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Brexit Deal Checklist Key Implications For Business

Key Implications for Business

Four and a half years after the UK voted to leave the EU, a deal between the UK and EU was finally reached. The expiry of the transition period on 31 December 2020 marked the start of a new relationship between the UK and the EU.

We have identified the key areas that are impacted by the Brexit deal (the Trade and Cooperation Agreement (TCA)) and outlined recommendations of what to consider for each of these areas.

Immediate planning in each of these areas is essential.

The global nature of our Firm and the clients we represent means that we have a number of experts who can provide advice that is tailored to your organisation and the challenges that you face.

If you would like help navigating the complicated, evolving landscape, please contact a member of our dedicated team of specialists **(contact details below)** or your usual Baker McKenzie contact.

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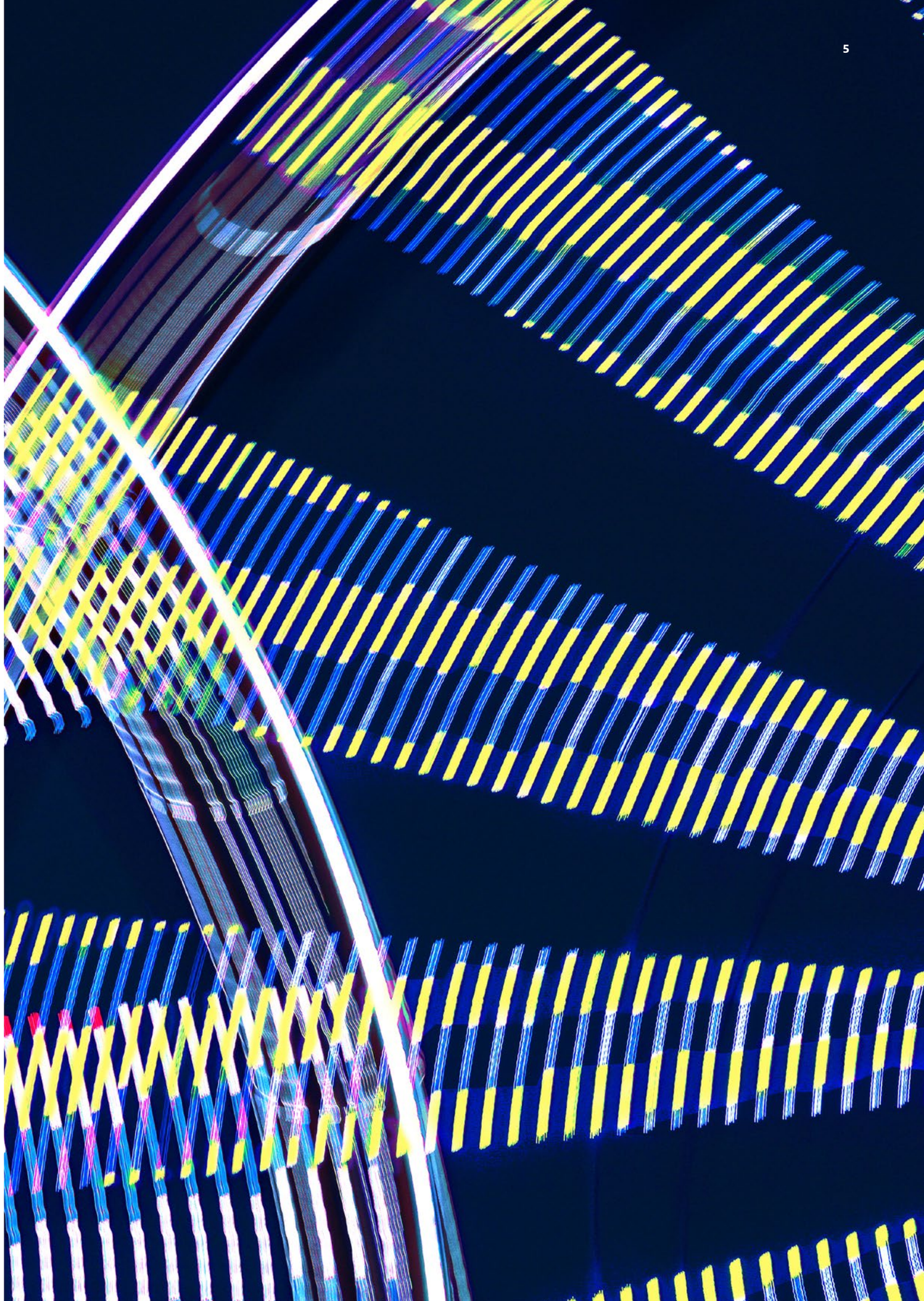


Product Regulatory

Key issues

General

- Although the TCA contains a number of provisions aimed at preventing unnecessary technical barriers to trade, products now need to comply with two different sets of regulations and compliance procedures which are placed on both the EU and Great Britain ("GB", which includes England, Scotland and Wales") markets from 1 January 2021.

- Companies in GB[1] previously qualifying as EU importers for product regulatory purposes have lost that status, with related obligations, liabilities and labelling requirements transferring to current EU distributors. In the same way, GB distributors now have GB importer status (with associated obligations) for product regulatory purposes if they are bringing products from the EU/EEA into GB for the GB market.

- British conformity assessment bodies have now lost their status as accredited entities for EU product conformity assessments, but the UK continues to accept products for the GB market that are CE-marked under certificates issued by EU conformity assessment bodies until 31 December 2021.

- GB-based authorised representatives and responsible persons are no longer recognised by the EU. Similarly, authorised representatives and responsible persons based in the EU are no longer recognised in GB as from 1 January 2021.

- UK companies no longer hold EU chemical (REACH) registrations and companies now need to comply with the new UK REACH regime.

- The new UK Conformity Assessment (UKCA) mark must be applied from 1 January 2021 to certain products for the GB market. In most cases, the CE mark can still be used for products for the GB market until 31 December 2021 but the UKCA mark must be used from 1 January 2022.

Pharmaceuticals and medical devices

- The TCA includes an Annex on medicinal products that provides for mutual recognition of Good Manufacturing Practice (GMP) inspections and certificates. This Annex also foresees that the UK and EU authorities should seek to cooperate from a regulatory point of view, within the framework of the TCA, with specific mention of promoting the adoption and implementation of internationally agreed scientific or technical guidelines. (We await further detail.) There will also be a Working Group on Medicinal Products - established in accordance with the TCA's governance structure - which will assist the Trade Specialised Committee on Technical Barriers to Trade.

- One issue where agreement failed to be reached was mutual recognition of batch testing. The UK will continue to waive batch testing requirements for UK imports from the EU for products placed on the market before January 2023. However, the EU will not be reciprocating. The UK's Association of the British Pharmaceutical Industry (ABPI) is lobbying for (i) both sides to agree a standalone Mutual Recognition Agreement (MRA) on batch testing and will be working with the EU's European Federation of Pharmaceutical Industries and Associations (EFPIA) on this issue, and (ii) for the UK to unilaterally extend its batch testing waiver for EU imports pending such an MRA.

- Despite the adoption of the TCA, medicines and medical devices are still subject to a new regulatory landscape in the UK, with the MHRA acting as the standalone regulator from 1 January 2021.

- Since 1 September 2020, the Medicines and Healthcare Regulatory Agency (MHRA) has published important guidance on the regulation of medicines and medical devices in GB and Northern Ireland (NI) from 1 January 2021. This guidance spreads out across dozens of documents covering a wide number of topics ranging from clinical trials, to licensing, imports and exports, and pharmacovigilance.

EU Compliance

- UK marketing authorisation holders (MAHs) are no longer recognised by the EU and some activities must be performed in the EU (or the EEA), e.g., related to pharmacovigilance and batch release.

- The EU no longer recognises UK Notified Bodies (NBs). A certificate issued by an EU-27 NB must cover any medical device requiring NB conformity assessment, if it is to be placed on the EU-27 market. The EU no longer recognises UK-based Authorised Representatives for medical devices.

- The threat of a no deal scenario in the last few months raised major concerns at the prospect of delays to vital medical supplies crossing the EU/UK border upon a no-deal Brexit. The adoption of a trade deal providing for zero tariffs and zero quotas on all goods that comply with the appropriate rules of origin, together with its Annex on medicinal products providing for the mutual recognition of GMP inspections and certificates should mitigate those concerns, at least to some extent.

UK Compliance

- The MHRA will now automatically "grandfather" existing marketing authorisations, etc., to be valid under a standalone UK system. Holders of converted EU marketing authorisations have to establish an MAH within the UK by 1 January 2023.

- The MAH for other UK marketing authorisations must be established in the UK or in the EU/EEA (but a UK located MAH will not be accepted in EU Member States). Likewise, companies may choose to establish their pharmacovigilance qualified person (QPPV) in the UK or the EU (but a UK located QPPV will not be accepted in EU Member states). If the QPPV is located in the EU, companies must nominate a UK contact person who reports to the EU QPPV.

- CE marking for medical devices will continue to be used and recognised in GB until 30 June 2023, and certificates issued by EEA notified bodies will continue to be valid for GB until such date.

- From 1 January 2021, all medical devices must be registered with the MHRA prior to their placement on the UK market (subject to grace periods that vary by device classification).

- Non-UK manufacturers must appoint a UK Responsible Person to register and act on their behalf.

NI Protocol

- Under the terms of the NI Protocol ("Protocol") in the withdrawal agreement, NI remains subject to EU pharmaceutical and medical devices legislation. This means that the MHRA must now apply a different set of rules and standards in NI from the rest of the UK.

- The EU and UK agreed on a phased approach until 31 December 2021, for the implementation of the Protocol in NI in areas such as batch testing, importation and the Falsified Medicines Directive.

Recommendations

General

- Assess supply chains for risk of EU and UK distributors acquiring importer status with related product compliance obligations and liabilities.

- Make arrangements to transfer to EU-27 conformity assessment bodies, authorised representatives and responsible persons and assess whether new UK responsible persons need to be identified.

- Plan to transfer chemical registrations and compliance ('only representative') roles from UK to EU entities.

- Verify EU and UK supply chains (including where REACH registrations were previously held) to determine whether action is required to ensure continued EU and UK compliance.

- Consider whether UKCA marking is needed for new products placed on the UK market.

Pharmaceuticals and medical devices

- Companies with Centrally Authorised Products (CAPs) held by UK entities, or with Mutual Recognition Procedure (MRP) / Decentralised Procedure (DCP) products with the UK as the Reference Member State (RMS), should have been transferred to the EU-27.

- Medical device companies using UK NBs should either transfer to an accredited EU branch of their UK NB or appoint a new NB in the EU-27 (and stockpile reserves in the meantime to cover any gaps in re-registration).

- Non-EU medical device manufacturers should ensure that they have an EU-based Authorised Representative appointed for the EU market and a UK-based Responsible Person for the UK market.

- Medical device manufacturers should ensure that they register their devices in the UK by the relevant transitional deadline.

1 Please note, we refer to GB as Northern Ireland ("NI") is subject to a separate regime.

Immigration

Key issues

- EEA nationals (including all EU citizens and Swiss nationals), who entered the UK before 31 December 2020, have their right to remain protected by the EU Settlement Scheme, which is open for applications until 30 June 2021.
- EEA nationals and their family members arriving in the UK from 1 January 2021 will still be able to come to the UK for visits in much the same way as they did before but for a maximum period of six months.
- If EEA nationals wish to come to the UK to work or to live long term, they will need to apply under the immigration rules system (primarily the Points-Based System), which has been overhauled with new rules which entered into force on 1 December 2020.
- Each EU and EEA state has its own immigration system and, therefore, UK citizens are now subject to the local requirements that might apply to UK nationals working in the EU in the event of no further agreement being reached.
- In its White Paper in December 2018, the UK government set out its plan to devise a "single immigration system" for skilled talent that is equally applicable to non-EU and EU migrants alike from 1 January 2021. The aim of the new system is to create a system where "it is workers' skills that matter, not which country they come from." This is very much in line with the recommendations of the Migration Advisory Committee earlier in 2020, but this is likely to cause difficulty for some employers that are reliant upon low-skilled migrants from the EU.
- The UK government planned to expand the current scheme to include medium-skilled roles (in addition to highly skilled workers), although this does not resolve the issue in relation to low-skilled migrants.
- Special arrangements exist between the Republic of Ireland and the UK. Irish citizens do not have to apply for any permission to live and work in the UK, as they continue to have the right to enter and live in the UK under the Common Travel Area.

Recommendations

- UK employers should consider reviewing/amending their HR processes to ensure these are fully compliant with the obligations arising under a sponsor licence in case the business has to fall back upon the Points-Based System arrangements when hiring EU nationals.

Financial Services

Key issues

- The TCA commits the EU and UK to allow access to operators from the other seeking to supply services through establishment (subject to compliance with host jurisdiction laws and regulations). The EU and UK also commit to ensuring that internationally agreed standards in the financial services sector are implemented and applied in their territories. Both the EU and UK preserve their right to adopt or maintain measures for prudential reasons, including in order to preserve financial stability and the integrity of financial markets.

- However, the TCA does not remove financial services licensing barriers arising from Brexit in any significant way. The UK has prioritised regulatory autonomy over alignment in its negotiations with the EU over financial services arrangements, and instead of blanket market access mechanisms is seeking regulatory and supervisory cooperation arrangements. This means that the UK will not be pursuing bespoke EU market access arrangements, but will instead rely on assessments of equivalence. Equivalence decisions are unilateral decisions that are outside the terms of the negotiated agreement.

- It is important to note that equivalence regimes do not cover the entirety of the financial services sector. For example, there is no equivalence regime for retail banking. Further, equivalence decisions may be unilaterally withdrawn.

- The UK issued a number of decisions in November 2020 granting equivalence to the EU in 22 areas. Together with these decisions, the UK issued a set of principles for the UK's equivalence framework, which is based on equivalent outcomes underpinned by compliance with internationally agreed standards and not necessarily technically equivalent rules.

- By contrast, the EU has not yet finished its equivalence assessments. The EU takes a technical, "detailed and granular" forward-looking approach to equivalence and regulatory divergence. The EU has expressed concern about the UK's plans for its future regulatory framework and the degree of divergence from the EU regime this might entail, and it is likely that the EU Commission will continue its equivalence assessments during the course of 2021 (and note that reforms tightening the EU's equivalence regime take effect in June 2021). Equivalence will only be granted by the EU Commission where it is in the EU's interest; for example, the EU Commission has granted equivalence on a time-limited basis for UK central securities depositories (CSDs) and for UK central counterparties (CCPs) where EU firms are dependent on the UK.

- UK Treasury's recent consultation on the Financial Services Future Regulatory Framework Review may further complicate the UK and EU positions on equivalence, as the Treasury is proposing wide ranging changes to the UK's financial services regulatory regime which perhaps anticipate future increasing divergence from parallel regulations in the EU. UK Treasury claims that onshoring EU legislation is not the optimal, long-term approach for UK regulation of financial services, and argues that there would be "significant disadvantages" to retaining the onshored regime over the long term. The Treasury's proposals include new "activity-specific" policy framework legislation covering key areas of regulation, which will allow for "more strategic policy input by the UK's democratic institutions". The approach would not need to follow the existing EU legislative file structure and, working with the regulators and industry stakeholders, UK Treasury will explore whether moving away from the EU legislative structure makes more sense in the UK context.

- For EU businesses that rely on "passports" to access the UK, passporting rights ceased on 31 December 2020. The UK authorities have announced temporary permissions regimes (TPRs) and measures around contractual continuity to allow firms to continue operating. Entities supervised by the Prudential Regulation Authority (PRA) may enter their TPRs by submitting an application for permission under Part 4A of the Financial Services and Markets Act 2000; the Financial Conduct Authority (FCA) has confirmed that firms wishing to enter the TPRs for inbound passporting EEA firms and investment funds must have submitted their notifications before 30 December 2020. Alternatively, a financial services contracts regime (FSCR) will enable EU passporting firms to continue to service UK contracts entered into on or before 31 December 2020 for a limited period, in order to wind down their UK business in an orderly fashion.

- For UK-based businesses accessing the EU, to date, the EU has announced limited transitional measures concerning CCPs and CSDs. Individual member states may put in place limited additional measures that vary from country to country. The EU has not established any EU-wide arrangements similar to the TPRs. Further, in many EU jurisdictions it is no longer possible for UK firms to service EU retail customers from the UK.

- The FCA and PRA have agreed memoranda of understanding (MOUs) with the European Securities and Markets Authority, the European Banking Authority, the European Insurance and Occupational Pensions Authority and EU member state regulators to allow cooperation and exchange of information. According to the declarations accompanying the TCA, the EU and UK aim to agree by March 2021 a MOU establishing a framework for regulatory cooperation on financial services, including among other things transparency and appropriate dialogue in the process of adoption, suspension and withdrawal of equivalence decisions.

Recommendations

- Financial services businesses should monitor announcements from relevant authorities and maintain dialogue with supervisors over planning and contingency measures, and they should not assume that any relevant equivalence decisions will be concluded.

- Given that licensing barriers exist from 1 January 2021, UK-based firms accessing the EU should consider "workarounds," such as booking business to certain jurisdictions, using back-to-back transactions and outsourcing, although European supervisors are adopting a restrictive approach to such practices. Strategies need to be adopted to address issues around contractual continuity if carrying on regulated activities in the EU. Again, take steps to review and re-paper stationery and contractual documentation.

- The ability of UK firms to continue providing services to retail customers resident in the EU is determined by national regimes. UK firms with EU retail customers need to decide on their approach to servicing existing contracts with those customers. Firms should take the steps available to continue to service customers in accordance with local law and national regulators' expectations. The FCA expects that firms will communicate with their customers in a timely and supportive manner, and treat them fairly.

- EU businesses that wish to maintain UK market access should have notified UK regulators of their intention to participate in relevant TPRs and should be preparing to apply for UK licences. Firms should also monitor UK-EU negotiations on equivalence. Workarounds for access may also be available (e.g., the UK's relatively generous Overseas Persons Exclusion).

Services

Key issues

General

- Under the TCA, impact for businesses will vary depending on which sector they operate in. Some sectors will see limited to no change, whereas in other sectors there will be additional requirements and standards and even a prohibition on the provision of certain services between the EU and the UK unless they are permitted under the WTO's General Agreement on Trade in Services (GATS).

Audiovisual

- The TCA expressly excludes audio-visual services from its scope. The AVMS Directive (AVSMD), the revised AVMSD and the country-of-origin principle therefore no longer applies. The European Convention on Transfrontier Television (ECTT) framework still applies, and the 20 EU countries that signed up to the ECTT must allow freedom of reception to services under UK jurisdiction. However, the way this right is given effect in each country may depend on how the ECTT has been implemented locally. The UK must also permit freedom of reception for services that originate in all countries that are party to the ECTT.

- The ECTT does not apply to video-on-demand (VOD) services, therefore VOD providers need to comply with AVMSD jurisdiction rules and seek local advice on the regulation and authorisation of VOD services.

- UK broadcasters no longer benefit from the country-of-origin principle under the EU Satellite and Cable Directive for the licensing of copyright material in cross-border satellite broadcasts.

Telecommunications

- As the EU Regulatory Framework is transposed into UK law through national legislation, there are no immediate consequences for the general telecom framework that applies in the UK. The existing national legislation continues to be valid and applicable. The UK has greater flexibility to make changes to the telecommunications framework (subject to commitments under the GATS).

- One area that has changed is mobile data roaming. From 1 January 2021, UK consumers (including employees of UK companies) are no longer able to rely on the EU Roaming Regulation, which guarantees surcharge-free roaming when travelling throughout EU and EEA countries. While surcharge-free roaming is not guaranteed from a legal perspective, mobile operators in the UK (Three, EE, O2 and Vodafone) have stated that they have no current plans to change their mobile roaming policies and the TCA commits the UK and EU to cooperating to promote "transparent and reasonable" roaming rates. The TCA also commits both the UK and EU to net neutrality.

- With respect to the cross-border provision of telecom services, a UK-established company continues to be able to provide cross-border telecom services into the EU. Under the GATS, signatory states (including all EU member states, the EU itself and the UK) have committed to liberalising their telecommunications markets, including enabling the cross-border provision of services, in accordance with common regulatory principles. The TCA reflects this. Nevertheless, some EU member states require telecommunications services providers to have a legal presence in an EU member state in order to obtain the necessary telecom authorisations (through the establishment of a subsidiary or branch/representative office). A UK-based entity would no longer fulfil this requirement. The TCA does however require that any such requirement is applied to all and also prohibits formal requirements for pre-authorisation.

Legal Services

- UK qualified lawyers may provide advice to clients on UK and public international law when located in an EEA member state using the title that they are permitted to use in the UK (e.g., solicitor, barrister) and without a requirement to requalify (though member states are still allowed to impose local registration rules on foreign attorneys, including UK qualified lawyers). The same applies to EU qualified lawyers advising clients when located in the UK (i.e., they may advise on the laws of the lawyer's country of qualification, EU law and public international law).

- The permission does not extend to UK lawyers advising on EU law or grant rights of audience before EU courts or administrative bodies.

- Note that UK law does not prohibit the provision of EU law advice by UK qualified lawyers. However, this may have implications for privilege in EU Commission competition investigations.

- UK production should quantify the impact of the loss of EU financial support and look for alternative funds.

Telecommunications

- Monitor developments for any divergence of the UK telecommunications regime from the current EU Regulatory Framework.

- UK-based entities that provide telecom services into countries in the EU/EEA should check whether there are any local laws that require the service provider to have a legal presence in an EU/EEA member state.

Recommendations

General

- Verify whether the TCA removes restrictions in the provision of services in your sector. If it does not, revisit your service delivery model urgently.

Audiovisual

- Ofcom-licensed media service providers should restructure their operations to secure an EU-27 broadcasting licence to maintain market access.

- UK broadcasters should secure IP protection and rights clearances for satellite broadcasts in individual EU member states.

Legal Services

- Confirm whether UK qualified in-house lawyers located in an EU member state (where that member state allows in-house lawyers to remain enrolled at the Bar) conform with the permissions granted in the TCA.

- Confirm with external counsel that they have appropriate arrangements in place to advise on EU law and preserve privilege (where applicable).

Commercial Contracts

Key issues

- **Governing law:** English law continues to be a good choice of law for contracts. This has not changed as a result of Brexit.
- **Forum for disputes:** Choosing English courts as the forum to resolve disputes (as opposed to arbitration) may result in a longer and more costly enforcement process. However, the UK has taken steps to join international conventions, which, if accepted, may reduce this time and cost. The Hague Convention on Choice of Court Agreements will apply to most commercial contracts entered into on or after 1 January 2021 where the parties agree a two way exclusive jurisdiction clause in favour of the English courts. This will allow streamlined enforcement in EU member states of English court judgments.
- **EU references:** Depending on how the EU is defined in a contract, a reference to the EU may not include the UK post-Brexit.
- **Consumer law:** The TCA commits the UK and the EU to broad alignment on the core principles of consumer law (but not the details) when it comes to online (but not offline) trade. In particular, the parties agree to require traders to act in good faith and abide by fair commercial practices and to provide comprehensive pre and post contractual information.

Recommendations

- **Governing Law:** Continue to use English law for contracts.
- **Forum for disputes:** Arbitration and the enforcement of arbitral awards are not affected by Brexit. If entering into a contract between a UK party and an EU-27 party, consider whether arbitration may be a more appropriate forum to resolve disputes. Consider choosing a two way, exclusive jurisdiction clause in favour of the English courts where appropriate (as opposed to an asymmetric or non-exclusive jurisdiction clause), in order that the Hague Convention on Choice of Court Agreements will apply. Monitor the status of the UK's accession to international conventions relating to the enforcement of court judgments.
- **EU references:** Check definitions in contract templates that refer to the EU against the relevant clauses, and consider whether references to the EU should be broadened to include the UK. Consider whether Incoterms need to be amended in light of which party will take on the customs clearance obligations on import into/ export from the UK and the EU. Reference to compliance with EU laws may need to include new equivalent UK laws.
- **Consumer contracts:** At this stage no immediate changes are required and regulatory drift is unlikely in the short to medium term so compliance with EU consumer law is likely to deliver substantive compliance with UK law as well.

Data Protection

Key issues

- **General Data Protection Regulation (GDPR) —** The GDPR no longer directly applies to the UK. However, the Data Protection Act 2018 will remain in force, which incorporates the GDPR into UK legislation with some minor amendments to take account of the UK's departure from the EU.
- **International data transfers** — Since 1 January 2021, the UK has become a "third country" for the purposes of international data transfers, which in normal circumstances would mean that transfers of personal data from the EEA to the UK need to be legitimised by appropriate safeguards, such as standard contractual clauses or binding corporate rules (BCRs). However, the European Commission is still considering whether to adopt a decision recognising that the UK provides an adequate level of data protection, such that these safeguards are not necessary. The TCA therefore provides that international data transfers from the EEA to the UK may continue without safeguards from 1 January 2021 for a period of four months, which will be automatically extended by a further two months if neither the UK nor the EU objects. This is on the condition that the UK continues to apply the GDPR (as it is incorporated into national law, known as the "UK GDPR"). In respect of the transfer of personal data from the UK to the EEA, the UK recognises all EEA countries, Gibraltar and the EU institutions as providing an adequate level of data protection, such that appropriate safeguards do not need to be put in place to legitimise these transfers. However, this designation may be withdrawn at any time.

Recommendations

- Continue to comply with the GDPR (including as it applies in the UK).
- Analyse data flows between the UK and the EEA to determine which may require safeguards in order to legitimise transfers in the event that the European Commission does not adopt an adequacy decision in respect of the UK, or the UK withdraws its adequacy decision in respect of the EEA.

Intellectual Property

Key issues

- **Exhaustion:** The TCA expressly gives the UK and EU respectively the right to determine when IP rights are exhausted.
- **Trademarks:** The "UK part" of already registered European Trade Marks (EUTMs) have been cloned automatically into an equivalent UK trademark registration with no administrative burden for the owner regarding the official register. The remainder of the EUTMs still cover the EU-27. Owners of pending EUTM applications will have to actively apply in the UK for equivalent national UK trademark protection under a new mechanism governed by UK law within a nine-month deadline following the UK's exit from the EU. Oppositions and invalidity actions at the European Intellectual Property Office that are based solely on a prior UK national right automatically fell away as "groundless" after 31 December 2020.
- **Parallel imports:** Goods sold in the UK may not be considered exhausted in the EEA and, therefore, parallel exports from the UK to the EEA may no longer be possible. The UK has taken steps to permit parallel imports from the EEA in the short term post-Brexit, but the longer-term position is unclear.
- **Patents:** Brexit does not affect existing patent laws in the UK and Europe (European Patent Convention (EPC)). The UK government has confirmed that the UK does not seek to participate in the Unitary Patent (UP) and Unified Patent Court (UPC) since Brexit.
- **Supplementary protection certificate (SPC):** Provisions to nationalise the SPC regime have been put in place.
- **Trade secrets:** The EU Trade Secrets Directive has been fully implemented in the UK; the changes to the previous laws were minimal.
- **Copyright:** The TCA commits the parties to maintain themselves as signatories to the major copyright and related rights treaties. There are no plans to implement the controversial EU Copyright Directive and copyright reforms in the UK.

Recommendations

- Any existing and new IP licences, agreements, etc., that include a definition of the EU (e.g., as the territory) should be checked to see whether this definition refers to the EU as constituted at the date of agreement or as constituted from time to time.
- Ongoing inter partes disputes involving the UK should be reviewed for strategic purposes.
- Businesses will potentially have greater control of parallel imports by third parties from the UK into EU/EEA states.
- Patents — business as usual, as Brexit does not affect the existing laws under the European Patent Convention.
- SPC — business as usual, which means that, in practice, the SPC remains the same.
- Copyright — business as usual, though licensees should check that their licences cover the UK outside of the EU.

Customs

Key issues

Tariff impact

- **Preferential tariffs:** Goods moving between the UK (with the exception of NI, for which there is a special regime) and the EU are not subject to tariffs or tariff rate quotas, provided that the goods meet the relevant rule of origin set out in the TCA. Goods that do not meet the rule of origin are subject to standard duties[2].
- **Rules of origin:** The TCA contains bespoke rules of origin for each tariff line. In order to benefit from preferential tariffs, goods generally need to be wholly obtained (e.g., grown, extracted etc.) in the EU or the UK, undergo significant manufacturing in the EU or UK, or have a certain proportion (generally more than 50%) of their materials by value originate within the EU or UK.
- **Free trade agreements:** There has been be a loss of duty relief under the EU Free Trade Agreements (FTAs) on imports into and exports from the UK. The UK has negotiated a number of continuity agreements which will largely transition many existing EU FTAs to apply in respect of the UK, with amendments.

Non-tariff impact

- Administrative burden of customs declarations on goods shipped from the UK (with the possible exception of NI) to the EU (and vice versa).
- In order to benefit from preferential duty rates, a proof of origin needs to be provided. This can take the form of (i) a Statement on Origin that the product is originating (precise language made out by the exporter on the invoice or other commercial document that describes the product), or (ii) the importer's knowledge that the product is originating, based on information such as the HS codes of the product and its components and/or the manufacturing process (similar to the self-certification provided for under the UK and EU's FTAs with Japan). Up to 31 December 2021 businesses making out a Statement on Origin do not need supplier's declarations from business suppliers in place when the goods are exported (but they must be confident that the goods do meet the relevant rules of origin). Businesses may be asked to retrospectively provide a supplier's declaration after this date.
- Risk of delays in getting goods customs cleared through the EU/UK border.
- The UK and EU have agreed to mutual recognition of each other's Authorised Economic Operator (AEO) programmes.

Recommendations

- Understand supply chains, where goods are moved from and to (including third countries, the UK and the EU), and what manufacturing takes place in the EU/UK, in order to ascertain which goods meet the rules of origin and to prepare proofs of origin.
- Calculate additional duties for non-originating goods, the financial impact on supply chains, and how to mitigate this.
- Consider Incoterms and consider who is responsible for any additional duties and customs clearance requirements.
- Consider which entities will act as importers into or exporters from the EU/UK and whether any formalities need to be completed for this.
- Scale up customs team/expertise.

2 i.e., third country duty rates in the EU Tariff for imports into the EU and third country duty rates in the UK Global Tariff for imports into the UK

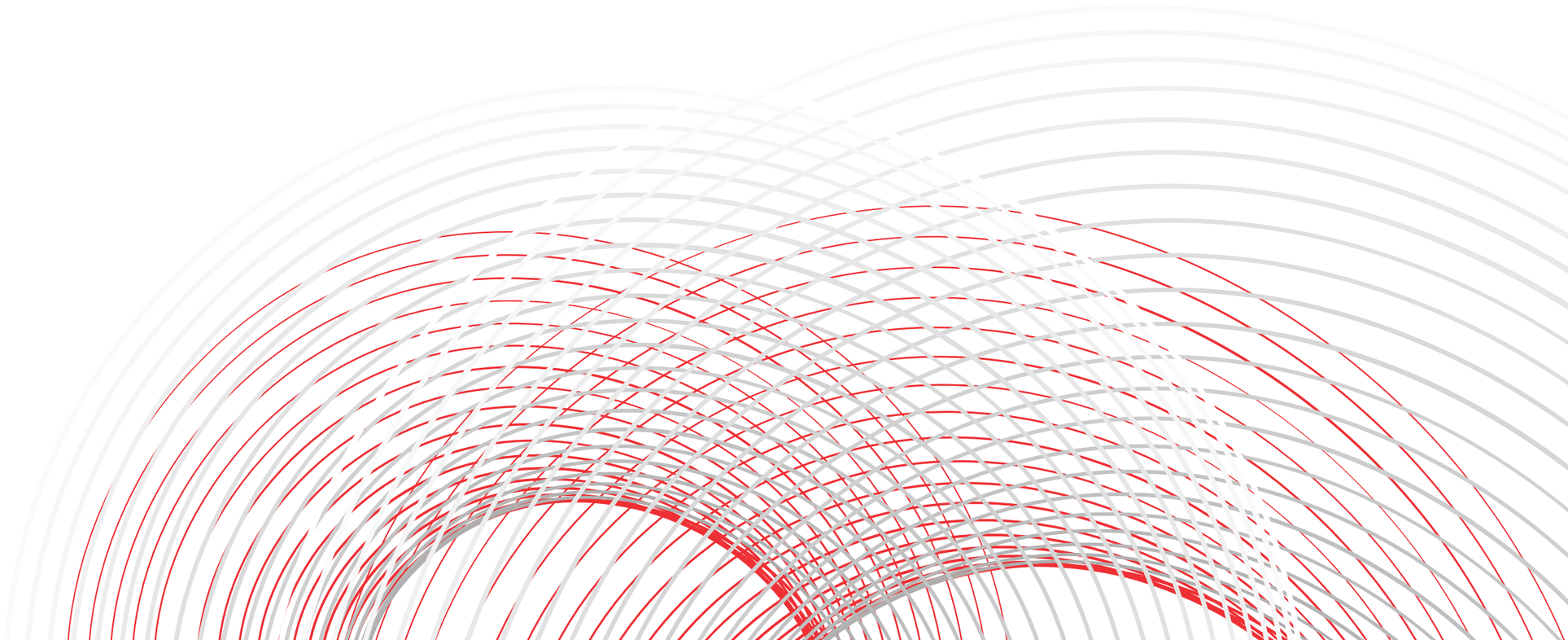
Employment

Key issues

- **Non-regression:** The UK the EU cannot regress from labour and social standards in force as of 31 December 2020, where that would affect trade or investment between them. It is unclear how much flexibility this will give the UK. For example, could departing from EU holiday pay calculation rules be said to affect trade or investment? In any event, there are currently no proposals to alter EU-derived employment law, so we don't anticipate any changes in this area in the immediate term, save in relation to European Works Councils (EWCs) as well as social security law. Future divergence, as opposed to regression, is permitted, subject to possible rebalancing measures.
- **European Works Councils (EWCs):** The TCA does not deal with EWCs. The current EWC regime no longer continues from 1 January 2021.
- The EU Commission's view is that central management or the representative agent can no longer be situated in the UK. Unless the employer has designated a new representative agent, the default representative agent is the member state employing the greatest number of employees.
- The same applies in respect of the governing law applicable to the EWC agreement if it is currently UK law.
- UK employees no longer count towards EWC thresholds. If the employer ceases to employ at least 1,000 employees in remaining member states (or no longer has 150 or more employees in at least two member states), it ceases to be subject to the EWC Directive even if an EWC is already established, although the EWC may continue to exist under domestic law. UK representatives may still be able to participate in EWCs subject to the individuals' agreement because the EWC Directive permits representatives from third countries (although an EWC agreement could equally state otherwise).
- **Social security:** EU social security rules continue to apply to any employee posted before 31 December 2020. For workers posted afterwards, the TCA has put in place measures so that social security benefits are coordinated. Broadly, it aims to ensure that only one set of rules applies to a person at any given time, so as to avoid the risk that such a person would pay double social security contributions or that no legislation applies to them at a given moment and are therefore left without social security protection.
- Nevertheless, employers sending employees from the UK to the EU and the EU to the UK still face more difficulties than existed under the EU regulatory framework that was applicable until 31 December 2020. For example, the TCA's detached worker rules, applicable to workers moving for less than 2 years, are only applicable to EU member states that elect for them to apply.

Recommendations

- **EWCs:** If an employer's central management/ representative agent is still based in the UK, it should take urgent advice to consider whether a new deemed host state applies from 1 January 2021, and whether an alternative host member state is possible or desirable.
- If the central management/representative agent is located in another member state, advice should be sought on what will happen to any UK representatives from 1 January 2021, if not already done so.
- **Social security:** Companies should identify any affected employees and seek advice on applicable rules.



Tax

Key issues

VAT

- The UK retains a VAT system and operates on the basis that the UK is a third country. The exception to this is for goods supplied to and from NI, which continue to be treated as intra-EU trade for VAT purposes.
- Businesses that move goods into the UK from the EU are generally subject to import VAT. Businesses that move goods from the UK to the EU also generally need to pay import VAT and this may have cash flow implications.
- As a result of the Protocol, goods moving between NI and the rest of the UK, are treated as imports/exports. UK VAT accounting generally remains the same with the exception of sales of goods between GB and NI by members of a UK VAT group. Members of a VAT group are subject to new compliance / reporting obligations to account for VAT on the movement of goods between NI and GB.
- Those supplying goods between NI and EU businesses and consumers need to notify HMRC that they are within the scope of the Protocol. When goods are supplied under the Protocol, an "XI" prefix needs to be put in front of the seller's VAT number when communicating with an EU customer or supplier.
- Businesses that rely on simplifications for goods moving into or out of the UK, including call-off stock, processing and repair relief, and triangulation, are no longer able to apply them in the same way as before. Businesses relying on a UK VAT registration to apply triangulation for goods moving between EU member states need to consider their eligibility to continue to use the simplification. They may be required to register in the EU.
- For businesses making distance sales of goods into the UK from the EU, the distance selling regime no longer applies, and there may be a requirement to register in the UK and charge VAT at the point of sale.
- Businesses selling goods from the UK into the EU may be required to newly register in the EU member state where goods are sold. A fiscal representative may be required depending on local rules.
- Marketplaces facilitating sales of goods in the UK to consumers may be required to account for VAT on those UK sales, and may be subject to new record-keeping and invoicing requirements.
- EU businesses that incur UK VAT, and are not UK VAT registered, are no longer able to make use of the EU (electronic) refund system and are required to apply under a manual refund system. UK businesses that incur EU VAT in member states where they are not VAT registered need to consider the local refund regime applicable to non-EU businesses.
- Businesses registered in the UK for Mini One Stop Shop (MOSS) to report digital services sold to consumers in the EU need to register for MOSS in an EU member state. Non-UK businesses reporting UK VAT on digital services via a MOSS registration in another member state need to register for VAT in the UK to account for UK VAT on these services.
- VAT may apply differently to cross-border supplies of advertising and broadcasting services, transfers and assignments of copyright, patents, licences, trademarks and similar rights, legal advice, banking services, supplies of staff and hire goods, among other things, where one counterparty is in the EU and one in the UK, particularly where the services are supplied to non-taxable persons. This is because the place of supply rules may be affected for such services.
- UK businesses that supply financial and insurance services (specified supplies) to EU customers may be able to recover VAT incurred on costs where previously the VAT was restricted from recovery.
- Travel operators need to review the application of the EU and UK Tour Operators Margin Scheme (TOMS) regimes.
- Freight transport services for consumers, and restaurant and catering services on passenger transport, between the EU and the UK are no longer intra-EU and may be subject to different place of supply rules.
- Invoicing requirements may change for UK businesses supplying services to EU customers.

Direct tax

- Much of tax law falls outside the competence of the EU, and relatively few direct tax directives have been adopted by the UK. The UK's status as a holding company location could be affected by the UK losing the benefit of the Parent-Subsidiary and Interest and Royalties Directives, under which payments between EU resident associated companies that meet the relevant conditions can be made free of withholding taxes.

Recommendations

- **VAT:** Businesses should carefully review their existing EU supply chains for goods, as the movements of goods between the UK and the EU are now subject to import and export procedures, and it is necessary to consider having both a UK and EU import hub for sales in those territories. Those businesses also need to consider updates to their processes to ensure VAT is correctly accounted for and recovered.
- Businesses providing cross-border services should also consider the impact of the numerous changes to the VAT laws on their arrangements, as most businesses with EU-UK trade will be impacted to some degree.
- **Direct tax:** There could be a withholding tax cost on certain inbound interest, royalty and (to a lesser extent) dividend payments between the UK and the EU-27 where currently there is none (e.g., a 10% withholding tax on interest payments between the UK and Italy), and this could mean that certain multinational structures need to be reviewed.

Export Controls

Key issues

- From 1 January 2021, additional export licensing requirements apply to movements of controlled goods from the UK into the EU, and vice versa. Certain dual-use exports from the UK to the EU that would not previously have required a licence will now do so. Similarly, exports from the EU to the UK that previously would not have required a licence are also affected.
- Existing UK export licences are no longer valid for exports out of the EU-27 member states to the rest of the world, and exporters are required to obtain new licences from another member state, as appropriate. Furthermore, exports from the UK to the rest of the world, which would previously have benefitted from a licence issued by another member state, no longer do so.
- There is no guarantee for ongoing alignment of UK and EU export control laws. As a result the structure and implementation of these export licensing regimes could change and diverge in future (including as a result of proposals to reform the EU's export control legislation in early 2021).

Recommendations

- Understand how your exports from the UK into the EU and vice versa are affected by the new licensing requirements.
- Check whether exports of controlled items from the UK previously made under a licence issued by an EU-27 competent authority require a licence granted by the UK authority, or from the EU-27 now require a licence granted by an EU-27 competent authority.
- To continue making controlled exports from the EU, UK companies should ensure there is an EU-incorporated contracting party to apply for export licences going forwards. Accordingly, consider establishing exporting entities in the UK for exports from the UK, and in the EU for exports from the EU.
- Follow developments in the ongoing process to modernise EU export control legislation, and any equivalent future proposals to reform UK export control laws.

Sanctions

Key issues

- Under the TCA, sanctions legislation agreed at EU level no longer automatically applies in the UK, and the UK is adopting and implementing an autonomous sanctions regime (although the UK continues to impose UN sanctions). The drafting of the UK sanctions legislation differs in a number of important ways from the drafting of the relevant EU regimes.
- From a sanctions policy perspective, the UK may diverge from the EU and adopt a more aggressive approach in a number of areas, and there will also be divergences in respect of which individuals and entities are subject to UK sanctions. The UK has already introduced its own human rights-focused sanctions regime under the new UK framework. The UK is also introducing changes from a sanctions licensing perspective.
- Companies operating in the UK and EU therefore need to comply with a new set of rules, and monitor any divergences in regimes.
- In particular, the UK's status as a third country in respect of the EU has a number of important implications for companies affected by the imposition of sectoral sanctions against Russia (aimed at restricting the ability to deal in certain sectors of the Russian economy and with certain Russian entities, or their subsidiaries).

Recommendations

- Review the new UK sanctions legislation to assess how changes to the UK regime impacts upon your business.
- Screen customers and counterparties against the new UK-specific list of sanctions targets, and ensure screening procedures maintain ongoing coverage for EU sanctions targets.
- Consider the impact of dealings in Russia and, in particular, with Russian entities (or their subsidiaries), given the notable potential impacts in this area.

Competition

Key issues

- **UK regime:** The substantive application of competition law remains essentially the same and there are no fundamental changes to the previous UK competition law regime. Previously, UK regulators and English courts had an obligation to interpret UK competition law consistently with EU law. This changes to an obligation to ensure that there is no inconsistency with pre-Brexit EU case law, unless there is an appropriate reason in light of specified circumstances to depart from that position. These specified circumstances are very broad, including where there are differences between markets in the UK and markets in the EU, and where there have been developments in forms of economic activity. This means that since 1 January 2021, the UK Competition & Markets Authority (CMA), sectoral regulators and English courts have flexibility to depart from pre-Brexit EU case law. However, the TCA wording relating to competition tightly mirrors that of the EU legislation, such that our view is that a material departure is unlikely.

Enforcement

- The CMA and UK sectoral regulators no longer have the power to enforce EU competition law in the UK, and they are only be able to investigate anti-competitive conduct under UK competition law that affects UK markets. Similarly, the EU Commission no longer has the ability to open investigations into cases involving anti-competitive agreements or conduct with effects confined to the UK, but continues to have the power under EU law to investigate UK firms if they engage in conduct or arrangements that have an effect on competition within the EEA.

- What this means is that, in practice, there will potentially be dual antitrust investigations by the CMA and the EU Commission where both the EU and the UK, in parallel, open an investigation and impose fines/or and other remedies for anti-competitive conduct affecting both the EU and the UK.

- Ongoing investigations: The EU Commission retained jurisdiction over EU competition law investigations that it initiated before 31 December 2020. These are known as "EU Continued Competence Cases". Since 1 January 2021, the CMA may not investigate the same conduct or agreement that is already the subject of an EU investigation (what constitutes the same conduct or agreement will no doubt be litigated).

- The CMA may open its own investigation into competition concerns which are the subject of an EU Continued Competence Case insofar as those concerns relate to effects arising from conduct after 31 December 2020.

- Therefore, businesses that are participating in alleged infringements that are being investigated by the EU Commission and that were not brought to an end by 31 December 2020 are at risk of the CMA opening a further investigation into such alleged infringements as may exist following that date.

Merger control

- There is a material change in the merger control field. The UK is no longer part of the EU "one-stop shop" notification procedure for merger control. UK turnover is no longer relevant for determining whether a merger satisfies the EU jurisdictional thresholds. Large global deals with substantive UK issues may need to be notified separately to the EU and the UK.

- If the EU Commission issued a merger clearance decision on or before 31 December 2020, the CMA has no jurisdiction to review that same transaction (subject to a referral request to the CMA having already been granted under Article 9 EU Merger Regulation) unless the decision is annulled, in full or in part, following an appeal.

State aid

- The UK is no longer bound to follow the EU State aid rules. In place of these rules, it must introduce its own independent system of subsidy control.

- The design of the new system must incorporate certain broad principles that are strongly influenced by the EU's State aid regime and must include an independent body (although the UK has full discretion over the functions of that body e.g., whether that body conducts ex ante review of subsidies).

- The TCA also includes provisions on transparency, the judicial review of subsidy decisions in national courts, and a reciprocal mechanism for each party to challenge a subsidy granted by the other party that is causing or is at risk of causing significant harm to its industries.

Damages actions

- Antitrust decisions by the EU Commission reached before 31 December 2020, as well as decisions in relation to EU Continued Competence Cases, can still form the basis of follow-on damages claims. However, claimants who wish to pursue follow-on damages claims in English courts are no longer able to rely on an infringement decision under EU law reached by the EU Commission in respect of (i) cases initiated after 31 December 2020 or (ii) cases initiated, but not decided, before 31 December 2020 but which are not EU Continued Competence Cases; as a binding finding of an infringement under UK competition law. They are, however be strongly persuasive evidence in all likelihood.

- In relation to standalone actions, these can still be brought from 1 January 2021 in relation to infringements of the EU prohibitions (either on their own or in parallel with the UK prohibitions) where these infringements occurred before 31 December 2020.

Supply Chains

- A number of EU Block Exemption Regulations exempt certain categories of agreements from the EU prohibition on anti-competitive agreements. These relate to distribution agreements, motor vehicles, research and development, technology transfers, specialisation, liner shipping consortia, and road, rail and inland waterway transport. These block exemptions are preserved in UK law. The retained exemptions continue to operate as exemptions from UK prohibitions on anti-competitive agreements. Agreements that benefitted from the EU block exemptions and the UK parallel exemptions before 31 December 2020 continue to benefit from the EU block exemption regulations as incorporated into domestic law after that date (so long as they continue to comply with the requirements of the retained exemptions).

- In addition, companies entering into new agreements from 1 January 2021 are also able to benefit from the retained exemptions provided they meet the relevant criteria of those exemptions.

Recommendations

Mergers

- Consider the impact of dual UK and EU merger filings on deal planning, timetables, and strategy. This will result in additional burden for the CMA is not a "light touch" authority when it considers there is a possible issue.

- Note that the CMA may issue "initial enforcement orders" (essentially, a worldwide freeze order) in relation to completed mergers (including completed mergers which were notified to the EU Commission). If the parties decide to complete such mergers without notifying the CMA, there is a risk that the CMA could subsequently investigate, impose an initial enforcement order, and/or ultimately prohibit the merger or require other remedies to resolve competition concerns that could arise.

Enforcement

- For cartel cases, the fact that a party has made a leniency application to the EU Commission whether before or after 31 December 2020 does not provide it with any protection from penalties with respect to any UK investigation.

- Companies should consider whether it is necessary to make a leniency application to both the CMA and the EU Commission in all relevant cases (as with other active enforcement jurisdictions).

- If a leniency application has already been made to the EU Commission, consider whether the conduct which has been reported also concerns the UK market and if so, carry out a risk-based analysis to inform the reporting strategy in the UK.

- Businesses with activities in the UK and EU-27 need to ensure that their agreements and practices continue to be both EU and UK competition law-compliant.

Damages Actions

- Claimants can continue to rely on UK infringement decisions in pursuing follow-on damages claims in the UK. The ability to bring standalone actions in relation to infringements of UK competition law remains unchanged.

Supply Chains

- Continue to draft agreements so that they fall within the scope of the relevant EU block exemption regulations.

Public Procurement

Key issues

- The TCA incorporates and supplements key provisions of the World Trade Organisation's Government Procurement Agreement (GPA), of which the EU and the UK are both signatories. The GPA is a multilateral treaty with the aim of opening up procurement markets between participating states. It applies to procurements conducted by certain specified entities, and in specified sectors (falling broadly under the headings of goods, services, and construction services).

- To the extent that a procurement is subject to the GPA, the TCA builds on this by setting out a number of other guarantees designed to encourage the participation of UK businesses in the procurements of the EU and its Member States (and vice versa). In particular, the TCA contains provisions focused on:

  - ensuring procurements are conducted using electronic means, and that notifications of procurement processes are published online;

  - preventing the exclusion of suppliers from a procurement solely on the basis that they do not have prior experience in the territory in question;

  - guaranteeing a sufficient number of suppliers are invited to participate in a procurement exercise to ensure genuine competition; and

  - confirming that procurement processes are subject to sufficiently independent and impartial review processes, that offer rapid interim measures (including the suspension of a procurement process, or performance of a resulting contract), and access to longer term corrective action.

- In addition, where a procurement is not subject to the GPA (and it is not of a type otherwise specifically provided for in the TCA's provisions), the TCA requires the UK and the EU to afford treatment no less favourable than the treatment afforded to each party's own suppliers in such processes.

Recommendations

- While the provisions of the TCA vis-à-vis public procurement are welcome, and provide some protections against economic nationalism for suppliers, they are less wide ranging than measures previously available under EU law. In particular, while the scope of procurements subject to GPA (and, by extension, TCA) protections is relatively wide-ranging, businesses will need to consider whether a particular procurement is conducted by a specified entity in a specified sector (as delineated in the Annexes of the GPA) in order to understand exactly the scope of protections from which they benefit. We are well-equipped to advise clients on such considerations.

- In addition, the UK Government published a green paper on public procurement in mid-December 2020 which aims to "*speed up and simplify procurement processes*" and includes "*overhauling our outdated public procurement regime*". It will therefore be important for suppliers to UK public bodies to keep abreast of how the UK's procurement regime may be reformed within the confines of its international obligations under the TCA.

Public Law

Key issues

- We anticipate that we will continue to see an increase in secondary legislation that is introduced by the UK Government under significant time pressure (e.g. to try to address deficiencies in the legal framework arising from Brexit). This could mean that secondary legislation is passed that is legally flawed and could be challenged by judicial review.

- Indeed, two key pieces of Brexit legislation, namely the European Union (Withdrawal) 2018 and the European Union (Withdrawal Agreement) 2020, are likely to generate high volumes of litigation, very likely to be brought by way of judicial review. This is because the two Acts:

  - are not clearly drafted in respect of key areas including, in particular (i) how the principle that retained EU law is supreme to domestic law will operate from 1 January 2021 onwards, and (ii) what status previously directly effective EU law (i.e. regulations) will have in the hierarchy of English law (e.g. as akin to primary or secondary legislation); and

  - hand significant powers to the Government to shape how EU law is retained within domestic law after Brexit, with relatively scant provision for Parliamentary oversight.

Recommendations

- The practical implications of such developments are likely to be highly sector-specific. Accordingly, we would encourage clients who are concerned about the implications of potential new legislation, or broader regulatory frameworks, for their businesses post-Brexit to contact us.

Brexit
How We Can Help

Baker McKenzie's dedicated team can help you assess the impact of Brexit on your business. We have identified the key challenges that you should be considering as part of your Brexit strategy.

Please contact one of our specialists for further information.

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