Pinsent Masons

# Brexit Handbook

## Preparing for a no deal Brexit

22 September 2020

# Preparing your business for January 2021

With the end of the Brexit transition period looming, businesses must prepare for changes that will impact their business from January 2021. There continues to be uncertainty regarding the future trading relationship between the UK and EU. But there are practical steps businesses can take now to prepare.

Many businesses will previously have conducted thorough risk assessments and contingency planning to identify the key areas of risk to their business in a no deal scenario. Some businesses have already tested many of their contingency plans at previous deadlines or as a result of the Covid-19 pandemic.

This handbook has been created to help businesses preparing for a no deal scenario at the end of the transition period to understand what essential steps they should take to prepare and to mitigate the potential risks that face their business.

This handbook is divided into three sections:

- Guidance and recommended steps for all businesses in all sectors
- Specific additional guidance for businesses with goods in the supply chain; and
- Specific additional guidance for businesses operating in the Financial Services and Energy sectors.

Given the continuing uncertainty, Pinsent Masons has also set up a Brexit hotline to support clients to prepare their business for Brexit. GCs, in-house legal and operational teams can use this service to seek advice on specific Brexit-related issues or to identify the steps they could be taking now to prepare.

The service can be accessed by email or phone:

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**For more information about how Pinsent Masons can support your Brexit preparations, please contact:**

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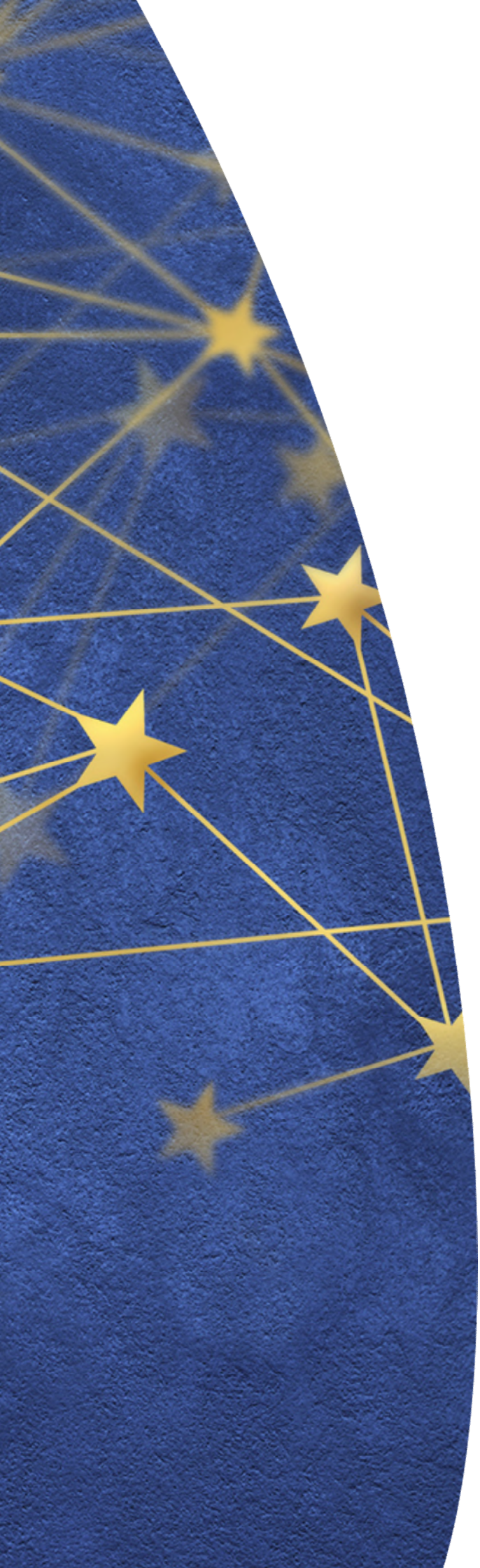



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For sector specific updates and further insights see **www.pinsentmasons.com/brexit**

# Guidance for all businesses

**In this Section**

- Workforce Issues
- Data Regulation
- Intellectual Property

# Workforce Issues

## The workforce

All businesses should be reviewing their current and future workforce profiles to consider what impact the end of free movement will have for them. Do you know what portion of your current UK workforce is exercising free movement rights in the UK? Are you typically reliant on recruits from other member states for particular roles or parts of the business? How can you mitigate the potential impact on your future recruitment plans if you are no longer able to recruit the skills you need from Europe?

If you anticipate that relocation of teams or individuals is likely – or if you just want to have the option – consider updating employment contracts accordingly. However, also consider encouraging mobility through non-contractual means, where possible. This is less challenging and time consuming to enforce, and has less negative impact on morale.

The likelihood of any immediate and substantive change to employment law is low. The political messaging has been clear that there is no desire to water down protection for employees, whether or not the underlying legislation emanates from Europe. The only exception to this is the disapplication of the European Works Council (EWC) provisions. Employers with UK representatives will need to take a look at these arrangements.

*The longer-term immigration status of your EU and EEA employees will depend upon whether they arrived in the UK before or after 11pm on 31 December 2020*

The longer-term immigration status of your EU and EEA employees will depend upon whether they arrived in the UK before or after 11pm on 31 December 2020. Freedom of Movement for EU workers in the UK will end on 31 December 2020. Those in the UK by that date will be eligible to remain in the UK long-term. Those arriving in the UK from 1 January 2021 will require work visas in order to lawfully work in the UK, unless they are otherwise entitled to do so.

The short term arrangements are clear and specific action can be taken now in order to secure the status of existing EEA employees in your workforce. The medium-term outlook is more reassuring with transitional arrangements expected. The longer-term outlook is currently less clear-cut and we await details from the Government as to what they propose. The recruitment of EEA nationals is likely to become more difficult, expensive and uncertain in the long term. Longer-term recruitment from Europe, from 1 January 2021, will largely have to fall under the Points Based System. EEA nationals will be treated in the same way that non-EEA nationals are currently treated, with most requiring employer-sponsored visas in order to work in the UK. Not all roles and individuals will be eligible for such visas.

## Short term

EEA employees living and working in the UK prior to 31 December 2020 are eligible to apply for Settled Status (if they have been continuously resident in the UK for 5 years or more) or pre- Settled Status. Settled Status is a permanent right under the UK's EU Settlement Scheme to live and work in the UK. It is easy and free to apply, and is a potentially valuable right. All eligible employees should be strongly encouraged to apply. They have until 31 December 2020 to do so. Any affected employees must apply for a status under the scheme if they wish to lawfully remain in the UK beyond June 2021, even if they have already acquired permanent residence in the UK.

## Long term

Contrary to earlier indications under Theresa May's government, there will be no transitional arrangements for EEA employees who join the business from overseas from 1 January 2021, and so they will not be allowed allow to work without a visa. There will also be no temporary route for those coming to the UK to fill lower-skilled jobs which would not qualify for an employer-sponsored visa under the Points Based System. This means there will be an abrupt end to access to the European labour market for many employers on 1 January 2021.

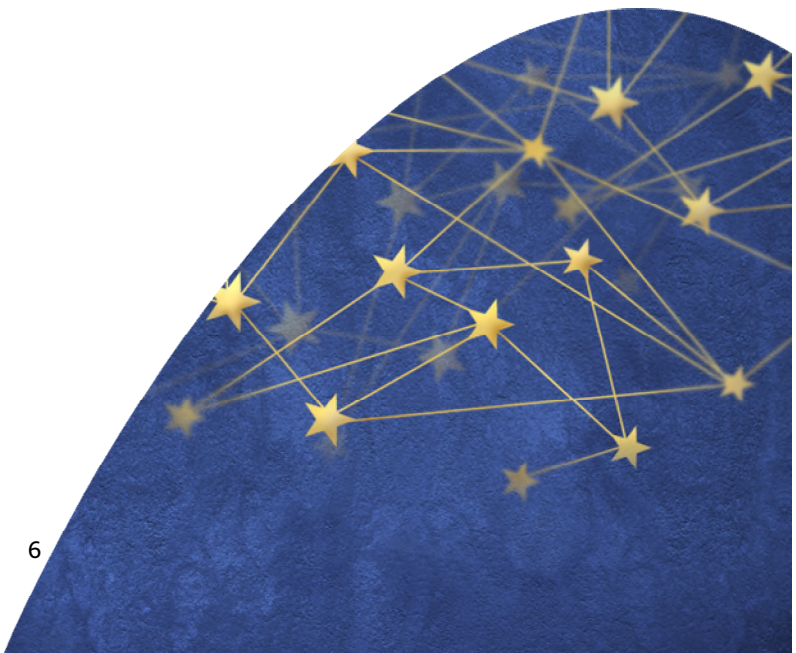
The Government, under Boris Johnson, has now confirmed the key aspects of the immigration rules which will apply to EEA and non-EEA national arrivals alike from 1 January 2021 onwards. In summary, the same Points Based System which currently applies to non-EEA workers will be extended to cover EEA workers as well, with some modifications being made to the rules. An individual's ability to work in the UK will then depend on the employer having a Sponsor Licence and the individual coming into a role which is sufficiently skilled and which meets a specified salary threshold.

We await the full detail of the rules from the Government but now have a clearer understanding of the skill and salary requirements which will have to be met. The new rules will apply to those arriving from 1 January 2021 and, presumably, EEA nationals in the UK prior to that date but who fail to apply for a status under the EU Settlement Scheme by 30 June 2021. Not all roles or individuals will qualify for visas.

This will create the tricky situation whereby EEA nationals in the UK after 1 January 2021 could have differing immigration rights depending upon when they arrived, with those in by 31 December 2020 having until 30 June 2021 to apply under the EU Settlement Scheme in order to remain without a visa. It remains unclear what, if anything, employers will be required to do to distinguish between these groups and verify that they have the right to work in the UK. The Government has suggested there will be no changes to the right to work checks employers must complete until June 2021. This will be an important area to keep an eye on, to avoid liability for illegal working.

### Immediate things to do

- Identify EEA national employees, and also non-EEA national employees who have family members that are EEA nationals working in the UK
- Identify UK nationals working in other EEA states who will also have to secure their ability to remain lawfully in that member state, if applicable
- Identify any frontier workers / commuters and consider any actions they should take to secure their ability to continue working in such a manner
- Speak to those employees about their immigration options in the UK and elsewhere in the EU (as applicable)
- Encourage any eligible employees to apply for Settled Status, or pre-Settled Status, by 20 June 2021
- Review outstanding recruitment plans which anticipate a 1 January 2021 start date, and consider the immigration status of those individuals. Consider accelerating recruitment where possible to get individuals into the UK by 31 December 2020



# Managing Data

The EU has a strong information/data economy and most businesses and other organisations depend on the flow of personal data across the EU. At the end of the transition period, the UK's own data protection compliance standards will not change. The Data Protection Act 2018 will remain in force and the EU Withdrawal Act will incorporate the EU General Data Protection Regulation (GDPR) into UK law alongside the Data Protection Act – the "UK GDPR". The GDPR currently allows the flow of personal data between EU member states (but not outside of the EEA). The UK Government has confirmed that the UK will continue to recognise the flow of personal data from the UK to the EEA countries following the end of the transition period.

*After the end of the transition period the UK will not be part of the EEA so it will be considered a "third country" for the purposes of GDPR. An adequacy decision by 1 Jan 2021 is currently very unlikely*

However, after the end of the transition period, the UK will not be part of the EEA so it will be considered a "third country" for the purposes of the GDPR. Therefore, the EU Commission has stated that transfers of personal data from the EU to the UK will require an "Adequacy Decision" of the EU Commission to approve the UK as an adequate destination for transfers of personal data from the EU (which is currently unlikely to be issued by the end of the transition period) or the implementation of one of the specified "safeguards" to allow such transfers.

Accordingly, following the end of the transition period, in a no deal scenario and until the UK has an Adequacy Decision to permit transfers of personal data from an European business/organisation to a UK business/organisation, one of the "safeguards" will be required. Currently (unless the transfer is intra group and approved Binding Corporate Rules are in place), the most appropriate measure is likely to be the signing of the EU Commission approved "Standard Contractual Clauses" or "Model Clauses" (in the appropriate form depending on the nature of the relationship between the parties). After the end of the transition period, UK companies will also not benefit from the EU database right. This right protects the substantial investment which goes into obtaining, verifying and presenting data in databases. Companies should take care when creating databases, to ensure that the value of the asset is not eroded. In particular, in the absence of the EU database right, it should be considered how databases might be protected by other means, including copyright and the laws of confidence.

## Immediate things to do

- Review personal data flows on which your business depends and the transfer mechanisms (UK to EU, EU to UK and onward transfers from UK to third countries)
- Review contracts for clauses which prohibit transfers of data outside the EU
- Contact and agree with the EU exporters of the personal data the mechanism to be put in place to ensure the free flow of such personal data from the EU, e.g. the Standard Contractual Clauses
- If consent is currently relied on to process the personal data of data subjects, check that the consent language covers personal data obtained outside the EEA (i.e. the UK will be outside the EEA) and consider refreshing
- Review Privacy Policies for transparency in relation to transfers of personal data in and outside the EU/EEA, as the UK will be outside the EU and EEA
- If you have nominated the Information Commissioner's Office (ICO) as your Lead Supervisory Authority (under the 'one stop shop' principle to include business in other EU member states), consider nominating another EU regulator if appropriate
- If you are processing EU data subjects' personal data and have no presence in another EU member state you are likely to be required to appoint an EU representative;
- Consider local privacy laws for your business(es) in another EU country/ processing EU personal data
- Assess how your valuable databases which you would want to protect from copying will be protected from January 2021

# Intellectual Property

The UK Government has published various statutory instruments (SIs) to implement the necessary changes to legislation resulting from Brexit. These SIs contain comprehensive and distinct mechanisms for the fate of harmonised IP rights.

The scope of protection provided by a EU trade mark (and international registrations designating the EU) will change after the end of the transition period. Currently, EU trade marks provide protection in the whole of the EU as well as the UK. On 1 January 2021, all existing registered EU trade marks and international registrations designated to the EU will be cloned. The cloning is automatic, at no cost, and will result in an equivalent UK national right with the same application date, priority or UK seniority, goods and services. The cloning will only concern EU trade marks, which have been registered, and international registrations designated to the EU, which have been granted, on or before exit day, i.e. 31 January 2020 in the event of a no deal, or after the transition period provided for in the Withdrawal Agreement, i.e. 31 December 2020 (which may be extended).

*The cloning is automatic at no cost and will result in an equivalent UK national right with the same application date, priority or UK seniority, goods and services*

The cloned rights will be called "comparable trade mark (EU)" and "comparable trade mark (IR)". Please note: The comparable trade mark (IR) is a national UK right and does not form part of the corresponding international registration.

Similar to the arrangement for EU trade marks and International registrations designated to the EU described above, the UK will provide for equivalent UK rights for Community designs and International designs designating the EU.

Brexit does not affect the current European patent system which is governed by the European Patent Convention, a non-EU related international treaty. However, the UK has formally withdrawn from the Unitary Patent Court (UPC) saying "Participating in a court that applies EU law and is bound by the CJEU would be inconsistent with the Government's aims of becoming an independent self-governing nation."

The UK will continue to recognise the EEA regional exhaustion regime immediately after Brexit, although the position is likely to change in the future. Vice versa, however, the placing on the UK market will not be recognised in the EEA as triggering exhaustion.

Another uncertainty arises from the fact that the UK Government has issued no policy statement regarding the exhaustion of rights in respect of goods first placed on the market in third countries outside the EEA. Given that the European Union (Withdrawal) Act 2018 provides that 'retained EU case law' will apply, it appears that the UK will operate a system of national exhaustion with non-EEA countries as there will be no change to international exhaustion (or, in the case of patents, to a concept of implied licence).

## Immediate things to do

- Accelerate any pending EU application with the aim of obtaining a EU trade mark or Community design registration before the end of the transition period
- Accelerate any pending opposition, invalidity or revocation action against EU rights, or, depending on perspective, deploy delaying tactics
- Duplicate new EU and UK trade mark filings because, to the extent EUTM applications are pending on 1 January 2021, they must be refiled in the UK by 30 September 2021 in order to become effective in the UK
- Review infringement actions (pending or contemplated), particularly if pan-EU relief is sought

# Guidance for businesses with goods in the supply chain

**In this Section**

- Supply Chain
- Commercial Contracts
- Competition Law – Merger Control, Antitrust and State aid
- Public Procurement
- Managing border disputes
- Customs & Compliance
- Goods and food placed on the market
- Trade & tariffs

## Supply Chain

In a complex and global world, supply chains underpin a business' operations. If a supply chain collapses it can cause disastrous losses. Businesses with critical supply chains have developed them to be highly efficient and resilient within the EU, but, in a no deal scenario, they may soon be subject to stresses that they were not designed to withstand.

Customer propositions may need to change to take account of new supply chain requirements. For example, a next-day delivery service that works at the moment could very possibly become unsustainable with customs clearances and rules of origin applied.

In today's world of global supply chains, even sourcing from a tier one supplier in the UK may not be sufficient to protect against currency movements, a new tariff regime, delays at the border and untried customs systems. Businesses need to map, understand and work with their wider supply chains in order to identify, understand and mitigate their risks.

There will be critical learnings from dealing with the Covid-19 pandemic which can be brought into business planning to help absorb shocks in the supply chain.

## Immediate things to do

- Identify and record cross border supply chains – prioritise tier 1 but also vital links in lower tiers of the supply chain

- Communicate with critical suppliers to understand their potential Brexit exposure and work collaboratively with the supply chain to minimise such exposure. This should include:
  - Operational – can deliveries continue or might there be delays at the border due to additional customs checks and clearances that are required;
  - Product standards and specifications - will any regulatory or product changes be required to ensure that the end product remains valid from a regulatory perspective in its destination markets;
  - Financial - what additional costs may stem from the supply chain? What effect will changes to the exchange rate have e.g. a weaker pound may mean imported goods such as clothing could be more expensive

- Where businesses have already undertaken stress testing on operating models, surveyed supply chains or identified critical links, they should take action now in order to avoid any breakage in the supply chain. For example, dual sourcing, near shoring suppliers and/or stock piling where practicable. Where businesses are implementing changes as a result of the Covid-19 pandemic, consider the impact of this in a no-deal Brexit scenario

- Put in place internal processes to quickly identify supply chain failures and ensure the warning signs are spotted e.g. delays, lack of communications from suppliers, credit rating monitoring, changes to other customers of key suppliers. Ensure that this information is funnelled to the correct decision makers that are able to take action fast if a failing supplier is identified

- Remain agile and consider innovative solutions if a failing supplier is identified. For example, can critical IPR or tooling be purchased to allow in-house sourcing, is there an opportunity to buy critical suppliers, where is alternative sourcing required

- Consider customer propositions and how these may be affected by the impact on the supply chain. For example, can next day delivery be sustained? Do longer delivery times need to be factored into the sales process? How can these disruptions be managed? Ensure that customer complaint departments are fully briefed on any likely challenges to provide a consistent approach to queries from customers

# Commercial Contracts

The first line of defence against downside risk is a sound commercial contract. Contracts represent the commercial capital of a business and should be carefully guarded and protected in order to ensure that the revenue of the business is underpinned, and costs within the supplier base are contained, while ensuring ongoing quality and timely supply.

For new contracts, sadly, there is no standard 'Brexit clause' that will protect every contract from the effects of leaving the EU. Instead it has become more common for businesses to change the risk profile of the relevant commercial contracts (e.g. delivery obligations and exchange rate mechanisms) to address Brexit risks. This is done in template or standard form contracts. Businesses are also incorporating Brexit risk sign off into their contract approval processes. This enables the risk to be considered on a case by case basis.

In a no deal scenario, businesses will also need to look promptly at existing contracts to identify if there are any changes required. These changes may be technical changes – i.e. changes to the contract required to ensure that it will remain valid after exit day and work from a legal perspective (e.g. where there is an EU territory, updates to data protection clauses that refer to transfers outside of the EU or governing law or jurisdiction clauses).

Operational changes may also be required to reflect how the customer/supplier relationship has been impacted. Some businesses have in-house capability and capacity to deal with their own import/export paperwork and customs clearances, and would prefer to remain in control. Others may look for external expertise to support customs clearances and paperwork, and outsource these elements to suppliers or third parties. Any contractual changes will need to match the operational response to be effective.

Amongst businesses, and partly as a result of the impact of Covid-19, there is an ongoing trend towards collaboration rather than a complete shifting of the risk between the parties. Ultimately, whilst a party in a strong negotiating position could shift the risk onto the counterparty, if that party is not well placed to bear the risk, it will not resolve the issues (delays to goods may still occur or could be worse). This may push the counter party into financial difficulties with the consequent risk of potential insolvencies.

*In a no deal scenario, businesses will also need to look promptly at existing contracts to identify if there are any changes required*

If you are considering terminating a contract, be wary of relying on Force Majeure or Material Adverse Change clauses. It is clear that Brexit has been foreseeable for some time now. Therefore, the language of the relevant clause would need to be very specific for this to be a potential route to termination.

## Immediate things to do

- Work closely with operational colleagues to understand how, in practice, the business is adapting and responding to the changes in border operations and deliveries, and ensure contractual updates reflect these
- Immediately review and update templates to ensure technical changes are implemented. Carry out these reviews in conjunction with data protection and IPR colleagues
- Consider logistics and delivery obligations under contracts, and liaise with suppliers and third party logistics providers to ensure that activity is undertaken to ensure continuity of supply (e.g. apply for authorised economic operator status and register for transitional simplified procedures). We would also recommend businesses appoint customs brokers for cross border suppliers as a priority
- Business should review contracts in priority order for Brexit risks. When reviewing contracts for Brexit we suggest that you review:
    - Territorial definitions;
    - The substance of the contract – whether it governs the ability to buy or sell goods or services, or depends on the import or export of goods or services;
    - Delivery obligations and responsibilities - do these sit with the customer or the supplier;
    - Liability for delay in deliveries – could this lead to liquidated damages and/or termination;
    - Which party is liable for increased costs in delivery for sectors where there will be an imposition of trade tariffs;
    - Is the contract clear as to which party needs to clear goods for export/import and is this consistent with any references to Incoterms within the contract?
    - What termination or variation clauses there are which may be required if a contract becomes unprofitable;
    - What contract levers exist to change the price or cost base – for example exchange rate mechanisms, price review or increase clauses, and when and how can these be implemented;
    - What additional technical changes are required, such as data protection.

# Competition law – Merger Control, Antitrust and State aid

EU competition law will still apply in the UK until the end of the transition period on 31 December 2020, though businesses should be aware of what happens after that date.

In summary:

- In relation to mergers, the European Commission (Commission) will retain jurisdiction over transactions impacting the UK market where the transactions meet the EU thresholds for notification, were notified to the Commission prior to 31 December 2020, and where the Commission's investigation is still 'live' at that date. However, there is the potential for live merger cases by the Commission to be referred to the Competition and Markets Authority (CMA) to continue, and it is also possible that the CMA could take on the role of monitoring and enforcing remedies or undertakings agreed prior to the end of the transition period, in Commission cases after the transition period. In contrast, if a merger has not been notified to the Commission by 31 December 2020, the CMA can open its own UK domestic merger investigation after that date, in parallel with any EU merger investigation, where it believes there is a realistic prospect that the deal may lead to a substantial lessening of competition in a UK market. However, notification of mergers in the UK remains voluntary.EU cartel and other antitrust investigations that have been formally initiated by the European Commission before 31 December 2020, will also continue to be dealt with exclusively by the Commission after that date. However, the CMA could intervene in respect of UK-specific activity which is ongoing and post-dates the transition period. If a formal investigation has not yet been initiated by the Commission by 31 December 2020, the CMA can open its own UK domestic antitrust investigation after that date, in parallel with any EU investigation where it believes there is an effect on trade within the UK.
- After 31 December 2020, the European Commission will no longer be able to carry out dawn raids in the UK.
- Even after the transition period ends, EU courts will retain exclusive jurisdiction to hear appeals involving Commission merger or antitrust decisions relating to cases opened during the transition period.
- The CMA will be able to bring director disqualification proceedings against directors involved in a breach of EU competition law which is the subject of an infringement decision taken by the Commission during the transition period and in certain other circumstances.
- EU competition law, including case law of the CJEU and, for example, block exemptions relating to vertical and other agreements, will be carried over into UK domestic law at the point of exit on 31 January 2020. However, the UK Government is consulting on the circumstances in which UK courts could diverge from CJEU case law after 31 December 2020.

- After 31 December 2020, subject to the provisions of the Irish Protocol in the Withdrawal Agreement and any further changes arising from the UK Internal Market Bill, EU State aid law will cease to apply in the UK. However, for four years after that date, the Commission will also be able to launch investigations into State aid granted in the UK up until 31 December 2020. From 1 January 2021, the anti-subsidy rules under the WTO will apply as a default and the UK Government will also consult on a new UK domestic anti-subsidy regime in 2021.

- Finally, the CJEU will continue to have jurisdiction in relation to:
  - proceedings brought by or against the UK before the end of the transition period;
  - preliminary ruling requests made by UK courts before the end of the transition period;
  - infringement proceedings against the UK for alleged breaches of EU law before the end of the transition period, which the Commission commences within a period of four years following the end of the transition period; and
  - infringement proceedings against the UK for non-compliance with a Commission decision, provided that the Commission commences the proceedings within a period of four years from the date of that decision.

The Government has indicated that after the end of the transition period, the UK will not have a domestic anti-subsidies regime in place for a short period allowing the Government to consider further, including as a result of the carrying out of a public consultation, the future shape and scope of such regime. At the same time, the UK will continue to be bound by any anti-subsidies related obligations that might arise under bilateral free trade agreements as well as obligations under the WTO's anti-subsidies arrangements; the Agreement on Subsidies and Countervailing Measures.

This provides for a less stringent anti-subsidies regime than EU State aid rules, without the need for the prior authorisation of aid, for example. Its scope is also narrower in that it applies only to goods. Whilst some businesses might consider that a less strict anti-subsidies regime would allow easier access to public support for their commercial activities, the likely disadvantage is less predictability as to how the State might decide who, and in what circumstances, should benefit from public subsidies. Equally, in the absence of a domestic State aid regulator, businesses which consider that they are being unfairly subsidised by the State, are likely to find it more difficult to defend their commercial interests.

## Immediate things to do

- For any transactions that may be taking place towards the end of 2020 or after that date, that may require merger notification, consider the need to engage in informal pre-notification discussions with the CMA and Commission
- Consider the implications of the end of the transition period for any ongoing antitrust investigations and the possibility of parallel investigations by the CMA if there is an effect in the UK
- Consider whether your business might be affected by ongoing State aid investigations or CJEU proceedings that relate to the UK, and continue to take appropriate action accordingly
- Consider whether your business might have been affected as a result of the grant of UK State aid to a competitor before the expiry of the transition period (and indeed, during the previous 10 years) and consider the appropriateness of making a complaint to the European Commission
- Consider whether any aid granted by public bodies in the EU or elsewhere might affect the interests of your UK business and, if so, consider raising this with the UK Government, which might be in a position to defend your interest under WTO or bilateral treaty arrangements
- If you are established and are carrying out activities in an EU Member State, any concerns in relation to aid by another EU Member State can still be raised with the European Commission and action may also be taken in the local courts to defend commercial interests that might have been affected as a result of such aid
- If you are based in another EU Member State, consider the extent to which UK State aid might raise issues which affect that trade between NI and the EU, which is subject to the Northern Ireland Protocol, and consider raising any concerns with the Commission as well as the appropriateness of seeking to defend your rights in the local courts
- Consider what might be the optimum approach in terms of a future domestic anti-subsidies UK regime and participate in future public consultation on the issue
- Continue to comply with EU State aid rules until the end of the transition period
- If you are based in, or trade with, Northern Ireland and are the beneficiary of UK subsidies after the end of the transition period, seek legal advice as to the risk of those subsidies being subject to the European Commission jurisdiction under the Northern Ireland Protocol

# Public Procurement

The current domestic public procurement legislation implements into UK law EU legislation which sets out detailed rules as to how to open up domestic public procurement markets to competition from suppliers across the EU's Single Market. The domestic legislation, and any other related obligations which arise under EU law, will continue to apply in and to the UK until the end of the transition period on 31 December 2020. Once that period expires, the domestic procurement legislation will continue to apply with some amendments to reflect the UK's status as a country which is no longer subject to EU law but also so as to reflect any new procurement-related commitments that might arise under bilateral free trade agreements.

In this regard it should be noted that the UK will be joining the WTO's plurilateral Agreement on Government Procurement (GPA) which commits its parties (including the EU, the United States, Canada, Japan and South Korea) to the mutual opening up of their domestic public procurement markets to each other's suppliers. The UK commitments under that agreement would be substantially similar to the current EU commitments and, therefore, UK domestic legislation is not expected to change substantially as a result of the UK acceding to the GPA in its own right. At the same time, it is expected that the UK Government would be seeking to amend and, at least in some respects, simplify domestic procurement legislation following public consultation in due course.

## Immediate things to do

- After the end of the transition period, opportunities for UK public contracts would no longer be advertised in the Official Journal of the EU but on a broadly equivalent new domestic online platform. Businesses from the UK, the EU as well as from countries which are parties to the GPA should monitor this new platform for any UK public contract opportunities which might be open to them
- UK-based businesses should continue to monitor the Official Journal of the EU as many (but not all) of the public contracts that are advertised by EU Member States will continue to be accessible to them as a result of the UK's membership of the GPA
- In the ongoing EU-UK negotiations, the EU has sought an agreement for the two sides to agree on enhanced access to each other's public procurement markets that goes beyond GPA commitments. However, at the time of writing, the UK had indicated that it was not interested in pursuing such arrangement. As a result, a number of utility as well as defence and security-related contracts in the EU that were previously open to UK-based suppliers might no longer be accessible to them. Equally, similar opportunities in the UK might no longer be accessible to EU-based suppliers
- Businesses should consider participating in the Government's expected public consultation on the review of domestic public procurement legislation, so as to register their views on how the legislation could be improved to allow for easier and fairer access to public contract opportunities and on how to render the remedies system more effective

# Managing cross-border disputes

UK businesses contracting or litigating with parties in EU Member States need to consider the potential impact of Brexit.

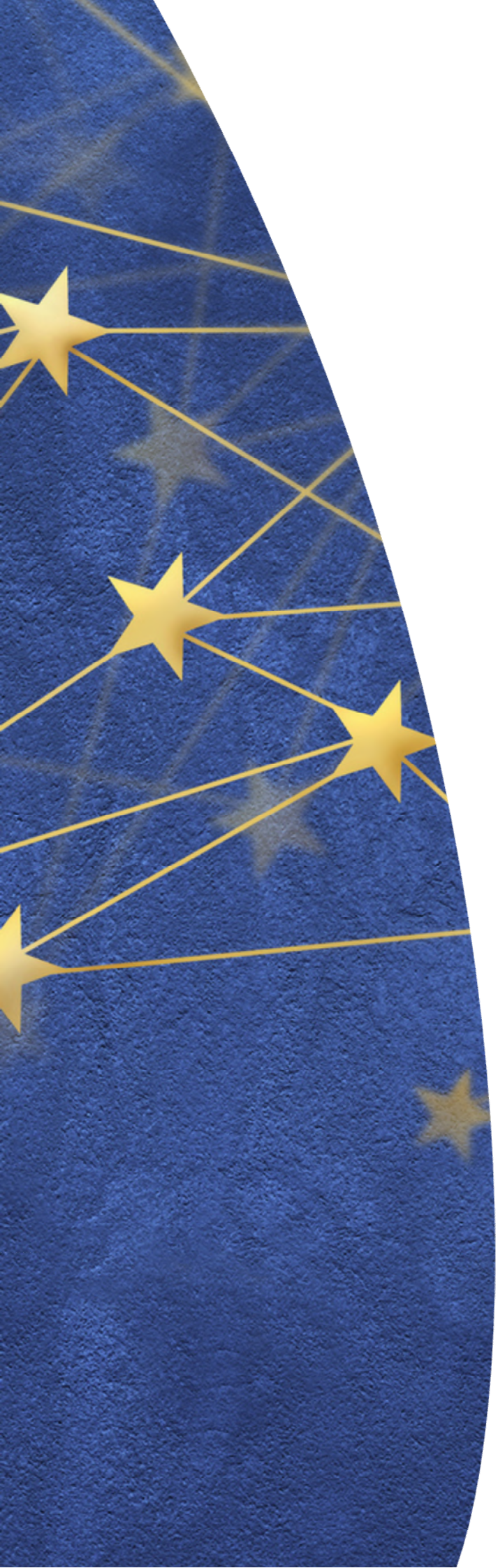
When entering into contracts, choice of law and jurisdiction are always important considerations. The biggest issue is whether UK judgments will continue to be recognised and enforced in EU Member States. Much will depend on the outcome of the UK's Brexit negotiations with the EU. The best case scenario is no change, with the UK, EU and other relevant states agreeing replacement arrangements which mirror the current regime. However, it is increasingly important to prepare for the possibility that continuity cannot be maintained.

As a result, jurisdiction clauses should not be treated as boilerplate in contract negotiations and specific advice should be sought on the possible scenarios and mitigating the risks which arise from them. This may include obtaining local law advice in the likely jurisdiction for enforcement.

Indeed, UK parties with existing contracts who are concerned about enforcement in the EU may wish to review and potentially re-paper existing dispute resolution provisions with the benefit of such advice. Parties already in dispute with a counterparty who might need to enforce a judgment in the EU after the end of the implementation period should take early advice on their position. There are some cases in which, for example, it might be advisable to issue proceedings before the end of the implementation period in order to take advantage of the continued application, under the Withdrawal Agreement, of the Brussels 1 Recast Regulation regime for jurisdiction and enforcement of foreign judgments, where proceedings are commenced by that date.

*UK parties with existing contracts who are concerned about enforcement in the EU may wish to review and potentially re-paper existing dispute resolution provisions with the benefit of such advice*

Businesses should be considering their main contracts, non-performance of which could result in serious crisis to the business. If there is a cross border element then the business should consider if it is possible to mitigate the contractual risks. For instance, UK businesses that manufacture physical goods should also be particularly concerned about:



- The regulatory considerations; for instance, the UK is introducing a new UK Conformity Assessed marking ("UKCA") that will be used in a no deal scenario for the majority of goods which currently fall within the CE marking regime. The UKCA marking will not be recognised by the EU, however, so UK manufacturers placing goods in the EU market will still be required to conform with CE marking requirements. Conformity assessments undertaken by UK notified bodies will no longer be recognised by the EU even if undertaken prior to the end of the implementation period. This may mean goods are not fit for purpose.

- Delivery of physical goods either inward or outward bound. If who is contractually responsible for delivery of the goods as there is likely to be a delay in goods travelling across the border? What penalties flow from a failure to deliver goods within time?

Parties should consider how best to minimise this risk now.

## Immediate things to do

- Take advice on business critical cross border contracts and determine whether it is possible for the parties to agree ways forward before the end of the implementation period to mitigate disputes and limit business disruption
- Take advice on limiting liability for delivery failures or delay
- Take advice on regulatory issues including markings of goods for instance
- Take advice on the drafting of an appropriate jurisdiction clause in any cross-border EU contract
- If arbitration would be an appropriate dispute resolution procedure in itself, consider adopting it where enforcement may be an important issue
- Take advice in the local jurisdiction for enforcement if there are uncertainties
- Take early advice on any cross-border dispute arising

# Customs & compliance

Businesses will only be directly affected by customs changes as a result of a no deal Brexit if they import goods from, or export goods to, the EU. Businesses which only import goods from countries outside the EU should be largely unaffected, but may benefit from reduced UK tariffs and postponed accounting for VAT.

Businesses which supply services in the EU may need to tax some steps in relation to VAT.

## Businesses which import/export goods from/to the EU

- Businesses which import goods from the EU or export goods to the UK need a GB Economic Operator Registration Identification (EORI) number. This can be obtained online, but in some circumstances can take around 5 working days to come through so should be applied for well before 31 December 2020. An EORI number is needed to complete customs declarations or have an agent make declarations on behalf of the business.

- From 1 January 2021 businesses importing goods from the EU will have to make customs declarations, as is currently the case when goods are imported from outside the EU. Businesses should work out how they are going to make the necessary customs declarations and, if they do not already have the necessary resource, should appoint a freight forwarder, customs agent or broker or use a fast parcel operator.

- Border controls on imports from the EU to Great Britain will be introduced in stages. This means that customs declarations and the payment of any tariffs for goods which are not controlled can be delayed for up to six months for goods imported from the EU between 1 January 2021 and 30 June 2021. Businesses need to declare imported goods in their own records and then make a supplementary declaration up to 6 months after the goods were imported. Before the supplementary declaration is made, the business or its customs agent or broker needs to be authorised by HMRC and will need to fulfil certain other conditions including having a duty deferment account. For goods imported from 1 July 2021, declarations will have to be made on import unless the business or its agents are registered for simplified procedures before the goods are imported.

- Businesses need to work out whether the goods they will be importing are on the controlled goods list, which includes alcohol and tobacco. For controlled goods, import declarations will need to be made from 1 January 2021, either before the goods leave the EU or on arrival in Great Britain, depending on the location through which they are imported.

- Businesses which import from the EU need to be aware of the tariffs that will apply. The UK government has set the tariff at zero for 47% of products. However, tariffs will apply to many goods imported into the UK, including some meat, poultry, dairy products and motor vehicles.

- Businesses will be able to use postponed VAT accounting to account for import VAT. This means a business will declare and recover import VAT on the same VAT return, rather than having to pay it upfront and recover it later. This will apply to goods imported from anywhere in the world.

- From 1 January 2021, businesses exporting goods from Great Britain to the EU will need to make customs declarations before the goods arrive at the port of export. Most declarations are submitted electronically using the National Export System. Businesses can apply to be authorised to use a simplified declaration procedure. Most exports of goods to the EU will be zero rated for VAT.

- Businesses that move goods between Great Britain and Northern Ireland or bring goods into Northern Ireland from outside the UK are advised by HMRC to sign up for the free Trader Support Service, which will handle the new processes arising under the Northern Ireland protocol from 1 January 2021.

## Businesses which import/export goods from/to non EU countries

- Businesses which import from non-EU countries should not have to make changes to their procedures as a result of Brexit. They should benefit from VAT postponed accounting, enabling them to account for VAT on imports in their next VAT return.

- There will also be reduced or zero tariffs on more non-EU imports than at present, in the absence of a deal with the EU, the UK will have to treat imports from outside the EU in the same way as those from the EU, and the UK has announced zero tariffs on many goods.

## Purely domestic businesses

- Businesses which do not import or export goods themselves should not be directly affected by Brexit customs issues. However, they may be indirectly affected if they purchase goods from UK suppliers which source their goods from the EU. They should consider whether they need to take any steps to secure critical supplies.

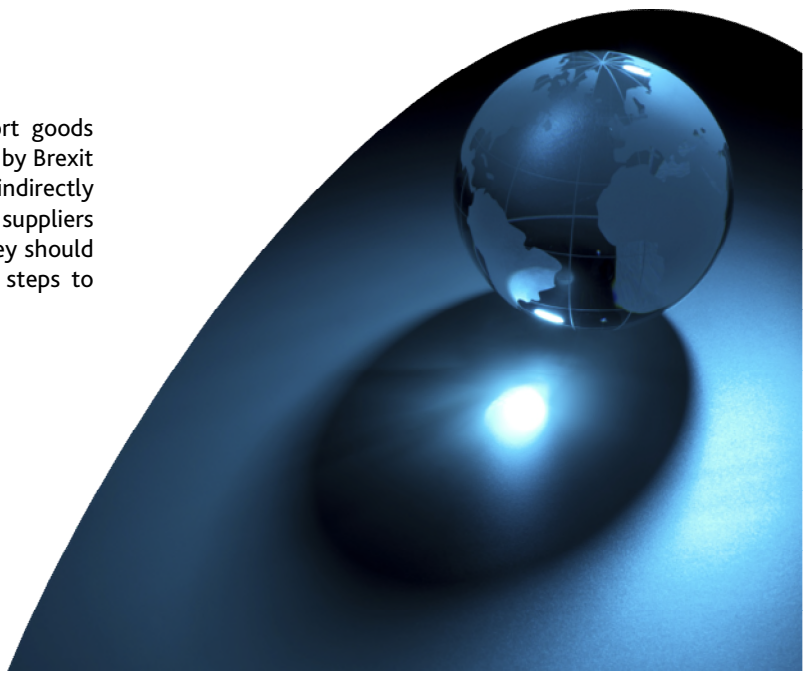
## Businesses supplying services in the EU

- Businesses which supply digital services to customers in the EU and currently use the VAT Mini One Stop Shop (MOSS) scheme in the UK will need to make arrangements so that they can register for the VAT MOSS scheme in an EU member state after 31 December 2020. A business will need to register in another member state by the 10th day of the month following the first sale to an EU customer. If sales are made in January 2021, the business must register by February 2021. A UK business will not be able to register in an EU member state before 1 January 2021. Alternatively businesses can register for VAT in each EU member state where sales are made.

## EU VAT refunds

- Any businesses which are entitled to claim VAT refunds for VAT paid in EU member states before 1 January 2021 should submit claims using the EU VAT refund electronic system before 31 March 2021. After that time claims will have to be made separately to each EU member state, where different deadlines and procedures may apply.

> *Businesses which only import goods from outside the EU may benefit from reduced tariffs and postponed accounting for VAT*



# Goods and Food placed on the market

With a No Deal Brexit becoming of increasing likelihood and only a matter of months before the end of the transition period for leaving the EU, guidance is emerging to assist business placing foods and manufactured goods on the GB, UK and EU market post 1 January 2021.

Whilst, the position may change in the event a trade deal, given the short timescales, all those manufacturing and distributing manufactured products should familiarise themselves with the impending changes. All those producing, distributing and supplying food should likewise familiarise themselves with the new landscape.

## Goods

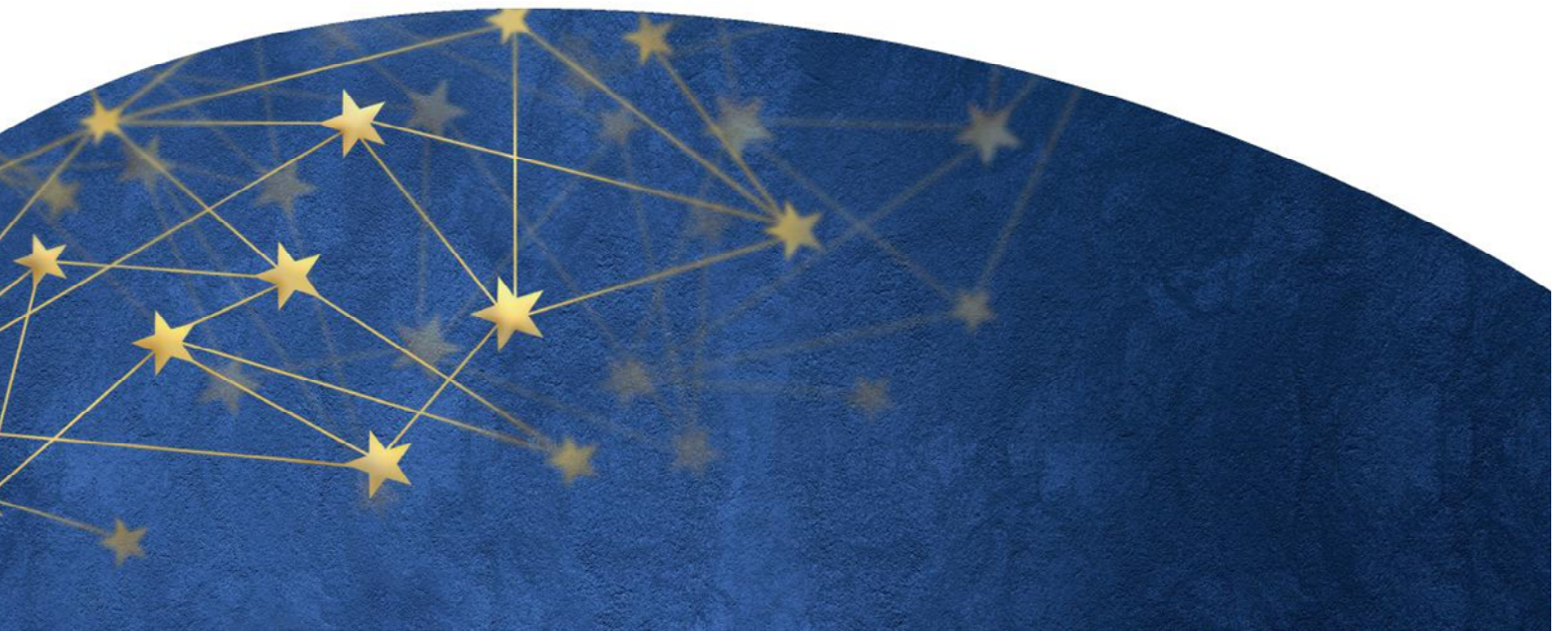
Summarised below are the changes that are likely forthcoming on the basis of presently available guidance for those placing manufactured goods, subject to the EU's new approach (toys, electrical and electronic equipment, PPE, etc.).

*Requirement for a UK or EU based entity*

- In short, placing on the UK market will require a UK based entity and placing on the EU market will require an EU based entity, i.e. an Importer, Authorised Representative or Responsible Person (for cosmetic products, for example).
- Authorised representatives and responsible persons based in the EU will no longer be recognised in Great Britain from 1 January 2021, whilst UK-based authorised representatives and responsible persons will no longer be recognised in the EU from 1 January 2021.

*Importer 'by default'*

- In relation to manufactured goods, obligations for manufacturers will broadly remain the same, but UK-based distributors and suppliers will automatically become importers where they are bringing goods from outside the UK and placing them on the UK market.
- EU-based distributors and suppliers will become importers where they are bringing goods from outside the EU and placing them on the EU market.
- The importer is not a simple 're-seller' of products, but has a key role to play in guaranteeing the compliance of imported products.
- Becoming an importer gives rise to additional obligations including for example ensuring:
  - That the appropriate conformity assessment procedure has been carried out by the manufacturer.
  - That the manufacturer has drawn up the technical documentation, affixed the relevant conformity marking (e.g. CE marking), fulfilled his traceability obligations and accompanied, where relevant, the product by the instructions and safety information.



*Labelling*

- One of the most significant duties placed on the Importer is in relation to labelling.
- The Importer into the market needs to display their name, trade name/mark and address on the product or the packaging This must be a UK name and address for the UK market and for the EU, this must be an EU name and address.
- For products that are placed on the UK and EU market from 1 January 2021, the product, packaging or information (for a limited period) must carry the details of both a UK based entity and an EU based entity.
- For placement on the GB market, until 31 December 2022, this information can be provided on accompanying documentation.

*Conformity Assessment and CE marking*

- From 1 January 2021 any mandatory third-party conformity assessment for the EU market will need to be carried out by an EU-recognised conformity assessment body. UK conformity assessment bodies will no longer be able to do this for products placed on the EU market unless this is agreed in a subsequent trade deal.
- CE marking will continue be mandatory for placement on the EU market.
- It will still be possible to use the CE mark for some goods sold in Great Britain until 31 December 2022, provided that the CE mark is currently applied to the goods on the basis of self-declaration, any mandatory third-party assessment was carried out by an EU-recognised notified body, and the certificate of conformity has been transferred to an EU-recognised notified body.

- This will only be possible however where GB and EU rules remain the same.

*UKCA Marking*

- UKCA marks will eventually be mandatory for most goods which currently require CE marking together with aerosol products.
  https://www.gov.uk/guidance/using-the-ukca-markfrom-1-january-2021
- UKCA marking will be required immediately after 1 January 2021 if all of the following apply:
  - The product is for the GB market;
  - The product is covered by legislation requiring UKCA marking;
  - The product requires mandatory third-party conformity assessment;
  - The conformity assessment has been carried out by a UK conformity assessment body;
- However, existing stock which was ready to place on the market before 1 January 2021 can still be sold in GB with a CE mark even if covered by a certificate of conformity from a UK body.
- Existing stock that has been fully manufactured and marked can still be placed on the GB market after 1 January 2021 with existing markings and notified body number, though it is not clear when this 'grace period' ends.
- Until 1 January 2023, for most goods it is possible to place the UKCA mark on a label affixed to the product/accompanying document as opposed to the product itself, after which the UKCA mark must be affixed to the product.
- The UKCA marking cannot be used for goods placed solely on the market in Northern Ireland, which will require CE marking or UK (NI) Marking.
- Products can bear both the UKCA and CE marking where they comply with the requirements of both UK and EU law.

*Declarations of Conformity*

- The rules around the UK Declaration of Conformity (DOC) will largely replicate EU requirements but in the UK these must now reference relevant UK and UK designated standards (those will be prefixed with BS rather than EN).

# Placing Food on the UK and EU market post Transition period

Food businesses also need to familiarise themselves with the impending changes at the end of the Transition period.

*Food Labelling - Requirements*

- As of 1 January 2021, in the UK, all directly effective EU law will be 'rolled over' into UK law and therefore food placed on the EU market must comply with Regulation (EU) No.1169/201 (FIC).
- Under FIC, the name/business name and address of the relevant Food Business Operator (FBO) responsible for food information is mandatory information and must appear on all pre-packed food labels.
- The FBO responsible for the food information is:
  - the operator under whose name or business name the food is marketed; or
  - If that operator is not established in the Union, the importer into the Union.

*UK and EU market – January 2021:*

From 1 January 2021:

- UK businesses wishing to place food on the EU market will need to make some changes to its labelling, where it only provides the name of a UK business to reflect the name and address of an EU based importer. Where it is intended that an external third party will carry out this role, contractual agreement should be sought.
- EU businesses wishing to place food on the UK market will also need to make changes to their labelling where it only provides a non-UK address; to reflect the name of a UK-based importer.

In a number of areas, the position remains unclear and the food industry would welcome greater clarification from government, including the position of Northern Ireland, organic foods, geographical indications, and health and identification marks.

Some of those issues which remain unclear are detailed below:

- For foods placed on the EU market by UK businesses:
  - The EU organics logo may not be permissible (subject to EU/UK equivalence agreement);
  - The EU emblem may not be permissible (subject to EU/UK equivalence agreement);
  - For products of animal origin, present guidance suggests the EU oval health and identification marks must be replaced by the new UK health and identification marks; and
  - Present guidance indicates that UK food must not be labelled as origin 'EU.'
- For foods placed on the UK market by EU businesses:
  - The EU organics logo may not be permissible (subject to EU/UK equivalence agreement);
  - The EU emblem may not be permissible (subject to EU/UK equivalence agreement); and
  - For products of animal origin, present guidance suggests that the EU oval health and identification mark must be replaced by the new UK health and identification mark.

# Trade and Tariffs

The UK will continue to implement all EU trade remedies measures, including anti-dumping and countervailing duties and safeguard measures, to protect UK businesses from unfair low-cost imports from third countries until 31 December 2020. After that date, the UK will begin operating its own independent trade policy, including the imposition of a new Most Favoured Nation Tariff regime; the UK Global Tariff in place of the EU's Common External Tariff. This will apply to all imports of goods into the UK unless there is a trade agreement in place with the exporting country which makes provisions for lower tariffs or some other exemption applies, such as a tariff relief or suspension. Separately, under the Northern Ireland Protocol to the Withdrawal Agreement, any goods coming into Northern Ireland which are at risk of being moved into the EU would need to continue to apply the EU External Common Tariff. It is worth keeping in mind that if no trade deal is agreed between the UK and the EU by the end of the transition period, the UK Global Tariff will also apply to imports from the EU. This is likely to mean that over 60 per cent of goods entering the UK from the EU would then be subject to tariffs on this basis.

Pending the establishment of a Trade Remedies Authority (TRA), the Trade Remedies Investigations Directorate (TRID) of the Department for International Trade is responsible for assessing the current EU measures and deciding whether they should be transitioned or terminated on 31 December 2020. UK businesses should already be aware if competing imported products are currently subject to EU anti-dumping duties. In addition, TRID has now been given the power to determine whether to open an investigation in relation to imports which are already the subject of an ongoing EU dumping investigation with a view to deciding the appropriateness of the imposition of UK trade remedies after 31 December 2020. Following the end of the transition period, and the transfer of TRID's functions to the TRA, the latter will also have the power to open an investigation into dumping on its own initiative, irrespective of whether the imports in question are the subject of an EU trade remedy or an ongoing EU investigation.

It would be important for UK manufacturers of products that currently enjoy the protection of EU anti-dumping duties, to make the case for the continuation of equivalent UK trade remedies, to protect against the potential dumping of imports into the UK after 31 December 2020. For UK companies that purchase products currently subject to EU anti-dumping duties, there is also the opportunity to try and secure the termination of such duties after 31 December 2020 and to lower their purchasing costs by engaging with the TRID's ongoing investigations.

*Any UK business that imports goods into the UK will need to understand what, if any, tariff rate the UK Government will apply after 31 December 2020*

Any UK business that imports goods into the UK will need to understand what, if any, tariff rate the UK Government will apply after 31 December 2020 on those goods to ensure that any tariff costs are taken into account by that company in its pricing and sourcing decisions. The UK Government has provided an online tool for checking the relevant tariffs that will apply from 1 January 2021. It is worth keeping in mind that these tariffs are subject to change as new bilateral trade agreements are negotiated and come into effect. Equally, businesses which currently import goods from the EU should remain alert to the possibility of the UK Global Tariff regime applying in the event of a no deal with the EU or some tariffs applying in the event of the current negotiations with the EU, leading to a "no frills" trade agreement

## Immediate things to do

- Check if you have not already, whether your business currently benefits or is otherwise affected by EU the imposition of anti-dumping duties or other trade remedies measures
- Engage with TRID to roll over or terminate certain trade remedies by submitting written representations to try and influence its decision
- Check what UK tariffs will apply to your imports from 1 January 2021

# Guidance for Regulated Sectors

**In this Section**



## Financial Services

Whilst we expect that UK financial services firms will generally have assessed the parts of their business that a no deal Brexit would impact (e.g. cross-border customers, whether at the time the contract is taken out or as a result of a change of residence mid-contract):

- UK and EU firms should continue to monitor business of this kind for any increase or areas that may have been incorrectly recorded and ensure that the details of this business is taken into account in any decisions made on how to manage the business following a no deal Brexit.

- EU firms doing business in the UK who wish to continue to do so must make sure they have registered with the FCA to enter the Temporary Permissions Regime. The ability to apply closed on 30 January 2020 but will reopen on 30 September 2020. However for credit institutions and insurers, the notification window to enter the TPR via a notification to the PRA closed on 11 April 2019 and it is no longer possible to submit a notification to enter the regime. Instead, a credit institution or insurer can apply to enter the TPR by applying for a top up permission of its passport before the end of the transition period, 31 December 2020. The position for fund managers is similar as for firms and the notification window will reopen on 30 September. For managers of umbrella UCITS funds, provided there is at least one sub fund registered before 31 December 2020 additional funds can be added after the Transition period ends, but for managers of umbrella Alternative Investment Funds, no additional sub-funds can be added after 31 December 2020.

- All firms should understand any cross-border data flows and have plans in place to replicate the data within the UK, or otherwise continue those data flows.

continue to carry out any new business in the UK and who do not apply to the FCA for the Temporary Permission Regime should review the FCA's Financial Services Contracts Regime (FSCR) to understand the requirements of supervised run-off for EU firms with UK branches or top-up permissions in the UK, and firms who entered the temporary permissions regime but did not secure a UK authorisation at the end and contractual run-off, for remaining incoming services firms. The FSCR will allow EEA firms to run-off existing UK contracts and exit the UK market in an orderly fashion. An exception to the FSCR is that EU firms managing UK authorised funds or acting as depositary will not be able to use the FSCR. The FSCR will automatically apply to EU passporting firms that do not notify the FCA that they wish to enter the temporary permissions regime, but who have pre-existing contracts in the UK which would need permission to continue. The FSCR will be time limited depending on the type of regulated activity being performed: it will apply for a maximum of 15 years for insurance contracts and 5 years for all other contracts;

- UK firms should familiarise themselves with the various temporary permissions and transitional arrangements that individual EU jurisdictions have put in place and assess whether and to what extent local authorisation or registration will be required to continue to do business in the relevant EU jurisdiction.

There are practical issues even if a UK based financial services firm does not undertake any activities in the EU. Firms should know where their various suppliers are based and whether any key suppliers are aware of issues arising from Brexit.

> *Some UK firms who do not have a significant exposure to the EU may not be so far advanced in their thinking and may not have taken material preparatory steps*

UK and EU regulators expect firms to be communicating with customers the impact that a no deal Brexit will have on existing arrangements and firms should have undertaken this exercise where it has been possible to explain that impact to customers.

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The impact of a no deal Brexit is not completely certain (for example, a relevant EU jurisdiction has not yet passed legislation to permit continuity of existing contracts), firms need to ensure that they are communicating with customers and providing as much clarity as possible as to the impact of Brexit on the customer's product or service.

Any UK firms who have not instigated a robust Brexit strategy should, as a matter of urgency, assess what EU related activities they carry on and take advice in the UK and if possible in the jurisdictions where customers or branches are based on the extent to which the firms can continue to carry on those activities.

There may be an EU-wide acceptance of the provision of those services (e.g. the ability of a UCITS manager or AIFM to delegate portfolio management to a UK based investment manager, although there is no similar arrangement for insurance) or firms may need to rely on the emergency legislation to permit continuity of contracts that EU member states have been putting in place. For example, Germany has announced a form of temporary permission regime; the Dutch Government has published a decree which includes an exemption which will enable UK investment firms to provide MiFID II services into the Netherlands to per se professional clients or eligible counterparties.

The risk for financial services firms who carry on business in the EU without proper regulatory cover is that they may be committing an offence in the jurisdictions in which they are carrying out those activities, which may be subject to a fine or to imprisonment depending on the local rules that apply.

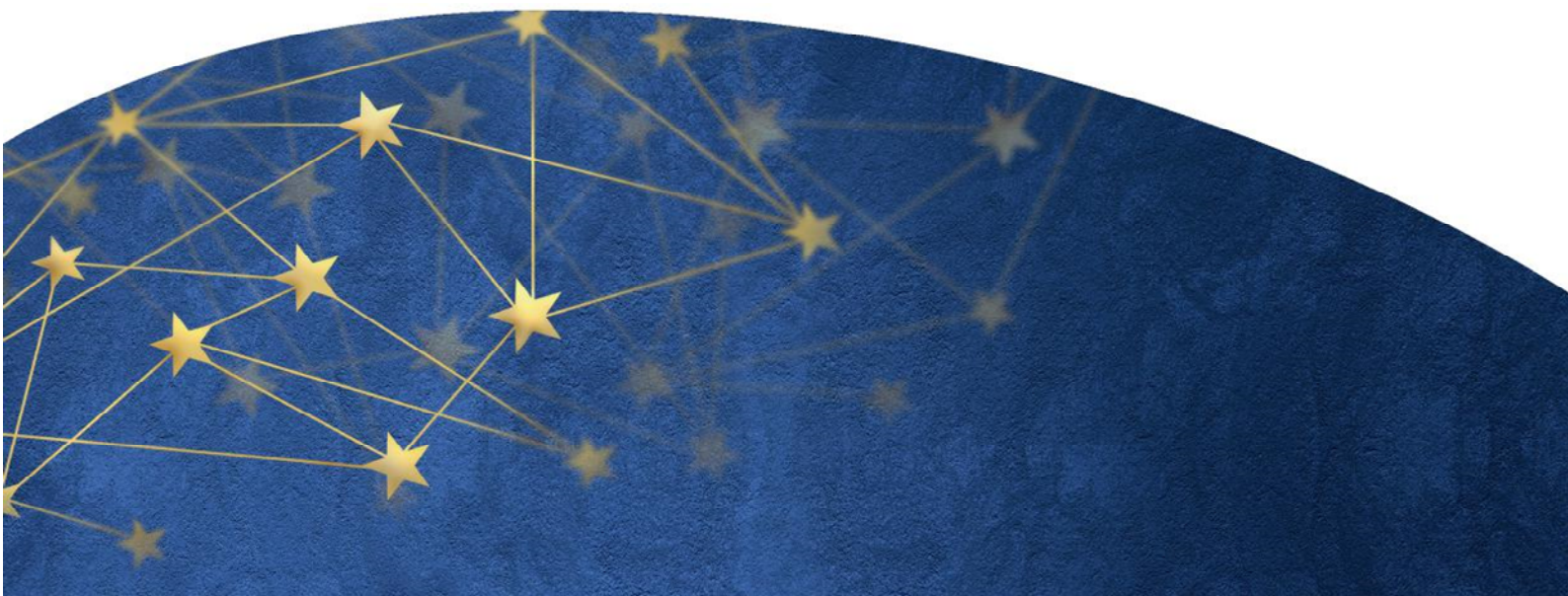
The European Supervisory Authorities have proposed a level of forbearance by local regulators, but this is still subject to appropriate laws being passed in each jurisdiction and any forbearance will not continue for any significant period. Further, any contracts entered into may be unenforceable by the financial services firm.

As a PRA/FCA regulated firm, UK financial services businesses also need to bear in mind the impact of UK regulations on a failure to adequately prepare for a no deal Brexit.

A failure to prepare in this way may be seen to demonstrate inadequate risk processes which could undermine the fitness and propriety of the firm. This could open up the firm to action from the FCA or possibly the PRA.

All those participating in the Senior Managers & Certification regime will need to be alert to the implications for the individual senior manager with responsibility for Brexit who most likely will have a personal liability.

For international businesses the need to know the EU-wide application of Directives to third countries and to know the individual emergency measures that are being taken by individual EU member states is vital. Not all member states have proposed emergency legislation, making it almost impossible to carry out business there from the UK. International businesses, if they have not done so already, should ensure that an EU-based subsidiary is providing any continuing services and through that subsidiary, making use of the network of EU passports that are available under the various Directives.



# Energy

Players in the energy sector share a number of concerns with other sectors of the economy, namely workforce, supply chain, data protection, intellectual property rights, financing costs and currency risks. For example, in response to the risk of a no deal Brexit, we're aware of companies stockpiling critical equipment commonly sourced from Europe (particularly in the offshore wind and oil & gas sub-sectors) such as wind turbine blades, power generators and blowout preventers. Similarly, supply chain issues are a particular focus in the nuclear sector given our departure from Euratom. For guidance on these types of concerns, please refer to the relevant parts of the Brexit Handbook.

Despite the uncertainty of a no deal Brexit, the majority of the energy market will continue to operate as it does today, however, we have set out below our recommendations of some key energy-sector specific actions you should consider in preparing for a no deal Brexit. It is not an exhaustive list and the precise scope of activities will depend on the particular sub-sector(s) you are engaged in:

## Immediate things to do

**Consider your energy trading portfolio**

- If you trade physical energy products which are delivered in the EU and you are registered with Ofgem, you will need to register with another European regulator in order to continue to comply with your obligations under REMIT
- For any new trades, ensure you consult your compliance teams before entering into them, especially if they are for physical delivery in the EU
- If you trade across interconnectors, you should be aware that new access rules governing trading across interconnectors are being developed and that you will need to familiarise yourself with them

**If you are licensed by Ofgem:**

- You should engage with the regulator who may be able to give you some guidance about how best to prepare for a no deal Brexit. You should also check the status of any contracts and licences held in EU27 states, which may be affected by a no deal Brexit
- You should keep up to date with any modifications which Ofgem proposes to make in relation to your licence or any industry codes affecting your business. Ofgem is already considering what changes to make, but this process is ongoing. The intention is that neither the scope of your obligations nor the underlying policy should be amended as a result of these modifications, but the process should be kept under review

**If you participate in the EU ETS**

- During the implementation period, the UK remains a full participant in the EU ETS. This means that participating UK operators must meet their 2020 compliance obligations including:
  - 31 March 2021 – submit verified annual emissions report for 2020 emissions; and
  - 30 April 2021 – surrender equivalent allowances to 2020 verified emissions.
- As of 1 January 2021, accounts administered by the UK in the EU ETS allowance registry and the Kyoto Protocol registry will be blocked. The UK government is procuring a new system to enable account holders to hold and trade Certified Emissions Reductions (CERs) and Emission Reduction Units (ERUs), which it expects to be operational in spring 2021. Businesses with accounts in the Kyoto registry should consider taking action to manage the risks created by a short gap in service before the new system is operational. For example, affected businesses could consider opening an account in another country's registry to hold and trade CERS and ERUs during this period

**If you participate in the EU ETS (cont.)**

- Clean development mechanism project developers should continue to approach the UK's Designated National Authority for new letters of approval;
- The UK government and devolved administrations issued the response to its consultation on the future of UK carbon pricing in June 2020 and confirmed its intention to establish a new UK Emissions Trading System (with Phase 1 running from 2021 to 2030). The UK ETS which could either be linked to the EU ETS or operate as a standalone system. The draft Greenhouse Gas Emissions Trading Scheme Order 2020 (the "Order") was laid before Parliament in July 2020 and will be operational from 1 January 2021. The UK ETS will cover the same greenhouse gases and sectors as the EU ETS. Although, the Order does not impose duties that are significantly more onerous than those imposed by the EU ETS, or require participants in the UK ETS to adopt significantly different compliance processes, it is important for participants to prepare now for the transition from the EU ETS to the new UK ETS (commencing on 1 Jan 2021).

## Short term

In addition to the immediate actions set out above, you may wish to consider the following:

- If you participate in the SEM, you could continue to do so as you do today, but if there is a no deal Brexit, there are serious concerns that the SEM may not be able to continue in the long-term (although the UK Government, the Irish Government and European Commission are committed to ensure that the arrangements can continue post-Brexit.
- REGOs and Guarantees of Origin for CHP issued in EU countries will continue to be recognised in the UK after the UK leaves the EU even in a no deal scenario. However, UK-issued guarantees will no longer be recognised in the EU. You should review any existing contractual arrangements with an EU electricity supplier or trader as it is possible that these contracts may be compromised.
- A new UK Carbon Emissions Tax will come into force in on 1 April 2019. The tax will be set at £16/tonne of greenhouse gas emitted over and above the installation's emissions allowance (based on EU ETS free allowance allocation). You will need to factor this in to your financial models and be aware that the reporting period under the new tax will be 1 April 2019 to 31 December 2019.
- If you are a nuclear operator and your supply contracts for nuclear material involve both a UK-established operator and an EU27-established operator, your supply contracts may need to be re-approved by the Euratom Supply Agency. You should engage with the Euratom Supply Agency on the process for re-approval and agree with your counterparties how to manage supply while this is taking place.

## Medium to long term

Although the general consensus is that there is no "day one" risk of the "lights going out", over the longer term, it is expected that the cost of participating in the energy sector will increase, whether as a result of higher / more volatile energy prices (notwithstanding the EU doesn't impose tariffs on electricity and gas imports on WTO countries) or costs associated with the UK being a "third country" from an EU perspective (e.g. tariff and non-tariff barriers associated with the supply chain etc). Domestic energy policy will need to adjust to reflect the UK's position outside the EU.

This may give rise to opportunities for energy sector participants. For example, there may be a renewed focus on incentivising domestic generation solutions, rather than reliance on EU imports, given that interconnector flows will no longer be frictionless. We also expect that the Government will remain committed to decarbonisation, given the carbon budget arrangements under the Climate Change Act and commitments under the Paris Agreement. In that context, smart de-centralised energy solutions may well continue to be an area for growth.

*We also expect that the Government will remain committed to decarbonisation, given the carbon budget arrangements under the Climate Change Act and commitments under the Paris Agreement*

# Brexit checklist

| Checklist for businesses | Pinsent Masons' Solution |
| --- | --- |
| ✓ Re-visit previous Brexit planning and lessons learned from Covid-19 within a Brexit working group | **Pathway to Preparedness**<br><br>To help you refresh your Brexit plans and take necessary action. Our Brexit advisory team and legal project managers can help you get back on track to create a pathway to preparedness.<br><br>In order to prepare for the end of the transition period businesses need to review and reappraise their existing plans. Using project management expertise our teams will support you to:<br><br>• conduct a gap analysis of preparedness and work with you to refresh and reappraise those plans in light of the current circumstances;<br>• support you to identify key actions required and associated timelines;<br>• provide advice and assistance on how these tasks can be completed effectively and efficiently; and<br>• provide you with a comprehensive revised plan with executable deadlines which can be shared with business stakeholders. |
| ✓ Carry out a gap analysis to identify any areas whether further preparation is required and/or preparation needs to be re-visited | |
| ✓ Review template contracts, business-critical contracts and supply chains for Brexit risk | **Brexit Contracting Solution**<br>Pinsent Masons has developed a comprehensive commercial contracts solution. This will enable you to:<br><br>• quickly and effectively ensure that new contracts are future proof;<br>• review and where necessary renegotiate existing contracts; and<br>• undertake supply chain risk analysis to alleviate the risk of any nasty surprises. |

| Checklist for businesses | Pinsent Masons' Solution |
| --- | --- |
| ✓ Consider how Brexit legislation under the Withdrawal Act could affect the business<br>✓ Brief the Board on possible Brexit scenarios | **Public Policy and Brexit Advisory**<br>Our Brexit Advisory Team draws on the strength of our market-leading Government Affairs legal practice and our Public Policy and Strategic Communications team. We can help you understand what Brexit may mean for your business and engage constructively in the process by:<br>• advising on legal, political, strategic and procedural issues associated with the Brexit process and related matters;<br>• considering how Brexit-related legislation may affect your business;<br>• briefing your board on Brexit-related risk, opportunities and probable outcomes; and<br>• helping you to engage in the policy-making process. |
| ✓ Consider establishing a base or subsidiary in the EU | **International Advisory**<br>Our Brexit Advisory Team has an international reach with experts in Dublin, Paris and Germany, who can advise on a range of cross-border issues arising from Brexit, including:<br>• establishing a base or subsidiary in the EU;<br>• cross-border supply chain risks; and<br>• cross-border disputes arising from Brexit. |
| ✓ Plan for workforce needs post-Brexit<br>✓ Engage with the current workforce, including within the EU | **Brexit employment & immigration tools**<br>There are a number of steps that can be taken now to assess the extent of the risks in your workplace and to provide a guidance and reassurance to affected employees. Our corporate immigration team can help you navigate the complexities of employment law that will arise from Brexit, including:<br>• staff training on the immigration options available to EEA employees; and<br>• strategic advice on the impact of changes in the UK litigation law on your employees. |

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| --- | --- |
| ✓ Review regulatory standards, compliance and changes in process/laws<br>✓ Map cross-border data flows in case of no adequacy<br>✓ Consider IPR and patent registrations and enforcement | **Regulatory deep dive**<br>Businesses must remain alert to any changes in regulations over the next few years, including during any post-Brexit transitional phase, to ensure that implementing any new regulations is still incorporated into their plans:<br>Our Brexit Advisory team includes our top-ranked Regulatory group, which can assist in:<br>• reviewing your business' current standards and compliance;<br>• advising on changes in legal processes and legislation; and<br>• advising on data regulation in case of no adequacy. |

## Public Policy and Strategic Communications

Pinsent Masons offers clients a full public policy and strategic communications service, through its own specialist consultancy team. Expert in managing political, media and reputational challenges, our team of communication and policy professionals help clients to understand, navigate and engage with the political process, and to enhance and protect their brands through smart, effective communication.

Should you wish to discuss the politics of Brexit, or how this may impact your business, please contact our Director of Public Policy and Strategic Communications, Andrew Henderson.

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