2021

An SME Guide to the UK-EU Trade & Cooperation Agreement:

Legal and Tax Implications

In collaboration with:

haysmacintyre

myerson solicitors

Introduction and Background

This guide, a collaboration report between **Haysmacintyre LLP** (auditors and tax advisors) and **Myerson Solicitors LLP** (legal advisors), provides UK based SMEs with an overview of the main legal and tax implications arising out of the EU-UK Trade and Cooperation Agreement (the TCA).

After a prolonged and challenging period of negotiation, the TCA was agreed on 24 December 2020 and took effect on 1 January 2021, to coincide with the end of the transition period and the UK's departure from the EU Single Market and Customs Union.

The TCA is a lengthy and complex agreement and represents the basis upon which the future relationship between the UK and the EU will be shaped. We believe that the TCA represents the beginning of this relationship and many future agreements will build upon what is currently in place. We will continue to report and update on these future developments.

This guide intends to summarise those areas which we believe are of key concern. The guide includes links to our other publications which examine the issues in further detail.

Please do visit regularly as this guide will be revised as updates and new information are announced.

Latest Developments

- The European Commission has published draft decisions to deem the UK's data protection regime "adequate". More information is available on the *Myerson Brexit Hub.*
- Save in relation to UK withholding taxes (as explained further in our section on withholding taxes), Budget 2021 did not introduce any specific Brexit related changes.
- The Government has announced that via the SME Brexit Support Fund, businesses can receive a grant of up to £2,000 for training and professional advice in relation to import and export related aspects. UK established businesses with no more than 500 employees and £100m annual turnover can qualify. For further details see here:

READ MORE HERE

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Myerson Solicitors and Haysmacintyre

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Haysmacintyre is an award-winning firm of chartered accountants and tax advisors based in London, comprising 38 partners and over 300 staff, with a strong international alliance, MSI Global Alliance. We help our clients solve problems, grasp opportunities and achieve their goals through our relatable, responsive and knowledgeable approach to delivery across our broad range of services.

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01 Trade In Goods

Trade In Goods

In terms of cross-border trade in goods, the TCA provides for zero tariffs and zero quotas, which is the first time the EU has agreed to such an arrangement in any trade deal. This is therefore an unprecedented term of the TCA, and one which will be hugely welcomed by many businesses.

Rules of Origin

Importantly, however, to qualify for the zero-tariff treatment, the goods in question must of be EU or UK origin. Any product which is not of UK or EU origin, or where a certain percentage of its pre-finished value is not of UK or EU origin, then tariffs may apply.

The rules of origin are complex, but do permit “full bilateral cumulation”, which means that both materials and processing are recognised for origin purposes. Additionally, there is a self-certification scheme in place which will help to facilitate trade on the basis of exporters giving a statement of origin in respect of the goods.

Technical Barriers and Customs Formalities

Notwithstanding the positive aspect of “zero tariffs and zero quotas”, businesses should be mindful that the UK no longer benefits from free movement of goods and this will inevitably mean more “red tape” for businesses.

In particular, customs checks on UK goods entering the EU will apply, and customs declarations will need to be made on imports and exports. Additionally, products will now need to comply with the standards and regulations of the country into which they are being exported (there is no equivalence of conformity assessment in the TCA).

Whilst the TCA recognises the Authorised Economic Operators (AEO) scheme (also known as the “trusted trader” scheme), this will nonetheless represent a significant change for businesses who have been used to the seamless nature of the free movement of goods.

For further information regarding trade in goods in light of the TCA:

CLICK HERE

Additionally, the UK Government has published guidance on post-Brexit tariff quotas and ceilings here:

CLICK HERE

02 Trade In Services

Trade In Services

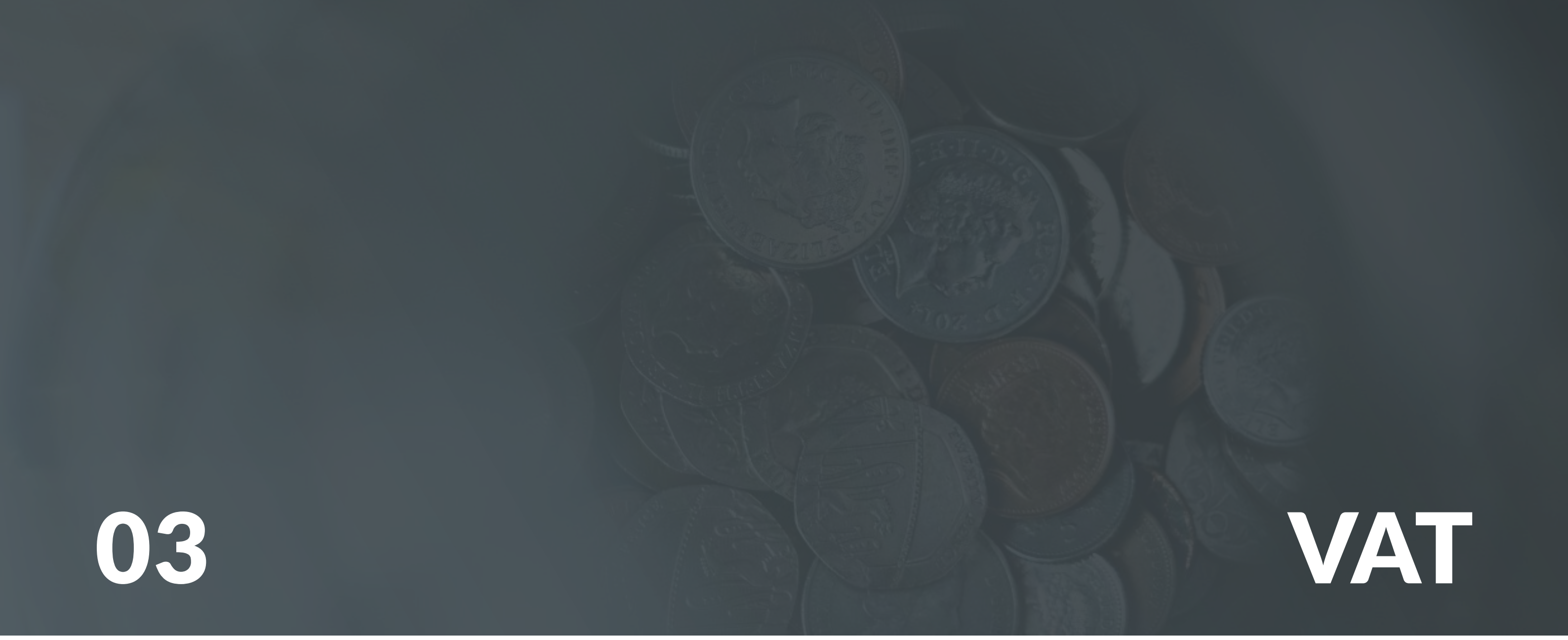
As expected, the TCA does not provide anywhere near the level of market access which was afforded to the UK whilst it was a member of the European Union. The UK will no longer benefit from the “country-of-origin” approach of “passporting” concept for financial services, which facilitated access to the EU Single Market. Other areas, such as professional qualifications, are also lacking (qualifications will now need to be recognised on a state-by-state basis in the EU).

The TCA does include a “most-favoured nation” statement, meaning that if the UK or the EU agree more favourable terms with another country in the future, such terms will be extended to include UK-EU trade. The TCA also provides that neither party shall treat incoming establishments any worse than its own.

Notwithstanding this, the TCA is light on substance with regards to services and we do expect to see these provisions gradually bolstered, including on a sector-specific basis.

For further information regarding trade in services in light of the TCA:

CLICK HERE



VAT

The VAT position was, itself, largely unchanged by the TCA. However, the UK VAT position post 1 January 2021 became clearer as a result of what was and wasn't included in the TCA.

Our analysis below summarises the VAT position of B2C transactions and B2B transactions for UK based businesses post 1 January 2021.

VAT – B2C Transactions

UK businesses selling goods to consumers in the EU

Businesses need to be very mindful when selling goods to consumers in the EU; the position is potentially very complicated as no VAT registration threshold will be in place and therefore a single sale to a consumer in an EU member state will lead to a VAT registration liability in that EU member state. The complexities may be reduced when new rules concerning the application of a new "International One Stop Shop" for accounting for EU VAT are introduced in July 2021 (though we have heard rumours this may be deferred until January 2022) for non-EU established businesses selling goods into the EU. This *article here* provides more detail of the issues facing UK businesses when selling goods to EU consumers and details the options available to be in a position to manage these issues most effectively.

UK businesses selling digital services to consumers in the EU

As with goods, there is again no registration threshold for the sale of digital services (i.e. music downloading, videos, online gaming, apps, software services etc). UK businesses are therefore required to register for VAT in each EU member state where they have consumers.

Alternatively, businesses can use the Non-Union Mini One Stop Shop (MOSS) scheme for non-established businesses (which is still available for services). This will mean having to register in one EU member state for the MOSS as a non-EU provider and accounting for VAT on all EU sales (at the various differing VAT rates) through the one MOSS return.

As a result of the above, many UK businesses will choose to register for VAT in another EU member state such as Ireland (and many have done so already). Unfortunately, current experience is that there are unprecedented delays in obtaining VAT registration in Ireland and this is likely to increase for the foreseeable future.

02 **Trade In Services**

VAT 03.1

03.1 VAT (continued)

Supply of (non-digital) services to consumers in the EU

The legislation has changed in respect of the place of supply of certain services which would previously have attracted UK VAT when provided to EU consumers before Brexit. This will no longer be the case. These services will now be outside the scope of VAT with the right to reclaim related input VAT (i.e. effectively zero-rated). This applies to most professional services to consumers (legal, accounting and advisory) and more detailed commentary is available in our *article here*.

VAT – B2B Transactions

UK businesses selling goods to businesses in the EU

For the sale of goods delivered to the EU where it is the UK business who is responsible for the delivery to the recipient (i.e. delivery duty paid "DDP") the UK business is responsible for the import VAT and Customs Duty that may arise when the goods enter into the EU member state concerned.

EU registration issues may also arise as a result of the UK losing access to a variety of EU simplifications that were in place before Brexit, these include the following:

- The loss of the call-off stock concession means any stock held overseas in an EU member state that is sold to a client would lead to a requirement to register for VAT.
- The loss of the supply and install simplification (and potentially other "land related supplies") could lead to a need to register in the EU state where the goods are installed (or where the land in the "land related services" is located).
- The loss of the triangulation simplification would lead to a need to register in another EU state, where you arrange for a supplier in one EU member state to deliver goods directly to a client in another EU state.

Post Brexit summary: FAQ's for B2B businesses

CLICK HERE

This article provides more detail of the issues facing UK businesses when selling goods to EU businesses and the options available to try and resolve the issues.

03.2 VAT (continued)

UK businesses selling services to businesses in the EU

With the exception of certain services where the place of supply is covered by special rules (i.e. services relating to land, performances, and electronically supplied services), these services will be treated as being exported services (or specified supplies with credit) which will be zero-rated for UK businesses. This will be of interest to Financial Services businesses in the UK trading with the EU as some of their services that were previously exempt could now qualify for the recovery of VAT on associated costs.

Other BREXIT & VAT related items:

BREXIT & VAT, some key things to remember

CLICK HERE

Withdrawal of the Retail Export Scheme

CLICK HERE

BREXIT: the Northern Ireland protocol

CLICK HERE

04 Impact on a Workforce

Impact on a Workforce

Employment Law and Immigration

The TCA itself has a somewhat limited impact on the immigration picture, at least for most UK employers.

The existing position for UK nationals working in the EU (and their EU counterparts in the UK) remains the same, with various routes to obtaining permanent residency and work rights available through the EU settlement scheme or under new immigration systems in place from 1 January 2021.

The TCA does include commitments from both sides on rules for temporary business activities. Whilst narrow and limited compared to the freedom UK employees and senior execs have previously enjoyed in moving around the EU for work reasons (or their EU counterparts working in the UK), the new provisions at least offer some clarity for businesses. The TCA's provisions for temporary business activities are categorised into five areas: contractual service providers; independent professionals; intra-corporate transferees; business visitors for establishment purposes; and short-term business visitors. There is an agreement to have no market access restrictions (such as economic needs tests) or discriminatory barriers on such categories of business persons. In addition, there are commitments on the maximum lengths of stay for the above categories and an agreement not to impose work permits on business visitors for establishment purposes.

Going forward, UK service providers and investors will need to check the national rules of the specific EU member states they are intending to visit to ensure that they are visiting for a permitted purpose and duration and to ensure compliance with any visa requirements.

It is worth noting that different rules apply to Irish citizens and to travel to and from the Republic of Ireland, as Ireland is in the Common Travel Area. This is a long-standing arrangement between the UK and Ireland which ensures that people moving between the two regions to live and work can continue to do so freely.

Finally, despite much noise from MPs across the political spectrum, it is unlikely that the completion of the TCA will result in fundamental shifts to the UK's employment laws and rights anytime soon. Whilst the UK is now no longer subject to follow future EU directives or ECJ decisions, there are provisions in the TCA to ensure a "level playing field" on employment rights by preventing changes that affect trade or investment. This aims to prevent either the UK or the EU from making major changes to employment laws that would give their businesses a competitive advantage.

You can read more about the employment and immigration issues of Brexit on the **Myerson Brexit Hub** including our guides on Settled Status and the new Immigration Rules.

03.2 **VAT**

Impact on a Workforce (Continued) 04.1

04.1 Impact on a Workforce (continued)

Impact on a Workforce

Social Security

Following the ratification of the TCA, protocols are in place concerning the Social Security arrangements for employees who are either:

- Being sent to work in the EU but from the UK; or
- Employees of an EU State employer who are sent to work in the UK under a secondment agreement.

Detailed commentary of these rules is available in our article here:

Social security from 1 January 2021

CLICK HERE

05 Intellectual Property

Intellectual Property

Unlike other aspects of the relationship with the EU where the UK's legal standards were derived solely from its membership to the EU (including the benefit of free trade agreements with third party countries), the parties were each already signatories to a number of international treaties governing intellectual property including the WTO Agreement on Trade-Related Aspects of Intellectual Property and the World Intellectual Property Organization treaties.

The TCA attempts to plug gaps not addressed by the above-mentioned treaties and in particular enshrines a principle that the UK and EU will protect the intellectual rights of each other's nations no less favourably than their own.

However, regardless of these legislative safeguards there will be some notable divergence from the pre-Brexit legal landscape as far as intellectual property is concerned.

More content will be published in respect of intellectual property in the coming months on the Myerson Brexit Hub:

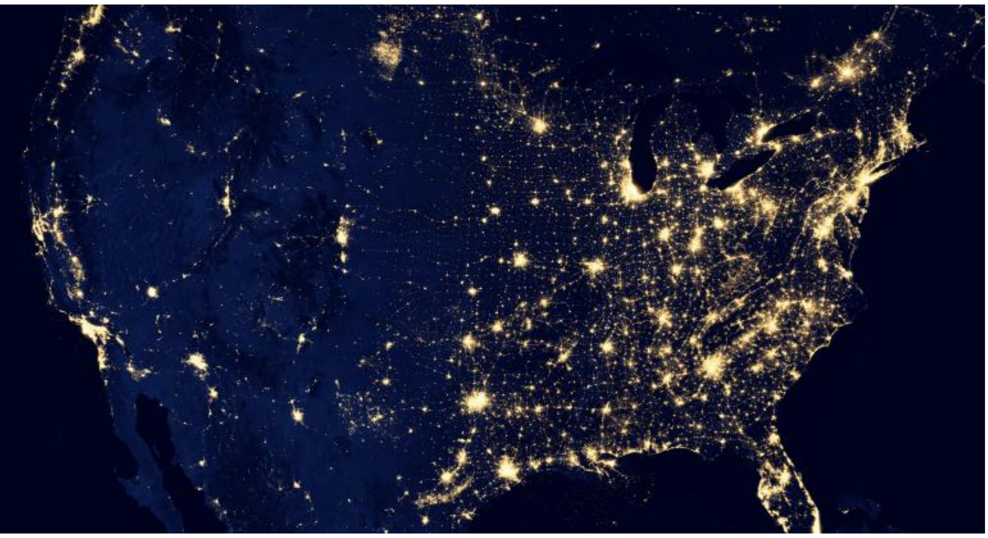
CLICK HERE

06 Data Protection – overseas transfers of personal data

Data Protection – overseas transfers of personal data

The TCA provides an initial grace period of 4 months (up to 6 months if extended) for cross-border data transfers to continue whilst the EU considers the adequacy of the UK's data protection regime. Essentially, this means "business as usual" for the grace period. If an adequacy decision is reached, the EU will deem the UK's data protection regime adequate to protect EU citizens' data and data transfers between the UK and the EU will continue uninterrupted.

However, if at the end of the grace period there is still no adequacy decision, the transfer of personal data from the EU to the UK will be deemed a transfer to a "third country" and alternative measures (known as appropriate safeguards) must be put in place, for example, implementing standard contractual clauses (known as SCCs) into contracts.



For further information regarding data protection issues post-Brexit:

CLICK HERE

07 Direct Taxation

Direct Taxation

Other than in respect to withholding taxes, which may lead to additional taxation on certain transactions (see below), the TCA does not have any significant impact on the UK's direct taxation system. Further the Financial Budget (and again save in respect to withholding taxes) did not introduce any Brexit related amendments. This was a missed opportunity for reducing the compliance burden on SMEs by repealing measures that were introduced solely to ensure compliance with EU law, such as UK to UK transfer pricing. It is hoped that this will be revisited in the next Budget.

08 Withholding Taxes

Prior to Brexit

Prior to Brexit, the UK has been able to benefit from the Parent Subsidiary Directive (PSD) and the Interest and Royalties Directive (IRD), which reduced withholding taxes between associated companies resident in EU member states to nil in most circumstances. Following the end of the Brexit transition period on 31 December 2020, the UK will no longer be able to benefit from these directives meaning that certain payments to and from UK companies will be subject to withholding taxes going forward.

The PSD removes the need to impose withholding taxes on any payments of dividends between associated companies in different EU member states. Companies are associated for the purpose of the PSD if one holds 10% of the capital of the other company for a minimum period of two years.

The IRD removes the need to impose withholding taxes on payments of interest and royalties between associated companies. "Associated" is defined differently here:

- 25% or more of the capital in the other; or
- 25% or more of the voting rights in the other.

Or a third company also resident in the UK or EU must hold directly:

- 25% or more of the capital in each of them; or
- 25% or more of the voting rights in each of them.

Post Brexit

From 1st January 2021 the UK can no longer benefit from the PSD. Although the UK can also no longer benefit from the IRD, it is, until 1 June 2021, still in force through UK domestic tax law (sections 757 to 767 of the Income Tax (Trading and Other Income) Act 2005) meaning that, subject to the associated companies conditions being met, payments of interest and royalties made **from the UK to EU member states,** up until 31 May 2021, will still have a withholding tax rate of nil.

The same does not apply, however, for payments made **from EU member states to the UK.** Instead companies will need to refer to the terms of the applicable double taxation agreement between the UK and the relevant EU member state to determine the appropriate rate of withholding tax to apply. In double taxation agreements with several EU jurisdictions the minimum withholding rate is more than 0%.

Position from 1st June 2021 – Budget 2021

As announced on 3 March 2021 the UK's domestic rules relating to legislating the IRD will be repealed with effect from 1st June 2021. What this means is that payments of interest and royalties made **from the UK to EU member states** can no longer rely on the UK's equivalent of the IRD and those payments might become subject to UK withholding taxes. This therefore "equalises" the UK payment position with the EU's and therefore from 1st June 2021 UK payer companies will also need to refer to the terms of the applicable double taxation agreement to determine the appropriate rate of withholding tax.

08.1 Withholding Taxes (continued)

Administration

Terms of a double tax treaty do not apply automatically and so applications will need to be made to HMRC where the terms of a double tax treaty allow for a reduced rate of withholding tax to seek their agreement.

Where a Directive was previously relied upon, recipients will need to submit a new application in order to receive the benefit of the reduced treaty rate. Applications are not a quick process and the administration needs to be done early to avoid delays in receiving dividends, interest and royalties.

Taxpayers should carefully check their debt and/or licencing agreements for the impact of any "grossing up" clauses, to determine whether they will be require to make increased payments as a result of the withholding tax now charged.

It is a possibility that the UK may renegotiate existing double tax treaty agreements such that the terms replicate those of the PSD and IRD.

For HMRC's latest guidance (updated 8 February 2021) please see here:

CLICK HERE

Enforcement of Judgments in the EU

Enforcement of Judgments in the EU

The TCA and post-Brexit framework offers no mutual recognition of judgments by Member States. Accordingly, for cases issued after 31 December 2020, enforcing an English judgment in the EU will now be less straightforward, more time consuming and more costly.

Some protection is offered for those with exclusive choice of court agreements, but in other cases enforcement will be subject to the national law of the country in which the judgment is being enforced.

For further information, please download Myerson's Guide to Litigating After the Transition Period, available on Myerson's Brexit Hub:

CLICK HERE

10 State Aid

The UK has now broken away from the EU state aid regime and will adopt an alternative "subsidy control" going forward.

As a consequence of the disapplication of EU state aid rules after the end of the Brexit transition period, changes to existing UK tax legislation were required. This was achieved by The Taxes (State Aid) (Amendments) (EU Exit) Regulations, SI 2020/1499. Without the changes, UK law would cease to operate effectively in a number of areas (including EIS, SEIS, VCT, R&D and capital allowances). The amendments are largely required to remove an ongoing reference, where UK law relies on EU instruments which have now been disapplied and, in the main, fixes the reference of the EU legislation as it had effect immediately before 1st January 2021 (and therefore UK legislation). The changes will apply in Great Britain (from IP completion day) but will not affect the application of EU state aid law in Northern Ireland (as set out in article 10 and Annex 5 of the NI Protocol).

The State Aid (Revocations and Amendments) (EU Exit) Regulation was passed on 1st January 2021. These regulations state that any rights, powers and obligations imposed under Article 107 or 108 of the Treaty on the Functioning of the European Union cease to be recognised in UK law. The UK does, however, still remain subject to the "anti-subsidy" obligations under World Trade Organisation Rules.

Interim Guidance

Under the TCA, the UK Government is obliged to create a new State Aid Regime in order to prevent unlawful competition between the UK and other European countries. This has not yet been established, however there are interim general principles outlined in BEIS guidelines which are to be followed for any aid given by a public body over a de minimis level of £350k.

For further information regarding interim general principles outlines in BEIS guidelines:

CLICK HERE

The key principles are broadly as follows:

- subsidies should pursue a public policy objective
- subsidies should be proportionate in terms of what is necessary to achieve the objective
- subsidies are necessary to bring about a change in behaviour
- the beneficiary would not have funded the project otherwise
- the objective could not have been achieved through other means
- the positives of the subsidy outweigh the negative

Consultation

The Business Secretary announced on 3rd February 2021 that there will be an 8 week-long consultation on how the subsidy control should work, and it is set to be administered by the Devolved Administrations.

Further details on the consultation can be found by clicking below:

CLICK HERE

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10 State Aid