

# A NO EXTENSION-BREXIT: HOW TO PREPARE REMOTELY

16 April 2020

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As part of our ThinkHouse Brexit webinar series, Ursula Johnston and Bernardine Adkins discuss the current negotiating positions of the EU and the UK for their future relationship and the potential scenarios that business will face in trading goods with the EU after the transition period. They focus on the practical requirements businesses will need to adopt to ensure that they can take advantage of any UK - EU trade deal.

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## Transcript

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**Ursula Johnston:** Good morning, or good afternoon, or good evening wherever you are right now, Bernadine and I are really pleased to spend the next 20 or 30 minutes with you

discussing what we see as the future for trade, post 2021 and beyond.

Bernardine Adkins is the partner from our EU Trade and Competition team, I am Ursula Johnston, Director in EU Trade and Competition team focusing on Trade.

So good afternoon Bernardine, it is lovely to see you sitting in sunny Warwick and I am down in sunny London.

**Bernardine Adkins**: Yes you are rubbing it in there Ursula because I understand it is sunny in London, but it is very rainy in Warwick at the moment, so I don't know what I am going to do about my exercise later on today.

There you go, but I am so pleased you introduced this as not being able Brexit because it is not that we are frightened of the word anymore but it is that we have left and really the question is what are the trading relations going to be between the UK and the EU post December of this year, and also from that flows what are the relationships going to be with other countries as well and so we really want to focus on that and so let's just remind ourselves to go back and it seems a world ago, eons ago, pre COVID-19 as to where we were, is that negotiations, we had left the EU, and as you know we created this fiction under the withdrawal agreement, a fiction of everybody said let's pretend that the UK still is in the EU, which is why the UK is still entitled to take full part in all the COVID planning that is currently going on and the procurement that is currently going on at an EU level.

We are, by virtue of a fixed fiction agreement we are still fully fledged members of the EU, although we cannot take part in the institutional aspects such as we do not have an MEP sitting anymore in the Parliament, we no longer have a seat at the Council of Ministers but we are still required to comply with community law.

And so where were we? Negotiations had begun and in February the UK had at long last published its guidelines in a 30 page document, its guidelines on the future negotiations, the future trading role, which I think we were all very pleased to see because to date the UK had very much said oh it's a secret, we don't want to compromise our negotiating position and I think they have learned the lesson that the EU learnt some years ago, is that it is imperative that anyone negotiating these huge free trade agreements is open, transparent, whereby business can make representations to the UK, or at the time it was the EU, as to what is the appropriate stance to be taking on certain things. So that was a great thing 30 pages worth, not that size necessarily matters and the EU published its negotiating position which was some 45 pages worth.

And then they had the early head to head, face to face meetings, teasing out the areas of

en passe and really now I just want to limit myself to saying obviously the totemic area which gets a lot of heat is around fisheries and we need to bear in mind that only represents 0.1% of our GDP but it is an emotive issue, as I said it is totemic of us leaving and that is going to be, it would seem a complete sticking point notwithstanding very little GDP that is at stake and the other potential sticking point that I, in my view, reading through the EU document, actually I do not think that is necessarily so, it was always about the level playing field and it has been spun in the press to say oh my goodness, this is terrible, the EU wants to trap us into, the UK into its regulatory system and that is not at all what the EU is asking for. They are asking for a so-called level playing field in certain areas, be it environment, social protection, employment, and also competition and state aid, importantly state aid.

And essentially whereas some people are saying oh the EU wants to trap the British into this dynamic alignment, in other words, the British will sign up to the current standards as to where we are and as the EU improves these standards and makes them stronger, the UK should align in keeping with the EU.

But the EU is not asking for that, if one actually looks at the detail of this text. It says it should be used as a reference point, it basically says to the UK we would like you to freeze the clock on those at the time you leave, but we all commit to communise standards which quite frankly is what one expects in any sophisticated modern free trade agreement is that the parties don't wish the other one to basically be gauging their costs and getting an unfair competitive advantage.

So this is something that we expect to see played out time and time again with respect to any free trade agreements between developed countries, or even not so developed countries and we have seen it recently in the Mexico, Canada, US agreement where Mexico had to agree to pay its coal workers a certain minimal level, otherwise that was an unfair undercutting.

So I cannot help but feeling it was always achievable provided people were prepared to nuance the language, step down from some of the spinning of how things were and compromise where it was necessary. It was always doable but it was clear that the timing was really going to be tight and Michel Barnier in those halcyon pre COVID days, back in early March, even before COVID-19 was on the landscape, said the EU, they may need more time but given that it has been over two weeks now they have not had face to face meetings, much of the commission like us is under lockdown, is working from home apart from state aids, some very sensitive areas such as state aid, they are all working from home.

Both Michel Barnier and Boris Johnson are also under self-isolation as well but the difference is between the EU and the UK here is whereas the beauty of having 27, 28 member states is you can delegate, you know this is about the coming together of resources, it means that the EU have a dedicated team, a whole team this is all they are doing and reporting in to Michel Barnier, reporting in to Ursula von der Leyen from time to time, whereas the head guys, Boris Johnson, Michael Gove Rishi Sunak, they are running, you know, an academic, a pandemic in the UK so they are simply not, even if they are super people, they are simply not going to be on top of the detail in a way that Michel Barnier is going to be able to do to direct the negotiations.

So that is going to be problematic for the UK, they are at a distinct handicap there, notwithstanding the excellent nature of the civil service that we have.

**Ursula:** So Bernardine, over the last couple of weeks I have had an increasing number of queries about whether the UK and the EU will agree to extend the transitional period beyond 31 December this year in light of the pandemic?

**Bernardine:** That would appear to be the sensible and pragmatic thing to do and if the Government is going to request an extension of one to two years it has to be agreed by the EU by the end of June, it needs to be done by 1 July and as you said there is a serious amount of pressure from business and politically on the Government to do that, but so far the Government is stonewalling, an inscription is this is enshrined in law, not that that matters because they can change the law but so far the Government is very much stonewalling and saying no we have left, so we are not going to ask for an extension as of end of June and we are not going to get an extension for a free trade agreement as of 31 December. That being the case I think it is practically nigh on impossible quite frankly, unless we rule on everything which we are unlikely to do, rule on everything for the free trade agreement or may be have an absolutely skeletal agreement, with more detail to come. Some sort of pragmatic work around but clearly at the moment politically the Government absolutely does not want to be seen to be blinking.

So I think there for business notwithstanding what pressure one may wish to put on the Government, business really needs to starting preparing and thinking about what sort of preparations it needs to take to be ready for 31 December because we are getting no signals from the Government that that is going to change, notwithstanding the very real challenges that the country and the economy is currently having.

Today in fact the FT that said it referenced banging our head against a brick wall, not to extend the transitional period but notwithstanding that, that is I am afraid is the situation

we are currently seeing and I think in that context Ursula it is over to you, what are the principal points that we need to be telling people to do to ensure, notwithstanding everyone is working out of their back bedrooms, what should we be doing?

**Ursula:** I think as well Bernardine when we talk about extending the transitional period, thinking about how much time do we need to extend by because there is an awful lot of difference in today's current climate between three months, six months and 12 months, or even 24 months, so I think one of the questions that Government will need to be asking itself, what is a realistic chunk of time that people will need to get prepared for trading on different terms of the EU and I would suspect that if we, as being predicted, we don't get back to business until as usual for another six months from now, which takes us to August/September, then I think businesses realistically need at least an additional six months to regroup, prepare and get their house in order for what will come when the UK leaves the European Union formally.

**Bernardine:** Let's assume that we go down the road, continue to go down the road the Government politically says is unconscionable with this is what we have promised, this is what we are going to do, and if, heaven forbid, the economy is still flat they will think well OK we are all feeling pain, let's just feel a bit more, how much worse can it get, and then it will be a question of people will not necessarily be blaming the Government for it, it might also be COVID-19. That being the case what could people realistically do given that so many of us we are not working.

**Ursula:** Well putting aside conversations on preparing logistics, procurement, supply chains, what I have done over the last couple of weeks is really think about, if I was a legal team I would perhaps have some additional resource, some additional time right now and I have got my team working remotely from home, what are five things that we could start to tackle in the coming weeks in preparation for Brexit or 2021 or 2022, whenever that may be? So I have put together a five point plan which I am just going to talk you through now and feel free to join in with questions.

I think the first thing to do is to have a look at your agreements with your service providers around costs for the trade so that could be rate, logistics, customs brokers. What are the terms of those service agreements and can you get yourself into a position to negotiate either a better quality of service, can you negotiate better rates, so for example say a customs broke typically will charge you £36 per cost inventory, can you negotiate down? Now one of the ways that clients normally find, you know, a simple quick fix to that, is to cut the number of service providers. I have clients that actually when they assess how many customs brokers do they currently engage in the UK, it could be ten, 20, 30, and

sometimes even more than that because they are relying on their customers to appoint a customs broker who still acts actually on their behalf, so that is a really quick thing in my view and something that somebody could easily do from home, have a look at your customs data, apply for that from HMRC and have a look through it, start doing some simple analytics, where can you make savings.

I think the next step would be to look at, what is your escalation policy around customs and trade disputes, or what happens when your goods get stopped at the border, because it is going to become an increasing problem for businesses that trade with the EU because obviously there is a two border crossing there, there is an export from the UK and a subsequent import into the EU or vice versa. So how are you going to deal with potential investigations by customs authorities, who internally is responsible for picking up those queries, if a customs officer walks onto your premises and asks to see documentation, how are you going to handle that and how are you going to communicate that plan effectively across the organisation.

So historically I have done a lot of work with businesses writing a policy and then ensuring that the training is in place so that everybody within the business knows their role in the event of an investigation or goods being stopped at the border.

And I think, and in terms of how long would that take for somebody to draft, I think depending on the size of the business and perhaps the number of sites you cover, but I think you could easily do that within two to four weeks. That to me is a quick win.

Something, a slightly bigger project, but again something that somebody within your legal team could easily take an initial view on, is in a post-Brexit trading world what trade facilitation measures are there available that could help your business save money, improve cashflow? That is going to become really key for businesses that particularly if we have a short recession in the UK this year, is how can we protect our cash, how do we ensure that our landed costs are as low as possible when we are importing or exporting around the world?

Now to get an authorisation for a customs bonded warehouse which it could suspend or delay the payment if needed to, or for example to operate a relief that would give you duty refunds on manufacturing raw materials that you have bought from outside the EU, those authorisations need to be cleared through HMRC and again the time process for that particularly in view that HMRC are going to be resource tight at the moment, against I would allow six to 12 months timeframe. So that to me again is a longer term project that could be easily tackled by legal team because you have that holistic view of the business, you can see where goods are moving to and from, or at least you know within your

organisation who do you need to go and ask to get that data, get your first step of the project so the feasibility study started.

**Bernardine:** Yes and also it goes with liquidity, right now is bitterly important, for a lawyer to be seen to be supporting liquidity of a business.

**Ursula:** Absolutely and you know we can obviously help businesses even take a very very initial first view of what is available to you and what would that application look like and what would you need to do to position yourself to be successful in obtaining that, in obtaining that authorisation.

The fourth item I had on my list was authorised economic operator. I know you are a fan of this Bernardine because we have been talking about this a lot and how we can support our clients in obtaining the status.

**Bernardine:** Also I think it is extraordinary how, compared to Germany, how little take up there is still in the United Kingdom. It is such a facilitative thing, I am just so surprised that business has not adopted it more, especially given how long it takes to get, anyway over to you Ursula.

**Ursula:** It is an interesting point saying, I spoke with HMRC a couple of weeks ago and we were talking about why has the number of authorisations been so low in the UK. Obviously the number of businesses applying has picked up but something that HMRC have been very cautious about is awarding the status where it is not merited, so quite often they are receiving applications and the level of information that is required, or the level of documentation you need to present to demonstrate that you meet this trusted trader status, is not there.

So HMRC rather than reject the application, are telling businesses to go back, have another look and then come back to us in three to four months' time, because once HMRC formally reject your application you are actually blocked from trying for another 12 months so it is actually possible that businesses that think they want this status make sure that the application is high quality from the get go and I think we have both looked through the negotiating guidelines and authorised economic operator is there from both sides.

Both the EU and the UK are saying this status is a way for us of recognising businesses on both sides of the border that we can essentially say they are compliant, they operate a secure supply chain to let's direct resource into looking at those businesses who do not meet this particular criteria.

**Bernardine:** I think it is probably naivety with some businesses, I think oh yes we can

apply for that, it is a form filling exercise, no Ursula, it is not a form filling exercise, you have to talk a little bit about what people need to do to make sure that they can meet that criteria.

**Ursula:** There is five sort of pieces to this, there is, on the one hand you have two modules that look at your physical safety and security, so do you have locks on your gates, do you have restricted access to the goods that you store in your warehouse for example, and then there is three other modules which really look at customs compliance. So do you operate in a customs compliant environment? & Do you ensure that your people have training? Do you have somebody responsible for customs? Do you ensure that if you give your freight forwarder proper instruction?

Now it is all very well to tick the box yes, but you need to demonstrate that so coming back to this example of do you instruct your freight forwarder, complete the customs declarations accurately on your behalf, or do you have a written policy that you share with your freight forwarder and do you routinely go back and check on their work and make sure that what they have done is accurate and complete because you know coming back to that first point I made about engaging with your service providers, it is very important to remember that your customs agent is not responsible for the day to day file on your behalf. If they get it wrong, or you have told them to do something incorrectly, it is on you, HMRC will come and look to recover that underpaid duty from you and then we have now seen it in a number of clients we are working with, levy penalties as well.

**Bernardine:** Yes, HMRC seems to be more aggressive at moment don't they, at least they were pre COVID anyway.

**Ursula:** Yes, well this again was something that has come out from an audit that was undertaken by the European Commission on customs compliance, how it is being regulated across customs authorities from different EU member states and the UK has been picked up particularly on tariff classification,, which is why we are seeing, well certainly since January this year, we have seen an increasing focus by the customs authorities on tariff classification.

**Bernardine:** So what is the fifth point then?

**Ursula:** so the fifth and final point is something that you are very familiar with as well, sanctions. So all the, our understanding both you and I, is that once we leave the European Union, so we leave that sanctions regime of the EU, the UK will have an independent sanctions policy, of course it will still fit within the international agreement on sanctions but we expect that the UK will move closer to a US style regime and will have,

be much quicker to react to developing political situations overseas and will increase the number of, will look to fine and impose penalties on businesses that do not comply.

**Bernardine:** Yes, criminal sanctions as well. And we expect that to be quite a sea change because to date people are really worried about US sanctions, or EU sanctions imposed by the individual member states and we envisage that the UK is going to be moving more towards the US style of sanctions. So all of that to come.

**Ursula:** And so what we are looking at saying to business, in particular legal teams is test the robustness of your sanctions policy now because if that is not watertight now, then once we leave the EU and adopt our own sanctions policy it is only going to become more difficult to improve your sanctions post processes and to make sure that everybody knows what they are doing from the get go.

**Bernardine:** And also an escalation policy as well because mistakes happen and what there is to have a policy whereby it shoots very quickly up towards the legal team who are then able to do something about it.

**Ursula:** And that includes of course like a process for voluntary disclosure as well, which again is sort of a topic in its own right.

**Bernardine:** Yes. All of this to come.

**Ursula:** It has actually just started raining

**Bernardine:** Guess what, the sun is out here, the sun is shining in Warwick. I might go and feed the ducks now. Thank you all for listening.

**Ursula:** Well thank you very much everybody for joining us this afternoon and we would be pleased to pick up any questions that you may have after you have watched this recording and we would like you to direct those through the team and through the link that I am sure you will see below the recording. So have a lovely afternoon and we wish you and your families all the very best over the coming weeks.

**Bernardine:** Thank you.

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