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POST-BREXIT BRITAIN - LEGAL ISSUES ARISING

Now that the EU-UK Trade and Cooperation Agreement (TCA) has been agreed the basis on which the UK is leaving the EU has been decided. Businesses should take stock of the current implications, as well as monitoring any future developments in this area.

This briefing note gives an overview of some of the key legal issues arising generally and by specific practice area. This is intended as an overview, but more specific advice can be found here or by contacting a member of our Brexit team or your usual Stevens & Bolton contact.

GENERAL ISSUES

- Familiarise yourself with retained EU law and how this applies in the UK.
- Consider current legal or compliance documents and the extent to which they may need to be amended to take into account the change in law, for example do references to compliance with law work, do compliance documents need to be amended, or does a particular arrangement need to be restructured?
- To the extent relevant, take into account the different position in Northern Ireland, which broadly will remain more closely aligned with EU law pursuant to the Northern Ireland Protocol.

BANKING AND FINANCE

- Following the end of the transition period, it is no longer possible for financial services firms authorised in the UK to take advantage of the passporting regime, by which their UK authorisation could be used as a basis to offer equivalent financial services in the EU. So a UK financial services firm wishing to offer financial services to clients in the EU will need to be appropriately authorised in accordance with the laws and regulations of that jurisdiction, or benefit from an equivalence decision by the EU Commission to the effect that the corresponding UK and EU regulations are equivalent, so that a separate EU authorisation is not required. This is also the case for EU firms wishing to provide financial services to UK clients.
- A parallel declaration to the TCA commits both sides to establish a memorandum of understanding in respect of dialogue on financial services and equivalence-related processes by March 2021.

- There are hopes that the Memorandum of Understanding will incorporate a mechanism to maintain equivalence and reduce the possibility of unilateral withdrawals of equivalence decisions, but nothing is yet agreed.
- Most financial services businesses will have already anticipated the loss of passporting and either set up EU-based businesses or refocused on the UK domestic market, but there may still be businesses that suffer a loss of business under the new regime.

COMMERCIAL CONTRACTS

Consider current legal or compliance documents and the extent to which they may need to be amended to take into account the change in law.

- Delays at the border and increased delivery charges for goods moving between the UK and EU means businesses should consider carefully the contractual basis on which goods are supplied or purchased, particularly where the supply is across the UK/EU border, or relies on inputs that cross the border.
- Adequate Force Majeure clauses and/or less stringent delivery conditions may be prudent for suppliers.
- In some cases contracts may need to be terminated or renegotiated.

COMPANY LAW

- UK companies are no longer eligible to participate in the EU cross-border mergers regime. All cross-border mergers involving UK companies (typically used in solvent cross-border reorganisations of corporate groups) had to be completed and registered before 1 January 2021. There is no proposal for alternative merger arrangements with the EU or with countries whose local laws permit mergers with non-EEA companies, so such reorganisations now need to be by way of share or asset transfers.
- UK subsidiaries of an EEA parent no longer qualify for the exemption from audit (for financial years beginning on or after 1 January 2021) and are now classed as "third country companies". As third country companies, EEA states may no longer be obliged to recognise their legal personality and limited liability under EU law. This could mean the loss of limited liability status (where a particular EEA state's national law or specific international law treaties don't preserve this). For example, UK registered companies domiciled in Germany (where the "real seat" theory is applied) will be treated in accordance with German domestic law, under which they do not meet the formalities of a GmbH, meaning shareholders could be personally liable for the company's debts.

UK companies are no longer eligible to participate in the EU cross-border mergers regime.

- UK branches of EEA companies are now subject to the same information and filing requirements as any other third country company's UK branches. Additional particulars about the EEA company must be supplied to Companies House by the end of March and disclosed on customer-facing material. Certain exemptions, particularly in relation to the filing of accounts, are no longer available.
- Likewise, EEA operating branches of UK businesses are also now "third country" businesses and are required to comply with specific EEA state accounting and reporting requirements - complying with the reporting requirements of the UK Companies Act 2006 may no longer be sufficient.
- UK companies which currently have an EEA corporate director must provide additional information about the director's legal form and governing law to Companies House.
- UK incorporated dormant companies with EEA parents will no longer be exempt from preparing or filing individual accounts (for financial years beginning on or after 1 January 2021).
- UK citizens may face restrictions on their ability to own, manage or direct a company registered in the EEA, depending on the sector and EEA state in which the company is operating. UK investors in EEA businesses may also face restrictions on the amount of equity that they can hold in certain sectors in some EEA states.

COMPETITION LAW AND MERGER CONTROL

Familiarise yourself with retained EU law and how this applies in the UK.

- The basic structure of UK (and EU) competition and merger control law will remain broadly the same in at least the short-medium term, but there are now two separate regimes instead of one and they will need to be considered separately.
- In the UK, laws in relation to the EU single market are replaced by laws on the internal market. This will impact the way in which territorial protections and parallel trade are regulated in the UK. The practical implications of this are not yet clear and should be kept under review.

DATA PRIVACY

- The TCA provides for a short term (four months with an opportunity to extend to six months) extension to existing arrangements for transfers of personal data from the EU to the UK.
- It is anticipated that this period will be sufficient for the European Commission to make an adequacy decision with respect to the UK.
- In light of the end of transition and recent changes in the law the following steps are advised:
    - Consider the need to appoint a UK or EU representative (note this is not the same as a Data Protection Officer!)
    - Review any changes required to Lead Supervisory Authority if you appointed one
    - Revisit and redraft documentation and data registers in light of the UK GDPR and the EU GDPR regimes
    - Consider transfers of personal data now given the UK will be treated as a third country in four/six months' time
    - Address transfers of personal data in light of the Schrems II decision
    - Be aware that new draft Standard Contractual Clause are in circulation
    - Revisit documentation such as privacy notices and data processing agreements and intragroup transfer arrangements in light of the above

EU funding will no longer be automatically available to the UK.

EU FUNDING

- EU funding will no longer be automatically available to the UK, although the UK will have the ability to opt-in to various funding programmes, such as the research and innovation programme Horizon 2020.

EXPORTING AND IMPORTING GOODS AND SERVICES

- Tariff and quota free trade is available for goods meeting the "Rule of Origin" criteria in the TCA.
- There are obligations in the TCA in relation to non-discrimination between UK and EU suppliers.
- There are two separate regulatory regimes, so parties will need to ensure they comply with both. Depending on the good or service in question, requirements might include:
    - The obtaining and maintenance of separate accreditations or certifications
    - The appointment of established representatives in each of the jurisdictions
    - The compliance with each territory's laws, which may be the same now, but may diverge over time

IMMIGRATION

- Despite the fact that the TCA has been agreed, free movement for EEA and Swiss nationals to the UK and UK nationals to the EEA and Switzerland ended at 11pm on 31 December 2020.
- There are now different immigration rules applicable to EEA and Swiss nationals depending on whether the EEA or Swiss national first arrived in the UK before or after 31 December 2020.
- Almost all EEA and Swiss nationals and family members who entered the UK before 31 December 2020 will need to apply for pre-settled or settled status under the EU Settlement Scheme (the Scheme) to continue to live and work in the UK long term. The deadline for applying under the Scheme is 30 June 2021. The application is usually submitted online and there is no fee.
- Individuals who have been "continuously resident" in the UK for at least five years should be eligible for settled status. "Continuously resident" means that the individual has been present in the UK for at least six months in every 12 month period. Once a person obtains settled status, they may be away from the UK for a total of five consecutive years. After this, settled status will lapse.

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- If the individual has been in the UK for less than five years, they should be granted pre-settled status. Pre-settled status is granted for five years and it seems that this cannot be extended. It is therefore vital for individuals to safeguard their continuous residence so that they are able to apply for settled status after five years in the UK. To be able to apply for settled status they must not spend more than six months in any 12 month period outside of the UK. Employers should therefore consider the implications of the length of any international secondments or regular business travel on that person's future eligibility to apply for settled status. In addition, if an individual is absent from the UK for a continuous period of more than two years, their pre-settled status will lapse altogether.
- If the EEA or Swiss national arrived in the UK after 31 December 2020 they will not be able to apply under the EU Settlement Scheme. To live and work in the UK they will need to apply under the new Immigration Rules. In many cases, employers will need to sponsor EEA and Swiss nationals under the new Skilled Worker category and they will require a sponsor licence. If your business does not already have a sponsor licence we recommend you consider applying for one as soon as possible.
- It's also worth bearing in mind that businesses will need to allow time for EEA and Swiss nationals to submit their immigration applications before they are able to start work. Further, it costs thousands of pounds to sponsor someone for five years so these additional costs will need to be factored into recruitment budgets.
- Businesses will also need to consider the impact of the end of free movement on business travel to and from the UK and EEA countries and Switzerland and also in relation to UK nationals who wish to travel to or work in the EEA or Switzerland.

INSOLVENCY AND SCHEMES OF ARRANGEMENT

There will no longer be automatic recognition across the EU of insolvency proceedings opened in the UK.

- The Recast Insolvency Regulation no longer applies as between the UK and EU after the end of the transition period (save in relation to pre-existing insolvencies where "main" proceedings were commenced in a member state, or the UK, prior to 1 January 2021).
- The result of this is that there will no longer be automatic recognition across the EU of insolvency proceedings opened in the UK. Proceedings may be commenced in other Member States without regard to any existing UK proceedings.
- Equally, insolvency proceedings commenced in EU Member States will no longer be automatically recognised in the UK, and an application to the UK court will be necessary to seek recognition or assistance.
- The recognition of UK insolvency proceedings in the EU will now be decided according to the domestic law of each Member State, subject to the overriding framework of the Recast Insolvency Regulation. This means that, if courts in the EU determine that a debtor

has its' centre of main interests in an EU Member State, proceedings in that Member State would be recognised across the EU notwithstanding the existence of any UK proceedings.

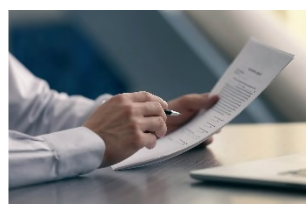
- There is also some uncertainty regarding the ongoing recognition of English law schemes of arrangement in the EU, now that the Recast Brussels Regulation on recognition and enforcement of judgments no longer applies. However, there are several other potential routes to recognition of schemes, including the Hague Convention, the Rome 1 Regulation and the Lugano Convention (if the UK's application to accede to the latter is supported by the EU).

INTELLECTUAL PROPERTY RIGHTS

- The TCA commits both the UK and EU to a high level of protection for intellectual property rights – much will remain the same.
- EU pan-European rights such as the popular EU trade mark no longer cover the UK, but right holders have been granted equivalent UK national rights to "fill the gap". A health-check on validity across key markets is advised.
- Reciprocal rights have been affected in some areas including unregistered design right and database rights; UK businesses relying on these rights should consider alternatives in the EU27.
- Patents are largely unaffected by Brexit, but businesses owning patents in the EU27 should keep a watching brief on proposals for the Unified Patents Court system there and take steps to preserve their position at the relevant time.
- The position on "exhaustion" of IP rights will not change immediately, but there will shortly be a UK government consultation on it, so this is one to watch for any business that trades in both the UK and EU27.

LITIGATING ACROSS BORDERS

- There are no longer reciprocal jurisdictional rules between the UK and EU/EFTA countries. Jurisdiction will be determined under national laws, increasing the risk of parallel court proceedings. There will be a greater incentive to be the first to issue proceedings in the preferred country. Including a provision requiring foreign based counterparties to provide a UK agents for service will help achieve a more speedy and cost-effective way to begin UK court proceedings.
- There will no longer be automatic reciprocal enforcement of judgments between the UK and EU/EFTA countries, enforcement for judgments under claims issued from this year will be determined under relevant local procedural laws. Most judgments should still be enforced, although the process will be slightly more cumbersome and expensive.
- These issues can be avoided if there is an exclusive jurisdiction clause and the Hague 2005 Choice of Court Agreements Convention can be used.
- These issues could also be mitigated if the EU agrees to the UK's request to join the Lugano Convention – their response is expected by April 2021.
- Anti-suit injunctions against counter parties commencing proceedings in EU/EFTA countries is now possible. Otherwise arbitration is unaffected.



PUBLIC SECTOR CONTRACTS AND SUBSIDIES

- For the moment public procurement procedures are materially unchanged, save that UK authorities will no longer be advertising on OJEU and will instead use Find a Tender.
- There is the prospect of a liberalising of the UK public procurement regime so this area should be kept under review.
- The TCA sets out the bare bones of the UK subsidy regime, which follows the general framework of the EU state aid regime. The UK regime has not yet been fully implemented so again, business will need to watch this space carefully for developments.

Take into account the different position in Northern Ireland, which broadly will remain more closely aligned with EU law pursuant to the Northern Ireland Protocol.

TAX

- Certain businesses will experience changes to the VAT rules and procedures in relation to supplies between the UK and EU member states. This is a complex area which will be fact specific but as a general proposition:
  - If importing goods from the EU, the treatment will now be as for importing goods from non-EU countries. A system of "postponed accounting" has been introduced for goods imported on or after 1 January 2021 (whether coming from the EU or elsewhere). The impact of this is that a UK registered business will account for import VAT through their VAT return rather than accounting for import VAT when the goods arrive into the UK.
  - For goods sold to UK consumers and shipped from overseas, the overseas seller will be required to register and account for UK VAT on those sales.
  - For exports from a UK supplier to the EU, the supplier will zero rate these supplies on export from the UK. The goods will be treated by the receiving EU member states in the same way as goods arriving from any other third country so that import VAT and any appropriate customs duties will be due when the goods enter the EU (subject to any ability to defer import VAT).
  - Supplies of services will be treated in the same way as any other supply to non-EU customers. Regard should be had to the place of supply rules and in particular there may be a requirement for UK suppliers of B2C suppliers of digital services to register for VAT in the EU.
- Customs declarations will be required upon importation of goods from the EU and customs duties will apply to certain goods (and vice versa). There remain particular issues in relation to moving goods to Northern Ireland.
- Royalties, interest and dividends between UK and EU group companies may now be subject to withholding tax due to a loss of the benefits of the EU Parent-Subsidiary Directive and the Interest and Royalties Directive. Companies should refer to the position under the relevant double tax treaty with a need to make treaty claims for full or partial relief under the relevant treaty. Businesses should check the withholding tax status of cross-border income flows between group member companies.
- The social security contribution and healthcare position for any internationally mobile staff in the EU should be considered carefully (including any impact on entitlement to benefits or healthcare in the relevant host country).

KEY CONTACTS

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