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# Key Implications for business

As the deadline for the UK's withdrawal from the EU approaches, and Brexit negotiations continue, it is vital for companies to address the challenges to their business.

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

The global nature of our Firm and the clients we represent means that we have a number of experts who can provide advice that is tailored to your organisation and the challenges that you face.

If you would like help navigating the complicated, evolving landscape, please contact a member of our dedicated team of specialists (contact details below) or your usual Baker McKenzie contact.

### Customs



### **Key issues**

#### **Tariff impact**

- The UK and EU will trade as third countries (on WTO terms). Introduction of duties on goods shipped from the UK to the EU (and vice versa).
- Loss of duty relief under EU Free Trade Agreements (FTAs) on import into and export from the UK.

#### Non-tariff impact

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

### Recommendations

- Understand supply chains, where goods are moved from and to (including third countries, UK and EU), and what manufacturing takes place in the EU/ UK.
- Calculate additional duties and financial impact on supply chains and consider how to mitigate this.
- Consider Incoterms and who is responsible for any additional duties and customs-clearance requirements.
- Consider which entities will act as importers into the UK/ EU and whether any formalities need to be completed for this.
- Consider whether to 'stock pile' or move existing stock in advance of Brexit to weather any risks of delays in getting goods through the border.
- Scale up customs team/expertise.

# **Product Regulatory**



### **Key issues**

- UK companies currently qualifying as EU importers for product regulatory purposes will lose that status, with related obligations, liabilities and labelling requirements transferring to current EU distributors. In the same way, UK distributors will have UK importer status (with associated obligations) for product regulatory purposes if they are bringing products from the EU/EEA into the UK for the UK market.
- UK conformity assessment bodies lose their status as accredited entities for EU product conformity assessments.
- UK-based authorised representatives and responsible persons will no longer be recognised by the EU.
- UK companies can no longer hold EU chemical (REACH) registrations and companies will need to comply with the new UK REACH regime.
- The new "UKCA" conformity assessment mark must be applied from the date of Brexit to certain products for the UK market. In most cases, the CE mark can still be used for products for the UK market, although this will be for a timelimited period only.

- Assess supply chain for risk of EU and UK distributors acquiring importer status with related product compliance obligations and liabilities.
- Make arrangements to transfer to EU-27 conformity assessment bodies, authorised representatives and responsible persons.
- Plan to transfer chemical registrations and compliance ('only representative') roles from UK to EU entities.
- Verify EU and UK supply chains (including where REACH registrations are currently held) to determine whether action is required to ensure continued EU and UK compliance.
- Consider whether UKCA marking is needed for new products placed on the UK market.

# **Immigration**



### **Key issues**

- The UK Government has set out how it intends to deal with EEA nationals (including all EU citizens and Swiss nationals) coming to the UK post-Brexit in the event of Britain crashing out of the EU with no deal. Individuals here before Brexit day will have their right to remain protected by the new EU Settlement Scheme. However, if there's no deal, EEA nationals and their family members arriving after Brexit won't benefit from this scheme. Instead, for a limited period, they will be able to come to the UK for visits. work or study – in much the same way as they do now – but crucially they will only be able to remain here in that capacity for three months. In this respect, if they wish to remain for a longer period, they will need to apply for and obtain European Temporary Leave to Remain. Under this new category of leave, which has been created specifically for a no-deal scenario, EU nationals will be granted permission to remain for a 3-year period. The full details regarding this scheme haven't been released, but the government has confirmed:
- Applicants will be subject to identity, criminality and security checks before being granted permission to stay
- Non-EEA family members wishing to accompany an EEA national under these arrangements will need to apply in advance for a family permit
- EEA nationals will be able to enter and leave the UK as they do now, using e-gates when travelling on a biometric passport
- EEA nationals will be granted the initial 3-month period of leave free of charge, but there will be an as yet undisclosed fee to apply for European Temporary Leave to Remain

These provisions fall outside of the special arrangements that exist between Ireland and the UK. Therefore, Irish citizens won't have to apply for European Temporary Leave to Remain and will continue to have the right to enter and live in the UK under the Common Travel Area.

EEA nationals wishing to stay for longer than three years will have to make a further application under the new skills-based system.

The details of this scheme – which isn't due to begin until 2021 – have yet to be announced, but it is anticipated that it will be similar to the current arrangements that apply to non-EU nationals.

· In its White Paper in December, the government set out its plan to devise a "single immigration system" for skilled talent that will be equally applicable to non-EU and EU migrants alike at the end of the transition period. The aim is to create a system where "it is workers' skills that matter, not which country they come from". This is very much in line with the recommendations earlier in the year of the Migration Advisory Committee, but this is likely to cause difficulty for some employers that are reliant upon low-skilled migrants from the EU. The government plans to expand the current scheme to also include medium-skilled roles (in addition to highly skilled workers) although this won't resolve the issue in relation to low skilled-migrants. The government also plans to reduce the impact of losing low-skilled migrants from the EU, by allowing low-skilled migrants from low risk countries (i.e., the USA, Canada, Australia) to enter the UK for

a time limited period of up to one year, but they will then be subject to a "cooling off" period and prohibited from returning to the UK for 12 months.

- Employers should consider reviewing/ amending their HR processes to ensure these are fully compliant with the obligations arising under a sponsor licence in case the business has to fall back upon the Points Based System arrangements when hiring EU nationals.
- It is still possible that if a wider trade deal is agreed with the EU, this may include some preferential treatment for EU nationals coming to the UK or British citizens going to the EU, but failing that, we will fall back upon the local immigration requirements in each jurisdiction (as there is no EU wide system of immigration control for third country nationals).

# Services general



### **Key issues**

#### General

- Under a no-deal scenario, the UK will be trading services with the EU on the basis of the WTO's General Agreement on Trade in Services (GATS).
- Under WTO rules, impact for businesses will vary depending on which sector they operate. Some sectors will see limited to no change, whereas in other sectors there will be additional requirements and standards and even a prohibition in the provision of certain services between the EU and the UK.
- If there is a deal between the EU and the UK, services will most likely be subject to a Free Trade Agreement (FTA) between the EU and the UK and impact will depend on exact content of that FTA.

#### **Audio Visual**

- The UK Government's "no-deal Brexit" technical notice on broadcasting and video-on-demand stated that if the UK leaves the EU with no deal, the AVMS Directive, the revised AVMS Directive and the country-of-origin principle will no longer apply to services under UK jurisdiction that are broadcast into the EU.
- The UK Government's technical notice recommended that UK media service providers assess if their service is available in the EU and if so, whether they have the correct licences to provide those services after Brexit.

### Recommendations

#### General

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

#### **Audio Visual**

- Ofcom licensed broadcasters should consider restructuring their operations to secure an EU-27 broadcasting licence to maintain market access.
- UK broadcasters should secure IP protection for satellite broadcasts in individual EU Member States.
- UK production should quantify the impact of loss of EU financial support and look for alternative funds.

## Financial Services



### **Key issues**

- Firms must be ready for a no-deal Brexit; this should be on a worstcase basis – if only undertaking the minimum steps.
- The European Central Bank has urged banks to use the remaining time before Brexit to make sure they are fully prepared -in particular, that boards should step up their preparations to complete their target operating models and, where applicable, fulfil their commitments to the ECB to build up local risk management capabilities and governance structures in the EU-27.
- For EU-27 businesses that rely on "passports" to access the UK, in a no-deal Brexit, the UK authorities have announced temporary permissions regimes and measures around contractual continuity to allow firms to continue operating. Alternatively, a financial services contracts regime will enable EU-27 passporting firms to continue to service UK contracts entered into prior to exit for a limited period, in order to wind down their UK business in an orderly fashion.
- For UK-based businesses accessing the EU-27, to date, the EU has announced limited transitional measures concerning derivatives and central depositaries. Individual Member States have to put in place limited additional measures that vary from country to country.
- The UK FCA has agreed MOUs with ESMA and EU regulators to allow cooperation and exchange of information.

- Financial services businesses should monitor announcements from relevant authorities and maintain dialogue with supervisors over Brexit planning and contingency measures.
- In a no-deal scenario, UK-based firms accessing the EU-27 should consider "workarounds", such as booking business to certain jurisdictions and using back-to-back transactions although European supervisors are adopting a restrictive approach to such practices. Strategies need to be adopted to address issues around contractual continuity if carrying on regulated activities in the EU-27. Again, take steps to review and re-paper stationery and contractual documentation.
- EU-27 businesses that wish to maintain UK market access should have notified UK regulators of their intention to participate in relevant temporary permissions regimes and should be preparing to apply for UK licences. They should monitor proposed UK no-deal Brexit contingency legislation. Workarounds for access may also be available (e.g., the UK's relatively generous Overseas Persons Exemption).

# **Commercial Contracts**



### **Key issues**

- Governing law: English law will continue to be a good choice of law for contracts. Post-Brexit this will not change.
- Forum for Disputes: choice of English courts to resolve disputes may be problematic. Arbitration will continue to be a good choice as it is not impacted by Brexit.

### Recommendations

- Governing Law: continue to use English law for contracts.
- Forum for disputes: if entering into a contract with a party in a different EU Member State, consider if arbitration is a more appropriate forum to resolve disputes.
- **Defined terms in contract templates:** consider definitions
  currently used e.g., where territory is
  'EU'. Incoterms may need to change
  if customs duties will be imposed.
  Reference to compliance with EU laws
  may need to include new equivalent
  UK laws.

# **Data Protection**



### Key issues

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

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

# Intellectual Property



### **Key issues**

- Trademarks: the "UK part" of already registered EUTMs (European Trade Marks) will automatically be cloned into an equivalent UK trademark registration with no administrative burden for the owner as regards the official register.
- The remainder of the EUTM will still cover the EU-27.
- Owners of pending EUTM applications will have to actively apply in the UK for equivalent national UK trademark protection under a new mechanism governed by UK law within a 9-month deadline following the UK's exit from the EU.
- Oppositions and invalidity actions at the European Intellectual Property
   Office that are based solely on a prior UK national right will automatically fall away as "groundless" on exit day.

Parallel imports/trade into the UK from the EU/EEA: legal status quo on the UK side but this is expected to change post Brexit into a system of "national exhaustion" of rights.

 Patents: Brexit will not affect existing patent laws in the UK and Europe(European Patent Convention, EPC).

- Brexit could impact the pending Unitary Patent (UP) and Unified Patent Court (UPC). While the UPC project may be derailed in any case due to a constitutional challenge in Germany, there is an increased probability of the UK being unable to participate in the UPC as a non-EU member
- SPC (supplementary protection certificate): provisions to nationalise the SPC regime have been put in place.
- Trade Secrets: The EU Trade Secrets
   Directive has been fully implemented in the UK; the changes to the previous laws were minimal.
- Copyright: There are no plans to implement the controversial EU Copyright Directive and copyright reforms in the UK.

- Consider dual filings of UK trademark and EUTM application to avoid potential delays to registration at the UK Intellectual Property Office.
- Any existing and new IP licenses, agreements, etc. that, include a definition of the EU (e.g., as the territory) should be checked to see whether this definition refers to the EU as constituted at the date of agreement or as constituted from time to time.
- Such "inter partes" disputes should be reviewed for strategic purposes.
- Businesses will potentially have greater control of parallel imports by third parties from the UK into EU/EEA states.
- Patents business as usual since the existing laws under the European Patent Convention are not affected by Brexit.
- SPC business as usual. This means that the SPC remains the same in practice.
- Copyright Business as usual

# Tax



### Key issues

- VAT: The UK will retain a VAT system but, depending on the terms of its continuing relationship with the EU-27, VAT will be operated on the basis that the UK is a third country (subject to any contrary agreement with the EU). VAT-registered businesses will not, however, have to pay import VAT at the time that goods are imported; payment can be deferred until the business makes its VAT return.
- 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 who meet the relevant conditions can be made free of withholding taxes.

- VAT: Companies should carefully review their existing EU supply chain for goods, as movements of goods between the UK and the EU will become subject to import and export procedures and it will be necessary to consider having both a UK and EU import hub for sales in those territories. Distance selling rules will no longer apply to goods moving between the UK and EU.
- Direct tax: there could be a withholding tax cost on certain inbound interest, royalty and (to a lesser extent) dividend payments between the UK and the EU-27 where currently there is none (e.g., a 10% withholding tax on interest payments between the UK and Italy), and this could mean that certain multinational structures need to be reviewed.



# **Export Controls**



### **Key issues**

- There will need to be a new system for licencing of controlled goods moving from the UK into the EU and vice versa.
- Certain dual-use exports from the UK to the EU, which would not previously have required a licence will now do so.
   Similarly, exports from the EU to the UK, which previously would not have required a licence will also be affected.
- Existing UK export licences will no longer be valid for exports out of EU-27 Member States to the rest of the world, and exporters will be required to obtain new licences from another Member State, as appropriate. Furthermore, exports from the UK to the rest of the world, which would previously have benefitted from a licence issued by another Member State will no longer do so.

### Recommendations

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

# Sanctions



### Key issues

- Upon a no-deal Brexit, sanctions legislation agreed at EU level will no longer automatically apply in the UK, and the UK will adopt and implement an autonomous sanctions regime (although the UK will continue to impose UN sanctions). From a policy perspective, the UK may also diverge from the EU and adopt a more aggressive approach in a number of ways.
- Companies operating in the UK and EU will therefore need to comply with a new set of rules, and monitor any divergences in regimes.
- In particular, the UK's status as a third country in respect of the EU will have a number of important implications for companies affected by the imposition of 'sectoral sanctions' against Russia (which are aimed at restricting the ability to deal in certain sectors of the Russian economy and with certain Russian entities, or their subsidiaries).

- Monitor developments around the introduction of the UK regime so as to be ready when the changes come into place, including to the extent that the UK imposes sanctions restrictions which go beyond those agreed at EU level.
- Consider the impact of dealings in Russia and with Russian entities (or their subsidiaries) in particular, given the notable potential impacts in this area.

# Competition



### **Key issues**

 UK regime: the substantive application of competition law will remain essentially the same - the UK has confirmed that it does not intend to make fundamental changes to the existing UK competition law regime. At present, UK regulators and English courts have an obligation to interpret UK competition law consistently with EU law. Post-Brexit, this will change to an obligation to ensure that there is no inconsistency with pre-Brexit EU case law, unless there is an appropriate reason in light of specified circumstances to depart from that position. These specified circumstances are very broad, including where there are differences between markets in the UK and markets in the EU, and where there have been developments in forms of economic activity. This means that post-Brexit, the UK Competition & Markets Authority (CMA), sectoral regulators and English courts will have some flexibility to depart from pre-Brexit EU case law.

#### **Enforcement:**

 The CMA and sectoral regulators will no longer have the power to enforce EU competition law in the UK, and they will only be able to investigate anti-competitive conduct

- under UK competition law that affects UK markets. Similarly, the EU Commission will no longer have the ability to open investigations into cases involving anti-competitive agreements or conduct confined to the UK, but will continue to have the power under EU law to investigate UK firms if they engage in conduct or arrangements that has an effect on competition within the EEA.
- Post-Brexit, there will potentially be dual antitrust investigations by the CMA and EU Commission where both the EU and the UK could in parallel open an investigation and impose fines and other remedies for anti-competitive conduct affecting both the EU and the UK.
- Ongoing investigations: if the EU Commission issues a formal infringement decision under EU competition law on or before Brexit day, the CMA and concurrent regulators cannot open an investigation into that same infringement after Brexit (unless the EU decision is annulled by the European courts after Brexit).

#### Merger control:

 The UK will no longer be part of the EU "one stop shop" for merger control. Large global deals with

- substantive UK issues may need to be notified separately to the EU and the UK.
- Ongoing deals: the one-stop shop notification system is still available up until Brexit. If the EU Commission issues a merger clearance decision on or before Brexit day, then the CMA will have no jurisdiction to review that same transaction unless the decision is annulled, in full or in part, following an appeal.
- State aid: a new UK state aid regime will be introduced. The current EU state aid regime will be transposed into domestic law and the CMA will adopt a new role as the UK state aid enforcement authority.
- Damages actions: English courts will
  not be bound by EU rulings issued after
  Brexit but may have regard to them
  and likely will find them to have high
  probative value in determining civil
  claims. If the EU Commission issues
  an infringement decision after Brexit,
  claimants wishing to pursue follow-on
  private damages claims in the English
  courts will no longer be able to rely on
  that decision as a binding finding of an
  infringement of UK competition law.

### Recommendations

#### **Before Brexit**

- **Mergers:** For deals where the current EU merger filing thresholds are met and have been notified or will be notified to the EU Commission before Brexit, the EU Commission will review the deal. If the EU Commission does not issue a decision on or before Brexit then, after that date, the CMA will have jurisdiction to review the impact of the merger in the UK. If you are in the middle of such a transaction. and it raises material substantive issues in the UK, consider engaging in discussions with the CMA at the same time as having pre-notification discussions with the EU Commission.
- Enforcement: If the EU Commission
  has opened an EU competition law
  investigation but has not issued a
  decision on or before Brexit day, the
  CMA/UK sectoral regulators could
  open a separate UK investigation
  into the same conduct if UK markets
  are affected. For cartel cases, if you
  have applied for leniency to the
  EU Commission and the EU has not
  opened an investigation before Brexit,
  consider also reporting to the CMA if
  UK markets are affected.

#### **Post Brexit**

- Businesses with activities in the UK and EU-27 will need to ensure that their agreements and practices continue to be EU and UK competition law-compliant.
- Consider cartel leniency strategy in light of potential dual investigations.
- Consider impact of dual UK and EU merger filings on deal planning and strategy.

# **Employment**



### Key issues

- Changes to current law: Theresa May and her administration's message had consistently been that they were committed to protecting workers' rights and that the UK would seek opportunities to enhance (rather than reduce) those rights. They had also given assurances that UK employment law would remain closely aligned to EU law following Brexit. Boris Johnson has given a similar message on protecting workers' rights. However, the new chief Brexit negotiator, David Frost, has expressed concerns over the EU continuing to be able to set new UK labour market rules and has criticised the "EU's drift towards heavy labour market regulation". That said, we consider it unlikely that there will be substantive changes in the immediate to short term, although the government may look to depart from some principles of EU-derived law at a later date. The UK may also have to commit to a certain level of ongoing employment protection in order to reach a trade deal with the EU. The main areas that will be immediately affected in a no-deal Brexit are:
  - **European Works Councils** the current EWC regime will only be able to continue with the EU's cooperation.

- The European Commission's view is that following exit day, as the UK will no longer be a Member State, if central management or the representative agent is currently situated in the UK, this will change – unless a new representative agent has been designated by the employer, the default representative agent will be the Member State employing the greatest number of employees. The same applies in respect of the governing law applicable to the EWC agreement if it is currently UK law. UK representatives will no longer be entitled to be represented unless this is permitted under the EWC agreement terms. Further, if the employer ceases to employ at least 1000 employees in Member States, it will cease to be subject to the EWC Directive even if an EWC is already established, although the EWC may continue to exist under domestic law.
- Social security the current rule that employees posted between countries can remain on their home country social security regime for up to two years may no longer apply as, unless agreed otherwise, the rules on social security will revert to those already in place between individual countries. Companies may need to review payroll procedures to ensure paying social security in the correct

country.

### Recommendations

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

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

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

# Pharmaceuticals and medical devices



### Key issues

#### **EU Compliance:**

- UK marketing authorisation holders (MAH) will be not be recognised by the EU, and some activities must be performed in the EU (or EEA), e.g., related to pharmacovigilance and batch release.
- UK Notified Bodies (NB) will no longer be recognised by the EU. Any medical device requiring NB conformity assessment must be covered by a certificate issued by an EU-27 NB, if it is to be placed on the EU-27 market after Brexit.UK-based Authorised Representatives for medical devices will no longer be recognised by the EU.

#### **UK Compliance:**

- The Medicines and Healthcare products Regulatory Agency (MHRA) will automatically "grandfather" existing marketing authorisations, etc. to be valid under a standalone UK system.
- If the MAH is not established in the UK, it must arrange a UK-based contact person within four weeks of Brexit, and all MAHs should ultimately be established in the UK within a transition period.
- Devices conforming to EU requirements (including the CE label) can continue to be placed on the UK market post-Brexit, for a time-

limited period.

 From exit day, all medical devices must be registered with the MHRA prior to their placement on the UK market (subject to grace periods that vary by device classification). Non-UK manufacturers must appoint a UK Responsible Person to register and act on their behalf.

### Recommendations

- Companies with Centrally Authorised Products (CAPs) held by UK entities or with MRP/DCP products with the UK as the RMS, should be transferring them to the EU-27.
- Medical device companies using UK NBs should either transfer to an accredited EU branch of their UK NB or appoint a new NB in the EU-27 (and stockpile reserves in the meantime to cover any gaps in re-registration).
- Non-EU medical device manufacturers should ensure that they have an EU-based Authorised Representative appointed for the EU market and a UK-based Responsible Person for the UK market.
- Medical device manufacturers should ensure that they register their devices in the UK by the relevant transitional deadline.

### Urgent next steps

The UK Department of Health is engaging with both pharmaceutical and medical device companies regarding six weeks' stockpiling to help alleviate any product shortages in event of a nodeal Brexit. Legislation prepared by the government also provides for emergency substitution powers for pharmacists in the event of medicine shortages due to Brevit

The UK Government is classifying medicines as Category 1 goods and medical devices as Category 2 goods (with chemicals for the purification of the UK's drinking water as Category 5 goods) and is tendering for freight services by sea and, for some cases of life-giving products, by air, to try to alleviate shortages in the short term. The potential impact of a no-deal Brexit on the UK's healthcare system remains one of the most controversial amidst the current political chaos.

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# Brexit How We Can Help

Baker McKenzie's dedicated team can help you assess the impact of Brexit on your business. We have identified the key challenges that you should be considering as part of your Brexit strategy.

Please contact one of our specialists for further information.

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