

28 December 2020

What Does Brexit Mean for You?

It Has Now Been Announced That the EU and UK Have Agreed on the Terms of a New Trade and Cooperation Agreement (the “Agreement”). The Agreement Covers a Number of Areas Relating to the Future Relationship Between the EU and the UK but Does not Cover the Majority of Services, Including Financial Services, in any Meaningful Way. So, Even With the Agreement, With the Current Transition Period Now Ending on 31 December 2020, What Does Brexit Mean for You?

INTRODUCTION

On 24 December 2020, the EU and UK negotiating teams agreed on the final terms of the Agreement, which must now be ratified by the EU and UK Parliaments. While the UK Parliament is being recalled this week to vote on the ratification of the Agreement before the transition period following the UK’s withdrawal from the EU ends at 23:00 GMT on 31 December 2020, the EU Parliament will take longer to vote on the ratification of the Agreement. The EU Commission has therefore proposed to apply the Agreement on a provisional basis, until 28 February 2021, during which time it is expected the EU Parliament will approve the Agreement and formal approval by all 27 EU member states will be given in the EU Council. Unlike other trade agreements recently concluded by the EU with other countries, as the Agreement only deals with matters within the current competence of the EU, it does not require ratification by the national parliaments of EU member states.

The Agreement covers, among other things, tariffs and quotas on goods, fisheries, labor and social standards, environmental protection, tax transparency, State Aid (to ensure a ‘level playing field’) and customs provision. However, the Agreement does not cover financial services (other than through a general undertaking to ensure the implementation and application of internationally agreed standards in the financial services sector for regulation and supervision), leaving decisions on equivalence and adequacy to be determined by each side unilaterally in due course.

Notwithstanding the Agreement, there will be a number of significant changes which will still take effect on 1 January 2021 after the current transition period has ended. The purpose of this memorandum is

to identify the principal changes taking effect on 1 January 2021 that will impact cross-border transactions, and their implications. **It is not a summary of all or any part of the Agreement.**

GOVERNING LAW

If you intend to enter into a contract governed by English law, there is no material change in respect of the choice of English law as the governing law of the contract; however, enforcement of judgments will be based on private international law or other treaties that are or will come into force. English law is considered a valid choice of law throughout the EU and English judgments, while not quite as easy to enforce in the EU as before the end of the Brexit Transition Period (even with the Agreement in place), will still be able to be enforced in most EU jurisdictions.

RESTRUCTURING

Restructurings: If you intend to restructure English law governed debt using an English scheme of arrangement or the new English restructuring plan, there should also be no material change in most EU jurisdictions. As noted above, English judgments regarding English law governed agreements should be recognised in most EU jurisdictions (although recognition will not be as straightforward as before 31 December 2020), much like equivalent New York law judgments rendered in New York.

Recognition of insolvency proceedings: Even with the Agreement in place, there will no longer be automatic recognition of insolvency proceedings of an EU jurisdiction in the UK and vice versa, which means that recognition will be based on other sources of recognition (such as the Cross-Border Insolvency Regulations 2006 (which is how the UK implemented the UNCITRAL Model Law on Cross-Border Insolvency) or common law principles of comity). Consequently, as a practical matter, until there is precedent, analysis and litigation of the cross-border recognition of insolvency proceedings is likely to be more time-consuming and costly. Additionally, the ability of a non-English court to compromise an English law governed debt is questionable under the English *Gibbs* principle and further development of the law in this area will be required. Finally, we would expect that “forum shopping” in insolvencies (both good and bad) will become more difficult and costly, though we note that there are many examples of UK and European companies filing for Chapter 11 in the US, and the end of the transition period on 31 December 2020 will ultimately have the effect of making a company’s stakeholders ask the same questions regarding recognition and effect that are asked when a company files for Chapter 11 in the US.

CAPITAL MARKETS

EU public offerings/listings: If you intend to offer equity or low denomination (less than Eur1000) debt securities to the public in the EU and/or list on an EU regulated market and your current regulator is the UK Financial Conduct Authority (FCA), the impact of the end of the transition period on 31 December 2020 is as follows:

- The FCA will cease to be recognised as a competent authority/regulator for the purposes of EU securities law. You will have to choose a new EU securities regulator, where you have a choice.

Please contact us if you would like advice on whether you have this choice and, if you do, how to exercise it. From 1 January 2021, you will no longer be able to passport prospectuses between the UK and EU, so you will need separate prospectuses for equity and low denomination debt offerings to the public in the UK and EU.

- The EU will not grandfather prospectuses whose validity straddles 31 December 2020, but the UK will treat prospectuses passported into the UK before 31 December 2020 as valid for use in the UK for 12 months from the date of their approval. From 1 January 2021, a supplement to a passported prospectus must be approved by the FCA. Issuers would have needed to have arranged passporting requests with relevant EU regulators or the FCA sufficiently in advance of 31 December 2020 to avoid delays.
- While the UK has granted equivalence to EU-adopted IFRS, the EU has not reciprocated for UK GAAP or UK-adopted IFRS. You may, therefore, be required to prepare two sets of financial disclosures compliant with two different sets of financial regulations for the offering/listing and to comply with ongoing reporting requirements. However, both the EU and the UK currently continue to recognise financial statements prepared in accordance with certain local GAAP (for example, US GAAP and the GAAP of Canada, China, Japan and South Korea, and also IFRS as adopted by the IASB) as equivalent to EU-adopted IFRS and UK-adopted IFRS.
- If you intend to offer debt securities in the UK and/or EU with denominations above Eur1000 or certain convertible or exchangeable securities then you can continue to select your EU securities regulator on a per-issue basis, which will be the competent authority of the EU member state where the debt is being offered or listed.

Private placement regime: If you are an issuer seeking to offer securities in the EU on an institutional private placement basis (i.e. to qualified investors only), you can continue to do so after 31 December 2020 in the same way as before. If you are a debt issuer offering wholesale debt (i.e. debt with a denomination of at least Eur100,000) in the EU, then you can continue to do so after 31 December 2020 using the exemption from the requirement for a prospectus for wholesale debt.

Recognition of “bail-in” clause: While not directly related to the UK ceasing to be treated as a member of the EU, a change to the rules affecting EU financial institutions may be relevant from 1 January 2021 either if you are subscribing for debt securities issued by an EU financial institution and the offering is governed by English law or if an EU financial institution is acting as an advisor to you in connection with a capital raising (e.g. as an underwriter, dealer or arranger) which is governed by English law. EU financial institutions are, from 1 January 2021, required to include in the offering document (where they are the issuer), or agreement (if they are the advisor), a clause recognising the right of the relevant EU resolution authority to convert the debt securities into equity or to write down the liabilities arising in connection with the offering or under the agreements pursuant to resolution powers granted to such authorities under the EU Bank Recovery and Resolution Directive. Industry bodies have developed standard form “bail-in clauses” which many such institutions have been including in English law governed agreements in preparation for Brexit. However, not all financial institutions have taken this approach. From 1 January 2021 they will be required to.

M&A

Private M&A: If you intend to acquire a private UK company, you should not only consider the implications of both the end of the transition period and the entry into the Agreement from a diligence perspective, but also in terms of the effect the UK ceasing to be treated as a member of the EU (even with the Agreement in place) may have on the interim covenant package, non-compete and the warranty

package that you seek, particularly in light of the twin challenges of the end of the transition period and the Covid-19 pandemic.

Public M&A: If you intend to acquire a publicly listed UK company, while the Takeover Panel is currently consulting on amendments to the UK Takeover Code in relation to certain aspects of the way in which offer conditions relating to regulatory approvals (including approval of the EU Commission) are dealt with, those amendments will not be in place on 1 January 2021. Otherwise, the only immediately apparent change is that if you are a non-UK issuer offering securities in the UK as part (or all) of your offer consideration (except in some cases where your offer is structured as a scheme of arrangement), as mentioned above, you will need an FCA-approved prospectus even if you have an EU-approved and passported prospectus for the offer made into the EU.

Antitrust: If the company you are acquiring has UK and EU revenues above the relevant antitrust filing thresholds, you will need to consider whether, as well as filing with the European Commission, it would be worthwhile after 1 January 2021 to file with the UK Competition and Markets Authority (if the transaction has not been filed with the European Commission before 1 January 2021). Parallel notifications will lead to the transaction being reviewed in both the UK and EU, under different timetables.

DATA PROTECTION

From 1 January 2021, if you hold UK or EU subject personal data and want to transfer it:

- from the UK to the EU, you will be able to do so in the same ways as prior to the UK leaving the EU; or
- from the EU to the UK, you will be able to continue to do so for an interim period under a provision which specifies that the UK is not to be considered as a third country under EU data protection law, provided that current UK data protection law remains in place.

The Agreement provides that this interim period will end either when the EU Commission adopts an adequacy decision in relation to UK data protection law, or four months after the Agreement comes into force (provided that either the EU or UK will, absent an objection by the other, be able to extend this period for a further two months).

TAX

- If you trade goods cross-border:
 - you will still be able to move goods between the EU and the UK free of tariffs after the end of the transition period, as long as the goods comply with the “rules of origin” set out in the Agreement;
 - the UK has changed its VAT rules so that there will be no cash-flow disadvantage to importing goods from the EU into the UK after the end of the Transition Period (and the position for imports from elsewhere will improve); the position for imports from the UK into an EU member state will depend on how it has implemented the EU VAT rules.
- If you are a financial services provider, you will be able to reclaim input VAT attributable to outbound supplies you make from the UK into the EU (or vice versa) from 1 January 2021, as you currently can in respect of outbound supplies from the UK to third countries.

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- If you are a corporate group with subsidiaries in the UK and EU, there are no immediate changes to when the UK will require withholding from payments out of the UK or how it will treat cross-border payments into the UK. On the other hand, withholding from payments of dividends, interest or royalties out of EU jurisdictions to UK-resident companies may be affected, depending on the terms of the bilateral tax treaty in place between the UK and the relevant country. You will also need to consider your tax grouping in an EU jurisdiction carefully where a UK-resident company has been an essential link in the group.

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In relation to these and any other issues in relation to Brexit, please contact your usual Sullivan & Cromwell contact or any of the contacts listed under “Contacts” below.

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