Brexit Update

February 2020

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SPECIAL REPORT

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BREXIT: CHALLENGES AND OPPORTUNITIES

After three and a half years of political to-ing and fro-ing on the subject of the UK's departure from the EU (**Brexit**), the UK's general election on December 12 2019 saw a significant victory for the Conservative Party and Prime Minister Boris Johnson's Government. Boris Johnson now has a clear parliamentary majority to drive the Brexit agenda forward, having finally broken the parliamentary deadlock that had been stalling legislative progress in the run-up to the election.

Withdrawal Agreement

A Withdrawal Agreement to govern the UK's departure from the EU on January 31 2020 (**Brexit Day**) was agreed between the EU, Euratom and the UK and ratified in January 2020. The Withdrawal Agreement addresses certain EU-related matters that will immediately be impacted by the withdrawal itself such as the UK-Ireland border, citizens' rights, dispute resolution mechanisms, the need to maintain EU law protections for certain products, the UK's settlement of any outstanding financial contributions owed to the EU, and a transition period.

Additionally, the UK, Norway, Iceland and Liechtenstein signed the EEA EFTA Separation Agreement on January 28 2020, which largely replicates the relevant terms of the Withdrawal Agreement.

Transition Period

The transition period will run from Brexit Day until December 31 2020, unless the UK-EU Joint Committee created under the terms of the Withdrawal Agreement agrees by July 1 2020 that the transition period should be extended by 1 or 2 years (the **Brexit Long Stop Date**).

An extension to the transition period seems unlikely at the time of writing as Boris Johnson has repeatedly ruled out requesting an extension beyond December 31 2020. The 2020 Withdrawal Act included a provision to prevent any UK Minister agreeing any extension of the transition period at the UK-EU Joint Committee. To agree any extension, the UK Parliament would need to pass legislation to repeal this restriction in the 2020 Withdrawal Act (and this would be difficult to achieve without support from the Conservative government due to its significant majority).

The UK has passed domestic legislation (being the European Union (Withdrawal Act) 2018 (the **2018 Withdrawal Act**), as amended by the European Union (Withdrawal Agreement) Act 2020 (the **2020 Withdrawal Act**)) which will have the effect of ensuring that existing EU law is recognised under UK law on Brexit Day.

The 2020 Withdrawal Act will ensure that (i) all EU laws and (ii) international agreements between the EU and non-Member States will apply in the UK throughout the transition period. The UK will be required to comply with all EU law and EU supervision and enforcement arrangements during the transition period – including any amendments to existing EU law and any new EU law which requires implementation by a date occurring within the transition period.

The UK will cease to be a Member State on Brexit Day but, in effect, it will continue to be treated as if it were a Member State until the Brexit Long Stop Date. The UK will remain a member of the Customs Union and the Single Market during the transition period. The UK will need to still comply with the "four freedoms" of the EU, being the freedom of movement of goods, people, services and capital over internal EU borders.

The Withdrawal Agreement itself will be enforceable by the UK courts both during and after the end of the transition period; meaning that the UK courts will have to enforce any rules of EU law incorporated into the Withdrawal Agreement. All EU law-derived domestic UK enactments will have effect subject to the provisions giving effect to the Withdrawal Agreement; meaning that if the UK Parliament were to pass legislation inconsistent with the Withdrawal Agreement, the courts would be required to disapply that legislation in favour of the Withdrawal Agreement. The Withdrawal Agreement provides that any of its terms which are based on EU law must be interpreted in the UK in accordance with case law decided by the Court of Justice of the European Union (**CJEU**) before the end of the transition period. Further, te UK courts will need to have "due regard" to CJEU case law determined after the end of the transition period when interpreting the Withdrawal Agreement. This could be an area of future debate as the 2020 Withdrawal Act gives wider powers to the UK Government to potentially introduce legislation which will allow UK courts to depart from the precedent effect of CJEU rulings after the end of the transition period.

Any EU laws enacted post-Brexit Long Stop Date will have no supremacy over any UK laws, meaning that the UK will not be bound by EU law principles or case law regarding their interpretation.

From the EU's perspective, EU Member States will have to treat the UK as a "third country" for EU law purposes from the Brexit Long Stop Date onwards, and as such they will no longer be required to apply EU Directives and Regulations in relation to the UK post-Brexit Long Stop Date.

Future Deal?

During the transition period, the UK will seek to negotiate with the EU a further trade deal in line with the revised Political Declaration, which sets out the framework for the future relationship between the UK and the EU.

Although it is hoped that the UK and the EU will be able to reach a long-term agreement incorporating the principles of the revised Political Declaration by the Brexit Long Stop Date, this appears to be ambitious and it remains to be seen whether it is achievable. There remains a significant risk that it will not be possible to agree a comprehensive trading agreement during an 11-month transition period (assuming that no extension has been agreed). Should this risk materialize and no agreement is reached, the UK will default to trading under World Trade Organisation (**WTO**) rules – a so-called "no deal" Brexit.

It is also possible that the UK and the EU could reach partial agreement so that there is a long-term trading agreement for certain sectors only. In this scenario, any sectors not covered by the terms of such an agreement would default to trading under WTO rules.

On February 3 2020, the UK government issued a written statement (the **UK Written Statement**) setting out its key intentions for future negotiations with the EU. The UK Written Statement included general proposals for future negotiations. We will provide further updates as more details emerge from negotiations with the EU.

It is notable that the UK Written Statement emphasised that the intention of the UK government is that the Brexit Long Stop Date should be no later than December 31 2020: "*There is complete certainty that at the end of 2020 the process of transition to that relationship will be complete and that the UK will have recovered in full its economic and political independence*".

In the UK Written Statement, the UK government indicated that they could seek a departure from the Political Declaration in order to seek a different form of trading relationship: "*The question for the rest of 2020 is whether the UK and the EU can agree a deeper trading relationship on the lines of the free trade agreement the EU has with Canada, or whether the relationship will be based simply on the Withdrawal Agreement deal agreed in October 2019, including the Protocol on Ireland / Northern Ireland. In either event the UK will be leaving the single market and the customs union at the end of this year and stakeholders should prepare for that reality*".

Against this backdrop, we explain in this report some of the key legal implications associated with such a default "no deal" scenario, and how the areas of (i) banking and financial services, (ii) tax, (iii) contracts and enforceability of judgements, (iv) employment law, (v) data protection and (vi) healthcare regulation may be impacted by this eventuality and (in some cases) by the terms of the Withdrawal Agreement itself. Any reference to "no deal" or a "no deal" scenario in this report should be understood as being a reference to trading under WTO rules in the absence of a future long-term trade deal between the EU and the UK.

LEGISLATIVE FRAMEWORK

As noted above, the UK has already implemented legislation to address the consequences of a "no deal" Brexit and the retention of pre-existing EU law.

While existing EU law (and amendments to existing law or new EU law having effect during the transition period) will apply during the transition period, it is not clear what arrangements will be in place after the Brexit Long Stop Date.

We will provide regular updates on the impact of any agreement reached between the UK and the EU to govern the future relationship.

In the event that it is not possible to agree a long term trade deal, the remainder of this note identifies the key issues in the event that the UK and the EU trade on WTO terms in a "no deal" Brexit.

BANKING & FINANCIAL SERVICES

Financial Passporting

A key benefit of membership of the EU is financial passporting. This means that lenders, funds and financial institutions authorised in the United Kingdom are able to conduct business within other European Economic Area (**EEA**) states based on their "home" Member State authorisation without obtaining a licence in each individual country.

In a "no deal" scenario, passporting will no longer be available in its current form. At the time of writing, passporting rights will remain in place until the Brexit Long Stop Date, but it is not certain what the future position will be regarding transfer of monies between the UK and entities in other EEA states.

The ending of financial passporting rights will affect:

- lenders, funds and financial institutions based in the United Kingdom that conduct business in the EEA; and
- lenders, funds and financial institutions based in the EEA that carry out certain types of business in the United Kingdom.

The nature and extent of any post-Brexit "passport" for UK-based firms will depend in large part on which model of relationship is agreed on between the United Kingdom and the EU. For example:

- Under an EEA/Norwegian model: passporting arrangements would be included.
- Under a Swiss/Canadian model: the nature and extent of any passporting would depend on the outcome of negotiations.
- Under a "no deal" WTO model: there would be no passporting rights of any kind.

The extent to which Brexit will affect any entity will depend upon the relevant regulatory regime and should be assessed on a case-by-case basis (with particular reference to the type of institution and the jurisdiction(s) within which it operates). However, in a WTO model "no deal" scenario, the following ramifications can be expected:

Retail Clients

- A bank established in the United Kingdom will only be able to conduct regulated investment business with a retail client in an EEA state if the bank has established a branch in that EEA state.

In order to establish a branch, the authorities in that EEA state would need to be satisfied that the United Kingdom benefitted from adequate regulation in certain key areas, such as anti-money laundering and the countering of the financing of terrorism. Cooperation and tax arrangements would also need to be in place between the two countries. The United

Kingdom should meet all these requirements post-Brexit Long Stop Date.

Professional Clients

- A lender, fund or financial institution established in the United Kingdom seeking to do business with professional clients in an EEA state will be able do so without establishing a branch in that Member State if it is registered in a register maintained by the European Securities and Markets Authority (**ESMA**).
- Such ESMA registration is only possible where the third country regulatory regime is considered equivalent and a decision to this effect has been adopted by the European Commission (known as an "equivalence decision").
- Until an equivalence decision can be obtained, UK-based firms would lose their passports in a "no deal" scenario and therefore would not be able to deal with EEA-based clients unless they have obtained interim approval under the temporary permissions regime. To continue to do business, they would be likely to need to set up a subsidiary in an EEA state.

Potential Adjustments to Facility Documents

In their note, the UK-based Loan Market Association (the **LMA**) (which is the association responsible for producing precedent forms of loan documentation which are widely used in the loan market) considers the following potential adjustments that parties could make to the facility documentation, although there are no immediate plans by the LMA to introduce any of these adjustments to their template documents.

- Tranching structures

If money is lent to a group spread across different jurisdictions (where some lenders and borrowers may be impacted by the loss of passporting rights), facilities could be structured into a number of different "tranches" to be made available to different members of the borrower group (effectively ringfencing specified portions of a facility to certain borrowers and lenders only). If this approach is taken, it will be important to assess how to categorise the availability and the amount of the tranche which may be impacted by the loss of the passporting rights.

- Fronting structures

The facility could be structured so that the lending which may be impacted by the loss of passporting rights is carried out by a single appropriately authorised "fronting" lender (noting that suitable back-to-back funding arrangements between the fronting lender and the rest of the syndicate would need to be put in place). Parties taking this approach should be mindful of the intra-lender credit risk associated with the back-to-back funding arrangements, and the extent to which a fronted lending structure will satisfy the licensing requirements.

- Illegality clause

Illegality clauses allow for a lender to exit the loan and be prepaid if it becomes unlawful for it or any of its affiliates to fund or maintain the loan.

More flexibility could be built into the illegality clause by expanding its application to instances where an institution reasonably considers that illegality may result from its maintenance of a loan. However, this will affect the standard risk allocation approach between lender and borrower and should be considered very carefully on a case-by-case basis.

- Facility agent resignation

A facility agent's ability to appoint a successor, which is usually limited by a requirement that any such successor be operating through an office in a specified jurisdiction(s), could be made more flexible by expanding the range of specified jurisdictions or by providing a more flexible location qualification. This will ensure that the new agent will not be prejudiced by having limited passporting rights for the deal, on a case-by-case basis.

- Account banks

Greater flexibility could be introduced by allowing the bank accounts required to be maintained by the borrower group under the LMA facility documentation to be held with other willing institutions in suitable jurisdictions (provided that they are acceptable to either the security agent or the relevant secured parties). This may increase the credit risk. Whether such increase in credit risk is justified will need to be considered on a case-by-case basis. Additionally, any institution which agrees to maintain such an account should satisfy itself that it can meet any of the applicable regulatory requirements associated with doing so.

Controls on borrower accession

Where the LMA facility documentation requires the consent of a specified group of lenders (but not all lenders) for the accession of a new borrower, greater protection could be introduced by preventing the accession of new borrowers or by requiring the consent of all lenders. If this approach is considered, it will be important to assess how those new borrowers should be categorised and whether parties to the existing agreements can accept a reduction in flexibility around these arrangements.

- Mandate letters and commitment letters

Mandate letters and commitment letters could be supplemented by including mechanics allowing for a transfer of the mandate/commitment to an institution's appropriately licensed affiliate. Alternatively, the institution could be allowed to change the branch from which the mandate/commitment is performed to a branch with the appropriate licensing.

Market Abuse

- The EU Market Abuse Regulation (the **MAR**) came into force on July 3 2016.
- The MAR ensures that rules keep pace with market developments, such as new trading platforms, as well as new technologies, such as high frequency trading. The Directive on Criminal Sanctions for Market Abuse (or **Market Abuse Directive**) complements the MAR by requiring Member States to introduce common definitions of criminal offences of insider dealing and market manipulation, and to impose maximum criminal penalties for the most serious market abuse offences. EU Member States have to make sure that such behaviour, including the manipulation of benchmarks, is a criminal offence.
- After the Brexit Long Stop Date, the UK may be able to provide more freedom to businesses by introducing legislation which is less onerous than MAR, but, realistically, it is probable that the UK's future legislation will be substantially similar to MAR, given that the EU is likely to require a comparable system to MAR to access the EU single market.

TAX

Holding Companies

Traditionally, multinational groups have often used UK holding companies to hold their EU operating companies to facilitate a tax-efficient repatriation of cash to shareholders or the ultimate parent company.

The UK's regime compares relatively favourably with other commonly used holding company jurisdictions, mainly due to lack of a dividend withholding tax, but also in part due to the UK's extensive network of double tax treaties. Generally, Brexit is not expected to have a significant impact on the current UK tax regime for holding companies, although it may produce certain traps for the unwary, namely:

- EU source withholding taxes are increasingly likely to become a cost

Post-Brexit Long Stop Date, EU-based operating subsidiaries may seek to impose withholding taxes on EU source dividends, interest or royalties paid to a UK holding company, since EU subsidiaries will no longer be obliged post-Brexit to apply the EU Parent-Subsidiary Directive (2011/96/EU) (**PSD**) or the EU Interest and Royalties Directive (2003/49/EC) (**IRD**) in relation to UK holding companies. As such, there may be withholding tax costs associated with cash repatriation from the EU to the UK in the form of dividends, or under intra-group financing or IP licensing arrangements. Such taxes may be reduced or eliminated under an existing double tax treaty, although UK treaty rates for dividends are usually 5% or 10%. It is expected that the UK treaties with Luxembourg, the Netherlands, Belgium and Switzerland will be amended to preserve the benefits of the PSD, although it is not yet clear whether and to what extent other EU Member States will align their treaties with the UK to preserve the current position under the IRD or PSD.

- UK companies within corporate groups may no longer be eligible for fiscal grouping in accordance with an EU Member State's fiscal unity or tax consolidation rules post-Brexit Long Stop Date, since eligibility for fiscal grouping typically requires tax residence in an EU or EEA Member State
- Post-Brexit Long Stop Date, UK-parented EU companies receiving US source income may no longer be eligible for benefits under the "EEA equivalent beneficiary" rules of the "Limitation of Benefits" Article of the applicable double tax treaty with the US

UK law currently imposes a 1.5% Stamp Duty Reserve Tax on issuances of UK shares and securities to depositary receipt issuers and clearance services. However, as a result of the Capital Duties Directive (2008/7/EC) and decisions of the CJEU and UK First-Tier Tribunal, HMRC announced that it would no longer seek to impose this charge. Post-Brexit Long Stop Date, the UK Government would technically be free to impose this stamp duty charge, although it stated in Autumn Budget 2017 that it would not seek to reinstate it. It could also impose a new capital duty on fundraising activities, although that is not something that the UK Government is considering at this stage.

Operating Companies

Generally, the UK corporation tax environment for operating companies is likely to remain relatively competitive post-Brexit Long Stop Date, particularly for large companies that own significant amounts of IP and conduct research and development (**R&D**) activities.

A potential down side, however, is that a relatively low corporation tax rate (19%) may increase the likelihood of a UK company being viewed as a (low-taxed) CFC from the perspective of certain overseas investor jurisdictions such as Japan, and possibly also some EU Member States, particularly if they have implemented the Council Directive 2016/1164 (known as the Anti-Tax Avoidance Directive, or ATAD I). All EU Member States, including the UK, must implement ATAD I into their national laws by January 1 2020. Such a concern may potentially be eliminated if there are "significant people functions" in the UK – which again may be helped by the UK's generous tax environment for R&D.

- Large UK operating companies may also benefit from generous R&D tax reliefs, as well as an effective 10% rate on profits from certain patent-derived income (known as the "UK patent box")

In broad outline, large UK operating companies that incur tax-deductible expenditure on R&D may be eligible for a refundable tax credit under the Research & Development Expenditure Credit (**R&DEC**) scheme, provided certain conditions are met. The amount of R&D expenditure credit is currently 12% of a large company's "qualifying R&D expenditure" incurred on or after January 1 2018, although the Government plans to increase the R&D tax credit rate to 13% and to review the definition of "qualifying R&D expenditure" to include investments in cloud computing and data. If the company is in a tax paying position, the credit will offset some or all of the tax liability; if the company is in a loss-making position, the credit is given by way of a cash refund from HMRC.

The UK patent box allows UK companies an effective 10% rate on profits attributable to "qualifying IP rights" or exclusive licenses of such rights, provided that the company significantly develops those rights, or makes plans or decisions for their development if another company in the same group develops them instead. "Qualifying IP rights" for UK patent box purposes generally includes patents granted under the UK Patents Act 1977, the European Patent Convention or their EEA equivalents.

"Qualifying IP rights" for UK patent box purposes also include marketing authorisations (**MA**) granted under applicable EU law in respect of medicinal products benefitting from certain EU law-derived protections or prohibitions in relation to marketing and clinical data. Because marketing authorizations may only be granted to persons based in the EU, UK companies would need to establish affiliates in a Member State to which existing MAs could be transferred, or which could obtain new MAs post-Brexit Long Stop Date. The UK patent box would have no value in these circumstances because it would not be available to the EU affiliate to whom the MAs are transferred.

- Other tax benefits of IP ownership include the availability of a deduction against taxable profits for accounts-based amortization of IP. Legislation has also recently been introduced to allow relief for the cost of goodwill in the context of a business acquisition, provided certain conditions are met.

Impact of Brexit on EU-UK Supply Chains

Unless businesses take the necessary steps to prepare for a "no deal" scenario in the manner described further below, there is a risk that Brexit could cause significant disruption to movements of goods between UK and EU businesses, mainly due to the fact that, after the Brexit Long Stop Date, the goods will no longer be able to move freely between the UK and the EU without having to pay customs or excise duties or fulfil related administrative requirements. This is a particularly important consideration for multinational groups with UK and EU subsidiaries that supply goods to each other within a supply chain, for example from an EU manufacturer to a UK distributor.

VAT Post-Brexit

The Withdrawal Agreement provides that EU VAT obligations under Council Directive 2006/112/EC will continue to apply for 5 years after the end of the Brexit Long Stop Date to UK-EU goods and services supplies that took place before the Brexit Long Stop Date. The same principle applies to goods dispatched or transported between the UK and the EU where the initial dispatch or transport occurred prior to the

Brexit Long Stop Date. Non-UK/ non-EU established businesses with a UK VAT registration that supply telecoms, broadcasting and electronic services to EU-based non-business consumers must file any amendments to their VAT returns with HMRC by December 31 2021. Similarly, those with an EU VAT registration supplying such services to UK-based non-business consumers must file any amendments to their EU VAT returns with the appropriate tax authority by that date. Any 8th Directive VAT refunds must be claimed by no later than March 31 2021. (The 8th Directive contains minimum requirements for VAT recovery procedures for EU businesses that incur VAT on related input costs in other EU Member States).

For UK-EU transactions that occur after the Brexit Long Stop Date, in the event of a "no deal" scenario the Government's aim will be to keep UK VAT procedures as close as possible to what they are now in order to provide continuity and certainty for businesses, although there will be some specific changes to the VAT rules and procedures that apply to transactions between the UK and EU Member States. The current UK VAT rules relating to intra-UK transactions will continue to apply to UK businesses post-Brexit Long Stop Date.

The Taxation (Cross Border Trade) Act 2018 amends certain aspects of the UK VAT system to the extent it interacts with the EU. HMRC has published the following key guidance on how certain VAT rules and procedures will work post-Brexit Long Stop Date in the event of a "no deal" scenario:

- The Government will introduce postponed accounting for import VAT on goods brought into the UK. This means that VAT-registered businesses importing goods to the UK will be able to account for and recover import VAT on their VAT return instead of paying import VAT upon arrival of the goods at the UK border. This new procedure will apply to imports from both EU and non-EU countries, thus giving UK businesses a significant cash flow advantage. However, customs duties may also be payable (see below on "Customs Duties post-Brexit").
- Low Value Consignment Relief for parcels valued at less than GBP 135 will no longer be available for goods entering the UK from overseas, whether from the EU or from outside the EU. This means that all goods entering the UK as parcels sent by overseas businesses will be subject to import VAT, unless they are VAT-exempt or zero-rated under UK domestic rules.
- Distance selling arrangements will no longer apply to UK businesses. Instead, they will be able to zero-rate sales of goods to EU-based non-business customers. Current EU rules mean that EU Member States would have to treat goods entering the EU from the UK in the same way as goods entering from other non-EU countries, with associated local import VAT and customs duties becoming due when the goods arrive into the EU. Each EU Member State will have its own separate rules for import VAT and customs duty. UK businesses will continue to be required to register for VAT in the EU Member States where the customers are based, in order to account for the VAT due in those countries.
- VAT-registered UK businesses will continue to be able to zero-rate exports of goods to EU businesses but will no longer be required to complete EC Sales Lists. Such UK businesses will need to retain evidence to prove that the goods have left the UK in order to support the zero-rating of the supply. Most businesses already maintain this evidence as part of current

processes and the required evidence will be similar to that currently required for exports to non-EU countries.

- The VAT "place of supply" rules for supplies of services will continue to apply in broadly the same way as they do now. (The current "place of supply" rules determine the country in which a business needs to charge and account for VAT). For UK businesses supplying digital services to EU non-business customers, the "place of supply" will continue to be where the customer resides.
- UK businesses that sell digital services to EU-based non-business customers will no longer be able to use the UK's Mini-One Stop Shop (MOSS) Union Scheme to report and pay VAT on sales of digital services to consumers in the EU. Any final VAT return under the MOSS Union Scheme must be submitted by April 20 2020. Businesses that wish to continue using the MOSS system will need to register for the VAT MOSS non-Union scheme in an EU Member State. The VAT MOSS non-Union scheme requires businesses to register by the 10th day of the month following the first sale to an EU customer after Brexit Day.
- UK businesses will continue to be able to claim refunds of VAT from EU Member States under the 13th Directive procedure, which lays down the minimum requirements for VAT recovery procedures for non-EU businesses that incur VAT on related input costs in EU Member States. This process varies across the EU and businesses will need to make themselves aware of the processes in the individual countries where they incur related input costs and wish to claim a refund.
- UK businesses will be able to continue to use the EU VAT number validation service to check the validity of an EU business customer's or supplier's VAT registration number. HMRC is developing a service so that UK VAT numbers can continue to be validated.

Where an EU-based business customer orders goods from a UK-based intermediate supplier that in turn orders the goods from a non-EU supplier for direct delivery to the customer in fulfilment of that customer's order post-Brexit Long Stop Date, the UK intermediate supplier will no longer be able to use the simplified triangulation procedure, meaning that it will need to register for VAT in the EU country where the customer is based. Nor will the simplified procedure be available if the original supplier is based in the UK, since the ultimate origin of the goods will be from outside the EU. (Broadly, a simplified triangulation procedure works by allowing an EU-based intermediate supplier to issue a VAT invoice to the EU customer and record the transaction in an EC Sales List or local equivalent, instead of having to register for VAT in the customer's EU jurisdiction. As part of this simplified procedure, the intermediate supplier must also provide its own VAT number to the original EU-based supplier as proof of zero-rating).

Customs Duties Post-Brexit

The Withdrawal Agreement provides that the Union Customs Code (Regulation (EU) No 952/2013) will continue to apply until the Brexit Long Stop Date, meaning that, with limited exceptions, goods will be able to move freely between the UK and the EU until then. The Code will also apply to movements of goods which straddle the Brexit Long Stop Date.

From a customs duty perspective, a "no deal" scenario means that the free circulation of goods between the UK and EU will cease, and import and export duties will become payable upon the making of the appropriate customs declaration. Separate safety and security declarations would also need to be made by the carrier of the goods (this is usually the hauler, airline or shipping line, depending on the mode of transport used to import or export the goods).

HMRC has published the following key guidance on how customs and excise duties will work post-Brexit Long Stop Date in the event of a "no deal" scenario:

- Goods traded between the UK and the EU after the Brexit Long Stop Date will be subject to the same requirements as third country goods, including the payment of customs duty.

Under WTO rules, the principle of most-favoured-nation (**MFN**) treatment means that, unless a preferential agreement is in place, the same rate of duty, on the same good, must be charged to all WTO members equally.

- Importers of goods into the EU from the UK will need to use the EU MFN rates set out in the Common Customs Tariff (CCT). The EU may also impose export tariffs for certain products, to which UK businesses will need to respond.
- Importers of goods into the UK from the EU will no longer be able to use EU tariff information published by the EU. Instead, the UK will apply its own MFN rates.

For this purpose, a new system of UK import tariffs has been implemented by secondary legislation pursuant to the Taxation (Cross Border Trade) Act 2018, which is expected to take effect as of the Brexit Long Stop Date. In the meantime, current UK tariff rates may be used as an indicator of the likely cost of such MFN tariffs when planning for any financial outcomes or results that need to factor in the anticipated cost of customs duties.

- For movements of excise goods (e.g. tobacco, alcohol and oil/hydrocarbons), the Excise Movement Control System (**EMCS**) will no longer be used to control suspended movements between the EU and the UK.

ECMS will continue to be used to control the movement of duty suspended excise goods within the UK, including movements to and from UK ports, airports and the Channel tunnel. This will mean that businesses moving excise goods within the EU, including those in duty suspension, will have to place those goods into UK excise duty suspension immediately on importation to the UK, otherwise excise duty will become payable.

- UK businesses that import and export goods to and from the EU will need to have a valid Economic Operator Registration and Identification (**EORI**) number, and must register for an EORI number via the EORI registration portal at https://www.gov.uk/eori at the earliest possible opportunity in order to avoid unnecessary delays at the border post-Brexit Long Stop Date.

An EORI number will be required for UK importers of goods from the EU who wish to make use of the Transitional Simplified Procedure (**TSP**). The TSP will allow importers to defer giving a full declaration until after the goods have crossed the border and to defer paying any duty until the month after import.

At the time of import or export, businesses will need to submit an import or export declaration to HMRC as appropriate, or arrange for their customs broker, freight forwarder or logistics provider to do this for them. For imported goods, UK businesses will need to pay import VAT and import duties, including any excise duty on excise goods, unless the goods are entered into duty suspension within a customs or excise warehouse. (A financial security may be required to cover the duty liability of the goods whilst they are being moved to the warehouses). It may also be necessary to apply for an import or export license or provide supporting documentation in order to be able to import or export specific types of goods into or out of the UK, or to meet the conditions of the relevant customs import or export procedure.

Potential Impact of Customs Duties on the Pharmaceutical Sector

In May 2018, a House of Commons committee held a hearing on the likely impact of a "no deal" scenario on the UK pharmaceutical industry. The report concluded that the UK would be able to trade in certain pharmaceutical products with the EU on a zero-tariff basis under the WTO's Pharmaceutical Tariff Elimination Agreement, which covers a limited range of finished products and ingredients, even though the UK is not a signatory. The EU is a signatory, meaning that the UK would receive the benefit on a MFN basis, although tariffs will apply in trade with other non-signatory countries like China, Russia, and Brazil. Although the Agreement is supposed to be updated every three years, it is estimated that roughly 1,000 products and 700 ingredients remain uncovered by the Agreement and will face tariffs. One large pharmaceutical company has reported that it may have to pay duties in all countries, including the EU, ranging from 4 per cent to 6.5 per cent for active pharmaceutical ingredients and intermediates. It is hoped that some of the larger pharmaceutical companies will be able to use their leverage to negotiate tariff-free trade in an increased range of pharma products.

Contractual Matters

From a contractual perspective, UK businesses will also need to ensure that their contracts and International Terms and Conditions of Service (**INCOTERMS**) reflect the fact that they are an importer or exporter as appropriate. Other contractual changes may also be necessary to take account of a "no deal" Brexit. Should any of these changes affect which party owns the goods at what point of the transaction or otherwise alter the extent to which the parties bear the economic risk in the goods, this could impact any functional analysis of any underlying goods transaction from a transfer pricing perspective if the transaction is made between UK and EU related parties. This would mean that the contract price(s) may no longer reflect the functions performed, assets used and risks assumed by each party to the transaction, thus increasing the risk of a transfer pricing adjustment either by HMRC or the tax authority of the relevant EU jurisdiction as appropriate.

Restructuring Options

UK businesses may wish to consider relocating from the UK to the EU (or vice versa) in order to be based in the same country as their suppliers or customers. Such a move would minimize any potential disruption to supply chains brought about by customs duty requirements. However, the following considerations should be borne in mind before doing so:

- Technically, a UK company should still be able to relocate its business to the EU on a tax-free basis, provided the transaction is structured correctly and certain conditions are satisfied. However, cross-border mergers between UK and EU companies will no longer be able to take place post-Brexit Long Stop Date, meaning that such tax-free treatment will no longer be available. Provided the merger process is formally initiated before the Brexit Long Stop Date, the relevant authorities may allow a cross-border merger to be completed in accordance with the proposed merger terms, and allow tax-free treatment accordingly.

- If an EU company wishes to relocate its business to a UK company by means of a cross-border merger involving (for example) an asset transfer, a PE transfer or a share for share exchange, it will no longer be able to do so on a tax-free basis since the EU transferor would no longer be bound by the EU Mergers Directive (2009/113/EC) in relation to a UK transferee post-Brexit Long Stop Date, thus giving rise to the possibility of exit taxation or other taxes in respect of capital gains imposed on the relevant EU transferor by its jurisdiction of residence. A payment deferral mechanism may, depending on the circumstances, be available in the relevant EU jurisdiction to mitigate any adverse cash flow impact of such taxes, particularly if the EU transferor's country has implemented ATAD I.
- Changing a company's residence from an EU jurisdiction to the UK would trigger an exit tax for the company by reference to the market value of its assets at the time of the change of residence if the EU country in question has implemented ATAD I (the UK already has a similar rule for a change of company residence in the opposite direction). That said, it should be possible for the EU transferor in these circumstances to defer payment of exit taxes by paying the tax in instalments over a five year period.

Exit taxes aside, there may be sound tax-driven reasons for relocating from the EU to the UK in certain circumstances. For example:

- IP-rich EU businesses may wish to relocate to the UK in order take advantage of the UK's relatively favourable tax environment for IP and related R&D discussed above (see section above on "Operating Companies").
- Moving parts of the supply chain to the UK would reduce the total cost of customs duties and bring them within the UK VAT regime, thus ensuring seamless UK VAT accountability and recoverability at the various stages of the supply chain without the need to go through a potentially cumbersome 13th Directive VAT refund process to recover input VAT incurred in an EU Member State.

That said, if a significant portion of the business's end-consumer base is in the EU, the business would still have to supply goods from the UK to EU-based non-business end-consumers and register for VAT in all EU Member States where those end-consumers are based. There will also be customs duty implications at this final end-consumer stage of the supply chain.

EMPLOYMENT

In headline, in either a deal or "no deal" scenario after the implementation period, there is little if any change expected in relation to UK employment laws in the short term.

The Government's position has been reasonably consistent during the period since the Brexit vote in June 2016. The Secretary of State with responsibility for employment law told Parliament on 7 November 2016 that the Government would "entrench all existing workers' rights in British law, whatever future relationship the UK has with the EU". While Prime Minister, Theresa May reiterated on numerous occasions that the Government "will not only protect workers' rights, but enhance them".

Boris Johnson has made similar promises about protecting workers' current rights but was criticised for the omission from the 2020 Withdrawal Agreement of a section in previous versions of the European Union (Withdrawal Agreement) Bill requiring the Government to report on divergence from new EU rights in the future.

In relation to current employment rights, the Government has issued a series of technical notices which confirm that, in the event of a "no deal" Brexit, workers in the UK will continue to enjoy the rights they are currently entitled to under EU law with one key exception (relating to European Works Councils – discussed further below). To achieve this, the 2020 Withdrawal Act provides for EU law (with necessary technical drafting amendments) to be imported into UK law on Brexit Day (*please see discussion on* *pages 3 and 4* *regarding the incorporation and interpretation of existing EU law*).

The Withdrawal Agreement also provides that EU law will continue to apply during the transition period until the Brexit Long Stop Date. Employment law rights derived from EU law (such as anti-discrimination rights, collective consultation obligations, TUPE regulations, family leave and working time rights) will therefore be maintained for this transition period as a minimum.

However, some comfort can be taken from the Political Declaration setting out the Framework for the Future Relationship between the EU and UK (which accompanied the Withdrawal Agreement) which includes a commitment to work together to safeguard "high standards of … workers' rights" and a statement that the future relationship must ensure open and fair competition, including provisions on social and employment standards.

European Works Council

The only substantive changes relate to European Works Councils (**EWC**s), which cannot continue to function as they do currently post-Brexit Long Stop Date.

The Withdrawal Agreement provides that no new requests to set up an EWC or information and consultation procedure can be made after the Brexit Long Stop Date.

For existing EWCs, the impact of Brexit will depend on the terms of the EWC. For EWCs which are not governed by UK law, the default position is that UK employees will no longer be entitled to have representatives on the EWCs, and the UK delegates' seats will need to be reallocated, unless the parties to the EWC agreement agree otherwise.

Those governed by UK law will need to designate another EU country to govern the EWC. The choice of which alternative law will apply should be carefully considered in light of the fact that it will have strategic implications for the composition of the EWC and national legal concepts to which it will be subject.

Changes to Employment Laws in the Future?

In theory, Parliament could make future legislative changes to employment law, but these are likely to be limited given the commitments given by the Government and, in the event of a no deal Brexit, the practicalities of negotiating any future trade arrangements with the EU.

In terms of case law, under the 2020 Withdrawal Act, in theory at least, the Supreme Court could re-examine and potentially overturn doctrines derived from European case law. Much-litigated issues such as holiday pay could, therefore, theoretically at least, be re-opened. However, again, in light of the reassurances given about the continued protection of employment rights, any significant roll-back would be surprising.

Immigration

Immigration is an area that has the ability to have significant impact on some employees and their families.

If the UK leaves the EU with a deal, it has been agreed that there will be a "transition period" from Brexit Day to the Brexit Long Stop Date (being December 31 2020 at the time of writing). During the transition period, free movement will effectively continue between the UK and the EU.

The UK Government has promised that, whether or not there is a Brexit deal, under the "EU Settlement Scheme" all EEA nationals and their families living and working in the UK as at December 31 2020 will have the continued right to reside and work in the UK and to acquire rights of permanent residence in the UK after five years of qualifying residence.

The scheme came into effect on March 29 2019. The Government has stated that applications for Settled or Pre-Settled Status must be made before the end of June 2021 if there is a Brexit deal (or December 31 2020 in the event of a "no deal" Brexit), to protect an individual's rights to remain in the UK.

The latest information on the "EU Settlement Scheme" is published by the UK government. Please see https://www.gov.uk/settled-status-eu-citizens-families for further information.

Practical Steps for Employers

The key impact will be for employers who recruit or second employees cross-border. Employers with affected employees will wish to ensure that they are familiar with the "Settled Status" procedure and the relevant deadlines.

Employment Taxes: Social Security

EU regulations currently help internationally mobile employees pay social security contributions in only one Member State. In the event of a "no deal" Brexit, these regulations will cease to have effect in the UK post-Brexit Long Stop Date. Although the UK has legislated for the status quo to continue, whether it will do so will depend entirely on reciprocal action by the EU, which has not been agreed. The UK had a limited number of agreements with some, but not all, of the EU Member States before the regulations took effect; however, these are far less comprehensive than the EU regulations, and may be limited in duration and scope.

Employers will therefore need to review the social security status of employees moving into or out of the EU, and will also need to review all international working arrangements to determine whether new social security obligations are triggered.

HEALTHCARE

The Department of Health and Social Care has provided guidance to the health sector about steps that need to be taken to deal with "no deal" (How Healthcare Providers Can Prepare for Brexit) (**DH Guidance**). The guidance is largely written for NHS providers but also applies to independent sector providers and GPs. Under this guidance, all providers are advised to continue with their business continuity planning, taking into account national guidance and including local risk assessments.

Workforce

Providers of health and care services are heavily dependent on EU workforce. According to NHS Digital, estimates are that nearly 62,000 (5.2 per cent) of the English NHS's 1.2 million workforce and an estimated 104,000 (around 8 per cent) of the 1.3 million workers in England's adult social care sector have come from EU countries.

This significant EU dependency coupled with significant workforce shortages across key skilled areas in healthcare and increasing early retirement by senior clinicians who have been affected by changes in pensions' cap means there is a heady confluence of risk factors around Brexit.

Mutual Recognition

Currently, there is mutual recognition of professional qualifications of healthcare staff under EU regulations – this is a crucial element in the context of the dependency of the UK health and care sector on EU health and care workers.

The DH Guidance makes it clear that health and care professionals with qualifications from EU institutions will continue to be recognised by UK health and care regulators after the Brexit Long Stop Date. However, a crucial question remains on the extent to which EU institutions will recognise time spent working in the UK healthcare sector as qualifying experience. The outcome of this may have an impact on the recruitment and retention of EU qualified staff after Brexit.

Right to Remain

Under the EU Settlement Scheme, EU citizens will be able to register for settled status in the UK if they have been here for five years, or pre-settled status if they have been here for less than five years. This will ensure the rights of EU citizens are protected in the UK after EU Exit, and guarantee their status and right to work.

At this stage, the future immigration rights of new health and care workers under a "no deal" Brexit is unclear. (*See employment section for further details)*

Steps to Take

Healthcare businesses should identify staff who are EU citizens and publicise the EU Settlement Scheme, the details of which are published on the UK government's website: https://www.gov.uk/settled-status-eu-citizens-families.

Procurement

If the UK leaves the EU with no-deal, then EU directives in respect of procurement legislation will no longer apply to the UK, although public procurement rules in the UK (and which derive from the EU) may remain in force. This is important for healthcare businesses commissioned to provide NHS services in light of changes to NHS legislation proposed in early 2019. The NHS legislative proposals together with any repeal of EU procurement rules (and derived UK rules) will have significant implications for the approach to outsourcing and commissioning of healthcare services, including the introduction of a "best value" test for procurement. The terms of the "best value" test are currently unclear and whilst there are concerns that this may be subjective and be harmful to independent sector providers, it may also allow for greater flexibility for extensions and direct awards of services where providers are meeting quality requirements.

The proposed NHS legislative changes also include safeguarding and strengthening of current rules around patient choice, which currently applies to elective services and which allow providers (NHS or independent) a route to market and a right to remain on a list provided they continue to meet commissioner requirements.

Steps to Take

Healthcare businesses should:

- review relationships and existing contracts to assess the risk to on-going contracts and whether any statutory exemptions (existing or anticipated and including as to listing) may be used to secure contract terms; and

- note that contractual relationships held through sub-contracts (where a NHS trust is a prime contractor) may affect statutory protections.

Supply of Medical Devices to the United Kingdom

Every day, healthcare businesses in the UK rely on EU manufacturers and suppliers of a vast number of medical devices and consumables; much of this is delivered on "just in time" delivery systems.

Currently, these medical devices are subject to EU and UK devices regulation and are not subject to tariffs. If there's no deal, the UK's participation in the European regulatory network would cease – this regulatory regime includes a mutuality of medical devices approved in EU Members states.

The MHRA has stated that for a time limited period the UK will continue to recognise medical devices approved for the EU market and CE-marked. The UK has published the design for its replacement for the CE mark, namely "CA UK". This will be the UK CE mark equivalent indicating compliance with the UK's post-Brexit legislation. That legislation may mirror the MDR and the IVDR, or the UK may take a different approach. The MHRA has said that it will be holding a consultation on the future process for placing a medical device on the UK market and that adequate time will be provided for businesses to implement any new requirements.

However, if there is disruption to shipping or transit routes, this may mean significant disruption or cancellation of healthcare services. The Department of Health and Social Care and national NHS bodies have stated that they have increased levels of stock holding in the national procurement and logistics operation, have requested certain suppliers that to increase stocks, where possible and have access to government shipment channels.

It is not clear whether the central government planning only covers providers of NHS healthcare services.

Steps to Take

- Independent healthcare providers should review their supply chain and confirm that suppliers have sufficient capacity and have increased supplies in the event of a "no deal" Brexit. Independent healthcare providers may wish to consider ensuring that additional stocks are held of medical devices where suppliers are unable to confirm that supply routes will be undisrupted.
- NHS providers should follow the DH Guidance
- Suppliers of Medical devices to the UK should consider whether they need to place surplus product on the UK market. While the UK will recognise an existing CE Mark post-Brexit, that recognition is time limited, and there may be "no deal" prompted customs, importation, production and logistics issues to consider.

Supply of Medical Devices from the United Kingdom

If there's a "no deal" Brexit, UK Notified Bodies will no longer by recognised by the EU. This means that if a medical device has been recognised by a UK Notified Body, the certification will no longer be in conformity with the applicable EU Directive and cannot be the basis for placing on the market in the EU.

Steps to Take

- Where suppliers of medical devices have only a UK Notified Body, its CE certifications will expire. New certificates will need to be obtained from an EU Notified Body. Some UK Notified Bodies have EU counterparts, which may offer options to recertify. Appointing an EU-based Notified Body should already be underway for there to be any chance for re-certification to be achieved prior to the Brexit Long Stop Date.

- Any UK (or other non-EU) company placing medical devices on the EU market will need to have an Authorised Representative in the EU.
- While the UK will recognise an existing CE Mark from a UK or EU Notified Body post-Brexit, there is no certainty that in a "no deal" scenario the EU will recognise CE (or any UK equivalent) marks of UK Notified Bodies. There has been some conjecture around emergency supplies and essential devices, but there is no certainty.
- Suppliers of Medical devices to the EU should consider whether they need to place surplus product on the EU market prior to the Brexit Long Stop Date given that "no deal" is likely to invalidate any UK Notified Body CE marking certificate.
- There may be "no deal" prompted customs, importation, production and logistics issues to consider.
- Medical Devices imported from the UK post-Brexit but already bearing pre-Brexit labelling will need to be re-labelled as to Notified Body and Authorised Representative identification.

Supply of Medicines to the United Kingdom

According to the Royal Pharmaceutical Society, the UK imports 37 million packs of medicine each month from the EU and exports even more.

EU directives regulate the supply and authorisation of medicines across Europe. The MHRA has stated that most medicines on the UK market already have a UK Marketing Authorisation (**UKMA**), which will be unaffected by exit from the EU.

However, a large proportion of drugs approved in the last decade (such as biotech and cell therapy treatments, and all drugs for the treatment of AIDS, cancer, neurodegenerative disorders or diabetes) have been approved via the EU "Centralized Procedure". This results in a single EU Marketing Approval (**EUMA**), permitting the sale of that product across the entirety of the EU.

The MHRA has stated that post-Brexit, EUMAs will be "converted", so far as the UK market is concerned, into UKMAs. This "grandfathering" process will happen automatically and be instigated by the MHRA.

Both the EU and the UK require certain named entities to be in existence with respect to medicinal products:

- A Qualified Person (**QP**). Before drugs can be placed on the market, their compliance with quality standards for release into the market must be legally certified by a QP, at his or her personal responsibility. A QP is an experienced individual, typically a licensed pharmacist, biologist or chemist, with experience working in pharmaceutical manufacturing operations who is suitably qualified to assess that quality compliance.
- A Qualified Person for Pharmacovigilance (**QPPV**) is an appropriately qualified person who is personally responsible for the safety of the medicinal products marketed by a MA Holder. The QPPV shall be "permanently and continuously at the MA Holder's disposal responsible for pharmacovigilance", being the assessment,

monitoring, and prevention of adverse events.

- An "Authorised Representative" who can be contacted in the event of a safety issue with a medicinal product.

QP: For product manufactured in the UK and placed on the UK market, or directly imported into the UK from a country not on a designated country list (whitelist), the QP must reside and operate in the UK. For products manufactured in a country on a whitelist or manufactured in a third country and imported into the UK from a country on a whitelist, the QP can reside in a country on the whitelist.

QPPV: For product placed on the UK market, while the QPPV should be established in the UK on day one, MA Holders without a current UK presence will have until the end of 2020 to do so. In the meantime, MA Holders are required to make arrangements for providing the MHRA with access to the relevant safety data related to UKMAs. An MA Holder's EU QPPV may take on responsibility for UKMAs until a UK QPPV is appointed.

Authorised Representatives: For medicinal product placed on the UK market, where the MA Holder is not yet established in the UK, the Authorised Person must be in the UK.

Steps to Take

- Independent healthcare providers should review their supply chain and confirm that suppliers have sufficient capacity and have increased supplies in the event of a "no deal" Brexit. Independent healthcare providers may wish to consider ensuring that additional stocks are held of medical devices where suppliers are unable to confirm that supply routes will be undisrupted.
- There appears no advantage in EU-based MA Holders placing surplus medicines on the UK market, at least not for regulatory purposes.
- MA Holders will be required to provide the MHRA with "baseline data" (which the MHRA has not yet specified) for its newly converted UKMAs (as the UK will no longer be part of the EU regulatory network and so will not have access to such data as applicable to the corresponding EUMA).
- Prepare for the need for UK based QP, QPPV and Authorised Representatives.
- There may be "no deal" prompted customs, importation, production and logistics issues to consider.

Supply of Medicines from the United Kingdom

Regarding MAs, the position is different for an EUMA Holder based in the UK placing product on the EU market. The EUMA must be held by an entity established in the EU. First, the EUMA will need to be transferred from the UK MA Holder to an EU based entity.

QP: For product manufactured in the UK and to be placed on the EU market, the QP must reside and operate in the EU.

QPPV: For product placed on the EU market, QPPV must be established in the EU.

Authorised Representatives: For medicinal product placed on the EU market, where the MA Holder is not yet established in the EU, the Authorised Person must be in the EU.

Steps to Take

- Transfer UK held EUMAs to an EU entity.

- UK-based entities holding current EUMAs but only having a UK based QP should consider whether they need to place surplus product on the EU market prior to the Brexit Long Stop Date.
- MA Holders with QPs and QPPVs currently residing only in the UK will either need to relocate them to the EU, or find replacement or additional individuals to reside and operate in the EU.
- There may be "no deal" prompted customs, importation, production and logistics issues to consider.

Supply of Tissues and Cells to and from the United Kingdom

UK organisations such as hospitals, stem cell laboratories, tissue banks and fertility clinics that undertake licensable activities working in this area are regulated by:

- the Human Tissue Authority (**HTA**) for organs, tissues and cells other than reproductive tissues and cells; and
- the Human Fertilisation and Embryology Authority (**HFEA**) for reproductive tissues and cells.

UK law already implements the EU Organ Directives and EU Tissues and Cells Directives, meaning safety standards for the movement of non-reproductive and reproductive tissues and cells will not change on exit or in the event of a "no deal" Brexit. Whilst this includes standards for the effective traceability of tissues and cells, UK organisations will no longer be required to use the Single European Code (**SEC**) or the EU Coding Platform which provides a central database of all licensed establishments across the EU.

UK establishments must however ensure they hold the appropriative import or export licences with the HTA for non-reproductive tissues and cells, and/or, if undertaking licensable activities using reproductive tissues, authorisation from the HFEA.

Steps to Take

Within 6 months following the Brexit Long Stop Date, UK establishments importing or exporting tissues and cells must:

- for non-reproductive cells, either (i) apply for an import or export licence with the HTA or (ii) update import or export licences already held to now include the EU, Norway, Iceland and Liechtenstein (where relevant to the transfer); and/or
- for reproductive cells, seek the appropriate authorisation from the HFEA.

UK JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

Now that we have entered the transition period which is currently planned to end on December 31 2020 whether a final deal is struck or not, parties need to give serious consideration to any current contracts which contain UK court clauses and any UK proceedings involving EU resident assets or people which will not be concluded and in respect of which exequatur proceedings may not have been commenced by the end of the transition period as any judgment may not be enforceable in the relevant EU jurisdiction if there has been no agreement on a future legal relationship.

The Current Position

Brussels I

Articles 67, 68 and 69 of the Withdrawal Agreement provide that, throughout the transition period, the

UK will enjoy the same benefits in respect of the recognition and enforcement of judicial decisions as it had as a Member State immediately prior to Brexit Day. The principal advantage of Regulation (EU) No 1215/2012 of the European Parliament and of the Council (Recast) (the **Brussels I Regulation**) is that it provides a simple mechanism for determining which jurisdiction's courts shall have jurisdiction over any particular dispute. The parties are free in contractual matters to agree which court shall have jurisdiction. Typically, in the absence of agreement, the defendant shall be sued in the jurisdiction of their domicile. There are special provisions in respect of claims by some weaker parties permitting them to sue in the jurisdiction of their own domicile. Additionally, the judgments of the court (whether they are for monetary or non-monetary relief) are then easily enforced across the EU as easily as domestic judgments of the court in which enforcement is made.

Additionally, the UK will remain a signatory to the Lugano Convention and the Hague Convention throughout the transition period.

Lugano Convention

Under the Lugano Convention (agreed in 1988), the EU and EFTA states agreed certain matters in respect of the recognition and enforcement of one another judgments. The Brussels I Regulation has advantages over the Lugano Convention; the most often cited advantage being that under the Brussels I Regulation a court selected by the parties is entitled to proceed even if proceedings were previously commenced in another Member State whilst under the Lugano Convention the court first seized of the matter must first rule on the matter before the second court can proceed (the "Italian Torpedo"). The Lugano Convention is an agreement and any new matter wishing to join the Convention may do but only with the ratification or agreement of all of the other parties, currently the EU itself and the EFTA states.

The EEA EFTA Separation Agreement does not cover civil judicial cooperation matters as these are governed by the Lugano Convention 2007.

The Hague Convention

The 2005 Hague Choice of Courts Agreements Convention provides that signatories agree that their courts will enforce the judgment of another member's courts where the parties have agreed an exclusive jurisdiction clause. Significantly, the Hague Convention only applies to contracts entered into after both jurisdictions are signatories.

Brexit Long Stop Date and potential for "No Deal"

The transition period will terminate at the end of 2020 unless otherwise agreed. While the stated intention of the UK is that they will agree a deal with the European Union before the end of 2020, the EU has indicated this is improbable. It is if anything more probable now than ever before that the UK will leave the European Union at the end of 2020 without a deal.

In such a "no deal" scenario, the Law Society of England and Wales and the European Commission have indicated that the result is that the parties will cease to be able to rely on the Brussels I Regulation, the Lugano Convention and the Hague Convention. Whilst the UK has signalled its intention to re-join Lugano this will require the agreement of the EU and the EFTA states. On January 28 2020, each of Iceland, Norway and Switzerland publicly welcomed the intention of the UK to accede to the Lugano Convention before the expiry of the transition period and indicated future support for accession by the UK to the Lugano Convention.

The UK has indicated that it will sign up to the Hague Convention effective immediately after the end of this transition period but this will likely only apply to contracts which contain an exclusive jurisdiction clause entered into after that date.

It may be that there are pre-EU agreements between any given Member State and the UK. These may as a matter of the law of the individual Member State revive after Brexit. However, whether this is the case is currently only a matter of argument and conjecture and is moreover a matter for the courts of the remaining EU Member State.

The European Commission has indicated that in the event of no deal being agreed after the expiry of the transition period, no UK judgments will be enforceable thereafter unless exequatur proceedings have been commenced to enforce the judgment in a remaining EU country before the end of the transition period (i.e. currently December 31 2020).

Whether the courts of any EU Member State will enforce any UK judgments as a matter of its domestic law in such a "no deal" scenario after the Brexit Long Stop Date is a matter for lawyers in that individual Member State; however many EU Member States do not enforce judgments of third countries.

This means that any current UK proceedings which are not concluded and in respect of which exequatur enforcement proceedings have not been commenced by the end of 2020 may not be enforceable in the relevant EU jurisdiction if there has been no agreement on a future legal relationship or extension. It also means that any contracts which anticipate enforcement of a UK judgment in Europe after the end of 2020 may not be enforceable either.

Conversely, the courts of England and Wales do not enforce non-money judgments from a foreign court and so judgments for declaratory or injunctive relief from an EU court will also not be enforceable in the UK (unless they are covered by the Hague Convention or the UK is admitted to the Lugano Convention by agreement).

Current Solutions

Currently, the best solution in commercial contracts is likely to use arbitration clauses rather than court jurisdiction clauses in most instances involving UK and foreign parties. However, if arbitration is not feasible (for example, one party may need to rely on the threat of possible default judgment or one party not be capable of entering into an arbitration agreement) then one should very seriously consider agreeing to the jurisdiction of a foreign court. If a foreign court is agreed, one should seriously consider bilingual contracts to prevent ambiguities in translation only being discovered during enforcement proceedings. Parties to international contracts involving Europe, Mexico or Singapore with contracts that contain exclusive jurisdiction clauses appointing the English courts should ratify or more likely re-negotiate all such agreements after the end of 2020 or any extension period if no permanent deal on the future relationship between the EU and the UK has been reached by that date or an extension agreed, so that such jurisdiction clauses may be enforceable under the Hague Convention.

DATA PROTECTION

In this section, we consider the key impact of a "no deal" Brexit on companies that process personal data. The General Data Protection Regulation, which was introduced in May 2018, has direct applicability in each Member State and also has extra-territorial application, in certain circumstances to companies outside of the EEA. In addition, each Member State has introduced supplemental national law, which for the UK is the Data Protection Act 2018 (**DPA 2018**).

The UK Position

For the transition period until the Brexit Long Stop Date, the DPA 2018 and the General Data Protection Regulation (**GDPR**) will continue to apply to the United Kingdom.

After the end of the Brexit Long Stop Date, the GDPR will no longer have direct effect in the UK. While the position at the end of the Brexit Long Stop Date remains subject to on-going negotiations, the Information Commissioner's Officer (**ICO**) has confirmed that the default position will be the "no-deal" position. Under the "no-deal" position the Withdrawal Agreement, the DPA 2018 and further implementing legislation such as the Data Protection, Privacy and Electronic Communications (Amendments, *etc*) (EU Exit) Regulations 2019 will incorporate into UK law a version of the GDPR called the "UK GDPR". The UK GDPR is very similar to the GDPR, and so this means that the compliance programs and data protection frameworks that are already in place will continue to be useful.

However, the extra-territorial application of the GDPR means that post-Brexit Long Stop Date certain UK companies will, in addition, continue to be subject to the GDPR where they are processing personal data in connection with offering goods or services to individuals within the EU or monitoring their behaviour.

The primary effect of this will be that many international companies with operations in the UK will need to simultaneously comply with the UK GDPR and the GDPR and so will need to be mindful of regulatory developments on both sides of the channel, particularly if over time there begins to be a divergence between the UK GDPR and the GDPR. In particular, the Withdrawal Agreement requires that any personal data of non-UK data subjects obtained prior to the Long Stop Brexit Date must continue to be subject to the GDPR, rather than just the UK GDPR. This could be potentially very onerous, as it is likely to require the separation of EU data to which the GDPR itself applies and UK data to which the UK GDPR applies.

Further, as the GDPR will continue to apply until the Brexit Long Stop Date, the ICO will remain a "competent authority" and will participate in the cooperation and consistency mechanism. However, notably, on Brexit Day the ICO will no longer be a member of the European Data Protection Board (**EDPB**). The ICO may be able to attend meetings on an exceptional basis, but will lose any voting rights. As a consequence, the ICO will no longer have any influence over data protection matters at an EU level.

After the Brexit Long Stop Date, the ICO will (i) cease to be a "competent authority" under the GDPR; (ii) no longer participate in the one stop shop; and (iii) will not be able to continue as the lead authority for cross-border processing within the EU. Therefore, those businesses that currently have the ICO as their lead authority, and which will continue to engage in cross-border processing within the EU after the Brexit Long Stop Date, should start identifying whether they will then qualify as having an alternative "main establishment" within the remaining EU member states and, consequently, which EU authority will fulfil the role as their lead supervisory authority.

The EU Position

For most companies on the continent, it will be business as usual, as the GDPR will continue to apply to their operations. However, the UK government has indicated that it intends to retain the extraterritoriality of the UK's data protection framework; such that the UK GDPR will apply to companies who are based outside of the UK where they are processing personal data about individuals in the UK in connection with offering them goods and services, or monitoring their behaviour. As a result, various EU-UK focused companies will also be subject to both the GDPR and the UK GDPR.

Legal Framework for Cross-Border Transfers

Perhaps the most significant effect of the UK's withdrawal from the EU, will be the impact on EEA-UK data flows.

The UK Position

Notably, the UK government has confirmed that, after the Brexit Long Stop Date, the UK would continue to allow the free flow of personal data from the UK to the EEA. This is because the government will transitionally recognise all EEA countries and Gibraltar as "adequate". In addition, where the EU has made an adequacy decision in respect of a country or territory outside of the EU prior to the Brexit Long Stop Date, the UK government intends to preserve the effect of these decisions on a transitional basis. This means that for UK-EU transfers and transfers to non-EU adequate countries, no additional safeguards or measures will need to be implemented as these transfers are considered to be in compliance with the UK GDPR.

Further, in the Data Protection, Privacy and Electronic Communications (Amendments, *etc*) (EU Exit) (No. 2) Regulation 2019 the UK government intends to recognise the US Privacy Shield self-certification as adequate for the transfer of personal data to the US, provided some small alterations are made to the Privacy Shield certification prior to the Brexit Long Stop Date.

However, the legal framework governing transfers of personal data from organizations (or subsidiaries) established in the EU to organizations established in the UK would change after the Brexit Long Stop Date. As set out below, certain steps will need to be taken in order to maintain the free-flow of personal data from EU entities to UK entities.

The EU Position

In a "no deal" scenario, the way in which EEA countries can transfer personal data to the UK will become purely a matter of EU law (over which the UK will cease to have any influence). In particular, an established mechanism exists to allow the free flow of personal data to countries outside the EEA where they are deemed adequate by the EU Commission. However, despite the UK's compliance with the GDPR and introduction of the UK GDPR, it is not guaranteed that a UK adequacy decision will be made by the EU Commission before the Brexit Long Stop Date.

As at the time of writing, the UK government has indicated to its EU counterparts that it is ready to begin preliminary discussions on an adequacy assessment now; however, the EU Commission has suggested that the adequacy procedure will not start until the UK becomes a third country (i.e. after Brexit Day when the UK has withdrawn from the EU). While we expect this timeline to slip, the EU has indicated that it will endeavour to adopt an adequacy decision in relation to the UK by the end of 2020, provided applicable conditions are met.

Steps to Take

We have identified the following key areas of focus for your company as we move towards Brexit.

Commercial Agreements

As identified in this report, Brexit will have an impact on commercial agreements. A number of steps should be taken to mitigate any data protection risk. These include, for example:

- ensuring that definitions relating to data protection law are amended to include reference to corresponding UK laws;
- reviewing indemnities providing protection for GDPR liabilities to ensure are effective for both UK GDPR and EU GDPR risks; and
- analysing whether: (i) there are any dependencies from suppliers that are affected by Brexit and consider obtaining confirmation from them that they are not affected; and (ii) whether any flow-down or subcontractor arrangements are affected.

International Transfers

In the absence of an adequacy decision, the most immediate action that must be taken by companies with EU-UK data flows is the implementation of a transfer mechanism. In the short term, the most effective solution will likely be to implement the EU Commission approved standard contract clauses ("**SCCs**") with any UK data controllers or processors with whom data will be shared; or for UK companies for their own data exports outside of the EEA. Note, however the following observations on how the SCCs may not be fit for purpose:

- the SCCs do not fit perfectly to every situation. They assume the data exporter is always a controller, and so there is no standard contract for the situation where the controller is based in the UK and the processor is based in the EEA;
- care should be taken where the SCC is between a company and its branch, as each party will not be a distinct legal entity and a contract may not be validly formed;
- the SCCs were written prior to the introduction of the GDPR and have not yet been updated by the European Commission to be compliant; this means that any SCCs that are put in place may need to be re-executed once updated versions are available; and
- the SCCs are currently under attack in the courts in a case brought by Mr. Max Schrems and may be held by the CJEU to be invalid. This will put companies relying upon SCC immediately in breach of the GDPR until revised, compliant, SCCs are executed or other data transfer methods are put in place. Note, on December 19 2019, the Advocate General of the CJEU provided his non-legally binding opinion to the CJEU upholding the validity of the SCCs. However, it is yet to be determined (as at the time of writing) whether the CJEU will follow this opinion.

If SCCs are not suitable, or not suitable as a long term solution then alterative compliance methodologies, such as Binding Corporate Rules should be considered.

Dual application of GDPR and the UK GDPR

The dual application of data protection standards should be carefully monitored, such that regulatory developments and guidance papers must be closely followed for both regimes. While the UK regulator has historically been known to take a fairly pragmatic and relaxed approach (compared to its French or German counterparts); the ICO is beginning to take a more stringent / conservative approach in a bid to demonstrate the UK's "adequacy". For companies with operations in EU markets and the UK, consider implementing a small taskforce or working group to ensure that any developments and regulatory decisions relevant to your business are carefully monitored on both sides of the Channel.

Care should also be taken on any cyber security incident. There could now be two regimes to follow when reporting to regulators and dealing with any follow on third party claims.

As mentioned above, given the application of GDPR to non-UK personal data (obtained prior to the

Brexit Long Stop Date) it may be necessary to separate non-UK data and UK data, for example, by implementing a technical solution to "tag" data. This is particularly the case if the EU and UK regime diverges.

EU-UK Representatives

Where a company is caught by the extra-territorial application of the GDPR, it is required to designate a representative within the EEA. The UK government will replicate this provision to require companies based outside of the UK to appoint a representative in the UK. This means that, after the Brexit Long Stop Date, UK companies (with no establishments in the EU) will need to appoint an EU representative; and vice versa for EU companies. If your business has no operations within either the EU or the UK, but is subject to the extra-territorial application of the GDPR or DPA 2018, a representative will need to be appointed. Care should be taken over that appointment of a representative. In theory, they are liable for the failures of the company that has appointed them and so many companies are not offering to provide European Representative services.

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