

Brexit – The Current State of Play

The post-Brexit world for which businesses are planning is as yet unknown. The state of play will depend upon the outcome of the October negotiations between the UK and the EU, and the terms of any final agreements that are approved for ratification by Parliament.

This note gives a brief, but by no means comprehensive, synopsis of the issues for businesses to consider when assessing the possible effects of Brexit, be it with or without a deal. This analysis should help you to generate a strategic plan to respond to problems, minimise the consequences, mitigate risks and maximise opportunities. Consequently this note is not tailored to any particular type of business but should be used as the basis for a more detailed review.

Primarily this note addresses a 'no-deal scenario' under which the UK would leave the EU without a withdrawal agreement, transition period, "mini deal" or sectoral UK-EU agreements, no political declaration on the framework for the future relationship and no future UK-EU relationship agreements in force immediately after Brexit.

Although not considered in this note, no-deal preparations of the UK government and other parties may apply to specific sectors and influence the contingency planning of a particular business.

What happens if there is a deal?

If the UK and the EU conclude a withdrawal agreement by exit day¹, the consequences include the following:

- A transition period will run post-Brexit from exit day until 31 December 2020. It is important to note that the transition period could be extended for up to one or two years².
- Formal negotiations on the future UK-EU relationship will only start post-Brexit.
- Throughout the transition period:-
 - most EU law will continue to apply to the UK;
 - most references to EU member states in EU law will include the UK; and
 - the UK will continue to be part of the EU customs union and single market.
- Following the end of the transition period, the withdrawal agreement has been drafted to attempt to avoid short-term disruption by clarifying what will happen when EU rules would otherwise stop applying to the UK. It is however possible some provisions will be superseded by the terms of the negotiated future UK-EU relationship. The withdrawal agreement will also preserve many of the existing rights of UK citizens resident in an EU member state and vice versa post transition.

¹ Section 20(1) of the European Union (Withdrawal) Act 2018 (EUWA) defined as "31 October 2019 at 11.00 p.m."

² By a decision of the joint committee established by Article 164 of the European Union (Withdrawal) Act 2018 (EUWA) which includes UK and EU representatives.

- If there is no agreement on the future UK-EU relationship by the end of the transition period:
 - some aspects of a no-deal scenario would apply, the long-term future arrangements for UK-EU security, transport, or judicial co-operation are not dealt with by the withdrawal agreement; and
 - the withdrawal agreement backstop would come into effect, establishing a single UK-EU customs territory, aligning Northern Ireland to EU customs and single market rules required to avoid a hard border, and imposing UK-EU level playing field measures to ensure fair competition in relation to taxation, environment, labour and social standards, state aid, competition, and state-owned undertakings and monopolies.

What happens if there is no deal?

Should no agreement be reached by exit day or there is no further extension of the Article 50 period and the Article 50 withdrawal notice is not revoked, the UK will leave the EU under Article 50, but without an agreement to govern the terms of withdrawal. Consequently there will be no transition period.

The primary concern is that EU law will suddenly stop applying to the UK as of the exit day (although any Brexit legislation passed prior to this date will ensure some degree of continuity).

No-deal consequences:

- UK law would change in areas where it currently relies on EU reciprocity.
- Unless there is a prior European Commission adequacy decision at the point of exit, the transfer of personal data from the EU to the UK will require an alternative legal basis, such as binding corporate rules or standard contractual clauses.
- UK entities would no longer be eligible to receive EU funding for projects under EU programmes, although the government has given a guarantee to continue funding such projects under a no-deal scenario.
- The UK will no longer be part of the EU's single market and customs union.
- The four freedoms³ will no longer apply to the UK under EU law.
- No mutual recognition of professional qualifications and regulatory frameworks.
- In an ideal scenario, legislation governing the UK government's post-Brexit policies would ideally have received Royal Assent by exit day, even for policies not intended to take effect on exit day. However, some of the government's Brexit Bills which were introduced in the 2017-19 parliamentary session fell when Parliament was prorogued at the end of the sitting on 9 September 2019 and so this now may not be possible.

³ The free movement of people, goods, services and capital.

- UK-EU trade in goods and services will take place under the EU rules that apply to non-EEA countries, and any applicable national laws and national practices of member states, with the World Trade Organization (WTO) rules and WTO schedules setting the baseline for access. Tariffs will apply.
- Continuity in the UK's trade with non-EU countries will depend on the government rolling over all the EU's existing trade agreements (and trade-related agreements) by exit day. The WTO rules and the WTO schedules set out the default position in the absence of any more preferential trade agreements or transitional arrangements.
- UK-EU negotiations on the future UK-EU relationship will need to start. The success of this will largely depend upon the circumstances that led to no deal, as this would affect the level of goodwill between the EU and the UK, and any preconditions set by the EU.

Material contracts and other agreements

A review of material contracts, significant agreements and finance documents in preparation for Brexit should include any current agreements which straddle the UK's exit from the EU (or the end of any agreed transition period) or agreements coming up for renewal, proposed new agreements and standard form contracts.

Depending on the legal form of your business other issues may need to be considered such as whether Brexit disclosures are required in public company documents or whether existing insurance policies cover potential losses.

Review current agreements

A review of current contracts should include:

- Any restrictions on your proposed Brexit strategies, including:
 - relocation (e.g. restriction on the terms of break clauses in real estate leases);
 - restructuring (e.g. the terms of change in control clauses); and
 - early termination (e.g. is termination permitted and, if so, on what terms).
- Potential changes to the deal (e.g. increased costs) or the ability to perform the agreement (e.g. any new illegality).
- Whether Brexit/a related event triggers termination, repayment, prevention of further drawdown, material adverse change (MAC), hardship, or a change in law.

- Positive opportunities for termination, assignment, novation and renegotiation.
- If changes are possible, whether any other amendments are required.

Review proposed future agreements

A review of future agreements should include:

- Possible Brexit strategies and the ability to pursue them.
- Counterparty risk.
- Potential changes to business costs, pricing, or key performance indicators.
- Potential changes in access to finance, labour or markets.
- Approach to proposed future agreements.

Decide whether agreements need amendment

Do the business's usual clauses require further consideration or amendment to address Brexit-related matters? E.g. Key employee, current/future references to the EU, data protection, governing law, jurisdiction, arbitration, currency denomination and allocation of currency risk, LIBOR benchmark and trigger events and consequences.

Businesses should consider whether to negotiate new Brexit clauses, to deal with the potential effect of Brexit-related events on the supply of goods or services, and trigger consequences such as termination, renegotiation or price adjustment.

Specific Contractual Areas for Consideration

Workforce

Issues may include:

- The extent to which the business relies on nationals from the EU, Iceland, Norway, Liechtenstein or Switzerland who work in the UK and vice versa – as well as their immigration status.
- Effects of a future skills-based UK immigration system – particularly important for businesses reliant on lower-skilled workers.
- Extent to which the workforce relies on the freedom of movement, establishment rights, recognition of qualifications, and rights to provide cross-border services.

In consideration of the above, the following mitigation steps may be useful:

- Retention strategies, e.g. provision of Brexit resources for staff, offering legal support on immigration issues (e.g. applications for citizenship, permanent residence and settled status or pre-settled status under the EU Settlement Scheme).
- Staff reallocation.
- Recruitment strategies.
- Alternative technological measures.

Cross-border Trade

Considerations for cross-border trade include:

- Location of business operations including production facilities, warehouses, offices and service providers.
- Location of customer base and markets for goods and services.
- Supply, production and distribution network (supply chain) for both the business and its contractors/ suppliers/end users.
- Cross-border trade with countries outside the EU and the extent to which they rely on the terms of the EU's trade agreements.
- Potential trade-related effects of a no-deal Brexit:
- Tariffs on imports and exports e.g. customs duties. In a no-deal scenario, UK-EU trade after exit would be on WTO terms and goods would be subject to customs duties. The government would set temporary tariff rates, which apply immediately after exit for a year, whilst they work on a permanent tariff regime.
- Other barriers on imports and exports including regulatory requirements, security and safety controls, customs declarations and any potential border delays. Changes may be required to businesses processes to comply with new import and export controls.
- Reliance on laws which may no longer apply after Brexit such as:-
 - Regulatory framework for goods and services;
 - EU licences, authorisations and certificates;
 - The four freedoms, and rights to provide cross-border services; and
 - EU's trade agreements with non-EU countries including preferential tariffs/market access rights.

Brexit Strategies

Key mitigation strategies may include:

- Diversification to reduce risk.
- Restructuring supply chains to maximise tariff, non-tariff and VAT efficiencies, or to use different goods or services suppliers that are less exposed to Brexit-related risks.
- Corporate restructuring to preserve EU market access such as:-
 - incorporating subsidiaries in the EU; and
 - relocating to the EU the business's UK-based production facilities, service providers, or headquarters.

Consideration of the EU rules and frameworks applicable after Brexit in line with your intended strategy must be completed to ensure that the desired effect in relation to Brexit strategy for cross-border trade. Businesses should also consider broader implications including capital cost, workforce issues and tax.

Data Protection

Key considerations:

- Reviewing personal data flows from the European Economic Area (EEA) to the UK and from the UK to other countries.
- Ensuring continuity in EEA-UK data flows and establishing appropriate safeguards under GDPR⁴ to enable the continued transfer of personal data from the EEA to the UK. In the absence of a European Commission adequacy decision this will include binding corporate rules or standard contractual clauses. In the event of a deal it is expected the adequacy decision will be postponed until the end of the transition period.
- Identifying who if anyone is the lead supervisory authority for the business after Brexit e.g. Information Commissioners Office or will it be a local supervisory authority in each EEA country in which it operates.
- Will a UK-based business operating in the EEA need to appoint a representative in the EEA for GDPR purposes even if the business has no EEA base (such as an office or branch), but processes the personal data of EEA-based individuals.
- Reviewing privacy notices and documentation.

⁴ the General Data Protection Regulation 2016/679

Economic Effects of Brexit

A Brexit review should consider the potential short-term and long-term economic effects of a no-deal Brexit on matters such as inflation, borrowing costs and exchange rates. Appropriate strategies to mitigate currency volatility, such as hedging may be considered.

It will be imperative to consider the effect of a no-deal Brexit on cash flow. If cash-flow issues are likely mitigation strategies including the reduction of costs, shortening payment times, reducing credit given and increasing credit received/new sources of credit should be considered.

mfg Solicitors LLP

September 2019

mfgsolicitors.com 0845 55 55 321  @mfgsolicitors

Offices in Kidderminster, Worcester, Bromsgrove, Telford, Ludlow and Birmingham.

mfg Solicitors LLP is a Limited Liability Partnership registered in England, number OC317146 Registered Office:
Adam House, Birmingham Road, Kidderminster, Worcestershire. DY10 2SH

mfg Solicitors LLP is authorised and regulated by the Solicitors Regulation Authority. SRA Number: 440475

Calls to mfg may be recorded for training or monitoring purposes.