

# BREXIT COUNTDOWN: BIG CHANGES ARE COMING ON 1 JANUARY 2021 WHATEVER HAPPENS AS NEGOTIATION TENSIONS RISE

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Legal Briefings

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As businesses and governments around the world continue to grapple with the implications of COVID-19, Brexit is fast approaching. This time for real.

Last year, as businesses awaited a potential Brexit without a deal, the difference was stark. 'Deal' meant entering a status quo transition period in which essentially nothing changed for business; whereas 'no-deal' represented the maximum possible change to trade rules – a move to so called 'WTO rules'.

In the end, a [Withdrawal Agreement was concluded](#), the UK formally exited the EU on 31 January this year and moved more or less seamlessly into the current transition period. Now, however, business faces substantial new trade friction whether or not a new EU/UK trade deal is agreed in time. Furthermore, 31 December 2020 is now a firm deadline (after the 1 July 2020 deadline to agree any extension expired).

This note provides a brief update on prospects for a deal, the implications for business with or without one and where to find more information and assistance to navigate the changes.

- [Negotiations are at the brink](#)
- [Whatever happens with the negotiations, business has to be ready for substantial changes to trade rules after 31 December](#)
- [Our Brexit materials and support](#)

## **NEGOTIATIONS ARE AT THE BRINK**

On the face of it, prospects for a deal are looking increasingly remote as the clock runs down. For example:

- Both sides recently made clear (UK's statement [here](#) and EU's [here](#)), that there can be no deal unless the other side substantially rethinks their current positions while at the same time reiterating that they themselves cannot compromise on their underlying positions.
- The basic disagreement between the UK and EU positions is fundamental. It is between:
  - the UK's desire to have the same policy freedoms as are enjoyed by other major economies with free trade agreements with the EU, such as Canada and Japan (hence UK references to wanting a 'Canada style' deal); and
  - the EU's desire for the UK to make level playing field commitments in areas such as state aid, competition law, workers' rights and other issues by reference to EU standards – well beyond EU practice for 'Canada style' deals (but justified in the EU's view by greater proximity and connection).
- Fisheries is also a key obstacle to a deal with the UK arguing for the return of control of its own waters for its fishermen against the EU seeking to retain as close to the status quo access for its fishermen as possible. This is a difficult area politically for both sides, disproportionate to its economic value.
- Last week the UK published its [UK Internal Market Bill](#) with controversial provisions to allow the override of specific parts of the Withdrawal Agreement to change how the Northern Ireland Protocol would apply after 31 December 2020. While the UK argues the

aim of the legislation is to protect the integrity of the UK's internal market, from the EU's perspective it reneges on obligations already undertaken that were designed to protect the integrity of the EU's internal market. Most controversially, the Bill would give the UK Government powers to override provisions of the Withdrawal Agreement giving the European Commission jurisdiction over State Aid to companies in Great Britain where they might "affect" trade between Northern Ireland and the rest of Ireland.

Negotiations may well end in acrimony and blame but it is too soon to know for sure. On the one hand, both sides were always going to hold back their compromises until crunch time and ratcheting tensions and rhetoric are therefore inevitable. On the other hand, deliberately announcing an intention to unilaterally ignore obligations already contracted, is hardly conducive to developing the trust that must underlie any new agreement.

In any event, the extreme time pressures mean that many matters will inevitably be left for discussions [over the years ahead](#).

## **WHATEVER HAPPENS WITH THE NEGOTIATIONS, BUSINESS HAS TO BE READY FOR SUBSTANTIAL CHANGES TO TRADE RULES AFTER 31 DECEMBER**

Assessing the odds of a successful conclusion to the negotiations misses the point for business. As we approach the end of the status quo transition period, business faces major change whether a follow-on trade deal is agreed or not.

A free trade agreement which is in any way analogous to a 'Canada style' deal will bring major changes for all kinds of trade. For services, and also even for goods, a 'Canada style' deal between the EU and the UK is much closer to so called 'WTO rules' than to EU membership. In other words, it is much closer to the situation that businesses face when trading between the United States and the EU or between Australia and the EU - where there is currently *no trade deal*. See our webinar [here](#) where our trade experts explain what operating under 'WTO rules' would mean in practice for EU-UK trade.

Throughout the Brexit process, our team at Herbert Smith Freehills has continued to work across our firm to help clients in all markets and parts of the world in preparing for this major change. Across a range of sectors, clients have set up new subsidiaries, acquired new regulatory approvals in the EU or the UK, prepared for changed distribution channels and sought to protect their people working across countries.

For those who had to make significant changes in order to continue to carry on business in the EU, particularly financial institutions, many of these changes were prepared in time for the original leaving date of 29 March last year but may not be fully implemented until the end of this year, when most service businesses face similar trading rules whether or not there is a EU-UK trade deal.

For businesses that trade in goods between the UK and the EU, the kind of ‘Canada style’ deal that is in prospect would likely eliminate tariffs and quotas on goods between the UK and EU (although full elimination is far from a certain outcome of even a successful negotiation). However, with the UK outside the EU’s customs union and single market, frictionless trade will no longer be possible. To continue trading in goods, businesses trading with the EU from the UK (and vice versa) will require new documentation, licences, certificates and authorisations to comply with customs formalities as well as regulatory obligations.

Last year, during the negotiations for the Withdrawal Agreement, both parties prepared a series of “mitigation measures” to temporarily reduce the severity of a cliff-edge Brexit. The EU took the strictest approach, not wanting to allow de facto “cherry-picking”. It did, however, prepare a series of autonomous measures where it considered that they were in the interests of the EU. This included listing the UK as safe for dual-use goods and for purposes of sanitary and phytosanitary measures, temporary authorisations of air and road haulage services and also some temporary equivalence decisions in the area of financial services. The UK prepared similar, more far reaching, measures including the unilateral reduction of customs duties and formalities and temporary recognition of EU conformity assessments. Currently, while the UK is preparing to take similar mitigation measures in the event of no-deal, the EU has not so far advanced extensive proposals for mitigation measures. The UK Government has issued [guidance](#) to help businesses with planning and the EU has also prepared numerous “[readiness notices](#)” (see our note [here](#)).

Another change that will come at the end of the transition period is that the UK will become free to enter into free trade agreements with other countries. On 11 September 2020, the UK signed its first trade deal as an independent nation outside the EU with [Japan](#) (largely replicating the EU’s trade deal with Japan, although apparently going further in a number of respects).

## **OUR BREXIT MATERIALS AND SUPPORT**

For more insights from Herbert Smith Freehills on the impact of Brexit on businesses, please visit our [Brexit](#) legal hub. Amongst other things, it contains the latest version of our [Beyond Brexit Legal Guide](#) (including our [Delivering Brexit: Putting plans into practice](#) checklist) and our [View from Brussels](#) series with insights for business on the implications of the ongoing Brexit process.

Many other insights are available on our [Beyond Brexit blog](#). Please subscribe [here](#) to get the latest updates.

If you would like to discuss specific arrangements for support through the risks of the move to an uncertain future relationship, on how you might express the concerns of your business to governments, on dispute risks that may arise, or on any other questions or challenges you have, please do contact your regular Herbert Smith Freehills relationship contacts, or otherwise any of our experts listed [here](#).

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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