

## 1 Background

- 1.1 Brexit threatens to have a significant impact on all businesses that operate in the UK, both when they are buying in goods and services from suppliers in the EU (whether as a manufacturer or a retailer) and when they are selling goods and services to customers in the EU. As such, all businesses need to consider the impact of Brexit, both as a buyer of goods and services from suppliers in the EU and when they are selling goods and services to customers in the EU. With this in mind, this guidance note simply identifies the issues that all businesses need to consider in relation to Brexit, whether as a buyer or a seller.
- 1.2 In considering the effects of Brexit, the response of a business may be different, depending on its position on the supply chain, the criticality of the contract (in terms of both value and the subject matter of the contract) and whether the business is seeking to work through the implications of Brexit on an existing contract or whether it is seeking to negotiate a new contract.
- 1.3 If a no-deal Brexit happens on 31 October 2019, there is now very little time to prepare. Therefore, up until 31 October 2019, each business should focus on the contracts which underpin its business. However, should a no-deal Brexit arise on 31 October 2019, all businesses will have to consider how a no-deal Brexit affects all of its contracts.
- 1.4 If the UK government requests (as it is now legally obliged to do) to extend the Article 50 period to 31 January 2020 and the EU agrees to this request, the deadline for a no-deal Brexit simply extends to 31 January or such other date as the EU may offer. Accordingly, any no-deal preparations are quite likely to remain relevant for some months.
- 1.5 Even if the EU and UK reach agreement on the UK's withdrawal from the EU and the accompanying Political Declaration regarding the future relationship, the UK and EU still need to agree to the terms of a new Free Trade Agreement by 31 December 2020 (extendable until 31 December 2022). If these negotiations are not successful, the risk on no-deal will remain for some years to come.
- 1.6 A no-deal Brexit will also affect trade with any third country with whom the EU has a Free Trade Agreement or other preferential trade relationship. There are 40 such arrangements covering 70 countries. While some countries have agreed to roll these arrangements over post-Brexit, the majority of the arrangements are still being negotiated.

- 1.7 Most current contracts do not contain adequate provisions to deal with the potential adverse consequences of Brexit. In particular, most contracts have been written on the basis that the UK is a member of the EU with no tariffs, no customs checks, freedom of movement of people and regulatory alignment. All of that will change with a no-deal Brexit. In addition, even with a deal, it is likely that there will be some friction at the border unless the UK agrees to enter into a new "customs union" with the EU. Accordingly, companies should review all current contracts along with any new contracts which are likely to continue in force beyond 31 October 2019 with a view to considering how the parties will deal with the potential consequences of Brexit.

## 2 A Summary of the Issues That Contracts Need to Deal With in the Event of a No-Deal Brexit

All businesses, whether as buyer or seller, need to consider the extent to which their contracts will protect them in relation to the following areas in the event of a no-deal Brexit:

- 2.1 Tariffs – Which party will be responsible for paying tariffs? Some contracts may contain specific provisions, while other contracts may reference an Incoterm. However, in many cases, existing contract wording can be contradictory and/or will not have been thought through with a no-deal Brexit in mind. Secondary issues will then arise in relation to how the various available reliefs may reduce the tariff burden.
- 2.2 Customs – The import of goods from the EU to the UK and the export of goods from the UK to the EU will require the correct completion of a myriad of customs procedures. While these procedures will be easier if a business benefits from any of the available trusted trader schemes, it is quite likely that existing contracts between UK and EU business will not deal with who needs to do what and the liabilities that will arise out of non-compliance. In so doing, contracts with customers, suppliers and logistics service providers must all be considered.
- 2.3 Delay – As a result of a no-deal Brexit, more checks will take place at the border. As a result, delays are likely to arise no matter how well a business has complied with the require customs formalities. All businesses need to consider the impact of delay. For example:
  - a. Is time of the essence?
  - b. Are liquidated damages payable?
  - c. Do other liabilities arise?
  - d. What termination rights arise?

- 2.4 Exchange rate variances – Are the parties protected or at risk from exchange rate fluctuations?
- 2.5 Change relief – Does the contract contain provisions in relation to:
- Material Adverse Change – Do any contracts contain any relief wording in the event of any material adverse change?
  - Can any relief be sought via any general change control procedures?
  - Can any relief be claimed via the force majeure provisions or via a claim of frustration?
- 2.6 Frameworks – Do suppliers have to accept all orders placed under contract or do suppliers have the right to reject such orders?
- 2.7 Tax – Consider the impact of changes in the VAT regime.
- 2.8 Staff – Does the ability of a party to perform under a contract depend upon its staff working in the UK (for EU suppliers) or the EU (for UK suppliers)? If so, consider the impact of the likely changes to the immigration rules and travel restrictions post a no-deal Brexit.
- 2.9 Data – If a business in the UK processes personal data of EU citizens in the UK post a no-deal Brexit, all relevant contracts need to contain the EU model processing clauses.
- 2.10 Duration – How long does the contract continue post a no-deal Brexit and/or can it be renegotiated at renewal or does it just roll over at the option of the buyer?
- 2.11 Standards and Regulations are likely to diverge post a no-deal Brexit, either because UK standards and regulations change or because new EU standards and regulations are not implemented in the UK. In addition, in some cases, businesses will need to obtain specific regulatory approvals and/or comply with additional labelling requirements.
- 2.12 Contract terminology – Any references to EU bodies, laws and regulations will need to be changed.
- 2.13 Territorial rights – Do contracts that refer to the EU as being the territory still cover the UK post a no-deal Brexit?
- 2.14 Liability and recoverable losses – Consider the ability of the business to recover (or its vulnerability to claims for) losses which are attributable to the effects of a no-deal Brexit.
- 2.15 Audit – To what extent can a party exercise any audit and verification rights to validate any claims brought by the other party following a no-deal Brexit?
- 2.16 Termination rights:
- To what extent are suppliers or customers able to cancel contracts for reasons related to a no-deal Brexit?
  - Is a business obligated to accept orders that it can no longer supply on an economic basis?
  - To what extent can the business exercise termination of convenience rights?
- 2.17 Solvency risk – Consider the risk that suppliers or customers may be affected by solvency risks which are attributable to its costs of business increasing and/or the effect of delays on processes that are dependent on just in time deliveries and so on.
- 2.18 Enforcement of contracts – Any judgements obtained in any of the UK courts in relation to contracts which include provisions for the non-exclusive jurisdiction of any of the UK courts are unlikely to be enforceable in the EU post a no-deal Brexit.
- 2.19 Variation rights – To what extent can a business seek to vary its contracts?
- 2.20 Should a business seek to agree new contracts which are drafted to cater for all of the issues that are likely to arise following a no-deal Brexit?

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