Brexit: the clock is ticking

With the end of June deadline on the horizon & COVID-19 dominating national agendas, the EU & UK must soon decide on whether to extend the transition period or not…David Greene reports

Four years on from the Referendum and we are coming to crunch time for our future relationship with the EU after the UK's departure from the EU at the end of January 2020. By the end of June the EU and UK have to conclude whether they want an extension to the transition period or not. Absent an extension, a very limited agreement between the UK and EU looks likely but no agreement at all remains a severe possibility.

It is now three months since we left the EU. Sadly, life and death have intervened in the form of COVID-19 and this is a changed world from that which saw us formally depart the single market. Timetables were then set without the foresight of the crisis that has engulfed the world. Under that timetable we departed the EU with a transition period ending on 31 December 2020 during which face to face negotiations were to take place to establish some form of trade agreement for departure and the future relationship.

Article 126 of the Withdrawal Agreement provides for the transition period in which all that flows from EU membership is retained for the year to 31 December 2020. By Art 132 the EU and UK 'may, before 1 July 2020, adopt a single decision extending the TP for up to 1 or 2 years'. Absent an extension to the transition period there is little or no time to resolve anything other than a degree of order to the end of the transition period. The July date is set because if agreement were to be reached the legislative timetable dictates that it cannot be much after July for the detail to be added to the broad principles.

COVID-19 has already had a significant impact on the negotiations between the UK and EU with a full round of negotiations missed in March and only getting going in April. After those talks brickbats were thrown on both sides with negotiations beginning again on 20 April. Ahead of this round the UK lead negotiator David Frost publicly stated that the UK would not ask for an extension to the transition period or accept an extension if the EU offered it. This was repeated by Michael Gove after the April round.

All negotiations are held virtually. The EU and UK have had two further rounds of negotiation this month and are expected to consider the progress of negotiations after the final round of negotiations in the first week in June.

The EU Commission published its negotiating directives in February and its legal text translating those directives into the draft text of an agreement on 18 March. Importantly for legal services the draft agreement includes reference to cross-border trade in services.

The UK Government has kept its negotiating cards somewhat closer to its chest. Only on 19 May did it publish the draft legal text of a future free trade agreement The UK has stated its ambition on services. With one eye on the clock, it is now talking of a limited agreement based on the precedent of the EU Canadian agreement (CETA), the EU-Japan agreement or the very limited EU-Australia agreement.

In terms of an agreement on services, such as professional services, this is not great news. However, the published parts of the legal texts on both sides contemplate some deal in relation to services including effectively fly-in fly-out provision. In legal services, however, that also falls within the domestic competence of the national regulator. The competence of the EU only goes so far. CETA and the Japan agreement, like all free trade agreements, concentrate on goods. The Japan agreement was coined the 'Sancerre for Suzukis' deal. Although some provision for services is made in these agreements it is fairly limited and does not reflect the more ambitious line taken by both sides on services in these negotiations.

On the UK side fishing rights, not services or goods, seem to have taken centre stage, despite their limited stake in EU trading, with the UK seeing this as a strong negotiating tool and, perhaps, totemic for a seafaring nation. The EU seeks full rights in UK waters while the UK is seeking a much more limited agreement based on the precedent of Norway.

Litigators watching the bun fight will be looking at progress on the issue of the jurisdiction and enforcement arrangements currently covered by the Brussels Regulation. A huge sigh of relief went up when the UK Government announced that it proposed to apply to accede to the Lugano Convention, replacing Brussels with a slightly more dated reciprocal agreement with the EU and EFTA states. We have long argued Lugano to be essential in the trans-European market to the cross border enforcement of individual rights. Some politicians, however, see it as a single market instrument and rail at it for that reason.

That view is also reflected in European circles who covet Lugano accordingly. Indeed the picture on the EU side, which has a veto, is not so rosy. The Justice Commissioner has voiced opposition to UK accession. The EU negotiating team express Lugano as part of the negotiations and do not want to see it (and other civil justice issues) separated out. Absent a deal, or perhaps with a very limited deal, Lugano might fall victim to manoeuvring.

This will be very disappointing and the race is on to persuade all stakeholders of the importance of Lugano to individual rights and to trade. Absent Lugano there are mechanisms for recognition and enforcement on a bi-lateral basis but they are clunky and uncertain. You will be digging out the old texts. Perhaps, there's a silver lining in the Lugano cloud for the more mature practitioners who may remember something of the pre-EU days. NLJ

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