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Brexit: Navigating the negotiations

A practical roadmap



1. Navigating the negotiations

Brexit will define the future relationship between the EU and the UK.

Brexit means change

The issues at stake have been well documented:

- Will tariffs apply to the movement of goods?
- Will laws, and the application of regulation, be aligned?
- What restrictions will apply to provision of goods and/or services?
- Will UK authorisations be effective in the EU (and vice versa)?
- Will policies be coordinated?
- When will the changes take place?

These are fundamental questions for business. Some or all of them are likely to result in material change.

The process creates uncertainty

There is no precedent for Brexit; no single process has been defined and none has been tested. It is fundamentally a matter of political negotiation, which will take time. No one, not even the participants in the negotiations, can be confident as to the ultimate outcome.

For business, the process creates a challenge that, if anything, is greater than that of the changes that Brexit could ultimately bring, the challenge of uncertainty.

Time to plan is business-critical

The shape of the eventual deal (if any), and any changes that brings, will be significant.

With time to plan, businesses will be able to adjust to most scenarios – even those involving the greatest change.

If change comes quickly, without time to plan, adaptation will be significantly more challenging.

Reorganising legal entities, obtaining new authorisations, moving people and restructuring contracts take time; not to mention the changes to business and accounting systems these imply.

Understanding the process is a priority

Given the current degree of uncertainty, business faces questions.

- What should we do now?
- Is “wait and see” the right approach?
- When should we do more or change course?

To answer those questions business needs to understand the Brexit process. How it might unfold? How to identify the direction of travel? How might timing be anticipated?

A framework to understand the process

In this Briefing Paper we provide a framework within which business can analyse the Brexit process, plan actions and respond to developments.

That framework has two complementary components:

- Three potential models – enabling business to plan ahead and respond as the position evolves
- An analysis of the legal, political and practical constraints – enabling business to track the process.

Finally, we explain how business can use these insights in practice.

2. The Unknown Path

The UK is the first EU Member State to seek to withdraw from the EU. The process for withdrawal is unprecedented.

The negotiations must address two core questions:

- What will be the terms of the UK's future relationship with the EU?
- How will the UK withdraw and move to that future relationship?

There is currently no consensus between the EU and the UK on the process, mechanisms or timing for resolving these questions. Indeed, the UK General Election in June 2017 created renewed political uncertainty as to the UK Government's position, although no clear indication of immediate substantive change.

Politics aside, the legal framework within which the negotiations must be conducted provides some hints as to how they will progress and, more fundamentally, sets the boundaries for what is possible.

Terminology

Even the terminology used to describe Brexit can vary depending on your perspective. In this Briefing Paper, for practical simplicity, we describe agreements which the UK and the EU might enter into as:

- Future Relationship Arrangement – one or more agreements or arrangements dealing with the relationship between the UK and EU post-Brexit.
- Withdrawal Agreement – an agreement whose primary focus is on the arrangements by which the UK ceases to be an EU member
- Interim Arrangements – arrangements that govern any period between the UK's withdrawal and the coming into force of the UK's Future Relationship Arrangement

Figure 1: key issues to be negotiated?

Withdrawal

1. Citizens' rights
2. Financial settlement
3. Arrangements regarding private parties and the status of their existing rights and obligations deriving from EU law (eg. licences and authorisations)
4. Arrangements regarding status of on-going administrative processes based on EU law
5. Dispute resolution for withdrawal process

Future relationship

1. UK Access to the Single Market: EU access to the UK Markets
2. Customs arrangements
3. Mutual recognition of regulation
4. Future cooperation in shared projects
5. Dispute resolution for future relationship

Both the EU and the UK recognise the benefit of transitional arrangements to prevent a "cliff edge" but it remains unclear if and when these will be agreed

The future relationship

The EU has entered into many international agreements with non-Member States, including Free Trade Agreements. Its legal power to enter into such Agreements is prescribed by the EU Treaties. Following withdrawal, the UK's relationship with the EU will need to be governed by a similar agreement that can only be finalised and concluded once the UK has withdrawn from the EU.

The question remains, however, whether and to what extent the terms of that future relationship can be negotiated and agreed before the UK ceases to be a member of the EU.

Withdrawal from the EU

The Article 50 process establishes the legal basis for the EU to enter into an agreement making arrangements for a Member State's withdrawal.

It states that the EU should seek to:

... negotiate and conclude an agreement with [the UK], setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.

29 March 2019

“The Article 50 Date” on which the UK's notice served under Article 50 will expire by default

Article 50 provides no further detail on what the “arrangements for... withdrawal” should or could cover and does not explain the meaning of the requirement that the Withdrawal Agreement must “take account of” the future relationship.

The UK's withdrawal is not conditional on a Withdrawal Agreement. If no agreement is reached by 29 March 2019, the UK's membership of the EU will cease without an agreement, unless the negotiating period under Article 50 is unanimously extended.

As we explain in the following sections, the possible models for how the negotiations could progress will largely depend on the resolution (or failure to resolve) these procedural issues.

Figure 2: indicative timeline under Article 50



3. Potential Models

Whilst the Brexit process has many variables, there are three basic models for its development.

Glide Path

The UK and EU would rapidly agree to provide a high degree of continuity for an extended “Interim Period”.

Agreement on this would be confirmed by Spring 2018 at the latest. Business would have confidence to plan for the Future Relationship Arrangement from that point.

How?

The mechanism for this would need to be an agreement that:

- following the Article 50 Date, the substantive effect of most of the rules that currently govern the UK’s membership would continue to apply (or, possibly, agreement to defer the Article 50 Date and so Withdrawal)
- longer term arrangements would be negotiated and implemented over an extended Interim Period (perhaps 5 years).

Likely?

There is some evidence this would align with the UK’s view:

- it would mirror the Great Repeal Bill process proposed by the UK Government prior to the General Election in June 2017, but at a UK/EU level
- UK has observed that, unlike “normal” trade negotiations, the UK and EU start aligned and need to determine when and how to diverge.

The UK’s “Must Haves”?

Prior to the 2017 UK General Election, Theresa May stressed that Brexit must mean that two key elements of the EU structures no longer apply to the UK

- free movement of people
- direct jurisdiction of the European Court in the UK

Figure 3: Possible Models for the Brexit Process

Glide Path

- Agree on Withdrawal Agreement by March 2018
- Continues status quo with change mechanism
- Subsequent long term deal starts from status quo
- Early confidence of continuity
- Ability to input into considered long term process

Cliff Hanger

- Wide ranging long term agreement reached
- New agreement an evolution of status quo
- Agreement not reached until “eleventh hour”
- High uncertainty until 29 March 2019
- Eventually, considerable continuity

Cliff Edge

- Little or no substantive agreement by the time of exit
- UK falls back on World Trade Organisation rules
- Possible agreement reached at later date
- High uncertainty until 19 March 2019
- Significant sudden change as well as uncertainty

Challenges?

The Glide Path would face a number of potential challenges:

- Establishing an appropriate legal mechanism and quickly reaching a UK and EU political consensus supporting an orderly Brexit

Aligning with the UK's Government's Brexit "Must Haves"

The first of these challenges is addressed in the subsequent sections of this Briefing Paper. As regards the UK's "Must Haves":

- Some limitation on freedom of movement for a period would not be dissimilar to the "emergency brake" negotiated by David Cameron before the referendum
- the UK could undertake, for the implementation period, to maintain and operate within the UK transposed from EU law by the Great Repeal Bill. As a result, the UK itself, would be subject to the European Court but the European Court would not have direct jurisdiction in the UK.

Cliff Hanger

The UK and EU would reach an agreement to maintain many key aspects of their relationship, but the agreement would be reached only at the last possible moment to take effect from the Article 50 Date. Continuity would be delivered but business would not have certainty of continuity in advance.

How?

The mechanism would be a Future Relationship Arrangement similar in character to a free trade agreement and dealing with the full scope of the relationship.

The negotiation, and necessary approvals and ratifications, would need to be completed over the period prior to the Article 50 Date.

Likely?

At first sight this would appear the most natural process to be followed as:

- it would replace the UK's membership of the EU with new, long term, arrangements without a gap
- negotiating until "one minute to midnight" would be typical of complex diplomatic negotiations.

Challenges?

The Cliff Hanger faces challenges:

- it would be unprecedented for such a major trade negotiation to be completed within the time available
- seeking to agree and secure approvals/ratification would be far more challenging for a long term deal than for an interim agreement
- it would create uncertainty throughout the process and right up to the Article 50 Date as to the potential outcome.
- even if the UK and the EU unanimously agree to extend the Article 50 negotiation period, the impact of uncertainty as to the outcome of the negotiations on businesses ability to plan for the future would be the same.

Cliff Edge

The UK and EU would fail to reach any substantive agreement on their future relationship by the Article 50 date or agree any mechanism for continuity pending such agreement.

The UK would leave the EU on the Article 50 Date and would immediately become a "third country". Very significant changes to the UK and EU relationship would take effect.

The UK and EU might agree a new relationship at a later date.

Likely?

Given the politics and complexity, there is a very real risk of this outcome if the UK and EU seek a comprehensive agreement in this timescale.

Challenges

Business would face uncertainty during the negotiations and sudden change on the Article 50 Date – the worst case scenario.

4. The negotiations and business – some key questions

In this section we summarise key questions business should ask to assess the negotiation process, timing and potential outcomes in the context of the models outlined above.

Following that, we provide some answers and guidance on areas of uncertainty.

Legal, political and practical

Brexit is an intensely political issue - in the UK, between national governments and within the institutions of both the EU and the individual EU Member States. The 2017 UK General Election results highlighted the political sensitivity of Brexit in the UK and potentially reopened policy changes made before the election.

The Brexit process, an unprecedented separation exercise, also represents an immense practical challenge.

These factors are easily confused with the legal framework. Officials, politicians, journalists and lawyers describe potential outcomes as “impossible”

without being clear whether that assessment is legal, political or practical.

It is important to maintain some clarity as to these differing factors. We can analyse the legal framework with some confidence. And draw on experience to assess the practical constraints. The political, however, is open to greater change and uncertainty.

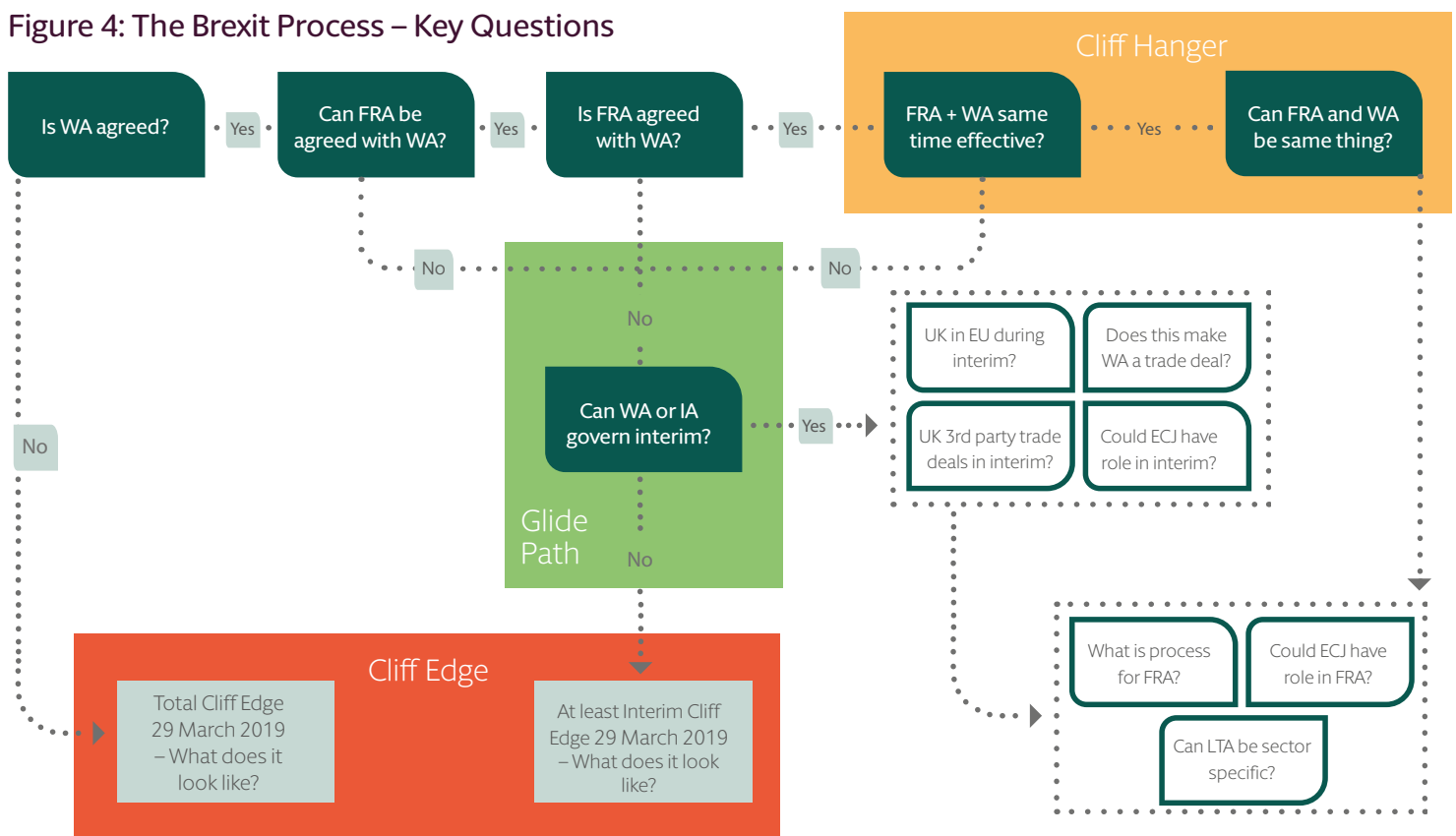
When looking at the Brexit process, businesses should therefore maintain a clear distinction between:

- The legal framework
- Practical constraints
- Political positions (including the legal and the practical).

A framework for understanding

Figure 4 provides a framework within which to understand the key questions and is explained below.

Figure 4: The Brexit Process – Key Questions



Key

WA – Withdrawal Agreement

FRA – Future Relationship Arrangement

IA – Interim Arrangement

Cliff Edge Scenarios

If the UK and EU are unable to agree any Withdrawal Agreement (and by implication any Future Relationship Arrangement), a Cliff Edge outcome is inevitable.

Business will also face a Cliff Edge, if a Withdrawal Agreement is agreed but:

- The Withdrawal Agreement is narrowly limited (for example, if focused primarily on the UK's financial liabilities); and
- No Future Relationship Arrangement takes effect at the same time as the Withdrawal Agreement. This could occur if:
 - as some have suggested, it is not legally possible to agree a Future Relationship Arrangement until the Withdrawal Agreement has taken effect; or
 - it proves politically impossible to agree by the time the Withdrawal Agreement takes effect and the UK leaves the EU; or
 - a Future Relationship Arrangement is negotiated but cannot receive any required level of ratification by the EU or Member States by the time the Withdrawal Agreement takes effect

Glide Path Scenarios

By contrast, the Glide Path will be delivered if:

- A Withdrawal Agreement is reached relatively quickly (by early 2018 latest) and so before any realistic expectation that a Future Relationship Arrangement could take effect; and
- It is legally possible to provide continuity of most aspects associated with the UK's membership of the EU for an extended implementation period (whether by extending the UK's membership on an adjust basis or creating a new “associate-membership” model for that period);
- The Withdrawal Agreement extends well beyond financial liabilities and backward looking withdrawal issues and, in particular, provides:

- the framework for negotiation of a Future Relationship Arrangement; and
- continuity for an extended Interim Period of up to several years whilst the Future Relationship Arrangement is finalised and takes effect.

This scenario is therefore reliant on a conclusion that it is legally, practically and politically possible to agree and give effect to a Withdrawal Agreement that has this effect.

As an alternative, if it proves practically and politically possible to agree a Glide Path and legally possible to identify a model for providing continuity, that continuity could be provided for in a further “Interim Arrangement” entered into and effective simultaneously with the Withdrawal Agreement.

Cliff Hanger Scenario

There is no realistic prospect of a full Future Relationship Arrangement being negotiated and ratified substantially prior to the Article 50 date.

Realistically, therefore, if a Future Relationship Arrangement and Withdrawal Agreement are negotiated to become effective simultaneously this will only happen close to the Article 50 Date. Unless Interim Arrangements are agreed early in the process, the result would be a Cliff Hanger scenario.





5. Negotiating Process: Legal possibilities and political preferences

Until the Article 50 Date, the UK remains subject to the rights and obligations of EU membership, unless agreed otherwise.

EU law currently provides that the EU cannot conclude an agreement with the UK governing, in detail, its future relationship until after the UK's withdrawal, at which point the UK becomes a "third country" from the perspective of the EU.

This gives rise to the risk that the UK will withdraw from the EU without the Future Relationship Arrangement being in place (the Cliff Edge).

This risk brings two legal questions into sharp focus:

- To what extent can the future relationship be negotiated prior to the UK's withdrawal?
- If there is a gap between the UK's withdrawal and the entry into force of the Future Relationship Arrangement, what will govern the gap?

Negotiating the future relationship prior to withdrawal

At present, the EU and the UK disagree about the extent to which negotiation of the Future Relationship Arrangement should or could legally take place during the Withdrawal Agreement negotiations, whether as part of, or in parallel to, those negotiations.

From a legal perspective, this is a question of interpretation of the EU laws governing negotiations between the EU and third countries (in particular, Articles 207 and 218 TFEU) and Article 50 TEU.

It is commonly understood that a comprehensive Future Relationship Arrangement could only be concluded in accordance with the EU laws governing the negotiation of international agreements with third countries.

However those laws have never been used to negotiate the future relationship of a withdrawing EU member State, so how they might apply to any negotiation and/or agreement before the UK becomes a third country has not been tested.

There is also a question whether Article 50, particularly the requirement that the "arrangements for... withdrawal" must "take account of" the framework

for the future relationship, provides a legal basis for the commencement of negotiations about the UK's future relationship. For example, this requirement could either be interpreted:

- widely – as setting a minimum requirement for what must be covered in the Withdrawal Agreement; or
- narrowly – as setting a limit on the scope of the Withdrawal Agreement.

Whether negotiations can, as a matter of EU law, commence before the UK's withdrawal would ultimately be a matter for conclusive determination by the CJEU. In the (very likely) absence of such a determination, the positions adopted by the EU and the UK (see below) will fill the 'legal' void. However, these will be assertions as to the legal position for the purposes of negotiation (and are likely to change as those negotiations progress). They should not be mistaken for genuine legal limits.

Ensuring an orderly transition

The simplest legal means of postponing withdrawal (and so potentially facilitating an orderly withdrawal) would be for the EU and the UK unanimously to extend the Article 50 negotiation period.

Although legally achievable:

- this would amount to delaying Brexit, which may prove politically unpalatable for one or both sides; and
- would not of itself create a process for agreeing a Future Relationship Arrangement; and
- it would not solve the problem that there would be a gap between withdrawal taking effect and a Future Relationship Arrangement coming into effect if the EU maintains a position that the UK cannot negotiate its future relationship with the EU while still a Member State.

If, for these reasons, extension of EU Membership is not a viable solution the EU and the UK would need to agree some form of Interim Arrangements, either to be included in the Withdrawal Agreement or concluded as a separate agreement. This would need to provide a stable basis for the relationship from withdrawal to the coming into effect of the Future Relationship Arrangement as well as a framework for agreeing and

implementing the latter. Options for achieving this are considered in the next section.

The EU's position – and why it matters legally

Since the UK triggered Article 50, the EU has published a number of documents (Guidelines and Directives) setting out its position, as required by Article 50 itself.

- The Guidelines set out the core principles according to which the EU should negotiate under Article 50.
- The Directives elaborate on the core principles set out in the Guidelines, providing further detail on the EU's position.

Both the Guidelines and the Directives set out the EU's political position on how it would like the negotiations to run and, as such, are subject to revision as the negotiations progress.

However, because the EU is required to adopt the Guidelines and Directives by the EU laws governing the negotiations, unless and until the Guidelines and/or Directives are revised, they represent the legally binding mandate within which the Commission must negotiate with the UK.

Figure 5 sets out the EU and the respective positions of the UK on the conduct of the negotiations as stated up to the end of May 2017.

Figure 5: The sides' stated positions

Issue	EU	UK*
Objectives/core principles of the negotiations under Article 50	<ul style="list-style-type: none"> – An orderly withdrawal – No cherry picking – the four freedoms are indivisible – Balance of rights and obligations – No sector-by-sector approach – Non-member, without obligations of a member, cannot have the same rights and benefits as a member – Single package – nothing is agreed until everything is agreed 	<ul style="list-style-type: none"> – Certainty, clarity and delivering a smooth, orderly exit – Controlling immigration – “A deep and special partnership” – End the jurisdiction of the CJEU in the UK – Ensuring free trade with European markets while also securing new trade agreements with other countries – “No deal is better than a bad deal”
Negotiating the future relationship	<ul style="list-style-type: none"> – Conduct the negotiations in phases: <ul style="list-style-type: none"> – The first phase will prioritise providing clarity and legal certainty on the immediate effects of withdrawal – EU to determine when sufficient progress has been achieved to allow negotiations to proceed to next phase – “Overall understanding on the framework for the future relationship” to be “identified” in second phase – “Preliminary and preparatory discussion” only in the context of Article 50 negotiations – Agreement on future relationship “can only be finalised and concluded once the United Kingdom has become a third country” 	<ul style="list-style-type: none"> – Necessary to agree the terms of future partnership “alongside” those of withdrawal from the EU – Unlike other trade negotiations with third countries, because EU and UK currently have the same rules
Transitional arrangements	<ul style="list-style-type: none"> – “To the extent necessary and legally possible” – “Bridges towards a foreseeable framework for the future relationship in the light of the progress made” – Arrangements should be clearly defined, limited in time and subject to effective enforcement mechanisms – Any prolongation of EU law must require existing EU regulatory, budgetary, supervisory, judiciary and enforcement instruments and structure to apply 	<ul style="list-style-type: none"> – In no one's interest for there to be a cliff-edge – “We want to have reached an agreement about our future partnership by the time the two year Article 50 process has concluded” – Phased process of implementation of new arrangements

*This table reflects the UK policy position prior to the UK General Election in June 2017.

6. The Negotiating Process: a practical assessment

The course the negotiations take in practice will largely be determined by the compromises reached during the negotiations.

1. Negotiating the future relationship

The EU has not ruled out negotiation of the future relationship taking place as part of the Article 50 negotiations or in parallel and that is not legally impossible.

The issue that would appear most ripe for disagreement – already acknowledged by senior members of the UK Government as the potential “row of the summer” – is the EU’s present insistence on conducting the negotiation in phases.

The EU also appears to have adopted a narrow interpretation of the wording of Article 50, meaning it considers that the negotiation of the UK’s withdrawal and future relationship must be conducted separately, with only limited overlap.

This approach is no doubt intended to put pressure on the parties to come to an early agreement on matters the EU contends to be most important, notably citizens’ rights and the financial settlement, before progressing to other issues.

The UK Government is presently resisting this but may find that the EU is unwilling to alter its approach at this stage. A wholesale change would require a revision of the Guidelines and Directives, which have been unanimously agreed by the Heads of State and Governments of the EU27 Member States. However, the drafting of those documents will, in practice, give the European Institutions significant discretion and ability to flex the process.

It remains to be seen whether the EU will insist on a formal separation of the negotiations on withdrawal and future relationship once the negotiations get underway. The wording of the EU’s Guidelines leaves some room for manoeuvre in this regard.

The terms of the UK’s withdrawal and its future relationship with the EU are likely to be closely inter-related. Given this close connection, and consequences of a Cliff Edge scenario, the framework of the future relationship should (at least) be clearly defined as part of the withdrawal negotiations.

Even if the negotiation of the future relationship started as soon as the negotiation of the Withdrawal Agreement, it would still be an unprecedented achievement to negotiate a deal as comprehensive as the one sought by the UK Government within the two year Article 50 period.

The UK Government has made the point that this is unlike a normal trade negotiation. As a result of the UK’s membership of the EU the two are currently aligned. However, it is clear that, on any view, agreeing the detail and implementing it is likely to take us beyond the Article 50 Date – requiring either an extension or an interim solution.

2. Mind the gap

Both sides have acknowledged Interim Arrangements might be necessary to avoid disruption and uncertainty. There is scope here for negotiation.

Interim Arrangements would need to manage the applicable institutional and regulatory framework between the EU and the UK during the intervening period, while also allowing for the two sides to progress negotiations on the future relationship.

One option would be for the EU and the UK to agree a form of continued membership with accommodations to recognise the UK’s withdrawing position. This would be akin to David Cameron’s renegotiation prior to the EU Referendum, including an emergency brake on immigration). However, such an arrangement would need to work within the legal confines of the EU Treaties. As such, limits to the jurisdiction of the CJEU while remaining a member on modified terms would appear highly unlikely.

It would also be open to the EU and the UK to seek a bespoke arrangement outside the scope of the EU Treaties that accommodates an autonomous middle ground between full membership and the future relationship.

A bespoke arrangement would need to address contentious issues such as the terms of Single Market access and the jurisdiction of the CJEU during the period. Such an arrangement is not legally impossible. Whether it could be agreed – under the Withdrawal Agreement or some other arrangement – would depend on time and the political will of the parties.

7. Action planning for business

Many businesses have developed a Brexit Action Plan.

In this paper we explain how to refine your plans by reference to the potential process and the manner in which the process develops¹.

Certainty and Alignment

Figure 6 illustrates the key implications of the three different models for business planning.

Understanding the implications of each model will help you plan, and move more quickly than the competition

The core issues, which will potentially vary over time with each model, are:

- The degree of certainty with which businesses can plan
- The likely degree of alignment between the legal and regulatory positions in the UK and the EU.

Where certainty is high, businesses can plan ahead with confidence; Where alignment is high, change required from current arrangements will be limited.

By contrast, if certainty is low, planning will be with low confidence (either “wait and see” or “plan for the worst”). If alignment is low, this implies significant change from current arrangements.

The implications of each model can be summarised as follows:

- **Glide Path:** Current uncertainty should reduce (and certainty rise) sometime before March 2018.

A high degree of alignment, only slightly reduced from current, should be maintained throughout an extended Interim Period (in Figure 6 assumed to be 3 years but potentially 5 or more).

At the end of that period, as a long term Future Relationship Arrangement takes hold, certainty will rise still further whilst there would likely be some reduction in alignment.

- **Cliff Hanger:** Current uncertainty would continue right up to March 2019 (or later, if Article 50 negotiation period is unanimously extended) with continuing risks of a Cliff Edge up to that point.

At that point, with a Future Relationship Arrangement in place, certainty will rise. However, assuming that the agreement reflects a degree of separation from the EU, alignment will reduce.

- **Cliff Edge:** The initial timescale is similar to Cliff Hanger – uncertainty continues to March 2019.

However, with no Forward Looking Agreement in place at that point, the UK would cease to have any formal coordination with the EU overnight. Notwithstanding the Great Repeal Bill, alignment would reduce substantially.

It is likely that, if negotiations fail to deliver an outcome by March 2019, those negotiations will continue in some form after the UK's exit from the EU.

The result would be continuing uncertainty for the duration of those extended negotiations followed, eventually, by some return to certainty and alignment at the end of those negotiations (here suggested to be around 2021).

It is vital to assess the certainty with which you can plan and the likely degree of change

¹ You can find guidance on the development of a Brexit plan in our Brexit Toolkit.

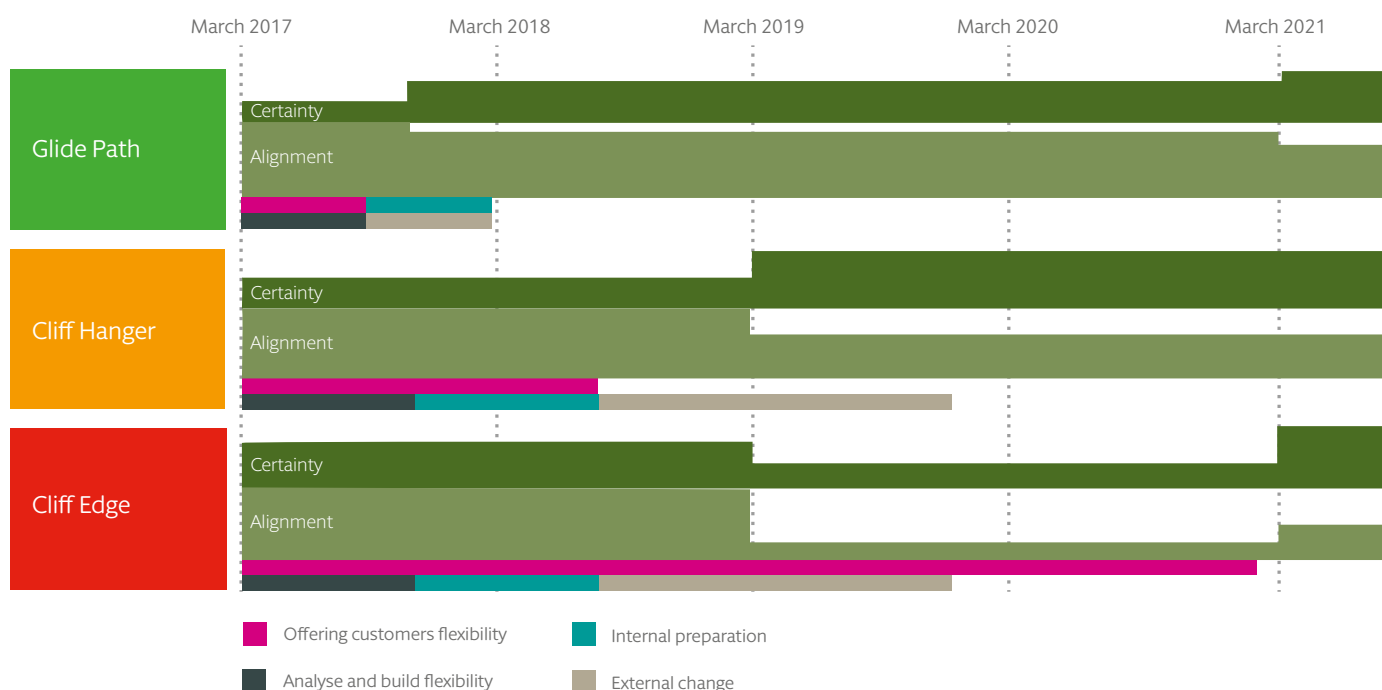
Implications for planning

This has some important implications for businesses planning their response to Brexit:

- During any initial period of uncertainty, flexibility will be the priority.
 - Operationally, your business should look to preserve its ability to respond to various Brexit outcomes. This should involve, for example, appropriate “change control” provisions in contracts
 - Your business should also seek out opportunities which this uncertainty brings. For many businesses, offering customers flexibility in the face of uncertainty (for example, business solutions which can respond flexibly if the restrictions on the movement of data between the UK and EU come into effect) could provide a potential competitive advantage.
- It is likely to become clear during 2017 if a Glide Path is probable. If so, the appropriate response will be to shift focus from uncertainty to the implementation process requiring you to:
 - put in place the steps, both within your business and with customers and suppliers, to manage the changes which will apply from the start of the Interim Period (for example, changes to the “free movement” regime);
 - modify your Brexit team’s approach to focus managing the continuing Interim Period (for example, influencing policy as the separation decisions evolve over that period).
- The **Cliff Hanger** will involve a more extended period of uncertainty but the implications will change over time:
 - If no Glide Path is apparent by early 2018, the working assumption should be that a Cliff Hanger or Cliff Edge is likely. Uncertainty will exist until very close to the Article 50 date.
 - Flexibility will therefore be at a greater premium, for a longer period, than in a Glide Path. This will provide even greater opportunities for those who can offer flexibility to their customers.

You can take operational steps to maximise flexibility – preparing not for Brexit but for the Brexit process.

Figure 6: Brexit process – Implications for Business Planning



If no deal is done by early summer 2018 we expect market sentiment to evolve – from “understand the worst case but wait and see before acting” to “assume the worst case and act accordingly”

- However, rapid approach of potential change means you will need to move from building a degree of your own flexibility to putting in place real changes to enable you to deal with a Cliff Edge should one occur.
- During Spring 2018 you should consider ramping up internal preparation – for example, implementing changes to your systems necessary to deal with potential new customs and VAT “borders”.
- At this stage, there will still be some chance the position will clarify so you may choose to minimise changes which have an effect outside your business (e.g. on your customers).
- By early summer 2018, unless the picture has clarified significantly, it is likely to be appropriate to start to implement changes necessary for your business to survive and thrive if there is a Cliff Edge.
- At this stage, your customers and suppliers are likely to expect you to do this. In turn, you should develop a diligence process to ensure your suppliers and customers are “Cliff Edge ready”
- The **Cliff Edge** will involve a similar period of uncertainty prior to the Article 50 Date but uncertainty (as well as the need for significant change) will increase further after that until the shape of any long term arrangement (or confirmation of the lack of one) becomes clear:
 - the value of offering flexibility to your customers will be even higher for even longer whilst the process of implementing change will be much more significant around, and in the months following the Article 50 Date;
 - it is likely the EU and UK will continue to seek some form of Future Relationship Arrangement meaning further change and uncertainty at some future point as that is finalised.

Figure 7: Sample Risks and Opportunities Matrix

			Glide path	Cliff hanger	Cliff edge
Contracts	Superseded provisions	Territorial and other references which no longer operates as intended			
	Change triggers	Provisions which Brexit triggers termination rights or contract change			
Customers	Uncertainty	Customers' uncertainty as to their own business and operational models			
	Concern about UK entity	Customers concerned about contracting with a UK entity			
Regulators	Divergence	UK and EU regulations diverge			
	Critical attitude	EU/Member State regulators become unsympathetic to a UK contracting party			
Excise	Potential costs	UK outside EU customers/VAT likely increase in administration and risk increase in real tax cost			

	No downside likely		No opportunity likely
	Likely to be some downside		Likely to be some opportunity
	Likely to be material downside		Likely to be material opportunity

Sectoral variations

There are variations in business needs in part dictated by their industry sector. For example, in some industries Brexit could require a lengthy process of relocation involving detailed regulatory processes. Notably among these are life sciences and financial institutions (in which regulatory capital creates additional burdens).

Whilst the precise approach set out in this Paper is not applicable to every aspect of every business:

- All businesses face broader considerations going beyond their special characteristics. These include contracts, people and data. The framework in this Paper is applicable in part to every business;
- Even within particular regulated areas, the principles of the analysis in this paper are likely to be helpful to any strategic analysis.

Specific planning steps

This analytical framework can be used to review potential Brexit issues for your business. There are three key steps:

Step 1: Issue Identification: Our Brexit Toolkit describes how to identify issues in your business which are potentially impacted by Brexit.

Step 2: Risks and Opportunities: For each issue, assess risks and opportunities against the three Brexit Process Models. For example, uncertainty may equal opportunity in some case; in others there may only be risk.

Figure 7 provides a sample framework for this analysis using some issues which are typical to most businesses.

Step 3: Responsibilities: Once issues and their associated risks and opportunities have been identified in each scenario, it is possible to track those issues as your assessment of the applicable scenario evolves and to allocate responsibility for each issue (see Figure 8).

Figure 8 – Action Planning Framework

	When	What	Who
Issue Identification			
Internal Flexibility			
Sales Messages			
Detailed Analysis			
Internal Implementation			
External Implementation			



8. Why Hogan Lovells?

Brexit Taskforce

You need advisors who can help you to:

- understand the risks and opportunities
- design and implement internal plans
- develop and deliver an effective engagement strategy to ensure your priorities are on the negotiating agenda.

When law, policy and politics converge, you need advisors who do not see Brexit through a narrow lens. You need advisors who see the big picture but don't miss the details.

In uncharted waters, you need advisors who are not afraid to innovate.

We have been leading analysis of Brexit since before the referendum was promised. We have been collaborating with our clients and other experts to provide a holistic view of the risks and opportunities. We are ready to help you to make the best of it by delivering sound legal analysis, global perspective and active engagement with policy makers.

- **Dedicated Brexit Team:** We are not newcomers to this. We established a dedicated taskforce of senior thought leaders from across our business in 2014 to analyze and alert business to the issues on the horizon including Brexit and Scottish independence. We are here to help you navigate the best course for your business in these uncertain times.
- **Thinking Ahead:** Hogan Lovells led early thinking on Brexit with detailed analysis of the potential implications of Brexit for different industry sectors published early in 2015. Since then we have worked with clients, think tanks, industry bodies, political experts and regulators in the UK and internationally to develop our thinking on impacts and likely responses. Our early work on Brexit issues was commended in the FT Innovative Lawyers Awards in 2015.

- **Understanding EU law and impact on the global stage:** The intersection of the EU with the UK and the rest of the world will be a critical issue in a post Brexit world. Our strong presence in the U.S., UK and EU means we have deep experience of analyzing whether laws of non-EU states meet EU standards - and the risks where they might not.
- **Sector insights:** Brexit impacts will vary depending on your sector. Our in-depth understanding of sectors enables us to identify the key issues particularly in those highly regulated sectors, such as financial services, insurance, energy, media and pharmaceuticals, which are likely to be significantly impacted by Brexit (find the issues and our key contacts by sector at: <http://maps.hoganlovells.com/europe>)
- **Full service experienced lawyers:** We advise across the full range of business legal issues and can help to understand the implications of change.
- **International trade agreements:** At its core Brexit is about the UK's trading arrangements. Our team includes leading trade negotiators such as Ambassador Hugo Paemen, who led the EU negotiations during the entire Uruguay Round, and Warren Maruyama, former General Counsel of the United States Trade Representative. Our dedicated international trade team provides insight into, and can help influence, trade negotiations and World Trade Organization (WTO) rules which will apply to the UK's relationships if no new agreement is reached with the EU.
- **Integrated European teams:** Responding to Brexit will involve reviewing structures in place across the UK/EU border (e.g. the potential loss of passporting rights in the financial services sector or optimising supply chains). With teams who work across Europe every day we have experience in developing practical solutions to pan-European issues.

- **Active engagement:** To protect priorities, business needs to engage actively in shaping the negotiations between, and the policy agenda of, the UK, the EU and key countries. Our internationally-recognized top-ranked government relations and policy advocacy team is experienced in developing and delivering strategies to influence business-critical policy issues in the most complex areas, combining legal analysis, deep regulatory knowledge and institutional and political insight.

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For the latest thinking on Brexit, and further resources on planning for it, visit our BrexitHub: www.hoganlovells.com/brexit; contact one of our team members listed; or email us: brexit@hoganlovells.com



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