BACK TO BREXIT: WHAT UK BUSINESS NEEDS TO KNOW

PROTECTING YOUR BUSINESS AND PREPARING FOR A NEW LEGAL AND REGULATORY ENVIRONMENT

GOWLING WLG

CONTENTS

INTRODUCTION

WHAT AWAITS US?

The UK may have left the EU on January 31 of this year, but the effect of this will not felt until 11:00 pm on 31 December on the expiry of the 'transitional' period.

Much speculation continues as to the nature and extent of the trading arrangements that the UK, the EU and the individual 27 Member States will have agreed (or not) by that date.

Despite all the talk of a 'no deal' Brexit – referred to euphemistically as an 'Australian' deal, making reference to the fact that Australia does not have a free trade agreement with the EU, the technical gaps between the two negotiating parties may yet be bridged. The issues that remain outstanding are political, rather than technical. The longer the parties wait to reconcile their political differences, however, the tighter the timetable is for an UK-EU FTA to be in place by 1 January of next year. The scale of the task facing the respective officials working on the negotiations should not be underestimated: to agree legal texts; carry out so called legal scrubbing, or, in Euro-speak, 'toilettage' of the agreed texts; and arrange for translations.

As well as the EU Council representing the 27 Member States, the European Parliament must also review any EU-UK agreement and give its consent. In a statement, the European Parliament has indicated that it would not accept having its "democratic oversight curbed by a last minute deal beyond the end of October."[1]

With its eyes to issues concerning the Rule of Law in Poland and Hungary, the European Parliament also stated that the publication of the Internal Market bill "represents a serious and unacceptable breach of international law." It further noted that the Withdrawal Agreement and the Ireland/Northern Ireland Protocol were of legally binding force that would apply whether or not the UK and EU agreed a future trading relationship. Further, in 'no circumstances' would the EU Parliament ratify any EU/UK agreement if the UK authorities breached or threatened to breach the Withdrawal Agreement.

To the extent that the FTA is a 'mixed' agreement i.e. areas fall within shared areas or member state only areas, such as security and justice, the EU national and regional assemblies, 38 in all, must also give their approval. Should that be the case, the coming into force of the UK-EU FTA is likely to be split, with those parts requiring national or regional approval being held over until a later date.

WHAT IS A FUTURE AGREEMENT LIKELY TO CONTAIN?

At the time of its signature alongside the conclusion of the Withdrawal Agreement, the Political Declaration was intended as between the parties to be the 'framework' with respect to which negotiations as between the UK and EU would add the flesh.

It is clear over recent months that the UK Government's appetite is now for little more than a 'bare bones' conventional free trade agreement (but with the addition of benefits on services – of which, more below). The EU for its part, has continued to hold its line that it will not permit the UK to have tariff and quota free access to the EU single market unless it agrees to a 'non-regression' of current EU level playing field (LPF) rules, namely those concerned with competition, state aid, taxation, labour and environmental standards, and climate change.

From what we know, provided a landing place can be found on LPF rules, a UK-EU FTA will result in zero tariffs and quotas on manufactured goods. This is not as good as it sounds, as it means that there will be a trade and customs border introduced as between the EU and the UK, with mandatory customs declarations and other border controls such as phyto-sanitary checks. From a perspective of the 'deal or no deal' question', in relation to trade in goods, business has to do the same amount of preparation for either eventuality. We explore this new landscape below.

In the areas where the UK has most to offer, namely trade in services, as was the case also under the May government, these are largely absent from the trade negotiations. The UK is currently seeking a greater access to the EU market with regard to the provision of services than is generally granted in free trade agreements. Given that the UK has indicated its wish to have regulatory divergence from the EU, this is unlikely to be forthcoming.

[1] https://www.europarl.europa.eu/news/en/press-room/20200907IPR86513/statement-of-the-uk-coordination-group-and-ep-political-group-leaders.

In the light of the fabled May 'redlines' the EU Council's negotiating deadlines lines were that market access, national treatment and establishment rights would be available for services providers. However, the common regulatory structures will no longer apply and services will be provided in a very different regulatory context post the Brexit Transition Period. In particular, financial and insurance service providers will no longer benefit from 'home' country control with a 'single passport' to provide services in other 'host' countries. So too, regulated professions will no longer benefit from mutual recognition of qualifications.

Much still remains uncertain and the devil will be in the detail. Short of any arrangement, the limited protection of WTO (GATS) rules apply. In the main, the regulation of services provision in the EU by third country entities remains a matter for the individual member state. Where that is the case, the entity must consider the nature of the service it wishes to provide in a particular member state (be it Mode I, II, III or IV and in which of the 160 service sectors it falls); it should then consider what commitment the state in question has lodged with the WTO for that designation in its Schedule of Specific Commitments to see where it is offering such commitments with respect to market access, national treatment and any limitations.

Outstanding concern also remains with respect to the free movement of data, where a recent judgment of the European Court of Justice found that the UK's surveillance laws that allow for "general and indiscriminate" bulk collection of data are contrary to the EU's data-protection rules. Here, the UK is awaiting an 'adequacy decision' from the EU to signal that its rules are adequate whereby there may be a free flow of data between the EU and UK. Absent such a decision, business will have to find alternative legal bases to transfer data between the EU and UK, adding to uncertainty and costs.

WHAT ARE THE STICKING POINTS?

The level playing field

The Political Declaration had included a commitment to a "level playing field" to ensure "open and fair" competition, albeit the precise nature of commitments would be "commensurate with the scope and depth of the future relationship". Controversially, and the extent to which the EU is pressing for this is not clear, the EU is alleged to be also asking for 'dynamic alignment' of the LPF rules.

State aid

One of the more tantalising aspects of the negotiations is what the UK were going to propose with respect to State aid. To date, among the LPF rules, this issue has been in a class of its own. The EU carried out the initial compromises from its opening position, accepting that, by contrast to all other FTAs with other States contiguous to the EU, that the UK would not accept a 'cut and paste' of the EU rules, nor would it be bound by the European Court of Justice. As a quid pro quo, it asked that the UK indicate what its own State aid rules would be. Only slowly and reticently has the UK in recent days started to indicate what points of principle it may include in a domestic regime, but that it needed to consult with business towards the end of the year or in the Spring as to the nature of that regime. More recently, we understand the issue of domestic enforcement and dispute settlement is being considered.

Governance and dispute resolution

The EU wishes to conclude a comprehensive trade agreement that would encompass trade, transport, foreign policy and fishing under a single umbrella arrangement. The UK, by contrast, is pressing for a series of bi-lateral agreements, with a comprehensive free trade agreement to be followed by separate deals for fishing, security, transport and energy.

Under an UK-EU FTA, the EU is asking for a similar system to that of the Withdrawal Agreement, where disputes under the Withdrawal Agreement are to be dealt with under the UK-EU Joint Committee. Under this procedure where discussions within this Committee are unresolved after three months, the matter proceeds to an arbitration panel. As with the Withdrawal Agreement, issues of EU law must be referred to the European Court of Justice. The UK position is not as detailed, but its mandate proposes that it should be "appropriate to a relationship of sovereign equals, drawn from existing Free Trade Agreements, such as those the EU has with Japan and Canada" It also refuses any role for the European Court of Justice.

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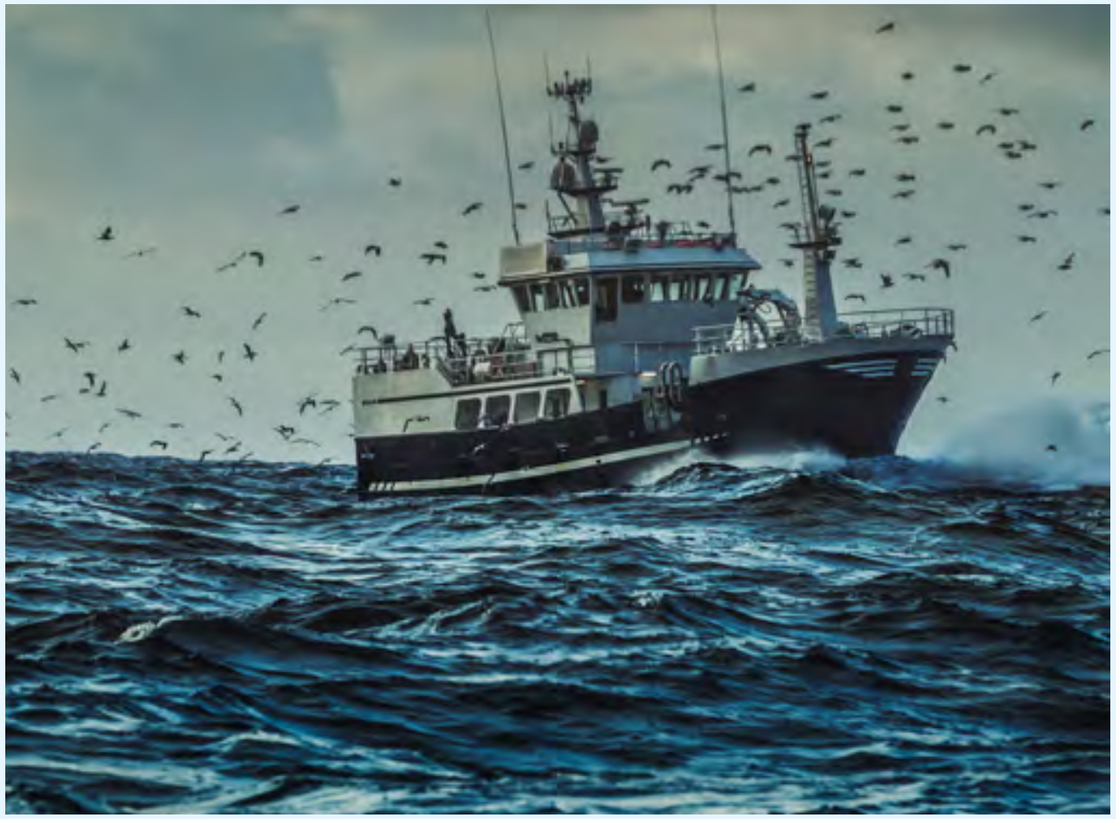
Fishing

The question of access of the EU fishing fleet to UK coastal waters and the allocation of fishing rights is where the UK holds its strongest card. Under the Political Declaration, it was agreed that issues of fishing and financial services would be considered first, before proceeding to the main body of the FTA. The UK for its part now wishes to hold off this issue until the end of negotiations to maximise its leverage. Recent indications are that there is a recognition that the EU accepts that as the UK will be an independent coastal state and that quotas for access to fishing will be reduced.



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PREPARATION FOR BREXIT

WITH BOTH THE UK AND EU STILL REMAINING SOME WAY OFF REACHING A POST-BREXIT TRADE AGREEMENT AND THE RISK OF A 'NO DEAL' ON 31 DECEMBER 2020 REMAINING A REAL POSSIBILITY, IT HAS NEVER BEEN MORE CRUCIAL FOR BREXIT TO BE FRONT OF MIND FOR BUSINESS LEADERS.

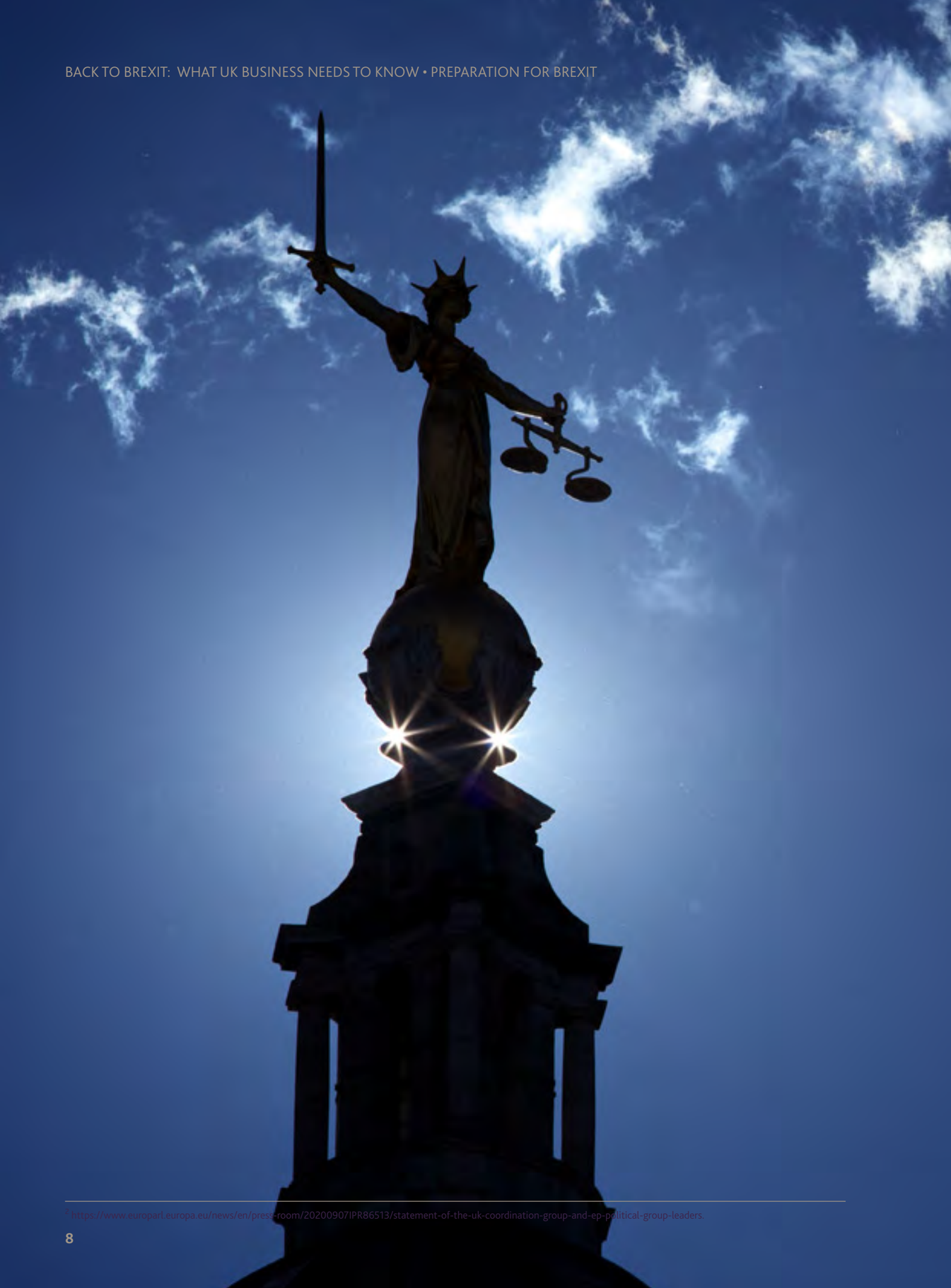
The extent to which Brexit will affect your business and the timeline for the effect to kick in will depend upon the sector in which you are active and the extent to which you trade with the EU. The European Commission, for instance has issued some 100 sector specific stakeholder preparedness notices from Air Transport to Waste Shipments.

Every organisation faces different challenges when it comes to the UK leaving the EU and planning is therefore essential to protect your business. Gowling WLG's Brexit task force is on-hand to help our clients in all sectors navigate and manage all eventualities.

Our experts play a regular part in the Brexit conversation and this guide provides advice on the key considerations and actions businesses should take to prepare themselves for survival and success if a no-deal Brexit becomes a reality.

Topics in this client briefing include:

- Customs / border tariffs
- Supply chains
- Regulation / non-tariff barriers
- Workforce
- Trade defence measures
- Sanctions



THE NEW UK-EU CUSTOMS BORDER

From 1 January 2021 (the end of the Brexit Transition Period), new customs controls will exist in respect of goods moving between the UK and the EU. The Government's Border Operating Model (published in July) sets out the rules for importing into Great Britain from the EU from 1 January 2021. The rules for moving goods to and from Northern Ireland are still yet to be agreed. Likewise, if a UK-EU Free Trade Agreement ("**FTA**") is not concluded – UK importers will be liable to pay tariffs on goods imported from the EU.

The creation of a customs border between the UK and the EU is a significant change in process for UK-EU traders. Whether or not a UK-EU FTA is in place, UK-EU traders will need to comply with customs formalities when importing and exporting goods.

Customs formalities include:

- completing and submitting customs declarations on export and import;
- paying any applicable duties (tariffs) on imports;
- obtaining (and complying with) applicable import and/or export licences;
- paying applicable import VAT and excise duties;
- complying with sanitary and phytosanitary measures (e.g. obtaining health certifications); and
- physical inspection of products of animal origin and plant products at the border.

It will still be necessary to complete these customs formalities even if a UK-EU FTA is concluded.

The Border Operating Model provides for a phased implementation of customs checks on imports of EU goods into Great Britain (but not Northern Ireland). Great Britain-based importers may be able to defer customs/import VAT payments and delay customs declarations for up to six months.

A UK-EU FTA would likely entitle UK and EU traders to preferential tariff treatment for products originating in the UK or EU. Preferential tariff treatment will only be available to traders who can demonstrate that they meet the so-called 'rules of origin' set out within any UK-EU FTA. The UK's FTAs with other third countries (see below) also contain specific rules of origin with which traders will need to comply in order to benefit from preferential tariff treatment.

To the disappointment of those sectors with complex JIT supply chains, notably the automotive sector, the EU has refused to grant diagonal/regional accumulation, whereby components of UK and EU origin would be 'cumulated' to meet local content rules under any FTA's agreed with third countries[2].

[2] https://www.europarl.europa.eu/news/en/press-room/20200907IPR86513/statement-of-the-uk-coordination-group-and-ep-political-group-leaders.

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WHAT SHOULD YOUR PREPARATION COVER?

1. **Assess potential tariff exposure if there is no UK-EU FTA –** the UK Global Tariff (see: https://www.gov.uk/check-tariffs-1-january-2021) sets out the duties that will be applicable on goods imported into the UK from countries with which the UK does not have an FTA. To what extent could, or should, this impact procurement strategy? Does reducing landed cost of goods being imported into the UK from the rest of the world potentially affect the business' competitiveness?

2. **Assessment of current exposure to customs and trade compliance risk –** to what extent could these risks increase when customs formalities between the UK and EU are introduced? Is your customs and trade compliance function ready for an increase in customs declarations? Do you have internal processes that will allow for the completion of customs declarations?

3. **'To defer or not defer?' That is the question –** the Border Operating Model gives GB importers a choice – deferring duties and declarations for up to six months may provide short-term breathing space but obtaining import/export information retrospectively will be difficult.

4. **Contract terms –** have you reviewed the Incoterms used in customer/supplier contracts? Do these terms reflect your business's risk appetite for import/export costs and duty liability?

5. **Appointing a customs broker –** does your business have a customs broker ready to complete customs declarations for UK-EU trade? Does it need one? If so, how will the customs broker be instructed and what type of representation (direct or indirect) is needed?

6. **Data requirements for customs declarations –** does your business understand the core data requirements for customs declarations, and the legal risks associated with getting this wrong?

7. **Import/export licences –** has your business reviewed whether it moves sensitive goods between the UK and EU that will require an import or export licence from 1 January 2021? Have licence applications been prepared in advance ready for submission?

FAQS

Will a UK-EU FTA mean that certain customs formalities are not required?

No. Deal or no deal, Brexit is going to alter fundamentally the customs formalities required to import / export across the UK-EU border. The UK has left the EU's Customs Union, and the UK's relationship with the EU will be radically different where the previous principles of mutual recognition of regulatory standards and free movement of goods, people, services and capital will no longer apply. A UK-EU FTA may provide for preferential duty rates, but none of these elements will obviate the need to complete customs declarations.

If a UK-EU FTA is concluded, businesses should also be aware that they will not automatically be entitled to preferential tariff treatment. Traders will need to be able to demonstrate that their products meet the relevant rules of origin – these will depend upon the terms of the UK-EU FTA and the nature of the products being imported/exported.

It is therefore important that traders understand these rules, and the origin of any inputs (e.g. raw materials or ingredients) in their products. Consider investing in origin management software to ensure your business can maintain appropriate evidence that your products qualify for preferential treatment.

How do I take advantage of delayed customs declarations?

The staged implementation of the GB-EU border by the UK Government allows traders to delay making import declarations and duty payments for up to six months from the date of import. It is not possible to do this if the goods are controlled goods (e.g. a licence is required), the goods were not in 'free circulation' in the EU prior to import, or the goods will not be released into free circulation on the GB market (e.g. the goods will not be sold in GB).

Traders will also need to hold a Duty Deferment Account, and be authorised by HMRC to use the Simplified Customs Declaration process (either Entry in the Declarant's Records or Simplified Customs Declaration Procedure) by the time that declarations must be submitted (i.e. no later than six months after import).

To make a delayed declaration, traders must make a record in their own commercial records at the point the goods enter GB, which sets out among other things the:

- relevant customs procedure code;
- declaration unique consignment reference (a reference number that allows you to identify the consignment in your records);
- purchase and, if available, the sales invoice numbers;
- date and time of entry in records – which is used for working out VAT payments;
- any temporary admission, warehousing or temporary storage stock account references;
- warehouse approval number (if applicable);
- written description of the goods – to ensure they are identifiable;
- customs value (e.g. the invoiced amount); and
- quantity of goods.

What documentation do I need to have in place to import/export goods between the UK and the EU after Brexit? Is there anything I should have in place before the UK leaves?

To import/export goods between the UK and EU after Brexit, you will need a GB EORI number. The EU importer will also need an EU EORI number. VAT registered businesses in the UK that trade with the EU have been automatically issued UK EORI numbers by HMRC, but non-VAT registered traders will need to apply online.

You should also consider who will be responsible for filing import declarations (if you are an importer) and export declarations (if you are an exporter). For example, a customs agent, freight forwarder or fast parcel operator may be able to submit customs declarations on your behalf. If you do intend to appoint a third party to submit customs declarations, you should ensure that you have an appropriate agreement in place with that third party. This agreement should clearly set out the third party's responsibilities, their liability to you (and your liability to them) for any deficiencies in customs declarations, and who is liable for paying any applicable customs duties (e.g. would the agent pay initially, and later be reimbursed?).

You should ensure that you have mapped out your existing supply chains, so that you can identify any 'pinch points' that may occur on the expiry of the Brexit Transition Period. In addition, this mapping exercise can be used to provide you with information on: the customs procedure codes (CPCs) that you currently rely on, the classification and origin of the goods you import/export, and the amount of duty and import VAT you currently pay (if any) on non-EU products.

What data do I need in order to complete customs formalities? Where can I find this?

The specific data sets required to make customs declarations will depend on whether you are importing or exporting, and whether the goods are subject to any regulatory control (e.g. export licences).

There are currently 54 data fields that require completion to file a customs declaration. HMRC has issued guidance on the data sets required to complete import/export declarations in the new Customs Declaration Service (CDS). (CDS will replace the existing CHIEF system.)

The most important data you will require are:

- tariff classification of the goods you are importing/exporting - by reference to a 10-digit commodity code;
- customs value of the goods you are importing/exporting - there are six methods for calculating customs value (the most common of which is the invoice value of a product);

- origin of the product - this will determine whether preferential duty rates may apply;
- description of the goods (and mass) - this may be critical for post-import audits;
- Customs Procedure Code (CPC) - documenting whether any simplification procedures have been used to import the product; and
- any additional information - this will include any licence and/or authorisation numbers.

Engagement with suppliers will be critical to obtaining this information in the first instance. However, you should ensure that you do not unduly rely on information provided to you by third parties.

What will the UK tariff be after Brexit? Where do I find the UK tariff regime and which goods does this cover?

The UK Global Tariff, published in May 2020, sets out the applicable duties on goods imported into the UK. You can check which tariffs apply to your business's products using the following link: https://www.gov.uk/check-tariffs-1-january-2021. Tariff rates are set by reference to commodity codes, and vary depending upon the product. The UK's Global Tariff is based upon the EU tariff in force in the UK while it was an EU Member State, with a number of revisions to simplify, reduce or remove certain tariffs.

The UK Global Tariff applies to all imports which are not eligible for preferential tariff treatment (e.g. under an FTA between the UK and a third country).

With which countries has the UK agreed FTAs? Will I be able to claim preferential tariff treatment when importing products from these countries? Will purchasers in countries with which the EU has FTAs continue to be able to purchase my products without paying duties?

The UK has agreed a number of Trade Continuity Agreements with countries with which the UK benefitted from preferential trading relations as an EU Member State. These 21 agreements replicate the terms of the trade agreements currently in place between these countries and the EU. The list of agreements is available here: https://www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries. There are 17 countries with which the UK currently enjoys preferential trading arrangements via an EU-negotiated FTA, but with which the UK has not yet concluded a Trade Continuity Agreement.

The UK has also recently concluded an FTA with Japan. The details of the FTA are not yet published, but the UK Government says this "secures additional benefits beyond the EU-Japan trade deal". The UK is currently negotiating FTAs with a number of countries including the USA, Canada (with whom the EU has an FTA), Australia and New Zealand.

Your business may be able to claim preferential tariff treatment provided that your products meet the relevant rules of origin under each of the FTAs. Some of these agreements permit so-called 'cumulation' with EU-origin, whereby it would be possible for a time limited period to use EU originating products to count towards the UK originating status of your products. The majority of these agreements, however, only permit this if a UK-EU FTA is concluded (and a trilateral agreement with the UK, EU and the relevant partner country is agreed).

Are we heading for a downturn, or a recession? Will there be insolvencies?

Obviously one needs to be thinking about being ready to 'recession proof' one's business, as even if your business is ready, and flourishes, or does not struggle, others may - and they could be your suppliers or your customers.

For all sorts of reasons, this might mean an enhanced focus internally and likely (or usefully) in dialogue with the bank, on banking covenants and on cash, and on lending facilities where they might be prudent.

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And in addition:

- Be alive to any changes in invoicing or deliveries or timeliness from a supplier - usually requests for payments upfront, or changes to invoicing, or an unscheduled request for a price increase may indicate cash-flow issues. Does the supplier need support from you (if they are critical to you)? Could you start to line up a second supplier, just in case?
- If supplying goods, check that you have adequate retention of title in your contracts where possible, and start putting them in if not.
- Consider if factoring or invoice discounting can help your successful business better weather the cash-flow issues of others
- Check that you have fit-for-purpose set off clauses in your contracts where possible, and start putting them in if not.
- In project work, keep regular checks on any delays, and the reasons for them - is there risk higher up in the chain (i.e. risk on payment)? Also, if any supplier in the chain is facing cashflow difficulties, customer support from above or sub-supplier support from below can be demanded when the timings are most project critical. Regular dialogue can help - and again, alternative supply can be lined up if needed.
- In all of these scenarios, a review of contracts might be wise to check on exclusivity provisions and for appropriate insolvency/step in/termination clauses.
- It may be too late, but is credit insurance available (and/if still affordable)? Or can a guarantor be sought and put in place?
- And the financial woes of others may also represent an opportunity: to acquire businesses, or parts of businesses, or assets, or good people looking for better job security.

If in difficulty yourself, then:

- Two things that are always important for directors to do, given the duties they owe, are: to take advice; and to keep proper records of decisions made, and why they were made.
- Options might include defensive mergers, or business sales to focus back on the core business, where the business may be most resilient.

VAT is a European-based tax - will it change after Brexit?

The UK VAT regime is not due to change immediately after Brexit.

But that does not mean that the rates won't change over time - a rise to increase tax take, or a fall if the economy needs a spending boost.

In the longer term, outside of the EU, the UK could of course scrap VAT altogether, and look at a sales tax instead - that would be not dissimilar to the US, but realistically must be at least a short while away, as it's likely just too big a change to try for now.

But what will likely change immediately is how VAT is charged (or not charged) on sales of goods and services between the UK and the EU - at the moment, the seller charges 'home' VAT, and the buyer gets to use the 'credit' for paying that as input tax in its own VAT returns. But once the UK is outside the EU, that may well change, and no VAT will be charged (just like on a sale to or from the US today). That may be a boost to exports (as of course would a falling exchange rate).

What will litigation look like from 1 January?

If there are issues and claims to be made, we will be losing the benefit of EU treaties and regulations on some of the taken-for-granted processes that apply today on an intra-EU but cross-border dispute: on service abroad, on jurisdiction and governing law; and on enforcement. All of this can still be done, of course (just as any non-EU based claimant can currently sue an EU based defendant), but it will not be as smooth, or as quick (if such an adjective can be applied) as it is today. UK-based claimants suing in the EU will have to find out the pre-1973 ways of dealing with these things - and it is almost certain that that will be clunky, slower and more costly than as at today. Anti-suit injunctions and Italian torpedoes may well return to the legal lexicon.

Meanwhile, however, those difficulties for UK-based claimants may not be such an issue for UK-based defendants, as it works exactly the same, in reverse, for EU-based claimants wanting to sue a UK-based defendant.

For some contracts, it may make an arbitral jurisdiction (with enforcement under the New York Convention) more attractive than a Court jurisdiction. Something possibly to think about in more detail than usual for future contracts.

SUPPLY CHAINS

DEAL OR NO DEAL, THE END OF THE BREXIT TRANSITION PERIOD MEANS A REAL RISK OF INCREASED COSTS AND DELAY TO SUPPLY CHAINS. WE OUTLINE THE ELEVEN ACTIONS TO TAKE NOW TO REDUCE THE IMPACT OF COST HIKES AND DELAYS - AND ANSWER THE MOST COMMON BREXIT SUPPLY CHAIN QUESTIONS.

Brexit will mean that there will need to be checks and possibly tariffs on the border between the UK and the EU. Any business exporting or importing goods in or out of the UK will be impacted. This means any business which buys or sells goods in the UK will near certainly be impacted, as most goods have some international element. Brexit brings a high risk of increased costs and delay:

- If there is disruption at ports and border crossing points - if so, this will mean delay and cost.
- More administration required to cross borders - eg customs declarations (which a HMRC report issued in early October 2019 has forecast as a cost to UK plc of some £15bn pa - quite a number).
- Potential tariffs, especially on imports. This may increase costs (although, on the updated temporary tariffs schedule issued by the government in early October 2019, some 88% of imported goods are planned to be tariff free).
- Potential export/import controls - which may delay or prevent the export or import.
- If there is currency volatility - a falling £ will increase the costs of imports. A volatile pound makes it difficult to price.

FAQS

What should I do?

1. Map your supply chain and identify where you have the most critical exposures. Your key focus should be on imports from and exports to the EU. Understanding the issues is half the solution.
2. Can you or your suppliers or (less helpful) your customers build up stocks in the UK?
3. Talk to your logistics providers - what will they be doing to keep your goods moving? And at what cost?
4. Liaise with critical suppliers/customers in the EU to identify potential issues and solutions.
5. Work out how you will fulfil export/import requirements such as completing customs declarations.
6. Identify the impact of tariffs. Look at the UK's proposed tariffs, and those may need to be priced into on-going contracts and future contracts, where commercially that is possible.
7. Build in contingency time for the risk of delays on cross border deliveries.
8. Consider hedging currency risk.
9. What do existing contracts say about price changes?
10. With new contracts, map out how the impact of Brexit will be managed - where will delivery happen (and risk pass) - the impact of tariffs and customs paperwork may make this very much more important than it used to be.
11. If you are a UK business, make sure you have an EORI number that starts with GB.

Can't I just rely on the force majeure clause?

Probably not. A force majeure clause normally provides some protection (e.g suspending the contract) if an event outside the control of a party happens which could not reasonably be anticipated. It will be hard to prove this for contracts entered into since the referendum. And the courts have indicated that even contracts pre referendum may not be able to use this – case law shows well that the English courts are not going to want to allow parties to avoid contracts because of Brexit and the costs of Brexit. Higher costs are not usually (i.e virtually never) enough for force majeure, or for frustration as a matter of English contract law.

However, this will depend on the precise wording of the clause in the contract and the actual issue that arises.

For new contracts, can I add a "Brexit" clause?

We have not seen general Brexit clauses frequently used. This is because it is difficult to say in general terms what the impact of Brexit should have on a contract.

It is better to focus specifically on the terms around duration, price and delivery in the specific contract.

In new contracts, what is the key issue to deal with?

If there is one issue, it is making clear where the delivery point is and what the parties' responsibilities are around delivery. If you use an Incoterm with the delivery point, it will allocate responsibility for many of the key issues. Incoterms 2020 are now in place and correct use of Incoterms is key when looking at responsibilities.

My EU supplier is refusing to take responsibility for importing into the UK and tariffs. What should I do?

- Are you already in contract? If so what does it say? If the EU supplier is responsible for import and tariffs, point this out.
- Consider how the risk of delay, increased delivery costs, and tariffs can be fairly allocated and make a proposal to the supplier.
- Consider an alternative supplier and where you may want them to be based, but bear in mind whether or not an existing contract is non-exclusive or can be terminated.

REGULATION & NON-TARIFF BARRIERS

To what extent Brexit will affect current regulation will vary from sector to sector, but the impact is very uncertain as the UK has committed to 'taking back control' of its laws. Even if it commits to non-regression with respect to level playing field rules, whereby UK regulation continues to comply with those standards, UK manufacturers will be effectively third country manufacturers. Tothe extent that the UK opts to diverge, there will be difficult transitional adjustment issues. This section considers the potential scenarios, what barriers these might create to trade and how to prepare for possible changes.

Regulation covers many different things, including everything from labelling, product standards and safety, up to the way in which group companies are structured in view of any preclusion on the same company controlling different parts of a supply chain.

Although, of course, this is only one type of non-tariff barrier. Other non-tariff barriers include measures such as border controls, phyto-sanitary checks, country of origin checks, and threats of anti-dumping duties.

- Companies need to have decided whether they wish to continue operating in both the UK and EU markets and, if so, what this might mean in terms of preparation for the end of the transition period on 31 December 2020. For example, there may be a requirement to open a new office(s) in the EU or the UK, or to transfer registrations held in the UK to an EU office and vice versa.
- Companies will also need to check whether there are particular non-tariff barriers to trade in goods between Great Britain and Northern Ireland, and the effect of onward export from Northern Ireland into the EU, where the Northern Ireland Protocol in the Withdrawal Agreement takes effect.
- Where currently products are manufactured in the UK and distributed from there to the rest of the EU, after the end of the Brexit Transition Period, any similar arrangement will constitute importation into the EU from a third country. In such circumstances, some regulatory regimes place obligations on the importer to ensure that the products meet EU requirements. That means that a company's distributors on the continent will be seen as importers and may need to take on additional regulatory responsibilities that they do not have now - with changes in costs to reflect this.

FAQS

Will I have to register my products somewhere in the EU27?

This will depend on who granted the registration or certification and who holds it. Where the certification or registration was granted by a UK body, a new registration will likely need to be sought from a body in the EU. Conversely, where it was issued by a body established in the EU, this will remain acceptable.

Where the registration is held by a UK company, it is likely that it will need to be transferred to a company established in the EU or EEA.

Will I have to open an office in the EU27?

A number of factors are relevant here, including whether certain tasks need to be performed in the EU. For example, regulatory regimes invariably require testing and monitoring activities to be carried out in the EU. Currently it appears unlikely that the EU will be willing to extend the scope of these activities to include operations carried out within third countries such as the UK. However, some or all of those activities may be capable of being outsourced to an authorised representative or agent in the EU, thus avoiding the need for a company to open a new office.

So, depending on the need to hold a certification in the EU and perform certain tasks in the EU, it may be that a company could have a minimal operation in the EU, together with an authorised representative or a more fully fledged operation capable of undertaking required activities.

BACK TO BREXIT: WHAT UK BUSINESS NEEDS TO KNOW • REGULATION & NON-TARIFF BARRIERS

What if I have a CE mark?

Where a company's CE mark has been granted through a UK Notified Body, it will need to be transferred to a Notified Body in one of the EU27 states and a new certificate of conformity issued.

Great Britain will operate a parallel system of conformity marking from 1 January 2021 (UKCA marking) so companies will need to consider whether they wish to secure this for the UK market. Companies that already have a CE mark will be able to use this in relation to most goods sold in Great Britain until 1 January 2022.

Depending on whether the Northern Ireland Protocol in the Withdrawal Agreement takes effect after the end of the Brexit Transition Period, companies may need to continue using CE marking when selling goods in Northern Ireland.

If I want to continue in the UK market, will I also need to have an office in the UK?

Where a company wants to continue operating in the UK market, it will need to take account of changes to UK law following the end of the Brexit Transition Period. Although, for the most part, the UK will adopt existing EU regulations as they stand at the point of Brexit, companies should be alive to where these have been changed and where they may diverge over time.

Companies should also be aware that whereas under EU law some regulatory regimes currently do not require a company to have either an established presence in the EU, or an authorised representative there, some changes made by the UK will require either establishment or an authorised representative in the UK.

For example, Regulation (EU) 552/2004 sets technical requirements to ensure that constituent parts and associated operating procedures used in air traffic management systems forming part of the European Air Traffic Management Network are interoperable across EU member states. The Regulation does not require a manufacturer based outside the EU to have an authorised representative in the EU. However, the amendments made to the Regulation, as it will apply in the UK in the absence of a EU-UK FTA trade deal requiring continuing adherence, will require companies either to be established in the UK or have an authorised representative in the UK in order to access the UK market in relation to the relevant parts.

It should, however, be noted that the current UK regulatory regimes differ across various sectors and are subject to changes in UK government policy both before and after the expiry of the Brexit Transition Period. For instance, the Ministry of Housing, Communities & Local Government has confirmed that manufacturers of construction products which have already established an authorised representative within the EU will not be required to establish a new authorised representative until 1 January 2022. However, a new authorised representatives will need to be established within the UK after this date.

It is therefore important for companies to keep up to date with developments and changes to the UK regulatory regimes which will apply to their sectors from 1 January 2021 and ensure that they structure their supply chain accordingly to meet any new UK law requirements.

BACK TO BREXIT: WHAT UK BUSINESS NEEDS TO KNOW • WORKFORCE

WORKFORCE

WHILE MUCH OF BRITISH EMPLOYMENT LAW DERIVES FROM EU LAW, SOME AREAS ARE PURELY UK PROVISIONS. SO TO WHAT EXTENT WOULD EXISTING LAWS BE AFFECTED BY BREXIT AND WHAT WIDER IMPLICATIONS MIGHT WE EXPECT? THIS SECTION ADDRESSES SOME OF THE INITIAL ISSUES BUSINESSES WILL NEED TO CONSIDER AND LOOK AT HOW BEST TO BE PREPARED.

The only formal changes to UK employment law come in the areas of European Works Councils and employee guarantee funds for insolvency.

Even so, deal or no deal, the impact of Brexit on employee relations could be very substantial. While the Withdrawal Agreement resolved the issue of the status of EU nationals - together with hints from Government of strict enforcement – the uncertainty of applications for so called 'Settled Status' nonetheless risks impacting individual employees, their colleagues and partners. Moreover, if there is substantial economic disruption as a result of COVID-19, lockdowns and the end of the Brexit Transition Period, the political polarisation may intensify and be reflected in the workplace, with belief in remain/leave becoming in itself a head of claim in employment disputes.

Some employers may have contingency plans that involve redundancies in the event of economic disruption caused by Brexit – be it with a deal, or no deal. Any collective consultation obligations would be triggered from the point 'no deal' becomes most probably inevitable.

KEY POINTS TO NOTE ARE:

- UK legislation, which is derived from EU law (discrimination, working-time, TUPE), remains in full force and effect, unless and until amended or repealed by the UK Government.
- The UK will no longer count as a State for the purposes of European Works Councils (EWCs). No new ones may be set up with UK workforce participation and the operation of existing EWCs may be impacted; Irish nationals may continue to live and work in the UK as previously.
- Other EU nationals will have to resolve their own immigration status in the first instance. Reports on the 'Settled Status' scheme suggest continued substantial problems and uncertainty in implementation.
- The previous Conservative administration committed to not changing EU-derived employment law. The current administration has made no such commitment, and has reduced the amount of guidance given to businesses. The medium-term outlook is therefore now more uncertain.
- In the event businesses suffer post-Brexit, there may be ill feeling towards colleagues who backed opposing sides of leave/remain. Such beliefs are likely to be protected under equalities legislation.

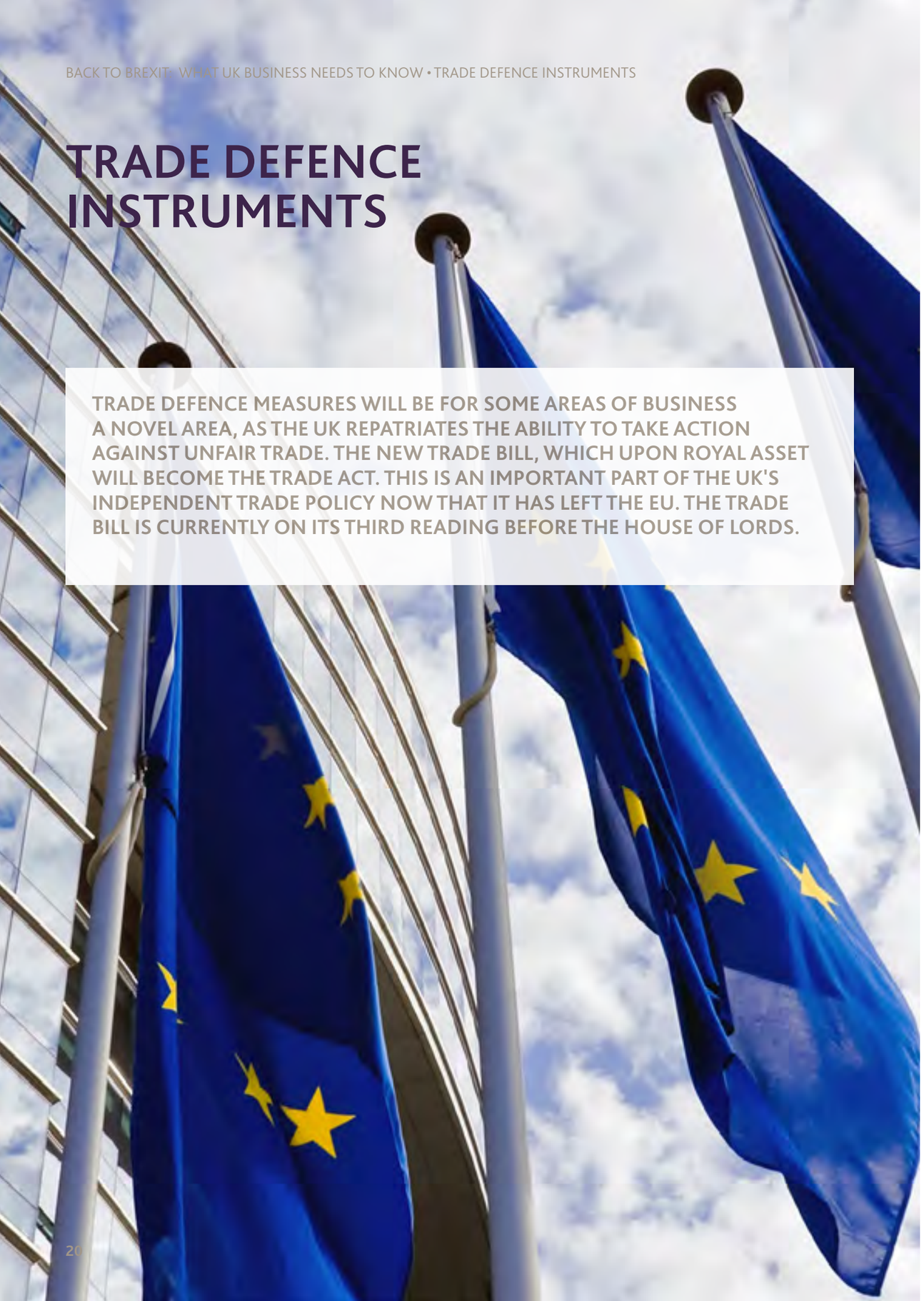
FAQS

What should I do?

1. As a matter of employment law, other than checking EWC arrangements, there is little employers have to do. However, as a matter of employee relations, any business that employs EU nationals should look to continue to provide such reassurance, as best they can, as to their continued value to that business. Employers should be aware that even if their employees' status is clear, that of their partners or dependents might not be.
2. Employers should be aware of this in managing absence, performance and disciplinary issues. In our view, Tribunals will be sympathetic to individuals citing related stress as a mitigating factor in any cases. Employers should check equalities policies to make sure that political beliefs are covered. Make sure managers understand this, through broader diversity training or specific reminders, so that decisions on, for example, redundancies are not tainted by political views.

Employers should check contingency plans that propose redundancies due to Brexit trade disruption. Make sure you are familiar with collective consultation obligations and are ready to begin any necessary processes to respond to political decisions or statements.

TRADE DEFENCE INSTRUMENTS



TRADE DEFENCE MEASURES WILL BE FOR SOME AREAS OF BUSINESS A NOVEL AREA, AS THE UK REPATRIATES THE ABILITY TO TAKE ACTION AGAINST UNFAIR TRADE. THE NEW TRADE BILL, WHICH UPON ROYAL ASSET WILL BECOME THE TRADE ACT. THIS IS AN IMPORTANT PART OF THE UK'S INDEPENDENT TRADE POLICY NOW THAT IT HAS LEFT THE EU. THE TRADE BILL IS CURRENTLY ON ITS THIRD READING BEFORE THE HOUSE OF LORDS.

BACK TO BREXIT: WHAT UK BUSINESS NEEDS TO KNOW • TRADE DEFENCE INSTRUMENTS

The Bill provides for the creation of the Trade Remedies Authority (the "**TRA**"). The TRA will be responsible for consulting upon, designing, and implementing so-called trade defence measures.

Trade defence measures include the application of additional duties or quotas to specific goods imported into the UK, these may take the form of:

- anti-dumping duties: in response to the 'dumping' of goods onto the UK market (i.e. where goods have been exported to the UK at below market prices or below the cost of production);
- anti-subsidy or countervailing measures: to counter distortive effects caused by imported goods that benefitted from financial contributions by a foreign government or public body (e.g. subsidising the production of certain goods);
- safeguarding measures: to protect UK industry from imports that are likely to cause material injury to the domestic industry of the UK (there are currently safeguarding measures in place in relation to certain steel products).

As an EU Member State, the UK was bound by trade defence measures taken by the EU. In 2019, the Department for International Trade determined that it would maintain a number of extant EU measures within UK law following the expiry of the Brexit Transition Period. A full list of the products subject to trade defence measures is available here: https://www.gov.uk/government/consultations/call-for-evidence-to-identify-uk-interest-in-existing-eu-trade-remedy-measures/outcome/final-findings-of-the-call-for-evidence-into-uk-interest-in-existing-eu-trade-remedy-measures

All trade defence measures that the UK has 'rolled over' from the EU will undergo a UK-wide 'transition review'. As the TRA has not yet been established, the Trade Remedies Investigations Directorate ("TRID") will undertake the transition reviews.

The transition reviews will determine whether a 'rolled over' measure should be maintained, amended or revoked upon the measure's expiry date (with this date determined by the EU in relation to the original measure). The TRID will consult British businesses as part of its review of the transitioned measures.

SANCTIONS

THE SANCTIONS AND ANTI-MONEY LAUNDERING ACT 2018 ("SAMLA") HAS BEEN AMENDED AND SECONDARY LEGISLATION WILL TRANSFER EXISTING EU SANCTIONS INTO UK LAW. THERE ARE A NUMBER OF NOT INSIGNIFICANT DIVERGENCES AND SO COMPANIES THAT ARE ENGAGED IN SANCTIONS SENSITIVE ACTIVITIES WILL BE WELL ADVISED TO REVIEW THE NEW UK REGULATIONS AND GUIDANCE AND ENSURE THAT THEY REMAIN COMPLIANT.

The UK Government, via its permanent seat on the UN Security Council, will continue to coordinate both with the EU and other allied nations for the imposition, implementation and lifting of sanctions at a global level.

Significantly, the EU Blocking Regulation is also being brought across into UK law, and so UK companies affected by US sanctions in relation to Iran or Cuba should now also consider their position under UK law.

The Global Human Rights Sanctions Regulations 2020, adopted under the SAMLA is a UK-specific sanctions regime distinct from those of the UN and EU-wide sanctions in which the UK usually participate. With extra-territorial effect, the aim of these sanctions is to deter and provide accountability to those involved in serious violations of certain human rights. The Regulations impose strict reporting obligations on certain entities in the financial and other professional services sector to which criminal sanctions are attached for non-compliance.

WHAT NEXT?

To date, EU member states have had a lacklustre approach to enforcing breaches of sanctions – in stark contrast to the US. The UK has indicated that it will be adopting a far more active approach to enforcement than it has in the past – hence the increase of criminal sanctions from two imprisonment years to ten!

In light of this enhanced risk, it is essential that companies consider their exposure to the risk of breach of applicable sanctions, and the adequacy of their compliance procedures along with the need to apply for relevant licences, and ensure they are prepared ahead of the end of the Brexit Transition Period. More information on the legislation can be found here: https://www.gov.uk/government/collections/uk-sanctions-regimes-under-the-sanctions-act

BACK TO BREXIT: WHAT UK BUSINESS NEEDS TO KNOW • SANCTIONS

BREXIT TASK FORCE

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BACK TO BREXIT: WHAT UK BUSINESS NEEDS TO KNOW • BREXIT TASK FORCE

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