BREXIT UPDATE 2019: KEY OPPORTUNITIES AND CONSIDERATIONS

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Anxiety and uncertainty are rising in the face of the Brexit deadline. The U.K. is scheduled to depart the European Union (EU) at 11 p.m. on March 29, 2019. Should no formal withdrawal treaty be approved by this point, a so-called "no-deal Brexit" will be the result. All EU rules and regulations will instantly cease to apply to the U.K.

Efforts to reach a withdrawal treaty have so far proved fruitless in Parliament. On January 15, 2019, U.K. lawmakers decisively voted down a withdrawal plan proposed by Prime Minister Theresa May. Despite this setback, May has said she plans to give British lawmakers another chance to vote on the withdrawal plan.

Concerns about the repercussions of a no-deal Brexit have led some lawmakers to urge May to delay the proceedings. A plan proposed by members of May's Conservative Party would postpone Brexit until May 23, theoretically giving lawmakers sufficient time to reach an agreement. Meanwhile, the Labour Party is pursuing a different tack, backing a second national referendum to re-litigate the question of whether the U.K should depart the EU.

WHAT HAPPENS IN THE ABSENCE OF A DEAL?

Concern has grown over the possibility of the U.K leaving the EU without an agreement due to the potential consequences of such an exit. The absence of a deal means that no agreements will be in place governing customs, citizen rights, trade and travel.

Failing to reach an agreement would also result in the elimination of a pre-defined transition period (March 2019 to December 2020). This grace period was designated to allow businesses enough time to adjust to any post-Brexit changes.

The absence of a bilateral trade deal between the U.K. and EU means that all trade between the two entities would be governed by World Trade Organization laws. Exports from the U.K. to the EU would then be subject to the same custom checks and tariffs that apply to other global trade partners lacking a formal agreement.

Observers have predicted that the immediate cessation of frictionless trade without tariffs would lead to increased prices, shortages of goods and trade delays on both sides. Border controls are also affected by the possibility of a no-deal Brexit. The U.K. and Ireland have promised that a hard border is not in the works for Northern Ireland, even in the absence of a deal. Ireland, however, would likely face significant EU pressure to introduce customs and immigration controls.

Reaction to the possibility of the U.K exiting without a deal have been vociferous. ADS Group, an aerospace trade organization, has said that such an exit risks "full-blown economic crisis."

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A survey by the Institute of Directors found that nearly one-third of British businesses are planning (or pondering) moving operations overseas to avoid the potential damage caused by the U.K. departing the EU without a deal.

Reuters, meanwhile, has reported that investment banks are warning British M&A teams that, in the event of a no-deal Brexit, they will not be allowed to pitch business to EU clients without a "chaperone" in the meeting.

As the deadline nears, EU leaders have broached the possibility of an extension. European Council President Donald Tusk said that while the EU had not originally planned to extend its two-year negotiation window, the British government's inability to reach consensus on an agreement made an extension the "rational solution."

HOW BREXIT IMPACTS BUSINESSES

Brexit, even accompanied by an agreement, would pose significant challenges and complications for businesses with regard to day-to-day operations. In the absence of an agreement, these challenges are likely to be even stiffer.

A few examples of the more pressing challenges within corporate finance transactions include the following:

Contracts

Organizations will need to ensure contractual continuity. All current contracts should be evaluated to determine whether Brexit will impact the ability of either party to meet its obligations, or whether Brexit will affect the continuing enforceability or scope of the contract.

For contracts that remain enforceable, there are still likely to be issues that need to be clarified or addressed post-Brexit. Discrepancies between EU and U.K. law may lead to legal uncertainty with regard to non-binding contractual provisions. These uncertainties—as well as differences in common and civil law due process—could spark increased litigation.

Brexit will also make it more difficult to serve U.K. proceedings on EU defendants and enforce judgments. Subsequently, the time and expense of cross-border litigation are likely to rise in response.

Entity Structure

U.K. company structures, once convenient, will cease to be recognized in the wake of a no-deal Brexit. Thousands of EU firms operating in the U.K. may find it necessary to change their legal structure, an expensive and complex process.

Other companies may consider the option of pursuing corporate reorganization in order to address the financial, regulatory and practical consequences of the U.K. departing without an agreement. Organizations with questions about remaining under U.K. jurisdiction may need to re-evaluate their legal structure, then possibly pursue a statutory change, transfer or merger in response.

Taxes

Whether domestic, international or cross-border, tax issues are part and parcel of all business formations, transactions and plans. These issues are far from low-level considerations; they often play a critical role in influencing corporate strategy, acquisitions and structures.

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One possible strategy firms are considering, as noted by PwC U.K., is the transfer of EU books of business into distinct legal entities. This scenario could include a de-merger of a business with a U.K. LLP. In this event, multiple tax considerations would follow.

M&A Due Diligence

Brexit could introduce significant uncertainty and risk into the deal-making process, both for current and future transactions. One example that illustrates such risks is evident in IP due diligence.

In the absence of a Brexit deal, the recognition and enforcement of cross-border judgments will no longer be subject to EU rules, leading to serious questions surrounding enforceability. EU design rights and trademarks will no longer be in effect in the U.K. The British government has gone on record saying it will provide trademark and design rights holders with an equivalent form of protection.

However, unregistered community design rights have not been addressed with any clarity. Companies should consult with legal counsel to determine if it makes sense to disclose designs in the EU and U.K. at the same time, in an effort to gain full protection.

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GDPR

The EU's General Data Protection Regulation (GDPR) has introduced strong new data privacy rights that apply to citizens of the EU and the organizations handling their information. The British government has indicated it plans to enact provisions that mimic GDPR policies.

However, in the absence of a Brexit agreement, data transferred between the two entities will immediately change in classification: from transfers between member states to transfers between a member state and a third party. To remain compliant with EU laws, transfers of personal data must have a lawful transfer mechanism.

INCREASED ACTIVITY FOR LAW FIRMS

While the anxiety and confusion sparked by the prospect of a no-deal Brexit may be a net negative, it has provided opportunity for law firms. Attorneys have been busy advising clients on the myriad potential consequences of Brexit and helping firms improve their positions through deal-making activity.

One relevant quote on this issue comes from Paul Butcher, Brexit director at Herbert Smith Freehills:

"Companies will leave lots of things to the last minute that lead times allow, because they will want to know what happens with the negotiations. Clients will therefore need their law firms to meet very tight deadlines while controlling cost and not compromising on quality."

HANDLING THE NEW WORKLOAD

Law firms in the U.K. and EU are hiring new attorneys to help manage the surge in demand created by Brexit, but personnel adjustments aren't the only answer.

Law firms are also implementing legal technology solutions to manage this deluge of demand. Document automation, legal process outsourcing and other management options are proving popular with U.K. and EU firms. Many of these firms, in fact, had committed to investing more in legal technology and information services even prior to the added impetus offered by Brexit.

CONCLUSION

As the Brexit deadline approaches, we still don't have certainty as to whether an agreement will be reached. The future landscape of EU/U.K. relations is also murky.

With that said, it's critical to understand the options, changes and evolving priorities within the United Kingdom. This will help business interests from the U.K—and across the globe—better prepare for the various scenarios impacting trade, investment and supply chain management decisions.

Ultimately, by making these preparations today, organizations will be best positioned to navigate the challenges and seize the opportunities that develop in the wake of Brexit.

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