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Ready for Brexit?

Readiness

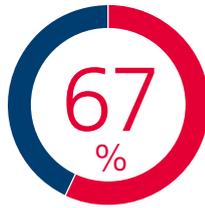
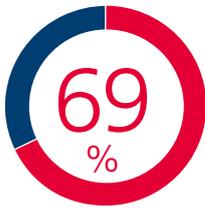


Only **22%** of large UK businesses are ready for Brexit, with **59%** currently preparing themselves. Another **11%** expect to prepare but haven't started.



Just **59%** of small businesses expect to prepare for Brexit.

Actions



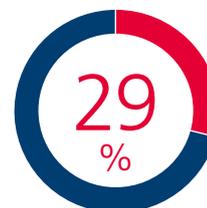
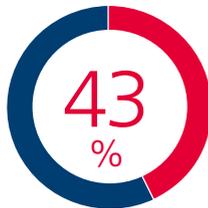
**69%** of the large businesses preparing for Brexit and **67%** of the medium-sized businesses are modifying their supply chains.



**70%**

**70%** of the large businesses preparing for Brexit are renegotiating contracts, with **68%** amending finance documents.

Optimism



**43%** of leaders in large UK businesses are optimistic about Brexit, with **28%** describing themselves as pessimistic. The remaining **29%** say they are neither optimistic nor pessimistic.

The Brexit businesses want



UK businesses overall are **4:1** in favour of staying in a customs union with the EU. Large businesses are even more enthusiastic, at over **5:1**.



Large businesses are over **4:1** in favour of staying in the EU single market, with businesses overall being more than **3:1** in favour.



Only **24%** of businesses definitely have enough information to plan their post-Brexit operations.



Over half of the large and medium-sized companies preparing for Brexit are relocating operations and/or staff (**51%** and **54%** respectively).



Optimists outnumber pessimists in England, but in Wales the numbers are evenly balanced, and in Scotland and Northern Ireland the pessimists outnumber the optimists.



**Three-quarters** of large companies (and **two-thirds** of all UK business) say it's important to have a Brexit transition period.

## Contents

- 05 Get ready – but for what?
- 06 Are UK businesses ready for Brexit?
- 09 What are UK businesses doing to prepare for Brexit?
- 15 The cost of Brexit
- 17 No Deal
- 24 The negotiated deal
- 27 Collateral damage: Brexit and non-EU countries
- 30 Getting to Brexit
- 34 CMS and Brexit

## Survey methodology

CMS commissioned Opinium Research to conduct an online survey of senior decision makers in 1,009 UK companies and 1,010 companies in six other EU countries, creating a snapshot of their views on Brexit and their preparations for it.

The survey was conducted between 13 and 20 March 2018.

This was followed by a second online survey of 1,006 UK companies between 8 and 15 August 2018, again conducted by Opinium, to determine how far business preparation and opinion had changed in the intervening months.

This report presents a summary of key findings from these surveys.



# Get ready – but for what?

The UK and the EU have negotiated a Brexit deal – but will parliament accept it, throw it out or try to change it? Will there be another referendum? And what will the final relationship between the UK and the EU look like?

As Theresa May told the House of Commons: “The choice is clear: we can choose to leave with no deal; we can risk no Brexit at all; or we can choose to unite and support the best deal that can be negotiated – this deal.” But it is the Commons that now poses the greatest threat to the deal. If MPs accept it and do not seek to derail Brexit legislation, we might – by about February – be able to say that the odds of a No Deal Brexit are low. At the moment, though, No Deal is a possibility for which every business should be engaged in contingency planning.

Many businesses think No Brexit is actually the least risky of Mrs May’s three choices. But the path to it is uncertain and might involve another referendum. And while some business leaders support that, others are backing the deal, even though it offers no certainty past the end of the transition period. The important thing for them is that it avoids the chaos of No Deal.

This report looks at the prospect of No Deal and how businesses may be able to prepare for it, as well as the risk of disruption to non-EU trade. It also assesses how far businesses have already prepared for Brexit, and reviews the key steps that companies in various sectors are taking.

When we surveyed the business community in August we found that only 12% of large companies had not started planning for Brexit. Some, especially in heavily regulated sectors, began two years ago or more. But only a minority have actually completed the process. Most are still working on it.

Many businesses want to defer decisions for as long as possible, avoiding unnecessary disruption and expenditure. But certainty about a Brexit deal won’t come in time to meet the lead times for most business planning. Any company which has not done so already should be assessing the risks it would face from a No Deal Brexit, and weighing the costs of preparing for it against the risks of not doing so.

Our surveys found both optimism and pessimism about Brexit in the business community – as well as many businesses that still don’t know whether to see it as positive or negative. The results also showed UK plc

being strongly in favour of a deal that offers a long transition period and leads to a close trading and regulatory relationship between the UK and the EU – a closer relationship than either the UK or the EU is proposing at the moment. A No Deal Brexit would be the absolute opposite of what businesses say they want.

As well as following the progress of Brexit in the political arena – and monitoring the government’s increasing preparations for and advice on a No Deal scenario – businesses need to keep up to date with what is happening beyond the Brexit negotiations. For example, a formidable amount of EU law has to be transposed into UK law by 29 March. Hundreds of statutory instruments are required. The UK has never seen such a blizzard of legislation. Inevitably, much of it will be done with little consultation or parliamentary scrutiny, and there will be unintended consequences. Even where everything goes well, there will be new systems and regulators to deal with.

As Europe’s largest law firm, CMS is used to helping clients manage their businesses through all types of legal and regulatory changes. We have found that there is no ‘one size fits all’ approach to the evolving changes arising or anticipated from Brexit. Different companies are impacted differently and have different priorities. Having a strategy to direct the analysis that reflects the business’s particular situation is key. While at one stage the discussion was on both the risks and opportunities arising from Brexit, at this stage in the process the immediate concerns of our clients are focused on ensuring processes are in place for the assessment and allocation of risks and that steps are taken to protect business continuity.

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# Are UK businesses ready for Brexit?

We've been advising clients on Brexit for well over two years. Even before the referendum, some had begun their contingency planning. But it's still true that most UK companies are not ready for Brexit – in particular, for a No Deal Brexit.

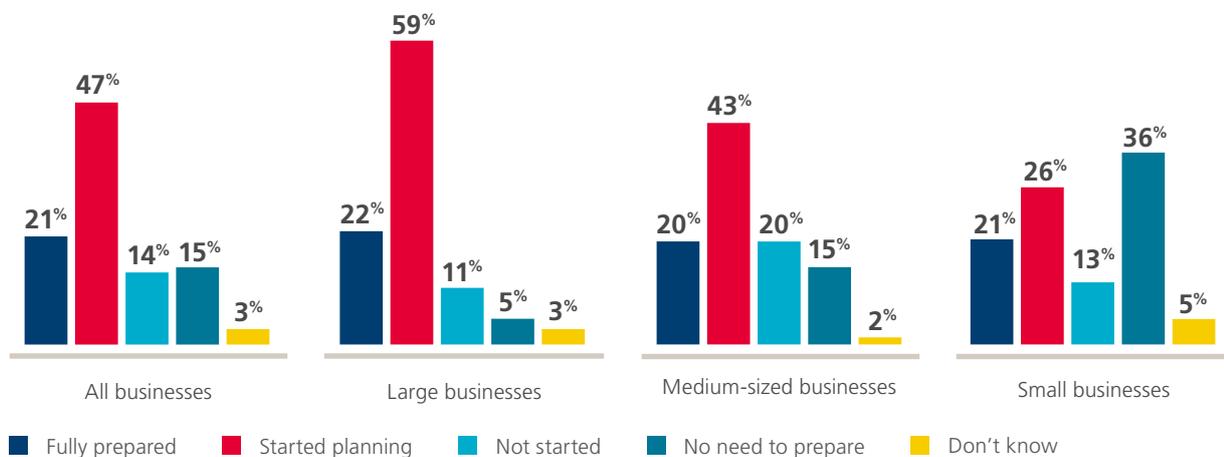
We found that just over one-fifth of the UK's large companies have completed their Brexit preparations. For the majority – three-fifths – Brexit preparations are ongoing. But more than one in ten have still not even begun to prepare.

Allowing for a margin of error, these statistics are substantially the same as those we gathered when we asked the same questions five months earlier. The only clear change is a slight increase in the percentage of companies that are actively preparing for Brexit.

The same is broadly true of small and medium-sized companies. The past few months have seen little significant change in the overall preparedness of these businesses for Brexit.

The implication is that, while a vanguard of companies are Brexit-ready, most – whether through choice or necessity – are taking a longer, perhaps more complex route to Brexit preparedness, or simply waiting for more certainty about Brexit.

## Is UK business prepared for Brexit?



## Preparedness among EU companies

A lower percentage of EU27 businesses feel they need to prepare for Brexit – for example, 43% of small EU27 companies said they did not.

As in the UK, the percentage needing to prepare increased according to size, with over 85% of large businesses in the EU27 having to make preparations.

The percentages of EU27 businesses that have completed their preparations or not started them are very similar to those we found among UK companies.



VICTORIAM: PRIMO



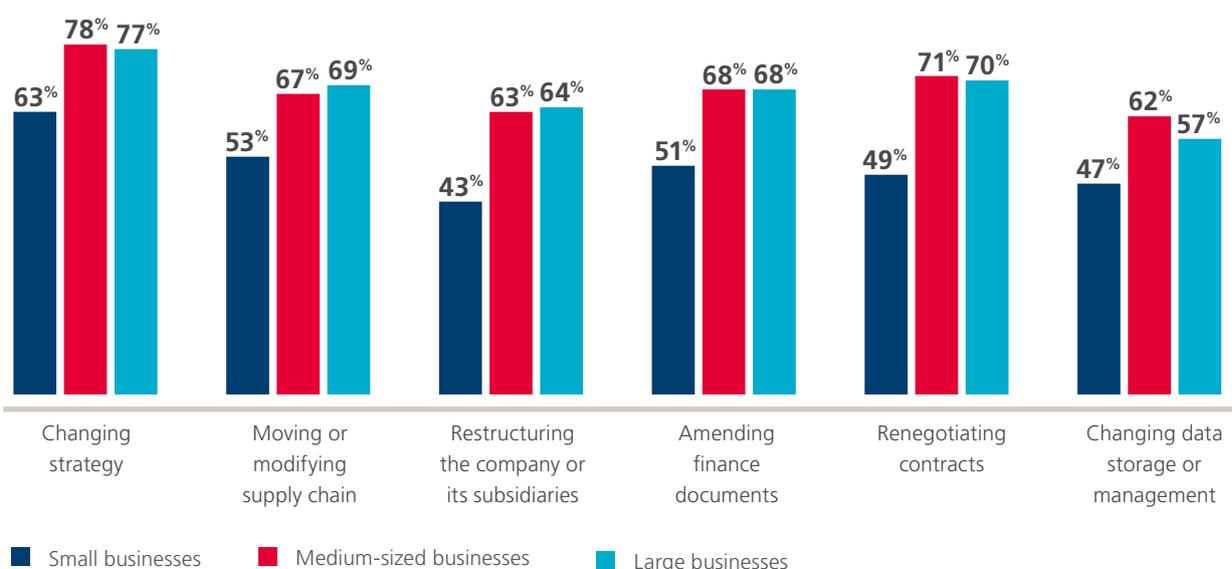
# What are UK businesses doing to prepare for Brexit?

Companies are making a variety of changes to the way they do business – even though they still don't know what sort of Brexit they should prepare for.

Perhaps unsurprisingly, our surveys show that over 75% of the large and medium-sized UK businesses that have prepared or intend to prepare for Brexit are changing their strategy. (All percentages shown in this section are of the businesses that need to prepare for Brexit.) There are some clear differences between

sectors. Only 60% of Real Estate companies are changing their strategy, for example, compared with over 80% of Energy companies. But there is no sector in which a majority are not revising their strategy – proof, if any were needed, that Brexit will affect business in every part of the UK economy, at every level.

## What are businesses doing to prepare for Brexit?



## Supply chain

Over two-thirds of the large (69%) and medium-sized (67%) businesses preparing for Brexit are modifying their supply chains. (This is a dramatic increase of 10 percentage points among medium-sized businesses since our March survey; the number of large businesses rose by only one point.) Over one-third of large businesses think that supply chains in their sector will have to be either completely changed or at least extensively adapted because of Brexit.

As the UK government noted in its guidance on *Trading with the EU if there's no Brexit deal*, "businesses should

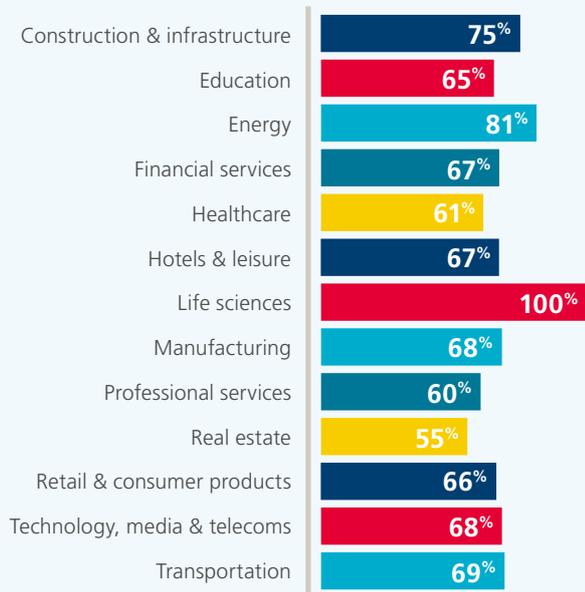
consider the impact [of No Deal] on their role in supply chains with EU partners" and "should take account of the volume of their trade with the EU and any potential supply chain impacts."

## Restructuring

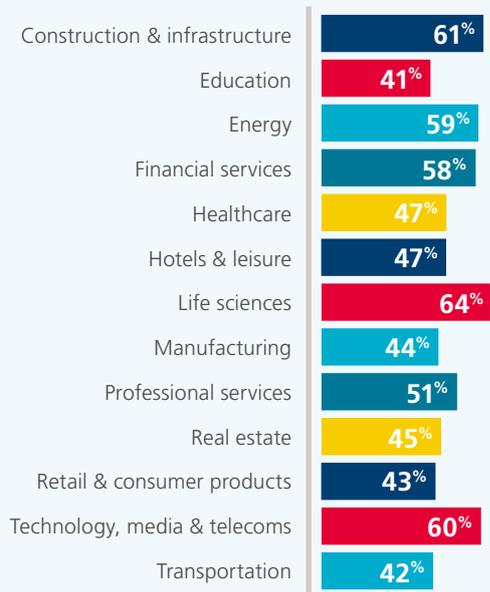
Banks and other financial services companies, as well as insurers, took an early lead in changing their corporate structures to reflect Brexit. New subsidiaries have blossomed across the EU, in moves designed to ensure that full European coverage could still be achieved after an anticipated loss of passporting and other provisions. But as our research shows, Brexit restructuring goes far

# Sector preparedness

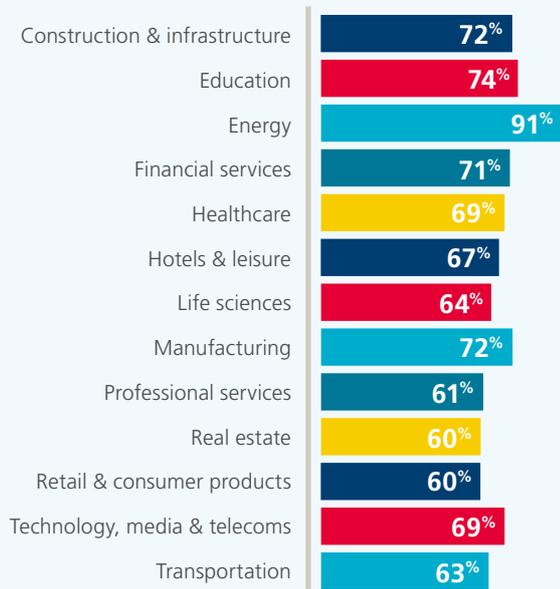
## Companies modifying supply chain – by sector



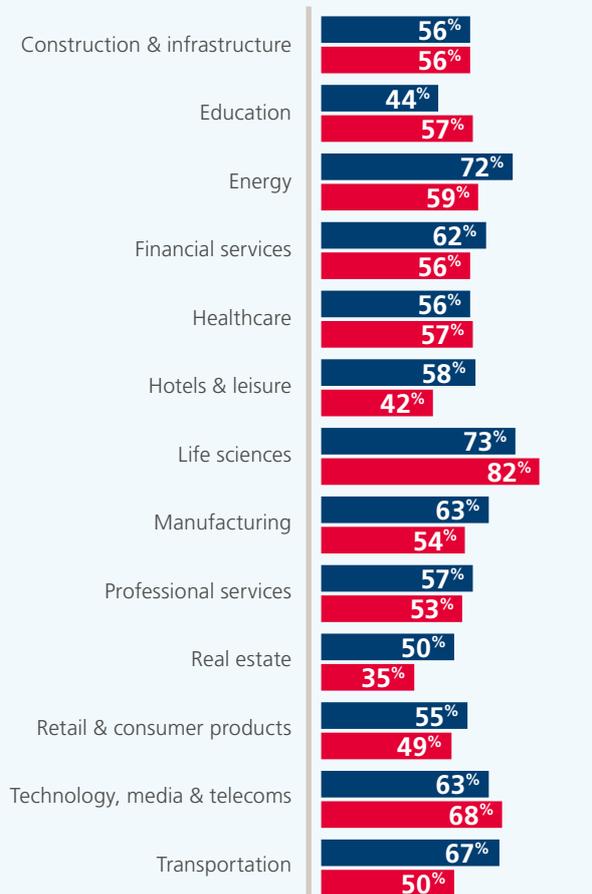
## Companies relocating operations or staff – by sector



## Companies renegotiating contracts – by sector



## Investment decisions – by sector



■ Increasing investment

■ Cancelling, postponing or reducing investment

beyond the financial sector. Companies from airlines to automotive OEMs have been incorporating new subsidiaries, altering holdings or even moving head offices to ensure that they can continue to do business after Brexit.

Nearly two-thirds of the large and medium-sized companies that are preparing for Brexit are doing some sort of restructuring.

## Amending finance documents

From reviewing material adverse change provisions to revising choice of law and jurisdiction clauses, many businesses have been amending finance documents in the light of Brexit. Sometimes the emphasis has been on whether existing agreements should be renegotiated. In other cases concern has been focused on changing templates to make sure future agreements will function well following any type of Brexit.

In many ways, this is a fairly straightforward aspect of Brexit to deal with. Legal agreements are fundamentally designed to anticipate contingencies, so amending them to reflect different Brexit scenarios will not usually present major problems (assuming of course that the parties are in agreement).

As our data shows, over two-thirds of the large and medium-sized companies preparing for Brexit have made this part of their preparations. The number of medium-sized companies doing this rose by 14 percentage points between March and August.

## Renegotiating contracts

Companies have also been reviewing contracts with an eye to Brexit (as well as amending their standard terms of business). As with finance documents, a variety of questions have to be considered. These may not only be legal questions, such as whether a contract assumes that the UK is an EU member state, or whether Brexit might constitute an event of default.

Repapering may also be necessary if a company makes other changes to its business in order to reflect Brexit – for instance, it might be necessary to transfer a contract to a new EU-based subsidiary.

We found that 70% of large businesses and 71% of medium-sized businesses are renegotiating contracts because of Brexit. Again, we saw a small increase (four percentage points) between March and August among the large businesses doing so and a much bigger increase (13 percentage points) among medium-sized businesses.

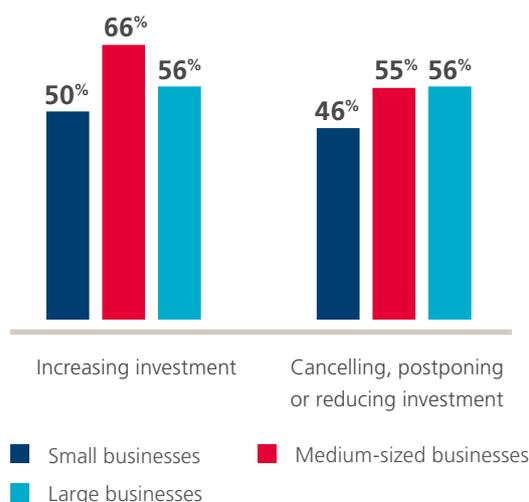
## Changing data storage or management

Fewer companies are making changes to how they handle data, although even here more than half of all the large and medium-sized UK companies preparing for Brexit are taking action. Those who are not should perhaps double-check that they don't need to: after the introduction of GDPR, companies need to pay great attention to where and how data is held. And if the UK fails to secure the sort of 'deep' Brexit deal on data that it hopes for, and instead has to rely on EU adequacy rules as the Commission has proposed, the issue could become a serious difficulty, particularly if there is any delay or problem in the adequacy process.

## Investment

Brexit is the cause of both more investment and less investment. Some projects are being pruned, axed or put on ice, while money goes into other capex required to prepare for Brexit or to hedge against Brexit scenarios.

### Brexit and investment: What are businesses doing?

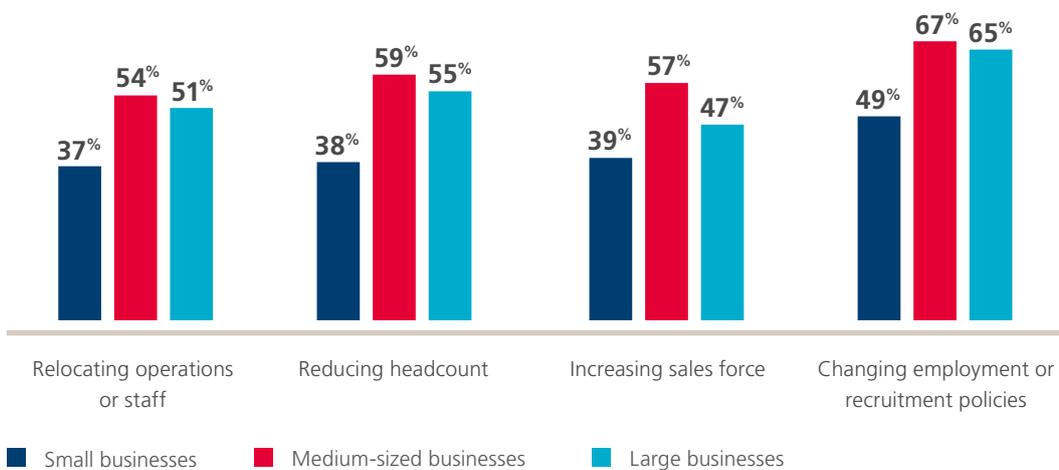


## The human factor

Financial services is the only sector in which a large number of relocations or staff moves has so far been publicised. Companies have otherwise tended to keep their cards close to their chests in this area. And many, of course, will still hope to avoid the expense and disruption of relocations – an approach which may be easier for companies which already have operations in both the UK and the EU27, and are thus better able to relocate people and functions at short notice.

Our data shows that Brexit is prompting many companies to cut headcount in some areas and increase it in others (sales being the one we focused on in our survey). But the most widespread HR impact of Brexit on companies of all sizes is the change it is driving in employment and recruitment policies. Many are concerned about their ability to retain EU citizens as employees or to recruit from the EU, especially in sectors such as construction, food, hospitality and healthcare, which have a high proportion of EU nationals in the workforce. Some will need to change how they do things because of other Brexit-driven changes, such as the relocation of manufacturing.

### Brexit and the workforce: What are businesses doing?

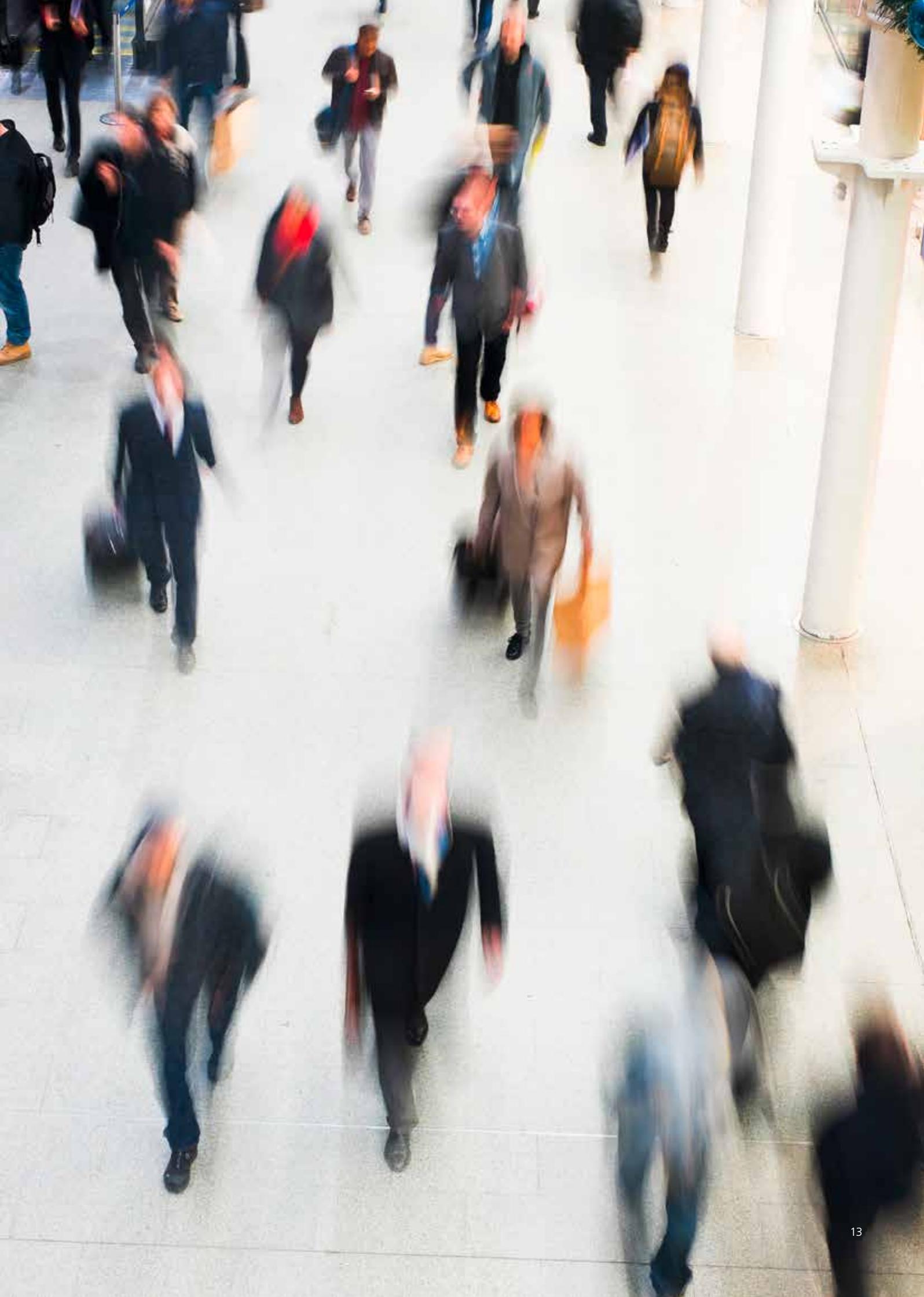


### Do companies know what they need to know?

We asked the businesses we surveyed whether they had enough information to plan for their post-Brexit operations.

A quarter (24%) definitely have enough information; a smaller number (8%) definitely don't. But most just aren't sure – 39% think they probably do, 23% think they probably don't, and 5% don't know at all.

This brings to mind Donald Rumsfeld's famous distinction between 'known knowns', 'known unknowns' and 'unknown unknowns' – with the latter being "the ones we don't know we don't know". Our data suggest that a lot of UK businesses still don't know what they don't know about Brexit.





## Is bigger better for Brexit Britain's businesses?

Our research shows that the more UK businesses are exposed to the EU, the more optimistic they tend to be about Brexit, and the more EU27 businesses are exposed to the UK, the more positive they too tend to be about it. This is a key paradox of Brexit.

At the time of the referendum, for instance, UK businesses which derive over 20% of their turnover from the EU were 50% positive about Brexit and only 28% negative. In contrast, UK businesses which get none of their income at all from the EU were only 26% positive but 37% negative.

Meanwhile EU businesses with the highest levels of turnover from the UK (over 30%) were very positive about Brexit at the time of the referendum, with a remarkable 67% feeling positive and only 13% negative.

Larger businesses are most likely to have the highest levels of cross-border turnover. Size offers a number of advantages in dealing with Brexit: more resources, better access to finance, more competitiveness in the labour market, a greater average ability to weather a downturn and so on. So while big businesses need to do more to get ready for Brexit, they are better placed to deal with it than their smaller counterparts. And the more familiarity UK companies already have with Europe, the better placed they are to understand what they need to do, and to implement their plans.

On average, in other words, the bigger a UK company is, the better it expects to do out of Brexit.

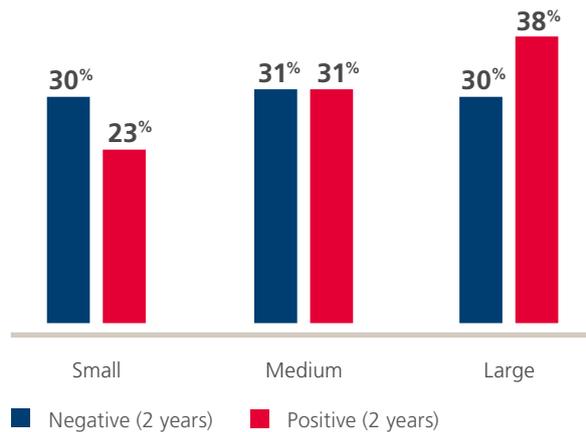
# The cost of Brexit

We asked UK businesses whether they expected Brexit to have a positive or negative financial effect on them over the next two years.

With marked differences between businesses of different sizes, and between different sectors, the average sentiment about the financial impact of Brexit was – just – in the black, with 32% expecting a positive effect and 30% a negative one. But the full picture is more complicated.

On average those companies that expect Brexit to benefit their business anticipate a boost equivalent to 2.6% of their turnover. But for those that expect a hit, on average the cost is 5.8% of turnover.

## Financial impact of Brexit on your business over two years



This represents a net cost of -0.6% of the combined turnover of the 1,000+ businesses in our sample.

Conservatively, that equates to a cost to UK plc of £20bn over the next two years.

Importantly, the question was asked when businesses thought there would almost certainly be a transition period. A No Deal Brexit could see a much more pessimistic prediction.

EU27 companies display a similar, if less marked, dynamic. Over two years, 26% foresee a positive effect, 19% a negative effect and 49% neither. But those expecting a boost envisage one of, on average, 1.8%, while those expecting a hit believe they will be down by an average of 3.0%.

A No Deal Brexit could see a much more pessimistic prediction.

In the short term at least, those who are the losers from Brexit are likely to lose rather more than the winners are likely to win.



# No Deal

A No Deal Brexit would have a huge effect on UK businesses. What can they do to minimise the impact?

Companies will not be able to respond to every challenge posed by No Deal, but they can be ready for most of them. We've listed some of the most frequently mentioned here. It's not a comprehensive list, and different companies will have very different requirements. In particular, we haven't dealt with sector-specific concerns. As businesses ranging from banks to chemicals manufacturers know, these may be some of the most challenging aspects of a No Deal Brexit.

Some of the preparations UK businesses are now making are explicit responses to the threat of No Deal. Others would be undertaken at some point anyway, as they would be needed after any type of Brexit.

## Check everything

A point which cannot be made too often is that, as far as Brexit is concerned, the devil is in the detail.

To take one example: some exporters and hauliers might think they can safely ignore the government's Brexit notices on plants. But strict EU rules on the movement of plants, designed to control disease, also cover wooden pallets and other packaging.

The government says that in a No Deal Brexit, all wood packaging material "moving between the UK and the EU would need to be ISPM15 compliant (treated and marked). These products may be subject to official checks either upon entry to the EU or after entry."

ISPM15 is an international standard. But many of the millions of pallets used in UK/EU trade will not be compliant, because compliance has not been needed for most of the single market. Furthermore, UK-treated pallets will be certified by the Forestry Commission and it is not clear that, in a No Deal Brexit, the EU will automatically accept FC certification. In the long term this would be resolved (although there would always be potential border delays). But in the short term there could be big problems, with loads containing non-compliant pallets refused entry to the EU.

The most important step businesses generally should take is just to audit their exposure to the risk of a No Deal Brexit. Many have already done so. Those that haven't should consider it as a matter of urgency. After that, they should be able to focus on prioritising the handling of individual risks.

We have referred to the EU and the EU27 here, but some of our points will also apply to companies doing business with the other countries in the European Economic Area: Iceland, Liechtenstein and Norway. Some are also relevant to Switzerland.



## Approvals etc

It seems likely that most approvals, certifications, licences and registrations issued by UK regulators will cease to be recognised in the EU if there is a No Deal Brexit. In the long term many mutual recognitions will no doubt be negotiated, but in the short term this will be a major problem for many businesses.

Companies need to audit their current regulatory approvals, establish which will lapse following No Deal and plan accordingly. In some cases it will be possible to pre-empt the difficulty by securing equivalent approvals from other EU regulators: some carmakers with UK operations, for example, have already arranged EU certification for their products.

In some sectors companies may have no alternative but to change aspects of the way they work, which is why various broadcasters and financial services companies, for example, have been moving certain operations from the UK to EU27 nations.



## Communications

Make sure your stakeholders receive appropriate information about your preparations for Brexit – regulators, shareholders, board members, staff, customers, JV partners, suppliers, the media. (In some cases – e.g. because of listing rules – there may be a requirement to disclose information.) If there is a No Deal Brexit, there will be no shortage of panic and misinformation. You will not only want to be calm and dependable, you will want to be seen to be so.



## Contracts

Contracts should be reviewed to look at how they allocate risk in the context of Brexit, and whether any specific Brexit-related issues (such as barriers to trade or additional costs) are likely to arise. References to EU institutions or laws may also need to be changed. In extreme cases, it may not be possible to perform a contract economically in a No Deal environment, or even to perform it at all.

Your existing contracts with entities in the EU may not include Incoterms – the rules which, among other things, define who is responsible for shipping goods across borders, and which may be relevant in determining, for example, which party has to pay VAT.

Any new contracts being negotiated should obviously take the possibility of a No Deal Brexit into account, particularly in clauses dealing with issues such as termination, governing law and choice of venue.



## Currency and foreign exchange

It's widely believed that sterling will fall significantly if there's no Brexit deal. Businesses will want to consider hedging or making other provisions accordingly. They may also have to deal with associated increases in the cost of imports (though exporters may of course see some benefits).

Some euro payments may take longer to process, as UK-based payment services providers will lose access to central payments infrastructure.



## Customs duties and systems

In the absence of a deal, UK businesses will trade with EU customers and suppliers on WTO terms, resulting in payment of customs duties on goods, increases in costs and delays in delivery times. Even goods which do not attract tariffs will be subject to delays, as regulatory checks are typically also part of the customs process. Some retailers – particularly online retailers – have been setting up distribution facilities in the EU27 in anticipation of such problems.

Businesses exporting to the EU or importing from it will have to make customs declarations and deal with other customs-related bureaucracy. Many will retain a customs broker or similar service provider to help them. But even companies that already export to non-EU countries and are thus familiar with the process may find themselves struggling with the extra administrative burden. Staff may have to be trained, new staff recruited and new systems put in place. For example, Next plc has

estimated that the increase in the volume of declarations for stock it imports from the EU will carry an administrative cost of around £100k.

HMRC has been communicating with businesses about the customs procedures and paperwork that No Deal will entail, and companies should familiarise themselves with its advice.

Companies may be able to speed up (though not altogether avoid) the customs process by, for example, enrolling in HMRC's Duty Deferment Scheme, or by obtaining Authorised Economic Operator accreditation. The latter is a lengthy process that would not be completed by 29 March 2019 but might have value in the longer term.

Various observers, including the Commons Public Accounts Committee and the National Audit Office, have expressed concern that HMRC's new Customs Declaration Service may not be fully ready for Brexit. If it is not, there will be additional problems for importers and exporters.

How customs and border checks between Ireland and Northern Ireland would be handled in the event of No Deal is unclear. Both the UK and the EU wish to avoid the imposition of a hard border between the two. And there will certainly be attempts to ensure that travel between the two can continue as smoothly as possible. But it is difficult to see how No Deal could not result in customs and regulatory controls on the Irish border.



## Data and IT

If the UK crashes out of the EU, it will be subject to the EU's rules on the transfer of data to third countries. Personal data can only be transferred from the EU to such countries if an adequate level of protection is guaranteed. Typically the EU will make an 'adequacy decision' on this, but it seems unlikely that an adequacy decision would be available in the immediate aftermath of a No Deal Brexit.

This could be a problem if you have customers in the EU, if your company includes EU entities with which data is exchanged, or if you use IT services providers (including cloud and data storage providers) to process data – depending on where they process it.

Transfers of data would still be possible on other legal bases, including contractual clauses. At the other extreme, a number of major companies are looking at setting up alternative data hubs in EU27. Whatever your approach, though, you need to have it in place before Brexit day.

Brexit may cause other types of IT problems. Companies may not have the resources needed to make changes to databases or software – or even install new systems – that are needed because of Brexit. Online offerings may have to be updated: potentially, e-commerce systems will have to be altered to reflect post-Brexit realities. Companies will not necessarily be able to continue using .eu domain names. Even companies that only sell within the UK would be wise to ensure that their online offering reflects, for example, any disruptions to supply that may be caused by Brexit.



## Disputes

You should review any dispute with an EU element, as various problems could arise. For example, some EU countries may not recognise UK insolvency proceedings after a No Deal Brexit, and it may be harder to enforce the judgments of UK courts in member states. As the government says in its Brexit notice on civil legal cases: “broadly speaking, cases ongoing on exit day will continue to proceed under the current rules. However, we cannot guarantee that EU courts will follow the same principle, nor that EU courts will accept or recognise any judgments stemming from these cases.”

The government has also confirmed that the UK would leave (but could seek to rejoin) the Lugano Convention – which is the basis of the UK’s civil judicial relationship with Norway, Iceland and Switzerland – and that it intends to rejoin the 2005 Hague Convention, which it would apparently expect to be able to do on 1 April 2019.

Faced with this uncertainty, businesses currently engaged in disputes involving EU countries (including disputes whose parties have attachable assets in EU countries) may wish to consider the use of arbitration. In other instances, it may be beneficial to advance proceedings as rapidly as possible – for example, obtaining a judgment before 29 March 2019 could make it easier to enforce.

As noted above, when agreeing new contracts businesses should consider appropriate post-Brexit terms for dispute resolution.



## Financing

You may want to look at your likely financing needs in the short to medium term. Would No Deal affect your ability to source financing on acceptable terms? Will you need contingency funding? You should also consider existing arrangements – for example, is there any possibility that the immediate disruption likely in the aftermath of a No Deal Brexit could cause you to breach covenants or trigger material adverse effect clauses?

If you benefit from any EU funding or financing – such as grants, loans or guarantees that come directly or indirectly from EU institutions – you need to make sure you understand what will happen to it after Brexit and, if it will cease, whether the UK government will step in to replace it.

Many commentators believe that a recession would follow No Deal, and that could inhibit any rise in interest rates that might be contemplated as a response to post-Brexit inflation. But an increase in interest rates will certainly be a possibility.



## Insurance

The government has said that, in the event of a No Deal Brexit, UK-based customers of EEA-based insurers (and other financial services firms) that passport into the UK will benefit from a temporary permissions regime allowing these firms to continue to provide those services for up to three years, during which time they can apply for UK authorisation. But UK firms could lose the right to passport into the EEA – although many are establishing entities in the EU27 to avoid that problem.

Insurance problems for most UK business are perhaps more likely to revolve around reviewing policies in advance of Brexit – you may need to notify insurers if personnel are relocated, for example, or assess whether you need to increase limits (perhaps because of stockpiling). Factors such as warranties and governing law may have to be considered.



## Intellectual property

Many intellectual property rights are derived from international agreements which do not depend on the UK’s membership of the EU. There will be a few issues around copyright, for example, chiefly in relation to broadcasting and some database rights, and the cross-border provision of certain material, but they will not affect most companies.

For granted UK patents and UK patent applications, there is no real change. The European Patent Office is not an EU institution and the Unified Patent Court and the unitary patent regime are not yet in force.

EU trade marks will continue to be protected in the UK and the owners of EU trade mark applications will have nine months to apply for equivalent UK trade mark protection. Trade mark owners based outside the EU who do not currently hold a UK designation should consider filing a subsequent UK designation (in addition to any existing EU designation), particularly for key brands.

Similar considerations will apply to Registered European Designs, although it is worth remembering that future designs first disclosed in the UK will only enjoy unregistered design protection in the UK, so designers who wish to enjoy EU-wide unregistered design protection will have to consider disclosing their designs simultaneously in the UK and the EU.

Some sectors will face specific challenges: for example, UK producers of food and drink protected by geographical indications will lose those rights in the EU and will have to apply for new EU GI protection as third country producers.

While many companies will not be immediately affected by a No Deal Brexit, they should nevertheless consider how it will affect their intellectual property filing and management strategy going forward: how far they will deal with it separately in the UK and the EU, how they will handle the exhaustion of rights etc. They should also review any IP licences they are party to, to ensure that these will not be disrupted by Brexit.

### Location, location, location

UK-based providers of financial services – as well as many from countries outside the EU which have relied on UK offices for their access to Europe – have led the way in establishing entities in the EU27 that will enable them to carry on providing services in the EU after No Deal (or, potentially, after other possible forms of Brexit). Companies in other sectors may benefit from doing so too.

Some companies working in areas such as technology and fintech are looking at establishing EU offices to ensure that they can still access EU talent once the UK has implemented its new immigration regime.

Manufacturers may be able to move some production into the EU27, especially if they already have sites there. Some are already doing so. But moving a production line is not quick or easy, and many are holding fire until they know not only if there is to be no deal but also how great the longer term disruption is likely to be.

What we are certainly seeing, though, is that decisions on investment in the UK are being deferred, and that some companies are taking the 'safe' option of developing new capacity in the EU27 rather than in the UK.



### Opportunities

Even a cloud like No Deal will have a silver lining for some businesses. Distressed assets may become available. Companies in need of deals may be prepared to do them on more favourable terms. Competitors may exit the market. If the value of sterling is badly hit by No Deal, exporters may be in a position to benefit. Businesses whose analysis shows they may be able to seize opportunities offered by No Deal should make sure they will be in a financial and organisational position to boost supply, expand operations or undertake acquisitions.



### People

EU citizens working in the UK are unlikely to be immediately affected by a No Deal Brexit, but the government has not yet made clear how it will guarantee their rights. (Nor do we know what the rights will be of UK citizens in EU countries.) And we don't know when the government is likely to introduce its proposed new rules on immigration, which would restrict the ability of many EU citizens to move to the UK for work.

Companies will probably want, as far as possible, to offer reassurances and assistance to staff who are EU citizens. Those with UK staff working in the EU will want to do the same for them. Companies should therefore ensure now that they know which of their staff could be affected by a No Deal Brexit.

Businesses may also need to address a wide range of other HR questions. Are you likely to need additional staff? Or fewer staff? Will you need people with skills you don't have at the moment? Do you have whatever short-term flexibility you may require? Might you have to put existing staff on shorter hours? Will training be needed for new post-Brexit systems? Will you need to relocate staff? These are issues that need to be dealt with well in advance of Brexit.



### Qualifications

After a No Deal Brexit UK workers may find that their professional qualifications are not recognised in the EU. Whether they are will depend on the rules of the relevant member state (regardless of where the qualifications were obtained). EU citizens relying on UK qualifications but working in other countries might also experience problems, as might EU citizens in the UK, who would be governed by UK rules on third country qualifications, which vary from sector to sector.





## Supply chain disruption

Goods, produce or components imported from or via the EU27 will take longer to arrive in the aftermath of a No Deal Brexit. This will affect many companies and is likely, thanks to the inevitable images of trucks queueing to get through Dover, to become the iconic aspect of No Deal for the general public.

Individual companies will need bespoke approaches to supply chain disruption. To take two contrasting examples: BMW's announcement that it will suspend production at its plant in Cowley for a month after 29 March has attracted a lot of attention. Less prominence has been given to reports that Bidfood – one of Britain's biggest suppliers of food to pubs, prisons and royal palaces – has been discussing with customers its contingency plans to switch to supplies of vegetarian dishes to avoid meat shortages that could follow No Deal.

Many companies see stockpiling as a solution to potential disruption. According to the Chartered Institute of Procurement and Supply, nearly a quarter of businesses are planning to stockpile goods. But it is not straightforward. Questions abound: for example, do you need more warehousing space? Will you have to extend your insurance? Is your cashflow adequate? How much notice do your suppliers need? Many companies have to deal with goods that cannot readily be stockpiled – Tesco's CEO Dave Lewis, for instance,

### Supplier vulnerability

A supply chain is only as strong as its weakest link, and companies may find that theoretically strong supply chains are hit because suppliers within them are struggling in a No Deal environment. Businesses should monitor supplier performance as closely as possible, and watch out for any signs that suppliers are in trouble. It may be necessary to act quickly to secure the supply chain.

Larger companies may be in a position to offer support to suppliers who are hit in this way. While this is obviously a decision to be made on a case by case basis, such support could be in the interests of both parties. If this is an option for you, it would be worth beginning discussions sooner rather than later.

If third parties provide your catering, cleaning, security, IT and other services, you will also want to establish that they are likely to have the secure supply chain and the people they need to continue doing so without disruption from Brexit.

### Demand for Brexit-related services is likely to outstrip supply

The UK has a limited supply of the people whose knowledge and skills are required to navigate a No Deal Brexit, ranging from customs brokers to trade lawyers. If you need them, don't wait until the last minute to find them.

believes that "if it came to it, we could take stockpiling of dry goods" but that "the possibility of stockpiling fresh food is very, very limited".

Switching to UK suppliers may be an option for some businesses, especially where 'vanilla' items are concerned. But where complex components are manufactured according to demanding specifications, this is only likely to be a solution in the longer term. There may be considerations around rules of origin. And the supply of even the most basic widget (or foodstuff) is not infinitely flexible: UK suppliers may be unable to satisfy a sudden surge in demand.

Some companies will simply create new supply chains altogether. A No Deal Brexit will make some supply chains unviable even after any temporary disruptions are resolved. Supply chain mapping will show where vulnerabilities are. UK businesses may also be on the receiving end of this, with customers from the EU27 deciding to cut them out of EU-based supply chains, typically because of concerns about Brexit risk, tariffs or rules of origin after Brexit.



### Tariffs

In a No Deal Brexit, tariffs will be a big thing for some importers and exporters, while making almost no difference to others. Goods coming from or going to the EU, or countries with which the EU has an FTA, may be subject to higher tariffs (or tariffs where there were none before), in accordance with WTO rules and schedules.

Companies should ascertain what tariffs will apply to their goods (and to goods in their supply chains). They will need to know in advance of Brexit what any new tariff burden is, and consider its likely impact on their pricing and competitiveness. Exporters may find some tariffs offset by a weaker pound; importers may face a double whammy.

## Non-tariff barriers to trade

Make sure you understand well in advance of Brexit what non-tariff barriers to trade may affect your business. If you trade globally you may be used to dealing with this issue, but for many of the large number of UK companies that only trade within the EU it will be an unpleasant novelty. And remember that new non-tariff barriers could affect trade with a wide range of non-EU countries too (see page 27).



## Tax

VAT will no longer apply in the same way to transactions between the UK and EU unless and until special continuation arrangements are agreed. The simpler procedures for intra-EU supplies (which generally avoid the need to pay VAT upfront and replace it with a 'reverse charge' in the buyer's VAT returns) may no longer apply. The government has said that UK importers would not need to pay VAT on imports at the border and could continue to account for the VAT in their quarterly returns. But this would not prevent EU countries imposing VAT at their borders on imports of UK goods, and companies should be prepared for this.

Businesses will no longer be able to use the UK's Mini One Stop Shop (MOSS) portal to report and pay VAT on sales of B2C digital services in the EU, but will need to register for the VAT MOSS non-Union scheme in an EU member state. This can only be done after the UK leaves the EU and has to be done by the tenth day of the month following a sale.

Certain tax reliefs will no longer be available to UK companies – e.g. tax neutral restructuring permitted by the EU Mergers Directive. Transactions reliant on such reliefs will need to be completed before Brexit. Similarly, businesses relying on the EU Parent-Subsidiary Directive for a withholding tax exemption on dividends paid between associated companies in the UK and the EU27 should review the extent of available treaty protection available under the UK's bilateral double tax treaties with other EU states, as should those whose interest and royalty payments between associates have previously enjoyed an exemption under the EU Interest and Royalties Directive.

Some members of the government have suggested that there could be cuts to corporation tax or other taxes after a No Deal Brexit, in an attempt to boost the economy. But these are purely political statements at the moment, and businesses will probably want to see the contents of any emergency Budget before relying on tax cuts in their planning.



## Trade with non-EU countries

Some UK businesses appear still to be unaware that their trade with countries outside the EU could be materially affected by Brexit. The EU has trade agreements with about 70 countries and other agreements that facilitate trade with nearly 170. At the moment, as an EU member state, the UK is a party to these. If there's a No Deal Brexit, UK importers and exporters will abruptly cease to benefit from them, and will face a wide range of new tariffs and non-tariff barriers to trade unless the UK can very rapidly negotiate alternatives. For more on this see page 27.



## Transport

As noted above, freight transport is likely to be subject to significant delays after a No Deal Brexit. But there are likely to be other disruptions to all forms of transport and travel between the UK and the EU (as well as, possibly, flights between the UK and some non-EU countries). Potentially, regulatory issues (e.g. a lack of the required paperwork for drivers, trucks, pilots or planes) could mean that services are not provided. The French minister for European affairs has warned that Eurostar services from the UK could be stopped on reaching the French border. In a worst case No Deal scenario, there could be short term disruption to transport and travel within the UK because of fuel shortages.

There is little that most businesses can do to shield themselves against potential disruption. It would obviously make sense to avoid planning any non-essential business travel immediately after Brexit day. More broadly, you can assess what workarounds may be available to you (which might be anything from travelling by different routes through videoconferencing to changing your transport provider).

Companies shipping goods can explore possibilities such as using less popular ports to reduce potential delays. They should also ensure as far as possible that their drivers and vehicles – or the drivers and vehicles of the freight companies they use – have the necessary authorisations to operate in the EU after Brexit. This may not be straightforward: for example, the shortfall in international road haulage permits for the UK is likely to be so severe that the Department for Transport is proposing to introduce what is effectively a weighted rationing scheme for them.

# The negotiated deal

On 25 November the European Council endorsed the withdrawal agreement and political declaration that the European Commission and the UK have negotiated.

There is some way to go before the agreement and the declaration are ratified. As we explain on page 30, the House of Commons may reject them. But it is worth looking briefly at some of their key points.

The most important aspect of the agreement for many businesses will be that it provides a **transition period** after the UK leaves the EU, during which the status quo is largely maintained. So, for example, goods will continue to flow freely between the EU and the UK. The transition period is scheduled to end on 31 December 2020 but can be extended by up to two years. Most trade experts believe an extension will be necessary.

The UK will continue to apply **EU law** and trade policy during the transition. It will enjoy nearly all the rights it had as an EU member state. But it will not be represented in EU institutions.

Essentially, **UK nationals** living in the EU at the end of the transition period will be able to stay, as will **EU citizens** in the UK. Close family members will have similar rights and may be able to join them. Where UK citizens have lived in an EU member state for five years (or EU citizens have lived in the UK for five years) they may have a permanent right of residence.

In the special case of **Gibraltar**, the UK and Spain have agreed a bilateral protocol on matters such as citizens' rights, air transport and customs co-ordination. As last-minute diplomatic arguments have shown, Gibraltar may be a problem during future negotiations.

But the biggest problem is still the **Irish border** question. If, at the end of the transition period, there is no new deal between the UK and the EU that avoids the introduction of a hard border between Northern Ireland and Ireland, the so-called **backstop** will be activated.

The backstop is a single customs territory between the EU and the UK. The whole of the UK would be in this territory and would have to maintain EU tariffs. However, only Northern Ireland would have to apply EU customs law. Some aspects of this customs union arrangement are not defined and will have to be negotiated during the transition.

As part of the backstop there would be a level UK/EU playing field in several areas. This would not equate fully

to the level playing field of the single market. For example, while the UK would have to align to future EU rules on competition and state aid, it would only make a "non-regression" commitment, agreeing not to lower its standards, on environmental protection and social and labour standards. Northern Ireland, however, would have to be aligned with many additional EU rules relating to the single market.

Once the backstop is activated, it can only be terminated when both the UK and the EU believe it is no longer necessary. As it is unlikely that any future relationship negotiated by the UK and the EU could both observe the UK's red lines and ensure that there is no hard border between Northern Ireland and Ireland, this is a serious concern.

However, the biggest problem with the backstop may be that, while it makes extensive provisions for Northern Ireland, the rest of the UK is potentially left in a limited customs arrangement with the EU without the extra arrangements required to keep trade flowing between the two. As noted above, further negotiation is needed. In the absence of extensive additional agreements the UK could face many of the non-tariff barriers to trade and other problems that it might have faced in a No Deal Brexit.

## The political declaration

The political declaration is a statement of how the EU and the UK will negotiate their future relationship and what form they expect that relationship to take. Unlike the withdrawal agreement, it is not binding. It is not exactly a 'wish list', as one MP called it, but nor is it a reliable guide to what will be in the final agreement. Much of it is vague or aspirational.

According to the declaration itself, it "establishes the parameters of an ambitious, broad, deep and flexible partnership across trade and economic cooperation, law enforcement and criminal justice, foreign policy, security and defence and wider areas of cooperation."

The scope of this partnership will be limited by the UK's third country status. There may be consultation and cooperation in many areas, but the UK will have no further role in the EU's decisions on, for example, foreign policy or security.



## Happily ever EFTA?

As contentious and intractable as both options are politically, the message from UK and EU27 businesses is clear: keep the customs union and single market. This is especially true of large businesses, but every type of business we surveyed, in every sector, supports the idea.

Overall the UK businesses we polled were 56% in favour of remaining in a customs union and 14% against: a ratio of 4:1. (Large businesses were even more in favour, with a ratio of 5:1.) EU27 businesses were similarly supportive, with a 4:1 ratio wanting to retain the status quo. Responses for the single market showed a ratio of 3:1 in favour of remaining (4:1 among large businesses).

In practical terms, the measures needed to achieve this would probably include the UK's seeking to remain in the European Economic Area through membership of EFTA, the European Free Trade Association. Some pro-Brexit MPs and others have been advancing the idea of temporary EFTA membership as a 'halfway house' that the UK could occupy for a fixed period after Brexit. Leaving aside the probable difficulties of negotiating such an arrangement, it seems clear that UK businesses have something more permanent in mind.

The EU and UK “envisage having a trading relationship on **goods** that is as close as possible” but will have “separate markets and distinct legal orders”. So the frictionless trade to which the UK has aspired will not be possible, although the declaration’s vision is of “a free trade area, combining deep regulatory and customs cooperation”, without “tariffs, fees, charges or quantitative restrictions”.

The declaration says the economic partnership should “build and improve on the single customs territory” provided for in the backstop. But the key message is perhaps the statement that “the extent of the United Kingdom’s commitments on customs and regulatory cooperation, including with regard to alignment of rules, would be taken into account in the application of related checks and controls”. In other words, the more the UK wants near-frictionless trade, the more it will have to commit to **aligning** with EU rules.

There are **level playing field** provisions that build on what is in the backstop. Again, the closer the economic relationship is to be, the more the UK has to align with EU rules. The same is true in regulatory matters, where the possibility of UK cooperation with EU regulatory agencies will be explored, and the UK “will consider aligning with Union rules in relevant areas”.

In **financial services**, the EU and UK “agree that close and structured cooperation on regulatory and supervisory matters is in their mutual interest.” But, as expected, the declaration envisages a regulatory approach based on third country equivalence, rather than enhanced equivalence or mutual recognition. The plan is to complete equivalence assessments by the end of June 2020.

For **services** generally, the declaration looks forward to “ambitious, comprehensive and balanced arrangements” on trade and investment. There will be “provisions on market access and national treatment under host state rules”. Although regulatory autonomy will be maintained, there will be attempts to make regulations compatible and reduce unnecessary regulation, as well as sector-specific provisions for e.g. telecoms services, financial services and delivery services. There will be “appropriate arrangements” for the mutual recognition of professional qualifications and some temporary entry provisions for business people.

On broader questions of **mobility**, the declaration notes that the UK “has decided that the principle of free movement of persons between the Union and the United Kingdom will no longer apply” – a statement which both highlights one of the UK’s red lines and reminds us that, were the red line to be modified, other outcomes could be negotiated.

Assuming the red line holds, the declaration says the UK will treat all EU citizens equally. There are plans to

negotiate rules allowing visa-free travel for short trips and a system to deal with longer stays for e.g. research, study, training and youth exchanges.

It seems the UK will (subject to conditions and financial contributions) be able to participate in **EU programmes** “in areas such as science and innovation, youth, culture and education, overseas development and external action, defence capabilities, civil protection and space”, and possibly in European research infrastructure consortiums. The declaration also notes the UK’s “intention to explore options for a future relationship with the European Investment Bank”.

In the field of **energy**, the EU and the UK “should cooperate to support the delivery of cost efficient, clean and secure supplies of electricity and gas, based on competitive markets and non-discriminatory access to networks.” There will be a framework for technical cooperation, and possibly cooperation on carbon pricing. A cooperation agreement between the UK and Euratom is planned.

There will be consultation and some cooperation in **foreign policy**, as well as some military cooperation and selective intelligence-sharing. There are some relatively detailed proposals for research and industrial cooperation in the defence sector, and plans for cooperation in areas such as cyber security, counter-terrorism and illegal migration. There will also be a **security partnership** and cooperation in tackling crime.

The parties will try to conclude a new **fisheries** agreement by July 2020. This is likely to be highly contentious. President Macron has reportedly said that the deal on a future relationship may fail altogether if a fisheries agreement can’t be reached in time.

Other areas covered by the declaration include the following.

- A **data adequacy** decision should be in place by the time transition ends.
- Some facilitation of **e-commerce** is envisaged, as is equal access to **telecoms** networks, services and suppliers.
- There will be some provision for the protection and enforcement of **IP rights**.
- There may be some common standards, remedies and review procedures for **public procurement**.
- There are plans to ensure air connectivity and to cooperate on **aviation** safety and security.
- Comparable market access would be negotiated for **road transport** operators, with bilateral agreements for cross-border **rail services**.
- There will be market access arrangements for **maritime** transport, and potentially cooperation on maritime safety and security.

# Collateral damage: Brexit and non-EU countries

A No Deal Brexit could have a wide range of impacts on UK businesses trading with non-EU countries, ranging from the very simplest one of delaying the shipment of goods that pass through the EU to more complex ones resulting, for example, from the effect of cumulative rules of origin. Companies need to consider all these – as well as the possibility that they will no longer be able to trade with other nations under the same conditions as they can now.

There has been a lot of talk about the UK ‘trading on WTO rules’ in the event of a No Deal Brexit. What the UK would actually be trading on is WTO terms, which set out how – and how far – a member state will keep its markets open to trade with other nations. They will, for example, specify tariffs. So UK companies trading with the EU after a No Deal Brexit would (on average) face a 2.4% tariff on electrical machinery, an 11.6% tariff on fish and fish products, a 24.6% tariff on sugars and confectionery and so on.

However, no nations trade on WTO terms alone. Rather, there is extensive reliance on various other agreements, such as preferential trade agreements and trade-related agreements, most of which are attempts to reduce non-tariff barriers to trade.

So assertions that, for instance, the US and the EU do not have a free trade agreement are technically correct but ignore the fact that trade between the US and the EU relies on over 130 other agreements, including over 50 bilateral ones.

There is some uncertainty about how many such agreements the UK is currently a party to through its membership of the EU. When the House of Commons International Trade Committee did the maths earlier this year it concluded that there were 40 trade agreements (with about 70 countries) and 759 trade-related agreements (with 168 countries), covering areas as diverse as regulatory cooperation, aviation, customs procedures, the nuclear industry and agriculture.

If the UK leaves the EU with no deal it will abruptly cease to enjoy the benefits of those agreements. It could be, as former chancellor Kenneth Clarke told the House of Commons in July, “the only developed country in the world that does not have a trade agreement with any other country.”

The UK is trying to ensure that doesn’t happen. This essentially involves persuading nations with which the EU has agreements to ‘roll them over’ after Brexit so that the UK can trade on their terms, or very similar terms.

## Tariff rate quotas

The UK also has to negotiate a solution to the problem of tariff rate quotas in the WTO. This was expected to be less problematic than that of rolling over existing trade deals, but the process is already running into objections from other WTO members.

Many countries importing into the EU enjoy quota arrangements. Typically, this allows a certain amount of a product into the EU per year at a lower tariff or with no duty at all. For instance, New Zealand can ship about 228,000t of sheep meat per year into the EU at zero duty. For imports beyond that amount, the normal tariff is payable. So the question arises, once the UK leaves the EU how should that quota be split between the UK and the EU27? How much can be shipped to each on preferential terms?

The UK and the EU have proposed a division based on previous patterns of trade, but a number of countries would prefer to reopen negotiations and determine new quotas from scratch. In August the head of the WTO said “it is very unlikely that you’re going to have 100% agreed outcome for all WTO members between now and March.”

The UK needs to roll over trade agreements between the EU and other nations so that it can benefit from them when the transition period ends. In other words, it wants to sign a new version of each agreement, with only minimal contextual changes, in order to continue the arrangements it currently enjoys with these nations as an EU member state.

In the long term, of course, the UK hopes to negotiate better deals with many of these nations. Indeed, that is a key (if disputed) argument for Brexit. But in the short term there is no time for extensive renegotiations and the deals must be rolled over if the UK is not to face a mountain of new barriers to trade.

A report from the International Trade Select Committee published earlier this year warned of trade with 70 nations “falling off a cliff edge” if the government did not act quickly to roll over the EU’s trade deals. It also said there was an urgent need for clarity “over the number, type, scope, extent and importance of the EU’s trade-related agreements” and warned that substantive amendments to the rolled-over agreements were almost certain to be required. Even so-called mixed agreements (to which the UK is a party in its own right) will probably need to be reworked, as they are likely to rely in part on EU rules and institutions.

The government has assured MPs that it understands the urgency to do this, but has been less than specific about exactly how much progress is being made. In July Liam Fox, the Secretary of State for International Trade, told the select committee that “we have an agreement in principle from all those [countries] we have had discussions with”. But he added that nothing had been put on paper, suggesting that this was because third countries are waiting to see whether an implementation period would give them time to negotiate bespoke agreements. He had earlier indicated to the press that “technical reasons” might mean some countries were unable to roll over an agreement.

Some countries are thought to have suggested that fuller negotiations are necessary. Some will be tempted to use the situation, and the UK’s difficult position, to explore the possibility of negotiating a more favourable deal (or, at the very least, to seek compensation for the disruption Brexit will cause to their trade).

While attention is focused on the Brexit negotiations themselves, the rollover issue has received comparatively little scrutiny. But – especially in the event of a No Deal Brexit – it could have a massive impact on the activities of many businesses. If the agreements are not rolled over then some tariffs could increase significantly. And some international trade could simply stop altogether. For example, UK companies which recently gained the ability to bid for public procurement work in Canada under the new EU-Canada free trade agreement would lose it again.

Any companies that do business in or with non-EU countries could be affected by this. They may have to brace for the imposition of tariffs, but they are likely to find that they face many other new barriers to trade as well.

Initially the UK had planned to roll over all deals by March 2019, but now appears to regard that as unrealistic – instead, the UK and EU have agreed that the UK should continue to benefit from the EU’s agreements with third countries during the transition period. As the House of Commons International Trade Committee explained earlier this year, “this entails some form of trilateral (UK-EU-third country) agreement in each case, but the precise nature and form of that agreement is as yet unclear.” And as with the rollover proposals, it is not clear that all third countries will play ball. Also, of course, this approach relies on there being a Brexit deal – if there is a No Deal Brexit then there will be no transition period, and the UK will simply and abruptly drop out of all the deals to which it is a party by virtue of being an EU member state.

Even if ‘straightforward’ rollovers can be agreed, the fact that the existing agreements assume, for example, the application of an EU framework and EU regulations, means that a simple ‘cut and paste’ approach is impossible. A degree of negotiation is unavoidable, although the UK will try to keep it to a minimum, possibly making concessions in order to achieve that. There is a lot to do in this area, and not much time to do it in.

If the government achieves its aims, businesses in the UK will see little impact. But if trade deals and other deals are significantly amended when they are rolled over (or, worse still, not rolled over at all), then importers and exporters face unpredictable consequences – unpredictable because we have no transparency at the moment about the progress of the deals or what changes, if any, are being negotiated.



## The view from business

Unsurprisingly, businesses like the idea of new trade deals. Our survey showed that just under two-thirds (64%) of UK business feels it important that there are new post-Brexit trade deals with non-EU countries. For businesses with turnover generated from the EU this rises to 78% and to 80% for those with turnover generated beyond the EU.

Also unsurprisingly, the view of new trade deals varies greatly between sectors. We found 77% support for the proposition in the retail and consumer goods sector, for example, but only 46% among real estate companies.

However, businesses may have to wait some time for new trade deals. The government's focus in the immediate future will be on rolling over existing trade deals rather than striking wholly new ones. And as trade negotiators around the world aver, negotiating new deals takes a long time.

Furthermore, there are serious questions about the impact new trade deals will have. In July the Commons Treasury and International Trade Committees jointly warned MPs that "free trade agreements between the UK and non-EU countries, including the United States, will be economically beneficial; but even a wide-ranging set of deals is unlikely to offset losses arising from leaving the single market and customs union in the short to medium term."

The committees cautioned that a UK-US free trade agreement alone would account for "nearly half of the trade that could be covered by post-Brexit deals" but that previous government analysis of the proposed EU-US Transatlantic Trade and Investment Partnership suggested that it would raise UK GDP by only 0.14-0.35%. The implication is that even a whole suite of new trade deals may bring only limited benefits for UK companies.

# Getting to Brexit

Harold Wilson, that wily survivor who steered his government through the UK's first European referendum in 1975, said a week is a long time in politics. True no doubt. But fewer than 20 weeks are left to arrange the UK's departure from the EU. Are they long enough to do what's needed?



The UK government now has to get the deal through parliament, which it will try to do before the House rises on 20 December. Many commentators believe the deal cannot command a majority in the Commons and will be voted down. (The Lords will also debate the deal but their approval is not required.)

The government is making great efforts to persuade MPs to support the deal. At the moment, though, a majority of them look likely to vote against it. All the opposition parties have said they are against it, as has the Democratic Unionist Party, despite its confidence and supply arrangement with the government. In addition, many Conservative MPs – by some counts over 90 – have indicated that they will not support it.

MPs who oppose the deal do so for various reasons. But a key problem is the Irish backstop and the restrictions it imposes on the UK, as well as its requirement for Northern Ireland to observe additional EU rules, which critics of the deal believe would lead to a regulatory border between Great Britain and Northern Ireland. Many MPs fear that the UK could be 'trapped' in the backstop indefinitely as a 'vassal state'. They want to see the backstop renegotiated or removed from the agreement. But the EU has been adamant that it would not accept a deal which did not include an Irish backstop. Furthermore, the EU feels it has already made a major concession by accepting the concept of a UK-wide backstop. (The Commission's preferred backstop, to which the UK objected strongly, covered only Northern Ireland.) It is highly unlikely to accommodate any more UK requests in this area.

The government hopes that some of the anticipated opposition in the Commons will melt away, as it has in several previous votes on Brexit measures. It argues that a vote against the deal risks bringing about a No Deal Brexit, or else preventing Brexit altogether. And it is certainly possible that as the vote draws near and

the political pressure become intense, some potential Conservative rebels may decide to back the deal after all. A few Labour MPs may also do so, and some MPs may abstain. But there would have to be a big shift in voting intentions for the Commons to accept the deal.

If the deal is **approved**, the government will proceed to introduce its EU (Withdrawal Agreement) Bill, to give effect to relevant provisions of the agreement in UK law and to allow for the exercise of delegated powers. It will also need to pass secondary legislation, and to ratify the withdrawal agreement as a treaty. That would be a demanding parliamentary workload at any time: with only a few weeks to work in there is a lot of scope for snags – in particular, for MPs who object to aspects of the withdrawal agreement to delay the process or amend the legislation. So the deal could still be derailed in parliament, even after it's been approved.

If parliament votes to **reject** the deal, the government has to make a statement to the Commons within 21 days setting out how it plans to proceed with Brexit. Within seven sitting days the House will then debate a 'motion in neutral terms' that says it has considered the statement. A motion in neutral terms would not usually be amendable, but earlier in the year the government conceded that it would be up to the Speaker of the Commons to decide whether the motion was really in neutral terms and therefore whether amendments would in fact be possible.

By contrast, the government conceded that MPs *will* be able to amend the motion on the withdrawal agreement and the political declaration (although it now seems to be looking for a loophole in this). So MPs could complicate matters further by, for example, accepting the agreement but rejecting the declaration, or by attaching conditions: e.g. that parliament must approve the final UK/EU deal or that there must be a referendum on the agreement.

As arguments about the amendability of motions have shown, the course of Brexit could be significantly altered by the finer points of parliamentary procedure. The government, for example, clearly hopes to use procedure to limit – or even remove altogether – the ability of MPs to amend the motion approving the Brexit agreement. Those opposed to the government's plans may equally seek to use the parliamentary rulebook to derail Brexit legislation or other government business. It is impossible to say with confidence what the ultimate effect of these manoeuvres is likely to be.

How would the government proceed if its motion on the deal is voted down or significantly amended? It might seek to go ahead with No Deal, but parliament would almost certainly try to close off that approach. It might accept certain amendments, particularly if it believes they cannot be used to derail the ratification of its deal. Alternatively, it could approach the EU27 and ask to reopen negotiations. The EU has indicated it would not do this, not least because time would be short and any revised agreement which the government negotiated would probably meet the same fate at the hands of the Commons. But the political declaration could be the subject of some rapid renegotiation if that was what MPs had objected to. The government could also simply try to get the deal through parliament again, if the vote was close. This might hit problems with rules that are intended to stop the same question being considered twice in one session of parliament, but in practice it would almost certainly be possible to find a way of doing so.

If the Commons is unable to approve the deal or agree on an alternative, demands for another referendum – now widely referred to as a people's vote – could become irresistible. Indeed, the Commons might view that as the only way to escape its paralysis. The EU would almost certainly agree to an extension on the Article 50 period to accommodate a referendum, as long as the UK gave some binding undertakings on what would happen afterwards.

Another way to break such a deadlock would be a general election, but this is less likely. Conservatives do not want to give Labour even the slightest chance of taking power, and in any case an election could produce another hung parliament, potentially leaving the situation unresolved.



## The January No Deal deadline

Under the EU (Withdrawal) Act, if 21 January 2019 passes with no deal being struck, or if the prime minister announces before that date that there is no deal, the government must make a statement to the

Commons, along the lines of the one mentioned above, followed by another 'motion in neutral terms', which again the Speaker will be able to rule on. It is widely supposed that, if this motion proves to be unamendable, the Speaker will find another way for parliament to set out its own view of what should be done.

At this stage we really would be in uncharted territory. If the government pushed ahead with No Deal, it seems likely that parliament would seek to block it. This might be done directly or, for example, by voting down the legislation that the government would need to implement it, or by attempting to legislate for a referendum to approve the No Deal option.

Parliament might try to direct the government to reopen negotiations with the EU. (EU leaders have said more negotiations are not an option, but might change their view if the UK's position changed.) There could even be a vote of no confidence in the government. If the government lost such a vote a general election would not be triggered immediately, but would follow unless another government could be formed.

In any of these eventualities, the UK would need time to resolve its position. How practical would it be to 'pause' Brexit? It is generally accepted that the EU27 would have no difficulty in agreeing to an extension to accommodate a referendum or some other time-limited event, but would be reluctant to extend the period by more than a few weeks to accommodate last minute twists and turns in the negotiating or ratification process. There is no appetite to let Brexit drag on, and the UK is already perceived as having wasted much of the negotiating period.

If parliament is desperate to avoid No Deal and none of the options above is feasible, there remains the Big Red Button of Brexit. It is generally assumed that the UK has the power to cancel its withdrawal from the EU, by revoking its Article 50 notification. Any attempt to do so would inevitably be deeply divisive and could provoke legal challenges. It is also possible that some form of consent for revocation would in practice be needed from the EU27. But in practice (subject to the view of the ECJ) it could probably be done.<sup>1</sup>

<sup>1</sup> The ECJ is considering a request from the Inner House of the Court of Session in Scotland for a preliminary ruling on the reversibility of Article 50 (case number: C-621/18). The case is proceeding under the expedited procedure, with a hearing on 27 November.

The EU General Court has just held that an application for the annulment of the Council's decision to open Brexit negotiations with the UK is inadmissible (T-458/17). It had been brought by a group of British citizens living in other member states. If this is appealed the ECJ would have to fast-track the appeal to deliver a judgment before Brexit day. In London on 7 December the High Court will consider whether *Susan Wilson and others v The Prime Minister*, a case which essentially seeks to halt Brexit on the basis of misconduct in the referendum, can proceed.



Revocation would require both a massive change of heart by the Commons and massive political courage. It would be contemplated only if the UK faced a stark choice between Scylla and Charybdis: either crash out of the EU into potential social and economic chaos, or cancel Brexit and attempt to contain the crisis that would inevitably ensue. The only circumstance in which it might be done without the cover of a referendum is probably if the EU27 could not agree on extending the Article 50 period to accommodate further negotiations or a referendum. In that situation, revocation would avoid No Deal chaos, but its effects in the longer term would be incalculable. It seems reasonable to assume that, at a minimum, we would see political upheaval in the UK and a real struggle for the government to rebuild bridges with other member states. Companies would benefit from remaining in the EU but might find they had to deal with new instabilities in the UK. A decision to Remain would not necessarily be the same as a return to 'business as usual'.

Odysseus, the hero of the Odyssey, chose to sail past the monster Scylla, losing a few more of his already diminished crew, rather than risking his entire ship in the whirlpool of Charybdis. But in navigating Brexit, which option would be which?



## The European Parliament

There is a general expectation that the European Parliament will comfortably endorse the proposed deal. The Commission has kept it very much 'in the loop' and has taken into account the parliament's resolutions on Brexit. It will avoid negotiating any Brexit deal that it thinks the parliament might reject.

The deal will be scrutinised by a committee of the parliament, which will put forward a recommendation to the parliament as well as voting on the proposal. (That vote is non-binding, but a rejection would be an indication of serious trouble ahead.) There will then be a vote in a plenary session. A simple majority of the MEPs present in the chamber – including MEPs from the UK – will be sufficient to approve the deal.

Guy Verhofstadt, the European Parliament's representative on Brexit matters, has said the parliament normally needs three months to consider and vote on a deal but that "if there is a delay of a few weeks we can manage." However, MEPs would certainly resist any suggestion that the process should take less than a couple of months.

If the parliament were in danger of failing to approve the deal before 29 March, there is a widespread assumption that the EU27 would be prepared to extend the Article 50 period by a few weeks, pushing the date of the UK's exit from the EU into April or even May. It would almost certainly not go any later than that, as the last voting session of the current parliament is on 18 April. (The parliament could convene a special plenary session, but elections to the parliament will be held between 23 and 26 May, with the first plenary session of the new parliament not due until July.)

One potential complication is that, under Article 218 of the Lisbon Treaty, the parliament can, if it so wishes, probably vote to request an opinion from the European Court of Justice on whether the agreement is compatible with the EU treaties. (The uncertainty about its ability to do so arises because the agreement is being made with a member state rather than a third country.) If that happened and the ECJ decided that the agreement was not compatible, then it would have to be amended. Furthermore, until the ECJ delivered its opinion, the parliament would be unable to vote on the agreement.

The parliament has referred previous international agreements to the ECJ, such as the EU-Canada agreement on Passenger Name Records, and the EU's FTA with Singapore. The court took over two-and-a-half years to deliver its opinion on the PNR agreement. Were the Brexit deal to be referred to the ECJ, we have no way of knowing how long the process would take. So while a referral would have to reflect a genuine concern, it would also potentially be a powerful weapon for anyone seeking to delay or derail Brexit.

It may be worth adding that member states can also request an opinion from the court (as can the European Council and the Commission).



## The European Council

A qualified majority of the European Council will have to approve the deal once the European Parliament has signed it off. That means the leaders of at least 20 member states, representing between them at least 65% of the EU27's population, will have to vote for it. In practice the expectation is that approval would be unanimous.

Once the European Council approves the deal, we will at last have certainty on some key aspects of Brexit. Uncertainty on many others will remain. But, above all, we will at last be sure that the UK is not crashing out of the EU on 29 March 2019 without a deal.

Although the emphasis in the media and in debate has often been on the negotiations in Brussels, the key risks for Brexit are really in Westminster. Brexit was triggered by UK politics and it will be UK politics that determine its shape, within the considerable constraints imposed by the EU's rules.

While MEPs, European governments, the European Commission and the UK's devolved administrations will all be influential to a greater or lesser degree, businesses wanting to assess the risk of a No Deal Brexit need to watch the mood in parliament above all else. If a Brexit deal gets through Westminster intact it is probably – barring the risk of a referral to the ECJ – safe.



## Brexit Day

The UK is expected to leave the EU on 29 March 2019, two years after the UK's Article 50 notification. But under Article 50 a different date could be specified in the withdrawal agreement. And, of course, the Article 50 negotiating period could be extended by mutual agreement between the UK and the EU27.



## Transition and beyond

The transition period is scheduled to end on 31 December 2020. The UK and the EU are unlikely to have agreed their new relationship by then, meaning that the backstop would be activated. However, the transition period may be extended by up to two years, and there is some possibility that a deal could be agreed and ratified by the end of the longest possible transition, on 31 December 2022. If it is, then it will govern relations between the UK and the EU when transition is over. If it is not, the backstop will kick in, and negotiations on a deal will continue for however long it takes the parties to arrive at an agreement.

Businesses will thus need to plan for two outcomes, with the complication that the political declaration offers little detail on the likely deal, while the withdrawal agreement leaves many aspects of the backstop unresolved.

The situation will inevitably continue to evolve, and the possibility remains that a change in UK government could see a major change in the likely shape of the deal. It will be some time before businesses can complete their planning for a post-Brexit future.

# CMS and Brexit

As Europe's largest law firm, CMS can help you assess the risks and opportunities in Brexit, and give you the legal tools and insights to manage them successfully.

Since 2016 we have been advising a wide range of clients – in the UK, the EU27 and beyond – on their planning and preparations for Brexit.

But with the UK set to leave the EU in less than five months, and the so-called transition period likely to end in December 2020, businesses now have only a limited time to develop and implement their Brexit strategies.

And however far advanced their Brexit planning is, all companies still have to deal with a continuing lack of certainty, as the UK and the EU seek both to negotiate an agreement on the UK's withdrawal from the EU and to determine the shape of their future relationship. As the situation develops, businesses will need to adapt quickly in order to succeed.

CMS can give you practical, pragmatic advice on the implications of Brexit for your business, providing clear insights and information as new developments unfold. We can support you in developing strategies to cope with the potential outcomes of Brexit, as well as the ongoing uncertainty and shifting probabilities that the Brexit process involves.

If you would like to know more, please get in touch with your usual CMS contact or any of the following partners.



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- Advising on the application of WTO rules and the likely WTO framework under which the UK will operate.
- Reviewing relevant regulatory frameworks in the UK and EU and identifying how products and services can be sold after March 2019.
- Advising on the status of foreign national employees and access to labour.
- Reviewing corporate structures and looking at alternative options to UK establishment to enable the provision of services and products in the EU to continue after Brexit.
- Advising on the migration of European Companies (Societas Europaea).
- Assisting with the relocation of corporate functions from the UK to EU27 states, and the secondment of UK employees to them, including regulatory considerations.
- Advising on the implementation of a number of cross-border mergers.
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