Need for transitional arrangements

The White Paper states that it wants “avoid a disruptive cliff-edge, and we should consider the need for phasing in any new arrangements we require as the UK and the EU move towards a new partnership” It. expects ‘to have reached an agreement about our future partnership by the time the two year Article 50 process has concluded’. It also states that “a phased process of implementation, in which the UK, the EU institutions and Member States prepare for the new arrangements that will exist between us, will be in our mutual interest. This will give businesses enough time to plan and prepare for those new arrangements”.

Companies need to ensure business continuity for three key interim periods in the exit process, whether there is a deal or not:

- The interim period between notification and exit;
- The gap between exit and conclusion of eventual trade arrangements;
- Adjustment to the new regime.

The difficulty is planning for these upheavals when the outcome of the final negotiations and their likely timescales are so uncertain.

Withdrawal timetable

<table>
<thead>
<tr>
<th>Trigger</th>
<th>2 year negotiating period</th>
<th>Longstop</th>
<th>Ongoing negotiations for future arrangements</th>
<th>Conclusion Implementation &amp; Ratification</th>
<th>Further phased adjustment period</th>
</tr>
</thead>
<tbody>
<tr>
<td>March 2017</td>
<td>........................................</td>
<td>March 2019</td>
<td>........................</td>
<td>2022 ++??</td>
<td>....</td>
</tr>
</tbody>
</table>

Scenario 1: DEAL – EU Trade Agreement

It is highly unlikely that both the withdrawal agreement and the new trade deal will be concluded at the same time There will be an extensive gap between conclusion of Article 50 negotiations in March 2019 and the end deal – negotiation, agreement and ratification of a new trade deal in over 2025
30 States is likely to last several years—e.g. CETA took seven years of negotiations and is still not fully ratified.

Important need for UK and EU to agree a binding transitional arrangements to bridge this period and allow business time to adapt to the new regime that is ultimately adopted. UK companies will need to “mind the gap”—as new rights are “phased in” and old EU rights are “phased out”.

**Scenario 2: NO DEAL – WTO**

If the UK withdraws without a deal, then it will revert to the WTO arrangements but will need to adopt its own Schedules. It could adapt the existing EU Schedules, but they will need substantial amendments to reflect the UK’s own trade volumes and that will take time for renegotiation. There would be no overarching international treaty to coordinate the phasing in and out of rights. The UK will have to adopt its own unilateral transitional arrangements in a piecemeal fashion. Companies will have to resort to self-help mechanisms to smooth the potential upheaval.

**AVOIDING THE CLIFF EDGE: ENSURING BUSINESS CONTINUITY AND A SUCCESSFUL ROLL OVER**

**Key issues**

**(1) Maintaining legacy rights in the UK**

Once enacted, the Great Repeal Bill will carry over the vast majority of EU rights into the domestic legal regime. A number of utilities such as telecoms, energy, water, road and rail transport are subject to harmonised European regulatory frameworks and it is anticipated that the GRB will replicate the majority of the current EU provisions. So UK businesses will have a degree of legal certainty and continuity within the UK. That will maintain the status quo and ensure the UK is in the best position to negotiate a free trade agreement or, failing that, secure recognition as equivalent outside the EU.

For example, the Communications Act 2003 already implements the regulatory framework into domestic law and empowers Ofcom to regulate various domestic markets through licence conditions and dispute resolution. It will not be perfect or exhaustive and will not be future proof. There may be parts that the UK decides not to carry across—e.g. there will be no internal market policy agenda so no need for a harmonised regime alongside 27 other Member States or for cross border cooperation between regulators. Similarly, there may over time be gradual reforms that repeal the EU derived regime and replace it with a framework inspired by independent UK policy.

At domestic level, there will be a basic level of recognition for acquired rights which will ensure that businesses can continue to operate within the UK. Those legacy rights will be “grandfathered” for some time and will be enforceable via existing or newly created regulators and agencies or before national courts. Companies will need to be vigilant and flexible to adjust to the domestic regime as it changes over time.
What about post-Brexit developments?

Rights conferred under the Great Repeal Bill will be “static” and fixed as at April 2019 and, most likely, will not take account of subsequent initiatives at EU level or ECJ case law developments. For instance, there may be EU Directives in the pipeline whose implementation dates fall close to or after the 2019 deadline and which will not be incorporated into the UK regime. In the telecoms sector, there will be no automatic entitlement to forthcoming EU rights such as increased roaming rights or universal broadband rights for UK citizens in 2020. National courts may decline to have regard to future developments from ECJ rulings. There may be a gradual divergence between UK regime and EU regime which, over time, may undermine the requirement of “equivalence” or “reciprocity” which is required for many EU passporting rights.

Cross-border Business

The application of the GRB will be restricted to the UK territory. The GRB does not guarantee that operators from other Member States will be able to continue to supply products and services here in the UK. Likewise, there is no guarantee that UK businesses will be able to retain automatic rights to supply products or services in the 30 other EEA States. Many cross-border businesses depend on EU authorisations or mutual recognition that entitle them to offer services such as insurance services, financial services or legal services in other Member States. The continued existence of these rights or the extent of any limitations placed upon them will depend upon the outcome of negotiations in the Council.

It may be that members of the EU Council will agree to respect and “grandfather” any acquired rights belonging to UK companies (and vice versa EU businesses active here in the UK) as part of the withdrawal agreement or framework arrangements. That happened with the withdrawal of Greenland in 1985, which protected existing rights as well as those still in the process of being acquired at the point of exit. Similarly, when Algeria ceased to be a dependent French territory, the ECJ recognised ongoing pension entitlements.

In the absence of any EU trade agreement, companies and businesses will have to resort to other mechanisms. Taking financial services as an example, such potential mechanisms include:

- Reliance on the new third country passporting rights – however this has not yet been activated and only has limited reach;
- WTO and GATS rules – however financial services rules are not developed sufficiently and GATS allows States to impose restrictions on cross-border services;
• Attaining EU Commission recognition that the UK financial services regime is “equivalent” to the EU framework – however this is a political process, which can be time consuming and can be revoked at any time. Also, it is not exhaustive and may omit certain sectors e.g. retail financial services;
• Corporate restructuring by setting up subsidiaries in each EEA State, which are authorised and regulated by that State; and
• Transferring employees, use of delegation and outsourcing structures.

Supply Chain and Labour Implications
Some UK industries, such as manufacturing, energy and transport are heavily reliant on importing inputs and components from other EEA States or elsewhere. For example, between 20 and 50% of car components used in the UK are sourced from across the EU. A number of UK component manufacturers export to vehicle manufacturers in the UK. In the absence of a deal, each leg of this supply chain would attract new tariffs, ranging from 2-3% for components to 5% for engines and 10% for finished vehicles. Similarly, 40% of our agricultural production is exported which post Brexit, could attract WTO tariffs of over 50% for butter and cheese and up to 90% for certain meat products. Similarly food production is heavily dependent on migrant labour from the EU, who may not be entitled to remain.

The application of tariffs and other non-tariff barriers may mean that is harder for UK businesses to compete with their EU counterparts or cross-border supply is uneconomic. Companies may need to take steps to review their procurement and employment arrangements and reconfigure their supply chains, where possible, to minimise impact of tariffs on imports and/or exports.

Pan-European rights
More complicated for rights that are inherently cross-border or depend on harmonised regime or mutual recognition and equivalence. For instance:

• Many companies rely on the unitary nature of EU intellectual property rights to obtain pan-European protection of their designs, trademarks and innovations. The UK has stated that it intends to ratify the unified patent convention although it is hard to see how this will be enforced without involvement of the CJEU. Many other IP rights, such as registered and unregistered community designs and EU trade marks will no longer have effect in the UK post Brexit, which will reduce its economic value for licences. Companies will need to identify which of their IP rights are now likely to be affected and may need to apply for further registrations in order to achieve maximum protection before Brexit occurs.
• Medicines are subject to centralised EU procedures which provide a one-stop-shop for authorisation, marketing, clinical trials and pharmacovigilance. Some of those Directives have not been implemented yet – in the absence of bilateral arrangements and/or mutual recognition between the UK and EU, pharma companies may need to transfer their medicine authorisations to subsidiaries in other EU States or may multiple applications at EU and UK level.

• Airlines such as Ryanair and Easyjet are authorised to operate commercial services within and across other EEA states, as part of the European Common Aviation Area Agreement and onto the USA under the EU-US Open Skies Agreement. Brexit will mean that the UK will have to accede to the ECAA or negotiate a separate bilateral agreement, failing which UK airlines will lose their access rights to operate in other Member States (and vice versa for European airlines that wish to fly to the UK). In the absence of such agreement, UK airlines may need to give up certain routes and markets or else restructure their ownership model and operations to move their European hub to another Member State and/or create a smaller UK company for domestic flights.

Contractual rights

Existing contractual arrangements may not be adequate to deal with the uncertainties of transition, especially when the timing and content of a future EU trade agreement, let alone its conclusion, is uncertain. If the EU mutual recognition and pass porting arrangements no longer apply, companies may find themselves unable to provide a particular product or service to the client at all – either because it is legally impossible as they are no longer authorised to operate in another Member State or practically impossible because their products or services no longer meet the particular standards in place in a particular country. The introduction of tariffs may make the supply impossible or uneconomical or make it more difficult to obtain necessary inputs and components from third party suppliers.

These difficulties are likely to create contractual disputes if pre-emptive measures are not taken – parties may seek to avoid their contractual obligations by claiming that the contracts have been frustrated or are no longer enforceable. They may sue a party for breach if its performance is prevented, delayed or hindered by regulatory and customs requirements.

Companies may resort to self-help mechanisms to minimise such disruption – for instance they could vary existing contracts or introduce additional clauses to new contracts:
• Introduction of so-called “Brexit clauses” to protect against force majeure and/or allow for re-negotiation, termination or arbitration in event of material change in the law;
• Change of choice of law clause and choice of jurisdiction to that of another Member State to ensure legal certainty and enforcement;
• Protection from insolvency in the supply chain;
• Allow for change to source of supply to avoid tariffs.

Long-term contracts (such as joint ventures, mortgages, business credit and insurance arrangements) will be the most problematical, especially those concluded several years ago when Brexit was not on the horizon. They may well have been syndicated or assigned to third parties in circumstances where there is no opportunity to vary their terms.

Conclusion

It is clear that the GRB will not suffice on its own to ensure business continuity for UK businesses, especially those engaged in the cross-border supply of goods and services. Nor will it protect the rights of EU or US companies that have invested in the UK on the assumption that a UK base will provide a gateway to EA markets. Companies will need time to adjust to the changing regulatory environment in which they operate.

There is a clear need for transitional bridging arrangements as part of any wider withdrawal agreement and a further phased adjustment period for any negotiated deal with the EU. In the event that there is no deal, companies will need to take proactive steps to manage the risks and minimise any potential loss of or limit to their right to conduct business in the EEA. Rather than falling over a cliff edge, companies will need to be well informed to take timely steps to restructure their business operations and renegotiate their contractual supply arrangements to ensure their business rolls over as part of a smoother transition. For many industries, those steps will need to be started in 2017-2018 ahead of exit and structured in a flexible way so that they can be adjusted as the future trading landscape becomes clearer.

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