



Brexit Deal

KPMG summary and analysis

January 2021



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Introduction

Brexit has, with effect from 1 January 2021, moved into full blown reality.

Whilst the Deal agreed on the terms of future trade and cooperation was very welcome, particularly as compared to a No Deal outcome, it does not replicate the frictionless trade arrangements that currently exist.

We therefore recommend that all our clients build a Brexit Response into your business planning for the next few years so as to be as prepared as possible for the challenges and opportunities ahead.



Brian Daly

Head of Brexit Response Team, KPMG in Ireland



Johnny Hanna

Partner in Charge in Northern Ireland

The legal agreements underpinning what has been described as a thin deal as far as trade is concerned, covering goods and certain aspects of services, run to thousands of pages of new laws and regulations. They will have material consequences from a strategic and operational perspective for businesses on the island of Ireland. Some of these consequences are more immediate whilst others will take longer to play out.

Some of the key consequences to take note of include:

- Irish businesses will have quota and tariff free access to the UK – this is a key benefit of the deal.
- There will be new non-tariffs costs on trade between the EU and the UK – more forms to be filled in, more tests and new labelling requirements for many products. There is also time and cost involved in getting used to the new rules and putting new systems and processes in place.
- There are new Rules of Origin – these determine if a good qualifies for tariff free treatment. Many businesses have already seen these rules may require them to reconfigure their supply chains.
- Under the Protocol special rules for trading in goods apply to Northern Ireland, the effect of which is to ensure that NI businesses can continue to trade with the EU on a tariff free basis without any customs declarations or border checks whilst also enjoying unfettered access selling into the GB market.
- Purchasing goods online from the UK has become more expensive and complicated.
- The lack of extensive coverage in the deal on services may affect the provision of services between the EU and the UK. This will depend on the nature of the service and on what agreements are reached in the future between the professional bodies in the UK and each EU country on the recognition of professional qualifications;
- There are important provisions for sectors including aviation, energy, fishing and road transport.
- There is very little in the deal on financial services – the next key development will be the outcome of discussions in relation to establishing structured regulatory cooperation arrangements, with a view to signing a Memorandum of Understanding for this framework by end- March 2021.
- There is an extensive new governance framework involving the establishment of a Partnership Council and many new Committees and Working groups to oversee the implementation of the agreement.
- There are provisions dealing with State Aid and what has become known as Level Playing Field conditions in areas such as labour laws, environmental standards and taxation, with specific provisions to deal with disputes in relation to these matters. Time will tell how they operate in practice.
- And as if all of this isn't enough to get used to, it should be borne in mind that the other agreements will be needed in the future to deal with Brexit, and the Trade and Cooperation Agreement itself will be reviewed every 5 years, with the first general review taking place by end 2025.

To assist you in understanding, planning and adjusting to this new reality the experts in our Brexit Response team have set out our analysis of some of the key aspects of the Deal and key issues business can focus on.

If you have any questions on any of the issues addressed here please make contact with me or any member of our Brexit Response Team.

Brian Daly

Head of Brexit Response Team
KPMG in Ireland



Business Impact and Planning: In Ireland



Brexit will create challenges and opportunities for the Irish economy and Irish based businesses. Some immediate challenges have emerged as companies deal with the reality of the new rules and paperwork. As these issues are bedded down, the medium and long term consequences of Brexit will demand different responses. Some will be tactical, others will be strategic.

We therefore recommend that all our clients build a Brexit Response into your business planning for the next few years so as to be prepared as possible for the challenges and opportunities ahead. See our suggested framework on page 6.

Some of the most immediate consequences of Brexit and the Trade and Cooperation Agreement include:

- Irish businesses will have quota and tariff free access to the UK – this is a key benefit of the deal.
- There will be non-tariffs costs on trade between the EU and the UK – more forms to be filled in, more tests and new labelling requirements for many products. There is also time and cost involved in getting used to the new rules and putting new systems and processes in place.
- There are new Rules of Origin – these are the rules that determine if a good qualifies for tariff free treatment. Many businesses have already seen that these rules may require them to reconfigure their supply chains.

Besides the challenge of increased trade frictions with our largest trading partner, opportunities could emerge in many areas – for example new FDI projects that would have historically looked at the UK as an English speaking base in the EU; spotting opportunities where UK companies are withdrawing from the EU market due to increased costs of trade, or an inability to provide services including financial services into the EU; or finding a new role in reconfigured supply chains, including on the island of Ireland.

As well as exploring opportunities to take advantage of Northern Ireland's unique position within the ambit of both the UK and EU, Irish businesses will also want the rules and procedures designed to secure the EU Single Market to work successfully at the ports in Northern Ireland – otherwise the reputation of goods produced in Ireland from a EU single market perspective could be put at risk.

In summary, Brexit will have an impact on trade between EU and the UK and on the island of Ireland. It will create new challenges at Government level in political and policy terms to make sure that the environment in Ireland remains attractive for business.

Those businesses who respond appropriately to this new reality will hopefully be able to cope with the immediate challenge Brexit has created and more importantly, be able to find opportunities to succeed and grow in the future.

Brian Daly





Business Impact and Planning: In Northern Ireland



The impact of the NI Protocol (together with the TCA) was always going to be sub-optimal to full membership of the EU single market and customs union and it will present both challenges and opportunities.

Businesses will need to assess the impact based on their individual circumstances and tailor their Brexit response appropriately.

With the notable exception of additional complexity for goods imported from GB, businesses established in Northern Ireland will benefit from a very favourable trading regime in relation to goods relative to similar businesses established in either the EU or GB. For example, unlike the position for GB, NI businesses will, in many cases, be able to trade as before with the EU, with continuing tariff free access, no customs procedures and no paperwork. Similarly, unlike the position for EU businesses (including Ireland), NI businesses will in most cases, continue to sell into the GB market without any customs procedures or paperwork. This will be a significant benefit to the many thousands of businesses in Northern Ireland who trade primarily across the island of Ireland, with the EU and those who sell into the GB market.

For NI businesses importing goods from GB (and for the relevant GB suppliers themselves), there is unfortunately a lot of complexity to digest in relation to the new customs rules and procedures, in particular the “at risk” test and the rules of origin criteria. These will need to be considered in detail to determine whether a zero customs duty outcome applies or whether there may be eligibility to claim a waiver for tariffs which might otherwise have been payable. The position will be dependent on a range of factors ([see our detailed commentary on the Protocol](#)).

Given that many operational aspects of the Protocol and the TCA itself were not agreed until the eleventh hour it was an impossible task and unrealistic to expect businesses to be adequately prepared. Even with various grace periods and a light touch approach taken on some matters, this has led to disruption for many businesses over recent weeks as they get to grips with this new regime in real time.

If NI businesses can get access to EU FTAs with third countries (which is not provided for currently in either the Protocol or the TCA) it will greatly assist the growth of the all-island economy, with its closely linked supply chains, and also help promote further export opportunities for businesses across the island. For that reason we expect Businesses and industry representatives to continue to lobby for this access with the Government in Ireland, the UK and at EU Commission level.

While there will be challenges ahead for existing businesses in relation to imports from GB (including when the initial grace periods and phased introductions expire) and it is too early to be definite on the potential medium to long opportunities for Northern Ireland, we expect there will be opportunities to attract new foreign direct investment as investors considering setting up in either the UK or EU weigh up the benefits of establishing new businesses in Northern Ireland in order to avail of its **unique position** as a frictionless gateway to both the UK and EU, while also offering export growth opportunities for existing NI businesses.

Johnny Hanna

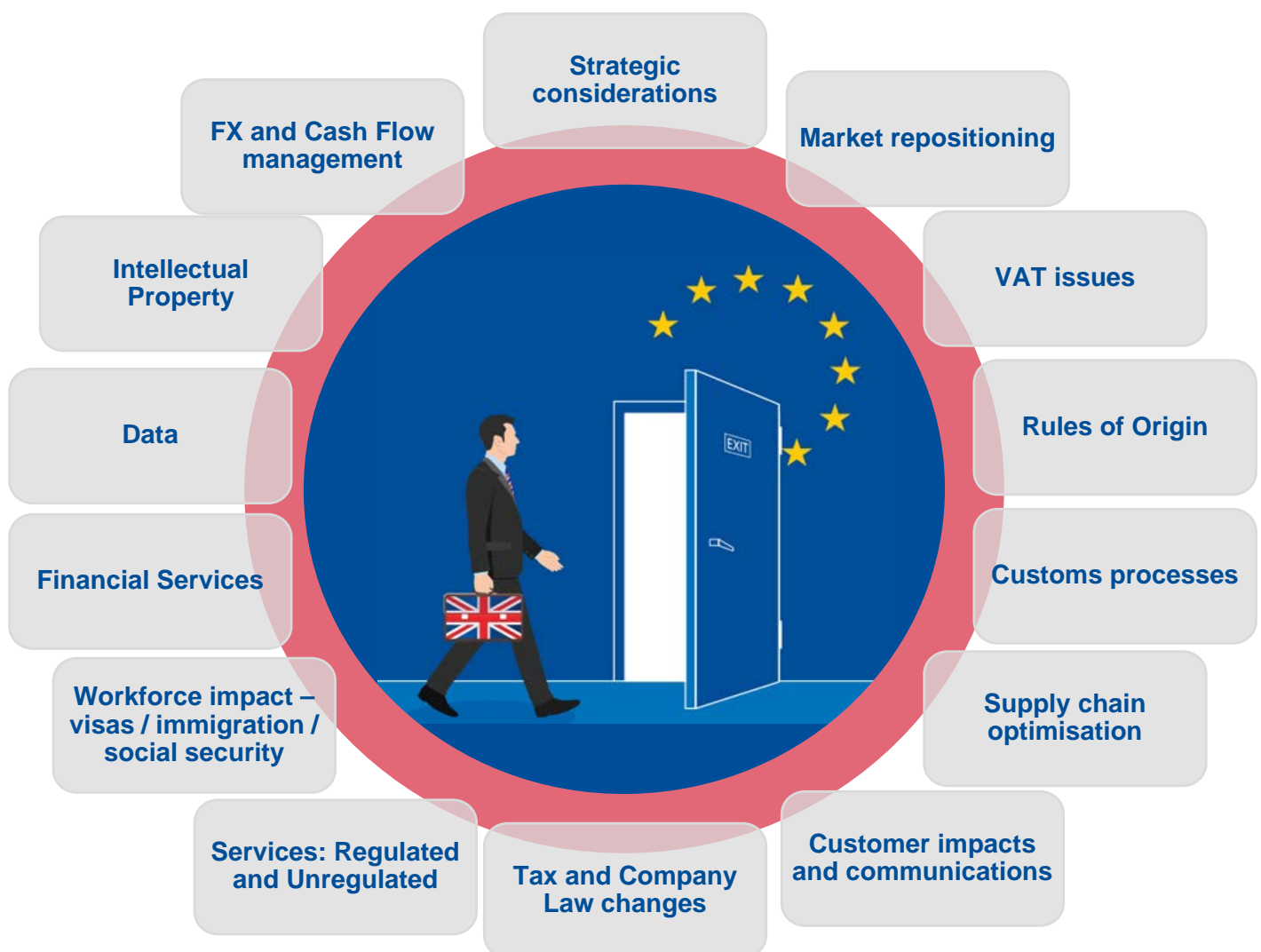




Business Planning Framework for Brexit Response

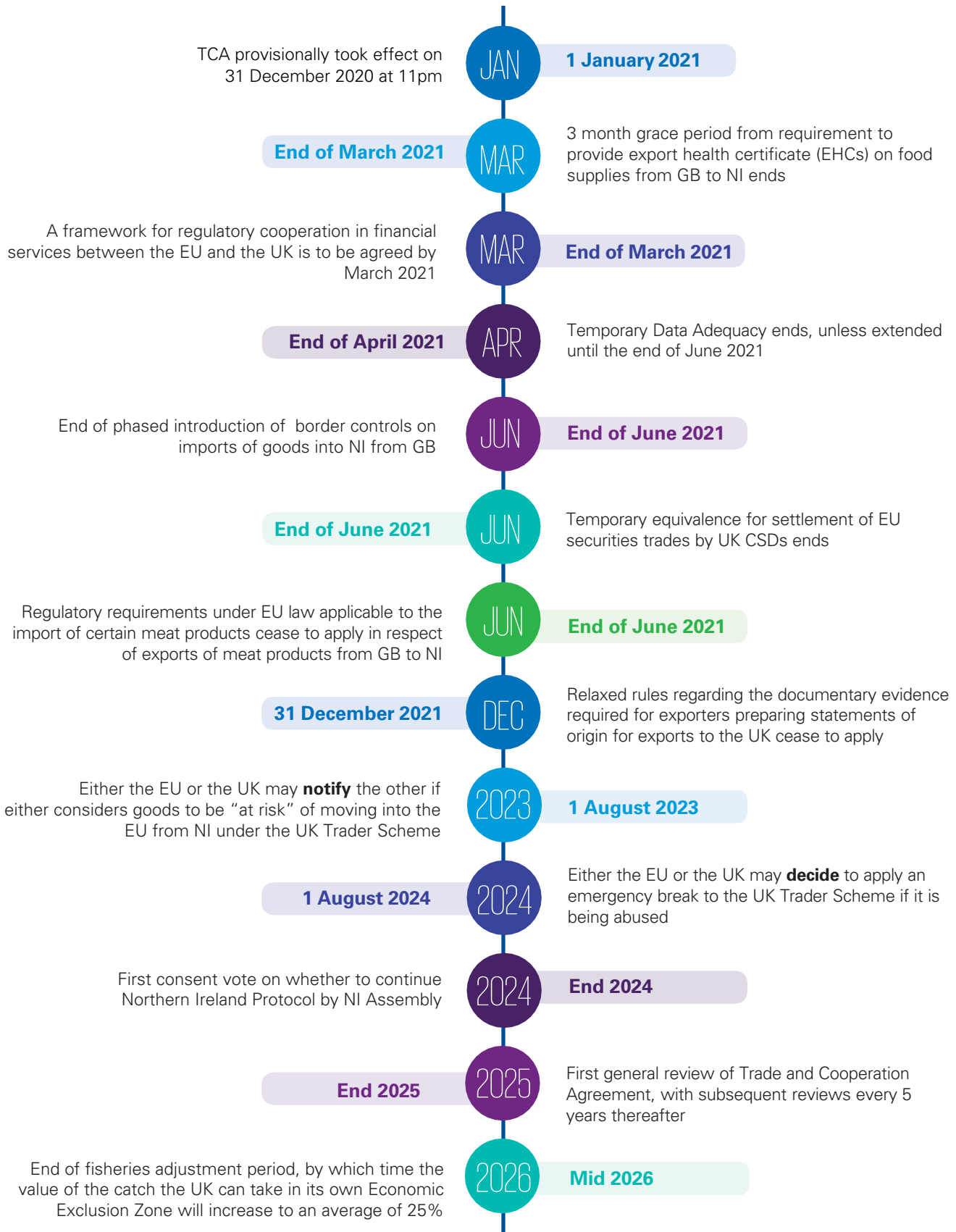
Planning framework to take advantage of the opportunities and respond to the challenges of Brexit.

This will require an understanding of what is in the deal, what is not in the deal, and keeping an eye on what changes emerge as the EU and UK move forward on different paths across a range of key topics such as:





Key aspects of the Deal: Key dates to be aware of





The Trade and Cooperation Agreement

The EU-UK Trade and Cooperation Agreement (TCA) covers a broad range of areas and establishes a new institutional framework for the operation and enforcement of the Agreement. However, it does not cover services, including financial services, to any great extent and there will undoubtedly be sectors such as fisheries which will be adversely affected by Brexit and where sectoral support will be required.

The TCA is underpinned by provisions ensuring a level playing field and mechanisms for avoiding and settling disputes between the EU and the UK concerning the interpretation and application of the TCA and supplementing agreements, with a view to reaching, where possible, a mutually agreed solution. These measures include an ability to impose unilateral rebalancing measures (Tariffs) in some instances.

The TCA also includes Most Favoured Nation Clauses such that if in the future either the UK or the EU agree to more preferential treatments with countries, the UK / the EU, as relevant, can generally claim equivalent treatment.

The EU and the UK have also agreed to create a joint body, called the Partnership Council, to efficiently manage the TCA, which will be co-chaired by a Member of the European Commission and a representative of the UK at ministerial level. The EU or the UK can refer to the Partnership Council any issue relating to the implementation, application and interpretation of the Agreement.

The TCA also provides for the establishment of a range of committees and working groups which appear to provide a framework for the resolution of disputes and for close cooperation between the UK and the EU across a broad range of areas into the future.

The TCA will be reviewed every 5 years, with the first general review taking place by end 2025. Either the UK or the EU can terminate the TCA with 12 months' notice.

Key elements of the TCA are discussed below.

Trade in goods

- The EU and UK have agreed to create a free trade area for goods with no tariffs or quotas on products as part of the larger economic partnership.
- The provisions in the TCA do not govern trade in goods between the EU and Northern Ireland, where the Protocol on Ireland and Northern Ireland included in the Withdrawal Agreement will apply, see page 14 for more information on the NI Protocol.
- Despite the agreement to create a free trade area, trading under TCA terms with zero tariffs and quotas will still be very different compared to the frictionless trade enabled by the EU's Customs Union and Single Market. In particular:
 - Rules of Origin will apply to goods in order to qualify for preferential trade terms under the TCA which can result in unexpected outcomes (see page 23 for more information on Rules of Origin);
 - All imports will be subject to customs formalities and documentation requirements and will need to comply with the rules of the importing party; and
 - All imports must meet EU / UK standards and will be subject to regulatory checks and controls for safety, health and other public policy purposes, including Sanitary and Phytosanitary standards in relation to the agri-food sector).

As we have seen in recent days, these technical barriers are not insignificant and have the ability to create significant disruption to supply chains.

Trade in services, including financial services & Investment

- The TCA between the UK and the EU contains limited provisions on services – more limited than those envisaged under the Joint Political Declaration made by the parties in October 2019. Trade in services between the UK and the EU will no longer be as liberal as was the case when the UK was a member of the EU Single Market.
- In the absence of further agreements between the UK and the EU on trade in services, the level of access to each other's markets may diminish over time as the EU Single Market further evolves and the UK charts its own path as a third country.





The Trade and Cooperation Agreement

(continued)

- Nonetheless, as noted by European Commission, the TCA “provides for a significant level of openness for trade in services and investment, going beyond the baseline provisions of the World Trade Organisation’s (WTO) General Agreement on Trade in Services (GATS)”.
- In this regard, the UK and the EU have agreed that neither party can
 - impose limitations on the number of services suppliers from the other party’s territory,
 - require a service supplier of the other party to establish or maintain an enterprise or be resident in its territory as a condition for the cross-border supply of a service, or
 - discriminate between their nationals.
- Both parties have also agreed they will afford to services and service suppliers of the other party treatment which is no less favourable than, in like situations, that available to its own services and services suppliers.
- It should be noted that the TCA does not cover financial services or audio-visual services.
- In practice, the ability to supply a particular service or invest in a certain sector will also depend on specific reservations set out in the TCA, which may be imposed on UK service suppliers when supplying services in the EU in some sectors and vice-versa.

Professional Qualifications

- The TCA provides that the *“professional bodies or authorities, which are relevant for the sector of activity concerned in their respective territories, may develop and provide joint recommendations on the recognition of professional qualifications to the Partnership Council”*.
- Hence there is a framework for mutual recognition of professional qualifications. Time will tell how extensive this turns out to be in practice.

More details are set out on pages 41 (services) and 37 (financial services)

Fisheries

- The TCA sets out new arrangements for the joint and sustainable management of shared fish stocks in EU and UK waters, *“while fully respecting the rights and obligations of independent coastal States as exercised by the Parties”*.
- It sets out new provisions on reciprocal access to waters as well new arrangements for sharing quotas. There will be a gradual phasing in of any changes of quota shares and provisions on access to waters. After a period of stability of five and a half years, during which the current rules will remain in place regarding reciprocal access, the TCA provides for annual consultations to establish the level and conditions of reciprocal access to each party’s Exclusive Economic Zones and territorial waters.

Dispute Resolution

- As noted above, the TCA provides for the set up of a Partnership Council and a range of Committees with representatives from the UK and the EU to deal with future disputes. The Partnership Council and these committees can enforce binding decisions on both the UK and the EU.
- In addition, the TCA provides for a Parliamentary Partnership Assembly, comprised of Members of the UK and EU Parliaments. The Assembly can make non-binding recommendations to the Partnership Council. The TCA also provides for civil society input on certain issues.
- The TCA also provides for time limited binding arbitration through an independent panel – both parties can appoint members to the panel.
- In addition, where one of the parties considers that the other has breached the terms of the TCA, parts of the TCA can be suspended.
- These general dispute resolution provisions do not apply to the level playing field elements of the TCA.

State aid and level playing field

- The TCA contains some level playing field provisions to ensure open and fair competition and to contribute to sustainable development.
- Both sides have agreed not to undercut current levels of protection in areas such as environmental standards and labour laws in a manner that would affect trade or investment between the EU and the UK.
- The TCA also sets out commitments to minimum international standards in the area of taxation, including provisions relating to tax transparency and harmful tax practices.
- The TCA includes a rebalancing mechanism to manage future divergence from the TCA. Both sides can diverge from the TCA but may also apply unilateral rebalancing measures in the case of significant divergences in the areas of labour and social, environment or climate protection, or of subsidy control, where such divergences materially impacts trade or investment and there is *“reliable evidence”* of same.
- Each side can also seek a review of the trade and other economic parts of the TCA to ensure an appropriate balance between the commitments in the TCA if rebalancing measures have been taken frequently or for more than 12 months.
- Both the EU and the UK have agreed to common principles on State aid – governed by a subsidy control mechanism (discussed below) replacing the application of EU State aid rules to the UK. The UK and the EU are bound by State aid restrictions in their bilateral free trade agreements as well as through the rules of membership of the WTO and commitments to the OECD in relation to harmful tax practices. Nevertheless, there may be increased scope for UK government activity in some areas that were previously restricted under the rules of the EU Single Market, including the expansion of regional or sectoral grants and tax incentives or holidays (possibly focused around the planned *“freeports”* programme).



The Trade and Cooperation Agreement

(continued)



Subsidies

- Both sides have agreed to substantive rules on the use of subsidies to ensure neither side can use trade-distorting subsidies. These rules are underpinned by agreed enforcement tools, including a dispute settlement framework. The EU and the UK have agreed that subsidies must respect a defined set of binding principles in order to be granted. Subsidies should only be granted if they are contributing to a well-defined objective of public interest, if there is a need for State intervention to remedy market failure, if there is no other measure available that would lead to the same effect and where the subsidy is proportionate when taking into account its negative effects on trade between the EU and the UK.
- These general principles are complemented by specific binding principles applying to key sectors, such as energy and financial services, or types of aid, such as subsidies relating to research and development (R&D).
- With the aim of transparency, the EU and the UK will publish information on an official website or a public database within 6 months of the granting of a subsidy and within 1 year for subsidies in the form of tax measures.

Law and regulation

- Regulated sectors will lose 'passporting' rights and businesses operating in regulated sectors such as pharmaceuticals and financial services are likely to need to secure EU registrations and/or approvals to continue operating, which may require establishing a presence in an EU Member State.

Digital trade, intellectual property, public procurement and small and medium enterprises (SMEs)

- The TCA contains provisions aimed at facilitating digital trade and ensuring the EU and the UK will cooperate on digital trade issues in the future, including on emerging technologies.
- The TCA sets out specific and detailed standards in respect of intellectual property rights, which are in addition to and which complement the existing Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) which has been agreed between all the member nations of the WTO.
- On public procurement, EU firms will be able to bid on UK public sector contracts on equal footing with UK firms and vice-versa.
- The TCA seeks to maintain favourable cross-border trade conditions for SMEs in the EU and the UK through specific provisions in the TCA in relation to SMEs. This includes provisions in relation to information sharing.

Energy and Climate Change

- Both sides have agreed to establish a new framework for future cooperation in energy.
- From 1 January 2021, the UK will no longer participate in the EU internal energy market and the UK will trade on third country terms with the EU.
- The TCA contains specific level playing field provisions in relation to the energy sector, as well as those applying more generally on social and environmental issues.
- The UK will no longer participate in the EU Emissions Trading System (ETS) but both sides will consider linking their respective carbon pricing systems to ensure the integrity of their systems are preserved.



The Trade and Cooperation Agreement

(continued)

- A new framework for cooperation in the fight against climate change will be established, including an agreement that the current level of climate protection in the EU and in the UK will continue to be upheld. This also includes cooperation in the development of offshore energy with a particular focus on the North Sea and reaffirmation by both sides on their ambition to achieve economy-wide climate neutrality by 2050. The UK will, however, define its own climate change policies and targets.
- There is a separate agreement between the UK and Euratom on the safe and peaceful uses of nuclear energy.

Aviation

- The TCA sets out new terms and conditions for market access, as well as arrangements for cooperation in the areas of aviation safety, security and air traffic management to ensure connectivity between EU and UK airports for passengers, goods and mail.
- UK air carriers wishing to fly under this Agreement will have to comply with certain conditions, such as holding a valid licence from the UK's competent authorities, having their principal place of business in the UK and being majority UK-owned and controlled.
- UK airlines will no longer be able to fly between two EU destinations.
- EU carriers will have to respect similar conditions on licences and principal place of business and continue to comply with EU requirements on EU/EEA/Switzerland majority ownership and control.
- As of 1 January 2021, the UK will no longer apply the EU's regulatory framework for aviation safety, and no longer participate in the European Union Aviation Safety Agency (EASA).

Road transport

- The TCA provides for quota-free point-to-point access for operators transporting goods by road between the EU and the UK. Without such an agreement, only operators holding European Conference of Ministers of Transport (ECMT) licences would be able to undertake such journeys.
- UK and EU hauliers will also be able to perform up to two additional operations in the other party's territory once they have crossed the border – this is less than the “free” movement that applied up to 31 December 2020.
- Full transit rights across the other party's territories are provided for in the TCA, meaning Ireland can continue to deliver goods to the EU via the UK.
- EU and UK hauliers will be bound by common road haulage sector standards under the TCA, such as those in relation to working conditions for drivers, qualification requirements and vehicle safety requirements.
- The TCA will also allow regular international bus services to continue to link the EU and the UK.





The Trade and Cooperation Agreement

(continued)

Social security coordination and short term visas

- The TCA contains a number of social security coordination measures aimed at protecting the entitlements of EU citizens temporarily staying in, moving to or working in the UK and vice versa after 1 January 2021.
- From 1 January 2021, UK nationals are allowed short-term visa-free visits of up to 90 days within any 180-day period in the EU, following an EU decision on this point. The UK has also decided to reciprocate for EU citizens. The EU decision is conditional on the UK continuing to provide for equal visa-free travel for short-term visits for EU citizens of **all** EU Member States, without discrimination between EU nationals.
- The free movement of Irish and UK citizens between the UK and Ireland continues to be governed by the Common Travel Area, which is expressly acknowledged in the TCA.
- The majority of social security benefits will be coordinated and protected between the EU and the UK, however, there are some exceptions, including family benefits, long-term care, special non-contributory benefits or assisted conception services.
- Further information on new immigration rules and social security cooperation is set out on pages 35 and 21 respectively.

Other areas of future cooperation

- There are further areas in which the EU and the UK agreed it was in their mutual interest to continue a close cooperation into the future, notably: health security, cybersecurity and information security.
- The UK will continue to participate in a number of EU Programmes, including Horizon Europe (Research), Euratom Research and Training, ITER fusion and Copernicus (satellite system). The UK remains a member of the European Space Agency.
- The TCA provides for cooperation between the EU and the UK on anti-money laundering and combating terrorist financing - confirming the EU and UK's continued commitment to Financial Action Task Force (FATF) standards.
- The TCA also contains a number of commitments in relation to peace, security and law enforcement, including continued UK participation in Prüm and UK cooperation with Europol and Eurojust.

Brexit Adjustment Reserve

In tandem with the TCA, on 25 December 2020 the European Commission put forward a proposed Regulation for a Brexit Adjustment Reserve to provide financial support to EU Member States worst affected by the UK leaving the EU. The proposed Regulation will now have to be adopted by the EU Parliament and the EU Council. The Reserve is intended to mitigate the adverse economic and social impacts of Brexit and will fund specific measures set up by the Member States to help businesses and economic sectors, workers, regions and local communities suffering from the impact of the end of Transition Period. The Brexit Adjustment Reserve will cover expenditure in any Member State over a period of 30 months, from 1 July 2020 to 31 December 2022.

The Brexit Adjustment Reserve will be implemented under shared management with the Member States and will most likely be implemented in Ireland through state agencies such as Enterprise Ireland and Bord Uisce Mhara. Member States will likely roll over existing systems already used for the management and control of cohesion policy funding or the European Union Solidarity Fund. Ireland's initial proposed allocation for 2021 is €1.051 billion or 25% of the fund.

The Reserve can be used to support measures such as:

- support to economic sectors, business and local communities, including those dependent on fishing activities in the UK waters;
- support to employment and reintegration in the labour market of citizens returning from the UK, including through short-time work schemes, re-skilling and training;
- ensuring the functioning of border, customs, sanitary and phytosanitary and security controls, fisheries control, certification and authorisation regimes, communication, information and awareness raising for citizens and businesses.

How can businesses avail of the Reserve?

Businesses should analyse what parts of their business will be significantly impacted by Brexit. Based on that analysis, identify projects that require substantial funding (>€1M) that may be eligible for funding from the Reserve. Thereafter, consider approaching Government agencies with the projects and lobby for funding.

More detailed insights on the impact of the TCA on VAT & Customs, People & Immigration, Data, Services, Financial Services, Taxation and Company Law are set out in the following pages.



The Withdrawal Agreement

- The maintenance of the Common Travel Area between Ireland and the UK.
- Regulatory alignment on agricultural products and industrial goods (note that this does not extend to services).
- Northern Ireland should benefit from both membership of the EU's Customs Union and membership of the UK's Customs territory.
- Northern Ireland should remain part of the UK VAT area but EU VAT rules concerning goods will continue to apply in NI.
- An all island Single Electricity Market will be maintained.

The above elements of the Withdrawal Agreement are designed to achieve frictionless trade on the island of Ireland and maintain North-South cooperation.





The Protocol on Ireland/Northern Ireland ("The Protocol")



On 24 December 2020 the [EU-UK Trade and Cooperation Agreement \(EU-UK TCA\)](#) was agreed and became operational from 1 January 2021. This followed the EU-UK Joint Committee's formal endorsement on 17 December 2020 of all [decisions](#) and other practical solutions related to the Protocol and the implementation of the Withdrawal Agreement which also became operational from 1 January 2021.

Notwithstanding the wider EU-UK TCA on 24 December 2020, the Protocol is the international legal agreement that will govern trade in goods in relation to Northern Ireland (NI) for at least the next 4 years. The legal text included in the December [decisions](#) and the guidelines in the December [Command Paper](#) set out the main operational aspects of the Protocol, for example, whether goods are "at risk" of moving into the EU and subject to EU tariffs. Whilst the EU-UK TCA provides the potential for zero tariffs and zero quotas on trade in goods between the EU and the UK, including on goods moving into NI from Great Britain (GB) and Rest of World (ROW), this will depend on a number of criteria, including complex rules of origin requirements in some cases.

The Protocol which was agreed as part of the Withdrawal Agreement seeks to avoid a hard border in Ireland, protect the EU Single Market and maintain NI's place in the UK internal market. It provides that whilst NI remains part of the UK VAT area and Customs territory, it also has access to the EU's Single Market. To achieve this NI is required to continue to apply EU Customs rules, Single Market rules on goods coming in and out of NI, as well as applying EU VAT rules on goods traded in NI.

A number of late derogations were agreed between the EU and the UK in December 2020, as the UK was not fully ready for the end of the Transition Period, in particular, regarding the import of food products from GB into NI. For this reason, the EU and the UK agreed a number of time limited derogations (i.e. grace periods) in a number of areas, such

as Export Health Certificates, import of meat products, medicines and a number of other areas. Although there will be a period of time required for businesses and Government agencies to fully adjust to the new trading rules and a number of grace periods have been agreed to ease this transition, the Protocol is now legally effective and fully operational. In this document we have focused on the main (but not all) areas affecting trade in goods for NI. This includes:

- i. Unfettered access to the GB market,
- ii. No tariffs on internal UK trade, (whilst also allowing for checks on goods "at risk" of moving through NI into the EU),
- iii. Further support for trade from GB to NI, including grace periods,
- iv. VAT

We have also included some comments around the new rules of origin conditions set out in the EU-UK TCA and how we see these interacting with the "at risk" rules.



The Protocol on Ireland/Northern Ireland ("The Protocol") (continued)

1. Unfettered access NI to GB

- The Protocol provides for unfettered access for NI goods into the UK internal market. The EU-UK TCA does not include any provisions regarding unfettered access as this is a UK internal market matter. The previously issued legislation and [HMRC guidance](#) on unfettered access sets out the rules that will apply.
- The December 2020 [Command Paper](#) includes some details on how unfettered access to the GB market will continue to be available to NI businesses. This will include a light touch approach in a Phase 1 period (which is expected to last until the second half of 2021) during which Qualifying NI Goods (QNIG) will be able to be placed on the GB market in cases where the goods move either directly from NI, or indirectly through the Republic of Ireland (ROI), for example, via Dublin Port or Rosslare. QNIG for the purposes of unfettered access will cover goods that are in free circulation in NI during this Phase 1 period. The legislation to enact this is included in the [Customs \(Northern Ireland\) \(EU Exit\) Regulations 2020](#) which forms part of the overall [Taxation \(Post-Transition Period\) Act 2020](#) and became legally effective from 1 January 2021. Also included in that Act is anti-avoidance legislation to prevent traders re-routing goods through NI simply to avoid tariffs and other customs requirements and this also applies from 1 January 2021. However, if moving goods via NI is already a normal commercial route used by businesses, including ROI businesses, they should be able to continue to use the NI route into GB to obtain unfettered access during the Phase 1 period.
- In the longer term the UK Government intend that unfettered access should only be available to genuine NI businesses and as such a longer term framework of rules (Phase 2) is proposed for later in 2021 which will aim to identify "qualifying traders" as they check into ports and airports through an auto-enrolment system, so that their goods can move into GB without further customs or tariffs. We will have to wait for the longer-term criteria to be set out, however, it is likely that an NI establishment test will need to be satisfied.
- It has been agreed that businesses will not be required to submit Export and Exit Summary Declarations for most goods when moving from NI to GB. However, the relevant data will be collected by alternative means, for example, data collected by ferry companies through other systems. In only limited cases will businesses be required to provide customs declarations for NI to GB movements, relating to international obligations for high risk goods and for goods not in free circulation (i.e., goods moving under special procedures including transit movements).



2. No tariffs on internal UK trade (checks on goods "at risk" of moving through NI into the EU and the new rules of origin tests under the EU-UK TCA)

- The EU-UK TCA does not remove the requirement to apply the "at risk" criteria set out in the Protocol and specifically the formal agreement reached between the EU and the UK in the December [decisions](#) on "at risk" goods still applies. As such, when goods enter NI from GB, although the EU-UK TCA provides for zero tariffs on trade between the EU and UK, this will be dependent on the complex rules of origin requirements being met. If a zero tariff preference can be claimed under the EU-UK TCA for goods moving from GB to NI, the goods can be declared as not "at risk". However, if a zero tariff preference cannot be claimed under the EU-UK TCA, businesses will need to consider the at risk rules to determine if an EU tariff is payable on goods moving from GB to NI. Whilst the EU-UK TCA does not cover goods that are imported directly into NI from ROW countries, the "at risk" rules will still be applicable for ROW imports, as will any free trade agreement that the UK has with that ROW country. HMRC have provided detailed Guidance on the "at risk" test for both GB to NI and ROW to NI movements, available [here](#).
- The Protocol set out a two-stage test which provides that goods would be classed as at risk unless the goods are,
 - a) not subject to "commercial processing" in NI, and
 - b) not "at risk" of subsequently being moved into the EU.

The agreement endorsed by the EU and UK on 17 December 2020 in respect of "at risk" goods was reached to support tariff free internal UK trade, where certain criteria can be met. This agreement contained provisions for both elements of the two-stage test, i.e. the commercial processing element and the at risk of subsequently moving into the EU element. We cover the main "at risk" issues and also the rules of origin implications for finished goods that are not subject to commercial processing under section a) below. For goods subject to commercial processing in NI see section b) as further "at risk" criteria needs to be considered.



The Protocol on Ireland/Northern Ireland

("The Protocol") (continued)

a) A good will not be considered to be "at risk" of entering the EU Single Market if:

1. In the case of goods brought into Northern Ireland from another part of the UK by direct transport,

- i. the duty payable according to the European Union Common Customs Tariff (EU CCT) is equal to zero, (which also now includes where it is zero due to the EU-UK TCA), or
- ii. the importer is a recognised under the UK Trader Scheme ("trusted trader"), who is importing that good for its sale to, or final use by, end-consumers located in the UK (including where that good has been subject to non-commercial processing as defined in Article 2 of the December 2020 decision before its sale to, or final use by, end-consumers). The areas included as non-commercial processing for these purposes is commented on towards the end of this section below.

2. In the case of goods brought into NI by direct transport from outside the UK or EU,

- i. the duty payable according to the EU CCT is equal to or less than the duty payable according to the customs tariff of the UK, or
- ii. the importer is a trusted trader who is importing that good for its sale to, or final use by, end-consumers located in NI (including where that good has been subject to non-commercial processing before its sale to, or final use by, end-consumers), and the difference between the duty payable according to the EU CCT and the duty payable according to the customs tariff of the UK is lower than 3% of the customs value of the good.

The above "at risk" tests are complicated and the rules of origin rules under the EU-UK TCA, applicable to GB goods entering NI, will add further complexities for certain products and industries. However, it should be noted that where goods moving from GB to NI can qualify for a zero tariff under the EU CCT, or for a zero tariff preference under the EU-UK TCA, they can enter NI tariff free without the business needing to use the trusted trader scheme to declare the goods not "at risk". The test of whether goods are "at risk" is determined at the point at which the goods move into NI into free circulation. Whether those goods are able to claim a zero tariff under either the EU CCT, or under the EU-UK TCA at the time of import is the key issue for businesses. We discuss further in a later section below the EU-UK TCA rules of origin criteria and the interaction with the at risk test.

The UK Trader Scheme

- Businesses will be able to apply to join the new UK [Trader Scheme](#) (for "trusted traders") if they:
 - Are established in NI, or established in GB and

have an indirect representative in NI (which could be the trader support service), and have a fixed place of business in NI where records are available and where goods are sold to, or provided for final use by, end consumers,

- Have no history of serious customs or tax infringements,
- Have sufficient control of their operations and record keeping capability to ensure they can provide evidence to support their not "at risk" declarations.

- As the criteria set out above to join the UK Trader Scheme would make it difficult for GB suppliers that do not have NI operations with a fixed establishment to avail of the UK Trader Scheme, it was decided at the end of December 2020 to provide more flexible arrangements for a short period to enable GB suppliers to meet the criteria and provide time for contractual terms to be restructured.
- Although a business may have been authorised under the UK Trader Scheme, it should be recognised that the business will still be required at the time a consignment of goods is imported into NI to self-certify on the customs import declaration whether that consignment meets the specific not "at risk" test, meaning that the goods will not be subject to commercial processing and will not be moved on into the EU.
- So although the UK Trader Scheme does not give businesses a blanket exemption that all of their goods are not "at risk", it should assist those businesses, for example, retailers, including supermarkets in NI, that only supply their goods to consumers in NI and do not carry out any processing on the goods in NI. These businesses should, in the main, be able to avail of the UK Trader Scheme and declare on their customs import declarations that most if not all of their goods are not "at risk" and not subject to an EU tariff.





The Protocol on Ireland/Northern Ireland ("The Protocol") (continued)

- One other benefit of the UK Trader Scheme is that eligible businesses will not need to complete origin certification; and if goods cannot qualify for tariff-free trade under the rules of origin requirements set out in the EU-UK TCA, they could still be traded tariff-free under this agreement by those businesses within the UK Trader Scheme who can declare that their goods will be used or sold in the UK and not in the EU.
 - **How does the TCA (including rules of origin criteria) impact on the "at risk" test for goods that fall into the above category (i.e., finished goods not subject to commercial processing in NI)?**
- HMRC have issued some [detailed guidance](#) in respect of how the rules of origin tests apply. The rules are clearly very complex and at this stage these do not specifically deal with NI and how the rules interact with the "at risk" test. HMRC are currently working on further specific guidance on this to provide NI specific examples and HMRC have indicated this will be available shortly.
- To determine if an EU tariff is payable, businesses will have to apply the "at risk" test, and for goods entering NI from GB, depending on the product type and its origin, the rules of origin tests may also apply.
- For direct imports of goods from ROW into NI, the rules of origin under the EU-UK TCA are not relevant. If there is a Free Trade Agreement between the UK and the 3rd country, the rules of origin in that FTA would be relevant. However, the "at risk" tests still apply.
- For goods moving into NI from GB (**and note in this section we are referring to finished goods not subject to commercial processing in NI**), the first thing to do would be to check if the EU tariff on that product would be zero under the EU CCT. If this does not provide for a zero tariff, then check whether a zero tariff preference can be claimed under the EU-UK TCA. To claim the zero tariff under the EU-UK TCA, this requires goods moving from GB to NI to meet UK origin requirements. Unless goods are wholly obtained in the UK, more complex rules of origin requirements apply as set out in the EU-UK TCA and these will vary depending on the specific product rules. If the zero tariff can be applied under either of these two categories then the goods should be declared as not "at risk" and no EU tariff should apply.
- As a general rule, goods are regarded as of origin to a particular country where;
 - They have been **wholly obtained** in that country (e.g. plants grown and harvested there, animals born and raised there, raw materials, etc.).
 - They have been **produced exclusively from originating materials** (e.g. yoghurt produced from EU milk and fruits). There can be different levels of tolerance for non-originating goods.
 - The goods have been produced from materials which do not originate in the country but which were **sufficiently processed** in that country to attribute origin.
- So for goods that move from GB to NI that have either a zero tariff under the EU CCT, or claim the preferential zero tariff rate under the EU-UK TCA, then it can be declared as not "at risk" and therefore no EU tariff applies.
- Alternatively, if goods that move from GB to NI that do not meet the zero tariff requirements above can be declared under the UK Trader Scheme as being only used or sold in either NI or GB, then the goods can be declared as not "at risk", irrespective of the origin of the goods.
- A strict application of the Protocol would have meant that all GB and ROW goods moving into NI that are subject to any processing in NI would have been deemed to be "at risk" goods. However, the agreement endorsed on 17 December 2020 means that a number of specified processing activities in certain sectors (referred to as "**Approved Processing Sectors**") will qualify for a derogation that their activities can be classified as "non-commercial processing". The specific areas covered by the derogation are as follows:
 - the sale of food to end consumers in the UK,
 - construction, where the processed goods form a permanent part of a structure that is constructed and located in NI by the importer,
 - direct provision of health or care services by the importer in NI,
 - not for profit activities in NI, where there is no subsequent sale of the processed good by the importer,
 - the final use of animal feed on premises located in NI by the importer.



The Protocol on Ireland/Northern Ireland ("The Protocol") (continued)



- So the specific activities carried out in these specific sectors can be classed as “non-commercial processing” but clearly this is not providing a blanket derogation for whole sectors. It should also be highlighted that businesses that meet the criteria set out in the specific Approved Processing Sectors, may still be subject to the additional “at risk” tests set out above under the UK Trader Scheme. This means that unless the EU tariff rate is zero (for goods imported from GB), or the EU tariff rate is equal to or less than the UK tariff (for goods imported from ROW), businesses that carry out non-commercial processing will still need to meet the authorisation requirements under the UK Trader Scheme, i.e., that goods imported from GB are for sale to, or final use by, end-consumers located in the UK, or in the case of the importation of ROW goods, they are sold or to be used in NI (and additionally, the UK tariff rate must not be more than 3% lower than the EU tariff).
- The non-commercial processing derogation also applies to small businesses with turnover of less than £500,000 (who are able to carry out any type of processing). However, in this case the additional “at risk” criteria set out above will also need to be met, so again this is not a blanket derogation for small businesses with turnover below £500,000.

b) What about goods subject to “Commercial Processing” in NI?

- As outlined at the start of this “at risk” section, the Protocol set out a two-stage test, one of which is that for goods to be declared not “at risk” they must not be subject to “commercial processing” in NI. Essentially

this means that all goods imported into NI from GB or ROW that are subject to commercial processing in NI will automatically be classed as “at risk” goods (with the exception of the two categories mentioned above i.e., the non-commercial processing by the approved sectors and processing by businesses with turnover below £500,000). For all other processors in NI, their goods will be “at risk”.

- However, goods being “at risk” does not necessarily mean that an EU tariff will be payable, for example, where the goods are used for commercial processing in NI and at the time of import into NI, either a zero tariff applies under the EU CCT, or where a zero tariff preference can be claimed under the EU-UK TCA (to be reported on the customs import declaration as applicable). In either case an EU tariff would not be payable, even though technically the goods are “at risk”. In other words, where the zero tariff rate can be applied to the goods on import into NI, this will mean that no EU tariff applies even for goods that will subject to commercial processing in NI. However, it should be remembered that to claim the zero-tariff preference under the EU-UK TCA, the rules of origin conditions will also need to be met. For example, if goods imported from GB that are to be commercially processed in NI are of UK origin under the rules of origin criteria in the TCA, these should not be subject to an EU tariff even where the NI processed goods are sold on into the EU. However, for goods that are to be commercially processed in NI that are not of UK origin under the TCA and a zero tariff cannot be applied, the EU tariff would apply.



The Protocol on Ireland/Northern Ireland ("The Protocol") (continued)

- For those businesses that carry out commercial processing on goods in NI that give rise to an EU tariff payment, these payments may be reimbursed where it can subsequently be shown that the goods have been sold to, or used in NI or the UK, and not moved into the EU. HMRC have indicated that they are still working on the reimbursement scheme and how applications will be submitted and payments made.
- It should also be noted that a business may be eligible to claim a de minimis tariff waiver which may be granted to an undertaking where the EU tariff that is due does not exceed €200,000 in total over three fiscal years. [Guidance](#) has been published on the Gov.uk website setting out the criteria for claiming under the waiver scheme. Whilst this may be of some assistance to some businesses, for large importers the de minimis amount is likely to be exceeded.
- Manufacturing businesses that cannot avail of a zero-tariff on import of goods into NI, may wish to consider using certain customs procedures to mitigate or defer payment of tariffs on "at risk" goods which would otherwise require payment of an EU tariff at the time of import into NI. A customs procedure known as Inward Processing Relief (IPR), which suspends the payment of any tariffs at the point of import, may provide a business with the time and flexibility to defer the duty point until the time of sale and release from IPR on those goods that are actually moved on to the EU and therefore subject to the EU tariff only at that point. The remaining products if sold into the UK market would not be subject to an EU tariff. This may be a viable option for some manufacturing businesses who are faced with a substantial up-front EU tariff liability that may not be available for reimbursement (if at all) for many months after it has to be paid.
- Clearly the "at risk" goods rules will be complex to operate for many businesses and the additional rules of origin criteria set out under the EU-UK TCA will only add to this complexity.

Customs Declarations

- Customs declarations and safety and security declarations will be required on imports of goods from GB into NI from 1 January 2021. This will bring additional compliance requirements and costs for businesses, however, the Trader Support Service (TSS) which was launched in September 2020 and will run for a period of at least two years will support businesses to file declarations. Businesses have been strongly advised to register for the [TSS](#) and decide if it wants to use this service to complete customs declarations. Alternatively, businesses may decide that they wish to make their own arrangements to submit the customs declarations themselves, or to employ a customs agent to do so from 1 January 2021. The TSS has been providing on-going education to traders for the past few months and also businesses that are registered with TSS will automatically receive an XI EORI number. NI Businesses will require an XI EORI to export and import goods with rest of world countries and also to import goods from GB into NI, as the importer will need to report this on the customs import declaration.





The Protocol on Ireland/Northern Ireland ("The Protocol") (continued)



3. Further supporting trade from GB to NI

- The Command Paper sets out a commitment to protecting the special status of agri-food movements from GB to NI. It has now been formally agreed that specific solutions will apply for food supply chains as it is recognised that the UK is not fully ready for the end of the Transition Period.
- This will provide a three-month grace period until 1 April 2021 from the requirement to provide Export Health Certificates (EHCs) as long as strict conditions are met.
- It has also been agreed to allow the import of certain chilled meats from GB to NI for a period of six months only. Strict conditions will apply during this period, including that the products must be fully aligned with corresponding EU legislation, that they are subject to checks and controls when entering NI, and that they will only be made available to end-consumers in NI.
- Supplies of goods between NI and GB will be exports and imports, although the UK Government will in most cases require the supplier to continue to account for the VAT as they do now. The UK has published a [VAT Policy](#) Paper and related guidance setting out how it proposes to operate VAT in respect of trade in goods between GB and NI; and the relevant legislation has been included in the recent [Taxation \(Post Transition Period\) Act 2020](#).
- Further changes to certain VAT rules also apply from 1 January 2021 in respect of supplies of services as a result of the UK exiting the EU. As services are not covered under the Protocol, these rule changes related to services will apply to the whole of the UK including NI. In particular, rules will change relating to the place of supply for certain B2C supplies, as well as changes under "use and enjoyment" rules. Additionally, UK (including NI), financial services businesses that provide VAT exempt financial services to customers located in EU countries may also be able to significantly improve their existing VAT recovery position after the end of the Transition Period. A summary of some of the main issues for NI businesses to be aware of can be viewed in our recent [KPMG VAT article](#).

It has also been announced that the Government will provide new funding to develop an end-to-end digital system known as the Movement Assistance Scheme (MAS), to enable agri-food goods that require certain sanitary and phytosanitary (SPS) controls and Export Health Certificates (EHCs) to move in a streamlined way after 1 April 2021. This may provide a simplified means to deal with requirements relating to EHCs and the costs will be met under the new MAS.

4. VAT

- The EU-UK TCA does not cover the specific new VAT rules that apply to NI. These rules are covered by the NI Protocol and mean that the VAT rules applying to trade in goods relating to NI will in some cases significantly change with additional complexities for businesses.
- The VAT Policy Paper also highlights that the second-hand margin scheme will no longer apply to goods brought from GB into NI to be sold in NI. VAT will have to be paid on the full sales price rather than the margin. This issue is of particular concern to the second-hand car industry in NI. This is noted in the December 2020 Command Paper which indicates that the UK Government are looking at ways to deal with the issue, however, as yet the issue is unresolved.



The Brexit Omnibus Act 2020 enacted in Ireland

On 10 December 2020 the *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020* (or the Brexit Omnibus Act 2020) was signed into law by the president.

The Act seeks to preserve continuing access to certain priority services, benefits and reliefs relating to the UK that might otherwise be denied when the Brexit Transition Period ended on 31 December 2020. It is understood that it will apply notwithstanding the Trade and Cooperation Agreement agreed between the EU and the UK on 24 December 2020.

Taxation	Healthcare	VAT & Customs					
<p>A range of reliefs for arrangements previously dependent on the UK's EU status are preserved for individuals including the artist's exemption, charitable donations, third level student fees, UK authorised health insurers, the taxation of certain pension products, seafarers' and fishers' allowances, sportspersons reliefs, disposals of certain assets and investments, mortgage interest relief and certain compensation payments.</p> <p>EU equivalent treatment is afforded to certain bodies such as stock exchanges, stock clearing intermediaries and other bodies to allow continuing access to Irish reliefs dependent on EU status, e.g. exemption from stamp duty for UK clearing houses.</p> <p>Preservation of Capital Acquisitions Tax (CAT) agricultural relief to UK property and certain capital gains tax (CGT) reliefs, e.g. UK investments can be taken into account in calculating reliefs for venture capital fund managers, continuation of the 7 year CGT exemption on certain disposals of UK land.</p> <p>Shares in UK companies / held by a UK trust can continue to be eligible for certain reliefs in respect of share schemes, e.g. in relation to clog shares and the Key Employee Engagement Programme (KEEP).</p> <p>A number of corporation tax reliefs are preserved, including group tax loss eligibility for Irish branches of UK companies, continued reliefs for certain charges on income, continued exclusion from scope of close companies' measures for loans to UK participants as well as continued eligibility of UK R&D activities in determining the amount of qualifying expenditure for the R&D tax credit.</p> <p>Continued application of a range of reliefs for corporate reconstructions and amalgamations.</p>	<p>Maintaining commitments derived from the Common Travel Area (CTA) including access to emergency, routine and planned healthcare.</p> <p>Preserve eligibility for individuals with full eligibility for public healthcare, access to necessary healthcare during a temporary stay, reciprocal access to healthcare not available in the other State and healthcare reimbursement arrangements as well as ability to raise charges for UK healthcare costs.</p> <tr> <th data-bbox="464 1122 762 1178">Student Support</th> <td data-bbox="464 1184 762 1373"> <p>Enables the continuation of grant and other supports for Irish students studying in the UK and UK students studying in Ireland, subject to ministerial discretion.</p> </td> </tr> <tr> <th data-bbox="464 1379 762 1435">Social Welfare</th> <td data-bbox="464 1442 762 1675"> <p>Preserve recognition of UK social security contributions in line with commitments derived from the CTA. These extend to cover entitlements to a range of social welfare benefits including pensions.</p> </td> </tr> <tr> <th data-bbox="464 1682 762 1738">Employees and Immigration</th> <td data-bbox="464 1744 762 2177"> <p>Protect employee wage related rights in the event of insolvency of a UK employer. Amend a range of technical provisions related to immigration clarifying the rights of British passport holders in Ireland. While passport checks within the CTA are not required, on a practical level passports are checked to ensure that someone has the right to enter the CTA. including to ensure no passport checks in the CTA.</p> </td> </tr>	Student Support	<p>Enables the continuation of grant and other supports for Irish students studying in the UK and UK students studying in Ireland, subject to ministerial discretion.</p>	Social Welfare	<p>Preserve recognition of UK social security contributions in line with commitments derived from the CTA. These extend to cover entitlements to a range of social welfare benefits including pensions.</p>	Employees and Immigration	<p>Protect employee wage related rights in the event of insolvency of a UK employer. Amend a range of technical provisions related to immigration clarifying the rights of British passport holders in Ireland. While passport checks within the CTA are not required, on a practical level passports are checked to ensure that someone has the right to enter the CTA. including to ensure no passport checks in the CTA.</p>
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VAT & Customs	The introduction of postponed VAT accounting which will result, subject to certain conditions, in VAT due on importation of goods from the UK and other non-EU countries no longer being payable at the time of import for VAT registered persons but instead at the time of submission of the importer's VAT return. For importers with full VAT recovery, no payment of import VAT should arise where the relief is applied. The application of the relief is not mandatory but if applied at import and VAT is not appropriately included in the relevant VAT return there can be severe penalties so it will be important to ensure the relief is operated correctly. Additional requirements, such as compliance with the customs legislation and tax rules, are being introduced to the VAT56 authorisation scheme, which allows a zero rate of VAT to apply to the purchase of certain goods and services by Irish VAT registered businesses. The VAT Retail Export Scheme is being amended such that UK based travellers may only avail of the scheme in respect of purchases of €75 or above. Under the Protocol on Ireland / Northern Ireland, EU VAT law governing goods, but not services, and EU excise law applies to and in Northern Ireland from the end of the Brexit Transition Period. The Act amends Irish VAT & excise legislation where necessary to include Northern Ireland in the definition of EU Member State or European Union as appropriate.
Social Security	From 1 January 2021, the UK is no longer an EU Member State which will have implications for social security coverage. The Act ensures that the 2019 Convention on Social Security between Ireland and the UK can continue to apply. The Convention ensures continuity of the Common Travel Area social protection arrangements as well as providing for contribution arrangements for UK and Irish citizens who work across Ireland and the UK. The 2019 Convention on Social Security between Ireland and the UK came into effect on 31 December 2020. Further details on social security rules applying from 1 January 2021 are set out on page 35
Transport	Recognition of a range of operators and qualifications to preserve cross border operation of bus and coach passenger services.
Financial Services	**Settlement finality:** Temporary preservation of certainty in settling a range of transactions in shares, securities and other financial instruments including mutual recognition and access to existing clearance systems in line with EU contingency measures. This will apply for a period of 18 months after the Transition Period for UK Central Counterparties (CCPs) and until 30 June 2021 in the case of UK Central Securities Depositories (CSDs). **Insurance contract continuity:** Measures to ensure Irish policy holders continue to benefit from insurance contracts underwritten by UK insurers for at least 15 years even if they are no longer permitted to conduct new EU business. A number of insurance sector tax changes related to preserving the ability to impose levies on various insurance premia.



The Brexit Omnibus Act 2020

enacted in Ireland (continued)

What the Act doesn't cover

A number of important taxation matters will change as a result of the UK's departure from the EU and are not covered in the Omnibus Act. Some of these are summarised on this page, together with advice on intragroup payments from other countries to the UK.

Taxation measures not dealt with in the Act

Taxation of Corporate Groups

The Act does not generally seek to preserve reliefs that are based in EU law, either Directives or decisions of the European Court of Justice. As such a number of important provisions will no longer apply in respect of transactions involving the UK. These include, but are not limited to, the EU Parent Subsidiary and Interest & Royalties Directives, the EU Mergers Directive, certain tax credits, including notional credits, for taxes paid in the UK, e.g. under schedule 24, paragraph 9I of the Taxes Consolidation Act 1997.

In some instances, Irish tax legislation provides similar reliefs to double tax treaty residents, e.g. withholding taxes on dividends and interest and therefore the impact may be minimal, subject to certain conditions.

Financial Services Taxation

A number of important reliefs / tax treatments in the financial services sector that are dependent upon EU Directives or the EU residence status of counterparties have not been preserved in the Act. These include, but are not limited to, provisions relating to the Undertakings for the Collective Investment in Transferable Securities (UCITS) Directive, the Alternative Investment Fund Managers Directive (AIFMD) and the tax treatment of Irish Real Estate Investment Trusts (REITs).

A number of reliefs from restrictions on interest deductions on "specified mortgages" in section 110, Taxes Consolidation Act 1997 may no longer apply. For example, there are exclusions from the restrictions where the securitisation is put in place by an EU/EEA credit/financial institution or such an institution outside of the EEA which is recognised by the EC as "equivalent". In addition, there are reliefs where the profit participating interest is paid to EU/EEA pension funds, or to EU/EEA residents which carry on genuine economic activities.

A complex series of reliefs apply in respect of Irish Real Estate Investment Fund (IREF) withholding tax measures introduced originally as part of Finance Act 2016. Typically, reliefs are confined to EEA equivalents of Irish pension funds, Personal Retirement Savings Accounts (PRSAs), investment undertakings and life assurance companies, etc. that are not Personal Portfolio IREFs. Where such investor entities are resident in the UK, they will no longer satisfy the necessary conditions.

UK branches and Irish life assurance companies operating on a freedom of services basis will need to have non-resident declarations from UK resident policyholders in order to be able to avail of the exclusion of gains on chargeable events.

Information exchange

The UK will no longer be party to EU information exchange regimes, e.g. Country by Country Reporting, the exchange of financial account information, EU Mandatory Disclosure, etc. As noted on page 46, the UK will continue to require reporting of arrangements falling under Hallmark D of the EU's Mandatory Disclosure Regime. It is understood that this is on the basis that the UK considers that it has committed to the mandatory disclosure of such arrangements at OECD level. As the UK will continue to be part of OECD exchange mechanisms there should be largely no impact on the exchange of most other information, e.g. Country by Country Reporting.

International Taxation considerations

Intra-group payments

In many EU countries (including but not limited to Germany, Luxembourg, Portugal and Italy) relief from withholding taxes on interest, royalties or dividends is improved by EU directives, e.g. the Parent-Subsidiary directive. Payments from entities in such countries to UK resident entities from 1 January 2021 may be subject to withholding taxes (possibly at a relatively low rate if a double tax treaty applies).

Some countries have taken steps to address these issues at a national level. For example, the UK and Austria have recently agreed conditions under which withholding tax will be relieved on dividends.

Businesses should assess now (if they have not done so already) whether this will impact them and whether they can take steps to mitigate any impact



VAT & Customs: Rules of origin



The Trade and Cooperation Agreement means that the EU and the UK have duty and quota free access to each other's markets – however, it is critical to understand that the agreement only applies to goods that meet certain conditions, specifically the rules of origin set out in the agreement.

Rules of origin can be complex, and it is important for businesses to fully assess how these rules impact on their trade in goods between the EU and Great Britain. Failure to properly determine origin can result in under or overpaying customs duties and potentially lead to corrective action being taken by customs authorities.

If you export goods to the UK, you should establish whether the goods qualify as EU origin in order for preferential tariffs to apply under the agreement. You should also be in a position to provide a declaration to your customer that the goods so qualify. If you import goods from the UK, you should ensure that you have evidence to support any claim made that the goods qualify as UK origin in order to avoid the payment of tariffs.

What does origin mean?

The origin of goods is not determined by where goods are shipped from. Rather "origin" is a customs term which describes the economic nationality of a product.

Under the agreement, goods are generally regarded as being either of EU or UK origin where;

- They have been wholly obtained in either the EU or the UK (e.g., plants grown and harvested in the EU/UK, animals born and raised EU/UK, raw materials extracted, etc. are considered to be of EU/UK origin as the case may be).
- They have been produced exclusively from originating materials (e.g. yoghurt produced in the EU from EU milk and fruits).

- The goods have been produced from materials which do not originate in either the EU or the UK but which were sufficiently processed in either territory to attribute UK or EU origin.

If a product is not "wholly obtained" in a country, it is necessary to look at the origin rules that are specific to that product in order to determine whether it can avail of reduced or zero tariffs under the agreement. For these purposes, it is important that the correct customs classification of the product is available in order to identify the specific origin rule to be applied under the agreement.

If a product does not automatically qualify for preferential origin under the product specific rules, additional rules can often assist. For instance, the **tolerance rule** may allow for the inclusion of a percentage (for instance 10% of the product's ex works price, 15% of the weight of the product) of non-originating product to be included.

We have set out below some examples of how Rules of Origin under the TCA can impact on businesses:

- Often UK sourced flour includes flour produced from Canadian or US wheat where the weight of US/Canadian grain used exceeds 15% of the flour. As a result the flour, even if largely produced in the UK, cannot avail of zero-tariffs under the agreement and instead duty is payable on import into Ireland.

Spanish oranges are processed into marmalade in the UK and imported into Ireland: provided the weight of non-EU/UK sugar used in the production of the marmalade does not exceed 40%, the marmalade qualifies for preferential tariffs



VAT & Customs: Rules of origin (continued)

- An Irish company imports goods from China into Ireland and subsequently sells the goods to the UK. Duty is payable on the importation of the goods into Ireland. In addition, as the goods have not undergone any processing in Ireland the goods do not qualify as EU origin – duty is therefore also payable on importation of the product into the UK.

It is important to note the limits of the preferential origin relief. If an Irish business sources product from the UK that was originally produced in the EU and was distributed from the UK (and not sufficiently worked on in the UK) then relief would not apply under the TCA. Relief only applies to goods of UK origin.

For example, a GB distributor buys products from a French manufacturer and imports it into the UK. No duty arises on importation of the product into the UK as the product is of EU origin. The distributor sells the products to customers both in GB and Ireland. The importation of the goods from GB into Ireland will not be able to avail of preference under the TCA as the product is not of UK origin. Tariffs will arise in Ireland unless another relief can be applied such as returned goods relief or transit followed and customs warehousing.

Cumulation

Cumulation allows a business to treat as originating in a country certain non-originating goods used or processing works done in another country. Under the agreement, bi-lateral cumulation applies such that materials originating from the UK, as well as production carried out within the UK on non-originating materials, may be considered as originating in the EU (and vice versa). This is an important aspect of the agreement but care is advised as the rules can be complex.

In addition, for rules of origin purposes, the agreement does not recognise other trade agreements entered into by either the EU or the UK. As a result, cumulation only applies to trade between the EU and the UK – the agreement does not enable processing carried out in say Northern Ireland, to be recognised as EU processing for the purposes of conferring EU origin under the EU trade agreement with Canada.

Proof of Origin

Under the agreement, entitlement to preferential rates of duty is subject to the appropriate evidence of origin being produced to support the customs import declaration. This can take the form of a declaration as to origin made by a registered exporter on the invoice or another commercial document identifying the goods, or be based on the importers own knowledge.

Irish exporters will need to register with Revenue for the Registered Exporters System (“REX”) in order to provide the REX number when issuing statements of origin to customers. REX is not however required for businesses exporting consignments of less than €6,000 or where no statement of origin is being provided.

It is good practice to also undertake due diligence to verify the accuracy of the proofs provided. Businesses can also consider obtaining a legally binding decision from customs authorities confirming the origin of a product (referred to as Binding Origin Information).

Hurdles for Irish businesses

If your products are not qualifying products under the agreement then they will be treated as akin to product from a Third Country and normal rules and duty rates will apply. Increasingly, businesses are finding that the terms of the agreement do not allow for zero tariffs to apply to a range of common supply chains, for instance:

- Non-EU sourced goods sold from Ireland to customers in Great Britain
- Purchases from UK based stocks of EU and non-EU produced goods
- Insufficient processing of products in the UK to confer UK origin

As a result, businesses are seeking to apply mitigation strategies, such as sourcing directly from EU producers, or seeking to use customs procedures (such as warehousing) and reliefs in order to manage or eliminate the potential for duties to apply.



Key VAT and Customs actions for Irish businesses to take

For ROI based businesses trading with GB, even with the Trade and Cooperation Agreement in place, you will still need to have processes in place to deal with Customs procedures and formalities and VAT rule changes.

We have set out below key actions relating to Customs & VAT required by businesses.

1

Understand the potential impact on your supply chain

Ensure you have reviewed your supply chain to understand the potential impact of customs controls, any customs duties and VAT on the movement of your goods into, from or across GB.

Ensure hauliers and freight forwarders are prepared with the relevant permits and registrations and paperwork and understand any filings required to be made by hauliers e.g. safety and security declarations on entry of RoRo stock into ROI.

2

EORI number

Importers and exporters of goods need to be customs registered. If not already registered, an application should be filed with Revenue via Revenue's Online Service (ROS) for an EORI (Customs) number if you are trading goods between ROI and GB.

Even with the Trade and Cooperation Agreement in place without an EORI number you will not be able to continue to trade with GB and your shipment of goods will be delayed until you receive a number.

3

Contracts

Assess whether the Incoterms in your contracts with your suppliers and customers meet your needs post 1 January 2021 and ensure you understand what they mean. Incoterms are internationally recognised trade terms that define each party's obligations, costs and risks associated with the delivery of goods from seller to buyer. Critically, Incoterms define whether you or your customer/supplier is responsible for the filing of customs declarations and any associated payment of duties and VAT.

4

Filing Customs declarations

Make sure you are in a position to file or have someone file customer declarations for your goods movements and that you can access the information needed for the declarations.

Have you appointed a customs agent or will your freight company file declarations on your behalf? Depending on your profile, a longer-term solution may be to bring the declaration process "in-house".

The rate of any Duty arising on goods depends on their Customs classification and origin. Ensure you have confirmed the commodity codes and origin for all goods moving into and out of GB and vice versa.

5

Trade and Cooperation Agreement provisions

The Trade and Cooperation Agreement reached between the UK and the EU provides for tariff free imports of "qualifying goods" traded between the EU and GB (i.e. goods of EU or UK origin). Determine if your products meet the origin tests to qualify for tariff free trade between the EU and GB and familiarise yourself with the process for supplier statements of origin status for qualifying products including the requirement to register for a Registered Exporters System ("REX") number where you export consignments of goods over €6,000 to Great Britain and you wish to certify the goods as qualifying for EU preferential origin.



Paying any Customs duty and VAT

How will you pay or defer any customs duty or import VAT payable at the time of import?

For any Duty, can you use the deferral account of your agent. If not, you can pay via a TAN account (which is allocated to traders when they receive an EORI number) or a customs deferment account if you have one. If your goods qualify for tariff free trade with GB under the Trade and Cooperation Agreement, then you will not have to pay Customs duty but you will still have to consider import VAT.

Assess whether you will qualify for postponed import VAT accounting which would eliminate the requirement to pay VAT at the point of import.



Export/Import Controls

Understand whether any additional controls will apply to your goods such as licensing requirements, Sanitary and Phytosanitary (SPS) controls or advance notification requirement (e.g. for agri products). This is critical as failure to produce the correct paperwork will result in an inability to customs clear your goods.



Importing into the UK

If you intend to customs clear goods in the UK, ensure you are familiar with the phased plan the UK Government has announced for the introduction of border controls on imports of goods into GB from 1 January 2021 up to July 2021 and the implications and additional criteria if you are not UK Customs established (e.g. the need to have an indirect representative etc.)

GB will become a third country for VAT purposes

The VAT rules for trading goods on the island of Ireland will remain the same but the rules for trade in goods between ROI and Great Britain will change and the rules for the supply of certain services cross border to and from GB and between ROI and NI will change also.



Familiarise yourself with how these new rules will operate and apply to your business. For example, those particularly impacted include sellers of goods B2B and B2C into GB from ROI and vice versa and also those supplying certain services B2C from ROI to GB and NI and vice versa.

Determine if any additional VAT considerations will arise from your movement of goods post 1 January 2021 or your supply of services, e.g. additional VAT registration requirements, no requirement to apply VAT on certain B2C supplies of services into GB and NI. Have a look at our recent VAT article (available [here](#)) and VAT webinar (available [here](#)).



Impact on ERP / finance system

As customs declarations will now be required when trading between ROI and GB, this will have consequences for ERP / finance systems. Assess what final changes may be required to your ERP (Enterprise Resource Planning) or finance systems in anticipation of a changed VAT and Customs Duty accounting regime post 1 January 2021.



Use of Customs relief/simplifications

Make sure you are aware of the reliefs and simplifications available such as customs warehousing, inward processing relief, transit which could mitigate the impact of Brexit on your business in ROI or GB, in particular in non-transit cases where the goods do not qualify as being of UK or EU origin. A guarantee is often required and, depending on the type, authorisations can take several weeks or months to process. If not in place now these could be put in place subsequently.

Critical criteria

The following three criteria are required to enable you to keep trading efficiently with GB under the new regime.

1. Make sure you have an EORI number
2. Make sure you have the ability (in house or via an agent) to file declarations and understand what information is needed for the declarations and if any additional controls apply to your goods movements.
3. Ensure you have the ability at the time of import to pay or defer any Duty arising on import of goods into Ireland and to pay or postpone import VAT.
4. Ensure you understand how to qualify for and claim preference relief from Tariffs under the EU/UK deal.



Key VAT and Customs actions for Northern Ireland businesses to take

For NI based businesses trading with GB, you will need to have processes in place to deal with Customs procedures and formalities.

This is still the case following the UK-EU Trade and Cooperation Agreement (TCA). We have set out below key actions relating to Customs & VAT required by businesses.

1

Understand the potential impact on your supply chain

Ensure you have reviewed your supply chain to understand the potential impact of a customs and VAT frontier on the movement of your goods.

2

Contracts

Assess whether the terms of your contracts (especially incoterms) with your suppliers and customers meet your needs post transition. In particular, who is responsible for import clearance and any duties arising.

3

Obtain an EORI number

To operate within a customs regime, importers and exporters of goods need to be customs registered. If not already registered, an [application](#) should be filed with HMRC to obtain an XI EORI (Customs) number if you are trading goods between GB and NI. If registered with the Trader Support Service (TSS) an XI EORI should be issued automatically to NI businesses.

4

Customs Classification and Origin

The rate of Duty arising on goods depends on their Customs classification and origin.

The EU-UK TCA provides for tariff free imports of “qualifying goods” traded between the EU and UK (including NI) of EU and UK origin. For goods imported from GB and considered “at risk” of moving into the EU, ensure you have confirmed the commodity codes and check if the EU tariff rate is zero or not and also determine if your products meet the origin tests to qualify for a preferential zero tariff under the TCA on import into NI and familiarise yourself with the process for supplier statements of origin status for all goods moving into NI from both GB and ROW countries.

5

Filing Customs declarations

Register for the Trader Support Service (TSS)

With effect from 1 January 2021, reporting for customs is now required when moving goods into NI from GB and ROW. Consider how you will file Customs declarations for the import of goods – register for the [TSS](#) which will assist with declaration submission.



6

Register for the UK Trader Scheme Trusted trader scheme

Register for the newly announced UK trusted [Trader Scheme](#) before the end of February 2021. This is available to businesses with an NI establishment who may be able to declare that the goods it receives in NI from GB and ROW are not "at risk" of moving into the EU so that an EU tariff is not payable (note there is also a temporary easement for GB businesses to access the Scheme where they supply to an NI business that is eligible for the Scheme). Check the criteria and process for declaring when goods are not "[at risk](#)" and also whether your business may be eligible to claim a [waiver](#) from EU tariffs (if applicable).

7

Export/Import Controls

Understand whether any additional controls will apply to your goods such as licensing requirements, Sanitary and Phytosanitary (SPS) controls or advance notification requirement (e.g. for agri-products). Understand when any grace periods will come to an end.

8

Use of Customs relief/simplifications

Make sure you are aware of the reliefs and simplifications available such as customs warehousing, inward processing relief, transit, which could mitigate the impact of Brexit on your business in NI, ROI and GB, in particular in non-transit cases where the goods do not qualify as being of UK or EU origin.

9

Impact on ERP/finance system

As customs declarations will now be required when trading between GB and NI, this will have consequences for ERP / finance systems. Assess what changes may be required to your ERP (Enterprise Resource Planning) or finance systems.

10

GB will become a third country for VAT purposes

The VAT rules for trading goods on the Island of Ireland will remain the same but the rules for trade in goods between NI and GB will change. NI will follow UK VAT rules for services and the rules for the supply of certain services cross border to and from the whole of the UK (including NI) and ROI will change. Familiarise yourself with how these new rules will operate and apply to your business. Have a look at our recent VAT article (available to view [here](#)) and VAT webinar (available [here](#)).



Analysis of key VAT and Customs measures

We have set out below our analysis of the key VAT & Customs changes for businesses operating on the island of Ireland (both North and South).

- [Ireland/Northern Ireland](#)
- [Ireland/Great Britain](#)
- [Northern Ireland/Great Britain](#)
- [Northern Ireland/other EU 26 Member States](#)
- [Northern Ireland/rest of the world \(ex Ireland and Great Britain\)](#)

Goods trade	VAT headlines	Customs headlines
Ireland/ Northern Ireland	<p>Northern Ireland will remain part of the UK VAT area but the EU VAT rules concerning goods will continue to apply in Northern Ireland.</p> <p>The current VAT treatment of sales of goods between Ireland and Northern Ireland will continue to apply. Northern Ireland businesses will have an XI identification number which will enable them to be linked into the EU VAT system when filing INTRASTAT and VIES/EC Sales reports. This number should also be used by Irish businesses selling and dispatching goods to NI registered customers.</p> <p>The UK can opt to apply reduced rates of VAT and exemptions that apply in Ireland to goods sold in Northern Ireland. How these optional measures could apply in practice in Northern Ireland remains to be clarified.</p>	<p>Northern Ireland will remain part of the customs territory of the United Kingdom but EU Customs rules concerning goods shall apply in Northern Ireland.</p> <p>Northern Ireland will also remain aligned to a limited set of rules related to the EU customs code and the EU's Single Market in order to avoid a hard border on the island of Ireland.</p> <p>The terms of the revised NI Protocol mean an all-Ireland economy is preserved with no Tariffs, customs controls or border checks applied to the trade in goods between Ireland and Northern Ireland allowing for frictionless trade North/South.</p> <p>There will be no requirement to file customs declarations to record the movement of goods between Ireland and Northern Ireland.</p>
Ireland/ Great Britain	<p>Sales of goods from Ireland to Great Britain should be treated as exports with no Irish VAT chargeable.</p> <p>The same rules should apply to the sale of goods from Great Britain to Ireland with no UK VAT chargeable.</p> <p>Import VAT will arise on the importation of goods into Ireland from Great Britain. Ireland has implemented postponed VAT accounting on imports ("PIVA") by approved persons who are registered for VAT and Customs and Excise in Ireland. Where a business opts to apply PIVA, the mechanism eliminates the VAT cash flow cost of imports resulting in a significant VAT cash flow benefit for traders. Applicants for VAT registration made after 31 December 2020 will need to separately request authorisation in order to be able to use PIVA.</p> <p>A similar position will apply in respect of imports of goods into Great Britain from Ireland which will attract import VAT. Like Ireland, the UK has introduced postponed VAT accounting in respect of all imports into the UK from both EU and non-EU countries from 1</p>	<p>From 11pm 31 December 2020, customs controls apply to the movement of goods between Ireland and Great Britain. As a result, export declarations need to be filed for goods exported from Ireland to GB and import declarations and a potential payment of tariffs will arise for goods imported into Ireland from GB.</p> <p>Import and export declarations need to be filed in respect of trade between Ireland and Great Britain notwithstanding a free trade agreement has been reached. The agreement does not remove many of the obstacles to frictionless trade associated with Brexit such as customs paperwork and regulatory checks.</p> <p>That said, the UK government will apply import controls for EU goods on a phased basis as follows:</p> <ul style="list-style-type: none"> • Customs import declarations and payment of tariffs can be deferred on standard goods "covering everything from clothes to electronics" until 1 July 2021. • There will be checks on and declarations required for controlled goods such as alcohol and tobacco. • High risk live animals and plants will not be physically checked at point of import but instead at the point of destination or other approved premises. From April 2021, all products of animal origin and regulated plants and plant products will require pre-notification and health documentation. • Full import controls will be applied from July 2021 at which point normal customs declarations and payment of tariffs will be required at import. <p>It is important to note that the EU has not introduced reciprocal measures and therefore the UK approach does not alter EU customs control procedures.</p>



Analysis of key VAT and Customs measures (continued)

Goods trade	VAT headlines	Customs headlines
<p>Ireland/ Great Britain (cont.d)</p>	<p>January 2021 for businesses that are VAT registered in the UK. During 2021, the UK also requires INTRASTAT Arrivals returns to be filed on imports of goods from the EU.</p>	<p>The Revenue Commissioners have introduced a Customs Roll-On Roll-Off Service whereby a Pre-Boarding Notification (“PBN”) recording the details of customs declarations for all goods carried on a vehicle or truck must be submitted in advance of arriving at the port of departure in either Ireland or the UK. The system is designed to facilitate the efficient flow of traffic through Irish ports in particular to assist manage the customs process for groupage loads efficiently and applies for transit movements as well as imports and exports.</p> <p>The UK’s Global Tariff Schedule will apply to imports of goods from the UK into GB from 1 January 2021 unless the goods qualify for EU origin under the agreement (see page 23 for information on Rules of Origin).</p>
<p>Northern Ireland/ Great Britain</p>	<p>The UK published a VAT Policy Paper (last updated on 12 January 2021) setting out how it will operate VAT in respect of trade in goods between Great Britain and Northern Ireland. NI businesses will continue to submit one UK VAT return and have one UK VAT registration number. The UK are aiming to apply the VAT rules broadly as they do now in that VAT will continue to be charged in respect of both B2B and B2C sales by the supplier, as domestic UK supplies, even though there is a recognition that supplies of goods between Great Britain and Northern Ireland (and vice versa) are exports and imports for VAT purposes after the Transition Period ends. The Policy Paper sets out a number of exceptions to these rules, including where goods move under a customs special procedure, where the domestic reverse charge applies and where the onward supply of goods provisions are used. In these cases, the importer/purchaser of the goods will have the VAT reporting responsibility.</p> <p>When a UK VAT registered business moves its own goods from Great Britain into Northern Ireland it will have to account for output tax as if it had sold the goods to a third party. If it intends to use the goods solely to make taxable supplies, then it can claim the VAT as input tax subject to the normal recovery rule including partial exemption. The movement of own goods the other way from Northern Ireland to Great Britain does not have the same requirement to account for output tax unless an actual supply takes place.</p> <p>UK VAT grouping will still be available to Northern Ireland businesses. Normally supplies between VAT group members are disregarded and no VAT charge arises. However, VAT groups will be required to account for VAT and reclaim it (subject to the normal recovery rules) where; a) goods are supplied by one group member to another and the goods move from GB to NI and b) supplies are made of goods located in NI at the time of supply, unless the supply is between group members that both have establishments in NI.</p>	<p>As NI will be part of the UK Customs area there generally should be no tariffs on goods moving from NI to GB and unfettered access has been promised by the UK Government. The legislation to enact this is included in the Customs (Northern Ireland) (EU Exit) Regulations 2020 which forms part of the overall Taxation (Post-Transition Period) Act and these have now received Royal Assent and will become legally effective from 1 January 2021. Also included in the Act is anti-avoidance legislation to prevent traders re-routing goods through NI simply to avoid tariffs and other customs requirements and this will also be in place by 1 January 2021. However, if moving goods via NI is already a normal commercial route used by businesses, including ROI businesses, they should be able to continue to use the NI route into GB to obtain unfettered access during the Phase 1 period.</p> <p>The above legislation sets out a broad definition that the UK Government intend to apply during what is referred to as a phase 1 implementation period which is expected to last for the first half of 2021. During this period, UK Government have said there should not be much change in respect of which goods will continue to be able to move into GB from NI unfettered. This should mean that goods that are in free circulation and originating in the EU (including ROI), that currently move through NI and into GB should be able to continue to do so in an unfettered way, meaning no tariffs and limited checks and controls. The UK Government have, as noted above, introduced anti-avoidance measures that applies from 1 January 2021, that aims to combat deliberate re-routing of supplies into GB via NI solely to avoid UK tariffs and customs procedures. It is the intention of UK Government to set out a long-term framework of rules which would apply from the second half of 2021 onwards and this will involve stricter rules around who can qualify for unfettered access into GB and the goods that will be deemed to be Qualifying Northern Ireland Goods. This is likely to involve a “qualifying NI establishment” test for businesses with legitimate business operations in NI.</p> <p>The EU and UK agreed as part of the formal decisions reached on 17 December that exit summary declarations will not be required in most cases in respect of the movement of goods from Northern Ireland to Great Britain. There will be a requirement in limited circumstances for exit summary declarations and other pre-lodgement requirements for goods moving from NI to GB, for example, where goods are moving under special customs procedures, including transiting from NI through GB and onto the EU and also in respect of goods that are classed as high risk.</p> <p>In respect of goods moving from GB to NI, new customs formalities and checks are now in place from 1 January 2021.</p> <p>HMRC have developed a new IT platform to track the movement of goods across the Irish Sea and deal with certain customs procedures. The system is known as the “Goods Vehicle Movement Service” (GVMS) and further details can be found on the HMRC website.</p> <p>HMRC have also set out details regarding the new free to use Trader Support Service (TSS), which has now been operational since 1 January 2021 to assist businesses with customs import declarations and safety and security declarations and it also has been providing on-going training and education webinars and information and will for a period of at least 2 years provide support for businesses to submit declarations in respect of</p>



Analysis of key VAT and Customs measures (continued)

Goods trade	VAT headlines	Customs headlines
<p>Northern Ireland/ Great Britain (cont.d)</p>	<p>The Policy Paper also says that businesses that move goods between NI and non-EU countries, make a customs declaration (including for GB to NI goods movements), or get a customs decision in Northern Ireland, will need to get an EORI number with the prefix XI to report the movement of these goods. For NI businesses that are already UK VAT registered, HMRC have said they will automatically issue the XI EORI number to them by mid-December (or the business had the option to make an application during December).</p> <p>The Policy Paper has also been updated to say that the margin scheme for second hand vehicles has been reinstated in NI where those second hand vehicles have been brought into NI from GB. It now says that VAT can be applied on the margin which is good news. Although at this stage this is an interim solution, a long term derogation has been requested by the UK to the EU Commission so that the margin scheme for motor vehicles can continue in the same way as the rest of the UK. This is a very important issue and without the long term derogation it would be very detrimental to the second hand car industry in particular that rely on the margin scheme, as well as potentially increasing prices for the consumer.</p> <p>It is important to note that the VAT rules relating to services is not covered by the Protocol and as such Northern Ireland will follow all the normal UK VAT rules for services. This will also give rise to some changes in VAT treatment in respect B2C supplies of services and “use and enjoyment” rules between the UK (including NI) and ROI. A further analysis of the VAT changes relating to NI in respect of goods and services can be accessed here.</p>	<p>This will be available to both NI and GB businesses that are registered for the TSS and we would encourage businesses that have not done so to register as soon as possible here.</p> <p>EU Tariffs may apply to goods brought into Northern Ireland from Great Britain. The Tariffs will apply if there is a risk that the goods will subsequently be moved to the EU. If the goods are not at risk of movement to the EU, then no tariffs should apply. The NI Protocol says that goods will be at risk of subsequently being moved to the EU unless it can be established that:</p> <ul style="list-style-type: none"> • They will not be subject to commercial processing in Northern Ireland; and • The goods fulfil criteria to be established by a Joint Committee, made up of representatives of the United Kingdom and the EU. <p>If goods can be proven to stay in Northern Ireland, then there are measures to allow for exemptions, or a potential reimbursement of duties paid. The Joint Committee set up under the Protocol agreed on the 17th December, as part of a series of formal decisions, the framework of rules on how the goods at risk issue will be operated. See our detailed analysis on the “at risk” goods issue in our commentary here on the application of the NI Protocol. This also includes some details on how the EU-UK TCA and specific rules of origin will apply and when preference may be claimed when goods move from GB into NI.</p> <p>Businesses may also be eligible to claim a waiver for duty on goods brought into NI from GB which might otherwise incur “at risk” tariffs, if the business has not exceeded the state aid allowances for that sector. See the recently published guidance to see whether you are eligible for a waiver.</p> <p>Where the UK agrees trade agreements with non-EU countries (as it has already done so with a number of countries, including Canada, Japan, Iceland, Norway, Switzerland), it may be open for Northern Ireland to be part of those agreements.</p>
<p>Northern Ireland/ other EU 26 Member States</p>	<p>The current VAT treatment of sales of goods between Northern Ireland and the other EU 26 Member States will continue to apply. Northern Ireland businesses will be required to file INTRASTAT and VIES reporting in respect of EU supplies and will use an XI prefix before their VAT registration number to denote that the goods are being supplied from Northern Ireland. Likewise, EU suppliers of goods to Northern Ireland business customers will be required to use the XI customer VAT number for zero-rating intra-community supplies. EU suppliers must also record these supplies for INTRASTAT and VIES reporting.</p>	<p>As with trade between Ireland and Northern Ireland, the current trading rules between Northern Ireland and the EU should continue with no tariffs and no declarations required on trade between Northern Ireland and the rest of the EU.</p>



Analysis of key VAT and Customs measures (continued)

Goods trade	VAT headlines	Customs headlines
Northern Ireland/rest of the world (ex Ireland and Great Britain)	<p>Broadly the same VAT treatment applying to imports of goods currently into Northern Ireland from third countries should continue to apply. It has been confirmed that imports into and exports from Northern Ireland involving third countries will require the use of an XI EORI number on the import and export declarations. It has also been confirmed that postponed import VAT accounting will be introduced for these imports into Northern Ireland in the same way that it will apply to the rest of the UK.</p>	<p>UK Tariffs under the UK's Global Tariff Schedule will apply to the import of goods directly into Northern Ireland unless the goods are at risk of being subsequently moved to the EU in which case it is understood EU tariff rates will apply. See our detailed analysis on the "at risk" goods issue in our commentary here on the application of the NI Protocol.</p> <p>As things currently stand, Northern Ireland will not have access to EU FTAs that currently exist with rest of world countries and this is not provided for under the Protocol. Discussions on the issue are on-going and if some agreement cannot be reached to continue this access, this will negatively impact on those businesses both in Northern Ireland and the Republic of Ireland that have integrated supply chains, using each other's raw materials to produce finished products that are exported to third countries with which the EU has an FTA.</p> <p>Whilst NI-produced goods may have the same access under UK FTAs to other markets as GB produced goods, there are still a lot of unknowns on how this will work in practice.</p>



Impact on employee mobility between the EU and the UK, immigration and social security rules

Summary

- The Common Travel Area and associated rights between the UK and Ireland will continue to operate and apply to Irish and UK nationals
- EU nationals in the UK by 31 December 2020 will have the opportunity to retain their right to live and work in the UK by making an application under the EU Settlement Scheme* (The reference to EU nationals in this document also includes EEA nationals). The UK has reached a separate agreement with Switzerland in relation to citizens' rights and service providers
- Whilst free movement of people between the UK and the EU ended on 31 December 2020, an agreement has been reached which will allow certain contractual service suppliers and independent professionals to work for cumulative periods of up to 12 months. In addition to this, the agreement contains provisions in relation to short term business travel (for periods of 90 days in any 6-month period) and intra company transfers
- The UK has introduced a new immigration system for those travelling to the UK from 1 January 2021. Irish passport holders do not need to apply for a work visa, however, if other EU nationals are travelling to the UK for work purposes, they are likely to require a work visa prior to travelling to the UK

Business Implications

EU Nationals living and working in the UK prior to 31 December 2020

Although Irish passport holders are not required to make an immigration application in the UK, other EU nationals living in the UK by 31 December 2020 should make an application under the UK's EU Settlement Scheme* to obtain proof of their right to live and work in the UK. The scheme is set to close on 30 June 2021 and at this time it is unclear how the UK will treat those who do not make an application. It should be noted that the UK adopts a very strict approach in relation to those who do not make other immigration applications prior to deadlines or visa expiry dates. Based on this approach, if an application is not made, the EU national may experience difficulties in proving their right to live and work in the UK.

EU Nationals working in the UK, but living in an EU Member State prior to 31 December 2020

EU nationals who work in the UK but are defined under UK immigration law as "not primarily resident" there, should consider making an application for a Frontier Worker Permit* as they may be ineligible for an EU Settlement Scheme application. This application may be useful for frequent commuters to the UK and is broadly drafted in comparison to the EU legal definition of frontier working.

EU Nationals entering the UK on or after 1 January 2021

Whilst free movement of people between the UK and the EU ended on 31 December 2020, an agreement has been reached which will allow certain contractual service suppliers and independent professionals* to continue working for cumulative periods of up to 12 months. This will benefit those in roles such as accounting, engineering, management consulting and medical services (amongst others). There are many more roles which may benefit from this provision, and as such employers should study this section in detail. Employers should also note that they will need to hold a UK Sponsor Licence* should they wish to use this immigration route for any EU nationals entering the UK.

The new UK immigration system became operational on 1 December 2020. For EU nationals who cannot avail of the provisions in Annex SERVIN 4 some limited activities (such as attending meetings and training) can be conducted in the UK whilst the person is a visitor. For people who are not in these categories they, must apply for a work visa under the new UK immigration system. To be eligible for the new "Skilled Worker" visa*, the applicant must (i) work for a regulated "Sponsor"; (ii) meet certain English language requirements; and (iii) meet other criteria such as salary and skills thresholds.

The UK will not have a specific immigration route for job roles which are defined as "low skilled". We note that some sector specific immigration schemes are due to continue (for example the Seasonal Agricultural Workers Scheme), however at the time of writing this scheme is only available to a small number of employers.



Impact on employee mobility between the EU and the UK, immigration and social security rules (continued)

Business Implications	
<p>EU Nationals entering the UK on or after 1 January 2021 (continued)</p>	<p>We also note that whilst it will be possible for nationals of certain countries to enter the UK without meeting the skill levels for a “Skilled Worker Visa” (e.g. on a Tier 5 Youth Mobility Visa), these immigration routes often contain a cap on the number of visas available each year or they can be very sector specific. As such, these immigration routes are unlikely to be a solution for employers seeking lower skilled labour in areas such as manufacturing, engineering and agri-food.</p> <p>As a result, employers should familiarise themselves with the new UK immigration system (including the provisions in relation to contractual service suppliers and independent professionals), pre-assess whether business activities can be carried out as a visitor in the UK, ensure that HR/recruitment staff are sufficiently skilled to navigate the new requirements and criteria of various applicable visas, and adopt a recruitment strategy that accounts for the end of the free movement of people.</p>
<p>Employer obligations</p>	<p>A UK employer may apply to become a regulated “Sponsor” and obtain a UK Sponsor Licence*. Many UK employers currently do not hold this licence and employers who are new to sponsoring employees should note that there are a number of duties and obligations placed on licence holders by the UK Home Office. As such, employers should put systems in place to ensure their compliance obligations are met.</p>
<p>British passport holders living in the EU prior to 31 December 2020</p>	<p>UK nationals living in the EU should make an immigration application in the Member State they are exercising EU “treaty rights” in (a person may be exercising treaty rights by, for example, working or studying). The relevant application schemes vary by Member State and have differing opening dates, evidential requirements and closing dates.*</p>
<p>British passport holders travelling to the EU on or after 1 January 2021</p>	<p>Whilst UK nationals do not need to make an immigration application in the Republic of Ireland, UK nationals travelling to elsewhere in the EU will need to ensure they have applied for any applicable work visas.*</p> <p>If the UK national does not come within the remit of Annex SERVIN 4 and they are travelling as a “business traveller”, they will be limited to spending 90 days in any six month period in the Schengen area.</p> <p>Employers should note that the permissible activities that a “business traveller” may carry out will vary according to Member State, and we encourage businesses to pre-assess if business activities can be carried out as a visitor, under Annex SERVIN 4 or whether a different work visa is required. Employers should also consider Frontier Workers, assess whether their employees can avail of such applications and avoid visa costs in the various post Brexit immigration systems throughout the EU.</p> <p>The agreement on contractual service suppliers and independent professionals* will provide some relief to employers who send certain workers throughout the EU. However, employers should note that some Member States have exercised an “opt out” in relation to certain roles and as such the immigration process will vary depending on the job role and the Member State the UK national is travelling to. As such, the agreement, is sub optimal compared to free movement of people. Whilst certain employees will be able to live and work in the EU for cumulative periods of up to 12 months, employers will need to pre-assess whether the UK national’s job role is eligible for this immigration route and whether any specific Member State opt outs apply. We note that some employers will be disappointed that their job roles are not included on the list, and appreciate that those employers will need to change the way they operate, build in visa costs and processing times for UK nationals and place more emphasis on managing their mobile workforce.</p>



Impact on employee mobility between the EU and the UK, immigration and social security rules (continued)

Business Implications	
<p>British passport holders in the Republic of Ireland</p>	<p>At a recent meeting of the Specialised Committee on Citizens’ Rights, it was confirmed that UK nationals living in the Republic of Ireland may obtain an immigration document to confirm their right to live and work in the Republic of Ireland. The scheme to provide this was set to open on 1 January 2021, and at this time it does not have a closing date. The introduction of the scheme is a mandatory requirement under the UK EU Withdrawal Agreement, and whilst UK nationals do not have to make this immigration application (due to the bilateral agreement between the UK and Ireland in relation to the Common Travel Area), the application may be useful in providing evidence of an applicant’s residence in Ireland for Irish citizenship applications.</p>
<p>Non-EEA family members of British passport holders in the Republic of Ireland</p>	<p>The rights of non-EEA family members of British passport holders will be impacted by Brexit if the non-EEA national lives in the Republic of Ireland on the basis of EU law.</p> <p>Assuming the UK national is exercising EU Treaty Rights in the Republic of Ireland and the non-EEA national holds a valid Irish Residence Permit prior to 31 December 2020, the non-EEA national may avail of the Irish Residence Permit ‘card exchange programme’. This application will provide proof that the non-EEA national’s right to live and work in the Republic of Ireland is protected by the UK EU Withdrawal Agreement.</p> <p>Since 1 January 2021, non-EEA family members of UK nationals are not able to live in the Republic of Ireland on the basis of EU law and a new pre-clearance immigration scheme for these non-EEA nationals has been introduced. Applications can be made to Immigration Service Delivery within the Department of Justice.*</p>

*Immigration applications

KPMG has immigration teams located in Northern Ireland, the Republic of Ireland and throughout the EU. As such, we are able to assist with each of the immigration applications set out above.

Social Security Coordination

The EU and the UK have agreed on a Protocol on Social Security Coordination within the TCA to take effect from 1 January 2021, intended to govern the social security position of individuals who move between the UK and the EU from that date. Individuals who had exercised their right to freedom of movement prior to the end of the Brexit Transition Period on 31 December 2020, in some circumstances, will remain eligible for coverage under EU Regulation 883/2004 on the Coordination of Social Security Systems (the EU Regulations), based on grandfathering provisions contained within the Withdrawal Agreement.

The new Protocol on Social Security Coordination applies to UK and EU nationals, and to third country nationals who are or have been subject to the social security system of either the UK or an EU country. It applies to the UK and all EU countries but does not apply to Norway, Iceland, Liechtenstein or Switzerland. HM Revenue and Customs have indicated that mobility between the UK and Switzerland, Iceland and Norway should be governed by the terms of the existing bilateral agreements between the UK and each of these countries. There is no agreement between the UK and Liechtenstein, thus UK domestic rules will apply.

Whilst the Protocol on Social Security Coordination provides welcome certainty to employers whose employees have multistate travel patterns, the EU country “opt-in” approach to posted workers which enables a posted worker to remain within his or her home country social security system for up to two years, was not envisaged in either the UK or the EU’s draft agreement. EU countries must notify the EU Commission whether they intend to opt in by 31 January 2021. This opt in approach may create issues for employers seeking to maintain home country coverage for posted employees in jurisdictions that do not opt-in, with the result that UK employees posted to their location will have to make social security contributions there from the start of the assignment, potentially increasing costs and fragmenting benefit entitlements. There is no equivalent to Article 16 of the EU Regulations in the Protocol on Social Security Coordination. Article 16 of the EU Regulations permitted home and host authorities to agree a position if it was deemed to be in the best interests of the employee. Most frequently, this was used to obtain home country coverage for postings/detachments of up to five years.



Impact on employee mobility between the EU and the UK, immigration and social security rules (continued)

Going forward, the new Protocol on Social Security Coordination appears more restrictive in its operation and coverage than the old rules for employees moving after 31 December 2020, particularly for posted workers generally and more specifically those employees looking to move on postings of over two years – more will be known by 1 February about the wider EU picture, as any EU countries which do not opt in are automatically excluded from the new Protocol on Social Security Coordination.

Ireland is in an unusual position in that Ireland and the UK agreed a bilateral Convention on Social Security in 2019 which was ratified by Ireland in December 2020, as part of the Brexit Omnibus Act and is now in force. (The Omnibus Act is discussed in more detail at page 21). The TCA provides that a bi-lateral taxation agreement can take precedence over the provisions in the TCA.

The bilateral 2019 Convention on Social Security between Ireland and the UK is more beneficial than the EU Protocol on Social Security Coordination. We understand that Ireland will opt into the Protocol on Social Security Coordination in the TCA. Clarity around the application of which agreement should apply in various circumstances is pending. Because the Protocol is more limited in scope than EU Social Security rules, there may well be instances where a liability to dual social security contributions arise, unless the employee's mobility arrangement is covered under a separate agreement between the UK and the relevant EU Member State / EEA country.





Impact on Financial Services

EU-UK Trade and Cooperation Agreement (TCA) – Financial Services

As had been expected and indeed messaged in the latter half of 2020, financial services are only covered in a limited manner in the text of the December EU-UK TCA. In essence, the TCA does not stray much further than WTO ‘most favoured nation’ terms.

Accordingly, the agreement of the TCA did not eliminate the majority of the ‘no-deal’ preparations and arrangements, noted below, that financial services firms had to apply and be in a position to adhere to in order to navigate the new regulatory landscape from 1 January 2021.

The next key development that will influence the longer term impact of Brexit on financial services will be the outcome of the discussion the parties committed to continue in relation to establishing structured regulatory cooperation arrangements, with a view to signing a Memorandum of Understanding for this framework by end- March 2021. Developments in this regard will be keenly watched and we will keep you informed of what emerges.

In summary the high-level and primarily indirect impacts for financial services firms of the TCA are as follows:

- While the terms of the TCA do not go as far as those in the EU Canada Free Trade Agreement with respect to financial services; both parties do confirm that they will maintain market access for the provision of financial services by means of establishment i.e. UK or EEA subsidiaries or ‘third country’ branch presence in each other’s territories.
- The TCA does not repeal or replace the ‘national law’ Brexit measures that were adopted by individual Member States ahead of Brexit. As such, UK firms that have obtained access to EU markets or citizens via these individual Member State measures can continue to do so.
- Further, the TCA does not prohibit ‘reverse solicitation’, however, there are significant individual National Competent Authority requirements and expectations with respect to the monitoring, control and oversight which should not be underestimated by UK firms.
- Indirectly (for the moment), financial services firms will be impacted by the following measures adopted in the TCA:
 - Cooperation on cyber-security matters and data-protection;
 - Respective rules on authorisation for the provision of services in each respective territory;
 - Non-discrimination measures for service providers and investors; and
 - Free movement of capital.
- There are no equivalence measures adopted within the TCA. However, a non-binding political declaration was

made alongside the agreement which commits the EU and UK to continue to undertake discussions to establish structured regulatory cooperation arrangements in financial services, with a view to signing a Memorandum of Understanding for this framework by end- March 2021.

- It is contemplated that these cooperation arrangements will allow for:
 - bilateral exchanges of views and analysis relating to regulatory initiatives and other issues of interest;
 - transparency and appropriate dialogue in the process of adoption, suspension and withdrawal of equivalence decisions; and
 - enhanced cooperation and coordination including in international bodies as appropriate.
- With respect to the granting of EU equivalence, the declaration notes that ‘the Parties will discuss, *inter alia*, how to move forward on both sides with equivalence determinations between the Union and United Kingdom, without prejudice to the unilateral and autonomous decision-making process of each side.’
- As noted below, the UK Financial Conduct Authority (FCA) has granted EU financial services firms equivalence with UK law in a number of key areas.

UK’s Financial Services Contract Regime

Further, the UK’s Financial Services Contract Regime (FSCR) ensures that firms can fulfil their existing contractual obligations in the UK for up to five years (15 years for insurance contracts), even if they are outside the Temporary Permissions Regime (TPR), provided it does not amount to new business. It allows EU/EEA firms to run-off contracts made prior to the end of the Transition Period with UK persons (individuals or legal entities). Firms that did not submit a TPR notification, or that are unsuccessful in securing full UK authorisation through the TPR route, automatically enter the FSCR, but have to take certain actions, including compliance with UK rules that did not previously apply to them.

Specific actions taken by the Irish Government in respect of UK financial services¹:

- **Settlement finality:** Temporary preservation of certainty in settling a range of transactions in shares, securities and other financial instruments including mutual recognition and access to existing clearance systems in line with EU contingency measures. This will apply for a period of 18 months after the Transition Period for UK Central Counterparties (CCPs) and until 30 June 2021 in the case of UK Central Securities Depositories (CSDs).

¹ The above measures were included in the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (the Brexit Omnibus Act 2020).



Impact on Financial Services (continued)

- **Insurance contract continuity:** Measures to ensure Irish policy holders continue to benefit from insurance contracts underwritten by UK insurers for at least 15 years even if they are no longer permitted to conduct new EU business.
- A number of insurance sector tax changes related to preserving the ability to impose levies on various insurance premia.

Limited - until end-June 2021, when the Commission's equivalence decision expires.

From an Irish perspective, the Migration of Participating Securities Act 2019 was signed into law on Christmas day 2019, and it sets out the mechanism by which relevant listed Irish securities will migrate from CREST to Euroclear Bank in Belgium. The Act contemplates that the migration process will be effected for all relevant Irish securities on the same day, which is likely to be sometime in Q1 2021.

The Act prescribes a number of steps to be taken by issuers prior to the migration of their relevant securities to Euroclear Bank. In particular, it will be necessary for each relevant issuer to pass certain resolutions at its next AGM or at an EGM (convened in advance of the final migration date) consenting to the migration, which could lead to considerable time pressure being applied to issuers to meet that deadline.

Banking services

UK banks may now provide banking services in the EU only if they hold valid authorisation from the relevant EU/EEA supervisory authorities. Where the authorisation process would not be finalised before the end of the Transition Period, EU/EEA supervisory authorities had asked institutions to implement contingency plans setting out alternative actions until they receive authorisations. Where UK financial institutions chose to cease their activities in the EU, they were required to finish the off-boarding of affected customers by end-2020 without causing detriment to consumers.

EU/EEA consumers are permitted to maintain existing bank accounts held with UK financial institutions, subject to the relevant UK legal requirements (and vice versa). However, the deposit protection rules may be different as between the UK and EU/EEA Member States, and if the deposit is held with a bank branch, it may no longer be covered by any scheme.

Banking prudential

The position of EU/EEA banks operating in the UK is covered by the TPR, provided the banks notified before end-2020.

The Prudential Regulation Authority (PRA) has issued guidance on the use of its transitional direction, made under the TTP, relating to firms' obligations under the Capital Requirements Regulation (CRR). This will delay the impact of some CRR onshoring changes relating to: EU-issued covered bonds, Pillar 1 capital requirements for credit risk, Pillar 1 risk weights for residential and commercial real estate, model permissions, use of credit ratings, securitisation, own funds requirements for CCP exposures and requirements for large exposures, liquidity and reporting and disclosure.

Pan-EU consolidated supervision and the EU joint decision-making framework have ended, but joint decisions made before end-2020 will continue until different decisions are taken by the PRA or the FCA.

Individual Pillar 2 requirements and PRA buffer and combined buffer requirements are not affected by onshoring changes, therefore transitional relief is not required.

Post Brexit Status Overview: Key impacts per financial services sector segment

Capital Markets

UK firms will no longer access EU wholesale financial markets via passporting but access may be possible depending upon the local regulatory regime and the activities performed. Measures have also been put in place to limit the impact of the end of the Transition Period.

On access to clearing, on 28 September 2020 the European Securities and Markets Authority (ESMA) announced that it will grant temporary third-country recognition to three UK CCPs from 1 January 2021 under the European Market Infrastructure Regulation. The recognition of these three UK CCPs, namely ICE Clear Europe Limited, LCH Limited and LME Clear Limited, means that EU clearing members of these CCPs will be able to continue to access the services and that the CCPs will be able to continue to provide their services in the EU at the end of the Transition Period on 31 December 2020. Recognition of these three UK CCPs will continue to apply while the equivalence decision remains in force, which is for 18 months until 30 June 2022.

The Bank of England has published an interim list of third-country counterparties (CCPs) that UK firms can continue to use for clearing services under the temporary recognition regime (TRR), for up to three years.

As regards trading venues, in the absence of mutual equivalence under the MiFID II share trading obligation (STO), the FCA is using its Temporary Transitional Power (TTP)² to allow UK firms to access an EU trading venue as long as the venue is a UK-Recognised Overseas Investment Exchange, has applied under the TPR or its activities meet all the conditions required to benefit from the Overseas Person Exclusion. ESMA has confirmed that trading of shares with EEA International Securities Identification Number (ISIN) on a UK trading venue in GBP will not be subject to the EU STO.

ESMA has made no announcement regarding the EU derivatives trading obligation (DTO). However, the FCA is using its TTP to allow firms subject to the UK DTO to trade with, or on behalf of, EU clients subject to the EU DTO and to transact or execute those trades on EU venues with the same regulatory status as listed above for STO, provided the firm has taken reasonable steps to be satisfied the client does not have arrangements in place to execute the trade on a trading venue to which both the UK and EU have granted equivalence (e.g. a US venue).

UK firms are allowed to access certain non-UK central security depositaries (CSDs) under the Transitional Regime, until the CSDs are permanently recognised under the UK Central Securities Depositories Regulation (CSDR). EU issuers can continue to use the one UK CSD – Euroclear UK & Ireland



Impact on Financial Services (continued)

The PRA has designated responsibility for ensuring compliance with group CRR prudential consolidation requirements to PRA subsidiaries of Financial Holding Companies (FHCs) or parent Mixed Financial Holding Companies (MFHCs) until the parent FHC or MFHC's application for approval or exemption has been determined. This rule will apply to a subsidiary firm controlled by a "parent FHC or MFHC in a Member State" (see also the new PRA Rulebook definition of "UK parent financial (or mixed financial) holding company").

The PRA's policy relating to the onshored Bank Recovery and Resolution Directive II (UK BRRDII) includes changes to the existing PRA regime for Contractual Recognition of Bail-In (CROB) and Stays.

The PRA continues to be lead supervisor for UK banks, but where new entities have been set up to manage EU/EEA business, banks will need to meet the requirements of the authorising local regulator. For non-UK banks the PRA will continue to supervise UK-based entities as "host" in cooperation with the home state supervisor. The ECB and UK regulators have agreed a memorandum of understanding that will allow supervisors to continue exchanging information and to coordinate the supervision of cross-border banking groups.

Insurance prudential

For both UK and EEA firms and groups, there are potential implications for the solvency capital requirement (SCR), including the classification of the UK for non-life charges, the unrated reinsurance counterparty charge, the equity charge for AIM stocks and any future sovereign debt change.

For UK-parented European insurance groups, the PRA is no longer the lead supervisor. Absent an explicit equivalence decision, the group supervisor is determined by the largest EEA balance sheet, with EEA group supervision at sub-group level. The PRA has restricted access to College of Supervisor arrangements, but worldwide group supervision could still include reliance on PRA group supervision.

For UK insurers with EEA parents, the relevant national EEA supervisor will continue to be the lead supervisor and the UK insurer will continue to be consolidated into the group's financial position, but the PRA has restricted access to College of Supervisor arrangements. Also, absent an explicit equivalence decision, PRA approvals under the UK Solvency II Directive (UK SII) will not be recognised and the EU group would need to consolidate the UK insurer on an EU SII basis (rather than permitting inclusion of the UK insurer on a UK SII basis using the deduction and aggregation method).

Generally, insurers have already adjusted their capital positions to prepare for a non-equivalence scenario, but the practical impacts of the change in lead supervisor and supervisory college arrangements will only be seen over time as issues arise.

Asset management and investment funds

For asset managers and funds, the key concern is whether and for how long the UK's regulatory framework will be adjudged by the EU to be equivalent as regards MiFID II, to enable the continued delegation of portfolio management services from EU entities (including funds) and EU professional clients to UK asset managers.

Asset managers will also be impacted by any divergence in capital markets regulations (such as the share trading obligations, central counterparties, market abuse and so on) and shifts in market liquidity, not only as between the UK and the EU, but to other markets. Evidence of this has already been seen in the first week of trading in 2021.

Furthermore, some EU professional clients may be constrained in appointing a third-country asset manager, and it is for individual Member States (and the UK) to decide whether they will allow portfolio management service to be provided to retail clients in their jurisdiction by third-country asset/wealth managers. This is a key topic of discussion under the forthcoming review of the Alternative Investment Fund Managers Directive (AIFMD).

UK UCITS funds are no longer UCITS. These funds may no longer be passported into the EU or be eligible assets for EU UCITS. A UK firm is not able to be the Management Company of EU UCITS.

UK Alternative Investment Funds (AIFs) and UK AIF Managers (AIFMs) have lost their EU passports. There is still no sign that the AIFMD non-EU passports will be introduced, so UK AIFMs will need, instead, to use national private placement regimes (NPPRs), which are generally limited to placements with professional clients and do not exist, or are of narrow scope, in some Member States.

The UK's TPR allows registered EU/EEA asset managers, fund managers and funds to continue to operate or be marketed in the UK for up to three years. Thereafter, EU UCITS and AIFs would be dependent on the UK's NPPR to market into the UK or to register with the FCA. The UK NPPR is currently the most open of the national regimes for professional investors, but the registration process for third-country funds requires each fund to be considered on a case-by-case basis. The proposed UK Offshore Funds Regime (OFR) will ease this process. The FCA will consider third countries' fund regimes and judge whether they are equivalent. Funds from countries that receive positive judgements will be able to register with the FCA via a simplified process.

Both EU and UK firms should also factor into their thinking the current debate on delegation and substance. EU entities will need to have increased in-house skills and more experienced staff than may previously have been permitted. Most policymakers recognise, though, that the delegation of portfolio management, both within the EU and to third countries, brings the best knowledge and skills from around the globe, to the benefit of EU investors.



Impact on Financial Services (continued)

Retail intermediaries

Note that the EU definition of “retail” is wide and includes many high-net-worth clients of private banks or wealth managers, for example, as well as some institutions, such as local authorities.

It is a matter for individual Member States to decide whether they will allow UK (or any other third country) firms to provide financial services to retail consumers in their jurisdiction. It is also for each Member State to decide what constitutes new business and whether they allow existing client relationships to continue to be serviced.

Therefore, business previously conducted by UK firms under MiFID II or IDD (Insurance Distribution Directive) passports will no longer be permitted unless the customer’s Member State permits it. Furthermore, the continued servicing of existing customers may be problematic. The position needs to be considered for each customer and for each Member State.

UK Equivalence Decisions in respect of the EU / EEA

- **European Market Infrastructure Regulation Equivalence Directions:** ‘This decision paves the way for UK entities to seek or apply for an exemption from the requirement to clear through a Central Counterparty (‘CCP’) or meet margin requirements for transactions with an EEA State entity in the same group. Granting this decision means these exposures can qualify as intragroup exposures in the credit valuation adjustment (CVA) calculation, ensuring that UK firms will in many cases not have to capitalise CVA on ‘Over The Counter’ (OTC) exposures to EEA State affiliates.’
- **Capital Requirements Regulation Equivalence Directions:** ‘For UK firms, these equivalence decisions will ensure they will not be subject to increased capital requirements as a result of their EEA State exposures.’
- **The Solvency 2 Regulation Equivalence Directions:** ‘This direction covers the equivalence decisions on both reinsurance and group capital treatment. A full set of Solvency II equivalence decisions for the EEA States is beneficial for the UK by providing certainty and continuity.’
- **Central Securities Depositories Regulation Equivalence Directions:** ‘With equivalence granted, the Bank of England can then assess Central Securities Depositories (CSDs) in the EEA for recognition (subject to establishing co-operation arrangements with the relevant EU authorities), allowing those CSDs, once recognised, to continue to service UK securities.’
- **Benchmarks Regulation Equivalence Directions:** ‘This decision determines that benchmark administrators in each EEA State comply with legal requirements which are equivalent to the Benchmarks Regulation which will apply in UK law after the end of the Transition Period and are appropriately supervised in the relevant EEA Member State. This equivalence decision acts as a mechanism to enable such administrators to be added to the Financial Conduct Authority’s (FCA’s) benchmarks register, and to enable them to provide benchmarks to supervised entities in the UK.’
- **Credit Rating Agencies Regulation Equivalence Directions:** ‘This means non-systemic credit rating agencies (CRAs) authorised or registered in the EEA States will be able apply to be certified in the UK, subject to certain regulatory requirements. Endorsement also allows for the cross-border use of ratings between the UK and the EU. This allows UK-registered CRAs to endorse credit ratings issued from affiliated EU CRAs which allows them to be used for regulatory purposes by UK firms.’
- **Short Selling Regulation Equivalence Directions:** ‘This means that EEA market makers will be eligible to make use of the exemption in Article 17 of the EU’s Short Selling Regulations (which disapplies certain short selling restrictions and reporting requirements) subject to complying with certain regulatory requirements.’
- **Central Counterparties (Equivalence) Regulations:** ‘Subject to entry into an appropriate cooperation arrangement between the Bank of England and the relevant national competent authorities of EEA states, and a Central Counterparty (CCP) specific recognition determination by the Bank of England, UK firms will be able to continue using EEA CCPs after the end of the Transition Period. This equivalence decision does not exclude EEA CCPs from the current UK Temporary Recognition Regime (‘TRR’). Until recognition decisions are made, EEA CCPs who meet the relevant eligibility criteria will remain in the TRR, which is due to last until December 2023 and may be extended by the UK Treasury.’
- Finally, the UK Department for Business, Energy and Industrial Strategy will be laying *The Statutory Auditors and Third Country Auditors (Amendment) (EU Exit) (No. 2) Regulations 2020* to grant audit equivalence to the EEA States and approve as adequate their audit competent authorities.



Impact on Services



There is little in the TCA for services. UK service suppliers will lose their automatic right to offer services across the EU from 1 January 2021 and may need to establish themselves in the EU to continue operating. UK service suppliers must now comply with the host-country rules of each Member State, which are often varying, as they will no longer benefit from the 'country-of-origin' approach or 'passporting' concept, under which authorisations issued by one Member State under EU rules enable access throughout the entire EU Single Market. See page 8 on key aspects of the TCA in relation to Services.

Set out below is our commentary on the impact of the TCA on cross-border services trade between the UK and the EU.

The mode of supply

The actual level of market access for services will depend on the way a service is supplied: whether it is supplied on a cross-border basis from the home country of the supplier, e.g. over the internet; supplied to the consumer in the country of the supplier, for example a tourist travelling abroad and purchasing services; supplied via a locally-established enterprise owned by the foreign service supplier, or through the temporary presence in the territory of another country by a service supplier who is a natural person.

Other rules

The application of other rules that complement the provision of services will also impact on future trade. For example, rules governing the mobility of people between the UK and the EU (see page 33) or regarding the transfer of data (see page 43) will have an impact. Whether a service is regulated or requires professional qualifications (and their recognition) will also have an impact on future trade.

In assessing the level of access to trade in services between the UK and the EU going forward, it will therefore be necessary to understand the application of the relevant provisions of the TCA, (e.g. visa free travel), the relevant national laws of Member States, any evolution of the Single Market in services and also the limited and evolving rules that govern trade in services at WTO level - covered under the General Agreement on Trade in Services (GATS).

In terms of the application of GATS, the UK has deposited a schedule with the WTO that sets out the services that can be provided to the UK under GATS and whether any restrictions apply to those services. The schedule is quite lengthy and broadly liberal in terms of the services that can be provided to the UK.

In the context of the significant complexities noted above, we recommend that businesses take the following actions:



Impact on Services (continued)

Brexit Issue(s)	Action required
<p>Services supply chain Understand what services your business imports and exports to / from the UK.</p>	<p>Review supply chain It is essential for businesses to review their supply chains to understand the movement of services into and out of the UK and the potential for disruption as a result of the UK no longer being a member of the Single Market.</p>
<p>Understand whether the services are regulated or unregulated and whether any elements of the TCA apply to them or whether they are included in the UK / EU WTO services schedules.</p>	<p>It is essential to understand that even though certain services may be provided between the UK and the EU freely on WTO terms, other rules associated with EU membership (and not dealt with in the TCA) may prohibit their import / export. For example, consider:</p> <ul style="list-style-type: none"> • Does the movement of a service require the transfer of data between the UK and the EU? • Does the movement of a service require the movement of people between the UK and the EU? If so, understand the immigration and short-term visa rules that apply under the TCA. • Determine if the professional qualifications in the EU are recognised by the UK and vice versa? • Determine if other regulatory requirements apply.
<p>Can steps can be taken to mitigate some of the impacts of other rules on the movement of services?</p>	<p>Once it is understood what issues may give rise to difficulties in the import / export of services to / from the UK, consider whether there are specific actions that may be taken to mitigate these. For example, where a service involves the flow of data subject to EU GDPR, consider the options / exclusions available within GDPR that would facilitate the transfer of data from the EU to the UK should the EU not ultimately grant an adequacy decision in respect of the UK (on time).</p>

The World Trade Organisation (WTO) General Agreement on Trade in Services (GATS) divides the provision of services into 4 modes – set out below:

Mode 1: Cross-border supply - Service delivered within the territory of the Member, from the territory of another Member, e.g. an Irish consultant provides a report to a UK consumer via post or email.

Mode 2: Consumption abroad - Service delivered outside the territory of the Member, in the territory of another Member, to a service consumer of the Member, e.g. an Irish individual travels to the UK for legal advice.

Mode 3: Commercial presence - Service delivered within the territory of the Member, through the commercial presence of the supplier, e.g. an Irish architect establishes an office in the UK.

Mode 4: Presence of a natural person - Service delivered within the territory of the Member, with supplier present as a natural person, e.g. an Irish consultant or health worker travels to the UK to provide their service to a UK recipient.

Mode 5: Over the last few years the concept of a new mode of supply of services (mode 5) has emerged, though this mode has not (yet) been formally adopted by the WTO. Mode 5 refers to services which are incorporated into goods which are then traded across international borders, e.g. a UK car manufacturer sells a car with inbuilt software, etc. into Ireland that will require the provision of future services as part of the contract.



Impact on Data movements



Brexit Data Protection Adequacy Decision:

The European Commission has given an 'adequacy decision' to a number of "third countries" such as Andorra, Japan, Israel and New Zealand. This permits the transfer of personal data from EU Member States to these third countries. This is allowed, as these countries have a satisfactory level of data protection safeguards compared to the EU Data Protection framework.

The European Commission has the power to determine, under Regulation (EU) 2016/679 on whether a country outside the EU offers an adequate level of data protection. The steps involved for the adoption of an adequacy decision are follows:

- a proposal from the European Commission;
- an opinion of the European Data Protection Board;
- an approval from representatives of EU countries; and
- the adoption of the decision by the European Commission.

No adequacy decision between the EU and a country which has been awarded one has ever been revoked.

The UK left the EU on 31 December 2020 and from 1 January 2021 the UK will be treated as a third country for purposes of the EU General Data Protection Regulation (GDPR).

However, the TCA states that transfers of personal data from the EU to the UK will not be considered transfers of personal data to a third country during the Specified Period and will not be prohibited by the GDPR. The Specified Period begins on 1 January 2021 and ends:

- on the date on which an adequacy decision in relation to the UK is adopted by the European Commission under Article 45(3) of the GDPR and Article 36(3) of Directive (EU) 2016/680; or
- four months after the specified period begins, which period shall be extended by two further months unless one of the Parties objects.

Therefore, personal data may be transferred between the EU and the UK from 1 January 2021 until the end of the Specified Period with transfers of personal data from the EU to the UK not being permitted from that time unless EU data exporters of data have taken steps to ensure adequate protection.

It is anticipated that the European Commission will grant the UK an adequacy decision in 2021. However, it is unknown whether that will happen before the end of the Specified Period.

Until an adequacy decision is formally adopted, it would be recommended for companies and organisations, to insert model Standard Contractual Clauses (SCCs) (approved by the European Commission) in the contracts which would provide the appropriate safeguards for the transfer of personal data to the UK in any event and would provide as robust a protection as possible.

In the unlikely scenario that a no adequacy decision is adopted, the UK (including Northern Ireland) will become a "third country" for the purposes of GDPR. This means that the legal framework governing transfers of personal data from organisations established in the EU to organisations established in the UK will change as transfers of personal data to the UK will be subject to the rules on international transfers to third countries provided for in the GDPR and other EU Directives and Regulations.

In its adequacy decisions, the Commission should provide for a periodic review mechanism of their functioning. The Commission may recognise that a third country, a territory or a specified sector within a third country, or an international organisation no longer ensures an adequate level of data protection. Consequently, the transfer of personal data to that third country or international organisation should be prohibited, unless the requirements under GDPR relating to transfers subject to appropriate safeguards, including binding corporate rules, and derogations for specific situations are fulfilled. In that case, provision should be made for consultations between the Commission and such third countries or international organisations.

The TCA also comprises of some general measures which relate to data protection and privacy. This includes assurances by both parties not to enact restrictions that would limit cross-border data flows between the EU and the UK.



Impact on Data movements (continued)

Schrems II and no Adequacy decision

The Schrems II judgement by the Court of Justice of the European Union (CJEU) on 16 July 2020 has had consequences on the use of SCCs. Schrems II refers to the Data Protection Commissioner v Facebook Ireland and Maximillian Schrems. Maximillian Schrems is an Austrian lawyer, who became known for legal cases against Facebook for its alleged privacy violations.

In Schrems II, the Irish High Court officially referred the case to the CJEU, along with eleven questions to address related to the validity of SCCs. The CJEU both affirmed the validity of Commission Decision 2010/87/EU which provided for SCCs for data transfers, and invalidated Commission Decision 2016/1250 which was the legal basis of the EU-US Privacy Shield. A Commission Decision is a legally binding decision issued by the European Commission at the end of a regulatory procedure, such as a marketing authorisation application or arbitration procedure.

The EU-US Privacy Shield was a framework for regulating exchanges of personal data between the European Union and the United States. It allowed US companies to receive personal data from EU entities more easily under EU data protection laws. It was a replacement for the International Safe Harbor Privacy Principles, which had been declared invalid by the CJEU in October 2015.

The CJEU upheld the use of SCCs, and also affirmed that the European Commission has no obligation to evaluate the level of data protection in countries to which data are transferred under them. In upholding the use of SCCs, the CJEU relied on statements in the General Data Protection Regulation (GDPR) foreseeing the use of “other clauses and additional safeguards” in cases where the SCCs cannot ensure protection. The GDPR is a regulation in EU law on data protection and privacy in the EU and the EEA.

Data controllers are more accountable for taking action when legislation in the country of import allows for access to data going beyond EU standards. Data controllers determine the purposes for which and the means by which personal data is processed. If a company/organisation decides ‘why’ and ‘how’ personal data should be processed, then it is a data controller. The CJEU states that data controllers transferring data under the SCCs must “verify whether the law of the third country of destination ensures adequate protection under EU law”, and that they “are required to verify, prior to any transfer, whether the level of protection required by EU law is respected in the third country concerned”. This will require data controllers to become experts in third-country law in a way and raises questions in particular about data transfers to third countries that are non-democratic or where the rule of law does not apply.





Impact on Direct Tax matters



International Standards

Under the TCA, the UK and the EU have committed to maintaining in law the OECD's Base Erosion and Profit Shifting (BEPS) minimum standards – that is Actions 5, 6, 13 and 14 dealing with Harmful Tax Practices, Preventing the granting of Treaty Benefits in inappropriate circumstances, Country by Country Reporting and Mutual Agreement Procedures.

The UK and the EU have also committed to promoting good governance in tax matters, improving international cooperation in the area of taxation and facilitating the collection of tax revenues.

Moreover, both the UK and the EU have agreed not to weaken or reduce the level of protection against BEPS as provided for in their tax legislation at the end of the transition period below the level provided for by the standards and rules which have been agreed in the OECD at the end of the transition period. This relates to:

- a) the exchange of information, whether upon request, spontaneously or automatically, concerning financial accounts, cross-border tax rulings, Country by Country reports between tax administrations, and potential cross-border tax planning arrangements;
- b) rules on interest limitation, controlled foreign companies and hybrid mismatches. These are not BEPS minimum standards, but they are best practices that both the UK and the EU implemented into legislation through the Anti-Tax Avoidance Directive (ATAD).

The TCA also provides that neither the UK nor the EU can weaken or reduce the level of protection as provided for in their legislation at the end of the transition period in respect of public Country by Country reporting by credit institutions and investment firms, other than small and non-interconnected investment firms.

These provisions are not subject to the general dispute settlement provisions of the TCA.

Harmful Tax Regimes

The commitments on tax between the UK and the EU are also captured in a stand-alone Joint Political Declaration on Countering Harmful Tax Regimes. This is a political commitment to the principles of countering harmful tax regimes and reflects the work done by the OECD in this area.

The UK and the EU have affirmed their commitment to applying the principles on countering harmful tax regimes set out in Article

5 of the OECD's BEPS Action plan. Harmful tax regimes cover business taxation regimes that affect or may affect in a significant way the location of business activity, including the location of groups of companies, within the UK or the EU. Tax regimes include both laws or regulations and administrative practices. If a tax regime meets the gateway criterion of imposing a significantly lower effective level of taxation than those levels which generally apply in the UK or the EU, including zero taxation, it should be considered potentially harmful.

Subsidies

The TCA includes details on the types of tax measures that could be considered a subsidy for the purposes of the agreement – which is relevant to assessing whether a tax measure could be considered an illegal subsidy under the terms of the agreement.

The types of tax measures that could be considered a subsidy include those where:

- i. certain economic actors obtain a reduction in the tax liability that they otherwise would have borne under the normal taxation regime; and
- ii. those economic actors are treated more advantageously than others in a comparable position within the normal taxation regime.

Tax Conventions

A number of provisions throughout the TCA provide that where the terms of the TCA are inconsistent with the terms of a Double Tax Agreement (DTA) or any other international agreement or arrangement relating wholly or mainly to taxation (collectively defined as *tax conventions*), the tax convention shall take precedence. Bilateral tax Conventions between the UK and EU Member States continue to apply.

It is worth noting that the TCA provides that *“with regard to a tax convention between the [European] Union or its Member States and the United Kingdom, the relevant competent authorities under this Agreement and that tax convention shall jointly determine whether an inconsistency exists between this Agreement and the tax convention.”*

In practice, this could potentially lead to a prolonged and lengthy process to resolve inconsistencies.



Impact on Direct Tax matters (continued)

Social security

Please see comments at page 35.

DAC 6

The UK has announced that it will not be applying all aspects of DAC 6 (the EU's Mandatory Disclosure Regime) from 1 January 2021. DAC 6 applies to reportable arrangements with a nexus to an EU Member State, the first step of which was implemented on or after 25 June 2018. The first reporting deadline for the UK (and most Member States, including Ireland) is at the end of January 2021.

HMRC has confirmed that it will not require the reporting of arrangements that arose in the period from 25 June 2018, notwithstanding that the UK was / was treated as a Member State of the EU throughout that period up to 31 December 2020.

The above does not apply to arrangements that are reportable under Hallmark D of DAC 6 – broadly speaking, these are arrangements that seek to undermine the disclosure and exchange of financial account and beneficial ownership information. The UK will continue to require reporting of such arrangements. It is understood that this is on the basis that the UK considers that it has committed to the mandatory disclosure of such arrangements at OECD level.

Given that DAC 6 can be said to be a relatively minor matter, it was quite surprising that the UK announced that it would not apply it almost as soon as the TCA was agreed. It will be interesting to see the level of UK divergence that arises in the area of taxation and beyond in the coming months and years. In particular, with regard to larger policy areas, for example the ongoing work at the OECD on BEPS 2.0.

EU Directives and laws

From 1 January 2021, EU directives will no longer apply to the UK, including those in the area of direct tax:

- the Parent-Subsidiary Directive – aimed at exempting dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and eliminating double taxation of such income at the level of the parent company;
- the Interest and Royalties Directive – aimed at ensuring fair taxation of interest and royalty payments made between associated companies in different EU countries, while avoiding double-taxation between EU countries by abolishing taxes levied at the EU country of source, while the EU country of receipt taxes the same payment;
- the Merger Directive – aimed at removing fiscal obstacles to cross-border reorganizations involving qualifying companies situated in two or more Member States;
- the Directive on Administrative Cooperation (DAC) – the framework for, among others, automatic exchange of information among Member States on certain categories of income and assets, on cross-border tax rulings, advance pricing arrangements and reportable cross-border arrangements. Much (though not all) of the information exchanged under the DACs is automatically exchanged /

available on request through other fora, e.g. through OECD equivalent mechanisms or under Double Tax Agreements.

- the Anti-Tax Avoidance Directive (ATAD), which contains legally binding anti-abuse measures, which all Member States apply, including controlled foreign company rules, exit taxation, interest limitation provisions and anti-hybrid rules (though the UK has committed to applying most of the provisions of ATAD in the TCA); and
- the Directive on tax dispute resolution mechanisms in the EU, which has the objective to establish an effective and efficient procedure to resolve disputes in the context of a well-functioning EU internal market.

In addition to the above, decisions of the European Court of Justice will no longer apply to the UK.

As a result of the above, the tax treatment of certain matters, for example intragroup payments of dividends, interest and royalties between residents of EU Member States and the UK may change from 1 January 2021. Double Tax Agreements between the UK and EU Member States will continue to apply, and such matters may be governed by them or the domestic legislation of the relevant countries. Comments on the impact for certain transactions between Ireland and the UK are discussed in more detail at page 21 on the recently enacted Brexit Omnibus Act.



Impact on some Company Law provisions

For corporate groups which may have an Irish registered company, either forming part of, or heading up the group, there are several Irish company law considerations to be borne in mind and which may require action as a result of the UK's departure from the EU. It should be noted that unless the UK were to apply and be accepted into the EEA, the effect of their departure from the EU is that they are also treated as having left the EEA with effect from 1 January 2021.

Future relationship with the EEA

Following the UK's withdrawal from the EU on 31 January 2020, the UK ceased to be a party to the EEA Agreement between the EU Member States and the three EEA EFTA States. During the Transition Period, for the purposes of the EEA Agreement, the UK continued until 31 December 2020 to be treated as an EU Member State and, therefore, was treated as an EEA country for that duration. However, from 1 January 2021, the UK is a third country with regard to the EEA Agreement – a position that is not affected by the TCA reached between the EU and the UK. Such a position can only be remedied by agreement between the UK and the three EEA EFTA States of Iceland, Liechtenstein and Norway. This may not be a course that the UK chooses to follow as the UK government has already indicated that it does not intend to apply for membership of the EFTA.

Indeed, in September 2018 Minister Lord Callanan said of continued EEA membership:

"Were we able to carry on with membership of the European Economic Area, of course freedom of movement would continue, which I think would disappoint a lot of people who voted for Brexit, while the legal options are not straightforward. It would require the agreement of existing EEA countries and the ongoing agreement and co-operation of the EU, which would not necessarily be forthcoming. I know that the option has been put forward in good faith by a number of people, but I am afraid that the legal and practical difficulties would be considerable. That is why we default to our proposals, which we continue to negotiate on in good faith in Brussels and in other member state capitals."

1. EEA Resident Director Requirement

The Irish Companies Act requires an Irish registered company to have at least one director who is resident in an EEA country:

- Any company that is relying on a UK resident director to fulfil this requirement will need to consider whether that director should be replaced with another director who is resident in an EEA country
- Alternatively, a bond can be obtained from an insurance company which would pay fines or penalties incurred under Irish tax or company law up to the value of €25,000 over a two year period
- A company could also obtain a certificate from the Irish Registrar of Companies to state that the company has a real and continuous link with an economic activity being carried out in Ireland on the basis of the Irish Revenue Commissioners being satisfied that this is the case.

2. Irish subsidiaries exempt from filing individual entity financial statements with the Irish Companies Office

Where an Irish company is a subsidiary undertaking of a holding undertaking which is established under the laws of an EEA country, the Irish subsidiary may not be required to file its individual entity financial statements with its annual return at the Irish Companies Office.

Certain conditions must be fulfilled in order to avail of this filing exemption, including the requirement that the holding

undertaking gives an irrevocable guarantee of the subsidiary's liabilities included in its financial statements for the whole of that financial year. The scope of this guarantee was recently expanded in the Companies (Accounting) Act 2017 to include "commitments" in the financial year as well as liabilities. However, this filing exemption is only available where the holding undertaking is incorporated in an EEA country.

Groups who do not want commercially sensitive information on their Irish subsidiaries to be publicly available may want to look at options such as having another EEA parent in the group guaranteeing the subsidiary's liabilities or preparing and filing abridged financial statements on the basis of qualification as a small company.

There are further considerations to be borne in mind where the Irish subsidiary is also a holding company and had been relying on the size exemption from preparing and filing consolidated financial statements. The Companies (Accounting) Act 2017 has decreased the size thresholds which must be met in order for a holding company to qualify as a small group. As a result, it is now only a small group which can avail of the size exemption from consolidation. A group that previously qualified may not be able to avail of this consolidation exemption. In other words, unless the group qualifies as a small group (see table below for criteria to be met), consolidated financial statements may be required to be prepared and filed at the Companies Office which could increase the extent of potentially commercially sensitive information on public record.



Qualifying Criteria for a Small Group. Two out of the three criteria must be met for at least two consecutive financial years

Turnover	<= €12 million
Balance sheet total	<= €6 million
Average number of employees	<= 50

3. Irish Stamp Duty Relief

A relief from liability to Irish stamp duty can be claimed under Section 80 of the Stamp Duties Consolidation Act, 1999 (as amended) in the case of a reconstruction or amalgamation involving the transfer of an undertaking or a transfer of shares. There are several conditions to be satisfied in order to qualify for the relief, key amongst which is that the acquiring company must be an EU or EEA registered company.

By virtue of the Brexit Omnibus Act 2020, an acquiring company, for the purposes of a section 80 relief claim, can be a UK incorporated company.

4. Some Other Considerations

- The Irish Companies Act permits an Irish registered company to change its financial year end date once in every five years. However, this restriction does not apply in the event that a change in financial year end by a subsidiary or holding undertaking of another EEA undertaking is to align its financial year end with that other EEA undertaking. Post the UK's exit from the EU and EEA, this could have practical consequences, for example, for an Irish company that has been recently acquired by a new UK parent.
- A UK company that has a sufficient presence in Ireland will have registered as a branch of an EEA company. However, as the UK has ceased to be part of the EEA, the branch registration will have to be changed to that of a non-EEA company.
- The UK's exit from the EU impacts the information that UK Companies House requires in relation to EEA companies who have registered UK Establishments (branches). Irish companies that have established a presence in the UK and that have registered under the UK's Overseas Companies Regulations will be required to provide, for example, details of the Irish company's purpose and details of issued share capital by 31 March 2021.

Summary

In the context of the implications for Irish registered companies who place reliance on the fact that the UK is a member of the EU / EEA, failure to act will likely result in a breach of Irish company law or having a corporate structure that is not ideal. Directors of Irish companies should examine all associations with the UK now to determine what action is needed.



Our Brexit Response Team

Don't delay. Planning for Brexit means understanding the implications and opportunities for your business today. Our team of Brexit experts are already working with businesses North and South to make sure they are Brexit ready.

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