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"No-Deal" Brexit Checklist Key Implications For Business

Key Implications for Business

The UK Government's refusal to request an extension to the Brexit transition period, along with the outstanding issues in the negotiations, means that the chances of the EU and the UK trading on a "no-deal" basis as of 1 January 2021 have increased.

It is vital, therefore, for companies to address the challenges to their business stemming from a no-deal scenario and prepare for such an eventuality.

We have identified the key areas that will be impacted by a no-deal Brexit and outlined recommendations of what to consider for each of these areas.

Forward 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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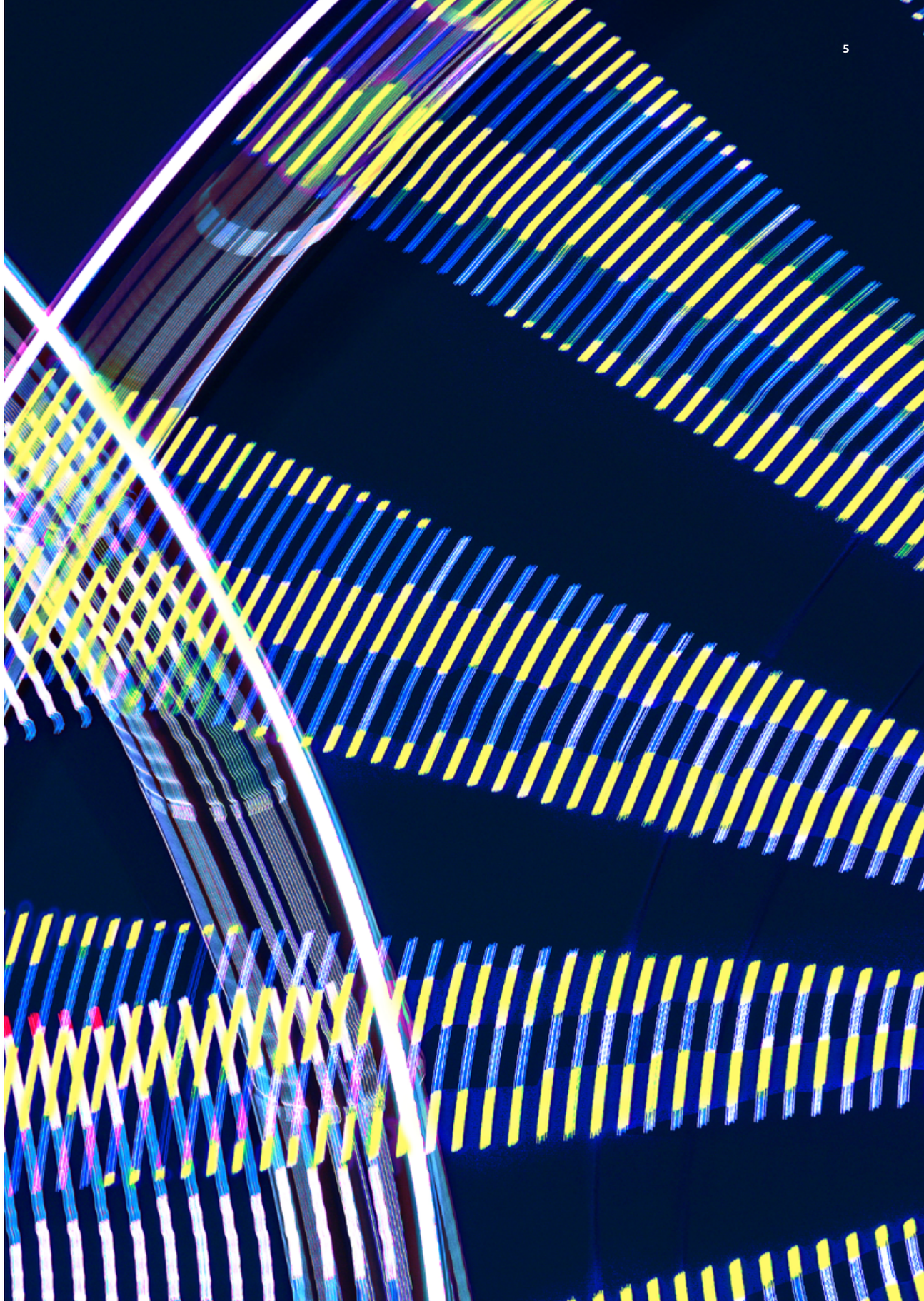

Product Regulatory

Key issues

General

- UK companies currently qualifying as EU importers for product regulatory purposes will lose that status, with related obligations, liabilities and labelling requirements transferring to current EU distributors. In the same way, UK distributors will have UK importer status (with associated obligations) for product regulatory purposes if they are bringing products from the EU/EEA into the UK for the UK market.

- UK conformity assessment bodies will lose their status as accredited entities for EU product conformity assessments, but the UK will continue to recognise EU conformity assessment bodies for a (currently undefined) period of time.

- UK-based authorised representatives and responsible persons will no longer be recognised by the EU. The UK will continue to recognise existing EU-based authorised representatives, although for certain products, new UK responsible persons must replace existing EU responsible persons (with grace periods for related label updates).

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

- The new UKCA conformity assessment mark must be applied from the date of Brexit to certain products for the UK market. In most cases, the CE mark can still be used for products for the UK market, although this will be for a time-limited period only.

Pharmaceuticals and medical devices

Current status:

- The government has withdrawn the no-deal guidance for pharmaceuticals and medical devices, issued before the last Brexit deadline, pending the outcome of the ongoing EU/UK negotiations for a future trade agreement.

- If an agreement is reached, we will hope to see a closer degree of harmonisation and a less bureaucratic regulatory divergence for the industry to navigate.

- If no deal is faced again, we assume that the previously prepared guidance will be reissued with few updates and so will be similar to that described below.

EU Compliance:

- UK marketing authorisation holders (MAHs) will not be 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 will no longer recognise 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 after Brexit. The EU will no longer recognise UK-based Authorised Representatives for medical devices.

UK Compliance:

- The Medicines and Healthcare products Regulatory Agency (MHRA) will automatically "grandfather" existing marketing authorisations, etc., to be valid under a standalone UK system.

- If the MAH is not established in the UK, it must arrange a UK-based contact person within four weeks of Brexit and all MAHs should ultimately be established in the UK within a transition period.

- From exit day, 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.

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 are currently 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.

- The UK Department of Health has again engaged (on 3 August 2020) with industry in a letter urging medicine and medical devices suppliers to prepare for Brexit by building up six weeks' worth of stocks on UK soil in case of disruption to imports (following warnings by the industry that their previous Brexit stockpile has been used up during the COVID-19 lockdown). Legislation prepared by the government also provides for emergency substitution powers for pharmacists in the event of medicine shortages due to Brexit.

- The UK Government will again be classifying medicines as Category 1 goods and medical devices as Category 2 goods (with chemicals for the purification of the UK's drinking water as Category 5 goods) and securing capacity on the Government Secured Freight Capacity for medical supplies by sea and, for some cases of life-giving products, by air, to try to alleviate likely hold ups at the borders of such key products.

Immigration

Key issues

- EEA nationals (including all EU citizens and Swiss nationals), who have entered the UK before the end of the transition period (31 December 2020) will 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 do now but for a maximum period of six months. If, however, they 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 is due to be overhauled with new rules coming in from 1 January 2021.
- Each EU and EEA state has its own immigration system and, therefore, UK citizens will be subject to the local requirements that might apply to UK nationals working in the EU in the event of no agreement being reached.
- Full details of the new immigration system are due to be published in the autumn but it is possible that they could be delayed due to COVID-19, in which case EEA nationals will have to apply under the existing immigration rules.
- In its White Paper in December 2018, the government set out its plan to devise a "single immigration system" for skilled talent that will be equally applicable to non-EU and EU migrants alike at the end of the transition period. The aim 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 the year, but this is likely to cause difficulty for some employers that are reliant upon low-skilled migrants from the EU. The government plans to expand the current scheme to include medium-skilled roles (in addition to highly skilled workers), although this will not resolve the issue in relation to low-skilled migrants. The government also plans to reduce the impact of losing low-skilled migrants from the EU, by allowing low-skilled migrants from low-risk countries (i.e., the US, Canada and Australia) to enter the UK for a time-limited period of up to one year, but they will then be subject to a cooling-off period and prohibited from returning to the UK for 12 months.
- Special arrangements exist between Ireland and the UK. Therefore, Irish citizens will not have to apply for any permission to live and work in the UK, as they will continue to have the right to enter and live in the UK under the Common Travel Area.

Recommendations

- 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

- A future EU/UK FTA is not expected to remove financial services licensing barriers arising from Brexit in any significant way. The UK is prioritising regulatory autonomy over alignment in its negotiations with the EU, and it 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. The UK and the EU aim to conclude their equivalence decisions by the end of the transition period, but this is not certain, not least in relation to all of approximately 40 outstanding assessments.

- 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 European Central Bank (ECB) has urged banks to use the remaining time before the end of the transition period to make sure they are fully prepared — in particular, that boards should step up their preparations to complete their target operating models and, where applicable, fulfil their commitments to the ECB to build up local risk management capabilities and governance structures in the EU-27.

- For EU-27 businesses that rely on "passports" to access the UK, passporting rights will cease at the end of the transition period. 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 the TPR for inbound passporting EEA firms and investment funds will reopen on 30 September 2020. Alternatively, a financial services contracts regime (FSCR) will enable EU-27 passporting firms to continue to service UK contracts entered into prior to the end of the transition period for a limited period, in order to wind down their UK business in an orderly fashion.

- For UK-based businesses accessing the EU-27, to date, the EU has announced limited transitional measures concerning central clearing and (previously) central securities depositories. Individual member states may put in place limited additional measures that vary from country to country.

- 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.

Recommendations

- Financial services businesses should monitor announcements from relevant authorities and maintain dialogue with supervisors over planning and contingency measures in preparation for the end of the transition period, and they should not assume that any relevant equivalence decisions will be concluded.

- Given that licensing barriers will exist after the transition period, UK-based firms accessing the EU-27 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-27. Again, take steps to review and re-paper stationery and contractual documentation.

- EU-27 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 a no-deal scenario, the UK will be trading services with the EU on the basis of the WTO's General Agreement on Trade in Services (GATS).
- Under WTO rules, impact for businesses will vary depending on in which sector they operate. 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.

Audiovisual

- If the UK leaves the EU without a deal, the AVMS Directive, the revised AVMSD and the country-of-origin principle will no longer apply. The European Convention on Transfrontier Television (ECTT) framework will still apply, 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 will need to comply with AVMSD jurisdiction rules and seek local advice on the regulation and authorisation of VOD services.
- UK broadcasters will 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 will be no immediate consequences of a no-deal Brexit on the general telecom framework that applies in the UK. The existing national legislation will continue to be valid and applicable. Following a no-deal Brexit, the UK will have greater flexibility to make changes to the telecommunications framework (subject to commitments under the GATS).
- One area that will change in the event of a no deal Brexit is mobile data roaming. From 1 January 2021, UK consumers (including employees of UK companies) will no longer be able to rely on the EU Roaming Regulation, which guarantees surcharge free roaming when travelling throughout EU and EEA countries. While surcharge-free roaming will not be 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.
- With respect to the cross-border provision of telecom services, a UK-established company will continue to be able to provide cross-border telecom services into the EU on the basis of the GATS. 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. 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). Following a no-deal Brexit, a UK-based entity would no longer fulfil this requirement.

Recommendations

General

- Verify whether the GATS removes restrictions in the provision of services in your sector.
- If it does not, check recent EU FTAs with third countries that cover services (such as the one between the EU and Canada) as an indication of what the EU will be willing to accept in a future EU/UK FTA.

Audiovisual

- Ofcom-licensed broadcasters should consider restructuring their operations to secure an EU-27 broadcasting licence to maintain market access.
- UK broadcasters should secure IP protection for satellite broadcasts in individual EU member states.
- 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.

Commercial Contracts

Key issues

- **Governing law:** English law will continue to be a good choice of law for contracts. Post-Brexit this will not change.
- **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.
- **EU references:** Depending on how the EU is defined in a contract, a reference to the EU may not include the UK post-Brexit.

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. 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. Incoterms may need to change if customs duties will be imposed. Reference to compliance with EU laws may need to include new equivalent UK laws.

Data Protection

Key issues

- **General Data Protection Regulation (GDPR) —** The GDPR will no longer directly apply to the UK. However, the Data Protection Act 2018 will remain in force, which incorporates the GDPR into UK legislation.
- **International data transfers —** In the event of a no-deal scenario, the UK would become a third country. Any transfer of personal data from the EU to the UK would need to be legitimised by appropriate safeguards, such as model clauses or binding corporate rules (BCRs). The UK could still get an adequacy decision recognising that it provides an adequate level of data protection at a later stage. However, in the interim period, organisations need to implement safeguards such as these. In respect of the transfer of personal data **from the UK to the EU**, the UK has indicated that it will recognise all EEA countries, Gibraltar and the EU institutions as providing an adequate level of data protection, such that appropriate safeguards will not need to be put in place to legitimise these transfers.

Recommendations

- Continue to comply with the GDPR.
- Analyse data flows between the UK and the EEA to determine which require safeguards in order to legitimise transfers.

Intellectual Property

Key issues

- **Trademarks:** The "UK part" of already registered European Trade Marks (EUTMs) will be cloned automatically into an equivalent UK trademark registration with no administrative burden for the owner regarding the official register. The remainder of the EUTMs will 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 will automatically fall away as "groundless" on exit day.
- **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 will not affect existing patent laws in the UK and Europe (European Patent Convention (EPC)). The UK government has confirmed that the UK will not seek to participate in the Unitary Patent (UP) and Unified Patent Court (UPC) after 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:** There are no plans to implement the controversial EU Copyright Directive and copyright reforms in the UK.

Recommendations

- Consider dual filings of UK trademark and EUTM applications to avoid potential delays to registration at the UK Intellectual Property Office.
- 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.

Customs

Key issues

Tariff impact

- The UK (with the exception of Northern Ireland, for which there will be a special regime) and the EU will trade as third countries (on WTO terms). Duties will be introduced on goods shipped from the UK to the EU (and vice versa).
- There will be a loss of duty relief under the EU Free Trade Agreements (FTAs) on imports into and exports from the UK.

Non-tariff impact

- Administrative burden of customs declarations on goods shipped from the UK (with the possible exception of Northern Ireland) to the EU (and vice versa).
- Risk of delays in getting goods customs cleared through the EU/UK border.

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.
- Calculate additional duties and the financial impact on supply chains and consider 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 the EU/UK and whether any formalities need to be completed for this.
- Consider whether to stockpile or move existing stock in advance of the end of the transition period to weather any risks of delays in getting goods through the border.
- Scale up customs team/expertise.

Employment

Key issues

- **Changes to current law:** The government has stated that workers' rights will be protected after Brexit and that it will introduce an employment bill, although draft legislation is yet to be produced. We consider it unlikely that there will be substantive changes in the immediate to short term, although the government may look to depart from some principles of EU-derived law at a later date. The UK may also have to commit to a certain level of ongoing employment protection in order to reach a trade deal with the EU. The main areas that will be immediately affected in a no-deal Brexit at the end of the transition period are:

- **European Works Councils (EWCs) —** The current EWC regime will only be able to continue with the EU's cooperation.

  The European Commission's view is that, following the end of the transition period, if central management or the representative agent is currently situated in the UK, this will change — unless the employer has designated a new representative agent, the default representative agent will be 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.

  If the employer ceases to employ at least 1,000 employees in member states (or no longer has 150 or more employees in at least two member states), it will cease 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 individual agreement because the EWC Directive permits representatives from third countries (although an EWC agreement could equally state otherwise).

- **Social security —** EU social security rules will continue to apply after the end of the transition period to any employee posted before the end of the transition period. The position in relation to workers posted after the end of the transition period is currently unclear. At the end of the transition period, the social security position will revert to any relevant social security agreement or the default rules.

- Companies may need to review payroll procedures to ensure they are paying social security correctly.

Recommendations

- EWCs: If an employer's central management/representative agent is based in the UK, it would be sensible for the employer to take advice now to consider whether (and where) to relocate central management/the representative agent. Advice should also be sought if the employer is in the process of setting up a new EWC.

- If the central management/representative agent is located in another member state, advice should be sought on what will happen to any UK representatives following Brexit.

- Social security: Companies should identify any affected employees and, once we have more clarity about what will happen, review its impact on those employees.

Tax

Key issues

VAT

- The UK will retain a VAT system but, depending on the terms of its continuing relationship with the EU-27, VAT will operate on the basis that the UK is a third country (subject to any contrary agreement with the EU). The exception to this is for goods supplied to and from Northern Ireland, which is expected to continue to be treated as intra-EU trade for VAT purposes.
- Businesses that move goods into the UK from the EU will generally be subject to import VAT. Businesses that move goods from the UK to the EU will also generally need to pay import VAT and this may have cash flow implications.
- For goods moving between Northern Ireland and the rest of the UK, the VAT treatment remains subject to clarification, with movements potentially being subject to import/export requirements.
- Businesses that rely on simplifications for goods moving into or out of the UK, including call-off stock, processing and repair relief, and triangulation, will likely no longer be able to apply them in the same way. 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 will no longer apply, 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 expected to no longer be able to make use of the EU (electronic) refund system and will be required to apply under a manual refund system. UK businesses that incur EU VAT in member states where they are not VAT registered will 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 are likely to need to register for MOSS in an EU member state. Non-UK businesses currently reporting UK VAT on digital services via a MOSS registration in another member state will need to register in the UK.
- 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 will no longer be 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 will become subject to import and export procedures, and it will be necessary to consider having both a UK and EU import hub for sales in those territories. Those businesses will 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

- There will need to be a new system for the licensing of controlled goods moving 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 will also be affected.
- Existing UK export licences will no longer be valid for exports out of the EU-27 member states to the rest of the world, and exporters will be 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, will no longer do so.

Recommendations

- Understand how your exports from the UK into the EU and vice versa will be affected by the new licensing requirements.
- Check whether exports of controlled items are currently made from the EU-27 under a licence granted by the UK authorities, or from the UK under a licence granted by EU-27 authorities.
- Consider establishing exporting entities in the UK for exports from the UK, and in the EU for exports from the EU.

Sanctions

Key issues

- Upon a no-deal Brexit, sanctions legislation agreed at EU level will no longer automatically apply in the UK, and the UK will adopt and implement an autonomous sanctions regime (although the UK will continue to impose UN sanctions). From a policy perspective, the UK may also diverge from the EU and adopt a more aggressive approach in a number of ways.
- Companies operating in the UK and EU will 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 will have 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

- Monitor developments around the introduction of the UK regime to be ready when the changes come into place, including to the extent that the UK imposes sanctions restrictions that go beyond those agreed at EU level.
- 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 will remain essentially the same for now — the UK has indicated that it does not intend to make fundamental changes to the existing UK competition law regime. At present, UK regulators and English courts have an obligation to interpret UK competition law consistently with EU law. The UK's previous no-deal competition law guidance and legislation indicates what the position may be after the transition period expires. The UK had previously decided that this would change 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 after the transition period expires, the UK Competition & Markets Authority (CMA), sectoral regulators and English courts will likely have flexibility to depart from pre-Brexit EU case law.

Enforcement

- The CMA and sectoral regulators will no longer have the power to enforce EU competition law in the UK, and they will only be able to investigate anti-competitive conduct under UK competition law that affects UK markets. Similarly, the EU Commission will no longer have the ability to open investigations into cases involving anti-competitive agreements or conduct confined to the UK, but will continue 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.

- After the transition period expires, there will potentially be dual antitrust investigations by the CMA and the EU Commission where both the EU and the UK could, in parallel, open an investigation and impose fines and other remedies for anti-competitive conduct affecting both the EU and the UK.

- Ongoing investigations: If the EU Commission issues a formal infringement decision under EU competition law on or before the expiry of the transition period, the CMA and concurrent regulators can open an investigation into the UK aspects of that same infringement only after the transition period expires.

Merger control

- The UK will no longer be part of the EU "one-stop shop" for merger control. Large global deals with substantive UK issues may need to be notified separately to the EU and the UK.

- Ongoing deals: The one-stop shop notification system is still available up until the end of the transition period. If the EU Commission issues a merger clearance decision on or before the expiry of the transition period, the CMA will have no jurisdiction to review that same transaction unless the decision is annulled, in full or in part, following an appeal.

State aid

- This is a key area of negotiation between the UK and the EU, and we expect to have more clarity later in 2020.

Damages actions

- The UK's previous no-deal planning guidance indicates the likely position, in the absence of any agreement between the EU and UK. This indicates that English courts will likely not be bound by EU rulings issued after the expiry of the transition period but may have regard to them, and likely will find them to have high probative value in determining civil claims. If the EU Commission issues an infringement decision after the expiry of the transition period, claimants wishing to pursue follow-on private damages claims in the English courts will likely no longer be able to rely on that decision as a binding finding of an infringement of UK competition law.

Recommendations

Before expiry of the transition period

- **Mergers:** For deals where the current EU merger filing thresholds are met and have been notified to the EU Commission before the expiry of the transition period, the EU Commission will review the deal. If the EU Commission does not issue a decision on or before the expiry of the transition period, after that date, the EU Commission will retain exclusive jurisdiction of that merger and the CMA will not have jurisdiction to review it. If there is a material likelihood that the merger will not have been formally notified to the EU Commission before the end of the transition period, merging parties may wish to consider the possibility that the CMA will ultimately have jurisdiction to review the merger (and consider engaging with the CMA significantly in advance of the end of the transition period). Consider approaching the CMA to discuss whether it might be useful to begin pre-notification discussions, in particular where the merger might not be formally notified to the EU Commission before the end of the transition period; and the merger is likely to raise material substantive issues in the UK.

- **Enforcement:** If the EU Commission has opened an EU competition law investigation but has not issued a decision on or before the expiry of the transition period, it will retain jurisdiction after the transition period. After the transition period ends, the CMA and UK sectoral regulators may obtain jurisdiction over elements of proceedings that have already been formally initiated by the EU Commission. For example, if the agreements or conduct under investigation may affect trade within the UK and are ongoing as at the end of the transition period, the CMA or sectoral regulators may investigate facts postdating the transition period. For cartel cases, if you have applied for leniency to the EU Commission and the EU has not opened an investigation before Brexit, consider also reporting to the CMA if UK markets are affected.

Post-transition period

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

- Consider a cartel leniency strategy in light of potential dual investigations.

- Consider the impact of dual UK and EU merger filings on deal planning and strategy.

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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