



CLYDE&CO

# RESILIENCE

Brexit: Maintaining supply chain resilience



# Countdown to Brexit: Where next and how can businesses prepare?

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**It's crunch time. With the clock ticking down to Brexit, the time for division, uncertainty and inaction is over: politicians need to come together to deliver a deal that works, and businesses can no longer afford to “wait and see” the outcome before planning their Brexit strategies.**

That was the stark message from keynote speakers at Clyde & Co's “resilience” event on 10 October, entitled “Brexit: Maintaining supply chain resilience”. The pan-industry event saw the Rt Hon Ken Clarke MP QC and Deputy Director of DexEU John O'Regan give their analysis of the current situation and prospects for agreeing a Brexit deal in the coming weeks, as well as the outlook beyond April 2019.

Giving the business perspective in terms of the threats and opportunities posed by the UK's imminent departure from the EU was supply chain risk consultant Nick Wildgoose, alongside Partners from Clyde & Co, who addressed critical issues such as employment and immigration; procurement and trade; and sanctions, bribery, corruption and slavery. The event also featured animated Q&A sessions, moderated by Bloomberg's Companies Reporter Suzi Ring.

This report summarises the key findings from the event and the recommendations for business which emerged from it.



# The political state of play

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## All over by Christmas?

Although joking that, as a civil servant he was constitutionally obliged to be “boring”, John O’Regan was able to impart some fascinating insight into the inner workings of the negotiations process. His view was that the next few months, if not weeks, are critical, and that agreements on several central issues are possible by the end of the year to: conclude the withdrawal agreement with the EU, including the Northern Ireland protocol, and agree the framework for a relationship going forward.

Acknowledging the behind the scenes efforts and achievements of diplomats and civil servants, Ken Clarke’s view was that the turbulent political environment means it’s still almost impossible to say with certainty what’s going to be agreed and when. He agreed that: “We’re now coming to an important climax,” but added, “there’s not been enough progress over the last two and a half years. We’re only now about to get down to the really serious negotiations.”

Mr Clarke’s view was that, though we urgently need “to answer the uncertainty which is doing so much damage to our flagging economy”, by Christmas, we can expect only “the broadest possible outline of where the ultimate destination must be.”

As policy-makers seek to end the uncertainty, John O’Regan recognised the vital importance of listening to businesses, saying candidly: “We need input from industry to get this right.”

## Backstops and emergency measures

Despite his evident frustration with the lack of political cohesion causing delays, Ken Clarke believes, “There’s no sensible person on either side of the channel who doesn’t want to minimise the damage,” pointing out that European economies also have much at stake from a bad or no deal scenario.

He argued that if necessary, emergency measures will have to come into play to avoid the much-publicised risks of airlines being unable to fly or medicines becoming unavailable, or even that a continuation of the current status quo might be possible as a backstop, until the final details are worked out.

## What about services?

Turning to the substance of the government’s Brexit White Paper (the so-called “Chequers plan”), John O’Regan pointed out that the proposals for cross-border services post-Brexit had received far less attention than the proposals putting forward for a customs arrangements for goods.

Outlining those, he made the case that, though challenging, opportunities existed to achieve a good outcome for services issues using the existing tools of international trade.

Where necessary, for instance when it comes to financial services (where the government has proposed a system based on the EU’s existing equivalence regime), negotiators will look to ensure additional binding commitments are included. This would, he said, provide more protections over the future reliability of such systems, so that businesses could make informed decisions.

Ken Clarke’s view was that politicians had always worked hard to ensure the single market was extended to services as well as goods, and that there should be a similar drive here.



# Burning business issues

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## **Don't delay on building in supply chain resilience**

"Can you afford to wait?" asked Nick Wildgoose, as he opened his speech about the impact of Brexit on supply chains, citing a statistic which suggested that 50% of businesses are holding back to see the political outcome of negotiations before planning their future strategy.

After all, he said, "This isn't just about supply chain resilience, it's about business performance – even potentially business survival."

With £258 billion of goods imported into the UK from the EU last year, he argued that despite the uncertainties, contingency planning is essential, pointing out that the other 50% of businesses who are already taking pro-active steps to secure their supply chains should be able to seize competitive advantage from their less-prepared rivals.

His advice to businesses was pragmatic. For those who don't know where to start, begin by looking at where you are most profitable. Protect your highest value products and services first - and not just at Tier 1 supplier level but sub-tiers too. Drive transparency to understand the full risks to which you are exposed, and use Brexit as a positive catalyst to enhance resilience measures.

## **Act now to secure staff status**

"While I'm confident that we will get a deal, sensible risk management dictates that we should prepare for a no-deal Brexit," advised Jonathan Chaimovic, Consultant in Clyde & Co's Employment Pensions and Immigration team. In an immigration context, that means people, where eligible should formalise their status now. Citizens of the EU countries should obtain Permanent Residence in the UK with UK citizens in EU countries obtaining equivalent status.

Despite Politicians' talk of "protected" status in the event of no deal, there has been no unconditional unilateral acceptance by the UK Government of the Citizens' Charter and/or the EU Settlement Scheme.

Chaimovic said that where once the assumption was that EU nationals would receive preferential treatment in any future post Brexit UK immigration framework, the signs are now that EU and non-EU nationals will likely be treated equally. As such, Chaimovic warned that it was vital for UK and EU employers to ensure they have the relevant regulatory permissions in place to employ relevant non-national staff post Brexit. So in a UK context, Chaimovic recommended that UK employers who do not currently have a Tier 2 Licence (currently only applicable to employing non-EU nationals) should consider applying for one now to potentially cover employing EU nationals following Brexit. Chaimovic also advised companies that where feasible they should be accelerating start dates of EU nationals in the UK and UK citizens in EU countries before 29 March 2019 to cover a no deal Brexit.

Looking ahead, and beyond the EU, Chaimovic pointed out that any free trade deal with the US, Australia or any other non EU country would almost certainly come with reciprocal immigration concessions. If that happened, non-EU nationals may even become subject to a "lighter-touch" regime than EU nationals.

In terms of high-skilled versus low-skilled migration, Chaimovic said that there was mixed messaging coming from the government's focus on highly-skilled workers, compared to recent recommendations from the Migration Advisory Committee (MAC). The MAC, whilst recommending EU and non EU nationals be treated equally post Brexit, recommended a reduction of the skills threshold from high skilled to "middle" skilled, the abolition of the Tier 2 General Quota and a reduction in the requirements of a Resident Labour Market Test for filling certain roles in the UK.

Chaimovic believes that the MAC's approach is more focussed on what UK PLC is actually going to need post Brexit and the Government's forthcoming White Paper will, amongst other things, set out the Government's response to the MAC's recommendations.

#### **Procurement and trade regulation – focus on business-critical contracts**

As well as being prepared on the "people" front, business also have some way to go to prepare on the commercial contract and management side, trade and procurement Partner David Hansom explained. As he put it: "There are so many issues here, it's a case of trying to triage to identify the most critical issues. These will be different for every organisation."

He pointed to three key practical strategies which many clients are already undertaking: mapping supply chains, identifying business-critical contracts and making sure those contracts are "Brexit-proof" – i.e. that they will work, whatever type of Brexit outcome is reached.

Many businesses have long term strategic contracts and suppliers based in the EU. Contracts will not have been drafted to contemplate Brexit and the impact on the delivery of the contract. Common queries, especially for long-term contracts, include issues such as are exchange rates hedged and what is the impact of exchange rate fluctuation on contract pricing. It is still not clear, for example, whether existing contractual dispute resolution provisions will work in the context of enforcement of EU judgments? Suppliers (at all levels of the supply chain) may want the right to (or have no choice) but to change contract terms if they are unable to fulfil their obligations. An example of this could be, because tariffs are prohibitive or manufacturing of components from the UK cannot continue if "rules of origin" have changed.

By locating, reviewing and amending key contracts now, business can be more prepared for the impact on their (increasingly global) supply chains. For those with a higher percentage of contracts with EU contractors, especially in the manufacturing sector, early work now could prevent contract disputes and supply chain issues arising later.

When it comes to public procurement with other countries outside the EU, Hansom said it may not be as easy as first thought for the UK to join the WTO Government Procurement Agreement (GPA) to allow access to overseas public procurement markets. This is because the UK wishes to adopt the existing EU "schedule" to the GPA, which sets out which markets are open to competition. A number of other signatories, including the USA,

are understood to be unhappy about this and are seeking to negotiate changes. It is possible that this could delay the UK's accession into the WTO and GPA. It is also not clear yet whether the UK will have access to the EU's other trade agreements during any "implementation period".

EU public procurement rules will be simply dropped into the UK rulebook. However, he flagged up that the White Paper does suggest the Government is aiming to be able to pursue a different procurement policy in the future, perhaps to promote a more "buy British" stance in public sector procurement. If so, it's unclear how that would fit with an EU regime that doesn't allow preferential purchasing on the basis of nationality and it seems unlikely that the EU would agree to this because of the favouritism to UK suppliers.

Hansom also made the point that, in the event of a no-deal Brexit, and if the WTO GPA has not been formalised, UK companies might not have equal access to EU public procurement markets either. Being locked out of both EU and global public procurements markets is "Doomsday stuff for UK contractors" he admits, "but it underlines the importance of this issue in the context of these negotiations."

His final point was that the current UK State Aid regime (which prohibits certain types of state financial assistance to industry) derives directly from the EU Treaty, meaning that the UK would have to create a new regime. Under the Government's current proposals, the UK would commit to a "common rule book" with the EU on certain areas (including state aid regulation). In





the event of a “no deal” Brexit, this would need to be in place by 29 March 2019 on the current timetable, and there is currently no draft of this. There is much to do to ensure that UK plc is “ready to go” whether there is an implementation period until the end of 2020, or not.

**Sanctions, anti-bribery and corruption – doing business outside the ‘cosy’ world of the EU**

Companies, especially SMEs, who are new to doing business outside of Europe, but who may need to do so post-Brexit should be prepared for a very different environment to the “cosy”, familiar world of the EU. “When it comes to sanctions, anti-bribery and corruption procedures and anti-slavery rules, you may have to deal with issues you had never previously considered. A number of the obvious countries the government has been promoting such as China, India and Nigeria operate under very different regulatory standards,” said Clare Hatcher, Partner in Clyde & Co’s Trade & Commodities team.

Businesses need to consider all the various risks to which they could be exposed, which can be categorised under three headings: political, regulatory and reputational.

These include the threat of sanctions or unstable political regimes disrupting supply chains, unexpected government seizures of assets or sudden changes to tariffs (political risks), to increased likelihood of encountering bribery, corruption or slavery (regulatory risks). Mis-handled, regulatory risk could soon become reputational risk, damaging the bottom line and share prices, Hatcher warned.

Post-Brexit, regulation on business standards such as bribery, corruption and slavery is unlikely to change, said Hatcher. When it comes to sanctions, UK and EU foreign policy goals are likely to remain closely aligned, however divergence between their approaches is possible over time, which would make compliance much more complex and expensive for businesses.

She pointed out that the new Sanctions and Money Laundering Act, which creates a new framework for sanctions after Brexit, appears to contain some similar features to US sanctions mechanisms, suggesting that US influence on UK policy could grow.

Hatcher advised that businesses need to start analysing risks in the companies and countries they intend to do business with, thoroughly vetting suppliers, putting robust anti-bribery, corruption and slavery procedures in place, and checking what sanctions, if any, may affect their operations and planned investments.

The consequences of getting it wrong can be severe, she warned. For instance, failure to abide by US sanctions on Iran can see companies or individuals excluded from US financial markets. Bribery prosecutions, though relatively rare, can see “eye-watering” fines imposed - and it’s not only corporates who could face lawsuits, individual directors can be held personally to account too.

# Summary

Despite 'Brexit fatigue' across UK plc, there is a great deal for business to consider. The findings from this event can be summarised as:

- Any type of Brexit will affect supply chain relationships.
- There is considerable uncertainty in UK plc as to what to focus on now in terms of Brexit preparedness. Many are waiting for the transition period.
- The implementation of all aspects of any Brexit is likely to take many years.
- Immigration requirements post Brexit are top of employers' list of Brexit concerns.
- Supply chains can be made more resilient now and many businesses are already considering how.
- New trade deals and agreements could create sanctions and trade regulation issues which business needs to consider early on.

Clyde & Co is advising a range of clients on the potential impact of Brexit on their supply chains and wider commercial activities. Our dedicated Brexit Hub (<https://www.clydeco.com/blog/brexit>) contains a wealth of information for our all of clients. For more thoughts on the issues raised above or advice on any other Brexit-related legal queries, please email [brexit@clydeco.com](mailto:brexit@clydeco.com), or your usual contact.

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