



BREXIT: CHARTING A NEW COURSE

ARTICLE 50 PROCESS

29 MARCH 2017:
Article 50 notice formally submitted

29 APRIL 2017:
European Council meets to approve negotiation guidelines

APRIL/MAY 2017:
EU Commission makes recommendation on opening negotiations

MAY/JULY 2017:
General Affairs Council adopts decision authorising opening of negotiations. Nominates EU Commission as EU Negotiator

JULY 2017- OCTOBER 2018:
Substantive Brexit negotiations

OCTOBER 2018- MARCH 2019:
Approval Phase - Any Article 50 agreement must be approved by the UK and EU

29 MARCH 2019 (or other agreed date):
UK leaves EU- either a cliff edge or start of implementation phase towards long term trading relationship

2-5 YEARS LATER:
End of implementation phase/ commencement of new trade agreement if agreed

Financial contribution from the UK

At the outset the Commission wants to settle the principles on which the UK will contribute to the EU's ongoing budgeted commitments while the UK is a Member State, but the UK House of Lords' preferred view under international law is that the UK will have no liability to meet budget obligations payable after it has left.

1

Framework for new Trade Agreement

The UK wishes to negotiate the framework of a new trade agreement or agreements with the EU alongside agreeing the terms of leaving and an "implementation phase" designed to ensure a smooth transition to a new relationship. The wording of Article 50 supports this, but Michel Barnier suggests this cannot be considered at all until the leaving arrangements are settled.

4

UK Political Risk

The UK Government has a relatively small majority and this could lead to difficulties in parliamentary management or to an early general election. The outcome of a general election could radically change the UK negotiating stance, if it sought for example continued membership of the Single Market through a treaty relationship with the EU or even to withdraw the notice altogether.

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COURSE OF NEGOTIATIONS

Risks of delay in Process

It seems likely that these issues of principle will take up a considerable period in which serious negotiations on the substance of the arrangements will not take place.

1. The resolution of these points will itself be complex
2. With general elections in key Member States, the policy of these directing minds in the negotiations is unlikely to become clear until after their elections

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Rights of EU Citizens

Both the UK and the EU, as well as many of the EU 27 Member States, have expressed the desire to settle the future of those already exercising their right of free movement as early as possible in the process.

2

EU Political Risk

There is a risk that changes in the continuing EU, particularly the Eurozone, could divert attention from the negotiations. The risks include the election of a right-wing Eurosceptic government in France, which might not be committed to remaining in the Eurozone, or, possibly, in the EU; a crisis in the Eurozone, most likely related to the economy of Greece or possibly other Member States; and a crisis related to the inflow of asylum seekers and the fragile military situation in the Middle East.

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WHAT OUTCOMES DOES THE UK FACE?

Once the Article 50 notice has been served, within the limitations of current UK policy, as set out in the Brexit White Paper, the range of outcomes are, broadly, reduced to two, but with variations possible:

1. A "hard Brexit" in which relations between the UK and the EU revert to those under WTO terms. If negotiations break down or the Article 50 agreement is rejected this could be a "cliff-edge", moving overnight from full membership of the EU to WTO terms. There may still be a move to WTO terms even if there is an implementing agreement, which would merely soften the transition.
2. A move to a new trading relationship with an implementing agreement intended to bridge the gap. It is unclear whether the arrangements will cover both goods and services and there are a number of possible options with different effects for different businesses.



IMPACT ON THE UNITY OF THE UNITED KINGDOM

The Scottish First Minister, Nicola Sturgeon, has announced that she wishes to hold a second referendum on Scottish independence from the UK between autumn 2018 and spring 2019 and has the support of the Scottish Parliament. Theresa May has indicated that she is not minded to consent to a second Scottish referendum until after Brexit, at a time when the options for the Scottish people are a lot clearer.

A vote in favour of independence is something that would in any case greatly complicate the process of the UK establishing its position as a trading nation outside of the EU and would also cause difficulties for Scotland establishing a different course from the rest of the UK without any certainty of EU membership.

Following independence, if Scotland wished to form a close relationship with the EU, Scotland would need to either apply for membership of the EU if it wished to re-join or seek to join EFTA and then the EEA. The standard accession process for joining the EU requires a unanimity vote and ratification by all Member States, which can take several years and risks being vetoed by Spain, which for domestic reasons is strongly opposed to accommodating States that have seceded from larger States. Joining EFTA and the EEA requires the approval first of the four EFTA States (Norway, Iceland, Liechtenstein and Switzerland) and then of the EU 27 and the EFTA States (other than Switzerland), again on a unanimous basis.

The position is different for Northern Ireland should it opt for reunification. Under the terms of the Good Friday agreement the UK Government is legally obliged to offer Irish voters a referendum on reunification if polls show sufficient support for this to happen. In that event, Northern Ireland would be in a position of becoming part of an existing EU Member State, rather than seeking to join the EU as a new independent State (similar to the position when East Germany joined the EU in 1990 following German reunification).

The position of Wales in relation to Brexit is relatively uncomplicated. The majority of voters in Wales, like the English, voted to leave the EU. The Welsh Government has however stated that it wishes Wales and the UK as a whole to remain within the Single Market.

WHAT SHOULD BUSINESSES BE DOING NOW?

It is evident that there is a real risk of a “hard Brexit” and this is the base case that many businesses will be examining, together with one or more other options, in order to devise a strategy to mitigate the potential negative effects of Brexit and maximise potential upsides. The focus of any Brexit review will of course depend on the nature of the businesses but will typically include a regulatory analysis (market access issues and deregulation opportunities), a supply chain analysis (impact of tariffs and non-tariff barriers) and a review of contracts (identifying problematical terms and contracting strategy issues).

This type of analysis will allow businesses to determine priorities for further action. This may involve engaging with government, directly or through industry bodies, to influence their approach based on prioritised analysis. At operational level it may mean strategic M&A, devising alternative legal structures, changes to geographical footprint and workforce, re-assessing investment plans, revising compliance frameworks and so on.

Given the evolutionary nature of the Brexit process any such monitoring should be on-going in order to sequence and trigger planned actions but also to continually re-validate adopted strategies.

Herbert Smith Freehills is working with numerous clients on the implications of Brexit for their activities. We have also collaborated extensively with other professional services organisations to provide holistic impact assessments and strategic advice, aligned with individual clients' objectives.

Please contact your usual Herbert Smith Freehills contact or any of the contacts listed here if you would like to discuss further.

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