



Brexit: Product Regulation and Safety—Some Initial Considerations for Importers

Following the speech given by UK Prime Minister Theresa May at the Conservative Party Conference in Birmingham, England, a timeline for Brexit is beginning to emerge.

Mrs May indicated that she intends to begin the formal process of the United Kingdom's withdrawal from the European Union (by invoking the now-famous Article 50 of the Lisbon Treaty) no later than the end of March 2017.

Since Article 50 requires, on its face, withdrawal to be completed within 24 months, that gives, for the first time, an anticipated (albeit not guaranteed) exit date of sometime around March 2019.¹

In this *Commentary*—the first in what will become a series of guides for importers—we begin to comment on the possible effect of Brexit upon tariffs, to look at the background of product safety and regulation in the EU, and to consider the consequences should regulation in post-Brexit UK and the EU begin to diverge.

What Will Brexit Mean for Importers into the UK and EU?

There are at least two important perspectives.

Recent headlines have centred upon tariffs. Will goods manufactured in the UK continue to enjoy tariff-free access to the European market? This is an extremely important question both for “home grown” manufacturers and for the large number of foreign companies that have established their EU bases in the UK and whose business models assume tariff-free access. We have already seen one such major investor—auto manufacturer Nissan—indicate that it might delay investment at its plant in Sunderland in the North of England until the position is clear.

“Important investment decisions will not be made in the dark”, Carlos Ghosn, Nissan's CEO, is reported to have said at the recent Paris Motor Show.²

Investment decisions of major overseas companies that have made the UK their home, such as Nissan, are extremely important for the British economy. The company's Sunderland plant (established more than 30 years ago), for example, is the largest such factory in the UK. Its 7,000 employees produce more than 500,000 cars annually,³ more than 75 percent of which are exported to the EU.⁴

Shortly after his comments at the Paris Motor Show, it was reported that Mr Ghosn had received assurances from the UK government that trading conditions for Nissan will not change post-Brexit.⁵ According to subsequent reports, the company has since confirmed that its Sunderland plant will be producing the successor to its highly acclaimed Qashqai SUV.⁶

Does this pattern of events signify an intention on the UK government's part to protect certain sectors of the country's economy from the effects of Brexit?

If so, this would herald a shift to a more interventionist approach from government than the UK has been used to in recent decades and would constitute significant political change.

We will follow these developments and provide comment insofar as is appropriate, but the subject of this *Commentary* is product regulation and safety.

Coinciding with the last meeting of the G20 Group of industrialised and emerging nations (in Hangzhou, China) Japan's External Trade Organisation, known as "JETRO", took the rather unusual step of issuing a memorandum commenting upon an overseas political development—specifically Brexit. Their 15-page document was titled "Japan's Message to the UK and the European Union".

As well as addressing concerns over future investment, the memo touched upon regulation and revealed that, after tariffs, the main concern amongst the Japanese companies polled was the risk, post-Brexit, of regulatory divergence as between the UK and the remaining 27 EU Member States. Some 67 percent of the companies polled expressed concern over this issue.⁷

Present Regulatory Position

Before 1985, all EU Member States—or more correctly, members of the European Economic Community ("EEC"), as the EU was then known—had their own national laws regarding liability for defective consumer products. These national laws were generally grounded on faulted-based contract or tort liability principles.

There was concern at EEC level, however, that divergence amongst different nations' laws might distort competition, affect the movement of goods within the Common Market (as it was then known) and afford inconsistent degrees of consumer protection country to country as against defective products.

Thus in 1985, Council Directive 85/374/EEC (the Product Liability Directive, or "PLD") was passed, introducing a common scheme of strict liability. This directive was duly incorporated into UK law, beginning with the Consumer Protection Act in 1987 ("CPA"). The CPA thus represents the law in England, Wales, Scotland and Northern Ireland quite independent of the PLD, and this will remain the case unless and until the CPA is repealed or revoked post-Brexit. There is currently no suggestion that it will be, nor, in our view, any reason that it should be. Quite the reverse: the UK government's start point seems to be that, at least at first, post-Brexit UK law should mimic EU law on all fronts.

In addition to the PLD, European Directive 2001/95/EEC on General Product Safety ("GPSD") aims at ensuring that only safe consumer products are sold in the EU, and it establishes the general safety requirements in the EU.

The GPSD provides for a set of legal obligations with which "producers" (which includes manufacturers, any person affixing his name, trademark or logo on the product, and non-EU manufacturers' authorised representative or importer in the absence of an authorised representative) and distributors must comply.

The fundamental requirement is to undertake a safety assessment before a product is marketed, and to take "corrective action" including, for example, withdraw or recall products from the market if, despite such assessment, it turns out that the products are unsafe. To this end, the European Commission operates a Europe-wide publicly accessible database ("RAPEX") upon which all unsafe products that present a serious risk and are subject to withdrawal (voluntary or not) are placed.

In the UK, the GPSD was given force of law by means of a piece of implementing legislation—the General Product Safety Regulation of 2005.⁸

Thus, as with product liability law, EU product safety rules are incorporated into and have become the law in England, Wales, Scotland and Northern Ireland. This position will not change on Brexit, and it will in fact remain unless and until repealed or revoked. The question becomes, therefore: will this law remain in step with the EU, or will it diverge?

Divergence?

As matters stand, it is perhaps difficult to see why the UK might want to fall out of step and apply a product safety regime that is either more or less stringent than at EU level. It is conceivable, however, that it may no longer, for example, wish or be allowed to participate in RAPEX—which is an EU construct—and/or that it might apply different interpretations of what constitutes a safe or unsafe product.

If this happens, inconsistencies will arise in relation to information about product withdrawals or recalls. In addition, a product withdrawn in the EU might not have to be withdrawn in the UK or vice versa, leading to increased uncertainty for operators. This is the case already, of course, when it comes to marketing products simultaneously in the United States and in the EU or Switzerland and the EU.

In addition, there is already a Proposal for a Regulation of the European Parliament and of the Council on consumer product safety, which would repeal the GPSD. The proposal is part of the “Product Safety and Market Surveillance Package” and aims at improving consumer product safety and strengthening market surveillance. When it enters into force as a regulation, it will apply directly in Member States of the European Economic Area (“EEA”)⁹ without the need for national implementing legislation.

If the UK has by then left the EU (and not joined the EEA), then it will immediately be out of step with this important development.

We shall be looking at other possible areas of difficulty in subsequent *Commentaries*.

Prediction

“It’s tough to make predictions—especially about the future”, a famous American once said, and whilst he did not have

Brexit in mind when he said it, the late Yogi Berra’s oft-quoted dictum certainly applies.

As indicated above, however, it seems that we are now able to predict with a little more confidence the issue of timing.

Prime Minister May also gave some limited guidance recently on the mechanics of Brexit when she stated that whilst the 1972 UK European Communities Act—which gives direct effect to EU law in Britain—faces repeal, all existing EU laws will be transposed into domestic legislation via the so-called “Great Repeal Bill”. The Prime Minister is reported as having said that she intended this announcement to give some certainty to business. It was also reported that she does not envisage that any future amendments to employment law in the UK would weaken employees’ rights in comparison with the rights of their EU counterparts.¹⁰

EU Directives such as the PLD and GPSD are *already* part of UK domestic legislation, and as mentioned above, directly applicable EU regulations are seemingly to become enshrined into UK law on Day 1 by virtue of the Great Repeal Bill.

Beyond Day 1

Businesses obviously need to be able to look beyond Day 1, and this is where it gets more difficult. Whilst as we have seen the UK government has now given some indication as to the likely future of UK employment law, no such guidance has been offered in the products sphere.

Will manufacturers, importers and distributors find themselves with two sets of regulations to deal with—one for the UK and one for the 27 remaining EU Members?

Most commentators so far seem to agree that in order to maximise the prospect of continued access to the single market, post-Brexit UK regulation (not just in the products sphere) will have to stay in line with regulation as it develops in the EU. As an aside, the UK’s own manufacturers and producers will need to comply with the EU rules if they wish to sell products into the EU after the UK leaves, a task that may be daunting if the UK rules start deviating from EU rules. That said, doing business with EU and non-EU European jurisdictions can already involve

such difficulties. The difference, perhaps, will be one of scale, given the size and importance of the UK's economy.

It is too early to say whether divergence will happen, or even in truth what would be the effect if it did or did not occur.

In this period of legal uncertainty, Jones Day's products lawyers worldwide are tracking and anticipating developments to help our manufacturing clients and contacts navigate the shifting obstacles of doing business in the UK and the rest of the EU. Our offices in London and Brussels are coordinating this effort, the aim of which is to help minimise disruption to the business of the Firm's clients and to continue to help facilitate the growth and success of those businesses.

Lawyer Contacts

If you have any question or observation arising out of this Commentary (or any of those that will follow it), please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

Ian F. Lupson

London
+44.20.7039.5959
iflupson@jonesday.com

Ursula Schliessner

Brussels
+32.2.645.14.60
uschliessner@jonesday.com

Cristiana Spontoni

Brussels
+32.2.645.14.48
cspontoni@jonesday.com

Ales Bartl

Brussels
+32.2.645.14.52
abartl@jonesday.com

Katherine M. Llewellyn

Brussels
+32.2.645.14.47
kllewellyn@jonesday.com

Peter J. Biersteker

Washington
+1.202.879.3755
pbiersteker@jonesday.com

Françoise S. Labrousse

Paris
+33.1.56.59.39.48
flabrousse@jonesday.com

Takashi Tanazawa

Tokyo
+81.3.6744.1604
ttanazawa@jonesday.com

Peter J. Wang

Shanghai / Beijing
+86.21.2201.8040 / +86.10.5866.1111
pjwang@jonesday.com

Endnotes

- 1 *Financial Times*, 01 October 2016.
- 2 *Financial Times*, 29 September 2016.
- 3 *Financial Times*, 08/09 October 2016.
- 4 *Financial Times*, 15/16 October 2016.
- 5 *Financial Times*, 15/16 October 2016..
- 6 *Sunday Telegraph*, 23 October 2016.
- 7 *Financial Times*, 07 September 2016.
- 8 SI 1803.
- 9 The European Economic Area consists of the 28 Member States of the European Union together with Iceland, Norway and Liechtenstein.
- 10 *Financial Times*, 03 October 2016.

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