



BREXIT UPDATE: DEAL OR NO DEAL?

Recent developments – or lack thereof – in Brexit negotiations, have made a ‘no-deal’ Brexit a significant possibility. All companies likely to be affected by Brexit should now be putting in place contingency plans to safeguard their business in the event that no agreement is reached.

HFW is assisting a number of companies across a wide range of industries, including aviation, financial services, insurance, travel and shipping with their Brexit preparations. For expert, sector-focussed advice on understanding the consequences of a ‘no-deal’ Brexit for your company, and the mitigation strategies that can be put in place, please do not hesitate to contact us.

What is the current status of negotiations?

There are two major streams being negotiated between the UK and the EU.

The first stream relates to the terms of the UK's exit from the EU (Exit Negotiations). Exit Negotiations include negotiations over a potential transition period during which, generally speaking, the UK will be part of the EU legal framework – including the common market and the customs union - without being a member of the EU.

The second stream relates to the future relationship between the UK and the EU (Future Relationship Negotiations). This relationship could take a number of forms, for example a UK-EU customs union or comprehensive free trade agreement between the UK and the EU.

Exit Negotiations resulted in the announcement of a draft withdrawal agreement on 19 March 2018. The draft text of this agreement provided for a transition period between 30 March 2019 and 31 December 2020. Since then, Exit Negotiations appear to have stalled as a result of a disagreement over how to avoid a physical border between Northern Ireland and the Republic of Ireland if no agreement on a future relationship can be reached by the end of the transition period. Whilst this is a matter relating to the future relationship, it has become seen to be crucial to finalising Exit Negotiations.

Future Relationship Negotiations are at an early stage. The UK Government's official position is set out in its White Paper on the future relationship – known as the Chequers White Paper. However, the response to this position from the EU negotiators has been, whilst not entirely dismissive, at best lukewarm.

What comes next?

'No-deal' Brexit is a commonly used term, usually used to refer to a situation in which trade between the UK and the EU would take place according to WTO rules. It is worth remembering that there are at least

two possible dates on which a 'no-deal' Brexit could take place.

The first possibility is that a 'no-deal' Brexit could take place following the failure of Exit Negotiations to produce a withdrawal agreement by 29 March 2019. If a withdrawal agreement is put in place by this date, it is very likely to include a transition period between 29 March 2019 and 31 December 2020.

The second possibility is that a 'no-deal' Brexit could take place on 1 January 2021, following the failure of Future Relationship Negotiations during the transition period to produce an outcome other than trade between the EU and the UK taking place on WTO terms.

At the time of writing (27 July 2018), the prospect of a 'no-deal' Brexit taking place on 29 March 2019 is unlikely, despite receiving considerable attention in the press. There appears to be little political will on either side for a 'no-deal' Brexit to take place on this date. The main contentious issue – Ireland – is a matter relating to the future relationship. In theory, there is no need for arrangements on avoiding a physical border between Northern Ireland and the Republic of Ireland to be part of the withdrawal agreement. It is therefore possible that this issue will be postponed to avoid a 'no-deal' scenario on 29 March 2019.

The chances of a 'no-deal' Brexit taking place on 1 January 2021 may be greater. The UK Government's current position in the Chequers White Paper is contentious both in the EU and the UK. It is currently unclear whether it will prove to be a workable basis for negotiations. There are a number of issues, including Ireland, Gibraltar and market access for services suppliers that could de-rail negotiations. And negotiations may be subject to political developments in the UK (where the minority Government's position is vulnerable) and the EU (where Parliamentary elections are due to take place next year). In addition, unless broad consensus on the future relationship is reached shortly, there may not be sufficient time to produce a detailed future relationship agreement: by

way of comparison the relatively uncontroversial free trade agreement between the EU and South Korea took over four years to conclude.

It may be possible to extend the Exit Negotiations period beyond 29 March 2019, or the transition period beyond 31 December 2020, however either extension is likely to be controversial.

What are WTO rules?

WTO rules impose a framework of minimum standards for international trade, and can be enforced by WTO member states. They are generally focussed on avoiding protectionist and discriminatory national policies. The rules are a baseline – countries may enter into bilateral or multilateral economic integration partnerships such as free trade agreements or common markets that afford mutually enhanced levels of market access and/or treatment for their members. They are also not comprehensive and do not cover many subjects currently governed by EU rules, such as the determination of jurisdiction, governing law and recognition of judgments in commercial disputes.

If trade between the EU and the UK were to take place according to WTO rules, there would be a number of significant differences. Key differences include:

- Tariffs on goods travelling between the UK and the EU. For some sectors (e.g. agriculture) tariff levels could be significant.
- Introduction of customs formalities on goods travelling between the UK and the EU. In certain cases (e.g. 'just-in-time' consumer goods) these delays could have a significant impact.
- Introduction of conformity assessment procedures on goods produced in the UK being exported to the EU and vice-versa. This could result in products having to be certified as conforming with an additional set of standards, or, in certain cases (e.g. products of animal origin) significant testing procedures being carried out at the point of import.

- Restrictions on UK businesses offering services to EU consumers or vice-versa. In certain cases there may also be restrictions on UK companies establishing companies offering services in EU Member States or vice-versa. These considerations are most relevant to service industries that are highly regulated or otherwise sensitive, such as financial or professional services.
- An end to the free movement of people.

It is also worth noting that it is not necessarily just businesses trading between the UK and the EU which will be affected. If no agreement is reached on the continued participation of the UK in trade deals which have been negotiated by the EU with a third country, then businesses which currently rely on the terms of those agreements to trade between the UK and the third country may be affected. For example, a Canadian manufacturer exporting to the UK under the preferential tariff terms set out in EU-Canada Comprehensive Economic and Trade Agreement (CETA) would be faced with tariff increases.

What preparations should we make for a 'no-deal' Brexit?

Businesses should prepare now for a 'no-deal' Brexit if it is likely to have an effect on their business operations. Whilst the prospect of a 'no-deal' Brexit taking place on 30 March 2019 is still unlikely, it would be imprudent for companies to 'bet-the-house' on this being avoided.

The exact nature of the preparations that should be made will be highly dependent on the nature of a company's business operations. The same considerations that apply to an EU manufacturing company using UK inputs would not apply to a UK insurer selling services into the EU. Therefore, the first step for businesses should always be to ascertain what specific effects a 'no-deal' Brexit would have on its operations.

One key consideration that is likely to be common to a number of businesses is the impact of Brexit

on contracts. A 'no-deal' Brexit could lead to increased difficulty or unattractiveness in the performance of contracts. Contractual parties are unlikely to be able to rely on existing contractual provisions - such as force majeure or material adverse change clauses - to remedy any contractual difficulties. Therefore, businesses should consider whether a bespoke Brexit clause should be included in existing and future contracts to provide a mechanism for resolving

Brexit-related contractual difficulties. Such clauses have the advantage of being capable of being drafted to cover a wide-range of potential future relationship outcomes.

More generally, businesses should consider the potential impact of Brexit on their operations, including on costs, prices, delays, changes in law, licensing requirements, tariffs, currency fluctuations and staff.

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As the new legal landscape begins to take shape we can help you to steer your business through the challenges and new opportunities that these changes will inevitably bring.

If you would like to discuss the consequences of Brexit on your business or organisation in more detail, as an alternative to Anthony or Jeremy please contact those listed below:

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