcher. It has been a slow infection in the UK’s political bloodstream, which – continuing the analogy – seems in the last few weeks and months to have turned to fall blown sepsis.

The question now is whether it could lead to the loss of some limbs. A ludicrous suggestion only a short time ago, but one that cannot be entirely dismissed today. The impact on the Scottish independence question will not be truly known for some time; renewed troubles in Northern Ireland cannot be ruled out – and arguably should be everyone’s greatest concern; and the breakdown of party discipline even risks the House of Commons attempting to legislate for matters which lie firmly outside their remit and within our own domestic autonomy – breaching 9 centuries of constitutional precedent which would undoubtedly cause us to question and re-evaluate our relationship with the UK. I am referring of course to the ‘Modge’ amendment, laid by Margaret Hodge and Andrew Mitchell purporting to legislate for the public registers of beneficial ownership. In another irony, they are seeking to do so by way of an amendment to a Brexit implementation bill – a bill about taking back sovereignty from Brussels is being used to abrogate the sovereignty of a smaller jurisdiction. If it wasn’t so serious, given their own mess, it would be laughable that **any** current MP would have the audacity to advance an argument they can legislate for us on the basis of ‘good government.’ (As another aside, I hope and expect that Guernsey can count on the rock solid support of Jacob Rees-Mogg and his colleagues in the European Research Group to resist this amendment as and when it returns to be debated in the House of Commons.)

### **So that is how we got here. But where exactly is here?**

Here is: we are presently in the customs union for the free movement of goods by virtue of protocol 3; here is, we are out for everything else; here is, where Daniel Hannan MEP wanted the UK to move to, when he visited the island in 2015; here is, being given notice by our larger neighbour that as they are re-drawing the boundaries with their own neighbours, they will be knocking down the garden shed; here is, they have promised to build us a new one but can’t tell us yet quite where it will be or what size or colour it be – that will only come from phase 2

of their negotiations with their neighbours about exactly where their new boundaries are going to be; here is, being landed with a lot of uninvited costs for our taxpayers and community - those of you in audience who knew the late Deputy Dave Jones, a member of UKIP, will know that he will be spinning in his grave at the prospect that MOTs have been imposed on us, not because of the EU, but because the UK is *leaving* the EU. Another irony. Here is, the diversion of people and resources in our small administration away from our own policy priorities to deal with someone else's. Here is looking at the political chaos in the United Kingdom, speculating on whether the governing party may split, on whether the government will collapse or on whether a general election might be called – although personally I struggle to see how that could resolve anything. Here is, a lot of uncertainty for our business leaders. In short, here is, not a very comfortable place – and everyone needs to move on to somewhere more comfortable as rapidly as possible.

We have planned extensively - starting before the UK decided to hold the referendum. We have responded to each twist and turn to protect our interests – those landmarks have included the triggering of Article 50; the negotiation and publication of the Withdrawal Agreement and its territorial extent; and detailed contingency planning for the risk of a no deal scenario. Whilst we cannot be sure that we know where we are headed, we have packed for the journey.

One thing has been clear throughout this whole chaotic process. Here in Guernsey, we have provided an oasis of calm response; a haven of stability for our business community; and we have worked through the challenges that might be created by Brexit with clarity and – in a lesson to Westminster – with consensus among our politicians. On Friday last week, by simple regulation, we changed the law in Guernsey to acknowledge 12 April as the next date that the UK is likely to leave the EU. Our enabling legislation (unlike the UK's) had foreseen and allowed for flexibility to change the Brexit date as defined in Guernsey law.

The government of Guernsey has engaged with the UK Government as it has developed its position over the course of the last two and a half years.

We have tried to be one step ahead by planning for a range of outcomes and by being ready to react to whatever results from the UK government's decisions and the UK parliament's deliberations. This helps us to plot our own path - one that works for Guernsey's own interests - in response to whatever decision the UK finally makes.

Guernsey's system of government by independents relies on consensus and compromise to make decisions. Each decision can be freely challenged at the time that it is made, taking into account the range of views that make up our parliament. Guernsey politicians are used to compromise and finding common ground. We respect the will of the majority. The consensus and political stability that Guernsey has, is something that the UK Government and UK parliamentarians are only now seeking themselves.

Over the last two years, the States has been working with the UK Government to carry out extensive preparations for all Brexit scenarios, including for a 'no deal' scenario.

We face challenges of a much smaller magnitude than those faced by the UK, as we have been a third country to the EU from the beginning.

We started preparing for the possibility of a UK referendum on EU membership in 2014 – including risks associated with a leave result in that referendum. That meant that our government could lay out an immediate plan less than a week after the UK decided to leave the EU.

This set us on a path which has ensured that we have been closely engaged in the negotiation process, so that our interests have been taken into account. We have worked closely at policy level across Whitehall; negotiated the strategy with the Cabinet Office at a senior level; and met politically with Robin Walker, Minister at the Department for Exiting the European Union on a quarterly basis.

It is as a result of this work that the Withdrawal Agreement negotiated between the UK and the EU takes our interests into account: the implementation period, and the Northern Ireland ‘backstop’, would only apply to us, insofar as Protocol 3 currently applies. So the agreement would not place any additional regulatory burdens on the islands.

Similarly, the UK’s own no-deal contingency planning takes our interests into account. We are working in lock step with the UK and Jersey to ensure that our contingency planning will minimise any possible disruption that a ‘no deal’ Brexit might have on supply chains. The UK’s nationwide contingency plan – Operation Yellowhammer – makes express reference to us. The individual regional plan in Portsmouth includes a strategic priority of maintaining critical supplies to the islands.

This means that we will still get essential supplies of food and medicines and of medical supplies, fuel and chemicals. There is no need to stockpile. That is not to say there will be no disruption at all, logistics and supply chains will need to change to cope with new checks on both sides of the Channel.

Whilst we will not see supplies dry up, we might see some reduction in choice for food, particularly for fresh fruit and vegetables that come from the EU via the UK. This will continue until the supply chains settle down into the ‘new normal’.

## **Code Group**

I want to digress to talk about some good news in the last few weeks, which helps set out where we presently are.

We have managed other external challenges at the same time, created by Europe, in the form of the EU’s list of uncooperative tax jurisdictions.

On 12 March, the EU made a decision that might have passed many people in Guernsey by, but which those here today will recognise as being important in terms of how our jurisdiction is treated in the EU and further afield. In an update to its EU tax listing process, ECOFIN – the European Council of Finance Ministers - reaffirmed Guernsey’s position as a cooperative jurisdiction for tax matters. The 90-plus third countries that were reviewed, including Guernsey, were assessed against standards of transparency, fair taxation and anti-base erosion and profit shifting, BEPS. As I said earlier, the UK will become a third country subject to the Code Group process after it leaves the EU.

No concerns were raised in respect of Guernsey's standards of tax transparency or anti-BEPS compliance. In November 2017, we made a commitment to the EU to address concerns that the EU Code of Conduct Group had about a lack of legal substance requirements. Their concerns were based on new thinking at EU level and developing policy within the OECD. Given that this was new ground, we had to design, consult and legislate for a new regime in our tax system that met these concerns within just 12 months. We met this deadline and have delivered an effective and proportionate regime that works to address the EU's concerns and that works for Guernsey – although rather predictably and sadly Oxfam – rather than concentrating on sorting out their own dire reputation and governance and instead of focussing on their core purpose – have found time to use their generous donors' funds to come out this week to criticise the regime's effectiveness, self-evidently, at this stage only 3 months into a new regime, without any evidence.

Guernsey's new Economic Substance Regime came into effect from 1<sup>st</sup> January 2019. All companies that are tax resident in Guernsey must comply with the Economic Substance Regime for accounting periods commencing on or after 1<sup>st</sup> January this year and for all subsequent accounting periods. Failure to comply will result in application of a new sanctions regime. These sanctions consist of escalating financial penalties; the spontaneous exchange of information and company strike off.

We have recognised the importance of monitoring the effectiveness of the Economic Substance Regime, in particular the enforcement efforts. If there any shortcomings are identified, they will be remedied. This will ensure that the sanctions regime remains rigorous, effective and dissuasive.

The EU has reviewed the changes made in Guernsey in regard to economic substance and has given us a positive assessment, removing us from an annex to the list of uncooperative jurisdictions. Not all jurisdictions have been successful in the EU Code of Conduct Group process and some finance centres have been given more time and remain on that annex – giving them continued uncertainty. We can be rightly proud of our achievement. We have worked closely with Jersey and the Isle of Man, had ongoing dialogue and negotiations with the Commission and engaged with industry. The result will help to confirm our position that we are a well-regulated finance centre with high standards and a cooperative approach with other jurisdictions. I am pleased that the decision has rightly unlocked access once again to the European Investment Fund as a source of investment into Guernsey-based funds. We hope it will also highlight the inconsistency in other lists around the world, often generated for political reasons and that are not based on objective criteria or backed up with evidence.

The Commission has already expressed its concern at individual national blacklists being maintained by EU Member States.

We know that some EU Member States are now reviewing their own national lists and we will continue to engage with them on this. In particular, we are actively pressing the Netherlands to take note of the EU process and outcome.

We stand ready to help other jurisdictions, including any relevant EU Member States, to develop and implement their own substance requirements.

We have risen to the challenge and demonstrated that we are, undeniably, a jurisdiction of substance. We have once again shown that we are a mature democracy with a ‘good neighbour’ approach to cooperation. Guernsey’s approved status for tax cooperation should enable us to develop a strong relationship with the EU when we seek greater access to markets and will set us off on the right foot - whenever the next phase of Brexit negotiations finally arrives.

### **Beneficial ownership registers**

I cannot talk about where the Bailiwick of Guernsey is heading today without returning to recent moves by Margaret Hodge and Andrew Mitchell to force a domestic UK policy on us without our consent. Amendments to the Sanctions and Anti-Money Laundering Act were proposed last year – and the one on Overseas Territories producing public registers of beneficial ownership of companies was passed by the Houses of Parliament. The amendment proposed for the Financial Services (Implementation of Legislation) Bill last month covers the Overseas Territories and Guernsey, Jersey and the Isle of Man.

We expect that Bill to be before the House of Commons again in the next few months, if there is a no deal Brexit. The amendments raise two issues: one on our constitutional position, and the other on differing approaches between the UK and Guernsey on beneficial ownership transparency.

On the constitutional issue we must and will remain resolute and robust. This is where we can be certain of our rights. The Channel Islands and the Isle of Man are not – and never have been – part of, or dependencies of, the UK. Guernsey is not represented in Westminster – we have no voice and no vote within the UK’s Houses of Parliament and we do not seek to change that. We are separate jurisdictions with our own legislatures, executives and judiciaries with full domestic autonomy.

The Channel Islands are British through their relationship with the Crown, as the modern day successor to the Duke of Normandy who invaded England almost 1,000 years ago. We have a mature legal system with our own jurisprudence that is derived from Norman law. It is a centuries-held constitutional rule that the UK Parliament does not legislate for Guernsey on domestic matters without our consent. It is bizarre that the SNP have been supportive of this amendment so far, whilst simultaneously arguing that Westminster cannot legislate for Scotland, referencing the 20 year old Sewel Convention. For that reason, I hope that in further dialogue they can be persuaded that supporting this amendment is very much not in Scotland’s interests.

The UK parliament cannot legislate for us to impose its policy position on us in this way. Let’s be unambiguous: any legislation that is made will be inoperative and unenforceable. Such a move attempts to undermine our democracy and autonomy. It smacks of colonialism – is it an irony or hypocrisy that the Labour Party support this amendment?

On the policy point, we recognise that the UK has decided to adopt a public register of beneficial ownership of companies and that there is a desire for Overseas Territories, Channel Islands, Isle of Man and international partners follow suit. Guernsey has the view that an accurate and verified register of beneficial ownership which is shared effectively in a timely

manner with tax authorities and law enforcement in other jurisdictions is, by a country mile, the better approach. It is appropriate and consistent with the principles underpinning GDPR, to consider a balance between placing personal information in the public domain – which is what a public register would do – and the public benefit of so doing. Arguments that a public register of beneficial ownership is the best way to fight economic crime and bolster national security are clouded with misinformation and prejudice. Guernsey maintains an accurate, verified and up-to-date register of beneficial ownership – of a greater quality than that in the UK. We share this information with law enforcement agencies in other jurisdictions, including the UK, and where national security is involved we can share the information within an hour.

This is a standard that the National Crime Agency and Home Office require and the effectiveness of the information sharing has been affirmed by the Home Office and is kept under annual review.

We have highlighted before that the development of an international standard in this area is a pre-requisite to the adoption by Guernsey of a public register. We are committed to the development and implementation of an international standard.

We want to work with the UK Government and the relevant international bodies to achieve the objective of developing standards to increase the effectiveness of registers of beneficial ownership around the world.

We do not agree – and there is no evidence - that public registers – particularly of the type currently operated by the UK – are in *any way* proven to be more effective in tackling money laundering and financial crime than the accurate and verified register we have operated for decades. Indeed, if Guernsey was to move to a UK-type system it would represent a significant reduction of the quality of data available. We are simply not prepared to lower our standards to those of the UK.

Just last month the OECD published its beneficial ownership toolkit. Its focus is on the quality of the data and how well the information is shared. The commentary on public registers is short: it just notes that the jury is still out and public availability is not the same as transparency.

One thing is clear, we strongly agree on the policy objective behind the amendment proposed by Hodge and Mitchell. We all wish to fight financial crime at the national and international level. It is the fact that we have the same policy objective which makes the constitutional impact of the proposed amendment so disagreeable.

So now let's finally answer that exam question I was set.

### **Where is the Bailiwick of Guernsey heading?**

The UK is constitutionally responsible for the island's formal international representation. This means that the UK has a duty to represent our interests in the UK's exit negotiations with the EU and in any negotiations for a new partnership with the EU. The UK has so far made clear that it will negotiate a new economic partnership for Guernsey – along with Jersey and the Isle of Man – that is commensurate with our economic needs. We will need to ensure that they adhere to this commitment and we do not get dragged into all sorts of obligations which are

disproportionate to our needs or size. This will be the next phase of the negotiations and we have been working to prepare ourselves for them.

Guernsey is an important economic partner to the UK; just last year the UK's Office of National Statistics reported that it was the fastest growing market for UK imports of goods and services between 2010 and 2017. The UK's exit will end the relationship that we have with the EU Customs Union.

In order to safeguard the customs relationship with the UK, and our economic relationship, the government of Guernsey signed a new customs framework with the UK Government last November. This will take effect when the UK leaves the EU in the event of no deal or when the UK leaves the EU's Customs Union itself. The customs framework ensures that Guernsey can continue to enjoy tariff-free trade with the UK, whilst maintaining regulatory autonomy and fiscal independence. This will provide continuity for Guernsey and certainty for businesses and consumers.

It also protects a centuries old constitutional relationship which allows for the free movement of goods with the UK, described in our historic Royal Charters.

If we can get our trading relationship in goods on a firm footing, then we can develop our trading relationship for services on top of these foundations.

The terms of future trade with the EU are dependent on the outcome of the UK's negotiations – and so certainty is still lacking. We are taking proactive steps to provide certainty wherever we can. Guernsey is still in dialogue with the UK Government about extending the UK's membership of the World Trade Organization ('WTO') to Guernsey, after the UK has established itself as a fully independent member. This will help provide business with a clear framework on which to undertake the trade in goods and services with the rest of the world.

These negotiations are proceeding well but they are complex and it is important that we get it right – as they set the tone for how we will manage trade issues with the UK for the years and decades to come. It might not be possible to extend the UK's membership of the WTO before the UK leaves the EU – especially if that is next Friday. But this should not cause any immediate practical problems. For political reasons, it is desirable for Guernsey to be included in the UK's membership of the WTO, to ensure our position as a centre for global trade and to assist with aspirations to access new developing markets, particularly in the service sector. The extension of the WTO membership to Guernsey will become more desirable over time, particularly if the UK looks to negotiate ambitious new trade agreements with developing markets, using WTO rules as a base.

Guernsey's relationship with the UK also allows for the movement of people between our jurisdictions. Guernsey is part of the Common Travel Area with the UK and Ireland, as are Jersey and the Isle of Man. The UK, EU, Channel Islands and Isle of Man have all committed to protect the Common Travel Area, and so we will continue to enjoy free movement within the UK and Ireland whatever the UK decides about Brexit.

We are working closely with the Home Office on a future immigration regime that respects the Common Travel Area but also takes into account Guernsey's interests and needs.



The UK's policy development is on hold during this current period of uncertainty, but what we can be sure of is that we will use the flexibility within the Common Travel Area to ensure we have an immigration system that works for us. We will also look afresh at our own population management regime to ensure that it complements this system.

We have already made a political commitment to respect the rights of EU nationals resident in Guernsey on 'exit day' – whenever that is – and have launched a 'settlement scheme' for EU nationals resident in Guernsey, like that launched in the UK. Our scheme opened to applications on Monday this week. There is no fee to apply for that settled status. I've said it before and I will say it again: these citizens are a welcome and valued part of our community.

And my key message is this. In a world of instability and with so much uncertainty and no clarity as to the UK's path, should we be worried? Well, you can worry if you want to, but I'm not going to.

Whilst we are uncertain about the outcome of the UK Brexit debate, we can be certain about the stability that Guernsey inherently has - and that Guernsey's government has created during the period of the Brexit process. We stand ready to respond to whichever path the UK chooses to take as it leaves the EU.

I am actually more confident about Guernsey's future than I was before the UK's referendum. Are there sunny uplands ahead for us? Yes, of that I am sure.

Not because of the UK being or remaining a member of the EU; and not because of Brexit and the prospect of the UK throwing off (as it sees it) the shackles of the EU, forging new free trade agreements; but in spite of all of that.

Despite all the white noise and acres of newsprint - fundamentally, *nothing* has really changed for Guernsey. All our core strengths remain: our political stability and maturity; our autonomy and rule of law; our language and time zone; our high quality regulation and regulators; our flexibility and agility; our common sense and pragmatism; our enterprise and ingenuity. All these strengths have seen us through centuries of external events: from the first time Westminster flexed its muscles during the civil war; through the Napoleonic wars; through the ending of privateering; the abolition of the sugar tax; the Occupation; the imposition and removal of exchange controls; and, dare I say it, through the UK joining the Common Market in 1973. And these strengths will see us through the UK leaving the EU, with or without a deal, or indeed staying in with or without a second referendum.

So, where is Guernsey heading? I can't predict the future any better than anyone else in this room. But in any event, it will be more productive if instead of trying to do so, we all instead remember the words of Abraham Lincoln, "if you want to predict the future, then create it." That is our challenge. And I am very confident that Guernsey will rise to it.