

# BREXIT: THE UNPALATABLE CONSEQUENCES OF NO DEAL

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George Peretz QC of Monckton Chambers analyses the trade consequences for both the UK and the EU if the UK leaves the EU with no deal as to the withdrawal agreement, including no transition period.

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One of the central problems of the EU referendum campaign was that both sides played down the complexity and difficulty of leaving the EU. The Leave side wanted to give the impression that it was easy to leave; while the Remain side did not want to admit the extent to which the UK legal and regulatory system had become integrated with the EU.

The unfortunate result has been that the general public, including many politicians, was wholly unprepared for the complexity of the task of unpicking the UK from the EU. In addition, most people have no idea of the magnitude of the threat that underpins the structure of *Article 50* of the *Treaty on European Union*: unless the departing EU member state concludes a withdrawal agreement within two years of notification of its intent to leave, the EU treaties simply cease to apply to it (see *Practice note, Brexit: Article 50 and the withdrawal process: Article 50 timeframe for negotiations and exit*). This may sound innocuous, but when one considers the extent of the UK's integration with the EU, it is in fact the legal equivalent of separating conjoined twins with an axe.

This article looks solely at the effects on trade of a no-deal Brexit; it does not examine other consequences that might arise from a no-deal Brexit, such as the position that UK citizens in the EU would face in terms of their continued rights to live and work and to access healthcare.

For general information on the no-deal scenario, see *Practice note, Brexit: Article 50 and the withdrawal process: Consequences if no withdrawal agreement is reached: no deal*. For collections of Practical Law's main materials on the no-deal scenario, and on international trade, see *Brexit materials: No-deal Brexit* and *International trade*.

## PARTIAL UK SOLUTIONS

To some extent, the problems can be dealt with on the UK side by simply importing all EU law applicable in the UK at the point of exit into UK law, which is the strategy adopted by the *European Union (Withdrawal) Act 2018* (EUWA) (see *Practice note, European Union (Withdrawal) Act 2018: legislating for Brexit*). That strategy still leaves a vast number of conundrums, as references to EU institutions, interests and policies will have to be systematically replaced, which will have to be done by statutory instruments (see *Brexit statutory instruments tracker*). This creates a risk of secondary legislation being rushed and lacking adequate scrutiny. An example is the state aid rules: if the current requirement that the aid have an effect on trade between member states were to be replaced with a requirement that the aid have an effect on trade within the UK, this would effectively widen the scope of the rules to catch lots of tiny projects that currently would not be caught.

Another problem that can be patched on the UK side is the lack of regulatory capacity to take over the regulation of EU businesses and imports that currently operate or are legally sold in the UK by virtue of their approval in other member states. As proposed in some of the recent UK government papers on the impact of "no deal", the UK can, at least in the short run, simply unilaterally recognise those EU approvals (see *Brexit materials: No-deal Brexit: Legal updates (UK no-deal notices)*).

For example, in the field of medicine, the UK can simply recognise a medicine approved by the European Medicines Agency (EMA). However, that approach has its limits because, after a no-deal Brexit, the UK regulator (the



Medicines and Healthcare products Regulatory Agency (MHRA)) will be locked out of the exchanges of information that enable medicines regulators in the EU to trust each others' judgments, and medicines not previously approved by the EMA will, as from Brexit day, need their own separate approval by the MHRA. However, fears that drugs recognised by the EMA will not legally be able to be imported are without much foundation; the problems are more likely to be logistical ones caused by disruption at the ports (see below).

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### PROBLEMS ON THE EU SIDE

One of the key drawbacks with these partial solutions is that they work only on this side of the Channel (or Irish Sea). The real problems with "no deal" are on the EU side.

As mentioned above, the effect of Article 50 is that, absent a withdrawal agreement, the UK simply becomes a third country in relation to the EU. The following examples illustrate just a few of the problems that would arise for UK exporters of goods and services if, on Brexit day, the UK becomes a third country in EU law with no withdrawal agreement:

- UK lawyers established in, say, Vienna would suddenly become subject to strict Austrian rules heavily restricting practice by non-Austrian lawyers. (For more information, see [Practice note, Brexit and UK lawyers' rights](#) and [Article, Brexit and UK lawyers' rights under WTO rules](#).)
- Farmers exporting live animals to France would find that exports are now banned (as the relevant EU Regulation prohibits all live animal imports save from approved third countries and, even if the UK were to be approved, all imports must go through approved veterinary stations, which do not currently exist in the French and Dutch ports that handle UK exports).
- UK haulage firms and their drivers would no longer have valid permits to drive lorries across the EU.

In addition, in a no-deal Brexit situation, all UK exports to the EU will immediately face the EU's general tariffs. On agricultural products these can be very high, and on some manufactured goods, such as motor vehicles, they are significant. For many UK exporters, an even bigger problem than the level of tariffs would be the fact that exporting to the EU would suddenly mean: dealing with the paperwork associated with customs declarations; paying VAT at the point of import; and, perhaps most significantly, submitting to customs formalities at the border. Given the very large volume of traffic through the Channel ports, and the lack of suitable customs infrastructure (particularly to deal with roll-on roll-off traffic), congestion and delay are likely to be serious.

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### POSSIBLE EU STEPS

In some cases, the EU could ameliorate the situation by passing legislation, sometimes at European Commission (Commission) level, sometimes at Council and Parliament level, to confer on the UK privileged third country status under relevant EU legislation. But, as shown by the example given above of live animal exports, even if the EU granted the UK privileged third country status, there would still be plenty of further new obstacles for UK exporters. And since "no deal" could well take place in acrimonious circumstances, it would be unwise to rely on the EU passing the necessary legislation (much of which takes some time to pass, even with good will).

Another point worth bearing in mind is that almost all third countries, even those with which the EU has no general free trade agreement (FTA), enjoy some agreements with the EU to facilitate trade in matters such as customs procedures and recognition of third-country bodies to certify compliance of products with EU rules. That is most obviously the case in aviation. While a member state, the UK needed none of this, but as a third country, it will. Even in an acrimonious no-deal situation, the EU may well enter into the agreements needed to keep planes flying across the Channel and Irish Sea, but there are no guarantees, and there is plenty of scope for member states to be less than accommodating if they so choose.

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### EU TRADE AGREEMENTS WITH THIRD COUNTRIES

A further important set of problems is that, once out of the EU, the UK falls out of all the trade agreements between the EU and third countries. The EEA Agreement and the various EU/Swiss agreements are probably the most important because the agreements are deep and involve close neighbours, but the EU's agreements with Canada and South Korea are also very important. The UK Department of International Trade argues that all these countries want to roll over these agreements to the UK. But no competent trade negotiator in any of these countries will miss the chance to wring concessions out of the UK, particularly as the UK is not in the best position to walk away.

For more information, see *Practice notes, UK preferential trade arrangements after Brexit: UK's rights under EU's trade agreements* and *Brexit: application of international agreements to the UK*.

### WTO RULES

Some commentators argue that World Trade Organization (WTO) rules would assist in alleviating the problems that would be caused by a no-deal Brexit. In evaluating that claim, it is important to start by recalling the weak enforceability of WTO rules compared to the EU's. WTO law is not applied directly by EU member states' administrations or courts. It binds the EU internationally, but the European Court of Justice (ECJ), EU institutions and member states will continue to apply EU law even where it violates WTO law. So the ability for the UK government or UK companies to get judgments from the ECJ forcing the EU institutions and member states to comply with the obligations that the UK is relying on will cease. In contrast, WTO dispute resolution mechanisms are slow, are only between states, and result only in an instruction to the party in breach to change the offending rules going forward. There is therefore a serious enforcement issue.

In addition, the content of WTO law is of limited help. The central principle of the WTO is that of non-discrimination (the misleadingly named "most favoured nation" rule), subject to the carve-out that preference can be given to exports from countries party to a comprehensive FTA. On a no deal, the UK would no longer be in an FTA with the EU and would fall to be treated in the same way as any other third country. The most obvious impact of the non-discrimination rule would be to make it harder for the EU to give the UK benefits that it does not give other third countries; that is, it would reduce the ability of the EU to waive or modify its tariffs, rules and procedures for the UK's benefit.

Indeed, the most favoured nation rule may make it harder for the UK to respond to the problems of "no deal" by waiving tariffs and checks on imports from the EU because if it does that, it could face claims that it should also waive them for imports from countries such as China and the US, which would be politically unattractive. (For more information, see *Practice notes, Brexit: WTO and international trade in goods: MFN principle: equal treatment unless an exception applies* and *Brexit: WTO and international trade in services: MFN principle: equal treatment unless an exception applies*.)

It is true that the difficulty of enforcing WTO rules, as well as the fact that there is some room for argument that (if there were a no deal) the UK should have some latitude, means that the UK might have some room for manoeuvre. But what is certainly not true is that WTO rules are of any assistance to the UK in this respect: in particular, there is likely to be little room for manoeuvre on the issue of tariffs.

Nor is it true, as has been claimed by some politicians, that WTO rules somehow prevent a hard border between Northern Ireland and the Republic of Ireland. Rather, the true position is that the WTO non-discrimination principle in fact points towards ensuring that the same checks and formalities are imposed at the Irish border as at other entry points into the UK or EU (that is, a hard border), otherwise exports over that border are given impermissible advantages over exports coming from other sources. Again, there is some room for debate as to whether there is any flexibility here, but on any view the claim that WTO rules militate against a hard border on a "no deal" is simply wrong.

Another claim sometimes made is that the WTO agreements on technical barriers to trade, trade facilitation, and sanitary and phytosanitary measures will be of help to the UK. That claim is implausible. For example, every significant obligation in the Trade Facilitation Agreement is qualified by terms such as "appropriate" and "where practicable": terms that make it difficult ever to establish a breach. In essence, these are (at best) vague obligations of very limited use. It is sometimes said that the fact that the UK will on 30 March 2019 still be applying EU standards as a matter of its own law under the EUWA means that the EU could not justify treating UK exports any differently from how it does now. But the problem with that claim is that, after Brexit, there will have been a legal sea change: the UK will no longer be subject to the supervision of the Commission and ECJ and will be free to interpret its rules, and change its rules, as it wants. That is, after all, the intended effect of Brexit. But it also means that the guarantees of complete compliance with EU rules that member states can rely on when dealing with each other will all have vanished. That fundamental difference is one that the EU is bound to point to if it is suggested that it should carry on treating the UK in any way as favourably as it does countries that have enforceable commitments to follow single market rules.

Finally, WTO rules have little to say on services (and certainly do not assist the UK lawyers in Vienna in the example given above), and do not cover aviation. It is therefore hard to see that WTO rules will do much to avert the consequences of a "no deal".