



BREXIT UPDATE - EU 'NO DEAL' CONTINGENCY PLANNING

The UK is due to leave the EU in just two months, and there is no clarity about whether an orderly withdrawal is possible. The EU has begun preparations for a 'No Deal' outcome, where the UK would leave the EU on 29 March 2019 and become a third country with no formal trade or political agreement in place.

This was always a possibility, but with the political turmoil in the UK, and the apparent lack of a majority of MPs in favour of any particular outcome, the EU views the likelihood of the UK leaving without a deal as significantly more likely today than it was even a few weeks ago. It has therefore put the wheels in motion to prepare for that eventuality.

For political reasons, the EU has decided to only do the minimum necessary to limit the damage to the EU economy of the UK leaving without a ratified withdrawal agreement. It has also stated that these contingency measures should be limited in time and not in any way seek to replicate the benefits of EU membership.

The European Commission has therefore proposed legislation in just a handful of areas, including financial services and aviation, and asked the other institutions to sign off on these proposals within an extremely tight deadline. Having said that, as the date draws closer it appears the EU is becoming more concerned about the likelihood of a 'No Deal' and is extending the areas covered to also include more politically charged topics such as fisheries. And recent press reports indicate EU Member States are not all content with this minimalist approach, with key countries arguing that the EU should seek to limit further the disruption in areas such as aviation and road haulage.

BACKGROUND

Under the terms of Article 50 of the Treaty on European Union (TEU), the UK will leave the EU on 30 March 2019 (11pm GMT on 29 March 2019). All EU law will cease to apply to the UK and the UK will become a third country vis-à-vis the EU, unless the Withdrawal Agreement concluded in November 2018 is ratified, or an extension to the Article 50 deadline is sought and granted by the EU.

The EU has long acknowledged that the UK's departure will cause significant disruption. It has repeatedly called on Member States, businesses and EU

Key issues

- The EU has put the wheels in motion to prepare for a 'No Deal' outcome.
- The European Commission has repeatedly stated individual businesses and EU Member States are responsible for ensuring they take the necessary precautions to prepare for a 'No Deal' outcome.
- The EU will only do the minimum necessary to try and mitigate the most severe disruptions in some narrowly defined areas.
- The European Commission has proposed legislation that will be adopted according to an accelerated timetable in order to be in place by the date the UK withdraws from the EU.
- The EU measures will be temporary, unilateral and revocable at any time.

"The European Council renews its call upon Member States, Union institutions and all stakeholders to step up their work on preparedness at all levels and for all outcomes."

European Council (Article 50),
29 June 2018

citizens to prepare for all possible scenarios, including an outcome where the UK leaves without a deal in place.

In addition to the 78 detailed [sectoral information notices](#) in the event of 'No Deal' already published by the European Commission, two further documents have been issued – one on the [13 November 2018](#) and one on the [19 December 2018](#) – outlining a Contingency Action Plan. These outline the measures required of the 27 remaining EU Member States, the action required of citizens and businesses and the contingency action required at the EU level. In addition, the documents identify a handful of areas where specific attention is needed because of "the far-reaching consequences that a disorderly withdrawal of the United Kingdom" would have for them.

The Commission also issued new proposals in relation to fisheries in mid-January 2019, a sign of both the nervousness that 'No Deal' really might come about and the political significance of the industry.

ACTION BY REMAINING 27 EU MEMBER STATES

The European Commission has given Member States strict instructions not to engage in bilateral talks and agreements directly with the UK. The Commission argues that this would undermine EU unity, something which it is determined to maintain throughout this process. The Commission warns that "bilateral solutions would be either incompatible with the division of competences within the European Union or [...] jeopardise the integrity of the European Union, with negative effects for citizens, businesses and public authorities."

The Commission has called on Member States to identify the changes they need to make to national legislation in order to prepare for the UK's withdrawal, but there are also some very practical recommendations in the documents, including the need to hire more customs officials and vets, as well as building infrastructure at ports and airports in order to manage the new checks that will be required once the UK is a third country. The Commission recognises that this infrastructure and additional manpower would in any event be necessary at the end of the two year transition period foreseen in the Withdrawal Agreement, but argues that preparations should speed up in case they are needed much sooner.

There is financial support available; EU state aid rules allow Member States to grant financial support in a 'No Deal' scenario, for example if small- and medium-sized enterprises (SMEs) require consultancy support or training on new customs procedures. Technical and financial support is also available through the EU's Customs 2020 Programme for training new customs officials for example.

Ireland is singled out for particular assistance, with the Commission stating that it will "support Ireland in finding solutions addressing the specific challenges of Irish businesses." The Commission also stated that EU funding will continue to be made available to support the peace process in the border counties of Ireland and Northern Ireland through the PEACE and INTERREG programmes.

For more information about what individual Member States are doing in preparation for a 'No Deal' Brexit, please see our client briefings: [France getting ready for a 'no deal' Brexit](#), [Germany prepares for 'No deal Brexit'](#) -

"The Commission [...] calls on Member States to refrain from entering into bilateral agreements, arrangements and discussions with the United Kingdom. These would undermine the ratification process, in most cases would not be compatible with Union law, and would risk creating an uneven [...] playing field among Member States. They would also complicate the Union's future negotiations on a new partnership with the United Kingdom."

Communication from the Commission: Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: Implementing the Commission's Contingency Action Plan, 19 December 2018

[Update and Brexit deal or no deal? - The Netherlands mitigates the risks with legislative measures.](#)

ACTION BY BUSINESSES AND CITIZENS

The Commission underlines the importance of individual businesses ensuring that they are prepared for a 'No Deal' outcome and refers back to the technical sectoral notices published throughout 2018. The Commission notes that businesses are responsible for ensuring that the correct authorisations and licences are in place when the UK ceases to be an EU Member State.

ACTION AT EU LEVEL

The Commission has made clear on various occasions that any action taken in the event of no deal being in place will be strictly limited, aimed at mitigating "significant disruptions in some narrowly defined areas," and serve only to protect the interests of the European Union. All measures must comply with a number of general principles, including:

- Measures must not replicate the benefits of EU membership, nor the terms of the transition period foreseen in the Withdrawal Agreement.
- Measures must be temporary and in principle not go beyond 2019.
- Measures will be adopted unilaterally by the EU and can therefore also be revoked unilaterally at any time.
- Measures must not remedy delays that could have been avoided by preparedness measures and timely action by relevant bodies.

This last point refers to the need for businesses, Member States and individuals to take responsibility for their own preparations.

The Commission has identified the following policy areas where contingency plans are required in the event of 'No Deal'. It is interesting to note that the Commission recognised there were other areas where there would be significant disruption (customs, personal data, for example) but considered that specific measures were not required, not possible, or the responsibility of others.

Financial services

The Commission notes that a lot of preparation has already taken place, such as the relocation of activities from the UK to the EU27 ahead of the UK losing the EU financial services passport, and insurance firms transferring contracts, setting up branches and merging with EU27 firms.

It therefore considers that "only a limited number of contingency measures is necessary to safeguard financial stability in the EU27." The Commission has proposed action in three areas:

1. A [conditional equivalence decision](#) valid for 12 months to ensure that there will be no disruption in central clearing of derivatives. The European Securities and Markets Authority (ESMA) will recognise temporarily central counterparties currently established in the UK.
2. A [conditional equivalence decision](#) valid for 24 months to ensure that there will be no disruption in services provided by UK central security depositaries who will be able to continue to provide notary and central maintenance services to operators in the EU27.

"The Commission calls on the co-legislators to ensure the adoption of the proposed legislative acts so that they are in force by the date of the withdrawal of the United Kingdom."

Communication from the Commission: Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: Implementing the Commission's Contingency Action Plan, 19 December 2018

3. Two delegated Regulations facilitating novation – one in regard to [the date at which the clearing obligation takes effect for certain types of contracts](#) and one in regard to [the date until which counterparties may continue to apply their risk-management procedures for certain OTC derivative contracts not cleared by a CCP](#) – for a fixed period, of certain over-the-counter derivatives contracts with a counterparty established in the UK to replace that counterparty with a counterparty established in the EU27.

But the Commission notes that in the area of cleared derivatives action may be needed because of the risk to financial stability of a disorderly close out of positions of EU clearing members in the UK central counterparties. For the moment, the rules on equivalence provide some safeguards but should the UK leave the EU without a deal, the Commission has stated it will adopt temporary and conditional equivalence decisions in order to ensure that there will be no disruption in central clearing and in depositaries services.

Air transport

There is a requirement under EU law for air carriers to be majority owned and controlled by EU legal entities and the Commission has stated that there will be no flexibility on this point. Airlines may therefore need to make significant changes to their shareholding structure and such changes must be in place so that airlines are able to meet the ownership requirements on 30 March 2019.

In order to ensure that flights can continue between the UK and the EU27, the Commission has proposed action in three areas:

1. Traffic rights: the Commission has issued a [proposal for a Regulation](#) to ensure that for 12 months UK carriers are allowed to fly over the territory of the EU, make technical stops for refuelling, as well as land in the EU and fly back to the UK. These measures will only apply if the UK grants the same reciprocal rights to EU airlines. And it is worth noting that the rights the Commission is proposing are a bare minimum, leading the proposed Regulation to be known as the "Bare Bones Regulation". UK airlines would only be able to fly to an EU country and back again, with no possibility to fly between two EU27 destinations (e.g. Paris to Madrid) or from an EU27 country to a third country (e.g. Paris to New York). The frequency of flights is restricted to the flights that took place in 2018 so there is no possibility to add new routes or additional flights to an existing route.
2. Aviation safety: the Commission has [proposed a Regulation](#) to extend for nine months the validity of safety certificates issued by the UK. This is to address the fact that the UK will only be able to issue licences after it has left the EU, and the European Aviation Safety Agency (EASA) will likewise only be able to issue certain certificates on the basis of a licence issued in a third country after the UK has left the EU.
3. One Stop Security system: the Commission has proposed that passengers and their cabin baggage flying from the UK and transiting via an EU27 airport continue to be exempted from a second security screening. This will be done under existing rules which allow the EU to recognise a third country's aviation security regime as equivalent for a limited period of time.

The proposals were issued in December 2018 and are currently being considered by the European Parliament and Council of the EU under the ordinary legislative procedure. The timing is tight but the institutions have committed to agreeing the texts in time for the UK's departure. Press reports following the initial discussions of these texts by Member States indicate that countries such as Spain are pushing back on the Commission's approach which they see as 'too rigid' and potentially harmful to "our own citizens and businesses". Similarly, in the European Parliament there is some pushback against the strict imposition of the airline ownership rules proposed by the Commission, and early indications that Parliamentarians may seek to at least delay the date when the rules will enter into force.

Road haulage

The Commission has recognised that in the event of 'No Deal', road haulage between the EU27 and the UK would be severely restricted and limited to an international system of limited quotas. The Commission has therefore [proposed a Regulation](#) to allow, for nine months only, access for road haulage operators licenced in the UK to transport goods by road between the UK and the EU27. The measure will expire on 31 December 2019. The goods being transported will be subject to customs and other checks as with any goods coming into the EU27 from a third country (see following section).

As with the rules on air traffic rights, the Commission has taken a minimalist approach only allowing UK hauliers to operate between the UK and the EU27, not between two points within the EU27 (known as 'cabotage'). Again, according to press reports this is being met with pushback from certain Member States, including France, who view the approach as overly restrictive.

Customs and dual-use goods

As noted above, the Commission has recognised the significant impact on ports and airports of new customs checks on goods arriving in the EU27 from the UK, but not proposed any specific measures to address this.

The only 'No Deal' measures to be taken in the area of customs are (i) a [technical measure](#) to include the seas surrounding the UK in rules on time-limits for lodging customs documents prior to entering or leaving the EU customs territory, and (ii) a [proposal for a Regulation](#) to add the UK to the list of countries for which a general authorisation to export dual-use items is valid throughout the EU.

Sanitary and phytosanitary (SPS) requirements

There are strict EU rules about the entry of live animals and animal products into the EU territory. The EU only allows imports of these products from countries that are listed as authorised third countries and they must all arrive through designated Border Inspection Posts (BIPs). The Commission has stated that it will add the UK to this list so long as all the applicable conditions are fulfilled. Being listed will merely allow the UK to export animal products to the EU27, it will not exempt UK produce from the sanitary and phytosanitary controls by Member State authorities at BIPs.

Similarly, for plant health (which is covered in one of the 78 sectoral notices) there will be no relaxation of the rules, and all plant products coming into the EU27 from the UK will need to be fully compliant with the relevant rules relating to imports from third countries. This includes wooden pallets used for

"Member States must take all necessary steps to be in a position, as from the withdrawal date in case the withdrawal agreement is not ratified, to apply the Union Customs Code and the relevant rules on indirect taxation to all imports from and exports to the United Kingdom."

Communication from the Commission: Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: Implementing the Commission's Contingency Action Plan, 19 December 2018

trade in goods which will themselves have to comply with the relevant SPS standards.

Climate policy

Under the Emissions Trading Scheme (ETS), the EU operates a fluorinated greenhouse gases quota system and companies are allocated a quantity of substance gases that they can legally place on the market. The Commission will adjust the allocations to exclude quotas for UK domestic activities.

Fisheries policy

The EU has also set out two proposals in relation to the European fishing industry: (i) a [Regulation](#) to provide for "continued reciprocal fishing access by the Union and United Kingdom vessels to each other's waters" until the end of December 2019, and (ii) a [proposal](#) to provide compensation under the European Maritime and Fisheries Fund if there is a "temporary cessation of fishing activities for fishermen and operators that have significant dependence on access to United Kingdom waters and who are affected by a closure of United Kingdom waters."

While not announced in the Contingency Action Plan published in December 2018, the Commission issued these proposals in response to "continued uncertainty in the UK surrounding the ratification of the Withdrawal Agreement" and to help mitigate the significant impact of 'No Deal' on the politically important EU fishing industry were the UK to shut off access to its fishing waters.

Citizens

Although this is an area primarily led by Member States, the Commission recommends that EU27 governments "take a generous approach to the rights of UK citizens" who are already in their country. This covers for example the rights of residence and the ensuing rights as regards employment, access to education and core social benefits. As regards travel and temporary stays, the EU has proposed that UK nationals be exempt from the visa requirement so long as EU citizens are granted the same exemption from UK visa requirements.

If you would like more information on any of the topics covered in this briefing or have any questions in regard to the EU's 'No Deal' contingency planning, please contact a member of the Clifford Chance team.

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