

MOFO BREXIT BRIEFING

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OUR TOP TEN TIPS ON FOLLOWING THE BREXIT PROCESS

By Sir Paul Jenkins*, Paul Friedman and Alistair Maughan

Nine months after the UK voted to leave the EU, the formal exit process has finally started. Within two years, the UK will be out of the EU either on agreed terms or cast adrift with no deal.

The negotiating rhetoric and posturing on both sides will be one confusing aspect of the next two years. UK Ministers have said they will not provide a running commentary on the negotiations, but, with 27 countries plus the European Parliament and Commission also involved and increasingly committed to transparency, there will be a lot of information and misinformation out there. This, plus the high levels of uncertainty until the very end of the process, will make it a difficult environment to take the best business decisions.

Over the next two years, informed insights will be at a premium, and that's what we aim to offer you. What lies behind the headlines? What are the critical moments? What are the questions you should be asking? What should be your planning assumptions?

1. Article 50 is old news

Commentators have focused on A50 because that's the mechanism to leave, and without an A50 deal, the UK is tipped unceremoniously out. But suddenly even the politicians seem to have woken up to the limits of any A50 deal. In the words of A50, the target deal sets out 'the arrangements for withdrawal, taking account of the framework for the future relationship with the EU'. Think of a divorce. This is the first part - agreeing the money, dividing the assets plus some high-level principles about the welfare of the kids. Important for sure, but the detailed arrangements for the children over the years to come are not covered. If there's an A50 deal, it'll be about funding pension liabilities of Brussels bureaucrats and infrastructure projects already agreed but not yet paid for, and it will say fine things about the future. But the detailed future relationship between the UK and the remaining 27 EU member states ('Remaining 27') – who gets the kids on which weekend, which schools they go to – is for Article 218.

2. Article 218 is the new Article 50

A218 is the Lisbon Treaty provision covering deals between the EU and third countries: as it leaves, the UK becomes a third country as far as the EU is concerned. For companies currently trading in the UK and the rest of the EU, this is where the future rules will be settled. Any future trade deal,

whether for goods, services or both, between the EU and the UK will be done under A218, and so too any agreement on the movement of people and capital. Unlike A50, A218 sometimes requires unanimity amongst the Remaining 27 and may also require ratification by EU national (and in some cases regional) governments.

3. Signs of sequencing

Sequencing will be critical for businesses. Even with a deal, the worst case scenario is an A50 divorce settlement followed by a UK/EU trade agreement, followed by UK/third-country trade deals. Best case scenario is probably a simultaneous A50 deal and transitional UK/EU trade agreement that includes transitional retention of rights under EU/third-country arrangements. Nobody seriously expects full UK/third-country trade deals until much later. The Remaining 27 have been clear that some or all of this may be on the table. But, going back to the divorce analogy, they want the money sorted out first, and they share the UK's wish for early resolution of the status of EU and UK residents in each other's countries after the divorce. So, watch out for movement on money and residents. Progress on these issues will see the Remaining 27 more ready to start A218 talks in tandem with A50: they are the keys to unlock helpful sequencing for business.

4. Signs of substance

Progress on money and the rights of UK/EU residents may be the first signs of movement. But, for businesses investing in the EU and the UK, progress on the basis of future trading between the two will be the more important signs of progress. One of the things we are pretty clear about is that the UK will not have current levels of access to the Single Market, nor, probably, to the Customs Union, which is critical for businesses with cross-border supply chains in Europe. There is likely to be softer language on movement of goods. Softer language on services will be harder to detect and progress harder to achieve. Much commentary has been about financial services, but legal services, for example, give rise to difficult issues not only of free movement but also continued mutual recognition of qualifications and rights to practice.

5. Transition is the key to a sensible Brexit

Whatever UK ministers may say, nobody seriously believes that the A50 deal – and detailed, long-term EU/UK arrangements – can be finalised in two years: there's too much, and it's just too complex. Transitional arrangements covering maybe the three to five years from 2019 are realistically the only way to provide a stable business environment until the final UK/EU and UK/third-country relationships are settled. Watch out for the first signs of the UK gently rowing back from its insistence that the European Court of Justice must be completely out of the picture by 2019 or that we'll pay our historic debts but nothing for the future. The continuing role of the Court and future contributions are critical to the possibility of a transitional agreement.

6. UK/third-country agreements are critical

Many critical UK relationships with non-EU countries are governed by EU/third-country agreements. When the UK leaves the EU, it will cease to be a party to those agreements. Replacements will be needed, and they won't come quickly. The hope is that sensible transitional arrangements will prevent a void opening up at the end of two years, for example, by rolling forward the 2007 EU-US Open Skies Agreement so the planes keep flying. But, whether dealt with initially in

transitional arrangements or in the longer term, watch out for the UK rushing into third-country deals too quickly. That will be the political temptation, but it will expose the UK's vulnerable negotiating position. Depending on your business model, a bad deal for the UK may be a good one for you.

7. It's not over 'til it's over

There's much talk of sectoral settlements, of ticking off issues one by one over the next two years. This may happen, and, if it does, there will be much trumpeting, especially by UK ministers. But, in terms of business planning, remember that nothing is finally settled until the whole exit package is settled. EU negotiations are notorious for going right up to the wire and beyond – stopping the clocks at 23.59 on deadline day. Last-minute rows about Gibraltar and Polish workers' rights could scupper the whole thing.

8. Timing is important

A50 gives two years (unless everyone agrees longer which is unlikely), so is 23.59 on 29 March 2019 the moment all is done or all is lost? Probably not. The European Parliament has to approve the final deal. The UK Parliament has been promised a vote before it goes to the EP. Current best thinking is all this will need six months. And what if the EP or the UK Parliament object? Will part of those six months be needed for more negotiations? There's nothing to watch out for here at the moment; in a year, we'll be looking for signs.

9. No deal is a real possibility

UK Ministers are fooling few people when they assert that no deal would be 'perfectly ok'. In [our earlier piece on the impact of President Trump's election](#), we highlighted the profound implications for the UK, and for those who do business here, if there is no deal. Business decisions over the next two years will be heavily risk-focused. We are already hearing about contingency plans for movement out of the UK in the banking and insurance sectors – not entire operations but enough for a sound base within the Remaining 27. This planning guards against specific sectoral problems but also recognizes the real risk of no deal. Understanding this risk is critical for business planning. Again, there are few signs at the moment either way; we'll need a closer look in 12 months or so.

10. Bureaucrats don't know best

This is hardly a controversial view even for a former bureaucrat, but the final point to bear in mind right now is that bureaucrats are doing the negotiating, and they need to understand sectoral issues and concerns. So make your views known. Discreet sectoral lobbying will be vital in London, Brussels and EU capitals where you operate. Use your governments. The Japanese Government/business Brexit analysis last year was far better than anything the UK Government or the Remaining 27 produced. Make sure that your sector's views are known.

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Please do not hesitate to call with any questions or concerns you may have. We're here to help.

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Read our [Brexit Fact Sheet: What You Need To Know About Triggering Article 50](#) for more information.

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***About Sir Paul Jenkins:**

From 2006 to 2014, Sir Paul Jenkins QC was the United Kingdom Government's most senior legal official, advising the governments of Prime Ministers Blair, Brown and Cameron. He is an acute observer of Brexit developments. Sir Paul Jenkins currently practices at Matrix Chambers.