What happens next?
Your Brexit Q&A handbook
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Brexit Webinar:
This deal, no deal, no Brexit-parliament votes

Q&As
Eversheds Sutherland is one of only a handful of practices awarded Tier 1 status for our legal advice by the Legal 500. We are a go-to resource for Brexit contingency planning and legal advice, monitoring of developments, and client and industry-specific briefings.

We are committed to giving clear, straightforward and objective advice on what an exit may mean for your business. The issues are not the same for every business and we will ensure that our legal advice is tailored to your needs.
This Q&A sheet explains some of the most pressing questions asked by clients about Brexit, including around topics such as:

- Procedure
- EEA/“Norway For Now”
- Financial services
- Environment
- Immigration
- Data protection
- Commercial
- Irish border
- Product regulation
- Trade
- Other
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Procedure
If there is a revocation of the Article 50 Notice, is there anything to prevent service of an almost immediate Article 50 Notice (in order to buy further time)?

Although unlikely, what is the deadline for the UK government should it wish to or need to revoke Article 50?

Our view is that the recent case before the Court of Justice of the EU, the Wightman case, would make service of another Article 50 notice difficult. This case said it is revocable but it is not something that should be abused. That’s what we think the judgment amounts to.

Revocation is possible up until the date of exit (whether the original date or any extended date) but needs to factor the time needed for Parliamentary approval of this step.

If a second referendum could take 6 months but the EU will only extend the March deadline if a meaningful discussion on a new deal is ongoing how could a second referendum with a “remain” option be viable?

These are very difficult timescale issues that I do not have a clear answer to. I suspect that what the timescale will need to be will become clear if we can have indicative votes and we can see which option could command a majority in the House of Commons.

Will the UK participate in the next EU elections in May 2019 if the Brexit deadline is extended?

Legally yes, but in practice it might be another issue. President Tusk has said that if the UK has not left the EU by 23 May, it will legally be required to hold these elections.

Could there be a ‘mini referendum’ to ask if we wanted to go to a full referendum?

No, we think this is unlikely.
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Does the Speaker’s decision mean a no deal Brexit is now a virtual certainty or do you think that the EU may yet give us an extension?

We think the EU is likely to grant an extension, despite this decision.

The view was that any extension would not go beyond June because of EU elections - how would the EU get around this given Tusk seems to be pushing for a longer extension?

There have to be MEP elections as these are rights enshrined in the EU Treaties.

What do you think are the chances of all 27 EU Member States agreeing to an extension? Any particular Member States that could be unwilling?

What is the chance of a single EU country rejecting the extension?

We think it is probable that all 27 would agree, but there have been reports that some EU member states might seek to impose additional terms. We have seen press reports that, for example, France may insist on conditions.

If extension to A50 notice - would transition period to December 2020 be extended?

There is only a transition period if the UK and the EU ratify and sign the proposed withdrawal agreement. If there is an extension to the Article 50 notice and the withdrawal agreement is approved during that extension period, then we do not know whether the parties would then agree to extend the transition period.

Can the Speaker’s decision on the 3rd vote be overturned or is it the final word?

The House of Commons has the right to vote to disapply the relevant rule of Parliamentary procedure.

Is there actually enough parliamentary time for a Minister of the Crown to make regulations to amend the date of the exit day - can it be done in a week?

Theoretically yes. They have to be laid before both Houses and approved but this can be done on a same day basis.
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EEA/”Norway For Now”
2.1 What is “Norway for now”?

The UK is currently in the European Economic Area (“EEA”) together with all of the other EU Member States and three of the members of the European Free Trade Area (“EFTA”) including Norway. “Norway for now” refers to the scenario where the UK would remain in the EEA by becoming a member of EFTA (subject to the EFTA states’ unanimous consent) but with the UK looking to transition out of the EEA in the future by signing a deep and comprehensive free trade agreement with the EU.

2.2 Would the UK be granted membership of EFTA and the EEA automatically?

The UK’s current membership of the EEA is based on it being an EU Member State and there are diverging views as to whether the UK automatically leaves the EEA when it leaves the EU (this is the UK Government’s view). The UK would need to apply to join EFTA, which would require the unanimous consent of the EFTA States.

2.3 Does EEA membership allow for the free movement of people?

Yes. The EEA States are part of the EU’s Single Market. This means that they benefit from, and have to comply with, the four freedoms including the free movement of people. Furthermore, Iceland, Norway, Liechtenstein and Switzerland are part of the Schengen Area.

2.4 Has Norway for Now and/or Canada Plus been discussed with the EU? If so, what is the EU’s position?

There has been some discussions on these. The UK’s position is towards an “a la carte” arrangement whereas the EU leans towards existing models. It was clear that Canada as a basis for a free trade agreement was open for discussion and that this might go towards Canada plus depending on negotiations in the future. The difficulty remains the hard border questions, there was nothing in the early papers to indicate how the Irish border could be dealt with in relation to a Canada plus arrangement.
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Financial Services
3.1 There was news that firms with UK funds would force redemption of EU investors. Is there any requirement for UK investors to be forced to redeem EU UCITS or AIFs?

No. The rules have been redrafted so this is no longer necessary.

3.2 What happens to the FCA’s TPR if Art 50 is postponed?

The Temporary Permission Regime only comes into force on a no deal Brexit and if Article 50 is postponed, so is the TPR.
4 Environment
4.1 Will UK companies who do not have an EU legal entity or have not appointed an OR representative to host their REACH registrations be able to sell chemicals into EU after UK leaves EU?

Under EU REACH, UK based suppliers will still be able to sell products into the EU. EU based customers must ensure that an appropriate EU REACH registration is in place.

In the event of a no deal Brexit, any UK based EU-REACH registration will be invalid. This means that UK based suppliers either need to appoint an OR (where this is possible), transfer the registration to an EU based entity or the EU based customer will need to register that substance itself if its imports are 1 tonne or more per year. Alternatively that customer will need to find a new supplier which is registered.
5 Immigration
Can you say more about your confidence that EU workers in the UK on the 1st April will be unaffected given they will not have applied for a right to remain as the application system is not yet available. Are the PM’s assurances legally binding?

If a deal is reached, the DWA provisions take effect in the EUWA so there’s direct legal protection. If the UK were to leave with no deal (which would now be 12th April), UK Visas and Immigration advise a system will be in place which still allows free entry into the UK until 31st December 2020 with some conditions attached to staying longer than 3 months; that is not in law yet, but would be introduced as delegated legislation deriving from the Social Security and Immigration Bill if there were to be no deal. Whilst the date of departure from the EU is delayed, freedom of movement continues without amendment. Either way, all EU nationals living in the UK on the date of Brexit would have until 2021 to apply for settled status, so there should be no concern.

The new immigration system was expected to take effect in 2020 (if I am correct), so in a no deal scenario, is the government ready to bring that date forward and introduce it immediately after exit date?

The current plan is for the new immigration system to take effect on 1st January 2021 in both scenarios. If the UK leaves the EU with no deal, EU nationals arriving after Brexit will be granted three months’ entry initially and then need to apply for European Temporary Leave to Remain in order to stay for another 36 months. There will not be a change to the right of admission to the UK until 2021.

Right to Work checks - if there is a no deal Brexit are employers required to undertake a check for new employees to ensure they have applied for settled status or European Temporary LTR?

No, the current plan is for the new immigration system to take effect on 1st January 2021 in both scenarios. If the UK leaves the EU with no deal, EU citizens arriving after Brexit will be granted three months’ entry initially and then need to apply for European Temporary Leave to Remain in order to stay for another 36 months. There will be no change to the right of admission to the UK until 2021.
5.4 If no transition arrangements are agreed between the EU and the UK have been actually agreed do we need to now prepare to cease EU workers’ contracts on 29th if we leave accidentally, to stay within the law?

We do not foresee any immigration reason for that, for the reasons set out above – EU citizens will continue to be allowed to work in the UK until 2021, so there is no impetus for change. The situation which could be different is in relation to British citizens who work in the EU27. In the event of no deal, it may become practically difficult to do that and that could mean their contracts should be reviewed.
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Data protection
Can you expand on implications of no agreement on data flows?

In the case of a hard Brexit, what do we need to consider about data protection?

The EU GDPR will remain part of UK domestic law as retained EU law. However, the EU GDPR and the Data Protection Act 2018 will be adjusted to operate effectively for the UK’s purposes post exit and a new “UK GDPR” will be formed – a single regime for general processing activities.

In respect of data flows, the UK will become a third country after exit and will be treated as such. The European Commission has not granted an adequacy decision in respect of the UK, and is unlikely to before exit. Therefore, an appropriate safeguard will be required for transfers of personal data from the EU into the UK: businesses that rely on these transfers will need to work with their EU counterparts to make sure a safeguard (such as the EU standard contractual clauses) is in place. As far as data transfers from the UK are concerned, the UK will recognise all EEA states, Gibraltar and EU institutions and bodies, as providing an adequate level of protection for personal data. Existing EU adequacy decisions will also be recognised by the UK on a transitional basis. The use of EU standard contractual clauses will continue to be an effective basis for data transfers to territories outside the UK. In addition, existing authorizations of binding corporate rules made under the EU process will continue to be recognised in UK law. These arrangements will be kept under review by the Government and Information Commissioner post exit. In terms of other data protection issues, organisations will also need to contemplate other data protection compliance issues arising from the UK’s third country status. For example, new representatives in the EU and/or UK may need to be appointed by organisations caught by the extra-territorial reach of the GDPR and/or UK GDPR. Organisations will also need to consider whether their lead supervisory authority in the EU will change as a result of Brexit. In addition, documentation may need to be updated, including records of processing activities, fair processing notices, data protection impact assessments and contracts.
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Commercial
7.1 Will disruptions caused as a result of a no deal Brexit impact on force majeure clauses?

Please can you suggest what we should be looking for in our supplier contracts in case of hard Brexit. You mentioned delay and increased tariffs is there anything else and could a Hard Brexit constitute a Force Majeure event?

Force majeure is a creature of contract and so whether a force majeure clause covers events arising as a result of Brexit will depend entirely on how it is drafted. Normally force majeure events tend to be unforeseeable and you could say that a lot of consequences arising from Brexit are foreseeable. In any event, there has to be a causative link between the event and the delay or failure to perform.

In terms of the main areas for supplier contracts, one area of focus should be any compliance obligation, including who bears the risk of changes in law, and to see if those types of obligations will be fit for purpose in a post Brexit world. New tariffs and new customs procedures may impact on pricing and delivery obligations.
Irish border
8.1 Can you give an “idiots” guide to the Backstop and why this is such a problem?

The key thing to understand about the backstop is this, the question of having a hard physical border between the Republic of Ireland and northern Ireland is an amazingly sensitive issue, it is much more than just having to have some hard infrastructure at a particular point on the border of the UK. Along with that goes the difficulty the necessity of maintaining the delicate political balance between the status of Northern Ireland as part of the UK, and its close neighbour the Republic of Ireland. The DUP are very anxious about steps taking in the context of Brexit agreements negotiations which they see as pushing Northern Ireland into the arms of the Republic because the Good Friday agreement makes it clear that if there was going to be any change in the constitutional status of NI there has to be a democratic vote on the part of the people of NI agreeing to that.

The backstop arrangement in the proposed withdrawal agreement only kicks in if no free trade deal has been concluded by the end of the transitional period. It means the UK stays in a customs union during the backstop and this would have an effect on the ability of the UK to strike the type of free trade agreements with non EU countries that it wants.
Product regulation
9.1 **Product regulation amendments will bring in the new UKCA regime to alter CE marking. Does this occur on day 1 after Brexit or is there period whereby CE marking will be acceptable?**

**How will the new UKCA system affect a supplier who is currently registered within the EEA but not UK?**

This is a complicated area and this answer is a very general overview. You need to approach this differently depending on whether the goods you are placing are to be placed on the UK market or the EU market.

For goods to be placed on the UK market, if you manufacture goods that meet the relevant EU regulatory requirements and bear the CE marking you can still place them on the UK market after exit but this will only be for a limited period of time. A new UK framework is proposed for conformity assessment: the new UKCA mark will indicate that a product complies with UK regulations and can be placed on the UK market.

All goods placed on the EU market after exit will need to conform with EU goods regulations. If a conforming good is already circulating on the EU market before exit, it can continue circulating after exit. Where goods have to undergo conformity assessment to make sure they comply with essential EU requirements, the results of conformity assessments carried out by UK conformity assessment bodies will no longer be recognised in the EU, even if the assessment was carried out before exit. So, in this situation you need to use an EU recognised conformity assessment body for either new assessments or for re-assessments of UK assessments.
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Trade
10.1 Whilst the UK have a temporary tariff of zero for 87% of products being imported would the EU have a similar zero tariff for exports?

No. The EU will apply its own Common External Tariff.

10.2 Could you repeat the countries with which the UK has reached an FTA with?

Chile, Eastern and Southern Africa, Switzerland, Faroe Islands, Fiji, Papua New Guinea. There are mutual recognition agreements (the first step towards a free trade agreement) with Australia and New Zealand.
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Other
11.1 Worst impact on businesses with hard Brexit?

I think that very much depends on the nature of your business. First step that we always advise is people should look at their supply chains. Whether they are in the business of supplying goods or not, or whether it’s a supply of services, whatever it may be they need to look at their supply chains. How do you get to your customers, what does it take to get to them? Are you going to have to effectively cross borders in the event of a hard exit, where are your people? Are they in the right places? Do you have the right business structures to trade post a hard exit? Including things like what corporate structures you are using and will they be recognised in law in all EU member states. Look at your contracts. Businesses often assume that existing force majeure clauses will protect them from adverse consequences arising from Brexit but we have seen very few force majeure clauses drafted in a way which would actually provide relief on Brexit. The same applies to compliance with law obligations. Often people assume they will be covered by them but they are actually drafted in a way that does not encompass the changes in law that might arise as a result of Brexit.