

Wider Brexit Guidance & Considerations for Buyers

Please note, this information is for guidance only and brings together resources from a range of sources. Where appropriate, members should seek legal and/or financial guidance.

On 31 December 2020, the Transition period for the United Kingdom will end and the UK will leave the EU Single Market and Customs Union.

The below looks at a number of issues that buyers need to be considering and provides links to various resources that can provide further guidance on specific issues.

The impact on market access for organisations across international borders leaving the EU with no deal would mean the UK leaving the EU single market and customs union. Trade with the EU would be on World Trade Organization (WTO) rules. 'No deal' would increase barriers to trade between the UK and EU in both goods and services. Trade in goods would be subject to tariffs as well as goods and services trade facing more non-tariff barriers. Leaving the EU customs union will result in costly administrative requirements and customs procedures, whatever new framework for trade is established. This could result in a significant additional administrative burden for companies and delays to consignments of goods, incurring additional costs.

Services account for around 80% of the UK economic output and 46% of UK exports with this share growing over time. The UK is the world's second largest exporter of services by value and is generally viewed as a world leader in many service activities such as financial services. The UK's exposure to services trade means that any major change of the terms of cross-border trade will affect businesses in many sectors across the economy, although some will have to adapt more than others.

From a buyer's perspective this could result in additional costs being presented by contractors (see resources below).

<https://commonslibrary.parliament.uk/research-briefings/cbp-8586/>

<https://commonslibrary.parliament.uk/research-briefings/cbp-8636/>

<https://www.gov.uk/prepare-to-import-to-great-britain-from-january-2021>

<https://www.gov.uk/prepare-to-export-from-great-britain-from-january-2021>

<https://www.gov.uk/guidance/moving-goods-into-out-of-or-through-northern-ireland-from-1-january-2021>

1. Competition Policy

The UK's regulator, the 'Competition and Markets Authority' (CMA), has acknowledged that the exit will "likely force the UK to set up its own parallel competition law regime", but that in the short term, there is no impact on work and it is for the UK government to decide next the steps. Whether there are any changes at all to UK competition laws will substantially depend upon the precise terms of the UK's exit. It seems highly unlikely that, whatever the route chosen, there will be much appetite for an overhaul of the substance of the UK competition

regime. Instead, it is possible that there could be a gradual policy shift, in addition to some more immediate procedural effects in relation to merger control, the desirability of the UK as a jurisdiction for competition damages claims, and the international role of the Competition and Markets Authority.

<https://www.gov.uk/government/organisations/competition-and-markets-authority>

2. Dispute Settlement

The UK Government has made it clear that it intends to bring an end to the jurisdiction of the CJEU in the UK, whilst continuing to honour international commitments and follow international law. Currently, where a contractor is in dispute with a contracting authority, the contractor can take the step of initiating a legal challenge through the courts, such as the High Court in England and Wales, the High Court in Northern Ireland or the Sheriff Court or Court of Session in Scotland. These courts can, if in doubt about the interpretation or validity of an EU law, ask the CJEU for clarification. The same mechanism can be used to determine whether a national law or practice is compatible with EU law. Come 31 December 2020, however, this option will, almost certainly, no longer be available to the courts.

This will require the UK to define a specific Dispute Resolution Mechanism (DRM) for disputes over public contracts.

3. Judicial

It may be that the decision of the court would become the deciding factor in any dispute and whilst appeals could be made against judgments, the court would remain the arbiter of the dispute.

Alternatively, there could be a mechanism put in place whereby challenges to the final decision of the court could be referred to the Supreme Court for determination and final judgment.

4. Quasi-Judicial

Another option could be the setting up of a semi-legal body whose decisions would have legal standing.

Such a body could be composed of legal and non-legal persons with in-depth knowledge and experience of procurement, who would have the ability to provide Expert determination.

Expert determination is often used to bring about a decision on a factual issue, for example in disputes involving defects, damages or valuations.

This method is particularly appropriate if resolving the factual issue in a dispute could clear the way for an overall amicable solution.

Expert determination often forms part of other dispute resolution proceedings.

5. Arbitration

Arbitration is a way of settling a dispute without having to go to court.

In Arbitration, both parties will put their case to an independent arbitrator, who will listen to both sides' positions, look at the evidence and decide what the outcome should be.

When the arbitrator makes a decision, it is legally binding. Therefore, in Arbitration, if you don't agree with the decision, you can't take your case to court to get the decision changed.

6. Mediation

Mediation is a voluntary procedure aimed at resolving a dispute constructively.

The objective is for the parties themselves to develop a forward-looking solution that fully meets their interests, with the support of an independent mediator.

Mediation can be used at various stages: independently of court proceedings (out-of-court mediation), during court proceedings but outside the court (court-related mediation) or during court proceedings but conducted by a different judge (court-internal mediation).

The principal advantage of mediation is that the confidentiality agreed among the parties allows them to conduct an open discussion that is not dominated by positions.

7. Conciliation

In a conciliation procedure, a neutral third party initially endeavours to act as intermediary between the parties. If necessary, the conciliator puts forward a proposal.

Although not binding, the proposal often helps the parties to reach an amicable solution.

What does it mean for buyers?

Whatever decision is taken regarding Dispute Resolution, the key thing for authorities will be to have a clear, concise audit trail of the decisions they have taken, the actions that have happened and any changes that have occurred.

This means that Contract Management will have a key role to play, whether in court or before a mediator or arbitrator.

Managing all aspects of the contract and collating information is the easiest way to safeguard your organisation against challenges.

8. Data Protection

Until the end of the transition period the General Data Protection Regulations (GDPR) will continue to apply in the UK. Buyers should therefore continue to follow existing guidance on the GDPR and monitor the ICO website for any developments in guidance during the

remainder of the transition period. However, what happens at the end of the transition period will depend on current negotiations. The government has said that it intends to incorporate the GDPR into UK data protection law from the end of the transition period – so in practice there will be little change to the core data protection principles, rights and obligations found in the GDPR. The EU version of the GDPR may also still apply directly to you if you operate in Europe, offer goods or services to individuals in Europe, or monitor the behaviour of individuals in Europe. The GDPR will still apply to any organisations in Europe who send you data, so you may need to help them decide how to transfer personal data to the UK in line with the GDPR. The Data Protection Act 2018 (DPA 2018), which currently supplements and tailors the GDPR within the UK, will continue to apply.

<https://ico.org.uk/for-organisations/data-protection-at-the-end-of-the-transition-period/data-protection-at-the-end-of-thetransition-period/>

9. Labour Standards

A large part of UK employment law is derived from and grounded in EU law. These laws cover issues such as working time, holiday pay, maternity rights and discrimination. The UK cannot currently reduce these rights below the minimum level set by EU law – but they can choose to introduce greater rights. Under the European Union (Withdrawal) Act 2018, these rights will be saved as ‘retained EU law’. However, unless there are provisions about maintaining existing workers’ rights standards in a future UK-EU agreement, these rights could be amended or reduced by domestic legislation after Brexit. What is important to bear in mind is that the EU’s trade agreements with third countries contain ‘level playing field’ clauses on labour standards. These clauses normally prohibit the parties from reducing their domestic labour standards in order to gain a trade advantage.

<https://commonslibrary.parliament.uk/withdrawal-agreement-bill-protection-for-workers-rights/>

10. Environmental Requirements

The UK government is committed to maintaining environmental standards and international obligations from 1 January 2021. The UK will continue its aim, set out in the 25 Year Environment Plan, to be the first generation to leave the natural environment in a better state than it inherited it. Existing EU environmental laws will continue to operate in UK law.

The following will also continue:

- the UK’s legal framework for enforcing domestic environmental legislation by UK regulatory bodies or court systems
- environmental targets currently covered by EU legislation – they are already covered in UK legislation
- permits and licences issued by UK regulatory bodies

From 1 January 2021, current legislation will be changed to:

- remove references to EU legislation

- transfer powers from EU institutions to UK institutions
- make sure the UK meets international agreement obligations

The UK government has introduced a new Environment Bill. It will establish a new, independent statutory body - the Office for Environmental Protection (OEP).

<https://deframedia.blog.gov.uk/2019/10/16/new-office-for-environmental-protection-will-ensure-governments-maintaingreen-credentials/>

Preparation and planning for 2021 is an essential requirement for buyers and there is no reason that organisations' preparations should not be advanced in some areas.