

5 KEY TAKEAWAYS

Brexit: Issues for U.S. Retail and Consumer Goods Businesses

[Kilpatrick Townsend](#) recently co-hosted a discussion with UK law firm [Mishcon de Reya](#) about the implications of Brexit for U.S. retail and consumer goods businesses doing business in Europe. The UK left the EU on January 31 2020. A transition period, during which EU laws have continued to apply in the UK as if it remained an EU Member State, is due to end on December 31 2020.

A free trade deal between the EU and UK would allow for tariff-free trade to continue between the EU and UK, but a number of obstacles remain in the negotiations and time is running out. There are a number of steps that businesses can take to prepare for the coming changes in the regulatory regimes, regardless of any deal being reached.

Below are the key takeaways on the 5 topics discussed during the program:

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Corporate

- Loss of freedom of establishment
 - A US business with its EU HQ in London and with branches in the EU (but not EU subsidiaries, which are separate corporate entities) may lose “freedom of establishment”.
 - UK companies operating in or managed from countries with a ‘real seat’ theory of incorporation should consider incorporating a subsidiary in that jurisdiction so they do not lose their liability status.
- EU director residence requirements: subsidiaries may need an EU resident director to satisfy certain countries’ EU director residence requirements (e.g., a subsidiary based in Ireland with UK-based directors may need an Ireland-based director).

Supply of Goods and Services

- Even if a UK/EU deal is reached, new customs formalities will increase the costs of transport and potentially introduce delays (see section 5 below). Services appear unlikely to form part of any free trade agreement.
- Without a trade deal, the UK will deal with the EU on WTO trade terms and apply a UK General Tariff. The UK is seeking to sign free trade agreements with countries that have an agreement with the EU on substantially similar terms to those agreements, e.g., with Japan in October 2020.
- Assess supply chains and consider potential increases in costs, as well as the need for regulatory compliance. Specific rules apply in certain sectors, requiring sector-specific determination of the precise regulatory impact of Brexit.

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Protection and enforcement of intellectual property rights

- Whilst there will be limited changes to patent and copyright law, separate trademark and design protection in the EU and the UK will be needed from January 1 2021 and there will be different criteria for unregistered design protection.
- Existing EU trademark and design registrations will be preserved in the UK through the automatic creation of cloned UK rights but, if you have an application for an EU registration pending at the end of the transition period, you will need to file separately in the UK (though can take advantage of a special 9 month window in which to do so and thereby retain the priority date of the EU application).
- Consider the impact of Brexit on IP rights with respect to existing and planned agreements, and disputes before the UK and EU trademark registries and the courts.
- IP rights in goods put on the market in the UK after January 1 2021 will not be exhausted when those goods are imported into the EEA, and so consent from the rights holder will be needed.

Regulatory compliance / Movement of data

- The UK will have its own regulatory regimes after January 1 2021, and without a free trade deal, the EU will not recognise UK regulatory or testing bodies. Seek regulatory approvals in both territories once the transitional period ends or by the end of 2021 at the latest.
- The UK will have its own product marking system for certain goods sold on the GB market (England, Wales and Scotland), though the EU CE mark can be used for a transitional period. Special rules will apply for Northern Ireland.
- The UK will be a ‘third country’ for the purposes of the EU’s General Data Protection Regulation (GDPR). The UK plans to incorporate the GDPR into its national laws from January 1 2021 as ‘UK GDPR’. If you offer goods and services to individuals in the UK (or monitor their behaviour online) you will need to comply with UK GDPR, including having a representative in the UK.
- The EU is currently assessing whether the UK data protection regime is essentially equivalent to the GDPR, which will impact on international data transfers. It is important to monitor developments on this issue, particularly following the European Court of Justice’s decision in *Schrems II* and guidance issued by regulators.

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Commercial contracts

Impact on Logistic Contracts

- **Customs:** Check contracts to see who is responsible for customs clearance and associated costs, including additional documentation/declarations and duties. If contracts or orders refer to Incoterms, the Incoterms determine parties’ responsibilities for goods at each point during the transit process, including payment of duty and VAT.
- **Delays:** Expected delays to flows of goods in and out of the UK could impact UK/US direct trade. Check contract delivery provisions.
- **Regulatory changes:** Determine responsibility for new testing, the additional costs of testing and any new labelling, and assessments/compliance in the event of a divergence between regulatory requirements.
- **Cost increases:** Increased costs of doing business may impact the price of goods. Contracts may need price review provisions, such as, caps or collars.

Impact on other cross-border arrangements

- **Exchange rates:** Determine which party bears the risk of fluctuations as volatility is expected.
- **Termination:** Consider whether termination rights with a short notice period are needed, or a specific Brexit termination clause should be added.
- **Territorial scope of agreements:** If a contract references the EU or EEA consider whether it should also reference the UK after Brexit. A contract that says “the EU from time to time” will not include the UK after Brexit.
- **References to laws/regulators, IP rights:** Because UK laws may diverge from EU laws, references to EU laws may not cover succeeding UK laws and regulations. Check whether contractual interpretation provisions should be amended to specify that they refer to current laws or include any amendments or replacements.

For more information, please contact:

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