END OF BREXIT TRANSITION PERIOD: ACTION ITEMS

The transition period, during which EU law continues to apply to and in the UK following its exit from the EU on 31 January 2020, is due to expire on 31 December 2020.

The UK and the EU are currently negotiating the terms of their future relationship. Discussions have not been fruitful so far due to significant differences in the parties' positions on sensitive topics such as fishing rights, level playing field/State aid and the potential continued judicial oversight of the Court of Justice of the European Union (CJEU) over certain aspects of UK law.

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Whilst there is still a possibility that a deal on future relationship could be struck before the end of the transition period – last-minute deals are not a rarity in EU politics – or even that the transition period could be extended beyond 31 December 2020, businesses engaged in cross-border trade between the UK and the EU should have detailed plans in place to account for the possibility that no deal will be reached, in line with the UK Government’s guidance to ‘check, change, go’.

We set out some key topics for businesses to consider below. Please note that the guidance set out below relates to a situation where no deal on future relationship is reached before the end of the transition period: if a deal is reached, different considerations will apply.

Tariffs on goods

A noticeable change for businesses exporting goods of UK origin to the EU and goods of EU origin to the UK will be the introduction of tariffs on a range of goods. Exporters should determine the classification of their goods in order to work out what tariff (if any) will be payable on them. Companies exporting goods of EU origin to the UK should check the UK government advice[1] to determine the classification and corresponding tariff on their goods in the UK. Companies exporting goods of UK origin to the EU should check the official advice[2] to determine the classification and corresponding tariff on their goods in the EU.

Companies involved in the cross-border manufacture of goods should also:

- Consider whether inward or outward processing tariff relief will be available; and
- Determine the origin of their goods. As tariffs attach to the origin or ‘nationality’ of the goods – generally the country in which the last substantial transformation took place – and not the place from which they were exported, companies may have to determine whether their goods are of UK or EU origin, as this could have an effect on the tariff treatment of these goods, including when exporting to third countries outside of the UK or EU.

Customs measures on goods

Companies trading goods between the UK and the EU should be aware of additional procedural steps which they will have to take in order to obtain customs clearance, such as obtaining an EORI number to export goods from the UK to the EU. Enhanced requirements will apply to certain goods, such as products of animal origin and certain medicines. We have produced a more detailed briefing on the additional customs requirements that will apply, which can be found on our website.[3]

Commercial Contracts

The end of the transition period could lead to contracts becoming more difficult to perform (for example because the introduction of customs checks could impact on the ability to meet KPI targets in contracts for the delivery of ‘just in time’ goods) or less attractive to perform (because the imposition of tariffs or currency fluctuations make it unprofitable to purchase the goods at the agreed price – in the absence of agreement to the contrary the buyer will be responsible for paying tariffs under English law).

Companies should review their existing contracts to determine their potential exposure, and attempt to re-negotiate contracts where possible. It is also advisable, where relevant, to include provisions in new contracts that determine what should happen in the event that no deal on future relationship is reached before the end of the transition period. Companies with contracts subject to English law whose contractual position may

1 https://www.gov.uk/guidance/uk-tariffs-from-1-january-2021

2 https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/what-is-common-customs-tariff/taric_en

3 https://www.hfw.com/Transitioning-to-new-border-arrangements-EU-UK-trade-from-1-January-2021

be adversely affected should not assume that they will be protected by force majeure or material adverse change clauses, unless they have been carefully drafted to cover the specific scenario, or the common law doctrine of frustration.

Data protection

From the end of the transition period, the UK will be classed as a 'third country' from the perspective of EU/EEA data protection law, including the GDPR. Chapter V of the GDPR requires that businesses which transfer personal data outside of the EEA to third countries ensure that the level of protection which is given to that personal data by the GDPR is not undermined as a result of the transfer.

Unless the third country is the subject of an adequacy decision of the European Commission – in which case businesses can generally freely transfer personal data to that country without restrictions – a business transferring personal data needs to ensure that one of the safeguards set out in Article 46 of the GDPR applies to the transfer, or one of the derogations set out in Article 49 of the GDPR can be relied on for the transfer.

It is possible that the UK could be granted an adequacy decision by the end of the transition period (whether or not combined with a wider agreement on future relationship) but this cannot be guaranteed. Businesses should review now what safeguards could be put in place, or what derogations could apply, to their transfers of personal data from the EEA to the UK.

The use of Standard Contractual Clauses (SCCs) – one of the approved safeguards - is likely to be the most practical route for businesses lawfully to transfer personal data from the EEA to the UK. However, the recent *Schrems II* judgment of the CJEU emphasises that, in addition to making transfers of personal data subject to these clauses, the transferor of personal data must also be satisfied that UK law would not undermine the level of protection afforded to personal data by the GDPR. For further commentary on the implications of this judgment please take a look at the briefing on our website.[4]

Whilst UK data protection law is and will continue for the foreseeable future to be based on the GDPR-standard, potential concerns over the widespread powers of UK authorities to access personal data, such as those contained in the Investigatory Powers Act 2016, may make it difficult for transferors of personal data to be satisfied that UK law would not undermine the level of protection afforded to personal data by the GDPR, as they must do in order to use the SCCs lawfully. This could create difficulty as no other potential safeguard or derogation may apply in individual cases. Future guidance of the European Data Protection Board, European Commission (Commission) and the UK's Information Commissioner's Office may provide greater certainty.

Transfers of personal data from the UK to the EEA and to countries which currently benefit from a Commission adequacy decision should remain unaffected.

Companies based in the UK which offer goods or services to individuals in the EEA, or which monitor the behaviour of individuals in the EEA, are also likely to be required to appoint a data protection representative in the EEA.

Dispute resolution

The Recast Brussels Regulation will cease to apply from the end of the transition period, which could have an impact on serving English Court proceedings on parties in the EU, establishing jurisdiction in English courts, or enforcing judgments of English Courts in the EU, although the provisions of the Regulation will continue to apply to disputes started before the end of the transition period.

4 https://www.hfw.com/International-data-transfers-from-the-EEA-and-UK-Take-care-July-2020

The UK has applied to join the Lugano Convention in its own right. The Lugano Convention is similar to Brussels Recast, although there are some differences, most notably in respect of the *'lis pendens'* rules on establishing jurisdiction in related proceedings. The UK's independent membership of the Lugano Convention would resolve many of the challenges that could arise as a result of the end of the application of Brussels Recast to the UK. For the UK to accede, the unanimous approval of all of the current members, including the EU, is required. The EU's position on the UK's membership remains unclear.

The UK is likely to accede to the Hague Convention on Choice of Courts. If the UK is not an independent member of the Lugano Convention following the end of the transition period, the rules of the Hague Convention may apply to certain disputes. However, the rules of the Hague Convention have a narrower scope as, for example, they only apply where there is an underlying exclusive jurisdiction clause, and cannot apply to certain types of underlying contracts (e.g. certain insurance contracts).

The position for choice of governing law of contracts is unlikely to be affected as the UK will maintain the Rome I rules on choice of law for contractual claims, and therefore parties can continue to choose English law to govern their contracts.

The enforcement of arbitral awards will not be affected, as these are generally governed by the New York Convention 1958, which sits outside the framework of UK law. Whilst we expect that choosing the jurisdiction of English Courts will continue to be popular due to their longstanding reputation for quality and fairness, parties with particular concerns about service or enforcement in the EU could consider arbitration as an alternative.

Employment

EU citizens (other than citizens of the Republic of Ireland) who start living in the UK by 31 December 2020 should apply for settled or pre-settled status by 30 June 2021 in order to continue living and working in the UK after 1 July 2021. Absent further agreement, EU citizens looking to move to the UK to work after 31 December 2020 will be subject to the UK's usual immigration system.

UK citizens who start living in an EU Member State (other than the Republic of Ireland) by 31 December 2020 should also have until 30 June 2021 to apply for an immigration status which allows them to continue living and working in that Member State after 1 July 2021: the application process will vary by Member State. Absent further agreement, normal immigration rules of each Member State are likely to apply to UK citizens looking to move to an EU Member State to work after 31 December 2020.

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