



BREXIT UPDATE - ‘NO-DEAL’ CHECKLIST

With both candidates to be the next Prime Minister of the United Kingdom refusing to rule out a ‘no-deal’ Brexit, and the current ‘no-deal’ deadline of 31st October 2019 looming, it is important for UK companies and companies which do business with the UK to ensure that they are ‘Brexit-proof’. In this briefing, we provide a checklist of key items for businesses to consider when planning for a no-deal Brexit.

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The UK is due to have a new Prime Minister on 24th July 2019, just over three months before 31st October 2019, the current date on which the UK is expected to leave the EU. Both remaining Prime Ministerial Candidates have refused to rule out ‘no-deal’. There does not appear to be a majority in the UK Parliament for the Withdrawal Agreement ‘deal’ that had been negotiated between the UK and the EU. The EU has signalled that it will not re-open negotiations on the text of the Withdrawal Agreement. And there have been indications that the EU may not be willing to grant the UK a further extension to the ‘Article 50’ period - during which the UK remains a Member State of the EU – beyond 31st October 2019. The UK may therefore be faced shortly with a binary choice between a ‘no-deal’ Brexit and revoking its Article 50 notification of its intention to withdraw from the EU. A ‘no-deal’ Brexit therefore looks more likely now than it has done at any time since the referendum in 2016.

A ‘no-deal’ Brexit is likely to have a significant impact both on companies in the UK, and companies which do business with the UK. Certain impacts are ‘known-unknowns’ – a no-deal Brexit could lead to significant disruption at Channel ports, but the likely extent of any disruption is unclear. However, there are concrete steps which companies that may be affected can take now

in order to reduce uncertainty. In this briefing we provide a checklist of key considerations for businesses planning for a ‘no-deal’ Brexit.

Tariffs for goods

A ‘no-deal’ Brexit could result in increased tariffs. Tariffs are likely to apply to goods of UK origin exported to the EU. They may also apply to some or all goods of EU origin exported to the UK, although the UK announced in March 2019 that it intended to apply zero tariffs for most products of any origin for at least a 12 month period in the event of a ‘no-deal’ Brexit. Increased tariffs may also apply where goods of UK origin are exported to countries with which the EU currently has a free trade agreement and vice versa. Areas to consider are:

- For companies currently producing goods of EU origin, will the origin of the goods change in the event of a ‘no-deal’ Brexit?
- For companies importing or exporting EU origin goods into the UK and vice versa, are you aware of the tariff that the UK and/or the EU will apply on your goods in the event of a no-deal Brexit?
- For companies currently importing or exporting UK origin goods into a country with which the EU currently has a free trade agreement and vice versa, will these goods still benefit from any

reduced tariff set out in the free trade agreement?

- In the event that a ‘no-deal’ Brexit results in tariffs increasing on goods you import or export, are you aware of any contractual provisions determining who should pay these increased tariffs, and can these provisions be re-negotiated?
- For companies in the UK using inputs of EU origin and vice versa, would it be possible to switch easily to domestic inputs if the imported inputs become subject to tariffs?

Dispute Resolution

Judgments of English Courts issued after the date of the UK’s exit in a no-deal scenario will no longer be enforced by EU Courts according to the rules set out in the Brussels Recast Regulation. UK membership of the Hague Convention on Choice of Court Agreements may help resolve some difficulties in enforcement, but this Convention is more limited in scope than the Brussels Recast Regulation (e.g. it only applies to exclusive jurisdiction agreements and does not apply to certain insurance contracts). Service of English Court proceedings in EU Member States (and vice versa) may also become more complex than at present. However, enforcement of arbitration awards should be

unaffected, as this is governed by the New York Convention¹.

- Have all recent English Court judgments already been enforced?
- Is arbitration being considered in contracts being negotiated?
- Are agent for service of process (a party nominated to accept service of proceedings in England and Wales) clauses being considered in contracts being negotiated?

Commercial Contracts

A 'no-deal' Brexit could result in it becoming more difficult for one or both parties to perform a contract (e.g. because of changes in laws or regulations), or less commercially attractive for one or more parties to perform a contract (e.g. because of delays in the transport of goods, currency fluctuations or increased tariffs).

- Has a review of the effect of Brexit on existing contractual terms been conducted (e.g. the effects of changes in laws and regulations, delays in the transport of goods, currency fluctuations and tariffs)?
- Are existing contracts being drafted with these potential effects in mind? In particular, are Brexit clauses facilitating re-negotiation or termination if Brexit has a substantial effect on the terms of a contract being included?

Data Protection

It is very unlikely that, on the first day after the UK has left the EU on a 'no-deal' basis, the UK's data protection legislation would be the subject of an adequacy decision by the European Commission. In order to transfer data from the EU to the UK in compliance with the GDPR, businesses would therefore need to have a safeguard in place (e.g. use of model clauses) or otherwise be able to rely on a derogation (e.g. the transfer is necessary for the performance of a contract with the data subject).

- Can safeguards be put in place, or can a derogation be relied upon, to allow the continued transfer of personal data from the EU to the UK following a 'no-deal' Brexit?

Employment

Following a 'no-deal' Brexit, freedom of movement between the UK and the EU will come to an end. There is no guarantee that any individual EU citizen will be able to live and work in the UK if they arrived after exit day or vice versa. Steps may need to be taken by EU citizens already living and working in the UK and vice versa to establish a secure immigration status.

- Have any plans been made to relocate employees before a no-deal Brexit?
- Are EU nationals working in the UK (and vice versa) being encouraged to apply for a form of settled immigration status?

Footnote:

- 1 <http://www.hfw.com/Brexit-impact-of-a-no-deal-on-English-disputes-with-EU-counter-parties>

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