

IMPACT OF COVID-19 ON BREXIT NEGOTIATIONS: A LEGAL PERSPECTIVE

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ABSTRACT

On June 23, the United Kingdom held a referendum and 51.9% voted to leave the European Union. The exit of the UK from the EU is termed 'Brexit'. Ever since World War II, there has been a rise in the economic and cultural globalisation and political integration especially in Europe under the European Union. Brexit will put an end to this trend. Leaving Europe means the UK will be treated as any other foreign country by all the other continuing members of the EU. New trade barriers will be imposed on exchange of goods, services and people. Brexit greatly affects not only the UK but also the EU and the rest of the world. It has been a topic of discussion ever since the 2016 referendum was held. It has wide implications on various fields from the trade sector to the health care sector. Brexit is currently in the transition period till the end of 2020. The UK and EU are negotiating agreements with each other. However, it is speculated that there is a high possibility of not reaching any agreement. In which case the rules of WTO are bound to apply for trade matters. Now, the outbreak of COVID-19 complicates things even more. This paper essentially aims to discuss the impact of Brexit on the legal system and laws in the UK. It also examines how things will unfold in case of a 'No Deal Brexit'. It then progresses into discussing the impact of the global pandemic on Brexit.

Keywords: Brexit, COVID-19, European Commission, Economic crisis, WTO Regulations, No Deal Brexit, Free Trade Deal.

Introduction

The term Brexit refers to the exit of the United Kingdom from the European Union. The UK joined the EU in 1973 and since then has been following the EU laws. In 2015 it was announced by the Conservative Party that in case it gets re-elected into the government it will hold a referendum to find out peoples view on UK's membership in the EU. In mid 2016, a referendum was held known as the 'Brexit Referendum' in which 51.9% voted in favour of the UK's exit from the EU. In 2017 the then Prime Minister of the UK, Theresa May announced a 12-point plan for discontinuation of the UK from the EU's single market. In the same year the UK also invoked Article 50 of the treaty of the European Union, a formal notice was served to the European Council of its intention to withdraw and to allow withdrawal negotiations. This technically began the two-year countdown for UKs exit. The UK was expected to leave the EU in 2019 but the House of Commons sought an extension period. The then Prime Minister requested to extend Article 50 until June 2019. After the European Council meeting it was agreed to grant an extension till May 2019 if the MPs approve the withdrawal agreement or April 2019 if the agreement is not approved by the House of Commons. In April 2019, an extension was sought again by the PM. The European Council agreed to extend Article 50 until October 2019, it was further extended to January 31st 2020. On 23rd January 2020 the withdrawal agreement received the Royal Assent. As decided earlier, on January 31st 2020 UK exited the EU and entered into a transition period which will continue till the end of the year. During the transition period both the states are supposed to negotiate and enter into agreements with each other failing which there will be a 'no deal Brexit'.

Brexit will have crucial implications not only in Europe but the rest of the world. However, the impact on the UK overshadows impact in other states. The UK was unstable on economic and political fronts immediately after the Brexit referendum, this in turn affected the rest of Europe and the world. Ever since then, Brexit has become a widely debated topic. Some argue that staying in the EU is beneficial for trade in the UK. While some with an opposing view argue that leaving and discontinuing net contributions to the EU will decrease taxes, and the government could spend more, leading to economic prosperity.

IMPACT OF BREXIT ON U. K's LEGAL SYSTEMS

Jurisdiction & Enforcement of Judgments - The problem the UK judiciary is likely to face in the future is that the clauses in favour of the jurisdiction within the UK might not be recognized by the EU courts of the EEA states. The EU has global jurisdiction that is embarked within the “2005 Hague Convention on Choice of Court Agreements”. There will be no difference between the English law which is used by the EU members or other laws by the “Rome Regulations”, which governs all over the EU Contractual choices of English law will therefore continue to be effective. Irrespective of how smoothly the transition period ends, the English Law governance of the contracts will prevail all over the EU. In case of contractual choices which are governed by “Brussels Regulations” will not apply once the UK exits EU in December but the UK is currently a part of “Lugano Convention”.

Alternate Dispute Resolution - Impact of Brexit on ADR led to 35% of companies changing their dispute resolution clauses. A little over half of that percentage has opted to solve the same in other EU countries and not in the UK. During this transition, ISDA was introduced where French and Irish law versions of the ISDA Master Agreement were offered to EEA states form of common and civil law. In case any arbitral awards have to be granted, it will be enforceable under the “New York Convention”, it is also important to note that EU members are signatories to this convention. So previously if any parties who were doubtful to proceed with cross-border arbitration will now favour it after UK exits.

TUPE Regulations - Currently under these regulations for an acquisition of assets forming a business, acquirers need to continue the employment of the existing staff of the previous owner on their current terms and conditions. whether or not the United Kingdom will choose to use the “automatic transfer” principle post Brexit, it is evident that it will become easier to alter terms and conditions of the previous employee after the acquisition. it might be useful to promote more flexibility of post-transfer harmonization of the employment terms. This step was not easy to perform considering the European case laws but this restraint can now be removed after Brexit.

Companies Act 2006 - This Act is a major part of the UK legislation which governs their companies. The provisions of this Act follow several EU directives which will not be impacted because of Brexit and will continue to govern. Such directives including the company law, accounting and shareholder rights directives.

The European Union (Amendment) Act or the Withdrawal Agreement Act – It will come into force on the last day of the transition period i.e on IP completion day. This agreement contains the majority of laws which are EU laws or EU derived UK laws. These are called ‘retained EU laws’. However, some fresh laws will be created in the UK which will replace the EU laws completely. The new laws will be made in the fields of immigration, agriculture, etc. Going forward, the EU Charter of Fundamental Rights will also not be a part of UK laws after the transition. One of the types of retained laws are the ‘direct retained laws’, these laws are basically the laws that directly apply to the UK as a member of the EU. Most of these laws are the EU Regulations but some EU and EEA Treaties are also directly applicable.

The Withdrawal Agreement tackles cases that are pending in EU courts before the end of transition, these cases will be enforced in the UK and the decisions will be binding on UK parties. UK courts are referring limited cases relating to the rights of the citizens to the Court of Justice of the European Union (CJEU). Relevant matters of the EU about dispute resolution under the Withdrawal Agreement will be decided by the CJEU. The EU is seeking for direct applicability of some areas such as State aid on a permanent basis, but the UK is unwilling to accept the same. EU law would still remain a part of all member states and can be applied by a UK court to decide a matter where the EU member states law is applicable.

It has to be noted that just by retaining some of the EU laws, the UK will not be treated as a member of the EU, and UKs own regulations will not be recognized as laws of the member states. Post transition, UK laws will not be required to follow CJEU decisions that were determined after the transition period. Lower courts will be required to follow pre-Brexit decisions. The Appellate Courts can depart from all the pre-Brexit case laws of the EU, however they are free to use them if they wish to.

Further Section 26 of the Actⁱ creates uncertainty by providing that, Government can alter the extent to which the court is required to apply EU case law and the retained EU law. The Separation Agreement law applies to rights of the citizens, financial matters and Northern Ireland protocol where arrangements have been made by the UK and EU which will continue even after the transition period. These rules and the respective parts of UK law have to be interpreted with the Withdrawal Agreement.

Principles of the EU laid down after the transition period will not be effective in the UK, however UK courts can use them in some specific situations.ⁱⁱ The need of the hour is for the UK to make new legislation in areas where new domestic regulatory regimes will be created.

In March 2020, the UK passed Immigration and Social Security Coordination Bill which will put a halt to free movement at the end of transition and make way for the UK to create its own point-based system. In the same month a new Trade Bill was introduced providing for implementation of international trade agreements and for the UK to follow WTO rules.

Some new laws in the UK post-Brexit are:

- The Customs Billⁱⁱⁱ which is a separate customs regime for the UK, Fisher
- Fisheries Bill, this allows the UK to regain control over its waters, marine water and environment.
- Agriculture Bill, this introduces schemes to pay for public goods, replacing UKs membership in EU Agriculture Policy.
- International Sanctions Bill^{iv} enables the UK to implement non-UK sanctions which was previously done in the EU.
- Nuclear Safeguards Bill^v to give control to the Nuclear Regulation Office
- Financial Services Bill, will ensure UK is open to international markets and provides stability to the financial sector post exit
- International Law Bill^{vi}, to create a clear framework of laws for cross border disputes for anyone living in the UK.

Impact on Mergers & Acquisitions - Brexit was definitely influenced by political factors as well as economic factors. Economically the UK has faced significant fluctuations since the

Brexit vote in 2016, it was the world's 5th largest economy in 2017 (March) but due to the reduction in the value of Pound compared to Euro has helped France gain a step ahead of the UK. This showed a temporary advantage in the M&A sector as the drop in the value interested international purchasers. However this cross-border M&A didn't last long and eventually in 2019 reached to level way below its earlier years. Below are a few changes or impacts on this sector due to Brexit:

Due to the uncertainties caused by Brexit, many companies are opting for careful contractual wording in their contracts in the event of no-deal Brexit after the transition period. Especially in acquisition agreements where 'material adverse change' clause is implemented to form a flexible contract. In the case of Sale and Purchase agreements, the older contracts are reviewed while the new contracts are drafted to check the references to EU regulations, the governing laws and jurisdiction.

Post-Brexit in the case of a UK Public company the M&As is governed by the UK Takeover Code instead of the EU law. To make sure this is indicated to everyone few amendments are being made to this code. A significant change is that in case of a takeover with shared jurisdiction and other regulators will come to an end. The impact of Brexit on M&A of private companies is very limited, it majorly impacts the EU cross-border merger regulations which makes it easier for companies within the EEA states to merge, the UK will not enjoy this benefit post the exit. Even if UK is willing to continue this legislation it is up to the EEA to accept the same.

In 2018 the Government of UK explained the impact of no-deal Brexit through 2 paper publications which deal with the business structure, the process of accounting and auditing and specific entry. Later in 2019, a statutory instrument has been released to guide the companies through the EU exit and the Amendments made to the Takeover Regulations. Companies with branches in the UK that are established outside the EU continue to be regulated by the "Overseas Companies Regulations 2019" and they will be dealt with as a third-country business. But now EU companies will also be regulated by the same act as they will be tagged as third-country business and these companies need to file according to the UK accounting

requirements. If they do not follow the same then these companies have to follow provisions of “Part 15 Companies Act 2006”

The political influence on merger control decisions is usually high but with the help of the EU merger control framework, this bullet could be dodged by the UK as the European Commission only made a decision based on the competition test. Post the exit UK might have to face uncertainty regarding deal clearance or use political influence to sway its decisions. Certain deals will neither help the EU from a “one-stop-shop” review by the European Commission and will rather need a review by both the European Commission and the UK's Competition and Markets Authority. Which will make the whole process lengthy and costly.

Implications of a No-deal Brexit- During the transition period, the EU and UK will negotiate a trade agreement. Till the end of the transition period, the UK is still a part of the EU single market and customs union. As the time is limited there is a high possibility that no trade agreement will be reached in which case, they will have to follow the WTO terms. The WTO is a place where its member countries negotiate international trade rules and in case they do not have a free trade agreement with each other they follow the WTO rules. In the present Brexit scenario, if the UK and EU do not reach a trade agreement with each other they will fall back to WTO rules, as both are members of WTO.

The rules of the WTO are very limited in scope in comparison to the EU single market. Individual persons or entities cannot enforce WTO rules by themselves; they can only enforce them through their state through the dispute settlement body of WTO.

For trade in goods the WTO members have to follow the rules in the General Agreement on Trade in Services. Essentially the rules contain that all the member states should be treated equally without discrimination, which is called the Most Favoured Nation (MFN) obligation, to give equal treatment to national goods and imported goods, to not exceed the limit for maximum tariffs set by member countries. The MFN obligation, national treatment and market access are also imposed on services by GATS. It also prohibits some market barriers unless they are reserved in member countries schedules. All the exports from UK to EU will be subject to EU's tariffs. The UK and EU cannot act favourable to each other in specific sectors without

giving the same treatment to other member countries. Member countries are allowed to grant favourable terms to each other provided that they have a free trade agreement and this agreement has to cover all sectors of industry and not just specific sectors.^{vii}

The UK will be treated as any other member country by the EU and it cannot trade in the EU single market. In case of a no deal Brexit it will also be compelled to follow the WTO rules. This will impose an enormous burden on individuals and businesses as compared to when they could trade in the EU single market. For import of goods from the UK to the EU and vice versa, custom checks will be essential and there might be a possibility of businesses requiring a certificate to show the origin of the goods. The end of the transition period might not only result in rise in tariffs but also increased costs to train people to fulfil the custom requirements.

The liberalization for services under GATS is much less as compared to liberalization for goods under GATT. This could pose a serious problem as the economy in the UK is more dependent on services than on goods. However, WTO members are more liberal to services than what is indicated in their schedules but this is not something that can be entirely relied upon.

Furthermore, there is very low protection for intellectual property rights under the WTO rules. UK generates a significant amount of audio-visual media services and transmits them to the EU, but the EU's schedule of commitments does not comment on this aspect.

IMPACT OF COVID 19 ON BREXIT NEGOTIATIONS

EU started an “Emergency Support Instrument” to help its member countries to deal with coronavirus. London is in an entanglement with EU regarding its share in the emergency fund. The amount in question is approximately €300 million. British officials believe that the two-thirds amount of money being demanded by EU is out of the scope in reference to the Brexit deal. As per the 2019 Withdrawal Agreement U.K should not be concerned with any new EU budgets introduced post its exit. As the transition period is scheduled to end to December, U.K in this period cannot be involved in the legislation and hence only liable to pay the budget for 2020 and can continue to receive the treatment of a member country.

European Commission played its part to help U.K deal with the coronavirus outbreak by granting two state aid schemes in march 2020 and one “umbrella” scheme in April. The first two schemes were approved to help the SMEs affected in the U.K in the form of a Temporary Framework. Under which U.K has to start it’s “Coronavirus Business Interruption Loan Scheme”. While the “umbrella” scheme not only supports the small and medium sized companies but also larger corporations. First support scheme - With the help of British Business Bank and other national promotional banks U.K aims to guarantee upto 80% of the loan requirements of SMEs which broadly covers their investment and working capital, this scheme is budgeted with a GBP of 45 million. Second support scheme - With a budget of GDP 600 million it aims to give direct grants to the companies affected by the pandemic. “Umbrella” scheme (Third scheme) - With a budget of £50 billion this aims to support SMEs and large corporations. These schemes help companies facing temporary financial difficulties as a result of the economic impact of the COVID-19.

A committee jointly formed by U.K and EU which specializes in financial provision and is also an instrumental part of the Brexit deal terms. It has been brought to this committee that British officials stand on their ground stating U.K should not be liable to the EU’s “Multi-annual Financial Framework Regulations.” As it should not acquire benefits or face liability of any changes that occur post- Brexit. Only one-third portion of the fund amount demanded is not disputed as it’s believed to fall under the “flexibilities” of the MFF regulations which were agreed upon previously by both the parties. While the European Commission believes that U.K is liable to pay the entire amount and also is eligible to be benefited from the “Emergency Support Instrument.” This committee is aiming to solve this matter with a Practical approach.

Prime minister Boris Johnson was accused for not taking a part in the EU’s efforts to deal with pandemic. Initially U.K stood on the ground that it is not a member of EU anymore and should hence make its own efforts to overcome this pandemic. Later when the P.M was criticized for putting “Brexit over Breathing” consideration of the future participation in the four EU procurement schemes was promoted and later it was clarified as a mistake by the Downing Street and it also blamed EU for not receiving a mail.

Out of the 27 members 25 EU member states came together for a project involving shared purchases of ventilators and approximately the number of countries also decided to teacup to buy hospital supplements such overalls and masks for the medical staff. Laboratory equipment is also being purchased with the help of a similar project. A joint procurement agreement was drafted in 2014 when U.K was governed by David Cameron in order to overcome H1N1. The need of this agreement occurred as few states faced shortage of medical kits, and other obvious benefits such as deducted prices bull orders and smaller states might lack medical purchasing skills. As per there terms of the transition period of Brexit, U.K is eligible to participate in this agreement till 31 December 2020 if it wishes to do so.

The U.K government is not favourable to extension of the transition period even with considerations of the current situation. As this not only raises economic risks but also has a long road ahead to sort out the regulatory and coordination challenges. “According to the plan EU and U.K agreed to decide upon air transport, aviation safety, civil nuclear energy, international security cooperation, fisheries and agreements of other sectors.”^{viii} They also need to settle matters regarding the free-trade agreement and weigh the possibilities of a Canada agreement aspiring for a zero-quota, zero-tariff deal but both EU and U.K have just drafted and published documents and nothing concrete has been decided. The end of the transition period and the EU’s financial framework of 7 years is on 31st December, 2020. This helps clear any budgetary obligations towards Britain.

DEFRA and HSE of the U.K have removed the guidance published previously regarding preparations for a “hard-Brexit” situation and updated new information about the applicability of EU laws till the trade deal is finalized by both the parties. But surprisingly ECHA just provided guidance to transfer REACH registrations, list of substances which are published by the companies incorporated in U.K. All these will help the companies to smoothly shift into the end of the transition period where U.K is be considered as a third-country to EU. The notices regarding future preparations of highly affected sectors like cosmetics, chemicals, medicinal and industrial products have also been updated by the European Commission. The highly affected U.K companies from sectors like biocides, pesticides, construction and medicinal products are hoping to find ways to continue their existing licenses and registrations

which are subject to EU regulations, also to have the same level of access with EU market as before Brexit.

EU is not very cooperative to get when it comes to deadlines. The European parliament has several times suggested to postpone the “European Medical Devices Regulations” applications for a period of one year which is May of 2021. This was suggesting keeping in mind the global pandemic and to avoid any shortage of such devices when in need. DEFRA has publicans stated in England that it will not resume its work on Chemicals Strategy which deals with chemical of national concern which is also sets out U. K’s approach to Brexit. DEFRA stated that it has re-directed the usage it’s resources to deal with the pandemic and will continue to do so till the emergency is over. The deadline of April 2020 for the call for evidence and to explain the substances of concern is postponed without any further information. The publication of this strategy was initially scheduled in 2022 but considering the current situation it will inevitably be delayed.

Brexit is facing lack of attention towards it’s negotiations because of the pandemic. While both EU and U.K are going their part to deal with it they are also facing several challenges by working remotely and making sure all the services run as per usual. Though the EU has not formally changed the requirements of the compliance by those businesses who import raw materials into the EU, the product obligations should be met irrespective of the circumstances and cannot be extended by the regulators as they usually have rigid deadlines. Despite this several EU and national authorities such as ECHA have decided to take into consideration the hardships faced during the current times and took measures to facilitate businesses to run smoothly instead of dealing with imminent regulatory action. Simultaneously the Health and Safety Executive of U.K while working remotely is also continuing it’s services for chemical regulations. HSE has stopped conducting “official recognition inspection” which is used to test the effectiveness of the organisations during this pandemic. It also put an end to accept and authorise applications for businesses such as commercial pesticides through postal services, they also requested to be contacted directly in case of any inability to meet the deadlines imposed.

Brexit definitely faced the hardships of coronavirus but surprisingly U.K benefitted from it as well. Businesses especially grabbed this opportunity. Companies within the sectors of and chemical industrial products should opt to relocate activities such as manufacturing important or in-demand products like PPE, as much as possible. The European Commission and U.K have made this process easier for the companies by granting access with EU's recommendation and authorisation procedure for non-Ce-marked PPE respectively. If the permission for extension of Brexit is granted, this will give businesses time to focus on their preparations such as setting up EU-based entities or transferring and getting authorisation for their REACH regulations or other licences.

One of the significant impacts of COVID -19 on Brexit is the chance of extension of the transition period which might make U.K reconsider its stand and eventually lead to a no-deal Brexit. The prospect of this negotiations to end by December are progressively decreasing. As the uncertainty of this matter grows there is less clarity regarding the applicability of the EU legislations on the U.K which were introduced post-Brexit. It is hence important for United Kingdom's businesses to be prepared for the chances in regulations and obligations implemented by EU across the supply chains.

It is not just the impact of COVID-19 that affects Brexit but it is also other way around. Due to the Brexit now U.K citizens might face a delay in acquiring vaccinations. As U.K withdrew from the pharmaceutical legal framework of EU is will not receive it's benefits after the transition period. It might be a problem as "European Medical Agency" is involved in scientific evaluation and safety monitoring of the medicines for EU while "Medicines and Healthcare products Regulatory Agency" is responsible in U.K but companies would prefer EMA's approval over MHRA due to the number of patients. With the withdrawal from EMA U.K also losses it's chance at "accelerated assessment" of the products unless U.K aligns itself with the European Commission's regulations at the end of the negotiations which is very unlikely. Now U.K has to join forces with non-EU countries for the purchase orders and other requirements which is not costly but comes with a longer wait period.

CONCLUSION

United Kingdom is currently dealing with three separate yet interrelated crises, while the global pandemic brings in the greatest Health crisis it is followed by Economical and Political disputes. As of September 5th, U.K is right behind Spain as the most affected country in the EU. According to the “European Centre for Disease Prevention and Control”^{ix} 342,351 affected people & 41,537 deaths are identified in U.K. Under the Johnson’s government this crisis is ignored by prioritising Brexit leading to a serious criticism of the system and popularising the phrase “Brexit over Breathing”. Many political observers are concerned that the Prime Minister is interested in using this Pandemic to crash-out of the EU and choosing the independence from Brussels over the current state of U.K.

This transition period was created with an intention to give both the EU and U.K time to negotiate a suitable deal and facilitate businesses from their respective countries to work out the documentation. But EU is not very cooperative in the negotiations as compared to its precedented agreements. The negotiators and policy makers are busy fighting this pandemic and remotely making sure all the services resume as per usual. Currently EU and U.K share the same regulations regarding worker’s rights, competition and environment policy which intend to level the playing field. Though Fishing, government industrial aid policies and the customs border in the Irish Sea are the major areas of the dispute. EU believes U.K government should stick to the rules while U.K desires it’s freedom from EU.

Though the application date for the extension period has passed in June the deal might not reach to a conclusion by the end of the year. This will lead to a last-minute extension, a fig-leaf of a deal leaving majority of the details to be discussed later or a no-deal Brexit. The Free Trade Deal is also a part of the current discussion as this will help minimise the tariffs and other trade barriers which will make it easier for the U.K goods to export to other EU countries after the transition period. In case of no-deal Brexit, U.K has to follow the rules of the World Trade Organisation in this situation traffic, delays and checks on goods will be applicable making it difficult for the U.K companies to survive in EU market and it’s a disaster for the U.K service industry.

Setting all differences aside EU still played a part to help U.K in this crisis by granting two state aid schemes in march 2020 and one “umbrella” scheme in April. Two Temporary Framework schemes were approved to help the SMEs affected in the U.K. which aims to broadly cover the investment and working capital of those companies (Budget - GBP of 45 million and 600 million respectively). While the “umbrella” scheme also supports larger corporations along with small and medium sized companies. It aims to help companies facing temporary financial difficulties as a result of the economic impact of the COVID-19 (Budget - £50 billion).

It is crucial to understand that irrespective of the significance of Brexit for the future of U.K, all political interests should be set aside and EU and U.K should work together to overcome this Pandemic and facilitate its citizens and their businesses to run smoothly. We personally believe U.K should have taken part in the EU’s joint procurement agreement or at least should not miss out on future opportunities available to ensure timely availability of vaccines and other medical equipment.

ENDNOTES

ⁱ The European Union (Amendment) Act or the Withdrawal Agreement Act, 2020

ⁱⁱ Ibid

ⁱⁱⁱ Taxation (Cross Border Trade) Act 2018

^{iv} Sanctions and Money Laundering Act 2018

^v Nuclear Safeguards Act, 2018

^{vi} Private International (Implementation of Agreements) Bill

^{vii} General Agreement of Trades and Tariffs, 1947

^{viii} OJ C 384I , 12.11.2019, p. 1.

^{ix}(ECDC) 2020

