

31 January 2020: Into the Unknown

I. Parliament has now passed the European Union (Withdrawal Agreement) Act (“the Act”). The Queen gave her Royal Assent to the legislation last week and the Prime Minister immediately signed the Withdrawal Agreement. Subject to the formality of the EU Parliament’s approval on 29 January, the UK will be leaving the EU on 31 January 2020 at 11pm GMT.

Related Capabilities

- International Arbitration & Litigation
- International Trade
- Europe

II. What does this mean for business?

A. Brexit is unique in its scope and complexity. It affects businesses across all sectors. No two businesses face precisely the same challenges; everything depends on the nature and footprint of their operations, suppliers and customers.

B. In the immediate term, it will remain “business as usual”. The UK has agreed a Transition Period with the EU, which will end on 31/12/2020. During that time, whilst the UK will no longer be a member state of the EU, it will continue to be treated as a member and will continue to participate in the single market.

C. Whilst the EU Exit Agreement provides for the Transition Period to be extended for up to 2 years, this is highly unlikely. The UK Government has stated repeatedly that it will not seek an extension and, to that end, has inserted a provision in the Act that expressly prohibits such extension being sought. This can only be changed by Parliament, again unlikely given the UK Government’s healthy majority in the House of Commons.

D. For planning contingency purposes, the prudent assumption for businesses must be that the UK will finally exit the EU on 31 December 2020 without having concluded a comprehensive trade deal with the EU, contrary to the Government’s assurances. A recent Bank of England survey showed 53% of businesses cited Brexit as one of their top sources of uncertainty.

III. What steps is the UK Government taking during the Transition Period?

A. The UK Prime Minister confidently predicts that he will conclude a trade deal with the EU before the 31 December 2020 deadline.

B. He also insists that he will negotiate, in parallel, a US Trade Deal. And President Trump told the World Economic Forum in Davos earlier this week that he was looking forward to “*a tremendous new deal with the UK*”.

IV. What are the prospects of either trade deal being successfully concluded in the time available?

A. Businesses should be extremely skeptical about either of the UK Government’s aspirations being achieved. The UK certainly does not hold the “trump card” in those negotiations.

B. The EU does not have a hard deadline. It has said that negotiations will not commence until March and, if the UK insists on its 31/12/20 exit deadline, they would need to be concluded by the summer to allow sufficient time for ratification by individual member states. The EU appears not appear to regard a “No Deal” exit by the UK as a credible threat: the UK represents 15% of the EU’s exports whilst the EU represents 45% of the UK’s. It is suggested the EU may be running down the clock deliberately to force UK to make concessions.

C. The EU is insisting on total regulatory alignment; the UK Government insist on divergence, particularly in relation to trade and immigration.

D. It is conceivable the UK may be able to secure a non-comprehensive trade deal by the time of its stipulated deadline. This might conceivably cover limited categories of goods such as pharmaceuticals and motor vehicles plus possibly cyber-security. It appears to be generally recognized by the EU and the UK (certainly by the Bank of England) that there would be insufficient time to discuss a trade deal in relation to services.

E. The prospects of a UK/US Trade Deal seem even more remote either in the short or the longer term, in spite of the President’s warm words in Davos and even though it represented one of the main reasons for the UK leaving the EU:

(i) This is the first trade deal the UK has negotiated in 40 years. The UK will be negotiating with experienced hard-nosed US trade officials, who will drive a hard bargain and seek to pry open UK markets e.g. pharmaceutical procurement and agricultural products;

(ii) The US is in a strong position given the relative size of the UK and US economies. The US is the UK’s single largest market with a trade surplus with US is £33.9bn; and the US is the largest source of FDI into the UK.

(iii) President Trump has insisted that the UK must walk away from the EU with No Deal;

(iv) The US will stand firm on food standards, animal welfare standards, agricultural standards and climate change/greenhouse gas emissions.

(v) The UK has announced plans to levy a digital tax, which would target US tech giants such as Amazon, Facebook, Apple, Google and Netflix. That places London and Washington on a collision course with the threat of retaliatory tariffs by the US.

(vi) And the next collision course involves the UK's anticipated deal with Huawei, a current 4G provider, to help run the UK's 5G network. This is likely to be announced later this week by the UK Government even though Mike Pompeo, the US Secretary of State, is currently in the UK putting pressure on Boris Johnson not to go ahead with the deal.

V. What steps should corporates be considering?

A. The Confederation of British Industry has advised the UK Government that neither the EU nor the UK is ready for "No Deal". However, businesses need to plan for that potential scenario and to conduct a root-and-branch evaluation of their operations. Larger corporates are in general likely to have developed certain contingency plans.

B. In developing contingency plans, businesses will need to prioritize by deciding what actions need to be taken now (e.g. whether to list in the EU or the US), what can be deferred, what actions might be left and where they should remain flexible if the political landscape changes.

C. As an example, in the financial services sector, more than 1,000 banks, asset managers and insurers from the EU have announced plans to open offices in post-Brexit UK Britain. They have applied to the Financial Conduct Authority for temporary permission to operate in the UK after Brexit so that they can continue to serve their UK clients to cover the possibility of two-way access between the UK and EU coming to an end following expiry of the Transition Period.

D. And Ernst & Young has this week reported that large UK-based financial services firms have implemented plans enabling them to continue operating in the EU. This will involve approximately around 7,000 positions being relocated from London to the EU, and a further 2,400 jobs being created and hired locally in their new EU hubs. The target destinations are Frankfurt, Paris, Dublin and Luxembourg.