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# Countdown to Brexit

A No Deal Checklist for business

March 2019









# Countdown to Brexit

Whether or not there is a 'No Deal Brexit' on 29 March, exiting the EU will have a major impact on businesses operating in the UK.

This checklist sets out some of the key points UK businesses need to consider, particularly in the light of a possible No Deal Brexit. It updates material from a previous CMS report, **Ready for Brexit?**

The complexities and uncertainties of Brexit mean different businesses will be affected differently and will have different priorities. Businesses in certain sectors – especially those which are heavily regulated – will have many additional considerations. Issues affecting specific sectors, such as financial services and life sciences, are not included in this general checklist, but updates and analyses covering these areas are available on our **Brexit website** or from your usual CMS contact.

Having a strategy that reflects your particular situation is key. The single most important step for your business is auditing exposure to the risk of a No Deal Brexit, if that has not yet been done. After that, you can prioritise the handling of individual risks.

CMS can help you audit and prioritise your legal risks, as well as advising on solutions and on other aspects of Brexit, including its longer term implications. Please get in touch with your usual CMS contact, or any of the members of our Brexit taskforce listed at the end of this checklist.



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## An Article 50 extension

If the UK and the EU27 agree an extension of the Article 50 negotiating period, the UK will not leave the EU on 29 March but at whatever later date the parties agree. However, an extension would not, by itself, eliminate the possibility of a No Deal Brexit. That can only be achieved by the ratification of the Withdrawal Agreement and Political Declaration, or by a revocation by the UK of its Article 50 notification. Otherwise (in the absence of any additional extension) the UK would still leave without a deal when the extension ended.

# A No Deal Brexit checklist for UK businesses



## Approvals

Certain approvals, certifications, licences and registrations issued by UK regulators may not be recognised in the EU after a No Deal Brexit.

- Businesses need to audit their current regulatory approvals, establish which will lapse and plan accordingly.
- In some cases it will be possible to pre-empt difficulties by securing equivalent approvals from other EU regulators, or by transferring approvals to subsidiaries based in the EU.
- Labelling on some goods exported from the UK to the EU may have to be changed.
- Some new approvals will also be needed in the UK after Brexit – e.g. those importing chemicals into the UK will need to be registered under the UK's replacement for the REACH system.



## Contracts

A No Deal Brexit has a variety of potential implications for contracts. In some cases, it may not be possible to perform a contract in the manner originally envisaged (or even to perform it at all).

- Contracts (both with EU parties and others) may need to be reviewed to look at risk allocation 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 need to be changed.
- Any new contracts being negotiated should take the possibility of a No Deal Brexit into account, particularly in clauses dealing with issues such as data protection, termination, governing law and choice of venue. In both existing and new contracts, the impact of Brexit on provisions such as those relating to business continuity, force majeure, change of laws / material adverse change and price review should also be considered.
- Businesses will wish to consider practical and commercial issues such as ensuring continuity of supply down the supply chain, contingencies for increased costs of doing business and fluctuations in currency/ foreign exchange rates that may affect contract pricing.



## Corporate activity

A No Deal Brexit has a variety of potential implications for ongoing M&A, fundraising or investment processes. While the parties will by now have considered the impact of Brexit generally on any transaction structure, valuation issues and risk allocation, it may be advisable to check current proposals, advice and key terms to assess the possible impact of a No Deal Brexit.

- Do corporate and tax structuring plans and advice take it into account? Will it affect assumptions on financing terms or costs, or other ongoing requirements?
- If binding contracts have not yet been entered into, what have the parties agreed will happen (or not happen) in respect of exclusivity, break fee or any other commitments?
- Has legal due diligence or verification considered the impact of the issues highlighted in this checklist or should the parties refresh some of that analysis?
- How does it affect the risk or timing of any necessary regulatory or third party approval?
- Do the relevant transaction documents cater for both Brexit and a No Deal Brexit? (See Contracts, above.)



Some of the points in this checklist apply not only to the EU but also to the other countries in the EEA: Iceland, Liechtenstein and Norway. Some are also relevant to Switzerland (e.g. citizens of all four of those countries will be able to remain in the UK on the same terms as EU citizens after a No Deal Brexit).



## Customs duties and checks

In the absence of a deal, it is anticipated that UK businesses will trade with EU customers and suppliers (and those from other nations with which the UK does not have its own trade agreements) on WTO terms, resulting in the likely 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 part of the customs process.

- Businesses need to be in a position to complete and submit customs declaration forms and deal with other customs-related bureaucracy (eg a business trading with the EU will need an EORI number).
- Businesses without appropriate internal expertise or resources may need assistance from customs brokers or other service providers.
- HMRC plans to implement Transitional Simplified Procedures for some imports from the EU, and businesses should check whether they are eligible to use these or other mitigating schemes, and whether they may be able to apply for any form of duty relief.
- Some businesses may use storage or distribution facilities in the EU, to avoid moving goods into and out of the UK.



## Data

Given that an EU adequacy decision will not be in place before a No Deal Brexit, the transfer of personal data from the EU to the UK will only be possible using an alternative data transfer mechanism (e.g. standard contractual clauses). Ensuring that personal data can still flow freely between the EU and the UK will be crucial for most businesses. Changes may also need to be made to existing data protection governance structures (including any records of processing).

- Businesses need to consider their data flows, audit their data transfer practices and update them where necessary to ensure that they can continue to compliantly transfer data from the EU to the UK, and update privacy notices where necessary.
- EU businesses that share personal data with UK service providers (or EU service providers that in turn use UK sub-processors) will need to ensure compliant data transfer mechanisms are in place and that such processing complies with EU data protection laws. So will EU businesses which outsource IT, HR or other functions to UK providers.
- EU businesses with UK headquarters will need to consider any potential alternative lead EU data protection regulator.
- Businesses based in the UK, and not in any other EU or EEA state, which offer goods or services to individuals in the EEA, or monitor the behaviour of individuals located in the EEA, will need to appoint a suitable local representative in the EEA.
- e-Commerce systems may have to be altered to reflect post-Brexit realities.



## Disputes

Questions may be raised about enforcement of judgments of UK courts in EU member states after a No Deal Brexit. For example, some EU countries may not recognise UK insolvency proceedings.

- Businesses should review any dispute with an EU element.
- 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 some instances, where that is possible, it may be beneficial to advance proceedings as rapidly as possible, since obtaining a judgment before Brexit day could make it easier to enforce.
- As noted above, when agreeing new contracts businesses should consider appropriate post-Brexit terms for dispute resolution.



## Employees

In a No Deal Brexit the UK will cease to be part of the EU's regime for freedom of movement. In addition, there is the possibility that some EU citizens may respond to the uncertainty caused by a No Deal Brexit by opting to leave the UK.

- Businesses should ensure that both they and any employees who may be affected by Brexit (whether EU citizens in the UK or UK citizens in the EU) fully understand the situation.
- In some cases businesses, having established which employees are affected, will be able to offer practical support at a relatively low cost.
- Businesses need to be aware that the position of EU citizens (other than Irish citizens) moving to the UK after a No Deal Brexit will be significantly less secure than that of those who arrived before Brexit. UK citizens moving to the EU after a No Deal Brexit may be in a similar situation.
- Retention may be a risk for some businesses, as may morale in businesses that are heavily exposed to No Deal, or where personal lives are affected. Businesses should assess the likely needs and concerns of the workforce and plan for appropriate communication and engagement, with a particular focus on key staff.
- Businesses may also need to ensure that certain staff are adequately informed about some basic issues that will arise after a No Deal Brexit (e.g. passport requirements, and the need for UK drivers to have International Driving Permits).
- Businesses that expect to be materially adversely affected by a No Deal Brexit may wish to engage in contingency planning for new working patterns or practices, or even for laying off staff.



## Finance and budgeting

A No Deal Brexit may affect some businesses' cashflow and access to finance.

- Businesses should model the effects of a No Deal Brexit and budget accordingly.
- Businesses need to consider whether they require contingency funding, and whether a No Deal Brexit will affect their ability to source financing on acceptable terms.
- Existing arrangements should be audited to establish whether, for example, disruption following a No Deal Brexit could cause covenants to be breached or trigger material adverse effect clauses.
- Business that benefit from funding or financing that comes, directly or indirectly, from the EU should make sure they understand what will happen to it after Brexit and, if it will cease, whether the UK government will step in to replace it.
- Businesses should also look at whether any new grants or other public funding may be available as a consequence of Brexit.



## Foreign exchange

It is anticipated that there will be significant volatility in currency markets, particularly that Sterling may fall significantly, if there is no Brexit deal.

- Businesses will want to consider hedging or making other provisions.
- Businesses should plan for associated increases in the cost of imports (though exporters may of course see some benefits).



## Intellectual property

Many IP rights are derived from international agreements which do not depend on the UK's membership of the EU. However, some businesses will have issues around copyright: chiefly in relation to broadcasting and some database rights, and the cross-border provision of certain material. UK producers of food and drink protected by geographical indications could lose those rights in the EU.

- While EU trade marks will continue to be protected in the UK, the owners of EU trade mark applications will have nine months to apply for equivalent UK trade mark protection.
- Any trade mark owners from outside the EU who do not 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: future designs first disclosed in the UK will only enjoy unregistered design protection in the UK, so designers who wish to enjoy EU-wide protection will have to consider disclosing their designs simultaneously in the UK and the EU.
- UK businesses that wish to keep .eu domains will have to act (but not necessarily before 29 March).
- Some businesses will need to establish whether they will be affected by any restrictions on parallel imports to the EU from the UK.
- All businesses should consider how a No Deal Brexit will affect their IP filing and management 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.
- Businesses should review any IP licences to which they are a party, to ensure that these will not be disrupted by Brexit.



## Messaging

Businesses will have a role to play in helping their stakeholders understand the likely consequences of a No Deal Brexit.

- Businesses should make sure stakeholders – including regulators, shareholders, board members, staff, customers, JV partners, suppliers and the media – receive appropriate information about their preparations for Brexit.
- In some cases – e.g. for listed companies – there may be a requirement to publicly announce or disclose information on the consequences of Brexit.



## Non-EU trade

The UK will not succeed in ‘transitioning’ (or ‘rolling over’) by 29 March all the trade agreements and similar agreements with other nations from which it benefits as a member of the EU. At the time of writing, only six have been transitioned, and the government has said that some others (such as those with Japan and Turkey) will not be transitioned by 29 March.

- If your business benefits from any of these agreements, you need to establish the effect that the loss of it would have, and identify any possible mitigating actions – you may find, for example, that new import duties are payable or that additional regulations apply.
- In a few situations, it may no longer be possible to do business – e.g. where market access comes through an agreement with the EU.



## Products

Businesses may have to make some changes in order lawfully to place goods on the EU 27/UK market after a No Deal Brexit.

- Depending on the nature of the product there will be conformity assessment and notified body changes required prior to 29 March, and possibly marking and labelling changes. There will be a transitional period for the UK market subject to certain exceptions.
- There will be a change of roles: EU-based businesses will become importers.
- Businesses trading in the UK and the EU will need to ensure compliance with both existing EU regimes and new UK equivalents for REACH, biocides, CLP and Plant Protection Products.
- Supply agreements should be checked in line with compliance and commercial changes.



## Qualifications

After a No Deal Brexit some 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 EU 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.

- Business need to ascertain the situation for their employees on a state-by-state basis, and devise a strategy accordingly, which may involve employees requalifying.
- Some businesses may be required to have qualified employees resident in the EU.



## Services

The impact of a No Deal Brexit on UK businesses providing services in the EU will depend on the sector involved, and possibly on the regime in the EU member state where they are seeking to work. In many cases – notably financial services – such businesses have been in the forefront of Brexit planning. Other types of business – e.g. UK manufacturers providing post-sale maintenance services to EU customers – may not yet have fully assessed their position.

- Businesses which do not yet know their position should establish it urgently and, if possible, develop a strategy that will enable them to provide services after Brexit.
- Any strategy will need to take account of potentially related issues such as data transfers and the recognition of qualifications after Brexit (see above).



## Supply chain disruption

Supply chains involving the EU will be disrupted by a No Deal Brexit. The degree and nature of the disruption will vary. Businesses supplying into the EU as part of a chain may also face problems.

- Supply chains should be mapped to identify vulnerabilities.
- Business should consider whether to stockpile where possible, and should in any case ensure that business continuity plans reflect potential failures in supply.
- Some businesses may wish to redesign their supply chains.
- All businesses in EU-related supply chains need to discuss the situation with their suppliers and/or customers, as appropriate, and where possible agree a pragmatic approach.
- Supplier performance should be monitored closely – if difficulties arise, it may be necessary to act quickly to secure the supply chain. In some cases, larger businesses may be in a position to offer support to troubled suppliers.
- Where third parties provide outsourced services, businesses should establish that they have the secure supply chain and the people they need to continue doing so without disruption.



## Tax

After a No Deal Brexit, importers of EU goods will have to pay VAT (as will EU importers of UK goods). UK businesses will no longer benefit from some tax reliefs available under EU directives.

- The UK government intends to introduce postponed accounting for import VAT, so VAT-registered businesses can account for it on their VAT returns, instead of at the time of import.
- Some businesses trading with EU countries will need to register for VAT in those countries.
- Businesses that use the UK's VAT MOSS Union scheme will need to register in the EU for the VAT MOSS non-Union scheme.
- Businesses should ascertain whether payments between associates in the UK and the EU will be covered by the UK's tax treaties with individual EU member states.
- Transactions dependent on tax reliefs that will not be available after Brexit should be completed urgently.



## Transport

The biggest perceived threats to transport continuity in a No Deal Brexit should be averted by the European Commission's proposals for regulations that will allow the temporary provision of certain air services between the UK and the EU, and that will permit UK hauliers temporarily to carry goods into the EU. But these provisions are limited and conditional. Additional customs checks and other factors may in any case disrupt travel and delay the transport of goods.

- Businesses may wish to consider alternative transport plans (e.g. different routes or providers).
- Caution may be appropriate in planning non-essential business travel for the period immediately after Brexit day.





## Some useful links

- [Implications for Business and Trade of a No Deal Exit on 29 March 2019](#)
- [UK government advice on how to prepare if the UK leaves the EU with no deal](#)
- [Brexit news and communications from the UK government](#)
- [Brexit-related guidance and information from the UK government](#)
- [HMRC's advice on preparing for changes at the UK border after a no deal EU exit](#)
- [Online tool for stakeholders to comment on proposed Brexit-related Statutory Instruments](#)
- [The Department for International Trade's summary of existing trade agreements if the UK leaves the EU without a deal](#)
- [The European Commission's Brexit pages](#)
- [The Commission's Brexit preparedness notices](#)
- [EU legislative initiatives and other legal acts targeted at remedying the negative impact of a No Deal Brexit](#)
- [Our Brexit hub](#)



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**We have advised businesses from the UK, the EU27 and around the world on Brexit-related matters including:**

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- ☒ Derivatives
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- ☒ Environmental issues
- ☒ General Brexit planning
- ☒ Import and distribution issues
- ☒ Intellectual property
- ☒ Product liability
- ☒ Public procurement
- ☒ Real estate matters
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- ☒ Restructuring
- ☒ Supply chain issues
- ☒ Tax
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**Our clients for Brexit work are in sectors and organisations including:**

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