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McKenzie.**

A close-up photograph of two flags. The Union Jack (United Kingdom flag) is on the left, showing its characteristic red, white, and blue diagonal stripes. The European Union flag is on the right, featuring a blue field with a circle of twelve gold stars. The two flags are partially overlapping, with the Union Jack appearing to be behind the EU flag.

# The road to Brexit

MARCH 2017

In her speech at Lancaster House in January, Prime Minister Theresa May set the UK on a course to 'Hard Brexit'.

Continued membership of the Single Market via the EEA – the so-called Norway model – would demand continued free movement of people, unacceptable to many in the vote leave movement. The customs union – or Turkey model – would prevent the UK from negotiating its own trade relationships outside the EU. And so it was determined that the UK would forge its own path to future relations with the EU.

As companies develop their risk planning, many now do so on the basis that the UK will agree a new Free Trade Agreement (FTA) with the EU. But what does this mean in real terms, and will the UK be able to secure a bespoke and mutually-beneficial agreement with the remaining EU-27 Member States? What would be the impact for the business community of a default to World Trade Organisation (WTO) rules?

**In a special one-day event, Baker McKenzie explored the next phase of the Brexit process, as the UK prepares to trigger Article 50, whilst the EU marks its 60th birthday.**

## FTA: Far too arduous?

Open Europe has calculated that the average timetable for negotiating an FTA is between four and seven years. The UK must handle this process within two years and in addition to the negotiations themselves, it faces several hurdles in the process:

- The European Commission has called for the UK to pay a €60 billion bill before the negotiations can even begin.
- Scotland is pushing for a second independence referendum at the close of the EU negotiation period.
- European governments are working to damp down rising secessionist movements, in areas including Catalonia, Flanders and the Basque region, so any 'independence' moves might be difficult politically.
- The European Parliament must consent to the final arrangement after it has been agreed at Council level. This requires majority approval on a 'take it or leave it' basis. Member States might then have to ratify at national level if the FTA is a 'mixed agreement'.
- The UK will also be attempting to determine its future trading relationships with the rest of the world. The United States, Canada, Brazil, India, the Gulf States, Australia and New Zealand have all been singled out as primary targets for FTAs.
- Questions may remain even with the establishment of an FTA: On the goods side, only goods which are covered by the FTA and which "originate" in either the UK or the EU27 will benefit from preferential treatment. On the services side, FTAs have been ineffective in liberalising services to date. The UK, particularly the City of London, will be seeking a new way forward with the EU27.



Rules of origin vary across different FTAs and proving origin can be burdensome. Trade in goods under a UK-EU27 FTA could therefore be significantly different to under the Single Market, and companies should evaluate the impact on their supply chains.

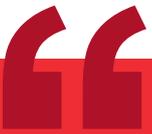
JESSICA MUTTON



FTAs do offer exceptions from Most Favoured Nation status, provided they cover substantially all products. This means you can have preferential rates in an FTA, without having to offer the same basis to all other third countries.

SUNNY MANN





GATS covers all services except those controlled by government. Additional agreements exist on Financial Services and Telecommunications, but the EU is protective of those areas and access is somewhat limited.

DANIEL LUND



Tariffs and other barriers are a real concern across the board, but particularly in sectors with highly integrated supply chains, including the pharma, chemical, aerospace, defence and automotive sectors.

JENNY REVIS

## WTO: The 'cliff edge'

Once considered the cliff edge, trading on the basis of WTO rules has moved from the unthinkable to increasingly likely, and we are planning for this contingency.

The WTO solution has real implications. Goods that are currently moving between EU and UK without tariffs will no longer be able to do so, and WTO rules on services are limited.

The ability to seek redress, when the entry of goods or services to a market is impeded, is restricted under WTO rules. Companies cannot take cases directly to the WTO, but must present them to their government, which can then decide whether to take the case to the WTO. Inevitably, this

demands an element of political consideration and business and national interests will not always be aligned.

Tariffs and other barriers are a concern across the board, but will be felt particularly in sectors with heavy integration of their supply chains, where different parts are moving back and forth between the UK and EU.

Companies should also expect extra vigilance from the UK government in collecting customs duties post-Brexit. Before, a percentage of those funds was remitted back to the EU; in the new world order, they will be retained in the UK as revenue.

## Provision of services

### WTO

- The WTO does offer some services provisions under its General Agreement on Trade in Services (GATS), which aims to remove restrictions and internal governmental regulations in the area of services delivery that are considered 'barriers to trade'. The GATS covers almost all internationally-traded services, and each WTO Member lists in its National Schedule those services for which it wishes to guarantee access to foreign suppliers. The commitments made by WTO Members apply on a non-discriminatory basis to all other WTO Members.
- A group of 54 countries within the WTO began negotiating their own augmentation to GATS. Some progress was made until November 2016, when the process was delayed following the election of Donald Trump in the US and in light of concerns from some about EU Data Protection and Privacy rules.
- Most Favoured Nation (MFN) clauses apply to services in the same way as goods.

### FTA

- FTAs contain market-access commitments and exemptions on a number of services sectors, and those commitment schedules can run to 400 pages, often including separate chapters on the provision of telecoms and financial services.

### Lessons from CETA

The EU-Canada FTA, known as CETA (the Comprehensive Economic and Trade Agreement) introduced to the EU the concept of the 'negative list'.

With a negative list, all services fall in scope unless they are specifically exempted, which helps to ensure new services, such as cloud computing, are captured in the agreement. Once the negative list has been agreed, negotiating parties cannot simply add new elements.

In negotiating with the EU, as opposed to other nations, the UK is dealing with a legal construct rather than a sovereign state. The EU can be challenged for acting outside its legal competency and authority, and thus cannot be approached in the same way as the US or Canada, for example. Doubts exist as to what the EU has the capacity and competency to approve and this is unclear from a services perspective.

# Audio-visual sector post-Brexit



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The audio-visual sector's road to Brexit can be expected to be particularly contentious. Governments are protective of media plurality, local cultural output and the need to protect consumers from inappropriate content. Protectionist measures to boost the local media sector are common, and tend to be justified under the rubric of the "cultural exception". A nation must be allowed to protect its cultural voice in the world.

75% of broadcasters with Ofcom licenses serve one or more EU 27 countries. They will be keen to preserve that access to the continent. But free trade agreements have been singularly unsuccessful in unlocking audio-visual industries. The Transfrontier Television Convention, which exists independently of the EU, offers some workarounds for UK based broadcasters in securing EU27 access. But the Convention has little enforcement 'teeth', is not adhered to by all European states and has not been updated for audio-visual online services, so risks becoming increasingly obsolete. At the same time, we see protectionist measures in France, Germany and other EU states seeking to impose levies on cross-border audio-visual online services to protect local cultural output. It may be expected similar laws would target the post Brexit audio-visual sector. With the possible exception of FinTech, it is difficult to think of a more multi-cultural sector than AV, which employs a geographically expansive and culturally diverse workforce.

It is not uncommon for production companies, for example, to shoot in locations across Europe, which requires sending employees to work in a variety of jurisdictions. Securing permission for people to work in Europe may be less simple than working with a single entity in the form of the EU. As a third country, the UK may be forced to deal with 27 different national bodies. Meanwhile, there are requirements in the sector to include a certain quantity of 'local origin content'. At present, there are certain workarounds for the UK, which offer an extended definition of European works under the Transfrontier Television Convention, but EU legislation may change to restrict this.

As well as considering whether they need to secure an EU 27 broadcasting licence to maintain market access, companies will also have to consider how they structure intra-group royalty and dividend flows. Multinationals often choose the UK as a hub to licence EU27 subsidiaries to serve local markets. The flow of dividends and royalties intra group from that structure benefits from EU rules, which prevent any withholding taxes

being levied. Post Brexit, AV companies will have to consider whether there is a better commercial structure to adopt to take advantage of UK/EU 27 double taxation treaties, which will replace EU rules on group royalties and dividends.

The EU's Audio-visual Media Services Directive governs EU-wide coordination of national legislation on all AV media: both traditional TV broadcasts and on-demand services. This is equivalent to the financial services passport and will be another challenge for the sector once it falls away. Protectionist barriers are already going up within the EU, for example, Germany is seeking payment for providing services to German consumers, so protectionist barriers for those outside the union are expected to be even more rampant.

These are just some of the issues facing the AV sector alone... In the long list of priorities for the UK and foreign governments, many of these queries may remain unsolved for some time, as the negotiators work through a very lengthy to-do list.



Governments are protective of media plurality, local cultural output and the need to protect consumers from inappropriate content... A nation must be allowed to protect its cultural voice in the world.

BILL BATCHELOR

# EU law post-Brexit

Upon leaving the European Union, all EU law will become UK law under the Great Repeal Bill and will then be repealed or amended on a case-by-case basis.

It is the UK's position that it will remain a compliant EU citizen throughout the exit negotiations, until the moment the UK leaves the union. As such, it will continue to comply with EU laws and will implement any new laws, such as the General Data Protection Regulation, that take effect during the two-year period of exit negotiations.

Thereafter, there are no guarantees as to how much the law may change. However, to benefit from any sort of equivalence regime with the EU, the UK will be expected to maintain certain regulatory standards, which may mean little real change in everyday business practices. Similarly, UK companies that do business within the EU will likely maintain EU standards for their domestic business, for ease of trade in the EU, as the alternative of dual-track compliance processes would otherwise be too burdensome.



Many in the UK claim to hate EU regulation, but it is often the case that those who do so are not able to name a single, specific measure that they want to see removed.

ROSS DENTON

# Business diplomacy

*With the Great Repeal Bill comes potential opportunity for the business community to shape the future legal landscape. James Small, of counsel at the Toronto office of Baker McKenzie, was instrumental in the CETA negotiations between Canada and Europe. In a conversation with competition partner Samantha Mobley, he shares his expertise.*



Let me start by saying that lobbying and business diplomacy are very different. Lobbying means influencing your home country's domestic agenda. In business diplomacy, you are attempting to influence the domestic agenda in another country. This requires getting in front of your own government and then attempting, on a bi- or a multi-lateral basis, to work with other countries to further your interests in that other country.

It's important to remember that in Europe, the types of conversations we are having today simply aren't taking place. People aren't sitting in a room and considering the impact of Brexit on supply chains and so forth. These meetings are a great start, but we need to go a step further and get European governments to think about these issues. This is where business diplomacy comes into play.



**How do you discern the interests of the EU27 governments, to see where business interest is aligned?** ?



There is a tendency to follow the party line in Brussels, but we must also remember that the EU is a legal construct and much of the lobbying is done at a Member State level. Leaving the EU is allowed for as a provision of the Lisbon Treaty, so it would be wrong for the EU to take an obstructionist approach. That said, any change to EU directives and regulations must be in EU interests and we must keep this in mind to get the result we want.



**How do you discern what is in the interest of the UK government, to see where business interest is aligned?** ?



It is for a government to decide what is in its interest, but take a step back and consider your own company's agenda. For a lot of companies, having greater legal certainty on a number of the issues we've talked about today is an absolute priority and this can only be achieved through direct government to government negotiations, so it would be prudent to pursue this agenda first at home before going abroad.



**What does success or failure look like?** ?



The ultimate failure would be a breakdown in negotiations, which means both parties go into the abyss, but it is an obligation of the Treaties of Europe that states must conduct themselves in a 'neighbourly way'. Restoring legal certainty would certainly be a win from any successful negotiation.

One way to help achieve this success is to involve other third countries, which are equally desirous of the same outcome. Japan, the US and others are especially keen to resolve financial services issues, for example, and to avoid another financial crisis. There are numerous opportunities to work together with international partners to make sure the negotiations between the UK and the EU stay on track and produce the best possible result.

# Employment, immigration and data privacy

Absent the EU principle of free movement of people, the UK government must carve its own approach to immigration. Speculation abounds as to the fate of EU citizens already living in the UK, the ability to recruit internationally for highly-skilled roles and what system the government will adopt for EU citizens.

The only official statement from the government has been that there is 'no change in legal status' for EU citizens. As such, under the existing treaty rights, job seekers, workers, the self-employed, the self-sufficient and students all remain 'qualified persons' entitled to free movement, as do their family members.

Protecting that status is a priority for individuals and their employers, before the treaty rights fall away post-Brexit. Baker McKenzie immigration specialist Tony Haque reviews the status.

Under current rules:

- Those with five or more years of residence in the UK can apply for permanent residence, and then British citizenship.
- Those with less than five years can seek a residence card.
- Approximately 30% of applications are rejected. EU citizens have a right to appeal – but their family members do not. Appropriate documentation is vital.
- This process can be lengthy, with some applications taking months to process.

*It is thought that most of the 2.9 million EU nationals in the UK have taken no action to secure their immigration status.*

Additional considerations on the immigration landscape:

- Some EU countries do not allow for dual nationality.
- Family members are allowed to remain in the UK under treaty rights – but this right may fall away if their spouse applies for British citizenship.
- If the new free trade agreement with the EU has no provision for preferential treatment of EU citizens entering the UK, they will be treated as third country nationals and, as things currently stand, fall under the provisions of the existing Points Based System for non-EU nationals.
- There may be a greater scope for reciprocal arrangements with countries both inside and outside the EU.

Considerations for your company:

- Have a clear sense of how many employees are from EU-27 countries.
- Seeking a right to remain for employees as if they were from a third country, would guarantee their right to stay regardless of any deal agreed with the EU.
- Refresh your anti-discrimination policies. Taking a decision to hire a British national over an EU-27 citizen would be a discriminatory practice with no defence.
- Do you need to have a base in the EU, or to implement new training schemes, internships and other programmes to fill skills gaps that may be left by departing EU workers?
- What would constitute a skilled worker, under new guidelines? For third countries, this requires some aspect of managerial or supervisory elements within a role.

*Government relations teams should highlight industries that would struggle with a skills shortage and encourage the government to offer those industries more relaxed immigration rules.*

## Data Protection

Data can only be transferred outside the EU when there are certain safeguards in place, which allow an 'adequacy decision' to be awarded by the European Commission.

In the long list of Brexit negotiation requirements, winning an adequacy decision is unlikely to be the top priority. UK policy in providing data to national security agencies may be too relaxed for EU requirements.

Without an adequacy decision, an alternative will need to be put in place, or companies face fines of up to 4% for failing to comply with international data transfer rules.

Alternative paths include an increased reliance on Model Contract clauses, in which the data importer agrees to certain provisions and safeguards in terms of data security, or BCRs (best in class rules), whereby the whole organisation must abide by certain principles. BCRs are becoming more commonplace, but can take 12 months to implement and require sign-off by multiple Member States.



This generation of staff may be able to secure their right to stay in the UK. The problem may arise in five or 10 years, with the next generation. Natural attrition will occur and it will be a question of how easy it is to re-hire.

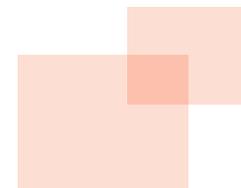
STEPHEN RATCLIFFE



Data protection law is undergoing a period of considerable change and some fluidity will be required within organisations to cope with those changes. People in the UK are starting to take more care about data privacy and their data rights and it would be politically unpopular to be seen rolling back data protections.

JULIA WILSON

# Your Brexit experts



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