awerian
Olislaegers De Creus & Clerens

Your Legal Partner

August 2019

Newsletter
Preparing for Brexit: urgent regulatory, trade and contractual considerations

Following the appointment on 24 July 2019 of Boris Johnson as the UK's Prime Minister, there is increasing awareness that Brexit could very likely take place on 31 October 2019 without an EU-UK agreement to ensure an orderly transition.

Enterprises that may be affected by Brexit must NOW prepare or review their contingency planning considering Johnson's stated intention to proceed "*come what may, do or die*" with Brexit on the current deadline and as the new UK Government reportedly assumes a no-deal scenario following the EU's refusal to renegotiate the November 2018 Withdrawal Agreement.

This article provides a selective overview of key regulatory, trade and contractual issues to consider and address without delay.

1. Regulatory and Trade Considerations

As a general matter, EU enterprises that trade in goods or services and that operate in, or do business with enterprises in, the UK are strongly recommended to **conduct a preliminary analysis of whether Brexit, and a no-deal scenario in particular, would result in any relevant trade barriers, price increases or supply chain disruptions**. In addition, a similar first step is recommended for UK enterprises doing business with counterparties that are based in the EU or in third countries, such as *e.g.* Canada or Japan, with whom the EU has concluded an international trade arrangement.

In this regard, enterprises trading between the EU and the UK should determine the extent to which there would be an immediate imposition of relevant tariffs, customs requirements, and regulatory barriers in terms of *e.g.* shipping, conformity or certification formalities and requirements. Furthermore, enterprises involved in trade with third countries under existing EU Free Trade Agreements (FTAs) should monitor or analyze whether:

- products would continue to meet minimum EU content requirements to benefit from preferential tariffs if UK content is no longer taken into account
- third countries demand the EU to renegotiate any terms of FTAs in order to reflect the UK's departure; and
- the UK is able to roll over EU FTAs or negotiate any new arrangements to ensure continued preferential access for UK enterprises

Next, enterprises that may be negatively affected should **assess the potential impact of trade barriers, price increases and supply chain disruptions** on their business operations in terms of additional costs, delays in supply and meeting demand, and a decrease in market competitiveness.

Last, enterprises that could face trade barriers, price increases or supply chain disruptions are

Maarten Vanderhaeghe
Counsel

Office address:
Culliganlaan 1A
1831 Diegem

Tel (dir):
+32 (0) 2 711 40 34

E-mail:
mvanderhaeghe@odc.law

Michael Olislaegers
Attorney - Partner

Office address:
Culliganlaan 1A
1831 Diegem

Tel (dir):
+32 (0) 2 711 40 45

E-mail:
molislaegers@odc.law

recommended to **take anticipatory measures to mitigate the negative impact** thereof such as, for example:

- reviewing all supply and shipping contracts with UK suppliers for Brexit sensitive clauses and arrangements and insisting that a similar review is done by their other suppliers worldwide (see also section 2 below)
- taking customs compliance measures such as *e.g.* activating an EU Economic Operator Registration and Identification ("EORI") number or available authorizations to enable and facilitate importation and/or exportation
- taking regulatory compliance measures such as *e.g.* monitoring and addressing any changes in terms of standards, conformity assessment bodies, or mandatory product requirements; and
- when no other remedy is available, switching to domestic production or alternative import or export markets if tariffs or other barriers and disruptions would price goods or services out of the current market.

2. Contractual Considerations

In view of the consequences that will result from any form of Brexit (with or without transitory arrangement), enterprises that may be affected should also consider the impact of such developments on the legal contracts that underpin their business operations.

In particular, EU officials have highlighted (i) that in view of the continuing standstill and Johnson's more hardline approach, chances of a no-deal scenario "*have greatly increased*" and (ii) that it is the responsibility of all stakeholders to prepare as EU and national contingency measures "*can only mitigate the most significant disruptions of a withdrawal without an agreement*.".[1]

Brexit will in principle not constitute an event of force majeure ("act of God") and will therefore be no valid excuse for non-performance or non-compliance of contractual or legal obligations because the business world has had ample time to prepare. Nevertheless, in particular circumstances, or due to the prevalence of specific contractual clauses defining force majeure, certain (in)direct consequences of Brexit may constitute force majeure or a valid cause for (automatic) termination of contractual obligations or rights. These circumstances and contractual clauses need to be determined before Brexit happens.

As a first step, enterprises that have not yet done so are therefore highly recommended to **review the terms of their existing contracts** in order to identify any possible Brexit-related:

- difficulties or inability to perform or enforce contractual obligations because *e.g.* such performance would breach EU law or would be hampered by trade barriers or supply chain disruptions
- cost implications due to the inclusion in the contract of *e.g.* provisions concerning the payment of additional performance costs resulting from tariffs or compliance measures
- uncertainties in terms of *e.g.* the extent to which the contract assumes that the UK is an EU Member State or is based on legislation that the EU and the UK have in common; and
- consequences of difficulties or an inability to perform contractual obligations such as *e.g.* the extent of either party's possible liability, the possibility to renegotiate relevant provisions, or the possibility to terminate the contract

Second, enterprises that may be affected should, to the extent possible and necessary, **renegotiate existing contracts and draft future ones with the aim of safeguarding** against the impact of Brexit by, among other things:

- minimizing Brexit-related risks through *e.g.* incoterms that shift the responsibility for tariff payment or customs clearance to the other party
- reducing additional compliance costs through *e.g.* a generic "change in law-

[1] See http://www.europarl.europa.eu/news/en/press-room/20190724IPR57806/brexit-an-orderly-exit-is-in-the-interests-of-both-parties; https://europa.eu/rapid/press-release_IP-19-2951_en.htm.

clause" that guarantees compensation for costs or delays resulting from regulatory changes
- removing Brexit-related liability through *e.g.* a "Brexit-clause" requiring renegotiation or termination of certain provisions in case of a substantial Brexit-effect; and
- addressing future litigation and enforcement issues resulting from the UK losing EU Member State status by renegotiating the clauses that identify the governing law of the contract and which court or arbitration body has jurisdiction

In this regard, it is important to add that even the Withdrawal Agreement does not provide for a transitory period during which the provision of cross-border services between the UK and the EU would continue to benefit from the EU's freedom of services regulation. For this reason, many London players in *e.g.* the financial, insurance or legal industries set up shop elsewhere in the EU but not all have yet fully reflected that in their business practices or contracts.

Last, it is worth highlighting that EU enterprises will want to avoid future litigation with UK (parentage) counterparts taking place in a jurisdiction that will soon lose feeling with EU laws and regulations, that may enact its own extra-territorial trade rules and sanctions, and that may even develop a bias against EU enterprises once Brexit bites the local economy. As such, it is further recommended that such enterprises must, as part of their Brexit preparation and existing contract renegotiations, NOW insist on amending and rejecting the choice of English law and venue in financing and other contracts proposed by UK counterparties, intermediaries and lawyers. Of course, UK enterprises may want exactly the opposite in order to safeguard their legal dominance and improve their legal negotiation positions when the contract turns sour.

3. Next Steps

Although the EU is reportedly ready to discuss Brexit in more detail with the new UK Government, little movement is expected in the upcoming weeks other than scheduled meetings of Prime Minister Johnson with EU leaders at the side-lines of the G7 Summit in Biarritz, France on 24-26 August 2019. With less than three months to go until the current Brexit-deadline, we therefore reiterate that enterprises, and smaller firms in particular, that may be affected by Brexit are well-advised to undertake the above-mentioned regulatory, trade and contractual contingency planning **now** to avoid significant risks, unexpected disruption and additional costs for their business.

We will continue to monitor relevant Brexit, as well as general international regulatory and trade, developments as they arise and can assist all businesses with legal advice concerning each legal issue that they encounter in that respect. Do not hesitate to contact us should you require such legal assistance.

Maarten Vanderhaeghe
Member of the Brussels' Bar Association

Michael Olislaegers
Member of the Brussels' Bar Association

www.odc.law | www.awerian.law