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Brexit: Key Implications for the Consumer Goods & Retail Sector

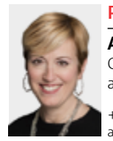
Key Implications for CG&R Businesses

On 31 January 2020, the UK formally left the European Union (EU) and entered a transition period during which negotiations to establish the future EU-UK trading relationship took place. A deal between the UK and the EU was reached on 24 December 2020 under the Trade and Cooperation Agreement (TCA). The TCA creates a new relationship between the EU and the UK from 1 January 2021. Consumer goods & retail (CG&R) businesses should review their Brexit planning as they continue to prepare for the key challenges ahead.

What should CG&R businesses be thinking about in terms of Brexit from 1 January 2021? We have identified the key areas for CG&R businesses that are impacted by Brexit and the TCA, and provide some practical considerations and recommendations to help you address and minimise the impact to your business.

If you would like help navigating the evolving Brexit landscape for CG&R businesses, please contact a member of our dedicated team of specialists (contact details below) or your usual Baker McKenzie contact. Additionally, for further analysis of more general key legal and regulatory issues resulting from Brexit, please see our **Brexit Deal Checklist: Key Implications for Business.**

KEY CONTACTS



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Import/export

Although the TCA removes tariffs on most imports and exports that originate in the EU or the UK, it introduces new formalities. New compliance paperwork and other administrative requirements may also cause delays in clearing goods through customs on entry into the UK and the EU.

Key issues

Tariff impact

- **Preferential tariffs:** The TCA eliminates tariffs and tariff rate quotas for most goods moving between the UK (with the exception of Northern Ireland, for which there is a special regime) and the EU, provided that the goods "originate" in the UK or the EU (i.e., meet the relevant rule of origin in the TCA). Goods that do not meet the rule of origin are subject to standard tariffs: 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.
- **Rules of origin:** The TCA contains bespoke rules of origin for each tariff line. 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 a loss of duty relief under EU Free Trade Agreements (FTAs) on imports into and exports from the UK. However, the UK has negotiated a number of continuity agreements that largely transition many existing EU FTAs to the UK, with amendments.

Non-tariff impact

- Customs declarations must be submitted for the movement of goods between the UK (with the possible exception of Northern Ireland) and the EU, so there will be the administrative burden of providing customs declarations on goods shipped from the UK to the EU and vice versa. There may also be delays in getting goods customs cleared.
- To benefit from preferential duty rates on goods originating in the UK or the EU, proof of origin needs to be provided. Proof of origin can be made out either through (i) a Statement on Origin issued by the UK/EU exporter that describes the product in sufficient detail to enable its identification, or (ii) by the "importer's knowledge" — this is a new option of self-certifying that the product satisfies the relevant origin rules (based on information such as the Harmonised System codes of the product and origin criteria used and/or the production or manufacturing process). 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 meet the relevant rules of origin. After this date, businesses may be asked to provide a supplier's declaration retrospectively.

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 to determine which goods meet the rules of origin and to prepare proofs of origin.
- Make sure you can provide proof of origin.
- Calculate additional duties for goods that do not originate in the UK or the EU, and the financial impact on supply chains, and consider tariff mitigation strategies.
- Consider Incoterms and consider who is responsible for any additional duties and customs clearance requirements.
- Consider which entities will act as importers into the UK and the EU and whether any formalities need to be completed for this.
- Scale up customs team and expertise.
- Stay abreast of trade talks and negotiations for existing EU FTAs whose terms have not yet been transitioned to apply to the UK.
- See also the **Product regulatory** section.

Tax

Key issues

VAT

- On 1 January 2021, the UK left the EU VAT regime. Although the UK retains a VAT system, VAT will be levied on the basis that the UK is a third country, with the exception of goods supplied to and from Northern Ireland, which continues to be treated as intra-EU trade for VAT purposes and to which special rules apply.
- There will be a cash flow impact for businesses importing goods into the UK from the EU because businesses will generally need to pay import VAT at the time the goods are declared in the UK and will only be able to recover this VAT on the next VAT return after holding the necessary documentation. Businesses that move goods from the UK to the EU will also generally need to pay import VAT and this may likewise have cash flow implications.
- 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. In addition, online marketplaces facilitating sales of goods in the UK to consumers may be required to account for VAT on those UK sales. New record-keeping and invoicing requirements will also apply to impacted businesses.
- 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.
- EU businesses that incur UK VAT and that are not UK VAT registered may no longer use the EU electronic refund system and they must 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.

Recommendations

- 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 an 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.
- Distance-selling rules will no longer apply to goods moving between the UK and the EU. UK businesses will be able to zero-rate sales of goods to EU consumers.
- Consider mitigation actions that can be taken, such as applying for a VAT/duty deferment account (which requires a bank guarantee), using customs-simplified procedures and obtaining Simplified Import VAT Accounting (SIVA), which is a procedure that enables a company or agent to operate a VAT and duty deferment account without a guarantee for the VAT element, therefore reducing the compliance cost to the business.

Key issues

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

- 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.

Product regulatory

Key issues

- From 1 January 2021, most businesses need to address product compliance separately in the UK and the EU (Northern Ireland is subject to a separate regime, which we do not cover in this crib sheet).
- Products that fall within one of the five sector-specific annexes to the TCA will benefit from some substantive mutual recognition measures, such as the sector-specific annexes covering organic products and wine.
- If a business plans to continue trading on both the EU and the UK markets, unless the products fall within one of the sector-specific annexes of the TCA, it must comply with two sets of rules.
- Some supply chain entities that previously had "distributor" status under product laws may have "importer" status (and related obligations) from 1 January 2021. Generally, before making a product available on a market, importers must ensure that the manufacturer has carried out the appropriate conformity assessment procedure and has drawn up the technical documentation, and that the product is correctly labelled and accompanied by any required instructions and safety information.

Products for the EU

- UK conformity assessment bodies have lost their status as accredited entities for EU product conformity assessments.
- UK-based companies or individuals designated as the required Responsible Person for the EU, such as the Responsible Person for cosmetics or the Food Business Operator for food products, will no longer be recognised by the EU.
- Companies in the UK previously qualifying as EU importers for product regulatory purposes have lost that status, with related obligations, liabilities and labelling requirements transferring to the EU distributors to whom they supply products.

Products for the UK

- The UK will accept products for the UK market that are CE-marked (under certificates issued by EU conformity assessment bodies, where needed) until, for most products, 31 December 2021. The new UK Conformity Assessed (UKCA) mark must be used for most products from 1 January 2022.
- Where a product for the UK market has been conformity assessed by a UK accredited body, the product must bear the UKCA mark from 1 January 2021.
- From 1 January 2021, Responsible Persons for cosmetics based in the EU are no longer recognised in the UK. A UK-based Responsible Person for cosmetics must have been appointed from 1 January 2021, but labels do not need to be updated for two years if they bear the details of an EU Responsible Person.
- For food labelling in the UK, food businesses will have a transitional period until 30 September 2022 to update labels on pre-packaged food and caseins to show the name and contact details of the UK food business operator.
- UK distributors now have UK "importer" status (with related obligations) for product regulatory purposes if they are bringing EU products into the UK market and supplying them on.

Organic products (Annex Tbt-4)

- The TCA provides for an equivalence agreement between the UK and the EU, which means that products certified as organic in one market will be recognised as organic in the other.
- This means the EU will accept the placing on the EU market of an agreed list of products that meet UK laws and that are accompanied by a certificate of inspection issued by a recognised UK control body, and vice versa.
- Organic products may bear the EU's organic logo, any UK organic logo or both logos.

Trade in wine (Annex Tbt-5)

- The TCA provides for simplified certification, documentation, labelling and packaging requirements for the import of wine produced in the UK or EU into the other market.

Sanitary and Phytosanitary (SPS) measures

- The SPS framework generally concerns food safety measures, along with any other measures intended to protect human, plant and animal health.
- The TCA does not provide for the mutual recognition of SPS measures in the UK and the EU. Instead, the TCA allows for the UK and the EU to maintain fully independent SPS rules.
- The SPS measures envisaged by the TCA largely reflect WTO rules in this area, for example, requiring transparency and measures that are neither arbitrary nor discriminatory, and that are proportionate to risk.

Recommendations

- Supply chain entities should devote time to confirming how to approach conformity assessment and product labels.
- Verify EU and UK supply chains to determine whether action is required to ensure continued EU and UK product regulatory compliance, particularly labelling (taking into account any applicable UK transitional measures for label updates).
- Arrange to transfer to EU-27 conformity assessment bodies EU product conformity assessments.
- Consider whether UKCA marking is needed for new products placed on the UK market.
- Assess supply chains for risk of UK and EU distributors acquiring "importer" status with related product compliance obligations and liabilities.
- Continue to monitor product regulatory requirements for the UK and the EU markets.

Antitrust and competition law

Key issues

Antitrust compliance

- The substantive application of competition law remains essentially the same and there are no fundamental changes to the previous UK competition law regime. From 1 January 2021, the UK Competition and Markets Authority (CMA), sectoral regulators and English courts will have flexibility to depart from pre-Brexit EU case law. However, the TCA wording relating to competition tightly mirrors that of the EU legislation, so a material departure is unlikely.

Merger control

- 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 transactions with substantive UK antitrust issues may need to be notified separately to the EU and the UK.

Enforcement

- The CMA and UK sectoral regulators no longer have the power to enforce EU competition law in the UK and can only investigate anti-competitive conduct under UK competition law that affects UK markets. Similarly, the European Commission may no longer open investigations into cases involving anti-competitive agreements or conduct with effects confined to the UK, but it 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 European Economic Area (EEA).

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

Recommendations

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

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

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

Key issues

Distribution agreements

- A number of EU Block Exemption Regulations, which exempt certain categories of agreements from the EU prohibition on anti-competitive agreements (including relating to distribution agreements, research and development and technology transfers) are preserved in UK law until they expire. 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 able to benefit from the retained exemptions provided they meet the relevant criteria of those exemptions.

Recommendations

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

Intellectual property rights

Brands are most often a (if not the) key asset for CG&R businesses. Therefore, securing brand protection through a range of intellectual property (IP) rights is essential. Be aware of how Brexit and the TCA may affect your IP rights portfolio.

Key issues

Trademarks

- The "UK part" of European trademarks (EUTMs) that were registered on 31 December 2020 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 by 30 September 2021.
- Oppositions and invalidity actions at the European Intellectual Property Office based solely on a prior UK national right automatically fell away as "groundless" after 31 December 2020.

Designs

- Similar rules to those related to registered trademarks will apply to registered community designs (RCDs).
- An RCD on the register and published before 31 December 2020 will be treated as if it had been granted as a UK-registered design.
- While there is a separate unregistered UK design right under the Copyright Design and Patents Act 1988, this is a different type of right to the unregistered community design right and the UK currently has no equivalent unregistered design right.
- Existing unregistered community design rights will continue to be protected and enforced in the UK for a term of protection at least equal to the remaining period of protection of the relevant community right.

Recommendations

Trademarks and designs

- Dual filings are now required to secure trademark or registered design protection in the UK and the EU.
- Identify any EUTM applications that were pending at 31 December 2020 and apply for equivalent UK national trademark protection within nine months.
- Review ongoing EU disputes that have a UK connection (e.g., EUTM oppositions with any UK prior rights or infringement actions involving UK activities or parties) that are pending and consider the impact on the brand's enforcement strategy.

Key issues

Geographical indications (GIs)

- The UK has set up its own GI schemes. The UK GI schemes protect registered product names when they are sold in Great Britain (GB), and the EU GI schemes protect registered product names when they are sold in Northern Ireland and the EU.
- Although the TCA does not require the UK to respect EU GIs, the UK announced on 4 January 2021 that all product names protected in the EU on 31 December 2020 would continue to be protected under the new UK GI scheme.
- From 1 January 2021, to secure protection under the UK GI scheme, non-UK (including EU) applicants will first need to obtain protection in the country of origin. However, EU producers whose product names were protected in the EU on 31 December 2020 will not need to apply for protection, as they will continue to be protected under the UK GI scheme, unless the UK changes its position.
- GB producers wanting to sell GI protected products to the EU will also need to apply under the new UK GI scheme to obtain protection in the country of origin before applying to the EU scheme.
- The full criteria for acceptance to secure protection under the UK GI scheme are currently unclear.

IP licensing/brand-sharing agreements

- Existing and future licences, coexistence agreements, brand-sharing agreements, etc., may include a definition of the territory that refers to the EU.

Recommendations

- Dual applications will be required to obtain protection in GB and the EU.
- Holders of GIs should closely monitor further developments, particularly in relation to the criteria for the protection of new EU GIs in the UK.
- Check existing and new IP agreements that include a definition of the EU (e.g., as the territory) to see whether this definition refers to the EU as constituted on the date of agreement or as constituted from time to time. Consider updating any agreements that refer to the EU as a territory.

Key issues

Exhaustion

Brand owners are often frustrated that, depending on the distribution model they have in place, they can't control the channels or countries in which their genuine goods are ultimately sold. The principle of "exhaustion" defines the limits on how brand owners can use their IP rights to control how and where their goods are sold. The TCA expressly leaves the UK and the EU free to set their own exhaustion policies. As of 1 January 2021:

- **The EU only recognises EEA exhaustion.** Once goods are put on the market in the EEA, any IP rights in those goods are exhausted and cannot be relied on to prevent further dealings with that product in the EEA (unless there are legitimate reasons to object). From 1 January 2021, goods put on the market in the UK will not be exhausted in the EEA.
- This means that trademark owners who first put goods on the UK market will potentially have greater control over the parallel imports of those goods by third parties from the UK into the EEA. The trademark owner's rights will no longer be considered exhausted in the remaining EEA states and third parties importing IP-protected goods will need the brand owner's consent.
- **The UK will continue to recognise EEA exhaustion,** at least in the short term. Goods put on the market in the EEA will be deemed exhausted in the UK. This means that trademark owners that put goods on the market in the EEA will be unable to prevent the parallel import of their goods into the UK by a third party, as these rights will be considered exhausted due to the UK's continued recognition of EEA exhaustion. However, the UK position may change, as a consultation is due to start in early 2021.

Recommendations

The details of exhaustion are highly complex and brand owners should be mindful of how the post-transition period regime that applies from 1 January 2021 will affect the exhaustion of their trademark rights and the resulting impact on their enforcement strategy. Additionally, brand owners should consider reassessing the following to ensure that they have in place the best parallel import strategy and effective controls to prevent the transit of counterfeit goods:

- Businesses will potentially have greater control of parallel imports by third parties from the UK into EEA states.
- Consider registering with rights owners programs offered by various online platforms. Consider markings or engravings on your products and other technical means (such as blockchain) to monitor the progress of goods in the supply chain.
- Engage with the customs authorities and ensure that appropriate new Applications for Action (AFA) are filed with them. In relation to IP enforcement more generally, note that pre-existing EU AFA filed in the UK will no longer cover the EU, while those filed in EU member states will no longer cover the UK.

It's business as usual for:

- **Patents:** UK national patents and European patents — via the European Patent Office — are unaffected by Brexit, since they are independent from EU membership.
- **Trade secrets:** The UK has implemented the EU Trade Secrets Directive. UK laws were already broadly in line with the requirements of the Directive.
- **Copyright:** International treaties on copyright continue to apply. Licensees should check that their licences cover the UK outside of the EU.

Commercial contracts

Key issues

- **Governing law:** Courts in EU member states will continue to be required to respect a choice of English law.
- **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.

Recommendations

- English law will continue to be a good choice of governing law for contracts. This has not changed because of Brexit.
- Brexit does not affect arbitration and the enforcement of arbitral awards. 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) so 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.
- Check definitions in contract templates that refer to the EU together with 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 law

The Withdrawal Agreement (entered into between the UK and the EU on 31 January 2020, under the terms of which the UK formally left the EU) converted EU-derived consumer laws into UK law on 31 January 2020. However, some changes to consumer law will apply from 1 January 2021.

Key issues

- 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.
- Any judgment of a UK court made against an EU retailer will no longer be automatically enforceable.
- There are no longer any reciprocal obligations on the EU and the UK to investigate breaches of consumer law or to take forward enforcement action under the Consumer Protection Cooperation Regulation.
- Businesses and consumers in the UK can no longer use the EU Online Dispute Resolution (ODR) platform.
- Businesses selling goods and services in the UK to UK customers will no longer need to comply with the geo-blocking regulation (which prohibits discrimination between customers in different EU countries).

Recommendations

- 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.
- If you are an EU retailer selling to UK consumers, review and update the information you make available to consumers about their rights to bring actions against you in UK courts post-Brexit.
- Remove links to the ODR platform from UK consumer websites.
- If you are a UK-based retailer selling to EU consumers, ensure that you continue to comply with the geo-blocking regulation even though it will no longer apply to UK consumers.

Privacy and data protection

The digital economy gives brand owners and retailers a wealth of data concerning the end consumer, but the access and use of this data requires compliance with data protection laws such as the EU's GDPR.

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:** On 1 January 2021, the UK became 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. However, the European Commission is still considering whether to adopt an adequacy decision recognising that the UK provides an adequate level of data protection, in which case these safeguards would not be necessary. The TCA 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). For transfers 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, so appropriate safeguards do not need to be put in place to legitimise these transfers. However, this designation may be withdrawn at any time.
- The UK Information Commissioner's Office (ICO) is no longer participating in the GDPR's "one-stop-shop" mechanism, which allows organisations to deal with one "lead" supervisory authority in the member state of their establishment.

Recommendations

- Continue to comply with the GDPR (including as it applies in the UK).
- Analyse data flows between the UK and the EEA (e.g., with suppliers and processors) to determine whether any safeguards are required 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.
- Businesses should check what their EEA lead supervisory authority (if any) is. If the ICO was designated the lead supervisory authority, depending on the business's cross-border data processing and establishments in the UK and the EEA, you may need to designate a different lead supervisory authority or appoint a European representative.

Labour

The labour needs of the CG&R sector are diverse, ranging from creative talent to sales staff, with the EU providing more than a quarter of the sector's total workforce in the UK. The sector will be vulnerable to potential skill shortages.

Key issues

Immigration

- Under the EU Settlement Scheme implemented in March 2019, EU workers can apply for pre-settled and settled status in the UK. The scheme also applies to nationals of the wider EEA.
- EU nationals that were living in the UK before 31 December 2020 will be allowed to remain in the UK on a long-term basis. They will need to apply under the EU Settlement Scheme for "pre-settled status" if they have been in the UK for less than five years or "settled status" if they have been in the UK for more than five years by 30 June 2021. The same rules apply to UK nationals living in the EU.
- There are special arrangements 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.
- EEA nationals wishing to come to the UK to work or to live long term must apply under the immigration rules system (primarily the Points-Based System), which has been overhauled with new rules that entered into force on 1 December 2020.
- Each EU and EEA state has its own immigration system, so UK citizens are now subject to the local requirements that apply to UK nationals working in the EU if no further agreement is reached and vice versa.

Recommendations

- Conduct an audit to identify which of your key employees may be affected by a change or restriction in their ability to work in the UK or the EU so that you can make contingency plans.
- Reassure and support affected employees and notify them of the process for securing their status under the EU Settlement Scheme.
- EU workers arriving after 31 December 2020 have a time-limited right to live and work in the UK, which might act as a disincentive for EU nationals to take up a role in the UK.
- In order to work in the UK, EU nationals will need to be sponsored by a UK employer under the new points-based system.
- UK employers should consider reviewing/amending their HR processes to ensure these are fully compliant with the obligations arising under a sponsor licence if the business has to rely on the Points-Based System when hiring EU nationals.

Key issues

Employment

Brexit has caused few changes to employment law. The main areas affected are:

- **European Works Councils (EWCs):** The TCA does not deal with EWCs. The former EWC regime established under the EWC Directive ceased from 1 January 2021.
- From 1 January 2021, the central management or the representative agent may not be situated in the UK and it must be transferred to an EU member state. Unless the employer has designated a new representative agent, the default representative agent is deemed to be the member state employing the greatest number of employees and, similarly, the law of that member state is deemed to apply to the EWC agreement (if it was previously governed by English law.)
- UK employees no longer count towards EWC thresholds. If the employer ceases to employ at least 1,000 employees in EU-27 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 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 to any employee posted to the UK 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 an employee at any given time to avoid the risk that they would pay double social security contributions or that no legislation would apply to them and, therefore, they would be 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 two years, are only applicable to EU member states that elect for them to apply.

Recommendations

- Employers should review their EWC agreements to assess what impact Brexit has and make changes accordingly.
- For example, if an EWC's central management/representative agent is still based in the UK, 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 EWC's central management/representative agent is located in another member state, determine what will happen to any UK representatives from 1 January 2021, if not already done.
- Employers should identify any affected employees and review the applicable rules.

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