

Brexit: towards the cliff edge?

Paul Henty provides an update on Brexit negotiations with the possibility of a 'no-deal' scenario looming large



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The aim of this piece is quite ambitious: to give an up to date assessment of the state of play in Brexit negotiations, assess the prospects of a trade deal being reached between the UK and EU before the end of the Transition Period and assess the potential impact on businesses if such a deal is not reached.

The UK's current status

The UK left the EU on 31 January 2020. While that date had undeniable significance, many of the effects of Brexit were cushioned by the EU-UK Withdrawal Agreement (WA), which came into force on 31 December 2019.

Articles 126–132 of the WA provided for a transition period (<https://bit.ly/36Jlvzd>), which will continue in force until 31 December 2020 (Transition Period). While Art 132 of the WA provided the possibility to extend the length of the Transition Period 'for up to one or two years' (see para 130), the deadline for exercising that option expired in July without being invoked.

During the Transition Period, EU law generally continues to apply to the UK and to produce 'the same legal effects as those which it produces within the Union and its Member States'. The EU's institutions and agencies, including the Court of Justice of the European Union (CJEU), maintain their powers to enforce, police, and review the application of EU law within the UK, including the application of the WA.

While agreeing to abide by EU Law, the UK has lost all powers to shape its content or

enforcement. The UK is no longer represented in the EU Commission, the Council of Ministers or the European Parliament. There are no longer any UK-nominated judges in the EU Court of Justice or the General Court. To some extent, it has become a 'rule taker' during the Transition Period.

These constitutional drawbacks acknowledged, the Transition Period has provided certainty and stability for business. This has included the right to continue trading with the EU27 on a tariff free basis and the extension of the rights of free movement of goods, services, capital and workers.

Latest in negotiations

At the end of 2019, alongside the EU Withdrawal Agreement, the parties signed up to a Political Declaration (<https://bit.ly/30K8CRJ>), within which they committed to negotiating a new partnership. In the EU's own words 'the parties' aim [is] to establish an ambitious future partnership, which reflects the political and geographical proximity and economic interdependence between the EU and the United Kingdom'.

The intention had been for intense discussions throughout 2020 to usher in the terms of the new partnership before the end of the calendar year.

The reality has been different. The practicality of negotiations was significantly impacted by the Pandemic, which prevented face-to-face talks. It is generally recognised that progress towards a deal has been disappointing. More problematically, there are a number of points on which the parties appear irreconcilably opposed.

One of these relates to the protection of fair competition. The EU has been clear that it will only maintain access to the EU internal market if the UK puts in place sufficient legal controls to prevent subsidies. Without such safeguards, UK firms could enjoy a significant advantage over their EU rivals.

The upshot of the ninth round of negotiations, which commenced on 28 September 2020, is as yet unclear although no substantive progress has been reported. Following the eighth round of negotiations, which concluded on 10 September, the EU expressed disappointment at the UK's position on subsidy control (<https://bit.ly/3iLOCWY>). The UK has signalled its intention to adopt a subsidy control system (<https://bit.ly/2GCz2xQ>) which mirrors the rules of the World Trade Organisation (WTO) rather than those of the EU. The WTO regime is far less prescriptive than the EU's own regulations on State aid.

This is not the only area of disagreement. Access to fishing rights in UK waters is vexing both sides. The EU is also concerned at the absence of guarantees from the UK that it will not regress in its domestic social, environmental, labour and climate standards. This again reflects the possibility of an unfair advantage for UK businesses in the single market if they are not subject to similar regulatory standards as undertakings from the EU 27. It is possible that such guarantees are not forthcoming in order to allow the UK Government room to manoeuvre in securing trade deals with third countries whose regulatory standards also fall below those of the EU.

The UK Internal Market Bill

While the negotiations required no further complications, these arrived in the form of the 'UK Internal Market Bill' (UKIMB), a controversial draft UK law laid before Parliament on 9 September 2020 and due to be considered at second reading by the House of Lords on 19 October (<https://bit.ly/3iH3svY>).

The stated aim of the UKIMB is to protect the integrity of the UK's Internal Market (UKIM) following the end of the Transition Period. From that point on, the devolved administrations of Scotland, Wales and Northern Ireland will have the power to introduce divergent regulatory standards. The risk is that this could distort competition within the UK and prevent trade across the home nations.

The UKIMB would ensure that goods or services within one part of the UK could legally be sold in any other part of the UKIM, even if those goods or services were subject to different regulatory standards in their home jurisdiction. It would use the legally understood principles of mutual recognition and non-discrimination to ensure there are no new barriers for businesses trading across the UK.

These proposals have drawn opposition from the Scottish and Welsh Governments, which have voiced a preference for the introduction of mutually-agreed common

frameworks in specific policy areas as a means of avoiding barriers to trade. There is also reported hostility on their part towards a perception of exceptionalism and unduly generous treatment towards Northern Ireland (for example in terms of access to the UKIM).

More significant resistance to the UKIMB has come from the EU, which considers several aspects of the Bill to be incompatible with the commitments given by the UK within the WA's Northern Ireland Protocol.

The Northern Ireland Protocol aims to avoid a hard border on the island of Ireland. For that purpose, Northern Ireland effectively remains part of the EU single market on a temporary (but indefinite) duration. As the Republic of Ireland will also remain a member of the single market, seamless trade and free movement of persons between North and South can continue. It also means that Northern Ireland will continue to work to the rules and standards set by the EU. That in itself makes inevitable certain barriers to trade between Northern Ireland and Great Britain.

For example, the Protocol foresees that exporters moving goods from Northern Ireland to Great Britain will need to fill out 'Exit Summary Declarations'. EU legislation requires, as a general principle, that all goods brought out of the customs territory of the Union, regardless of their final destination, be risk assessed and subject to customs control before departure or—in the case of deep sea containerised maritime shipments—before commencement of vessel loading. Consequently, where a customs declaration or a re-export declaration is not required, an exit summary declaration has to be lodged. Section 42 of the Internal Market Bill could frustrate this. It gives a UK government minister the power to disapply or modify the rules in the protocol so Northern Ireland businesses do not have to fill out export declarations or comply with other exit procedures.

The use of this power could threaten not only the integrity of the EU's customs system but also those of the UK. A leaked HM Treasury paper from 2019 warned that without such checks on 'West-East' trade, third countries could use Northern Ireland to circumvent and undermine the UK's own customs and regulatory requirements.

Also threatened is Art 10 of the Protocol under which the UK government undertakes to notify the European Commission if it intends to offer any state aid affecting businesses in Northern Ireland. Section 43 of the Internal Market Bill, in defiance of Art 10, would allow the Northern Ireland secretary to disapply or modify Art 10 without Brussels' consent.

Section 43 also confers on the Minister the power to deviate from the EU's own rules on state aid, as interpreted by the EU Court

of Justice. This precludes a claimant from having an action referred to the European Court of Justice to adjudicate whether or not there has been an illegal state subsidy. Furthermore, it prevents individuals from challenging a decision by the UK, which not only breaches the provisions of the Protocol but also Art 4 of the WA.

Legal action by the EU

Perhaps unsurprisingly, the EU has commenced infringement proceedings against the UK, invoking the dispute resolution mechanism of the WA, which confers jurisdiction on the EU Court of Justice. On 1 October, the EU Commission sent the UK a formal notice of breach of the WA (<https://bit.ly/2GLuLRZ>). Commission President Ursula Von der Leyen warned '[t]his draft Bill is by its very nature a breach of the obligation of the good faith laid down in the withdrawal agreement. Moreover if adopted as it is it will be in full contradiction to the protocol of Ireland-Northern Ireland'. The EU required the UK to remove the controversial elements of the IMB by 30 September 2020. The UK Government declined to do so, the controversial provisions having been approved by the House of Commons at the first reading of the UKIMB.

What does this mean for citizens & businesses?

The prospect of a 'no deal' Brexit scenario looks likelier than ever. Any agreement on the future relationship would need to be concluded by the end of September 2020. Businesses, already browbeaten by the effects of the COVID-19 pandemic, must take positive steps to review how they would be affected if arrangements for a free trade area with the EU 27 cannot be concluded before the end of the Transition Period.

The base assumption should be that the two blocs will deal with each other on the basis of the rules of the WTO. That effectively means that imports to and exports from the EU 27 will need to satisfy customs requirements. Some goods will also attract tariffs, usually calculated as a percentage of the value of the goods in question. There is obvious potential for disruption to trade between the UK and EU member states and potentially also between Northern Ireland and the rest of the UK.

Since the referendum, EU businesses have asked their UK-based suppliers about their preparations for severance from the internal market. In many cases, UK businesses have difficulty in providing satisfactory answers, owing to the unprecedented and rapidly evolving nature of the situation.

What actions should be taken? Some of the most important are the following:

- ▶ Consider the impact on those supply chains in which your business is involved.

Will you still be able to receive or forward goods as required in a timely manner which will allow you to meet pre-existing contractual commitments? If not, can changes to contractual commitments be negotiated? Should suppliers be substituted to streamline the chain?

- ▶ Will the goods shipped and received by your business attract tariffs? If so, what is the level of those tariffs? Who will be responsible for them under your contractual arrangements? If this is not clear, can a solution be negotiated?
- ▶ How will changes to the VAT regime affect your business? Could imports / exports previously exempt now attract VAT? How will the cost be borne and what effect will this have on margins?
- ▶ Are any goods shipped to the EU dual use goods? If so, will your business require a licence to continue exports?
- ▶ Consider the impact of GDPR. During the Transition Period, personal data can flow freely. If no deal is reached to allow this unhindered circulation to continue, special measures will need to be taken by private parties to allow personal data to be exported to the UK. Such measures could include incorporating EU Commission approved contractual protections between data controllers and processors, as well as obtaining data subject consent to the export.
- ▶ Will your labels need to be changed? Food products for example must display the address of an entity based inside the EU27 in order to circulate legally within the EU single market. Likewise you may need to check if your goods and/or associated packaging still lawfully qualify for the use of display EU certification marks such as CE marks or the EU Ecolabel.

There remains a chance that even at the eleventh hour a deal can be salvaged between the UK and EU. The BBC for example has cited unconfirmed rumours of progress towards an agreement (<https://bbc.in/3dhngor>).

The substance of these reports is unknown, however. What is more likely is considerable disruption to trade flows that will ensue from the UK's rupture from the EU internal market. With that in mind, it is better for businesses and citizens to err on the side of over-planning for a no deal scenario, even at a time when they may already find themselves preoccupied with the first global pandemic in over 100 years. If COVID-19 has taught us anything, it is the imperative for sensible precautions in the face of an existential threat.

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