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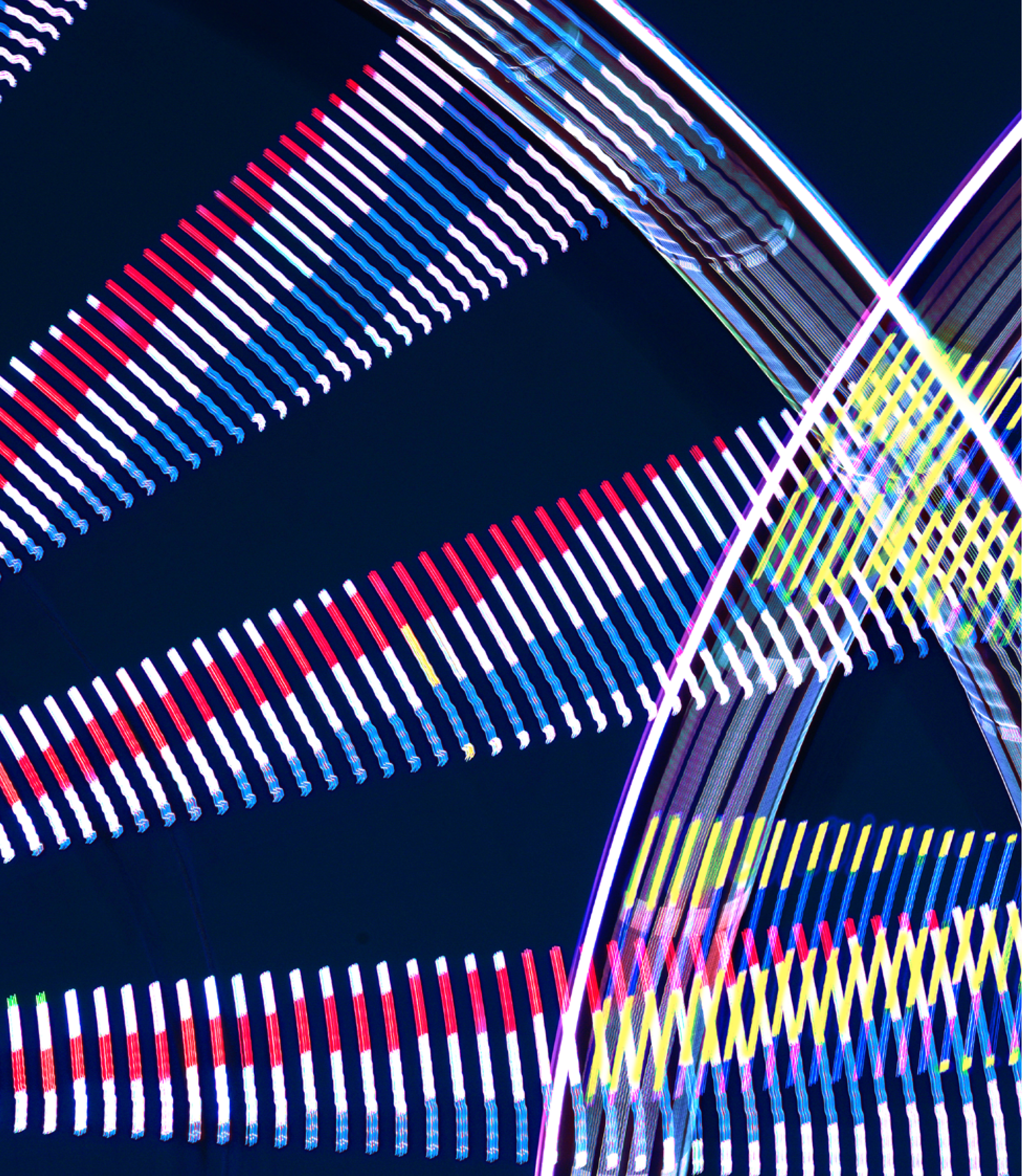
Brexit: Key Implications for Energy, Mining and Infrastructure Sector



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.

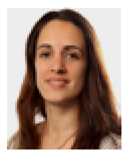
Regardless of whether a free trade agreement (FTA) is concluded between the EU and the UK or whether negotiations end in a "no-deal," EMI companies will be impacted in many areas. For example, the post-Brexit, movement of some key goods between the UK and the EU may attract new tariffs and will become subject to customs formalities. These pose a risk of delays at the EU-UK border, which may affect 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 are more difficult to predict, with several potential scenarios in the event of a no-deal Brexit. The UK government's 2018 Budget stated that in a no-deal scenario the UK would impose a carbon emissions tax (CET) on relevant emissions from UK stationary installations currently covered under the EU Emissions Trading Scheme (ETS). Over the longer term, the UK government is seeking to reach an agreement with the EU for a linked UK ETS but, at the same time, it is also exploring carbon pricing options. Similarly, moving forward, the UK government has a number of options for the UK state aid and sanctions regimes in a no-deal scenario, which may create opportunities and pose challenges for EMI companies.

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. EMI companies should consider these as part of their own specific contingency planning.

For further analysis of more general key legal and regulatory issues resulting from Brexit, please visit our **'No deal' Brexit Checklist: Key Implications for Business**.

KEY CONTACTS



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Supply Chain Issues

Key issues

- In a no-deal scenario, the UK and the EU will trade as third countries following the end of the transition period (31 December 2020), and EMI companies will be required to pay new tariffs and customs duties and complete customs declarations for goods crossing the EU-UK border. As a result, EMI companies will be subject to additional financial and administrative burdens related to the movement of goods between the UK and the EU.

- The new requirement to complete customs declarations (as well as other customs compliance checks at the border) for goods moving between the UK and the EU poses an inherent risk of delays in clearing customs, which is likely to affect 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.

- The precise tariff impact on common EMI-related goods in a no-deal Brexit will vary. For example, under both the EU's Common External Tariff and the UK's Global Tariff (which will replace the Common External Tariff on 1 January 2021), imports of items such as electricity, gas, crude oil, various line pipe, drill pipe, casing and tubes, and many hydrocarbons, precious and semi-precious stones will continue to carry a zero duty rate once the transition period ends. As such, the duty rates for flows of these items between the UK and the EU will not be impacted.

- Certain other key goods traded by EMI companies, such as chemicals, plastics and equipment/spare parts required for constructing and maintaining energy-related and other infrastructure, may attract customs duties when moving between the UK and the EU. For other goods, such as drills, turbines, pumps, jet fuel and many fuel oils, the UK intends to introduce lower duty rates than under the EU's Common External Tariff. EMI companies can use the online HMRC search tool to compare the impact on particular goods.

- As the UK intends to lower or remove tariffs on products such as jet fuel and fuel oils, there is a risk that UK refineries that produce these products may face a more challenging domestic market post-Brexit (from both EU-based and non-EU based competitors). This competitive risk will similarly apply to UK producers of other EMI products where the UK intends to lower or remove tariffs.

- Additional export controls will apply to dual-use controlled items moving between the UK and the EU following the end of the transition period. Such items are prevalent in the EMI sector, for example, certain pumps and valves could be considered dual-use items (see further on this below). This could 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.

- EMI companies operating in the UK North Sea may face particular challenges after the transition period for a number of factors, including potentially increased tariffs and other costs on a range of goods that are key to exploration, production and the provision of services, high impact from supply chain disruptions, strong connection with EU supply chains and a highly specialist workforce (see comments under "People" below).

- Even if a deal is reached between the EU and the UK (and they agree and ratify an FTA), many of these impacts will still be present, as customs declarations will still need to be completed, the goods will still need to clear customs and dutiable goods will only benefit from preferential tariff rates to the extent they meet (and can be evidenced to meet) the origin requirements stipulated under the FTA.

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) calculate the additional duties and financial impact on the supply chain; (3) consider potential mitigation strategies (e.g., decreasing the movement of goods between the UK and the EU); and (4) understand which goods may have a high impact on operations in the event of supply chain delays and bottlenecks.

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

- Develop contingency plans to mitigate against 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 the UK that can act as importers/exporters and engaging the services of customs brokers.

Contractual Issues

Key issues

Governing law

- English law is commonly used as a "neutral" governing law for EMI contracts and this should be unaffected by Brexit as it will not cause any changes to substantive UK or English law. After the transition period ends, courts in EU member states will continue to be required to respect a choice of English law under the Rome I and Rome II Regulations (which can be retained unilaterally by the UK). There is no reason to avoid a choice of English law because of a no-deal exit.

- Note though that English law up to the end of the transition period includes directly effective EU law. While the UK has already taken steps to save substantive EU law, there may well be increasing divergence between the two systems over time.[1] Also, the UK application of provisions may diverge from the EU once UK judges are not obliged to follow the decisions of EU courts.

- 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 Brexit will not affect the traditional underlying reasons for this preference.

Forum for disputes

- Arbitration is a popular choice for dispute resolution in many EMI contracts and this 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 that are arbitrated. The New York Convention, to which the UK will remain a party, governs the enforcement of arbitral awards and Brexit will not affect this.

- 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 the choice of English courts, which will depend in part on the UK's accession to the Hague Convention on Choice of Court Agreements (HCCA) and/or the Lugano Convention. The former can be joined unilaterally, whereas the latter requires the consent of all contracting states; whether this consent will be obtained remains unclear. 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.

- 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, in particular, a "no-deal" Brexit (depending on the drafting of the clauses) 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 and the performance of customs formalities. Contractual clauses that reference these and other standards, such as indices used in price adjustment formulae, may require review and revision in light of the post-Brexit environment.

1 Note the UK government is currently managing a consultation as to what courts should be able to diverge from EU case law and the position may not be entirely clear before Brexit.

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 Brexit will affect the reputation of English courts.

- 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 it is certainly recommended if not already done. Claims and rights under these types of clauses may not crystallise until after the transition period is concluded and the full effects of the Withdrawal Agreement 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 that 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 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 should not be significantly affected by Brexit, there remain some issues to consider.

Contractual rights

- Brexit should not affect IP rights under agreements (although consider issues in relation to governing law and dispute resolution above).

Patents/copyright

- Holders of UK and European patents should be unaffected by Brexit in either deal scenario, given that neither is based on EU legislation and the UK government has stated its intention to remain in the European Patent Convention. The UK government has however changed its position in relation to whether the UK will join the Unitary Patent and Unified Patent Court. Similarly, rights in respect of copyright should be unaffected.

Trademarks

- Right holders with an existing EU trademark or "registered Community design" will have a new UK equivalent right granted automatically. These will be subject to renewal in the UK and will be capable of being assigned and licensed independently from the equivalent EU right. EMI companies with pending applications for EU trademarks will still need to actively apply for an equivalent UK trademark under a new mechanism within a nine-month period following the end of the transition period.

Data protection

- This will remain a significant issue for many EMI companies, particularly those holding information on a significant number of customers. The General Data Protection Regulation is EU legislation and, as such, it will not apply to the UK after the transition period, but its provisions have been incorporated into UK law under the Data Protection Act 2018.

Recommendations

IP

- IP rights with regional application (i.e., a contractual licence that permits the use of knowhow 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 will need to act relatively quickly on pending EU trademarks, as the nine-month period is a deadline.

Data protection

- There should not be substantive changes to EMI companies' obligations in the event of an agreement between the UK and the EU. However, in the event of a no-deal scenario, EMI companies will need to be cautious around any transfer of personal data from the EU to the UK and this will need to be legitimised by appropriate safeguards, such as model clauses or binding corporate rules at least until a separate adequacy decision is made by EU authorities. Adequacy decisions are also revised periodically, so this would add an element of uncertainty to the process moving forward.

- The UK needs to establish agreements with non-EU third countries, notably the US, to ensure the continuity of personal data transfers. EMI companies that rely on these should follow the status of discussions and consider whether they need to alter their practices or impose additional safeguards.

Competition /State aid/Sanctions

Key issues

Antitrust compliance

- The substantive application of competition law should remain essentially the same under either EU-UK deal option. The UK government has indicated that it does not intend to make fundamental changes to the existing UK competition law regime, at least in the short to medium term.

Merger control

- After the transition period, the UK will 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

- Provisions to ensure fair competition between the UK and the EU have posed one of the biggest obstacles in negotiations at a time in which COVID-19 has driven governments and central banks to unleash waves of state assistance.

- The EU has previously pushed for its rules to be incorporated into UK law following "dynamic alignment," with the EU Court of Justice acting as final arbiter. However, this position has publicly softened somewhat with the EU being open to a compromise involving equivalent rules but with independent oversight.

- During the transition period, EMI companies operating in the UK must continue to comply with UK competition law (based on the EU rules) and those operating in the EU must comply with EU competition law.

- After the transition period ends, the UK will no longer be part of the EU competition system. Companies operating in the UK and the EU will need to comply with both UK and EU antitrust rules, although these should remain generally consistent. However, the UK and the EU competition authorities may investigate breaches of these rules in parallel where they affect both markets. Importantly, the EU competition authorities will be able to investigate UK companies — even if the relevant conduct takes place in the UK — if it affects the EU27.

- Existing approvals of state aid, including block exemption approvals, will remain valid during the transition period and these are carried over into UK law under the Withdrawal Act.

Sanctions

- As set out in the Withdrawal Agreement, EU sanctions continue to apply in the UK during the transition period. In the event of a no-deal Brexit, sanctions legislation agreed at the EU level will no longer automatically apply in the UK and an autonomous sanctions regime will come into force under the Sanctions and Anti-Money Laundering Act 2018 from that time. The UK government has also stated it will implement UN sanctions in UK law after the transition period.

- The UK government has stated there will be no gaps in implementing existing sanctions regimes after the transition period, although new regulations are still to be published.

- From a policy perspective, after the transition period, the UK may diverge from the EU, potentially adopting a more aggressive approach in a number of aspects. Companies operating in the UK and the EU will therefore need to comply with both regimes. 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 the 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 the EU may lose the benefit of currently available exemptions to this programme.

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.

State aid

- The position after the transition period ends depends largely on whether an agreement between the UK and the EU is reached.

- If an agreement is reached, it is most likely that UK state aid rules will remain separate but substantively aligned with the EU, with the UK system being administered by the domestic Competition and Markets Authority. However, there will potentially be an entirely new and possibly far more complex mechanism for resolving disputes. This could 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.

- If no agreement is reached, the UK will not be constrained by EU rules and it could devise a new regime that may well diverge from the EU position, particularly over time. The UK government may of course come under strong internal pressure to design a more generous regime for the UK, particularly if there is a sustained decline in foreign direct investment in the UK post-Brexit. A more generous UK regime could also provide advantages to UK EMI companies, although the UK, as a World Trade Organisation (WTO) member, would remain bound by the terms of the WTO Agreement on Subsidies and Countervailing Measures. These rules constrain the use of subsidies, although overall these constraints are not as onerous as existing EU rules and enforcement options by third parties are substantially more limited.

- Conversely, the UK will have limited scope to oppose the grant of unlawful aid by EU states and it could face the imposition by the EU of anti-subsidy duties on its exports of subsidised products to the EU.

- In theory, any new UK state aid regime would also need to be consistent with the various FTAs the UK is seeking to conclude with countries such as the US, Japan, Australia and New Zealand. Politically, the UK may also face international pressure to avoid devising a regime that is too advantageous for UK companies, especially with the US, Japan and the EU all working together to forge new subsidy rules for China.

- 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 introduction of the UK regime to be ready when the changes come into place. Focus should be placed on divergence between the UK and the EU, as this will add to sanctions compliance challenges across the supply chain.

Energy Policy /Climate Change/Other Regulatory Issues

Key issues

Energy regulation and policies

- Negotiations between the UK and the EU on environmental and energy regulation has formed part of the so-called "level playing field" concept, which requires the UK to conform to EU standards. However, the UK has no legal obligation to maintain the current standards if no agreement is reached.
- The UK government has confirmed that the Clean Growth Strategy and Industrial Strategy, including the Grand Challenges and Sector Deals, will 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 European Economic Area (EEA) states
  - requirements under both the Feed-in Tariffs and Contracts for Difference schemes and the Renewables Obligation

Climate change

- The UK will be released from its renewable energy targets under the EU Renewable Energy Directive. However, the UK government has stated that it will still comply 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 will not be part of the EU Green Deal launched in December 2019 but leaving the EU will 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.
- ETS: Under the Withdrawal Agreement, the UK remains in the EU ETS during the transition period and operators must comply with obligations relating to the 2020 scheme year. Obligations in relation to the monitoring, reporting and verification of emissions have also been replicated under UK law.
- Post-January 2021, the UK government has stated it is open to considering a link between any UK ETS and the EU ETS (as Switzerland has done).
- The EU has stated that funds under the EU ETS Innovation Fund would be available to UK companies developing a project in the EU, Norway or Iceland but not otherwise.

Power

- During the transition period, the UK's electricity markets remain 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.
- After the transition period, cross-border flows across electricity interconnectors will no longer be governed by EU legislation. Depending on the outcome of negotiations, alternative trading arrangements will apply.
- In the event of a no-deal scenario, the EU Regulation on Energy Market Integrity and Transparency (REMIT) is likely to be maintained in the UK, although potentially with 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 from 1 January 2021. 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. In a no-deal scenario, the UK will be excluded from the EU's framework for financial services regulation. While the UK has implemented temporary transition provisions for EU businesses, where UK EMI companies trade on EU exchanges or trade with EU counterparties, EU regulatory requirements will need to be complied with.

Chemical substances

- UK EMI companies currently subject to the EU's Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) legislation, which requires the registration of chemicals before they are placed on the market, may face additional challenges in a no-deal scenario. Such companies will not only need to comply with the new UK REACH regime, but also, in order to continue carrying out relevant operations in the EU after the transition period, such companies will need to appoint an appropriate representative or transfer registrations to an EU entity.
- UK downstream users (that do not hold an EU REACH registration) currently importing chemicals from an EU/EEA country will be subject to more onerous obligations, including the need to ensure the substances they purchase are covered by a valid UK REACH registration.

Dual-use items

- While military items already require export licensing for transfers between the UK and the EU, most dual-use items (i.e., items that can be used for both civil and military purposes, such as certain chemicals, hardware, software and technology) currently do not. As discussed above, in a no-deal Brexit, additional export controls will apply to such dual-use items.

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 ("Oil Stocking Directive"). The Oil Stocking Directive also requires one-third of emergency stocks to be held as finished oil products. To meet its obligations, the UK government requires suppliers to the UK market to hold stocks.
- After the transition period ends, the Oil Stocking Directive will no longer apply 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. Pending agreement(s), EU-traded tickets held by UK-obligated companies may no longer operate as they do now and UK companies may lose the ability to access some or all of the EU market for tickets.

Recommendations

General regulatory

- If no agreement with the EU is reached, the UK has essentially three choices. First, non-alignment with generally weaker environmental policies and product standards, etc. Second, so-called "dynamic alignment," with UK policies and standards matching those of the EU in the future. Third, non-alignment with generally stronger policies and standards (although individual standards could of course be weaker in some areas).

- Alignment may well be beneficial to the future competitiveness of the UK's EMI sectors. The EU Green Deal (see further below) is more than a series of environmental policies. It also includes comprehensive plans for industrial policies, digitalisation, financing mechanisms and investment.

- Alignment may also benefit EMI companies in the clean energy sector, not only in terms of EU market access, but also, from the Green Deal investment plan, a EUR 1 trillion opportunity.

- In the non-alignment scenarios, UK EMI companies will of course still face a number of issues arising out of EU rules that will need to be carefully considered. The Green Deal, for example, includes a carbon border adjustment tax to prevent carbon leakage to companies operating in countries with weaker regulations. The EU has already threatened to potentially apply this mechanism against the UK and this would clearly make it more challenging for UK companies exporting relevant goods into the EU market.

- Pending further discussions between the EU and the 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 to directly operate after the transition period.

ETS

- 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. EMI companies that are operators should confirm that delivery of allowances will be possible from 1 January 2021 to ensure compliance with surrender obligations for 2020 emissions. Operators should consider actions to address such loss of access.

- It seems unlikely that the EU and the UK could potentially decide on a linking agreement in a no-deal scenario. In that situation, the UK will likely either proceed with its own stand-alone scheme or institute a CET (the UK government has previously proposed this). As above, a scheme that is weaker than the EU may attract a carbon border adjustment tax from the EU, which would negatively affect certain UK imports into the EU.

Power

- Affected EMI companies, particularly interconnectors and market participants, should be considering contingency planning for 1 January 2021 for both agreement and no-deal scenarios. Particularly in a no-deal scenario, it is likely trade on interconnectors will be less efficient, but the extent of that inefficiency and the impact on contracts is not clear and it may not be until after the transition period.

- Market participants in the UK should follow the discussions on changes to the REMIT and they will need to register with an EU regulatory authority under the REMIT to avoid 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 setting up trading desks in the EU with requisite regulatory authorisations or building on existing EU operations.

- Pending further agreement, 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 countries' electricity suppliers or traders require the transfer of a Guarantee of Origin recognised by the EU.

- EMI companies operating in the nuclear sector will need to be prepared for new licensing requirements on dual-use goods and changes to the authorisations for spent fuel and radioactive waste.

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; the deadline for entities to transfer across/create new registrations so that they can continue to import into the UK market depends on the tonnage being imported. 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 toward 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 comes 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 after the transition period (or if they cannot be replaced if they decide to return to their country of origin post-Brexit).

- EU nationals currently living in the UK or EU nationals who enter during the transition period up to 31 December 2020 will be allowed to remain in the UK on a long-term basis. 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.

- More uncertainty attaches to the position on the movement of people between the EU and the UK after the transition period. The details of this system — which is due to begin in 2021 — have yet to be announced but it is anticipated that it will be similar to the current points-based system for non-EU nationals.

- EMI companies often rely on the temporary transfer of employees and contractors. An EU-UK agreement that facilitates this would assist but that is unlikely in the event of a no-deal scenario.

Recommendations

- Consider that uncertainties around the position of workers to work in the UK or the EU after the transition period could lead to at least a short-term shortage of skilled workers. EU nationals arriving in the UK after the transition period 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.

- In the event of a no-deal scenario, after the transition period, UK nationals will immediately be subject to local visa and work permit requirements in each EU country (as there is no EU-wide system of immigration control for third-country nationals). Concurrently, monitor information from EU countries in which you operate to ensure you understand these requirements in advance so any planned assignments are not put at risk.

- Review all arrangements for the temporary transfer of employees and contractors between the EU and the UK. These may not be workable after the transition period or they may require additional time and paperwork. This is potentially an even more significant issue for employees and contractors working in the offshore oil and gas sector in the North Sea.

- The current rule that employees posted between countries can remain on their origin country social security regime for a limited period may no longer apply if social security rules revert to those already in place between individual countries or the default rules.

Tax

Key issues

- The UK will retain its VAT system but, subject to an EU-UK agreement, VAT will operate on the basis that the UK is a third country[2] and with special rules for goods moving to or from Northern Ireland.

- EMI companies that move goods into the UK from the EU 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.

- 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. Companies selling goods in or through Northern Ireland should continue to monitor EU developments that may apply to them. The EU Commission has proposed the introduction of a special VAT identification number for businesses in Northern Ireland to allow them to be identified for the purpose of goods sold and transported from Northern Ireland to the EU (and vice versa), which are intended to be treated as cross-border supplies of goods within the EU.

- Some EMI companies are reliant on simplifications for goods moving into or out of the UK, including triangulation, which companies will likely no longer be able to apply in the same way as now. 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 they 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, and supplies of staff and hire goods, among other things, where one counterparty is in the EU and one is 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.

2 Except for goods moving to and from Northern Ireland.

- EU directives, including the Parent-Subsidiary Directive and the Interest and Royalties Directive, 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 IP 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.

Recommendations

- EMI companies should carefully review their existing EU supply chains for goods, as, pending agreement, the movement of goods between the UK and the EU will become subject to import and export procedures, and 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 post-Brexit should be reviewed. This is particularly relevant for multinational extractive companies, which may wish to review their company structures.

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