KNEPPELHOUT

BREXIT:
A GUIDE TO EU – UK TRADE OF GOODS

1 July 2020

1. INTRODUCTION

On 31 January 2020, the United Kingdom (UK) exited the European Union (EU) under the terms of the Withdrawal Agreement. In accordance with the Withdrawal Agreement, there is now a transition period in place until 31 December 2020[1]. At the end of the transition period the UK's withdrawal will inevitably create barriers to trade and cross-border exchanges that do not exist today.

The impact on trade between the EU and the UK will be significant: as a non-EU country, the UK will no longer be in the internal market and customs union of the EU. As a result, new and different rules, conditions and procedures will apply in relation to the trade of goods between the EU and the UK.

This article provides a general overview of the Brexit implications from (mainly) an EU trade, customs and VAT point of view[2]. Also, it addresses some special trade regulatory matters such as food law, REACH, export controls and sanctions[3].

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[1] Based on the Withdrawal Agreement the transition period may be extended once for up to 1 or 2 years. The UK government has so far ruled out such an extension. Despite the formal requirement saying that an extension should be submitted before 1 July 2020, it cannot be excluded that an extension will be agreed upon at a later moment.

[2] This document is distributed for informational use only; it does not constitute legal advice and should not be taken as such.

[3] There are broader and far-reaching consequences for public administrations, businesses and citizens as of 1 January 2021. The EU Commission is reviewing the over 100-sector specific stakeholder preparedness notices it published during the Article 50 negotiations with the UK: https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/future-partnership/getting-ready-end-transition-period_en.

2. BREXIT STATUS: THE TRANSITION PERIOD AND FUTURE RELATIONSHIP

During the transition period all EU rules and Regulations will continue to apply to and in the UK as when it was an EU Member State. There are therefore no immediate changes for companies involved in trade between the EU and the UK during this period. Instead, companies have been advised to use this time to prepare for the upcoming changes that will apply after the end of the transition period. This does not only involve import and export related activities, but in particular trade regulatory related matters such as food regulations, REACH, export controls and sanctions.

While writing this article it is not likely that the transition period will be extended as the UK has formally rejected this option. It is therefore expected that the transition period will indeed end on 31 December 2020. During the transition period, the EU and the UK are seeking to reach an agreement on their future relationship. Amongst other things, the agreement will determine the rules, conditions and procedures that will apply to trade between the EU and the UK following Brexit.

Once the transition period ends, EU legislation will cease to apply to and in the UK. The future relationship will depend on whether an agreement will be reached, and if so, what that agreement specifically entails.

No-deal Brexit

In a no-deal scenario, the UK would immediately leave the EU, with no agreement about the “divorce” process. The no-deal scenario becomes reality if the EU and the UK fail to reach an agreement before the end of the transition period.

Under no-deal the UK would leave the single market and customs union and this also implies leaving EU institutions such as the Court of Justice of the EU and ECHA[4]. Also, from a sanctions legislation point view the UK is no longer committed to the Common Foreign Security Policy (CFSP)[5].

Following a no-deal, trade between the EU and UK will be subject to the rules of the World Trade Organization (WTO). This will not only result in significant changes, such as higher import duty tariffs and border checks, but also uncertainty on trade and customs aspects which are not covered by the WTO rules and which the EU and UK have not made any agreements on[6].

EU-UK Trade Agreement

There are currently Brexit trade deal talks between the EU and UK. A trade agreement will be aimed at reducing or eliminating tariffs, removing quotas, but also on matters like competition, environment and fisheries. The UK and the EU have many differences yet to overcome as they try to close a trade agreement by the end of the year.

At present, there is still much uncertainty concerning trade between the EU and UK after the transition period. It is however clear that, in any case, trade will be substantially different once the transition period has ended, whether it ends with an EU-UK Trade Agreement or in a no-deal.

[4] The European Chemicals Agency (ECHA) works for the safe use of chemicals. It implements the EU's chemicals legislation, benefiting human health, the environment and innovation and competitiveness in Europe.

[5] The Common Foreign and Security Policy (CFSP) of the EU was established by the Treaty on European Union (TEU) in 1993 with the aim of preserving peace, strengthening international security, promoting international cooperation and developing and consolidating democracy, the rule of law and respect for human rights and fundamental freedoms.

[6] For example the Irish backstop that aimed to prevent a fysical border (one with customs controls) between the Republic of Ireland and Northern Ireland after Brexit.

3. CUSTOMS TARIFFS

As a result of Brexit, the UK will exit the single market and the customs union when the transition period ends. Currently, there are no tariffs or customs formalities required for goods moving between the UK and the EU. As from 1 January 2021 the UK will however be regarded as a third country[7] and movements of goods between the EU and the UK will be considered as import and export transactions. As a result, trade in goods between the EU and the UK will become subject to customs formalities and customs tariffs will apply.

There are different possible outcomes regarding customs tariffs.

No-deal Brexit

If the UK leaves the EU with no deal, the default position is that trading between the EU and UK will be subject to the rules of the World Trade Organization (WTO), including the 'Most Favoured Nation' (MFN) principle. Under this principle, countries are required to apply their most favourable tariffs to all WTO member countries, unless they conclude a trade agreement with a particular WTO Member. Under the MFN principle the EU will apply its most favourable customs tariff to the UK as it does to any other third country.

In May 2020 the UK announced its new MFN Global Tariff regime (UKGT). It will replace the EU's Common External Tariff (ECT) once the transition period ends. The UKGT applies to 9,500 products of which around 2,500 products will be tariff free. The UKGT has for example removed tariffs on a wide range of goods in addition to scrapping so-called nuisance tariffs (those below 2%) and the Meursing table covering goods such as confectionary and bakery products.

[7] A third country is a country not member of the EU.

For certain industries where the UK has a protective interest, tariffs have been maintained. This concerns goods such as agricultural products and cars. If there is no trade agreement by the end of the transition period, then the tariffs in the UKGT will apply to import of goods from the EU (as for imports from the rest of the world).

EU – UK Trade Agreement

If a trade agreement is concluded between the EU and the UK, preferential tariffs are expected to apply to the majority of goods traded between the EU and the UK. Preferential tariffs may take form in reduced or zero rated import duty tariffs on certain goods or certain quantities of those goods (tariff quotas). The specific tariff rates and tariff quotas that may be applicable to specific goods will however only be known for certain once a trade agreement has been concluded.

Considering the long period of time it generally takes to conclude trade agreements ,it is however quite likely that there will be no agreement by the end of the transition period. Also, the UK is looking for a "Canada-style trade deal"[8], while the EU requires a more ambitious free trade agreement.

> *Michel Barnier on 5 June 2020: "To tell the truth, this week there have been no significant areas of progress"*[9]

It can therefore not be excluded that there will be a period in which EU – UK trade will be subject to WTO rules. Higher tariffs and customs formalities will result in the increase of costs for trade.

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[8] Comparable to CETA, the EU-Canada trade agreement.

[9] https://ec.europa.eu/commission/presscorner/detail/en/speech_20_1017

It should also be noted that the UK will no longer be covered by the free trade agreements that the EU has concluded with other countries and regions. Examples are the trade agreements between the EU and respectively South Korea, Japan and Canada. The preferential treatment provided by these agreements will cease to apply to UK goods once the transition period ends. As a result, UK input in EU goods will be considered as non-originating content under EU free trade agreements.

The UK is seeking to conclude its own agreements with EU trade partner countries and regions to ensure that the preferential access under EU trade agreements will continue to apply to trade between the UK and those trading partners after the transition period.

4. CUSTOMS

Following the transition, movement of goods between the EU and the UK will be considered import and export with a non-EU country and thereby subject to customs formalities. Import of UK goods into the EU must be cleared by customs under a specific customs procedure, depending on whether the goods will remain in the Union customs territory, are up for transit or intended for re-export. Customs formalities will therefore apply, declarations will have to be lodged and customs authorities may require guarantees for potential or existing customs debts.

When UK goods enter the EU they may incur import duties as set out in the EU Common Customs Tariff. Certain goods may in addition be subject to excise duty, import VAT, and import restrictions. Import and export licenses issued by the UK will no longer be valid in the EU.

Goods exported from the EU to the UK must similarly be cleared by customs under a specific export procedure. Exported goods are not subject to duties, VAT or excise duties in the EU, but (most probably) will be dutiable in the UK. Certain EU export restrictions or prohibitions on particular types of goods may apply.

4.1 Exporter of Record

When exporting goods from the EU, an export declaration must be submitted by the exporter to the relevant customs authorities. On 1 October 2019, the Dutch Customs authorities announced that non-EU companies may not be stated as the "exporter" of goods in Box 2 of the export declaration after the 1st of December 2019[10]. This means that exporters for customs purposes can only be EU-established entities, having an EORI number. An exception has been made for the re-export of non-Union goods. Previously it was permitted for non-EU companies to appoint an indirect customs representative[11].

Following the change an EU-established entity must act as exporter on the customs export declaration, and has to be mentioned with its EORI number in box 2 of the export declaration (see paragraph 4.2).

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[10] To give businesses time to adjust their supply chains and systems, Dutch Customs announced on 18 November 2019 an adjustment of this date to 1 April 2020. According to the further announcement of the Dutch Customs authorities following the Covid- 19 outbreak, the implementation deadline has meanwhile been postponed to the 15th day of the month following the month the measures concerning Covid-19 are ended by the Dutch Government. The current Covid-19 measures are in force up to and including the 1st of July 2020.

[11] Please also see the SDU Whitepaper (in Dutch) "Exporteursbegrip in de Europese douanewetgeving: https://www.sdu.nl/bedrijfsvoering/douane/inenuitvoer/exporteursbegrip

Non-EU companies are forced to assign an EU-established (group) entity to act as exporter for customs purposes for the export of Union goods. This can be any person having its registered office, central headquarters or a permanent business establishment in the customs territory of the Union. A permanent business establishment is defined as a fixed place of business, where both the necessary human and technical resources are permanently present and through which a person's customs-related operations are wholly or partly carried out. Alternatively, an assessment of the used Incoterms can be considered[12].

So how could this affect non-EU companies? If you are a non-EU company shipping under the Incoterm EXW (Ex Works) from the Netherlands or are (having) submitting export declarations on behalf of your non-EU company that is only registered for VAT within the Netherlands, this could significantly affect your supply chain. A potential solution is to agree with the EU supplier to change the EXW Incoterm into FCA.

Based on the new exporter definition, parties are contractually free to choose any person established in the EU to act as exporter. This person does not necessarily have to be a party in the sales chain. Note that the party which is contractually assigned as exporter takes over the responsibility for the correctness of the export declaration towards the customs authorities. It should furthermore be noted that logistics service providers (customs agents, shipbroker, carriers, etc.) are – generally speaking – not often willing to take on the role of exporter due to the (financial) risks involved.

This change will also impact UK-based companies exporting and acting as an exporter of record from the Netherlands when the transition period ends.

[12] The Incoterms rules are terms of trade for the sale of goods. The latest edition of the Incoterms is from 2020.

UK- based companies exporting from the Netherlands should find alternative means for ensuring an uninterrupted flow of exports from the EU, including for example and if appropriate choosing other Incoterms or setting up an EU legal entity (or a “permanent business establishment”) for customs purposes. The export of dual-use goods in particular requires careful consideration. UK-based companies may also consider appointing parties established in the EU to act as the exporter by means of contractual arrangements.

4.2 EORI

With the EORI number Customs identifies economic operators in the same way in all Member States (EORI = Economic Operators Registration and Identification number). An EORI is required to make customs declarations and applying for authorisation to use customs simplifications and procedures. The EORI number is an unique identification number that companies are required to use when exchange data with Customs in all EU Member States. The EORI number for economic operators consists of a country code and a unique code or a unique number[13].

Companies that currently only trade goods between the EU and the UK have not previously needed an EORI Number. After the transition period, a company requires an EORI number to move goods between the EU and the UK (either in the EU, UK or in both, depending on the circumstances). If the supplier company only completes import or export declarations in the EU and the customer completes the equivalent declarations in the UK, then the company only needs the EU EORI number, while the customer needs an UK EORI.

[13] In the Netherlands the Dutch EORI number starts with “NL” followed by the economic operator’s tax reference number. The European Union keeps a central record of all EORI numbers in an EORI database that is available to the customs authorities of the various member states: https://ec.europa.eu/taxation_customs/dds2/eos/eori_validation.jsp?Lang=en

However, for companies that move goods resulting in both an export declaration in the EU and an import declaration in the UK (or vice versa), it will be necessary to obtain both an EU and an UK EORI number[14]. This is for example the case for companies that are the importer of record in the UK and exporter in the EU.

4.3 Authorisations

After the transition period authorisations from customs authorities may become invalid, depending on the type of authorisation, the issuing authority, the holder and the geographical coverage. Authorisations from the UK customs authorities, such as authorisations for customs simplifications, Authorised Economic Operator (AEO) as well as certain authorisations to holders of an UK EORI number will no longer be valid in EU.

Furthermore, import and export of goods which require specific authorisations under EU rules, such as dual-use items or agricultural goods may also for the movement of goods between the UK and the EU require such a specific authorisation.

4.4 EU origin goods

The EU has notified its international partner countries in free trade agreements that during the transition period the UK will continue to be looked at as being an EU Member State. Products originating in the UK, such as (semi)finished products, components and raw materials that are subsequently exported from the EU, are therefore still to be treated as of EU origin under the EU free trade agreements.

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[14] After the transition period, a company needs an EORI number that starts with GB to move goods to or from the UK.

After the transition period, these UK products will no longer qualify as EU originating goods. This will also affect Proof of Origin and Supplier's Declarations. Decisions concerning Binding Origin Information (BOIs) and Binding Tariff Information (BTIs) issued from the UK or to UK EORI holders will also no longer be valid in the EU after the transition period.

5. VAT

After the transition period the UK will leave the EU VAT regime, regardless whether a trade agreement is reached. The movement of goods to the UK will be considered an export to a non-EU country and no longer looked at as an "intra-community supply" under EU VAT Law. This also means there will be no further requirement for Intrastat reporting and European Commission (EC) sales listings. Furthermore, some EU Member States require the appointment of a fiscal representative in order to meet local rules.

Following the transition period, VAT will become due on EU importation, unless the EU Member State of importation allows that import VAT is deferred to the periodical VAT return[15]. Goods are exempted from VAT when they are exported to a destination outside the EU (i.e. the UK). In this case, the exporter must be able to prove that the goods have left the EU, for example with a certification of exit provided by the customs authorities.

[15] In the Netherlands this is the so-called Art. 23 VAT Deferment: This reverse-charge mechanism on import means that you are not required to pay the VAT on import immediately. The VAT can then be paid when you file your VAT return. In order to do this, you will need an Article 23 permit. As a foreign entrepreneur, you are not entitled to apply for an Article 23 permit yourself. You can however engage a fiscal representative for this purpose. This representative can apply for a permit for you.

Also, the UK will no longer be able to take advantage of the EU distance selling regime. For distance selling i.e. the sale of goods to non-VAT registered companies and individuals, currently, the seller can include its domestic VAT rates in the sales price. After the transition period, such sales between the EU and UK will most likely have to be zero rated, which requires that the buyer pays its local VAT and customs duties. Depending on the sales terms, the seller may however be liable for the VAT in the buyer's country. If for example an EU supplier is liable to declare the import and pay VAT in the UK, it may be necessary to VAT register in the UK following the transition period. The same applies for UK suppliers who may be required to register for VAT in the EU Member States that they import into. Some EU Member States further require non-EU companies to appoint a representative when registering for VAT. After the transition period this may also apply to UK companies registering for VAT in EU Member States, and vice versa.

6. EXCISE DUTIES

Excise duties are indirect taxes on certain products such as alcohol, tobacco and oil. Movement of excise goods within the EU can be done either under duty suspension or release for consumption (duty paid). After Brexit, imports of excise goods from the UK into the EU will be treated the same as imports from the rest of the world. After the transition period, movements of excise goods between the EU and UK will become import and exports transactions, and the Excise Movement and Control System (EMCS) and the System for Exchange of Excise Data (SEED) will no longer apply[16].

[16] EMCS is the automated system for the movement of excisable goods with union status under the suspension of excise duty within the EU (made in the EU or for which the import duties have been paid in the EU).

[17] After Brexit, EMCS can be used to move excise duty-suspended goods from the place they enter the UK to their final destination in the UK.

Authorisations in relation to excise duties held in EU Member States by companies established in the UK will furthermore cease to be valid. As a result, companies moving excise goods between the EU and the UK following the transition period will have to fulfil customs formalities, such as customs, safety and security declarations. Excise duty must furthermore be paid upon import, unless the goods are placed in a customs or excise suspensive arrangement[17].

7. EU FOOD LAW

EU Food Law sets out common rules concerning food products placed on the EU market. [18]EU Food law harmonises the labelling of food placed on the EU market. It also particularly imposes certain restrictions and obligations on companies trading in food products on the EU market. Following the transition period, EU Food Law will no longer apply to the UK, which will instead introduce its own food laws. As these may differ from EU Food Law, companies importing food (& feed) products from the UK to the EU must ensure that imported food complies with EU Food law requirements. This may require changes to the labelling of food products in order to comply with mandatory labelling of the origin of the products, the EU importing company and mandatory information.

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[16] EMCS is the automated system for the movement of excisable goods with union status under the suspension of excise duty within the EU (made in the EU or for which the import duties have been paid in the EU).

[17] After Brexit, EMCS can be used to move excise duty-suspended goods from the place they enter the UK to their final destination in the UK.

[18] In 2002, the European Parliament and the Council adopted Regulation (EC) No 178/2002 laying down the general principles and requirements of food law (General Food Law Regulation). The General Food Law Regulation is the foundation of food and feed law. It sets out an overarching and coherent framework for the development of food and feed legislation both at Union and national levels. To this end, it lays down general principles, requirements and procedures that underpin decision making in matters of food and feed safety, covering all stages of food and feed production and distribution.

Certain food products, such as genetically modified food as well as vitamins or minerals, food additives and flavorings may not be placed on the EU market unless such products have been authorized by the EU Commission. The import of some food products may also require authorisations. Companies established in the UK will no longer be able to hold EU authorisations as these can only be held by companies established in the EU.

As regards trade in animal products, imports from the UK will not be permitted unless the UK as well as the exporting company itself have been included by the Commission on the list of approved third countries and establishments. The EU and UK also (still) have to agree on what veterinary requirements will apply following the transition period.

When importing or exporting animal products between the EU and the UK, the exporting company must obtain a veterinary certificate evidencing that the animal product complies with all requirements of the importing destination. For import to the EU the Common Veterinary Entry Document (CVED) must be submitted to the competent authority before export, along with a veterinary health certificate and other required documents. Once the documentary control has been completed, the importer must request the physical inspection, which is performed at one of the Border Inspection Posts (BIP). After the inspection, the importer must submit the import declaration, along with the CVED and other required formalities to release the goods. Companies that import or export food products should therefore prepare for the additional time and costs resulting from changes in required certificates, authorisations and inspections when trading in food products.

8. REACH

Unless agreed otherwise, once the transition period ends EU REACH legislation concerning movement of chemicals will cease to apply in the UK, and the competent authorities in the EU and UK will work independent from each other[19]. Companies engaged in supply or purchase of chemical substances, mixtures or articles between the EU and the UK must therefore comply with both EU and UK REACH laws and register with their respective agencies[20]. These changes may result in significant changes in the legal obligations of the companies in the supply chain.

Registrations held by companies established in the UK may no longer be valid in the EU. As a result, it may be necessary for UK based companies to either transfer authorisations and registrations, or appoint an EU based manufacturer, importer or Only Representative (OR) for REACH purposes. Downstream users in the EU will need to assess whether the substance is registered by an EU registrant. If this is not feasible, then companies may need to choose an alternative supplier, ensure that the UK registrant appoints an OR, or become appointed as importer or OR and register the substance themselves.

Similarly, authorisations held by companies established in the UK may no longer be valid in the EU. As such, UK based holders of authorisations may need to transfer their authorisation to an EU based entity to ensure that their EU based downstream users continue to be covered under the authorisation.

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[19] EU Regulation No. 1907/2006 on the Registration, Evaluation, Authorisation and Restriction of Chemicals ('EU REACH'), which governs the regulation of chemicals for the protection of human health and the environment.

[20] UK REACH legislation and a UK chemicals agency are expected to come into force on 31 December 2020.

9. EXPORT CONTROLS

The legal framework for the export of dual-use items is laid down in Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items ("EU Dual-Use Regulation"). According to this regulation, dual-use items as listed in Annex I of that regulation are subject to export controls and therefore export is only allowed if an export authorization is granted by the competent authority of the EU Member States (controlled goods).

Whereas authorisations are required for the movement of controlled goods to non-EU countries, movement of controlled goods within the EU in many cases does not require prior authorisation. After the transition period, export restrictions and prohibitions under the EU Dual-Use Regulation will apply to the UK as a third country. Export authorisations issued by the UK will no longer be valid in the EU for exports of dual-use items. Therefore, exports from the EU covered by a UK license will require an authorisation issued by the competent authority of one of the EU Member States in accordance with the EU Dual-Use Regulation. For exports from the EU to the UK, the controls applicable to exports to non-EU countries will apply to exports to the UK.

There are different forms of authorisations, including the EU general export authorisations. The EU has already included the UK as a covered destinations under the EU general export authorisation EU001 (the so-called UGEA 001[21]), which covers most dual-use items of Annex 1 of the EU Dual-Use Regulation[22].

[21] The EUGE 001 does not permit exports for WMD end-use applications, or to a customs free zone or a free warehouse located in a destination covered by the authorisation (https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32009R0428#d1e32-253-1).

[22] Similarly, the UK has adopted a new Open General Export License (OGEL) for the export of dual-use items from the UK to EU Member States.

Although companies need to fulfil the relevant conditions in order to obtain the authorisation, the inclusion of the UK will ease the administrative burden on companies exporting controlled items to the UK. No considerable changes are expected for the movement of military items: these currently already require a license for all exports including intra-EU transfers.

10. SANCTIONS

Restrictive measures or 'sanctions' are an essential tool of the EU's Common Foreign and Security Policy (CFSP). They are used by the EU as part of an integrated and comprehensive policy approach, involving political dialogue, complementary efforts and the use of other instruments at its disposal. Sanctions against foreign states, entities and individuals are adopted by the European Council and applicable in all EU Member States. A large part of sanctions are adopted by the United Nations (UN) Security Council and implemented by the EU.

During the transition period, UN and EU sanctions are implemented in the UK through EU law, but the UK can also adopt autonomous UK sanctions regimes. After this period, any new sanctions measures adopted in the EU will no longer apply to the UK, which will instead implement its own sanctions framework. The UK's Sanctions and Anti-Money Laundering Act 2018 (SAMLA) is designed to allow the UK government to create sanctions going forward. SAMLA gives the UK the power to diverge from EU sanctions regimes. Companies should therefore carefully review their commitments in light of the change in application of the EU and UK sanctions regimes.

11. FINAL REMARKS

The UK withdrew from the EU on 31 January 2020. As of 1 February 2020, the transition period provided for in the Withdrawal Agreement applies until 31 December 2020, unless it is decided to extend it. During the transition period, EU law continues to apply to and in the UK.

It is not certain if the EU and the UK will reach a trade agreement to enter into force following the transition period. In any event, a no-deal Brexit as well as a trade agreement will be very different from the UK's participation in the internal market, in the EU Customs Union and in the VAT and excise duty area. Moreover, various trade regulatory areas such as food law, REACH, export controls and sanctions will be affected.

Companies are advised to review their supply chains as a customer or supplier and – depending on the specifics of the business sector – take appropriate actions.