

## Brexit and UK Health Care

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There is no dedicated and standalone focus on health in the Brexit negotiations. The final position will be affected by multiple negotiation streams, so businesses must prepare for a wide range of outcomes.

One of the key, and most controversial, arguments for the United Kingdom's exit from the European Union was that Brexit would release additional funding for UK public health services. At this stage, there is still a wide range of options for the final Brexit deal so the question of additional funding is not yet answered.

The health sector is affected by multiple and parallel ongoing Brexit negotiations: trade, supply of goods, procurement, workforce, research, pharmacy and medicines, access to technologies and reciprocal health care are all highly relevant. There is no separate, standalone negotiation stream for health in the exit discussions, which means it is not always easy to assess the impact on the UK health sector.

Negotiation positions have been published in certain important areas, providing some signposts for their general direction. For example, the United Kingdom has published its position on workforce and availability of goods so it is easier to see the direction of travel in these areas.

In other areas the future picture is less clear; for example in science and innovation (including medical research), the United Kingdom has only set out its "vision" for the future of its partnership with the European Union. Progress in many areas is likely to be stalled unless key terms on trade and financial issues are resolved.

Health care businesses are advised to prepare for this uncertainty by including flexibility in their arrangements.

There are three key areas for health affected by Brexit: workforce, tariff and pricing, and procurement.

### HEALTH CARE WORKFORCE

In the immediate aftermath of the Brexit vote, many health care organisations expressed serious concerns about the right of EU health workers to remain in the United Kingdom, and the future recruitment of health care staff if there was loss of freedom of movement.

As far as the right to remain is concerned, something of an early comfort has been offered to the thousands of foreign health care professionals that bolster the country's services. The government has confirmed that EU citizens that are resident in the United Kingdom will continue, from a specified date that is not before March 2017, to benefit from rights to live and work in the United Kingdom.

The precise disentangling of health care worker's rights and obligations is more complicated, but the United Kingdom and European Union have published their positions. In late September this year, the EU taskforce published a RAG rated table setting out 60 workforce related areas. There is still divergence (red) on important issues and further discussion (yellow) to "deepen" understanding in others, but there are areas of convergence (green) in relation to some aspects of residence rights, frontier workers and social security co-ordination.

At the moment, it is likely that freedom of movement will end, but trade associations and representative bodies

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of NHS and other health care providers have called for post-Brexit immigration rules to allow health and care providers to continue to recruit from EU countries if they are unable to fill vacancies with resident workers.

A further concern, the recognition of professional qualifications, is as important as freedom of movement to employers of health care workers. Both the United Kingdom and the European Union have issued comforting signals on this subject and this will be an area where it is likely to be in both parties' interests to find resolution.

## **TRADE IMPORTS**

The outcome of the trade negotiations on customs and duties to be applied to goods and supplies between the United Kingdom and remaining EU Member States will be one of the most significant factors affecting the cost of doing business in the health care sector.

The European Union, taken as a whole, is the United Kingdom's largest trading partner. According to November 2017 UK parliamentary reports, UK exports to the European Union in 2016 were £241 billion, whilst UK imports from the EU were £312 billion: 53 per cent of all UK imports, representing an increase of 3 per cent on the previous year.

There are no reliable figures for overall National Health Service (NHS) imports but, given the percentage share of government health spend in the United Kingdom and the heavy reliance in the NHS on EU supplies of IT, infrastructure, health equipment and supplies, even marginal tariffs on the supply of goods would be costly, especially given existing financial pressures. Early and shared notifications have been made by the United Kingdom and the European Union to the World Trade Organization (WTO), committing to maintaining market access and seeking agreement on tariff apportionments. Until a final decision is reached, health care businesses should, at the very least, be taking the following steps in all their contractual arrangements to ensure that potential price changes have been taken into consideration:

- Review termination, change in law and force majeure provisions to prevent pricing changes from making contracts unaffordable.
- Check the tariff changes that may apply if the WTO rules are adopted, and allow for flexibility in pricing clauses.
- Map supply chains to check the impact of tariffs at different stages; this is particularly key for manufacturers of health care products.

## **HEALTH CARE PROCUREMENT**

There is a range of possible procurement regimes that may be adopted, including a bespoke regime, or reliance on the WTO Government Procurement Agreement (GPA). The United Kingdom is a member of the GPA as part of the European Union and may need to re-join after Brexit, although there are some arguments that a fresh application may not be necessary.

The GPA sets out procedures, thresholds and principles that apply to procurements by government bodies listed in the GPA. Some of these procedures will look and feel very familiar to procurement specialists and will ensure continuity of service.

Given the substantial intra EU-UK trade, there is considerable enthusiasm for ensuring that suppliers have confidence that any process is not only fair and transparent but also allows for effective remedies. The NHS will continue to want and need EU suppliers of health care goods, products, equipment and IT to provide services to the public; and likewise the EU market will want to access UK health care providers.

The procurement of NHS services has been a controversial topic; some commentators have argued Brexit can be used to reverse perceived privatisation of public services. In reality, the NHS procurement rules do not stem from European legislation, but from the NHS purchaser and provider split, and market economy in health, which has been a policy of successive governments for almost two decades. Any change in this area would therefore be a matter of policy change for the UK Government.

There is a high degree of flexibility in EU procurement rules for NHS procurements under the light touch regime. Interestingly, the GPA does not contain a similar light touch regime so there would be no clear GPA regime that applied. Even upon Brexit, however, NHS procurements and NHS choice are regulated by a series of standalone regulations that will not be affected by Brexit. Any change in this area would, again, be a matter of policy change for the government.

Planning for an uncertain outcome is always difficult, but businesses are advised to ensure contracts and trade arrangements have flexibility around pricing and future changes in law. Flexibility clauses may sometimes increase the price of doing business, as parties factor in the risk of changes, so it will be important to keep a

close and on-going watch on the negotiations.

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