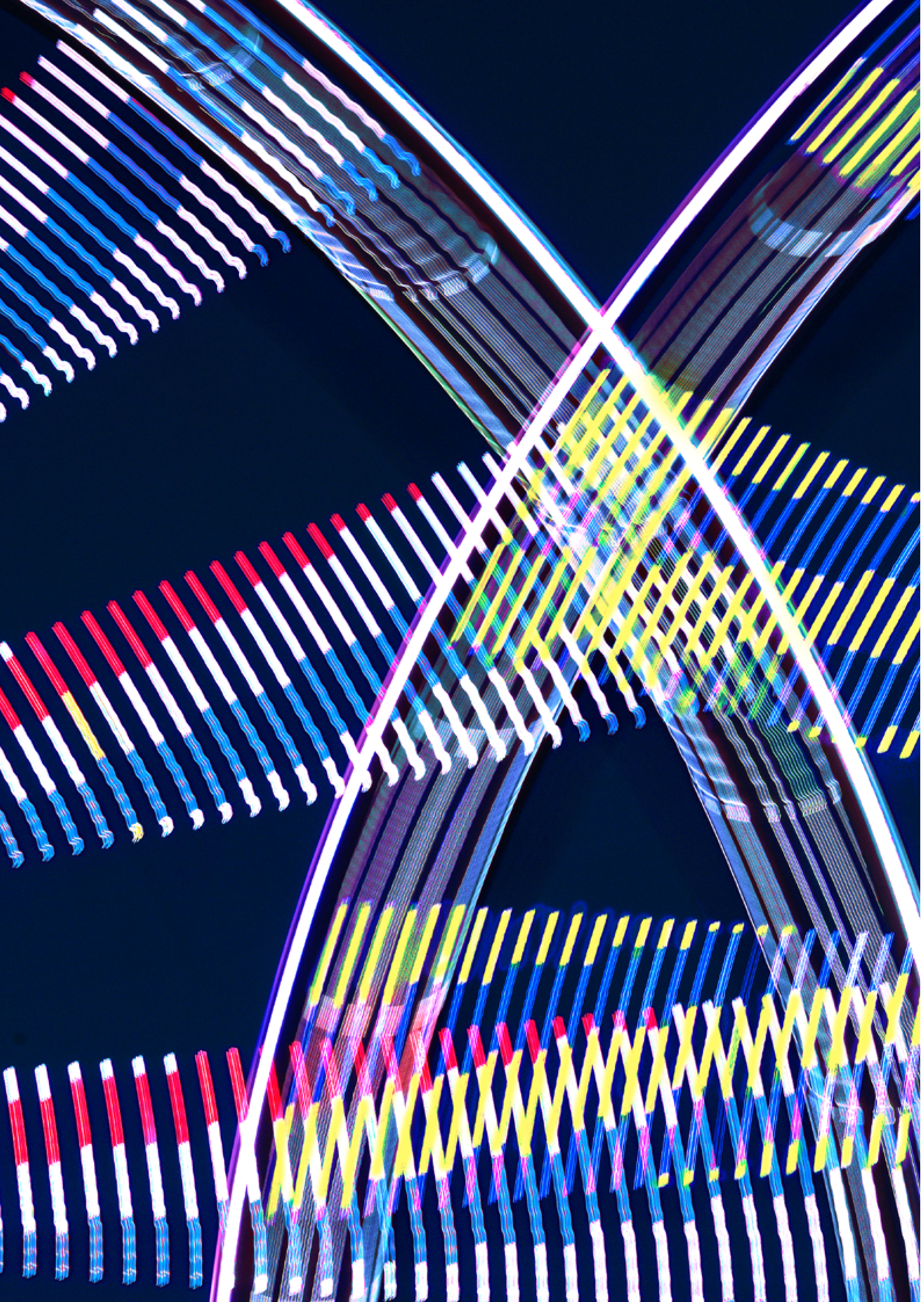
Brexit: Key Implications for Energy, Mining and Infrastructure Sector



Key Implications for Business

Globally, all companies in the energy, mining and infrastructure (EMI) sectors face difficult long term challenges arising from the need to decarbonise our economies and the resulting transformation in how energy is generated and consumed. Many such companies established in the UK have global operations and are well-versed at navigating diverse political and regulatory landscapes. Brexit of course along with its related legislation, the latest but not the last being the EU-UK Trade and Cooperation Agreement (TCA), presents yet another set of challenges for these companies to manage.

While some of the most significant negatives of the "no deal" scenario should now be avoided, EMI companies will still be impacted by Brexit in many areas. For example, post-Brexit, movement of goods will still be subject to customs formalities. These pose a risk of delays at the EU-UK border which may impact supply chain resilience, especially in relation to critical spare parts needed for the operation of EMI projects. Contractual clauses, in long term supply contracts in particular, may need updating to manage some of these potential risks or in response to Brexit-related restructuring. Operationally, EMI companies may need to strengthen their capability to manage supply chain disruptions as and when they occur.

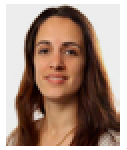
Other impacts, in areas not addressed, or effectively addressed in the TCA, are still difficult to predict. The TCA allows for the new UK Emissions Trading Scheme (ETS) to be linked with the EU ETS in the future but does not implement this, leaving it uncertain whether UK exporters will be hit with the EU's proposed carbon border adjustment tax when it comes into force. Similarly, the UK government now has a number of options for the UK state aid and sanctions regimes, which may create opportunities and pose challenges for EMI companies.

Lastly, it is well worth noting that the TCA is not necessarily a permanent regime because either the EU or UK may terminate it on 12 months' notice. This would bring the parties back to what is in practical terms the "no deal" scenario.

While the EMI sectors are diverse and Brexit impacts will vary for different EMI companies depending on their market focus, we outline below a number of key issues and recommended actions. These should be considered by EMI companies as part of their own specific Brexit planning.

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. 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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Supply Chain Issues

Key issues

- The TCA is more than a trade agreement and provides for cooperation between the parties on a variety of issues, including trade across the border. However, while it provides for zero tariffs and no quotas for goods meeting the "rules of origin" regime in the Agreement, EU-UK trade will be far from the essentially frictionless activity it was while the UK was part of the single market and customs union. As a result, EMI companies will still be subject to additional financial and administrative burdens related to the movement of goods between the UK and the EU.

- The import of goods between the EU and UK will be subject to customs formalities as well as checks and audits by customs authorities who may assess goods for conformity with EU or UK regulatory requirements. As with other free trade agreements, tariff concessions are dependent on the rules of preferential origin stipulated in the TCA. These in turn are based on existing regulations such as the Union Customs Code and other free trade agreements (FTAs) to which the EU is a party. Overall, the position is likely to be better than if no deal had been reached, partly due to certain specific exceptions, but trading goods under the new regime poses an inherent risk of delays in clearing customs which is likely to impact the delivery of goods. Such delays could cause potentially significant knock-on effects, especially in relation to critical spare parts needed for the operation of infrastructure and other energy projects. Of course the goods most at risk of running afoul of the rules of origin included in the TCA are component goods made up of materials originating outside the EU or UK as applicable.

- Goods that do not meet the rules of origin are subject to standard duties (for the EU, the Common External Tariff; for the UK, the UK Global Tariff).

- Additional export controls now apply to dual-use controlled items moving between the UK and the EU. Certain dual-use exports from the UK to the EU now require a licence (where they did not previously). Such items are prevalent in the EMI sector - for example certain pumps and valves could be considered dual-use items. This may have a potential impact on not only the movement of dual-use items between mainland UK and the EU but also to the EU/UK continental shelf. There is no guarantee of ongoing alignment between the UK and EU on export control laws and requirements could further diverge in the future.

- EMI companies operating in the UK North Sea may now face particular challenges for a number of factors, including potentially increased tariffs (for goods not meeting the relevant rules of origin) and other costs on a range of goods that are key to exploration, production and the provision of services, as well as a high impact from supply chain disruptions, a strong connection with EU supply chains and a highly specialist workforce (see comments on People below).

Recommendations

- Conduct a full supply chain assessment to (1) understand where goods are moved to and from (including third countries, the UK and the EU); (2) consider potential mitigation strategies (e.g. decreasing the movement of goods between the UK and the EU); and (3) understand which goods may have a high impact on operations in the event of supply chain delays and bottlenecks.

- Ascertain which goods meet the rules of origin and prepare proofs of origin. Calculate additional duties for non-originating goods and the financial impact on supply chains.

- Verify that goods are correctly classified and valued and origin requirements under the TCA and other relevant FTAs are complied with. Ensure that the correct export licences are procured before exporting any dual-use goods.

- Develop contingency plans to mitigate supply chain disruptions, such as stockpiling and identifying additional suppliers for key equipment and strengthening operational response capability (people and other resources).

- Ensure that responsibility for customs compliance is properly allocated. Consider setting up entities in the EU and UK that can act as importer/exporter.

- Follow developments in terms of changes to either the EU or UK export control regime (noting that the EU is currently reviewing their regime).

Contractual Issues

Key issues

Governing law

- English law is commonly used as a "neutral" governing law for EMI contracts and this has not changed as a result of Brexit. EU courts are still required to respect a choice of English law under the Rome I and Rome II Regulations (which have been retained unilaterally by the UK). There is no reason to avoid a choice of English law.

- Note though that English law up to the end of the Transition Period includes directly effective EU law. While the UK has taken steps to save much substantive EU law in a range of areas, there may well be increasing divergence between the two systems over time. Also the UK application of provisions may diverge from the EU over time.

- Many international lenders have historically favoured English law for EMI contracts, in part, for reasons of neutrality and its common law basis which allows a high level of "freedom to contract". As above, this should not change as the traditional underlying reasons for this preference have not been affected by Brexit.

Forum for disputes

- Arbitration is a popular choice for dispute resolution in many EMI contracts and will be unaffected by Brexit, as arbitration does not depend on EU law. Choosing a London seat (regardless of whether or not the substantive governing law is English law) remains a valid choice for disputes which are arbitrated. Enforcement of arbitral awards is governed by the New York Convention to which the UK remains a party and has not been affected by Brexit.

- Other EMI contracts, particularly certain collateral agreements, provide for disputes to be resolved by the UK courts. English courts are well-regarded for the quality of their judiciary and judicial decision-making.

- There may be an increase in time and cost from an enforcement perspective associated with a choice of English courts, which will depend in part on the UK's accession to the Lugano Convention (the UK has already acceded to the Hague Convention on Choice of Court Agreements (HCCA)). Lugano requires the consent of all contracting states and whether this will be obtained remains unclear. However, exclusive jurisdiction clauses are likely to be respected and enforceable by virtue of the HCCA and even more so if the UK accedes to the Lugano Convention. Alternative jurisdiction clauses (i.e. one party may choose a different jurisdiction to the other party) are rare in the EMI context, usually limited to finance agreements contemplating enforcement, and should be avoided without taking prior legal advice.

- Change in law/force majeure/material adverse effect clauses: These types of clauses are commonly included in many EMI contracts, particularly those for the supply of goods or services over the long term. Their application is sensitive to many Brexit impacts, and the coming into force of the TCA may well be a trigger event for such clauses.

- Reference standards: Brexit places additional focus on standards such as INCOTERMS which allocate responsibility for the payment of customs duties (in case rules of origin requirements have not been met for particular goods) and performance of customs formalities. Contractual clauses that reference these and other standards, such as indices used in price adjustment formulae, may now require review and revision.

Recommendations

- Forum for disputes: EMI companies should consider what forum is most appropriate for the resolution of disputes under their contracts. It should be noted that enforcement is just part of the analysis and there is nothing to indicate that the reputation of English courts will be affected by Brexit.

- Contract review: Many EMI companies will already have carried out recent reviews of these types of clauses in their contracts in respect of the Withdrawal Agreement and/or the impact of Covid-19. This is well worth a revisit depending on the direction of negotiations and is certainly recommended, if not already done. It is also possible that claims and rights under these types of clauses may have crystallised with the TCA having come into force and the full effects on the parties' dealings have become apparent.

- EMI companies may have included standards such as INCOTERMS in their EU related agreements, with the focus more on delivery obligations than those relating to customs/delays at the border. Existing precedents/template agreements may also fail to fully address other recent changes in the global trading environment.

- Particular clauses which may require review and updating include risk allocation in relation to delays (including delays at the border) and duty related costs, pricing structures, timing of pricing reviews and payment terms. Clauses that refer to the "EU" and intend to include the UK may also need to be revised.

Intellectual Property/ Data protection

Key issues

Intellectual property (IP)

- EMI companies tend to hold their intellectual property (IP) in a number of different forms, with a higher proportion in unregistrable forms such as contractual agreements compared to other industry sectors. While IP rights under the majority of these have not been significantly affected by Brexit, there remain some issues to consider.

Contractual rights

- IP rights under agreements have not been affected by Brexit (although consider issues in relation to governing law and dispute resolution above).

Patents/copyright

- Holders of UK and European patents have not been affected by Brexit given neither are based on EU legislation and the UK will remain in the European Patent Convention (this is affirmed in the TCA). The UK government has however determined that the UK will not join in with the Unitary Patent and Unified Patent Court. Similarly, rights in respect of copyright should be unaffected and there are no plans for the UK to implement the controversial EU Copyright Directive and copyright reforms.

Trademarks

- Right holders who held an EU trademark or registered Community design before the end of the Transition Period have a new UK equivalent right which was granted automatically. These are subject to renewal in the UK and are capable of being assigned and licensed independently from the equivalent EU right. EMI companies who had pending applications for EU trademarks still need to actively apply for an equivalent UK trademark under the new mechanism within a nine-month period following the end of the Transition Period.

Data protection

- Data protection will remain a significant issue for many EMI companies, particularly those holding information on a significant number of customers. The GDPR is EU legislation and as such does not apply to the UK after the Transition Period, but its provisions have been incorporated into UK law under the Data Protection Act 2018 with only minor amendments.

- There are also issues to consider in relation to data transfers from EU countries to the UK. Since 1 January 2021, the UK has become a "third country" for the purposes of international data transfers, which means that transfers of personal data to the UK need to be legitimised by appropriate safeguards, such as standard contractual clauses or binding corporate rules (BCRs). However, the European Commission is still considering whether to adopt a decision recognising that the UK provides an adequate level of data protection, such that these safeguards are not necessary. The TCA therefore provides that transfers to the UK may continue without safeguards until 1 May 2021, which will be automatically extended until 1 July 2021 if neither party objects. In terms of transfers from the UK to the EU, the UK has recognised EU countries, Gibraltar and EU institutions as providing adequate protection.

Recommendations

IP

- IP rights with regional application (i.e. a contractual licence that permits the use of know-how within territorial limits) that refer to the “EU” may need to be amended.

Trademarks

- EMI companies relying on EU trademarks should not have to make substantial changes for existing trademarks. They need to act relatively quickly on pending EU trademarks as the nine-month period is a deadline (see above).

Data protection

- EMI companies should continue to apply the GDPR.

- In terms of personal data transfers from the EU to the UK, EMI companies should monitor the discussions on whether the EU will grant an adequacy decision in respect of the UK. Adequacy decisions are also revised periodically so even if an adequacy decision is made, there will be an element of uncertainty to the process moving forward. In terms of transfers from the UK to the EU, no action should be necessary unless the UK changes its position, which it may do unilaterally.

Competition/ State Aid/Sanctions/ Public Procurement

Key issues

Antitrust compliance

- The substantive application of UK competition law remains essentially the same although there is some (albeit limited) scope for UK courts to depart from pre-Brexit EU case law in certain circumstances.

- The CMA and UK sectoral regulators no longer have power to enforce EU competition law in the UK and are only able to investigate competition matters under UK competition law that affects UK markets. A similar position applies to the EU Commission although it continues to have power under EU law to investigate UK companies if their conduct or agreements affect competition within the EU.

Merger control

- The UK is no longer be part of the EU "one-stop shop" for merger control.

- Large global transactions with substantive UK antitrust issues may need to be notified separately to both the EU and the UK competition authorities.

State aid

- The UK is no longer bound by the EU state aid system. Under the TCA the UK must introduce its own independent regime of subsidy control.

- Significant uncertainties still exist around many aspects of the new UK regime, such as which UK authority will administer the regime, and draft legislation is yet to be introduced. While the new regime must incorporate certain broad principles that already underpin the EU regime, the UK does have significant flexibility in how it designs the new system.

- Importantly, the TCA does retain the previously agreed position that the EU regime (and jurisdiction of EU courts) applies to the UK to the extent UK measures have an effect on trade in goods between NI and the EU. This may in practice act to limit the UK in terms of making major departures from the EU position.

Sanctions

- The EU sanctions regime no longer applies in the UK. The UK will now adopt an autonomous sanctions regime under the Sanctions and Anti-Money Laundering Act 2018 (the Sanctions Act) (although, as a member of the UN, UN sanctions will be imposed in the UK in the interim).

- From a policy perspective, the UK may now diverge from the EU, potentially adopting a more aggressive approach in a number of aspects. What has already been introduced in the UK is a more human rights focused approach than in the EU regime. The UK government has announced changes from a sanctions licensing perspective. Companies operating in the UK and EU will therefore need to comply with both regimes and monitor any divergences. Clearly, differences in sanctions policy between the EU and the UK could create compliance issues for UK companies operating in the EU. Such challenges would add to those already experienced by companies navigating differences between the current EU/UK sanctions regime and that of the US.

- The UK's status as a third country in respect of the EU will have a number of important implications for EMI companies, particularly those affected by sectoral sanctions programmes directed at Russia (i.e. sanctions aimed at restricting companies' ability to deal in certain sectors of the Russian economy and with certain Russian entities or their subsidiaries). Current EU sectoral sanctions on Russia impose restrictions on specific dealings with certain designated Russian banks and defence and energy companies. For example, post-Brexit companies operating in the UK and EU have lost the benefit of currently available exemptions to this programme.

Public procurement

- The TCA incorporates and supplements key provisions of the WTO Government Procurement Agreement (GPA), of which the EU and the UK are both signatories. The GPA is a multilateral treaty with the aim of opening up procurement markets between participating states. It applies to procurements conducted by certain specified entities, and in specified sectors including goods, services and construction activities, all of which apply to the EMI sector.

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

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

  - preventing procurement solely on the basis that participants do not have prior experience in the territory in question;

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

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

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

Recommendations

Merger control

- Companies considering a merger that will affect both UK and EU markets will need to comply with both UK and EU merger rules (noting that the UK rules will be substantially changed if the relevant foreign investment review legislation becomes law).

State aid

- Despite uncertainties, UK state aid rules will be separate but substantively aligned with the EU, at least in terms of the broad principles expressed in the TCA. A new independent UK authority is likely to be created to administer the UK regime. While it is possible that the change will present new opportunities for EMI companies, there will also be a far more complex mechanism for resolving disputes between the UK and EU. This is likely to add an element of uncertainty for recipients of UK state aid which may pose unfamiliar challenges for UK EMI companies given a third party challenge to assistance received by the company may take a lengthy period to wind its way through the new dispute resolution system.

- The new UK state aid regime will also need to be consistent with the various FTAs the UK is seeking to conclude with countries such as the US, Australia and New Zealand.

- We recommend that affected EMI companies follow the status here closely, considering where the balance of interest for the company lies.

Sanctions

- EMI companies should monitor developments around the conclusion of the UK regime to be ready when the changes come into force. Particular focus should be placed on divergence between the UK and EU, as this will add to sanctions compliance challenges across the supply chain.

- Consider the impact of dealings in Russia and, in particular, with Russian entities (or their subsidiaries), given the notable potential impacts in this area.

Public Procurement

- While the TCA provisions provide some protection against economic "nationalism", they fall short of previously proposed measures. Most are also linked to whether a particular procurement is covered by the GPA and EMI companies will need to scrutinise the GPA Annexes carefully to determine whether the protections apply in each case.

- EMI companies operating in the UK should also note the UK government published its own green paper on public procurement in December 2020.

Energy Policy/ Climate Change/Other Regulatory Issues

Key issues

Energy regulation and policies

- Under the TCA, the parties have committed to high levels of protection/standards in relation to energy, environmental protection and the fight against climate change. However, a very early criticism of the Agreement has been a lack of provisions addressing co-operation between the parties in terms of the physical supply of gas and electricity, how interconnectors will operate moving forward, market coupling arrangements and overall market planning. It is expected therefore that the TCA will simply be a basis for much more detailed negotiations on these and other issues moving forward.

- The UK Clean Growth Strategy, Industrial Strategy, including the Grand Challenges and Sector Deals continue to apply to the UK as will:

  - trading practices and enforcement standards on eco-design and energy labelling;
  - the legislative regime for hydrocarbon licensing and environmental protection;
  - electricity supplier Guarantees of Origin issued in all EU countries;
  - microgeneration technology installer certificates (including for solar PV) issued by EEA states; and
  - requirements under both the Feed-in Tariffs and Contracts for Difference schemes and the Renewables Obligation.

Climate change

- The UK is now released from its renewable energy targets under the EU Renewable Energy Directive. However, the UK government has committed to complying with its local and international climate change obligations and the UK remains a party in its own right to international climate change agreements such as the Paris Agreement.

- The UK is no longer part of the EU "Green Deal" launched in December 2019 but leaving the EU does not affect the UK government's statutory commitments under the Climate Change Act, which is domestic legislation. This obliges the UK government to take steps to achieve net zero carbon emissions by 2050.

- Emissions trading scheme (ETS): Under the Withdrawal Agreement, the UK remained in the EU ETS during the Transition Period and operators were obliged to comply with obligations relating to the 2020 scheme year. Obligations in relation to monitoring, reporting and verification of emissions have also been replicated under UK law. Moving forward, the UK government has stated it is open to considering a link between the UK Emissions Trading Scheme (which commences in 2021 and is detailed under the Greenhouse Gas Emissions Trading Scheme Order 2020) and the EU ETS (as Switzerland has done). Notably, the TCA only allows for linking of the schemes in the future and does not address whether the EU will apply its proposed carbon border adjustment tax to imports of relevant goods from the UK.

- The EU has stated that funds under the EU ETS Innovation Fund would only be available to UK companies developing a project in the EU, Norway or Iceland.

Power

- During the Transition Period, the UK's electricity markets remained coupled with the EU, with common rules governing cross-border flows under EU legislation relevant to the functioning of the EU's Internal Energy Market.

- Moving forward, cross-border flows across electricity interconnectors are no longer governed by EU legislation and alternative trading arrangements will apply: the EU and the UK have until 2022 to decide on new rules for efficient trading across interconnectors. Interim arrangements based on existing rules will apply in the meantime. The TCA regulates trade in electricity and gas over interconnectors, provides for co-operation in relation to security of supply and the development and integration of renewable and hybrid sources of electricity as well as providing for open, fair competition. A Specialised Committee on Energy shall ensure that transmission system operators develop arrangements setting out technical procedures for electricity capacity allocation and the management of congestion.

- The EU Regulation on Energy Market Integrity and Transparency (REMIT) will be maintained in the UK, although with some changes.

- Renewable Guarantees of Origin and Guarantees of Origin for combined heat and power issued in EU countries will continue to be recognised in the UK. This will allow UK suppliers to continue to comply with their fuel mix disclosure obligations and ensure that existing supply contracts are not compromised.

Derivatives trading

- Some EMI companies trade in commodity derivatives contracts and this may constitute a regulated activity. Where UK EMI companies trade on EU exchanges or trade with EU counterparties, EU regulatory requirements need to be complied with.

Chemical substances

- UK EMI companies which were formerly subject to the EU's Registration, Evaluation, Authorisation & Restriction of Chemicals (REACH) legislation, which requires registration of chemicals before they are placed on the market, will not only need to comply with the new UK REACH regime but the EU rules in order to continue carrying out relevant operations in the EU. Such companies will need to appoint an appropriate representative or transfer registrations to an EU entity.

- UK downstream users (who do not hold an EU REACH registration) importing chemicals from an EU/EEA country are now subject to more onerous obligations, including the need to ensure the substances they purchase are covered by a valid UK REACH registration.

Oil stocking obligations

- The UK has international obligations to hold emergency oil stocks as required by the International Energy Agency (IEA) and by the EU Oil Stocking Directive 2009/119/EC (the Directive). The Directive also requires that one third of emergency stocks be held as finished oil products. To meet its obligations, the UK government requires suppliers to the UK market to hold stocks.

- The Directive no longer applies in the UK, although the UK will remain a member of the IEA and its requirements will remain. Domestically traded tickets (effectively commitments to hold oil stocks on behalf of another party) will not be affected.

Recommendations

Climate change

- UK stationary installation operators and aircraft operators will continue to have access to their registry accounts administered by the UK for 2020 compliance obligations up to and including 30 April 2021. The UK ETS proposals are particularly relevant to companies in energy-intensive industries such as steel, the power generation sector and aviation. It is likely that the UK government will seek to link the new UK ETS with the EU regime. The previously proposed option, the imposition of a carbon emissions tax (CET), is an alternative but any scheme that is substantially weaker than the EU's may attract the announced carbon border adjustment tax from the EU, which would negatively affect applicable UK exports to the EU.

Power

- Under the new arrangements, it is likely trade on interconnectors will be less efficient than formerly but the extent of that inefficiency and the impact on contracts remains unclear.

- Market participants in the UK need to register with an EU regulatory authority under REMIT to avoid a disruption to cross-border trade, trade within EU wholesale energy markets or trade within the Single Electricity Market.

- Some UK-based energy trading firms are either setting up trading desks in the EU, with requisite regulatory authorisations or building on existing EU operations.

- UK-issued Renewable Guarantees of Origin and Guarantees of Origin for combined heat and power will no longer be recognised in the EU after the Transition Period. This may create issues for UK companies if their contracts with EU electricity suppliers or traders require the transfer of a Guarantee of Origin recognised by the EU.

- Pending further agreement between the EU and UK, installer certification issued in respect of microgeneration technologies in the UK will no longer be recognised in the EU and relevant UK companies will likely need certification in each of the countries in which they do business in order to directly operate after the Transition Period.

Chemical substances

- UK EMI companies should carefully review their roles in the EU and UK REACH systems and their current supply chains. EU REACH registrations held by UK-based EMI companies will carry across directly into UK REACH. UK-based EMI companies currently registered with EU REACH will no longer be able to sell into the EEA market without transferring their registrations to an EU/EEA-based organisation.

Oil stocking obligations

- UK EMI companies engaged in international ticketing arrangements should monitor the status of agreements. Companies holding stocks on behalf of other countries should consider the impact of UK stocks not being eligible to count towards EU obligations.

People

Key issues

- Many EMI companies rely on a substantial number of highly skilled and frequently highly mobile employees to carry out their operations. A portion of these come from the EU. For example, reports have found that 5% of skilled/managerial workers of the total oil and gas workforce and 7% of the offshore workforce come from the EU. The EMI sectors will be vulnerable to potential skill shortages if working EU nationals cannot stay in the UK now that the Transition Period has ended (or cannot be replaced if they decide to return to their country of origin).
- EU nationals who entered the UK before 31 December 2020 are allowed to remain in the UK on a long-term basis under the EU Settlement Scheme. They will need to apply 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. The same rules apply to UK nationals living in the EU.
- EU nationals who now wish to come to the UK to work need to apply under the new immigration rules system (primarily the Points-Based System with additional rules which took effect on 31 December 2020).
- EMI companies also often rely on the temporary transfer of employees and contractors. Employers sending employees from the EU to the UK or vice versa may well face more difficulties than existed under the framework that was applicable during the Transition Period. For example the TCA's detached worker rules, applicable to workers moving for less than two years are only applicable to EU states that elect for them to apply. A future EU-UK agreement that facilitates this would assist, and is more likely to be reached given there is a deal, but it is unlikely to happen in the short term.

Recommendations

- Consider that uncertainties around the position of workers to work in the UK or the EU now the Transition Period has ended could lead to at least a short-term shortage of skilled workers. EU nationals now arriving in the UK will have a time-limited right to work in the UK, which might act as a disincentive for those workers to take up a role in the UK.
- Continue to engage with and encourage your existing employees to certify their residency status in the UK while also reviewing recruitment strategy moving forward, especially for critical roles.
- Review all arrangements for the temporary transfer of employees and contractors between the EU and the UK. These may not now be workable or may require additional time and paperwork. Potentially, this is an even more significant issue for employees and contractors working in the offshore oil and gas sector in the North Sea.

Tax

Key issues

- The UK will retain its VAT system but VAT will operate on the basis that the UK is a third country[1] and with special rules for goods moving to or from Northern Ireland.
- EMI companies that move goods from the EU into the UK will generally be subject to import VAT. Companies that move goods from the UK to the EU will also generally need to pay import VAT and this may have cash flow implications. Companies that are registered for UK VAT may use postponed accounting which will mitigate the VAT impact as import VAT can be declared and recovered on the same VAT return.
- As a result of the Protocol, goods moving between NI and the rest of the UK, are treated as imports/exports. UK VAT accounting generally remains the same with the exception of sales of goods between GB and NI by members of a UK VAT group. Members of a VAT group are subject to new compliance/reporting obligations to account for VAT on the movement of goods between NI and GB. Those supplying goods between NI and EU businesses and consumers need to notify HMRC that they are within the scope of the NI Protocol. When goods are supplied under the NI Protocol, an "XI" prefix needs to be put in front of the seller's VAT number when communicating with an EU customer or supplier.
- Some EMI companies that are reliant on simplifications for goods moving into or out of the UK, including triangulation, will likely no longer be able to apply them in the same way. Companies relying on a UK VAT registration to apply triangulation for goods moving between EU countries need to consider their eligibility to continue to use the simplification and may be required to register in the EU and comply with additional administrative requirements. A fiscal representative may be required depending on local rules.
- EMI companies providing cross-border services should also consider the impact of the numerous changes to the VAT laws on their arrangements. For example, 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 amongst 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 impacted for such services.
- EU directives, including the Parent-Subsidiary and Interest and Royalties Directives, will no longer apply. Accordingly, relief from foreign withholding taxes arising in EU countries will rely on the application of double tax treaties (and not all such treaties eliminate withholding 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 EU27 where currently there is none (e.g. a 10% withholding tax on interest payments between the UK and Italy). The loss of EU tax directives could also result in withholding tax applying to royalty payments for the use of intellectual property between related companies involving a UK member. Outbound payments by UK companies should continue to benefit from these directives as the UK has legislated to preserve the effect of EU-derived domestic legislation that was in force immediately prior to exit day.

1 Except for goods moving to and from Northern Ireland which will continue to be treated as intra-EU trade for VAT purposes.

Recommendations

- EMI companies should carefully review their existing EU supply chains for goods, as the movement of goods between the UK and the EU are now subject to import and export procedures. EMI companies may wish to consider having both a UK and EU import hub for sales in those territories. Accounting processes may also need to be updated to ensure VAT is correctly accounted for and recovered.

- EMI companies should consider the tax implications of relocating operations and employees. Some countries have amended their tax laws to anticipate tax restructurings following Brexit, particularly in relation to the introduction of favourable personal tax regimes.

- Potential withholding tax liabilities should be reviewed. This is particularly relevant for multinational extractive companies, that may wish to review their company structures.

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